SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,	:	MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION
Petitioner,	:	
— against —	:	Index No.: 450835/2016
ARMOR CORRECTIONAL HEALTH MEDICAL SERVICES, OF NEW YORK, INC. P.C., and ARMOR CORRECTIONAL HEALTH MEDICAL SERVICES OF NEW YORK, INC.,	:	
Respondents.	:	

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The People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York ("NYAG"), submit this Memorandum of Law in support of the Verified Petition.

PRELIMINARY STATEMENT

Armor Correctional Health Services, Inc. ("Armor") has repeatedly submitted false and fraudulent claims to Nassau County in connection with Armor's contract to provide jail health services to inmates at the Nassau County Correctional Center ("NCCC"). Armor's false claims span a five-year period from 2011 to the present and include (a) charges for services that Armor altogether failed to provide and (b) charges for woefully and dangerously inadequate health services. In total, Nassau County has paid Armor more than $50 million under the contract.

Every time a government contractor submits a false claim, it is an affront not only to the government agency with which it has contracted, but ultimately to the taxpaying public. Here, the effect of Armor's false claims is particularly acute: the false claims glossed over a failure to provide key medical services to scores of inmates with a high incidence of physical and mental illness. For some, Armor's failures were even a matter of life and death. Tragically, twelve inmates have died at NCCC since 2011 – including one only days ago – and the New York State Medical Review Board expressly found that Armor provided inadequate medical care to five of the eight decedents whose cases it has reviewed.

Armor's own documents leave no doubt that it sought payment for services that it either did not perform or performed insufficiently:

- Amor's contractually-required self-assessments (or "self-audits") from 2011 through 2015 show that Armor fell below the thresholds for adequate performance in approximately half the assessments (70 of 137), with failures spanning twenty-seven different subject areas concerning the provision of jail health services;

- Armor's self-audits also show that when it failed to adequately perform it often compounded that failure by also failing to develop contractually-required corrective action plans to improve performance;
- Amor's records show repeated failures to respond to inmates' requests for medical services within the required timeframe (and, on occasion, failure to respond at all);
- Armor's self-audits, decedents' medical records, and former inmates' statements show that inmates frequently did not receive medication within twenty-four hours of a written prescription, as required by the contract for most medications; and
- Armor's internal staffing records show that it failed, for long periods of time, to fill an array of required staff positions, including key clinical and management positions.

Armor's false and fraudulent claims for payment also constitute fraudulent business practices in violation of Executive Law § 63(12), as do the many misrepresentations in its proposal to the county seeking the contract to provide health services at NCCC.

The NYAG brings this summary proceeding seeking, inter alia, critical equitable relief, including oversight by a monitor and an injunction barring Armor from submitting proposals for future contracts with Nassau County. Armor has consistently failed to perform critical services as required under the contract, and yet the county has continued to renew its contract (even though the contract does not permit such renewals). Swift injunctive relief is required to protect the health of inmates at NCCC.

The undisputed and highly probative nature of the proof lends itself to a summary proceeding, which NYAG brings (1) under Executive Law § 63(12) and New York State False Claims Act (State Finance Law §§ 187 et seq.) for injunctive relief, civil penalties, damages, and costs; and (2) in the alternative, under Executive Law §63-c for damages and injunctive relief for

Armor's breach of contract. For the reasons set forth below, as well as in the Verified Petition, the affidavits and other documents annexed thereto, and the Affirmation of Assistant Attorney General Dorothea Caldwell-Brown, together with the exhibits attached thereto, the NYAG requests that this Court: (a) declare that Armor's practices and conduct violated State Finance Law §189(1)(a)-(b) and Executive Law § 63(12), or, in the alternative, Executive Law § 63-c; (b) permanently enjoin and restrain Armor from engaging in the illegal and fraudulent practices described herein, (c) appoint an independent monitor to oversee ongoing compliance with the contract, (d) permanently enjoin Armor from bidding on future jail health services contracts in New York State; (e) direct that Armor, pursuant to Finance Law § 189, pay treble damages and penalties of $12,000 for each violation, or, in the alternative, award Petitioner the monies that Armor without right obtained as a result of its breach of contract; (f) require an accounting by Armor to determine the amount of Nassau County's damages; and (g) direct Armor to pay costs.

STATEMENT OF FACTS

The facts relevant to this proceeding, which are more fully set forth in the Verified Petition, the Affirmation of Assistant Attorney General Dorothea Caldwell-Brown (the "DCB Aff."), and the exhibits annexed thereto and referred to therein, are summarized below.

A. NASSAU COUNTY'S CONTRACT WITH ARMOR FOR JAIL HEALTH SERVICES

In 2009, Nassau County solicited bids through a request for proposal ("RFP") process to find a jail health services company to provide medical services at Nassau County Correctional Center ("NCCC"). DCB Aff. ¶ 18.[1] Armor submitted a proposal in response, asserting its ability and willingness to perform the services requested in the RFP. DCB Aff. ¶ 18; Ex. 9.

[1] All references to exhibits in this Memorandum are references to exhibits to the Affirmation of Dorothea Caldwell-Brown.

In May 2011, two years after an RFP process that began in 2009, Nassau County entered into a two-year contract with Armor to provide health care services to inmates and detainees (collectively referred to as "inmates") at NCCC, with the contract year running from May to June of the following year. DCB Aff. ¶ 18; Ex. 8. The county renewed the contract twice for two-year periods, in May 2013 and May 2015, even though the contract only permitted two additional one-year renewals. DCB Aff. ¶ 18; Ex. 8 at 1, § 1. The current contract will expire in May 2017, and Nassau County issued a new RFP for this contract in March 2016.[2] DCB Aff. ¶ 18.

The contract requires that Armor provide a full range of medical, mental health, and dental services, including on-site specialty services (such as physical therapy, dialysis, and infectious disease services). Id. ¶ 20; Ex. 9 at 1.1; Ex. 8. Armor is also responsible for maintaining a laboratory and infirmary, as well as discharge planning and a quality improvement program. Id.

In exchange for its services, Armor's base payment started at approximately $10.5 million in 2011 and steadily increased to reach approximately $11.6 million for the contract year starting in June 2015. DCB Aff. ¶ 23. The contract provides for monthly billing, which should include any adjustments based on Armor's performance and its expenses from the previous month. Ex. 8 at 21, § 6(d). Armor collects its fee by submitting monthly "claim vouchers" stating the amount owed by Nassau County for the services rendered at NCCC. DCB Aff. ¶ 27.

The contract makes payment contingent on Armor's submission of a claim voucher "that (a) states with reasonable specificity the services provided and the payment requested as consideration for such services, (b) certifies that the services rendered and the payment requested are in accordance with [the contract], and (c) is accompanied by documentation satisfactory to the

[2] Notably, the County initiated this RFP process some months after the NYAG commenced its investigation into Armor. DCB Aff. ¶ 18, n. 14.

County supporting the amount claimed." DCB Aff. ¶ 26; Ex. 8 at 11, § 6(f). Armor is also required to submit monthly reports on various indicators relating to its performance under the contract, such as how often Armor timely responds to inmates' requests for medical assistance and how often it provides timely full health assessments upon admission. DCB Aff. ¶ 31; Ex. 8 at 7, § 4.

The contract incorporates by reference several documents that set forth detailed standards for how the covered services should be performed. DCB Aff. ¶ 19. Significantly, the contract explicitly incorporates a 2002 settlement agreement between Nassau County and the U.S. Department of Justice that includes specific actions NCCC must take to provide adequate medical care to its inmates. Id. ¶ 19; Ex. 8 at 5, § 3(k)(1); Ex. 9 at 1.1. The contract also explicitly incorporates Armor's proposal in response to Nassau County's RFP, in which Armor makes detailed representations concerning how it will perform the services required and meet all applicable laws and regulations, as well as satisfy the terms of the DOJ settlement agreement. DCB Aff. ¶ 19; Ex. 8 at 3, § 3(a); Ex. 9. Further, the contract requires that Armor adhere to the National Commission on Correctional Health Care standards regarding jail health. DCB Aff. ¶ 19; Ex. 8 at 5, § 3(k)(1).

The contract also sets forth benchmarks for satisfactorily meeting select requirements under the contract (called "performance indicators") and financial reductions for failing to meet those benchmarks (for example, the "performance indicator" of seeing inmates within seventy-two hours of receipt of their requests for medical care has a "benchmark" of 90%, meaning for a given month Armor must timely respond to such "sick call" calls 90% of the time. DCB Aff. ¶ 29; Ex. 8, Attch. 2. Upon failure to meet that benchmark, Armor is subject to a fee reduction of $50 per patient not seen within seventy-two hours). Id. The contract requires that Armor include

any such reduction in the subsequent month's claim voucher so payments to Armor are appropriately reduced. DCB Aff. ¶ 29; Ex. 8 at 10 § (6)(d).

Accordingly, the contract contains specific performance standards and quality measures that delineate what constitutes adequate provision of health services under the contract. For example, the contract includes specific staffing requirements, timeframes for responding to inmates' requests for medical consultations, requirements for providing and maintaining needed medications, and requirements that Armor routinely perform self-audits to identify any problem areas, and, when necessary, that it develop and implement corrective action plans to address any identified problems. DCB Aff. ¶¶ 49, 53-54, 65, 92-94, 190. Payment is contingent on Armor's performance of its contractual obligations consistent with these standards and specific requirements governing performance. See supra, pp. 4-5. While Nassau County initially had a monitor to oversee compliance with the contract, that position became vacant in 2013 and was never subsequently filled. DCB Aff. ¶ 32.

B. ARMOR DID NOT MEET NUMEROUS OBLIGATIONS REQUIRED UNDER THE CONTRACT

1. Armor Did Not Conduct Continuous Quality Improvement Assessments or Create Corrective Action Plans Consistent with its Contractual Obligations and Representations

Armor is contractually-required to perform numerous monthly, semi-annual, and annual assessments as part of its continuous quality improvement program to monitor the quality of care provided to inmates and its compliance with its contractual obligations, and it guaranteed that it would perform such reviews in its proposal. DCB Aff. ¶¶ 40-46; Ex. 8 at 8, §5; Ex. 9 at 1.28-1.29. Through these reviews, Armor could evaluate and improve the quality of its services and its compliance with various contractual requirements concerning the provision of health care services. However, Armor's documents reflect it did not perform the required reviews, and

Armor's Senior Vice President admitted under oath that Armor failed to fully comply with each of these continuous quality improvement program requirements. DCB Aff. ¶¶ 37-38, 50-51.

Specifically, Armor is contractually required to perform at least the following assessments, and in most instances did not adhere to the contractual requirements:

- "Continuous quality improvement" reviews to determine areas in need of improvement. DCB Aff. ¶ 49; Ex. 9 at 1.28. Armor is required to perform at least four to five such reviews (referred to herein as "self-audits") each month "to ensure continuous monitoring of key indicators at a frequency designed to comply with accreditation standards." Id. The subject areas of those self-audits are pre-determined by Armor's corporate office, although Armor staff at NCCC must also identify additional areas to be audited based on NCCC's specific needs.[3] DCB Aff. ¶ 49. Armor barely performed half the audits that were required. Id. ¶ 51.
- "[A]t least two process and two outcome/quality improvement studies" each year. Id. ¶ 42; Ex. 9 at 1.28. A process study examines the effectiveness of the health care delivery system by investigating systemic problems, and outcome/quality studies look closely at certain health outcomes among inmates. DCB Aff. ¶ 43. Armor has no record of performing these studies.[4] Id. ¶ 48.
- "[A]n annual review of the [Quality Improvement Program] . . . to evaluate the program's

[3] Self-audits are characterized by service area (e.g., requests for medical care and outpatient referrals) and consist of evaluating various aspects of providing that service in a random sample of approximately ten medical records to determine if the service was adequately performed. For example, a mental health audit consists of an evaluation of fourteen different aspects of providing mental health services, including timely screenings, timely consultations with appropriate staff, development of treatment plans when needed, and proper documentation of that patient's care. During the audit, an Armor employee reviews the randomly-selected medical records to determine if each of the elements comprising the audit were properly performed. DCB Aff. ¶ 49, n. 21.

[4] Executive Law § 63(12) vests the NYAG with authority to "take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules." Pursuant to this authority, the NYAG issued a subpoena to Armor seeking a wide range of documents in connection with its provision of health services at NCCC. DCB Aff. ¶ 4, Ex. 1. For purposes of this Petition, NYAG is making a good-faith assumption that Armor produced all responsive documents.

effectiveness." Id. ¶ 42; Ex. 9 at 1.28. Armor has no record of performing these annual reviews. DCB Aff. ¶ 48.

- Semi-annual operational reviews of certain substantive areas, including sick calls, mental health, and specialty care, performed by Armor's corporate office. Id. ¶ 45; Ex. 9 at 1.29. Armor has no record of conducting these semi-annual reviews. DCB Aff. ¶ 48.
- Semi-annual "Performance Enhancement Reviews [that] include review and audit of each of Armor's contractual obligations with NCCC." Id. ¶ 46; Ex. 9 at 1.58. Armor has no record of conducting these reviews. DCB Aff. ¶ 48.

Armor's failure to perform the monthly self-audits is particularly egregious: its own records demonstrate that it failed to perform approximately half of the audits required, even though such assessments are critical for continuously monitoring its performance in areas that are essential to providing inmates with adequate medical care. From 2011 through 2015, Armor conducted only 137 self-audits instead of the 240-300 required under the contract. Id. ¶ 51.

The contract further requires that Armor create corrective action plans ("CAPs") to address deficiencies found as a result of the self-audits and semi-annual reviews, but these key plans were not developed for over 60% of its self-audit failures. Id. ¶ 57; Ex. 9 at 1.19. This means Armor took no formal action to resolve identified issues concerning its provision of medical care. CAPs are a key component for improving the quality of health services once a problem has been identified through an audit: they set forth specific steps to resolve the deficiencies, identify the people engaged in the problem-solving tasks, set forth monitoring and evaluation processes, and specify dates for delineated tasks to be completed. DCB Aff. ¶ 54.

From 2011 through 2015, Armor failed 70 of the 137 self-audits (51%) it actually

performed, with these failures spanning across 27 of the 33 subject areas evaluated. Id. ¶ 55.[5] Armor only developed CAPs to address 26 of those 70 audit failings, leaving forty-four failed audits without any CAPs. Id. ¶ 57. In key service areas, Armor never developed corrective action plans despite routinely failing most of the self-audits performed in those areas. For example, Armor only developed two CAPs addressing specialty consultation referrals, but not in response to the five failed audits in that category. Id. ¶¶ 57, 158, 160.

Even when CAPs were developed, they were not consistently implemented. While implementation should be documented in the Continuous Quality Improvement meeting minutes, these minutes do not reflect that CAPS were regularly implemented and their effectiveness re-evaluated, as required under the contract. Id. ¶¶ 41, 58. For example, Armor devised a corrective action plan to address its failure in performing diagnostic services (again, despite four self-audit failures), but there is no indication in Armor's records that the plan was implemented or its effectiveness evaluated. Id.

2. Armor Did Not Implement a Sick Call System Consistent With Its Contractual Obligations and Representations

The contract requires that Armor implement and operate a sick call system through which inmates can request and obtain health care treatment by submitting request forms. DCB Aff. ¶ 65; Ex. 8 at 3-4, §§ 3(a),(f); Ex. 9 at 1.10. Under the contract, a registered nurse must "triage" – i.e., assess and refer for appropriate care – an inmate's sick call form within twenty-four hours of pick up, and a clinician must see the inmate within forty-eight to seventy-two[6] hours of receipt of the sick call. DCB Aff. ¶¶ 65-66.

[5] An audit score below 90% constitutes a failure. DCB Aff. ¶ 52.

[6] The contract requires that inmates be seen within forty-eight hours of Armor's receipt of the request (and seventy-two for weekends), although fee reductions are only imposed after seventy-two hours. DCB Aff. ¶ 71; Ex. 8, Attch. 2. Armor's proposal specifically represents that a licensed nurse will visit the inmate within forty-eight hours of receipt of a sick call request. Ex. 9 at 1.10.

While Armor only conducted two self-audits on this service over the course of the contract (one of which it failed), NYAG's analysis of Armor's January and February 2016 Sick Logs reveals there were, respectively, 2,827 and 2,660 sick call requests, and Armor's clinicians only timely responded to approximately 37% of those requests in January and 28% of these requests in February. Id. ¶¶ 56, 72; Ex. 15, Attch. 4; Ex. 17.

In some of these cases, inmates filed repeated sick call requests, and Armor delayed weeks before arranging for a clinician visit. DCB Aff. ¶ 74; Ex. 17. Indeed, Armor's own providers often noted that inmates were not receiving timely follow-up care in the sick logs themselves. DCB Aff. ¶ 75, Exs. 18-20. Incredibly, at one point in 2015, sick call slips were not picked up for many days because the collection box key was missing. DCB Aff. ¶ 76; Ex. 21.

Individual inmates' experiences also reflect Armor's failure to satisfy this contractual obligation. One former inmate with a medical history significant for psychiatric and medical illness filed multiple sick call requests soon after admission to obtain prescribed medications he was already taking. DCB Aff. ¶ 81; Affidavit of William Hine, dated May 26, 2016 ("Hine Aff.") ¶¶ 5-10. Despite experiencing vomiting, diarrhea, and chills, Armor failed to provide him with any of his psychiatric medications for almost a week after his admission. Hine Aff. ¶ 11. Armor delayed more than two weeks in assigning medical staff to examine him, and even then most of his medical issues were not attended to. Id. ¶¶ 15-16. Another inmate who was detained weeks after having heart surgery filed multiple sick calls for medical attention for his cardiac condition and related medical issues, but, despite the seriousness of his medical condition and recent history of major surgery, Armor's clinicians often responded several weeks later, and sometimes not at all. DCB Aff. ¶¶ 164-67; Affidavit of Jeffrey Anlyan, dated June 14, 2016 ("Anlyan Aff.") ¶¶ 7-12. Yet another inmate was hospitalized for a urinary tract infection after

Armor ignored – for weeks – his sick call requests in which he indicated that he felt weak, had chest pains, and had blood in his urine. DCB Aff. ¶ 84; Ex. 26.

3. Armor Did Not Provide Access to Medications Consistent with Its Contractual Obligations and Representations

The contract requires that Armor give medications in a timely, continuous and clinically appropriate manner so as to maintain therapeutic treatment levels and avoid adverse consequences to inmates' health, and all medications must be recorded on inmates' medical charts. DCB Aff. ¶¶ 93-94; Ex. 9 at 1.22, 1.24; Ex. 13 at J-D02. To that end, Armor must maintain a stock of approved medications and arrange for a back-up pharmacy so that new medication orders are timely administered to inmates, and inmates must receive formulary medications within 24 hours of the written prescription. DCB Aff. ¶ 92; Ex. 9 at 1.22 - 1.24; Ex. 8, Attch. 2.

Contrary to its medication obligations, Armor's self-audits, decedents' medical records and former inmates' statements reflect that inmates did not receive necessary medications in a timely manner. DCB Aff. ¶¶ 99-126. Over the course of the contract period, Armor failed nearly three-quarters of its self-audits (8 out of 11) conducted on medication administration. Id. ¶ 56; Ex. 15, Attch. 3.

This inadequate performance is reflected in inmates' experiences. For example, one inmate died after Armor failed to provide him with medications prescribed by its own nurse for asthma and productive cough (among other conditions) and the State Medical Review Board found that Armor did not perform an adequate admission exam on the decedent and did not provide him with critical medications. Id. ¶¶ 101-03; Ex. 7 at ¶ 1, 14; Ex. 28. Another Armor inmate was taking two HIV medications at the time she was incarcerated, and yet Armor only ever provided her with one of the two at any given time (in addition to not providing her anti-

psychotic medications) and twice failed to provide either of the medications for a full week. Affidavit of Shirley Quirk, dated June 8, 2016 ("Quirk Aff.") ¶¶ 4-5. By the time she was released, her HIV viral load was higher, which her treating nurse attributed to her not receiving one of her needed medications. Quirk Aff. ¶ 6; Affidavit of Patricia Dellatto, dated June 17, 2016 ("Delatto Aff.") ¶ 6.

Another inmate reports being told by an Armor nurse, during his initial intake health exam, that he would not be getting all of the medications he was currently taking and "will be lucky to get Motrin." Hine Aff. ¶ 9. That same inmate was not even given all of his Armor-approved medications, including needed pain medications, and he became increasingly weak and tired. He ultimately lost consciousness and fell on the floor, leading to a concussion. Id. ¶¶ 24-25. He was admitted to the hospital and, upon release, was informed by Armor's medical director that he would not receive all the medications on the hospital discharge notes because "just because it is written on the hospital discharge doesn't mean that you will get it."). Id. ¶¶ 31-33. Other inmates experienced similar delays in accessing needed medications and refusals to provide necessary medications. DCB Aff. ¶¶ 104-107, 110-11; Exs. 29, 30, 31; Affirmation of Marc Gann, Esq., dated June 1, 2016 ("Gann Aff."); Dellatto Aff. at ¶ 9.

4. Armor Did Not Provide Diagnostic Services Consistent with its Contractual Obligations and Representations

Under the contract, Armor is required to perform various diagnostic and laboratory services on-site as needed. Critical findings must be reported to clinicians within three hours and non-critical results are to be reported to clinicians within five days. All such results are to be documented in the medical record. DCB Aff. ¶ 95, Ex. 8 at 4, §§ 3(i) and 3(j).

Armor's self-audits, however, demonstrate that it failed to provide laboratory and x-ray services in an effective and timely manner. For example, Armor's August 2015 self-audit of

diagnostic services showed that, in 67% of the sampled cases, Armor failed to document in the medical record the time and date that a laboratory test or x-ray was obtained, decreasing the utility of such testing. DCB Aff. ¶ 122. Over the past five years, Armor has failed four of the six self-audits conducted assessing its provision of diagnostic services. Id. ¶ 121; Ex. 15, Attch. 1. This is reflected in inmates' experiences: one inmate reported being told he could only have one x-ray performed of one part of his body, even though he was experiencing chronic pain in multiple areas. Hine Aff. ¶ 20.

In some instances, the tests ordered by an Armor clinician were never performed. For example, one decedent's medical record reflects that he had a respiratory ailment and Armor's clinician ordered an x-ray, but the x-ray was never performed. The State Medical Review Board noted the decedent's symptomatic underlying respiratory condition in citing Armor's failure to perform a "crucial diagnostic exam [X-ray]. DCB Aff. ¶ 125, Ex. 7 at ¶ 15.

Further, even when documentation shows that the lab tests were performed, Armor's August 2015 self-audit report revealed that Armor failed to consistently collect laboratory specimens within seventy-two hours of being ordered. DCB Aff. ¶ 123-124, Ex.15, Attch. 1 Similarly, audit records revealed that Armor failed to consistently ensure that the laboratory and/or x-ray services performed matched those ordered by the clinician. Id.

5. Armor Did Not Provide Mental Health Services Consistent With Its Contractual Obligations and Representations

Armor is required under the contract to develop mental health treatment plans and provide appropriate follow-up care for inmates identified with mental illness. DCB Aff. ¶¶ 127-129. The contract, through its incorporation of the Department of Justice settlement, specifically requires the development and implementation of treatment plans for inmates with special needs, including inmates with mental illness. Id. ¶ 127; Ex. 8 at 5, § 3(k)(1); Ex. 8, Attch. 3. Armor is

also required, for inmates who require continuous supervision related to their mental health, to have "contemporaneous treatment plan(s)" that reflect, inter alia, intervention(s) for the inmate. DCB Aff. ¶ 128; Ex. 8, Attch. 2.

Similarly, in its proposal (which is incorporated into the contract), Armor repeatedly represented that it would provide mental health treatment planning to guide treatment and care. DCB Aff. ¶ 129; Ex. 9 at 1.34-1.35. For example, the proposal states that "Armor develops an initial Treatment Plan during the mental health evaluation," and claims that one of the "key components" of its mental health/behavioral service program is "Multidisciplinary Treatment Plans." Id.

However, Armor's records reflect that it routinely failed to complete mental health treatment plans and provide appropriate follow-up care. Armor's self-audits document Armor's failure to complete mental health treatment plans, and Armor's clinicians have also noted on Sick Logs that Armor failed to refer inmates for mental health evaluations. DCB Aff. ¶ 130.

Further, the State Medical Review Board's review of two inmates' deaths in 2012 and 2014 found that Armor provided inadequate psychiatric care. Id. ¶¶ 134- 144. One case involved an Iraq war veteran with a history of post-traumatic stress disorder, bi-polar disorder and opioid abuse. Id. ¶ 136; Ex. 32. Armor's psychiatrist overlooked or otherwise neglected to document his mental health histories, and no psychiatric follow-ups were planned. Id. The inmate committed suicide in his cell, and the State Medical Review Board found that the Armor psychiatrist's assessment was "inadequate in not properly accounting for and addressing" the inmate's PTSD, Bipolar Disorder, Anxiety Disorder and need for medications. Ex. 4 at 3.

Despite Armor's poor performance in this area and the clear need for assessment and improvement, it failed to perform the contractually-required semi-annual mental health

assessments and only performed four mental health self-audits since 2011. Id. ¶ 146.

6. Armor Did Not Refer Inmates for Specialty Care Consistent With Its Contractual Obligations and Representations

The contract requires that Armor provide certain specialty services onsite and refer inmates for off-site specialty care when Armor cannot meet their medical needs onsite. DCB Aff. ¶¶ 150-51; Ex. 9 at 1.7, 1.51-1.52. Armor also represented in its proposal that when requests for off-site specialty care are "deferred," the requesting provider will "then outline[] an alternative plan of care or submit[] further information," and the inmate will be reevaluated within thirty days. Ex. 9 at 1.17. However, from September 2011 through September 2015, Armor's self-audits reflect a consistent pattern of inappropriate and failed practices relating to off-site specialty referrals, demonstrating non-compliance with the contract: over the course of the contract, Armor has failed all five of its self-audits in this area. DCB Aff. ¶ 153; Ex. 15, Attch. 8.

Armor is responsible for deciding whether to deny or approve its clinicians' requests for specialty referrals, and yet records reflect that it frequently failed to make such decisions at all. DCB Aff. ¶ 154. Moreover, it wasn't until December 2015 – after an egregious incident whereby an inmate's referral to an off-site oral surgery consultation was delayed despite having a complex jaw fracture – that Armor realized it did not have a process for handling requests that were incomplete or pending information needed to make a determination. Id. ¶ 159.

Even when Armor did deny or approve a request, it often failed to implement alternative plans for follow-up care when the requests were denied and failed to ensure that the requested specialty care was timely received when requests were approved. Id. ¶¶ 155-156. Armor's records show that it did not reliably schedule off-site specialty services within thirty days of the approval as required under its own policy, delaying needed care and jeopardizing inmates' health. Id. ¶ 156.

One inmate's experience particularly reflects Armor's handling of specialty requests: A former NCCC inmate reported that his requests for an off-site cardiology evaluation were discouraged by Armor clinicians, who said the requests would be denied by Armor's corporate office. Anlyan Aff. ¶13. After about sixteen months at NCCC, he sued Armor, alleging that it failed to meet his medical needs. Id. ¶14; DCB Aff. ¶¶ 83, 166. Shortly thereafter, Armor arranged for him to see a cardiologist who, upon examining him, immediately referred him for cardiac angioplasty. Anlyan Aff. ¶16; DCB Aff ¶ 166.

7. Armor Did Not Create and Maintain Medical Records Consistent with its Contractual Obligations and Representations

Under the contract, Armor is required to properly create and maintain comprehensive medical records for each inmate. DCB Aff. ¶ 176. Such medical records must include current notes from all health care providers, including medication administration records and diagnostic reports. Id. ¶ 177. Armor's proposal, incorporated into the contract, stated it could install a "turnkey" electronic record system that would reduce the probability of error, eliminate legibility issues, and have easily-accessible data, in addition to a host of other benefits, and provision of this service is included in the county's monthly payment. Id. ¶¶ 20, 178; Ex. 9 at 1.40-1.43.

Despite this requirement for comprehensive medical records, an electronic record system has not yet been implemented and medical records were sometimes not available when needed: in just two months (January and February 2016), over 150 charts were not available when inmates requested medical consultations, meaning their requests for care were ignored or delayed because Armor failed to perform one of its most basic, yet critical, functions: making inmates' medical records available. Id. ¶ 74. Even medical records that could be located had other inadequacies, including not setting forth the date inmates were examined and illegible clinician signatures. Id. ¶¶ 183-186. Notably, the position of medical records director was understaffed,

and at times vacant, from July 2013 through mid-May 2015. Id. ¶193, Ex. 40.

8. Armor Did Not Maintain Medical Equipment Consistent with its Contractual Obligations and Representations

Armor is required to, "at a minimum," have certain equipment available for the examination and treatment of inmates, including automated external defibrillators, and must ensure that such emergency equipment are available and checked regularly. DCB Aff. ¶ 187; Ex. 13 at J-D-03. However, Armor's September 2015 self-audit of its clinical equipment and supplies revealed that it failed to check its AED defibrillator as recommended by the manufacturer and failed to check the emergency crash cart every shift. Id. ¶ 188. Notably, this is one of only two audits ever conducted by Armor in this crucial service area. Id.

9. Armor Did Not Staff NCCC Consistent With Its Contractual Obligations and Representations

The contract sets forth jail staffing requirements, including specific positions that must be provided and the number of full-time equivalent ("FTE") employees that must be staffed in those positions, and Armor also staffs positions not identified in the contract. Ex. 8, Attch. 1; Ex. 10. The initial contract provided for a staff of 74.5 FTEs, including a Health Services Administrator, a Director of Nursing, a Medical Director, and a Mental Health Director as managers, and a mix of clinical and administrative staff, including a physician, psychiatrist, various levels of nurses (charge, registered and licensed practical), and other allied medical and mental health professionals. DCB Aff. ¶ 23; Ex. 10. In May 2013, when the contract was renewed, the staffing was revised to 76.9 FTEs. DCB Aff. ¶ 24; Ex. 8, Attch. 1. Armor's staffing records for the period covering June 2011 to November 2015 show that Armor did not fulfill its staffing obligations under the contract, even for clinicians and the most senior management positions. DCB Aff. ¶¶ 191- 193; Ex. 40.

Over the course of the contract, Armor left several key positions vacant and/or

understaffed, thereby failing to meet its contractual staffing obligations, including:

- Director of Nursing: The contract requires one FTE in this position, which is responsible for guiding and directing the nursing staff, including ensuring that relevant policies and procedures are current and properly followed, yet it was vacant from June 2012 through part of February 2013 (7.5 months);
- Mental Health Clinical Coordinator: The contract requires one FTE in this position, which is responsible for coordinating mental health services, yet it was vacant from April 2014 through November 2015 (nineteen months);
- Psychiatric Advanced Registered Nurse Practitioner/Physician Assistant ("ARNP/PA"): The contract requires .6 FTEs in this position, which is part of the mental health treatment team, yet it was vacant from June 2013 to November 2014 (sixteen months);
- Utilization manager: The contract requires at least one FTE for this position, which is responsible for managing patients' access to off-site and on-site specialty care, yet it was vacant from June 2013 through November 2015 (2.5 years); and
- Continuous Quality Improvement and Nurse Educator: The contract requires at least one FTE in this position, which has many responsibilities relating to nurse education and the continuous quality improvement program, yet it was vacant from November 2014 through November 2015 (one year).

DCB Aff. ¶ 192; Ex. 40.

Nassau County's estimated overpayment for these vacancies is $484,795. Id. ¶ 194. In addition to the above-listed vacancies, Armor also understaffed other important positions, providing fewer FTEs than contractually required, including:

- Masters-level Mental Health Professionals: Armor was contracted to provide 4.8 masters-

level MHPs, but in the 2014-2015 contract year, it understaffed that position every month out of the year, staffing this position at 84.64% of the required FTEs for that year;

- Psychiatric ARNP/PAs: Armor was required to provide .6 psychiatric ARNP/PAs, and yet, in addition to leaving the position vacant for over a year, it then understaffed the position from November 2014 through November 2015, with an average percent staffed for the 2014-2015 contract year of 31.31% and an average of 50% for June 2015 through November 2015; and
- Medical Records Director: Armor was required to staff one FTE for the position of medical records director, yet this position was understaffed, and at times vacant, from July 2013 through mid-May 2015, with an average staffing percentages of just 32.43% and 39.11% for the 2013-2014 and 2014-2015 contract years, respectively.

DCB Aff. ¶ 193; Ex. 40.

C. ARMOR BILLED NASSAU COUNTY THE FULL MONTHLY AMOUNT OWED FOR MONTHS IN WHICH ARMOR DID NOT MEET ITS CONTRACTUAL OBLIGATIONS

From 2011 to the present, Armor submitted claim vouchers for payment on a monthly basis for one-twelfth of the annual contract price. DCB Aff. ¶ 27. The contract requires that these vouchers state the services provided with "reasonable specificity," be supported by documentation, and certify that the services were rendered and payment was requested in accordance with the contract. Id. ¶ 26; Ex. 8, § 6(f) at 11. This information and documentation are necessary to ensure Armor properly bills for the services rendered, and yet Armor failed to fully satisfy these obligations, and billed the county for months when the services were not provided in full. DCB Aff. ¶¶ 27-28.

Each claims voucher contains a certification stating:

> I hereby certify that this claim voucher is just, true and correct; that the amount claimed is actually due and owing and has not been previously claimed . . . I further certify that all items and/or services were delivered or rendered as set forth in this claim, and for all items and/or services delivered or rendered in accordance with a purchase order or contract that the prices charged are in accordance with the reference purchase order or contract. For all claims made as reimbursement for employee expenses, I further certify that the amounts set forth were actually and necessarily expended for the benefit of Nassau County . . .

Id. ¶ 26, n. 19; Ex. 11.

To support its claims vouchers, Armor is also required to provide Nassau County with monthly reports containing important information about Armor's provision of services.[7] DCB Aff. ¶ 31; Ex. 8 at 7-8, § 4. However, Armor's monthly reports do not comport with the contract's requirements. DCB Aff. ¶ 33. Approximately half of the twenty-four contractually required indicators were not listed in the monthly report template, including key information on Armor's provision of health services, such as (a) the number of new admits who receive health screens at intake and the percentage seen within four hours; (b) the percentage of inmates receiving full health assessments within seven days; and (c) the number of inmates who request access to medical or mental health care and the percentage who are then seen within seventy-two hours of their request. Id.

Additionally, the claims vouchers did not specify the services provided as the basis for the monthly payment, but stated only, for most months, that payment was for "medical health services" or "health services." Id. ¶ 28. Further, despite the voucher's certification, Armor never reduced the amount owed to reflect that its services were not performed consistent with its contractual requirements, including never providing the contractually-required financial

[7] While Armor's Senior Vice President testified that Nassau County Sheriff's Office employees said Armor did not have to send certain reports or information, and indeed the county has not had a contract monitor since 2013, Armor has never produced any evidence that these contractual requirements were formally amended. The contract can only be amended with "prior written consent of the County Executive or his or her duly designated deputy." The contract further states: "The failure of a party to assert any of its rights under this Agreement, including the right to demand strict performance, shall not constitute a waiver of such rights." DCB Aff. ¶ 21; Ex. 8 at 15-16, § 13.

reductions for not adequately performing its obligations under the contract. Id. ¶ 30. Moreover, Armor did not disclose, through any monthly reports sent to the county or any other written documentation, its underperformance or non-performance of the contractually-required services for each and every month in which adjustments to the fee were appropriate. Id. ¶ 34.

Fee reductions, however, were required due to Armor's failure to fully perform its contractual obligations. For example:

- Armor allocated $78,688 of the contract cost to electronic medical records in the first year of the contract alone, and $81,056 in the second year, yet it has not yet implemented this system – which was already developed – and never reduced the amount owed by the County for not providing this service. DCB Aff. ¶ 159; Ex. 9, Attch. 1.
- From 2011 through 2015, Armor failed seventy self-audits, each of which required the development of a CAP. However, instead of developing seventy CAPs, Armor only created twenty-six. DCB Aff. ¶ 57. The contract sets forth a reduction of $100 per day for each CAP not completed within forty-five days from the date of the occurrence. Id. ¶ 61. A conservative cost estimate for Armor's failure to develop at least forty-four CAPs is $528,000. Id. ¶ 62.
- For January and February 2016, there is no record that Armor's clinicians ever saw inmates in approximately 34% and 32%, respectively, of all sick call requests, and, when an Armor clinician did respond, 44% and 60% of those visits, respectively, were not within seventy-two hours of Armor's receipt of the request, meaning a total of just 37% and 28% of requests were timely handled. Id. ¶ 72. Fee reductions are triggered if fewer than 90% of inmates are not seen by a clinician within seventy-two hours of Armor's receipt of the request. Armor's performance falls well below that benchmark, triggering

a reduction of $50 per inmate not seen within seventy-two hours of Armor's receipt of the request. Nassau County's fee, however, was not reduced for these months. Id. ¶ 29. Based on this two-month sample alone, Armor should refund at least $123,450. Id. ¶ 88.[8]

- Armor never reduced its monthly fee to reflect vacancies or understaffing, which for the vacancies alone, for the positions identified herein, amounts to approximately $484,795. Id. ¶ 194.

Moreover, Armor's failure of so many self-audits in a wide range of subject areas suggests that further financial reductions should have been applied. Id. ¶¶ 55-56. Each of the self-audits Armor performed fall under one of the contractual "performance indicators" for which there is a financial reduction upon failing to meet the benchmark.[9]

STATUTORY FRAMEWORK FOR SPECIAL PROCCEDINGS

Executive Law § 63(12) empowers the NYAG to bring a special proceeding for permanent injunctive relief, restitution, damages, and civil penalties whenever a person or business engages in "repeated fraudulent or illegal acts or otherwise demonstrate[s] persistent fraud or illegality in the carrying on, conducting or transaction of business." A special proceeding under Executive Law § 63(12) is "plenary as an action, culminating in a judgment, but is brought on with the ease, speed and economy of a mere motion." David D. Siegel, N.Y. Practice § 547, 973 (5th ed. 2011). The legislative purpose for allowing a special proceeding

[8] This two-month sample illustrates Armor's serious underperformance in one of the most important areas of its work. Even though it was contractually required to calculate this sick call data each month, it failed to ever do so over the five years of the contract. While a full audit could be conducted over the five years to fully calculate all damages owed, time is of the essence given the risk of continued inadequate care to inmates. Upon information and belief, the fee deduction would equal some $3.7 million extrapolating the fee reduction for the recent two-month sample to the 60-month course of the Contract. DCB Aff. ¶ 89.

[9] Under the contract, Armor bears the burden of demonstrating adequate performance on each of these measures, yet it has failed to do so. Therefore, the People are constrained from seeking judgment and damages on these indicators at this time and instead seek relief only to the extent Armor's non-performance and underperformance can be quantified based on the available documentation, as set forth in the Affirmation and Petition.

under Executive Law § 63(12) is to further the public interest by providing an expeditious means to enjoin fraudulent or illegal activity and obtain relief for victims. State v. B.C. Assocs., 194 N.Y.S.2d 353, 356-58 (Sup. Ct. N.Y. Cnty. 1959).

A special proceeding goes right to the merits. The Court is required to make a summary determination upon all the pleadings, papers and admissions to the extent that no triable issues of fact are raised. See NY Civil Practice Law and Rules ("CPLR") 409. To the extent factual issues are raised, then they must be tried "forthwith." CPLR 410. It is the very purpose of a special proceeding to provide a summary remedy, "so summary, indeed, as to dispense with the need or occasion for the application of summary judgment." Council of the City of N.Y. v. Bloomberg, 6 N.Y.3d 380, 401 (N.Y. 2006) (internal quotations and citation omitted).

ARGUMENT

I. ARMOR KNOWINGLY SUBMITTED FALSE CLAIMS FOR PAYMENT IN VIOLATION OF THE NEW YORK STATE FALSE CLAIMS ACT

Armor knowingly submitted false and fraudulent claims for payment to Nassau County by requesting payment: (a) for services that it did not render and (b) for services it rendered inconsistent with its contractual requirements. These claims plainly violate the New York False Claims Act, which provides that any person who "knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . shall be liable to the state or a local government." State Finance Law § 189(1)(a)-(b) (the "NY False Claims Act" or "FCA"). State Finance Law § 190(1) specifically empowers the NYAG to bring a civil action if a subordinate governmental entity has been presented with a false or fraudulent claim for payment. Since Nassau County has not initiated a civil action and has not indicated any willingness to enforce the contract's terms, NYAG brings this action to protect the county from

the false and fraudulent claims being submitted by Armor for payment.

A. Armor Knowingly Presented False or Fraudulent Claims to Nassau County

1. Armor Presented Claims for Payment to Nassau County

The threshold question in any action pursuant to the NY False Claims Act, State Finance Law §§ 187 et seq., is whether a claim for payment was submitted. Here, Armor's payment arrangement with Nassau County fits squarely within the FCA's definition of "claim." The FCA defines "claim" as meaning, inter alia: "any request or demand, whether under a contract or otherwise, for money or property that . . . is presented to an officer, employee or agent of the state or a local government." State Finance Law § 188(1)(a)(i).

Armor and Nassau County's contract sets forth an annual rate, and each month Armor presented Nassau County with invoices for payment based on that annual rate. DCB Aff. ¶¶ 23, 27. Therefore, Armor presented employees and agents of a local government with a demand for monetary payment pursuant to a contractual agreement. As such, Armor presented claims for payment as defined in the FCA.

2. Armor's Claims Were False and Fraudulent

The claims submitted by Armor to Nassau County were false and fraudulent under the FCA. The statute defines "false claim," for purposes of violating State Finance Law § 189, to mean "any claim which is, either in whole or part false or fraudulent." State Finance Law § 188(2). Courts recognize two general categories of FCA violations: "legally false claims (a claim provided in violation of a contract, specification, regulation or statute) and factually false claims (a claim for goods or services not provided)." United States v. Dialysis Clinic, Inc., No. 5:09-CV-00710, 2011 U.S. Dist. LEXIS 4862, at *39 (N.D.N.Y Jan. 19, 2011) (citing United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008)); see also United States. ex rel. Bilotta v. Novartis Pharms. Corp., 50 F. Supp. 3d 497, 534 (S.D.N.Y

2014).

Armor submitted claims for payment to Nassau County that were both legally and factually false, because: (a) Armor presented claims for services that it did not deliver, and (b) Armor presented claims for services that it failed to render consistent with its contractual requirements. For each of these reasons, Armor improperly sought payment from Nassau County by presenting false and fraudulent claims for payment.

i. Armor Presented False and Fraudulent Claims for Payment By Seeking Payment Even When the Services Were Not Delivered

Armor repeatedly presented claims seeking one month's payment in full, even when it failed to provide key services under the contract. This practice – submitting a claim for services that were never provided – is the very definition of a "factually false" claim under the FCA. United States ex rel. Conner, 543 F.3d at 1217 ("In a run-of-the-mill 'factually false' case, proving falsehood is relatively straightforward: A relator must generally show that the government payee has submitted . . . 'a request for reimbursement for goods or services never provided.") (citing United States ex rel. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001); Mikes 274 F.3d at 697 (describing a "factually false" certification as involving, inter alia, "a request for reimbursement for goods or services never provided."); United States ex rel. Bilotta, 50 F. Supp. 3d at 534; see also United States and N.Y. ex rel. Ortiz v. Mt. Sinai Hospital et al., No. 13 Civ. 4735, 2015 U.S. Dist. LEXIS 153903 (S.D.N.Y. Nov. 9, 2015) (denying Defendants' motion to dismiss federal and state FCA causes of action for submitting improper bills to the Medicare and Medicaid programs, including "phantom billing" for medical services that were never performed).

Examples of Armor's failure to provide the services for which Nassau County was charged include:

- Failure to develop and implement corrective action plans to correct the findings in forty-four failed self-audits (DCB Aff. ¶ 57);
- Failure to implement an electronic health records system (Id. ¶ 178); and
- Leaving vacant several positions and not providing the full staffing required under the contract, including positions that are instrumental to providing adequate medical care to NCCC inmates (Id. ¶¶ 192-93).

One of Armor's most important contractual requirements is to monitor the quality of its services through self-audits and to develop and implement corrective action plans ("CAPs") whenever it fails a self-audit. DCB Aff. ¶ 54. Given the importance of developing and implementing CAPs, the contract sets forth a significant financial reduction for non-compliance: if performance falls below 90% (i.e., in a given month, Armor fails to develop and implement CAPs for at least 90% of identified failures during its self-audits), there is a $100 reduction per day for each review not completed within forty-five days of the deficiency. Id. ¶¶ 60-61. Armor's performance fell far below the 90% benchmark: Armor failed to develop CAPs over 60% of the time it failed a self-audit, leaving forty-four audit failures unaddressed. Id. ¶ 57. However, Armor never reduced the amount owed, meaning it falsely and fraudulently billed Nassau County at least $528,000 based solely on its failure to develop CAPs. Id. ¶ 62.

The contract also requires that, when Armor fails to maintain staffing at 85% of the levels stated in the contract, it reduce the amount the County owes by the amount of the hourly or daily rate for each staff member whose position is vacant, for each day of the vacancy. Ex. 8, Attch. 2. Accordingly, under the clear terms of the contract, for each month in which a position was vacant or staffed at less than 85% of the contracted FTE amount, Armor was required to reduce the amount charged to Armor. Id. It never did so, despite lengthy vacancies and understaffing

important positions by less than half the required FTEs. DCB Aff. ¶ 30. Based on the vacancies alone, Armor overcharged Nassau County by an estimated $484,795. Id. ¶ 194.

Further, in its cost proposal, Armor allocated $78,688 of the contract cost to electronic medical records in the first year of the contract alone, and $81,056 in the second year. Id. ¶ 178; Ex. 9, Attch. 1. Yet Armor has not yet implemented electronic medical records and never reduced the amount owed by the county for this service. DCB Aff. ¶ 178.

As Armor never reduced the amount owed by Nassau County to account for its failure to provide these services, Armor violated, and continues to violate, State Finance Law § 189(1)(a)-(b) by presenting claims for payment in full when the underlying services were not provided.

ii. Armor Presented False and Fraudulent Claims for Services That It Failed to Render Consistent With its Contractual Requirements

Armor also presented "legally false" claims for payment by seeking payment in full despite not meeting the standards set forth in the contract when providing the services for which it sought payment. Such false certifications of compliance with contractual provisions are actionable under the FCA. The certifications may be "express" or "implied," and Armor is subject to liability under either theory.

Armor expressly certified compliance because it submitted claim vouchers certifying that the amount claimed is actually due, as required by the clear terms of the contract. The contract specifically requires that Armor certify the services were rendered in accordance with the contract when submitting a claim for payment. DCB Aff. ¶ 26; Ex. 8 at 11, § 6(f). Given this requirement, Armor expressly certified compliance by submitting claims for payment in full.

In addition, Armor's actions also satisfy the criteria for liability under the implied false certification theory. The United States Supreme Court recently recognized liability under the federal FCA for "implied false certifications" of compliance with a contract's terms so long as

the contract terms at issue are "material to the Government's payment decisions." Universal Health Services, Inc. v. United States ex rel. Escobar No. 15-7, slip op. at 1 (U.S. June 16, 2016), http://www.supremecourt.gov/opinions/15pdf/15-7_a074.pdf (involving a qui tam plaintiff's claim that a mental health facility submitted false Medicaid claims when employees at the facility were not actually licensed to provide mental health counseling services or authorized to prescribe medicine).[10]

In Escobar, the Supreme Court confirmed that the implied false certification theory can be a basis for liability. Id. Specifically:

> [L]iability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In those circumstances, liability may attach if the omission renders those representations misleading.

Id. at 1-2.

The Court further ruled that FCA liability for non-disclosure turns on whether the "defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." Id. In this case, the facts establish that (1) Armor submitted monthly claims seeking payment in full for all medical health services required under the contract, (2) Armor routinely failed to provide certain of these services consistent with important contractual requirements governing the quality of care provided, (3) those contractual requirements were material to the county's payment decision, and (4) Armor never disclosed its non-compliance. As a result, many of Armor's claims for payment were misleading, and Armor is subject to liability under the FCA for all such misleading claims under the implied false certification theory.

[10] Since the New York False Claims Act was based on the federal False Claims Act, 31 USC § 3729 et seq., it is "appropriate to look toward federal law when interpreting the New York act" as guidance in statutory interpretation. State ex rel. Seiden v. Utica First Ins. Co., 96 A.D.3d 67, 71 (1st Dept. 2012).

Accordingly, each and every month that Armor submitted a claim for payment without disclosing that it did not provide services consistent with the terms of the contract, and without reducing the amount owed, Armor misrepresented the basis for payment and submitted a false and fraudulent claim to Nassau County. This includes, but is not limited to, claims submitted for months in which Armor:

- Failed to examine inmates within seventy-two hours of receiving a sick call request, including when it failed to examine inmates at all;
- Failed to provide mental health services consistent with the contract, including not developing and implementing treatment plans;
- Failed to provide specialty referrals or arrange for specialty care following a referral when required under the contract;
- Failed to perform ordered diagnostic services consistent with the contract's requirements;
- Failed to maintain medical records consistent with the contract's requirements; and
- Failed to maintain medical equipment consistent with the contract's requirements;

Armor billed in full for those services, even though it failed to perform them consistent with the contract's explicit requirements that were designed to ensure high-quality medical care for inmates, and it never disclosed its non-compliance despite knowing the significance of those requirements. Further, the significance and materiality of the specific contractual requirements for each of those services are clear, as the contract: (a) requires rigorous self-auditing of these services, (b) has specific reporting requirements relating to Armor's performance of these services, (c) conditions payment on compliance with the contract terms, including for these services, and (d) has a schedule for reducing payments to Armor upon its failure to meet the contract's specific requirements for performance of these services. Accordingly, Armor's

numerous areas of non-compliance, as set forth above in detail (see supra, Statement of Facts, Section B, pp. 6-22) are not small deviations from Armor's contractual requirements, but rather significant deviations from Armor's most fundamental obligations under the contract – indeed, the very heart of the services that Armor was contracted to provide.

Particularly egregious examples are months in which Armor failed to timely address sick calls and failed to provide adequate access to specialty care. Responding to inmates' requests for medical consultations is one of the most fundamental aspects of providing medical care. The "sick call" system is the sole way inmates are able to access urgent and non-urgent health care services. By failing to abide by the contractual time constraints (clinician visit within forty-eight to seventy-two hours), Armor is improperly delaying access to needed care, allowing inmates' medical conditions to go untreated – even conditions that are urgent. Despite the critical nature of this contractual obligation, Armor often failed to perform this basic function. See supra, pp. 9-11. For example, at one point, sick calls were not picked up for days because the key to the collection box went missing. DCB Aff. ¶ 76; Ex. 21. In at least two one-month periods in 2016, Armor failed to timely respond to 63% and 72% of requests, meaning the vast majority of inmates waited days before being seen by a clinician, if they were seen at all, risking deterioration of the medical or psychiatric condition prompting the request. DCB Aff. ¶ 72. This was as recent as five months ago, and well after Armor knew the NYAG was investigating it for such conduct.

Armor is contractually required to provide a reduction of $50 per inmate not seen within seventy-two hours of when Armor receives the request. DCB Aff. ¶ 88; Ex. 8, Attch. 2. However, Armor never reduced the amount owed by Nassau County to reflect its failure to

provide timely sick calls.[11] DCB Aff. ¶ 90.

Similarly, access to needed specialists is a fundamental aspect of providing appropriate medical services to inmates, and the failure to fully meet this contractual requirement can be devastating. Armor failed all of its self-audits for specialty consultation referrals, and the audits demonstrate that Armor did not reliably act upon its own clinicians' referrals to needed specialists – meaning the requests were never approved or denied, but just languished, resulting in the inmates never seeing specialists. See supra, pp. 15-16. This failure was then exacerbated by Armor not implementing an alternate plan for appropriate care. DCB Aff. ¶ 155. Moreover, even if the requests were approved, Armor often failed to schedule off-site specialty services within the required thirty-day period. Id. ¶ 156. Manifestly, these failures – alone and often compounded on top of each other – seriously jeopardize inmates' health. This outcome, unfortunately, is not merely theoretical: an inmate died in July 2014 after Armor failed to arrange a requested consultation to a rheumatologist, and the State Medical Review Board determined that had a rheumatologist been seen and treatment received, the death may have been prevented. Id. ¶ 161, 162; Ex. 35.

Armor was not entitled to reimbursement in full for services that were not rendered consistent with the standards set out in the contract, and by submitting claims for full reimbursement despite its failure to comply with key provisions of the contract, those claims for reimbursement were false and fraudulent in violation of State Finance Law § 189(1)(a)-(b).[12]

[11] Since the NYAG seeks immediate injunctive relief, it cannot, at this time, quantify the full scope of Armor's non-compliance with, and under-performance of, its contractual obligations. Upon information and belief, the fee deduction would equal some $3.7 million extrapolating the fee reduction for the recent two-month sample to the 60-month course of the Contract. DCB Aff. ¶ 89.

[12] Armor also repeatedly failed self-audits in numerous other service areas, indicating that other reductions were likely triggered and not provided. DCB Aff. ¶¶ 55-56. Over five years, Armor ultimately failed seventy audits in twenty-seven subject areas, and each audit failure falls under one of the "performance indicators" for which there is a contractual financial reduction for failure to meet the benchmark.

3. Armor Knowingly Submitted False and Fraudulent Claims for Payment

The FCA defines "knowing and knowingly" as meaning: "that a person, with respect to information: (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." State Finance § 188(3)(a). The statute goes on to state that there need not be any specific intent to defraud, although acts "acts occurring by mistake or as a result of mere negligence are not covered." § 188(3)(b).

Here, there is little question that Armor had actual knowledge that it submitted false claims as that term is defined in the FCA. Armor (a) rendered the medical services required under the contract, (b) prepared and submitted the claims for payment, and (c) was responsible for monitoring the services provided so it could accurately bill the county. As such, Armor, as the entity providing medical services and billing for those services, knew it was both not performing and underperforming services required under the contract that form the basis for payment and that it was nonetheless submitting claims for payment in full.

As Armor's actions easily satisfy the definition of "actual knowledge," Armor also certainly meets the lowest knowledge standard of "reckless disregard." In 1986, the federal FCA was amended to create liability based on reckless disregard and deliberate ignorance because this expanded liability would cover "not just those who set out to defraud the government, but also those who ignore obvious warning signs." UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 793 (1999). Since 1986, federal courts have consistently defined reckless disregard as an extension or aggravated form of gross negligence. United States ex rel. Davis v. District of Columbia, 793 F.3d 120, 124 (D.C. Cir. 2015); see also United States ex rel. Davis v. Prince, No. 1:08-cv-1244, 2011 U.S. Dist. LEXIS 77152, at *11 (E.D. Va. Jun. 23, 2011) ("It is intended that persons who

ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act." (quoting Civil False Claims, § 2.06[B], at 291 (quoting H. Rep. No. 99-660 (June 26, 1986))). "Reckless disregard," in the context of an FCA cause of action, "was designed to address the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered." United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group, Inc., 370 F. Supp. 2d 18, 42 (D.D.C. 2005).

Accordingly, poor recordkeeping and a general failure to ensure that bills submitted for payment have a factual basis will be considered "reckless disregard." See United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir 1997) (holding that the District Court properly found that a psychiatrist and his wife acted with "reckless disregard" under the FCA when the psychiatrist's wife prepared insurance claims based on assumptions of how much time he spent with patients, and the provider himself failed to review the bills submitted on his behalf); see also United States v. Raymond & Whitcomb, 53 F. Supp. 2d 436, 447 (S.D.N.Y 1999) ("One who signs a certification cannot choose to remain unaware of the veracity of that certification like the proverbial ostrich who buried its head in the sand so as to see no evil, hear no evil, and speak no evil. Thus, a failure to conduct a proper investigation before making a false statement may be sufficiently reckless to yield False Claims Act liability.").

Even if Armor maintains it did not have actual knowledge that it submitted false and fraudulent claims, there can be no question that it acted with "reckless disregard," as it ignored "red flags" concerning its billing practices. Armor was fully aware (not least through its self-audits, when they were performed) of which services it was performing in full, not performing and underperforming, while nonetheless failing to perform the quality assessment reporting that

would help quantify, and let the County to know, the full extent of its non-performance. Armor also knew the dollar amount it was billing Nassau County – the full monthly rate, every month. Armor's failure to take the most basic steps to ensure it was accurately billing Nassau County for the services provided each month, despite clear "red flags," constitutes reckless disregard concerning the accuracy of the claims submitted by Armor for payment.

II. ARMOR ENGAGED IN REPEATED AND PERSISTENT FRAUDULENT BUSINESS PRACTICES IN VIOLATION OF EXECUTIVE LAW § 63(12)

The OAG may bring a claim under Executive Law § 63(12) to enjoin repeated or persistent fraud in the "carrying on, conducting or transacting of business." Armor engaged in such fraudulent business practices by (a) misrepresenting the standard of care and services that would be provided to inmates and (b) presenting false and fraudulent claims for payment for services that were not rendered or were inadequately rendered. These misrepresentations were repeated and persistent.

A. Armor Engaged in Repeated and Persistent Fraudulent Business Practices by Misrepresenting the Standard of Care and Provision of Services

Executive Law § 63(12) defines the terms "fraud" or "fraudulent" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Consistent with this language and the legislative intent, courts have consistently applied an extremely broad view of what constitutes fraudulent and deceptive conduct under Executive Law § 63(12). See, e.g., Lefkowitz v. Bull Inv. Group, Inc., 46 A.D.2d 25, 28 (3d Dep't 1974), lv denied 35 N.Y.2d 647 (1975) ("It is well settled that the definition of fraud under subdivision 12 of section 63 of the Executive Law is extremely broad and proof of scienter is not necessary.").

Courts have repeatedly held that a prima facie claim of fraud under Executive Law

§ 63(12) can be established by showing "whether the act complained of has the capacity or tendency to deceive." See, e.g., State v. Applied Card Sys., Inc., 27 A.D. 3d 104 (3d Dep't 2005), aff'd on other grounds, 11 N.Y.3d 105 (2008) (internal citations omitted) (citing State v. Gen. Elec. Co., Inc., 302 A.D.2d 314 (1st Dep't 2003)). It is not necessary to establish the traditional elements of common law fraud, such as intent to deceive and reliance, to establish liability for fraud under Executive Law § 63(12). Gen. Elec. Co., 756 N.Y.S.2d at 524; State v. Ford Motor Co., 136 A.D.2d 154, 158 (3d Dep't 1988), aff'd, 74 N.Y.2d 495 (1989); State v. Merkin, No. 450879/09, 2010 N.Y. Misc. LEXIS 523, at *18-19 (Sup. Ct. N.Y. Cnty. 2009).

In both its proposal to Nassau County and the contract, Armor represented the various services that it would provide and the quality of those services. See Exs. 8 and 9. For example, Armor represented in its proposal and in the contract that inmates submitting sick call requests would be seen by licensed nurses within forty-eight to seventy-two hours of receipt of the request, yet Armor persistently and repeatedly failed to satisfy this obligation. DCB Aff. ¶ 65; Ex. 9 at 1.10-1.11; Ex. 8 at 3, §3(a). Similarly, Armor represented in its proposal and in the contract that it would arrange for specialty services when needed, and yet NCCC inmates were repeatedly unable to access off-site specialty care. See supra, pp. 15-16. It also made specific representations about mental health treatment planning, but two of the four audits conducted evidence Armor's failure to complete such plans. DCB Aff. ¶ 146; Ex. 9 at 1.35; Ex. 8, Attch. 2.

Armor's misrepresentations concerning the standard of care and services it would provide, as represented in the contract and in its proposal in response to NCCC's Request for Proposals, constitute fraudulent conduct in violation of Executive Law § 63(12).

B. Armor Engaged in Repeated and Persistent Fraudulent Business Practices by Submitting False and Fraudulent Claims for Payment to Nassau County

Further, as set forth extensively in Section I, see supra, pp. 23-34, for five years Armor

repeatedly and persistently submitted false and fraudulent claims for payment, seeking payment based on false representations concerning its performance of its contractual duties. Such fraudulent business practices are also actionable under Executive Law § 63(12). See, e.g., Hogan v. Cuomo, 67 A.D. 3d 1144, 1145 (3d Dep't 2009) (finding that the NYAG "possesses authority, pursuant to Executive Law § 63 (12) and State Finance Law § 190, to investigate and issue subpoenas related to potential fraud or illegality in obtaining public pension benefits.") (emphasis in original).

III. ARMOR ENGAGED IN REPEATED AND PERSISTENT ILLEGAL BUSINESS PRACTICES IN VIOLATION OF EXECUTIVE LAW § 63(12)

In addition to authorizing the OAG to enjoin repeated or persistent fraud, Executive Law § 63(12) also authorizes the OAG to enjoin repeated or persistent illegality in the "carrying on, conducting or transacting of business." Courts have repeatedly found that a violation of a state law constitutes "illegality" within the meaning of Executive Law § 63(12). See, e.g., State v. Princess Prestige Co., Inc., 42 N.Y.2d 104, 107 (1977) (violation of Personal Property Law); State v. Empyre Inground Pools, Inc., 227 A.D.2d 731, 733 (3d Dep't 1996) (violations of Lien Law and home improvement contract provisions of General Business Law).

Thus, Armor's repeated and persistent violations of the FCA, as set forth in Section I, also constitute a violation of Executive Law § 63(12).

IV. EXECUTIVE LAW SECTION 63-C PROVIDES THE ATTORNEY GENERAL WITH AUTHORITY TO RECOVER FUNDS MISAPPROPRIATED BY ARMOR DUE TO ITS BREACH OF THE CONTRACT

In the alternative to the FCA and Executive Law § 63(12) causes of action, the Attorney General seeks recovery of funds overpaid to Armor pursuant to Executive Law § 63-c, known as the "Tweed Law." The statute does not require that the Attorney General identify any misconduct by government officials. The Tweed Law permits the Attorney General to bring a

civil suit against any person who has "obtained" or "disposed of" governmental funds "without right." Executive Law § 63-c(1). See State v. Grecco, 21 A.D.3d 470, 474-78 (2d Dep't 2005). As explained by the Second Department in Grecco:

> [T]he Tweed Law vests the Attorney-General with the discretionary authority to seek the recovery of money or property (other than real property) belonging to the State or a municipality, or to recover damages or other compensation for the same, or both, pursuant to any viable action or proceeding at law or in equity available to the State or municipality.

Id. at 477.

The facts demonstrated on this motion plainly satisfy the elements of Section 63-c, as the Attorney General seeks, on behalf of Nassau County, to recover money from Armor based on Armor's failure to perform key elements of the contract, as set forth herein, constituting a partial breach of the contract. See, e.g., Buchwald v. Waldron, 183 A.D.2d 1080, 1081 (3d Dep't 1992) (upholding lower court's judgment of partial breach of a home improvement contract where the contractor performed defective work).

As a result of Armor's breach of contract, Armor without right obtained and received money held and owned by the County. As a consequence of the breach, Nassau County suffered damages that include, but are not limited to, financial damages for all payments rendered in exchange for services not provided or not substantially performed.

V. THE COURT SHOULD GRANT PERMANENT INJUNCTIVE RELIEF, CIVIL PENALTIES AND COSTS

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

Given the significant continued risk to inmates' health if Armor continues to provide such grossly inadequate medical services, the NYAG seeks injunctive relief at this time. The NYAG seeks an order: (a) requiring Armor to fully comply with its contractual requirements and appointing an external monitor to ensure such compliance, and (b) prohibiting Armor from

bidding on future contracts to provide jail health services in New York State.

In actions brought pursuant to Executive Law § 63(12), this Court's remedial powers are extremely broad, and courts routinely grant permanent injunctive relief in addition to other forms of relief. See State v. Princess Prestige Co., Inc., 42 N.Y.2d 104, 107 (1977); State v. Daro Chartours, Inc., 72 A.D.2d 872, 873 (3d Dep't 1979); State v. Scottish-Am. Ass'n, Inc., 52 A.D.2d 528, 528-29 (1st Dep't 1976); State v. Mgmt. Transitions Res., Inc., 454 N.Y.S.2d 513, 516 (Sup. Ct. N.Y. Cnty. 1982); State v. Midland Equities of N.Y., Inc., 458 N.Y.S.2d 126, 129-130 (Sup. Ct. N.Y. Cnty. 1982). To ensure Armor complies with the law, the Court should permanently enjoin it from providing services inconsistent with the contract terms and appoint an external independent monitor to oversee compliance, paid by Armor.

Courts in New York have the ability, in addition to enjoining illegal or fraudulent practices, to fashion necessary relief. See, e.g., State v. Cohen, 473 N.Y.S.2d 98, 101 (Sup. Ct. N.Y. Cnty. 1983) (requiring respondent to apply or file notice with the NYAG before filing any further small claims court actions after a finding that he abused the civil court process).

Appointment of a monitor in this instance is necessary to ensure compliance with the Court's Final Judgment and is appropriate given the impact on inmates of Armor's continued failure to comply with its contractual obligations, Armor's history of knowingly performing its contractual duties inadequately, and the detailed nature of Armor's legal and contractual requirements. See United States v. Apple, Inc., No. 12-cv-2826, 2013 U.S. Dist. LEXIS 129727, at *20 (S.D.N.Y. Sept. 5, 2013) (appointing an external monitor to oversee Apple's compliance with the Final Judgment and relevant antitrust laws) (subsequent history not included). Armor should also be enjoined from bidding on any future contracts to provide jail health services in New York. See, e.g. Cohen, 473 N.Y.S.2d at 54, n.2 ("This court, through both its inherent

powers and equity, has the discretion and the responsibility to fashion an appropriate remedy.").

B. Armor Should be Ordered to Pay Penalties and Treble Damages for Violations of the False Claims Act

State Finance Law § 189(1)(h) sets out a civil penalty of between $6,000 and $12,000, plus three times the amount of damages sustained due to the violator's actions. Given the egregiousness of Armor's behavior and the dire consequences of Armor's failure to perform the duties for which it nonetheless sought payment, it should be ordered to pay the maximum penalty of $12,000 per false claim and treble damages.

Under the clear terms of the statute, Armor must pay treble damages simply by virtue of having violated the FCA. Armor should also be ordered to pay the maximum civil penalty of $12,000 per false and fraudulent claim based on: (1) the nature of the services Armor was contracted to provide – health care services for individuals who are wholly dependent on its care – and the impact of its failure to properly provide those services; (2) the five-year scope of Armor's fraudulent claims practices; and (3) Armor's culpability for having actual knowledge of the false claims. Each and every monthly claim voucher where Armor: (a) did not provide some of the services for which it billed and (b) billed for services rendered inconsistent with the terms of the contract is a false and fraudulent claim for which a $12,000 penalty should be assessed. At the very least, this includes: (a) all claims from the beginning of the contract to the present based on its failure to implement electronic health records; (b) the months where Armor failed to develop CAPs; (c) the two months Armor grossly failed to timely respond to sick calls, and (d) the approximately 84.5 months Armor left key positions vacant, and the many more months Armor understaffed positions by at least 15%.

C. Armor Should be Ordered to Pay Damages for Partial Breach of Contract

In the alternative to awarding triple damages under the False Claims Act, Armor should

be ordered to pay damages resulting from its failure to perform key services under the contract for which NCCC paid in full. Armor should be ordered to pay restitution of the full amount the county overpaid for the services it failed to perform consistent with the contract's requirements.

D. The Court Should Direct an Accounting on Damages

Upon finding Armor liable, this Court should order an accounting of the damages to determine Nassau County's overpayment to Armor as a result of Armor's non-performance and under-performance of its contractual obligations, including its failure to apply the financial reductions triggered by its failure to adequately perform certain services. While Armor's liability is evident, an accounting is necessary to determine the amount of the county's overpayment due to Armor's repeated submission of claims for services that it failed to perform at all and services that it failed to perform consistent with the contract's terms. However, such an accounting should not delay NYAG's request for immediate injunctive relief, which is necessary to protect inmates' health.

E. Armor Should be Ordered to Pay Costs

CPLR 8303(a)(6) provides that the court may award the NYAG "a sum not exceeding two thousand dollars against each defendant" in a special proceeding pursuant to Executive Law § 63(12). Courts have routinely granted these costs. See, e.g., Daro Chartours, Inc., 72 A.D.2d at 873; State v. Nat'l Home Protection, Inc., No. 400431/09, 2009 N.Y. Misc. LEXIS 3667, at *17 (Sup. Ct. N.Y. Cnty. Dec. 8, 2009); Midland Equities, 458 N.Y.S.2d 126 at 129-30; State v. Hotel Waldorf-Astoria Corp., 323 N.Y.S.2d 917, 919-20 (Sup. Ct. N.Y. Cnty. 1971).

Therefore, an award of additional costs in the amount of $2,000 against Armor should also be granted.

CONCLUSION

For the reasons set forth in this memorandum, the Court should make a summary determination in Petitioner's favor on all causes of action and grant injunctive relief, damages, civil penalties and costs, as requested in the Verified Petition.

Dated: New York, New York
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Respectfully submitted,

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