V I R G I N I A:

IN THE FAIRFAX CIRCUIT COURT

Sara A. McCorkle,	)	
Plaintiff.	)	
v.	)	Case No. CL-2022-0004439
Erickson Senior Living LLC, et al.	)	
Defendants.	)	

ORDER

THE COURT has before it the Defendants' Demurrer and Motion to Dismiss; the Court, having considered the filings and arguments presented by the parties, respectfully **SUSTAINS** the Demurrer as to the negligent hiring and training claims in Count I and the entirety of Count III, **OVERRULES** the Demurrer as to the direct liability and negligence per se claims in Count I and the entirety of Count II, and **GRANTS** the Motion to Dismiss solely for the breach of contract claim based on the Disclosure Statement in Count IV.

THE COURT FINDS as follows:

Count I

1) Plaintiff asserts both direct and vicarious liability against the Defendants. Defendants argue that the only direct liability alleged is against the care staff working with the Plaintiff. In the employment context, Virginia courts recognize both vicarious and direct liability. *See, e.g.*, *Kensington Assocs. v. West*, 234 Va. 430, 432 (1987) ("Under the doctrine of respondeat superior, an employer is liable for the tortious act of his employee if the employee was performing his employer's business and acting within the scope of his employment."); *Parker v. Carilion Clinic*, 296 Va. 319, 343 (2018) ("If an

employer 'has himself committed a wrong against the plaintiff, [the employer] may be held liable for his own wrongdoing.'").

As stated in *Parker*, "[a] corporate defendant may be liable as a primary tortfeasor (independent of respondeat superior liability) if it authorized, directed, ratified, or performed the tortious conduct through those who, under the governing management structure, had the discretionary authority to act on behalf of the corporation." *Id.* "In the corporate context, this statement would include corporate officers acting with authority under corporate bylaws or boards of directors acting with authority under a corporate charter." *Id.* Further, "[t]hose whose conduct creates direct corporate liability include . . . those to whom a corporation *has confided the management of the whole or a department or division of its business*." *Id.* at 344 (emphasis added) (quoting *GTE Sw., Inc. v. Bruce*, 956 S.W.2d 636, 641-42 (Tex. App. 1997)).

In *Egan v. Butler*, the Supreme Court of Virginia considered "how high a position in the corporate ranks" an employee would need to be to make their actions "the actions of the corporate employer." 290 Va. 62, 76 (2015). The court declined to create a bright-line rule because this question is "fact-sensitive" and "dependent upon the power, role, and independence of the employee relative to the nature and structure of the corporate employer." *Id.* The court in *Egan* cited several cases, including one that defined "managerial capacity" as an employee having "the discretion or authority to speak and act independently of higher corporate authority." *Id.* (quoting *Chavarria v. Fleetwood Retail Corp. of N.M.*, 143 P.3d 717, 725 (2006)). Finally, the court stated that when an agent "is a permanent employee or officer of the company, the question as to the authority and power of such a representative should be left to the jury, unless the evidence shows

that this authority on the occasion in question was necessarily limited." *Id.* (quoting *Bardach Iron & Steel Co. v. Charleston Port Terminals*, 143 Va. 656, 672 (1925)).

The Complaint alleges that the Plaintiff was injured while she was a resident at Garden Ridge Assisted Living ("Garden Ridge"), which is operated by Defendant Greenspring Village, Inc. ("Greenspring"). Am. Compl. ¶¶ 3-4. The Complaint further alleges that Don Wright, the Manager of Garden Ridge, misrepresented the facility's capabilities. Am. Compl. ¶ 13. The Complaint states that, before the Plaintiff's alleged injuries, the family informed Don Wright that the Plaintiff was using the bathroom alone, in direct contrast to her care plan. Am. Compl. ¶¶ 11, 16. The Complaint alleges that Don Wright's failure to update the Plaintiff's care plan with this information led to the attending nurse being unaware of the behavior and, as a result, unable to provide the level of care and attention that Plaintiff required. Am. Compl. ¶ 24. Additionally, Plaintiff asserts that Don Wright was informed via email that only one nurse was responsible for three hallways. Am. Compl. ¶ 19.

Therefore, when taking the facts alleged in the Complaint as true, the Complaint states that a manager directly misrepresented the facility's capabilities and failed to update the Plaintiff's care plan to note that she was using the bathroom unaccompanied. The Complaint also alleges that a manager was aware of staffing shortages and did nothing to rectify the lack of staff. If Don Wright were determined to have the "discretionary authority to act on behalf of the corporation" in his position, his behavior would show that Greenspring "authorized, directed, ratified, or performed the tortious conduct" complained of by the Plaintiff. *See Parker*, 296 Va. at 343. However, "the question as to the authority and power of [an agent] should be left to the jury." *Egan*, 290 Va. at 76 (quoting *Bardach*,

143 Va. at 672)). Thus, whether Don Wright had the discretionary authority to act on behalf of Greenspring is a question for the jury. For these reasons, the direct action against Greenspring is sufficiently pled.

The Complaint alleges that Defendant Erickson Senior Living LLC ("Erickson") is the parent company of Greenspring. Am. Compl. ¶ 2. However, it is not alleged that any manager within Erickson's corporate structure knew of or ratified the conduct at Garden Ridge. Despite that, Plaintiff asserts that the relationship between the Defendants was a joint venture. Am. Compl. ¶ 5. A joint venture is established by contract, express or implied, where two or more persons jointly undertake a business enterprise in which they are to share in the profits or losses, and each is to have a voice in the business's control or management. *Wells v. Whitaker*, 207 Va. 616, 625-26 (1966). Whether a given set of circumstances constitutes a joint venture is "generally a question for the jury . . . [and w]here such a relationship exists, each member is responsible for the negligent acts of another member which are within the scope and object of the joint undertaking." *Smith v. Grenadier*, 203 Va. 740, 744-45 (1962). Thus, whether a joint venture between the Defendants exists such that Greenspring's direct liability can be imputed to Erickson should be reserved for the jury. Consequently, the Court finds that the Plaintiff has adequately pled direct liability against Erickson.

2) Plaintiff alleges negligence per se based on the Defendants' violations of several assisted living regulations. Defendants assert that licensure regulations do not create a private cause of action and cannot be used to establish negligence per se.

In Virginia, "substantive law" determines whether a claimant has a right to bring an action. *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 21 (2013) (quoting *Roller v. Basic*

Constr. Co., 238 Va. 321, 327 (1989)). "Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and historic common-law principles recognized by our courts." *Cherrie v. Virginia Health Servs., Inc.*, 292 Va. 309, 314 (2016). In *Cherrie*, the court analyzed whether plaintiffs could bring a declaratory judgment asserting a private right of action to produce documents under 12 VAC § 5-371-140, a regulation concerning nursing home licensure. *Id.* at 312-13. The court stated, "[t]he claimed right here does not implicate . . . any historically recognized common-law right of action to compel the production of the policies and procedures. The existence of any viable right of action, therefore, must come from statutory law." *Id.* at 315. The court subsequently found that "because the governing statutes do not authorize a private right of action, . . . the estates' claims cannot be enforced in this declaratory judgment action." *Id.* at 319.

While the Defendants are correct that the regulations do not create a private right of action, the Plaintiff's claim is not based on a private right of action authorized by the regulation but instead alleges the common law right of action of negligence. *Cherrie* does not explicitly foreclose a plaintiff bringing a negligence per se action due to a defendant's lack of compliance with regulations; it only stands for the proposition that the regulation did not *create* a private right of action a claimant may sue under to enforce the regulation. *See id.* This understanding of *Cherrie* was recognized in a subsequent case, which stated that "[t]he concept of *statutory* standing addresses only whether a litigant has a legally cognizable right of action to assert a statutory claim. The presence or absence of a statutory right of action has no impact on . . . whether a litigant has standing to assert a constitutional claim." *Howell v. McAuliffe*, 292 Va. 320, 333 n.5 (2016) (finding the

dissent's reliance on *Cherrie* unpersuasive when analyzing an alleged violation of the Virginia Constitution).

Negligence per se represents the adoption of "the requirements of a legislative enactment as the standard of conduct of a reasonable [person]." *Butler v. Frieden*, 208 Va. 352, 353 (1967). "When applicable, the violation of a statute or municipal ordinance adopted for public safety constitutes negligence because the violation is the failure to abide by a particular standard of care prescribed by a legislative body." *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78 (2004) (citing *Moore v. Virginia Transit Co.*, 188 Va. 493, 497-98 (1948). However, "the violation of a statute does not, by that very fact alone, constitute actionable negligence or make the guilty party negligent per se." *Williamson v. Old Brogue, Inc.*, 232 Va. 350, 355 (1986). "[A] statute may define the standard of care to be exercised where there is an underlying common-law duty, but the doctrine of negligence per se does not create a cause of action where none otherwise exists." *Id.* As stated in *Parker*, "[t]he absence of an underlying common-law duty renders the presence of a statutory standard of care irrelevant." 296 Va. at 345.

While there is no recognized "special relationship" between assisted living facilities and residents that creates an automatic common-law duty, "[g]eneral negligence principles require a person to exercise due care to avoid injuring others." *RGR, LLC v. Settle*, 288 Va. 260, 275 (2014); Charles E. Friend, *Personal Injury Law in Virginia* § 1.1.1., at 2 (3rd ed. 2003) ("There is . . . a general duty not to injure others [that] arises whenever [a] defendant's conduct creates a risk of harm to others."). This standard was confirmed in *Commercial Distributors, Inc. v. Blankenship*, which stated that an adult

home had "a duty to exercise ordinary care for the safety of its residents." 240 Va. 382, 393 (1990).

Even if a duty did not exist beforehand, one was created once the Defendants were informed of the Plaintiff's dangerous tendency to use the bathroom without assistance while under their care. *See Jefferson Hosp. v. Van Lear*, 186 Va. 74, 80 (1947) ("[T]he attendants of the hospital were, of course, aware of the physical condition of Mr. Van Lear. They knew the nature of his operation and his disabilities. They had been instructed that he should not be permitted to answer a call of nature without the assistance of an orderly. They knew, or should have known, that a delay in answering his call for a nurse or an orderly for a service of this character might induce him to get out of bed and attempt to wait upon himself. Indeed, they had actual notice of this, because both a nurse and an orderly testified that on previous occasions he had gotten out of bed to attend to some trivial need."). Thus, the Defendants had a duty to the Plaintiff that they could base a common law negligence claim on and, therefore, a negligence per se claim is not foreclosed by *Cherrie*.

For these reasons, the negligence per se claim within Count I should not be dismissed due to the Plaintiff alleging a violation of assisted living regulations.

3) Plaintiff alleges both negligent training and hiring in her Complaint. Defendants argue that negligent training is not recognized as a cause of action in Virginia and the Plaintiff has not sufficiently pled her claim for negligent hiring.

As stated in *Hernandez v. Lowe's Home Centers, Inc.*, "the Supreme Court of Virginia has not yet recognized a cause of action for negligent supervision or for negligent training. Nor has it completely ruled out such a cause of action under Virginia law." 83 Va.

Cir. 210, 215 (Norfolk 2011). However, several Virginia courts have declined to recognize a cause of action for negligent training. *Garcia v. B & J Trucking, Inc.*, 80 Va. Cir. 633 (Sussex Cnty. 2010) (suggesting that the claim of negligent training may exist but that "the employer's duty to train the employee runs only so far as the employee can be deemed reasonably unable to understand the risk that is involved with the employment"); *Banach v. Benton*, 74 Va. Cir. 233 (Portsmouth 2007) (finding that there is no such cause of action in Virginia); *Gray v. Rhoads*, 55 Va. Cir. 362 (Charlottesville 2004) ("[T]here are no statutes or cases in Virginia in which courts have recognized the tort of negligent training."); *Williams v. Dowell*, 34 Va. Cir. 240 (Richmond 1994) (involving an employee physically and verbally attacking a patron where the court declined to recognize a cause of action for negligent training).

Garcia suggested that such a cause of action *may* exist. 80 Va. Cir. at 634. However, that case involved a dispute between an employee and their employer. *Id.* In *Williams*, which concerned a patron suing an employer for the negligence of its employee, the court suggested that to plead a claim for negligent training adequately, a plaintiff must allege facts that establish the employer "knew that [the employee's] past actions strongly suggested that [the employee] was unfit for a job which involved an unreasonable risk of harm to others." 34 Va. Cir. at 243. Reviewing these two cases, the court in *Hernandez* did not preclude the possibility of a negligent training claim but stated that the plaintiff failed to allege a "special need" to train the employee. 84 Va. Cir. at 214.

The Complaint states that "Defendants, through their staff and operating within the course and scope of their employment, breached additional standards of care, including . . . failing to staff their facility with sufficient staff, properly trained, to meet the care needs

of their high-acuity residents, including Ms. McCorkle." Am. Compl. ¶ 32(j). Thus, while the existence of a negligent training claim is not foreclosed in Virginia, the Plaintiff has failed to assert a "special need" for the Defendants to train their employees, and has not alleged that the Defendants knew of past actions which strongly suggested the employees were unfit for their positions and that this unfitness involved an unreasonable risk of harm to others.

The cause of action for negligent hiring exists when an employer "conducts an activity through employees." *Interim Pers. of Cent. Va., Inc. v. Messer*, 263 Va. 435, 440 (2002) (quoting *Se. Apartments Mgmt. v. Jackman*, 257 Va. 256, 260 (1999)). Liability is based upon an employer's failure to exercise reasonable care in hiring an individual with "known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which . . . it should have been foreseeable that the hired individual posed a threat of injury to others." *Id.* (citing *Jackman*, 257 Va. at 260). At most, the Complaint alleges that Defendants failed to hire adequate numbers of staff to meet their residents' needs. Am. Compl. ¶ 32(j). The Complaint does not allege that the employees hired by the Defendants posed a threat to others due to propensities the Defendants knew of, or of propensities the Defendants could have reasonably discovered. Thus, the negligent hiring claim in Count I is not adequately pled.

4) For these reasons, the Court will **SUSTAIN** the Demurrer regarding the negligent hiring and training claims and **OVERRULE** the Demurrer regarding the claims of direct liability and negligence per se.

Count II

5) Plaintiff alleges that Defendants misrepresented the services offered by the Defendants and that this conduct violated the Virginia Consumer Protection Act ("VCPA"). *See* Va. Code § 59.1-200(5),(6),(14). Defendants argue that the Plaintiff cannot allege violations under the VCPA because Plaintiff's claims are exempt under the Act. § 59.1-199(A) ("Nothing in this chapter shall apply to . . . [a]ny aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States."). Defendants assert that any misrepresentations regarding the facility's capabilities and number of staff are aspects of a consumer transaction authorized under the laws and regulations of Virginia. The Defendants' argument is, essentially, that because the care provided by assisted living facilities and its communications with residents are *regulated* in Virginia, any misrepresentations are exempt from the VCPA. However, in *Manassas Autocars, Inc. v. Couch*, the court stated that

> Manassas construes this language to mean that any aspect of a consumer transaction that is regulated by Title 46.2, or by regulations adopted pursuant to that Title, becomes an "authorized" aspect of the transaction and is therefore exempt from the VCPA. Applying this logic to the case before us, Manassas argues that the advertisement at issue was exempt from a claim under the VCPA because it was "an aspect of the consumer transaction" between Manassas and the Couches, and dealer advertising is regulated and therefore "authorized" by Code § 46.2-1581 and the regulation.
>
> Manassas' construction of Code § 59.1-199(A) equates the word "authorized" with "regulated." This interpretation, if correct, would provide an exemption from the VCPA to all motor vehicle dealer advertising regardless of content, since such advertising is regulated pursuant to Title 46.2. Section 59.1-199(A), however, exempts only those aspects of a consumer transaction that are "authorized." Authorized actions are those

> sanctioned by statute or regulation. Manassas was not entitled to exemption from a VCPA claim on the sole ground that motor vehicle dealer advertising is regulated by other statutory provisions and regulations. Accordingly, we find no error in the trial court's ruling that the Couches could pursue a claim under the VCPA in this case.

274 Va. 82, 89-90 (2007).

There are several examples of courts finding that VCPA claims are excluded under § 59.1-199(A). *Caruth v. Clark*, No. 1:16-CV-149, 2017 WL 1363314, at *6 (E.D. Va. Apr. 12, 2017) (finding that dentistry is a well-regulated profession that is outside the purview of the VCPA, and the conduct complained of was regulated by the Virginia Board of Dentistry); *Ott v. Baker*, 53 Va. Cir. 113, 114 (2000) (stating that "various statutes and regulations in Virginia . . . refer to and govern abortions as well as health care" and, as such, health care and abortions are barred under the VCPA's exclusion); *Condominium Unit Owners' Ass'n v. Crossland Sav. FSB*, 15 Va. Cir. 239, 241 (1989) (finding that the VCPA does not apply to legal malpractice cases). However, it is important to note that at least one of these cases casts doubt on its application to the present claim; the court in *Caruth* plainly stated that dentists, lawyers, and other licensed professionals were "distinguishable from a car dealership *or a nursing home* based on the skill involved in the authorization process." 2017 WL 1363314, at *6 (emphasis added).

Other cases have gone the opposite way when considering this issue. *Saiyed v. Council on Am.-Islamic Rels. Action Network, Inc.*, 346 F. Supp. 3d 88, 99 (D.D.C. 2018) ("[A]s the Supreme Court of Virginia has observed, the word 'regulated' is not synonymous with the word authorized.' To qualify for the VCPA exemption, the provision of the legal services at issue here must have been authorized under some regulation or statute. While the practice of law by a licensed attorney is authorized, the unauthorized

practice of law is by definition not 'authorized' by law or regulation. To the contrary, under the Rules of the Virginia Supreme Court and at least one other statute, the practice of law by an unlicensed non-lawyer is expressly prohibited . . . . Mr. Days was not licensed to practice law, and thus the legal services he provided to plaintiffs were categorically not authorized under Virginia Supreme Court rules and at least one statute governing the licensed practice of law."); *Wingate v. Insight Health Corp.*, 87 Va. Cir. 227, 233-34 (2013) (finding that the "aspect" at issue "cannot be narrowly restricted to the alleged misrepresentation, since no law would authorize misrepresentation" but stating the defendants must show a statute "authorizing advertising and sales of drugs by practitioners" that "address[es] communications by practitioners to their patients."). The *Saiyed* court, in particular, noted that "[t]he VCPA expressly excludes from its reach certain transactions, including those provided by '[b]anks, savings institutions, credit unions, small loan companies, public service corporations, [and] mortgage lenders,' among others. Legal services, however, are not listed among these express exclusions." *Id.* at 98.

Further, in *Beaty v. Manor Care, Inc.*, the court dealt with a remarkably similar case to the claim at issue here:

> First, Defendants assert that the brochure, and the alleged misrepresentations therein, are regulated by Virginia Code § 63.1-175(D). That Section provides that:
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> > [a]ny facility licensed exclusively as an adult care residence shall not use in its title the words 'convalescent,' 'health,' 'hospital,' 'nursing,' 'sanatorium,' or 'sanitarium,' nor shall the words be used to describe the facility in brochures, advertising, or other marketing material. No facility shall advertise or market a level of care which it is not licensed to provide. Nothing in this subsection shall prohibit the facility from describing services available in the facility.

> Va. Code § 63.1-175(D). This Section, however, does not regulate the type of misrepresentations alleged by Plaintiffs. Plaintiffs are not alleging that the facility advertised a level of care it was not licensed to provide, but rather that it advertised care it did not provide. Furthermore, the Statute specifically states that it does not prohibit the facility from describing its services. It is precisely that description of which Plaintiffs complain. Therefore, Virginia Code Section 63.1-175(D) does not regulate the conduct that is the basis of Plaintiffs' claim.
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> Second, Defendants assert that the specific shortcomings of the facility alleged by Plaintiffs are regulated by Virginia law. Specifically, Defendants note that Virginia Code § 63.1-174 requires that the assisted living facility have "adequate and sufficient staff to provide services to maintain . . . the physical safety of the residents on the premises," and that "the State Board shall have the authority to promulgate and enforce regulations . . . to protect the health, safety, welfare, and personal rights of residents." Va. Code § 63.1-174. While those statutes regulate the assisted living facility, they do not cover misrepresentations made regarding those aspects of the facility. The [VCPA] was designed to protect consumers in transactions. In this case, the transaction was the inducement to enter the contract. Plaintiffs do not bring this Count on the grounds that the supervision at Arden Courts was deficient, but rather on the basis of misrepresentations made regarding the degree of supervision. Accordingly, the type of statute that would exempt Plaintiffs' claims from the VCPA would be one which regulated advertising and sales. As discussed above, although Virginia Code Section 63.1-175(D) is most relevant to Plaintiffs' claim, it does not apply to the specific representations made in this case.

No. 02-1720-A, 2003 WL 24902409, at *5 (E.D. Va. Feb. 10, 2003). The Court disagrees with the cases cited by the Defendants that find the VCPA exclusion applies in blanket form to the entire healthcare industry or other regulated professions, such as the practice of law or dentistry. As noted by the *Saiyed* court, the VCPA expressly excluded transactions within several industries, which did not include licensed professionals or the entire healthcare field. 346 F. Supp. 3d at 98.

The Court adopts the reasoning in *Wingate* and *Beaty*. The Complaint, in this case, alleges that Erickson advertised false information about the level of care that would be provided to residents and that Defendants' staff also misrepresented the level of care the

facility was able to provide the Plaintiff. Am. Compl. ¶¶ 38-40. Plaintiff alleges that both the staff, including Garden Ridge's Manager, and the Disclosure Statement include false statements about the number of staff on duty to provide care to the Plaintiff. *See* Am. Compl. ¶¶ 13, 41, 43. In *Wingate*, the court stated that to exclude the claim under the VCPA, the defendants must be able to show (1) a statute authorizing advertising and sales of drugs by practitioners (2) that "at least address[es] communications by practitioners to their patients." 87 Va. Cir. at 234. By this logic, Defendants need to show a statute authorizing advertising of the assisted living facility's capabilities that addresses communications between the facility and its residents. *See id.* Additionally, the Defendants would need to show a regulation authorizing the giving of a Disclosure Statement that addresses the accuracy of the information provided. *See id.* There is a regulation discussing the information to be provided in a Disclosure Statement. See 22 VAC 40-73-50(A)(1) ("The assisted living facility shall prepare and provide a statement to the prospective resident . . . that discloses information about the facility. The statement shall . . . [d]isclose information fully and accurately in plain language."). For these reasons, a claim based *entirely* upon misrepresentations in the Disclosure Statement would be barred under the VCPA.

However, the Plaintiff's claim under the VCPA is only partially based on the accuracy of the Disclosure Statement. The Complaint also alleges misrepresentations via false advertising of the facility's capabilities. As stated in *Beaty*, while certain statutes "regulate the assisted living facility, they do not cover misrepresentations made regarding those aspects of the facility . . . . Plaintiffs do not bring this Count on the grounds that the supervision . . . was deficient, but rather on the basis of misrepresentations made

regarding the degree of supervision." 2003 WL 24902409, at *5. Plaintiff brings her VCPA claim because the Defendants misrepresented the level of care that would be provided. Thus, the Court finds that her VCPA claim based on these misrepresentations is not barred based on the analysis in *Beaty*. *See id.*

6) Defendant also argues that Plaintiff failed to state a claim under the VCPA because the misrepresentation was not based on an existing fact but a future event that had yet to occur. The Defendants previously made this argument in a Demurrer filed on June 10, 2022. Judge Christie A. Leary entered an Order overruling the Defendants' Demurrer on June 24, 2022. Thus, this Court will rule in accordance with the previous Order, which stated that "the Court finds that Plaintiff has set forth sufficient factual misrepresentations to make out a claim under Virginia's Consumer Protection Act."

7) For these reasons, the Court will **OVERRULE** the Demurrer as to the entirety of Count II.

Count III

8) Count III solely encompasses the Plaintiff's request for punitive damages. Defendants argue that Count III fails to state a cause of action under Virginia law. In *Papadatos v. Kaur*, the court noted that a remedy is the "means employed to enforce a right or redress an injury" and that "damages -- which are the measure of injury -- are not a remedy." 109 Va. Cir. 40, 43 (Fairfax Cnty. 2021). As held in *Kozar v. Chesapeake & O. Ry. Co.*,

> [I]t is a mistake to characterize the right to recover punitive damages at common law a "common law remedy". There is an important distinction between a "remedy" which Bouvier's Law Dictionary defines as "the means employed to enforce a right or redress an injury", and "damages" which are defined as "[t]he indemnity recoverable by a person who has sustained an

> injury and the term includes not only compensatory, but also exemplary or punitive or vindictive damages."
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> Damages are simply a measure of injury, and to say that at common law there was "punitive damages as a right of action" or there was available "the common law remedy action of punitive damages" or a "punitive damages remedy" is a misuse of the legal terminology.

449 F.2d 1238, 1240 (6th Cir. 1971).

In Count III, the Plaintiff incorporates the paragraphs from Count I and II. However, Count III does not *once* state the underlying remedy Plaintiff employs to "enforce a right or redress an injury." *Papadatos*, 109 Va. Cir. at 43. Punitive damages are not a remedy and cannot be considered a distinct cause of action. *See Kozar*, 449 F.2d at 1240. While the Court acknowledges that Plaintiff has incorporated the allegations in Count I and Count II within her request for punitive damages, this does not clarify whether the Plaintiff is requesting punitive damages under a negligence theory or via the VCPA. If the former, the allegations of reckless disregard and willful and wanton conduct may be enough to sustain a request for punitive damages. If the latter, the VCPA does not authorize punitive damages; instead, it allows a plaintiff to recover treble damages. *See* Va. Code § 59.1-204(A). While the Plaintiff explicitly requests treble damages and attorney's fees under the VCPA, this does not clarify whether the Plaintiff is also attempting to recover punitive damages through their VCPA claim. Thus, the Defendants are correct that Count III fails to state a cause of action through which Plaintiff could request punitive damages. The Plaintiff must plead a valid cause of action under which punitive damages may be requested, such as negligence.

9) For these reasons, the Court will **SUSTAIN** the Demurrer as to Count III.

Count IV

10) Plaintiff alleges that she entered into an Addendum to her initial contract with Greenspring on November 25, 2020. This agreement listed Level D services in an exhibit to the agreement, which Plaintiff claims the Defendants were thereafter contractually obligated to provide. *See* Am. Compl. Ex. B. Additionally, Plaintiff asserts that a Disclosure Statement given to her by the Defendants creates a contractual obligation and that Defendants violated this contract due to understaffing. *See* Am. Compl. Ex. C. Defendants first argue that the Disclosure Statement is not a contract. Defendants also assert that the exhibit listing Level D services in the Addendum is not part of the contract and, therefore, the Defendants did not breach the agreement by not providing those services. The essential elements of a cause of action for breach of contract are (1) a legal obligation of a defendant to a plaintiff, (2) a violation or breach of that obligation, and (3) a consequential injury or damage to the plaintiff. *Caudill v. Wise Rambler*, 210 Va. 11, 13 (1969).

The Complaint states that "[a]s part of their contractual obligations, Defendant provided an Assisted Living Facility Disclosure statement that restated the contractual obligations of Defendant with corresponding fees." Am. Compl. ¶ 69. The Complaint further alleges that the Disclosure Statement listed the number of staff per shift. Am. Compl. ¶ 69. The Disclosure Statement, attached as Exhibit C of the Complaint, explicitly states that certain regulations require assisted living facilities to provide a statement "to prospective residents and legal representatives . . . that discloses information about the facility." Am. Compl. Ex. C. The Disclosure Statement must also be provided to residents, their legal representatives, and the general public if requested. Am. Compl. Ex. C.

The Complaint does not allege that the Disclosure Statement *creates* obligations; instead, it asserts that the Defendants gave Plaintiff the Disclosure Statement as part of a *previous* contractual obligation. *See* Am. Compl. ¶ 69. However, the Complaint does not clearly explain how giving the Disclosure Statement was an obligation under any previous contract, nor does the Complaint state that it amended any previous contracts to add additional obligations. In fact, the original contract between Plaintiff and Greenspring does not obligate Greenspring to provide the Disclosure Statement. Am. Compl. Ex. A. This contract only states that Plaintiff acknowledges that she has *received* the Disclosure Statement three days before signing the contract. Am. Compl. Ex. A. Further, the Disclosure Statement is a document that the Defendants are legally obligated to give to a wide range of individuals, including those who have yet to enter into contractual relationships with the Defendants. The Plaintiff does not allege any facts showing that the giving of this document created a contractual obligation between the two parties. Without additional facts alleging that giving the Disclosure Statement was a contractual obligation under the previous contracts, how the Disclosure Statement amended previous contracts to add additional obligations, or how the Defendants giving this document to the Plaintiff created a legal obligation, the Complaint has failed to state a claim for breach of contract based on the Disclosure Statement.

However, the Addendum *does* create legal obligations between the parties. The Complaint states that the Addendum "modified the original admission agreement, set forth the contractual obligations for Level D services, which Defendant was contractually obligated to provide." Am. Compl. ¶ 67. The Services section of the Addendum states that "[a]ll [r]esidents are admitted to the [facility] with a minimum of a Service Package C while

a 30-day evaluation takes place, unless otherwise indicated. Following the evaluation, assisted living services shall be provided to the Resident as needed and identified in the Resident's assessment and support plan." Am. Compl. Ex. B. There is no indication within the Addendum that Plaintiff was to receive Service Package D, instead of Service Package C, for the first thirty days. Under Service Package C, incontinence care would not be provided but Service Package C promised a "pull cord" and assistance from nurses when the cord was pulled. Am. Compl. Ex. B. Plaintiff alleges that Defendants did not provide a working "call button" for several weeks during her residency there. Am. Compl. ¶ 71. The Court may infer from the Complaint that the pull cord and call button are the same devices, as the Addendum does not mention a call button as a service under any service package, and a pull cord and call button are both meant to alert staff to a patient's need for assistance. Thus, even under Service Package C, Defendants breached a valid contractual obligation. For these reasons, the Plaintiff has sufficiently pled a breach of contract claim under the Addendum.

11) Defendants assert that the source of duty rule bars Plaintiff's contract claim. A court must determine "whether a cause of action sounds in contract or tort," by ascertaining "the source of the duty violated." *Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558 (1998). Courts have consistently held that to recover in tort, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241 (1991). As stated in *Oleyar v. Kerr*:

> If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not

> upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.

217 Va. 88, 90 (1976). However, "a single act or occurrence can, in certain circumstances, support causes of action both for breach of contract and for breach of a duty arising in tort." *Dunn Constr. Co. v. Cloney*, 278 Va. 260, 266 (2009).

All of these cases discussing the source of duty rule concerned whether the court should dismiss the *tort* action because the claim sounded in contract law. The Court is unaware of any authority using the source of duty rule to dismiss a contract action because the claim sounds in tort law. In fact, the Supreme Court of Virginia has routinely stated that the source of duty rule exists "[t]o avoid turning every breach of contract into a tort." *See, e.g.*, *id.* at 267. Therefore, the Court is unpersuaded to apply the source of duty rule to the breach of contract claim, in reverse of the rule's typical application.

12) Defendants argue that the contract claim is subsumed by the Virginia Medical Malpractice Act ("VMMA"). Malpractice is "*any tort action or breach of contract action* for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." § 8.01-581.1. As an initial matter, the Supreme Court of Virginia has raised doubts that assisted living facilities are automatically covered under the VMMA. *Blankenship*, 240 Va. at 393 ("Adult homes are neither hospitals, nursing homes, nor custodial institutions . . . . Although hospitals and nursing homes are included within the definition of "health care provider" in Code § 8.01-581.1, adult homes are not so included. We think the omission to be significant, and hold that adult homes of the kind under consideration here are not

held to the standard of care which applies to health care providers."). In addition, the court in *Caruth* considered a similar argument to the one made by the Defendants:

> The parties disagree about whether the Virginia Medical Malpractice Act ("VMMA") applies to this case. Specifically, their arguments are framed with regard to whether the VMMA "preempts" any of Ms. Caruth's claims. This is not the proper inquiry. The VMMA provides a set of rules that govern malpractice claims; it does not determine "when the patient has a cause of action–an entirely separate issue." *Simpson v. Roberts*, 287 Va. 34, 45 (2014) (McClanahan, J., concurring) (emphasis added); *see also* Va. Code § 8.01-581.1 (defining malpractice as "any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered ...") (emphasis added). Thus, the application of the VMMA necessarily presumes an underlying cause of action before the Court can consider whether or not the Act applies.
>
> The rules outlined in the VMMA include: (1) a statutory damages cap of $750,000; (2) a provision restricting recovery for attorney's fees and costs; (3) a pre-filing notice requirement; and (4) the requirement of expert testimony to prove certain claims . . . . The parties do not identify which of these procedural rules they believe are relevant for the purposes of Counts I-IV. Therefore, the Court is unable to either grant or deny any specific relief based on Defendants' Motion for Summary Judgment . . . .The parties may raise the issue again on a motion in limine if they seek to exclude specific evidence or if the VMMA otherwise becomes relevant. *See Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37 (2006) (deciding the VMMA issue on a motion in limine).

2017 WL 1363314, at *7. The Defendants have not identified "which of these procedural rules they believe are relevant for the purposes" of Count IV. *Id.* Thus, the Court cannot grant the relief sought under the Defendants' VMMA argument.

13) For these reasons, the Court will **GRANT** the Motion to Dismiss only against the breach of contract claim based on the Disclosure Statement.

WHEREFORE, IT IS ORDERED that the Demurrer is **SUSTAINED** as to the negligent hiring and training claims in Count I and the entirety of Count III, and **OVERRULED** as to the direct liability and negligence per se claims in Count I and the

entirety of Count II. The Motion to Dismiss is **GRANTED** solely for the breach of contract claim based on the Disclosure Statement in Count IV.

IT IS FURTHER ORDERED that the Plaintiff is **GRANTED** leave to amend within 21 days of this order if a continuance of the trial date is sought from the Court's Calendar Control. A continuance will be granted inasmuch as the Demurrer was heard in close proximity to the date set for trial. If the Plaintiff chooses to proceed to trial without amendment or does not amend within 21 days, whichever occurs first, then the negligent hiring and training claims in Count I, Count III, and the breach of contract claim based on the Disclosure Statement in Count IV are **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 2nd day of March, 2023.

David Bernhard
Judge, Fairfax Circuit Court

Endorsement Waived
Per Rule 1:13

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