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

Petitioner, Index No. _____/22

-against-

FULTON COMMONS CARE CENTER, INC.; MOSHE KALTER; AARON FOGEL; FRADY KALTER; ESTHER FOGEL; MINDY STEGER; SHEINDY SAFFER; CHANA KANAREK; DOVID KALTER; YITZCHOK KALTER; ARYEH KALTER; SHEVA TREFF; CHAYA LIEBERMAN A/K/A SARA LIEBERMAN; THE NEW FULTON COMMONS COMPANY LLC; FULTON COMMONS REALTY CO., L.P.; FULTON COMMONS REALTY CO., INC.; THE NEW BRIDGE VIEW COMPANY LLC; STEVEN WEISS; and CATHIE DOYLE,

Respondents.
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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"), acting through the Medicaid Fraud Control Unit ("MFCU"), submits this Memorandum of Law in support of its Verified Petition pursuant to Executive Law § 63(12) against Fulton Commons Care Center, Inc. ("Fulton Commons"); Fulton Commons' owners, Moshe Kalter ("Kalter"), Aaron Fogel ("Fogel"), Frady Kalter, Esther Fogel, Mindy Steger, Sheindy Saffer, Chana Kanarek, Dovid Kalter, Yitzchok Kalter, Aryeh Kalter, Sheva Treff, and Chaya Lieberman a/k/a Sara Lieberman (collectively referred to hereinafter as "Respondent-owners"); Fulton Commons' related-party companies,[1] The New Fulton Commons Company LLC ("New Fulton"), Fulton Commons Realty Co., L.P. ("Fulton Realty LP"), Fulton Commons Realty Co., Inc. ("Fulton Realty Inc."), and The New Bridge View Company LLC ("New Bridge View") (collectively referred to hereinafter as "Corporate Respondents" or the "Fulton Commons Enterprise"); Fulton Commons' Comptroller, Steven Weiss ("Weiss"); and Fulton Commons' former administrator, Cathie Doyle ("Doyle") (collectively referred to hereinafter as "Respondents").

[1] As discussed below, nursing homes are required by law to file Cost Reports with the New York State Department of Health ("DOH"). (*See* 10 NYCRR Part 86-2.) The Cost Report and the instructions thereto also require, at several points, the disclosure of "related companies"—any company with which the operator has a "Non-Arm's Length Arrangement," as defined by Schedule 16:

> An arrangement between the operator of a facility and an organization related to the common ownership or control for the furnishing of services, facilities, or supplies; An arrangement where there is a family relationship between the operator and the organization, and where services, facilities, or supplies are furnished in instances where the operator and the organization are involved in any other business.

Throughout this Memorandum of Law, a company that meets the above definition will be referred to as a "related party" and multiple such companies will be referred to as "related parties."

By persistently violating the legal duties imposed upon them as the operators and/or governing body of a nursing home, Fulton Commons and Kalter, including through their agents, Weiss and Doyle, caused unnecessary death, neglect, abuse, mistreatment, illness, suffering, and indignity of the residents in Fulton Commons' care. Rather than properly operating Fulton Commons as a healthcare facility focused on quality patient care, Respondents treated Fulton Commons as nothing more than an investment vehicle guaranteed to generate substantial profits from government-funded healthcare and repeatedly disregarded the many laws specifically designed to protect the vulnerable individuals who called Fulton Commons "home."

In order to bring an end to the irreparable harm that Respondents' operation, ownership, management, control, and/or collusive financial arrangements have brought upon the residents of Fulton Commons through their repeated and persistent fraud and illegality since as early as January 1, 2018, the Attorney General seeks an order, inter alia: (a) permanently enjoining Respondents from engaging in the illegal and fraudulent conduct alleged in the Verified Petition; (b) directing Corporate Respondents, except Fulton Commons, and Respondent-owners to pay restitution to the State; (c) directing Respondents Fulton Commons LP, Fulton Realty, Inc., and Respondent-owners to fully account for and disgorge all monies wrongfully received; (d) appointing a financial monitor to oversee Fulton Commons' financial operations and ensure that Fulton Commons ceases collusive and self-dealing payments, loans, and other transfers of value to the Corporate Respondents and/or Respondent-owners; (e) appointing an independent healthcare monitor to oversee Fulton Commons' healthcare operations and ensure that Fulton Commons improves healthcare outcomes for its residents; (f) enjoining Fulton Commons from accepting any admissions of new residents until such time as Fulton Commons meets its obligations to ensure sufficient and adequate care and staffing for all existing residents and any new residents; (g)

directing Corporate Respondents, except Fulton Commons, and Respondent-owners to pay for the expenses of the monitors appointed; (h) requiring the establishment of a lawful governing body and directing the members of same to participate in quality assurance and performance ("QAPI") committee meetings; (i) removing Dr. Olaf Butchma from the position of Medical Director; (j) directing all Respondents, except Fulton Commons, to pay statutory penalties and pre- and post-judgment interest; and (k) directing all Respondents except Fulton Commons to reimburse the State for the costs of this investigation.

PRELIMINARY STATEMENT

By this Special Proceeding, Petitioner seeks permanent injunctive relief, restitution, disgorgement, and civil penalties for Respondents' repeated and persistent fraudulent and illegal conduct in the operation of and/or collusive financial arrangements with Fulton Commons—a for-profit nursing home located at 60 Merrick Avenue in East Meadow, New York. From January 1, 2018 through January 31, 2022, Respondent-owners, Fulton Realty LP, and Fulton Realty Inc.—facilitated by Respondents New Fulton, New Bridge View, and Weiss—converted at least $16,005,083.59 meant for resident care for their own benefit while Fulton Commons' residents suffered from neglect, abuse, and mistreatment largely due to insufficient and inadequate staffing.

The residents of Fulton Commons are vulnerable, frail, elderly, and disabled individuals, who are mostly beneficiaries of taxpayer-funded healthcare insurance programs such as the New York State Medical Assistance Program ("Medicaid") and Medicare. 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][1].) Every nursing home must provide each resident with the care, treatment, diet, and health services needed to attain their "highest practicable quality of life" (10 NYCRR §

415.1[a][2]) and must have sufficient staffing to provide adequate care. (*See* 10 NYCRR § 415.13; *see also* 10 NYCRR § 415.26; 42 CFR § 483.35.)

In violation of this "special obligation" (10 NYCRR § 415.1[a][1]), as detailed in the Verified Petition and its accompanying affidavits and attorney affirmation, Respondents repeatedly and persistently engaged in fraud and illegality.

Respondents' repeated and persistent fraud and illegality includes the repeated neglect, abuse, and mistreatment of many residents who suffered and died under the care of Respondents Fulton Commons, Kalter, Weiss, and Doyle, due to their violations of law; the conversion of more than $16 million in government-funded healthcare reimbursements that was taken from Fulton Commons by Respondent-owners and the Fulton Commons Enterprise through exorbitant rent paid to related-party landlord, Respondent Fulton Realty LP, and salaries paid to certain Respondent-owners for no-show jobs; the filing of false and misleading Cost Reports and Certification Statements for Provider Billing Medicaid with DOH; the violation of statutory limits on equity withdrawals and asset transfers from nursing homes without seeking prior approval from DOH; and the unjust enrichment of certain Respondents at the expense of vulnerable nursing home residents and the Medicaid and Medicare Programs. Respondents' repeated and persistent fraud and illegality in their operation of Fulton Commons and their conversion of funds—or the facilitation thereof—from the facility must be stopped through the imposition of injunctive and monetary relief.

In support of the Verified Petition, the State submits substantial evidence, including but not limited to the following: 14 affidavits of civilian witnesses, who were residents or family members of residents of Fulton Commons; the affidavits of MFCU investigative staffers: Senior Auditor-Investigator Kristen Ronan ("Ronan Aff."), reporting the results of various financial,

staffing, and resident care analyses; Detective John M. Tarpey ("Tarpey Aff."), reporting, inter alia, statements of witnesses who were unavailable to execute affidavits or whose statements were cumulative to affidavits submitted herewith; and Medical Analyst Mary E. Conway, Registered Nurse ("RN") ("RN Conway Aff."), providing a primer on the care needs of nursing home residents, describing the healthcare duties of nursing homes and the impact on residents when those duties are not fulfilled, and detailing specific findings of Fulton Commons' failure to provide adequate care; and the Affirmation of Special Assistant Attorney General Prabhjot Sekhon, appending all other exhibits ("Sekhon Aff.").

Much of the pain and indignity experienced by Fulton Commons' residents was preventable and future suffering can be averted if Respondent-owners, Fulton Realty LP, and Fulton Realty Inc. stop—voluntarily or by Court order—repeatedly illegally converting millions of dollars in Medicaid and Medicare funds from Fulton Commons as up-front profit,[2] and instead enable Fulton Commons to retain and spend necessary funds to improve resident care, hire and retain sufficient numbers of qualified and adequately-supervised staff, and comply with applicable laws designed to ensure nursing homes protect, rather than exploit, residents, and defer profits until after services are rendered in accordance with the law.

FACTS

All of the relevant facts are fully set forth in the Verified Petition, its accompanying affidavits and attorney affirmation, and the exhibits attached thereto, each of which is fully

[2] 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 to its residents, with sufficient staffing to render such care, is referred to herein as "up-front profit."

incorporated herein by reference. The following is a recitation of certain salient facts to illustrate Respondents' most egregious conduct.

Nursing homes are skilled nursing facilities that primarily provide subacute care, and in some cases, rehabilitation services, to frail, elderly, and disabled individuals, who are very much dependent on the nursing home staff for their complex medical needs as well as their basic human needs. Medicaid and Medicare reimburse nursing homes for the cost of providing care to eligible beneficiaries. In exchange for receiving taxpayer funding from the state and federal governments, nursing home operators are obligated to provide residents with quality care and treatment, dignity, respect, and a comfortable living environment.

Fulton Commons, a 280-bed nursing home, is primarily funded by Medicaid and Medicare. The nursing home is owned by two related families: the Kalters, who own 60%—Respondent Kalter (42%), his wife, Respondent Frady Kalter (10%), and their eight adult children, Respondents Mindy Steger, Sheindy Saffer, Chana Kanarek, Dovid Kalter, Yitzchok Kalter, Aryeh Kalter, Sheva Treff, and Chaya Lieberman a/k/a Sara Lieberman (collectively referred to hereinafter as the "Kalter-1% Owners") who each own 1% of Fulton Commons; and the Fogels—Frady Kalter's brother, Respondent Fogel (30%), and his wife, Respondent Esther Fogel (10%). Kalter is Fulton Commons' operator and governing body[3] and is the only owner who plays any role in Fulton Commons' operations or in negotiating its financial arrangements—often with the Fulton Commons Enterprise, which is comprised of related party entities also controlled by Kalter—namely, Fulton Realty LP, owner of the real property and Fulton Commons' landlord;

[3] Each nursing home in New York State is required to have a "governing authority or operator" recognized by DOH that is "the party responsible for the operation" of the nursing home. (*See* 10 NYCRR § 600.9.) The "governing authority or operator" is also referred to in New York State regulations as the "governing body." (*See, e.g.*, 10 NYCRR § 415.27.) Fulton Commons and Kalter comprise Fulton Commons' governing body.

New Fulton, which is responsible for handling all of Fulton Commons' operational expenses and is the actual employer of all individuals, including nursing staff, who purportedly render services to Fulton Commons; and New Bridge View, Respondent Weiss's employer and the centralized business office for four related party nursing homes, which are owned in part, operated, and controlled by Kalter—Fulton Commons, Midway Nursing Home ("Midway"), Mayfair Care Center ("Mayfair"), and Bridge View Nursing Home ("Bridge View"). (*See* Pet. at ¶¶ 42–43.) Midway, Mayfair, and Bridge View are collectively referred to herein as the "Sister Facilities."

I. Respondents Fulton Commons, Kalter, Weiss, and Doyle Repeatedly and Persistently Violated Residents' Rights Through Repeated Neglect, Abuse, and Mistreatment

As set forth in the Verified Petition and its supporting affidavits and attorney affirmation, since at least January 1, 2018, Respondents Fulton Commons, Kalter, Weiss, and Doyle have repeatedly failed to comply with a multitude of state and federal laws, rules, and regulations designed to protect and promote the well-being of nursing home residents, thereby causing significant harm to residents and their families. These egregious failures in resident care, often the result of the persistent failure to staff the nursing home adequately, include but are not limited to: inadequate supervision leading to residents sustaining grave injuries, including fractures, bruises, and face-disfiguring lacerations; horrific wounds and amputations; preventable harm from significant medication errors and the failure to render necessary treatments; preventable hospitalizations; and grossly inadequate nursing staffing. As a result of inadequate nursing staffing, residents: went unmonitored with their conditions unassessed; were left crying in pain for prolonged periods without assistance; were forced to sit in soiled briefs after failing to receive toileting assistance and/or incontinence care for hours; did not receive necessary assistance with basic grooming and hygiene; were not provided with appropriate physical therapy services; lost mobility and independence; and suffered malnutrition and hunger from insufficient, inappropriate,

and unpalatable nutrition. Specific examples of the harm caused to residents from inadequate staffing include: nursing staff standing by as a non-ambulatory resident suffering from dementia crawled on the floor; at least two unreported instances of sexual abuse by a licensed practical nurse ("LPN") who was allowed continued access to vulnerable residents for approximately two years after the earliest unreported incident that was known to Fulton Commons and Doyle; non-existent infection control during the first wave of the COVID-19 pandemic,[4] including the failure to heed guidance from the on-staff infection preventionist ("IP") along with interspersing COVID-19 infected residents with uninfected residents, likely contributing to 74 resident deaths from COVID-19 in a three month period; falsification of a medical record to conceal inadequate treatment; and falsifying infection control training records to make it appear as though staff received required training when they had not.

In light of the deplorable conditions at Fulton Commons, it is unsurprising that in April 2022, the federal Centers for Medicare and Medicaid Services ("CMS") lowered Fulton Commons' inflated Overall rating from 5-Stars (out of 5) to 2-Stars—a "BELOW AVERAGE" rating. (*See* Pet. at ¶ 11.) CMS also placed Fulton Commons on the candidate list for its Special Focus Facility ("SFF") Program, where it joins the ranks of the poorest performing nursing homes in the country. (*Id.* at ¶¶ 11, 136–138.)

The latest evidence of the indignities suffered by Fulton Commons' residents came in the form of Nassau County Indictment No. 1454N-22, unsealed on November 30, 2022, charging Fulton Commons, former Fulton Commons LPN Daniel Persaud, and former Fulton Commons

[4] The first wave of the COVID-19 pandemic refers to the period between March 1, 2020 and May 31, 2020.

Director of Nursing ("DON") Carol Frawley with 13 counts in total, including several felonies, arising from the unreported sexual abuse of residents by LPN Persaud. (*See* Pet. at ¶ 12.)

II. Respondents Fulton Commons, Kalter, Weiss, and Doyle Repeatedly and Persistently Unlawfully Operated Fulton Commons with Insufficient and Unqualified Staff, in Violation of 10 NYCRR §§ 415.13 and 415.26(c) as well as 42 CFR § 483.35, Resulting in the Appalling Neglect, Abuse, and Mistreatment of Fulton Commons' Residents

It is no surprise that Fulton Commons neglected, abused, and mistreated its residents in light of its woeful understaffing, evidenced by, inter alia, its persistently dismal CMS staffing ratings from as early as 2016. (*Id*. at ¶ 146.) Despite their legal obligation under 10 NYCRR § 415.13 to hire a qualified medical team and sufficient staff to provide each resident with necessary care according to their individualized plans of care, Respondents Fulton Commons, Kalter, Weiss, and Doyle instead chose to prioritize up-front profit and persistently failed to adequately staff the nursing home to meet this legal duty. This intentional reduction in expenses to maximize revenue inevitably led to dismal resident care as the existing staff were left in an impossible situation and could not feasibly provide proper care for all of the nursing home's residents.

As part of its health oversight duties, CMS evaluates and compares nursing homes nationwide based on several quality measures and metrics. (*See* Ronan Aff. at ¶ 73.) From as early as January 2016 through the most recently released ratings in October 2022, CMS nearly consistently rated Fulton Commons' Overall Staffing and RN Staffing levels as 1-Star ("MUCH BELOW AVERAGE") or 2-Star ("BELOW AVERAGE"). (*Id*. at ¶ 74.) The sole exception to these pitiful ratings was a single quarter starting in July 2021, when they finally achieved a 3-Star ("AVERAGE") rating for one quarter. (*Id*.)

Fulton Commons' inadequate staffing levels—particularly when it came to supervisory nursing staff—are also evident from a targeted review of their staffing records, which reveals that from January 1, 2020 through May 31, 2020, January 1, 2021 through March 31, 2021, and in

January 2022, Fulton Commons failed to meet the target staffing level for RNs that a CMS study found minimized quality-of-care issues. (*See* Pet. at ¶¶ 164, 174–175.)

Respondents Fulton Commons, Kalter, Weiss, and Doyle's failure to adequately staff the nursing home is further demonstrated by the numerous family members who were forced to either make out of pocket payments to Fulton Commons' staff in the hopes that their loved ones' care would then be prioritized, or to take on the role of staff themselves and provide the custodial care that Fulton Commons was paid to but failed to provide. (*Id*. at ¶¶ 152–156.) Multiple family members reported having no choice but to provide various grooming services to their loved ones, including oral, nail, and hair care. (*Id*. at ¶ 154.)

Fulton Commons' dangerously poor care was only exacerbated by the COVID-19 pandemic, which isolated residents from their family members and forced them to rely entirely on nursing home staff (*id*. at ¶ 156), who acknowledged being unable to provide all the necessary care to the residents—before, during, and after the first wave of the COVID-19 pandemic. (*Id*. at ¶¶ 150–151.) Indeed, Fulton Commons did not even adequately utilize the staff it had during the pandemic, and intentionally sidelined its IP, refusing to implement necessary infection control protocols, which likely led to rampant COVID-19 infections throughout the facility and 74 deaths in a three-month period. (*Id*. at ¶¶ 99–104.)

III. "Just the Numbers": Respondent Kalter, Owner, Operator, and Governing Body of Fulton Commons, Failed to Meet His Legal Responsibility to Provide Adequate Care, Focusing Only on the Nursing Home's Revenue and His Extraction of Up-Front Profit

By admittedly focusing on nothing other than the resident census and bank account balances (*id*. at ¶¶ 201, 203), Kalter, as the owner, operator, and governing body of Fulton Commons, flagrantly disregarded his legal duty to ensure that Fulton Commons was in compliance with all state and federal laws, rules, and regulations. Kalter's dereliction of his duties as the

operator and governing body of Fulton Commons is evidenced by, inter alia: (1) his lack of involvement in the creation and implementation of Fulton Commons' policies and procedures (*id*. at 192); (2) the fact that he never met with or spoke to Respondent Doyle, the facility's administrator from September 2016 to November 16, 2022 (*id*. at ¶ 191); (3) his failure to ensure Fulton Commons maintained sufficient staffing levels (*id*. at 194); and (4) his failure to participate in mandated QAPI committee meetings and to review QAPI reports (*id*. at 198–200).

Respondent Kalter has received significant financial benefit from the facility but has shirked his direct responsibility for Fulton Commons, its employees, and its residents. (*Id*. at ¶¶ 181–221.)

IV. Respondent-Owners, Fulton Realty LP, and Fulton Realty Inc. Converted Millions in Government Funds Through Self-Dealing Financial Arrangements Disguised as Bona Fide Business Expenses

Between January 1, 2018 and January 31, 2022, Respondent-owners and Respondent Fulton Realty LP converted over $16 million in Medicare and Medicaid funds mainly through two fraudulent and illegal schemes: (1) a collusive real estate arrangement that obligated Fulton Commons to pay Fulton Realty LP an exorbitantly inflated rent; and (2) salaries paid to the Kalter-1% Owners by New Fulton for no-show jobs at Fulton Commons. (*Id*. at ¶¶ 205–225, 229–236.)

As the operator of Fulton Commons and the controlling owner of Fulton Realty LP, Kalter negotiated a verbal triple-net lease *with himself* pursuant to the terms of which Fulton Commons paid rent that was far in excess of actual property costs. (*Id*. at 205–208.) In fact, over the course of four years, Fulton Commons paid $14,913,403 in "excess rent,"[5] $12.1 million of which was transferred to Kalter in the form of sham management fees (more than $8 million) for the "work he [did] for Fulton Realty LP," which Kalter admitted was limited to the one-time acquisition of

[5] Excess rent refers to Fulton Commons' rent minus Fulton Realty LP's property expenses.

the real property, or distributions (at least $3.7 million). (*Id*. at ¶ 216.) Fogel received over $2.68 million in the form of distributions from Fulton Realty LP. (*Id*. at ¶ 220.)

Secondly, Kalter, with the assistance of Respondents New Fulton, New Bridge View, and Weiss, placed his eight adult children, the Kalter-1% Owners, on New Fulton's payroll in sham employment positions. Despite providing no services to Fulton Commons, the Kalter-1% Owners collectively received over $1 million in salaries paid for no-show jobs along with fraudulent annual W-2 statements for the period between January 1, 2018 and January 22, 2022. (*Id*. at ¶¶ 229–236.)

In addition to the conversion schemes described above, while the residents of Fulton Commons were languishing under the care of Respondents Fulton Commons, Kalter, Doyle, and Weiss, Fulton Commons was deprived of $9 million, which was transferred out of the nursing home to benefit Kalter's other investments, namely the Sister Facilities. Kalter has historically treated Fulton Commons as his alter ego, causing Fulton Commons to repeatedly transfer funds to other companies he controlled, including the Sister Facilities, thereby disregarding its corporate form and using its assets to fund his other business interests while rendering those funds unavailable to spend on resident care at Fulton Commons. (*Id.* at ¶¶ 226–228.).

V. Respondent Kalter Caused Fulton Commons to File False and Misleading Cost Reports by Falsely Certifying that Expenses with No Legitimate Business Purpose Were Incurred to Provide Patient Care in the Facility

Every nursing home in New York State is required to file an annual Cost Report with DOH pursuant to 10 NYCRR Part 86-2 to report income, expenses, assets, liabilities, and certain statistics. For the years 2018 through 2021, Respondent Kalter caused Fulton Commons to falsely represent to DOH that all reported salaries, including those paid to Respondent Kalter-1% Owners for no-show jobs, were incurred to provide patient care in the facility. During this time period, Kalter also repeatedly falsely certified that Fulton Commons' Cost Reports were "true and

complete." (*Id*. at ¶ 243.) Fulton Commons' Cost Reports thus prevented DOH from learning the truth about the magnitude of monies that Respondent-owners diverted away from resident care.

VI. Respondent Kalter Repeatedly and Persistently Committed Fraud and Illegalities by Violating Equity Disclosure and Withdrawal Limits for Nursing Home Owners

Respondent Kalter further committed fraud by repeatedly making withdrawals of equity and/or transfers of assets from Fulton Commons above statutorily prescribed limits—3% of the prior year's revenue (the "3% Rule") (*see* Public Health Law § 2808[5][c])—without seeking approval from DOH. (*See* Pet. at ¶¶ 244–253.) Kalter never sought permission from DOH at any time between 2018 and 2021, before withdrawing more than 3% of Fulton Commons' previous year's revenue, yet he repeatedly violated the 3% Rule by charging the nursing home exorbitantly inflated rent, in order to receive distributions from Fulton Realty LP, and by paying salaries to the Kalter-1% Owners for no-show jobs. In fact, between 2018 and 2021, Kalter failed to seek approval from DOH for the withdrawal of equity and/or the transfer of assets totaling more than $11.5 million from Fulton Commons. (*Id*. at 252.) This failure was particularly egregious in 2020, when Kalter failed to seek approval from DOH for the withdrawal and/or transfer of more than 9% of Fulton Commons' equity/assets, the removal of which resulted in Fulton Commons ending the year with a negative net worth position, in violation of Public Health Law § 2808(5)(a) and 10 NYCRR §§ 400.19(b)(1) and 415.26(h)(7). (*See* Pet. at ¶¶ 222–225, 252.)

VII. Respondent Kalter Repeatedly and Persistently Violated Conditions of Participation in the Medicaid Program in His Operation of Fulton Commons and Submitted False Certifications on Behalf of Fulton Commons to DOH

Nursing homes must meet certain conditions of participation in order to continue participating in the Medicaid Program. (*See* 18 NYCRR § 515.2[b].) An unacceptable practice under the Medicaid Program is defined as "conduct which constitutes fraud or abuse," including

but not limited to the submission of false claims for services not rendered, making or causing to be made any false, fictitious, or fraudulent statement or misrepresentation of material fact in claiming a Medicaid payment; or converting Medicaid payments, in whole or in part, "to a use or benefit other than the use and benefit intended by [Medicaid]." (18 NYCRR §§ 515.2[b][1][a], [2], [4].) Despite Respondents Fulton Commons, Kalter, Weiss, and Doyle's repeated and persistent violations of a multitude of state and federal laws, rules, and regulations designed to protect nursing home residents, Respondent Kalter annually falsely certified to DOH that all of Fulton Commons' Medicaid claims were submitted for services provided in accordance with all federal and state laws and regulations. (*See* Pet. at ¶¶ 240–243, 255–257.)

STATUTORY FRAMEWORK

I. Summary Proceedings

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." (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, NY Prac § 547 at 1054 [6th ed 2018].) The legislative purpose for allowing a Special Proceeding under Executive Law § 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, NY County 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[b].) 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, Rosenblatt, J., dissenting] [internal citation omitted].)

II. Statutory Authority

MFCU 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 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 its Medicaid and Medicare Program regulations to investigate and prosecute provider fraud and nursing home resident abuse and neglect. (*See* Executive Law § 63[12]; 42 USC § 1396b[q]; 42 CFR § 1007.11[a].)[6] The Attorney General is authorized by the Inspector General of the United

[6] Under federal law, "(a) [MFCU] 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: (1) Fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers. (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 [MFCU] 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) [MFCU] will also review complaints

States Department of Health and Human Services to recover federal Medicare funds in this proceeding. (*See* Pet. at ¶ 31; s*ee People v Miran*, 107 AD3d 28, 39 [4th Dept 2013] [holding that federal Medicare recovery is within MFCU jurisdiction].)

A claim under Executive Law § 63(12) can seek relief for repeated or persistent fraud and/or repeated or persistent illegality. Here, the Attorney General brings claims on both grounds, as Respondents Fulton Commons, Kalter, Weiss, and Doyle persistently and illegally neglected nursing home residents entrusted to their care while Respondent-owners, Fulton Realty LP, and Fulton Realty Inc. repeatedly and persistently obtained millions of dollars in public funds by engaging in the fraudulent financial practices that brought about such neglect as detailed *supra*.

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 under Executive Law § 63(12). (*See*, *e.g.*, *Lefkowitz v Bull Inv. Group*, 46 AD2d 25, 28 [3d Dept 1974] ["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"] [internal citations omitted].) 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). (*See*

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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. (2) At the option of [MFCU], it may review complaints of abuse or neglect, including misappropriation of funds or property, of patients or residents of board and care facilities, regardless of whether payment to such facilities is made under Medicaid." (42 CFR § 1007.11; *see also* 42 USC § 1396b[q].)

People v Apple Health & Sports Clubs, Ltd., 206 AD2d 266, 267 [1st Dept 1994] [noting that Executive Law § 63(12) broadly construes the "definition of fraud so as to include acts characterized as dishonest or misleading and eliminating the necessity for proof of an intent to defraud"]; *see also State v Ford Motor Co.*, 136 AD2d 154, 158 [3d Dept 1988].) 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, 107 [3d Dept 2005].)

Here the Respondents have created a scheme and "artifice" in the core sense of the words—a structure designed from the outset to take money out of the facility and away from resident care in a manner that ensures that the Respondents take profit immediately, automatically, and repeatedly, regardless of the quality of care the nursing home provides or whether it complies with its legal duties. Further, Respondents designed a structure to obscure their fraudulent financial transactions behind a web of shell companies and complicit individuals.

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). (*See, e.g., 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, NY County 1982] [holding that career counseling service that operated as an employment agency without a license and improperly took up-front fees violated Executive Law § 63[12]'s prohibition on illegality].)

Both fraud and illegality must be repeated or persistent, each of which is 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]; *see, e.g.*, *People v Wilco*

Energy Corp, 284 AD2d 469, 471 [2d Dept 2001]; *Empyre*, 227 AD2d at 733 [citing directly to Exec. Law § 63[12]].) "Persistent" is defined as "continuance or carrying on of any fraudulent or illegal act of conduct." (Exec. Law § 63[12].) In this matter, as shown in the Verified Petition and its supporting affidavits and attorney affirmation, there is no question that fraud and illegality are embedded in Respondents' business model, and that hundreds of nursing home residents were repeatedly and persistently neglected, abused, and mistreated.

Moreover, the Attorney General is empowered under the Tweed Law to investigate the misappropriation and misuse of any government funds. (*See* Exec. Law § 63-c; *see also Cuomo v Ferran*, 77 AD3d 698, 701 [2nd Dept 2010]; *State of New York v Franklin Nursing Home*, 65 AD2d 788, 788 [2d Dept 1978] [Attorney General on behalf of State may recover Medicaid overpayments].) Respondent-owners and Respondents Fulton Realty LP and Fulton Realty Inc.'s conversion of Medicaid and Medicare funds meant for resident care for their own enrichment clearly qualifies as public money "without right obtained" that the Attorney General is statutorily empowered to recoup. (Exec. Law § 63-c[1].) Finally, Respondents Fulton Commons, Fulton Realty LP, Fulton Realty Inc., and Respondent-owners were similarly unjustly enriched at the expense of the Medicaid and Medicare Programs as they unjustly, and under false pretenses, received millions of dollars for services not rendered to Fulton Commons' residents.

ARGUMENT

I. Respondents Have Engaged in Repeated and Persistent Fraudulent Conduct in Violation of Executive Law § 63(12)

As noted above, fraud under Executive Law § 63(12) is defined more broadly than common law fraud, with liability turning on whether the act "has the capacity or tendency to deceive, or

creates an atmosphere conducive to fraud." (*Applied Card*, 27 AD3d at 105 [*quoting State of New York v Gen. Elec.*, 302 AD2d at 314, 316–317 (1st Dept 2003).])

Under this standard, the State's evidence overwhelmingly demonstrates that Respondents engaged in fraud in violation of Executive Law § 63(12), in five principal ways. First, Corporate Respondents, Respondent-owners, and Respondent Weiss engaged in fraud by repeatedly and persistently converting Medicaid funds to line the pockets of the Respondent-owners instead of using them to care for vulnerable nursing home residents. Second, Corporate Respondents and Respondents Kalter, Fogel, and Weiss repeatedly and persistently caused Fulton Commons to pay inflated rent to a company owned by Kalter and Fogel to increase their profits. Third, Respondents Fulton Commons and Kalter repeatedly and persistently filed or caused Fulton Commons to file false and misleading Cost Reports and Certification Statements for Provider Billing Medicaid with DOH. Fourth, Respondents Fulton Commons and Kalter repeatedly and persistently violated statutory limits on owner or operator equity withdrawals and/or asset transfers by failing to seek approval from DOH before withdrawals of equity and/or transfers of assets from Fulton Commons that created a negative net worth position in 2020, and repeatedly and persistently violated statutory limits on owner or operator equity withdrawals and/or asset transfers by withdrawing and/or transferring more than 3% of Fulton Commons' prior year's revenue or assets without express permission from DOH. Fifth, Respondents Fulton Commons, Kalter, Weiss, and Doyle repeatedly deceived DOH as well as current and prospective residents and their families as to the deficient care delivered at Fulton Commons. Respondents used these five schemes to commit fraud by obfuscating from DOH and the public how much of Fulton Commons' Medicaid and Medicare funds Respondent-owners were siphoning off to enrich themselves. These schemes "ha[ve] the capacity or tendency to deceive" and Respondent-owners actually used "deception[s],

misrepresentation[s] [and] concealment[s]" to commit these frauds. (*See Applied Card*, 27 AD3d at 106 n.1.)

A. Corporate Respondents, Respondent-Owners, and Respondent Weiss Engaged in Fraud Through Repeated and Persistent Conversion of Medicaid Funds Via Related-Party Transactions

Corporate Respondents, Respondent-owners, and Respondent Weiss, through their agents and employees, repeatedly engaged in fraudulent acts and/or demonstrated persistent fraud by converting $16,005,083.59 in up-front profit from Medicaid and Medicare funds that Fulton Commons received for resident care, through their schemes of charging exorbitantly inflated rent and paying salaries for no-show jobs.

Respondents Fulton Realty LP, Fulton Realty Inc., Kalter, and Fogel, facilitated by Respondents New Fulton, New Bridge View, and Weiss, imposed inflated rent obligations on Fulton Commons and pocketed the excess rent, or the amount above the property expenses. At the same time, Respondents Kalter-1% Owners, facilitated by New Fulton, New Bridge View, Kalter and Weiss, converted taxpayer funds that Fulton Commons received for resident care for their own use through sham salaries for no-show jobs. Through such transactions, Respondent-owners, Fulton Realty LP, and Fulton Realty Inc. kept the Medicaid and Medicare dollars for themselves, maximizing their profits at the expense of resident care.

As a result, Corporate Respondents, Respondent-owners, and Weiss's' repeated and persistent use of related-party transactions to convert $16,005,083.59 Medicaid and Medicare dollars away from resident care and into their own pockets undeniably constitutes fraud.

B. Corporate Respondents and Respondents Kalter, Fogel, and Weiss Engaged in Fraud Through Repeated and Persistent Collusive and Inflated Real Estate Transactions

Corporate Respondents and Respondents Kalter and Fogel, through their agents and employees, including Respondent Weiss, repeatedly engaged in fraudulent acts and/or demonstrated persistent fraud by entering into a collusive and self-dealing lease agreement obligating Fulton Commons to pay artificially high rent to related-party Fulton Realty LP. Specifically, Respondent Kalter, facilitated by Respondents New Fulton, New Bridge View, and Weiss, committed fraud by causing Fulton Commons to enter into an unwritten lease agreement with Fulton Realty LP, pursuant to the terms of which Fulton Commons was obligated to pay exorbitantly inflated rent, which was well beyond the fair market value of the property—indeed, amounting to the highest percentage of rent to revenue of any Medicaid and Medicare-certified nursing home on Long Island in 2018 and 2020, and the tenth and fourth highest for such homes in the State in those years, respectively. Respondent Kalter utilized this rent scheme, set forth in full in the Verified Petition (*see* Pet. at ¶¶ 205–225), to transfer millions of dollars out of Fulton Commons into the bank accounts of Fulton Realty LP, and from there into his and Fogel's pockets through sham management fees and the payment of distributions.

Fulton Commons' unnecessary and inflated rental obligations are fraudulent within the meaning of Executive Law § 63(12) because they are self-dealing transactions that have the "capacity or tendency to deceive." (*Gen. Elec.*, 302 AD2d at 314.) Respondents' collusive real estate transactions were part of a broader scheme to hide from DOH, Medicaid, and the public where the Medicaid funds were actually going—to Kalter and Fogel, as the owners of Fulton Realty LP (and Kalter as the owner of Fulton Realty Inc.), rather than to resident care. (*See* Pet. at ¶¶ 205–225.) This duplicity allowed Kalter and Fogel to circumvent the 3% Rule under the Public

Health Law because distributions were not paid directly from the nursing home, but rather from Fulton Realty LP, which charged rent at a mark-up of anywhere between 50.38 and 94.6% in the years 2018 to 2021. (*See* Ronan Aff. at ¶ 53.) Kalter also received yearly management fees from Fulton Realty Inc., often in excess of $3 million, simply for the one-time acquisition of the mortgaged property. (*See* Pet. at ¶¶ 216, 219.)

Respondents' fraudulent real estate transactions falsely appeared to be the cost of doing business in New York, while these obligations were actually conduits to move money out of Fulton Commons and into Kalter and Fogel's pockets. (*Id*. at ¶¶ 205–225) Respondents' actions also "create[d] an atmosphere conducive to fraud" in the for-profit nursing home industry, by inflating the statewide rent to revenue ratios for nursing homes, thereby encouraging other nursing home owners to charge inflated rents to their homes. (*See* Pet. at ¶¶ 211–212; *see also Gen. Elec.*, 302 AD2d at 314.)

C. Respondents Fulton Commons and Kalter Engaged in Fraud Through Repeated and Persistent Violations of Limits on Owner Equity Withdrawals and in Filing False and Misleading Cost Reports and Medicaid Provider Certifications

Respondents Fulton Commons and Kalter, through their agents and employees, further repeatedly committed fraudulent acts and/or demonstrated persistent fraud by: (1) failing to seek approval from DOH for withdrawals of equity and/or transfers of assets from Fulton Commons in excess of the disclosure threshold—3% Rule—in violation of Public Health Law § 2808(5)(c) (*see* Pet. at ¶¶ 244–253); (2) failing to seek approval from DOH before withdrawals of equity and/or transfers of assets from Fulton Commons that created a negative net worth position in 2020, in violation of Public Health Law § 2808(5)(a) and 10 NYCRR §§ 400.19(b)(1) and 415.26(h)(7) (*Id*. at ¶¶ 222–225); (3) preparing, filing, and/or causing to be filed with DOH false and/or misleading

Cost Reports that falsely designated equity distributions to Respondent Kalter-1% Owners as salaries for no-show jobs and falsely asserted that such purported salaries were incurred to provide patient care at Fulton Commons (*Id*. at ¶¶ 238–243); and (4) submitting false Certification Statements for Provider Billing Medicaid to DOH, in which Kalter falsely attested that the Medicaid claims submitted by Fulton Commons were for care and services actually furnished and performed in accordance with applicable laws. (*Id*. at ¶¶ 254–257.)

First, Respondent Kalter committed fraud by repeatedly and persistently withdrawing equity and/or transferring assets from Fulton Commons in excess of 3% of the prior year's revenue, without first obtaining permission from DOH. The legislature enacted the 3% Rule within Public Health Law § 2808(5) to prevent the "precipitous withdrawals of substantial facility equity or assets for non-facility purposes . . ." as such withdrawals "may impair facility operations and thus occasion detriment to the welfare of an utterly reliant resident population." (*Brightonian Nursing Home v Daines*, 21 NY3d 570, 574 [2013].) This limit applies to all nursing homes because the legislature recognized that "the liquidity of even . . . facilities [with positive net worth] may be rendered insufficient to meet their day-to-day operating expenses thus impairing the satisfaction of institutional care and treatment obligations." (*Id*. at 576.) The statute and its associated regulations merely impose a delay so that DOH can review the "financial condition of the facility and its quality of care record" before deciding whether the withdrawal should be permitted. (*Id*. at 578–579.) As the Court of Appeals observed when upholding the constitutionality of the statute, excess withdrawals of equity or transfers of assets could "occasion irreparable harm within an especially fragile and dependent resident population" at nursing homes. (*Id.* at 578.)

DOH has defined the "withdrawals" covered by the 3% Rule to include:

> (i) any transfer of a facility's cash or other assets directly or indirectly to or for the benefit of its operator;

> . . .
>
> (iii) any liability incurred within any period of time required for financial reporting in accordance with Part 86 of this Title by a facility or its operator by reason of a mortgage, lease, borrowing or other transaction relating to such a facility that exceeds, in the aggregate, $50,000;
>
> . . .
>
> (v) payment to the operator or owner of a salary in excess of the maximum amount allowed for reimbursement purposes by the Department of Health.

(10 NYCRR § 400.19[a][3].)

Here, the related-party transactions, which Kalter used to funnel money to himself and his family members, are transfers of a nursing home's "cash or other assets directly or indirectly to or for" Kalter's benefit. (*Id*.) The unwritten lease agreement whereby Kalter, Fogel, and Fulton Realty Inc., as the owners of Fulton Realty LP, placed exorbitant rent obligations on Fulton Commons and profited substantially from the millions of dollars of excess rent, are liabilities "incurred . . . by a facility or its operator by reason of a . . . lease." (*Id*.) Additionally, New Fulton, through the machinations of Kalter and Weiss, paid the Kalter-1% Owners "a salary in excess of the maximum amount allowed" by DOH each year between 2018 and 2021, as those salaries were paid for no-show jobs. (*Id*.) As discussed in the Verified Petition, Fulton Commons' equity withdrawals and/or transfers of assets exceeded the 3% threshold between 2018 and 2021—and caused a negative net worth position in 2020—yet Kalter failed to seek DOH permission for his withdrawals in any of those years, further indicating his repeated and persistent fraudulent conduct. (*See* Pet. at ¶¶ 222–225, 244–253.)

Respondents Fulton Commons and Kalter managed to complete these withdrawals—totaling $11,576,151.53 in withdrawals of equity and/or transfers of assets in violation of the 3% Rule during the years 2018 through 2021—by "conceal[ing]" them from DOH and not seeking permission as required by statute and regulation. As a result of these "dishonest [and] misleading"

withdrawals of nursing home equity and/or transfers of nursing home assets without permission, through the sham lease and the salaries for Kalter's children's no-show jobs, Respondents Fulton Commons and Kalter committed fraud within the meaning of Executive Law § 63(12.) (*Apple Health*, 206 AD2d at 267.) The "irreparable harm" that the Court of Appeals identified came to pass, as set forth at length above and in the Verified Petition: Respondent-owners, Fulton Realty LP, and Fulton Realty Inc. withdrew so much money from Fulton Commons that the nursing home could not provide required care to the "especially fragile and dependent resident[s]." *(Brightonian*, 21 NY3d at 578.) The result of Corporate Respondents, Respondent-owners, and Weiss's fraud is needless pain and suffering by Fulton Commons' residents.

In addition, Respondents Fulton Commons and Kalter further committed fraud by repeatedly and persistently filing annual Cost Reports between 2018 and 2021 wherein Kalter falsely certified that all reported salaries, including those paid to Respondent Kalter-1% Owners for no-show jobs, were paid to provide patient care in the facility. Similarly, Kalter falsely attested in annual Certification Statements for Provider Billing Medicaid that the Medicaid claims submitted by Fulton Commons were for care and services actually furnished and performed in accordance with applicable laws, all while the care at Fulton Commons was in violation of virtually every New York State regulation governing nursing homes.

The false statements in the nursing home's Cost Reports and the false certifications are literal "misrepresentation[s]" and "concealment[s]" within the meaning of Executive Law § 63(12). In addition, these misrepresentations served to further the Kalter-1% Owners' fraudulent salaries. By lying to DOH about the true nature of the salaries—namely, that they were actually distributions to the nursing home's minority-share owners—Respondents made their frauds harder to detect. Fulton Commons' false Cost Reports thus "have the capacity or tendency to deceive"

because they literally misrepresent the nursing home's financial relationships. (*Applied Card*, 27 AD3d at 106; *see also People v Katz*, 16 Misc 3d 1104[A], 2007 NY Slip Op 51258[U], at *3 [Sup Ct, NY County, June 4, 2007] ["prepar[ing] and submit[ting] . . . documents which misrepresented the nature of the [challenged] transactions" constitutes fraud under Executive Law § 63(12)].) Respondents' pattern of these false statements over several years renders this fraud repeated and persistent.

D. Respondents Fulton Commons, Kalter, Weiss, and Doyle Engaged in Fraud by Repeatedly Creating a Culture of Cover-Up to Conceal the Rampant Resident Neglect, Abuse, and Mistreatment at Fulton Commons

The financial frauds perpetrated by Respondents foreseeably resulted in the facility's residents being neglected, abused, and mistreated. Respondents Fulton Commons and Kalter, through their agents Weiss and Doyle, fraudulently attempted to conceal the home's poor performance and health outcomes by deceiving government health oversight agencies, including DOH and CMS, and current and prospective residents and their family members as to the true nature of the conditions within the nursing home—specifically, that Respondents Fulton Commons and Doyle, with at least the tacit approval of Kalter and Weiss: (1) subjected Fulton Commons' residents to acts of neglect, abuse, and mistreatment; (2) failed to report acts of neglect, abuse, and mistreatment to DOH and/or law enforcement; and (3) engaged in a culture of cover-up to conceal the rampant resident neglect, abuse, and mistreatment, especially during the first wave of the COVID-19 pandemic. (*See* Pet. at ¶¶ 41–138.)

As outlined in the Verified Petition, Respondent Doyle, with at least the implicit approval of Respondents Kalter and Weiss, created a culture of cover-up and deceit at Fulton Commons, regularly prioritizing her self-interests and the facility's financial interests above the healthcare

needs of the residents. This was never more obvious than during the first wave of the COVID-19 pandemic, when Doyle sidelined Fulton Commons' IP and engaged in a massive, coordinated scheme to conceal the nursing home's poor infection control performance, which likely led to the decimation of its census from presumed COVID-19 infections. (*Id*.) During the first wave of the pandemic, Respondent Doyle directed and orchestrated this fraudulent scheme by intentionally: (1) underreporting COVID-19 resident deaths to DOH (*id*. at ¶¶ 118–119); (2) disregarding clear DOH infection control guidance (*id*. at ¶¶ 108–114); (3) repeatedly sending false robocalls to family members denying there was COVID-19 in Fulton Commons (*id*. at ¶¶ 120–122); (4) falsely announcing to staff that there was no COVID-19 in the building (*id*. at ¶ 123); (5) directing staff to refrain from informing family members that their loved ones had suspected or presumed COVID-19 (*id*. at ¶¶ 93, 124–125); (6) resisting testing residents for COVID-19 (*id*. at ¶¶ 126–129); and (7) failing to cohort residents based on their COVID-19 status until she anticipated that DOH would be arriving the next day to conduct an infection control survey (*id*. at ¶¶ 130–132).

As detailed in the Verified Petition, Fulton Commons' duplicity went so far as to intentionally fail to appropriately report at least two instances of sexual abuse by the same LPN, allowing him to have continued access to vulnerable residents for two years. (*Id.* at ¶¶ 11–12, 81[iii].) Fulton Commons and former DON Carol Frawley were indicted in November 2022 for crimes arising out of the sexual abuse allegations. (*Id*.) Fulton Commons maintained an artificially high CMS Overall rating until this intentional egregious misrepresentation was uncovered by DOH. Thereafter, Fulton was appropriately downgraded to a 2-Star facility and became a SFF candidate. (*Id*. at ¶¶ 136–138, 202.)

There is no telling how many lives were impacted by Respondents Fulton Commons, Kalter, Weiss, and Doyle's fraud, but it cannot be disputed that family members may have been

misled into leaving their loved ones in the care of Fulton Commons when they were their most vulnerable, only for them to suffer unimaginable neglect, abuse, and mistreatment. There is arguably no worse misrepresentation or concealment.

II. 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 or regulation 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 732–733; *E.F.G. Baby Prods.*, 40 AD2d at 366; *State v Scottish-Am. Ass'n*, 52 AD2d 528, 528 [1st Dept], *appeal dismissed* 39 NY2d 1033 [1976].) Respondents' repeated and persistent violations of the Public Health Law and Social Services Law, and federal Social Security Act and its Medicare regulatory counterparts, are all actionable as repeated and persistent illegality under Executive Law § 63(12).

As demonstrated in the Verified Petition and its supporting affidavits and attorney affirmation, Respondents Fulton Commons, Kalter, Weiss, and Doyle have repeatedly and persistently violated numerous New York State and federal laws designed to protect and promote the health, safety, and well-being of nursing home residents, therefore committing repeated and persistent illegality actionable under Executive Law § 63(12). Further, the fraudulent acts described above themselves constitute repeated and/or persistent illegal acts and are also actionable under Executive Law § 63(12)'s prohibition against illegality. These include Respondent Kalters's failure to seek approval from DOH for withdrawals of equity and/or transfers of assets from Fulton Commons: (i) in excess of the disclosure thresholds, in violation of Public Health Law § 2808(5)(c); and (ii) that created a negative net worth position, in violation of Public Health Law § 2808(5)(a) and 10 NYCRR §§ 400.19(b)(1) and 415.26(h)(7). These also include Respondents Fulton Commons and Kalters's preparation, filing, and/or causing to be filed false

Cost Reports with DOH, on behalf of or for Fulton Commons, which failed to disclose that expenses with no legitimate business purpose were incurred by Fulton Commons, in violation of 10 NYCRR Part 86-2.

Additionally, Respondents have committed multiple "unacceptable practices" in violation of Medicaid Program regulations by: (i) submitting Medicaid claims for services not provided (18 NYCRR § 515.2[b][1][i][a]); (ii) making, or causing to be made any false, fictitious or fraudulent statement or misrepresentation of material fact in claiming a Medicaid payment, or for using in determining the right to payment (18 NYCRR § 515.2[b][2]); (iii) converting payments from the Medicaid Program (18 NYCRR § 515.2[b][4]); and (iv) furnishing medical care, services, or supplies that fail to meet professionally recognized standards for health care (18 NYCRR § 515.2[b][12]).

Finally, Respondents are also liable for violations of 18 NYCRR § 518.3(a), by submitting incorrect and/or improper claims to the Medicaid Program, causing such claims to be submitted, and/or receiving payment for such claim. They are therefore in possession of Medicaid funds to which they are not entitled and should return those overpayments to the Medicaid Program. Similarly, Respondents are also liable for violations of federal Medicare payment statutes and regulations, including 42 USC § 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 also* 42 CFR §§ 401.303, 401.305.)

A. Respondents Fulton Commons, Kalter, Weiss, and Doyle Failed to Meet the Needs of Nursing Home Residents, Resulting in Neglect, Abuse, and Mistreatment, in Violation of State and Federal Law

1. Respondents Fulton Commons, Kalter, Weiss, and Doyle Operated the Nursing Home with Insufficient Staffing in Violation of State and Federal Law

New York nursing homes must maintain sufficient and qualified personnel on a 24-hour basis to provide nursing care and related services to all residents in accordance with each resident's needs. (*See* 10 NYCRR § 415.13; *see also* 10 NYCRR § 415.26.) Similarly, under federal regulations, all nursing homes are required to maintain "sufficient nursing staff with the appropriate competencies and skill sets to provide nursing and related services to assure . . . the well-being of each resident." (*See* 42 CFR § 483.35.)

Respondents Fulton Commons, Kalter, Weiss, and Doyle failed to sufficiently and adequately staff Fulton Commons to meet the requisite standards of care. (*See* pp. 9–10 *supra*; *see also* Pet. at ¶¶ 139–177.)

2. Respondents Fulton Commons, Kalter, Weiss, and Doyle Admitted Residents for Whom the Nursing Homes Could Not Provide Adequate Care, in Violation of State Law

New York nursing homes are required to limit resident admissions, and "accept and retain only those nursing home residents for whom [they] can provide adequate care . . . ." (10 NYCRR § 415.26[i][1][ii].) Respondents Fulton Commons, Kalter, Weiss, and Doyle continued to admit and/or authorize the admission of residents to Fulton Commons even when they were under-staffed, resulting in staff failing to provide residents with adequate care. (*See* Pet. at ¶¶ 145–147.)

3. Respondents Fulton Commons, Kalter, Weiss, and Doyle Failed to Meet the Needs of Nursing Home Residents, Resulting in Neglect, Abuse, and Mistreatment

Residents of New York State's nursing homes are protected by law from acts of neglect, abuse, and mistreatment. (*See* Public Health Law § 2803-d.) Neglect is defined as the "failure to provide timely, consistent, safe, adequate and appropriate services, treatment and/or care . . . including but not limited to: nutrition, medication, therapies, sanitary clothing and surroundings, and activities of daily living." (10 NYCRR § 81.1[c].) Abuse is defined as "inappropriate physical contact . . . , which harms or is likely to harm the . . . resident." (10 NYCRR § 81.1[a].) Finally, mistreatment is defined as "inappropriate use of medications, inappropriate isolation or inappropriate use of physical or chemical restraints." (10 NYCRR § 81.1[b].)

Moreover, both state and federal laws require that nursing homes safeguard their residents from acts of neglect, abuse, and mistreatment, and that any such acts be promptly reported to DOH and law enforcement, as applicable. (*See* Public Health Law §§ 2803-c[h], 2803-d[7]; *see also* 10 NYCRR § 415.4[b], 42 CFR § 483.12, and 42 USC § 1320b-25.) Further, to prevent mistreatment, nursing homes are charged with ensuring that each resident is free from any psychotropic drug administered for purposes of discipline or convenience, and not required to treat the resident's medical conditions or symptoms (*See* 10 NYCRR § 415.4[a][1]; *see also* Public Health Law § 2803-c[3][h]; 42 CFR § 483.10[e][1].)

As detailed extensively in the Verified Petition, Respondents Fulton Commons, Kalter, Weiss, and Doyle, failed to ensure that the nursing home was sufficiently and adequately staffed, leading to foreseeable neglect, abuse, and mistreatment of Fulton Commons' vulnerable residents. (*See* Pet. at ¶¶ 71–138.) Furthermore, Fulton Commons and its former DON, Carol Frawley, were indicted on November 30, 2022, inter alia, for repeatedly failing to report allegations of sexual

abuse and allowing the accused nursing staff member to continue contact with residents. (*See* Pet. at ¶¶ 11–12, 81[iii].)

4. Respondents Fulton Commons, Kalter, Weiss, and Doyle Failed to Provide Residents with Adequate Clinical and Custodial Care, Treatment, and Medication Administration, in Violation of State and Federal Law

Each resident has the right to "adequate and appropriate medical care" as well as the right "to be fully informed of his or her medical condition and proposed treatment . . . , and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions." (Public Health Law § 2803-c[3][e]; *see also* Public Health Law § 2803-c[2].) Pursuant to 10 NYCRR § 415.13, nursing homes are required to timely administer "treatments, medications, diets, and other health services" in accordance with each resident's needs. (*See also* 42 CFR § 483.10[a][1].) Residents are similarly entitled to "adequate and appropriate medical care," pursuant to 10 NYCRR § 415.3(f). (S*ee also* 42 CFR § 483.10[d][2] [protecting residents' rights to a physician of choice to "assure provision of appropriate and adequate care and treatment")]; 10 NYCRR § 415.11[a]–[c] [requiring nursing homes to develop timely individualized, comprehensive care plans that include objective timetables to "meet each resident's medical, nursing and mental and psychosocial needs"]; 42 CFR § 483.20.)

Respondents Fulton Commons, Kalter, Weiss, and Doyle routinely failed to provide Fulton Commons' residents with necessary and timely medication, treatment, and custodial and medical care. (*See* Pet. at ¶¶ 11, 71–177.)

5. Respondents Fulton Commons, Kalter, Weiss, and Doyle Violated Their Obligations Under New York and Federal Law to Ensure the Well-Being of Fulton Commons' Residents

Pursuant to 10 NYCRR § 415.12, nursing homes must provide the necessary quality of care and services to attain and maintain the "highest practicable physical, mental, and psychosocial well-being," of each resident, including but not limited to the following:

- developing and implementing medical services to meet the needs of its residents, pursuant to 10 NYCRR § 415.15;
- ensuring that each resident receives adequate supervision to prevent accidents, pursuant to 10 NYCRR § 415.12(h)(2);
- providing appropriate treatment and services to assist with urinary incontinence to prevent urinary tract infections and "to restore as much normal bladder function as possible," pursuant to 10 NYCRR § 415.12(d)(1);
- ensuring 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, pursuant to 10 NYCRR § 415.12(c) and 42 CFR § 483.25(b);
- ensuring that residents receive proper treatment and care to maintain good foot health, including providing foot care and treatment to prevent complications from the resident's medical condition, pursuant to 42 CFR § 483.25(b)(2);
- ensuring that the residents' abilities in activities of daily living "do not diminish" and that they are given appropriate services to maintain and improve such abilities, including their

ability to bathe, dress and groom, ambulate, toilet, eat, and use speech or other communication systems, pursuant to 10 NYCRR § 415.12(a) and 42 CFR §§ 483.24(b) and 483.55;

- acquiring, receiving, dispensing, and administering "all drugs and biologicals required to meet the needs of each resident," as required by 10 NYCRR § 415.18 and 42 CFR § 483.45;
- ensuring that residents are free of any significant medication errors, pursuant to 10 NYCRR § 415.12(m);
- ensuring that residents do "not experience reduction in range of motion" unless unavoidable (10 NYCRR § 415.12[e][1]), and ensuring that residents who are limited in their range of motion receive "appropriate treatment and services to increase range of motion" (10 NYCRR § 415.12[e][2]);
- ensuring that each resident maintains acceptable parameters of nutritional status, receives a therapeutic diet when there is a nutritional problem, and sufficient fluid intake to maintain proper hydration and health, pursuant to 10 NYCRR § 415.12(i)–(j);
- providing "each resident with a nourishing, palatable, well-balanced and medically appropriate diet that meets residents' daily nutritional and special dietary needs[,] . . . employ[ing] sufficient competent staff to carry out the functions of the dietary service[,] . . . provid[ing] assistance with eating and special eating equipment and utensils for residents who need them[,] . . . [and] stor[ing], prepar[ing], distribut[ing] and serv[ing] food under sanitary conditions," pursuant to 10 NYCRR § 415.14 (*see also* 42 CFR § 483.60);
- offering activities that "promote and maintain the resident's sense of usefulness . . . , make his or her life more meaningful, stimulate and support the desire to use [their] physical and

mental capabilities to the fullest extent and enable the resident to maintain a sense of usefulness and self-respect," pursuant to 10 NYCRR § 415.5(f)(1);

- developing, implementing, and maintaining an effective, comprehensive, data-driven QAPI program that focuses on indicators of the outcomes of care and quality of life, pursuant to 42 CFR § 483.75;
- informing each resident, consulting with the resident's physician, and notifying the resident's representative(s) when there is a change in condition, including but not limited to an accident, discharge, and change of room, pursuant to 42 CFR § 483.10(g)(14)(i);
- ensuring that only licensed individuals within a profession in which a license is a prerequisite, practice in such profession, pursuant to Education Law § 6512; and
- ensuring that residents receive treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident's choices, pursuant to 42 CFR § 483.25.

Beyond these particular responsibilities, nursing homes must protect and promote their residents' "right to a dignified existence, self-determination, respect, full recognition of their individuality, consideration and privacy in treatment and care for personal needs, and communication with and access to persons and services inside and outside the facility." (10 NYCRR § 415.3[a].) Additionally, nursing homes must provide each resident with the enumerated rights under the Residents' Bill of Rights as codified in Public Health Law § 2803-c, including but not limited to ensuring that each resident receives courteous, fair, and respectful care and treatment. (*See* Public Health Law §§ 2803-c[2], [3][g].)

Federal law similarly guarantees respect and dignity in care as a "fundamental principle" that applies to all treatment and care provided to nursing home residents. (*See* 42 CFR § 483.25; *see also* 42 CFR § 483.10[a][1].)

Respondents Fulton Commons, Kalter, Weiss, and Doyle repeatedly and persistently violated the above-cited regulations, and in so doing, failed in their responsibility to safeguard the welfare of the residents in Fulton Commons. (*Supra* at pp. 32–35.)

6. Respondents Fulton Commons, Kalter, Weiss, and Doyle Failed to Provide a Safe and Comfortable Environment to Fulton Commons' Residents, in Violation of State and Federal Law

Nursing homes must maintain a safe, healthy, functional, sanitary, and comfortable environment for residents. (*See* 10 NYCRR § 415.29; *see also* 42 CFR § 483.10[a][1]). In particular:

> The facility shall provide: (1) a safe, clean, comfortable, and homelike environment, allowing the resident to use his or her personal belongings to the extent possible; (2) housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior; (3) clean bed and bath linens that are in good condition; (4) comfortable and safe temperature levels; and (5) for the maintenance of comfortable sound levels.

(10 NYCRR § 415.5[h]). Respondents Fulton Commons, Kalter, Weiss, and Doyle repeatedly and persistently failed to maintain a secure, safe, sanitary, healthy, and comfortable environment for residents. (*See* Pet. at ¶¶ 91–92.)

7. Respondents Fulton Commons, Kalter, Weiss, and Doyle Failed to Ensure Effective Infection Control in Fulton Commons, in Violation of State and Federal Law

Nursing homes must "establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment in which residents reside and to help prevent the development and transmission of disease and infection." (10 NYCRR § 415.19; *see also* 42

CFR § 483.80[a].) Nursing homes must also report accurate infection control data to DOH. (*See* 10 NYCRR § 702.4.)

Each nursing home is required to have a written infection control program in which the facility: "(1) investigates, controls and takes action to prevent infections in the facility; (2) [d]etermines what procedures, such as isolation and universal precautions should be utilized for an individual resident and implements the appropriate procedures; and (3) [m]aintains a record of incidents and corrective actions related to infections." (10 NYCRR § 415.19[a][1]–[3]; *see also* 42 CFR § 483.80[a].) Necessary infection control practices include but are not limited to: isolating residents when needed (10 NYCRR § 415.19[b][1]); properly sanitizing and storing all equipment to prevent the spread of infection (*id*. at § 415.19[b][2]); and ensuring that staff wash their hands after each direct resident contact (*id*. at § 415.19[b][4]).

Nursing homes are further required to designate a qualified professional who has completed specialized training in infection prevention and control to serve as their IP and be responsible for their infection control programs. (*See* 42 CFR § 483.80[b].)

Respondents Fulton Commons, Kalter, Weiss, and Doyle repeatedly and persistently failed to utilize their IP during the first wave of the COVID-19 pandemic and further failed to implement effective infection control measures thereby allowing for the spread of COVID-19 throughout Fulton Commons, which contributed to increased resident infections, severe illness, and 74 COVID-19 related resident deaths during that three-month period. (*See* Pet. at ¶¶ 99–117.)

8. Respondent Kalter Illegally Delegated Operational Control of Fulton Commons to Respondents Weiss and Doyle

Nursing homes must be administered "in a manner that enables [them] to use [their] resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." (10 NYCRRR § 415.26.) To accomplish this,

nursing homes must have a governing body that is legally responsible for establishing and implementing policies for the facility regarding the management and operation of the home. (*See* 10 NYCRR § 415.26[b].) Encompassed within the duties reserved for the governing body are the responsibilities to appoint the administrator, establish written policies for the nursing home, operate the facility, be responsible for providing or arranging services for residents, and develop an effective process to properly respond to resident complaints. (*Id*.) At least one member of the governing body is required to participate on the QAPI committee. (10 NYCRR § 415.27[b][4].)

Pursuant to 10 NYCRR § 600.9, the governing body "is the party responsible for the operation of a medical facility." As detailed in the Verified Petition, Kalter is Fulton Commons' sole member of the governing body, and he improperly delegated all operational control to Respondent Doyle, as administrator of the home, and Respondent Weiss, as the liaison between Doyle and Kalter. In so doing, Kalter abdicated all the control that a governing body was supposed to retain over the nursing home, in violation of 10 NYCRR § 600.9.

B. Respondent Kalter Repeatedly and Persistently Violated Equity Withdrawal and Asset Transfer Disclosure Rules for Nursing Homes Owners

As explained in detail in the Verified Petition and in Section I *supra*, Kalter also repeatedly and persistently violated the 3% Rule in order to conceal Respondent-owners' and Fulton Realty LP's repeated and persistent conversion of millions of dollars of up-front profit taken from Fulton Commons, while disregarding Fulton Commons' special obligation to its residents. (*See* p. 13 *supra*; *see also* Pet. at ¶¶ 244–253; Public Health Law § 2808[5][c]; *Brightonian Nursing Home v Daines*, 21 NY3d 570, 575, 577–578 [2013].)

New York law prohibits certain nursing homes, including Fulton Commons, from "withdraw[ing] equity or transfer[ring] assets which in the aggregate exceed three percent of such

facility's total reported annual revenue for patient care services" without prior written approval from DOH. (*See* Public Health Law § 2808[5][c].) The definition of withdrawals of equity or asset transfers is broad and specifically includes the following: "(i) any transfer of a facility's cash or other assets directly or indirectly to or for the benefit of its operator . . . (iii) any liability incurred within any period of time required for financial reporting in accordance with [10 NYCRR] Part 86 . . . by a facility or its operator by reason of a mortgage, lease, borrowing or other transaction relating to such a facility that exceeds, in the aggregate, $50,000 . . . and (v) payment to the operator or owner of a salary in excess of the maximum amount allowed for reimbursement purposes by the Department of Health." (10 NYCRR § 400.19[a][3].)

Between 2018 and 2021, Fulton Commons routinely engaged in transactions—namely, the payment of excess rent and the payment of salaries for no-show jobs—that qualified as equity withdrawals or asset transfers in excess of the 3% withdrawal threshold. Yet, in another pattern of repeated fraud and illegality, Kalter never once gave DOH notice of, nor obtained approval for, these transactions. As a result, he violated the equity withdrawal and/or asset transfer limits every single year from 2018 through 2021.

Namely, as early as 2018 through at least 2021, Fulton Commons paid $14,902,698 through a fraudulent and illegal rent scheme in which it paid exorbitant rent to Fulton Realty LP in order to disguise Respondents Kalter, Fogel, and Fulton Realty Inc.'s profits. (*See* Pet. at ¶ 213–217, 248.) Fulton Commons' excess rent was nothing more than a distribution paid to Kalter and Fogel disguised as a bona fide business expense. Thus, Kalter orchestrated this transfer of Fulton Commons' cash for the direct or indirect benefit of himself as the majority and controlling owner of Fulton Realty LP. (*See* 10 NYCRR § 400.19[a][3][i].)

Alternatively, these excess rent payments can also be categorized as a withdrawal of equity pursuant to a liability incurred by Fulton Commons as a result of a lease, despite the fact that there was no written lease between Fulton Commons and Fulton Realty LP. (*See* 10 NYCRR § 400.19[a][3][iii].) Of the $14,902,698 Fulton Commons paid to Fulton Realty LP in excess rent, Kalter transferred over $8 million to himself in illegal and fraudulent management fees. Additionally, Kalter took over $4 million in illegal and fraudulent distributions from the $14,902,698 paid by Fulton Commons to Fulton Realty LP in excess rent, and Respondent Fogel took more than $2 million in such distributions. (*See* Pet. at ¶ 220.)

Moreover, the Kalter-1% Owners' "salaries" were payments to owners of salaries in excess of the maximum amount allowed for reimbursement purposes by DOH. (*See* 10 NYCRR § 400.19[a][3][v].) Salaries to owners are permitted as expenses only when the owners render services to the facility. The Kalter-1% Owners did not provide a single service to Fulton Commons, and therefore, their "salaries" were illegal and fraudulent equity withdrawals and/or asset transfers. (*See* Pet. at ¶ 230–233.)

C. Respondent Kalter Caused Respondent Fulton Commons to File False and Misleading Cost Reports with DOH by Falsely Certifying that Expenses with No Legitimate Business Purpose Were Incurred to Provide Patient Care in the Facility

Respondents Fulton Commons and Kalter further committed repeated and persistent illegality by preparing, filing, and/or causing to be filed false Cost Reports with DOH, on behalf of or for Fulton Commons, which failed to disclose that expenses with no legitimate business purpose were incurred by Fulton Commons, in violation of 10 NYCRR Part 86-2. (*See* p. 12 *supra*; *see also* Pet. at ¶¶ 43, 229–234; Ronan Aff. Ex. 4.)

As operator of Fulton Commons, Kalter was responsible for ensuring that Fulton Commons complied with its annual obligation to file accurate Cost Reports with DOH. (*See* 10 NYCRR § 86-2.6; *see also* Ronan Aff. at ¶ 18.) In order to file a Cost Report with DOH, the facility's operator must electronically sign the Operator's Certification, which contains the following two statements:

Certification Statement

> Misrepresentation or falsification of any information contained on this form may be punishable by fine and/or imprisonment under New York State Law and Federal Law.

Certification of Operator:

> I also certify that all salary and non-salary expenses presented in the RHCF-4 [Cost Report] (with the exception of those expenses attributable to Research, Physicians Offices and other Rentals, Gift Shop, Public Restaurant, Fund Raising and Sold Services) considering the adjustments contained in the Part II and the recoveries of expenses detailed in Exhibit I of the Part IV *were incurred to provide patient care in the facility.*

(Ronan Aff. at ¶ 18; *see also* Ronan Aff. Ex. 4 [emphasis added].)

The operator must further certify that the report is "true and complete." (*See* Ronan Aff. at ¶¶ 18, 65; *see also* Ronan Aff. Ex. 4.) Since as early as 2018, Kalter has signed the annual Certification by Operator for Fulton Commons as required by 10 NYCRR § 86-2.6—falsely attesting that all of Fulton Commons' reported statements were true and that all expenses—including the salaries paid to the Kalter-1% Owners for no-show jobs—"were incurred to provide patient care in the facility." (*See* Ronan Aff. at ¶ 64; *see also* Ronan Aff. Ex. 4.) By including the salaries paid to the Kalter-1% Owners in Fulton Commons' annual Cost Reports, Kalter repeatedly and persistently caused Fulton Commons to make false and misleading statements in the years 2018 through 2021 in violation of its obligations under 10 NYCRR Part 86-2. In addition, during these years, Kalter repeatedly and persistently falsely certified—by submitting to DOH the above-

quoted Certification of Operator—that Fulton Commons' Cost Reports were "true and complete." (*See* Ronan Aff. at ¶¶ 18, 65; *see also* Ronan Aff. Ex. 4.)

D. Respondents Have Repeatedly and Persistently Engaged in Unacceptable Practices in Violation of New York Law

As a participant in the Medicaid Program, Fulton Commons must adhere to certain rules, many of which were violated by Respondents and discussed in detail below and in the Verified Petition. (*See* Pet. at ¶¶ 59–63.)

1. Respondents Submitted or Caused the Submission of Claims for Services Not Provided, In Violation of New York Law

Medicaid providers commit an unacceptable practice by "submitting, or causing to be submitted, a claim or claims for . . . unfurnished medical care, services or supplies" in connection with receiving payment for the provision of Medicaid services. (18 NYCRR § 515.2[b][1][i][a].)

Respondents have submitted or caused the submission of claims to Medicaid for unfurnished medical care and services. (*See* pp. 13–14 *supra*.) They failed to provide needed medical care, timely transfer residents to the hospital, timely administer medications, turn and position residents as needed, timely assist residents to the bathroom and provide incontinent care, and provide feeding and hydration assistance, among other medical necessities. (*See* pp. 7–9 *supra*; *see also* Pet. at ¶¶ 71–116.)

2. Respondents Made or Caused to be Made False Statements in Claiming Medicaid Payments, in Violation of New York Law

It is an unacceptable practice for Medicaid providers to "mak[e], or caus[e] to be made any false, fictitious or fraudulent statement or misrepresentation of material fact in claiming a medical assistance payment, or for use in determining the right to payment." (18 NYCRR § 515.2[b][2][i].) As discussed in Section II(C) *supra*, when submitting electronic claims for payment to the

Medicaid Program for the reimbursement of services, providers must submit the following Certification Statement for Provider Billing Medicaid to DOH: "I (or the entity) have furnished or caused to be furnished the care, services, and supplies itemized and *done so in accordance with applicable federal and state laws and regulations*." (Emphasis added.)

Respondents caused the submission of and submitted false Certification Statements for Provider Billing Medicaid through their conduct in providing grossly substandard care to Fulton Commons residents in violation of New York State and federal laws (*see* Pet. at ¶¶ 59, 71–138), and by entering into self-dealing and collusive transactions and failing to seek approval from DOH for withdrawals of equity and transfers of assets from Fulton Commons in excess of the disclosure thresholds in violation of Public Health Law § 2808(5)(c). (*See* pp. 40–42 *supra*.)

3. Respondents Engaged in Conversion, In Violation of State Law

Medicaid providers commit an unacceptable practice when they "convert[ ] a [Medicaid] payment, or any part of such payment, to a use or benefit other than for the use and benefit intended by the [Medicaid] program . . . ." (18 NYCRR § 515.2[b][4].) Respondents have converted payments from the Medicaid Program by taking undisclosed "up-front profit" through the fraudulent schemes described above, which are uses other than that intended by the Medicaid Program: resident care and welfare.

4. Respondents Failed to Meet Recognized Standards in Furnishing Medical Care, In Violation of State Law

New York law provides 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 Medicaid Program. (18 NYCRR § 515.2[b][12].) Based on the statutory and regulatory violations described above, Respondent

Fulton Commons, and in turn Respondent-owners and the entire Fulton Commons Enterprise, were not entitled to reimbursement from Medicaid for the substandard services provided.

E. Respondents are Responsible for Overpayments Under State and Federal Law

Respondents are liable for violations of Medicaid payment statutes and regulations, by submitting incorrect and/or improper claims, causing such claims to be submitted, and/or receiving payment for such claim, in violation of 18 NYCRR § 518.3(a).

Respondents are similarly liable for violations of federal Medicare payment statutes and regulations, including 42 USC § 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 also* 42 CFR §§ 401.303, 401.305.)

Due to Respondents' persistent and repeated neglect, abuse, and mistreatment of Fulton Commons residents, they are in possession of Medicaid and Medicare funds to which they are not entitled and must return those overpayments to the respective government programs.

III. Corporate Respondents, Respondent-Owners, and Respondent Weiss Have Misappropriated Public Property in Violation of Executive Law § 63-c and Must Repay the Medicaid Program

The Attorney General is empowered under the Tweed Law to bring an action to recover public money that was improperly obtained. Specifically, Executive Law § 63-c authorizes the Attorney General to maintain an action on behalf of the State to recover any money, funds, credits, or other property belonging to the State where they have been "obtained, received, converted, or disposed of" "without right." (Exec. Law § 63-c[1].) The State may also recover damages or other compensation pursuant to this statute. (*Id.*)

Courts have found Executive Law § 63-c to be the appropriate vehicle for recovering Medicaid funds that were obtained "without right." (*See Ferran*, 77 AD3d at 701 [holding that the State was entitled under Executive Law § 63-c to recovery of Medicaid funds paid in connection with fraud]; *State of New York v Franklin Nursing Home*, 65 AD2d at 788–789 [noting that Executive Law § 63-c authorizes the Attorney General to recover Medicaid overpayments on behalf of the state].)

As used in the statute, "without right" means recoverable "pursuant to any viable action or proceeding at law or equity," under a claim of right. (*State of New York v Grecco*, 21 AD3d 470, 477 [2d Dept 2005].) Significantly, Executive Law § 63-c does not require that the respondent knew that it was delivering less than full payment and receiving funds without right. (*See People v Journal Co.*, 213 NY 1, 8 [1914] [authorizing recovery in connection with double billing mistake, notwithstanding that services were billed and paid for in good faith]; *see also People v Murphy*, 235 AD2d 554, 555 [2d Dept 1997] [sustaining Executive Law § 63-c action against State employee to recover payments made in excess of his employment contract due to calculation error]). Further, funds that were obtained without right may be recovered from those who are third-party or downstream recipients. (*See State of New York v Seventh Regiment Fund*, 98 NY2d 249, 260 [2002] [noting Executive Law § 63-c action may be upheld against bona fide purchaser and that "[t]o be sure, the wrongful exercise of dominion need not consist of a manual taking on the defendants' part"].)

As detailed above and in the Verified Petition, Corporate Respondents, Respondent-owners, and Respondent Weiss have repeatedly and persistently obtained, received, converted, or disposed of Medicaid funds intended for resident care from Fulton Commons, a nursing home primarily funded by Medicaid and Medicare, thereby taking money that belongs to the State. They

did so by: (i) entering into a collusive and/or self-dealing lease agreement obligating Fulton Commons to pay artificially high rent (*see* Pet. at ¶¶ 205–212); (ii) paying salaries to the Kalter-1% Owners for no-show jobs (*id.* at ¶¶ 229–243); (iii) failing to seek approval from DOH prior to withdrawals of equity and/or and transfers of assets from Fulton Commons in excess of the disclosure thresholds and the negative equity rule, in violation of Public Health Law § 2808(5)(c) and Public Health Law § 2808(5)(a), 10 NYCRR §§ 400.19(b)(1), and 415.26(h)(7) (*id.* at ¶¶ 222–225, 244–253); and (iv) preparing, filing, and/or causing to be filed false Cost Reports, on behalf of Fulton Commons, with DOH that falsely certified that salaries paid to the Kalter-1% Owners were incurred to provide patient care in the facility (*id.* at ¶¶ 238–243.)

In addition, Corporate Respondents and Respondent-owners' receipt of public funds from Medicaid is without right because they repeatedly violated Medicaid regulations, as explained *supra* at pp. 13–14. Respondents have improperly obtained, received, converted, or disposed of Medicaid funds that belong to the State based on their failure to provide residents with proper care in violation of State and federal regulations. Pursuant to 18 NYCRR § 504.6(d), a provider may only submit Medicaid claims for reimbursement for services provided in compliance with Title 18 of the New York Official Compilation of Codes, Rules and Regulations. (18 NYCRR § 504.6[d].) Providers receive overpayments when they receive any amount "not authorized to be paid" under the Medicaid Program because of fraud. (18 NYCRR § 518.1[c].) Medicaid providers can be made to repay the State for "inappropriate" or "improper" care or supplies. (18 NYCRR § 518.3[b].) Further, Medicaid payments may also be withheld when it has been determined that "a provider has abused the program or has committed an unacceptable practice." (18 NYCRR § 518.7[a][1]; *see also* 18 NYCRR §§ 515.3[b], 518.1[c].)

Respondents have committed multiple unacceptable practices in violation of Medicaid Program regulations, including by: (i) submitting Medicaid claims for services not provided (18 NYCRR § 515.2[b][1][i][a]); (ii) making, or causing to be made any false, fictitious or fraudulent statement or misrepresentation of material fact in claiming a Medicaid payment, or for using in determining the right to payment (18 NYCRR § 515.2[b][2]); (iii) converting payments from the Medicaid Program (18 NYCRR § 515.2[b][4]), and (iv) furnishing medical care, services, or supplies that fail to meet professionally recognized standards for health care (18 NYCRR § 515.2[b][12]).

Respondents also made or caused to be made materially false statements that certified compliance with all federal and state laws, such as prohibitions against fraud, conversion, and misappropriation of public property, along with the DOH's cost reporting requirements, and the 3% Rule. (*See supra* at pp. 13–14.) Based on the statutory and regulatory violations described above, Respondent Fulton Commons was not entitled to reimbursement from Medicaid for the substandard services provided.

In addition, Corporate Respondents, Respondent-owners and Respondent Weiss are jointly and severally responsible for Medicaid overpayments received by Fulton Commons. (*See* 18 NYCRR § 518.3[c].) The State is entitled to repayment from not only the entity or person providing the care (or in this case, failing to provide care, or providing horribly deficient care) but the "person under whose supervision" such care was provided. (18 NYCRR § 518.3[b].) The State may recover the amount paid for such care "even though payment was made to another person." (*Id.*)

Corporate Respondents, Respondent-owners and Respondent Weiss failed to provide adequate care under the supervision of Kalter, and they are therefore all jointly and severally liable to the State for Medicaid overpayments they received, obtained, or disposed of from Fulton

Commons insomuch as Executive Law § 63-c's reach extends beyond those with knowledge of the basis for the overpayment. (*See Grecco*, 21 AD3d at 477; *see also Seventh Regiment Fund*, 98 NY2d at 260; *Journal Co.*, 213 NY at 8; *Murphy*, 235 AD2d at 755.)

IV. Respondents Fulton Commons, Fulton Realty LP, Fulton Realty Inc., and Respondent-Owners are 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 NY3d 253, 275 [2022] [internal quotation and citation omitted].) To recover under a theory of unjust enrichment, a litigant must show that: "(1) [a] party was enriched, (2) at [the other] party's expense, and (3) that it is against equity and good conscience to permit the [enriched] 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 overpayments made to Fulton Commons to which it was not entitled because the services claimed for such payment were either not provided or were so deficient as to be tantamount to neglect, abuse, and/or mistreatment. Fulton Commons was enriched through its receipt of Medicaid funds at the State's expense. It would be against equity and good conscience for Respondents Fulton Commons, Fulton Realty LP, Fulton Realty Inc., and Respondent-owners to retain these funds. The quality of services, including the fact that they be provided, is undeniably material to the State. Indeed, 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, abuse, and mistreatment of residents reach the very heart of the bargain struck between the State and the nursing home to provide services to elderly, frail and disabled Medicaid beneficiaries.

Moreover, it would promote equity and good conscience to permit the State to recover Medicaid overpayments from Respondents Fulton Realty LP, Fulton Realty Inc, and Respondent-owners. Privity is not required for an unjust enrichment claim, as long as there is a connection between the petitioner 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 AD3d 659, 662 [2d Dept 2019].) "[T]he requirement of a connection between plaintiff and defendant is a modest one." (*Myun-Uk Choi v Tower Research Capital LLC*, 890 F3d 60, 69 [2d Cir 2018] [interpreting New York State law].)

Respondent-owners enriched themselves through their receipt of Medicaid overpayments from the State, in the form of equity withdrawals or asset transfers from Fulton Commons disguised as bona fide business expenses—rent and salaries—at the State's expense. (*See* Pet. at ¶¶ 205–243.) These Respondents not only knew that Fulton Commons was a Medicaid provider and therefore received reimbursement from the State, but, knew or should have known that the nursing home was not entitled to payment for the failure to provide adequate services, through staffing and admissions decisions authorized by Kalter, Weiss, and Doyle. (*Id*. at ¶¶ 71–177.)

V. Respondent-Owners, Weiss, and Doyle Are Also Individually Liable for the Repeated and Persistent Illegal and Fraudulent Acts Alleged in the Verified Petition

Respondent-owners, Weiss, and Doyle are jointly and severally liable for the repeated and persistent fraud and illegality enumerated in the Verified Petition. 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. (*See, e.g., People v Apple Health & Sports Clubs*, 80 NY2d 803, 807 [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]; *Matter of People v Frink Am.*, 2 AD3d 1379, 1381–1382 [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*, 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 Am. Motor Club, Inc.*, 179 AD2d 277, 284–285 [1st Dept 1992] [officer liable under Executive Law § 63(12) for violations of insurance law where "he personally participated in the illegal insurance business"]; *Matter of State of New York v Daro Chartours, Inc.*, 72 AD2d 872, 872–873 [3d Dept 1979] [officer of corporation held personally liable for his fraudulent conduct]; *People v 21st Century Leisure Spa Int'l, Ltd.,* 153 Misc 2d 938, 944 [Sup Ct, NY County 1991] [officer and manager of health club found personally liable where he was advised by the Attorney General that the club was operating in violation of law and continued to enroll members when the business' closing was imminent]; *Mgmt. Transition Res., Inc.,* 115 Misc 2d at 491 [principals of business found personally liable] [Sup Ct, NY 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, 407–408 [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]); or controlled the financial affairs of the corporation (*F.T.C. v Amy Travel Service, Inc.*, 875 F2d 564, 574 [7th Cir 1989], *revd on other grounds F.T.C. v Amy Travel Service, Inc.*, 937 F3d 764 [7th Cir 2019]).

Here, the State has clearly established that Respondents Kalter, Weiss, Doyle, and the Kalter-1% Owners were aware of and participated in Fulton Commons' fraudulent conduct. Kalter acknowledged in sworn testimony that he operated, owned, and controlled Fulton Commons. (*See* Pet. at ¶ 186.) As the governing body of Fulton Commons, Kalter was recognized by DOH as responsible for the care of nursing home residents and for compliance with State law. (*Id.* at ¶ 187.) Kalter further acknowledged that he has ultimate authority over everything although he does not participate in the day-to-day operations of the facility other than a daily review of the patient census and bank account balances. (*Id.* at ¶¶ 181–203.) Kalter established Fulton Commons' inflated lease obligations and directed Respondent Weiss to place the Kalter-1% Owners on the facility's payroll. Kalter, alone, determined whether distributions will be paid from any of the entities in the Fulton Commons Enterprise and was the main signatory on the facility's bank accounts. Kalter was thus the "major actor" in the fraudulent and illegal activities of Fulton Commons and is personally liable for its misconduct. (*Empyre,* 227 AD2d at 734.)

Similarly, as the Comptroller, Weiss was directly responsible for arranging no-show jobs for the Kalter-1% Owners and as the liaison between Kalter and Respondent Doyle, Weiss had "actual knowledge of and participat[ed] in [Fulton Commons'] fraudulent and illegal business

dealings and is liable for "any money" Fulton Commons owes to the State. (*Apple Health,* 80 NY2d at 807.)

Doyle admitted in sworn testimony, corroborated by Kalter and Weiss's sworn testimony, that she is in charge of the nursing home. (Pet. at ¶ 189; Ronan Aff. Ex. 1 at 71, 74, 118–121, 238, 241, 245; *see also* Ronan Aff. Ex. 7 at 47, 49, 67, 73, 101–102, 273–274; Tarpey Aff. Ex. 3 at 54, 121.) As detailed in the Verified Petition, Doyle created a culture of deceit and cover-ups at Fulton Commons. Further, the Kalter-1% Owners knowingly received fraudulent salaries and W-2 statements from Fulton Commons as they have never provided any service to the nursing home. (*See* Pet. at ¶¶ 229–237.)

Finally, the fundamental Medicaid payment regulations that Respondents collectively violated, 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 also require 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]–[b].) The broad liability imposed by these regulations plainly reach all individual Respondents, who intimately took part in the repeated and persistent fraud and illegality of the Fulton Commons Enterprise.

VI. The Court Should Grant Permanent Injunctive Relief, Restitution, Disgorgement, Interest, and Costs

This Court has broad authority to grant injunctive relief, restitution, disgorgement, civil penalties, and costs in proceedings brought pursuant to Executive Law § 63(12). (*See Princess*

Prestige, 42 NY2d at 107; *Daro Chartours*, 72 AD2d at 873; *Scottish-Am Ass'n*, 52 AD2d at 528.) The Court is also required by statute to grant pre-judgment interest in cases, like this one, involving deprivations of property through conversion. (*See* CPLR 5001[a]; *see also Schneiderman ex rel. People v Lower Esopus River Watch, Inc.*, 39 Misc 3d 1241[A], at *28 [Sup Ct, Ulster County April 8, 2013].) 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, pre- and post-judgment interest, and costs.

A. The Court Should Grant Permanent Injunctive Relief Against Respondents' Illegal and Fraudulent Conduct

Executive Law § 63(12) expressly authorizes the Court to grant injunctive relief whenever the Attorney General makes a showing of repeated or persistent fraudulent or illegal conduct or deceptive practices. Courts routinely grant permanent injunctive relief in addition to other forms of relief. (*See Princess Prestige*, 42 NY2d at 108; *Daro Chartours, Inc.*, 72 AD2d at 873; *Scottish-Am. Ass'n*, 52 AD2d at 528; *Mgmt. Transition Res., Inc.*, 115 Misc 2d at 489; *State v Midland Equities of New York, Inc.*, 117 Misc 2d 203, 206 [Sup Ct, NY County 1982].)

Violations of the Public Health Law are also subject to injunction under the explicit terms of Public Health Law § 2801-c, which 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 regulations concerning financial requirements, healthcare requirements, and filings with the DOH, each of which was adopted pursuant to Public Health Law Article 28. (*See* pp. 28–29, 40–46 *supra*.) 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.[7]

Here, the Attorney General has proven that Respondents have engaged in widespread misconduct in their operation of Fulton Commons, including the neglect, abuse, and mistreatment of vulnerable nursing home residents and their fraudulent conversion of millions of dollars of Medicaid and Medicare funds. The Court should grant comprehensive injunctive relief, enjoining Respondents from engaging in the fraudulent and illegal practices alleged in the Verified Petition, including, but not limited to enjoining all Respondents from further violating healthcare regulations relating to nursing home services in New York State, as well as from further engaging in any fraudulent or illegal acts relating to reimbursement by the New York State Medicaid Program and the federal Medicare Program.

Further, given the inadequate care provided to the residents of Fulton Commons, Respondent Fulton Commons should be enjoined from accepting any new residents unless and until it provides signed certifications to the Attorney General certifying that its operator has met his obligation to operate the nursing home by ensuring sufficient care and staffing for all existing residents and for any new residents, after exercise of due diligence by an identified clinician at Fulton Commons, and ensuring that the nursing home's staffing level meets, at a minimum, the

[7] On October 18, 2022, pursuant to Public Health Law Section 2801-c, the Commissioner of Health specifically requested that the Attorney General seek injunctive relief in this action, in addition to any other remedies available by law. (*See* Sekhon Aff. Ex. 1.)

3.5 HPRD required by Public Health Law § 2895-b(3), and otherwise fully complying with all New York State laws regarding minimum staffing levels and spending on direct care staff.

Given the widespread nature of Respondents' fraud, the Court should also direct Respondents Fulton Realty LP, Fulton Realty Inc., and Respondent-owners to provide a complete accounting to Petitioner of all monies wrongfully received; correct Fulton Commons' false and misleading Cost Reports from 2018 through 2021; and submit the corrected Cost Reports to Petitioner.

Finally, to protect Fulton Commons' residents from Respondents' misconduct, the Court should appoint two monitors to oversee the nursing home. The first monitor should oversee healthcare operations at the nursing home and ensure that Fulton Commons improves patient care. The second monitor should oversee Fulton Commons' financial operations and ensure that Respondents cease collusive and self-dealing payments. These monitors should be given plenary authority to visit Fulton Commons and related companies, and to inspect relevant records. Respondents, excluding Fulton Commons, Weiss, and Doyle, should be ordered to pay the expenses of such monitors.

B. The Court Should Order Respondents Liable for Damages and Restitution to the Medicaid Program

In addition to injunctive relief, Executive Law § 63(12) explicitly provides for restitution to victims of fraud as a "vehicle by which aggrieved consumers [can] recover the money which is due them without resorting to costly litigation" (*Ford Motor Co., Inc.*, 136 AD2d at 158) and 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). However, "there is no requirement under Executive Law § 63(12) that the injured or defrauded party be a consumer." (*Katz*, 16 Misc 3d 1104[A], at

*3.) As a result, the power to direct restitution under § 63(12) is to be liberally construed. (*See State v Maiorano*, 189 AD2d 766, 767 [2d Dept 1993].) The scope of the relief granted "is addressed to the sound judicial discretion of the court." (*Princess Prestige*, 42 NY2d at 108; *Gen. Electric*, 302 AD2d at 316-17.) In addition, Executive Law § 63-c expressly permits the state to recoup funds, or obtain "damages or other compensation," or both, for state monies that are "without right obtained, received, converted, or disposed of." Finally, as discussed above, the State may obtain repayment of any overpayment of Medicaid funds under Executive Law § 63-c.

Here, the Court should order restitution under Executive Law § 63(12) and on the State's unjust enrichment claim. Respondents Fulton Realty LP, Fulton Realty Inc., and Respondent-owners should pay restitution to Medicaid for all of the funds that they improperly converted, a total of $16,005,083.59. Medicaid is effectively the "consumer" in this situation. For qualifying New Yorkers, Medicaid steps into the shoes of those consumers to contract with nursing homes to pay for their health care. Rather than use the Medicaid money paid Fulton Commons to provide adequate care to residents, Respondents Fulton Realty LP, Fulton Realty Inc., and Respondent-owners funneled the Medicaid dollars to line their own pockets.

The Court should also order Respondents to pay $16,005,083.59 in damages pursuant to Executive Law § 63-c, for converting that amount from Medicaid. (*See Ferran*, 77 AD3d at 701.)

C. 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 . . . ." (*State of New York v Applied Card,* 11 NY3d 105, 125 [2008]; *see also People v Ernst & Young, LLP*,

114 AD3d 569, 570–571 [1st Dept 2014] [finding disgorgement may be available as an equitable remedy, notwithstanding the absence of loss to individuals or independent claims for restitution].) The primary purpose of disgorgement is to deter law violations by depriving violators of their ill-gotten gains. (*Ernst & Young, LLP supra* at 569; *see also People v Greenberg*, 43 Misc 3d 1229[A] [Sup Ct, NY County 2014], *affd* 127 AD3d 529 [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." (*WorldCom, Inc.*, 467 F3d at 81.) Respondents should be ordered to disgorge all profits they received from their illegal or fraudulent conduct. Again, because of the widespread and long-running nature of Respondents' fraud, the Court should order them to provide an accounting of all profits obtained from fraudulently and/or illegally obtained funds from 2018 to present.

D. The Court Should Appoint a Financial Monitor and Healthcare Monitor

The Court should appoint a financial monitor to oversee Fulton Commons' financial operations and ensure that Respondents cease collusive and self-dealing payments, loans and other transfers of value to themselves, with plenary powers of 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 fraudulent and/or illegal practices and determine who among the staff of the management company are complicit in the harms. The Court should also appoint a healthcare monitor to oversee Fulton Commons' healthcare operations.

In its investigation, MFCU found a troubling culture of cover up in numerous areas of operation at Fulton Commons, such as a failure to report required events to DOH, including sexual abuse, in violation of Public Health Law § 2803-d, and last-minute whitewashing of conditions at

the facility before a DOH visit. Fulton Commons was indicted on November 30, 2022, in connection with crimes arising from the two sexual abuse allegations.

E. The Court Should Order Respondents to Pay Penalties for Their Repeated Violations of the Public Health Law and Medicaid Regulations

The Public Health Law and Social Services Law provide multiple grounds for the assessment of a civil penalty for violation of their 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.*, *Wilco*, 284 AD2d at 474 [2d Dept 2001]; *People v. Allied Mktg. Group, Inc.*, 220 AD2d 370, 370 [1st Dept 1995].) The stories of horrific neglect, abuse, and mistreatment in the Verified Petition undoubtedly establish that Respondents must pay penalties for their unconscionable violations of law.

F. The Court Should Order Respondents to Pay Costs

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; *People v. Therapeutic Hypnosis Inc.*, 83 Misc 2d 1068, 1071–1072 [Sup Ct, Albany County 1975]; *State of New York v Hotel Waldorf-Astoria Corp.*, 67 Misc 2d 90, 92 [Sup Ct, NY County 1971].) Therefore, an award of additional

costs in the amount of $2,000 against each Respondent, except Respondent Fulton Commons, should also be granted.

G. The Court Should Order Respondents to Pay Pre- and Post-Judgment Interest

New York CPLR 5001(a) provides that pre-judgment 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].) Pre-judgment interest is mandatory in an action for conversion. (*Scotti v Barrett*, 166 AD3d 698, 699 [2d Dept 2018].) In this action, pre-judgment interest is thus mandatory on Petitioner's Executive Law § 63-c claim, which sounds in conversion. (*See Schneiderman v Lower Esopus River Watch, Inc.*, 39 Misc 3d 1241[A], at 1, 28 [Sup Ct, Ulster County 2013] [granting pre-judgment interest on Executive Law § 63-c claims]; *cf. Seventh Regiment Fund, Inc.*, 98 NY2d 259 [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 . . . ."] [citations omitted].) Whether to order pre-judgment interest, the rate of interest, and the date from which it runs are 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." (CPLR 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 NY2d 577, 581 [2001].)

The Court must order pre-judgment interest on Petitioner's claim for conversion. (*See Scotti*, 166 AD3d 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 Fulton Commons in violation of the 3% Rule, as shown on the charts in the Verified Petition. (*See* Pet. at ¶ 252.)

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

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CONCLUSION

For the reasons set forth in this memorandum, the Court should make a summary determination in the State's favor on all causes of action and grant injunctive relief, restitution, disgorgement, civil penalties, costs, and pre- and post-judgment interest as requested in the Verified Petition.

Dated: December 13, 2022

Respectfully submitted,

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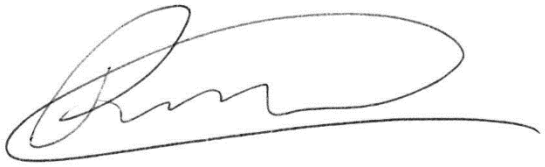
CERTIFICATION PURSUANT TO RULE 202.8-b

I, Prabhjot Sekhon, an attorney duly admitted to practice law before the Courts of the State of New York, hereby certify that this Memorandum of Law contains 18,401 words, excluding the parts of the Memorandum of Law explicitly exempted by Rule, and that Petitioner's request for permission to file an oversize submission as provided in Rule 202.8-b(f) is forthcoming.

Dated: Hauppauge, New York
December 12, 2022

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

By:



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