Winans v. Emeritus Corporation Doc. 53

United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARVILLE WINANS, by and through his guardian ad litem, RENEE MOULTON, on his own behalf and on behalf of other similarly situated, Plaintiff, v. EMERITUS CORPORATION and DOES 1 through 100, Defendants.	Case No. 13-cv-03962-SC ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS; DENYING MOTION TO STRIKE

I. INTRODUCTION

Plaintiff Arville Winans ("Plaintiff") brings this action for declaratory and injunctive relief and damages against Defendant Emeritus Corporation ("Defendant") by and through his guardian ad litem Renee Moulton. Plaintiff is a resident of one of Defendant's assisted living facilities in Tracy, California. He alleges that Defendant has engaged in a scheme to defraud seniors by falsely representing that it will provide sufficient staff to care for all of its residents based on the residents' evaluations, "when in

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truth [Defendant] determines facility staffing based on labor budgets set to meet profit margins established by corporate headquarters." ECF No. 24 (First Amended Complaint ("FAC")) ¶ 2. Defendant now moves to dismiss and strike Plaintiff's FAC. ECF Nos. 32 ("MTD"), 34 ("MTS"). Both motions are fully briefed. ECF Nos. 43 ("MTS Opp'n"), 44 ("MTD Opp'n"), 46 ("MTS Reply"), 47 ("MTD Reply").[1] The Court finds the matter appropriate for resolution without oral argument per Civil Local Rule 7-1(b). As explained below, Defendant's motion to dismiss is GRANTED in part and DENIED in part, and Defendant's motion to strike is DENIED.

II. BACKGROUND

Defendant is the largest provider of assisted living for senior citizens in the nation. FAC ¶ 15. It operates 72 facilities in California alone, which have an aggregate of 5,000 residents. Id. ¶ 10. Defendant's assisted living facilities offer room, board, and assistance for seniors in certain activities of daily living. Id. ¶ 16. These facilities also have "memory care units," which serve individuals with dementia and other cognitive disorders. Id. ¶ 17. Plaintiff is a senior citizen and has been a resident of one of Defendant's facilities since October 2009. Id. ¶ 8. Ms. Moulton, his niece, is his agent, having been granted his power of attorney in September 2009. Id.

In its uniform contract with each resident, Defendant

[1] Plaintiff has also filed an administrative motion for leave to file a surreply to address new choice-of-law arguments raised in Defendant's reply brief. ECF No. 49 ("Admin. Mot."), 49-1 ("Surreply"). Defendant has opposed the administrative motion. ECF No. 52. The Court GRANTS the motion, but the surreply does not change the ultimate disposition of the motion to dismiss.

represents that it will evaluate the resident prior to admission and assign the resident a "Level of Care" from 1 to 7, with higher monthly charges imposed for higher levels of care.[2] Id. ¶¶ 21-22. The uniform contract also represents that Defendant will periodically re-evaluate each resident to determine if he or she requires additional assistance. Id. ¶ 23. If so, Defendant may assign the resident a higher Level of Care and collect additional monthly charges. Id. Defendant conducts these periodic re-evaluations using its "wE Care" system, which was previously called "Vigilan." Id.

Using the wE Care system, Defendant has repeatedly increased Plaintiff's Level of Care, along with his monthly rate. In September 2010, Defendant assigned Plaintiff a Level of Care of "3" and placed him in the Alzheimer's and Memory Care Unit. Id. ¶ 55. Defendant increased Plaintiff's Level of Care to "4" in September 2012, and then to a "5" in May 2013. Id. ¶¶ 56-57. Each change to Plaintiff's Level of Care has resulted in a new agreement, signed by Ms. Moulton on behalf of Plaintiff, and a higher monthly rate. Id. ¶¶ 55-58. Since his arrival at Defendant's facility in 2009, Plaintiff's monthly rate has increased from approximately $1,200 to $2,800. Id. ¶ 58.

Defendant touts the wE Care system through its marketing materials. See id. ¶ 27-32. Defendant's website states that "[t]he ability to provide the most comprehensive and consistent

[2] Defendant argues that its contracts are not uniform, MTD at 1, but at the pleading stage, the Court must take all well-pleaded allegations as true. Defendant also contends that Plaintiff concedes that the contracts are not uniform by alleging that each resident negotiates an individual care plan. Id. However, this does not preclude the possibility that Defendant makes uniform representations in each of its contracts.

personal care services begins with the resident evaluation process," that wE Care allows Defendant "to accurately evaluate and monitor the personal care services of your loved one," and that wE Care is used to determine the "staff required to deliver the services." Id. ¶¶ 27-28. Another unidentified marketing material states that Defendant's resident evaluation system will: "address the time needed to complete care activities, how often those care activities need to be done, any personal preferences that you . . . may have, and the staff required to complete the activities." Id. ¶ 32.

Plaintiff alleges that these representations are false and misleading because Defendant staffs its facilities based on profit margins, without regard for resident need. Specifically, Plaintiff pleads: "Contrary to the express and implied representations in its form contract and other uniform written statements, [Defendant] does not staff its facilities to meet the aggregate assessed needs of its residents, but instead determines staffing based on labor budgets designed to meet profit objectives." Id. ¶ 33. Plaintiff points to deposition testimony of Susan Rotella, Defendant's former Vice President of Operations, who has sued Defendant for wrongful termination. Id. ¶ 36. Rotella testified that wE Care was used to assign residents a Level of Care and corresponding monthly rates, but the portion of the software program that calculated how many minutes per day of care and what number and type of staff were necessary to provide that care were turned off at the facility level. Id. ¶ 37.

In support of his understaffing allegations, Plaintiff also alleges that, in or around January 2011, he was attacked by another

resident when they were left unsupervised in a dining area. Id. ¶ 59. As a result of the attack, Plaintiff suffered multiple cuts and bruises to his face and head, and the facility was issued a deficiency for inadequate staff and insufficient resident supervision by the Community Care Licensing ("CCL") division of the California Department of Social Services ("CDSS"). Id. On information and belief, Plaintiff alleges that a number of Defendant's other facilities have also been cited for inadequate staffing by CDSS. Id. ¶ 60.

Plaintiff filed this action in state court on July 29, 2013. ECF No. 1 Ex. A. Defendant subsequently removed to federal court on diversity grounds. ECF No. 1. After Defendant filed a motion to dismiss, Plaintiff amended his complaint. ECF Nos. 18, 24. The FAC asserts claims for (1) violation of the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 et seq.; (2) violation of the California Unfair Competition Law ("UCL"), id. § 17200 et seq.; and (3) elder financial abuse, Cal. Welf. & Inst. Code § 15610.30. FAC ¶¶ 73-114. Among other things, Plaintiff seeks restitution, punitive damages, and an injunction prohibiting Defendant from "promising elders, dependent adults, and their family members that [Defendant] will provide the care and personal services needed by each resident as assessed in their comprehensive evaluation and from charging its residents based on this false promise." Id. pg. 30. Plaintiff also seeks an injunction "requiring Defendant to budget for and provide adequate aggregate staffing that is sufficient to meet its residents' assessed needs." Id. Plaintiff, through Ms. Moulton, seeks to represent all persons who resided at one of Defendant's California assisted living

facilities from July 29, 2009 through the present. Id. ¶ 62.

Defendant now moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), as well as to strike Plaintiff's class action allegations pursuant to Rule 12(f).

III. MOTION TO DISMISS

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

Claims sounding in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." See Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and

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how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quotation marks and citations omitted).

B. Plaintiff's Claims for Equitable Relief

Citing to California law, Defendant argues that the Court should abstain from adjudicating Plaintiff's claims for equitable relief because they require the Court to assume the functions of CDSS. MTD at 4 (citing Alvarado v. Selma Convalescent Hosp., 153 Cal. App. 4th 1292 (Cal. Ct. App. 2007)). Under California law, courts may abstain from deciding UCL claims where: (1) they implicate complex economic or policy decisions best handled by the legislature or an administrative agency; or (2) granting injunctive relief would impose an undue burden on the trial court. See Alvarado, 153 Cal. App. 4th at 1298. Plaintiff contends that federal law controls here, not California law. MTD Opp'n at 5. Specifically, Plaintiff contends that the Court should apply the abstention doctrine set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, 817 (1976), which provides that federal courts have a "virtually unflagging obligation to exercise jurisdiction," and that courts should only abstain in extraordinary and narrow circumstances. Id. at 5-6. Plaintiff further argues that, even under California law, the Court should decline from abstaining. Id. at 7-8.

As set forth below, the Court finds that (1) choice of law principles require it to consider the California abstention doctrine, and (2) the California abstention doctrine bars

Plaintiff's claims for equitable relief.

1. Choice of Law

Under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), a federal court sitting in diversity jurisdiction applies state substantive law and federal procedural law. An issue is procedural if it is "concerned with judicial administration, such as the methods of presenting facts to a court or the way a jury operates." Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 645 (9th Cir. 1988). An issue is substantive if it is "concerned with the legal rights of the parties." Id. While the distinction between substantive and procedural law is not always clear, the intent of Erie is to ensure that, in diversity cases, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

In Sims, the Ninth Circuit addressed the issue of whether a California anti-injunction statute was procedural or substantive. 863 F.2d at 645. The statute, California Civil Code section 3423, bars an injunction to prevent the breach of a personal service contract, unless the contract guarantees annual payments of at least $6,000. The district court found that, even if section 3423 were applicable, Federal Rule of Civil Procedure 65 allowed the grant of temporary injunctive relief. Id. at 646. The Ninth Circuit reversed. The court found that Rule 65 and section 3423 did not conflict because the former "merely sets out the procedural requirements for injunctions and restraining orders," while the latter "expressly prohibits the issuance of injunctions in this

type of contract dispute." Id. The court then held that because of lack of conflict, Erie "require[d] the application of state law over federal law if the state law is outcome-determinative." Id. The Court concluded that section 3423 was outcome-determinative because an injunction would accomplish what California law prohibited, and that California policy should be respected by federal courts sitting in diversity. Id. at 647.

Plaintiff argues that Sims is inapposite because the Ninth Circuit did not "consider generally whether injunctive relief is a substantive or procedural issue." MTD Surreply at 2. That may be so, but Sims does hold that federal courts sitting in diversity must defer to state law on issues of injunctive relief where the state law is outcome-determinative. Here, California's abstention doctrine has the potential to determine the outcome of Plaintiff's claims for equitable relief. Moreover, under Plaintiff's theory, a federal court applying California law could grant an injunction, where a California court applying California law could not. This is plainly contrary to Sims, as well as Erie. The fact that Defendant removed to federal court should not affect the remedies available to Plaintiff.

Plaintiff further argues that, unlike the anti-injunction statute in Sims, the California judicial abstention doctrine does not mandate that the Court abstain from granting equitable relief. This argument is also unavailing. While Plaintiff is correct that the application of the abstention doctrine is discretionary, see Alvarado, 153 Cal. App. 4th at 1298, that does not mean the doctrine is not substantive or outcome-determinative. Neither the Ninth Circuit nor the Supreme Court has enunciated the rule

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Plaintiff is advocating here: that an issue is necessarily procedural where it turns on the application of a discretionary rule.

Plaintiff's reliance on Travelers Casualty v. W.P. Rowland Constructors Corp., No. CV 12–00390–PHX–FJM, 2012 WL 1718630 (D. Ariz. May 15, 2012), is also misplaced. See Surreply at 3. The case is not binding on this court and, in any event, it is distinguishable. In Travelers, the court applied federal law rather than state law because the issue presented was purely procedural: should the court apply Rule 65 or Arizona law to determine the appropriate standard for granting a preliminary injunction. 2012 WL 1718630, at *2. Indeed, the court distinguished Sims because both federal and Arizona law permitted it to issue the type of injunctive relief requested by the plaintiff. Id. In contrast, in this action, California's abstention doctrine imposes limits on equitable relief not present in the federal Colorado River abstention doctrine.

Plaintiff's final argument conflates federal and state abstention doctrines. Plaintiff cites to AXA Corporate Solutions v. Underwriters Reinsurance Corp., where the Seventh Circuit addressed whether the trial court had erred in applying an Illinois statute allowing a Defendant to move to dismiss if there is another action pending between the same parties for the same cause. 347 F.3d 272, 276 (7th Cir. 2003) (citing 735 Ill. Comp. Stat. § 5/2-619(a)(3)). The trial court reasoned that the differences between the Colorado River abstention doctrine and the Illinois statute were sufficient to require the court to follow the state law. Id. at 276. The Seventh Circuit reversed, finding that the state

statute was procedural. Id. at 278. The court reasoned that the problem addressed by the state law was closely akin to topics such as forum non conveniens and venue statutes, which were matters of judicial organization. Id. AXA is inapposite because California's abstention doctrine is significantly different from the Illinois and federal abstention doctrines. The California doctrine does not require the Court to abstain from exercising jurisdiction or hearing a case altogether. It merely limits the types of claims that a Plaintiff may assert based on a balancing of the equities. See Acosta v. Brown, 213 Cal. App. 4th 234, 246-47 (Cal. Ct. App. 2013). Accordingly, the California abstention doctrine is not procedural in nature.[3]

For these reasons, the Court finds that California law controls the issue of whether Plaintiff is entitled to the equitable relief it seeks.

2. Abstention

As California law controls, the Court must determine to what extent, if any, the California judicial abstention doctrine bars Plaintiff's claims. The doctrine gives courts the discretion to abstain from deciding UCL claims and other claims for equitable relief. See Alvarado, 153 Cal. App. 4th at 1297 (abstention applies to UCL claims); see also Acosta v. Brown, 213 Cal. App. 4th at 249 ("The absence of [a UCL] claim does not diminish the force of the principles upon which Alvarado rests because . . . the relief sought in this case . . . is in the nature of equitable

[3] Plaintiff's position is also contrary to its own authority. See Wehlage v. EmRes Healthcare, Inc., 791 F. Supp. 2d 774 (N.D. Cal. 2011) (considering the merits of the defendant's California abstention argument).

relief."). However, the abstention doctrine may not be used to refrain from adjudicating legal claims. See Walsh v. Kindred Healthcare, 798 F. Supp. 2d 1073, 1085 (N.D. Cal. 2011). Accordingly, the doctrine only implicates Plaintiff's UCL claim, as well as the equitable remedies sought in connection with Plaintiff's CLRA claim.[4] It does not affect Plaintiff's claims for money damages.

Judicial abstention is appropriate where (1) "the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency," or (2) "granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress."[5] Alvarado, 153 Cal. App. 4th at 1298. Abstention is warranted under the first ground when "granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency." Id. Courts have abstained on the second ground when the equitable relief requested would result in a network of injunctions that "would have the cumulative effect of a statutory regulation, administered by the . . . courts through the medium of contempt hearings." Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599 (Cal. Ct. App. 1970).

[4] Plaintiff argues that the abstention doctrine does not reach its claims under the CLRA and the Elder Abuse Act because those claims are legal causes of action. MTD Opp'n at 7. However, Plaintiff fails to mention that he is seeking both legal and equitable remedies through his CLRA claim.

[5] California courts may also abstain "when federal enforcement of the subject law would be more orderly, more effectual, [or] less burdensome to the affected interests," Alvarado, 153 Cal. App. 4th at 1298; however, that scenario is not relevant here.

a. Complex economic policy

As to the first prong of the abstention doctrine, Defendant argues that Plaintiff is asking the Court to assume the functions of CDSS. MTD at 5. Defendant argues that Plaintiff's understaffing allegations are predicated on a California regulation, 22 Cal. Code Regs. § 87411(a), that requires residential care facilities for the elderly ("RCFE") to employ staff in sufficient numbers, "and competent to provide the services necessary to meet resident needs." Id. Defendant contends that determining whether its facilities comply with section 87411(a) requires expertise and case-by-case evaluation that are better left to CDSS. Id. Moreover, according to Defendant, "[t]he constantly changing requirements of the residents served by [Defendant's] communities would mean virtually continuous court scrutiny over potentially tens of thousands of staffing decisions each and every day." Id. at 7.

In support, Defendant cites to the California Court of Appeal's decision in Alvarado. In that case, the plaintiff asserted a UCL claim based on the defendant's alleged failure to provide sufficient direct nursing care for the residents of its skilled nursing facilities ("SNF") in violation of California Health & Safety Code section 1276.5(a). Alvarado, 153 Cal. App. 4th at 1296. The court held that abstention was proper, reasoning that section 1276.5(a) was a regulatory statute that the legislature intended the Department of Health Services ("DHS") to enforce. Id. at 1304. The court also found that DHS was better equipped to evaluate compliance with the statute's 3.2 nursing-hours-per-patient-per-day ("NHPPD") requirement, which implicated a

host of specialized determinations, including whether the facility at issue was a special treatment program service unit, whether certain employees' hours counted toward the requirement, and what formula should be used to calculate nursing hours. Id. at 1305-06. Defendant contends that Plaintiff's claims would require an even higher level of agency expertise since section 87411(a) does not set forth objective standards, such as staff per resident per hour, but merely requires a "sufficient number[]" of "competent" staff. MTD at 6-7.

Plaintiff responds that Alvarado's holding was subsequently limited by Shuts v. Covenant Holdco LLC, 208 Cal. App. 4th 609 (Cal. Ct. App. 2012). MTD Opp'n at 8. In Shuts, the trial court relied on Alvarado in sustaining the defendant's demurrer to the plaintiff's claims for violations of section 1276.5(a)'s NHPPD requirement. 208 Cal. App. 4th at 618-19. The court of appeal reversed because the plaintiff's claims were based on California Health and Safety Code section 1430, a statute which was never invoked by the plaintiff in Alvarado. Id. at 619. The court found that section 1430(b) conferred a private right of action for the violation of a SNF resident's right to reside in a facility with an adequate number of qualified personnel. Id. at 619-20. The court also found that Alvarado's concern with rendering complex economic policy decisions was no longer pertinent. Id. at 622. Since Alvarado was decided, DHS's successor agency "ha[d] made significant progress in providing administrative guidance on the 3.2 NHPPD standard, and how it should be calculated." Id.

Plaintiff's reliance on Shuts is misplaced. Shuts's outcome turned on the court's interpretation of section 1430(b), which

provides a private right of action for residents of SNFs, but not for residents of the RCFEs at issue here. Further, while California may have provided significant administrative guidance with respect to section 1276.5(a)'s NHPPD requirement, no such guidance exists as to section 87411(a). It is entirely unclear how CDSS determines whether a RCFE is sufficiently staffed in accordance with the statute, and the Court is ill-equipped to develop its own framework for making such a determination.

Plaintiff suggests that the Court can use Defendant's wE Care system to determine compliance with section 87411(a)'s staffing requirements. MTD Opp'n at 9. But the Court could not enforce an injunction by blindly relying on the outputs of the wE Care system. It would need to make an independent determination of whether the staffing levels provided by wE Care were sufficient to meet the needs of Defendant's residents. Such a determination is beyond the Court's expertise.

Accordingly, the Court abstains from Plaintiff's claims for equitable relief to the extent that they are predicated on alleged violations of section 87411(a). Plaintiff argues some aspects of his UCL and CLRA claims are not predicated on section 87411(a), and that the Court should not abstain from deciding those aspects of his claims. MTD Opp'n at 7. He contends that the gravamen of this case is that Defendant represents that it staffs its facilities to meet the aggregate needs of its residents, but it actually determines staffing levels based on profit objections. Id. Thus, Plaintiff reasons that establishing liability for these misrepresentation claims does not require regulatory interpretation or proof that Defendant violated section 87411(a). Id. Defendant

responds that the abstention doctrine "addresses whether the remedy for a violation should be devised, monitored[,] and enforced administratively by [an agency] or judicially by the courts, not whether the applicable regulations determine liability in the first place." Reply at 4 (internal quotations omitted). Defendant further argues that the Court could not administer the remedy without assuming CDSS's role in determining whether staffing is sufficient to meet resident needs.

The Court agrees with Defendant. As Plaintiff concedes in his opposition brief, his claims stem from the allegation that Defendant fails to staff its facilities to meet the aggregate assessed needs of its residents. See MTD Opp'n at 7. Thus, there is no way for the Court to craft an equitable remedy without first establishing what those aggregate assessed needs are. This question necessarily requires an analysis of section 87411(a). To put it another way, Plaintiff essentially alleges that Defendant represented that it would comply with 87411(a) by staffing its facilities to meet the aggregate needs of its residents, but has failed to do so. See FAC ¶ 33. The promise allegedly encompassed by Defendant's standard contracts -- that residents "will receive[] the services appropriate to [their] individual needs" -- is identical to the requirements of section 87411(a) -- that "[f]acility personnel shall at all times be sufficient in numbers, and competent to provide the services necessary to meet resident needs." Cal. Code Regs. tit. 22, § 87411(a). Thus, the Court cannot enforce the contractual promise through an injunction without assuming the role of a state regulatory agency.

In short, the Court is ill-equipped to make complex policy

determinations about the aggregate assessed needs of Defendant's residents. CDSS has already been tasked with making such determinations, and the Court declines to second-guess its judgment.

b. Undue burden on the trial court

Abstention is also warranted here because "injunctive relief would place an unnecessary burden on the court because of the existence of other, more effective remedies." Alvarado, 153 Cal. App. 4th at 1302. As Defendant points out, CDSS already has the tools and authority necessary to address what Plaintiff asks the Court to regulate by injunction. Id. By statute, any person may request an inspection of an RCFE. Cal. Health & Safety Code § 1569.35. If a state investigator determines that a deficiency exists and the deficiency is not corrected by the date specified by CDSS, the RCFE may be fined up to $150 per day until the deficiency is corrected. Cal. Code Regs. tit. 22, §§ 87759, 87761. In certain instances, CDSS may also revoke the license of a RCFE if a deficiency is not corrected.[6] Id. § 87775.

By comparison, it would be unduly burdensome for the Court to establish a system for regulating Defendant's seventy-two California facilities. The staff and resources of CDSS presumably dwarf that of any monitor the Court could appoint. The court-appointed monitor might need to respond to resident complaints, as well as set aggregate staffing levels for each individual facility, levels which change constantly. Such regulatory activities are

[6] This process has already been invoked at the facility where Plaintiff currently resides. After Plaintiff was attacked by another resident in January 2011, CDSS investigated and issued a deficiency for understaffing. FAC ¶ 59.

beyond the scope of the Court's expertise. The Court is not prepared to assume responsibility for ensuring that the needs of Defendant's 5,000 California residents are being met on a daily basis.

3. Conclusion

For these reasons, and the reasons set forth above, the Court abstains from adjudicating Plaintiff's UCL claim. The Court also abstains from adjudicating Plaintiff's CLRA claim, but only to the extent that Plaintiff seeks equitable relief in connection with that claim. The Court does not abstain from adjudicating Plaintiff's claims for legal relief.[7]

C. CLRA

Defendant argues that the Court should dismiss the remainder of Plaintiff's CLRA claim because: (1) Plaintiff cannot couch a routine breach of contract claim as a CLRA claim to obtain extra-contractual remedies, (2) the misrepresentations identified by Plaintiff are non-actionable puffery, and (3) Plaintiff has failed to plead affirmative misrepresentations or omissions with sufficient particularity.

Defendant's first argument is predicated on principles developed in the UCL context that are sometimes applied to CLRA claims. California courts have held that a breach of contract may form the predicate for a UCL claim, but only if the breach also constitutes conduct that is unlawful, unfair, or fraudulent. Arce v. Kaiser Found. Health Plan, Inc., 181 Cal. App. 4th 471, 489

[7] The Court recognizes that Plaintiff's CRLA claim, to the extent that it seeks legal relief, is also based understaffing allegations that may implicate issues of complex economic policy. However, as set forth above, California's judicial abstention doctrine does not allow the Court to abstain from hearing such a claim.

(Cal. Ct. App. 2010). With respect to the unfairness prong of the UCL, "a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice under the UCL." Id. (internal quotations omitted). Similar to the UCL, the CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Applying UCL principles, Courts have held that a breach of contract is not actionable under the CLRA without proof of more, for example, where a defendant knowingly sells a defective product. Baba v. Hewlett-Packard Co., C 09-05946 RS, 2010 WL 2486353 (N.D. Cal. June 16, 2010).

The Court finds that Plaintiff has alleged something more than a breach of contract here. Specifically, Plaintiff has alleged that Defendant publicly touted its ability to meet the individual needs of its residents, even though staffing decisions were based on profit margins. Plaintiff has also alleged a systematic breach of Defendant's standard resident contracts. In light of Defendant's allegedly standardized contracts, the compromised capacities of many of Defendant's residents, the fact that many of these residents are dependent on Defendant for basic services and may not be in a position to complain once they are under Defendant's care, and the difficulties associated with transitioning to a different RCFE, the Court finds that Plaintiff has alleged sufficient facts to state a claim for a violation of the CLRA. In short, Plaintiff has sufficiently alleged that

Defendant engaged in unfair competition by making misrepresentations to a vulnerable class of consumers.

As to its second argument, Defendant contends that the alleged misrepresentations underlying Plaintiff's CLRA claim are non-actionable puffery. MTD at 11-12. Puffery is "exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely." Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997). "The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions." Haskell v. Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994). A representation "that amounts to 'mere' puffery is not actionable." Id. The Court agrees that a few of the representations mentioned in the FAC are puffery, including the representations that the wE Care system is "state of the art," and that Defendant's services are "high quality." See FAC ¶¶ 26, 27. However, Plaintiff's CLRA claim is also based on allegations that Defendant represents that it uses the wE Care system to determine staffing levels, and that Defendant provides "enough staff to care for all of the residents at its facilities based on the residents' evaluations." See e.g., id. ¶¶ 21, 30. These statements are not vague or generalized, and their truth can be objectively determined. Accordingly, the Court declines to dismiss Plaintiff's CLRA claims on puffery grounds.

Defendant's third argument is that Plaintiff's CLRA claim should be dismissed for failure to comply with the heightened pleading standard of Rule 9(b), which requires that the circumstances constituting fraud be pleaded with particularity. MTD at 17. Defendant considers several allegations in isolation,

while ignoring others. Defendant has lost the forest for the trees. The sufficiency of Plaintiff's allegations must be based upon the complaint as a whole. Lima v. Gateway, Inc., 710 F. Supp. 2d 1000, 1007 (C.D. Cal. 2010). The Court finds that, taken as a whole, the FAC asserts sufficient facts to support a claim under the CLRA.

Defendant argues that Plaintiff failed to plead that he saw or relied on Defendant's website and marketing materials. MTD at 21. However, the absence of such allegations is not fatal to Plaintiff's claim because Plaintiff does allege that he read and relied on Defendant's standard contract. Also lacking merit is Defendant's argument that Plaintiff has failed to allege that he would have behaved differently had the omitted information been disclosed. See MTD at 23. It is plausible that Plaintiff would have chosen a different assisted living facility had he known about the actual staffing practices at Defendant's facilities.

Defendant also argues that Plaintiff has not established that it had any duty to disclose the manner in which it staffs its facilities. Id. at 22. The Court disagrees. In its form contracts, Defendant represents that it will provide different levels of care depending on a resident's needs, that it will develop a service plan based on the resident's evaluation, and that residents will receive services appropriate to their individual needs. FAC ¶ 21. These representations are contradicted by facts Defendant allegedly failed to disclose: that Defendant does not use evaluations to set staffing levels, but sets them using predetermined corporate labor budgets. Id. ¶ 33. These allegations are sufficient to support a duty to disclose. See

Donahue v. Apple, Inc., 871 F. Supp. 2d 913, 925 (N.D. Cal. 2012) (actionable omission must be contrary to the representation made by the defendant). Based on Plaintiff's allegation that Defendant had a consistent staffing policy, FAC ¶¶ 33-41, it is also plausible that Defendant was aware of the omitted facts at the time it made the representations.

Accordingly, the Court declines to dismiss Plaintiff's CLRA claim to the extent that it does not seek equitable relief.

D. Elder Financial Abuse

Defendant moves to dismiss Plaintiff's third and final claim for elder financial abuse. Financial abuse of an elder occurs when a person or entity "takes, secretes, appropriates, obtains, or retains real or personal property of an elder." Cal. Welf. & Inst. Code § 15610.30(a)(1). A person or entity engages in elder abuse when an elder "is deprived of any property right, . . . regardless of whether the property is held directly or by a representative of an elder or dependent adult." Id. § 15610.30(c).

Defendant argues that Plaintiff's claim fails because Ms. Moulton, who is not an elder, represented Plaintiff as his agent via power of attorney in the relevant transactions. MTD at 14-15. The fundamental problem with this argument is that Ms. Moulton did not have anything to do with Plaintiff's initial contract for services with Defendant. Plaintiff entered into that contract on his own. See ECF No. 33 Ex. 1 ("Resident Agreement") at 23. Defendant contends that Plaintiff's claims are not based on his original contract, but the amendments to his service plan signed by Ms. Moulton that increased his Level of Care. MTD at 15. But many aspects of Plaintiff's claims pre-date Ms. Moulton's involvement,

including his general allegation that Defendant does not staff its facilities to meet the aggregate needs of its residents. In any event, Plaintiff's allegations support a plausible inference that Plaintiff expected that Defendant's services would increase with his assigned Level of Care when he initially entered Defendant's facility.

Next, Defendant argues that a standard breach of contract claim cannot support a claim for financial elder abuse. MTD at 16. This argument is substantially similar to an argument the Court addressed and rejected regarding Plaintiff's CLRA claim. See § III.C supra. For the reasons set forth above, the Court finds it unavailing.

Accordingly, the Court declines to dismiss Plaintiff's claim for financial elder abuse.

IV. MOTION TO STRIKE

Defendant moves to strike Plaintiff's class allegations pursuant to Federal Rule of Civil Procedure 12(f). Rule 12(f) provides that a court may, on its own or on a motion, "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike "are generally disfavored ... [and] are generally not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." Rosales v. Citibank, 133 F.Supp.2d 1177, 1180 (N.D. Cal. 2001).

Class allegations typically are tested on a motion for class certification, not at the pleading stage. See Collins v. Gamestop Corp., C10–1210–TEH, 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6,

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2010). However, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). Thus, some courts have struck class allegations where it is clear from the pleadings that class claims cannot be maintained. E.g., Sanders v. Apple Inc., 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009).

Defendant's lead argument is that the facts of this case are similar to those in Dennis F. v. Aetna Life Insurance, 12–cv–02819–SC, 2013 WL 5377144 (N.D. Cal. Sept. 25, 2013), where the undersigned recently denied class certification. MTS at 5. Dennis F. is distinguishable. In that case, the plaintiff sought to represent a class of adolescents who had been denied insurance coverage for care at residential treatment centers. 2013 WL 5377144, at *2. The Court denied class certification on the ground that Plaintiff's claims were predicated on medical necessity determinations unique to each individual class member. Id. at *4. In contrast, this case turns on whether Defendant misrepresented the staffing levels maintained at its facilities.

Next, Defendant argues that Plaintiff's claim that understaffing endangered or resulted in substantial harm to the class is not appropriate for class adjudication. MTS at 10. That may be so, but as Defendant concedes, Plaintiff "does not seek recovery for personal injuries, emotional distress or bodily harm that may have been caused by Defendant or by inadequate staffing at Defendant's facilities." FAC ¶ 64. Defendant contends that if Plaintiff is not seeking to recover for the alleged personal injuries, those allegations should be struck from the complaint.

MTS at 13. However, Defendant cannot credibly contend that these allegations are irrelevant. Evidence of personal injuries at Defendant's facilities may help support Plaintiff's claims that those facilities are understaffed. In any event, pleadings may properly allege facts that do not directly support a claim for relief where they provide necessary or informative background.

Defendant further argues that Plaintiff does not and cannot satisfy the typicality or adequacy requirements of Rule 23(a). Id. at 13-15. Here, Defendant rehashes a number of arguments from its motion to dismiss. The Court declines to revisit those arguments again. In any event, typicality and adequacy raise factual issues not appropriate for determination at the pleadings stage.

Finally, Defendant argues that the proposed class is not ascertainable because it includes every resident of Defendant's California communities, including those who have received all of the services they contracted for with Defendant. Id. at 16-17. Once again, Defendant raises factual questions not appropriate for resolution at the pleading stage. Moreover, to the extent that Defendant's argument has merit, the Court need not deny class certification altogether. Instead, it could potentially certify a narrower class than the one proposed by Plaintiff. Whether or not this is feasible or necessary is a question for another day.

In sum, the Court finds that Defendant's motion to strike Plaintiff's class allegations is premature. The motion is DENIED in its entirety.

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V. CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss is GRANTED in part and DENIED in part. The Court abstains from adjudicating Plaintiff's UCL claim, as well as the equitable remedies sought through his CLRA claim. Plaintiff's other claims remain undisturbed. Defendant's motion to strike is DENIED.

IT IS SO ORDERED.

March 5, 2014

UNITED STATES DISTRICT JUDGE

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