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

**PLAINTIFF'S OPPOSITION TO ADMINISTRATIVE MOTION TO STAY DISCOVERY**

Judge: Hon. Edward J. Davila

## I. INTRODUCTION

Defendants have improperly filed their motion as an administrative motion under Local Rule 7-11, yet they seek a motion to stay discovery and a protective order, or, in the alternative a motion for several month extension of time to respond to discovery. Defendants' motion should be denied for this reason and also on the grounds that the relief sought is not justified.

## II. FACTUAL BACKGROUND

This is financial elder abuse class action. Notably for purposes of this motion, the Plaintiffs are all senior citizens. The Plaintiffs and proposed class representatives range in age from 77 to 93 years of age. The Vi at Palo Alto is a high-end Continuing Care Retirement Community ("CCRC"). Complaint ¶ 2. The proposed Plaintiff Class ("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 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 its parent company CC-Chicago. Id. ¶¶ 3, 7, 56-60. CC-Palo Alto concealed these, and other important facts, from Plaintiffs. Id. ¶¶ 100, 150. 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. 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.

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## III. LEGAL ARGUMENT

### A. DEFENDANTS HAVE IMPROPERLY FILED THEIR REQUEST AS AN ADMINISTRATIVE MOTION

As stated in Schwarzer, Tahima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial (The Rutter Group 2014), 11:1160 "[p]rotective orders are obtained by the usual noticed motion procedure …" Instead, Defendants have filed their motion as an Administrative Motion. Local Rule 7-11 governs the filing of Administrative Motions and states:

> **7-11. Motion for Administrative Relief**
>
> The Court recognizes that during the course of case proceedings a party may require a Court order with respect to miscellaneous administrative matters, not otherwise governed by a federal statute, Federal or local rule or standing order of the assigned judge. These motions would include matters such as motions to exceed otherwise applicable page limitations or motions to file documents under seal, for example.

Local Rule 7-11 (emphasis added). Protective Orders are governed by Rule 26(c) and do not concern a "miscellaneous administrative matter." Because Defendants chose to label their motion an Administrative Motion, Plaintiffs are being required to file this Opposition a mere four days after the Motion was filed and are limited to a five page brief. Defendants' motion is procedurally defective and should be denied for this reason alone.

### B. PLAINTIFFS ARE PERMITTED TO PURSUE DISCOVERY UNDER THE FEDERAL RULES

Defendants claim that there should be a stay of discovery because the motions to dismiss have not yet been decided; however there is ample precedent for permitting discovery to proceed despite a pending motion to dismiss. Courts in this district have rejected the notion that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) in and of itself justifies any stay of discovery. See *In re Flash Memory Antitrust Litig.*, 2007 U.S. Dist. LEXIS 95869 (N.D. Cal. Dec. 24, 2007) (calling the defense position, based on *Twombly*, that all discovery should be stayed pending the

resolution of motions to dismiss "overbroad and unpersuasive"); *see also, Mlejnecky v. Olympus Imaging Am., Inc.*, 2011 U.S. Dist. LEXIS 16128 (E.D. Cal. Feb. 7, 2011)(rejecting defendants' request for a stay of discovery pending resolution of standing related argument in a consumer class action.)

Here, the Parties have already conducted their Rule 26(f) conference and have exchanged (lengthy) initial disclosures. When the Parties filed their Joint Statement on August 8, 2014 under the heading "Proposed limitations or modifications of the discovery rules" they jointly wrote "None." It was understood that discovery could proceed. While the Parties did discuss the need for a protective order (to address confidential information), they never reached agreement on Defendants' assertion that an Attorneys' Eyes Only provision was needed. To the extent that Defendants suggest in their Administrative Motion that discovery cannot proceed without a protective order to address confidential information, it is Defendants that bear the burden of presenting an order to the Court – they have not done so. Plaintiffs already fulfilled their promise of providing a draft order with a single layer of protection – which has been rejected by the Defendants. This is not a legitimate reason the grant a stay of discovery.

**C. DEFENDANTS HAVE NOT MET THEIR BURDEN OF PROOF**

On a motion for a protective order, the person seeking to limit discovery has the burden of establishing grounds for its issuance. *Blankenship v. Hearst Corp.* (9th Cir. 1975) 519 F.2d 418, 429. Contrary to Defendants' arguments, the information requested by Plaintiffs is reasonably calculated to lead to the discovery of evidence relevant to issues in the litigation. The Federal Rules permit the discovery of any matter "relevant to any party's claim or defense" or that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). The scope of discoverable information is broader than the evidence that is admissible at trial. *Id.* The Federal Rules authorize broad pretrial discovery based on the general principle that "the broad right of discovery is based on the general principle that litigants have a right to 'every man's evidence,' and that wide access to relevant facts serves the integrity and fairness of the

judicial process by promoting the search for the truth." [Internal quotation marks omitted] *Rivera v. NIBCO, Inc*., 384 F.3d 822, 824 (9th Cir. 2004).

A party seeking a protective order must demonstrate "good cause" that "specific prejudice or harm will result" from the discovery. *Phillips ex rel Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). The burden imposed by a discovery request must be "undue" to constitute good cause for a protective order. Fed. R. Civ. P. 26(c).

This case involves complex issues – as evidenced by the in-depth arguments during the hearing on September 9, 2014. Hundreds of millions of dollars are at issue – as is the financial security of approximately five hundred senior citizens. These elderly Californians have a strong interest in seeing this case successfully concluded within their lifetimes. Their interest in receiving a speedy trial must be weighed against Defendants' claims of burden. As reflected in the Joint Case Management Statement, which was filed on August 8, 2014 [Doc. 41], this dispute has been pending since before September 2013 when the Parties engaged in pre-litigation mediation. The issues underlying the case have long been understood by the Defendants and it is reasonable to expect that they have devoted resources over the past year and a half to collecting documents and information that is responsive to the initial round of discovery that Plaintiffs served on September 16, 2014. Defendants' argument that "[t]here is nothing urgent or otherwise time-sensitive in plaintiffs' discovery requests" is unfair given both the amount of time that the dispute has been pending between the parties and the advanced age of the Plaintiffs and the class that they seek to represent. The maxim, "justice delayed is justice denied" applies with particular force in this litigation.

Finally, while it is true that the Parties met and conferred prior to Defendants filing this motion, Plaintiffs' counsel's statements to defense counsel were not as open and shut as suggested in the Administrative Motion and accompanying Declaration. *See*, Declaration of Anne Marie Murphy.

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## IV. CONCLUSION

Defendants have failed to file a noticed motion, as is plainly required under the Federal Rules. For this reason alone the request for a protective order and stay of discovery should be denied. However, setting aside the procedural defects in the motion, Defendants have not met their burden of demonstrating that a protective order and stay of discovery should be granted. Under the Federal Rules' broad view of discoverable information, there is no good cause to grant a protective order. This case involves claims brought by elderly Californians against the companies that operate their CCRC – their need for a speedy resolution must be weighted against Defendants' claims of burden and expense. Plaintiffs request that the Court deny defendants' motion and direct full and complete discovery responses.

Dated: October 3, 2014

**COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Anne Marie Murphy*
NIALL P. McCARTHY
ANNE MARIE MURPHY