**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| KATHLEEN AUDIA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Case No.: 1:17-cv-06618 |
| v. | ) | |
| | ) | Hon. Samuel Der-Yeghiayan |
| BRIAR PLACE, LTD., an Illinois corporation, | ) | |
| | ) | |
| Defendant. | ) | |

**PLAINTIFF'S RESPONSE IN OPPOSITION TO**
**DEFENDANT'S MOTION TO DISMISS**

Plaintiff Kathleen Audia, by and through her attorneys, Robbins, Salomon & Patt, Ltd., for her Response to Defendant's Rule 12(b)(6) Motion to Dismiss the Amended Complaint ("Motion to Dismiss"), states as follows:

## INTRODUCTION

American Sign Language ("ASL") is the primary language for many people, like Plaintiff, who are deaf. For persons who are deaf, "effective communication," in the context of healthcare, means the *ability to share* with doctors and nurses their symptoms and conditions, medical history, etc., the *ability to ask questions* about their diagnoses, prognoses, medication, treatment, etc., and the *ability to understand* the risks of a procedure or treatment, treatment options, how and when to take medication, side-effects of medication, financial obligations, etc.

866 days. Two years and four months. That is the length of time Plaintiff stayed at Defendant's facility not knowing, *inter alia,* why she was not being discharged, that she had the right to request to be discharged, what her rehabilitation goals were, what behaviors were required of her to be able to go outside of the facility independently, and, most importantly, what behaviors were required of her to get discharged. She was unaware of that and other vital

information, because she was not able to share information, ask questions or understand what was being asked or told. She was not able to participate in her own care or rehabilitation for 866 days, because Defendant refused her many requests to provide to her an on-site American Sign Language interpreter or other appropriate auxiliary aids and service to achieve effective communication.

Pursuant to Fed.R.Civ.P. 12(b)(6), Defendant has moved to dismiss the Amended Complaint. For the reasons stated herein, Defendant's motion should be denied.

## LEGAL STANDARDS

Under the federal pleading standard, a complaint must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), so defendants have "fair notice" of the claim "and the grounds upon which it rests." *Briscoe v. Health Care Service Corporation*, 2017 WL 5989727 at *2 (N.D. Ill. December 4, 2017), citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957). This means that (1) "the complaint must describe the claim in sufficient detail to give the defendant 'fair notice of what the ... claim is and the grounds upon which it rests" and (2) its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a "speculative level." *J.T. ex rel. A.F. v. Hamos,* 2012 WL 476-0645 (C.D. Ill. October 5, 2012), citing *EEOC v. Concerta Health Services, Inc.* 496 F.3d 773, 776 (7th Cir. 2007).

The complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,*556 U.S. 662, 678 (2009), quoting *Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Hallinan v. Fraternal Order of Police Chicago Lodge No. 7,* 570 F.3d 811, 820 (7th Cir. 2009). Defendants must meet a high standard in order to have a complaint dismissed under Rule 12(b)(6), because, in ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Bontkowski v. First National Bank of Cicero,* 998 F.2d 459, 461 (7th Cir. 1993), *cert denied,* 510 U.S. 1012 (1993). Further, the Seventh Circuit has explained that this rule "reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks v. Ross,* 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002)).

## ARGUMENT

Defendant argues the Amended Complaint should be dismissed because (1) there are insufficient factual allegations that Defendant intentionally discriminated against and was deliberately indifferent to Plaintiff to support a claim for damages under the Rehabilitation Act (Count I); (2) the Affordable Care Act does not provide a private right of action (Count II); (3) plaintiff failed to attach a Section 2-622 affidavit to support her claim for negligence and healing arts malpractice (Count III); and (4) there are no allegations suggesting that Defendant's conduct was willful or wanton or recklessly indifferent to support a claim for punitive damages under the Illinois Nursing Home Care Act (Count IV). Based on the federal pleading requirements, Plaintiff's Amended Complaint sufficiently pleads facts that allow the court to draw the reasonable inferences to support claims for damages under each count.

### A. The Complaint Sufficiently Pleads Facts to Support Plaintiff's Claim for Damages under the Rehabilitation Act (Count I).

Congress enacted the Rehabilitation Act forty-five years ago as a comprehensive federal program to "empower individuals with disabilities to maximize . . . independence, and inclusion and integration into society, through . . . the guarantee of equal opportunity." 29 U.S.C. § 701(b)(1)(F). To effectuate those purposes, Section 504 of the Rehabilitation Act provides: "no otherwise qualified individual with a disability … shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…" 29 U.S.C. § 794(a). Section 504 seeks "not only to curb 'conduct fueled by discriminatory animus,' but also to right 'the result of apathetic attitudes rather than affirmative animus.'" *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152 (10th Cir. 1999) (quoting *Alexander v. Choate*, 469 U.S. 287, 296 (1985)); *see also* 28 C.F.R. § 41.51(b)(3) (Justice Department's Section 504 coordination regulation prohibiting criteria or methods of administration that have the purpose *or effect* of discriminating).

Although the Seventh Circuit has yet to decide whether discriminatory animus or deliberate indifference is required to show intentional discrimination, it follows the majority of the other circuits in applying the deliberate indifference standard. *Everett v. Baldwin*, 2016 WL 8711476, at *10 (N.D. Ill. Jan 15, 2016), citing *McKinnie v. Dart,* 2015 WL 5675425 at *7 (N.D. Ill. September 24, 2015).[1] That standard "does not require personal animosity or ill will but

[1]See *Meagley v. City of Little Rock* 639 F.3d 384, 389 (8th Cir. 2011)(the deliberate indifference standard, unlike some tests for intentional discrimination, "does not require a showing of personal ill will or animosity towards the disabled person," but rather can be "inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." quoting *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009)); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001) ("Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood."). The Ninth Circuit's guidance on what is required to meet each of the deliberate indifference elements is instructive here. The *Duvall* court explained that "[w]hen the

rather may be inferred when there is knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Id.*, citing *Phipps v. Sheriff of Cook County,* 681 F.Supp.2d 899, 918 (N.D. Ill. 2010); *Love v. Westville Correctional Center,* 103 F.3d 558, 561 (7th Cir. 1996). See also *Hamos* at *8 (To show deliberate indifference, a plaintiff must show knowledge (*i.e.*, notice an accommodation is required) and deliberate conduct (as opposed to mere negligence)), citing *Kennington v. Carter*, 2004 WL 2137652 at *7 (S.D. Ind. 2004).

To recover compensatory damages under the Rehabilitation Act, a plaintiff must prove intentional discrimination. *Everett*, at *9, citing *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 337 (7th Cir. 2015); *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 n.4 (7th Cir. 2014); *Strominger v. Brock*, 592 Fed.Appx. 508, 511 (7th Cir. 2014). Although Defendant argues that the holding in *Everett* supports dismissal in this case, Defendant's argument is not persuasive. In *Everett,* plaintiff alleged that defendants ignored medical permits (prescriptions) for accommodations and repeated requests for accommodations for his disability. *Everett,* at *2. Specifically, plaintiff alleged his physical disability (knee injury) necessitated a cell assignment including a lower bunk on a lower floor of the jail, which was required by the medical permits. *Id.* In *Everett*, the court denied the defendants' motion to dismiss and held that the complaint sufficiently alleged that the repeated requests for accommodations "should have alerted Defendants of the need to accommodate his medical condition, and the failure to do so suggests indifference to [plaintiff's] medical needs." *Everett,* at *10, citing *Hildreth v. Cook*

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plaintiff has alerted the . . . entity to his need for accommodation (or where the accommodation is obvious, or is required by statute or regulation), the . . . entity is on notice that an accommodation is required." *Id.* at 1138. To meet the second element of the deliberate indifference test, "a failure to act must be the result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* at 1139. *Liese v. Indian River County Hospital District,* 701 F.3D. 334, 344 (11th Cir. 2012).

*Cnty.*, 2010 WL 1656810, at *3 (N.D. Ill. Apr. 23, 2010). The *Everett* court relied on the decision in *Hildreth,* in which the court held that defendant's refusal to permit the disabled plaintiff the use of a typewriter to communicate, notwithstanding a circuit court's order permitting such use, supported an inference of intentional discrimination. *Id.* at *3.

Defendant's reliance on *Everett* and *Hildreth* to argue that deliberate indifference cannot be inferred from Plaintiff's Amended Complaint is misplaced. Defendant states that unlike the defendants in those cases it neither "violated any court order" nor "failed to honor a medical prescription," so Plaintiff's Amended complaint must be dismissed. [Def.'s Mem. in Support of its Rule 12(b)(6) Motion to Dismiss, Doc. # 20, ¶ III. A.] This argument incorrectly suggests that deliberate indifference under the Rehabilitation Act *can only* be inferred if a plaintiff alleges a violation of a court-ordered accommodation or a failure to honor a medical prescription. Defendant cites to no decision, nor could Plaintiff find any, that holds a Plaintiff must allege one of those two facts to demonstrate deliberate indifference. In fact, such a requirement is wholly inconsistent with the purpose of the Rehabilitation Act and would place an impossible burden on many plaintiffs seeking equal access to goods and services under the Rehabilitation Act.

Here, Plaintiff's Amended Complaint [Doc. #15] satisfies her pleading requirements pursuant to FED. R. CIV. P. 8(A)(2), as it unequivocally provides fair notice to the Defendant of the bases of her claims. The Amended Complaint also contains sufficient facts to show deliberate indifference (*i.e.*, notice that an accommodation is required, and deliberate conduct (as opposed to mere negligence)). The Amended Complaint alleges deliberate conduct with specificity in multiple paragraphs, including that Defendant "relied upon exchange of written notes or required Plaintiff to lip read during numerous complex and sufficiently lengthy conversations even though Plaintiff required *and requested* the availability of an ASL interpreter…", "Defendant failed to

provide appropriate aids and services to Plaintiff to allow for effective communication between her and its doctors, nurses, counselors, social workers, therapists...", *"[t]hroughout Plaintiff's 866 day stay* at Defendant's Facility, Plaintiff was required to lip read or exchange notes with the Facility's Personnel during numerous Vital Encounters..." (Doc. #15 at ¶¶ 6, 8, 13 (Emphasis added.)), and identifies 14 categories of "vital encounters"—and at least *444* encounters—where Plaintiff was required to communicate without an ASL interpreter or other effective auxiliary aid or service. [Am. Compl. ¶¶ 6.A.-N. & 13.A.–I.] *See Stokes v. City of Chicago*, 2018 WL 497365 *3 (N.D. Ill. January 22, 2018)("It is possible to demonstrate discrimination on the basis of disability by a defendant's refusal to make a reasonable accommodation.") citing *Washington v. Ind. High Sch. Athletic Ass'n., Inc.*, 181 F.3d 840, 848 (7th Cir. 1999). The Amended Complaint also alleges that Defendant violated the Rehabilitation Act (along with Section 1557) by, *inter alia*, "... failing to establish comprehensive policies and procedures to meet its legal mandates to achieve effective communications." [Am. Compl. ¶ 9.D.] Plaintiff has sufficiently set forth allegations, with comprehensive detail, of Defendant's deliberate indifference to Plaintiff's medical condition and civil rights: Defendant was aware during the 866 days stay that Plaintiff was deaf and required auxiliary aids and services for effective communication under the Rehabilitation Act; Plaintiff's repeated requests for an ASL interpreter over the course of 866 days; and Defendant's failure to provide an ASL interpreter or any other effective auxiliary aids or services for 866 days and at least 444 vital encounters. As in *Everett* and *Hildreth,* based on these allegations, Defendant's deliberate indifference to Plaintiff's need for accommodation can be reasonably inferred.

Finally, Defendant, in passing, asserts Plaintiff failed to allege Defendant denied Plaintiff benefits because of her disability. Paragraph 6 of the Amended Complaint states "Defendant has

failed to provide Plaintiff, a person with a disability, the same quality of care as other residents and deprived her of the opportunity to participate in her care and rehabilitation on the basis of her disability." [Am. Compl. ¶ 6]. Further, the allegations of the Defendant's conduct sufficiently set forth this element of her claim. [Am. Compl. ¶¶ 8, 11, 13, 22]. These allegations are incorporated into Count 1. [Am. Compl. ¶ 17].

For the foregoing reasons, Count I of Plaintiff's Amended Complaint sufficiently states a cause of action for compensatory damages under the Rehabilitation Act, and Defendant's motion to dismiss should be denied.

### B. The Affordable Care Act Provides for a Private Right of Action (Count II).

Defendant incorrectly asserts that the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116, does not provide a private right of action. The language of Section 1557 of the ACA is clear and unambiguous in that it specifically references the applicability of four civil rights statutes and the availability of the enforcement mechanisms of those statutes, *to wit*:

> an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*), or Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity ... The enforcement mechanisms provided for and available under such title VI, title IX, section 504 or such Age Discrimination Act shall apply for purposes of violations of this subsection.

*See* 42 U.S.C. § 18116(a).

In agreeing with other district courts, this past December, this court affirmed that §1557 provides a private right of action for claims of intentional discrimination. *See Brisco,* at *9, citing *York v. Wellmark, Inc.,* No. 4:16-cv-00627-RGE-CFB, slip op. at 29 (S.D. Iowa September 6, 2017); *Se. Pa. Transp. Auth. V. Gilead Scis., Inc.,* 102 F.Supp.3d 688, 699 (E.D. Pa. 2015);

*Calum v. CVS Health Corp.*, 137 F.Supp.3d. 817, 848 (D.S.C. 2015); *Rumble v. Fairview Health Servs.,* No. 14 –cv-2037, 2015 WL 1197415, at*7 n.3 (D. Minn. Mar. 16, 2015) ("The Court reaches this conclusion because the four civil rights statutes" that Congress "referenced and incorporated into Section 1557 permit private rights of action.").

In addition, the Department of Health and Human Services (HHS) Office of Civil Rights (OCR), which is the department responsible for promulgating Section 1557's regulations, interprets Section 1557 as authorizing a private right of action for violations of that section. *See* 81 Fed. Reg. 31375, 31439 (When discussing the enforcement mechanisms of § 92.301 "… We provided that based on the statutory language, a private right of action and damages for violation of Section 1557 are available to the same extent that such enforcement mechanisms are provided for and available under Title VI, Title IX, Section 504 or the Age Act with respect to recipients of Federal financial assistance…"). Because HHS is the agency directed by Congress to issue regulations implementing Section 1557 of the ACA, *see* 42 U.S.C. § 1557(c), and the OCR is responsible to render technical assistance explaining the responsibilities of covered entities to comply with Section 1557, its guidance regarding interpretation of these regulations is entitled to deference. *See Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (citing *Chevron, U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

Based on the foregoing, Section 1557 provides for a private right of action for damages to enforce violations of its nondiscrimination mandates. Defendant's motion to dismiss Count II of the Amended Complaint should be denied.

### C. A Section 2–622 Affidavit Is Not Required For Plaintiff To Assert Claims For Negligence Against The Defendant.

An action for negligence under the Illinois Nursing Home Care Act ("Act"), 210 ILCS 45/1-101, *et seq*., is not considered an action "for healing art malpractice" within the meaning of 735 ILCS 5/2-622. *Eads v. Heritage Enterprises,* 204 Ill. 2d 92, 94 (2003). Therefore, a plaintiff who asserts a private right of action under the Act is not required to support a complaint with an affidavit of counsel and certificate of merit from a physician or other health care provider. *Id.* The Healing Arts Malpractice Act, is applicable only to "action[s], whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice." 735 ILCS 5/2-622a.

When the applicability of Section 2–622 is raised, the court must consider the threshold issue of whether plaintiff's cause of action sounded in "medical, hospital or other healing art malpractice" within the meaning of that statute. *Eads,* at 100. "Healing art malpractice" is not defined in Section 2-622. To determine whether a complaint sounds in ordinary negligence or healing art malpractice, courts look to the evidence that will be necessary to establish the defendant's standard of care. *Edelin v. West lake Community Hospital,* 510 N.E.2d 858 (1st Dist. 1987). In medical malpractice actions, plaintiffs generally are required offer expert testimony to establish the standard of care unless the defendant's conduct is so grossly negligent or the procedure is so common that a lay person could understand it. *Id.,* at 961. If the standard can be established on the basis of defendant's administrative policies or other evidence short of medical expert testimony, a suit may proceed on a theory of ordinary negligence. *Kolanowski v. Illinois Valley Community Hospital,*544 N.E.2d 821, 824 (3d Dist. 1989).

Here, the bases for Plaintiff's negligence action is whether Defendant had a duty to provide an on-site ASL interpreter or other auxiliary aid or service to achieve effective communication during sufficiently complex and lengthy communications and whether Defendant

breached said duty. Despite Defendant's argument that this determination turns on medical judgment, no medical expert testimony is required to prove the Defendant's standard of care. The focal issue is whether the Defendant had a duty to provide, and failed to provide, effective communication during medical services, not whether the Defendant committed malpractice in providing medical services to Plaintiff. *See generally, Bryant v. Madigan,* 84 F.3d 246, 249 (7th Cir. 1996)(A plaintiff's claim that his or her disability is negligently treated is not the equivalent of medical malpractice.); *Stokes v. City of Chicago*, 2018 WL 497365 *3 (N.D. Ill. January 22, 2018)(A complaint for denial of benefit or accommodation by reason of disability is not a claim for medical malpractice.). Plaintiff's Amended Complaint alleges that Defendant had a duty to provide Plaintiff skilled nursing care and rehabilitation services in a manner to avoid mental anguish or emotional distress, and to provide, pursuant to the Illinois Nursing Home Act, 210 ILCS 45/1-101 *et seq.*, its services to the Plaintiff in a language that Plaintiff understands. [Am. Compl. ¶ ¶ 36 & 37]. The evidence that will be required to prove Plaintiff's claim will entail establishing what communication access policies Defendant had in place during Plaintiff's residency, whether those communication access policies provided for patients who are deaf, like Plaintiff, to receive services in a language they understand, and whether Defendant complied with those policies. The standard of care at issue involves what communication accommodations are required of a nursing home and not, as Defendant suggests the medical judgment required for "assessing and reporting of the medical needs of the patient." [Def.'s Mem. in Support of its Rule 12(b)(6) Motion to Dismiss, Doc. # 20, p. 10]. Medical judgment is not required for determining communication accommodation. Other than vaguely arguing that "medical judgment" is implicated, Defendant does not describe how the failure to provide effective communication falls under medical judgment. *Id.* The fact that the alleged negligent failure to

provide effective communication occurred in a medical setting does not convert this into a medical malpractice claim.

Because the allegations of the Amended Complaint sound in ordinary negligence, a Rule 2-622 affidavit is not required. Accordingly, Defendant's motion to dismiss Count III should be denied.

**D. The Complaint Sufficiently Pleads Facts to Support Plaintiff's Claim for Punitive Damages under the Illinois Nursing Home Care Act (Count IV).**

In determining a motion to dismiss, the court must decide only if it can "draw the reasonable inference that the defendant is liable for the misconduct alleged," assuming the factual allegations, as pleaded, are true. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Regarding the appropriateness of awarding punitive damages, the Illinois Supreme Court has stated, "[i]t has long been established in this State that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, (1978). The Illinois Supreme Court further recognized that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* Citing Restatement (Second) of Torts § 908(2) (1979).

Here, Plaintiff has alleged facts, if deemed as true, allow for the reasonable inference that the Defendant is liable for punitive damages. Plaintiff has alleged that Defendant knew she was deaf and, nonetheless, kept her in its facility for 866 days without providing an ASL interpreter to allow her to effectively communicate, including communicate during assessments as to whether she should be discharged. [Am. Compl. at ¶¶ 6, 8, 13, 14, 22]. Plaintiff has alleged that Defendant's conduct in failing to provide her with a means to effectively communicate with

doctors and staff during at least 444 vital encounters denied her federally protected civil rights under the Rehabilitation Act and Section 1557 of the ACA. These factual allegations must be taken as true for purposes of this motion, and they establish that the Defendant's conduct constituted reckless indifference and wanton disregard for her rights to participate in her own care, to ask questions about her care, to ask why she remained at the facility for over two years, and to ask what she needed to do to be discharged. The allegations of the Amended Complaint are consistent with the Seventh Circuit's decisions on pleading punitive damages. *See generally, Cadek v. Great Lakes Dragway, Inc.,* 58 F.3d 1209, 1212 (7th Cir. 1995)(A drag strip racer's allegations of various negligence and intentional torts against the proprietors of a race track for misrepresenting the track's fire-fighting capabilities by displaying an inoperable fire truck by the track were sufficient to state a cause of action for punitive damages); *Normand v. Orrin Extermination Co.,* 193 F.3d 908, 910-911 (7th Cir. 1999)(Plaintiff's allegations that defendant *knew* that her home was infested with termites but lied to her to avoid honoring its service guarantee was sufficient to withstand a motion to dismiss the claim for punitive damages); *Harvey v. Price*, 603 F.Supp. 1205 (S.D.Ill. 1985)(Plaintiff's allegations that defendant made a misrepresentation to plaintiff's attorney concerning insurance coverage in an earlier incident were sufficient to withstand a motion to dismiss the claim for punitive damages.).

Under Illinois law, whether punitive damages can be awarded for a particular cause of action is a question of law, but whether a defendant's conduct was sufficiently willful or wanton to justify the imposition of punitive damages is a fact question for the jury to decide. *Cirrincione v. Johnson,* 184 Ill.2d 109, 116 (1998). Here, Defendant only challenges that the factual allegations do not allege "an aggravated or egregious form of tort, or any conduct approaching willfulness or wantonness." [Def.'s Mem. in Support of its Rule 12(b)(6) Motion to Dismiss,

Doc. # 20, p. 13]. Because punitive damages are available under the Illinois Nursing Home Care Act and Plaintiff's well-pleaded facts allow for the inference that Defendant is liable for such damages, the claim is facially plausible and it is premature to dismiss Plaintiff's claim for punitive damages.

## CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss the Amended Complaint should be denied.

Date: January 30, 2018

Respectfully submitted,

By: /s/ Jennifer M. Sender

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 30, 2018, all counsel of record who are deemed to have consented to electronic service are being served a true and correct copy of the foregoing document using the Court's CM/ECF system, in compliance with Local Rule 5.2(a):

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