

2014 WL 3740255 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.
San Francisco Division

Arville WINANS, by and through his Guardian ad litem, Renee Moulton,
on his own behalf and on behalf of others similarly situated, Plaintiff,

v.

EMERITUS CORP. and Does 1 through 100, Defendants.

No. 3:13-cv-03962-SC.
April 17, 2014.

**1) Plaintiff's Notice of Motion for Clarification of March 5, 2014 Order; 2)
Memorandum of Points and Authorities in Support Thereof; 3) (Proposed) Order**

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Judge: Hon. [Samuel Conti](#).

DATE: May 30, 2014

TIME: 10:00 a.m.

PLACE: Courtroom 1

TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on May 30, 2014 at 10:00 a.m., or as soon thereafter as the parties may be heard, in the Courtroom of the Honorable Samuel Conti in Courtroom 1 at San Francisco Courthouse, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Arville Winans ("Winans"), by and through his guardian *ad litem*, Renee Moulton ("Moulton"), will, and hereby does, move this Court for clarification of its Order of March 5, 2014 to indicate that Plaintiff may seek injunctive relief under [Cal, Civ. Code sec. 1770 et. seq.](#) and Cal. W&I Code sec. 15610.30 et seq., including but not limited to injunctive relief enjoining Defendant Emeritus Corporation ("Emeritus") from making the misrepresentations and misleading statements at issue herein, and requiring Defendant Emeritus to disclose all material facts about how it uses, or does not use, its resident evaluation system and how it determines staffing at its facilities. Plaintiff respectfully asks the Court to confirm that both forms of requested relief remain part of this case.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, all pleadings and papers in this action, and upon such other matters as may be presented to the Court.

DATED: April 17, 2014

<<signature>>

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I. Plaintiff Seeks Clarification of Court's Order Regarding Injunctive Relief Sought Under the **Elder Financial Abuse Statute and the CLRA**

Plaintiff brings this motion seeking clarification of the Court's Order Granting in Part and Denying in Part Motion to Dismiss entered on March 5, 2014 ("Order"). Specifically, Plaintiff seeks clarification regarding his request for particular and targeted injunctive relief to prohibit **Elder Financial Abuse**, Cal. W & I Code § 15610.30 *et seq.*, and under the Consumers Legal Remedies Act, Cal. Civ. Code § 1770 *et seq.* ("the CLRA").

Plaintiff *does not* seek clarification on the Court's decision to abstain from determining whether Plaintiff and the putative class are entitled to an injunction requiring Defendant "to budget for and provide staffing adequate to meet its residents' aggregate assessed needs," under Cal. B&P Code § 17200 *et seq.*, the Unfair Competition Law ("the UCL") and the CLRA.

However, the Court did not address Plaintiff's specific request for injunctive relief under the **Elder Financial Abuse** law, nor did it directly address Plaintiff's request for injunctive relief under the CLRA insofar as Plaintiff sought to enjoin Defendant from "promising **elders**, dependent adults, and their family members that Emeritus will provide the care and personal services needed by each resident as assessed in their comprehensive evaluation and from charging its residents based on this false promise." Plaintiff's First Amended Class Action Complaint ("FAC") at ¶113 and Prayer at ¶10.

Such injunctive relief differs significantly from asking the Court to order that Defendant provide staffing adequate to meet residents' assessed needs as required by 22 CCR § 87411(a). It does not present the type of issues upon which the Court of Appeal based its equitable abstention decision in *Alvarado v. Selma Convalescent Hosp.*, 153 Cal.App.4th 1292 (2007). Similarly, it does not raise the concerns which led this Court to invoke the equitable abstention doctrine. Plaintiff seeks an injunction to prohibit Emeritus from making false or misleading statements to Plaintiff and the public and from basing the fees charged to its

residents on those statements. This type of injunctive relief does not 1) “implicate complex economic or policy decision best handled by the legislature or an administrative agency;” or 2) “impose an undue burden on the trial court.” Order at 7.

Plaintiff has requested that this Court enjoin Defendant from promising **elders** and their family members that Emeritus will provide the personal care services needed by each resident as determined by their resident assessments, and from continuing to charge residents based on their Levels of Care as determined by wE Care. The prayed injunction would require Defendant to disclose to Plaintiff and the putative class members the material facts about how Emeritus actually determines and provides staffing at its facilities--i.e., based on pre-set budgets designed to meet profit objectives.

II. This Court Would Not Need to Perform the Functions of an Administrative Agency

To grant this form of injunctive relief, the Court would not need to perform the functions of the California Department of Social Services or to determine whether Defendant meets the “adequate staffing” requirements of [22 CCR § 87411\(a\)](#). Rather, once Plaintiff has proven that Emeritus uses its wE Care system only to justify resident fees, but not to provide staffing at its facilities, the Court can order an injunction that would 1) prevent Emeritus from representing that resident evaluations determine the amount of care that will be provided, 2) require Emeritus to disclose that staffing is based on pre-set labor budgets and corporate profit margins rather than resident evaluations and the aggregate care levels determined by those evaluations; and 3) prohibit Emeritus from charging its residents monthly fees based on their wE Care evaluation results. The Court therefore would not be required to make any determinations regarding whether Emeritus meets the “sufficient staffing” requirements under [22 CCR § 87411\(a\)](#) or to direct Emeritus to provide such staffing,

Issuing an injunction that requires Defendant to tell the truth and to disclose the material facts about how Emeritus uses (or does not use) its resident evaluations does not “implicate complex economic or policy decision best handled by the legislature or an administrative agency”. The California legislature has already made the determination that businesses may not use “unfair methods of competition and unfair or deceptive acts or practices” in the sale of goods or services to a consumer. [Cal. Civ. Code § 1770\(a\)](#). The legislature did not exempt assisted living facilities from the CLRA. In fact, the legislature included provisions, [Cal. Civ. Code §§ 1780\(b\)](#) and [3345](#), which increase the penalties for transactions directed at senior citizens and persons with disabilities, the very class of persons served by assisted living facilities. The legislature underscored the importance of preventing the behavior prohibited under the CLRA by expressly authorizing many forms of relief, including “An order enjoining the methods, acts, or practices.” [Cal. Civ. Code § 1780\(a\)\(2\)](#).

Similarly, in enacting the **elder financial abuse** statute, Cal. W&I Code § 15610.30, the California legislature has already made the important policy decision of prohibiting persons or businesses from taking the property of an **elder** or dependent adult “for a wrongful use or with intent to defraud.” W&I Code § 15610.30(a)(1). Assisted living facilities are not exempted from this prohibition, and logically so, as their target population is the protected class under the act. The legislature provided that violations of the **elder abuse** statute would entitle victims to “compensatory *and all other remedies otherwise provided by law*” Cal. W&I § 15657.5(a) (emphasis added). Thus, the remedies explicitly listed under Cal. W&I § 15657.5(a) are not exclusive. Another Court in this district so noted in deciding that, while the plaintiff had not met the conditions necessary to receive *enhanced* compensatory damages specified in the statute, she was not prevented from seeking regular compensatory damages which were not specified. *Sakai v. Merrill Lynch Life Ins. Co.*, 2008 U.S. Dist LEXIS 69420 (N.D. Cal. Sept. 10, 2008). This same reasoning applies to injunctive relief.

The California Supreme Court has considered the availability of an injunction when a statute lists specific remedies, but not injunctive relief. *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110 (1947). The *Orloff Court* rejected the defendant's argument that because the right had been created by statute, the only remedies available were those listed in the statute. *Id.* at 322. Noting that the statute ([Cal. Civ. Code § 54](#)) did “not expressly exclude the availability of preventative -- specific -- injunctive relief”, the Court held that injunctive relief was not precluded, provided it was appropriate under what is now [Cal. Civ. Code § 3422](#). *Id.* at 117-18. [Cal. Civ. Code § 3422](#) permits the issuance of an injunction “where pecuniary compensation would not afford

adequate relief” or “where the restraint is necessary to prevent a multiplicity of judicial proceedings.” [Cal. Civ. Code § 3422 \(1\) and \(3\)](#). Both factors are met here,

III. The Injunctive Relief Sought Will Not Impose an Undue Burden on the Court

The injunctive relief requested will not “impose an undue burden on the trial court,” The Court need not make determinations of what constitutes “sufficient staffing” at Defendant’s facilities in order to find that it has misrepresented its resident evaluation system and failed to disclose that Emeritus does not use wE Care to determine staffing at its facilities, or that Defendant continues to charge residents based on those misrepresentations and misleading statements. Enjoining a defendant from misrepresenting its products or services is well within this Court’s expertise. It is something federal courts have been doing for more than 100 years. [William R. Warner & Co. v. Eli Lilly & Co.](#), 265 U.S. 526, 531-33 (1924) (to prevent future acts of unfair competition and deception, Court directs lower court to issue injunction requiring that defendant’s packaging “bear labels clearly distinguishing [defendant’s] bottled product from the bottled product of” plaintiff, as well as affirmatively stating that defendant’s product shall not be used to fill prescriptions calling for plaintiff’s product); [Herring-Hall-Marvin Safe Co. v. Hall’s Safe Co.](#), 208 U.S. 554, 560 (1908) (enjoining defendant from using the name “Hall” in its marketing or labeling unless accompanied by disclaimer that defendant is not the original “Hall’s Safe and Lock Company”); [Singer Mfg. Co. v. June Mfg. Co.](#), 163 U.S. 169, 204 (1896) (enjoining defendant from using the word “Singer” in its marketing without clear disclaimers that the machines are not made by the Singer Manufacturing Company).

An injunction prohibiting further misrepresentations and misleading statements, or charges based on Emeritus’ misrepresentations and misleading statements, and requiring that Emeritus disclose material facts is the type of order that federal courts are qualified to craft and that are routinely issued when the facts at trial support such an order. See, e.g., [Stanley Black & Decker, Inc. v. D&L Elite Invs., LLC](#), 2013 U.S. Dist. LEXIS 101434, p. 4-5 (N.D. Cal. July 19, 2013) (finding defendant in contempt of the Court’s previously issued injunction prohibiting it from marketing, advertising, selling or distributing counterfeit batteries with Black & Decker’s labels and issuing sanctions); [Disney Enters. v. Tran](#), 2013 U.S. Dist. LEXIS 62548 (N.D. Cal. May 1, 2013) (issuing injunction prohibiting defendant from using unlicensed Disney characters on its inflatable bounce houses); [Coach, Inc. v. Diana Fashion](#), 2011 U.S. Dist. LEXIS 143182, 13-14 (N.D. Cal. Dec. 13, 2011) (enjoining defendant from using Coach trademarks in connection with the sale and offer of sale of its products); [SEC v. Jasper](#), 883 F. Supp. 2d 915, 929 (N.D. Cal. 2010) (following jury finding that defendant committed securities fraud, district court entered injunction permanently enjoining him from violating federal securities laws); [SEC v. Hilsenrath](#), 2009 U.S. Dist. LEXIS 58930, *8 (N.D. Cal. 2009) (following a guilty plea and conviction for securities fraud, district court entered injunction permanently barring defendant from violating federal securities laws); [Rivera v. Bio Engineered Supplements & Nutrition, Inc.](#), 2008 U.S. Dist. LEXIS 95083, *10-12 (C.D. Cal. 2008) (recognizing the suitability of injunctive relief in case alleging false advertising and violations of Cat, B&P § 17200).

IV. Without an Injunction Enjoining Emeritus from Further Misrepresentations and Misleading Statements, and Requiring Disclosure of Material Facts, Plaintiff and the Putative Class Members Face a Real and Immediate Threat of Repeated Injury

Defendant has never disclosed to Plaintiff or the putative class members the true facts regarding how it calculates and provides staffing at its facilities. In fact, Emeritus conceals these calculations from its own employees. FAC at ¶¶ 37-38. Plaintiff continues to reside in an Emeritus facility, and his monthly charges are still purportedly based on his wE Care evaluation. FAC at ¶¶ 8, 54-58. Plaintiff and the putative class members face an immediate threat of repeated injury, because Defendant continues to misrepresent and conceal the facts about how it uses evaluations and staffs facilities from its current residents. [Clark v. City of Lakewood](#), 259 F.3d 996, 1007-8 (9th Cir. Wash. 2001). Further, Defendant continues to charge Plaintiff and the putative class members monthly fees based on these misrepresentations and misleading statements. An injunction enjoining Defendant to disclose the material facts about how it uses its resident evaluations and how it determines staffing at its facilities would provide Plaintiff and the putative class members the information necessary to decide whether or not to stay at an Emeritus

facility or to re-negotiate their monthly rates. Compensatory damages are not sufficient to provide the necessary relief to the Plaintiff and the putative class members who are current residents. Unless Emeritus is ordered to make such disclosures and prohibited from charging residents based on misrepresentations and misleading statements, it will continue to deprive Plaintiff and other **elders** and dependent adults of money they are entitled to, money that they rely on for their care and basic life needs.

V. Conclusion

For the reasons stated herein, Plaintiff respectfully requests that this Court clarify its Order of March 5, 2014 to indicate that Plaintiff may seek injunctive relief under the CLRA and the **Elder Financial Abuse**, including but not limited to injunctive relief enjoining Defendant Emeritus from making the misrepresentations and misleading statements at issue herein, and requiring Defendant Emeritus to disclose all material facts about how it uses, or does not use, its resident evaluation system and how it determines staffing at its facilities. Plaintiff respectfully asks the Court to confirm that both forms of requested relief remain part of this case.

DATED: April 17, 2014

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