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COURT OF APPEALS

STATE OF NEW YORK

WEST MIDTOWN MANAGEMENT GROUP, INC.,

Respondent,

-against-

No. 81

STATE OF NEW YORK, DEPARTMENT OF
HEALTH, OFFICE OF THE MEDICAID
INSPECTOR GENERAL,

Appellant.

20 Eagle Street
Albany, New York
June 7, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 81, West Midtown
3 Management Group v. State of New York.

4 Counsel.

5 MS. OLSEN: Good afternoon. May it please the
6 court, Caroline Olsen on behalf of the Office of the
7 Medicaid Inspector General. With the court's permission,
8 I'd like to reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. OLSEN: A final audit report found that West
11 Midtown had received Medicaid overpayments of 1.86 million
12 - - -

13 CHIEF JUDGE DIFIORE: Counsel, what's the exact
14 issue before us? Are we here to determine whether the IG
15 can recoup the entire amount by any means, or are we here
16 to determine whether the overpayment can only be recouped
17 through the withholding process as defined in the notices?

18 MS. OLSEN: We're here to correct the error in
19 the First Department's decision which conflated and
20 basically equated the force and effect of the - - - of the
21 final audit report with the notice of withholding. Under
22 Social Services Law 145(a) a final audit report has the
23 effect of a - - - any - - - the final audit report here had
24 the effect of 1.86 million dollar money judgment, that was
25 the final and dispositive determination of liability.



1 Under the relevant regula - - - regulatory scheme, notices
2 of withholding simply inform a provider that a - - - that
3 the agency has selected a particular mechanism to recover
4 that, and so the - - - the First Department's decision
5 confused liability and remedy and that's the error that
6 needs to be corrected.

7 JUDGE GARCIA: But put another way then, did the
8 First Department decision foreclose your agency from
9 withholding, or did it prohibit you from collecting at all?

10 MS. OLSEN: Well, on the very first page of the
11 decision it does say that under the final audit report the
12 agency is - - - is limited to - - - under the final audit
13 report to collecting 1.46 million dollars - - - to 1.46
14 million.

15 JUDGE GARCIA: So they've limited the amount of
16 your recovery?

17 MS. OLSEN: Well, I think that we would need
18 clarity from the court that that - - - that the order does
19 not limit our - - - our recovery under the final audit
20 report.

21 JUDGE STEIN: So when it comes to the withholding
22 part of it, do you agree that the notices that you sent
23 that - - - that are in the record were not sufficient to
24 enable you to collect that additional amount without some
25 further notice at least?



1 MS. OLSEN: Well, I - - - I don't think that
2 issue - - -

3 JUDGE STEIN: Not to collect, I'm sorry. To
4 withhold.

5 MS. OLSEN: I don't think that issue is - - - is
6 squarely before the court because, again, in this instance,
7 the agency did issue additional notices of withholding
8 before it began collecting the remainder of the - - - of
9 the 400,000 dollars.

10 JUDGE FEINMAN: And - - - and this lawsuit was
11 actually commenced before those notices - - - the
12 subsequent notices went out, right?

13 MS. OLSEN: That's exactly right, yes.

14 JUDGE FEINMAN: So those notices aren't
15 necessarily part of this record, so that's why it's not
16 before us? Or - - -

17 MS. OLSEN: I think under this court's case law,
18 including Michael B., there's no - - - the court should
19 consider - - - very well consider those, and I think it - -
20 - it's particularly appropriate to do so here because the -
21 - - the main contention is there is a lack of notice, but
22 in fact, the agency provided the notice that everyone seems
23 to - - - that - - - that the petitioner - - -

24 JUDGE FAHEY: Well, that - - - isn't - - - isn't
25 that the point? Isn't the point you provided a right to



1 recover. The question is does that eliminate the fair
2 notice requirement that's set out in 519.5? And that's a
3 distinction that - - - that it seems that the Appellate
4 Division drew here.

5 MS. OLSEN: Well, I think there are two - - - to
6 unpack that question a little bit I think there's - - -

7 JUDGE FAHEY: Go ahead.

8 MS. OLSEN: The question is notice of what, and
9 so the final audit report puts the - - - puts the agent - -
10 -

11 JUDGE FAHEY: Well, the notice of the amount that
12 you're going to collect, that's what - - - that's what
13 you're required to give. That's what a fair notice
14 requirement would be, and you can't conflate the two
15 things. A right to recover is not the same as a right to
16 notice of a party of what you're going to recover. There's
17 no question you properly established the right to recover
18 here. It's just a question of whether or not they were
19 properly notified of it. And the way I read what the
20 Appellate Division said is that, yeah, you've got a right
21 to recover, but you still have to give them the notice of
22 the amount that you're going to take.

23 MS. OLSEN: And I think the - - - the notices at
24 issue here did do so. If you look the - - - if you read
25 the notices, they have to be read in light of the statutory



1 and regulatory context, and they have to be read in light
2 of the fact that the notices, which are on page - - - page
3 50 of the - - - of the record explicitly referenced the
4 final audit report. That portion of the final audit report
5 says that if you do not settle within 20 days the agency
6 will begin to recover using a - - - will provide notice,
7 will begin to recover not barring any other remedy at law.

8 But even if - - - putting aside the plain reading
9 of the notices, we know that West Midtown understood that
10 the final - - - the final audit report was a statement of
11 liability and that the notices of withholding did not
12 affect that. And we know that because there are three
13 contemporaneous statements in the record from West Midtown
14 that post-date the notices that use the 1.46 million dollar
15 figure that say we understand that we are liable for 1.86
16 million dollars. And so there - - - there really can be no
17 question that they actually understood that - - - that
18 point.

19 JUDGE WILSON: Have you by now withheld the full
20 amount, the 1.86?

21 MS. OLSEN: That's correct, and following this -
22 - - the issuance of the notice in July 2014, the agency did
23 collect that amount. And so what this action is really
24 trying to argue is that we were somehow precluded from
25 issuing additional notices of withholding and that that



1 money has to be - - - that money, which no one disputes is
2 an overpayment for - - - for services that were not
3 reimbursable under Medicaid have to be - - - nonetheless
4 have to go back to the - - - to the provider.

5 JUDGE WILSON: And did you collect those under
6 the notice that's - - - the newer notice that's not in the
7 record, or did you collect them under the old notice? Or
8 is it not clear what you notice you collected under?

9 MS. OLSEN: Those were collected exclusively
10 under the - - - the subsequent notices that - - - the one
11 that - - - the first one being issued in July 2014. And
12 just to remind the court about why there was this - - -
13 this - - - what's seemingly a gap, at West Midtown's
14 request, the agency granted a significant reduction in the
15 withholding rate from 50 percent to 5 percent, so it
16 actually took several years to recover the full 1.46
17 million dollars. When the agency had recovered that in
18 mid-2014, the agency then - - - it expeditiously provided
19 notice that it was going to collect the remaining amount.

20 JUDGE WILSON: So the thing that - - - the thing
21 that's stumping me a little that I'm probably just missing
22 something is if what's at issue here is whether the notices
23 that are in the record gave you the ability to collect
24 beyond the 1.46 million, but in fact, you withheld the
25 differences between the 1.46 and the 1.86 based on notices



1 that aren't in the record, sort of what we're doing here
2 because even if we say you could or could not collect that
3 additional amount under the original notices, you didn't
4 actually collect it under those notices.

5 MS. OLSEN: Well, again, as - - - that gets back
6 to the - - - sort of the reason why we're here to begin
7 which is that the First Department's decision actually
8 treats the notices of withholding as if they can have the -
9 - - they can amend the final audit report and the liability
10 - - -

11 JUDGE WILSON: So that's the sole point.

12 MS. OLSEN: That's the issue.

13 JUDGE FEINMAN: So the issue really is did that
14 FAR - - - I'm calling it a FAR, that final audit report,
15 get amended by those notices, and your position is it
16 doesn't because they didn't accept any offer of settlement
17 within twenty days?

18 MS. OLSEN: Our - - - our position is that the -
19 - - that the notice of withholding could not amend the
20 final audit report, and that is true because of the act - -
21 - the regul - - - statutory and regulatory scheme under the
22 Social Services Law, and it is also true as - - - just as a
23 matter of fact here that the notices of withholding when
24 plainly read could not be read to - - - to somehow limit
25 the liability and that again is confirmed from the - - -



1 from the contemporaneous statements.

2 JUDGE FAHEY: Just - - - just so I'm clear, and
3 maybe I read the record wrong, is the actual notice - - -
4 not the FAR, but the notices that were sent out - - - said
5 1.4, right?

6 MS. OLSEN: That is correct, but the very - - -

7 JUDGE FAHEY: Okay. So let me just - - - let me
8 just follow up. So they said 1.4, the only time that they
9 got actual notice of the 1.8 was on a telephone call; is
10 that correct? Because that's what the record says.

11 MS. OLSEN: I think that's incorrect because I
12 think the final audit report provided the - - - provided
13 notice that they were on the hook for 1.86.

14 JUDGE FAHEY: Well, it didn't provide the
15 statutory notice that's set out in - - - in 519.5, did it?

16 MS. OLSEN: Well, I think there's some - - - it's
17 - - - there's an open question whether it is sufficient to
18 put the notice of withholding into the final audit report,
19 but here the final audit report did do that. And I would
20 just say on the September 2013 call, both of the - - - two
21 of the three contemporaneous statements from West Midtown
22 when - - - in correspondence with the court and the agency
23 acknowledged the 1.86 million. So between the notice of
24 withholding that mentioned 1.46 million and that September
25 call they acknowledged their liability for 1.86 million.



1 JUDGE WILSON: So can - - - I'm sorry. Could you
2 help me with one more thing? There's a sentence in the
3 Appellate Division sentence, the majority, that says,
4 "Contrary to the dissent's assertions, we express no view
5 as to OMIG's right to continue pursuing the higher point
6 estimate." What does that mean?

7 MS. OLSEN: It's a - - - it's a somewhat
8 bewildering statement in the decision. Again, I sort of -
9 - - I point the court to the fact that in that beginning
10 part of the - - - the beginning part of the decision the
11 court said that the agency was bound or was capped at 1.46
12 million, but I think regardless of how you read that
13 sentence, we're seeking clarity that the notices of
14 withholding and that - - - we're not capped the final audit
15 report and that the agency was free to collect the 1.86
16 million.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.
18 Counsel.

19 JUDGE WILSON: What does that sentence mean?

20 MR. GOIDEL: Well, I can only speculate, Your
21 Honor, and I'm perfectly willing to do that. First, if it
22 may please the court, I'm Jonathan Goidel, and I'm here on
23 behalf of the respondents. I don't know whether or not
24 what the Appellate Division majority meant by that was
25 perhaps there was some other vehicle by which - - - perhaps

1 another audit, perhaps some other vehicle by which they
2 could seek to pursue the higher number. I don't know, but
3 what I do know is that, as Justice Fahey said a couple of
4 times, the requisite notice was not given for withholding
5 more than 1.4. And if I could get the - - -

6 JUDGE STEIN: But does that - - - aren't there -
7 - - isn't there more than - - - first of all, isn't there
8 more than one way to collect the liability - - -

9 MR. GOIDEL: That's - - -

10 JUDGE STEIN: - - - owed?

11 MR. GOIDEL: Your Honor, yes.

12 JUDGE STEIN: Okay.

13 MR. GOIDEL: And I - - -

14 JUDGE STEIN: Well, let me - - - let me finish.

15 MR. GOIDEL: Surely.

16 JUDGE STEIN: And - - - and so withholding is one
17 way.

18 MR. GOIDEL: Correct.

19 JUDGE STEIN: Okay. And let's assume for the
20 moment that up until the time they collected the 1.4
21 million dollars, right, they had only served notices of
22 their intent to withhold that amount. What prevents them
23 from then serving additional notices of withholding of the
24 amount between 1.4 and 1.8 million dollars?

25 MR. GOIDEL: The statutory framework requires



1 that they give particular notices of what they are going to
2 do, how they're going to collect the amount that they've
3 determined to collect.

4 JUDGE STEIN: But does it say they have to do it
5 at the very beginning and - - - and never change?

6 MR. GOIDEL: And never change?

7 JUDGE STEIN: Never change the method or the
8 amount that they do by any particular - - -

9 MR. GOIDEL: I would - - - well, Your Honor,
10 that's an interesting question, and I suppose that requires
11 a looking into, as I've done in preparation for arguing
12 here today, into the definition of not barring any other
13 remedy permitted by law. And I would suggest to the court
14 that increasing the amount that you're collecting is not a
15 remedy. I think that sentence contemplates attachment. I
16 think it contemplates the filing of a judgment. I think it
17 contemplates cutting off their rights as a provider.

18 JUDGE RIVERA: But - - - but are those things
19 exclusive? Why couldn't they have - - - these look like
20 form notices to me, by the way. So they have the form
21 notices for withholding the lower amount, and then they can
22 move on and try and collect all the way to the top if you
23 do not appeal it, if you don't seek administrative review.

24 MR. GOIDEL: Because what the notices say, the
25 cover letter which is statutorily required or required by



1 regulation, contemplates three scenarios. So the provider
2 is given notice of three potential scenarios, not the
3 fourth which is what OMIG is now suggesting was an
4 available option - - - three. Option number one, pay the
5 entire 1.4 immediately, write a check, here you go, we're
6 done.

7 JUDGE RIVERA: Within twenty days, yeah.

8 MR. GOIDEL: Yes, within twenty days, correct.
9 Option number two, contact us within twenty days and work
10 out a payment arrangement for that money, and you get to
11 control your fate in terms of controlling your cash flow -
12 - - this is a business, controlling the - - - the severity
13 of the effect of the withholding on your business. And
14 then option number three, which is in the last paragraph of
15 the first page on page 37 of the record is if you do
16 nothing, which for all intents and purposes I suppose is
17 what my client did - - - if you do nothing within that
18 period of time we're going to collect 1.4, but we're going
19 to do it at 50 percent. And that's a heavy lift.

20 JUDGE STEIN: No, we're - - - it said we're going
21 to withhold 1.4. It didn't say that's - - -

22 JUDGE FEINMAN: We're going to collect.

23 JUDGE STEIN: - - - all we're going to collect.

24 MR. GOIDEL: Well, it says we're going to
25 liquidate.



1 JUDGE RIVERA: No, no. It says, "We're going to
2 withhold equal to 50 percent of your medical billings to
3 recover payment and liquidate the lower confidence limit
4 amount, interest, and/or penalty" - - -

5 MR. GOIDEL: Right.

6 JUDGE RIVERA: - - - "not barring any other
7 remedy allowed by law."

8 MR. GOIDEL: So now the question is what is any
9 other remedy allowed by law? And I think - - - and the
10 majority of the Appellate Division thought - - -

11 JUDGE RIVERA: But think of it logically, sir.

12 MR. GOIDEL: That's what I'm trying to do.

13 JUDGE RIVERA: They - - - they've got this lower
14 amount that they say we have a very high confidence that
15 even if you appealed, we will succeed. You're going to
16 have to pay this. Then we believe there's an additional
17 amount over that, and they give you what that top number
18 is.

19 MR. GOIDEL: Right.

20 JUDGE RIVERA: We have a confidence level in
21 that, depends if we're going to win that, fine. But all
22 this says is, look, pay the whole - - - as you say, pay the
23 whole amount or work - - - upfront or work out a payment
24 schedule. Logically you're saying that they are then
25 giving up the other amount if you do nothing?



1 MR. GOIDEL: Well, what I'm saying is that if you
2 then take - - -

3 JUDGE RIVERA: Why is the government giving up
4 all that money?

5 MR. GOIDEL: Well, they're not. What they're
6 doing is they - - - what they say in that notice, in the
7 cover letter, they say we will pursue the 1.8 if you
8 appeal. So the - - - the notices that they give are not
9 bereft of reference to the 1.8. They could easily - - -

10 JUDGE RIVERA: Well, they're telling - - -
11 they're telling you what will happen if you go through an
12 appeals process.

13 MR. GOIDEL: But they don't tell you what will -
14 - -

15 JUDGE RIVERA: But if you do none of these things
16 - - -

17 MR. GOIDEL: They don't tell you - - -

18 JUDGE RIVERA: - - - you're liable.

19 MR. GOIDEL: No, they don't tell you that. What
20 they tell you is that we're going to liquidate your - - -

21 JUDGE STEIN: But isn't that the - - - I think
22 the question isn't that the only logical assumption?
23 Because - - - because the result that - - - that you're
24 arguing for would say here are all these options, okay, and
25 this would be the higher amount, and this would be the



1 lower amount. And then if you do nothing you automatically
2 get the lower amount?

3 MR. GOIDEL: At 50 percent. It's not that you
4 automatically get it. Yeah, the options contemplate your
5 participation by negotiating, which by the way they did.

6 JUDGE RIVERA: Yeah, but then your - - -

7 MR. GOIDEL: They did contact within twenty days.

8 JUDGE RIVERA: - - - your client came back - - -
9 yes, but your client came back to the well and didn't want
10 50 percent. You got it down to 5 percent.

11 MR. GOIDEL: Well, that's - - -

12 JUDGE RIVERA: So in - - - in actuality, this
13 paragraph doesn't really apply the way you're suggesting it
14 does.

15 MR. GOIDEL: Well, except that there - - - in
16 theory, there are no paragraphs because we did contact
17 within twenty days, and we did say a 50 percent withhold is
18 going to destroy our business. You're going to put us out
19 of business. We did. And all - - - we've always taken the
20 position - - - and the IG said that we seem to have
21 abandoned it. It's not that we abandoned it. It's just
22 that there's no - - -

23 JUDGE RIVERA: So - - - so I'm sorry. You're
24 saying you complied with option two?

25 MR. GOIDEL: And indeed, we did. We contacted



1 within twenty days and there's in the record multiple
2 letters and emails to the Office of the Medicaid Inspector
3 General saying 50 percent is going to kill us. It's going
4 to kill my client and put him out of business. Please
5 reduce to 15 percent. Here is the information that you've
6 requested to - - -

7 JUDGE RIVERA: And was that with reference to the
8 1.4 or the 1.8?

9 MR. GOIDEL: They believed it was within
10 reference to the 1.4. That's the point because that's the
11 only - - -

12 JUDGE RIVERA: But weren't you still talking
13 about the 1.8?

14 MR. GOIDEL: But they were - - - no, there was no
15 reference to the 1.8. There was only reference - - - they
16 said they were going to liquidate the 1.4 at 50 percent.
17 And O'Connell and Aronowitz said please don't do that.
18 Please liquidate the 1.4 at 15 percent, and here are the
19 financial documents for that. What - - - what seems to be
20 the fly in the ointment to making this a nice, smooth
21 matter is that my client contemplated through counsel
22 appealing but they never did. So the OMIG is attempting to
23 treat this as a situation where they did appeal because
24 they expressed an intention to appeal.

25 JUDGE STEIN: That's not how I - - - I



1 interpreted that as them saying that they did - - - that
2 you client did nothing.

3 MR. GOIDEL: But they didn't do nothing.

4 JUDGE STEIN: But aren't you - - - aren't you
5 really sort of making an estoppel argument?

6 MR. GOIDEL: I don't believe so. I believe that,
7 as Judge Fahey said, what we're doing is we're saying
8 there's a - - - there's a statutory framework and you have
9 to give requisite notice. And they wouldn't - - -

10 JUDGE STEIN: But - - - but notice of what?

11 MR. GOIDEL: Notice - - -

12 JUDGE STEIN: So the - - - the FAR, the, right,
13 final audit report, gave notice. Okay, this is the - - -
14 this is the amount we think you owe, 1.8, but this is the
15 amount that we're willing to negotiate with you about, the
16 1.4 if you do certain things, okay. And then assuming that
17 you don't do those certain things then they say we're going
18 to immediately start to withhold money.

19 MR. GOIDEL: At 50 percent, but they did contact
20 them.

21 JUDGE STEIN: Correct.

22 MR. GOIDEL: It's that last paragraph on page 37
23 that says, "If within twenty days you fail to make full
24 payment or contact the OMIG" - - - which they did. Now
25 there is no - - -



1 JUDGE STEIN: No, no, and arrive at a plan.

2 MR. GOIDEL: No, that's not what it says with
3 regard to the last paragraph. It does not say that. But
4 in any event, they did come to a plan, and there - - -
5 we've always taken the position that there really was an
6 agreement reached and that it was done through various
7 conversations and meetings, OASAS, the Office of Alcohol
8 and Substance Abuse Services was involved. They - - - they
9 were lobbying on behalf of my client with the sister
10 agency. And there was ultimately an agreement that it was
11 going to be 1.4. It's not in the record because it was
12 oral. But we - - -

13 JUDGE RIVERA: Has any lower court agreed with
14 you about this option two, that you did actually comply
15 with the requirements?

16 MR. GOIDEL: Well, yeah, they mentioned that we
17 did contact within twenty days and that it's not true that
18 we didn't. Yes, of course.

19 JUDGE RIVERA: Who is the they in that sentence?
20 When you said that they - - - I asked what court has found.
21 You said they.

22 MR. GOIDEL: Oh, the - - - I'm sorry. Yes, the
23 Appellate Division did in fact acknowledge that within
24 twenty days there was contact made, and it's in the record.
25 It's plain.



1 JUDGE RIVERA: But did - - - but did they
2 determine that that contact complied with option number
3 two?

4 MR. GOIDEL: There was no discussion of that
5 specifically, but - - - but it was. And if I could just -
6 - - Your Honor asked why are we here if they've already
7 collected it and they - - - it was under the separate
8 notices. Nobody's done the math, and it's not before the
9 court. But if they were collecting 1.4 versus 1.8 at
10 interest, then they would have had to be - - - a lot more
11 of that money would have been going toward interest, and
12 they would not have actually satisfied the notice
13 requirements because they would have started collecting - -
14 - it still would have been - - - it still would have been
15 principle versus interest that they were collecting under
16 the original notices. So those numbers don't jive.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. GOIDEL: Thank you, Your Honors.

19 CHIEF JUDGE DIFIORE: Counsel.

20 JUDGE RIVERA: Did they comply with option two?

21 MS. OLSEN: No, they didn't, Your Honor.

22 JUDGE RIVERA: Why not?

23 MS. OLSEN: Because in order to comply with
24 option two, there had to be some settle - there had to be a
25 settlement agreement. You had to enter into an explicit



1 repayment agreement to reach the 1.46 million. Everything
 2 in the record actually defies the idea that there was some
 3 kind of settlement reached. Not only was there the July
 4 2nd email that said we expect to request a hearing, but
 5 after they defaulted on their right to request a hearing
 6 they brought litigation to overcome that failure and to
 7 actually try to reduce the liability determination in the
 8 FAR. And so - - -

9 JUDGE RIVERA: So in option two this reference to
 10 repayment agreement is defined somewhere else as a formal
 11 written agreement?

12 MS. OLSEN: It's not, but I think any - - - I
 13 think the plain - - - the common sense reading of this
 14 interpret - - - of this - - - of the FAR, the cover letter
 15 combined with the provider rights section is you can - - -
 16 your - - -

17 JUDGE RIVERA: Let me ask you something. So
 18 let's say I'm the target. I call up day eighteen and I
 19 say, yes, I want to - - - I'll - - - we'll pay the lower
 20 confidence amount. I can't do it at that rate. Can you
 21 work with me? I'll do it in the following way. And if - -
 22 - and if you all at that point over the phone agree, is
 23 that a repayment agreement?

24 MS. OLSEN: I - - - I don't think that - - -
 25 respectfully, I don't think that's the facts that we have



1 here. I think to - - -

2 JUDGE RIVERA: No, but I'm asking. Would that
3 be?

4 MS. OLSEN: It could - - - it could be. I think
5 that it would have - - - probably would have to be
6 memorialized somewhere and it was clearly not memorialized
7 on - - - on this record. I would just like to say, too,
8 the petitioner's trying to argue that these notices of
9 withholding and trying to characterize them as if they said
10 the agency is collecting 1.46 million and no more, and this
11 - - - there's no support in the record anywhere for - - -
12 for that contention. They expressly - - - expressly refer
13 back to the final audit report which says that if you
14 default on your - - - if you do not accept a settlement, we
15 will begin within twenty days to with - - - to withhold not
16 barring any other remedy at law. I think they're trying to
17 manufacture confusion out of the cover letter here, but
18 this is an ex post reading whereas we have contemporaneous
19 statements from West Midtown demonstrating that throughout
20 the course of the litigation they understood that they were
21 on the hook for 1.86 million dollars.

22 And for all of these reasons, we ask the court to
23 reverse the First Department's decision holding that the
24 notices of withholding had the effect of altering West
25 Midtown's liability and that the agency was permitted to



1 recoup the full 1.86 million dollars overpayments.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 (Court is adjourned)

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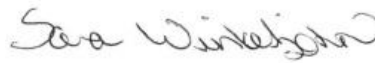
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of West Midtown Management Group, Inc. v. State of New York, Department of Health, Office of the Medicaid Inspector General, No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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