

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

SUSAN SCHMIDT, as ATTORNEY-IN-FACT for
REGINA PINKALL, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

SAPPHIRE NURSING AT WAPPINGERS, LLC;
MACHLA ABRAMCZYK; ESTHER FARKOVITS;
RICHARD PLATSCHEK; ROBERT SCHUCK; and
DOES 1-25,

Defendants.

Index No. _____

Summons Filed: June 21, 2019

SUMMONS

To the above-named Defendants:

You are hereby summoned and required to answer the attached complaint of the Plaintiff in this action and to serve a copy of your answer upon the attorneys for the Plaintiff at the address stated below.

If this summons was personally delivered to you in the State of New York, you must serve the answer within 20 days after such service, excluding the day of service. If this summons was not personally delivered to you in the State of New York, you must serve the answer within 30 days after service of the summons is complete, as provided by law.

If you do not serve an answer to the attached complaint within the applicable time limitation stated above, a judgment may be entered against you, by default, for the relief demanded in the complaint.

Plaintiff designates Suffolk County as the place of trial.

The basis of venue is Defendant Sapphire Nursing at Wappingers, LLC's place of residence, which is in Dutchess County: 37 Mesier Avenue, Wappingers Falls, New York.

Dated: White Plains, New York
June 21, 2019

**FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP**

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VERIFIED
CLASS ACTION COMPLAINT

Date Index No. Purchased:
June 21, 2019

Plaintiff Susan Schmidt, as Attorney-in-Fact for Regina Pinkall, individually and on behalf of all others similarly situated (also referred to as “Patients,” “Residents,” or the “Class”), by and through her undersigned attorneys, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, as and for her class action complaint, allege, with personal knowledge as to her own actions and based upon information and belief as to those of others, as follows:

NATURE OF THE ACTION

1. Plaintiff brings this class action against Sapphire Nursing at Wappingers, LLC (“Sapphire”); Machla Abramczyk, Esther Farkovits, Richard Platschek, and Robert Schuck (the “Ownership Defendants”); and Does 1-25 (collectively, “Defendants”) -- the owners and operators of Sapphire Nursing at Wappingers, a nursing home located at 37 Mesier Avenue, Wappingers Falls, New York (the “Facility”) -- on behalf of herself and a class of similarly situated nursing home patients who were victimized by unsafe and inadequate care in the

Facility. Defendants' unlawful conduct violates Section 2801-d of New York's Public Health Law ("PHL").¹

2. Defendants are entrusted to provide care to the elderly and infirm nursing home patients in their custody. Unfortunately, Defendants have betrayed and continue to betray that trust. For example, Defendants fail to sufficiently staff the Facility. Shortly after taking over the operations of the Facility in April 2017, Defendants dramatically reduced staffing at the Facility and failed to staff a sufficient number of nurses and aides, thereby depriving the Facility's residents of the level of care required under New York and federal law.² Among many other shocking failures, this understaffing caused Defendants to fail to groom patients or attend to their wounds, regularly wash or change patients, resulting in some patients lying in their own fecal matter and urine for hours at a time and contracting urinary tract and C-Diff infections.

3. Unsurprisingly, the Nursing Home Compare website operated by the federal Centers for Medicare & Medicaid Services ("CMS") shows that the Facility currently receives a

¹ PHL § 2801-d provides a cause of action by residents against nursing homes that deprive them of "any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation." *See* PHL 2801-d(1).

² *See* 10 N.Y.C.R.R. § 415.13 (mandating that a nursing facility "shall provide sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident"); 42 U.S.C. § 1396r(b)(4)(C)(i)(I) (mandating that a nursing facility "must provide 24-hour licensed nursing services which are sufficient to meet the nursing needs of its residents"); 42 U.S.C. § 1395i-3(b)(4)(A)(i) (mandating that a nursing facility must provide "nursing services and specialized rehabilitative services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident").

rating of one star (“much below average”) out of a five-star scale, further evidencing the lack of adequate care and staffing at the Facility.³

4. The understaffing at the Facility and its harm to residents was documented during an inspection in April 2018 by the New York State Department of Health (“DOH”).⁴ In its report, the DOH noted that the Facility failed to provide sufficient nursing staff. According to the inspection report, the shortage of nurses and aides led to patients being left in bed for long periods of time, being put to bed early, delays in patients getting incontinence care, among other problems. The report noted that “the facility did not ensure that sufficient nursing staff were available to provide the services necessary to attain the highest practicable physical, mental and psychosocial well-being of the resident population on two of three units . . . in accordance with resident needs identified in the facility assessment.”

5. As the Facility has approximately 62 beds and is operating at a high occupancy rate (at 92%),⁵ there are many other residents currently languishing in an unsafe and inadequate nursing home.

6. Accordingly, Plaintiff, individually and on behalf of the Class, asserts claims against Defendants for violation of PHL § 2801-d and seeks monetary damages in an amount to

³ See Nursing Home Compare Profile for the Facility (available at <https://www.medicare.gov/nursinghomecompare/profile.html#profTab=0&ID=335275>) (accessed June 18, 2019) (copy annexed hereto as Exhibit 1).

⁴ See Apr. 4, 2018 DOH Inspection Report (available at <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=335275&SU RVEYDATE=04/04/2018&INSPTYPE=STD>) (accessed June 18, 2017) (copy annexed hereto as Exhibit 2).

⁵ See New York State Department of Health profile for the Facility (available at https://profiles.health.ny.gov/nursing_home/view/150352) (accessed June 18, 2017) (copy annexed hereto as Exhibit 3).

be determined at trial, statutory damages in accordance with PHL § 2801-d(2), and injunctive relief prohibiting further wrongful conduct, as well as any other available relief at law or in equity.

PARTIES

Plaintiff

7. Plaintiff Susan Schmidt sues on behalf of Regina Pinkall, her mother who was a resident of the Facility from approximately December 23, 2015, to October 1, 2017.

8. Susan Schmidt is a citizen and resident of Suffolk County, New York.

9. Regina Pinkall is a citizen and resident of Ulster County, New York.

10. As of April 10, 2015, Regina Pinkall appointed Susan Schmidt her Attorney-in-Fact pursuant to a durable power of attorney (“POA”). A copy the POA is annexed hereto as Exhibit 4.

Defendants

11. Defendant Sapphire Nursing at Wappingers, LLC (“Sapphire”) is a New York limited liability company with its principal place of business in Dutchess County, New York.

12. Defendants Machla Abramczyk, Esther Farkovits, Richard Platschek, and Robert Schuck (the “Ownership Defendants”) each hold ownership interests in Sapphire. Machla Abramczyk owns a 20% interest in Sapphire, Esther Farkovits a 33% interest, Richard Platschek a 33% interest, and Robert Schuck a 13% interest.⁶ On information and belief, the Ownership Defendants are all citizens and residents of New York State.

⁶ See Nursing Home Compare Ownership Information for the Facility (available at <https://www.medicare.gov/nursinghomecompare/ownership-info.html#ID=335275>) (accessed June 17, 2019) (copy annexed as Exhibit 5). On information and belief, Esther Landa, the person noted on the Nursing Home Compare website as having an ownership interest, is the same person as Esther Farkovits.

13. In addition to the Defendants identified with particularity, Plaintiff alleges all claims against Doe Defendants 1-25, with addresses and names unknown, who are other persons that have owned, operated, or controlled the Facility during the relevant period.

JURISDICTION AND VENUE

14. This Court has jurisdiction over all causes of action asserted herein. Defendants are subject to the personal jurisdiction of this Court pursuant to CPLR 301.

15. Defendants have conducted and do conduct business in the State of New York, including through operation of the Facility.

16. Venue is also proper in this County pursuant to CPLR 503(d) because Defendants maintain their principal place of business in this County.

FACTUAL BACKGROUND

I. The Nursing Home Crisis Leads To Legislation Granting Patients A Right To Bring Class Actions Against Operators For Improper Care And To Federal Databases Tracking Nursing Home Ratings.

17. In an effort to protect the vulnerable nursing home population, ensure that their rights are enforced, and provide them with a form of legal recourse which would not otherwise be economically feasible, the New York State Legislature enacted PHL §§ 2801-d and 2803-c.

18. Predating the enactment of PHL §§ 2801-d and 2803-c, “the public’s confidence in the State’s ability to protect its most defenseless citizens, the aged and infirm, had been destroyed by a series of dramatic disclosures highlighting the abuses of nursing home care in their State.” *See* Governor’s Memoranda, Nursing Home Operations, McKinney’s 1975 Session Laws of New York, p.1764. In Governor Carey’s letter to the Legislature accompanying the bills for PHL §§ 2801-d and 2803-c, he stated that these bills were “designed to deal directly with the most serious immediate problems which have been uncovered with respect to the

nursing home industry.”⁷ The Sponsor’s Memorandum relating to PHL § 2803-c and the transcripts of the Senate debates indicate that the purpose of the statute was to establish certain minimum standards for the care of nursing home patients. *See* Governor’s Bill Jacket for Chapter 648 of the Laws of 1975; Senate Debate Transcripts, 1975, Chapter 648 Transcripts, pp.4521, 4525. The term “residential health care facility” was intentionally used by the Legislature in an effort to curb abuses in the nursing home industry.⁸

19. The Commission’s Summary Report specifically indicated that PHL § 2801-d creates a cause of action for a patient of a facility which deprived the patient “of rights or benefits created for his well-being by federal or state law or pursuant to contract” which resulted in injury to the patient. The Commission stated that this statute “introduce[s] a degree of equality between nursing homes and their otherwise vulnerable and helpless patients and, through private litigation brought by patients either in individual or class action lawsuit, provides a supplemental mechanism for the enforcement of existing standards of care.”

20. The Legislative Memorandum “Nursing Home–Health Care Facilities–Actions by Patients” relating to PHL § 2801-d observes that nursing home patients “are largely helpless and isolated,” that many are “without occasional visitors,” and that “[m]ost cannot afford attorneys,” and therefore the bill provides nursing home patients “with increased powers to enforce their rights to adequate treatment and care by providing them with a private right of action to sue for damages and other relief and enabling them to bring such suits as class actions.” *See* McKinney’s Session Laws of New York, 1975 pp.1685-86. That memorandum states that the

⁷ *Morisett v. Terence Cardinal Cooke Health Care Ctr.*, 8 Misc.3d 506, 509 (Sup. Ct. N.Y. Cnty. 2005).

⁸ *See Town of Massen v. Whalen*, 72 A.D.2d 838 (3rd Dep’t 1979).

proposed PHL § 2801-d “creates incentives which would encourage private non-governmental parties (*i.e.*, plaintiffs’ attorneys) to help protect the rights of nursing home patients.” *Id.*

21. This statutory cause of action was created as an additional remedy, separate and distinct from other available traditional tort remedies.⁹

22. In addition, in the wake of an emphasized focus on the adequacy of care provided by skilled nursing home facilities, in December of 2008, the Centers for Medicare & Medicaid Services (“CMS”) enhanced its Nursing Home Compare public reporting site to include a set of quality ratings for each nursing home that participates in Medicare or Medicaid. The primary goal of this rating system is to provide residents and their families with an easy way to assess nursing home quality, in order to make meaningful distinctions between high and low performing nursing homes. The rating system features an overall five-star rating based on facility performance in three areas, each of which has its own five-star rating: (1) health inspections, which is measured based on outcomes from State health inspections; (2) staffing, which is a measure based on the nursing home’s aggregate staffing demand (based ultimately on the residents’ Minimum Data Set (“MDS”) -- a set of metrics used to determine for each resident the amount of staffing needed) and staffing supply (based on payroll records for Registered Nurse (“RN”), Licensed Practitioner Nurse (“LPN”), and nurse aide hours per resident per day); and (3) quality measures.¹⁰

⁹ See *Kash v. Jewish Home & Infirmary of Rochester, N.Y. Inc.*, 61 A.D.3d 146, 150 (4th Dep’t 2009).

¹⁰ See Centers for Medicare & Medicaid Services, “Design for Nursing Home Compare Five-Star Quality Rating System: Technical User’s Guide” (July 2018 ed.) (the “CMS Technical Guide”) (available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf>) (last visited August 28, 2018).

23. This class action seeks to address the injustices that caused the Legislature to enact PHL § 2801-d. As alleged in more detail below, Defendants have violated and continue to violate their statutory obligations by failing to provide, among other things, adequate staffing, supervision, treatment, hygiene, and medical attention to the Class.

II. Defendants Disregard The Regulatory Framework That Protects Nursing Home Patients.

24. Beginning in 2007, the Facility was known as Elant at Wappingers Falls and was operated by Elant at Fishkill, Inc (“Elant”). In or around 2017, Sapphire took over operations of the home and changed its name to Sapphire Nursing at Wappingers.

25. On December 1, 2014, Yertle Operations, LLC (“Yertle”) and Elant entered into an Asset Purchase Agreement (“APA”) whereby Yertle agreed to purchase-- upon final approval by the New York State Public Health and Health Planning Council (“PHHPC”) -- the operations of two residential health care facilities from Elant: Elant at Fishkill (located at 22 Robert R. Kasin Way, Beacon, New York 12508) and Elant at Wappingers Falls. Upon PHHPC approval, Yertle and Sapphire would enter enter into an Assignment and Assumption Agreement whereby Yertle would assign its rights and obligations relating to the Wappingers Falls facility under the APA to Sapphire.

26. Concurrently, Elant and 22 Robert Kasin Way Real Estate, LLC (“22 Robert Kasin LLC”) entered into a Contract of Sale whereby 22 Robert Kasin LLC agreed to purchase the real estate associated with Elant at Fishkill and Elant at Wappingers Falls for one dollar from Elant. Upon PHHPC approval, 22 Robert Kasin LLC would enter into an Assignment and Assumption Agreement with 37 Mesier Avenue Real Estate, LLC (“37 Mesier LLC”), whereby 22 Robert Kasin LLC would assign its rights and obligations relating to the Wappingers Falls facility to 37 Mesier LLC. And upon PHHPC approval, 37 Mesier LLC would lease the

premises to Sapphire for a term of 30 years. As noted in the PHHPC memorandum conditionally approving the transfer of operations from Elant to Yertle to Sapphire and the transfer of the real estate interest from Elant to 22 Robert Kasin LLC to 37 Mesier LLC, “[t]here is a relationship between [37 Mesier LLC] and [Sapphire] in that the entities have common ownership,” and “[t]he lease arrangement is a non-arm’s length agreement.”¹¹

27. In or around June 2015, Sapphire applied to the PHHPC for approval of the sale and transfer. According to the PHHPC memorandum, Defendants proposed, as part of their application, “to make no significant changes to staffing levels.”¹²

28. In or around February 2016, the PHHPC conditionally approved Defendants’ application to take over the Facility.¹³ And the transfer of ownership and operations was complete on April 27, 2017.¹⁴

29. Upon taking control of the Facility, Defendants began to dramatically reduce staffing, particularly registered nurses (“RNs”), licensed practical nurses (“LPN”), and nurse aides.

¹¹ State of New York Public Health and Health Planning Council Committee Day Agenda pp.151-163, Exhibit 6, Project # 151321-E (the “PHHPC Memo.”) at 1 & 10 (Jan. 28, 2016) (available at https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2016-01-28/docs/exhibits.pdf) (accessed June 18, 2019) (relevant portion of which is annexed hereto as Exhibit 6).

¹² Exhibit 6, PHHPC Memo. at 8.

¹³ See State of New York Electronic Certificate of Need, Project 151321 Summary (the “eCON Summary”) (available at <https://apps.health.ny.gov/facilities/cons/nysecon/Home.action>) (accessed June 18, 2019) (copy annexed hereto as Exhibit 7).

¹⁴ Exhibit 7, eCON Summary.

30. Upon taking control of the Facility, Defendants began to dramatically reduce nurse staffing, particularly registered nurses (“RNs”), licensed practical nurses (“LPN”), and nurse aides.

31. After Defendants assumed control in April 2017, family members of Regina Pinkall, including Susan Schmidt, began to notice that the Facility was insufficiently staffed. In conversations with staff, it became apparent that there were fewer and fewer registered nurses (“RNs”), licensed practical nurses (“LPN”), and nurse aides available to provide care to the residents during any given shift.

32. Accordingly, since the takeover, the Facility has had a high number of reported complaints and deficiencies arising from inadequate care of its elderly and disabled residents, as reflected in records maintained by DOH and CMS and in media reports.

33. As early as February 2018, local news media reported that staffing levels were dangerously low.¹⁵ As one article noted, “[s]adly, it appears the neglect and severe understaffing at the Goshen facility may be part of a pattern of mismanagement by Sapphire,” Assemblyman James Skoufis said in a statement, adding that families deserve to know “their loved ones are in good hands.”¹⁶

34. Indeed, a DOH investigation found that Defendants failed to provide sufficient staff.¹⁷ According to the DOH’s April 4, 2018 inspection report, the shortage of nurses and aides led to delays in residents being put to bed in the evenings and taken out of bed in the mornings

¹⁵ See <https://www.recordonline.com/news/20180223/lawmakers-call-for-probe-of-three-more-mid-hudson-sapphire-nursing-homes> (accessed June 13, 2019).

¹⁶ *Id.*

¹⁷ See Exhibit 2, Apr. 4, 2018 DOH Inspection Report.

and delays getting showers and incontinence care, among other problems. Based on its observations during the inspection, the DOH found that the Facility failed (i) to provide sufficient staffing; (ii) to administer the appropriate medications; (iii) to ensure the necessary care and services were provided to prevent recurrent UTIs; and (iv) to establish and maintain an infection prevention and control system designed to provide a safe, sanitary and comfortable environment and to help prevent the development and transmission of communicable diseases and infections.

III. The Facility Is Unsafe And The Conditions To Which Its Patients Are Subjected Violate Numerous Statutes.

35. Conditions at the Facility have been and continue to be unsafe and violative of applicable laws, rules, and regulations, and the care provided to Regina Pinkall and the Class has been and continues to be inadequate.

36. Defendants failed and continue to fail to promote the care for the Facility's residents in a manner that maintains or enhances each resident's dignity and respect in full recognition of their individuality and in contravention of applicable federal and/or New York State laws, rules, and regulations.

37. Among other failures, Defendants failed and continue to fail to provide sufficient nursing staff to provide the nursing and related services necessary to attain and maintain the highest practicable physical and psycho-social well-being of the Patients. A resident's right to sufficient staffing is one of the most important rights protected by New York and federal statutes.¹⁸

¹⁸ See 10 N.Y.C.R.R. § 415.13; 42 U.S.C. § 1396r(b)(4)(C)(i)(I); 42 U.S.C. § 1395i-3(b)(4)(A)(i).

38. Defendants' failure to properly staff the Facility is particularly egregious because understaffing is one of the primary causes of inadequate care and often unsafe conditions in nursing facilities. Numerous studies have shown a direct correlation between inadequate staffing and serious care problems including, but not limited to, a greater likelihood of falls, pressure sores, significant weight loss, incontinence, and premature death. Although the dangers caused by understaffing are common knowledge in the nursing home industry, Defendants nonetheless chose not to provide adequate staffing levels.

39. Defendants have subjected Regina Pinkall and the Class to indignities and other harms that directly resulted and continue to result from inadequate nurse staffing levels at the Facility, including but not limited to: infrequent and inadequate turning and repositioning; no response or long response times to call lights; failure to provide adequate showers; lack of assistance with grooming and bathing; inadequate attention to toileting needs, resulting in Regina Pinkall and the Class remaining in their own urine and fecal matter for extended periods of time; lack of assistance with eating; failure to provide fluids as needed; lack of assistance with dressing; and being confined to their beds without removal for long periods. Indeed, Plaintiff has found no nurses or doctors present on the floor for hours at a time or indeed for an entire evening.

40. For example, Regina Pinkall was frequently left sitting in urine and feces for extended periods of time, resulting in her contracting several urinary tract infections and eventually a C-DIFF infection which took months to treat after she was released from the Facility. Often, when Ms. Schmidt visited her mother, Ms. Pinkall, in the afternoon, Ms. Pinkall would be wearing the same clothing from the day before. There were times that the nurses would document that Ms. Pinkall had been showered when she had not been.

41. Because of inadequate staffing, Ms. Pinkall was not properly turned or repositioned during the day, resulting in her developing bedsores on her back. On one occasion, Ms. Pinkall was left sitting in pain for days with an open wound on her heels without treatment.

42. On another occasion, Ms. Pinkall was scheduled for a doctor's appointment in the afternoon but never made it to the appointment and returned to the Facility several hours later without being fed or given anything to drink. That same night she was not fed dinner which is not a safe practice given that she is a diabetic and must take medication in the evenings with food.

43. Also, as a result of the failure by Defendants to procure the proper authorizations to bill Medicaid, Ms. Pinkall did not receive necessary physical therapy, causing severe atrophy in her muscles.

44. As a result of Defendants' inadequate care, Regina Pinkall sustained physical and emotional injuries and endured conscious pain and suffering. Indeed, when she eventually visited her regular doctor, after enduring care at the hands of Defendants, he was shocked to see the decline in her health.

45. Upon information and belief, as a result of Defendants' inadequate care, the other members of the Class have sustained and will continue to sustain physical and emotional injuries and have endured and will continue to endure conscious pain and suffering.

46. Defendants' inadequate care also injured Regina Pinkall and the other members of the Class by placing them at an increased risk of harm.

47. And Defendants' failure to satisfy their obligations pursuant to federal and/or New York law -- particularly the obligation to provide sufficient staffing -- economically injured Regina Pinkall and the other members of the Class by depriving them of the benefit of the

services for which they paid Defendants -- namely, a nursing home with, at the least, staffing sufficient to satisfy the requirements of New York and federal law

CLASS ACTION ALLEGATIONS

48. This action is brought on behalf of the Plaintiff identified above and all similarly situated persons pursuant to Civil Practice Law and Rules 901, *et seq.*¹⁹ The Class is defined as:

All persons who reside, or resided, at the Facility from April 27, 2017, to the present.

49. Plaintiff reserves the right to amend the above definitions, or to propose other or additional classes, in subsequent pleadings and/or motions for class certification.

50. Plaintiff, as Attorney-in-Fact for her mother, Regina Pinkall, is a member of the Class.

51. Excluded from the Class are: (i) Defendants; any entity in which Defendants have a controlling interest; the officers, directors, and employees of Defendants; and the legal representatives, heirs, successors, and assigns of Defendants; (ii) any judge assigned to hear this case (or any spouse or family member of any assigned judge); (iii) any juror selected to hear this case; (iv) claims for personal injury and wrongful death; and (v) any and all legal representatives of the parties and their employees.

¹⁹ PHL § 2801-d explicitly provides for these statutory claims to be brought as a class action. *See* PHL § 2801-d(4) (providing that “[a]ny damages recoverable pursuant to this section, including minimum damages as provided by subdivision two of this section, may be recovered in any action which a court may authorize to be brought as a class action” (emphasis added)). PHL § 2801-d(2) provides that “compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury, but in no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility under section twenty-eight hundred seven of this article or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists.”

52. This action seeks to enjoin Defendants from understaffing, failing to disclose its understaffing, and making misleading promises about staffing at the Facility. In addition, this action seeks recovery -- including statutory minimum damages -- from the Defendants for their injuries resulting from Defendants' failure to meet their contractual, statutory, and regulatory obligations.

53. Plaintiff and the Class satisfy the requirements for class certification as provided by Civil Practice Law and Rules 901, *et seq.*, for the following reasons:

54. **Numerosity of the Class.** Members of the Class are so numerous that their individual joinder is impracticable. The Class consists of hundreds, if not thousands, of persons and is therefore so numerous that joinder of all members, whether required or permitted, is impracticable. The precise number of persons in the Class and their identities and addresses may be ascertained from Defendants' records. If deemed necessary by the Court, members of the Class may be notified of the pendency of this action.

55. **Common Questions of Fact and Law.** Common questions of law and fact exist as to all members of the Class. These common legal and factual questions include, without limitation:

- a. Whether Defendants violated or violate New York laws, including, but not limited to, PHL 2801-d, by depriving any patient of the Facility of any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule, or regulation, or by any applicable federal statute, code, rule, or regulation during the Class Period;
- b. Whether Defendants violated or violate New York laws, including, but not limited to, PHL 2803-c, by failing to provide any patient of the Facility with adequate and appropriate medical care, failing to provide courteous, fair and respectful care and treatment, and failing to ensure every patient was free from mental and physical abuse during the Class Period;
- c. Whether Defendants failed or fail to employ an adequate number of qualified personnel to carry out all of the functions of its Facility in violation of PHL 2801-d and 2803-c;

- d. Whether Defendants' decision to understaff the Facility violated or violates any right(s) of residents as set forth in PHL 2801-d and 2803-c;
- e. Whether Defendants' decision to understaff its Facility and failure to provide adequate and appropriate medical care violated or violates any right(s) of residents as set forth in the Patients' Bill of Rights pursuant to PHL 2803-c;
- f. Whether Defendants' conduct violated or violates sections 31.19(a) and 16.19(a) of the New York Mental Hygiene Law;
- g. Whether Defendants' conduct violated or violates section 415 of the New York Code Rules and Regulations, including but not limited to subsections 415.3, 415.5, 415.12, 415.13, 415.14, 415.15, and 415.26; and
- h. Whether Defendants' conduct violated or violates the federal Nursing Home Reform Act, codified at 42 U.S.C. §§ 1395i-3(a)-(h) & 1396r(a)-(h) and at 42 C.F.R. §§ 483.15, 483.20, 483.25, 483.30, 483.40, 483.60, & 483.75.

56. **Typicality.** The claims of Plaintiff are typical of the claims of the proposed Class because Plaintiff's claims are based upon the same legal theories and same violations of New York State law. Plaintiff's grievances, like the proposed Class members' grievances, all arise out of the same business practices and course of conduct by Defendants. Further, Plaintiff's damages arise out of a pattern of uniform and repetitive business practices conducted by Defendants.

57. **Adequacy.** Plaintiff will fairly and adequately represent the Class on whose behalf this action is prosecuted. Her interests do not conflict with the interests of the Class.

58. Plaintiff and her chosen attorneys, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("FBFG"), are familiar with the subject matter of the lawsuit and have full knowledge of the allegations contained in this Complaint so as to be able to assist in its prosecution. Indeed, FBFG has been appointed as lead counsel in several complex class actions across the country and has secured numerous favorable judgments in favor of its clients. FBFG's attorneys are competent in the relevant areas of the law and have sufficient experience to vigorously represent the Class members. Finally, FBFG possesses the financial resources

necessary to ensure that the litigation will not be hampered by a lack of financial capacity and is willing to absorb the costs of the litigation.

59. **Superiority.** A class action is superior to any other available methods for adjudicating this controversy. The proposed class action is the surest way to fairly and expeditiously compensate so large a number of injured persons, to keep the courts from becoming paralyzed by hundreds -- if not thousands -- of repetitive cases, and to reduce transaction costs so that the injured Class members can obtain the most compensation possible.

60. Class treatment presents a superior mechanism for fairly resolving similar issues and claims without repetitious and wasteful litigation for many reasons, including the following:

- a. Absent a class action, Class members will suffer continuing, ever-increasing damages; violations of Class members' rights will continue without remedy; and the Facility will continue to remain understaffed, resulting in the mistreatment and improper care of its Patients.
- b. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions. Many members of the Class are not in the position to incur the expense and hardship of retaining their own counsel to prosecute individual actions, which in any event might cause inconsistent results.
- c. When the liability of Defendants has been adjudicated, the Court will be able to determine the claims of all members of the Class. This will promote global relief and judicial efficiency in that the liability of Defendants to all Class members, in terms of money damages due and in terms of equitable relief, can be determined in this single proceeding rather than in multiple, individual proceedings where there will be a risk of inconsistent and varying results.
- d. A class action will permit an orderly and expeditious administration of the Class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions. If Class members are forced to bring individual suits, the transactional costs, including those incurred by Defendants, will increase dramatically, and the courts of New York will be clogged with a multiplicity of lawsuits concerning the very same subject matter, with the identical fact patterns and the same legal issues. A class action will promote a global resolution, and will promote uniformity of relief as to the Class members and as to Defendants.
- e. This lawsuit presents no difficulties that would impede its management by the Court as a class action. The class certification issues can be easily determined

because the Class includes only the residents of the Facility, the legal and factual issues are narrow and easily defined, and the Class membership is limited. The Class does not contain so many persons that would make the Class notice procedures unworkable or overly expensive. The identity of the Class members can be identified from Defendants' records, such that direct notice to the Class members would be appropriate.

FIRST CAUSE OF ACTION

PUBLIC HEALTH LAW § 2801-d

61. Plaintiff repeats, reiterates, and re-alleges each and every allegation contained above with the same force and effect as if the same were set forth at full length herein.

62. At all relevant times, Defendants conducted business as a licensed nursing home as defined under PHL § 2801(2).

63. At all relevant times, Defendants had possession and control of the Facility's building(s), the nursing home located at 37 Mesier Avenue, Wappingers Falls, New York.

64. At all relevant times, Esther Farkovits, Richard Platschek, Machla Abramczyk, and Robert Schuck have each had the ability, acting either alone or in concert with others with ownership interests, to direct or cause the direction of the management or policies of the Facility.

65. Accordingly, the Ownership Defendants are controlling persons of the Facility pursuant to PHL § 2808-a.

66. The Facility is a geriatric center, adult living facility, and/or a nursing home, which provides nursing care to sick, invalid, infirmed, disabled, or convalescent persons in addition to lodging and board or health related services pursuant to PHL § 2801(2).

67. The Facility is a residential health care facility as defined in PHL § 2801(3).

68. Defendants are subject to the provisions of PHL §§ 2801-d and 2803-c, as well as the rules and regulations set forth in sections 31.19(a) and 16.19(a) of the New York Mental Hygiene Law, section 415 of the New York Code Rules and Regulations, and the federal

Nursing Home Reform Act. These rules and regulations impose various obligations on Defendants, including, among others, a duty to adequately staff the Facility.

69. Regina Pinkall and the Class entered the Facility for care, treatment, supervision, management, and/or rehabilitation.

70. Regina Pinkall and the Class were under the exclusive care, custody, control, treatment, rehabilitation, supervision, and management of Defendants.

71. During the period of Regina Pinkall's and the Class's residency in the Facility, Defendants, through their officers, employees, agents, and staff, violated PHL § 2801-d by depriving Regina Pinkall and the Class of rights or benefits created or established for their well-being by the terms of a contract(s) and/or by the terms of state and federal statutes, rules, and regulations.

72. During Regina Pinkall's and the Class's residency, they sustained personal injuries and suffered mental anguish as a result of Defendants' failure to meet their contractual, statutory, and regulatory obligations, particularly the obligation to adequately staff the Facility.

73. During Regina Pinkall's and the Class's residency at the Facility, they were and are subjected to indignities and other harms that directly resulted and result from inadequate staffing levels at the Facility, including but not limited to: infrequent and inadequate turning and repositioning; no response or long response times to a call light; failure to provide adequate showers; lack of assistance with grooming and bathing; inadequate attention to toileting needs requiring Regina Pinkall and the Class to remain in their own urine and fecal matter for extended periods of time; lack of assistance with eating; failure to provide fluids as needed; lack of assistance with dressing; and being confined to their bed without removal for long periods.

74. Plaintiff complained to the Facility's staff regarding the neglectful, improper, and/or inadequate care and treatment of Regina Pinkall.

75. As a result of the foregoing acts and/or omissions, Defendants deprived Regina Pinkall and the Class of their rights in violation of PHL § 2801-d.

76. Defendants' deprivation of Regina Pinkall's and the Class's rights in violation of PHL § 2801-d substantially contributed to, created, and/or caused Plaintiff's and the Class's injuries. These injuries include, but are not limited to: being subjected to an increase risk of harm; being forced to undergo unnecessary medical treatment; incurring medical expense; suffering disfigurement, disability, mental anguish, and pain; suffering loss of enjoyment of life; and suffering a loss of the benefit of the bargain for which they contracted with Defendants -- namely, a residency at a nursing home with, at the least, staffing sufficient to satisfy the requirements of New York and federal law.

77. Defendants' responsibilities and obligations to Regina Pinkall and the Class are non-delegable, and thus Defendants have direct and/or vicarious liability for violations, deprivations, and infringements of such responsibilities and obligations by any person or entity under Defendants' control, direct or indirect, including their employees, agents, consultants, and independent contractors, whether in-house or outside entities, individuals, agencies, or pools, or caused by Defendants' policies, whether written or unwritten, or its common practices.

78. All acts and omissions committed by employees and agents of Defendants were pervasive, omnipresent events that occurred and continued throughout Regina Pinkall's and the Class's residency at the Facility, and were such that supervisors, administrators, and managing agents of Defendants knew, or should have been aware, of them.

79. Pursuant to PHL § 2801-d(2), Plaintiff and the Class seek compensatory damages in an amount sufficient to compensate each Patient for his or her injury, but in no event less than twenty-five percent of the daily per-patient rate of payment established for the Facility under PHL § 2807, or, in the event the Facility does not have an established rate, the average daily total charges per patient for the Facility, for each day that such injury existed.

80. In addition to damages suffered by Regina Pinkall and the Class as the result of Defendants' deprivation of their rights as nursing home residents, justice requires that Plaintiff and the Class recover attorney's fees pursuant to PHL § 2801-d(6), punitive damages pursuant to PHL § 2801-d(2), and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the putative Class, respectfully requests that the Court grant relief against Defendants as follows:

- a. For a Court Order certifying that the action may be maintained as a class action;
- b. For injunctive relief prohibiting Defendants' violations of PHL §§ 2801-d and 2801-c in the future;
- c. On the First Cause of Action for violation of PHL § 2801-d, damages in an amount to be determined at trial and punitive damages, together with costs, disbursements, and attorney's fees in this action;
- d. For restitution and any other monetary relief permitted by law;
- e. For attorney's fees and costs; and
- f. For such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff, individually and on behalf of the Class, demands a trial by jury as to all issues triable of right.

Dated: White Plains, New York
June 21, 2019

Respectfully Submitted,

**FINKELSTEIN, BLANKINSHIP,
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Attorneys for Plaintiff and the Proposed Class

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

I, the undersigned, am an attorney admitted to practice in the Courts of the State of New York and say that:

I am the attorney of record for the Plaintiff and proposed Class. I have read the annexed Summons and Class Action Complaint and know the contents thereof, and the same are true to my knowledge, except those matters therein which are based on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based on the contents of the file. The reason I make this affirmation instead of Plaintiff is because Plaintiff resides outside the county in which I have my office.

Dated: White Plains, New York
June 21, 2019

/s/Todd S. Garber
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