**No. _____**

# In The
# Supreme Court of the United States

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ABET LIFE, INCORPORATED,

*Applicant,*

v.

ALEX M. AZAR II, Secretary, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

*Respondent.*

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**On Application for a Writ of Injunction to the United States Court of Appeals for the Fifth Circuit**

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## EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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*ATTORNEYS FOR APPLICANT*

September 10, 2020

## QUESTION PRESENTED

Whether HHS violates Due Process of Law and the Fifth Amendment of the U.S. Constitution by imposing a Medicare payment suspension and confiscates all earned Medicare payments but provides no appeal or right to a hearing to challenge the sanction.

## PARTIES AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the present Emergency Application for Writ of Injunction and the proceedings below:

Applicant is ABET LIFE, INC. This healthcare provider was Plaintiff in the United States District Court for the Southern District of Texas. It was also the Plaintiff-Appellant in the U.S. Court of Appeals for the Fifth Circuit. The provider corporation does not have any parent corporation or any public stock.

Respondent is ALEX M. AZAR II, in his official capacity as the Secretary of the U.S. Department of Health & Human Services. The Secretary was the Defendant in the United States District Court for the Southern District of Texas. He was also the Defendant-Appellee in the U.S. Court of Appeals for the Fifth Circuit.

## LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Applicant states that there are no proceedings directly related to this case in this Court.

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**TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:**

## INTRODUCTION

Pursuant to Rules 20, 22 and 23 of the Rules of this Court, and 28 U.S.C. § 1651 Appellant-Applicant Abet Life, Inc. (hereinafter "Abet Life" or "Applicant") respectfully requests a writ of injunction against Alex M. Azar II, Secretary, United States Department of Health and Human Services (hereinafter "Respondent" or "HHS"), that enjoins the Medicare payment suspension that will otherwise force the healthcare provider's closure, and that jeopardizes the health and safety of its patients. Due to exigent circumstances, Applicant files this Emergency Application for Writ of Injunction, and relief is requested by September 18, 2020.

On March 17, 2020, HHS issued a notice of its Medicare payment suspension that withholds all earned payment for services rendered by Abet Life, a Medicare certified home health agency. These payments will be applied toward a Medicare overpayment should one be subsequently determined by HHS. However, the government provided no appeal or right to hearing to dispute or contest the suspension action. Applicant moves to temporarily enjoin HHS's "suspension" of its Medicare payments during the COVID-19 emergency or until the government provides a hearing on the adverse action in conformance with Due Process of Law. The suspension will irreparably harm Applicant by forcing it out of business and into bankruptcy, and it jeopardizes the health and safety of the provider's patients

by disrupting their services and requiring that they obtain them elsewhere in the Houston-area, a "hot spot" of the COVID-19 outbreak.

## DECISIONS BELOW

All decisions in this case in the lower courts are styled *Abet Life, Inc. v. Azar*. The district court's Final Judgment dismissing the case for lack of subject-matter jurisdiction is attached hereto as Appendix A. While the court did not rule on Applicant's motion for preliminary injunction, it denied its motion for temporary restraining order. *See* Appendix B. The order of the U.S. Court of Appeals for the Fifth Circuit denying Applicant's motion for an injunction pending appeal is attached hereto as Appendix C.

## JURISDICTION

Applicant has a pending appeal in the U.S. Court of Appeals for the Fifth Circuit. This Court has jurisdiction under 28 U.S.C. § 1651.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of U.S. CONST. amend. V are reproduced in the appendix to this Application (Appendix L).

The relevant provisions of the Medicare portion of the Social Security Act. 42 U.S.C. § 1395 *et seq*., are reproduced in the appendix to this Application (Appendix M), along with the applicable regulations (Appendix N).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Issuance of a Medicare Payment Suspension

HHS issued a notice of suspension of Medicare payments on March 17, 2020.[1] *See* Appendix D. The suspension was brought under 42 C.F.R. § 405.371(a)(2) and based upon a "credible allegation of fraud." Critically, the provider has *not* been charged with fraud by the government; the allegation may be made by "any source." 42 C.F.R. § 405.370 (definitions).[2] The preliminary findings merely state that "Documentation does not support the services billed met criteria for skilled nursing services." As a result of the suspension action, *all* Medicare payments owed to the provider are being withheld pending resolution of the ongoing investigation, and they will be applied to liquidate any subsequently determined overpayment. By letter dated August 26, 2020, HHS extended the suspension an additional 180 days beginning on September 7, 2020.

### B. National Emergency for COVID-19 Pandemic

Unfortunately, the suspension action could not come at a worse time. President Donald Trump declared a national emergency over the COVID-19 outbreak on March 13, 2020. *See* Appendix E. Dr. Deborah Birx, White House Coronavirus Response Coordinator, has reported that U.S. deaths cause by COVID-

[1] A suspension of payment means "the withholding of payment by a Medicare contractor from a provider or supplier of an approved Medicare payment amount before a determination of the overpayment exists, or until the resolution of an investigation of a credible allegation of fraud." 42 C.F.R. § 405.370 (definitions).

[2] Unfortunately, healthcare is a competitive business and it is not uncommon for competing home health agencies or disgruntled employees to make such allegations to obtain a competitive advantage or as a means of personal vengeance.

19 may be catastrophic. She stated that Dr. Anthony Fauci, National Institute of Allergies and Infectious Diseases, has predicted U.S. deaths could range from 1.6 to 2.2 million in a worst-case scenario and projects 100,000 to 200,000 in a best-case scenario. To date, there are 188,688 COVID-19 related deaths.[3] The surge in confirmed coronavirus cases is overwhelming our nation's hospitals. And it is having a cascading effect on ancillary providers and practitioners as well.

### C. Forced Closure of Applicant's Home Care Provider Threatened

In a *Declaration Under Penalty of Perjury of Binny Oonnoonny*, the provider's President and owner averred that the suspension will force Applicant to shut down its business and file bankruptcy. ¶ 16. *See* Appendix F. When it filed suit, the provider employed some 30 bilingual care givers and had a diverse census of approximately 35 patients. *Id.* at ¶ 3. Due to the payment suspension, Applicant has been forced to lower its census to ensure quality care, and it now provides care to approximately 10 patients.[4] *Id.* at ¶ 28. The provider derives approximately 90% of its revenue from Medicare, and it has an estimated value of $2.1 million. *Id.* at ¶ 3. Despite obtaining funding through the Paycheck Protection Program,[5] the provider will soon deplete it business and all personal resources, and it will only be able to survive for another two to three weeks. *Id.* at ¶¶ 26-34. Because the provider is not being

[3] Reported by the Centers for Disease Control and Prevention as of September 9, 2020, at www.cdc.gov (due to the reporting time lag, this number is not as high as other news networks report).
[4] Since the signing of Binny Oonnoonny's July 24, 2020 declaration, the provider has reduced its patient census from 15 to approximately 10.
[5] In March 2020, U.S. lawmakers agreed on the passage of a $2 trillion stimulus bill called the CARES (Coronavirus Aid, Relief, and Economic Security) Act to blunt the impact of an economic downturn set in motion by the global coronavirus pandemic.

paid for the home health services it provides to Medicare program beneficiaries, it will soon be compelled to terminate its employees as well as cease operations. *Id.*

**D. Jeopardy to Health and Safety of Applicant's Patients**

If Abet Life is forced to close, the provider's patients will have to obtain their home health services elsewhere. In a *Declaration Under Penalty of Perjury of Jan Spears*, the healthcare consultant, with over 35 years' experience, opined that "CMS has imposed the suspension even though its impact will force Abet Life's closure and despite the fact it jeopardizes the health and safety of patients of the provider and their access to essential healthcare services." *Id*. at ¶ 17. *See* Appendix G. She explained that the Houston-area was a "hot spot" of the COVID-19 outbreak. *Id*. at ¶ 19. Because of the overwhelming impact of the virus on the Houston-area healthcare community, she expressed concern that these patients may only be able to access essential healthcare under the Medicare program through Applicant's agency. *Id*. at ¶¶ 15-16, and 18. Noting that most of the provider's patients are unwilling or unable to be transferred due to their condition and/or refusal (in accordance with Patient Rights) because of a fear of developing new relationships in the midst of the COVID-19 outbreak, she pointed out that homecare providers are also reticent to accept new or transferred patients.[6] *Id*.

[6] Recently, National Association for Home Care & Hospice President William Dombi commented that "This is one of those times when the home health agencies have to figure out where the balance is to be struck between the safety of their staff and caring for the patients that they have." https://homehealthcarenews.com/2020/03/nahcs-dombi-agencies-arent-panicking-in-the-streets-over-pdgm/

### E. Rebuttal of Medicare Payment Suspension

On March 27, 2020, Applicant submitted a rebuttal to HHS opposing the suspension. *See* Appendix H. It explained that the suspension would force the provider to close and file bankruptcy, and doing so in the midst of the COVID-19 epidemic jeopardized the provider's patients and was a danger to their life and health.[7] Subsequently, on April 28, 2020, HHS issued a reply that continued the suspension essentially because there are numerous other Medicare homecare providers in the Houston-area. *See* Appendix I.

### F. Federal Lawsuit Seeking Injunctive Relief

On April 1, 2020, Abet Life filed suit alleging procedural Due Process and *ultra vires* claims. *See* Appendix J. The provider asserted that its Due Process and *ultra vires* claims are collateral to the Respondent's administrative process, invoking *Mathews v. Eldridge*, 424 U.S. 319, 326-32 (1976). Additionally, Applicant relies on *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000), to assert that jurisdiction lies because § 405 "would not simply channel review through the agency, but would mean no review at all." In such situation jurisdiction is available under 28 U.S.C. § 1331. *Id*. at 19.

[7] Respondent may suspend Medicare payments where there is a "credible allegation of fraud" against the provider, *unless* there is good cause *not* to suspend payments. 42 C.F.R. § 405.371(a)(2). The regulation provides that that good cause may exist not to suspend a provider's payments if, among other things, it is determined that beneficiary access to services would be so "jeopardized by a payment suspension," *in whole or in part*, as to cause a "danger to life or health." 42 C.F.R. § 405.371(b)(1)(ii). Clearly, the application of this exception focuses on the impact of suspension as it relates to the delivery of services by a particular provider, and not whether services otherwise exist in the healthcare community at large.

On June 26, 2020, the trial court dismissed the case for lack of subject matter jurisdiction. *See* Appendices A & B. Judge Miller relied heavily on *True Health Diagnostics, LLC v. Azar*, 392 F. Supp. 3d 666 (E.D. Tex. 2019), in deciding the case. Unlike *True Health Diagnostics*, Applicant only seeks to *temporarily* enjoin the Medicare payment suspension during the COVID-19 emergency or until a hearing is provided on the adverse action in conformance with Due Process of Law. Applicant does not seek a determination that the suspension is wrongful under the Medicare Act. Indeed, this is quite different from a request for permanent reinstatement of benefits. *See Family Rehab., Inc. v. Azar*, 886 F.3d 496, 503 (5th Cir. 2018). In *True Health Diagnostics*, the plaintiff actually sought such permanent relief in contending that the claims being suspended in 2019 were part of an earlier 2017 suspension. *True Health Diagnostics*, 392 F. Supp. 3d at 680-81. Clearly, Judge Miller failed to recognize this distinction and wrongly applied *True Health Diagnostics* in dismissing Applicant's case.

On July 27, 2020, Abet Life filed Appellant's Opposed Motion for Injunction Pending Appeal with the Fifth Circuit court. *See* Appendix K.[8] On August 17, 2020, the Fifth Circuit panel issued its order denying Applicant's motion for an injunction pending an appeal. *See* Appendix C.

[8] The exhibits to Appellant's Opposed Motion for Injunction Pending Appeal are not included in Appendix K. They are, however, contained in Appendices A, B, F, G, E, and J.

## REASONS FOR GRANTING THE APPLICATION

With respect to a stay and an affirmative injunction, they may be issued by a Circuit Justice "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'n, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987). However, unlike the issuance of a stay of a lower court order, "[a] Circuit Justice's issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts' and therefore 'demands a significantly higher justification' than that required for a stay. *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J.) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J.)).

Thus, "[to] obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are "indisputably clear."' *Id.* at 1306 (quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J.). However, the Court may also issue an injunction, "based on all the circumstances of the case," without having its order "construed as an expression of the Court's view on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014). The Court may also consider "a traditional ground for certiorari," such as whether "[t]he Circuit Courts have divided on whether to enjoin the requirement." *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014).

### A. There is a Significant Possibility this Court would Grant Certiorari

The questions presented in this case are of critical importance to healthcare providers participating the Medicare program. At issue are the payments earned by providers that have delivered healthcare services to our nation's Medicare beneficiaries and the administrative process extended to them to dispute and contest the federal agency's Medicare payment suspension. The Fifth Circuit's decision in *Family Rehab.* and its progeny strongly support the conclusion that providers have a protected property interest in earned Medicare payments that are suspended and withheld to be applied towards Medicare overpayments. *See Family Rehab., Inc. v. Azar*, 886 F.3d 496 (5th Cir. 2018) (District court has jurisdiction under collateral-claim exception to hear provider's procedural due process and *ultra vires* claims); *Family Rehab., Inc. v. Azar*, No. 3:17-CV-3008-K, 2020 WL 230615 (N.D. Tex. Jan. 15, 2020), *Med-Cert Home Health Care, LLC v. Azar*, 365 F. Supp. 3d 742 (N.D. Tex. Feb. 4, 2019), *Adams EMS, Inc. v. Azar*, No. H-18-1443, 2018 WL 5264244 (S.D. Tex. Oct. 23, 2018), and *Home Health Innovations, Inc. v. Azar*, No. 5:18-CV-00601, 2018 WL 8809231 (W.D. Tex. June 18, 2018). When addressing the government's contention that providers have no property interest in Medicare payments, Judge Kinkeade asserted the "position was so ludicrous as to be specious." *Family Rehab.*, 2020 WL 230615, at *5. Nonetheless, HHS imposes a suspension without making available to the provider an appeal or right to a hearing to challenge the action. *See* 42 C.F.R. §§ 405.372 and 405.375(c). Indeed, there is an obvious high risk of deprivation when no hearing is available to challenge the

suspension. However, other circuits are at odds with this position. *See, e.g., Accident, Injury and Rehab. v. Azar*, 943 F.3d 195 (4th Cir. 2019) (Because the administrative process anticipates and accommodates potential delays in obtaining ALJ review, the due process validity of the process does not depend on the timeliness of an ALJ hearing. Escalation ensures a timely post-deprivation review). Clearly, this case addresses the serious legal question of whether a Medicare certified home health agency has a property interest in earned Medicare payments *and* if there is a high risk of deprivation when a hearing is not available to challenge the suspension action. Due to the issue's importance to Medicare providers throughout the United States, it is likely that four justices would be interested in granting certiorari to provide guidance on such a significant healthcare issue.

### B. The Violation of Abet Life's Rights is Indisputably Clear

Violation of Abet Life's rights is indisputably clear and the provider will be forced to shut down and file bankruptcy if injunctive relief is not made available to the provider. To be entitled to an injunction, a movant must show (1) a likelihood of success on the merits; (2) irreparable harm if an injunction is not granted; (3) that the issuance of an injunction will not substantially harm the other party; and (4) whether granting the injunction would serve the public interest. *Canal Authority of State of Fla. v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974). *See also Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (*Ruiz* I); *Coastal States Gas Corp. v. Dept. of Energy*, 609 F.2d 736, 737 (5th Cir. 1979); *Fortune v. Molpus*, 431 F.2d

799, 804 (5th Cir. 1970); *and Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685 (5th Cir. 1968). The injunctive relief is "preventive or protective in that it seeks to maintain the *status quo*" during the appeal. The *status quo* is the last actual, peaceable, non-contested status that preceded the pending controversy. Accordingly, this Court should order that HHS cease its suspension of the provider's payments and return those being withheld to the Applicant.[9] As shown below, Abet Life meets all of these factors and is entitled to an injunction.

### 1. The *Mathews* Factors Establish a Due Process Violation

Abet Life is likely to prevail on its underlying procedural due process claim. *See Canal Authority*, 489 F.2d at 572 (factor one). "Procedural due process protects against governmental deprivation of a liberty or property interest." *Mathews v. Eldridge*, 424 U.S. at 332. When analyzing whether a party's procedural Due Process rights have been violated, courts weigh three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirements would entail.

*Id*. at 335. (emphasis added).

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[9] This Court has long recognized that there is no particular magic in the phrase "*status quo*." The focus of injunctive relief is on the prevention of injury by a proper order, not merely on preservation of the *status quo*. If the currently existing *status quo* itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested *states quo* between the parties or by allowing the parties to take proposed action that will minimize the irreparable injury. *See Canal Authority*, 489 F.2d at 567.

### a. First *Mathews* Factor

Under the first *Mathews* factor, the Court determines whether there is a private interest that will be affected by the government's action. *See Mathews v. Eldridge*, 424 U.S. at 335. The evolving precedent in this jurisdiction holds that Medicare providers have a legitimate claim of entitlement to payment for services that are covered under the Medicare Act and actually rendered. *See, e.g., Family Rehab.*, No. 3:17-CV-3008-K, 2020 WL 230615, at *5 (N.D. Tex. Jan. 15, 2020). To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a "legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Thus, property interests are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and support claims of entitlement to those benefits. *Pers. Care Prods., Inc. v. Hawkins*, 635 F.3d 155, 158 (5th Cir. 2011) (citing *Roth*, 408 U.S. at 577). In *Med-Cert Home Health Care, LLC v. Azar*, the Honorable Judge Fish presiding in the Northern District of Texas analyzed this issue and found that "precedent makes clear that [the provider] has a valid property interest in receiving Medicare payments for services rendered." 365 F. Supp. 3d 742, 751 (N.D. Tex. 2019); *see Family Rehab.*, 2020 WL 230615, at *4 (concluding a Medicare-certified home health agency whose Medicare payments were being withheld had a property interest in the Medicare payments for

services rendered); *Adams EMS, Inc. v. Azar*, No. H-18-1443, 2018 WL 5264244, at *10 (S.D. Tex. Oct. 23, 2018) (Ambulance supplier had "a property interest in receiving and retaining the Medicare payments it has earned."). Indeed, district courts throughout the Fifth Circuit have found that providers do, in fact, have a valid property interest in earned Medicare payments. *See also Home Health Innovations, Inc. v. Azar*, No. 5:18-CV-00601, 2018 WL 8809231 (W.D. Tex. June 18, 2018) (The Court granted the TRO "finding the plaintiff had met its burden of persuasion on all four factors").

HHS has consistently argued in the *Family Rehab.* line of cases that providers have no property interest.[10] In fact, early cases are at odds with recently issued precedent holding that providers have a property interest in earned Medicare payments. Indeed, the Fifth Circuit has issued prior decisions that run contrary to *Family Rehab.* and its progeny. For example, in *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975), the Court relied on *Hilburn v. Butz*, 463 F.2d 1207 (5th Cir. 1972) to conclude there was no denial of Due Process. There, the Court distinguished the applicability of *Goldberg v. Kelly*, 397 U.S. 254 (1970), which was based on judicial notice of the fact that welfare recipients as a class would be deprived of their very means of existence while awaiting an outcome of a post-termination hearing. Thus, preventing them from seeking redress under the welfare program. In *Peterson*, the Court reasoned that the appellant had failed to show the provider had incurred any

[10] However, HHS conceded in oral argument in *Sahara* that the provider actually does have a property interest in earned Medicare payments. *Sahara Health Care, Inc. v. Azar II,* No. 18-41120 (5th Cir. Nov. 7, 2019) (Oral Argument at 21:25).

"dire consequences" due to the suspension. Obviously, this case is very different because the suspension will result in irreparable harm to the provider forcing its closure and bankruptcy.

Likewise, in the recently decided *True Health Diagnostics, LLC v. Azar*, 392 F. Supp. 3d 666 (E.D. Tex. 2019), the trial court found no Due Process violation due to suspension. The *True Health* Court found that the diagnostic laboratory failed to show it could not obtain full relief at a post-deprivation hearing. The Court also pointed out that the plaintiff sought *permanent* injunctive relief to stop the suspension of claims that were part of a previous suspension action, and it did not show that its claims are wholly collateral. Abet Life is faced with shutdown and bankruptcy as result of the suspension. But the provider only seeks *temporary* injunctive relief, i.e., until the COVID-19 emergency is lifted or until a hearing is provided to challenge the suspension action. As in *Family Rehab.*, Applicant seeks only temporary relief from the suspension until a hearing, which is quite different from a permanent reinstatement of benefits. 886 F.3d at 503-94. It is plainly collateral to the result of the hearing. *Id.*

When addressing the government's contention that providers have no property interest in Medicare payments, Judge Kinkeade asserted the "position was so ludicrous as to be specious." *Family Rehab.*, 2020 WL 230615, at *5. He stated, "[i]f there were no recognized property interest, providers would be expected to treat every patient as a charity case where reimbursement would just be a nice bonus." *Id.* He concluded that "Medicare providers would not provide

service to Medicare patients without the reasonable expectation of payment, [and] the Medicare statute constitutes an 'independent source' that 'support[s] claims of entitlement filed by Medicare providers.*" Id.* Because "the Medicare statute outlines a program for reimbursement, a provider who renders service to Medicare patients has more than a unilateral expectation." *Id.* Thus, Abet Life has a substantial interest in the receipt of Medicare payments for covered services it has rendered that ultimately affects its private interest in the survival of the business." *Id*. at *4. Clearly, Applicant has a property interest in suspended Medicare payments under 42 C.F.R. § 405.371(a)(2).

Importantly, the suspension withholds from the provider *approved* Medicare payments that are "applied to reduce or liquidate any overpayment." 42 C.F.R. § 405.372(e). *See also* 42 C.F.R. § 405.370 (definition of "suspension of payment"). This is distinguishable from the situation where a State imposes a "payment hold" on current claims because of "prima facie evidence of fraud" on past claims. *See Pers. Care Prods., Inc. v. Hawkins*, 635 F.3d 155, 157 (5th Cir. 2011). HHS contends *Personal Care Products* bars injunctive relief and has argued that the provider has no property interest in its earned Medicare payments because of an "allegation of fraud" (Doc. 00515516371, at 15-17). Under a Medicaid payment hold, the state inspector general may impose a "payment hold" on payments of "future claims" submitted for reimbursement. 1 Tex. Admin. Code § 371.1703. In other words, it is a hold on payment of future claims when there is "prima facie evidence" of fraud – the future payments are tainted. Thus, the Fifth Circuit held in *Personal*

*Care Products* that the Commission's investigation of the provider found prima facie evidence of fraud, and "Texas law" gave the provider "no claim of entitlement" to its future Medicaid reimbursements. *Id*. at 159. Of course, no person has a legitimate claim of entitlement to property that is not theirs.

However, a Medicare payment suspension is very different because the government is actually withholding "approved Medicare payments." 42 C.F.R. § 405.370(a) (definition of suspension). These payments are not tainted by fraud. Suspension is akin to seizing the provider's money owed for services rendered. Obviously, if these monies were paid into a bank account, the provider would have a protected property interest. Indeed, no one would dispute that providers have a property interest in their bank accounts that requires some measure of protection under the due process clause. *See, e.g., Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980). Clearly, the result should be the same with respect to suspended payments and the money paid for services rendered. Governmental deprivation of such an interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing. *See Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell, J., concurring). One can only hope our constitutional rights are not so tenuous as to be lost forever because of a mere allegation.

**b. Second *Mathews* Factor**

Under the second *Mathews* factor, the Court determines whether the procedures used by HHS protect the private interest. *Mathews v. Eldridge*, 424 U.S. at 335. *See also Family Rehab.*, 2020 WL 230615, at *8. Not only has the

provider not been extended an administrative appeal or otherwise provided a hearing to challenge the suspension, Applicant's Medicare payments are suspended for an *indefinite* period because there is no established time frame for resolving the investigation.[11] Judge Kinkeade recognized that a hearing is the essential step to "decreasing the risk of erroneous deprivation." *See Family Rehab.*, 2020 WL 230615, at *9. Thus, it cannot be disputed there is a high risk that Applicant will be erroneously deprived of its property interest in Medicare payments suspended in accordance with 42 C.F.R. § 405.371(a).

Moreover, the opportunity for rebuttal does not satisfy the requirements for "some kind of a hearing." *See* 42 C.F.R. § 405.372(b). *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). While the regulations instruct providers have an opportunity for rebuttal and that they may submit a "statement (to include any pertinent information) as to why" the suspension should not be put into effect, *see* 42 C.F.R. § 405.374(b), they also are informed the determination is "not an initial determination and not appealable." *See* 42 C.F.R. § 405.375(c).

Indeed, the rebuttal process is nothing more than a unilateral review of the suspension. Judge Friendly's influential article "Some Kind of Hearing," created a list of basic due process rights. *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975). The opportunity for rebuttal fails to satisfy *almost all*

[11] Under the regulations, good cause not to continue to suspend payments is deemed to exist if a payment suspension has been in effect for 18 months and there has not been a resolution of the investigation, but Respondent may extend the suspension beyond that point when the case has been referred to and sanctions are being considered by the OIG *or* DOJ has an ongoing investigation. *See* 42 C.F.R. §§ 405.371(b)(3)(i) and 405.371(b)(3)(ii).

of these. The rebuttal process is not before an unbiased tribunal; there is no right to know the opposing evidence; there is no right to cross examine; the decision is not based only on the evidence presented; and the decision is not reviewable. The provider is essentially given an opportunity to complain, but it does so to CMS who imposed the adverse action, and though the agency considers the rebuttal, it does so absent any standard of review or without extending to the provider a right to a hearing.

While HHS may argue a hearing is made available to the provider, it only is offered *after* an overpayment has been determined. *See* 42 U.S.C. § 1395ff; 42 C.F.R. Part 405, Subpart I. In other words, the provider must wait until the completion of the investigation, which lasts for an *indefinite* period of time, and the issuance of an overpayment determination, that is, if one *ever* is issued. It is not uncommon for such investigations to take more than a year or longer to complete before the overpayment determination is made. Only then can the provider pursue an administrative appeal of *the overpayment*.[12] As this Court is well aware, the provider may then have to wait for as long as five years for a hearing, and while the government is recouping its Medicare payments. *See Family Rehab.*, 886 F.3d at 500. Under the agency's scheme, the Medicare payment suspension essentially escapes *any* meaningful review other than the unilateral review of the rebuttal.

[12] Ordinarily, the suspension is lifted once an overpayment is determined. Then the provider must go through the administrative process, where only the initial two levels of appeal are protected from recoupment. Once the ALJ hearing is requested, the provider goes back into recoupment, or must begin repaying the debt through an approved repayment plan. It often takes 5 years for the ALJ hearing to take place after it is requested. The suspension, however, is never reviewed in the administrative process; only the denied claims are addressed.

Clearly, there is a high risk of deprivation under the rebuttal process used by HHS that is void of the most basic Due Process rights as to the suspension of Abet Life's Medicare earned payments.

### c. Third *Mathews* Factor

The third *Mathews* factor weighs the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Mathews v. Eldridge*, 424 U.S. at 335. HHS cannot hide behind the contention it has an interest in protecting the Medicare Trust Funds and administering it efficiently. While the government may contend it has a right to suspend payments because of a "credible allegation of fraud," it does not have a right to make such allegations and deny the provider Due Process and a hearing to challenge the adverse action. Because the suspension would force the provider's closure prior to a hearing, Applicant's interest is greater than the government's interest in protecting the Medicare Trust Fund and administering it efficiently. Indeed, the quandary that HHS finds itself in arises from *inefficient* administration. *See Family Rehab*., 2020 WL 230615, at *10 (Because recoupment and collection of an alleged overpayment would shut down the provider prior to a hearing). Clearly, HHS's hypothetical risk of loss does not outweigh Abet Life's ongoing deprivation of its property interest without Due Process. *See Family Rehab*., 2020 WL 230615, at *11 (Going out of business outweighs the burden of delayed recoupment).

Likewise, the patients at Abet Life have a constitutional Due Process right (consistent with principles of equal protection) to access safe and reliable

services under the federal Medicare program.[13] *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process). In fact, it has been a longstanding core value of Medicare that the program should provide equal access to appropriate and high-quality health services for all beneficiaries, including those with chronic, long-term, and mental health conditions.[14] Indeed, this Court observed many years ago that "medical care is as much a basic necessity of life to an indigent as welfare assistance." *See Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 259 (1974). HHS discriminates against the class of Medicare beneficiaries entitled to medically necessary home health services by imposing suspension under circumstances that place in jeopardy their health and safety and will deny to them access to essential healthcare. *Id*. *See also Spears Declaration*, ¶¶ 15-18.

[13] A patient cannot secure Medicare home health services without the aid of a certified provider, and a Medicare beneficiary cannot secure home care without the provider being paid by the Medicare program. Clearly, a patient's right to access safe and reliable home health care under the federal Medicare program is at stake here. Moreover, the patient's constitutional right to access is one in which the provider is intimately involved. *See Singleton v. Wulff*, 428 U.S. 106 (1976). Therefore, Applicant is uniquely qualified to litigate the constitutionality of the government's interference with, or discrimination against, such access, and the provider appropriately asserts the rights of beneficiaries against governmental interference with access to home care.

[14] *See* www.medicareadvocacy.org/medicare-info/medicare-and-health-care-reform/

*See* Appendix G. Abet Life has shown the violation of its rights is indisputably clear.

### C. The Balancing of the Equities Strongly Favors an Injunction

#### 1. Irreparable Injury without Injunctive Relief

Imminent and irreparable injury will occur if this Court does not grant Abet Life's motion for injunction and order the requisite injunctive relief. *See Canal Authority*, 489 F.2d at 572 (factor two). To establish irreparable injury, Applicant must show "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Family Rehab.*, No. 3:17-CV-3008-K, 2018 WL 3155911 (N.D. Tex. June 28, 2018), at *6 (quotation omitted). The suspension will force Applicant to shut down its business and file bankruptcy. *Oonnoonny Declaration* ¶ 16. *See* Appendix F. Going out of business is an irreparable injury. *Family Rehab.*, 886 F.3d. at 504. ("The combined threats of going out business and disruption to Medicare patients are sufficient for irreparable injury."). Likewise, the suspension jeopardizes the patients' access to home health services provided by Applicant, and doing so in the midst of the COVID-19 emergency poses a danger to their life or health. *Spears Declaration*, ¶¶ 15-18. *See* Appendix G. Clearly, there is irreparable injury if the injunction is denied.

#### 2. The Balancing of Hardships Sharply Favors Applicant

The threatened injury faced by Abet Life outweighs the harm that would be sustained by HHS if the injunction is not granted. *See Canal Authority*, 489 F.2d

at 572 (factor three). Without injunctive relief, Applicant will be forced to shutter its doors and close down its business, and the Medicare beneficiaries relying on the provider must seek to obtain essential home care services elsewhere during the COVID-19 emergency when access to such services is uncertain during this crisis. On the other hand, HHS will not suffer harm from granting the injunctive relief sought because the government will *always* have the opportunity to later suspend or otherwise collect Medicare payments for services *if an overpayment is ultimately determined*. *See Family Rehab.*, 2018 WL 3155911, at *7; *see Med-Cert*, 365 F. Supp. 3d at 757. The government will only be required to do what it is otherwise obligated to do under law, pay for the current claims of Medicare beneficiaries. Indeed, the *only* harm posed here is to Abet Life as it will go out of business and file bankruptcy if the injunction is denied. This harm will have a cascading effect. Employees will lose their jobs. Medicare beneficiaries that rely on the provider will have their essential healthcare services disrupted in the midst of the pandemic.

**3. An Injunction is in the Public Interest**

Issuance of the injunction would not adversely affect the public interest. *See Canal Authority*, 489 F.2d at 572 (factor four). The quality of home care provided by Abet Life is not at issue, only the reimbursement for the home health services. No public interest would be adversely affected by granting injunctive relief. If anything, the public would benefit from continued access to Applicant's services. *See Family Rehab.*, 2020 WL 230615, at *11; *Med-Cert*, 365 F. Supp. 3d

at 757 (Not disserve the public interest by conflicting with Congress' statutory scheme).[15] Clearly, granting the injunction does not disserve the public interest.

Without doubt, the latter three factors are heavily tilted in Abet Life's favor, and especially in light of *Family Rehab.*, *Med-Cert*, *Adams EMS*, and *Home Health Innovations,* precedent where trial courts have considered essentially the same issues and held in favor of the provider. The provider has established there is irreparable injury if the injunction is denied. *See* Part C, 1. It has established that the injunction would not substantially harm Respondent. *See* Part C, 2. Applicant has also established that granting the injunction does not disserve the public interest. *See* Part C, 3. Thus, Abet Life has shown that the balance of the equities weighs heavily in favor of granting the injunction. Where, as here, the denial of an injunction "will utterly destroy the *status quo*," irreparably harming the provider, but the granting of the injunction will cause relatively slight harm to the government, Applicant need not show an absolute probability of success in order to be entitled to an injunction. *See Ruiz*, 650 F.2d at 565 (citing *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979)). *See also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Clearly, balancing of the equities strongly favors an injunction.

[15] Applicant should not be required to post a bond because Respondent is obligated to pay for the home health services of the Medicare beneficiaries on service with the provider. *See Family Rehab.*, 2018 WL 3155911, at *7 (In its discretion, the Court waived the bond requirement upon issuance of preliminary injunction).

## CONCLUSION

For the reasons stated in this application, Abet Life meets all of the requirements for an injunction in this case, and public interest is best served by this Court granting the application.

Respectfully submitted,

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