

ARBITRATION PURSUANT TO AGREEMENT OF PARTIES

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

**ANSWER**

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, state as follows for their Answer to the Complaint filed herein:

**Introduction & Affirmative Allegations**

Commonwealth does not deny that its independent living community’s Daily Check-in procedure failed Ms. Franklin in this unfortunate case. Moreover, Commonwealth does not intend to assert that, as an unregulated independent living operator which provides no health care, it owed no common law duties to Ms. Franklin, despite a body of case law suggesting otherwise. Commonwealth will admit that, under the circumstances of this case, CSL’s staff failed to properly perform the Daily Check-in procedure such that the staff did not accurately confirm Ms. Franklin’s status on December 10, 11, 12 and 13, 2015. Thus, Commonwealth is admitting liability in this case as to Ms. Franklin’s claims for simple negligence (Count I) and breach of contract (Count VI) and hopes that this proceeding will result in a reasonable award to Ms. Franklin for her damages related to the check-in procedure’s failure. Quite simply,

Commonwealth is dismayed that this incident occurred in the CSL community and has taken steps to assure that such an event will not occur in the future.

While Commonwealth accepts responsibility for its actions, it does not accept Plaintiff's attempt to turn this case into something it is not. While the impact Commonwealth's failures had on Ms. Franklin were traumatic, Commonwealth's intentions and actions in this case were not egregious. While Commonwealth agreed to check on Ms. Franklin each day, it did not agree to provide a level of care akin to a health care provider, such as an assisted living facility or nursing home. Despite Commonwealth's best intentions and significant investments in the CSL community, this case represents a perfect storm of unforeseen events and an unfortunate series of human errors that resulted in Ms. Franklin's ordeal. Regarding the facts leading up to this incident, Commonwealth avers as follows:

- Commonwealth purchased the building in June 2014. The prior owners operated the building as senior apartments, with no services provided. Commonwealth renovated the building and first operated a full-service independent living wing at the community (with dining, housekeeping and 24-hour concierge/daily check-in services) in the spring of 2015. On or about September 24, 2015, Commonwealth began operating a licensed assisted living facility with a memory care unit within the community, but separate from the independent living portion of the building.
- Prior to Commonwealth's involvement, the community offered no daily check-in procedure and was simply senior living apartments with no services provided.
- Commonwealth invested millions of dollars to improve the building, including the addition of a commercial kitchen with dining facilities, the replacement of the emergency pull cord system, and an upgrade of the fire alarm and sprinkler system. The prior pull cord system alerted an off-site service, which would call 911 if the resident did not answer a call. To improve the process, Commonwealth installed a system called Healthsense that directly notifies the community staff with an automated phone notification when a pull-cord is activated and continues to call until a staff member physically deactivates the alarm in the resident's apartment.
- Commonwealth also implemented an emergency pendant system provided by Healthsense. Commonwealth offers the pendants to all of its independent living residents free of charge. When activated, the emergency pendants also directly notify the CSL staff with an automated message indicating which resident activated the

pendant (by apartment number) and which zone of the building the pendant is in (for instance, Zone 5 might be the dining room). The automated notifications do not cease until a staff member finds the resident and physically deactivates the pendant.

- Ms. Franklin was a resident of the independent living portion of CSL pursuant to a Residency Agreement dated May 18, 2015, which contains a section entitled “Your Capacity for Residential Apartment Living,” and explicitly states that:

The portion of the Community in which you reside (“Residential Housing”) consists of residential apartments with convenience services designed for persons who are capable of providing for their own health care and personal care needs. **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 needs 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 for as long as you reside in Residential Housing.**

(Emphasis added.)

- Thus, as an independent living resident, Ms. Franklin represented to Commonwealth that she was capable of living independently. Likewise, because Commonwealth was not providing any health care to Ms. Franklin, it did not collect any health information from Ms. Franklin, nor did it assess her medical condition at any time.
- As a way of providing redundant measures for assuring the well-being of its independent living residents, Commonwealth implemented a “Daily Check-in” procedure. Ms. Franklin was subject to the check-in procedure under her Residency Agreement, as it was included in the Resident Handbook, which she agreed to abide by as part of her agreement with Commonwealth. The procedure imposed very simple requirements on both residents and CSL staff:

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 that 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.

- This brief paragraph established an uncomplicated double-check system essentially designed to make sure each resident was present and accounted for each day. This policy did not set a specific time to complete the check, and there is no way that such a deadline could reasonably be met, as residents such as Ms. Franklin were free to

leave the facility whenever they wanted, driving their own cars and without any requirement that they tell the staff where they were going. As such, check-ins were recorded in the log at various times during the day as residents who had failed to call in were located.

- From the day she moved in to CSL until December 9, 2015, Ms. Franklin did, in fact, live independently at the community, including taking care of her mobility, preparing meals, transferring and all other personal care needs. In fact, Ms. Franklin would often leave the facility and drive her own car.
- Although aware of the emergency pendants Commonwealth offered, Ms. Franklin did not avail herself of a free pendant because she already had one she was renting from another service. Tragically, Ms. Franklin's contract with her emergency pendant provider was coming to an end, so she had packed up her pendant to return it the very day she broke her clavicle (December 9, 2015). She planned to pick up a free pendant from the front desk the next day.
- On the evening of December 9, 2015, Ms. Franklin broke her clavicle while reaching over in her bed to place her remote control on a bedside table. The unexpected nature, location and severity of the injury was such that Ms. Franklin, who had lived independently for years, was unable to reach her phone, which sat just a few feet away from her, and was also unable to pull the emergency pull-cord in her bathroom, which was approximately 15 feet away.
- In the face of this tragic confluence of circumstances whereby Ms. Franklin was rendered unable to call for help immediately via her phone, the emergency pull-cord in her bathroom or an emergency pendant, CSL's staff exacerbated Ms. Franklin's suffering through a series of unfortunate human errors:
  - First, on Thursday, December 10, 2015, the CSL receptionist on duty received a call at 10:00 a.m. and believing the person on the phone to be Ms. Franklin, indicated in the call log that Ms. Franklin had checked in.
  - Second, on Friday, December 11, 2015, the CSL receptionist on duty saw another resident and made an entry in the call log to check that resident in; however, the receptionist mistakenly made the entry on Ms. Franklin's line of the log.
  - Third, on Saturday, December 12, 2015, the CSL receptionist on duty misread the log book as indicating that Ms. Franklin was out of the building until Sunday.
  - Finally, on Sunday morning, December 13, 2015, when the CSL activities director noticed several flyers outside Ms. Franklin's apartment, she went to the front desk to ask whether Ms. Franklin had been checked on and was told she was out of the building. At that time, the call log contained

an erroneous entry for each of the previous three days and thus provided incorrect information to the activities director, preventing her from accurately assessing Ms. Franklin's status.

- Commonwealth has never had an incident where a resident needed help and was not checked on before or since Ms. Franklin's incident. While many independent living operators shy away from providing any well-being monitoring at all, Commonwealth believes that a Daily Check-in procedure, in concert with on-site emergency pull cord and pendant systems, represents an independent living best practice which its residents should expect from a responsible operator.
- Since this failure of the check-in system, Commonwealth has installed yet another electronic system provided by Healthsense to eliminate the human errors identified through Ms. Franklin's incident. Now, each independent living resident hits a button in his or her bathroom that creates an electronic check-in log. The receptionist is sent the electronic log by email and is required to resolve any resident's failure to check in via a phone call and/or a visit to the resident's apartment. The system provides additional notices during the day until all residents' check-in status is resolved for a given day.

In sum, Commonwealth has taken every reasonable measure to prevent anything like this from ever happening again. Until this incident, Commonwealth was not on notice that its belt-and-suspenders Daily Check-in system might be subject to multiple human errors resulting in terrible consequences for one of its residents when all other methods of emergency notification (phone, pull cord, pendant) had failed. Commonwealth, however, categorically denies any allegation that Defendants have acted with any intent to deceive or to injure any of its residents, and specifically Ms. Franklin.

#### **Responses to Plaintiff's Allegations**

1. Regarding the allegations contained in paragraph 1 of the Complaint, Defendants admit the allegations only to the extent that Ms. Franklin was a resident of CSL during the times relevant to the incident alleged in her Complaint and that she currently resides in Charlottesville, Virginia. Defendants also admit that Osprey/Pantops Place, LLC is the owner of the community known as Commonwealth Senior Living at Charlottesville. Defendants admit that

Commonwealth Assisted Living, LLC, through its Series E entity manages the subject community on behalf of the owner. Finally, Defendants deny that Ms. Franklin's residency at CSL began on or about May 18, 2015, as that was the date of her Residency Agreement; however, Ms. Franklin actually moved in to the facility on May 25, 2015.

2. Defendants admit the allegations contained in paragraph 2 of the Complaint.

3. Regarding the allegations contained in paragraph 3 of the Complaint, Defendants admit the allegations only to the extent that CAL's Series E LLC manages CSL and that CSL is located at the stated address. Defendants deny any remaining allegations contained in paragraph 3 of the Complaint.

4. Defendants admit that the CAL Series E LLC was an agent of Osprey/Pantops Place, LLC.

5. Defendants deny the allegations contained in paragraph 5 of the Complaint.

6. The allegations contained in paragraph 6 of the Complaint do not contain assertions of law or fact to which a response is required.

#### **BACKGROUND**

7. Defendants admit the allegations contained in paragraph 7 of the Complaint.

8. Defendants admit the allegations contained in paragraph 8 of the Complaint.

9. Defendants deny the allegations contained in paragraph 9 of the Complaint.

10. Defendants admit the allegations contained in paragraph 10 of the Complaint.

11. Regarding the allegations contained in paragraph 11 of the Complaint, Defendants admit that CAL sometimes includes independent living services in communities it manages. CSL became a CAL community in June 2014; however, prior to operating any independent living in CSL, Commonwealth invested millions of dollars to renovate the building.

Commonwealth added a commercial kitchen to provide dining services and invested significant funds into the renovation of the building. Commonwealth also added additional services, such as housekeeping and updated emergency systems prior to operating the facility as independent living. (*See* Intro. & Affirmative Allegations above.)

12. Defendants admit the allegations contained in paragraph 12 of the Complaint.

13. Defendants admit the allegations contained in paragraph 13 of the Complaint only to the extent that independent living is an arrangement that can be attractive to some elderly persons; however, Defendants deny any allegations contained in paragraph 13 suggesting that independent living provides a level of care to an elderly person as part of a continuum that includes assisted living and/or skilled nursing care, which are health care services. Defendants aver that an independent living community, by its very nature, does not provide any health care services to its residents.

14. Regarding the allegations contained in paragraph 14 of the Complaint, Defendants admit that an independent living setting permits an elderly resident to maintain her independence and may provide more safety than some other residential options; however, Defendants deny the allegations contained in paragraph 14 to the extent they suggest that any care or guarantee of security is provided in the independent living setting.

15. Regarding the allegations contained in paragraph 15 of the Complaint, Defendants admit the allegations only to the extent that the independent living setting can be beneficial to both the resident and the community, if the resident eventually needs additional services. Defendants deny any remaining allegations contained in paragraph 15 of the Complaint.

16. Regarding the allegations contained in paragraph 16 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

17. Defendants admit the allegations contained in paragraph 17 of the Complaint.

18. Regarding the allegations contained in paragraph 18 of the Complaint, Defendants admit the allegations only to the extent that independent living is not regulated by the Commonwealth of Virginia and no state license is necessary for the operation of such a facility. Defendants aver that Ms. Franklin does enjoy regulatory protection through the Adult Protective Services division of the Virginia Department of Social Services. Defendants further assert that while CSL's independent living residents do share some common areas with the assisted living portion of the community, such as dining facilities and the lobby, the assisted living and memory care residents reside in different portions of the community which are segregated from the independent living sections. Defendants admit that the assisted living portion of the community is regulated and licensed by the Virginia Department of Social Services. Defendants deny any remaining allegations contained in paragraph 18 of the Complaint.

19. Defendants admit the allegations contained in paragraph 19 of the Complaint to the extent that CAL created marketing materials; however, Defendants deny any allegations suggesting that CAL owns the subject facility.

20. Regarding the allegations contained in paragraph 20 of the Complaint, Defendants assert that the cited portions of its website are written documents the terms of which speak for themselves, and Defendants deny any allegations inconsistent with its website. Further, Defendants aver that Commonwealth's website was drafted prior to CAL's management of CSL and that the statements made on the website clearly relate to Commonwealth's assisted living



communities. Defendants further aver, however, that their commitment to investing in their communities to improve resident care applies to CSL, and any other community in which CAL is involved.

21. Regarding the allegations contained in paragraph 21 of the Complaint, Commonwealth asserts that its mission statement is a written document the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of Commonwealth's mission statement.

22. Regarding the allegations contained in paragraph 22 of the Complaint, Commonwealth asserts that the cited portions of its website are written documents the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of the website.

23. Regarding the allegations contained in paragraph 23 of the Complaint, Commonwealth asserts that its "Core Values" statement is a written document the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of the "Core Values" statement.

24. Regarding the allegations contained in paragraph 24 of the Complaint, Commonwealth asserts that its website is a written document the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of Commonwealth's website.

25. Regarding the allegations contained in paragraph 25 of the Complaint, Commonwealth asserts that its marketing materials are written documents the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of the marketing materials.

26. Regarding the allegations contained in paragraph 26 of the Complaint, Commonwealth asserts that its marketing materials are written documents the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of the marketing materials. Defendants also aver that the software and systems they have implemented do not, in many instances, relate to their provision of independent living services. Moreover, Plaintiff does not, and cannot allege that Commonwealth made any representations to her regarding the use of these systems as part of the subject Daily Check-in procedure, which was the only service in her contract creating an affirmative duty on the part of Commonwealth in relation to her well-being.

27. Regarding the allegations contained in paragraph 27 of the Complaint, Commonwealth asserts that its website is a written document the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of Commonwealth's website. Stating further, Defendants admit that they implemented the Healthsense emergency response technology in the CSL community.

28. Defendants admit the allegations contained in paragraph 28 of the Complaint to the extent that Commonwealth's website does contain testimonials, which speak for themselves. Defendants deny any allegations contrary to the testimonials contained on Commonwealth's website.

#### **STATEMENT OF FACTS**

29. Regarding the allegations contained in paragraph 29 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-28 of the Complaint as if fully set forth herein.

30. Regarding the allegations contained in paragraph 30 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Defendants do admit that Ms. Franklin ultimately became a CSL resident pursuant to the terms of the Residency Agreement attached as Exhibit A to the Complaint.

31. Defendants admit the allegations contained in paragraph 31 of the Complaint. Stating further, Defendants aver that when Ms. Franklin resided in the building under the predecessor's management, the building was operated as senior living apartments with no services provided, as opposed to a full service independent living community.

32. Regarding the allegations contained in paragraph 32 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

33. Regarding the allegations contained in paragraph 33 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

34. Regarding the allegations contained in paragraph 34 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

35. Regarding the allegations contained in paragraph 35 of the Complaint, Defendants admit the allegations only to the extent that Ms. Franklin's daughter did visit the community and inspect an apartment. Regarding any remaining allegations contained in paragraph 35, Defendants lack sufficient information or knowledge to determine the truth or falsity of such allegations and, therefore, deny the same.

36. Regarding the allegations contained in paragraph 36 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

37. Upon information and belief, Defendants admit the allegations contained in paragraph 37 of the Complaint, as Plaintiff would have been made aware of the terms of the Residency Agreement and Resident Handbook, which contained information regarding the Daily Check-in procedure.

38. Regarding the allegations contained in paragraph 38 of the Complaint, Defendants admit the allegations only to the extent that their marketing materials did not at that time include any information or representations regarding the Daily Check-in procedure. Regarding the remaining allegations contained in paragraph 38, Defendants lack sufficient information or knowledge to determine the truth or falsity of such allegations and, therefore, deny the same.

39. Regarding the allegations contained in paragraph 39 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Commonwealth admits, however, that the details of the Daily Check-in procedure, as set forth in the Resident Handbook, would have been made available to Plaintiff as part of the process and that the allegations in this paragraph accurately describe the procedure, except to the extent the allegations suggest that the procedure required staff to go to a resident's room "immediately."

40. Regarding the allegations contained in paragraph 40 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Defendants admit, however, that the Daily Check-in procedure was implemented as a way to ensure the well-being of all residents. Further, Defendants aver the

Residency Agreement contained a specific section entitled “Your Capacity for Residential Apartment Living,” which stated as follows:

The portion of the Community in which you reside (“Residential Housing”) consists of residential apartments with convenience services designed for persons who are capable of providing for their own health care and personal care needs. **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 needs 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 for as long as you reside in Residential Housing.**

(Emphasis added.)

41. Upon information and belief, Defendants admit that a copy of the community’s Residency Agreement and Resident Handbook would have been provided to Plaintiff and/or her daughter.

42. Regarding the allegations contained in paragraph 42 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

43. Regarding the allegations contained in paragraph 43 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

44. Regarding the allegations contained in paragraph 44 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Defendants, however, admit that Ms. Franklin ultimately entered into the subject Residency Agreement with CSL. Defendants deny any allegations that they entered into any agreements with Plaintiff’s family.

45. Defendants admit the allegations contained in paragraph 45 of the Complaint.

46. Defendants admit the allegations contained in paragraph 46 of the Complaint.

47. Defendants admit the allegations contained in paragraph 47 of the Complaint.

48. Regarding the allegations contained in paragraph 48 of the Complaint, the referenced Resident Handbook is a written document the terms of which speak for themselves, and Defendants deny any allegations inconsistent with the terms of the document.

49. Regarding the allegations contained in paragraph 49 of the Complaint, the referenced Resident Handbook is a written document the terms of which speak for themselves, and Defendants deny any allegations inconsistent with the terms of the document.

50. Regarding the allegations contained in paragraph 50 of the Complaint, the referenced Resident Handbook is a written document the terms of which speak for themselves, and Defendants deny any allegations inconsistent with the terms of the document.

51. Defendants deny the allegations contained in paragraph 51 of the Complaint and aver that the subject Residency Agreement was signed on or about May 18, 2015; however, Ms. Franklin did not move into the community until on or about May 25, 2015.

52. Defendants deny the allegations contained in paragraph 52 of the Complaint as Defendants did not request any information regarding Ms. Franklin's medical conditions in order to approve her for independent living. In fact, Defendants aver that the Residency Agreement was accepted and agreed to by Defendants based solely upon Ms. Franklin's representation, as contained in Section II(C)(1) of the Residency Agreement that she was capable of living independently.

53. Defendants deny the allegations contained in paragraph 53 of the Complaint.

54. Defendants deny the allegations contained in paragraph 54 of the Complaint.

55. Defendants admit the allegations contained in paragraph 55 of the Complaint.

56. Defendants deny the allegations contained in paragraph 56 of the Complaint and aver that Ms. Franklin's apartment was approximately 135 feet from the front receptionist desk.

57. Upon information and belief, Defendants admit that Ms. Franklin routinely called the front desk to check in, pursuant to her obligation to do so under the Residency Agreement.

58. Defendants admit the allegations contained in paragraph 58 of the Complaint.

59. Regarding the allegations contained in paragraph 59 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Defendants do admit that Ms. Franklin used the community's dining services on a regular basis.

60. Defendants admit the allegations contained in paragraph 60 of the Complaint.

61. Regarding the allegations contained in paragraph 61 of the Complaint, Defendants admit the allegations only to the extent that Ms. Franklin did regularly comply with the Daily Check-in procedure. Regarding the remaining allegations contained in paragraph 61, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

62. Upon information and belief, Defendants admit the allegations contained in paragraph 62 of the Complaint only to the extent that Ms. Franklin broke her clavicle at some point. Regarding the remaining allegations contained in paragraph 62 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

63. Upon information and belief, Defendants admit the allegations contained in paragraph 63 of the Complaint only to the extent that Ms. Franklin was unable to get out of bed.

Regarding the remaining allegations contained in paragraph 63 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

64. Upon information and belief, Defendants admit the allegations contained in paragraph 64 of the Complaint. Further, Defendants aver that they offered every independent living resident, including Ms. Franklin, a free emergency pendant, as described above in the Introduction and Affirmative Allegations section, which would have provided Ms. Franklin with the means to summon help from her bed.

65. Regarding the allegations contained in paragraph 65 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

66. Defendants admit the allegations contained in paragraph 66 of the Complaint.

67. Regarding the allegations contained in paragraph 67 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

68. Regarding the allegations contained in paragraph 68 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

69. Upon information and belief, Defendants admit the allegations contained in paragraph 69 of the Complaint.

70. Upon information and belief, Defendants admit the allegations contained in paragraph 70 of the Complaint only to the extent that Ms. Franklin suffered from the time of her injury forward while in her bed. Regarding the remaining allegations contained in paragraph 70



of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

71. Defendants deny the allegations contained in paragraph 71 of the Complaint, and aver that the receptionist desk is approximately 135 feet from Ms. Franklin's apartment.

72. Regarding the allegations contained in paragraph 72 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

73. Regarding the allegations contained in paragraph 73 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

74. Regarding the allegations contained in paragraph 74 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

75. Regarding the allegations contained in paragraph 75 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

76. Upon information and belief, Defendants admit the allegations contained in paragraph 76 of the Complaint.

77. Regarding the allegations contained in paragraph 77 of the Complaint, Defendants admit that a fire alarm activated in the facility on December 11, 2015 and aver that the alarm was caused by a resident burning food in her kitchen. CSL utilizes a fire detection system that displays which alarm has been triggered a panel in the community's office. This was another new system Commonwealth installed in renovating the building.

78. Regarding the allegations contained in paragraph 78 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

79. Regarding the allegations contained in paragraph 79 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

80. Defendants admit the allegations contained in paragraph 80 of the Complaint.

81. Regarding the allegations contained in paragraph 81 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Defendants admit the allegations contained in paragraph 81 of the Complaint, however, only to the extent that the CSL staff did not check on Ms. Franklin on December 12, 2015.

82. Regarding the allegations contained in paragraph 82 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Further, Defendants aver that the activities director, Ms. Hollie Drobinski, did stop by Ms. Franklin's apartment on the morning of December 13, 2015 to deliver a flyer. Ms. Drobinski did notice there were some flyers outside her door, and she went to the reception desk to ask the receptionist whether Ms. Franklin had been checked on. The receptionist indicated that Ms. Franklin was out of the facility, and the call log erroneously indicated that Ms. Franklin had been checked on in the days prior.

83. Regarding the allegations contained in paragraph 83 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

84. Regarding the allegations contained in paragraph 84 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

85. Regarding the allegations contained in paragraph 85 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

86. Regarding the allegations contained in paragraph 86 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Defendants deny the distances cited in paragraph 86 of the Complaint and aver that, upon information and belief, Ms. Franklin's daughter stopped at the reception desk to inquire about reserving the private dining room before proceeding to her mother's room.

87. Upon information and belief, Defendants admit the allegations contained in paragraph 87 of the Complaint.

88. Upon information and belief, Defendants admit the allegations contained in paragraph 88 of the Complaint.

89. Regarding the allegations contained in paragraph 89 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

90. Regarding the allegations contained in paragraph 90 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

91. Regarding the allegations contained in paragraph 91 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

92. Regarding the allegations contained in paragraph 92 of the Complaint, Defendants admit the allegations only to the extent that Ms. Franklin was taken to a hospital by ambulance. Regarding the remaining allegations contained in paragraph 92, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

93. Upon information and belief, Defendants admit the allegations contained in paragraph 93 of the Complaint.

94. Regarding the allegations contained in paragraph 94 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

95. Upon information and belief, Defendants admit the allegations contained in paragraph 95 of the Complaint.

96. Regarding the allegations contained in paragraph 96 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

97. Regarding the allegations contained in paragraph 97 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same. Further, Defendants aver that Ms. Franklin would have required skilled nursing services and would have no longer been able to enjoy an independent lifestyle as

a result of her broken clavicle and breast cancer, regardless of the delay in receiving medical care for her broken clavicle.

98. Defendants deny the allegations contained in paragraph 98 of the Complaint.

99. Defendants deny the allegations contained in paragraph 99 of the Complaint.

100. Defendants deny the allegations contained in paragraph 100 of the Complaint.

101. Defendants deny the allegations contained in paragraph 101 of the Complaint.

102. Defendants deny the allegations contained in paragraph 102 of the Complaint.

Further, Defendants aver that Ms. Franklin herself was checked on by the staff, by phone, on a day prior to December 9, 2015 when the call log indicated she had not checked in by 10:30 a.m.

103. Defendants deny the allegations contained in paragraph 103 of the Complaint.

104. Defendants deny the allegations contained in paragraph 104 of the Complaint.

105. Defendants deny the allegations contained in paragraph 105 of the Complaint and aver that the 10:30 a.m. deadline applied only to the residents who were required to check in. The receptionist was required to review the call log beginning at 10:30 a.m. to determine if any residents had failed to check in, requiring follow up action. The residents subject to the Daily Check-in procedure were independent, and many of them would leave the facility regularly without informing CSL staff. Thus, it would not be unusual for residents who had not called to check in to have check-in times noted in the afternoon. Further, Defendants aver that the receptionists regularly (a) called to follow up with residents who did not call to check in by 10:30 a.m. and (b) went to residents' apartments to assure that those residents were okay when they did not answer the follow up call. On at least one occasion prior to December 9, 2015, Ms. Franklin herself was called by the receptionist when the log did not reflect that she had checked in that day.

106. Defendants deny the allegations contained in paragraph 106 of the Complaint and aver that the log book was reviewed and that the receptionists were advised of issues related to the log book prior to Ms. Franklin's incident.

107. Defendants deny the allegations contained in paragraph 107 of the Complaint.

108. Defendants admit the allegations contained in paragraph 108 of the Complaint only to the extent that the log book erroneously reflected that Ms. Franklin checked in on December 10, 2015. Defendants deny the remaining allegations contained in paragraph 108 of the Complaint.

109. Defendants deny the allegations contained in paragraph 109 of the Complaint and aver that an entry was made in the log book for Ms. Franklin on December 11, 2015, which was in error.

110. Defendants deny the allegations contained in paragraph 110 of the Complaint and aver that the log book did contain an entry for Ms. Franklin for December 12, 2015, which appears to have been made in error and scratched out.

111. Defendants deny the allegations contained in paragraph 111 of the Complaint.

112. Regarding the allegations contained in paragraph 112 of the Complaint, Defendants assert that the log book is a written document the terms of which speak for themselves, and Defendants deny any allegations contrary to the terms of the log book. Specifically, Defendant denies that any specific gap contained in the log book means that a check did not occur for any specific resident. Further, Defendants aver that the deadline of 10:30 a.m. applied only to the residents who were required to check in with the front desk, and the Residency Agreement and Resident Handbook did not specify a time by which CSL was to follow up when a resident failed to check in by 10:30 a.m.

113. Defendants admit the allegations contained in paragraph 113 of the Complaint to the extent that several flyers had accumulated outside Ms. Franklin's door; however, Defendants deny the remaining allegations contained in paragraph 113.

114. Regarding the allegations contained in paragraph 114 of the Complaint, Defendants admit the allegations only to the extent that Ms. Franklin did not use the dining facilities from December 10–13, 2015, and aver that Ms. Franklin did use the dining facility on December 9, 2015. Defendants deny any remaining allegations contained in paragraph 114.

### **COUNT I - NEGLIGENCE**

115. Regarding the allegations contained in paragraph 115 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-114 of the Complaint as if fully set forth herein.

116. Defendants deny the allegations contained in paragraph 116 of the Complaint.

117. Defendants deny the allegations contained in paragraph 117 of the Complaint.

118. Defendants admit the allegations contained in paragraph 118 of the Complaint.

119. Defendants deny the allegations contained in paragraph 119 of the Complaint.

120. Defendants deny the allegations contained in paragraph 120 of the Complaint.

121. Defendants admit the allegations contained in paragraph 121 of the Complaint.

122. Defendants deny the allegations contained in paragraph 122 of the Complaint.

Stating further, Defendants admit that under the circumstances of this case, CSL's front desk staff failed to properly perform the Daily Check-in procedure such that the staff did not accurately confirm Ms. Franklin's status on December 10, 11, 12 and 13, 2015.

123. Regarding the allegations contained in paragraph 123 of the Complaint, Defendants admit only that, under the circumstances of this case, CSL's front desk staff failed to

properly perform the Daily Check-in procedure such that the staff did not accurately confirm Ms. Franklin's status on December 10, 11, 12 and 13, 2015. Defendants deny any remaining allegations contained in paragraph 123 of the Complaint.

124. Regarding the allegations contained in paragraph 124 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

### **COUNT II - NEGLIGENCE**

125. Regarding the allegations contained in paragraph 125 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-124 of the Complaint as if fully set forth herein.

126. Defendants deny the allegations contained in paragraph 126 of the Complaint.

127. Defendants deny the allegations contained in paragraph 127 of the Complaint.

### **COUNT III - PUNITIVE DAMAGES**

128. Regarding the allegations contained in paragraph 128 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-127 of the Complaint as if fully set forth herein.

129. Defendants deny the allegations contained in paragraph 129 of the Complaint.

130. Defendants deny the allegations contained in paragraph 130 of the Complaint.

131. Defendants deny the allegations contained in paragraph 131 of the Complaint.

132. Defendants deny the allegations contained in paragraph 132 of the Complaint.

133. Defendants deny the allegations contained in paragraph 133 of the Complaint.

134. Defendants deny the allegations contained in paragraph 134 of the Complaint.

135. Defendants deny the allegations contained in paragraph 135 of the Complaint.



136. Defendants deny the allegations contained in paragraph 136 of the Complaint.

137. Defendants deny the allegations contained in paragraph 137 of the Complaint.

138. Defendants deny the allegations contained in paragraph 138 of the Complaint.

139. Defendants deny the allegations contained in paragraph 139 of the Complaint.

**COUNT IV - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

140. Regarding the allegations contained in paragraph 140 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-139 of the Complaint as if fully set forth herein.

141. Defendants deny the allegations contained in paragraph 141 of the Complaint.

142. Defendants deny the allegations contained in paragraph 142 of the Complaint.

**COUNT V - VIRGINIA CONSUMER PROTECTION ACT**

143. Regarding the allegations contained in paragraph 143 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-142 of the Complaint as if fully set forth herein.

144. Regarding the allegations contained in paragraph 144 of the Complaint, Defendants aver that such allegations call for legal conclusions to which no response is required. Otherwise, Defendants deny the allegations contained in paragraph 144 of the Complaint.

145. Regarding the allegations contained in paragraph 145 of the Complaint, Defendants aver that such allegations call for legal conclusions to which no response is required. Otherwise, Defendants deny the allegations contained in paragraph 145 of the Complaint.

146. Regarding the allegations contained in paragraph 146 of the Complaint, Defendants aver that such allegations call for legal conclusions to which no response is required. Otherwise, Defendants deny the allegations contained in paragraph 146 of the Complaint.

147. Defendants deny the allegations contained in paragraph 147 of the Complaint.
148. Defendants deny the allegations contained in paragraph 148 of the Complaint.
149. Defendants deny the allegations contained in paragraph 149 of the Complaint.
150. Defendants deny the allegations contained in paragraph 150 of the Complaint.
151. Defendants deny the allegations contained in paragraph 151 of the Complaint.
152. Defendants deny the allegations contained in paragraph 152 of the Complaint.
153. Defendants deny the allegations contained in paragraph 153 of the Complaint.
154. Defendants deny the allegations contained in paragraph 154 of the Complaint.
155. Defendants deny the allegations contained in paragraph 155 of the Complaint.

**COUNT VI - BREACH OF CONTRACT**

156. Regarding the allegations contained in paragraph 156 of the Complaint, Defendants restate and reallege their responses to paragraphs 1-155 of the Complaint as if fully set forth herein.

157. Defendants admit the allegations contained in paragraph 157 of the Complaint.
158. Defendants admit the allegations contained in paragraph 158 of the Complaint.
159. Defendants admit the allegations contained in paragraph 159 of the Complaint.
160. Defendants admit the allegations contained in paragraph 160 of the Complaint.
161. Defendants admit the allegations contained in paragraph 161 of the Complaint.
162. Defendants admit the allegations contained in paragraph 162 of the Complaint.
163. Defendants admit the allegations contained in paragraph 163 of the Complaint.
164. Defendants admit the allegations contained in paragraph 164 of the Complaint.
165. Defendants admit the allegations contained in paragraph 165 of the Complaint.
166. Defendants admit the allegations contained in paragraph 166 of the Complaint.

167. Defendants admit the allegations contained in paragraph 167 of the Complaint.

168. Defendants admit the allegations contained in paragraph 168 of the Complaint.

169. Defendants deny the allegations contained in paragraph 169 of the Complaint and aver that the activities director, Ms. Hollie Drobinski did go to Ms. Franklin's apartment and did go to the front desk to determine whether she had been checked on.

170. Defendants admit the allegations contained in paragraph 170 of the Complaint.

171. Regarding the allegations contained in paragraph 171 of the Complaint, Defendants lack sufficient information or knowledge to determine the truth or falsity of the allegations and, therefore, deny the same.

172. Defendants deny any allegations not specifically admitted herein.

173. Defendants assert that Plaintiff's claims set forth in Counts III, IV, and V should be dismissed on the grounds set forth in Defendants' Motion to Dismiss and accompanying Memorandum in Support of same.

174. Defendants assert that any damages awarded under Virginia law herein must relate solely to Ms. Franklin's injuries caused by the delay in receiving medical attention after her clavicle broke occasioned by the failure of CSL's staff to properly perform the Daily Check-in procedure.

175. Defendants will rely upon any and all properly provable defenses to the allegations and claims made by Plaintiff in her Complaint and reserve the right to amend their Answer if at any time they be so advised.

WHEREFORE, Defendants, Osprey/Pantops Place, LLC, t/a Commonwealth Senior Living at Charlottesville and Commonwealth Assisted Living, LLC, by counsel, respectfully request that the Arbitrator enter an award in this case (1) in favor of the Plaintiff on her claims

for simple negligence (Count I) and breach of contract (Count VI), with an accompanying award of damages (related solely to the check-in procedure's failure) under Virginia law as proven by Plaintiff at the hearing of this matter, and (2) dismissing Plaintiff's Counts II, III, IV, and V with prejudice.

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

By:   
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Of Counsel

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**CERTIFICATE**

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

Charles A. Gavin, Esquire  
Cawthorn, Desekvich & Gavin, P.C.  
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*Counsel for Plaintiff*



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