

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
COUNTY OF CRAVEN 2020 MAY 26 P 2:13 SUPERIOR COURT DIVISION
18-CVS-01561

LAURA WISE, Administrator of the Estate)
of MARTHA A. REINERT, BARBARA)
FOX PARKER, and JERRY)
SINGLETARY, on behalf of themselves)
and all others similarly situated,)
Plaintiffs,)
v.)
LAKE POINTE ASSISTED LIVING, INC.,)
TONY BIGLER, AND EDITH BIGLER,)
Defendants.)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR
CLASS CERTIFICATION**

THIS MATTER comes before the court upon Plaintiffs' unopposed Motion for Class Certification (the "Motion") pursuant to Rule 23, North Carolina Rules of Civil Procedure; and THE COURT, having considered the Motion, FINDS and CONCLUDES as follows.

PROCEDURAL HISTORY

1. Plaintiffs' Complaint was initially filed on November 30, 2018, and later amended, with the operative pleading, the Third Amended Complaint, having been filed on September 23, 2019 ("the TAC").

2. Since the initial Complaint, the Parties have engaged in written discovery and have taken seven (7) depositions.

3. On January 30, 2020, Plaintiffs served notice that their motion for class certification would be heard in Craven County Superior Court on March 30, 2020. The hearing was later continued because of issues surrounding the COVID-19 pandemic.

4. The Defendants have indicated that they do not oppose the motion.

FINDINGS OF FACT

FACTS AND ALLEGATIONS COMMON TO CLASS MEMBERS

5. Each of the named Plaintiffs alleges that he or she entered into a valid and enforceable contract with the Defendants, and seeks recovery for allegedly material, knowing, and/or intentional breaches, together with interest and costs. Plaintiffs further allege that they paid for services they did not receive due, in part, to understaffing; in short, Plaintiffs allege that they did not receive the benefit of the bargain under their contract.

6. Specifically, Plaintiffs allege in the TAC among other things that:

- Defendants Lake Pointe Assisted Living, Inc., Tony Bigler, and Edith Bigler (“Defendants”) promised the Plaintiffs and the Class Members that they would comply with the staffing and personal care and supervision regulations set forth in 10A N.C.A.C. 13F, .0600, Staffing, and 10A NCAC 13F .0901, Personal Care and Supervision;
- During the Class Period, Defendants’ business practice was to knowingly fail to comply with the staffing and personal care and supervision regulations set forth in 10A NCAC 13F .0600 and .0901;
- During the Class Period, in addition to 10A N.C.A.C. 13F .0600 and 10A NCAC 13F .0901, Defendants routinely materially breached its promise to comply with other North Carolina laws, rules and regulations pertaining to rights of the residents of Lake Pointe Assisted Living;
- That these promises were a part of Plaintiffs’ and the putative class members’ written contracts with the Defendants (“Home Contracts”);
- During the Class Period, Defendants routinely breached those promises;
- That this conduct constitutes a material breach of contract (First Claim for Relief); and
- Defendants knowingly and intentionally materially breached their contractual obligations to the Plaintiffs and the Class Members and engaged in deceptive trade practices (Second Claim for Relief).

7. Defendants have denied the material allegations of the TAC.

8. Plaintiffs also contend that Defendants engaged in unfair acts or practices by (1)

establishing a uniform business model of intending to and actually staffing Lake Pointe Assisted Living ("Lake Pointe") at levels that would make it impossible to provide the services that Lake Pointe contractually agreed to provide and (2) promising Plaintiffs and the Class Members to comply with North Carolina law, rules and regulations while knowing that they had no ability or intent to comply with North Carolina law, rules and regulations.

9. Defendants dispute that they materially breached the contract. Defendants also dispute that they engaged in any activity that would give rise to claims under Chapter 75 or that there is otherwise a basis for Plaintiffs' claims under Chapter 75.

CONCLUSIONS OF LAW

Class Prerequisites

10. Rule 23(a) of the North Carolina Rules of Civil Procedure states that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. Gen. Stat. § 1A-1, Rule 23(a).

11. The Plaintiffs in this case have the burden of showing that all the requirements of Rule 23 have been met to allow the action to proceed as a class action. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459 (1987).

12. A class action exists under Rule 23 when "the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 697 (quoting *Crow*, 319 N.C. at 280). This requirement, that a class exists, is the first prerequisite for certification of a class. *See id.*

13. Other prerequisites for bringing a class action are that (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2)

there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenbury, 345 N.C. at 697.

14. If the court concludes that Plaintiffs have met these prerequisites, the court must next determine whether "a class action is superior to other available methods for the adjudication of [the] controversy." *Crow*, 319 N.C. at 284. "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. . . . [T]he trial court has broad discretion in this regard. . . ." *Id.*

Common Issues

15. The Plaintiffs contend that the common issues are:

- (a) whether the Home Contract and Lake Point Declarations required Lake Pointe to have sufficient staff to meet the care needs of the residents as required by North Carolina law;
- (b) whether Lake Pointe failed to comply with numerous rights of the residents under the applicable state laws regulating Lake Pointe as a health care facility;
- (c) whether 10A NCAC 13F .0604(e)(1) imposes minimum staffing requirements requiring Lake Pointe to have sufficient staff to meet the care needs of the residents;
- (d) whether Defendants failed to meet the minimum staffing requirements of 10A NCAC 13F .0604(e)(1) and the Lake Pointe Home Contract and Disclosures

by failing to provide sufficient staff to meet the care needs of the residents;

- (e) whether Lake Pointe's failure to meet the minimum staffing requirements required by North Carolina laws and regulations, including but not limited to failing to furnish residents proper or sufficient nursing, cosmetic, and social services, breached the Lake Pointe Home Contract, 10A NCAC 13F .0604, and the North Carolina Unfair and Deceptive Trade Practices Act;
- (f) whether chronically understaffing Lake Point in violation of 10A NCAC 13F .0604(e)(1) in violation of North Carolina law is an unfair and deceptive trade practice in violation of the North Carolina Unfair and Deceptive Trade Practices Act;
- (g) whether Lake Pointe's failure to disclose its history of noncompliance with North Carolina law is an unfair or deceptive practice in violation of the North Carolina Unfair and Deceptive Trade Practices Act;
- (h) whether Defendants failed to furnish residents with proper food and beverage services including not providing residents a daily minimum of three nutritionally adequate, palatable meals and three snacks per day in accordance with 10 NCAC 13F .0904;
- (i) whether Defendants' failure to provide residents a daily minimum of three nutritionally adequate, palatable meals and three snacks per day in accordance with 10 NCAC 13F .0904 was a violation of the Lake Pointe Home Contract and Disclosures, 10 NCAC 13F .0904, and the North Carolina Unfair and Deceptive Trade Practices Act;
- (j) whether Defendants failed to provide residents with 14 hours per week of activities that promoted socialization, physical interaction, group

accomplishment, creative expression, increased knowledge and learning of new skills in accordance with 10A NCAC .0905;

(k) Whether Defendants failed to comply with their contractual promises to Plaintiffs and the Class Members;

(l) Whether Defendants knew that they would be unable to comply with the terms of their contractual promises at the time of contracting;

(m) Whether Defendants conduct, acts, and/or omissions constitute a breach of contract with the Plaintiffs and Class Members;

(n) Whether Defendants conduct, acts, and/or omissions is a violation of the North Carolina Unfair Trade Practices Act;

(o) whether Tony and/or Edith Bigler are alter egos of Lake Pointe Assisted Living;

(p) Whether Plaintiffs are entitled to pre-judgment interest, costs, and attorneys' fees from Defendants; and

(q) Whether Plaintiffs and the Class Members have sustained damages and, if so, the proper measure of such damages, including treble damages.

(r) whether Tony and/or Edith Bigler were responsible for the management and/or operations of Lake Pointe Assisted Living;

(s) whether Tony and/or Edith Bigler are individually liable for Lake Pointe Assisted Living, Inc. breach of contract;

(t) whether Tony and/or Edith Bigler are individually liable for Lake Pointe Assisted Living's failure to comply with North Carolina law relating to the licensing and operation of adult care homes in North Carolina; and

(u) whether Tony and/or Edith Bigler are individually liable for engaging in

unfair or deceptive trade practices as the owners, operators, and managers of Lake Pointe Assisted Living.

16. These issues of fact and law provide the basis for this action and predominate over any issue affecting only individual class members.

17. Any inquiries related to the amount of damages to which Plaintiffs and the class members may be entitled do not overwhelm the prevailing common questions identified above. Accordingly, a class exists due to the common questions of law or fact affecting the named and unnamed class members.

The Named Plaintiffs Will Fairly and Adequately Represent the Class

18. Rule 23 requires, for the purposes of due process, that the named representatives establish that they will fairly and adequately represent the interests of all members of the class. *Faulkenbury*, 345 N.C. at 697. Thus, Plaintiff must show that: (a) the class representatives have no conflict of interest with the members of the class; (b) the class representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; and (c) the class representatives within this jurisdiction [will] adequately represent members outside the state. *Id.* . For the reasons set forth below, the court FINDS that the named Plaintiffs each satisfy all the requirements necessary to fairly and adequately represent the class.

19. "For a conflict of interest to prevent plaintiffs from meeting the requirements of Rule 23(a), the conflict 'must be fundamental.'" *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 430 (4th Cir. 2003) (internal citation omitted). A conflict is not fundamental "when . . . all class members 'share common objectives and the same factual and legal positions [and] have the same interest in establishing [liability].'" *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (quoting *Gunnells*, 348 F.3d at 431).

20. In this case, the interests of Plaintiffs align with those of the other class members.

Plaintiffs' claims arise from the same conduct that gives rise to the claims of other class members and are based on the same legal theories and involve a multitude of similar professional health care incidents. Each named Plaintiff, like each member of the proposed class, has a strong interest in proving the TAC's allegations that Defendants materially, knowingly, and intentionally breached the Home Contract and otherwise are liable for their conduct per Chapter 75.

21. The named Plaintiffs have shown their commitment to carrying out the duties of a class representative in this litigation, including but not limited to, responding to discovery requests and agreeing to participate in a mediation.

22. Plaintiffs include two former long-term residents of Lake Pointe, Jerry Singletary and Barbara Fox Parker, and Laura Wise, the Executor of the Estate of Martha Reinert. As a result of their long-term residency at Lake Pointe, Jerry Singletary and Barbara Fox Parker have extensive knowledge of the factual foundation of the lawsuit. Laura Wise is a nurse. In the four months her mother, Martha Reinert, was a resident at Lake Pointe, Laura spent a good deal of time in the facility and communicating with facility management. As such, she has extensive knowledge of the factual foundations of the suit. All Plaintiffs are able to identify the dates that their loved ones were residents at Lake Point, what they observed about the type of care that is at issue in the suit and the care they received, and how they learned about Lake Point losing its license. Also, all Plaintiffs affirmed a commitment to seeking a class-wide resolution to the problem. These statements show that named Plaintiffs meet the threshold required to serve as class representatives. *See Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 316 (N.D. Ohio 2009) (citing Wright, Miller & Kane, 7A Fed. Prac. & Proc. Civ. 3d § 1766 (2008)).

The Class Members Are So Numerous That It Is
Impractical to Bring Them All Before the Court

23. Here, the class members are so numerous that it is impractical to bring them all before the court. It is not necessary that plaintiffs in a class action demonstrate the impossibility of joining class members. Rather, they must "demonstrate substantial difficulty or inconvenience in joining all members of the class." *Crow*, 319 N.C. at 283. "There can be no firm rule for determining when a class is so numerous that joinder of all members is impractical. The number is not dependent upon any arbitrary limit, but rather upon the circumstances of each case." *Id.* Class actions have been sustained in North Carolina with as few as eight members. *See e.g., Big Bear of North Carolina, Inc. v. High Point*, 33 N.C. App. 563 (1977), *rev'd on other grounds*, 294 N.C. 262 (1978).

24. Here, according to Defendants' records, there are 176 class members who have been residents at Lake Point during the relevant period. This satisfies the numerosity requirements of Rule 23. *See Olivera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 256 (M.D.N.C. 2007) (quoting *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997)) (finding that large numbers alone "may allow the court to presume impracticality of joinder and find that the numerosity requirement has been met"). *See also Cypress v. Newport News General & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (18 class members sufficient). Class actions have been sustained in North Carolina with as few as eight members. *Elliott v KB Home North Carolina, Inc.*, No. 08CVS21190, 2012 WL 757135 (N.C. Super. Feb. 27, 2012) (*citing Big Bear of North Carolina, Inc. v. High Point*, 33 N.C. App. 563 (1977), *rev'd on other grounds*, 294 N.C. 262 (1978)).

Adequate Notice Will Be Given to the Class

25. Once a class is certified, it is up to the trial court judge to ensure that the best

practical notice be sent to class members. *Crow*, 319 N.C. at 283. Such notice "should include individual notice to all members who can be identified through reasonable efforts, but it need not comply with the formalities of service of process." *Id.* at 283-84. Because Defendants have some identifying information for the putative class members from the time period when they were residents of Lake Pointe including dates of stay, the court FINDS that Defendants can assist in the identification of class members.

26. Plaintiffs have submitted to the court a direct notice of class action that will be sent to all members of the Class. The Notice of Class Action gives the opt-out deadline for Class Members to opt-out of the impending trial. The court approves Plaintiffs' proposed Notice of Class Action, attached as Exhibit A to this Order (the "Notice").

A Class Action is the Superior Method of Adjudication

27. Once the trial court judge finds the prerequisites to certification have been met, the trial court judge must determine whether "a class action is superior to other available methods for the adjudication of th[e] controversy." *Crow*, 319 N.C. at 284. "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Id.* The usefulness of the class action must be balanced, however, against inefficiency or other drawbacks. *Id.*

28. Here, Plaintiffs seek class certification based upon allegations that Defendants materially, knowingly, and intentionally breached the contracts and otherwise violated Chapter 75 related to a policy and practice of understaffing the Lake Pointe adult care home. If this class action is not allowed to proceed, the same issues could be relitigated in perhaps over a hundred individual cases by residents who entered into identical Home Contracts.

29. The court in *Joseph v. General Motors Corp.* explained why a class action is sometimes superior to other forms of litigation:

First, relitigation of the same issues and presentation of the same evidence in hundreds of individual actions or arbitration proceedings would be grossly inefficient and wasteful of judicial resources. Second, maintenance of individual actions would be prohibitively expensive. Many of the crucial issues in this case require substantial discovery, expert testimony and trial time, all of which would render uneconomical individual actions.

109 F.R.D. 635, 642 (D. Colo. 1986).

30. That is the case here. Given the potential for over a hundred of individual cases that may have to be litigated on this issue and the costs required to do so, the court FINDS that a class action is the superior method for adjudication of this case.

31. At the certification stage, the trial court judge has broad discretion in deciding whether an action should be allowed to continue as a class action. *Faulkenbury*, 345 N.C. at 699. Based upon the foregoing, and in the exercise of its discretion, the court CONCLUDES that Plaintiffs in this case have met all the requirements of Rule 23, and that this matter should be certified as a class action.

32. Based on the foregoing, the Plaintiffs have established to the satisfaction of this Court the actual existence of a class, that the named class representatives will fairly and adequately represent the interests of all members of the class, that the absent class members are so numerous that it is impractical to bring them all before this Court, and that a class action is superior to other available methods for the adjudication of this controversy.

33. There are numerous common questions of law and fact involving the Class Members, as set forth above, and those common questions predominate over any individualized issues.

34. At this juncture, any defenses the Defendants may have to the merits of the Plaintiffs claims do not prevent certification of this matter as a class action. Certification of this action as an opt-out class action is appropriate under Rule 23 of the North Carolina Rules of

Civil Procedure.

NOW, THEREFORE, BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs' Motion for Class Certification is **GRANTED**.
2. This action be, and the same is hereby, **CERTIFIED** as an opt-out class action, as against the Defendants Lake Pointe Assisted Living, Inc., Tony Bigler, and Edith Bigler, pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, with the class defined as:

All persons who were residents of Lake Pointe Assisted Living from December 1, 2014 through the present.

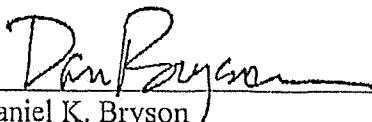
3. Excluded from the class are: (a) any judge or magistrate presiding over this action and members of their immediate families; (b) any Defendant and its legal representatives; and (c) all persons who properly execute and file a timely request for exclusion from the Classes.
4. Daniel K. Bryson and Matthew E. Lee of Whitfield Bryson LLP, Stephen J. Gugenheim of Gugenheim Law Offices, P.C., and J. David Stradley of White & Stradley, PLLC are appointed Class Counsel. Plaintiffs Laura Wise, Administrator of the Estate of Martha A. Reinert, Barbara Fox Parker, and Jerry Singletary are hereby appointed Class Representatives.

5. The class list of Lake Pointe residents from December 1, 2014 through the present will be provided to class counsel, and notice of the pendency of this class action shall be given by counsel for the representative Plaintiffs. Notice shall be provided by direct notice mailed to the last known address of the resident and any person identified or designated to receive notice, and by any other practicable means as developed by the notice provider. The notice shall be mailed to the class members by first-class United States Postal Service mail no later than Monday, May 25, 2020. The claims by all class members shall relate back to the time of the filing of the original Complaint on November 30, 2018. Any request for exclusion from the class

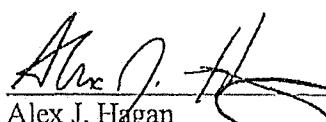
must be postmarked by no later than July 24, 2020 and mailed to the Craven County Clerk of Superior Court.

The parties consent to the entry of this Order out of county, out of term, and out of session.

Consented this the 18th day of May, 2020.



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Hon. Superior Court Judge Presiding

So Ordered, this the 21st day of May 2020.