

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

In the Matter of

**Investigation by LETITIA JAMES,
Attorney General of the State of New York, of
Marks Homecare Agency Inc.; Martin Ganz,
Respondents.**

Assurance No. 22-068

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation, pursuant to Section 343 of the New York General Business Law and Section 63(12) of the New York State Executive Law, into potentially anticompetitive conduct in the homecare industry. As part of its investigation, the OAG, among other things, interviewed numerous market participants, gathered and analyzed relevant market data, and reviewed documents and information produced by market participants.

This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by Marks Homecare Agency, Inc., Martin Ganz, and the OAG (collectively “Parties”).

OAG’S FINDINGS

1. Marks Homecare Agency, Inc. is engaged in the homecare business as a Fiscal Intermediary within the Consumer Directed Personal Assistance Program (“CDPAP”). Marks Homecare Agency has its principal place of business in Corona, New York.
2. Martin Ganz, acting on behalf of Marks Homecare Agency, resides in Brooklyn, New York.

3. Many chronically ill, and/or physically disabled patients who need care may prefer to be taken care of in the comfort and familiarity of their own home. They may also have trusted and caring family members or friends that look after them. Many of these patients that need long-term care participate in a Medicaid program that allows a patient's family member or a close friend to serve as a caregiver at the patient's home and be compensated for their time.

4. The Consumer Directed Personal Assistance Program is a New York State Medicaid program that enables chronically ill or physically disabled patients who have a medical need for assistance with activities of daily living or skilled nursing services to choose their caregivers, enabling those caregivers to receive wages paid out of Medicaid funds.

5. As part of CDPAP, patients who want to hire a family member or friend to take care of them work with Fiscal Intermediaries (defined below) to accomplish this. In a competitive market, patients can choose among several different Fiscal Intermediaries to work with based on the services and compensation provided to a patient and their caregiver.

6. A Fiscal Intermediary plays an important role in the care and well-being of chronically ill or physically disabled patients within the Consumer Directed Personal Assistance Program ("CDPAP"). A Fiscal Intermediary is an entity that handles the timesheet processing, payments to a patient's caregivers, and other administrative functions on behalf of patients.

7. Fiscal Intermediaries compete with each other by trying to recruit and retain patients and their selected caregivers. This allows the Fiscal Intermediary to collect payments from Managed Care Organizations to pay the patient's caregiver and use the margin for administrative costs and profit. Fiscal Intermediaries differentiate themselves principally by the effective hourly wages paid to a patient's caregiver. In a competitive market, a patient would be

incentivized to move to a competing Fiscal Intermediary that pays the caregiver a higher hourly wage.

8. Marks Homecare and Fiscal Intermediary (“FI-2”) are competing Fiscal Intermediaries in the homecare industry that work with and have their own sets of patients and patient caregivers that participate in Medicaid funded homecare services.

9. On or about and between January, 2018, and at least until September, 2018, Marks Homecare and FI-2 had an unlawful agreement not to compete with each other. Martin Ganz, on behalf of Marks Homecare, and FI-2, agreed that neither company would take each other’s existing patients, i.e., if a patient from Marks Homecare requested a transfer to FI-2, FI-2 would reject that patient and vice versa.

10. Agents of Marks Homecare and FI-2 carried out the unlawful agreement using telephone calls and text messages.

11. As a result of this unlawful agreement, certain vulnerable long-term care patients and their selected caregivers were rejected when they tried to move to a competing Fiscal Intermediary. Marks Homecare and FI-2 denied certain vulnerable patients and their caregivers the ability to choose alternative services and/or higher wages.

12. Marks Homecare and FI-2 also exchanged information about the hourly rates they were paying caregivers.

13. On February 26, 2018, Martin Ganz, on behalf of Marks Homecare, attempted to enter into an unlawful agreement with another competing Fiscal Intermediary, (“FI-3”). On that date, Martin Ganz asked FI-3 to enter into an agreement not to take each other’s existing patients. This unlawful attempt was rejected by FI-3.

14. The OAG finds that Marks Homecare and Martin Ganz, through the above-described conduct on or about the above-described dates, entered into a contract, agreement, arrangement or combination restraining competition and attempted to enter into a contract, agreement, arrangement or combination restraining competition in violation of General Business Law § 340 *et seq.* (the “Donnelly Act”) and Executive Law § 63(12).

PROSPECTIVE RELIEF

WHEREAS, Marks Homecare and Martin Ganz neither admit nor deny the OAG’s Findings in paragraphs (1)-(14) above;

WHEREAS, the OAG is willing to accept the terms of this Assurance pursuant to Executive Law § 63(15) and to discontinue its investigation; and

WHEREAS, Marks Homecare, Martin Ganz, and the OAG each believe that the obligations imposed by this Assurance are prudent and appropriate:

IT IS HEREBY UNDERSTOOD AND AGREED, by and between Marks Homecare, Martin Ganz, and the OAG that:

15. Marks Homecare and Martin Ganz shall not engage in unlawful collusive or anticompetitive conduct.

16. Marks Homecare and Martin Ganz shall not enter or attempt to enter into any unlawful collusive or anticompetitive agreements with a competitor, including, but not limited to, unlawful agreements to refrain from competing for patient/caregiver clients.

17. Marks Homecare shall not exchange any competitively sensitive information with a competitor, including, but not limited to, information about wages or benefits paid to caregivers, absent a non-pretextual legitimate business justification for doing so.

18. Marks Homecare shall implement an antitrust compliance program consisting of the following:

a. Within ten (10) calendar days of execution of this Assurance, Marks Homecare shall communicate with its management and executive personnel to (i) inform them that Marks Homecare has executed this Assurance and (ii) outline the conduct prohibited by this Assurance.

b. Within thirty (30) calendar days of execution of this Assurance, Marks shall develop, implement, and administer an antitrust compliance program for its management and executive personnel to ensure compliance with the terms and conditions of this Assurance. The antitrust compliance program shall include at least an annual training. The training program shall be conducted by outside counsel or an outside consultant, as appropriate, at the expense of Marks Homecare.

c. Within sixty (60) calendar days of execution of this Assurance, Marks Homecare shall provide the OAG with a sworn statement confirming that it has taken the steps required to comply with this Assurance and describing the substance of the antitrust compliance program (the "Certification"). The Certification shall include the information contained in the communications to management and executive personnel and a copy of the antitrust compliance program materials.

d. For each of the five years following the execution of this Assurance, on the anniversary of the date of this Assurance, Marks Homecare shall provide the OAG with an annual report of the status of its antitrust compliance program.

19. For each of the five years following the execution of this Assurance, on the anniversary of the date of this Assurance, Marks Homecare and Martin Ganz shall each provide

the OAG with a written certification affirming under penalty of perjury, their compliance with the requirements set forth in this Assurance (“Assurance Certification”), signed by Martin Ganz and an executive from Marks Homecare for their respective certifications.

20. Marks Homecare expressly agrees and acknowledges that a default in the performance of any obligation in paragraph 18 is a violation of the Assurance, and that the OAG thereafter may commence any other appropriate investigation, action, or proceeding, and that evidence that the Assurance has been violated shall constitute prima facie proof of the statutory violations described in paragraph 39, pursuant to Executive Law § 63(15).

21. Marks Homecare shall submit itself to antitrust oversight by the OAG as follows:

a. Marks Homecare shall retain all records relating to its obligations under this Assurance, including copies of all correspondence, emails, and memoranda communicating to all its personnel its obligations pursuant to this Assurance. Without waiving any of its rights and preserving all of its privileges, Marks Homecare shall, upon thirty (30) days’ written notice from the OAG, provide all documentation and information necessary for the OAG to verify its compliance with this Assurance.

b. Marks Homecare shall, upon request by the OAG, facilitate the availability of its officers, owners, employees, or agents, who may have their individual counsel present, for interviews by the OAG, either informally or on the record, regarding compliance with this Assurance. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Marks Homecare.

22. Marks Homecare agrees that it will pay by wire transfer, payable to the State of New York, a Monetary Relief Sum of Five Hundred Thousand Dollars (\$500,000) in penalties, no later than 10 (ten) business days from the date of execution of this Assurance.

23. Martin Ganz agrees that he will pay by wire transfer, payable to the State of New York, a Monetary Relief Sum of Fifty Thousand Dollars (\$50,000) in penalties, no later than 10 (ten) business days from the date of execution of this Assurance.

24. Any payments and all correspondence related to this Assurance must reference Assurance # 22-068. The OAG agrees to provide wire transfer instructions to Marks Homecare and Martin Ganz no later than the date of execution of this Assurance.

MISCELLANEOUS PROVISIONS

25. The OAG has agreed to the terms of this Assurance based on, among other things, the OAG's own factual investigation as set forth in Findings (1)-(14) above.

26. If the Assurance is voided or breached, Marks Homecare and Martin Ganz agree that any civil statute of limitations or other time-related defenses applicable to the subject of the Assurance and any civil claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event the Assurance is voided or breached, Marks Homecare and Martin Ganz expressly agree and acknowledge that this Assurance shall in no way bar or otherwise preclude the OAG from commencing or conducting any civil action or proceeding, however denominated, related to the Assurance, against Marks Homecare and/or Martin Ganz, or from using in any way any statements, documents or other materials OAG obtained during its investigation, including, but not limited to, those produced or provided by Marks Homecare prior to or after the date of execution this Assurance.

27. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Marks Homecare and Martin Ganz in agreeing to this Assurance.

28. Marks Homecare and Martin Ganz acknowledge that they have entered into this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

29. To the extent there is further investigation or litigation relating to the Findings of the OAG (paragraphs (1)-(14) above), or proceedings against individuals or entities that are not Parties to or released by this Agreement, Marks Homecare will provide reasonable cooperation to the OAG without waiving any of its legal rights or privileges, including, but not limited to a representative for Marks Homecare being available, upon reasonable notice, to meet with attorneys or other representatives of the OAG either in person, by telephone, or by video, and to answer questions related to issues pertaining to the investigation or litigation relating to the Findings of the OAG (paragraphs (1)-(14) above). Marks Homecare agrees that to the extent such investigation or litigation proceeds, if so requested or demanded by the OAG, Marks Homecare will not interfere with or prevent its current employees from testifying in subpoena hearings, depositions, and/or at trial, upon reasonable notice. Marks Homecare also agrees to make available to the OAG, upon reasonable notice, documents or other materials relevant to any such investigation or litigation.

30. Unless a term limit for compliance is otherwise specified within this Assurance, Marks Homecare's and Martin Ganz's obligations under this Assurance are enduring. Nothing in this Assurance shall relieve Marks Homecare and Martin Ganz of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

31. Marks Homecare and Martin Ganz shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this Assurance affects or is intended to limit or restrict Marks Homecare's and Martin Ganz's (i) testimonial obligations or (ii) right to

take legal or factual positions in defense of litigation or other investigations or proceedings of any kind. Nothing in this Assurance is intended to limit or restrict Marks Homecare and Martin Ganz's assertion of any legal rights or privileges.

32. This Assurance is not intended, and should not be construed, as an admission of liability by Marks Homecare or Martin Ganz. This Assurance is not intended for use by any third-party in any other proceeding. This Assurance does not create any rights for any third-party. The OAG may use this Assurance only in litigation involving Marks Homecare and/or Martin Ganz arising out of any alleged breach of this Assurance or to enforce its terms and for no other purpose.

33. This Assurance may not be amended except by an instrument in writing signed on behalf of all the Parties to this Assurance.

34. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Marks Homecare. Marks Homecare shall cause this Assurance to be adopted by any such successor, assignee or transferee. This Assurance shall be binding on and inure to the benefit of the Parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written notice to the OAG. Marks Homecare agrees that it shall be prohibited from assigning, delegating, or otherwise transferring any of its rights or obligations under this Assurance unless and until Marks Homecare and Martin Ganz have complied with paragraphs 22 and 23 of this Assurance.

35. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or

unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

36. To the extent not already provided under this Assurance, Marks Homecare, without waiving any of its legal rights or privileges, shall, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance.

37. All notices, reports, requests, and other communication to any party pursuant to this Assurance shall be in writing by first class mail and/or electronic mail and shall be directed as follows:

If to Marks Homecare Agency, Inc., to:

Marks Homecare Agency, Inc.
c/o Kristina Giyaur, Esq.
Sauchik & Giyaur
17 State Street, Suite 3230
New York, NY 10004
kgiyaur@mdrxlaw.com

If to Martin Ganz, to:

Mr. Martin Ganz
c/o Norman A. Bloch, Esq.
Thompson Hine LLP
335 Madison Avenue, 12th Floor
New York, NY 10017-4611
norman.bloch@ThompsonHine.com

If to the OAG, to:

Bureau Chief, Antitrust Bureau
New York State Office of the Attorney General
28 Liberty Street, 20th Floor
New York, NY 10005
Antitrust.Bureau@ag.ny.gov

38. Acceptance of this Assurance by the OAG shall not be deemed approval by the OAG of any of the practices or procedures referenced herein, and Marks Homecare and Martin Ganz shall make no representation to the contrary.

39. Pursuant to Section 63(15) of the Executive Law, evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

40. If a court of competent jurisdiction finally determines that Marks Homecare and/or Martin Ganz has breached this Assurance, the party that breached this Assurance, either Marks Homecare and/or Martin Ganz, shall pay to the OAG the reasonable cost, if any, of such determination and of enforcing this Assurance, including, without limitation, reasonable legal fees, expenses, and court costs.

41. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. The OAG is willing to accept this Assurance pursuant to Section 63(15) of the Executive Law, in lieu of commencing a statutory proceeding against Marks Homecare and/or Martin Ganz.

42. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.


43. Nothing contained herein shall be construed as to deprive any person of any legal right or privilege under any provision of law.

44. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

45. This Assurance shall be effective on the date of execution of this Assurance by the Parties.

IN WITNESS WHEREOF, this Assurance is executed by the Parties hereto on December 2nd 12/2, 2022.

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, New York 10005

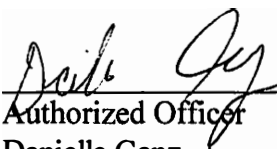
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Marks Homecare Agency, Inc.

By: 
Authorized Officer
Danielle Ganz

By: 
Martin Ganz