No. 24-_____

IN THE

Supreme Court of the United States

ESTATE OF JUDITH BROOK, and ADAM BROOK,

Petitioners,

—v.—

JOSEPH RUOTOLO, ESQ., IRA SALZMAN, ESQ., DIANA ROSENTHAL, ESQ., FELICE WECHSLER, ESQ., MENTAL HYGIENE LEGAL SERVICE, KENNETH BAROCAS, ESQ., IAN SHAINBROWN, ESQ., THE SHAINBROWN FIRM, L.L.C., KARL HUTH, ESQ., HUTH REYNOLDS, L.L.P., HOWARD MUSER, ALLEGIANT HOME CARE, L.L.C., ANN REEN, R.N., MARY MANNING WALSH NURSING-HOME, ALLEN LOGERQUIST, M.D., FLORENCE PUA, M.D., TOWANA MOE, R.N., JOHN MICHAEL NATIVIDAD, ARTHUR AKPEROV, DORIS BERMUDEZ, NAVJOT SEPLA, MARIE SWEET MINGOA, JOHN DOES #1–10, MONITOR/ME, L.L.C., JASON KUBERT, M.D., ANTHONY BACCHI, M.D., and ERIC NOWAKOWSKI, R.P.A.-C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a court-appointed guardian for an adult, acting under color of state law, is immune from liability under 42 USC §1983 for forcing his ward into a nursing-home against her will without authority to do so.

2. Whether a court-appointed attorney for an "alleged incapacitated person", employed by the State and acting under color of state law, is immune from liability under 42 USC §1983 for her *intentional acts* intended to have her client deemed incapacitated against her client's wishes, and to have the power-of-attorney held by her client's son annulled, thereby allowing the court to strip her client of all her civil and constitutional rights and property against her client's wishes.

3. Whether a court-appointed guardian, acting under color of state law, is immune from liability under 42 USC §1983 for orchestrating a scheme to procure a guardianship by fraud.

"America's guardianship system was designed as a last resort to be used only in the rare and drastic event that someone is totally incapacitated by mental or physical disability. In those cases, conscientious guardians can provide vital support, often in complex and distressing circumstances. … [T]he system has grown into a vast, lucrative, and poorly regulated industry that has subsumed more than a million people, many of whom insist they are capable of making their own decisions, and placed them at risk of abuse, theft, and even death." Blake, H. *et al.*, 2022.

"Beyond Britney: Abuse, Exploitation, and Death Inside America's Guardianship Industry." *BuzzFeed News* (Sept. 17, 2021), in *Best American Magazine Writing 2022* (pp. 277–298). Columbia Press.

The case at bar is an egregious, yet in many ways all too common, example of how guardianship courts wrongfully deprive citizens of their civil and constitutional rights, their property, and, as here, their lives. The Complaint alleges that during the proceeding under New York State's Mental Hygiene Law Art. 81 to determine whether decedent Dr. Judith Brook should have a permanent guardian appointed, the court-appointed temporary guardian, Joseph Ruotolo, engaged in numerous acts of misconduct that led to Judith's premature death and damage to Judith's Estate. *Inter alia*, Ruotolo forced Judith into a nursing-home against her will without a court order required under New York Mental Hygiene Law Art. 81 for him to do so, and engaged in unauthorized financial transactions, intended to run up his commissions, that caused hundreds-of-thousands of dollars of financial damage to Judith's Estate.

Ruotolo's scheme was facilitated by Judith's court-appointed attorney Diana Rosenthal's intentional acts intended to have the guardianship court find Judith incapacitated and annul her son Dr. Adam Brook's power-of-attorney and healthcare-proxy. Rosenthal waived Judith's appearance at the guardianship trial even though Judith stated, in an audio-recorded statement, that she wanted the trial postponed so that she could be present (Judith had been discharged from the hospital the night before trial and was too tired to go to court). Rosenthal also successfully objected to Adam's attorney James Kaplan's proffer of documentary evidence that Adam had diligently paid $235,316 for homecare-services for his mother over the

preceding 7 months, evidence which refuted Ruotolo's perjured testimony that Adam was two months in arrears for payments for homecare-services.

Upon being forced into the nursing-home, Judith was not permitted to walk to the bathroom but was forced to lie in her own stool 24 hours a day. The nursing-home did not administer to Judith any of her medications, including pantoprazole, which her gastro-enterologist Dr. SriHari Mahadev had prescribed to prevent gastrointestinal bleeding. When Judith then developed gastrointestinal bleeding, she was not taken to a hospital but allowed to bleed until she fainted. CPR was initiated, causing a rib fracture that caused pneumonia and Judith's premature death only 71 days after the guardianship court had declared Judith "incapacitated", annulled her son Dr. Adam Brook's power-of-attorney and healthcare-proxy, and expanded Ruotolo's powers as guardian.

Prior to the decision of the Court of Appeals for the Second Circuit here appealed from, the Courts of Appeals for the Second and Fourth Circuits allowed suit against state court-appointed guardians for adults under 42 USC §1983, while the Court of Appeals for the Ninth Circuit deemed state court-appointed guardians for adults not to be state actors. *See Gross v. Rell*, 695 F.3d 211 (2d Cir. 2012); *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986); *cf. Taylor v. First Wyoming Bank, NA*, 707 F.2d 388 (9th Cir. 1983).

In the case at bar, the district court dismissed the action on grounds that the guardianship court-appointed guardian was not a state actor and hence the district court lacked requisite federal jurisdiction.

The Court of Appeals for the Second Circuit found that the district court erred in concluding that it lacked subject matter jurisdiction over petitioner's

§1983 claims, but then held that a guardian forcing his elderly ward into a nursing-home against her will was a "state procedural violation" that did not give rise to a §1983 claim. For this legal conclusion, the Court of Appeals cited *Zahra v. Town of Southold*, 48 F.3d 674, 682 (2nd Cir. 1995), a case about revocation of a building permit that had nothing to do with forcing anyone into an institution.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is Adam Brook, M.D., Ph.D. in his capacity as executor of the estate of Dr. Judith Brook and in his personal capacity.

Respondents (defendants-appellees below) are Joseph Ruotolo, Esq., Ira Salzman, Esq., Diana Rosenthal, Esq., Felice Wechsler, Esq., Mental Hygiene Legal Service, Kenneth Barocas, Esq., Ian Shainbrown, Esq., The Shainbrown Firm, L.L.C., Karl Huth, Esq., Huth Reynolds, L.L.P., Howard Muser, Allegiant Home Care, L.L.C., Ann Reen, R.N., Mary Manning Walsh Nursing-home, Allen Logerquist, M.D., Florence Pua, M.D., Towana Moe, R.N., John Michael Natividad, Arthur Akperov, Doris Bermudez, Navjot Sepla, Marie Sweet Mingoa, John Does #1–10, Monitor/Me, L.L.C., Jason Kubert, M.D., Anthony Bacchi, M.D., and Eric Nowakowski, R.P.A.-C.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Brook v. Ruotolo, Nos. 23-1339(L), 23-7446(Con.), judgment entered on August 23, 2024.

Brook v. Ruotolo, Nos. 22-cv-6173 (ER), judgment entered August 22, 2023.

Brook v. Monitor/Me, LLC, 23-cv-1319 (ER), judgment entered August 22, 2023.

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PETITION FOR WRIT OF CERTIORARI

Until the Second Circuit's decision in the case at bar, what most constrained court-appointed guardians from abusing their positions was "the salutary effects that the threat of liability can have", *Gross v. Rell*, 40 A.3d 240, 250 (Conn.Sup.Ct.2012) (quoting earlier authority, upon referral from the Court of Appeals for the Second Circuit to answer a certified question). The threat of monetary damages in suits in federal court for violation of constitutional rights under §1983, away from the state courts who appointed the abusive guardians, was a crucial curb on court appointees' misconduct. *Gross v. Rell*, 695 F.3d 211 (2nd Cir. 2012)

After all, the Ku Klux Klan Act, codified as 42 USC §1983, was enacted to give every American the right to sue in federal court for deprivation of constitutional rights because state courts might be reluctant to impose justice on politically connected state-appointed officials. *Monroe v. Pape*, 365 U.S. 167, 176–177 (1961)

The Second Circuit's decision in the case at bar conflicts with Supreme Court decisions that give Americans the right to sue individuals acting under color of state law when they abuse their positions to force individuals into institutions. *See Zinermon v. Burch*, 494 U.S. 113 (1990). In addition, the Second Circuit's decision conflicts with prior Second Circuit precedent (*Gross*, 695 F.3d 211) that a court-appointed guardian is suable under §1983 for conspiring with others to wrongfully obtain guardianship of a ward who did not need a guardian and to force the ward into a nursing-home against her will.

Moreover, the Second Circuit's decision presents a question of exceptional importance because it conflicts

with the Fourth Circuit's authoritative decision that court-appointed guardians for adults are suable under §1983 (*Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir.1986)) and will allow unscrupulous guardians nationwide to wrongfully deprive their wards of their constitutional rights.

The consequences of the Second Circuit's decision are not theoretical.

The decision, that court-appointed guardians are not suable in federal court under §1983 when they force their wards into nursing-homes, will allow unscrupulous guardians to dump their elderly wards in nursing-homes against their will—as happened to decedent Dr. Judith Brook. As the *BuzzFeed News* series, cited *supra*, makes clear, unscrupulous guardians wrongfully forcing people adjudicated incompetent into institutions, when such people do not need or want institutionalization, is a widespread problem in many states.

OPINIONS BELOW

The Second Circuit's opinion is *Brook v. Ruotolo*, No. 23-1339 (2nd Cir. Aug. 23, 2024), reproduced at App.3–15. The district court's opinion is *Brook v. Ruotolo*, No. 22-cv-6173 (S.D.N.Y. Aug. 21, 2023), reproduced at App.18–41.

JURISDICTION

The Second Circuit issued its opinion on August 23, 2024, and denied petitioner's petition for rehearing and rehearing *en banc* on October 2, 2024. This Court has jurisdiction under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant sections of Art. 81 of the New York Mental Hygiene Law and its Law Revision Commission Commentary are reproduced at App.98–116.

STATEMENT OF THE CASE

1. Procedural posture.

This petition comes to the Court after the Second Circuit decided that the complaint should be dismissed under Fed.R.Civ.P. Rule 12(b)(6). (App.8–9) Accordingly, at this stage in the litigation, the complaint's factual allegations must be accepted as true. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2004–2005 (2017) (*per curiam*)

2. Factual background.

A. Decedent Dr. Judith Brook's brother Howard Muser filed a petition for guardianship in May 2019.

On May 9, 2019, Judith's younger brother, Howard Muser, and his son-in-law/attorney Ian Shainbrown, filed a petition to appoint Muser as Judith's guardian and to void Judith's son Dr. Adam Brook's power-of-attorney and healthcare-proxy. The complaint alleges that Howard's motive was to rewrite Judith's will to favor his children, including Shainbrown's wife Ilyse Muser, at the expense of Judith's son Adam and Judith's young granddaughters Juliette and Cassie. (App.43–44, Complaint ¶8)

At the time Muser filed the petition, Judith was an inpatient in the Riverside Rehab rehabilitation center, and Adam and Riverside social worker Tara Diamond

were arranging for home health-aides in preparation for Judith's discharge home. (App.47, Complaint ¶106) But Muser's petition alleged, falsely, that Adam was refusing to arrange for homecare-services for his mother. Without waiting for Judith or Adam's answer to the initial papers, on May 28, 2019, the guardianship court appointed the court's favorite appointee[1] Joseph Ruotolo, Esq. to be Judith's temporary guardian with power to arrange homecare-services. (App.46–47, Complaint ¶95) Ruotolo is a disgraced[2] ex-cop.

B. Ruotolo manufactured a phony payment controversy in August 2019.

Ruotolo chose his favorite homecare agency, Allegiant Home Care, to provide homecare-services for Judith. Ruotolo insisted that Adam provide Allegiant an unlimited credit-card authorization. (App.49, Complaint ¶188) Adam did not receive any invoices for Judith's homecare-services from Allegiant in June or July 2019. (App.57–60, Complaint ¶319)

Adam received the first two invoices on August 19, 2019; one of these invoices had a "Due Date" of August 9, 2019, and the other had a "Due Date" of August 17, 2019. The invoices arrived in an envelope

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[1] The guardianship judge appointed Ruotolo to positions in her court 21 times in the preceding two calendar-years 2018–2019 in violation of the part 36 Rules of the Chief Judge of the New York State courts. (App.47, Complaint ¶134) The part 36 Rules are intended to prevent cronyism and corruption.

[2] Ruotolo was found guilty of police brutality multiple times in New York Police Department trials, including for repeatedly pepper-spraying a handcuffed, elderly, African American civil servant beneath his glasses, who was not resisting him. (App.45–46, Complaint ¶¶27–28)

postmarked August 13, 2019 (*i.e.*, the first invoice was "overdue" even before Allegiant mailed the invoice to Adam!). (App.57–60, 71–72, Complaint ¶¶319–320, 341–342) Allegiant successfully charged Judith's credit card for these invoices on August 16, 2019. (App.66–68, Complaint ¶333)

On August 23, 2019, at 11:22 AM, Ruotolo emailed Adam, copying the court, the court-evaluator, and all parties to present a false "emergency":

> Per the home care agency, ***service will discontinue due to a two-month outstanding invoice*** owed for services to your mother. … It is imperative that you correct this error today, before 1 p.m., for the home care services to remain in place over the weekend. … Please provide to the undersigned Dr. Judith Brook's working credit card/bank routing number and checking account number and/or debit card forthwith, which I will forward to the home care agency. (App.51–52, Complaint ¶305) (Emphasis in original.)

But there was no "two-month outstanding invoice". (App.52, Complaint ¶306) That Ruotolo gave Adam 98 minutes to provide Ruotolo with "Dr. Judith Brook's working credit card/bank routing number and checking account number and/or debit card", without indicating how much was owed, is strong evidence that Ruotolo and Allegiant were manufacturing grounds for the guardianship court to annul Adam's power-of-attorney and healthcare-proxy. (App.52–53, Complaint ¶307)

The Court is referred to App.51–73, Complaint ¶¶305–346, for details of how Ruotolo manufactured this controversy and deceived the guardianship court

into believing that Adam was willfully refusing to pay for homecare-services for his mother.

C. Ruotolo lied again to the guardianship court on January 3, 2020, claiming falsely that Adam did not pay invoices for homecare-services in November or December 2019.

At the January 3, 2020-final trial date, conducted in Judith's absence notwithstanding Judith's recorded request that she wanted the trial postponed so that she could be present, Ruotolo testified falsely that Adam had not been paying Allegiant's invoices for Judith's homecare-services since "mid-November", and that this could result in Allegiant not providing homecare-services. (App.79–80, Complaint ¶421)

Ruotolo knew this was false. Ruotolo's own December 11, 2019-email with an attached spreadsheet from Allegiant Home Care documented Adam's timely payments of $221,282.68 over a 6-month period. (App.81–83, Complaint ¶¶427–430) The Second Circuit's Decision, p.12, "concludes" that some of Adam's payments were made after the due date. But the complaint alleges that Allegiant sometimes would not provide invoices until after the due date (App.71, Complaint ¶341) and that Allegiant sent invoices to Ruotolo, not to Adam, which caused delay. (App.78–79, Complaint ¶419) It is uncontroverted that Adam paid all invoices within a few days of receiving them. (App.80–81, Complaint ¶424)

D. On January 17, 2020, Ruotolo forced Judith into the nursing-home against her will and forced her to stay there, without authority to do so. (App.86, Complaint ¶468)

The complaint alleges that the nursing-home's medical records and Ruotolo's own timesheet document that Judith repeatedly asked to be sent home but was not permitted to do so. (App.86–89, Complaint ¶¶501, 505–507, 511–516)

In the nursing-home Judith was forced to lie in her own stool 24 hours-a-day and was not given any of her medications, including pantoprazole, which her gastroenterologist Dr. SriHari Mahadev had prescribed to prevent gastrointestinal bleeding. (App.86, 89, Complaint ¶¶476, 525) Ruotolo directed nursing-home staff not to discuss Judith Brook's medical condition or care with Dr. Adam Brook. (App.86–87, Complaint ¶501) Ruotolo ignored Adam's repeated emails that Judith needed to be seen urgently by a medical professional. (App.87–88, Complaint ¶¶509–510)

When, predictably, Judith developed gastrointestinal bleeding, she was not taken to a hospital but allowed to exsanguinate until she fainted. (App.86, Complaint ¶497) CPR was commenced, causing a rib fracture, which led to pneumonia and Judith's premature death on March 15, 2020, 71 days after the guardianship court annulled Adam's power-of-attorney and healthcare-proxy and appointed Ruotolo guardian with expanded powers. (App.89, 91, Complaint ¶¶547–548, 601)

E. Ruotolo abused his authority as court-appointed guardian by unauthorized financial transactions, intended to increase his commissions as guardian, which caused hundreds-of-thousands of dollars of damage to Judith's Estate.

On March 11, 2020, as Judith lay dying in a coma with a breathing-tube down her throat, Ruotolo, in contravention of guardianship rules, transferred $2,788,100 in securities and cash from Judith's Fidelity accounts with named beneficiaries to accounts under Ruotolo's control at UBS without named beneficiaries. (App.95, Complaint ¶606)

Ruotolo's motive for this transfer was to increase the "changes to principal" on his fee-request by $2,788,100, from which he calculated his commission (request for commission of $55,952.04 from "changes to principal" alone, among other requests for commissions). (App.97, Complaint ¶612)

According to forensic accountant Dr. Eric Kreuter, these transfers damaged Judith's estate plan because had the beneficiaries not been removed, they would have inherited these securities immediately. By passing to the estate, these securities would have been inherited by Judith's heirs according to the Will's distribution schedule very slowly, *i.e.*, it would have taken Adam 34 years to inherit his share, and Juliette and Cassie would never inherit their full share. (App.95–97, Complaint ¶610)

It cost Judith's estate $63,417 as of March 2021 in legal fees to recover these improperly transferred funds. (App.97, Complaint ¶611)

In addition, Ruotolo sold appreciated Apple stock for $379,747.36 but had no legitimate reason to do so

because there was $138,836.94 in cash available in Judith's bank accounts, and Judith, being hospitalized and having full insurance coverage, had minimal monthly expenses. (App.91–95, Complaint ¶¶602–605)

Dr. Kreuter calculated that these stock sales had a "negative impact on the estate of Judith Brook in the amount of $62,873.22 (additional taxes paid that could have been avoided) and $174,032.93 to $184,909.99 (loss of appreciation in stock value)." (App.92–95, Complaint ¶605)

Ruotolo's motive for these sales of Judith's securities was to increase his commissions.

Ruotolo's fee-request to the court listed the Apple stock sales on "SCHEDULE B CHANGES TO PRINCIPAL"; the Apple stock sales increased the "changes to principal" by $379,747.36, from which Ruotolo calculated a commission with the New York Surrogate Court Practice Act sliding-scale.

F. Judith's court-appointed attorney Diana Rosenthal's intentional efforts to oppose Judith's wishes that she not be declared incapacitated and that Adam's power-of-attorney and healthcare-proxy not be annulled.

Judith's guardianship court-appointed attorney Rosenthal waived Judith's appearance at the January 3, 2020-trial even though Rosenthal never discussed waiver with Judith, even though Rosenthal was repeatedly told Judith did not want to waive her appearance and wanted the trial postponed (Judith had only been discharged home from the hospital the night of January 2, 2020 and did not feel well enough

to come to court on January 3), and even though Rosenthal was present when Adam played an audio-recording of his mother in which Judith said she "absolutely" wanted the trial postponed so that she could be present. (App.76–77, Complaint ¶¶397–398)

Moreover, Rosenthal inexplicably objected to Adam's attorney James Kaplan's proffer of evidence that Adam paid $235,316 for homecare-services over the preceding 7-month period. Rosenthal objected in order to prevent the court from considering this evidence that Adam was diligent in paying for homecare-services. (App.83, Complaint ¶431)

Thus, Rosenthal failed to comply with her duties to Judith under New York Mental Hygiene Law §81.10 and its Law Revision Commission comments, which expressly state that the role of the court-appointed attorney (as opposed to the court-appointed court-evaluator) is to advocate for the alleged incapacitated person's wishes. App.47–49, Complaint ¶¶162–165; *see Matter of St. Luke's-Roosevelt Hosp.*, 159 Misc.2d 932, 942 (Sup.Ct. 1993) ("The statute wisely recognizes that in many situations the person assigned to investigate and report to the court [the court-appointed court-evaluator] may have conclusions or recommendations at odds with the wishes of the AIP [alleged incapacitated person], and acknowledges the AIP's right to have those wishes and desires vigorously advocated by counsel whose sole loyalty is to the AIP.")

3. Proceedings below.

a. Adam is the executor of Judith's estate and filed suit against Ruotolo and others in the S.D.N.Y. on July 20, 2022, for violation of his mother's and his constitutional rights under color of law, and for claims arising under state law. The district court dismissed

the complaint holding that "no federal question jurisdiction exists because no defendant is a state actor either by virtue of their own authority and actions or through the existence of a conspiracy with state actors, and there is thus no federal claim on which to base original subject matter jurisdiction." *Brook v. Ruotolo*, No. 22-cv-6173 (S.D.N.Y. Aug. 21, 2023)

b. The Court of Appeals affirmed on other grounds. The court first decided that "the district court erred in concluding that it lacked subject matter jurisdiction over Adam's section 1983 claims. … Adam's section 1983 claims were clearly based on federal law." *Brook v. Ruotolo*, No. 23-1339 (2nd Cir. Aug. 23, 2024)

However, with regard to the claim that Ruotolo forced Judith into a nursing-home against her will and did not let her leave, notwithstanding that Ruotolo lacked a court order or any authority to do so, the Court of Appeals then held that "Adam does not explain how the alleged state procedural violation amounted to a violation of Judith's federal constitutional rights", and cited *Zahra*, 48 F.3d 674, a case about revocation of a building permit.

The Court of Appeals did not understand that a plaintiff may bring suit under §1983 for a state actor's violation of her rights, such as the right of a person to be secure in her person against unreasonable seizure. *Zinermon*, 494 U.S. at 125 Forcing an individual into a nursing-home against her will, without authority to do so, is an unreasonable seizure.

Nor did the Court of Appeals understand Ruotolo's schemes to manufacture a phony controversy that Adam purportedly was not paying homecare-invoices for his mother, when in fact Adam paid $235,316 for homecare-services for his mother over a 7-month

period. Every single delay in payment was due to the homecare-agency providing the invoices to Ruotolo, not to Adam, and, as detailed in the Complaint, Adam not being sent invoices. (App.53, Complaint ¶308) A state actor executing a fraudulent scheme to have a person declared incapacitated and to annul an existing power-of-attorney and healthcare-proxy, so that he could be appointed to the lucrative position of guardian with expanded powers, is a serious violation of the victims' constitutional rights.

Nor did the Court of Appeals address Judith's court-appointed attorney Rosenthal's *intentional* wrongful actions and inactions intended to have Judith declared incapacitated and Adam's power-of-attorney annulled, such as Rosenthal's waiving Judith's appearance at the January 3, 2020-trial even though Rosenthal never discussed such waiver with Judith and even though (as the audio-recording proves) Judith did not want her appearance waived; and such as Rosenthal's successful objection to Adam's attorney Kaplan's proffer of documentary evidence that Adam had paid $235,316 for homecare-services for his mother over the preceding 7-month period. This too was a serious violation of Judith's constitutional rights. The right to counsel means the right to counsel who will advocate for the party's wishes, not against them. *Tower v. Glover*, 467 U.S. 914 (1984)

REASONS FOR GRANTING THE PETITION

The "Beyond Brittney" *BuzzFeed News* series, cited *supra*, documents a nationwide crisis of guardianship courts depriving elderly individuals of their civil and constitutional rights, and vacating power-of-attorneys held by their close relatives, without due process of law:

In local courts across the country—often woefully unfit for the sweeping power they command—guardians, lawyers, and expert witnesses appear frequently before the same judges in an established network of overlapping financial and professional interests. They are often paid from the estate of the person whose freedom is on the line, creating powerful incentives to form guardianships and keep them in place.

"The judge knows the lawyers, the lawyers know each other," said J. Ronald Denman, a former state prosecutor and Florida lawyer who has contested dozens of guardianships over the past decade. "The amount of abuse is crazy. You're going against a rigged system."

Without being convicted of any crime, those declared incapacitated face some of the most severe measures that the courts can take against any US citizen. Most freedoms articulated in the UN Universal Declaration of Human Rights are denied to people under full guardianship: They can lose their rights to vote, marry, start a family, decide where they live, consent to medical treatment, spend their money, seek employment, or own property.

Thousands of professional guardians, lawyers, and corporations now hold sway over assets totaling tens of billions of dollars. Some guardians have hundreds of people under their control. And despite the public perception that guardianship is a protective measure for older adults nearing death, the system traps huge numbers of young people.

The case at bar is a paradigm of abuse of the guardianship system by a professional guardian and other court-appointees.

The guardianship proceeding was contaminated by numerous egregious violations of due process, including Judith's court-appointed attorney waiving Judith's appearance at trial, against Judith's wishes.

Upon being appointed guardian by the state guardianship court and acting under color of state Mental Hygiene Law Article 81, Ruotolo promptly dumped Judith in a nursing-home against her will, where she was forced to lie in her own stool 24 hours-a-day and was not administered any of her medications, including pantoprazole, which prevents gastrointestinal bleeding. When Judith then developed gastrointestinal bleeding, she was not taken to a hospital but allowed to bleed until she fainted. CPR was initiated, causing a rib fracture, which led to pneumonia and Judith's premature death.

Meanwhile Ruotolo, in his effort to run up his commissions, engaged in financial transactions with Judith's property that he lacked authority to make, causing hundreds-of-thousands of dollars of damage to Judith's Estate.

Now that the Court of Appeals has removed the threat of liability in federal court, unscrupulous guardians will dump their wards in nursing-homes against their wills and without authority to do so with impunity.

The Court of Appeals' decision will be understood as meaning that court-appointed guardians cannot be sued under §1983. It is thus a very dangerous decision that will have serious consequences for citizens subjected to guardianship proceedings, and citizens

who have been judicially declared incompetent. Moreover, the Court of Appeals' decision is built on an erroneous legal foundation that warrants correction by this Court.

1. Ruotolo forcing Judith into the nursing-home against her will was not a mere "state procedural violation", but a violation of Judith's rights under the Fourth and Fourteenth Amendments.

The Court of Appeals' decision held that a guardian forcing his elderly ward into a nursing-home against her will was a "state procedural violation" that did not give rise to a §1983 claim, relying on *Zahra*, 48 F.3d at 682. But *Zahra* was not a case about forcing an elderly citizen into a nursing-home. *Zahra* was about revocation of a building permit.

"[I]n any §1983 action the initial inquiry must focus on whether the two essential elements to a §1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)

2. Ruotolo was a state actor acting under color of state law.

The district court decided that Ruotolo was not a state actor because, in the court's view, guardians for adults are not state actors. The district court further determined that guardians for adults were not state actors not by conducting its own analysis of the facts alleged as to Ruotolo's conduct, but simply by citing four district court decisions, discussed *infra*.

The Court of Appeals, in contrast, asserted that it need "not resolve the "fact-intensive inquiry" "that the state-action doctrine demands," *Lindke v. Freed,* 601 U.S. 187, 197 (2024), because Adam's section 1983 claims fail for a more obvious reason—namely, that Adam's allegations of a grand conspiracy to deprive him and his mother of their federal rights are entirely conclusory." *Brook v. Ruotolo*, No. 23-1339 (2nd Cir. Aug. 23, 2024)

The United States, and the million citizens subject to guardianship, need a clear statement from this Court as to whether a state-appointed guardian's forcing his ward into a nursing-home, without authority to do so, constitutes "state action" for §1983 liability, particularly given the circuit courts' confusion regarding this issue. This Court's precedents should allow this Court to analyze whether such conduct by a state-appointee constitutes state action.

"When Congress enacted §1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape,* 365 U.S. 167, 172 (1961)." *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988) As the Court stated in *United States v. Classic*, 313 U.S. 299, 326 (1941):

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

In the case at bar, Ruotolo was a state actor by virtue of his appointment by the state guardianship court to be Judith's guardian; Ruotolo was acting under color of state Mental Hygiene Law §§81.19–81.21 and was clothed with the authority of state law. The Order appointing him was his "badge of authority"; he printed out copies of the Order of appointment and showed them to nursing-home administrators.

Without that badge of authority as state-appointed guardian acting under color of state Mental Hygiene Law, had Ruotolo ordered hospital and nursing-home staff to forcibly move Judith from the hospital to the nursing-home against her will, no one would have listened to him. Had Ruotolo merely been a private citizen without an Order of appointment from the state court that he could show to hospital and nursing-home administrators, the administrators would not have acceded to Ruotolo's instructions to transfer Judith to, and force her to remain in, the nursing-home.

Suits against state actors, acting in their personal capacity, are premised on "an official's abuse of his position." *Hafer v. Melo*, 502 U.S. 21, 27 (1991) A state actor may be found personally liable for monetary damages when he is found to have acted beyond the scope of his authority. *Murphy v. Smith*, 844 F.3d 653 (7th Cir. 2016)

In the case at bar, Ruotolo was acting beyond the scope of his authority when he forced Judith into the nursing-home against her will and forced her to remain there. Under New York Mental Hygiene Law, a ward may not be forced into a nursing-home against her will without a "hearing on notice". *See Matter of Drayton v. Jewish Assn. for Servs. for the Aged*, 127 A.D.3d 526, 528 (App.Div. 2015):

> The decision to move an individual from her home or community to a nursing-home or other residential facility affects "constitutionally protected liberty interests" (*Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H.—City of New York],* 89 NY2d 889, 891 [1996]; *see also Matter of Eggleston v Gloria N.,* 55 AD3d 309 [1st Dept 2008]). Thus, Mental Hygiene Law §81.36(c) provides that when a guardian seeks the authority to remove the IP [incapacitated person] from her home and community against her wishes, the IP must be provided with a hearing on notice before the article 81 court.

The one exception to this is that "the article 81 court [the guardianship court] may for good cause shown issue an order modifying the guardian's powers to include such placement power, and shall set forth the factual basis for dispensing with the hearing", *Drayton*, 127 A.D.3d at 528

Here, there was no hearing and no court order modifying the guardian's powers to include such placement power accompanied by an explanation setting forth the factual basis for dispensing with a hearing.

The required hearing is not a procedural nicety. It affords the ward the opportunity to express her views directly to the guardianship court as to her wishes regarding nursing-home placement. It also affords the ward the opportunity to argue against nursing-home placement. The record is clear that Judith was adamantly opposed to being placed in a nursing-home. It is likely that, when confronted in person with Judith's adamant opposition to nursing-home placement, the guardianship judge would not have

expanded Ruotolo's authority to include nursing-home placement.

That Ruotolo was not a state employee is of no consequence. A state-appointed official cannot evade §1983 liability by virtue of his not being a state employee. *West v. Atkins*, 487 U.S. 42, 56 (1988)

As stated, in determining that Ruotolo as a state-appointed guardian was not a state actor, the district court conducted no analysis of the facts alleged as to Ruotolo's conduct, but simply by cited four district court decisions, *Shabtai v. Shabtai*, No. 20-cv-10868 (S.D.N.Y. Apr. 16, 2021); *Galanova v. Portnoy*, 432 F.Supp.3d 433 (S.D.N.Y. 2020); *Sasscer v. Barrios-Paoli*, 2008 W.L. 5215466 (2008); and *Storck v. Suffolk County Dept. of Social Services*, 62 F.Supp.2d 927 (E.D.N.Y. 1999). *See Brook v. Ruotolo*, No. 22-cv-6173 (S.D.N.Y. Aug. 21, 2023). All these decisions are either easily distinguishable, or of little precedential effect as they were not reached after adversarial briefing.

Shabtai decided that the court-appointed guardian was not a state actor simply because, in the court's view, "private entities and individuals acting pursuant to court orders are not considered state actors". But Ruotolo, in forcing Judith into the nursing-home against her will, was not acting pursuant to a court order; as pleaded (Complaint ¶660), the court Order that the guardianship court issued did not give Ruotolo authority to force Judith into a nursing-home against her will.

Nor could the guardianship court have issued such an order giving Ruotolo authority to force Judith into a nursing-home against her will without the guardianship court first giving Judith a hearing on notice in which Judith could contest the grant of such an order; *see Drayton*, 127 A.D.3d at 528, quoted *supra.*

In addition, *Shabtai*, in which the court *sua sponte* dismissed the *pro se* complaint without adversarial briefing, lacks significant precedential effect because a decision "announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 572 (1993)

Galanova, 432 F.Supp.3d 433, was also decided without adversarial briefing since the *pro se* plaintiff did not file an opposition brief to defendants' motion to dismiss. *Galanova* decided that "guardians, "although appointed by a court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983."

But that concept that exercising independent professional judgment in the interest of a client renders a party not a state actor is clearly wrong. For example, in *West*, 487 U.S. at 52, the court decided that defendant orthopedic surgeon "[was] not removed from the purview of §1983 simply because [he was a] professional[] acting in accordance with professional discretion and judgment." Thus, the fact that Ruotolo was tasked with exercising independent judgment did not preclude him from being a state actor.

The *West* court decided that the crucial difference between the physician defendant in *West* and the public defenders in *Polk County v. Dodson*, 454 U.S. 312 (1981), who were found not to be state actors, was "the adversarial role the defense lawyer plays in our criminal justice system as the decisive factor", *Polk*, at 51.

In the case at bar, Ruotolo's role as guardian was not adversarial to the State but was to provide for Judith's personal needs and property management, roles which

were aligned with the mission of the State. Ruotolo was not Judith's lawyer; his role was custodial. "[A]s the Court in *Polk County* pointed out, one who performs a custodial function pursuant to state law falls within the scope of §1983. *See* 454 U.S. at 320, 102 S.Ct. at 450. There can be no doubt that the guardian has custody of his ward[.]" *Thomas S. v. Morrow*, 781 F.2d 367, 377 (4th Cir. 1986)

In addition, in *Tower*, 467 U.S. 914, the defendant public defenders were found to be state actors because the complaint alleged that they engaged in intentional misconduct, and "public defenders have no immunity from §1983 liability for intentional misconduct of the type alleged here." *Id.* at 921 In the case at bar, the Complaint accuses Ruotolo of intentional misconduct, *inter alia*, in forcing Judith into the nursing-home against her will without authority to do so.

Sasscer v. Barrios-Paoli, 2008 W.L. 5215466 (2008), in which the court dismissed the *pro se* complaint, is easily distinguishable. *Sasscer* pertained to a property guardian, without "personal needs" powers, who the complaint alleged was negligent in preparing plaintiff's tax returns. There was no allegation that the property guardian had forced plaintiff into a nursing-home or had procured the guardianship by fraud, which, as discussed *infra*, caused the guardianship court to strip Judith of all her civil and Constitutional rights.

Unlike the purely financial injury that the *Sasscer* plaintiff suffered for which an adequate remedy exists by a suit for monetary compensation in state court, there is no adequate post-deprivation remedy in state court for the deprivation of Judith's Fourth and Fourteenth Amendment rights not to be physically restrained. Nor is there an adequate post-deprivation

remedy in state court for Ruotolo procuring Judith's guardianship by fraud, with the guardianship court stripping Judith of all her civil and Constitutional rights on January 3, 2020, leading directly to Judith's death 71 days later on March 15, 2020.

The *Sasscer* court reasoned that the property guardian was not a state actor because the guardian "exercise[d] independent professional judgment in the interest of [its] client" *Sasscer*, p. 9, reasoning which, as discussed *supra*, was expressly rejected in *West*, 487 U.S. at 52.

In addition, the *Sasscer* court cited *Storck v. Suffolk County Dept. of Social Services*, 62 F.Supp.2d 927, 941 (E.D.N.Y. 1999) for the proposition that "guardians ad litem, although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983". But a guardian for an adult appointed under New York Mental Hygiene Law Art. 81 is not a guardian *ad litem*.

Storck pertained to a guardian *ad litem* for an infant, not a guardian for an adult appointed pursuant to Mental Hygiene Law Art. 81. In New York, a law guardian for an infant is the infant's court-appointed attorney and functions as the infant's lawyer.

Not so with Art. 81 guardians for adults, who never act as lawyers for the "incapacitated persons". The role of the Art. 81 guardian is "to act on behalf of an incapacitated person in providing for personal needs and/or for property management", not to represent the incapacitated person as an attorney. *See* Mental Hygiene Law §§81.03(a), 81.10. Indeed, some court-appointed Art. 81 guardians are not lawyers.

A separate individual is appointed as the "attorney for the incapacitated person", who in the case at bar was first Mental Hygiene Legal Service employees Diana Rosenthal and Felice Wechsler, and later Kenneth Barocas.

New York courts have deemed guardians *ad litem* for infants as not being state actors because they are the infants' court-appointed attorneys. But this reasoning is patently inapplicable to Art. 81 guardians for adults, who are not their wards' attorneys.

3. Plaintiff stated a claim for violation of Judith's constitutional rights regardless of whether there was a conspiracy.

The Court of Appeals decided that "Adam's section 1983 claims fail for a more obvious reason—namely, that Adam's allegations of a grand conspiracy to deprive him and his mother of their federal rights are entirely conclusory".

While petitioner does not agree that at the pre-discovery pleading stage the meticulous factual detail of the 717-paragraph complaint is entirely conclusory,[3] regardless of whether there was a conspiracy, the complaint alleges violation of Judith's

[3] As one of many examples, Complaint ¶21–22 alleges that "[court-evaluator] Salzman telephoned [guardian] Ruotolo on January 2"; that, in that telephone call, "Salzman and Ruotolo plotted-out how they were going to rig the January 3 hearing"; and that immediately after that telephone call Ruotolo spent 1.3 hours "[p]repar[ing] [a] proposed order for [the] hearing of 1/3/20". In fact, Ruotolo's timesheet documents that such a phone call occurred, that the January 3-hearing was discussed, and that immediately after the phone call Ruotolo prepared the proposed order appointing Ruotolo as guardian, which the guardianship judge signed at the conclusion of the January 3-hearing.

Constitutional rights by state actors acting under color of state law.

Even if there was no conspiracy, court-appointed guardian Ruotolo forcing Judith into a nursing-home against her will without authority to do so was wrongful conduct actionable under §1983.

Even if there was no conspiracy, Ruotolo's procuring the guardianship by fraud was wrongful conduct actionable under §1983.

Even if there was no conspiracy, Judith's court-appointed attorney Rosenthal's intentional wrongful acts—in opposition to her client Judith's wishes that a guardian not be appointed—constituted wrongful conduct actionable under §1983. This included Rosenthal waiving Judith's appearance at the January 3, 2020-trial without discussing such waiver with Judith and despite Rosenthal being repeatedly told that Judith—who had been discharged from the hospital the day before—wanted the trial postponed so that she could be present and despite Rosenthal hearing an audio recording of Judith saying she "absolutely" wanted the trial postponed so that she could be present. (App.76, 78; Complaint ¶¶397, 408) This also included, at the January 3, 2020-trial, Rosenthal objecting to Adam's attorney James Kaplan's proffer of a list of $235,316 in payments Adam had made for homecare-services for his mother over a 7-month period, in order to prevent introduction of evidence of Adam's diligence in caring for his mother: an objection the guardianship court sustained.

4. Ruotolo and Rosenthal deprived Judith of rights under the Fourth and Fourteenth Amendments.

"§1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." … Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983." *Zinermon*, 494 U.S. at 124 quoting *Monroe*, 365 U.S. at 173–174

A citizen may bring a §1983 claim in three ways: First, "[a] plaintiff may bring suit under §1983 for state officials' violation of his rights to, *e.g.,* freedom of speech or freedom from unreasonable searches and seizures." Second, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." [Citing case.]" Third, the Due Process clause encompasses "a guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. at 125

For the ordinary citizen, forced placement in an institution, whether it is a nursing-home or a mental hospital, "produces a massive curtailment of liberty," *Humphrey v. Cady,* 405 U.S. 504, 509 (1972), and in consequence "requires due process protection." *Addington v. Texas,* 441 U. S. 418, 425 (1979); *O'Connor v. Donaldson,* 422 U. S. 563, 580 (1975) (BURGER, C. J., concurring)." *Vitek v. Jones*, 445 U.S. 480, 491–492 (1980) "[S]ubstantive "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the

individual is committed", *Rodriguez v. City of New York*, 72 F.3d 1051, 1061 (2nd Cir. 1995) quoting *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992). "[A]s a procedural matter, due process does not permit continuation of a challenged involuntary civil commitment without a hearing, at which the substantive predicates must be established by clear and convincing evidence, *see Addington v. Texas,* 441 U.S. 418, 423-31, 99 S.Ct. 1804, 1807-12, 60 L.Ed.2d 323 (1979); *see also Goetz v. Crosson,* 967 F.2d at 31(same); *Warren v. Harvey,* 632 F.2d 925, 930 (2d Cir.) (same), *cert. denied,* 449 U.S. 902, 101 S.Ct. 273, 66 L.Ed.2d 133 (1980)." *Rodriguez*, 72 F.3d at 1062

A court-appointed guardian forcing an elderly ward into a nursing-home against her will without authority to do so is a seizure of her person and interferes with her personal right where to live, an inherent species of benefit violating the ward's Fourth and Fourteenth Amendment rights. *See Dejesus v. Village of Pelham Manor*, 292 F.Supp.2d 162, 172 (S.D.N.Y. 2003) (distinguishing *Zahra*, 48 F.3d 674 from the "impermissible detention or seizure of Plaintiffs' persons").

Mental Hygiene Law Art. 81 recognizes a due process right to a motion and hearing on the issue of nursing-home placement before an "incapacitated person" can be placed in a nursing-home. Ruotolo's forcing Judith into the nursing-home violated both Judith's federal Constitutional rights, and Judith's rights under New York statutory law:

> The decision to move an individual from her home or community to a nursing-home or other residential facility affects "constitutionally protected liberty interests" [citing cases]. Thus, Mental Hygiene Law

> §81.36(c) provides that when a guardian seeks the authority to remove the IP [incapacitated person] from her home and community against her wishes, the IP must be provided with a hearing on notice before the article 81 court.

Drayton v. Jewish Assn. for Servs. for the Aged, 127 A.D.3d 526, 528 (App.Div. 2015)

Not only did the guardianship court not grant Ruotolo authority to force Judith into a nursing-home against her will, the court could not have done so without "a hearing on notice" to Judith, with Judith not only present, but Judith having the right to be heard on the issue of nursing-home placement. *Drayton*, *supra*

While a guardianship court may "for good cause shown" dispense with such a hearing, if it does dispense with such a hearing it "shall set forth the factual basis for dispensing with the hearing", *Drayton* at 528. That did not happen here.

Judith was not given a hearing. And Ruotolo did not have a court-order authorizing nursing-home placement, let alone a court-order accompanied by the guardianship court's statement of "good cause shown" for dispensing with a hearing.

The required hearing regarding nursing-home placement is not some procedural nicety. It is a fundamental federal and state constitutional right against the unauthorized "detention or seizure" of the person.

Simply put, Ruotolo was completely without authority to force Judith into the nursing-home against her will.

The Court of Appeals' decision in the case at bar ignores Supreme Court and Circuit Court precedent that state-appointees who abuse their positions by forcing individuals into institutions against their will, without authority to do so, are state actors liable for monetary damages under §1983. *Rodriguez*, 72 F.3d 1051 (wrongful involuntary commitment for three days actionable for monetary damages under §1983); *O'Connor*, 422 U.S. at 577; *Gross*, 695 F.3d 211 (court-appointed guardian liable for monetary damages)

Forcing an individual into and involuntarily confining her in an institution, whether it is a nursing-home or a psychiatric facility, is a traditional function of the state and can lawfully be done by private parties only when the state delegates them authority to do so. *Zinermon*, 494 U.S. 113 Officials acting with the "badge of authority" of the State who involuntarily confine citizens without authority to do so are liable for monetary damages under §1983. *Zinermon* at 139A

Thus, Judith's estate may sue Ruotolo under §1983 for forcing her into the nursing-home against her will without authority to do so and thereby violating her Fourth and Fourteenth Amendment rights not to be involuntarily confined.

A clear statement from this Court that a court-appointed guardian forcing an individual into a nursing-home without authority to do so is actionable under §1983 is needed to address the nationwide epidemic of court-appointed guardians abusing their wards by forcing them into institutions against their will without authority to do so.

5. Judith's court-appointed attorney Rosenthal's intentional efforts to oppose Judith's wishes that she not be declared incapacitated and that Adam's power-of-attorney and healthcare-proxy not be vacated creates §1983 liability.

Rosenthal waived Judith's appearance at the January 3, 2020-trial even though Rosenthal never discussed waiver with Judith and even though Rosenthal was repeatedly told Judith did not want to waive her appearance and wanted the trial postponed so that she could be present (Judith had only been discharged home from the hospital the night of January 2, 2020, and did not feel well enough to come to court on January 3). (App.76–77, Complaint ¶¶397–398)

In addition, Rosenthal objected to Adam's attorney Kaplan's proffer of evidence that Adam paid $235,316 for homecare-services over a 7-month period in order to prevent the court from considering this evidence that Adam was diligent in paying for homecare-services. (App.83, Complaint ¶431)

Thus, Rosenthal failed to comply with her duties expressly stated in Mental Hygiene Law §81.10 and its Law Revision Commission comments to advocate for *Judith's wishes*. (App.47–49, Complaint ¶¶162–165) In doing so, Rosenthal deprived Judith of her Constitutional rights, including her right to be present at the hearing, the right to effective assistance of counsel who would advocate for her wishes not against them, the right to cross-examine witnesses and to offer evidence, and adherence to the rules of evidence. *In re Gault*, 387 U.S. 1, 28 (1967); *Suzuki v. Quisenberry*, 411 F.Supp.1113, 1127 (D.Haw. 1976)

That the proceeding is denominated civil and not criminal is immaterial, *Gault*, 387 U.S. at 49, since the loss of liberty upon being adjudicated incompetent is at least as severe as criminal confinement or commitment to a mental hospital. *See Matter of St. Luke's-Roosevelt Hosp. Ctr.*, 89 N.Y.2d 889, 891 (1996) ("constitutionally protected liberty interests [a]re at stake"); *see also Matter of Eugenia M.*, N.Y. Slip Op 51301 (Sup.Ct. 2008) ("[T]he appointment of a guardian is a drastic remedy which involves an invasion of the respondent's freedom and a judicial deprivation of his constitutional rights.").

Thus, Rosenthal deprived Judith of her constitutional rights.

6. Rosenthal was a state actor.

Rosenthal, as an attorney working for the New York Mental Hygiene Legal Service, was an employee of New York State. (App.46, Complaint ¶31, 33) "[S]tate employment is generally sufficient to render the defendant a state actor." *West*, 487 U.S. at 49

In *Polk County v. Dodson*, 454 U.S. 312 (1981), this Court has held that public defenders in criminal litigation are not liable for monetary damages under §1983 for their negligent conduct. However, the Complaint alleges that Rosenthal's conduct as Judith's court-appointed was not merely negligent, but intentional, and that Rosenthal intentionally sought to defeat Judith's wishes that she not be declared incompetent, that her son Dr. Adam Brook's power-of-attorney and healthcare-proxy not be voided, and that a guardian not be appointed. (App.77–78, Complaint ¶407) Attorneys employed by the State "are not immune from liability under §1983 for intentional

misconduct, "under color of" state law", *Tower v. Glover*, 467 U.S. 914, 923 (1984).

Though the Complaint's allegations of Rosenthal's intentional misconduct are sufficient at the pleading stage, in and of themselves, to render Rosenthal liable under §1983, it is important to note that Rosenthal was not a public defender but a court-appointed attorney for a person alleged to be incompetent.

"[B]ecause the law favors providing legal remedy to injured parties, grants of immunity must be narrowly construed; that is, courts must be "careful not to extend the scope of the protection further than its purposes require." *Forrester v. White,* 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *see also Owen,* 445 U.S. at 645 n.28, 100 S.Ct. 1398 (1980) (citations omitted)." *Weissman v. National Ass'n of Securities Dealers*, 500 F.3d 1293, 1297 (11th Cir. 2007)

Furthermore, *West v. Atkins*, 487 U.S. at 51–52, explains that "[t]o the extent this Court in *Polk County* relied on the fact that the public defender is a "professional" in concluding that he was not engaged in state action, *the case turned on the particular professional obligation of the criminal defense attorney to be an adversary of the State*, not on the independence and integrity generally applicable to professionals as a class." (Emphasis added.)

Unlike public defenders, whose professional role is adversarial to the State in defending their clients, the professional role of the court-appointed attorney for a person alleged to be incompetent is not adversarial to the State. In a guardianship proceeding, the State is not seeking to find the person incompetent; rather, it is conducting a proceeding to determine if the person is incompetent.

Thus, had Rosenthal's misconduct been merely negligent, and not intentional, she still would have been a state actor. This Court should not expand immunities from §1983 liability to attorneys who are not public defenders in litigation that is not criminal litigation. For the Court to do so would violate the legal principle that "grants of immunity must be narrowly construed." *Weissman*, 500 F.3d at 1297

7. Ruotolo's conduct in procuring the guardianship by fraud was state action.

As discussed in §1 *supra*, the complaint alleges that Ruotolo procured the guardianship by fraud. In particular, the complaint alleges that in August 2019 Ruotolo manufactured a phony controversy through a scheme by which he: 1. Insisted on unneeded private duty nurses at $125 per hour, 7 days-a-week, 12 hours-a-day, when only home health aides were needed, at $29 per hour; Ruotolo did so so that he could run up a huge bill quickly. (App.49–51, Complaint ¶¶208–210) 2. Conspired with Allegiant so that invoices for homecare-services would not be sent to Adam for payment. (App.55–56, Complaint ¶¶314–315) 3. On Friday, August 23, 2019, emailed Adam, *copying the Court*, that unless Adam paid an undisclosed amount within 98 minutes or provided "Dr. Judith Brook's working credit card/bank routing number and checking account number and/or debit card" so that Ruotolo and Allegiant could make unlimited withdrawals of Judith's assets without Adam seeing any invoices, "[homecare] ***service[s]*** [for Judith] ***will discontinue due to a two-month outstanding invoice*** owed for services to your mother". (App.51–52, Complaint ¶305) (emphasis in original) 4. Emailed the guardianship court that Adam was receiving invoices

"every two weeks" and not paying them, when that was false. (App.56–57, Complaint ¶317)

It is inexplicable that the Court of Appeals deemed "simply nonsensical" Adam's allegation that Ruotolo's copying the Court on the Friday, August 23, 2019, 11:22 AM-email was part of Ruotolo's scheme. (App.12) Ruotolo copied the Court on this email for the sole reason that *he wanted to mislead the guardianship judge into believing that Adam had received invoices for homecare-services and was not paying them* to the tune of being over $100,000 in arrears, and that as a result Judith's homecare-services would terminate in a few hours right before the weekend. (App.73, Complaint ¶346) Having the guardianship judge believe that Adam was not diligent in paying the invoices for his mother's homecare-services would provide the judge with a justification for annulling Adam's power-of-attorney and healthcare-proxy and appointing Ruotolo to the lucrative position of Judith's guardian.

Had Ruotolo's motive been Judith's welfare, rather than procuring Judith's lucrative guardianship by fraud, he would have simply notified Adam that there were invoices that were due and would have forwarded the invoices he was receiving from Allegiant Home Care to Adam for payment; and he would have given Adam more than 98 minutes to make payment. (App.73, Complaint ¶346)

Ruotolo furthered this scheme by lying to the Court under oath at the January 3, 2020-trial that Adam had not made payments for homecare-services "since mid-November" (App.79–80, Complaint ¶421) when Ruotolo knew by his own December 11, 2019-email (with the attached spreadsheet from Allegiant Home Care) that this was false and that Adam had made

$221,282.68 in payments for homecare-services as of December 11, 2019 for the preceding 6 months of homecare-services for his mother (App.83, Complaint ¶429)

Ruotolo's procuring the guardianship by fraud was misconduct as a state actor. It was only because Ruotolo was court-appointed guardian to arrange homecare that he was able to insert himself into payment process between his handpicked homecare-services company Allegiant and Adam, and thereby orchestrate a scheme whereby Adam would not receive invoices and thus could be accused of breaching his fiduciary duty to pay homecare invoices. It was only because Ruotolo as court-appointed guardian inserted himself in the payment process that he was able to make false allegations at the January 3, 2020-trial that Adam had stopped making payments for homecare-services for two months when this was false and Ruotolo knew it.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of' state law." [Citing case.]" *Monroe v. Pape*, 365 U.S. 167, 184 (1961)

Ruotolo's procuring the guardianship by fraud was the means by which he deprived Judith of all her civil and constitutional rights and gave Ruotolo significant control over her person. Judith lost not only control over her property, but also her freedom, including her choice to have her sole surviving son Board-Certified cardiothoracic surgeon Dr. Adam Brook to be her power-of-attorney and healthcare-proxy (App.73–75, Complaint ¶357), and her choices to have her sole surviving son Adam visit her in the hospital (App 90–

91, Complaint ¶¶550–555) and to be with her son (App.83–84, Complaint ¶438).

Ruotolo procuring the guardianship by fraud also enabled him to exceed his authority as guardian by forcing Judith into the nursing-home against her will and not letting her go home as were her wishes. As discussed *supra*, in the nursing-home Judith was not permitted to walk to the bathroom but forced to lie in her own stool 24 hours-a-day, and she was not given any of her medications. As discussed *supra*, this led to her premature death 71 days after Ruotolo was appointed guardian.

8. This case is a rare vehicle to address governmental deprivation of millions of ordinary citizens' rights to life, liberty, and property.

Individuals who have a guardian imposed on them by state courts nationwide have committed no crime, but the loss of liberty they suffer often exceeds that imposed upon inmates of the federal penitentiary. And unlike criminal defendants, individuals upon whom a guardianship is imposed are adjudicated incompetent in "special proceedings" which, as here, in actual practice (if not in law) lack the full panoply of constitutional protections. Dr. Judith Brook was subjected to a proceeding where she had no meaningful representation, where she was denied the right to be present and to confront the witnesses against her, and where the guardianship court denied her son and his attorney an adjournment to address new false allegations in the 67-page court-evaluator report that was delivered to the parties at 4:14 PM the day before trial. The court ran roughshod over the ordinary rules of evidence, relying on double and

triple-hearsay from unidentified witnesses, such as a care manager cited in the court-evaluator's report who the court-evaluator not only did not speak with, he did not even know her name. (App.84–86, 75–76, Complaint ¶¶442, 384)

This scenario of a due process-less guardianship proceeding is very common, as documented in the *Beyond Brittney Buzzfeed News* series and other publications such as the American Bar Association report on New York guardianships[4], but what is unique here is that this case has been brought through briefing at multiple appellate levels by highly experienced counsel. Most victims of abuses in the American guardianship courts are elderly individuals, usually with health problems. They and their families generally lack the financial resources to afford experienced counsel to take a case such as this all the way to the Supreme Court; what little caselaw there is is littered with summary decisions after inadequate or no briefing by *pro se* litigants.

America's guardianship system is rife with abuse and deprivation of civil and constitutional rights that causes tremendous suffering among the individuals that the system ostensibly is intended to help. This court's intervention is a crucial first step to reigning in the gross miscarriages of justice that have become all too common in the state guardianship courts in 21st Century America.

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[4] https://vera-institute.files.svdcdn.com/production/downloads/publications/incapacitated-indigent-and-alone-guardianship-new-york.pdf, accessed October 30, 2024.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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Counsel for Appellant

March 7, 2025

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of October, two thousand twenty-four.

ORDER

Docket Nos: 23-1339 (L), 23-7446 (Con)

Adam Brook, M.D., Ph.D., Individually and as Executor of the Estate of Dr. Judith Brook,

Plaintiff - Appellant,

—v.—

Joseph Ruotolo, Esq., Ira Salzman, Esq., et al.,

Defendants - Appellees,

Eric Nowakowski, R.P.A.C.

Consolidated Defendant - Appellee,

Anthony Bacchi, M.D.,

Defendant.

Appellant, The Estate of Dr. Judith Brook, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk
[SEAL]

Appendix B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of August, two thousand twenty-four.

PRESENT:

DENNY CHIN,
RICHARD J. SULLIVAN,
Circuit Judges,
CLAIRE R. KELLY,
Judge.*

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* Judge Claire R. Kelly, of the United States Court of International Trade, sitting by designation.

Nos: 23-1339(L), 23-7446(Con)

ADAM BROOK, M.D., PH.D., Individually and as Executor of the Estate of Dr. Judith Brook,

Plaintiff-Appellant,

—v.—

JOSEPH RUOTOLO, ESQ., IRA SALZMAN, ESQ., DIANA ROSENTHAL, ESQ., FELICE WECHSLER, ESQ., MENTAL HYGIENE LEGAL SERVICE, KENNETH BAROCAS, ESQ., IAN SHAINBROWN, ESQ., THE SHAINBROWN FIRM LLC, KARL HUTH, ESQ., HUTH REYNOLDS LLP, HOWARD MUSER, ALLEGIANT HOME CARE, L.L.C., ANN REEN, R.N., MARY MANNING WALSH NURSING HOME, ALLEN LOGERQUIST, M.D., FLORENCE PUA, M.D., TOWANA MOE, R.N., JOHN MICHAEL NATIVIDAD, ARTHUR AKPEROV, DORIS BERMUDEZ, NAVJOT SEPLA, MARIE SWEET MINGOA, JOHN DOES #1-10, MONITOR/ME LLC, JASON KUBERT, M.D., ANTHONY BACCHI, M.D.,

Defendants-Appellees,

ERIC NOWAKOWSKI, R.P.A.C.

Consolidated Defendant-Appellee,

ANTHONY BACCHI, M.D.,

Defendant.†

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† The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

For Appellant Adam Brook, Individually:

ADAM BROOK, *pro se*, Houston, TX.

For Appellant Adam Brook, as Executor of the Estate of Judith Brook:

Daniel W. Isaacs, Law Offices of Daniel W. Isaacs, PLLC, New York, NY.

For Appellees Mental Hygiene Legal Service, Diana Rosenthal, and Felice Wechsler:

BLAIR J. GREENWALD, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Matthew W. Grieco, Senior Assistant Solicitor General, *on the brief*), *for* Letitia James, Attorney General of the State of New York, New York, NY.

For Appellee Joseph Ruotolo:

LISSETT C. FERREIRA (Colleen M. Meenan, *on the brief*), Meenan & Associates, LLC, New York, NY.

For Appellee Ira Salzman:

JOSEPH L. FRANCOEUR, Wilson Elser Moskowitz Edelman & Dicker LLP, New York, NY.

For Appellees Karl Huth and Huth Reynolds LLP:

MATTHEW REYNOLDS (Joshua L. Rushing, Huth Reynolds LLP, Huntington, NY, *on the brief*), Huth Reynolds LLP, Chesterfield, VA.

For Appellee Kenneth Barocas:

ERIN O'LEARY, Lewis Brisbois Bisgaard & Smith LLP, New York, NY.

For Appellees Allegiant Home Care, L.L.C. and Ann Reen:

DAVID S. RUTHERFORD, Rutherford & Christie, LLP, New York, NY.

For Appellees Arthur Akperov, Doris Bermudez, Allen Logerquist, Mary Manning Walsh Nursing Home, Marie Sweet Mingoa, Towana Moe, John Michael Natividad, Florence Pua, and Navjot Sepla:

CHARLES KUTNER, Kutner Friedrich, LLP, New York, NY.

For Appellee Jason Kubert:

WAYNE M. RUBIN, Feldman, Kleidman, Collins & Sappe LLP, Fishkill, NY.

For Appellees Ian Shainbrown, The Shainbrown Firm LLC, and Howard Muser:

Ian Shainbrown, The Shainbrown Firm LLC, Livingston, NJ.

Appeal from a judgment of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 22, 2023 judgment of the district court is **AFFIRMED.**

Dr. Adam Brook, individually and on behalf of the estate of his mother, Dr. Judith Brook, appeals from the district court's judgment dismissing his claims under 42 U.S.C. § 1983 and state law against numerous individuals and entities involved in

Judith's care at the end of her life.[1] Adam alleged that the defendants conspired with a state court judge and/or each other to declare Judith incapacitated in a scheme to siphon off her assets before her death. The district court dismissed Adam's consolidated complaints for lack of subject matter jurisdiction, reasoning that none of the defendants was a state actor or was otherwise acting under color of law, and that the court therefore lacked federal question jurisdiction under 28 U.S.C. § 1331. It further concluded that Adam had abandoned any assertion of diversity jurisdiction, so it lacked original jurisdiction entirely and could not exercise supplemental jurisdiction over his numerous state-law claims.[2] *See Brook v. Ruotolo*, Nos. 22-cv-6173

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[1] Because both mother and son were/are doctors with the same surname, we will refer to them by their respective first names. Although Adam listed the Estate of Judith Brook as a separate plaintiff in one of his now-consolidated complaints, Adam, as executor of Judith's estate, is the proper party to assert claims arising from the alleged infringement of Judith's federal rights. *See Barrett v. United States*, 689 F.2d 324, 331 (2d Cir. 1982); *see also Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978) ("Under [section] 1988, . . . state statutory law, modifying the common law, provides the principal reference point in determining survival of civil rights actions."); N.Y. Estates, Powers & Trusts Law § 11-3.2(b) (providing that personal representative of decedent may bring action for injury to decedent); *id.* § 1-2.13 (defining personal representative as person who has received letters to administer estate of decedent). Adam properly retained counsel for the claims he brought in his role as executor of the estate. *See Pridgen v. Andresen*, 113 F.3d 391, 393 (2d Cir. 1997) (holding that executor of estate may not proceed *pro se* when the estate has beneficiaries or creditors other than the litigant).

[2] Adam does not challenge the district court's conclusion that he failed to carry his burden to establish diversity jurisdiction. We therefore need not address the issue. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued

(ER), 23-cv-1319 (ER), 2023 WL 5352773 (S.D.N.Y. Aug. 21, 2023); 28 U.S.C. § 1367(a). We assume the parties' familiarity with the facts, procedural history, and issues on appeal.

I. Subject Matter Jurisdiction

At the outset, we note that the district court erred in concluding that it lacked subject matter jurisdiction over Adam's section 1983 claims. Federal question jurisdiction exists for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. To find federal question jurisdiction, federal courts look to the face of the complaint to see "if [the] plaintiff's statement of his [or her] own cause of action shows that it is based on federal law." *Romano v. Kazacos*, 609 F.3d 512, 518 (2d Cir. 2010) (internal quotation marks omitted). Adam's section 1983 claims were clearly based on federal law. While the district court concluded that those section 1983 claims failed because none of the defendants was a state actor, the failure to show state action is not a "jurisdictional deficiency." *Monsky v. Moraghan*, 127 F.3d 243, 245 (2d Cir. 1997). Rather, it is a merits issue "to be tested under Rule 12(b)(6)." *Id.* The district court therefore had subject matter jurisdiction over Adam's section 1983 claims.

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in the briefs are considered [forfeited] and normally will not be addressed on appeal."); *Behrens v. JPMorgan Chase Bank, N.A.*, 96 F.4th 202, 205 (2d Cir. 2024) (holding that invocation of subject-matter jurisdiction may be forfeited).

II. Section 1983 Claims

Of course, the failure to plead facts showing that any of the defendants was a state actor or was otherwise acting under color of law would be a proper basis for dismissing Adam's claims under Rule 12(b)(6). But we need not resolve the "fact-intensive inquiry" "that the state-action doctrine demands," *Lindke v. Freed*, 601 U.S. 187, 197 (2024), because Adam's section 1983 claims fail for a more obvious reason – namely, that Adam's allegations of a grand conspiracy to deprive him and his mother of their federal rights are entirely conclusory. Because he has failed to plead facts that would support a reasonable inference that any of the defendants violated his or his mother's federal rights, we affirm the district court's dismissal of his section 1983 claims. *See Jusino v. Fed'n of Cath. Tchrs., Inc.*, 54 F.4th 95, 100 (2d Cir. 2022) ("We may affirm on any ground with support in the record, including grounds upon which the district court did not rely." (internal quotation marks omitted)).[3]

The state court proceedings giving rise to this suit began in May 2019 when Judith's brother, Howard Muser, brought a petition pursuant to New York Mental Hygiene Law ("NYMHL") Article 81 to have himself appointed as Judith's guardian. *See* J. App'x at 285–97. Muser alleged that Judith was incapacitated and that her adult son, Adam, was withholding medical treatment and support from her. According to Muser, Adam "assumed control of

[3] After oral argument, Adam sought permission to file an oversized letter pursuant to Federal Rule of Appellate Procedure 28(j) regarding our caselaw on state action. *See* Doc. No. 165. Because we resolve this appeal without reaching the state action question, we deny Adam's motion as moot.

Judith's assets" and "would oftentimes engage in activities against Judith's best interest," including refusing Judith's purported requests "for an aid[e] to assist [her] with her daily functions." *Id.* at 288–90. Muser requested that a temporary guardian be appointed pending resolution of his petition.

Shortly after receiving Muser's petition, a New York court appointed defendant Joseph Ruotolo as Judith's temporary guardian, as well as defendants Diana Rosenthal and Felice Wechsler as counsel to represent Judith during the guardianship proceedings. After holding four hearings, including two in which Judith herself testified, the state court found that Judith was incapacitated and entered an order that (1) prohibited Adam from removing Judith from New York, (2) restrained Adam from interfering with any home care or other medical treatment that the temporary guardian deemed appropriate, (3) voided all powers of attorney and health care proxies that Judith had previously executed, and (4) expanded the temporary guardian's powers to act on Judith's behalf. *See id.* at 302–04. Several months later, Judith died, and the guardianship ended.

Adam subsequently brought this section 1983 action on behalf of himself and the estate of Judith, alleging a grand conspiracy among the state court judge, Judith's temporary guardian, the court evaluator, Judith's attorneys, Muser, and Muser's attorneys to have Judith declared incapacitated so that the court could "award lucrative fees" to the conspirators from Judith's substantial assets. *Id.* at 59. In a separate complaint, Adam alleged a conspiracy between Judith's temporary guardian and the Mary Manning Walsh Nursing Home, based on the temporary guardian's decision to place Judith in

the nursing home after she was released from the hospital.

"It is well settled that claims of conspiracy containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (internal quotation marks omitted). Yet that is precisely what Adam has done here. Based purely on conjecture, Adam baldly asserts in his first complaint that the defendants conspired to find Judith incapacitated, "because a finding of 'incompetence' would then enable the judge to use [Judith's] substantial assets . . . to pay all those defendant participants in their respective roles." J. App'x at 29. Adam's section 1983 claim in his second complaint fares no better, as it boils down to a conclusory assertion that the Mary Manning Walsh nursing home conspired to deprive Judith of her federal rights when it accepted her as a resident after the temporary guardian placed her there upon her discharge from the hospital.[4]

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[4] In both complaints, Adam insists that the temporary guardian's placement of Judith in a nursing home – a placement that lasted four days – did not comply with state law, since the guardian allegedly did not have the proper court order to make such a placement. But the state court's January 3, 2020 order authorized the temporary guardian to "[p]rovide for the maintenance and support of [Judith], including paying all bills as may be reasonabl[y] necessary to maintain [Judith] at home *or in an appropriate facility*." J. App'x at 304 (emphasis added). In any case, Adam does not explain how the alleged state procedural violation amounted to a violation of Judith's federal constitutional rights. *See Zahra v. Town of Southold*, 48 F.3d 674, 682 (2d Cir. 1995) ("Our precedents have firmly established that the mere violation of a state law does not automatically give rise to a violation of federal constitutional rights.").

Adam's litany of unsupported assertions about the intent and motivations of the various defendants do not salvage his claims. We "have no obligation to entertain pure speculation and conjecture." *Gallop*, 642 F.3d at 368. Adam alleges, for example, that the defendants "viewed [Judith] as a walking piggybank" and that "Ruotolo considered Adam Brook easy prey for Ruotolo's schemes to claim Adam Brook had breached his fiduciary duty to his own mother." J. App'x at 123. These statements do not render Adam's section 1983 claims non-conclusory. Equally conclusory is Adam's insistence that Judith's court-appointed attorneys – who as state employees presumably would not have benefitted from any court-ordered fees – conspired to have Judith declared incapacitated because they might *someday* "decide to enter private practice in guardianship law in New York" with the expectation "that the other guardianship attorneys would repay the favor." *Id.* at 88. Other assertions are simply nonsensical. Adam alleges that Ruotolo's decision to include the court evaluator and the court on an email somehow "reveal[ed] that [Ruotolo's] intention was not for Judith Brook's welfare, but rather to instigate a controversy with Dr. Adam Brook, so that Ruotolo could then cite the controversy to the [c]ourt to void Adam Brook's power-of-attorney and appoint Ruotolo as Judith Brook's guardian." *Id.* at 124. How that accusation follows from Ruotolo cc'ing the court evaluator and court on an email is a mystery.

Adam's allegation that Ruotolo and the court evaluator "rigged" the January 3, 2020 hearing is equally conclusory. *Id.* at 174. Adam points out that Ruotolo's time sheet shows that Ruotolo and the court evaluator had a phone call the day before the

hearing, after which Ruotolo reviewed the court evaluator's report and prepared a draft order to be submitted to the court. Adam insists that the court evaluator and guardian used the call to "plot[]-out how they were going to rig the January 3 hearing." *Id.* But Adam pleads no facts from which that conclusion could reasonably be inferred. It is no secret that the court evaluator, the court-appointed guardian, and the court itself all were of the view that Judith was incapacitated and that guardianship and care by someone other than Adam were necessary to protect her interests. The January 3 hearing was not "rigged" just because Adam disagrees with that conclusion.[5]

Having reviewed the pleadings *de novo*, we are persuaded that Adam has failed to plead a section 1983 violation and that his federal claims must therefore be dismissed. *See Jusino*, 54 F.4th at 100. We further conclude that the district court did not err in its order denying Adam's motion for relief from final judgment, since the allegations Adam sought to add to his complaints – based on the state court's September 2023 order awarding fees for Judith's guardianship – would not have cured the deficiencies in his complaints. *See* Sp. App'x at 20; Sp. App'x Addendum at 17–46. Rather than rendering the

[5] Adam's assertion that the temporary guardian falsely testified that Adam had not made timely payments for homecare services is contradicted by Adam's own complaint. *See* J. App'x at 190–91 (indicating that between August 13, 2019 and December 23, 2019 Adam failed to pay twelve of thirty-nine invoices by the invoice due date). And the temporary guardian's statement about how many invoices he thought were still outstanding, even if ultimately incorrect, does not support a reasonable inference that the guardian deprived or conspired to deprive Judith or Adam of their federal rights. *Id.* at 163.

complaints non-conclusory, the proposed new allegations simply double down on the theory that the state court judge was conspiring with the other defendants, with the new evidence being yet another state court order that Adam disagrees with. *See* Dist. Ct. Doc. No. 152-1.

III. State-Law Claims

The district court concluded that it could not exercise supplemental jurisdiction over Adam's state-law claims because it lacked original jurisdiction. *See Brook*, 2023 WL 5352773, at *7; 28 U.S.C. § 1367(a). As already explained, the district court erred in concluding that it lacked federal question jurisdiction over Adam's section 1983 claims, so its conclusion that section 1367(a) prohibited it from exercising supplemental jurisdiction was likewise erroneous. Nonetheless, we decline to remand the case to the district court because the exercise of supplemental jurisdiction here would clearly have been an abuse of discretion. Adam's state-law claims vastly outnumber his conclusory section 1983 claims – all of which have now been dismissed – and the case is in its infancy, such that "judicial economy, convenience, fairness, and comity" all "point toward declining to exercise jurisdiction over the remaining state-law claims." *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 119 (2d Cir. 2006) (internal quotation marks omitted); *see also id.* at 124 (holding that district court's exercise of supplemental jurisdiction was abuse of discretion); *TPTCC NY, Inc. v. Radiation Therapy Servs., Inc.*, 453 F. App'x 105, 107 (2d Cir. 2011) (same). Furthermore, Adam has already asserted many of his state-law claims in another state-court proceeding, making the exercise of supplemental jurisdiction here particularly

inefficient. *See* Complaint, *Estate of Judith Brook v. Joseph Ruotolo*, No. 805045/2024 (Sup. Ct. N.Y. Cnty. Jan. 5, 2024), NYSCEF No. 1.

* * *

We have considered Adam's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court and **DENY** as moot the motion pending at Doc. No. 165.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk of Court
[SEAL]

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGMENT

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22 **CIVIL** 6173 (ER)

ADAM BROOK,

Plaintiff,

—against—

JOSEPH RUOTOLO, ESQ., et al.,

Defendants.

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23 **CIVIL** 1319 (ER)

ESTATE OF JUDITH BROOK and ABAM BROOK,

Plaintiff,

—against—

MONITOR/ME, LLC, et al.,

Defendants.

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated August 21, 2023, Defendants' motions to dismiss are GRANTED and

Plaintiff Adam Brook's motion to disqualify is DENIED as moot; accordingly, both cases are closed.

Dated: New York, New York

August 22, 2023

RUBY J. KRAJICK
Clerk of Court

BY: /s/ Illegible
Deputy Clerk

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION & ORDER

22-cv-6173 (ER)

ADAM BROOK,

Plaintiff,

—against—

JOSEPH RUOTOLO, ESQ., *et al.*,

Defendants.

23-cv-1319 (ER)

ESTATE OF JUDITH BROOK and ABAM BROOK,

Plaintiffs,

—against—

MONITOR/ME, LLC, *et al.*,

Defendants.

RAMOS, D.J.:

This consolidated action arises out of allegations by the Estate of Judith Brook ("the Estate") and Adam

Brook ("Adam"), in his individual capacity and as personal representative of the Estate (together, "Plaintiffs"), that Defendants conspired to declare Judith Brook incapacitated, seize her assets, and force her into a nursing home where she was deprived of proper medical treatment, leading to her death. Before the Court are Defendants' motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), as well as Adam's motion to disqualify Ian Shainbrown and Joshua Rushing. 22-cv-6173 ("*Brook I*"), Docs. 89, 90, 93, 95, 98, 100, 103, 106; 23-cv-1319 ("*Brook II*"), Docs. 36, 39. For the following reasons, the motions to dismiss are GRANTED, and the motion to disqualify is DENIED as moot.

I. BACKGROUND

A. Factual Background

Dr. Judith Brook ("Judith") was a renowned researcher and professor of psychiatry. *Brook I*, Doc. 1 ("*Brook I* Compl.") ¶ 24. As part of her estate planning, on June 15, 2006, while she was of sound mind and body, Judith appointed her husband, David Brook, as her attorney-in-fact and healthcare proxy. *Id.* ¶ 58. She further appointed her sons Jonathan Brook and Adam as substitute attorneys-in-fact and healthcare proxies. *Id.* Adam is also a medical doctor. *Id.* ¶¶ 26, 61. After Jonathan Brook died on July 3, 2015 and David Brook died on November 20, 2018, Adam became Judith's sole attorney-in-fact and healthcare proxy. *Id.* ¶ 58. Judith's will also left the bulk of her $8 million estate to Adam and to Jonathan's two daughters. *Id.* ¶¶ 69–71. Adam lived with his mother at the family home in Central Park

West, Manhattan. *Brook II*, Doc. 1 ("*Brook II* Compl."), ¶ 12.

Judith also had a brother, defendant Howard Muser, but her will left only small bequests for Muser and his children and nothing for his wife. *Brook I* Compl. ¶ 67. In fact, in July 2018, Muser even asked Judith to increase the amount of the bequests to his children, but Judith told Muser it "was a bad idea." *Id.* ¶¶ 69–71.

In September 2018, Judith sustained a spinal fracture, and underwent a balloon kyphoplasty procedure at NYU-Langone Hospital to alleviate her pain. *Id.* ¶¶ 72–73. Unfortunately, the procedure led Judith to suffer a second spinal fracture, and the medication prescribed to treat her resulting pain left her in a coma for three days. *Id.* ¶¶ 73–76. Once Judith awoke, NYU-Langone discharged Judith to the Riverside Premier Rehabilitation and Healing Center ("Riverside"). *Id.* ¶ 77. But Adam was dissatisfied with his mother's condition and took her by ambulance from Riverside to New York Presbyterian Weill-Cornell Hospital ("New York Presbyterian"). *Id.* ¶ 78. New York Presbyterian physicians diagnosed that, while Judith had been in the coma, she had developed bilateral deep vein thromboses and pulmonary emboli, which they decided to treat with a regimen of anticoagulants. *Id.* ¶¶ 76, 79. Unfortunately, while the anticoagulants successfully treated the pulmonary emboli, they also caused Judith to bleed into her stomach from a hereditary hemorrhagic telangiectasias disease. *Id.* ¶ 79. The bleeding was treated successfully with an endoscopy. *Id.* By May 2019, Judith was at Riverside, making a steady recovery and was about to be discharged. *Id.* ¶ 80. Riverside recommended that

Judith have 24/7 supervision when she was at home, which Adam arranged. *Id.* ¶ 81.

On May 9, 2019, Muser filed a petition to have Judith declared incompetent, void Adam's power of attorney and health care proxy, and have Muser appointed as her guardian with his wife as successor guardian ("the Petition"). *Id.* ¶ 84. Muser's son-in-law, defendant Ian Shainbrown, and Shainbrown's colleague and friend, defendant Karl Huth—through their respective law firms, defendants the Shainbrown Firm, L.L.C., and Huth, Reynolds, L.L.P—prepared and filed the Petition.[1] *Id.* ¶ 85. The Petition alleged that Adam was misappropriating his mother's wealth and withholding medical treatment and support from her, even as multiple people pled for him to provide her care; that, while Judith was incapacitated, Adam had forced her to execute documents granting him total control of her personal and property management; and that Adam had refused Muser's repeated requests over five months to discuss the nature of those documents. *Id.* ¶¶ 60, 89–92, 96–112. It alleged that Judith was "distraught" over Adam's conduct and wanted Muser to intervene. *Id.* ¶¶ 91, 94, 107. The Petition also sought the appointment of a temporary guardian while the guardianship matter was resolved. *Id.* ¶ 86. Adam alleges that Muser, frustrated with the small bequests in Judith's will and her repeated refusals to give him money, filed the Petition to gain control of Judith's assets and increase the bequests for himself and his family; and Muser intended the temporary guardian to "spy" on Judith and Adam and feed the

[1] Shainbrown and the Shainbrown Firm, L.L.C. are collectively referred to herein as "the Shainbrown Defendants"; and Huth and Huth, Reynolds, L.L.P. are "the Huth Defendants."

court lies and half-truths about Adam's purported maltreatment of Judith. *Id.* ¶¶ 67, 84, 86.

Justice Kelly O'Neill-Levy of the New York Supreme Court, New York County, heard the Petition and signed an order to show cause on May 16, 2019, appointing defendants Mental Hygiene Legal Services ("MHLS") to represent Judith, and Margaret Crowley, Esq.[2] as court evaluator. *Id.* ¶ 118. Defendants Diane Rosenthal, Esq., and Felice Wechsler, Esq., of MHLS, served as Judith's court-appointed attorneys (with MHLS, "the MHLS Defendants"). *Id.* ¶¶ 31–32, 149. Justice O'Neill-Levy also appointed defendant Joseph Ruotolo, Esq., to serve as Judith's temporary guardian on May 28, 2019 and expanded his powers on May 30, 2019.[3] *Id.* ¶¶ 117, 133. On May 29, 2019, Ruotolo, in his first act as guardian, canceled Judith's discharge from Riverside. *Id.* ¶ 135.

On May 30, 2019, while at Riverside, Judith got out of bed, attempted to walk down the hall, and fell, suffering a hairline fracture to her humerus and a fracture to her nose. *Id.* ¶¶ 136–38. On May 31, 2019, Adam visited Judith at New York Presbyterian (where she was hospitalized to recover from her fall) and found Muser there as well; Judith told Muser and Adam that she did not want the court or Muser

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[2] Following a prolonged illness, Crowley withdrew as court evaluator on November 8, 2019 and died on August 3, 2020. *Id.* ¶¶ 118, 127, 359. Justice O'Neill-Levy appointed defendant Ira Salzman, Esq., successor court-evaluator on November 18, 2019. *Id.* ¶ 30.

[3] In some places, the Complaint states that Ruotolo was appointed in May 2019, *see e.g., id.* ¶ 117, but in other places it states that the appointment occurred in May 2020*, see e.g., id.* ¶ 133. As Judith died March 15, 2020, *id.* ¶ 24, the Court attributes the 2020 dates to a typographical error.

involved and wanted Adam in charge of her care. *Id.* ¶¶ 139–42. Muser agreed during the visit to withdraw the Petition, but he did not thereafter do so. *Id.* ¶ 143.

When Judith was to be discharged from New York Presbyterian, Ruotolo directed that she be returned to Riverside rather than return home with Adam, even though Judith did not wish to return to Riverside. *Id.* ¶¶ 144–47. The Complaint is inconsistent as to when Judith was discharged from New York Presbyterian and whether she was discharged to Riverside or back home with Adam. It first states: "On June 8, 2019, four large men . . . forcibly dragged 100-pound Judith Brook out of her hospital room, strapped her . . . to a gurney, and carted her off to the Riverside rehabilitation facility on Ruotolo's instructions." *Id.* ¶ 147. Thereafter, however, it states that Judith was only ready for discharge from New York Presbyterian on June 21, 2019, and Ruotolo refused that day to let her go home, and on June 24, 2019, Judith was slated for discharge to Riverside, but Ruotolo "[e]ventually . . . relented" and allowed her to be discharged home. *Id.* ¶¶ 178–84. Ruotolo further appointed defendant Allegiant Home Care, L.L.C. ("Allegiant") to provide homecare services to Judith, including home health aides ("HHAs") and nurses.[4] *Id.* ¶ 40.

Justice O'Neill-Levy presided over hearings on the Petition on July 1, 2019 and September 6, 2019, and held a trial held on October 18, 2019. *Id.* ¶¶ 225, 354, 356. Adam alleges the defendants intentionally

[4] Defendant Ann Reen, R.N., Allegiant's vice president (with Allegiant, "the Allegiant Defendants"), was directly involved with Judith's homecare services and the related billing and invoicing. *Id.* ¶ 41.

created a record of misrepresentations, which they then presented at the guardianship proceedings, including:

- Crowley informed the court that Adam refused to provide Judith the 24/7 care that Riverside recommended, but Adam alleged he never refused to do so and provided an HHA. *Id.* ¶¶ 119–27, 248. Crowley's court-evaluator report was admitted, over Adam's objection, without cross-examination because Crowley was ill. *Id.* ¶¶ 127–30.
- Adam alleged Judith informed her MHLS attorney Rosenthal that she did not wish to be declared incapacitated, nor did she want a guardian but instead wanted Adam to be in charge of her care, but Rosenthal did not advocate for Judith's stated desires. *Id.* ¶¶ 149–61.
- Ruotolo claimed that there was no food at home except ice cream, and the resulting lack of proper nutrition had caused Judith to be taken to the emergency room with severe diarrhea and pain. *Id.* ¶¶ 186–92, 201. But Adam alleged the house was well-stocked with perishable and non-perishable goods; he had given Judith's caretakers an unlimited credit card authorization to order anything further that Judith wished to eat; and Judith was not taken to the hospital for diarrhea, merely to her geriatrician, who diagnosed that the diarrhea and pain were from a bacterial infection caused by the antibiotics she had been prescribed for a urinary tract infection. *Id.*

- Ruotolo stated that he had received reports from Allegiant that "Judith is lethargic and playing in feces daily," but Adam denied both allegations. *Id.* ¶¶ 232–35.
- Ruotolo alleged Adam had refused to pay for Judith's home health care services for months, risking termination of those services, but Adam alleges that he was charged and timely paid all of Judith's expenses. *Id.* ¶¶ 305–52, 360–61.

Adam alleged that Justice O'Neill-Levy conspired with the defendants to create this fictious record and thereby declare Judith incapacitated so that the defendants could rack up excessive and unnecessary fees against Judith's assets. *See, e.g., id.* ¶¶ 131, 167, 190, 205–210, 266–67, 615.

On January 3, 2020, Justice O'Neill-Levy terminated Adam's power of attorney and healthcare proxy and expanded Ruotolo's guardianship powers over Judith and her property. *Id.* ¶ 117.

Three days later, on January 6, 2020, Adam alleged no nurse came to administer Judith's medication for her, so he administered it; Ruotolo filed a police report against Adam on January 11, 2020 alleging that Adam was interfering with his mother's medication. *Id.* ¶¶ 448–59. On January 12, 2020, Judith became ill from either Adam's (according to Ruotolo) or Allegiant's (according to Adam) mishandling of the medication and was taken to New York Presbyterian by ambulance. *Id.* ¶¶ 460–61, 465.

When Judith was discharged from New York Presbyterian five days later on January 17, Ruotolo directed that Judith go to defendant Mary Manning Walsh Nursing Home ("MMW") over Judith's protests

that she did not want to go to the nursing home. *Id.* ¶¶ 467–68; *Brook II* Compl., ¶¶ 15, 22–24. Adam alleges that, because of Ruotolo's instructions to MMW not to inform Adam regarding Judith's condition or medical care, he was not able to tell MMW staff about the importance that Judith receive a particular medication that he alleged was important and that New York Presbyterian had included on its discharge medication list. *Brook I* Compl. ¶ 469–75. He also alleges that MMW was negligent in several ways, including prohibiting Judith from walking to the bathroom and instead forcing her to lie in her own stool for hours, as well as failing to recognize the symptoms of her gastrointestinal bleeding. *Id.* ¶¶ 476, 497. Similarly, when Judith refused to take her medication, MMW staff[5] simply did not give them to her (including cardiac medication and medication to prevent gastrointestinal bleeding), nor did they inform Adam, who could have convinced Judith to take the medication "because she listened to what her son said," and he "was her protector." *Id.* ¶¶480–82, 485–86. Additionally, MMW contracted with Monitor/Me, L.L.C. ("Monitor/Me") to provide telemedicine services to MMW patients.[6] *Brook II* Compl. ¶ 90.

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[5] Among the MMW medical staff Adam alleges were negligent and committed malpractice are defendants Allen Logerquist, M.D., Florence Pua, M.D., Eric Nowakowski, R.P.A.-C., Towana Moe, R.N., John Michael Natividad, R.N., Arthur Akperov, R.N., Doris Bermudez, R.N., Navjot Sepla, R.N., and Marie Sweet Mingoa, R.N. (together with MMW, "the MMW Defendants"). *Id.* ¶ 538.

[6] Nowakowski was employed by Monitor/Me to provide MMW telemedicine services, where he was supervised by defendant Jason Kubert, M.D., of Monitor/Me. *Id.* ¶ 42. Defendant

On January 21, 2020, Judith had a seizure, became unresponsive, and lost consciousness, for which she was administered CPR at MMW and then taken by ambulance to New York Presbyterian's emergency room.[7] *Brook I* Compl. ¶¶ 535–37. New York Presbyterian diagnosed Judith with a rib fracture from the CPR. *Id.* ¶ 547. On February 5, 2020, at Ruotolo's direction, Judith returned to MMW upon her discharge from New York Presbyterian. *Id.* ¶ 560. While the paramedics were transporting Judith to MMW, however, she had difficulty breathing, and the paramedics asked an MMW physician to evaluate her; the MMW physician determined that Judith needed to return to New York Presbyterian, where she was then taken and readmitted. *Id.*¶¶ 564–66.

On January 31, 2020, MHLS requested to vacate its appointment as counsel for Judith, which Justice O'Neill-Levy granted on February 6, 2020 and named defendant Kenneth Barocas, Esq., as successor counsel. *Id.* ¶¶ 567–68. On February 14, 2020, Barocas (allegedly without having ever spoken to Judith) supported Ruotolo's request to expand his guardianship powers to allow Judith to be involuntarily placed in hospice, and New York Presbyterian physicians not be required to speak with Adam regarding Judith's medical condition or care. *Id.* ¶¶ 578–83. Justice O'Neill-Levy granted the request. *Id.*

Anthony Bacchi, M.D. is alleged to be the alter ego of Monitor/Me. *Id.* ¶ 44.

[7] Adam alleges that Judith was hospitalized because of (1) the failures to diagnose Judith's condition and improper medicating and (2) MMW's failure to communicate with him because he "would have caught their errors and thereby prevented the devastating consequences of their errors." *Brook I* Compl. ¶ 536.

On February 15, 2020, Adam found his mother unresponsive at New York Presbyterian. *Id.* ¶ 584. New York Presbyterian medical staff discovered that Judith had another gastrointestinal bleed, which they treated. *Id.* ¶ 586. Judith regained consciousness the next day but fell back into a coma the day after that.[8] *Id.* ¶¶ 586–87. Judith never recovered from her coma and died while still at New York Presbyterian on March 15, 2020. *Id.* ¶ 601.

In February and March 2020, while Judith was hospitalized at New York Presbyterian, Ruotolo liquidated portions of her stock and engaged in other transfers of securities and cash from Judith's accounts, which Adam alleges vitiated Judith's estate plans and incurred massive and unnecessary tax consequences to the beneficiaries of Judith's estate. *Id.* ¶¶ 602–12. Ruotolo's guardianship ended by law at Judith's death on March 15, 2020, but, when he submitted a final accounting to Justice O'Neill-Levy, it was based on the estate's increased value on April 30, 2020 and contained several other alleged financial irregularities. *Id.* ¶¶ 616–26.

Relatedly, Adam alleges Allegiant committed billing fraud, charging inflated prices for unnecessary or unperformed work. *Id.* ¶¶ 633–44. And Adam contends that the Shainbrown and Huth Defendants also submitted fraudulent bills to Justice O'Neill-Levy for unnecessary or unperformed work. *Id.* ¶¶ 649–50. Thus, Adam alleges that Defendants' conspiracy and wrongful conduct cost the estate

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[8] Adam alleges Judith's coma could have been avoided had New York Presbyterian staff been required to communicate with him because he "would have urged [the] medical staff to treat Judith[]'s gastrointestinal bleeding aggressively and to obtain cardiology consultation." *Id.* ¶ 588.

hundreds of thousands, if not millions, in accounting and legal fees. *Id.* ¶¶ 629–30.

Letters Testamentary were issued on February 17, 2021, and Adam was appointed co-executor of Judith's estate. *Brook II* Compl. ¶ 2.

B. Procedural History

Adam, personally and as a personal representative of the Estate, filed suit against Ruotolo, Salzman, the MHLS Defendants, Barocas, the Shainbrown Defendants, the Huth Defendants, Muser, the Allegiant Defendants, and the MMW Defendants on July 20, 2022. *Brook I* Compl. He brought claims under 42 U.S.C. § 1983 and § 1988, as well as eleven state law claims (New York constitutional tort violation, wrongful death, survivorship, breach of fiduciary duty, medical and legal malpractice, fraudulent billing, unjust enrichment, violation of the Judiciary Law, fraud on the court, and intentional infliction of emotional distress). *Id.* ¶¶ 652–717. The complaint alleges the Court has subject matter jurisdiction under both diversity and federal question jurisdiction. *Id.* ¶¶ 53–56.

On February 16, 2023, Adam and the Estate then filed a second action against the Monitor/Me Defendants for the same MMW-related conduct alleged in the first action. *Brook II* Compl. He again brought claims under 42 U.S.C. § 1983 and § 1988 alongside eleven state law claims, several of which were the same as of the first action (New York constitutional tort violation, wrongful death, survivorship, breach of fiduciary duty, medical malpractice, intentional infliction of emotional distress, negligence, negligent supervision, negligent selection, negligent retention, and respondeat

superior). *Id.* ¶¶ 151–223. The complaint alleges the Court has federal question subject matter jurisdiction. *Id.* ¶¶ 47–49.

The two actions were consolidated on April 18, 2023. *Brook II*, Doc. 35.

Defendants moved to dismiss both actions under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, including under the *Rooker-Feldman* abstention doctrine and on the basis that some defendants are subject to absolute immunity under the Eleventh Amendment as quasi-judicial actors, as well as under Rule 12(b)(6) for failure to state a claim. *Brook I*, Doc. 90 (Ruotolo Mot.), Doc. 93 (MHLS Defs. Mot.), Doc. 95 (Salzman Mot.), Doc. 98 (MMW Defs. Mot.), Doc. 100 (Huth Defs. Mot.), Doc. 103 (Defs.[9] Joint Mot.), Doc. 106 (Nowakowski Mot.); *Brook II*, Doc. 36 (MMW Mot.), Doc. 39 (Kubert Mot), Doc. 41 (Nowakowski letter mot.) (joining and adopting MMW and Kubert's motions). Additionally, Adam moved to disqualify as counsel Shainbrown (who represents the Shainbrown Defendants and Muser) and Joshua Rushing (who represents the Huth Defendants). *Brook I*, Doc. 89.

II. LEGAL STANDARDS

"It is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" *Triestman v. Federal Bureau of*

[9] The Joint Motion is filed on behalf of all defendants in the first action ("the *Brook I* Defendants") except Nowakowski and the Allegiant Defendants. The Allegiant Defendants were served after the motion was filed and joined it thereafter. Doc. 118.

Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (citation omitted).

A. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

"Determining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citation omitted), *aff'd*, 561 U.S. 247 (2010); *see also United States v. Bond*, 762 F.3d 255, 263 (2d Cir. 2014) (describing subject matter jurisdiction as the "threshold question"). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citation omitted). While the Court must accept as true all factual allegations in the complaint, *Morrison*, 547 F.3d at 170, it may not draw any jurisdictional inferences in favor of Plaintiffs, *Fraser v. United States*, 490 F. Supp. 2d 302, 307 (E.D.N.Y. 2007) (citing *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998)). "Jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (citing *Drakos*, 140 F.3d at 131). Thus, in resolving a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a district court may consider evidence outside the pleadings. *Morrison*, 547 F.3d at 170 (citing *Makarova*, 201 F.3d at 113).

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). However, this "flexible plausibility standard" is not a heightened pleading standard, *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 n.3 (2d Cir. 2007) (internal quotation marks and citation omitted), and "a complaint . . . does not need detailed factual allegations" to survive a motion to dismiss, *Twombly*, 550 U.S. at 555.

The question on a motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Sikhs for Just. v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y 2012) (quoting *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995)). Indeed, "the purpose of Federal Rule of Civil Procedure 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits" or "weigh[ing] the evidence that might be offered to support it." *Halebian v. Berv*, 644 F.3d 122, 130 (2d

Cir. 2011) (internal quotation marks and citation omitted). Thus, when ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). In considering a Rule 12(b)(6) motion, a district court may also consider "documents attached to the complaint as exhibits[] and documents incorporated by reference in the complaint." *Doe v. N.Y. Univ.*, No. 20 Civ. 1343 (GHW), 2021 WL 1226384, at *10 (S.D.N.Y. Mar. 31, 2021) (quoting *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010)).

III. DISCUSSION

When the Court is confronted by a motion raising a combination of Rule 12(b) defenses, it will pass on the jurisdictional issues before considering whether the complaint states a claim. *Foley v. Union de Banques Arabes Et Françaises*, No. 22-cv-1682 (ER), 2023 U.S. Dist. LEXIS 125579, at *17 (S.D.N.Y. July 20, 2023) (citations omitted). Accordingly, the Court first addresses Defendants' arguments as to subject matter jurisdiction. Because the Court holds that it lacks both federal question and diversity subject matter jurisdiction in both actions, it need not reach the arguments concerning *Rooker-Feldman* abstention or immunities, and it may not consider any arguments under Rule 12(b)(6).

A. The Court Lacks Federal Question and Supplemental Jurisdiction

Federal question subject matter jurisdiction exists where a "civil actions aris[es] under the Constitution,

laws, or treaties of the United States." 28 U.S.C. § 1331. Here, the only federal causes of action are a single § 1983 claim[10] in each of *Brook I* and *Brook II*. *Brook I* Compl. ¶¶ 652–717; *Brook 2* Compl. ¶¶ 151–223. Section 1983 claims may only be brought where defendants are state actors or acted under color of law. 42 U.S.C. § 1983; *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) ("To state a claim for relief in an action brought under § 1983, [plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." (citation and internal quotation marks omitted)).

Defendants argue, however, that they are not state actors, and no § 1983 claim may therefore lie against them, as a result of which the Court lacks federal question jurisdiction. *Brook I*, Doc. 92 (Ruotolo) at 6–7, Doc. 94 (MHLS Defs.) at 10–11, Doc. 97 (Salzman) at 9–14, Doc. 99 (MMW Defs.) at 10–11, Doc. 102 (Huth Defs.) at 4–9; *Brook II*, Doc. 37 (MMW Defs.) at 13–14, Doc. 40 (Kubert) at 5–7. Plaintiffs respond

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[10] Both actions also purport to assert claims under § 1988. However, as the *Brook I* Defendants correctly point out (Doc. 104 at 13), § 1988 does not give rise to an independent cause of action; it merely sets forth the procedure governing other civil rights actions. *See Roundtree v. New York*, 778 F. Supp. 614, 617–18 (E.D.N.Y. 1991) ("[T]he plaintiff states in his complaint that he proceeds as well under 42 U.S.C. Section 1988. This section does not, however, provide a cause of action; rather, it governs actions or proceedings brought to enforce other civil rights provisions (such as Section 1981 or Section 1983).").

that the defendants acted under color of law first because MHLS attorneys Rosenthal and Weschler are state employees (*Brook I*, Doc. 127 at 8); and Ruotolo and Salzman were court (and therefore state) appointed (*Brook I*, Doc. 119 at 12–16, Doc. 128 at 8–9). Further, Plaintiffs argue Defendants acted under color of law insomuch as they conspired with state actors, including Justice O'Neill-Levy and Ruotolo as a court-appointed guardian, to violate Plaintiffs' rights. *Brook I*, Doc. 119 at 12–16, Doc. 125 at 7–8, Doc. 126 at 5–6, Doc. 127 at 8, Doc. 128 at 8–9; *Brook II*, Doc. 44 at 7–14, Doc.45 at 7–12.

The Court holds that no federal question jurisdiction exists because no defendant is a state actor either by virtue of their own authority and actions or through the existence of a conspiracy with state actors, and there is thus no federal claim on which to base original subject matter jurisdiction. First, neither Rosenthal, Weschler, Ruotolo, nor Salzman were state actors by virtue of their positions. Rosenthal and Weschler, Judith's court-appointed attorneys, were employees of MHLS, a New York state agency. *Brooks I* Compl. ¶¶ 31–33. But, court-appointed attorneys, *including* MHLS attorneys, do not act under color of state law by virtue of their appointment. *Sasscer v. Barrios-Paoli*, No. 05-cv-2196 (RMB), 2008 WL 5215466, at *6 (S.D.N.Y. Dec. 8, 2008); *Pecou v. Hirschfeld*, No. 07-cv-5449 (SJF), 2008 WL 957919, at *2 (E.D.N.Y. Apr. 3, 2008). Ruotolo and Salzman served, respectively, as court-appointed guardian and evaluator. *Id.* ¶¶ 27, 30. But, a court-appointed guardian likewise does not act under color of state law by virtue of his appointment. *Shabtai v. Shabtai*, No. 20-cv-10868 (JGK), 2021 U.S. Dist. LEXIS 73759, at *4 (S.D.N.Y. Apr. 16, 2021); *Galanova v. Portnoy*, 432 F. Supp. 3d

433, 445–46 (S.D.N.Y. 2020); *Sasscer*, 2008 WL 5215466, at *5; *Storck v. Suffolk Cnty. Dep't of Soc. Servs.*, 62 F. Supp. 2d 927, 941 (E.D.N.Y. 1999). Nor does a court-appointed evaluator. *Shabtai*, 2021 U.S. Dist. LEXIS 73759, at *4. Accordingly, neither court-appointed attorneys Rosenthal and Weschler, nor court-appointed evaluator Salzman, nor court-appointed guardian Ruotolo were state actors. *See Duboys v. Bomba*, 199 F. Supp. 2d 166, 170 (S.D.N.Y. 2002) ("[T]he law in this Circuit consistently holds that a court appointment of a private individual is not sufficient to establish state action." (citations omitted)).

Moreover, Plaintiffs have not established that any of the defendants, as private actors, became state actors by virtue of conspiracy with state actors. Section 1983 claims may be brought where a private actor conspired with a state actor to deprive the individual of their rights. *Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) ("[A] private actor acts under color of state law when the private actor 'is a willful participant in joint activity with the State or its agents.'" (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970))). But "'a merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against' a private party." *Browdy v. Karpe*, 131 F. App'x 751, 753 (2d Cir. 2005) (quoting *Ciambriello*, 292 F.3d at 324); *see also Sasscer*, 2008 WL 5215466, at *6 ("[I]n any event, Plaintiff's conclusory assertion is insufficient to allege a conspiracy between [the court-appointed individual] and [the judge]." (citing *Gyadu v. Hartford Ins. Co.*, 197 F.3d 590, 591 (2d Cir. 1999) ("[A] complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights

cannot withstand a motion to dismiss." (internal quotations omitted)))). Particularly, the plaintiff "must provide some factual basis supporting a meeting of the minds" between the state and private actors to cause the injury, and he must provide some details of time and place. *Catania v. United Fed'n of Teachers*, No. 21-cv-1257 (GHW) (JW), 2023 U.S. Dist. LEXIS 73772, at *9–10 (S.D.N.Y. Apr. 26, 2023) (R&R) (quoting *Romer v. Morgenthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000)); *see also Quirk v. DiFiore*, 582 F. Supp. 3d 109, 115 (S.D.N.Y. 2022) (citing *Ortiz v. Ledbetter*, No. 19-cv-2493, 2020 WL 2614771, at *6 (S.D.N.Y. May 22, 2020)). Here, despite having filed two complaints amounting to over 300 pages, Plaintiffs have not properly pled a conspiracy between any of the defendants and Justice O'Neill-Levy, the only genuine state actor. Indeed, Plaintiffs have admitted that "Judge O'Neill-Levy was not a participant in the conspiracy to force Judith into a nursing home and keep her there"; rather, the specific conspiracy alleged is that "Ruotolo and Judge O'Neill-Levy conspired to have Ruotolo appointed Judith's guardian." *Brook II*, Doc. 44 at 10. And Plaintiffs' primary factual allegation underlying the assertion of Ruotolo and Justice O'Neill-Levy's conspiracy is merely that Justice O'Neill-Levy has appointed Ruotolo as a guardian 21 times, and attorneys who are often appointed as guardians have a "financial motive to conspire with [Justice O'Neill-Levy] and work together to enrich themselves at the expense of alleged incapacitated persons and their families in guardianship litigation." *Brook I* Compl. ¶¶ 132, 134. But such a conclusory allegation is insufficient to show a meeting of the minds, nor do the complaints provide any details as to the time or place of any agreement between Justice O'Neill-Levy

and Ruotolo. *See Catania*, 2023 U.S. Dist. LEXIS 73772, at *9–10 (citing *Romer*, 119 F. Supp. 2d at 363); *Quirk*, 582 F. Supp. 3d at 115 (citing *Ortiz*, 2020 WL 2614771, at *6). Rather, these are mere conclusory allegations insufficient to state a § 1983 claim. *See Browdy*, 131 F. App'x at 753 (quoting *Ciambriello*, 292 F.3d at 324); *Sasscer*, 2008 WL 5215466, at *6 (citing *Gyadu*, 197 F.3d at 591). As Plaintiffs have now conceded that no conspiracy existed between Justice O'Neill-Levy and any other defendant, and their arguments that the other defendants conspired only with Ruotolo are unavailing since he is not a state actor, Plaintiffs have therefore failed to establish that *any* defendant in either action under color of state law, no matter how egregious their conduct is alleged to be. Plaintiffs continued exclamations to the contrary throughout the complaints that they are the victims of an elaborate conspiracy does not change the result: repeating it does not make it so. Accordingly, Plaintiffs cannot state a claim under § 1983 with respect to any defendant, and no federal cause of action therefore exists in this case. The Court therefore does not have federal question subject matter jurisdiction.

As to the remaining state claims, the Court generally has discretion to exercise supplemental jurisdiction over state law claims arising from the same common nucleus of operative fact as the federal claims. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009). But, where no proper basis first exists for original federal jurisdiction over at least one claim, the Court cannot exercise supplemental jurisdiction. *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996); *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 730 (2d Cir.

1993). Consequently, where as here, no original federal subject matter jurisdiction exists, the Court may not exercise supplemental jurisdiction over Plaintiffs' state law claims. *See Grazette v. City of N.Y.*, 20-cv-965 (ER) (SLC), 2022 U.S. Dist. LEXIS 206566, at *19 (S.D.N.Y. Nov. 14, 2022) (holding no supplemental jurisdiction exists where federal question jurisdiction was improper and collecting cases), *R&R adopted by* 2023 U.S. Dist. LEXIS 39004 (S.D.N.Y. Mar. 8, 2023).

B. Adam Has Abandoned His Argument that the Court Has Diversity Jurisdiction

Moreover, diversity subject matter jurisdiction cannot save Plaintiffs' claims. Plaintiffs did not argue the Court has diversity subject matter jurisdiction in *Brook II*, wherein the Estate is a plaintiff, only in *Brook I*, in which the sole plaintiff is Adam in his individual capacity and as a personal representative of the Estate. *Compare Brooks I* Compl. ¶¶ 53–56, *with Brooks II* Compl. ¶¶ 47–49. In *Brooks I*, Adam alleged complete diversity exists because he is a citizen of Florida, and all defendants are citizens of New York or New Jersey for purposes of subject matter jurisdiction. *Brooks I* Compl. ¶¶ 26–51, 55. But the *Brook I* Defendants' joint motion to dismiss argued that complete diversity cannot exist because, as representative of the Estate, Adam's citizenship is in New York, where Judith lived at the time of her death. *Brooks I*, Doc. 104 at 14–15. In opposition, Adam argued that the *Brook I* Defendants' "argument is without merit [because] the Complaint's well-pleaded factual allegations set forth a federal question granting this Court subject matter jurisdiction pursuant to 28 U.S.C. § 1331." *Brooks I*, Doc. 124 at 11.

A "party's failure to address [a] claim raised in [an] adversary's papers may indicate abandonment." Hanig v. Yorktown Cent. School Dist., 384 F. Supp. 2d 710, 723 (S.D.N.Y. 2005) (citing Ortho Pharm. Corp. *v. Cosprophar, Inc.*, 828 F. Supp. 1114, 1129 (S.D.N.Y. 1993). Accordingly, where a plaintiff fails to respond to defendants' arguments in support of their motion to dismiss, courts will deem the underlying claim or argument dismissed. See, e.g., Bright-Asante v. Saks & Co., 242 F. Supp. 3d 229, 238 (S.D.N.Y. 2017); Arma v. Buyseasons, Inc., 591 F. Supp. 2d 637, 642–43 (S.D.N.Y. 2008). Here, Adam's opposition responds to Defendants' arguments as to the non-existence of diversity jurisdiction solely by arguing that federal question jurisdiction exists. See Brook I, Doc. 124 at 11. In other words, even though he bears the burden of establishing subject matter jurisdiction exists, Makarova, 201 F.3d at 113, he makes no arguments in support of the existence of diversity jurisdiction. Accordingly, the Court finds that Adam abandoned his arguments that it has diversity subject matter jurisdiction in light of the Brook I Defendants' arguments. See, e.g., Bright-Asante, 242 F. Supp. 3d at 238; Arma, 591 F. Supp. 2d at 642–43.

Consequently, this Court does not have subject matter jurisdiction under either federal question or diversity jurisdiction, and it must dismiss *Brook I* and *Brook II*.

C. The Court Need Not Decide Parties' Remaining Arguments as to Abstention, Immunity, Rule 12(b)(6), and Disqualification

The Court need not reach the arguments concerning *Rooker-Feldman* abstention or defendants'

immunities because it has already held that it lacks either diversity or federal question subject matter jurisdiction. It also therefore may not consider any arguments under Rule 12(b)(6), and Adam's motion to disqualify is rendered moot.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are GRANTED, and Plaintiff Adam Brook's motion to disqualify is DENIED as moot. The Clerk of Court is respectfully directed to terminate the motions—*Brook I* (22-cv-6173), Docs. 89, 90, 93, 95, 98, 100, 103, 106; and *Brook II* (23-cv-1319), Docs. 36, 39—and close both cases.

It is SO ORDERED.

Dated: August 21, 2023
New York, New York

/s/ Edgardo Ramos
EDGARDO RAMOS, U.S.D.J.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Complaint and Demand for Jury Trial

Adam Brook, M.D., Ph.D.
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Delray Beach, FL 33483
(646) 774-0971
brook1231@gmail.com
Plaintiff *pro se*

Adam Brook,

Plaintiff;

—v.—

Joseph Ruotolo, Esq., Ira Salzman, Esq., Diana Rosenthal, Esq., Felice Wechsler, Esq., Mental Hygiene Legal Service, Kenneth Barocas, Esq., Ian Shainbrown, Esq., The Shainbrown Firm, L.L.C., Karl Huth, Esq., Huth, Reynolds, L.L.P., Howard Muser, Allegiant Home Care, L.L.C., Ann Reen, R.N., Mary Manning Walsh Nursing Home, Allen Logerquist, M.D., Florence Pua, M.D., Eric Nowakowski, R.P.A.-C, Towana Moe, R.N., John Michael Natividad, Arthur Akperov, Doris Bermudez, Navjot Sepla, Marie Sweet Mingoa, R.N., and John Does #1-10,

Defendants.

The Conspiracy in the Article 81 Case Between Defendants with the State Court Judge

8. As more fully alleged herein, the defendants' conspiracy commenced with the filing of the Petition by defendant Muser and his attorneys on May 9, 2019, to have his sister Judith Brook declared an "incompetent person" ("IP") so that Muser could be appointed her Guardian to take over and misappropriate her assets, change her Will and enrich himself with his sister's assets, and enrich his attorneys with court-awarded fees and compensation. Crucially, under state law applicable to such a Petition, New York Mental Hygiene Law §81.09(f) and 81.10(f) and case law, provide that "(w)hen judgment grants the petition," the court may grant compensation "payable by the estate" of the alleged incapacitated person ("AIP") to the Court appointed evaluators, and the AIP's court appointed lawyers, typically the New York Mental Hygiene Legal Service ("MHLS"). Granting the Petition also entitles the Petitioner's attorneys to obtain their legal fees from the AIP's estate. Accordingly, when presented with a high net worth individual AIP like Judith, all the participants in the conspiracy, defendants herein, had a strong financial motive to join the conspiracy with the state court judge, for the common purpose and understanding that they would all do whatever was necessary, including violating due process and other legal and Constitutional protections, to have Judith declared incompetent under state law so that they could be paid by invading her substantial assets, reported early on by the first evaluator as nearly $8-million.

The state court judge, although entitled to judicial immunity from monetary damages in this action, had the same incentive because she could use a finding of incompetence to reward her favorite Guardian, Ruotolo, for his repeated assistance in taking on *21 prior* appointed positions in her Court during the two immediately preceding calendar-years (2018–2019). All of these 21 appointments were in guardianship litigation regarding AIPs with much smaller value estates, yielding much smaller compensation to Ruotolo.

21. In the alternative, defendants Salzman and Ruotolo are liable for acting under color of state law in violation of §1983 because they were appointed by the Court and conspired with each other and with the court-appointed Guardianship lawyers and Guardianship Defendants, acting for the state and obtaining significant aid from the court-appointed defendants, as hereinafter alleged, to achieve the common, preordained goal of all of them to find Judith Brook incapacitated so that each of them would be paid fees and compensation by Judith's assets and estate. Direct evidence of the conspiracy is shown, as hereinafter alleged, by Ruotolo's January 2, 2020 timesheet entry, "TC [telephone call] from CE [court-evaluator] re hearing of 1/3/20". Thus after Salzman finished and photocopied his court-evaluator report on December 31, Salzman telephoned Ruotolo on January 2 and told Ruotolo that he (Ruotolo) was going to be guardian.

22. Salzman and Ruotolo plotted-out how they were going to rig the January 3 hearing, as shown by Ruotolo's next time entries the same

day, still on January 2, that Ruotolo immediately after the call with Salzman "Prepare[d] proposed order for hearing of 1/3/20 (1.3 hours)" in which he appointed himself as Guardian with expanded powers over Judith's person and property and vacating Adam's long standing power and proxy for Judith. Thus, Ruotolo knew in advance of the hearing from his private discussion with Salzman that Salzman was going to see to it that he (Ruotolo) was going to be appointed guardian on January 2, before the January 3 hearing had even occurred. And that is exactly what occurred on January 3, 2020. Ruotolo then used his expanded powers wrongfully, breached his appointed fiduciary duty to his ward to care for her person and protect her assets, but instead sought to enrich himself and the co-conspirators at Judith's expense.

27. Defendant Joseph Ruotolo, Esq. ("Ruotolo") is an attorney currently licensed by the State of New York and a citizen and resident of New York. Ruotolo was a former New York City Police officer, but obtained his New York license to practice law, and his appointment to the fiduciary list of the New York County Supreme Court, without disclosing that he had been found guilty in NYPD disciplinary proceedings and sanctioned for excessive use of force on multiple occasions. Ruotolo personally paid a settlement of $5000 for his vicious assault on an elderly African-American civil servant, an innocent bystander. (*Lindo v. Sgt. J. Ruotolo et al.*, Case #1:98-cv-09066-SHS-DF (S.D.N.Y.) docket sheet; the City of New York paid $80,000) Upon information and belief,

Ruotolo kept his history of his misconduct secret until it was discovered and documented in the "fee hearings" after Judith's death.

28. Evidence during the fee hearings in the Article 81 case, after Ruotolo's appointment, disclosed that Sergeant Ruotolo was accorded full due process rights in an NYPD disciplinary proceeding in which four eyewitnesses testified against him. Ruotolo unsuccessfully challenged his termination in an Article 78 proceeding, filed as New York County Supreme Court Index number 119209-2000. Mr. Ruotolo failed to disclose his NYPD disciplinary history to the Committee on Attorney Character and Fitness at the time of his application for admission to the bar as an attorney licensed in New York State. Ruotolo also failed to disclose his NYPD disciplinary history in his application for appointment to the New York Supreme Court Part 36 list of individuals eligible for appointment as fiduciaries in guardianship proceedings.

31. Defendant Diana Rosenthal, Esq. ("Rosenthal") is an attorney duly licensed in the State of New York. By Order to Show Cause dated May 16, 2019, Judge O'Neill-Levy appointed Mental Hygiene Legal Service as court-appointed attorney for Judith Brook, and Ms. Rosenthal served as one of the Mental Hygiene Legal Service attorneys assigned to represent Judith Brook. Upon information and belief, Rosenthal is a citizen and resident of New York.

95. None of these allegations were true, but they caused the court on May 28, 2019 to enter an order appointing a temporary Guardian,

Ruotolo. The court did so without hearing from Adam or Judith.

106. The petition falsely claimed that Adam Brook refused to arrange for home health aides for Judith Brook. To the contrary, while Judith Brook was still in the Riverside rehabilitation facility, Adam Brook was working with the Riverside social worker Tara Diamond to arrange home health aides for Judith Brook, and Adam Brook had in fact discussed with Joyce Lovelady that Ms. Lovelady be one of Judith Brook's aides. Ms. Lovelady has significant experience caring for elderly individuals.

134. Review of Ruotolo's public record of appointments indicates that Judge O'Neill-Levy appointed Ruotolo *21 times* to guardianship positions in the years 2018–2019, notwithstanding former Chief Judge Judith Kaye's admonition that guardianships not become fonts of patronage. (J. Fritsch, "*Chief Judge Calls for Measures To Thwart Guardianship Abuses*", *New York Times*, December 6, 2001)

162. NYMHL §81.10 and the Law Revision Commission comments to §81.10 are clear: court-appointed attorneys for "alleged incapacitated persons" are legally mandated to vigorously represent their clients' wishes:

> The role of counsel, as governed by this section, is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court. At a minimum that representation should include conducting

personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the allegedly incapacitated person. (Law Revision Commission comments to NYMHL §81.10)

163. The New York Mental Hygiene Law, Article 81, wisely recognizes that in many situations the person assigned to investigate and report to the court may have conclusions or recommendations at odds with the wishes of the alleged incapacitated person, and acknowledges the alleged incapacitated person's right to have those wishes and desires vigorously advocated by counsel whose sole loyalty is to the alleged incapacitated person.

164. As Judith Brook's court-appointed attorneys, defendants Mental Hygiene Legal Service, Diana Rosenthal, and Felice Wechsler were mandated by law, including NYMHL §81.10, to advocate for their client's wishes. Judith Brook clearly and repeatedly stated, including on the record in open court as quoted *infra*, that she did not want a guardian appointed and that she wanted her son Dr. Adam Brook to continue as her healthcare-proxy and power-of-attorney.

165. Defendants Diana Rosenthal, Felice Wechsler, and MHLS failed to represent Judith Brook and ensure that Judith Brook's point of view was presented to the court. Diana Rosenthal, Felice Wechsler, and MHLS failed to explain to

Judith Brook her rights. Diana Rosenthal, Felice Wechsler, and MHLS failed to counsel Judith Brook regarding the nature and consequences of the proceeding. Diana Rosenthal, Felice Wechsler, and MHLS failed to secure and present evidence and testimony to support their client's wishes. Diana Rosenthal, Felice Wechsler, and MHLS failed to provide vigorous cross-examination. Diana Rosenthal, Felice Wechsler, and MHLS failed to offer arguments to protect Judith Brook's rights. In these omissions, Diana Rosenthal, Felice Wechsler, and MHLS were acting as part of the aforesaid conspiracy so that Judith would be declared incapacitated which would then authorize the Court to charge Judith's estate with the expense of paying Diana Rosenthal, Felice Wechsler, and MHLS as well as the other co-conspirators.

188. In addition, on June 6, 2019 Dr. Adam Brook had provided an unlimited credit card authorization to Allegiant Homecare which gave Allegiant the ability to make charges not only for the payment of Allegiant home health aides, but also to pay for whatever necessities Judith Brook might need such as food, so that if the Allegiant home health aide was unable to find a particular food that Judith Brook wanted, Allegiant would be able to order that food for Judith Brook.

208. The decision to implement nurses at $125 per hour was made by Ruotolo and Allegiant Home Care, and Ruotolo notified all parties of implementing nurses at $125 per hour by email dated June 26, 2019. Private-duty nurses at $125 per hour and home health aides at $32

per hour works out to $1884 per day. Thus, Allegiant was billing Judith Brook at a rate of $687,660 per year for homecare services.

209. Billing Judith Brook quickly at a high rate was critical to Ruotolo and Allegiant Home Care's scheme. Ruotolo and Allegiant wanted to be able to claim that Adam Brook was in arrears in excess of $100,000. Ruotolo and Allegiant's scheme was to manufacture purported "arrears": Ruotolo and Allegiant ran up a high bill with private-duty nurses, Allegiant did not send Adam Brook invoices, and then Allegiant did not use the unlimited credit card authorization that Adam Brook had provided until suddenly, two weeks before the expected date of the guardianship hearing (September 6, 2019), Allegiant then billed Judith Brook's credit card $348,957.50 in a single day (August 23, 2019), which of course would be rejected by the credit card company; and then Allegiant falsely claimed that homecare services would stop for non-payment, thereby manufacturing a phony "crisis" that would justify Judge O'Neill-Levy voiding Dr. Adam Brook's power-of-attorney and healthcare-proxy and Judge O'Neill-Levy appointing Ruotolo as Judith Brook's guardian.

210. Ruotolo hoped that such high charges for unnecessary care (private-duty nurses 12 hours-a-day at $125 per hour) would provoke a controversy with Dr. Adam Brook, and would enable a large bill to be run up so that the court-appointees appointed by Judge O'Neill-Levy could falsely claim that Dr. Adam Brook was purportedly refusing to pay for homecare services, as discussed *infra*. Ruotolo learned

these dishonest tricks in the approximately 500 guardianships that he had been involved with in the preceding decade.

The Friday, August 23, 2019 manufactured payment controversy

305. The hearing on Judith Brook's guardianship had been scheduled for September 6, 2019. Two weeks before that hearing, on Friday, August 23, 2019, 11:22 AM, while Dr. Adam Brook was at work treating cancer patients, out of the blue, and strategically done on a summer Friday, Ruotolo emailed Dr. Adam Brook and copied the Court, the court-evaluator, and all parties to create yet another false controversy, and attempt to obtain direct access for Allegiant to Judith's bank accounts:

Mr. Brook,

This matter is before the Court on September 6, 2019. As you are aware, I have been ordered to arrange for home care services for Dr. Judith Brook, and you have been ordered to disburse your mother's funds for said services, which have been in place since May, 2019. Per the home care agency, ***service will discontinue due to a two-month outstanding invoice*** owed for services to your mother. Either your mother's credit provided by you is no longer valid and/or has been stopped from being charge.

It is imperative that you correct this error today, before 1 p.m., for the home care services to remain in place over the weekend. I have

attached the Payment Authorization and Guarantee that you previously completed.

Please provide to the undersigned Dr. Judith Brook's working credit card/bank routing number and checking account number and/or debit card forthwith, which I will forward to the home care agency. (Emphasis in the original.)

306. But the fact was that Allegiant Homecare had failed to provide Dr. Adam Brook with invoices. Nor had Allegiant provided Dr. Adam Brook with notice that services for Judith Brook would be discontinued as claimed by Ruotolo. Indeed, Allegiant suddenly discontinuing services without notice and without cause would have constituted malpractice by Allegiant. Allegiant never provided invoices to Dr. Adam Brook (which Dr. Adam Brook would have paid had Allegiant sent them to him). Moreover, Dr. Adam Brook had provided Allegiant with an unlimited credit card authorization. As is documented by the credit card statements, Allegiant failed to bill Judith Brook's credit card in June or July 2019. Allegiant did in fact successfully bill Judith Brook's credit card on August 16, 2019 for charges of $1,794; $10,000; and $7,260. (page 17)

307. That Ruotolo gave Dr. Adam Brook 98 minutes to provide Ruotolo with "Dr. Judith Brook's working credit card/bank routing number and checking account number and/or debit card", without indicating how much was owed, is strong evidence that Ruotolo and Allegiant were furthering their scheme and the object of the conspiracy with the Court and co-

conspirators, to manufacture grounds to void Dr. Adam Brook's power-of-attorney and healthcare-proxy.

308. Nine minutes later, on August 23, 2019, 11:32 AM, Dr. Adam Brook responded to Ruotolo and copied the Court, the court-evaluator, and all parties, to put them on notice of the unreasonableness of Ruotolo's request:

> I have received no invoice that is 2 months outstanding
>
> I am not going to address a problem that has been outstanding you claim for 2 months while I am at work on 90 minutes notice.
>
> This stinks of manipulative behavior intended to steal my mother's assets.

309. Fifteen minutes later, at 11:47 AM, Ruotolo again emailed Judge O'Neill-Levy's Law Clerk Premila Reddy, the court-evaluator, and all parties and again urged that his powers be "expanded" based on this manufactured controversy:

> Ms. Reddy,
>
> As can be seen from Adam Brook's response below, the issue of payment – which he has been court-ordered to make, will not be addressed before 1 p.m., today. My understanding, from the court evaluator's report, is that the AIP has sufficient assets to pay for her care. Dr. Judith Brook's services will discontinue without payment by cross petitioner. I apology [*sic*] for the short notice, but time-is-of-the-essence. Therefore, I respectfully request an expansion of my powers to include the ability to

marshal Dr. Judith's assets to pay for her ongoing home care services.

Respectfully submitted,

Joseph Ruotolo

310. Two minutes later, August 23, 2019, 11:49 AM, defendant Diana Rosenthal emailed the Court, the court-evaluator, and all parties, again without conferring with her client but manifestly in support of Ruotolo and the conspiracy:

MHLS [Mental Hygiene Legal Service] has no objection to Mr. Ruotolo's application.

311. Ms. Rosenthal stated MHLS's "no objection" to Ruotolo's improper request, despite Judith Brook's explicit statement that she did not want a guardian, despite the fact that Rosenthal had not discussed appointing Ruotolo as guardian with her client Judith Brook, and despite the fact that Rosenthal had not investigated the claim of "arrears" at all, nor discussed the matter with Dr. Adam Brook or Judith Brook to find out the facts of the matter. Ms. Rosenthal stated MHLS's lack of objection to Ruotolo's request even though she had been copied less than an hour earlier on Adam Brook's email stating "I have received no invoice that is 2 months outstanding". Ms. Rosenthal did not look into the facts, contact Dr. Adam Brook or accord him any opportunity to demonstrate that "arrears", if any, were due to Allegiant failing to provide invoices and failing to bill Dr. Judith Brook's credit card in amounts below the credit limit. Ms. Rosenthal's failure to diligently advocate for

her client Judith Brook's clearly articulated wishes constituted further legal malpractice.

312. Five hours later, August 23, 2019, 5:11 PM, Ruotolo emailed the Court, the court-evaluator, and all parties:

> Below is the most recent attempt, by the home care agency, to satisfy a portion of Judith Brook's outstanding arrears: today at 5:02 p.m. Cross-petitioner is unable to comply with the Court's order.
>
> I believe it would be detrimental to the health of Dr. Judith Brook to be without the home care services currently in place.

313. Attached was a credit card sale receipt with a charge for $3065 and a "declined" message.

314. Allegiant, rather than send invoices to Dr. Adam Brook, attempted on August 23, 2019 suddenly to bill Dr. Judith Brook's credit card directly for multiple charges totaling $348,957.50 using the unlimited credit card authorization that Adam Brook had signed on June 6, 2019 after Ruotolo complained to the Court that a credit card authorization with a $20,000 limit was unacceptable. $348,957.50 was manifestly in excess of the limit on Judith Brook's credit card, and that is why the credit card charges were declined. Moreover, Allegiant had not provided invoices to Adam Brook showing such an amount owed.

315. Furthermore, Ruotolo's statement that this was "the most recent attempt, by the home care agency, to satisfy a portion of Judith Brook's outstanding arrears" implied that there were "arrears" and that the home care

agency had made previous unsuccessful attempts to collect payment from Dr. Adam Brook that Dr. Adam Brook was refusing to pay. But in fact, Allegiant failed to provide Dr. Adam Brook with invoices, and *Allegiant had not notified Dr. Adam Brook of any previous unsuccessful attempts to bill Judith Brook's credit card.* Accordingly, Ruotolo's implication that Dr. Adam Brook was refusing to make payments was false and made with knowledge of its falsity or reckless disregard for its truth or falsity, and succeeded in providing false evidence to the Court in furtherance of the conspiracy to make it appear that Dr. Adam Brook was failing to make payments for homecare services which purportedly would lead to Judith Brook being placed in the dangerous situation of not having homecare.

316. Ruotolo knew that Dr. Adam Brook had provided an unlimited credit card authorization on Judith Brook's credit card. On June 27, 2019 12:57 PM Adam Brook emailed his then attorney Harvey Corn the unlimited credit card authorization for Allegiant Homecare that Adam Brook had successfully faxed to Allegiant on June 6, 2019 at 10:14 AM. On June 27, 2019 1:13 PM, Mr. Corn forwarded this email and the attached unlimited credit card authorization to Mr. Ruotolo. It must be emphasized that Adam Brook is in possession of proof that the unlimited credit card authorization was successfully faxed to Allegiant on June 6, 2019 at 10:14 AM.

317. On August 23, 2019, at 4:34 PM, Joe Ruotolo emailed the Court and all parties:

So, all parties and cross-petitioner are aware, invoices for the AIP's home care service are mailed every two weeks to the Brooks' residence.

I am informed the home care agency attempted to receive payments authorizations for weeks: recently, this past Friday, for appx $19,000; and today, at 12:39 p.m. for $3,065 – all denied, as they were in July and August. As a courtesy, the agency did not press Adam Brook for payment until it approached this week's balance. Attached hereto, is the most recent credit card denial to assist the AIP's son. It is anticipated, cross-petitioner and "Deanna," of card member services, will process all outstanding payments today.

As to Mr. Shainbrown's question regarding home care services, they are still in place.

318. But, in fact, Judith Brook's Fidelity credit card statement contains charges for $1,794, $10,000, and $7,260 on August 16, 2019, a total of $19,054 that was *successfully* billed to Judith Brook's credit card. (page 17) In claiming that the payments were "all denied", Ruotolo lied to the Court in order to justify the voiding of Judith Brook's power-of-attorney and healthcare proxy and his appointment as Judith Brook's guardian.

319. On August 23, 2019, at 7:00 PM, Dr. Adam Brook emailed the Court, the court-evaluator, and all parties:

I am writing in response to your August 23, 2019 1:11 PM email requesting: "Please update

the court once you have looked into the credit card authorization issue."

I spoke with Deanna from Cardmember Services a few hours ago, and Deanna told me that Allegiant attempted to bill my mother's credit card this morning for charges of $45,793; $10,000; $5,000; $92,000; $92,000; $3,000; and $3,000.

This works out to a grand total of $250,793 dollars for less than 3 months of work.

The reason why the charges are so high is Allegiant charges 125 dollars an hour for private duty nursing, even though I have repeatedly informed Court-appointed Interim Guardian Joseph Ruotolo and the head of the Allegiant Home Care agency Ann Reen that there is absolutely no medical indication for a private duty nurse (as opposed to a home health aide, which costs 20 dollars an hour if hired privately). Remember, I am a Board-Certified Cardiothoracic Surgeon with 20 years of clinical experience.

Nobody, not even Donald Trump, has a 30 day credit card limit of 250,000 dollars.

Mr. Ruotolo has stated in his 4:34 email today that: "I am informed the home care agency attempted to receive payments authorizations for weeks: recently, this past Friday, for appx $19,000; and today, at 12:39 p.m. for $3,065 – all denied, as they were in July and August. As a courtesy, the agency did not press Adam Brook for payment until it approached this week's balance. Attached hereto, is the most recent credit card denial to assist the AIP's

son." Mr. Ruotolo's statement is materially false and misleading.

Today is the first time I have been notified that a credit card authorization has been rejected.

Indeed, the first invoice received from Allegiant was the July 31, 2019 and August 8 invoices (held together by a paper clip), addressed to Judith Brook, and postmarked August 13, 2019, for charges of 7,853 dollars and 12,996 dollars.

Allegiant should have been sending invoices regularly and billing the credit card regularly. Why was this not done before?

Furthermore, by email today at 6:12 AM I wrote to Ms. Reen and Mr. Ruotolo: "It has come to my attention that one of the Allegiant home health aides, Ms. Mojica, filed a complaint against one of the Allegiant nurses regarding the care my mother Dr. Judith Brook received. Please send me a copy of this complaint. Please also explain to me why I was not notified that this complaint had been filed and why Allegiant continued to send the same nurse back to provide care to my mother. Thank you in advance for your anticipated cooperation."

I have previously complained about this nurse Nicole. Yet I find that today Allegiant has assigned Nicole to be my mother's nurse.

My mother again now has stated that she does not want any private-duty nurse, and that she wants a home health aide. The irony of all this is that my mother is completely competent.

Pursuant to Deanna of Cardmember Services' instructions, my mother will call Cardmember Services and request an increase in the credit card limit.

Should Allegiant refuse to provide further care for my mother, I can arrange for home health aide coverage 24-7 with another agency on relatively short notice.

320. The invoices that Allegiant mailed on August 13, 2019 contained an invoice dated July 31, 2019 with terms of "9 days" meaning the invoice was "overdue" before Allegiant even mailed the invoice. (pages 1–4) This was manifestly manipulating the record to create false claims of overdue invoices.

321. In fact, Allegiant attempted to bill Judith Brook's credit card $348,057.50 on August 23, 2019 (at the time on August 23, 2019 that Dr. Adam Brook had spoken with Deanna of Cardmember Service, Deanna had told him that $250,793 had attempted to have been billed on the credit card, but, in a subsequent discussion on August 29, 2019, Matthew of Cardmember Service told Dr. Adam Brook that $347,057.50 had been charged (as Allegiant made additional charges on August 23, 2019 after Adam Brook's telephone call with Deanna)), without warning to Dr. Adam Brook that Allegiant would be doing so and without providing Dr. Adam Brook with invoices justifying those charges.

322. On August 29, 2019, Adam Brook and Judith Brook called Fidelity cardmember service, and spoke with Matthew from Fidelity cardmember service, and Dr. Adam Brook made an audio

recording of that telephone call. A transcription of the audio recording provides:

Adam Brook: Hi, I'm sorry, I didn't catch your name.

Matthew: My name is Matthew.

Adam Brook: Hi Matthew, this is Dr. Adam Brook calling, and I'm here with my mother Dr. Judith Brook, and so we're calling about her Fidelity credit card ending in 8135.

Matthew: Yes, I did get that current info from the automated phone system. I would just need to speak to the applicant to verify them before we could continue.

Adam Brook: OK, yeah, no, she's right here. Hi Mom. Judith Brook: Hi. How are you sir?

Matthew: Excellent. Can I have you state your full name for the sake of our recording?

Judith Brook: Dr. Judith Suzanne Brook. B-R-O-O-K.

Matthew: Splendid. And could I have you verify the zip code we have on file for you followed by your date of birth?

Adam Brook: The zip code.

Judith Brook: My zip code is 1-0-0-2-5. Matthew: May I have your date of birth? Judith Brook: My what?

Adam Brook: Date of birth. Judith Brook: Oh. 12, 31, 39.

Matthew: And do I have your consent to speak to Adam about this account?

Judith Brook: Yes, you do.

Matthew: Thank you. And how can I help you two wonderful people today?

Adam Brook: So, I believe on August 23rd, 2019, Allegiant Homecare attempted to charge the credit card, and I wanted to know the time and the amount of all the charges that occurred on August 23rd, 2019.

Matthew: OK. So just to clarify it looks like all of the attempts they made on throughout the multiple days they were charging you, none of those went through, so you haven't --

Adam Brook: I understand that but what I need to know is the amount and the time at which they tried to make the charges. If you have that information.

Matthew: Yes, sir I do. There's quite a few of them do you have a pen and paper.

Adam Brook: Yeah, I got a pen and paper in hand.

Matthew: OK, so starting with the ones that are most recent I have. August 28th.

Adam Brook: No, no, no, I just want August 23rd, 2019, that's it.

Matthew: OK, my mistake. So August 23rd, 4:02 PM Central. 3,065 dollars.

Adam Brook: OK.

Matthew: 3:22 PM. 3,065 dollars.

Adam Brook: OK.

Matthew: 3:31 PM. 92,301 dollars and 50 cents.
Adam Brook: OK.

Matthew: 2:12 PM. 3,065 dollars.

Adam Brook: OK.

Matthew: 2:11 PM. 92,301 dollars, 50 cents.

Adam Brook: OK.

Matthew: 1:08 PM. 3,065 dollars.

Adam Brook: OK.

Matthew: 1:05 PM. 92,301 and 50 cents.

Adam Brook: OK.

Matthew: 9:45 AM. 5,000 even.

Adam Brook: OK.

Matthew: Also 9:45 AM. 10,000 even.

Adam Brook: OK.

Matthew: And 944. 45,793 dollars.

Adam Brook: OK. Were those all the charges on August 23, 2019?

Matthew: Yes sir.

Adam Brook: Thank you for your time. I appreciate your help. I hope you have a great day. Bye-bye.

Matthew: You too sir.

323. This conversation demonstrated Judith's competence and clear state of mind on August 28, 2019.

324. But as importantly, this transcript proves that Allegiant Homecare suddenly billed Dr. Judith Brook's credit card $348,957.50 in a single day. This was manifestly unreasonable and done solely to create a misleading record of "rejection."

325. Thus, Allegiant had attempted to place on Dr. Judith Brook's credit card on August 23, 2019:

402 PM $3,065.

322 PM $3,065.

331 PM $92,301.50

212 PM $3,065.

211 PM $92,301.50

108 PM $3,065.

105 PM $92,301.50

945 AM $5,000.

945 AM $10,000.

944 AM $44,793.

326. The sum total of these attempted charges is $348,957.50.

327. Indeed, Judge O'Neill-Levy said at the December 9, 2020 hearing:

> I was part of this case, I lived the panics, I lived the conference calls on Friday afternoon when home care wasn't going to come, and the availability to get everyone together and how we were going to ensure that Ms. Brook was cared for over the weekend. (Tr.44)

328. From the foregoing facts, this is a summary of the way that Ruotolo, Allegiant Vice President Ann Reen, and Allegiant Home Care engineered a pretextual controversy in furtherance of the conspiracy: 1. Ruotolo insisted on an unlimited credit card authorization for payment of Allegiant's homecare services; 2. Ruotolo insisted on

unneeded private duty nurses for Judith Brook at $125 per hour (as opposed to home health aides at Allegiant's inflated rate of $32 per hour) in order to quickly run up a hundred-thousand-dollar bill; 3. Allegiant failed to provide Dr. Adam Brook with invoices; 4. In June, July, and the first half of August 2019, Allegiant failed to use the unlimited credit card authorization that Adam Brook had provided; 5. Allegiant without warning suddenly attempted to bill Judith Brook for $348,957.50 on Friday, August 23, 2019, knowing this huge sum would be rejected. Then, when the charges would not go through since they were over the credit limit, instead of Allegiant contacting Dr. Adam Brook, providing copies of alleged invoices and asking for an alternate form of payment, Allegiant notified Ruotolo, and Ruotolo went running to Judge O'Neill-Levy falsely claiming that Dr. Adam Brook was refusing to pay for homecare services for Judith Brook and claiming that "time-is-of-the-essence" and that unless Judge O'Neill-Levy immediately voided the power-of-attorney and healthcare-proxy Dr. Adam Brook held for his mother and expanded Joseph Ruotolo's power as guardian to include marshaling Judith Brook's assets, Judith Brook would be left without healthcare services due to claimed nonpayment of Allegiant's bills.

Joseph Ruotolo's August 26, 2019 order to show cause and temporary restraining order

329. Ruotolo wasted no time to use these manufactured controversies to attempt to expand his powers and immediately drafted an

order to show cause to expand his powers to make himself guardian of Judith Brook's person and property. This is documented by the time charges which he later submitted to the Court to bill Judith Brook on August 24, 2019, August 25, 2019, and August 26, 2019 for $1187.50, $1330, and $475, respectively, for preparing and serving an order to show cause. (page 15)

330. On August 26, 2019, Joseph Ruotolo filed an *ex parte* order to show cause restraining Dr. Adam Brook from withdrawing Judith Brook's funds and requesting expansion of his powers to include "marshalling" Judith Brook's assets. Ruotolo accompanied the order to show cause with an August 25, 2019 "Affirmation in Support of Notification" and an August 25, 2019 "Affirmation in Support of Order to Show Cause with Temporary Restraining Order".

331. Ruotolo made several very serious materially false and misleading allegations in these August 25, 2019 affirmations, including:

332. Ruotolo's August 25, 2019 "Affirmation in Support of Notification", at ¶4, Ruotolo claimed: "Adam Brook has not disbursed JUDITH BROOK'S funds for the home care services currently in place since July, 2019. Those service total approximately $100,000, and may terminate if not paid immediately."

333. To the contrary, as hereinabove alleged, on June 6, 2019 Dr. Adam Brook had faxed an unlimited credit card authorization on Judith Brook's Fidelity VISA credit card to Ruotolo's chosen homecare agency, Allegiant Homecare, with the expectation that Allegiant would bill

Judith Brook's credit card regularly. Second, review of Judith Brook's Fidelity VISA credit card statements indicate that Allegiant *did not bill Judith Brook's credit card in June 2019 or July 2019,* and that Allegiant successfully billed Judith Brook's credit card for $19,054 on August 16, 2019. Third, Allegiant failed to provide invoices to Dr. Adam Brook, so Dr. Adam Brook did not know that Allegiant had run up such a large bill in 3 months-time. Fourth, after not billing Judith Brook's credit card for three months, on August 23, 2019 two weeks before the scheduled September 6, 2019 hearing date to determine whether the power-of-attorney and healthcare-proxy Dr. Adam Brook held for his mother would be voided, Allegiant suddenly attempted to bill Judith Brook's credit card for $348,957.50 for less than 3 months of work. Fifth, when, unsurprisingly the credit card company did not process the transaction because $348,957.50 was over the credit card's limit, Allegiant did not inform Dr. Adam Brook or provide invoices so that he could arrange an alternate method of payment, but informed Joseph Ruotolo. Sixth, when Joseph Ruotolo learned that the charge for $348,957.50 did not go through, Joseph Ruotolo did not inform Dr. Adam Brook privately so that Dr. Adam Brook could obtain the Allegiant invoices, review the charges, and arrange payment for what was owed; instead Ruotolo went directly to the Court requesting again that the Court expand his powers to include "marshalling" Judith Brook's assets, and voiding Dr. Adam Brook's power-of-attorney and healthcare-proxy, followed by

Joseph Ruotolo's August 26, 2019 submission of an order to show cause to void Dr. Adam Brook's power-of-attorney and healthcare-proxy.

334. As already alleged, Ruotolo and Ann Reen insisted on using private duty nurses at $125 per hour instead of home health aides at Allegiant's (inflated) rate of $32 per hour. By insisting on using private duty nurses, not only was Joseph Ruotolo able to reward Ann Reen, Vice President of Allegiant Homecare, Ruotolo and Ann Reen were able to run up a $100,000 bill in 3 months-time, thereby enabling this scheme in furtherance of the conspiracy whereby they could claim that Dr. Adam Brook had purportedly allowed a $100,000 bill to run up, purportedly threatening the discontinuation of homecare services for Dr. Judith Brook.

335. Ruotolo's August 25, 2019 "Affirmation in Support of Order to Show Cause with Temporary Restraining Order", ¶4, says: "I made numerous attempts to have Adam Brook effectuate a proper payment authorization for the AIP's home care services. With some delay, a payment authorization-with payment limited to twenty thousand dollars, was signed by Adam Brook, as Power-of-Attorney, which also included a signature by the AIP on the same document (attached hereto as "Exhibit B")." This statement is intentionally misleading. Ruotolo emailed an uncompleted Allegiant payment authorization form to Harvey Corn on Saturday, June 1, 2019 at 12:59 PM (so that Harvey Corn could provide it to Dr. Adam Brook for completion). A payment authorization form with a $20,000 cap was

successfully faxed to Allegiant on June 5, 2019 at 2:36 PM. After Ruotolo informed Dr. Adam Brook (via Adam's attorney Harvey Corn) that a payment authorization form with a $20,000 cap was considered unacceptable, Dr. Adam Brook successfully faxed a payment authorization form with no cap to Allegiant on June 6, 2019 at 10:14 AM.

336. Ruotolo intentionally misled the Court in his August 26, 2019 "Affirmation in Support of Order to Show Cause with Temporary Restraining Order" by including the June 5, 2019 credit card authorization form with a $20,000 cap as an exhibit to his affirmation, when in fact Dr. Adam Brook faxed a credit card authorization form with an unlimited cap to Allegiant on June 6, 2019 that superseded the June 5 credit card authorization, and the June 6 fax was received by Allegiant only 2 business days after Ruotolo had faxed the uncompleted form to Dr. Adam Brook's then attorney Harvey Corn. The Court credited this Ruotolo claim because doing so furthered the Court's goal with the co-conspirators to support grounds to remove Adam's powers.

337. Likewise, Ruotolo's claim that he made "numerous attempts" to obtain a payment authorization form with an unlimited cap was intentionally misleading. A review of Ruotolo's timesheet reveals Ruotolo made the following efforts in June 2019 to obtain a payment authorization: 1. An initial June 3, 2019 telephone call; 2. A June 4, 2019 telephone call; and 3. A June 5, 2019 telephone call in which Mr. Ruotolo told Harvey Corn that the

payment authorization with a $20,000 cap was unacceptable. (page 9)

338. The reason why Dr. Adam Brook initially put a cap on the credit card authorization is that Dr. Adam Brook wanted to be notified before any massive charges were made on Judith Brook's credit card, which, as it transpired, is exactly what happened when Ruotolo's chosen homecare agency Allegiant Homecare suddenly attempted to bill a total of $348,957.50 to Judith Brook's credit card on August 23, 2019.

339. Ruotolo's August 26, 2019 "Affirmation in Support of Order to Show Cause with Temporary Restraining Order", ¶6, says: "Adam Brook has not made, nor allowed, a home care service payment, since the end of June, 2019. The current arrears, from my understanding, hover around $100,000." But this statement is false and intentionally misleading. First, Allegiant successfully billed Judith Brook's credit card for $19,054 on August 16, 2019. Second, Allegiant failed to provide Dr. Adam Brook with invoices, and it is absurd to expect that Dr. Adam Brook would make a payment when he was never notified that a bill was due or what amount was due. Third, the high bill of $100,000 was directly the result of Ruotolo and Allegiant's scheme to run up a high bill by using private-duty nurses at $125 per hour, 12 hours-a-day, 7 days-a-week, when only home health aides were needed (for which Allegiant billed Judith Brook at the inflated rate of $32 per hour).

340. Ruotolo's August 26, 2019 "Affirmation in Support of Order to Show Cause with Temporary Restraining Order", ¶11 asserts:

> But more egregious, Adam Brook stopped complying with this Court's Order to pay for JUDITH BROOK'S care almost as soon as the courtroom doors closed, after his requested July 1, 2019 conference. Again, in his email to all parties-August 23, 2019 (Exhibit D), Adam Brook acknowledged the receipt of home care service invoices mailed to his home, in July, 2019. But instead of making payment as agent for JUDITH BROOK, he willingly ignored the arrears, fixated on a paper clip fastener that bound the invoice(s) mailed to his home, and tallied home care services to an amount that only exists in his mind.

341. But, contrary to Ruotolo's August 26, 2019 affirmation, Dr. Adam Brook's August 23, 2019 email did not "acknowledge[] the receipt of home care service invoices *mailed to his home, in July, 2019*". (Emphasis added.) Dr. Adam Brook's August 23, 2019 email says: "[T]he first invoice received from Allegiant was the July 31, 2019 and August 8 invoices (held together by a paper clip), addressed to Judith Brook, and *postmarked August 13, 2019*, for charges of 7,853 dollars and 12,996 dollars." (Emphasis added.)

342. Contrary to Ruotolo's affirmation, Dr. Adam Brook did not "willingly ignore[] the arrears", Dr. Adam Brook never received the invoices (other than the two invoices sent in an envelope postmarked August 13, 2019) because Allegiant did not send them, and in any event

Allegiant had an unlimited authorization on Dr. Judith Brook's credit card. If Allegiant billed more than the credit limit because Allegiant billed over $350,000 in a single day on Judith Brook's credit card, Allegiant should have notified Dr. Adam Brook directly and Dr. Adam Brook would have resolved any problem of money being due.

343. Ruotolo's August 26, 2019 affirmation, ¶12, falsely threatened:

> It is unknown if the home care services, for Judith Brook, will remain in place without payment. But given that this matter may take several dates to conclude, JUDITH BROOK'S health—already compromised, risks further deterioration without the continuation of proper home care services.

344. Ruotolo was deceitfully manufacturing a "panic", that unless Dr. Adam Brook's power-of-attorney and healthcare-proxy were voided, Dr. Adam Brook would not pay for homecare services for Judith Brook, and Judith Brook would be left in the dangerous situation of being without homecare services.

345. Importantly, Ruotolo's manufactured controversies were successful, because this phony "panic" was then cited by the Court as a major factor on January 3, 2020 for Judge O'Neill-Levy to void Dr. Adam Brook's power-of-attorney and healthcare-proxy and expand the appointment of Joseph Ruotolo to the lucrative position of being Dr. Judith Brook's guardian of person and property. In an attempt to justify her actions, J. O'Neill-Levy made the following

statement at a December 9, 2020 hearing conference:

> So that piece falls so far from fraud and corruption, but I take those allegations seriously and that is what I tried, I think the argument was that home care was paid and the allegation that home care was not paid, but again, I was part of this case, I lived the panics, I lived the conference calls on Friday afternoon when home care wasn't going to come, and the availability to get everyone together and how we were going to ensure that Ms. Brook was cared for over the weekend. (December 9, 2019 hearing, Tr.44)

346. But, as demonstrated *supra*, this was a manufactured crisis, manufactured by Allegiant not billing Judith Brook's credit card in June or July 2019 despite having an unlimited credit card authorization, by Allegiant not providing Dr. Adam Brook with timely invoices, by Allegiant billing Judith Brook's credit card $348,957.50 on one day, August 23, 2019 and then, rather than informing Dr. Adam Brook that the charges did not go through on the credit card because the charges were over the credit limit, Allegiant and Ruotolo going directly to the Court with the claim that Judith Brook's homecare services were purportedly going to be terminated because Dr. Adam Brook was refusing to pay for homecare services.

357. In addition to Adam Brook, Howard Muser, and Nicole Hazard testifying, Judith Brook testified. Judith Brook's testimony provides as follows:

THE COURT: Can you just let her answer the question before you start asking another question? Because she's --

[MR. KAPLAN] Q Who takes care of your finances and your health?

A My finances are taken care of by my son.

Q Okay.

A And what was the second question?

Q Who takes care of your health care needs, oversees them?

A My son.

Q Okay. Now, to the best of your knowledge, does your son hold a power of attorney for you?

A Yes. The problem is that he's being a cardiothoracic surgeon, he spends a lot of time at the hospital so I do get to see him a lot, but not as much as I'd like.

Q Well, now, Dr. Brook, you sat through this hearing and you know that a petition has been brought by your brother Howard Muser.

A He he's a pisser.

Q I'm sorry, could you elaborate?

A Is that a new term?

Q Yes.

A Oh, okay. My brother has – I'm really distressed because of his behavior. He has a whole bunch of -- a slew of, kids which is great. On the other hand --- and a lovely wife. On the other hand -- and nice.

MS. ROSENTHAL: Dr. Brook, I think he just asked are you aware that he brought a petition.

So let's just answer yes or no.

Q Are you aware that he brought a petition to revoke Adam's power of attorney?

A Um, he should not have, because he doesn't know what the hell he's doing. And I don"t want him involved at all in my family's life, period. He's finished.

Q Are you saying that you're opposing his petition to revoke Adam's power of attorney?

A Yes.

Q And as far as you're concerned, Adam should continue with the power of attorney?

A Absolutely.

Q And he should continue as your health care proxy?

A Yep. (October 18, 2019 hearing, Tr.164–165)

384. Salzman included in his report a double hearsay voicemail of a third party; Ruotolo had emailed Salzman the voicemail of the third party. Salzman included a transcription that Salzman himself made of the voicemail. Salzman's report asserted that the voicemail was by a "Mary Amadillo", who in the voicemail claimed both that she was a care manager at New York Presbyterian Hospital and that Dr. Adam Brook was opposed to his mother receiving physical therapy. This was hearsay and untrue; Dr. Adam Brook was not opposed to his mother receiving physical therapy. On January 3, 2020, Judge Kelly

O'Neill-Levy, in accepting the whole report into evidence, accepted the voicemail into evidence; and Salzman argued that Dr. Adam Brook's purported opposition to physical therapy was yet another reason for voiding Dr. Adam Brook's power-of-attorney and healthcare proxy. In a February 11, 2021 7:55 AM email Salzman later conceded that "Mary Amadillo" "is not a person I ever met or spoke to", and that he actually did not know the identity the individual who had allegedly left the voicemail for Mr. Ruotolo. Thus, the voicemail was not only double hearsay, it was unauthenticated. Salzman breached his fiduciary duty as court-evaluator by failing to investigate who had left the voicemail and failing to make a reasonable assessment of the accuracy of the voicemail.

397. Before he left for the courthouse, Dr. Adam Brook made an audio recording of his mother on his iPhone. A transcription of the audio recording is as follows:

Adam Brook: Mom, do you want the hearing postponed so that you can be present?

Judith Brook: Absolutely. (audio recording transcript)

398. Even though Diana Rosenthal (Judith Brook's court-appointed attorney) *had not discussed waiver of Judith Brook's appearance at the January 3, 2020 trial with her client*, Diana Rosenthal without foundation and in breach of her professional obligations to her client informed the Court (Judge O'Neill-Levy) that Rosenthal was waiving Judith Brook's appearance at the January 3, 2020 trial. The transcript of the January 3 trial provides:

THE COURT [J. O'NEILL-LEVY]: Ms. Rosenthal, you had sent an e-mail with regard to waiving your client's appearance to everyone, but I just want to say on the record that Dr. Judith Brook testified on the last Court appearance and that you are waiving her appearance today?

[COURT-APPOINTED ATTORNEY FOR JUDITH BROOK] MS. ROSENTHAL: Yes, your Honor, I am.

THE COURT: Thank you. So, the successor Court Evaluator report is being put into evidence now as Court Exhibit I.

[DR. ADAM BROOK'S ATTORNEY] MR. KAPLAN: My client tells me his mother did not want to waive her appearance this morning.

DR. A. BROOK: She never asked my mother.

THE COURT: So, can you -- you need to communicate just with your attorney, okay? Please don't call out.

DR. A. BROOK: I didn't call out. I raised my hand.

THE COURT: But I didn't call on you.

So, could this be marked as Court Exhibit I please?

407. Moreover, since Diana Rosenthal's (and MHLS's) conduct was not merely negligent, but intentional and intended to defeat her client's wishes not to be declared incapacitated and for Dr. Adam Brook's power-of-attorney and healthcare-proxy not to be voided, and since the result of Diana Rosenthal's (and MHLS's) conduct was the stripping of all of Judith

Brook's civil and Constitutional rights, Diana Rosenthal (and MHLS's) conduct constituted wrongful conduct, under color of law, and those actions deprived Judith Brook of her rights, privileges, and immunities secured by the U.S. Constitution and laws in violation of 42 U.S.C. §1983. In addition, since New York State Constitution Article I, including Article I §6, is unambiguous on this right, Diana Rosenthal and MHLS's wrongful waiver of Judith Brook's appearance against Judith Brook's wishes is actionable under the New York State Constitution.

408. Later in that same hearing, while on the witness stand during his direct examination, Dr. Adam Brook tried to play the audio recording of his mother's statement that she wished to attend, but Judge O'Neill-Levy interrupted Dr. Adam Brook and prevented Dr. Adam Brook from playing the audio recording. The transcript of the January 3, 2020 hearing provides:

Q. Dr. Brook, have you read the Court Evaluator's report?

A. I have, and after reading the report and telling my mother Dr. Judith Brook it was full of false statements, my mother asked that she be allowed to be present today. She couldn't come today, but if I can play --

THE COURT: Just answer the question. All right.

I would ask that you just answer the question. (Tr.79)

419. Ruotolo's January 3, 2020 testimony provides:

But, in between the time she was discharged and the end of June, there were issues with payment to the home care agency and the home care agency kept alerting me at that time, I was forwarding those e-mails to Mr. Corn, and then Mr. Corn forwarded them to his clients, and that's when the case, since Mr. Corn was discharged, and Mr. Kaplan has taken over the case for Dr. Brook, every e-mail I would get from the home care agency, which are multiple e-mails, multiple times a week, regarding the payments for services to Judith Brook, that they are not being paid. I would forward to Dr. Adam Brook's counsel and then I would presume they would forward it to Dr. Adam Brook.

So, since the bill wasn't being paid in June, I think it was about 100 something thousand dollars, I submitted the motion to Court to expand powers to the Property Guardian. (Tr.13)

421. At the January 3 hearing, Ruotolo testified that Dr. Adam Brook was not making payments for homecare services, which the court used to ask a leading question in support of her planned Order:

THE WITNESS [RUOTOLO]: … There was one time, I think there was a bill for $16,000. Maybe in the last 60 days a check was received for 300, for $300. I think as of today's date, that the bills are still outstanding from November, mid November, so that would put almost two months that the bills have not been paid.

THE COURT: And that resulted in their potentially not providing home health care?

THE WITNESS: Correct, correct. I have used the agency on other matters and I sort of assured them eventually they would get paid. (Tr.14)

424. Dr. Adam Brook has documentary evidence that he made timely payments of $235,316 for homecare services over a 7-month period:

9/8/19 $50,000 check #5223 Citibank 9/19/19 statement

8/16/19 $1794 credit card Elan Financial Services 8/19 statement

8/16/19 $10,000 credit card Elan Financial Services 8/19 statement

8/16/19 $7260 credit card Elan Financial Services 8/19 statement

8/27/19 $4608 credit card Elan Financial Services 8/19 statement

8/27/19 $3064 credit card Elan Financial Services 8/19 statement

8/27/19 $3065 credit card Elan Financial Services 8/19 statement

8/27/19 $768 credit card Elan Financial Services 8/19 statement

9/12/19 $25,000 check #1064 First Republic 9/19 statement

9/19/19 $25,000 check #1066 First Republic 9/19 statement

10/5/19 $31,822.75 check #5073 First Republic 10/19 statement

10/22/19 $17,434 check #5075 First Republic 10/19 statement

11/8/19 $11,904 check #5085 First Republic 11/19 statement

11/22/19 $10,320 check #5088 First Republic 11/19 statement

12/5/19 $344.50 check #5097 First Republic 12/19 statement

12/10/19 $18,438.43 check #5099 First Republic 12/19 statement

1/7/20 $14,493.32 check #5109 First Republic check 1/7/20

427. Crucially, Dr. Adam Brook attempted to rebut Ruotolo's false and unexpected testimony. During the lunch break, Dr. Brook copied the list of payments he had made from his iPhone onto a yellow sheet of legal paper. Dr. Brook did not have with him the bank/credit card statements underlying this list of payments because, having received Ruotolo's December 9, 2019 email with the attached Allegiant spreadsheet *indicating that Ruotolo knew that Dr. Adam Brook had made payments to Allegiant Home Care of $221,710.68 as of December 9, 2019*, Dr. Brook did not expect Ruotolo to commit perjury to claim otherwise. Dr. Adam Brook's attorney James Kaplan already having been denied an adjournment, then offered this list of payments as an exhibit, but Judith Brook's court-appointed attorney Diana Rosenthal objected, again contrary to Judith's wishes, and Judge O'Neill-Levy sustained the objection. The transcript provides:

Q [MR. KAPLAN] I guess on page 26 it [Salzman's court-evaluator report] also says

that home care bills have not been paid. We have discussed that.

THE COURT [J. O'NEILL-LEVY]: We have discussed that.

Q [MR. KAPLAN] You brought up a possible Exhibit, which I would like to offer.

[COURT-APPOINTED ATTORNEY FOR JUDITH BROOK] MS. ROSENTHAL: I object to this.

THE COURT: I will sustain that.

THE WITNESS [DR. ADAM BROOK]: It lists over $260,000 of payments in five months that have been made to Allegiant Horne Care Agency, but apparently, I am not getting credit for that.

THE COURT: Let the record reflect Mr. Kaplan lifted up a yellow sheet of legal paper that his client had written out during the break, and so, counsel objected to admitting it into evidence and I will sustain that. (January 3, 2020 hearing, Tr.111–112)

428. Ruotolo's December 11, 2019 3:20 PM email, *on which court-evaluator Salzman and Rosenthal (court-appointed attorney for Judith Brook) were copied*, attached a spreadsheet from Allegiant of total-charges of $221,710.68, and a list of payments by me totaling $202,499.75. However, in this email Ruotolo conceded that Allegiant had in addition "received check no.: 5099—$18,438.43 & check No.: 5097—$344.50." Dr. Adam Brook's payments of $18,438.43 and $344.50 were not included in

the list of Adam Brook's payments on the Allegiant spreadsheet.

429. Therefore, per Ruotolo's December 11, 2019 email, as of December 11 total payments to Allegiant were:

$202,499.75+$18,438.43+$344.50=$221,282.68

430. Thus, if the Allegiant charges listed on the spreadsheet attached to Ruotolo's email were correct, Dr. Adam Brook's arrears to Allegiant as of December 11, 2019 were at most $428 ($221,710.68 billed minus $221,282.68 paid), compared with $221,282.68 Dr. Adam Brook already paid to Allegiant.

431. Diana Rosenthal's objection to Adam's hand-written but accurate listing of $235,316 in payments as of January 3, 2020 that Mr. Kaplan proffered was a further occurrence of legal malpractice. Rosenthal's role, under NYMHL §81.10 and its Law Revision Commission comments, was to advocate for Judith Brook's wishes, which by Judith Brook's express testimony in Court was for her son Dr. Adam Brook to continue as her power-of-attorney and healthcare-proxy. By successfully suppressing crucial evidence that supported Adam Brook's diligence in payments and continuation of Dr. Adam Brook's power-of-attorney and healthcare-proxy, Diana Rosenthal (and her employer MHLS) wrongfully defeated her client Judith Brook's wishes. Diana Rosenthal's (and MHLS's) conduct constituted legal malpractice.

438. As another example, Adam Brook recorded a conversation he had with his mother on January 29, 2020, 8 days after Judith Brook

sustained a rib fracture during CPR at Mary Manning Walsh Nursing Home. A transcription of that conversation provides:

Judith Brook: Hello.

Adam Brook: What were you just saying?

Judith Brook: I said oh hi, this is Judy. I want to be with Adam, and wherever he decides to go is where I'm going to go.

442. Based on the record, the Guardianship judge, in conspiracy with the identified co-conspirator defendants committed the following Constitutional violations, lack of due process, and breach of evidentiary requirements in this proceeding up to January 3, 2020.

1. Ignoring Judith's rational, competent testimony in court at the September 6 and October 18 hearings and finding against her explicit wishes;

2. Allowing court-evaluator Crowley to resign because she was repeatedly purportedly "too ill" to undergo cross-examination on her report, but then allowing successor court-evaluator Salzman to rely on Crowley's report;

3. Denying Adam Brook and his attorney James Kaplan any time to gather evidence and prepare for the January 3 hearing, so that they could respond to new allegations in Salzman's lengthy successor court-evaluator report, which Salzman did not release to Kaplan until January 2, 4:14 PM. Salzman has previously engaged in such

"Bum's rush" tactics. S*ee Black v. Wrigley*, No. 1: 17-cv-00101 (N.D. Ill. 2019);

4. Refusing to postpone the January 3 hearing so that Judith could be present, thereby denying Judith her statutory, common-law, and Constitutional-rights, including her due process right to be heard and to confrontation in a proceeding that resulted in complete deprivation of her civil-rights;

5. Refusing to allow Adam Brook to present evidence that he had made $235,316 in payments to Allegiant for homecare-services over a 7-month period;

6. Denying Judith legal-representation by an attorney who actually would meet and confer with Judith, and advocate for Judith's wishes not against them;

7. Allowing substantial admission of and reliance on hearsay and demonstrably false testimony and unsworn submissions by the co-conspirators;

8. Improperly shifting the burden-of-proof to Judith, instead of placing the burden-of-proof to show by clear-and-convincing evidence on petitioner Muser, where it properly resided, *see Ha*, 174 A.D.3d 704, 705 (2nd Dept. 2019) ("The burden of proof shall be on the petitioner" (Mental Hygiene Law §81.12[a])");

9. Vacating Adam Brook's longstanding power-of-attorney and healthcare-proxy and finding incapacity of Judith without clear-and-convincing evidence, *see Chaim*, 26 Misc. 3d 837, 847 (Surrogate's Court, New

York 2009) ("Article 81 requires proof by clear and convincing evidence (Mental Hygiene Law §81.12[a])"), and without stating the basis for vacating the power-of-attorney and healthcare-proxy.

468. On January 17, Ruotolo directed that Judith Brook not be allowed to go home but ordered her sent to the Mary Manning Walsh Nursing Home ("MMW") against her will. Ruotolo placing Judith Brook in MMW, and forcing Judith Brook to remain in MMW, violated NYMHL §81.22(a)(9) since Ruotolo had no court order to do so or change her residence.

476. At MMW, Judith Brook was not permitted to walk to the bathroom, but was forced to lie for hours in her own stool. Page 3, Adam Brook January 20, 2020 email to Ruotolo.

497. The development of dark/tarry stools in this elderly woman with a history of gastro-intestinal-bleeding should have prompted immediate transfer to a hospital. But MMW staff did not transfer Judith Brook to a hospital. In failing to transfer Judith Brook to a hospital MMW staff deviated from the standard of care.

Ruotolo failed to ensure Judith received proper treatment and medical care.

501. On January 17, 2020, Ruotolo directed that Judith Brook be placed in the Mary Manning Walsh Nursing-Home against her will and directed nursing-home staff not to discuss Judith Brook's medical condition or care with Dr. Adam Brook. Ruotolo ignored pleas from

Judith Brook and Judith Brook's friend Rubenstone that Judith Brook be returned home.

505. Upon information and belief, Ruotolo also learned that Judith Brook wanted to return home.

506. Mary Manning Walsh medical records, entry for January 18, 2020, 10:22 AM is an entry by Mary Manning Walsh social worker Dori Shore, in which Ms. Shore wrote: "Resident reports that she is eager to go home and is having difficulty adjusting to facility which caused her to be awake most of the night. Resident denies any issues with depression, appetite, or concentration."

507. But Ruotolo, having wrongfully obtained his expanded power of appointment over Judith's person and property forced Judith Brook to stay in the Mary Manning Walsh Nursing Home against her will and did not let her go home.

509. On January 19, 2020, 7:01 AM, Dr. Adam Brook emailed Ruotolo:

> I have now been told that a nurse came in and offered my mother ibuprofen.
>
> Ibuprofen is contraindicated in my mother, who has hereditary hemorrhagic telangi-ectasia, because of ibuprofen's effects on hemostasis: my mother could have a major bleeding episode.
>
> My [mother] needs to be evaluated promptly by a competent medical professional.

Thank you in advance for ensuring that will happen this morning.

510. Ruotolo's timesheet has a January 19, 2020 entry for $47.50, "Rcd [received] emails from A. Brook re IP's [incapacitated person's] medications." However, Ruotolo failed to take any action to address the worsening condition of Judith Brook that Dr. Adam Brook had repeatedly advised Ruotolo of. In particular, Ruotolo failed to raise these concerns with Mary Manning Walsh medical staff.

511. Mary Manning Walsh Nursing Home, medical records page 229, entry for January 19, 2020, 6:09 PM says: "Resident is shouting at the staff and refusing care including VS [vital signs]. She is saying 'she wants to go home.' MD notified as well as Nursing Supervisor."

512. But Ruotolo and the Mary Manning Walsh Nursing Home staff forced Judith Brook to remain in the Mary Manning Walsh Nursing Home against her will and would not let her return home. Ruotolo and Mary Manning Walsh Nursing Home staff did so even though they did not have any legal authority to do so. The January 3, 2020 Order expanding Ruotolo's powers as guardian did not include the power to change her residence or force Judith Brook into a nursing home against her will.

513. Ruotolo's timesheet also has a January 19, 2020 entry billing $475 for 1 hour regarding "AM TC [telephone call] from L. Rubenstone re her TC with A brook this day, staying with IP [incapacitated person] overnight & her desire for IP to return home."

514. Ruotolo's timesheet also has a January 19, 2020 entry for 0.1 hours, $47.50, "Received voice message from N. Hazard re IP's [incapacitated person's] desire to return home."

515. Ruotolo's timesheet also has a January 19, 2020 entry for which Ruotolo billed $47.50, 0.1 hours, stating "Rcd [received] email from petitioner [Howard Muser] re IP's [incapacitated person's] return home."

516. But Ruotolo and the Mary Manning Walsh Nursing Home staff ignored all these requests and forced Judith Brook to remain in the Mary Manning Walsh Nursing Home against her will, being mistreated, and not receiving ordered and medically necessary medications. Doing so constituted both medical malpractice and intentional infliction of emotional distress.

525. Judith Brook's gastroenterologist Dr. SriHari Mahadev had prescribed to Judith Brook the medication pantoprazole in order to prevent gastrointestinal bleeding. According to the medication administration record on pages 8-12 of Mary Manning Walsh medical records, Mary Manning Walsh healthcare providers failed to administer pantoprazole to Judith Brook.

547. NYP staff determined that Judith had sustained a rib fracture as a result of the CPR she underwent at MMW.

548. The rib fracture led to pneumonia and Judith Brook's death less than 2 months later.

549. Thus, Ruotolo and the other defendants failed to ensure that Ruotolo's ward Judith Brook received proper treatment and medical care.

Ruotolo prevents Adam Brook from visiting Judith Brook in New York Presbyterian Hospital, intentionally inflicting emotional distress on Judith Brook

550. On January 23, 2020, Judith Brook remained hospitalized on the geriatric ward of New York Presbyterian Hospital.

551. Dr. Adam Brook went to visit Judith Brook on the geriatric ward at about 5:30 PM.

552. Dr. Adam Brook was having a quiet visit with his mother when New York Presbyterian Hospital officer Craig and 3 other police officers showed up and politely escorted Dr. Adam Brook out of the building.

553. On January 24, 2020, Dr. Adam Brook discussed this event with Warren Bobb, a patient care services representative at New York Presbyterian Hospital. A transcription of this telephone conversation provides:

Warren Bobb: So there is a restriction on your visits and that was implemented by the court-appointed guardian Joseph Ruotolo.

Adam Brook: And what was the—hold on a second—implemented by court-appointed --

Warren Bobb: Guardian.

Adam Brook: Guardian Joseph Ruotolo, hold on a second I'm just writing this down. And what was the reason that he gave for that?

Warren Bobb: He doesn't have to give us a reason. He's the guardian, and he can make these decisions. (January 24, 2020 audio recording of telephone conversation between

Adam Brook and Warren Bobb, N.P.; transcription of January 24 audio recording of telephone conversation between Adam Brook and Bobb)

554. When Dr. Adam Brook's attorney James Kaplan raised this issue with Ruotolo, Ruotolo asserted in a January 24, 2020 email:

> If your client is restricted from entering NY Presbyterian, that is something that is not under my control. I have no sway over NY Presbyterian. (January 24, 2020 email chain Kaplan-Ruotolo)

555. If what Mr. Bobb reported was correct, then Ruotolo lied to Mr. Kaplan, because Ruotolo had given NYP the restriction to exclude Adam Brook from seeing his own mother in the hospital.

Judith Brook dies on March 15, 2020

601. Judith Brook never recovered from the coma she went into on February 17, 2020. Judith Brook died while still in NYP on March 15, 2020.

In his efforts to increase his fees, Ruotolo damaged Judith's estate plan

602. Forensic-accountant Dr. Eric Kreuter's November 10, 2020 affidavit provides:

> During his time as the guardian of Judith Brook, Mr. Ruotolo liquidated a portion of Apple stock in Judith Brook's Charles Schwab account as well as liquidated securities from her TIAA account and put the cash proceeds

into a checking account. Based on my review of underlying bank and investment statements, as of February 29, 2020 (since the Apple stock was sold and TIAA was transferred during February), there was $138,836.94 of available cash prior to these transactions.

603. There was therefore no need for Ruotolo to disrupt Judith Brook's Estate plan by massive transfers and sales of securities, generating enormous tax liabilities, and directing money away from named-beneficiaries in Judith Brook's various accounts.

604. But that is exactly what Ruotolo did.

605. Forensic-accountant Dr. Kreuter's November 10, 2020 affidavit says:

> During his time as the guardian of Judith Brook, Mr. Ruotolo liquidated a portion of Apple stock in Judith Brook's Charles Schwab account. If proper diligence were performed prior to the sale of any Apple stock, consideration for tax implications would have been made. If proper tax harvesting of the various investment accounts were considered, there were various options in other investment accounts to sell assets, such as the Fidelity account ending in 0204, which had lower amounts of unrealized gains/losses. These assets could have been used to offset each other (tax efficiency). By ignoring all other options, unnecessary capital gains were incurred by Judith Brook personally. Additionally, if proper diligence for estate planning was considered, there should have been further consideration given to the fact that there would be a significant step-up in

basis of the Apple stock inuring to the benefit of the beneficiaries of Judith Brook's estate. Lastly, there was significant appreciation in Apple stock from the date of sale to the present time, which demonstrates the added impact on the value of the Estate.

The table below summarizes the tax impacts on what could have been step-ups in basis (this table was taken from the attached schedule):

Date Sold	Units Sold	Total Proceeds	Cost Basis	Realized Gain
2/11/2020	162.1944	$52,066.57	$4,037.48	$48,029.09
2/11/2020	460.8056	147,924.75	23,137.28	124,787.47
2/28/2020	239.1944	63,204.67	12,010.07	51,194.60
2/28/2020	210.0000	55,490.35	11,136.05	44,354.30
2/28/2020	140.0000	36,993.57	7,534.55	29,459.02
2/28/2020	70.0000	18,496.78	4,048.05	14,448.73
2/28/2020	10.8056	2,855.27	762.39	2,092.88
	Total	$377,031.96	$62,665.87	$314,366.09
		Times Tax Rate (L/T Cap Gains @ 20%)		20%
	Unnecessary Taxes if Step-up in Basis was Utilized			$62,873.22

The table below summarizes the impact of the loss of appreciation of Apple stock (this table was taken from the attached schedule):

	Value of Apple at 9/28	114.96
	Times 4 (stock split)	459.84
	Shares sold	1293.00
	Total Value if Held	594,573.12
	Value of Liquidation	377,031.96
	Loss of Appreciation	217,541.16
Times Tax Rate (L/T Cap Gains – 20%)		43,508.23
Loss of Appreciation Net of Tax		$174,032.93
Times Tax Rate (L/T Cap Gains – 15%)		32,631.17
Loss of Appreciation Net of Tax		$184,909.99

The tables above summarize the negative impact on the estate of Judith Brook in the amount of **$62,873.22 (additional taxes paid that could have been avoided) and $174,032.93 to $184,909.99 (loss of**

appreciation in stock value) (See attached schedule). Based on the financial data reviewed and my analysis, I believe that the quantification of the economic impact on the Estate is accurate within a reasonable degree of certainty. (November 10, 2020 Kreuter affidavit)

606. Additionally, on March 11, as Judith Brook lay dying in a coma with a breathing-tube down her throat, Ruotolo transferred $2,788,100 in securities and cash from Judith Brook's Fidelity accounts to accounts under Ruotolo's control at UBS.

610. Forensic-accountant Dr. Kreuter's affidavit explained that as a result of Ruotolo not maintaining the beneficiaries designated in the UBS accounts:

6. Upon the death of Judith Brook, Mr. Ruotolo transferred substantially all the assets out of the three Fidelity investment accounts (ending in 0204 | 6369 | 1686) and into newly opened UBS investment accounts (ending in 1741 / 2741 / 2841). In the Fidelity account, specific individuals were designated as beneficiaries: Dr. Brook, who is entitled to a 50% share of the account, and his two nieces, Cassandra Brook and Juliette Brook, each of whom would be entitled to a respective 25% share of the account. The newly opened UBS accounts did not have any such designation and, in doing so, Mr. Ruotolo changed the nature of the beneficiaries from the three individuals in the Fidelity accounts to the general Estate, which is to be passed on through the designations of the will. According to the terms of the will, the investments were required to be put into

separate trusts and Dr. Brook was entitled to $80,000 per year with increases for inflation to be linked to an index for consumer prices. Upon Dr. Brook's death, the remaining balance in his trust would then be distributed to Cassandra's and Juliette's respective trusts equally. Assuming an inflation rate of 3% and return on assets invested in the trust of 8% it would take Dr. Brook over 34 years to receive 100% of the funds, as opposed to receiving the funds immediately upon the death of Judith Brook. If there is no change in the manner Dr. Brook would receive distributions, then he potentially is impacted by any difference between his investment returns (controlling all of the money) and the investment returns in UBS (when he is not controlling the money).

7. In addition, the change that Mr. Ruotolo has effected by transferring funds from beneficiary accounts to non-beneficiary accounts significantly impacts when Juliette and Cassandra Brook would begin to receive funds by delaying the onset of their receiving funds for 17 and 20 years, respectively, and dramatically decreasing the amount of funds they would receive. If there is no change in the manner Juliette and Cassandra Brook would receive distributions, then they are impacted by any difference between their investment returns (controlling all of the money) and the investment returns in UBS (where they are not controlling the money). Under the terms of the will, Juliette and Cassandra Brook are entitled to $35,000 per year, with increases for inflation, starting when they tum age 35. Due to the projected growth (at 8%) in Juliette's and Cassandra's trusts, between their current age

and when they reach age 35, they will each never be able to receive 100% of the funds in their respective trust accounts. (November 10, 2020 Kreuter affidavit)

611. Just to attempt to correct or mitigate the damages to the Estate and damage to the trusts' beneficiaries (Adam, Cassie and Juliet) caused by Ruotolo cost the Estate and plaintiff personally in excess of $300,000 in legal and accounting fees.

612. Ruotolo's accounting schedule B lists these asset-transfers as "changes to principal". Ruotolo initiated these transfers not to benefit Judith Brook, but to run-up "changes to principal" and "justify" a higher commission. In his fee-requests, Ruotolo has requested, as a commission to be paid to him at the Court's direction, a sliding-scale percentage of the "changes to principal".

660. Joseph Ruotolo, Esq. then deprived Judith Brook of her Constitutionalrights under the Fourteenth, Fifth, and Fourth Amendments by dumping Judith Brook in a nursing home against her will, without a statutorily-required court order, *see* (NYMHL §81.22(a)(9)), and refused to allow her to return home as she wished.

Dated: July 20, 2022

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Appendix F

NEW YORK MENTAL HYGIENE LAW ARTICLE 81 PROCEEDINGS FOR THE APPOINTMENT OF A GUARDIAN FOR PERSONAL NEEDS OR PROPERTY MANAGEMENT

Excerpts

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§ 81.03 Definitions.

When used in this article,

(a) "guardian" means a person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate's court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management.

(b) "functional level" means the ability to provide for personal needs and/or the ability with respect to property management.

(c) "functional limitations" means behavior or conditions of a person which impair the ability to provide for personal needs and/or property management.

(d) "least restrictive form of intervention" means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person's personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and

self-determination in light of that person's understanding and appreciation of the nature and consequences of his or her functional limitations.

(e) "available resources" means resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.

§ 81.10 Counsel.

(a) Any person for whom relief under this article is sought shall have the right to choose and engage legal counsel of the person's choice. In such event, any attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court in accordance with subdivision (c) of section 81.09 of this article in determining whether counsel should be appointed.

(c) The court shall appoint counsel in any of the following circumstances unless the court is satisfied that the alleged incapacitated person is represented by counsel of his or her own choosing:

1. the person alleged to be incapacitated requests counsel;

2. the person alleged to be incapacitated wishes to contest the petition;

3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing

home or other residential facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility;

4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;

5. the petition requests the appointment of a temporary guardian pursuant to section 81.23 of this article;

6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;

7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

(d) If the person refuses the assistance of counsel, the court may, nevertheless, appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

(e) The court may appoint as counsel the mental hygiene legal service in the judicial department where the residence is located.

(f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or

any attorney appointed pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.

(g) If the court appoints counsel under this section, the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator.

§ 81.19 Eligibility as guardian.

(a) 1. Any individual over eighteen years of age, or any parent under eighteen years of age, who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian, including but not limited to a spouse, adult child, parent, or sibling.

2. A not-for-profit corporation organized to act in such capacity, a social services official, or public agency authorized to act in such capacity which has a concern for the incapacitated person, and any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law which is found by the court to be suitable to perform the duties necessary to assist the incapacitated person may be appointed as guardian, provided that a community guardian program shall be appointed as guardian only where a special proceeding for the appointment of a guardian under this article has been commenced by a social services official with whom such program was contracted.

3. A corporation, except that no corporation (other than as provided in paragraph two of this subdivision) may be authorized to exercise the powers necessary to assist the incapacitated person with personal needs.

(b) The court shall appoint a person nominated as the guardian in accordance with the provisions of section 81.17 of this article unless the court determines the nominee is unfit or the alleged incapacitated person indicates that he or she no longer wishes the nominee to be appointed.

(c) In the absence of a nomination in accordance with section 81.17 of this article, the court shall appoint a person nominated by the person alleged to be incapacitated orally or by conduct during the hearing or trial unless the court determines for good cause that such appointment is not appropriate.

(d) In making any appointment under this article the court shall consider:

1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501, 5-1601 or 5-1602 of the general obligations law and sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law;

2. the social relationship between the incapacitated person and the person, if any, proposed as guardian, and the social relationship between the incapacitated person and other persons concerned with the welfare of the incapacitated person;

3. the care and services being provided to the incapacitated person at the time of the proceeding;

4. the powers which the guardian will exercise;

5. the educational, professional and business experience relevant to the nature of the services sought to be provided;

6. the nature of the financial resources involved;

7. the unique requirements of the incapacitated person; and

8. any conflicts of interest between the person proposed as guardian and the incapacitated person.

(e) Unless the court finds that no other person or corporation is available or willing to act as guardian, or to provide needed services for the incapacitated person, the following persons or corporations may not serve as guardian:

1. one whose only interest in the person alleged to be incapacitated is that of a creditor;

2. one, other than a relative, who is a provider, or the employee of a provider, of health care, day care, educational, or residential services to the incapacitated person, whether direct or indirect.

(f) Mental hygiene legal service may not serve as a guardian.

§ 81.20 Duties of guardian.

(a) Duties of guardian generally.

1. a guardian shall exercise only those powers that the guardian is authorized to exercise by court order;

2. a guardian shall exercise the utmost care and diligence when acting on behalf of the incapacitated person;

3. a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person;

4. a guardian shall file an initial and annual reports in accordance with sections 81.30 and 81.31 of this article;

5. a guardian shall visit the incapacitated person not less than four times a year or more frequently as specified in the court order;

6. a guardian who is given authority with respect to property management for the incapacitated person shall:

(i) afford the incapacitated person the greatest amount of independence and self-determination with respect to property management in light of that person's functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living;

(ii) preserve, protect, and account for such property and financial resources faithfully;

(iii) determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons;

(iv) use the property and financial resources and income available therefrom to maintain and support the incapacitated person, and to maintain and support those persons dependent upon the incapacitated person;

(v) at the termination of the appointment, deliver such property to the person legally entitled to it;

(vi) file with the recording officer of the county wherein the incapacitated person is possessed of real property, an acknowledged statement to be recorded and indexed under the name of the incapacitated person identifying the real property possessed by the incapacitated person, and the tax map numbers of the property, and stating the date of adjudication of incapacity of the person regarding property management, and the name, address, and

telephone number of the guardian and the guardian's surety; and

(vii) perform all other duties required by law.

7. a guardian who is given authority relating to the personal needs of the incapacitated person shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living.

81.21 Powers of guardian; property management.

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may authorize the guardian to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act.

Transfers made pursuant to this article may be in any form that the incapacitated person could have

employed if he or she had the requisite capacity, except in the form of a will or codicil.

Those powers which may be granted include, but are not limited to, the power to:

1. make gifts;

2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support;

3. convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;

4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment;

5. enter into contracts;

6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;

7. exercise options of the incapacitated person to purchase securities or other property;

8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse;

10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law;

11. authorize access to or release of confidential records;

12. apply for government and private benefits;

13. marshall assets;

14. pay the funeral expenses of the incapacitated person;

15. pay such bills as may be reasonably necessary to maintain the incapacitated person;

16. invest funds of the incapacitated person as permitted by section 11-2.3 of the estates, powers and trusts law;

17. lease the primary residence for up to three years;

18. retain an accountant;

19. pay bills after the death of the incapacitated person provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed; and

20. defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed.

The guardian may also be granted any power pursuant to this subdivision granted to committees and conservators and guardians by other statutes subject to the limitations, conditions, and responsibilities of the exercise thereof unless the granting of such power is inconsistent with the provisions of this article.

(b) If the petitioner or the guardian seeks the authority to exercise a power which involves the transfer of a part of the incapacitated person's assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the following information:

1. whether any prior proceeding has at any time been commenced by any person seeking such power with respect to the property of the incapacitated person and, if so, a description of the

nature of such application and the disposition made of such application;

2. the amount and nature of the financial obligations of the incapacitated person including funds presently and prospectively required to provide for the incapacitated person's own maintenance, support, and well-being and to provide for other persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support; a copy of any court order or written agreement setting forth support obligations of the incapacitated person shall be attached to the petition if available to the petitioner or guardian;

3. the property of the incapacitated person that is the subject of the present application;

4. the proposed disposition of such property and the reasons why such disposition should be made;

5. whether the incapacitated person has sufficient capacity to make the proposed disposition; if the incapacitated person has such capacity, his or her written consent shall be attached to the petition;

6. whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will together with a statement as to how the terms of the will became known to the petitioner or guardian; for purposes of this article, the term "will" shall have the meaning specified in section 1-2.19 of the estates, powers and trusts law and "similar instrument" shall include a revocable or irrevocable trust:

(i) if the petitioner or guardian can, with reasonable diligence, obtain a copy, a copy of the most recently executed will or similar instrument shall be attached to the petition; in such case, the petition

shall contain a statement as to how the copy was secured and the basis for the petitioner or guardian's belief that such copy is a copy of the incapacitated person's most recently executed will or similar instrument.

(ii) if the petitioner or guardian is unable to obtain a copy of the most recently executed will or similar instrument, or if the petitioner or guardian is unable to determine whether the incapacitated person has previously executed a will or similar instrument, what efforts were made by the petitioner or guardian to ascertain such information.

(iii) if a copy of the most recently executed will or similar instrument is not otherwise available, the court may direct an attorney or other person who has the original will or similar instrument in his or her possession to turn a photocopy over to the court for its examination, in camera. A photocopy of the will or similar instrument shall then be turned over by the court to the parties in such proceeding unless the court finds that to do so would be contrary to the best interests of the incapacitated person;

7. a description of any significant gifts or patterns of gifts made by the incapacitated person;

8. the names, post-office addresses and relationships of the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act and of the beneficiaries under the most recent will or similar instrument executed by the incapacitated person.

(c) Notice of a petition seeking relief under this section shall be served upon:

(i) the persons entitled to notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article;

(ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless the court dispenses with such notice; and

(iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely affected by the relief requested in the petition unless the court dispenses with such notice.

(d) In determining whether to approve the application, the court shall consider:

1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;

2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;

3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;

4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;

5. whether the proposed disposition will produce estate, gift, income or other tax savings

which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and

6. such other factors as the court deems relevant.

(e) The court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings:

1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;

2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and

3. the incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.

(f) Nothing in this article imposes any duty on the guardian to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person and the guardian shall not be liable or accountable to any person for having failed to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the

incapacitated person to or for the benefit of another person.

§ 81.36 Discharge or modification of powers of guardian.

(a) The court appointing the guardian shall discharge such guardian, or modify the powers of the guardian where appropriate, if it appears to the satisfaction of the court that:

1. the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized to exercise;

2. the incapacitated person has become unable to exercise powers necessary to provide for personal needs or property management which the guardian is not authorized to exercise;

3. the incapacitated person has died; or

4. for some other reason, the appointment of the guardian is no longer necessary for the incapacitated person, or the powers of the guardian should be modified based upon changes in the circumstances of the incapacitated person.

(b) The application for relief under this section may be made by the guardian, the incapacitated person, or any person entitled to commence a proceeding under this article.

(c) There shall be a hearing on notice to the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. The court may for good cause shown dispense with the hearing provided that an order of modification increasing the powers of the guardian shall set forth the factual basis for dispensing with the hearing. If the incapacitated person or his or her counsel raises an issue of fact as to the ability of the incapacitated person to provide for his or her personal needs or

property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

(d) To the extent that relief sought under this section would terminate the guardianship or restore certain powers to the incapacitated person, the burden of proof shall be on the person objecting to such relief. To the extent that relief sought under this section would further limit the powers of the incapacitated person, the burden shall be on the person seeking such relief.

(e) If the guardian is discharged because the incapacitated person becomes fully able to care for his or her property, the court shall order that there be restored to such person the property remaining in the hands of the guardian. If the incapacitated person dies, the guardian shall provide for such person's burial or other disposition the cost of which shall be borne by the estate of the incapacitated person.

Appendix G

McKinney's Mental Hygiene Law § 81.10

§ 81.10 Counsel

Effective: December 13, 2004

LAW REVISION COMMISSION COMMENTS

In the past it often has not been clear whether the guardians ad litem appointed pursuant to Article 77 or 78 were acting as advocates for the person who was the subject of the proceeding or as a neutral "eyes and ears" of the court. In order to alleviate this confusion, Article 81 distinguishes between the two roles of counsel and that of guardian ad litem, now known as court evaluator, and creates separate rules to govern each. The role of court evaluator is to act to provide an independent assessment of the allegedly incapacitated person. The duties of the court evaluator are governed by section 81.09 and are discussed in the comment to that section. The role of counsel, as governed by this section, is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court. At a minimum that representation should include conducting personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the allegedly incapacitated person.

The differentiation between the two roles reflects the two competing views of guardianship proceedings. Given the serious issues at stake in a guardianship proceeding, there is, on the one hand, strong support for the appointment of counsel and the adversarial approach to guardianship proceedings. On the other hand, there is recognition that an objective "best interests" assessment of the allegedly incapacitated person, rather than the adversarial approach, may better serve the needs of that person. Article 81 offers a balanced approach to these concerns. Although the appointment of the court evaluator under Article 81 is mandatory in every case, the appointment of counsel is not. Section **81.10** identifies seven situations in which the court must appoint counsel to represent the allegedly incapacitated person if the person has not retained counsel: 1) the person alleged to be incapacitated requests counsel; 2) the person alleged to be incapacitated wishes to contest the petition; 3) the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other similar residential facility; 4) if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent; 5) the petition requests provisional relief pursuant to section 81.23 of this article; 6) the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated; and 7) if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

In recognition of the fact that counsel's advocacy role will provide protection for the allegedly incapacitated

person, and that some estates may be financially overburdened by the expenses of both the court evaluator and counsel, the section permits the court to dispense with or suspend the appointment of the court evaluator if counsel is appointed.

If the appointment of counsel is necessary and the person resides in certain statutorily described facilities, the court may appoint **MHLS** to act as counsel.

The court shall determine reasonable compensation for any attorney appointed under this section, including **MHLS**, and the fee shall be paid by the incapacitated person, unless the court finds the person to be indigent.