JAMES McMANIS (40958)
SHARON KIRSCH (157157)
HILARY WEDDELL (293276)
McMANIS FAULKNER
a Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244
Email: hweddell@mcmanislaw.com

Attorneys for Defendants,
CC-Palo Alto, Inc. a Delaware corporation;
Classic Residence Management Limited Partnership,
an Illinois limited partnership; and CC-Development
Group, Inc., a Delaware corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BURTON RICHTER, an individual; **LINDA COLLINS CORK**, an individual; **GEORGIA L. MAY**, an individual; **THOMAS MERIGAN**, an individual; **ALFRED SPIVACK**, an individual; and **JANICE R. ANDERSON**, an individual; on behalf of themselves and all other similarly situated

Plaintiff,

vs.

CC-PALO ALTO, INC., a Delaware corporation; **CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP**, an Illinois limited partnership; and **CC-DEVELOPMENT GROUP, INC**., a Delaware corporation

Defendants.

Case No.: C 14-00750 EJD

DEFENDANTS' COMBINED REPLY IN SUPPORT OF MOTION TO DISMISS CLASS ACTION COMPLAINT FOR: 1. CONCEALMENT; 2. NEGLIGENT MISREPRESENTATION; 3. BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE TRUST; 4. FINANCIAL ABUSE OF ELDERS (CALIFORNIA WELFARE AND INSTITUTIONS CODE §§ 15600, ET SEQ.); 5. VIOLATION OF CALIFORNIA CIVIL CODE §§ 1750, ET SEQ.; 6. VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE §§ 17200, ET SEQ.; AND 7. BREACH OF CONTRACT

Date: August 15, 2014
Time: 9:00 a.m.
Dept.: Courtroom 4, 5th Floor
Judge: Hon. Edward J. Davila

Trial Date: Not yet set.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Defendants CC-Palo Alto, Inc. ("CC-PA"), CC-Development Group, Inc. ("CC-DG"), and Classic Residence Management Limited Partnership ("CRMLP") (collectively "defendants") submit this combined reply in support of their motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiffs' complaint suffers from several fundamental flaws, notably that plaintiffs lack standing to sue because they have not, and cannot, allege that they have suffered any damage as a result of defendants' alleged conduct. Interwoven throughout plaintiffs' complaint and opposition are numerous assertions that plaintiffs have a "security interest" in their entrance fees and that defendants have acted "illegally," but the law does not support their assertions, no matter how many times they repeat them. In addition, all of plaintiffs' claims are grounded in fraud and they have failed to plead with the specificity required by Rule 9(b). Plaintiffs also lump together all of the defendants in this case, without specifying which defendant is responsible for which acts in violation of Rule 9(b). Thus, defendants respectfully request that their motions to dismiss be granted.

ARGUMENT

I. PLAINTIFFS DO NOT HAVE A "SECURITY INTEREST" IN THE REPAYABLE PORTION OF THE ENTRANCE FEES.

Plaintiffs state that "This is not a case where the Plaintiffs rely on a hypothetical finding that the funds at issue belong to them" yet that is exactly what plaintiffs are doing. *See* Plaintiffs' Combined Opposition to Defendants' Motions to Dismiss Complaint (hereinafter "Opp."), at 10:1-2. Plaintiffs repeatedly allege that their "security interest in their entrance fees has been impaired" (*see* Complaint, ¶¶ 3, 8, 60, 79, 80, 127, 130, 131 and Opp. at 1:11-13, 3:6-8, 10:4-5, 12:7-9, and 17:5-7) but they do not have a security interest. A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation." Com. Code § 1201(b)(35). A "Security agreement" is defined as "an agreement that creates or

[1] All future references to a "Rule" hereinafter made are to the Federal Rules of Civil Procedure unless otherwise specified.

provides for a security interest." Com. Code § 9102(a)(73). The allegations of the complaint and its attachments establish no such interest or agreement exists.

Plaintiffs erroneously suggest that the loans are secured because, although the Residency Contracts and promissory notes state that the entrance fees are loans, "the word 'unsecured' is never used." Opp. at 5:6-8; *see also* Opp. at 16:10-11. In reality, though, CC-PA does not have to disclaim the fact that it is not granting plaintiffs a security interest in the money loaned because such an interest must be expressly granted. In order to create a security interest there must an expression of intent and a description of the collateral. *DuBay v. Williams,* 417 F.2d 1277, 1285 (9th Cir. 1969) (holding a document did not grant a security interest because it contained "no words of creation or grant"). The entrance fee is clearly an unsecured loan because there is no grant of a security interest in any collateral. *See Needle v. Lasco Indus., Inc.*, 10 Cal. App. 3d 1105, 1108 (1970) (citing *American Card Co. v. H.M.H. Co.*, 97 R.I. 59 (1963) (financing statement failed to qualify as a security agreement because there was no evidence of an agreement by the debtor to grant a security interest), *Scott v. Stocker,* 380 F.2d 123 (10th Cir. 1967), and *DuBay,* 417 F.2d at 1285).

Likewise, plaintiffs' attempt to overcome the provision in each Residency Contract that states the residents have no "interest in any payments made under this Contract" by arguing the entrance fee is a "loan" and not a "payment" is wholly unpersuasive. *See* Opp. at 16:6-16. The Residency Contract does not define "payment" so the term is given its ordinary meaning. *See Santisas v. Goodin*, 17 Cal.4th 599, 609 (1998). The entrance fee and monthly fees are clearly both amounts paid—i.e. "payments"—under the Residency Contract.

Plaintiffs misapply "waste" cases to support their theory that they have a security interest in the money they loaned to defendant. "[W]aste is, functionally, a part of the law which keeps in balance the conflicting desires of persons having interests in the same land." *Cornelison v. Kornbluth,* 15 Cal.3d 590, 598 (1975). Waste cases deal with situations where there is physical damage to the real property securing a loan. *Bedrock Financial, Inc. v. United States,* 2013 WL 2244402, at *10 (E.D. Cal. May 21, 2013). Moreover, each of the waste cases cited by plaintiffs are cases that deal with secured obligations where collateral was pledged as security for the

repayment obligation. *See Bedrock,* 2013 WL 2244402, at *8 (federal tax lien against the property); *Fait v. New Faze Develop., Inc.*, 207 Cal. App. 4th 284, 290 (2012) (secured by a deed of trust); *The Nippon Credit Bank, Ltd. v. 1333 North California Boulevard,* 86 Cal. App. 4th 486, 490 (2001) (secured by a deed of trust).

Contrary to plaintiffs' argument, they have failed to supply any authority in support of their theory that they have a "security interest" in the entrance fees. A loan does not need to be repaid from the same funds advanced by the lender. Since the unsecured loans are not yet due and plaintiffs have not—and cannot—allege that CC-PA has ever failed to pay any entrance fee obligation when it became due, plaintiffs cannot argue that their interest in these unsecured loans has been impaired.

II. CC-PA'S DISTRUBTIONS TO ITS PARENT, CC-DG, ARE NOT ILLEGAL.

Plaintiffs repeatedly allege that CC-PA's distributions to CC-DG were "illegal" and that CC-PA was required to maintain cash reserves sufficient to satisfy all the entrance fee repayment obligations. Distributing excess cash to a parent company is not prohibited by law, is common business practices, and is consistent with the terms of the residency contracts. *See, e.g., Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1284 n.12 (1994) (recognizing that parent company's receipt of money from a subsidiary in the form of dividends and interest on loans and the reinvestment of some portion of those funds in the subsidiary "are precisely the kinds of transactions which would occur among entities which respect the corporate separateness among entities"); *see also* Complaint, Exh. 3, page 3 ("the continuing care statutes do not preclude distributions of surplus cash to a provider's principal"). Plaintiffs mistakenly rely on Health & Safety Code sections[2] 1792.6 and 1793 to state that CC-PA is required to maintain cash reserves sufficient to cover all of the entrance fee repayment obligations or disclose its failure to do so. *See, e.g.*, Complaint, ¶¶ 6, 51, 52, 100, 146, 150, and 158.

[2] All future references to a "section" hereinafter made are to the California Health & Safety Code unless otherwise specified.

Plaintiffs' reliance on section 1793(f) (Complaint, ¶ 52), which requires providers without a refund reserve to disclose such in all marketing materials, is misplaced as section 1793 is obsolete. Section 1793 was superseded by section 1792.6 in 2000 but was somehow inadvertently left in the statutes when the comprehensive changes of 2000 were made. *See* Declaration of Hilary Weddell in Support of Defendants' Combined Reply ("Weddell Decl."), Exh. A (California Department of Social Services' publication of the continuing care contract statutes with a "banner" indicating that section 1793 has been superseded by section 1792.6). Section 1793 is obviously displaced as not only are its statutory cross-references incorrect[3] after the 2000 amendments but all of its surviving provisions are included in section 1792.6. Even the number of the section is out of order. *See* Weddell Decl., Exh. B (Westlaw editorial note). The requirement that providers without a refund reserve disclose such in all marketing materials was not included in the new section 1792.6.

Likewise, plaintiffs' reliance on section 1792.6 is of no help. Section 1792.6 requires providers that offer a refundable contract to maintain a refund reserve in trust for the residents. Until recently, the California Department of Social Services ("DSS")—the agency charged with enforcing the continuing care contract statutes—interpreted section 1792.6 to apply only to pure refundable contracts. Contracts, like the one offered by CC-PA that condition repayment on contract termination and resale of the unit were not found to be within the definition of a "refundable contract" under section 1771(r)(2)[4], despite the fact that they may contain a ten (10) year outside date for repayment. This determination rests, in part, on the fact that the likelihood

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[3] For example, section 1793(a) refers to, inter alia, subsection (e) of section 1792.2 which does not exist. Section 1793(b)(5)(B) states that the life expectancy table is in paragraph (1) of Section 1792.2(b), but the life expectancy table is now found in section 1792.6(c)(2)(A).

[4] Section 1771(r)(2) states: "Refundable contract" means a continuing care contract that includes a promise, expressed or implied, by the provider to pay an entrance fee refund or to repurchase the transferor's unit, membership, stock, or other interest in the continuing care retirement community when the promise to refund some or all of the initial entrance fee extends beyond the resident's sixth year of residency. Providers that enter into refundable contracts shall be subject to the refund reserve requirements of Section 1792.6. A continuing care contract that includes a promise to repay all or a portion of an entrance fee that is conditioned upon reoccupancy or resale of the unit previously occupied by the resident shall not be considered a refundable contract or purposes of the refund reserve requirements of Section 1792.6, provided that this conditional promise of repayment is not referred to by the applicant or provider as a "refund."

of not reselling by the ten (10) year outside date is remote. On April 24, 2012, DSS notified CCRC providers that the refund reserve requirement would, starting May 1, 2012, now apply to all fixed-time contingent on resale contracts. *See* Declaration of Gary Smith in Support of Defendants' Combined Reply ("Smith Decl."), Exh. A. This reserve is provided to account for the unlikely scenario that a unit would not resell after ten years.

Plaintiffs' reliance on section 1792.6 is misplaced because that section does not require reserves that equal the full balance that a CCRC is obligated to repay and only applies to contracts entered into after DSS' change in interpretation of what constitutes a "refundable" contract. *See* Smith Decl., Exh. A. This entrance fee reserve is based on a calculation that takes into consideration the resident's estimated life expectancy, a probability factor of a unit not reselling during the ten year period beginning after the resident's estimated life expectancy end date, and a discount rate that takes into account the time value of money. *See* § 1792.6(c)(2)(A) (life expectancy tables). CC-PA has fully funded this entrance fee reserve. *See* Complaint, Exh. A, page 12 (line entitled "assets limited as to use—by state for entrance fee repayments"); *see also* Complaint, page 12, fn. 3.

Plaintiffs' allegation that CC-PA's promotional materials concede that it is required to "maintain sufficient cash reserves to pay back their Entrance Fees" is inaccurate. Opp. at 2:14-21. Plaintiffs rely on a portion of a marketing brochure as evidence that defendants have "acknowledged" the entrance fee reserve requirement. Opp. at 2:19-22 and Complaint, Exh. 2. The paragraph from the marketing brochure plaintiffs refer to states:

> The financial operation and solvency of CCRCs in California are closely monitored by the DSS. State law requires that reservation deposits be placed in an escrow account at a financial institution approved by the Department. The funds remain in the escrow account until the community proves that it has met stringent State requirements. The California DSS continues to regulate the community after the release of the funds and requires the community to maintain certain cash reserves in amounts sufficient to meet State requirements. The CCRC must also file annual reports with the State that demonstrate continuing strong fiscal management and financial solvency.

Plaintiffs rely on a tortured reading of this paragraph to claim that CC-PA "stated that there was a reserve fund for the Entrance Fees, and that they would be held in escrow." Opp. at 19:23-25.

However, the reference to an escrow account refers to the initial reservation deposits collected before the community opened. Under Article 3 of the continuing care statutes, initial reservation deposits are placed in escrow until construction of the community is at least fifty percent (50%) completed and the community is able to demonstrate that it has met the other stringent state financial requirements. *See* §§ 1780-1785. The statement that DSS "requires the community to maintain certain cash reserves in amounts sufficient to meet state requirements" refers to providers' obligations under section 1792 to maintain minimum liquid reserves. These minimum liquid reserves consist of 1) an operating reserve, and 2) a debt service reserve. *See* § 1792(a). Section 1792.4 states that the operating expense reserve component must equal 75 days' net operating expenses. Section 1792.3 requires that the debt reserve component must equal the principal and interest payments paid during the prior fiscal year on any long term debt and facility lease payments paid during the prior fiscal year. The statutes require that CC-PA demonstrate its compliance with the minimum liquid reserve requirements each year and submit reports to DSS with its annual audited financial statements, which CC-PA has done. *See* § 1792.5; Complaint, Exh. A, Form 5-5. The DSS has the authority to increase the amount that CC-PA is required to hold in its liquid reserve. *See* § 1792(d).

The DSS has the responsibility for overseeing CCRC providers. It regularly evaluates the performance and financial strength of each provider to determine whether it has the ability to fulfill contractual repayment obligations. If DSS had found that CC-PA had not met these obligations, plaintiffs would surely have alleged as much. Instead, plaintiffs have attached a letter from DSS (Complaint, Exh. 3) dated August 2, 2012, which asked for a response, nothing more, to insinuate a problem. Accordingly, the complaint fails to establish illegal conduct on the part of defendants.

III. PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE FOR ADJUDICATION.

Plaintiffs' entire complaint must fail because plaintiffs have not established that they have standing, an essential element for jurisdiction. The first element to demonstrate standing is an "injury in fact," which requires showing "an invasion of a legally protected interest which is

concrete and particularized and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). If the first element of standing fails, necessarily so do the other two. Contrary to plaintiffs' argument, they have no standing with regards to the entrance fees because an "impairment of [the] security interest" underlying the unsecured loans is not sufficient to demonstrate an injury in fact. The United States Supreme Court recently rejected the idea that a mere increased risk of harm satisfies the injury in fact prong because it "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA,* 133 S.Ct. 1138, 1142-43 (2013). Plaintiffs' allegations regarding the entrance fees repayment obligations do not demonstrate that their injury is "certainly impending" but rather are based on a series of highly unlikely, contingent, and hypothetical events. Plaintiffs do not allege that CC-PA has failed to meet a repayment obligation, and in fact cannot allege such facts because CC-PA has never defaulted on an entrance fee repayment obligation. *See* Complaint, Exh. 4 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee repayment obligation.").

To hold that plaintiffs have standing with regards to the "security interest" in the repayable portion of the entrance fees—unsecured loans that are not yet due—would essentially confer standing on any plaintiff who loaned money and then changed his or her mind. Allowing a creditor to dictate what a debtor may do with money that is subject to a valid loan, absent contractual language regulating such use, would be to rewrite the parties' contract. *See Hyundai Amer., Inc. v. Meissner & Wurst GmbH & Co.,* 26 F. Supp. 2d 1217, 1219 (N.D. Cal. 1998) ("Courts interpret contracts as made by the parties and do not make new ones for them."); *see also Jones v. Re-Mine Oil Co.,* 47 Cal. App. 2d 832, 836-37 (1941) (a transaction cannot be condemned as "fraudulent" merely because one party later believes he made a bad deal). Clearly the law does not allow such an illogical result.

Plaintiffs also fail to demonstrate an injury in fact with regard to their monthly fees. The claim that plaintiffs have suffered injury with regard to the increased taxes from the recent tax assessment is unavailing. CC-PA has agreed to pay the amount assessed in back taxes (over $12

million) and will pay the additional taxes as a result of the increase (approximately $1.9 million per year) during the pendency of its appeal of the tax assessment. *See* Complaint, ¶¶ 65-66 and Exh. 21. Likewise, despite plaintiffs' strained reading of the Residency Contracts, they have not (and cannot) alleged facts sufficient to show that defendants have improperly inflated monthly fees by misallocating insurance costs. *See* Complaint, ¶¶ 69-73. One subsection in an "including but not limited to" list cannot reasonably be read to modify another. Such a reading clearly contradicts the language of the Residency Contract, which states multiple times that the residents' monthly fees are intended to pay for all operating costs of the community, and expressly includes the costs of insurance policies. *See* Complaint, Exhs. 5, 7, 9, and 15 at recital E and sections 2.1.16, 3.3.2, and 3.3.3; Exhs. 11 and 13 at section 3.3.2. Plaintiffs also fail to demonstrate standing with regard to marketing costs as they provide no basis for their allegations that marketing costs have been improperly allocated, or how CC-PA "used the term 'marketing costs' in a misleading manner." *See* Complaint, ¶¶ 13, 74, and 75.

IV. THE GRAVAMEN OF PLAINTIFFS' COMPLAINT IS FRAUD AND THEREFORE ALL ALLEGATIONS MUST SATISFY THE HEIGHTENED STANDARDS OF RULE 9(b).

Plaintiffs' entire complaint is comprised of allegations of a unified fraudulent course of conduct, thus all allegations in the complaint must satisfy the heightened standards of Rule 9(b). *See Vess v. Ciba-Geigy Corp.,* 317 F.3d 1097, 1106 (9th Cir. 2003); *see also Adams v. NVR Homes, Inc.,* 193 F.R.D. 243, 250 (D. Md. 2000); *Toner v. Allstate Ins. Co.,* 821 F.Supp. 276, 283 (D. Del.1993) ("Although the language of Rule 9(b) confines its requirements to claims of mistake and fraud, the requirements of the rule apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud."). Additionally, in complaints for fraud against a corporation, a plaintiff must allege: the names of the persons who made the misrepresentations; their authority to speak for the corporation; to whom they spoke; what they said or wrote; and when it was said or written. *Lazar v. Sup. Ct (Rykoff-Sexton, Inc.)*, 12 Cal. 4th 631, 645 (1996).

The gravamen of plaintiffs' complaint is that defendants conspired to conceal "important facts" and negligently misrepresented that residents "would feel a sense of security" in order to

obtain large entrance fees, which were then distributed from CC-PA to CC-DG. All of plaintiffs' claims are comprised of a unified course of conduct alleging that defendants did not maintain cash reserves, and actively concealed this information from plaintiffs. Although the complaint alleges an overall fraudulent scheme, it lacks details as to each of the parties' roles. This is not sufficient under the heightened requirements of Rule 9(b). *See Altman v. PNC Mortgage*, 850 F. Supp. 2d 1057, 1070 (E.D. Cal. 2012). "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1065 (E.D. Cal. 2010). Thus, plaintiffs' entire complaint should be dismissed for failure to comply with Rule 9(b). *Vess*, 317 F.3d at 1107.

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR CONCEALMENT.

Plaintiffs' concealment claim likewise fails to meet the specificity requirements of Rule 9(b). The complaint lacks evidence that defendants were under a duty to disclose facts, who within the defendant entities failed to disclose facts, that each individual plaintiff would not have entered into a residency contract with CC-PA if they had known of the concealed fact, and that as a result of the concealment each individual plaintiff was harmed. *Boschma v. Home Loan Center, Inc.*, 198 Cal. App. 4th 230, 248 (2011). This factual deficiency mandates dismissal of this cause of action.

Furthermore, plaintiffs' recurrent allegation that the fact that CC-PA would distribute excess cash to its parent, CC-DG, and that CC-PA did not intend to maintain cash reserves to cover all repayment obligations is unavailing. The Residency Contract, signed by each plaintiff, clearly states that once the contract is terminated, entrance fee repayments will be made after entrance fees are received from a new resident. *See* Complaint, Exhs. 5, 7, 9, and 15 at section 8.5.2 and Exhs. 11 and 13 at section 9.1.2 (stating after repayments will be made on the earlier of (i) 14 days after a new resident executes a residency contract and pays the applicable entrance

fee or (ii) 10 years).[5] Plaintiffs had no reason to believe that entrance fees would be held in reserve and used to satisfy repayment obligations.

VI. THE COMPLAINT FAILS TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION.

Plaintiffs unsuccessfully attempt to state a claim for negligent misrepresentation. The only alleged misrepresentation is a vague statement contained in a marketing letter addressed to "friends" dated October 9, 2008. Complaint, ¶106 and Exh. 18. The negligent misrepresentation claim is sorely lacking as it fails to include allegations that each plaintiff received the letter, when, why the statement was untrue, that they relied on the alleged misrepresentation contained therein, why that reliance was reasonable, and that each individual plaintiff would not have entered the community if not for the alleged misrepresentation. *See Noll v. eBay, Inc.*, 282 F.R.D. 462, 468 (N.D. Cal. 2012) ("A plaintiff must plead reliance on alleged misstatements with particularity…"). Plaintiffs cannot make such allegations because the four plaintiffs that entered the community years before the alleged misrepresentation was made could not have relied on it when deciding whether to enter the community. *See Katz v. Feldman*, 23 Cal. App. 3d 500, 504 (1972) ("a party may not allege inconsistent facts in his pleading in the same case"). In fact, plaintiffs concede that four of the six named plaintiffs cannot claim that they relied on the marketing letter (Opp. at 13:18-20) yet now, after realizing that the 2008 marketing letter will not withstand a motion to dismiss, claim that the marketing brochure from 2005 also contained actionable misrepresentations. Plaintiffs' claim fails, though, because as discussed above plaintiffs have overstated CC-PA's statutory obligations and the exhibits to the complaint demonstrate that defendants are in full compliance with all statutory reserve requirements.

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[5] Early Residency Contracts had an outside repayable date of 25 years after contract termination but were later amended to reduce the outside date to 10 years. *See, e.g.*, Complaint, Exhs. 5 and 7 at section 8.5.2 and Amendment to Section 8.5.2.

VII. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY.

The complaint alleges defendants owed plaintiffs a fiduciary duty "by virtue of the nature of their relationship whereby Plaintiffs and members of the Class reposed confidence in the integrity of Defendants, which was voluntarily accepted and/or assumed by Defendants." Complaint, ¶ 112. However, "before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 221 (1983), superseded by statute on other grounds. The relationship between plaintiffs and CC-PA is a commercial relationship defined by a written contract. The parties' relationship does not fall within one of the traditional fiduciary relationships that have been recognized by courts in the commercial context, for example, between a trustee and beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, or agent and principal. *See Wolf v. Superior Court,* 107 Cal. App. 4th 25, 30 (2003). Notably, the statutory scheme on which plaintiffs rely to impose liability here does not impose a fiduciary relationship. Compare California Civil Code section 2923.1 which imposes a fiduciary relationship between mortgage brokers and borrowers ("A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower.").

The complaint alleges CC-PA was "entrusted with large sums of money that Plaintiffs set aside for their retirement," (Complaint, ¶ 76) but an arms-length transaction does not give rise to a fiduciary duty, even if it is aimed at elders. *See Wolf,* 107 Cal. App. 4th at 31 (rejecting claim of fiduciary relationship because "[e]very contract requires one party to repose an element of trust and confidence in the other to perform"); *Das v. Bank of America, N.A.,* 186 Cal. App. 4th 727, 740 (2010) (finding no existence of fiduciary duty between elderly and mentally incapacitated account holder and bank). It is inconceivable to think that every relationship "between contracting parties where the defendant targeted senior citizens" (Opp. at 15:1-3) is a fiduciary relationship. Also, plaintiffs' allegation that CC-PA "assumed the role of caregiver and

business partner" (Complaint, ¶ 76) clearly contradicts the parties' relationship as evidenced by the Residency Contracts. According to the California Supreme Court, fiduciary duties are "inappropriate in a buyer-seller context" because the "various statutory and common law doctrines fashioned to protect the consumer from overreaching and deception are strong and flexible enough to accomplish that purpose[;]…it is unnecessary to call upon the law of fiduciary relationships to perform a function for which it was not designed and is largely unsuited." *Comm. on Children's Television*, 35 Cal.3d at 222. Furthermore, the bare assertion that any fiduciary duty that is imposed on CC-PA also extend to CC-DG and CRMLP is insufficient. *See* Complaint, ¶ 76. Because the complaint lacks evidence of a fiduciary relationship, plaintiffs' breach of fiduciary duty cause of action should be dismissed with prejudice.

VIII. THE COMPLAINT FAILS TO STATE A CLAIM FOR FINANCIAL ELDER ABUSE.

Plaintiffs' claim of financial elder abuse is premised on their claims of misrepresentations and concealment and thus is subject to the heightened requirements of Rule 9(b). *See Edelman v. Bank of America Corp.*, 2009 WL 1285858, at *3 (C.D. Cal. April 17, 2009); *see also Chavers v. GMAC Mortgages, LLC*, 2012 WL 2343202, at *7 (C.D. Cal. June 20, 2012). Plaintiffs claim that defendants "assisted one another" in taking, appropriating and/or retaining plaintiffs' property with an "intent to defraud" because CC-DG "created [CC-PA] for the purpose of inducing Plaintiffs and the Class to loan substantial Entrance Fees to [CC-PA], which it would then move upstream to [CC-DG]." Complaint, ¶ 128. These conclusory allegations, void of any factual evidence, is insufficient to support a claim of financial elder abuse against defendants.

CC-PA has not deprived the residents of any property right and this is not a situation where an elder was unduly influenced to enter into a contract wherein a property right was relinquished for little or nothing in return. Situations where courts have found financial elder abuse to occur are vastly different than the circumstances here. For example, a court found a "skeletal claim" of financial elder abuse where developers effectuated a lot line adjustment and encumbered real property of elders without a valid power of attorney and without payment for any portion of the parcel. *See Bonfigli v. Strachan,* 192 Cal. App. 4th 1302, 1316 (2011).

Another court found a colorable claim of financial elder abuse where the facts suggested that one defendant, "knowingly notarized fraudulent loan documents then attempted to cover that act by persuading Plaintiff to sign his journal or another acknowledgment," which resulted in the elder plaintiff losing equity in his home while the defendants retained the money obtained through the refinance. *Harrison v. Downey Savings and Loan Ass'n*, 2009 WL 2524526, at *6 (S.D. Cal. Aug. 14, 2009).

Here, the defendants have not taken or retained any of plaintiffs' property for a wrongful use or with intent to defraud. Plaintiffs each freely entered into a contractual relationship with CC-PA, and pursuant to the terms of that agreement, paid an entrance fee upon entering the community. The Entrance Fee Promissory Note is an unsecured, general obligation of CC-PA. CC-PA has performed all of its obligations under the contract, and has made all repayments as they become due. *See* Complaint, Exh. 4 ("Neither the provider [CC-PA] nor any Vi affiliated entity has ever defaulted on an entrance fee repayment obligation."). Thus, plaintiffs have not been deprived of any right to which they are entitled. Accordingly, there is no colorable claim for elder abuse here and the fourth cause of action should be dismissed.

IX. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE CONSUMERS LEGAL REMEDIES ACT.

Plaintiffs' CLRA claim is grounded in fraud and subject to the requirements of Rule 9(b) because it is entirely based on allegations that defendants made misrepresentations and omissions. *Noll,* 282 F.R.D. at 468. CLRA claims are governed by the "reasonable consumer" test, which requires plaintiffs show that members of the public are likely to be deceived. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1025-26 (N.D. Cal. 2012) (citing *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008)). Plaintiffs have failed to allege facts showing defendants' representations were false or misleading according to the reasonable consumer standard. Plaintiffs' complaint details one alleged misrepresentation, a marketing letter that says "residents feel a sense of security." Complaint, Exh. 18. Based on this one letter plaintiffs claim "the essence" of CC-PA's offering is that "it will take care" of plaintiffs and "enhance the last

chapter of their lives, and that Vi will be their home." Complaint, ¶ 56-57. A statement that residents feel "a sense of security" is a vague, subjective statement that is not actionable under the CLRA. As this court explained in *Cullen v. Netflix, Inc.*:

> Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable." Vague or highly subjective claims about product superiority amount to non-actionable puffery; only "misdescriptions of specific or absolute characteristics of a product are actionable."

880 F. Supp. 2d 1017, 1026 (N.D. Cal. 2012) (internal citations omitted). The CLRA claim also fails because, as discussed above, plaintiffs did not allege that they each received and justifiably relied on the alleged misrepresentation contained in the 2008 marketing letter.

Furthermore, plaintiffs' CLRA cause of action should be dismissed with prejudice for failure to comply with venue affidavit and notice requirements as strict adherence to the statute's requirements is necessary to accomplish the Act's goals.[6] *See Laster v. T–Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) (dismissing CLRA claim with prejudice where pre-suit letter was sent after complaint was filed); *Outboard Marine Corp. v. Super. Ct.*, 52 Cal App. 3d 30, 38-41 (1975) (rejecting plaintiff's argument that substantial compliance is sufficient and finding strict adherence to CLRA's notice requirements is necessary); *Von Grabe v. Spring PCS*, 312 F. Supp. 2d 1285, 1303-04 (S.D. Cal. 2003) (dismissing CLRA claim with prejudice where plaintiff's pre-suit letter failed to comply with notice requirements and complaint did not contain allegations of compliance).

X. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE UCL.

Plaintiffs' UCL claims are also subject to the heightened pleading requirements of Rule 9(b) because they are predicated on misrepresentations and omissions that are grounded in fraud. *See Tietsworth v. Sears, Roebuck and Co.*, 2009 WL 3320486, at *6 (N.D. Cal. Oct. 13, 2009). Because plaintiffs' UCL cause of action rests upon their other claims, which have not been

[6] The Pennsylvania case cited by plaintiffs in support of their contention that the venue requirement is procedural and thus not required in federal court was recently criticized by a California federal court. *See McVicar v. Goodman Global, Inc.*, 2014 WL 794585, at *9 (C.D. Cal. Feb. 25, 2014).

adequately pled, these claims cannot serve as predicate offenses to support plaintiffs' UCL claim. As such, plaintiffs' UCL claim should be dismissed.

XI. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT.

The breach of contract claim must be dismissed with prejudice as to CC-DG and CRMLP as they are not parties to the Residency Contracts (s*ee*, *e.g.,* Complaint, ¶ 45), and therefore cannot be liable for breach of contract. *See Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (1968) (the first element for breach of contract is a contract). In addition, as discussed above, plaintiffs have not pled sufficient facts to demonstrate they have suffered any harm, a necessary element to a breach of contract claim. "'[W]here it is clear from the unambiguous terms of the contract that the alleged conduct of the defendant does not constitute a breach of contract,' the complaint should be dismissed." *Guerard v. CNA Financial Corp.,* 2009 WL 3152055, *8 (N.D. Cal. Sept. 22, 2009) (quoting *Arbor Acres Farm, Inc. v. GRE Ins. Group,* 2002 WL 777447, *5 (N.D. Cal. Jan. 16, 2001)). Thus, plaintiffs' seventh cause of action for breach of contract must be dismissed.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that their motions to dismiss the complaint should be granted in their entirety for failure to state a claim under Rule 12(b)(6).

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McMANIS FAULKNER

//s// James McManis
JAMES McMANIS
SHARON KIRSCH
HILARY WEDDELL

Attorneys for Defendants,
CC-Palo Alto, Inc. a Delaware corporation;
Classic Residence Management Limited Partnership, an Illinois limited partnership;
and CC-Development Group, Inc., a Delaware corporation