

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of

DCH AUTO, as Tenant Obligated to Pay Taxes and
DCH INVESTMENTS INC. (NEW YORK), as Tenant
Obligated to Pay Taxes,

Petitioners-Appellants,

- against -

The TOWN OF MAMARONECK, a Municipal Corporation,
its Assessor and Board of Assessment Review and
THE VILLAGE OF MAMARONECK, a Municipal Corporation,
its Assessor and Board of Assessment Review,

Respondents-Respondents.

For a Review under Article 7 of the RPTL

BRIEF OF AMICI CURIAE CVS ALBANY LLC, ET AL.

KOEPPEL MARTONE & LEISTMAN, L.L.C.
Attorneys for the Proposed Amici Curiae
155 First Street, P.O. Box 863
Mineola, New York 11501-0863
Tel.: (516) 747-6300
Fax: (516) 747-8227
DLeistman@taxcert.com

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Preliminary Statement

Proposed Amici Curiae respectfully submit this Brief in support of the appeal by Petitioners-Appellants DCH Auto from the January 27, 2021 "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings Entered by Supreme Court, Westchester County, which brings up for review the decision of the Appellate Division, Second Department in Matter of DCH Auto v. Town of Mamaroneck, 178 A.D.3d 823, 111 N.Y.S.3d 553 (2d Dept. 2019).

Identity and Interest of The Amici

The Appellate Division, Second Department, in its December 11, 2019 Decision and Order, held that the Petitioners-Appellants, DCH Auto, a net lessee with the contractual obligation to pay real estate taxes, did not have standing to file an administrative complaint under RPTL § 524(3), as such a complaint can only be filed by the owner of the property.

The Amici are all net lessees of commercial properties, with the contractual obligation to pay real estate taxes, that have filed RPTL Article 5 complaints and RPTL Article 7 petitions challenging the assessed value on their leased properties. The affected properties include retail drug stores, movie theatres and bowling alleys.

Thousands of RPTL Article 5 complaints and RPTL Article 7 petitions are filed each year throughout New York State by net lessees. The net lease agreement is typical for many types of properties, including those owned by the Amici, as well as for many other types of commercial properties, such as big-box retail, industrial buildings and banks.

Accordingly, the issue of a net lessee's standing and ability to file RPTL Article 5 complaints is a matter of statewide importance, as the issue affects thousands of net lessees that have, or will, appeal their assessed values.

Appeal By DCH Auto

Petitioners-Appellants, DCH Auto, by a brief dated July 27, 2021, has appealed to this Court from the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings entered by the Supreme Court, Westchester County on January 27, 2021, which final judgment was necessarily affected by the Appellate Division's December 11, 2019 Decision and Order on a prior appeal in the action.¹

Amici respectfully submit that DCH Auto's appeal be granted, based upon the following arguments which further

¹All references to the Decision and Order of the Appellate Division, Second Department dated December 11, 2019 are hereafter the "Appellate Division."

support and amplify the grounds for reversal of the Judgment and Orders of the lower Courts, set forth by DCH Auto in its brief.

ARGUMENT

POINT I

THERE IS NO COMPELLING PRECEDENT WHICH SUPPORTS
THE INTERPRETATION OF RPTL § 524(3) BY THE APPELLATE DIVISION.
CIRCULO v. ASSESSOR OF LONG BEACH IS INAPPOSITE

A. Circulo's Rationale Applies Only to Exemption Issues

The Appellate Division, Second Department relied solely on two of its own prior recent precedents in its DCH Auto decision holding that a RPTL § 524(3) complaint can only be filed by an owner, and not a net lessee. In effect, the Appellate Division found the term "person whose property is assessed" under RPTL § 524(3) to be mutually exclusive of the term "aggrieved party" under RPTL § 704(1).

The DCH Auto decision cites Larchmont Pancake House v. Board of Assessors, 153 A.D.3d 521, 61 N.Y.S.3d 45 (2d Dep't 2017), aff'd on other grounds 33 N.Y.3d 228, 100 N.Y.S.3d 680 (2019) and Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, Nassau County, 96 A.D.3d 1053, 947 N.Y.S.2d 559 (2d Dep't 2012) as the only precedential support. In turn, the Appellate Division in Larchmont cited only to Circulo as support for its Larchmont decision. Therefore, the premise for both DCH

Auto and Larchmont is Circulo. As we demonstrate further, Circulo is completely distinguishable from the situation here and involved different statutory criteria. As Circulo lends no support for the subsequent decisions in Larchmont and DCH Auto involving RPTL § 524(3), the DCH Auto decision is erroneous and compels reversal.

In Circulo, supra, the petitioner sought an exemption pursuant to RPTL § 420-a, which provides that:

"1. (a) Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section." (emphasis added)

Therefore, only an owner of real property is statutorily entitled to, and may apply for, an exemption. RPTL § 420-a(11) states:

"11. An exemption may be granted pursuant to this section upon application by the owner on a form prescribed by the commissioner or any comparable form, which application may be filed with the assessor of the appropriate county, city, town or village on or before the applicable taxable status date. Where the assessor receives no such

application, the assessor may nevertheless grant the exemption provided the assessor personally inspects the property and certifies in writing that it satisfies all of the requirements for exemption set forth in this section. Where property is not granted an exemption pursuant to this section, the owner may seek judicial review pursuant to article seven of this chapter or article seventy-eight of the civil practice law and rules." (emphasis added)

The criteria of "owner" is utilized throughout RPTL Article 4 (see RPTL § 420-a(5); RPTL § 420-a(6); § 420-a(7); § 420-a(9); § 420-a(10); § 420-b(1)(a), et seq.).

To obtain an exemption under RPTL § 420-a, as a threshold matter, the property must both be owned by the party seeking the exemption and utilized for the exempt purpose. See, Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v. Town of Fallsburg, 78 N.Y.2d 194, 202-203, 573 N.Y.S.2d 43, 46-47 (1991); Association of the Bar v. Lewisohn, 34 N.Y.2d 143, 153, 356 N.Y.S.2d 555, 561 (1974); People ex rel. Watchtower Bible & Tract Soc., Inc. v. Haring, 8 N.Y.2d 350, 207 N.Y.S.2d 673 (1960).

In Circulo, an application was made for an exemption by Circulo Housing Corp., which was not the owner of the subject property. Circulo Housing Corp. filed an RPTL Article 5 complaint seeking review of the denial of the exemption on grounds that such denial was unlawful (see RPTL § 522(10)(a)),

and upon denial of the RPTL Article 5 complaint, filed an RPTL Article 7 petition on the same grounds (see RPTL § 701(9)(a)). The Court granted the respondent City's motion to dismiss the RPTL Article 7 petition on the following basis:

"... a condition precedent to the commencement of such a proceeding is that the owner must have made a complaint regarding the unlawful assessment to the Board for review pursuant to RPTL article 5 (see RPTL 524). Here, the entity which filed the administrative complaint for review of the assessment of the East Hudson Street property was Circulo Housing Development Fund Corporation, which, according to the deed to the East Hudson Street property, is not the owner of that property. There is no evidence that the owner of the East Hudson Street property ever filed an administrative complaint for review of the assessment of that property. As such, the petition did not 'show that a complaint was made in due time to the proper officers to correct such assessment,' as is required (RPTL 706[2];" 947 N.Y.S.2d at 562.

While not expressly stated by the Court, the RPTL Article 5 complaint was defective because it was not filed by the owner of the property, which was the only party statutorily entitled to apply for and receive the exemption (RPTL § 420-a(1)(a); § 420-a(11)). Accordingly, as discussed further below, Circulo is sui generis, based on its own unique facts and the statutory language of RPTL § 420-a involving exemptions being limited to the owner of the property.

B. Further Factors Distinguishing *Circulo*

The Appellate Division erred in extending Circulo beyond matters involving exemptions, and instead applying it in Larchmont and DCH Auto to other statutory grounds for review of assessments. Some statutory background in RPTL Article 5 and Article 7 is instructive.

(i) Assessment Review Proceedings in General

The review of an assessment of real property is a two-stage process. First, a complainant must exhaust the remedies available at the administrative level under RPTL Article 5 by the filing of a grievance complaint pursuant to RPTL § 524. If the complaint is denied, the complainant may seek judicial review of the denial by commencing a special proceeding under RPTL Article 7 by the filing of a petition in court.

At the judicial level, a proceeding for review of assessment upon real property by certiorari is governed by RPTL Article 7 and is a "special proceeding" as that term is defined by CPLR Article 4.

RPTL § 706(1) states a petitioner is limited to challenging the assessment on the grounds that the assessment is illegal, excessive, unequal and/or misclassified, so long as the basis for review was raised in the RPTL § 524(3) administrative

complaint. If a petitioner wishes to assert any other causes of action, such as, challenging the method upon which an assessor relied upon to determine the assessment, the assessor's jurisdiction to impose taxes, or the constitutionality of the assessment, such challenges may be pursued through a CPLR Article 78 proceeding or collaterally attacked in a plenary action. See, Kahal Bnei Emunim, supra, 78 N.Y.2d at 204, 573 N.Y.S.2d at 48; and see, Hewlett Assocs. v. New York, 57 N.Y.2d 356, 456 N.Y.S.2d 704 (1982); Dun & Bradstreet, Inc. v. New York, 276 N.Y. 198, 206 (1937); Troy Towers Redevelopment Co. v. City of Troy, 51 A.D.2d 173, 175, 380 N.Y.S.2d 89, 92 (3d Dep't 1976), aff'd 41 N.Y.2d 816, 393 N.Y.S.2d 397 (1977).

(ii) Statutory Grounds for Review of Assessments

The grounds for assessment review available at both levels are nearly identical under both RPTL § 524(2) and RPTL § 706(1):

RPTL § 524(2)	RPTL § 706(1)
The grounds for review of an assessment shall be that the assessment complained of is excessive, unequal or unlawful, or that real property is misclassified.	The grounds for reviewing an assessment shall be that the assessment to be reviewed is excessive, unequal or unlawful, or that real property is misclassified.

Both sections provide four (4) distinct grounds for review by an aggrieved party, which are further defined, identically, under RPTL § 522 and RPTL § 701:

1. Excessive assessment: the property's assessment exceeds its full market value or is excessive because of the denial of all or a portion of a partial exemption. RPTL § 522(4), § 701(4).
2. Misclassified assessment: the real property is misclassified, e.g. classified as non-homestead when in fact it qualifies for the homestead class. RPTL § 522(6), § 701(5).
3. Unequal assessment: the property is assessed at a higher percentage of its full market value than all other properties (or properties of the same class) on the assessment roll. RPTL § 522(9), § 701(8).
4. Unlawful assessment: a property is wholly exempt, is located entirely outside the boundaries of the taxing unit in which it is designated as being located, property has been assessed and entered on the assessment roll by a person or entity without authority to make the entry, and various other technical grounds. RPTL § 522(10), § 701(9).

A complainant in an RPTL Article 5 administrative review proceeding may raise any combination of the foregoing grounds for review or all of them at once in a RPTL § 524(3) complaint. The standard grievance form promulgated by the New York State Office of Real Property Tax Services ("ORPTS") identified as

"RP-524"² sets forth each of the four categories of grounds for review at "Part Three: Grounds for Complaint." Each section contains its own subsection in Part Three, and each subsection defines the various "reasons" for the complainant asserting the ground for review, consistent with the definitions promulgated by RPTL § 522 and § 701. However, the failure to raise any single ground for review in an RPTL Article 5 administrative complaint prevents a complainant from later raising it in an RPTL Article 7 petition for judicial review. See, Sterling Estates, Inc. v. Board of Assessors of Nassau County, 66 N.Y.2d 122, 495 N.Y.S.2d 328 (1985); City of Little Falls v. Board of Assessors of Town of Salisbury, 68 A.D.2d 734, 418 N.Y.S.2d 809 (4th Dep't 1979); Singer Company v. Tax Assessor of Village of Pleasantville, 86 Misc.2d 831, 382 N.Y.S.2d 628 (Sup. Ct., Westchester Co., 1976) aff'd 56 A.D.2d 655, 391 N.Y.S.2d 902 (2d Dep't 1977); Pollak v. Board of Assessors of Nassau County, 62 A.D.2d 1019, 403 N.Y.S.2d 762 (2d Dep't 1978).

As seen from the foregoing, the standard for an "unlawful entry," i.e., the denial of an exemption, under RPTL § 522(10)

²Form RP-524 promulgated by ORPTS can be found at:
New York State Department of Taxation & Finance
Office of Real Property Tax Services
Complaint on Real Property Assessment For ____
https://www.tax.ny.gov/pdf/current_forms/orpts/rp524_fill_in.pdf
(last updated March 2009).

and § 701(9), is different than the standard for an excessive, misclassified or unequal assessment under RPTL § 522(4), (6); and (9), and RPTL § 701(5), (8) and (9). Pursuant to RPTL § 420-a, and other similar exemption statutes in RPTL Article 4, only an owner is statutorily entitled to apply for and receive an exemption, and hence, only the owner may contest the denial of same. There is no similar proscription in cases where the issue involves non-exemption grounds. Hence, the Appellate Division erred in applying Circulo's holding involving the exemption to Larchmont and DCH Auto which involved other general grounds for assessment review, i.e., excessiveness and inequality.

C. The Appellate Division Decision in Larchmont is Predicated on Circulo and, Therefore, Does Not Support DCH Auto

The Appellate Division in DCH Auto also cited its decision in Larchmont as support for its holding that a net lessee has no standing to file a complaint under RPTL § 524(3). However, the Court in Larchmont relied solely on Circulo as support for its holding:

" ..., RPTL article 5 requires that the property owner file the complaint or grievance to obtain administrative review of a tax assessment (see RPTL 524[3]; *Matter of Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach, Nassau County, N.Y.*, 96 A.D.3d at 1056, 947 N.Y.S.2d 559). The

petitioner, which filed the complaints with the Board of Assessment Review, never owned the subject property. Therefore, the court lacked subject matter jurisdiction to review the assessments, as the petitioner failed to satisfy a condition precedent to the filing of the petitions pursuant to RPTL article 7. Accordingly, the court should have granted the appellants' motions to dismiss the petition in each proceeding." 153 A.D.3d at 522, 61 N.Y.S.3d at 46.

As Circulo is inapposite to any claim for review other than one involving "exemptions" or "unlawful entry" there is simply no support for the Appellate Division's reasoning involving RPTL § 524(3) in Larchmont. This Court, in Larchmont, affirmed on other grounds, either not reaching the issue of the interpretation of RPTL § 524(3), or declining to accept the reasoning of the Appellate Division. Accordingly, neither Circulo or Larchmont support the interpretation of RPTL § 524(3) by the Appellate Division in DCH Auto, and hence, there is absolutely no precedent which supports the decision.³

³The Appellate Division in DCH Auto also cited Grecian Garden Apartments, Inc. v. Barlow, 71 Misc.2d 457, 336 N.Y.S.2d 204 (Sup Ct., Monroe Co., 1972). Grecian merely held that it was possible and not improper for one party – the owner, to file the administrative complaint and for another party – the net lessee, to file the RPTL Article 7 petition. The Grecian Court did not say that only the owner can statutorily file the administrative complaint, or that the net lessee is precluded by statute from filing the complaint.

POINT II

THE PLAIN TERMS OF RPTL § 524(3) DO NOT PRECLUDE A NET LESSEE FROM FILING A COMPLAINT

As there is no applicable precedent to support the interpretation of RPTL § 524(3) by the Appellate Division (see Point I), the only support therefore must come from the terms of the statute itself. However, RPTL § 524(3) simply does not say that only an owner can file a complaint thereunder.

RPTL § 524(3) provides that:

"Notwithstanding the provisions of section five hundred twenty-eight of this title, and except in cities with a population of five million or more, a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." (emphasis added)

Absent from the statute is any mention of the word "owner."
If the Legislature had wished to restrict RPTL § 524(3)

complaints to only "owners," it could have utilized that language, as it has done in other sections of the Real Property Tax Law [see RPTL § 420-a(1)(a); RPTL § 420-a(5); RPTL § 420-a(6); § 420-a(7); § 420-a(9); § 420-a(10); § 420-b(1)(a), et seq.].

In interpreting a statute, the Court should attempt to effectuate the intent of the Legislature. As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language, giving effect to its plain meaning. See, Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 968 (1998). Simply stated, a court should not add words to a statute to discern intent. American Transit Ins. Co. v. Sartor, 3 N.Y.3d 71, 76, 781 N.Y.S.2d 630, 633 (2004); Chemical Specialties Mfrs. Ass'n v. Jorling, 85 N.Y.2d 382, 626 N.Y.S.2d 1 (1995).

In the absence of any controlling statutory definition, courts must "construe words of ordinary import with their usual and commonly understood meaning, and in that connection [courts] have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase". Rosner v. Metro. Prop. & Liab. Ins. Co., 96 N.Y.2d 475, 479, 729 N.Y.S.2d 658,

660 (2001) (quoting Matter of Vill. of Chestnut Ridge v. Howard, 92 N.Y.2d 718, 723, 685 N.Y.S.2d 915, 990 [1999]).

Here, the Appellate Division improperly crafted the word "owner" into RPTL § 524(3) where that term is absent. This is reversible error.

A net lessee certainly falls within the ambit of the term "person whose property is assessed" under RPTL § 524(3). For instance, even where statutory assessment language was more restrictive than the language contained within RPTL § 524 (3), this Court has broadly construed it in order not to thwart the purpose of the statute. This Court has consistently interpreted the phrase "exclusive" use under exemption statutes such as RPTL § 420-a and § 420-b to mean "principal" or "primary." Association of the Bar v. Lewisohn, *supra*; Matter of Yeshivah Shearith Hapletah v. Assessor of Fallsburg, 79 N.Y.2d 244, 249, 582 N.Y.S.2d 54, 56 (1992); Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v. Department of Entl. Protection of the City of New York, 11 N.Y.3d 327, 335, 869 N.Y.S.2d 878, 883 (2008); Matter of Maetreum of Cybele, Magna Mater, Inc. v. McCoy, 24 N.Y.3d 1023, 997 N.Y.S.2d 676 (2014); Matter of Greater Jamaica Dev. Corp. v. New York City Tax Commn., 25 N.Y.3d 614, 623 15 N.Y.S.3d 738, 742 (2015). This statutory

construction standard has also been considered within the context of RPTL Article 7. See, Town of New Castle v. Kaufmann, 72 N.Y.2d 684, 536 N.Y.S.2d 37, 39 (1988).

The standard for exemption statutes is one applied in favor of the taxing authorities (Matter of Yeshivah Shearith Hapletah, supra; Matter of Greater Jamaica Dev. Corp. v. New York City Tax Commn., supra). In contrast, the interpretation of RPTL Article 5 and RPTL Article 7 is liberal and in favor of the taxpayer. Great Eastern Mall Inc. v. Condon, 36 N.Y.2d 544, 548, 369 N.Y.S.2d 672 (1975); W.T. Grant v. Srogi, 52 N.Y.2d 496, 513, 438 N.Y.S.2d 761, 769 (1981); Waldbaum, Inc. v. Finance Adm'r of New York, 74 N.Y.2d 128, 133, 544 N.Y.S.2d 561, 563 (1989); Matter of Garth v. Bd. of Assessment Review for Town of Richmond, 13 N.Y.3d 176, 180, 889 N.Y.S.2d 513, 516 (2009). The Appellate Division, by its DCH Auto decision, has adopted a statutory construction of RPTL § 524(3) that is more restrictive than that adopted by this Court for exemption statutes. This is error.

POINT III

RPTL § 524(3) AND RPTL § 704(1) MUST BE INTERPRETED TOGETHER

The Appellate Division declined to interpret RPTL § 524(3) and RPTL § 704(1) together, instead finding different standing

grounds for the RPTL § 524(3) complaint and the RPTL § 704(1) petition, even though the complaint is the condition precedent for the petition. This was reversible error. When the terms of related statutes are involved, they must be analyzed in context and in a manner that harmonizes the related provisions and makes them compatible. Matter of M.B., 6 N.Y.3d 437, 447, 813 N.Y.S.2d 349, 356 (2006); Tall Trees Constr. Corp. v. Zoning Board of Town of Huntington, 97 N.Y.2d 86, 91, 735 N.Y.S.2d 873, 876-877 (2001).

The Appellate Division should have reviewed the statutes together, and found that absent a specific statutory provision making reference to an "owner" (see RPTL § 420-a(1), etc.; Point I, and Point II, supra), a net lessee is a "person whose property is assessed" with standing to file an RPTL § 524(3) complaint. As such, that person is "aggrieved." See, Waldbaum, Inc. v. Finance Adm'r of New York, 74 N.Y.2d 128, 544 N.Y.S.2d 561 (1989); Matter of Steel Los III/Goya Foods, Inc. v. Board of Assessors of County of Nassau, 10 N.Y.3d 445, 859 N.Y.S.2d 576 (2008); Matter of Long Island Power Auth. v. Assessor of the Town of Huntington, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018); Ames Dep't Store, Inc. v. Assessor, 261 A.D.2d 835, 689 N.Y.S.2d 791 (4th Dep't 1999); Caldor, Inc. v. Town of Ramapo,

253 A.D.2d 876, 678 N.Y.S.2d 508 (2d Dep't 1998); K-Mart Corp. v. Board of Assessors, 176 A.D.2d 1034, 575 N.Y.S.2d 185 (3d Dep't 1991); Big "v" Supermarkets, Store #217 v. Assessor of E. Greenbush, 114 A.D.2d 726, 494 N.Y.S.2d 520 (3d Dep't 1985).

An interpretation harmonizing the statutes together will also avoid the inequitable and impractical results that will follow from the construction of RPTL § 524(3) by the Appellate Division. It has long been held that the petitioner in an RPTL Article 7 proceeding may not add additional grounds for review or seek greater relief than that specified in the RPTL § 524(3) complaint. See, Sterling Estates, Inc. v. Board of Assessors of Nassau County, supra, [petition may not be amended to interpose grounds for review that were not previously protested in administrative complaint]; City of Little Falls v. Board of Assessors of Town of Salisbury, supra, (RPTL administrative complaint sought review solely on ground of overvaluation and, therefore, petitioner was precluded from interposing additional ground of inequality in petition); Singer Company v. Tax Assessor of Village of Pleasantville, supra, (petitioner in RPTL Article 7 petition may not seek greater relief than that sought in complaint before Board of Assessment Review); Pollak v. Board of Assessors of Nassau County, supra. The Appellate Division

here in DCH Auto, has held that an owner must file the RPTL § 524(3) complaint but that the net lessee may file the RPTL § 704 petition. This interpretation may lead to the result that the net lessee is precluded from obtaining full relief and review of its assessed value if same was not plead or requested by a different party with possible different interests, i.e., the owner in the RPTL § 524(3) complaint. The prior decisions of this Court and the Appellate Divisions' contemplate an interpretation of the statutes wherein one party, i.e., the net lessee, files both the RPTL § 524(3) complaint and RPTL § 704 petition.

CONCLUSION

For all the foregoing reasons, this Court should:

(a) grant the motion of CVS Albany LLC, et al., to appear as Amici Curiae on the appeal by DCH Auto;

(b) grant the appeal of DCH Auto and reverse the decisions, Orders and Judgments of the Courts below; and

(c) for such other and further relief as may be just, necessary and proper.

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KOEPPEL, MARTONE & LEISTMAN, LLC
Attorneys for the Proposed Amici
CVS Albany LLC, et al.
155 First Street, P.O. Box 863
Mineola, New York 11501
(516) 747-6300

By: 

DONALD F. LEISTMAN, ESQ.

By: 

MICHAEL P. GUERRIERO, ESQ.

On the Brief:
DONALD F. LEISTMAN, ESQ.
MICHAEL P. GUERRIERO, ESQ.
JASON M. PENIGHETTI, ESQ.