

1 **WHEREAS** the Estate of Ardelle Ryder was *not* named as a party plaintiff in the
2 Complaint filed by plaintiff Barbara Williams in the *Williams v. Emeritus litigation*; and

3 **WHEREAS** defendant EMERITUS filed a Motion to Dismiss in this matter (Docket
4 No. 6) addressing plaintiff's first claim for "Breach of Contract," second claim for "Breach of
5 Trust and Good Faith," third claim for "Breach of Fiduciary Duty," fifth claim for "Negligent
6 Infliction of Mental Suffering," sixth claim for "Abuse of Senior Citizen and Elderly Person,"
7 and seventh claim for "Fraud and Deceptive Trade Practice"; and

8 **WHEREAS** on August 17, 2012, after its consideration of the moving, opposition,
9 and reply papers filed by the parties in connection with defendant's Motion to Dismiss, this
10 Court filed and served an Order ruling on defendant's Motion to Dismiss, identified as Docket
11 No. 12. In its Order, this Court ruled:

12 A. Plaintiff BARBARA WILLIAMS is not the real party in interest as to the
13 claims for Breach of Contract, Breach of Trust and Good Faith, and Breach of
14 Fiduciary Duty; and

15 B. Rather than dismissing the first claim for relief for Breach of Contract, and the
16 second claim for relief for Breach of Trust and Good Faith, plaintiff
17 BARBARA WILLIAMS was given 60 days leave to allow the real party in
18 interest – Ardelle Ryder's Executor or Administrator – to ratify, join, or be
19 substituted into the action; and

20 C. The sixth claim for relief for Abuse of Senior Citizen and Elderly Person was
21 dismissed with prejudice; and

22 D. The fifth claim for relief for Negligent Infliction of Mental Suffering, and the
23 seventh claim for relief for Fraud and Deceptive Trade Practice were both
24 dismissed without prejudice as to plaintiff BARBARA WILLIAMS.

25 A true and correct copy of this Court's August 17, 2012, Order is attached hereto as
26 Exhibit "A".

27 **WHEREAS** the deadline for the Executor or Administrator of the Estate of Ardell
28 Ryder to ratify, join or substitute into this action was October 17, 2012; and

EXHIBIT "A"

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BARBARA WILLIAMS,

Plaintiff,

v.

EMERITUS CORPORATION, a foreign
corporation, doing business in Nevada as
LOYALTON OF LAS VEGAS, DOES I
through X and ROES I through X,

Defendants.

Case No. 2:11-cv-01497-MMD-RJJ

ORDER

Before the Court is Defendant Emeritus Corporation's Motion to Dismiss (dkt. no. 6). The Court has also considered Plaintiff Barbara Williams' Opposition (dkt. no. 9), and Emeritus' Reply (dkt. no. 10).

I. BACKGROUND

Plaintiff Barbara Williams is the daughter of Ardelle Ryder, who is now deceased. On February 28, 2009, Ryder, who was previously living at a nursing home in Glendale, California, moved in to the Loyalton of Las Vegas, a nursing home in Las Vegas that is operated by Defendant Emeritus. Williams visited Ryder at the Loyalton the following day and, when she eventually found her, Ryder began complaining of the pain in her left foot, which was swollen. Williams then spoke to the Community Relations Director at the Loyalton regarding her mother's condition and, having been assured that her mother would be examined, left the facility.

1 Williams phoned the nurse at the Loyalton the following day, March 1, 2009, who
2 reassured Williams that Ryder was doing fine. On March 2, however, Williams visited
3 Ryder at the Loyalton and noticed that her foot was still swollen and that she was still in
4 pain. Williams called for the nurse, who apparently did not immediately respond, so
5 Williams wheeled Ryder to the nurse's office. Ryder's blister was allegedly leaking as
6 William's wheeled her to the nurse. When the nurse saw Ryder's foot she commented
7 that the foot did not look as bad the day before but recognized that Ryder needed
8 hospitalization.

9 The paramedics arrived shortly thereafter and when one of the paramedics
10 removed Ryder's sock from her foot the blister peeled back, revealing Ryder's flesh.
11 The paramedic identified Ryder's blister as a burn and she was taken to the hospital. At
12 the hospital, Williams learned that Ryder was very ill and had a bad infection. Ryder
13 died two days later.

14 In September 2011, more than two years after her mother's death, Williams filed
15 this lawsuit against Emeritus asserting the following claims: (1) breach of contract, (2)
16 breach of the duty of good faith and fair dealing, (3) breach of fiduciary duty, (4)
17 negligence, (5) negligent infliction of emotional distress, (6) abuse of elder, and (7) fraud
18 and deceptive trade practice. Williams represents herself in this lawsuit and files these
19 claims on her own behalf. That is, Williams did not file this lawsuit as the executor or
20 administrator of her mother's estate. Emeritus has now filed a motion to dismiss all
21 claims except for the negligence claim. For the reasons discussed below, the Court
22 grants Emeritus' motion in part and denies it in part.

23 II. DISCUSSION

24 A. Real Party in Interest

25 1. Legal Standard

26 Emeritus argues that Williams is not the proper party to pursue many of the claims
27 in her complaint. However, Emeritus bases this argument on Rule 17 of the *Nevada*
28 Rules of Civil Procedure, which do not apply in federal court. *Hanna v. Plumer*, 380

1 U.S. 460, 465 (1965) (In diversity cases, "federal courts are to apply state substantive
2 law and *federal procedural law*") (emphasis added). Therefore, the Court will analyze
3 Emeritus' motion under Rule 17 of the Federal Rules of Civil Procedure.

4 Rule 17 establishes who may bring an action in federal court. It states that "[a]n
5 action must be prosecuted in the name of the real party in interest." The "real party in
6 interest" is the person to whom the claim belongs, or, in other words, the person who,
7 under the governing substantive law, is entitled to enforce the right asserted. *Rawoof v.*
8 *Trexor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008). However, a court may only
9 dismiss an action brought by an improper plaintiff when, after the defendant objects, "a
10 reasonable time has been allowed for the real party in interest to ratify, join, or be
11 substituted into the action." Fed. R. Civ. P. 17(a)(3).

12 Emeritus argues that Williams is not the real party in interest as to the claims for
13 breach of contract, breach of the covenant of good faith and fair dealing, breach of
14 fiduciary duty, fraud, and abuse of senior citizen. The Court will discuss these claims
15 separately to determine, under Nevada law, if Williams is entitled to enforce them.

16 2. Breach of Contract

17 The first element of a breach of contract claim is the existence of a valid contract
18 entered into between the parties. *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev.
19 2000). Thus, the plaintiff must be a party to or in privity of contract with the defendant to
20 enforce the terms of the contract. *Ferris v. Carson Water Co.*, 16 Nev. 44, 47 (1881).

21 Before Ryder was admitted to the Loyalton she was required to enter into a
22 contract with Loyalton for nursing home services. Williams bases her claim on this
23 contract. However, this contract, which Williams attached to her complaint, clearly states
24 that the parties to the contract are Ryder and Loyalton. The fact that Williams signed the
25 contract as Ryder's legal representative does not make Williams a party to the contract.
26 Therefore, Ryder's estate is the real party in interest as to this claim because it was
27 Ryder, and not Williams, who possessed the right to enforce the terms of the Contract.

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1 **3. Breach of the Implied Covenant of Good Faith and Fair Dealing**

2 The same analysis applies to Williams' breach of the implied covenant of good
3 faith and fair dealing claim because this claim is premised on the existence of a contract
4 between Williams and Loylton. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995).
5 Therefore, Williams is not the real party in interest for this claim either.

6 **4. Breach of Fiduciary Duty**

7 Williams is not the real party in interest as to the breach of fiduciary duty claim
8 because the fiduciary relationship existed, if at all, between Ryder and Loylton. *Mosier*
9 *v. S. Cal. Physicians Ins. Exch.*, 74 Cal. Rptr. 2d 550, 565 (Cal. Ct. App. 1998) (the
10 existence of a fiduciary relationship is required for breach of fiduciary duty claim). Again,
11 Williams is not a party to the contract at issue and, even if she were, any purported
12 fiduciary duties under that contract were owed to Ryder. Williams had no relationship
13 with Emeritus that would give rise to a fiduciary duty. Therefore, Williams is not the real
14 party in interest as to this claim.

15 **5. Fraud**

16 Williams alleges that both Williams and her mother were deceived by Emeritus'
17 false advertisements and representations. Because Williams pleads this claim so
18 vaguely, the Court cannot determine conclusively who the real party in interest is. Thus,
19 the Court will allow Williams to assert it to the extent it pertains to any alleged fraud
20 committed against Williams herself. However, to the extent this claim pertains to
21 Emeritus defrauding her mother, it is her mother's estate that has a right to assert the
22 claim.

23 **6. Abuse of Elder (NRS § 200.5091, et. seq.)**

24 Because Williams is not clear, the Court can only assume that Williams brings this
25 claim under NRS § 200.5091, et. seq., which is a criminal statute dealing with the
26 neglect, exploitation, or isolation of elders. However, this statute has no express
27 provision providing for a private right of action. Rather, the statute provides for penalties
28 that are penal in nature. NRS § 200.5099. "[T]he absence of an express provision

1 providing for a private cause of action to enforce a statutory right strongly suggests that
2 the Legislature did not intend to create a privately enforceable judicial remedy."
3 *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 101 (Nev. 2008). Furthermore, the
4 policy behind this statute is to ensure reporting of elder abuse and to improve
5 cooperation among the different departments of the state government in identifying elder
6 abuse. NRS § 200.5091. Nothing in this policy speaks to the rights or remedies of
7 individuals. Therefore, a private right of action is neither expressed nor implied in this
8 statute. As such, neither Williams, nor Ryder's Estate for that matter, can bring an action
9 on this claim.

10 7. Conclusion

11 In conclusion, the Court finds that Williams is not the real party in interest to
12 assert the claims for breach of contract, breach of the implied covenant of good faith and
13 fair dealing, breach of fiduciary duty and fraud. However, the Court does not dismiss
14 these claims at the present time because, pursuant to Rule 17(a)(3), the Court will allow
15 the real party in interest – Ryder's executor or administrator – to ratify, join, or be
16 substituted into the action. Said party will have sixty (60) days from the date of this order
17 to do so. The claim for elder abuse will be dismissed with prejudice.

18 The Court will analyze the two claims to which Williams is the real party in interest
19 – the negligent infliction of emotional distress and the fraud claims as they pertain to
20 Emeritus' alleged deception of Williams herself.

21 B. Remaining Claims

22 1. Legal Standard

23 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
24 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
25 "a short and plain statement of the claim showing that the pleader is entitled to relief."
26 Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require detailed factual allegations, it
27 demands "more than labels and conclusions" or a "formulaic recitation of the elements of
28 a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v.*

1 *Allain*, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the
2 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, to
3 survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a
4 claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (internal citation
5 omitted). A claim is facially plausible when the plaintiff's complaint alleges facts that
6 allow the court to draw a reasonable inference that the defendant is liable for the alleged
7 misconduct. *Id.*

8 2. NIED

9 Williams' NIED claim fails for two reasons, both of which stem from the fact that
10 her complaint is excessively vague. First, Williams does not adequately allege that she
11 contemporaneously observed an accident, or any injury causing event or incident for that
12 matter. *Crippens v. Sav On Drug Stores*, 961 P. 2d 761, 762 (Nev. 1998) (plaintiff must
13 adequately allege she was located near the scene of the accident that she observed).
14 Rather, Williams alleges that she observed an ongoing condition of neglect, which is not
15 the proper basis for an NIED claim. If it were the proper basis, then such a claim would
16 lie, for example, every time someone observed a family member in the hospital during a
17 course of treatment that turned out to be improper.

18 Second, an NIED claim also requires a plaintiff to adequately plead that she
19 suffered "a shock resulting from the direct emotional impact stemming from the sensory
20 and contemporaneous observance of the accident." *Id.* This second element necessarily
21 fails because, as just discussed, Williams does not adequately allege contemporaneous
22 observance of an accident or event. However, this claim would still fail even if she did.
23 Williams appears to allege that the "shock" she suffered was high blood pressure. Yet,
24 high blood pressure is more of a condition resulting from shock than a shock itself.
25 Thus, Williams does not adequately allege the required "shock." Moreover, even if
26 Williams' high blood pressure did constitute shock, Williams does not state when (or
27 even approximately when) her high blood pressure occurred (e.g., after a visit to the
28 nursing home or hospital, one month after her mother's death, one year after her

1 mother's death, etc.). Without these allegations the Court cannot determine whether
2 Williams adequately alleges that her high blood pressure stems from her observance of
3 an accident (assuming there is an accident), thus making her allegations merely
4 speculative. Accordingly, under the facts alleged Williams fails to state a valid NIED
5 claim.

6 3. Fraud

7 The Court dismisses Williams' fraud claim because it is not pled with the requisite
8 amount of specificity. Rule 9 of the Federal Rules of Civil Procedure state that "[i]n
9 alleging fraud or mistake, a party must state with particularity the circumstances
10 constituting fraud or mistake." Pleading fraud with particularity requires "an account of
11 the time, place, and specific content of the false representations, as well as the identities
12 of the parties to the misrepresentations." *Swartz v. KPMG, LLP*, 476 F.3d 756, 764 (9th
13 Cir. 2007); see also *Morris v. Bank of Nev.*, 886 P.2d 454, 456 n.1 (Nev. 1994).

14 Williams alleges Emeritus made false advertisements and representations, yet in
15 her complaint Williams does not allege when the false advertisement was made, where
16 they were made and what Emeritus allegedly misrepresented. As currently pled, this
17 claim leaves Emeritus in the dark in preparing a defense. The alleged
18 misrepresentations could have occurred prior to, during, or after Ryder's admission to
19 the Loyaltan, they could have been made in an advertisement, over the phone, or in
20 person, and they could have been made by any number of persons. The lack of this
21 kind of specific information is fatal to Williams' fraud claim.

22 III. CONCLUSION

23 IT IS HEREBY ORDERED that Emeritus' Motion to Dismiss (dkt. no. 6) is
24 GRANTED in part and DENIED in part, as follows:

- 25 • DENIED as to the claims for breach of contract, breach of the covenant of
26 good faith and fair dealing, breach of fiduciary duty and fraud (as it pertains
27 to the alleged fraud committed against Ryder).

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- GRANTED as to the claim for elder abuse. Dismissal of this claim is with prejudice.
- GRANTED as to the claim for negligent infliction of emotional distress and fraud (as it pertains to the alleged fraud committed against Williams). Dismissal of these claims will be without prejudice.

IT IS FURTHER ORDERED that the executor or administrator of Ardelle Ryder's Estate has sixty (60) days from the date of this order to ratify, join, or be substituted into this action, pursuant to Rule 17(a)(3) of the Federal Rules of Civil Procedure.

DATED THIS 17th day of August 2012.


UNITED STATES DISTRICT JUDGE