

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON**

HELEN HAMILTON, by and through her)
Power of Attorney, MELISSA BUCHANAN,)
individually, and on behalf of all others)
similarly situated)

Plaintiff,)

v.)

BARBOURVILLE NURSING HOME, INC.)
d/b/a "Barbourville Health and Rehabilitation Center")
65 Minton Hickory Farm Road)
Barbourville, KY 40906)

Case No.

JURY DEMAND

CLASS REPRESENTATION

Serve: **VIA CERTIFIED MAIL**
RETURN RECEIPT REQUESTED
CT Corporation System
306 W. Main Street, Suite 512
Frankfort, KY 40601

MANAGEMENT ADVISORS, INC.
200 South Kentucky Avenue
Corbin, KY 40702

Serve: **VIA CERTIFIED MAIL**
RETURN RECEIPT REQUESTED
CT Corporation System
306 W. Main Street, Suite 512
Frankfort, KY 40601

SEKY HOLDING CO.
200 South Kentucky Avenue
Corbin, KY 40702

Serve: **VIA CERTIFIED MAIL**
RETURN RECEIPT REQUESTED
CT Corporation System
306 W. Main Street, Suite 512
Frankfort, KY 40601

TERRY E. FORCHT
500 Scenic View Drive
Corbin, KY 40701

Serve: **VIA CERTIFIED MAIL**
RETURN RECEIPT REQUESTED
Terry E. Forcht
500 Scenic View Drive
Corbin, KY 40701

and

UNKNOWN DEFENDANTS, JOHN DOES 1-5

Defendants.

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

Plaintiff, Helen Hamilton, by and through her Power of Attorney, Melissa Buchanan, and the Class of similarly situated individuals she seeks to represent (hereinafter referred to as “the Class”), bring this action for monetary damages and injunctive relief on her own behalf and on behalf of the proposed class against Defendants, Barbourville Nursing Home, Inc.; Management Advisors, Inc.; SEKY Holding Co.; Terry E. Forcht; and Unknown Defendants (“Defendants”) as more fully described herein.

I. NATURE OF THE ACTION

1. This is a class action for monetary damages and injunctive relief to redress systematic violations of state and federal regulations that obligate Defendants to provide sufficient staffing of licenses nurses and nurse aides to the residents of Barbourville Nursing Home, Inc., which Defendants committed at any time within the five (5) years prior to the filing of this Complaint through the date of the final disposition of this action (the “Class Period”) brought by Melissa Buchanan, as the Power of Attorney for Helen Hamilton. Melissa Buchanan is a Kentucky

resident who brings this action on behalf of her mother, Helen Hamilton, as her Power of Attorney, and on behalf of all the current and former residents of the skilled nursing facility known as Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center” located at 65 Minton Hickory Farm Road, Barbourville, KY 40906. Helen Hamilton currently resides at Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center” located at 65 Minton Hickory Farm Road, Barbourville, KY 40906. This action does not seek recovery for bodily injury, wrongful death, or other personal injury claims that an individual class member may have with respect to care provided (or not provided) at Defendants’ facility.

2. The named Plaintiff brings this action individually and on behalf of other similarly situated persons to redress Defendants’ chronic understaffing of its skilled nursing facility in violation of 42 C.F.R. 483.35, 902 KAR 20:300, and KRS § 446.070 wherein Plaintiff and members of the class were or are residents. The named Plaintiff brings this action individually and on behalf of other similarly situated persons to redress Defendants’ unconscionable and opportunistic failure to provide a sufficiently staffed facility as required by law.

3. The Plaintiff, individually and on behalf of the Class, also seeks injunctive relief preventing such abuses in the future, and for all damages recoverable, including but not limited to compensatory and punitive damages, pursuant to KRS § 446.070.

II. PARTIES, JURISDICTION, AND VENUE

4. Helen Hamilton currently resides at Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center” located at 65 Minton Hickory Farm Road, Barbourville, KY 40906. Helen Hamilton has resided at that location since on or about February 28, 2020. Melissa Buchanan is a citizen and resident of the Commonwealth of Kentucky currently

residing at 6018 KY 225, Artemus, Kentucky 40903 and is the duly appointed Power of Attorney/Attorney-in-Fact (KRS § 457.010 *et seq.*) for her mother, Helen Hamilton.

5. Defendant Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center” located at 65 Minton Hickory Farm Road, Barbourville, KY 40906, and is authorized to do business in the Commonwealth of Kentucky. Upon information and belief, at all times material this action, Defendant Barbourville Nursing Home, Inc. was the “licensee” of the nursing facility. Under the laws and regulations promulgated and enforced by the Cabinet for Health and Family Services, as licensee of the facility, Defendant Barbourville Nursing Home, Inc. was legally responsible for the facility and for ensuring compliance with all laws and regulations related to the operation of the facility. The causes of action made the basis of this suit arise out of such business conducted by said Defendant Barbourville Nursing Home, Inc. in the ownership, operation, management, control, licensing and/or services provided for the facility during the residency of Helen Hamilton and others similarly situated persons. Defendant Barbourville Nursing Home, Inc. may be served as indicated in the above caption. Hereinafter, this Defendant shall be referred to as the “Facility.”

6. Defendant Management Advisors, Inc. is a Kentucky Corporation with its principal office located at 200 S. Kentucky St., PO Box 1450, Corbin, Kentucky 40702, which is authorized to do business in the Commonwealth of Kentucky. Upon information and belief, at times material to this action, Defendant Management Advisors, Inc. owned, operated, managed, controlled, and/or provided services to nursing facilities, including Barbourville Nursing Home, Inc. in Barbourville, Kentucky. The causes of action made the basis of this suit arise out of such business conducted by said Defendant Management Advisors, Inc. in the ownership, operation, management, control and/or services provided for the facility during the residency of Helen

Hamilton and others similarly situated persons. Defendant Management Advisors, Inc. may be served as indicated in the above caption.

7. Defendant SEKY Holding Co. is a Kentucky Corporation with its principal office located at 200 S. Kentucky St., PO Box 1450, Corbin, Kentucky 40702, which is authorized to do business in the Commonwealth of Kentucky. Upon information and belief, at all times material to this action, Defendant SEKY Holding Co. owned, operated, managed, controlled, and/or provided services to nursing facilities, including Barbourville Nursing Home, Inc., in Barbourville, Kentucky. The causes of action made the basis of this suit arise out of such business conducted by said Defendant SEKY Holding Co. in the ownership, operation, management, control and/or services provided for the facility during the residency of Helen Hamilton and other similarly situated persons. Defendant SEKY Holding Co. may be served as indicated in the above caption.

8. Defendant Terry E. Forcht, residing at 500 Scenic View Drive, Corbin, Kentucky 40701, owned and operated Defendants Barbourville Nursing Home, Inc. d/b/a "Barbourville Health and Rehabilitation Center," Management Advisors, Inc., and SEKY Holding Co. during the residency of Helen Hamilton and throughout the entirety of the class period. The causes of action that make the basis of this suit arise out of Defendant Terry E. Forcht's ownership, operation, and control of Defendants Barbourville Nursing Home, Inc. d/b/a "Barbourville Health and Rehabilitation Center," Management Advisors, Inc., and SEKY Holding Co. Defendant Terry E. Forcht owned, operated, managed, and/or controlled Defendants Barbourville Nursing Home, Inc. d/b/a "Barbourville Health and Rehabilitation Center," Management Advisors, Inc., and SEKY Holding Co. either directly, as alter egos of one another, as a single business enterprise, or through a joint enterprise, partnership or the agency of each other and/or other diverse subalterns,

subsidiaries, governing bodies, agents, servants or employees. Defendant Terry E. Forcht may be served as indicated in the caption.

9. John Does 1 through 5, Unknown Defendants are entities and/or persons, either providing care and services to Plaintiff and other similarly situated persons, or directly or vicariously liable for the damages suffered by Plaintiff and other similarly situated persons. Plaintiff is currently unable to identify these Unknown Defendants, despite diligent efforts, but may discover such identities upon further investigation. Said Defendants are named insofar as their acts and/or omissions were negligent, tortious or otherwise wrongful with respect to the Defendants' failure to provide services to Plaintiff and other similarly situated persons.

10. Unless otherwise specified, the Defendants Barbourville Nursing Home, Inc. d/b/a "Barbourville Health and Rehabilitation Center," Management Advisors, Inc., SEKY Holding Co., Terry E. Forcht, and/or the "Unknown Defendants" will hereafter be referred to collectively as "Defendants."

11. Defendants Barbourville Nursing Home, Inc. d/b/a "Barbourville Health and Rehabilitation Center," Management Advisors, Inc., and SEKY Holding Co. are incorporated in and maintain their principal offices in the Commonwealth of Kentucky and are therefore citizens of the Commonwealth of Kentucky. Defendant Terry E. Forcht resides in and is therefore a citizen of the Commonwealth of Kentucky. At least one class member is a citizen of a state other than the Commonwealth of Kentucky.

12. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1332(d). The matter in controversy exceeds the sum or value of \$5,000,000.00, exclusive of interest and costs, in that the aggregate pecuniary loss of all class members exclusive of interests

and costs exceeds \$5,000,000.00. At least one class member is a citizen of a state other than the Commonwealth of Kentucky.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the Defendants reside in and/or conduct business in this District. Furthermore, a substantial part of the events and/or omissions giving rise to this claim occurred in this District.

III. FACTUAL ALLEGATIONS

14. Plaintiff incorporates all of the allegations contained in Paragraphs 1-13 as if fully set forth herein.

15. Defendants are jointly and *in solido* liable and indebted unto Plaintiff and others similarly situated for such damages as are reasonable in the premises, together with legal interest thereon from date of judicial demand until paid and all costs of this proceeding provided under law, plus injunctive relief, along with all other general and equitable relief to which Plaintiff and others similarly situated are entitled, for the following reasons, to-wit:

16. From at least in or near March 13, 2003, through in or near July 2023, Defendants owned, operated, and managed the above-listed skilled nursing facility in Kentucky and were legally responsible for numerous similarly situated skilled nursing facility residents. Helen Hamilton has resided in and continues to reside in Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center” located at 65 Minton Hickory Farm Road, Barbourville, KY 40906, which residency began on or about February 28, 2020.

17. Collectively, Defendants admitted, housed, and were legally responsible for more than 100 similarly situated skilled nursing facility residents, including Helen Hamilton.

18. Pursuant to 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)), skilled nursing facilities such as the Facility must comply with all applicable laws that include the requirement that:

The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans: (i) . . . **l****icensed nurses;** and (ii) Other nursing personnel, including but not limited to **nurse aides.**

42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)) (emphases added).

19. The Defendants did not meet the duty owed to Plaintiff and each class member to “provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans” in direct violation of 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)).

20. In direct contravention of 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)), Defendants chronically understaffed the Facility given the number and acuity level of its residents as is more fully alleged herein below.

21. Minimum staffing of personnel in the Facility is dependent by law upon the acuity (need) level of the residents of the Facility. The analysis of whether a skilled nursing facility provides adequate staffing entails three (3) basic steps: (a) determining the collective acuity level of the residents at the facility; (b) determining the staffing levels at the facility; and (c) comparing the collective acuity and staffing levels at the facility in light of recognized minimum staffing requirements. A facility’s acuity level is based upon the average resident acuity in the population for whom care is being provided, and it is not necessary to determine whether all residents individually receive a certain number of hours of nursing care per day, but rather whether the

facility – as a whole – is adequately staffed to account for the facility’s collective acuity level. Although a facility’s acuity level can vary from day to day, the acuity rates can be determined by taking the average facility acuity over the course of several months. This process provides a reliable index of a facility’s average patient nursing needs, a key for determining adequate staffing requirements.

22. The staffing analysis described above is done at a facility-level. Thus, it does not require any individualized inquiry into how many hours of direct nursing care any specific resident received on any given day. Rather, the proper analysis is whether the *facility as a whole* employed an adequate number of qualified staff to competently care for the collective needs of its residents. Notably, the United States Centers for Medicare & Medicaid Services (“CMS”) has already developed a methodology for determining the level of staffing required to meet the needs of residents based on the collective acuity levels of the residents via the CMS Agency Patient-Related Characteristics Report (formerly the Case Mix Report), which is the average resident need score based on resident assessment data that CMS has already collected and calculated.¹

23. If a skilled nursing facility’s staffing levels are lower than the level of staffing required to meet the needs of residents as determined by their collective acuity, that facility has violated its residents’ statutory, affirmative and actionable right to reside in a skilled nursing facility that employs an adequate number of staff pursuant to 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)).

24. Upon information and belief, the Facility was inadequately staffed in violation of 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R.

¹ A self-authenticating link to a portion of this staffing information is at: <https://data.cms.gov/provider-data/dataset/4pq5-n9py>.

§ 483.35(a)(1)). Namely, the nursing hours per patient day for days during the residency of Helen Hamilton at the Facility and during the entirety of the class period alleged herein were well below the required levels to meet the collective needs of the residents given the collective acuity of the residents of the Facility. For example, upon information and belief, Defendants provided approximately 50% less registered nurses and 21% less total nursing hours than that which was required for the resident population in 2018, Defendants provided approximately 56% less registered nurses and 17% less total nursing hours than that which was required for the resident population in 2019, Defendants provided approximately 65% less registered nurses and 19% less total nursing hours than that which was required for the resident population in 2020, Defendants provided approximately 63% less registered nurses and 28% less total nursing hours than that which was required for the resident population in 2021, and Defendants provided approximately 48% less registered nurses and 14% less total nursing hours than that which was required for the resident population in 2022. Moreover, this understaffing persisted during the entire class period and continues to date.

25. Plaintiff and members of the Class suffered injury in fact and concrete harm in that Defendants did not “provide services by sufficient numbers” of “licensed nurses” and/or “other nursing personnel” including “nurse aides”; all in violation of 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)).

26. Plaintiff and members of the Class suffered pecuniary harm by being deprived of the value of payments made to the Facility for skilled nursing services when these services were not actually rendered consistent with 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)).

27. Collectively, and as directly managed and overseen by Defendants Management

Advisors, Inc., SEKY Holding Co., and Terry E. Forcht, Defendants siphoned funds and assets away from the direct care givers at the facility named herein under the guise of management and administrative fee expenses which were “related-party transactions” (*i.e.*, “less than arms’ length”) as reported in the Medicare cost report submitted, under penalty of perjury, to the assigned regulators for the Commonwealth of Kentucky for the reporting period. Through such budgetary constraints, the Defendants systematically failed to have the resources or the staff on hand to manage the care of residents to include Helen Hamilton and others similarly situated.

28. Pursuant to KRS § 446.070, Helen Hamilton and others similarly situated are entitled to recover the damages residents, including Plaintiff and others similarly situated, sustain as a result of Defendants’ fault.

IV. ALTER EGO/SINGLE BUSINESS ENTERPRISE/JOINT ENTERPRISE

29. Defendant Terry E. Forcht owned, operated, managed, and/or controlled Defendants Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center,” Management Advisors, Inc., and SEKY Holding Co. either directly, as alter egos of one another, as a single business enterprise, or through a joint enterprise, partnership or the agency of each other and/or other diverse subalterns, subsidiaries, governing bodies, agents, servants or employees. *See Inter-Tel Techs., Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152, 166 (Ky. 2012) (corporate entity defendants additionally liable when corporate entities exist as alter egos of one another); *Eubank v. Richardson*, 353 S.W.2d 367, 369 (1962) (“A joint adventure is an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses.”); *Abbott v. Chesley*, 413 S.W.3d 589, 603 (Ky. 2013) (holding separate law firms and attorneys were engaged

in joint enterprise). At relevant times mentioned herein, Defendants owned, operated, managed, controlled and/or provided services for Defendant Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center” either directly or through a joint enterprise, partnership or the agency of each other and/or other diverse subalterns, subsidiaries, governing bodies, agents, servants or employees.

30. Notably, these corporate entities operate under the same corporate umbrella, which is owned/operated by Defendant Terry E. Forcht and which utilize the same office and have overlapping officers. Defendants Management Advisors, Inc. (and its owner/operator SEKY Holding Co. (f/k/a First Corbin Long Term Care, Inc. prior to amendment to the Articles of Incorporation filed with the Kentucky Secretary of State on or about August 30, 2017)) manages and operates the Facility including but not limited to the administrative and fiscal operations and developing the Facility’s budget, which includes funding for staffing for licensed nurses and nurse aides at the Facility. Defendants Management Advisors, Inc. (and its owner/operator SEKY Holding Co.) also monitors the Facility’s census, revenue rates, and operating trends. Moreover, upon information and belief, Defendant Management Advisors, Inc. recruited and selected the Administrator of the Facility who then reported to Defendant Management Advisors, Inc. while also determining staffing levels at the Facility and being responsible that the Facility was, in fact, compliant with all applicable laws, regulations, and the Facility’s own policies and procedures that includes the obligation to provide sufficient staffing to meet the acuity need of the Facility’s resident population. Further, upon information and belief, the Facility admitted in annual reports to the United States Government that the Facility exists as part of a “chain organization” while Defendant Management Advisors, Inc. identified itself as the “management” for the Facility in annual reports to the United States Government.

V. CLASS ALLEGATIONS

31. The cause of action alleged herein is appropriate for class action treatment and class certification pursuant to the governing and applicable rules of civil procedure, including Rule 23 of the Federal Rules of Civil Procedure. Plaintiff and the members of the Class were victims of the Defendants' understaffing of licensed nurses and nurse aides at the Facility; all in violation of 42 C.F.R. § 483.35(a)(1) ("Sufficient Staff") and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)).

32. As detailed herein, the Class is so numerous that joinder of all members is impractical. Next, there are questions of law and fact common to the Class. Next, the claims of the representative, Plaintiff, are typical of the claims of the Class. Next, Plaintiff, as a representative party, will fairly and adequately protect the interests of the Class. Next, the prosecution of separate actions by or against individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for any party opposing the Class. Next, adjudications with respect to the individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest if this matter is not brought as a Class Action. Next, the Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate, final injunctive relief or corresponding declaratory relief with respect to the Class as a whole. Next, the questions of law or fact common to the members of the Class predominate over questions affecting only individual members and a Class Action is superior to other available methods for the fair and efficient adjudication of the controversy.

33. This action seeks class-wide damages for the Defendants' violations of 42 C.F.R. § 483.35(a)(1) ("Sufficient Staff") and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)) alleged herein that injured Plaintiff and others similarly situated. This action also seeks injunctive relief necessary to prohibit Defendants' continued violations alleged herein. This action is appropriate for class certification under Rule 23 of the Federal Rules of Civil Procedure because questions of law and fact common with respect to liability and damages as to Plaintiff and the Class far more predominate over any issues affecting individual members of the Class. Resolution of these issues within a class action is the superior and manageable method to achieve fair and efficient adjudication of this controversy.

34. This action does not seek recovery for personal injuries, emotional distress, or bodily harm that may have been caused by Defendants' inadequate staffing at the Facility.

35. The entitlement of Plaintiff and the Class to the monetary and equitable relief sought will turn on application of readily identifiable and objectively determinable facts and standards that derive from data and documents maintained by Defendants including but not limited to, objective comparison of the assessed needs of the resident population at the Facility to the actual staffing levels at the Facility.

36. Plaintiff brings this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class consisting of all who reside or formerly resided at the Facility beginning at any time within the five (5) years prior to the filing of this Complaint through the date of the final disposition of this action.

37. Plaintiff seeks to have this matter proceed as a Class Action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class of plaintiffs similarly situated, as Plaintiff herein represents that she suffered injuries and/or damages common to all those similarly situated

who incurred injuries and/or damages arising from the acts alleged herein that injured her and others similarly situated.

38. Plaintiff alleges that she be allowed to serve as class representative, representing others similarly situated or putative plaintiffs, and proposes that the class can be defined as follows:

A. Plaintiff Subclass One: “Private Pay Residents”

The first subclass sought to be represented in this action is defined as follows: all persons who resided in (or continue to reside in) the FACILITY, that is and was owned, operated, and/or managed by the Defendants named herein from the date of five years prior to the date of filing of this complaint, through the date of the final disposition of this action, wherein the Defendants were reimbursed for services provided to a “class member” by private pay and/or privately acquired insurance and/or any Health Maintenance Organization (“HMO”) or Preferred Provider Organization (“PPO”). The subclass does not include: (a) any officers, directors or employees of the Defendants; (b) any judge assigned to hear this case (or spouse or family member of any assigned judge); (c) any juror selected to hear this case.

B. Plaintiff Subclass Two: “All Residents – Injunctive Relief Only”

The second subclass sought to be represented in this action as it relates to injunctive relief only, is defined as follows: all persons who were resided in (or continue to reside in) the FACILITY, that is and was owned, operated, and/or managed by the Defendants named herein at any time from five years prior to the date of filing of this complaint, through the date of the final disposition of this action. The class does not include: (a) any officers, directors or employees of the Defendants; (b) any judge assigned to hear this case (or spouse or family member of any assigned judge); (c) any juror selected to hear this case.

39. *Numerosity.* Although the precise number and identities of the proposed Class Members is presently unknown to Plaintiff, such data may be ascertained through appropriate discovery. However, upon information and belief, Plaintiff submits that the class of plaintiffs consists of more than 100 residents and former residents of the Facility, for whom Defendants were responsible for at all times pertinent herein, who suffered injuries and/or damages as a result of Defendants’ intentional acts and statutory violations during the class period as detailed herein.

40. Upon information and belief, there are hundreds of current and former residents that were subjected to the Defendants’ understaffing of licensed nurses and nurse aides at the Facility in violation of 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a).

Records published by the United States Centers for Medicare and Medicaid show that the Facility maintains 135 beds for residents of the Facility and that the Facility maintains a daily average of 106.5 residents. Accordingly, current and former residents of the Facility owned and operated by Defendants Defendant Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center,” Management Advisors, Inc., and SEKY Holding Co. total in the hundreds during the class period. Although the exact number of such persons is unknown to Plaintiff at this time, Defendants’ record systems contain the exact information of the identities of all such parties. Because Defendants maintain control of such information, Plaintiff reserves the right to amend these allegations following completion of relevant discovery from Defendants. Given the number of residents of Defendants Defendant Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center,” the members of the Class are so numerous that joinder of all members is impracticable and inconsistent with the orderly and efficient administration of justice, the efficient use of scarce judicial resources, and contrary to the public good.

41. *Commonality and Typicality.* Plaintiff’s claims are common and typical of the claims of the proposed Class in that Plaintiff is a member of the Class, Plaintiff’s claims arise from the same uniform corporate policies, procedures, practices and course of conduct maintained and undertaken by Defendants, Plaintiff’s claims are based on the same legal and remedial theories as those members of the Class and involve typical and similar factual circumstances, the injuries suffered by Plaintiff are typical and similar to the injuries suffered by members of the Class, and Plaintiff seeks a common form of relief for Plaintiff and members of the Class. Plaintiff’s claims are similar in nature and typical of the claims of each member of the Class of the acts of underfunding and understaffing of the Facility named herein that injured Plaintiff and who Plaintiff proposes to represent, in that all of her claims are based on the same legal theories, arise from the

same actions involving the acts and statutory violations perpetrated by Defendants as detailed herein, over the same period of time. Defendants uniformly understaffed the Facility in contravention of 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”) and 902 KAR 20:300(1)(a) (incorporating 42 C.F.R. § 483.35(a)(1)), which injured Plaintiff and the Class.

42. *Adequacy of Representation.* Plaintiff, as the representative party, can and will fairly and adequately protect the interests of the entire Class and has retained skilled attorneys, with the necessary financial means, who are experienced in the prosecution of mass tort and class actions and who will handle this action in an expeditious and economical manner; all in the best interest of all members of the Class.

43. *Predominance.* Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class.

Among the questions of law and facts common to the Class are as follows:

- a. Whether statutory requirements and common law have been and continue to be violated by Defendants’ acts as alleged herein;
- b. Whether Defendants engaged in the course of conduct alleged herein;
- c. Whether the members of the Class have suffered damages entitling them to damages pursuant to KRS § 446.070, and, if so, what the proper measure thereof is.

VI. NEGLIGENCE PER SE (KRS § 446.070)

44. Plaintiff hereby incorporates the allegations asserted in paragraphs 1 through 43 above as though set forth below.

45. KRS § 446.070 specifically provides for a private right of action by any person injured by the violation of *any* statute as follows:

A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

KRS § 446.070. Any statute may serve as a basis for a 446.070 action provided that three prerequisites are met: first, the statute in question must be penal in nature or provide “no inclusive civil remedy,” *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005); second, “the party [must be] within the class of persons the statute is intended to protect,” *Young*, 289 S.W.3d at 589 (citing *Hargis*, 168 S.W.3d at 40); and third, the plaintiff’s injury must be of the type that the statute was designed to prevent. *Griffith v. Kuester*, 780 F.Supp.2d 536, 547 (E.D. Ky. 2011) (quoting *Carman v. Dunaway Timber Co.*, 949 S.W.2d 569, 570 (Ky. 1997)).

46. Administrative regulations such as the staffing regulation 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”), may serve as the basis for a KRS § 446.070. *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 228 (Ky. 2015).

47. Defendants owed Plaintiff and each member of the Class a duty to provide adequate staffing at the Facility pursuant to the express provisions of 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1). Further, there is no inclusive civil remedy for Defendants’ violations of 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”).

48. Plaintiff and each member of the Class are within the class of persons nursing home regulation 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”), was designed to protect pursuant to the express provisions of KRS § 216B.010 (“the licensure of health facilities and health services is a means to insure that the citizens of this Commonwealth will have safe, adequate and efficient medical care”); *see also Vanhook*,

supra, 67 F.Supp.3d at 823 (“[t]he statute’s end goal in implementing its licensure provisions, then, is to protect users of Kentucky health care facilities.”).

49. The injury suffered by Plaintiff and each member of the Class – being deprived from living in an adequately staffed facility – is of the type the staffing regulation 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”), was designed to prevent and applies to the safety of the citizenry, particularly nursing home residents.

50. Plaintiff and members of the Class suffered injury in fact and concrete harm in that Defendants did not “provide services by sufficient numbers” of “licensed nurses” and/or “other nursing personnel” including “nurse aides” to current and former residents at the Facility, including Plaintiff; all in violation of 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”).

51. It is alleged that Plaintiff and members of the Class suffered pecuniary harm by being deprived of the value of payments made to the Facility for skilled nursing services when these services were not actually rendered consistent with 902 KAR 20:300(1)(a), which incorporates 42 C.F.R. § 483.35(a)(1) (“Sufficient Staff”).

52. As a result of Defendants’ violations, Plaintiff and each member of the Class have suffered an injury and a violation of their rights which cannot be adequately remedied at law and therefore are entitled to equitable relief, including but not limited to an injunction.

53. Pursuant to KRS § 446.070, Plaintiff and each member of the class are also entitled to actual and punitive damages.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, Helen Hamilton, through her Power of Attorney, Melissa Buchanan, individually, and on behalf of the Class she seeks to represent, respectfully demands

judgment against the Defendants, jointly and severally, and prays for relief from the Defendants as follows:

1. As it relates to Plaintiff Subclass One only, for an amount of compensatory damages in excess of the jurisdictional minimum that is fair and reasonable, as established by the evidence;
2. As it relates to Plaintiff Subclass One only, for an amount of punitive damages that is fair and reasonable, also as established by the evidence;
3. As it relates to Plaintiff Subclass One only, for pre-judgment interest and post-judgment interest;
4. As it relates to Plaintiff Subclass One only, for the costs herein expended, including reasonable attorneys' fees;
5. As it relates to Plaintiff Subclass One only, for any and all damages allowed by statute;
6. As it relates to Plaintiff Subclass One only, for costs herein expended;
7. As it relates to both Plaintiff Subclass One and Plaintiff Subclass Two, for all equitable relief the Court may deem proper;
8. As it relates to both Plaintiff Subclass One and Plaintiff Subclass Two, for injunctive relief preventing such abuses in the future and as follows:
 1. For an Order permanently enjoining defendants, and each of them, from violating rights referenced above. For an injunction, requiring that:
 - a. That Barbourville Nursing Home, Inc. d/b/a "Barbourville Health and Rehabilitation Center maintain actual nursing hours (licensed nurses; and other nursing personnel, including but not limited to nurse aides) of

3.94 nursing hours per patient day;

b. the Defendants report to their licensing authority all incidents of actual or suspected abuse or neglect (as defined by law) of which it has learned in the last three (3) years at Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center, which were not reported to the licensing authority, Adult Protective Services and/or Law Enforcement;

c. the Defendants provide proof to the Court of compliance with the reporting requirements over the last three (3) years for any and all such incidents in the form of a copy of the report submitted to their licensing authority;

d. Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center conduct quarterly, confidential surveys of *all* residents and residents’ representatives inquiring whether any conduct which may be deemed suspected abuse and/or neglect, and/or a violation of residents’ rights has occurred (with a clear, court approved definition of these terms included, with examples), and requiring that the responses to these surveys be turned over to the Long Term Care Ombudsman assigned to the pertinent facility for review. Further, after providing confidential surveys in unredacted form to the Ombudsman, Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center shall than redact only the name of the individual residents who completed the survey (or on whose behalf the survey was completed) from the surveys, and maintain copies of those surveys for a period of five (5) years, and that the

surveys be made available (with names redacted) to any prospective resident, or their representative, any current resident, or their representative, or any past resident, or their representative, within 24 hours of a request;

e. that Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center notify all current residents of this injunction by providing a copy of the injunction to them and their power of attorney/responsible party and/or personal representative, if any;

f. that Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center notify all future residents (at the time the admission agreement is signed) by providing a copy of this injunction during the period for which this injunction is in force to any new resident and to his or her power of attorney/responsible party and/or personal representative, if any;

g. That this injunction shall remain in full force and effect until the earlier of either of the following: (1) ten years from the date of entry of judgment, or (2) five years if no other violations of the injunction have been found by this or any other Court of competent jurisdiction regarding Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center. The burden of proof to obtain the shorter period shall be on the Defendants;

h. This injunction shall be enforced by the Court upon motion of any interested party (*i.e.*, plaintiffs or any other current or former resident (and/or their power of attorney/responsible party and/or personal

representative, if any, or any employee of Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center) and/or the filing of a new action of any such interested party. Each separately identifiable violation of this injunction shall be punishable by a \$5,000 fine payable to the person filing the motion or bringing the action and a payment of all reasonable attorney’s fees and costs incurred by the person bringing the motion or action against the Facility for violation of the injunction. A separate, identifiable violation includes for example, each giving of a dose of medication that is not prescribed is a separate violation that each resident may demand, separately;

i. Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center shall draft a policy and procedure to the satisfaction of the Court covering the handling of suspected abuse and neglect reporting as well as the obligation to assess and document patients’ needs *immediately* upon arrival and when an emergency occurs; and on staffing; and

j. Barbourville Nursing Home, Inc. d/b/a “Barbourville Health and Rehabilitation Center shall prepare a training program to the satisfaction of the Court to train its staff on the new policies and procedures; and shall submit verification, under oath, of compliance with that training program by all employees of each of the FACILITY within 12 months, and then repeated annually during the term of this judgment;

9. For punitive damages;
10. For a trial by jury; and

11. For any and all other relief to which the Plaintiff and the Class she seeks to represent may appear justly entitled.

Respectfully submitted,

GARCIA & ARTIGLIERE

/s/ Stephen M. Garcia

Stephen M. Garcia

312 S. 4th Street, Suite 700

Louisville, KY 40202

Telephone: 502.584.3805

*Counsel for Plaintiff and the Class Plaintiff
Seeks to Represent*