

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 16 MAP 2017**

GOLDEN GATE NATIONAL SENIOR CARE LLC, et al.,

Appellees

v.

COMMONWEALTH OF PENNSYLVANIA Acting by Attorney General,
Josh Shapiro,

Appellant.

**AMENDED BRIEF OF *AMICI CURIAE* AARP AND AARP FOUNDATION
IN SUPPORT OF APPELLANT COMMONWEALTH OF
PENNSYLVANIA Acting by Attorney General, Josh Shapiro**

Appeal granted by the Supreme Court of Pennsylvania on April 24, 2017, No. 336
MD 2015 from the March 22, 2017 Order of the Commonwealth Court of
Pennsylvania.

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STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people’s financial security, health, and well-being. AARP’s charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Among other things, AARP and AARP Foundation advocate for access to affordable health and long-term care in a manner that ensures both quality and respect for individual rights.¹

AARP and AARP Foundation submit this brief because the Commonwealth Court improperly dismissed the Commonwealth’s claims by finding—as a matter of law—that marketing statements made by Golden Gate National Senior Care LLC and its nursing facilities (“Defendants”) were mere “puffery.” Defendants’ statements about the services available in their facilities went to the heart of what consumers consider most important in making decisions about long-term care—whether the nursing facility staff can meet their needs. If the allegations in the Commonwealth’s Complaint are true, instead of providing the care they promised and for which they billed, Defendants’ nursing facilities failed to provide basic care because they were chronically understaffed. This is an issue of great

¹ No person or entity other than the *amicus curiae*, its members, or counsel paid in whole or in part for the preparation of this *amicus curiae* brief.

importance to older Americans and to the public—and one that could be properly resolved only through discovery and substantive fact-finding. Actions like this one are at the core of consumer protection law’s purpose. Yet, by dismissing the claims as a matter of law, the Commonwealth Court foreclosed the State’s ability to use the consumer protection law to obtain relief for damages caused by the deceptive exploitation of vulnerable nursing facility residents.

SUMMARY OF ARGUMENT

The lower court erred in dismissing the Commonwealth’s complaint at the pleading stage because whether Defendants’ marketing statements were puffery is an unexplored question of fact. A marketing statement is puffery as a matter of law only if it is so obviously unimportant that reasonable minds cannot differ as to its materiality. Defendants’ claims about what services staff would provide were material and very likely to mislead reasonable consumers. As such, the question of whether they were false representations or mere puffery should have been decided after discovery and fact-finding.

Elderly people seeking nursing facility care are in the midst of medical crises caused by precipitous declines in health, rapid increases in disability, or the death or illness of caregivers. They often seek information about nursing facilities under incredible stress and time pressures—and nursing facility administrators, marketers, and sales persons are aware of these pressures. When making the life-

changing decision of whether to live in a nursing facility, prospective residents and their family members want to know whether they or their loved ones will receive the assistance they need with activities of daily living. Yet, there is a dearth of reliable information available to consumers evaluating nursing facilities. The Centers for Medicare & Medicaid Services (“CMS”) Nursing Home Compare website is the only comprehensive resource for consumers to compare nursing facilities, but its rating system is confusing and does not address many of the qualitative aspects of nursing facility care that consumers are concerned about. Defendants’ marketing statements spoke to those same qualitative aspects.

Public policy also favors allowing the puffery determination to be made only after discovery and fact-finding. Nursing facilities generate billions in revenue from providing a critically important service to more than a million of the most vulnerable Americans. Unfortunately, many nursing facilities, particularly for-profit nursing facilities, deliver sub-par care because of chronic understaffing. Administrative enforcement of nursing facility regulations can be so lenient that it removes the incentives for nursing facilities to fully comply with the law. Consumer protection laws are, thus, a necessary and effective mechanism to hold nursing facilities to their promises and to incentivize nursing facilities to provide consumers with accurate and realistic information about their services.

The Commonwealth Court should not have conducted any puffery analysis beyond determining that the marketing statements were sufficient to raise a question of fact. Moreover, the puffery analysis that the court did conduct was deeply flawed. The court misinterpreted the standard in *Castrol v. Pennzoil*, 987 F.2d 939 (3rd Cir. 1993) construing it in a way that greatly expanded the class of statements that are puffery. For these reasons, we respectfully urge the Court to reverse the decision on appeal.

ARGUMENT

I. The Commonwealth Court Erred In dismissing The Complaint Because Whether Defendants' Statements Were False Representations Or Mere Puffery Is A Question Of Fact That Could Only Be Resolved Through Discovery.

A judgment on the pleadings requires the court to accept as true all well pled averments set forth in the complaint and all inferences reasonably deducible therefrom. *Pa. State Lodge, Fraternal Order of Police v. Dep't of Conservation and Natural Res.*, 909 A.2d 413, 415-16 (Pa. Comwlth. 2006), *aff'd*, 924 A.2d 1203 (Pa. 2007). A complaint cannot be dismissed at the pleading stage if there is a disputed issue of fact. *See e.g. Currie v. Phillips*, 70 Pa. D. & C. 4th 401 (C.P. 2005). Any doubt "must be resolved in favor of overruling the preliminary objections." *Pa. State Lodge*, 909 A.2d at 416.

A. The court erroneously ignored the majority rule that whether a statement is puffery is a mixed question of fact and law.

False representations are distinct from puffery. *Castrol v. Pennzoil*, 987 F.2d 939, 945 (3rd Cir. 1993) (citing W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 109, at 756-57 (5th ed. 1984)). Puffery is sales talk that is offered and understood as an expression of the seller's opinion, which is to be discounted by the buyer, and upon which no reasonable buyer would rely. *Castrol*, 897 F.2d at 945.

Courts usually treat puffery as a question of fact, or as a mixed question of fact and law. *See, e.g., In re Enzymotec Sec. Litig.*, Civil Action No. 14-5556 (JLL) (MAH), 2015 U.S. Dist. LEXIS 167403, at *41-42 (D.N.J. Dec. 14, 2015) (court rejected securities fraud defendants' argument that statements that company had "strong brand recognition," was "on track," and "very stable" could be dismissed at the pleadings stage as puffery because it was a question of law and fact that required consideration of the "total mix" of available information to determine materiality); *Snyder v. Farnam Cos.*, 792 F. Supp. 2d 712, 722-23 (D.N.J. 2011) (observing that puffery "is normally a question of fact for the jury" and holding that defendant's statement that its product was "the brand pet owners trust to aid in the wellbeing of their pets" was an affirmation specific enough to survive the pleadings stage) (internal quotation marks and citation omitted); *Burke v. Honeywell Int'l*, Civil Action No. 15-1921, 2016 U.S. Dist. LEXIS 55186 (E.D.

Pa. Apr. 26, 2016) (whether a statement creates an express warranty and whether puffery defeats the warranty claim is usually a question of fact for the jury); *Redmac, Inc. v. Computerland of Peoria*, 140 Ill. App. 3d 741, 95 Ill. Dec. 159, 489 N.E.2d 380, 382-83 (Ill. App. Ct. 1986) (treating the issue of puffery as a question of fact and holding that a seller’s representations that a computer would be “free of defects” upon delivery and would work for a “reasonable period of time” were not puffery); *United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶¶ 37-38, 349 Wis. 2d 587, 612–14, 836 N.W.2d 807, 819–20 (Wis. 2013) (holding that whether puffery is a question of fact or law should be determined at summary judgment and evaluating expert evidence to conclude that representations were not puffery).

For its determination that the issue of puffery is a question of law, the Commonwealth Court relied on a Ninth Circuit opinion that is not binding on Pennsylvania courts and has not been widely adopted. Reproduced Record (“R.R.”) at 91a-92a (citing *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1043 (9th Cir. 2008)).² While the court can certainly consider persuasive authorities, its reliance on *Newcal* was in error. The Ninth Circuit rule is a significant departure from the majority rule traditionally applied in local

² The case from which *Newcal* drew its quotation, *Cook, Perkiss, & Liehe v. Northern California Collection Service, Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) has been relied on by only one other state court outside the Ninth Circuit: Ohio’s Second District Court of Appeals. See *Dayton Sports Center, Inc. v. 9-Ball Inc.*, 751 N.E.2d. 520 (Ohio Ct. App. 2001).

jurisdictions, and the court provided no justification for adopting the minority view. Had the court correctly held that puffery determination was a question of fact in this case, the complaint could not have been dismissed.

B. Whether the statements in this case were false representations or mere puffery should have been determined after the parties tested their accuracy and materiality through the discovery process.

A marketing statement is puffery as a matter of law “only if [it is] *so obviously unimportant* to an investor that reasonable minds *cannot differ* on the question of materiality.” *Enzymotec*, 2015 U.S. Dist. LEXIS 167403, at *14 (quoting *Shapiro v. UJB Fin. Corp.*, 964 F. 2d. 272, 281 (3rd. Cir. 1992)) (emphasis added). For example, a company executive’s statement to investors that he “believe[d] [the company] could continue to grow net earnings at a faster rate than sales” was puffery. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1427 (3rd. Cir. 1997) (emphasis added). The judgment that the statements in *Burlington Coat Factory* were immaterial puffery makes sense because investors are sophisticated parties, familiar with the ins and outs of the business and the norms of promotional speech, and whose decisions are often informed by careful professional analysis. It would be obvious to such investors that a company executive’s belief about the future success of the company is subjective. However, the relationship between a company executive and investors is quite different from the relationship between a nursing facility and a resident. Nursing facility

residents and their families are not professionals with a deep understanding of the nursing facility industry. They do not have extensive resources to inform their decision. They are ordinary people dealing with a health crisis and facing a stressful, emotional, and time-sensitive choice. As a result, they are far worse equipped to know what realistic expectations of nursing facility services are than an investor is to interpret the subjective statement of a company executive. A reasonable consumer of nursing facility services is simply quite different than a reasonable investor or even a reasonable purchaser of other consumer goods. Prospective nursing facility residents take the nursing facility, its administrators, and staff at their word because this is the most direct and detailed source of information they have when choosing among long-term care options.

Even under the Commonwealth's rubric of puffery as a matter of law, Defendants' statements could not reasonably have been interpreted as puffery. A nursing facility has complete control over whether it will provide adequate staff and deliver on its promises to provide certain services. In this respect, Defendants' statements are more akin to misrepresentation of the characteristics of goods, as was the case in *Honey Creek. Honey Creek Stone Co. v. Telsmith, Inc.*, 11 Pa. D. & C. 5th 33 (Pa. Com. Pl. Dec. 31, 2009). In *Honey Creek*, a used industrial machine dealer's statement that a stone crusher "seem[ed] to be in good shape" was sufficient to create an express warranty because it "differ[ed] from the typical

exaggerations that are classified as puffery.” *Id.* at 41. If a statement that a machine is “in good shape” is sufficiently specific to be a material misrepresentation of its characteristics, then Defendants’ statements about the services they provide are sufficient as well.

II. People Looking For Nursing Facility Care Will Reasonably Rely Upon The Statements Of The Facility Because There Is So Little Reliable And Empirical Information That They Can Use To Select A Nursing Facility.

A. Indirect sources of nursing facility quality information are inadequate.

The dearth of reliable information about nursing facility quality has been recognized for some time. *See* U.S. Gov’t Accountability Off., GAO T-HEHS-99-111, *Assisted Living: Quality-of-Care and Consumer Protection Issues* (1999). In 2008, CMS implemented the Five-Star quality rating system, which assigns each nursing facility an overall rating and three component ratings based on the extent to which the nursing facility meets CMS’ quality standards. U.S. Gov’t.

Accountability Off., GAO-17-61, *Nursing Homes: Consumers Could Benefit from Improvements to the Nursing Home Compare Website and Five-Star Quality Rating System*, 2 (2016). The rating is a composite of three measures: (1) reports from a state government health inspection conducted once every twelve to fifteen months; (2) self-reported staffing data collected over a two-week period each quarter; and (3) a care quality rating calculated from self-reported resident

assessment data. *Id.* Noticeably absent from these criteria is any form of customer satisfaction data. *Id.* at 22.

Consumers find it difficult to interpret the meaning of CMS' rating because it is calculated in a confusing and un-intuitive manner.³ *Id.* at 16-19. The ratings are calculated by comparing the three above-mentioned quality measures to the information reported from other nursing facilities in the state. *Id.* at 16. The ratings are not helpful to a consumer trying to determine whether a particular nursing facility provides the services that she needs because, among other things, high scores in one quality measure may mask low scores in another measure and the data is outdated when it reaches the consumer. *Id.* at 17-19. Additionally, the rankings are not consistent from one state to another, making star-ratings comparisons between nursing facilities nationally essentially useless. *Id.* at 20. A nursing facility in one state could provide the exact same quality of services in another state and receive a different star rating. *Id.* The system is most effective at identifying the worst-performing nursing facilities. *Id.* at 16. Importantly, the Five Star rating system does not include customer satisfaction information, an important quality measure in and of itself and one that would be the most direct way to help

³ For a full explanation of ratings calculation, see *Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide*, (2017), <https://goo.gl/GdHMSq>.

consumers distinguish between high quality and low quality nursing facilities. *Id.* at 22-24.

Even if CMS' rating system were based on more consistent comparisons, its utility would still be compromised because much of the data from which it is derived is self-reported by the facilities and does not accurately reflect the quality of the care being provided. Self-reported data is not audited by CMS. *Special Focus Facility Study: Nursing Facilities' Self-Regulation Cannot Replace Independent Surveys*, Center For Medicare Advocacy (2014), 2, available at <https://goo.gl/8KxQC9>. The Center for Medicare Advocacy has found that un-audited, self-reported staffing data tends to overstate the amount of staffing that is actually provided. *Don't be fooled by the Federal Nursing Home Five-Star Quality Rating System*, Center for Medicare Advocacy (2016), available at <https://goo.gl/P5xUoY>. The composite star ratings of facilities with poor results on the independent health inspection are often buoyed by higher ratings in the self-reported, often inflated, staffing data. *Id.*

- B. The court failed to apply the reasonable consumer standard in its evaluation of Defendants' marketing statements because it failed to consider that the statements misrepresented exactly the kind of information that consumers most care about and are otherwise unable to access.**

CMS' Nursing Home Compare website does not address the most important question that consumers have about prospective nursing facilities: *Will the facility*

be able to meet my needs? CMS provides data on some quantifiable measures of the nursing facility's quality, but it does not provide information about how the nursing facility operates, or what services it provides to residents. Defendants' marketing statements misrepresented exactly that kind of information. The court's conclusion that the statements were puffery was flawed because it failed to take into account any information about what consumers of nursing facility services consider important and why. This is information that would have been revealed in discovery. Additionally, the court failed to acknowledge that many of Defendants' statements did contain objectively verifiable representations.

1) Marketing Statement 1: "We have licensed nurses and nursing assistants available to provide nursing care and help with activities of daily living. Whatever your needs are, we have the clinical staff to meet those needs." R.R. at 232a.

Staffing levels and the availability of nursing care are among the top priorities of consumers of nursing facility services. R. Tamara Konetzka et al., *Use of Nursing Home Compare Website Appears Limited by Lack of Awareness and Initial Mistrust of Data*, Health Affairs, 706, 707,709 (2016). Some survey respondents reported that the availability of nursing services was the single most important factor in their decision. *Id.*

There is good reason for consumers to be concerned about staffing. Numerous studies have shown a strong correlation between staffing levels and patient outcomes. Charlene Harrington et al., *The Need for Higher Minimum Staffing Standards in U.S. Nursing Homes*, Health Serv. Insights, 14 (2016). The nursing staff levels required by federal and state laws “remain well below the levels recommended by experts.” *Id.* at 13.⁴ A 2004 study of nursing facility staffing demonstrated “a strong association between higher total staffing levels and better outcomes as defined by lower survey deficiencies and improved resident quality measures.” *See id.* at 14. In fact, higher state minimum Registered Nurse and total nurse staffing levels have more effect on care quality than increasing Medicaid payment rates. Charlene Harrington, James H. Swan & Helen Carrillo, *Nurse Staffing Levels and Medicaid Reimbursement Rates in Nursing Facilities*, Health Serv. Res. 42:1105–1129 (2007). Despite the demonstrated importance of maintaining adequate staff, half of all nursing facilities in the U.S. are understaffed: 25% dangerously so. Harrington et al., *supra*, at 15.

Defendants’ Marketing Statement 1 was clearly intended to create the impression that they would provide adequate staffing to attend to their residents’ care needs. Yet, the court determined that this statement was puffery, citing language from *EP Medsystems* holding that it was “subjective analysis, expressed

⁴ Pennsylvania requires nursing facilities to provide a minimum of 2.7 hours of nursing care per day per resident, Pa. Code § 211.12, CMS recommends 4.1 hours.

in broad, vague language,” that did not “falsely represent specific characteristics of the services offered.” R.R. at 92a; *see EP Medsystems v. EchoCath, Inc.*, 235 F.3d. 865 (3rd Cir. 2000). But the subjective analysis in *EP Medsystems* was a company executive’s statement about sales goals and contracts that the company was on the verge of securing. *Id.* Whether a company achieves sales goals or secures certain contracts depends on factors outside of the company’s control. Providing adequate nursing staff is entirely within Defendants’ control; they have simply elected not to do so. Defendants’ marketing statements do not deserve the same degree of protection that a good faith prediction of uncertain events would receive.

Whether a nursing facility provides adequate staff is measurable, and therefore is not puffery under a correct interpretation of *Castrol*. Nursing facilities take regular assessments of resident acuity, which is a measurement of the amount of nursing care the facility needs based on the care needs of its residents. Harrington et al., at 14-15, *supra*; *see also* R.R. at 235a, ¶ 92 (describing the federally mandated assessment of each resident’s individual needs). Golden Gate facilities conduct a detailed assessment of each prospective resident’s care needs and determine the amount and type of staff type needed to fill that need, information which is reflected in the resident’s care plan. R.R. at 238a-239a. All of these measurements provide a fair standard against which to measure the adequacy of the staffing at a nursing facility. Additionally, both CMS and

Pennsylvania's Department of Health and Human Services publish recommended minimum staffing standards. Using these recommendations as a standard against which to measure adequate staffing would not be a *de facto* mandate because nursing facilities are not obligated to market their staffing levels as a selling point.

The court further offered that the statement “makes no representation that nurses will be immediately available to provide such assistance, or that it will be provided within a specific time frame.” R.R. at 92a. This reasoning ignores that some needs are immediate. If residents must wait an unreasonable amount of time for the care services the facility has promised to provide them, their needs are not being met and, as a result, they could suffer injury or death.

2) Marketing Statement 2: “Snacks and beverages of various types and consistencies are available at any time from your nurse or nursing assistant.” R.R. at 92a.

Surveys indicate that information regarding food, for example food policy, is a primary concern for consumers seeking to place a loved one in a nursing facility. See J.G. Hefele et al., *Choosing a Nursing Home: What Do Consumers Want to Know, and Do Preferences Vary across Race/Ethnicity?*, Health Serv. Res. 51-3, 1173 (2016). According to the U.S. General Accounting Office, research studies using a variety of performance measures completed during the previous 5 to 10 years have shown that 35% to 85% of U.S. nursing facility residents is

malnourished, and 30% to 50% have substandard body weight. Debra Shipman, *Are Nursing Homes Adequately Staffed?: The Silent Epidemic of Malnutrition and Dehydration in Nursing Home Residents*, 33 J. of Gerontological Nursing, no. 7, July 2007, at 15-18. Nearly 80% of nursing facility residents needs assistance with at least one activity of daily living, including the ability to eat independently.

Dep't of Health and Human Serv., Ctr. for Medicare & Medicaid Serv., Nursing Home Data Compendium: *Percentage of Nursing Home Residents by Level of Cognitive Impairment: U.S. 2011-2014*, 159 (2015). In 2007, one third of older adults in nursing facilities suffered from diabetes. Caroline Barnhart et al., *"Everyone else gets ice cream here more often than I do--It burns me up" - Perspectives on Diabetes Care from Nursing Home Residents and their Doctors*, BMC Geriatrics 16:28 (2016), available at: <https://goo.gl/R7puiV>. The ready availability of snack foods to manage blood sugar levels is of critical concern to diabetics.

The court held that Marketing Statement 2 was puffery because it “contain[ed] no more than broad, commendatory language.” R.R. at 92a. But the court’s analysis ignores that there is a statement of fact contained therein. “Various types and consistencies” may be broad and vague if the accusation was that the nursing facility provided snacks but they were insufficient in variety, but there is no reasonable interpretation of “various types and consistencies” that does

not imply at least two different snacks and beverages being available at any time. The language “at any time” is neither broad nor vague, as the court stated. R.R. at 93a. Its only function in the statement is to further clarify that the availability of snacks and beverages will not be confined to certain hours.

3) Marketing Statement 3: “A container of fresh ice water is put right next to your bed every day, and your nursing assistant will be glad to refill or refresh it for you.” R.R. at 232a.

The continuous availability of water is a crucially important care service because dehydration is particularly common among nursing facility residents. Dehydration induced hospital visits cost Medicare about \$5.5 billion every year. H.J. Miller, *Dehydration in the Older Adult*, 41 J. of Gerontological Nursing, no. 9, Sept. 1, 2015, at 8, 9. Dehydration is correlated with increases in mortality rates and severity of disabilities in elderly people, and can be exacerbated by prescription medications. *Id.* The regular delivery of water is important because older adults have a less sensitive thirst response, meaning that they must reach a higher level of dehydration before they begin to feel thirsty. *Id.* Additionally, many nursing facility residents suffer from disabilities that render them incapable of maintaining sufficient hydration on their own. *Id.* at 8.

The court determined that Marketing Statement 3 was puffery as a matter of law because it contains “subjective analysis or extrapolations, such as opinions,

motives and intentions, or general statements of optimism.” RR 93a. If merely containing subjective analysis, extrapolations, etc. was sufficient to render a statement puffery, then any statement, no matter how factual and specific, could be puffery so long as some plausibly subjective language is sprinkled in. The court’s reasoning simply does not hold water.

The court once again ignored that a statement can be objectively falsifiable even if some of its components are subjective. In *Burlington Coat Factory*, then-judge Alito broke down an executive’s statement that he “believe[d] the company could continue to grow net earnings at a faster rate than sales” into components. *See Burlington Coat Factory*, 114 F.3d at 1427. First, that the company’s net earnings were currently outpacing their sales; second, that the executive believed the company could continue to follow that trend. *Id.* The court found that the statement about current earnings was factual and was not the subject of the dispute, and that only the forward looking part of the statement was not actionable. *Id.* at 1427-28. The court should have undertaken a similar analysis here. If the dispute focused on whether the water was icy enough, or whether the nurse’s assistant was truly glad to refill the water, the statement would no doubt be inactionable puffery. The other components of this statement unambiguously promise that a fresh container of water will be provided every day, and that the container will be refilled if necessary. The “subjective analysis, opinions, extrapolations” language

is once again quoted from *EP Medsystems*, but providing a daily container of water is entirely within the nursing facilities' control, unlike the sales goals and unsecured contracts in *EP Medsystems*. 235 F.3d at 865. Furthermore, there is nothing unreasonable or optimistic about the idea of a nursing facility providing its residents with a daily container of water.

4) Marketing Statement 4: “Clean linens are provided for you on a regular basis, so you do not need to bring your own.” R.R. at 232a.

A 2016 study of consumer preferences in selecting a nursing facility found that nearly every participant interviewed mentioned facility cleanliness as a high priority in their decision. J.G. Hefele et al., *supra*, at 1173. Many residents suffer from incontinence issues that necessitate regular changing of linens. That nursing facilities will provide clean linens is not an unreasonable expectation. The court, once again, ignored that this statement is objectively verifiable through discovery.

5) Marketing Statement 5: “Not only do we want to meet your nutritional needs, but we want to exceed your expectations....” R.R. at 232a.

Marketing Statement 5 promised to meet residents' nutritional needs and provide a pleasurable dining experience; factors that significantly affect one's quality of life. The transition from independent living to life in an institutional setting is a stressful experience for new residents. The discontinuity between

former and present lives, the lack of privacy, and losing the ability to perform basic activities of daily living like eating may lead to social isolation and loneliness.

Ross Watkins et al., *Exploring Residents' Experiences of Mealtimes in Care Homes: A Qualitative Interview Study*, BMC Geriatrics 17:141, 7 (2017), available at: <https://goo.gl/gZbRFB>. Having specially trained staff dedicated to mealtime activities, and not distracted by myriad other responsibilities, can improve feeding assistance provided to nursing facility residents. *Id.* Consumers would be hesitant to choose Golden Gate nursing facilities if they were aware that its residents habitually eat meals alone in their rooms because there is insufficient staff to help them to the dining room, R.R. at 233a (86); or that residents do not finish meals or eat at all because they do not receive assistance to eat, R.R. at 248a-249a, 260a; or that residents do not receive the food that is appropriate for their dietary restrictions, R.R. at 253a, 255a; or that the staff falsify records to indicate residents have eaten when they have not, R.R. at 257a.

Not only was the Commonwealth Court wrong to consider puffery an issue of law, but its evaluation and discussion of each of these marketing statements shows that the court failed to use the standard of a “reasonable” consumer of nursing facility services—it made conclusory findings of subjectivity and did not consider any of the aforementioned data regarding what is actually important to

nursing facility residents and why.

III. The Court's Analysis On The Issue Of Puffery Misinterpreted The Rule Set Forth By The 3rd Circuit In *Castrol v. Penzoil*.

Castrol v. Penzoil does not support the Commonwealth Court's interpretation that "[c]laims that are not 'specific and measurable by comparative research' are indicative of puffery." R.R. at 90a. The provision of *Castrol* cited by the court explains that the claim in that case was not puffery because it was specific and measurable. *See Castrol*, 987 F.2d at 946. *Castrol* then cited to three different authorities: *Gillette Co. v. Wilkinson Sword*, Civil Action No. 89 CV 3586 ((KMW), 1991 U.S. Dist. LEXIS 21006, at *42-43 (S.D.N.Y. Jan. 9, 1991), holding that a "performance claim which can be comparatively measured is not puffery;" *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 249-53 & n. 23 (D.Del. 1980), holding that "claims concerning specific product attributes are not puffery;" and *In re Bristol-Myers Co.*, 102 F.T.C. 21, 321 (1983), holding that "claims subject to measurement are not puffery." *Id.* In other words, *Castrol* set forth three characteristics, each of which was an independently sufficient but not necessary reason that the statement in that case was actionable non-puffery.

In a leap unsupported by logic or precedent, the Commonwealth Court decided that a statement is not puffery only if it makes representations about specific product attributes that can be measured and compared. A more accurate

description of the *Castrol* puffery holding would have been: “specific claims, claims subject to measurement, and claims subject to comparative research are some of the kinds of claims that are not puffery.” The court’s mistake of logic drastically increased the scope of statements covered by the puffery defense; arguably none of the three above-mentioned cases *Castrol* itself cites as examples of non-puffery would satisfy the court’s interpretation of the *Castrol* standard. See *Castrol*, 987 F.2d at 946.

IV. Public Policy Necessitates That The Determination Of Whether Defendants’ Marketing Statements Were Puffery Be Determined After An Opportunity For Discovery.

A. The legal concept of puffery is nebulous, and determining whether a statement is or is not puffery requires consideration of the context of the surrounding transaction.

The legal concept of puffery has existed since the sixteenth century, but a consistent, universally accepted definition of what exactly constitutes puffery has yet to emerge.⁵ M. Neil Browne et. al., *Legal Tolerance Toward the Business Lie and the Puffery Defense: The Questionable Assumptions of Contract Law*, 37 S. Ill. U. L.J. 69, 73 (2012). Puffery ironically remains a somewhat vague, ill-defined

⁵ Courts, including Pennsylvania courts, have historically taken a know-it-when-I-see-it approach to puffery. See Richard J. Leighton, *Making Puffery Determinations in Lanham Act False Advertising Cases: Surveys, Dictionaries, Judicial Edicts, and Materiality Tests*, 95 Trademark Rep. 615, note 18 (2005); see also *Russell v. Erie Indem. Co.*, 43 Pa. D. & C.2d 199, (Pa. Com. Pl. 1967). In struggling to articulate a legal definition for puffery, courts have looked to sources like Prosser and Keeton and the writings of Judge Learned Hand. See *Castrol*, 987 F.2d at 945; *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106 (10th Cir. 2009).

concept. Rulings on what exactly constitutes puffery have been inconsistent. Bayer's claim to have the "world's best aspirin" was inactionable puffery, but Advil's claim that "like Tylenol," it "doesn't upset the stomach" was not. *See In re Sterling Drug, Inc.*, 102 F.T.C. 395, § II.A.1 (1983), *see also McNeilab, Inc. v. Am. Home Prods. Corp.*, 675 F. Supp. 819, 822 (S.D.N.Y. 1987). Papa John's slogan "better ingredients, better pizza" was puffery, but a yogurt company's claim that yogurt was "nature's perfect food" was not. *See Pizza Hut, Inc. v. Papa John's Intern. Inc.*, 227 F.3d 489, 498 (5th Cir. 2000), *see also In re Dannon Milk Prods., Inc.*, 61 F.T.C. 840, 840 (1962). Puffery determinations have been made for centuries in the absence of a universal, consistent puffery rule because the purpose of puffery is to evaluate whether a buyer is likely to be misled, and that determination is almost entirely context dependent. Rather than attempting to apply bright-line rules as the Commonwealth Court did in this case, a puffery analysis should take into consideration the context of the transaction and the relationship between the parties.

Puffery is based on the legal doctrine of *caveat emptor*. *See* Stefan J. Padfield, *Is Puffery Material to Investors? Maybe We Should Ask Them*, 10 U. Pa. J. Bus. & Emp. L. 339, 350–53 (2008) (citations omitted). But in the context of selecting a nursing facility, even the most reasonable, savvy, and responsible consumer is very limited in what they can do to protect themselves. Consumers

cannot sample the quality of the care before selecting a facility. The decision to place a loved one in a nursing facility is high-pressure and time-sensitive. *See Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 255, 258 (1990)). This limits the ability of the consumer to shop for different options.

B. Nursing facilities hold residents' lives in their hands, and their importance will continue to increase as the population of elderly Americans increases.

Nursing facilities provide essential care to a large population of the most vulnerable Americans. 1.2 million Americans lived in nursing facilities in 2014. Centers for Medicare and Medicaid Services, *MDS 3.0 Frequency Report*, First Quarter 2017, *available at*: <https://goo.gl/6bZq1m>. Of those people, nearly 65% suffer from moderate to severe cognitive impairments that necessitate significant assistance with activities of daily living. CMS, *Nursing Home Data Compendium* at 159. Usually people enter nursing facilities as a last resort, often times following a hospitalization or a sudden change in disability level, when they can no longer care for themselves and when their families are no longer capable of meeting their care needs. *See* Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 *New Eng. J. Crim. & Civ. Confinement* 1 (1998).

Nursing facilities will play a larger role in our society as the elderly population continues to grow. Estimates show that 70% of people 65 and older will require care from a nursing facility at some point during their lives. Carrie E. Henning-Smith & Tetyana. P. Shippee, *Expectations About Future Use of Long-Term Services and Supports Vary by Current Living Arrangement*, 34 Health Affairs, no. 1, Jan. 2015, 39; *see also* Donald Redfoot et al., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in Availability of Family Caregivers*, AARP Public Policy Institute (2013), *available at*: <https://goo.gl/q3KaWQ>. The population of Americans over 85 is expected to triple by 2060. Erica L. Reaves & MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, Kaiser Family Foundation, December 15, 2015, 2, *available at*: <https://goo.gl/cmt29k>. It is, therefore, critical that state governments and consumers have effective ways to hold nursing facilities accountable for deceptive marketing practices that are used to lure residents in, only to provide them sub-standard care.

C. Administrative enforcement of nursing facility regulations is ineffective.

Administrative enforcement of nursing facility regulations does not give sufficient incentive to follow the law. Nursing facilities that receive federal funding, as Golden Gate facilities do, are required to comply with the standard-of-care regulations put forth in the 1987 Omnibus Budget Reconciliation Act. *See* 42

U.S.C. §§ 13951-3, 1396r (2012); 42 C.F.R. §§ 483.1-.75 (2011). States are responsible for inspecting nursing homes to verify their compliance with the regulations. *See, e.g., Nursing Home Inspections* Pa. Dep't of Health, *available at*: <https://goo.gl/KXuVyd> (last accessed: Aug. 9, 2017). However, state inspections typically understate serious care deficiencies. U.S. Gov't Accountability Off., GAO-08-517, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, 11 (2008).

Even when administrative agencies find deficiencies in care, penalties are lenient and do not create sufficient incentive to fix care quality problems. Federal law mandates the most severe consequences for facilities that fail to timely remedy serious, longstanding, or repeated violations of federal quality of care standards. These consequences include exclusion from participation in Medicare or Medicaid or temporary suspension of reimbursement. *See* 42 C.F.R. §§ 488.406, 488.412, 488.14, 488.417 (2011). However, a 2006 report by the U.S. Department of Health and Human Services found that, for violations requiring a nursing facility's permanent exclusion from participation in Medicare, CMS failed to impose that mandatory sanction 55% of the time. *See* Office of the Inspector Gen., Dep't of Health & Human Servs., OEI-06-03-00410, *Nursing Home Enforcement: Application of Mandatory Remedies*, at i (2006). For

violations requiring temporary suspension of Medicare reimbursement, CMS failed to impose that mandatory sanction 28% of the time. *Id.* at ii. Even though cited facilities often remedied the violations after the time for Medicare exclusion or payment suspension had expired, all those reviewed in a subsequent survey were found to have new instances of noncompliance that again required referral to CMS for enforcement action. *Id.*

Pennsylvania nursing facilities have also failed to comply with regulatory minimum standards of care. In the span of only three years (from March 7, 2014 to May 26, 2017), inspection reports showed that Pennsylvania's nursing facilities were cited for 16,119 deficiencies. *See ProPublica, Nursing Home Inspect: Pennsylvania, available at: <https://goo.gl/2W2UHq> (last visited Aug. 11, 2017) (raw data available at: <https://data.medicare.gov/data/nursing-home-compare>).* The vast majority of these deficiencies (15,374) involved the potential for more than minimal harm to the residents. *Id.* A significant number of these deficiencies (492) were categorized in the higher-severity levels, those that cause actual harm to residents. *Id.* In 2017, from January to May alone, Pennsylvania nursing facilities were cited 558 times and 8 of these citations were for widespread deficiencies that caused actual harm and put residents' health or safety in immediate jeopardy. *Id.* Yet, in the same year, the Pennsylvania Department of Health did not ban new admissions to and did not revoke the licenses of the worst offenders. *See Nursing*

Home Inspections, supra. The Department did impose civil penalties in many instances. See Penn. Dept. of Health, Penn. Nursing Care Facility Sanctions: Feb. 11, 2014 – July 21, 2017, available at: <https://goo.gl/NNq65S> (last visited Aug. 11, 2017). However, some argue that these penalties are too small to change behavior and are treated as a cost of doing business. Brambila, Nicole C., *How Nursing Homes Have Their Fines Reduced*, ReadingEagle.com, Dec. 6, 2016, available at: <https://goo.gl/kVZ9WJ> (last visited Aug. 11, 2017). Nursing facilities know that they will most likely not face the most severe penalties for the most serious and persistent violations, eliminating the incentive to provide care that meets minimum standards and reasonably mitigates the risk of harm to vulnerable residents.

D. Nursing facilities enjoy handsome profits and significant legal protections, and only consumer protection measures can ensure that nursing homes bear some responsibility for fulfilling their obligations.

A Nursing facilities will continue to fail to comply with the law as long as it is profitable to do so. In 2015, the nursing facilities were a \$132 billion industry in the U.S. IBIS World, *Nursing Care Facilities in the US: Market Research Report*, November 2016, available at: <https://goo.gl/2bBwKo> (last visited Aug. 12, 2017). Of this revenue, 41% comes from the federal-state funded Medicaid program and

22% from Medicare.⁶ Charlene Harrington & Hugh Armstrong et al., *Comparison of Nursing Home Financial Transparency and Accountability in Four Locations*, 41 Ageing International. no. 1, March 2016, at 17-39, 21. It is no surprise, then, that 70% of nursing facilities are for-profit entities. U.S. Gov't Accountability Off., GAO-16-700, *Skilled Nursing Facilities: CMS Should Improve Accessibility and Reliability of Expenditure Data*, (2016). For-profit facilities have been shown to operate with lower staffing levels and more quality deficiencies than nonprofit facilities. Harrington et al., *supra*, at 16. Facilities with the highest profit margins provide the poorest quality care. *Id.* This data shows that nursing facilities have a strong financial incentive to make misleading statements about the care they will provide and to understaff; and the Commonwealth's Court's decision erroneously removes one of the largest disincentives for doing so—the potential for legal liability.

CONCLUSION

The Commonwealth erred when it decided that Defendants' statements were puffery as a matter of law. Not only is this an issue of fact that should have been resolved after discovery, but the court did not apply the proper standard to its analysis by failing to consider what a reasonable consumer of nursing facility services actually considers important and why. The court's ruling sets a dangerous

⁶ Long-term care includes homes, assisted living facilities, and other forms of elder adult care. Nursing facilities make up \$120 billion of the \$156.8 billion long-term care industry.

precedent that forecloses the Attorney General’s ability to hold nursing facilities accountable for deceptive conduct—contrary to the purposes of the consumer protection law—and insulates nursing facilities from any and all marketing statements, no matter how likely they are to mislead and confuse consumers. This leaves consumers in the untenable position of having to choose a nursing facility based on information provided by that facility without recourse when those representations are deceptive. For these reasons, and those detailed in the Commonwealth’s brief, the court should reverse the decision on appeal.

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CERTIFICATE OF SERVICE

I hereby certify that (2) copies of the Amicus Brief of AARP and AARP Foundation in Support of Appellant were served on this 23rd day of August, 2017 by first class mail next day service, upon each of the following, which service satisfies the requirements of Pa.R.A.P. 121:

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