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15 Attorneys for Plaintiffs and the Proposed Class

16
17 **UNITED STATES DISTRICT COURT**

18 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

19 Arville Winans, by and through his Guardian ad litem,
20 Renee Moulton, on his own behalf and on behalf of others
similarly situated,

21 Plaintiff,

22 vs.

23 Emeritus Corp. and Does 1 Through 100,

24 Defendants.
25
26
27

CASE NO. 3:13-cv-03962-SC

SECOND AMENDED CLASS ACTION COMPLAINT FOR:

1. VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT (Civ. Code § 1750 *et seq.*)
2. ELDER FINANCIAL ABUSE (W&I Code § 15610.30)

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. Plaintiffs and the proposed Class bring this action for declaratory and injunctive
3 relief and damages to stop the unlawful and fraudulent practices of Emeritus Corporation, also
4 known as Emeritus Senior Living (hereafter “Emeritus”) and Brookdale Senior Living, Inc.
5 (“Brookdale”) (collectively “Defendants”).

6 2. Defendants have engaged in a scheme to defraud seniors, persons with disabilities
7 and their family members by making misrepresentations, misleading statements, and concealing
8 material facts such that reasonable consumers are misled and reasonably expect that Emeritus uses
9 its resident evaluation system to determine and provide staffing at its assisted living facilities in
10 California. As shown in Emeritus’ marketing materials promoting its resident evaluation
11 program, Emeritus knows that **the number one reason** people select a senior living community is
12 the quality of care they receive. Emeritus promises that its use of this program “**will provide the**
13 **most comprehensive and consistent personal care.**” This is false and misleading because
14 Emeritus does not use the results generated by its resident evaluation system to determine or
15 provide staffing at its facilities. Rather, as a matter of corporate policy and standard operating
16 procedure, Emeritus staffs its facilities based on pre-determined labor budgets designed to meet
17 corporate profit objectives. Defendants fail to disclose and conceal this fact from the Plaintiffs
18 and the putative Class members.

19 3. According to Emeritus, its facilities use a proprietary, “state-of-the-art
20 computerized resident evaluation program called wE Care” (previously called “Vigilan”) that
21 allows Emeritus to “accurately evaluate and monitor” the care needs of each resident. Using this
22 program, Emeritus conducts an initial resident assessment and assigns each resident a “Level of
23 Care,” which Emeritus represents is based on the amount of caregiver time required to meet the
24 resident’s needs.

25 4. In form admission contracts entered into with each resident, Emeritus promises to
26 provide the assistance required and specified by the resident evaluation and which corresponds to
27 that resident’s assigned Level of Care. Emeritus bases its monthly “Level of Care” charges on the
28 amount of staff time Emeritus has itself represented is necessary to deliver those personal care

1 services. The reasonable consumer expects that Emeritus will use its resident evaluation system
2 and the personal care levels generated by it when determining and providing staffing levels at its
3 facilities. In addition, the reasonable consumer expects that Emeritus will have in place corporate
4 policies and operating procedures that ensure that Emeritus has the amount of staff time it has
5 determined is necessary to meet the aggregate needs of Emeritus' residents as determined by the
6 resident evaluation system.

7 5. In fact, Emeritus does not use its resident evaluation system the Levels of Care of
8 its assisted living facility residents in determining or providing facility staffing. Instead, as a
9 matter of corporate policy and standard operating procedure, Emeritus staffs its assisted living
10 facilities based on corporate labor budgets and profit goals. Defendants do not disclose and
11 affirmatively conceal these crucial and material facts from residents (including Plaintiffs), their
12 family members and the consuming public.

13 6. Defendants' misrepresentations, misleading statements, and omissions are material
14 to the reasonable consumer because seniors and/or their family members chose an "assisted"
15 living facility because they need assistance, which is provided by the staff of that facility. It is a
16 matter of fundamental importance to the reasonable consumer that Emeritus does not staff and has
17 no intention of staffing its facilities based on the resident evaluation numbers Emeritus has itself
18 determined are necessary to provide the services for which it is charging its residents.

19 7. If the named Plaintiffs had known the true facts about Emeritus' corporate policy of
20 ignoring its resident evaluation system and the personal care levels generated by it in determining
21 and providing facility staffing, they would not have agreed to enter Emeritus or paid Emeritus
22 significant amounts of money in new resident fees and monthly charges. If the putative Class
23 members had known the true facts, in all reasonable probability they would not have agreed to
24 enter Emeritus and paid new resident fees and monthly charges to Emeritus, or in all reasonable
25 probability would have paid Emeritus less money.

26 8. This action seeks to require Defendants to disclose to prospective and current
27 residents, their family members, and/or responsible parties that Emeritus does not use its resident
28 evaluation system or the aggregate personal care levels in setting and providing staffing at its

1 facilities. In addition to injunctive relief, this action seeks class-wide damages based on
2 Defendants' misrepresentations, misleading statements and material omissions alleged herein.
3 This action does not seek recovery for personal injuries, emotional distress or bodily harm that
4 may have been caused by Defendants' conduct alleged herein.

5 **PARTIES**

6 **Plaintiffs**

7 9. Plaintiff Arville Winans is a resident of Emeritus at Heritage Place in Tracy,
8 California and has resided there since approximately October 2009. At all times relevant to this
9 complaint, Arville Winans was an elder as defined under California Welfare & Institutions Code §
10 15610.27 and a senior citizen as defined under California Civil Code § 1761(f). Renee Moulton is
11 his niece and has been his power of attorney since September 3, 2009. Ms. Moulton was
12 appointed Mr. Winans' guardian ad litem for the purposes of prosecuting this lawsuit on August
13 23, 2013. Arville Winans is and was at all times herein mentioned a resident of the State of
14 California. He brings this action on behalf of himself and all others similarly situated.

15 10. Plaintiff Ruby A. Richardson brings this action in her capacity as Trustee of the
16 Wilma F. Fritz Trust. Ruby Richardson is Ms. Fritz's sister. Wilma Fritz was a resident of
17 Emeritus at Villa del Rey in Napa from approximately July 27, 2012 to June 2013. At all times
18 relevant to this complaint, Richardson and Fritz were residents of California, elders as defined
19 under California Welfare & Institutions Code § 15610.27, and senior citizens as defined under
20 California Civil Code § 1761(f). Ms. Richardson brings this action on behalf of the Wilma F.
21 Fritz Trust and on behalf of all others similarly situated.

22 **Defendants**

23 11. Defendant Emeritus Corporation, doing business as Emeritus Senior Living,
24 ("Emeritus") is a Washington Corporation with its principal place of business in Seattle,
25 Washington.

26 12. Defendant Brookdale Senior Living, Inc. ("Brookdale") is a Delaware Corporation
27 with its principal place of business in Brentwood, Tennessee. On or about July 31, 2014,
28 Emeritus Corporation merged with Brookdale Senior Living, Inc. According to press releases

1 issued by Defendants regarding the merger, Emeritus is now a wholly owned subsidiary of
2 Brookdale Senior Living, Inc. According to the SEC 10-Q filing of Brookdale Senior Living Inc.
3 for the quarter ending June 30, 2014 it has assumed all of the liabilities of Emeritus.

4 13. In California, Defendants own, lease, and/or operate approximately seventy-two
5 (72) assisted living and/or memory care facilities under the Emeritus name. On information and
6 belief, Plaintiffs allege that there are more than 5,000 residents in Defendants' Emeritus facilities
7 in California.

8 14. The true names and capacities, whether individual, corporate, associate, or
9 otherwise, of the Defendants designated herein as Does 1 through 100, inclusive, are presently
10 unknown to Plaintiffs and thus sued by such fictitious names. On information and belief, each of
11 the Defendants designated herein as "Doe" is legally responsible for the events and actions
12 alleged herein, and proximately caused or contributed to the injuries and damages as hereinafter
13 described. Plaintiffs will seek leave to amend this Complaint, in order to show the true names and
14 capacities of such parties, when the same has been ascertained.

15 **JURISDICTION AND VENUE**

16 15. Plaintiffs filed this case in the Superior Court of California, Alameda County.
17 Defendant Emeritus removed the case to this Court on August 27, 2013 alleging jurisdiction under
18 the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

19 16. This Court has jurisdiction over all of the claims alleged herein. Defendants are
20 subject to the personal jurisdiction of this Court because Defendants have sufficient minimum
21 contacts in California, or otherwise intentionally avail themselves of the California market
22 through participation in assisted living facilities located in California, derivation of substantial
23 revenues from California, and other activities, so as to render the exercise of jurisdiction over
24 Defendants by the California courts consistent with traditional notions of fair play and substantial
25 justice.

26 17. Venue is proper in this District under 28 U.S.C. § 1391(a) and California Civil
27 Code § 1780, based on the following facts: this Court is a court of competent jurisdiction;
28 Defendants conduct substantial business in this District, including but not limited to the

1 ownership, operation and management of assisted living facilities in the counties of Alameda,
2 Contra Costa, Monterey, Napa, Sonoma, Humboldt, and Lake; a portion of Defendants' liability
3 arose in this district; and the acts upon which this action is based occurred in part in this District.

4 **GENERAL ALLEGATIONS APPLICABLE TO ALL CLAIMS**

5 18. Defendant Brookdale is the largest provider of assisted living and memory care for
6 senior citizens in the nation. Its wholly-owned subsidiary, Defendant Emeritus, has the largest
7 number of assisted living and/or memory care facility residents within the state of California.

8 19. Assisted living facilities, also called Residential Care Facilities for the Elderly
9 ("RCFEs"), offer room, board and daily assistance for seniors in certain activities of daily living
10 ("ADLs"), such as preparing meals, shopping, transportation, preparing and taking medication,
11 using the telephone, paying bills, housekeeping, and others.

12 20. Assisted living facilities are intended to provide a level of care appropriate for those
13 who are unable to live by themselves, but who do not have medical conditions requiring more
14 extensive nursing care and significant assistance with most of their ADLs. Emeritus' assisted
15 living facilities also have "memory care units," which serve individuals with dementia and other
16 cognitive disorders.

17 21. In recent years, Emeritus has increasingly been accepting and retaining more
18 residents with conditions and care needs that were once handled almost exclusively in skilled
19 nursing facilities. This has allowed it to increase not only the potential resident pool but also the
20 amounts of money charged to residents and/or their family members.

21 22. At Emeritus facilities, residents are charged a base rate plus additional charges
22 based on their assessed Level of Care and the services and assistance associated with that level.
23 Thus, the higher the Level of Care determined by Emeritus for a resident, the more money
24 Emeritus charges that resident.

25 **Uniform Representations in Emeritus Standard Form Contracts**

26 23. Defendant Emeritus represents to residents that it will use its resident evaluation
27 system to determine and then provide the level of assistance that Emeritus has itself decided is
28 necessary to provide the services and care for which its residents are paying.

1 24. Specifically, Emeritus makes the affirmative representation in each resident’s
2 uniform contract that, in addition to the “core services” it provides in exchange for the monthly
3 base rent, it evaluates each resident and provides additional “personal care services” as described
4 in the resident’s evaluation:

5 We provide different levels of Personal Care Services depending on your needs. We will
6 perform a comprehensive Resident Evaluation prior to your admission to the Community,
7 regularly thereafter, and as your condition warrants, in order to determine the level of
8 Personal Care Services that you need. We will develop your Service Plan, based on your
9 Resident Evaluation, that describes how we will provide these services. You will receive
10 the services appropriate to your individual needs, as described in your Service Plan. If you
11 are admitted to a hospital or other outside facility, we reserve the right to reevaluate you,
12 prior to the re-admission process, to ensure that we can continue to properly care for you at
13 the Community. The current levels of Personal Care Services and their corresponding fees
14 are set forth in Appendix D.

15 25. Based on the resident evaluation, Emeritus assigns the resident a “Level of Care”
16 from 1 to 7, with higher monthly charges imposed for higher care levels. Emeritus agrees to be
17 “responsible” for providing these services.

18 26. Emeritus reinforces the misleading representation that its staffing will be based on
19 resident need through the use of its resident reassessment program. Specifically, in its form
20 contract, Emeritus promises to periodically re-evaluate residents to determine if their care needs
21 require additional assistance. If so, Emeritus states that it shall be entitled to the resident’s “Level
22 of Care” and corresponding monthly charges. Emeritus conducts these periodic resident re-
23 evaluations using its wE Care system (previously called “Vigilan”).

24 27. In addition, at various times during the Class Period, Emeritus has sent out standard
25 letters notifying facility residents of rate increases. Among other things, these letters emphasize
26 the increased costs of providing the residents’ quality care, including staffing costs. For example,
27 in July 2012, the Executive Director of Emeritus at Heritage Place sent out letters to its residents
28 and/or their representatives detailing an upcoming change in their “Level of Care rates.” That
letter stated the exact number of minutes assigned to each Level of Care category offered by
Emeritus.

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1 28. As a result of Emeritus’ misrepresentations, misleading statements and material
2 omissions alleged herein, reasonable consumers, including the named Plaintiffs, the putative Class
3 members and the general consuming public reasonably expect that Defendant will use its resident
4 evaluation system and the Levels of Care generated by it when determining and providing facility
5 staffing. Seniors and/or their family members choose an “assisted” living facility because they
6 need assistance, which is provided by the staff of that facility. Emeritus’ marketing materials
7 promoting its resident evaluation program state that **the number one reason** people select a
8 senior living community is the quality of care they receive. Emeritus promises that its use of the
9 resident evaluation system **“will provide the most comprehensive and consistent personal**
10 **care.”** It is a matter of fundamental importance to the reasonable consumer that Emeritus does
11 not staff and has no intention of staffing its facilities based on the resident evaluation numbers
12 Emeritus has itself determined are necessary to provide the services for which it is charging its
13 residents.

14 29. Since the merger between Defendant Brookdale and Defendant Emeritus at the end
15 of July 2014, Defendants have not issued new contracts to all current residents. In fact, the
16 original admissions contract plus any amendments to account for changes in Level of Care still
17 govern the residency of most, if not all, residents at the Emeritus facilities in California.

18 **Emeritus’ Marketing Materials**

19 30. Through its corporate website, marketing brochures, scripted marketing
20 presentations, and other standardized corporate-issued marketing materials, Emeritus reinforced
21 the misrepresentations and misleading statements made in every contract that its California
22 assisted living facilities use Emeritus’ resident evaluation system and the personal care levels
23 generated by it to determine and provide the necessary levels of staffing.

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1 31. For example, Emeritus’ website until fairly recently touted its resident evaluation
2 system, wE Care, as a key component of Emeritus’ promise to provide residents with the quality
3 “services that [they] need.” As Emeritus’ website explains, wE Care enables Emeritus to provide
4 the services that residents are determined to need through their initial (or subsequent) assessment:

- 5 • At Emeritus Senior Living, our residents’ well being is our top priority. We know
6 that the number one reason people select a senior living community is the quality of
7 the care they receive. (NIC National Survey) *The ability to provide the most
8 comprehensive and consistent personal care services begins with the resident
9 evaluation process.* (emphasis in original).
- 10 • To that end, Emeritus Senior Living created a state-of-the-art computerized resident
11 evaluation tool called wE Care™. This powerful software tool allows us to
12 accurately evaluate and monitor all the personal care services of your loved one.

13 32. The Emeritus website specifically stated that resident care plans are used, among
14 other things, to “assign[] tasks for staff.” The corporate website included a video describing wE
15 Care as the proprietary method used to determine the “staff required to deliver the services”
16 promised to residents. On or shortly after the July 31, 2014 merger between Defendants
17 Emeritus and Brookdale, visitors to the www.emeritus.com website began to be redirected to the
18 www.brookdale.com website. The aforementioned materials do not appear on that website.

19 33. Emeritus marketing materials across the nation are standardized per company
20 policy. One stock brochure states: “To ensure that we meet your needs, we use a state-of-the-art
21 computerized assessment system, called the wE Care Resident Evaluation Program. This helps us
22 accurately evaluate and monitor assisted living services for each resident.”

23 34. In another corporate marketing brochure, Emeritus represents to the prospective
24 residents and their family members that:

- 25 • “At Emeritus Senior Living, our residents’ well being is our top priority. We know
26 that the number one reason people select a senior living community is the quality of
27 the care they receive. (NIC National Survey) *The ability to provide the most
28 comprehensive and consistent personal care services begins with the resident
evaluation process.*” (emphasis in original)
- “To that end, Emeritus Senior Living created a state-of-the-art computerized
resident evaluation tool called wE Care. This powerful software tool allows us to
accurately evaluate, predict, and monitor all the personal care services of your loved
one.”

- “Individual care plans [are] created which results in better service delivery”

35. Until approximately 2010, Emeritus used Vigilant, the resident evaluation system upon which wE Care is based. Its marketing materials describing Vigilant are virtually the same, with the sole exception of the name of the system and Emeritus’ representation that it “created” wE Care.

36. Further, Emeritus dictates that all facilities and their staff adhere to a uniform message when marketing Emeritus to prospective residents and their family members.

“This is our comprehensive resident evaluation system.

How it works is that our nurse will spend 45 minutes to an hour with you and your mother discussing your mom’s diagnoses, her care needs, personal preferences, and a little bit of her life story. When our nurse completes the evaluation, he will then process that information in our wE Care computer program to create a tailored care plan just for your mom. This care plan will address the time needed to complete care activities, how often those care activities need to be done, any personal preferences that you or your mother may have, and the staff required to complete the activities.

What this means to you is that you can be assured that your mother’s care is being managed in a way that you and she prefer and that all of her care needs will be met.

Will this work for you?”

Emeritus’ Non-Disclosure and Concealment

37. Contrary to the express and implied representations in its form contract and other uniform written statements, Emeritus does not use the resident evaluation system or assessed personal care levels in setting or providing facility staffing, but instead determines staffing based on labor budgets designed to meet corporate profit objectives. Emeritus conceals these material facts from its residents, their family members and the general public.

38. Emeritus has the capability to determine, to the minute, the facility staffing levels required to meet the aggregate Levels of Care promised to residents. Through wE Care (and its predecessor Vigilant), Emeritus can easily calculate the amount and type of staff needed by the facility on any given shift based on the evaluated needs of residents. Emeritus’ current national Executive Vice President of Quality Services, Budgie Amparo, testified under oath that Emeritus’

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1 resident evaluation software allows it to determine aggregate resident acuity and the staffing
2 necessary to meet resident needs.

3 39. Emeritus' resident evaluation software and systems can calculate to the minute the
4 aggregate staffing necessary to provide the assessed care needs for facility residents on any given
5 day, on any given shift. Or as Emeritus' Executive Vice President of Quality Services, Budgie
6 Amparo, testified under oath in a lawsuit alleging elder abuse by Emeritus, the data generated by
7 the resident's evaluation represents the "time spent by [an Emeritus employee] to meet or provide
8 that service." With its resident evaluation system, Emeritus can calculate the amount and type of
9 staff needed by a facility for the population or group of residents therein viewed as a whole on
10 any given shift based on the evaluated needs of residents. While Emeritus uses this resident
11 evaluation system to set and charge monthly rates, Emeritus intentionally does not use this
12 software to staff its facilities. Instead, Emeritus staffs its facilities to meet strict labor budgets that
13 are designed to meet corporate profit goals, a fact it actively conceals from residents and their
14 family members.

15 40. For example, Susan Rotella, Emeritus' former Vice President of Operations for the
16 Western Division, testified at a deposition in her wrongful termination lawsuit against Emeritus
17 that while she was employed by Emeritus, corporate management was focused on reducing labor
18 costs while simultaneously targeting potential residents with higher needs, or acuties.

19 41. Ms. Rotella knew that while Emeritus used its resident evaluation system to assign
20 a Level of Care and corresponding monthly rate to its residents, the portion of the software
21 program that calculated how many minutes per day of care and what number and type of staff
22 were necessary to provide that care were turned off at the facility level. When Ms. Rotella
23 repeatedly asked company executives—including the Chief Operating Officer, the Executive Vice
24 President of Quality Services, and the Executive Vice President of Administration—what tool the
25 company used to determine facility staffing based on resident acuity and needs, she was told that
26 staffing was based on financial targets.

27 42. Rotella testified that she was told by Budgie Amparo, the Executive Vice President
28 of Quality Services, "We will never have staffing formulas in this company, because if we have

1 staffing formulas and an adverse resident situation occurs, like a resident death, and they find out
2 through the investigation that we didn't have the right number of people for the staffing hours in
3 our model, we can be sued.”

4 43. In a wrongful death lawsuit against Emeritus, Budgie Amparo was designated by
5 Emeritus as the person most qualified to discuss Emeritus' policies, guidelines, and/or instructions
6 to facilities concerning the relationship between resident acuity and staffing.

7 44. Beginning prior to the start of the proposed Class Period and continuing into the
8 present, Emeritus senior management has pressured its employees at the divisional, regional and
9 facility levels to increase facility occupancy and the number of residents either admitted or
10 retained with high Levels of Care, while simultaneously requiring reductions in the labor budget.

11 45. On information and belief, Emeritus continues to direct Executive Directors at its
12 facilities to staff based on a strict budget determined by corporate headquarters that is designed to
13 meet profit objectives. Former Executive Directors of Emeritus facilities have testified under oath
14 that they were not allowed to increase their labor budgets without approval from corporate
15 headquarters. Budgie Amparo testified under oath in 2013 that budgets set by Emeritus senior
16 executives limit how many staff hours a facility manager may schedule. If there is any deviation
17 from this budget in any given month, executive directors must give a detailed explanation on a
18 “budget variance report.”

19 46. Further, Executive Directors are given a disincentive to request a staffing increase
20 because under corporate policy regarding the compensation of Executive Directors, they can only
21 receive a bonus if they meet earnings targets set by Emeritus' corporate headquarters in
22 Washington State. The former Vice President of Operations for Emeritus' Western Division
23 (which at the time was the California division) testified under oath that the 2008 bonus plan for
24 executive directors—which came directly from the senior executive management—rewarded
25 management employees only if they met profit and occupancy goals for the facility. Plaintiffs
26 allege on information and belief that Emeritus continues to base management employee bonuses
27 on meeting profit and occupancy goals.

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1 47. Defendant Brookdale is aware of the facts alleged above, but has not at any time
2 disclosed those facts to residents or their family members. Nor has Defendant Brookdale issued
3 to all of the residents of its Emeritus facilities in California new contracts that remove the Level of
4 Care charges, which are allegedly based on the personal care minutes determined necessary by
5 resident evaluations at Emeritus. In fact, Defendants continue to charge residents and/or their
6 family members at their Emeritus facilities in California a “Level of Care” charge purportedly
7 based on the amount of care time determined necessary by the wECare evaluation system.

8 **The Misrepresented and Concealed Facts Are Material**

9 48. Defendants’ misrepresentations and misleading statements and the facts they
10 conceal are material to the reasonable consumer. An important and significant factor in choosing
11 to move oneself or one’s relative to an Emeritus facility is the provision of staffing that the facility
12 itself has determined is necessary to meet the aggregate assessed needs of facility residents.

13 49. Defendants’ misrepresentations, misleading statements and omissions regarding
14 Emeritus’ provision of the amount of personal care time, *i.e.* staffing, that Emeritus has
15 determined is necessary to meet resident care needs based on their assessed Levels of Care are
16 material to prospective residents and their family members. Assurances that a facility will
17 provide the amount of staffing the facility itself believes is necessary to meet the assessed needs
18 of facility residents is a substantial factor (and indeed often the most important factor) in deciding
19 to enter an assisted living facility. The named Plaintiffs would not have entered Emeritus
20 facilities, or they would have paid a lower price, if they had known that, although Defendants
21 would charge them based on the staffing associated with their assessed Level of Care, Emeritus
22 did not and does not use Emeritus’ resident evaluation system and the Levels of Care generated
23 by it to set facility staffing levels. Likewise, members of the putative Class would in all
24 reasonable probability not have entered Emeritus’ facilities, or would have insisted upon a lower
25 price, if they had known that Emeritus did not and does not use its resident evaluation system and
26 the Levels of Care generated to set staffing levels at its facilities.

27 50. This is true even for residents who currently are practically independent. These
28 residents choose an assisted living facility as opposed to remaining at home or moving into an

1 independent living community because they wish to “age in place.” They may not need
2 significant assistance with the activities of daily living initially, but they expect to (and will)
3 become more dependent as they age and do not want to move yet again when that happens.

4 51. A key factor for these residents in selecting Emeritus is that the facility will provide
5 the staffing that Emeritus itself has determined is necessary to meet their assessed needs, both
6 now and as those needs, and corresponding Level of Care fees, increase.

7 52. Defendants have a duty to disclose to the consuming public that they do not use
8 Emeritus’ resident evaluation system or the personal care levels generated by it to set aggregate
9 staffing levels because of, among other things, the substantial safety risk to current and future
10 residents from Defendants’ conduct, particularly as Defendants serve a vulnerable population that
11 needs assistance.

12 53. The non-disclosure is material because, among other things, Defendants know that
13 their conduct risks the safety of their residents. Melanie Werdel, Emeritus’ Executive Vice
14 President of Operations, testified under oath that multiple people at the divisional, regional and
15 facility level in California had reported to her and Emeritus headquarters that there were serious
16 problems in staffing at Emeritus facilities in California and that such understaffing was resulting
17 in poor outcomes for the residents. Lisa Hulse, Vice President of Quality Services for the
18 Western (California) Division, has agreed in sworn testimony that a facility that does not employ
19 enough caregivers to meet the residents’ needs is “a dysfunctional facility.” California’s
20 Department of Social Services (DSS) has conducted numerous Noncompliance Conferences with
21 Emeritus senior executives and managers of California facilities to discuss the failure of various
22 facilities to meet state laws and regulations. Budgie Amparo confirmed in testimony given under
23 oath that at least some of the issues discussed in these conferences related to poor resident care
24 caused by inadequate staffing.

25 54. In October 2007, the Resident Services Director for the Emeritus at Emerald Hills,
26 Mary Kasuba, facility sent a letter to the facility’s executive director, Nancy Cordoba, and copied
27 it to ten senior executives at Emeritus, including the then CEO and the COO. In it, she reported a
28 “huge shortage of staff” resulting in dangerous situations. “Since I came to work with Emerald

1 Hills, there has not been enough staff to cover any part of the day-to-day staffing needs to give the
2 residents their quality of care that Emerald Hills advertises in its information. Not enough in the
3 kitchen, housekeeping, resident assistances, and med techs.”

4 55. Budgie Amparo testified at a trial against Emeritus alleging elder abuse that having
5 enough staff to meet the needs of its residents is a safety issue. Amparo confirmed that for the
6 residents to be safe, Emeritus must have enough staff to meet all of their needs.

7 56. Defendants are fully aware of the facts alleged above. Yet, Defendants have failed
8 to disclose and actively concealed from residents, prospective residents and their family members
9 the true facts about how staffing is set at Emeritus facilities.

10 **Emeritus’ “Close the Back Door” Policy**

11 57. Defendants’ misrepresentations, misleading statements and material omissions
12 affect not only the decision of residents to enter the facility but also the decision to stay at an
13 Emeritus facility.

14 58. In choosing assisted living in general and an Emeritus facility in particular, the
15 resident forgoes other options such as their former home, an independent living community, or
16 other facilities where they can try to build a new community. Once in a facility, there are
17 significant physical, emotional and other burdens for the residents that are triggered if they
18 terminate residency, including impacts such as “transfer trauma.” Defendants know and rely on
19 this fact. As Brookdale notes on its website “(a)s a resident’s health needs increase, they may
20 transition from one level to the next, all within the same community. This provides a permanent
21 link to friends and families for them by assuring they remain in a single location.”

22 59. Defendants put great effort into increasing and maintaining building occupancy to
23 the detriment of their prospective and future residents. When residents or their family members
24 complain about staffing and/or conditions at an Emeritus facility, employees are instructed to
25 reassure them that things will improve and that the incident or incidents are temporary snags.
26 Facility staff are told that residents “are not to hear we are short-staffed.”

27 60. The Senior Vice President of Quality Services for each division receives a monthly
28 performance review on Quality and Risk. One category in which he or she is scored is “Projected

1 Average Moveouts.” The Senior VP and facility Executive Directors are instructed to minimize
2 potential moveouts. Executive Directors are regularly told by upper management to do
3 everything they can to “save” the move-out. The program has been referred to on monthly review
4 sheets as “Close the Back Door.”

5 61. Emeritus also repeats its misrepresentations and misleading statements when it
6 conducts periodic re-evaluations of residents. Often, the facility discovers additional personal
7 care services needed by the resident justifying a Level of Care fee increase. Written strategies
8 disseminated from corporate headquarters to facility Executive Directors in California stated:

9 We do a great job of managing labor and general expense control. We need to apply the
10 same level of scrutiny to our rent increases. We need to make sure that we do not miss
11 giving any rent increases and we are applying the appropriate rate increase to meet or
12 exceed our budget.

13 ...

14 One of the most common mistakes we make with level of care is not keeping up our
15 assessment with change of conditions. As a result, we wind up with residents who are
16 progressing in terms of their needs but not being charged for it.

17 62. Each time Emeritus staff perform a reassessment that results in an increased Level
18 of Care, residents or their family members must sign a contract amendment detailing the
19 additional personal care services for which Emeritus will be responsible and for which the
20 resident must pay more fees. Again, Defendants do not disclose to the resident or their family
21 members that Emeritus does not and will not increase its staff for that resident or facility to
22 correspond to the increased Level of Care.

23 63. Defendants thereby unjustly continue to profit from the original fraud by
24 perpetuating the misrepresentations, misleading statements, and failures to disclose.

25 **Arville Winans**

26 64. Plaintiff Arville Winans has resided at Emeritus at Heritage Place in Tracy,
27 California from approximately September 25, 2009, through the present. When Mr. Winans
28 moved to Emeritus on or around September 25, 2009, Defendant Emeritus provided him with a
standard contract under which it promised to provide certain “core services” in exchange for a
monthly base rate. Additionally, the contract stated that Emeritus would be responsible for

1 providing any additional “personal care services” Mr. Winans would need as determined by his
2 initial resident evaluation and any subsequent determinations by Emeritus staff that his level of
3 needs had changed. Emeritus represented to Mr. Winans and his niece that its California assisted
4 living facilities would base personal care time for all residents on the results of their resident
5 evaluations. Mr. Winans and his niece read and heard these representations and misleading
6 statements, and relied upon them in their decision to pay money to Emeritus. Emeritus failed to
7 disclose and concealed from Mr. Winans and his niece that it does not use the resident evaluations
8 to set staffing, but instead staffs its facilities based on profit margin. Mr. Winans and his niece
9 would not have agreed to enter Emeritus, or would have paid less money, if they had known the
10 true facts about Emeritus’ services and the resident evaluation system.

11 65. Mr. Winans’ cognitive function subsequently declined. In or around September
12 2010, Defendant’s staff completed a computerized evaluation of Mr. Winans and assigned him a
13 Level of Care of Three (3). He was placed in the Alzheimer’s and Memory Care Unit. His
14 contract was amended to reflect this and his increased monthly rent. Ms. Moulton signed the new
15 agreement on Mr. Winans’ behalf as his power of attorney and “representative” as that term is
16 defined in California W&I Code § 15610.30(c)(2).

17 66. On or around September 4, 2012, Emeritus re-evaluated Mr. Winans with its wE
18 Care software system and increased his Level of Care to Four (4). In a contract dated
19 September 7, 2012, Emeritus states that the contract is an “agreement [between the parties]
20 regarding: your identified needs and the services we will provide or arrange for to meet those
21 needs.” Ms. Moulton signed the new agreement on Mr. Winans’ behalf as his power of attorney
22 on or around September 7, 2012.

23 67. On or around May 11, 2013, Emeritus re-evaluated Mr. Winans with its wE Care
24 software system and increased his point level to five. In a contract dated May 31, 2013, Emeritus
25 states that it is an “agreement [between the parties] regarding: your identified needs and the
26 services we will provide or arrange for to meet those needs.” Ms. Moulton signed the new
27 agreement on Mr. Winans’ behalf as his power of attorney.

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1 68. Since his arrival in September 2009, Mr. Winans' monthly rate has increased from
2 approximately \$1,200 to \$2,800. Although Emeritus raised Mr. Winans' point level and monthly
3 rate, his care and the staff assigned to him have not increased accordingly. Indeed, Ms. Moulton
4 has observed that Emeritus staff have not spent the additional time with her uncle that corresponds
5 to his increased Levels of Care, despite paying higher monthly fees and Emeritus' promises that
6 these higher fees will result in additional care time.

7 69. Since the July 31, 2014 merger of Defendant Brookdale and Defendant Emeritus,
8 Defendants have not provided Ms. Moulton with a new contract for Mr. Winans which does not
9 include a Level of Care charge, nor have they disclosed to Ms. Moulton that the Level of Care
10 charge for which Mr. Winans is currently billed is not used to calculate staffing at Emeritus
11 facilities.

12 **Wilma Fritz**

13 70. Wilma F. Fritz resided in Emeritus at Villa Del Rey in Napa, California from
14 approximately July 25, 2012, until approximately June 2013. Ms. Fritz passed away on
15 January 29, 2014. Plaintiff Ruby A. Richardson, her sister, held a durable power of attorney for
16 Ms. Fritz during this entire time. Ms. Richardson is also the trustee of the Wilma F. Fritz Trust,
17 the successor-in-interest to Ms. Fritz's causes of action against Emeritus Corporation.
18 Ms. Richardson brings this lawsuit in her capacity as Trustee of the Wilma F. Fritz Trust.

19 71. When Ms. Fritz entered Emeritus, on or around July 25, 2012, Emeritus provided
20 her with a standard contract under which it promised to provide certain "core services" in
21 exchange for a monthly base rate. Additionally, the contract stated that Emeritus would be
22 responsible for providing any additional "personal care services" Ms. Fritz would need as
23 determined by her initial resident evaluation and any subsequent determinations by Emeritus staff
24 that her level of needs had changed. At that time, Emeritus assigned Ms. Fritz a Level of Care
25 Three (3) and her monthly fee for Personal Care Services was \$1,525.00. Emeritus represented to
26 Ms. Richardson, Ms. Fritz's power of attorney and "representative" as that term is defined in
27 California W&I Code § 15610.30(c)(2), that Emeritus' California assisted living facilities would
28 base personal care time for all residents on the results of their resident evaluations. Ms. Richardson

1 read and heard these representations and misleading statements, and relied upon them in her
2 decision to pay money to Emeritus. Emeritus failed to disclose and concealed from
3 Ms. Richardson that it does not use the resident evaluations to set staffing, but instead staffs its
4 facilities based on corporate profit goals and margin. Ms. Richardson would not have used
5 Emeritus if she had known the true facts about Emeritus' services and the resident evaluation
6 system.

7 72. Ms. Richardson signed the contract on Ms. Fritz's behalf as her power of attorney
8 and "representative" as that term is defined in California W&I Code § 15610.30(c)(2).

9 73. On or around January 2013, Emeritus informed Ms. Richardson that because
10 Ms. Fritz had tried to escape from the facility, Emeritus needed to move her to the Memory Care
11 Unit and raised her monthly fees. Despite paying higher fees, Ms. Richardson noted that Ms.
12 Fritz received even less personal care time than she had previously. Additionally, facility staff
13 admitted to Ms. Richardson that they were understaffed.

14 74. In or around June 2013, Ms. Richardson decided to move Ms. Fritz out of the
15 facility. She spoke with Emeritus management above the facility level who begged her not to
16 move Ms. Fritz, but she nonetheless removed her from the facility.

17 CLASS ALLEGATIONS

18 The Named Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil
19 Procedure 23(b)(3) as set forth below.

20 75. **Class Definition:** This action is brought on behalf of the named Plaintiffs and all
21 similarly situated persons who resided at one of the California assisted living facilities owned
22 and/or operated by Defendants under the Emeritus name from July 29, 2009 through the present
23 (the "Class Period"), and who contracted with Emeritus for services for which Emeritus was paid
24 money.

25 76. Excluded from the above-referenced Class are the officers, directors, and
26 employees of Defendants, and any of Defendants' shareholders or other persons who hold a
27 financial interest in Defendants. Also excluded are any judge assigned to hear this case (or any
28 spouse or family member of any assigned judge), or any juror selected to hear this case.

1 77. This action is brought as a class action and may properly be so maintained pursuant
2 to Federal Rule of Civil Procedure 23 and applicable case law. In addition to injunctive relief,
3 this action seeks class-wide damages based on Defendants' misrepresentations and misleading
4 statements and material omissions alleged herein. This action does not seek recovery for personal
5 injuries, emotional distress or bodily harm that may have been caused by misrepresentations and
6 misleading statements made by Defendants or by inadequate staffing at Defendants' facilities.

7 78. **Impracticability of Joinder (Numerosity of the Class)**. Members of the Class are
8 so numerous that their individual joinder herein is impracticable. The precise number of members
9 of the Class and their addresses are presently unknown to Plaintiffs. Defendant currently owns
10 and/or operates approximately 72 assisted living facilities under the Emeritus name in California.
11 The number of residents at those facilities during the Class Period likely exceeds 5,000
12 individuals. The precise number of persons in the Class and their identities and addresses may be
13 ascertained from Defendants' business records which identify all of the putative Class members
14 who signed the resident admissions contract.

15 79. **Questions of Fact and Law Common to the Class**. Numerous important common
16 questions of law and fact exist as to all members of the Class and predominate over the questions
17 affecting only individual members of the Class. These common legal and factual questions
18 include without limitation:

19 (a) whether Defendants have violated and continue to violate the Consumer
20 Legal Remedies Act, California Civil Code § 1750, *et seq.* by making false and misleading
21 statements that give rise to a reasonable expectation on the part of the reasonable consumer that
22 Emeritus uses its resident evaluation system and the Levels of Care generated by it to determine
23 and provide staffing at Defendants' Emeritus assisted living facilities in California, when, in fact,
24 Defendants do not and have no intention to do so;

25 (b) whether Defendants' misrepresentations, misleading statements and
26 omissions regarding the resident evaluation system and the staffing of their facilities as alleged
27 herein were and are material to the reasonable consumer;

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1 (c) whether a reasonable consumer would be likely to be deceived by
2 Defendants' misrepresentations, misleading statements, and material omissions;

3 (d) whether by making the misrepresentations, misleading statements and
4 material omissions alleged in this Complaint, Defendants have violated and continue to violate the
5 Consumer Legal Remedies Act;

6 (e) whether Defendants had exclusive knowledge of material facts not known or
7 readily accessible to Plaintiffs and the proposed Class members;

8 (f) whether Defendants have failed to disclose and concealed from Plaintiffs
9 and the Class members that they staff Emeritus facilities based on corporate profit goals and
10 without regard to the results of its resident evaluation system;

11 (g) whether the fact that Defendants staff Emeritus facilities based on profit
12 goals as opposed to the results of the residents' evaluations is material, and whether Defendants
13 had and have a duty to disclose the foregoing concealment and omission;

14 (h) whether Plaintiffs, the Class and the consuming public were likely to be
15 deceived by the foregoing concealment and omission;

16 (i) whether Plaintiffs, the Class and the consuming public have a reasonable
17 expectation that Defendants will use the resident evaluation system and the Levels of Care
18 generated by it to determine and provide staffing at Defendants' Emeritus facilities;

19 (j) whether Plaintiffs, the Class and the consuming public have a reasonable
20 expectation that Defendants would have in place corporate policies and procedures to implement
21 the resident evaluation system with respect to services and staffing;

22 (k) whether Defendants' misrepresentations, misleading statements, failures to
23 disclose and concealment of its true policies, procedures and practices regarding how Defendants
24 staff their Emeritus facilities in California violated the CLRA;

25 (l) whether Defendants have committed financial elder abuse under California
26 W&I Code § 15610.30 by taking, secreting, appropriating, obtaining and/or retaining money from
27 elders and dependent adults for a wrongful use and/or with the intent to defraud them;

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- 1 (m) whether Plaintiffs and the members of the Class have sustained injury;
- 2 (n) whether Plaintiffs and the members of the Class are entitled to damages, and
- 3 the nature of such damages; and,
- 4 (o) whether Plaintiffs and the Class are entitled to declaratory and injunctive
- 5 relief and/or other relief, and the nature of such relief.

6 80. **Typicality.** The claims of the Named Plaintiffs are typical of the claims of the

7 Class. As alleged above, Defendants made false and misleading statements and material

8 omissions to Plaintiffs and the Class members and/or their family members which gave rise to a

9 reasonable expectation on their part that Defendants use Emeritus' resident evaluation system and

10 the Levels of Care generated by it when determining staffing levels at their Emeritus facilities.

11 The resident evaluation system allows Defendants to determine and provide the aggregate staffing

12 Emeritus has determined is necessary to meet the assessed needs of the residents, but in fact,

13 Defendants do not use this critical information in budgeting for or employing staff at their

14 California Emeritus facilities. Further, as alleged above, Defendants have failed to disclose and

15 concealed these material facts from the Named Plaintiffs and the Class. Plaintiffs' claims are

16 typical of the claims of the proposed Class in the following ways: 1) Plaintiffs are members of the

17 proposed Class; 2) Plaintiffs' claims arise from the same uniform corporate policies, procedures,

18 practices and course of conduct on the part of Defendants; 3) Plaintiffs' claims are based on the

19 same legal and remedial theories as those of the proposed Class and involve similar factual

20 circumstances; 4) the injuries suffered by the Named Plaintiffs are similar to the injuries suffered

21 by the proposed Class members; and 5) Plaintiffs seek a common form of relief for themselves

22 and the members of the Class.

23 81. **Adequacy.** The Named Plaintiffs are adequate representatives of the Class on

24 whose behalf this action is prosecuted. Their interests do not conflict with the interests of the

25 Class. Also, they have retained competent counsel with extensive experience in class action and

26 senior care litigation and who will prosecute this action vigorously.

27 82. **Predominance.** With respect to Plaintiffs' claims under the CLRA and the Elder

28 Abuse Act, Class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3)

1 because questions of law or fact common to Class members predominate over any questions
2 affecting only individual members of the proposed Class.

3 83. **Superiority.** Moreover, a class action is superior to other methods for the fair and
4 efficient adjudication of the controversies raised in this Complaint because:

5 (a) individual claims by the Class members would be impracticable because the
6 costs of pursuit of such claims would far exceed what any individual Class member has at stake;

7 (b) relatively little individual litigation has been commenced over the
8 controversies alleged in this Complaint and individual Class members are unlikely to have an
9 interest in separately prosecuting and controlling individual actions;

10 (c) the concentration of litigation of these claims in one forum will achieve
11 efficiency and promote judicial economy;

12 (d) the proposed Class is manageable, and no difficulties are likely to be
13 encountered in the management of this class action that would preclude its maintenance as a class
14 action;

15 (e) the proposed Class members are readily identifiable from Defendant's own
16 records; and,

17 (f) prosecution of separate actions by individual members of the proposed Class
18 would create the risk of inconsistent or varying adjudications with respect to individual members
19 of the proposed Class that would establish incompatible standards of conduct for Defendant.

20 84. Without a class action, Defendants will likely retain the benefit of their wrongdoing
21 and will continue in their illegal course of conduct which will result in further damages to
22 Plaintiffs and the proposed Class.

23 **FIRST CLAIM**
24 **CALIFORNIA CONSUMERS LEGAL REMEDIES ACT**
25 **(Cal. Civil Code § 1750 et seq.)**
26 **AGAINST ALL DEFENDANTS**

27 85. Plaintiffs refer to, and incorporate herein by reference, all preceding paragraphs.

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1 86. Plaintiffs and the Class members are “senior citizens” and/or “disabled persons” as
2 defined in California Civil Code § 1761(f) and (g). They are also “consumers” as defined in
3 California Civil Code § 1761(d).

4 87. Defendants are “persons” as defined under California Civil Code § 1761(c). The
5 assisted living and memory care services provided by Defendants constitute “services” under
6 California Civil Code § 1761(b). The agreement by Plaintiffs and the putative Class members to
7 provide monthly payments to Defendants in exchange for assisted living and memory care
8 services constitute a “transaction” under California Civil Code § 1761(e).

9 88. In Emeritus’ uniform resident contracts presented to prospective residents and their
10 family members, Emeritus represented and Defendants continue to represent that Emeritus uses its
11 resident evaluation system to determine the services that will be provided to the residents, thus
12 giving rise to a reasonable expectation on the part of the putative Class members that the Levels
13 of Care generated by the resident evaluation system will be used in determining and providing
14 facility staffing. That same representation was made in Emeritus’ re-evaluations of residents, rate
15 increase letters, corporate website statements and other standardized corporate promotional
16 materials. As alleged herein, these uniform corporate representations are false and misleading,
17 and are likely to deceive the reasonable consumer.

18 89. Contrary to Emeritus’ uniform misrepresentations and misleading statements,
19 Defendants do not use Emeritus’ resident evaluation system or the Levels of Care of Emeritus
20 residents in setting or providing facility staffing, but instead use predetermined labor budgets
21 designed to meet corporate profit targets, goals and margins. Defendants do not disclose and
22 actively conceal this corporate policy and procedure from current and prospective residents and
23 their family members.

24 90. The named Plaintiffs, their family members and powers of attorney, the putative
25 Class members and reasonable consumers considered material Emeritus’ misrepresentations and
26 misleading statements that it uses its resident evaluation system to determine and provide
27 services, and thus had and have a reasonable expectation that Defendants will use the resident
28 evaluation system to set and provide facility staffing based on the amount of time Emeritus has

1 itself determined is necessary to provide the Levels of Care established by its resident
2 assessments. If the named Plaintiffs had known the true facts, they would not have agreed to enter
3 an Emeritus facility or to place their relatives in an Emeritus facility, or would have paid less
4 money. If the putative Class members had known the true facts, they would in all reasonable
5 probability not have agreed to enter an Emeritus facility or to place their relatives in an Emeritus
6 facility, or would have paid less money to Emeritus.

7 91. The facts that Defendants misrepresent, fail to disclose and actively conceal are
8 material and are likely to deceive the reasonable consumer. Consumers choose an assisted living
9 facility because they need care and/or wish to age in a place as their care needs change.
10 Reasonable consumers, including the residents and their family members herein, consider of great
11 importance the staffing levels provided by the assisted living facility they select, and such
12 consumers also attach great importance to Emeritus' claims regarding the benefits of its resident
13 care evaluation system.

14 92. Residents and their family members would consider material Defendants' uniform
15 corporate policy and procedure of basing its staffing not on its resident evaluation system or the
16 Levels of Care generated by it but on fixed budgets and profit margins. They could not reasonably
17 have been expected to learn or discover these non-disclosed facts, and in fact, Defendants have
18 affirmatively concealed them.

19 93. Defendants have violated and continue to violate the Consumers Legal Remedies
20 Act, California Civil Code §§ 1750 *et seq.* ("CLRA") in at least the following respects: (a) in
21 violation of section 1770(a)(5), Defendants have misrepresented, failed to disclose and concealed
22 the true characteristics and/or quantities of services provided at their Emeritus facilities in
23 California; (b) in violation of section 1770(a)(7), Defendants have misrepresented, failed to
24 disclose and concealed the true standard, quality and/or grade of services provided at their
25 Emeritus facilities in California; (c) in violation of section 1770(a)(9), in Emeritus' standard
26 resident admissions contracts, Emeritus has falsely advertised that it will provide the assistance
27 specified by each resident's evaluation and which corresponds to that resident's assigned Level of
28 Care, knowing that Defendants do not intend to provide the services as advertised; and (d) in

1 violation of section 1770(a)(14), Defendants have represented that the agreement signed by
2 residents and/or their representatives, and under which they pay their monthly rate, confers on
3 residents the right to reside in a facility that provides services based on the amount of staff time
4 that its own resident evaluation system has determined is necessary to provide the services for
5 which the residents are charged, when in fact, Defendants do not use Emeritus' resident
6 evaluation system or the Levels of Care generated by it when determining and providing facility
7 staffing.

8 94. These misrepresentations, misleading statements, acts, practices, and omissions by
9 Defendants are and were intended to induce and lure elderly and dependent adult residents and
10 their family members into agreeing to be admitted to Defendants' facilities and to pay new
11 resident services fees and monthly rates based on Defendants' resident evaluation system and
12 assessed Levels of Care.

13 95. Defendant Emeritus made the written misrepresentations and misleading statements
14 alleged herein through various uniform means of communication, including without limitation,
15 the admission agreement, subsequent agreements based on re-evaluations of the resident, letters to
16 residents regarding rate increases, standardized corporate marketing and promotional materials,
17 Defendant Emeritus' website, scripted sales presentations, and other written corporate materials
18 disseminated to the public in connection with Defendants' services. These representations and
19 misleading statements were made directly to the named Plaintiffs, putative Class members and
20 their family members and/or representatives by Emeritus in its standard resident admission
21 contract and reinforced by the uniform means of communication listed above.

22 96. In addition to its affirmative misrepresentations and misleading statements that
23 Emeritus provides services to its residents as determined by its resident evaluation system, and the
24 staff time Emeritus has determined is necessary to provide those services, Defendants failed to
25 disclose and concealed from Plaintiffs, the putative Class members, and their family members that
26 Emeritus does not use its resident evaluation system and the Levels of Care generated by it to
27 determine or provide facility staffing, and that to the contrary it has a common policy and
28 procedure of staffing its facilities to fixed budgets and profit goals.

1 97. Defendants had exclusive and superior knowledge of material facts not known to
2 the named Plaintiffs, Class members or the general public at the time of the subject transactions
3 and actively concealed these material facts.

4 98. Defendants had exclusive and superior knowledge of their corporate policy and
5 procedure of ignoring Emeritus' resident evaluation system and the Levels of Care generated by it
6 in setting staffing levels. Further, Defendants' officers, directors and managers were repeatedly
7 advised by its own staff that Emeritus facilities were not adequately staffed to meet resident
8 needs. Defendants also knew that its failure to provide staffing based on the amount of time that
9 Emeritus had itself determined was necessary to provide the care and services for which it
10 charged its residents had a propensity to pose a heightened health and safety risk to the named
11 Plaintiffs and Class members. Defendants intentionally concealed, suppressed and/or failed to
12 disclose the true facts with the intent to defraud the named Plaintiffs and putative Class members.
13 The named Plaintiffs and the putative Class members did not know these material undisclosed
14 facts and could not reasonably have been expected to discover them.

15 99. As a direct and proximate result of the Defendants' conduct, Plaintiffs and the
16 putative Class members suffered actual damages. Plaintiffs and the Class members paid money to
17 Defendants in the form of new resident services fees and their initial monthly fees. Plaintiffs and
18 the Class members continue to pay monthly fees.

19 100. Plaintiffs sent Defendant Emeritus a notice to cure under California Civil Code §
20 1782(a), which was received by Defendant Emeritus on August 3, 2013. More than 30 days has
21 passed since Defendant's receipt, and Defendant has not replied to the notice nor has it corrected
22 or remedied the violations alleged in the notice and herein.

23 101. Accordingly, Plaintiffs and the Class members are each entitled to no less than
24 \$1,000 in statutory damages pursuant to California Civil Code § 1780(b). Plaintiffs and the Class
25 members are also entitled to actual damages and restitution in an amount to be proven at trial.

26 102. Additionally, Plaintiffs and each putative Class member are entitled to damages of
27 \$5,000 pursuant to California Civil Code § 1780(b). Plaintiffs and each of the putative Class
28 members are seniors and/or disabled persons as defined by California Civil Code § 1761(f) and

1 (g). Plaintiffs and the putative Class members have each suffered substantial economic harm.
2 Defendants knew that their conduct negatively impacted seniors and disabled persons.
3 Defendants' conduct caused the named Plaintiffs and the putative Class members to lose property
4 set aside for personal care and maintenance and assets essential to their health and welfare.
5 Further, Plaintiffs and the putative Class members are substantially more vulnerable than other
6 members of the public to Defendants' conduct because of their age, poor health, impaired
7 understanding, restricted mobility and/or disabilities.

8 103. Plaintiffs additionally seek treble damages under California Civil Code § 3345,
9 punitive damages, reasonable attorneys' fees and costs, and all other relief the Court deems just
10 and proper. Excluded from Plaintiffs' request are damages related to any personal injuries,
11 emotional distress or wrongful death suffered by any member of the Class.

12 104. Defendants' conduct presents a continuing threat of substantial harm to the public
13 in that, among other things, Defendants continue to misrepresent how they use the resident
14 evaluation system and how they determine and provide staffing at their Emeritus facilities in
15 California. Despite the knowledge that Defendants do not staff their Emeritus facilities based on
16 the resident evaluations and assessed Levels of Care, but instead staff based on corporate profit
17 goals and margins, Defendants continue to induce elderly and vulnerable citizens to enter their
18 facilities. Accordingly, Plaintiffs seek an injunction that requires that Defendants immediately
19 cease the CLRA violations alleged herein with regard to Defendants' misrepresentations,
20 misleading statements and material omissions, and to enjoin them from continuing to engage in
21 any such acts or practices in the future. Specifically, Plaintiffs seek an injunction requiring
22 Defendants to disclose to Plaintiffs, the putative Class members and the consuming public that
23 Defendants do not staff their Emeritus facilities in California based on their resident evaluation
24 system or the Levels of Care generated by that system.

25 **SECOND CLAIM FOR ELDER FINANCIAL ABUSE (Cal. W&I Code § 15610.30)**
26 **AGAINST ALL DEFENDANTS**

27 105. Plaintiffs refer to, and incorporate herein by this reference, all preceding
28 paragraphs.

1 106. Plaintiffs and the putative Class members are and at all times were “elders” as
2 defined under California W&I Code § 15610.27 and/or “dependent adults” as defined under
3 California W&I Code § 15610.23.

4 107. Defendant Emeritus entered into an agreement with the named Plaintiffs, the
5 putative Class members and/or their personal representatives whereby Defendant Emeritus
6 represented that Emeritus determines services and the staffing necessary to provide those services
7 at its California assisted living facilities based on its resident evaluation system and the Levels of
8 Care generated by that system. Defendant Emeritus made this promise in exchange for new
9 resident services fees and monthly payments it received from the Plaintiffs and putative Class
10 members. Yet, Emeritus did not and had no intention of complying with its obligations under the
11 contract. Defendant Emeritus did not intend to and does not determine or provide facility staffing
12 based on the resident evaluation system and the Levels of Care generated by it, but instead bases
13 facility staffing on corporate profit goals.

14 108. Defendants knew or should have known that such conduct would likely be harmful
15 to Plaintiffs and the putative Class members.

16 109. Defendants knew or should have known that Plaintiffs and the putative Class
17 members had a right to the funds used to pay new resident services fees and monthly fees to
18 Defendants.

19 110. Since the merger of Defendant Emeritus and Defendant Brookdale on or about July
20 31, 2014, neither Defendant has disclosed to the named Plaintiffs or the members of the putative
21 Class that they do not base facility staffing on the Levels of Care generated by the wE Care
22 resident evaluations. Nor have Defendants offered Plaintiff Winans or the members of the
23 putative Class new contracts that do not contain Level of Care charges based on the resident
24 evaluations. Additionally, neither Defendant has offered to return to the named Plaintiff or the
25 members of the putative Class the funds used to pay new resident services fees and monthly fees.

26 111. As a result of the conduct alleged herein, Defendants took, secreted, appropriated,
27 obtained and retained the funds of Plaintiffs and the putative Class members for a wrongful use
28 and/or with the intent to defraud.

1 112. Defendants' conduct was despicable, fraudulent, reckless and carried out with a
2 willful and conscious disregard for the rights and safety of Plaintiffs and the members of the
3 putative Class.

4 113. Accordingly, Plaintiffs and the putative Class seek an injunction requiring
5 Defendants to disclose to Plaintiffs, the putative Class members and the consuming public that
6 Emeritus does not use its resident evaluation or Levels of Care generated by that system to set or
7 provide facility staffing, but instead bases staffing on pre-set budgets designed to meet corporate
8 profit goals. Plaintiffs and the Class also seek an injunction prohibiting Defendant from basing its
9 Levels of Care fees on the amount of staff time Defendant represents is necessary to provide the
10 required services, when Defendant does not, as a matter of corporate policy and procedure, use
11 those numbers in setting staffing levels at its facilities.

12 114. Plaintiffs and the putative Class members also seek compensatory damages,
13 reasonable attorneys' fees, costs and expenses, punitive damages, treble damages pursuant to
14 California Civil Code § 3345, and all other remedies permitted by law. Plaintiffs do not seek
15 certification of any claims for damages related to any personal injuries, emotional distress or
16 wrongful death suffered by any member of the Class.

17 WHEREFORE, Plaintiffs pray for judgment as follows:

18 **PRAYER**

- 19 1. For a Court order certifying that the action may be maintained as a class action;
20 2. For statutory damages;
21 3. For actual damages according to proof, excepting any damages for personal injury,
22 emotional distress and/or wrongful death suffered by the named Plaintiffs or any
23 Class member;
24 4. For restitution and any other monetary relief permitted by law;
25 5. For reasonable attorneys' fees, costs and expenses;
26 6. For treble damages pursuant to California Civil Code section 3345;
27 7. For punitive damages;
28 8. For pre-judgment and post-judgment interest, according to law;

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19 **UNITED STATES DISTRICT COURT**

20 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

21 ARVILLE WINANS, by and through his
guardian ad litem Renee Moulton, on his own
22 behalf and on behalf of all others similarly
23 situated,

24 Plaintiff,

25 v.

26 EMERITUS CORPORATION and DOES 1 to
27 100, inclusive,

28 Defendants.

Case No. 3:13-cv-03962-SC

CERTIFICATE OF SERVICE

1 I am employed with the law firm of McKenna Long & Aldridge LLP, whose address is
2 600 West Broadway, Suite 2600, San Diego, California 92101. I am over the age of eighteen
3 years, and am not a party to this action. I hereby certify that on April 15, 2015, I electronically
4 served the following document(s):

5 **SECOND AMENDED CLASS ACTION COMPLAINT** on the interested parties in this
6 action by the filing of the above-described document(s) with the clerk of the United States District
7 Court, Northern District of California, through the CM/ECF system. The CM/ECF system will
8 send email notification of the filing to the parties and their counsel of record who are registered
9 with the court's CM/ECF system at the email address(es) provided as follows:

- 10 • **Robert Stephen Arns**
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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on April 15, 2015 at San Diego, California.

s/Aaron T. Winn

Aaron T. Winn

USW 804593513.3