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DANIEL BAER and ROSE BAER, through Stephen Baer as their Agent with Power of Attorney, For themselves and all others similarly situated, PLAINTIFFS, v. SHANNONDELL, INC., and DELL MANAGEMENT SERVICES, INC., DEFENDANTS	:	COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION-LAW No. 2018-13760 CLASS ACTION JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction and Summary Of Argument

Summary judgment should be granted in favor of all members of both Sub-Classes One and Two against Defendants Shannondell Inc. ("Shannondell") and Dell Management Services, Inc. ("Dell") on all three counts of the Third Amended Complaint.

There are no issues of material fact. There is no dispute that Defendants deducted from entrance fee refunds an appliance fee for either appliance depreciation or replacement, the cost of new cabinetry, countertops and other property and the cost of duct cleaning (the "Deductions").

The Count Three claim that these Deductions were a breach of contract[1] and the Count Two claim for violation of the Continuing Care Providers Registration and Disclosure Act ("CCPRDA") are based simply on relating those Deductions to the language in a document -- the Shannondell Residence and Care Agreement ("RCA") for Count Three and the Shannondell Disclosure Statements for Count Two. Breach of the RCA is then only a matter of contract interpretation. That is the function of the Court as a matter of law. Violation of the CCPRDA is simply a matter of comparing the contents of the Disclosure Statements to the requirements of the statute. There is no issue of fact to be decided.

As to the treble damages claim for violation of the Unfair Trade Practices and Consumer Protection Law (Count One), there is irrefutable evidence applicable on a class wide basis about the information – or lack of it -- on the face of the Refurbishment Sheet sent to all class members. The court has already recognized as a matter of law that the Refurbishment Sheet itself is prima facie evidence that Defendants fraudulently concealed from class members facts that would have alerted them to their claims. The court should further rule now as a matter of law that this evidence satisfies Plaintiffs burden of proving a deceptive act prohibited by the UTPCPL.

Matter Before the Court

Plaintiffs' Motion for Summary Judgment on all counts in the Third Amended Complaint.

[1] Count Three alleging breach of contract is the most straightforward of the three claims. Throughout this brief, we will therefore deal with the Counts in reverse numerical order.

Statement of Issues

1. With respect to Sub-Class One,
    a) should summary judgment be granted on the claim for breach of the RCA (Count Three)? *Suggested answer: Yes.*
    b) should summary judgment be granted on the claim for violation of the CCPRDA (Count Two)? *Suggested answer: Yes*
    c) concerning the violation of the UTPCPL (Count One), should the Court grant summary judgment by ruling
        i. that Defendants engaged in deceptive acts and practices and
        ii. that all class members either relied on that deception by cashing their refund checks or are entitled to a presumption of reliance. *Suggested answer: Yes*
2. With respect to Sub-Class Two
    a) on the breach of contract claim (Count Three), should the Court grant summary judgment by ruling
        i. that Shannondell breached the RCA and
        ii that the statute of limitations was tolled by Defendants' fraudulent concealment? *Suggested answer: Yes*
    b) on the CCPRDA claim (Count Two), should the court grant summary judgment by ruling
        i. that Defendants violated the statute and
        ii. that the statute of limitations was tolled by Defendants' fraudulent concealment? *Suggested answer: Yes*

c) on the UTPCPL claim (Count One), should the Court grant summary judgment by ruling

i. that Defendants engaged in deceptive acts and practices;

ii. that all class members either relied on that deception by cashing their refund checks or are entitled to a presumption of reliance; and

iii. that the statute of limitations was tolled by Defendants' fraudulent concealment? *Suggested answer: Yes*

Relevant Procedural History

The Complaint was filed on May 23, 2018 as a class action on behalf of all former Shannondell residents or their representatives who signed an RCA before February 1, 2013 and had the refund of their Entrance Fee reduced by the Deductions. On December 21, 2021 the court certified the class as requested but, applying a six-year statute of limitations, limited it to those who had received their refund *after* May 23, 2012.

Following discovery on the merits, Plaintiffs were permitted to move that the class be expanded to cover those who had received refunds *before* May 23, 2023. They argued that Shannondell had actively concealed the facts giving rise to the claims such that Shannondell was estopped from asserting a statute of limitations defense. With leave of court they submitted proposed findings of fact and conclusions of law on the issue. Defendants did not present any proposed findings, moving instead to strike Plaintiffs' proposed findings. The motion to strike was denied.

On September 29, 2023 the Court granted the motion to expand the class and granted Plaintiffs leave to file a Third Amended Complaint. After it was filed Defendants eventually responded to that pleading with an Answer and New matter.

On October 10, 2023 the Court supplemented its order expanding the class with an order establishing two separate subclasses -- one for those who received refunds before May 23, 2012 and another for those who received refunds after. It ordered that Plaintiffs' counsel were to "identify and move to add one or more representative plaintiffs for Sub-Class Two within 30 days." In an accompanying memorandum (Ex. A) the court stated that, viewing the facts supporting tolling in the light most favorable to Plaintiffs, Plaintiffs at that stage had "established a prima facie case of fraudulent concealment."

Plaintiffs then filed without opposition a motion in compliance with the Court's October 10 directive regarding Sub-Class Two representatives. On November 13, 2023, the Court granted the motion, ordering that Robert Levin, Executor of the Estate of Harry Berman, and Janette Kalny, Executor of the Estate of John Davidson, were approved as representatives of Sub-Class Two subject to Defendants' right to challenge their adequacy or other qualifications as class representatives.

The November 13 order also approved the parties' agreed upon case management schedule providing for a March 1, 2024 discovery cut off and providing that by that time a) all class representatives would respond to interrogatories and b) all class representatives and any opting out class members could be deposed.

Facts Relevant To The Motion

Plaintiffs have presented the facts several times in support of earlier motions. For purposes of this motion for summary judgment all facts are presented in numbered paragraphs in

the attached Appendix. If Defendants dispute any of these facts – which we contend they cannot – they should for the court's convenience refer to the paragraph number and cite evidence in the record that supports their position.

Argument

A. Standard for Summary Judgment

As noted below,[2] the standards for granting summary judgment are well settled. It can be granted "in whole or in part;" and if granted only in part, the court can those specify facts which remain controverted and need to be tried. Pa. R. Civ. P. 1035.2 and 1035.5.

Here there can be no genuine issue of material fact on the terms of the RCA, Shannondell's Deductions from Entrance Fee refunds, information required by statute missing from its disclosure statements and the content of the Refurbishment Sheets which was deceptive in violation of the PUTPCPL.

Most telling is that Defendants chose to sidestep filing their own proposed findings of fact on the tolling issue. Those facts are the same as those presented in support of this motion for summary judgment. Yet when Defendants had the opportunity to respond with their own proposed findings on the tolling issue, they ducked. They chose instead to file a bizarre motion to strike all of Plaintiffs proposed findings which was denied. Had there been genuine factual

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[2] "A motion for summary judgment may properly be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. In passing on a motion for summary judgment, the court must examine the record in the light most favorable to the non-moving party. [However], it is clear that to survive a motion for summary judgment, the non-moving party may not rely merely upon the allegations of the contested pleadings, but must set forth specific facts by way of affidavit, or in some other way as provided by the rule, demonstrating that a genuine issue exists." Kerns v. Methodist Hosp., 393 Pa. Super. 533, 536–37, 574 A.2d 1068, 1069–70 (1990)

issues regarding plaintiffs' proposed findings on tolling, Defendants surely would have said what they were.

Defendants can take more discovery before March 1, 2024 of class representatives and opt outs. But none of that discovery can possibly reveal facts which contradict those supporting this motion for summary judgment. Rule 1035.3(b) providing that a party may claim an inability to present evidence essential to oppose a motion for summary judgment is here not an escape hatch. All of the arguments made in this motion are now ripe for adjudication by the court as a matter of law.

B. Breach of The RCA By Defendant Shannondell (Count III) (Appendix ¶¶ 1-38)

1. The Unambiguous Meaning of the RCA When Read as a Whole Does Not Permit the Deductions for Appliance Fees and Replacement of Property

Interpretation of an unambiguous contract is a question of law for the court. Seven Springs Farm, Inc. v. Croker, 569 Pa. 202, 801 A.2d 1212, 1215 n. 1 (2002); Mitch v. XTO Energy, Inc., 2019 PA Super 189, 212 A. 3d 1135, 1138 (2019); Cardinale v. R.E. Gas Dev., LLC, 2017 PA Super 13, 154 A.3d 1275, 1290 (2017) (court's interpretation of unambiguous contract applicable on a class wide basis); Bair v. Manor Care of Elizabethtown, PA, LLC, 108 A.3d 94, 96 (Pa. Super. 2015), *appeal denied*, 633 Pa. 752, 125 A.3d 775 (2015).

A determination of whether the terms of the RCA permitted the Deductions calls for applying a hierarchy of contract interpretation principles. The overarching principle is to determine the intent of the parties. That is to be accomplished by accepting the plain meaning of the words in the contract. The plain meaning is to be determined *by viewing the contract as a*

whole and giving effect to all its terms. As stated in LJL Transportation, Inc. v. Pilot Air Freight Corporation, 599 Pa. 546, 962 A.2d 639, 647–48 (2009),

> The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself. [I]n determining the intent of the contracting parties, *all provisions in the agreement will be construed together and each will be given effect....* [This Court] will not interpret one provision of a contract in a manner which results in another portion being annulled. (citations omitted). See also, Porter v. Chevron Appalachia, LLC, 204 A.3d 411, 418-19 (Pa. Super. 2019) (interpretation cannot result in annulment of a contract term). (italics added)

As further explained in Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 661 (1982), "When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed. Where the intention of the parties is clear, there is no need to resort to extrinsic aids or evidence. Hence, where language is clear and unambiguous, the focus of interpretation is upon the terms of the agreement as *manifestly expressed,* rather than as, perhaps, silently intended." (italics in original)

Shannondell will argue that the challenged Deductions were permitted by the Vacancy Fee term in section VII(3)[3] of the RCA, viz., that deductions from the Entrance Fee refund are allowed for "general restoration of the residence to its original condition." But the argument

[3] Section VII(3):

> The Vacancy Fee will be used to cover the reasonable cost of cleaning and refurbishing the residence, including, but not limited to, cleaning or replacement of carpeting, spackling and/or painting of walls, any other appropriate repairs and general restoration of the residence to its original condition.

cannot be considered without viewing the RCA as a whole to understand the meaning of this language.

The proper inquiry leads directly to the virtually identical language in section II(C) of the RCA.[4] There the parties agreed that if modifications to the unit made by the resident "must be removed prior to remarketing the residence, *the cost of restoration to the original condition will be deducted from the entrance fee refund."* Such restoration work was common, and Shannondell even employed two people in a "Design Section" to help residents modify or otherwise design their units. (App. ¶5)

So there is complete congruity between sections II(C) and VII(3). The former says the resident is responsible for the "cost of restoration to the original condition;" the latter says he is responsible for "the reasonable cost of . . . general restoration of the residence to its original condition." Both say that the cost is applied by deducting it from the amount of the Entrance Fee refund.

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[4] IIC. Modifications to your Residence.

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2. Should you request alterations, renovations and/or additions to your residence after occupancy, such changes must be approved in advance by Shannondell at Valley Forge in our sole discretion. The cost for approved alterations, renovations and/or additions are your responsibility. All alterations, renovations and/or additions are subject to the following conditions:

***

b. When the residence is vacated, Shannondell will determine whether the residence can be re-marketed without such alterations, renovations and/or additions being removed. **If Shannondell, in its sole discretion determines that the alterations, renovations and/or additions must be removed prior to remarketing the residence, the cost of restoration to the original condition will be deducted from the entrance fee refund."** (emphasis added)

Further reference to the agreement as a whole reveals that appliances, cabinetry, countertops and other replaced property could not possibly be charged to the resident as part of the Vacancy Fee. Those items were "provided by Shannondell;" and Shannondell contracted that it would replace and maintain them. Section II(B) says that among the "Facilities Provided by Shannondell" in exchange for the Entrance Fee are "Furnishings." They include: "a kitchen which includes a refrigerator, range, microwave, sink, cabinets, dishwasher and garbage disposal [and] a washer and dryer." Id. Section III(C), in turn, makes Shannondell "responsible for all necessary repairs, maintenance and *replacement of Property and equipment* owned by Shannondell."

If Shannondell can charge the resident for appliances and cabinetry or other property it replaces when the resident dies, then these sections becomes a nullity.

The forgoing discussion should end the legal analysis related to the claim for breach of contract. The RCA when viewed as a whole is unambiguous that the Vacancy Fee deduction for restoration to original condition does not permit the Deductions. Shannondell therefore breached the RCA.

2. Even If Other Contract Interpretation Principles Applied, They Would Dictate the Same Result

The next tier of contract interpretation principles still deals only with the language within the four corners of the RCA. They do not even apply unless the plain meaning of a contract term cannot be discerned from the actual words of the agreement. Nat'l Cash Reg. Co. v. Mod. Transfer Co., 224 Pa. Super. 138, 302 A.2d 486, 488 (1973) (interpretation is required only when the contract language is unclear).

Assuming arguendo that the court found a lack of clarity based only on the plain meaning of the words of the RCA, then the meaning of "general restoration to its original condition" would have to be interpreted in light of the "including but not limited to" phrase which precedes it. The "including but not limited to" phrase followed by a sequence of examples calls for applying the doctrine of *ejusdem generis*, meaning "of the same kind or class." *Black's Law Dictionary,* https://thelawdictionary.org/ejusdem-generis. The doctrine is that "where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." Id.; Marcellus Shale Coal. v. Dep't of Env't Prot., 292 A.3d 921, 943 (Pa. 2023); McClellan v. Health Maint. Org. of Pa., 546 Pa. 463, 686 A.2d 801, 806 (1996) (per curiam) (citations omitted) (statutory language interpretation); Steele v. Statesman Ins. Co., 530 Pa. 190, 607 A.2d 742, 743 (1992); Commonweatlh ex rel. Fisher v. Philip Morris, Inc., 4 A. 3d 749, 756, n.8 (Pa. Commw. Ct. 2010); Smith v. Se. Pennsylvania Transp. Auth., 707 A.2d 604, 608 (Pa. Commw. Ct. 1998); Royal Ins. Co. (U.K.) v. Ideal Mut. Ins. Co., 649 F. Supp. 130, 134–35 (E.D. Pa.) (contract interpretation).[5]

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[5] Cf. Dechert LLP v. Com., 606 Pa. 334, 998 A.2d 575, 581 (2010). There the court explained that the phrase "including but not limited to" "broaden[s] the reach of a statute, rather than . . . limit[ing] the scope to those matters enumerated therein." The ruling did not negate the principle, however, that in order to carry out clear legislative intent, additional specific terms allowed by the broadened statute must still be "of the same kind or class." This was most recently confirmed by the Pennsylvania Supreme Court in Marcellus, supra, 292 A. 3d at 944, quoting Department of Environmental Protection v. Cumberland Coal Resources, LP, 628 Pa. 17, 102 A.3d 962, 976 (2014):

> "In sum, the presence of such a term as "including" in a definition exhibits a legislative intent that the list that follows is not an exhaustive list of items that fall within the definition; yet, any additional matters purportedly falling within the definition, but that

Here the only items specifically "included" as examples of "the reasonable costs of cleaning and refurbishing" the residence are "cleaning or replacement of carpeting, spackling, and or painting of walls." These charges are for purely cosmetic refurbishment. Charges of up to $7,500 for depreciation or brand new appliances, new HVAC and new cabinetry are not cosmetic charges of that same "general nature."

A charge for appliance depreciation is especially dissimilar to the general nature of the given examples of permitted deductions. They all relate to physical work done to the unit. Appliance depreciation is purely an accounting concept. It does nothing to improve the unit, cosmetic or otherwise, and nothing to restore it to its original condition.

3. Even if the "Restore" Language Was Deemed Ambiguous, the Only Admissible Parol Evidence Would Resolve Any Ambiguity In Favor of Disallowing the Challenged Deductions

Terms are ambiguous only if they are "reasonably susceptible of different constructions." Trizechahn Gateway LLC v. Titus, 601 Pa. 637, 976 A.2d 474, 483 (2009). The "reasonably" qualifier is important: there is no ambiguity if one of the two proffered meanings is unreasonable. Id. A contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction. Samuel Rappaport Family Partnership v. Meridian Bank, 441 Pa.Super. 194, 657 A.2d 17, 21–22 (1993). Here based on the foregoing analysis, there are not two reasonable constructions of the "restoration" language.

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are not express, must be similar to those listed by the legislature and of the same general class or nature."

Should the court somehow conclude otherwise, it could refer to parol or extrinsic evidence to explain the "restoration" language. But extrinsic or parol evidence of an alleged ambiguity is only proper if the evidence addresses the meaning of the specific ambiguous terms in the contract -- not the subjective intent of the parties. Bohler–Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 93 (3d Cir.2001). So Shannondell testimony about what it may have intended is not admissible parol evidence.

Here the evidence outside the four corners of the RCA that specifically relates to any purported ambiguity in the "restoration" language exists in the form of Defendants' changes to the Vacancy Fee term in a later version of the RCA. In REV 13 effective February 1, 2013 a change to the exact section of the RCA at issue, section VII(3), added express language that the reasonable cost of cleaning and refurbishing the residence would include the cost of "appliance depreciation not to exceed actual replacement costs." (App. ¶10) So Defendants must have recognized that the charge was not covered in prior versions of the RCA. If it had been there would have been no reason to make the change.

Similarly, Defendants would not have changed section II(D) of REV 13 by eliminating Shannondell's obligation for "replacement" of its property. They must have realized that earlier versions giving Shannondell that obligation meant that it was their obligation, not the obligation of a deceased resident or his representative, to pay for the replacement of appliances.

4. Shannondell Must Be the Party to Absorb an Adverse Resolution of any Ambiguity

If there could be any lingering doubt as to how to resolve a purported ambiguity in the "restoration" language, it would be eliminated by the principle that ambiguity in a contract

ultimately should be resolved against the party who drafted it. Lane v Commonwealth, 2008 PA Super. 157, 954 A. 2d 615, 619 (2008); Bucks Orthopaedic Surgery Associates, P.C. v. Ruth, 925 A.2d 868, 871 (Pa.Super. 2007). Here there is no dispute that Shannondell drafted the RCAs.

5. Damages for breach of the RCA.

Breach of contract damages are the amount that puts the plaintiff in the same position he would have been in had the breach not occurred. Ely v. Susquehanna Aquacultures, Inc., 2015 PA Super 247, 130 A.3d 6, 10 (2015):

> Damages for a breach of contract should place the aggrieved party in "as nearly as possible in the same position [it] would have occupied had there been no breach." *Helpin v. Trustees of Univ. of Pennsylvania,* 608 Pa. 45, 10 A.3d 267, 270 (2010). To that end, the aggrieved party may recover all damages, provided "(1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) they can be proved with reasonable certainty." *Id.* at 270.

Here damages are simply the amount of the Deductions for each class member, plus interest.

That amount should have gone to Plaintiffs; but was instead deducted from each entrance fee refund. These precise amounts and the exact dates of the refunds/deductions are all known from spreadsheets provided by Defendants in discovery per this Court's orders. As the first component of damages, each class member is therefore entitled to those amounts.

The second component of Plaintiffs' damages – and we do mean damages – is pre-judgment interest as a matter of law. As explained in TruServ Corp. v. Morgan's Tool & Supply Co., Inc., 39 A.3d 253, 264 (Pa. 2012):

> [W]here a party's right to the payment of interest is not specifically addressed by the terms of a contract, a nonbreaching party to a contract may recover, *as damages,* interest on the amount due under the contract; again, this Court refers to such interest as prejudgment interest. The purpose of awarding *interest as damages*:
>
> is to compensate an aggrieved party for detention of money rightfully due him or her, and to afford him or her full indemnification or compensation for the wrongful interference with his or her property rights. The allowance of interest as an element of damages is not punitive, but is based on the general assumption that retention of the money benefits the debtor and injures the creditor. 25 C.J.S. Damages, § 80.
>
> Many jurisdictions have enacted statutory provisions for interest as damages. *Id.* at § 82. *In 1988, in Fernandez, supra, this Court adopted Section 354 of the Restatement (Second) of Contracts as the law of this Commonwealth with respect to the recovery of interest as damages in breach of contract actions. Section 354, titled "Interest As Damages," provides:*
>
> (1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled. (italics added)

The statutory rate of interest in Pennsylvania is 6% per annum. 41 Pa. Cons. Stat.§ section 202. Each class member is therefore entitled to pre-judgment interest at 6% interest per annum on the amount of the improper Deductions running from the date of the refund check to the date of the judgment.

The amount of the Deductions charged to each class member is itemized on spreadsheets prepared by Plaintiffs' Expert, Jesse Cooper. Exhibits U, V and W. His work is based on spreadsheets of the information provided by Defendants. Exhibits P, Q, R and S.

Mr. Cooper's Exhibits U and V cover residents whose refunds were net of the Vacancy Fee provided for in the challenged Vacancy Fee section of their RCE, i.e., refunds that varied because that Vacancy Fee depended on the varying amounts charged for appliance depreciation or

replacement, replacement of property etc. As explained in paragraphs 35 - 37 of the Appendix, the total damages for those residents who had "Variable" Deductions, are

a. For Sub-Class One -- $3,581,019+ $1,488,194 = $5,069,213

b. For Sub-Class Two -- $576,095 + $462,434 = $1,038,529

c. TOTAL DAMAGES --VARIABLE DEDUCTIONS = $6,107,742

Mr. Cooper's Exhibit W covers residents who accepted an offer made by Defendants in early 2019 to change their Vacancy Fee to a flat five percent of their entrance fee. As explained at paragraphs 31-33 of the Appendix, these residents were not told when the offer was made that this lawsuit was pending, which if successful would have saved them thousands of dollars because the Vacancy Fee deduction could not have included appliance depreciation or replacement of property. Mr. Cooper therefore calculated the difference between the average Vacancy Fee deducted as a flat five percent of the entrance fee ($15,865) and the average variable Vacancy Fee that would have been deducted if the challenged Deductions were disallowed ($6,848). The difference, $9,017, is the amount of damage calculated for each person who made an uninformed decision to accept a flat five percent deduction as the Vacancy Fee. See Appendix paragraphs 38-39.

Total damages for the 161 residents who chose a five percent Vacancy Fee -- 1,451,737.

TOTAL DAMAGES FOR BOTH VARIABLE AND FIVE PERCENT RESIDENTS

$6,107,742
$1,451,737

TOTAL $7,559,479

C. Violation of the CCPRDA (Count Two) vs Shannondell and Dell
(Appendix facts ¶¶ 39-48)

Count Two is based on the "Civil liability" section of the CCPRDA, 40 Pa. Cons. Stat. §3117:

> (a) Any person who, as a provider, or on behalf of a provider:
>
> > (2) enters into a contract for continuing care at a facility without having first delivered a disclosure statement meeting the requirements of this act to the person contracting for such continuing care
>
> shall be liable to the person contracting for such continuing care for damages and repayment of all fees paid to the provider, facility or person violating this act, less the reasonable value of care and lodging provided to the resident by or on whose behalf the contract for continuing care was entered into prior to discovery of the violation, misstatement or omission or the time the violation, misstatement or omission should reasonably have been discovered, together with interest thereon at the legal rate for judgments and court costs and reasonable attorney fees.
>
> (b) Liability under this section shall exist regardless of whether or not the provider or person liable had actual knowledge of the misstatement or omission.

The statute applies to both Shannondell as the provider and Dell as the Shannondell management company which acted "on behalf of a provider."[6]

Defendants entered RCAs with class members without having first delivered a disclosure statement meeting the requirements of section 3117. First, the "Disclosure Statement" section of the Act," 40 Pa. Cons. Stat. §3207 requires that at or before the time a resident signs an agreement with or provides money to a provider, the provider must deliver to the resident a disclosure statement

[6] The Definitions section, 40 Pa. Cons. Stat. §3203 defines the term "Manager" as "a person who operates a facility for the provider. So Dell is considered a Manager under the statute.

> "which shall contain all of the following information unless such information is in the contract, a copy of which must be attached to the statement:
>
> * * *
>
> (7) A description of all fees required of residents, including the entrance fee and periodic charges, if any.
>
> * * *
>
> (9) Certified financial statements of the provider, including:
>
> (i) A balance sheet as of the end of the two most recent fiscal years.
>
> (ii) Income statements of the provider for the two most recent fiscal years or such shorter period of time as the provider shall have been in existence.

Contrary to the requirements of this section, the Shannondell disclosure statements did not describe all fees required of residents: fees for appliance deprecation, for appliance replacement, for HVAC equipment, for replacement of cabinets, countertops and other Shannondell property and the charge for duct cleaning. They were not mentioned.

Second, the disclosure statements did not include the required financial statements. App ¶ 44.

Third, there is a complete failure disclose the terms of the entrance fee refund, let alone in "clear and understandable language" as required by the statute. The section titled "Resident's Agreement," 40 Pa. Stat. Ann. §3214, provides that a contract between a resident and a provider "shall be written in nontechnical language easily understood by a layperson and shall:"

> * * *
>
> (8) Provide in clear and understandable language, in print no smaller than the largest type used in the body of said agreement, the terms governing the refund of any portion of the entrance fee. (underline added) [7]

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[7] The Department's regulations which elaborate on the disclosure requirements relating to both the Disclosure Statement and the Resident's Agreement, 30 Pa. Code §151.1 et seq. are to the same effect 30 Pa. Code §151.9(b) provides:

(b) Readability. Documents given to residents and prospective residents, including disclosure statements and resident's agreements, shall be drafted in accordance with the following standards:

The RCA did not meet the requirements of this section because it did not disclose that the appliance and other fees described above would be deducted from the refund of the Entrance Fee.

Fourth, CCPRDA regulations provide that amendments to disclosure statements and resident's agreements "may be filed" with the Department at any time with a cover outlining the sections amended. 30 Pa. Code §§151.7 and 151.8.[8] Notice to the Department is "required," however, for "material changes in the financial or factual information" contained in the disclosure statement.

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(1) The language used shall be readable by a person of average intelligence and education.
(2) Information presented should be conveyed in a logical sequence and in a clear and direct fashion.
(3) Complex and compound sentences should be avoided.
(4) Words should convey their commonly understood meanings

[8] § 151.7. Disclosure statements.

(a) Disclosure statements shall contain the information and (40 P. S. § 3207) and the information required by this section.

* * *

(d) The certified financial statements required to be contained in disclosure statements, under section 7(a)(9) of the act (40 P. S. § 3207(a)(9)), shall be prepared in accordance with Chapter 147 (relating to annual audited insurers' financial report required).

(e) Amendments to disclosure statements may be filed with the Department at any time. A filing should be accompanied by a cover letter briefly outlining the sections of the disclosure statement amended. Changes in the operation of a provider or facility which require an amendment to a disclosure statement include, but are not limited to, the following:

* * *

(3) Other material changes in the financial or factual information contained in the disclosure statement or statement in support of the provider's original application for a certificate of authority. Explanatory material and copies of pertinent documents concerning

Defendants made material changes to their disclosure statement effective February 1, 2013 by eliminating Shannondell's responsibility to replace appliances and imposing deductions from entrance fee refunds for depreciation not to exceed replacement cost. They not only failed to notify the Department of these material changes. They actively misled the Department and the public by repeatedly filing letters after the amendments saying "No change in Resident Agreement statement."

Defendants' liability under section 3117 is entirely consistent with the "Purpose" section of CCPRDA. 40 Pa. Cons. Stat. §3202 states in pertinent part:

> The General Assembly recognizes that continuing-care communities have become an important and necessary alternative for the long-term residential, social and health maintenance needs for many of the Commonwealth's elderly citizens.
>
> The General Assembly recognizes the need for full disclosure with respect to the terms of agreements between prospective residents and the provider and the operations of such providers. (underlining added)

Damages for violation of the CCPRDA. Since the disclosure statement provided to incoming residents did not meet the requirements of the Act, all class members are entitled to damages and the return of all fees in amounts that exceeded the value of the care and lodging

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the material changes shall be filed with the Department at the time an amended disclosure statement is filed. (underlining added)

§ 151.8. Resident's agreement.

(a) Each resident's agreement shall contain the information required by section 14 of the act (40 P. S. § 3214) and the information required by this section

(b) Amendments to the resident's agreement may be filed with the Department at any time. The filing should be accompanied by a cover letter briefly outlining the sections of the resident's agreement amended.

they received from Shannondell. 40 Pa. Cons. Stat. §3117. Here, the reasonable value of care and lodging Defendants provided was equal to the monthly fees paid by the residents. The residents paid more than the cost of that care and lodging by the amount deducted from their Entrance Fee refunds to pay for appliances and other property that should have been paid for by Shannondell.

For the same reasons as explained regarding breach of contract, Plaintiffs are also entitled as a matter of law to interest on the amount of the deductions at 6% annually from the date of the net refund.

Total damages for violation of the CCPRDA, the same amount as for damages for breach of contract: $7,559,479.

Finally the CCPRDA entitles Plaintiffs to recover their costs and reasonable attorneys fees. These amounts would become the subject of a further motion if appropriate. P

D. Violation of the UTPCPL (Count One) (Appendix facts ¶¶ 49-62)

1. Through the Deceptive Refurbishment Sheet Which Accompanied the Refund, Defendants Created Misunderstanding as to Whether Shannondell Was Contractually Entitled to the Challenged Deductions

The Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §201-1 et seq. (1976), was designed to "end unfairness and deception in consumer transactions with the result that consumers would be placed on a more equal footing with sellers." Commonwealth v Monumental Properties, Inc., 459 Pa. 450, 474, 329 A. 2d 812, 824 (1974). If ever there was a situation calling for equal footing, it is this case involving a for-profit retirement business skimming millions of dollars from the entrance fee refunds owed to hundreds of deceased residents.

Section 201-2(4) of the Law defines "unfair or deceptive acts or practices" by listing twenty specific prohibited practices, and it adds as the twenty first, "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of misunderstanding or confusion." 73 Pa. Cons. Stat. §201-2(4)(xxi).

Section 201-9 creates a private right of action for "any person who purchases . . . services primarily for personal, household or family use . . . and thereby suffers any ascertainable loss of money . . . as a result of the use by . . . any person . . . of a method, act or practice" as defined in section 201-2(4). Like all sections of the Law this section is to be liberally construed. Monumental Properties, supra, 829 A. 2d at 816.

The deceptive conduct here was in the use of the Refurbishment Sheet. Under the circumstances in which it was used -- and on its face -- it created a likelihood of misunderstanding or confusion by making recipients believe that Shannondell was entitled to the Deductions.

The circumstances were that the recipient of the Entrance Fee refund was either the conduit to the beneficiary of the payment or the beneficiary himself, invariably a relative of a deceased resident. For the beneficiary, the refund would be a windfall. Knowing that it would amount to hundreds of thousands of dollars, the recipient would await the payment of the refund for an average of 14 months after the resident died. With the anticipation from such a delay he would eventually receive the check showing an amount deducted from the refund for appliance fees that was very small compared to the amount of the check – less than 2% on average -- an amount that would not cause the recipient to pause before depositing the check.

On its face the one page Sheet was set up so the deduction for the appliance fee would appear innocuously as simply one of the line-items in a business-like accounting for the refund

amount. It was placed such that it did not stand out among approximately 10 other line-items describing deductions from the refund for work done to the unit and amounts owed to Shannondell for unpaid monthly fees, garage fees or other expenses. Nor did it stand out among another six items showing the arithmetic to arrive at the Balance of Refund due.

When listed as "Shannondell Appliance Depreciation Fee" the line said "STANDARD" as if this was an entirely normal and regular charge that should not be questioned. When described as "Appliance Replacement" it was accompanied with invoices for each of the replaced appliances paid by Shannondell creating the impression that it should be reimbursed as a matter of routine.

Section VII(3) of the RCA said that any amounts owed to Meadows[9] were "to be subtracted from the Entrance Fee refund at the time it is paid." A line item on the Sheet for the "Amount Due Meadows" paraphrased that language in the "Items Repaired" column. It said "Entrance Fee Refund will be reduced by any outstanding balance due to the Meadows at Shannondell."

Unlike the "Amount Due Meadows" line item, the Shannondell Appliance Fee item did not suggest any term in the RCA as a basis for the deduction, whether by quoting, paraphrasing, or otherwise referring to the RCA. Shannondell therefore avoided referring to the "restoration to its original condition" language in section VII(3) of RCA that it was relying upon to charge for depreciation. Unaware of that language, any refund recipient would be sidetracked from wondering: How could depreciation, merely an accounting concept, be considered a "repair?" How did depreciation have anything to do with the physical activity involved in a "general

[9] App. ¶53. Meadows was an assisted living and nursing care center at Shannondell at Valley Forge where some residents lived once they were no longer capable of independent living.

restoration of the residence to its original condition?" Why was Shannondell referring to an Appliance Depreciation Fee as "STANDARD."

Of course, by not referring to the "restoration" term of the RCA, Defendants were also avoiding the disclosure that its meaning came from the earlier modification section of the RCA that used the same language. So the Refurbishment Sheet was deceptive in not providing context from the RCA. It thereby created misunderstanding by the recipient on whether Shannondell actually had the contractual right to impose the deductions. See Monument Properties, supra, 329 A. 2d at 829 (the Consumer Protection Law contemplates that in 'appropriate circumstances, a court may require affirmative disclosures by a seller to prevent misrepresentation and deception . . ..', citing Commonwealth v. Foster, 57 Pa. D. & C.2d 203, 208 (C.P. Allegheny County 1972).

Finally, the Refurbishment Sheet did not say that Shannondell had in its discretion decided to make the Appliance Fee the lower of two alternative amounts –- depreciation or replacement -- both subject to a $7500 cap. Nor did it say that for purposes determining the lower of the two amounts, Shannondell considered each HVAC condenser unit atop the building occupied by the resident to be an "appliance."[10]

The cost of replacing just the appliances in a kitchen was approximately $4016[11]. A new HVAC unit cost $4000- $5000.[12] The resident was therefore never told that but for the inclusion of a new HVAC unit in the calculation of appliance replacement cost, that cost would have been lower than the depreciation charge. E.g. If replacement of Baer "appliances" was only the cost

[10] Ex. L, Darrenkamp 3/17/22 hearing testimony p. 9, 23.
[11] Tessler Statement, Ex. H; Ex M, Darrenkamp 1/14/22 hearing testimony p.102, 106.
[12] Ex M, Darrenkamp testimony p.104

of his kitchen appliances, the $4016 cost of replacing those appliances would have been less than the $7500 he was charged for depreciation.

2. The Deception That Shannondell Used to Impose the Deductions Was the Direct Cause of Plaintiffs' Losses Such That Further Proof of Reliance Should Not Be Not Necessary

As a general rule reliance must be proven as an element of liability for violation of the UTPCPL. See Debbs v Chrysler Corp., 202 PA Super 326, 810 A. 2d 137, 156-158 (2002). Reliance satisfies its requirement that a consumer can recover only for "ascertainable loss . . . as a result of" a deceptive act or practice. The phrase "as a result of" indicates the intent of the Legislature to require a causal connection between the unlawful practice and a plaintiff's loss. DiLucido v Terminix Int'l, Inc., 450 Pa. Super. 393, 402, 676 A. 2es 1237, 1241 (1996), abrogated on other grounds by Gregg v. Ameriprise Fin., Inc., 245 A.3d 637 (Pa. 2021).

Here class members lost money by being shortchanged on the amount of their entrance fee refunds by the amounts of the Deductions shown on the deceptive Refurbishment Sheet. They were not asked in advance to agree to the Deductions so that Shannondell then take their money. Shannondell had taken the money before residents got their checks. They necessarily relied on the Refurbishment Sheet by cashing the check thinking that there was no reason to challenge the STANDARD deductions.

That was the essence of the fraudulent concealment. Why should each class member have to go further and say that he relied on the Sheet or would not have accepted the Deductions if the Sheet was not deceptive? Such testimony would be mere surplusage as to the causal connection between the deceptive Sheet and their loss.

3. Even If Further Evidence of Reliance Were Required, A Finding of a Confidential Relationship Between Plaintiffs and Defendants Would Give Rise to a Presumption of Reliance in Plaintiff's Favor

If a defendant has a fiduciary or confidential relationship with the plaintiff, the fiduciary has the burden to prove the validity of the transaction. Young v. Kaye, 443 Pa. 335, 342, 279 A.2d 759, 763 (1971):

> When the relationship between persons is one of trust and confidence, the party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage. McCown v. Fraser, 327 Pa. 561, 192 A. 674 (1937); Null's Estate, 302 Pa. 64, 153 A. 137 (1930); Popovitch v. Kasperlik, 70 F.Supp. 376 (W.D.Pa.1947); see generally 17 C.J.S. Contracts s 184 (1963). This well settled doctrine, founded on strong considerations of public policy, renders inapplicable the general rule requiring an affirmative showing of fraud. *To the contrary, transactions between persons occupying a confidential relationship are prima facie voidable, and the party seeking to benefit from such a transaction must demonstrate that it was 'fair, conscientious, and beyond the reach of suspicion.'* Leedom v. Palmer, 274 Pa. 22, 25, 117 A. 410, 411 (1922). See also McCown v. Fraser, supra, 327 Pa. at 564, 192 A. at 676. (italics added)

Accord: Basile v. H & R Block, Inc., 777 A.2d 95, 107 (Pa. Super. Ct. 2001). (prima facie evidence of confidential relationship shown on summary judgment, if believed at trial, binds defendant to having fiduciary duty as a matter of law.)

As in Basile, supra, the general principle that a fiduciary has the burden of proving the fairness of the transaction includes the fiduciary's burden to prove the reliance element of a UTPCPL claim. This follows from the principle that if there is a fiduciary relationship, the plaintiff is excused from proving reliance because it is presumed.

> As we recognized in our prior disposition, *see Basile II,* 729 A.2d at 584, the obligations of a defendant bound by a fiduciary duty relieve the plaintiff of the burden to prove reliance in claims it asserts for violation of the UTPCPL. *Cf. Young,* 279 A.2d at 759 (stating that where fiduciary duty is established, general rule requiring affirmative showing of fraud is inapplicable). Accordingly, if upon remand the Plaintiffs succeed in demonstrating a confidential relationship with Block, their reliance, inherent in a finding of fiduciary duty, will be presumed for purposes of claims under the UTPCPL. *See Basile II,* 729 A.2d at 584.

Basile v. H & R Block, Inc., 777 A.2d 95, 107–08 (Pa. Super. Ct. 2001).

4. A Presumption of Reliance Exists Here Because Plaintiffs Had A Confidential Relationship With Shannondell When the Refunds Were Paid

The question then becomes whether Defendants had a fiduciary relationship with plaintiffs at the time the refunds were made.

A fiduciary duty can arise based on a finding that the parties have a "confidential relationship." Basile v. H & R Block, Inc., 563 Pa. 359, 372–73, 761 A.2d 1115, 1122–23 (2000). In Weir by Gasper v. Est. of Ciao, 521 Pa. 491, 504–05, 556 A.2d 819, 825–26 (1989) the Pennsylvania Supreme Court explained:

> a confidential relationship exists when the circumstances make it certain that the parties do not deal on equal terms; where, on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed. In both situations an unfair advantage is possible. Leedom v. Palmer, 274 Pa. 22, 25, 117 A. 410, 411 (1922). **Such a relation is created between two persons when it is established that one occupies a superior position over the other; intellectually, physically, governmentally, or morally, with the opportunity to use the superiority to the other's disadvantage.** Cwynar, 388 Pa. at 653, 131 A.2d at 137. Where a confidential relationship exists, the law presumes the transaction voidable unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances and beyond reach of suspicion. Leedom; Ruggieri v. West Forum Corp., 444 Pa. 175, 282 A.2d 304 (1971); Young v. Kaye, 443 Pa. 335, 279 A.2d 759 (1971). (emphasis added)

The "disparity in position between the parties" is the key factor in determining whether a fiduciary-in-fact relationship developed between parties in an otherwise arm's-length business relationship. Id. at 835.

The contours of a "confidential relationship" were well summarized in the Pennsylvania Supreme Court's opinion on a second appeal in Basile v. H & R Block, Inc., 777 A.2d 95, 178 (2001). In remanding to the Superior Court the issue of whether a confidential relationship existed on the facts of the case, the Court explained:

> Our Supreme Court has acknowledged that **"[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line."** In re Estate of Scott, 455 Pa. 429, 316 A.2d 883, 885 (1974). The Court has recognized, nonetheless, that "[t]he essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Id. Accordingly, "[a confidential relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed[.]" Frowen v. Blank, 493 Pa. 137, 425 A.2d 412, 416–17 (1981)(emphasis added).

Here the connection between Shannondell and the former resident at the time the refund was paid had important characteristics of a confidential or fiduciary relationship. Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP, 281 Conn. 84, 109, 912 A.2d 1019, 1035 (2007) examined whether the developer of a retirement community had a fiduciary duty to its residents that could support the tolling of the statute of limitations. The Supreme Court of Connecticut reasoned that a jury could find that the developer did have that duty based on ample evidence concerning the advanced age of the residents, the fact that they had provided the facility with confidential medical and financial information, and that their payment of their Entrance Fee was likely the last major investment of their lives intended to provide for their future home and medical care. Id., 912 A. 2d at 1035. *The same factors evidence the existence of a confidential*

relationship in this case. See Appendix ¶¶ 49-54. *All of the facts recited in those paragraphs are from Defendants' deposition testimony. None can be disputed.*

Here there existed a gross disparity in the strength of the parties, the disparity which Pennsylvania law focuses on in analyzing the confidentiality of a relationship. Shannondell held the Resident's money. The Resident was dead. The ultimate recipient of the refund was not even a party to the RCA, an agreement signed on average nine years earlier. Yet he was suddenly going to be hundreds of thousands of dollars richer by receiving money that was not previously his. He had no incentive to scrutinize appliance-related deductions of less than 2 percent of the entrance fee for a precise accounting.

This was especially so because, in the months after the Resident died, Shannondell had sole access to the unit to determine if appliances "needed" replacement. Shannondell also had complete discretion to apply a self-serving interpretation of the Vacancy Fee definition on what it meant to "restore the unit to its original condition." If knowledge is power, then Shannondell was strong; the recipient was weak. The Resident's representative received the Entrance Fee refund entirely at the grace of Shannondell.

This case therefor calls for application the principle that whether a confidential bond exists between two parties "cannot be reduced to a catalogue of specific circumstances." Basile, supra. The circumstances here are that Shannondell abused its superior position vis-à-vis members of the class. It was supposed to distribute Entrance Fees net of only bona fide deductions. Its meager itemization of the Deductions was inadequate. It was perfectly situated to obscure the truth and provide misleading information to refund recipients for its own benefit, and it took advantage of its superior knowledge to do just that.

Plaintiffs are therefor entitled to a presumption of reliance that excuses their having to further prove it as an element of their UTPCPL claim.

5. Damages for violation of the UTPCPL

Under the Civil Penalties section of the statute, 73 Pa. Cons. Stat. §201-8, damages are the Deductions plus interest at 6% annually. Plaintiffs are entitled to attorneys fees and costs, and at the court's discretion, up to three times the actual damages sustained. This case calls for a multiplier being applied to the damages suffered. That multiplier must be rationally applied, but "should not be closely constrained by the common-law requirements associated with the award of punitive damages." Schwartz v Rocky, 593 Pa. 536, 556 (2007). At the appropriate time, we will urge the Court to award treble damages in the amount of $22,678,000.

E. The Statutes of Limitation Were Tolled for All Claims as a Result of Defendants' Fraudulent Concealment in the Context of the parties Confidential Relationship and the Burden of Proving Otherwise For Individual Class Members Shifts to Defendants
(Appendix facts ¶¶ 63-71)

The statutes of limitation are four years for breach of contract, 42 Pa. Cons. Stat. Ann. § 5525; six years for violation of the PCCPRDA, 40 Pa. Cons. Stat. §3217 and six years for violation of the UTPCPL, Gabriel v. O'Hara, 368 Pa. Super. 383, 395–96, 534 A.2d 488, 494–95 (1987). Absent tolling the statutes would begin to run on the dates each class member received his entrance fee refund with the Deductions accompanied by the deceptive Refurbishment Sheet.

1. The Law on Tolling as a Result of Fraudulent Concealment

Plaintiffs are not trying to establish tolling by relying in their case in chief on the discovery rule that individual class members by exercising due diligence could not have realized the facts

giving rise to their claims. The tolling argument rests instead exclusively on an estoppel theory based on proof of Defendants conduct amounting to fraudulent concealment.

Gustine Uniontown Assocs., Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc., 2006 PA Super 12, 892 A.2d 830, 835, n 2 (2006):

> "The discovery rule is distinct from the issue of whether a party is equitably estopped from invoking the statute of limitations. Fine v. Checcio, 582 Pa. 253, 870 A.2d 850 (2005). The discovery rule operates to toll the statute of limitations during the period the plaintiff's injury or its cause was neither known nor reasonably knowable to the plaintiff. Id. The separate doctrine of fraudulent concealment tolls the statute based on an estoppel theory and provides that a that a defendant may not invoke the statute of limitations if through either intentional or unintentional fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his duty of inquiry into the facts. Id. Thus, the former doctrine involves a plaintiff's lack of knowledge and *the latter doctrine pertains to a defendant's conduct after the cause of action arose."* (italics added)"

Once Plaintiffs show tolling due to fraudulent concealment, the burden shifts to Defendants to establish that tolling is nonetheless inapplicable because of plaintiffs' failure to exercise due diligence. Fine v Checcio, 582 PA 253, 870 A. 2d 850, 861 (as statute of limitations tolled due to fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause). See generally, Weir by Gasper v. Est. of Ciao, 521 Pa. 491, 504–05, 556 A.2d 819, 825 (1989) (Where a confidential relationship exists, the law presumes the transaction voidable unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances and beyond reach of suspicion.) ; Frowen v. Blank, 493 Pa. 137, 144, 425 A.2d 412, 416, 418 (1981); Young v. Kaye, 443 Pa. 335, 342-43, 279 A.2d 759, 763 (1971).

2. The Facts Compel a Finding of Fraudulent Concealment

The Court has already ruled that Plaintiffs have established prima facie that Defendants' conduct amounted to fraudulent concealment.

The Court couched its ruling redefining the class as having viewed the evidence "in the light most favorable to Plaintiff." This meant that in order to prevail on the merits, a jury would have to believe Plaintiffs' evidence. But that evidence consists exclusively of facts about Defendants' conduct. There is no denying that conduct. No reasonable juror could find otherwise. The evidence of fraudulent concealment cannot be seen in any "light" less favorable to Plaintiffs or at all favorable to Defendants.

We refer to the facts in the Appendix at paragraphs 63-78. We challenge Defendants a) to show that any of these facts are unsupported in the record; or b) show that any of these facts could only be credited based on credibility; or c) produce any evidence common to all class members that would refute them.

3. The Existence of a Fiduciary or Confidential Relationship Further Supports Tolling

The earlier discussion that a confidential relationship existed to entitle Plaintiffs to a presumption of reliance for the UTPCPL claim also applies to support tolling based on fraudulent concealment.

Where the confidential or fiduciary nature of a relationship would make it inequitable to permit the action to be barred by limitations, estoppel will toll the statute of limitations. Annotation, Fiduciary or Confidential Relationship as Affecting Estoppel to Plead Statute of Limitations, 45 A.L.R.3d 630, 645 § 10[a] (1972). Schwartz v. Pierucci, 60 B.R. 397, 402–03 (E.D. Pa. 1986) explains that

> "[w]here a fiduciary commits an act of fraud against his principal, the statute of limitations will be tolled, since the very position the fiduciary is in, prohibits the principal

> from uncovering the fraud. Furthermore, the fiduciary, because of his position of trust, would have an affirmative duty to the principal to disclose the fraud. Absent a disclosure, the fiduciary commits an act of continual covering up of the fraud."

See also Cantor v. Perelman, 414 F.3d 430, 440 (3d Cir. 2005); Claude Worthington Benedum Found. v. Harley, No. CIV.A. 12-1386, 2013 WL 2458457, at *7 (W.D. Pa. June 6, 2013); Wise v. Mortg. Lenders Network USA, Inc., 420 F. Supp. 2d 389, 395 (E.D. Pa. 2006); Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel, 832 F. Supp. 922, 935 (E.D. Pa. 1993).

Even where courts have stopped short of finding that a confidential relationship is itself an independent basis for tolling, they nonetheless reason that it is an important factor weighing in favor of finding tolling based on either fraudulent concealment or the discovery rule. Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP, 281 Conn. 84, 106-110, 912 A.2d 1019, 1034-1036 (Conn. 2007); Gurfein v. Sovereign Grp., 826 F. Supp. 890, 919 (E.D. Pa. 1993); OBG Tech. Servs., Inc. v. Northrop Grumman Space & Mission Sys. Corp., 503 F. Supp. 2d 490, 505 (D. Conn. 2007).

Conclusion and Relief Requested

The motion for summary judgment should be granted. We summarize the relief called for by the above arguments.

For Sub-Class One the court should:

- grant summary judgment in favor of residents charged a Variable Vacancy Fee and against Shannondell for breach of the RCA (Count Three) and award damages in the total amount of $5,069,213.
- grant summary judgment in favor of Plaintiffs charged a Variable Vacancy Fee against both Shannondell and Dell for violation of the CCRDA (Count Two), award

damages in the total amount of $5,069,213 and award Plaintiffs costs and attorneys fees

- grant summary judgment on Counts Two and Three in favor of Plaintiffs who received a flat Vacancy Fee of five percent of their entrance fee in the amount of $1,451,737
- grant summary judgment on the claim for violation of the UTPCPL (Count One) by ruling
    - that Defendants engaged in deceptive acts and practices;
    - that all class members either relied on that deception by cashing their refund checks or are entitled to a presumption of reliance;
    - that compensatory damages are awarded to Plaintiffs in the total amount of $6,520,950;
    - that up to treble damages be awarded to Plaintiffs; and
    - that Plaintiffs be awarded costs and attorneys fees.

For Sub-Class Two the court should:

- grant summary judgment on the breach of contract claim (Count Three) Court by ruling
    - that Shannondell breached the RCA and
    - that the statute of limitations was tolled by Defendants' fraudulent concealment.

      that Plaintiffs are awarded damages in the amount of $1,038,529
- grant summary judgment on the CCPRDA (Count Two) by ruling
    - that Defendants violated the statute and

- that the statute of limitations was tolled by Defendants' fraudulent concealment.
- that compensatory damages are awarded to Plaintiffs in the total amount of $1,038,529.
- that Plaintiffs are awarded their costs and attorneys fees

- grant summary judgment on the UTPCPL claim (Count One) by ruling
  - that Defendants engaged in deceptive acts and practices
  - that all class members either relied on that deception by cashing their refund checks or are entitled to a presumption of reliance;
  - that the statute of limitations was tolled by Defendants' fraudulent concealment;
  - that compensatory damages are awarded to Plaintiffs in the total amount of $1,038,529.
  - that up to treble damages be awarded to Plaintiffs; and
  - that Plaintiffs be awarded costs and attorneys fees.

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Dated: January 12, 2024