To be Argued by:
F. PAUL GREENE
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

AARON MANOR REHABILITATION AND NURSING CENTER, LLC, *et al.*,

Plaintiffs/Petitioners-Respondents-Cross-Appellants,

– against –

HOWARD A. ZUCKER, M.D., J.D., as Commissioner of the New York State Department of Health and ROBERT MUJICA, as Director of the Budget,

Defendants/Respondents-Appellants-Respondents,

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory and Injunctive Relief.

Case No.: 533802

REPLY BRIEF FOR PLAINTIFFS/PETITIONERS-RESPONDENTS-CROSS-APPELLANTS

HARTER SECREST & EMERY LLP
F. Paul Greene, Esq.
Christina M. Deats, Esq.
Attorneys for Plaintiffs/Petitioners-Respondents-Cross-Appellants
1600 Bausch & Lomb Place
Rochester, New York 14604
(585) 232-6500
fgreene@hselaw.com
cdeats@hselaw.com

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Plaintiffs-Petitioners-Respondents-Cross Appellants ("Plaintiffs"), by and through their undersigned counsel, Harter Secrest & Emery LLP, hereby submit their Reply Brief in further support of the Cross Appeal made by Plaintiffs. Undefined capitalized terms used herein have the meanings ascribed to them in the Second Amended Verified Petition & Complaint in this matter, found at R.[1] 283 to 308.

PRELIMINARY STATEMENT

The Court below summarily dismissed Plaintiffs' claims under PHL § 2807(3) and Equal Protection, ignoring the clear questions of fact that permeate these claims. In opposing Plaintiffs' present appeal, Defendants repeat these missteps, ignoring the factual record and arguing instead that these claims raise only questions of law. Defendants' arguments fail, however, given the inherently factual nature of determining whether costs are "reasonable" and "appropriate" for reimbursement under PHL § 2807(3), and whether Plaintiffs are similarly situated with voluntary facilities when it comes to the reimbursement of ongoing capital costs. In addition, Defendants' actions in relation to residual equity, as well as the underlying statute, are clearly arbitrary and capricious, further underscoring the need for a determination on the merits below.

[1] Citations bearing the prefix "R." are to the Record on Appeal. (Dkt. No. 5.)

FACTS

The following facts are undisputed on the record and determinative on Plaintiffs' appeal. Plaintiffs alleged in their pleading and showed via numerous sworn submissions that reimbursement for ongoing capital costs beyond a facility's fortieth year of operation is a crucial and necessary element of Medicaid reimbursement. (R. 72 ¶ 5; 75 ¶ 19; 162-64 ¶¶ 6-9, 14, 16; 170-71 ¶¶ 4-6; 175-77 ¶¶ 6-7, 13, 17; 178-79 ¶¶ 4-6; 182-83 ¶¶ 4-6; 187-89 ¶¶ 4, 8; 298 ¶ 63; 348 ¶ 13.) In response, Defendants offered nothing to show that reimbursement for ongoing capital costs was somehow not necessary to providing appropriate care to residents living in such a facility. Moreover, Defendants provided no record on return for any of the over 100 facilities in this suit to show whether the Department of Health completed the mandatory determination that each Plaintiff's Medicaid rate, after elimination of the residual equity payment factor, would still be sufficient to meet the costs which must be incurred by efficiently and economically operated facilities, under PHL § 2807(3).

Plaintiffs also alleged and showed below that, prior to the Residual Equity Elimination Clause, for-profit, also known as proprietary, nursing homes incurred the same sort of ongoing capital costs and reimbursement for those costs as not-for-profit, also known as voluntary, nursing homes did. (R. 75 ¶ 18; 162 ¶ 7; 164 ¶¶ 13-15; 166-67 ¶¶ 26-27; 168-69 ¶¶ 34, 36; 176-77 ¶¶ 14-15; 187-88 ¶¶ 4-6; 291

¶¶ 23-24; 347-48 ¶¶ 9-13.) These costs include, for example, replacement of an aging roof, purchase of new non-movable equipment, and other additions or upgrades to the building and grounds of a facility. (R. 72-73 ¶¶ 6-9; 163 ¶ 9; 164 ¶ 14; 165 ¶¶ 20-21; 166-67 ¶¶ 26, 28; 168 ¶¶ 30, 32-33; 171 ¶¶ 5-7; 176 ¶ 12; 177 ¶ 15; 178-79 ¶¶ 5-7; 183 ¶¶ 5-7; 187-89 ¶¶ 4-5, 8; 290-91 ¶¶ 18-21; 347 ¶ 10.) Defendant offered no proof below to show that there was any difference in the type of ongoing capital costs incurred by facilities of differing sponsorship, or that reimbursement for these costs is not a necessary element of a facility's Medicaid rate.

On the issue of retroactivity, it was undisputed below that Defendant attempted to enforce the Residual Equity Elimination Clause retroactively, *i.e.*, effective as of April 2, 2020 but noticed in a Dear Administrator Letter, dated August 7, 2020, and ultimately clawed back in rate year 2020 payment cycle 2243, dated September 2, 2020. (R. 244-45.) As for the appropriate rate period in which the Residual Equity Elimination Clause could take effect, the next applicable capital rate period began on January 1, 2021, with capital rates running on a calendar year basis. (R. 352-53 (Department of Health's Capital Reimbursement Certification for "Capital Reimbursement Rate Year - 2020," issued as part of the standard rate-setting process); *see also* R. 162-63 ¶ 8; 290 ¶ 19; 346-47 ¶¶ 6-8.) The nine months between the April 1, 2020 effective date of the Residual Equity

Elimination Clause and the next capital rate period, commencing on January 1, 2021, gave Defendants sufficient time to, for example, provide proper notice of and adopt regulations reflecting the elimination of residual equity. *See* N.Y. S.A.P.A. § 202(1)(a) (60 day notice and comment period for adoption of regulations). Defendants below conceded that such a change in regulations was necessary before they enforced the Residual Equity Elimination Clause, but they eliminated the residual equity payment factor without any such regulatory change. (R. 217 ¶ 14 (conceding that regulatory amendment was required before residual equity could be eliminated).) Today, Defendants' regulations remain the same as they were before the Residual Equity Elimination Clause, allowing for continuing payment of the residual equity elimination factor. *See* 10 N.Y.C.R.R. § 86-2.21(e)(7). The nine months between April 1, 2020 and January 1, 2021 also gave Defendants sufficient time to determine, under PHL § 2807(3), whether the resulting rates would have been sufficient to fund the ongoing capital needs of affected facilities, or whether an appropriate substitute was required, such as depreciation, which voluntary facilities continue to enjoy. *See* 10 N.Y.C.R.R. § 86-2.19 (depreciation regulation).

ARGUMENT

POINT I

PLAINTIFFS' CLAIM UNDER PHL § 2807(3) REQUIRES A FACTUAL DETERMINATION OF THE COSTS THAT MUST BE INCURRED BY EFFICIENTLY AND ECONOMICALLY OPERATED FACILITIES.

PHL § 2807(3), which Defendants quote only selectively in their papers, reads in more fulsome and relevant part as follows:

> Prior to the approval of such rates, as provided in subdivision two of this section, the commissioner *shall determine*, and in the case of approvals by the state director of the budget, certify to such official that the proposed rate schedules for payments to hospitals for hospital and health-related services are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities.

See PHL § 2807(3) (emphasis added).

At issue in this suit below was the PHL § 2807(3) determination required of the Commissioner before eliminating the residual equity payment factor without an appropriate substitute, such as depreciation, which voluntary facilities continue to enjoy beyond their fortieth year of operation. The record presented below and now placed before this Court shows, apparently, that no such determination was made. Defendants produced no sort of calculation, analysis, comparison, report or other information or document showing or in any way addressing whether any Plaintiff's Medicaid rate would satisfy the requirements of PHL § 2807(3) after elimination of residual equity. It must be remembered in this regard, and the uncontroverted record evidence shows, that residual equity pays for the most necessary and

essential cost of nursing home care: payment for the home itself in which residents live and receive their life-sustaining care. There can be no expenditure more crucial than replacing a failing roof or purchasing new non-movable equipment to ensure resident safety, comfort, and well-being. Because of this, under PHL § 2807(3), Defendants could not eliminate residual equity without an appropriate replacement to reimburse affected facilities for these costs.[2]

Yet the State apparently thought it appropriate to eliminate residual equity without considering how removing this crucial reimbursement factor would affect either facilities or their residents. Defendants have adduced no proof whatsoever that Defendants even attempted to comply with PHL § 2807(3), let alone determined that a proprietary nursing home rate without residual equity could satisfy the substantive requirement of the statute.

And that requirement, *i.e.*, that the resulting rate be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," is inherently a question of fact. On the motion below, the only

[2] Defendants ignore this issue altogether, claiming simply that because the Legislature eliminated residual equity, such elimination was proper. (*See* Defs.' Reply Br. at 19-20.) Certainly, the Legislature's power is broad in this regard, but it is constrained by its own prior actions, including PHL § 2807(3), which affirmatively guarantees facilities that they will be reimbursed for "the costs which must be incurred by efficiently and economically operated facilities." Certainly, the Legislature cannot decree tomorrow that Medicaid providers will receive no payment whatsoever for the care they provide, which, of course, is the logical outcome of Defendants' current argument. It must be remembered in this regard that the Residual Equity Elimination Clause purports to end payment for the very homes in which nursing home residents live and receive their care, and which homes providers are obligated by the State to provide.

evidence presented as to whether ongoing capital costs "must be incurred" by a facility spoke resoundingly and unanimously in Plaintiffs' favor. (R. 72 ¶ 5; 75 ¶ 19; 162-64 ¶¶ 6-9, 14, 16; 170-71 ¶¶ 4-6; 175-77 ¶¶ 6-7, 13, 17; 178-79 ¶¶ 4-6; 182-83 ¶¶ 4-6; 187-89 ¶¶ 4, 8; 298 ¶ 63; 348 ¶ 13 (clear factual showing that reimbursement of ongoing capital costs was and remains a necessary component of Plaintiffs' Medicaid rates).) Clearly, there can be no more necessary cost incurred by a nursing facility after its fortieth year of operation than paying for ongoing upkeep and improvement of the facility for the care and ultimate benefit of its residents.

In response, Defendants were silent. Defendants offered no testimony or other factual proof to show that reimbursement for ongoing capital costs for an aging facility was somehow not necessary to the health and safety of that facility's residents. (R. 211-45; 331 ¶ 16.) Nor did Defendants offer any example of a specific facility where residual equity payments exceeded actual financial need. Because of this, Defendants never shifted the burden to Plaintiffs on Defendants' summary judgment motion and the issue of whether a rate without residual equity could still satisfy the requirements of PHL § 2807(3) should have proceeded below to discovery and resolution on the merits. *See Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986) (motion for summary judgment must be denied if movant cannot shift burden to nonmovant, "regardless of the sufficiency of the opposing

papers"). At minimum, Defendants should have been required to provide the relevant record on return for each facility, showing the calculations, if any, supporting Defendants' contention that Plaintiffs' Medicaid rates still satisfy PHL § 2807(3) after elimination of residual equity. Or, in the alternative, Defendants should have stated that no such record exists, which would prove Plaintiffs' point in relation to PHL § 2807(3), *i.e.*, that the statutorily required determination was never made.

POINT II

DEFENDANTS IGNORE THE UNCONTROVERTED RECORD EVIDENCE THAT PROPRIETARY AND VOLUNTARY FACILITIES HAD PREVIOUSLY BEEN COMPENSATED FOR THE EXACT SAME COSTS, PRIOR TO THE RESIDUAL EQUITY ELIMINATION CLAUSE.

Defendants suffer from a singular misunderstanding when it comes to determining whether Plaintiffs are similarly situated with voluntary facilities concerning reimbursement of ongoing capital costs for older facilities. Specifically, Defendants focus solely on how such reimbursement was made, arguing that because the Department of Health paid for the same exact ongoing costs (for example, replacement of a leaky roof) via different methods, then proprietary and voluntary facilities must not be similarly situated, under an Equal Protection analysis. (*See* Defs.' Reply Br. at 21-22.)

This argument misses the point, however, because it is not merely the "how" of such reimbursement that matters,[3] but also the "what," *i.e.*, what costs were reimbursed and whether those costs bear a reasonable resemblance to one another *See Diaz v. Minhas Constr. Corp., LLC,* 188 A.D.3d 812, 814 (2d Dep't 2020) ("circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances"). As shown below, the costs at issue are exactly the same: ongoing capital costs for maintenance and improvement of buildings, nonmovable equipment, and grounds for nursing facilities beyond their fortieth year of operation, regardless of sponsorship. Indeed, when the Department of Health undertook, in the relevant regulations, to list the expenses that depreciation and proprietary capital reimbursement each pay for, the Department used the exact same terminology: "buildings," "nonmovable equipment" and "capital improvements." *See* 10 N.Y.C.R.R. § 86-2.19(a)-(b) (depreciation regulation, listing "buildings," "capital improvements" and "nonmovable equipment"); § 86-2.21(a)(1) (proprietary capital reimbursement regulation, listing "building" and "nonmovable equipment"), (9) (listing "capital improvements").

[3] Indeed, the "how" of ongoing capital reimbursement is identical for voluntary and proprietary facilities, or at least it was before the Residual Equity Elimination Clause took effect, as both sponsorships are reimbursed for such expenses in the capital portion of their rates, under the neighboring subsections of the Department of Health's regulations. *See* 10 N.Y.C.R.R. § 86-2.19 (depreciation rules for voluntary facilities); § 86-2.21 (capital reimbursement rules for proprietary facilities).

In addition, in the regulation governing how the Medicaid rate is calculated for all facilities, whether voluntary or proprietary, the Department used a single regulatory section to define the elements of the capital component of the Medicaid rate, regardless of sponsorship, which equates depreciation for voluntary facilities with residual equity for proprietary facilities. *See* 10 N.Y.C.R.R. § 86-2.10(g) (entitled "Capital component of the rate"). Specifically, § 86-2.10(g) states that "the allowable facility specific capital component of the rate shall include allowable capital costs determined in accordance with sections 86-2.19 [depreciation], 86-2.20, 86-2.21 [residual equity] and 86-2.22 of this Subpart and costs of other allowable items determined by the department to be nontrendable divided by the facility's patient days in the base year determined applicable by the department." *See id*. There is no dichotomy made between "capital" and "equity" in this section, as Defendants try to create here. Rather, when defining the capital component of the rate for all facilities, the Department's own regulations treat voluntary and proprietary facilities exactly the same.

Given these admissions in Defendants' own regulations that ongoing capital costs are the same, regardless of sponsorship, Plaintiffs respectfully submit that they have conclusively shown that Plaintiffs are sufficiently similarly situated with voluntary facilities when it comes to reimbursement of ongoing capital costs.

Hence, Plaintiffs' Equal Protection claim should have survived summary judgment below and proceeded to discovery and resolution on the merits.

POINT III

DEFENDANTS' ACTIONS IN ELIMINATING ONGOING CAPITAL REIMBURSEMENT FOR FOR-PROFIT FACILITIES WERE CLEARLY ARBITRARY AND CAPRICIOUS

As shown in the June 1, 2021 Decision and Order/Judgment below, Defendants' rash move to eliminate residual equity without an appropriate replacement was arbitrary and capricious, *inter alia* because it was improperly retroactive.[4] (R. 30-36.) Core to Plaintiffs' Equal Protection claim, which was summarily dismissed below, is that this disparate treatment of for-profit homes was indeed arbitrary and capricious, lacking rational basis. (R. 300 ¶¶ 77-79 (alleging arbitrary and capricious interference with constitutionally protected right).)

Defendants attempt to rehabilitate the Department of Health's claw back by arguing that: PHL § 2808(11) allows for the retroactive rate changes that the Department made; and (ii) the relevant "rate period" for the elimination of residual equity began on whatever date the Department chose. (*See* Defs.' Reply Br. at 7-15.) Neither contention holds water.

[4] Similarly, the Residual Equity Elimination Clause, to the extent it can be read to eliminate residual equity retroactively, or without an adequate replacement, is arbitrary and capricious, and therefore violative of Plaintiffs' Equal Protection rights.

A. PHL § 2808(11) Does Not Create a Blanket Exemption from PHL § 2807(7) for Legislative Rate Changes.

Defendants' primary argument in relation to PHL § 2807(7) is that the budget bill language adopting the Residual Equity Elimination Clause as part of PHL § 2808(20)(d) repealed PHL § 2807(7) in relation to the elimination of residual equity, simply by way of a single "notwithstanding" used in the amendment. (*See* Defs.' Reply Br. at 7-8.) Such boilerplate "notwithstandings" do not abrogate well-established legal standards, however. Rather, notwithstanding the State's usage of such language, the time-honored rule still applies that - - unless specific intent to repeal a legal requirement is contained in statutory language or can be strongly inferred - - statutes on the same subject must be read together, and harmonized. Indeed, as the Court of Appeals has stated in *Alweis v. Evans*, 69 N.Y.2d 199 (1987):

> Repeal by implication is distinctly not favored in the law. Obviously, the judiciary should not lightly infer that the Legislature has repealed one of its own enactments when it has failed to do so expressly; the Legislature is hardly reticent to repeal statutes when it means to do so. Generally, a statute is deemed impliedly repealed by another statute only if the two are in such conflict that it is impossible to give some effect to both. If a reasonable field of operation can be found for each statute, that construction should be adopted. These principles apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently.

See id. at 204-05 (internal citations omitted).

Defendant presented no proof below, other than the language of PHL § 2808(20)(d) itself, to show that the Legislature intended to repeal the protections of PHL § 2807(7), which has prohibited retroactive rate making for nearly half a century. Yet PHL § 2808(20)(d) makes no mention of retroactive application, nor does it reference PHL § 2807(7), let alone create an exception under it. Indeed, as the Court below correctly found, "if the Legislature intended retroactive application of PHL §2808(20)(d), it would have expressly provided for an exception to PHL § 2807(7)'s notice requirements." (R. 35.)

And to be clear, in Defendants' view, the Residual Equity Elimination Clause was intended to do away with one of the most important procedural protections nursing homes have, when it comes to their Medicaid rates: the guarantee that such rates will be calculated by the Department, certified as sufficient under PHL § 2807(3), approved by the Division of Budget, and then noticed to the homes at least 60 days before the rates become effective. *See* PHL § 2807(7). This, of course, is no peppercorn of a right. How can a facility plan, for example, whether to build a new wing to allow for appropriate social distancing between residents if it does not know at least 60 days in advance whether such a huge, but necessary, expenditure will be paid for? Absent clear language in PHL § 2808(20)(d) that calls for repeal of or an exception under PHL § 2807(7), this Court must read the two statutes together and hold that residual equity may be

eliminated only after adequate advance notice has been given under PHL § 2807(7).

This is the very "reasonable field of operation" identified by the *Alweis* Court, *i.e.*, that - - assuming, arguendo, that PHL § 2807(3) and facilities' equal protection rights have been satisfied - - residual equity may be eliminated under the Residual Equity Elimination Clause, but only upon certification under PHL § 2807(3) and then proper notice under PHL § 2807(7). Certainly there is nothing on the face of PHL § 2808(20)(d) or its legislative history - - of which there is none - - calling for or justifying a rate change without notice. Nor can one infer that, in the early days of a global pandemic, as the state careened into lockdown and nursing homes became the front line of fighting COVID-19 infections, the Legislature intended to harm nursing homes by taking away, without any notice, a reimbursement factor as crucial as residual equity. Indeed, the exact opposite is true, *i.e.,* the Legislature acknowledged the perilous state in which nursing homes found themselves, and thus intended that the statute do no harm. This was the very reason behind the Delay Clause, which allowed Defendant the Director of Budget to postpone elimination of residual equity until the statewide declaration of emergency had passed. *See* L. 2020, Ch. 56, § 1 (Part NN § 3 (Delay Clause)).

Beyond this, Defendants attempt to argue that PHL § 2808(11), through its legislative history, shows that the phrase "or as otherwise authorized by law" is a

stand-alone exemption, allowing any rate change created by the Legislature to have retroactive effect. Of course, no such exemption would be necessary if, as Defendants contend, the Legislature intended to repeal PHL § 2807(7) in relation to the Residual Equity Elimination Clause. Moreover, Defendant ignores the holding of *Jewish Home*, which stated, in the clearest terms possible, that the exceptions contained in PHL § 2808(11) are finite, and therefore the only exceptions applicable to PHL § 2807(7). *See Matter of Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262-63 (1994). This is important, because the "or as otherwise authorized by law" language upon which Defendant relies was part of the statute when *Jewish Home* was decided, showing that the Court of Appeals has already considered Defendants' current contention and rejected it. *See id.* at 260 (stating that "we reject respondents' effort to construct a detour around the clear mandate of Public Health Law § 2807(7)(a)"). This is further shown by the fact that in *Jewish Home*, Defendant argued that PHL § 2807(7) applied only to the "normal rate-making process," not to extraordinary changes in methodology, of which the Residual Equity Elimination Clause is undoubtedly one. The *Jewish Home* Court rejected that argument out of hand. *See id.* at 261-63.[5]

[5] *Jewish Home* is the only reported case addressing PHL § 2808(11) and its relationship to PHL § 2807(7).

In the long history of PHL § 2807(7), no reported decision has ever found that legislative changes to rate methodologies are somehow exempt from its prohibition against retroactivity merely because they were made by the Legislature. Rather, the Court of Appeals has applied PHL § 2807(7) to legislative rate changes directly analogous to the case at bar. In *Anthony L. Jordan Health Corp. v. Axelrod*, 67 N.Y.2d 935 (1986), the Court of Appeals held that a statutory rate change made by the Legislature on March 31, 1983 could not be made retroactive to April 1, 1983, after the Department of Health had finally gotten around to implementing the change in December 1983. *See Jordan Health*, 67 N.Y.2d at 936. Plaintiffs' undersigned counsel's firm represented the plaintiff in *Jordan Health*, and presented the same argument it does here, *i.e.*, that a retroactive rate change made by the Department, even pursuant to a legislative rate change, is improper under PHL § 2807(7). In response, Defendant's predecessor made the same argument she makes here, *i.e.*, that the Department was duty bound by the Legislature to make the change retroactively, even though the Department made the rate change a number of months later. On these facts and legal arguments, duplicated in full here, the *Jordan Health* Court rejected the Department's contention that a legislatively created retroactive rate change was permitted.[6]

[6] In response, on oral argument, Defendants may contend that *Jordan Health* does not apply here because it was decided before adoption of PHL § 2808(11). This timing is true, but *Jordan Health* established the general rule that retroactive rate changes are improper, and PHL

As distinguished in Plaintiffs' opening brief (*see* Pls.' Opening Br. at 20), Defendants' reliance on the *Tioga* line of cases further underscores the limited exemptions created by PHL § 2808(11). Specifically, Defendants cite three cases for the proposition that rate changes anticipated by the rate-setting regime of which they are a part do not run afoul of PHL § 2807(7), even if they are made retroactively. (*See* Defs.' Reply Br. at 15-16 (citing *Tioga Nursing Home v. Axelrod*, 90 A.D.2d 570, 571 (3d Dep't 1982); *St. Joseph's Hosp. Health Ctr. v. Dep't of Health*, 247 A.D.2d 136, 146 (4th Dep't 1998); and *Kaye v. Whalen*, 44 N.Y.2d 754 (1978)).) It is undisputed here that the elimination of residual equity was not anticipated as part of the State's Medicaid program, nor presaged anywhere under PHL § 2808, which is the primary statute under which nursing homes are reimbursed under Medicaid in New York State, prior to adoption of the Residual Equity Elimination Clause. By contrast, in each of Defendants' cases, the change at issue was part of the rate-setting methodology before the change was made, even though when it was made, it was made retroactively. *See, e.g.*, *Tioga Nursing Home*, 90 A.D.2d at 571-72; *St. Joseph's Hosp. Health Ctr.*, 247 A.D.2d at 145-46; and *Kaye*, 44 N.Y.2d 754 at 755 (adjustment pursuant to PHL § 2807(2), which provision pre-dated the rate year in question, was not retroactive

§ 2808(11), as shown in *Jewish Home*, created a limited and exhaustive set of exceptions to PHL § 2807(7), agreed to by the state and the industry. PHL § 2808(11) did not create a general caveat saying that any rate change made by the Legislature may be applied retroactively.

ratemaking, especially where the facility had been "notified by letter that the amounts received for services provided in [the relevant rate year] should be considered tentative and subject to adjustment upon adoption of new rates and regulations"). Thus, if Defendant is correct that "or as otherwise authorized by law" in PHL § 2808(11) is an independent caveat to PHL § 2807(7), then Defendants' three cases show what that alleged caveat means: retroactive rate changes anticipated by express provisions of law existing at the time the original rate was set[7] are not subject to the prohibitions of PHL § 2807(7).

B. Capital Rate Periods Run on an Annual Basis, Hence the Next Applicable Rate Period Began January 1, 2021.

On the issue of when the rate period began for the next capital rate after adoption of the Residual Equity Elimination Clause, the factual evidence below was unequivocal that, for capital rates, the rate period always runs on a calendar year basis. (R. 352-53 (Department of Health's Capital Reimbursement Certification for "Capital Reimbursement Rate Year - 2020"); *see also* R. 162-63 ¶ 8; 290 ¶ 19; 346-47 ¶¶ 6-8.) In response, Defendants offered rate periods of all shapes and sizes, from one month to fifteen months. (*See* Defs.' Reply Br. at 13-

[7] As demonstrated immediately below, capital rates are set on a calendar year basis, and the rate at issue here was set in November 2019: 60 days before it took effect on January 1, 2020. The state of the law as of November 2019 (and January 2020 for that matter) was that the residual equity payment factor was a part of Plaintiffs' rates, or potentially so. There was no indication in law or statute at the time that residual equity would be eliminated or even changed less than halfway through the 2020 rate year.

14.) All Defendant has done in this regard, however, is create a question of fact. Certainly, if the Legislature had wanted to eliminate residual equity as of April 1, 2020, it would have said so and omitted the qualification "rate period" from the amendment to PHL § 2808(20)(d). Instead, it stated that any such elimination, after appropriate rulemaking, would take place as of the next operative rate period, which - - given the time that has intervened and the lack of appropriate notice under PHL § 2807(7) - - is currently January 1, 2023. And on the rulemaking point, Defendants argue here that no rulemaking was required to eliminate the residual equity payment factor, but stated unequivocally, under oath, below that such rulemaking was indeed necessary. (R. 217 ¶ 14.) Of course such rulemaking was necessary, because the rules as they currently stand require the ongoing payment of residual equity, and have not been amended to reflect any change created by the Residual Equity Elimination Clause. *See* 10 N.Y.C.R.R. § 86-2.21(e)(7) (residual equity regulations still in force today).

This again is the "reasonable field of operation" identified by the *Alweis* court, allowing PHL § 2808(20)(d), as amended, to stand together with PHL § 2807(7), PHL § 2807(3) and PHL § 2808(11): by scheduling the elimination of residual equity for the next rate period, which would have been January 1, 2021, the Legislature allowed the Department of Health to take all of the steps necessary to make that rate change, which included: (i) issuing a State Plan Amendment for

federal approval (R. 217 ¶ 14)[8]; (ii) amending regulations on at least 60 days' notice under the State Administrative Procedure Act and after comment by affected facilities (*id.*); (iii) determining that the resulting rates would be sufficient under PHL § 2807(3) and certifying that result to the Division of Budget; and (iv) providing notice of the rate change by no later than November 1, 2020, to take effect with the next capital rate period, beginning January 1, 2021. Because this "reasonable field of operation" exists, this Court must reject Defendants' argument, unsupported by legislative history or express statutory text, that the Legislature demanded an immediate cessation of residual equity only three months after the 2020 capital rate period had begun.

Defendants also argue that the term "rate period" as used in PHL § 2808 should actually mean only "period," such that when the Legislature uses "rate period" in the statute, the relevant change should begin as of the date given by the Legislature, not as of the next applicable rate period. This contention fails after even a cursory reading of PHL § 2808. Historically, the Legislature has been very precise when setting effective dates in PHL § 2808. When the Legislature wants a Medicaid reimbursement change to take effect as of a date certain, it uses the term

[8] Indeed, the timing of the State Plan Amendment process here proved Plaintiffs' point that the Legislature, by using the term "rate period," specifically allowed the Department sufficient time to complete all the steps necessary before residual equity could be eliminated. Here, State Plan Amendment approval did not occur until September 14, 2020. (R. 259.)

"period" without the "rate" modifier. This is made clear in the very first section of PHL § 2808, where the Legislature determined funding levels for grants available to facilities required to "address[] the overall increases in input costs borne by such facilities." *See* PHL § 2808(1-a) (referencing three specific periods beginning April 1 of three consecutive years and corresponding with the state fiscal year); *see also* PHL § 2808(2-b)(b)(i)(A) ("for periods on and after April first, two thousand nine the operating cost component of rates of payment shall reflect allowable operating costs as reported in each facility's cost report for the two thousand two calendar year"); § 2808(2-b)(b)(iii) (referencing "periods prior to January first, two thousand nine"); § 2808(2-b)(b)(x) (same); § 2808(2-c)(d) (Quality Pool regulations "may be made effective for periods on and after January first, two thousand thirteen"); § 2808(2-d) (referencing a "period May first, two thousand eleven through May thirty-first, two thousand eleven"); § 2808(2-d)(b) (referencing a "period April first, two thousand nine through March thirty-first, two thousand eleven"); § 2808(12)(a) (referencing a "period July first, nineteen hundred ninety-five through March thirty-first, nineteen hundred ninety-six"); § 2808(12)(c)-(e) (referencing four separate "periods" commencing on April 1 and corresponding to the state fiscal year); § 2808(12)(f) (referencing nine separate "periods" generally corresponding to the state fiscal year); § 2808(12)(f-1) (referencing specific state "fiscal year periods beginning April first, two thousand

six"); § 2808(15) (referencing a "period April first, nineteen hundred ninety-five through March thirty-first, nineteen hundred ninety-six"); § 2808(18)(a)-(c) (referencing fourteen separate "periods" beginning on specific months); § 2808(20)(c) (referencing a "period beginning October first, two thousand three or one hundred eighty days after the effective date of this subdivision, whichever is later, through March thirty-first, two thousand four"); § 2808(21)(e) (referencing "periods prior to April first, two thousand nine"); § 2808(24) (referencing "periods on and after July first, two thousand seven").

In this regard, the Legislature's use of "period" is at least as prevalent as its use of "rate period," and "period" is the Legislature's clear preference, when it wishes to establish a date certain for a Medicaid methodology change, rather than one that corresponds with a specific rate period. Hence, Defendants' argument that it is the Legislature, rather than the Department, that defines "rate periods" in PHL § 2808 is misplaced. Rather, it is the Legislature that uses the Department's "rate period" term of art when it wishes to restrict a methodology change to begin with the next such rate period, as was the clear case with the amendment to PHL § 2808(20)(d).

* * *

Given the above, Defendants' actions were clearly improperly retroactive, and clear questions of fact exist as to the arbitrary and capricious nature of

Defendants' construal of the term "rate period" in relation to Plaintiffs' Equal Protection Claim. These material questions of fact should have proceeded to discovery and a determination on the merits below, and should have not been resolved on summary judgment based on Defendants' untested contentions. Plaintiff, however, has not yet had discovery on the Department's construal of the term "rate period," nor on its admission below that regulations were required before residual equity could be eliminated. At minimum, summary judgment before such discovery could be had was premature, warranting reversal on this issue.

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CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court affirm the decision below in part, to the extent it gave relief to Plaintiffs, but reverse the Decision below to the extent it did not grant Plaintiffs' First and Fourth Causes of Action and granted Defendants' summary judgment motion in part, thereby reinstating Plaintiffs' Third and Fifth Causes of Action.

Dated: Rochester, New York
January 19, 2022

HARTER SECREST & EMERY LLP

By: _____

F. Paul Greene
Christina M. Deats
Attorneys for Plaintiffs-Petitioners-Respondents-Cross Appellants
1600 Bausch & Lomb Place
Rochester, New York 14604
Telephone: (585) 232-6500

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