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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

MONTANA HEALTH CARE ASSOCIATION;  
a Montana non-profit corporation; CASLEN  
LIVING CENTERS, INC., a Montana  
corporation; THE PINES OF POLSON, INC., a  
Montana corporation; VALLEY VIEW HOME,  
a Montana non-profit corporation; WIBAUX  
COUNTY NURSING HOME, a Montana non-  
profit corporation; EVERGREEN AT  
MISSOULA, L.L.C., d/b/a MISSOULA  
HEALTH AND REHABILITATION CENTER,  
a Washington limited liability company; and  
EMPRES AT SHELBY, LLC, d/b/a MARIAS  
CARE CENTER, a Washington limited  
Liability Company;

Plaintiffs,

v.

THE MONTANA DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES, and  
SHEILA HOGAN, in her official capacity as  
Department director,

Defendants.

Cause No. \_\_\_\_\_

**COMPLAINT**

## INTRODUCTION

This Complaint challenges a set of administrative rules adopted by the Montana Department of Public Health and Human Services (the “Department”) that purport to cut Medicaid reimbursement rates for nursing facilities and assisted living facilities, including the Plaintiffs. The Department’s rulemaking cutting reimbursement rates effective January 1, 2018 violated, *inter alia*, essential provisions of the Montana Administrative Procedure Act (“MAPA”) by: (1) failing to clearly and thoroughly demonstrate the reasonable necessity of proposed rate cuts, (2) adopting rules in conflict with substantive law, and (3) depriving the Plaintiffs of their right to meaningfully and effectively participate in the rulemaking process. More recently, the Department indicated it will leave in place the defective rate cuts for state fiscal year 2019, i.e., July 1, 2018 through June 30, 2019.

Plaintiffs request that this Court declare the January 1, 2018 reimbursement rules and accompanying rate cuts invalid and ineffective, enjoin their application, and order the Department to apply the prior reimbursement rates, which were in effect before January 1, 2018. Plaintiffs also request that this Court invalidate and enjoin the Department’s proposed rate rules effective July 1, 2018, to the extent that such rules continue the defective January 1, 2018 rate cuts into state fiscal year 2019 or fail to comply with applicable substantive law.

Plaintiffs hereby allege as to their claims against the Department and its director, Sheila Hogan, as follows:

## **PARTIES, JURISDICTION, AND VENUE**

1. The Montana Health Care Association (“MHCA”) is an association representing nursing facilities and assisted living facilities throughout Montana. MHCA’s principal place of business is Helena, Lewis and Clark County, Montana. A list of MHCA’s membership is attached as Exhibit 1.

2. Caslen Living Centers, Inc., is a Montana corporation that operates assisted living facilities in Anaconda, Columbus, Helena, Lewistown, Livingston, and Whitehall, Montana. Caslen’s assisted living facilities are licensed through the Department and currently serve 21 Medicaid recipients.

3. The Pines of Polson, Inc., is a Montana corporation that operates assisted living facilities in Polson, Montana. The Pines of Polson’s facilities are licensed through the Department and currently serve three Medicaid recipients.

4. Valley View Home is a Montana non-profit corporation that operates a skilled nursing facility in Glasgow, Montana. Valley View Home is licensed through the Department and currently serves 36 Medicaid recipients.

5. Wibaux County Nursing Home is a county-owned skilled nursing facility in Wibaux, Montana. Wibaux County Nursing Home is licensed through the Department and currently serves 15 Medicaid recipients.

6. Evergreen at Missoula, L.L.C. (d/b/a Missoula Health and Rehabilitation Center) is a Washington limited liability company that operates a skilled nursing and assisted living facility in Missoula, Montana. The Missoula Health and Rehabilitation Center is licensed through the Department and currently serves 47 Medicaid recipients.

7. EmpRes at Shelby, LLC (d/b/a Marias Care Center) is a Washington limited liability company that operates a skilled nursing facility in Shelby, Montana. The Marias Care Center is licensed through the Department and currently serves 19 Medicaid recipients.

8. The Department is an agency of the State of Montana established pursuant to Mont. Code Ann. § 2-15-2201 (2017). The Department administers the Montana Medicaid program and sets by rule the Medicaid reimbursement rates for services provided under the Medicaid program, including services provided by the Plaintiffs. Mont. Code Ann. §§ 53-2-201(1)(g), 53-6-113(3).

9. The Medicaid reimbursement rules involved in this Complaint are as follows:

| <i>Provider Type</i>       | <i>Mont. Admin. R.</i>   |
|----------------------------|--------------------------|
| Skilled Nursing Facilities | 37.40.307 and 37.40.309  |
| Assisted Living Facilities | 37.40.1421 and 37.85.105 |

10. The Department is organized into several divisions, including the Senior and Long-Term Care Division (the “SLTC Division”), which administers the programs that reimburse nursing facilities and assisted living facilities for services they provide to Medicaid recipients.

11. Sheila Hogan is the director of Public Health and Human Services appointed by the Governor pursuant to Mont. Code Ann. §§ 2-15-2201 and -111.

12. The Court has personal and subject matter jurisdiction over the parties and over the subject matter of this action.

## FACTUAL AND LEGAL BACKGROUND

13. Generally, the Department sets reimbursement rates for services provided to Medicaid recipients each state fiscal year (or other specified period) through the MAPA rulemaking process. *See* Mont. Code Ann. § 2-4-101, *et seq.* The fiscal years involved in this Complaint are as follows:

| <i>Fiscal Year</i>           | <i>Begin Date</i> | <i>End Date</i> |
|------------------------------|-------------------|-----------------|
| Fiscal Year 2017 (“FY 2017”) | July 1, 2016      | June 30, 2017   |
| Fiscal Year 2018 (“FY 2018”) | July 1, 2017      | June 30, 2018   |
| Fiscal Year 2019 (“FY 2019”) | July 1, 2018      | June 30, 2019   |

### A. The Department’s Obligations under MAPA

14. The public has a right to participate in the operation of government agencies prior to final agency decisions, as provided by law. Mont. Const. art. II, § 8.

15. One of the purposes of MAPA is to give public notice of governmental action and to provide for public participation in that action. Mont. Code Ann. § 2-4-101(2)(a).

16. Agency regulations, standards, or statements of general applicability that implement, interpret, or prescribe law or policy, or describe the procedures of an agency, are “rules” that must be adopted according to MAPA rulemaking procedures. Mont. Code Ann. § 2-4-102(11).

17. Each Medicaid reimbursement rate is a “rule” as defined in MAPA because each rate is a regulation, standard, or statement of general applicability that implements Montana’s Medicaid law and prescribes the reimbursement policies of the program.

18. MAPA requires the Department to provide interested parties an opportunity

to submit data, views, or arguments on the Department's proposed rulemaking. Mont. Code Ann. § 2-4-302(1)(a) and (4).

19. The Department's rulemaking decision must be voided if the decision was made after failing to provide requested documents and information that would have allowed the public to participate more effectively and meaningfully in the decision.

20. A rule is invalid and ineffective if the rule is inconsistent or in conflict with statute. Mont. Code Ann. § 2-4-305(6)(a). A rule is also invalid and ineffective if it is not reasonably necessary to effectuate the purpose of the statute. Mont. Code Ann. § 2-4-305(6)(b).

21. MAPA requires the Department to give written notice of proposed rulemaking. Mont. Code Ann. § 2-4-302(1)(a). This notice must provide a statement of the reasonable necessity for the proposed rule.

22. The statement of reasonable necessity must explain the principal reasons and the rationale for the proposed rule and for the particular approach the agency takes in complying with the mandate to adopt rules. Mont. Code Ann. § 2-4-305(6)(b). The reasonable necessity of the rule must be "clearly and thoroughly demonstrated" in the statement of proposed rulemaking and in the public comment considered by the agency. *Id.* "A statement that merely explains what the rule provides is not a statement of reasonable necessity for the rule." *Id.* The rule is invalid and ineffective if these requirements are not met. *Id.*

23. An agency may not rely upon an adoption notice to correct deficiencies in a statement of reasonable necessity. Mont. Code Ann. § 2-4-305(8)(b).

24. MAPA allows the Department to adopt by reference model code, federal rules, or other, similar publications. Mont. Code Ann. § 2-4-307. If another publication is adopted by reference, it must be in existence and available to the public at the time of the notice of proposed rulemaking. Mont. Code Ann. § 2-4-307(3)(a). If the publication adopted by reference changes in the time between the notice of proposed rulemaking and the notice of adoption, the altered publication requires a separate process of rulemaking under MAPA. Mont. Code Ann. § 2-4-307(3)(b).

**B. Plaintiffs' Right to Know and Participate**

25. The public has a right to observe the deliberations of all public bodies and agencies, including the Department. Mont. Const. art. II, § 9.

26. In addition to MAPA, Title 2, Chapter 3 protects the public's right to know of and participate in agency actions. Mont. Code Ann. §§ 2-3-101 and -201.

27. The Plaintiffs have a right to advance notice of Department actions that are of significant interest to the public. Mont. Code Ann. § 2-3-103(1)(a). The Plaintiffs also have a right to participate meaningfully in the Department's deliberations before the Department takes final action. Mont. Code Ann. § 2-3-111(1).

28. The Plaintiffs also have a right to attend meetings of the Department wherein its decisions about setting reimbursement rates are made. Mont. Code Ann. § 2-3-203.

29. Any violation of the public participation and open meeting statutes voids the Department's decisions made without public participation or without open meetings. Mont. Code Ann. §§ 2-3-114 and -213.

### **C. Nursing Facility Reimbursement Rates in General**

30. Plaintiff nursing facilities are reimbursed on a per diem basis for services they provide to Medicaid recipients. The Department sets the total per diem rate for nursing facilities, which is comprised of a combination of government funding and a patient contribution.

31. Government funding comes from the Montana General Fund (the “General Fund”), federal special revenue, and state special revenue. Funds for Medicaid provided from the General Fund and state special revenue are matched by Federal special revenue on an approximately 2-to-1 basis. For each dollar paid from the General Fund and state special revenue, the state receives approximately two dollars of Federal special revenue.

32. For nursing facilities, the Department determines the Medicaid per diem rate according to a “price-based reimbursement methodology.” Mont. Admin. R. 37.40.307(2) and 37.40.309(2).

33. The “price-based reimbursement methodology” includes an “operating component” and a “direct resident care component.” Mont. Admin. R. 37.40.307(2).

34. By rule, the “operating component” of the per diem rate is set at 80% of the “statewide price for nursing facility services.” Mont. Admin. R. 37.40.307(2)(a).

35. The “direct resident care component” of the per diem rate is 20% of the “statewide price for nursing facility services,” adjusted according to each facility’s patient mix. Mont. Admin. R. 37.40.307(2)(b). The patient mix is a factor based on a measurement of the acuity of the conditions and care needs of a facility’s residents as compared to the statewide average. Actual per diem rates paid to each nursing facility



vary from the average rate according to each facility's Medicaid patient mix as compared to the statewide average patient mix.

36. The "statewide price for nursing facility services" is described in Mont. Admin. R. 37.40.307(2)(c):

The statewide price for nursing facility services will be determined each year through a public process. Factors that could be considered in the establishment of this price include the cost of providing nursing facility services, Medicaid recipients [sic] access to nursing facility services, and the quality of nursing facility care.

37. In practice, the Department sets the "statewide price for nursing facility services" by considering only three factors: (1) the total appropriated funding, (2) the projected patient contribution, and (3) the projected number of bed days. The following formula reflects the Department's calculation:

$$\frac{(Total Appropriations + Projected Patient Contribution)}{Projected Bed Days} = Statewide Price$$

38. The patient contribution toward the per diem rate varies according to each patient's ability to pay. Regardless of the Department's estimated patient contribution, Montana Medicaid will always pay the difference between the actual patient contribution and the per diem rate set by the Department.

39. As calculated by the Department, the so-called "statewide price for nursing facility services" does not account for the costs incurred in providing nursing facility services, the availability of nursing facility services, or the quality of care.

40. The Department did not determine the current "statewide price for nursing facility services" through MAPA rulemaking or any other public process.

41. One of the sources of state special revenue for nursing facility rates is the “utilization fee” provided in Mont. Code Ann. § 15-60-102 (the “Bed Fee”). The Bed Fee is a tax paid by all nursing facilities in Montana for each “bed day,” which is defined as a 24-hour period that a resident is present in a facility, or that a bed is held for a resident who is temporarily absent. Mont. Code Ann. § 15-60-101(1)(a). The Bed Fee is paid for all residents, including Medicaid recipients and those who pay through other means.

42. The Bed Fee was adopted in 1991 with support from nursing facilities for the express purpose of matching each dollar of the Bed Fee with federal funding and repaying the whole amount back to nursing facilities through higher Medicaid reimbursement rates. Among other purposes, the Legislature intended the Bed Fee to reduce cost shifting in nursing facility services, wherein non-Medicaid residents must pay more to make up deficits left by insufficient Medicaid reimbursements.

43. By statute, the Bed Fee has risen substantially in the current FY 2018 and will rise substantially in the coming FY 2019. In FY 2017, the bed fee was \$8.30. Mont. Code Ann. § 15-60-102(1)(a) and (b). In FY 2018, the bed fee is \$11.30. Mont. Code Ann. § 15-60-102(1)(c). Beginning in FY 2019 (i.e., on July 1, 2018) the bed fee will be \$15.30. Mont. Code Ann. § 15-60-102(1)(d).

44. The Bed Fee revenue is split between the General Fund and the state special revenue account provided in Mont. Code Ann. § 15-60-211. Specifically, \$2.80 of the bed fee must be deposited in the General Fund. Mont. Code Ann. § 15-60-102(2)(a). The remainder of the fee must be deposited in the state special revenue

account. Mont. Code Ann. § 15-60-102(2)(b).

45. Mont. Code Ann. §§ 15-60-101 and -211 require that specific portions of the Bed Fee revenues be used as follows:

a. The first \$8.30 of the Bed Fee must “be used to maintain the price-based average payment rate to nursing facilities at the [FY] 2017 base amount.” Mont. Code Ann. § 15-60-102(1)(a) and (b).

b. The additional \$3.00 of Bed Fee assessed in FY 2018 must “be used to increase the price-based average payment rate to nursing facilities above the [FY] 2017 base.” Mont. Code Ann. § 15-60-102(c).

c. The additional \$7.00 of Bed Fee assessed in FY 2019 and beyond must “be used to increase the price-based average payment rate to nursing facilities above the [FY] 2017 base.” Mont. Code Ann. § 15-60-102(d).

**D. Reimbursement Rates for Other SLTC Division Programs**

46. Mont. Admin. R. 37.85.105 is an omnibus rule that provides effective dates for various reimbursement fee schedules that are not contained in the rule. Mont. Admin. R. 37.85.105 is attached as Exhibit 2. Mont. Admin. R. 37.85.105(4)(a) incorporates by reference Medicaid fee schedules for assisted living services through the Home and Community-Based Services (“HCBS”) waiver program.

47. Mont. Admin. R. 37.85.105 specifies neither the rates nor the methodology used to calculate the assisted living reimbursement rates. Instead, the rule states that the “description of the method for setting the reimbursement rate and the administrative rules applicable to the covered service are published in the chapter or subchapter of this title

regarding that service.” Mont. Admin. R. 37.85.105(1).

48. Mont. Admin. R. 37.40.1421 is the rule that should describe “the method for setting the reimbursement rate” for assisted living and other HCBS waiver services. Mont. Admin. R. 37.40.1421 is attached as Exhibit 3. Mont. Admin. R. 37.40.1421(6) states that the reimbursement rate for HCBS waiver services is based on appropriations and the estimated demand for the services.

49. Mont. Admin. R. 37.40.1421 does not describe specifically how rates are set for assisted living and other HCBS waiver services, nor does it provide a specific rate. Instead, Mont. Admin. R. 37.40.1421 merely notes two factors considered in setting the rates and makes circular reference to Mont. Admin. R. 37.85.105.

#### **E. Appropriated Funds**

50. The Montana Legislature appropriates on a biennial basis funds for reimbursement of Medicaid providers.

51. The 65th Regular Session of the Montana Legislature convened in January 2017. During that session, the Montana Legislature passed the following bills that are relevant to the Plaintiffs’ claims:

- a. HB 2, the General Appropriations Act of 2017, provided appropriations for the Department from the General Fund, state special revenue, and Federal special revenue. The relevant portion of HB 2 as passed in the 65th Regular Session is attached as Exhibit 4. The Plaintiffs are all reimbursed through the SLTC Division, which has its own line-item in HB 2. *See* HB 2, 65th Reg. Session, B-2, line 14 (2017).

b. HB 618 amended the Bed Fee statutes to increase the amount of the Bed Fee imposed in FY 2018 and FY 2019 and restrict how the increased Bed Fee revenue could be used. HB 618 increased the Bed Fee by an additional \$3.00 per bed day in FY 2018. Beginning in FY 2019, this additional Bed Fee collection will rise to \$7.00. The \$3.00 of Bed Fee collected in FY 2018 and \$7.00 collected in all subsequent years must be used to increase reimbursement rates above the FY 2017 price-based average payment rate. Amendments to HB 618 adopted in the Montana Senate also reserved a portion of the Bed Fee for worker wages, but that provision is not at issue here. The enrolled version of HB 618 is attached as Exhibit 5.

c. SB 261 created a reserve fund and provided for various reductions in appropriations under HB 2 that would be triggered by actual revenue collections during FY 2017 and FY 2018. Revenue collections in FY 2017 were low enough to trigger all of the budget cuts in SB 261. The enrolled version of SB 261 is attached as Exhibit 6. Specifically, two sections of SB 261 are relevant to the Plaintiffs' claims: Section 21, which cut \$7,000,000 from the Department's General Fund appropriations over the biennium for the Health Resources Division (rather than the SLTC Division) with an instruction that the cut be applied to Medicaid provider rates; and Section 12, which cut the Department's overall General Fund appropriations by .5%.

52. Provider nursing facilities supported HB 618 because it guaranteed that the increased Bed Fees and the associated matching federal funds would be used to increase

nursing facility reimbursement rates above FY 2017 levels.

53. In addition to the legislative intent expressed in the plain language of HB 618, the legislative history shows that the increased Bed Fees and matching federal funds were needed to defray the cost of complying with new federal regulations and reduce the need to shift costs to residents who pay for their own care. *See Hearing on HB 618 Before the H. Appropriations Comm.*, 65th Leg., Reg. Session, Exhibit 2 (Mont. 2017) (written testimony of Rose Hughes regarding compliance costs) (attached as Exhibit 7).

54. In August 2017, the Governor directed state agencies, including the Department, to submit proposals for 10% reductions to their respective budgets. The Department provided its proposal to the Governor's office in September 2017, which the Governor adopted pursuant to Mont. Code Ann. § 17-7-140. The Department's proposal and the Governor's cuts did not affect the Plaintiff's Medicaid reimbursement rates.

55. The Montana Legislature reconvened on November 14, 2017, for a two-day Special Session to address budget shortfalls caused by lower-than-projected revenue collections. In the Special Session, the Legislature amended the General Appropriations Act of 2017 to incorporate all of the triggered budget cuts included in SB 261 and the cuts ordered by the Governor pursuant to Mont. Code Ann. § 17-7-140. The Legislature also reduced appropriations to specific programs other than Medicaid reimbursement rates.

#### **F. Nursing Facility Rate Notice**

56. On July 10, 2017, the Department issued MAR Notice No. 37-789, which announced the Department's intention to amend the nursing facility reimbursement rule,

Mont. Admin. R. 37.40.307. That rule is attached as Exhibit 8. The proposed amendments increased per diem reimbursement rates to reflect the additional Bed Fee revenue that resulted from HB 618. The amendments described in MAR Notice No. 37-789 were adopted on September 22, 2017, with a retroactive effective date of July 1, 2017. Upon information and belief, the per diem rate that followed MAR Notice No. 37-789 accurately reflected the effect of the Legislature's appropriations in HB 2, plus the additional Bed Fees collected pursuant to HB 618.

57. On July 10, 2017, the Department also issued MAR Notice No. 37-805 (the "Nursing Facility Notice"), which announced the Department's intention to adopt a new rule to reduce the per diem reimbursement rates for nursing facilities. A copy of this notice is attached as Exhibit 9.

58. The Department's statement of reasonable necessity in the Nursing Facility Notice explained that the purpose of the new rule was to implement the contingent budget cuts included in SB 261. Specifically, the Nursing Facility Notice states:

The percentage of reduction in overall expenditures needed to stay within legislatively approved appropriations in HB2 and SB261 is calculated at 3.47%. The reduction of 3.47% is to the General Fund portion of the funding for nursing facility reimbursement which is made up of General Fund and state special funding to match to the federal funding decreasing the impact to nursing facility reimbursement. *State special funding is not impacted by the decrease required by SB261.*

\* \* \*

Given the effective date of this rule, October 1, 2017 (1/4 of SFY2018), 25% of the total funding and days were taken out of the rate calculation (leaving \$140,659,743 and 751,507 days), in order to calculate the new rate *for the remaining 9 months of the fiscal year* (October 1, 2017, through the end of the fiscal year, June 30, 2018).

(Emphasis added.)

59. In the Nursing Facility Notice, the Department stated that the 3.47% cut was necessary because the budget cuts required by SB 261 would be spread across nine months instead of a full fiscal year. Beyond this, the Department did not explain how it calculated the 3.47% rate cut.

60. The MHCA requested details of the Department's calculation of the proposed 3.47% rate cut, but the Department ignored MHCA's requests.

61. The Montana Legislature's Children, Families, Health, and Human Services Interim Committee (the "Interim Committee") formally objected to the Nursing Facility Notice and several other notices of proposed rulemaking in letters dated July 26, 2017, and November 8, 2017. Copies of the Interim Committee's letters are attached as Exhibits 10 and 11.

62. The Department held the MAPA public hearing on the Nursing Facility Notice on August 15, 2017. Despite the Plaintiffs' repeated requests, the Department failed to provide a meaningful explanation of its rate calculations before the hearing, or before the close of the public comment period provided in the Nursing Facility Notice. *See Exhibit 12 (email from Rose Hughes to Marie Matthews and Barbara Smith, Requests for Information (August 2, 2017)).*

63. At the September 11, 2017 meeting of the Interim Committee, Sheila Hogan told the committee that 3.47% reimbursement rate cut would be reduced to 2.99% over nine months.

64. Originally, the Department intended the new rules described in the Nursing



Facility Notice to take effect on October 1, 2017. The Interim Committee's objection, combined with opposition from MHCA, its members, and others, forced the Department to delay implementation of the rate cuts proposed in the Nursing Facility Notice.

65. On November 22, 2017, the Department responded in writing to the Interim Committee's objections. The Department's response is attached as Exhibit 13. Enclosed with the Department's response were final adoption notices for its proposed rules. The Department explained:

After receiving written comments objecting to the rate reduction, the Department announced its intention to amend the proposed rate reduction from a 3.47% reduction to a 2.99% reduction to current provider rates. As explained in the enclosed final notices, the Department was able to reduce the rate reduction to 2.99% by limiting the rate decreases to the following two appropriation reductions actions passed by the 2017 legislature: a) SB 261 Section 21, and b) the Medicaid share of SB 261 Section 12. The 2.99% rate reduction was based on the assumption that the new rates would take effect January 1, 2018.

66. The Department's letter did not fully explain how it calculated the 2.99% rate cut, nor did it explain how a 2.99% rate reduction over six months could recoup the same budget shortfall as the previously noticed 3.47% rate reduction over nine months.

67. The Department did not assert that the budget cuts made by the Governor or the Montana Legislature's Special Session were factors in the 2.99% rate reduction. According to the Department, the only factors considered in the 2.99% cut were Sections 12 and 21 of SB 261, which only affected General Fund appropriations.

68. The Department did not publish a new notice of proposed rulemaking for the 2.99% rate cut, nor did the Department hold a public hearing or provide any notice or opportunity to comment on the new rate cut.

69. On December 6, 2017, the Department provided to the MHCA a spreadsheet explaining how the Department calculated the 2.99% cut for nursing facilities. That spreadsheet showed that the Department applied the 2.99% cut to all funding sources that comprised the total reimbursement rate, rather than just the General Fund portion. *See Exhibit 14 (email from Shaunda Hildebrand to Rose Hughes, RE: Medicaid – Nursing Facility – Notice of adoption 37-805 (December 6, 2017))*.

70. On December 8, 2017, the Department published a notice of adoption for the rule described in the Nursing Facility Notice, revised as described in its letter to the Interim Committee, with an effective date of January 1, 2018. 23 Mont. Admin. Reg. 2320–2325 (Dec. 8, 2017). The relevant pages of the Montana Administrative Register are attached as Exhibit 15.

71. On its face, the purpose of the Nursing Facility Notice was to adopt Mont. Admin. R. 37.40.309. That rule is attached as Exhibit 16. The substance of Mont. Admin. R. 37.40.309 is, for all material purposes, identical to language already contained in Mont. Admin. R. 37.40.307. *Compare Exhibit 8 with Exhibit 16.*

72. The average, per diem Medicaid reimbursement rate for nursing facilities in FY 2017 was \$176.06.

73. According to the Department's calculations, the net effect of HB 2 appropriations and the additional Bed Fees from HB 618 raised the average reimbursement rate by \$11.11, to \$187.17. The Department summarized its calculation of the average FY 2018 reimbursement rate in a document provided to the MHCA on July 17, 2017. That document is attached as Exhibit 17. The Department's calculations

indicate that the average per diem reimbursement rate for nursing facilities had to be at least \$187.17 to satisfy the requirements of the Bed Fee statutes.

74. For services provided on or after January 1, 2018, Plaintiff nursing facilities have been reimbursed at the lower rates described in the Department's notice of adoption regarding the Nursing Facility Notice, as modified by the Department's November 22, 2017 letter.

#### **G. Omnibus Rate Notice**

75. On July 7, 2017, the Department published Notice No. 37-788 (the "Omnibus Rate Notice"), which announced the Department's intent to amend Mont. Admin. R. 37.85.105 and other rules to update the effective dates of the fee schedules referred to in those rules. The Omnibus Rate Notice is attached as Exhibit 18.

76. According to the Department's statement of reasonable necessity, the amendments proposed in the Omnibus Rate Notice were needed to "reflect appropriations reductions" in HB 2 and to "reflect the mandated legislative reductions required to comply with [SB 261] if revenue projections do not meet certain levels on August 15, 2017." Omnibus Rate Notice at 1017.

77. In the Omnibus Rate Notice, the Department states that a 3.47% reduction is "needed to stay within legislatively approved appropriations in HB2 and SB261." Omnibus Rate Notice at 1018. The Omnibus Rate Notice does not explain how the Department determined that a 3.47% reduction was needed.

78. The Department represented that the 3.47% cut was necessary because the budget cuts required by SB 261 would be spread across nine months instead of a full

fiscal year.

79. The Interim Committee formally objected to the Omnibus Rate Notice in its letters dated July 26, 2017, and November 8, 2017, which are attached as Exhibits 10 and 11, respectively.

80. Despite the Plaintiffs' repeated requests, the Department failed to provide a meaningful explanation of its rate calculations before the July 27, 2017 public hearing on the Omnibus Rate Notice. *See* Exhibit 12 (email from Rose Hughes to Marie Matthews and Barbara Smith, *Requests for Information* (August 2, 2017)). At the hearing, MHCA offered public comment on the proposed rulemaking and reiterated its requests for documents and information from the Department.

81. At the hearing, MHCA also specifically asked the Department to account for Social Security increases and other sources of funding for assisted living reimbursement in its final rule. The Department had previously agreed that its method for calculating assisted living rates should be changed to address issues raised by the providers.

82. Originally, the Department intended the amendments described in the Omnibus Rate Notice to take effect on October 1, 2017. The Interim Committee's objection, combined with opposition from MHCA, its members, and others, forced the Department to delay implementation of the amendments described in the Omnibus Rate Notice.

83. The Department's November 22, 2017 letter in response to the Interim Committee's objection, *see supra* ¶ 68, stated the Department would reduce the rate cut

for services covered by the Omnibus Rate Notice from 3.47% to 2.99%. The Department's letter did not fully explain how it calculated the 2.99% rate cut, nor did it explain how a 2.99% rate reduction over six months could recoup the same budget shortfall as the previously noticed 3.47% rate reduction over nine months.

84. After the public hearing and close of the public comment period on the Omnibus Rate Notice, but before it issued the associated Notice of Amendment, the Department revised the fee schedules referred to in Mont. Admin. R. 37.85.105 to reflect the 2.99% rate cut. Eventually, the Department posted the revised fee schedules on its website, but none of these fee schedules were available during the public comment period. The revised fee schedules for some services, including assisted living services, were not available to the public when the Department certified its final notice of amendment to the Secretary of State.

85. The Department did not republish its notice of proposed rulemaking after the fee schedules were revised, nor did the Department hold a public hearing or allow public input on the new rate reduction and revised fee schedules.

86. The Department formally published its Notice of Amendment related to the Omnibus Rate Notice on December 8, 2017. 23 Mont. Admin. Reg. 2287–2302 (Dec. 8, 2017). The relevant pages of the Montana Administrative Register are attached as Exhibit 19.

87. In the Department's Notice of Amendment related to the Omnibus Rate Notice, the Department explained that the "lowered rate reduction was achieved by implementing legislatively mandated funding reductions in [SB 261] §§ 12 and 21." The

Department did not attribute any of the rate cut to the Montana Legislature's Special Session or the Governor's cuts made pursuant to Mont. Code Ann. § 17-7-140.

88. The Department's Notice of Amendment did not respond to MHCA's comments about factoring increased Social Security payments into assisted living reimbursement rates.

89. For services provided on or after January 1, 2018, the Plaintiff assisted living facilities have been reimbursed at the lower rates described in the Department's notice of adoption regarding the Omnibus Rate Notice, as modified by the Department's November 22, 2017 letter.

#### **H. Subsequent Department Determinations**

90. The Department repeatedly represented to the Plaintiffs, the Interim Committee, and the public that the 2.99% rate reduction was needed to recoup the FY 2018 budget cuts over a period of six months. 23 Mont. Admin. Reg. 2297 ("amount of time available to achieve the required spending reductions" was a factor in calculating the cut), 2321 (same), 2299 ("the reduction must be made during [FY] 2018. A percentage rate reduction can be smaller if the total is recovered over a longer period of time.") (Dec. 8, 2017). By the Department's own calculations, the rate reduction required over a period of 12 months would be only 1.49%. 23 Mont. Admin. Reg. 2323 (Dec. 8, 2017).

91. The Special Session's amended budget incorporated Sections 12 and 21 from SB 261 and cut the equivalent appropriations for FY 2018 and FY 2019. In FY 2019, the Department must account for essentially the same amount of funding it cut

in FY 2018, but it has a full 12 months, rather than 6 months, to do so. Accordingly, even under the Department's approach, the rate reduction for FY 2019 would be 1.49% rather than 2.99%.

92. On March 23, 2018, Sheila Hogan told the Interim Committee that the Department would not revise its reimbursement rates for FY 2019, so the rate cuts for FY 2018 would continue through FY 2019. The Department provided no substantive explanation of why it was necessary to continue the same 2.99% rate cut into the next fiscal year.

93. The meetings wherein the Department considered rates for FY 2019 were not noticed or open to the public. The Department has not made the minutes of these meetings available for public inspection. The Department has provided no opportunity for public participation in the determination of base FY 2019 reimbursement rates for assisted living facilities.

94. On May 15, 2018, the Department certified a Notice of Public Hearing on Proposed Amendment and Repeal concerning the per diem reimbursement rates for nursing facilities. MAR Notice 37-845 is attached as Exhibit 20. According to the notice, the Department intends to repeal Mont. Admin. R. 37.40.309—the rule that implemented the nursing facility rate cut—and increase nursing facility reimbursement rates by 6.34%. The notice does not show how the Department calculated the funding available for the new rate. It is not clear from the notice whether the 6.34% increase is measured from the invalid rate cut that was effective as of January 1, 2018, or the prior rate, which was effective beginning on July 1, 2017. Further, it is not clear whether the

proposed rates would continue the full 2.99% rate cut imposed January 1, 2018, or any other rate cut.

**COUNT 1. FAILURE TO ADOPT NURSING FACILITY RATE OR RATE METHODOLOGY AS A RULE**

95. The other paragraphs of this Complaint are incorporated herein by reference.

96. The Department has failed to adopt rules that specify the amount of the “statewide price for nursing facility services,” the actual reimbursement rates set by the Department for nursing homes, or the method or process the Department uses to set the statewide price for nursing facility services or the reimbursement rates.

97. The reimbursement rate, or the rate formula, is a rule that must be adopted according to MAPA’s rulemaking requirements to be valid and effective.

98. Because the reimbursement rate, or the rate formula, is not specified in Mont. Admin. R. 37.40.309, the rate cut rule purportedly adopted was not adopted as a rule in compliance with MAPA and is therefore invalid and ineffective.

99. The continued application of the invalid and ineffective rate cut rule impairs the legal rights and privileges of the Plaintiff nursing facilities.

**COUNT 2. FAILURE OF REASONABLE NECESSITY IN NURSING FACILITY NOTICE**

100. The other paragraphs of this Complaint are incorporated herein by reference.

101. The only rulemaking proposed in the Nursing Facility Notice was the adoption of Mont. Admin. R. 37.40.309.



102. Because there is no substantive difference between Mont. Admin. R. 37.40.309 and the preexisting rule, Mont. Admin. R. 37.40.307, there is no reasonable necessity for Mont. Admin. R. 37.40.309, as adopted through the Nursing Facility Notice.

103. The Department represented that the Nursing Facility Notice was necessary to implement cuts in General Fund appropriations; however, the Department proceeded to implement a rate that cut both General Fund and state special revenue expenditures. The Department has not shown and cannot show that its cuts to state special revenue expenditures and patient contributions were reasonably necessary.

104. Because Mont. Admin. R. 37.40.309 lacks reasonable necessity, it is invalid and ineffective.

105. The continued application of Mont. Admin. R. 37.40.309 impairs the legal rights and privileges of the Plaintiff nursing facilities to appropriate reimbursement.

### **COUNT 3. FAILURE TO ADOPT OTHER SLTC PROGRAM REIMBURSEMENT RATES AS A RULE**

106. The other paragraphs of this Complaint are incorporated herein by reference.

107. Mont. Admin. R. 37.85.105 and 37.40.1421 do not specify the actual reimbursement rates or rate formulas set by the Department for assisted living services provided through the HCBS waiver program.

108. The reimbursement rates or the rate formulas for assisted living services provided through the HCBS waiver program are rules that must be adopted according to MAPA's rulemaking requirements to be valid and effective.

109. Because the reimbursement rates, or the rate formulas, are not specified in Mont. Admin. R. 37.85.105 and 37.40.1421, the rates purportedly adopted were not adopted as rules in compliance with MAPA and are not valid and effective.

110. The continued application of the invalid and ineffective reimbursement rates impairs the legal rights and privileges of the Plaintiff assisted living facilities.

**COUNT 4. FAILURE TO PROVIDE REQUIRED STATEMENTS OF  
REASONABLE NECESSITY**

111. The other paragraphs of this Complaint are incorporated herein by reference.

112. The statements of reasonable necessity contained in the Nursing Facility Notice and the Omnibus Rate Notice do not state the rationale for the proposed rules and for the particular approach the Department proposed to take in complying with the mandate to adopt rules, or clearly and thoroughly demonstrate the reasonable necessity of a 3.47% cut to reimbursement rates.

113. The Department's notices did not demonstrate a meaningful consideration of the factors set forth in Mont. Code Ann. §§ 53-6-101(2) and -113(3) for policy changes that affect Medicaid services and rates.

114. The Department's November 22, 2017 letter and the notices of adoption that followed the Nursing Facility Notice and the Omnibus Rate Notice demonstrate that a 3.47% cut to reimbursement rates was not reasonably necessary.

115. The notices of adoption that followed the Nursing Facility Notice and the Omnibus Rate Notice did not and, as a matter of law, could not correct the fundamental

flaws with the Department's original statements of reasonable necessity.

116. The rules adopted pursuant to the Nursing Facility Notice and the Omnibus Rate Notice are invalid and ineffective due to the inadequate statements of reasonable necessity in those notices.

117. The application of the Department's invalid and ineffective rules impairs the legal rights and privileges of the Plaintiffs to appropriate reimbursement.

#### **COUNT 5. LACK OF SUBSTANTIVE REASONABLE NECESSITY**

118. The other paragraphs of this Complaint are incorporated herein by reference.

119. The Department has not shown that a 2.99% cut to the providers' reimbursement rates is reasonably necessary.

120. The 2.99% cut to the providers' reimbursement rates is not reasonably necessary.

121. Because the 2.99% cut to reimbursement rates is not reasonably necessary, the Department's rules implementing the cut are invalid and ineffective.

122. The application of the invalid and ineffective rules impairs the legal rights and privileges of the Plaintiffs to appropriate reimbursement.

#### **COUNT 6. CONFLICT BETWEEN NURSING FACILITY RULES AND BED FEE STATUTE**

123. The other paragraphs of this Complaint are incorporated herein by reference.

124. According to the Department's own calculations, applying the Bed Fee as

directed by Mont. Code Ann. § 15-60-102 would raise reimbursement rates to \$187.17. *See* Exhibit 17. Due to Mont. Admin. R. 37.40.309, the Department has actually paid an average reimbursement rate of \$181.01 since January 1, 2018.

125. Because the Department is not paying an average reimbursement rate of \$187.17 for FY 2018, it is and necessarily must be using at least a portion of the \$3.00 of Bed Fee that was dedicated to increasing rates above the FY 2017 level for the impermissible purpose of maintaining FY 2017 levels.

126. Because the Department is not paying an average reimbursement rate of \$187.17 for FY 2018, it is and necessarily must be using at least a portion of the \$8.30 of Bed Fee that was dedicated to maintaining the FY 2017 level for the impermissible purpose of backfilling lost General Fund appropriations, without actually maintaining the FY 2017 level.

127. The Department has indicated that it will maintain the 2.99% reimbursement rate cut for FY 2019, even though the Bed Fee assessment will rise again in FY 2019. Therefore, it will be and necessarily must be using at least a portion of the \$7.00 of additional Bed Fee collected in FY 2019 for the impermissible purpose of maintaining FY 2017 levels, rather than raising rates above FY 2017 levels.

128. Because Mont. Admin. R. 37.40.309 was adopted with an arbitrary or capricious disregard for the purposes of and is inconsistent and in conflict with the Bed Fee statutes, Mont. Code Ann. §§ 15-60-102 and -211, the rule is invalid and ineffective pursuant to Mont. Code Ann. §§ 2-4-305(6)(a), (7), and 2-4-506(2).

129. The application of the Department's rule impairs the Plaintiff nursing

facilities' statutory rights and privileges to reimbursement in accordance with the Bed Fee statutes.

**COUNT 7. VIOLATION OF MONT. CODE ANN. §§ 15-60-102 AND -211**

130. The other paragraphs of this Complaint are incorporated herein by reference.

131. Regardless of compliance or lack of compliance with MAPA requirements, the Department cannot use funds from the special revenue account provided in Mont. Code Ann. § 15-60-211 for any purposes other than those specifically allowed by the statute.

132. The Department is using at least a portion of the \$3.00 of Bed Fee that was dedicated to increasing rates above the FY 2017 level for the impermissible purpose of maintaining FY 2017 levels.

133. The Department is using at least a portion of the \$8.30 of Bed Fee that was dedicated to maintaining the FY 2017 level for the impermissible purpose of backfilling lost General Fund appropriations, without actually maintaining the FY 2017 level.

134. The Department's violation of Mont. Code Ann. §§ 15-60-102 and -211 has denied the Plaintiff nursing facilities' right to reimbursement in accordance with the Bed Fee statutes.

**COUNT 8. DENIAL OF MEANINGFUL OPPORTUNITY FOR PUBLIC PARTICIPATION**

135. The other paragraphs of this Complaint are incorporated herein by reference.

136. The Department failed to provide requested information and documentation upon which its proposals and decisions regarding rate cuts in Mont. Admin. R. 37.40.309 and 37.85.105 were made, which were essential to interested parties' ability to effectively and meaningfully submit data, views, and arguments on or otherwise meaningfully participate in the Department's decisions.

137. The information and documentation the Department did provide was false or misleading.

138. The Department has violated the Plaintiffs' rights under MAPA and Mont. Const. art. II, § 8.

139. The Department failed to determine the statewide price for nursing facility services through a public process, as required by Mont. Admin. R. 37.40.307.

140. The Department's actions have denied Plaintiffs a meaningful opportunity for public participation in the rulemaking and rate setting process.

#### **COUNT 9. FAILURE TO ADOPT ALTERED FEE SCHEDULES BY REFERENCE**

141. The Department purportedly adopted by reference fee schedules for assisted living services provided through the HCBS waiver program. Mont. Admin. R. 37.85.105(4)(a).

142. After the Department published the Omnibus Rate Notice, it altered the fee schedules that it intended to incorporate by reference. The fee schedules were not available to the Plaintiffs or the public at the time of the hearing or during the comment period for the Omnibus Rate Notice.

143. MAPA required the Department to initiate a separate rulemaking process for adopting the altered fee schedules. Mont. Code Ann. § 2-4-307(3)(b).

144. Because the Department failed to adopt the altered fee schedules through a separate rulemaking process, the altered fee schedules are invalid and ineffective.

145. The application of the invalid and ineffective fee schedules impairs the Plaintiff assisted living facilities' statutory rights and privileges to appropriate reimbursement.

#### **COUNT 10. VIOLATION OF RIGHT TO PUBLIC PARTICIPATION AND OPEN MEETINGS**

146. The Department's decision to extend the 2.99% rate cuts to FY 2019 was made without notice or an opportunity for public participation, in violation of Mont. Code Ann. §§ 2-3-103 and -111, and Mont. Const. art. II, § 8.

147. The Department's meetings wherein it decided to extend the 2.99% rate cuts were not noticed and open to the public, as required by Mont. Code Ann. § 2-3-203 and Mont. Const. art. II, § 9.

148. The Department's violations of the above statutes and constitutional provisions have prejudiced the Plaintiffs' statutory and constitutional rights to know and participate.

149. The Department's decision to extend the 2.99% rate cuts must be voided. Mont. Code Ann. §§ 2-3-114 and -213.

#### **COUNT 11. INJUNCTIVE RELIEF**

150. The other paragraphs of this Complaint are incorporated herein by

reference.

151. The rule purportedly adopted through the Nursing Facility Notice is invalid, ineffective, and contrary to statute, yet the Department has reimbursed and continues to reimburse the Plaintiff nursing facilities at a rate lower than what is required by the prior rules and by Mont. Code Ann. §§ 15-60-102 and -211, in violation of the Plaintiff nursing facilities' rights to appropriate reimbursement under those statutes.

152. By statute, Plaintiff nursing facilities must be reimbursed in FY 2018 under the rates in effect immediately prior to January 1, 2018.

153. The rule amendments adopted through the Omnibus Rate Notice are invalid and ineffective, yet the Department has reimbursed and continues to reimburse the Plaintiff assisted living facilities at a lower rate based on those amendments.

154. Plaintiff assisted living facilities are entitled to reimbursement at the rates that were effective before the Omnibus Rate Notice.

155. The continued application of the Department's invalid and ineffective reimbursement rules will cause great injury to all Plaintiffs.

156. Unless a preliminary and permanent injunction is awarded, the Department will continue to violate Plaintiffs' rights.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request the following relief on their Complaint against Defendant:

A. A declaration that the Department's rules implementing the 2.99% cut to Plaintiffs' reimbursement rates is invalid and ineffective, including:



- a. The entirety of Mont. Admin. R. 37.40.309, as adopted through the Nursing Facility Notice;
- b. The amendments to Mont. Admin. R. 37.85.105(4)(a), as implemented through the Omnibus Rate Notice; and
- c. The altered fee schedules purportedly adopted through Mont. Admin. R. 37.85.105(4)(a).

B. A temporary restraining order, and a preliminary and permanent injunction enjoining the Department from applying its rules implementing the 2.99% cut to reimbursement rates, including:

- a. The entirety of Mont. Admin. R. 37.40.309, as adopted through the Nursing Facility Notice;
- b. The amendments to Mont. Admin. R. 37.85.105(4)(a), as implemented through the Omnibus Rate Notice; and
- c. The altered fee schedules purportedly adopted through Mont. Admin. R. 37.85.105(4)(a).

C. An order directing the Department to reimburse nursing facilities for FY 2018 at the reimbursement rates established prior to the 2.99% cut to reimbursement rates and required by Mont. Code Ann. §§ 15-60-102 and -211 (i.e., the rates in effect immediately prior to January 1, 2018), and taking any and all actions necessary to adjust payments previously made at the invalid and ineffective rate;

D. An order directing the Department to reimburse assisted living facilities for FY 2018 at the reimbursement rates established prior to the 2.99% cut to reimbursement

rates (i.e., the rates in effect immediately prior to January 1, 2018), and taking any and all actions necessary to adjust payments previously made at the invalid and ineffective rate;

E. A declaration that the Department's proposed rate rules effective July 1, 2018, for nursing facilities and assisted living facilities are invalid and ineffective to the extent such rules continue the defective January 1, 2018 rate cuts into FY 2019 or fail to comply with applicable substantive law;

F. Preliminary and permanent injunctive relief enjoining the Department from applying any rules effective July 1, 2018, for nursing facilities and assisted living facilities, to the extent such rules continue the defective January 1, 2018 rate cuts into FY 2019 or fail to comply with applicable substantive law;

G. An order directing the Department to reimburse nursing facilities and assisted living facilities for services provided in FY 2019 at rates adopted in compliance with applicable law;

H. An order awarding costs and reasonable attorney's fees to the Plaintiffs; and

I. Further relief as this Court deems just and proper.

DATED this \_\_\_\_ day of June, 2018.

LUXAN & MURFITT, PLLP

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