IN THE SUPREME COURT OF PENNSYLVANIA

No. 16 MAP 2017

COMMONWEALTH OF PENNSYLVANIA,
Acting by Attorney General Josh Shapiro,

Appellant,

v.

GOLDEN GATE NATIONAL SENIOR CARE LLC; GGNSC HOLDINGS LLC; GGNSC ADMINISTRATIVE SERVICES LLC; GGNSC CLINICAL SERVICES LLC; GGNSC EQUITY HOLDINGS LLC; GGNSC HARRISBURG LP; GGNSC HARRISBURG GP, LLC; GGNSC CAMP HILL III LP; GGNSC CAMP HILL III GP, LLC; GGNSC CLARION LP; GGNSC CLARION GP, LLC; GGNSC GETTYSBURG GP, LLC; GGNSC ALTOONA HILLVIEW LP; GGNSC ALTOONA HILLVIEW GP, LLC; GGNSC LANSDALE LP; GGNSC LANSDALE GP, LLC; GGNSC MONROEVILLE LP; GGNSC MONROEVILLE GP, LLC; GGNSC MT. LEBANON LP; GGNSC MT. LEBANON GP, LLC; GGNSC PHOENIXVILLE II LP; GGNSC PHOENIXVILLE II GP, LLC; GGNSC PHILADELPHIA LP; GGNSC PHILADELPHIA GP, LLP; GGNSC WILKES-BARRE II LP; GGNSC WILKES-BARRE II GP, LLC; GGNSC TUNKHANNOCK LP; GGNSC TUNKHANNOCK GP, LLC; GGNSC ERIE WESTERN RESERVE LP; GGNSC ERIE WESTERN RESERVE GP, LLC; GGNSCC POTTSVILLE LP; GGNSC POTTSVILLE GP, LLC,

Appellees.

BRIEF OF APPELLANT, THE COMMONWEALTH OF PENNSYLVANIA, ACTING BY ATTORNEY GENERAL JOSH SHAPIRO

APPEAL FROM ORDER OF THE COMMONWEALTH COURT ENTERED MARCH 22, 2017 AT NO. 336 M.D. 2015

JOSH SHAPIRO
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DATE: August 16, 2017 **BY:** **JONATHAN SCOTT GOLDMAN**
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STATEMENT OF JURISDICTION

This is an appeal from a final order of the Commonwealth Court's original jurisdiction. The Supreme Court has exclusive jurisdiction pursuant to 42 Pa. C.S. §723(a).

ORDER IN QUESTION

AND NOW, this 22nd day of March, 2017, we dispose of Defendants Golden Gate National Senior Care, LLC, *et al's* Preliminary Objections as follows:

Preliminary Objection 1: Overruled.

Preliminary Objection 2: Overruled.

Preliminary Objection 3: Sustained.

Preliminary Objection 4: Sustained.

Preliminary Objection 5: Sustained.

Preliminary Objection 6: Sustained.

Preliminary Objection 7: Overruled.

Preliminary Objection 8: Sustained.

Preliminary Objection 9: Moot.

Preliminary Objection 10: Sustained.

Preliminary Objection 11: Sustained.

Preliminary Objection 12: Sustained.

Based on the disposition of the Preliminary Objections, the Amended Complaint is hereby dismissed.

/s/ Anne E. Covey
ANNE E. COVEY, Judge

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Scope of review: In reviewing an order sustaining preliminary objections on appeal, this Court may examine the entire record, including the complaint, preliminary objections, and responses thereto.

Standard of review: On questions of law, this Court exercises plenary review. *Allegheny County Sportsmen's League v. Rendell*, 860 A.2d 10, 14 (Pa. 2004)("*Sportsmen's League*"). In reviewing preliminary objections in the nature of a demurrer, the Court must consider all well-pleaded material facts "and all reasonable inferences drawn from those facts." *Id.* (citing *Comm. ex. rel. Nicholas v. Pa. Labor Rel. Bd.*, 681 A.2d 157, 159 (Pa. 1996)). It may affirm only after making a determination that it is "clear from doubt" the plaintiff will be "unable" to prove facts sufficient to establish a right to relief. *Sportsmen's League* (citing *Pa. AFL-CIO v. Comm. of Pa.*, 757 A.2d 917, 920 (Pa. 2000)). Indeed, this Court has held that, because such an order dismisses a plaintiff's suit even before discovery has commenced, it should be affirmed only where the complaint "clearly" and "without a doubt" fails to state any claim for which relief may be granted and the Court is "certain" the law will not permit the appellant to prevail. *Sportsmen's League* (citing *Willet v. Pa. Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997)(quoting *Cty. of Allegheny v. Comm. of Pa.*, 490 A.2d 402, 408 (Pa. 1985)).

STATEMENT OF QUESTIONS INVOLVED

I. Whether the Commonwealth stated a claim under the Consumer Protection Law by alleging that Golden Living failed to provide residents with material things it had promised, including basic levels of assistance with daily living?

A. Whether the Commonwealth Court improperly dismissed the Commonwealth's false advertising claims at the preliminary objections phase where the Commonwealth alleged that Golden Living engaged in unfair methods of competition and unfair or deceptive acts and practices under §§2(4)(v), (ix), (x) and (xxi) of the Consumer Protection Law?

B. Whether the Commonwealth Court improperly dismissed the Commonwealth's claims under §§2(4)(v) and (xxi) of the Consumer Protection Law on the basis that Golden Living's representations and fraudulent and deceptive conduct, did not pertain to *advertising* – though neither the Commonwealth's allegations nor these sections of the Law are limited to "advertising"?

C. Whether the Commonwealth Court improperly dismissed the Commonwealth's claims at the preliminary objection phase for lack of specificity and failure to attach documents to the Amended Complaint under Pa. R.Civ.P. 1019, without leave to amend, where the

Commonwealth sufficiently pled fraudulent and deceptive conduct sufficient to create confusion and misunderstanding by consumers?

II. Whether the Commonwealth Court erred in holding that the Commonwealth cannot be a "person in interest" *entitled to recover damages* in restoration or restitution when it *sues as a plaintiff* under the Consumer Protection Law?

III. Whether the Commonwealth Court erred in holding, at the preliminary objections phase, that discovery could reveal no set of facts that would support the Commonwealth's well-pled allegations supporting its entitlement to "pierce the corporate veil" and impose vicarious liability against Golden Living?

IV. Whether the Commonwealth Court erred in holding, on preliminary objections, that the Commonwealth could not recover in unjust enrichment against Golden Living's *parent entities* ***only*** because Department of Human Services ("DHS") regulations supersede the Commonwealth's common law unjust enrichment claims – even though the regulations apply only to nursing home "providers" and Golden Living's parent entities, who were unjustly enriched, are <u>not</u> "providers" under those regulations?

V. Whether the Commonwealth Court erred in holding, on preliminary objections, that the Commonwealth should not be permitted leave to amend, despite the special status the General Assembly gave to the Attorney General

in §4 of the Consumer Protection Law to "bring … action in the name of the Commonwealth" to protect the "public interest," the traditionally broad reading afforded the Law in service of the public interest, and – though the Commonwealth Court presumably was not aware of them at the time – the myriad of other substantive errors in its Opinion and Order?

STATEMENT OF THE CASE

Following an extensive internal investigation, the Commonwealth brought the present action against "Golden Living" – a number of parents, subsidiaries and/or affiliated companies which purport to provide "skilled nursing care" to consumers in Pennsylvania. The Commonwealth maintains that, through a campaign of deceptive marketing materials and billing statements, Golden Living materially misrepresented the quantity, frequency and availability of services that it would (and did) provide to its nursing home residents. The Commonwealth believes that Golden Living's failure to provide these services is no accident. Rather, it is the result of an institutional and systemic scheme to skimp on the staffing required to deliver the basic care their residents required and to, instead, maximize profits at the expense of Pennsylvania's nursing home consumers, their families, and the Commonwealth, all of which were deceived by the scheme. The Commonwealth believes that these actions by Golden Living violate the Consumer Protection Law.

Procedural History.

On July 1, 2015, the Commonwealth filed a Complaint and Petition for Injunctive Relief against Golden Living and, on August 6, 2015, Golden Living

filed preliminary objections.[1] On September 8, 2015, the Commonwealth filed an Amended Complaint and Petition for Injunctive Relief which added eleven additional facilities operated by Golden Gate National Senior Care, LLC as defendants (the "Amended Complaint").[2] (Amended Complaint; Reproduced Record (RR) 209a-424a). At 162 pages and 281 paragraphs, the Amended Complaint was exhaustive. Backed by this detailed recitation of facts, the Commonwealth made claims against Golden Living for (1) violations of the Consumer Protection Law; (2) breach of contract; and (3) unjust enrichment.[3]

On October 8, 2015, Golden Living, again, filed preliminary objections. (Defendants' Preliminary Objections to Plaintiff's Amended Complaint and Petition for Injunctive Relief; RR 425a-58a) They alleged, *inter alia*, that, ***as a matter of law***:

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[1] The Commonwealth was represented by private counsel before the Commonwealth Court. In this appeal, however, it is represented, in-house, entirely by the Office of Attorney General's own counsel. Indeed, after they became aware of the Commonwealth's pre-complaint investigation, Golden Gate National Senior Care, LLC and various of Golden Living's defendant nursing homes (the "Golden Living Plaintiffs") sued the Commonwealth, in part, to prevent the Attorney General from hiring outside counsel. They lost. *See GGNSC Clarion LP v. Kane*, 113 A.3d 1062, 1074 (Pa. Cmwlth. 2016)(the "Declaratory Judgment Matter")(the Golden Living Plaintiffs "lack standing under Section 103 of the Commonwealth Attorneys Act to assert any claim with respect to the contingent fee agreement … or the participation of [the law firm]").

[2] The Commonwealth refers to the Defendants/Appellees collectively as "Golden Living."

[3] The Commonwealth later withdrew its breach of contract claim.

- the Commonwealth failed to state a claim for "false advertising" under the Consumer Protection Law (§§2(4)(v) and 2(4)(ix)) because each of Golden Living's documented false statements was merely "puffery," and none was a material misrepresentation, and the Commonwealth failed to allege that Golden Living's false advertisements "deceived or had a tendency to deceive a *substantial segment* of their audience" (POs 4-5 and 8; RR 441a-43a & 447a-49a);

- the Commonwealth failed to allege sufficient facts about the care plans of specific residents to support a finding that Golden Living had engaged in "other fraudulent or deceptive conduct" that creates a "likelihood of confusion or misunderstanding" under the catchall provision of the Consumer Protection Law (§2(4)(xxi)) (PO 6; RR 443a-45a);

- the Commonwealth was not a "person in interest" under the Consumer Protection Law and, therefore, could not recover restoration damages under §4.1 (PO 10; RR 452a-53a);

- the Commonwealth's claims against Golden Living's parent entities must fail because it alleged insufficient facts to pierce the corporate veil or impose vicarious liability (PO 12; RR 454a-56a); and

- courts cannot order unjust enrichment against Golden Living because the General Assembly created a specific statutory remedy for the DHS to recover overpayments made to nursing homes through the Pennsylvania Medical Assistance Program (the "Program") (POs 3 and 11; RR 439a-41a & 453a-54a).

The Commonwealth disagreed with each of Golden Living's arguments. On November 6, 2015, the Commonwealth filed its response in opposition to Golden Living's Preliminary Objections. (Commonwealth's Answer to Preliminary Objections; RR 459a-506a) The Commonwealth explained, *inter alia*, that:

- Golden Living's marketing statements violate the Law because they contain false and deceptive information material to consumers and, at the preliminary objection stage, the Court may not accept Golden Living's assertion that their false statements are true. (RR 480a-82a)

- Consistent with Pa. R.C.P. No. 1019(a), the Commonwealth identified which statements are deceptive, and why, so Golden Living can prepare a defense; it gave specific examples where Golden Living promises services it knew or should have known staffing levels were insufficient to perform, and it frequently provided deficient care in Pennsylvania. (RR 483a-84a; 486a-87a; 491a-94a)

- This Court's decision in *Meyer v. Community College of Beaver County*, 93 A.3d 806 (Pa. 2014) ("*Meyer II*"), restricted the liability of a local municipality under the Consumer Protection Law due to sovereign immunity, but did not limit the Commonwealth's right to recover restoration damages under §4.1 of the Law. (RR 497a-99a)

- The Commonwealth brought its unjust enrichment claim against the Golden Living parent entities and GGNSC Equity Holdings LLC, only, under a theory of alter ego/vicarious liability, not breach of contract, and its allegations that the parents directly control Golden Living's facilities and siphon off a significant amount of the profits are sufficient to state a claim for restitution. (RR 500a-04a)

- The Commonwealth's unjust enrichment claim is based on the seizure by Golden Living's parents of profits paid for care not actually provided, and not for violations of rules and regulations governing the Program. (RR 476a-77a)

In the event the Commonwealth Court found merit in any of Golden Living's objections, the Commonwealth respectfully requested leave to amend. *See* Commonwealth's Opposition to Defendants' Brief in Support of Preliminary Objections, 5/9/16, at 58 ("Should the Court conclude that Plaintiff's allegations are not made with sufficient specificity, Plaintiff requests leave to amend the Complaint.").

On March 22, 2017, the Commonwealth Court issued the Opinion and Order which is the subject of this appeal. Citing to *GGNSC Clarion LP v. Kane*, 113

A.3d 1062 (Pa. Cmwlth. 2016), the Commonwealth Court properly overruled POs 1 and 2, rejecting Golden Living's claim that, by filing suit, the Attorney General had engaged in the unauthorized regulation of health care facilities.[4] Op.,158 A.3d at 213. But the Commonwealth Court sustained POs 4-6, 8 and 10 (relating to the Consumer Protection Law) (Op.,158 A.3d at 213-30); POs 3 and 11(relating to unjust enrichment) (Op.,158 A.3d at 231-36); and PO 12 (relating to piercing the corporate veil) (Op.,158 A.3d at 236-38).[5] It also denied, without discussion, the

[4] In the Declaratory Judgment Action, the Golden Living Plaintiffs also challenged the authority of the Attorney General to investigate or pursue any litigation against nursing home care providers under the Consumer Protection Law at all. That Court dismissed, concluding that, notwithstanding the authority of the Department of Health ("DOH") over nursing homes, the Attorney General has authority to pursue the claims before this Court, including claims relating to Golden Living's systematic understaffing at its facilities: "DOH does not have exclusive authority to investigate or pursue litigation concerning staffing levels at skilled nursing facilities or to employ a model to establish such standards within the context of an anticipated action under the Consumer Protection Law." *GGNSC Clarion LP*, 131 A.3d at 1070.

[5] The Commonwealth Court overruled PO 7 (relating to heightened pleading requirement for fraud), properly holding that "a claim under Section 2(4)(xxi) of the [Law] is subject to a lesser standard than common law fraud," and recognizing that the "Commonwealth reaffirms in its brief that it is 'proceeding under [Section 2(4)(xxi)'s] "deceptive" prong'". (Op., 158 A.3d at 225, *citing Commonwealth v. Percudani*, 825 A.2d 743 (Pa. Cmwlth. 2003), *amended*, 851 A.2d 987 (2004) and *Commonwealth v. Manson*, 903 A.2d 69, 74 (Pa. Cmwlth. 2006)("The question, then, is not whether a company or corporate officer engaged in conduct that was intended to deceive. Rather, **the question is whether the company or corporate officer engaged in conduct that might be 'deceptive to the ordinary consumer.'**"(citations omitted)(emphasis in Opinion)). The Commonwealth Court also overruled as moot POs 9 and 11 as the Commonwealth

Commonwealth's request for leave to amend. Based on its Order, the Commonwealth Court dismissed the Commonwealth's Amended Complaint.

The Commonwealth asserts that the Commonwealth Court's ruling is unfounded and contrary to the law and public interest. Indeed, if allowed to stand, the Commonwealth believes the ruling may have a wide-ranging, negative impact on its ability to protect the rights of its citizens under the Consumer Protection Law.

Accordingly, the Commonwealth, acting through Attorney General Josh Shapiro, respectfully appeals the Commonwealth Court's decision which it believes, among other things: improperly applies the demurer standard; wrongly denies leave to amend; and potentially carries wide-ranging and unintended consequences that contravene the intent of the General Assembly and limit the Commonwealth's ability to enforce the Consumer Protection Law and protect its citizens from deceptive business practices in myriad industries. (NOA, 4/20/2017; RR 76a-208a).[6]

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had agreed to withdraw it breach of contract claim. (Op., 158 A.3d at 231 and nn. 24-25)

[6] Golden Living filed a cross-appeal, 20 MAP 2017, on May 4, 2017, which it subsequently withdrew.

Judges Whose Determination Is to Be Reviewed.

The *en banc* Opinion of the Commonwealth Court was written by Judge Anne E. Covey and joined by President Judge Mary Hannah Leavitt and Judges Robert Simpson, P. Kevin Brobson, Patricia A. McCullough, and Michael H. Wojcik. Judge Renée Cohn Jubelirer wrote a concurring and dissenting opinion. The Opinion is reported at 158 A.3d 203 (Pa. Cmwlth. 2012) and attached hereto as "Exhibit A."

Statement of Facts.

A. The Commonwealth's Investigation.

Prior to filing its Complaint, the Office of Attorney General (the "OAG") conducted an extensive investigation of Golden Living's facilities in Pennsylvania. Among other things, it:

- examined staffing levels reported to the Commonwealth and federal centers for Medicare and Medicaid Services during annual licensure surveys (AC ¶116; RR 243a);
- interviewed former Golden Living employees and family members of residents (AC ¶¶14-15; RR 216a); and
- analyzed deficiencies identified through DOH surveys. (AC ¶116; RR 243a)

The OAG found a systemic failure by Golden Living to deliver adequate staff in its facilities to provide the care Golden Living had promised its residents. It is believed that the purpose of this intentional short-staffing was to increase

profits. (AC ¶280; RR 370a) Regardless, as a result of chronic under-staffing, residents were routinely denied timely and appropriate assistance with basic and necessary aspects of daily living – including items that Golden Living had promised to provide them. (AC ¶117; RR 243a) Among these widespread deficiencies, the OAG found that Golden Living frequently failed to bathe residents as required; left incontinent residents in wet and soiled clothing and bedding; and failed to provide residents with proper assistance in eating meals. (AC ¶¶15-16; RR 216a-17a) In its Amended Complaint, the Commonwealth detailed approximately 120 examples of Golden Living's failure to provide its residents with the basic assistance it had promised. (*See* AC at ¶¶119-239; RR 244a-357a)

B. Structure and Relationship of Golden Living's Corporate Entities.

Golden Living is a series of affiliated companies and parent entities that operate 25 separate nursing homes throughout Pennsylvania. (*See* AC¶¶ 27-76; RR 221a-30a) The five defendant parent entities own, operate and control these 25 facilities by:

- Exercising operational and managerial control over all Pennsylvania facilities.[9] (AC ¶¶24-25; RR 220a);

[9] GGNSC Administrative Services LLC and GGNSC Clinical Services LLC.

- Indirectly owning and operating the facilities.[10] (AC¶¶ 22-23; RR 219a);

- One of the parent entities, GGNSC Equity Holdings LLC, has a controlling ownership interest in all of Golden Living's Pennsylvania facilities.[11] (AC ¶26; RR 220a).

Through this corporate scheme, the parent entities exercise overwhelming control over the essential operations of ***all*** *Golden Living's facilities in Pennsylvania* including, for example, the powers to: create and implement policies; limit staffing and control personnel decisions; perform site visits to observe quality of care and enforce corporate level policies; prepare and submit requests for reimbursement and required cost reports under the Program; require centralized reporting of key data including daily reporting of census information; and maintain a company-wide Customer Compliance Hotline for residents. (AC ¶¶253 and 258; RR 360a & 362a-63a).

Of particular importance here, the parent entities control how Golden Living markets its services to Pennsylvania residents. Indeed, many of the misrepresentations catalogued by the Commonwealth were made directly by one or more of the parent entities. Brochures and other information were disseminated at Golden Living's unified website, www.goldenliving.com, which the parents

[10] GGNSC Holdings LLC and Golden Gate National Senior Care LLC.

[11] GGNSC Equity Holdings LLC is also a general partner of GGNSC Wilkes-Barre II LP, GGNSC Phoenixville II LP, and GGNSC Camp Hill III LP.

controlled. To the extent individual facilities participated directly in marketing, they did so under the direction and control of Golden Living's parent entities. (AC ¶250; RR 359a-60a)

There was also a financial arrangement between the parents and the facilities. Golden Living's facilities paid substantial fees to the parent entities. As a result, the parent entities received millions of dollars per year from the facilities. (AC ¶¶254-56; RR 360a-62a) The Commonwealth also believes that a significant amount of the profits generated by each facility is siphoned off to the parents. But no consideration is paid for these transfers. (AC ¶¶259-63; RR 363a-66a)

C. Golden Living's Deceptive, Misleading and Unfair Conduct Toward the Commonwealth and its Consumers Violates the Law.

The Commonwealth has the fifth highest percentage of elderly residents of any state[12] and, for Pennsylvania's many elderly citizens and their families, the cost of nursing home care is substantial. (AC ¶77; RR 230a-31a) Due to Golden Living's penetration into Pennsylvania's nursing home industry, thousands of Pennsylvania consumers have purchased such care from Golden Living facilities. (AC ¶78; RR 231a) From 2008 to 2013, private consumers paid Golden Living an

[12] The Older Population: 2010, 2010 Census Briefs, Population U.S. Census Bureau, https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf (last visited 8/10/2017).

average of $241 *per day* – more than $7,200 per month for each resident. (AC ¶4; RR 214a) And those are just private payments, direct from consumers. (*Id.*)

The Commonwealth is also a major purchaser of nursing home services. (AC ¶78; RR 231a) In 2013, for example, the Commonwealth paid 46 percent of all monies to Pennsylvania nursing homes. (*Id.*) These monies included substantial payments to Golden Living, as more than half of their customers pay through Medicaid. (*Id.*) Indeed, from 2008 to 2013, the Commonwealth paid Golden Living $188 per day for each Medicaid recipient – more than $5,800 per month for each such resident. (AC ¶5; RR 214a)

In exchange for these substantial payments by the Commonwealth and its citizens, Pennsylvanians residing in nursing homes are entitled to receive essential, skilled nursing services and assistance with the activities of daily living ("Basic Care"). (AC ¶7; RR 214a & 15a) Such Basic Care includes assistance and supervision with:

a. using the bathroom;

b. changing wet and soiled underwear, clothing and bed linens;

c. transferring between beds and wheelchairs;

d. repositioning one's body in the bed or wheelchair;

e. dressing, grooming, bathing, and brushing and flossing;

f. eating and drinking; and

g. performing active and passive "range of motion" exercises.

(*Id*.)

Through its marketing and other communications, Golden Living promises residents and potential residents that they will receive these services. (AC¶¶ 82-87; RR 231a-34a) Based on the OAG's investigation, however, Golden Living *fails to provide* a significant percentage of these services to most of its resident patients.[13] (AC ¶100; RR 239a)

Golden Living's failure to provide Basic Care at its facilities in Pennsylvania is not isolated or random – rather, it is a necessary consequence of its failure to provide adequate staff. (AC ¶87; RR 234a) These omissions are serious, routine, and potentially knowing and purposeful. The Commonwealth believes discovery will reveal that these deficiencies are a crucial part of Golden Living's profit model.

D. Deceptive and Misleading Representations in Golden Living's Advertising and Marketing Materials.

Golden Living directly markets its nursing home facilities to Pennsylvania consumers through websites, videos, advertisements and other means, including

[13] The following Basic Care assistance was *promised* by Golden Living but *not provided* in accordance with residents' individual care plans: getting to the bathroom; changing wet and soiled underwear, clothing and bed linens; repositioning residents to avoid bed sores at least every two hours (or more if required); responding timely to "call lights" and providing requested assistance; eating and drinking at meals while food is still hot; range of motion exercises; and bathing and personal hygiene assistance including regular bed baths and showers, oral care, nail care, shaving and dressing, etc. (AC ¶105; RR 240a-41a)

written marketing materials that are distributed to hospitals and hospital staff which refer patients to nursing homes. During the relevant time, each of these forms of marketing contained misrepresentations about the Basic Care that was provided by Golden Living. (AC ¶82; RR 231a) Golden Living's marketing materials, for example, included the following specific, false and misleading misrepresentations:

a. Licensed nurses and nursing assistants are available to provide nursing care and help with activities of daily living.

b. Clean linens are provided on a regular basis, so you do not need to bring your own.

c. A restorative plan of care is developed to reflect the resident's goal and is designed to improve wellness and function. The goal is to maintain optimal physical, mental and psychosocial functioning.

(AC ¶¶83-84; RR 232a-33a)

None of the above representations by Golden Living was true. Also, despite promises to provide services such as various snacks and beverages "at any time," a container of fresh ice water by your bedside "every day," and a dining room atmosphere with the food, environment and conversation to "nourish both your body and soul," these promised services were consistently *unavailable* to nursing home residents. (AC ¶85; 233a) In addition, Golden Living *omitted* essential information, material to consumers choosing a nursing home for themselves or a

loved one, where the truth contradicted the false and misleading story Golden Living was trying to sell.

For example, Golden Living did not disclose that residents would have to wait excessively for basic care – and frequently would not receive care as often as needed or requested. Golden Living hid from consumers that residents frequently were forced to eat alone in their rooms because Golden Living refused to hire sufficient staff to get them up, dressed and ready in time to take their meals in the promised "soul-nourishing" dining room. (AC ¶86; 233a-34a) Through this calculated mix of affirmative misrepresentations and material omissions, Golden Living packaged and sold a nursing home to unwitting Pennsylvania consumers that was a lie.

E. Additional Deceptive and Misleading Conduct from Golden Living's Non-Advertising Materials and Individual Facilities.

Golden Living's individual facilities relied on the marketing materials described above and others prepared by Golden Living's corporate offices. (AC ¶91; RR 235a) They also made deceptive and misleading representations in specific "resident care plans" they prepared for each nursing home resident which were just plain false. These plans specifically prescribed *care that* ***was not delivered*** and outlined delivery *schedules that* ***were not followed***.[14] Basic Care

[14] Under federal and state law, nursing homes must complete a resident assessment (a Minimum Data Set or MDS) for each resident within 14 days of

deemed necessary was prescribed and scheduled – but routinely not delivered. (AC ¶91; RR 235a)

If the Commonwealth is permitted to proceed with discovery, it expects to uncover evidence that these resident care plans were not designed merely to mislead nursing home consumers and their families, but to set the trap for even greater consumer abuses. Indeed, in its pre-complaint investigation, the OAG found that Golden Living's *billing statements* also were misleading and deceptive. Golden Living used these deceptive statements to charge consumers, insurers and the Commonwealth for care that was not actually provided. (AC ¶¶99-100; RR 239a)

Golden Living doubled down on its deception by trying to cover up its misleading practices. (AC ¶101; RR 239a) During Commonwealth survey periods and DOH inspections, Golden Living increased the number of Certified Nurses Aides on site. (AC ¶102; RR 240a) It also used office and administrative staff – who were neither nurses nor medically-trained employees – to supplement regularly scheduled nurses. (AC ¶102; RR 240a) Golden Living staged these temporary reinforcements to trick the Commonwealth into believing that staffing levels were sufficient to meet the Basic Care requirements of Golden Living's nursing home residents. (*Id.*) They were not.

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arrival. The MDS is used to evaluate each resident's needs and develop a care plan for each resident. (AC ¶¶92-98; RR 235a-39a)

Statement of the Order Under Review.

The Commonwealth Court granted Golden Living's Preliminary Objections Nos. 3-6, 8, and 10-12, and dismissed the Amended Complaint without leave to amend. (Op. and Order, 3/22/2017, 158 A.3d at 239) In so doing, it determined that the Commonwealth had not alleged sufficient facts to establish that Golden Living had engaged in false advertising or otherwise violated the Consumer Protection Law. (*Id.,*158 A.3d at 213-31)

Specifically, it determined that the material misrepresentations made by Golden Living were merely "puffery," and therefore, not actionable. (*Id.*, 158 A.3d at 215-23) It also determined that the Amended Complaint lacked sufficient specificity under Pa. R.Civ.P. No. 1019(a) because it *described* Golden Living's failure to provide care rather than *including* specific resident care plans and/or specific bills for services – which the Commonwealth has not been able to obtain through discovery.[15] (Op. and Order, 158 A.3d at 223-24) It also held that the Commonwealth cannot be a "person in interest" entitled to restitution or restoration under §4.1 of the Consumer Protection Law, 73 P.S. §201-2(4.1). (Op. and Order, 158 A.3d at 226-30) That Court further held that the Commonwealth may not recover in unjust enrichment because DHS has an exclusive statutory remedy for overpayment of services, and may not pierce the corporate veil because it did not

[15] The Commonwealth Court dismissed before allowing discovery to begin.

allege that Golden Living is a "sham" with "no other purpose than as a vehicle for fraud." (Op., 158 A.3d at 231-38)

Statement of Place of Raising or Preservation of Issues.

In its Amended Complaint, the Commonwealth made claims against Golden Living for (1) violating the Consumer Protection Law, (2) breach of contract, and (3) unjust enrichment. The Commonwealth filed an answer to preliminary objections and supporting brief in opposition to Golden Living's preliminary objections in which it responded to each of Golden Living's arguments, thereby raising and preserving each of those issues for appeal. (Commonwealth's Answer to Preliminary Objections; RR 459a-506a) (Commonwealth's Opposition to Defendants' Brief in Support of Preliminary Objections, 5/9/2016) In its brief, the Commonwealth also requested leave to amend its Amended Complaint if the Court determined that the Commonwealth's allegations lacked the specificity required by Pa. R.Civ.P. 1019. (Commonwealth's Opposition to Defendants' Brief in Support of Preliminary Objections, 5/9/16, at p. 58)

SUMMARY OF THE ARGUMENT

The Commonwealth Court's dismissal of the Amended Complaint against Golden Living – on a *demurrer*, before discovery was permitted to begin, and without even allowing leave to amend – was, perhaps unintentionally, a radical act. The lack of deference given to the Commonwealth is surprising, not only in the Court's failure to apply the deferential legal standard to which every plaintiff is entitled on a demurrer, but even more so in light of the express statutory duty the General Assembly gave the Attorney General under the expansive Consumer Protection Law: to "bring … action in the name of the Commonwealth" to protect the "public interest". 73 P.S. §201-4. And the Order does not only affect this case against Golden Living. It may well have wide-ranging and unintended consequences that limit the ability of the Attorney General to protect the Commonwealth of Pennsylvania and, particularly her most vulnerable citizens, from the deceptive practices of a wide swath of business that span the gamut – nursing homes, payday lenders, opioid manufacturers, and beyond.

The potential impact of the Order is matched by the substantial legal flaws in the Opinion. The Commonwealth Court erred in two overarching ways: (1) it failed to properly apply the standard on preliminary objections in the nature of a demurrer; and (2) it misinterpreted the minimum requirements for liability to attach under the Consumer Protection Law. On preliminary objections, the Court was

required to deem true all well-pleaded material facts and reasonable inferences; then it could dismiss only if it was clear and free from doubt that the Commonwealth could not possibly prove facts sufficient to prevail. It did neither.

The Court was required to apply that standard of review throughout, including to the *minimum conduct* and *standard* required to establish liability under the Consumer Protection Law. But it got both wrong. Contrary to the Court's Opinion, the conduct covered by the Law is not confined only to "advertising"; the Law equally applies to representations made about goods and services *outside the realm of advertising* including, generally, "[e]ngaging in … fraudulent or deceptive conduct which creates likelihood of confusion or of misunderstanding." 73 P.S. §§201-2(4)(v) and (xxi).

And the standard to establish liability under the Consumer Protection Law does not require the Commonwealth to establish *intent* or *actual deception* of any particular consumer, as the Court required. Rather, a plaintiff need only show that the offending acts and practices are "capable" of being "interpreted in a misleading way" based upon the "overall impression" from the "totality" of what is "said [and] reasonably implied". *Commonwealth ex. rel. Corbett v. Peoples Benefit Services, Inc.*, 923 A.2d 1230, 1236-37 (Pa. Cmwlth. 2007)(" *Peoples Benefit"*)(citations omitted). Put otherwise, to state a claim for violation of the Consumer Protection Law, the Commonwealth need only allege that Golden Living engaged in

deceptive conduct which created a "likelihood of confusion or … misunderstanding." 73 P.S. §§201-2(4)(xxi). The Commonwealth unquestionably did this. But, because the Commonwealth Court misstated and misapplied both the minimum conduct and standard required to establish liability under the Law, the Court dismissed its claims anyway.

These overarching legal problems run throughout the Opinion and Order. Within them – and in addition – the Commonwealth Court made a number of specific and substantial errors:

- It dismissed, out of hand, the Commonwealth's "false advertising" claims, alleging that each statement was mere "puffery" – but failed to apply the proper standard under the Consumer Protection Law or analyze the statements in context to assess the "totality" of what was being said and "reasonably implied" and determine whether the statements were "capable of being interpreted in a misleading way";

- It held that the Consumer Protection Law applies only to claims of false advertising and dismissed the Commonwealth's legitimate, non-advertising claims under sections 2(4)(v) and (xxi) without performing any analysis at all;

- It dismissed the Amended Complaint as insufficiently specific under Pa. R.Civ.P. 1019(a) because it did not identify specific individuals who were actually deceived and describe when and how each deception occurred – even though actual deception is not required under the Consumer Protection Law – and *sua sponte* objected that the Commonwealth did not attach certain documents to its Amended Complaint and did not grant leave to amend – even though Golden Living had waived any objection, Golden Living had the documents, and making them public would have violated the privacy and confidentiality to which nursing home residents are legally entitled;

- It held that the Commonwealth may not ***recover*** *restitution* under the Consumer Protection Law based on *Meyer II*, an inapposite case in which this Court held that, because of sovereign immunity, governmental entities may not be forced to ***pay*** *restitution* under the Consumer Protection Law – even though, under the Consumer Protection Law, the General Assembly specifically empowered the Attorney General to bring action to protect the public interest and authorized all such plaintiffs to recover restitution;

- It rejected the Commonwealth's attempt to pierce the corporate veil based on the wrong legal standard – even though the Commonwealth pleaded the proper, Delaware legal standard to pierce the corporate veil under the alter ego theory, here: Golden Living's parent and subsidiary "operated as a single economic entity" and an "overall element of injustice and unfairness" was present;

- It dismissed the Commonwealth's claim for unjust enrichment against only the Golden Living *parents* (as opposed to the facilities) due to allegedly superseding regulations that apply only to nursing home "providers" – even though the parents, who were unjustly enriched, are <u>not</u> "providers" so the regulations do not apply to them; and

- It denied the Commonwealth leave to amend, which is particularly problematic in light of the errors above.

For all of these reasons, the Order should be reversed and this case should be remanded so it can to proceed to discovery without further delay.

ARGUMENT

This appeal presents to the Court a matter of significant importance to the Commonwealth and its citizens. While the issues may seem narrow at first blush, the ramifications of the Commonwealth Court's improvident dismissal are broad. That Court sustained Golden Living's preliminary objections and dismissed the Commonwealth's Amended Complaint prior to the commencement of discovery and, worse, without granting the Commonwealth leave to amend.

In doing so, the Commonwealth Court did not afford the Commonwealth the basic, permissive standard required in evaluating preliminary objections on a demurrer: it may affirm only after making a determination that it is "clear from doubt" the plaintiff will be "unable" to prove facts sufficient to establish a right to relief. *Sportsmen's League*, 860 A.2d at 14. Every plaintiff is entitled to this standard, lest valid claims be prematurely dismissed. That is what happened here.

If this Court does not reverse the Order, the Commonwealth's ability to enforce the Consumer Protection Law will be constrained in ways that contravene the intent of the General Assembly. Such an effect may limit the Commonwealth's ability to protect its citizens from deceptive business practices, not only in the nursing home industry, but also in the payday lending industry, the pharmaceutical/opioid industry, and myriad other commercial enterprises. For all

of these reasons, more fully explained below, this Court should reverse the Commonwealth Court's decision and remand the case for further proceedings.

I. THE COMMONWEALTH PROPERLY STATED A CLAIM UNDER THE CONSUMER PROTECTION LAW BY ALLEGING THAT GOLDEN LIVING FAILED TO PROVIDE MATERIAL THINGS IT PROMISED TO ITS NURSING HOME RESIDENTS.

In 1968, the General Assembly enacted the Consumer Protection Law to protect the public from unfair and deceptive business practices. 73 P.S. §§201-1 to 201-9.3. It empowered the Attorney General to sue in the name of the Commonwealth to protect the rights guaranteed to all Pennsylvanians under the Law and further authorized courts to order defendants to pay restitution in the form of money or property to "any person in interest". 73 P.S. §§201-4 and 4.1.

The Commonwealth properly stated a claim under the Consumer Protection Law in this case because it sufficiently alleged in its Amended Complaint that Golden Living engaged in marketing and other practices that were misleading, unfair and deceptive to Pennsylvania consumers. The Commonwealth focuses on four sections of that Law, which declare it an unfair or deceptive act or practice to:

- Section 2(4)(v) – *represent* that goods or services have characteristics, uses, benefits or quantities that they do not have;[17]

[17] 73 P.S. §201-2(4)(v) ("Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have").

- Section 2(4)(ix) – *advertise* goods or services "with intent not to sell them as advertised";[18]

- Section 2(4)(x) – *advertise* goods or services "with intent not to supply reasonably expectable public demand";[19] and

- Section 2(4)(xxi) – *engage in* "any other fraudulent *or deceptive* conduct" which creates a "likelihood of confusion or of misunderstanding" (emphasis added).[20]

Section 2(4)(xxi) is the "catchall" provision of the Law insofar as it confers liability for engaging in "*any other* … conduct" that is "fraudulent" or "deceptive" and creates a "likelihood" of "confusion" or "misunderstanding". 73 P.S. §§201-2(4)(xxi)(emphasis added). Like Section 2(4)(v), this section of the Consumer Protection Law is in no way limited to advertising. Further, Pennsylvania courts have recognized that the amendment to section 2(4)(xxi) that added the language "or deceptive" signals approval of a less restrictive interpretation of the law. *Commonwealth v. Percudani*, 825 A.2d 743, 746-47 (Pa. Cmwlth. 2003).

The Commonwealth has alleged that Golden Living promised to provide its nursing home clients with types, levels, amounts and frequency of Basic Care,

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[18] 73 P.S. §201-2(4)(ix) ("Advertising goods or services with intent not to sell them as advertised").

[19] 73 P.S. §201-2(4)(x) ("Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity").

[20] 73 P.S. §201-2(4)(xxi) ("Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding").

skilled nursing and other amenities that it simply failed to provide. Based on the Commonwealth's well-stated allegations, Golden Living's empty promises were both direct and implied – and they indicate that Golden Living's unfair practices were part of a deliberate scheme to deceive consumers. The Commonwealth Court's Order sustaining Golden Living's preliminary objections (Nos. 4-8 & 10) and dismissing the Commonwealth's claims under the Consumer Protection Law was improper as a matter of law and, therefore, should be reversed.

A. The Consumer Protection Law applies broadly to protect the most vulnerable and confers liability where conduct merely is "capable" of being interpreted in a misleading way from the "overall impression" of what is said and "implied" – even if no deception actually occurred.

The Consumer Protection Law was created to allow expansive legal oversight and protection of consumers. It is intended "to encompass ***all claims*** of ***unfair*** *and* ***deceptive*** *acts or practices* in the conduct of ***any*** trade or commerce." *Ash v. Continental Ins. Co.*, 932 A.2d 877, 882 (Pa. 2007)(citing *Commonwealth v. Peoples Benefit Services*, 895 A.2d 683, 696 (Pa. Cmwlth. 2006)(emphasis added); *Commonwealth by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974); *Keller v. Volkswagen of America, Inc.*, 733 A.2d 642 (Pa.Super. 1999); *Wallace v. Pastore*, 742 A.2d 1090 (Pa.Super. 1999)). As the Commonwealth Court has explained, neither intent nor actual deception must be proved to establish liability; a plaintiff need only show that the offending acts and practices are

"capable" of being "interpreted in a misleading way" based upon the "overall impression" from the "totality" of what is "said [and] reasonably implied":

> [a]n act or a practice is deceptive or unfair [under the Consumer Protection Law] if it has the "capacity or tendency to deceive." Neither the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way. The test for the court is to determine the overall impression arising from the totality of what is said, as well as what is reasonably implied….

Peoples Benefit, 923 A.2d at 1236-37 (citations omitted).

And this "test" of the "overall impression" of what is said and "implied" must be judged so as to protect the most average, vulnerable consumers. *See also Com. v. Hushtone Industries, Inc., et al.*, 4 Pa. Commw. 1, 22 (1971) ("A statement which creates a deceptive impression upon purchasers is proscribed *although the statement might* ***technically be true***. It is the *meaning that is conveyed* to the average reader which must be sought out. It is the meaning and impression arising from the sum total not only of what is said but also of all that is reasonably implied that is significant") (citations omitted) (emphasis added).[22]

[22] This Court has long looked to federal decisions interpreting the Federal Trade Commission ("FTC") Act for guidance interpreting the Consumer Protection Law. *Monumental,Properties, Inc.*, 329 A.2d at 817. In one such case, the United States Supreme Court explained that it is no defense to the law that no right thinking person would actually believe the claim, because the law is specifically intended to protect even members of the general public who are ignorant, unthinking and credulous. *FTC v. Standard Ed. Soc.*, 302 U.S. 112, 116 (1937)(a

Consumers of nursing home services almost invariably are elderly or disabled. These segments of the population are particularly vulnerable and are frequently targeted by those who want to deceive, defraud and take advantage. Nursing home care requires a substantial financial commitment by individuals or their families.[23] Few, if any, "want" to enter a nursing home. Such decisions are typically emotionally and psychologically difficult and made under duress. The Consumer Protection Law is designed precisely to protect such consumers.

B. Golden Living violated the Consumer Protection Law.

Here, the totality of Golden Living's marketing statements creates an expectation of life at Golden Living nursing homes that simply is not possible due to pervasive understaffing. From their statements, consumers can assume that Golden Living employs enough nurses and other staff to:

- provide the Basic Care, snacks and beverages promised to its residents, refill bedside containers of ice water, and supply the promised clean linens ***in a reasonably timely manner or as needed***;

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citizen has "no duty … to suspect the honesty of those with whom he transacts business. ***Laws are made to protect the trusting*** as well as the suspicious. . . . the rule of caveat emptor should not be relied upon to reward fraud and deception")(emphasis added). *See also A.P.W. Paper Co., Inc. v. FTC*, 149 F.2d 424, 426 (2d Cir. 1945), *aff'd,* 328 U.S. 193 (1946)(it is *immaterial* that more careful observers were not actually misled by use of words "Red Cross" and Red Cross emblem as FTC Act was *intended to protect the unthinking* as well as the more intelligent).

[23] Residents of nursing homes often do not have assets to pay the full cost of care, which is partially or fully subsidized by the government, including by the Commonwealth.

- ***clean, dress and transport residents to the dining hall for meals*** so they can regularly enjoy the promised dining room with a "high level of service, delicious food and an overall pleasurable dining experience"; and

- actually ***execute on and satisfy the requirements of*** the promised restorative plan of care which is individually developed for each resident.

But they do not. While the emphasized words above were not *expressly stated* by Golden Living, they were reasonably and necessarily *implied*. Therefore, they should have been considered below under the standard of review for preliminary objections on a demurrer when the Commonwealth Court was required to consider, in the light most favorable to the Commonwealth, all well-pleaded material facts and "all reasonable inferences drawn from those facts". *Sportsmen's League* (citing *Comm. ex. rel. Nicholas v. Pa. Labor Rel. Bd.*, 681 A.2d 157, 159 (Pa. 1996)); *Yocca v. Pittsburgh Steelers Sports, Inc*., 854 A.2d 425, 497 (Pa. 2004) (In considering preliminary objections, trial court must accept not only express statements but implied statements contained in the complaint). It is respectfully submitted that the Commonwealth Court failed to do so.

Indeed, Golden Living's promises are meaningless unless it actually makes the staff resources available to execute them. After all, what good are promises of individualized Basic Care plans, dining rooms, and snacks if you cannot access them when you need to? If your bedsheets are not changed when you soil them, what good is a promise that clean linens are provided "on a regular basis"? By systematically failing to adequately staff its nursing homes, Golden Living

prevented its residents from taking advantage of the promised items, making them inaccessible and proving its promises empty.

At a minimum, Golden Living's marketing statements indicate that it was engaged in acts or practices that are "capable of being interpreted in a misleading way." *Peoples Benefit*, 923 A.2d at 1236. Similarly, Golden Living's billing statements imply that the services listed and promised in residents' individual care plans were being provided when, in fact, they were not.[24] Such conduct violates the Law. *See id.*

C. The Commonwealth Court erred by dismissing the Commonwealth's claims that Golden Living's statements, actions and practices that violated the Consumer Protection Law were mere "puffery".

The Commonwealth Court erred when it summarily dismissed all Golden Living's improper statements as merely inactionable "puffery". The Commonwealth Court did this without meaningful analysis and without giving the Commonwealth the deference required under the preliminary objections standard for a demurrer. This ruling an error of law and should be reversed.

[24] The Commonwealth Court seems to suggest these billing statements are irrelevant because residents receiving them already live there. *See* Op., 158 A.3d at 222-23. This makes no sense. Golden Living's residents are like other consumers. They can demand better services, insist on reimbursement for services billed but not provided, or leave completely and move to a competing nursing home.

1. "Puffery" is *meant* to be obvious, not "deceptive" conduct.

In *Meyer II*, on which the Commonwealth Court relies regarding restoration damages, this Court acknowledges that the Consumer Protection Law was an effort to place the bargaining powers of consumers and merchants on "more equal terms." *Meyer II*, 93 A.3d at 811-12. Indeed, the Superior Court has recognized that this law is *sui generis* and supplements rather than supplants traditional common law remedies. *Gabriel v. O'Hara*, 534 A.2d 488, 494 (Pa.Super. 1987). *See also, Valley Forge Towers v. Ron-Ike F. Ins.*, 574 A.2d 641, 644 (Pa.Super. 1990), *aff'd,* 605 A.2d 798 (Pa. 1990) (Consumer Protection Law's principle enhancements of pre-existing common law protections include the list of practices designated as "unfair or deceptive" and, therefore, unlawful).

The Court of Appeals for the Third Circuit has defined "puffery" as "an exaggeration or overstatement expressed in broad, vague, and commendatory language." *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993). It is "offered ***and understood*** as an expression of the seller's opinion only" and "***[is meant] to be discounted as such by the buyer***." *Id.* (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* §109, at 756-57 (5th ed. 1984)(emphasis added). "Puffery" allows a seller "to lie his head off, ***so long as he says nothing specific***" and the buyer is meant to understand that the seller is lying and discount the statements as lies. *Id.* "Puffery" is not legally actionable

precisely because such statements are obvious and "***distinguishable from misdescriptions or false representations*** of specific characteristics of a product."[28] *Id.* (emphasis added). Classic puffery includes statements that a product is the "best in the world," the "last you'll ever need" or the "strongest known to man".

The Commonwealth does not dispute the definition of "puffery" as stated in *Castrol* and adopted by Commonwealth Court below. And it does not disagree that if a statement is, in fact, merely "puffery," it is not a false representation. But the Commonwealth Court completely misapplied the concept of "puffery" to the facts of this case to conclude that Golden Living's many misleading statements are merely "subjective" opinion with no legal consequence. *See* Op., 158 A.3d at 218. This conclusion is wrong and lacks the necessary analysis.

When performing a puffery analysis, the Court cannot, as the Commonwealth Court did below, take the offending statements out of context and consider them in a vacuum. Rather, it must take pains to scrutinize such statements in their full, native context – as experienced by the consumer. *Castrol,* 987 F.2d at 946. This is essential. Of course, here, the Commonwealth Court was

[28] One of the hallmarks of a puffery defense is that no reasonable person would believe the "puffery" statements. Here we have the opposite. No reasonable consumer going into a Golden Living nursing home should have reason to doubt the representations made, whether they are general or specific, given the circumstances of this case. The statements made by Golden Living were not wholly unbelievable.

required to apply this analysis in a manner consistent with the deferential standard of review required for preliminary objections on a demurrer. It did none of these things.

2. Golden Living's conduct is not "puffery".

The Commonwealth Court makes quick work of analyzing and dismissing as "puffery" claims based on nine "marketing statements" in just more than four pages.[29] Op., 158 A.3d at 216-19. For example, Golden Living promised: "We have licensed nurses and nursing assistants available to provide nursing care and help with activities of daily living (ADLs). ***Whatever your needs are, we have the clinical staff to meet those needs***." *Id.* at 217. (emphasis added).

The Commonwealth Court acknowledges the Commonwealth's claim that Golden Living "does not have sufficient staff to render care" but dismisses it, out of hand, because the statement "makes no representation that nurses will be **immediately** available to provide such assistance, or that it will be provided within a specific time frame. *Thus, we conclude [this statement] is puffery*." *Id.* (bold in original; italics added). The problem is *this*: the "needs" of the average nursing

[29] The Commonwealth does not attempt to expose the Commonwealth Court's flawed logic regarding each statement but, rather, demonstrate that Court's general failure to use a standard that would protect the vulnerable and confer liability where, in the eyes of an "unthinking" consumer, conduct is "capable" of being interpreted in a misleading way from the "overall impression" of what is said and "implied".

home consumer ***do*** require "immediate" or, at least reasonably prompt, medical assistance, for example, if their blood sugar falls below a certain level or they fall and cannot get up. For the average nursing home consumer, the definition of "needs" *includes* a degree of reasonable promptness – and sometimes immediacy.

When Golden Living promises such consumers that "Whatever your needs are, we have the clinical staff to meet those needs" – *from the consumers' perspective*, based on the "totality of what is said, as well as what is reasonably implied" – Golden Living's statement is misleading and deceptive.[30] *Peoples Benefit*, 923 A.2d at 1236-37 (citations omitted). Golden Living does not "have the clinical staff to meet those needs". Their statement is false.

Under the Consumer Protection Law, it is plain error for the Commonwealth Court to dismiss Golden Living's conduct because it "makes no representation that nurses will be **immediately** available to provide such assistance, or that it will be provided within a specific time frame." Op., 158 A.3d at 217 (bold in original). This is not "puffery" because Golden Living's consumers are not in on the lie. *Castrol Inc.*, 987 F.2d at 945 (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* §109, at 756-57). Rather, they are victims of Golden Living's

[30] As an enterprise that routinely services such consumers, Golden Living *should* also recognize this statement as misleading. But the law is clear: Golden Living's intent is not relevant; all that matters is the point of view of the consumer. *Peoples Benefit*, 923 A.2d at 1236-37 (citations omitted).

misleading and deceptive conduct. And that conduct violates the Consumer Protection Law.

Golden Living also advertised that its dining room had "a variety of flavors, an attractive environment and plenty of pleasant conversation" – an "experience" it hoped "will nourish both your body and your soul" – and pressed the nursing home consumer to "please join us [at] a seat reserved for you in our dining room." (AC ¶83(e); RR 232a) These phrases likely would not be considered actionable if a consumer claimed that the flavors in the dining room were not sufficiently varied, the environment was not sufficiently attractive or the conversation was not sufficiently plentiful – *and, to be sure, the Commonwealth is <u>not</u> making such claims*. But, based on these statements, surely a nursing home consumer would have a reasonable expectation that he or she would be able to regularly sit and eat in Golden Living's dining hall! This is another example of Golden Living's "deceptive conduct" which creates a "likelihood of confusion or of misunderstanding" under Section 2(4)(xxi) of the Law. 73 P.S. §201-2(4)(xxi).

A Golden Living resident with such reasonable expectations as being able to regularly eat in the promised dining room, however, can only be disappointed. Golden Living's statement is unfair, deceptive, fraudulent and misleading under the Law because it reasonably implies their much-touted dining room is *accessible to residents*. It implies that Golden Living hires sufficient staff to wake, dress, and

transport consumers to the dining hall *for regularly scheduled meals*. But these reasonable expectations are contrary to consumers' actual experience.

Indeed, the adequacy of Golden Living's nursing home staff is objective and can be measured. It is measured against Golden Living's assessment of resident needs and Golden Living's staff records. The Amended Complaint is filled with examples of nursing care services not being provided. In not measuring up to its promises, Golden Living's product violates the Consumer Protection Law. 73 P.S. §§201-2(4)(v), (ix), (x), and (xxi).

Golden Living's many other marketing statements, actions and practices that the Commonwealth detailed in its Amended Complaint similarly violate the Law. Those statements, actions and practices – when analyzed in context and from the point of view of the consumer, as is required – carry with them "overall impression[s]" and "reasonable impli[cations]" that are false. *Peoples Benefit*, 923 A.2d at 1236. Golden Living's statements that it will provide residents with Basic Care, snacks and beverages, and clean linens - reasonably leave the overall impression that it will provide these essential items *in good faith*, *as needed* and *in a timely manner*. Promises that Golden Living will develop individual, restorative care plans for each resident reasonably imply that Golden Living will actually *execute on those plans* and *provide the care outlined* – not just list the elements of those plans on their residents' billing statements.

At a minimum, Golden Living's marketing statements, actions and practices detailed in the Amended Complaint are "capable of being interpreted in a misleading way" and have the "capacity or tendency to deceive." *Peoples Benefit*, 923 A.2d at 1236. As such, they violate the Consumer Protection Law. The Commonwealth Court erred by dismissing these claims on a demurrer.

D. The Commonwealth Court improperly limited the Commonwealth's claims to "false advertising" and ignored that Golden Living's conduct also violates sections 2(4)(v) and (xxi) of the Consumer Protection Law which are in no way limited to advertising.

The Commonwealth Court improperly limited its analysis of the Commonwealth's claims to Golden Living's "false advertising" under the Consumer Protection Law. And it dismissed those claims based on an "advertising" analysis. But the Commonwealth's claims under sections 2(4)(v)[31] and (xxi) of the Law are not limited to "advertising" at all. Therefore, this Court

[31] The Commonwealth Court relies on federal district court case *Seldon v. Home Loan Servs., Inc.*, 647 F.Supp.2d 451 (E.D.Pa. 2009), for the proposition that §2(4)(v) of the Law is "limited to" claims of false advertising. But this is incorrect. It seems that the court in *Seldon*, without analysis, misinterpreted cases indicating that false advertising claims ***could*** be brought under §2(4)(v) and cited them for the incorrect proposition that ***only*** false advertising claims could be brought under §2(4)(v). In fact, nothing in those cited cases actually limits §2(4)(v) to claims of false advertising. *See Karlson v. Fed. Deposit Ins. Corp.*, 942 F.Supp. 1022 (E.D.Pa. 1996), *aff'd,* 107 F.3d 862 (3d Cir. 1997) and *Weinberg v. Sun Co.*, 740 A.2d 1152 (Pa.Super. 1999), *rev'd on other grounds,* 777 A.2d 442 (Pa. 2001). Moreover, even if the Court's improper limitation of §2(4)(v) to false advertising claims was proper, it would not matter. The Commonwealth's claim under §2(4)(xxi) (the catchall provision) also includes unfair or deceptive conduct beyond advertising.

should reverse and remand so an analysis of the Commonwealth's non-advertising consumer protection claims can be performed.

While Golden Living's brochures and other marketing materials distributed to consumers and prospective residents constitute advertising, their many individual statements detailed in the Amended Complaint – *oral representations*, *resident care plans*, *billing statements*, and *resident assessments or MDSs* made directly to nursing home consumers by Golden Living's personnel – clearly do not. The Commonwealth Court seems to believe that if an action by Golden Living is not directly tied to the solicitation of new business, it is not relevant to their inquiry as to whether Golden Living is engaging in unfair or deceptive business practices. As a matter of law, however, such non-advertising statements are equally actionable claims under sections 2(4)(v) and (xxi) of the Consumer Protection Law.

Golden Living's oral representations, resident care plans, billing statements, and resident assessments or MDSs provide important benchmarks for the level of care and the means by which to assess whether those benchmarks are met. These statements further mislead Golden Living residents, communicating expectations of the services they will receive that, while reasonable, are false. In limiting its analysis to *advertising-based* claims only, the Commonwealth Court erred as a matter of law. As such, the Court failed to consider significant evidence of

Golden Living's non-advertising statements which separately show that Golden Living violated sections 2(4)(v) and (xxi) of the Consumer Protection Law.

E. The Commonwealth Court erred by holding that the Amended Complaint was insufficiently specific under Pa. R.Civ.P. 1019(a) and by *sua sponte* objecting to the Commonwealth's failure to attach certain documents.

The Commonwealth Court erred as a matter of law in determining that the Amended Complaint did not meet the minimum specificity required under Pa. R.Civ.P. 1019(a) and in objecting *sua sponte* to the Commonwealth's failure to attach certain documents. In doing so, the Commonwealth Court held that the Commonwealth was required to identify *specific individuals* who were *actually deceived* and detail exactly *when and how these deceptions took place.* *See* Op., 58 A.3d at 224.

But actual deception is <u>not</u> even required to state a claim under the Consumer Protection Law. And Golden Living had waived the objection that the Commonwealth Court raised *sua sponte*, likely because the documents belonged to Golden Living. In each case, the information wrongly deemed required was not only unnecessary to provide notice to Golden Living, but would have violated the privacy and confidentiality to which nursing home residents are legally entitled. The Commonwealth Court's determinations on these issues are plainly errors of law. On these bases, too, the Order should be reversed.

1. The Commonwealth Court went way beyond the minimal pleading standards of Pa. R.Civ.P. 1019(a) by requiring the Commonwealth to plead facts not required even to establish liability under the Consumer Protection Law.

Pennsylvania Rule of Civil Procedure 1019(a) requires merely that "[t]he material facts on which a cause of action is based shall be stated in a concise and summary form." In determining whether a pleading meets this minimal standard, a court need only assess whether the facts alleged are sufficient to put the defendant on notice of the alleged claims so it can prepare a defense. *Foster v. Peat Marwick Main & Co.*, 587 A.2d 382 (Pa. Cmwlth. 1991), *aff'd*, 676 A.2d 652 (Pa. 1996). No citation to specific "evidence" is required to meet this minimum threshold. *Dep't of Transp. v. Bethlehem Steel Corp.*, 380 A.2d 1308 (Pa. Cmwlth. 1977) ("the complaint need not cite evidence but only those facts necessary for the defendant to prepare a defense"). Moreover, the allegations must be read in the context of the overall complaint before concluding it lacks sufficient specificity. *See Yacoub v. Lehigh Valley Med. Assocs.*, 805 A.2d 579 (Pa.Super. 2002).

In its Amended Complaint, the Commonwealth made detailed factual allegations which, if true, establish that Golden Living has repeatedly made statements that have the capacity and tendency to deceive consumers. *Peoples Benefit*, 923 A.2d at 1236-37. These facts alleged by the Commonwealth are based, in part, on information obtained through the Centers for Medicare and Medicaid Services as well as interviews of former employees and family members

of Golden Living residents. Golden Living's repeated misstatements are "likely to make a difference in the purchasing decision[s]" of consumers for nursing home services. *Id.*

For purposes of deciding preliminary objections on a demurrer, each of these well-pleaded allegations, and all reasonable inferences from them, must be deemed true. *Wurth by Wurth v. City of Philadelphia*, 584 A.2d 403, 407 (Pa. Cmwlth. 1990). Employing the appropriate deference, the Commonwealth has established, as a matter of law, that Golden Living violated the Law and exceeded its burden necessary to defeat preliminary objections. *Peoples Benefit*, 923 A.2d at 1236-37.

The Commonwealth Court misapprehended the law when it required the Commonwealth to further identify *specific individuals who were deceived* by Golden Living and *when and how, in each case, this deception occurred*. *See* Op., 58 A.3d at 224 ("there are no allegations specifically identifying any particular resident care plan or MDS from which the Facility deviated, or any allegation identifying any specific bill for services that were not provided."). Such specificity is neither required for the Commonwealth to establish a *prima facie* case nor establish liability under the Consumer Protection Law. *Com. by Pappert v. TAP Pharmaceutical Products,* 885 A.2d 1127, 1136 (Pa. Cmwlth. 2005).

Under the Consumer Protection Law, the Commonwealth need not allege that any particular consumer saw or relied on Golden Living's representations; it

need not even show actual deceit. Rather, to establish liability under the Law, the Commonwealth must only show that Golden Living's statements have the "capacity or tendency to deceive." *Peoples Benefit*, 923 A.2d at 1236 ("An act or a practice is deceptive or unfair [under the Consumer Protection Law] if it has the capacity or tendency to deceive. Neither intention to deceive nor actual deception must be proved; it need only be shown that the acts and practices can be interpreted in a misleading way.").

The Commonwealth is neither required to fully identify and describe injured parties entitled to restitution under the Consumer Protection Law nor specify sums unlawfully gained from each; these amounts are better known to Golden Living anyway. *Peoples Benefit*, 895 A.2d at 690. Specific allegations of time and place are not required under Pa. R.Civ.P. 1019. *See also Commonwealth v. Nat'l Apartment Leasing Co.*, 529 A.2d 1157, 1161 (Pa. Cmwlth. 1987) (allegations by Commonwealth that landlord violated Consumer Protection Law by engaging in "course of conduct" by improperly withholding security deposits sufficiently described practice to enable landlord to prepare defense, even though complaint did not specify time, place or date of violation).

For these reasons, this Court should reverse.

2. The Commonwealth Court was wrong to *sua sponte* object to the Commonwealth's failure to attach documents to the Amended Complaint, because any objection had been waived.

As Judge Cohn Jubelirer discussed in her Concurring and Dissenting Opinion, Golden Living ***never*** objected that the Commonwealth had not attached certain documents to the Amended Complaint. Op., 158 A.3d at 239-40. Therefore, any such objection had been waived. *See* Pa. R.Civ.P. 1032(a)(a "party waives all … objections which are not presented … by preliminary objection"). The Commonwealth Court was wrong to raise this issue *sua sponte*.

3. Golden Living likely did not object to the Commonwealth's failure to attach these documents because they were Golden Living's *own* documents and it already knew their contents.

Pennsylvania Rules of Civil Procedure 1019(h) and (i) are not academic exercises; they requires parties to attach documents on which claims or defenses are based – so they have fair notice of each other's claims and defenses.[32] Here, the documents *belonged to* ***Golden Living***. Golden Living has them and is well acquainted with their contents. In addition, the Commonwealth did not in fact possess the documents and could not have attached them to the complaint in any case. Finally, there was certainly no prejudice from the Commonwealth's failure

[32] *See, e.g., Lerner v. Lerner,* 954 A.2d 1229, 1235 (Pa.Super. 2008). *See also* Pa. R.Civ.P. 1019(a).

to attach them. It makes sense that Golden Living did not object.[33]

4. Since the Commonwealth Court insisted that the Commonwealth plead this new, additional information, it should have given the Commonwealth notice and an opportunity to cure.

By insisting the Commonwealth plead facts beyond the legal requirements and standards for liability under the Consumer Protection Law and *sua sponte* raising a waived objection to the non-attachment of documents, the Commonwealth Court wrongly changed the "rules of the game" after the Commonwealth had already filed its responses to Golden Living's preliminary objections. Therefore, in denying the Commonwealth an opportunity to amend, the Commonwealth Court refused to let the Commonwealth cure what suddenly were now errors under this new legal regime.

The Rules of Civil Procedure expressly allow an opportunity to cure such defects. Had the Commonwealth been given notice of the Commonwealth Court's new pleading requirements, it could have explained that the writings were not in its

[33] Further, as Judge Cohn Jubelirer correctly surmised, "the writings at issue could contain confidential medical information." Op., 158 A.3d at 240. Nursing home residents who receive Medicaid have broad legal rights to privacy and confidentiality regarding accommodations, medical treatment, communications, personal and clinical records, and other matters. 42 U.S.C. §1396r(c)(1)(A)(iii) and (iv). Indeed, in its answers to preliminary objections, the Commonwealth prophylactically *explained* that it could not lawfully use documents it had obtained from Golden Living without judicial authorization. (Answer to POs at 7-8; RR 466a-67a) But the Commonwealth Court did not address this in its Opinion.

possession and/or were not accessible due to legal constraints over privacy and confidentiality. Pa. R.Civ.P. 1019(i) (when a claim is based on a writing, the pleader shall attach a copy … "*but if [it] is not accessible to the pleader, it is sufficient so to state, together with the reason*, and to set forth the substance in writing") (emphasis added). Or it could have further amended its complaint as of right, attaching the requested documents or explaining why it was unable to do so. Pa. R.Civ.P. 1028(c)(1) ("A party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections").

If these objections by the Commonwealth Court were proper – and, as set forth above, they quite clearly were not – certainly the Commonwealth Court should not have raised them for the first time if it was not prepared to grant the Commonwealth leave to amend its complaint to address them. *See* Pa. R.Civ.P. 1028(c)(1). On this issue, too, this Court should reverse.

II. THE COMMONWEALTH IS A "PERSON IN INTEREST" ENTITLED TO RESTITUTION UNDER THE CONSUMER PROTECTION LAW.

The Commonwealth Court erred as a matter of law in holding that the Commonwealth was not entitled to restitution under the Consumer Protection Law because it is not a "person in interest". It was wrong on both counts. The Commonwealth is not only a "person in interest," but it is entitled to restitution here. The Court should reverse.

Section 4.1 of the Consumer Protection Law provides allows any "person in interest"[34] to recover restitution where a court awards relief under section 4 of the Law. 73 P.S. §201-4.1 ("the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act"). Section 4 expressly allows the Attorney General to obtain such relief. 73 P.S. §201-4 ("Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person."). In this way, the General Assembly gave the Commonwealth the rights to both *sue* on behalf of the public for violations of the Consumer Protection Law and to *recover restitution* of "any moneys or property" obtained in violation of it. 73 P.S. §§201-4 and 4.1.

Indeed, this authority is further supported by Section 8(b) of the Consumer Protection Law, 73 P.S. §201-8(b). It provides that "[i]n any action brought under section 4 … the Attorney General . . . may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty … which … ***shall be in addition***

[34] The Law defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." 73 P.S. §201-2(2).

to other relief which may be granted under sections 4 and 4.1 of this act" (emphasis added). The General Assembly would not have referenced Sections 4 and 4.1 here if it had not authorized the Attorney General to recover restoration damages under those sections.

The Commonwealth Court's Opinion flies in the face of this clear language of the Consumer Protection Law and directly contravenes the liberal interpretation afforded that Law by the courts. *See, e.g., Commonwealth v. Monumental Properties* and *Hush-Tone Industries, Inc.* The Opinion is based on an improper interpretation of this Court's recent decision in *Meyer II*, 93 A.3d 806. But that decision addressed whether a governmental entity is *subject to monetary damages* under the Consumer Protection Law – not whether it can *enforce* the law *and receive restitution* under it.

In *Meyer II*, this Court held that the General Assembly did not intend to hold a local government entity liable for damages under the Consumer Protection Law. That decision was based on sovereign and governmental immunity. *See* 93 A.3d at 576. Given the "longstanding precedent that governmental agencies are ordinarily immune from common-law punitive damages" and the unlikelihood that the General Assembly intended to subject municipalities to the "appointment of a receiver" or "dissolution" as permitted under the Law, this Court held that a local

government unit was not a "person in interest" *against whom relief could be obtained*. 93 A.3d at 577-78 (citing 73 P.S. §201-9).

From this limited holding on a question *opposite* to the one in this matter (a sovereign government's obligation to *pay* monetary relief in *Meyer II* versus the Commonwealth's ability to *seek* monetary restitution here), the Commonwealth Court concluded simply that if a sovereign government entity could not be a "person" against whom one could recover monetary relief under the Consumer Protection Law, then it must not be a "person in interest" entitled to receive monetary relief under the Law either. This determination ignores the obvious and compelling reasons to treat government entities differently than in *Meyer II* where they are attempting to obtain restitution on behalf of the government and taxpayers. The Commonwealth Court's conclusion lacks analysis and fails to appreciate the different positions of the governmental entities in each case.[35]

This Court's rationale in *Meyer II* was to protect municipal governments from unintended recoveries in violation of sovereign immunity. Even if the

[35] In its Opinion, the Commonwealth Court notes that the same day *Meyer II* was issued, this Court also decided *Commonwealth v. TAP Pharmaceutical Products*, 94 A.3d 350 (Pa. 2014) ("*TAP*"). In *TAP*, the Commonwealth had sued pharmaceutical companies under the Consumer Protection Law to challenge drug prices. There, the Commonwealth was, in fact, awarded restoration against one of the defendants. On appeal, this Court vacated the order and remanded without addressing whether the Commonwealth was a "person" eligible to receive restitution. Trying to avoid this contemporaneous decision, the Commonwealth Court deflected that *TAP* created no binding precedent here. *See* Op., 158 A.3d at 229.

Commonwealth Court's rigid interpretation of "person in interest" required it to prevent *municipalities* both from paying restitution under the Consumer Protection Law and recovering under it, the express role given to the *Attorney General* under the Law requires a different interpretation. *Meyer II* in no way suggests that the Legislature sought to prohibit the Attorney General from recovering appropriate monetary relief under the Consumer Protection Law; it is inapposite to this matter.

As set forth above, sections 4 and 4.1 of the Consumer Protection Law expressly *entitle* the Attorney General to seek and receive judicial relief. Even if the Legislature wanted to limit municipalities' recoveries under the Law, it would make no sense for them to give the Attorney General power to seek relief with one hand, but take back its ability to get that relief through restitution with the other. Such an interpretation is both nonsensical and inconsistent with the broad reading traditionally afforded the Law in service of the public interest. *Monumental Properties*, 329 A.2d 812; *Hush-Tone Industries, Inc.*

For these reasons, Commonwealth Court's decision to deny the Commonwealth's right to obtain restitution under §4.1 of the Consumer Protection Law should be reversed.

III. THE COMMONWEALTH COURT SHOULD NOT HAVE REJECTED THE COMMONWEALTH'S ATTEMPT TO PIERCE THE CORPORATE VEIL AT THIS EARLY STAGE OF THE PROCEEDINGS.

While piercing the corporate veil generally is disfavored, the Commonwealth Court acted prematurely in dismissing the Commonwealth's claim at this early stage of the proceedings. The Commonwealth pled this claim for relief with sufficient factual specificity and, based on the totality of the allegations in the Amended Complaint, it may be necessary and appropriate to pierce the corporate veil here. But discovery is required to know for sure. This Court should reverse on this issue with an instruction allowing the Commonwealth to seek all discovery necessary to fully explore the corporate formations, functions, interactions and financial arrangements between Golden Living's various parents and subsidiaries. The issue of piercing the corporate veil should be reevaluated at an appropriate time and only after such discovery has concluded.

The Golden Living entities were incorporated in the State of Delaware, and the Commonwealth Court is correct that Delaware law applies. *See* 158 A.3d at 236. But while the Commonwealth Court quotes correctly from *Wallace v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999), that case provides only a partial and oversimplified analysis of the requirements. *Wallace* appears to state that, in order to pierce the corporate veil, the "corporation must be a sham and exist for no other purpose than as a vehicle for fraud" – and, as the Commonwealth Court stated, the

Commonwealth does not claim that the Golden Living entities are a "total sham". 158 A.3d at 237 (citing *Wallace*, 752 A.2d 1175, 1184). But *Wallace* is easily distinguishable from the facts of the present matter; it does not apply here.

In this case, the Commonwealth seeks to pierce Golden Living's corporate veil under an *alter ego* theory. To do so under Delaware law, a plaintiff need only show: "(1) that the parent and the subsidiary … 'operated as a single economic entity' and (2) that an 'overall element of injustice or unfairness ... [is] present.'" *In re Foxmeyer Corp.,* 290 B.R. 229 (D.Del. 2003)("*Foxmeyer*"). In this context, the Commonwealth need not allege or establish that the corporation is a "sham".

A. Golden Living is operated as a "single economic entity".

To establish operation "as a single economic entity," Delaware courts consider a number of factors including whether the dominant shareholder siphoned corporate funds and whether, in general, the corporation simply functioned as a facade for the dominant shareholder. *United States v. Golden Acres, Inc.,* 702 F.Supp. 1097, 1104 (D.Del. 1988). It is not necessary that all factors be met. Indeed, a single factor could be sufficient to establish that the parent and the subsidiary operated as a single economic entity. *Id.*

Here, the Commonwealth alleged in its Amended Complaint that Golden Living's profits were siphoned off by its parent entities and Golden Living's facilities were largely controlled by its parent entities. *See,* e.g., AC ¶ 259; RR

363a ("Payments made by Golden Living Facilities to the Golden Living Parent Entities also provide one mechanism by which the significant profits of the Golden Living Facilities are siphoned out of the facilities."). The Commonwealth also alleged that the parent entities controlled the facilities by: restricting the ability of facility managers to increase staffing; supervising and overriding personnel decisions; visiting facilities to observe care and enforce corporate policies; preparing requests for reimbursement under the Program; creating company-wide policies; requiring centralized reporting of key data points from each facility; and maintaining a company-wide hotline for residents to call with complaints. (AC ¶ 258; RR 362a-63a) With these allegations, the Commonwealth sufficiently pled that Golden Living's parents and subsidiaries operated as a single economic entity – at least for the purpose of surviving preliminary objections. *Foxmeyer,* 290 B.R. 229, 236; *Sportsmen's League*, 860 A.2d at 14; *Wurth by Wurth*, 584 A.2d at 407.

B. An "overall element of injustice or unfairness" is present.

There does not appear to be a clear test under Delaware law to establish that an "overall element of injustice or unfairness" is present; courts consider the totality of the circumstances, including "such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration[s] ... are involved." *Foxmeyer,* 290 B.R. 229, 236. Here, the Commonwealth has alleged enough:

- Golden Living caused significant harm to the public interest by taking advantage of Pennsylvania's vulnerable elderly and disabled consumers and their families;

- Golden Living did this, for example, by creating an institutional and systemic scheme to skimp on staffing required to deliver Basic Care and satisfy other promises made to nursing home residents and, instead, to maximize profits at the expense of Pennsylvania's nursing home consumers, their families, and the Commonwealth, which pays for nursing home services at Golden Living through Medicaid; and

- More than half of Golden Living's customers pay through Medicaid and, from 2008 to 2013, the Commonwealth paid Golden Living $188 per day for each Medicaid recipient – more than $5,800 per month for each resident. (AC¶¶ 5 and 78; RR 214a & 231a)

Given these well-pleaded allegations in the Amended Complaint and the fact that the Commonwealth filed this suit in accordance with its statutory powers and duties to protect the public under the Commonwealth Attorneys Act, it is plain that the Commonwealth sufficiently pled an "overall element of injustice or unfairness" in this matter, sufficient to survive preliminary objections. *Foxmeyer,* 290 B.R. at 236; *Sportsmen's League*, 860 A.2d at14; *Wurth by Wurth*, 584 A.2d at 407.

For these reasons, the Commonwealth Court erred in sustaining Golden Living's preliminary objection to the Commonwealth's request to pierce the corporate veil. The Order should be reversed. The Commonwealth respectfully asks that, on remand, it be permitted sufficient latitude to seek all discovery needed to fully explore the corporate formations, functions, interactions and financial arrangements between Golden Living's various parents and subsidiaries.

IV. THE COMMONWEALTH COURT ERRED IN DISMISSING THE COMMONWEALTH'S CLAIM FOR UNJUST ENRICHMENT AGAINST GOLDEN LIVING'S PARENT ENTITIES.

The Commonwealth alleges that Golden Living submitted bills to the Pennsylvania Medical Assistance Program (the "Program"), and received payment from the Commonwealth, for care that it did not, in fact, provide. Consistent with the Commonwealth's argument on piercing the corporate veil, Golden Living's facilities then transferred those ill-gotten profits to their parent entities. Therefore, the Commonwealth brought a claim for unjust enrichment against the parent entities. (AC at ¶¶279-81; RR 370a)

The Commonwealth Court dismissed this claim on preliminary objections, reasoning that the statutory remedy under the Program supplants a common law remedy of unjust enrichment. Op., 158 A.3d at 231-36. It is true that DHS, as authorized by the General Assembly, has established rules and regulations governing the submission of claims and making of payments to nursing home providers. For most claims relating to the Program, DHS' regulations would supersede the Commonwealth's common law claim for unjust enrichment. But not here.

DHS' regulations apply only to claims against nursing home "providers". "Provider" is defined as an "*individual* or *medical facility* which signs an agreement with [DHS] to participate in the [Program], including, but not limited

to: licensed practitioners, pharmacies, hospitals, nursing homes, clinics, home health agencies and medical purveyors." 55 Pa. Code §1101.21 (emphasis added).[36] While Golden Living's nursing facilities are "providers," Golden Living's parent entities plainly are not.[37] And the Commonwealth's claim for unjust enrichment is against Golden Living's *parent entities* ***only***, not the facilities.

Because the parent entities are not "providers," the regulations do not apply to them. As this Court recognized in *Feingold v. Bell of Pennsylvania*, where an "administrative remedy is inadequate," a "court may exercise jurisdiction":

> As with all legal rules, the exhaustion of administrative remedies rule is neither inflexible nor absolute, and this Court has established exceptions to the rule. Thus, a court may exercise jurisdiction where the administrative remedy is inadequate. The mere existence of a remedy does not dispose of the question of its adequacy; the administrative remedy must be "adequate and complete."

383 A.2d 791, 793-94 (Pa. 1977) (citations omitted). *See also Clairton Slag, Inc. v. Department of General Services*, 2 A.3d 765, 781 (Pa. Cmwlth. 2010); *Citizens'*

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[36] A Manual establishes rules for providers participating in the Program, 55 Pa. Code §§1101-1251, which: prohibit certain acts (55 Pa. Code §1101.75), govern payments to nursing homes (55 Pa. Code §1187) and restitution and repayment by providers (55 Pa. Code §1101.83); and establish administrative appeal procedures (55 Pa. Code §1101.84).

[37] Golden Living's parent entities are neither individuals nor medical facilities. On information and belief, they did not sign agreements with DHS to participate in the Program, and are not licensed practitioners, pharmacies, hospitals, nursing homes, clinics, home health agencies or medical purveyors. Therefore, they are not "providers" under the law. 55 Pa. Code §1101.21.

Ambulance Service Inc. v. Gateway Health Plan, 806 A.2d 443, 448-449 (Pa.Super. 2002) (allowing claim for unjust enrichment where administrative remedy not available to subcontractor of ambulance services).

In *Feingold*, this Court permitted an equitable action against Bell of Pennsylvania even though the PUC had extensive regulatory authority over telephone service. 383 A.2d at 793-794. In reaching that result, this Court determined that the PUC lacked power to grant the plaintiff the type of relief requested. Since the administrative remedy was not "adequate and complete," the plaintiff was allowed to proceed with his action in court. 383 A.2d at 795-96.

Similarly, here, the DHS' administrative remedy is inadequate to address the Commonwealth's claims against Golden Living's *parents* because DHS' regulations do not apply to them. The parent entities are not "providers" for purposes of the Program and, according to the Amended Complaint, they have attempted to insulate themselves from the actions of Golden Living's facilities in Pennsylvania.[38] Therefore, the Commonwealth is entitled to seek unjust enrichment from Golden Living's parents through the courts.[39]

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[38] (AC ¶¶279-80; RR 370a-71a)

[39] The Commonwealth recognizes that common law claims related to the submission of claims and payments to Golden Living's *facilities* would be superseded by DHS' regulatory scheme; unlike Golden Living's parents, their facilities are "providers" and, therefore, DHS' regulations apply to them. 55 Pa. Code §1101.21.

For these reasons, the Commonwealth Court's Order sustaining these preliminary objections (POs 3 & 11) and dismissing the Commonwealth's claims against Golden Living's parent entities for unjust enrichment should be reversed.

V. THE COMMONWEALTH COURT SHOULD HAVE GRANTED THE COMMONWEALTH LEAVE TO AMEND.

Even if Commonwealth Court was correct in finding that the Commonwealth pleaded its Amended Complaint insufficiently – and, as set forth above, it most certainly was not – the Commonwealth Court should have granted the Commonwealth leave to amend. This is particularly so in light of the express instruction the General Assembly gave to the Attorney General in the Consumer Protection Law to "bring … action in the name of the Commonwealth" to protect the "public interest". 73 P.S. §201-4. At a minimum, this matter should be remanded back to the Commonwealth Court with the direction to allow the Commonwealth to file a second amended complaint by which it might address any deficiencies that this Court finds with its Amended Complaint.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order of the Commonwealth Court and remand so this important matter can to proceed to discovery without further delay.

Respectfully submitted,

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Date: August 16, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 13,987 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

Date: August 16, 2017

/s/ Jonathan Scott Goldman
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APPENDIX A

Opinion and Order of March 22, 2017

158 A.3d 203
Commonwealth Court of Pennsylvania.

COMMONWEALTH of Pennsylvania Acting by Attorney General, Kathleen Kane, Plaintiff
v.
GOLDEN GATE NATIONAL SENIOR CARE LLC; GGNSC Holdings LLC; GGNSC Administrative Services LLC; GGNSC Clinical Services LLC; GGNSC Equity Holdings LLC; GGNSC Harrisburg LP; GGNSC Harrisburg GP, LLC; GGNSC Camp Hill III LP; GGNSC Camp Hill III GP, LLC; GGNSC Clarion LP; GGNSC Clarion GP, LLC; GGNSC Gettysburg LP; GGNSC Gettysburg GP, LLC; GGNSC Altoona Hillview LP; GGNSC Altoona Hillview GP, LLC; GGNSC Lansdale LP; GGNSC Lansdale GP, LLC; GGNSC Monroeville LP; GGNSC Monroeville GP, LLC; GGNSC Mt. Lebanon LP; GGNSC Mt. Lebanon GP, LLC; GGNSC Phoenixville II LP; GGNSC Phoenixville II GP, LLC; GGNSC Philadelphia LP; GGNSC Philadelphia GP, LLC; GGNSC Wilkes–Barre II LP; GGNSC Wilkes–Barre II GP, LLC; GGNSC Tunkhannock LP; GGNSC Tunkhannock GP, LLC; GGNSC Erie Western Reserve LP; GGNSC Erie Western Reserve GP, LLC; GGNSC Pottsville LP; GGNSC Pottsville GP, LLC, Defendants

No. 336 M.D. 2015
|
Argued: June 8, 2016
|
FILED: March 22, 2017

Synopsis

Background: Commonwealth filed complaint and petition for injunctive relief against skilled nursing facilities and their parent companies, which were group of limited liability companies that operated the facilities, asserting claims for violations of Unfair Trade Practices and Consumer Protection Law (UTPCPL), breach of contract, and unjust enrichment.

Holdings: The Commonwealth Court, No. 336 M.D. 2015, Covey, J., held that:

[1] chain wide marketing statements were puffery that were not actionable as false advertising under UTPCPL;

[2] patient-specific representations in care plans and bills did not constitute advertising, and thus did not support claim for false advertising under UTPCPL;

[3] Commonwealth failed to allege claim for violation of UTPCPL based on engaging in fraudulent or deceptive conduct with sufficient specificity;

[4] Commonwealth was not "person in interest" entitled to seek restoration under UTPCPL;

[5] Commonwealth was required to pursue statutory remedies for medical assistance billing disputes, and thus requiring dismissal of unjust enrichment claims.

[6] Commonwealth failed to allege that parent companies used corporate form to engage in fraud or that parent companies were sham, as required to state claim for piercing the corporate veil under Delaware law.

Complaint dismissed.

Cohn Jubelirer, J., filed concurring and dissenting opinion.

West Headnotes (58)

[1] Pleading
Mode of objecting;preliminary objections

Commonwealth Court's review of preliminary objections is limited to the pleadings.

Cases that cite this headnote

[2] Pleading
Mode of objecting;preliminary objections

In ruling on preliminary objections, the Commonwealth Court must accept as true the well-pled averments set forth in the complaint, and all inferences reasonably deducible therefrom.

Cases that cite this headnote

[3] **Pleading**

Mode of objecting;preliminary objections

In reviewing preliminary objections, the Commonwealth Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.

Cases that cite this headnote

[4] **Pleading**

Mode of objecting;preliminary objections

To sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

Cases that cite this headnote

[5] **Antitrust and Trade Regulation**

Medical professionals;doctor and patient

Unfair Trade Practices and Consumer Protection Law (UTPCPL) does not apply to providers of medical services. 73 Pa. Stat. Ann. §§ 201-2(4), 201-3.

Cases that cite this headnote

[6] **Courts**

Decisions of United States Courts as Authority in State Courts

Although federal district court decisions are not binding, they may be cited as persuasive authority.

Cases that cite this headnote

[7] **Antitrust and Trade Regulation**

Advertising, marketing, and promotion

Puffery is not actionable as false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

1 Cases that cite this headnote

[8] **Antitrust and Trade Regulation**

Advertising, marketing, and promotion

"Puffery," which is not actionable as false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), is an exaggeration or overstatement expressed in broad, vague, and commendatory language. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

1 Cases that cite this headnote

[9] **Antitrust and Trade Regulation**

Advertising, marketing, and promotion

Puffery is distinguishable from misdescriptions or false representations of specific characteristics of a product, and as such, it is not actionable as false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[10] **Antitrust and Trade Regulation**

Advertising, marketing, and promotion

Claims that are not specific and measurable by comparative research are indicative of puffery that is not actionable as false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

1 Cases that cite this headnote

[11] **Antitrust and Trade Regulation**

Purpose and construction in general

Courts

Construction of federal Constitution, statutes, and treaties

In interpreting the Unfair Trade Practices and Consumer Protection Law (UTPCPL), Pennsylvania Courts look to judicial decisions interpreting the Lanham Act for guidance. Lanham Trade-Mark Act § 1, 15 U.S.C.A. § 1051 et seq.; 73 Pa. Stat. Ann. § 201-1 et seq.

Cases that cite this headnote

[12] Antitrust and Trade Regulation

Advertising, marketing, and promotion

If marketing statements are offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable person would rely, they are puffery, and may not form the basis for a false advertising action under the Unfair Trade Practices and Consumer Protection Law (UTPCPL). 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[13] Antitrust and Trade Regulation

Questions of law or fact

Determination of whether an alleged misrepresentation is a statement of fact or is instead mere puffery that is not actionable as false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL) is a legal question. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[14] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that nurses and nursing assistants were available to provide nursing care and help with activities of daily living, whatever the resident's needs were, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted that companies did not have sufficient staff to render such care; statements contained subjective analysis and were expressed in broad, vague, and commendatory language, Commonwealth did not contend that companies did not have nurses and assistants to provide care, and statement did not represent that nurses would be immediately available or provide specific time frame. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[15] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that snacks and beverages of various types and consistencies were available at any time from nurse or nursing assistant, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted that there was insufficient staffing to timely respond to residents' requests; statement contained no more than broad, vague, and commendatory language, and Commonwealth did not contend that snacks and beverages were not always available from staff. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[16] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that container of fresh ice water would be placed next to residents' beds every day and that nursing assistant would be glad to refill it, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted companies did not provide such care due to

understaffing; statement contained subjective analysis or extrapolations, such as opinions, motives, and intentions, or general statements of optimism, and was an exaggeration or overstatement expressed in broad, vague, and commendatory language. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[17] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that clean linens were provided to residents on regular basis so that they did not need to bring their own, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted companies did not provide such care due to understaffing; statement did not contain a false representation of specific characteristics of the services offered. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[18] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, stating that exceptional dining was important to companies, that companies wanted to meet nutritional needs and exceed expectations, and that company hoped experience would nourish residents' bodies and souls, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted residents were unable to use dining facilities due to staffing shortages; marketing statement expressed companies' priorities and intentions for residents, rather than making specific objective representations about quality of dining experience, and statements were overstatement expressed in broad language. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[19] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that the companies believed that respecting residents' individuality and dignity was of utmost importance, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted facilities had staffing shortages; statement contained general statements of optimism and was overstatement expressed in broad, vague, and commendatory language, and statement communicated that it was offered as expression of companies' opinion on which no reasonable person would rely. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[20] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that restorative plan of care would be developed to reflect resident's goals and to improve wellness and function, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted facilities suffered from understaffing; Commonwealth did not allege that plans of care were not developed or were not reflective of resident's goals, but rather than plans were incomplete or not properly followed or updated, and statements reflected opinions, motives, and

intentions, or general statements of optimism. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[21] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that companies worked with interdisciplinary team to assess issues and nursing care that could enhance resident's psychological adaptation to decrease in function, increase performance in daily living activities, and prevent complications associated with inactivity, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted facilities suffered from understaffing; statement contained opinions, motives, intentions, and general statements of optimism, and Commonwealth did not assert that companies failed to work with disciplinary team to assess issues and nursing care. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[22] Antitrust and Trade Regulation

Health care and medical insurance

Chain-wide marketing statements by group of companies that operated skilled nursing facilities, that goal was to help residents restore strength and confidence so resident could get back to enjoying life, constituted puffery, and thus were not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL), though Commonwealth asserted facilities suffered from understaffing; statement primarily discussed companies' priorities and intentions for residents, contained opinions, motives, intentions, and general statements of optimism, and was exaggeration or overstatement expressed in broad, vague, and commendatory language. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[23] Antitrust and Trade Regulation

Health care and medical insurance

Patient-specific representations in resident assessments and care plans and bills to Commonwealth did not constitute advertising, and thus alleged conduct of skilled nursing facilities in failing to adhere to assessments and billing Commonwealth for services that were not provided was not actionable by Commonwealth as false advertising under Unfair Trade Practices and Consumer Protection Law (UTPCPL); representations made in resident care plan development were not likely to make a difference in a purchasing decision, since such representations were made after an individual was admitted and became resident, and isolated statements to customers, potential customers, and in billing did not constitute sufficient dissemination to be defined as advertising. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[24] Antitrust and Trade Regulation

Advertising, marketing, and promotion

A claim of false advertising under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), by its very nature, requires that a representation be advertised. 73 Pa. Stat. Ann. § 201-2(4)(v, ix).

Cases that cite this headnote

[25] Statutes

Undefined terms

Statutes

Dictionaries

Where a court needs to define an undefined term in a statute, it may consult definitions in statutes, regulations, or the dictionary for

guidance, although such definitions are not controlling. 1 Pa. Cons. Stat. Ann. § 1903(a).

Cases that cite this headnote

[26] Antitrust and Trade Regulation

Advertising, marketing, and promotion

Provision in Unfair Trade Practices and Consumer Protection Law (UTPCPL) prohibiting advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement disclosed a limitation of quantity, applied only to claims of false advertising. 73 Pa. Stat. Ann. § 201-2(4)(x).

Cases that cite this headnote

[27] Antitrust and Trade Regulation

Particular cases

Commonwealth failed to make allegations specifically identifying any particular resident care plan or assessment from which skilled nursing facility deviated, or to identify any specific bill for services that were not provided, as required to state claim that companies that operated facilities violated Unfair Trade Practices and Consumer Protection Law (UTPCPL) by engaging in fraudulent or deceptive conduct creating a likelihood of confusion or of misunderstanding based on failures to comply with care plans or assessments or billing for services that were not rendered; general allegations of wrongdoing were insufficient, especially given that documents were not attached to complaint, and neither patients nor documents were sufficiently described to permit companies to prepare a defense. 73 Pa. Stat. Ann. § 201-2(4)(xii); Pa. R. Civ. P. 1019(a).

Cases that cite this headnote

[28] Pleading

Matters of Fact or Conclusions

Plaintiff is required to plead all the facts that must be proved in order to achieve recovery on the alleged cause of action. Pa. R. Civ. P. 1019(a).

Cases that cite this headnote

[29] Pleading

Certainty, definiteness, and particularity

Pleading must be sufficiently specific so that the defending party will know how to prepare his defense. Pa. R. Civ. P. 1019(a).

Cases that cite this headnote

[30] Pleading

Certainty, definiteness, and particularity

Lower court has broad discretion in determining the amount of detail that must be averred since the standard of pleading set forth in the rules of civil procedure that the material facts on which a cause of action is based shall be stated in concise and summary form is incapable of precise measurement. Pa. R. Civ. P. 1019(a).

Cases that cite this headnote

[31] Pleading

Certainty, definiteness, and particularity

Claim under catchall provision in Unfair Trade Practices and Consumer Protection Law (UTPCPL), prohibiting engagement in fraudulent or deceptive conduct which created a likelihood of confusion or misunderstanding, was subject to a lesser standard than common law fraud, and thus was not subject to particularity requirements for pleading common law fraud claims. 73 Pa. Stat. Ann. § 201-2(4)(xxi); Pa. R. Civ. P. 1019(b).

Cases that cite this headnote

[32] Pleading

Mode of objecting;preliminary objections

A party is permitted to file preliminary objections on the basis of a pleading's legal insufficiency. Pa. R. Civ. P. 1028(a)(4).

Cases that cite this headnote

[33] **Fraud**

Elements of Actual Fraud

To establish fraud, a plaintiff must prove: (1) the misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result.

Cases that cite this headnote

[34] **Antitrust and Trade Regulation**

Fraud;deceit;knowledge and intent

Under catchall provision in Unfair Trade Practices and Consumer Protection Law (UTPCPL), prohibiting engaging in fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding, the question is not whether a company or corporate officer engaged in conduct that was intended to deceive consumers, but rather the question is whether the company or corporate officer engaged in conduct that might be deceptive to the ordinary consumer. 73 Pa. Stat. Ann. § 201-2(4)(xxi).

Cases that cite this headnote

[35] **Courts**

Dicta

Commonwealth Court opinion addressing and deciding a preliminary objection presented to the Court is not dicta. Pa. R. Civ. P. 1028(c)(2).

Cases that cite this headnote

[36] **Antitrust and Trade Regulation**

Public entities or officials

Antitrust and Trade Regulation

Persons liable

Commonwealth was not "person in interest" entitled to seek restoration under Unfair Trade Practices and Consumer Protection Law (UTPCPL); definition of "person" liable under the UTPCPL did not include Commonwealth, and "person" would not be given different meanings in different sections of same statute. 73 Pa. Stat. Ann. §§ 201-2(2), 201-4.1.

Cases that cite this headnote

[37] **Statutes**

Construing together;harmony

In determining legislative intent, all sections of a statute must be read together and in conjunction with each other, and construed with reference to the entire statute.

Cases that cite this headnote

[38] **Statutes**

Similarity or difference

When the meaning of a word or phrase is clear when used in one section of a statute, it will be construed to mean the same thing in another section of the same statute.

Cases that cite this headnote

[39] **Statutes**

Conflict

Statutes

General and specific statutes

A conflict between various statutes or parts thereof is to be avoided and, if possible, the apparently conflicting provisions must be construed together with the more specific provisions prevailing over the general ones.

Cases that cite this headnote

[40] **Implied and Constructive Contracts**

Contract for Services

Human Services Code and Medical Assistance Manual set forth manner in which medical assistance billing disputes were required to be

remedied and charged Department of Human Services with responsibility for resolving those disputes, and thus those remedies were required to be strictly pursued, and Commonwealth was not entitled to bring unjust enrichment claims against companies that operated skilled nursing facilities based on allegations that the companies were unjustly enriched by the facilities submitting billings to the medical assistance program for care that was either not provided or inadequately rendered. 1 Pa. Cons. Stat. Ann. § 1504; 62 Pa. Stat. Ann. §§ 206, 403.1; 55 Pa. Code §§ 1101.11(a, b), 1101.74, 1101.75, 1101.83, 11871.

Cases that cite this headnote

[41] Implied and Constructive Contracts
Unjust enrichment

Unjust enrichment is an equitable doctrine.

Cases that cite this headnote

[42] Implied and Constructive Contracts
Unjust enrichment

"Unjust enrichment" is the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected, for which the beneficiary must make restitution.

Cases that cite this headnote

[43] Implied and Constructive Contracts
Unjust enrichment

An action based on unjust enrichment is an action which sounds in quasi-contract or contract implied in law.

Cases that cite this headnote

[44] Action
Cumulative or exclusive remedies

Where the legislature explicitly reveals in a statute that it does not intend for a statutory remedy to be the exclusive remedy, a statutory procedure for dispute resolution does not preempt common law claims. 1 Pa. Cons. Stat. Ann. § 1504.

Cases that cite this headnote

[45] Administrative Law and Procedure
Exhaustion of administrative remedies

When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, at least initially, by the administrative agency. 1 Pa. Cons. Stat. Ann. § 1504.

Cases that cite this headnote

[46] Corporations and Business Organizations
Particular occasions for determining entity

Commonwealth failed to allege that parent companies, which were limited liability companies that operated skilled nursing facilities, used corporate form to engage in fraud or similar injustice or that the facilities were a sham and existed for no other purpose than as a vehicle for fraud, as was required to state claim for piercing the corporate veil under Delaware law, in Commonwealth's action against parent companies and facilities for violations of the Unfair Trade Practices and Consumer Protection Law (UTPCPL) and other causes of action. 73 Pa. Stat. Ann. § 201-1 et seq.

Cases that cite this headnote

[47] Corporations and Business Organizations
Subjection to Requirements as Imposed by State of Incorporation;What Law Governs

Existence and extent of shareholder liability for corporate indebtedness is determined by the law of the state of incorporation.

Cases that cite this headnote

[48] **Corporations and Business Organizations**
Justice and equity in general

Corporations and Business Organizations
Fraud or illegal acts in general

To pierce the corporate veil under Delaware law's alter-ego theory, requiring that the corporate structure cause fraud or similar injustice, the term "similar injustice" includes the contravention of law or contract.

Cases that cite this headnote

[49] **Corporations and Business Organizations**
Fraud or illegal acts in general

To state a veil-piercing claim, under Delaware law, the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors.

Cases that cite this headnote

[50] **Corporations and Business Organizations**
Justice and equity in general

Corporations and Business Organizations
Fraud or illegal acts in general

The fraud or similar injustice that must be demonstrated to pierce a corporate veil under Delaware law must, in particular, be found in the defendants' use of the corporate form.

Cases that cite this headnote

[51] **Corporations and Business Organizations**
Reluctance to apply remedy

Piercing the corporate veil is an extraordinary remedy reserved for cases involving exceptional circumstances.

Cases that cite this headnote

[52] **Corporations and Business Organizations**
Presumptions and burden of proof

There is a strong presumption against piercing the corporate veil, and the independence of separate corporate entities is presumed.

Cases that cite this headnote

[53] **Corporations and Business Organizations**
Nature of remedy

Purpose of the doctrine of piercing the corporate veil is to assess liability for the acts of a corporation to the equity holders in the corporation by removing the statutory protection otherwise insulating a shareholder from liability.

Cases that cite this headnote

[54] **Corporations and Business Organizations**
Justice and equity in general

Where a corporation operates as a mere facade for the operations of a dominant shareholder, the dominating shareholder may be held liable for the corporation's inequitable conduct perpetrated through the use of the corporate form's protections.

Cases that cite this headnote

[55] **Corporations and Business Organizations**
Fraud or illegal acts in general

Corporations and Business Organizations
Factors Considered

While there is no bright-line test for when to pierce the corporate veil, courts consider the following factors: (1) undercapitalization, (2) failure to adhere to the corporate formalities, (3) substantial intermingling of corporate and personal affairs, and (4) use of the corporate form to perpetrate a fraud.

Cases that cite this headnote

[56] **Corporations and Business Organizations**
Reasons and Justifications

Corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime.

Cases that cite this headnote

[57] **Corporations and Business Organizations**
Reluctance to apply remedy

Any inquiry involving corporate veil-piercing must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception.

Cases that cite this headnote

[58] **Corporations and Business Organizations**
Justice and equity in general

Corporations and Business Organizations
Alter ego in general

Corporations and Business Organizations
Domination or control by shareholder

One exception to the general rule that the corporate entity should be recognized and upheld is the alter ego theory which requires proof (1) that the party exercised domination and control over the corporation, and (2) that injustice will result if the corporate fiction is maintained despite unity of interests between the corporation and its principal.

Cases that cite this headnote

Attorneys and Law Firms

***211** Victoria S. Nugent, Washington, DC, for plaintiff.

Thomas H. Lee, II, Philadelphia, and Elizabeth M. Locke, Alexandria, VA, for defendants.

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge, HONORABLE RENÉE COHN JUBELIRER, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE P. KEVIN BROBSON, Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE ANNE E. COVEY, Judge, HONORABLE MICHAEL H. WOJCIK, Judge

Opinion

OPINION BY JUDGE COVEY

Before this Court are Golden Gate National Senior Care, LLC, *et al.*'s (Golden Gate) preliminary objections to the Commonwealth of Pennsylvania's (Commonwealth) Amended Complaint and Petition for Injunctive Relief addressed to this Court's original jurisdiction. [1]

1 A related dispute was before this Court in *GGNSC Clarion LP v. Kane*, 131 A.3d 1062 (Pa. Cmwlth. 2016) (*GGNSC Clarion*). In *GGNSC Clarion*, the petitioners and their affiliated entities are the owners and operators of long-term care facilities, including skilled nursing facilities, who sought declaratory relief contending that, among other things, the Commonwealth's Office of Attorney General (OAG) lacked authority to investigate or pursue litigation concerning staffing levels at skilled nursing facilities since the Health Care Facilities Act, Act of July 19, 1979, P.L. 130, *as amended*, 35 P.S. §§ 448.101–448.904b, vested exclusive jurisdiction in the Department of Health. On January 11, 2016, this Court sustained the OAG's preliminary objections, granted the OAG's motion to dismiss and dismissed petitioners' amended petition for review. On December 28, 2016, the Pennsylvania Supreme Court affirmed this Court's decision. *See GGNSC Clarion LP v. Kane*, 152 A.3d 983 (Pa.2016).

***212** Golden Gate consists of a group of companies that manage and operate 36 skilled nursing facilities (Facilities) in Pennsylvania. GGNSC Holdings LLC, Golden Gate National Senior Care LLC, GGNSC Clinical Services LLC, and GGNSC Administrative Services LLC are described in the pleadings as parent entities (Parent Entities). [2] On July 1, 2015, the Commonwealth, by the Office of Attorney General (OAG), filed a Complaint and Petition for Injunctive Relief (Original Complaint) addressed to this Court's original jurisdiction against 14 of Golden Gate's Pennsylvania Facilities. On August 6, 2015, Golden Gate filed preliminary objections to the Original Complaint setting forth ten objections.

2 Parent Entity Defendants GGNSC Holdings LLC and Golden Gate National Senior Care LLC, indirectly own and operate the Facilities located in Pennsylvania. Parent Entity Defendant GGNSC Administrative Services LLC and Parent Entity

> Defendant GGNSC Clinical Services LLC exercise operational and management control over the Facilities. Defendant GGNSC Equity Holdings LLC is a general partner in three of the Facilities and holds a controlling ownership interest in the Facilities.

On September 8, 2015, the Commonwealth filed an Amended Complaint and Petition for Injunctive Relief (Amended Complaint), naming an additional 11 of Golden Gate's Pennsylvania Facilities as defendants.[3] Therein, the Commonwealth asserted the following three claims against Golden Gate: (1) Unfair Trade Practices and Consumer Protection Law (UTPCPL)[4] violations (seeking injunctive relief, restoration and civil penalties); (2) breach of contract (seeking damages); and (3) unjust enrichment (seeking disgorgement). ***213** The Commonwealth alleged that Golden Gate engaged in unfair and deceptive acts and practices towards Pennsylvania consumers and the Commonwealth by: (1) making chain-wide misrepresentations in marketing materials; (2) making Facility-level misrepresentations in its marketing materials, resident assessments/care plans and billing statements, presenting misleading appearances during Commonwealth inspections, and creating false records; (3) making misleading statements about the level of care that would be provided to residents; and (4) failing to provide basic care. On October 8, 2015, Golden Gate filed preliminary objections to the Amended Complaint, setting forth twelve objections (Preliminary Objections).

3 According to the Amended Complaint:

> The [Facilities] located in Pennsylvania include Defendants Golden LivingCenter—Blue Ridge Mountain (Harrisburg, PA); Golden LivingCenter—Camp Hill (Camp Hill, PA); Golden LivingCenter—Clarion (Clarion, PA); Golden LivingCenter—Doylestown (Doylestown, PA); Golden LivingCenter—East Mountain (Wilkes–Barre, PA); Golden LivingCenter—Gettysburg (Gettysburg, PA); Golden LivingCenter—Hillview (Altoona, PA); Golden LivingCenter—Lancaster (Lancaster, PA); Golden LivingCenter—Lansdale (Lansdale, PA); Golden LivingCenter—Mansion (Sunbury, PA); Golden LivingCenter—Monroeville (Monroeville, PA); Golden LivingCenter—Mt. Lebanon (Pittsburgh, PA); Golden LivingCenter—Murrysville (Murrysville, PA); Golden LivingCenter—Phoenixville (Phoenixville, PA); Golden LivingCenter—Reading (Reading, PA); Golden LivingCenter—Rosemont (Rosemont, PA); Golden LivingCenter—Scranton (Scranton, PA); Golden LivingCenter—Shippenville (Shippenville, PA); Golden LivingCenter—Stenton (Philadelphia, PA); Golden LivingCenter—Summit (Wilkes Barre, PA); Golden LivingCenter—Tunkhannock (Tunkhannock, PA); Golden LivingCenter—Uniontown (Uniontown, PA); Golden LivingCenter—Western Reserve (Erie, PA); Golden LivingCenter—West Shore (Camp Hill, PA); and Golden LivìngCenter—York Terrace (Pottsville, PA)....

Amended Complaint at 3, ¶ 2. Such Facilities "are licensed by the Department of Health and ... are certified under the Medicare and Medicaid programs pursuant to Titles XVIII and XIX of the federal Social Security Act, 42 U.S.C. §§ 1395[–1395b–10], and 42 U.S.C. §§ 1396[–1396w–5], administered by the United States Department of Health and Human Services ... through the Centers for Medicare and Medicaid Services ...." *GGNSC Clarion*, 131 A.3d at 1064 n.2.

4 Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. §§ 201–1–201–9.3.

[1] **[2]** **[3]** **[4]** This Court's review of preliminary objections is limited to the pleadings. *Pa. State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 592 Pa. 304, 924 A.2d 1203 (2007).

> [This Court is] required to accept as true the well-pled averments set forth in the ... complaint, and all inferences reasonably deducible therefrom. Moreover, the [C]ourt need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

Id. at 415–16 (citations omitted).

I. Preliminary Objections 1 and 2

Golden Gate in its Preliminary Objection 1 alleges that the OAG lacks statutory authority to pursue this action because it effectively seeks to regulate skilled nursing facility staffing levels, an area within the Pennsylvania Department of Health's (DOH) exclusive purview. In its Preliminary Objection 2, Golden Gate avers that the Commonwealth is attempting to set new minimum staffing requirements by "completely bypass[ing] the regulatory procedures in place that govern how changes to laws and regulations are to be made, including the requirements of public notice and the opportunity for [Golden Gate] and other interested parties to be heard on any such changes." Preliminary Objection 2 at 13, ¶ 33.

On March 30, 2016, this Court issued an order, wherein it noted the parties' agreement that Preliminary Objections 1 and 2 were resolved by this Court's opinion in *GGNSC Clarion LP v. Kane*, 131 A.3d 1062 (Pa. Cmwlth. 2016) (*GGNSC Clarion*), which dismissed a declaratory judgment action raising the same issues presented in Preliminary Objections 1 and 2. For the reasons explained therein, Preliminary Objections 1 and 2 are overruled.

II. UTPCPL—Preliminary Objections 4, 5, 6, 7, 8 and 10

Golden Gate's Preliminary Objections 4, 5, 6, 7, 8 and 10 all pertain to the alleged UTPCPL violations. [5]

[5] Golden Gate's Preliminary Objections 4, 5, 6, 7, 8 and 10 specify as follows:

- Preliminary Objection 4—Demurrer—the Amended Complaint fails to state a claim under Sections 2(4)(v) or 201–2(4)(ix) of the UTPCPL (marketing materials).
- Preliminary Objection 5—Demurrer—the Amended Complaint fails to state a claim under Section 2(4)(x) of the UTPCPL.
- Preliminary Objection 6—Insufficient Specificity in the Complaint—the Amended Complaint fails to inform Golden Gate of any specific bases on which the Commonwealth is seeking recovery under Section 2(4)(xxi) of the UTPCPL (the catch-all provision).
- Preliminary Objection 7—Demurrer—the Commonwealth failed to plead any potential fraud claim under Section 2(4)(xxi) of the UTPCPL with the required particularity.
- Preliminary Objection 8—Insufficient Specificity in the Complaint—the Amended Complaint fails to set forth with sufficient specificity a claim for false advertising under the UTPCPL.
- Preliminary Objection 10—Demurrer—the Commonwealth may not seek restitution or restoration under Section 4.1 of the UTPCPL, added by the Act of November 26, 1976, P.L. 1166, 73 P.S. § 201–4.1, because the Commonwealth is not a "person" as defined in the UTPCPL.

[5] ***214** Initially, we note that Section 3 of the UTPCPL states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined [in Section 2(4)(i)-(xxi) of the UTPCPL [6]] ... are hereby declared unlawful." 73 P.S. § 201–3. Section 2(4) of the UTPCPL provides, in relevant part:

> **'Unfair methods of competition'** and **'unfair or deceptive acts or practices'** mean any one or more of the following:
>
> ....
>
> (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> ....
>
> (ix) Advertising goods or services with intent not to sell them as advertised;
>
> (x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
>
> ....
>
> (xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

73 P.S. § 201–2(4). This Court has explained:

> An act or a practice is deceptive or unfair if it has the 'capacity or tendency to deceive.' **Neither the intention to deceive nor actual deception must be proved; rather,**

> **it need only be shown that the acts and practices are capable of being interpreted in a misleading way. The test for the [C]ourt is to determine the overall impression arising from the totality of what is said, as well as what is reasonably implied, in the advertisement or solicitation.** In consumer protection cases brought in the public interest by the Attorney General, where establishing a violation hinges upon the content of the solicitations themselves, summary judgment may be granted without the need for extrinsic evidence and even in the presence of extrinsic evidence offered by the defense. Moreover, we are cognizant of our [S]upreme [C]ourt's directive that the UTPCPL is to be construed liberally to effectuate its objective of protecting consumers of this Commonwealth from fraud and unfair or deceptive business practices.

Commonwealth v. Peoples Benefit Servs. Inc., 923 A.2d 1230, 1236 (Pa. Cmwlth. 2007) (citations omitted; emphasis added) (*Peoples Benefit II*); *see also Pa. Dep't of Banking v. NCAS of Del., LLC*, 995 A.2d 422 (Pa. Cmwlth. 2010). Nonetheless, the UTPCPL does not apply to providers of medical services. *See Walter v. Magee–Womens Hosp. of UPMC Health Sys.*, 876 A.2d 400 (Pa. Super. 2005);[7] *see also* ***215** *Foflygen v. R. Zemel, M.D. (PC)*, 420 Pa.Super. 18, 615 A.2d 1345 (1992). "Nursing homes are not one-dimensional business enterprises, but instead they are hybrid organizations, offering both medical and non-medical services." *Zaborowski v. Hosp. Care Ctr. of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 493 (C.P. Mercer 2002). Thus, courts have held that nursing homes are liable under the UTPCPL only for the non-medical services they provide. *Id.; see also GGNSC Clarion*; *Goda v. White Cliff Leasing P'ship*, 62 Pa. D. & C.4th 476 (C.P. Mercer 2003);[8] *Simmons v. Simpson House, Inc.*, —— F.Supp.3d ——, 2016 WL 7209931 (E.D. Pa. No. 15–06636, filed December 12, 2016).

6 73 P.S. § 201–2(4)(i)-(xxi).

7 In *Walter*, the Pennsylvania Superior Court found that the trial court had properly rejected a UTPCPL claim where "processing, review, and analysis of ... Pap smear reports ... [were] more akin to providing medical services than 'consumer-oriented, non[-]medical activities of a healthcare administrator.' " *Id.* at 408.

8 In *Goda*, a decedent's husband brought an action against a skilled care nursing home, alleging, *inter alia*, violations of the UTPCPL. For purposes of determining the applicability of the UTPCPL, the trial court described "medical services" as "those evaluative, diagnostic, preventative, therapeutic and supervisory services that are customarily provided by or at the direction of a physician or health care worker in order to treat a patient." *Id.* at 489. Applying that definition, the trial court reviewed each of the allegations to determine whether the alleged acts pertained to medical or non-medical services.

A. Preliminary Objection 4—Puffery

In Preliminary Objection 4, Golden Gate contends that the purported representations attributed to it in the Amended Complaint do not violate Sections 2(4)(v) and 2(4)(ix) of the UTPCPL because they do not constitute false advertising since they are puffery rather than material representations.

[6] [7] [8] [9] [10] [11] Courts have held that Sections 2(4)(v) and 2(4)(ix) of the UTPCPL are limited to false advertising claims. *See Seldon v. Home Loan Servs., Inc.*, 647 F.Supp.2d 451 (E.D. Pa. 2009).[9] The United States Third Circuit Court of Appeals has explained: "Material representations must be contrasted with **statements of subjective analysis or extrapolations, such as opinions, motives and intentions, or general statements of optimism, which constitute no more than puffery** ...." *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 872 (3d Cir. 2000) (emphasis added; quotation marks omitted). Puffery is not actionable as false advertising. *See Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939 (3d Cir. 1993).

> Puffery is an exaggeration or overstatement expressed in broad, vague, and commendatory language.

> Such sales talk, or puffing, as it is commonly called, is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer[, and on which no reasonable person would rely]. The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.
>
> W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 109, at 756–57 (5th ed. 1984).[10] **Puffery is distinguishable from** misdescriptions or **false representations of specific characteristics** of a product. As such, **it is not actionable**.

Castrol, Inc., 987 F.2d at 945 (emphasis added). Claims that are not "specific and ***216** measurable by comparative research" are indicative of puffery. *Id.* at 946. Further:

> The conclusion that advertising text can be clear enough that it simply cannot be challenged as misleading is also consistent with numerous cases holding that puffery can be so obviously exaggerated that even credulous consumers cannot be misled. *See, e.g., Am. Italian Pasta*[*Co. v. New World Pasta Co.*], 371 F.3d [387,] 389–90, 392–93 [(8th Cir. 2004)] (holding that puffery, including 'exaggerated statements of bluster or boast upon which no reasonable consumer would rely' are non-actionable statements under [Section] 43(a)(1)(B)) [of the Lanham Act[11]]; *United States Healthcare* [*, Inc. v. Blue Cross of Greater Phila.*], 898 F.2d [914,] 922 [(3d Cir. 1990)] ('Mere puffing, advertising that is not deceptive for no one would rely on its exaggerated claims, is not actionable under [Section] 43(a) [of the Lanham Act].' (internal quotation marks and citations omitted)); *Marriott Corp. v. Ramada Inc.*, 826 F.Supp. 726, 728 (S.D.N.Y. 1993) (dismissing false advertising claim because ad was an obvious parody and one that no 'reasonable person would be misled—even absent the disclaimer—into believing'); *cf. Reilly v. Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949) (stating that puffery in advertisements goes too far if 'credulous persons' rely on it as a material representation of fact).

Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 254 n.17 (3d Cir. 2011).

9 Although federal district court decisions are not binding, they may be cited as persuasive authority. *Mannella ex rel. Mannella v. Port Auth. of Allegheny Cnty.*, 982 A.2d 130 (Pa. Cmwlth. 2009). We find *Seldon* instructive.

10 Bracketed text in original Keeton quotation.

11 The Trademark Act of 1946, 15 U.S.C. §§ 1051–1141n, is commonly referred to as the Lanham Act. In interpreting the UTPCPL, Pennsylvania Courts look to judicial decisions interpreting the Lanham Act for guidance. *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812 (1974); *see also Boehm v. Riversource Life Ins. Co.*, 117 A.3d 308 (Pa. Super. 2015).

1. Chain-wide Marketing Statements

[12] **[13]** In its Amended Complaint, the Commonwealth alleges that Golden Gate's alleged "marketing materials [(Marketing Statements)][12] were deceptive and misleading, because they represented that Golden Gate's [Facilities] would provide care that was not, in fact, provided a significant percentage of the time at many of [the Facilities] due to understaffing." Amended Complaint at 23, ¶ 85.[13] The Commonwealth also avers that the Marketing Statements included significant omissions. However, the law dictates that if the Marketing Statements were "offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer[, and on which no reasonable person would rely]," they are puffery, and may not form the basis for a UTPCPL action. *Castrol*, 987 F.2d at 945 (quoting W. Page Keeton, et al., *supra* at 756–57). "[T]he determination of whether an alleged misrepresentation 'is a statement of fact' or is instead 'mere puffery' is a legal question ...." ***217** *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (quoting *Cook, Perkiss, & Liehe v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990)). Thus, we review those Golden Gate Marketing Statements the Commonwealth alleges violate the UTPCPL in that context.

12 The Commonwealth alleges that:

> Defendants marketed the Golden Living company and its skilled nursing facilities in Pennsylvania directly to Pennsylvania consumers, disseminating brochures, Web sites, videos, advertisements, and other information containing misrepresentations about the Basic Care provided at these facilities. On information

> and belief, printed marketing materials were also distributed to hospitals and hospital staff that made referrals to nursing homes.
>
> Amended Complaint at 21, ¶ 82.

13 The Commonwealth does not identify in its Amended Complaint specifically where these Marketing Statements appear or when they were made. Golden Gate does not explicitly admit making such Marketing Statements. Thus, hereinafter, we refer to the alleged Marketing Statements as Marketing Statements.

[14] Marketing Statement No. 1: "We have licensed nurses and nursing assistants available to provide nursing care and help with activities of daily living (ADLs). Whatever your needs are, we have the clinical staff to meet those needs." Amended Complaint at 22, ¶ 83(a). This statement contains "subjective analysis or extrapolations, such as opinions, motives and intentions, or general statements of optimism," *EP Medsystems*, 235 F.3d at 872, and is "expressed in broad, vague, and commendatory language." *Castrol*, 987 F.2d at 945. It does not contain a "false representation[ ] of **specific characteristics**" of the services offered. *Id.* (emphasis added). The Commonwealth does not contend that Golden Gate does not have licensed nurses and nursing assistants for the purpose of providing nursing care and helping with ADLs. Rather, it maintains that Golden Gate does not have sufficient staff to render care. However, Marketing Statement No. 1 makes no representation that nurses will be **immediately** available to provide such assistance, or that it will be provided within a specific time frame. Thus, we conclude that Marketing Statement No. 1 is puffery.

[15] Marketing Statement No. 2: "Snacks and beverages of various types and consistencies are available at any time from your nurse or nursing assistant." Amended Complaint at 22, ¶ 83(b). This statement contains no more than "broad, vague, and commendatory language." *Castrol*, 987 F.2d at 945. The Commonwealth does not assert in its Amended Complaint that snacks and beverages were not always **available** from staff, but rather, that there was insufficient staffing to **timely** respond to residents' requests. Because Marketing Statement No. 2's references to the availability of "snacks and beverages of **various types**" at "**any time**" are vague and broad, it is puffery. Marketing Statement No. 2 (emphasis added).

[16] Marketing Statement No. 3: "A container of fresh ice water is put right next to your bed every day, and your nursing assistant will be glad to refill or refresh it for you." Amended Complaint at 22, ¶ 83(c). This Marketing Statement contains "subjective analysis or extrapolations, such as opinions, motives and **intentions**, or **general statements of optimism**," *EP Medsystems*, 235 F.3d at 872 (emphasis added), and is "an exaggeration or overstatement expressed in broad, vague, and commendatory language." *Castrol*, 987 F.2d at 945. Accordingly, Marketing Statement No. 3 is puffery.

[17] Marketing Statement No. 4: "Clean linens are provided for you on a regular basis, so you do not need to bring your own." Amended Complaint at 22, ¶ 83(d). The term "regular basis" is "vague" and undefined. *Id.*; *Castrol*, 987 F.2d at 945. The statement does not contain a "false representation[ ] of **specific characteristics**" of the services offered. *Castrol*, 987 F.2d at 945 (emphasis added). For these reasons, Marketing Statement No. 4 is puffery.

[18] Marketing Statement No. 5:

> Providing exceptional dining is **important to us**. Not only do **we want** to meet your nutritional needs, but **we want to** exceed your expectations by offering a high level of service, delicious food and an overall pleasurable dining experience. Dining in the LivingCenter is all about choice. With a variety of ***218** flavors, an attractive environment and plenty of pleasant conversation, **we hope** the experience will nourish both your body and your soul, so please join us. We have a seat reserved for you in our dining room!

Amended Complaint at 22, ¶ 83(e) (emphasis added). The Marketing Statement primarily expresses Golden Gate's priorities and intentions for residents, rather than makes specific objective representations about the quality of the dining experience. This Marketing Statement does not contain a "false representation[ ] of **specific characteristics**" of the services offered. *Castrol*, 987 F.2d at 945 (emphasis added). Instead, it encompasses "subjective analysis or extrapolations, such as opinions, **motives**

and intentions, or **general statements of optimism**," *EP Medsystems*, 235 F.3d at 872 (emphasis added), and is "an exaggeration or overstatement expressed in broad, vague, and commendatory language." *Castrol*, 987 F.2d at 945. Further, the Commonwealth's alleged misrepresentations relate to residents' inability to make use of the dining facilities due to staffing shortages, rather than the quality of the dining experience. We do not interpret the statement "[w]e have a seat reserved for you in our dining room[,]" as a promise that residents will always be brought to the dining facilities. Amended Complaint at 22, ¶ 83(e). Accordingly, Marketing Statement No. 5 is puffery.

[19] Marketing Statement No. 6: "**[W]e believe** that respecting your individuality and dignity is of utmost importance." Amended Complaint at 23, ¶ 84(a) (emphasis added). Based on the preface alone, "we believe," it is clear that this statement contains "subjective analysis or extrapolations, such as opinions, **motives and intentions**, or **general statements of optimism**," *EP Medsystems*, 235 F.3d at 872 (emphasis added), and is "an exaggeration or overstatement expressed in broad, vague, and commendatory language." *Castrol*, 987 F.2d at 945. The Marketing Statement communicated that it was "offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer[, and on which no reasonable person would rely]." *Id.* at 945 (quoting W. Page Keeton, et al., *supra* at 756–57). Therefore, Marketing Statement No. 6 is puffery.

[20] Marketing Statement No. 7: "A restorative plan of care is developed to reflect the resident's goals and is designed to improve wellness and function. The goal is to maintain optimal physical, mental and psychosocial functioning." Amended Complaint at 23, ¶ 84(b). First, the Commonwealth makes no allegation that "restorative plan[s] of care" were not developed, or not reflective of resident's goals, but rather it alleges that the plans were incomplete or not properly followed or updated. Amended Complaint at 23, ¶ 84. Next, although the first sentence in the Marketing Statement is a specific representation that "a restorative plan of care is developed[,]" the descriptive words that follow —that the plan will "**reflect** the resident's goals and is **designed to improve** wellness and function[,]" constitute "subjective analysis or extrapolations, such as **opinions**, **motives and intentions**, or **general statements of optimism**." *EP Medsystems*, 235 F.3d at 872 (emphasis added). Further, because there is no allegation the promise was not delivered it is not actionable. The second sentence in the Marketing Statement describing Golden Gate's goal contains "subjective analysis or extrapolations, such as opinions, **motives and intentions**, or **general statements of optimism**," *EP Medsystems*, 235 F.3d at 872 (emphasis added). Accordingly, Marketing Statement No. 7 is puffery.

[21] ***219** Marketing Statement No. 8: "We work with an interdisciplinary team to assess issues and nursing care that **can** enhance the resident's psychological adaptation to a decrease in function, increase levels of performance in daily living activities, and prevent complications associated with inactivity." Amended Complaint at 23, ¶ 84(c) (emphasis added). This statement contains "subjective analysis or extrapolations, such as opinions, **motives and intentions**, or **general statements of optimism**," *EP Medsystems*, 235 F.3d at 872 (emphasis added). Further, because the Commonwealth has not alleged that Golden Gate does not "work with an interdisciplinary team to assess issues and nursing care," Amended Complaint at 23, ¶ 84(c), the statement does not contain a "false representation[ ] of specific characteristics" of the services offered. *Castrol*, 987 F.2d at 945. Thus, Marketing Statement No. 8 is puffery.

[22] Marketing Statement No. 9: "**Our goal** is to help you restore strength and confidence so you feel like yourself again and can get back to enjoying life the way you should. That's The Golden Difference." Amended Complaint at 23, ¶ 84(d) (emphasis added). The statement primarily discusses Golden Gate's priorities and intentions for residents. It contains "subjective analysis or extrapolations, such as **opinions, motives and intentions**, or **general statements of optimism**," *EP Medsystems*, 235 F.3d at 872 (emphasis added), and is "an exaggeration or overstatement expressed in broad, vague, and commendatory language." *Castrol*, 987 F.2d at 945. For these reasons, we conclude Marketing Statement No. 9 is puffery.

Because Golden Gate's chain-wide Marketing Statements quoted in paragraphs 83 and 84 of the Amended Complaint are puffery and, thus, may not form the basis of a UTPCPL claim, Preliminary Objection 4 is sustained as it pertains to those Marketing Statements.

2. Facility-level Representations

In the Amended Complaint, the Commonwealth also alleges that Golden Gate's individual Facilities "made deceptive, misleading, and unfair misrepresentations to the Commonwealth and to consumers regarding the care they provided in [M]arketing [Statements], resident assessments[,] care plans[ ] and bills, creating a likelihood of confusion and misunderstanding." Amended Complaint at 24, ¶ 88.

a. Marketing Statements

For the reasons discussed above, the Marketing Statements are puffery and do not support the Commonwealth's UTPCPL claim. [14]

14 As previously explained, the UTPCPL does not apply to medical services; thus Marketing Statements 7, 8 and 9 would not form the basis for a UTPCPL claim. *See Goda*; *see also GGNSC Clarion; Walter; Zaborowski*.

b. Resident Assessments, [15] Care Plans and Bills

15 The Amended Complaint alleges:

> Under federal and state law, nursing homes are required to complete a resident assessment, known as a Minimum Data Set [(MDS)], for each resident within 14 days of his arrival at the facility. The MDS is an individualized, date-specific assessment of each resident's needs; it must be updated each quarter while the resident is at the facility, or whenever a significant change in the resident's health or capabilities is observed. Among other things, the MDS evaluates each resident's functional capabilities to perform activities of daily living ('ADLs'). The MDS is based on actual observations of resident care provided over a seven-day period, not a prospective assessment of what care a resident will need. It describes the actual assistance the facility provided and will provide going forward, and that the resident received. The MDS reflects, for each ADL, whether the resident could complete the ADL independently, required assistance (supervision only, limited assistance, or extensive assistance), or was totally dependent on staff. If the resident required assistance with a particular ADL, the MDS also reflects whether the resident needed set-up help only, the assistance of one staff member, or the assistance of two staff members.

Amended Complaint at 25–26, ¶ 92. Accordingly, our discussion of resident assessments includes MDS.

[23] The Commonwealth, in its Amended Complaint, alleges violations of ***220** Sections 2(4)(v), 2(4)(ix), 2(4)(x), and 2(4)(xxi) of the UTPCPL, resulting from the Facilities' failure to adhere to numerous patient-specific representations made in resident assessments and care plans. Rather than quote the specific wording therein, the Commonwealth describes numerous instances where care purportedly promised in resident care plans was not provided. *See, e.g.*, Amended Complaint at 34, ¶ 120; 35–37, ¶ 121; 41, ¶ 125; 48–52, ¶ 135; 68, ¶ 153; 73–76, ¶ 159; 88–91, ¶ 182; 93, ¶ 185; 99–102, ¶ 192; 116–118, ¶ 208; 125, ¶ 214. The Commonwealth also alleges that it was billed for services that were not provided.

In *Seldon*, the United States District Court for the Eastern District of Pennsylvania addressed a similar situation. There, the plaintiffs brought an action against a lender and a loan servicing company, alleging, *inter alia*, a claim for fraudulent and deceptive conduct pursuant to the UTPCPL. Specifically, after falling behind in their mortgage payments, the plaintiffs contacted the defendants and the parties reached an agreement on an alternative payment plan intended to bring the plaintiffs current on their mortgage. However, the plaintiffs alleged in their complaint that the defendants made material misrepresentations concerning the repayment plan. The defendants filed a motion to dismiss. The court addressed the relevant UTPCPL claims as follows:

> [The p]laintiffs ... allege violations of [Sections 2(4)(v) and (ix) [of the UTPCPL]. **Section [ ]2(4)(v) [of the UTPCPL]** forbids '[r]epresenting that goods or services have ... characteristics, ... benefits or quantities that they do not have.' **Section [ ]2(4)(ix) [of the UTPCPL]** prohibits '[a]dvertising goods or services with intent not to sell them as advertised.' Pennsylvania state and federal courts have ruled that both of **these subsections apply only to claims of false advertising.** *Karlsson v. [Fed. Deposit Ins. Corp.]*, 942 F.Supp. 1022, 1023 (E.D. Pa. 1996), *aff'd*, 107 F.3d 862 (3d Cir. 1997); *Weinberg v. Sun Co.*, 740 A.2d 1152, 1167 (Pa. Super. 1999),

rev'd on other grounds, 565 Pa. 612, 777 A.2d 442 (2001).[16] To set forth a claim for false advertising under these provisions of the UTPCPL, a plaintiff must allege: (1) 'a defendant's representation is false'; (2) 'it actually deceives or has a tendency to deceive'; and (3) 'the representation is likely to make a difference in the purchasing decision.' *Fay v. Erie Ins. Gr*[*p.*], 723 A.2d 712, 714 (Pa. Super. 1999) (listing elements for violation of [Section] 2(4)(v) [of the UTPCPL]); *see Weinberg*, 740 A.2d at 1167 (stating same elements apply to [Section] 2(4)(ix)) [of the UTPCPL].

Seldon, 647 F.Supp.2d at 466 (emphasis added).

16 *See also Commonwealth v. Percudani*, 844 A.2d 35 (Pa. Cmwlth. 2004).

[24] **[25]** We note that a claim of false advertising, by its very nature, requires that a representation be **advertised**. Since the UTPCPL does not define "advertising," we consider judicial interpretation of ***221** the term under the Lanham Act.[17]

17 Section 1903(a) of the Statutory Construction Act of 1972 provides that when words in a statute are undefined, they must be accorded "their common and approved usage[.]" 1 Pa.C.S. § 1903(a). "Where a court needs to define an undefined term, it may consult definitions in statutes, regulations or the dictionary for guidance, although such definitions are not controlling." *Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006). *Black's Law Dictionary* (9th ed. 2009) defines "advertising" as "[t]he action of drawing the public's attention to something to promote its sale." *Id.* at 63. Further, according to *Merriam–Webster's Collegiate Dictionary* (11th ed. 2004), "advertising" is "the action of calling something to the attention of the public esp[ecially] by paid announcements." *Id.* at 19.

The United States District Court for the Eastern District of Pennsylvania explained:

'The threshold matter in addressing an alleged false statement actionable ... is whether the statement constitutes 'commercial advertising or promotion.'" *Premier Comp Solutions, LLC v. Penn Nat'l Ins. Co.*, No. Civ.A.07-1764, 2012 WL 1038818, at *7 (W.D. Pa. Mar. 28, 2012) (quoting 15 U.S.C. § 1125(a)(1)(B)). In the absence of an express definition of 'commercial advertising or promotion' in the Lanham Act, courts have developed a four element test to define these terms in accordance with the Act's language and congressional intent. *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F.Supp.2d 384, 455–56 (D. N.J. 2009); *Caldon, Inc. v. Advanced Measurement & Analysis Grp., Inc.*, 515 F.Supp.2d 565, 578 (W.D. Pa. 2007). 'Commercial advertising or promotion for purposes of the Lanham Act consists of (1) commercial speech; (2) by a defendant in commercial competition with [others in the market]; (3) designed to influence customers to buy the defendant's products; (4) **that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry.**' *Synygy, Inc. v. Scott–Levin, Inc.*, 51 F.Supp.2d 570, 576 (E.D. Pa. 1999). **Only after determining that the relevant statement constitutes commercial advertising or promotion does a court consider the remaining elements of a Lanham Act claim based on a false or misleading representation** of a product under 15 U.S.C. § 1125(a)(1)(B). *Premier Comp Solutions*, 2012 WL 1038818, at *7. While courts disagree about whether the Lanham Act reaches certain oral statements, **it is well-settled that the challenged statements, at the very least, must be 'widely disseminated' and 'part of an organized campaign to penetrate the relevant market.'** *Fashion Boutique v. Fendi USA, Inc.*, 314 F.3d 48, 56–57 (2d Cir. 2002). 'Although advertising is generally understood to consist of widespread communication through print or broadcast media, 'promotion' may take other forms of publicity used in the relevant industry, such as displays at trade shows and sales presentations to buyers.' *Id.* at 57.

Notably, **it is well[-]established that 'isolated statements to potential customers generally do not constitute sufficient dissemination to be defined as advertising** within the meaning of the Lanham Act' and 'private statements to competitors—without more—falls short of commercial advertising as defined in the Act.' *Pitney Bowes, Inc. v. ITS Mailing Sys. Inc.*, No. Civ.A.09-5024, 2010 WL 1005146, at *5 (E.D. Pa. Mar. 17, 2010) (emphasis omitted) (citing ***222** *Schmidt, Long & Assoc., Inc. v. Aetna U.S. Healthcare, Inc.*, No. Civ.A.00-3683, 2001 WL 856946, at *11 (E.D. Pa. July 26, 2001) ('Generally, isolated private statements are not sufficiently disseminated to constitute advertising.')). Thus, '[p]roof of widespread dissemination within the relevant industry is a normal concomitant of meeting this requirement,' and 'isolated

> disparaging statements do not have redress under the Lanham Act.' *ConsulNet Computing, Inc. v. Moore*, No. Civ.A.04-3485, 2007 WL 2702446, at *11 (E.D. Pa. Sept. 12, 2007) (quotations omitted).

Synthes, Inc. v. Emerge Med., Inc., 25 F.Supp.3d 617, 716–17 (E.D. Pa. 2014) (emphasis added).

Consistent with the above, the *Seldon* Court concluded:

> Here, plaintiffs have presented no facts regarding defendants' production of any false advertising. Instead, **plaintiffs allege that defendants misrepresented the benefits, fees, and amounts owed concerning the loan and misrepresented the scheduled monthly payments under the repayment plan. Because individual employees or agents of defendants made these representations, they do not qualify as advertising and cannot constitute a violation of the UTPCPL's false advertising prohibition.** *See Thompson v. The Glenmede Trust Co.*, No. 04428, 2003 WL 1848011, at *1 (Pa. Ct. Com. Pl. Philadelphia County Feb. 18, 2003) ('Individual representations made by [defendants] upon which [p]laintiffs allegedly relied do not constitute 'advertising' as intended by the UTPCPL.'). For plaintiffs' claim under [Section] 2(4)(ix)[of the UTPCPL], plaintiffs have also failed to allege that defendants intentionally engaged in false advertising. *See Karlsson*, 942 F.Supp. at 1023 (noting that [Section] 2(4)(ix) [of the UTPCPL] requires element of intent). Because plaintiffs do not allege the elements of a false advertising claim under [Section 2(4)](v) or (ix) [of the UPTCPL], plaintiffs have failed to set forth a claim on which this court can grant relief.

Seldon, 647 F.Supp.2d at 466 (emphasis added).

Similarly, in the instant matter, as described in the Amended Complaint, resident care plan development involves assessment and representations made by the Facilities' staff. Specifically, the resident and his or her

> 'care team' will sit down together (called a 'care coordination' meeting), usually within 72 hours of admission, and review what the assessments say, including what you can do for yourself and what you may need assistance with. Your care team will consist of key members of our staff, like the nurses, social worker, dietitian, etc. In effect, the care plan you develop together becomes your personal 'road map for success.'

Amended Complaint at 28–29, ¶ 96. Further, with respect to Sections 2(4)(v) and 2(4)(ix) of the UTPCPL, "[b]ecause individual employees or agents of defendants allegedly made these representations, they do not qualify as advertising and cannot constitute a violation of the UTPCPL's false advertising prohibition." *Seldon*, 647 F.Supp.2d at 466. Moreover, **representations made in resident care plan development are not likely to make a difference in the purchasing decision, since such representations are made after an individual is admitted and becomes a resident. Further, these " 'isolated statements to ... [customers and] potential customers ... do not constitute sufficient dissemination to be defined as advertising**. ...' " *Synthes, Inc.*, 25 F.Supp.3d at 717 (emphasis added) quoting *Pitney Bowes, Inc.* at *5. **For the same reasons, resident assessments and alleged employee misrepresentations in *223 billing do not qualify as advertising under those UTPCPL sections.** Accordingly, Golden Gate's Preliminary Objection 4 is sustained.

B. Preliminary Objections 5, 6, 7 and 8—Insufficient Pleadings

Golden Gate further argues that, even if the alleged representations do not constitute puffery, the Commonwealth failed to sufficiently plead facts to support the alleged UTPCPL violations. It then sets forth separate arguments which comprise Preliminary Objections 5, 6, 7 and 8.

1. Preliminary Objection 5

[26] Golden Gate contends that the facts set forth in the Amended Complaint do not support a claim that it violated Section 2(4)(x) of the UTPCPL by advertising goods or services while intending not to reasonably supply public demand. Although the aforementioned discussion in *Seldon* does not address Section 2(4)(x) of the UTPCPL, the language used therein—"**[a]dvertising** goods or services with intent not to ... "—is almost identical to that in Section 2(4)(ix) of the UTPCPL. 73 P.S. § 201–2(4)(x) (emphasis added). Therefore, we

similarly interpret Section 2(4)(x) of the UTPCPL to "apply only to claims of false advertising." *Seldon*, 647 F.Supp.2d at 466. For the reasons previously discussed herein, the Marketing Statements are puffery, and the representations made in resident care plans and bills do not constitute advertising. Because the alleged conduct is not false advertising, the Commonwealth failed to plead facts sufficient to support the alleged violation claim. Accordingly, Preliminary Objection 5 is sustained.

2. Preliminary Objection 6

[27] Golden Gate also argues that the Amended Complaint fails to comply with the Pennsylvania Rules of Civil Procedure which require specificity in pleadings. Specifically, Golden Gate contends that the Commonwealth failed to plead facts necessary to support its claim that Golden Gate violated Section 2(4)(xxi) of the UTPCPL. Further, Golden Gate asserts that "[the Commonwealth's] Amended Complaint fails to set forth specific factual allegations regarding [Golden Gate's] deviation from any particular resident's care plan or [resident assessment], or a single instance when [Golden Gate] billed a resident or the Commonwealth for services that were not actually provided." Preliminary Objections at 20, ¶ 63. Golden Gate claims that "the only factual support [the Commonwealth] provides for [its] conclusory allegations takes the form of vague, general and non-specific statements attributed to unnamed, former employees and other 'Confidential Witness[es].' " Preliminary Objection 6 at 20, ¶ 62 (quoting Amended Complaint at 34–147, ¶¶ 119–239).

[28] **[29]** **[30]** We acknowledge:

> [Pennsylvania Rule of Civil Procedure] No. [(Rule)] 1019(a) provides that '[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form.' This rule requires a plaintiff to plead all the facts that must be proved in order to achieve recovery on the alleged cause of action. Moreover, the pleading must be sufficiently specific so that the defending party will know how to prepare his defense.

Commonwealth v. Peoples Benefit Servs. Inc., 895 A.2d 683, 689 n.10 (Pa. Cmwlth. 2006) (*Peoples Benefit I*). "It may be granted that 'the lower court has broad discretion in determining the amount of detail that must be averred since the standard of pleading set forth in Rule 1019(a) is incapable of precise measurement. Goodrich–Amram § 1019(2)–10&11.' ***224** *United Refrigerator Co. v. Applebaum*, 410 Pa. 210, 213, 189 A.2d 253, 255 (1963)." *Pike Cty. Hotels Corp. v. Kiefer*, 262 Pa.Super. 126, 396 A.2d 677, 681 (1978).

In the instant case, the Amended Complaint sets forth numerous examples of instances where Golden Gate allegedly failed to comply with resident care plans. *See, e.g.*, Amended Complaint at 34, ¶ 120; 35–37, ¶ 121; 41, ¶ 125; 48–52, ¶ 135; 68, ¶ 153; 73–76, ¶ 159; 88–91, ¶ 182; 93, ¶ 185; 99–102, ¶ 192; 116–118, ¶ 208; 125, ¶ 214. However, there are no allegations specifically identifying any particular resident care plan or MDS from which the Facility deviated, or any allegation identifying any specific bill for services that were not provided. The Commonwealth asserts that "[t]here is no requirement in Pennsylvania law that the Commonwealth set forth specific deviations from any particular resident's care plan or MDS, or that the Commonwealth identify in its complaint individual bills for services to individual residents that were not actually provided." Commonwealth's Answer to Preliminary Objections at 28. It further contends that this Court may "reasonably infer that the pervasive and significant omissions of care alleged ... reflect deviations from care contemplated in residents' MDS assessments and care plans[.]" *Id.* at 28–29. The Commonwealth asks this Court to make assumptions based on **general allegations** describing documents it has not provided. This, the Court is not prepared to do.

Section 2(4)(xxi) of the UTPCPL prohibits "[e]ngaging in any ... fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201–2(4)(xxi). Golden Gate contends that while the Commonwealth in the Amended Complaint asserts that deceptive resident assessments and billing statements were submitted to it and/or the insurers, the Commonwealth failed to allege how documents not issued to consumers could deceive consumers. Golden Gate further maintains that the Amended Complaint does not reflect facts explaining how a consumer could be misled by a billing statement to believe that he received services or assistance that he had not in fact received, or how an un-itemized per diem charge could convey to a consumer that a particular service had been provided in the first place.

Notably, Rule 1019(i) states:

> When any claim or defense is based upon a writing, **the pleader shall attach a copy of the writing**, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa. R.C.P. No. 1019(i) (emphasis added).

The general allegations of wrongdoing pertaining to unidentified Marketing Statements, resident care plans, billing statements and MDSs are not sufficiently specific to meet the pleading requirement, especially given that the documents were not attached to the Amended Complaint, and neither the patients nor the documents were sufficiently described to permit Golden Gate to prepare a defense. [18] Accordingly, Preliminary Objection 6 is sustained. [19]

18 The Commonwealth did not state in the Amended Complaint that the Marketing Statements, resident care plans, billing statements or MDSs were not accessible and the reason therefor in accordance with Rule 1019(i).

19 The Concurrence/Dissent maintains that the Majority has, *sua sponte*, raised the issue of the Commonwealth's failure to attach the subject documents. Such is not the case. Golden Gate explicitly raised the issue of the Commonwealth's lack of specificity in its pleading in accordance with the Pennsylvania Rules of Civil Procedure. Indeed, Golden Gate contends that the Commonwealth

> asserts that Golden Living made deceptive representations in three forms: (1) 'care **plans** shared with residents that outlined the care that the Facilities promised to provide;' (2) 'billing **statements** that included a per diem charge leading recipients to believe that all services had been provided;' and (3) ... '**MDSs**'[ ] that were submitted to the Commonwealth on a quarterly basis (or more frequently) for each resident covered by Medicaid and monthly billing statements submitted for Medicaid payments' which 'created the impression that the Golden Living Facilities had provided, and would continue to provide, a level of care that was not provided.'

Preliminary Objection 6 at 19–20, ¶ 61 (emphasis added) (quoting Amended Complaint at 157, ¶¶ 267, 269). Accordingly, Golden Gate's assertion that, "the only factual support [the Commonwealth] provides for [its] conclusory allegations takes the form of vague, general and nonspecific statements attributed to unnamed, former employees and other 'Confidential Witness [es]' " expresses the very deficiency resulting from the Commonwealth's failure to attach the documents. Preliminary Objection 6 at 20, ¶ 62 (quoting Amended Complaint at 34–147, ¶¶ 119–239). Further, the Concurrence/Dissent's speculation that the Commonwealth might not have attached the documents based on privacy concerns is simply conjecture on its part. Nonetheless, it is clear that the Commonwealth gave **no** written explanation for its failure to so attach the documents, and thus it did not comply with Rule 1019(i).

*225 3. Preliminary Objection 7

[31] Golden Gate asserts in Preliminary Objection 7 that "[t]o the extent [the Commonwealth's] Amended Complaint alleges a claim for fraud against [Golden Gate under the UTPCPL's catch[-]all provision (Section 2(4)(xxi) of the UTPCPL)], that claim should be dismissed pursuant to [Pennsylvania Rule of Civil Procedure] Nos. 1028(a)(4) and 1019(b) for failure to plead the claim with particularity." Preliminary Objection 7 at 22, ¶ 71.

[32] **[33]** **[34]** Rule 1019(b) provides, in relevant part, that "[a]verments of fraud or mistake shall be averred with particularity." Pa.R.C.P. No. 1019(b). Rule 1028(a)(4) permits a party to file preliminary objections on the basis of a pleading's legal insufficiency. Notwithstanding, in *Commonwealth v. Percudani*, 825 A.2d 743 (Pa. Cmwlth. 2003), *amended*, 851 A.2d 987 (2004), this Court held that a claim under Section 2(4)(xxi) of the UTPCPL is subject to a lesser standard than common law fraud. [20] As this Court later explained in *Commonwealth v. Manson*, 903 A.2d 69 (Pa. Cmwlth. 2006):

> Prior to the 1996 amendments to the [UTPCPL], [S]ection 2(4)(xxi) [of the UTPCPL] merely prohibited 'fraudulent conduct,' and a plaintiff had to establish the elements of common law fraud to prove a

claim. [*Percudani*]. The 1996 amendments revised the provision to prohibit 'fraudulent or deceptive conduct.' *Id.*

Even after the 1996 amendments became effective, our [S]uperior [C]ourt has continued to interpret [S]ection 2(4)(xxi) [of the UTPCPL] to require that a plaintiff establish the elements of common law fraud to prove a claim. *Id.* However, this court has rejected that interpretation because: (1) the statute is to be liberally construed to effectuate the legislative goal of consumer protection; (2) the legislature's addition of the words 'or deceptive' signals a less restrictive interpretation; and (3) maintaining the pre–1996 requirement would ***226** render the words 'or deceptive conduct' redundant and superfluous, contrary to the rules of statutory construction. *Id.*

The question, then, is not whether a company or corporate officer engaged in conduct that was intended to deceive consumers. Rather, **the question is whether the company or corporate officer engaged in conduct that might be 'deceptive to the ordinary consumer**.' *Id.* at 746.

Manson, 903 A.2d at 74 (emphasis added; footnotes omitted); *see also Peoples Benefit I; Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 40 A.3d 145 (Pa. Super. 2012).

20 "[T]o establish fraud, a plaintiff must prove: (1) the misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result." *Commonwealth v. Manson*, 903 A.2d 69, 74 n.5 (Pa. Cmwlth. 2006).

The Commonwealth reaffirms in its brief that it is "proceeding under [Section 2(4)(xxi) of the UTPCPL's] 'deceptive' prong[.]" Commonwealth's Br. at 22 n.7. Accordingly, because the Commonwealth was not required to meet the particularity requirements for common law fraud claims, Preliminary Objection 7 is overruled.

4. Preliminary Objection 8

Lastly, Golden Gate contends that although the Commonwealth alleges in its Amended Complaint false advertising claims under Sections 2(4)(v) and 2(4)(ix) of the UTPCPL and that deceptive, misleading and unfair statements appeared in the Marketing Statements to Pennsylvania consumers and hospital staff, the Commonwealth failed to specify: (1) who was allegedly deceived by the Marketing Statements; (2) the particular Marketing Statements in which each allegedly deceptive statement appeared; (3) where those Marketing Statements were allegedly disseminated; and, (4) when those Marketing Statements were allegedly disseminated. According to Golden Gate, a false advertising claim under the UTPCPL requires the Commonwealth to demonstrate that the false advertisement actually deceived or had a tendency to deceive a substantial segment of its audience. Having already determined that the Marketing Statements constitute puffery and are not material misrepresentations, Golden Gate's Preliminary Objection 8 is sustained.

C. Preliminary Objection 10 [21]

21 The Concurrence/Dissent asserts that because the Majority dismisses the underlying substantive claims, "there is no need to decide whether the Commonwealth is a 'person in interest entitled to restitution or restoration under Section 4.1 of the UTPCPL and, therefore, the question is moot and the discussion related thereto is merely dicta." Concurring/Dissenting Op. at 240. The Concurrence/Dissent similarly objects to the Majority's discussion of Preliminary Objection 12.

However, "[p]reliminary objections are permissible in an original jurisdiction action, [Pennsylvania Rule of Appellate Procedure] 1516 [(b)], and are to be made in accordance with the appropriate Rule of Civil Procedure. *See* Pa.R.A.P. 1517; *see also* Pa.R.C.P. [No.] 1028 (Preliminary Objections)." *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 839 A.2d 185, 190 (2003), *aff'd*, 589 Pa. 412, 909 A.2d 804 (2006). Rule 1028(c)(2) specifically requires, in pertinent part, that "**[t]he court *shall determine* promptly *all* preliminary objections**." Pa.R.C.P. No. 1028(c)(2) (bold and italic emphasis added).

Moreover:

According to *Black's Law Dictionary*, 'dictum,' is generally used as an abbreviated form of 'obiter dictum,' or 'a remark by the way.' To elaborate, it is described as[:]

[A]n observation or remark made by a judge in pronouncing an opinion upon a

> cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but **not necessarily involved in the case or essential to its determination**.... Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of adjudication.
>
> *Black's Law Dictionary* 409 (5th ed. 1979). *See also Stellwagon v. Pyle*, 390 Pa. 17, 133 A.2d 819 (1957) (language in judicial opinion **going beyond issue decided** is considered dictum); *O'Neill v. Metropolitan Life Ins. Co.*, 345 Pa. 232, 26 A.2d 898 (1942) (statement of court on **an issue not raised** is dictum).
>
> *Giffear v. Johns–Manville Corp.*, 429 Pa.Super. 327, 632 A.2d 880, 884 n.6 (1993) (emphasis added), *aff'd sub nom. Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (1996). Clearly, addressing and deciding a preliminary objection presented to the Court is not dicta.
>
> In addition to the Majority addressing and resolving **all** the preliminary objections **raised as directed by Rule 1028(c)(2)**, because the Commonwealth may choose to seek leave of Court to refile its Amended Complaint or bring similar complaints against other providers there is a likelihood that this or other similar matters may return to this Court.

[35] **[36]** In Preliminary Objection 10, Golden Gate avers that the Commonwealth ***227** may not recover restoration under Section 4.1 of the UTPCPL. Under the UTPCPL, only a "person in interest" may seek restoration. 73 P.S. § 201–4.1. The UTPCPL defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." 73 P.S. § 201–2(2). According to Golden Gate, since the UTPCPL's definition of "person" does not include the Commonwealth, it may not seek restoration on its own behalf.

In support of its position, Golden Gate relies on *Meyer v. Community College of Beaver County*, 625 Pa. 563, 93 A.3d 806 (2014) (*Meyer II*), wherein our Supreme Court considered whether the UTPCPL "defines a 'person' subject to liability as including both private entities and political subdivision agencies." *Id.* at 808. The Supreme Court therein explained:

> Where the words of the statute at issue are not explicit, this Court may consider, *inter alia*, the following criteria: '[t]he circumstances under which it was enacted,' '[t]he mischief to be remedied,' '[t]he object to be attained,' '[t]he former law, if any, including other statutes upon the same or similar subjects,' and '[t]he consequences of a particular interpretation.' 1 Pa.C.S.[ ] § 1921(c). In our view, **although it is a close question, the aforementioned factors suggest that the legislature did not intend to define 'person' as including political subdivisions and their agencies**.
>
> First, at the time of the UTPCPL's adoption, the common law provided both a doctrine of sovereign immunity, as well as a derivative interpretive presumption against depriving the state of sovereign rights or property, both of which arguably extended to political subdivision agencies. Given the extant ubiquity of these doctrines, we find it unlikely that the legislature would depart from them with such general language as 'any other legal entities.'
>
> Furthermore, ... **the legislature enacted the UTPCPL** to account for the fundamental inequality between buyer and seller, and **to protect consumers from exploitative merchants**. The parties offer, and we discern, no evidence to suggest that, in enacting the UTPCPL, the General Assembly was concerned with and, thus, sought to eliminate unfair trade practices in the public sphere.
>
> Finally, the consequences of adopting an interpretation of 'person' to include political subdivision agencies strongly suggest to us that the General Assembly did not intend their inclusion. First, in the context of public enforcement actions, the UTPCPL provides that the Attorney General or a District Attorney may obtain, 'on behalf of the Commonwealth,' civil penalties in varying amounts, up to $5,000 per violation. [Section 8 of the UTPCPL,] 73 P.S. § 201–8. Likewise, in the context of private actions, plaintiffs may recover treble ***228** damages in an amount up to three times the amount of their actual damages, as well as costs and attorney fees. *See* [Section 9.2 of the UTPCPL, added by the Act of November 24, 1976, P.L. 1166, *as amended*,] 73 P.S. § 201–9.2. These damages, although designed, in part, for other more remedial purposes, do contain a deterrent, punitive element. *See Schwartz v. Rockey*, ... 932 A.2d 885, 898 ([Pa.] 2007) (noting

> the treble damage provisions are 'a hybrid,' with both punitive and remedial aspects) (internal quotations and citations omitted). Although the legislature certainly has the authority to impose punitive sanctions and damages upon its political subdivisions, the proceeds of which would go to its own treasury, we are of the opinion that it would not take such an uncharted course without making a clearer statement, particularly given our longstanding precedent that governmental agencies are ordinarily immune from common[ ]law punitive damages.
>
> Moreover, under certain circumstances, the Attorney General may seek the 'dissolution, suspension or forfeiture of the franchise or right to do business' of a 'person' who violates a court's injunction against an unfair or deceptive practice, as well as the appointment of a receiver to manage the party's affairs. *See* [Section 9 of the UTPCPL,] 73 P.S. § 201–9. In our view, it is incongruous that the General Assembly would adopt a provision effectively authorizing the Attorney General, with court approval, to eliminate political subdivisions.
>
> In sum, we hold the UTPCPL is ambiguous as to whether political subdivision agencies constitute 'persons.' However, based on our consideration of the law prior to the UTPCPL's enactment, the UTPCPL's purpose, and the consequences of a holding that it applies to such agencies, **we conclude the legislature did not intend for the definition of 'person' to include political subdivision agencies**.

Meyer II, 93 A.3d at 814–15 (citations omitted; emphasis added).

[37] **[38]** **[39]** Although, in *Meyer II*, the issue was whether a political subdivision agency can be a person *liable* under the UTPCPL, Golden Gate argues that the Supreme Court's pronouncement also precludes the Commonwealth from being a "**person** in interest," entitled to seek restoration under the UTPCPL. 73 P.S. § 201–4.1 (emphasis added). When presented with the issue of giving "person" different meanings in various sections of the statute, both this Court's majority and (now) President Judge Leavitt's dissenting opinion in *Meyer v. Community College of Beaver County*, 30 A.3d 587 (Pa. Cmwlth. 2011) (*Meyer I*), *rev'd*, *Meyer II*, concluded that the term "person" must have a consistent meaning throughout the UTPCPL. [22]

[22] In her dissenting opinion, (now) President Judge Leavitt stated:

> I agree with the majority that if the Commonwealth or a local agency is a person for purposes of being a plaintiff under the [UTPCPL], then it follows that either must also be a 'person' for purposes of being a defendant. Stated otherwise, the word 'person' must have one meaning for all purposes of the statute.

Meyer I, 30 A.3d at 604 (Leavitt, J., dissenting). The Concurrence/Dissent essentially argues that the word "person" should be interpreted differently under different sections of the UTPCPL. It asserts that the reasoning in *Meyer II* is inapplicable to the instant matter since "no liability will be imposed upon a government entity; instead, the Commonwealth is seeking restitution and restoration from Golden Gate, a merchant, for money the Commonwealth paid as a result of the alleged deception." Concurring/Dissenting Op. at 241. However:

> It is axiomatic that in determining legislative intent, all sections of a statute must be read together and in conjunction with each other, and construed with reference to the entire statute. **When the meaning of a word or phrase is clear when used in one section, it will be construed to mean the same thing in another section of the same statute**. A conflict between various statutes or parts thereof is to be avoided and, if possible, the apparently conflicting provisions must be construed together with the more specific provisions prevailing over the general ones.

Housing Authority of County of Chester v. Pennsylvania State Civil Service Comm'n, 556 Pa. 621, 730 A.2d 935, 945–46 (1999) (citations omitted; emphasis added). Accordingly, the Court may not interpret the word "person" to exclude the Commonwealth under the liability provisions of the UTPCPL and then interpret it to include the Commonwealth under the restoration provision of the same statute. Notably, the Supreme Court in *Meyer II* did not limit its definition of the word "person" to a particular section of the UTPCPL, and, in fact, the Court's language implies broad application of the definition:

> **the UTPCPL** is ambiguous as to whether political subdivision agencies constitute 'persons.' However, based on our consideration of the law prior to the **UTPCPL**'s enactment, the **UTPCPL's purpose**, and the consequences of a holding that it applies to such agencies,

> **we** conclude the **legislature did not intend for the definition of 'person'** to include political subdivision agencies.
>
> *Meyer II*, 93 A.3d at 815 (emphasis added).

***229** On the same date the Supreme Court issued the *Meyer II* decision, it decided *Commonwealth v. TAP Pharmaceutical Products*, 626 Pa. 1, 94 A.3d 350 (2014). In *TAP*, the Commonwealth challenged pharmaceutical companies' prescription drug pricing claiming that the defendant companies engaged in deceptive practices. Among the claims advanced by the Commonwealth were multiple UTPCPL violations. This Court ultimately found that one of the *TAP* defendants violated the UTPCPL and, *inter alia*, awarded restoration under Section 4.1 of the UTPCPL. On review, the Supreme Court vacated this Court's order and remanded the matter because the Commonwealth had not properly accounted for prescription drug rebates. The Supreme Court did not address whether the Commonwealth was entitled to restoration under the UTPCPL as a "person in interest." 73 P.S. § 201–4.1. Therefore, there is no binding Pennsylvania authority directly addressing whether the Commonwealth is a "person" in interest entitled to restoration under the UTPCPL.

However, the United States District Court for the Southern District of New York addressed this very issue in *In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, (S.D.N.Y. Master File No. 1:00–1898, MDL 1358 (SAS), M21–88, filed July 2, 2015), 2015 U.S. Dist. LEXIS 88035, 2015 WL 4092326. Therein, the District Court considered a similar Commonwealth argument, reviewed the relevant case law, and explained:

> The Commonwealth's entitlement to restoration under the UTPCPL turns on whether it qualifies as a 'person' under the restoration provision of the statute. The Pennsylvania courts have not provided a clear answer to this question. In *Commonwealth v. TAP Pharmaceutical Products*, [36 A.3d 1112 (Pa. Cmwlth. 2011), *vacated and remanded*, 626 Pa. 1, 94 A.3d 350 (2014),] the trial court analyzed the term 'person' and concluded that the Commonwealth was a public entity entitled to restoration under the statute. This decision was later vacated and remanded by the Pennsylvania Supreme Court because the Commonwealth failed at trial to provide a rational accounting of the relevant state agency's damages. The Pennsylvania Supreme Court did not, in remanding *TAP*, address the Commonwealth's ***230** entitlement to restoration as a 'person' under the statute.
>
> The very day that it remanded *TAP*, the Pennsylvania Supreme Court issued a decision in [*Meyer II*], holding that 'political subdivision agencies' do not constitute 'persons' under the UTPCPL. In *Meyer* [*II*], the court confronted the definition of 'person' under the UTPCPL in a slightly different context: whether a public entity was a 'person' that could be sued under the statute, not whether a public entity was a 'person' entitled to restoration. Context aside, the statutory provision the *Meyer* [*II*] court interpreted—which defines 'person' under the UTPCPL—was the same one at issue in *TAP*.
>
> The Commonwealth urges the Court to ascribe different meanings to the word 'person' across different sections of the UTPCPL, arguing principally that the Commonwealth's broad enforcement power under the statute militates in favor of an expansive definition of 'person' in the context of *recovering damages*, and a narrower definition of 'person' in deciding whether to hold a public entity *liable* under the statute. For additional support, the Commonwealth juxtaposes [S]ection 4 of the [UTPCPL], which permits the Attorney General to 'bring an action in the name of the Commonwealth' to restrain violations of the statute, with the restoration provision—[S]ection 4.1 [of the UTPCPL]—which gives the court discretion to direct that defendants 'restore *any person in interest*' whenever a court 'issues a permanent injunction ... *as authorized in* [*S*]*ection 4* [*of the UTPCPL*].' [73 P.S. §§ 201–4, 4.1 (emphasis added)]. Reading these contiguous provisions of the statute together and accounting for its overall purpose of 'policing the marketplace and remedying unfair and deceptive conduct,' the Commonwealth concludes that restoration must be available to it as a remedy under the statute.
>
> This is a fair interpretation—and perhaps a more appealing one from a policy perspective—but still remains at odds with the Pennsylvania Supreme Court's pronouncement in *Meyer* [*II*]. Further, as defendants point out, counting the Commonwealth as a '*person* in interest' would stretch the statutory definition beyond its plain meaning. **It is even more troubling to give 'person' different meanings in different sections of the same statute, especially after the Pennsylvania Supreme Court recently defined the term without**

explicitly limiting its meaning. After considering various statutory interpretation arguments, the *Meyer* [*II*] Court excluded the Commonwealth and its agencies as 'persons' under the UTPCPL and gave no indication that the result would or should be different in the enforcement context. A contrary ruling in this case would appear to defy *Meyer* [*II*] and do violence to the UTPCPL's statutory scheme.

MTBE, Slip Op. at 19–22, 2015 U.S. Dist. LEXIS 88035 at 21–23, 2015 WL 4092326 at 5–6 (emphasis added; footnotes omitted). Accordingly, the District Court concluded that the Commonwealth was prohibited from seeking restoration under the UTPCPL. We find the District Court's analysis compelling and, for the reasons stated therein, similarly conclude that the Commonwealth may not seek restoration under the UTPCPL in this case. [23] Thus, Golden Gate's Preliminary Objection 10 is sustained.

[23] Notably, the District Court acknowledged its difficulty reconciling the *TAP* and *Meyer II* decisions:

> [T]his issue is an important one that the Pennsylvania Supreme Court should squarely address. Only adding to the confusion of the conflict in authorities is the [C]ourt's decision to remand *TAP* on unrelated grounds on the same day it issued *Meyer* [*II*], without any mention in *TAP* of the overlapping issue at the heart of *Meyer* [*II*]. The upshot is two rulings, issued on the same day, that may contradict each other.

MTBE, Slip. Op. at 22, 2015 U.S. Dist. Lexis 88035 at 23, 2015 WL 4092326 at 6 (footnote omitted).

*231 III. Breach of Contract—Preliminary Objection 9 [24]

[24] Preliminary Objection 9—Demurrer—the Amended Complaint fails to state a viable breach of contract claim.

Golden Gate argues that the Commonwealth's common law contract claim should be stricken from the Amended Complaint and dismissed with prejudice because the Department of Human Services' [25] (DHS) Nursing Facility Provider Agreements (Provider Agreements) are not contracts, as the Provider Agreements do not require any consideration to be paid to providers. Further, DHS has taken the position that Provider Agreements "represent nothing more than enrollment forms" and are "not contractual in character." *Dep't of Pub. Welfare v. Presbyterian Med. Ctr. of Oakmont*, 583 Pa. 336, 877 A.2d 419, 427 (2005). The Commonwealth states in its brief that, after considering Golden Gate's arguments and authority, it would, with Golden Gate's concurrence, agree to withdraw its breach of contract claim (Count II). Under the circumstances, the Court considers Count II of the Commonwealth's Amended Complaint withdrawn and, thus, Preliminary Objection 9 is moot.

[25] Effective November 24, 2014, the Department of Public Welfare was officially renamed the Department of Human Services.

IV. Unjust Enrichment—Preliminary Objections 3 and 11 [26]

[26] Preliminary Objection 3—Demurrer—the common law breach of contract and unjust enrichment claims are barred by Section 1504 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1504.

Preliminary Objection 11—Demurrer—if this Court finds that a contract existed between Golden Gate and the Commonwealth, the unjust enrichment claim should be stricken. Having accepted the Commonwealth's withdrawal of its breach of contract claim, we do not address Golden Gate's Preliminary Objection 11.

[40] Golden Gate asserts in Preliminary Objection 3 that because the General Assembly has provided a statutory remedy, the Commonwealth's common law cause of action for unjust enrichment must be dismissed. The unjust enrichment claim allegedly arises from the Facilities' "submi[ssion of] billings to the Pennsylvania Medical Assistance [(MA)] Program." Amended Complaint at 160, ¶ 279.

[41] **[42]** **[43]** **[44]** **[45]** Unjust enrichment is an equitable doctrine. *See Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 606 Pa. 584, 2 A.3d 526 (2010). It "is the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected, for which the beneficiary must make restitution. An action based on unjust enrichment is an action which sounds in quasi-contract or contract implied in law." *Id.* at 531 n.7 (citation omitted). Our Supreme Court has

> consistently held that where a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of

redress. *Interstate Traveller Serv[s.], Inc. v. [ ] Dep['t] of Env[tl.] Res*[.], 486 Pa. 536, 406 A.2d 1020 (1979); ***232** [ ] *Dept. of Env[tl.] Res*[.] *v. Wheeling–Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320 (1977); *Erie Human Relations Comm['n] ex rel. Dunson v. Erie Ins*[.] *Exch*[.], 465 Pa. 240, 348 A.2d 742 (1975); *Borough of Green Tree v. B[d.] of Prop* [.] *Assessments*, 459 Pa. 268, 328 A.2d 819 (1974); *Colteryahn Sanitary Dairy v. Milk Control Comm['n]*, 332 Pa. 15, 1 A.2d 775 (1938); *Ermine v. Frankel*, 322 Pa. 70, 185 A. 269 (1936); *Bowman v. Gum, Inc.*, 321 Pa. 516, 184 A. 258 (1936); *White v. Old York R[d.] Country Club*, 318 Pa. 346, 178 A. 3 (1935); *Taylor v. Moore*, 303 Pa. 469, 154 A. 799 (1931); *Moore v. Taylor*, 147 Pa. 481, 23 A. 768 (1892).

This theory is also embodied in our Statutory Construction Act [of 1972 [27]] which states:

> In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and *no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect.*

1 Pa.C.S. § 1504 (emphasis added).

Jackson v. Centennial Sch. Dist., 509 Pa. 101, 501 A.2d 218, 220 (1985); *see also White v. Conestoga Title Ins. Co.*, 617 Pa. 498, 53 A.3d 720 (2012). "[B]ut, where the legislature explicitly reveals in a statute that it does not intend for such exclusivity, a statutory procedure for dispute resolution does not preempt common law claims." *Id.* at 733. Further:

> When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, at least initially, by the administrative agency. Full utilization of the expertise derived from the development of various administrative bodies would be frustrated by indiscriminate judicial intrusions into matters within the various agencies' respective domains.

Feingold v. Bell of Pa., 477 Pa. 1, 383 A.2d 791, 793 (1977).

27 1 Pa. C.S. §§ 1501–1991.

We therefore review relevant statutory and regulatory provisions to determine whether the Legislature has provided a statutory remedy to address the alleged overpayment for provider services and, further, whether it "enact[ed] a pervasive regulatory scheme and ... establish[ed] a governmental agency possessing expertise and broad regulatory and remedial powers to administer [it.]" *Id.*

Section 206 of the Human Services Code (Code) [28] describes:

> [DHS] shall have the power:
>
> (1) Whenever the General Assembly shall have appropriated money to [DHS] for public welfare purposes, **to purchase necessary services for individuals entitled to such services at rates not exceeding those charged the general public or actual cost; such services may be purchased directly from agencies or institutions conforming to minimum standards established by [DHS] or by law or [DHS] may reimburse local public agencies which purchase such services from such agencies or institutions.** Except for day ***233** care services, this clause shall not be interpreted to include the direct provision by [DHS] of services to dependent or neglected children.
>
> (2) **To establish rules and regulations not inconsistent with law prescribing minimum standards of plant, equipment, service, administration and care and treatment for agencies and institutions furnishing service to individuals paid for, in whole or in part, by money appropriated to [DHS] by the General Assembly, and when not otherwise established by law, fixing per diem or other rates for services furnished by such agencies or institutions.**

62 P.S. § 206 (emphasis added). Section 403.1 of the Code [29] provides in relevant part:

(a) [**DHS**] **is authorized to establish rules, regulations, procedures and standards consistent with law as to the administration of programs providing assistance** ... that do any of the following:

(1) Establish standards for determining eligibility and the nature and extent of assistance.

(2) Authorize providers to condition the delivery of care or services on the payment of applicable copayments.

(3) Modify existing benefits, establish benefit limits and exceptions to those limits, establish various benefit packages and offer different packages to different recipients, to meet the needs of the recipients.

(4) **Establish or revise provider payment rates or fee schedules, reimbursement models or payment methodologies for particular services.**

(5) Restrict or eliminate presumptive eligibility.

(6) **Establish provider qualifications.**

(b) [DHS] is authorized to develop and submit State plans, waivers or other proposals to the Federal Government and to take such other measures as may be necessary to render the Commonwealth eligible for available Federal funds or other assistance.

62 P.S. § 403.1 (emphasis added).

28 Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §§ 101–1503. Effective December 28, 2015, the Public Welfare Code was renamed the Human Services Code. *See* 62 P.S. § 101.

29 Added by Section 2 of the Act of June 30, 2011, P.L. 89.

DHS's Regulations are contained in the Medical Assistance (MA) Manual (Manual). [30] The Manual "sets forth the MA regulations and policies which apply to providers." Section 1101.11(a) of the Manual, 55 Pa. Code § 1101.11(a). Section 1101.11(b) of the Manual provides that "[t]he MA Program is authorized under Article IV of the [Code] (62 P.S. §§ 401–488) and is administered in conformity with Title XIX of the Social Security Act (42 U.S.C. §§ 1396–1396[w–5]) and regulations issued under it." 55 Pa. Code § 1101.11(b).

30 55 Pa. Code §§ 1101.11–1251.81

Section 1101.74 of the Manual provides:

> If, after investigation, [DHS] determines that a provider has submitted or has caused to be submitted claims for payments which the provider is not otherwise entitled to receive, [DHS] will, in addition to the administrative action described in [Sections] 1101.82–1101.84 [of the Manual] (relating to administrative procedures), refer the case record to the Medicaid Fraud Control Unit of the Department of Justice for further investigation and possible referral for prosecution under Federal, State and local laws. Providers who are convicted by a Federal court of willfully defrauding the Medicaid program are subject to a $25,000 ***234** fine or up to five years imprisonment or both.

55 Pa. Code § 1101.74. Further, Section 1101.75(a) of the Manual [31] enumerates provider prohibited acts which include submitting false or fraudulent claims. Section 1101.75(b) of the Manual also mandates that providers or other persons who violate its provisions are subject to criminal penalties, enforcement actions and restitution and repayment. *See* 55 Pa. Code § 1101.75(b).

31 Section 1101.75(a) of the Manual states, in relevant part:

> An enrolled provider may not, either directly or indirectly, do any of the following acts:
>
> (1) Knowingly or intentionally present for allowance or payment a false or fraudulent claim or cost report for furnishing services or merchandise under MA, knowingly present for allowance or payment a claim or cost report for medically unnecessary services or merchandise under MA, or knowingly submit false information, for the purpose of obtaining greater compensation than that to which the provider is legally entitled for furnishing services or merchandise under MA.

> (2) Knowingly submit false information to obtain authorization to furnish services or items under MA.
>
> ....
>
> (5) Submit a claim for services or items which were not rendered by the provider or were not rendered to a recipient.
>
> ....
>
> (8) Submit a claim which misrepresents the description of the services, supplies or equipment dispensed or provided, the date of service, the identity of the recipient or of the attending, prescribing, referring or actual provider.
>
> ....
>
> (12) Enter into an agreement, combination or conspiracy to obtain or aid another in obtaining payment from the Department for which the provider or other person is not entitled, that is, eligible.
>
> (13) Make a false statement in the application for enrollment or reenrollment in the program.
>
> (14) Commit a prohibited act specified in [Section] 1102.81(a) [of the Manual] (relating to prohibited acts of a shared health facility and providers practicing in the shared health facility).

55 Pa. Code § 1101.75(a).

Section 1101.83 of the Manual specifically provides for restitution and repayment as follows:

> (a) **If [DHS] determines that a provider has billed and been paid for a service or item for which payment should not have been made, it will review the provider's paid and unpaid invoices and compute the amount of the overpayment or improper payment. [DHS] will use statistical sampling methods and, where appropriate, purchase invoices and other records for the purpose of calculating the amount of restitution due for a service, item, product or drug substitution.**
>
> (b) [DHS] may seek reimbursement from the ordering or prescribing provider for payments to another provider, if [DHS] determines that the ordering or prescribing provider has done either of the following:
>
> (1) Prescribed excessive diagnostic services; or
>
> (2) Ordered diagnostic services or treatment or both, without documenting the medical necessity for the service or treatment in the medical record of the MA recipient.
>
> (c) **The amount of restitution demanded by [DHS] will be the amount of the overpayment received by the ordering or prescribing provider or the amount of payments to other providers for excessive or unnecessary services prescribed or ordered. If the ordering or prescribing provider is convicted of an offense under Article XIV of the [Code] (62 P.S. §§ 1401– *235 1411), the restitution penalties of that article applies.**
>
> (d) **The provider shall pay the amount of restitution owed to [DHS] either directly or by offset of valid invoices that have not yet been paid. The method of repayment is determined by [DHS]. All [DHS] demands for restitution will be approved by the Deputy Secretary for [MA] before the provider is notified.**
>
> (e) **If [DHS] determines that a provider has committed any prohibited act or has failed to satisfy any requirement under [Section] 1101.75(a) [of the Manual] (relating to provider prohibited acts), *it* may institute a civil action against the provider in addition to terminating the provider's enrollment. If [*DHS*] institutes a civil action against the provider, [*DHS*] may seek to recover twice the amount of excess benefits or payments plus legal interest from the date the violations occurred.**
>
> (f) The provider is prohibited from billing an eligible recipient for any amount for which the provider is required to make restitution to [DHS].

55 Pa. Code § 1101.83 (italic and bold emphasis added). [32]

32 The Commonwealth contends that there is no authority for a **regulation** to displace common law remedies. However, Sections 1101.75 and 1101.83 of the Manual substantially track Section 1407 of the Code, 62 P.S. § 1407, added by Section 3 of the Act of July 10, 1980, P.L. 493, which provides a comprehensive, detailed statutory procedure addressing fraudulent MA claims, providing criminal penalties therefor, and permitting DHS to pursue civil remedies. Further, Section 1410 of the Code states "**[DHS] shall have the power and its duty shall be to adopt rules and regulations** to carry out the provisions of this article." 62 P.S. § 1410 (added by Section 3 of the Act of July 10, 1980, P.L. 493) (emphasis added).

Finally, Section 1187.1(c) of the Manual states: "The MA Program provides payment for nursing facility services provided to eligible recipients by enrolled nursing facilities. **Payment for services is made subject**

to this chapter and **Chapter 1101** (relating to general provisions)." 55 Pa. Code § 1187.1(c) (emphasis added).

The Commonwealth admits that "[DHS] has promulgated comprehensive regulations to implement the [MA P]rogram [that] cover rate-setting ... and include mechanisms both for punishing non-compliance ... and for recovering overpayments to providers." Commonwealth's Br. at 40. Nevertheless, the Commonwealth contends that it is entitled to pursue its equitable unjust enrichment claim.

The instant matter is controlled by our Supreme Court's decision in *Commonwealth v. Glen Alden Corp.*, 418 Pa. 57, 210 A.2d 256 (1965).[33] In *Glen Alden*, the Commonwealth filed an action in the trial court's equity jurisdiction seeking an order requiring the defendants to remove burning coal piles, asserting that the coal piles constituted a public nuisance. The trial court sustained the defendants' preliminary objections to the trial court's equity jurisdiction.

33 In *Glen Alden*, the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, 35 P.S. §§ 4001–4015 was at issue. The Supreme Court's decision was superseded by the 1968 amendments to the Act, *see* Act of June 12, 1968, P.L. 163, 35 P.S. § 4012.1, *as recognized in Borough of Brookhaven v. American Rendering, Inc.*, 434 Pa. 290, 256 A.2d 626 (1969).

On appeal, the Pennsylvania Supreme Court explained: "[W]e have frequently decided that equity has no jurisdiction to inquire into a controversy where to do so would obviate a statutory procedure provided by the Legislature for its resolution." ***236** *Id.* at 258. Finding that the Air Pollution Control Act set forth a specific procedure to address the very issue before the trial court in equity, the Court held that "equity may not inquire into the dispute, notwithstanding the fact that the complaint may state a cause of action in public nuisance, traditionally cognizable in equity." *Id.* The Court explained: "The Commonwealth, at the instance of the Secretary of Health, complains that the burning refuse piles maintained by defendants release noxious gases to the detriment of the health and well[-]being of the surrounding residents. The Air Pollution Control Act is designed to regulate this very problem." *Id.* The Court further stated: "[W]e do not hesitate to conclude that the Legislature has provided a statutory method for resolution of the alleged problem set forth in the Commonwealth's complaint, and therefore, it must be strictly pursued." *Id.* at 259. The Court concluded: "[W]e see no reason why [the Commonwealth] should be permitted to short circuit the method provided by the Legislature for resolving the present controversy." *Id.* at 260.

In the case at bar, the Commonwealth contends that the Parent Entities and GGNSC Equity Holdings LLC were unjustly enriched because the Facilities submitted billings to the MA Program for care they either did not provide, or was inadequately rendered. As in *Glen Alden*, a statutory remedy exists, and "we see no reason why [the Commonwealth] should be permitted to short circuit the method provided by the Legislature for resolving the present controversy." *Id.* at 260. Both the Code and the Manual set forth the manner in which MA billing disputes shall be remedied, and charges DHS with the responsibility of resolving the same. Because Section 1504 of the Statutory Construction Act of 1972 and the aforementioned case law require those statutory remedies to be strictly pursued, we sustain Golden Gate's Preliminary Objection 3 and dismiss the Commonwealth's unjust enrichment claim.[34]

34 Having dismissed the Commonwealth's unjust enrichment claim, we need not address Golden Gate's other related arguments.

V. Preliminary Objection 12

[46] Golden Gate alleges in Preliminary Objection 12 that claims against the Parent Entities must fail because the Commonwealth has not alleged facts sufficient to pierce the corporate veil or impose vicarious liability.

[47] Under Pennsylvania law, the existence and extent of shareholder liability for corporate indebtedness is determined by the law of the state of incorporation. *Broderick v. Stephano*, 314 Pa. 408, 171 A. 582 (1934). The Parent Entities and the Facilities were incorporated in Delaware. Therefore, in evaluating whether the Commonwealth has alleged sufficient facts to pierce Golden Gate's corporate veil, we must apply Delaware law.

[48] [49] [50] [51] [52] [53] [54] [55] [56] [57] [58] The Delaware Court of Chancery has explained:

> In order to state a cognizable claim to pierce the corporate veil of the [g]eneral [p]artner, plaintiffs must allege facts that, if taken as true, demonstrate the [o]fficers' and/or the [p]arents' ***complete*** **domination and control** of the [g]eneral [p]artner. **The degree of control required to pierce the veil is exclusive domination and control** ... to the point that [the [g]eneral [p]artner] **no longer has legal or independent significance of [its] own.**
>
> Piercing the corporate veil under the alter ego theory **requires that the *cor* *237 *porate structure* cause fraud or similar injustice**.[35] Effectively, the corporation must be a sham and **exist for no other purpose than as a vehicle for fraud**.

Wallace v. Wood, 752 A.2d 1175, 1183–84 (Del. Ch. 1999) (italic and bold emphasis added; footnotes and quotation marks omitted); *see also Outokumpu Eng'g Enters., Inc. v. Kvaerner Enviropower, Inc.*, 685 A.2d 724, 729 (Del. Super. 1996). Accordingly, "[t]o state a 'veil-piercing claim,' the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors." *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003). Notably, "the fraud or similar injustice that must be demonstrated in order to pierce a corporate veil under Delaware law must, in particular, 'be found in the defendants' **use of the *corporate form.***" *Foxmeyer Corp. v. Gen. Elec. Corp.*, 290 B.R. 229, 236 (Bankr. D. Del. 2003) (italic and bold emphasis added) (quoting *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260, 269 (D. Del 1989)).[36]

35 The term " '[s]imilar injustice' includes the contravention of law or contract." *Nufarm v. RAM Research*, 1998 WL 668648 (Del. Ch., C.A. No. 16179, filed Sept. 15, 1998), Ltr. Op. at ——.

36 Under Pennsylvania law:

> Piercing the corporate veil is an extraordinary remedy reserved for cases involving exceptional circumstances. There is a strong presumption against piercing the corporate veil, and the independence of separate corporate entities is presumed.
>
> The purpose of the doctrine of piercing the corporate veil is to assess liability for the acts of a corporation to the equity holders in the corporation by removing the statutory protection otherwise insulating a shareholder from liability. Where a corporation operates as a mere façade for the operations of a dominant shareholder, the dominating shareholder may be held liable for the corporation's inequitable conduct perpetrated through the use of the corporate form's protections.
>
> While there is no bright-line test for when to pierce the corporate veil, courts established the following list of factors for consideration: '[1] [u]ndercapitalization, [2] failure to adhere to the corporate formalities, [3] substantial intermingling of corporate and personal affairs and [4] use of the corporate form to perpetrate a fraud.' *Lumax Indus., Inc.* [*v. Aultman*], ...669 A.2d [893,] 895 [(Pa. 1995)] (citing *Dep't of Envtl. Res. v. Peggs Run Coal Co.*, ...423 A.2d 765, 768–69 ([Pa. Cmwlth.] 1980)).
>
> *Newcrete Prods. v. City of Wilkes–Barre*, 37 A.3d 7, 12–13 (Pa. Cmwlth. 2012) (citations omitted).
>
> Importantly, "[t]he corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime." *Mosaica Educ., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 925 A.2d 176, 184 (Pa. Cmwlth. 2007). Further:
>
> > Any inquiry involving corporate veil-piercing must 'start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception.' *Wedner v. Unemployment Comp*[.] *Bd. of Review*, 449 Pa. 460, 296 A.2d 792, 794 (1972). **One 'exception' is the alter ego theory which requires proof (1) that the party exercised domination and control over [the] corporation; and (2) that injustice will result if [the] corporate fiction is maintained despite unity of interests between [the] corporation and its principal.**
>
> *Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co.*, 53 A.3d 53, 58 n.7 (Pa. Super. 2012) (emphasis added).

The Commonwealth alleges numerous facts in the Amended Complaint supporting its assertion that the Parent Entities controlled the Facilities, and that the Parent Entities siphoned monies from the Facilities.[37] The Commonwealth contends that GGNSC Holdings LLC directly or indirectly owns each of the Parent Entities and each of the Facilities, and that *238 GGNSC Holdings LLC "exercises pervasive, day-to-day control over the operations of the [Facilities] through the actions of ... the other [Parent Entities]." Amended Complaint at 150, ¶ 253. Further, the Commonwealth in its Amended Complaint describes the corporate structure as follows:

> [T]he relationship between each of the [Facilities] and Golden Gate National Senior Care LLC, GGNSC Clinical Services LLC, and Golden Ventures is not a typical arm's length relationship, in which one business contracts with another to provide services at its direction. On information and belief, the [Facilities] do not provide direction to or exercise any measure of control over Golden Gate National Senior Care LLC, GGNSC Clinical Services LLC, or Golden Ventures, nor do the [Facilities] direct the services that these entities provide to them. Rather, these [Parent Entities] exercise pervasive day-to-day control over the [Facilities]—at the direction of the ultimate parent company, [GGNSC Holdings LLC]. The [Facilities] are then, in turn, required to pay each of these [Parent Entities] for these services.

Amended Complaint at 152, ¶ 257. The Commonwealth further avers:

> The [Parent Entities] exercise control over the [Facilities] by, for example:
>
> (a) Restricting the ability of the [Facilities'] managers to increase staffing levels;
>
> (b) Supervising—and in some cases, overriding—the personnel decisions of the [Facilities];
>
> (c) Visiting facilities, observing care, and enforcing corporate-level policies;
>
> (d) Preparing and submitting requests for reimbursement and required cost reports under the [MA] Program in Pennsylvania;
>
> (e) Creating and implementing company-wide policies and incentive programs;
>
> (f) Requiring centralized reporting of key data points—such as daily reporting of census information—from the [Facilities] to the [Parent Entities];
>
> (g) Maintaining a company-wide Customer Compliance Hotline for residents to call if they have raised a concern with [Facilities] staff but still feel that their concern has not been addressed to their satisfaction.

Amended Complaint at 152–53, ¶ 258.

37 Importantly, "[t]he Commonwealth has not alleged (and is not suggesting) that the [Facilities] are deeply in debt or insolvent [.]" Commonwealth's Br. at 54.

Clearly absent from the Amended Complaint, however, are allegations that Golden Gate "**use[d] ... the *corporate form*" to engage in "fraud or similar injustice**[.]" *Foxmeyer*, 290 B.R. at 236 (emphasis added). Thus, the Commonwealth did not allege that the Parent Entities used the particular nature of Golden Gate's corporate structure to engage in "fraud or similar injustice." *Id.* Nor did the Commonwealth allege in its Amended Complaint facts sufficient to support a conclusion that "[Golden Gate] [is] a sham and exist[s] for **no other purpose** than as a vehicle for fraud." *Id.* (emphasis added). [38] Accordingly, Golden Gate's Preliminary Objection 12 is sustained. [39]

38 In the Amended Complaint, the Commonwealth alleges that the various Facilities "own[ ] and operate[ ] skilled nursing facilit[ies.]" Amended Complaint at 11–20, ¶¶ 27–76. As such, these allegations conflict with the premise that the Facilities are "sham[s] and exist for **no other purpose** than as a vehicle for fraud." *Wallace*, 752 A.2d at 1184 (emphasis added).

39 We also reject the Commonwealth's assertion that the Parent Entities are vicariously liable for the acts of the Facilities, given that the argument seeks to disregard the corporate form without meeting the requirements for piercing the corporate veil.

***239 Conclusion**

Based on the foregoing, Preliminary Objections 1, 2, and 7 are overruled. Preliminary Objections 3, 4, 5, 6, 8, 10, 11 and 12 are sustained. [40]

40 For the reasons stated herein, Preliminary Objection 9 is moot.

Given our disposition of the Preliminary Objections, for all of the above reasons, the Amended Complaint is dismissed.

ORDER

AND NOW, this 22nd day of March, 2017, we dispose of Defendants Golden Gate National Senior Care, LLC, *et al.*'s Preliminary Objections as follows:

Preliminary Objection 1: Overruled.

Preliminary Objection 2: Overruled.

Preliminary Objection 3: Sustained.

Preliminary Objection 4: Sustained.

Preliminary Objection 5: Sustained.

Preliminary Objection 6: Sustained.

Preliminary Objection 7: Overruled.

Preliminary Objection 8: Sustained.

Preliminary Objection 9: Moot.

Preliminary Objection 10: Sustained.

Preliminary Objection 11: Sustained.

Preliminary Objection 12: Sustained.

Based on the disposition of the Preliminary Objections, the Amended Complaint is hereby dismissed.

CONCURRING AND DISSENTING OPINION BY JUDGE COHN JUBELIRER

I, respectfully, cannot completely agree with the thoughtful Majority opinion, and, therefore write separately.

I concur with the Majority's decision insofar as it holds that the Commonwealth has not stated claims under Sections 2(4)(v), 2(4)(ix), and 2(4)(x) of the Unfair Trade Practices and Consumer Protection Law (UTPCPL), [1] because the representations in the advertising materials are puffery. I also agree that the care plans, resident assessments, and bills are not advertising and are, therefore, not actionable under the above provisions. However, Section 2(4)(xxi) of the UTPCPL differs from the other provisions relied upon by the Commonwealth as Section 2(4)(xxi) establishes a cause of action to remedy "any ... fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201–2(4)(xxi). There is no requirement under this "catch all" provision that the representation be made in an advertisement.

1 Act of December 17, 1968, P.L. 1224, as amended, 73 P.S. §§ 201–2(4)(v), (ix), (x).

By addressing Section 2(4)(xxi) separately from Sections 2(4)(v), 2(4)(ix), and 2(4)(x), the Majority recognizes this distinction. However, the Majority, *sua sponte*, raises and then sustains a preliminary objection on the basis that the Commonwealth did not attach a copy of the writings that underlie the cause of action. *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 158 A.3d 203, 224 (Pa. Cmwlth., No. 336 M.D. 2015, filed March 22, 2017). Golden Gate National Senior Care LLC (Golden Gate) did not raise this as a basis for its preliminary objections, see Rule 1032(a) of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 1032(a) (a "party waives all ... objections which are not presented ... by preliminary objection"), and it is not jurisdictional. Because the Court addressed an objection not raised by Golden Gate, the Commonwealth could not respond by either amending its pleading or explaining why the writings could not be attached. See Pa. R.C.P. No. 1028(c)(1) ("A party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections" ***240**); Pa. R.C.P. No. 1019(i) ("[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, *but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing*" (emphasis added)). I note that the writings at issue could contain confidential medical information. See 42 U.S.C. § 1396r(c)(1)(A)(iii) (providing residents of skilled nursing facilities who receive medical assistance through Medicaid with "[t]he right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups"). I would therefore not dismiss this claim, pursuant to Section 2(4)(xxi) of the UTPCPL, insofar as it alleges deceptive

conduct involving bills and care plans which could directly impact purchasing decisions. [2]

2 I recognize that care plans are created after a resident arrives at a nursing care facility. However, the relationship between residents, and their representatives, and the facilities are ongoing, and the services are arguably continually purchased. In addition, care plans are amended as needs change. Therefore, I cannot say at this early stage, that the allegations here could not affect whether residents and/or their representatives can make informed decisions regarding whether to continue to purchase services from a particular facility. See, e.g., the federal Resident's Bill of Rights, 42 U.S.C. §§ 1395i–3(c), 1396r(c), and associated regulations, which require that residents who receive assistance through Medicare or Medicaid be given care plans and be provided with the opportunity to be involved in the crafting of and amending of such plans; 42 U.S.C. § 1395i–3(c)(1)(A)(i) (providing for "[t]he right [of Medicare recipients] to ... be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment"); 42 U.S.C. § 1396r(c)(1)(A)(i) (providing the same for those residents that receive assistance through medical assistance programs administered by states (Medicaid)); see also 42 C.F.R. § 483.10 (detailing the rights of residents in long term care facilities); 42 U.S.C. §§ 1395i–3(c)(1)(B)(iii), 1396r(c)(1)(B)(iv) (providing for the right to be informed "periodically during the resident's stay, of services available in the facility and of related charges for such services").

I also question the Majority's decision to sustain Golden Gate's Preliminary Objection X, alleging that the Commonwealth may not recover restitution or restoration for itself under Section 4.1 of the UTPCPL, 73 P.S. § 201–4.1. Because the Majority has already dismissed the underlying substantive claims, there is no need to decide whether the Commonwealth is a "person in interest" entitled to restitution or restoration under Section 4.1 of the UTPCPL, and therefore the question is moot and the discussion merely dicta. I do not believe the Court should address a complex issue of first impression in dicta. [3] This is particularly true where, as here, the resolution of the issue is subject to differences of opinion. I am not convinced that the Supreme Court's determination in *Meyer v. Community College of Beaver County*, 625 Pa. 563, 93 A.3d 806 (2014) (*Meyer II*), that the UTPCPL does not include a political subdivision or agency in its definition of "a 'person' subject to *liability*" would necessarily mean that the Attorney General could not be a "person in interest" here, in bringing a cause of action under Section 4.1. I agree with the Majority that "[w]hen the meaning of a word or phrase *is clear* when used in one ***241** section, it will be construed to mean the same thing in another section of the same statute." *Housing Auth. of Cnty. of Chester v Pa. State Civil Serv. Comm'n*, 556 Pa. 621, 730 A.2d 935, 945–46 (1999) (emphasis added). However, the Supreme Court has found that the UTPCPL is *not clear*, but is *ambiguous* as to the meaning of the word "person." *Meyer II*, 93 A.3d at 814. In *Meyer II*, the Supreme Court applied the principles of statutory construction to that ambiguous term and reasoned that the General Assembly could not have intended to include political subdivisions as a *person subject to liability* because imposing liability would violate the longstanding principle that government entities are not subject to punitive damages, and because the purpose of the statute is to protect consumers from merchants, not from the government. *Id.* at 814–15. That reasoning is not applicable here because no liability will be imposed upon a government entity; instead, the Commonwealth is seeking restitution and restoration from Golden Gate, a merchant, for money the Commonwealth paid as a result of the alleged deception. Given that the Supreme Court has found the term "person" ambiguous as used in the UTPCPL, an interpretation that the Commonwealth can be a "person of interest" in the restoration provision is permissible and consistent with our mandate to construe the terms of the UTPCPL "liberally to effect its object of preventing unfair or deceptive practices." *Com., by Creamer v. Monumental Props., Inc.*, 459 Pa. 450,329 A.2d 812, 817 (1974). [4]

3 The same principle applies to the Majority's decision to address Golden Gate's Preliminary Objection XII. There is no need for the Majority to hold that the Commonwealth cannot pierce the corporate veil when the Majority already dismissed all the substantive claims asserted.

4 I believe that this relief could nonetheless be available under Section 4 of the UTPCPL, 73 P.S. § 201–4, if the Commonwealth can prove a claim under Section 2(4)(xxi). Section 4 provides the Attorney General with the authority to seek injunctive relief if it has reason

to believe that any person has violated the substantive provisions of the UTPCPL. In interpreting a similar provision of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41–58, as amended, federal courts have uniformly held that because the FTC Act provides the government with the authority to seek injunctive relief, the panoply of equitable power are also available to the courts to deprive a defendant of unjust gains. I note that we may look to federal decisions under the FTC Act for guidance in interpreting similar provisions in the UTPCPL. *Com., by Creamer v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812, 818 (1974). The Attorney General under the UTPCPL sits in the same position as the FTC sits under the FTC Act. *See e.g., Fed. Trade Comm'n v. Commerce Planet, Inc.*, 815 F.3d 593, 599 (9th Cir. 2016), *cert. denied sub nom. Gugliuzza v. Fed. Trade Comm'n*, —U.S. ——, 137 S.Ct. 624, 196 L.Ed.2d 515 (2017), and *cert. denied sub nom. Gugliuzza v. Fed. Trade Comm'n*, — U.S. ——, 137 S.Ct. 624, 196 L.Ed.2d 515 (2017) (concluding "[t]he equitable jurisdiction to enjoin future violations of § 5(a) [of the FTC Act, 15 U.S.C. § 53(b)] carries with it the inherent power to deprive defendants of their unjust gains from past violations"); *Fed. Trade Comm'n v. Mylan Labs., Inc.*, 62 F.Supp.2d 25, 37 (D.D.C.), *on reconsideration in part sub nom. Fed. Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1 (D.D.C. 1999) (holding that the FTC may seek disgorgement or any other form of equitable ancillary relief once an injunction is issued under Section 13(b) of the FTC Act); *Fed. Trade Comm'n v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) ("The [trial court] has broad remedial discretion to grant an appropriate form of equitable relief under section 13(b) of the [FTC] Act").

For the foregoing reasons, I respectfully dissent to the Majority's decision to dismiss the Commonwealth's claim under Section 2(4)(xxi) of the UTPCPL on the basis of an objection that was not raised by Golden Gate but raised *sua sponte* by this Court. I also disagree that the Court should address a complex and significant issue of first impression in dicta and question the Majority's resolution of that issue. In all other areas, I concur.

All Citations

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CERTIFICATE OF SERVICE

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