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FRANKLIN COUNTY, C.S.C.

NORTH CAROLINA

FRANKLIN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 382

JEANNE T. BARTELS, by and through, WILLIAM H. BARTELS, Attorney-in-Fact, and JOSEPH J. PFOHL, Executor of the ESTATE OF BERNICE C. PFOHL, CLAIRE M. MURPHY, by and through MICHELE MULLEN, Attorney-in-Fact, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SABER HEALTHCARE GROUP, LLC, SABER HEALTHCARE HOLDINGS, LLC, FRANKLIN OPERATIONS, LLC d/b/a FRANKLIN MANOR ASSISTED LIVING CENTER, SMITHFIELD EAST HEALTH HOLDINGS, LLC d/b/a GABRIEL MANOR ASSISTED LIVING CENTER, and QUEEN CITY AL HOLDINGS, LLC, d/b/a THE CROSSINGS AT STEELE CREEK,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE coming on to be heard and being heard before the undersigned, upon Plaintiffs' motion pursuant to Rule 65 of the North Carolina Rules of Civil Procedure and N.C.G.S. § 1-485 for a preliminary injunction against all Defendants, prohibiting them from staffing below the minimum staffing standards set forth in 10A N.C.A.C. 13F.1308, and appointing a third-party compliance monitor pending the conclusion of this action on the merits.

Stephen J. Gugenheim, Andrew D. Hathaway, Matthew E. Lee, and Jeremy R. Williams appeared on behalf of the Plaintiffs. Edward J. Bennett, Mary Beth Hickcox-Howard, Steven B. Epstein, and S. Todd Hemphill appeared on behalf of the Defendants.

And it appearing to the Court, after hearing arguments by Counsel for Plaintiffs and Defendants, reviewing the court file, materials submitted by the parties to the Court, including the items noted in paragraphs 11 and 12 *infra* and the following: Plaintiffs' Memorandum of Law in Support of their Motion for Preliminary Injunction, including Exhibits A – F attached thereto; Supplemental Exhibits to Plaintiffs' Motion for Preliminary Injunction (Exhibits G – I); Second Supplemental Exhibits to Plaintiffs' Motion for Preliminary Injunction (Exhibit J); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction; Defendants' Evidentiary and Legal Materials Submitted in Opposition to Plaintiffs' Motion for Preliminary Injunction, that Plaintiffs' Motion for Preliminary Injunction should be allowed.

The Court, therefore, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant Franklin Operations, LLC d/b/a Franklin Manor Assisted Living Facility ("Franklin Manor") is a Virginia corporation with a principal place of business located in Youngsville, North Carolina.

2. Defendant Smithfield East Health Holdings, LLC d/b/a Gabriel Manor Assisted Living Center ("Gabriel Manor") is a North Carolina corporation with a principal place of business located in Clayton, North Carolina.

3. Defendant Queen City AL Holdings, LLC d/b/a The Crossings at Steele Creek ("Steele Creek") is a North Carolina corporation with a principal place of business located in Charlotte, North Carolina.

4. Defendants Saber Healthcare Group, LLC and Saber Healthcare Holdings, LLC (collectively, "Saber") are Ohio corporations doing business in North Carolina that own, operate,

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manage, or control the adult care homes known as Franklin Manor, Gabriel Manor, and Steele Creek (collectively, the "North Carolina Care Centers").

5. On April 25, 2016, Plaintiffs filed the present action against Defendants asserting multiple claims related to Defendants' understaffing of the North Carolina Care Centers and Defendants failure to comply with the Adult Care Home Residents' Bill of Rights, N.C.G.S. 131D-21.

6. On April 25, 2016, Plaintiffs also filed the Motion for Preliminary Injunction before the Court.

7. On May 9, 2016, Plaintiffs filed an Amended Class Action Complaint adding Plaintiff, Claire M. Murphy, by and through Michele Mullen as Attorney-in-Fact. Claire M. Murphy is currently a resident at Franklin Manor.

8. A hearing on Plaintiffs' Motion for a Preliminary Injunction was held Monday, May 16, 2016 in Granville County, North Carolina, and continued on Thursday May 19, 2016 in Wake County, North Carolina.

9. Counsel for each of the parties consented to the entry of an order by the undersigned out-of-county and out-of-session.

10. The Court heard and considered evidence from Plaintiffs and Defendants.

11. Specifically, the Court was presented with the following evidence from the Plaintiffs:

a. Affidavit of Michele Mullen dated May 9, 2016;

b. Affidavit of Patricia Eyes dated May 18, 2016, whose mother, Catherine Myers, is currently a resident at Gabriel Manor;

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c. Five reports from the North Carolina DHSR citing Franklin Manor for deficiencies and violations on December 4, 2014, April 22, 2015, September 8, 2015, September 21, 2015, and December 14, 2015;

d. Two letters regarding failure to timely abate previous deficiencies from North Carolina DHSR to Franklin Manor and the Saber Defendants on January 8, 2016, and March 24, 2016;

e. Four reports from the North Carolina DHSR citing Gabriel Manor for deficiencies and violations on January 9, 2015, May 28, 2015, September 3, 2015, and November 19, 2015;

f. Six letters dated March 18, 2016 from North Carolina DHSR to Gabriel Manor and the Saber Defendants assessing penalties totaling $52,000.00 for unabated violations of North Carolina regulations;

g. Seven reports from the North Carolina DHSR citing Steele Creek for deficiencies and violations on November 5, 2014, February 2, 2015, June 2, 2015, June 30, 2015, July 27, 2015, August 5, 2015, and February 17, 2016;

h. A Johnston County DSS monitoring report regarding Gabriel Manor dated February 17, 2016;

i. Eight monitoring reports from the Mecklenburg County DSS regarding Steele Creek dated January 14, 2016, February 12, 2016, February 17, 2016, March 10, 2016, March 17, 2016, April 8, 2016, April 18, 2016, and May 9, 2016;

j. Six monitoring reports from the Franklin County DSS regarding Franklin Manor dated January 14, 2016, February 2, 2016, February 9, 2016, February 18, 2016, April 7, 2016, and April 8, 2016.

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k. Defendant Saber Healthcare Group, LLC's "North Carolina Policies and Procedures";

l. Steele Creeke's Special Care Unit Disclosure Statement stating, among other things, that "Saber Healthcare Group staffs its Special Care Unit . . ."

m. Website pages from www.saberhealth.com;

n. Job postings on www.careerbuilder.com for Franklin Manor, Gabriel Manor, and The Crossings at Steele Creek;

o. Email from Franklin Manor Executive Director regarding staffing at Franklin Manor;

p. Photos of balloons covering the Franklin Manor Zero Star rating certificate;

q. 2016 License Applications filed by Franklin Manor, Gabriel Manor, and The Crossings at Steele Creek.

12. Defendants presented the Court with the following evidence:

a. Affidavit of Meghan Lamphere dated May 11, 2016;

b. Affidavit of Robin Eichorn dated May 16, 2016;

c. Affidavit of Laurie Minard dated May 19, 2016; and

d. Affidavit of Sherry Tabor dated May 19, 2016.

13. In her affidavit, Michele Mullen testified as follows:

a. Claire Murphy is not being regularly changed and is frequently soiled when Michele Mullen visits her.

b. The personal care aides leave Claire Murphy and other residents at the dining room table after dinner because they are preoccupied with cleaning dishes rather than caring for residents.

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c. Personal care aides have to serve people dinner while other residents are forced to watch and wait for extended periods of time.

d. Showers and baths are not occurring regularly and Claire Murphy frequently appears dirty and unkempt.

e. Laundry service is poor. When laundry is actually done, Claire Murphy's clothing will go missing and other residents' clothing will end up in Claire Murphy's wardrobe.

f. Supervision of the residents is poor resulting in wandering, falls, and theft of personal items from Claire Murphy's room and elsewhere.

g. The staff forgets to put Claire Murphy's dentures in her mouth.

h. The staff frequently loses or misplaces Claire Murphy's ambulation aides like her cane and her walker.

i. The staff are frequently preoccupied with their cell phones and talking amongst themselves rather than caring for residents.

j. Some staff have reported to Michele Mullen that they have never worked with dementia residents and that they are not certified to do so.

14. Plaintiffs' also submitted a document regarding Steele Creek from the Mecklenburg County Department of Social Services dated May 9, 2016 and entitled "Complaint Investigation Summary." The report was prepared in connection with allegations that:

a. The facility failed to provide appropriate staffing;

b. The facility failed to provide appropriate personal care; and

c. The facility failed to administer medication as ordered.

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15. Each of these allegations were substantiated by the Mecklenburg County DSS report.

16. Patricia Eyes, is the duly authorized Power of Attorney ("POA") for her mother, Catherine Myers, a resident at Gabriel Manor.

17. Ms. Eyes' testified that the needs of her mother, and other residents of Gabriel Manor, are currently not being met. She observed her mother not being bathed regularly and not being changed regularly after soiling herself, as well as other residents not receiving timely assistance from aides when calling out for help.

18. In addition, each of the three North Carolina Care Centers have been cited recently by the North Carolina DHSR for violations such as:

a. Leaving a resident in their own waste for extended periods of time resulting in excoriation (rubbing off) of skin;

b. Residents locked out of their rooms which resulted in residents soiling themselves due to the inability to access their bathrooms;

c. Failure to meet minimum staffing requirements pursuant to 10A N.C.A.C. 13F.1308(a);

d. Failure to assure residents were treated with respect, consideration, and dignity; and

e. Failure to administer medication as ordered by prescribing physician.

19. The Court finds that the unrefuted evidence shows that the North Carolina Care Centers have failed to staff the North Carolina Care Centers in compliance with the minimum staffing requirements set forth in 10A N.C.A.C. 13F.1308.

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20. The Court finds that the unrefuted evidence shows that as of May 9, 2016, The Crossings at Steele Creek failed to comply with the minimum staffing requirements set forth in 10A N.C.A.C. 13F .1308.

21. The Court also finds that the unrefuted evidence shows that Defendants have violated the Adult Care Home Bill of Rights, N.C. Gen. Stat. § 131D-21 in that Defendants failed to provide care and services to the Residents of the North Carolina Care Centers which are adequate, appropriate, and in compliance with relevant federal and State laws and rules and regulations and that the Residents of the North Carolina Care Centers were not treated with respect, consideration and dignity and full recognition of his or her individuality.

22. The Court was not presented with factual evidence by Defendants that refuted the factual findings referenced in the Division of Health Service Regulation Statements of Deficiency, and referenced herein.

23. The Court was not presented with factual evidence by Defendants that refuted the factual allegations contained in the Plaintiff's First Amended Complaint.

CONCLUSIONS OF LAW

24. Based on the findings of fact herein, the Court makes the following conclusions of law.

25. At all times relevant hereto Franklin Manor was a licensed Adult Care Home with a Special Care Unit and was required to comply with N.C. Gen. Stat. § 131D-2.1, *et seq.*, 10A N.C.A.C. 13F.0101, *et seq.*, and 10A N.C.A.C. 13F.1301, *et seq.*

26. At all times relevant hereto Gabriel Manor was a licensed Adult Care Home with a Special Care Unit and was required to comply with N.C. Gen. Stat. § 131D-2.1, *et seq.*, 10A N.C.A.C. 13F.0101, *et seq.*, and 10A N.C.A.C. 13F.1301, *et seq.*

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27. At all times relevant hereto Steele Creek was a licensed Adult Care Home with a Special Care Unit and was required to comply with N.C. Gen. Stat. § 131D-2.1, *et seq.*, 10A N.C.A.C. 13F.0101, *et seq.*, and 10A N.C.A.C. 13F.1301, *et seq.*

28. At all times relevant hereto Saber was the operator, manager, or the controlling agent of the North Carolina Care Centers, and was required to ensure the North Carolina Care Centers complied with N.C. Gen. Stat. § 131D-2.1, *et seq.*, 10A N.C.A.C. 13F.0101, *et seq.*, and 10A N.C.A.C. 13F.1301, *et seq.*

29. N.C. Gen. Stat. § 131D-28 provides as follows:

> Every resident shall have the right to institute a civil action for injunctive relief to enforce the provisions of this Article. The Department of Health and Human Services, a general guardian, or any other person appointed ad litem pursuant to law, may institute an action pursuant to this section on behalf of the resident or residents. Any agency or person above named may enforce the rights of the resident specified in G.S. 131D-21 which the resident is unable to enforce.

30. Plaintiffs Jeanne T. Bartels, by and through William H. Bartels as Attorney-in-Fact, Joseph J. Pfohl, Executor of the Estate of Bernice C. Pfohl, and Claire M. Murphy, by and through Michele Mullen as Attorney-in-Fact, are "residents" of the North Carolina Care Centers as defined by N.C. Gen. Stat. § 131D-20.

31. As residents, Plaintiffs have standing to pursue injunctive relief under N.C. Gen. Stat. § 131D-28 on behalf of themselves and all other residents of the North Carolina Care Centers.

32. 10A N.C.A.C. 13F.1308 requires Defendants to staff the North Carolina Care Centers at no time less than a ratio of one staff member for every eight residents on the first and second shift and one staff member for every ten residents on the third shift.

33. Defendants are required to comply with the Adult Care Home Bill of Rights, N.C. Gen. Stat. § 131D-21.

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34. It appears by the First Amended Complaint that the Plaintiffs are entitled to the relief requested and the commission of any future act in violation of 10A N.C.A.C. 13F.1308 would produce injury to the Plaintiffs and residents of the North Carolina Care Centers.

35. There is a substantial likelihood that the North Carolina Care Centers will not be in compliance with the minimum staffing requirements required by 10A N.C.A.C. 13F.1308 during the pendency of this lawsuit if an injunction is not entered.

36. Defendants' failure to comply with the minimum staffing requirements required by 10A N.C.A.C. 13F.1308 is likely to produce injury to the residents of the North Carolina Care Centers.

37. The residents of the North Carolina Care Centers are likely to sustain irreparable harm unless an injunction is issued;

38. Plaintiffs are likely to prevail on the merits of this action.

39. It is further this Court's opinion that entry of an injunction is necessary for the protection of the rights of the residents of the North Carolina Care Centers during the pendency of this litigation.

40. No harm will result to the Defendants from the entry of a preliminary injunction as the preliminary injunction enjoins Defendants from violating the minimum staffing requirements required by 10A N.C.A.C. 13F.1308. And, even if there were any harm to Defendants, any potential harm to Defendants is outweighed by the immediate and irreparable harm that would result to residents of the North Carolina Care Centers in the absence of a preliminary injunction.

41. After considering the evidence before the Court regarding the potential harm to Defendants, and finding none, the Court requires that Plaintiffs post a bond of $250.00.

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42. Plaintiffs requested that the Court appoint an individual to conduct periodic, random, and unannounced inspections of the North Carolina Care Centers to determine Defendants' compliance with the terms of this Order, and in particular, Defendants' compliance with the minimum staffing requirements set forth in 10A N.C.A.C. 13F.1308.

43. The Court requires that the parties select a qualified individual with experience in the field of long-term care to serve as a monitor to perform inspections of the North Carolina Care Centers in order to determine Defendants' compliance with the terms of this Order. If the parties are unable to agree, the Court will appoint the monitor.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Defendants are hereby enjoined from staffing any shift of any day at any of the North Carolina Care Centers at levels below the minimum staffing ratios set forth in 10A N.C.A.C. 13F.1308, and shall immediately notify Plaintiffs' counsel in writing if there are any instances in which the Defendants have failed to staff any shift on any day at any of the North Carolina Care Centers at the minimum staffing levels;

2. The parties will select or the Court will appoint a monitor with authority to inspect the North Carolina Care Centers at any time, without notice, and gather any and all information that the monitor deems relevant to Defendants' compliance with the minimum staffing standards set forth in 10A N.C.A.C. 13F.1308. Defendants shall provide the monitor with access to Defendants' time cards, staff schedules, and any other information requested by the monitor that he or she deems relevant and necessary to evaluate Defendants' compliance with 10A N.C.A.C. 13F.1308's minimum staffing requirements and, upon request, provide the monitor with copies of any such documents;

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3. The Court takes notice that as a result of serving as a monitor of the North Carolina Care Centers the person appointed may have access to protected health information of the residents of the North Carolina Care Centers. Pursuant to 45 CFR §164.512(e)(1)(i), the Court orders and permits Defendants to disclose any and all protected health information of any resident of any of the North Carolina Care Centers that such monitor deems necessary and relevant to determine Defendants' compliance with the terms of this Order. The monitor shall not disclose any protected health information to any individual and shall not reveal any protected health information of any resident as part of any report submitted to the parties;

4. In the event that the monitor finds any violations of the terms of this Order, within 10 business days, the monitor shall prepare and submit to counsel for the parties an inspection report that specifies the monitor's findings and include in such report any and all documents that support those findings;

5. During the pendency of this action, Plaintiffs shall be responsible for payment of reasonable fees and expenses to the monitor for performing inspections of the North Carolina Care Centers;

6. Any payment of reasonable fees and expenses to the monitor for performing inspections of the North Carolina Care Centers by Plaintiffs' may be recoverable at the conclusion of this action in accordance with N.C.G.S. § 7A-305(d)(7).

7. This order was entered in open court on May 19, 2016 and is signed by the undersigned on this, the 27th day of May, 2016.

Donald W Stephens

Hon. Donald W. Stephens
Superior Court Judge Presiding

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The Defendants on May 24, 2016 having removed this case to the United States District Court for the Eastern District of North Carolina and having served notice of such removal, this order is hereby stayed unless and until the case is remanded to this court for further proceedings.

So ordered this, the 27th day of May, 2016.

Donald W. Stephens

DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR COURT JUDGE

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing **ORDER** in the above captioned action upon all parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Stated Postal Service, addressed as follows:

Gugenheim Law Offices, PC
116 N. Person Street
Raleigh, NC 27601

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Poyner Spruill LLP
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Suite 1900
Raleigh, NC 27601

This the 1st day of June, 2016.

Leanna W Anderson,
Asst. Clerk

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