

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of
EMPIRE STATE ASSOCIATION OF ASSISTED
LIVING, INC., ADIRONDACK MANOR HFA
d/b/a EVERGREEN HOME FOR ADULTS,
CAMILLUS RIDGE TERRACE, BRIARWOOD
MANOR, INC, PAINTED POST PARTNERS d/b/a
BASSETT MANOR. ULTIMATE CARE NEW
YORK d/b/a THE BRISTAL AT EAST MEADOW,
GURWIN JEWISH - FAY J. LINDNER RESIDENCES,
BRONXWOOD HOME FOR THE AGED, INC.,
CRESTVIEW MANOR HFA LOUNDOVILLE HFA,
THE PALM BEACH HFA, LLC AMBER COURT OF
BROOKLYN, TONAWANDA MANOR and ELM YORK HFA,

Index #: 6275/08

**ATTORNEYS
AFFIRMATION AND
AMICUS CURIAE BRIEF**

Petitioners

For a Hybrid Proceeding pursuant to Article 78 of
the Civil Practice Law and Rules and for a Declaratory Judgment

-against-

RICHARD H. DAINES, in his official capacity as
Commissioner of the New York State Department of Health.

Respondent.

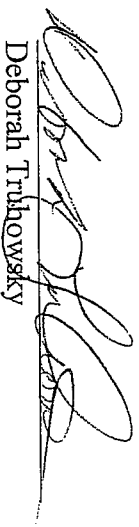
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DEBORAH TRUHOWSKY, an attorney duly licensed to practice law before the Courts
of the State of New York, affirms the following under penalty of perjury:

I am a partner at SCHWARTZAPFEL TRUHOWSKY MARCUS P.C., and I am
familiar with the facts and circumstances of this matter. This affirmation is submitted in
opposition to the petitioner's application for an Article 78 proceeding on the above referenced
matter and in the Matter of New York Coalition for Quality Assisted Living, Inc., et al. v.
Richard F. Daines, Index #: 6328/08 and to submit an amicus curiae brief (Exhibit "A") on
behalf of Long Term Care Community Coalition, Alzheimer's Association New York City,

NCCNHR: the National Consumer Voice for Quality Long-Term Care, New York State Nurses Association, New York State Long Term Care Ombudsman Program, Assisted Living Consumer Alliance, Friends and Relatives of the Institutionalized Ages, Suffolk County Long Term Care Ombudsman Program and Coalition of Institutionalized Ages and Disabled.

Dated: December 3, 2008
Jericho, New York 11753



Deborah Truhowsky
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TABLE OF AUTHORITIES

Regulations

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Medicare and Medicaid Programs; Fire Safety Requirements for Long Term Care Facilities,
Automatic Sprinkler Systems, Centers for Medicare and Medicaid Services, Department of
Health and Human Services, Federal Register, Volume 73, Number 157 (August 13, 2008).

Statutes

NY Public Health Law§4650

Articles

Levy, Clifford, *Broken Homes: A Final Destination*, The New York Times (April 28, 2002).
Scope and Standards of Assisted Living Nursing Practice for Registered Nurses, American
Assisted Living Nurses Association (September 18, 2006).
Stearns, Sally C., *et al.*, *Determinants and Effects of Nurse Staffing Intensity and Skill Mix in
Residential Care/Assisted Living Settings*, The Gerontologist 47:662-671 (2007).

STATEMENT OF INTEREST OF AMICUS CURIAE

The Long Term Care Community Coalition (LTCCC) is a New York State based nonprofit organization that is devoted to improving care for the elderly and disabled. We work to ensure that long term care consumers, who are often very vulnerable, are cared for safely and treated with dignity. LTCCC conducts a range of activities to accomplish these goals. We conduct research on policies, laws and regulations affecting care for the elderly and disabled and develop recommendations for New York State and federal leaders; educate policymakers and the

general public on issues relating to long term care and the impact of policies on consumer safety and well-being; advocate for state and national policies to improve care; serve as a watchdog group to ensure vulnerable consumers are protected by making sure that minimum standards are met by providers and, when they aren't, are that appropriate enforcement action is taken.

While we work to improve care for the elderly and disabled in all settings, ensuring good care and quality of life in residential care settings like assisted living and nursing homes has long been a central focus of our work. Over the course of our history – over twenty five years – LTCOC has built a reputation as not only a strong consumer voice but also as an honest and evenhanded resource for insight and expertise on long term care policy issues. In the assisted living area, our work has ranged from a study of whether the promise of assisted living is being realized in New York State to the development and dissemination of a series of nationally acclaimed guidebooks for assisted living administrators, workers and consumers on how to realize greater resident autonomy and independence in assisted living. LTCOC leaders have served on the boards of directors of both the national assisted living consumer organization (the Assisted Living Consumer Alliance) and the national nursing home consumer organization (NCCNHR, formerly known as the National Citizens' Coalition for Nursing Home Reform) as well as on New York State's task force charged with developing recommendations for the assisted living regulations that are being challenged in this case. For many years we have hosted a committee of stakeholders focused on assisted living in New York State. This committee, which includes consumer organizations, civic groups and professional groups, worked for many years on the development of the assisted living law, with its important consumer protections, and has provided ongoing input to the state task force on the needs and priorities of the New York families who are current or potential assisted living consumers and the people who provide care in assisted living. Taken together, these activities and experiences give us keen insights into the both the fundamental needs of assisted living residents in terms of standards and minimum requirements as well as the preferences of consumers, particularly those in New York State.

The Alzheimer's Association, founded in 1980, is the world leader in Alzheimer research and support. It is the largest voluntary health organization dedicated to finding prevention methods, treatments and a cure for Alzheimer's disease. The New York City Chapter, a founding member of the Alzheimer's Association, founded in 1978, was incorporated in 1985 as a 501(c)(3) not-for-profit organization. Its priority is to improve the quality of life for people with dementia -- including Alzheimer's disease -- their family members and caregivers by providing support, education and information -- free of charge, and through the development of innovative model programs that are replicated nationwide, and to eliminate Alzheimer's through the advancement of research. The Association has an extensive network of partnerships throughout the City and serves in an advisory capacity to government, social service and human service agencies and the medical and academic communities. The New York City Chapter is an essential resource for our community and is an integral component of the City's healthcare system.

NCCNHR: The National Consumer Voice for Quality Long-Term Care is a national organization of individuals and community groups that advocates for quality for people with long-term care needs, with a particular focus on ensuring adequate staffing and raising standards related to the provision of care. NCCNHR provides information and leadership on federal and state regulatory and legislative policy development and models and strategies to improve care and life for residents of long-term care facilities.

The Office of the New York State Long-Term Care Ombudsman is authorized under the federal Older Americans Act to serve as an advocate for residents of long-term care facilities including nursing homes, assisted living and other adult care facilities. Ombudsmen help protect the health, safety and rights of residents by identifying, investigating and working to resolve concerns related to quality of care and quality of life. In New York, 42 local ombudsman programs with a corps of more than 1,000 certified volunteer ombudsmen provide a regular presence in nursing homes and adult care facilities, including assisted living. This makes the program aware of the many issues faced by residents of assisted living facilities.

In addition, one of the responsibilities of the Ombudsman Program is to analyze, comment on and monitor the development and implementation of federal, state and local laws and regulations and other governmental policies and actions which may impact residents of long-term care facilities. The Ombudsman Program strongly believes that the regulations vetted through the state review process establish the basic care standards and enforcement authority needed to protect the health, safety and rights of residents.

The Assisted Living Consumer Alliance (ALCA) is a national collaboration of groups and individuals working together to promote consumer safety, choice, and rights in assisted living. Consumer protections are essential. Approximately one million Americans live in assisted living, generally because they no longer can live safely at home. ALCA provides information for both consumers and advocates, and works collaboratively with government officials and health care professionals to improve assisted living. ALCA supports an improved quality of care, along with greater focus on consumers' needs and preferences. Standards must be strengthened and enforced.

The New York State Nurses Association is the nation's oldest and largest state professional association for registered nurses. It also is New York's largest union solely dedicated to promoting the interests of RNs and their patients. With more than 36,000 members, NYSNA has been the voice for nurses in New York State for more than a century. The association is affiliated on the national level with the American Nurses Association. NYSNA staff works with its members to meet their needs through representation in the workplace, advocacy in the halls of government, and provision of quality continuing education and practice standards.

The Suffolk County Long Term Care Ombudsman Program advocates for residents of all

long term care residences in Suffolk County, New York. The Program has first-hand knowledge of how the health and safety of the residents in assisted living facilities have been at risk over the years due to the lack of laws and regulations in New York. We have advocated for years for regulations to be enacted to provide necessary oversight, particularly with the growth in numbers of people aging and moving into assisted living. Many of these people have dementia and other special needs that cannot be addressed without regulation and proper oversight.

Friends and Relatives of the Institutionalized Aged, FRIA, is an independent, not-for-profit consumer organization dedicated to long term care reform and to promoting the dignity and independence of seniors in long term care settings. Assisted living facilities must be regulated, especially to make sure consumers receive clear and complete information regarding facility services, costs and policies in order to make informed decisions and to allow oversight by the Department of Health.

The Coalition of Institutionalized Aged and Disabled (CIAD) is a non-profit, grassroots organization run by and for adult home and nursing home residents and resident councils. Established in 1973 to bring pride, purpose and self-determination to residents of long term care institutions, CIAD is dedicated to protecting the rights of residents and improving the quality of their life and care.

I. INTRODUCTION

Amici; the Long Term Care Community Coalition, Alzheimer's Association New York City, NCCNHR: The National Consumer Voice for Quality Long-Term Care, New York State

Nurses Association, New York State Long Term Care Ombudsman Program, Assisted Living Consumer Alliance, Friends and Relatives of the Institutionalized Aged, Suffolk County Long Term Care Ombudsman Program and Coalition of Institutionalized Aged and Disabled strongly support an assisted living system that fosters resident safety, autonomy and independence. These three goals reflect the tenets that underlie the fundamental concept of assisted living: to serve individuals who do not need 24-hour per day nursing home services, yet need (or desire) a congregate residential setting where they can maintain independence and autonomy while receiving care services and monitoring appropriate to their needs and abilities. The typical assisted living consumer is an elderly individual with increasing frailty (physical and/or mental) who needs help with some of their activities of daily living. The type of help they need can range from simple assistance preparing meals or bathing and grooming to more intensive care and monitoring for those who have greater needs due to physical frailty and/or progressive dementia, such as that brought on by Alzheimer's Disease. Generally speaking, assisted living consumers either fall into the range needing higher levels of care and monitoring or are rapidly moving in that direction as they get older. Because of the critical needs and vulnerability of this population, we believe that it is crucial that the system provide sufficient oversight to ensure that residents are cared for safely and with dignity and that workers are adequately equipped and supported to provide good care and quality of life. The assisted living regulations under question in this case, to a large extent the product of several years' negotiations with provider representatives, consumers and other stakeholders, provide a foundation for a sensible and fair system. For these reasons, we strongly urge the court to uphold the validity of the regulations.

II. THE DEPARTMENT OF HEALTH'S PROPOSED REGULATIONS ARE CONSISTENT WITH THE LEGISLATIVE PURPOSE OF THE ASSISTED LIVING REFORM ACT WHICH WAS PROMULGATED IN RESPONSE TO THE NEED FOR ASSISTED LIVING THAT IS SUBSTANTIALLY DIFFERENT FROM THE EXISTING ADULT HOME SYSTEM.

The assisted living law was many years in the making precisely because it was widely understood and accepted that the existing system of licensed adult homes was not working and required substantial changes to respond to the changing needs of consumers and the growth in numbers of people turning to assisted living to provide care in a residential setting as well as changes in the industry, both nationally and in New York State. The need for substantial change from the adult home model is clearly laid out in the law, which provides distinct requirements for basic assisted living and for enhanced and special needs assisted living. We believe that petitioner's argument that adult homes and basic assisted living are essentially the same is simply without merit; the fact that the law requires a potential assisted living to first become a licensed adult home before it can apply for and be considered for assisted living licensure, having a range of different criteria, is clearly indicative of legislative intent that there be substantive distinction between the two types of facilities.

III. THE REGISTERED NURSE STAFFING REQUIREMENT FOR FACILITIES THAT ARE CERTIFIED TO BE SPECIAL NEEDS ASSISTED LIVING RESIDENCES (PROVIDING SPECIAL CARE SPECIFICALLY FOR PEOPLE WITH ADVANCING DEMENTIA) OR ENHANCED ASSISTED LIVING RESIDENCES (CARING FOR PEOPLE WHO ARE "AGING IN PLACE" - REMAINING IN THE FACILITY AS THEY BECOME SUBSTANTIALLY MORE FRAIL) IS ESSENTIAL TO MAKE SURE THAT THESE PARTICULARLY VULNERABLE POPULATIONS ARE SAFE AND PROTECTED. RESIDENTS AT THESE LEVELS NEED ACCESS TO AN RN TO MONITOR THEIR ABILITY TO REMAIN IN THE RESIDENCE AS WELL AS TO ASSESS AND MONITOR THEIR ON-GOING CARE.

The requirement that assisted living facilities have an RN on duty for one eight hour shift five days a week is authorized by the ALRA and essential to the legislative goal of allowing consumers the option to safely age in place in assisted living or to live in assisted living when they have Alzheimer's Disease or other dementia. The petitioners argue that requiring facilities providing enhanced or special needs care to hire an RN is tantamount to requiring an assisted

living facility to provide direct skilled nursing care and that it is arbitrary, irrational and too costly. This is simply untrue.

In fact, this is not an arbitrary requirement but one that responds, conservatively we believe, to the particular situations of those people who will be in Enhanced Assisted Living Residences (EALRs) and those in Special Needs Assisted Living (SNALRs). For the vulnerable populations being served in facilities that choose these special certifications, it is necessary to have someone on staff on at least a full time basis who is capable of assessing residents (has the skills and knowledge necessary to recognize and evaluate changes that may be indicative of an increase in frailty or dementia). Simply put, if a facility is going to be providing care for individuals who have moved beyond the need for basic assistance and care and who are clearly becoming more frail and/or more demented, we believe that it is absolutely essential that there be somebody on staff on at least a full time basis who has the ability to recognize and evaluate these residents to ensure their safety. This argument is born out by research indicating that "having a greater proportion of total direct care hours provided by licensed staff was associated with a substantial reduction in the relative risk of hospitalization."¹ It is disingenuous for the plaintiffs to argue that they are being forced to require skilled care because nowhere do the regulations state that the RN is to provide care; in fact, the regulations respond directly to provider concerns about the costs of hiring an RN by allowing the RN to have a non-caregiving function (such as that of facility administrator). In addition, if a facility is unable or unwilling to meet this threshold requirement for EALRs or SNALRs, they are free to provide basic assisted living (or to remain as a licensed adult home or enriched housing).

III. THE PROPOSED CASE MANAGEMENT REGULATIONS ARE CONSISTENT WITH THE LEGISLATIVE INTENT TO CREATE AN ASSISTED LIVING SYSTEM DISTINCT FROM THE EXISTING ADULT HOME SYSTEM.

As noted above, promulgation of the assisted living law, with both licensure and certification requirements above and beyond that of the adult home system, clearly establishes

¹ *Determinants and Effects of Nurse Staffing Intensity and Skill Mix in Residential Care/Assisted Living Settings*, The Gerontologist 47:662-671 (2007).

that the legislature intended to create a regulatory scheme for assisted living distinct from that of the adult home care system. The law's certification requirements – for enhanced and special needs facilities – are further, incontrovertible evidence that the legislators intended to move beyond the old adult home system and establish a system that was more responsive to the specific needs of those who depend on assisted living. Nonetheless, petitioner argues that ALRs should have the same case management requirement as that which has long been in place for licensed adult homes because “there is no difference in the case management or care needs of residents in these two types of facilities....” This argument is simply untrue.

Regulations which are rationally related to protecting the health of assisted living residents cannot be said to be contradictory to this intent. The relative clinical complexity of the population assisted living is meant to serve requires additional safeguards, like the proposed case management regulations. To allow assisted living facilities to operate under the same guidelines as adult homes would essentially let these facilities provide care under regulations which are targeted at a class of long term care facility with a very different resident population than is meant to receive care in assisted living.

IV. THE DEPARTMENT OF HEALTH'S REGULATIONS IMPOSING NEW ARCHITECTURAL REQUIREMENTS ARE REASONABLE AND ARE WITHIN THE SCOPE OF THE LEGISLATURE'S INTENT IN ENACTING THE ASSISTED LIVING REFORM ACT.

The standards set forth in the regulations pertaining to architectural requirements are both reasonable for the providers and important for resident safety. Petitioner argues that the regulation's architectural requirements and building codes are arbitrary and capricious and undermine the statute's intent. They argue that the standards set forth in 10 NYCRR § 1001.13 “should be nullified.” In fact, these standards lay out reasonable requirements for automatic sprinkler system, smoke detectors, handrails in staircases and hallways to be used by residents, emergency call systems in resident bedrooms and bathrooms, etc... We believe that these are basic, common sense requirements for all public housing, and certainly are essential for any facility that is going to be a congregate home for elderly people with heightened healthcare and other needs. In fact, the federal government has recently recognized the need to insure safety in

residential care facilities by mandating this summer that all long term care facilities in the United States be equipped with sprinkler systems.²

V. THE REGULATION'S SCHEDULE OF PENALTIES FOR FACILITIES THAT VIOLATE THE LAW IS REASONABLE AND NECESSARY TO ENSURE SAFETY OF VULNERABLE RESIDENTS IN THE YEARS TO COME. PETITIONERS ARGUMENT THAT ASSISTED LIVING FACILITIES SHOULD BE AFFORDED THE OPPORTUNITY TO RECTIFY "NON-ENDANGERING" VIOLATIONS FOUND ON INSPECTION BEFORE THE IMPOSITION OF A FINE IS CONTRARY TO THE FUNDAMENTAL PURPOSES OF THE ALRA. SUCH AN INTERPRETATION WOULD UNDERMINE THE LEGISLATIVE INTENT OF THE LAW AND PUT FUTURE ASSISTED LIVING RESIDENTS AT RISK.

Petitioner correctly cites the New York Public Health Law §4663 which states that "**Any person who violates** any provision of this article or **any rule or regulation promulgated by the department**, or the terms or conditions of any order or permit issued by the department pursuant to this article, **shall be subject to the maximum penalties** which may be levied against a licensed adult care facility." [emphasis added] Petitioner, however, does not argue that the regulations allow for higher penalties, which would run afoul of the law, but rather that the regulations are illegal because they do not allow a facility "to rectify any non-endangering conditions cited in inspection reports before a fine is imposed." Simply put, petitioner is not concerned about fines raised but rather of receiving less latitude in being fined at all when they are found to have violated the law. This is a significant misinterpretation of the law that, if anything, provide for the "maximum penalties" for violation of "any rule or regulation promulgated by the department." In addition, as a matter of public policy the law should be interpreted to afford maximum ability for meaningful enforcement, in order to ensure that the regulations fulfill the clear legislative intent that the assisted living law establishes an improved system over that which has existed under the long plagued adult home licensure system.

VI. THE REGULATION'S REQUIREMENT THAT A FACILITY MAY NOT IMPOSE A BLANKET REQUIREMENT FOR A GUARANTOR OF PAYMENT, AND MAY ONLY

² Medicare and Medicaid Programs; Fire Safety Requirements for Long Term Care Facilities, Automatic Sprinkler Systems, Centers for Medicare and Medicaid Services, Department of Health and Human Services, Federal Register, Volume 73, Number 157 (August 13, 2008).

IMPOSE SUCH A REQUIREMENT IN SITUATIONS WHERE IT HAS "REASONABLY DETERMINED" THAT THERE IS A NEED FOR A GUARANTOR, IS AN IMPORTANT PROTECTION FOR CONSUMERS AND THEIR FAMILIES WHICH IS CONSISTENT WITH THE ASSISTED LIVING LAW AND GENERALLY ACCEPTED PRINCIPLES REGARDING TREATMENT OF CONSUMERS.

Petitioner argues that: "The Department states that operators may not require a guarantor unless the operator has 'reasonably determined', on a case by case basis, that the prospective resident would lack either the current capacity to manage financial affairs and/or the financial means to assure payment due under the residency agreement. See, Section 1001.8(f)(4)." [Emphasis in original.] In fact, this requirement addresses an important protection for both the consumer and his or her family by ensuring that facilities cannot impose a blanket rule that residents have guarantors. For the consumer, it is indicative of being treated as an adult who, unless otherwise determined, is to be assumed to be capable of making decisions and responsible for him/herself unless otherwise indicated (i.e., it is unnecessarily infantilizing and demeaning to the majority of people entering assisted living who are fully capable of making decisions for themselves). For the family, it means that they can move their loved one into an assisted living facility without worrying that at some point in the future they may be caught unawares with responsibility for paying for it. Two things are crucial to note in this regard: 1. Any facility has the right to decide, on a case by case basis, that an individual needs to have a guarantor in order to be admitted to the residence and 2. If the resident runs out of money in the future the facility is free to evict him or her. Another valuable benefit of this provision is that it will prevent a guarantor provision from being buried in a boilerplate residency agreement where people are less likely to take note of it and understand fully what they are agreeing to. In addition, it precludes the potential for systematic discrimination against individuals who are qualified to enter a residence but don't have children or other family who can be guarantors for them at some indefinite point in the future.

VII. THE REGULATION'S REVIEW AND APPROVAL PROCESS FOR ASSISTED LIVING FACILITIES AND, IN PARTICULAR, THE REQUIREMENT FOR PRE-ADMISSION AND ANNUAL RESIDENT ASSESSMENT EVALUATIONS, ARE RATIONALLY RELATED TO THE LEGITIMATE AND IMPORTANT STATE GOALS OF

ENSURING THAT FACILITIES ARE ABLE TO PROVIDE THE LEVEL OF CARE
REQUIRED LAW AND RESIDENTS ARE BEING CARED FOR SAFELY.

Petitioner cites “pre-admission documentation [which] has irrationally been changed to an annual requirement” and the fact that currently licensed adult homes are “being required to resubmit architectural standard documentation and obtain costly architect certification to confirm compliance with standards...” as being unnecessary and burdensome. In fact, the specific section of the regulations that the plaintiff refers to as burdensome and irrational is 10 NYCRR §1001.10 (i)(1) which states in its entirety: “identify and evaluate the resident’s needs, interests, and strengths and the capability of the facility to meet those needs, prior to admission and then at least once every 12 months, using the Personal Data and Resident Evaluation Form prescribed by the Department[.]” As advocates for consumers, we believe that this is a reasonable and rational requirement. If anything, given the increasing needs of the frail elderly who are residents of assisted living, this is a conservative timetable since such individuals are likely to have changing needs and abilities to carry out the activities of daily living. It is axiomatic that if their needs were not in flux (and, in fact, growing) they would not be moving into an assisted living facility in the first place. Thus, it is essential that an assisted living facility, having admitted such individuals, ensure that they are receiving appropriate assistance and care. Periodic monitoring of a resident’s status is crucial to achieve these goals.

VIII. CONCLUSION

Assisted living is the fastest growing type of senior housing in New York State and nationwide. For the growing population of seniors and their families, assisted living is increasingly seen as a viable and attractive alternative to nursing home placement, particularly for those who can no longer live safely on their own due to physical frailty and/or the onset of Alzheimer’s Disease or other dementia. Assisted living holds out the promise of a more homelike environment than that provided in most nursing homes, and the ability for residents to receive care and monitoring while maintaining their autonomy and independence.

Unfortunately, our state and federal governments have been late in recognizing the growth of assisted living and states have just begun to address the crucial safety and consumer protection issues that are necessary to make sure that this is a safe as well as viable option for the

elderly in the years to come. In New York State, the history is particularly egregious. New York has long required that any establishment providing residential health services be licensed. Licensure options primarily consisted of nursing homes, for those needing 24-hour a day care and monitoring, and adult homes or enriched housing for people whose needs did not rise to that level. Several years ago, when assisted living started to become popular, a number of providers opened up in the state, providing many of the same services as those provided in adult homes but not applying for licensure. To the extent that they were functioning as adult homes or enriched housing they were, in essence, operating illegally. Many of these providers would, in fact, have been disqualified from operating adult homes because they were publicly traded corporations and, until now, the state has prohibited publicly traded corporations to provide these types of services as a matter of public policy.

This situation resulted in a confusing and dysfunctional system in which many consumers were subjected to abusive business practices and had little recourse against poorly performing or dishonest unlicensed providers. At the same time, it perpetuated a growing chasm between the many licensed facilities serving low income residents and the private pay facilities (both licensed and not licensed) serving affluent residents. The dysfunction of the system became apparent to all with the publication in 2002 in *The New York Times* of a Pulitzer Prize winning investigative series on the abuse of mentally ill adults in licensed adult homes.³ Two years later the New York State legislature passed the Assisted Living Reform Act (ALRA).

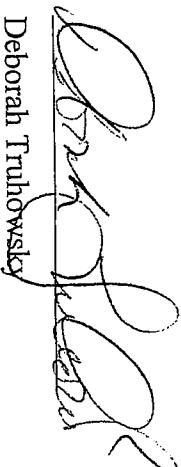
Given this history, and the clear language of the ALRA (identifying, for instance, the assisted living residence as a separate and distinct entity from adult homes and enriched housing and further distinguishing enhanced and special needs residences), there can be no doubt that the intent of the law was to establish a new and distinct assisted living system that responds to the changes in what consumers want, need and expect in assisted living and the concomitant changes taking place in the marketplace. These regulations, written with specificity and precision to accurately implement the clear language of the law and the legislative intent behind the law, should be upheld in their entirety for the well being of both present and future assisted living consumers and for the betterment of the assisted living industry as a whole.

³ Levy, Clifford, *Broken Homes: A Final Destination*, *The New York Times* (April 28, 2002).

Date: December 3, 2008

Respectfully submitted,

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Deborah Truhowsky

Counsel for Amicus Curiae

AF F I D A V I T O F S E R V I C E

STATE OF NEW YORK }
 } ss:
COUNTY OF NASSAU }

Dana Randazzo, being duly sworn deposes and says that (s)he is not a party to this

action,(s)he is over the age of eighteen and that (s)he resides in Suffolk, New York and that on

December 3, 2008,(s)he served the within **ATTORNEYS AFFIRMATION AND AMICUS**


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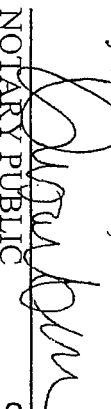
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the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service with New York State.


Dana Randazzo

Sworn to before me this 3
day of December, 2008


NOTARY PUBLIC

LISA HOLDOS
Notary Public, State of New York
No. 01HO5045354
Qualified in Suffolk County
Commission Expires JUNE 12, 20

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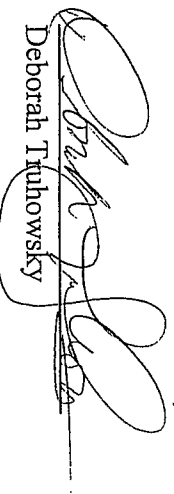
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