ARBITRATION PURSUANT TO AGREEMENT OF PARTIES

DIANE FRANKLIN, Plaintiff, v. OSPREY/PANTOPS PLACE, LLC, T/A COMMONWEALTH SENIOR LIVING AT CHARLOTTESVILLE, et al., Defendants.	)	McCammon Group Case No. 2016000286 Michael E. Harman, Esquire, Arbitrator

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants, Osprey/Pantops Place, LLC, t/a Commonwealth Senior Living at Charlottesville ("CSL") and Commonwealth Assisted Living, LLC ("CAL") (collectively referred to as "Defendants" or "Commonwealth"), by counsel, and pursuant to Fed. R. Civ. P. 12(b)(6), state as follows for their Memorandum in Support of Defendants' Motion to Dismiss:

I. Introduction

As Defendants set forth in their Answer, they do not deny that their Daily Check-in procedure failed Ms. Franklin. They remain dismayed that Ms. Franklin's incident occurred at the CSL community, despite their good faith efforts to assure the well-being of their residents through a system of emergency pull cords, emergency pendants and the Daily Check-in procedure. Defendants admit that they breached the Residency Agreement with Ms. Franklin in failing to execute the Daily Check-in procedure properly during her incident. Further, Defendants will not contest Plaintiff's negligence claim in the interest of assuming responsibility for a failure to follow its own best practices.

While Commonwealth accepts responsibility for its actions, it does not accept Plaintiff's characterization of its conduct as egregious in this case. Confusing the severity of this incident's

consequences to her with Commonwealth's conduct related to the incident, Plaintiff has included numerous unfounded claims in her Complaint. Plaintiff's claims in this regard are insufficiently pled and must be dismissed.

Plaintiff's claim for punitive damages (Count III) cannot move forward because she has failed to show that the conduct alleged was willful or wanton. Likewise, Count IV for intentional infliction of emotional distress must be dismissed because Plaintiff has failed to show that the Defendants' conduct in this case was intentional or reckless *and* outrageous and intolerable. Finally, Plaintiff has failed to set forth sufficient facts to support a claim for misrepresentation of the quality of services under the Virginia Consumer Protection Act ("VCPA") (Count V) because she has not alleged any misrepresentations that satisfy the statute's requirements and the applicable heightened pleading standard. In sum, Ms. Franklin's own allegations establish that this is not a case of intentional wrongdoing on the part of Commonwealth. Thus, Plaintiff's claims seeking exemplary damages fail as a matter of law and must be dismissed.

II. Statement of Facts[1]

Ms. Franklin entered into a Residency Agreement with Commonwealth for accommodations in the unlicensed independent living portion of Commonwealth's community – apartments designed for persons "capable of providing for their own health care and personal needs." (Compl., Ex. A at 6.) Despite suffering from multiple sclerosis, Ms. Franklin had maintained her independence her entire life up to and including the time she signed the Residency Agreement. (Compl. ¶ 33.) Ms. Franklin reviewed and initialed every page of the

[1] In reciting Plaintiff's allegations as part of this Statement of Facts section, Defendants are not admitting the truth of any particular fact asserted and refer the Arbitrator to their Answer in regard to the contested facts in this case.

Residency Agreement prior to signing it. (Compl. ¶ 47.) As such, Ms. Franklin agreed to and acknowledged the following terms:

- The Residential Housing portion of the Community is not licensed to offer and **does not offer assistance with medications, bathing, dressing mobility needs, supervision, monitoring of your health or safety, or other personal care activities.**
- It is **your responsibility to provide for your own health care and personal care** so long as you reside in Residential Housing.
- **You represent to us that you are capable of providing for your own health care and personal care needs** and will provide for all such needs as long as you reside in Residential Housing.

(Compl., Ex. A at 6 (emphasis and bullets added). Thus, Ms. Franklin represented to Commonwealth that she was capable of living independently and acknowledged that Commonwealth was not responsible for monitoring her health and safety. The Complaint contains numerous allegations contradicted by these terms, and each must be disregarded. As the contract shows, Commonwealth did not assume, and did not represent that it would provide, any higher level of "care" than the Daily Check-in procedure.

The Daily Check-in procedure is described in the Resident Handbook as follows:

> To ensure the well-being of all residents we ask that you call the Front Desk no later than 10:30 a.m. each day. In the event you do not call we will call your apartment phone; if you do not answer an employee will then come to your apartment to ensure that you are okay and not in need of assistance.

(Compl., Ex. B at 7.) When Plaintiff's daughter visited Commonwealth, a sales representative advised them of a Daily Check-in procedure, representations that mirrored the content of the Resident Handbook, absent the conflicting notion that any follow-up would be performed "immediately," which is contradicted by the plain terms of the Resident Handbook. (Compl. ¶¶ 37–39.) Despite numerous allegations regarding the research Plaintiff and her family had done regarding Commonwealth's website and marketing materials (Compl. ¶¶ 19–32), Plaintiff and

her family had never heard of the Daily Check-in procedure prior to visiting the community. (Compl. ¶ 38.) Thus, although Plaintiff alleges that there was no training, no redundancy, and no oversight to ensure the receptionists carried out the check-in procedure, Plaintiff's own allegations confirm that Commonwealth never made any such representations to Plaintiff about the Daily Check-in procedure. (Compl. ¶¶ 38, 99–104.)[2] Indeed, although Plaintiff cites numerous statements from Commonwealth's website and marketing materials, she admits that the totality of Commonwealth's representations regarding the procedure was reflected in the two-sentences describing the procedure in the Resident Handbook. (Compl. ¶¶ 38–39.)

On the evening of December 9, 2015, Plaintiff reached across her body with her left hand to place her TV remote on a bedside table to her right and broke her clavicle. (Compl. ¶ 62.) As a result of the broken clavicle, Plaintiff was unable to remove herself from her bed, unable to reach a telephone, and had no emergency alert systems within reach. (Compl. ¶ 64.) For the next four days, CSL's staff did not check-in with Plaintiff by phone or by visiting her apartment in accordance with the Daily Check-in procedure. (Compl. ¶¶ 66, 80–82.) Plaintiff suffered for almost four days, unable to move. (*See* Compl. ¶¶ 65–83.) Plaintiff's daughter ultimately found her, and Plaintiff went to the hospital for treatment. (Compl. ¶¶ 88, 92.)

Plaintiff alleges that the failure of the check-in system caused her injuries, in addition to the injuries she suffered related to the broken clavicle itself, which she does not allege was caused in any way by Commonwealth. On December 10, a receptionist erroneously thought she

---

[2] In terms of redundancy, Plaintiff acknowledges in her Complaint that Commonwealth utilized the Daily Check-in procedure as "an additional way to ensure the safety of the resident on a daily basis." (Compl. ¶ 40.) As reflected in the Resident Handbook, the Daily Check-in was part of an overall system of safety measures provided by Commonwealth, which included 24-hour front desk coverage, the emergency pull cord system, staff monitoring of the common areas, and surveillance cameras in the common areas. (Compl., Ex. B at 8, 10, 15, 16.) Of course, Commonwealth also offered every resident a free emergency pendant; however, this was not required of the independent living residents.

saw Plaintiff in the lobby and noted her presence in the log book. (Compl. ¶ 108.) For the next three days, there was no notation for Plaintiff in the log book. (Compl. ¶¶ 109–14.) As Plaintiff points out, Commonwealth failed her in this regard. (*See id.*) Commonwealth agrees. It cannot agree, however, with allegations that Commonwealth intentionally misled Plaintiff or took any other action in conscious disregard for Ms. Franklin's safety.

In fact, Plaintiff's own allegations confirm that Commonwealth implemented a Daily Check-in procedure, carried it out, and did so as an additional measure of safety for the residents, in concert with the community's other safety features. At bottom, the parties' Residency Agreement and the incorporated Resident Handbook govern the parties' relationship in this case, and any allegations contrary to those documents must be disregarded by the Arbitrator in ruling on Commonwealth's motion to dismiss.

III. Applicable Law

The parties entered into an Agreement to Arbitrate this case on February 1, 2016. Clause 5 of that agreement dictates that "the law to be applied in the arbitration shall be the substantive law of the Commonwealth of Virginia and federal procedural law, including the Federal Rules of Civil Procedure." Accordingly, Defendants file this motion to dismiss pursuant to Rule 12(b)(6) and invoke the pleadings standards set forth under Rules 8, 9, and 10 of the federal rules.

IV. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss should be granted unless a complaint contains "sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Iqbal*, the Supreme Court articulated the two-pronged analytical approach to be followed when testing the legal sufficiency of pleadings under Rule 8 in the context of a Rule 12(b)(6) motion. First, a court must identify

and reject legal conclusions unsupported by factual allegations because they are not entitled to the presumption of truth. *Id.* at 680. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 678. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Second, assuming the veracity of "well-pleaded factual allegations," a court must conduct a "context-specific" analysis drawing on "its judicial experience and common sense" and determine whether the factual allegations "plausibly suggest" an entitlement to relief. *Iqbal*, 556 U.S. at 663–64. The plausibility standard requires more than a showing of "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. In other words, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663.

A court must consider the attached exhibits as a part of the complaint, and "in the event of conflict between the bare allegations of the complaint and any exhibit attached pursuant to Rule 10(c), the exhibit prevails." *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991); *see also* Fed. Rule Civ. Proc. 10 (c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

In short, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678–79. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief, as required by Rule 8." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (internal quotation marks and brackets omitted) (quoting *Iqbal*, 556 U.S. at 679). It follows that where a plaintiff's complaint does not satisfy the

standard set forth by the Supreme Court in *Twombly* and *Iqbal*, a defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim should be granted.

V. Analysis

Plaintiff has failed to plead sufficient facts to support her claims for (1) punitive damages, (2) intentional infliction of emotional distress, and (3) misrepresentations about the quality of service under the Virginia Consumer Protection Act. These claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

A. Plaintiff has failed to plead sufficient facts to support a claim for punitive damages.

Even if taken as true, Plaintiff's factual allegations are not sufficient to support a claim for punitive damages because her allegations do not satisfy the requirement that the conduct be willful and wanton.

Generally, the imposition of punitive damages is not favored and, because they are in the nature of a penalty, they should be assessed only in cases of the most egregious conduct. *Poulston v. Rock*, 251 Va. 254, 270, 467 S.E.2d 479, 488 (1996) (citations omitted). A claim for punitive damages at common law in a personal injury action must be supported by factual allegations sufficient to establish that the defendant's conduct was willful or wanton. *Woods v. Mendez*, 265 Va. 68, 76–77, 574 S.E.2d 263, 268 (2003) (citations omitted). Willful and wanton negligence is action undertaken in conscious disregard of another's rights, or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct *probably* would cause injury to another. *Green v. Ingram*, 269 Va. 281, 292 (2005) (emphasis added) (citations omitted). Negligence conveys the idea of heedlessness, inattention, inadvertence, whereas willfulness and wantonness convey the

idea of purpose or design, actual or constructive. *Id.* In sum, a claim for punitive damages depends entirely on the conduct of the defendant, not the result of that conduct.

In support of her claim for punitive damages, Plaintiff offers nothing more than a result-driven critique of how the program might have been better designed and implemented with the benefit of knowing what happened to Ms. Franklin. Plaintiff alleges that she was relying on the Daily Check-in procedure to protect her well-being. (Compl. ¶ 131.) Plaintiff further alleges that the Defendants knew about her medical condition and supposedly acknowledged their understanding that they were responsible for her well-being, safety, and security. (Compl. ¶ 133.) These allegations are directly contradicted by the language of the Residency Agreement. Indeed, Plaintiff acknowledges in her Complaint that Commonwealth is "essentially legally positioned as no more than a residential landlord." (Compl. ¶ 17.) As discussed, the Independent Living Residency Agreement explicitly states:

> The Residential Housing portion of the Community is not licensed to offer and does not offer assistance with medications, bathing, dressing, mobility needs, *supervision, monitoring of your health and safety*, or other personal care activities.

(Compl., Ex. A at 6 (emphasis added).) As such, the plain language of the Residency Agreement contradicts Plaintiff's allegation that Commonwealth acknowledged any responsibility for her health and safety.

In truth, as an independent living resident, Plaintiff has alleged only one "right" that has been violated: her entitlement to a daily check-in from the receptionist staff at CSL, an obligation detailed in the Resident Handbook that she signed. Given this contradiction, Plaintiff's allegations in support of punitive damages can be separated into two categories: (1) Defendants failed to train all staff on how to implement the daily check-in routine, and (2) Defendants failed to supervise the use of the log book.

In this case, the Defendants' alleged conduct does not rise to the level of willful and wanton. The first set of allegations regarding a failure to train cannot support a claim for punitive damages. As Plaintiff details in her Complaint, the Daily Check-in procedure required that the receptionist at the Front Desk call a resident if that resident did not call before 10:30 a.m. If the resident did not answer, then a staff member was to walk to the resident's apartment and check on that resident. The simplicity of the system is self-evident. To suggest that failing to train staff on this rudimentary system amounts to egregious conduct evidencing a *conscious disregard* of Plaintiff's rights or reckless indifference to consequences which would *probably* cause injury to Plaintiff, would be an improper application of the punitive damages doctrine.

Even assuming a failure to train staff on how and when to use a phone and walk to another part of the facility could, in theory, support punitive damages, Plaintiff has not alleged any facts that indicate there was some intent, purpose, design, or conscious disregard behind this lack of training. The same may be said for failing to train food service staff or flyer delivery persons to observe a "problem" entirely contained to the inside of a resident's apartment and the entries in the log book at the front desk. At best, the facts alleged illustrate a general heedlessness or inattention to the potential for human error in such an elementary procedure.

The same logic applies to Plaintiff's claims that CSL failed to monitor the use of the log book. It is important to note that this Daily Check-in procedure is a contractual obligation only. This is in the context of an independent living facility where *residents* represent to the facility that they are "capable of providing for their own health care and personal needs and will provide for all such needs for as long as [the residents] reside in Residential Housing." (Compl., Ex. A at 6.) Plaintiff expressly acknowledged that she wanted to live in, and did receive a residence in, the *unlicensed* independent living portion of the community. (*Id.* at 1.)

There was no prior incident at the facility like the Plaintiff's. There is no allegation of prior complaints from residents of staff failing to follow check-in procedure. Defendants had no reason to believe that the procedure was insufficient. Even though there were missed entries in the log book, the staff was certainly implementing the policy on a regular basis. (Compl. ¶ 112.) Plaintiff herself was complying with the check-in procedure, by calling to check in with the front desk every day. (Compl. ¶ 57.) She makes no allegation that the receptionist who checked her in each day did not know why Ms. Franklin was calling her. Ms. Franklin does not allege that her call was not answered and acknowledged every day prior to December 10, 2015 during her almost seven months as a resident.

For all of these reasons, the supposed failure to monitor staff performing the Daily Check-in procedure cannot be characterized as an example of the "most egregious conduct." *See Puent v. Dickens*, 245 Va. 217, 427 S.E.2d 340 (1993) (finding that a drunk driver with a .24% blood alcohol level who was actually drinking from an open liquor bottle while driving *and* after the collision that occurred because he was driving too fast and did not break before hitting the plaintiff's car, and who also attempted to flee the scene of the accident, was *not* enough to support a claim for punitive damages).[3]

Plaintiff has failed to plead sufficient factual allegations to support a claim for punitive damages because the conduct alleged cannot plausibly be characterized as willful or wanton

---

[3] For a failure to monitor staff case that *does* satisfy the "most egregious conduct" standard see *Crewe v. Cote De Neige*, No. CL0801075P-03, 2008 WL 6324867 (Va. Cir. Ct. 2009). In this Newport News case, a jury awarded a 55 year-old mentally handicapped man $750,000 dollars in damages, with $250,000 of that designated as punitive damages, because the assisted living facility he lived in hired a male CNA with a criminal record, who repeatedly sodomized the resident, permanently damaging his sphincter muscle in his rectum. The CNA was the only employee for most of his shift and was the victim's direct caregiver. The owner of the facility knew the man for twenty-four years before she hired him and was on notice of his violent past. Undoubtedly, that was the most egregious conduct and it stands in stark contrast to Plaintiff's allegations of Commonwealth's conduct in this case.

under Virginia law. Again, Plaintiffs' allegations at most constitute heedlessness, inattention, or inadvertence.

B. Plaintiff has failed to allege sufficient facts to support a claim for intentional infliction of emotional distress.

Plaintiff has failed to allege sufficient facts to support a claim for intentional infliction of emotional distress because she has failed to show that the conduct in this case was intentional or reckless *and* outrageous and intolerable.

Under Virginia law, the elements of a cause of action for the tort of intentional infliction of emotional distress are: (1) intentional or reckless conduct, where the wrongdoer specifically intended to inflict emotional distress or should have known that emotional distress would result from such conduct; (2) outrageous and intolerable conduct, judged by general standards of decency and morality; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. *Womack v. Elridge*, 215 Va. 338, 342 (1974). The Supreme Court of Virginia has stated that liability for this tort is found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Russo v. White*, 241 Va. 23, 27, 400 S.E.2d 160, 162 (1991). A claim for intentional infliction of emotional distress must allege all facts necessary to establish the cause of action to withstand challenge on a motion to dismiss. *Harris v. Kreutzer*, 271 Va. 188, 204, 624 S.E.2d 24, 33 (2006). Because of the risks inherent in torts where injury to the mind or emotions is claimed, such torts are not favored in the law. *Id.*

Plaintiff alleges that the Defendants failed "to protect her and allow[ed] her to remain unattended" and thus, "intentionally inflicted severe emotional stress" upon her. (Compl. ¶ 141.) Plaintiff goes on to allege that the Defendants failed "to attend to her needs as agreed." (Compl.

¶ 142.) Because of this conduct, she alleges that she suffered "anxiety, depression, trauma, and shock." (Compl. ¶ 141.)

The Residency Agreement unambiguously confirms that the Defendants did *not* agree to protect the Plaintiff or to attend to Plaintiff's needs, but rather, agreed to follow a Daily Check-in procedure as set forth in the Resident Handbook. (Compl., Ex. A at 6, Ex. B at 7.) Given this contradiction, Plaintiff's remaining allegation is that Commonwealth's staff failed to follow and monitor the check-in procedure and therefore, she remained unattended. She has not adequately alleged that this failure was intentional or reckless as required for this claim. In fact, on December 10, Plaintiff acknowledges that one receptionist thought she saw the Plaintiff and marked her present – this was "inaccurate," but not intentional or reckless. Even if Plaintiff could plausibly plead that the staff acted recklessly on the remaining days, an administrative failure to properly follow a check-in policy is not so extreme in degree as to go beyond all possible bounds of decency. There are no facts to support a claim that the failure to implement the check-in procedure properly was atrocious or utterly intolerable in a civilized community. As with punitive damages, this claim depends on the Defendants' conduct, and the failure to perform according to the residency agreement does not satisfy the Supreme Court's definition of "outrageous or intolerable conduct."

Plaintiff has not alleged all facts necessary to establish a claim of intentional infliction of emotional distress because the conduct alleged was not reckless and certainly does not reach the level of outrageousness required under Virginia law to sustain the claim.

C. Plaintiff has failed to plead sufficient facts to support a claim under the Virginia Consumer Protection Act.

Plaintiff has failed to plead sufficient facts to support a claim under the Virginia Consumer Protection Act because she has not alleged any misrepresentations that satisfy the requirements of the statute.

Under the VCPA, a supplier is prohibited from misrepresenting that services have certain characteristics or benefits. Va. Code Ann. §59.1-200(5). Suppliers also may not misrepresent that services are of a particular standard, quality, grade, style, or model. *Id.* at § 59.1-200(6). Using any other deception, fraud, false pretense, false promise, or misrepresentation with a consumer transaction is prohibited. *Id.* at § 59.1-200(14). In order to sustain a claim under the VCPA, a plaintiff must prove that the defendant acted with *an intent* to deceive or otherwise mislead, *i.e.*, with fraudulent intent, as to a material fact on which the plaintiff relied to her detriment and which resulted in measurable damages. *Padin v. Oyster Point Dodge*, 397 F. Supp. 2d 712, 722 (E.D. Va. 2005).

Moreover, as a claim sounding in fraud, the Plaintiff's VCPA claim is subject to the heightened pleading standards set forth in Rule 9. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *Hamilton v. Boddie-Noell Enterprises, Inc.*, 88 F. Supp. 3d 588, 591–92 (W.D. Va. 2015); *see also Fravel v. Ford Motor Co.*, 973 F. Supp. 2d 651, 656 (W.D. Va. 2013) ("As a claim sounding in fraud, Rule 9(b)'s particularity requirements apply to the VCPA."). This standard requires a plaintiff making a VCPA claim to state with particularity "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Id.* "Failure to comply with Rule 9(b)'s pleading standard is treated as a failure to state a claim under Rule 12(b)(6)." *Id.*

Plaintiff alleges that the Defendants misrepresented services sold to her. Specifically, Plaintiff alleges that Defendants sold her "provision of care" services and that Defendants' marketing materials and "other materials" made misrepresentations regarding the Defendants "suitability to care for Ms. Franklin." (Compl. ¶ 147.) She also alleges that the Defendants made misrepresentations about the quality and excellence of their care, the excellence and skilled training of their staff, and that Commonwealth "could comply with the terms of its contract as a part of a consumer transaction." (Compl. ¶¶ 147–151.)

Plaintiff has failed to allege adequate facts to support a claim under the VCPA, because Plaintiff has not shown that that the representations were false or that the Defendants intended to deceive her when they made their representations. Plaintiff alleges that the Defendants (1) made general representations about the quality of "care" provided and (2) made false representations about their ability to comply with the Daily Check-in procedure. As discussed, the Residency Agreement flatly contradicts any assertion that the Defendants represented to Plaintiff that Commonwealth would provide her with the level of care alleged as a resident in the independent living section of the community. (Compl., Ex. A, at 6.)

The additional "representations" as to quality of service are supposedly sourced from a website that speaks generally about all of the communities the Defendants offer throughout the Commonwealth of Virginia, including assisted living and memory care communities. One incident in one independent living community does not render these general representations false. Even assuming for the sake of argument that Plaintiff's allegations could satisfy the heighted pleading standard and the representations were somehow rendered false, Plaintiff has not alleged sufficient facts to support a claim that the Defendants acted with an intent to deceive. At most, the representations by employees, residents, and the Defendants show that the Defendants goal is

to provide exceptional service. One incident cannot be used to show that the whole of Defendants' operations, varied as they are, have been falsely misrepresented in marketing materials and evidence that the Defendants "really had no intent to comply with its general representations on quality of services." (Compl. ¶ 152.)

Plaintiff's allegations that the Defendants made misrepresentations that they could comply with the terms of their contract are likewise insufficient. Though Plaintiff sets forth her assessment of the Daily Check-in procedure, she fails to adequately allege that the Defendants made any such representations about the check-in program. (*See* Compl. at 151.) Instead, Plaintiff acknowledges that the Daily Check-in procedure is, in fact, not on the website. (Compl. ¶ 38.) According to the Complaint, all representations regarding the daily check-in procedure came from Commonwealth's agent, who represented:

- "that a potential resident would call a phone number staffed by CAL/CSL daily by no later than 10:30, and in the event the resident did not, the facility would first attempt to confirm the well-being of the resident by calling the resident's apartment, and if efforts to contact the resident were unsuccessful, CAL/CSL would immediately send someone to the resident's apartment to check on the resident."

- "that the program was an additional way to ensure the safety of the resident on a daily basis."

(Compl. ¶¶ 39–40.) The agent then handed Plaintiff's daughter the Residency Agreement and Resident Handbook, which describe the program. (Compl. ¶ 41.) Notably, the description within these documents does not indicate that staff will go *immediately* to the resident. (Compl. ¶ 50, Ex. A at 6, Ex. B at 7.) Nonetheless, this is the entirety of Plaintiff's allegations of misrepresentations regarding the Daily Check-in procedure to support its VCPA claim.

These statements are simply not enough. There is no indication that Commonwealth's agent made these statements with intent to deceive. Plaintiff offers a legal conclusion to satisfy

this requirement: "Plaintiff's overall conduct evidences the fact that it really had no intent to comply with its . . . specific representation that it would ensure Ms. Franklin's well-being by checking in on her daily." (Compl. ¶ 152.) Plaintiff offers a litany of statistics that, even if the Court assumes are true, actually evidence an intent *to* comply with its contractual obligation. (Compl. ¶ 112.) Once the fictional "Program deadline of 10:30 a.m." is removed (because that requirement is nowhere to be found in the Resident Handbook), Plaintiff's statistics indicate that the Defendants fully complied with the contractual obligation the vast majority of the time – certainly enough to evidence an intent to comply. (Compl. ¶ 112(b).) The allegation that the staff did not comply with check-in procedure *some* of the time does not logically lead to the conclusion that there was an intent to deceive the Plaintiff and there was no intent to comply at all. Furthermore, the lack of a notation does not definitively support the conclusion that the check-in was not performed. It only indicates that a check-in was not recorded.

Plaintiff has failed to plead to sufficient facts to support a claim under the Virginia Consumer Protection Act, because the misrepresentations she lists are not false and she fails to allege adequate facts to support an intent to deceive as required by the statute.

VI. Conclusion

Defendants respectfully request that the Arbitrator dismiss Counts III, IV, and V pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and any other relief the Arbitrator deems appropriate.

OSPREY/PANTOPS PLACE, LLC, T/A COMMONWEALTH SENIOR LIVING AT CHARLOTTESVILLE and COMMONWEALTH ASSISTED LIVING, LLC

By:_____
Of Counsel

W. Benjamin Pace (VSB No. 48633)
Erica Mitchell (VSB No. 89420)
WILLIAMS MULLEN
200 South 10th Street, Suite 1600 (23219)
Post Office Box 1320
Richmond, Virginia 23218-1320
Tel: 804.420.6932
Fax: 804.420.6507
wpace@williamsmullen.com
Counsel for Defendants

CERTIFICATE

I certify that on this 4th day of April, 2016, a copy of the foregoing was sent by email and first-class mail, postage prepaid to:

Charles A. Gavin, Esquire
Cawthorn, Desekvich & Gavin, P.C.
1409 Eastridge Road
Richmond, Virginia 23229
Counsel for Plaintiff