UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AUDREY HEREDIA as successor-in-interest to the Estate of Carlos Heredia; AMY FEARN as successor-in-interest to the Estate of Edith Zack; and HELEN GANZ, by and through her Guardian ad Litem, ELISE GANZ; on their own behalves and on behalf of others similarly situated,

Plaintiffs,

v.

SUNRISE SENIOR LIVING, LLC; SUNRISE SENIOR LIVING MANAGEMENT, INC.; and Does 2-100,

Defendants.

CASE NO. 8:18-cv-01974-JLS-JDE

ORDER: (1) DENYING MOTIONS TO STRIKE EXPERT TESTIMONY (Docs. 389, 390, 375, 430) and (2) GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Doc. 439)

Before the Court is an Amended Motion for Class Certification ("Motion" or "Motion for Class Certification") filed by Plaintiffs Amy Fearn (as successor-in-interest to the Estate of Edith Zack) and Helen Ganz (as Guardian ad Litem for Elise Ganz) (together, "Plaintiffs"). (Mot., Doc. 438-1.) Defendants Sunrise Senior Living, LLC and Sunrise Senior Living Management, Inc. (together, "Defendants" or "Sunrise") opposed, and Plaintiffs replied. (Opp., Doc. 402-1; Reply, Doc. 412-1.) Sunrise also filed four opposed motions to strike expert declarations filed by Plaintiffs in support of their Motion. (Mots., Docs. 375, 389, 390, 430; Opps., Docs. 442-1, 444-1, 425, 479-1; Replies, Docs. 445, 488, 485-1, 487-1; Sur-Reply, Doc. 466.) Having considered the parties' briefs and underlying evidence, and having held oral argument, the Court DENIES the motions to strike and GRANTS the Motion for Class Certification for the reasons set forth below.

I. BACKGROUND

This is a putative class action arising out of Sunrise's alleged failure to staff its assisted living facilities (or residential care facilities) at levels sufficient to provide the promised level of care to its residents. Based on Sunrise's alleged failure, Plaintiffs brings three claims in their Second Amended Complaint ("SAC"): (1) violation of the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq*.; (2) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*.; and (3) violation of the elder financial abuse statute, Cal. Welf. & Inst. Code § 15610.30. (SAC ¶¶ 90-130, Doc. 77.)

Sunrise provides assisted living and memory care for senior citizens and persons with disabilities in facilities across the United States, including California. Plaintiff Amy Fearn is the successor-in-interest and daughter of decedent Edith Zack, a resident of Sunrise of San Mateo, in San Mateo, California from September 2016 to November 2016. (*Id.* ¶ 10; Declaration of Amy Fearn ("Fearn Decl.") ¶ 3, Doc. 438-54.) Plaintiff Helen Ganz was a resident of Sunrise of San Rafael, in San Rafael, California, who resided in the

facility from September 30, 2016 to June 16, 2019. (*Id.* ¶ 11, Doc. 77; Declaration of Elise Ganz ("Ganz Decl.") ¶ 3, Doc. 438-53.) Ms. Ganz's claims are asserted by her daughter and Guardian ad Litem, Elise Ganz. (Ganz Decl. ¶ 3, Doc. 438-53.) Plaintiffs allege that Sunrise makes uniform representations in its standardized contracts "that it will use its resident assessment system to identify the level of care necessary to ensure that residents receive the services they require and to identify the amount Sunrise will charge them for services." (SAC ¶ 34, Doc. 77.) However, Plaintiffs contend that, "[c]ontrary to the express and implied representations in the Sunrise standardized contract and other uniform written statements, Sunrise facilities are not sufficiently staffed to meet the aggregate assessed needs of all facility residents." (*Id.* ¶ 47.) Plaintiffs allege that "Sunrise has engaged in a scheme to defraud seniors, persons with disabilities, and their family members at its assisted living facilities in California." (*Id.* ¶ 2.) Plaintiffs further allege that a "reasonable consumer would not agree to pay increased fees if she knew that Sunrise facilities did not in fact have staff sufficient in numbers and training to deliver services that Sunrise itself determined were necessary and promised to provide." (*Id.* ¶ 41.)

A general description of the evidence concerning Plaintiffs' claims is provided below.

A. Sunrise Residency Agreements

At Sunrise's assisted-living facilities in California, residents (or their authorized representatives) are required to sign a residency agreement prior to move-in. (*See* Answer to Plaintiffs' Second Amended Complaint ("Answer") ¶ 35, Doc. 83 ("Defendants admit" that "residency agreements have been and are currently used for residents in Sunrise communities in California" and "a residency agreement must be executed by the resident or an authorized representative prior to move-in[.]").) Indeed, California law requires that Sunrise "complete an individual written admission agreement . . . with each resident or the resident's representative." Cal. Code Regs. tit. 22, § 87507(a). Accordingly, Defendant

Sunrise Senior Living Management, Inc. ("Sunrise Management") along with the resident (or their representatives) are signatories to the residency agreements. (*Id.* ¶ 3 ("Defendants admit that Sunrise Management is a signatory to residency agreements used for residents in its California communities."), Doc. 83.)

Sunrise's residency agreements discuss, among other things, use of an "assessment" to determine a resident's level of service needed and associated fees. (*See*, *e.g.*, Declaration of Jeff Slichta, Senior Vice President of Operations, West Division ("Slichta Decl.") ¶ 7 ("Each resident's Residency Agreement sets forth that resident's care level and addresses fees," which "may include a move-in fee, base fees, service level fees, medication management fees, and fees for certain amenities."), Doc. 402-6.) For example, in the residency agreements for Plaintiffs, [redacted] (*See*, *e.g.*, Ex. 1 ("Fearn Residency Agreement") at SUN000495, Doc. 438-3; *see also id.* Ex. 2 ("Ganz Residency Agreement") at SUN000057 (same).) The agreements [redacted] (Ex. 1 (Fearn Residency Agreement) at SUN000495, Doc. 438-3; *id.* Ex. 2 (Ganz Residency Agreement) at SUN000057 (same).) Moreover, the residency agreements provide that Sunrise [redacted] (*See*, *e.g.*, Ex. 1 at SUN000496, Doc. 438-3.)

Although Sunrise's residency agreements have changed over time, Sunrise acknowledges that its residency agreements discuss that Sunrise uses an "assessment" process for determining a prospective resident's service level and that the service levels "correspond to different prices charged for the services." (Answer ¶ 7 ("Defendants admit that Sunrise Management uses a system of resident assessments and corresponding service

levels, and that those service levels correspond to different prices charged for the services."), Doc. 83; Ex. 4 (2012-2014 Sunrise residency agreement) (noting "assessment" process), Doc. 402-7; *id.* Ex. 7 (May 2015-Present Sunrise residency agreement) (same).)

Plaintiffs allege that Sunrise's representations as to its assessment process, among other items, suggest to "[t]he reasonable consumer . . . that, as a matter of policy and practice, Sunrise will provide sufficient staff at each facility to deliver to all facility residents the amount and type of care that Sunrise has identified as necessary based on resident assessments and overall census." (SAC ¶ 3, Doc. 77.) Sunrise argues that the residency agreement provisions described above "contain *no* representations about staffing levels." (Opp. at 11, Doc 402-1.)

B. Sunrise's Assessment Process

Sunrise conducts resident assessments [redacted]. (*See, e.g.*, Ex. 21 [redacted], Doc. 402-8; *id.* Ex. 22 [redacted]; Slichta Decl. ¶ 11, Doc. 402-6 [redacted] The [redacted] (Slicta Decl. ¶ 12, Doc. 402-6.) To [redacted] (*Id.* ¶ 16.) The [redacted]. (*Id.*; Ex. 50 (30b6 Depo.) at 84:17-85:7 [redacted]

[redacted], Doc. 438-36.) [redacted]. (Slichta Decl. ¶ 16 [redacted], Doc. 402-6.)

Based [redacted]. (*See*, *e.g.*, *id.* ¶ 18 [redacted]; Ex. 27 [redacted], Doc. 402-8.) According to Sunrise, [redacted] (Slichta Decl. ¶ 15, Doc. 402-6.) The service levels further correspond to certain fees that a resident will pay. (*See*, *e.g.*, Ex. 27 at 2 [redacted], Doc. 402-8; Slichta Decl. ¶ 24 [redacted], Doc. 402-6.) Plaintiffs argue that Sunrise [redacted] (Mot. at 8, Doc. 438-1.) Plaintiffs also assert that [redacted] (*Id.*)

C. Sunrise's Staffing Process

As noted above, the [redacted] (*See*, *e.g.*, Slichta Decl. ¶ 25, Doc. 402-6.) According to Sunrise, [redacted] (*Id.* ¶ 34.) The [redacted] (*Id.*) Sunrise notes [redacted]. (*Id.* ¶¶ 33, 45-46; *see also id.* ¶ 33 [redacted].

Plaintiffs assert that Sunrise's [redacted] has systemic flaws. Plaintiffs note that [redacted] (Mot. at 8, Doc. 438-1.) Plaintiffs note that because [redacted] (*Id.* at 9.) Moreover, [redacted]. *First*, according to Plaintiffs, [redacted] (*Id.*) *Second*, [redacted] (*Id.*) For example, Plaintiffs' staffing expert, Cristina Flores, noted that [redacted]

[redacted] (Declaration of Cristina Flores ("Flores Decl.") at 14 n.11, Doc. 288-42.) Plaintiffs argue that [redacted] (Mot. at 9, Doc. 438-1.) [redacted] (*Id.* at 10 (citing Reply Declaration of Patrick Kennedy ("Kennedy Decl.") ¶ 32, Doc. 438-55.).)

Plaintiffs assert as a result of Sunrise's deficient staffing model, "[a]ll residents are subjected to a corporate staffing model that fails to ensure staffing sufficient to meet promised services." (Mot. at 19, Doc. 438-1.) Plaintiffs contend that "Sunrise markets its services as providing 'peace of mind' that residents will receive the care they need as they 'age in place.'" (Reply at 19, Doc. 412-1.) Yet, "[a]s a result of Sunrise's failure to adopt and implement policies and procedures that ensure adequate staffing, all residents are subjected to a substantial and unreasonable risk that they will not receive promised care services." (Mot. at 20, Doc. 438-1.) This is a risk, Plaintiffs argue, that residents paid to avoid which "undercut[s] an essential reason for contracting." (Reply at 19, Doc. 412-1.)

Indeed, according to Plaintiffs, there exists "ample evidence of negative resident outcomes indicative of the substantial and ongoing risk residents face as a result of Sunrise's inadequate policies and procedures regarding facility staffing." (Flores Decl. ¶ 59, Doc. 288-42; *see also* Declaration of Megan A. Yarnall ¶¶ 2-10 (attaching, among other things, "[a]n index of the incidents and complaints produced from Sunrise's files" and "copies of the [California Department of Social Services' Community Care Licensing Division] Complaint Investigation Reports and Facility Evaluation Reports"), Doc. 438-41.) Accordingly, Plaintiffs argue that "[t]he payment of money coupled with Sunrise's (undisclosed) defective staffing policies constitute legal injury for all class members." (Mot. at 20-21, Doc. 438-1.)

Sunrise argues that it does not employ a defective staffing model. Sunrise contends, [redacted]. (Opp. at 5, Doc. 402-1 (internal quotation marks omitted).) As support, Sunrise points to, among other things, testimony from its Senior Vice President of Operations and declarations from Sunrise staff. (*See*, *e.g.*, Compendium of Staff Declaration in Support of Defendants' Opposition to Plaintiffs' Amended Motion for Class Certification, Doc. 402-11).) Sunrise also contends that "Executive Directors, "Assisted Living Coordinators," and other coordinators regularly assist with ADLs." (Opp. at 3, Doc. 402-1; *see also* Slichta Decl. ¶ 5 [redacted], Doc. 402-6.) Therefore, Sunrise argues, [redacted] (Opp. at 6, 6 n.6, Doc. 402-1.)

Plaintiffs argue otherwise. Plaintiffs note that [redacted] (Mot. at 10, Doc. 438-1.) For example, [redacted] (*Id.* (citing Ex. 13 at SUN0025352, Doc. 438-14).) Plaintiffs also note [redacted]. (*See*, *e.g.*, Ex. 21 at SUN001417 [redacted], Doc. 438-20.) Indeed, [redacted]

[redacted] (Ex. 30 at SUN0095935, Doc. 438-24.) Plaintiffs also note that [redacted]. (Mot. at 21, Doc. 438-1.)

Accordingly, Plaintiffs seek to certify the following class (the "Class") under Federal Rule of Civil Procedure 23(b)(3):

> [A]ll persons who resided at a Sunrise California Facility from June 27, 2013 through the present ('Class Period'), contracted with and paid money to Defendants pursuant to a Residency Agreement, and whose claims are not subject to arbitration because: (1) neither the Resident nor Resident's Responsible Party (as defined in the Residency Agreement) agreed to or accepted the arbitration provision in writing; or (2) if arbitration was initially accepted, the Resident or Resident's Responsible Party provided written notice of withdrawal within the 30-day period prescribed in the Residency Agreement.

(*Id.* at 1-2.) [1] The named Plaintiffs also seek an order appointing them as class representatives in this action. Further, Plaintiffs seek this Court's approval of the following firms as class counsel: Schneider Wallace Cottrell Konecky LLP, Stebner & Associates, Dentons US LLP, Law Offices of Michael D. Thamer, the Arns Law Firm, Janssen Malloy LLP, and Marks Balette Giessel & Young, P.L.L.C.

II. LEGAL STANDARD

"A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013). Rule 23(a) "requires a party seeking class certification to satisfy four requirements: numerosity,

[1] The Sunrise California Facilities consists of forty-three Sunrise assisted-living facilities in California. (Amended Declaration of Christopher J. Healey ("Healey Decl.) ¶ 3, Doc. 438-2.)

commonality, typicality, and adequacy of representation." *Id*. (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011)). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> > (2) there are questions of law or fact common to the class;
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> > (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id*. at 350-51.

"Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id*. at 345. Here, Plaintiffs seek certification of the class under Rule 23(b)(3), which permits maintenance of a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

III. DISCUSSION

As noted above, before the Court are several motions: (1) an Amended Motion for Class Certification (Mot., Doc. 438-1) and (2) four motions seeking to strike declarations

submitted by Plaintiffs' experts (Mots., Doc. 375, 389, 390, 430). The Court first addresses Sunrise's motions to strike.

A. Motions to Strike

Sunrise seeks to strike declarations submitted by the following experts filed in support of Plaintiffs' Motion for Class Certification: (1) Cristina Flores, Plaintiffs' staffing expert; (2) Patrick Kennedy, Plaintiffs' damages expert; and (3) Dale Schroyer, Plaintiffs' systems engineering expert. (Mots., Docs. 389, 390, 375, 430.) Sunrise filed a sur-reply in support of its motion to strike Mr. Schroyer's reply declaration, which the Court permitted. (Sur-Reply, Doc. 466.)

The Ninth Circuit has stated that "in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018). "Under *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). In addition to the express requirements of Rule 702, a trial court "must assure that the expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043-44 (9th Cir. 2014) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)).

However, while the Ninth Circuit has noted that courts should evaluate expert testimony under *Daubert*, it has also noted that "[i]nadmissibilty alone is not a proper basis to reject evidence in support of class certification." *Sali*, 909 F.3d at 1004. "Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage," which "accords" with the Ninth Circuit's "prior guidance that a district court should analyze the 'persuasiveness of the evidence presented'

at the Rule 23 stage." *Id.* at 1006 (quoting *Ellis*, 657 F.3d at 982). The Ninth Circuit has further noted that it "license[s] greater evidentiary freedom at the class certification stage" and that courts should not "rely[] on formalistic evidentiary objections" to "exclude[] proof that tend[s] to support class certification." *Id.*

Below, the Court evaluates Sunrise's arguments as to the "admissibility" of the expert reports to determine the "weight that evidence is given at the class certification stage." *Sali*, 909 F.3d at 1006; *see also Aberin v. Am. Honda Motor Co.*, 2021 WL 1320773, at *4 (N.D. Cal. Mar. 23, 2021) ("The Court will consider both parties arguments as to the reliability of the proffered expert testimony to assist in evaluating the weight of the evidence as it relates to class certification."); *Coates v. United Parcel Serv., Inc.*, 2019 WL 8884492, at *8 (C.D. Cal. July 2, 2019).

1. Motion to Strike the Declaration of Cristina Flores

Dr. Cristina Flores is a registered nurse in California, holds a Ph.D. in Nursing Policy from the University of California, San Francisco, and has been certified as a RCFE (Residential Care Facilities for the Elderly) Administrator since 1996. (Flores Decl. ¶¶ 5, 7, Doc. 288-42.) Dr. Flores opines that [redacted] (*Id.* ¶ 32.) Dr. Flores contends that [redacted] (*Id.*) Dr. Flores based her conclusions on, among other things, her experiences as a RCFE certified administrator, her time task study, and Sunrise's internal documents concerning its staffing procedures and staffing methodology. (*See*, *e.g.*, ¶¶ 31, 33 n.9, 57.)

Sunrise "takes no issue with Dr. Flores' credentials as a nurse or RCFE operator" (Mot. at 24, Doc. 390) but argues that Dr. Flores' opinions are unreliable and irrelevant to

Plaintiffs' Motion principally because: (1) "care manager target hours are *not* reflective of how Sunrise staffs its communities or what care was actually provided to residents" and (2) her estimates "on the number of minutes it takes to complete certain tasks" are "based on her *memory*; inapposite literature that does not support her conclusions; and a 'time study' she conducted *for purposes of this litigation* at her 6-resident facilities." (Mot. at 1-2, Doc. 390.) The Court finds Sunrise's arguments unpersuasive.

First, Sunrise argues that Dr. Flores' opinions are inadmissible because "care manager target hours are not reflective of how Sunrise staffs its communities or what care was actually provided to residents." (*Id.* at 1.) However, Sunrise's arguments here are simply disagreements about what the disputed facts show in this case. For example, Sunrise argues that Dr. Flores' opinions are irrelevant because "she assumed that . . . only care managers provide care to residents," and "she did not consider that community executive directors and neighborhood coordinators . . . have complete discretion to staff care managers." (*Id.* at 14, 16.) However, Plaintiff's interpretation of the evidence—that care managers are responsible for providing ADL services, that services provided by other staff, if at all, are minimal, and that Sunrise staff have little discretion to vary hours—is not unmoored from the underlying evidence. (*See*, *e.g.*, Opp. at 14-16, Doc. 444-1 (collecting evidence).) As a result, Plaintiffs' expert is not required to accept Sunrise's version of the disputed facts. *See*, *e.g.*, Fed. R. Evid. 702 Advisory Committee Note (2000 Amendment) ("When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").

Second, Sunrise argues that Dr. Flores' opinions as to the "number of minutes it takes to complete certain tasks" are unreliable. (Mot. at 1-2, Doc. 390.) However, the Court finds Sunrise's arguments here are similarly unpersuasive. While the Court recognizes that Dr. Flores noted that her "task time studies . . . were of limited sample size

and were conducted in facilities far smaller than those Sunrise operates," Dr. Flores also noted that her "task time studies did not form the exclusive basis for [her] opinion." (*See*, *e.g.*, Reply Declaration of Cristina Flores ("Flores Reply Decl.") ¶ 18, Doc. 289-1.) Indeed, Dr. Flores also based her estimates on, among other things, her "more than 25 years as a nurse in the field of assisting living care," her experiences as a RCFE Administrator, and Sunrise's own estimates of time needed by its caregiver staff to provide ADL services. (*See*, *e.g.*, Flores Decl. ¶¶ 22-33, 35 n.12, Doc. 288-42.)

Sunrise makes additional arguments challenging the applicability of Dr. Flores experience as well as her time task studies; however, none of Sunrise's arguments show that her opinions lack a "reliable foundation" or "relevan[ce] to the task at hand" for purposes of class certification. *Daubert*, 509 U.S. at 596; *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2014) ("The judge is 'supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.'"); *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014) (noting that "[t]he district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury" (internal quotation marks omitted)).

2. Motion to Strike the Declaration of Patrick Kennedy

Dr. Patrick Kennedy, Plaintiff's damages expert, holds a Doctorate in Economics from Stanford University and is "an economist and Managing Director with Torrey Partners." (Kennedy Decl. ¶ 1, Doc. 288-41.) Consistent with Plaintiffs' theory of liability, Dr. Kennedy notes that "the appropriate measure for calculating damages or restitution under Plaintiffs' claims is the excess of what Plaintiffs paid to the Defendant over the value, if any, of what the Plaintiffs received." (*Id.* ¶ 12.) Accordingly, Dr. Kennedy purports to provide a methodology for calculating the following three categories of fees that Plaintiffs seek to recover: (1) move-in fees, (2) "recovery of a

portion of the monthly fees paid for care services and medication management services (collectively, 'Service Fees')," and (3) "statutory damages as authorized under the CLRA." (Opp. at 3 (citing SAC ¶¶ 104, 108-109, 121, 130, Prayer ¶¶ 2-4, Doc. 77), Doc. 442-1.)

Dr. Kennedy opines that "damages can be reasonably calculated on a class-wide basis using a commonly applied methodology and reliable data." (Kennedy Decl. ¶ 36, Doc. 288-41.) As to move-in fees, Dr. Kennedy notes that no value offset is required as there were no direct benefits provided to residents associated with the move-in fees. (*See*, *e.g.*, *id.* ¶ 57.) Dr. Kennedy contends that the move-in fees paid by putative class members are ascertainable from Sunrise's business records. (*Id.* ¶ 66.) As to service fees, Dr. Kennedy opines that "[i]f the trier of fact determines that Plaintiffs' recovery should be reduced to reflect an offset for the amount that residents would have paid if they had knowledge of Sunrise's allegedly defective care services staffing, then the staffing shortfall percentages calculated by Sunrise's staffing expert can be used to estimate an offset to the full recovery." (Kennedy Decl. ¶ 62, Doc. 288-41.) For example, Dr. Kennedy notes that "[i]f Sunrise provided only 80 percent of required staffing, then this amount can be used as a conservative measure of the amount that a reasonable consumer would have paid for partial care services at the outset." (*Id.*) Plaintiffs contend that using such information along with "Sunrise's daily assessment and staffing records" as well as Sunrise's own pricing model, damages can be calculated based on what a reasonable person would have paid for Sunrise's care services under the circumstances." (Mot. at 24, Doc. 438-1.)

Sunrise argues that Dr. Kennedy's opinions here are inadmissible because: (1) "Dr. Kennedy relies on the target staffing hours for only one position (care managers)"; (2) "Dr. Kennedy speculates that Sunrise's target hours reflect the absolute minimum number of hours needed to provide resident care, and that a community is necessarily 'understaffed' if staffing levels do not exceed target"; (3) "Dr. Kennedy . . . conceded that his model could not account for the possibility that different residents faced different risks of purported understaffing"; (4) "Dr. Kennedy admits that Sunrise is entitled to an 'offset'

for the value of its services rendered, but he performed no analysis to determine the amount of that offset and provides no plan for doing so"; and (5) "Dr. Kennedy's damages model depends entirely on 'inputs' he expects to receive from Dr. Cristina Flores." (Mot. at 1-3, Doc. 389.) The Court finds Sunrise's arguments as to Dr. Kennedy's declaration unpersuasive.

First, Sunrise's arguments that Dr. Kennedy's methodology focuses on hours provided by its caregiver staff and does not consider that Sunrise allegedly "sets its target staffing hours far *above* what is needed to provide resident care" fails. (*Id.* at 1.) Like the arguments directed to Dr. Flores' declaration, Sunrise's criticisms here are directed at conclusions Plaintiffs have drawn from the disputed facts. As the Court noted above, Plaintiffs have provided evidence that Sunrise's target staffing hours are insufficient and do not appropriately reflect the level of care needed for its residents. *See*, *e.g.*, *supra* pp. 7-10. Sunrise's criticisms do not show that Dr. Kennedy's opinions are inherently unreliable or irrelevant.

Second, Sunrise argues that Dr. Kennedy's "model could not account for the possibility that different residents faced different risks of purported understaffing." (Mot. at 1, Doc. 389.) However, as Plaintiffs note, "[a]t most, any potential variation in the 'experiences' of the class members with Sunrise staffing might impact the calculation of Service Fee damages and Sunrise's offset defense to that claim." (Opp. at 9, Doc. 442-1.) The mere fact that individual damages calculations may be necessary does not render Dr. Kennedy's opinions unreliable. As the Ninth Circuit has explained, to obtain "class certification, Plaintiffs need to be able to allege that their damages arise from a course of conduct that impacted the class"; however, "they need not show that each members' damages from that conduct are identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017).

Third, Sunrise's argument that Dr. Kennedy "performed no analysis to determine the amount of . . . offset and provides no plan for doing so" is contradicted by

Dr. Kennedy's declaration. (Mot. at 2, Doc. 389.) Dr. Kennedy gave several examples of how Plaintiffs would determine offsets based on alleged staffing shortfalls at Sunrise's California facilities. (*See*, *e.g.*, Kennedy Decl. ¶¶ 61-65, Doc. 288-41.) Sunrise's arguments to the contrary are unpersuasive in light of the specific examples Dr. Kennedy provided. Accordingly, the Court does not find that Sunrise's arguments undercut the reliability or relevance of Dr. Kennedy's opinions.

3. Motions to Strike the Declaration and Reply Declaration of Dale Schroyer

Dale Schroyer, Plaintiffs' systems engineering expert, opines that the ProModel/MedModel, a staffing simulation software, "provides a well-established methodology to determine the amount of care time required per day in Sunrise's assisted living facilities and to quantify the extent to which available staff time was sufficient or insufficient." (Declaration of Dale Schroyer ("Schroyer Decl.") ¶ 18, Doc. 288-51.) He notes that "[s]ince at least 2000, MedModel computational software has been used to determine the capacity of nursing home staff to meet the care needs of the facility's resident population" and has been used by hospitals such as Mayo Clinic and John Hopkins Hospital "to make decisions regarding staffing resources." (*Id.* ¶¶ 14-15.) Mr. Schroyer notes that with data inputs provided by Sunrise—"the same kind of inputs that are used by ProModel/MedModel computational and analytic software to test workload and staffing in . . . healthcare institutions across the country"—Plaintiffs can determine staffing shortfalls in Sunrise's facilities. (*See*, *e.g.*, *id.* ¶¶ 18-20.) In his reply declaration, Mr. Schroyer provided calculations of staffing shortfalls across selected Sunrise facilities. (*See*, *e.g.*, Reply Declaration of Dale Schroyer ¶¶ 12-16 ("Schroyer Reply Decl."), Doc. 412-3.) Plaintiffs contend that Mr. Schroyer could not perform his "shortfall analysis" when Plaintiff's filed his initial declaration because of Sunrise's alleged "discovery delays." (Mot. at 24, Doc. 438-1.)

Sunrise argues that this Court should find Mr. Schroyer's declaration and reply declaration inadmissible for several reasons. As to the initial declaration, Sunrise argues that the Court should exclude Mr. Schroyer's declaration because (1) "the Schroyer Declaration fails to meet the requirements of Rule 702 because Mr. Schroyer admittedly did not provide *any* type of opinion" and (2) "Plaintiffs have failed to produce the required disclosures relating to Mr. Schroyer's 'expert' non-opinions." (Mot. at 1-2, Doc. 375.) As to the reply declaration, Sunrise argues the Court should strike the reply because: (1) "the Reply Declaration is procedurally improper because it was submitted for the first time on reply"; (2) Plaintiffs "repeated[ly] fail[ed] to comply with Federal Rule of Civil Procedure 26(a)'s disclosure requirement—both by disclosing Mr. Schroyer's opinions for the first time on reply and by refusing to produce the materials he relied upon"; and (3) "Sunrise is concerned that the Reply Declaration relies on confidential information that violates protective orders." (Mot. at 1-2, Doc. 430.) Sunrise also filed a sur-reply in support of its motion to strike Mr. Schroyer's Reply Declaration as permitted by the Court. (Sur-Reply, Doc. 466.)

As to the initial declaration, the Court find that Mr. Schroyer's opinions expressed therein are not so inherently unreliable or irrelevant that they should be excluded at the class certification stage. In his declaration, Mr. Schroyer details how Plaintiffs can use ProModel/MedModel to determine staffing shortfalls across Sunrise's California facilities based on Sunrise's internal records. Mr. Schroyer also explains, with supporting examples and relevant academic scholarship, how "[t]he U.S. military, leading manufacturing and service companies, and healthcare institutions across the country use and depend upon ProModel for . . . determinations" as to "how many workers are needed to perform a defined set of job tasks." (Schroyer Decl. ¶¶ 11-16, Doc. 288-51.) Indeed, according to Mr. Schroyer, the data inputs he proposed as to Sunrise "are the same kind of inputs that are used" by a variety of healthcare institutions, which Sunrise did not dispute. (*Id.* ¶ 20.)

Sunrise argues that the Court should nonetheless find Mr. Schroyer's declaration inadmissible because "Plaintiffs have failed to produce the required disclosures relating to Mr. Schroyer's 'expert' non-opinions." (Mot. at 1, Doc. 375.) But the underlying record illustrates that Plaintiffs produced evidence pertinent to Mr. Schroyer's opinions in June and July 2020. (*See*, *e.g.*, Declaration of Brian S. Umpierre ("Umpierre Decl.") ¶¶ 6-11, Doc. 280-2.) While Sunrise contends that Plaintiffs' productions as to Mr. Schroyer are inadequate, Sunrise did not seek relief from this Court until after Plaintiffs filed their Motion. Indeed, Sunrise all but acknowledges that there are no pending discovery motions before the Special Master appointed in this case as to Plaintiffs' alleged discovery violations. Therefore, Sunrise's delay in seeking relief from Plaintiff's alleged discovery violations demonstrates a lack of prejudice. Fed. R. Civ. P. 37(c)(1).

Sunrise also seeks to exclude Mr. Schroyer's reply declaration on procedural and substantive grounds. As to Sunrise's procedural arguments, including Sunrise's arguments that Plaintiffs have presented "new evidence on reply," the Court declines to exclude Mr. Schroyer's reply declaration on these bases. As the Ninth Circuit explained, district courts are afforded "greater evidentiary freedom at the class certification stage," and they should not "lean[] on evidentiary formalism in striking . . . declarations as 'new evidence.'" *Sali*, 909 F.3d at 1006; *see also id.* at 1003 ("At this preliminary stage, a district court may not decline to consider evidence solely on the basis that the evidence is inadmissible at trial."). While Sunrise contends that it has been prejudiced by Mr. Schroyer's reply declaration, the Court notes that Sunrise's sur-reply declaration indicates to the contrary as evidenced by Sunrise's detailed arguments. Of course, the Court recognizes that at this stage Sunrise did not depose Mr. Schroyer as to his specific calculations. However, Sunrise's contentions here affect only the weight afforded to Mr. Schroyer's calculations. Sunrise will have an opportunity to make any additional arguments at summary judgment and trial, as expert discovery has not closed. (*See* Amended Scheduling Order, Doc. 477); *Sali*, 909 F.3d at 1005-06 ("'As class certification

decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty.'").

As to Sunrise's substantive arguments about Mr. Schroyer's reply declaration, they do not demonstrate that Mr. Schroyer's opinions warrant exclusion under *Daubert* or Rule 702 at this stage. Indeed, Dr. Schroyer provided detailed information as to the inputs he considered in finding alleged staffing shortfalls across selected Sunrise California facilities, including methods used to account for variability. (*See*, *e.g.*, Schroyer Reply Decl. ¶ 47, Doc. 412-3.) Sunrise also does not dispute that models such as the one proposed by Mr. Schroyer in this case have been used by healthcare facilities across the country in calculating staffing shortfalls. In any event, the Court does not heavily rely on Mr. Schroyer's shortfall calculations in concluding that class certification is appropriate given the other evidence in the record that supports certification.

B. MOTION FOR CLASS CERTIFICATION

1. Commonality and Predominance

In addressing Plaintiffs' Motion for Class Certification, the Court begins with an analysis of the Rule 23(a)(2) commonality requirement and the Rule 23(b)(3) predominance requirement, both of which often involve overlapping considerations. *See, e.g.*, *In re AutoZone, Inc., Wage & Hour Emp. Pracs. Litig.*, 289 F.R.D. 526, 533 n.10 (N.D. Cal. 2012), *aff'd*, 789 F. App'x 9 (9th Cir. 2019)).

Rule 23(a)(2) requires that "there [be] questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The plaintiff must allege that the class's injuries "depend upon a common contention" that is "capable of classwide resolution." *Id.* In other words, the "determination of [the common contention's] truth or

falsity [must] resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What matters to class certification . . . is not the raising of common questions—even in droves—but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation marks and citation omitted).

The predominance requirement under Rule 23(b)(3) "is far more demanding" than the commonality requirement of Rule 23(a). *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 981 (C.D. Cal. 2015) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Windsor*, 521 U.S. at 623. "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1234 (9th Cir. 1996). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed.1986)). Indeed, "when 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

Plaintiffs contend that commonality and predominance are satisfied as to their CLRA, UCL, and elder financial abuse claims. The Court agrees.

i. CLRA & UCL Claims

Plaintiffs' CLRA and UCL claims are related. *See Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The UCL prohibits "unlawful, unfair, or fraudulent business act[s] or practice[s]" and "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Similarly, the CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. Both claims "are governed by the 'reasonable consumer' test." *Williams*, 552 F.3d at 938; *see also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012) ("Conduct that is 'likely to mislead a reasonable consumer' violates the CLRA."). Under this test, Plaintiffs "must 'show that members of the public are likely to be deceived.'" *Id.* Courts have routinely found that claims under the UCL and CLRA are ideal for class-wide certification. *See*, *e.g.*, *Bruno v. Quten Rsch. Inst., LLC*, 280 F.R.D. 524, 532 (C.D. Cal. 2011) ("[B]ecause Plaintiff's other claims under the FAL and CLRA rely on the same objective test, that is, whether 'members of the public are likely to be deceived,' these other claims also do not require individual analysis of class members' injury nor negate such class members' Article III standing.").

Plaintiffs have satisfied both commonality and predominance as to their UCL and CLRA claims. As to commonality, Plaintiffs have shown that the putative class members signed similar residency agreements, were exposed to the same representations regarding Sunrise's assessment process and are all subject to Sunrise's purportedly defective staffing model for its California facilities. *See supra* pp. 3-5. As a result, common questions of whether residents are, for example, "likely to be deceived" by Sunrise's statements as to its assessment process and care services are capable of resolution on a classwide basis. *See Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (noting that "a single common question" is all that is required for commonality, even if "'circumstances of each particular class member vary'"). Plaintiffs have provided evidence that they can prove their claims through use of Sunrise's own business records, marketing materials, and statements from

its staff personnel. Moreover, as the reasonable consumer test standard focuses on the defendants' conduct, as opposed to any individual conduct by putative class members, this standard also militates towards a predominance finding. *Williams*, 552 F.3d at 938 (noting that under the reasonable consumer test for CLRA and UCL claims, Plaintiffs "must 'show that 'members of the public are likely to be deceived'").

Sunrise makes several arguments to the contrary. Sunrise argues that "the facts here show" that "resident expectations and experiences are fundamentally individualized." (Opp. at 10, Doc. 402-1.) However, individualized questions would not predominate in part because Plaintiffs' UCL and CLRA claims center on an objective test that focuses on Defendants' conduct. *See*, *e.g.*, *Wilson*, 668 F.3d at 1140. Moreover, Plaintiffs have presented evidence that class members were all exposed to similar residency agreements, that class members received similar representations regarding Sunrise's assessment and staffing process, and all putative class members are subject to Sunrise's staffing model. Sunrise also contends that "Plaintiffs . . . have not shown they can prove . . . reliance on a classwide basis." (Opp. at 19, Doc. 402-1.) Yet, Sunrise ignores that under the reasonable person standard "a finding that the defendant has failed to disclose information that would have been material to a reasonable person who purchased the defendant's product gives rise to a rebuttable inference of reliance as to the class." *Edwards v. Ford Motor Co.*, 603 F. App'x 538, 541 (9th Cir. 2015). Indeed, Sunrise does not argue that staffing considerations are immaterial to putative class members' decision to contract with Sunrise.

Sunrise further argues that Plaintiffs' claims fail as to predominance and commonality because "staffing at Sunrise varies based on local manager's discretion, the 'neighborhood' where the resident lived, the time period, and each resident's needs." (Opp. at 1, Doc. 402-1.) But the Court is not convinced that these issues would predominate in this action given Sunrise's own admissions that all residents are required to sign a residency agreement, the residency agreement discusses an assessment process (that has remained relatively consistent across the class period) and are all subject to Sunrise's

allegedly deficient staffing model. (*See*, *e.g.*, Answer ¶ 7 ("Defendants admit that Sunrise Management uses a system of resident assessments and corresponding service levels, and that those service levels correspond to different prices charged for the services."), Doc. 83; Ex. 4 (2012-2014 Sunrise residency agreement) (noting "assessment" process), Doc. 402-7; *id.* Ex. 7 (May 2015-Present Sunrise residency agreement) (same).) In any event, Plaintiffs' have presented evidence that Sunrise staff have little discretion to vary caregiver hours.

Therefore, the Court finds that predominance and commonality has been met as to Plaintiffs' CLRA and UCL claims.

ii. Elder Financial Abuse Claim

Plaintiffs argue that their elder financial abuse claim also satisfies commonality and predominance. Under California, "financial abuse" of "an elder or dependent adult occurs when a person or entity," among other things, "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." Cal. Welf. & Inst. Code § 15610.30(a). A person or entity is "deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if . . . the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." *Id.* § 15610.30(b). In this case, "Plaintiffs contend that Sunrise wrongfully took money from elders by promising to provide assisted living services, while failing to disclose that its staffing policies fail to ensure facility staffing that is sufficient to meet the residents' assessed needs." (Mot. at 13, Doc. 438-1.) Plaintiffs argue that "[a]s the liability determination primarily focuses on defendant's conduct, the financial elder abuse claims are likewise well-suited for class treatment." (*Id.*)

Sunrise argues that "[p]laintiffs have failed to show how their elder abuse claim is susceptible to classwide proof." (Opp. at 25, Doc. 402-1.) In particular, Sunrise contends

that "individualized inquiries into whether an 'elder' or other family member owned the funds paid to Sunrise would be necessary." (*Id.*) As support, Sunrise cites to several declarations from the putative class members. (*Id.*) Sunrise also argues that Plaintiffs lack common proof of its intent to defraud current and potential residents. However, as Plaintiffs' note, the underlying evidence illustrates that Plaintiffs can point to Sunrise's use of "round down" target staffing formula and alleged corporate knowledge that "its staffing formula placed care managers in an 'impossible" position" to show intent to defraud. (Reply at 24-25, Doc. 412-1.) As Plaintiffs' elder financial abuse claim also focuses on Defendants' common conduct, the Court too finds that this claim satisfies the predominance and commonality requirements.

iii. Classwide Damages

"Rule 23(b)(3)'s predominance requirement takes into account questions of damages." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017). Plaintiffs must "show that their damages stemmed from the defendant's actions that created the legal liability." *Id.* (internal quotation marks omitted). To meet "this requirement, plaintiffs must show that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Id.* (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)). However, it is well-established that the need for individualized "'damage calculations alone cannot defeat certification.'" *Id.* In addition, "[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages." *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019) (internal quotation marks omitted).

Here, Plaintiffs contend that their damages model based on their CLRA and elder financial abuse claim looks at the "difference between what consumers paid to defendants and the 'actual value of that which [they] received." (Mot. at 23, Doc. 438-1; *see also id.*

at 24 ("Plaintiffs' damages model addresses Defendants' contention that recovery should be offset for 'value conferred.'"). As to move-in fees, Plaintiffs contend "[n]o offset is required . . . , as those fees are generally paid prior to admission, before the resident receives any care services." (*Id.* at 24.) As to service fees, Plaintiffs' expert opines that "[i]f the trier of fact determines that Plaintiffs' recovery should be reduced to reflect an offset for the amount that residents would have paid if they had knowledge of Sunrise's allegedly defective care services staffing, then the staffing shortfall percentages calculated by Sunrise's staffing expert can be used to estimate an offset to the full recovery." (Kennedy Decl. ¶ 62, Doc. 288-41.) For example, "[i]f Sunrise provided only 80 percent of required staffing, then this amount can be used as a conservative measure of the amount that a reasonable consumer would have paid for partial care services at the outset." (*Id.*) Plaintiffs contend that using such information along with "Sunrise's daily assessment and staffing records" as well as Sunrise's own pricing model, damages can be calculated based on what a reasonable person would have paid for Sunrise's care services under the circumstances." (Mot. at 24, Doc. 438-1.)

The Court finds that "Plaintiffs generally will be able to 'show that their damages stemmed from the [Defendants'] actions that created the legal liability.'" *Just Film, Inc.*, 847 F.3d at 1121. Plaintiffs have proposed a method for "measuring damages that are directly attributable to their legal theory of the harm" caused by Sunrise's conduct. *Id.* In addition, Plaintiffs note that they can determine how much each individual class member paid for the various move-in and services fees by use of Sunrise's own business records. (*See*, *e.g.*, Mot. at 24, Doc. 438-1; Kennedy Decl. ¶¶ 39, 43, 66, Doc. 288-41; Ex. 50 (Slichta 30(b)(6) Depo.) at 215:12-15 (A: "Sunrise maintains records of the fees that we charge residents."), Doc. 438-36.) "At this stage, Plaintiffs need only show that such damages can be determined without excessive difficulty and attributed to their theory of liability, and have proposed as much here." *Just Film, Inc.*, 847 at 1121.

2. Superiority

"The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id.* Here, each member of the class pursuing a claim individually would burden the judiciary and run afoul of Rule 23's focus on efficiency and judicial economy. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."). Indeed, as the Court noted above, Plaintiffs' claims center around whether Sunrise made certain misrepresentations to the class as a whole and whether Sunrise adequately staffs its California facilities. Therefore, adjudicating Plaintiffs' claims on a class wide basis is manageable and would further the goals of judicial economy and efficiency. *Id.* Further, litigation costs would likely "dwarf potential recovery" if each class member litigated individually. *Hanlon*, 150 F.3d at 1023.

Sunrise argues that "[a] class action is not 'superior' to individual actions here" because "Ms. Ganz," for example, "claims her mother suffered unique *physical* injuries due to alleged understaffing." (Mot. at 24, Doc. 402-1.) However, as Plaintiffs note, "[a]lthough the SAC references poor care that Helen Ganz endured, it specifically excludes claims for personal injuries." (Reply at 24, Doc. 412-1; *see also* SAC ¶ 81 ("This action does not seek recovery for personal injuries, emotional distress, or bodily harm that may have been caused by Sunrise's conduct alleged herein."), Doc. 77.) Accordingly, the superiority element has been met.

3. Numerosity

Plaintiffs contend that the Class satisfies numerosity under Rule 23(a) because there are at least 2,400 current and former residents of Sunrise California Facilities that fall within the Class definition. (*Id*. at 14.) Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The numerosity requirement is not tied to any fixed numerical threshold," rather, "it 'requires examination of the specific examination of the specific facts of each case and imposes no absolute limitations.'" *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (quoting *Gen. Tel. CO. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). However, "precedent provides some guidance," and "in general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Id.*; *see also Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008), *vacated on other grounds*, 555 F.3d 581 (9th Cir. 2012) ("As a general rule, classes of forty or more are considered sufficiently numerous.").

Here, Plaintiffs have plainly satisfied the numerosity requirement. Plaintiffs note that the underlying evidence confirms that there are at least 2,400 class members. (Mot at. 14, Doc. 438-1.) Sunrise does not challenge Plaintiffs' assertions. (Reply, Doc. 412-1.) Instead, Sunrise estimates that there are an estimated 3,059 putative class members. (Opp. at 9, 9 n.10, Doc. 402-1.) Given the estimated class size, the Court finds that Plaintiffs have plainly satisfied numerosity such that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

4. Typicality

To establish typicality, Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v.*

Buono, 847 F.3d 1108, 1116 (9th Cir. 2017). "Measures of typicality include 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (internal quotation marks omitted).

Here, Plaintiffs have satisfied Rule 23(a)(3)'s typicality requirement. Plaintiffs, like other putative class members, signed Sunrise's residency agreements as a requirement for entering Sunrise's California Facilities as a resident. (Ex. 1 ("Amy Fearn Residency Agreement"), Doc. 438-3; *id.* Ex. 2 ("Helen Ganz Residency Agreement").) Plaintiffs also allege that they, similar to other putative class members, were exposed to Sunrise's residency agreements that contained deceptive statements and omissions as to Sunrise's assessment system for staffing. (SAC ¶¶ 47-55, 61, 72, Doc. 77.) Finally, Plaintiffs allege that—like other putative class members—they suffered, among other things, economic injury in the form of "Move-In Fees" and "inflated Service Fees." (*Id.* ¶¶ 58, 61, 72.) As the Plaintiffs and the putative class members share the same characteristics, Plaintiffs' claims are "reasonably coextensive with that of the class." *See*, *e.g.*, *Just Film, Inc.*, 847 F.3d at 1117; *see also Parsons*, 754 F.3d at 685 (holding that "plaintiffs have satisfied the typicality requirement of Rule 23(a)" where "[t]he named plaintiffs thus allege 'the same or [a] similar injury' as the rest of the putative class; they allege that this injury is a result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims.").

Sunrise argues that Plaintiffs have not demonstrated typicality for two primary reasons; neither is persuasive. *First*, Sunrise argues that Edith Zack "had different expectations than others" because she "was a 'respite' resident, meaning she did not sign a long-term contract with Sunrise." (Opp. at 24, Doc. 402-1.) However, as courts have repeatedly noted, "[d]iffering factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality." *See*, *e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011). As Ms. Zack alleges that she suffered injury from

Sunrise's alleged misrepresentations and omissions in its residency agreements—an alleged course of conduct not unique to her—typicality is satisfied. *See Parsons*, 754 F.3d at 685; *see also Just Film, Inc.*, 847 F.3d at 1116 ("representative claims . . . need not be substantially identical" and "[e]ven if [plaintiff's] damages differ from the damages of some class members, typicality is not defeated" (internal quotation marks omitted)).

Second, Sunrise argues that Plaintiffs cannot demonstrate typicality because "Ms. Ganz and Ms. Fearn are not typical of the 226 residents whose family members declared they received adequate staffing." (Opp. at 25, 402-1.) However, Sunrise's argument misunderstands the nature of Plaintiffs' theory of liability. Plaintiffs allege that current and former residents were exposed to material misrepresentations and omissions in Sunrise's residency agreements as to staffing. (SAC ¶¶ 47-55, 61, 72, Doc. 77.) That some residents declared that they received adequate staffing does not demonstrate that the putative class members were not exposed to Sunrise's alleged misrepresentations and omissions in its resident agreements or were not subject to inflated service fees. *See Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) (typicality satisfied where plaintiff alleged that the class "experienced the same informational harm of not being told about H—2A work paying $12 per hour, and the harm of wage underpayment after performing qualifying H-2A work"). Indeed, the record evidence demonstrates that each putative class member signed a residency agreement that references Sunrise's assessment system for staffing and setting of service levels—all facts Sunrise concedes. (Opp. at 4, 11, Doc. 402-1 (noting that "all putative class members signed some version of Sunrise's Residency Agreement," assessments are conducted "at move-in and at least every six months thereafter," "are required by state law," and "determine[] each resident's 'service level' . . . which is based on total 'points' for all assessed needs.").)

In short, this action is not one where "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Just Film,*

Inc., 847 F.3d at 1116 (internal quotation marks omitted). The typicality requirement has been satisfied.

5. Adequacy

Plaintiffs also argue that the adequacy requirement under Rule 23(a)(4) has been met. (Mot. at 16, Doc. 438-1.) To establish adequacy, Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Resolution of "two questions" determines legal adequacy: (1) "do the named plaintiffs and their counsel have any conflicts of interest with other class members" and (2) "will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018) (internal quotation marks omitted). As to the proposed class counsel specifically, "[a]dequacy of representation also depends on the qualifications of counsel" and the "named representative's attorney [must] be qualified, experienced, and generally capable to conduct the litigation." *Id.* (internal quotation marks omitted).

Here, adequacy has been met. As to the named Plaintiffs, the record contains no evidence that they have a conflict of interest as to any other putative class member. Plaintiffs signed similar agreements as the other putative class members. (Ex. 1 (Amy Fearn Residency Agreement), Healey Decl., Doc. 438-3; *id.* Ex. 2 (Helen Ganz Residency Agreement).) Plaintiffs were also subject to the same course of conduct by Sunrise as to the alleged misrepresentations and omissions as to Sunrise's assessment system for staffing. (*See*, *e.g.*, Ganz Decl. ¶¶ 19, 26 (noting "failures in care services" and that "at no time did anyone from Sunrise tell me that, due to the manner in which Sunrise sets facility staffing, my mother faced a substantial risk that she would not receive promised care services during her stay."), Doc. 288-55; Fearn Decl. ¶¶ 21, 27 (noting "examples of a lack of care" and that "[a]t no time did anyone from Sunrise tell me that, due to the manner in which Sunrise sets facility staffing, my mother faced a substantial risk that she would not

receive promised care services during her stay"), Doc. 288-56.) As the Court finds no signs of conflict of interest and Plaintiffs claims are co-extensive with the putative class members, the Court finds that Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

As to the putative Class Counsel, the Court also finds that adequacy has been satisfied. The putative Class Counsel submitted several declarations attesting to their experience in class action lawsuits asserting alleged understaffing in assisted living/nursing facilities. (Declaration of Guy B. Wallace ¶¶ 4-15, Doc. 288-52; Healey Decl. ¶ 95, Doc. 288-4.) Sunrise does not challenge the putative Class Counsel's adequacy. As the declarations of the putative Class Counsel discloses sufficient class action experience, the Court finds Class Counsel adequate. Fed. R. Civ. P. 23(a)(4).

IV. CONCLUSION

For the foregoing reasons, the Court (1) DENIES Defendants' motions to strike and (2) GRANTS Plaintiffs' Motion for Class Certification. The following Class is certified under Rule 23(a) and 23(b)(3):

1. Class: All persons who resided at a Sunrise California Facility from June 27, 2013 through the present ("Class Period"), contracted with and paid money to Defendants pursuant to a Residency Agreement, and whose claims are not subject to arbitration because: (1) neither the Resident nor Resident's Responsible Party (as defined in the Residency Agreement) agreed to or accepted the arbitration provision in writing; or (2) if arbitration was initially accepted, the Resident or Resident's Responsible Party provided written notice of withdrawal within the 30-day period prescribed in the Residency Agreement.
2. The term "Sunrise California Facility" includes the following forty three (43) assisted living facilities owned and/or operated by Sunrise under the Sunrise

name: Sunrise at Alta Loma, Sunrise at Belmont, Sunrise at Beverly Hills, Sunrise at Bonita, Sunrise at Burlingame, Sunrise at Canyon Crest, Sunrise at Carmichael, Sunrise at Claremont, Sunrise at Danville, Sunrise at Fair Oaks, Sunrise at Fresno, Sunrise at Fullerton, Sunrise at Hermosa Beach, Sunrise at Huntington Beach, Sunrise at La Costa, Sunrise at La Jolla, Sunrise at La Palma, Sunrise at Mission Viejo, Sunrise at Monterey, Sunrise at Oakland Hills, Sunrise at Palo Alto, Sunrise at Palos Verdes, Sunrise at Petaluma, Sunrise at Playa Vista, Sunrise at Pleasanton, Sunrise at Rocklin, Sunrise at Sacramento, Sunrise at Sabre Springs, Sunrise at San Marino, Sunrise at San Mateo, Sunrise at Santa Monica, Sunrise at San Rafael, Sunrise at Seal Beach, Sunrise at Sterling Canyon, Sunrise at Studio City, Sunrise at Sunnyvale, Sunrise at Tustin, Sunrise at Walnut Creek, Sunrise at West Hills, Sunrise at Westlake Village, Sunrise at Wood Ranch, Sunrise at Woodland Hills, and Sunrise at Yorba Linda.

3. As to residents of the San Rafael facility, the Class Period commences September 29, 2016.
4. Plaintiffs Amy Fearn and Elise Ganz are appointed as the Class Representatives.
5. The Court appoints the law firms of Stebner & Associates, Schneider Wallace Cottrell Konecky LLP, Dentons US LLP, Law Offices of Michael D. Thamer, the Arns Law Firm, Janssen Malloy LLP, and Marks Balette Giessel & Young, P.L.L.C as class counsel in this case.
6. The Court directs the parties to meet and confer and to submit an agreed-upon form of class notice that will advise class members of, among other things, the damages sought and their rights to intervene, opt out, submit comments, and contact class counsel. The parties shall also jointly submit a plan for the dissemination of the proposed notice. The parties must work

together to generate a class list to be used in disseminating class notice, and they must work together to create a notice that satisfies Rule 23. The proposed notice and plan of dissemination, as well as a proposed order granting approval of such notice, shall be filed with the Court on or before **December 10, 2021**.

7. The Court has redacted portions of this Order in the publicly-available version in accordance with the parties' prior applications to seal certain information as confidential. Upon review, the Court is skeptical that any redactions are appropriate. Any party wishing to maintain any portion of this document under seal shall file within 10 days a declaration – which may be filed under seal – identifying with specificity any language that should remain redacted and providing good cause. Failure to make a timely and sufficient showing will result in an unredacted – or more minimally redacted – version being placed on the public docket.

DATED: November 16, 2021

HON. JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE