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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 16 MAP 2017

COMMONWEALTH of Pennsylvania
Acting by Attorney General, Josh Shapiro,

Appellant

v.

GOLDEN GATE NATIONAL SENIOR CARE LLC, et al.,

Appellees.

BRIEF OF *AMICI CURIAE* CENTER FOR ADVOCACY FOR THE RIGHTS AND INTERESTS OF THE ELDERLY, COMMUNITY LEGAL SERVICES, COMMUNITY JUSTICE PROJECT, and NEIGHBORHOOD LEGAL SERVICES IN SUPPORT OF APPELLANT COMMONWEALTH OF PENNSYLVANIA

Appeal from the March 22, 2017 Order of the Commonwealth Court of Pennsylvania, at No. 336 M.D. 2015.

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are non-profit organizations that promote the rights of seniors and low-income consumers. *Amici* have a special interest and substantial expertise regarding the needs and rights of current and prospective nursing home residents, as well as low-income consumers in Pennsylvania.

The Center for Advocacy for the Rights and Interests of the Elderly ("CARIE") is a Philadelphia-based elder advocacy organization. For 40 years, CARIE has assisted, educated and advocated on behalf of more than 100,000 seniors and caregivers, including thousands of nursing home residents, to ensure seniors can live with dignity and the greatest independence and quality of life possible. CARIE LINE, a telephone, online and in-person service providing advocacy, counseling, education, and referrals, serves over 3,000 individual elders and caregivers each year. Since 1981, CARIE has provided long-term care ombudsman services in Philadelphia, including advocacy and complaint resolution for elders in nursing homes, assisted living facilities, domiciliary care, and adult day centers. CARIE currently provides ombudsman services at 150 long-term care settings, serving thousands of frail seniors in Philadelphia.

For over 50 years, **Community Legal Services, Inc. ("CLS")** has served the legal needs of low-income Philadelphians by providing advice and representation in civil matters, advocating for legal rights, and conducting

community education. CLS' Homeownership and Consumer Rights Unit represents consumers in a range of matters to preserve their homes and maintain economic security, including mortgage foreclosure, tax foreclosure, debt collection, payday lending, student loans, and predatory lending schemes. CLS also provides advice and referral services to low-income consumers and advocates for laws and programs to protect consumers from unfair and predatory practices. CLS' Aging and Disabilities Unit represents seniors and people with disabilities in a range of public benefits and consumer matters, including challenges to denials of Medicaid, Medicare, or disability benefits, decisions by managed care organizations to deny care, and violations of nursing home residents' rights and quality-of-care requirements in nursing homes and personal care homes.

The Community Justice Project ("CJP") is a statewide project of the Pennsylvania Legal Aid Network. CJP engages in impact advocacy—such as class action litigation and administrative advocacy—on behalf of low-income families and individuals in civil matters. Much of CJP's work is done directly on behalf of consumers or for the benefit of consumers, including challenges to fraudulent or deceptive acts and practices under the Unfair Trade Practices and Consumer Protection Law ("UTPCPL").

Neighborhood Legal Services Association ("NLSA") provides free civil legal representation, advice, and education to low-income individuals and families.

Over the past 51 years, NLSA has helped over 1.1 million indigent residents and victims of domestic violence of Allegheny, Beaver, Butler and Lawrence Counties in a range of civil legal issues. For over 20 years, NLSA has offered expanded legal services to all senior citizens in housing and consumer matters and preparing personal care documents like powers of attorney and advance directives. In the past 7 years, NLSA has handled over 4,600 such cases, of which more than 36% were consumer-related.

Amici are interested in this case because of the significant impact it will have on the Commonwealth's most vulnerable residents: seniors and low-income families.

SUMMARY OF ARGUMENT

The Court must consider Defendants' marketing statements from the perspective of seniors targeted by the statements in light of their unique vulnerabilities and the specific challenges present in the nursing home context. Nursing home residents are often exposed to neglect and substandard care as alleged in the Amended Complaint. Current and prospective residents are particularly susceptible to false and misleading statements due to cognitive impairments, limited publicly-available information about nursing home quality, and widespread inaccuracies in available information. Consequently, older consumers must rely on advertisements, marketing statements, and individual

representations to guide vital decisions about their health, safety, and wellbeing. It is, therefore, essential to give meaning to the remedial provisions of the UTPCPL to protect vulnerable seniors from false, misleading, and deceptive conduct, including advertising.

Defendants' marketing statements are concrete, specific, and measurable, and thus actionable under the UTPCPL. Far from the vague, subjective statements typically considered non-actionable puffery, many of the statements recite specific requirements of federal and state law. Defendants' express representations in resident assessments, care plans, and bills are also actionable under the UTPCPL because the statute is not limited to statements made in widely disseminated advertising and applies to individual representations made directly to consumers. The Commonwealth Court's contrary holding yields an unprecedented narrowing of the statute in direct conflict with its broad remedial purpose.

Moreover, the Court must recognize the Commonwealth's clear statutory authority to seek restoration from Defendants as a result of their unfair and deceptive practices. Preventing the Commonwealth from seeking restoration under the UTPCPL in this case and others would harm vulnerable consumers, especially seniors and low-income families, contrary to the clear intent of the legislature.

ARGUMENT

I. Nursing home residents are uniquely vulnerable and must be protected from false and misleading statements.

A. Nursing home residents are frequent victims of abuse and neglect.

Nursing home residents are vulnerable to abuse and neglect, and frequently suffer injury or even death as the result of substandard care. Nursing home residents live communally, often isolated from their support networks, and are highly dependent on others for basic care due to physical and cognitive impairments. These factors independently increase the risk of elder mistreatment, and the risks are compounded by the presence of other co-occurring factors. Nat'l Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, 88-103 (Richard J. Bonnie & Robert B. Wallace eds., 2003) ("*Elder Mistreatment*"). Unsurprisingly, the empirical data shows an alarming trend of abuse and neglect in nursing facilities in Pennsylvania and nationwide.

In a 2000 study of abuse and neglect in nursing homes, 44% of the residents interviewed stated they had been abused, and 95% said they had been neglected or had witnessed the neglect of another resident. *Id.* at 453, 463. National databases maintained by nursing home enforcement agencies also show health and safety violations at disturbing rates. In 2014, state inspections revealed that over 10% of the facilities surveyed nationwide were cited for causing actual harm to residents or placing them in immediate jeopardy. Ctrs. for Medicare and Medicaid Servs.,

U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2015 Edition* 96 (2015).

Pennsylvania nursing homes are no exception. Over a three-year period before May 2017, Pennsylvania nursing homes were cited for 15,454 deficiencies, the fifth highest nationally. Charles Orenstein & Lena Groeger, ProPublica, *State-by-State Breakdown*, Nursing Home Inspect (Aug. 2017), http://projects.propublica.org/nursing-homes/summary. 14,729 incidents involved at least the potential for more than minimal harm to residents, and 493 were characterized as causing actual harm or immediate jeopardy to the health and safety of residents - the most severe categorizations. *Id.*

Facilities with the most serious violations are also the most likely to cycle in and out of compliance with federal law and to continue to harm residents despite enforcement efforts. U.S. Gov't Accountability Office, GAO-07-241, *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* 27 (2007). A 2007 GAO Report examining facilities with a history of harming residents found that nearly half of the facilities moved in and out of compliance more than once over a five-year period, continuing to harm residents even after sanctions had been applied. *Id.* at 27-28.

Yet these statistics substantially underrepresent the scope of the problem. The challenges associated with compiling accurate data on nursing home abuse

mean that existing data fails to capture a "vast reservoir of undetected and unreported elder mistreatment in nursing homes." *Elder Mistreatment*, at 102. This conclusion is echoed by a June 2015 in-depth report analyzing Philadelphia nursing home inspections and investigations from 2012 through 2014, which showed that the Pennsylvania Department of Health ("DOH") dismissed 92% of the 507 complaints filed by residents or other individuals as unfounded. Community Legal Services of Philadelphia, *Careless: How the PA Department of Health Has Risked the Lives of Elderly and Disabled Nursing Home Residents* (2015) ("*Careless*"), available at https://clsphila.org/learn-about-issues/careless-how-pennsylvania-department-health-has-risked-lives-elderly-and-disabled. Even when violations were found, DOH routinely mischaracterized their severity, sometimes even classifying deaths caused by nursing home negligence as "minimal harm." *Id.* at 8. The report revealed that complaints were often dismissed only to have DOH surveyors conduct an annual survey just weeks or even days later and record many serious violations. *Id.* at 4. Moreover, of the 161 follow-up visits conducted after a violation was found, not once was it determined that the violation persisted. *Id.* at 2. These findings are consistent with the daily experiences of the elderly clients that *Amici* represent. Dismissals and misclassifications result in data that dramatically underestimates the scope of the harm to seniors who depend on nursing homes for their health, safety, and

happiness, and misleads prospective residents considering their options.

B. Public rating systems do not accurately reflect the disparity in nursing facility quality.

Many online resources assessing nursing facility quality are not user-friendly, and intermediaries, including hospital discharge planners, are reluctant to recommend these sites to consumers. Lisa R. Shugarman & Julie A. Brown, *Nursing Home Selection: How Do Consumers Choose?* at vi (2006). Even when prospective nursing home residents look to online tools to compare the quality of nursing homes, flaws in DOH investigations and inspections fundamentally undermine their reliability.

DOH is required to report all violations and complaints to the Centers for Medicare and Medicaid Services ("CMS"). CMS compiles this data and publishes it via its Nursing Home Compare tool. This tool provides consumers with ratings for each nursing home based on substantiated complaints and reported violations. *About Nursing Home Compare Data*, Nursing Home Compare, https://www.medicare.gov/NursingHomeCompare/Data/About.html (last visited Aug. 1, 2017). The severity of violations, as reported by DOH, is also considered when CMS rates nursing facilities. *Careless*, at 9. Therefore, if DOH fails to substantiate legitimate complaints, or fails to accurately classify violations, prospective nursing home residents are forced to make critical decisions based on inaccurate and incomplete information and necessarily rely more heavily on

advertisements and marketing statements to inform their decisions.

C. Nursing home selection is stressful and often crisis-driven.

Seniors frequently seek admission to nursing facilities in the midst of a crisis caused by a decline in health, increase in disability, or the death or illness of a spouse or caregiver. *See* Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 L. Med. & Health Care 254, 255, 258 (1990). Crises create time pressure and stress that significantly impairs consumers' ability to thoroughly investigate available options.

This pressure is particularly pronounced in hospital settings because hospitals are incentivized to discharge Medicare patients quickly to control costs, even if the patient has not substantially recovered. Qian et al., *'Quicker and Sicker' Under Medicare's Prospective Payment System for Hospitals: New Evidence on an Old Issue from a National Longitudinal Survey*, 63 Bull. of Econ. Res. 1, at 2 (2011). Thus, hospital patients and families must make critical decisions about nursing home placement in the brief window between notification and discharge when their health is still compromised. Shugarman & Brown, at 10. It is, therefore, vital to prohibit nursing facilities from making false and misleading statements to influence life-altering decisions made during one's most difficult moments.

II. The "chain-wide marketing statements" are actionable under the UTPCPL.

A. The marketing statements must be viewed from the perspective of seniors seeking nursing home services.

The Court must consider Defendants' marketing statements from the perspective of seniors targeted by the statements. *See Com. v. Hush-Tone Indus., Inc.*, 4 Pa. Cmwlth. 1, 22 (1971) (noting that statements made to vulnerable populations are subject to "close scrutiny"). Even among neurologically and psychiatrically healthy seniors, decision-making impairments may be present in approximately 35% of the population. Natalie L. Denburg et al., *The Ability to Decide Advantageously Declines Prematurely in Some Normal Older Persons*, 43 Neuropsychologia 1099, 1102-1104 (2005). "[C]ognitive vulnerability generally, and impairments in decision-making ability specifically, even in the context of relatively intact memory and intellect, can explain why older adults are frequently the victims of unscrupulous business activities." Natalie L. Denburg et al., *The Orbitofrontal Cortex, Real World Decision Making, and Normal Aging*, 1121 Annals N.Y. Acad. Sci. 480, 482 (2007). Individuals who demonstrate difficulty with reasoning and decision-making are unable to detect misleading claims in advertising and are especially vulnerable to the "truth effect" (the tendency to believe information after repeated exposure). *Id.* at 491. Cognitive vulnerability,

compounded by crisis, creates a substantial disparity in bargaining power that the UTPCPL was intended to address.

B. The marketing statements violate the UTPCPL and are not mere puffery.

Defendants' "chain-wide marketing statements" are concrete, specific, and measurable, and thus actionable under the UTPCPL. This case marks the first time a Pennsylvania appellate court has used "puffery" to limit claims under the UTPCPL. In the absence of state precedent, the Commonwealth Court relied on federal Lanham Act cases discussing puffery. *See Com., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 818 (Pa. 1974) (recognizing that courts may look to decisions under Lanham Act for guidance). Under the Lanham Act, puffery is "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 the seller's opinion only and regarded by the buyer as such. *Id.* Puffery is "distinguishable from misdescriptions or false representations of specific characteristics of a product." *Id.* The court here, however, misapplied established law and extended the concept beyond any reasonable application.

A review of local federal court cases that have applied the concept of puffery to UTPCPL claims makes clear that Defendants' specific statements regarding the nature of its services do not constitute puffery, but rather are actionable under the UTPCPL. *See, e.g., Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 417

(E.D. Pa. 2016) (finding "measurable factual assertions" that average customer will save money over time are not puffery). Objectively-verifiable assurances, such as those made by Defendants, that "licensed nurses and nursing assistants [are] available to provide nursing care and help with activities of daily living" (Statement 1), "[s]nacks and beverages of various types and consistencies are available at any time from your nurse or nursing assistant" (Statement 2), and "[c]lean linens are provided for you on a regular basis" (Statement 4) are similarly "measurable factual assertions" and cannot be considered puffery. Including an indefinite qualifier like "various types" or "regular basis" does not render these direct assurances puffery because the essential implication remains clear. At minimum, Defendants assured prospective residents that appropriately credentialed staff would be available and food, beverages, and clean linens provided. Indeed, it is hard to imagine a more specific, provable statement than "[a] container of fresh ice water is put right next to your bed every day" (Statement 3). The Commonwealth alleges that credentialed staff were regularly unavailable and that residents often lacked access to food and beverages between meals and waited hours for clean linens, rendering these statements grossly misleading, at best.

Defendants' representations are easily distinguished from vague statements typically considered puffery like "You're in good hands with Allstate," or that a product is "safe" and "reliable." *See Gidley v. Allstate Ins. Co.*, 2009 WL 4893567,

at *4 (E.D. Pa. Dec. 17, 2009); *Sabol v. Ford Motor Co.*, 2015 WL 4378504, at *4 (E.D. Pa. July 16, 2015). A direct, concrete assertion that a service will be provided ("[a] restorative plan of care is developed to reflect the resident's goal" (Statement 7)) is obviously distinct from subjective assurances. *See Robinson v. Kia Motors Am., Inc.*, 2015 WL 5334739, at *4 (D.N.J. Sept. 11, 2015) (distinguishing concrete representations of services to be provided from subjective assurances, like "customers can rest easy knowing their vehicle is in the skilled hands of Kia technicians"). Given the need among seniors for assistance with activities of daily living, basic nutrition, and essential hygiene, explicit representations about appropriate staffing, substantive care plans, food and beverages, and linens are *exactly* the kind of statements prospective residents rely on in selecting a nursing facility.

Moreover, the cases relied upon by the Commonwealth Court do not support the holding that Defendants' statements constitute puffery and compel the opposite conclusion. The Commonwealth Court repeatedly cites *Castrol*, for example, but ignores the holding that defendants' marketing claims regarding motor oil were "both specific and measurable by comparative research," and thus not puffery. *Castrol*, 987 F.2d at 946. Defendants' representations here are significantly more definite than the claim in *Castrol*. For example, Statement 8 states, "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." This is a specific statement about specific services purportedly provided, and it is easily tested. Did Defendants provide and implement needs assessments? Did Defendants provide skilled nurses or nursing assistants to help with meals, hygiene, and mobility? The Commonwealth includes myriad examples of how, as the result of chronic understaffing, Defendants' actions demonstrated the falsity of its representations - leaving residents without food, proper hygiene, or assistance when they called for help.

In *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241 (3d. Cir. 2011), the court emphasized that statements must be viewed in the context of the entire advertisement and found the product label clear enough not to mislead reasonable consumers. *Id.* at 253-54 n.17. In contrast, the context here renders the marketing statements more likely to deceive, not less. Given the dearth of accurate information available to seniors, explicit assurances made by facility operators are highly influential and the record contains nothing to support the conclusion that consumers should not or would not have been misled by the statements.[1]

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[1] Some courts have found that "puffery" raises a mixed question of law and fact. *See, e.g., United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 836 N.W.2d 807, 819 (Wis. 2013); *In re: Enzymotec Sec. Litig.*, 2015 WL 8784065, at *14 (D.N.J. Dec. 15, 2015). Where, as here, there is at least a question as to whether reasonable seniors would rely on the statements,

C. Many of the marketing statements track specific statutory requirements and are not mere puffery.

Contrary to the court's characterization of Defendants' marketing statements as "puffery," Statements 1, 4, 7, and 8 closely track specific provisions of the Nursing Home Reform Act of 1987 ("NHRA"), 42 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. §§ 483.1-.95, as well as the Pennsylvania Code, 28 Pa. Code § 211.1-.17. Similar to statements by a defendant regarding compliance with federal standards, these marketing statements are both definite and demonstrable. *See U.S. ex rel. Knisely v. Cintas Corp., Inc.*, 298 F.R.D. 229 (E.D. Pa. 2014). The NHRA enumerates requirements that nursing facilities must meet to receive Medicare and/or Medicaid funding. The Pennsylvania Code identifies requirements to receive state nursing facility licensing. Defendants' near-verbatim recitation of applicable federal and state standards demonstrates that the statements are specific and measurable representations, not vague overstatements.

Statement 1 asserts, "We have licensed nurses and nursing assistants available to provide care and help with activities of daily living (ADLs). Whatever your needs are, we have the clinical staff to meet those needs." The NHRA explicitly requires that "[t]he facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to

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adjudication on the pleadings is inappropriate.

assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. . .” and specifies the types and qualifications necessary for compliance. 42 C.F.R. § 483.35. *See also* 42 U.S.C. § 1395i-3(b). Additionally, the Pennsylvania Code specifies the minimum number of nursing and other staff required given a facility’s resident population, 28 Pa. Code §§ 211.6-.16. Statement 1 is not mere sales talk. It is a specific representation, derived directly from measurable federal and state requirements, that the facility has adequate staffing to provide appropriate care and help with ADLs. For those with severe cognitive and physical limitations, there is nothing more important in choosing a nursing facility than adequate staff to address basic needs.

Statement 4 states, “Clean linens are provided for you on a regular basis, so you do not need to bring your own.” This statement also closely parallels specific statutory obligations. The NHRA requires facilities to provide “[c]lean bed and bath linens that are in good condition” and “appropriate to the weather and climate.” 42 C.F.R. §§ 483.10(i), 483.90(e). Again, this is a clear, concrete assurance, consistent with applicable law, that clean linens will be provided. As demonstrated throughout the Amended Complaint, this is not an abstract concept for those who struggle with incontinence and need assistance with basic hygiene.

Statement 7 asserts, “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." Statement 8, as discussed above, refers to assessment and implementation of an individualized care plan. Applicable regulations require precisely what these statements promise. For example, 42 C.F.R. § 483.21 states:

> (1) The facility **must develop and implement a comprehensive person-centered care plan for each resident**, consistent with the resident rights set forth at § 483.10(c)(2) and § 483.10(c)(3), that **includes measurable objectives and timeframes to meet a resident's medical, nursing, and mental and psychosocial needs** that are identified in the comprehensive assessment. The comprehensive care plan must describe the following:
>
> . . .
>
> (A) **The resident's goals** for admission and desired outcomes.
>
> . . .
>
> (ii) **Prepared by an interdisciplinary team**. . .

§ 483.21 (emphasis added). Care plans must be developed upon admission and updated after quarterly reviews or any significant physical or psychological problem. *Id. See, e.g.,* 42 U.S.C. § 1395i-3(b); 42 C.F.R. §§ 483.10(b)-(c), 483.20, 483.24. Additional provisions require that a "resident is given the appropriate treatment and services to maintain or improve his or her ability to carry out the activities of daily living." 42 C.F.R. § 483.24. Viewed together with the express requirements to develop, implement, and modify care plans, these representations go far beyond mere puffery. They are not generalized, aspirational or subjective

statements that a prospective nursing home resident would recognize as mere salesmanship. They are specific, concrete, and measurable commitments, required by applicable law, on which prospective residents would reasonably rely to ensure their needs are met. There could hardly be a more influential promise for seniors than assistance with dressing, eating, toilet use, and personal hygiene.[2]

D. Statements made in resident assessments, care plans, and bills are actionable under the UTPCPL.

The court erred in holding, sua sponte, that statements made in resident assessments, care plans, and bills do not qualify as "advertising and cannot constitute a violation of the UTPCPL's false advertising prohibition." Reproduced Record ("R.R.") at 101a. The court's conclusion rests on an erroneous reading of case law and results in an unprecedented narrowing of the statute in direct conflict with its broad remedial purpose.

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[2] The court states, without analysis, that Statements 7, 8, and 9 cannot form the basis of a UTPCPL claim because the UTPCPL only applies to non-medical services. R.R. at 96a n.14. While courts have found that the legislature "did not intend to disturb existing common and statutory law" regarding physician liability and make physicians the "guarantors of their fault-free work" under the UTPCPL, *Gatten v. Merzi*, 579 A.2d 974, 976 (Pa. Super. Ct. 1990), the UTPCPL clearly applies where a defendant agrees to provide specific services and then fails to deliver them. Here, Defendants promised to develop and implement care plans despite allegedly lacking sufficient staff to do so. *See Goda v. White Cliff Leasing P'ship*, 62 Pa. D. & C. 4th 476, 491 (Com. Pl. 2003) (claim regarding "proper staffing" could be medical or non-medical). Importantly, the Commonwealth does not allege medical malpractice or negligence in the provision of prescribed care. Rather, it alleges that the facilities were insufficiently staffed to provide the care *at all*, including basic, promised *non-medical* assistance with dressing, eating, mobility, and hygiene. R.R. at 233a. Any attempt to construe the alleged failure to provide basic care to nursing home residents, like help going to the bathroom, as a claim equivalent to medical malpractice is a cynical effort to evade liability under the UTPCPL.

Pennsylvania courts have consistently recognized the elements of claims under Sections 201-2(4)(v) and 201-2(4)(ix). "To set forth a cause of action under section 201-2(4)(v), a plaintiff must establish that a defendant's representation is false, that it actually deceives or has a tendency to deceive and that the representation is likely to make a difference in the purchasing decision." *Fay v. Erie Ins. Grp.*, 723 A.2d 712, 714 (Pa. Super. Ct. 1999); *Weinberg v. Sun Co.*, 740 A.2d 1152, 1167 (Pa. Super. Ct. 1999). None of these elements require that the statement be made in advertising, and the Pennsylvania Supreme Court has never adopted such a requirement.

Both this Court and lower courts have repeatedly recognized that the UTPCPL should be "construed liberally to effect its object of preventing unfair or deceptive practices." *Com., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 817 (Pa. 1974); *Agliori v. Metro. Life Ins. Co.*, 879 A.2d 315, 318 (Pa. Super. Ct. 2005); *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 591 (Pa. Super. Ct. 2013). This Court in *Monumental Properties* observed that Section 3 clearly reflects the UTPCPL's remedial scope. *Monumental Properties*, 329 A.2d at 815. The Court further emphasized the necessity of considering the context in which the claims arose, stating that "It would be difficult indeed to imagine anything that affects the lives and welfare of the people of this Commonwealth more than housing." *Id.* at 824. In light of the legislative intent for a broad application, the

Court found that the UTPCPL reaches statements contained in residential leases. *Id.* at 822.

The Superior Court likewise has found individual statements and assurances made to a prospective car purchaser to be actionable under Sections 201-2(4)(v), (vii), (ix), (xi), and (xxi). *Knight v. Springfield Hyundai*, 81 A.3d 940, 951 (Pa. Super. Ct. 2013). In *Knight*, the plaintiff alleged that an employee of a car dealership misrepresented the mileage on the vehicle, falsely stated that the vehicle had not been in any prior accidents, misrepresented the ownership history of the vehicle, and promised to have title and registration placed in consumer's name, but then failed to do so. *Id.* The Commonwealth Court's holding is thus contrary to establish Superior Court precedent.

The Commonwealth Court's reliance upon *Synthes, Inc. v. Emerge Med., Inc.*, 25 F. Supp. 3d 617 (E.D. Pa. 2014) is misplaced. While courts may consider Lanham Act cases to interpret the UTPCPL when relevant, the Lanham Act is inapposite here. The plain language of Section 43(a) of the Lanham Act limits its scope to "commercial advertising or promotion." 15 U.S.C. § 1125(a). The Lanham Act is "primarily intended to protect commercial interests" and that a commercial "competitor in a Lanham Act suit does not act as a 'vicarious avenger' of the public's right to be protected against false advertising." *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990). "Instead, the

statute provides a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising." *Id.* at 230. With its emphasis on protecting commercial interests and its limited applicability to "commercial advertising or promotion," the Lanham Act is an imperfect guide for interpreting false advertising and misrepresentation claims raised by consumers of products and services for personal use - those protected under the UTPCPL. Of the provisions at issue here, only Sections 201-2(4)(ix) and (x) contain the word "advertising," and it is not qualified by a term like "commercial" that circumscribes the type of advertising within the statute's ambit. 73 P.S. §§ 201-2(4)(ix), (x). The Court here should not limit the UTPCPL solely by analogy to a law unconcerned with protecting consumers from false or misleading statements in a wide variety of contexts.

The court's reliance on *Seldon v. Home Loan Servs., Inc.*, 647 F. Supp. 2d 451 (E.D. Pa. 2009) is also misplaced because *Seldon* is based on cases that do not support such a narrow reading of the UTPCPL. Instead, these cases only address the elements of claims under Sections 201-2(4)(v) and 201-2(4)(ix) in the factual situations before the court – advertisements in newspapers, television, and radio. *See Karlsson v. F.D.I.C.*, 942 F. Supp. 1022, 1023 (E.D. Pa. 1996); *Weinberg v. Sun Co.*, 740 A.2d 1152, 1155 (Pa. Super. Ct. 1999). The *Karlsson* and *Weinberg* courts had no occasion to consider whether "false advertising" claims under the

UTPCPL are *limited* to these types of public advertisements. The only case cited by *Seldon* which holds that individual representations do not constitute advertising is an unpublished Common Pleas decision, without reference to any authority.[3] *Thompson v. The Glenmede Tr. Co.*, 2003 WL 1848011, at *1 (Pa. Com. Pl. Feb. 18, 2003). The *Thompson* court cited no authority because none exists.

Courts in other jurisdictions have also rejected such narrow interpretations of similar statutes. *See Gabali v. OneWest Bank, FSB*, 2013 WL 1320770, at *4 (N.D. Cal. Mar. 29, 2013) (finding statements by banks to prospective borrowers actionable); *Below v. Norton*, 751 N.W.2d 351, 362 (Wis. 2008) (finding that "false advertising" law "covers fraudulent representations made to even one prospective purchaser"); *Grube v. Daun*, 496 N.W.2d 106, 116 (Wis. Ct. App. 1992) (observing that statutory language appears limited to "advertising practices," but protects public from all deceptive representations, including "face-to-face sales where no media advertising is involved"). Courts have also found false or misleading bills to be actionable. *See MBS-Certified Pub. Accountants, LLC v. Wisconsin Bell Inc.*, 828 N.W.2d 575, 579 (Wis. Ct. App. 2013).

The Commonwealth here has pleaded sufficient facts to support violations of

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[3] Similarly, in *Com. v. Percudani*, 844 A.2d 35 (Pa. Commw. Ct. 2004), the court dismissed the Commonwealth's claim under Section 201-2(4)(v) without defining "false advertising" or citing any cases which do so. *Id.* at 47.

Sections 201-2(4)(v), (ix), and (x) based on statements made in resident assessments, care plans, and bills. *See* R.R. at 235a-239a, 367a. The care plans given to residents described promised care that was not delivered. The billing statements and individualized resident assessments provided to the Commonwealth suggested that the identified services had been provided. The Amended Complaint exhaustively describes Defendants' alleged failure to provide the promised and requisite care. *Id.* at 244a-357a. Accordingly, the Commonwealth has thoroughly demonstrated why care plans, assessments, and bills were false or deceptive to both consumers and the Commonwealth and likely to influence ongoing purchasing decisions. *See Com. v. TAP Pharm. Prod., Inc.*, 36 A.3d 1197, 1271 (Pa. Commw. Ct. 2011) (holding that Commonwealth may sue on behalf of state agencies and consumers). In light of the Commonwealth's detailed allegations regarding Defendants' failure to furnish care, as specifically represented to consumers and the Commonwealth, this Court must not limit the scope of the UTPCPL where the housing, health, and safety of vulnerable seniors are at stake.

E. The UTPCPL's catchall provision extends beyond statements made in advertising.

Even if the Court concludes that Sections 201-2(4)(v), (ix), and (x) apply only to statements made in widely disseminated advertisements, no such limitation can be imposed on claims under Section 201-2(4)(xxi). As noted by Judge Cohn Jubelirer in dissent, Section 2(4)(xxi) differs from other provisions of the UTPCPL

in many respects and contains no requirement that representations be made in an advertisement. R.R. at 131a. In fact, the Commonwealth Court has explicitly held as much. *See Com. ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 895 A.2d 683, 695 (Pa. Commw. Ct. 2006) (observing that while it "may be true" that Section 201-2(4)(v) applies only to the advertising context, "*Percudani* does not impose similar requirements on claims brought under UTPCPL section 201–2(4)(ii), (iii) or (xxi)").

The majority in this case also recognized that Section 201-2(4)(xxi) has a broader scope than other provisions of the UTPCPL. The court observed that "(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 render the words 'or deceptive conduct' redundant and superfluous, contrary to the rules of statutory construction." R.R. at 106a-107a.

Accordingly, Pennsylvania courts have found a wide variety of statements and misrepresentations actionable under Section 201-2(4)(xxi), including statements made outside of formal advertising. *See, e.g., Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 40 A.3d 145, 147 (Pa. Super. Ct. 2012) (individual assurances made to prospective home buyers regarding quality of work); *Grimes v. Enter. Leasing Co. of Philadelphia, LLC*, 66 A.3d 330, 337 (Pa.

Super. Ct. 2013) (inflated costs in car rental contract). It is irrelevant, here, that the statements made in care plans, resident assessments, and bills were made directly to residents or to the Commonwealth. The Commonwealth thoroughly alleges Defendants' persistent failure to provide the care assured in these documents, rendering its representations false or misleading. Whether in public advertising or in other statements likely to influence ongoing purchasing decisions, these misrepresentations fall squarely within the scope of Section 201-2(4)(xxi).

III. The Commonwealth may seek restoration under the UTPCPL on behalf of itself and others.

A. The plain language of the UTPCPL authorizes the Commonwealth to seek restoration.

Section 4 of the UTPCPL authorizes the Attorney General ("AG"), acting in the public interest, "to bring an action in the name of the Commonwealth . . . to restrain by temporary or permanent injunction" any conduct prohibited by the UTPCPL. 73 P.S. § 201-4. When issuing an injunction under Section 201-4, the court may "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 [the UTPCPL]." 73 P.S. § 201-4.1. *See also Com. v. TAP Pharm. Prod., Inc.*, 36 A.3d 1112, 1158 (Pa. Commw. Ct. 2011), *vacated on other grounds*, 94 A.3d 364 (Pa. 2014). Therefore, the court's power to order restoration is plainly and inextricably linked to the AG's power to seek injunctive relief.

Further, Section 8 of the UTPCPL provides that the AG, on behalf of the Commonwealth, may recover civil penalties for willful violations of the UTPCPL "**in addition to** other relief which may be granted under sections 4 and 4.1." 73 P.S. § 201-8 (emphasis added). If the Commonwealth were not permitted to seek restoration under Section 4.1, civil penalties could not be described as relief that may be sought by the Commonwealth "in addition to" relief under that section. Such a reading would render the language of Section 8 meaningless. *See Holland v. Marcy*, 883 A.2d 449, 455–56 (Pa. 2005) ("[C]ourts must attempt to give meaning to every word in a statute."). Accordingly, no ambiguity exists regarding the AG's authority to seek injunctive relief, including restoration for affected consumers under Sections 4 and 4.1. Defendants did not argue as much below, and there is no conceivable basis to require such a radical revision of the plain statutory language.

The Commonwealth Court's opinion, however, does just that, concluding that the Commonwealth "may not seek restoration under the UTPCPL in this case." R.R. at 115a. To the extent the Commonwealth Court's conclusion may be construed as prohibiting the Commonwealth from seeking restoration for consumers, it is untenable in light of the plain statutory language. The Commonwealth Court's ruling requires the untenable conclusion that consumers of nursing home services are not "persons" or "persons in interest" under the

UTPCPL – a conclusion that defies the statutory text, common sense, and any argument asserted by Defendants or discussed by the court.

B. Applying the Court's reasoning in *Meyer* would subvert the purpose of the UTPCPL.

The Commonwealth Court erred in relying on this Court's interpretation of "person" in an entirely different, narrower factual context.

In *Meyer v. Cmty. Coll. of Beaver Cty.*, 93 A.3d 806 (Pa. 2014), this Court made clear that it was addressing only the single, narrow question of whether "the UTPCPL's definition of 'person' . . . includes political subdivision agencies." *Id.* at 812–13. This Court found the statutory definition of "person" to be ambiguous as to whether it includes political subdivision agencies like a community college and concluded that the legislature did not intend to include such agencies in the definition of "person." *Id.* at 814. The Court focused nearly exclusively on the consequences of subjecting a political subdivision to liability under the UTPCPL. *Id.* at 814-15 (discussing common law sovereign immunity, punitive damages, and dissolution power). The Court's interpretation of "person" in *Meyer* was, by its own terms, strongly influenced by considerations involving political subdivisions as defendants in UTPCPL actions, none of which pertains when the Commonwealth is the plaintiff.[4]

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[4] The unpublished opinion from the Southern District of New York cited by the Commonwealth

This Court's holding in *Meyer* can be reconciled with the reading urged by the Commonwealth. "Person in interest" is a distinct legal concept from "person" as defined elsewhere in the statute and as interpreted by *Meyer*. Had the legislature intended to limit restoration to only "persons," it would not have used the distinct phrase "person in interest." Although doctrines of statutory interpretation understandably may prevent the Court from ascribing different meanings to the same word in different statutory provisions, nothing prevents the Court from ascribing *different* meanings to *different* words and phrases. The Court must give meaning to the additional phrase "in interest." Viewed in context, the phrase "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," suggests a broad class of persons intended to be protected by the UTPCPL beyond just those authorized to bring suit or incur liability. 73 P.S. § 201-4.1. To hold otherwise would dramatically undercut the Commonwealth's ability to recover ill-gotten gains, restrict the Commonwealth to prospective relief, undermine public protection, and flout the repeated admonition by this Court to construe the UTPCPL liberally.

Court is equally unpersuasive because the court lacked the authority to reach a different result. *See In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 2015 WL 4092326, at *6 (S.D.N.Y. July 2, 2015).

C. The Attorney General's power to seek restoration is essential to protect the Commonwealth's most vulnerable citizens.

Preventing the AG from seeking restoration under the UTPCPL would harm the Commonwealth's most vulnerable citizens, especially seniors and low-income families. The enforcement remedies otherwise available to the Commonwealth are often insufficient to fully redress prohibited practices in nursing home transactions and other consumer contexts. Free or low-cost legal and advocacy services are limited, and seniors must often pursue relief on their own. Additionally, seniors, like other consumers, are increasingly forced to fend for themselves in a private arbitration system that is often biased, secret, and lawless. *See* National Consumer Law Center, Consumer Arbitration Agreements, (7th ed. 2015), available at www.nclc.org/library.

Amici represent elderly nursing home residents with quality-of-care concerns and low-income victims of fraudulent and deceptive schemes. Requests for representation far outstrip resources, however, and *Amici* are only able to represent a fraction of those requiring assistance. In 2016, for example, CLS helped 41 nursing home residents avoid illegal nursing home discharge or address other quality-of-life issues. Similarly, CLS represented approximately 500 individuals with non-homeownership consumer issues, including many cases involving unfair and deceptive practices like predatory lending schemes and sham debt settlement arrangements. This is only a small portion of the Pennsylvanians facing these legal

issues. But, *Amici*, and other similar organizations, lack the resources to represent all seniors and low-income consumers with meritorious cases and frequently turn away potential clients and refer them to the AG for assistance.

The AG's power to protect the public is critical. It fills a gap where private and publicly-financed lawyers are unavailable. The AG has used its authority under the UTPCPL to address a host of wrongs against the public, including seniors. *See Pennsylvania Dep't of Banking v. NCAS of Delaware, LLC*, 995 A.2d 422, 443 (Pa. Commw. Ct. 2010) (unfair and deceptive practices by payday lender for misrepresenting finance charge and fees); *Com. ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1232 (Pa. Commw. Ct. 2007) (unfair and deceptive marketing practices targeting senior citizens in sale of prescription drugs, mental and dental cards, and other services for seniors); *Com. v. Hush-Tone Indus., Inc.*, 4 Pa. Cmwlth. 1, 2 (1971) (false advertising claims in sale of hearing aids). The AG has also used its power under the UTPCPL to seek the return of proceeds illegally obtained through unfair and deceptive practices. *See Com. v. TAP Pharm. Prod., Inc.*, 36 A.3d 1197, 1221 (Pa. Commw. Ct. 2011) (alleging that state agencies that administer health services for low-income and elderly Pennsylvanians paid inflated reimbursement rates for pharmaceuticals); *Com. v. BASF Corp.*, 2001 WL 1807788, at *2 (Pa. Com. Pl. Mar. 15, 2001) (same).

Without the ability to seek restoration on behalf of both itself and the public,

the Commonwealth would be deprived of an important enforcement tool and vital resource needed to fully redress UTPCPL violations. The perpetrators of egregious misdeeds, like the fraudulent mistreatment of seniors at issue here, would be able to retain ill-gotten gains. Vulnerable consumers would be harmed and bad actors rewarded. The Court must recognize the essential and plainly articulated authority of the AG to seek restoration when enforcing the broad remedial purpose of the UTPCPL. To decline to do so would ignore the clear intent of the legislature and sanction the unfair and deceptive practices alleged in this case. The Court should protect vulnerable seniors and reject efforts to curtail the AG's power.

CONCLUSION

This Honorable Court should vacate the decision dismissing the Commonwealth's UTPCPL claims and remand for reconsideration in light of the statute's broad remedial purpose.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Pa. R. App. P. 2135. This brief contains 6,999 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: August 16, 2017

/s/ Jonathan Sgro
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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Amicus Brief of Center for Advocacy for the Rights and Interests of the Elderly, Community Legal Services, Community Justice Project, and Neighborhood Legal Services in support of Appellant Commonwealth of Pennsylvania were served on this 16th day of August, 2017 by first class mail, upon each of the following, which satisfies the requirements of Pa. R. App. P. 121 and Pa. R. App. P. 2187:

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