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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES, NORTHWEST – VAN NUYS**

12 ADELE FRANZ, an individual; MELISSA)
13 FRANZ, an individual; and GINA)
14 MARTENSON, an individual,)

15 Plaintiff,)

16 v.)

17 MOTION PICTURE & TELEVISION)
18 FUND, a business entity, form unknown;)
19 SAEED HUMAYUN, M.D., an individual;)
20 JOAN CAREY, R.N., an individual; and)
21 DOES 1 through 100, inclusive,)

22 Defendants.)

CASE NO.: LC076641

**PLAINTIFFS' OPPOSITION TO
DEFENDANT JOAN CAREY'S MOTION
TO STRIKE PORTIONS OF THIRD
AMENDED COMPLAINT**

**Submitted with Declaration of James R.
Gillen, Esq.**

Hearing:
Date: October 3, 2007
Time: 9:00 a.m.
Dept.: "B"

23 COMES NOW Plaintiffs ADELE FRANZ, MELISSA FRANZ and GINA MARTENSON and
24 hereby submit their Opposition to Defendant JOAN CAREY'S Motion to Strike Portions of Plaintiffs'
25 Third Amended Complaint. Defendants MOTION PICTURE & TELEVISION FUND and SAEED
26 HUMAYUN, M.D. have submitted an improper and tardy Notice of Joinder, which for the reasons
27 contained hereinafter, cannot be considered.
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. STATEMENT OF RELEVANT AND ALLEGED FACTS 4

III. PLAINTIFFS HAVE SPECIFICALLY PLED ALL OF THE SUBJECT CAUSES OF ACTION – WILLFUL MISCONDUCT, ELDER ABUSE, INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS AND FRAUD (NEGLIGENT MISREPRESENTATION). 6

 A. Willful Misconduct (No. 2) 7

 B. Elder Abuse (No. 3) 9

 C. Intentional Inflection of Emotional Distress (No. 4) 10

 D. Fraud (Negligent Misrepresentation) (No. 5) 10

IV. THE PRAYER PROPERLY REQUESTS “PUNITIVE DAMAGES,” AS PLAINTIFFS HAVE SUFFICIENTLY PLED CAUSES OF ACTION PERMITTING SAME 10

 A. Willful Misconduct (No. 2); Intentional Inflection of Emotional Distress (No. 4); Fraud (Negligent Misrepresentation) (No. 5) 10

 B. Elder Abuse (No. 3) 12

V. THE PRAYER FOR RELIEF PROPERLY REQUESTS “TREBLE DAMAGES,” AS PLAINTIFFS HAVE PROPERLY PLED CAUSES OF ACTION PERMITTING SAME 12

VI. CONCLUSION 13

TABLE OF AUTHORITIES

California Cases:

Angie M. v. Superior Court, 37 Cal.App.4th 1217, 1224, 4 Cal.Rptr.2d 197 (1995) 8

Central Pathology Serv. Med. Clinic v. Superior Court, 3 Cal.4th 181, 10 Cal.Rptr.2d 208 (1992) 1,10

City & County of San Francisco v. Strahlendorf, 7 Cal.App.4th 1911, 1913, 9 Cal.Rptr.2d 817, 817 (1992) 3

Country Villa Claremont Healthcare Ctr., Inc. v. Super. Ct. (Rodriguez), 120 Cal.4th 426, 431, 15 Cal.Rptr.3d 315, 319(2004) 1,9,10

Covenant Care, Inc. v. Super. Ct. (Inclan), 32 Cal.4th 771, 782-790, 11 Cal.Rptr.3d 222, 229-236 (2004) 9,12

Delaney v. Baker, 20 Cal.4th 23, 82 Cal.Rptr.2d 610 (1999) 9

New v. Consolidated Rock Prod. Co., 171 Cal.App.3d 681 (1985) 7,8

O’Shea v. Claude C. Wood Co., 97 Cal.App.3d 903, 912 (1979) 8

California Statutes:

California Civil Code §3294 11

California Civil Code §3294(a) 11

California Civil Code §3345 2,3

California Civil Code §3345(b)(3) 3,12

California Code of Civil Procedure §425.13 1,9,10,12

California Code of Civil Procedure §425.13(a) 1

California Code of Civil Procedure §1005(b) 4

California Penal Code §368 8

California Penal Code §368(b) 8

California Penal Code §368(b)(2) 8

California Penal Code §368(c) 9

California Welfare & Institutions §15610.27 9

California Welfare & Institutions Code §15657 9,12

California Welfare & Institutions Code §15657.2 9,10

Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) 1,9,11

MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION

Defendant JOAN CAREY’S Motion to Strike contends that Plaintiffs may not allege Punitive Damages against CAREY in their Third Amended Complaint, and thereby seeks to have stricken intentional and reckless language contained in Paragraphs 84, 85, 88, 100 and 101, which are found in Plaintiffs’ Willful Misconduct and Elder Abuse Causes of Action (Nos. 2 and 3, respectively). Defendant CAREY also seeks to have Plaintiffs’ Prayer for Punitive Damages as asserted in the Causes of Action for Willful Misconduct, Elder Abuse, Intentional Infliction of Emotional Distress and Fraud (Negligent Misrepresentation) stricken, as well. Basically, Defendant asserts that Plaintiffs have not pled with sufficient specificity; however, this Court has previously held that Plaintiffs have, in fact, properly pled the at-issue Causes of Action – Willful Misconduct, Elder Abuse, Intentional Infliction of Emotional Distress and Fraud (Negligent Misrepresentation), each of which includes allegations and the requisite language necessary to trigger a proper request for Punitive Damages.

Furthermore, Plaintiffs’ material grievance in the herein action is actually violation of the *Elder Abuse Act (aka Elder Abuse and Dependent Adult Civil Protection Act (EADACPA))*. Therefore, since the gravaman of the at-issue Causes of Action is the Elder Abuse Act, **California Code of Civil Procedure §425.13 is not applicable.** [*Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court*, 120 Cal.App.4th 426, 15 Cal.Rptr.3d 315 (2004).] Plaintiffs do acknowledge, however, that should they desire to allege Punitive Damages against any of the Defendants based upon torts arising from the Professional Negligence of a health care provider, which would specifically concern their claim for Professional Negligence in Cause of Action No. 1, *California Code of Civil Procedure* §425.13 would apply. [*See Central Pathology Serv. Med. Clinic v. Superior court*, 3 Cal.4th 181, 10 Cal.Rptr.2d 208 (1992).] Plaintiffs further acknowledge that *California Code of Civil Procedure* §425.13 requires them to file any such Motion to Amend to Include Punitive Damages within a specific window of time; that is, not less than nine months before the case is set for trial, or within two years after the Complaint is filed – whichever is *earlier*. [*California Code of Civil Procedure* §425.13(a).]

Plaintiffs thus believe they are in full compliance with the Court’s Order of August 7, 2007 [*see* Declaration of Shelby B. Crawford in Support of Defendant JOAN CAREY’S Motion to Strike

1 Portions of the Third Amended Complaint, with **Minute Order, dated August 7, 2007**, attached
2 thereto as Exhibit 1], and are not thereby required to amend their Complaint at this time, since they
3 are not now making a Punitive Damages' claim based the Professional Negligence of a health care
4 provider. Specifically regarding Plaintiffs' Punitive Damages' allegations, this Court stated the
5 following at the hearing on August 7th:

6 With respect to the Motion to Strike the claim for Punitive Damages, that seems to be
7 moot based on my rulings on the Fraud Causes of Action. However, to the extent that
8 the claims seeking Punitive Damages arise from the provision of medical care, the
9 claim for Punitive Damages is subject to CCP 425.13. [Reporter's Transcript of
10 Proceedings, Case No. LC076641, dated August 7, 2007, p. 7, lines 2-7, a true and
11 correct copy of which is attached hereto as **Exhibit 1**, and incorporated herein by
12 reference.]

13 In an astonishing and professionally questionable attempt to argue that Plaintiffs' allegations
14 of Treble Damages be stricken based upon *California Civil Code* §3345, Defense counsel has
15 deliberately mis-cited the Statute and thereby attempted to mislead this Court in its moving papers by
16 eliminating certain portions of the Statute that specifically permit Treble Damages in the herein Elder
17 Abuse case. Notably, Trebled Punitive Damages are expressly authorized for conduct against Elders
18 by *California Civil Code* §3345, as follows:

19 (a) This section shall apply only in actions brought by, on behalf of, or for the benefit
20 of **senior citizens or disabled persons**, as those terms are defined in subdivisions (f)
21 and (g) of Section 1761, to redress unfair or deceptive acts or practices or unfair
22 methods of competition.

23 (b) Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil
24 penalty or other penalty, or any other remedy the purpose or effect of which is to punish
25 or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of
26 fact's discretion, the trier of fact shall consider all of the following factors, in addition
27 to other appropriate factors, in determining the amount of fine, civil penalty or other
28 penalty, or other remedy to impose. **Whenever the trier of fact makes an affirmative
finding in regard to one or more of the following factors, it may impose a fine, civil
penalty or other penalty, or other remedy in an amount up to three times greater
than authorized by the statute, or, where the statute does not authorize a specific
amount, up to three times greater than the amount the trier of fact would impose
in the absence of that affirmative finding:**

(1) **Whether the defendant knew or should have known that his or her conduct
was directed to one or more senior citizens or disabled persons.**

(2) Whether the defendant's conduct caused one or more senior citizens or disabled
persons to suffer: loss or encumbrance of a primary residence, principal employment,
or source of income; substantial loss of property set aside for retirement, or for personal
or family care and maintenance; or substantial loss of payments received under a
pension or retirement plan or a government benefits program, or assets essential to the
health or welfare of the senior citizen or disabled person.

(3) **Whether one or more senior citizens or disabled persons are substantially
more vulnerable than other members of the public to the defendant's conduct**

1 **because of age, poor health or infirmity, impaired understanding, restricted**
2 **mobility, or disability, and actually suffered substantial physical, emotional, or**
3 **economic damage resulting from the defendant's conduct.** [Emphasis added.] [*Id.*]

4 In their moving papers, Defendant CAREY surreptitiously eliminates Section (b)(1) and (b)(3),
5 both of which apply to the case *sub judice*, and only includes Section (b)(2). In so doing, Defense
6 intentionally attempts to mislead this Court into believing that since Plaintiffs' case does not involve
7 "marketing 'schemes and sales pitches' designed to take advantage of or defraud [elders]," Plaintiffs
8 do not come within the purview of *California Civil Code* §3345. [JOAN CAREY'S Motion to Strike
9 Portions of Third Amended Complaint, served August 28, 2007, p. 7, lines 24-26.] **However**, the
10 Statute is clear in only requiring an affirmative finding as to **one or more of the factors** enumerated
11 in Sections (b)(1) *or* (b)(2) *or* (b)(3) to impose Treble Damages. Hence, not only is Defense counsel's
12 conduct deplorable on its face, the level of incompetence in interpreting the Statute is shocking. Even
13 a first year law student's reading of the Statute could not escape the fact that property loss (Section
14 (b)(2)) is not a required element of Section 3345; rather, it is one of three factors that may entitle an
15 Elder to Treble Damages. Apparently this fact was lost on Defense counsel. Furthermore, the Statute
16 *specifically* mentions "physical" and/or "emotional" damage resulting from a defendant's conduct as
17 another qualifying criteria. [*California Civil Code* §3345(b)(3).] This tactic on the part of Defense is
18 the ultimate "sharp" practice and should not be tolerated by this Court.

19 Finally, Defendants MOTION PICTURE & TELEVISION FUND and SAEED HUMAYUN,
20 M.D. are not entitled to "joinder" status by way of their Notice of Joinder to Defendant CAREY'S
21 Motion to Strike. Notably, said Defendants filed and served an Answer to the subject Third Amended
22 Complaint on August 29, 2007. [Defendants MOTION PICTURE TELEVISION FUND and SAEED
23 HUMAYUN, M.D.'S Answer to the Third Amended Complaint, served August 29, 2007, a true and
24 correct copy of which is attached hereto as **Exhibit 2**, and incorporated herein by reference.] A
25 "motion to strike" filed after a defendant has answered, and which is based on declarations and facts
26 outside the pleadings, may be treated as a motion for summary judgment. [*City & County of San*
27 *Francisco v. Strahlendorf*, 7 Cal.App.4th 1911, 1913, 9 Cal.Rptr.2d 817, 818 (1992)]. Thus
28 interpreted, the issue in this case is whether the evidence submitted by Defendants MOTION
PICTURE & TELEVISION FUND and SAEED HUMAYUN, M.D., by and through Defendant
CAREY, is sufficient to compel summary judgment in favor of Defendants. By virtue of their reliance
on Defendant CAREY'S moving papers, these Defendants have not even scratched the surface of the
burden necessary to win Summary Judgment.

1 In addition, even if “Joinder” was proper, Plaintiffs did not receive adequate Notice of Joinder
2 via Defendants’ personal service of said “Joinder” on September 12, 2007. [Defendants MOTION
3 PICTURE TELEVISION FUND and SAEED HUMAYUN, M.D.’s Notice of Joinder to Defendant
4 JOAN CAREY, R.N.’s Motion to Strike Portions of Third Amended Complaint, served September
5 12, 2007, a true and correct copy of which is attached hereto as **Exhibit 3**, and incorporated herein by
6 reference.] “Unless otherwise ordered or specifically provided by law, all moving and supporting
7 papers shall be served and filed at least 16 court days before the hearing.” [*California Code of Civil*
8 *Procedure* §1005(b).] These Defendants served their Joinder on September 12th, which is only 15 days
9 prior to the hearing on this matter (October 3rd), and hence, it is untimely.

10 Substantively, the Notice served by Defendants MOTION PICTURE and HUMAYUN is
11 likewise defective. It is impossible for Plaintiffs to decipher on the face of the Notice whether said
12 Defendants are joining Defendant CAREY’S Motion for purposes of a ruling as to Defendant CAREY
13 only; or if they are joining CAREY’S Motion for purposes of a ruling as to MOTION PICTURE and
14 HUMAYUN, as well. For this reason, Defendants’ “Notice” is terribly insufficient, as Plaintiffs have
15 not been informed as to which parties are entreating the Court for rulings regarding Plaintiffs’
16 allegations justifying Punitive Damages and their Prayer for same.

17 II.

18 STATEMENT OF RELEVANT AND ALLEGED FACTS

19 Plaintiff ADELE FRANZ was admitted to Defendant MOTION PICTURE & TELEVISION
20 FUND [hereinafter “FUND”] on or about July 8, 2003, at which time she was 85 years old, pursuant
21 to a written admission agreement and other related documents in which Defendants promised Plaintiffs
22 they would provide Plaintiff ADELE FRANZ with such care as her condition reasonably required.
23 [Plaintiff’ Third Amended Complaint ¶15.] Said documents are attached to Plaintiffs’ Third Amended
24 Complaint as Exhibit 1. At that time, Plaintiff ADELE FRANZ was suffering from Osteoporosis;
25 Osteoarthritis with degenerative joint disease; Open reduction internal fixation right hip (May 2003);
26 and T11 compression fracture, all of which were documented and otherwise well-known to
27 Defendants. *Id.* Plaintiff ADELE FRANZ had sustained falls while under the care of Defendants and
28 was at risk for falls, as documented in the FUND’S medical records dated November 30, 2003, January
15, 2004, and February 2, 2005. Defendants’ medical records dated July 23, 2004, also document that
Plaintiff ADELE FRANZ had sustained falls prior to her admission to the FUND, which facts were

1 thus also known to Defendants. [*Id.* at ¶¶19,20,21.] Specifically, Defendants knew and documented
2 in their medical records of February 2, 2005 that "[t]he patient [Plaintiff ADELE FRANZ] has had
3 several falls in the last week, two within the last week, two within the last 24 hours. These appear to
4 happen when she attempts to get herself out of bed." [*Id.* at ¶21.]

5 Notwithstanding, on or about the evening of December 25, 2005 between the hours of 11:30
6 p.m. and 12:30 a.m., Defendants left ADELE FRANZ unattended and unrestrained in her bed, and also
7 failed to lower the bed and/or raise the bed rails. [*Id.* at ¶22.] During said time, ADELE FRANZ fell
8 from her bed onto the floor and broke both of her femurs, which could not have happened if she had
9 been properly restrained or supervised due to her known fall risk when attempting to exit bed. *Id.*

10 Upon falling from her bed, Plaintiff ADELE FRANZ was unable to move and in a completely
11 helpless state, so she was forced to lie there in her own excrement for a significant duration of time
12 before she was found by Defendants and/or Defendants' staff, despite the fact that Plaintiff ADELE
13 FRANZ had been able to ring for assistance. [*Id.* at ¶23.] Thereafter, a physician was not summoned
14 to aid Plaintiff ADELE FRANZ, as Defendants wrongly determined that ADELE FRANZ was not
15 hurt, when she had actually broken both femurs. [*Id.* at ¶¶24,25.] The fact that a physician was not
16 requested to come examine ADELE FRANZ is noted in Defendants' medical records, dated December
17 27, 2005. [*Id.* at ¶24.] Instead, Defendants gave Plaintiff Tylenol, and wholly failed to provide any
18 pain medication whatsoever until ten hours after her fall. [*Id.* at ¶25.] Defendants also failed to contact
19 Plaintiff ADELE FRANZ' daughters, Plaintiffs MELISSA FRANZ or GINA MARTENSON, both of
20 whom learned of the incident only when they independently telephoned Defendants, which fact is also
21 documented in Defendants' medical records, dated December 27, 2005. [*Id.* at ¶26.]

22 Plaintiffs MELISSA FRANZ and GINA MARTENSON had also witnessed other instances of
23 leaving their mother improperly unattended or treated [*e.g.,Id.* at ¶34], including a negligently
24 administered catheter, which led to ADELE FRANZ contracting Septicemia immediately subsequent
25 to her discharge from the FUND on or about April 5, 2006. [*Id.* at ¶37.]

26 As a result of Defendants' acts and omissions, ADELE FRANZ sustained a broken right femur,
27 broken left femur, exacerbation of Dementia, Insomnia, Depression, severe emotional distress, weight
28 loss and Septicemia, and was forced to wear very uncomfortable bi-lateral leg braces, endure
significant knee and leg pain, and undergo a Tendonectomy, all of which are documented in
Defendants' medical records. [*Id.* at ¶¶31,32,77.] She continues to suffer from the detrimental physical,
emotional and mental effects from having sustained two broken femurs in her old age.

III.

PLAINTIFFS HAVE SPECIFICALLY PLED ALL OF THE SUBJECT CAUSES OF ACTION – WILLFUL MISCONDUCT, ELDER ABUSE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND FRAUD (NEGLIGENT MISREPRESENTATION).

Defendant MOTION PICTURE & TELEVISION FUND is an entity, not a person. The acts and omissions of said entity are thus necessarily carried out by people. Plaintiffs have alleged that Defendants JOAN CAREY, R.N. and SAEED HUMAYUN, M.D., were such people who negligently and recklessly carried out the acts and omissions of Defendant MOTION PICTURE & TELEVISION FUND, and that, further, said Defendants were managing agents whose negligent and reckless acts and omissions were ratified by Defendant MOTION PICTURE:

87. To the extent that the herein alleged willful acts and omissions were committed by DEFENDANTS' employees and/or agents, it is herein alleged that Defendant FUND had advance knowledge of the unfitness of Defendants DOES 1-100 and/or other persons, who were acting as their employees and/or agents providing care for Plaintiff ADELE FRANZ, yet Defendant FUND employed or otherwise contracted with said persons with a conscious disregard of the rights or safety of others; and/or Defendant FUND learned of the acts and omissions of Defendants DOES 1-100 and/or other persons, yet approved, authorized and/or ratified that wrongful conduct; and/or Defendant FUND itself committed said acts of oppression, fraud or malice by way of an officer, director or managing agent of the corporation, including, but not limited to, Defendants HUMAYEN and CAREY. [Third Amended Complaint ¶87.]

Furthermore, Plaintiffs have alleged JOAN CAREY'S specific capacity that put her in the position to negligently and/or recklessly either act and/or fail to act regarding the Elder, ADELE FRANZ, which acts and omissions amounted to violations of the Elder Abuse Act, as previously determined by this Court to have been satisfactorily pled in Plaintiffs' Elder Abuse Cause of Action. [See Plaintiffs' Third Amended Complaint ¶¶ 91 to 105.] Specifically, this Court stated, "**The court finds that the joinder of Joan Carey, R.N. is proper and all the findings on the demurrer and motion to strike apply to her.**" [Emphasis added.] [See Declaration of Shelby B. Crawford in Support of Defendant JOAN CAREY'S Motion to Strike Portions of the Third Amended Complaint, with **Minute Order, dated August 7, 2007**, attached thereto as Exhibit 1.]

Regarding CAREY'S capacity that afforded her opportunity to commit negligent or reckless acts and/or omissions, thus invoking a claim for Elder Abuse, Plaintiffs pled the following:

6. Defendant JOAN CAREY, R.N., is an individual, business form unknown, who is allegedly licensed by the State of California as a Registered Nurse, and who is located and doing business in Los Angeles County, California. At all times during which the incidents alleged herein took place, **Defendant CAREY was either an employee or agent of Defendant**

1 **MOTION PICTURE & TELEVISION FUND and/or DOES 1 through 100, and each of**
2 **them, in the capacity of Patient Care Services Manager, and/or was otherwise responsible**
3 **for the medical care and treatment of Plaintiff ADELE FRANZ in CAREY'S capacity**
4 **as either a Registered Nurse or Patient Care Services Manager, or both.** [Emphasis
5 added.] [*Id.* at ¶ 6.]

6 Said acts and omissions were pled as follows:

7 114. During the course of Plaintiff ADELE FRANZ' residency at the FUND, Defendant FUND and
8 DOES 1-100, by through their authorized employees and/or agents, Defendant JOAN CAREY,
9 R.N. and Norine Jameson, LVN, among others, **represented orally to Plaintiffs that**
10 **Defendant FUND and DOES 1-100 would comply with Plaintiffs' request and the**
11 **custodial necessity to ensure the bed rails were up at night to prevent Plaintiff ADELE**
12 **FRANZ from falling. These representations occurred on or about November 29, 2003,**
13 **January 15, 2004, July 23, 2004 and February 2, 2005, among other times, as well.**
14 Further, Defendant FUND and DOES 1-100 must necessarily possess full information
15 concerning the facts of the controversy. [Emphasis added.]

16 115. These representations were made at the direction of, and as a direct response to, instructions
17 Defendant FUND had given directly, or that others, including their authorized employees and
18 agents had given. Further, **Defendant JOAN CAREY, R.N.,** Norine Jameson, LVN and
19 Naomi Rada, among others, were **authorized and instructed to make such statements** as
20 were made to Plaintiffs by Defendant FUND'S corporate officers, directors and/or managing
21 agents, who authorized, ratified and/or approved the representations, **which were false and**
22 **known, or reasonably should have been known,** by Defendant FUND and said third parties
23 to be false **when made,** or the **representations were made recklessly and without regard**
24 **for their truth.** Said representations were further made without a reasonable basis for
25 believing them to be true. [Emphasis added.]

26 116. These **representations and suggestions were made and intended for the purpose of**
27 **inducing reliance** by Plaintiff ADELE FRANZ so she would become, then remain, a
28 resident/patient at the FUND, so that Defendant FUND and DOES 1-100 could earn fees paid
by or on behalf of Plaintiff ADELE FRANZ for her care that purportedly complied with the
legal standards therefore. [Emphasis added.]

124. **Plaintiffs MELISSA FRANZ and GINA MARTENSON routinely informed and**
complained to DEFENDANTS, including to Defendant CAREY, and other staff to whom
Plaintiff ADELE FRANZ' care had been delegated, **regarding DEFENDANTS' acts and**
omissions that were violative of Plaintiff ADELE FRANZ' care plan and intervention
requirements and a breach of Defendants' duty toward Plaintiff ADELE FRANZ.

125. In each case, Plaintiffs MELISSA FRANZ and GINA MARTENSON were assured that their
mother, ADELE FRANZ, would receive proper care and treatment. [Emphasis added.] [*Id.*
at ¶¶ 114, 115, 116, 124, 125.]

A. Willful Misconduct.

Plaintiffs have properly pled the requisite factual allegations of notice and recklessness. As
summarized above in the "The Statement of Relevant and Alleged Facts" (Section II), Plaintiffs pled
that Defendants, including JOAN CAREY, knew about the peril (fall risk); documented the peril and
its likelihood (e.g., February 2, 2005 record); yet consciously failed to take steps to avoid the peril,
resulting in the accident of December 25/26, 2005. Hence, Defendants' conduct, including JOAN
CAREY, was reckless, pursuant to *New v. Consolidated Rock Prod. Co.*, which states: "Willful or

1 wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury
2 to another will probably result, or with a wanton and reckless disregard of the possible results.” [*New*
3 *v. Consolidated Rock Prod. Co.*, 171 Cal.App.3d 681 (1985) citing *O’Shea v. Claude C. Wood Co.*,
4 97 Cal.App.3d 903, 912 (1979).]

5 Also, authority exists supporting a civil action for violation of *California Penal Code* §368,
6 in favor of a crime victim. Violation of a criminal statute embodying a public policy is generally
7 actionable even if no specific civil remedy is provided in the criminal statute. Any injured member
8 of the public for whose benefit the statute is enacted may bring an action. [*See Angie M. v. Superior*
9 *Court*, 37 Cal.App.4th 1217, 1224, 4 Cal.Rptr.2d 197 (1995).] According, nursing home residents
10 who are victims of criminal abuse or neglect as defined in *California Penal Code* §368 have a Cause
11 of Action for personal injury. Indeed, this statute broadly proscribes the conduct that forms the basis
12 for most personal injury actions brought by a resident/patient, such as ADELE FRANZ. One is guilty
13 of violating *California Penal Code* §368(b) if it was known or should have been known that another
14 person is an elder (or dependent adult) and: 1) under circumstances or conditions likely to produce
15 great bodily harm or death, willfully causes or permits the elder to suffer, or inflicts unjustifiable
16 physical pain or mental suffering on that person; *or* 2) having the care or custody of an elder, willfully
17 causes or permits the person or health of the elder to be injured, or willfully causes or permits the elder
18 to be placed in a situation that endangers his/her person or health.¹ Finding of a Section 368 violation
19 would necessarily mean Defendants’ conduct was felonious and malicious, and alleging said violation
20 is not duplicative of the Willful Misconduct Cause of Action, since Section 368 only requires that the
21 offending person/party *either willfully causes or permits* the harm. Upon sufficient proof at trial,
22 Punitive Damages would be proper.

23 The *Angie M.* Court found that the *Penal Code* prohibited the acts alleged therein by the
24 plaintiff; that the plaintiff was clearly a member of the class intended to be protected by those criminal
25 statutes, and was thus entitled to bring a civil action for violations of them. [*Angie M. v. Superior*
26 *Court*, 37 Cal.App.4th at 1224.] Herein, finding of a Section 368 violation would necessarily mean
27 Defendants’ conduct was felonious and malicious.

28

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Under §368(c), a person is guilty of a misdemeanor, rather than a felony, for treating an elder as described, except under circumstances not likely to cause great bodily harm or death, or as specified in §368(b)(2) above, except that the elder’s person or health “may be” endangered, rather than is endangered.

1 Finally, this Court expressly deemed the Cause of Action for Willful Misconduct sufficiently
2 pled on June 5, 2007. [Reporter’s Transcript of Proceedings (regarding Demurrer to First Amended
3 Complaint), dated June 5, 2007, p 3, a true and correct copy of which is attached hereto as **Exhibit 4**,
4 and incorporated by reference.]

5 **B. Elder Abuse.**

6 An Elder Abuse claim may be brought against an elder’s custodian or caregiver who may *or*
7 *may not* be a health care provider. The Defendants’ status as health care providers is merely incidental
8 to the custodian/caregiver role. Moreover, the *Elder Abuse and Dependent Adult Civil Protection Act*
9 (*EADACPA*) legislative history indicates that “professional negligence” for *Code of Civil Procedure*
10 §425.13 purposes is distinct from the abuse and neglect actionable under the *Act*. [*Covenant Care, Inc.*
11 *v. Super. Ct. (Inclan)*, 32 Cal.4th 771, 782-790, 11 Cal.Rptr.3d 222, 229-236 (2004); *Country Villa*
12 *Claremont Healthcare Ctr., Inc. v. Super. Ct. (Rodriguez)*, 120 Cal.4th 426, 431, 15 Cal.Rptr.3d 315,
13 319(2004) – **Section 425.13 likewise is not applicable to common law counts such as Fraud and**
14 **Willful Misconduct joined with an Elder Abuse Act claim in an action against a custodian that**
15 **is also a health care provider.**

16 As argued above with respect to the Willful Misconduct Cause of Action, Plaintiffs have
17 alleged facts in their Third Amended Complaint outside of Professional Negligence, which rise to the
18 level of recklessness by virtue of these Defendants’ pattern of conscious disregard of ADELE FRANZ’
19 rights and safety; specifically, by acknowledging that she was a fall hazard; documenting her falls and
20 fall risks on numerous occasions; then repeatedly failing to do anything to prevent her inevitable
21 injury, despite having knowledge of her condition and health and safety risks. [Plaintiff’s Third
22 Amended Complaint §§15, 19-22.] Hence, Plaintiff’s Third Amended Complaint has pled the reckless
23 acts and omissions of these Defendants invoking the *Elder Abuse Act*. Albeit, Plaintiffs’ Elder Abuse
24 Action is not duplicative of their Willful Abuse Action, since Elder Abuse specifically applies to
25 persons over age 65 (Section 15610.27), and the California Supreme Court has held that a health care
26 provider engaging in reckless abuse or neglect of an elder within the meaning of *Welfare & Institutions*
27 *Code* §15657 is subject to the heightened remedies of the *EADACPA*, and is not subject to the
28 limitations of Section §15657.2, which apply only to Professional Negligence actions. [*Delaney v.*
Baker, 20 Cal.4th 23, 82 Cal.Rptr.2d 610 (1999).] The abuse and neglect specified in §15657, in other
words, is something other than, and mutually exclusive of, “professional negligence,” as that term is

used in §15657.2.

C. Intentional Infliction of Emotional Distress.

Plaintiff alleged the requisite outrageous conduct with reckless disregard of the probability of causing the emotional distress in Plaintiffs’ Third Amended Complaint Paragraphs 15,19,20,21,23,24,25,27,28 and 37. Further, Plaintiffs alleged the nature and extent of ADELE FRANZ mental suffering caused by these Defendants in Paragraph 111 of the Third Amended Complaint.²

D. Fraud (Negligent Misrepresentation).

Plaintiffs have pled the requisite specificity in Paragraph 114, 115 and 116, which were reproduced in their entirety above.

IV.

THE PRAYER PROPERLY REQUESTS “PUNITIVE DAMAGES,” AS PLAINTIFFS HAVE SUFFICIENTLY PLED CAUSES OF ACTION PERMITTING SAME.

While Plaintiffs are aware that full compliance with *California Code of Civil Procedure* §425.13 is required in order to pursue Punitive Damages on their claim for Professional Negligence, the following Causes of Action properly request Punitive Damages, as the additional evidentiary showings mandated by Section 425.13 are not applicable.

A. Willful Misconduct (No. 2); Intentional Infliction of Emotional Distress (No. 4); Fraud (Negligent Misrepresentation) (No. 5).

Although *California Code of Civil Procedure* §425.13 applies to intentional, as well as non-intentional, torts arising from the Professional Negligence of a health care provider (*see Central Pathology Serv. Med. Clinic v. Superior court*, 3 Cal.4th 181, 10 Cal.Rptr.2d 208 (1992)), it does not apply to other claims, including claims of intentional tort in which the gravaman of the cause of action is EADACPA. [*Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court*, 120 Cal.App.4th 426, 15 Cal.Rptr.3d 315 (2004).] Since Plaintiffs Elder Abuse action was fully and sufficiently pled, as determined by this Court, it is improper to strike Plaintiffs’ request for Punitive Damages on these

²“As a direct and proximate result of the acts and omissions of DEFENDANTS and DOES 1-100, Plaintiff ADELE FRANZ suffered severe and extreme emotional distress, including anxiety; diminished mental capacity; frustration at being completely immobilized and permanently compromised due to the two broken femurs sustained in the fall from bed that occurred the evening of December 25, 2005; depression due to her deteriorating physical condition brought on by the seriousness of broken femurs in elders; shame; humiliation; and embarrassment. The nature of the severe and extreme emotional distress caused noticeable and distinguishable changes in Plaintiff ADELE FRANZ which continue to this day.” [Plaintiffs’ Third Amended Complaint in ¶111.]

1 other intentional theories, as the material grievances upon which they are alleged constitute violations
2 of the *Elder Abuse Act*.

3 Defense asserts that Plaintiffs failed to comply with *California Civil Code* §3294 in their
4 pleadings so as to justify a Prayer for Punitive Damages. Notably, Section 3294 specifically permits
5 an award of Punitive Damages where the following has been proven:

6 (a) In an action for the breach of an obligation not arising from contract, where it is
7 ~~only by awarding punitive damages that the defendant is justly compensated for the wrong done to the plaintiff~~
8 the sake of example and by way of punishing the defendant.

9 (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon
10 acts of an employee of the employer, unless the employer had advance knowledge of
11 the unfitness of the employee and employed him or her with a conscious disregard of
12 the rights or safety of others or authorized or ratified the wrongful conduct for which
13 the damages are awarded or was personally guilty of oppression, fraud, or malice. With
14 respect to a corporate employer, the advance knowledge and conscious disregard,
15 authorization, ratification or act of oppression, fraud, or malice must be on the part of
16 an officer, director, or managing agent of the corporation.

17 (c) As used in this section, the following definitions shall apply:

18 (1) "Malice" means conduct which is intended by the defendant to cause injury to the
19 plaintiff or despicable conduct which is carried on by the defendant with a willful and
20 conscious disregard of the rights or safety of others.

21 (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust
22 hardship in conscious disregard of that person's rights.

23 (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a
24 material fact known to the defendant with the intention on the part of the defendant of
25 thereby depriving a person of property or legal rights or otherwise causing injury. *Id.*

26 Again, Section 3294 pertains to awarding damages “[w]here it is proven by clear and
27 convincing evidence.” [Emphasis added.] [*California Civil Code* §3294(a).] Clearly, the herein
28 parties are not now at a point in this litigation where they must prove any facts. However, Plaintiffs
adequately invoked Section 3294, when the following was alleged:

99. DEFENDANTS had advance knowledge of the unfitness of Defendants DOES 1-100 and/or
other persons, who were acting as their employees and/or agents providing care for Plaintiff
ADELE FRANZ, yet DEFENDANTS employed or otherwise contacted with said persons with
a conscious disregard of the rights or safety of others; and/or DEFENDANTS learned of the
acts and omissions of Defendants DOES 1-100 and/or other persons, yet approved, authorized
and/or ratified that wrongful conduct; and/or DEFENDANTS itself committed said acts of
oppression, fraud or malice by way of an officer, director or managing agent of the corporation,
including, but not limited to, Defendants HUMAYEN and CAREY. [Plaintiffs’ Third
Amended Complaint ¶99.]

Further, Plaintiffs thoroughly alleged relevant background and active facts constituting Section
3294 *oppressive* conduct, including Paragraphs 85, 96 and 103. [See also Third Amended Complaint,
¶¶15 and 19-22.] Additional alleged facts include the following:

- Notice of Plaintiff's compromised physical and mental condition [Plaintiffs' Second Amended Complaint ¶15.];
- Notice of Plaintiff's past falls [*id.* at ¶¶19,20,21];
- Notice of Plaintiff's falls at the FUND [*id.* at ¶¶19,20,21];
- Notice of Plaintiff's fall risk, especially from bed [*id.* at ¶¶19,20,21];
- Failure to properly restrain Plaintiff while in bed by lowering the bed and/or raising the bed rails [*id.* at ¶¶27,28];
- Failure to properly supervise Plaintiff while in bed [*id.* at ¶¶27,28];
- Causing Plaintiff to lie in her own excrement without assisting her despite the fact Plaintiff had rung for assistance [*id.* at ¶23];
- Failure to request a physician examine Plaintiff after she suffered two (2) broken femurs [*id.* at ¶24];
- Failure to provide pain medication for ten (10) hours after Plaintiff had suffered two (2) broken femurs [*id.* at ¶25];
- Reckless insertion of catheter upon Plaintiff's discharge from FUND causing her to experience severe and life-threatening case of Septicemia [*id.* at ¶37].

Finally, this Court has deemed said alleged facts concerning the above Causes of Action to constitute sufficient pleading for same. [See Declaration of Shelby B. Crawford in Support of Defendant JOAN CAREY'S Motion to Strike Portions of the Third Amended Complaint, with **Minute Order, dated August 7, 2007**, attached thereto as Exhibit 1; and Plaintiffs' **Exhibit 1**, Reporter's Transcript of Proceedings (re Second Amended Complaint), dated August 7, 2007.]

B. Elder Abuse (No. 3).

The California Supreme Court, in a unanimous decision, held that a plaintiff seeking heightened remedies under *California Welfare & Institutions Code* §15657 of EADACPA does not have to comply with *California Code of Civil Procedure* §425.13 in order to claim punitive damages. [*Covenant Care, Inc. v. Superior Court*, 32 Cal.4th 771, 11 Cal.Rptr.3d 222 (2004).]

V.

THE PRAYER FOR RELIEF PROPERLY REQUESTS "TREBLE DAMAGES," AS PLAINTIFFS HAVE PROPERLY PLED AN ELDER ABUSE CAUSE OF ACTION, WHICH PERMITS SAME.

Plaintiffs previously cited in their introductory section (above, p. 2) the entire text of *California Civil Code* §3345, and thereafter revealed Defense counsel's notorious deletion of relevant language and stunning attempt to mislead this Court. As outlined, the trier of fact need not make a determination as to all three factors listed in Section 3345, one of which includes an Elder's property loss, which was asserted by Defense to constitute an affirmative requirement to invoke the Statute; rather, *an affirmative finding as to only one factor is required*, one of which includes physical or emotional damage at the hand of the accused. Furthermore, Plaintiffs have sufficiently alleged the

1 following in their Third Amended Complaint so as to properly request Treble Damages in their Prayer
2 pertaining to the Elder Abuse Cause of Action *only*:

3 100. **By virtue of the herein-above described acts and omissions, DEFENDANTS, including**
4 **DOES 1-100, acted with recklessness, oppression, fraud, and/or malice in the commission**
5 **of this abuse within the meaning of *California Civil Code* §3294, and Plaintiff ADELE**
6 **FRANZ is thereby entitled to recover punitive damages and treble punitive damages**
7 **under *California Civil Code* §3345.**

8 101. **Specifically, pursuant to *California Civil Code* §3345(b)(1), Plaintiff ADELE FRANZ**
9 **alleges that DEFENDANTS, including DOES 1-100, knew or should have known that**
10 **their conduct was directed to a senior citizen, that is, Plaintiff ADELE FRANZ. Further,**
11 **pursuant to *California Civil Code* §3345(b)(3), Plaintiff ADELE FRANZ alleges that a**
12 **senior citizen residing at MOTION PICTURE & TELEVISION FUND, specifically,**
13 **ADELE FRANZ, was substantially more vulnerable than other members of the public**
14 **to said DEFENDANTS' conduct because of age, poor health or infirmity, impaired**
15 **understanding, restricted mobility or disability, and that ADELE FRANZ actually**
16 **suffered substantial physical and emotional damage resulting from said DEFENDANTS'**
17 **conduct. An affirmative finding in regard to either of these factors permits the**
18 **imposition of punitive and treble damages, according to *California Civil Code* §3345.**

19 102. ***California Code of Civil Procedure* §425.13 does not apply to the herein claim, since the**
20 **gravaman of this specific Cause of Action is the *California Elder Abuse and Dependent***
21 ***Adult Civil Protection Act (EADACPA)*; that is, *California Welfare & Institutions Code***
22 **§15600, et seq., and not the professional negligence of a health care provider, pursuant**
23 **to *Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court*, 120 Cal.App.4th 426,**
24 **15 Cal.Rptr.3d 315 (2004). [Emphasis in original.] [Plaintiffs' Third Amended Complaint**
25 **¶¶100-102.]**

26 Based on the above, Plaintiffs respectfully submit they have appropriately included in their
27 Prayer a request for Treble Damages, since Plaintiff ADELE FRANZ is, and has been pled to be, an
28 Elder, and has suffered the loss alleged in the Complaint at the hand of Defendants, including JOAN
CAREY, in full violation of the Elder Abuse Act.

VI.

CONCLUSION

_____ Plaintiffs respectfully submit that the Court deny Defendant CAREY'S Motion to Strike, as
well as that of Defendants MOTION PICTURE & TELEVISION FUND and SAEED HUMAYUN,
M.D., by way of their Notice of Joinder, as Plaintiffs' Third Amended Complaint contains appropriate
allegations sufficiently warranting a Prayer for Punitive Damages. In the alternative, should this Court
decide to grant the Motion to Strike, Plaintiffs request the Court grant leave to amend.

DATED: September 17, 2007

JAMES R. GILLEN

By _____
James R. Gillen, Attorney for Plaintiffs

PROOF OF SERVICE BY MAIL
(C.C.P. Sections 1013a and 2015.5)

1
2 STATE OF CALIFORNIA)
3 COUNTY OF LOS ANGELES) ss.

4 I am a resident of/employed in the aforesaid county, State of California; I am over the age of
5 eighteen years and not a party to the within action; my business address is: 4300 Promenade Way,
Suite 118, Marina del Rey, California 90292-6279.

6 On September 17, 2007, I served the foregoing **PLAINTIFFS' OPPOSITION TO**
7 **DEFENDANT JOAN CAREY'S MOTION TO STRIKE PORTIONS OF THIRD AMENDED**
8 **COMPLAINT** on the interested parties in this action, by placing [x] a true copy [] the original
thereof, enclosed in a sealed envelope, addressed as follows:

9 Peter C. Connor
10 George E. Nowotny
11 Donna M. San Agustin
12 LEWIS BRISBOI BISGAARD & SMITH, LLP
221 North Figueroa Street, Suite 1200
Los Angeles, California 90012
(213) 250-1800
Fax (213) 250-7900

[Attorneys for Defendants MOTION PICTURE & TELEVISION FUND, a business entity, form
13 unknown; SAEED HUMAYUN, M.D., an individual, JOAN CAREY, R.N., an individual]

14 Daniel E. Kenney
15 Shelby Crawford
16 HARRINGTON, FOXX, DUBROW & CANTER
1055 7th Street, 29th Floor
Los Angeles, CA 90017
(213) 489-3222
Fax (213) 683-4835

[Attorneys for Defendant JOAN CAREY, R.N., an individual]

18 [VIA OVERNIGHT DELIVERY]) I deposited in a box or other facility regularly maintained by the
19 express service carrier or delivered it to an authorized courier or driver authorized by the express
20 service carrier to receive documents in an envelope or package designated by the express service
21 carrier with delivery fees paid or provided for, and addressed to the person on whom it is to be served
at the office address as last given by that person on any document filed in the cause and served on the
party making service, otherwise at that party's place of residence, pursuant to *California Code of Civil
Procedure §1013(c) and (d), at Marina del Rey, California.*

22 I declare under penalty of perjury under the laws of the State of California that the foregoing is
23 true and correct, and that I am employed in the office of a member of the bar of this Court at whose
24 direction the service was made.

Executed on September 17, 2007 at Marina del Rey, California.

25
26 _____
Barbara Sharp