IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:21-cv-00384-TDS-JLW

SONYA HOOKER, SYBIL RUMMAGE, DONNA DEAL, KENNETH MICHAEL DEAL and BETTY DEAL, individually and on behalf of a class of those similarly situated,

Plaintiffs,

v.

THE CITADEL SALISBURY LLC, SALISBURY TWO PROPCO LLC, ACCORDIUS HEALTH LLC, THE PORTOPICCOLO GROUP, LLC, SIMCHA HYMAN and NAFTALI ZANZIPER,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, pursuant to LR 7.3(f) hereby respond to Defendant's motion at Doc. 24 and brief at Doc. 25 filed on July 19, 2021.

1. Summary of Argument.

Defendants have raised certain "immunity bills" passed during the COVID-19 pandemic. However, the bills do not bar the claim. Defendants' other bases for dismissal fail as well. The motion should be denied.

2. **Background.**

Defendants challenge various aspects of the substantive claims which are: 1) breach of contract (Doc. 1, ¶¶ 207-221); 2) Chapter 75 claim under N.C.G.S. § 75-1.1 & § 75-16 (¶¶ 222-234); 3) breach of fiduciary duty (¶¶ 235-245); and 4) negligent infliction of severe emotional distress (¶¶ 246-253).

There is no claim for medical malpractice nor for personal injury. Rather, the focus of the case is understaffing. Other courts have denied motions to dismiss in analogous cases. *See Jenack v. Goshen Operations, LLC,* No. EF008129-2018, 2019 N.Y. Misc. LEXIS 6878, 2019 NY Slip Op 33773(U) (Supreme Court of the State of New York, County of Orange Feb. 11, 2019):

> Here, plaintiffs have filed a 21-page Complaint consisting of 84 paragraphs alleging defendants' violations of state and federal statutes that mandate minimum staffing requirements which were not met, resulting in injury to the plaintiffs. Plaintiffs specifically set forth instances where plaintiffs and residents of the nursing home would ask for help with going to the bathroom but, because of insufficient staffing, would receive no assistance for hours. Plaintiffs also attached as an exhibit to the complaint the NYS Department of Health Report of a survey completed on January 29, 2018…. The allegations alleging a violation of Public Health Law § 2801-d are sufficiently pleaded.

2019 N.Y. Misc. LEXIS 6878, *4-5 (emphasis added).

Here, Plaintiffs allege numerous specific instances when the named Plaintiff residents received no service or ineffective service – poor service consistent with chronic understaffing practices and corporate malfeasance. *See* Complaint, Doc. 1, ¶¶ 59-189, statement of facts for Plaintiffs Sybil Rummage and Betty Deal. They also filed with the Complaint expert evidence in the form of the Report of Dr. Harrington. Doc. 6-5.

As noted, other courts have found that nursing home residents and their families can bring similar claims.[1] Here, the Rule 12 motion should be denied.

3. <u>As to "Litigation History":</u>

Defendants take the position that "the Citadel mistakenly underreported agency nurse hours to CMS and … when these hours were considered, the facility was appropriately staffed according to CMS metrics." Doc. 25, p. 2. No factual support is cited. As Plaintiffs' initial filings reflected, the low reported staffing hours that go to the heart of this case were not just reported to the Federal Government by the Defendants' Citadel home in Salisbury, but also by the other nursing homes in Defendants' North Carolina chain. That fact tends to refute Defendants' position.

Defendants give no explanation for how they could have made such a "mistake" across so many facilities for such a long period of time, including before COVID even existed, and over and over again at dozens of homes. Plaintiffs' filings were fairly explicit

[1] *See also Beverly Enterprises-Arkansas v. Thomas,* 259 S.W. 3d 445, 448, 370 Ark. 310 (Ark. 2007) ("We conclude that one main and preliminary overarching issue does exist in this case, which is whether the Batesville nursing facility was chronically understaffed so as to violate the residents' statutory and contractual rights."); *GGNSC Arkadelphia, LLC v. Lamb,* 465 S.W. 3d 826, 835, 2015 Ark. 253 (Ark. 2015); *Robinson Nursing and Rehabilitation Center, LLC v. Phillips*, 519 S.W.3d 291, 295, 2017 Ark. 162 (Ark. 2017); *Walsh v. Kindred Healthcare*, No. C 11-00050 JSW, 798 F. Supp. 2d 1073, 2011 U.S. Dist. LEXIS 63231(N.D. Cal. June 15, 2011); *Walsh v. Kindred Healthcare*, No. C 11-00050 JSW, 2012 U.S. Dist. LEXIS 201492, *4-5 (N.D. Cal. Aug. 6, 2012); *Salas v. Grancare, Inc*., 22 P.3d 568 (Colo. Ct. App. 2001); *Passucci v. Absolut Ctr. for Nursing & Rehabilitation at Allegany, LLC*, No. 2010/6955, 2014 N.Y. Misc. LEXIS 5834, *51, 2014 NY Slip Op 33459(U) (Supreme Court of New York, Erie County Jan. 10, 2014) (certifying class on "claims … arising out of the understaffing of the Orchard Park facility"); *aff'd*, 125 A.D.3d 1313 (Supreme Court of New York, App. Div., 4th Dept. Feb. 6, 2015); *Fleming v. Barnwell Nursing Home & Health Facilities, Inc*., 766 N.Y.S.2d 241, 2003 N.Y. App. Div. LEXIS 11209, 309 AD2d 1132, 1133-34 (N.Y. App. Div. 2003); *MacRae v. HCR Manor Care Services, LLC*, No. SA CV 14-00715-DOC-RNB, 2018 U.S. Dist. LEXIS 225466, *12, 2018 WL 8064088 (C.D. Cal. Dec. 10, 2018) (understaffing class case).

on this point, making Defendants' failure to address it all the more notable. *See* Doc. 10, pp. 4-5 (all 36 facilities had low staff hours reported); Doc. 6-5, pp. 30 (tables in Harrington report reflecting not just Citadel Salisbury, but other Citadel facilities in the chain showing low hours), 38-52 (same, in greater detail).

Defendants further assert that "on June 25, 2020, CMS, due [sic] COVID-19, waived the requirement for staffing data to be submitted through PBJ." Doc. 25, p. 2. This is a red herring. CMS did not give facilities an open-ended excuse – only the first quarter was excused. *See* Doc. 25-2, p. 1 (stating that CMS was ending waiver after quarter 1).

Defendants bought the Citadel Salisbury facility on February 1, 2020. On March 10, 2020, a COVID emergency was declared. Doc. 25, p. 2. There was COVID in the building by early April 2020, based on what is now known. Defendants contend that the advent of the pandemic excuses all staffing failures. This contention fails as a ground for dismissal. First, this is a merits issue for discovery, not a basis for dismissal. Second, Defendants have not explained why their other facilities in their chain showed low staffing hours even before COVID occurred. *See* Harrington report, Doc. 6-5, pp. 38-62. If COVID caused the low staffing, why did the rest of the chain have chronic low staffing before COVID ever came?

Plaintiffs allege the Citadel Salisbury staffing was low throughout, including right after Defendants took over ownership on February 1, 2020. From February 1, 2020 through to when the Governor declared an emergency on March 10, 2020, there was no COVID in the facility, nor can any COVID immunity bill apply.

Defendants contend that "[d]uring *Rummage I*,[2] it was conclusively established that by December of 2020, the Citadel achieved regulatory compliance in the form of a deficiency free survey." Doc. 25, p. 2. This is false. The facility remains to this day on the Special Focus list reserved for the worst-performing nursing homes. *See* Doc. 1, Complaint, ¶ 41(a), 43, 192. The Citadel's regulatory compliance history is available online.[3]

Defendants next contend that for fourth quarter 2020, the Citadel had a staffing hours number of 4.05873 hours per resident day ("HPRD"). Doc. 25, pp. 2-3.

Plaintiffs' evidence is that the hours were lower than Defendants contend. *See* Harrington report, Doc. 6-5, pp. 30-31.

Defendant argues that "North Carolina does not impose a minimum nursing staffing level." Doc. 25, p. 3. In fact, North Carolina does impose a standard, which Defendants violated. *See* Doc. 6-5, p. 19 (Harrington report, citing 10A NCAC 13D .2303(b)).

On the issue of written resident agreements, the Complaint alleges that Defendants were obligated to provide written resident agreements and provide written disclosures, and they did not do so. Complaint ¶¶ 4, 60-67 (facts regarding Plaintiff Rummage), 137 (Plaintiff Deal), 227-32 (Count II). Defendants argue that by virtue of an operations

[2] Defendants note the significant amount of work and discovery conducted in the now-dismissed state court lawsuit, *Marshall v. Accordius Health LLC*, No. 20-cvs-728 (Rowan County Super. Ct.). Doc. 25, p. 2 (*Marshall* or "*Rummage I*"). Plaintiffs are hopeful that the discovery from *Rummage I* will assist to expedite these proceedings.

[3] https://projects.propublica.org/nursing-homes/homes/h-345286. Deficiencies were found in reports dated Feb. 19, 2021, Oct. 12, 2020, Sept. 1, 2020, Jun 29, 2020, May 21, 2020, Jan. 31, 2020, Nov. 13, 2019, Oct. 27, 2019, Aug. 13, 2019, and so forth.

transfer agreement between the old owner, Genesis, and the new Defendant owner, Defendants assumed and stepped into the shoes of all old Genesis agreements and can rely on them. Doc. 25, p. 4.

This Court noted in prior proceedings that the issue of what the new owners did or did not assume from Genesis by way of resident agreements was not clear and was a matter for discovery. *See Accordius Health LLC v. Marshall*, No. 1:20-cv-464 (M.D.N.C.), Order, Doc. 39, pp. 13-16.[4] The basis for the Court's ruling arose out of the fact that the sale documents between Genesis and Citadel referenced a "standard form of resident agreement" but no such "standard form" was present in the record. *See id.* It is premature to rule on the issues raised by the resident agreements at this Rule 12(b)(6) stage.

4. <u>The Statutory Immunity Argument.</u>

The argument should be rejected because the immunity bill does not apply.

First, there is an obvious period of time where the legislation cannot apply. The Complaint alleges a course of conduct beginning on February 1, 2020 and continuing on to the present. The COVID immunity legislation only applies during the time designated as a COVID state of emergency. The Governor declared a state of emergency on March 10, 2020. It did not start until March 10, and there is no immunity for before that date. From February 1 through March 9, 2020, no immunity bill can apply. *See* Complaint ¶ 38

[4] After the nursing home plaintiffs initially sued in state court (*Rummage I*), the defendants brought a case in this Court seeking to compel arbitration. No. 1:20-cv-464 (M.D.N.C.). In that matter, after briefing, this Court entered an order finding that discovery was warranted on some of the arbitration-related issues. The case was then dismissed by the parties.

("These events occurred at the Citadel in February 2020 before the advent of COVID-19 at the Facility, nor can Defendants blame COVID-19 for their actions").

Plaintiffs allege understaffing during that entire time period. They allege understaffing in February 2020 onward. Because the immunity bill could only, at best, limit the claim, not extinguish it, there is no basis to dismiss the claim under Rule 12.

Further, the immunity laws include a causation element. The Complaint plainly alleges understaffing caused by a business model, not by COVID. If these allegations are substantiated during discovery, then the immunity bill will not apply.

The Complaint alleges that Defendants had a business model of cutting budgets and staffing, which they implemented throughout their chain of facilities, and which they implemented at the Citadel Salisbury "before the advent of COVID-19 at the Facility." Doc. 1, ¶ 38. The immunity bill applies to understaffing caused by the pandemic, not to understaffing caused by implementation of Defendants' business model.

The COVID immunity bill includes a causal element. It is easy to see why a causation element is needed to avoid absurd results. Assume a hospital lacked a stair rail and never had safety staff by the rail-less stairs. COVID arrives. A patient falls off the stairs and alleges negligence due to lack of the stair rail and safety staff. The hospital raises the immunity bill. Obviously, in that case, the bill would not immunize liability, because there was no causal connection between COVID and the liability. The COVID did not cause the stair to lack a rail or lack safety staffing – that would have been the situation anyway. Thus it is not a situation the COVID bill was meant to capture.

A review of the bill's language reflects this causal element. *See* N.C.G.S. §§ 90-21.130 to 90-21.134. Under § 90-21.131, "[i]t is the purpose of this Article to promote the public health, safety, and welfare of all citizens by broadly protecting the health care facilities and health care providers in this State from liability that may result from treatment of individuals during the COVID-19 public health emergency under conditions *resulting from circumstances associated with the COVID-19 public health emergency*." (Emphasis added). In other words, the understaffing must be causally connected to COVID to be excused. If the understaffing is due to Defendants' normal business model, which would have been defective regardless of the pandemic, then it is not excused by the pandemic.

The substantive immunity provision of the statute, N.C.G.S. § 90-21.133, reiterates the causation requirement:

> (a) Notwithstanding any law to the contrary, except as provided in subsection (b) of this section, any health care facility, health care provider, or entity that has legal responsibility for the acts or omissions of a health care provider shall have immunity from any civil liability for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services only if all of the following apply:
>
> (1) The health care facility, health care provider, or entity is arranging for or providing health care services during the period of the COVID-19 emergency declaration, including, but not limited to, the arrangement or provision of those services pursuant to a COVID-19 emergency rule.
>
> (2) *The arrangement or provision of health care services is impacted, directly or indirectly*:
>
> a. *By a health care facility, health care provider, or entity's decisions or activities in response to or as a result of the COVID-19 pandemic*; or
>
> b. *By the decisions or activities, in response to or as a result of the COVID-19 pandemic, of a health care facility or entity where a health care provider provides health care services*.

> (3) The health care facility, health care provider, or entity is arranging for or providing health care services in good faith.
>
> (b) The immunity from any civil liability provided in subsection (a) of this section shall not apply if the harm or damages were caused by an act or omission constituting gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care provider providing health care services; provided that the acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

(Emphasis added). *Compare* Complaint ¶ 38 ("These events occurred at the Citadel in February 2020 before the advent of COVID-19 at the Facility"). *See also* Complaint ¶¶ 40, 159.

The Portopiccolo Group LLC does not fit in the category health care provider under § 90-21.133(a) and § 90-21.132(7).

Under § 90-21.133(a)(2)a, the "arrangement or provision of health care services" must be "impacted, directly or indirectly" by the facility's "decisions or activities in response to or as a result of" the pandemic. This is a causation requirement. It is disputed. Plaintiff argues that facility conditions including staffing were egregious due to Defendants' business model – the nursing home was chaotically understaffed in February 2020, weeks before there were any COVID-19 cases being reported. The facility would have been egregiously understaffed with or without COVID.

Staffing is the single largest cost for a for-profit skilled nursing chain.[5] In cost-cutting efforts, the executive decision to cut the budget often materializes in the form of reduced staffing pay and resources, such that the facility loses staff.

The burden of proof is on the party raising the immunity defense. *See Bryant v. City Of Cayce*, 332 F. App'x 129, 132 (4th Cir. 2009) (qualified immunity).[6] It is Defendants' burden to prove that the reason for their understaffing was due to COVID.

Under § 90-21.133(b), provided the defendant has established the other elements of the defense (which is disputed), then the immunity applies absent a showing of gross negligence, reckless misconduct, or intentional misconduct, "provided that the acts, omissions, or decisions resulting from a resource or staffing shortage shall not be considered to be gross negligence, reckless misconduct, or intentional infliction of harm." This clause is subject to the causation ("impacted") requirement expressed by subsection (a). The language of this part of the statute raises the possibility that should the defendant prove the other elements of the defense including causation, it is immunized for its conduct even if it is reckless or intentional. This breadth raises constitutionality concerns, but there is no need for the Court to reach those issues at this time. As it stands, the causation requirement is disputed, as well as the other elements noted above, and so, the defense should not apply so as to bar the complaint outright as claimed.

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[5] Staffing represents in the long-term care industry about 60% to 65% of a facility's operating costs. *See* Betsy Rust, How SNFs are cutting costs without cutting back on care, June 29, 2018, McKnight's Long Term Care News.

[6] *See also Henry v. Purnell,* 501 F.3d 374, 377-78 & n.4 (4th Cir. 2007) (immunity defense); *Ferrera v. Robbins*, No. COA20-339, 2021-NCCOA-318, ¶ 9, 2021 N.C. App. LEXIS 336 (N.C. Ct. App. July 6, 2021) (qualified immunity).

Defendant also contends the claim is barred by N.C.G.S. §§ 99E-70 to 99E-72. Doc. 25, p. 6. That law provides that "[i]n any claim for relief arising from any act or omission alleged to have resulted in the contraction of COVID-19 …, no person shall be liable for any act or omission that does not amount to gross negligence, willful or wanton conduct, or intentional wrongdoing." N.C.G.S. § 99E-71(a) (emphasis added). However, no Plaintiffs are claiming in this case that because of Defendants' unlawful practices, the Plaintiff contracted COVID. Thus, the statute does not apply because the claim is not that "any act or omission … resulted in the contraction of COVID-19."[7]

5. Breach of Contract Claim.

Ignoring Plaintiffs' allegations that Defendants as new owners needed to do new admission agreements and make new disclosures,[8] Defendants point to forms allegedly signed by the Plaintiffs when the old owners ran the facility. Doc. 25, p. 7. Plaintiff Rummage alleged she signed a Genesis form entitled an admission agreement, but it was incomplete. Doc. 1, ¶ 61. Defendants attach the form. Doc. 25-3. It had been produced in the prior case and the version Defendant attaches has the same bates number as the one cited by the Complaint. *Compare* Doc. 1, ¶ 61 n. 45; Doc. 25-3. On its face, it is, indeed, incomplete: it cites to numerous other documents that are not included. *See id.*

But then Defendants attach what they claim to be a version of a "2015 Welcome Packet Genesis utilized when Rummage was admitted." Doc. 25, p. 7; Doc, 25-4. This is

[7] Also, Plaintiffs allege grossly negligent and reckless conduct. Complaint ¶¶ 159 (alleging the business model was "reckless and intentional"), 252 (emotional distress claim).
[8] See Complaint, Doc. 1, ¶¶ 4, 61-65, 137, 202(i), 230-32,

a new document, not found in Ms. Rummage's nursing home chart when Defendants produced it to Plaintiffs in the prior case, and not bates numbered. Presumably Defendants obtained it from Genesis, but obviously this will all need to be determined in discovery. The document is not alleged in or attached to the Complaint and it is unfair for Defendants to seek to bring it before the Court before discovery, apparently trying to turn this motion into a Rule 56 motion. Defendants provided no supporting declaration to authenticate or provide a foundation for the apparent Genesis document. Defendants have provided no evidence the document was ever provided to the Rummage family.[9]

For that reason, the motion may be denied. But even if one progresses to examine the content of these newly-produced materials, they contain promises and commitments that support the breach of contract claim.

For example, the Genesis document contains a promise that the facility will provide "a safe, clean, comfortable, and homelike environment, including but not limited to receiving treatment and supports for daily living safety." Doc. 25-4, p. 23. "The center must provide" various services to that effect. *Id.* The contract claim alleges a breach of express or implied contract, and it is reasonable to conclude that where the contract promised to provide nursing home services, this also meant staffing. *See* Doc. 1, ¶¶ 209

[9] Courts "generally do not consider extrinsic evidence when evaluating the sufficiency of a complaint" in a Rule 12(b)(6) motion to dismiss. *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014). A court's consideration of extrinsic documents in deciding a Rule 12(b)(6) motion converts the motion into one for summary judgment. *See* Fed. R. Civ. P. 12(d); *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015) (citing *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011)). Such conversion is inappropriate when the parties lack a reasonable opportunity for discovery. 780 F.3d at 606.

(alleging express or implied contract), 210 (alleging the Citadel "breached its contracts with the Plaintiffs"), 212 (alleging that the Citadel was chronically understaffed and breached express or implied terms of the contract).

It is also well-established in North Carolina that a contract carries with it an implied covenant by the parties to act fairly and in good faith in carrying out the agreement.

> In addition to its express terms, a contract contains all terms that are necessarily implied "to effect the intention of the parties" and which are not in conflict with the express terms. Among these implied terms is the basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement. All parties to a contract must act upon principles of good faith and fair dealing to accomplish the purpose of an agreement, and therefore each has a duty to adhere to the presuppositions of the contract for meeting this purpose.

Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) (citations and quotations omitted). It is not credible for Defendants to argue that they did not have a duty to provide adequate staffing either as an express or implied term of their contract, or as part of their implied duty to act in good faith and fair dealing.

Further, Plaintiffs dispute that the old Genesis agreement materials constituted the applicable contract with the Defendants as new owners. This is not an issue susceptible to resolution at the Rule 12 stage. While it is true that an express and implied contract cannot co-exist, it is premature to at this stage ask the Court to determine what contract applied. Plaintiffs' evidence will be that after the Defendant new owners took over, they sought to get residents and families to sign a new form contract, identifying the Citadel as the new facility and *inter alia* including a defective arbitration agreement violating CMS

regulations the chain must comply with to receive Medicare/Medicaid revenues.[10] It is understandable if now, Defendants want to try to rely on the legacy agreement of the former owner, but the same facts reflecting that Defendants believed they needed a new contract also show that Defendants believed the old owner's contract did not apply.

Defendants contend that a duty to abide by the Bill of Rights statute cannot be written into any contract. Doc. 25, p. 9. However, a version of the Bill of Rights language is found in the very Genesis welcome packet that Defendants point to. *See* Doc. 25-4, starting on page 13. Genesis sets out the "Residents Rights under Federal Law," *id.*, and those under the state law are similar. *Compare* 42 C.F.R. § 483.10 (federal); N.C.G.S. § 131E-117 (state). While the Genesis materials attached by Defendant are premature for consideration and simply flag the need for discovery, it is worth noting that "[t]he Fourth Circuit has said that a district court is required to construe documents considered in a Rule 12(b)(6) context in the light most favorable to the plaintiff." *S.C. v. United States*, No. 1:16-cv-00391-JMC, 2017 U.S. Dist. LEXIS 35946, *17-18, 2017 WL 976298 (D.S.C. March 14, 2017). Construed in Plaintiffs' favor the Genesis document supports them.

Next, Defendants argue that only The Citadel Salisbury LLC as the contracting party can be liable for the breach of contract claim. Doc. 25, p. 8. However, the Complaint alleges liability of the remaining Defendants based on principles of civil conspiracy, concert of action, and piercing the corporate veil. Doc. 1, ¶¶ 208, 220. Plaintiffs are entitled

[10] This was briefed to some extent in the case at No. 1:20-cv-00464-TDS-JLW, and the relevant federal regulation was cited in the Court's order there at Doc. 39, p. 13 n.5, citing 42 C.F.R. § 483.70(n).

to discovery on that issue. Portopiccolo admits providing what it calls "back office" services to the benefit of the local nursing homes, and Plaintiffs allege it has deeper direct involvement in key decisions on facility status and budgets. Accordius Health, LLC provides "management services" at the nursing homes and was directly involved in staffing decisions. *See* Doc. 1, ¶¶ 15, 17, 45(c).

6. Unfair and deceptive trade practices -- Learned profession.

Defendants contend the Chapter 75 claim is barred by the learned profession exemption. Doc. 25, p. 12. G.S. § 75-1.1 states: "(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. (b) For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

First, Defendants have the burden to show that the exemption applies. The burden of establishing the applicability of the exclusion is upon the party seeking it. N.C.G.S. § 75-1.1(d) ("Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim."); *and see* N.C.P.I.—Civil 813.62,[11] p. 2, n.2 (pattern jury instruction, saying the same). Defendants have not carried their burden to show why the defense should apply to bar the claim.

Second, the exemption does not apply where the facts run too far afield from issues of learned *medical* practice and focus more on general *business* practices. While it lacks

[11] https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master-2020/civil/c813.62-[2020].pdf.

precedential value, illustrative is *Hamlet H.M.A., LLC v. Hernandez*, 262 N.C. App. 51, 821 S.E.2d 600 (2018) (finding that the trial court improperly dismissed defendant's Unfair and Deceptive Trade Practices counterclaim based upon the learned profession exception to N.C. Gen. Stat. § 75.1-1 – claim involved "a business dispute unrelated to rendition of medical services"), *aff'd by equally divided court*, No. 425A18 (Dec. 6, 2019) (per curiam) ("without precedential value"). The Court of Appeals noted:

> This case involves a business deal, not rendition of professional medical services….

262 N.C. App. 51, 63-64.

Here, if, as alleged, the nursing home was supposed to give all patients or their families copies of the Patient Bill of Rights and did not, it is hard to see how this business practice rises to the level of professional services by a learned profession.

Likewise, if the nursing home corporate management made a business decision to reduce budgets to a point leading to understaffing, this may not be the same thing as the type of considered judgment by a member of a learned profession that the NC Learned Profession exception is meant to protect.

Courts have applied a two-part test: "In order for the learned profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citations omitted).

Here, the persons providing medical care to the nursing home patients, such as the physician acting as medical director at the facility, are members of a learned profession. However, it is disputed whether individuals such as Mr. Hyman or Mr. Zanziper as the businessmen running Portopiccolo or making the budget decisions are members of a learned profession. No allegations are being made against any physician. Neither the medical director nor facility administrator are named Defendants.

In *Hamlet*, the Court of Appeals found that "[t]his case involves a business deal, not rendition of professional medical services." 821 S.E.2dat 608. Likewise, here, the facility's administrator herself drew a distinction between the staffing issues, which were "business," versus medical care matters at the Citadel. Complaint ¶ 3.

7. <u>Highly regulated industry.</u>

Defendant fails to cite any cases where a Court dismissed a Chapter 75 claim on the basis that the defendant contended in a Rule 12 motion that it was a member of a highly regulated industry. Doc. 25, pp. 14-18. The Complaint extensively alleges the manners in which the Defendants violated and evaded the effect of various regulations. *E.g.*, Complaint ¶¶ 21, 47-49. Particularly given as it is Defendants' burden to establish the defense, the motion is premature.

8. <u>Aggravating Circumstances.</u>

To succeed on their Chapter 75 claim, the Plaintiffs must prove the existence of aggravating circumstances, going beyond a simple breach of contract. Doc. 25, p. 17; *see Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992); *Dalton v. Camp*, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001). Here, if the

factual allegations are borne out, they may suffice to allow a finding that such aggravating circumstances exist.

Cf. Post v. Avita Drugs, LLC, No. 17 CVS 798, 2017 NCBC 93 (Rowan County Super. Ct.), wherein the Business Court surveyed several cases in which a G.S. 75-1.1 claim involved a contract. The Court concluded that most substantial aggravating circumstances are attendant to the formation of the contract and are some variety of a fraud-in-the-inducement. 2017 NCBC 93, ¶¶ 25-28. Here, there is a dispute about whether the applicable contract was formed at the time of the old Genesis facility ownership, or when the new Defendant owners came in.

Further, with regard to Defendants' assumption of ownership, Plaintiffs have alleged a letter from Defendants' executive promising "5 star service" when in fact the facility had a one-star rating under the Nursing Home Compare system. Complaint ¶¶ 50-51. Beyond that, Plaintiffs extensively allege a business plan to cut and reduce staff hours to a minimum that fell below what was reasonable. Defendants deny this and contend they forgot to include some "agency" or contract labor hours on their payroll reporting to the government. Yet they fail to explain the similarly low hours they reported for their other facilities at other times. The motion is premature.

9. Rule 9(b) Specificity.

Rule 9(b) requires pleading with particularity in substantive claims for fraud or mistake. The Complaint alleges no claim for fraud or mistake. The Rule does not apply. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's

mind may be alleged generally." Fed. R. Civ. P. 9(b) (emphasis added). A Chapter 75 claim for unfair and deceptive trade practices is different from a common law fraud claim. *See* Complaint ¶¶ 224-25.

10. Reliance, actual injury.

Plaintiffs' unfair and deceptive claim alleges that Defendants engaged in unfair and deceptive conduct "which proximately caused actual injury to the Plaintiffs." Complaint ¶ 226. Reliance is part of the "proximately caused" element as Plaintiffs indicate. Complaint ¶ 224 n. 112. The Complaint further cites cases on the reliance issue. *Id.* Plaintiffs have adequately alleged the claim, including reliance and injury.

11. Breach of fiduciary duty.

Defendants cite *Hager v. Smithfield East Health Holdings, LLC*, 264 N.C. App. 350, 356, 826 S.E.2d 567, 572 (2019), Def. Br. p. 19, for the contention that it is not possible under the facts alleged that any Defendant bore a fiduciary duty. The courts have limited to number of "de jure" categories of fiduciary duty to "legal relationships" such as "physician and patient." 826 S.E.2d at 571. However, courts have also allowed for the existence of fiduciary duties arising out of "de facto" relationships. *Id.* at 571-72. In *Hager*, the plaintiff sought to "expand the category of *de jure* fiduciary relationships to include assisted living facilities with memory wards and their residents." *Id.* at 572. The court declined the invitation and further found that the facts did not permit the inference of a de facto fiduciary relationship either. *Id*. at 572-74. In the instant case, the Plaintiffs do not seek a finding of a fiduciary duty to the patient, as in *Hager*. Rather, they allege a narrower de facto fiduciary duty which arose on the part of the facility management to

honestly and accurately inform the resident sponsor Plaintiffs as to the status of their loved ones who were admitted as residents. Complaint ¶¶ 236-244. The fact allegations regarding Ms. Hooker as sponsor for Ms. Rummage, her mother, as resident, reflect poor efforts to communicate, a social worker admitting records were false, Complaint ¶¶ 77, inability to get information, 80, 82, 97, conflicting statements about medications, 84-85, ineffective care plan meetings, 111-113, and see sworn statements of Ms. Hooker filed at Docs. 13-1 to 13-4. Resident sponsor Donna Deal alleges similar misconduct by the facility as she sought to obtain information as to her mother-in-law, resident Betty Deal. Complaint ¶¶ 141-157, 165-173; and see Deal sworn statement at Doc. 13-5.

It is the Court that will ultimately determine whether the facts gave rise to a fiduciary duty. Plaintiffs contend that if their detailed allegations are corroborated by discovery, they would suffice to allow a conclusion that the facility assumed a fiduciary duty.

12. Negligent Infliction of Emotional Distress.

A plaintiff must allege that the defendant negligently engaged in conduct that was reasonably foreseeable to cause severe emotional distress and the conduct did in fact cause such emotional distress. Doc. 25, p. 20. In the Complaint, the Plaintiffs have alleged the elements of the claim, citing to the pattern jury instruction. Complaint ¶¶ 247-253, citing N.C.P.I.-Civil 102.84.[12] There is no obligation that the plaintiff certify the claim at the time of filing via a physician or expert as with a medical malpractice claim. Nor is there a requirement of pleading with particularly as with a fraud claim. When it comes to adult

[12] https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master-2019/civil/c102.84%20[2018].pdf

children and family sponsors whose parents are admitted to a nursing home, and who allege mistreatment and false information provided as to their loved one at the facility, it is credible that past a certain point, severe emotional distress can be suffered. For example, the detailed allegations as to Ms. Hooker and Ms. Rummage reflect an adult daughter, Ms. Hooker, frankly at her wit's end trying to make sure that her mother received necessary heart medication. The allegations, further corroborated by her sworn statements, reflect a deficient situation playing out for months. Likewise, Donna Deal describes her distress at trying along with her husband to ensure the care of her mother-in-law, Betty Deal. The facts support a claim for emotional distress under Rule 12.

CONCLUSION

Defendants' motion to stay should be denied.

Respectfully submitted this the 9th day of August, 2021.

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CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies pursuant to LR 7.3(d)(1) that the instant brief does not exceed 6,250 words. Based on the word processing software, the word count for this brief is at 6,078 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 9, 2021, his law firm filed the instant brief using the Court's ECF system, which shall electronically serve all counsel of record.

Date: August 9, 2021.

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