Passucci v Absolut Ctr. for Nursing & Rehabilitation at Allegany, LLC
2014 NY Slip Op 33459(U)
January 10, 2014
Supreme Court, Erie County
Docket Number: 2010/6955
Judge: Patrick H. Nemoyer
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[* 1]

At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 10th day of JANUARY, 2014

STATE OF NEW YORK : SUPREME COURT : COUNTY OF ERIE

MARGARET PASSUCCI, as Administratrix of the Estate of LUCILLE FIERLE,
Plaintiff,

v.

ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ALLEGANY, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT AURORA PARK, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT DUNKIRK, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT EDEN, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ENDICOTT, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT GASPORT, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT HOUGHTON, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ORCHARD PARK, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT SALAMANCA, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT THREE RIVERS, LLC; ABSOLUT CENTER FOR NURSING AND REHABILITATION AT WESTFIELD, LLC; ABSOLUT FACILITIES MANAGEMENT, LLC; ISRAEL SHERMAN and JOHN DOES 1-200,
Defendants.[1]

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DECISION and ORDER

INDEX NO. 2010/6955

APPEARANCES: MICHAEL C. SCINTA, ESQ., for Plaintiffs[2]
WILLIAM J. BRENNAN, ESQ., for Defendants

PAPERS CONSIDERED: The NOTICE OF MOTION of Plaintiffs;

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[1]This caption is taken from the amended complaint and defendants' papers; it differs from that on plaintiffs' papers.

[2]Although there is only one named plaintiff, the Court generally will refer to plaintiffs, in the plural, as all potential members of the class sought to be certified. The Court will refer to Margaret Passucci as the named plaintiff.

[* 2]

the ATTORNEY AFFIDAVIT of Michael C. Scinta, Esq., with annexed exhibits, including the AFFIDAVIT OF CHARLENE A. HARRINGTON, Ph.D., R.N., F.A.A.N. and the EXPERT AFFIDAVIT OF BRUCE R. ENGSTROM, CPA / ABV / CFF, CFA;

the MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION;

the AFFIDAVIT OF WILLIAM J. BRENNAN, ESQ., with annexed exhibits;

the EXPERT AFFIDAVIT OF KATHLEEN M. CANTABEN, MPA, RN, with annexed exhibits;

the AFFIDAVIT OF JODY BANTLE[LPN],, with annexed exhibits;

the AFFIDAVIT OF SUZANNE TREMANE, with annexed exhibits;

the AFFIDAVIT OF JACK HUGHES, with annexed exhibits;

the AFFIDAVIT OF COLLEEN PHELPS, with annexed exhibits;

the EXPERT AFFIDAVIT OF DOROTHEA A. RUSSO, C.P.A., with annexed exhibits;

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF[S'] MOTION FOR CLASS CERTIFICATION; and

the reply ATTORNEY'S AFFIDAVIT of Michael C. Scinta, Esq., with annexed exhibits.

THE BACKGROUND AND PLEADINGS:

This action was commenced in July 2010. As pleaded in the amended complaint of July 2011, the action is brought in the name only of Margaret Passucci, as Administratrix of the Estate of Lucille Fierle (Ms. Fierle or decedent), who died on February 3, 2009 while a resident at the 202-bed nursing home (otherwise referred to as the Orchard Park facility) owned and operated by defendant Absolut Center for Nursing and Rehabilitation at Orchard Park, LLC. At the time of her death, Ms. Fierle had been a patient at the Orchard Park facility for almost all of the preceding 31 months or so, beginning in June 2006.

As pleaded in the amended complaint, the action also is brought on behalf of all other similarly situated. By "others similarly situated," the complaint refers to others allegedly in the same situation as plaintiff and her decedent, i.e., those who are current or former patients (i.e., since July 9, 2007,[3] a day three years prior to commencement of the action),[4] or family members of such patients (Margaret Passucci is decedent's daughter),[5] at one or more of the 11 nursing homes[6] (also referred to herein as the Absolut facilities) owned or managed by the 12 entities and the single individual named as defendants in the amended complaint. The one named individual defendant, Israel Sherman, is identified in the amended complaint as the current CEO and owner of the 12 named corporate defendants which, again, consist of the 11 separately incorporated owners of the 11 Absolut facilities and one overarching management corporation, known as Absolut Facilities Management, LLC (AFM). Besides those defendants, the amended complaint names as defendants any number of as-yet-unidentified individuals or entities, i.e., "John Does 1-200," whose "relationships to the named defendants, or whose acts

[3]The period since July 9, 2007 and to date is therefore referred to by plaintiffs as the "class period."

[4]Indeed, the amended complaint seeks certification of two subclasses of the primary class of "Facility Resident[s]," namely, the "Facility Resident Private Pay Subclass," and the "Facility [Resident] Public Pay Subclass." Record estimates or enumerations of how many members might actually comprise that primary class of patients range from about 8500 (as of December 2011) to 10,571 (as of March 2013). Of that latter number, defendants assert that roughly 6800 were short-term residents ("short term" being defined as a rehabilitative stay of 90 days or less), whereas 3700 were long-term residents. Defendants state that the average short-term length of stay was 27.7 days, whereas the average length of stay for a long-term resident was 634.2 days.

[5]Thus, apart from the aforementioned class and subclasses of patients, the amended complaint seeks certification of a separate class of patients' "Family Member[s]," i.e., those who are or were related by blood or marriage to, or are or were in some other recognized family relationship with, a patient.

[6]The Court is told by defendants that the 11 facilities range in size from 37 to 320 beds, and that the 11 facilities have a total of 1342 beds. Defendants say that 1753 persons are currently employed at all of the Absolut facilities and their management firms (as of what date such employment was reckoned, the Court has not been told).

[* 4]

or omissions, give rise to legal responsibility for damages incurred by plaintiffs and by all those similarly situated." The amended complaint alleges that AFM and Israel Sherman "owned, operated, managed," etc., and "did business as," and are the "controlling entity" or "controlling person of" the 11 nursing home entities/facilities.

The amended complaint states two causes of action, one alleging a violation of Public Health Law § 2801-d, and another alleging common-law negligence. The purpose and effect of the statute that forms the basis for the first cause of action is more fully summarized *infra* but, for present purposes, it suffices to note that the statute, entitled "Private actions by patients of residential health care facilities," creates a private right of action on the part of a nursing home patient. The right of action is for the recovery of damages for any "injuries suffered" as a result of a nursing home's having deprived the patient of "any right or benefit created or established for the well-being of the patient by the terms of any contract [or] by any state [or federal] statute, code, rule or regulation" (Public Health Law § 2801-d [1]). For purposes of applying that section, an "injury" includes, but is not limited to, physical or emotional harm to a patient, death of a patient, or financial loss to a patient (Public Health Law § 2801-d [1]).

As alleged in the amended complaint, defendants violated the statutory rights of decedent and other residents during the class period by "failing to ensure a dignified existence for residents; failing to adequately staff the facilities; failing to provide [an] adequate number of qualified personnel; failing to advance and support environments that promoted resident dignity and quality of care; [and] engaging in a pattern of failing to provide appropriate and adequate resources for facility staff, facility maintenance, facility supplies, and staff training." The first cause of action further alleges that defendants violated various provisions of 10 NYCRR, including, but not limited to, §§ 415.3, 415.4, 415.5, 415.11, 415.12, 415.13, 414.14, 415.15,

[* 5]

415.16, 415.17, and 415.22.[7] Plaintiffs inform this Court, however, that the gravamen of the first cause of action is that defendants deprived decedent and the proposed class members of rights and benefits provided by statute, regulation, or contract as a result of its company policy of cutting its operational costs at every corner, including by understaffing its facilities to the point where there were and are not enough staff members to properly tend to the needs and expectations of the residents. Indeed, at oral argument, and the references to general cost-cutting apparently notwithstanding, it was represented to the Court that all of the alleged deprivations and indignities visited upon the nursing home residents stem from or boil down to defendants' allegedly inadequate staffing of its facilities.

Pursuant to their first cause of action, plaintiffs seek compensatory and punitive damages, attorneys fees, and litigation costs. With regard to the compensatory damages

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[7]In their memorandum of law, plaintiffs note that the regulations in question require nursing homes to provide care in a manner and environment that maintains or enhances the patient's quality of life (*see* 10 NYCRR § 415.5) and dignity (*see* 10 NYCRR§ 415.3; 415.5). In addition, plaintiffs note that the regulations guarantee to patients:

> "10 NYCRR § 415.29(i) - the right to clean surroundings;
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> 10 NYCRR § 415.14 - the right to palatable and nutritious food;
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> 10 NYCRR § 415.29(f) - the right to an adequate hot water supply;
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> 10 NYCRR § 415.5(a) - the right to an on-going program of activities designed to meet resident interests;
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> 10 NYCRR § 415.5(h)(l) - the right to live in a clean, comfortable, and home[-]like environment;
>
> 10 NYCRR § 415.5(3) - the right to clean bed and bath linens in good condition;
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> 10 NYCRR § 415.5(4) - the right to comfortable and safe temperature level; and
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> 10 NYCRR § 415.13 - the right to have sufficient nursing staff to provide nursing and related services to obtain or maintain the highest practicable, physical, mental, and psychosocial well-being of each resident."

sought, however, plaintiffs explicitly assure this Court that they seek no individualized, non-economic damages for physical or bodily injury or wrongful death (the complaint does not explicitly allege bodily injury to any patient). It is not clear if individualized, non-economic damages for emotional harm likewise fall within that disclaimer or disavowal. Nevertheless, plaintiffs suggest that their aim under the first cause of action is to recover the economic (loss-of-bargain-type) damages referenced in Public Health Law § 2801-d (2). The suggestion, in other words, is that plaintiffs seek to recover, as a class, all or part of the cost of confining decedent and the other patients at the facility or facilities for each day during the class period that the nursing home care was substandard.

The second cause of action of the amended action alleges that the various defendants owed residents of their facilities various duties or obligations under principles of common-law negligence, including the "provision of palatable food and hydration, personal hygiene, dignity, provision of adequate supplies, appropriate maintenance of the facility, [and employing adequate number of qualified personnel to carry out all functions of the facility, and staff training." It is further alleged that defendants breached those duties, and that such breaches "caused damages to plaintiff, and those similarly situated." Besides the compensatory damages thus referred to, plaintiffs by their negligence cause of action seek recovery of their costs and disbursements and attorneys' fees.

The Court is told that defendants served an answer to the amended complaint, but the Court has not seen that paper.

THE MOTION:

By their motion (as opposed to by the amended complaint), plaintiffs seek "certification of the following class: all current residents as well as former [patients] who resided at defendants' facilities between July 9, 2007 and the present." Plaintiffs seek such certification in

relation to both their causes of action. The Court notes that plaintiffs' motion papers do not give any mention to the proposed patient subclasses – i.e. private-pay and public-pay patients – outlined in their amended complaint.[8] Moreover, the Court sees in none of the papers any mention of the "family member" class referenced in the amended complaint, let alone any estimate of how many members such a prospective class might contain, let alone any proposed definition of such a class.[9] Defendants oppose the motion.

EVIDENCE AND ARGUMENTS IN SUPPORT OF AND OPPOSITION TO THE MOTION:

The arguments of the parties in favor of and in opposition to class certification are far-ranging and not easily summarized. Generally, of course, plaintiffs take the position that the statutory prerequisites for class certification – numerosity, commonality/predominance, typicality, adequate represenatation, and superiority – are met in this case, whereas defendants take the position that, other than numerosity, those prerequisites are not met. Beyond that basic level of analysis, the major threads of argument involve the following matters:

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[8]The Court would merely note here that certification of two subclasses of private pay and public pay patients, respectively, would certainly make sense vis-à-vis the task of quantifying damages, assuming that the litigation ever progresses to that stage. Beyond that, however, the Court notes that it has no intention of now addressing (sub)class certification issues to which the parties have devoted nary a word in their voluminous supporting and opposing papers.

[9]The amended complaint suggests plaintiffs would have the "Family Member" class restricted to those relatives who paid something toward a given patient's nursing home stay, but that is far from explicit. The complaint does explicitly allege that Ms. Passucci paid personal funds toward her mother's nursing home stay. The Court would merely note that it sees nothing in Public Health Law § 2801-d, nor in the case law arising under that statute, that would authorize a family member as such to sue under the statute for a nursing home's infliction of a statutorily defined injury upon a patient. The Court would further note that, insofar as the negligence cause of action is concerned, recovery by a mere family member of an allegedly injured party would appear to run afoul of tort rules generally precluding a tortfeasor's liability to family members and other bystanders as such, except in the case of a "close" family member who was in the "zone of danger" created by the tortfeasor's conduct (*see generally Trombetta v Conkling,* 82 NY2d 549, 552-554 [1993]; *Bovsun v Sanperi,* 61 NY2d 219, 229-231 [1984]; *Tobin v Grossman,* 24 NY2d 609, 613-619 [1969]). Beyond that, however, the Court will merely reiterate that it has no intention of presently addressing class certification issues ignored by the parties themselves on this motion.

The ownership situation:

Plaintiffs' papers are replete with references to the (current, i.e., since about June 2007) common ownership/operation/management of all 11 of the Absolut nursing-home-operating entities[10] by defendant Israel Sherman and defendant AFM. Plaintiffs note that Israel Sherman owns 54% of each of the 11 facility-operating entities, whereas AFM owns 45% of each entity (the remaining 1% of each entity is owned by Sam Sherman, Israel Sherman's brother, who is not a named defendant herein, but who presumably is a "John Doe" defendant). Plaintiffs further point out that Israel Sherman is the 100% owner of AFM. Plaintiffs also point out that he is 100% owner of Billet Accounting and Information Technologies, LLC (not a named defendant herein, but also possibly a "John Doe" defendant), which provides financial accounting services for all 11 facilities. Plaintiffs thus point out that Israel Sherman has authority over all 11 facilities and makes all financial decisions regarding them. Plaintiffs accordingly allege that AFM is a "controlling entity" and Israel Sherman a "controlling person" of the various nursing home entities, thereby bearing liability for those entities' civil wrongs pursuant to Public Health Law § 2808-a (1). Defendants' thesis appears to be that, through their common ownership and management by Israel Sherman and/or his entities, the 11 Absolut nursing home facilities are not operated as "freestanding entities, but rather as integral units of a single yet excessively fragmented organization," and that Israel Sherman exerts sole, ultimate, and complete control either directly or indirectly over the management and operation of each facility, including with respect to staffing and other policy and budgeting/spending issues, all with a direct negative impact on overall patient care.

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[10]Actually, plaintiffs repeatedly refer to AFM's and Israel Sherman's ownership of the 11 "facilities," but that is inaccurate. The nursing home businesses or operations (as opposed to the nursing home real properties, which are owned by non-defendants) are nominally owned, respectively, by the 11 "Absolut Center For..." entities, which are owned, in turn, as outlined in the accompanying text.

In response, defendants assert that their common ownership and management of the nursing homes is neither unlawful nor problematical for patients.

Decedent's stays and treatment at the nursing homes:

The named plaintiff's decedent was admitted to the facility (later acquired but not then owned or managed by defendants) at Aurora Park on December 30, 2002 and was discharged to a hospital on March 12, 2003. She was readmitted to the Aurora Park facility on March 15, 2003 and was discharged therefrom to home on April 21, 2003. On October 5, 2005, Ms. Fierle was admitted to the Orchard Park facility, from which she was discharged on November 11, 2005. On February 1, 2006, Ms. Fierle was readmitted to the Orchard Park facility and was discharged therefrom on the last day of that month. On May 7, 2006, Ms. Fierle was again admitted to the Orchard Park facility and was discharged therefrom just under three weeks later. On June 5, 2006, she was readmitted to that facility, where she remained until her September 25, 2007 transfer to Bry-Lin (where Ms. Fierle received electro-convulsive treatment for the purpose of controlling her behavior). On November 8, 2007, Ms. Fierle was transferred back to the Orchard Park facility (by then owned/managed by defendants), where she remained until her December 31, 2008 transfer to Buffalo Mercy Hospital. On January 7, 2009, Ms. Fierle was transferred back to the Absolut Orchard Park facility, which she remained until her death at the age of 81 on February 3, 2009.

In support of the motion, plaintiffs adduce the testimony of Ms. Fierle's family members – including the named plaintiff, Ms. Passucci; a second daughter, Kathleen Herling; and decedent's sister, Rosemary Wagner. Essentially, decedent's relatives testified that, as a result of prevailing staffing levels, insufficient care was provided to the residents of the Orchard Park facility. Ms. Passucci testified that, as a result of such understaffing, she personally had to escort or transport their mother and other residents to activities. Ms. Pasucci often observed

her mother and other residents being left daily in dirty diapers, having to wait extended periods of time for staff assistance with toileting and other things, and being presented with inedible food. Residents who could not feed themselves simply had food trays placed in front of them. Ms. Passucci also personally noticed horrible odors of urine throughout the facility, which was almost never cleaned properly.

Ms. Wagner testified to much the same concerning the overall uncleanliness and foul odor of the facility. She confirmed that, as a result of inadequate staffing, Ms. Wagner personally would have to help decedent (and sometimes other residents) move to the dining room and activities, assist decedent with eating, get her ready for bed, clean her, and change her diapers and bedding. Ms. Wagner often found that decedent's bed was not made or changed, and that decedent sometimes had no bed linens at all. According to Ms. Wagner, decedent's grooming and clothes-laundering needs were not met, and decedent did not like the way the food looked and tasted.

Ms. Herling testified that response times to calls for assistance often exceeded 45 minutes or an hour, and that her mother would soil herself before receiving toileting assistance. Ms. Herling further observed that her mother did not receive appropriate turning and positioning services, and that her bandages were not regularly changed. Ms. Herling noted that there was not enough staff to assist with the feeding of residents, and that residents unable to feed themselves would simply be left with their food trays, which then would be taken away from them without their having eaten their meal. Ms. Herling felt that the food presentation was "horrible." Also, residents would be left on the toilet for prolonged periods of time, awaiting assistance. Ms. Herling complained to the facility administrator about the lack of adequate staffing, poor response times, and general uncleanliness of the facility, but never received an appropriate response and never noticed any increase in staff. Ms. Herling also testified that the facility smelled like urine and "dirty diapers."

Defendants argue in response that, far from evincing dissatisfaction with the care furnished at the facilities since 2002, Ms. Fierle's family repeatedly had her admitted to such facilities as a short-term and long-term patient. Defendants further point out that decedent's family members, including the named plaintiff, participated in no fewer than seven "Team Care" meetings without ever expressing any concerns or issues regarding the care and treatment received by Ms. Fierle.[11] Indeed, defendants assert that the fact that Ms. Fierle's family ultimately left her in defendants' Orchard Park facility for virtually all of the last 2½ years of her life, and never sought to place her in a different nursing home, belies the family members' EBT testimony concerning the supposedly constant and pervasive deficiencies at that facility. Defendants further note that Ms. Fierle was a "private pay" patient, meaning that she or her family bore the entire cost, amounting to more than $200,000, of her last 2½ years of care and treatment by defendants.

In reply, plaintiffs contend that defendants' various challenges to the credibility of plaintiff and her sister and aunt are irrelevant to whether class classification should be granted.

The 89 affidavits of alleged deficiencies:

In support of their motion, plaintiffs submit 89 affidavits of residents or former residents (and at least one former employee) of various Absolut facilities or family members of such residents. Each affiant attests to deprivations of patient dignity attributable to one or more isolated or pervasive deficiencies in the care rendered to patients at defendants' various facilities and at various junctures. The deficiencies so described consist of defendants' alleged failure to perform timely toileting of residents, or allowing residents to sit or lie in their waste for extended periods of time; failure to provide assistance with meals to residents unable to feed

[11]Defendants do allow that Ms. Herling did lodge one complaint with the New York State Department of Health (DOH) in December 2008 concerning the food (a puréed as opposed to a cut-up pork chop) served to decedent on one occasion, but point out that DOH's investigation of that complaint revealed no violations of state or federal regulations.

themselves, and to provide palatable food to residents; failure to ensure adequate hydration of residents; failure to properly medicate residents; failure to ensure proper hygiene and general good grooming of residents, including washing, shaving, nail trimming/cleaning, and clothes laundering and changing; failure to ensure a sanitary and comfortable (and properly heated and cooled) living environment, including a failure to remove food, urine and feces, and other debris from floors, and a failure to eliminate the stench of feces and urine from throughout the facility; failure to safeguard residents' belongings against loss or theft; failure to properly staff the facilities, and to supervise residents, and to address and respond to complaints regarding staffing and operation of the facilities, and to properly respond to residents' calls and needs; and failure to comply with residents' personal preferences and ensure residents adequate daily interaction with other residents and staff.

In opposition to the motion, defendants complain about plaintiffs' law firm's written and telephonic communications with residents and/or their family members, presumably including the 89 affiants, in the run-up to this motion. Defendants assert that the law firm's inquiries were ostensibly posed by misleadingly self-described "nursing home investigator[s]" and resembled a push poll in which residents and family members were asked how they felt about defendants' supposedly "dirty facilities," at which there supposedly had been incidents of "abuse." Defendants point out that residents and their family members nonetheless overwhelmingly responded to such inquiries by asserting how satisfied they were with the care rendered at defendants' facilities. Indeed, defendants note that the 89 affidavits adduced by plaintiffs represent complaints made by or on behalf of less than 1% of the potential patient class members. Defendants further assert in opposition to the motion that the high quality of care provided at their facilities is attested to by the fact that employees frequently have placed their own family members in defendants' facilities.

In reply, plaintiffs' law firm denies misleading anyone in the way in which it contacted

prospective class members, and notes that such allegations in any event do not warrant a denial of class certification. Plaintiffs also assert that their provision of the 89 affidavits suffices to establish the typicality and commonality of the named plaintiff's claims vis-à-vis those of the putative class members.

The nursing experts' opinions:

Also in support of their motion, plaintiffs present the affidavit of their expert in nursing home care. That expert avers that federal and state regulations require nursing homes to provide sufficient nursing staff and provide adequate nursing and related services to residents in order to restore or maintain the highest practical physical, mental and psycho-social well-being of each resident. According to plaintiffs' expert, the provision of adequate qualified staff reduces the risk of adverse health events; lowers overall costs of care; improves the physical functioning of the residents; reduces patient mortality; promotes early discharge from the facility; reduces the risks of pressure ulcers, urinary tract infections, and other complications; promotes and enhances resident dignity; reduces the need for antibiotics; reduces state-issued deficiencies and citations; reduces the risk of weight loss; reduces acute care hospitalizations; and generally increases the likelihood of patients' recovery and stabilization. Further according to plaintiffs' expert, a failure to provide qualified and sufficient staff produces the opposite results: an increased risk of health problems, a decreased risk of recovery and stabilization, and a deprivation of patient dignity. Plaintiffs' expert promises to provide analysis to the Court (i.e., later in the litigation) as to whether defendants have provided and provide adequate and appropriate staffing at their facilities.

In response, defendants point out that plaintiffs' expert merely sets forth generalities concerning the need for adequate qualified staff at nursing homes and the risks of understaffing at nursing homes, without actually asserting that the Absolut facilities are understaffed and

without actually identifying any adverse patient outcomes. Defendants also present the opinions of their own expert in nursing/administration (*see infra*).

In reply, plaintiffs explain that their expert has not yet made any effort to prove the merits of their case, which is not required in order for plaintiffs to obtain class certification.

The economics experts' opinions:

In support of their motion, plaintiffs adduce the affidavit of their certified public accountant/valuation analyst/financial forensics expert. The upshot of that expert's affidavit is that, in percentage-of-revenue terms, and in comparison to the "average" nursing home facility in New York, the defendants spend far (ostensibly between one third and two thirds) less on patients' dietary needs, inpatient routine services, and direct care paid hours. According to the expert, in order to meet the statewide average in those areas of spending, defendants would have had to have spent at least $85 million more – including $18 million more on food and other dietary services, $14 million more on direct care salaries, and $53 million more on inpatient routine services – from June 7, 2007, the date on which Israel Sherman assumed ownership of defendants' facilities, through December 31, 2010. The expert further avers that, despite taking in lower-than-average revenue on a per-patient basis, defendants on average generated $4.48 per patient day in higher profit than the average facility in the state.

Defendants' rejoinder, expressed in the affidavit of their expert accountant, seems to be that an "average" nursing home cost figure is just that. Defendants further point out that they enjoy lower costs than they otherwise might because they are a conglomerate of 11 facilities that benefits from consolidated management; because they thus enjoy certain economies of scale in terms of their costs of purchasing food, medicine, and laundry and housekeeping supplies; and because they operate in regions of the state generally blessed with lower labor and other costs. Defendants moreover note that their costs of running each of their 11 facilities

are in line with the cost experiences of other operators of multiple facilities in the region. On the other hand, defendants note that the statewide average cost figures focused upon by plaintiffs' expert are themselves skewed upward by the much higher costs of operating nursing homes downstate. Defendants assert that the economic efficiencies condemned by plaintiffs are in fact necessary in order to enable defendants to remain profitable despite recent cuts in Medicaid reimbursement. Defendants also take issue with some of plaintiffs' expert's calculations concerning by how much average costs statewide actually exceed defendants' costs; defendants' expert furnishes his own (higher) cost figures for defendants' facilities. In that regard, defendants note that the dollar figures cited by plaintiffs' expert are unaudited figures, whereas the figures utilized by defendants' expert are prepared in accordance with generally accepted accounting principles and have been certified by an independent auditor. Defendants also point out that the appropriate inquiry should not be into defendants' total labor expenditures, but rather into the number of hours worked by defendants' patient-care personnel. Finally, defendants note that any alleged understaffing, whether as supposedly indicated by the fewer hours worked or the lesser labor costs incurred, and any alleged underspending on food or other necessities for nursing home patients would, to the extent actually actionable by plaintiffs, naturally be expected to result in notably poorer patient outcomes. Defendants note, however, that no such poor outcomes are noted by plaintiffs themselves or in the DOH surveys and complaint investigation reports (*see infra*).

Defendants also make the point that the services offered and thus the patient care costs incurred at each of their facilities can vary widely based upon the particular mix of patients thereat and their needs for specialized care. Defendants indeed argue that each of their 11 facilities is unique in its size (bed or patient count) and services offered, and that some such services require heavier staffing. As examples, defendants note that patients who have difficulties in swallowing receive care and treatment specifically tailored to their needs at two of

[* 16]

the 11 facilities, as do patients in dementia units (which exist at four of the 11 facilities), as to respiratory patients (respiratory units exist at three of the 11 facilities), as do obese patients (advanced bariatric care is offered at two of the 11 facilities), as do patients with co-morbidities, as do patients in need of physical or occupational therapy.

In reply, plaintiffs assert that they need not conclusively demonstrate the merits of their amended complaint in order to obtain class classification. Otherwise, plaintiffs assert that defendants' showing in opposition to the motion amounts to an acknowledgment that, in operating their facilities, defendants, understaff them and otherwise underspend on patients' needs (i.e., in comparison to the average facility), albeit not to the extent alleged by plaintiffs.

The DOH surveys and investigations:

By the affidavit of their expert nurse/administrator, defendants assert that the purpose of a skilled nursing facility is to provide constant nursing care to residents, principally the elderly, possessing significant limitations in carrying out such basic activities of daily living as eating, bathing, walking, sitting, and toileting; that a patient's physical impairments may be compounded by dementia or other cognitive impairment; and that nursing home patients are generally elderly, frail, confused and potentially confrontational individuals who cannot meet their own needs and who sometimes present a risk of harm to themselves or others. Defendants assert that the wide range in the conditions of various patients warrant an individual assessment of each patient's medical needs and necessitate a wide variation in the types and complexity and intensity of care rendered to the patients. Defendants point out that there are eight major categories, and 66 subcategories, of care rendered by nursing homes.

Defendants point out that as Medicare-certified facilities licensed by the DOH, defendants' 11 facilities must comply with Medicaid/Medicare requirements and State regulations, and are subject to in-depth and random (unannounced) surveys conducted by the

[* 17]

DOH pursuant to federal and state requirements. The DOH surveys typically closely evaluate the care and treatment provided to a representative sample of the nursing home's residents as well as the overall quality of the patient environment. The surveys result in the generation of reports completed by the DOH and transmitted to the facility. Such survey reports note any deficiencies and rate them on a scale of A through L according to a matrix that takes into account the deficiencies' severity (i.e., potential for harm to a patient or patients) and scope ("isolated," part of a "pattern," or "widespread"). Depending on the severity and scope of any deficiency, the facility operator is given a short period of time to rectify the deficiency or, in drastic cases, immediately subjected to a sanction. Defendants also note that the DOH, besides conducting the periodic random surveys, investigates any specific complaints made about a nursing home. Such investigations likewise result in reports that disclose whether the complaint was substantiated and whether a regulatory violation or other deficiency was found.

Upon her evaluation of 103 DOH surveys of the Absolut facilities between 2007 and March 2013, defendants' expert nurse/administrator notes that two surveys found no deficiencies whatsoever; that 27 surveys found that the most serious deficiency was one that caused no "actual" harm, that gave rise only to a "potential" for more than "minimal" harm, but that was nonetheless "isolated" in its scope; that 52 surveys found that the most serious deficiency was one creating a potential for more than minimal harm and that was a "pattern" in its scope; that seven surveys found the most serious deficiency to be one that caused actual but not immediate harm and that was isolated in scope; and that only three of the surveys found that the most serious deficiency was one that caused "immediate" jeopardy to a patient and involved a pattern of conduct. Defendants' expert also points out that, of the three surveys that found any immediate harm as a result of a pattern of deficiency, all such deficiencies occurred at only one of the 11 Absolut facilities (the expert does not say which one). Defendants' expert notes that the DOH accepted defendants' plan of correction in each instance and has never

[* 18]

refused to recertify any of the Absolut facilities. Defendants' expert further notes that, at the Orchard Park facility where Ms. Fierle was a patient on and off since 2006, a January 2007 survey (i.e., one completed before the class period and indeed before defendants' ownership/management of that facility) found: a "pattern" deficiency concerning recordkeeping based upon 8 of 19 resident records reviewed; a problem with the administration of medications based on 2 of 29 residents surveyed; a deficiency involving a failure to record that residents had been told of the risks of flu shots; several minor deficiencies related to food preparation; and several deficiencies in building construction (i.e., safety issues). As a result of the November 2007 survey of the Orchard Park facility, the following deficiencies were found: privacy issues based on 2 of 11 residents surveyed; urinary infections in 3 of the 17 residents surveyed; medication errors involving 1 of 30 residents surveyed; problems in the labeling and storage of drugs by the facility's pharmacy; and several building deficiencies involving patient egress and the integrity of smoke walls. Moreover, in its (apparently most recent) November 2008 survey of the Orchard Park facility, DOH found deficiencies based upon the following: 1 of 14 residents surveyed having been deprived of his or her right to choose where to eat; 1 of 17 residents surveyed having been deprived of his or her right of self-determination in some other matter; 2 of 5 medication rooms not having proper locks; and 2 of 5 residential units having building issues such as chairs blocking exit doors or improper firewall construction. In sum, defendants' expert nurse/administrator noted that the deficiencies found at the Orchard Park facility by DOH in 2007-2008 were almost uniformly minor ones involving a small percentage of residents surveyed. (Defendants do not say so, but this Court would note that the aforementioned deficiencies appear at least on their face to have nothing to do with the staffing deficiencies and related patient problems or indignities now alleged by plaintiffs.) With specific regard to such allegations of inadequate staffing, defendants' expert notes that neither the federal nor state authorities have set specific staffing levels for skilled nursing facilities, which

are given the discretion to staff appropriately based upon such factors as the census of residents and the mix of their medical conditions. Nevertheless, upon its review of facility records, the DOH collects and reports data concerning staffing levels at each surveyed facility for the two-week period just prior to a given DOH survey, noting the actual hours worked during that period by various categories of staff members of that facility, including the medical director, the director of nursing, all registered nurses, all licensed practical nurses, all certified nurses aides, all dietitians, all food service workers, and all therapeutic personnel, such as occupational and physical therapists (and their assistants and aides) and social workers. Defendants point out that only 1 of the 103 DOH surveys of Absolut facilities found any deficiency with regard to staffing levels.[12] Moreover, according to defendants' expert, none of the surveys found any increases in such expected markers or indicia of insufficient staffing as patient skin problems, muscular contracture, falls or other accidents, or loss of weight or malnutrition, nor were there any noted decreases or deficiencies in residents' activities of daily living, e.g., bathing, dressing, or toileting. Nor, notwithstanding plaintiffs' allegations concerning the pervasiveness of foul odors at the Orchard Park and other Absolut facilities over the years, did any of the surveys report any such problem at any of the facilities.

In reply, plaintiffs assert that the DOH surveys found defendants' facility to be at least somewhat deficient 98% of the time. Plaintiffs further contend that, according to Ms. Fierle's relatives, the DOH surveys of the Orchard Park facility at least were by no means "unannounced" and that, prior to each such visit, the facility would beef up its staffing at and spruce up the nursing home.

Upon her evaluation of reports concerning 433 complaints made to the DOH regarding

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[12]Neither side has told this Court which facility was found to have inadequate staffing, when that finding was made, how severe the problem was found to be, and what particular patient harm, if any, resulted from the problem.

Absolut's facilities between 2007 and March 2013, defendants' expert nurse/administrator noted that 355 investigations, or about 82% of the total, found no violation of any federal or state regulation, whereas 51 investigations, or about 12% of the total, either found insufficient credible evidence for the complaint of abuse, neglect, or inappropriate care, or found the complaint to be substantiated but not serious enough to result in a statement of deficiency. Thus, defendants' expert recounts that only 25 investigations, or less than 6% of the total, culminated in a statement of deficiency. Defendants note that none of the DOH complaint investigations found any deficiency in staffing levels at defendants' facilities.

In reply, plaintiffs note that the DOH found defendants' facilities out of compliance in 94.6% of its investigations of patient/family complaints.

Other allegations and arguments of the parties:

Otherwise, defendants note that the 11 Absolut facilities vary greatly in size and in the scope of services that they offer. Additionally, defendants assert that the patient class members each differ in countless ways, including in the lengths of their respective stays in a facility (ranging from mere days to 22 years), in their individual physical and mental conditions, and in their required level of care and treatment. Defendants further predict that any litigation of this dispute as a class action will prove to be unmanageable inasmuch as 26% of the putative class members died during the class period, and further inasmuch as 35% were diagnosed with Alzheimer's disease or dementia (defendants do not account for any potential overlap between the categories of deceased and demented patients). Defendants further argue that any litigation of the claims of over 10,000 patients will, particularly in the discovery process, prove to be unmanageable inasmuch as the medical records of the named plaintiff's decedent alone extend to almost 6600 pages. Defendants further argue that a class action is not a superior vehicle for seeking redress for alleged violations of the rights of nursing home

patients, as attested to by the sheer number of individual personal injury claims filed under Public Health Law §2801-d against nursing homes in general and against the Absolut facilities in particular, and as attested to by the number of such lawsuits filed by plaintiffs' counsel, including lawsuits centering on or at least including allegations of facility understaffing. Defendants further assert that there are good policy reasons for not certifying this as a class action inasmuch as the statute, in lieu of proof of actual damages, authorizes the recovery of "draconian penalties" of at least 25% of the per diem cost of the patient's stay in the nursing home, a recovery that, if awarded to an entire class of patients, might bankrupt a facility. Defendants additionally assert that it would be inappropriate to allow a jury to substitute its judgment with regard to the conditions that historically prevailed at a nursing home for the contemporaneous reviews and considered conclusions of DOH surveyors and complaint investigators. Finally, defendants assert that certification of a class to include all current residents of defendants' facilities might create an adversarial relationship between those patients and the nursing home staff.

In reply, plaintiffs argue that Ms. Fierle's (and presumably any other resident's) medical records are not relevant to this action. Plaintiffs also note that, although an individual action may appropriately be brought against a nursing home, including under Public Health Law § 2801-d, in a case in which damages for personal injuries are sought, this action does not seek any such damages. Finally, plaintiffs argue that the strategies of other law firms in other cases, or for that matter the instant-case-unrelated litigation strategies of plaintiffs' law firm itself, are not relevant to whether class action status is appropriate in this case.

THE LAW:

The statutes:

As indicated, Public Health Law § 2801-d, which was enacted in 1975, creates a private

right of action in favor of a patient and against:

> "[a]ny residential health care facility that deprives any patient in said facility of any right or benefit, as herein after defined[13] . . . For purposes of this section a 'right or benefit' of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by terms of any contract, by any state statute, code, rule or regulation or any applicable federal statute, code, rule or regulation" (§ 2801-d [1]).

Also for the purposes of that section, a compensable " 'injury' shall include, but [shall] not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient" (Public Health Law § 2801-d [1]). Public Health Law § 2801-d (2) provides,

> "Upon a finding that a patient has been deprived of a right or benefit and that said patient has been injured as a result of said deprivation, . . . compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury, but in no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility under section twenty-eight hundred seven of this article or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists."

That same subsection authorizes the patient to recover punitive damages in the case of the nursing home's willful or reckless disregard of the patient's rights, and Public Health Law §2801-d (6) authorizes an award of attorneys' fees to a prevailing patient. Public Health Law § 2801-d (4) provides that

> "[a]ny damages recoverable pursuant to this section, including minimum damages as provided by subdivision two of this section, may be recovered in any action which a court may authorize to be brought as a class action pursuant to article nine of the [CPLR]."

CPLR 901, entitled "Prerequisites to a class action," provides in pertinent part:

> "a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
>
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

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[13]The statute makes it an affirmative defense to any cause of action thereunder "that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury" for which the patient sues (*see* Public Health Law § 2101-d [1], [2]).

> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> 4. the representative parties will fairly and adequately protect the interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

CPLR 902, entitled "Order allowing class action," provides:

> "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:
>
> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
>
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
>
> 5. The difficulties likely to be encountered in the management of a class action."

CPLR 903 provides, in pertinent part, that "[t]he order permitting a class action shall describe the class."

The case law:

"Whether a lawsuit [should proceed] as a class action . . . is a determination made upon a review of the statutory criteria as applied to the facts presented; it ordinarily rests within the sound

discretion of the trial court (CPLR 901; *see also Brown v State of New York*, 250 AD2d 314, 320)" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999], *affg* 252 AD2d 1 [1st Dept] 1998]). CPLR 901 (a) sets forth five threshold requirements that must be met in all class actions (*see* CPLR 902). Assuming that all five prerequisites are satisfied in the judgment of the court, the inquiry then turns to the strictly discretionary factors or considerations (i.e., non-requirements) listed in CPLR 902 (*see Askey v Occidental Chemical Corp.*, 102 AD2d 130, 137-138 [4th Dept 1984]). The representative for the proposed class has the burden of showing that all prerequisites for a class action have been met (*see Askey*, 102 AD2d at 137). Such showing must be made by means of a sufficient and competent evidentiary record, and not merely by conclusory allegations set forth in the pleadings or affidavits (*see id.* at 138; *see also Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]; *Katz v NVF Company, APL*, 100 AD2d 470, 473 [1st Dept 1984]; *Dupack v Nationwide Leisure Corp.*, 70 AD2d 568, 569 [1st Dept 1979]). Nevertheless, the courts recognize "that article 9 of the CPLR was enacted to liberalize the narrow class action legislation which preceded it by providing a flexible, functional scheme for certification of class actions" (*Evans v City of Johnstown*, 97 AD2d 1, 2 [3d Dept 1983]; *see also Askey*, 102 AD2d at 137; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]).

As far as this Court is aware, despite the nearly 40-year existence of Public Health Law § 2801-d, there is only one reported decision addressing a motion for class certification of the kinds of claims raised in this action. That decision was rendered by the Third Department in a case known as *Fleming v Barnwell Nursing Home & Health Facilities* (309 AD2d 1132 [2003]). In that case, the named plaintiff, the personal representative of the estate of a former patient at the primary defendant's apparently lone nursing home facility, sought certification of a class of "more than 200" similarly situated patients of that nursing home. The plaintiff sought such certification in connection with both a newly pleaded cause of action under Public Health Law § 2801-d and an originally pleaded cause of action for negligence. In support of that motion, the plaintiff adduced proof that, following the death of

the decedent as a result of a sepsis, the DOH "investigated the conditions at [the] defendant's facility and found numerous violations of DOH regulations under 10 NYCRR part 415." Whether the nursing home violations found by DOH consisted only of the non-provision of adequate food and heat that was the apparently sole subject of the plaintiff's section 2801-d claim (*see infra*), or whether the violations found by DOH went beyond such matters, is not revealed by the decision. On the appeal from the order denying class certification, the Third Department modified, holding:

> "An action by residents of a residential health care facility for violating their rights or benefits created by statute or regulation may be brought as a class action if the prerequisites to class certification set forth in CPLR article 9 are satisfied (*see* Public Health Law § 2801-d [4]). Questions of law or fact common to the class must predominate over questions relating to individual class members (*see* CPLR 901 [a] [2]). Plaintiff's proposed class included all residents of defendant's 228-bed facility during a one-year period. Although plaintiff attempts to base his negligence claims on defendant's policies and procedures rather than individual circumstances or conduct, questions as to whether those policies breached defendant's duty to individual residents, whether those inadequate policies proximately caused harm to each resident, and the different amounts of individual residents' damages demonstrate the lack of common question predominance (*compare Evans v City of Johnstown,* 97 AD2d 1, 3 [1983]). As plaintiff failed to establish all the requirements of CPLR 901, Supreme Court properly denied class certification for the negligence claim (*see id.* at 3).
>
> "We reach a different result regarding class certification for the Public Health Law § 2801-d claim. A class of over 200 is so numerous as to render joinder of all individuals impracticable (*see* CPLR 901 [a] [1]). The predominance requirement may be satisfied even if not all class members were subjected to all the improper conduct (*see Weinberg v Hertz Corp.,* 116 AD2d 1, 6-7 [1986], *affd* 69 NY2d 979 [1987]). Here, questions regarding defendant's violation of DOH rules affecting residents predominate (*see* CPLR 901 [a] [2]). Plaintiff's specific claims that his decedent received inadequate heat and inedible food are typical of class claims (*see* CPLR 901 [a] [3]), plaintiff can fairly represent the class (*see* CPLR 901 [a] [4]), and a class action appears to be the superior method of adjudicating this claim (*see* CPLR 901 [a] [5]).
>
> * * *
>
> "Once all CPLR 901 prerequisites are satisfied, the court must then consider factors listed in CPLR 902 (*see Evans v City of Johnstown, supra* at 3). Presumably, aged and infirm nursing home residents are not interested in individually controlling the prosecution of the action (*see* CPLR 902 [1]), prosecuting separate actions would be inefficient and impractical (*see* CPLR 902 [2]; Public Health Law § 2801-d [2] [providing a common formula to ascertain damages to individual class members]), no other litigation concerning this controversy is currently in progress (*see* CPLR 902 [3]), it is desirable to concentrate the litigation in the county where the facility is located (*see*

> CPLR 902 [4]), and there are no apparent difficulties in managing this class (*see* CPLR 902 [5]). As CPLR 901 and 902 are satisfied, plaintiff's Public Health Law § 2801-d claim should be certified as a class action" (*Fleming,* 309 AD2d at 1133-1134 [bracketed material in original; two footnotes omitted; one footnote reproduced as running text]).

Subsequent case history reveals that the class so certified later was refined or redefined (*see* CPLR 902) to include 242 individuals who had been patients in the nursing home during a 13-month time frame roughly coinciding with the plaintiff's decedent's stay at that facility (or perhaps coinciding with the period covered by the subsequent DOH investigation), and that the class action eventually was settled with court approval, after about six years of litigation, for $950,000 (*see Flemming v Barnwell Nursing Home and Health Facilities,* 56 AD3d 162 [3d Dept 2008], *affd* 15 NY3d 375 [2010]).

DISPOSITION OF THE MOTION:

Timeliness of the motion:

At the outset, the Court must address defendants' argument that the motion for class certification is untimely filed under CPLR 902, which requires the motion to be made within 60 days after the time established for all defendants in the action to have served their responsive pleadings (*see generally Argento v Wal-Mart Stores, Inc.,* 66 AD3d 930, 932 [2d Dept 2009]; *Jones v Mega Imperial Constr. Corp.,* 251 AD2d 229 [1st Dept 1998]). In interpreting that requirement, the Court of Appeals has noted that "[t]he explicit design of Article 9 * * *, is that a determination as to the appropriateness of class action relief shall be promptly made at the outset of the litigation." (*O'Hara v Del Bello,* 47 NY2d 363, 368 [1979], *rearg denied* 48 NY2d 656 [1979]). Defendants point out that they filed their answer to the amended complaint on July 29, 2011, whereas this motion was not made until August 29, 2013, i.e., about 23 months after the lapse of the 60-day period. However, as defendants acknowledge, case law allows for an extension of the 60-day period specifically to enable the named plaintiff to conduct discovery essential to the issue of class certification (*see Meraner v Albany Med. Ctr.,* 199 AD2d 740, 742 [3d Dept 1993]). Moreover, there can be no doubt that this

Court "has the discretion, pursuant to CPLR 2004, to extend the 60-day deadline either prospectively or retroactively upon good cause shown" (*see Argento,* 66 AD3d at 932 [citations omitted]; *see also Galdamez v Biordi Constr. Corp.,* 50 AD3d 357, 358 [2008]).

Although defendants deride plaintiffs' discovery efforts in this case, implying that such efforts do not justify the 23-month delay in moving for class certification, the Court notes that defendants themselves boast that they disclosed to plaintiffs' counsel nearly 200,000 documents (or pages), the identities of over 10,000 current or former patients, and the identities of over 6000 current or former employees. In any event, it is this Court's view, based largely on what transpired during numerous court conferences conducted in this matter, that the parties jointly charted a course whereby they each would be entitled, of course in advance of any motion for class certification, to seek disclosure relevant to the class certification issue. The Court takes specific notice of various notations and letters in its file showing that a date for a motion for class certification was initially set by the parties for March 30, 2012, that such a motion date was initially postponed by mutual agreement for about six weeks on account of the ongoing disclosure process, and that there subsequently was an indefinite but far longer postponement of the motion date, likewise by ostensible agreement, and likewise at a time when pre-certification disclosure clearly was still ongoing. Eventually, at conferences conducted in March and April 2013, this Court set the August 2013 date ultimately observed by plaintiffs (*see generally Argento,* 66 AD3d at 932). It is this Court's recollection that defendants did not object at the time to the setting of that date. Under all of the circumstances at bar, this Court must deem defendants to have waived or otherwise abjured the 60-day limit now sought to be enforced by them. At the very least, and even if defendants never expressly agreed to so extend plaintiffs' time to move for class certification, plaintiffs' counsel nonetheless may be excused for believing that there existed a tacit agreement to that effect (*see Argento,* 66 AD3d at 933).

[* 28]

Plaintiffs' request for class certification in relation to the statutory claim:

Broadly speaking, the Court must agree with plaintiffs' general position that it is neither necessary nor appropriate for the Court to make a determination of the merits of the named plaintiff's statutory claim pursuant to Public Health Law § 2001-d, nor of the merits of the putative claims made by any or all of the prospective class members, before ruling on the motion for class certification. In other words, the Court does not see fit, in deciding the classification issue, to inquire into let alone adjudge the credibility of the testimony of the named plaintiff and that of decedent's other family members concerning the adequacy of the staffing and the care rendered to decedent at Absolut's Orchard Park facility. Thus, the Court simply does not deem it appropriate to deny the motion for class certification based upon the circumstance, highlighted by defendants, that decedent's family members kept her confined and paid for her care at that facility for most of the last 2½ years of her life, virtually without recorded complaint. Nor can the Court decide the motion based upon such considerations as the fact that, during the class period, the DOH never or almost never found any fault with the level of staffing at defendants' facilities, and never or almost never found instances or evidence of the kinds of patient neglect and indignities alleged by plaintiffs.

Moreover, broadly speaking, this Court must agree with plaintiffs' general position that, insofar as the amended complaint alleges defendants' violation of Public Health Law § 2801-d, this action is or would be appropriately prosecuted as a class action. Defendants' broadly adopted stance that this kind of action is not appropriate for class action status is belied by the straightforward language of the statute, particularly its subdivision (4), which specifically authorizes the prosecution of the statutory claims in the form of a class action. As noted by plaintiffs, the recognized purpose of the statute is "[t]o provide patients in nursing homes . . . with increased powers to enforce their rights to adequate treatment and care by providing them with a private right of action to sue for damages and other relief and enabling them to bring such suits as class actions" (Mem of State Exec Dept, 1975 McKinney's

[* 29]

Session Laws of NY, at 1685). Moreover, besides creating a private right of action for patients and specifically allowing such right to be vindicated in the form of a class actions, the Legislature fixed a minimum recovery in the form of per diem loss-of-bargain damages and permitted an award of attorneys' fees, thereby assuring that any potential recovery would be large enough to encourage the private bar to commence actions on behalf of nursing home patients, who otherwise might not be able to finance such litigation (*see id.* at 1686; *see also Morisette v Terence Cardinal Cooke Health Care Ctr.,* 8 Misc 3d 506, 513-514 [Sup Ct New York County 2005]). Indeed, "the clear intent of [the statute] was to expand the existing remedies for conduct that, although constituting grievous and actionable violations of important rights, [otherwise] did not give rise to damages of sufficient monetary value to justify litigation" (*Doe v Westfall Health Care Ctr.,* 303 AD2d 102, 109 [4th Dept 2002]). In the face of those clear legislative directives and purposes, defendants' arguments concerning the general difficulties to be faced by the Court and counsel in managing a class action of this sort, and also concerning the potentially ruinous liability that defendants might well face if the action is permitted to proceed as a class action, simply do not carry the day. The same must be said of defendants' observations concerning the apparent historical rarity of class actions brought under the statute, and concerning the general prevalence and efficacy of individual actions and claims heretofore routinely brought under the statute. However, the Court must note that, although it is not persuaded to completely deny class certification based on such arguments of defendants, the Court applies the statutory criteria and exercises its discretion in such a way as to define the class to be certified much more narrowly and circumspectly than requested by plaintiffs.

That brings the Court to an area of analysis on which the Court believes that plaintiffs have missed the point. The Court notes that considerations of the typicality and commonality of the claims require, at the least, a comparison between the experiences and claims of the named plaintiff or plaintiffs (or, in this case, the experience of the single named plaintiff's decedent) and the experiences and claims of other putative members of the class (*see* CPLR 901 [a] [2], [3]; *see also Fleming,* 309

AD2d at 1133-1134). Here, the Court has the sense that plaintiffs have given short shrift to that aspect of the analysis in the context of their own claim, which alleges not merely that all of defendants' patients were deprived of their regulatory rights and contractual benefits, not to mention their dignity, but that defendants' patients all suffered those deprivations as a result of the understaffing and resultant abysmal conditions *of the particular facility* where *each* of those patients resided at the time of such alleged injuries. The Court must note, however, that during the class period, decedent was a patient at only one of defendants' 11 facilities, i.e., the Orchard Park facility, and that only for about 19 months, i.e., from July 9, 2007, a date three years prior to commencement of this action, until February 3, 2009, the date of death. Thus, if and to the extent that the named plaintiff's decedent was deprived of her regulatory or contractual rights or benefits as a consequence of any actions or omissions of defendants, such deprivation necessarily must have occurred (according to the named plaintiffs' own claim) as a result of the alleged understaffing of the Orchard Park facility alone. Just as important, to the extent that decedent was deprived of her regulatory or contractual rights or benefits during her stay at the Orchard Park facility, it was of as a result of the actions or omissions of the discrete set of doctors, nurses, aides, therapists, and other caregivers and staff employed at that facility. Therefore, the Court concludes, the only claims that any prospective class members have or might have in common with decedent, and the only claims of prospective class members that are or might be typified by claims brought on behalf of decedent, are claims likewise arising out of the understaffing of the Orchard Park facility during the same time frame (*see* CPLR 901 [a] [2], [3]; *Fleming,* 309 AD2d at 1133-1134). In other words, the questions of fact bearing upon the named plaintiff's claim are unique to her claim and such claims as might be pressed by or on behalf of those others who were likewise residents of the Orchard Park facility during the same time frame as decedent.[14]

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[14]In that connection, the Court notes defendants' uncontroverted proof that the required and historical staffing levels at defendants' nursing homes necessarily differed from facility to facility and indeed from floor to floor or unit to unit within each facility based on each facility's particular patient population and its mix of medical conditions. Moreover, the Court has little

To put it conversely, any claims of understaffing on the part of putative class members who were residents of facilities other than the Orchard Park facility do not have a great deal to do with the claims of understaffing of the Orchard Park facility.[15] The conditions at the Orchard Park facility were not necessarily the same as prevailed at the other 10 Absolut facilities, whether at the same time as decedent was confined to the Orchard Park facility, or at other times. Thus, questions of fact concerning the alleged understaffing of each of the other 10 facilities, the resultant actions or omissions of short staff at such other facilities, and the impact of such alleged wrongful acts or omissions upon the patients of each of those other facilities are not the same questions of fact upon which would hinge the claims of decedent and other patients of the Orchard park facility. In simplest terms, the Court is not persuaded that the "course of conduct" that allegedly injured decedent and other patients at the Orchard Park facility is the "same" as whatever course of conduct may have injured patients at the other 10 facilities, as required in order to satisfy the commonality and typically requirements of CPLR 901 (2) and (3) (*Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 22 [1st Dept 1991]; *see Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98-99 [2d Dept 1980]; *Dagnoli v Spring*

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doubt that the historical staffing levels probably also would have differed even from day to day and shift to shift within a given unit or facility, given the unavoidable periodic turnover in any discrete workforce, workers' vacation schedules and, perhaps most critically, employees' often completely unpredictable use of their sick time.

[15]If there is to be litigation over the adequacy of staffing at defendants' other 10 nursing homes during a particular time frame, such litigation must be prosecuted in the names of at least one of the individuals who actually were patients at each of those nursing homes during that particular time period. In that instance, the Court might plausibly find the experiences and claims of the named plaintiffs to be typical of, and to have sufficient in common with, the experiences and claims of all other of defendants' patients at the same facility. In the circumstances at bar, however, the Court cannot find the named plaintiff's claims of understaffing at the Orchard Park facility to be representative of the putative claims of the other facilities' patients. Even if the Court were inclined to find the named plaintiff's claims to be sufficiently representative of the putative claims of patients of defendants' other 10 facilities, it is clear that, given the varying staffing levels and other relevant conditions at each facility, for the court to countenance the prosecution of all such putative claims within the context of a single broad class action would require the Court to recognize and certify an inordinate and probably unworkable number of subclasses of such patients (*see* CPLR 906 [2]).

Val. Mobile Vil., 165 AD2d 859 [2d Dept 1990]). Rather, the Court would conclude that the respective patient populations of the various Absolut facilities suffered, if at all, from separate and discrete wrongs, if any, perpetrated by the discrete workforce employed, and involving the other discrete conditions existing, at each such facility (*see generally Yeger v E*Trade Sec. LLC,* 65 AD3d 410, 413 [1st Dept 2009]; *Rife v The Barnes Firm, P.C.,* 48 AD3d 1228, 1230 [4th Dept 2008]; *Mitchell v Barrios-Paoli,* 253 AD2d 281, 291 [1st Dept 1999]; *Karlin v IVF Am. Inc.,* 239 A.D.2d 562, 563 [2d Dept 1997]). The Court would further note that defendants would have a statutorily recognized affirmative defense to the claims of the various patients of each particular facility based on the exercise of reasonable care by the discrete staff of each particular facility (*see* Public Health Law § 2801-d [1], [2]). The mere "fact that wrongs were committed pursuant to a common plan or pattern does not permit invocation of the class action mechanism where the wrongs done were individual in nature or subject to individual defenses" (*Mitchell,* 253 AD2d at 291; *see City of New York v Maul,* 59 AD3d 187, 194 [1st Dept 2009], *affd* 14 NY3d 499 [2010]). Thus, in the parlance of CPLR 901 (a) (2), unless the class is defined to include only patients and personal representatives of patients of the Orchard Park facility during the time that decedent was confined there, questions of fact common to the proposed class would not "predominate over any questions affecting only individual members." Moreover, in the parlance of CPLR 901 (a) (3), unless the class is defined to include only patients and personal representatives of patients of the Orchard Park facility during the aforementioned time frame, the claims of the representative party are not "typical of the claims . . . of the class."

The Court acknowledges that plaintiffs have purported to show – chiefly by proof of defendants' common ownership and management of the 11 facilities, by the opinions of plaintiffs' economics expert concerning defendants' overarching financial practices, and by anecdotal evidence of various patients' care and treatment at all 11 facilities – that all of defendants' facilities were understaffed and that all of defendants' patients suffered deprivations and indignities as a

result. However, it is this Court's judgment that plaintiffs have fallen far short of actually demonstrating that. Indeed, this Court has no means of ascertaining on the current record that any particular facility of defendants was understaffed, be it continuously, routinely, or on a particular day or shift. As defendants note, the proof of common ownership has no tendency to establish understaffing or a resultant statutory violation at any single facility, let alone an across-the-board understaffing situation or statutory violation. The economics evidence adduced by plaintiffs is subject to criticism on the rather obvious basis that plaintiffs' economist seems to mistreat the concept of an average in somewhat the manner of a Lake Wobegon parent or teacher. In that connection, the Court can merely note that in any hierarchy of values, some values naturally will be above and some values below the mean – they can't all be at or above the mean, and it is not to be expected that all will be even near the mean. In short, an average cannot logically constitute a minimum. Even the EBT testimony and averments adduced by plaintiffs on the motion, although disturbing, does not have much tendency to establish constant or programmatic understaffing of all of defendants' facilities. Finally, the Court cannot leave this point without observing that the record, although far from fully enlightening on the subject, suggests strongly that there may not yet even have existed common *ownership and control* of any the 11 facilities *by the related defendants* at the time of much of the allegedly deficient care testified to by decedent's family members and averred by the 89 affiants.

For purposes of determining the merits of the proceeding, the Court well understands the difference between an allegation and proof of a particular fact. However, before it could grant a motion for certification of a class consisting of all 10,500 plus (and counting[16]) of defendants' patients over a 6- to 7-year (and enlarging) period, this Court would have to have seen more satisfactory

[16]If, as suggested by the record, the number of potential class members increased by nearly 2100 between December 2011 and March 2013, the Court would expect the number to be at least 1500 greater today than it was in March 2013.

proof that the claimed experiences of decedent at the Orchard Park facility were in fact reflective and representative, in terms of the alleged understaffing that plaintiffs themselves have made the linchpin of their action, of the experiences of all of defendants' other patients at all of defendants' other 10 facilities. Again, the Court has not seen any such proof. Thus, this Court concludes that the claims of the named plaintiff herein may fairly be regarded as representative only of the claims of other patients who were residents of the Orchard Park facility between July 9, 2007 and February 3, 2009 (*see* CPLR 901 [a] [2], [3]; *see also Fleming,* 309 AD2d at 1133-1134).

As suggested by the preceding paragraphs, some of the Court's observations concerning the non-commonality and non-typicality of the named plaintiff's claims vis-a-vis the claims of most of the other prospective class members bring the Court to a related point concerning counsels' (and this Court's) perceived ability or inability to manage the broader class action that plaintiffs seek to maintain (*see* CPLR 902 [5]). That latter point of analysis of course bears also on the requirements that the name plaintiff (and her counsel) be willing and able to fairly and adequately protect the interests of the proposed class (*see* CPLR 901 [4]; *see generally Pruitt,* 167 AD2d at 24) and that the class action (as proposed by plaintiffs) be superior to other available methods for the fair and efficient adjudication of the controversy (*see* CPLR 901 [5]). Even apart from the administrative headaches that inevitably would arise in prosecuting a class action on behalf of over 10,000 prospective class members (i.e., the patients at all 11 of defendants' facilities since July 9, 2007), this Court would note that it sees no realistic prospect of managing the discovery process and any trial itself if the case were to involve, as plaintiffs themselves would fashion it, the issue of the adequacy or inadequacy of the staffing at 11 different facilities over so many years.[17] The Court

[17]The Court has in mind, of course, the large number of witnesses that likely would have to be called to testify or documents that would have to be introduced into evidence if any eventual trial of this action were to focus on the levels of staffing deployed, and deficiencies allegedly consequently existing, from day to day at all 11 facilities operated by defendants during the entirety of the class period advocated by plaintiffs. Moreover, the Court has the following additional concerns: If the class were to be defined as broadly as plaintiffs seek, what

[* 35]

further notes that, according to the statute, the measure of the minimum damages imputed to any single class member would be 25% of the per patient per diem charge or reimbursement rate *for each day* that the statutory violation and consequent patient injury (or, as plaintiffs frame it, the understaffing situation) existed (*see* Public Health Law § 2801-d [2]). That in turn means that plaintiffs, in order to recover statutory damages for each member of the class (who were confined at the various homes for discrete time periods) ultimately would have to adduce proof of the level of staffing on each unit of each facility on each day, if not on each shift. Although plaintiffs' counsel apparently genuinely desires to undertake to manage a litigation of such expansiveness and complexity, this Court will do counsel the favor of not allowing him to try to do so. In making its observations, the Court intends no disparagement of the skill and capabilities of plaintiffs' counsel, but rather seeks to emphasize only the utter unwieldiness of the litigation as proposed by plaintiffs. The Court will merely conclude that all of the foregoing factors combine to render a class action along the lines proposed by plaintiff an unmanageable and non-superior method of adjudication.

In contrast, the Court foresees (or at least has the hope) that counsel and the Court itself might conceivably be able to adequately manage the class action if it were to be maintained on behalf of the (probably) mere hundreds of patients who resided at the 202-bed Orchard Park facility between July 9, 2007 and February 3, 2009 (*see* CPLR 902 [5]; *Fleming,* 309 AD2d at 1134). Moreover, the Court foresees that the trier of fact might realistically grapple with any issues of liability and damages that might arise out of a contest over the adequacy of staffing at a single facility over that much more limited time frame. At the least, the Court believes that the relatively numerically limited and factually confined class action to be countenanced by the Court will prove to be less of a

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would the trier of fact be expected to do if the evidence at any eventual trial of the action were to the effect that some of defendants' facilities were always adequately staffed whereas others were not, or if the trial proof were to the effect that some of the facilities were inadequately staffed at some junctures but adequately staffed during others? What would the jury verdict sheet have to look like in order to give the trier of fact the direction and leeway it would need in order to make adequate, fair, and reviewable findings in such circumstances?

litigation disaster than would be the broader class action sought by plaintiffs.

As to the other factors that the Court is obligated or sees fit to consider pursuant to CPLR 901 and 902, the Court is able to conclude that, as the class is relatively narrowly defined and certified by this Court, the numerosity requirement is satisfied, i.e., that the class is so numerous that the joinder of all of its prospective members is or would be impracticable (*see* CPLR 901 [a] [1]; *Fleming,* 309 AD2d at 1133). The Court further concludes that, at least with respect to the named plaintiff's purported representation of all patients of the Orchard Park facility over the 19-month period in question, the named plaintiff and her counsel will, as best as the Court can project, fairly and adequately protect the interests of the other class members (*see* CPLR 901 [a] [4]; *Fleming,* 309 AD2d at 1134). The Court is further able to conclude that, to the extent that the Court limits the class to patients of the Orchard Park facility, a class action is superior to other available methods for the fair and efficient adjudication of the statutory claims (*see* CPLR 901 [a] [5]; *Fleming,* 309 AD2d at 1134). Given plaintiffs' avowed intent to seek to recoup only economic (i.e., loss-of-bargain) damages and not any non-economic damages for pain and suffering or other forms of personal or bodily injury, the Court can deduce that many if not most class members would, as a practical matter, be unable to vindicate their rights and obtain the demanded monetary relief in the absence of class certification (*see* CPLR 902 [1], [2]; *Fleming,* 309 AD2d at 1134).[18] The Court notes that no related litigation is currently in progress (*see* CPLR 902 [3]; *Fleming,* 309 AD2d at 1134). Finally, the Court notes that it may be desirable to concentrate the litigation in Erie County, where defendants' Orchard Park facility is located (but where the former patients and their personal representatives might not now be located) (*see* CPLR 902 [4]; *Fleming,* 309 AD2d at 1134).

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[18]The Court arrives at that conclusion despite the fact that damages in the form of a 25% per diem price rebate might turn out to involve significant recoveries for the longest term patients.

Plaintiffs' request for class certification in relation to the negligence claim:

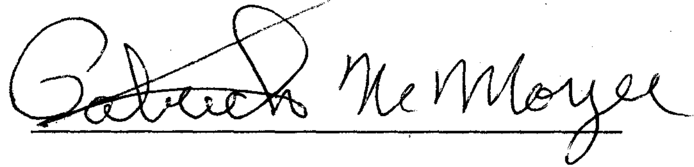
On the other hand, the Court must deny, in its entirety, the request for class certification in relation to the second cause of action for negligence, even a class certification along the limited lines outlined *supra*. At the outset, the Court must express its uncertainty with regard to whether plaintiffs' disclaimer of any intent to seek recovery of non-economic damages for physical or bodily injury (or emotional harm) to decedent or any other patient of the Orchard Park facility pertains to the negligence cause of action, as opposed to just the cause of action for violation of Public Health Law § 2801-d. In that regard, the Court notes that the second cause of action of the amended complaint merely makes reference to the causation of damages to the named plaintiff (or her decedent) and those similarly situated as a result of defendants' alleged negligence. Whatever the case, it is a fundamental requirement of recovery under the law of negligence that the defendant's actions or omissions have breached a duty of due care owed by that defendant to a particular claimant and have caused some compensable injury/damage to that claimant discretely (*see Akins v Glens Falls City School Dist.,* 53 NY2d 325, 333 [1981], *rearg denied* 54 NY2d 831 [1981]; *Donohue v Copiague Union Free School Dist.,* 64 AD2d 29, 32-33 [2d Dept 1978], *affd* 47 NY2d 440 [1979]; *see also Monroe v City of New York,* 67 AD2d 89, 95 [2d Dept 1979]). For that reason, even if plaintiffs truly seek to recover only loss-of-bargain-like damages attributable to defendants' alleged negligence in understaffing its Orchard Park facility, and even to the extent that any understaffing of a unit may be deemed to have constituted a compensable injury to each and every patient of such unit, the Court is constrained to find that individualized or non-common questions of fact – including "questions as to whether those policies breached defendant[s'] duty to individual residents, whether those inadequate policies proximately caused harm to each resident, and the different amounts of individual residents' damages" – predominate over questions of fact common to the entire class (*Fleming,* 309 AD2d at 1133; *see* CPLR 901 [2]). The Court is further constrained to find that,

inasmuch as plaintiffs cannot demonstrate the existence of at least one prerequisite for maintaining a class action in relation to the negligence cause of action, class certification must be denied with regard to that cause of action (*see Fleming,* 309 AD2d at 1133, citing *Evans,* 97 AD2d at 3).

Accordingly, plaintiffs' motion for class certification is GRANTED IN PART, and this Court hereby CERTIFIES A CLASS of plaintiffs who, like the named plaintiff's decedent, were patients of the facility/entity known as Absolut Center for Nursing and Rehabilitation at Orchard Park, LLC from July 9, 2007 through February 3, 2009. Plaintiffs' motion for class certification, including with respect to the cause of action for negligence, is otherwise DENIED.

All counsel are to report for a status conference to be held on March 19, 2014, at 1:45 p.m., in Part 34 at 50 Delaware Avenue.

SO ORDERED:



HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

JAN 10 2014

BY KEVIN J. O'CONNOR
COURT CLERK