

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

-----X
In the Matter of

the Liquidation of

QUALITY HEALTH PLANS OF NEW YORK, INC.
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Index No.: 451399/2020

**AFFIRMATION OF
DONALD N. COHEN**

Donald N. Cohen, an attorney at law, duly admitted to practice before the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury:

1. I am a Special Counsel in the office of General Counsel of the New York Liquidation Bureau, which serves as the staff for Linda A. Lacewell in her capacity as Superintendent of Financial Services of the State of New York as liquidator (the "Liquidator") of Quality Health Plans of New York, Inc. ("QHPNY"). I submit this affirmation upon information and belief, based on my review of the files maintained by my office and conversations I have had, in support of the Liquidator's application, in accordance with Insurance Law Section 7428, for Court approval of the Assignment of Claims Agreement (the "Assignment Agreement") between the Liquidator and Northwell Health, Inc. ("Northwell), a New York not-for-profit corporation. A copy of the Assignment Agreement is annexed as Exhibit 1; the proposed order approving the Assignment Agreement is annexed hereto as Exhibit 2.

Background

2. By an order dated September 8, 2020 (the "Liquidation Order"), this Court placed QHPNY into liquidation pursuant to the motion of the Superintendent of Financial Services of the State of New York (the "Superintendent"). The Liquidation Order, among other things: (a) appointed the Superintendent as Liquidator of QHPNY, (b) directed the Liquidator to take possession of QHPNY's property and liquidate QHPNY's business and affairs in accordance with

Insurance Law Article 74, and (c) vested the Liquidator with all powers and authority expressed or implied under Insurance Law Article 74, in addition to the powers and authority set forth in the Liquidation Order and with title to QHPNY's property, contracts, rights of action, and all of its books and records.

3. Pursuant to the Liquidation Order, the Liquidator took possession of QHPNY's liquid assets of approximately \$1.65 million. The estate also has a potential claim for monies from the Centers for Medicare and Medicaid Services for approximately \$2.3 million. By contrast, the Liquidator's records currently show Class Two policyholder liabilities under Insurance Law Section 7434 are approximately \$41.3 million.

Investigation Into Potential D&O Claims

4. Pursuant to the Liquidation Order, the Liquidator investigated potential claims against QHPNY's former owners, directors and officers and their related entities, for mismanagement, self-dealing and fraud. The Liquidator took notice that QHPNY's largest creditor, Northwell, had previously commenced a lawsuit against certain former owners, directors and officers of QHPNY and their related entities, alleging self-dealing, fraud and financial impropriety (the "Khan Action").

5. Based on her investigation, the Liquidator has concluded that claims exist against the former QHPNY owners, directors and officers and their related entities, but it is unlikely that the estate has sufficient assets to fund a lawsuit seeking broad relief against them. The expenses of a litigation would be impacted by the following factors:

- a. The legal and factual complexity of the potential claims. The claims involve business dealings over the last decade with many companies owned or controlled by former QHPNY owners, directors and officers. Prosecution of the lawsuit would

require the Liquidator to review potentially thousands of inter-company and related party transactions and would almost certainly require substantial assistance of outside experts.

- b. The location of many of the parties involved. Most of the former QHPNY owners, directors and officers live outside of New York State, and most of the related entities that they own and control are also located outside New York State. Based on motions that the former owners, directors and officers and their related entities have filed in the Khan Action, the potential defendants are expected to engage in costly motion practice relating to personal jurisdiction issues, as well as other dispositive motions based on legal and factual issues.
- c. Scope of the discovery. Much of the discovery and evidence involved in a litigation would require expensive e-discovery processes. Virtually all of QHPNY's records, email and otherwise, were electronically stored. When the Liquidator took control of QHPNY's assets, she discovered that there are significant problems even accessing QHPNY's electronically stored information ("ESI"), which has already necessitated the retention of a forensic ESI expert. Identifying, searching and reviewing the ESI for litigation purposes will entail substantial time and expense.
- d. Collectability of any judgments. If judgments are obtained against any of the former owners, directors and officers or their related entities, the Liquidator has substantial concerns about the time and expense required to enforce them. Because many of the former owners, directors and officers and their related entities are located out of state, the process of locating and seizing their assets is likely to be difficult, time-consuming, expensive and uncertain.

Northwell And Its Lawsuits Against QHPNY And Its Former Owners, Directors And Officers

6. In 2019, Northwell sued QHPNY in New York Supreme Court, Nassau County, for failing to pay alleged obligations to Northwell, asserting claims for breach of contract, third-party beneficiary of contract, unjust enrichment, quantum meruit and accounts stated. At the time Northwell filed its complaint, it calculated its claims, through its various hospitals and healthcare facilities, to be in excess of \$18.5 million. Northwell's claims against QHPNY are the largest identified claim to date against QHPNY. The Northwell action against QHPNY was stayed by the Liquidation Order and it is expected that Northwell's policy claims will be resolved within the estate.

7. As previously mentioned, in 2020, before QHPNY entered liquidation, Northwell also sued most of QHPNY's then-current and former owners, directors and officers and their related entities in New York Supreme Court, Nassau County, in the Khan Action, asserting claims for, among other things, piercing the corporate veil, fraudulent transfers, fraud, unjust enrichment, and conversion. Northwell's claims against the former QHPNY owners, directors and officers and their related entities in the Khan Action related to QHPNY's failure to pay its alleged obligations to Northwell, and the former owners', directors' and officers' alleged improper activities in running QHPNY for their own benefit. The Khan Action is currently pending in Nassau County Supreme Court.

8. After review of the Northwell litigations and upon discussions with Northwell's counsel, the Liquidator has determined that it is in the estate's best interests to assign its claims against certain of QHPNY owners, directors, officers and related entities to Northwell. This is permissible, with the Court's approval, under the broad authority granted the Superintendent as Liquidator under Insurance Law Section 7428, to sell, compromise or otherwise dispose of the

property of the estate, including claims of the estate, upon a determination that it is in the best interests of the estate to do so. Several reasons underlie the Liquidator's determination. First, Northwell is the largest creditor of the QHPNY estate, and the interests of QHPNY and Northwell are aligned with respect to the recovery of money from the former QHPNY owners, directors and officers and their related entities.

9. Second, Northwell has already taken independent action to pursue such claims and has already undertaken significant work in prosecuting claims against QHPNY's former owners, directors and officers and their related entities. Discovery is in progress in the Northwell lawsuit and Northwell has represented to the Liquidator that it has already undertaken an extensive review of the available documentary record. Were the Liquidator to retrace Northwell's steps, the Liquidator would be required to devote substantial resources to develop the case to the point Northwell has already reached. There are significant efficiencies in permitting Northwell to continue to prosecute the claims.

10. Third, the Assignment Agreement is structured to place the risk of litigation recovery entirely on Northwell. The QHPNY estate would not be responsible for covering any of the expenses of the litigation unless and until there is a financial recovery. In this way, the Assignment Agreement permits QHPNY's claims to be vigorously pursued by Northwell on behalf of all the creditors of QHPNY, while at the same time conserving the estate's limited assets.

11. Fourth, the Assignment Agreement is designed to provide adequate oversight and transparency concerning Northwell's prosecution of the claim. Northwell is required to pursue the litigation in "a commercially reasonable manner, including being responsible for paying its attorneys' fees and other costs and expenses." (Assignment Agreement ¶3.) The Liquidator has the right to demand periodic status reports and information on fees and costs. (Assignment

Agreement ¶3.) In the event of a recovery, the Liquidator would have an opportunity to perform any additional reviews of fees and expenses as appropriate. Finally, in the event of a successful litigation, the reimbursement of attorneys' fees is structured so that Northwell still bears a share of its own fees in order to further incentivize reasonable fees in the lawsuit. (Assignment Agreement ¶7.) Northwell counsel's billing rates have been reviewed and are deemed reasonable by the Liquidator.

The Assignment Agreement

The Liquidator and Northwell have executed the Assignment Agreement as of June 29, 2021, subject to approval of the liquidation court (Assignment Agreement ¶8.) Its key provisions are as follows:

- a. QHPNY assigns to Northwell all of its claims against QHPNY's former owners, directors and officers and their affiliated companies and related persons (the "Assigned Claims"), except for certain claims against four former directors and officers. (Assignment Agreement ¶¶ 1 & 2.) The Liquidator believes that narrow claims exist against these four individuals that fall within the coverage of QHPNY's D&O insurance policy. The Liquidator has already noticed these unassigned claims to the individuals and QHPNY's insurance carrier, and intends to pursue them independently for the benefit of all of the estate's creditors.
- b. Northwell shall pursue the Assigned Claims in a commercially reasonable manner, paying its attorneys' fees and costs. QHPNY will not maintain control over the litigation of the Assigned Claims. (Assignment Agreement ¶ 3.)
- c. Northwell agrees that any monies recovered in the litigation of the Assigned Claims shall be delivered to the Liquidator for distribution to all allowed creditors of the

- QHPNY estate on a proportional basis in accordance with the priorities set forth in §7434 of the New York Insurance Law, subject only to the reimbursement to Northwell of the agreed upon portion of its attorneys' fees and expenses paid by Northwell in obtaining the recovery. (Assignment Agreement ¶ 6.)
- d. Northwell's attorneys' fees and expenses will be reimbursed on a going forward basis (*i.e.*, only fees and expenses incurred after Court approval of the Assignment Agreement), only if there is a recovery or settlement in the litigation, as follows: (i) 100% of costs and expenses not including attorneys' fees, (ii) 100% of the first \$250,000 in attorneys' fees, (iii) 85% of the next \$250,000 in attorneys' fees, and (iv) any remaining portion of the attorneys' fees reimbursed at the same percentage as Northwell's pro rata distribution of its claim. (Assignment Agreement ¶ 7.)
- e. The Assignment Agreement is subject to approval of the liquidation Court. (Assignment Agreement ¶ 8.)

The Assignment Agreement Is Cost-Effective And Protects All Creditors

12. Absent an agreement with Northwell, the Liquidator is unlikely to have sufficient assets in the estate to effectively litigate the claims sought to be assigned, and the cost of litigation would substantially deplete the limited assets that are available to the Liquidator. The Assignment Agreement will permit the estate's claims to be prosecuted for the benefit of all of the estate's creditors, without requiring the estate's limited assets to be expended on an uncertain outcome. Under the Assignment Agreement, Northwell is willing to bear the risk, while agreeing that it will receive only its proportionate share, along with all other creditors, of any recovery, net of a portion of its expenses. If there is no recovery, the estate will not pay any litigation expenses to Northwell.

13. The Assignment Agreement also clarifies the respective positions of the Liquidator and Northwell in connection with the existing Khan Action in Nassau County. By assigning the Liquidator's claims (except for those against four enumerated directors and officers), the issue of the ownership of those claims will be resolved and any potential dispute between the Liquidator and Northwell relating to overlapping claims will be eliminated. The Assignment Agreement further provides that Northwell will dismiss its non-fraud claims against the four enumerated individuals, so that the Liquidator may independently pursue those claims with the D&O carrier for the benefit of all creditors. The clarification of these matters will simplify the administration of the estate and reduce the Liquidator's administrative costs.

14. A further benefit of the Assignment Agreement is that it will enable the Liquidator to turn to the other business of the estate, in particular the adjudication and allowance of claims under QHPNY's insurance policies, including Northwell's, in an expeditious manner. If the other business of the estate can be resolved, there will be no need to keep the estate open and incur additional administrative costs (in addition to litigation costs) solely to enable a complex litigation to continue. The Assignment Agreement provides that in the event of a recovery by Northwell after the estate is closed, the net litigation proceeds will be distributed pursuant to Insurance Law Section 7434. (Assignment Agreement ¶6).

Conclusion

15. For the reasons set forth above, the Liquidator has determined that the Assignment Agreement is in the best interests of all the creditors of the QHPNY estate. It will reduce the costs of estate administration, while enabling a potentially significant benefit to all creditors. The Assignment Agreement will enable Northwell to pursue its claims but does so in a way that benefits

all creditors of QHPNY and safeguards the interests of the other creditors, who will receive their proportionate shares of such a recovery as mandated by Insurance Law Section 7434.

16. Annexed hereto as Exhibit 3 is a form of notice of the order to show cause seeking the approval of the Assignment Agreement for publication in the *New York Post* and the *New York Daily News*.

17. No previous application has been made for the relief requested herein to this or any other Court or Judge.

WHEREFORE, the Liquidator requests that the Court issue an order approving the Assignment Agreement and authorizing and permitting the Liquidator of QHPNY to carry out the terms thereof.

Dated: New York, New York
June 29, 2021


By: 
Donald N. Cohen
Special Counsel

EXHIBIT 1

ASSIGNMENT OF CLAIMS AGREEMENT

This assignment of claims agreement (the "Agreement") is made between (i) Northwell Health, Inc. ("Northwell"), a New York not-for-profit corporation with a principal place of business at 2000 Marcus Avenue, New Hyde Park, NY 11042, and (ii) Quality Health Plans of New York, Inc. ("QHPNY"), a New York insurance corporation in liquidation with a principal place of business c/o New York Liquidation Bureau ("NYLB"), 180 Maiden Lane, 15th Floor, New York, NY 10038.

1. Subject to court approval of this Agreement as set forth in paragraph 8 below, QHPNY hereby assigns to Northwell all claims or causes of action QHPNY has against the former owners, directors or officers of QHPNY and any of their affiliated companies and related persons including family members, except that the assignment does not include any claims or causes of action QHPNY has against Steven Bory, Richard Clark, Francis Olsen or Timothy Scott (hereinafter, the "Assigned Claims").

2. Subject to court approval of this Agreement as set forth in paragraph 8 below, Northwell shall dismiss its existing claims or causes of actions against Steven Bory, Richard Clark, Francis Olsen or Timothy Scott in *Northwell Health, Inc. v. Safia H. Khan et al.*, Supreme Court of the State of New York, Nassau County, Index No. 602464/2020 (the "Northwell/Khan Action"), except that Northwell may retain any fraud or fraud-based claims against Steven Bory, Richard Clark, Francis Olsen or Timothy Scott in the Northwell/Khan Action.

3. Northwell shall pursue the Assigned Claims by commencing or continuing a litigation (the "Litigation") in a commercially reasonable manner, including being responsible for paying its attorneys' fees and other costs and expenses involved. QHPNY will not maintain any

control over Northwell's pursuit of the Assigned Claims or the Litigation; however, Northwell's counsel will provide the Superintendent of Financial Services of the State of New York as Liquidator of QHPNY (the "Liquidator") and/or the NYLB as the Liquidator's agent with periodic status reports on the Litigation and fees and costs upon request.

4. QHPNY, the NYLB and Northwell shall cooperate in making documents available to each other as needed for the Litigation or any claim asserted by the Liquidator against Steven Bory, Richard Clark, Francis Olsen or Timothy Scott, subject to an appropriate confidentiality agreement preserving the confidentiality obligations of QHPNY, the NYLB and Northwell.

5. At the conclusion of the Litigation by trial or settlement (or any phase resulting in a financial recovery), Northwell shall prepare a statement of account reflecting fees and expenses incurred in the Litigation itemized by attorney and the general categories of work performed, plus any contingency fee owed. Northwell shall provide additional reasonable billing detail as requested by the Liquidator or the NYLB.

6. Subject to paragraph 7 below, Northwell agrees that any monies recovered as a result of the Litigation ("Litigation Recovery") shall be delivered to the Liquidator of QHPNY for distribution in accordance with the priorities set forth in Section 7434 of the New York Insurance Law. At the Liquidator's discretion, the Liquidator may permit Northwell to deduct from the Litigation Recovery its pro rata share of the distributions as determined under Section 7434. In the event that the QHPNY liquidation proceeding is closed before the Litigation Recovery occurs, the Liquidator shall include in her petition to close the QHPNY liquidation a request for post-closing authority without further order of the court to receive any Litigation Recovery, and to use such assets, first to pay all administrative expenses incurred in connection with the collection and

disbursement of such Litigation Recovery, and then to distribute the remaining assets to allowed claimants of QHPNY in accordance with Section 7434.

7. Before delivering the Litigation Recovery to the Liquidator, Northwell may deduct from the Litigation Recovery a portion of its total attorneys' fees (hourly rates payable to its counsel plus any agreed upon contingency fee) and litigation costs and expenses, as follows: (a) 100% of paid costs and expenses, not including attorneys' fees, incurred from the date of the court approval of this Agreement, (b) 100% of the first \$250,000 in total attorneys' fees incurred from the date of the court approval of this Agreement, (c) 85% of the next \$250,000 in total attorneys' fees incurred from the date of the court approval of this Agreement, and (d) any remaining portion of the total attorneys' fees incurred from the date of the court approval of this Agreement to be reimbursed at the same percentage as Northwell's pro rata distribution under paragraph 6 above.

8. This Agreement is subject to approval by the QHPNY liquidation court in the action captioned *In the Matter of the Liquidation of Quality Health Plans of New York, Inc.*, Index No.451399/2020, currently pending before the Supreme Court of the State of New York, New York County. The Liquidator will apply to the liquidation court seeking such approval promptly after this Agreement is fully executed. Northwell will cooperate with the Liquidator, QHPNY and the NYLB in seeking such court approval. In the event that the liquidation court declines to approve this Agreement, then the Agreement will have no further effect.

9. All parties to this Agreement are represented by counsel and have had the opportunity to review the Agreement with counsel before executing the Agreement. Accordingly, the parties agree that the *contra proferentum* legal doctrine that any ambiguity in

the contract shall be construed against the drafter of the contract has no application to this Agreement.

10. The Agreement may be signed in counterpart and electronic signatures shall be deemed as originals.


11. The Agreement constitutes the full and complete agreement of the parties signing below and cannot be modified unless done so in writing.

NORTHWELL HEALTH, INC.

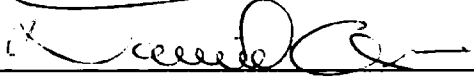
QUALITY HEALTH PLANS OF NEW YORK, INC.

In Liquidation

**By the Superintendent of Financial Services of
the State of New York as Liquidator**

By: 

**Konstantine "Gus" Costalas
Senior Vice President
Managed Care Contracting**

By: 

Special Deputy Superintendent David Axinn

Dated: 6/28/2021

Dated: June 29, 2021

EXHIBIT 2

At IAS Part 59 of the Supreme Court of the State of New York, County of New York, at the Courthouse, 60 Centre Street, in the County, City and State of New York, on the ____ day of _____, 2021.

P R E S E N T:

HON. DEBRA A. JAMES, J.S.C.

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

-----X
In the Matter of

Index No.: 451399/2020

the Liquidation of

ORDER

QUALITY HEALTH PLANS OF NEW YORK, INC.,
-----X

Based upon (1) the June 29, 2021, affirmation, and attachments thereto, of Donald N. Cohen (“Cohen Aff”), Special Counsel of the New York Liquidation Bureau (“NYLB”), which serves as the staff of the Superintendent of Financial Services of the State of New York in her capacity as liquidator (“Liquidator”) of Quality Health Plans of New York, Inc. (“QHPNY”), for an order approving an Assignment of Claims Agreement (Exhibit 1 to the Cohen Aff.) between Northwell Health, Inc. (“Northwell”) and QHPNY, and (2) all answering papers filed with the Court (the “Answering Papers”);

NOW, based upon the application of the Liquidator, it is

ORDERED, that the application is granted, the Assignment of Claims Agreement between Northwell and QHPNY is approved, and the Liquidator is authorized and permitted to take the necessary steps to effect, carry out and consummate the Assignment of Claims Agreement.

E N T E R

EXHIBIT 3

**IN THE MATTER OF THE LIQUIDATION OF
QUALITY HEALTH PLANS OF NEW YORK, INC.
Supreme Court, County of New York
Index No. 451399/2020**

NOTICE

The Superintendent of Financial Services of the State of New York and her successors in office were appointed liquidator (“Liquidator”) of Quality Health Plans of New York, Inc. (“QHPNY”). The Liquidator has, pursuant to New York Insurance Law Article 74, appointed David Axinn, Special Deputy Superintendent (“Special Deputy”), and John Pearson Kelly, Assistant Special Deputy Superintendent (“Assistant Special Deputy”), as her agents to liquidate the business of QHPNY. The Special Deputy and the Assistant Special Deputy carry out their duties through the New York Liquidation Bureau (“NYLB”), 180 Maiden Lane, New York, New York 10038. The Liquidator has submitted to the Court an application seeking an order, in accordance with Insurance Law Section 7428, approving an Assignment of Claims Agreement between Northwell Health, Inc. and QHPNY. In the Assignment of Claims Agreement, QHPNY assigns to Northwell Health, Inc., subject to the Court’s approval, certain claims that QHPNY has against (i) former owners, directors and officers of QHPNY, and (ii) entities related to the former QHPNY owners, directors and officers.

A hearing is scheduled on the application on the ____ day of ____, 2021, at __:__ .m. before the Court at the Courthouse, Part 59, Room 331, 60 Centre Street, New York, New York (“Return Date”). If you wish to object to the application, you must serve a written statement setting forth your objections and all supporting documentation (“Answering Papers”) upon the Liquidator, by at least ten (10) days prior to the Return Date, and the original Answering Papers must be filed with the Court on or before the Return Date. Service on the Liquidator shall be made by first class mail at the following address:

Superintendent of Financial Services of the State of New York as
Liquidator of Quality Health Plans of New York, Inc.
180 Maiden Lane, 14th Floor
New York, NY 10038
Attention: General Counsel

The application is available for inspection at <http://www.NYLB.org/QualityHealth.htm>. In the event of any discrepancy between this notice and the documents submitted to the Court, the documents control. Requests for further information shall be directed to the NYLB, Donald N. Cohen, Special Counsel, at 646.574.4595 or DCohen@NYLB.org.

Dated: [insert date]

LINDA A. LACEWELL
Superintendent of Financial Services of the
State of New York as Liquidator of
Quality Health Plans of New York, Inc.