SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--X

PEOPLE OF THE STATE OF NEW YORK by
LETITIA JAMES, Attorney General of the
State of New York,

Petitioner, Ind. No. ____________

-against-

COLD SPRING ACQUISITION, LLC D/B/A COLD
SPRING HILLS CENTER FOR NURSING &
REHABILITATION, COLD SPRING REALTY
ACQUISITION, LLC, VENTURA SERVICES, LLC
D/B/A PHILOSOPHY CARE CENTERS, GRAPH
MGA, LLC, GRAPH MANAGEMENT, LLC,
GRAPH INSURANCE COMPANY A RISK RETENTION
GROUP, LLC, HIGHVIEW MANAGEMENT INC.,
COMPREHENSIVE CARE SOLUTIONS, LLC,
PHILIPSON FAMILY, LLC, LIFESTAR FAMILY
HOLDINGS, LLC, ROSS CSH HOLDINGS, LLC,
ROSEWELL ASSOCIATES, LLC,
B&L CONSULTING, LLC, ZBL MANAGEMENT, LLC,
BENT PHILIPSON, AVI PHILIPSON,
ESTATE OF DEBORAH PHILIPSON, JOEL LEIFER,
LEAH FRIEDMAN, ROCHEL DAVID,
ESTHER FARKOVITS, BENJAMIN LANDA,
DAVID ZAHLER, CHAYA ZAHLER, CHAIM ZAHLER,
JACOB ZAHLER, CHESKEL BERKOWITZ, and
JOEL ZUPNICK,

Respondents.
--X

MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

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Petitioner, the People of the State of New York, by Letitia James, Attorney General of the State of New York (the "State"), submits this Memorandum of Law in support of the Verified Petition and Motion for a Preliminary Injunction pursuant to Executive Law § 63(12), the Public Health Law, the Social Services Law, and the False Claims Act against Respondents COLD SPRING ACQUISITION, LLC D/B/A COLD SPRING HILLS CENTER FOR NURSING & REHABILITATION, COLD SPRING REALTY ACQUISITION, LLC, VENTURA SERVICES, LLC D/B/A PHILOSOPHY CARE CENTERS, GRAPH MGA, LLC, GRAPH MANAGEMENT, LLC, GRAPH INSURANCE COMPANY A RISK RETENTION GROUP, LLC, HIGHVIEW MANAGEMENT INC., COMPREHENSIVE CARE SOLUTIONS, LLC, PHILIPSON FAMILY, LLC, LIFESTAR FAMILY HOLDINGS, LLC, ROSS CSH HOLDINGS, LLC, ROSEWELL ASSOCIATES, LLC, B&L CONSULTING, LLC, ZBL MANAGEMENT, LLC, BENT PHILIPSON, AVI PHILIPSON, ESTATE OF DEBORAH PHILIPSON, JOEL LEIFER, LEAH FRIEDMAN, ROCHEL DAVID, ESTHER FARKOVITS, BENJAMIN LANDA, DAVID ZAHLER, CHAYA ZAHLER, CHAIM ZAHLER, JACOB ZAHLER, CHESKEL BERKOWITZ, and JOEL ZUPNICK, (collectively "Respondents"). The Attorney General seeks permanent injunctive relief, restitution, disgorgement, civil penalties and costs for Respondents' fraudulent and illegal conduct and persistent violations of their duties as nursing home operators, leading to unnecessary death, illness, suffering, and humiliation of nursing home residents in their care. Rather than operating a healthcare facility and hoping it would be a profitable venture through quality of outcomes and diligent management, Respondents created a financial machine to guarantee large profits out of government-funded healthcare without regard to resident care or well-being.

The Attorney General seeks an order:

a. Declaring Respondents violated Executive Law § 63(12), Executive Law § 63(c), and other applicable laws and regulations, and that they were unjustly enriched by doing so;

b. Permanently enjoining Respondents from continuing to violate the law and from making any self-dealing payments, loans, and other transfers of excessive value to the Respondents and related entities;

c. Appointing a financial monitor to oversee Cold Spring Hills financial operations and ensure that Cold Spring Hills ceases collusive and self-dealing payments, loans and other transfers of value to the Respondents;

d. Appointing a healthcare monitor to oversee Cold Spring Hills' healthcare operations and ensure that Cold Spring Hills improves healthcare outcomes for the residents;

e. Directing the Respondents to provide the healthcare monitor with real-time 24-hour/day remote access to all Cold Spring Hills' electronic medical records systems for its residents, with the highest-level permissions granted to the healthcare monitor, to enable viewing of all edits made to any records by any person and/or systems administrator;

f. Directing Respondents pay restitution to the Medicaid and Medicare programs;

g. Directing that each Respondent fully account for and disgorge all monies wrongfully received;

h. Removing Respondents Bent Phillipson and Avi Phillipson immediately and permanently from any role at Cold Spring Hills or any related entity; and

i. Directing Respondents to pay civil penalties, costs, including the costs of the Attorney General's investigation, and post-judgment interest.

I. PRELIMINARY STATEMENT

This special proceeding under Executive Law § 63(12) seeks injunctive relief to stop the repeated and persistent fraud and illegality by the persons who have operated, owned and controlled Cold Spring Hills, a for-profit 588-bed nursing home located at 378 Syosset-Woodbury Road, Woodbury, New York whose residents are all vulnerable, frail, elderly, or disabled individuals, and primarily Medicaid and/or Medicare beneficiaries whose care is funded by New York taxpayers.

New York's nursing home laws set a fundamental standard: "A license to operate a nursing home carries with it a special obligation to the residents who depend upon the facility to meet every basic human need." 10 NYCRR § 415.1(a).

New York law imposes this "special obligation" on nursing home operators to care for their residents so that all residents are provided the care, treatment, diet, and health services needed to attain their "highest practical quality of life" under 10 NYCRR § 415.1(a), clinical care in accordance with individualized Care Plans under 10 NYCRR § 415.3(f), and required care provided by sufficient staff.

New York law also requires nursing home operators to make accurate disclosures of financial facts to the New York State Department of Health ("DOH"), including related party transactions, and to comply with the State's equity disclosure laws governing extraction of assets and equity from nursing homes. DOH relies on nursing home operators' disclosures and certifications of compliance with their legal duties.

In violation of these obligations, Respondents' repeated and persistent fraud and illegality from 2014 to the present in the operation of Cold Spring Hills includes: (1) Cold Spring Hills' repeated shocking neglect and inhumane mistreatment of many of its residents who have needlessly suffered and died under its care; as well as (2) unconscionable fraudulent and hidden wrongful conversion of millions of dollars in "up-front profit"[1] taken from Cold Spring Hills by its owners, their family members and their Favored Persons[2] – all while Cold Spring Hills received

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[1] "Up-front profit" refers to the practice of making payments from the nursing home to Respondents under the guise of pre-determined and self-negotiated "expenses" and other transfers of funds, as a priority over, and without regard to, ensuring that the nursing home has used the public funds it receives to meet the nursing home's duty to provide required care, with sufficient staffing to render such care, to its residents is referred to herein as "up-front profit."

[2] Capitalized terms not defined herein shall have the same meaning as set forth in the Petition.

over $157 million from Medicaid and $88 million Medicare for resident care yet repeatedly and persistently disregarded and violated its legal duties to provide required care to its vulnerable residents, and sufficient staffing to provide that care.

Respondents also concocted a complex scheme through a web of related party entities to siphon these Medicaid and Medicare dollars from Cold Spring Hills without alerting regulators or oversight agencies. Among the several individuals whose control over Cold Spring Hills was concealed from DOH is Respondent Bent Philipson, the *de facto* owner of Cold Spring Hills, who has an ownership interest in 68 nursing homes in several states and who refused to testify in the course of this investigation, on the grounds that his testimony would tend to incriminate himself.

The pain and humiliation experienced by Cold Spring Hills' residents can be prevented in the future only if Respondents are stopped – by court action if necessary – from converting substantial amounts of Medicaid and Medicare funds from Cold Spring Hills as "up front profit," and instead require Cold Spring Hills to retain and expend substantially more of those funds for direct care staffing and to improve care to its residents, deferring "profit" until after services are rendered in accordance with law. To illustrate, in 2020 if Respondent Bent Philipson took 1.76 million less from Cold Spring Hills (i.e., less than half of the $3.9 million he diverted that year) Cold Spring Hills could have provided over 34,000 additional hours of direct care to its vulnerable residents.

To protect Cold Spring Hills' vulnerable residents, judicial intervention is required now to enjoin Respondents' repeated persistent, fraudulent, and illegal conduct because Respondents continue to show flagrant disregard for the law. For example, in January 2021, the Attorney General issued a comprehensive Nursing Home Report that put Respondents on clear notice that the practice of taking substantial "up front profit" from for-profit nursing homes with below-

average-staffing increased risks of harm and death to vulnerable residents. Yet Respondents have persisted in violating New York law, keeping staffing at Cold Spring Hills at insufficient levels to provide for necessary resident care. Not only are residents suffering and at risk of harm, but if another deadly wave of the pandemic or another highly contagious infectious disease were to hit, the same dangerous for-profit nursing home conditions described in the Attorney General's Nursing Home Report would likely cause the same wide-scale harm, if not worse. Justice demands that Respondents' repeated illegal practices end now.

Accordingly, for the reasons stated herein, the Attorney General respectfully asks the Court to promptly issue an order imposing injunctive relief to bring an end to Respondents' repeated, persistent, fraudulent, and illegal conduct that exploits the vulnerable residents at Cold Spring Hills, the Medicaid program, the Medicare program, other payors, and the direct healthcare workers who are working in poor conditions at Cold Spring Hills.

In addition to enjoining Respondents' persistent fraud and illegality in their operations of Cold Spring Hills, Petitioner also seeks restitution in the amount of not less than $22 million as disgorgement of the illegally converted taxpayer-funded healthcare dollars that Respondents fraudulently transferred to themselves while disregarding Cold Spring Hills' duty to provide required care to and staffing for its residents. Respondents then retained these funds without right under Executive Law § 63-c.

In support of the Verified Petition, the State submits substantial evidence, including but not limited to the following: nine Civilian Affidavits; the Affidavit from Medicaid Fraud Control Unit ("MFCU") Detective Ryan Ricker ("Detective Aff."), detailing statements of witnesses who were unavailable to execute affidavits, refused to execute affidavits due to fear of retaliation by Respondents, or whose statements were cumulative to the affidavits submitted herewith; the

Affidavit of Senior Auditor-Investigator Patrick Beltrani ("Auditor Aff."), describing the financial and Medicaid and Medicare claims analysis; and the Affidavit of Medical Analyst, Registered Nurse Mary Conway ("Medical Analyst Aff."), outlining the healthcare duties of nursing homes and the impact on resident care when those duties are not fulfilled. Other evidence supporting the Petition, including numerous transcripts of Examinations taken pursuant to Executive Law § 63 (12) of various Respondents and witnesses, are attached to the Affirmation of Special Assistant Attorney General ("SAAG") Christina Pinnola ("SAAG Aff.").

II. ATTORNEY GENERAL'S FINDINGS OF FACTS

All of the relevant facts are fully set forth in the Petition, the accompanying affidavits, and the Exhibits thereto, each of which is fully incorporated herein by reference. The following is a recitation of certain salient facts to illustrate Respondents' most egregious conduct.

Cold Spring Hills, a Medicaid and Medicare provider, is a 588-bed for-profit nursing home, comprised of five separate residential buildings on the same campus in the Town of Oyster Bay, Nassau County, New York. From 2017 through 2021, Cold Spring Hills received over $157 million from New York State's Medicaid Program and over $88 million from Medicare, to provide critical care to its elderly and/or disabled residents. Petition, ¶¶ 44, 89.

Respondents repeatedly committed countless acts of neglect against the residents of Cold Spring Hills. Cold Spring Hills' residents suffered neglect and humiliation for years: prior to the COVID-19 pandemic, during the peak of the first wave, and continuing into 2022. Instances of harm and neglect included failing to (1) meet the most basic care needs including bathing and nail care; (2) provide proper medical treatment, including necessary dental care and wound care; (3) properly clean resident rooms and provide clean linens, which caused residents to live in complete filth; (4) promptly toilet residents, resulting in residents sitting in wet and dirty diapers for extended

periods of times; (5) provide proper feeding and weight monitoring; and (6) provide care required under resident care plans. Moreover, despite the importance of preventing pressure injuries by providing residents with sufficient and appropriate care, Cold Spring Hills residents suffered from pressure injuries while residing at Cold Spring Hills – and many had their pressure injuries significantly worsen under Cold Spring Hills' care. *E.g.*, *id.*, ¶¶ 8(b), 8(c), 127, 146, 161, 179, 182, 213, 329.

Residents at Cold Spring Hills were at a higher risk of death under Respondents' ownership and control. An analysis of Cold Spring Hills' in-house death rate revealed that it rose in both 2018 and 2019 compared to its 2017 level. *Id.*, ¶ 228.

Residents of Cold Spring Hills were also at greater risk of contracting COVID-19 due to multiple infection control failures at the onset of and during the pandemic. Cold Spring Hills repeatedly failed to follow multiple infection control measures, endangering its residents and staff, including by failing to: (1) have a dedicated infection preventionist ("IP") on staff; (2) properly cohort residents; (3) maintain separate staff for COVID-19 positive and COVID-19 negative residents; (4) properly track COVID-19 infections; (5) communicate infection levels; and (6) train staff. *Id.*, ¶ 230.

Cold Spring Hills' multiple infection control failures were clear violations of the laws and regulations governing nursing homes in New York and put countless residents at risk of harm and death. Cold Spring Hills' myriad of infection control violations coupled with insufficient staffing contributed to 98 COVID-19 deaths at the facility throughout each of its five buildings between March 2020 and June 2020. *Id.*, ¶ 231.

A. **Respondents Failed to Provide Cold Spring Hills with Sufficient and Properly Trained Staff, Resulting in Unconscionable Resident Neglect**

Respondents chronically understaffed Cold Spring Hills which ultimately endangered the residents. After Respondents purchased Cold Spring Hills, the CMS Registered Nurse ("RN") Staffing Rating dropped from a "four star" rating ("ABOVE AVERAGE") in 2016 to "two star" or "BELOW AVERAGE" RN Staffing rating in 2019. Yet Respondent Bent Philipson sought to further cut nursing staff at Cold Spring Hills several times. In early February 2020, just before COVID-19 hit downstate New York, Bent Philipson orchestrated a plan to cut further $1.6 million in expenses by eliminating staff at Cold Spring Hills, and asked Yossi Emanuel, the Administrator at Cold Spring Hills, to carry out his plan to reduce payroll costs. *E.g.*, Petition, ¶¶ 112, 280.

Unsurprisingly, Respondents' failure to provide sufficient staffing led to increased deaths: In the three-month period from March 1, 2020 through June 4, 2020, a total of 166 Cold Spring Hills' residents died, including 98 COVID-19 deaths and 68 non-COVID-19 deaths. Respondent Bent Philipson doubled down on his scheme to extract profits at the expense of resident care by pushing the facility to keep admission numbers up regardless of whether staff could handle it; he consistently reviewed daily census information, and pressured staff when he thought census numbers were dropping. In 2021 alone, Cold Spring Hills reported in its Cost Repot that it admitted 582 residents. *Id.*, ¶ 349.

B. **Cold Spring Hills Submitted False Payroll-Based Journal Data to CMS, Inflating Direct Care Staff Numbers**

Respondents tried to conceal their devastation of Cold Spring Hills' staffing by causing it to submit false RN staffing data to CMS to make it look like Cold Spring Hills was doing better than it actually was. The owners and operators of Cold Spring Hills falsely represented higher numbers of RN staff to the government. Petition, ¶¶ 352-59.

C. Cold Spring Hills Concealed the True COVID-19 Death Count from DOH and the Public

Cold Spring Hills failed report more than half of the COVID-19 deaths to DOH during the height of the pandemic. Specifically, an analysis of Cold Spring Hills' resident records reveals that Cold Spring Hills should have reported 98 COVID-19 deaths to DOH through HERDS for this period. Cold Spring Hills, however, only reported 47 COVID-19 deaths to DOH through HERDS for this period, failing to report through HERDS 51 resident COVID-19 deaths from March 1, 2020 to June 4, 2020. Petition, ¶¶ 364-66.

D. DOH Inspections Dating Back to August 2018 Show Respondents' Disregard for Resident Welfare – DOH Issues Multiple Citations to Cold Spring Hills Including a Finding of "Immediate Jeopardy."

From August of 2018 to July 31, 2022, Cold Spring Hills was cited 59 times by DOH for violations of laws, rules and regulations, or violations of Executive Orders. Respondents failed to address these deficiencies and thus, it is no surprise that on May 9, 2022, DOH held Cold Spring Hills in "Immediate Jeopardy" following an onsite survey. Petition, ¶¶ 371-76.

E. Respondents Bent Philipson, Benjamin Landa and Their Agents Exercised Control Over Cold Spring Hills to Transfer Millions of Dollars of Its Assets To Themselves And Favored Persons Through Self-Dealing And Collusive Related Party Transactions In Order To Conceal Their Up-Front Profit-Taking.

From 2016 to 2021, Respondents used their many related party LLCs to obscure the magnitude of the fraudulent up-front profit-taking they directed to themselves, their family members, and other Favored Persons, under the guise of purported [3] legitimate business transactions. Through the three fraudulent schemes, and through additional persistent illegality through those schemes and other deceptive acts, Respondents exercised control over Cold Spring

[3] For readability, this memorandum does not always use adjectives such as "purported" or "bogus" to modify Respondents' use of terms such as "rent," "management," or "consulting," but absence of the modifier does not signify the transaction to be bona fide.

Hills and converted over $22.6 million in government funds. From 2016 through 2021, Respondents used these collusive related party transactions to convert $22,626,853.86 from Cold Spring Hills. Petition, ¶ 381.

F. <u>The Fraudulent Promissory Note Scheme: Respondents Required Cold Spring Hills to Pay a $16 Million Promissory Note with 13% Interest</u>

Once in control of Cold Spring Hills' operations and real estate, Respondents forced Cold Spring Hills to enter into a fraudulent promissory note scheme, to pay a related party a $16 million promissory note with 13% interest. Respondents later caused Cold Spring Hills to refinance its existing loan to take advantage of lower interest rates. In doing so, Bent Philipson and the other owners of Cold Spring Realty caused Cold Spring Hills to pay this fraudulent promissory note plus $5.6 million interest to themselves in order to increase their personal profit from Cold Spring Hills, while depleting the amount of cash available to it to pay for staffing. Petition, ¶¶ 387-88.

G. <u>The Fraudulent "Cash Flow Rental" Rent Payment Scheme: Respondents Converted Over $15.3 Million from Cold Spring Hills Through "Cash Flow Rental" Payments that Flowed Through a Collusive Lease with Cold Spring Realty</u>

Members of three families – Benjamin Landa's family, Bent Philipson's family and David Zahler's family – were represented on both sides of the collusive lease agreement between Cold Spring Hills and its related party landlord Cold Spring Realty. Through a fraudulent rent payment schedule under that lease, Respondents converted over $15.3 million from 2016 through 2021. Of the $15,362,000 of "cash flow rental" payments made to Cold Spring Realty, $15,224,902.62 was further converted by Cold Spring Realty to its owners: Benjamin Landa, Philipson Family, LLC, Cheskel Berkowitz and Lifestar. Cold Spring Realty was also used by Respondents to convert government stimulus funds and the illegal conversion of $15,224,902.62 from Cold Spring Hills through Cold Spring Realty included a portion of stimulus funds provided to Cold Spring Hills in response to the COVID-19 pandemic. Petition, ¶¶ 394-407.

H. Respondents Violated the Asset Transfers or Equity Withdrawal Transfer Limits

In addition to constituting an illegal conversion for personal profit, the withdrawal of more than $3,930,389.18 of the $11 million converted in so-called "cash flow rental" transfers from Cold Spring Hills to Cold Spring Realty, between 2018 and 2020, also violated PHL § 2808(5)(c) because these withdrawals were not approved by DOH. Respondents also violated asset/equity withdrawal limits by transferring over $823,000 between 2018 and 2019 from Cold Spring Hills to a corporation owned by Bent Philipson, Highview Management Inc. ("Highview") and an LLC owned by Joel Leifer, Rosewell Associates, LLC ("Rosewell). Petition, ¶ 408.

I. Respondents Convert Funds Through Fraudulent Management/ Consulting Fee Schemes

Respondents Bent Philipson, Highview, Ventura Services, LLC D/B/A Philosophy Care Centers ("Ventura"), Avi Philipson, Joel Leifer, and Rosewell and converted a total of $5,249,298.30 in duplicative and/or unnecessary purported consulting and management fees from Cold Spring Hills. Respondents Bent Philipson, Ventura and Avi Philipson created a collusive related party arrangement between Ventura and Cold Spring Hills to accomplish and conceal Bent Philipson's conversion through Ventura of $4,260,860.05 in assets from Cold Spring Hills from 2019 through 2021. Highview's receipt of $563,438 in assets transferred from Cold Spring Hills represents his hidden conversion of those funds for Bent Philipson's personal profit, which were disguised as legitimate management fees on the Cold Spring Hills Cost Report. And from 2016 through 2021, Rosewell, owned by Joel Leifer, who is also a 25% nominal owner of Cold Spring Hills, converted $425,000.02 from Cold Spring Hills for sham management services that were either not provided or were of little value. *E.g.*, Petition, ¶¶ 411-446.

J. Respondents Bent Philipson, Avi Philipson Caused Cold Spring Hills to Transfer Over $18 Million of Nursing Home Assets to Related Parties

In addition to the conversions set forth above, Bent Philipson and Avi Philipson made Cold Spring Hills transfer over $15 million of its assets directly and over $3.5 million indirectly to related party LLCs owned and controlled by Bent Philipson, Avi Philipson, and David Zahler. These related parties include Graph MGA, LLC, Graph Management, LLC, Graph Insurance Company A Risk Retention Group, LLC ("Graph Insurance LLCs") that purportedly provided insurance services and Comprehensive Care Solutions, LLC ("Comprehensive") affiliated with David Zahler that purportedly provided food, laundry, and supply services. David Zahler is an owner of Lifestar, which is a 25% owner of Cold Spring Realty. Petition, ¶¶ 450-51, 455.

K. Respondent Cold Spring Hills' Operator Repeatedly Filed False and Misleading Cost Reports to Conceal the Fraudulent and Illegal Extraction of "Up-Front Profit" Through Other Related Party Transactions, Specifically Highview, Graph Group, and Comprehensive.

In violation of its obligations under 10 NYCRR Part 86-2, Avi Philipson, owner and operator of Cold Spring Hills, submitted false annual Cost Reports from 2017 through 2021 wherein he failed to disclose "related companies" or "Non-Arm's Length Arrangements," such as Highview, the Graph Insurance LLCs, Comprehensive, and Prudent Consulting, LLC.[4] Cold Spring Hills failed to identify these entities as related parties in Cost Reports. In addition to not properly disclosing these related parties, from 2017 through 2021, Avi Philipson, the owner and operator of Cold Spring Hills, repeatedly and persistently violated disclosure requirements by failing to submit required audited financial statements, or Part III for the Cost Report. Petition, ¶¶ 458-469.

[4] Prudent Consulting is a related party owned entirely by Joel Leifer and provided purported fiscal services to Cold Spring Hills. From 2016 through 2021, Respondents caused Cold Spring Hills to transfer $640,679.00 to Prudent Consulting for such services. Petition, ¶¶ 69, 463.

L. <u>Cold Spring Hills' Operator Repeatedly and Persistently Violated Conditions of Participation in the Medicaid Program in Its Operation of Cold Spring Hills</u>

By its conduct in the operation of Cold Spring Hills, its operator repeatedly and persistently violated Title 18 NYCRR § 515.2(b), which requires that a provider submit medical claims only for services provided in compliance with Title 18 of the Official Compilation of Codes, Rules, and Regulations of New York State. *See also* 18 NYCRR §§ 515.5(a) and (b).

III. STATUTORY FRAMEWORK

A. <u>Summary Proceedings</u>

Executive Law § 63(12) empowers the Attorney General to bring a special proceeding for permanent injunctive relief, restitution, and damages whenever a person or business engages in "repeated or persistent fraud or illegality." *See* Exec. Law § 63(12) ("[w]henever any person shall engage in repeated fraudulent or illegal acts . . . the attorney general may apply . . . on notice of five days" for relief). A special proceeding as authorized under Executive Law § 63(12) is "as plenary as an action, culminating in a judgment, but is brought on with the ease, speed and economy of a mere motion." Siegel & Connors, *N.Y. Practice* § 547, at 1054 (6th ed 2018). The legislative purpose for allowing a special proceeding under Section 63(12) is to further the public interest by giving the Attorney General an expeditious means to enjoin fraudulent or illegal activity and to obtain relief for its victims, including *ex parte* relief. *People v. B.C. Assocs., Inc.*, 22 Misc 2d 43, 44-46 (Sup Ct, N.Y. Cnty. 1959).

A special proceeding goes directly to the merits. The Court is required to make a summary determination upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised. *See* CPLR § 409. To the extent factual issues are raised, then they must be tried "forthwith." *See* CPLR § 410. It is the very purpose of a special proceeding to provide a summary

remedy, "so summary, indeed, as to dispense with the need or occasion for the application of summary judgment." *Council of City of New York v. Bloomberg*, 6 NY3d 380, 401 (2006).

B. **Statutory Authority**

All of the statutes under which the State brings this proceeding are remedial in nature. *See, e.g*, *People ex rel. Cuomo v. Greenberg*, 95 AD3d 474, 483 (1st Dept 2012), *affd*, 21 NY3d 439 (2013) (quoting *People v. Federated Radio Corp.*, 244 NY 33, 38 [1926]) (Executive Law § 63[12] is a remedial statute). Remedial statutes are to be liberally construed to achieve their intended purpose. *See Matter of Daimler Chrysler Corp. v. Spitzer*, 7 NY3d 653 (2006); *People v. Lexington Sixty-First Associates*, 38 NY2d 588 (1976); *State v. Martin Fine*, 113 AD2d 304 (1st Dept 1987).

MFCU in the Office of the Attorney General of the State of New York is responsible for investigating and prosecuting healthcare providers and associated persons engaged in civil and criminal fraud against the Medicaid and Medicare programs and for protecting the State's vulnerable nursing home residents from exploitation, abuse, and neglect by providers.

The investigation leading to this proceeding was undertaken pursuant to the well-established authority vested in the Office of the Attorney General by the Executive Law, New York Medicaid rules and regulations, and MFCU's federal grant of authority under the Social Security Act and the Medicaid and Medicare program regulations to investigate and prosecute provider fraud and nursing home resident abuse and neglect. *See* Executive Law § 63(12); 42 U.S.C. 1396b(q); 42 C.F.R. § 1007.11(a).[5] The Attorney General is authorized by the Inspector

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[5] 42 C.F.R. § 1007.11 provides:

> (a) The Unit will conduct a statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws, including criminal statutes as well as civil false claims statutes or other civil authorities, pertaining to the following:

General of the United States Department of Health and Human services to recover federal Medicare funds in this proceeding. *See People* v. *Miran*, 107 AD3d 28 (4th Dept 2013), *lv den* 21 NY3d 1044 (2013), *cert den* _ US_ , 134 S Ct 2312 (2014) (federal Medicare recovery within MFCU jurisdiction).

C. <u>Executive Law § 63(12)</u>

A claim under Executive Law § 63(12) can seek relief for repeated or persistent fraud – or repeated or persistent illegality. Here, the Attorney General brings claims on both grounds, as the Respondents persistently and illegally neglect nursing home residents entrusted to their care <u>and</u> repeatedly and persistently obtained millions of dollars in public funds by engaging in the fraudulent financial practices that bring about such neglect.

Executive Law § 63(12) defines the terms "fraud" or "fraudulent" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Consistent with this language and the legislative intent, courts have consistently applied an extremely broad view of what constitutes fraudulent and deceptive conduct in proceedings brought by the Attorney General

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> (1) Fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers;
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> (2) Fraud in any aspect of the provision of health care services and activities of providers of such services under any Federal health care program (as defined in section 1128B(f)(1) of the Act), if the Unit obtains the written approval of the Inspector General of the relevant agency and the suspected fraud or violation of law in such case or investigation is primarily related to the State Medicaid program.

(b)

> (1) The Unit will also review complaints alleging abuse or neglect of patients or residents in health care facilities receiving payments under Medicaid and may review complaints of the misappropriation of funds or property of patients or residents of such facilities.

See also 42 U.S.C. 1396b(q).

under Executive Law § 63(12). *See, e.g., Lefkowitz v. Bull Inv. Group*, 46 AD2d 25, 28 (3d Dept 1974), *affd* 35 NY2d 647 (1975) ("It is well settled that the definition of fraud under subdivision 12 of section 63 of the Executive Law is extremely broad and proof of scienter is not necessary") It is not necessary to establish the traditional elements of common law fraud, such as intent to deceive and reliance, to establish liability for fraud under Executive Law § 63(12). *People v. Apple Health & Sports Clubs, Ltd.*, 206 AD2d 266, 267 (1st Dept 1994); *State v. Ford Motor Co.*, 136 AD2d 154, 158 (3d Dept 1988), *affd* 74 NY2d 495 (1989). Instead, the test of fraudulent conduct under Executive Law § 63(12) is whether the act "has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *In re People v. Applied Card Sys., Inc.*, 27 AD3d 104, 106 (3d Dept 2005), *affd on other grounds*, 11 NY3d 105 (2008).

Here the Respondents have created a scheme and "artifice" in the core sense of the words – a structure designed from the outset to obtain nursing home operating licenses, to take money out of the nursing homes and away from resident care in a manner that ensures that the Respondents take profit immediately, regardless of the quality of care. Respondents obscured these transactions behind a web of shell companies and complicit individuals and created a fictional narrative that the facility was a money-losing operation that simply could not deliver quality care. Respondents' scheme and artifice simply skims government funds directly off the top and into their back pockets, while they hold themselves out as the *Monopoly* game character with empty front pockets.

As to the "illegality" prong of the statute, courts have repeatedly found that a violation of state, federal, or local law constitutes illegality within the meaning of Executive Law § 63(12). *State v. Princess Prestige*, 42 NY2d 104, 107 (1977); *People v. Empyre Inground Pools, Inc.*, 227 AD2d 731, 733 (3d Dept 1996); *Lefkowitz v. E.F.G. Baby Products*, 40 AD2d 364, 366 (3d Dept

1973); *State v. Mgmt. Transition Res.*,115 Misc 2d 489, 491 (Sup Ct, New York County 1982) (career counseling service that operated as an employment agency without a license and improperly took up-front fees violated Executive Law § 63[12] prohibition on illegality).

Both fraud and illegality must be repeated or persistent, each of which are also defined in the statute. "Repeated" is defined as "repetition of any separate and distinct fraudulent or illegal act or conduct which affects more than one person." Exec. Law § 63(12); *People v. Wilco Energy Corp*, 284 AD2d 469, 471 (2d Dept 2001); *Empyre*, 227 AD2d at 733. "Persistent" is defined as "continuance or carrying on of any fraudulent or illegal act of conduct." Exec. Law § 63(12).

Further, the Attorney General is empowered under the Tweed Law to investigate the misappropriation and misuse of any government funds. *See* Executive Law § 63-c;[6] *see also Cuomo* v. *Ferran*, 77 AD3d 698, 701 (2nd Dept. 2010); *State of New York* v. *Franklin Nursing Home*, 65 AD2d 788 (2d Dept 1978) (Attorney General on behalf of State may recover Medicaid overpayments).

In this matter, as shown in the supporting affidavits, there is no question that fraud and illegality are embedded in Respondents' business model, and that hundreds of nursing home residents are repeatedly and persistently neglected – indeed, neglected on every shift, on every unit, on every floor, on every day of every year since Respondents took control of Cold Spring Hills and started cutting staff to pocket the savings. And for every one of those hundreds of nursing home residents on every day of every year since Respondents took control of Cold Spring Hills, the Respondents submitted claims to Medicaid and Medicare and other insurers for payment.

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[6] "Where any money . . . or other property . . . owned by the state . . . has heretofore been . . . without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages . . . may be maintained by the state[.] The attorney general shall commence [such] an action, suit or other judicial proceeding . . . whenever [s]he deems it for the interests of the state so to do." Exec. Law § 63-c.

III. ARGUMENT

A. Respondents Have Engaged in Repeated and Persistent Illegality Within the Meaning of Executive Law § 63(12).

A violation of any state, federal or local law constitutes "illegality" within the meaning of Executive Law § 63(12) and is actionable thereunder when persistent or repeated. *Princess Prestige*, 42 NY2d at 106; *Empyre*, 227 AD2d at 732-33; *State v. E.F.G. Baby Prods.*, 40 AD2d 364, 366 (3d Dept 1973); *State v. Scottish Am. Ass'n*, 52 AD2d at 528 (1st Dept 1976). Respondents' repeated and persistent violations of the Public Health Law, the Social Services Law, and the federal Social Security Act and Medicare counterparts are all actionable under Executive Law § 63(12).

As demonstrated in the Petition and supporting Affidavits, Respondents repeatedly and persistently violated the following statutory provisions of Article 28 of the Public Health Law:

> **PHL § 2801-a** requiring a Certificate of Need application to include, inter alia, "information as to the character, competence and standing in the community of every individual and entity of the applicant and specify the identity of every nursing home in which each of those individuals and entities is, or in the preceding seven years has held a controlling interest or has been a controlling person, principal stockholder or principal member; and the nature of that interest. (*See, e.g.*, Petition ¶ 58(a), 493.)
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> **PHL § 2803-c** establishing rights of patients in certain medical facilities, aka the "Patient's Bill of Rights," which include the following rights violated by Respondents: (1) Every patient shall have the right to receive adequate and appropriate medical care; (2) Every patient shall have the right to receive courteous, fair, and respectful care and treatment; and (3) Every patient shall be free from mental and physical abuse and from physical and chemical restraints. (*See* Petition ¶ 493(a).)
>
> **PHL § 2803-d** establishing the duty of reporting to the Department of Health both by the facility and almost all staffers whenever there is "reasonable cause to believe that a person receiving care or services in a residential health care facility has been abused, mistreated, neglected or subjected to the misappropriation of property by other than a person receiving care or services in the facility." (*See, e.g.*, Petition ¶ 5.)

PHL § 2803-x establishing disclosure requirements related to nursing homes and related assets and operations. (*See, e.g.*, Petition ⁋ 17, 57-58, 60.)

PHL § 2805-e establishing mandatory financial and healthcare reports by residential health care facilities. (*See, e.g.*, Petition ⁋⁋ 48, 58, 359, 489(b).)

PHL § 2808(5) establishing limitations on the withdrawal of funds from nursing homes in excess of 3% of its most recent annual revenue, without the approval of DOH, also known as the 3% equity withdrawal rule. (*See, e.g.*, Petition ⁋⁋ 407-08, 498(b).)

Regulations of DOH adopted under the foregoing statutes, and repeatedly and persistently violated by Respondents, include:

10 NYCRR § 415.3 – requiring that each resident's right to adequate and appropriate medical care be fulfilled. (*See, e.g.*, Petition ⁋ 493(a).)

10 NYCRR § 415.3(f) – requiring that each resident be provided with clinical care in resident's care plan. (*See, e.g.*, Petition ⁋ 493(c).)

10 NYCRR § 415.4(a) – setting limits to ensure resident free from medically unnecessary physical and chemical Restraints. (*See, e.g.*, Petition ⁋⁋ 77, 310-11.)

10 NYCRR § 415.4(b) – defining and prohibiting resident neglect. (*See, e.g.*, Petition ⁋⁋ 3, 8, 122-227.)

10 NYCRR § 415.5 – requiring maintenance or enhancement of quality of life and each resident's dignity. (*See, e.g.*, Petition ⁋⁋ 8, 82, 327.)

10 NYCRR § 415.11 – requiring creation of comprehensive and timely care plans, provision of services in accordance with comprehensive care plans and revision of care plans as necessary to assure the continued accuracy of a resident's health assessment. (*See, e.g.*, Petition ⁋⁋ 25, 29, 143, 147, 163, 215.)

10 NYCRR §§ 415.12-(a)(1): requiring the necessary quality of care and services to attain and maintain the "highest practicable physical, mental, and psychosocial well-being," of each resident be provided, including but not limited to failing to ensure that the residents' activities of daily living "do not diminish." (*See, e.g.*, Petition ⁋⁋ 137-38, 163-64, 169-70.)

10 NYCRR§ 415.12(a)(3): requiring facility to ensure that a resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene. (*See, e.g.*, Petition ⁋⁋ 5, 8(b), 136-37, 178, 183, 193, 195, 223, 493.)

10 NYCRR§ 415.12(c): requiring facility to ensure that (1) a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable despite every reasonable effort to prevent them; and (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing. (*See, e.g.*, Petition ¶¶ 8(c), 178-79, 186-87, 189.)

10 NYCRR § 415.12(h)(2): requiring that adequate assistance and supervision to residents to prevent accidents be provided. (*See, e.g.*, Petition ¶¶ 8(b), 305-09.)

10 NYCRR § 415.12(i): requiring facility to ensure that a resident maintains acceptable parameters of nutritional status, such as body weight and protein levels and receives a therapeutic diet when there is a nutritional problem. (*See, e.g.*, Petition ¶¶ 8(c), 178, 183, 193, 223-24.)

10 NYCRR § 415.13 – requiring the provision of nursing services, also reflected in federal law at CFR 483.35 – i.e., facility is required to have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident; facility must ensure that a resident is offered sufficient fluid intake to maintain proper hydration and health. (*See, e.g.*, Petition ¶¶ 8, 227, 235, 493.)

10 NYCRR § 415.13(a) – requiring that facility maintain sufficient personnel on a 24-hour basis to provide nursing care to all residents in accordance with each resident's needs as set forth in a comprehensive care plan that the nursing facility is required to develop. (*See, e.g.*, *id.*)

10 NYCRR § 415.14 – requiring that each resident be provided with a nourishing, palatable, well-balanced and medically appropriate diet that meets residents' daily nutritional and special dietary needs, that facility employ sufficient competent staff to carry out the functions of the dietary service, that facility provide assistance with eating and special eating equipment and utensils for residents who need them, and that facility store, prepare, distribute and serve food under sanitary conditions. (*See, e.g.*, Petition ¶¶ 8, 227, 235, 493.)

10 NYCRR § 415.15 – requiring the development and implementation of medical services to meet the needs of facility's residents. (*See, e.g.*, Petition ¶ 493.)

10 NYCRR § 415.16 – requiring the development and implementation of rehabilitation services to meet the needs of facility's residents. (*See, e.g.*, Petition ¶¶ 145-54, 215-22.)

10 NYCRR § 415.17 – requiring the development and implementation of dental services to meet the needs of facility's residents. (*See, e.g.*, Petition ¶¶ 133-35, 195.)

10 NYCRR § 415.19 – requiring facility to maintain an effective infection control program designed to provide a safe, sanitary, and comfortable environment, including as reflected in federal law at CFR 483.80. (*See, e.g.*, Petition ¶¶ 30, 230.)

10 NYCRR § 415.22 – requiring facility to maintain clinical records for each resident in accordance with accepted professional standards. (*See, e.g.*, Petition ¶¶ 130, 208.)

10 NYCRR § 415.26(h)(7) – restricting withdrawal of funds without DOH approval. (*See, e.g.*, Petition ¶ 408.)

10 NYCRR § 415.26(h)(3)(iii) – prohibiting kickbacks and accepting gifts from vendors or suppliers. (*See, e.g.*, Petition ¶ 77.)

10 NYCRR § 400.4 –requiring written contracts containing required information with vendors, management companies and others. (*See, e.g.*, Petition ¶ 453.)

10 NYCRR § 702.4 – setting forth infection control reporting requirement to report data to DOH via HERDS. (*See, e.g.*, Petition ¶ 20.)

10 NYCRR § 86-2.5 – requiring facility to file complete and accurate annual financial and statistical reports (Medicaid Cost Reports) to DOH. (*See, e.g.*, Petition ¶¶ 17, 58, 62, 442, 457-64.)

Respondents repeatedly and persistently violated the following Medicaid financial regulations, as promulgated under the Social Services Law, and subject to injunctive relief under Article 63 of the CPLR and Executive Law § 63(12):

18 NYCRR 521.3 – Mandatory Compliance Program; false certification for failures in compliance. (*See* Petition ¶¶ 469-75.)

18 NYCRR § 515.2(b) – Unacceptable Practices constituting fraud and abuse, including:

(1) – False claims
(4) – Conversion
(5) – Bribes and kickbacks
(8) – Receiving additional payments
(10) – Conspiracy
(12) – Failure to meet recognized standards

18 NYCRR § 504.6(d) – Requirement that a provider submit Medicaid claims for reimbursement only for services provided in compliance with Title 18 of the Official Compilation of Codes, Rules and Regulations of New York State. (*See id.*)

Respondents violated the following federal regulations promulgated by the United States Department of Health and Human Services for the protection of nursing home residents under title 42 of the United States Code and title 42 of the Code of Federal Regulations:

42 CFR § 483.1 – requiring that nursing homes must comply with federal statutes and regulations to participate in Medicaid and Medicare. (*See generally* Petition.)

42 CFR § 483.10 – requiring that nursing homes must treat residents with respect and dignity, provide all services in care plan, keep residents free from restraints. (*See, e.g.*, Petition ¶¶ 8, 77, 82, 310-11, 327, 493(c).)

42 CFR § 483.12 – requiring that residents must be free from neglect, abuse, misappropriation of property and exploitation. (*See, e.g.*, Petition ¶¶ 3, 8, 122-227.)

42 CFR § 483.20 – requiring that nursing homes must develop personalized care plans and assess and review them periodically. (*See, e.g.*, Petition ¶¶ 25, 29, 143, 147, 163, 215.)

42 CFR § 483.24 – requiring that nursing homes must provide necessary care and service to attain or maintain highest practical- physical, mental & psychosocial well-being… and ensure residents' abilities to do activities of daily living do not diminish unnecessarily; requiring that nursing homes must provide grooming, good nutrition, and hygiene. (*See, e.g.*, Petition ¶¶ 137-38, 163-64, 169-70.)

42 CFR § 483.25 – requiring that nursing homes must ensure residents receive treatment and care in accordance with professional standards, care plan, and resident choice. (*See id.*)

42 CFR § 483.35 – requiring that nursing homes must have sufficient nursing staff with appropriate skills sets and competencies to assure resident safety. (*See, e.g.*, Petition ¶¶ 8, 227, 235, 493.)

42 CFR § 483.40 – requiring that nursing homes must provide physical therapy, occupational and rehabilitative services. (*See, e.g.*, Petition ¶¶ 145-54, 215-22.)

42 CFR § 483.50 – requiring that nursing homes must provide dental, laboratory, radiology and other diagnostic services. (*See, e.g.*, Petition ¶¶ 133-35, 195.)

42 CFR § 483.60 – requiring that nursing homes must employ sufficient staff for food and nutrition services, and staff must possess appropriate competencies for care plans. (*See, e.g.*, Petition ¶¶ 8, 227, 235, 493.)

42 CFR § 483.70 – requiring that nursing homes must do an annual update to assessment of resources needed to care for residents competently, daily and in emergencies. (*See generally* Petition.)

> **42 CFR § 483.80** – requiring that nursing home infection control and prevention must include system for preventing, identifying, reporting, investigating, and controlling infection. (*See, e.g.*, Petition ¶¶ 20, 30, 230.)

In addition, at all relevant times, New York law imposed on Cold Spring Hills, as a nursing home, a "special obligation" to care for its residents, including by ensuring that it provides each resident with the care, treatment, diet, and health services that they need to attain their "highest practical level of well-being" pursuant to 10 NYCRR § 415.1(a)(1)-(2) and sufficient staffing to provide required care, pursuant to 10 NYCRR § 415.13(a-d). Cold Spring Hills violated each of the above regulations repeatedly during the relevant time period.

Additionally, Respondents repeatedly and persistently violated Medicaid financial regulations, including 18 NYCRR §515.2, which is promulgated under the Social Services Law and is subject to injunction under CPLR Art. 63 and Executive Law §63(12). 18 NYCRR §515.2(b)(12) states that "[f]ailure to meet recognized standards in furnishing medical care, services or supplies that meet professionally recognized standards for health care" is an unacceptable practice constituting fraud and abuse under the medical assistance program.

Respondents are also liable for violation of federal Medicare payment statutes and regulations, including 42 U.S.C. 1320a-7k, which defines an overpayment as "any funds that a person receives or retains under title XVIII or XIX of the Social Security Act" to which the person, after applicable reconciliation, is not entitled" and requires that overpayments of Medicare funds be repaid within 60 days. *See* 42 C.F.R. 401.303, 401.305.

Respondents are also jointly and severally liable for violation of the fundamental Medicaid payment regulations, which require repayment to the state "from the person submitting an incorrect or improper claim, or the person causing such claim to be submitted, or the person receiving payment for the claim" and requiring repayment of Medicaid funds for "inappropriate, improper, unnecessary or excessive care, services or supplies from the person furnishing them, or the person

under whose supervision they were furnished, or the person causing them to be furnished. . . . Medical care, services or supplies ordered or prescribed will be considered excessive or not medically necessary unless the medical basis and specific need for them are fully and properly documented in the client's medical record." 18 NYCRR § 518.3 (a)-(c).

B. Respondents Have Repeatedly and Persistently Violated PHL § 2801-a, requiring certain ownership information in a Certificate of Need ("CON") Application.

Under New York law, Cold Spring Hills was required to submit a CON application to DOH seeking approval for a CON to assume operations from the former operator. Public Health Law § 2801-a requires that a CON application must include, *inter alia*, "information as to the character, competence and standing in the community of every individual and entity of the applicant and specify the identity of every nursing home in which each of those individuals and entities is, or in the preceding seven years has held a controlling interest or has been a controlling person, principal stockholder or principal member; and the nature of that interest." (PHL § 2801-a.) Per the statute, DOH "shall not" approve an applicant "unless it finds that each individual and entity, in relation to ownership of a nursing home located in the United States, for at least the previous seven years, demonstrated satisfactory character, competence and standing in the community and the nursing home provided a consistently high level of care." At a minimum, the "consistently high level of care" inquiry includes consideration of CMS ratings, repeated or severe violations of federal and state nursing home regulations, licensure revocations, and involuntary termination from the Medicare or Medicaid program. Further, the statute is clear that bootstrapping new owners is not allowed – individuals that seek to acquire ownership shares *after* the operator entity is formally approved must themselves go through DOH approval.

On or around 2014, to facilitate the purchase of Cold Spring Hills, Bent Philipson, along with others, sought a CON from DOH and provided DOH with financial disclosure documents,

During the application process, the initial operating ownership interests submitted to DOH listed Bent Philipson as a 5% owner of Cold Spring Hills. However, soon thereafter, Bent Philipson or his agents removed him from the CON application and re-assigned his 5% interest to his son, Respondent Avi Philipson, thereby increasing Avi's ownership interest to 25%.[7] Avi Philipson was 22 years old and studying abroad at the time that the 2014 CON was filed with his name as an owner. Petition, ¶ 91.

Moreover, the CON application submitted to DOH indicated that Respondent Esther Farkovits, the daughter of Respondent Benjamin Landa, was a 25% owner of Cold Spring Hills. *Id.*, ¶ 61. Respondent Esther Farkovits testified in an examination taken pursuant to Executive Law ¶ 63(12) that she "assumed" her father, Respondent Benjamin Landa, gave her a 25% ownership interest in Cold Spring Hills as a "gift," as she did not make an investment in exchange for her ownership interest. Respondent Esther Farkovits also testified that she was wholly unaware of her ownership interest in Cold Spring Hills until she was served with a subpoena in 2022, pursuant to this investigation. *Id.*

Despite that fact that Respondents Bent Philipson and Benjamin Landa controlled business operations at Cold Spring Hills together until 2019, and always intended to do so, they did not disclose their involvement to DOH to avoid the scrutiny called for by PHL § 2801-a and to seamlessly acquire the CON by DOH. Indeed, Respondents Bent Philipson and Benjamin Landa agreed to name their children as straw owners of Cold Spring Hills on corporate organizing documents and in formal submissions to deceive DOH to intentionally skirt and violate PHL § 2801-a.

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[7] Later, as per a new CON application filed for the "Assignment of Membership Interest," dated September 27, 2016, Bent Philipson's since-deceased wife, Respondent Deborah Philipson, received a 1% ownership interest from their son, Avi Philipson.

C. **Respondents Have Repeatedly and Persistently Violated PHL 2808(5)(C).**

Public Health Law § 2808(5)(c) prohibits the withdrawal of equity or transfer of assets in an aggregate amount exceeding 3% of a nursing home's most recently reported annual revenue from patient care services without the prior approval of DOH's Commissioner. *See Brightonian Nursing Home v. Daines*, 21 NY3d 570, 575-79 (2013); 10 NYCRR § 400.19. The purpose of the restrictions on asset transfers and equity withdrawal, as stated in the bill jacket, is "to make it more difficult – if not impossible – for unscrupulous or incompetent owners to place their facilities in a financially unsound position by withdrawing excessive amounts of working capital." *See* L. 1977, Ch. 521. Bill Jacket Budget Report on Bills. As the Court of Appeals stated in upholding Public Health Law § 2808(5):

> Nursing homes serve a particularly needy and vulnerable clientele and are largely compensated with public funds. Preserving their financial viability and capacity to provide care and treatment at mandated levels is thus a proper and uncontroversial subject of legislative concern. The particular concern addressed by the presently challenged enactment — that precipitous withdrawals of substantial facility equity or assets for non-facility purposes may impair facility operations and thus occasion detriment to the welfare of an utterly reliant resident population—is not new. Public Health Law § 2808 (5) (c) is only the most recent of several restrictions on the alienation of facility equity and assets contained in Public Health Law § 2808.

Brightonian Nursing Home, 21 NY3d at 574.

Respondents repeatedly violated PHL § 2808(5) by failing to seek DOH consent for massive transfers of funds out of the facility. They made such transfers for "non-facility purposes" in the guise of inflated rent and bogus "management" fees. Specifically, from 2018 through 2020, Respondents transferred $3,930,389.18 from Cold Spring Hills to Cold Spring Realty, Highview, and Rosewell in excess of the three percent equity limit for which they did not obtain prior permission from DOH. Petition,¶ 407. Respondent's failure to comply with these requirements constitutes repeated and persistent illegal conduct under Executive Law § 63(12).

D. **Respondents Have Repeatedly and Persistently Violated the "Patient's Bill of Rights," PHL § 2803-c.**

As discussed *infra*, Respondents repeated violations of Section 415 of Title 10 of the New York Codes, Rules and Regulations is a violation of PHL § 2803-c. PHL § 2803-c(2) states that every nursing home shall adopt and make public a statement of the rights and responsibilities of the patients who are receiving care in such facilities and shall treat such patients in accordance with the provisions of such statement. PHL § 2803-c(3) states that such statement of rights and responsibilities shall include:

> (e) Every patient shall have the right to receive adequate and appropriate medical care, to be fully informed of his or her medical condition and proposed treatment unless medically contraindicated, and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions.
>
> . . .
>
> (g) Every patient shall have the right to receive courteous, fair, and respectful care and treatment and a written statement of the services provided by the facility, including those required to be offered on an as-needed basis.

PHL § 2803-c(3)(e) and (g).

As amply evidenced in the supporting affidavits and exhibits submitted herewith, Respondents provided residents of Cold Spring Hills with inadequate medical treatment and violated residents' rights to "adequate and appropriate medical care," by taking money for themselves, rather than hiring sufficient staff to attend to basic resident healthcare needs. During the relevant period, the most basic needs of the residents were not met – they did not receive regular showers or nail care, were left in their own feces and urine for hours, and received inadequate wound care, *inter alia*.

These violations, reported in dismal detail in the Petition, violated all of the healthcare laws, rules and regulations and Medicaid and Medicare payment regulations cited above.

E. Respondents Have Engaged in Repeated and Persistent Fraudulent Conduct in Violation of Executive Law § 63(12) in Their Operation of Cold Spring Hills

Executive Law § 63(12) defines "fraud" and "fraudulent" broadly to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise, or unconscionable contractual provisions." As noted above, fraud under Executive Law § 63(12) extends beyond the reach of common law fraud. *See e.g.*, *Lefkowitz v. Bull Inv. Grp*, 46 AD2d at 28; *People v. 21st Century Leisure Spa Int'l, Ltd.*, 153 Misc 2d 938, 943-44 (Sup Ct, New York County 1991). The test of fraudulent conduct under Executive Law § 63(12) is whether the act "has the capacity or tendency to deceive or creates an atmosphere conducive to fraud." *Applied Card Sys.*, 27 AD3d at 106 (quoting *Gen. Elec.*, 301 AD2d at 314).

For the reasons discussed above, Respondents' violations of PHL § 2801 and PHL § 2808(5) constitute repeated fraudulent conduct within the meaning of Executive Law § 63(12). Respondents misrepresented to DOH about who owned and controlled Cold Spring Hills, submitted false documentation to support ownership, which failed to disclose the true nature of their profit taking and related entities. Moreover, Respondents pilfered the facility in the form of inflated rent, the issuance of a promissory note at excessive interest, and fees to purported management and consulting companies owned by Respondents

F. Corporate Respondents are Liable for the Repeated and Persistent Illegal and Fraudulent Acts Alleged in the Petition

Cold Spring Hills received $157 million in Medicaid funds from 2016 through 2021 despite committing numerous violations set forth above and in the supporting documents filed herewith. Petition, ¶ 89.

Cold Spring Realty converted $15,362,000.00 through a collusive lease agreement with Cold Spring Hills and over $2 million in interest as a result of the issuance of a promissory note with 13% interest. *Id.*, ¶ 390, 401-02.

Ventura is owned by Respondent Bent Philipson, provided purported consulting services to Cold Spring Hills. From 2019 through 2021, Ventura converted $4,260,860.05 from Cold Spring Hills. *Id.*, ¶ 411.

In addition to Ventura, related entities owned or controlled by Bent Philipson received payments, directly or indirectly, from Cold Spring Hills. Highview, a purported management company, converted $563,438 in 2019. *Id.*, ¶ 442. The Graph Insurance LLCs, purported insurance entities collectively received over $10.6 million from 2017 through 2021. *Id.*, ¶ 460.

Comprehensive, an entity affiliated with David Zahler, received over $8.1 million from Cold Spring Hills for unspecified purported services from 2016 through 2021. *Id.*, ¶ 454.

Rosewell, owned by Joel Leifer, who is a 25% owner of Cold Spring Hills, provided purported management services to Cold Spring Hills, from which it received $425,000.02 from 2016 through 2019. *Id.*, ¶ 444.

The owners of Cold Spring Hills used various pass-through entities to funnel funds from Cold Spring Hills to accounts for the benefit or themselves and/or family members. These pass-through entities include: (1) The Philipson Family, LLC, owned by Bent Philipson; (2) B&L Consulting, LLC, owned by Benjamin Landa which received $499,992.00 from Cold Spring Hills through Cold Spring Realty, purportedly for "consulting" services; (3) Lifestar, an owner of Cold Spring Realty, owned by Zahler family,[8] which received $1,906,228.50 from 2016 through 2020; (4) Ross CSH Holdings, LLC, owned by Cheskel Berkowitz, who is an owner of Cold Spring Realty, received $1,906,228.50 from 2016 through 2020; and (5) ZBL Management, LLC, owned

[8] David Zahler and Chaya Zahler (together 60%), Rochel David (10%), Leah Friedman (10%), Jacob Zahler (10%) and Chaim Zahler (10%).

by Joel Zupnick and Cheskel Berkowitz, who is a 25% owner of Cold Spring Realty, received a portion of the interest due on the promissory note. *See, e.g.*, Petition, Chart at ¶ 14.

G. **Respondents Bent Philipson, Avi Philipson, Estate of Deborah Philipson, Joel Leifer, Leah Friedman, Rochel David, Esther Farkovits, Benjamin Landa, David Zahler, Chaya Zahler, Chaim Zahler, Jacob Zahler, Cheskel Berkowitz, and Joel Zupnick Are Personally Liable.**

Executive Law § 63(12) is directed against "any person" who "shall engage in repeated fraudulent or illegal acts." It is well-settled that individuals, including corporate officers and directors, are liable for illegal or fraudulent acts in violation of Executive Law § 63(12) if they personally participate in the illegal or fraudulent acts or have actual knowledge of them. Where such liability is found, relief that can be obtained against a corporate entity can also be obtained against the officers or directors of the corporation. *People v. Apple Health & Sports Clubs, Ltd.*, 206 AD2d 266 (1992) (president of health club liable for its fraudulent and illegal conduct under Executive Law § 63[12] where he had actual knowledge of and participated in such conduct); *People v. Frink Am., Inc.*, 2 AD3d 1379, 1381-82 (4th Dept 2003) (president and chief executive officer liable for unlawful conduct under Executive Law § 63[12]); *People v. Court Reporting Inst.*, 245 AD2d 564, 565 (2d Dept 1997) (officers and directors who have actual knowledge of, or participate in business' fraudulent and illegal dealings may be held personally liable under Executive Law § 63[12]); *Empyre Inground*, 227 AD2d at 734 (personal liability found under Executive Law § 63[12] where corporate officer participated in fraudulent and illegal activity and consumers regularly complained to him); *People v. Concert Connection Ltd.*, 211 AD2d 310, 320 (2d Dept 1995) (president of the corporation who was aware that the corporation was reselling and offering to resell entertainment tickets for more than the maximum premium price allowable under state law was properly found personally liable under Executive Law § 63[12]); *People v. Amer. Motor Club, Inc.*, 179 AD2d 277, 284-85 (1st Dept 1992) (officer liable under Executive Law §

63(12) for violations of insurance where "he personally participated in the illegal insurance business"); *State v. Daro Chartours, Inc.*, 72 AD2d 872, 873 (3d Dept 1979) (officer of corporation held personally liable for his fraudulent conduct); *21st Century Leisure Spa Int'l Ltd.*, 153 Misc 2d at 944 (officer and manager of health club found personally liable where he was advised by NYAG that the club was operating in violation of law and continued to enroll members when the business' closing was imminent); *State v. Mgmt. Transition Res*., *Inc.*, 115 Misc 2d at 492 (principals of business found personally liable) (Sup Ct, New York County 1982).

Officers and directors of a corporation will also be held liable for the fraudulent or illegal practices of their corporations if they: "directed and guided the corporation in matters of policy" (*Consumer Sales Corp. v. F.T.C.*, 198 F2d 404, 407-08 [2d Cir 1952]); "occupied policy making or directing positions during the period of the violations charged" (*Benrus Watch Co. v. F.T.C.*, 352 F2d 313, 325 [8th Cir 1965], *cert. denied*, 384 US 939 [1966]); or controlled the financial affairs of the corporation (*F.T.C. v. Amy Travel Service, Inc.*, 875 F2d 564, 574 [7th Cir 1989], *cert. denied*, 493 U.S. 954 [1989]).

Additionally, PHL § 2808-a provides that any "controlling person of any residential health care facility" is jointly and severally liable to the state to the same extent that the residential health care facility in which they hold an interest is liable. That statute makes clear that "for purposes of this section, a 'controlling person' of a residential health care facility shall be deemed to mean any person who by reason of a direct or indirect ownership interest (whether of record or beneficial) has the ability, acting either alone or in concert with others with ownership interests, to direct or cause the direction of the management or policies of said facility." *Id.* § 2808-a(b); *see also Ocean Side Institutional Indus., Inc. v. United Presbyterian Residence*, 254 AD2d 337, 338 (2d Dept 1998) ("Legislative history reveals that the requirement that an individual have an ownership

interest in order to be deemed a 'controlling person' was imposed 'to insure that liability and responsibility follow the capability to make a profit.'").

Here, the State has clearly established that Respondents Bent Philipson, Avi Philipson, Estate of Deborah Philipson, Joel Leifer, Leah Friedman, Rochel David, Esther Farkovits, Benjamin Landa, David Zahler, Chaya Zahler, Chaim Zahler, Jacob Zahler, Cheskel Berkowitz, and Joel Zupnick either held ownership interests and/or participated in Cold Spring Hills' fraudulent conduct. Some of these Respondents acknowledged in sworn testimony that they are persons who have operated, owned, and controlled Cold Spring Hills (or, in Bent Philipson's case, acknowledged that an answer as to his conduct and knowledge of that of others would tend to incriminate him). Accordingly, the above-named Respondents are liable for Cold Spring Hills' deceptive, fraudulent and illegal conduct.

H. <u>Bent Philipson's Admissions through his Invocation of his Right Against Self Incrimination</u>

Bent Philipson invoked his privilege against self-incrimination with respect to nearly every question asked of him, including all of the topics within the scope of the Petition. *See* Petition, ¶ 19 (noting Bent Philipson asserted protection against self-incrimination approximately 685 times, on the grounds that his testimony would tend to incriminate him). Respondent Bent Philipson's invocation of his right against self-incrimination under the Fifth Amendments of the Federal and State Constitutions preserves his protection against use of such information in a criminal case. However, by doing so, he has invited an adverse inference to be taken by the Court, as trier of fact, from his silence. *Marine Midland Bank v. Russo*, 50 N.Y.2d 31 (1980). As Bent Philipson is also a principal of Respondent entities Cold Spring Realty, Ventura and Philipson Family, LLC, his knowledge and actions are imputable to them as well.

I. **Medicaid Payments Must Be Repaid Under the Tweed Law as They Were Without Right Obtained, Received, Converted, or Disposed of by Respondents**

The State seeks to recover Medicaid payments obtained by Respondents under N.Y. Exec. Law § 63-c. That provision allows the State to recover funds that were "without right obtained, received, converted, or disposed of." N.Y. Exec. Law § 63-c, known as the "Tweed Law," is applicable to Medicaid funds and vests the Attorney General with the discretionary authority to seek the recovery of money or property (other than real property) belonging to the State, or to recover damages or other compensation, or both, pursuant to any viable action or proceeding at law or in equity available to the State." *Cuomo v. Ferran*, 77 AD3d 698, 701 (2d Dept 2010) (dentists liable to repay all Medicaid funds received through association with excluded person).

The *Ferran* case is instructive. The trial court found, on summary judgment, that the Medicaid funds paid to two LLCs called "Dental Wagon" and "Dental Wheels" that operated dental offices on converted buses were "without right obtained" in violation of the Tweed Law because they were paid in violation of New York and federal regulations, which prohibit persons who were previously sanctioned by "exclusion from federal healthcare programs" for earlier fraudulent conduct from being involved in any way in the provision of healthcare services paid for by a healthcare program. The dentists who owned the LLCs, who actually performed many of the services and who were not the excluded persons, had received Medicaid payments due to the recruiting and management efforts of an excluded non-dentist, even though the dentists disclaimed knowledge of the exclusion. The Appellate Division affirmed, holding that, "A provider reimbursed on a fee-for-services basis also may not submit any claim and cannot be reimbursed for any medical care, services, or supplies furnished in violation of any condition of participation in the Medicaid program (*see* 18 NYCRR 515.5 [e])." *Id.* at 701; *see also* 18 NYCRR § 515.2

(setting forth "unacceptable practices" in Medicaid program, including submission of claims for reimbursement that to do conform with applicable laws and regulations).

Here, in addition to the extensive list of violations of the healthcare regulations described above, and very similarly to *Ferran*, the Respondents also engaged in subterfuge to obtain the license to operate Cold Spring Hills using Respondent owners as front persons to avoid DOH scrutiny.

J. <u>Violations of the Public Health Law and Regulations Are Subject to Damages.</u>

Under § 2801-d of the Public Health Law, a nursing home is liable if it "deprives any patient of said facility of any right or benefit, as hereinafter defined, for injuries suffered as a result of said deprivation." Those rights and benefits include:

> any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority.

As such, pursuant to § 2801-d of the Public Health Law, Cold Spring Hills deprived its residents of the right to adequate and appropriate medical care and is therefore liable.

K. <u>The Court Should Grant Permanent Injunctive Relief, Restitution, Disgorgement, Rescission, Civil Penalties and Costs.</u>

Violations of the Public Health Law are subject to injunctive relief under the explicit terms of the Public Health Law. Section 2801-c provides that:

> The supreme court may enjoin violations or threatened violations of any provisions of this article [Art. 28]; and it may enjoin violations of the regulations of the department adopted thereunder. Upon request of the public health council or the commissioner, the attorney general shall maintain an action in the supreme court in the name of the people of the state to enjoin any such violation. Notwithstanding any limitation of the civil practice law and rules, such court may, on motion and affidavit, and upon proof that such violation is one which reasonably may result in injury to any person, whether or not such person is a party to such action, grant a temporary injunction upon such terms as may be just, pending the determination of the action.

Respondents repeatedly and persistently violated the regulations cited in the Petition concerning financial requirements, healthcare requirements and filings with the DOH, each of which was adopted pursuant to Public Health Law Art 28. The Commissioner of Health has specifically requested that the Attorney General seek such injunctive relief pursuant to Section 2801-c in this action, in addition to any other remedies available by law. Petition, ¶ 42.

Accordingly, this Court has broad statutory equitable authority to grant injunctive relief, restitution, disgorgement, rescission, civil penalties and costs in proceedings brought pursuant to Executive Law § 63(12). *See Princess Prestige*, 42 NY2d at 107-08; *Daro Chartours, Inc.*, 72 AD2d at 873; *State v. Scottish-Am Ass'n*, 52 AD2d at 528. In addition, in this case, Respondents' repeated and persistent fraudulent and illegal acts warrant the imposition of injunctive relief under Executive Law §63(12), as well as restitution to the Medicaid and Medicare programs, disgorgement, civil penalties, and costs.

L. <u>The Court Should Order Respondents to Pay Restitution</u>

In addition to injunctive relief, the Court should order Respondents to pay restitution to New York taxpayers, through the tax-funded Medicaid and Medicare programs, which have paid many millions of dollars, as well as the nursing home residents themselves endangered and harmed as a result of Respondents' illegal and fraudulent conduct. Executive Law § 63(12) explicitly provides for restitution to affected persons as a "means to make the victims of past fraud whole again." Governor's Approval Mem, 1970 McKinney's Session Laws of NY, at 3074. The scope of the relief granted "is addressed to the sound judicial discretion of the court." *Princess Prestige*, 42 NY2d at 108.

M. The Court Should Order Respondents to Disgorge Their Ill-gotten Profits

Respondents should be required to disgorge their ill-gotten gains. In a proceeding brought by the Attorney General under Executive Law § 63(12), this Court may order "disgorgement – an equitable remedy distinct from restitution – of profits that [the] respondents derived." *Applied Card*, 11 NY3d at 125; *People v. Ernst & Young*, 114 AD3d 569, 569 (1st Dept 2014). The primary purpose of disgorgement is to deter law violations by depriving violators of their ill-gotten gains. *See People v. Ernst & Young*, 114 AD3d at 569; *People v. Greenberg*, 43 Misc.3d 1229[a] (Sup Ct, N.Y. Cnty 2014), *affd*, 127 A.D.3d (1st Dept 2015); *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F3d 73, 81 (2d Cir 2006). Therefore, the size of the disgorgement order "need not be tied to the [amount of] the losses suffered." *Id.* Respondents should be ordered to disgorge all profits they received from their deceptive or fraudulent conduct.

Those profits were massive. While paying minimal wages, raising census, and reducing staffing, the revenues from Medicaid and Medicare went up. The "savings" from staffing cuts instead paid the Respondents' "up front profits," which were drained from the facility in the form of inflated rent, a promissory note at exorbitant interest," fees to purported management and consulting companies owned by Respondents and outright transfers to the Respondents. From 2016 through 2021, Respondents converted over $22.6 million from Cold Spring Hills that should have been spent on resident care but was instead used to enrich themselves at the expense of Cold Spring Hills' residents.

N. The Court Should Order Respondents to Return Medicaid and Medicare Overpayments to The State.

Respondents are also liable for unjust enrichment. An unjust enrichment claim is equitable in nature and depends upon "broad considerations of equity and justice." (*Columbia Mem'l Hosp. v. Hinds*, 38 N.Y.3d 253, 275 [2022].) To recover under a theory of unjust

enrichment, a litigant must show that: "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Id.*) The "essential inquiry" is whether it would be against "equity and good conscience" to permit the respondents to retain what is sought to be recovered. (*Id.*)

Here, the State is entitled to recoup the Medicaid and Medicare overpayments made to Respondents to which they were not entitled because the services they claimed to have performed for such payments were either not provided or were so deficient as to be tantamount to neglect and mistreatment and wholly failed to conform with applicable laws and regulations. The Respondents were enriched through their receipt of Medicaid and Medicare funds at the State's and federal government's expense. It would be against equity and good conscience for the Respondents to retain these funds – the quality of services, including the fact that they be provided and conform to applicable laws and regulations, is undeniably material to the State: the provision of health care consistent with professional standards is a condition of participation in the Medicaid Program. (18 NYCRR §§ 504.6(d), 515.2(a)(3), 515.2(b)(12), 515.2(b)(1)(i)(a).) Neglect and mistreatment of residents reaches the very heart of the bargain struck with the Respondents to provide services to elderly, frail and/or disabled Medicaid beneficiaries.

Moreover, it would promote equity and good conscience to permit the State to recover Medicaid and Medicare overpayments from Respondents. Privity is not required for an unjust enrichment claim, as long as there is a connection between the plaintiff and the respondent that is "not too attenuated": "that is, the parties must have something akin to specific knowledge of one another's existence." (*Bashian & Farber, LLP v. Syms*, 173 A.D.3d 659, 662 [2d Dep't 2019].) "[T]he requirement of a connection between plaintiff and defendant is a modest one." (*Myun-Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60, 69 [2d Cir. 2018] [interpreting New York

law].) Through their relationship with The Villages, Telegraph, and other related entities, Respondents knew that The Villages was a Medicaid and Medicare provider and therefore received reimbursement from the State and federal governments, and, knew or should have known that The Villages was not entitled to payment due to its repeated and persistent neglect and inhumane treatment of its residents, and repeated and persistent understaffing of The Villages. Respondents nonetheless disregarded their commitment to the State and federal governments and withdrew said Medicaid and Medicare funds for themselves, rather than adequately funding The Villages.

O. <u>The Court Should Appoint a Financial Monitor, and a Healthcare Monitor.</u>

The Court should Appoint a financial monitor to oversee Cold Spring Hills financial operations and ensure that Cold Spring Hills ceases collusive and self-dealing payments, loans, and other transfers of value to the Respondents, with plenary powers visitation and inspection, and specific authority to withhold any payments to any Respondent or related person. Only a financial expert with plenary authority can counteract such deceptive practices and determine who among the staff of the management company are complicit in the harms.

P. <u>The Court Should Order Respondents to Pay Penalties for Their Repeated Violations of the Public Health Law and Medicaid Regulations.</u>

The Public Health Law and Social Services Law provides multiple grounds for the assessment of a civil penalty for violation of its provisions. 10 NYCRR 81.7(a) provides that "In addition to any other penalties prescribed by law, any person who commits an act of physical abuse, mistreatment or neglect or who fails to report such an act may be liable for a penalty pursuant to section 12 of the Public Health Law after an opportunity to be heard."

Monetary penalties may also be imposed for violation of Medicaid payment rules. 18 NYCRR Part 516. Courts routinely award penalties in civil enforcement cases brought by the New

York Attorney General. *See*, *e.g.*, *In re People v. Wilco Energy Corp.*, 284 AD2d 469, 474 (2d Dept 2001); *Allied Mktg. Group*, 220 AD2d at 370.

Q. <u>The Court Should Order Respondents to Pay Costs.</u>

CPLR § 8303(a)(6) provides that the court may award the Attorney General "a sum not exceeding two thousand dollars against each defendant" in a special proceeding pursuant to Executive Law § 63(12). Courts have routinely granted these costs. *See e.g.*, *Daro Chartours*, 72 AD2d at 873; *Midland Equities*, 117 Misc 2d at 208; *In re People v. Therapeutic Hypnosis Inc.*, 83 Misc 2d 1068, 1071-72 (Sup Ct, Albany County 1975), *revd on other grounds*, 52 AD2d 1017 (3d Dept 1976); *State of New York v. Hotel Waldorf-Astoria Corp.*, 67 Misc 2d 90, 92 (Sup Ct, N.Y. Cnty 1971). Therefore, an award of additional costs in the amount of $2,000 against each Respondent should also be granted.

R. <u>The Court Should Order Respondents to Pay Interest.</u>

New York CPLR § 5001(a) provides that prejudgment interest is mandatory on "a sum awarded because of . . . an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property. . . ." Interest runs at a rate of 9% per year. (CPLR § 5004(a)). Prejudgment interest is mandatory in an action for conversion. *Scotti v. Barrett*, 166 A.D.3d 698, 699 (2d Dep't 2018). In this action, prejudgment interest is thus mandatory on Petitioner's 63-c claim, which sounds in conversion. *See State v. Lower Esopus River Watch, Inc.*, 39 Misc. 3d 1241(A), at 1, 28 (Sup. Ct. Ulster Cnty. 2013) (granting prejudgment interest on Executive Law § 63-c claims); *cf. State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 259 (2002) (explaining that Executive Law § 63-c "did not create a new cause of action, but merely gave an additional remedy" and observing that the Executive Law § 63-c claim in that case "is in substance one for conversion"). Ordering prejudgment interest, the rate of interest, and the date from which it runs, is within the Court's discretion on equitable claims. *See* CPLR § 5001(a). Where, as here,

"damages were incurred at various times," the Court may order "interest [to] be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." *Id.* at § 5001(b). "[T]he purpose of awarding interest is to make an aggrieved party whole" by compensating them for the loss of use of the money when the wrongdoer possessed it. *Spodek v. Park Property Dev. Assocs.*, 96 N.Y.2d 577, 581 (2001).

The Court must order pre-judgment interest on Petitioner's claim for conversion. *See Scotti*, 166 A.D.3d at 699. In this case, given Respondents' extended pattern of fraud to hide and further the conversion, the Court should also order pre-judgment interest on the equitable claims, at the statutory rate of 9%. Ordering full pre-judgment interest is necessary to compensate the Medicaid and Medicare programs for the loss of use of millions of dollars for resident care. Interest should run on the funds that Respondents fraudulently and illegally withdrew from Cold Spring Hills.

The Court should further order post-judgment interest at the statutory rate of 9%. *See* CPLR §§ 5003, 5004.

CONCLUSION

For the reasons set forth in this memorandum, the Court should make a summary determination in the State's favor (and for the protection of the up to 588 residents of Cold Spring Hills) on all causes of action and grant injunctive relief, restitution, disgorgement, civil penalties and costs, as requested in the Verified Petition.

Dated: December 15, 2022

Respectfully submitted,

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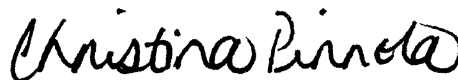
CERTIFICATION PURSUANT TO RULE 202.8-b

I, Christina Pinnola, an attorney duly admitted to practice law before the Courts of the State of New York, hereby certify that this Affidavit contains 13,053 words, excluding the parts of the Affidavit explicitly exempted by the Rule, and that Petitioner's request for permission to file an oversize submission as provided in Rule 202.8-b(f) is forthcoming. In preparing this certification, I have relied on the word count of the word processing system used to prepare this Affidavit.

Dated: Hauppauge, New York
December 15, 2022

Respectfully submitted,
Letitia James
Attorney General of the State of New York

By:



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