NIALL P. McCARTHY (SBN 160175)
nmccarthy@cpmlegal.com
ANNE MARIE MURPHY (SBN 202540)
amurphy@cpmlegal.com
DEMETRIUS X. LAMBRINOS (SBN 246027)
dlambrinos@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road
Burlingame, California 94010
Telephone: (650) 697-6000
Facsimile: (650) 692-3606

Attorneys for Plaintiffs Burton Richter, Linda Collins Cork, Georgia L. May, Thomas Merigan, Alfred Spivack, and Janice R. Anderson

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 others similarly situated,

Plaintiffs,

v.

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. 5:14-cv-00750-EJD

PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Date: August 8, 2014
[August 15, 2014 per Stipulation ECF28]
Time: 9:00 a.m.
Courtroom: 4, 5th Floor
Judge: Hon. Edward J. Davila

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I. INTRODUCTION

Defendants' Motions to Dismiss are internally inconsistent as they argue both a lack of ripeness and that the statute of limitations has run. Apparently the harm to Plaintiffs has occurred for statute of limitation purposes, (Mot. at 19) but not for ripeness purposes (Mot. at 6). Moreover, contrary to Defendants' assertion, Plaintiffs' lawsuit is not an attempt to "change" the terms of their contracts, nor are the alleged injuries based on "mere speculation." Mot. at 1. Rather, Plaintiffs allege that they entrusted Defendant CC-Palo Alto, Inc. ("CC-Palo Alto") with hundreds of millions of dollars in refundable Entrance Fees, and that CC-Palo Alto illegally transferred (*i.e.* "upstreamed") those funds to its corporate parent CC-Development Group, Inc. ("CC-Chicago"). It is significant that Defendants can provide no evidence that they disclosed the upstreaming of Entrance Fees to the residents. Due to the illegal upstreaming, CC-Palo Alto has become dangerously under-capitalized, and Plaintiffs' security interest in their Entrance Fees has evaporated. In California the impairment of one's security interest is a cognizable, non-speculative harm. In addition, CC-Palo Alto has overcharged Plaintiffs routinely in the form of artificially inflated monthly fees. Defendants argue that the fees have not been inflated, but this is a fact issue and not the proper grounds for a motion to dismiss. At the pleading stage, Plaintiffs' allegations must be taken at face value. Finally, Plaintiffs have sufficiently pled that each Defendant is jointly liable for these injuries under secondary liability theories. Accordingly Defendants' motions should be dismissed. [1]

II. STATEMENT OF FACTS

The Vi at Palo Alto is a high-end Continuing Care Retirement Community ("CCRC"). Complaint ¶ 2. The proposed Plaintiff Class ("Plaintiffs" or "the Class") consists of all individuals who have resided at the Vi at Palo Alto between January 1, 2005 and the present. *Id.* ¶ 21. Prior to entering the Vi at Palo Alto, Plaintiffs and the Class entered into Continuing Care

[1] While each of the Defendants filed a separate motion to dismiss, these motions are substantially identical. Unless otherwise noted, references to "Mot." refer to the lead motion to dismiss, which was filed by CC-Palo Alto. The only material difference between the motion filed by CC-Palo Alto and the motions filed by CC-Chicago and Classic Residence Management Limited Partnership ("CRMLP") is that the latter two motions argue that CC-Palo Alto's liability cannot be imputed to them on the basis of the conspiracy, aiding and abetting, or alter ego allegations. Each of these arguments will be addressed in this combined opposition. Collectively the three Defendants will be referred to as "Defendants."

Residency Contracts ("Residency Contracts"), and made over $450 million in loans to CC-Palo Alto, on the order of hundreds of thousands or millions of dollars per resident, in the form of refundable Entrance Fees. *Id*. ¶¶ 4-5. Plaintiffs and the Class also pay large monthly fees to reside at the Vi at Palo Alto. *Id.* ¶¶ 10-14.

CC-Palo Alto breached the Residency Contracts and impaired Plaintiffs' security interest in their Entrance Fees by illegally upstreaming hundreds of millions of dollars to the parent company CC-Chicago. *Id*. ¶¶ 3, 7, 56-60. CC-Palo Alto concealed these, and other important facts, from Plaintiffs. *Id*. ¶¶ 100, 150. CC-Palo Alto also made the following false assurances regarding the security of Plaintiffs' Entrance Fees:

> [Residents experience] a sense of security, knowing that they have made a good choice. They know their entrance fee refund will not fluctuate with changes in the market…. Our residents enjoy a vibrant and enriching lifestyle with the knowledge that they have planned wisely to secure their future.

Id. at Ex.18.

Plaintiffs reasonably expected that CC-Palo Alto would maintain sufficient cash reserves to pay back their Entrance Fees because California law requires it. *See* California Health & Safety Code §§ 1792.6, 1793. While CC-Palo Alto's motion conspicuously avoids mentioning this issue, its promotional materials have acknowledged this reserve requirement since approximately 2005:

> **The California DSS [Department of Social Services] 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.**

Complaint ¶¶ 6 and Ex. 2 (page 3) (emphasis added).

Defendants do not dispute that they have failed to maintain sufficient cash reserves to cover their Entrance Fee refund obligations; rather, they assert that their failure to do so is not actionable. *See Id*. at Ex. 4 (page 1) ("there is no entrance fee repayment reserve") and Mot. at 6. CC-Palo Alto's failure to maintain sufficient reserves is a direct violation of California law. Complaint ¶ 51. The allegation that Defendants have violated California law is sufficient grounds for Plaintiffs' claims under California Business & Professions Code Section 17200, which

provides that violations of state law provide a basis for private lawsuits. *Infra* at 20-21. This violation is also grounds for a breach of contract claim, because all of the laws in effect are incorporated into the Residency Contract by operation of law at the time it is executed. *Infra* at 21-22. Since 2005, Plaintiffs have collectively loaned CC-Palo Alto over $450 million in Entrance fees. Complaint ¶ 5. As of 2012, CC-Palo Alto had upstreamed over $190 million to CC-Chicago, and had incurred a deficit of over $300 million. *Id*. at ¶¶ 7, 9. The net effect of this upstreaming practice has been to shift the financial risk of non-payment to the residents, which substantially impairs their security interest. *Id*. ¶ 60.

This upstreaming practice caused the California Department of Social Services ("DSS") to write CC-Palo Alto a letter that noted the following concerns:

> [T]he issue is whether CC-PA's distributions of cash to its *non-provider* parent have weakened CC-PA's financial position so that it is (or the Department hay have reason to believe that it is) "insolvent, is in imminent danger of becoming insolvent, is in a financially unsound or unsafe condition, or that its condition is such that it may otherwise be unable to fully perform its obligations pursuant to community care contracts" within the meaning of Health & Safety Code (H&SC) sections 1792(d)… 1793.13… and 1793.50(a).
>
> If the entrance fee from the resale of a Health Center resident's unit has already been collected and distributed to [CC-Chicago] when the Health Center resident's contract terminates, CC-PA's cash will not be sufficient to make the entrance fee repayment due.

Complaint at Ex. 3 (page 2) (emphasis in original).

In addition to this illegal upstreaming, Defendants have harmed Plaintiffs and the Class by charging them artificially inflated monthly fees. Complaint ¶¶ 10-14, 63-75. These monthly fees, which are supposedly intended for the upkeep and improvement of the facilities at the Vi at Palo Alto, have been artificially inflated in multiple ways. First, CC-Palo Alto has stated it will pass on property taxes to the residents that were incurred solely due to CC-Palo Alto's illegal upstreaming. *Id*. ¶¶ 11 and 63-68.[2] That cost amount is about $1.9 million a year to the Class. *Id.* ¶ 65. Second, CC-Palo Alto improperly allocated charges for earthquake insurance premiums to Plaintiffs, who are only contractually responsible for capital items. *Id*. ¶¶ 12 and 69-73. Third,

[2] In fact, CC-Palo Alto has already passed on some of these taxes by electing to suspend credits that were due to Plaintiffs as "Cumulative Operating Surplus," and which should have been used to create an operating reserve at the Vi at Palo Alto or remitted to the Plaintiffs as lower monthly fees. *Id*. ¶ 66.

CC-Palo Alto overcharged Plaintiffs for so-called "marketing costs" that were used to subsidize CC-Chicago's national marketing campaign. *Id*. ¶¶ 13, 74-75. These overcharges have been uniformly imposed on Plaintiffs and the Class. Defendants' illegal upstreaming of Plaintiffs' Entrance Fees and its overcharges associated with the monthly fees give rise to the seven causes of action alleged in Plaintiffs' Complaint, which are each discussed in more detail below. Given that Plaintiffs display causes of action for these claims, Defendants' motions should be dismissed.

III. LEGAL ARGUMENT

A. Legal Standard For Motion To Dismiss

Courts deciding motions to dismiss must accept as true "all material allegations of the complaint" and "all reasonable inferences" drawn from those allegations. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Courts may dismiss a case "where there is no cognizable legal theory or [there is] an absence of sufficient facts alleged to support a cognizable legal theory." *Id*. The central task for courts considering such motions to assess whether the complaint "nudge[s] [Plaintiffs'] claims across the line from the conceivable to plausible." *Bell Atlantic et al. v. Twombly et al.*, 550 U.S. 544, 570 (2007). All that is required under Federal Rule of Civil Procedure 8(a)(2) is that the complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id*. at 555. The purpose of this rule is to "give the defendant fair notice of what the … claim is and the grounds up on which is rests." *Id*. A complaint that accomplishes this task "does not need detailed factual allegations" so long as the allegations consist of more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id*. Plaintiffs' Complaint clearly satisfies these standards.

B. Plaintiffs Have Standing To Bring Their Claims

Defendants' standing argument is ill-founded and does not provide a complete picture of the appropriate legal standards. To establish standing, a plaintiff must demonstrate (1) an injury in fact, (2) a causal connection between the alleged injury and defendants' conduct and omissions, and (3) a likelihood that a favorable decision will provide redress for that injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Defendants challenge only the injury in fact element, but their argument fails for three reasons.

First, the injuries suffered by Plaintiffs resulting from CC-Palo Alto's upstreaming of their Entrance Fees to CC-Chicago are not hypothetical. Plaintiffs have suffered and continue to suffer economic harm. This upstreaming has decimated CC-Palo Alto's finances, and CC-Palo Alto lacks the financial capability to cover the amounts due. Complaint at Ex. 3 (page 2). This represents a concrete detriment and an actual injury to Plaintiffs' security interest in those fees. Defendants mischaracterize the Entrance Fees as "unsecured loan[s]" (Mot. at 6). While the Residency Contracts and promissory notes state that the Entrance fees are "loans," the word "unsecured" is never used. Moreover, the laws in existence at the time the Residency Contracts were executed, including California's Health & Safety Code, became part of the contracts by operation of law. *Castillo v. Express Escrow Company*, 146 Cal. App. 4th 1301, 1308 (2007). Therefore, the statutory reserve requirements in California's Health & Safety Code Sections 1792(d), 1792.6, and 1793 operated as implied terms in the Residency Contracts. This is, as Plaintiffs and the Class have alleged, a fact recognized in Defendants' own promotional materials. Complaint ¶ 6 and Ex. 2 (page 3). Furthermore, California case law recognizes that lenders, such as Plaintiffs and the Class, have a security interest in the property subject to the loan (here the "Entrance Fees"), and that impairment of that security interest is cognizable harm. *See, e.g., Fait et al. v. New Faze Development*, 207 Cal. App. 4th 284, 295-96 (2012).[3] This rule prevents borrowers from "milking" whatever assets they have pledged as "sole security for repayment of a debt." *See The Nippon Credit Bank, Ltd. v 1333 North California Blvd. et al*, 86 Cal. App. 4th 486, 495-97 (2001); *Bedrock Fin., Inc. v. United States*, 2013 U.S. Dist. LEXIS 71984 *29 (E.D. Cal. 2013) ("any action that diminished the lender's security interest in favor of the borrower's financial gain was impermissible 'milking' of the property"). This rule applies equally to borrowers subject to promissory notes with an express security interest, and to those with "nonrecourse provisions in their loans." *Nippon*, 86 Cal App. 4th at 496-97.

Second, injuries suffered by Plaintiffs resulting from Defendants' overcharges are not hypothetical. Plaintiffs have alleged that they have paid, and continue to pay, artificially inflated

[3] Damages in such an action are "measured by the amount of injury to the security caused by the mortgagor's acts, that is by the substantial harm which impairs the value of the property subject to the lien so as to render it inadequate security for the mortgage debt." *Id*. at 295.

monthly fees. Complaint ¶¶ 10-14, 63-75. These overcharges represent past and ongoing injuries. Defendants' argument that the contract "trumps" these claims (Mot. at 7) rings hollow. This is the precise issue in dispute. Plaintiffs allege that the Defendants breached their fiduciary duties and the terms of the Residency Contract by charging inflated fees. These fees were inflated because they included charges for (a) marketing charges that did not benefit the Vi at Palo Alto; (b) premiums for earthquake insurance coverage for the buildings at the Vi at Palo Alto, which is not an appropriate allocation; and (c) property taxes levied against CC-Palo Alto due to its illegal, and undisclosed upstreaming. There is nothing in the Residency Contract permitting such overcharges, and Defendants' arguments are unavailing.

Defendants incorrectly state that the Plaintiffs only claim they "may be harmed" by the newly assessed taxes. Mot. at 7 (emphasis in original). Plaintiffs allege that Defendants owed the community a credit for an annual operating surplus, which would have reduced their monthly fees, and, while Defendants agreed to pay the back-taxes that were assessed, they suspended the credit pending their appeal of the tax assessment. Complaint ¶ 66 and Ex. 21 (page 1). Plaintiffs have not received this credit, and therefore were overcharged as a result of the taxes levied due to the alleged unlawful upstreaming. Moreover, Defendants do not deny Plaintiffs' allegation that they ultimately intend to pass on these payments (both for back taxes and increased property tax going forward) to the residents. *Id.* ¶ 63. The harm is concrete.

As to the charges for earthquake insurance, Defendants' only argument is that one subsection of the contract cannot be read to modify another subsection. Mot. at 8. This misses the point and has no legal basis. The correct rule of interpretation is that the contract "must be read as a whole and in light of the law relating to it when made." *Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1143 (9th Cir. 1988). The Residency Contract should be read as a complete document. When read together, its terms clearly state that the residents' monthly fees may pay for insurance, but the residents are only responsible for replacement of capital items, which do not include the buildings at the Vi at Palo Alto. Complaint ¶¶ 69-73. Therefore, Plaintiffs have alleged a present and ongoing injury in the form of inflated monthly fees due to Defendants' improper allocation of insurance charges.

Regarding the marketing expenses, Defendants claim that the Residency Contract provides that "marketing expenses are an operating cost of the community to be paid by monthly fees." Mot. at 8. Defendants' position is misleading because it ignores the fact that the Residency Contract does not define the term "marketing costs." *See* Complaint ¶ 74. Plaintiffs are entitled to a reasonable interpretation of the term that does not permit Defendants to artificially classify all costs they wish to pass on to Plaintiffs as "marketing costs." The Residency Contract provides that monthly fees are intended to "pay all costs of operating the community" – this supports Plaintiffs' position that the residents' monthly fees should not be used to pay for CC-Chicago's national marketing campaign. *Id*. ¶¶ 74-75. Such a marketing campaign benefits CC-Chicago's other facilities, which are, in essence, getting a free ride on Plaintiffs' monthly fees. *Id*. While a "strong [national] marketing program" may benefit Plaintiffs indirectly, there is nothing in the Residency Contracts permitting Defendants to pay for *that* program from Plaintiffs' monthly fees.

Third, Defendants also rely on the mistaken assumption that "potential future harm" is insufficient to establish injury in fact. Mot. at 6. To the contrary, the Ninth Circuit and its district courts have repeatedly held that "plaintiffs need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." *Gary Harris et al. v. Board of Supervisors et al.*, 366 F.3d 754, 762 (9th Cir. 2004) (emphasis in original); *see also Central Delta Water Agency et al. v. USA et al.*, 306 F. 3d 938, 947-48 (9th Cir. 2002) ("the possibility of future injury may be sufficient to confer standing on plaintiffs; threatened injury constitutes 'injury in fact'"); *Covington et al. v. Jefferson County et al.*, 358 F.3d 626, 639 (9th Cir. 2004) (stating that "evidence of a concrete risk of harm to [the plaintiff] is sufficient for injury in fact," and the "relevant inquiry" is whether defendants' actions caused a "reasonable concern of injury" to the plaintiff); *Raich et al. v. Gonzalez et al.*, 500 F.3d 850, 857 (2007) ("it is clear that Raich's threatened injury may be fairly traced to the defendants, and that a favorable injunction from this court would redress Raich's threatened injury"); *Estate of John Migliaccio et al. v. Midland National Life Insurance Co.*, 436 F. Supp. 2d 1095, 1104 (C.D. Cal. 2006) ("threatened rather than actual injury can satisfy Article III standing requirements"). This principle has also been recognized by the Supreme Court on multiple occasions. *See Friends of the Earth, Inc. et al. v. Laidlaw Environmental Services*

(TOC), Inc., 528 U.S. 167, 185- (2000) (finding that a "plaintiff who is injured faces the threat of future injury due to illegal conduct" has standing); *Gladstone Realtors et al. v. Village of Bellwood et al.*, 441 U.S. 91, 99 (1979) ("the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"). Defendants' claims to the contrary are simply wrong and the cases they cite are inapposite.[5]

C. Plaintiffs' Claims Are Ripe For Adjudication

Plaintiffs' claims are ripe. Just like the standing doctrine, ripeness does not act to preclude claims simply because the alleged harm has not happened yet (for the reasons stated above, harm in this case has already occurred). The test is whether there is a "realistic danger of sustaining direct injury." *Babbit v. United Farm Workers National Union et al.*, 442 U.S. 289, 298 (1979). In other words, "one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id*.

Defendants argue that the language used by Plaintiffs in paragraph 130 of the Complaint warrants dismissal of every cause of action. Mot. at 9. This selective reading of the Complaint is not appropriate. The Complaint contains the following allegations of present, concrete, and continuing harm:

- Entrance Fees: "The effect of these practices is to shift all financial risk of repayment to the resident, which substantially impairs the value of Plaintiffs' security interest." Complaint ¶ 60.
- Monthly Fees (Taxes): "Defendants have elected to 'suspend the crediting to residents of any excess amounts in the Cumulative Operating Surplus … until appeal of the base year assessment is completed.' According to the Residency Contract, however, such surplus amounts should be used to create an operating reserve for the Vi at Palo Alto, or should be remitted to the residents in the form of lower monthly fees…. CC-Palo Alto's decision to suspend these credits was done to cover the increased taxes." Complaint ¶ 66.

[5] Defendants (Mot. at 6-7) cite to *Buttram v. Owens-Corning Fiberglass Corp.*, 16 Cal. 4th 520, 531 n. 4 (1997) to support their assertion that allegations of future harm do not meet the injury in fact requirement. However, *Buttram* does not discuss standing at all. It is a California personal injury case assessing the correct test to use in an asbestos case where the plaintiff claims latent onset of a disease. *Id*. *Buttram* discusses how the term "injury in fact" is used "in the context of third party liability insurance coverage," not for conferring of Article III standing. The only other case Defendants cite to on this point, *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971), does not even use the term "injury in fact" or "standing." Instead, *Budd* discusses the concept of "actual harm" in the context of an attorney malpractice action. *Id*. Neither of these cases has any bearing at all on Article III standing, and both are entirely divorced from the relevant jurisprudence.

- Monthly Fees (Earthquake Insurance): "Plaintiffs should not have been charged for the full premium of such [earthquake] insurance, because, under the contract they are only liable for capital costs." Complaint ¶ 73.

- Monthly Fees (Marketing Costs): "These costs have been substantial. Plaintiffs have paid in excess of $5.5 million of marketing costs from March 2006 through 2013. A portion of these costs are attributable to CC-Chicago's national marketing campaign…. The imposition of these costs is improper and Plaintiffs and the Class are entitled to a return of these funds." Complaint ¶ 75.

The cases cited by Defendants on this issue (Mot. at 9-10) are unpersuasive. For example, *Ventura County Human Society* does not even address the ripeness issue. *See Ventura County Human Society v. Holloway*, 40 Cal. App. 3d 897, 907 (1974). Rather, *Ventura* concerned a challenge to a will based on plaintiffs' claim that the "true intention" of the testator had not been determined. *Id*. at 906. The *Ventura* court affirmed the dismissal of the plaintiffs' breach of contract claim because it found that even had this inquiry been carried out, the plaintiffs may still have been precluded from the estate. *Id*. In other words, the plaintiffs in that case never established an interest in the estate. Similarly, *Pacific Legal Foundation* limited its analysis of the ripeness issue to claims which, in essence, "attempt to obtain review of the propriety of administrative regulations prior to their application to the party challenging them." *See Pacific Legal Foundation, et al. v. Jackson et al.*, 33 Cal. 3d 158, 171 (1982). *Pacific Legal* does not apply to cases such that this one, where Defendants have already unlawfully transferred Plaintiffs' Entrance Fees out of state, and have already imposed overcharges in the form of inflated monthly fees. Finally, the *National Organization for Marriage* case concerned claims brought by a non-profit advocacy group challenging a New York law regulating "political committees." *See National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691 (2013). The Second Circuit found that the case *was ripe* for adjudication even though the New York Board of Elections had made "no *specific* effort … to classify NOM as a political committee." *Id*. (emphasis in original). Instead, what mattered to the court was that "the plaintiff faced a 'credible threat' that the law would be enforced against it." *Id*. at 690.

In this case, the Complaint contains allegations that the Entrance Fees at issue belong to the Plaintiffs, and that CC-Palo Alto transferred those funds to its corporate parent and now lacks the financial ability to repay them, while the parent, CC-Chicago, affirmatively states it has no

obligation to repay Plaintiffs. Complaint ¶¶ 3, 8, 51, 77, 100. This is not a case where the Plaintiffs rely on a hypothetical finding that the funds at issue belong to them. Moreover, Plaintiffs have alleged that due to CC-Palo Alto's prior upstreaming, it will not be able to refund their Entrance Fees. *Id*. ¶¶ 3-9, 47-62. Plaintiffs have also alleged that their security interest in their Entrance Fees has been impaired. *Id*. ¶¶ 3, 8, 60, 127, 130, 131, 146; *see also supra* at 5-6. Finally, Plaintiffs allege that they have been overcharged. *Id*. ¶¶ 3, 10-14, 63-75, 127, 149. These are concrete injuries that are ripe for adjudication.

D. Plaintiffs Have Plead Their Fraud Claims With Specificity

Plaintiffs' fraud claims have been pled with specificity. The standards for concealment and negligent misrepresentation are distinct and must be assessed separately. Defendants have attempted to merge the requirements for these separate causes of action into a single pleading standard. Mot. at 10-12. Defendants' approach unnecessarily confuses the issues. Plaintiffs have laid out their arguments as to each cause of action separately below.

Defendants also seek to extend the heightened pleading requirement for fraud claims to all of Plaintiffs' causes of action, even those that are not based on fraud. Mot. at 10. This is inappropriate. Plaintiffs' claims for breach of contract, breach of fiduciary duty, financial abuse of elders, California Civil Code § 1750, and California Business and Professions Code § 17200 (under the unfair and unlawful prongs) do not require a showing, or incorporate the elements, of fraud. Each of these is a free-standing cause of action and is subject to the normal pleading requirements, which have been met.

> [t]o require that non-fraud allegations be stated with particularity merely because they appear in a complaint alongside fraud averments, however, serves no similar reputation-preserving function, and would impose a burden on plaintiffs not contemplated by the notice pleading requirements of Rule 8(a) …. [Therefore] allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a).

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104-05 (9th Cir. Cal. 2003).

Defendants also incorrectly claim that Plaintiffs have failed to allege "the names of the persons who made the misrepresentations." Mot. at 11. To the contrary, and as detailed more fully below (*infra* at 12-14), Plaintiffs provided specific examples of misrepresentations made by

Defendants and attached the relevant documents to the Complaint (*see* Exs. 2 and 18). The statements at issue were made by the Defendants in their corporate marketing materials, and the statements therein were made to prospective residents prior to their decision to enter the Vi at Palo Alto. *Id*. Specifically, Exhibit 2 to the Complaint is a letter from Maryellen Conner and Mike Wilson (members of the sales staff at Classic Residency by Hyatt) to prospective residents, which states, *inter alia*, that the residents "know" their Entrance Fees will not "fluctuate with the market." *Id*. In any case, this requirement does not apply to the concealment claim, which requires only a showing that Defendants omitted important facts.

1. Plaintiffs Have Stated A Claim For Concealment

While fraud claims for intentional misrepresentation must generally meet the heightened pleading standards of FRCP 9(b), courts recognize that "a plaintiff in a fraudulent concealment suit will not be able to specify the time, place, and specific content of an omission as precisely as would a plaintiff in a false representation claim." *Baggett et al. v. Hewlett-Packard Company*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007). The reason for this is that "such a plaintiff is alleging a failure to act instead of an affirmative act, [and therefore] cannot point out the specific moment when the defendant failed to act." *Id*. Given these circumstances, "a fraud by omission, or fraud by concealment claim, can succeed without the same level of specificity required by a normal fraud claim." *Id*. (Internal quotations omitted throughout). Moreover, in cases involving "corporate fraud," Rule 9(b)'s particularity requirement is "relaxed" because "the facts supporting the fraud are exclusively within the defendants' possession." *Migliacco*, 436 F. Supp. 2d at 1106.

Plaintiffs allege that Defendants concealed at least six important facts from them. Complaint ¶ 100. Each of those concealed facts are listed separately. *Id*. Defendants assert that there is no cause of action for concealment because they had a duty to disclose these facts. Mot. at 13. This is incorrect. Such a duty arises in the following four circumstances:

> (1) When the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material.

Baggett, 582 F. Supp. 2d at 1267-68.

Each of these circumstances is alleged here. Plaintiffs allege, for example, that Defendants failed to disclose that they did not maintain cash reserves sufficient to meet their repayment obligations, and that they actively concealed this information from Plaintiffs. Complaint ¶¶ 12-13, 25, 28, 31. 34, 38, 41, 51-60, 80, 87-88, 97-103, 150. Plaintiffs also allege that Defendants had a fiduciary duty, which they breached. *Id*. ¶¶ 76-80, 111-123.

Finally, Plaintiffs sufficiently allege that they reasonably relied on Defendants' representations regarding the financial security of their investment in the Vi at Palo Alto, and that they were harmed as a result because their security interest in their Entrance Fees was impaired and they were overcharged. *Id*. ¶¶ 25, 28, 31, 34, 38, 41, 80.

2. Plaintiffs Have Stated A Claim For Negligent Misrepresentation

The elements of negligent misrepresentation are as follows:

(1) Defendant made a misrepresentation of a material fact;

(2) Defendant had no reasonable ground for believing the fact to be true,

(3) Defendant intended to induce another's reliance on the fact misrepresented,

(4) Plaintiff justifiably relied on the misrepresentation; and

(5) Plaintiff was damaged.

Apollo Capital Fund LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226, 243 (Cal. App. 2d Dist. 2007).

Contrary to what is stated in Defendants' Motion (Mot. at 13), negligent misrepresentation does not require knowledge of falsity. *See Id*. ("[A] defendant who makes false statements honestly believing that they are true, but without reasonable ground for such belief … may be liable for negligent misrepresentation") (internal quotations omitted); and *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 231 (Cal.App.2d Dist. 2013) (no "knowledge of falsity" requirement). Moreover, courts have held that claims for negligent misrepresentation "need not satisfy the heightened pleading standard of Rule 9(b)." *See, e.g., Peterson v. Allstate Indemnity Company*, 281 F.R.D. 413, 418 (C.D. Cal. 2012).

Nevertheless, Plaintiffs have alleged with particularity that Defendants made material misstatements to the Plaintiffs. Plaintiffs provided two examples of this conduct (Complaint ¶¶ 6,

56). Those examples constitute affirmative misstatements that go beyond what Defendants characterize as "implied misrepresentations" or "puffery." *See* Mot. at 13-14.

First, Defendants used a marketing brochure which contains the following statements (provided in Question and Answers form) with regard to the Entrance Fees.

> Who monitors or regulates CCRCs and the fees collected by these communities? **What guarantee do I have that my reservation deposit and my entrance fee are secure?**
>
> 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 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.[6]

Complaint ¶ 6 and Ex. 2 (page 3) (emphasis added).

Second, Defendants sent a marketing letter containing the following statement:

> [Residents experience] a sense of security, knowing that they have made a good choice. They know their entrance fee refund will not fluctuate with changes in the market…. Our residents enjoy a vibrant and enriching lifestyle with the knowledge that they have planned wisely to secure their future.

Complaint ¶ 56 and Ex. 18.

Defendants claim that because the letter was written in 2008, Plaintiffs who signed Residency Contracts prior to that date cannot have relied on it. Mot. at 14. While the timing may be true, the brochure cited above was used as early as 2005. Moreover, Defendants offer no statement that the language in the 2008 letter was not used before 2008.

Defendants assert that there is a clause in the Residency Contract which states that CC-Palo Alto is the only entity responsible for repayment, and that the existence of this clause means that no misrepresentations were made. Mot. at 14. To the contrary, this clause implied that CC-Palo Alto would be capable of refunding the Entrance Fees when they became due and would not need the support of its parent company to do so. Regardless, it does not indicate that CC-Palo Alto planned to send Plaintiffs' funds to its corporate parent, or that CC-Chicago intended to

[6] Defendants now disavow any requirement to maintain such reserves. *See* Complaint at Ex. 4 (page 1).

disavow any and all repayment obligations. Defendants' citation to this clause is misplaced. In any case, Plaintiffs have alleged that they reasonably relied on these misrepresentations and were harmed as a result. Complaint ¶¶ 104-110. Importantly, Defendants cannot identify where they disclosed the upstreaming of funds to Chicago.

E. The Complaint Alleges Sufficient Grounds As A Basis For The Court's Subject Matter Jurisdiction

As reflected in the Complaint, this Court has jurisdiction under 28 U.S.C. 1332(d)(2), which provides that district courts have original jurisdiction in any civil action in which (a) the matter in controversy exceeds the sum or value of $5,000,000, and (b) is a class action consisting of more than 100 members in which any member of the proposed class is a citizen of a state different from any defendant. These requirements are met in this case. The amount in controversy is in the hundreds of millions of dollars (Complaint ¶ 1), and there are over 100 members in the proposed class (Complaint ¶ 22). Furthermore, the Plaintiffs are citizens of California and Defendants CC- Palo Alto and CC-Chicago are Delaware Corporations. CC-Chicago's principle place of business is in Illinois, and CRMLP is an Illinois limited partnership (Complaint ¶¶ 15-17). Defendants' argument that the absence of a paragraph labelled "jurisdictional statement" justifies dismissal puts form above substance, especially given jurisdictional elements are pled. Defendants cite no Ninth Circuit cases to support their claim.

F. Plaintiffs Have Stated A Claim For Breach Of Fiduciary Duty

The test for whether a fiduciary duty exists is whether "confidence is reposed by persons in the integrity of others, and [whether] the latter voluntarily accept or assume to accept the confidence." *Tri-Growth Centre City, Ltd. et al. v. Silldorf et al.*, 216 Cal. App. 3d 1139, 1150 (4th Dist. 1989). Once the relationship is formed, the fiduciary owes a duty of undivided loyalty. *See Pierce et al. v. Lyman*, 1 Cal. App. 4th 1093, 1102 (2nd Dist. 1991). Defendants' motions challenge only the existence of the alleged fiduciary relationship in this case, not whether there has been a breach of the duties flowing from that relationship. Mot. at 15-16.

One factor used to determine whether a fiduciary relationship exists is whether "one party [to the transaction] must rely on the good faith and integrity of the other." *Stevens v. Marco et al.*,

147 Cal. App. 2d 357, 372 (2nd Dist. 1956). Courts analyzing similar facts have found fiduciary relationships to exist between contracting parties where the defendant targeted senior citizens, which are a "protected class" in California. *See In re National Western Life Insurance Deferred Annuities Litigation*, 467 F. Supp. 2d 1071, 1087 (S.D. Cal. 2006); *Abbit et al. v. ING USA Annuity and Life Insurance Co.*, 2014 U.S. Dist. LEXIS 24715 *23-24, No. 13cv2310-GPC-WVG (S.D. Cal. Feb. 25, 2014) (denying motion to dismiss where plaintiffs alleged that "Defendant targets senior citizens with products that falsely promise security," and that "Defendant drafted all contractual material… taking advantage of [its] superior knowledge and bargaining power"); *Estate of John G. Migliaccio et al. v. Midland National Life Insurance Co. et al.*, 436 F. Supp. 2d 1095, 1108 (C.D. Cal. 2006) (denying motion to dismiss where plaintiffs alleged that defendants "trained their sales agents to lure senior citizens into their confidence by offering assistance with estate and financial planning, ultimately to sell them improper annuities").

Such is the case here. Plaintiffs and the Class trusted in the good faith and integrity of CC-Palo Alto to keep the refundable portion of their Entrance Fees financially secure. Complaint ¶¶ 4, 52, 56-60, 106. This trust was based on representations made by CC-Palo Alto and the fact that Plaintiffs planned to spend the rest of their lives at the Vi at Palo Alto. Complaint ¶¶ 2, 57, 76. CC-Palo Alto assured Plaintiffs and the Class that their Entrance Fee refunds would "not fluctuate with changes in the market," thus promising a continuing sense of financial security.[7] Complaint at Ex. 18. Defendants now assert that Plaintiffs and the Class should have known that "the repayment obligation is satisfied using money received from the resale of the unit," rather than funds held in reserve. Mot. at 20. This evolving misrepresentation is at the crux of Plaintiffs' Complaint. CC-Palo Alto lured Plaintiffs, a protected class of vulnerable senior citizens, into the Residency Contracts by promises of ongoing financial security – thus taking on fiduciary duties which they ultimately breached. Complaint ¶¶ 4, 52, 56-60, 106. CC-Palo Alto exploited its superior knowledge, bargaining power, and Plaintiffs' vulnerable position. It has now transferred tens of millions of dollars belonging to Plaintiffs to CC-Chicago, which disclaims

[7] Defendants' use of Penny Pritzker's name in connection with their promotion of the Vi at Palo Alto provided a further, ultimately false, assurance of financial stability. Complaint ¶ 57.

any obligation to repay them. Complaint ¶¶ 3, 7, 9, 58, 79. Furthermore, the fact that California DSS "reviews and approves each contract" (Mot. at 16) is irrelevant here, because the Residency Contracts do not state, and the Plaintiffs were never informed, that CC-Palo Alto planned to upstream Plaintiffs' Entrance Fees to CC-Chicago, or that it would charge inflated monthly fees. Complaint ¶¶ 25, 28, 31, 34, 38, 41, 99-110.

CC-Palo Alto attempts to dodge this responsibility by stating that the Residency Contracts show that the Entrance Fees are "unsecured loans" and that the "plaintiffs have no vested ownership interest in them." Mot. at 15. In taking this position, Defendants cite to a contractual provision that states the residents have no "interest in any payments made under this Contract." *See, e.g.,* Complaint at Ex. 5 (Section 9.5) (emphasis added). First, the Residency Contract never describes the Entrance Fee loans as "unsecured." Second, the provisions cited by Defendants apply only to "payments," not to Plaintiffs' interest in their Entrance Fees which are explicitly defined as "loan[s]" in the Residency Contracts. *See id*. (Section 8.5). ("Your entrance fee is intended to be a loan to the provider"). Defendants' attempt to convert Plaintiffs' Entrance Fees from "loans" into "payments" is further evidence of their indifference to the rights and interest of the Plaintiffs. At a minimum, this dispute cannot be resolved through a pleading challenge.

G. Plaintiffs Have Stated A Claim For Financial Elder Abuse

Defendants only challenge to Plaintiffs' claim for elder abuse is that "CC-PA has not taken, appropriated, or retained a property right belong to plaintiffs." Mot. at 16. This assertion is the source of the dispute between the Parties, and is not a justification for dismissing Plaintiffs' claim. At the motion to dismiss phase, Plaintiffs' allegations are to be taken as true, and Defendants' argument fails for two reasons. *Negrete v. Fidelity and Guarantee Life Insurance Company*, 444 F. Supp. 2d 998, 1001 (C.D. Cal. 2006).

First, Plaintiffs allege that Defendants took, appropriated and retained their property by charging them inflated amounts for monthly fees. Complaint ¶¶ 3, 10-14, 63-75, 127. Defendants' answer to this allegation is that "the monthly fees are intended to cover all costs of operating the community." Mot. at 17. This misses the point. Plaintiffs have alleged that Defendants have artificially inflated their monthly fees by passing on taxes attributable to their

illegal upstreaming, marketing expenses befitting facilities other than the Vi at Palo Alto, and earthquake insurance charges that cover the Vi at Palo Alto's buildings. Complaint ¶¶ 3, 10-14, 63-75, 127. The portion of the fees Plaintiffs are challenging did not cover the costs of operating the community, and they were not contemplated by the Residency Contracts. *Id*.

Second, Plaintiffs allege that CC-Palo Alto illegally took, appropriated, and retained their Entrance Fees by upstreaming them to CC-Chicago. Complaint ¶¶ 3, 7, 9, 58, 59, 127. This upstreaming impaired Plaintiffs' security interest in those fees. Complaint ¶¶ 8, 60, 120, 127, 130, 131. Defendants rely on their unsupported factual assertion that Plaintiffs have "no vested interest in the repayable portion of the entrance fee." Mot. at 17. Defendants continue to rely on a section of the Residency Contracts that discuses "payments" even though it acknowledges that the Entrance Fee "is intended to be a loan to the Provider." Mot. at 17. Moreover, California law requires Defendants to maintain financial reserves sufficient to repay the Entrance Fees. *Supra* at 5-6. These laws are incorporated into the Residency Contracts by operation of law and function as a security interest for those loans. *Id*. Defendants violated the California laws governing these reserve requirements, breached these terms of the Residency contract, and impaired Plaintiffs' security interest.[8]

Defendants' argument is an assertion of its position on the merits, and is not appropriate at the motion to dismiss phase which is concerned solely with the pleadings. This identical argument – that an elder abuse claim should be dismissed because defendant did not "take" property – has been raised and rejected in numerous cases where the complaint at issue contained an allegation to the contrary. *See, e.g., Negrete* 444 F. Supp. 2d at1002-03; *Abbit*, 2014 U.S. Dist. LEXIS 24715 at *26-27.

H. Plaintiffs Have Stated A Claim Under The Consumer Legal Remedies Act

Defendants state that Plaintiffs' CLRA claims should be dismissed for four reasons: Plaintiffs' compliance with the venue affidavit requirements; Plaintiffs' compliance with the pre-

[8] Plaintiffs also allege that the Residency Contracts were not freely entered into. Rather, they were offered on a "take it or leave it" basis and the prospective residents were pressured into signing them lest they lose the opportunity to live at the Vi at Palo Alto. Complaint ¶ 46.

complaint notice requirements; an allegation that some of the Plaintiffs are barred by the statute of limitations; and an allegation that Plaintiffs have failed to state a claim.

The first argument is easily dispensed with. Plaintiffs have filed concurrently with this Opposition, an affidavit that meets the requirements of California Civil Code § 1780(d). *See* Exhibit A attached hereto (Affidavit of Burton Richter). In addition, at least one court has held that the affidavit requirement is a purely procedural rule that does not apply to complaints filed in Federal Court, and therefore does "not have a significant impact on the outcome on the case." *See Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735, 738 n. 1 (E.D. Pa. 2011).

Defendants' second argument is a similar attempt to put form above substance, and fails for the same reasons. First, the CLRA pre-filing notice only applies to claims for damages. It does not apply to the claims for equitable relief or attorneys' fees. Next, Plaintiffs sent a post-filing demand letter to Defendants on March 28, 2014 per Civil Code 1782(d). *See* Declaration of Demetrius Lambrinos ("Lambrinos Decl."), Exhibit 1. Next, Defendants rely on *Laster v. T-Mobile United States, Inc.*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) (Mot. at 18), which states that the reason for the pre-complaint notice rule is to facilitate "expeditious remediation before litigation." This goal is not met by requiring pre-complaint notice in this case because the Parties have already attempted, and failed, to mediate this dispute. Complaint ¶ 23. In other words, Defendants were already on notice of Plaintiffs' claims before the Complaint was filed, and had not taken any remedial action. Indeed, they have flatly refused to do so.

Defendants' statute of limitations argument also fails. Defendants assert that the three year statute of limitations for CLRA claims started to run when the residents entered their respective Residency Contracts, and that four of the class representatives did so in 2005, which is more than three years prior to filing the Complaint. Mot. at 19. Initially, this argument completely contradicts Defendants' ripeness argument. Next, this argument fails because, as Plaintiffs have alleged, Defendants concealed their business practices. Complaint ¶¶ 97-103. *See NLRB v. Don Burgess Construction Corp.*, 596 F. 2d 378, 383 (9th Cir. 1979) ("fraudulent concealment tolls a statute of limitations").

Furthermore, "[i]n California, the discovery rule postpones accrual of a claim until the plaintiff discovers, or has reason to discover, the cause of action." *Plumlee v. Pfizer*, 2014 U.S. Dist. LEXIS 23172 *26, No. 13-cv-00414 (N.D. Cal. Feb. 21, 2014). Plaintiffs did not discover that Defendants did not have Entrance Fee reserves until March 15, 2012 or after, and the Complaint was filed on February 19, 2014. *See* Complaint ¶ 51 and Ex. 4 (page 1). Therefore, the statute has yet to run. Furthermore, Plaintiffs and the Class have paid, and continue to pay, inflated monthly fees, and Defendants continue to upstream their Entrance Fees. The fact that this conduct is ongoing tolls the statute of limitations. *See Allen v. Similasan Corp.*, 2013 U.S. Dist. LEXIS 139874 *14 (S.D. Cal. Sept. 27, 2013) ("[t]he continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them").

Defendants' fourth argument fails because it hinges on the same flawed assumptions it has repeatedly made. First, Defendant asserts that the alleged misrepresentations were not "material" and that Plaintiffs were not induced to alter their positions. Mot. at 19. This is clearly incorrect. Plaintiffs have alleged injury. They were lured into the Vi at Palo Alto by Defendants' assurances of financial security. Complaint ¶¶ 4, 56-60, 106. Second, Defendants assert that members of the public were not likely to be deceived by their failure to disclose their upstreaming practice because "there is no security interest as the Entrance Fees are a general, unsecured loan of CC-PA." Mot. at 20. This is incorrect and not a proper argument at the motion to dismiss phase. Plaintiffs have alleged that the entrance fees are secured by California's reserve requirements, which are incorporated into the residency contract by operation of law. *Supra* at 5-6. Furthermore, there is nothing in any of the Residency Contracts or promotional materials indicating that the Entrance Fees are unsecured. *Id*. In fact, Defendants used marketing material that stated there was a reserve fund for the Entrance Fees, and that they would be held in escrow. Complaint ¶ 6 and Ex. 2 (page 3) and *supra* at 13. Finally, in arguing that Plaintiffs have failed to allege a "tangible increase cost" (Mot. at 20), Defendants have again ignored Plaintiffs' allegations that Defendants have charged Plaintiffs and the Class inflated monthly fees. Complaint ¶¶ 3, 10-14, 63-75.

I. Plaintiffs Have Stated A Claim Under California Business And Professions Code Section 17200

Plaintiffs allege that Defendants have engaged in fraudulent, unfair, and/or unlawful business practices under California's Unfair Competition Law ("UCL") as provided in Business and Professions Code Section 17200 *et seq.* Complaint ¶¶ 144-153.

Defendants argue that Plaintiffs cannot state a claim under the unlawful prong, because the claims for concealment, negligent misrepresentation, breach of fiduciary duty, financial elder abuse, and violations of the CLRA "have not been adequately pled." Mot. at 21. First, as stated above, this is false. Second, even if it were true, Plaintiffs would still have a claim under the unlawful prong due to Defendants' violations of California law, including California Health & Safety Code §§ 1792.6, 1793, which contain the Entrance Fee reserve requirements. Health & Safety Code § 1793.5 explicitly states that "[a] violation under this section **is an act of unfair competition as defined in Section 17200 of the Business and Professions Code**." (Emphasis added).

Defendants next argue that Plaintiffs have failed to adequately plead their UCL fraud claims because they have not alleged that Defendants owed a duty to disclose. Mot. at 21. First, this is the incorrect standard. California law is clear that "the fraud contemplated by section 17200's third prong bears little resemblance to common law fraud or deception." *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1105 (Cal. App. 2d Dist. 1996). "The test is whether the public is likely to be deceived…. This means that a section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. *Id*. This test is met in this case. Complaint ¶¶ 144-153. Second, even if Defendants' arguments were correct, Plaintiffs have alleged such a duty. *See discussion supra* at 12. Third, in the context of a fraud claim, a duty to disclose can arise where "the defendant had exclusive knowledge of material facts not known to the plaintiff." *Mui Ho v. Toyota Motor Corp.,* 931 F. Supp. 2d 987, 998 (N.D. Cal. 2013). A duty to disclose may also arise when the defendant "actively conceals a material fact from the plaintiff." *Id.* at 998. Both of these circumstances exist here. Plaintiffs allege that Defendants failed to disclose that

they did not maintain cash reserves sufficient to meet their Entrance Fee repayment obligations, and that they actively concealed this information from Plaintiffs. Complaint ¶¶ 12-13, 25, 28, 31. 34, 38, 41, 51-60, 80, 87-88, 97-103. The important facts that Defendants concealed and failed to disclose were in their exclusive possession and were not known to Plaintiffs. *Id*. ¶¶ 100, 150.

Defendants also assert that Plaintiffs' UCL claims are not actionable because they have not suffered an injury in fact. Defendants state that this requirement for UCL claims is intended to follow the standing requirement under Article III. This argument fails for the same reason as Defendants' Article III argument. The standing doctrine is not meant to force Plaintiffs to wait until a threatened injury comes to pass before filing suit. *Supra* at 7-8. Parties have standing to bring claims based on threats of injury. *Id*. Regardless, beyond the impairment of their security interest in their Entrance Fees (*supra* at 5-6), Plaintiffs have lost money as a result of Defendants' unfair, fraudulent, and unlawful conduct because they have paid inflated monthly fees. Complaint ¶¶ 3, 10-14, 63-75.

Finally, Defendants argue that Plaintiffs are not entitled to restitution because they do not have an ownership interest in their Entrance Fees. Mot. at 22. This is false. The Entrance Fees are loans that Plaintiffs and the Class made to CC-Palo Alto. They are secured by California's statutory reserve requirements and by a promissory note. *Supra* at 5-6. Plaintiffs have alleged a sufficient ownership interest. Plaintiffs also have an ownership interest in the money they have paid in inflated monthly fees.

J. Plaintiffs Have Stated A Claim For Breach Of Contract

Plaintiffs allege that Defendants breach the Residency Contracts in multiple ways, including: (1) failing to adhere to the reserve and disclosure requirements of California Health & Safety Code §§ 1792.6, 1793, which are incorporated into the contracts as a matter of law (*see Castillo v. Express Escrow Company*, 146 Cal. App. 4th 1301, 1308 (2007)); (2) misconstruing the term "marketing expenses" to cover CC-Chicago's national marketing campaign (*see* Complaint at Ex. 5 Sections 3.3.3. and 3.3.4); and (3) passing on charges for earthquake insurance coverage for the buildings at the Vi at Palo Alto, which are not included as capital items under the Residency Contracts. *Id.* Each act is a separate contractual breach. *See* Complaint ¶¶ 154-160.

As to the first alleged breach for failure to maintain reserves, Defendants argue that "[d]istributing excess cash to a corporate parent is a common business practice and not prohibited by law." Mot. at 22. First, those are factual contentions which are not appropriate for a motion to dismiss. Regardless, this does not mean that parties to a contract which includes a reserve requirement may deplete those reserves by participating in such transfers. As Plaintiffs have explained, such practices are actionable to the extent they impair a lender's security interest. *Surpa* at 5-6 (citing cases). The damages for such activities are measured by the impairment of the security interest. *Supra* at fn. 3. Defendants assert that a letter from the DSS supports their argument that California's statutes "specifically contemplate' that a provider will distribute excess cash to a parent company." Mot. at 22. This is a misleading citation. Here is the full sentence:

> Although the continuing care statutes do not preclude distributions of surplus cash to a providers principle (in fact the statute specifically contemplates such distributions), **the statutes do require that the provider entity remain financially sound after making those distributions**.

Complaint at Ex. 3 (page 3) (emphasis added).

The DSS further noted its concern that "[i]f the entrance fee from the resale of a Health Center resident's unit has already been collected and distributed to [CC-Chicago] when the Health Center resident's contract terminate, [CC-Palo Alto's] cash will not be sufficient to make the entrance fee repayment due." *Id*. at page 2. The DSS was also concerned that due to its cash transfers, CC-Palo Alto could be "insolvent, is in imminent danger of becoming insolvent, [or] is in a financially unsafe or unsound position" such that it may not be able to make its repayment obligations. *Id*. The DSS also cited to an actuarial study that found that CC-Palo Alto "does not possess sufficient resources for current residents (including the actuarial present value of periodic fees expected to be paid in the future by present residents) to cover the actuarial present value of the expected costs of performing all remaining obligations to such residents under their contracts." *Id*. at page. 1. In sum, this letter clearly does not "concede[]" (Mot. at 22) that CC-Palo Alto's cash transfers are code compliant – in fact, the opposite is true.

As to the second and third breaches, which relate to the monthly fees, Defendants claim that the expenses at issue were intended to cover "all costs" (Mot. at 23) of the operating the

community. This again, is a fact argument not appropriate for a motion to dismiss. Plaintiffs' position is that the marketing costs at issue did not benefit the community, but were instead used to benefit Defendants' other facilities vis-a-vis a national marketing campaign. Complaint ¶¶ 13, and 74-75. Plaintiffs also allege that the earthquake insurance at issue covers the buildings at the Vi at Palo Alto, which are not included as capital items under the contract. *Id*. ¶¶ 12, 69-73. Defendants' arguments presuppose the outcome of fact issues which remain to be litigated and are irrelevant to this Court's assessment of the pleadings.

K. Plaintiffs Have Sufficiently Pled Conspiracy Against CC-Chicago And CRMLP

"[C]onspiracy may be inferred from conduct and need not be proved" by an express agreement. *Ngo v. City of Santa Ana*, Case No. SACV 13-1660-DOC (RNBx), 2014 U.S. Dist. LEXIS 22278 at *7 (C.D. Cal. Feb. 20, 2014) (quoting *Ward v. EEOC*, 719 F.2d 311, 314 (9th Cir. 1983)); *see also Alfus v. Pyramid Technology Corp*., 745 F. Supp. 1511, 1521 (N.D. Cal. 1990) ("proof of a conspiracy does not require a showing of an explicit agreement; a demonstration of a tacit agreement is enough") (quoting case). Plaintiffs allege a quintessential conspiracy: one business illegally siphoning funds to another. Defendants CC-Chicago and CRMLP nonetheless argue that Plaintiffs' Complaint fails to adequately allege the existence of a conspiracy with the specificity required by Rule 9(b). Defendants' argument is peculiar. The only way Plaintiffs' allegations could not be plausibly read as a conspiracy would be to assume that CC-Chicago had no knowledge of CC-Palo Alto's upstreaming, and no intent to accept and retain the over $190 million in upstreamed funds. Such assumptions are not only implausible, but demonstrably false.

Defendants argue that they cannot be liable for conspiracy because "one cannot be a co-conspirator unless defendant is legally capable of committing the tort charged." CC-Chicago MTD at 9:25-26; CRMLP MTD at 10:3-4. Defendants wrongly cite *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511 (Cal. Supr. Ct. 1994) in support of this argument. In *Applied Equipment*, the California Supreme Court explained that an obligation or duty owed only by one party cannot be expanded to another party simply by alleging conspiracy. *See id.* at 511-

512. For example, a co-conspirator cannot be held liable for a claim based on breach of a fiduciary duty unless that co-conspirator actually owed a fiduciary duty to the plaintiff; but a coconspirator can be held liable for fraud, even without owing a special duty to the plaintiff, because all parties "share[] the 'duty to abstain from injuring the plaintiff through express misrepresentation.'" *Id.* at 512-13. In this case, as Defendants concede, Plaintiffs' allegations center on fraud. Fraud requires no heightened or special duties. All of the Defendants owed Plaintiffs a duty not to harm them through express or implied misrepresentations. Accordingly, *Applied Equipment* is of little help to Defendants.[9]

L. Plaintiffs Have Sufficiently Pled Aiding And Abetting Against CC-Chicago And CRMLP

Defendants CC-Chicago and CRMLP next argue that the Complaint fails to adequately allege aiding and abetting. Defendants are wrong, as the Complaint adequately alleges both knowledge, and substantial assistance. First, with respect to knowledge, Defendants state that Rule 9(b) applies to allegations of aiding and abetting. Defendants fail to add, however, that even under Rule 9(b), it is sufficient to plead actual knowledge generally. *See Casey v. U.S. Bank Nat. Assn.*, 127 Cal. App. 4th 1138, 1148 (Cal. Ct. App. 2005); *citing Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003). "[W]hile fraud must be pled with specificity, 'malice, intent, knowledge, and other condition of mind of a person may be averred generally.'" *Neilson*, 290 F.Supp.2d at 1119; *citing Gonzalez v. Lloyds*, 532 F. Supp. 2d 1200, 1207 (C.D. Cal. 2006). Plaintiffs have adequately alleged knowledge. *See* Complaint ¶ 19.

Second, somewhat incredibly, Defendants argue that the Complaint fails to allege substantial assistance. To the contrary, both Defendants were active and significant participants in the conduct alleged in the Complaint; neither were bystanders. With respect to CC-Chicago, the receipt and retention of $190 million in illegally siphoned funds indisputably constitutes substantial assistance. For its part, CRMLP set the budgets for CC-Palo Alto that included and allowed for the various overcharges alleged in the Complaint. *See* Complaint ¶ 17. This too

[9] Plaintiffs do not contend that CC-Chicago and CRMLP are liable as co-conspirators on the negligent misrepresentation, breach of fiduciary duty, or breach of contract claim.

constitutes substantial assistance. Accordingly, the Complaint adequately alleges aiding and abetting with respect to both CC-Chicago and CRMLP.

M. Plaintiffs Have Sufficiently Pleaded Alter Ego Against CC-Chicago

Defendant CC-Chicago further argues that paragraph 20 of the Complaint fails to adequately allege that it acted as the alter ego of CC-Palo Alto. Paragraph 20 merely makes a legal assertion – the factual allegations supporting a plausible alter ego claim are found throughout the Complaint – and is not the only basis for Plaintiffs' alter ego claim. For example, as conceded by CC-Chicago, the factors that support a finding of alter ego include: "inadequate capitalization [and] commingling of funds and other assets of the two entities." CC-Chicago MTD at 12:9. In fact, under California law, one of the most important factors, if not the most important factor, under the alter ego analysis is inadequate capitalization. *See Automotriz del Golfo de California S.A. De C.V. v. Resnick*, 47 Cal. 2d 792, 796-97 (Cal. Supr. Ct. 1957); *Laborers Clean-Up Contract Admin. Trust Fund v. Uriate Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984).

Plaintiffs' Complaint is replete with specific factual allegations regarding inadequate capitalization and commingling of funds. In fact, the very core Plaintiffs' case – the improper upstreaming of $190 million from CC-Palo Alto to CC-Chicago – supports a plausible conclusion that there was inadequate capitalization and commingling of funds.[10] The upstreaming also directly results in inadequate capitalization of CC-Palo Alto. Specifically, the Complaint alleges inadequate capitalization as follows: "Due to this upstreaming activity, CC-Palo Alto does not have enough money to refund these fees…" Complaint ¶ 3; "As a result of this illegal upstreaming, CC-Palo Alto is financially incapable of honoring its debts…" *Id.* ¶ 7; "CC-Palo Alto now has a deficit of over $300 million and owes Plaintiffs over $450 million." *Id.* ¶ 9. Accordingly, Plaintiffs have plausibly alleged alter ego liability with respect to CC-Chicago.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions should be denied.

[10] Moreover, the Complaint alleges in detail how CC-Palo Alto and CC-Chicago commingled marketing costs. *See* ¶¶ 13, 74-75.

Dated: March 31, 2014

COTCHETT, PITRE & McCARTHY, LLP

By: */s/ Demetrius X. Lambrinos*
NIALL P. McCARTHY
ANNE MARIE MURPHY
DEMETRIUS X. LAMBRINOS

Attorneys for Plaintiffs Burton Richter, Linda Collins Cork, Georgia L. May, Thomas Merigan, Alfred Spivack, and Janice R. Anderson

EXHIBIT A

NIALL P. McCARTHY (SBN 160175)
nmccarthy@cpmlegal.com
ANNE MARIE MURPHY (SBN 202540)
amurphy@cpmlegal.com
DEMETRIUS X. LAMBRINOS (SBN 246027)
dlambrinos@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road
Burlingame, California 94010
Telephone: (650) 697-6000
Facsimile: (650) 692-3606

Attorneys for Plaintiffs Burton Richter, Linda Collins Cork, Georgia L. May, Thomas Merigan, Alfred Spivack, and Janice R. Anderson

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 others similarly situated,

Plaintiffs,

v.

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. 5:14-cv-00750-HRL

AFFIDAVIT OF BURTON RICHTER IN SUPPORT OF VENUE PURSUANT TO CALIFORNIA CIVIL CODE SECTION 1870(d)

AFFIDAVIT OF BURTON RICHTER

I, BURTON RICHTER, state and declare as follows:

1. I am a Plaintiff in the above-entitled action, and I bring this action on behalf of myself and all others similarly situated.

2. I am a competent adult over eighteen years of age and I have personal knowledge of the following facts for which I could and would competently testify to under oath in open court if called to do so.

3. I am a resident of the County of Santa Clara, in the State of California.

4. The facts, transactions, and occurrences set forth in the Complaint took place in the County of Santa Clara, in the State of California.

5. I am informed and believe that the appropriate venue of this matter is the Northern District of California.

I declare under penalty of perjury under the laws of the State of California, and the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on this 28 day of March of 2014 in Palo Alto, California.

BURTON RICHTER