UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ENA JOHNSON, by her next friend CECELIA JOHNSON; OLGA SKIBINA, by her next friend ANZHELA LITVACHKIS; JOHN DELMAR, by his next friend MARGARET DELMAR; ROSE SOLIS, by her next friend MARIA PATTI; JOSEF ITAMARI; JULIA LEBRON, by her next friend JENNIFER LEBRON; RAISA REZNIKOV, by her next friend NAOMI KOSOVSKY; MATTIE DOW, by her next friend AUDREY LOGAN; ROBERT SCHWARTZ, by his next friend DAVID SUNSHINE; YENTA MELMAN, by her next friend FANYA MOSIONZHNIK; and HYACINTH FORBES, by her next friend CASIMIR FORBES, individually and on behalf of all persons similarly situated,

Plaintiffs,

-against-

NIRAV R. SHAH, as Commissioner of the New York State Department of Health; ELIZABETH R. BERLIN, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability ASSISTANCE; ROBERT DOAR, as Commissioner of the New York City Human Resources Administration; and, PERSONAL-TOUCH HOME CARE, INC.; AMERICARE CERTIFIED SPECIAL SERVICES INC.,

Defendants.

11 Civ. 1956 (KAM)(SMG)

SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. Alterations to the New York Public Health Law mandated by the 2011-2012 New York State Budget Bill, effective April 1, 2011, have changed reimbursement methodology for Medical Assistance Program ("Medicaid") funded Certified Home Health Agencies ("CHHAs") in New York State, thereby making it less profitable for CHHAs to serve patients in need of high-hour care. In response to these changes, CHHAs are engaging in a pattern and practice of arbitrarily and capriciously (i) reducing or terminating home care services, or threatening to reduce or terminate home care services, of patients whose need for services has not changed; (ii) reducing or terminating home care services, or threatening to reduce or terminate home care services, without adequate notice of the reduction or termination, an opportunity for Fair Hearing, or Aid Continuing benefits; and (iii) failing or refusing to comply with Aid Continuing orders ("Aid Continuing Directives"). Further, by engaging in this pattern and practice, CHHAs are placing Named Plaintiffs and members of the plaintiff class in grave danger of being unnecessarily institutionalized.

2. CHHAs are also engaging in a pattern and practice of obtaining or attempting to obtain physicians' orders authorizing the reduction or termination of care when (i) the CHHA has made the decision about how much care should be provided for non-medical reasons and (ii) the order does not reflect the physician's opinion of the patient's medical needs.

3. New York State regulations, 18 N.Y.C.R.R. §§ 358-3.1(f)(2) and 505.23(d), deny Fair Hearing rights to Medicaid recipients when a patient's CHHA care is reduced or terminated pursuant to a physician's order. These state regulations are premised on the incorrect assumption that physicians' orders always reflect their independent judgment about their patients' medical needs. In fact, CHHAs typically draft plans of care and present them to physicians for their

signature, so the CHHAs are significantly involved in these reduction or termination decisions – often based on their bottom line, not their patients' needs.

4. The New York State Department of Health, the New York State Office of Temporary and Disability Assistance, and the New York City Human Resources Administration have a pattern and practice of (i) allowing CHHAs to arbitrarily reduce or terminate, or threaten to reduce or terminate the level of care when their patients' needs or eligibility for care have not changed; (ii) failing to provide or ensure the provision of timely and adequate notice and failing to provide an opportunity for a Fair Hearing and Aid Continuing regarding the actual or threatened termination or reduction of CHHA services; (iii) failing to ensure that CHHAs comply with Aid Continuing Directives; and (iv) allowing CHHAs to reduce or terminate care, or to threaten to reduce or terminate care, even though CHHAs have not provided timely and adequate notice and an opportunity for a Fair Hearing and Aid Continuing.

5. Plaintiffs Ena Johnson, Olga Skibina, John Delmar, Rose Solis, Josef Itamari; Julia Lebron, Raisa Reznikov, Mattie Dow, Robert Schwartz, Yenta Melman, and Hyacinth Forbes (collectively, "Named Plaintiffs") bring this action by their respective next friends on behalf of themselves and a class consisting of all current and future Medicaid recipients in New York State who are or will be recipients of Medicaid-funded home health care provided by CHHAs, who have had or will have their CHHA services terminated or reduced without a change in their need or eligibility for the service, or without timely and adequate notice and the opportunity for Fair Hearings and Aid Continuing.

6. Plaintiffs allege that Defendants' wrongful conduct violates their rights under the Medicaid Act, 42 U.S.C. § 1396 et seq. and its implementing regulations; Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq. and its implementing

regulations; Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794; and the Due Process Clause of the 14th Amendment to the United States Constitution. Plaintiffs allege that 18 N.Y.C.R.R. §§ 358-3.1(f)(2) and 505.23(d), which deny Fair Hearing rights when an adverse action is taken or threatened pursuant to a purported physician's order, violate 42 U.S.C. § 1396a(a)(3); 42 C.F.R §§ 431.210, 431.220, 431.230, 431.231; the Due Process Clause of the 14th Amendment to the United States Constitution; and the Supremacy Clause of the United States Constitution, when applied in the context of Medicaid-funded home health services provided by CHHAs.

JURISDICTION AND VENUE

7. Jurisdiction over this action is conferred upon this Court by 28 U.S.C. §§ 1331, 1343 and 1367. This action is authorized by 42 U.S.C. § 1983 as an action seeking redress of the deprivation of statutory and constitutional rights under color of law; the Americans with Disabilities Act, 42 § U.S.C.§ 12117; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2).

8. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b) in that it is the judicial district in which Named Plaintiffs Olga Skibina, John Delmar, Rose Solis, Josef Itamari, Julia Lebron, Raisa Reznikov, Mattie Dow, Robert Schwartz, Yenta Melman, and Hyacinth Forbes reside, and in which Named Plaintiff Ena Johnson resided, and in which a substantial part of the events giving rise to the claims occurred.

PARTIES

9. Named Plaintiff ENA JOHNSON was an eighty-five year-old woman who lived at 1279 Bergen Street in Brooklyn, New York. She received Medicaid-funded CHHA care, provided twenty-four hours per day, in two twelve-hour shifts ("split-shift" care), for many

years. Cecelia Johnson is her daughter and next friend. Ena Johnson brings this action by her next friend because she could not adequately represent herself or understand the nature of the claims herein.

10. Named Plaintiff OLGA SKIBINA is a twenty-four year-old woman who lives at 1821 East 32nd Street, Brooklyn, New York. Ms. Skibina has been receiving Medicaid-funded split-shift CHHA care since October 1, 2010. Anzhela Litvachkis is Ms. Skibina's mother and next friend. Olga Skibina brings this action by her next friend because she cannot adequately represent herself or understand the nature of the claims herein.

11. Named Plaintiff JOHN DELMAR is an eighty-seven year-old man who lives at 8903 Avenue M, Brooklyn, NY. Mr. Delmar was receiving Medicaid-funded split-shift CHHA care but now only receives twelve hours of care per day. Margaret Delmar is Mr. Delmar's daughter and next friend. John Delmar brings this action by his next friend because he cannot adequately represent himself or understand the nature of the claims herein.

12. Named Plaintiff ROSE SOLIS is an eighty-six year-old woman who lives at Sunrise Senior Living, an assisted living facility, at 2211 Emmons Avenue, Brooklyn, New York. Ms. Solis received Medicaid-funded split-shift CHHA care until April 17, 2011. Maria Patti is her granddaughter and next friend. Rose Solis brings this action by her next friend because she cannot adequately represent herself or understand the nature of the claims herein.

13. Named Plaintiff JOSEF ITAMARI is a ninety year-old man who lives alone at 1357 51st Street, Brooklyn, New York. Mr. Itamari received twelve hours per day of Medicaid-funded CHHA care until March 14, 2011.

14. Named Plaintiff JULIA LEBRON is seventy-two years-old and lives at 180 Union Street in Brooklyn, New York. Ms. Lebron has received Medicaid-funded split-shift

CHHA care since August 2009. Jennifer Lebron is her daughter and next friend. Julia Lebron brings this action by her next friend because she cannot adequately represent herself or understand the nature of the claims herein.

15. Named Plaintiff RAISA REZNIKOV is ninety years-old and lives at 2954 Brighton West 12th Street, Brooklyn, New York. Ms. Reznikov previously received split-shift CHHA care but now only receives twenty-four hour care provided by one aide ("sleep-in" care). Naomi Kosovsky is her granddaughter and next friend. Raisa Reznikov brings this action by her next friend because she cannot adequately represent herself or understand the nature of the claims herein.

16. Named Plaintiff MATTIE DOW is eighty-one years-old and lives alone at 385 Throop Avenue, Apt. 307, Brooklyn, New York. Ms. Dow has received Medicaid-funded split-shift CHHA care for approximately two years. Audrey Logan is her daughter and next friend. Mattie Dow brings this action by her next friend because she cannot adequately represent herself or understand the nature of the claims herein.

17. Named Plaintiff ROBERT SCHWARTZ is eighty years-old and lives at 66 West End Avenue, New York, New York. Mr. Schwartz has received Medicaid-funded split-shift CHHA care for approximately three years. David Sunshine is his brother-in-law and next friend. Robert Schwartz brings this action by his next friend because he cannot adequately represent himself or understand the nature of the claims herein.

18. Named Plaintiff YENTA MELMAN is eighty-five years-old and lives at 6201 Bay Parkway, Brooklyn, New York. Ms. Melman has received Medicaid-funded split-shift CHHA care for approximately two years. Fanya Mosionzhnik is Ms. Melman's daughter and next friend. Ms. Melman brings this action by her next friend because she cannot adequately

represent herself or understand the nature of the claims herein.

19. Named Plaintiff HYACINTH FORBES is eighty-five years-old and lives at 105 Ashland Place Brooklyn, New York. Ms. Forbes has received Medicaid-funded split-shift CHHA care for approximately four years. Casimir Forbes is Ms. Forbe's son and next friend. Ms. Forbes brings this action by her next friend because she cannot adequately represent herself or understand the nature of the claims herein.

20. Defendant NIRAV R. SHAH is the Commissioner of the New York State Department of Health ("DOH"), and as such is responsible for the administration of the Medicaid program in the State of New York. He maintains an office at Corning Tower, Empire State Plaza, Albany, New York.

21. Defendant ELIZABETH BERLIN is the Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance ("OTDA") and as such is responsible for the operations of the Office of Fair Hearings, including but not limited to ensuring compliance with Aid Continuing Directives, scheduling and conducting Fair Hearings, issuing recommended decisions after Fair Hearings, and ensuring compliance with Fair Hearing decisions involving the Medicaid program. She maintains an office at 40 North Pearl Street, Albany, New York and at 14 Boerum Place, Brooklyn, New York.

22. Defendant ROBERT DOAR is the Commissioner of the New York City Human Resources Administration ("HRA") and as such is responsible for the administration of the Medicaid program in New York City. He maintains an office at 180 Water Street, New York, New York.

23. Defendant PERSONAL-TOUCH HOME CARE, INC. ("Personal-Touch") is a CHHA. Personal-Touch's office for its Brooklyn Branch is located at 2701 Emmons Avenue,

Brooklyn, New York 11235.

24. Defendant AMERICARE CERTIFIED SPECIAL SERVICES INC. ("Americare") is a CHHA. Americare is located at 171 Kings Highway, Brooklyn, New York 11223.

STATUTORY AND REGULATORY SCHEME

A. Framework of the Medicaid Program

25. Medicaid is a joint federal-state program established under Title XIX of the Social Security Act (the "Medicaid Act"), which provides federal funding for state programs that furnish medical assistance and rehabilitation and other services to needy individuals. 42 U.S.C. § 1396 et seq.; 42 C.F.R. § 430 et seq.

26. States are not required to participate in the Medicaid program, but if they do, they must conform to federal law and regulations in order to qualify for federal financial participation. 42 U.S.C. §§ 1396a, 1396c.

27. Any state participating in the Medicaid program must adopt an approved State plan, and must administer the program through a "single state agency." 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10(b)(1). New York has elected to participate in the Medicaid program, and the "single state agency" responsible for the administration of the Medicaid program in New York is the New York State Department of Health ("DOH"). N.Y. Soc. Serv. Law § 363-a(1).

28. Effective October 1, 1996, DOH assumed the responsibility, formerly held by the New York Department of Social Services ("NYDSS"), for the administration of New York's Medicaid program. All regulations of NYDSS with respect to the Medicaid program continued, in full force and effect, as regulations of DOH. N.Y. Soc. Serv. Law § 363-a(1).

29. DOH, as the "single state agency," remains ultimately responsible to supervise the actions of its agents and to ensure that its agents comply with the federal and state statutes and regulations governing the Medicaid program. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. §§ 431.10(b)(1), 431.50, 435.903; N.Y. Soc. Serv. Law §§ 363-a(1), 364(2).

30. DOH may not delegate to any agent the authority to exercise administrative discretion in the administration or supervision of the State plan, or issue policies, rules, and regulations on program matters. 42 C.F.R. § 431.10(e)(1).

31. Although DOH retains ultimate responsibility for making final administrative determinations regarding individual Fair Hearings, the hearings themselves are scheduled and conducted by hearing officers employed by OTDA who issue recommended decisions to the Commissioner of DOH pertaining to the individual Fair Hearings.

B. Home Health Services Under Medicaid

32. The Medicaid Act and its implementing regulations require that participating states provide home health services, at a minimum, to any individual who, under the State plan, is entitled to nursing facility services. 42 U.S.C. § 1396a(a)(10)(D); 42 C.F.R. § 440.220(a)(3).

33. Under the Medicaid Act, "Medical Assistance" includes payment of part or all of the cost of home care services. 42 U.S.C. § 1396d(a)(7).

34. In New York State, "Medical Assistance" includes home health services provided in a recipient's home and prescribed by a physician. N.Y. Soc. Serv. Law § 365-a(2)(d).

35. The Medicaid Act requires that participating states use "reasonable standards ... for determining eligibility for and the extent of medical assistance" in a manner consistent with the objectives of the program and that medical assistance be provided in a manner consistent with the "best interests of the recipients." 42 U.S.C. § 1396a(a)(17), (19).

36. Medical assistance made available to a categorically needy individual "shall not be less in amount, duration or scope than the medical assistance made available to other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i); *see also* 42 C.F.R. § 440.240(b).

37. Medical assistance must be "sufficient in amount, duration or scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b).

38. The Medicaid agency may not arbitrarily deny or reduce amount, duration, or scope of a required service because of the diagnosis, type of illness, or condition. 42 C.F.R. § 440.230(c).

39. Medicaid-funded home health care recipients in New York receive their care from Certified Home Health Agencies ("CHHAs"), privately-owned vendors licensed by DOH. 10 N.Y.C.R.R. § 763.11(a)(7).

40. CHHA services generally comprise skilled nursing services, physical therapy, occupational therapy and home health aide services in conjunction with assistance with tasks requiring some medical skill. 18 N.Y.C.R.R. § 505.23(a)(2)(i).

41. CHHAs must provide home health services in accordance with applicable federal and DOH regulations governing the administration of home health care services. 18 N.Y.C.R.R. § 505.23(b)(1).

42. Home health services recipients include (a) all Medicaid recipients who are currently receiving CHHA services in their home, or in any other community setting, and (b) all hospitalized Medicaid recipients who received CHHA services prior to hospitalization. 18 N.Y.C.R.R. § 505.23(d).

43. Home health care is provided pursuant to a plan of care. 10 N.Y.C.R.R. § 763.6.

44. These plans of care must be reviewed by a treating physician and by a CHHA at

least every 62 days. 10 N.Y.C.R.R. § 763.6(e).

45. Before discharging a patient, a CHHA must consult with the patient, the patient's authorized practitioner, the patient's family, and the patient's legal representatives. 10 N.Y.C.R.R. § 763.5(d), (h).

46. When a CHHA determines to discharge a patient, an interim plan of care must be developed to address the patient's essential health and safety needs until such time as alternative placement becomes available and such placement is made. 10 N.Y.C.R.R. § 763.5(d), (g), (h).

47. A CHHA may not reduce or terminate a patient's services solely because of a change in the patient's source of payment or the patient's inability to pay for care. 10 N.Y.C.R.R. § 763.5(f).

C. Fair Hearing Process and Notice and Aid Continuing Requirements

48. Federal law and regulations require a state's Medicaid program to provide Medicaid applicants and recipients an opportunity for an administrative Fair Hearing when Medicaid benefits are denied, reduced, or terminated. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.220.

49. Federal law requires timely and adequate notice to Medicaid applicants and recipients of any action to deny, discontinue, suspend, or reduce medical assistance authorization or services. 42 U.S.C.§ 1396a(a)(3); 42 C.F.R. §§ 435.919, 435.912, 431.206(b)-(c), 431.210; U.S. Const. Amend. XIV, § 1.

50. When determinations are made to reduce or terminate Medicaid benefits, recipients who request a Fair Hearing in a timely manner are entitled to receive their benefits unchanged pursuant to Aid Continuing Directives until a Decision After Fair Hearing ("DAFH") is issued. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.230(a), 431.231(c); U.S. Const. Amend.

XIV § 1.

51. State hearing systems must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970). 42 C.F.R. § 431.205(d).

52. In 1996, New York State implemented new regulations regarding rights applicable to applicants and recipients of CHHA services (in the form of an appendix to 18 N.Y.C.R.R. § 505.23), pursuant to an Order of the United States District Court for the Western District of New York, in an action entitled *Catanzano v. Dowling*, 900 F. Supp. 650 (W.D.N.Y. 1995). These regulations (the "Catanzano Implementation Plan") are codified at 18 N.Y.C.R.R. § 505.23(d).

53. The Catanzano Implementation Plan specifically delineates rights applicable to CHHA applicants and recipients when a CHHA seeks to deny, reduce, or terminate their care contrary to a physician's order, and makes clear that under these circumstances, recipients of CHHA services have Fair Hearing rights including the rights to timely and adequate notice and Aid Continuing. 18 N.Y.C.R.R. § 505.23(d).

54. Under this Plan, when a Medicaid recipient requests a Fair Hearing, OTDA must notify HRA that a request for a Fair Hearing has been made and that Aid Continuing has been ordered. HRA must then notify the CHHA that it is required to provide the Aid Continuing by keeping all services in place. 18 N.Y.C.R.R. § 505.23(d).

55. The Catanzano Implementation Plan makes clear that when a CHHA seeks to reduce, terminate, or deny home health care services which have been ordered by the Medicaid recipient's treating physician – *i.e.*, when a CHHA seeks to act in contravention of a physician's orders – the CHHA must refer the case to HRA, which in turn must ensure that the recipient receives a timely and adequate notice, an opportunity for a Fair Hearing, and Aid Continuing

pending the resolution of any requested hearing. 18 N.Y.C.R.R. § 505.23(d).

56. The preamble of the Catanzano Implementation Plan notes that the Plan applies only to "adverse actions taken contrary to a treating physician's orders with respect to home health services." 18 N.Y.C.R.R. § 505.23(d).

57. New York State regulation 18 N.Y.C.R.R. § 358-3.1(f)(2), the regulation defining general Fair Hearing rights, provides that when decisions are made to reduce, terminate, or deny Medicaid benefits because of a physician's order, the Medicaid recipient does not have a right to a Fair Hearing.

D. ***Integrated Setting***

58. The ADA and Section 504 require a public entity to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 42 U.S.C. §§ 12101, 12132, 12134; 29 U.S.C. § 794(a); 28 C.F.R. §§ 35.130(b)(7),(d) and 41.51.

CLASS ACTION ALLEGATIONS

59. Named Plaintiffs bring this action, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and as representatives of a class of:

> all current and future Medicaid recipients in New York State who are or will be recipients of Medicaid-funded home health care provided by CHHAs, who have had or will have their CHHA services terminated or reduced without a change in their need or eligibility for the service, or without timely and adequate notice and the opportunity for Fair Hearings and Aid Continuing.

60. The class is so numerous that joinder of all class members in this action would be impracticable. Upon information and belief, there are at least hundreds of persons in the class.

61. The claims of the Named Plaintiffs are typical of the claims of the class, and questions of law and fact common to the class predominate over any individual questions.

62. The common questions of fact include: (i) whether CHHAs are engaged in a pattern and practice of arbitrarily and capriciously reducing or terminating, or attempting to reduce or terminate patients' Medicaid-funded home health care services even though the patients' medical needs have not changed; (ii) whether Defendants Shah, Berlin, and Doar have a pattern and practice of allowing CHHAs to engage in a pattern and practice of arbitrarily and capriciously reducing or terminating, or attempting to reduce or terminate patients' Medicaid-funded home health care services, even though the patients' medical needs have not changed; (iii) whether the CHHAs are significantly involved in determining how many hours of care patients will receive; (iv) whether Defendants have a pattern and practice of failing to provide or ensure the provision of timely and adequate notice to patients before their Medicaid-funded home health care is reduced or terminated; and (v) whether Defendants have a pattern and practice of failing to provide Aid Continuing benefits, or ensure the provision of Aid Continuing, in compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class.

63. The common questions of law include: (i) whether members of the plaintiff class have a right to timely and adequate notice, and Fair Hearing and Aid Continuing benefits pending the outcome of a Fair Hearing, under federal law, regardless of whether adverse actions by CHHAs are contrary to or in accordance with doctors' orders; (ii) whether 18 N.Y.C.R.R. §§ 358-3.1(f)(2) and 505.23(d) as applied to members of the plaintiff class so as to deny them timely and adequate notice, Fair Hearings and Aid Continuing benefits, violates class members' rights under the Medicaid Act and the Due Process clause; and (iii) whether Defendants' actions in reducing or terminating class members' CHHA services, or allowing reduction or termination of class members' CHHA services, in the absence of any change in their medical needs and

without adequate notice or an opportunity for a Fair Hearing and Aid Continuing, violate their right to care in the most integrated setting under the ADA, 42 U.S.C. § 12131 et seq. and its implementing regulations, and Section 504, 29 U.S.C. § 794.

64. Named Plaintiffs will adequately and fairly protect the interests of all members of the proposed class because they have the requisite personal interest in the outcome of this litigation and have no interest antagonistic to any members of the proposed class.

65. Named Plaintiffs are represented by the New York Legal Assistance Group ("NYLAG"), whose attorneys are experienced in class action litigation, including litigation regarding the Medicaid home health services program. Named Plaintiffs are also represented by the law firm Patterson Belknap Webb & Tyler LLP, whose attorneys are experienced in complex federal litigation.

66. A class action is the superior method for a fair and efficient adjudication of this matter in that Defendants have acted in a manner generally applicable to the class and a class action will avoid numerous separate actions by class members that would unduly burden the courts and create the possibility of inconsistent decisions, thereby making final injunctive and declaratory relief appropriate as to the class as a whole.

67. Moreover, it would be impracticable for potential plaintiffs, who are, by definition, disabled and indigent individuals, to obtain legal services on an individual basis for their claims. Hence their rights under the law may well be meaningless without certification of a class action seeking common redress.

FACTS CONCERNING THE CLASS

68. Medicaid-funded home health services enable people who need assistance with

the activities of daily living – essential life activities such as ambulating, bathing, toileting, or eating – to receive care from a home attendant, home health aide, or visiting nurse while remaining safely in their own homes, rather than having to permanently reside in a Medicaid-funded nursing home or other institution.

69. CHHAs are privately-owned vendors licensed by Defendant Shah.

70. CHHAs provide a range of home health services to Medicaid recipients, including basic custodial care, physical therapy, and skilled nursing.

71. Effective April 1, 2011, the New York State Public Health law was amended to change the methodology for calculating the amounts CHHAs are reimbursed by the State for the care CHHAs provide to Medicaid recipients. This change was made pursuant to the 2011-2012 New York State Budget Bill.

72. Prior to April 1, 2011, CHHAs were reimbursed for home health service on a fee-for-service basis. Effective April 1, 2011, rates of reimbursement include "ceiling limitations" which prevent CHHAs from being fully reimbursed for high-hour cases, even when patients require round-the-clock care.

73. Although these ceilings were apparently designed to discourage CHHAs from authorizing more care than is necessary for a particular recipient, in practice they create a significant incentive for CHHAs to deny, reduce, or discontinue high-hour cases even where that level of care is necessary.

74. CHHAs appear to believe that in many situations they will now lose money on cases that require them to provide many hours of care.

75. As a result of this perceived fiscal threat, CHHAs are engaging in a pattern and practice of arbitrarily and capriciously (i) reducing or terminating home care services, or

threatening to reduce or terminate home care services, of patients whose need for services has not changed; (ii) reducing or terminating home care services, or threatening to reduce or terminate home care services, without adequate notice of the reduction or termination, an opportunity for Fair Hearing, or Aid Continuing benefits; and, (iii) failing or refusing to comply with Aid Continuing Directives.

76. CHHAs are also engaging in a pattern and practice of obtaining or attempting to obtain a physician's order reducing or terminating care when (i) the CHHA has made the decision about how much care is needed for non-medical reasons and against the best interests of the patient; (ii) the doctor is unaware or not fully informed of the changes in a plan of care or order; (iii) the CHHA has misled the physician regarding the available options for a patient's care; or (iv) the order otherwise does not reflect the physician's opinion of the patient's medical needs.

77. CHHAs draft plans of care and present them to treating physicians for their signature. Especially for patients whose need for home care services does not change, treating physicians routinely sign plans of care as they are presented to them without confirming that the plans call for the same level of care as previously ordered.

78. Treating physicians are not usually aware of the complicated statutory and regulatory scheme surrounding Medicaid-funded, CHHA-provided services. As a result, even when a physician notices that a plan of care calls for a reduction or termination of services, that physician may not understand his or her ability to disagree with or modify the plan of care.

79. CHHAs are also engaging in a pattern and practice of attempting to obtain patients' agreement to or acquiescence in reductions in or terminations of care by (i) misleading recipients and their family member representatives and (ii) threatening to take adverse action

against recipients when recipients or their family member representatives seek to challenge reductions by, for example, threatening to institutionalize the patients in a hospital or nursing home.

80. Defendant Shah, Berlin and Doar are aware of the patterns and practices of CHHAs described herein.

81. On April 8, 2011, Defendant Shah issued a "Dear Administrator" letter to CHHAs reminding them of their responsibility to comply with federal and state laws.

82. On April 15, 2011, Defendant Shah issued a second "Dear Administrator" letter stating in even stronger terms the obligations of CHHAs to comply with procedural requirements of the law.

83. These "Dear Administrator" letters have not ended the pattern and practice of arbitrary, erroneous, and illegal reductions or terminations.

84. Defendants Shah, Berlin, and Doar have a pattern and practice of (i) allowing CHHAs to arbitrarily reduce or terminate, or threaten to reduce or terminate the level of care when their patients' needs or eligibility for care have not changed; (ii) failing to provide or ensure the provision of timely and adequate notice and failing to provide an opportunity for a Fair Hearing and Aid Continuing regarding the termination or reduction or the threatened termination or reduction of CHHA services; (iii) failing to ensure that CHHAs comply with Aid Continuing Directives; and (iv) allowing CHHAs to reduce or terminate care, or to threaten to reduce or terminate care, even though CHHAs have not provided timely and adequate notice and an opportunity for a Fair Hearing and Aid Continuing.

85. Defendants Shah and Berlin also have a pattern and practice of issuing DAFHs finding that they lack jurisdiction to consider challenges to the reduction or termination of

individuals' CHHA services when such actions are purportedly taken pursuant to physicians' orders, thereby effectively denying Fair Hearings to such individuals.

FACTS CONCERNING NAMED PLAINTIFFS

A. Ena Johnson

86. Ena Johnson was, at the time of the filing of the First Amended Complaint, an eighty-five year-old woman and a Medicaid recipient.

87. Ms. Johnson had many strokes during the past ten years. As a result, she became bed-bound, non-verbal and suffered from numerous severe ailments including severe muscle weakness, incontinence, bed sores, and dementia.

88. Ms. Johnson required total assistance with every activity of daily living.

89. Ms. Johnson had multiple nighttime needs. She was incontinent and used adult diapers, which had to be changed every two hours throughout the night.

90. Ms. Johnson developed a bedsore as a result of being bed-bound. She required someone to turn her every two hours so that her bedsore could heal and to prevent the formation of additional sores. Ms. Johnson required a nurse for daily wound care for her bedsore.

91. For the past several years, Ms. Johnson received split-shift CHHA services provided by Personal-Touch. In addition, prior to being admitted to the hospital on April 4, 2011, a nurse from Personal-Touch visited Ms. Johnson every other day at home to care for her bedsore.

92. Between April 2010 and April 2011, Ms. Johnson was admitted to Long Island College Hospital ("LICH") on three occasions. In the first two instances, Ms. Johnson's split-shift care CHHA services were reinstated in her home upon her discharge from the hospital.

93. On April 4, 2011, Ms. Johnson was admitted to LICH for the third time, and it

was expected that she would be ready for discharge in 2 to 3 days.

94. On April 8, 2011, Ms. Johnson was ready for discharge and needed Personal-Touch to reinstate her split-shift care so that she could return home. Ms. Johnson's hospital social worker contacted Personal-Touch and requested that her split-shift care be reinstated. The social worker and Ms. Johnson's daughter, Cecelia, were informed by Personal-Touch that they planned to reduce Ms. Johnson's care to twelve hours per day, seven days per week.

95. Ms. Johnson received no prior notice of the threatened reduction of her split-shift care CHHA services. She was not informed of her right to a Fair Hearing.

96. A complication with Ms. Johnson's health required her to remain in the hospital until April 14, 2011, when she was again ready for discharge.

97. Again, the hospital social worker requested that Personal-Touch reinstate Ms. Johnson's split-shift care CHHA services. Personal-Touch responded that they would only provide twelve hours per day, seven days per week, of care for Ms. Johnson.

98. As of the date of the filing of the Class Action Complaint, Ms. Johnson remained in the hospital because Personal-Touch would not reinstate the split-shift care necessary to meet Ms. Johnson's medical needs according to the doctors' orders in place at that time.

99. Personal-Touch offered no doctor's order indicating that her needs had changed and she needed fewer hours of care.

100. Because Ms. Johnson no longer required hospital care, the hospital was only eligible for reimbursement at a lower rate, or Alternative Level of Care. Long Island College Hospital thus threatened to move her to a nursing home because they could not afford to keep her in the hospital and because they wanted to prevent her from getting an infection.

101. Ms. Johnson did not need to go to a nursing facility, nor did she want to be placed

in a nursing facility, because she could and was entitled to live safely at home, in an integrated setting, with the assistance of split-shift care CHHA care.

102. On April 13, 2011, an attorney at the New York Legal Assistance Group ("NYLAG") requested a Fair Hearing for Ms. Johnson. OTDA issued an Aid Continuing Directive which was sent to HRA on April 14, 2011. The City in turn advised Personal-Touch of the Aid Continuing Directive.

103. As of the date of the filing of the Class Action Complaint, Ms. Johnson had not received Aid Continuing benefits.

104. On April 22, 2011, Ms. Johnson's split-shift care was restored by Personal-Touch.

105. Ms. Johnson died on July 16, 2011.

B. Olga Skibina

106. Olga Skibina receives Medicaid-funded split-shift CHHA care provided by Personal-Touch twenty-four hours a day, in two twelve-hour shifts.

107. Ms. Skibina was hit by a car driven by a drunk driver on September 24, 2009. She sustained massive and near-fatal injuries to her head.

108. After the incident, Ms. Skibina was in intensive care for five weeks, in a rehabilitation center for five more weeks, in another hospital for one month, and then in a sub-acute rehabilitation center for nine months.

109. On October 1, 2010, Ms. Skibina returned home with the provision of split-shift CHHA services provided by Personal-Touch.

110. Ms. Skibina needs split-shift care because she must be turned every few hours, day and night; her diapers must be changed often to help prevent skin breakdowns and infections; and she has trouble swallowing, one of the consequences of which is that if she

begins to cough, she must be moved into a sitting position so that she will not choke on her own saliva.

111. When Ms. Skibina returned home from the rehabilitation facility in October 2010, she was in a near-vegetative state; however, since her return home, with one-to-one care from her home attendants, and the stimulation and attention from her family, Olga has finally made significant progress. She is now able to speak simple words in order to have her needs met, and understands much of what is said to her.

112. Because of the long period during which she was unconscious, Ms. Skibina experienced decerebration because her nerves and muscles received no stimulus from her brain. This decerebration resulted in severe spasticity, so she does not have normal use of her limbs, although she is not paralyzed. However, since she has been home, Ms. Skibina has begun to be able to move her limbs at will, to a limited extent, and to open her hands, with the assistance of her home health aide.

113. On or about April 5, 2010, a medical coordinator from Personal-Touch called Anzhela Litvachkis, Ms. Skibina's mother, and told her that at the end of April, Ms. Skibina would no longer receive nighttime care; her hours would be reduced to just 12 hours per day.

114. Ms. Litvachkis asked the representative from Personal-Touch for written notice of the threatened change, and was told that Personal-Touch was not providing written notice in terminations like her daughter's.

115. About two weeks later, Ms. Litvachkis called the medical coordinator at Personal-Touch back to ask about their plan for Olga's care. The medical coordinator told Ms. Litvachkis that all of Personal-Touch's cases would be reduced to only eight hours of care per day, but they did not yet have a date on which this would happen for Ms. Skibina.

116. No one from Personal-Touch mentioned any doctor's orders as the basis for the planned reduction of care. Ms. Skibina's doctor did not order a change and would not have done so given her medical condition.

117. Olga Skibina is finally making progress in recovering from her horrible and tragic accident, because she is at home with one-on-one around-the-clock care and surrounded by her loving and attentive family.

118. Because of Olga Skibina's many night-time needs, she cannot be cared for by one person alone. She needs a care-giver to be awake, alert, and available 24 hours per day. This need can only be met with split-shift care.

119. As of the date of the filing of the First Amended Complaint, Ms. Skibina was at risk of losing her life-sustaining vital home health services due to Personal-Touch's intention to cut the care provided to their patients.

120. On May 2, 2011, NYLAG requested a Fair Hearing and Aid Continuing for Ms. Skibina. Aid Continuing was ordered.

121. Personal-Touch complied with the Aid Continuing order and kept Ms. Skibina's split-shift care in place.

122. A Decision After Fair Hearing was issued on June 9, 2011, reversing Personal-Touch's decision to reduce Ms. Skibina's care.

C. John Delmar

123. John Delmar is eight-seven years-old and suffers from numerous physical and mental ailments, including advanced dementia, chronic venous insufficiency of bilateral lower extremities, hypertension, congestive heart failure, unsteady gait, and incontinence. He is also a borderline diabetic.

124. Mr. Delmar requires assistance with every activity of daily living.

125. Mr. Delmar has multiple nighttime needs. He is incontinent and uses adult diapers, which must be changed. Due to his dementia, he is also awake for much of the night and does not want to stay in bed.

126. For the last approximately one and one-half years, Mr. Delmar has received split-shift CHHA services provided by Personal-Touch.

127. On approximately April 3, 2011, Mr. Delmar was hospitalized at Beth Israel Hospital for sepsis and cellulitis of his leg. He was also treated for an enlarged prostate, which was discovered during his hospitalization.

128. After approximately two weeks, Mr. Delmar was ready for discharge and needed Personal-Touch to reinstate his split-shift care so that he could return home. Mr. Delmar's social worker informed his daughter, Margaret Delmar, that Personal-Touch refused to reinstate Mr. Delmar's split-shift care and that Personal-Touch would only provide a reduced level of twelve hours of care per day, seven days per week.

129. Mr. Delmar received no prior notice of the reduction of his split-shift CHHA service, nor was he informed of his right to a Fair Hearing or Aid Continuing.

130. Personal-Touch did not present any doctor's order ordering a reduced level of care for Mr. Delmar.

131. The hospital social worker informed Margaret Delmar that she could either pay for an additional twelve-hour shift of care for her father or send him to a nursing home, but that in no case could Beth Israel continue to keep Mr. Delmar in the hospital because he was medically ready for discharge.

132. Ms. Delmar agreed to take her father home with the reduced level of care because

she was left with no other choice; she was fearful that he would be institutionalized, but she could not afford to pay for the additional twelve hours of care out-of-pocket.

133. Mr. Delmar does not need to be placed in a nursing home, nor does he want to be placed in a nursing home as he can and is entitled to live safely at home with the assistance of split-shift CHHA care.

134. As of the date of the filing of the First Amended Complaint, Margaret Delmar was providing nighttime care for her father, placing Mr. Delmar's safety and health at risk due to his nighttime needs and due to Ms. Delmar's own medical conditions, and further endangering the safety and health of Ms. Delmar. Ms. Delmar suffers from extreme lower back pain, arthritis in her knees, diabetes, and hypertension. She also suffers from depression and anxiety. She worked as a home health aide until one year ago, when her doctor advised her that, due to her medical conditions, it was unsafe for her to continue to perform the physical demands of her job.

135. On the very first night that Mr. Delmar was home from the hospital, which was the first time that he was without split-shift care in the past year and one-half, he fell down while trying to use a urinal and the urine spilled all over the room. Ms. Delmar was not strong enough to pick her father up from the floor and she had to awaken a neighbor to help Mr. Delmar back into bed. As of the date of the filing of the First Amended Complaint, Mr. Delmar used adult diapers, which Ms. Delmar had to change, causing Ms. Delmar great physical pain and additional damage to her back.

136. As of the date of the filing of the First Amended Complaint, Ms. Delmar was suffering both physically and emotionally because her father required care throughout the night leaving her unable to sleep, which caused pain and damage to her back, and she had to stay awake for much of the night to assist him.

137. On April 21, 2011, an attorney at NYLAG requested a fair hearing for Mr. Delmar to challenge the reduction of his home care services.

138. The State issued an Aid Continuing Directive, but Personal-Touch did not comply with it.

139. As of the date of the filing of the First Amended Complaint, Mr. Delmar's family members were fearful that, if his split-shift care was not reinstated soon, they would have been left with no choice but to place him in a nursing home, which would be disorienting for him due to his advanced dementia, insufficient because he would not have the one-on-one care that he needs, and inappropriate because he can and is entitled to live in his own home with split-shift care.

140. After the filing of the First Amended Complaint, Personal-Touch reinstated split-shift care for Mr. Delmar.

141. On May 27, 2011, a Decision After Fair Hearing was issued, finding that Personal-Touch's determination to reduce Mr. Delmar's care was not correct and reversing the reduction.

D. Rose Solis

142. Rose Solis is eighty-six years-old and suffers from numerous mental and physical problems including dementia, diabetes, high blood pressure, and glaucoma; she therefore requires assistance with most basic activities of everyday living.

143. She needs nightly assistance going to and from the bathroom, to prevent her from falling, and to ensure that she finds her way safely back to her bed.

144. On March 5, 2011, Ms. Solis began receiving Medicaid-funded CHHA services from Personal-Touch in the amount of 24 hours per day, provided in two twelve-hour shifts.

145. On April 14, 2011, Ms. Solis was admitted to New York Community Hospital because of high blood pressure.

146. On April 17, 2011, she was discharged from the hospital and was taken back home to Sunrise. Shortly after returning home, an aide sent by Personal-Touch arrived to assist her and resume her CHHA services.

147. That night, Ms. Solis' granddaughter Maria Patti received a phone call from the aide who was with her grandmother. The aide told Ms. Patti that she had just spoken with her superior and that she had been instructed to leave Ms. Solis by herself because Personal-Touch would not pay her for her to work that night.

148. Neither Ms. Solis nor Ms. Patti had received any prior notice or warning of Personal-Touch's intent to reduce or discontinue Ms. Solis' care. Personal-Touch simply told the aide to leave at a moment's notice, completely abandoning and endangering the welfare of Ms. Solis.

149. Ms. Patti immediately called Personal-Touch to ask why they had instructed the aide to leave and was told that, because Ms. Solis had been in the hospital for over 24 hours, she was treated as a "new case" and that Personal-Touch would have to assess her before putting care back in place.

150. Because it would have been dangerous for Ms. Solis to be left alone through the night, Ms. Patti called back the aide who was still with her grandmother and agreed to privately pay her to work through that night; pursuant to that agreement, the aide agreed to provide the care.

151. The next day, Personal-Touch sent a nurse to assess Ms. Solis. The nurse completed the assessment and then told Ms. Patti that Personal-Touch would authorize her for

CHHA services, but only in the amount of twelve hours per day. Ms. Patti expressed her concern that 12 hours per day was insufficient to meet her grandmother's needs, but was told that Personal-Touch is no longer offering split-shift care and that the highest level of care they would offer Ms. Solis is 12 hours per day.

152. At that time, Ms. Patti asked Sunrise to make arrangements to move Ms. Solis to a different floor in the facility that provides care 24 hours per day. They told her that it was possible, but not until Thursday, April 21; between April 17 and April 21 Ms. Patti privately paid for the aide to care for Ms. Solis at night.

153. The service at Sunrise on the floor with 24 hour care is extremely expensive and not covered by Medicaid. Ms. Patti and her family cannot afford to continue to pay for Ms. Solis to stay in the facility, with the twenty-four hour care, on a long-term basis.

154. Personal-Touch never provided any notice concerning its intent to reduce Ms. Solis' care to twelve hours per day nor did they inform of her right to request a Fair Hearing, with Aid Continuing benefits.

155. No physician ever ordered that Ms. Solis' care be reduced or discontinued. The nurse from Personal-Touch told Ms. Patti that the reduction was not taken pursuant to any physician's order; rather, the reduction was because Medicaid would no longer pay for the full number of hours.

156. The abrupt termination of Ms. Solis's care caused her to experience increased anxiety and disorientation. She experienced chronic stomach pain and trouble sleeping, and was placed on a more restrictive floor which prevented her from freely going outside if she so desired.

157. As of the date of the filing of the Class Action Complaint, Ms. Solis' family was

fearful that if her split-shift care was not reinstated, she would have to be moved from Sunrise to a nursing home. A move to an unfamiliar nursing home environment would have been extremely disorienting and frightening for Ms. Solis, potentially resulting in a decline in her condition.

158. On April 25, 2011, NYLAG requested a Fair Hearing on behalf of Ms. Solis. As of the date of the filing of the First Amended Complaint, Aid Continuing benefits were requested but had not been implemented.

159. At the beginning of May 2011, Personal-Touch sent a nurse to evaluate Ms. Solis in order to reinstate her split-shift care. During the evaluation, the nurse attempted to convince Ms. Solis' family to agree to the reduced 24-hour sleep-in care. After Ms. Solis' family refused to agree to the reduced care, the nurse stated that Personal-Touch would put the split-shift care back in place for the time being.

160. On May 4, 2011, Personal-Touch reinstated split-shift care for Ms. Solis.

161. A Fair Hearing was held on May 25, 2011. On May 27, 2011, a Decision After Fair Hearing was issued, finding that the determination to reduce Ms. Solis' home health services was not correct and directing the agency to authorize the split-shift care retroactive to the discontinuance date.

E. Josef Itamari

162. Josef Itamari is ninety years-old and lives alone.

163. Mr. Itamari suffers from numerous physical ailments related to his advanced age including muscle weakness, shortness of breath, problems with his prostate that cause frequent and sometimes unexpected urination, and great difficulty walking and getting up and down from chairs. He has a pacemaker.

164. He lives on the third floor in a house with no elevator; there is a stair lift only

between the first and second floors.

165. Mr. Itamari struggles when he must get up and down the last flight of stairs to get to his apartment. If he has to go to the store alone, it takes a very long time, and is very difficult and painful; it is also extremely dangerous for him to be unattended on the stairs.

166. Mr. Itamari is a Holocaust survivor and uses a wheelchair given to him by an agency that assists Holocaust survivors. He leaves it downstairs at the entrance to his house, but can only use it with someone else's assistance; he cannot push it himself.

167. For about the last two years, until February 28, 2011, Mr. Itamari received CHHA services from Americare in the amount of twelve hours per day, seven days per week.

168. The home aides from Americare assisted him with all activities of daily living, including ambulating, daily chores, preparing meals and tending to personal hygiene.

169. In February 2011, Mr. Itamari traveled to Israel to visit his grandchildren. He was only able to travel with the assistance of others, including his children in Israel and an agency that assisted him back and forth to the airport in New York and onto the plane.

170. Prior to leaving for Israel, Mr. Itamari spoke with his Americare caseworker, Lily Lask, and informed her of his plans to be away from February 28, 2011 through March 14, 2011.

171. Prior to Mr. Itamari leaving for Israel, his son, Isaak Ruttner, also spoke with Ms. Lask. Ms. Lask told Mr. Ruttner that it was standard procedure to close the case temporarily and that when Mr. Itamari returned, Americare would restart his case. She told him to ask Mr. Itamari's doctor to send a new order to Americare, two to three days prior to his return from Israel, so that his services could be in place upon his return.

172. Mr. Itamari's doctor signed an order on March 1, 2011, sent to him by Americare, stating "patient will be on vacation with his son for two weeks. All homecare services are

discontinued as of 02/28/2011."

173. A few days before Mr. Itamari's return, his son asked Mr. Itamari's doctor to submit a letter to Americare ordering that Mr. Itamari's services be reinstated. Mr. Itamari's doctor did submit such a letter to Americare on March 9, 2011.

174. However, when Mr. Itamari returned from Israel on March 14, 2011 and called Americare to let them know of his return and ask that his CHHA services be restored, he was informed that his services had been terminated and would not be restored.

175. Americare refused to provide a reason for the termination and refused to provide a written notice of the discontinuance to Mr. Itamari. He never received any written notice that his services would be discontinued.

176. On April 21, 2011, NYLAG requested a Fair Hearing and Aid Continuing benefits for Mr. Itamari.

177. Americare did not comply with the Aid Continuing Directive.

178. On May 4, 2011, Mr. Itamari's doctor sent a letter to Americare stating his medical opinion that Mr. Itamari requires CHHA services, indicating that Mr. Itamari was suffering without CHHA services and ordering that they be restored immediately.

179. Mr. Itamari's Fair Hearing was held on May 26, 2011. At the Fair Hearing, a representative from Americare introduced the March 1, 2011 doctor's order and an attorney from NYLAG introduced the May 4, 2011 doctor's order.

180. The DAFH was issued on June 7, 2011. It found that the Commissioner was without jurisdiction to reach the merits of Mr. Itamari's case because of the March 1, 2011 order.

181. Since his return from Israel, Mr. Itamari has been living at home without the protection of any CHHA services, forced to complete his activities of daily living without

adequate assistance, and is suffering greatly.

182. Because of his advanced age and mobility problems, Mr. Itamari is always at grave risk of falling, and a fall could be devastating. Mr. Itamari has already fallen at least twice in his apartment since Americare's termination of his care and remains at risk of falling again.

183. Mr. Itamari is also extremely isolated due to the difficulties he has ambulating and ascending and descending the stairs leading to his third floor apartment.

184. Because it is difficult and dangerous for Mr. Itamari to leave his home without the assistance of an aide, Mr. Itamari has missed numerous medical appointments and is unable to go food shopping, which often means that he does not have sufficient food in his pantry.

185. Mr. Itamari has a wound on his leg that requires care in the form of application of cream. Mr. Itamari has great difficulty applying the cream himself.

186. Without CHHA services, Mr. Itamari is unable to accomplish various chores around his home and, as a result, his home has become extremely dirty.

187. Further, since his return from Israel, Mr. Itamari's health has deteriorated. He has lost a significant amount of weight, approximately 8 to 10 pounds.

188. Mr. Itamari needs his CHHA services to be restored so that he can continue living safely at home. He has been able to get by on his own, but only with great difficulty. He does not know what he will do if his care is not restored soon.

F. Julia Lebron

189. Julia Lebron is seventy-two years-old and suffers from Alzheimer's disease.

190. Ms. Lebron is bed-bound and non-verbal and has numerous additional severe ailments, including muscle weakness, incontinence, skin breakdown, and dementia.

191. She requires total assistance with every activity of daily living and has multiple

nighttime needs; she is incontinent and uses adult diapers, which must be changed frequently, and because she unable to reposition herself, she must be repositioned in bed, to prevent bedsores, every two hours, around the clock.

192. Since August 2009, Ms. Lebron has received CHHA services twenty-four hours per day, in two twelve-hour shifts, seven days per week, provided by Americare.

193. On March 31, 2011, Ms. Lebron had a seizure and was admitted to Long Island College Hospital ("LICH").

194. The next day, April 1, 2011, a Friday, she was ready to be discharged from the hospital; however, on Monday April 4, 2011, Ms. Lebron's daughter, Jennifer, received a phone call from Americare who informed her that Ms. Lebron's case had been closed due to Medicaid cutbacks.

195. Jennifer Lebron was informed that Americare could re-accept her as a new client, but Americare was only willing to offer her eight hours of care per day, which is insufficient to meet Ms. Lebron's needs.

196. Americare never sent Julia or Jennifer Lebron any written notice of the termination of Ms. Lebron's care and never informed them of her right to request a Fair Hearing, with Aid Continuing, for Ms. Lebron.

197. On April 5, 2011, an attorney at NYLAG requested a Fair Hearing, with Aid Continuing, for Ms. Lebron; however, Americare refused to provide the care.

198. After NYLAG called Americare regarding its failure to comply with the Aid Continuing Directive, Americare finally agreed, on April 8, to restore twenty-four hour per day split-shift care for Ms. Lebron. The hospital social worker made arrangements for Julia Lebron to return home that same day.

199. As of the date of the filing of the First Amended Complaint, Ms. Lebron was at risk of losing her life-sustaining vital home health services due to Americare's intention to cut the care provided to its patients.

200. Ms. Lebron's fair hearing took place on May 4, 2011. Americare did not appear at the hearing.

201. A Decision After Fair Hearing was issued on May 6, 2011, reversing Americare's decision to discontinue Ms. Lebron's care and directing Americare to supply split shift to Ms. Lebron.

G. Raisa Reznikov

202. Raisa Reznikov is ninety years-old.

203. Ms. Reznikov has had two strokes, a broken hip, and surgery. She is depressed and suffers from dementia as a result of early onset Alzheimer's disease. She also suffers from a heart condition, high blood pressure, hernias, serious bladder problems and problems with her bowel movements.

204. As a result of her illnesses, Ms. Reznikov is unable to perform the basic activities of daily life without help. She cannot walk unassisted, she cannot transfer from the bed to a wheelchair or commode, and she cannot dress or clean herself.

205. In 2009, she broke her hip and was hospitalized and then later moved to a rehabilitation center for several months. She returned home in early July 2009 with split-shift care provided by Personal-Touch.

206. Ms. Reznikov had that care continuously from July 2009 until Monday April 25, 2011, when her care was abruptly cut to sleep-in care.

207. On Wednesday, April 19, 2011, a supervisor from Personal-Touch called Ms.

Reznikov's daughter, Marina Jacobson, and told her that as of April 25, 2011, care would be reduced to sleep-in care. Ms. Denisova told Marina Jacobson that the family would have to provide the rest of the care themselves, or send Ms. Reznikov to a nursing home.

208. Personal-Touch gave no reason for this change except that they were cutting services to all their clients.

209. Personal-Touch sent no notice to anyone of this change in care.

210. Marina Jacobson called Ms. Reznikov's doctor to see whether the doctor had agreed to this change and the doctor said she had not.

211. Beginning on Monday, April 25, 2011, services were cut to sleep-in care. Ms. Reznikov therefore only had care from one aide who could not care for Ms. Reznikov around-the-clock.

212. Ms. Reznikov gets up six or seven times every night to go to the bathroom, which she cannot do alone. She sleeps in a bed with hospital bars, so that she will not fall out. She could not get out of bed alone and she could not transfer to the commode without help. The sleep-in aide could not be up helping Ms. Reznikov six or seven times during the night and then also care for her all day.

213. On May 2, 2011, NYLAG requested a Fair Hearing and Aid Continuing benefits for Ms. Reznikov.

214. Ms. Reznikov's Fair Hearing took place on May 25, 2011. Personal-Touch did not appear at the hearing.

215. A Decision After Fair Hearing was issued on June 9, 2011, reversing Personal-Touch's decision to discontinue Ms. Reznikov's care and directing Personal-Touch to supply split-shift care to Ms. Reznikov.

H. Mattie Dow

216. Mattie Dow is eighty-one years old and lives alone.

217. She suffers from multiple medical ailments. Ms. Dow has a pacemaker, difficulty breathing, muscle weakness, scoliosis and acute pain throughout her body, including, in her chest, from the pacemaker, and in her rectum.

218. Ms. Dow requires assistance with all of the activities of daily living, including washing, getting in and out of the tub, cooking, dressing, personal grooming, toileting, and ambulating. She also must have someone to assist her shopping and going to doctor's visits.

219. Ms. Dow also has multiple nighttime needs. She cannot get in and out of bed alone and needs assistance toileting during the night. She is very unsteady on her feet and at great danger of falling; she is unable, and too scared, to go to and from the bathroom during the night on her own.

220. For the last approximately two years, Ms. Dow has received split-shift CHHA services, provided by Americare.

221. On one occasion in November 2010, there was a scheduling problem and the nighttime aide did show up for her shift. As a result, Ms. Dow soiled herself in bed and had to wait until the morning until an aide came to clean her and assist her to the bathroom.

222. On March 31, 2011, Ms. Dow was taken to LICH because she was having difficulty breathing, and her primary care doctor suggested that she check herself in for medical treatment. It was later discovered that she had pneumonia.

223. When Ms. Dow was ready to be discharged on April 7, 2011, Americare indicated that it would no longer provide Ms. Dow with split-shift care and offered instead only eight hours of CHHA care per day.

224. Americare provided no notice to Ms. Dow that her services were to be reduced and presented no doctor's orders supporting the decision to reduce Ms. Dow's hours of care.

225. Ms. Dow and her family were shocked by the abrupt reduction of Ms. Dow's care and feared for her safety.

226. On April 8, 2011, Ms. Dow's grandson, Tracy Neil, at the suggestion of the LICH social workers, requested a Fair Hearing with Aid Continuing benefits on Ms. Dow's behalf.

227. Mr. Neil and the social workers at LICH also requested that Americare resume Ms. Dow's spit-shift CHHA services in full; Americare did not comply with the repeated requests or with the Aid Continuing Directive.

228. On April 13, 2011, Mr. Neil spoke with an attorney at NYLAG. NYLAG contacted Americare to request that the care be immediately reinstated, and on April 14, 2011, Americare agreed to resume Ms. Dow's services in full pursuant to the Aid Continuing Directive.

229. On Saturday, April 16, 2011, Ms. Dow returned home, but no aide was there to meet her. A nurse from Americare arrived at about 4 p.m., but she was only there to reassess the needs of Ms. Dow. On Sunday April 17, full care was reinstated.

230. Despite the fact that care was in place, Ms. Dow's family continued to be afraid that Americare would again attempt to terminate her services. Americare called Ms. Dow after her return home on April 16 to inform her that the intention of Americare was to try to transfer Ms. Dow's case to a Community Alternative Systems Agency ("CASA"), which provides a lower level of care; on April 20, Americare called and informed Ms. Dow's daughter, Ms. Logan, that her mother's case would be converted to CASA care for twenty hours per day after the Fair Hearing.

231. On May 12, 2011 a representative from NYLAG appeared on behalf of Ms. Dow at her Fair Hearing. Although duly notified of the time and place of the hearing, Americare failed to appear at the hearing to offer evidence establishing that the determination to reduce Ms. Dow's care resulted from physician's order, or that the determination was made in accordance with the Catanzano Implementation Plan.

232. A Decision After Fair Hearing was issued on May 19, 2011 directing Americare to continue to provide Ms. Dow with split shift care. Ms. Dow continues to receive split-shift care under this Decision.

233. Also on May 19, 2011 Americare contacted not only Ms. Dow's grandson, Mr. Neil, and her daughter, Ms. Logan, but also Ms. Dow herself, attempting to get the family to agree to live-in care for Ms. Dow. The call caused Ms. Dow stress and anxiety as she feared that her care would be reduced. Mr. Neil called Americare on Ms. Dow's behalf and instructed them not to call Ms. Dow directly any more.

234. On June 22, 2011 Ms. Dow received a form notice from Americare, dated June 20, 2011, stating that her physician, Dr. Sudarsanam Konka, had determined that effective June 29, 2011, her services should be reduced from split shift to live-in care. The notice provided an opportunity for Ms. Dow to contact her doctor if she believed that the doctor had ordered this reduction in error.

235. On June 27, 2011, Ms. Logan and Mr. Neil went to Dr. Konka's office to discuss his new order. Dr. Konka stated that he never gave authorization for Americare to reduce Ms. Dow's level of care. Dr. Konka drafted a letter attempting to clarify what he had ordered and faxed it to Americare, as allowed for in the notice which Ms. Dow received.

236. At present, Americare has not said whether it will restore care pursuant to the

revised doctor's orders.

237. Without split-shift care, Ms. Dow may have to be institutionalized in a nursing home or other long-term care facility. Ms. Dow does not want to be institutionalized in a nursing home, and is entitled to continue to living at home with the care she needs. She cannot be at home without round-the-clock care.

I. Robert Schwartz

238. Robert Schwartz is an eighty year-old Medicaid recipient.

239. Mr. Schwartz suffers from both physical and mental problems including cellulitis and dementia.

240. He needs assistance with every activity of daily living including grooming, dressing, ambulating and transferring, toileting, and chores.

241. Mr. Schwartz lives with his wife, Irene Schwartz, who is also disabled.

242. For the past three years, Mr. Schwartz has received split-shift CHHA services from Empire State Home Care Services, Inc. ("Empire").

243. On February 24, 2011, Mr. Schwartz was admitted to Saint Luke's Hospital with cellulitis.

244. While Mr. Schwartz was in the hospital, Mr. Schwartz's brother-in-law and next friend, David Sunshine, was informed by Empire that Mr. Schwartz's case was being closed, but that they would conduct an initial assessment to see if they could take him back as a new case.

245. Mr. Schwartz never received any written notice indicating that his case would be closed.

246. Empire conducted what they called their "initial assessment" on March 4, the day Mr. Schwartz was discharged from the hospital. On that day, Empire developed a plan of care,

which started him with twelve hours per day, for two weeks, and then planned to taper the care down to 5 hours per day over the course of 60 days. This plan of care was presented to Mr. Sunshine before Mr. Schwartz was discharged.

247. Mr. Sunshine verbally expressed to Empire that this plan of care was totally inadequate to meet his brother-in-law's needs, but he was told that it was the most that Empire would offer.

248. Mr. Sunshine reluctantly agreed to the plan of care because he wanted Mr. Schwartz to be able to return home that day.

249. Once at home, the inadequacy of Mr. Schwartz's care quickly became problematic.

250. His wife, who is barely able to care for herself due to her own disabilities, was forced to try to care for him at night but she was totally unable to meet his needs and Mr. Schwartz was left sleeping in soiled clothes and bedding for several nights in a row.

251. After a couple of days, Mr. Sunshine again asked Empire to re-instate the split-shift care and they refused. Over the next few days, Mr. Sunshine called Empire repeatedly and pleaded with them to reinstate the care.

252. After that, Mr. Sunshine learned from one of the social workers from the hospital that he could request a fair hearing to challenge the reduction of CHHA services.

253. On March 14, 2011, Mr. Sunshine requested a Fair Hearing to challenge the reduction of his CHHA services. He made the request by telephone and was told that the state had ordered Aid Continuing.

254. On March 17, 2011, Mr. Sunshine was told by Empire that they would not comply with the Aid Continuing Directive, insofar as it ordered reinstatement of split-shift care,

but that Empire would refrain from tapering the care to less than twelve hours per day.

255. On March 21, 2011, Mr. Sunshine called NYLAG for assistance.

256. On March 24, 2011, as a result of advocacy by NYLAG, Empire finally agreed to comply with the Aid Continuing Directive and restored Mr. Schwartz's split-shift care.

257. Despite the fact that care is in place now, Mr. Schwartz and his family are afraid that Empire will attempt to terminate or reduce his services any day. Ms. Schwartz is only receiving the split-shift care pursuant to an Aid Continuing Directive from the State.

258. Without split-shift care, Ms. Schwartz may have to be institutionalized in a nursing home or other long-term care facility.

259. As of the date of the filing of the First Amended Complaint, Mr. Schwartz was at risk of losing his life-sustaining vital home health services due to Empire's intention to cut the care provided to their patients.

260. On May 25, 2011, Plaintiffs voluntarily dismissed the case against Empire without prejudice; Empire had resolved all outstanding issues for Mr. Schwartz.

J. Yenta Melman

261. Yenta Melman is an eighty-five year old holocaust survivor and Medicaid recipient who lives alone in Brooklyn.

262. She suffers from multiple ailments, including an arrhythmic heart, muscle weakness, and seizures during the nighttime. The medicine she takes for these conditions sometimes causes her to spontaneously lose consciousness. She is bed-bound and can only walk with the help of a walker and the assistance of an aide.

263. She is able to continue living in her home with the help of 24-hour per day home health care services provided on a split-shift basis.

264. For approximately two years, Ms. Melman has received CHHA services twenty-four hours per day, in two twelve-hour shifts, seven days per week, provided by Personal-Touch. Prior to that she received CHHA services from Family Home Care Services for approximately ten years in the amount of twelve hours per day, seven days per week. Her level of care was increased to two twelve-hour shifts because she fell while alone at night and hit her head, causing internal bleeding.

265. Ms. Melman has multiple nighttime needs. In addition to all transfers and ambulation, she uses a commode by her bedside a minimum of three or four times a night and needs assistance to do this every time. She frequently has seizures, which have increased in frequency recently, occurring nearly every day and sometimes multiple times in the same day. Aides need to constantly observe her because these seizures occur with no warning and she can fall and injure herself when they occur.

266. On Friday, April 29, 2011, a representative from Personal-Touch called Ms. Melman's daughter, Fanya Mosionzhnik, while Ms. Mosionzhnik was away on vacation and informed her that Personal-Touch would be reducing Ms. Melman's care from split-shift care to twelve hours of care per day. During the call Ms. Mosionzhnik repeatedly asked the representative not to reduce the care to twelve hours per day, and at the very least to only reduce it to sleep-in care. The representative finally relented, and agreed to only reduce Ms. Melman's care to sleep-in.

267. After this initial call, Ms. Mosionzhnik called Personal-Touch many times asking that it continue to provide split-shift care for Ms. Melman. Personal-Touch refused and reduced Ms. Melman's care to sleep-in on May 5, 2011. Personal-Touch further informed Ms. Mosionzhnik that sleep-in care was only being provided temporarily and that they planned to

further reduce Ms. Melman's care from sleep-in to only eight hours of care per day.

268. On May 5, 2011, Ms. Mosionzhnik contacted NYLAG.

269. A Fair Hearing was requested on Ms. Melman's behalf on May 6, 2011 and the State issued an Aid Continuing Directive.

270. Personal-Touch refused to comply with the Aid Continuing Directive unless Ms. Melman's treating physician issued an order directing the implementation of split-shift care.

271. Ms. Mosionzhnik called Ms. Melman's primary care physician, Dr. Merson, to ask whether he had authorized the reduction in Ms. Melman's care, and to obtain a new order directing the implementation of split-shift care. After reviewing the file, Dr. Merson stated that he accidentally signed the order to reduce because he was accustomed to routinely signing the same forms to continue the same level of care for Ms. Melman. He stated that he would provide to Personal-Touch a new order directing that split-shift care be reinstated.

272. On May 13, 2011, NYLAG transmitted to Personal-Touch a letter from Dr. Merson, dated May 12, which read: "I write concerning my patient Yenta Melman. I have been informed that Ms. Melman's home care services have been reduced from two 12-hour shifts, provided 7 days per week, to one 24-hour shift, provided 7 days per week. It is my medical opinion that Ms. Melman continues to need two 12-hour shifts, provided 7 days per week. Please reinstate such services pursuant to the Plan of Care I signed on May 4, 2011 and rescind any other orders to the contrary. If necessary to reinstate the two 12-hour shifts, provided 7 days per week, please send to me a revised order for two12-hour shifts, provided 7 days per week, and I will sign such order immediately." Upon receipt of this letter, Personal-Touch reinstated care pursuant to the Aid Continuing Directive.

273. On June 6, 2011, the hearing was held. At the hearing, Personal-Touch

submitted the doctor's orders, dated May 6, 2011, into evidence, and Ms. Melman's representative put the May 12, 2011, letter into evidence.

274. On June 27, 2011, a Decision After Fair Hearing was issued finding that that administrative law judge did not have jurisdiction to hear the matter because of the signed reduction. That same day Personal-Touch contacted Ms. Mosionzhnik to inform her that Ms. Melman's care was being reduced to sleep-in care immediately.

275. On July 8, 2011, around ten in the evening, Ms. Melman fell and injured herself while trying to use the commode without the assistance of an aide. Ms. Melman's new sleep-in aide was not aware of her medical condition causing her to spontaneously lose consciousness.

K. Hyacinth Forbes

276. Hyacinth J. Forbes is an eighty-five year-old Medicaid recipient.

277. Ms. Forbes suffers from numerous physical and mental ailments, including total blindness and dementia. She has undergone a hysterectomy and has had a breast removed. Because of these conditions she requires total assistance with all of the activities of daily living, including feeding herself, toileting, washing, dressing, and personal grooming.

278. Ms. Forbes has multiple nighttime needs. She is incontinent and uses adult diapers, which must be changed approximately three times a night. She also needs assistance cleaning herself when her diapers are changed. She requires frequent turning during the night so that she does not develop bed sores.

279. For the last approximately four years, Ms. Forbes has received CHHA services twenty-four hours per day, in two twelve-hour shifts, seven days per week, provided by Personal-Touch.

280. On approximately April 18, 2011, Deedee Joyner-Forbes, Ms. Forbes' daughter-in-law, received a phone call from Personal-Touch informing her that Ms. Forbes would no longer be receiving the same level of care, but rather would begin receiving sleep-in care. The employee explained that Personal-Touch was no longer a long-term care agency and that they were no longer providing split-shift care to their patients. The employee from Personal-Touch told Ms. Joyner-Forbes that the family had until the next day to accept sleep-in care. The employee stated that as an alternative to sleep-in care, the family could accept 12 hours of care during the daytime and care for Ms. Forbes themselves at night, or they could put Ms. Forbes in a nursing home.

281. That same day, Casimir Forbes, Ms. Forbes' son, also received a phone call from a representative of Personal-Touch who told Mr. Forbes that his mother's services were going to be reduced that very same day. Mr. Forbes asked for more time to make a decision on how to care for his mother and the representative from Personal-Touch told him he had until the next day to make a decision.

282. Ms. Joyner-Forbes contacted New York City Council Member Letitia James' office the next day, April 19, 2011, to ask for assistance in maintaining Ms. Forbes' home care. Council Member James' office contacted Personal-Touch on Ms. Forbes' behalf and Personal-Touch agreed to maintain the same level of care until May 5, 2011.

283. On approximately May 4, 2011, lawyers at NYLAG requested a Fair Hearing on Ms. Forbes' behalf to challenge the reduction of her home care services. The State issued an Aid Continuing Directive.

284. Beginning May 6, 2011, Personal-Touch maintained Ms. Forbes's care because of the Aid Continuing Directive.

285. Ms. Forbes' Fair Hearing took place on Monday, June 6, 2011. An attorney from NYLAG was present as Ms. Forbes' representative. At the Fair Hearing, Personal-Touch's representative produced doctor's orders dated May 10, 2011, signed by Ms. Forbes' primary physician, Dr. Irina Erlikh, authorizing a decrease in home care from split-shift care to sleep-in care. The hearing was adjourned for two days, until Wednesday, June 8, 2011, to give Ms. Forbes' representative an opportunity to review this newly produced evidence.

286. During the adjournment Mr. Forbes contacted Dr. Erlikh to ask why she had ordered this reduction. Dr. Erlikh explained that she had signed the order in error. To correct this error she provided Mr. Forbes with both a letter reciting Ms. Forbes' medical needs, stating that she continued to require split-shift care and stating that any previous orders to the contrary should be ignored, and a copy of the order reducing care on which Dr. Erlikh made a new notation indicating that it had originally been signed in error and that split-shift care should be reinstated. This new evidence was presented to the administrative law judge when the hearing was reconvened.

287. The DAFH was issued on July 7, 2011. It found that the Commissioner was without jurisdiction to reach the merits of Ms. Forbes's case because of the May 10, 2011 order.

288. If Ms. Forbes' split-shift care is not maintained, she may have to be institutionalized in a nursing home or other long-term care facility as she cannot be adequately cared for at home without split-shift care.

FIRST CAUSE OF ACTION

Against CHHA Defendants for Reductions or Terminations Without Timely and Adequate Notice and Fair Hearing Rights, Where Plaintiffs' Needs Have Not Changed, Contrary to Physicians' Orders

289. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

290. CHHA Defendants have been reducing or terminating, or threatening the reduction or termination of, the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, without timely or adequate notice and an opportunity for a Fair Hearing and Aid Continuing.

291. CHHA Defendants have been reducing or terminating, or threatening reduction or termination, of the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, without a change in Plaintiffs' need or eligibility for the services, in an arbitrary and capricious manner.

292. When these actions are taken contrary to physicians' orders, CHHA Defendants' conduct violates Plaintiffs' rights under 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b), (c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

SECOND CAUSE OF ACTION

Against Government Defendants for Failure To Prevent Reductions or Terminations Without Timely and Adequate Notice and Fair Hearing Rights, Where Plaintiffs' Needs Have Not Changed, Contrary to Physicians' Orders

293. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

294. Defendants Shah, Berlin, and Doar (collectively, "Government Defendants") have failed to ensure that Named Plaintiffs and other members of the plaintiff class, for whom there has been no change in Plaintiffs' need or eligibility for the services, do not suffer an arbitrary and capricious reduction or termination or threatened reduction or termination of their CHHA services.

295. Government Defendants have failed to ensure that Named Plaintiffs and other members of the plaintiff class, do not suffer a reduction or termination or threatened reduction or termination of their CHHA services without timely and adequate notice, an opportunity for a Fair Hearing, or Aid Continuing.

296. These failures violate Plaintiffs' rights under 42 U.S.C.§ 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b),(c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

THIRD CAUSE OF ACTION

Against CHHA Defendants for Failure to Comply with Aid Continuing Directives

297. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

298. CHHA Defendants' have failed to provide Aid Continuing benefits in compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services.

299. CHHA Defendants' conduct violates Plaintiffs' rights under 42 U.S.C.§ 1396 et seq.; 42 U.S.C. § 1396a(a)(10)(B)(i); 42 U.S.C. § 1396a(a)(17), (19); 42 C.F.R. § 440.230(b), (c); 42 C.F.R. 440.240(b); and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

FOURTH CAUSE OF ACTION

Against Government Defendants for Failure to Ensure Compliance with Aid Continuing Directives

300. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

301. Government Defendants have failed to ensure compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class.

302. This failure violates Plaintiffs' rights under 42 U.S.C.§ 1396 et seq.; 42 U.S.C. § 1396a(a)(10)(B)(i); 42 U.S.C. § 1396a(a)(17), (19); 42 C.F.R. § 440.230(b), (c); 42 C.F.R. 440.240(b); and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

FIFTH CAUSE OF ACTION

Against Defendants Shah and Berlin To Declare Invalid, as Applied to CHHA Cases, State Regulations Governing Reductions or Terminations Purportedly In Accordance with Physicians' Orders

303. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

304. 18 N.Y.C.R.R. § 358-3.1(f)(2), as applied in the context of Medicaid-funded home health services provided by CHHAs, and 18 N.Y.C.R.R. § 505.23(d) deny Fair Hearing rights when an adverse action is taken or threatened in accordance with a physician's order, and thereby violate Plaintiffs' rights under 42 U.S.C. § 1396a(a)(3); 42 C.F.R §§ 431.210, 431.220, 431.230, 431.231; the Due Process Clause of the 14th Amendment to the United States Constitution; and the Supremacy Clause of the United States Constitution.

SIXTH CAUSE OF ACTION

Against All Defendants for Reductions or Terminations Without Timely and Adequate Notice and Fair Hearing Rights, Purportedly In Accordance with Physicians' Orders

305. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

306. CHHA Defendants have been reducing or terminating, or threatening the reduction or termination of, the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, purportedly in accordance with physicians' orders, without timely or adequate notice, an opportunity for a Fair Hearing, or Aid Continuing.

307. Government Defendants have allowed CHHA Defendants to reduce or terminate, or threaten to reduce or terminate the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services without timely or adequate notice, an opportunity for a Fair Hearing (including a decision on the merits), or Aid Continuing, when the actions are purportedly in reliance on physicians' orders, in reliance on 18 N.Y.C.R.R. § 358-3.1(f)(2) and 18 N.Y.C.R.R. § 505.23(d).

308. Although these actions purport to be in accord with 18 N.Y.C.R.R. § 358-3.1(f)(2) and 18 N.Y.C.R.R. § 505.23(d), the actions nonetheless violate Plaintiffs' rights under 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b), (c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

SEVENTH CAUSE OF ACTION

Against All Defendants for Failure to Provide Services in the Most Integrated Setting In Violation of the ADA

309. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 173 above as if set forth fully therein.

310. Defendants' have been reducing or terminating, or allowing the reduction or termination, of CHHA services of Named Plaintiffs and other members of the plaintiff class, when there is no change in their needs or eligibility justifying the reductions or terminations, or without adequate notice, Fair Hearing rights, or Aid Continuing.

311. Sometimes these actions are contrary to a physician's order; sometimes they are in accordance with a physician's order.

311. Whether these actions are contrary to or in accordance with a physician's order, this conduct results in or threatens to result in the unnecessary institutionalization of Named Plaintiffs and members of the Plaintiff class, in violation of their rights under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.; 28 C.F.R. §§ 35.130(b)(7),(d) and 41.51; and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment:

I. Certifying a class of all current and future Medicaid recipients in New York State who are or will be recipients of Medicaid-funded home health care provided by CHHAs, who have had or will have their CHHA services terminated or reduced without a change in their need or eligibility for the service, or without timely and adequate notice and the opportunity for Fair Hearings and Aid Continuing.

II. Declaring that:

A. CHHA Defendants' reduction or termination, or threatened reduction or termination, of the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, without timely or adequate notice, an opportunity for a Fair Hearing, or Aid Continuing, violates Plaintiffs' rights under 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b), (c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

B. Government Defendants' failure to ensure that Named Plaintiffs and other members of the plaintiff class do not suffer a reduction or termination, or threatened reduction or termination of their CHHA services without timely or adequate notice, an opportunity for a Fair Hearing, or Aid Continuing, violates Plaintiffs' rights under 42 U.S.C.§ 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b),(c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

C. CHHA Defendants' reduction or termination, or threatened reduction or termination, of the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, where there has been no change in Plaintiffs' need or eligibility for the services, without timely or adequate notice, an opportunity for a Fair Hearing, or Aid Continuing, violates Plaintiffs' rights under 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b), (c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

D. Government Defendants' failure to ensure that Named Plaintiffs and other members of the plaintiff class, for whom there has been no change in Plaintiffs' need or eligibility for the services, do not suffer a reduction or termination or threatened reduction or

termination of their CHHA services without timely and adequate notice, an opportunity for a Fair Hearing, or Aid Continuing, violates Plaintiffs' rights under 42 U.S.C.§ 1396a(a)(3); 42 C.F.R. §§ 435.912, 435.919, 431.206(b),(c) and 431.210; and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

E. CHHA Defendants' failure to provide Aid Continuing benefits in compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, violates Plaintiffs' rights under 42 U.S.C. § 1396 et seq.; 42 U.S.C. § 1396a(a)(10)(B)(i); 42 U.S.C. § 1396a(a)(17), (19); 42 C.F.R. § 440.230(b), (c); 42 C.F.R. 440.240(b); and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

F. Government Defendants' failure to ensure compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class violates Plaintiffs' rights under 42 U.S.C.§ 1396 et seq.; 42 U.S.C. § 1396a(a)(10)(B)(i); 42 U.S.C. § 1396a(a)(17), (19); 42 C.F.R. § 440.230(b), (c); 42 C.F.R. 440.240(b); and the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

G. CHHA Defendants' reduction or termination, or threatened reduction or termination, of the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, without a change in Plaintiffs' need or eligibility for the services, is arbitrary and capricious in violation of Plaintiffs' rights under the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

H. Government Defendants' failure to ensure that CHHAs do not reduce or terminate, or threaten to reduce or terminate, the CHHA services of Named Plaintiffs and other

members of the plaintiff class in an arbitrary and capricious manner violates Plaintiffs' rights under the Due Process Clause of the 14th Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

I. 18 N.Y.C.R.R. § 358-3.1(f)(2), which denies Fair Hearing rights when an adverse action is taken or threatened in accordance with a physician's order, violates 42 U.S.C. § 1396a(a)(3); 42 C.F.R §§ 431.210, 431.220, 431.230, 431.231; the Due Process Clause of the 14th Amendment to the United States Constitution; and the Supremacy Clause of the United States Constitution, when applied in the context of Medicaid-funded home health services provided by CHHAs.

J. 18 N.Y.C.R.R. § 505.23(d), which denies Fair Hearing rights when an adverse action is taken or threatened in accordance with a physician's order, violates 42 U.S.C. § 1396a(a)(3); 42 C.F.R §§ 431.210, 431.220, 431.230, 431.231; the Due Process Clause of the 14th Amendment to the United States Constitution; and the Supremacy Clause of the United States Constitution.

K. Defendants' practice of reducing or terminating, or allowing the reduction or termination, of CHHA services of Named Plaintiffs and other members of the plaintiff class, when there is no change in their needs or eligibility justifying the reductions or terminations, or without adequate notice, an opportunity for a Fair Hearing, or Aid Continuing, results in or threatens to result in the unnecessary institutionalization of Named Plaintiffs and members of the Plaintiff class, in violation of their rights under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.; 28 C.F.R. §§ 35.130(b)(7),(d) and 41.51; and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

III. Enjoining:

A. CHHA Defendants from reducing or terminating, or threatening reduction or termination, of the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, without timely or adequate notice, an opportunity for a Fair Hearing, or Aid Continuing.

B. Government Defendants from failing to ensure that Named Plaintiffs and other members of the plaintiff class do not suffer a reduction or termination, or threatened reduction or termination of their CHHA services without timely or adequate notice, an opportunity for a Fair Hearing, or Aid Continuing.

C. CHHA Defendants from reducing or terminating, or threatening reduction or termination, of the CHHA services of Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services, where there has been no change in Plaintiffs' need or eligibility for the services, in an arbitrary and capricious manner.

D. Government Defendants from failing to ensure that Named Plaintiffs and other members of the plaintiff class, for whom there has been no change in Plaintiffs' need or eligibility for the services, do not suffer a reduction or termination or threatened reduction or termination of their CHHA services in an arbitrary and capricious manner. .

E. CHHA Defendants to provide Aid Continuing benefits in compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class who are, were, or will be recipients of their services.

F. Government Defendants to ensure compliance with Aid Continuing Directives to Named Plaintiffs and other members of the plaintiff class.

G. Government Defendants from applying 18 N.Y.C.R.R. § 358-3.1(f)(2) in the context of Medicaid-funded home health services provided by CHHAs.

H. Government Defendants from applying 18 N.Y.C.R.R. § 505.23(d) so as to deny Fair Hearing rights when an adverse action is taken or threatened allegedly in accordance with a physician's order.

I. Defendants from reducing or terminating or failing to prevent the reduction or termination of CHHA care for Named Plaintiffs and members of the Plaintiff class in a manner that leads to their unnecessary institutionalization.

IV. Awarding:

A. Named Plaintiffs Ena Johnson, Olga Skibina, John Delmar, Rose Solis, Raisa Reznikov, Yenta Melman, and Hyacinth Forbes actual and compensatory damages against Defendant Personal-Touch Home Care, Inc. in an amount to be determined by this Court.

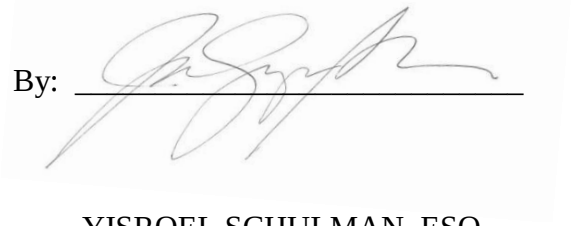
B. Named Plaintiffs Josef Itamari, Julia Lebron, and Mattie Dow actual and compensatory damages against Defendant Americare Certified Special Services, Inc., in an amount to be determined by this Court.

V. Awarding reasonable attorneys' fees, as provided by 42 U.S.C. § 1988;

VI. Awarding costs and disbursements; and,

VII. Granting such other and further relief as the Court deems equitable and just.

Dated: July 25, 2011
New York, New York

By: 

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