

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
C.A. NO. 1884-CV-01808 (BLS2)

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

PURDUE PHARMA L.P., PURDUE PHARMA INC.,  
RICHARD SACKLER, THERESA SACKLER,  
KATHE SACKLER, JONATHAN SACKLER,  
MORTIMER D.A. SACKLER, BEVERLY SACKLER,  
DAVID SACKLER, ILENE SACKLER LEFCOURT,  
PETER BOER, PAULO COSTA, CECIL PICKETT,  
RALPH SNYDERMAN, JUDITH LEWENT, CRAIG  
LANDAU, JOHN STEWART, MARK TIMNEY,  
and RUSSELL J. GASDIA,

Defendants.

*Received  
9/18/19  
Purdue v. Commonwealth  
and court*

**COMMONWEALTH'S RESPONSE TO THE SUGGESTION OF BANKRUPTCY FILED  
BY DEFENDANTS PURDUE PHARMA L.P. AND PURDUE PHARMA INC.**

The Commonwealth of Massachusetts respectfully submits this Response to the Notice of Suggestion of Bankruptcy and Automatic Stay of Proceedings filed on September 16, 2019 by defendants Purdue Pharma L.P. and Purdue Pharma Inc. (collectively, "Purdue"). This Court has the authority to determine whether any claims are stayed. Contrary to Purdue's suggestion, the automatic stay provision of 11 U.S.C. § 362 does not apply to this case. As set forth below, (1) this action is an exercise of the Commonwealth's police power and is excepted from the automatic stay under 11 U.S.C. § 362(b)(4), and (2) the automatic stay does not apply to the individual defendants because they are not debtors in the bankruptcy.

**BACKGROUND**

On June 12, 2018, the Attorney General filed this suit against Purdue and its directors and

executives, alleging that they perpetrated a deadly, illegal scheme to deceive doctors and patients about Purdue’s addictive drugs. The Commonwealth asserts that the defendants violated the Massachusetts Consumer Protection Act, G.L. c. 93A, and created a public nuisance. The Commonwealth seeks injunctive relief, restitution, civil penalties, the costs of investigation and litigation of defendants’ violations under G.L. c. 93A, the costs of abatement of the public nuisance created by defendants’ conduct, and other money damages.

Earlier this year, the defendants filed motions to dismiss. The Court heard the motions on August 2, 2019, and took them under advisement.

On September 15, 2019, Purdue filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Southern District of New York. The petition does not name as debtors any of the individual defendants in this action: Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, Russell Gasdia.

## **ARGUMENT**

### **I. THE POLICE POWER EXCEPTION TO THE AUTOMATIC STAY APPLIES TO THIS ACTION BY THE COMMONWEALTH.**

This police power action by the Commonwealth is excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).<sup>1</sup> The automatic stay provision of the bankruptcy code, 11

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<sup>1</sup> This Court has “concurrent jurisdiction with the Bankruptcy Court to determine the applicability of the automatic stay provisions of the Bankruptcy Code.” *City of Beverly v. Bass River Golf Mgmt., Inc.*, 92 Mass. App. Ct. 595, 599 n.5 (2018), citing *Lombardo v. Gerard*, 32 Mass. App. Ct. 589, 593-594 (1992). *See also In re Bona*, 124 B.R. 11, 15 (S.D.N.Y. 1991) (“The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay.”), quoting *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 347 (2d Cir. 1985); *Garcia v. Serrano (In re Garcia)*, 553 B.R. 1, 12 (Bankr. D.P.R. 2016) (“a state court may make a valid and binding determination regarding the applicability of the

U.S.C. § 362, contains an exception for actions brought in the government’s exercise of its police and regulatory powers. This exception, 11 U.S.C. § 362(b)(4), provides in pertinent part:

(b) The filing of a [bankruptcy] petition . . . does not operate as a stay . . . of the commencement or continuation of an action or proceeding by a governmental unit . . . , to enforce such governmental unit’s . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s . . . police or regulatory power.

The definition of “governmental unit” includes a State or Commonwealth. *See* 11 U.S.C. § 101(27).

This action to enforce G.L. c. 93A falls squarely within the police and regulatory power exception to the automatic stay. *See Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 733 n.1, 752 (2008) (police power exception allows Commonwealth’s action under G.L. c. 93A); *Commonwealth v. Consumer Health Benefit Assoc.*, No. 09-04347F (Mass. Super. Ct. Apr. 13, 2011) (MacLeod, J.) (same) [Ex. 1]; *In re Capachione*, No. 19-40200-CJP (Bankr. D. Mass. Jun. 28, 2019) (Panos, J.) (same) [Ex. 2]; *In re Zak*, No. 15-10098-JNF (Bankr. D. Mass. Jan. 21, 2015) (Feeney, J.) (same) [Ex. 3]; *Attorney Gen. v. Winthrop Healthcare Inv’rs, L.P.*, No. 06-5340, at 8 (Mass. Super. Ct. Feb. 7, 2007) (Spurlock, J.) (same) [Ex. 4]; *In re Winthrop*

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automatic stay to a prepetition state court proceeding that arises in or is related to a bankruptcy case”), citing *Siskin v. Complete Aircraft Servs. (In re Siskin)*, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001).

Massachusetts courts have accordingly exercised their concurrent jurisdiction to decide the applicability of the automatic stay and allowed exempted actions to proceed. *See, e.g., Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 733 n.1 (2008) (police power exception allows G.L. c. 93A action by Commonwealth); *Commonwealth v. Consumer Health Benefit Assoc.*, Civil Action No. 09-04347F (Mass. Super. Ct. Apr. 13, 2011) (same) [Ex. 1]. Massachusetts courts have also determined whether an automatic stay applies as to a debtor’s co-defendants. *See, e.g., Bass River Golf Mgmt., Inc.*, 92 Mass. App. at 599 (action against guarantor of petitioning debtor not subject to stay); *Allegheny Int’l Credit Corp. v. Bio-Energy of Lincoln, Inc.*, 21 Mass. App. Ct. 155, 158 (1985) (general partner not entitled to stay where limited partner was protected debtor).

*Healthcare Inv'rs*, No. 07-61115 (Bankr. N.D. Ga. Feb. 5, 2007) (same) [Ex. 5]; *Commonwealth v. First All. Mortg. Co. (In re First All. Mortg. Co.)*, 263 B.R. 99, 114 (B.A.P. 9th Cir. 2001) (same).<sup>2</sup>

Similarly, public nuisance actions brought by the government are exempted police power actions under 11 U.S.C. § 362(b)(4). *See, e.g., Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 370 (6th Cir. 1997) (police power exception allowed city to condemn and demolish debtor's property alleged to be public nuisance); *In re D'Mello*, 473 B.R. 207, 210 (Bankr. E.D. Mich. 2011) (police power exception "clearly" applied to town's public nuisance action, and the action was limited only by the restriction in § 362(b)(4) against enforcement of money judgements); *In re Porter*, 42 B.R. 61, 67 (Bankr. S.D. Tex. 1984) (police power exception allowed public nuisance action by state attorney general where debtor was alleged to have violated state law); *Smith-Goodson v. CitFed Mortg. Corp. (In re Smith-Goodson)*, 144 B.R. 72, 74-75 (Bankr. S.D. Ohio 1992) (police power exception allowed city action against public nuisance; "[p]roceedings which relate to matters of public safety are excepted from the stay"). *Cf. Lawton v. Steele*, 152 U.S. 133, 136 (1894) ("The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of

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<sup>2</sup> These seven cases also establish that the Commonwealth's requests for relief here (including injunctive relief, restitution, civil penalties, and other money damages) do not remove the action from the police power exception. *See In re First All. Mortg. Co.*, 263 B.R. 99, 114 (reversing application of stay to Commonwealth's claims under G.L. c. 93A for monetary relief); *Consumer Health Benefit Assoc.* [Ex. 1] (police power exception allows Commonwealth's action under G.L. c. 93A seeking injunctive relief, restitution, civil penalties, and fees and costs); *In re Capachione*, No. 19-40200-CJP (Bankr. D. Mass. Jun. 28, 2019) (same) [Ex. 2]; *In re Zak*, No. 15-10098-JNF (Bankr. D. Mass. Jan. 21, 2015) (same) [Ex. 3]. Section 362(b)(4) addresses remedies in police power actions and limits only the post-judgment enforcement of money judgments.



whatever may be regarded as a public nuisance.”).

These decisions about consumer protection and public nuisance reflect a well-established policy that government actions to prove that debtors violated health and safety laws are not stayed upon the filing of a bankruptcy petition. “Where the debtor is being prosecuted for engaging in fraudulent conduct, the automatic stay should not allow the debtor to be shielded from the government’s attempt to protect its citizens and uphold its laws related to the health and welfare of its citizens.” *In re First All. Mortg. Co.*, 263 B.R. at 108 (Commonwealth action under G.L. c. 93A). To that end, a government action “to determine whether [the defendant] has violated specified statutory and regulatory provisions” is protected by the police power exception in 11 U.S.C. § 362(b)(4). *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 41 (1991); *see also Spookyworld, Inc. v. Town of Berlin (In re Spookyworld, Inc.)*, 346 F.3d 1, 10 (1st Cir. 2003) (“section 362(b)(4) embodies a fundamental judgment of Congress: that protecting the public welfare and safety trumps the concerns that underlie the automatic stay”); *Midlantic Nat. Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 503 (1986) (“It is clear from the legislative history that one of the purposes of [prior version of § 362(b)(4)] exception is to protect public health and safety”). The Commonwealth alleges that the defendants committed intentional illegal conduct that caused widespread injury and death. This is precisely the kind of case that Congress exempted from the automatic stay.

## II. THE AUTOMATIC STAY DOES NOT APPLY TO THE INDIVIDUAL DEFENDANTS FOR THE ADDITIONAL REASON THAT THEY ARE NOT DEBTORS IN THE BANKRUPTCY.

“The automatic stay provisions of the Bankruptcy Code only apply to a proceeding against the [petitioning] debtor, not against others.” *Bass River Golf Mgmt., Inc.*, 92 Mass. App. Ct. at 599 (quotations omitted), quoting *In re Two Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 969 (1st Cir. 1993). Stays have been held to be inapplicable to

proceedings against a co-defendant of the debtor, against individual partners of debtor partnerships, and against the guarantors of a debtor's liabilities. *See Allegheny Int'l Credit Corp.*, 21 Mass. App. Ct. at 158, and cases cited; *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 4 (1st Cir. 1983) ("had Congress intended § 362(a) to apply to solvent co-defendants, it would have said so"), citing *Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadorena, S.A. de C.V.*, 10 B.R. 488 (N.D. Ill. 1981). The individual defendants are not debtors in the bankruptcy, and the automatic stay does not apply to them.

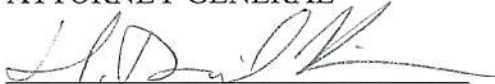
### CONCLUSION

For the above reasons, the Commonwealth's claims are not stayed. The Court should deny the defendants' pending motions to dismiss for the reasons stated in the briefs and at the hearing.

Dated: September 18, 2019

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS  
By its Attorney,  
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## CERTIFICATE OF SERVICE

I, Hyungwoo David Kim, Assistant Attorney General, hereby certify that I am today, September 18, 2019, serving the foregoing document upon all parties by e-mail to:

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Hyungwoo David Kim  
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# **EXHIBIT 1**



NOTICE

COMMONWEALTH OF MASSACHUSETTS

33

SUFFOLK, SS.

2-9  
SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. 09-4347F

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

CONSUMER HEALTH BENEFIT ASSOCIATION,  
NATIONAL BENEFITS CONSULTANTS, LLC,  
GUARANTEE TRUST LIFE INSURANCE COMPANY  
and VANTAGE AMERICA SOLUTIONS, INC.,

Defendants.

SUFFOLK SUPERIOR COURT  
CIVIL CLERK'S OFFICE  
2011 FEB - 7 PM 2:45  
MICHAEL JOSEPH JONOVAN  
CLERK/MAGISTRATE

COMMONWEALTH'S MOTION TO STRIKE ANSWER,  
AFFIRMATIVE DEFENSES AND JURY TRIAL DEMAND OF  
DEFENDANTS CONSUMER HEALTH BENEFIT ASSOCIATION AND  
NATIONAL BENEFITS CONSULTANTS, LLC AND TO ENTER THEIR DEFAULT

Pursuant to Mass. R. Civ. P. 37 and 55(a), the Commonwealth of Massachusetts (the "Commonwealth"), acting by and through its Attorney General, Martha Coakley, moves this Honorable Court to strike the answer, affirmative defenses and jury trial demand of Defendants Consumer Health Benefit Association ("CHBA") and National Benefits Consultants, LLC ("NBC") and to enter their default for failure to "otherwise defend" this action and failure to comply with discovery orders and obligations.<sup>1</sup> In support of its Motion, the Commonwealth relies on its Memorandum of Law in support hereof, a Case Appendix in support hereof, a Document Appendix in support hereof and pleadings, other filings and Court Orders in this action. The Commonwealth's certificate pursuant to Super. Ct. R. 9C is appended hereto.

<sup>1</sup> On October 13, 2009, the Commonwealth filed a complaint alleging that Defendants engaged in unfair and deceptive acts and practices in connection with the marketing and sale of a discount health plan.

4/13/11 The Commonwealth's Motion is Allowed As the reasons stated in the supporting memorandum. Further, in connection with the suggestion of bankruptcy filed, this court finds that the within prosecution is exempted from the stay. 11 USC § 362(b)(4).

1/2/2011

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. 09-4347F

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COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

CONSUMER HEALTH BENEFIT ASSOCIATION,  
NATIONAL BENEFITS CONSULTANTS, LLC,  
GUARANTEE TRUST LIFE INSURANCE COMPANY  
and VANTAGE AMERICA SOLUTIONS, INC.,

Defendants.

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**COMMONWEALTH'S RESPONSE  
TO SUGGESTIONS OF BANKRUPTCY**

The Commonwealth of Massachusetts (the "Commonwealth"), files this Response to Suggestions of Bankruptcy relating to two of the Defendants, Consumer Health Benefit Association ("CHBA") and National Benefits Consultants, LLC ("NBC"), in order to give all Defendants notice that the Commonwealth intends to continue to prosecute the within proceeding notwithstanding that CHBA and NBC have made voluntary filings for bankruptcy protection.

**BACKGROUND**

1. On October 13, 2009, the Commonwealth commenced the within lawsuit in the Superior Court, Suffolk County, of the Commonwealth of Massachusetts, Case No. 09-4347F (the "Civil Action"), against four entities relating to the marketing and sale of a discount health plan. The Complaint alleges violations of the Consumer Protection Act, G.L. c. 93A, § 2, through unfair and deceptive acts and practices.

2. The Complaint seeks injunctive relief, restitution, civil penalties and the costs of investigation and litigation of Defendants' violation of G.L. c. 93A.

3. The Commonwealth moved to strike the answer and enter default against CHBA and NBC (the "Default Motion") on January 19, 2011.

4. In March, the Court set a hearing on the Default Motion for April 12, 2011 (now rescheduled to April 13, 2011).

5. The Commonwealth cross-moved for summary judgment against all Defendants on April 1, 2011.

6. On April 3, 2011, CHBA and NBC filed voluntary petitions for bankruptcy in the United States Bankruptcy Court for the Southern District of Florida. CHBA lists five creditors seeking \$2.2 million plus other claims of unknown amounts, including the Federal Trade Commission (listed as seeking \$2.2 million in a consumer restitution action), the Commonwealth and the State of Arkansas through its Attorney General. NBC listed nine creditors seeking \$2,314,693,89, including the Federal Trade Commission (listed as seeking \$2.2 million in a consumer restitution action) and the Commonwealth.

7. The Commonwealth respectfully intends to continue prosecution of the Civil Action, including proceeding to judgment as to all of the Defendants. As set forth below, such an exercise of the government's police and regulatory power is specifically excepted from the automatic stay under 11 U.S.C. § 362(b)(4).

8. This Court has jurisdiction to determine that the continued prosecution of the within proceeding is exempted from the automatic stay under 11 U.S.C. § 362(b)(4).

9. The Commonwealth acknowledges that it will not attempt to collect any money judgment it may obtain against CHBA or NBC in the Civil Action without first resorting to the Bankruptcy Court, should the case still be pending there.



**I. THIS COURT HAS JURISDICTION TO DETERMINE THE INAPPLICABILITY OF THE AUTOMATIC STAY.**

10. A state court has concurrent jurisdiction with a bankruptcy court to determine the applicability of the automatic stay. See, e.g., In re Bona, 124 B.R. 11, 15 (S.D.N.Y. 1991). “The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay.” In re Bona, 124 B.R. at 15 (quoting In re Baldwin-United Corporation Litigation, 765 F.2d 343, 347 (2d Cir. 1985)).

11. Massachusetts courts have exercised their jurisdiction and made determinations as to the applicability of the automatic stay. See, e.g., Marine Midland Bank v. Herriott, 10 Mass.App.Ct. 743, 746-747 (1980).

**II. POLICE POWER EXCEPTION TO THE AUTOMATIC STAY APPLIES.**

12. The automatic stay provision of the bankruptcy code cited by the Suggestions of Bankruptcy, 11 U.S.C. § 362, contains an exception for actions brought in the government’s exercise of its police and regulatory powers.

13. This exception, 11 U.S.C. § 362(b)(4), provides in pertinent part:

(b) The filing of a [bankruptcy] petition... does not operate as a stay...  
(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit..., to enforce such governmental unit’s... police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit’s... police or regulatory power;

The Bankruptcy Code’s definition of a governmental unit includes the federal, state and local levels and includes a department, agency or instrumentality of a state or Commonwealth. 11 U.S.C. § 101(27).

14. The Civil Action, seeking to protect Massachusetts residents by enforcing the Consumer Protection Act, G.L. c. 93A, § 2, falls squarely within the police and regulatory power exception to the automatic stay. “From legislative history and case law, it is well-established that consumer protection is a valid exercise of the police and regulatory power for purposes of § 362(b)(4).” In re First Alliance Mortgage Co. (Massachusetts v. First Alliance Mortgage Co.), 263 B.R. 99, 108, 114 (9th Cir. BAP 2001) (holding action by Commonwealth under G.L. c. 93A was exempt in its entirety from the automatic stay). State consumer protection actions seeking injunctive relief, restitution, civil penalties, attorneys’ fees and/or investigation costs have been held excepted from the automatic stay. In re First Alliance Mortgage Co., 263 B.R. at 103, 114 (holding action by Commonwealth under G.L. c. 93A seeking injunctive relief, restitution, civil penalties and attorney’s fees and costs exempt from the automatic stay); In re Luskin’s, Inc. (State of Maryland v. Luskin’s, Inc.), 213 B.R. 107 (D. Md. 1997); In re Hughes, 87 B.R. 49 (Bankr. S.D. Ohio 1988).

15. CHBA and NBC should not be allowed to use the automatic stay to prevent the Commonwealth from fixing its claim for their unfair and deceptive conduct. “Where the debtor is being prosecuted for engaging in fraudulent conduct, the automatic stay should not allow the debtor to be shielded from the government’s attempt to protect its citizens and uphold its laws related to the health and welfare of its citizens.” In re First Alliance Mortgage Co., 263 B.R. at 108.

16. Permitting the Commonwealth to proceed with the prosecution of the Civil Action will enable the Commonwealth to fix its claim for damages in a Massachusetts Court, where many of the injured consumers are residing, rather than the distant Bankruptcy Court in Florida.

17. The Commonwealth respectfully gives notice of the inapplicability of the automatic stay to its prosecution of the within consumer protection lawsuit against the defendants,

including CHBA and NBC, as well as its intention to continue prosecution of the lawsuit, including fixing restitution, civil penalties and the costs of investigation and prosecution. The Commonwealth will not, however, attempt to enforce against CHBA or NBC any money judgment it obtains against them without first resorting to the United States Bankruptcy Court if their bankruptcies are still pending there.

Dated: April 12, 2011

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS  
By its Attorney,  
MARTHA COAKLEY  
ATTORNEY GENERAL



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**CERTIFICATE OF SERVICE**

I, Emiliano Mazlen, of the Office of the Attorney General, hereby certify that a true copy of the above document was served upon all parties to this action by mailing same, postage prepaid and sending same by facsimile on April 12, 2011 to counsel of record for Defendants Guarantee Trust Life Insurance Company and Vantage America Solutions, Inc. and to the counsel that submitted the Suggestions of Bankruptcy relating to Defendants Consumer Health Benefit Association and National Benefits Consultants, LLC.



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Emiliano Mazlen  
Assistant Attorney General

# EXHIBIT 2



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
CENTRAL DIVISION

In re:

RICHARD W. CAPACHIONE,

Debtor

## Chapter 7


Case No. 19-40200-CJP

**ORDER DECLARING THE INAPPLICABILITY OF THE AUTOMATIC STAY TO  
THE MASSACHUSETTS ATTORNEY GENERAL'S ENFORCEMENT ACTION  
AGAINST DEBTOR**

This matter having come before the Court upon the Commonwealth of Massachusetts' Motion for Determination of Inapplicability of Automatic Stay to Massachusetts Attorney General Enforcement Action (the "Motion") and the Court having considered the Motion, the assent of the debtor Richard W. Capachione (the "Debtor"), and that no other objections were filed, it is ORDERED AND ADJUDGED that the Commonwealth of Massachusetts' Motion is GRANTED. The State Court Enforcement Action, including but not limited to the Complaint attached as Exhibit 1, is a police power and regulatory action that is excepted from the automatic stay under 11 U.S.C. § 362 (b)(4) and may be filed and proceed to judgment. However, the automatic stay continues to prohibit enforcement of any monetary judgment adjudicated against Debtor pursuant to 11 U.S.C. § 362(a).

Dated: June 28, 2019

By the Court,

  
Christopher J. Panos  
United States Bankruptcy Judge

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION No.

<p>COMMONWEALTH OF MASSACHUSETTS</p> <p>Plaintiff,</p> <p>v.</p> <p>RICHARD CAPACHIONE, an individual; and NEW ENGLAND HARDSCAPES, INC., AQUA OUTDOOR ENVIRONMENTS, and R AND R CONSULTING, LLC., corporations</p> <p>Defendants.</p>	<p><b>COMPLAINT</b></p>
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**I. INTRODUCTION**

1. The Commonwealth of Massachusetts, (the “Commonwealth”), by and through its Attorney General, Maura Healey, brings this action in the public interest pursuant to G. L. c. 93A, § 4. The Commonwealth seeks injunctive relief, restitution, civil penalties, and reasonable attorney fees and costs.

2. Richard Capachione (“Capachione”), acting individually and through three closely held corporations New England Hardscapes, Inc., Aqua Outdoor Environments, Inc., and R and R Consulting, LLC. (collectively “Defendants”), violated the Massachusetts Consumer Protection Act, G. L. c. 93A, § 2, by taking hundreds of thousands of dollars in consumer deposits and progress payments for home improvements projects, when Defendants knew or should have known that they would be unable to complete the projects in the manner or timeframe agreed upon, and then failed to refund consumer deposits when Defendants became unable or unwilling to complete the projects.

3. Defendants' actions caused consumers to suffer monetary losses and property damage and forced consumers to hire new contractors to fix or complete the work Defendants had agreed to and been paid to complete.

4. Since 2003, Capachione and his corporations have provided home improvement and construction services in the Commonwealth of Massachusetts—specifically, installation and construction of in-ground swimming pools and pool decks (including related plumbing and electric components), construction of outdoor living spaces, and retaining walls.

5. During this time, neither Capachione, nor his corporations have been continuously registered as home contractors with the Office of Consumer Affairs and Business Regulation (“OCABR”).

6. Typically, Capachione required a large payment at the contract signing, a so-called “mobilization payment,” and another large payment before or at the start of a project.

7. In connection with these projects, Capachione often required consumers to make periodic payments (*i.e.*, “progress payments”). The written agreements between Defendants and consumers indicated that Defendants would perform the specified home improvement work in exchange for the progress payment. Capachione usually insisted on a progress payment at the outset of each phase of work, or, at least, prior to completion of a particular phase of work—purportedly to be used to purchase materials or cover the cost of labor.

8. Defendants collected hundreds of thousands of dollars in progress payments that Capachione represented would be used complete the projects in the particular manner promised and within certain time frames. Capachione typically represented—orally and in writing—that these progress payments would be used to obtain requisite building permits, arrange for,



supervise and pay third-party contractors to perform work, and obtain materials necessary for the projects.

9. Defendants failed to provide customers with home improvement services in exchange for these progress payments and then failed to refund their deposits and progress payments after failing perform the agreed-upon work.

10. In numerous instances—particularly after January of 2016—Capachione induced consumers to enter into agreements and make progress payments when, given Defendants existing, outstanding and/or unfinished projects and the precarious financial condition of his corporations, Capachione, in fact, lacked the ability to perform the projects in the timeframe and in the manner agreed upon.

11. Through these unfair and deceptive practices, Defendants wrongfully obtained hundreds of thousands of dollars from Massachusetts consumers, damaged consumers properties, and caused unsafe and unsanitary conditions to persist on their properties in violation of G. L. c. 93A, § 2.

12. Defendants' unfair and deceptive conduct also violates the Home Improvement Contractor Act ("HICA"), G. L. c. 142A, which prohibits Defendants from, inter alia: (1) offering home improvement services without registering as a home improvement contractor, (2) abandoning and/or failing to complete home improvement projects without justification, (3) failing to credit homeowner payments made to Defendants in connection with residential contracting transactions, (4) materially misrepresenting the timeframe for completing home improvement projects, (5) failing to pay for materials or services where Defendants received sufficient funds for the work, (6) failing to include statutorily mandated information and disclosures in the home improvement contract, and (7) demanding and receiving deposits to be

paid in advance of the commencement of work that exceeded the amounts allowed by G. L. c. 142A, § 2(a)(6).

13. Under G. L. c. 142A, § 17, Defendants' violations of the HICA constitute additional unfair and deceptive acts in violation of the Consumer Protection Act, G.L. c. 93A, § 2.

## **II. JURISDICTION AND VENUE**

14. The Attorney General is authorized to bring this action pursuant to G. L. c. 12, § 10 and G.L. c. 93A, § 4.

15. This Court has jurisdiction over the subject matter of this action pursuant to G. L. c. 12, § 10; G. L. c. 93A, § 4; G.L. c. 214, § 1; and G. L. c. 223A, § 3(a), (b), (c) and (d).

16. Venue is proper in Suffolk County pursuant to G. L. c. 223, § 5; G. L. c. 93A, § 4.

## **III. PARTIES**

17. The plaintiff is the Commonwealth of Massachusetts, represented by Attorney General Maura Healey, who brings this action in the public interest.

18. Defendant Richard Capachione is a natural person last known to reside at 21 Independence Road, Acton, Massachusetts. At all relevant times, he was the sole owner and managing agent of New England Hardscapes, Inc. and Aqua Outdoor Environments, and, at present, is the owner and managing agent of R and R Consulting, LLC.

19. Defendant New England Hardscapes, Inc., was a Massachusetts corporation that prior to April 13, 2018, operated as a home improvement contractor with a principal place of business at 930 Main Street, Acton, Massachusetts. New England Hardscapes, Inc., On April 13, 2018, Richard Capachione, President of New England Hardscapes, Inc. filed voluntary dissolution paperwork with an effective date of December 31, 2017.

20. Defendant Aqua Outdoor Environments has a mailing address of P.O. Box 1214, Littleton, Massachusetts and is not incorporated in Massachusetts. Aqua Outdoor Environments appears as a d/b/a for both New England Hardscapes, Inc. and R and R Consulting, LLC.

21. Defendant R and R Consulting, LLC, is a Massachusetts corporation, incorporated on August 10, 2017, with a principal place of business at 930 Main Street, Acton, Massachusetts.

22. Capachione is liable for the misconduct alleged herein both in his individual capacity for his own direct participation in the violations and in his capacity as owner/managing agent of the corporations which, at all relevant times, were under his sole direction and control.

#### IV. FACTS

##### *Capachione's Business Practices*

23. At relevant times, Capachione was the sole owner and managing agent of New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC, through which he purported to offer construction and home improvement services to Massachusetts homeowners, primarily the construction of in-ground swimming pools, including plumbing/filters and electrical components, retaining walls, pergolas, and patios.

24. Capachione had at least two additional full-time employees—his wife, Renee Capachione, and a “scheduler” to handle the scheduling of jobs.

25. Capachione hired subcontractors to perform specific aspects of a home improvement project, including masonry, stonework, and electrical work. Capachione represented to homeowners that he both selected and supervised those contractors.



26. Until April 11, 2018, Capachione was registered with OCABR to do business as a home improvement contractor under the name of New England Hardscapes, Inc.<sup>1</sup>

27. Capachione represented to homeowners that he could construct and implement construction of in-ground pools and outdoor “environments” for consumers to enjoy and for improvement of their property values.

28. In at least one instance, Capachione represented that he was capable and equipped to install a handicap-accessible ramp into a pool for a consumer’s daughter who was disabled, used a wheelchair and needed a ramp to use the swimming pool for water therapy.

29. Capachione represented himself as experienced in supervision and selection of contractors and vendors for home improvement projects.

30. Capachione often used written agreements when contracting with consumers. These agreements usually, if not always, lacked key disclosures required by the Massachusetts Home Improvement Contractor Act, including: (a) a clear description of any other documents that are part of the agreement; (b) the social security number and registration number of the contractor; (c) the calendar date when work under the contract is scheduled to begin; (d) the calendar date on which the work is scheduled to be substantially completed; (e) a detailed description of the work to be done and the materials to be used in the performance of the contract; (f) a time schedule of payments to be made under the contract and the amount of each payment, stated in dollars, including all finance charges; (g) the actual cost of any materials or equipment of a special order or custom-made nature, which must be ordered in advance of the commencement of the work, in order to ensure that the project will proceed on schedule; (h)

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<sup>1</sup> New England Hardscapes, Inc. was registered and licensed with OCABR as a home improvement contractor under two different license numbers, the first expired on January 9, 2012 and the second expired on April 11, 2018.

notice that the contractor was required to be registered and that inquiries about the registration should be directed to the director of OCABR; (i) a description of the owner's three-day cancellation rights under G. L. c. 142A; (j) a warning, in ten point or larger bold type, "do not sign this contract if there are any blank spaces"; (k) information regarding any and all necessary permits needed to perform the Specifications; and (l) notification that homeowners who secure their own permits shall be excluded from the Guaranty Fund under G. L. c. 142A.

31. Further, in his written agreements with consumers, Capachione typically included a paragraph containing project "specifications" or a breakdown of particular aspects or phases of a project—with a dollar amount accompanying each phase. He represented the cost for each phase to be a "progress payment" or a sum to cover the particular work described, including his purchase of the materials.

32. Capachione—orally and in writing—represented to consumers that the progress payments in the agreement would cover labor and materials. However, in multiple instances, progress payments were not used for that particular purpose.

33. After soliciting and accepting large initial deposits and progress payments from homeowners, Capachione repeatedly engaged in a pattern of delays and excuses while failing to perform the home renovations or deliver the necessary materials which he had already received payment to procure.

34. Capachione continued to solicit new work, enter into new agreements and accept new deposits from consumers while simultaneously failing to complete scheduled tasks for his existing consumers.

35. Defendants repeatedly failed to complete residential contracting projects they had been hired and paid to complete and failed to deliver the materials they were required to purchase under the agreement with the “progress payments” paid by consumers.

36. Likewise, Capachione repeatedly failed to provide refunds to consumers who prepaid for the work Defendants never completed—even where consumers made a demand under G. L. c. 93A, or when consumers have obtained court judgments.

37. Capachione failed to refund or account for his failure to refund over \$250,000 of his clients’ deposits.

*Capachione’s Undercapitalization of His Corporations and Insolvency*

38. Capachione knew or should have known that his business was undercapitalized and in a precarious financial position, making it highly likely he would not have the financial resources to complete these home improvement projects in the manner and in the timeframes agreed upon.

39. For example, in 2017 and 2018, the Internal Revenue Service attempt to make several withdrawals from Capachione’s business account to satisfy a \$13,081.28 tax lien. Those withdrawals were unsuccessful due to insufficient funds in his account.

40. Capachione’s banks charged him thousands of dollars in fees from July 2016 through August 2018 for having insufficient funds to satisfy drafts to a multitude of his creditors.

41. Moreover, on November 9, 2017, Capachione executed an “Assignment for the Benefit of Creditors” on behalf of New England Hardscapes, Inc., which owed “priority tax liens to taxing authorities in the amount of approximately \$35,000” and “owes approximately \$67,000 to about twenty creditors.” Capachione sold five motor vehicles, namely two dump trucks, a flatbed truck, and a 6-wheel diesel truck, purportedly to pay creditors.



42. Capachione's businesses had no employees by August of 2017.

43. In April 2018, Capachione filed for voluntary dissolution of New England Hardscapes, Inc. with the Secretary of the Commonwealth, listing an effective date for dissolution of December 31, 2017.

44. Consumers have filed more than nine lawsuits against Capachione and obtained over \$22,749.14, in judgments, most of which he failed to pay.

45. Likewise, vendors and suppliers filed lawsuits against him and have also obtained judgments against Capachione.

46. Capachione took consumers' money and made them promises that he knew or should have known he could not delivery due to the fact that his business, New England Hardscapes, Inc. had ceased to operate in July or August 2017, and he had sold off a large amount of equipment to pay creditors.

47. Nevertheless, Capachione continued to accept deposits and progress payments from consumers, even taking on new home improvement projects, while failing to disclose to consumers Defendants were unlikely to perform the contracts in the manner or time agreed upon due to the undercapitalization and financial instability of his corporations.

48. All told, over the past decade, Capachione has engaged in a systemic pattern of unfair and deceptive conduct.

***Notice of Intent to File Action***

49. Pursuant to G. L. c. 93A, § 4, on the Commonwealth mailed notice of its intent to file this action to Capachione, subject to relief from the Automatic Stay by the Bankruptcy Court of the District of Massachusetts (Western Division) by sending such notice, postage prepaid, to Capachione's attorney, by certified and electronic mail.

**V. CAUSES OF ACTION**

**Count I: Unfair and Deceptive Acts of Practices in Violation of G. L. c. 93A, § 2**

50. The allegations in the paragraphs above are re-alleged and incorporated herein.

51. General Laws chapter 93A, § 2(a) declares unlawful “unfair or deceptive acts or practices in the conduct of trade or commerce[.]”

52. Defendants conduct trade and commerce in Massachusetts and with Massachusetts consumers.

53. Each Defendants is an individual, corporation or other legal entity, and is therefore a “person” as defined under G. L. c. 93A, § 1(a).

54. By initiating and engaging in the conduct described above, Capachione, individually and/or through his corporations, New England Hardscapes, Inc., Aqua Outdoor Environments, and R and R Consulting, LLC, engaged in unfair or deceptive acts and practices that violated G. L. c. 93A, § 2(a) and the regulations promulgated thereunder by, without limitation:

- a. making material misrepresentations and omissions regarding his ability to deliver products and perform services related to home improvement transactions in violation of G. L. c. 93A, § 2(a) and 940 CMR 3.09(2);
- b. taking consumer deposits and progress payments for home improvement projects when Capachione knew or should have known he would not complete the project in the contracted timeframes;
- c. failing to return consumer deposits and progress payments for labor and materials that Capachione failed to provide; and



- d. engaging in violations of G. L. c. 142A, § 1 *et. seq.* (the Home Improvement Contractor Act), each of which constitutes a violation of G. L. c. 93A, § 2, including, *inter alia*:
- i. abandoning and failing to complete home renovations without justification in violation of G. L. c. 142A, § 17(2);
  - ii. failing to credit homeowner deposits and progress payments made to Capachione in connection with residential contracting transactions in violation of G. L. c. 142A § 17(3);
  - iii. making material misrepresentations in the procurement of contracts and making false promises of a character likely to influence, persuade or induce the procurement of a contract in violation of G. L. c. 142A, § 17(4);
  - iv. failing to pay for materials and services rendered in connection with his operating as a contractor after he received sufficient funds as payment for the particular work, in violation of G. L. c. 142A, § 17(14); and
  - v. failing to include statutorily required information and disclosures in the home improvement contract including but not limited to; the calendar date when work under the contract is scheduled to begin, the calendar date on which the work is scheduled to be substantially completed; and the actual cost of any materials or equipment of a special order or custom-made nature, which must be ordered in advance of the commencement of the work, in order to ensure that the project will proceed on schedule, in violation of G. L. c. 142A § 2.

55. Defendants knew or should have known that the acts and practices described above are unfair and/or deceptive, in violation of G. L. c. 93A, § 2.

**Count II: Misrepresentation/False Pretenses**

56. The allegations in the paragraphs above are re-alleged and incorporated herein.

57. Capachione wrongfully induced consumers pay him progress payments for home improvement projects by falsely representing both orally and by way of written agreements that he would complete (and intended to complete) the project in a certain timeframe and according to certain specifications;

58. Capachione falsely represented his intention and his ability to complete projects in particular manner and pursuant to particular timeframes—causing consumers to rely on those representations and pay him lump sums, or “progress payments”;

59. Consumers’ reliance was justified because Capachione continued to reassure them that he would complete projects in the timeframe agreed upon and, in numerous instances, the work started out in a satisfactory manner.

60. Capachione continued to enter into new agreements for home improvement projects while his existing projects were already failing to meet specifications and timelines and while his corporations were undercapitalized and in a precarious financial state.

61. Capachione knew or should have known he could not meet the timeline or specifications of the projects in the agreements when he solicited new consumers for work and had those consumers been aware of his inability to perform and his outstanding work for other consumers they would have been unlikely to enter into an agreement and make payments to him for home improvement work.

62. As a direct result of the unfair and/or deceptive conduct described hereinabove, Capachione was unjustly enriched by hundreds of thousands of dollars.

63. Capachione knew or should have known that the acts and practices described above are unfair and/or deceptive, in violation of G. L. c. 93A, § 2.

**VI. PRAYER FOR RELIEF**

**WHEREFORE**, the Commonwealth requests that this honorable Court grant the following relief, after trial on the merits:

- a. Enter judgment in favor of the Commonwealth;
- b. Issue an appropriate permanent injunction to enjoin Defendants from:
  - i. Undertaking, offering to undertake, or agreeing to perform residential contracting, landscape design and/or home improvement services; and
  - ii. Performing, supervising, offering to undertake, or agreeing to perform construction, reconstruction, alteration, repair, removal, or demolition on residential dwellings;
- c. Order Defendants to provide restitution Massachusetts consumers' ascertainable losses resulting from Defendants' conduct in violation of G. L. c. 93A, § 2;
- d. Order Defendants to pay civil penalties of \$5,000 for each violation of G. L. c. 93A;
- e. Award attorneys' fees and costs to the Commonwealth; and
- f. Enter such other relief as the Court deems just and reasonable.

Respectfully submitted,

COMMONWEALTH OF  
MASSACHUSETTS

MAURA HEALEY  
ATTORNEY GENERAL

By: \_\_\_\_\_  
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Date: June \_\_, 2019

# EXHIBIT 3



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

In re:

David Zak, Debtor

Chapter 7

Case No. 15- 10098-JNF

~~PROPOSED~~ ORDER DECLARING THE INAPPLICABILITY OF THE AUTOMATIC  
STAY TO THE MASSACHUSETTS ATTORNEY GENERAL'S ENFORCEMENT  
ACTION AGAINST DEBTOR

**WHEREAS**, the Commonwealth filed a complaint under G.L. c. 93A, §§ 2(a) and 4 in the Massachusetts state court, captioned *Commonwealth of Massachusetts v. David Zak, et al*, Superior Court Civil Action No. 11-624H (the "Enforcement Action"), seeking permanent injunctive relief, restitution, civil penalties, attorneys' fees and costs, and maintains that the continued prosecution of the Enforcement Action is an exercise of its police and regulatory powers and is excepted from the automatic stay under 11 U.S.C. § 362(b)(4);

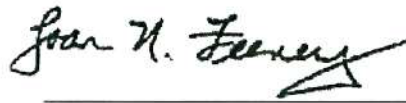
**WHEREAS**, the Court has reviewed the Commonwealth's Motion for a Determination of Inapplicability of Automatic Stay to the Enforcement Action and Debtor's Response thereto, and all parties have had an opportunity to be heard; and

**WHEREAS**, the Commonwealth acknowledges that it will not attempt to attach any property of the Debtor or the bankruptcy estate, or collect on any money judgment it may obtain against the Debtor in state court by the Enforcement Action without first returning to the Bankruptcy Court while the Debtor's bankruptcy case is pending.

**IT IS HEREBY ORDERED THAT:**

The Enforcement Action, *Commonwealth of Massachusetts v. David Zak, et al*, Superior Court Civil Action No. 11-624H is a police power and regulatory action that is excepted from the automatic stay under 11 U.S.C. § 362(b)(4). This order shall not be stayed by Bankruptcy Rule 4001(a)(3).

DATED: \_\_\_\_\_, 2015.



01/21/2015

Judge Joan N. Feeney  
United States Bankruptcy Court Judge

# **EXHIBIT 4**



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 06-5340

ATTORNEY GENERAL & others<sup>1</sup>

vs.

WINTHROP HEALTHCARE INVESTORS, L.P.  
d/b/a GOVERNOR WINTHROP NURSING HOME & others<sup>2</sup>

**FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT ON THE  
RECEIVER, ROBERT J. GRIFFIN'S, EMERGENCY MOTION FOR  
AUTHORIZATION TO CLOSE THE GOVERNOR WINTHROP NURSING HOME**

**INTRODUCTION**

The Commonwealth of Massachusetts through the Attorney General filed a complaint against the defendants, Winthrop Healthcare Investors, L.P. d/b/a Governor Winthrop Nursing Home, Westburg Care Industries, L.P., H.P./Salisbury Inc., and Douglas K. Mittleider (Winthrop), alleging that the Governor Winthrop Nursing Home (Facility) failed to provide adequate care to its residents. This allowed the Commonwealth's motion for a temporary restraining order and for a writ of attachment, and also appointed a temporary receiver on December 21, 2006. The receiver, Robert J. Griffin (Receiver), moved this court for authorization to close the Facility. After receiving evidence, a visit to the Facility on January 24,

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<sup>1</sup> Robert J. Griffin, as temporary receiver, and the Department of Public Health of the Commonwealth of Massachusetts

<sup>2</sup> Westburg Health Care Investors, L.P.; H.P./Salisbury Inc.; and Douglas K. Mittleider

2007 by this court and hearing the parties. The court authorized the Receiver on February 2, 2007 to close the facility. The memorandum that follows contains the court's findings of fact and rulings of law on that issue.

### FINDINGS OF FACT

Winthrop is the owner and licensee of a Massachusetts nursing home facility located at 142 Pleasant Street in Winthrop, Massachusetts. The Facility is licensed by the Department of Public Health (DPH) as a long term care facility for up to ninety-one residents. At the time this proceeding was filed, the Facility had sixty residents. As of January 24, 2007, the Facility had fifty-three residents. The Facility is a two floor structure that is approximately forty years old. Its rooms are primarily triples, with three residents per room. The Facility also has two single rooms and two double rooms.

In August and September of 2006, the Facility underwent its annual DPH re-certification surveys. Both the Life Safety Code survey, completed on August 30, 2006, and the Quality of Care survey, completed on September 5, 2006, showed multiple deficiencies at the Facility. The survey also indicated that the Facility was out of compliance with the requirements for participation in the Medicaid and Medicare programs and was in need of substantial repairs.

Management of the Facility was overseen by an affiliate of Winthrop, AltaCare Corporation (AltaCare). Until January 1, 2007, the Facility administrator reported directly to AltaCare's Director of Operations, Kerry Gibson, who was responsible for the direct oversight of a number of facilities. Gibson reported to company President, Doug Mittleider, who had ultimate authority over all financial decisions at the various affiliated companies. AltaCare and other Winthrop affiliates controlled almost all of Winthrop's funds. The Facility's Medicaid and

Medicare and other funds were deposited electronically into an account that was not controlled by the Facility administrator or staff. With the exception of a small petty cash account, which was limited to \$500 at a time, and an "impressed account," which was limited to \$2,000 at a time, the Facility administrator and staff have no funds or authority to pay bills directly. Winthrop's central corporate office or its affiliates paid the Facility's bills through a centralized payables system. Under this system, invoices were entered at the Facility, and the Facility administrator made recommendations to Alta Care as to which bills should be paid but had no authority or ability to pay them.

Effective September 11, 2006, Kevin Cogan took over as the new administrator at the Facility. Upon his arrival, Cogan assessed the Facility and determined that numerous quality of care, financial, and physical plant problems existed at the Facility, including those identified in the recently completed surveys.

Cogan noted that the Facility had over \$1.4 million dollars in uncollected accounts receivable outstanding, more than half of which was over 120 days past due and largely uncollectible. It had over \$740,000 in payables due, much of which was substantially in arrears.

Cogan also noted that, the physical plant, as well as furniture and equipment at the Facility, was in substantial disrepair. The Facility was plagued by broken kitchen equipment (including oven doors which had to be propped closed with a wooden stick), had defective smoke detectors, inadequate or non-functional fire doors, inoperable bathrooms and shower rooms, inaccessible call lights in showers, a lack of sufficiently hot water, mold in the freezer and refrigeration unit, mold in the heating and air vents, and mold in the medical supply closet. The cost of remedying these conditions was hundred of thousands of dollars, but the Facility had a



capital budget of only \$22,500.

Cogan prepared a plan of correction to address the noted survey deficiencies and other problems. In order to carry out the plan of correction and to address the Facility's immediate cash needs, Cogan made repeated requests to Kerry Gibson, Doug Mittleider, and other corporate officers of Winthrop's affiliates from September until December of 2006 for cash and resources to address the deficiencies and to pay bills.

Despite being aware of the deficiencies, the corporate officers of Winthrop and its affiliates failed to provide the resources needed at the Facility in a timely fashion. This resulted in threats from numerous vendors to terminate services unless they were paid. During the period of September to December of 2006, both the gas and electric companies threatened to terminate services due to non-payment. The failure to pay the fire alarm vendor approximately \$3,300 that was past due resulted in the vendor's refusal to fix the five inoperable smoke detectors at the facility. The smoke detectors were not repaired until they were brought to the attention of the Receiver, who was appointed in late December. Additionally, although the corporate officers did provide a check for half of the cost for the repair of the oven doors, the check was not honored due to insufficient funds. The vendor then demanded full payment up front before it would order the doors, and the doors were not repaired until November 2006.

Winthrop's owners and its affiliates were also aware of the serious physical plant deficiencies at the Facility. When the managers did try to correct some of the deficiencies, the check to the contractor, Interstate Restoration Group (Interstate), was not honored for insufficient funds. Adding to their problems, Interstate commenced work on or about December 8, 2006 without first obtaining building permits. Because the Facility owed the Town of Winthrop more

than \$75,000 in past due real estate taxes and water and sewer fees, the contractor was unable to obtain a building permit for its work.

Because of this mismanagement and financial abandonment, as of December 21, 2006, the Facility was in an emergency situation. Contributing to the emergency situation were the following conditions: (1) a shortage of nursing staff and management; (2) unpaid Nursing Facility User Fees due on September 30, 2006 in the amount of \$68,726, and another payment for the quarter ending December 31, 2007 of approximately \$68,000, which could result in the Facility's license being revoked; (3) the electric company's threats to terminate service due to non-payment; (4) the contract for rehabilitative services expired on December 21, 2006 with no ability to renew because of non-payment; (5) only one working shower for sixty residents; (6) the Administrator informed DPH that the Facility was experiencing financial difficulties and did not have sufficient funds to implement the necessary correction to ensure resident safety; (7) the Administrator's requests for additional funds were being ignored; and (8) effective December 29, 2006, Mr. Cogan, the Administrator of the Facility, would be resigning.

Subsequent to the appointment of the Receiver on December 21, 2006, additional factors evidencing the owners' and their affiliates financial abandonment and disregard for resident safety became known, including: (1) the agency providing the Director of Nursing and other nurse supervisors demanded assurances that the Facility would have adequate staff nurses at the Facility. When the Facility could not provide those assurances and refused to use that current agency's nurses, the agency pulled its Director of Nursing and other nurses from the Facility; (2) the Facility was without a Director of Nursing for four days, a situation that was not remedied until the Receiver was appointed and brought in a new Director of Nursing; (3) effective



December 5, 2006, the Facility was subject to a denial of payment for new Medicaid and Medicare admissions as a result of its failure to correct the survey deficiencies. This left the Facility without the ability to increase revenue before it was brought back into substantial compliance. However, management has failed to provide the financial resources necessary to correct the survey deficiencies; (4) the Facility was unable to pay its bills and faced the loss of services of essential vendors and service providers. Because it owed the company that provided respiratory therapy and occupational therapy services over of \$50,000, the company refused to renew its service contract with the Facility, which was terminated effective December 21, 2006. The Facility did not have a plan in place to provide these services. These services were restored after the Receiver was appointed and brought in a new vendor; (5) the Facility faced the potential loss of its license as a result of its failure to pay state user fees.

The Receiver brought in a management company, Landmark Health Solutions, Inc. (Landmark), to manage the Facility. Landmark has stabilized the conditions at the Facility but has not had sufficient resources to correct all survey defects. Interstate continued construction at the Facility under the supervision of Winthrop's owners and affiliates without a building permit until the lack of a permit was brought to the attention of the Receiver. The Receiver instructed Interstate to immediately cease work and not to recommence such work until it could provide the Receiver with a copy of a valid building permit and proof of insurance. No such permit or proof of insurance has been provided and all non-emergency work at the building has ceased.

Since the institution of the Receivership, census at the Facility has declined to fifty-three residents due, in large part, to the denial of payment for new Medicaid and Medicare admissions.

The Facility is subject to termination from participation in the Medicaid and Medicare

programs effective as early as February 28, 2007, with respect to the fire safety code violations, and at the latest March 5, 2007, with respect to quality of care violations, if the survey deficiencies are not corrected and the Facility is not brought into substantial compliance with programs requirements. The Facility cannot be economically viable if terminated from the Medicaid and Medicare programs.

The Receiver does not have funds available to correct all of the survey deficiencies by March 5, 2007. In fact, during the course of the Receivership, the Receiver has had funds available to pay only employee payroll and necessary vendors, such as the food vendor. Thus far, the Receiver has been unable to pay all of the expenses it has incurred during the course of the Receivership. The Receiver was denied more than \$230,000 in Medicare and Medicaid funds, which were deposited into a Winthrop bank account in Georgia controlled the defendants, their affiliates, or lenders.

The Facility is projected to have an operating deficit of between \$91,000 and \$104,000 per month for the first three months of 2007. The Facility has unpaid pre-receivership liabilities (exclusive of obligations to its affiliates) in excess of \$850,000, including accounts payable of \$784,000.

The Receiver has provided a plan for an orderly transition of residents to other facilities. Suitable, alternative placements are available for residents at nearby facilities, including substantial numbers of beds at particular facilities to which a substantial number of Facility residents could move together. The plan provides for a measured, humane process to move residents and minimize harm to them.

Winthrop, having declared bankruptcy on January 25, 2007, leaves this court without a

viable plan, under its management to keep the Facility open. Winthrop failed to present any evidence as to how it would cure or fund operating deficits at the Facility, or how it would fund measures necessary to correct survey deficiencies and other problems at the Facility. The only witnesses who testified on behalf of the defendants each testified that they lacked knowledge as to whether the funds existed to bring the facility back into compliance. This court finds that closure of the Facility is in the best interests of the residents.

### RULINGS OF LAW

This court has jurisdiction over this action pursuant to G. L. c. 12, § 10 and G. L. c. 111, § 72N, G. L. c. 111, § 72K and G. L. c. 93A, § 4. The court has concurrent jurisdiction with the bankruptcy court to determine whether this action is stayed as a result of the defendant Winthrop's bankruptcy filing. See *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 347 (2d Cir. 1985); *State of New York v. Mirant New York, Inc.*, 300 B.R. 174, 177 (S.D.N.Y. 2003); *Nat'l Labor Relations Bd. v. Edward Cooper Painting, Inc.*, 804 F.3d 934, 939 (6th Cir. 1986); *In re Bona*, 124 B.R. 11, 14-15 (S.D.N.Y. 1991). In accordance with an order from the bankruptcy court where Winthrop's bankruptcy action is pending, and applicable case law, the automatic stay does not apply in this case.<sup>3</sup>

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<sup>3</sup> The bankruptcy court issued an order on February 5, 2007 directly addressing the issue of whether this court had jurisdiction over the matter given that the defendants had filed bankruptcy. The court stated that the action pending before this court "is a police power and regulatory action that is excepted from the automatic stay under 11 U.S.C. § 362(b)(4)." *In re: Winthrop Healthcare Investors*, No. 07-61115 (Bankr. N.D. Ga. Feb. 5, 2007); see also *In re First Alliance Mortgage Co.*, 263 B.R. 99, 107 (Bankr. 9th Cir. 2001); *In re Spookyworld, Inc.*, 346 F.3d 1, 10 (Bankr. D. Mass. 2003); *In re McMullen*, 386 F.3d 320, 324-325 (1st Cir. 2004); *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 6 (Bankr. D. Ma. 1999). Therefore, the automatic stay is not applicable to this case, and the issue of whether the Facility should be closed is properly before the court.

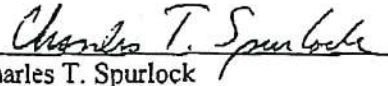


A temporary receiver may close a facility with leave of the court. G. L. c. 111, § 720. In ruling on the issue of closure, the court shall consider the best interests of the residents and the possibility of transferring them to suitable, alternative placements, the rights, interests and obligations of the licensee, the owner, the mortgagees, and other secured parties and lienholders, the licensure status of the facility; the condition of the real estate with respect to state and federal construction requirements and other factors which the court deems relevant. *Id*

The Receiver must close the Facility pursuant to G. L. c. 111, § 720 for the following reasons: (1) the Facility has a declining census and insufficient cash flow to meet its ongoing expenses or to correct many outstanding survey violations, especially the physical plant, environmental, quality of care, and financial issues; (2) the Facility is subject to a freeze on payments from Medicaid and Medicare for new admissions which effectively precludes increasing census and revenues; (3) the Facility is in need of extensive repairs to its physical plant, as well as substantial expenditures to replace dilapidated and unsafe furnishings and equipment; (4) repairs to the Facility have been stopped as a result of the defendants' inability to obtain a building permit because it owes the Town of Winthrop in excess of \$75,000 in past due property taxes; (5) the Facility has unpaid pre-receivership liabilities totaling more than \$850,000, including accounts payable of approximately \$784,000 (exclusive of related party obligations) and \$68,726 (exclusive of penalties) and no available funds to pay these obligations; (6) the Facility will be terminated from participation in the Medicare and Medicaid programs as of February 28, 2007, unless it comes into compliance with its Statements of Deficiencies, which would preclude any prospect of economic viability for the Facility.

ORDER

It is therefore ORDERED that the temporary receiver, Robert J. Griffin, is authorized to close the Governor Winthrop Nursing Home.

  
Charles T. Spurlock  
Justice of the Superior Court

Dated: February 7<sup>th</sup>, 2007.



# EXHIBIT 5

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

ENTERED ON DOCKET  
FEB 05 2007

IN RE:

WINTHROP HEALTHCARE INVESTORS, L.P.

Debtor.

Case No. 07-61115 CRM

JOINT SUPPLEMENTAL ORDER

This Matter is before the Court, and upon consideration of the motions filed by the Debtor (Docket Nos. 7 and 9), and the opposition and motion filed by Commonwealth of Massachusetts (Docket Nos. 11-14, 16-18, 22-29), and the opposition filed by the Temporary Receiver, Robert J. Griffin (Docket No. 15), and the hearing held on February 1, 2007 on the above motions and oppositions, all parties having had an opportunity to be heard, the Court hereby orders the following:

1.) The Massachusetts state court action, Martha Coakley, Attorney General of the Commonwealth of Massachusetts v. Winthrop Healthcare Investors, L.P. d/b/a Governor Winthrop Nursing Home et al., Superior Court Civil Action No.: 2006-5340C (the "State Court Action") is a police power and regulatory action that is excepted from the automatic stay under 11 U.S.C. § 362 (b)(4); and

2.) Robert Griffin, the Temporary Receiver in the State Court Action is excused under 11 U.S.C. § 543(d) from turning over assets to the Debtor until further order of the Court.

Commonwealth of Massachusetts

Debtor

(Read And Approved As To Form)

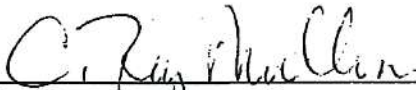
/s/ Stephanie Kahn  
Stephanie Kahn  
Assistant Attorney General  
Office of the Attorney General

/s/ John K. Rezak  
John K. Rezak, Esq.  
John K. Rezak, P.C.

**Robert Griffin, State Court Receiver**

/s/ Anthony Cichello  
Anthony Cichello, Esq.  
Krokidas & Bluestein LLP

Date: February 5 2007

  
United States Bankruptcy Court  
Northern District of Georgia