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

BRIEF FOR PLAINTIFFS/PETITIONERS-RESPONDENTS-CROSS-APPELLANTS

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Plaintiffs-Petitioners-Respondents-Cross Appellants ("Plaintiffs"), by and through their undersigned counsel, Harter Secrest & Emery LLP, hereby submit their Brief in Opposition to the Appeal made by Defendants-Respondents-Appellants-Respondents ("Defendants") and in 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

Defendants' appeal is moot, as they have both withdrawn notice of the challenged rate change and proceeded with a different rate change covering the same rate period. And even if Defendants' appeal were not moot, the Residual Equity Elimination Clause is improper, both facially and as applied, because it calls for and resulted in retroactive rate setting in clear violation of N.Y. Public Health Law ("PHL") § 2807(7). The Court below granted Plaintiffs relief on this narrow yet sufficient ground, which Defendants challenge here. The decision below is grounded in solid authority on this issue, however, and should be affirmed in relation to PHL § 2807(7).

In relation to Plaintiffs' claims that were dismissed on summary judgment below, specifically their plenary claims under PHL § 2807(3) and the Equal

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

Protection Clauses of the New York and United States Constitutions, the Court below misapplied the relevant burden of proof, improperly requiring Plaintiffs to prove their case as a matter of law, simply to move forward. Plaintiffs respectfully submit that they provided more than ample proof below to satisfy this burden but, more importantly, the burden applied by the Court below was completely back-to-front: it was Defendants who had the burden on their summary judgment motion to prove the absence of any material fact requiring trial, not the other way around. This Defendants did not do. Hence, Defendants' summary judgment motion on these issues should have been denied and the action should proceed below through discovery and resolution on the merits.[2]

QUESTIONS PRESENTED

1. Has Defendants' recent retroactive takeback in relation to the residual equity payment factor rendered the present appeal moot?

Answer Below: Not addressed.

2. Did the Residual Equity Elimination Clause repeal the longstanding prohibition against retroactive ratemaking found in PHL § 2807(7) in any respect?

Answer Below: No.

[2] Not at issue in this appeal is Plaintiffs' Second Cause of Action, which sought injunctive relief under the so-called Delay Clause (*see* L. 2020, Ch. 56, § 1 (Part NN § 3)), which allowed the Director of the Budget to delay elimination of residual equity until 90 days after the coronavirus emergency declaration had been lifted in New York. Given the lifting of that declaration on or about June 24, 2021, Plaintiffs no longer pursue their Second Cause of Action.

3. Were Defendants forbidden from making their retroactive rate change under PHL § 2807(7)?

Answer Below: Yes.

4. Did Defendants show, as a matter of law, that the relevant "rate period" for purposes of the Residual Equity Elimination Clause began as of April 2, 2020?

Answer Below: Not addressed.

4. Did Defendants meet their burden to show that no material fact existed requiring trial on Plaintiffs' plenary claim under PHL § 2807(3)?

Answer Below: Yes.

5. Did Defendants meet their burden to show that no material fact existed requiring trial on Plaintiffs' plenary Equal Protection claim?

Answer Below: Yes.

FACTS

Through the Medicaid program, the State of New York is the single largest payor for long-term care in New York. (R. 74 ¶ 12; 162 ¶ 5; 289 ¶ 12.) A facility's Medicaid rate consists of operating costs and capital costs. (R. 162 ¶ 6; 290 ¶ 18.) Residual equity is a crucial payment factor in the Medicaid reimbursement capital rate of for-profit a/k/a proprietary residential health care facilities in New York. (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; 187-88 ¶¶ 4, 8; 298 ¶ 63.) For decades, the Department of Health reimbursed proprietary nursing homes for ongoing capital costs after a facility's initial 40-year, so called "useful life" had passed. (R. 72-73 ¶¶ 5-7; 162-63 ¶¶ 8-11; 168 ¶¶ 31-33; 187-89 ¶¶ 3-5, 8-9; 290-91 ¶¶ 19-21.) Specifically, residual equity ensured that such facilities were reimbursed for facility additions and improvements, such as replacing an old roof or installing a new piece of immovable equipment. (R. 72-73 ¶¶ 6-8; 163 ¶ 9; 164 ¶ 14; 165 ¶ 20; 166-67 ¶ 26; 168 ¶¶ 32-33; 171 ¶¶ 5-6; 176 ¶ 12; 178-79 ¶¶ 5-6; 183 ¶¶ 5-6; 187-88 ¶¶ 4-5; 290-91 ¶¶ 18-21; 347 ¶ 10.) During the COVID-19 pandemic, facilities used these funds, for example, to retrofit and improve their facilities to protect their residents and staff. (R. 73 ¶ 9; 165 ¶¶ 20-21; 167 ¶ 28; 168 ¶ 30; 171 ¶¶ 6-7; 177 ¶ 15; 179 ¶¶ 6-7; 183 ¶ 7; 188-89 ¶ 8.) Without residual equity, no mechanism exists under the Medicaid program to reimburse proprietary facilities beyond their 40-year useful life periods for such necessary, ongoing costs. (R. 166-67 ¶ 26; 168 ¶¶ 32-33; 347-48 ¶¶ 9-13.)

Not-for-profit facilities, otherwise referred to as "voluntary" facilities, are similarly reimbursed for ongoing capital costs for renovations and improvements to their buildings, albeit through depreciation. (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; 347 ¶ 12.) Both methodologies - - residual equity and depreciation - - are intended to

reimburse a facility for its ongoing capital costs in full, regardless of whether the facility is proprietary or voluntary in sponsorship. (R. 164 ¶¶ 13-14; 166-67 ¶ 26; 168-69 ¶ 34; 291 ¶ 23; 347 ¶¶ 9-10.) In this regard, both methodologies pay for exactly the same costs, for facilities in exactly the same situation in relation to such costs. (R. 188 ¶ 6; 291 ¶ 24; 347-48 ¶¶ 9-13.)

As part of the 2020 budget process, effective April 1, 2020, the Legislature amended N.Y. Public Health Law ("PHL") § 2808(20)(d) to add the following language: "for rate periods on and after April first, two thousand twenty, there shall be no payment factor for residual equity reimbursement in the capital cost component of Medicaid rates of payment for services provided by residential health care facilities" (the "Residual Equity Elimination Clause"). (R. 71 ¶ 3; 103; 105-06; 164 ¶ 15; 285 ¶ 1; 291-92 ¶ 25; 293 ¶ 35; 296 ¶ 47.) This Clause was coupled with a provision in PHL § 2808(20)(e) stating that any resulting changes to the rate "shall" be reflected in regulations. *See* PHL § 2808(20)(e) ("[T]he commissioner shall adopt or amend on an emergency basis any regulation the commissioner determines necessary to implement any provision of this subdivision."). Although dependent on the commissioner's determination that such regulatory changes were "necessary," a regulatory change was indeed necessary to eliminate residual equity, because the residual equity payment factor

was, and remains today, a requirement under governing regulations. *See* 10 N.Y.C.R.R. § 86-2.21(e)(7). (R. 165 ¶ 19; 169 ¶ 36; 263; 290-91 ¶ 20.)

Months later, Defendants announced in a Dear Administrator Letter, dated August 7, 2020 ("August 7, 2020 DAL") that they would claw back residual equity payments from all affected proprietary facilities in the state, which would take place in payment cycle 2243, effective September 2, 2020. (R. 244-45.) This claw back would extend back to April 2, 2020.[3] (*See id.*; *see also* R. 76 ¶ 22; 166 ¶¶ 24-25.) The claw back was announced and ultimately conducted without any change to the underlying payment regulations, as required under PHL § 2808(20)(e).

Such an elimination of residual equity meant that after 40 years of operation, proprietary nursing homes would receive no reimbursement whatsoever for the State's use and occupancy of facility buildings by Medicaid recipients who receive care in those buildings. (R. 72 ¶ 5; 164 ¶ 16; 168 ¶ 32; 188 ¶ 5.) Due to the immediate and irreparable harm Plaintiffs would suffer if this retroactive claw back were not enjoined, Plaintiffs moved successfully below for preliminary injunctive relief to preserve the status quo. (R. 266-82.)[4]

[3] No explanation has been offered as to why Defendants chose this April 2, 2020 date, rather than the date referenced in the Residual Equity Elimination Clause, April 1, 2020.

[4] Defendants did not seriously challenge the harm shown by Plaintiffs in this regard. (R. 211-45 (Affidavit of Ann Foster presenting no factual opposition to Plaintiffs' clear showing of irreparable harm).) Defendants appealed the trial court's preliminary injunction decision, but later withdrew that appeal. In that appeal, Defendants again never challenged the finding of irreparable harm below.

Further, Defendants did not produce any relevant administrative record in relation to their abrupt and unsupported change to Plaintiffs' Medicaid rates. (R. 211-45; 331 ¶ 16.) Hence, either: (i) no such administrative record exists, meaning that Defendants neither discussed nor otherwise undertook the analyses required under PHL § 2807(3) to determine whether it was appropriate to implement the Residual Equity Elimination Clause in the manner they chose, *i.e.*, without finding an appropriate replacement, such as extending depreciation[5] to all facilities, not just voluntary facilities; or (ii) such a record exists, but was not been placed before the Court below.

Based on the submissions and argument made before it, the Court below granted Plaintiffs' motion for an injunction in full, including in relation to the retroactive rate change Defendants had made in the interim in payment cycle 2243. (R. 266-82; *see also* R. 209-10.) In response, Defendants sought leave to reargue the preliminary injunction on exactly the same grounds presented here, and ultimately moved for summary judgment. Defendants began to reinstate residual equity payment as of the date the preliminary injunction issued, October 26, 2020,

[5] Depreciation is provided for in a regulation, and hence extending depreciation to all facilities via regulation is exactly the kind of regulatory change Defendants could and should have undertaken under the Residual Equity Elimination Clause, before eliminating residual equity payments from Plaintiffs' rates. (R. 169 ¶ 36.)

but refused (and continue to refuse) to reinstate residual equity payments back to the original date as of which such payments were eliminated: April 2, 2020.[6]

The Court below ultimately issued its Decision and Order/Judgment, dated June 1, 2021, on Plaintiffs' Petition, as well as on Defendants' motions for reargument and summary judgment. (R. 8-39.) In the Decision, the Court below expressly held that retroactive elimination of residual equity was improper, specifically back to April 2, 2020, and granted Plaintiffs' First and Fourth Causes of Action in that respect. (R. 30-37.) The Court below also denied Defendants' motion for reargument of Plaintiffs' preliminary injunction motion. (R. 19-23.) In that motion, Defendants had argued that even if they could not claw back residual equity as of April 2, 2020, they could still eliminate residual equity as of October 7, 2020, 61 days after Appellants issued the August 7, 2020 DAL with purported notice of the April 2, 2020 rate change. (R. 23.) The Court below expressly noted that it "disagree[d]" with this argument. (*Id.*) Beyond this, the Court below granted Defendants summary judgment on Plaintiffs' Third and Fifth Causes of Action, which sight relief under PHL § 2807(3) and Equal Protection, respectively. (R. 28-30, 36.)

[6] Plaintiffs have brought this refusal to the attention of the Court below, and will be seeking contempt relief, if it not immediately remedied.

In response to the Decision, Defendants subsequently announced that they would retroactively eliminate the residual equity payment factor from Plaintiffs' Medicaid rates back to October 8, 2020 based on the alleged "notice" given in the August 7, 2020 DAL.[7] On August 6, 2021, Plaintiffs thus commenced a new hybrid Article 78 proceeding and plenary action, to challenge this new claw back, which expressly took the place of the original claw back at issue in this appeal. Plaintiffs in that new action again sought preliminary injunctive relief, which the Court below granted on November 8, 2021. *See Aaron Manor Rehab. & Nursing Ctr., LLC et al. v. Zucker et al.,* Index No. 906847-21 (Sup. Ct. Albany County) (Dkt. No. 1 (Verified Petition & Complaint); Dkt. No. 47 (Decision and Order granting preliminary injunctive relief).) The new action, referred to as *Aaron Manor II*, and the present action have been filed as related actions, with the *Aaron Manor II* action also assigned to Justice Kimberly A. O'Connor below.

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[7] This appears to be Defendants' answer to the prohibition against their original retroactive claw back found in the Decision below. If they could not use the August 7, 2020 DAL to take back residual equity payments as of April 2, 2020, they would pivot and use it to take back funds as of 62 days later: October 8, 2020. Of course, the August 7, 2020 DAL says nothing about an October 2020 rate change. (R. 244.)

ARGUMENT

POINT I

DEFENDANTS' RECENT ACTION TO CLAW BACK RESIDUAL EQUITY FUNDS AS OF OCTOBER 2020 RENDERS THE PRESENT APPEAL MOOT AND UNDERSCORES THE NEED FOR DIRECTION TO DEFENDANTS THAT THEY MUST ABIDE BY PHL § 2807(7).

This Court's jurisdiction only applies to live controversies, and does not extend to giving advisory opinions on "academic, hypothetical, moot, or otherwise abstract questions." *See Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 810-11 (2003). As the Court of Appeals has stated, "where changed circumstances prevent us from rendering a decision which would effectually determine an actual controversy between the parties involved, we will dismiss the appeal . . . ." *See id.* (internal quotation marks and citation omitted); *see also Citineighbors Coal. of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 728-29 (2004) ("Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.") (internal quotation marks and citation omitted).

This Court "may take judicial notice of events that occur after a notice of appeal is filed that render an appeal moot." *See Butler v. Stagecoach Grp., PLC*, 72 A.D.3d 1581, 1582 (4th Dep't 2010) (plaintiffs' appeals deemed moot due to a settlement agreement between the parties entered into after the filing of the notices

of appeal) (citing *Matter of Giovanni K.*, 62 A.D.3d 1242 (4th Dep't 2009)). Indeed, as this Court has stated, "it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot." *See Cerniglia v. Ambach*, 145 A.D.2d 893, 894 (3d Dep't 1988) (affirming trial court's order dismissing C.P.L.R. Article 78 petition as moot); *see also* 57 N.Y. Jur. Evidence and Witnesses § 21.

It is axiomatic that Defendants cannot claw back the same funds twice, but that is exactly what Defendants seek in the present appeal. When the Court below prohibited the elimination of residual equity retroactively back to April 2, 2020, Defendants pivoted, and are currently seeking below to eliminate residual equity "prospectively," from a point at least 60 days after the original August 7, 2020 DAL.[8] As noted above, this maneuver is the subject of an independent, yet related, action currently before Supreme Court and subject to a preliminary injunction: *Aaron Manor II*.

For purposes of this appeal, however, the salient issue is that Defendants have rescinded their original claw back, which is the subject of this appeal, and are now seeking relief from the Court below to move forward with the overlapping claw back at issue in *Aaron Manor II*. Defendants cannot, of course, do both.

[8] Of course, this "prospective" change is still retroactive, as it would occur now over a year after its proposed effective date, October 8, 2020.

They can only eliminate residual equity once, and they have clearly now chosen to eliminate residual equity as of October 8, 2020 via the new rate change at issue in *Aaron Manor II*, no longer as of April 2, 2020, which is the rescinded rate change at issue here. This renders the present appeal moot.

And Defendants' actions in *Aaron Manor II* run directly counter to their argument here concerning PHL § 2807(7). In *Aaron Manor II*, Defendants expressly acknowledge and invoke PHL § 2807(7), arguing - - albeit unsuccessfully - - that they satisfy PHL § 2807(7) by making their "prospective" rate change effective 62 days after the August 7, 2020 DAL. In this regard, Defendants use PHL § 2807(7) as a sword in *Aaron Manor II*, arguing that PHL § 2807(7) requires them to eliminate residual equity as of October 8, 2020. Here, Defendants use PHL § 2807(7) as a shield, arguing both that their present actions qualify under an exemption to PHL § 2807(7), found in PHL § 2808(11), and that the Residual Equity Elimination Clause repealed PHL § 2807(7), at least in relation to residual equity. Given Defendants' clear acknowledgement in *Aaron Manor II* that PHL § 2807(7) does apply to the elimination of residual equity, Plaintiffs respectfully submit that this issue - - if not moot - - must now be determined in Plaintiffs' favor.

This is especially so, given Defendants' recidivist tendencies when it comes to retroactive ratemaking. As detailed in Point II below, Appellants have a long

history - - becoming more frequent in recent years and culminating in the *Aaron Manor II* claw back - - of retroactive ratemaking in violation of PHL § 2807(7). In response, the Court below gave clear direction that PHL § 2807(7) forbids retroactive ratemaking, except in very limited circumstances enumerated in the PHL § 2808(11), which direction was both necessary and supported by relevant authority. To the extent this Court determines that Defendants' present appeal is not moot, a clear affirmance by this Court under PHL § 2807(7) may help to limit Defendants' improper retroactive claw backs in the future.

POINT II

THE COURT BELOW PROPERLY GRANTED RELIEF UNDER PLAINTIFFS' FIRST AND FOURTH CAUSES OF ACTION.

A. PHL § 2807(7) Barred Defendants' Retroactive Rate Change.

Defendants argue that because the Residual Equity Elimination Clause was contained in a statute, it was "otherwise authorized by law," and therefore outside the ambit of PHL § 2807(7) as limited by PHL § 2808(11). (Defs.' Br. at 3, 8, 15.) In doing so, Defendants grossly misread PHL § 2808(11) and the scope of its limited exceptions to PHL § 2807(7). As demonstrated below, there is no exclusion under PHL § 2808(11) for rate changes "otherwise authorized by law," for the simple reason that all rate changes must, in the first instance, be authorized by law, and such an exception as the one promoted by Defendants here would quickly swallow the rule of PHL § 2807(7).

Further, the Court of Appeals has made clear that the legislative intent behind and resulting scope of PHL § 2808(11) is narrow:

> The Legislature adopted Public Health Law § 2808 (11) in 1992 to remedy a perceived flaw in Public Health Law § 2807 (7) (a) that arose as a result of Matter of Wellsville Manor Nursing Home v Axelrod (supra; see, L 1992, ch 25; Mem of A. Gottfried [Sponsor] in Support of Assembly Bill A 9461, Bill Jacket, L 1992, ch 25). In Wellsville, the Appellate Division applied section 2807 (7) (a) to prohibit retroactive revision of a new facility's rates based on its actual experience and reported costs. At the time of the enactment, the sponsors of the remedial legislation asserted that "[t]he current statute restricts the capacity of [DOH] to recognize legitimate rate adjustments to an already published rate" (Mem in Support, Senator Tully and Assemblyman Gottfried, Bill Jacket, L 1992, ch 25).

Matter of Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health, 84 N.Y.2d 252, 262 (1994). Applying the maxim of *expressio unius est exclusio alterius*, the Court of Appeals rejected the state's argument that the ban on retroactivity applied only to the "normal rate-making process." *See id.* at 261-63. Indeed, the Court of Appeals went further to make clear that the enumerated exceptions in PHL § 2808(11) were the only such exceptions that the industry and the Department of Health could agree on, and thus that they were exhaustive. *Id.* at 262-63. Given this, Defendants' current argument that any change made necessary by statute falls outside of PHL § 2807(7) - - which mirrors their argument in *Jewish Home* that ratemaking outside the "normal rate-making process" is exempted from PHL § 2807(7) - - must fail.

Moreover, the "as otherwise authorized by law" argument that Defendants espouse fails as a matter of simple English grammar. The exhaustive exclusions as listed in PHL § 2808(11) read as follows:

Exclusion	Text
Exclusion list heading	the provisions of [PHL 2807(7)] shall not apply to
Exclusion No. 1	prospective or retroactive adjustments to rates that are based on rate appeals filed by such facility,
Exclusion No 2	audits,
Exclusion No 3	changes in patient conditions or acuity levels,
Exclusion No 4	the correction of errors or omissions of data or errors in the computations of such rates,
Exclusion No 5	the submission of cost report data from facilities without an established cost basis,
Exclusion No 6	the judicial annulment or invalidation of existing rates or
Exclusion No 7:	changes in the methodology used to compute rates which changes are promulgated
<u>subpart to Exclusion No. 7</u>	following the judicial annulment or invalidation of existing rates or as otherwise authorized by law[9]

[9] In this regard, the adverbial phrase, "as otherwise authorized by law" modifies the verb "promulgated" in list element 7 in PHL § 2808(11).

See PHL § 2808(11). This listing makes clear that the "as otherwise authorized by law" language contained in PHL § 2808(11) is modifier to exclusion number 7, which reads "changes in the methodology used to compute rates which changes are promulgated . . . as otherwise authorized by law." *See* PHL § 2808(11).

Defendants, by contrast, offer a construction of PHL § 2808(11) that would read, nonsensically, as follows: "the provisions of [PHL 2807(7)] shall not apply to . . . as otherwise authorized by law." The plain language of the statute does not allow for this reading, but rather, as shown above, restricts the "as otherwise authorized by law" to rate changes that "are promulgated," *i.e.*, set forth in regulation either "following the judicial annulment or invalidation of existing rates or as otherwise authorized by law."

Here, it is beyond dispute that there was no such "promulgation," although such a promulgation was required by the Legislature in the Residual Equity Elimination Clause. *See* PHL § 2808(20)(e) (noting that "the commissioner shall adopt or amend on an emergency basis any regulation the commissioner determines necessary to implement any provision of this subdivision").) And Defendants acknowledge the unfulfilled need for regulations here, stating that "modification of State regulations" was required before residual equity could be eliminated. (R. 217 ¶ 14.) No such modification has occurred, however. Instead, the residual equity rules in effect before the Residual Equity Elimination Clause

was adopted are still in place today, and were in place when Defendants attempted the retroactive claw back at issue in this suit. *See* 10 N.Y.C.R.R. § 86-2.21. (R. 165 ¶ 19; 169 ¶ 36; 290-91 ¶ 20.)

Indeed, instead of promulgating or modifying the residual equity regulations under the State Administrative Procedure Act, the Commissioner rushed forward with the elimination of residual equity, blind to the effects such an elimination would have either on hundreds of nursing homes across the state or, more importantly, on the tens of thousands of vulnerable residents at those facilities. There simply was no rulemaking, on an emergency basis or otherwise, and therefore no basis to invoke the "as otherwise authorized by law" caveat under PHL § 2808(11).[10]

Second, even if the "as otherwise authorized by law" caveat applied as Defendants argue, it would create an unfettered ability for the Legislature to erase potentially billions of dollars of previously paid Medicaid reimbursement with the stroke of the statutory pen. The relevant thought experiment is this: if PHL § 2808(11) allowed the Department of Health, as of September 2, 2020, to claw back residual equity payments as of April 2, 2020, then where is the limit? Can the

[10] Indeed, reliance upon this caveat did not seem to be front of mind for Defendants when implementing the Residual Equity Elimination Clause. Defendants have produced no administrative record showing that they believed this rate change to be "promulgated . . . as otherwise authorized by law," nor did they rely on PHL § 2808(11) when opposing Plaintiffs' motion for a preliminary injunction.

Legislature, for example, authorize a retroactive claw back of Medicaid payments back to 2019, to 2018, or beyond? Would the Legislature be limited to the elimination of residual equity in this regard, or could it, for example, claw back 100% of the Medicaid reimbursement paid to facilities for years or even decades prior? Of course, such a sweeping power to eliminate all Medicaid payments back as far as the Legislature wishes to go is neither the purpose or effect of PHL § 2808(11), which, as the Court of Appeals noted in *Jewish Home*, is inherently limited in scope.

Beyond this, the limitations of PHL § 2807(3) provide a backstop as well, requiring a minimum level of reimbursement to "meet the costs which must be incurred by efficiently and economically operated facilities." *See* PHL § 2807(3). Further, the constitutional limits of retroactivity are not set by PHL § 2808(11); rather they are prescribed by relevant decisional authority, including, as Defendants acknowledged below, *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573 (1991). In *Alliance of Am. Insurers*, the Court of Appeals enumerated certain mandatory factors to consider when determining whether retroactive governmental action passes constitutional muster, including, *inter alia,* "fairness to the parties, reliance on pre-existing law, the extent of retroactivity, and the nature of the public interest to be served by the law." *Id.* at 586 (citation omitted). These factors are inherently factually intensive, and unsuitable therefore for summary judgment.

Further, they must be applied with the knowledge that Courts view retroactive governmental action as inherently suspect. *See, e.g.*, *id.* ("persons should be able to rely on the law as it exists and plan their conduct accordingly and that the legal rights and obligations that attach to completed transactions should not be disturbed"); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-37 (1998) (holding unconstitutional a retroactive requirement that a company pay benefits to former employees); *James Square Assocs. LP v. Mullen*, 91 A.D.3d 164, 172-73 (4th Dep't 2011), *aff'd*, 21 N.Y.3d 233 (2013) (retroactive denial of Empire Zone Act benefits held unconstitutional).

Given this, Defendants-Respondents' argument under PHL § 2808(11) is both unsupported by the language of the statute and facially overbroad, and should be rejected.

B. Defendants' Authority on Retroactivity is Inapposite.

Defendants' retroactivity authority can be rejected out of hand. Specifically, in *Terence Cardinal Cooke Health Ctr. v. Comm'r of Health of the State of N.Y.*, the First Department found that plaintiff, a "specialty hospital" certified by the Office of People with Developmental Disabilities, was not included in the definition of "residential health care facility" and thus PHL § 2807(7)'s 60-day advance notice requirement of changes to its reimbursement rates did not apply. *Terence Cardinal Cooke Health Ctr. v. Comm'r of Health of the State of N.Y.*, 175

A.D.3d 435, 436 (1st Dep't 2019). Defendants' reliance on this case is therefore misplaced, and wholly inapplicable to the instant matter.

The next two cases on which Defendants rely stand for the unsurprising proposition that rate adjustments already foreseen in the statutory rate structure when services are rendered are not retroactive ratemaking, even if the adjustments occur after the rate-year in question. *See St. Joseph's Hosp. Health Ctr. v. Dep't of Health*, 247 A.D.2d 136, 145-46 (4th Dep't 1998) (rate adjustment made pursuant to reimbursement regime in place before the adjustment was made, specifically the Bad Debt and Charity Care ("BDCC") allocation, did not constitute retroactive ratemaking); *Tioga Nursing Home v. Axelrod*, 90 A.D.2d 570, 571-72 (3d Dep't 1982) *aff'd* 60 N.Y.2d 717 (1983) (adjusting Medicaid rate after base-year audit when actual mortgage costs were determined to be lower than estimated mortgage costs was not retroactive rate making). These cases are similarly inapposite. Here, it is undisputed that the regulations requiring the payment of residual equity remain on the proverbial books, and do not foresee reimbursement without a residual equity payment factor. The state now admits that those regulations must be changed before residual equity may be eliminated. (R. 217 ¶ 14 ("modification of State regulations" was required before residual equity could be eliminated).)

Lastly, Defendants cite *Matter of Dry Harbor Nursing Home v. Zucker*, 175 A.D.3d 770, 775 (3d Dep't 2019). There, Petitioners contended that the retroactive

application of a regulation, 10 N.Y.C.R.R. § 86-2.42, failed to pass constitutional muster. In response, this Court refrained from entertaining such a challenge, specifically because petitioners in that case allegedly lacked a "cognizable . . . vested property interest." *See Dry Harbor Nursing Home*, 175 A.D.3d at 775. This Court did not decide the issue currently before it, *i.e.*, whether PHL § 2807(7) bars retroactive ratemaking via the Residual Equity Elimination Clause.[11] Moreover, this Court did not, as Defendants contend here, hold that a retroactive rate change conducted by statute cannot be challenged. To the contrary, by assessing petitioners' property interest status, the *Dry Harbor* Court acknowledged that one must look beyond the statute itself to determine whether retroactivity is proper. If the only question were - - as Defendants claim to be the case - - whether the retroactive rate change had been made via statute, then no judicial analysis, whether under PHL § 2807(7) or otherwise, would be allowed. Fortunately for Medicaid providers across the state, that is simply not the law.[12]

[11] The "vested property interest" authority upon which the *Dry Harbor* Court relied: (i) pertained to a due process, not a retroactivity challenge; and (ii) in any event, was based on the "base year" reimbursement regime, which was replaced in 2012 by the "statewide pricing regime" at 10 N.Y.C.R.R. § 86-2.40. There is nothing in the "statewide pricing" regime making rates issued thereunder provisional until audited, as was the case under the "base year" regime. *See, e.g.*, 10 N.Y.C.R.R. § 86-2.7 (rates issued under "base year" regime provisional until audited or time for audit has passed). Hence, this authority was inapposite to *Dry Harbor*, which concerned rate years 2013 and after, as does this matter.

[12] Defendants do not otherwise dispute that absent an exception under PHL § 2808(11) or case law, PHL § 2807(7) prohibits retroactive rate changes.

C. Under the Residual Equity Elimination Clause, the Earliest Affected "Rate Period" Begins as of January 1, 2021.

In another clear misreading of statutory text, Defendants contend that the Residual Equity Elimination Clause applied immediately to any residual equity payments made after April 1, 2020. The clear language of the Clause, however, limits its reach to the elimination of a *payment factor* - - *i.e.*, an element used in calculating the rate, not any specific rate payment itself - - for "*rate periods* on and after April first, two thousand twenty." PHL § 2808(20)(d) (emphasis added).) The Clause says nothing about stopping payments in the middle of a rate period or clawing back payments already made. Rather, according to the Clause's clear mandate, the only thing Defendants were authorized to do is, for each rate period beginning on or after April 1, 2020, remove the residual equity reimbursement factor from the capital cost component of nursing home Medicaid rates. And the Legislature directed that Defendants make this change by regulation. *See* PHL § 2808(20)(e) ("[T]he commissioner shall adopt or amend on an emergency basis any regulation the commissioner determines necessary to implement any provision of this subdivision."). (R. 217 ¶ 14 (Defendants' concession that "modification of State regulations" was required before residual equity could be eliminated).)

The term "rate period" however, is a reimbursement term of art, and - - as Defendants argue - - we are to assume here that the Legislature was aware of such terminology when creating the Residual Equity Elimination Clause. In relation to

the capital component of a nursing home's Medicaid rate, however, the relevant "rate period" follows the calendar year, with draft notice of the capital rate issuing in or about August of a given year and final notice of the relevant rate given in November, so as to provide appropriate notice under PHL § 2807(7). *See* 10 N.Y.C.R.R. § 86-2.21(a)(7) (capital rate period is on calendar year basis). (*See also* R. 162-63 ¶ 8; 290 ¶ 19; 346-47 ¶¶ 6, 8.) Further, this Court is required, in the first instance, to read statutory requirements on the same subject matter together, so as to harmonize the requirements before they are said to conflict. *See Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 2 N.Y.3d 524, 544 (2004) ("If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted.") (internal quotation marks and citation omitted); *Iazzetti v. City of New York,* 94 N.Y.2d 183, 189 (1999) ("[W]henever possible, a reviewing court should adopt a construction that permits a reasonable field of operation for each statute. It is especially important that provisions relating to the same subject matter [. . .] be read together and applied harmoniously and consistently.") (internal quotation marks and citations omitted).

In response on this issue, Defendants said nothing. They offered no proof, nor ever produced a record on return, showing in any way that a "rate period" as referenced in the Residual Equity Elimination Clause began as of April 2, 2021. Yet it was Defendants' burden on summary judgment to show what relevant "rate

period" was intended by the Legislature in the Residual Equity Elimination Clause, which Defendants did not. Plaintiffs respectfully submit that the Legislature enacted the clause with a reference to "rate periods" on or after April 1, 2020 to allow the Department of Health time before the next rate period to do all the things it now contends were necessary before residual equity could be eliminated, *i.e.*, revise regulations, which has yet to be done; calculate new rates; obtain rate approval from the Division of Budget; provide notice of such approved rates, and then arrange for payment thereunder. Again, Defendants contend that the Legislature must be presumed to be aware of these practicalities in changing the capital rate. Hence, the only consistent reading of the Residual Equity Elimination Clause together with 10 N.Y.C.R.R. § 86-2.21(a)(7) and PHL § 2807(7) is that the first "rate period" in which residual equity could be eliminated under the Clause was the period beginning January 1, 2021.[13] Indeed, this is what the undisputed evidence on the current record shows (R. 162-63 ¶ 8; 217-18 ¶ 14; 290 ¶ 19; 346-47 ¶¶ 6, 8), which Defendants did nothing to counter.

Given this, the Residual Equity Elimination Clause gives no authority for the retroactive claw back in which Defendants engaged here.

[13] Because January 1, 2021 has now passed and January 1, 2022 is less than 60 days hence, Defendants cannot eliminate residual equity as of this date either. Rather, the first date as of which Defendants can satisfy both the Residual Equity Elimination Clause and PHL § 2807(7) is January 1, 2023, provided that Defendants give appropriate notice under PHL § 2807(7).

POINT III

LEGAL STANDARD ON SUMMARY JUDGMENT MOTION

"Summary judgment is a drastic remedy that 'should not be granted where there is any doubt as to the existence of [triable] issues [of fact], or where the issue is arguable'." *Hall v. Queensbury Union Free Sch. Dist*., 147 A.D.3d 1249, 1250 (3d Dep't 2017) (quoting *Sillman v. Twentieth Century-Fox Film Corp*., 3 N.Y.2d 395, 404 (1957)). A party moving for summary judgment must therefore show that it is entitled to judgment as a matter of law, and that there is no genuine issue of material fact to be determined at trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980) (stating summary judgment standard). Where a moving party fails to meet this burden, summary judgment may not issue. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) ("Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers."); *see also Halbina v. Brege*, 41 A.D.3d 1218, 1219 (4th Dep't 2007) (denying summary judgment where moving parties failed to tender sufficient evidence to eliminate any material issues of fact); *Holly v. Morgan*, 2 A.D.3d 1170, 1171 (3d Dep't 2003) (same). Where an issue of fact is even "arguable," a motion for summary judgment must be denied. *Stone v. Goodson*, 8 N.Y.2d 8, 14 (1960) (affirming the denial of summary judgment). Further, where evidence submitted in support of a motion for summary judgment can be construed in more

than one fashion, it must be construed in favor of the non-moving party. *See Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dep't 1964) ("On this motion we accept as true, as we must, the [non-movant's] evidence and also any evidence of the [movant] favorable to the [non-movant].").

On a motion for summary judgment, a moving party cannot pick and choose among the proof to be presented; rather it must "lay bare [its] proofs" to allow the court a full examination of the relevant record. *Johnson v. Phillips*, 261 A.D.2d 269, 270 (1st Dep't 1999) ("[O]n a motion for summary judgment, parties must lay bare their proofs in non-hearsay form."); *see* N.Y. C.P.L.R. 3212(b) (a motion for summary judgment "shall be supported by affidavit [which] shall recite *all* the material facts" (emphasis added)). Further, conclusory or self-serving allegations are insufficient as a matter of law to give rise to summary judgment. *See KG2, LLC v. Weller*, 105 A.D.3d 1414, 1415 (4th Dep't 2013) (reversing trial court order granting summary judgment). Lastly, where material discovery is outstanding, summary judgment should not issue. *See Malester v. Rampil*, 118 A.D.3d 855, 856 (2d Dep't 2014) ("A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment."); *Sloan v. Repsher*, 263 A.D.2d 906, 901 (3d Dep't 1999) ("Under CPLR 3212 (f), summary judgment should be denied as premature where the opposing party has not yet had adequate opportunity to conduct discovery.").

POINT IV

THE COURT BELOW IMPROPERLY GRANTED DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' THIRD CAUSE OF ACTION UNDER PHL § 2807(3).

The Court below "dismiss[ed]" Plaintiffs' Third Cause of Action on the basis that Plaintiffs allegedly had "not shown, by any competent evidence, that their rates would be inadequate to cover their necessary, as opposed to actual, costs if residual equity reimbursement is eliminated in accordance with Public Health Law § 2808(20)(d), as amended." (R. 29.) In so holding, the Court below improperly put the burden of proof on Plaintiffs, when it remained squarely with Defendants.

Specifically, the Court below made no finding that Defendants had met their burden of proof in relation to PHL § 2807(3), specifically that Plaintiffs' Medicaid rates, after elimination of residual equity, would have still been "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *See* PHL § 2807(3). This is because the record below is devoid of any proof supporting the inference, let alone a substantive finding, that Plaintiffs' Medicaid rates, after elimination of residual equity, would still satisfy the requirements of PHL § 2807(3). Specifically, Defendants produced no rate sheets for any of the 116 facilities in this suit on this issue; they produced no certification that the rates for these facilities satisfied PHL § 2807(3); they produced no study or other analysis showing that Plaintiffs' rates - - after

elimination of residual equity - - would still satisfy PHL § 2807(3); and they did nothing to counter the clear proof from Plaintiffs ongoing capital costs are costs that "must be incurred by efficiently and economically operated facilities," which must therefore be reimbursed. (R. *passim*, 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).) This only makes sense, of course, because: (i) Defendants have been paying Plaintiffs residual equity for years, and Defendants are not in the business of paying monies not "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities;" (ii) prior to the elimination of residual equity, Defendants certified, as they were required to under PHL § 2807(3), that these costs were necessary; and (iii) voluntary, *i.e.*, not-for-profit facilities are still reimbursed for the self-same costs beyond their fortieth year of operation, via depreciation.

Hence, Defendants suffered a complete failure of proof on this issue, and the burden of proof never shifted to Plaintiffs on the motion for summary judgment below. Moreover, the determination of "costs which must be incurred by efficiently and economically operated facilities" is one made, in the first instance,

by Defendant the Commissioner, *inter alia*, when he certifies to the Director of Budget that a facility's Medicaid rates meet this PHL § 2807(3):

> 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). Yet Defendants produced no such determination, likely because no such determination was made before the Residual Equity Elimination Clause was adopted.[14] Further, Plaintiffs had no ability to request documentation of such a finding, or take testimony concerning the Department's position on the issue. Indeed, in this regard, Plaintiffs alleged, upon information and belief, that:

- certain Plaintiffs' rates were already below the minimum required by PHL § 2807(3);
- Defendant the Commissioner had always approved residual equity for eligible facilities, because residual equity was a necessary cost for reimbursement under PHL § 2807(3); and
- the Department of Health has since determined that continuing capital costs must be reimbursed for a rate to be appropriate under PHL § 2807(3).

[14] It must be remembered in this regard that the Residual Equity Elimination Clause was adopted by the Legislature and signed into law on April 3, 2020, a mere 15 days after the Medicaid Redesign Team II made their mistaken recommendation to eliminate residual equity from the rates of for-profit facilities on March 19, 2020. (R. 293-94 ¶¶ 32-35, 39.) Hence, it is highly unlikely that the Department of Health made any determination as to whether the Residual Equity Elimination Clause would run afoul of PHL § 2807(3) before the Department advocated for passage of the Clause.

(R. 289 ¶ 15; 291 ¶ 22, 293 ¶ 31; *see also* R. 299 ¶ 65 ("If the Commissioner removes residual equity reimbursement from Petitioners' rates under the Residual Equity Elimination Clause, the resulting rates will no longer be 'reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities.'").)

Defendants denied these allegations, (R. 330-31 ¶¶ 9-11), thereby creating a question of material fact as to each. They produced no proof whatsoever to dispel these questions of material fact, which they themselves had created. It is unclear what proof the Court below had expected from Plaintiffs on these issues, but - - as demonstrated above - - it was Defendants that bore that burden on their motion, a burden they completely failed to meet. Hence, Defendants' motion for summary judgment should have been denied in relation to Plaintiffs' plenary Third Cause of Action under PHL § 2807(3). At minimum, Defendants' motion should have been denied as premature, pending discovery on these issues, because any information concerning the Commissioner's determinations and certifications arising under PHL § 2807(3) are in Defendants' possession. This includes the record on return for each facility that saw its rate changed under the Residual Equity Elimination Clause, which Defendants failed to produce. In such a situation, summary judgment is, at best, premature under N.Y. C.P.L.R. 3212(f).

POINT V

THE COURT BELOW IMPROPERLY GRANTED DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' FIFTH CAUSE OF ACTION FOR VIOLATION OF EQUAL PROTECTION.

Similarly, the Court below put the burden on Plaintiffs to affirmatively and conclusively show that they are similarly situated to not-for-profit homes when it comes to the reimbursement of continuing capital costs beyond a facility's fortieth year of operation. This burden was entirely Defendants' however, and Defendants submitted no proof to show that for-profit and not-for-profit facilities differed in any respect, when it comes to the need for reimbursement for continued capital costs. Indeed, Defendants could not submit any such proof, as Defendants continue to reimburse not-for-profit facilities for these costs, specifically because, as alleged in the Second Amended Verified Petition in this matter, they are necessary "to meet the costs which must be incurred by efficiently and economically operated facilities". (R. 299 ¶ 65.)

Instead, in their Reply Memorandum of Law below, Defendants relied on *Bay Park Ctr. for Nursing & Rehab., LLC v. Shah*, 111 A.D.3d 1227 (3d Dep't 2013) for the contention that for-profit and not-for-profit facilities could never, under any circumstances, be found to be similarly situated for equal protection purposes. The Court below accepted this argument without further analysis, incorporating it into its decision. (R. 30.) The Court below made no factual

finding, however, and gave no analysis as to why the facts in this matter would be in any way similar to the facts in *Bay Park*.

That is because the facts are entirely dissimilar. In *Bay Park*, a group of for-profit nursing homes sought equal protection relief because of the elimination of the "return on" and "return of" equity reimbursement factors. *See Bay Park*, 111 A.D.3d at 1228-29. As this Court noted in *Bay Park*: "Voluntary non-profit facilities, on the other hand, may not withdraw their equity for private purposes and, accordingly, they do not receive reimbursement for return on or return of equity." *See id.* at 1229 (internal citations omitted). Based on this fundamental difference, this Court found that the *Bay Park* plaintiffs could not show that they were similarly situated to voluntary facilities concerning the rate change. This only makes sense, because if for-profit facilities are receiving reimbursement for costs not incurred by not-for-profit facilities, such as the loss of value of the use of equity as reimbursed via the "return on" and "return of" equity factors, then for-profit facilities cannot contend that they are similarly situated to voluntary facilities in this regard.

Here, however, it is undisputed that voluntary and proprietary facilities beyond their fortieth year of operation received reimbursement for the same exact continuing capital costs, prior to the Residual Equity Elimination Clause. Regardless of sponsorship, each type of facility would receive reimbursement if

they fixed a leaky roof, replaced outdated windows, expanded their facilities, or reworked facility space to allow for social distancing. Because of this, *Bay Park* actually supports a finding of similar situatedness here. *Bay Park* found no similar situatedness expressly because there, for profit facilities were receiving a cost reimbursement that not-for-profit facilities were not. The converse of that reasoning holds equally true: where voluntary and proprietary facilities are receiving reimbursement for the same underlying costs, they are similarly situated for equal protection purposes when the reimbursement is terminated for one type of facility.

Again, as was the case with Plaintiffs' Third Cause of Action under PHL § 2807(3), Plaintiffs clearly pled their position on this issue, and Defendants denied it, creating an issue of material fact for resolution on the merits. (R. 291 ¶ 24 ("[W]hile DOH utilized different methodologies for proprietary and voluntary facilities, the two methodologies sought to reimburse the home, over the life of the facility, for its capital costs incurred by the operator in building and improving the facility."); 300 ¶ 76 ("Petitioners, as for-profit facilities currently in operation, are similarly situated to not-for-profit facilities in relation to the continued use of, and need for compensation for, their facilities and improvements thereto."); 330 ¶ 9 (denying same).) Defendants submitted no proof to support in their motion to support these denials, nor to otherwise dispel the issue of material fact they

created. Hence, Defendants failed to meet their burden and their motion should have been denied.

This is underscored by the clear authority in New York and in the federal courts concerning the "similarly situated" test. Specifically, to be considered "similarly situated," the relevant "circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances." *See Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101 (2d Cir. 2001) (noting also that "[w]hether two people are similarly situated is usually a question of fact for the jury"); *Diaz v. Minhas Constr. Corp., LLC*, 188 A.D.3d 812, 814 (2d Dep't 2020) (citing *Lizardo* and stating further that "[t]he key is that they be similar in significant respects") (internal quotation marks omitted). Here, Plaintiffs have more than shown that - - and certainly, at a minimum, raise a question of fact concerning whether - - they are similarly situated to voluntary facilities when it comes to the reimbursement at issue here. (R. 164 ¶ 14; 166-67 ¶¶ 26-27; 168-69 ¶ 34; 347-48 ¶¶ 9-13.)

Given this and given the complete lack of proof from Defendants that Plaintiffs were in any way dissimilarly situated from voluntary facilities when it came to reimbursement for continuing capital costs, Defendants' motion should have been denied and Plaintiffs' Fifth Cause of Action should proceed to discovery and resolution on the merits.

CONCLUSION

For the reasons set forth above, 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 judgement motion in part, thereby reinstating Plaintiffs' Third and Fifth Causes of Action.

Dated: Rochester, New York
December 1, 2021

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