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Matter of Riccelli Enters., Inc. v State of New York Workers' Comp. Bd.
2012 NY Slip Op 31250(U)
April 30, 2012
Supreme Court, Onondaga County
Docket Number: 10-6901
Judge: John C. Cherundolo
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The BOOKMARK on the left hand side of this page has an index of the issues and the conclusions reached by the Court, all in favor of the Petitioner (Ricelli Enterprises, *et al)* and all against the NYS WCB.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

In the Matter of

RICCELLI ENTERPRISES, INC., RICCELLI TRUCKING, INC. and SYRACUSE SAND AND GRAVEL, LLC,

Petitioners,

For a Judgment Pursuant to New York CPLR Article 78

v.

STATE OF NEW YORK WORKERS' COMPENSATION BOARD, and ROBERT E. BELOTEN, as Chairman of the Workers' Compensation Board,

Respondents.

Index No. 10-6901
RJI No. 33-10-5407

DECISION

STATEMENT OF FACTS

New York State law requires that employers maintain Workers' Compensation insurance for their employees. Petitioners/plaintiffs in this matter, sought to provide their Workers' Compensation insurance through the Transportation Industry Workers' Compensation Trust ("TRIWCT" or "Trust"). This Trust was operated so as to act as a group self-insured trust ("GSIT") as authorized by statute, with oversight by the New York State Workers' Compensation Board.

Petitioners/plaintiffs are former members of TRIWCT. In this matter, the original petition was filed on November 29, 2010, and sought, upon various grounds under Article 78, a judgment annulling and setting aside assessments made in July of 2010 and all other assessments levied by the New York State Workers' Compensation

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Board due to its participation in the now defunct TRIWCT. That Article 78 proceeding also asked the Court to grant other equitable relief.

Subsequently, other former members of the TRIWCT either brought their own action, or seek to intervene in the pending action in this Court. Sunshine Bulk Commodities, Inc. ("Sunshine") filed a verified petition in Ontario County seeking similar relief as that sought here on May 9, 2011. That petition is very similar to the original petition pending before this Court.

The original petition in this matter, as well as the original Sunshine petition, were grounded in allegations that the New York State Workers' Compensation Board had overstepped its statutory authority and acted in an arbitrary and unreasonable manner in pursuit of the deficit assessments that they alleged to be due. Petitioners/plaintiffs then sought to amend the original petition seeking not only equitable relief, but also relief at law. In the proposed amended petitions, the petitioners/plaintiffs allege violations of statutory and regulatory law with regard to the creation and administration of TRIWCT, leading to the conclusion that the deficit assessments that the Workers' Compensation Board seeks to enforce have been illegally created and assessed, without authority or justification. The proposed amended petition also alleges wrongful activities on behalf of S.A.F.E., LLC, the Board's designated administrator for the Trust, once the Board took over the Trust and all its activities in July of 2008.

Without going into significant detail, the contentions deal with the authorization of TRIWCT as a GSIT on or about January 8, 2001, despite what the petitioners/plaintiffs allege to be a failure to adhere to the statutory requirements and regulations in its creation. Petitioners/plaintiffs further allege that the Board allowed

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TRIWCT to accumulate enormous financial deficits over the years, when the Board had knowledge that TRIWCT, being operated by administrator CRM, was operating in an insolvent manner from the first year of operation forward throughout the seven years of operation. The petitioners/plaintiffs further complain that the Workers' Compensation Board, despite such knowledge, assured the members of the Trust that there were no fiscal issues concerning the operation of TRIWCT by the original administrator, Compensation Risk Managers, LLC ("CRM"). The amended petitions further allege that the appointed administrator, S.A.F.E., LLC, further allowed the deficits to accumulate by failing to properly administer the claims before them and/or conduct proper actuarial or financial analysis.

The amended petitions/complaints further allege that the Workers' Compensation Board provided the petitioners/plaintiffs no notice or opportunity to be heard when the Board developed the deficit assessments. As a result, they allege a denial of due process, not only in the activities of the Board, but also with regard to the activities of the New York State Legislature in amending Workers' Compensation Law §50(3-a)(7)(b), and then complain that the application of that statute retroactively does not pass basic constitutional tests.

Petitioners/plaintiffs further allege that in attempting to enforce the aforesaid deficit assessments, the Board in seeking enforcement under Workers' Compensation Law §26, as the June, 2010 amendment allowed, causing severe and permanent hardships to the former members of TRIWCT that threaten their very corporate existence.

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The Workers' Compensation Board, Robert E. Beloten and S.A.F.E., LLC, the respondents/defendants named in the amended petition/complaint deny each and every part of the allegations, and seek to impress upon this Court the fact that they operated the Trust in a careful and prudent manner as required by law.

Other members of TRIWCT then came forward, and now seek to intervene in the action, inasmuch as all of their claims and contentions are the same as petitioners/plaintiffs, Riccelli and Sunshine.

Thus, at this time, pending before this Court, are five separate motions which the Court now must decide. (1) Respondents/defendants move to change the venue in this matter from Onondaga County to Albany County, taking the position that Albany County is the only place where proper venue can be laid in this matter. (2) Petitioners/plaintiffs seek to amend the petition/complaint so as to add claims to the amended petition/complaint and add as an additional party S.A.F.E., LLC. (3) Petitioners/plaintiffs, Riccelli and Sunshine, seek to consolidate a case currently pending in Supreme Court, Ontario County, captioned: *"Sunshine Bulk Commodities, Inc. v State of New York Workers' Compensation Board, et al"*, known as Index No. 106359, with the pending Riccelli proceeding/action, as amended. (4) All of the intervenors in this matter, all of whom contend to be other former members of TRIWCT who have similar claims, contentions, and requests for relief, seek to intervene in this matter and bring similar, if not identical claims against the Workers' Compensation Board and other respondents/defendants as are set forth in the Riccelli/Sunshine cases. And (5) The petitioners/plaintiffs, including Sunshine and all intervenors seek to have the Court grant a stay of any and all further proceedings pursuant to CPLR §7805 with

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regard to all enforcement activities of the Workers' Compensation Board until a final determination can be made as to all claims in this proceeding/action, such stay of which would prevent respondents/defendants from taking any further action as against petitioners/plaintiffs and intervenors or referring any action to the Attorney General to enforce the alleged deficit assessments, or to levy any further assessments, or to file or enforce judgments, or to issue any stop-work orders, or to otherwise seek the payment of any other monies from or against the petitioners/plaintiffs/intervenors with respect to their participation in TRIWCT.

Extensive materials were submitted to the Court from October of 2011 through the date that the motion was heard before this Court on January 26, 2012. This Court originally granted a temporary restraining order as against the Board from conducting any further enforcement activities on any of the alleged deficit assessments or judgments. That temporary restraining order remains in effect to the date of this decision.

After due deliberation and after reviewing the vast quantity of materials, both factual and legal that the parties have submitted to the Court, the Courts' decision is as follows.

<u>I - RESPONDENTS/DEFENDANTS' MOTION TO CHANGE VENUE</u>

The initial matter to be taken up by this Court before any other issue is addressed is the request for relief of the respondents/defendants to change the venue in this matter from Onondaga County to Albany County. Respondents/defendants move by Notice of Motion dated May 26, 2011 and supporting papers to change the place of trial of this

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proceeding to Albany County upon the grounds that Onondaga County is not the proper venue for the proceeding.

The respondents/defendants' motion is based upon the fact that the petition, sounding initially as a CPLR Article 78 proceeding, challenges a multi-million dollar member assessment, which allegedly represents petitioners/plaintiffs' pro rata share of the Trust's deficit - i.e., the total amount needed to satisfy the petitioners/plaintiffs' portion of the Trusts remaining Workers' Compensation obligations.

Respondents/defendants rely upon the fact that all relevant decision making pertaining to whether, how, and when to issue the assessment was made by the Board at its principal offices located at 20 Park Street in the City and County of Albany, State of New York.

When the motion to change the venue was originally filed, the only pending pleading was petitioners Article 78 petition. Since that time, petitioners (and/or plaintiffs) have moved to amend their initial pleading in this matter to include additional claims against the Board, thus presumably converting the matter from only an Article 78 proceeding to a proceeding/action which is based upon a petition/complaint.[1]

Respondents/defendants contend that the first question this Court has to determine is whether venue was properly in this County when the original proceeding was commenced. Respondents/defendants argue that that is a threshold question and

[1] This Court allows the amendment of the petitioners/plaintiffs pleadings as set forth below.

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that based on that analysis alone, Albany County is the only proper county for the proceeding to be venued.

The Board contends that pursuant to 506(b) of the CPLR, an Article 78 proceeding can be commenced only in the county where the agency's principal office is located or where the challenged determination was made, or where the material events surrounding the basis of the proceeding occurred. The Board contends that all of the material events that give rise to the challenged action - the deficit assessment - occurred in Albany County. The Board further contends that the petition alleges a series of factual allegations, leading up to the underlying determination, and that all of those facts took place in Albany County. Respondents/defendants argue that the initial submission by CRM of the application for group self insurance was submitted to the Board's Albany office. They further contend that the petitioners/plaintiffs, while alleging to have joined the reputed trust in Onondaga County - the place where they signed the papers - that the papers did not become effective until they were filed and accepted by the Board, which occurred in Albany County. Respondents/defendants further contend that the petitioners/plaintiffs allege lack of Board oversight of the Trust, and that oversight took place at the Board's office in Albany County. The Respondents/defendants further allege that petitioners/plaintiffs withdrawal from the Trust was not effective until the request was filed and accepted by the Board, which happened in Albany County. They further contend that the Board's final determination to terminate the Trust also took place in its Albany County offices. The Board further argues that the first interim assessment, and the amount of that assessment, was determined in Albany, and the invoices were prepared in the Albany office. Demands

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for payment were made from the Albany Board office. The Board also argues that BST's offices are located in Albany County, (the forensic accounting firm that acted as consultant for the Board). Finally, the Board argues that the deficit assessment itself - the challenged determination - was determined by the Board in its Albany County office.

Thus, the respondents/defendants in that fashion, argue that all of the material underlying events that led to the challenged determination took place in Albany County, and that the petitioners/plaintiff's have failed to identify any material acts committed by them or anyone else that occurred in Onondaga County, in reference to the challenged determinations.

Respondents/defendants further argue that given the motion to amend the petition to convert it to a petition/complaint (which respondents/defendants have not opposed) creates a conflict under §502 of the CPLR, which allows such proceedings/actions to be brought in the county where plaintiffs' reside. The respondents/defendants argue that the joinder of the additional claim creates a conflict, and that conflict gives the court the absolute discretion to determine what is the place of appropriate venue, and that in the exercise of that discretion, the appropriate place of venue is Albany County. In making that argument, the respondents/defendants argue that there have been numerous cases similar or identical to the one before the court that have been venued in Albany County. Respondents/defendants argue that there have been several challenges to deficit assessments issued in conjunction with other insolvent group self-insurance trusts ("GSIT"), and that all but three have been in Albany County. Of the three, one was originally venued in Westchester until the court granted the respondents/defendants' motion to change the site of the trial to Albany. The other two

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are the case before this Court, and the *Sunshine* case currently pending in Ontario County. Respondents/defendants further argue that there have been several enforcement actions dealing with deficit assessments that have been brought by the Board in Albany County against other parties, including CRM (the trust administrator) and the Trust's actuaries, accountants, and other parties allegedly responsible for the creation of the deficits. Taking all of that into consideration, the respondents/ defendants argue that it "just makes sense, we submit, for the court to exercise its discretion in view of the conflict in the venue provisions created by the motion to amend to transfer the case to Albany County." The final argument, which respondents/defendants argue is the most compelling evidence of Albany County's expertise in this area, is the fact that the New York State Liquidation Litigation Coordination Panel has transferred several actions against CRM, venued throughout the state, to Albany County.

Thus, respondents/defendants argue that when the case was originally commenced as an Article 78 proceeding, Onondaga County was not the proper place of venue. They further posit that upon the motion to amend the pleadings to convert the action to a proceeding/action, the court's absolute discretion should be used to move the place of venue to Albany County because of the expertise of the Albany Supreme Court.

Petitioners/plaintiffs argue that the case law of the State of New York is clear, as is the Fourth Department, that under §506(b) of the CPLR, the place where the determinations are made is separate and distinct from where the actual material events occurred. To that end, petitioners/plaintiffs argue that Riccelli is located in Onondaga County; the Workers' Compensation Board has offices in Onondaga County; the

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Workers' Compensation Board has sent people to Onondaga County to convince Riccelli and others why the Trusts were such a wonderful vehicle to assume and marshal Workers' Compensation claims; and that the Board selected S.A.F.E., LLC which has its principal office in Syracuse. Petitioners/plaintiffs further argue that BST was provided information from an accounting firm in Syracuse. Petitioners/plaintiffs also argue that TRIWCT insured employers in Onondaga County, and that the employees were hired, and conduct their work activity for an Onondaga County company; that they were injured here in Onondaga County, and that their Workers' Compensation cases were heard in Onondaga County, for the most part. Petitioners/plaintiffs further argue that the Workers' Compensation Law §26 judgments are claimed to be unconstitutional, and these judgments must, as a matter of fact and law, be filed and enforced in Onondaga County, and that all of the collection proceedings will be in Onondaga County, and, if Riccelli is to be forced to close business operations, the consequent layoffs of hundreds of employees, will occur in Onondaga County with the consequent burden on the County.

Petitioners/plaintiffs argue that there is no conflict in the CPLR venue statutes as it relates to this case. They contend that venue is proper under §506(b) of the CPLR because all of the material events occurred in Onondaga County, and that venue is also proper in Onondaga County pursuant to CPLR §503, because the principal place of business and operations of Riccelli is in Onondaga County. Thus, it is alleged by that there is no conflict between the two venue provisions, and under both, Onondaga County is the appropriate county for the matter to be pending and for the trial to occur. Petitioners/plaintiffs further contend that the Trust documents were signed in

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Onondaga County, and that CRM is not an Albany County company, but rather is located in Poughkeepsie, where it might be alleged that the fraud actually occurred. In conclusion, petitioners/plaintiffs argue that all of the material acts and events actually occurred in Onondaga County - that it was here where the employers and employees were convinced to join the alleged scheme. The fact that Albany acted as a place where decisions were "rubber-stamped", does not mean that the place of venue should be transferred there.

Petitioners/plaintiffs further argue that TRIWCT has not been the subject of judicial review by any Albany court, and that statutes involved with the Trust have not been interpreted by any Albany court. They allege that the issues before this Court are issues of first impression, and that all of the discovery and investigation surrounding the material facts must be done in Onondaga County.

PROCEDURAL HISTORY

New York State requires that employers maintain workers' compensation insurance for their employees. Petitioners/plaintiffs sought to provide this insurance through the Transportation Industry Workers' Compensation Trust (TRIWCT), which was originally and purportedly formed under the name Transportation Trust of New York (the "Trust") as a Group Self Insured Trust ("GSIT") that is authorized by statute, with oversight by the Board, to provide for such group self-insurance. Riccelli is a former putative member of the purported Trust.

Riccelli filed its original Petition (the "Original Petition") in this proceeding on November 29, 2010. The Original Petition sought, upon various grounds under Article 78, a judgment annulling and setting aside deficit assessments or other actions taken by

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the Board due to its participation in the purported Trust. That petition also sought an order granting other equitable relief.

The return date on the respondents/defendants' motion to change venue was adjourned several times, at the request of the parties, ultimately to January 26, 2012.

Riccelli's Original Petition was grounded in allegations that the Board had abused its discretion, overstepped its statutory authority and otherwise acted in an unlawful, arbitrary, capricious and unreasonable way when the Board issued its approval of the Trust as a GSIT, in its failure to oversee the administration and otherwise regulate the operation of the Trust, and in its pursuit of purported deficit assessments and other amounts from Riccelli without formal administrative or judicial review in violation of procedural due process. Petitioners/plaintiffs further allege that investigation uncovered additional violations of constitutional, statutory and regulatory law respecting the creation and administration of TRIWCT and the investigation uncovered deficit assessments that the Board seeks to enforce, that have been levied and enforced illegally, and without authority or justification. Petitioners/plaintiffs argue that their investigation and the investigation done by the Board revealed the disloyal and illegal nature of actions of the Boards' appointed administrator for the Trust, S.A.F.E., LLC ("SAFE"), as it relates to the matters in suit.

Riccelli then filed motions with this Court on October 3, 2011 to: (1) amend the Original Petition in this proceeding to add S.A.F.E., LLC as a respondent/defendant and to add claims for declaratory relief and money damages; (2) to consolidate a pending proceeding commenced by a similarly situated former member of the putative Trust, Sunshine Bulk Commodities, Inc. ("Sunshine"), in Ontario County captioned *Sunshine*

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Bulk Commodities, Inc. v. State of New York Workers' Compensation Board et al., (Index No. 106359), with this proceeding; and (3) to stay all further actions by the Board against Riccelli and Sunshine with respect to their participation in the purported Trust. At the same time, a collection of former members of the putative Trust, who are factually similarly situated to Riccelli and Sunshine (the "Proposed Intervenors"), filed a motion to intervene in this proceeding, as amended, and to stay all further actions by the Board against those Proposed Intervenors with respect to any part their participation in the purported Trust. Oral arguments on all motions were had on January 26, 2012.

This Court finds that the instant motion to change venue is meritless. This Court finds that venue lies in any county where the material events took place [CPLR §506(b)] and that all material events were in Onondaga County. The gravamen of the action is the Board's imposition of deficit assessments upon Riccelli and the Board's threatened efforts to enforce the assessment through the filing of and execution of judgments. Both events occurred (or will occur) in Onondaga County. The Board premises its alleged deficit assessment upon Riccelli's participation in the purported Transportation Trust, and it is clear that all material events concerning this participation occurred in Onondaga county, where Riccelli is located. It is Onondaga County where Riccelli engaged in all relevant and material acts relating to its participation in the Trust. Riccelli signed any and all documents pertinent to its participation in the Trust in Onondaga County; Riccelli made contributions toward the purported Trust fund in Onondaga County; Riccelli received notice of its alleged pro-rata share of the deficit assessment in Onondaga County; Riccelli made its choice to pay (or not to pay) portions thereof in Onondaga County; Riccelli's injured employees are located in Onondaga

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County; Riccelli's workers' compensation claims were filed and processed in Onondaga County; and the Board has sought to take enforcement action against Riccelli through the filing and execution of judgments in Onondaga County, (*See generally* Affidavit of Richard J. Riccelli, Sr.).

Further, if petitioners/plaintiffs pending motion to amend the pleadings is granted, this case will include claims for declaratory relief against the Board as well as claims against a new respondent/defendant, S.A.F.E., LLC, for monetary damages. With the amendments, venue is proper in Onondaga County pursuant to both CPLR §506(b) and CPLR §503. Not only have the significant material events occurred here, but both Riccelli, as a petitioner/plaintiff, and S.A.F.E., LLC, as a respondent/defendant have offices in Onondaga County, thus making residence another proper ground for venue of this action/proceeding in Onondaga County.[2]

DISCUSSION

Riccelli's Original Petition alleged claims for relief under CPLR Article 78. For Article 78 claims, §7804(b) governs venue and incorporates by reference the venue provisions of CPLR §506(b) regarding special proceedings. *(See* CPLR §506(b), §7804(b)).

CPLR §506(b) provides that, generally, in special proceedings against a body or officer, venue is proper in any county within a judicial district where:

a. the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or

[2] This Court, later in this decision, grants petitioners/plaintiffs' motion to amend the petition/complaint. Venue thus is proper pursuant to CPLR §503.

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b. where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or

c. where the material events otherwise took place, or

d. where the principal office of the respondent is located.

(CPLR §506(b)).

All the alternative bases for venue under §506(b) are "equally proper." 8Weinstein-Korn-Miller, NY Civ Prac, ¶7804-04.

The location where the "material events otherwise took place" has been interpreted as "'the county wherein occurred the underlying events which gave rise to the office action complaint of.'" *See Matter of Brothers of Mercy Nursing & Rehab Center v. Debuono*, 237 AD2d 907, 908 (4th Dept 1997), *quoting Matter of Dealy v. Board of Estimate*, 248 App Div 165, 166 (2nd Dept 1939); *citing Matter of Gardiner v. Harnett*, 168 Misc 349 (Sup Ct, Onondaga County 1938), *aff'd* 255 App Div 106 (4th Dept 1938).

New York courts have routinely acknowledged that the county in which the material events took place is often distinct from that in which the determination complained of (sometimes referred to as the "official act") occurred. In *Matter of Daley, supra*, for example, an Article 78 proceeding was commenced to challenge a New York City Board of Estimate determination denying an application for death benefits on the ground that the claimant's husband's death did not result from an accidental injury sustained in the course of employment. (*See, Matter of Daley,* 258 App Div 165). In *Daley*, the decedent had been employed in, and the accident upon which the claim was based, occurred in Queens County. The court found that although the "official act" of

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the Board of Estimate had taken place in New York County, the material events - or the underlying events giving rise to the official act complained of - took place in Queens County, and thus, the respondent was "entitled to institute" the proceeding in Queens County. *(See, Matter of Daley, Id* at 166).

Not only is the county where the "material events otherwise took place" an equally proper venue, New York courts that have considered the issue have concluded that the location of the material events is the *preferred* venue. *See Lacqua v. O'Connell,* 280 AD 31, 32 (1st Dept 1952) ("[I]t is the view of the Justices of the Appellate Divisions of both the First and Second Departments that such a proceeding can best be heard and determined where the material facts took place..."); *Ronco Communications & Electronics v. Valentine*, 70 AD2d 773, 773 (4th Dept 1979) ("Each is proper but 'where the events took place' usually will and should govern."), *citing* 8 Weinstein-Korn-Miller, NY Civ Prac, ¶7804-04.

In a fairly recent proceeding, *Matters of Brothers of Mercy Nursing*, a petitioner challenged the Department of Health's use of a certain price adjustment factor to calculate the petitioner's Medicaid reimbursement rates. The Fourth Department overturned the lower courts' decision to transfer the case to Albany County, finding that the location of the material events "usually will and should govern" the place of venue. *Matter of Brothers of Mercy Nursing*, 237 AD2d at 907. Furthermore, the court found that the material events in that case had occurred in Erie County, "where the acts of petitioner gave rise to the reimbursement rate determinations." *Id* at 908 (emphasis added). The court rejected the contention that as a matter of public policy, Albany County was the only proper venue, noting that "numerous Medicaid reimbursement

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cases have been litigated in counties other than Albany during the past 20 years, including counties within the Fourth Judicial Department." *Id.*

Similarly, here, the "acts of petitioner that gave rise to the [Board's] determination" took place in Onondaga County. It is in Onondaga County that Riccelli allegedly joined the purported Trust; it is in Onondaga County that all decisions respecting the Trust membership were made, including the decisions to pay contributions, to file claims, and to remain in the purported Trust, among others. It is in Onondaga County where Riccelli was levied upon for payment of its alleged pro-rata share of the deficit assessment. It is in Onondaga County where Riccelli was directed to send a signed Deficit Assessment Contractual Agreement ("DACA") along with payments toward the assessment. The Board directed that Riccelli send the signed DACA and payments of the assessment amount to S.A.F.E., LLC, as the Board's agent, in Onondaga County. SAFE's intimate involvement in all events surrounding the demise of the purported Trust and imposition of assessments occurred in Onondaga County. Onondaga County is also the place where Riccelli is vulnerable to the threatened filing of judgments against it for its decision (made in Onondaga County) not to pay its full pro rata share of the deficit assessment until the procedural and substantive validity of that assessment can be judicially determined. It is Onondaga County where Riccelli, as employer, hired the employees covered under the Trust. It is Onondaga County where the alleged injured employees worked, where they were injured, and where they filed (and continue to file) claims. It is Onondaga County where Board determinations on each claim was (and is) made and enforced. It is Onondaga County where the injured workers receive medical and rehabilitative care. It is Onondaga County where the

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compensation benefits are delivered to the injured workers. It is the Onondaga health care system and social services system that must deal with the injured workers. It is Onondaga County, where, if a cease work order is enforced, the effects of closure and layoffs will occur. It is Onondaga County that will have to deal with the issues surrounding potential permanent layoffs and the systematic local and social problems that undoubtedly follow.

The Board argues that the Court should focus on Albany as the only county with any real connection to this controversy. This argument is misguided. The Board argues that venue must lie exclusively in Albany County because that is where its "decision making process" took place.[3] The cases relied upon by respondents/defendants are unique, and confined to a particular class of cases, such as motions to quash subpoenas, parole proceedings and real property valuation certification proceedings - i.e., proceedings where the determination or act complained arose out of <u>a hearing or other procedural process that took place in a particular county.</u> In essence, in all of the case law submitted by the Board, the material "acts giving rise to the determination complained of" were the underlying proceedings themselves. *See, e.g., New York Republican State Committee v. New York State Comm'n on Gov't Integrity,* 138 AD2d 884 (3rd Dept 1988) (finding New York County to be a proper venue for proceeding to quash subpoenas because the challenged subpoenas were "issued from the

[3] In their Notice of Motion to Change Venue, and the Affirmation of Richard Lomardo and Affidavit of Mary Beth Woods, respondents/defendants' claim only that venue in Onondaga County is "improper" and that the only proper place of venue is in Albany County. Respondents/defendants make no allegations that the venue should be changed to Albany County on the basis of convenience, and thus, this Court need not address the issue of why "convenience of material witnesses and the ends of justice" under §510(3) would also support a decision finding Onondaga County as the proper place of venue.

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Commission's office in that county pursuant to an investigation conducted there"); *County of Nassau v. State of New York*, 249 AD2d 353 (2nd Dept 1998) (finding Albany County to be proper venue for challenge to determination in real property valuation certification process took place in that county, where plaintiff had also availed itself of administrative review there); *see also Matter of Phillips v. Dennison*, 41 AD3d 17 (1st Dept 2007) (in action challenging parole determination; holding that venue was properly placed in the county where the parole hearing was held and thus, where the "decision-making process leading to the determination under review" took place); *Matter of Vigilante v. Dennison*, 36 AD3d 620 (2nd Dept 2007) (in action challenging parole determination, holding that venue was Albany County, where the administrative appeal process took place and thus, where the "decision making process leading to the determination took place").

This is not the case in the matter at bar. Here, the Board's failure to hold any kind of hearing or proceeding before issuing the deficit assessments to petitioners/plaintiffs is a central component of petitioners/plaintiffs' claims. Here, the principal underlying events revolve not around a proceeding, as in the cases cited by the Board, but around Riccelli's joinder and participation in the purported Trust (in Onondaga County) and the resultant consequences thereof (in Onondaga County), which Riccelli contends were imposed illegally and unconstitutionally by the Board (in Onondaga County).

The Board's interpretation of CPLR §506(b), asserting that the county where the "material events" occurred is necessarily the "county where the Board's decision-making process" occurred effectively eliminates the "material events" assessment in a venue

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motion. The legislature has separately provided the venue "where the Board's decision-making process" occurred by specifying in CPLR §506(b) that venue is also proper in the county where "the determination complained of" was made. Reading §506(b) as the Board does - equating the location of the "material events" with the location of the "determination complained of" - renders one of the alternative prongs of assessment for venue under CPLR §506(b) superfluous and unnecessary, thereby violating the canon of statutory construction that every word of the statute is to be given effect. *See* McKinney's Cons Laws of NY, Book 1, Statutes, §231; *see also Matter of OnBank & Trust Co,* 90 NY2d 725, 731 (1997) ("We decline to read the [statute] in such a way as to render some of its terms superfluous.").

In *Knight v. State Dep't of Envtl Conservation*, 110 Misc.2d 196 (Sup Ct, Monroe County 1981), the court denied a change of venue to Albany County and found that Monroe County, within the Seventh Judicial District, was a proper county although not the *only* proper county for purposes of venue. The court found that because of "material events and some of the determinations complained of" occurred within Ontario and Livingston Counties, the Seventh Judicial District was a proper venue. The court further stated:

> *[T]his court rejects respondents' arguments that the "material events" within the meaning of CPLR 506 (subd [b]) are the development and administration of the wetlands acquisition program in Albany. To do otherwise would be to define "material events" as if they were the same as respondents' "determinations" and thus to "deprive petitioners of the alternative basis for venue which the Legislature clearly intended to provide." Furthermore, a reading of CPLR 506 (subd [b]) . . . reveals not only that there are alternative places where this proceeding may be brought, which of course means there can be more than one*

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> *proper county for venue purposes; but also that there is no requirement that all the determinations complained of, or all the material events, must take place within the same county or judicial district in order to be properly venued therein.*
>
> *(Knight v. State, Id.)*

In *Hecht v. New York State Teachers' Retirement System*, 138 Misc.2d 198 (Sup Ct, Suffolk County 1987), respondent, the New York State Teachers' Retirement System, had contended that the proper venue was Albany County because the determination complained of (denial of death benefits) was made there and the act sought to be compelled (payment of a death benefits claim) could only be done in Albany County because the respondent's principal and only office was located there. The court, however, found that the material events that were subject of the dispute were the decedent's employment, which occurred in Nassau County, and his retirement, which occurred in Suffolk County, and denied the change of venue from Suffolk County to Albany County because the material events, at least in part, had occurred there. *(Id.* at 201-202). *Citing* Weinstein-Korn-Miller, the court held that the general basis for venue of "'where the material events took place has raised several problems of interpretation' and it is clear that §506(b):

> *"'does not limit venue to the place where acts by the official whose conduct is challenged occurred. Such a limited interpretation would make the "material events" basis of venue superfluous, since the place where the challenged action occurred is already a proper venue under the first alternative of CPLR 506(b).'"*
>
> (*Id.* at 200 (emphasis in original), *quoting* Weinstein-Korn-Miller ¶7804.02[2]).

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If the legislature had intended that Albany County be the only proper venue in any case where a Board determination is challenged, the legislature could have so provided. CPLR §506(b)(2) sets forth a list of governmental agencies against which special proceedings may only be brought in Supreme Court, Albany County. The Workers' Compensation Board is not one of the agencies included. The legislature clearly envisioned certain cases challenging Board determinations where venue would properly lie in counties other than Albany County, particularly in those counties where the "material events otherwise took place."

For all the reasons set forth above, this action was properly brought in Onondaga County, and the respondents/defendants' motion to change venue, must be denied.

Riccelli filed a motion to amend the Original Petition on October 3, 2011. In the motion for leave to amend, Riccelli seeks to add additional claims for relief under Article 78 as well as claims for declaratory relief against the Board. Petitioners/plaintiffs also seek to add claims for monetary damages against a new respondent/defendant, S.A.F.E., LLC.

For reasons set forth below, this Court grants the motion to amend made by petitioners/plaintiffs. As a result, the venue provisions governing special proceedings, as set forth above, continue to govern the Article 78 claims, but the provisions of CPLR §503 regarding the parties' residence, governs those claims for declaratory relief and monetary damages, *See* CPLR §503.[4]

[4] Because venue is proper in Onondaga County under both §503 and §506(b), there is no conflict in applying both provisions. Even if there was such a conflict, this Court finds that venue is proper in Onondaga County. Under CPLR §502, where venue provisions conflict because of "joinder of claims or parties," the "court shall order as the place of trial one that is proper to at least one of the parties or claims." *See* CPLR §502. Here, the CPLR venue provisions categorically, quantitatively and qualitatively

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CPLR §503(a) provides that venue is proper in the county in which one of the parties resided when the action was commenced. CPLR §503(a). Under CPLR §503(c), corporations and limited liability companies are deemed a resident of the county in which their principal offices are located. CPLR §503(c).

This venue is proper and lies in Onondaga County under both §503 and §506(b). Under §503, Onondaga County will be a proper venue because Riccelli's principal offices are located there, as are the principal office of newly added respondent/defendant, S.A.F.E., LLC.

Also, as set forth above, under §506(b), Onondaga County is proper because the "material events" underlying the Board's challenged actions occurred there.

CONCLUSION

Based on this Court's review of the motion papers and accompanying papers submitted, and upon oral argument, and the applicable statutory and case law submitted and reviewed, this Court finds that Onondaga County is the proper place of venue for the parties to conduct pretrial discovery and conduct a trial in this case.

Respondents/defendants motion to change the place of venue in this action is DENIED.

II - PETITIONERS/PLAINTIFFS' MOTION TO AMEND THE PETITION/COMPLAINT

Petitioners/plaintiffs in this action move to amend the petition/complaint to add additional claims and to add another party to the action, S.A.F.E., LLC. Petitioners/

leave this Court to the only possible conclusion - the proper venue lies in Onondaga County.

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plaintiffs make this request for relief pursuant to CPLR §3025(b).

New York CPLR §3025(b) provides, in pertinent part, as follows:

> *A party may amend his pleading…at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuance.*

The Court of Appeals has applied this statue as written, stating that: "Permission to amend pleadings should be 'freely given' [and] … is committed to the court's discretion." *Edenwald Contracting Co. v. New York,* 60 NYS2d 957 (1983), *see also* 3 Weinstein-Korn-Miller, N. Y. Civ. Prac., ¶3025.11 ("The court should exercise the widest discretion in granting leave on appropriate terms to serve supplemental pleadings as well as amended pleadings.").

The rule for Article 78 proceedings is no different. An "[a]rticle 78 proceeding, as a special proceeding, is governed by the Civil Practice Law and Rules provisions applicable to actions, including the general provision governing amended pleadings." 6 NY Jr. Article 78 and Related Proceedings §282 (2011); *see also In the Matter of Al Tech Specialty Steel Corporation v. New York State Department of Taxation and Finance,* 121 Misc.2d 141 (Sup Ct Albany County August 2, 1985) (granting petitioner leave to file a proposed second amended petitioner respecting a demand for refunds of special assessments levied by the New York Department of Taxation and Finance and the New York Department of Environmental Conservation).

New York State law provides that the primary factors a court will address in a request to amend a pleading under CPLR 3025(b) are: 1) whether the non-moving party would be prejudiced by the granting of the motion; and 2) whether the proposed

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amendment is "patently lacking in merit." *See Letterman v Reddington*, 278 AD2d 868 (4th Dep't 2000) ("Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit.").

In assessing prejudice, an important factor a court will consider is the timing of the motion. In this case, the parties are in the very earliest stage of litigation. The Board has not yet responded to the Original Petition and/or the Sunshine Petition, and the parties have not engaged in any discovery. For these reasons alone, any claim of prejudice is meritless. *See Joel v. Weber*, 166 AD2d 130 (1st Dep't 1991) ("In view of the fact that the parties are in the early stages of litigation, and discovery has not yet commenced, it is not surprising that defendants do not claim either prejudice or surprise by the instant motion for leave to amend.").[5] "[M]ere lateness is not a barrier to [an] amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." *Edenwald*, 60 N.Y.2d at 959.

No prejudice is argued by the Board and none can be shown because the Board has been and is in possession of all of the relevant facts respecting the additional allegations of the Riccelli Petition-Complaint. It is alleged that the Board was and is responsible for the creation and administration of GSITs. *See Pejcinovic v. City of New York*, 258 AD2d 365 (1st Dep't 1999) (granting an amended pleading that sought to "articulate the customs and practices of municipal defendant that are claimed to have resulted in the

[5] The Board does not assert prejudice and at oral argument the Attorney General advised the Court that there was no real objection to the motion to amend. Counsel for the Board simply took the position that there was no objection to the amendments (and the requested consolidation) as long as the venue of the action was in Albany County.

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violation of plaintiffs' civil rights [where] ... the City was given sufficient notice, at the time of the original complaint, respecting the acts about which plaintiffs [were] complaining.”).

Prejudice requires a significant change in position or hindrance in the defense of a claim. The procedural state of the underlying matter demonstrates that the Board has not "“incurred some change in position or hindrance in the preparation of [its] case which could have been avoided had the original pleading contained the proposed amendment.”" *Bryndle v. Safety-Kleen Sys., Inc.*, 66 AD3d 1396 (4th Dep’t 2009); *citing Whalen v. Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288 (N.Y. 1998). If anything, the granting of the leave to amend will allow better focus to further delineate the allegations against the Board, given the detailed, specific allegations set forth in the Gilberti Affirmation and the Riccelli Petition-Complaint.

Given the circumstances of this matter – this Court finds no real significant delay that would hinder a defense of claims set forth by Riccelli. This Court finds that no prejudice exists.

The Riccelli Petition-Complaint alleges in great detail facts purporting to support the corresponding requests for relief. The Riccelli Petition-Complaint describes: in detail what Riccelli alleges to be the statutory history and legislative and regulatory requirements for the formation, administration and oversight of GSITs generally, and TRIWCT, in particular; the details of the Respondents/defendants’ failure to adhere to those statutory and regulatory requirements; and the alleged violations of law respecting the Board’s unilateral assessments of TRIWCT’s members. The Riccelli Petition-Complaint further alleges that Riccelli and Sunshine were not, at any time, given notice,

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or an opportunity to be heard regarding the Board's action The Complaint enumerates the myriad of complaints that Riccelli sets forth in which the Board, through its alleged malfeasance and nonfeasance dating back to 2001, created the onerous deficits that the Board now seeks to thrust upon Trust members. It is alleged that the claims for relief in the Riccelli Petition-Complaint necessarily follow from blatant violations of statutory and constitutional law alleged therein. The Riccelli Petition-Complaint alleges that TRIWCT was created solely by an unlicensed third party administrator known as CRM, not by a group of employers as required by law, a fact that is alleged was known or should have been obvious to the Board at the time of the purported Trust's creation. The Riccelli Petition-Complaint alleges that statutorily required procedures, including, *inter alia*, the creation and filing of necessary documents, were either not followed or followed in a derelict (if not fraudulent) manner. These allegations if proven true in this lawsuit, may give rise to the claims they support, including, possibly - among others - a declaration that TRIWCT was never validly formed.

It is alleged that the Board has never accorded any member the right to be heard with respect to the alleged pro-rata share of the deficit, and that the Board did not and has not provided any level of administrative review to challenge the basis on which the levied amounts were determined. It is alleged that the Board specifically reserved the right to issue additional assessments and collect sums beyond those stated in invoices it recently provided to Riccelli and Sunshine. These facts, it is alleged, set forth colorable due process claims, claims of invalidity, claims of unjust and illegal taking, and violations of the equal protection clause.

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It cannot be said that these are "patently meritless claims" that would prejudice the respondents/defendants. The Riccelli Petition-Complaint sets forth with some significant detail allegations of purposeful conduct and knowledge and activities concerning matters within the Board's and SAFE's knowledge that if proven at trial may establish each element of the claims set forth therein. Indeed, even if the standard for granting a motion to amend were a likelihood of success – which it is not – the allegations and claims as described in the Riccelli Petition-Complaint would conceivably satisfy the test.

CPLR § 401 states that no party can be joined in an article 78 proceeding except by leave of court. CPLR 3025(b) is a proper vehicle for such addition of parties. *See* 3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3025.14a (recognizing CPLR 3025(b)'s "remarkably broad scope," and its use as an appropriate mechanism "to add a party defendant."). *See also Roberts v. New York City Housing Authority*, No. 401167/09, 2010 NY Slip Op 33328U (Sup Ct New York County Dec. 1, 2010) (granting leave under CPLR § 3025(b) to amend an article 78 Petition to add a respondent).

It is alleged that SAFE is intimately and complicitly involved in the process that has, *inter alia*, caused TRIWCT's members to be assessed, without authority or justification, significant sums of money, all without proper notice and the opportunity to be heard, as required by the State of New York and United States Constitutions. As set forth in the Riccelli Petition-Complaint, SAFE's very purpose, it is alleged, is to act as the administrator of TRIWCT, on behalf of the Board, and administer claims and prepare financial and actuarial analyses. These actions that form the basis for the purported deficit assessments are at the heart of this litigation.

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For all of the foregoing reasons, the requested Motion to Amend is hereby GRANTED.

III - PETITIONERS'/PLAINTIFFS' MOTION TO CONSOLIDATE

Petitioners/plaintiffs, Riccelli, filed yet another motion with this Court on October 3, 2011. That additional motion was to consolidate a pending proceeding commenced by a similarly situated former member of the alleged Trust, Sunshine Bulk Commodities, Inc. ("Sunshine"). The Sunshine action was commenced in Ontario County and carries the caption *Sunshine Bulk Commodities, Inc. v. State of New York Workers' Compensation Board, et al*, (Index No. 106359).

The respondent/defendant, Workers' Compensation Board does not oppose the motion to consolidate on any strong legal grounds. The Board opposes consolidation only if this case is not transferred to Albany County, pursuant to the Board's previously decided pending motion for change of venue. For that purpose, the Board alleges that consolidation would not be proper under the law, as Onondaga County is not a proper county.

The Board has moved for a change of venue in both this proceeding the *Sunshine* proceeding, alleging Albany County, and neither Onondaga nor Ontario Counties are a proper place of venue. The Board relies on the fact that, to date, there have been ten (10) Article 78 proceedings brought against the Board by members of insolvent GSIT's to challenge their deficit assessments. The Board notes that other than this proceeding currently pending in Onondaga County and the *Sunshine* proceeding, currently pending in Ontario County, only one of those proceedings was brought in a county other than

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Albany. In that proceeding, *Visiting Nurse Regional Health Care System v. Workers' Compensation Board*, the Supreme Court, Westchester County granted the Board's motion for change of venue to Albany County.

The Board argues that since Onondaga County is not a proper venue for either the pending action or the *Sunshine* action, the Board opposes consolidation of the *Sunshine* proceeding with this proceeding in Onondaga County. Otherwise, the Board consents to the issuance of an order consolidating the two proceedings and transferring the consolidated proceeding to Albany County.

The Board relies on the case of *Woods v. County of Westchester*, 112 AD2d 1037 (2nd Dept 1985), in supporting the position that when two actions are pending in the Supreme Court in different counties, a motion to consolidate may be made in either county and, the court must fix the venue of the consolidated action in the order that orders the consolidation. *Woods v. County of Westchester*, 112 AD2d 1037, at 1038. The Board recognizes that while venue normally is preferred in the county where the action was first commenced, that that should only occur when both counties are proper. *Citing, Perinton Associates v. Heiklen Farms, Inc.*, 67 AD2d 832 (4th Dept 1979); *Davidov v. Searles*, 20 Misc.3d 1107(A) (Supreme Court, Kings County, 2008). The Board then argues that neither Ontario nor Onondaga County are proper, and as a result, the matter should be consolidated and transferred to Albany County.

DISCUSSION

When there are common questions of law and fact, consolidation is favored by the courts in the interest of judicial economy, ease of decision making, and uniform resolution. *Amtorg Trading Corp. v. Broadway and 56th Street Associates*, 191 AD2d

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212 (1st Dept 1993); *Humiston v. Grose*, 144 AD2d 907 (4th Dept 1988). Generally, consolidation is favored by the courts, and unless the party resisting consolidation demonstrates prejudice to a substantial right, a motion to consolidate should be granted. Common questions of law and fact justifies the granting of a motion for consolidation under CPLR §602. *See, General Crush Stone Co. v. Central New York Contracting Co.*, 25 Misc.2d 572 (Supreme Court, Onondaga County, 1960); 3 Weinstein-Korn-Miller, N.Y. Civ. Prac., p. 602.04, *citing, Sodus Fruit Farm, Inc. v. Williams*, 181 Misc. 397 (Supreme Court, Wayne County, 1943).

The primary factor in determining the propriety of a consolidation is whether the actions involve common questions of law and fact. *Gutman v. Klein*, 26 AD3d 464 (2nd Dept 2006). Here, there is little question that Riccelli's and Sunshine's claim arise from their status as members of the entity known as TRIWCT, and the actions surrounding the formation and administration of the punitive Trust, with the imposition of the subsequent deficit assessments. Each allegedly joined TRIWCT unaware of the alleged illegal activity surrounding its creation, and unaware of the alleged purposeful or negligent failure to comply with the statutes and regulations by those charged with oversight and its creation. Each are now faced with proposed deficit assessments arising from their participation in the alleged non-conforming Trust. Each had been the recipients of significant deficit assessments and judgments procured by the Board all allegedly without notice and without an opportunity to be heard. The claims of these petitioners/ plaintiffs arise out of common, and in some cases identical, questions of law and fact. However, if prejudice to a substantial right is the result of such a consolidation, then the matters should not be consolidated to the detrimental prejudice

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of such a right to an opposing party. *See, Amcan Holdings, Inc. v. Torys, LLP*, 32 AD3d 337 (1st Dept 2006); *Teitelbaum v. PTR, Co.*, 6 AD3d 254 (1st Dept 2004); *Zupich v. Flushing Hospital and Medical Center*, 156 AD2d 677 (2nd Dept 1989); *DelBello v. Wilmot*, 59 AD2d 1023 (4th Dept 1977).

Here, it is clear that there is no prejudice to a substantial right of the Board, if the matters are consolidated and venued in Onondaga County. Whether the matter is heard in Onondaga County or Albany County, for purposes of prejudice, does not matter. This Court sees not a scintilla of prejudice to any substantial rights that the Board may have with regard to the defense of these actions, given a consolidation in Onondaga County. In fact, in its opposing papers, the Board does not even suggest prejudice, only that Onondaga County is not the appropriate county for venue.

Indeed, the consolidation of multiple, special proceedings is appropriate where they involve common questions of law and fact. Actions at law, equity, and special proceedings are all subject to consolidation where common questions of law or fact exist. *Elias v. Artistic Paper Box Co.*, 29 AD2d 118 (2nd Dept 1967). Here, the court finds that consolidation will avoid unnecessary duplication of discovery, trials, costs and expenses, and will avoid any possibility of inconsistent decisions based upon the same facts, in these or other actions. *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 AD3d 846 (2nd Dept 2008).

As a result, the motion to consolidate in this matter must be GRANTED.

IV - THE MOTIONS TO INTERVENE

The petitioners/plaintiffs in this matter, together with the "proposed intervenors", move to allow the intervenors to be parties to this action so as to allow

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them to make such claims as they may have against the respondents/defendants.

The proposed intervenor group consists of 70 Sheldon, Inc., 3679 River Road, Inc., A.T. & A. Trucking Corporation, B. Pariso Transport, Inc., Carmen M. Pariso, Inc., Excel Recycling, LLC, Sunshine Bulk Commodities, Inc., TC Ambulance Corporation, TC Ambulance Group, Inc., TC Ambulance North, Inc., TC Billing and Services Corporation, TC Hudson Valley Ambulance Corporation, TCBA Ambulance, Inc., TransCare Corporation, TransCare Management Services, Inc., TransCare New York, Inc., TransCare Westchester, Inc., Winters Brothers Management Services Corporation, Winters Brothers Recycling Corporation, Winters Brother Recycling East End, Inc., Winters Brothers Transfer Station Corporation, Winters Brothers Waste Systems, Inc., Winters Holtsville Transfer Station, LLC, Winters MSW Holdings, LLC, Winters North Shore Recycling, LLC, Winters Waste Services of New York, LLC, and Winters Waste Services of New York, Inc.

The proposed intervenors seek to intervene in the Riccelli action, and seek to proceed upon the intervenor petition-complaint.

It is alleged by the petitioners/plaintiffs that by adding the intervenors, together with Sunshine and Riccelli, that the total group thus comprises the "employer group" all of which have similar claims and requests for relief as against the respondents/defendants. It is alleged that the employer group, including the proposed intervenors, is comprised of employers that all conduct business in the State of New York, and all of whom are former putative members of the alleged Trust. It is alleged that each member of the employer group sought to provide workers compensation coverage to its employees through the Trust, pursuant to the Group Self-Insured Trust

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("GSIT") program, administered by the Board. The litigation seeks remedies for all members of the employment group as a result of the allegations that the Board failed to lawfully, reasonably and constitutionally administer and monitor the GSIT program.

The complaints of each member of the employer group alleges negligence, gross negligence and intentional failure to provide legislative, mandated oversight of the TRIWCT, on behalf of the Board which has subsequently levied unsubstantiated deficit assessments as against each member of the employer group.

The employer group brings a series of near identical common law actions as against the respondents/defendants, as well as S.A.F.E., LLC for breach of fiduciary duty, and performing its duties negligently and improperly. Other similar claims each of the members of the employer group brings against the respondents/defendants and S.A.F.E., LLC. deal with requests for declaratory relief and interim and ultimate stay of enforcement proceedings.

The Board objects to the interventions in this case again relying upon the fact that Onondaga County is not a place of proper venue for this proceeding. The Board otherwise consents to an order granting Sunshine and proposed intervenors to file the proposed intervenor petition, as long as this matter is transferred to Albany County. The Board also alleges that the proposed intervenor petitioners/plaintiffs should not permit the proposed intervenors to go forward with the first, second, third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh causes of actions, as such claims are allegedly barred by the statute of limitations.

The Board contends that an Article 78 proceeding must be commenced within four (4) months after the determination to be reviewed becomes final and binding upon

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the petitioner. (*Citing,* CPLR §217). Relying on the case of *Crest Mainstream, Inc. v. Mills*, 262 AD2d 846 at 847 (3rd Dept 1999), the Board asserts that a determination is final and binding when it "has its impact" upon the petitioner who is thereby aggrieved - or when the decision maker has arrived at a definite position on the issue that inflicts an actual, concrete injury that may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. *See, Crest Mainstream, Inc. v. Mills*, 262 AD2d 846 at 847; *Alterra Healthcare Corp. v. Novello,* 306 AD2d 787 at 788 (3rd Dept 2003).

The Board argues that Sunshine and the proposed intervenors time to challenge the member assessments began to run when they received the assessment invoices, which were mailed to them on July 29, 2010. As a result, the respondents/defendants contend that it was at that time that Sunshine and the proposed intervenors were impacted and aggrieved by the assessments since Sunshine and the proposed intervenors were unambiguously directed to either pay the assessment or enter into a repayment agreement within forty-five (45) days, and were advised that their failure to do so would subject them to enforcement and collection as authorized by law, including referral to the Attorney General for the collection and/or the filing of a judgment, pursuant to Workers' Compensation Law §26 in the amount of alleged unpaid deficit assessments. The Board also asserts finality on the basis that the Workers' Compensation Law provides no procedures for administrative review of a member assessment.

The Board contends that since Sunshine commenced its Article 78 proceeding on May 9, 2011, more than nine (9) months after receiving the assessment, and the

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proposed intervenors filed their motion to intervene on October 3, 2011, more than fourteen (14) months after receiving the assessments, that Sunshine's and the proposed intervenors' challenges to the assessments are thus time barred. The Board further contends that Sunshine and the proposed intervenors should not be permitted to go forward with those causes of action contained in the proposed intervenor petition, which challenged the July 29, 2010 member deficit assessment. Those claims include the first, second, third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh causes of action.

In support of their contentions, the Board cites *Held v. Workers' Compensation Board,* Index No. 1847-09 (June 27, 2011) and *Selective Insurance Co. of America v. Workers' Compensation Board*, Index No. 3010-11 (October 21, 2011) for the authority that a participant to workers' compensation challenged assessment must file the appropriate challenge within four (4) months from the date of receipt of the assessment. The Board contends that the subject claims that they seek to dismiss, although dressed up as claims for declaratory relief, clearly are a challenge to the Board's authority to issue member deficit assessments under the conditions presented in this case, and as a result, are governed by the four-month statute of limitations provisions applicable to an Article 78 proceeding. *Citing, Dandomar Co., LLC v. Town of Pleasant Valley Town Board*, 86 AD3d 83 (2nd Dept 2011); *Town of Webster v. Village of Webster*, 280 AD2d 931 (4th Dept 2001); *McCarthy v. Zoning Board of Appeals of the Town of Niskayuna*, 283 AD2d 857 (3rd Dept 2011).

The Board contends that a challenge to a legislative enactment can only be made via declaratory judgment action, while a challenge to an application of the legislation must be done through an Article 78 proceeding. As a result, they posit, that the seventh,

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eighth, ninth, tenth and eleventh causes of action are challenges to the Board's conduct in imposing the member assessments, even though couched in constitutional claims, and are thus subject to the statute of limitations for an Article 78 proceeding. *Citing, Overhill Building Co. v. Delany*, 28 NY2d 448 (1971); *Krovarsky v. Housing and Development Administration of the City of New York*, 31 NY2d 184 (1972).

Sunshine and the proposed intervenors argue that the Board's arguments with regard to the TransCare intervenors are timely pursuant to their tolling agreement with the Board. Additionally, Sunshine and the proposed intervenors argue that the "relation-back" doctrine applies, relating to the proposed intervenors' claims back to Riccelli's claims, which were timely made in the original petition. Third, Sunshine and the proposed intervenors allege that the proposed petitions/complaints do not seek merely a review of the Board's deficit assessment determination, but rather seek to prohibit the Board from continuing to exceed its statutory authority by way of a writ of prohibition and/or alternatively, seek a declaration that the statutes at issue and their application by the Board are unconstitutional. The petitioners/plaintiffs, including Sunshine and the proposed intervenors, assert that these are claims which are not subject to the four-month statute of limitations.

DISCUSSION

A. The Claims Interposed by the TransCare Intervenors Are Timely Pursuant to a Tolling Agreement

The claims interposed by the TransCare Intervenors are timely. TransCare entered into a tolling agreement with the Board, which, after a number of extensions, expired on September 7, 2011 (*see* Affidavit of David White, Ex. A). That tolling

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agreement provided that the time period during which the agreement was in effect would not be "included, asserted or relied upon in any way in computing the running of the time under any applicable statute of limitations." The tolling agreement further provided that the agreement would be "effective and relate back to October 29, 2010." Thus, one month out of the four month statute of limitations period remained when the tolling agreement expired. Accepting as true the Board's position that the four month statute of limitations applies to such claims, the four month period would not have begun to run until September 7, 2011 and would not have expired until October 7, 2011. The Proposed Intervenors, including the TransCare intervenors, filed their motion to intervene on October 3, 2011, well before the October 7, 2011 expiration date, and thus, the TransCare Intervenors' claims are timely.

B. All of the Proposed Intervenors' Claims are Timely Pursuant to the Relation Back Doctrine

Pursuant to well-established authority, all of the Proposed Intervenors' claims are timely pursuant to the "relation back" doctrine (*see Ferguson v Barrios-Paoli*, 279 AD2d 396, 398-399 [1st Dept 2001]). Under CPLR 7802(d), a court may allow an interested person to intervene in a special proceeding, and once intervention has been granted, an intervenor is afforded the same rights accorded the original parties in the action (*see Greater New York Health Care Facilities Ass'n v DeBuono*, 91 NY2d 716 [1998]; *see also Omiatek v Marine Midland Bank, NA*, 9 AD3d 831, 832 [4th Dept 2004]).

Where the claims of a proposed intervenor are challenged on statute of limitations grounds, the "relation back" doctrine permits the claims of an intervening

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party to proceed where such claims are "the same as or similar to" those claims set forth in the original petition (*id.*). Among the factors that may be considered in making this determination are: "whether the substance of the new claims is the same as those asserted in the original complaint or petition, whether the addition of the new claims does not change the potential liability of the defendants, and whether the new party is related to the original plaintiff or petitioner" (1 Weinstein-Korn-Miller, NY Civ Prac ¶ 203.30[b]).

In *DeBuono*, the Court of Appeals defined the doctrine concisely:

> We conclude that a party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence. Also, the proposed intervenor and the original petitioner must be so closely related that the original petitioner's claim would have given the respondent notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the respondent.
>
> (91 NY2d at 721).

Given the facts presented in this proceeding, *Ferguson v Barrios-Paoli* (279 AD2d 396 [1st Dept 2001]) is particularly instructive on the issue of whether the Proposed Intervenors' claims are the same as or similar to, or based on the same transaction or occurrence as, those claims made by Riccelli. In that case, petitioner Ferguson had been an officer of the NYC Transit Authority Police ("TAPD") prior to the TAPD's consolidation with the New York Police Department ("NYPD") (*id.* at 398-399). In taking on new employees as part of the consolidation, the NYPD dissolved the TAPD's "career path program," and then analyzed the work that the TAPD officers engaged in to determine whether they should be assigned to an investigative "unit" immediately, or whether they should be processed through an investigative "track" that operated,

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essentially, as an on-the-job training program. Ferguson and others in his unit were deemed to have held jobs with the TAPD that did not involve sufficient levels of "investigative duties" according to the NYPD, and thus were assigned to the investigative track. Ferguson and other investigative track officers were then denied a promotion as a result of this status.

The court analyzed whether or not the claims made by Ferguson and the claims made by proposed intervenors, who were similarly-situated former TAPD officers, were sufficiently interrelated to justify the application of the relation back doctrine, and held:

> It is beyond question that the claims of the proposed intervenors and the claim advanced by petitioner Ferguson derive from the same adverse determination by the NYPD, which ended the TAPD career path program .... [T]he municipal respondents can hardly profess surprise that relief from their administrative determination is sought on behalf of more than one police officer. .... In addition, the analysis conducted by the NYPD, comparing the TAPD investigative track with the NYPD investigative track, suggests that the City was aware of the identity of the officers involved in the comparable TAPD program ....
>
> (*Id.*).

Just like the officers who participated in the TAPD program, Riccelli's and the Proposed Intervenors' claims equally and identically arise from their status as members of the putative Trust and they were equally impacted by the same set of transactions and occurrences – the Board's unlawful authorization of the Trust as a GSIT, the Board's failure to properly oversee the Trust's administration, the Board's unlawful deficit reconstruction and issuance of deficit assessments and the Board's unlawful filing and entry of judgments in an effort to coerce payments of the deficit assessments. Moreover, the Board was well aware of the existence of the other putative members of the Trust

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and that its actions in issuing the 2010 Deficit Assessment, and the pro rata share allocations, had similarly impacted them.

Indeed, starting in October of 2008 and continuing through July 29, 2010, the Board sent deficit assessment mailings to each putative Trust member, all on the same dates and all using the identical cover letter or memoranda addressed to "Members of the Transportation Industry Workers' Compensation Trust." The mailing to all putative Trust members in October 2008 all contained an identical set of "Frequently Asked Questions." In the mailings, the Board consistently asserted that all members of the Trust would be held jointly and severally liable for the entire amount of the Trust deficit. Indeed, in the "Frequently Asked Questions" document, the Board stated: "You are jointly and severally liable with the other employers who participated in TRIWCT at the same time" (Woods Aff., Ex. EEE at 3). Given the Board's consistent assertions, the Board can hardly claim surprise that other putative Trust members would seek to challenge the Board's authority to issue the deficit assessments, particularly its authority to impose joint and several liability, as Riccelli has done in the Original Petition.

Furthermore, the substance of the Proposed Intervenors' claims set forth in the Proposed Intervenors' Verified Petition-Complaint, and the relief sought therein, are virtually identical to the substance of Riccelli's claims and relief sought, as contained in the Proposed Amended Verified Petition-Complaint. It is important to note that in neither the Original Petition nor the Proposed Amended Verified Petition-Complaint, has Riccelli sought the payment of any money damages from the Board. Similarly, in their proposed claims, the Proposed Intervenors also do not seek any money damages from the Board. Thus, the addition of the Proposed Intervenors' claims does not change

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the relief requested nor cause any prejudice to the Board.

Clearly, the claims against Riccelli and the Proposed Intervenors arise out of the same "transaction or occurrence," and "the substance of the [the Proposed Intervenors'] claims [are] the same as those asserted in the [Riccelli Petition] ..., the addition of the [Proposed Intervenors' claims] does not change the potential liability of the defendants, and the [Proposed Intervenors are] related to the original petitioner" due to their joint status as members of the putative Trust (*see* 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 203.30[b]) and the ongoing assertion of the Board of the application of joint and several liability of each for the total of TRIWCT's deficit assessment. Whatever factor a court may examine in making such determination, all facts point to the same conclusion: all of the Proposed Intervenors' claims relate back to the claims asserted by Riccelli and are not time barred.[6]

C. Certain Claims Seek a Writ of Prohibition, Which Would Restrain Continuing Harm, and Are Not Subject to a Four Month Statute of Limitations.

Of the ten causes of action that the Board asserts are untimely, the Board has characterized the Proposed Intervenors' first cause of action as "*a challenge to the Board's authority* to issue the member assessment" and the seventh through eleventh causes of action as "*challenges to the Board's conduct* in imposing the member assessments" (Opp.

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[6] It is also worth noting that CPLR 7802(d) "grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 ... which requires a showing that the proposed intervenor's 'claim or defense and the main action have a common question of law or fact'" (*DeBuono,* 91 NY2d at 720, *citing* Alexander Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7802:4, at 295; *see also Ferguson,* 279 AD2d at 398-399 ["[A]s respondents concede, CPLR 7802[d] permits 'other interested persons' to intervene in the proceeding, conferring upon the court greater latitude in allowing intervention ....."]).

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Memo. at 24). The Board apparently asserts that the remaining objectionable claims – Proposed Intervenors' second through fifth causes of action – simply challenge the 2010 Deficit Assessment (*id.* at 22-24). The Board then contends that the four month statute of limitations "applicable to an Article 78 proceeding" applies to all of these claims (*id.)*.

The Board significantly mis-characterizes the thrust of many of Proposed Intervenors' claims, apparently resting its characterization upon a fundamental misunderstanding of the nature of the three basic remedies available under Article 78, and the applicable statutes of limitations to each. Generally, Article 78 codifies and brings together, for procedural purposes, the old common law writs of mandamus, certiorari and prohibition (14 Weinstein-Korn-Miller, NY Civ Prac ¶ 7801.01 at 78-4 - 78-7).[7] While on different theories, in seven out of ten of the causes of action objected to by the Board, the

[7] A claim in the nature of mandamus serves two functions – to compel the performance of a ministerial duty and to review the administrative determination of a body or officer involving the exercise of discretion and for which no evidentiary hearing was required. (14 Weinstein-Korn-Miller, NY Civ Prac ¶ 7801.01 at 78-4 - 78-7). A claim in the nature of certiorari seeks to review the determination of a body or officer, made after the body or officer conducted an evidentiary hearing required by law (*id.*) A claim in the nature of prohibition seeks to prevent a judicial body or officer or an officer or body acting in a quasi-judicial capacity from acting or threatening to act without, or in excess of, its jurisdiction or in clear violation of a complainant's rights *(id.*).

Despite the fact that the Board has conceded that the 2010 Deficit Assessment contains amounts that cannot be lawfully collected from putative Trust members such as the Proposed Intervenors, the Board continues to seek payment of the 2010 Deficit Assessment and to attempt to enforce the 2010 Deficit Assessment through the filing and/or enforcement of Section 26 judgments. At the same time, in light of its concession, the Board also attempts to argue (in a footnote in its opposition papers) that to the extent that the 2010 Deficit Assessment is found not final and binding, the Proposed Intervenors' challenge to the 2010 Deficit Assessment must be found premature and not ripe.

To be ripe for review under Article 78, an action "must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process... [and] there must be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Gordon v Rush*, 100 NY2d 236, 242 [2003]). This is not the case where "an alleged harm is contingent on a future event which may or may not come to pass" or "where without a final agency action, there is no basis for evaluating whether a controversy exists or whether petitioners will suffer a concrete injury." Thus, the Board's actions in continuing to enforce, or threaten to enforce, the 2010 Deficit Assessment, which continued to occur as late as September 23, 2011 and October 4, 2011, are ripe for review under Article 78 (in addition to being subject to the other remedies available to Proposed Intervenors discussed above, including prohibition and declaratory relief).

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Proposed Intervenors seek to restrain and enjoin the Board's ongoing enforcement of the 2010 Deficit Assessment and thus, seek a remedy in the nature of prohibition (*see* CPLR 7802[c], 7803[2]; *Nicholson v State Comm'n on Judicial Conduct,* 50 NY2d 597 [1980]; *see also Moxham v Hannigan,* 89 AD2d 300 [4th Dept 1989]).

The first and third causes of action in the Proposed Intervenors' Verified Petition-Complaint seek to prohibit the Board from taking actions that are alleged to be in excess of its statutory authority. The seventh through eleventh causes of action seek to prohibit the Board from acting in violation of Petitioner's constitutional rights. These seven claims thus seek to restrain the Board from acting in a quasi-judicial capacity where the Board is acting in excess of delegated authority and in clear violation of the Proposed Intervenors' rights.

As a review of the Workers' Compensation Law and its relevant legislative history shows, the Board generally has the power to act in a quasi-judicial capacity. Here, the Board clearly exercised that quasi-judicial power in determining claim awards that formed the basis for the deficit assessments and other amounts it now seeks to collect from Proposed Intervenors. The Board further acted in a quasi-judicial capacity in conducting a forensic analysis and audit of the Trust and subsequently issuing assessments against the putative Trust members, seeking recovery of monies allegedly owed. By doing so, it passed judgment on the liabilities of the putative Trust members and thus exercised quasi-judicial powers.[8] The Board also exercised its quasi-judicial powers by filing for the entry of non-

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[8] An agency official, like the State Comptroller, has been found to be acting in a quasi-judicial capacity when he performs his audit functions, which involves the power to hear, examine, allow or reject claims for monies allegedly owed and to seek recovery of monies allegedly improperly paid (*see Matter of Stop BHOD v City of New York*, 22 Misc3d 1136A [Sup Ct, Kings County 2009]; *see also People ex rel. Desidero v Connolly*, 238 NY 326 [1924] [distinguishing certain sewer commissioners, who were acting as contracting and disbursing agents in exercising the power to authenticate or approve payment of a liability from auditors and assessors who act upon their conferred power "to hear and examine, and thereupon to

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appealable judgments against certain of the putative Trust members.

Because these seven claims seek to enjoin the Board from further enforcement action and thus, restrain a harm that is "clearly ongoing," the four month statute of limitations that might ordinarily apply to the article 78 review of administrative determinations does not apply here.

In *Taub v Committee on Professional Standards* (200 AD2d 74 [3d Dept 1994]), the Third Judicial Department's Committee on Professional Standards, issued letters to the petitioner attorney, directing that he discontinue advertisements which they believed were violative of the Code of Professional Responsibility. The court found that although the respondents/defendants had stated in their letters that "this matter is now closed," they had also admitted that they "had every intention of continuing to act in accordance with their belief that plaintiff's advertising is improper." Thus, the court found that the harm that the petitioner sought to restrain (further disciplinary action by the respondents/defendants) was "clearly ongoing," and the proceeding was not "time-barred"(*see also Johnson v Carro*, 24 AD3d 140 [1st Dept 2005] [holding that proceeding was not time-barred because challenged assertion of authority in that case was resulting in continuing harm]; *Civ Serv Emp Ass'n v Helsby*, 31 AD2d 325, 330 [3d Dept], *aff'd* 24 NY2d 993 [1969] ["Since prohibition involves an attack on the jurisdiction of the court or officer, immediate review is made available without regard to the stage of the proceeding or the ability of the aggrieved party to obtain a later review of the determination," quoting 14 Weinstein-Korn-Miller, NY Civ Prac ¶ 7801.06 at 78-13]; *see also* Siegel, NY Practice § 559 [4th ed] ["[W]ith

allow or to reject" liabilities and therefore "pass[ ] judgment as judges do upon the acts or liabilities of others"]).

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prohibition the defect under attack is a want of subject matter jurisdiction or an exercise of power so excessive as to be its equivalent, which presumably authorizes an attack at any juncture.”]).

Similarly, here, the Board has made clear in the deficit assessment mailings to the Proposed Intervenors, as well as in its representations to this Court orally and in the opposition papers filed in this proceeding, that it clearly intends to continue to seek payment of the 2010 Deficit Assessment from the Trust members and to file Section 26 judgments or enforce those judgments already filed, against Proposed Intervenors. Indeed, the Board continues to oppose the application for a stay, which would prevent the Board from exercising this power pending a determination by this Court on the merits of the claims. In the oral hearing before the Court on October 4, 2011, counsel for the Board stated that while it had not *yet* enforced the Section 26 judgments already filed by issuing stop work orders or seizing property, it viewed its authority to do so as a “valuable collection tool” that it would not relinquish.

The first, third, and seventh through eleventh causes of actions clearly seek relief that is in the nature of a writ of prohibition, and seek to enjoin a continuing harm. As such, the four month statute of limitations asserted by the Board is inapplicable and such claims have been timely made.

D. Certain Claims Seek Declaratory Relief and Are Not Subject to a Four Month Statute of Limitations

The sixth through eleventh causes of action are timely because they also seek a declaration that the statutory provisions at issue, WCL Sections 50(3-a)(7)(b) and 26 are facially unconstitutional. These kinds of challenges are not subject to the four month statute

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of limitations applicable to the review of administrative determinations under article 78.

Proposed Intervenors' sixth through eleventh causes of action seek a declaration that Sections 50(3-a)(7)(b) and 26 of the Workers' Compensation Law deprive Proposed Intervenors of procedural and substantive due process, effect a taking of their property without providing just compensation and unconstitutionally impair their contracts.

The constitutionality of a statute or any other true legislative enactment is properly determined by a claim for declaratory relief (*see New York City Health & Hospitals Corp v McBarnette*, 84 NY2d 194 [1994] [holding that the declaratory action is the proper vehicle for challenging the validity or constitutionality of a statute or any legislative action by a legislative body]). Such claims for declaratory relief are not subject to the four month statute of limitations that is applicable to final determinations under CPLR article 78. Rather, such declaratory judgment claims are subject to the six year catch-all statute of limitations in Section 213 of the CPLR (*see* CPLR 213[1]).

In some cases, courts have held that claims requesting declaratory relief that could have been brought under article 78 should be subject to the four month statute of limitations in CPLR 217 (*see New York City Health & Hospitals Corp v McBarnette*, 84 NY2d 194 [1994]; *Solnick v Whalen*, 49 NY2d 224 [1980]). The courts' rationale in those cases, however, does not apply to claims which challenge true legislative enactments (rather than legislative or quasi-legislative actions taken by an agency, such as rule making). The article 78 proceeding is not an appropriate vehicle for such challenges, and thus, the four month statute of limitations is inapplicable (*see McBarnette*, 84 NY2d at 202-205, *citing Matter of Ames Volkswagen v State Tax Comm'n*, 47 NY2d 345, 348 [1979]; *New York Pub*

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Interest Research Group v Steingut, 40 NY2d 250, 254 [1976]; *Matter of Merced v Fisher*, 38 NY2d 557, 559 [1976]).

Thus, to the extent that the sixth through eleventh causes of action seek a declaration that the statutes at issue are facially unconstitutional, they have been timely made.

As a result, the proposed intervenors must be granted leave to intervene and must be granted the opportunity to proceed upon such pleadings as this Court finds appropriate. This Court finds that the intervenors' claims are not time-barred and may be submitted accordingly, for all the reasons set forth above. As a result, the motions to intervene must be GRANTED.

V - PETITIONERS/PLAINTIFFS'/PLAINTIFFS' MOTION TO STAY

The petitioners/plaintiffs, and all intervenors (hereinafter all referred to as petitioners/plaintiffs), make a request for relief to this Court to stay any and all further collection and enforcement proceedings pursuant to CPLR §7805 until a final determination can be made as to all claims and the proceeding/action, and preventing respondents/defendants from taking any further action against the petitioners/plaintiffs and the proposed intervenors or referring any action to the Attorney General, to enforce the alleged deficit assessments; to levy any further assessments; to file or enforce judgments; to issue stop-work orders; or to otherwise seek the payment of any other monies from or against the petitioners/plaintiffs and the proposed intervenors with respect to their participation in the purported Trust.

Petitioners/plaintiffs and the intervenors move specifically pursuant to CPLR §7805. It is important for the Court to determine the preliminary standard for such a stay under CPLR §7805, and once established, to test whether the application of that

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statute requires or demands a stay of enforcement actions in this proceeding, as requested by the petitioners/plaintiffs.

The Standard Required for Stay under CPLR §7805

CPLR §7805 provides, in pertinent part, as follows:

> **§7805. Stay.**
>
> On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs, except that the enforcement of an order or judgment granted by the Appellate Division in a proceeding under this article may be stayed only by order of the Appellate Division or the Court of Appeals. Unless otherwise ordered, security given on a stay is effective in favor of a person subsequently joined as a party under §7802.

CPLR §7805 authorizes a court to grant a stay in an Article 78 proceeding. Such stays may be ordered in the "sound discretion of the trial court". *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 AD3d 212 (4th Dept. 2009). A stay or injunction may be granted upon the petitioners/plaintiffs demonstration that at least one of the claims presented by them is a meritorious claim. Relief in the form of a stay must be ancillary or incidental to the ultimate relief that the petitioners/plaintiffs/intervenors are requesting. *36th and Second Tenants Association v. State Division of Housing and Community Renewal*, 243 AD2d 321, 664 NYS2d 532 (1st Dept. 1977); *Peachey v. Commission of Motor Vehicles*, 75 AD2d 720, 427 NYS2d 160 (4th Dept. 1980). The request for stay cannot be the only relief that the petitioner is seeking, but must relate in an indivisible way to the main relief sought in the Article 78

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proceeding or related claims. *Peachey v. Commissioner of Motor Vehicles*, 75 AD2d 720, 427 NYS2d 160 (4th Dept. 1980).

Petitioners/plaintiffs claim that they have met their burden in support of a stay as to all claims, *citing, Matter of Allison v. New York City Landmarks Preservation Commission*, 2011 NY Slip.Op. 32285(U) at 33 (Supreme Court, New York County, August 18, 2011). Respondents/defendants strongly dispute the request for stay, and urge the Court to reject petitioners/plaintiffs/intervenors request on the basis that there is little likelihood that the petitioners/plaintiffs will succeed on the merits, that they have not presented to this Court any irreparable harm, and that they equities weigh heavily in favor of the respondents/defendants and against a stay.

Petitioners/plaintiffs/intervenors argue that pursuant to CPLR §7805 that each of the requirements otherwise needed to invoke the provisional remedy of a preliminary injunction need not be met. They take the position that there is authority that only irreparable harm need be established for relief sought pursuant to CPLR §7805. *Citing,* Weinstein-Korn-Miller on NY Civ Prac, they assert:

> Case law suggests that to obtain a stay under CPLR §7805, the petitioner must show irreparable harm. It is not entirely clear, however, if a petitioner must also show the likelihood of success on the merits and the balance of equities factors in order to obtain a stay under §7805. (*Citing,* 14 Weinstein-Korn-Miller, NY Civ Prac §7805.01; *citing, Town of East Hampton v. Jorling*, 181 AD2d 781 (2nd Dept. 1992)).

Petitioners/plaintiffs/intervenors posit that even absent the ability to assess the petitioners/plaintiffs' likelihood of success on the merits, a court should grant the CPLR §7805 stay solely on the basis of irreparable injury. *Citing, Jorling,* they present that the Second Department held that even though the State's arguments concerning the

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merits of the Town's underlying claims were not properly before the court, a stay was properly granted due to the possibility of irreparable injury to the petitioners/plaintiffs if the DEC were permitted to proceed with the enforcement orders (*Town of East Hampston v. Jorling*, 181 AD2d 781).

Petitioners/plaintiffs/intervenors take the position that in *Jorling*, the Second Department did not specifically state that a party seeking a stay pursuant to CPLR §7805 need not show the likelihood of success on the merits. They allege that the court in *Jorling* simply stated that the respondents/defendants arguments concerning the merits of the underlying claims were not properly before the court. They argue that in *Melvin v. Union College*, the Second Department further expanded upon the requirements pursuant to CPLR §7805 when they concurred that the appellant in that case had established the likelihood of success on the merits, irreparable injury, and a balancing of the equities. *See, Melvin v. Union College*, 195 AD2d 447 (2nd Dept. 1993). In that case, the motion had been styled as one for preliminary injunction, as the lawsuit had been commenced as an action seeking non-article 78 relief. The respondent in that case cross-moved to convert the action to an Article 78 proceeding, and that motion was granted by the Supreme Court. In granting the motion for "preliminary injunction" in the converted Article 78 proceeding, the Second Department stated that it was applying CPLR §7805. It is upon those facts that respondents/defendants urge this Court that the same standard as is applied to CPLR §6311 should govern a request for stay under CPLR §7805.

A number of lower courts have applied the same criteria that are used for assessing a motion for preliminary injunction pursuant to CPLR §6311. *Jarrett v.*

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Westchester County Department of Health, 166 Misc.2d 777 (Supreme Court, Westchester County, 1995); *Jamaica Chamber of Commerce, Inc. v. Metropolitan Transportation Authority*, 159 Misc.2d 601 (Supreme Court, Queens County, 1993); *Lee v. New York City Department of Housing Preservation and Development*, 162 Misc.2d 901 (Supreme Court, New York County, 1994).

Respondents/defendants argue that regardless of what the petitioners/plaintiffs call their motion, they are actually seeking an order temporarily preventing the Board from filing or enforcing Workers' Compensation Law §26 judgments, and as a result what petitioners/plaintiffs are actually, in fact, seeking is a preliminary injunction.

This lawsuit was originally commenced as an Article 78 proceeding to challenge the deficit assessment issued against the petitioners/plaintiffs. The original petition did not contain any challenge to the Board's authority to enter a Workers' Compensation Law §26 judgment against the petitioners/plaintiffs. It appears that the parties are in general agreement that an Article 78 proceeding is not the proper vehicle to make such a challenge. Article 78 proceedings are uniform devices for challenging the activities of an administrative agency in court. A CPLR Article 78 review is generally restricted to questions raised under CPLR §7803. *See, Serth v. New York State Department of Transportation*, 104 Misc.2d 545 (Supreme Court, Albany County), modified 79 AD2d 801 (1980). The judicial function in an Article 78 proceeding is limited to the review of the propriety of the determination of the administrative body in an effort to determine whether their acts were arbitrary and capricious in nature. *See, Burkes Auto Body, Inc. v. Ameruso,* 113 AD2d 198 (1st Dept. 1985).

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Petitioners/plaintiffs (hereafter including intervenors), through their amended complaint, add claims for declaratory relief, and other claims challenging the constitutionality of the application by the Board of the June, 2008 amendment to Workers' Compensation Law §50(3-a)(7)(b)(l. 2010 ch. 56, pt. R §4). That amendment set forth language that presumptively empowers the Board to enter a Workers' Compensation Law §26 judgment against a member of an insolvent GSIT, which does not pay a deficit assessment. This challenge is set forth in the form of a declaratory judgment action. *See, Overhill Building Co. v. Delany,* 28 NY2d 449 (1971). In reality, even though the request for relief is presented pursuant to CPLR §7805, the petitioners/plaintiffs seek an order temporarily preventing the Board from filing or enforcing Workers' Compensation Law §26 judgments, thus seeking preliminary injunction relief under CPLR §6311. *See, 36th and Second Tenants Association v. New York State Division of Housing and Community Renewal*, 243 AD2d 321 (1st Dept. 1997).

Upon review of the cases dealing with this subject, this Court finds that when generally presented with a stay application pursuant to Article 78 proceedings, and CPLR §7805, the courts will look to CPLR §5519(c), and the provisions that are set forth under that section will generally govern the applications under CPLR §7805. *Murphy v. County of Nassau,* 203 AD2d 339, 609 NYS2d 940 (2nd Dept. 1994).

Indeed, CPLR §7805 is consistent with the general provisions of CPLR §5519, in that is specifically forbids a lower court judge from staying an order of the Appellate Division. The decision to grant or deny a stay is generally committed to the court's

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discretion. *Town of East Hampton v. Jorling*, 181 AD2d 781; *Ten Mile River Holding, Ltd. v. Jorling*, 150 AD2d 927, 541 NYS2d 270 (3rd Dept. 1989).

The stay of the type requested in this action is similar to a preliminary injunction in that petitioners/plaintiffs seek to prevent the Board from acting on its determinations. Under such circumstances, CPLR §7805 authorizes a court to issue a preliminary injunction in an appropriate situation. *Savastano v. Numberg*, 77 NY2d 300, 567 NYS2d 618 (1990); *Melvin v. Union College*, 195 AD2d 447. In situations such as this, the courts have applied the traditional three-factor test for obtaining relief in which the petitioner must show: (1) a likelihood of success on the merits; (2) irreparable injury; and (3) that the balance of equities is a his or her favor. *See,* 14 Weinstein-Korn-Miller, NY Civ Prac §7805.01; *Melvin v. Union College*, 195 AD2d 447. However, at least two cases dealing with a CPLR §7805 stay have discussed only the irreparable injury factor. *Town of East Hampton v. Jorling*, 181 AD2d 781; *Stewart v. Parker*, 41 AD2d 785, 341 NYS2d 189 (3rd Dept. 1973).

There is little question in this case but that the request for stay pursuant to CPLR §7805 is really a request for preliminary injunction. As a result, this Court will apply the three-factor test used for preliminary injunctions. This Court finds that when courts are presented with stay applications under CPLR §7805, they generally look to CPLR §5519(c). *Murphy v. County of Nassau*, 203 AD2d 339.

A preliminary injunction - or a stay seeking the type of equitable, provisional remedy that is sought here, is designed to protect the movant in maintaining the status quo while the factual and legal issues are examined during the course of litigation. *Credit Agricole Indosuez v. Rosslyskty Kredit Bank*, 94 NY2d 541, 708 NYS2d 26

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(2000); *Berger v. Rabb*, 161 AD2d 865; 14 Weinstein-Korn-Miller, NY Civ Prac §6301.01.

In order to be successful, the movant must make a threshold showing to the court in order to obtain what the courts have called extraordinary relief. Indeed, a request to this Court to prevent the Board - even temporarily - to withhold on the execution of Workers' Compensation Law §26 judgments is, in this Court's opinion, extraordinary relief. As a result, this Court finds that the movant must show (1) a likelihood of success on the merits; (2) an irreparable injury; and (3) that the balance of equities lie in favor of the movant. *See, Nobu Next Door, LLC v. Fine Arts Housing*, 4 NY3d 839, 800 NYS2d 48 (2005); *WT Grant Co. v. Srogi*, 52 NY2d 496, 438 NYS2d 761.

Thus, this Court will examine, in turn, the three specific threshold requirements to make its determination as to whether the petitioners/plaintiffs are entitled to the equitable relief that they seek in this matter. In so doing, this Court will be cognizant of several legal principals that have developed through the courts in making its decision. Ths first of these is that an application for a stay pursuant to CPLR §7805, particularly the type of equitable request as set forth in this case is addressed to the trial court's sound discretion. *Allen v. Pollack*, 289 AD2d 426, 735 NYS2d 147 (2nd Dept. 2001); *After Six, Inc. v. 201 East 66th Street Associates,* 87 AD2d 153, 450 NYS2d 793 (1st Dept. 1982); *Wooster Group, Inc. v. Schechner*, 183 AD2d 504, 583 NYS2d 431 (1st Dept. 1992); *City of Buffalo v. Mangan*, 49 AD2d 697, 370 NYS2d 771 (4th Dept. 1975); *Picotte Realty, Inc. v. Gallery of Homes, Inc.*, 66 AD2d 978, 412 NYS2d 47 (3rd Dept. 1978). This is a cardinal principal of equity jurisdiction such that even if the petitioners/plaintiffs meet the applicable three-pronged legal threshold, entitlement to

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relief need not necessarily be granted as a matter of right. *Doe v. Axelrod*, 73 NY2d 748, 536 NYS2d 44 (1988). This Court has broad discretion in formulating the scope of the preliminary injunction. *See*, 14 Weinstein-Korn-Miller, NY Civ Prac §6301.07; *HIG Capital Management, Inc. v. Ligator,* 233 AD2d 270, 650 NYS2d 124 (1st Dept. 1996); *Paddock Construction, Ltd. v. Automated Swim Pools, Inc.*, 130 AD2d 894, 515 NYS2d 662 (3rd Dept. 1987).

In exercising the Court's discretion, this Court must take into consideration a host of factors including (1) the adequacy of other remedies, (2) the enforceability and ethicacy of any stay or injunction, (3) the public interest, and (4) laches in their own right.

The Court must also consider the nature of the alleged irreparable injury and balance the equity prongs of the usual three-part test, and weigh the extent to which these prongs are applicable in the alternatives to the three-pronged test. *Doe v. Axelrod*, 73 NY2d 748, 536 NYS2d 44 (1988); *Aetna Insurance Co. v. Capasso*, 75 NY2d 860, 552 NYS2d 918 (1990). *See,* 14 Weinstein-Korn-Miller, NY Civ Prac §6307(1). It is well-settled that a court may grant a stay or injunctive relief without satisfying each element of the three-pronged threshold test. This is particularly true if the movant's demonstration of irreparable harm shows that the harm would be particularly severe or that the final judgment on the merits would be ineffectual in the absence of a stay or preliminary injunction. In circumstances such as this, the degree of proof needed for the movant to show a probability of success on the merits is reduced from what would ordinarily be required. *State of New York v. City of New York*, 275 AD2d 740, 713 NYS2d 360 (2nd Dept. 2000); *Republic of Lebanon v. Sotheby's*, 167 AD2d 142, 561

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NYS2d 566 (1st Dept. 1990); *Gibouleau v. Society of Women's Engineers*, 127 AD2d 740, 511 NYS2d 932 (2nd Dept. 1987); *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 56 AD2d 615, 391 NYS2d 880 (2nd Dept. 1977). Where there is a particularly severe demonstration of irreparable harm, a showing of probability of success on the merits is reduced to the point where the movant needs only to show that there are disputed issues of fact and law and that there is a reasonable possibility that these issues could ultimately be resolved in the movant's favor. Thus, where a movant shows a convincingly strong threat of irreparable injury, and relatively minor inconvenience to a defendant, the court may grant the requested relief even though there is some doubt about whether the movant will actually prevail on the merits. *Republic of Lebanon v. Sotheby's*, 167 AD2d 142, 561 NYS2d 566; *Gibouleau v. Society of Women's Engineers*, 127 AD2d 740, 511 NYS2d 932; *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 56 AD2d 615, 391 NYS2d 880; *Gramercy Co. v. Benenson*, 223 AD2d 497, 637 NYS2d 383 (1st Dept. 1996); *United States Ice Cream Corp. v. Carvel Corp.*, 136 AD2d 626, 523 NYS2d 869 (2nd Dept. 1988); *Delta Properties, Inc. v. Fobare Enterprises, Inc.*, 251 AD2d 960, 674 NYS2d 817 (3rd Dept. 1998). These cases generally support contentions that if the movant is likely to go out of business or suffer a severe hardship that could possibly render the final judgment ineffectual, then the relief should be granted. *See, Lebanon v. Sotheby's, Id.; Gibouleau v. Society of Women's Engineers, Id., Schlosser v. United Presbyterian Home, of Syosset, Id., Gramercy Co. v. Benenson, Id.* and *United States Ice Cream Corp. v. Carvel Corp. Id.*

It is also widely held that the court had broad discretion in formulating the scope of the preliminary injunction. *HIG Capital Management, Inc. v. Ligator*, 233 AD2d

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270, 650 NYS2d 124; *Paddock Construction, Ltd. v. Automated Swim Pools, Inc.*, 130 AD2d 894, 515 NYS2d 662. This is particularly true when the court directs the parties to proceed to trial as early as practicable and/or where the court orders that a preference be given in the interest of justice. *Springfield Bayside Corp. v. Hochman*, 44 Misc.2d 882, 255 NYS2d 140 (Supreme Court, Queens County); *Wickham v. Champlain Creameries, Inc.*, 40 Misc.2d 831, 244 NYS2d 195 (Supreme Court, Albany County, 1963); *Pilgreen v. 91 5th Ave. Corp.*, 91 AD2d 565, 457 NYS2d 48 (1st Dept. 1982); *339 Lexington Ave. Corp. v. Gabel*, 41 Misc.2d 474, 246 NYS2d 9 (Supreme Court, New York County, 1963); *O'Hayer v. St. Aubin*, 44 Misc.2d 786, 255 NYS2d 101 (Supreme Court, Westchester County, 1964).

With these legal principals in mind, this Court will now discuss the three-pronged threshold test to determine whether the petitioners/plaintiffs are entitled to the equitable injunctive relief requested - a stay of enforcement on behalf of the respondents/defendants.

A. HAVE PETITIONERS/PLAINTIFFS THROUGH THE PAPERS SUBMITTED TO THIS COURT AND THE ARGUMENTS PRESENTED, SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS?

1. A General Review of the Standards of Law and a Preliminary Application to Facts Presented

The first prong of the three-pronged threshold test for equitable relief is to determine whether the petitioners/plaintiffs have shown on the papers submitted to this Court that there is a likelihood of success on the merits. Because of the nature of relief, in the equitable rules dealing with the propriety of stays and injunctive relief, to really

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assess the likelihood of success on the merits in this case, calls for at least some evaluation of whether there would be any irreparable injury if the preliminary injunction is not granted. Generally that is the second-prong of the three-pronged threshold test, but to some extent, the tests will be merged for purposes of determining the true standard that the petitioners/plaintiffs have in showing the likelihood of success on the merits.

A preliminary injunction may be obtained only if the moving party has established a clear right to this relief. *Golf and Western Corp. v. New York Times Co.*, 81 AD2d 772, 439 NYS2d 13 (1st Dept. 1981); *Heldman v. Douglas*, 33 AD2d 695, 306 NYS2d 213 (2nd Dept. 1969); *Hempstead v. Jablonsky*, 187 Misc.2d 792, 724 NYS2d 808; 14 Weinstein-Korn-Miller, NY Civ Prac, §6301.07(4). The general rule is generally set forth as follows:

> To entitle a plaintiff to prohibition, by injunction from a court of equity, either provisional or perpetual, he must...show a clear legal and equitable right to the relief demanded, or to some part of it, and to which the injunction is essential... *People v. Canal Board*, 55 NY 390 at 394-395 (1874); *Graves v. Lombardi*, 42 AD2d 700, 345 NYS2d 146 (2nd Dept. 1973).

The petitioners/plaintiffs cause of action must be legally sufficient so as to show a likely success upon the merits if the matter is tried, or must at least meet the modified standard sometimes recognized where irreparable injury is particularly severe. *Weisner v. 791 Park Ave. Corp.*, 6 NY2d 426, 190 NYS2d 70 (1959); *Republic of Lebanon v. Sotheby's*, 167 AD2d 142, 561 NYS2d 566. The petitioners/plaintiffs, as movants in this matter, must show to the court through the papers submitted that there is evidence of likelihood of success, irreparable injury, and that the balance of equities supports the

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need for a stay of enforcement in this matter. Where there are conflicts in the motion papers, or in the proposed facts to be submitted, the court may grant the requested relief, especially when allegations are not controverted or are controverted in an unconvincing fashion. *Frank May Associations, Inc. v. Boughton*, 281 AD2d 673, 721 NYS2d 154 (3rd Dept. 2001). Where there is a sharp dispute as to material facts, the plaintiffs burden increases. *DeLury v. City of New York,* 48 AD2d 595, 378 NYS2d 49 (1st Dept. 1975); *Hartford v. Resorts International, Inc.*, 43 AD2d 828, 351 NYS2d 414 (1st Dept. 1974).

In the case submitted to this Court, it is not the court's function to finally determine the merits of an action. The court's function here is to determine whether interlocutory relief is necessary to preserve the status quo until a decision can be reached on the merits. *Gambar Enterprises, Inc. v. Kelly Services, Inc.*, 69 AD2d 397 (4th Dept. 1979); *Tucker v. Toia*, 54 AD2d 322 (4th Dept. 1976). The standard of proof seems well settled that if the moving party makes a *prima facie* showing of the right to relief, that is enough to allow for a stay or injunctive relief, but the actual proof of the case must be left to the full hearing on the merits. *Tucker v. Toia*, 54 AD2d 322; *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 AD3d 212 (4th Dept. 2009). Where a subsequent judgment might be rendered ineffectual unless a preliminary injunction to maintain the status quo is granted, such preliminary injunction may be granted even where the court has grave doubts regarding the likelihood of plaintiff's success on the merits. *Valdez v. Northeast Brooklyn Housing Development Corp.*, 205 NY Slip.Op. 50986(U) (Supreme Court, Kings County, 2005); *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 56 AD2d 615.

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The petitioners/ plaintiffs contend that because they stand to lose their business forever if a stay or injunctive relief in this matter is not granted, that the equities tip heavily in their favor and that they only have the need to demonstrate serious questions going to the merits rather than likelihood of success on the merits. *Citing, Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2nd Circuit, 1984); *State v. City of New York*, 275 AD2d 740 (2nd Dept. 2000). Petitioners/plaintiffs further contend that even if there isn't a dispute regarding petitioners/plaintiffs' ability to remain in business that the existence of such a factual dispute will not bar the granting of a stay or preliminary injunction if one is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Mister Natural, Inc. v. Unadulterated Food Products, Inc.*, 152 AD2d 729 (2nd Dept. 1989). Thus, petitioners/plaintiffs contend that a question of fact (i.e., *prima facie* proof) has been laid before this Court as to whether the petitioners/plaintiffs will be able to stay in business pending a trial on the matter. Relying on *Mister Natural, Inc. v. Unadulterated Food Products, Inc., Id.*, petitioners/plaintiffs contend that a likelihood of success on the merits is established because there is a question of fact with regard to that issue.

Petitioners/plaintiffs also contend that to demonstrate a likelihood of success on a constitutional claim, it is not necessary that the argument be ultimately successful, but the required showing is that the requested relief is based upon substantial principals of constitutional law. In making that argument, the petitioners/plaintiffs quote from the Fourth Department decision of *Time Square Books v. City of Rochester*, as follows:

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> *We emphasize that our conclusion that plaintiffs have demonstrated a likelihood of ultimate success must not be equated with a final determination on the merits. Plaintiffs may not ultimately prevail in obtaining judgment...there position, however, is based on substantial principals of constitutional law and involves novel issues of first impression in this state. It is appropriate, therefore, to grant a preliminary injunction to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner. (Time Square Books v. City of Rochester*, 223 AD2d 270 at 278 (4th Dept. 1996); *citing, Tucker*, 54 AD2d at 326).

Indeed, the facts and legal questions presented to this Court do present aspects of constitutional law which are two weighty to be finally determined at a preliminary stage by this Court. Petitioners/plaintiffs contend that this is precisely the situation in which a preliminary injunction should be granted - to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner.

"CPLR 7803(2) authorizes a proceeding under article 78 to test 'whether the body or officer...is proceeding or is about to proceed without or in excess of jurisdiction ....'" (*Rush v Mordue*, 68 NY2d 348, 352 [1986]). Put simply, a writ of "prohibition lies when an administrative agency exercising quasi-judicial power exceeds its authorized powers in a proceeding over which it has jurisdiction" (*New York State Dep't of Taxation & Finance v Tax Appeals Tribunal*, 151 Misc 2d 326, 332 [Sup Ct, Albany County 1991], *citing Matter of Nicholson v State Comm'n on Judicial Conduct*, 50 NY2d 597, 606 [1980]). Prohibition is the "means to prevent an arrogation of power in violation of a person's rights, particularly constitutional rights" (*id.*, citing *Matter of Lee v County Ct of Erie County*, 27 NY2d 432, 437-438 [1971]).

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Relief under CPLR 7803(2) requires an examination of the following: "(1) whether the body or officer is acting in a judicial or quasi-judicial capacity, (2) whether the judicial or quasi-judicial officer is acting without or in excess of jurisdiction, and (3) whether the petitioner has a clear legal right to the relief sought" (14 Weinstein-Korn-Miller, NY Civ Prac ¶ 7803.01). In addition, a court will consider "whether an adequate alternative remedy exists, such as an appeal, inasmuch as prohibition will not be granted if an adequate alternative remedy exists" (*id.*)

As an initial matter, without question, the Board acts in a judicial or quasi-judicial capacity. Indeed, a history of the statutory scheme that led to the Board's creation shows that at all times the workers' compensation laws provided for a statutory entity (i.e., Board) that exercises "quasi-judicial" powers in enforcing the laws and processing workers' compensation claims.

Between 1913 (when the Workers' Compensation Law was first enacted) and 1945 (when the workers' compensation scheme was overhauled, and the Board was created), the legislative history and session laws of the workers' compensation statute evidences the clear understanding of the quasi-judicial function of the entities charged with administering the workers' compensation laws (*see e.g.,* Laws of 1913, Chapter 816, Section 60 [referring to an "Industrial Board" and a "Workmans' Compensation Commission" with "quasi-judicial" authority]; Bill Jacket L 1921, Ch 50 ["Report to Legislature"] [assessing the propriety of combining in "one body administrative functions with quasi-judicial functions"]; Donlan, Mary, Vice Chairman of the Industrial Board Report to the Executive Chamber, Bill Jacket 1945 ["What [the bill] would do is to integrate in the Board the judicial and quasi-judicial authorities …"]).

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In analogous contexts, courts have found that government officials act in a quasi-judicial manner in determining the propriety of a writ of prohibition. For example, in the criminal law context, both district attorneys and attorneys general have been found to be acting in a quasi-judicial capacity (and subject to prohibition) where they represent "the public in bringing those accused of crime to justice" (*see e.g. Schumer v Holtzman*, 60 NY2d 46, 51 [1983]). Indeed, the function of the Board here has marked similarities to that of a public prosecutor. As described by the Court of Appeals in *McGinley v Hynes* (51 NY2d 116 [1980]):

> The role of a public prosecutor in our system of criminal justice has two fundamentally distinct and separate aspects. On the one hand, the public prosecutor has the obligation of representing the State in its efforts to bring individuals accused of crimes to justice. When he is fulfilling this responsibility, the public prosecutor may readily be viewed as an officer performing a "quasi-judicial" act, and his conduct may therefore become the subject of an article 78 proceeding in the nature of prohibition. ...
>
> On the other hand, public prosecutors also perform a role "analogous to that of a police officer", which entails the investigation of suspicious circumstances with a view toward determining whether a crime has been committed .... Manifestly, when this purely investigative function is involved, the acts of the public prosecutor are to be regarded as "executive" in nature and, in consequence, cannot legitimately be the object of a writ of prohibition, except, perhaps, in a most unusual and at present unforeseeable circumstance.
>
> (*Id.* at 123-124.)

Here, while an "investigation" into an appropriate assessment of liability by the Board might be deemed as "executive" or "administrative" in nature, the Board's determination of the Trusts' liability, and the pro rata allocation of that liability to each Petitioner, its imposition of the 2010 Deficit Assessment as well as the July 29, 2011 assessment upon Petitioners/plaintiffs, and subsequent actions of judgments and threat of stop-work orders, are akin to prosecutorial acts. Here the Board is not only acting as

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prosecutor – but also has the power to enter judgments without notice or opportunity to be heard, and with no right of appeal. The Board is and has acted in a quasi-judicial capacity for purposes of the claims Petitioners/plaintiffs bring, subjecting the Board to a writ of prohibition.[9]

Black's Law Dictionary's definition of "quasi-judicial" provides context to the facts presented in this matter respecting what the Board should or could have done in computing the Deficit Assessments:

> quasi-judicial: the action, discretion etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.
>
> (*Black's Law Dictionary* [2006]).

Here there were no hearings – i.e. petitioners/plaintiffs had no opportunity to be heard. The petitioners/plaintiffs contend that there is no evidence that the Board properly ascertained facts and weighed evidence before it arrived at the 2010 Deficit Assessment.[10] Thus they argue that there is simply no indication that the Board took the appropriate actions of an agency charged with quasi-judicial functions. If this is proven by petitioners/plaintiffs, this alone could be said to violate petitioners/plaintiffs' due process rights, and this alone might be said to demonstrate that the Board – acting in its quasi-judicial authority – exceeded its authority in issuing the deficit assessments.

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[9] As indicated previously, the State Comptroller has also been found to be acting in a quasi-judicial capacity in performing audits, due to his power to hear, examine, and allow or reject claims for monies allegedly owed (*Matter of Stop BHOD*, 22 Misc3d 1136A [Sup Ct, Kings County 2009]).

[10] The Board sharply refutes this, asserting that it acted reasonably at all stages of the dealings with TRIWCT.

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Petitioners/plaintiffs allege that the Board improperly qualified TRIWCT as a GSIT, in violation of law, and, because TRIWCT was never a valid Trust, the Board is without power to issue any deficit assessment against TRIWCT members. When the Board exercised its quasi-judicial powers here, it is alleged that it did so by stepping far outside the bounds of its delegated statutory authority and in clear violation of petitioners/plaintiffs' constitutional rights. The Proposed Amended Petition lays out the allegations that petitioners/plaintiffs contend support this proposition in detail. The claims are summarized as follows.

(1) The Board unlawfully approved and authorized the Trust, despite the overwhelming evidence – available to the Board – that the Trust failed to meet even the minimum statutory requirements for a GSIT and where the foundation documents upon which the GSIT application relied were fraudulently procured. (2) After the Trust became insolvent and defaulted (which it is alleged the Board allowed, and aggravated, by its failure to properly oversee the Trust's administration), the Board reconstructed and calculated the Trust's deficit at over $140 million, (3) seeking to hold the former members jointly and severally liable for the entire amount of the alleged deficit assessment. (4) The Board then levied assessments against the putative Trust members in the amount of their alleged pro rata share of the deficit, (5) all without affording any of the Trust members an opportunity to be heard, and (6) without the statutory authority to do so. Petitioners/plaintiffs further contend that, (7) the Board's 2010 Deficit Assessment is unlawful and unauthorized because it was issued well after the required 120 day time period set forth in WCL § 50(3-a)(7)(b) and (8) because, as the assessment includes WCL Section 15(8) and 151 assessments that by legislative

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amendment, cannot be levied against the petitioners/plaintiffs. It further claimed that, (9) the Workers' Compensation Law, as it existed when the Trust was first approved and authorized by the Board in late 2000/early 2001 and when the Trust defaulted in 2007, included no provision for the imposition of joint and several liability. They consequently argue that the Board's attempt, therefore, to impose joint and several liability upon former TRIWCT members exceeds its statutory authority.

Finally, (10) premised upon the 2010 Deficit Assessment, it was argued that without providing the petitioners/plaintiffs with adequate due process, the Board (11) has unlawfully deemed the petitioners/plaintiffs' in "default of the payment of compensation" and has filed, (12) under Section 26 of the Workers' Compensation Law, for entry of non-appealable judgments against three of the petitioners/plaintiffs, and has threatened to file such judgments against the others. (13) The Board subsequently assessed and billed petitioners/plaintiffs for an amount exceeding $142,000,000 for which they now seek recovery, and thus similar claims (1-12) exist.

As a result of all of the above actions, they argue that the Board must be restrained from continuing to seek payment of the unlawful 2010 Deficit Assessment and 2011 Deficit Assessment and from enforcing the deficit assessments through the entry of non-appealable judgments, enforcement of those judgments or the issuance of stop work orders.

The petitioners/plaintiffs argue further that the gravity of the harm that the Board threatens is severe. If the Board is not restrained from collecting the 2010 Deficit Assessment, and entering Section 26 judgments, the petitioners/plaintiffs could ultimately be forced into bankruptcy. The Board's continued enforcement, and

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threatened enforcement of the 2010 Deficit Assessment and the Section 26 judgments, as well as the 2011 Deficit Assessment cannot be adequately corrected on appeal or by other ordinary proceedings at law or in equity. Indeed, despite the fact that the petitioners/plaintiffs have been given no opportunity to be heard on the deficit assessments underlying them, the Section 26 judgments are non-appealable and thus, the petitioners/plaintiffs can and will have no remedy against their issuance. Similar arguments are made concerning the July 29, 2011 assessments totaling $142,530,734.

2. <u>Petitioners/Plaintiffs' Contentions that TRIWCT Did Not Meet Statutory Requisites to Qualify as a GSIT</u>

Petitioners/plaintiffs contend TRIWCT was never lawfully established as a GSIT. They argue that the Board's contention to the contrary is self-serving, conclusory, inconsistent with its own position and allegations in other litigation, and entirely at odds with a report by BST – <u>the entity hired by the Board to audit the Trust</u> (the "BST Report"). They argue that this utter failure to comply with statutory obligations, by itself, lend the appropriate factual support for petitioners/plaintiffs' claims sounding in prohibition and estoppel.

The Board maintains that TRIWCT was "validly formed" and "not, as petitioners/plaintiffs allege, 'created solely by CRM'" (Woods Aff. ¶¶ 85, 101). BST in their report requested by the Board repeatedly questions the legitimacy of the formation of the "group" and devotes a substantial portion of its report to the fatal problems plaguing the "group's" formation (Woods Aff., Ex. XX [BST Report] at 14-25).

At the time TRIWCT was formed, New York law outlined a procedure whereby groups of employers within a related industry who determined that group insurance was

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feasible were authorized to develop Trust agreements setting forth the terms governing the operation of the Trust, appoint a board of Trustees, and hire a group administrator to manage claims and the payment of awards. The BST Report states that in forming TRIWCT (and apparently other CRM managed groups), CRM complied with nearly none of these mandatory statutory procedures. Instead, CRM ran roughshod over the statutory mandates and created the TRIWCT entity that petitioners/plaintiffs contend was anything but a GSIT. BST reports:

- "TRIWCT was not formed by a group of group of employers; rather the Trust was essentially formed by the Trust administrator for the sole purpose of generating revenues for the Trust administrator's owners" (Woods Aff., Ex. XX [BST Report] at 14).

- "[I]n the case of TRIWCT and other Trusts managed by CRM, it appears the Trusts were created by CRM, without any input from the groups of employers. . . . Instead, CRM solicited members to join the Trust after they convinced an initial Trustee to sign the Trust documents CRM prepared" (*id.*¸ at 21-22).

- "It is clear from a review of the TRIWCT Trust and Service Agreements, and other TRIWCT-related documents that the genesis of TRIWCT began with CRM" (*id.* at 22).

- "CRM's virtual, all-encompassing control over the formation of TRIWCT and its subsequent operation raises the question as to whether TRIWCT was truly independent or merely an extension of CRM"

(*id.* at 24).

BST reported that Emil Panichi, the sole "purported initial Trustee" (BST's words) "denies ever being a Trustee, let alone a member of TRIWCT" (*id.* at 23-24). The BST Report at pages at 14 through 25, details the tale surrounding TRIWCT's formation,

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through the BST retrospective analysis. The Board contends that - at the time - there was no visible evidence of such impropriety.[11]

Many of the salient facts became clear. Mr. Emil Panichi never signed (or at least denies signing) the purported foundation documents; never agreed to be a Trustee; never participated in the purported Trust; and never authorized CRM to submit applications. The entity in the purported Trust Agreement identified as the sole founding member of TRIWCT – "Emil Panichi, DBA Royal Carting Service Company", did not exist as of December 27, 2000 (Woods Aff., Ex. XX [BST Report] at 15).

The BST report makes it clear that TRIWCT was fraudulently created:

> BST was not able to ascertain whether the signatures on the Trust and Service Agreements were Panichi's and/or why Panichi would have signed these documents when he apparently was never a member of TRIWCT, and maintained private coverage through his insurance carrier. However, the timing of the purported signatures (November 2000) is in direct conflict with the documentation provided by Panichi's attorney and his insurance broker – which suggests that Panichi did not even meet with CRM until one year later (December 2001). If this is true, then the authenticity of the documents submitted by CRM to the WCB related to the formation of TRIWCT may be in serious question, and consequently, the WCB may have made its decision to approve TRIWCT's formation on these questionable documents.
>
> (Woods Aff., Ex. XX [BST Report] at 24 [emphasis added]).

These facts raise serious questions concerning what the Board knew or should have had obvious reason to know, of TRIWCT's illegal formation. The BST Report, and accompanying exhibits demonstrate the real possibility that the Board knew, or that, with

[11] The Board further takes the position that even if there was visible evidence, that it doesn't matter because TRIWCT operated - as a Trust - for seven (7) years.

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even a minimal amount of due diligence, would have known the illegal and inadequate formation of TRIWCT. According to the BST Report,

> "CRM was also the Trust administrator for seven other group self-insured Trusts in New York, including at least four that have Trust agreements that are virtually identical to that of the TRIWCT Trust (with the exception of the Trust name and Trust formation dates)"
>
> (Woods Aff., Ex. XX [BST Report] at 21).

Apparently, four CRM Trusts, including TRIWCT, received Board approval in the two-week window between December 19, 2000 and January 1, 2001. This court finds these facts to be significant.

These facts present *prima facie* evidence that the Board was on notice that several, supposedly independent employer groups submitted nearly identical founding documents. A trier of fact should be given the opportunity to review whether these facts and this coincidence warranted investigation. The conclusion could be reach in complete derogation of its statutory duties, either the Board actively facilitated CRM's fraudulent creation of the Trusts, or, at a minimum, was grossly or recklessly negligent in its oversight of the formation process that culminated in large scale fraud perpetrated by CRM. Clearly, these facts, if proven, show the oversight by the Board was sloppy at best. These facts allow the argument that the Board turned a blind eye to the blatant deficiencies in the putative Trust's application form.

The Trust application form is promulgated by the Board pursuant to legislative mandate (*see* L. 1966, ch. 896, set forth in Ex. 2 to Gilberti Aff., dated October 3, 2011 [Proposed Amended Petition at Ex. A]). The application must include, among other

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things, "a certified list, in duplicate, of the names and addresses of all officers, directors, Trustees and general manager of the employer group, together with evidence of the authority of the individual executing the application" (Woods Aff., Ex. H [Application for Group Self-Insurance, GSI-1]).

Here, the application form is incomplete and woefully inaccurate. By way of example only, the form is signed by Martin D. Rakoff, the Chief Executive Officer of CRM – who apparently had no authority to sign the form application on behalf of TRIWCT because he was never CEO of the Trust. The application lacks the necessary certified list of officers, directors, Trustees and general manager as well as any evidence of Rakoff's authority to act as Chief Executive Officer of the Trust.[12] In December of 2000 the Trust had no Chief Executive Officer for the simple reason that it had no members. This was apparent and a trier of fact could find it should have been apparent to the Board. The Board argues that it had no reason to suspect CRM's integrity as an organization in late 2000. Petitioners/plaintiffs argue that at the very time the Board was approving TRIWCT as a GSIT, it was investigating and threatening to sanction CRM for making materially false misrepresentations in its advertising materials.[13]

At the time the application form was submitted by CRM, CRM was not a "group" nor even a licensed third party administrator. It is not clear to this Court how the Board

[12] It also lacks any evidence that Rakoff himself signed the form. The signature calls for a notary, and although there is a notary stamp of Rakoff's partner Daniel Hickey, Hickey did not sign the form. The application is therefore equally deficient in this aspect as well. Additionally, there was no indication, at least as found by BST, that there were any Trustees that could authorize the application submitted by Rakoff.

[13] The advertising and marketing materials deserve review by the finder of fact, as it may be shown that such materials contained claims effectively limiting the liability of the Trust members.

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could approve CRM as an administrator when they were not licensed as such. If that fact is proven to the be true, a trier of fact may well find the Board acted in clear excess of its statutory and regulatory authority.

The parties appear to agree that the regulations in effect in 2000 were set forth at 12 NYCRR Part 315. Section 315.6 of that part set forth application requirements for group self-insurers. A question of fact is presented whether the application documents failed to comply with Section 315.6 as it existed in December of 2000. Section 315.6 required the submission of the following documents, none of which were supplied, according to the proof submitted to this Court: a payroll report by classification code for each participating employer for the five preceding annual fiscal periods; a report indicating compensation and medical losses incurred by each participating employer for a period up to 10 years prior to the date of application; and a certified, independently audited financial statement of the group's assets and liabilities.

The absence of these documents could be seen by a trier of fact as an example of the Board's failure to insure that it was approving a "group." The types of documents that the regulations and statutes require, at that time, evidence the logic of the statutory scheme within which GSIT's would be regulated by the Workers' Compensation Board. The purpose of these documents being required, it would seem, is to establish that a group of employers, each of which might not independently have the resources to qualify for "self-insurance," may jointly prove sufficient "financial soundness" to ensure the payment of compensation provided that certain requirements were satisfied (*see e.g.*, Woods Aff., Ex A [Memoranda of State AFL-CIO] ["Every necessary protection is in this bill to assure the financial soundness of the proposed self-insured group . . . [including] the authority of

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Workmens' Compensation Board Chairman to oversee the financial operations of the group]). At the time TRIWCT was initiated, the idea of GSIT's was relatively new, and the concept was indeed, novel. In fact, GSIT regulations postdated the creation of many GSIT's, and all of CRM's operated GSIT's appear to have their startups before the regulations were adopted. As part of the Board's regulatory duties, it would clearly appear they had the duty to assure that each GSIT was adequately funded with an appropriate structure to succeed. Each GSIT was, in reality, akin to a startup insurance company. As such, many - it could be assumed - would be subject to failure unless due diligence was done by the Board to assure the GSIT structure was in place to assure success. The required materials, information and disclosures thus provided a basis to the Board as to whether to allow a GSIT to function. Without that information, or in the absence of the Board exercising due diligence, the possibility of catastrophic failure became a predictable reality. A trier of fact could find that the Board's failure to comply with Section 315.6 undermined the legislative scheme, led to approval of an unqualified and perhaps even non-existent entity, and ultimately doomed TRIWCT to failure.

If these irregularities are proven to be true, it is clear that knowledge of such omissions or irregularities must be imputed to the Board. Other examples are presented by the petitioners/plaintiffs: (1) by cover letter dated November 12, 2000, CRM submitted the Form GSI-1 application containing a notary seal of Daniel Hickey, with an unsigned jurat, stating that the application was signed on November 13, 2000, a day after it was sent to the Board. (2) The Agreement and Undertaking of Employer Group as Self-Employer, notarized by Hickey, declares that Panichi signed it in Hopewell Junction, New York on October 31, 2000. On the same page, Hickey attests that Panichi signed the document

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before him on November 13, 2000, not October 31, 2000. These inconsistencies seem to be compounded by the fact that (3) the Trust and service agreements submitted to the Board on November 12, 2000, declare that they were made on December 27, 2000. If these things are proven at trial, it is clear that such inconsistencies were obvious and must have - absent clear dereliction of duty - caught the attention of the Board.

The Board argues that the "Joinder and Indemnification Agreements" evidence qualification of a "group" of employers as a member of such agreements were submitted early on in the application process. The Board submits Exhibit "N" to the Woods Affidavit in support of its contention that it "did receive joinder and indemnification agreements with applications . . . from six employers prior to January 8, 2001, when the Board granted TRIWCT self-insurance status." Exhibit N does contains six Joinder and Indemnification Agreements, four from the Panichi companies and two from Winters Brothers companies (*see* Woods Aff., Ex N). The Board relies upon the Panichi documentation as evidence of Trust validity. However, not a single Panichi company became a member of TRIWCT.

Petitioners/plaintiffs further contend that an examination of each of the purported Joinder and Indemnification Agreements reveals that they lack any evidence of having been received by the Board prior to January 8, 2001. There is no date-stamp, no acknowledgment by the Board, nor any other indication that these Agreements were actually in the Board's possession during that critical time. A review of the documents confirms the lack of date stamps or other such evidence.

This contrasts starkly with all of the other (i.e. non-Panichi and Winters Brothers entities) Joinder and Indemnification Agreements provided by the Board to this Court and set forth in Exhibit E to the Woods Affidavit. Exhibit E purports to contain 29 such

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agreements signed by the petitioners/plaintiffs to this litigation upon becoming members of the Trust. Each of these agreements – except the two agreements belonging to the supposed founding Winters Brothers companies that are also set forth in Exhibit N[14] – display the date stamps showing when they were received by the Board. Petitioners/plaintiffs contend that an inference can be made other than that the alleged "founding" companies' joinder documents were not in the Board's possession until sometime after the Board approved the Trust. Only disclosure will clarify the true time line.

The Board further argues that there is no substance to petitioners/plaintiffs' assertions that the Trust was "fictional" and that it was never validly formed. (Woods Aff. ¶ 101). However, the petitioners/plaintiffs contend that this is at odds with the public position the Board has taken in related litigation involving CRM.

The Board, as successor to the numerous failed CRM "Trusts," has both instituted separate actions against CRM and its affiliates, and defended against CRM and its affiliates in a bankruptcy proceeding filed in the United States District Court for the Southern District of New York. The Board has attached for the Court's review a Verified Complaint filed on December 3, 2009 in Supreme Court, Albany County against CRM, its affiliated companies and principals (*see* Woods Aff., Ex WW).

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[14] Contrary to the Board's contentions, it is contended through affidavits submitted that neither Winters Brothers Recycling Corp. nor Winters Brothers Transfer Station Corp. was a founding member of the Trust. As set forth more fully in the Affidavit of Joseph Winters, dated January 3, 2012 and filed herewith, while the Winters Brothers companies did at some point secure workers' compensation insurance through what they believed was a validly-formed provider of such insurance, Joseph Winters, president and CEO of those companies, never met with Panichi or any other employer to form a Trust; never intended to form a group self-insured Trust; never agreed to act as Trustee; never attended a board meeting; and never knew until the Trust was dissolved that anyone ever thought he was a Trustee.

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The allegations of the Amended Verified Complaint repeat verbatim those contained in the original pleading. Among the allegations made by the Board, one allegation of fraud by CRM in the formation of TRIWCT and others. This, the petitioners/plaintiffs argue fully substantiates petitioners/plaintiff' claims that TRIWCT was invalidly formed. Indeed, the Board alleges:

- "Upon information and belief, upon signing the initial Trust documents, certain initial Trustees of the Trusts were neither aware they were forming a GSIT, nor that they were signing anything other than ordinary workers' compensation insurance paperwork." (Amended Verified Complaint ¶ 679).

- "Upon information and belief, potential Trust members were not made aware of the circumstances surrounding the formation of the Trusts (including that all documents were drafted at the behest of CRM and may not have been properly notarized). . . ." (Amended Verified Complaint ¶ 690).

- "The misrepresentations fraudulently induced the members to enter the Trusts and caused each of the Trusts to be damaged." (Amended Verified Complaint ¶ 697).

(*see* Gilberti Aff., Ex. 5 [Amended Verified Complaint] ¶¶ 679, 690 and 697).

The petitioners/plaintiffs argue that the Board should not be allowed to take a contrary position in this matter respecting the fraudulent formation of the Trust. They assert that the Board's self-serving argument reeks of hypocrisy, and should not be countenanced by this Court. This Court, however, finds that to be a question for the finder of fact.

If there was a fraud committed by CRM, it is clear that the Board did not uncover the fraud perpetrated by CRM in late 2000 when the Board approved TRIWCT. The petitioners/plaintiffs allege that the Board was on actual notice of the fraud no later than

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August 4, 2004, when there was still time to take action to mitigate the resultant harm to petitioners/plaintiffs.

The Board has submitted with its papers the draft "Executive Summary" of a Level II Review of TRIWCT undertaken "as of 12/31/02" (*see* Woods Aff., Ex T). Petitioners/plaintiffs allege that a slightly different (and more revealing) version of this draft document, containing the complete report dated August 4, 2004, is attached to the BST Report as Exhibit 35, but omitted from the submissions. Petitioners/plaintiffs allege that a true and correct copy of Exhibit 35 ("Draft Level II Review) is attached to the Gilberti Affirmation as Ex. 6.

On page 8 of the Draft Level II Review, attached to the Gilberti affidavit, the Board writes: "The Group Administrator indicated that one of the Trustees listed above was part of the committee to start up the Trust. However, that member never joined the Group and, therefore, never became a Trustee" (*see* Gilberti Aff., Ex.6 at 8). This statement must be viewed, they argue, in concert with what the Board purportedly approved in 2000: <u>a Trust with only one founding Trustee, i.e., Panichi</u>. The Group Administrator's statement that this founding Trustee never joined the group and never became a Trustee was directly at odds with other documentation before the Board and presents evidence for a finder of fact in support of the claim that the Trust was a fraudulent, illicit, and statutorily repugnant creation.[15]

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[15] Given the known facts, as urged by the petitioners/plaintiffs, the Board's approval of TRIWCT violated the governing statutory and regulatory process for approval of group self-insurers. Petitioners/plaintiffs urge that it is difficult not to suspect some dubious connection between the Board and CRM during the formation period of TRIWCT and the other CRM-managed Trusts. Discovery in this case will certainly endeavor to understand what actually happened, since the Board's papers clearly deny any such relationship or any other impropriety. The petitioners/plaintiffs tell the Court that it has been reported, however, that Robert Snashall, Chair of the Workers' Compensation Board during this time

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Indeed, the Board admits that it approved CRM's TRIWCT application notwithstanding that CRM was not licensed in December of 2000. It could be said that it naturally follows that CRM had no lawful authority to act as a group administrator for any group (*see* Woods Aff. ¶ 88). This Court sits with wonder to understand how an unlicensed entity could be considered qualified to administer a startup GSIT, particularly given the tenuous nature of the startup quasi insurance carrier being established. It could be argued that the Board should have been over cautions given the nature of newly conceived GSIT's, operating in their infancy.

Petitioners/plaintiffs contend that based on the factual evidence submitted that it is clearly shown that nearly every document required by statute and regulations necessary for submission for approval was either absent or flawed and that even a cursory examination of the submitted documents reveals that they were fraudulently procured or submitted. From the documents supplied to the Court, a *prima facie* case is made to the extent that the Board, at the time of approval, suspected CRM of making false in misleading statements, that CRM was not licensed and that there were a host of irregularities in the ongoing application papers that create a question of fact (or law) as to whether the Board exceeded its statutory authority in authorizing TRIWCT as a GSIT, warranting a writ of prohibition.

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period, left the Board in 2003 and soon thereafter went to work for CRM. As the Times Union reports, "Snashall joined CRM after completing his term as chairman of the compensation board and at one point sought to represent the troubled administrator in front of the board. He stepped down after ethical questions were raised" (*see,* http://www.timesunion.com/business/article/Workers-comp-crisis-may-be-costly-625178.php#ixzz1iEQmi7AO). A copy of the Times Union Article is attached to the Gilberti Affirmation as Ex. 3. This Court at this time draws no inference of any kind from this allegation, as it is unimportant to the Court's role in determining whether a stay should be issued.

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3. Petitioners/Plaintiffs Argument that the Trust Documents are Void *Ab Initio* and Unenforceable

Petitioners/plaintiffs seek to persuade the court that the Trust documents that the Board relies upon and seeks to enforce as the basis for the disputed deficit assessments are void and unenforceable for myriad reasons. Chief amongst these the posit is that the instruments were procured through fraud – a fact that they say the Board readily admits, and argues in public papers filed in their action against CRM. They assert that it naturally follows that if the proof shows they were procured through fraud "in the factum," the documents are void *ab initio* as a matter of law, and the Trust is void as an entity.

The well-settled policy of New York courts is to treat agreements that were procured through fraud harshly (*see M v G*, 451 NYS2d 607, 612 [Fam Ct, New York County 1982] ["New York law has long been in the vanguard of jurisdictions that have adopted an expansive concept of actionable fraud."]; *M v Commissioner of Soc Servs*, 425 NYS2d 199, 205 [Fam Ct, New York County 1980] [noting that "New York courts are vigilant in their scrutiny of fraud not only to protect the interests of the individual aggrieved but also to vindicate the law's integrity by eschewing even the slightest semblance of judicial imprimatur for a transaction tainted by deception."]).

In *Angerosa v. White,* the Fourth Department has held that:

> "fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity" (*Angerosa v White Co*, 248 AD 425, 431 [4th Dept 1936], *aff'd without opinion* 275 NY 525 [1937]).

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More recently, other courts have endorsed this position. (*see e.g.*, *Orix Credit Alliance, Inc v Paul,* 1993 US Dist LEXIS 3278 at *12-*13 [SDNY March 16, 1993] [quoting *Angerosa*, 248 AD at 431]; *Hadden v Consol. Edison Co.*, 45 NY2d 466, 470 [1978] [holding that "any relinquishment of the option to dismiss induced by such deceit and device as to constitute fraud would be ineffective and not binding, as 'fraud vitiates everything which it touches,'" [quoting *Angerosa*, 248 AD 425, 431]). Thus, "[a] contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference whether the fraud goes to the factum, or whether it is preliminary to the execution of the agreement itself" (*Sabo v Delman*, 3 NY2d 155, 162 [1957], quoting *Angerosa*, 248 AD at 431).

Agreements procured through fraud in the factum are void *ab initio* (*see e.g.*, *DeSola Group v Coors Brewing Co*, 199 AD2d 141, 141-142 [1st Dept 1993] [holding that a contract was unenforceable as a result of fraud in the factum because "defendant represented that the sole purpose of the Agreement was to provide a billing number for accounting purposes so that plaintiff could be paid."]; *Telford v Metropolitan Life Ins Co*, 223 AD 175, 177 [3d Dept 1928], *aff'd without opinion,* 250 NY 528 [1928] ["When the deception induced by misrepresentation relates to the nature of the contract which another is thereby induced to execute and produces such essential error that the persons so tricked and deceived may be said never to have intended to make any contract whatsoever of the nature alleged, the so-called contract is deemed to have been wholly void *ab initio*."]).

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Petitioners/plaintiffs allege that pursuant to well-settled law, the facts of this matter clearly lend themselves to a finding of fraud in the factum, or as stated in *Mix v. Neff*:

> Fraud in the factum generally connotes an attack upon the very existence of a contract from its beginning, in effect alleging that there was no legal contract and that the instrument never had a valid inception. The attack is upon certain facts which occurred at the time of the alleged execution of the agreement, upon which facts the validity of the agreement depends. *For example, the claim could be that the signatory signed an instrument different from that which he understood it to be. In such case, the instrument would be void ab initio.*

(*Mix v Neff*, 99 AD2d 180, 182-183 [3d Dept 1984] [emphasis added]).

The Board claims in its lawsuit against CRM that CRM employees falsely represented to the purported initial Trustees that they were simply signing "ordinary workers' compensation paper work" (*see* Gilberti Aff., Ex. 5 [Amended Verified Complaint], ¶ 679). In the Amended Verified Complaint filed against CRM in conjunction with its bankruptcy, the Board alleges that the Trust was a fraud (*see id.* ¶¶ 654-673). The Board states – amongst other things – that:

- CRM and its principals "made certain representations of fact, with the knowledge that such representations were false, and/or with the intent to induce the Trusts, their members, and the WCB into continuing to permit CRM to service the Trusts" (*id.* ¶ 655);
- "The Trusts, their members, and the WCB relied on the defendants' representations in electing to continue using CRM's services for the Trusts. Such reliance resulted in the insolvency and ultimate dissolution of the Trusts, as well as the WCB's assumption of each of the Trust's liabilities, to its detriment" (*id.* ¶ 656); and
- "Upon information and belief, upon signing the initial Trust documents, certain initial Trustees of the Trusts were neither aware they were forming a GSIT, nor that they were signing anything other than ordinary workers' compensation insurance paperwork" (*id.* ¶ 679).

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The Board's thus seeks to prove in that action that: "CRM and its affiliates...perpetrated a fraud upon the Trusts" (*id.* ¶ 657). Thus, petitioners/plaintiffs argue that procured by fraud, the Trust documents are fatally flawed, tendering them "nothing more than [] scrap[s] of paper" that are unenforceable as a matter of law (*Angerosa*, 248 AD at 431).

The Board argues that petitioners/plaintiffs should not be permitted to retain the benefits of the purported Trust agreements – i.e., that they procured workers' compensation coverage – while repudiating parts that "disadvantage" them (*see* Opp. Memo. at 38). It is, however, argued that it is only because of this fraud that the petitioners/plaintiffs are the subject of the Board's attempt to have them collectively pay $142,538,734. Petitioners/plaintiffs do not claim that the Trust documents were procured through fraud in the inducement, which would render them *voidable*. Petitioners/plaintiffs claim that the agreements were procured by fraud in the factum and, thus, are entirely void *ab initio* as a matter of law (*see Mix*, 99 AD2d at 182-183; *see supra*, Point III).

"[F]raud in the inducement is usually based on facts ... which tend to demonstrate that an agreement, *valid on its face and properly executed*, is to be limited or avoided" (*Mix*, 99 AD2d at 183). Petitioners/plaintiffs argue that from the limited information available to them, they have made a *prima facie* case that the Trust documents here were <u>not validly executed, nor valid on their face</u>. If they success at trial on this point, the Board's argument fails.

Petitioners/plaintiffs contend they received no special benefit for their membership in TRIWCT. They allege that each Petitioner paid contributions to the putative Trust each year that very closely parallel the premium each Petitioner now pays

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to secure insurance from other sources (*see* Tripi Aff. ¶¶18-20; McLaughlin Aff. ¶¶ 20-22; Mix Aff. ¶¶ 20-22; Chiodo Aff. ¶¶10-12; White Aff. ¶¶ 24-26; Yates Aff. ¶¶ 11-13). While some of what they say may be shown to be true, the Board takes the position otherwise, citing market rates, but not specifically identifying any particular rates for the Court to review. Petitioners/plaintiffs point to the case of Carmen M. Pariso, Inc., arguing that the current premiums are substantially *less than* the contribution made to the Trust in its final year of existence, 2007 – despite the passage of time and inflation[16] (*see* McLaughlin Aff. ¶ 21). Again, specific proof of market conditions is lacking.

Petitioners/plaintiffs also argue that the Board's argument that if the putative Trust was void, the members would be subject to civil and criminal penalties must fail on the grounds of estoppel. The members relied, in good faith, on the representations of CRM and the Board that they had secured workers' compensation coverage during their periods of membership. Immediately after they left the Trust, petitioners/plaintiffs secured workers' compensation coverage, they contend they are in compliance with Section 50 of the WCL (*see* Tripi Aff. ¶ 18; McLaughlin Aff. ¶ 20; Mix Aff. ¶ 20; White Aff. ¶ 24; Yates Aff. at ¶ 11; Chiodo Aff. at ¶10). Thus, they argue that during their membership, petitioners/plaintiffs were under the entirely reasonable assumption – induced by the misrepresentations and fraud of CRM and the Board – that they had workers' compensation coverage, and in fact, CRM acted as if they did.

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[16] For the year 2009-2010, Carmen M. Pariso, Inc. paid $142,182.00 to obtain workers' compensation coverage through the State Insurance Fund (*see* McLaughlin Aff. ¶ 21). In the Trust's last year of existence (2007), their company paid $183,923.00 to obtain such coverage (*id.).* Petitioners/plaintiffs point to this as evidence they received no special benefit. This fact is unclear to this Court, as neither party has put before this Court evidence of market conditions as they existed from 2001 to the end of 2007. What is clear is that many of the petitioners/plaintiffs are being assessed amounts that may be said to expand the "premium" liabilities for the subject years of TRIWCT by as much as tenfold.

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4. <u>Petitioners/plaintiffs' claim that the Board's Willful Ignorance and Reckless Failure to Oversee the Trust Affirmatively Facilitated the Fraud Perpetrated Upon Petitioners/Plaintiffs</u>

Petitioners/plaintiffs allege that the Board's malfeasance and reckless discharge of its statutory duties did not stop with its unlawful approval of TRIWCT as a group self-insurer. They argue that in the face of overwhelming evidence to the contrary, the Board denies this and that the Board exercised its duties professionally and competently. Petitioners/plaintiffs argue that the Board presents only conclusory statements as an attempt to cover-up its illegal, reckless and gross negligent behavior. (*see* Woods Aff. ¶¶ 113-172). They further argue that – i.e. the <u>facts</u> – demonstrate that the Board communicated to CRM implicit and explicit assurances of impunity in its mismanagement of TRIWCT.

Effective January 31, 2001, the Board completed the promulgation of regulations, which appear at 12 NYCRR Part 317, entitled "Group Self Insurance." The regulations established application procedures, qualifications and responsibilities for group self insurers. The WCB Chair is authorized "to revoke his consent furnished [to operate as group self-insurer] at any time for good cause shown" (WCL § 50[3-a][2][f]; originally enacted as L. 1966 Ch. 895). Indeed, legislatively and as a matter of regulatory policy, the Chair has the power, and resultant obligation, to revoke a GSIT when appropriate and necessary. The Board also has the power and authority - indeed the duty - to regulate the entities providing compensation coverage. The purpose of these powers is clear - to be sure that the Workers' Compensation system operates efficiently so as to provide the appropriate benefits to injured workers.

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12 NYCRR § 317.9 requires that group self-insurers maintain Trust assets within the Trust fund that exceed claims and all other liabilities. Any GSIT that fails to do so is deemed underfunded and required to "immediately provide the Board with an acceptable plan of action as may be appropriate to make up the deficiency in a time prescribed by the chair" (12 NYCRR § 317.6).

In June 2003, the Board hired PricewaterhouseCoopers LLP ("PWC") to analyze certain historical financial information and various financial, operating and other data for the year ending December 31, 2002 (the "PWC Report"). The Board omitted the PWC Report from the papers it submitted to this Court, but petitioners/plaintiffs have provided this Court with a copy of that Report (originally attached to the BST Report as Exhibit 33) as Exhibit 7 to the Gilberti Affirmation.

The PWC Report, if proven to be accurate, creates issues of fact that are at odds with the Board's assertion that TRIWCT had no funding issues and that the Board had no knowledge of these issues in its early years of operation.

PWC notes that at the end of 2002, the Trust's second full year of operation, the Trust already had a deficit of $132,659, or a 95% relationship of assets to liabilities. This figure represented a best case analysis, applicable only if needed claim reserves were discounted to reflect investment income (*see* Gilberti Aff. Ex. 7 at 15). When PWC examined the particulars, however, this best case analysis was questionable, as PWC concluded that: "the Trust does not have any investments at December 31, 2002, and as a result has not recorded any investment income. If the reserves were not discounted, an additional liability of $575,033 would be required" (*id.* at 15). Thus, the Trust's actual (non-hypothetical) funding status was a very troubling 79%. Thus, contrary to the Board's

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assertions otherwise, from these facts, a question of fact is developed that may draw the inference that TRIWCT was experiencing a serious funding deficit by late 2002, and the Board was aware of the circumstances underlying that deficit in 2003.[17]

The Board disputes Petitioners/plaintiffs' allegations that the Board was on notice of actuarial problems in the Trust's accounting practices for the year ending December 31, 2002; specifically, that SGRisk's reserve estimates were below PWC's estimate (Woods Aff. ¶¶ 128-136). Petitioners/plaintiffs refer to the "Level II Report" issued by the Board for the year ending December 31, 2002, the Board itself writes:

> The reserves held by the Trust ($2.30 million) are $93,775 lower than the low estimate calculated by the Consultant. At this time, an adjustment in the amount of $93,775 to bring reserves up to the low estimate of the expected range calculated by the Consultant is considered necessary.

(Woods Aff., Ex T [Level II Report for 12/31/2002] at 12).

The Board also denies petitioners/plaintiffs' assertion that the Board knew as of August 2004 that SGR was "deviat[ing] from industry benchmarks without evidence to support the deviation, resulting in understated claim-related liabilities and expenses" (Woods Aff. ¶¶ 136-137). In disputing this allegation the Board relies on the statement in SGRisk's own report that the actuarial reserve estimates "were computed in accordance with generally accepted actuarial loss reserving standards and principals" (*id.* ¶ 136.) The petitioners/plaintiffs allege that the Board knew that SGRisk's practices were unacceptable.

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[17] This analysis forms the basis of the allegations set forth in paragraph 86 of the Proposed Amended Petition that, as of August 4, 2004 (the date of the draft Level II Review set forth in Respondent's Exhibit T), the Board knew or should have know that TRIWCT was only 78% funded. The actual percentage of under-funding alleged by the petitioners/plaintiffs is 79.9%. These facts, together with the assumptions in the Level II Report and the PWC Report pose enough factual information to set forth a *prima facie* case on the issue. These facts alone must have - or should have - raised an inquiry from the Board that should have analyzed what the operating methodologies of CRM (on behalf of TRIWCT) were, including assessments of adequacy of reserves, actuarial assumptions, GSIT operations, etc. Apparently they did not.

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[* 88]

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The allegation in the Petition, according to the petitioners/plaintiffs, was based upon what PWC found in its review and communicated to the Board in 2004, a finding repeated by BST in its report as follows:

> March 4, 2004/August 4, 2004 - PricewaterhouseCoopers issues a report to the WCB ... conclud[ing] that the loss development factors utilized by SGRisk deviated from industry benchmarks and that there was no "strong evidence" to support the deviation.
>
> (Woods Aff., Ex XX [BST Report] at 10, 51; *see also* Woods Aff., Ex S ["PWC Reports on Rates and Reserves as of December 31, 2002"] at 3).

The Board contends that it had no reason to know that SGRisk "was employing an actuarial methodology that understated claim-related liabilities and expenses" (*see* Woods Aff. ¶ 125). The Board's consultants, it is alleged – PWC and BST – provided to them.[18]

Petitioners/plaintiffs argue that when presented with this proof of the Trust's precarious financial condition, the Board did nothing. They argue that despite the regulatory deficit as of December 31, 2002 and 2003 coupled with the Board's concomitant awareness that SGRisk was employing inappropriate actuarial criteria, the Board's letters to CRM and the TRIWCT members failed to present any of these documented concerns.

The factual information submitted to the Court shows that on November 24, 2004, the Board wrote CRM and the TRIWCT members concerning the years ending December 31, 2002 and December 31, 2003, and stated:

[18] Petitioners/plaintiffs, it is worth noting that the PWC reports were not the first time the Board had reason to question SGRisk's competence or intentions. According to BST, SGRisk was called in to testify before the Board at a Section 111 hearing in January of 2003 with respect to its actuarial practices, which practices then drew criticism from the Board (*see* Woods Aff., Ex XX [BST Report] at 54 [n 97] and 57 [SGRisk "applied a different methodology after being criticized during the Section 111 hearings."]).

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> As you can see, based upon all the information available for this Group and the funding requirements set forth in NYCRR Part 317, which states that group self-insurers are required to establish and maintain Trust assets in an amount which exceeds Trust liabilities, the WCB has determined that there are no regulatory funding issues as of the years ended December 31, 2002 and December 31, 2003.
>
> (Woods Aff., Ex V).[19]

Petitioners/plaintiffs also allege that the documentary evidence shows that the Board became aware that CRM was improperly hiring its own affiliated companies to perform services, including excess and reinsurance coverage and medical claims administration (*see* Proposed Amended Petition ¶¶ 89-92). The Board does not deny this, but argues that it took effective remedial action:

> [P]etitioners' assertion that the Board took no remedial action upon learning that CRM had hired its affiliated companies to perform certain services for TRIWCT . . . is without merit. In fact, upon learning of these potential conflicts of interests, the Board immediately advised TRIWCT's Trustees that they should investigate this practice.
>
> (Woods Aff. ¶¶ 147-148).

Petitioners/plaintiffs argue that the documents relied upon by the Board belie this assertion. The Board points to its Exhibit "Y" as evidence of their remedial action taken. Exhibit "Y" is a letter from Trisha M. Gannon, the Board's supervising accountant, dated August 23, 2006, to CRM, copied to the Trustees, advising that the Trust had no regulatory funding issues. This letter, dated August 23, 2005, provides in its entirety:

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[19] A review of the Level II Report and the PWC report from August of 2004 show that the Board adopted a policy that if the asset to liability ratio was more than 90% then the Trust was adequately funded. That (presumably) was the case during the first two years of operation of TRIWCT. That raises a question of fact as to whether the Board exceeded the guidelines and regulations that itself established - that each GSIT must be 100% funded or appropriate remedial action must be taken. Additionally, it further shows that the Board simply adopted the assumptions of the actuarial assessment done by the CRM consultant. It is the Board that had the particular knowledge and competency (presumably) to fully evaluate the early assumptions of TRIWCT. It appears they did not.

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> The Workers' Compensation Board has reviewed the annual reports submitted for [the Trust] for the fiscal year ending December 31, 2004. Based upon our review, and the funding requirements set forth in Part 317 NYCRR, a final determination has been made regarding the funding status of this Trust.
>
> **The Workers' Compensation Board determines that Transportation Industry WC Trust has no regulatory funding issues at this time.**
>
> Thank you for your cooperation during our review. If you have any question, please contact me at (518) 402-6306 or by email at trisha.gannon@wcb.state.ny.us.

(Woods Aff., Ex Y [emphasis in original]).

Exhibit "Y," as compiled by the Board for these proceedings, contains a Level I Review also dated August 23, 2005. That report does make note of the inherent conflict of interest present in CRM's procurement of excess insurance through an affiliated company and suggested that the Trustees investigate this issue (*see* Woods Aff., Ex Y, Level I Report at 7). But, there is no evidence in the letter or otherwise that this Level I Review was enclosed with the letter or otherwise sent to the Trustees. Unlike customary practice (and as evidenced by other Board correspondence in this record [*see e.g.* Woods Aff., Exs V, FF, and UU]), the August 23rd letter does not indicate that it contained any enclosures, nor does it refer to the Level I Report.

But, petitioners/plaintiffs argue even if the Level I Review document had been sent to the Trustees, it hardly qualifies as "remedial action" given that the Board did nothing to follow up on its suggestion that the "Trustees investigate." Further, they posit that the Board concedes that as of December 31, 2005, TRIWCT was officially underfunded, with a Trust equity ratio of 84.19%, substantially below the 90% benchmark used as its threshold for intervention (*see* Woods Aff. ¶¶ 148-153 ["As petitioners correctly note ... the Board

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determined that TRIWCT was underfunded for the year ending December 31, 2005."]). If in fact the 90% threshold was adopted by the Board, this Court sees no evidence before it why the Board, even if given deference to its own regulations, would adopt such an arbitrary threshold, given the critical role that full funding places in the Workers' Compensation scheme. Thus, the use of the 90% funding threshold is perplexing and problematic by itself because the Board's own regulations require 100% funding, and deem any Trust that is not 100% funded to be "underfunded" within the meaning of the regulations. It must be said that TRIWCT members relying on the competency of the Board in fulfilling it's functions described by it's own regulations, must have assumed the Board exercised due diligence and followed it's own regulations. These facts, if proven before a trier of fact, create a question of fact that calls in question the Board's lack of action at least as early as August 4, 2004 and continuing. The Board's determination to wait until there was some more substantial deficits prior to intervention in August of 2005, in contravention of its governing regulations, possible provided an assurance of impunity to CRM, and it might be said to have substantially contributed to the ultimate insolvency of the Trust.

With regard to the Board's letters of November 2004 and August 2005, the proof seems to support the fact that the Board at that time knew that TRIWCT was underfunded and chose, for whatever reason, to do nothing. It can be argued, as petitioners/plaintiffs urge that the Board's communication to CRM that it "had determined that there are no regulatory funding issues" constituted a clear and unmistakable message of condonation of CRM's practices and is cogent evidence of the Board's affirmative complicity in CRM's mismanagement. The fact that by that time the former Chair of the Board was employed by

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CRM and that fact alone raises more questions as to the cause and effect of these communications that can only be explored further in discovery (*see*, *supra*, n 10).

Petitioners/plaintiffs assert further that the Board's claim that it undertook remedial action is also simply unsubstantiated by the record. The Board writes:

> On September 29, 2006, pursuant 12 NYCRR 317.9(b)(1), the Board called for a meeting with the Trustees to discuss TRIWCT's financial condition and determine the appropriate action to restore the Trust's financial stability . . . . By letter dated November 16, 2006 (a copy of which is submitted herewith as Exhibit "DD"), the Board summarized what had been discussed and agreed to [at the meeting].

(Woods Aff., ¶¶ 155-157).

An examination of Exhibit "DD" shows that what was agreed to was the preparation and execution of a "Consent Agreement":

> Next Steps: A Consent Agreement will be developed, which will include the 2007 projection" (*see,* Woods Aff., Ex DD [emphasis in original]).

(Woods Aff. Ex DD).

The record before this Court is absolutely devoid of any such Consent Agreement. The Board did not submit any such agreement – signed or unsigned – in connection with the pending motion, nor did BST mention a Consent Agreement in its Report, nor did it attach an executed copy as an exhibit. If these facts are proven at trial, it can easily be argued that the Board took no determinative action to rectify the significant and prolonged underfunding issues. Thus, *prima facie* evidence such as this shows a likelihood of success on petitioners/plaintiffs' claims.

Given the Board's inaction, and apparent ignorance of the information it was provided, petitioners/plaintiffs allege that the Trust's financial performance predictably worsened with the passage of time. In the face of this glaring and obvious underfunding

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and likelihood of financial demise, the Board's consistent reaction was to do nothing. By the end of 2006, the Trust had a funding ratio of 74%, according to the documents submitted. Yet again, the record fails to disclose any remedial action by the Board. The Board asserts that it notified CRM and the TRIWCT Trustees in August of 2007 that a meeting would be required to discuss the "long-term viability of TRIWCT" (*see,* Woods Aff. ¶ 170). There is nothing before this Court that provides evidence that the meeting occurred or that any other remedial action was undertaken (*see* Woods Aff. Ex. LL).[20]

The Board did schedule a meeting for January 25, 2008 (*see* Woods Aff. ¶ 172), almost six (6) months after the August 9, 2007 letter. It is argued that this stalling undoubtedly signaled to CRM that the Board was not seriously undertaking to interfere with its malfeasance in the administration of the Trust. By the time the scheduled meeting date arrived, the Trust members exited, *en masse*, and none of TRIWCT's members renewed their coverage through the Trust for 2008.

Petitioners/plaintiffs argue that the Board allowed TRIWCT to languish under CRM's leadership for another eight months, thereby compounding the harm to TRIWCT's members caused by CRM's mismanagement. The Board argues, in response, that first it had no forewarning of the "abrupt termination" of TRIWCT, and secondly, that the "process by which the Board retains a TPA to administer the claims and the actual transfer of claims files are both time-consuming" (Woods Aff. ¶ 180).

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[20] The letter from the Board, dated August 9, 2007, was apparently sent to Louis Vigliotti and TRIWCT Trustees, and indeed declares that the Trust to be underfunded. The letter paints to the regulation NYCRR 317, which provides that the Trust assets must exceed Trust liabilities. Under §317.9, the letter discusses a meeting, and the recipients were told that someone from the self-insurance office would contact them. Neither of the parties submit any proof to this Court that such a meeting was planned or that contact was made to set up the meeting.

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The factual evidence submitted to this Court shows that TRIWCT was not the first of the CRM-managed Trusts to fail. In fact, it appears that it was sixth in a line of seven (*see* Gilberti Aff., Ex 2 [Papa Declaration] ¶ 51. It was not until months later – July 3, 2008 – that the Board advised CRM and the TRIWCT Trustees that it would assume administration of TRIWCT (and transfer files from CRM to SAFE) (Woods Aff. ¶¶ 178-179).

The Board argues that it had no reason to revoke TRIWCT's status as a group self-insurer at that time any sooner. Mary Beth Woods writes:

> Despite petitioners' assertion that the Board unreasonably delayed in revoking TRIWCT's self-insurance status . . . , the Board had no reason to terminate the Trust at any time prior to CRM's notification to the Board that none of TRIWCT's members had renewed their coverage.
>
> (Woods Aff. ¶ 54, n 23).

Petitioners/plaintiffs assert that if this statement is truly reflective of the Board's perception, it is no surprise that so many Trusts failed. They say that it is also glaring evidence of the message received by CRM during its administration of the Trust – that it could with impunity imperil petitioners/plaintiffs' funds and that the Board would do nothing.

If these facts, as above stated, are proven to be true, a trier of fact could easily find that the injurious residue of the Board's actions and inactions is far-reaching and comprehensive. Contrary to the Board's conclusory contention that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (Opp. Memo. at 40), it has long been the law in New York that courts can, and will, apply the doctrine of equitable estoppel against governmental entities "where [their] misleading nonfeasance would otherwise result in a manifest injustice ...."

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(*Agress v Clarkstown Cent. Sch.*, 69 AD3d 769, 771 [2d Dept 2010]; *see also Rudey v Landmarks Preservation Comm'n.*, 82 NY2d 832 [1993] ["While estoppel may not be invoked against a governmental agency to prevent it from discharging its statutory duties, the rule is not absolute where, such as here, matters of agency discretion are involved."]).

As broadly stated in *Brennan v New York City Housing Authority* (72 AD2d 410 [1st Dept 1980]):

> "Equitable estoppel is a vital doctrine now more actively invoked than in years past. Courts throughout this State have applied this doctrine under any number of circumstances ...."

Thus, while courts have invoked the doctrine of estoppel against a government agency only in unusual circumstances, estoppel is appropriate where a government agency recklessly or negligently fails in its duties:

> An exception to the general rule is 'where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice." This Court has invoked the doctrine of estoppel against governmental entities where its "misleading nonfeasance would otherwise result in a manifest injustice' [s]uch as where the plaintiff has been the victim of bureaucratic confusion and deficiencies.

(*Agress*, 69 AD3d 769, 771, *citing Bender v New York City Health & Hospitals Corp.*, 38 NY2d 662 [1976]). Petitioners/plaintiffs here argue that they are the victims of unlawful and reckless actions by the entity responsible for insuring a proper administration of the laws.

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This case may - if the facts are supported at trial - present precisely the type of unusual circumstance that *Agress* and *Bender* envision as appropriate for the invocation of estoppel. If proven as argued here, the Board's own pervasive reckless behavior and nonfeasance in the approval and oversight of the Trust – and the Board's attempts to thrust the disastrous consequences of that behavior onto petitioners/plaintiffs (who were, after all, good faith participants in a program they believed to be lawfully and competently formed and administered by the Board) – is the very definition of manifest injustice (*see Allen v Board of Educ.*, 168 AD2d 403, 404 [2d Dept 1990] ["An estoppel may be imposed in such cases when the public agency's misconduct has induced justifiable reliance by a party who then changed his position to his detriment."]).

If it is proven, as argued here, that at the hands of the Board, petitioners/plaintiffs were induced to join a fraudulently created and recklessly administered Trust, then it is the Board – not the victims – who should be responsible for the consequences it created by its reckless discretion and oversight. *(Angress, Ibid.; Bender, Ibid.; Allen, Id.).*

5. Plaintiffs/Plaintiffs Contentions Concerning the Boards Failure to Timely Levy the Deficit Assessments.

The third cause of action assumes, without admitting, the existence of a Trust and/or the applicability to petitioners/plaintiffs of those provisions of the WCL dealing with defaulted group self insurers. This cause of action is pled in the alternative. It asserts several independent bases for invalidating the Board's actions in levying, and seeking to enforce, the Deficit Assessments. Chief among these are: (1) that the Board issued the 2010 Deficit Assessment nearly two years after the expiration of the 120-day

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period mandated by WCL § 50(3-a)(7)(b) (*see* Proposed Amended Petition/Complaint ¶ 154); and (2) that the 2010 Deficit Assessment included amounts prohibited by Section 50(3-a)(7)(b). These are examined in turn below.

Section 50(3-a)(7)(b) provides, in pertinent part:

> The chair shall levy an assessment on the members of a defaulted group self-insurer within 120 days of such default or of the effective date of this chapter of the laws of 2008 which amended this subdivision, whichever is later, . . . for such an amount as he or she determines to be necessary to discharge all liabilities of the group self-insurer . . . . The chair may impose subsequent deficit assessments, or return funds to members, to adjust the moneys collected to reflect the time of participation, and percent of group self-insurer liabilities for the time.

(Workers' Compensation Law § 50(3-a)(7)(b) [emphasis added]).

The Board argues that it generally imposes a mandatory two-part scheme of assessment, by necessity: first the Board argues that it must impose an "interim assessment" within 120-days [*see* Woods Aff. at ¶ 232]); and secondly, at any undefined point in the future, the Board must levy an actual assessment for the entire liability of the group self-insurer after a "post-deficit reconstruction." The Board thus asserts that "the 120-day period [provided by] WCL § 50(3-a)(7)(b) is inapplicable to the post-deficit reconstruction member assessment that was issued in July 2010" (Opp. Memo. at 49).

Petitioners/plaintiffs assert that the Board's interpretation is not supported by the language of the statute itself, which does not speak of either "interim assessments" or "post-deficit reconstruction assessments." Instead, they argue that the statutory language imposes upon the Board a definitive time line for the levy of assessments against members of defaulted group self-insurers. In other words, it is argues that within 120 days after default (or, if it is later, the effective date of the statute), the Board "shall levy an assessment

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for such an amount as [the Board] determines to be necessary to discharge all the liabilities" of the group self-insurer.

It is further agrgued that the Board's statutory authority to adjust this sum is also carefully circumscribed by statute. The Board may "impose subsequent assessments or return funds" only to "adjust moneys collected to reflect time of participation and percent of group self-insurer liabilities for the time" (*id.).* It is important to note that a member's share of the deficit assessment – its so-called pro rata share – is determined according to "its time of participation" and its "percent of GSI liabilities" as determined by the percentage its contributions bore to the totality of contributions for the period of its membership.

This 120-day time limitation on the Board's actions accomplishes two salient objectives: first, it provides the Board with a ready source of funds to administer and pay claims; and secondly, it provides a measure of certainty to members of GSITs as to their exposure for the failed Trust's deficit so that financial planning is possible.

The fundamental question here is thus whether the statute authorizes the two-part scheme posited by the Board: the "interim" assessment issued within 120-days; and then the "final" assessment, issued at any point in the future. The answer to this question lies within the sole province of this Court as it involves one of "pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent" (*Kurcsics v Merchants Mut. Ins. Co.,* 49 NY2d 451, 459 [1980]). Deference to the agency interpretation is not required (*Angello v Labor Ready, Inc.*, 7 NY3d 579, 583 [2006], citing *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman,* 62 NY2d 539, 545 [1984]; *Kurcsics,* 49 NY2d 451, 459).

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Indeed, deference is accorded when statutory interpretation requires a "type of specialized knowledge" or expertise (*Matter of Belmonte v Snashall*, 2 NY3d 560, 565 [2004]), requiring an "evaluation of factual data and inferences to be drawn therefrom" (*see Kurcsics*, 49 NY2d 451, 459). When it is does not, courts are "'free to ascertain the proper interpretation from the statutory language and legislative intent'" (*Seittelman v Sabol*, 91 NY2d 618, 625 [1998], citing *Matter of Gruber,* 89 NY2d 225, 231-232; *Matter of Dental Socy. v Carey,* 61 NY2d 330, 335 ["Whether administrative action violates applicable statutes and regulations is a question with the traditional competence of the courts to decide"]).

It seems to this Court, without deciding the issue, that the Board's interpretation defies the plain meaning of the statute. Had the Legislature intended to provide for the two-step assessment process advanced by the Board, it could simply have so provided, but it did not. Instead, the Legislature required an assessment to be made "within 120 days" of an amount "sufficient to discharge all the liabilities of the group self insurer" (WCL § 50[3-a][7][b] [emphasis added]).

There is nothing provided for in the statute that allows for interim, preliminary or provisional assessment or levys. And there is nothing empowering a subsequent final or full assessment in the language of the statute. The statute allows, but does not require the Board to levy subsequent assessments or return funds to members to adjust the moneys collected to reflect "time of participation" or "percentage of group self-insurer liabilities." These specific contingencies clearly relate to an individual's pro rata share, adjusted to reflect a shorter or longer period of membership in the GSIT or a different ratio of individual contributions to the whole. It cannot be said that the language authorizes the

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issuance of a new assessment as to the overall liability of the GSIT. In other words, it does not authorize the Deficit Assessments at issue here.

This Court cannot ignore the plain meaning of the statute as written. It is well-settled that "new language cannot be imported into a statute to give it a meaning not otherwise found therein" (*Matter of Chemical Specialties Mfrs. Ass'n. v Jorling,* 85 NY2d 382, 394, [1995], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94 at 190; *see also, Matter of Raritan Corp. v Silva,* 91 NY2d 98, 107 [1998] ["Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of the statute."]).

The rule of statutory construction providing that words be given their ordinary and usual meaning is the governing standard (*see,* McKinney's Cons Law of NY, Book 1, Statutes § 94). It does not permit the phrase "in an amount . . . necessary to discharge all of the liabilities of the group self insurer" to be construed, as the Board has, as "a temporary amount based upon existing data subject to later revision at some unspecified point in time for the full amount of liabilities after a deficit reconstruction has taken place." It appears that the legislature reasonably contemplated that the reconstruction effort would commence immediately upon default and could be accomplished within the 120 days allotted by statute. The Court finds it is not necessary to reach this question, because "'no rule of construction gives the court discretion to declare the intent of the law <u>when the words are unequivocal</u>'" (*Matter of Raritan Corp.,* 91 NY2d 98, 107 [emphasis in original], citing *Bender v Jamaica Hospital,* 40 NY2d 560, 562).

Here, the words of the statute are clear and unequivocal. The Board's interpretation, vastly and indefinitely expanding its powers to levy multiple assessments, is unsupported.

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In levying an assessment in July, 2010 to discharge "all the liabilities" of TRIWCT, the Board clearly exceeded its statutory authority. On this ground petitioners/plaintiffs are likely to succeed on the merits.

6. The Board Has Exceeded Its Statutory and Regulatory Authority in Enforcing the 2010 Assessment Because It Includes Sections 15(8) and 151 Assessments That Are Contrary To Law.

The Board's effort to enforce deficit assessments that are now statutorily unlawful is plainly contrary to both legislative intent and common sense. The Legislature amended the Workers' Compensation Law on April 1, 2011 to eliminate the ability of the Board to issue assessments pursuant to Sections 15(8) and 151 of the WCL. Nonetheless, the 2010 Deficit Assessment that the Board currently seeks to enforce includes assessments issued pursuant to those two sections. The notion that the Board can continue to threaten members of TRIWCT with enforcement of the entire deficit amount knowing that the assessment includes components that the legislature has eliminated, is simply not a legally recognizable power of the Board..

An agency has only that power which is granted to it by the Legislature (*see Beer Garden, Inc v New York State Liquor Auth*, 79 NY2d 266, 276 [1992] ["It is of course a fundamental principle of administrative law that agencies are possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication."]). It follows from this basic principle that "an administrative officer has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature" (*New York State Health Facilities Ass'n v Axelrod*, 77 NY2d 340, 346 [1991], quoting *Campagna v Shaffer*, 73 NY2d 237, 242 [1989]; *see also Schenkman v Dole*, 148 AD2d 116, 121 [1st Dept 1989] ["[a]ny adjustments or alterations to

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the statute must come from the Legislature and the Board cannot seek to accomplish what it perceives to be a more tenable result by way of ignoring, or amending, the clear statutory mandate."]).

Here, on April 1, 2011, the Legislature amended the WCL to eliminate the Board's ability to issue assessments against discontinued GSITs under WCL §§ 15(8) and 151 (*see* L. 2011, ch. 57, pt. G, §§1, 7, 10). There can be no dispute regarding the intent of the Legislature to eliminate liability for such assessments. Moreover, the Sponsor's Memorandum plainly states that "the bill will cease assessments of discontinued GSITs under §§ 15(8) and 151," (*see* Sponsor's Memorandum, attached to Gilberti Aff. as Exhibit 11).

The Board admits that the statute removes from it the power to issue such assessments in its opposition memorandum of law:

> On April 1, 2011, the WCL was amended to eliminate WCL §§15(8) and 151 assessments for inactive self-insurers, effective January 1, 2011. L. 2011 Ch. 57 Pt. G §§1, 7, 10. The Board's forensic accountants are in the process of recalculating the deficit amount and each member's *pro rata* share thereof, without the estimated liability for future WCL §§151 and 15(8) assessments, for all of the insolvent GSITs for which member assessments were issued prior to April 1, 2011. It is anticipated that BST will complete its calculations for TRIWCT in or about March 2012. At that time, the Board will issue a revised assessment invoice to each TRIWCT member.

(Opp. Memo. at 49).

The Board seeks to enforce the deficit assessments, despite the uncontested fact that the amount includes the 'future liability' for assessments under Sections 15(8) and 151 that

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are no longer applicable or lawful. Thus, because the current assessments impose liability that the Legislature has expressly declared shall no longer be imposed, the assessments are in direct contravention of legislative intent.

The Board recognizes the difficulty of its position in admitting that it is "recalculating" the deficit assessments, while at the same time claiming to have the authority to enforce those assessments in the interim (*see* Opp. Memo. at 49; Woods Aff. ¶¶ 299-301). The Board contends that the assessments were lawful when made (*see* Opp. Memo. at 48). To endorse the line of reasoning underlying the Board's position would be to permit the Board, or any other administrative body, to contravene legislative intent and violate well-established principles of law, simply because in the past it was allegedly allowed to engage in the prohibited practice.

The Legislature unmistakably declared its intent to eliminate the Board's ability to assess the members of discontinued GSITs under WCL §§ 15(8) and 151. The Board is not just operating beyond the scope of the authority given to it by the Legislature, it is actively operating in defiance of the Legislature's command that it not impose such assessments on discontinued GSITs. This cannot be countenanced by this Court or any court. For this reason alone, the Board's actions of enforcement must be stayed.

7. Plaintiffs/Peitioners' Contention that the Board Exceeded Its Authority In Imposing Joint and Several Liability On Petitioners/Plaintiffs.

The Board asserts two bases for imposing joint and several liability on petitioners/plaintiffs by contract and according to statute. With regard to the former, the

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Board seeks to enforce the joinder and indemnification agreements signed by each of TRIWCT's members.

It is axiomatic that a "purported entity" that does not legally exist cannot enter into contracts (*see 183 Holding Corp. v 183 Lorraine St. Assocs.*, 251 AD2d 386, 386-387 [2d Dept 1998], quoting *Kiamesha Dev. Corp. Guild Props.*, 4 NY2d 378, 389 [1958]). From this principle, it follows that when an entity "was not in existence at the time the contract was executed...it lacks the capacity to seek enforcement of the contract" (*Bay Shore Family Partners, L.P. v Found. of Jewish Philanthropists*, 239 AD2d 373, 375 [2d Dep't 1997], citing *Winter v Beale, Lynch & Co.*, 198 AD2d 124 [1st Dept 1993]). Thus, where an entity has failed to comply with statutory requirements for its formation, it lacks the capacity to contract and it lacks the capacity to seek enforcement of its agreements (*Bayshore Family Partners, supra*, at 376-377 [holding that a business that failed to comply with the formal requirements for creating a partnership could not seek enforcement of an agreement it entered into before it gained legal existence]; *see also 183 Holding Corp.*, 251 AD2d at 386-387).

Here, the Joinder and Indemnification Agreements that the Board seeks to enforce purport to be between the various members of the putative Trust and the Trust itself as a "group self-insured Trust" (*see* Gilberti Aff. ¶ 56). It is contended that the Board failed to comply with a number of statutory requirements, as well as the Board's own regulations, in purporting to form the putative Trust. Challenges are also made because, as alleged, the Trust was also invalid because the founding documents were procured by fraud in the factum. The contention of the petitioners/plaintiffs is that the Trust was never legally created for the reasons previously discussed above. The petitioners/plaintiffs argue that

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the Trust did not have the capacity to contract and, therefore, the Board cannot on the Trust's behalf seek to enforce the agreements that it purportedly entered (*see 183 Holding Corp.*, 251 AD2d at 386-387; *Bay Shore Family Partners*, 239 AD2d at 375). Here, the Board seeks to enforce TRIWCT's agreements with the former members. However, petitioners/plaintiffs have shown a likelihood of success, if only relying on the Board's own commissioned reports, and statements made (i.e., admissions) in the lawsuits against CRM and other entities. This Court finds that petitioners/plaintiffs have a likelihood of success on the merits as to the fraudulent creation of TRIWCT. As such, there is an equal likelihood of success on the issue of contractual joint and several liability. A *prima facie* case has been made. To that extent, a stay should be ordered halting enforcement of the deficit assessments until these issues are legally determined.

As to its statutory authority, the Board argues that "[s]ince 1966, the clear and unambiguous language" of the WCL, and specifically §50(3-a), provides that all members of a GSIT are jointly and severally liable for the GSIT's workers' compensation obligations (Opp. Memo. at 27). The Board has not pointed this Court to any "clear and unambiguous language" supporting this contention because there was none. The Board cites "the legislative history and a 2008 clarifying amendment to the statute" in a convenient attempt to rescue its assertion (*id.*). A "clarifying amendment" would not be unnecessary if the language of the statute relied upon the Board was in fact "clear and unambiguous" since 1966. Furthermore, an examination of the authority, upon which the Board relies, fails to support that argument. Indeed, it suggests quite the opposite.

The 'clear and unambiguous language' to which the Board refers does not, at any point, contain any mention of joint and several liability. WCL §50(3-a)(2) provides only

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that "the group shall assume the liability of all the employers within the group and pay all compensation for which the said employers are liable under this chapter" (*see* WCL §50[3-a][2]). Thus, the group – as an entity – is liable for and must pay any compensation owed by a member employer. Indeed, this is the very purpose of forming a GSIT. In no way does that language support the contention that each individual member of a GSIT is jointly and severally liable for the obligations of the others.

The Board claims that its interpretation is entitled to deference. The well-established principle of statutory construction cautions that "language cannot be imported into a statute to give it a meaning not otherwise found therein" (*see Chemical Specialties Mfrs Ass'n v Jorling,* 85 NY2d 382, 394 [1995], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190). Put simply, it is well-settled that "a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact," (*id.,* quoting McKinney's Cons Laws of NY, Book 1, Statutes § 363, at 525; *see also Am. Transit Ins. Co. v Sartor*, 3 NY3d 71, 76 [2004] ["A court cannot amend a statute by adding words that are not there."]).

An examination of the legislative history of WCL §50(3-a)(2) does not confirm the interpretation sought by the Board. To wit, the Board claims that Senator Laverne opposed the 1965 Bill because it did not provide for joint and several liability amongst the members (*see* Opp. Memo. at 31). However, from the facts presented here, it appears that Senator Laverne himself introduced a Bill in 1966 that was identical to the version rejected in 1965 (*see* Gilberti Aff., Ex. 10, Senate Bills, Print 2721, Intro. 2639 [Feb. 14, 1966]; *compare* Senate Bills, Print 4361, Intro. 3943 [April 1, 1965]). It is difficult to imagine that Senator

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Laverne would introduce the 1966 Bill that did not provide for joint and several liability if, as the Board intimates, he believed it to be vital and necessary to the legislation.

This Court's review of the legislative history confirms the opposite – that WCL §50(3-a)(2) did not provide for joint and several liability (*see* Gilberti Aff., Ex. 12, Bill Jacket, L. 1966 ch. 895 at 25 [Memo. in Opposition of American Insurance Association, Mar. 31, 1966] ["Most important is the fact that nothing in the bill requires participating employers to assume a joint and several liability . . . It should be noted that the bill states the group shall assume liability and pay for such employers all compensation for which the employers are liable"]).

No reference to joint and several liability was included in WCL §50(3-a)(2) statute until 2008, when the statute was amended to provided that "[e]ach member shall be responsible, jointly and severally, for all liabilities of the group self-insurer provided for by this chapter occurring during its respective period of membership" (L. 2008 Ch. 139 § 1). The 2008 amendment to WCL §50(3-a)(2) enacted not only after the petitioners/plaintiffs purportedly joined TRIWCT, but it was also enacted after the Trust had been dissolved. The Board seeks to have this Court retroactively impose joint and several liability on the former members of TRIWCT. This Court cannot and will not do. To the extent that the Board relies on its self-made regulations as authority to implement joint and several liability is equally unavailing because to the extent that the pre-2008 statute did not authorize joint and several liability, the Board acted *ultra vires* in promulgating regulations to that effect.

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8. Petitioners/Plaintiffs' Contentions that they Have Demonstrated a Likelihood of Success on Their Constitutional Claims

(a) Procedural Due Process (Sixth Cause of Action)

The primary question that must be answered here is - can the Board declare the existence of a vast debt (the assessments), withhold full and fair notice of the basis for calculating the debt, and treat petitioners/plaintiffs' refusal to pay the entire debt as a trigger for filing unappealable judgments to collect portions of the debt, without affording petitioners/plaintiffs an opportunity to contest the legitimacy and accuracy of the alleged debt before an impartial tribunal? Petitioners/plaintiffs contend that is what the Board has done, and the action it threatens to continue pursuant to the combined operation of Section 50(3-a)(7)(b) and Section 26 of the WCL. Petitioners/plaintiffs contend that those statutory provisions, on their face and as applied by the Board, violate the fundamental dictates of procedural due process vouchsafed by the Fourteenth Amendment of the Federal Constitution and Article I, § 10 of the State Constitution (*see* Proposed Amended Petition ¶¶ 173-182).

The Board's memorandum of law asserts that they have given all the information necessary to the petitioners/plaintiffs and to the extent they wish to see more, they need only sign the "DACA" or "MOU". It has been made clear that petitioners/plaintiffs claim does not endeavor to suggest that WCL § 50(3-a)(7)(b) authorizes entry of a judgment "in the amount of the member's pro rata share of the Trusts' entire deficit amount", as opposed to the amounts of compensation awards to member's employees (Opp. Memo. at 56-57). Petitioners/plaintiffs' claim recognizes that such compensation awards form a portion of the declared deficit made collectible through the unconstitutional mechanism of WCL §26

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unappealable judgments only when, according to the plain language of the statute, "a member neglects or fails to pay an assessment" (WCL § 50[3-a][7][b] [emphasis supplied]. In short, the statute authorizes the Board to use an unconstitutional mechanism to collect the entire deficit amount, albeit not by a single judgment but bit by bit, judgment after judgment, unless petitioners/plaintiffs capitulate to pay all or most of what the Board demands.

Nothing in the jurisprudence of procedural due process allows the state to dispense with the requirements of prior notice and a meaningful opportunity to be heard simply because the deprivations of property entailed by a debt collection scheme occur piecemeal. The scheme authorized by WCL § 50(3-a)(7)(b), by permitting the Board to take petitioners/plaintiffs' property until its demand for payment of the full assessment is met, like the garageman's lien struck down in *Sharrock v. Dell Buick-Cadillac* (45 NY2d 152 [1978]), "empowers the ... [Board], to engage in conduct which is tantamount to blackmail" (*id.* at 165).

The Board further asserts that petitioners/plaintiffs' claim impermissibly seeks to appeal or collaterally attack the Board's compensation awards (Opp. Memo. at 58-59). This is not how the Court understands petitioners/plaintiffs' argument. What petitioners/plaintiffs challenge is the Board's efforts to collect the portion of the assessments represented by those awards, or any others, by the filing of unappealable judgments absent compliance with the minimal requirements of procedural due process.

The Board asserts that "[n]o facts are alleged that the WCL § 26 judgments [it had filed] were obtained ... in violation of procedural due process" (Opp. Memo. at 59). Petitioners/plaintiffs contend, as they have throughout, that the fact that those judgments

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were filed only because the petitioners/plaintiffs refused to pay their full deficit assessments, the legitimacy and accuracy of which has never been subjected to the "crucible" of a fair hearing, is, as noted above, a violation of due process. It is clear to this court that the affected petitioners/plaintiffs and proposed intervenors did not participate in the proceedings which gave rise to the awards of compensation on which the judgments were based. Rather they were represented by CRM and, after termination of the Trust, by Respondent/Defendant SAFE, acting on behalf of the Board. It is equally clear to this Court that petitioners/plaintiffs procedural due process claim, among others, rest on allegations that the Board's awards process, in connection with claims against members of TRIWCT, was infected by the fraud, malfeasance and egregious mismanagement perpetrated by both CRM and SAFE, and by the Board's complicity therein (*see* Proposed Amended Petition ¶¶ 179, 189, 200, 211, 219, 222, 231, 250, 254, 255, 256, 257, 264).

In its Opposition Memorandum of Law, the Board acknowledges that a "significant contributing factor to ... [the Trust's] deficit was the acts and omissions of CRM ..." (Opp. Memo. at 76 n 55). Moreover, in its Amended Verified Complaint filed in its lawsuit against CRM, the Board has alleged that the Trust was damaged in an amount "equal to the joint and several liability of its members" because CRM : "failed to promptly investigate claims"; "engaged in dilatory tactics"; caused the Trust "to be subject to excessive fines and penalties" and "delayed claims proceedings and settlements" (*see* the Board's Amended Verified Complaint, ¶¶ 427-436, attached to the Gilberti Aff. as Exhibit 5).

The process the Board asserts as satisfying petitioners/plaintiffs' constitutional entitlement has been challenged by petitioners/plaintiffs, as a sham, fraught with

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heightened risk of error and lacking any semblance of the "fairness and reliability" demanded by due process (*see Matthews v Eldridge*, 424 US 319, 343 [1976]).

The Board asserts that it "cannot begin to understand the basis for petitioners/plaintiffs' assertions" regarding lack of notice and opportunity to contest the basis of the Board's assessments (Opp. Memo. at 60). The petitioners/plaintiffs contend that the Board implicitly concedes that it has not provided petitioners/plaintiffs with critical documents referenced in the BST Report for review by petitioners/plaintiffs' experts (Opp. Memo. at 62). It is claimed that the Board has withheld these documents (*see* Gilberti Aff. at ¶¶ 94-96), offering to provide them so that petitioners/plaintiffs' experts could "evaluate the accuracy of BST's findings," but only if petitioners/plaintiffs signed "an interim repayment agreement" (Opp. Memo. at 14). In short, the Board required petitioners/plaintiffs to admit to and begin paying the deficit assessments in order to obtain the documents upon which their accuracy hinged.

"Fundamental notions of procedural due process require that before the State may deprive a person of a significant property interest in aid of a creditor, that person be given notice and an opportunity to be heard prior to deprivation of that interest" (*Sharrock,* 45 NY2d at 165 [emphasis supplied]). Such process is guaranteed "to protect against arbitrary deprivation of property" which encompasses "simply mistaken deprivations of property interests ..." (*Fuentes v Shevin*, 407 US 67, 81 [1972]). The notice and hearing "must be granted at a time when the deprivation can still be prevented" for due process does not "embrace[ ] the general proposition that a wrong may be done if it can be undone" (*id.* at 81-82. These protections apply to the seizure of corporate assets as well, since "the probability of irreparable injury ... is sufficiently great so that some procedures are

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necessary to guard against the risk of initial error" (*North Georgia Finishing, Inc. v Di-Chem, Inc.*, 419 US 601, 608 [1975]).

Applying the foregoing principles, courts have insisted on the safeguards of notice and a pre-deprivation hearing in striking down a garageman's lien authorizing the retention and sale of a repaired vehicle (*Sharrock, supra*), the prejudgment replevin of chattels (*Fuentes, supra*), the prejudgment garnishment of a corporate debtor's bank account (*North Georgia Finishing, Inc.*, *supra*), the prejudgment attachment of realty in a suit for assault and battery (*see Connecticut v Doehr*, 501 US 1 [1991]) and a city's levy of a tax assessment for a local improvement (*see Londoner v City and County of Denver*, 210 US 373 [1908]).

In each of those cases, violations of procedural due process were found to have occurred even though the deprivations of property were temporary. In this case, the deprivation of petitioners/plaintiffs' property resulting from the Board's ability to file and enforce the unappealable judgments would be permanent. The petitioners/plaintiffs assert that this case presents a much more egregious affront to the dictates of procedural due process.

Petitioners/plaintiffs respectfully submit that the claimed denial of procedural due process is strongly supported by the aforementioned principles and precedents. This Court finds, based on all of the facts laid bare before it, that petitioners/plaintiffs have a reasonable likelihood of success. As a result, a stay of enforcement should be issued. Accordingly, a stay is clearly warranted.

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9. The Petitioners/Plaintiffs Contentions Relating to the Additional Constitutional Claims (Seventh through Eleventh Causes of Action).

Petitioners/plaintiff contend that their additional constitutional claims are also sufficiently meritorious to warrant a stay. The Boards' opposition to those claims rests almost entirely on the Third Department decisions in *Aides at Home v State of New York Workers' Compensation Bd* (76 AD3d 727 [3d Dept 2010]), and *Held v. State of New York Workers' Compensation Bd* 85 (AD3d 35 [3d Dept 2011]), together with the Board's factual assertions which petitioners/plaintiffs argue (and have argued) are refuted by the Board's own documents.

At the outset, it should be noted that the Board incorrectly asserts that these additional constitutional claims challenge only "the Board's conduct", and not the statutory provisions the Board is purporting to enforce. (Opp. Memo. at 54 n 38). Paragraph 19 of the Proposed Amended Petition states that "Petitioners also seek a declaration that Section 50(3-a)(7)(b), as enacted by the legislature and as interpreted and implemented by the Board, causes a deprivation of property without procedural and substantive due process of law and constitutes an impermissible interference with contract, all in violation of the United States and New York Constitutions". Moreover, that paragraph has been incorporated by reference in each of the pleaded claims (*See* Proposed Amended Petition ¶¶ 183, 199, 208, 216 and 227). Thus, to the extent that the statutory provisions actually authorize the Board's challenged conduct (a matter which petitioners/plaintiffs dispute), the constitutionality of those provisions is clearly called into question. The substantive due process claims are set forth in petitioners/plaintiffs' seventh, eighth and ninth causes of action in the Proposed Amended Petition (¶¶ 183-215).

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The "touchstone" of substantive due process "is protection of the individual against arbitrary action of government" (*County of Sacramento v Lewis*, 523 US 833, 845 [1998] [internal quotation and citation omitted]). Petitioners/plaintiffs' allegations claim a "tsunami" of arbitrariness oppressively exercised by the Board for nearly a decade.

The seventh cause of action asserts that the Board's arbitrary and illegal conduct is responsible for the deficit it seeks to collect from petitioners/plaintiffs (Proposed Amended Petition ¶¶ 183-198). Such conduct, it is alleged, consisted of the Board's illegal creation of TRIWCT and its affirmative facilitation and condonation of CRM's fraudulent and otherwise egregious mismanagement of the Trust whereby contributions paid by petitioners/plaintiffs were diverted from their intended purpose of paying legitimate employee compensation claims.

Petitioners/plaintiffs' *prima facie* evidence of such diversion is shown by the fact that petitioners/plaintiffs' current private insurance premiums are comparable to the contributions they made to the Trust. The Board opines that petitioners/plaintiffs' assertion of comparable payments "seems unlikely" (Opp. Memo. at 76 n 54); but petitioners/plaintiffs assert it is demonstrably true (*relying on:* Affidavit of Louis Tripi at ¶¶ 18-20; Affidavit of Tom McLaughlin at ¶¶ 20-22; Affidavit of Christopher H. Mix at ¶¶ 20-22; Affidavit of Sam Chiodo at ¶¶ 10-12; Affidavit of David A. White at ¶¶ 24-26; Affidavit of Russell Yates at ¶¶ 11-13). This Court has trouble digesting this claim, as previously stated, because of the lack of market data supporting or defeating these claims. However, the Board does concede that a "significant contributing factor to ... [the] deficit was the acts and omissions of CRM ..." and others (Opp. Memo. at 76 n 55) (emphasis supplied).

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There has been submitted to this Court *prima facie* evidence that the Board affirmatively facilitated and condoned CRM's fraud and mismanagement. The Board's own documents, it can be argued, support the petitioners/plaintiffs' claims. Those documents support the position that, as early as 2003, the Board had knowledge or should have realized that the Trust was experiencing serious funding deficits and that CRM's accounting and other business practices were woefully deficient. Petitioners/plaintiffs contend that the Board not only failed to take remedial action, in derogation of its obligations imposed both by statute and its own regulations, but on two occasions, in 2004 and in 2005, the Board sent letters to CRM stating that it had "determined" that the Trust had "no regulatory funding issues", when the clear documentary proof was otherwise. (*see* Gilberti Aff. ¶¶ 75 and 77 and generally ¶¶ 60-89).

A violation of substantive due process occurs "when ... state officials communicate to a private person that he or she will not be ... interfered with while engaging in misconduct that is likely to endanger the ... property of others ..." (*Pena v Deprisco*, 432 F3d 98, 111 [2nd Cir 2005]). It matters not whether the assurance of impunity is communicated explicitly or implicitly (*id.* at 111-112).

Contrary to the Board's assertion, as this Court interprets the applicable case law, an allegation of intent to injure is not necessary to support such a claim (Opp. Memo. at 63). The Court in *County of Sacramento, supra*, required that standard of due process liability in cases challenging police pursuits resulting in death or injury. But the Court did not decree the insufficiency of deliberate indifference or recklessness as a standard of due process liability in other contexts "when actual deliberation is practical" and officials have "time to make unhurried judgments" (523 US at 850-853; *see also Pena, supra*, 432 F3d

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at 112-114). Clearly, that was the context in which the Board's arbitrary conduct occurred, as the allegations are set forth by petitioners/plaintiffs.

Petitioners/plaintiffs argue that the Board's arbitrary conduct deprived petitioners/plaintiffs of their property interest in the reasonable certainty and security of adequate insurance coverage based on their contributions to the Trust, and the Board now threatens to further deprive them of funds in order to rectify the harm the Board itself caused or helped create by its complicity in CRM's theft. In essence, the claim is that the Board has facilitated CRM's stealing of petitioners/plaintiffs' money and now insists that they pay the bill for the theft. If that proof survives the test of the trier of fact, such conduct is "so egregious, so outrageous that it may fairly be said to shock the contemporary conscience" and constitute a violation of substantive due process (*see County of Sacramento, supra*, 523 US at 847 n 8).

Petitioners/plaintiffs' eighth cause of action challenges the Board's calculation of the deficit assessment as the product of rampant arbitrariness violative of substantive due process (*see* Proposed Amended Petition ¶¶ 199-207). Petitioners/plaintiffs claim the Board has withheld critical documents and data needed to fully determine the accuracy and propriety of the assessment (*see* Gilberti Aff. ¶ 96), and as a result, the evidence of illegal and arbitrary ingredients is conspicuous. No doubt, the Board has admitted that certain documents have not been turned over. As a result, a review of this claim can only be done by the Court applying a somewhat lesser standard to determine whether petitioners/plaintiffs have a likelihood of success.

The facts submitted to this Court by the petitioners/plaintiffs such as: (1) The assessments issued by the Board were not issued within the 120-day period mandated by

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WCL § 50(3-a)(7)(b). The Board concedes that (2) the assessments illegally include assessments under WCL sections 15(8) and 151 (Opp. Memo. at 48-49, 68 n 48). (3) The claims that the assessments undoubtedly and wrongfully includes amounts for losses incurred by the Board's arbitrary complicity in CRM's fraudulent and egregious mismanagement of the Trust. (4) The factual data supporting petitioners/plaintiffs claim that the assessments were based on <u>unaudited</u> financial statements, they urge must be viewed as a potent sign of unreliability in the accounting industry (*see* Gilberti Aff. ¶ 97). (5) The projection of increasing liability amounts for the most recent years on which the deficit assessments are based renders the total assessment inherently suspect from the standpoint of general accounting principles, since the terminated status of the Trust and the two year statute of limitations for filing claims would be expected to produce a projection of decreasing liabilities (*see* Dannible Aff. ¶¶ 5-6 and Exhibit B thereto ¶ 4). (6) The risk of arbitrariness in connection with calculations of future payments for claims such as permanent partial disability, since the relevant variables cannot be reliably predicted and the amount of the payment cannot therefore be reliably quantified (*see Burns v Varriale*, 9 NY3d 207 [2007]). And (7) The yet unknown but to be established evaluation of the component parts of the deficit assessments and the determination of what amounts each of the years provides in claims, damages, injuries, pay outs, and reserves, including incurred but not reported (IBNR) claims, to establish what part of the deficit assessments comprise post August 4, 2004 documents (Level II Report and PWC Report) that otherwise might have been averted if TRIWCT members were alerted to the true economic status at that time (apparently only known by the Board and CRM).

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All of these issues lead this Court to a general consensus and support, through *prima facie* evidence, that petitioners/plaintiffs have a reasonable likelihood of success.

Petitioners/plaintiffs' ninth cause of action challenges the Board's threatened retroactive imposition of joint and several liability on petitioners/plaintiffs for the entire deficit as a contravention of substantive due process (*see* Proposed Amended Petition ¶¶ 208-215). The Board's reliance on the *Held* and *Aides at Home* decisions to support its contrary position (Opp. Memo. at 66) is misplaced, as those decisions did not focus upon and carefully examine the issue of statutory interpretation which petitioners/plaintiffs have raised in support of these and other claims. Prior to a June 2008 Amendment to WCL § 50, enacted after the termination of TRIWCT, the statute imposed group liability, not joint and several liability (*see* Point IV(c), *supra*). The Board takes no account of the allegation that "[t]he claimed monetary shortfalls in TRIWCT allegedly result from the Board's own unlawful, grossly incompetent and unconstitutional conduct" (Proposed Amended Petition ¶ 211).

Petitioners/plaintiffs' claims of unconstitutional taking (Proposed Amended Petition ¶¶ 216-226) and impairment of the obligation of contract (Proposed Amended Petition ¶¶ 227-234) also seem to be grounded by the evidence presented and shows a reasonable likelihood of success on behalf of the petitioners/plaintiffs. Regarding the former, the Board contends that there can be no claim under the Takings Clause for the taking of money (Opp. Memo. at 69-72). That position have not been universally embraced by the courts (*see United States Fidelity & Guaranty Co. v McKeithen*, 226 F3d 412 [5th Cir 2000]) and awaits a binding majority decision by the Supreme Court. But, petitioners/plaintiffs have identified a protected property interest, albeit intangible, that the Board has taken, which

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taking the Board threatens to compound – namely the reasonable security of adequate insurance coverage based on the payment of contribution to the Trust coupled with the threatened extinction of each of the petitioners/plaintiffs. This Court has reviewed the remaining contentions of the Board and find them to be unavailing. The same is true of the Board's opposition to petitioners/plaintiffs' impairment of contract claim (Opp. Memo. at 77-81). The Board argues that the challenged legislation is entitled to "substantial deference" (Opp. Memo. at. 80), But, petitioners/plaintiffs allege that the actions supporting the impairment in this case has been allegedly undertaken "to serve the Board's self-interest in avoiding financial responsibility for its own wrongdoing" (Proposed Amended Petition ¶ 234). As stated by the United States Supreme Court:

> In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the contract clause would provide no protection at all.

(*United States Trust Company of New York v New Jersey*, 431 US 1, 25-26 [1977]).

10. Petitioners/Plaintiffs Contentions that the *Aides at Home and Held* Cases are Distinguishable and Not Dispositive of, nor Relevant Precedent Regarding the Claims Presented.

The Board cites *Aides at Home v State of New York Workers' Compensation Bd* (76 AD3d 727 [3d Dep't 2010]) and *Held v State of New York Workers' Compensation Bd* (85 AD3d 35 [3d Dep't 2011]), as support for its contention that petitioners/plaintiffs are not likely to succeed on the merits of four of their claims, namely: (1) that the Board lacks the statutory authority to take the actions complained of; (2) that the Board's acts are arbitrary

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and capricious; (3) that petitioners/plaintiffs have been deprived of substantive due process; and (4) that the Board has taken petitioners/plaintiffs' property without due process of law.

The Board does not contend that petitioners/plaintiffs' claims are barred by collateral estoppel or *res judicata* due to the *Aides at Home* or *Held* decisions, nor could it. Petitioners/plaintiffs were neither parties in the *Aides at Home* or *Held* proceedings nor did they have a "full and fair opportunity to be heard" on the claims in those proceedings. At best, the Board can only argue, as it does, that under the doctrine of *stare decisis*, that the holdings in *Aides at Home* and *Held* on these claims are relevant precedent in determining whether petitioners/plaintiffs' claims have a likelihood of success.

A review of both cases leads this Court to a finding that the cases are factually and legally distinguishable from this proceeding and are not dispositive of, or precedential as to, any of petitioners/plaintiffs' claims. Nothing in those decisions prevents the petitioners/plaintiffs from making a prima facie showing of entitlement to the relief sought in the Proposed Amended Petitions.

A. *Aides at Home v. State of New York Workers' Compensation Board* Is Distinguishable and Not Dispositive of Petitioners/Plaintiffs' Claims

In *Aides at Home*, the petitioner-appellant, *Aides at Home*, challenged actions taken by the Board with respect to the New York Health Care Facilities Workers' Compensation Trust ("HCF Trust"), which they allege was "established" and authorized by the Board in 1997. Here, an entirely different GSIT is at issue – TRIWCT. Petitioners/plaintiffs do not concede that TRIWCT was ever validly established or authorized (*see* Woods Aff., Ex. YYY).

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Because an entirely different GSIT – the HCF Trust – was at issue in the *Aides at Home* proceeding, the facts and circumstances surrounding its formation, the employers who were members of the group, its administration by the Hamilton Wharton Group and/or Walter B. Taylor (as opposed to CRM), the reasons for its insolvency and termination, its deficit reconstruction and the amount of the deficit assessment, the amount of the pro rata share allocations of the deficit assessment to employer members, and its oversight by the Board are entirely different from the facts surrounding TRIWCT, as alleged in this proceeding, and as the facts - at least to this point - have been developed.

The Proposed Amended Petition contains a number of claims concerning the unlawful and fraudulent formation of TRIWCT, the Board's unlawful authorization of TRIWCT as a GSIT, and the Board's failure to properly oversee the Trust and take immediate action when the Board had notice of CRM's fraudulence and malfeasance. The *Aides at Home* Petition contains none of these types of allegations, at least as far as this Court can tell from the decision and briefs submitted.

Aides at Home involved a challenge to a different provision of the Workers' Compensation Law. The Board contends that the deficit assessment levied against HCF Trust members in *Aides at Home* was "identical" to the deficit assessment levied against the putative Trust members in this proceeding (Opp. Memo. at 13, 62, 69). But, it is clear to this Court that the deficit assessments at issue in *Aides at Home* were levied by the Board under WCL Sections 50(3-a)(3) and 50(5). Here, the deficit assessment and pro rata share allocations were issued by the Board under WCL Section 50(3-a)(7)(b), which was added to the statute by amendment in 2008 and was not in effect at the time the assessments at

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issue in *Aides at Home* were levied.[21] Prior to the 2008 amendments, WCL Section 50 did not provide for a mechanism for the Board to directly levy deficit assessments against insolvent Trusts for deficit amounts remaining in the Trusts. Rather, the Board relied upon its general authority under Section 50(3-a) and its authority regarding administrative assessments under Section 50(5) to issue the deficit assessment against *Aides at Home*.[22]

Apart from the factual differences between this proceeding and *Aides at Home*, the claims decided by the Third Department are also distinguishable from the claims brought here.

1. Claims that the Board Exceeded Its Statutory Authority

Given the differing statutory provisions at issue, the claim asserted by *Aides at Home* that the Board exceeded its statutory authority was based on very different arguments than those put forth by the petitioners/plaintiffs here. *Aides at Home* contended that the Board, in issuing the deficit assessment, had failed to comply with a very narrow and confining statutory procedure in Section 50(5) as it existed at that time. According to petitioner, when presented with insolvent GSITs who had defaulted in paying compensation, the Board was permitted only to pay the compensation owed to the injured employee, seek

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[21] Subsection 7(b) was added to Section 50(3-a) when the WCL was amended in June 2008 and did not become effective until October 28, 2008 – after the *Aides at Home* petition had been filed with the court.

[22] As set forth in its papers and briefs filed in *Aides at Home*, the Board relied upon the general statement in Section 50(3-a)(3) that the insolvency of a Trust member "does not relieve the group self-insurer from the payment of compensation for injuries or death sustained by an employee during the time that a member was a participant..." and the authority under Section 50(5)(f) to levy assessments against all group self insurers for its administrative costs, including the costs of any unpaid compensation and benefits due to the default of an insolvent GSIT, for its authority to issue the deficit assessment against former members of the HCF Trust *(see* Brief of Respondents, *Aides at Home v. State of New York Workers' Compensation Board*, No. 6389-08 [3d Dept Apr. 22, 2010], attached to the Gilberti Affirmation as Ex. 8).

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reimbursement from Trust members for those claims paid and then, if the Trust member failed to pay, levy an assessment against the entire self-insurance community (Woods Aff., Ex YYY at 16-28). *Aides at Home* further argued that the statute did not authorize the Board to assess it for liability arising from incidents that occurred after they had terminated their membership in the HCF Trust nor for potential future and contingent Trust liability (*id.* at 28, 31).

In contrast, here, petitioners/plaintiffs do not challenge the Board's authority under Section 50(5) nor challenge the Board's authority, in general, to issue deficit assessments. Petitioners/plaintiffs do challenge the Board's authority to issue a deficit assessment to the putative members of TRIWCT under the particular facts and circumstances at issue in this proceeding, namely, that TRIWCT was invalidly formed and unlawfully authorized and approved by the Board as a GSIT. Petitioners/plaintiffs claim that the Board lacked the authority to issue the 2010 Deficit Assessment and to impose joint and several liability on them because, as they claim, TRIWCT is not a valid GSIT. They also claim that the Board lacked authority to issue the 2010 Deficit Assessment after the 120-day period required by WCL § 50(3-a)(7)(b) had expired and lacks authority to continue to enforce the 2010 Deficit Assessment because it contains, in part, certain administrative and other assessments that may no longer, by law, be included in the deficit assessment calculation.

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None of these arguments were made in *Aides at Home,*[23] and thus any holding by the Third Department regarding the Board's authority under Section 50(3-a) generally and Section 50(5) to issue a deficit assessment is irrelevant and not precedential in this proceeding.

2. Claims Regarding the Arbitrary and Capricious Nature of Board's Conduct

Aides at Home challenged the Board's determination in levying the deficit assessment as arbitrary and capricious, unreasonable and excessive. In support, the petitioner asserted several legal arguments regarding the Board's authority under Section 50(3-a)(3), as it existed then, and the HCT Trust indemnity agreement.[24] None of these legal arguments have been made by petitioners/plaintiffs in this case, and to the extent the Court rendered a holding as to their merit, this court finds such holding not to be precedential here.

[23] *Aides at Home* did not raise the issue of whether the Board had the authority to impose joint and several liability as a "question presented" in its appellate briefs filed with the Third Department. Thus, the Court's statements, citing the statute as amended in 2008, that *Aides at Home* remained "jointly and severally liable for the liabilities of the Trust that were incurred during petitioner's membership until such time that those liabilities were satisfied" and that "[t]his statutory mandate was explicitly articulated in the Trust and indemnity agreements that petitioner accepted when it joined the Trust" appear to be dicta. Even if the statements were not dicta, this Court finds these statements not be controlling here. Here, it is alleged, the Trust was never validly formed, which rendered any indemnity agreement that a putative Trust member may have had with the Trust a nullity and which rendered Section 50(3-a)(3) (as amended or not) inapplicable to the putative Trust members. The Board's citation to *Workers' Compensation Board v A&T Healthcare LLC* (85 AD3d 1436, 1437 [3d Dept 2011]), which involved a different GSIT, is not controlling here, for the same reasons.

[24] More specifically, *Aides at Home* contended that given the Board's limited authority under the statute and the indemnity agreement, it was arbitrary and unreasonable for the Board to hold it liable for injuries that occurred after it had terminated its membership in the HCF Trust. Further, petitioner argued that the Board's determination to issue the deficit assessment asking for one-time payment of a share of the total HCF Trust liability, instead of seeking reimbursement from the insolvent HCF Trust and its members as claims were paid, was irrational and arbitrary and capricious and constituted improper rulemaking (Woods Aff., Ex. YYY at 47-53).

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Aides at Home also challenged the Board's application of the assessment methodology to the HCF Trust as arbitrary and excessive, contending that based on the number of claims open, the actual amounts paid, a review of the loss run reports, and the self-insured retention limits for the HCF Trust, the Board had charged the Trust members amounts "well beyond reserves, well beyond anticipated Trust exposure and contrary to claims data that had developed" (Woods Aff., Ex. YYY at 53-54). Noting that claims had continued to develop, petitioner objected that the deficit assessment was based on projections that were over three years old (*id.* at 54-56). All of these arguments were based on facts and circumstances that were particular to the HCF Trust, its employer members and the claims that had been made by those members' employees.

While the petitioners/plaintiffs in this proceeding also have challenged the methodology used by the Board in determining the 2010 Deficit Assessment (among many other things), they have done so on the basis of a very different set of facts and circumstances that are particular to TRIWCT. Unlike in *Aides at Home*, a primary basis for petitioners/plaintiffs' arbitrary and capricious claim is that the Board has failed to provide the data and the assumptions underlying the actuarial reports that formed the basis for BST's deficit reconstruction and analysis.

Thus, the court's holding in *Aides at Home* that the deficit assessment was reasonable and not excessive cannot be dispositive of the petitioners/plaintiffs' claims. The doctrine of *stare decisis* only applies to prevent parties from re-litigating settled principles of law or legal issues. It does not apply to factual determinations (*see Samuels v High Braes Refuge, Inc*, 8 AD3d 1110 [4th Dept 2004]; *State v Moore*, 298 AD2d 814 [3d Dept 2002]; *see also Stubbart v Monroe County*, 86 Misc2d 29 [Sup Ct, Monroe County 1976]

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["Precedent inextricably tied to a peculiar factual context must not be allowed to control when different background facts prevail notwithstanding the limited facts of the cases may appear identical."]).

Because the Third Department's holding on the arbitrary and capricious claim in *Aides at Home* was based on legal arguments that have not been made here and/or if made, were done so on facts far different than those presented here. *Aides at Home* does not operate to prevent petitioners/plaintiffs from making a *prima facie* showing of success on their arbitrary and capricious claims here.

3. Constitutional Claims

The Board also asserts that the substantive due process and taking claims which were decided in *Aides at Home* are dispositive of the substantive due process and takings claims made by petitioners/plaintiffs here.

In its brief before the Third Department, *Aides at Home* contended that the Board had violated its due process by issuing the deficit assessment without the authority to do so and "without any Court oversight" (Woods Aff., Ex. YYY at 57). The petitioner provided no further explanation of, or basis for, that claim. In support of its takings claim, *Aides at Home* contended that the Board had taken its property (funds) by "usurp[ing] Trustees' authority, declar[ing] unilaterally it had assumed all Trustee rights and responsibilities and attack[ing] member assets as it deemed necessary" (*id.* at 58). These claims pale in comparison to the detailed allegations supporting petitioners/plaintiffs' constitutional claims in the case before this Court.

The petitioners/plaintiffs here have brought three separate claims alleging violations of substantive due process. These claims are set forth in detail in the Proposed Amended

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Petition, but are summarized as follows: (1) that the Board's malfeasance, in turning a blind eye to CRM's fraud and negligence, affirmatively facilitated the Trust deficit and prevented petitioners/plaintiffs from avoiding it; (2) that the deficit assessment and pro rata shares are speculative, inaccurate, unreliable and irrational and bear no relationship to a legitimate State interest; and (3) that the imposition of joint and several liability is unlawful, patently arbitrary and unreasonable. As for the takings claim, petitioners/plaintiffs do not contend that the Board's "usurpation" of the role of Trustee for the Trust has resulted in the taking of their property; rather, they contend that the Board's conduct, in holding them retroactively responsible for the Board's own knowing and deliberate malfeasance over the course of seven years of complicity in CRM's fraudulent and otherwise gross mismanagement of TRIWCT, effected a taking of their property. These constitutional claims made here are significantly distinguishable from those that were asserted and briefed by *Aides at Home*.

Because these constitutional claims were never appropriately presented to the Third Department, were briefed only by Petitioner *Aides at Home*[25] and were not squarely decided by the Third Department, they cannot be considered binding precedent in any event (*see Aides at Home*, 76 AD3d at 729). A case is precedent only as to those questions presented, considered and squarely decided (*see People v Bourne*, 139 AD2d 210 [1st Dept 1988]; *see*

[25] Out of its 58-page appellant's brief (*see* Woods Aff, Ex. YYY), *Aides at Home* devoted little more than a full page to its constitutional claims. These claims were not addressed at all by the Board in its response brief nor were they addressed by the petitioner in its reply. Neither party included a "question presented" in their briefs regarding the constitutionality of the Board's actions (*see* Respondents' Brief, attached to Gilberti Affirmation as Ex. 8; *see also* Reply Brief on Behalf of Petitioner/Appellant, *Aides at Home v. State of New York Workers' Compensation Board*, No. 6389-08 [3d Dept, May 13, 2010], attached to Gilberti Affirmation as Ex.9).

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also Robinson Motor Xpress, Inc v HSBC Bank, USA, 37 AD3d 117 [2d Dept 2006] ["Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision."]).

Thus, not only are the constitutional claims alleged in *Aides at Home* distinguishable, but the Third Department's holding on those constitutional claims is not binding precedent. This Court finds that *Aides at Home* does not bar the claims of petitioners/plaintiffs in this case.

B. Petitioners/Plaintiffs Contend that *Held v. State of New York Workers' Compensation Board* Is Distinguishable And Is Not Dispositive Of Petitioners/Plaintiffs' Claims

In *Held*, the petitioners/plaintiffs were a group of thirteen GSITs that were not terminated or defaulted Trusts, but rather, at the time of suit, were considered healthy, solvent GSITs. (85 AD3d 35 [2011]). Furthermore, none of these Trusts were administered by CRM nor did they allege that any of their Trusts had been fraudulently formed or mismanaged. Unlike the petitioners/plaintiffs here, the *Held* petitioners/plaintiffs did not challenge a "deficit assessment" nor were the *Held* petitioners/plaintiffs challenging the imposition of joint and several liability upon their members. Rather, the *Held* petitioners/plaintiffs' challenge was to the Board's authority to assess them under WCL § 50(5) for the liabilities of defaulted Trusts, sometimes known as "cross-Trust" liability. Factually, the *Held* case is very different from this proceeding.

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The Board repeatedly cites *Held* as precedent for the proposition that since 1966, GSIT members have been jointly and severally liable for the Trust obligations which were incurred during such membership. As argued in detail above, prior to the 2008 amendments, the WCL contained no provision imposing joint and several liability on GSIT members. The *Held* decision does not change this.

In fact, this particular question was not presented to the Third Department in *Held*, nor was it decided by the court in *Held*. The court only referred to the issue of "joint and several liability" in one paragraph of its decision, which includes the statement that the Board quotes throughout its opposition papers as support for the proposition that since 1996, the WCL has imposed joint and several liability on GSIT members: "Each member of a group self-insurer is jointly and severally liable for the compensation obligations of all other members of that group..." (*see Held,* 85 AD3d at 42).

When read in context, it is apparent that this quoted statement does not support the Board's position. The Third Department was referring to a GSIT's "contractual obligation of joint and several liability" not a statutory obligation (*id.)*. Further, the quoted statement was not a holding by the court on any issue that was presented to the court for decision, but rather was merely dicta. The issue presented to the *Held* court was whether the Board's imposition of Section 50(5) assessments against the petitioners/plaintiffs for the defaulted GSIT's liabilities was consistent with this contractual obligation of joint and several liability. The court did not analyze the petitioners/plaintiffs' Trust agreement or indemnity agreements and decide whether, in fact, such contractual liability existed. Rather, assuming that there was such contractual

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liability, the court found that the imposition of the Section 50(5) assessments was not inconsistent with such joint and several liability (*id.* ["We also reject plaintiffs' assertion that an interpretation allowing assessments against all self-insurers is inconsistent with the contractual obligation of joint and several liability assumed by the individual members of a group self-insurer."]).

Statements by an appellate court that amount to dicta are not binding precedent and are not required to be followed (*see Robinson Motor Xpress*, 37 AD3d at 124 ["Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision."]; *see also Chiasson v New York City Dept of Consumer Affairs*, 138 Misc 2d 394, 396 [Sup Ct New York County 1988] ["It is a general principle of law that statements made by a court in an opinion which are unnecessary to the holding are dicta; such statements do not have the force of judicial authority . . ."]). Accordingly, the statement from the *Held* decision that has been oft-quoted by the Board in its opposition papers is irrelevant and non-binding on this Court on the claims at issue.

The Board also cites *Held* with respect to aspects of petitioners/plaintiffs' constitutional claims. (*see* Opp. Memo. at 75, 77, 79). The *Held* court's holding on the constitutional claims asserted in that case with respect to Board action taken under WCL Section 50(5)(g) (regarding cross-Trust assessments for administrative costs) are irrelevant to petitioners/plaintiffs' takings claims with respect to the Board's actions under Section 50(3-a)(7)(b). Thus, the *Held* court's holdings all regarded the constitutionality of the Board's application of WCL Section 50(5)(g) and are irrelevant here. The Board contends that "Since such assessments do not constitute a taking, it

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follows that the assessments levied against the jointly and severally members themselves, likewise, do not constitute a taking," (*see* Opp. Memo. at 77, n 56). However, without an analysis of the facts presented in this proceeding and the merits of the taking claim asserted by the petitioners/plaintiffs, the Board's assertion is simply illogical and unsupported.

This Court finds that the petitioners/plaintiffs have shown a likelihood of success on the merits by coming forth with evidentiary proof that makes a *prima facie* showing of success.

This Court makes this finding based on all materials submitted. Additionally, the Court finds the following documentary evidence important in its decision.

The Court is impressed with the exhibits attached to the affidavit of William Gilberti, Esq., dated January 4, 2002, and the import in this case. Exhibit "6" attached to the Gilberti affidavit is the Level II review of TRIWCT as of December 31, 2002. This draft document is dated August 4, 2004, and is very telling with regard to the financial status of the TRIWCT as of December 31, 2002 and December 31, 2003. It must be remembered that on November 24, 2004, the Workers' Compensation Board wrote a letter to their reputed Trust members advising them that there was no regulatory funding issues for December 31, 2002 and December 31, 2003 years. However, a review of the document would seem to indicate otherwise.

For example, on page 30, with regard to the GAAP to regulatory analysis for the fiscal year ending December 31, 2002, shows a $93,775 adjustment to the reserves held by the Trust. This was because the reserves reported by the Trust of $2,300,000 were $93,775 (or 3.9%) lower than the low estimate calculated by the consultant. The low

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estimate is that estimate which, under the best of all conditions, would indicate the estimated losses of the Trust. The best estimate of the projected losses as of that time by the consultant was $2,519,764. Thus, the reserves held by the Trust ($2,300,000) were $219,764 less than what the consultant wrote as the most likely scenario with regard to losses. This was an 8.7% difference. If the high estimate of the consultant were used, the Trust reserves would need to be increased by 17%, or $471,740.

In the PWC and Level II Report, it is acknowledged that the Workers' Compensation Board would recommend that the Trust reserves be set at least as the best estimate. PWC went on to recommend that an adjustment in the amount of $93,775 to bring the reserves up to the low estimate of the expected range calculated by the consultant is considered necessary.

The Board acknowledges on page 34 of the Level II Report that the rules and regulations which govern group Trust state that the Trust assets must exceed the Trust liabilities. Under that definition, the Board and PWC acknowledge that this group is marginally underfunded and those sanctions applicable to underfunded groups may be considered. This is even after PWC made the adjustment of $93,775 to bring the Trust to the low estimate calculated by the consultant. If the Workers' Compensation Board demanded compliance with good and accepted practice, the recommendation would have been that the Trust's reserves be at least at the best estimate, or an additional $219,764, representing an 8.7% increase in the reserves.

Again, even more telling is that the policy of the Workers' Compensation Board was to only impose sanctions applicable for underfunded groups when the Trust equity ratio falls below 90%. As a result, for the period ending December 31, 2002, the Trust

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was deemed to have no significant funding issues, when in fact, under normal circumstances, assets failed to equal liabilities.

The Level II Report and PWC estimated that the regulatory deficit as of that time, was $132,659, representing 4% of the total contributions earned for the fiscal year ending December 31, 2002. If, however, the best estimate of reserves was used according to the consultant, an estimated $126,000 would have to be included as a liability, making the total Trust equity ratio approximately 90%. In other words, there is no way in which it could be said that "the Trust has been deemed to have no significant funding issues" as was reported to the purported Trust members on November 24, 2004.

With regard to the 2003 year, there was no GAAP to regulatory analysis as there was for the 2002 year as part of the Level II and PWC reports. However, at page 36 of the Board's Level II Report, there is comment about the 2003 funding status which indicates that net result of all adjustments made results in the regulatory assets of 6.76 million dollars in regulatory liabilities of 6.92 million dollars (representing no change from the GAAP report) or a total deficit of $155,305. There is no indication there as to how the reserve losses were set, but a natural assumption would be that the low estimate from the consultant would have been used to determine the total deficit of reserves. It is not known with any certainty what the best estimate of potential losses or reserves was as of December 31, 2003. However, it must be assumed that additional reserves would have been necessary to have the actual reserves meet the best estimate of the consultant. It is very likely (and evidence will show eventually exactly what the numbers were) that the Trust equity ratio was again at least 10%, and potentially more. Again, the report

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noted that the rules and regulations which govern group Trusts state that the Trust assets must exceed Trust liability, and that as a result, the group is marginally underfunded, and sanctions applicable to underfunded groups may be considered. Again, the document reports that the policy of the Workers' Compensation Board was to only impose sanctions applicable for underfunded groups when the Trust equity ratio falls below 90%. They thus determined that "the Trust has been deemed to have no funding issues with a regulatory Trust equity ratio of 97.75%." Based on the November 24, 2004 letter, it does not appear that there was any information that was relayed to the reputed Trust members that Trust assets did not equal Trust liabilities.

Exhibit "7" of the Gilberti affidavit of January 4, 2012 is a report from PricewaterhouseCoopers, LLP.

Based on PWC's review, the financial statement as of December 31, 2002 was predominately the same as the adjusted level II regulatory financial statement. That document showed a regulatory deficit of $132,659, or a funding status percentage of 95%. Again, this is assuming that the reserves were brought to the lowest recommended level submitted by the actuary. Noteworthy, is that there apparently was no investment income reported for the year as the Trust did not have any investments as of December 31, 2002. It is not explained why there was no investment income nor was it explained why there was no investments as of December 31, 2002, but the report clearly states that if the reserves were not discounted an additional liability of $575,033 would be required, meaning that there would be a funded deficit of over $707,000, equaling a 79.9% Trust equity ratio for the year.

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There is no statement in the PWC report (Exhibit “7") of Gilberti’s affidavit of January 4, 2002 for the operating year ending December 31, 2003. The Court is left to assume that the same assumptions and accounting practices were used to develop the December 31, 2003 year-end, which has already been discussed above, indicating a total deficit for fiscal year 2003 of $155,305. Again, it must be assumed that there would be a significant adjustment if the most likely scenario of claims payment would have been reserved rather than the lowest.

Clearly, by August 14, 2004, the Workers’ Compensation Board was on notice that there were significant funding issues, and accounting issues, with the way that CRM was doing business. Also, it is clear that CRM was not following the advice of their actuary in making actual reserves, and despite all of these issues, a November 24, 2004 letter was sent to the reputed Trustees advising them that the Workers’ Compensation Board found no regulatory funding issues for December 31, 2002 and December 31, 2003.

Equally concerning to this Court is the information found in the Level II Report draft dated August 4, 2004. This rather significant information appears at pages 12 and 13 of that report, and deals with the marketing material and information used by CRM, that was being used to lure and entice employers to participate in their groups. Among the concerning issues to this Court is the “CRM Workers’ Compensation Insurance - Group Trust Programs” binder of information, as well as the CRM website, www.trustcrm.com.

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There are a number of issues that are outlined on pages 12 and 13 with regard to these materials. The first is a false statement that appeared in a number of places on the documentation reviewed that read:

> *A licensed administrator (CRM) provides all group services to include underwriting, claims management, loss control, administration and coordination of independent accounting, actuarial and legal services.*

The statement implies that the license held by CRM (presumably the third-party administrator license (TPA)) relates to all of the services listed, when in fact the TPA license held by CRM, received some eight months after the TRIWCT began operations, related only to the claims management aspect. The second important issue is that the documentation reviewed used the terms insurance and self-insurance interchangeably, when in fact the two have very different meanings the latter implicating liability on behalf of potential Trust members.

The third issue relates to the fact that the documentation made the boast that members enjoyed significant savings compared to traditional insurance products. The document goes on to show in point number 4 that the marketing information stated that the contributions and claims were overseen by a member-based board of Trustees, the group administrator, the claims administration and the State of New York Workers' Compensation Board. The implication - as found in the Level II Report - was that contributions were regularly overseen by the Workers' Compensation Board. This was found to be inappropriate.

Most importantly for purposes of some of the arguments concerning joint and several liability in this case is that the website, www.trustcrm.com, states that:

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For practicable purposes, joint and several liability can be mitigated if not eliminated through reinsurance.

The report noted that although proper reinsurance protection certainly limits the overall exposure of the group Trust, to imply that each member is virtually protected from any joint and several liability as a result of the reinsurance is misleading.[26]

Additional responses in the frequently asked questions part of the marketing material relates membership in the Trust to be similar to a safety group. Safety groups do not assume joint and several liability, but the Workers' Compensation Board in this case is suggesting that the Trust that was set up by CRM is similar to a safety group. The answer to the question "does joint and several liability mean that I would be liable for the losses of other participants?" imply that group self-insurance Trusts are "all but guaranteed" to out perform any safety group. This was found to be misleading as the results of a group Trust cannot be guaranteed, and to compare group Trusts to safety groups is not an appropriate comparison, particularly in light of joint and several liability assumed by group members. Similarly, the final response to the frequently asked question "if another member leaves the plan or goes out of business would the

[26] In June of 2010, the Task Force on Group Self-Insurance found that because of the deficiencies in the wording of the statutes, among others, that there are significant problems enforcing joint and several liability. The Task Force found that many GSIT members do not fully understand or comprehend joint and several liability. Certainly many cannot possibly understand the depth of the dark hole of liability they assumed when entering a GSIT. The Task Force also recognizes that joint and several liability can significantly impact the members business operations and can have a serious impact on the employers' financial position, including their ability to borrow and acquire surety bonds, for years into the future. [See Task Force on Group Self-Insurance, Report to Governor Paterson and the New York State Legislature, June 2010 at p. 10]. The Task Force also found that it is not cost effective nor likely attainable to provide a level of regulatory oversight needed to assure proper operation. [*Id.* at p. 10]. The Task Force found specifically that "members oftentimes do not even understand the risk of joint and several [responsibility]; they are under the impression they bought a traditional policy." [*See, id.*, Exhibit "D", Comparison of the Rules and Regulations Governing Group Self Insurance, p. 6]. They NOTE, "It is difficult, if not impossible, for an employer to accurately weigh the risks/benefits of joining a group as opposed to other types of coverages allowed." [*Id.* at p. 6].

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remaining members o the self-insured group be required to pay their claims?" - the answer is that "this is identical to the concept of any safety group provides its members regarding risk sharing". Again, this was found to be misleading, as liability assumed for any given policy year by a safety group member is limited to the premium paid.

It is important to this Court that the marketing materials just described apparently existed during all or some of the first four years of the creation of this Trust. Such marketing materials obviously were misleading and clearly intended to entice members to join with an acknowledgment by CRM that they would have little or no joint and several liability. This marketing material becomes important in the trial of this action, when the Board seeks to impose joint and several liability upon the petitioners/plaintiffs. If, in fact, they were told that there were distinct limits to joint and several liability, this would have an impact on the reason for their joining the Trust.

The Workers' Compensation Board, as is evident to this Court, as of August 4, 2004, had significant reason to know that the TRIWCT was grossly underfunded, in violation of its regulations, and yet sent a letter dated November 24, 2004 to the reputed Trust members that the Workers' Compensation Board finds no regulatory funding issues for December 31, 2002 and December 31, 2003. In this Court's opinion, these facts alone raise serious questions with regard to the Board's ability to allocate joint and several liability past that date. Clearly, if the Trust members had received notice that the assets of the Trust, based on the premiums that they had paid, formed only between 79.9% and 95% of the Trust, especially when the assumptions rooted those numbers in the least possible payments seen by the actuary in reserves, these facts would no doubt lead the Trust members to take action either to remove themselves from the Trust at

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that time, or take such other further actions as might be in their interest. The fact that the Workers' Compensation Board did not take action to rectify the fact that TRIWCT was not 100% funded at that time for those two calendar years, makes it doubtful that the Board should be in a position, as a matter of equity and law, to enforce joint and several liability against the petitioners/plaintiffs. The fact that the funding equity ratio as of December 31, 2005 was reported at 84.19% and then subsequently as of December 31, 2006 to be 74% and yet the Board takes no action other than to arrange meetings is again significant upon the issue of joint and several liability and other issues previously stated.

Indeed, as of September 29, 2006 when it became clear to the Board that the operating year ending December 31, 2005 showed a significant lack of complete funding, it appears the Board did little more than send a letter dated September 29, 2006, pursuant to 12 NYCRR 317.9(b)(1) calling for a meeting to discuss TRIWCT's financial condition and determine the appropriate action to restore the Trust's financial stability. However, it appears the Board did not do anything further at that time to remediate the funding deficits. By the end of 2006, the funding ratio was down to 74% for the year ending December 31, 2006, and again, the Board did nothing to remediate the lack of appropriate funding.

What is clear to the Court is that the reputed Trust members then, on their own, withdrew from the Trust and purchased Workers' Compensation insurance from carriers as of January of 2008. As of January, 2008, there were no Trustees left, and none of the TRIWCT members renewed their coverage for the year 2008. At that point, despite having clear knowledge of mismanagement, the Board did nothing until July 3,

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2008 at which time it advised CRM and TRIWCT that it would assume administration of the Trust, and directed CRM to transfer files to S.A.F.E., LLC.

The Level I Report dealing with the TRIWCT operating year ending December 31, 2005 is again telling. The Level I Report for that operating year shows that the accumulated regulatory deficit for this Trust is approximately $2,071,000 as of December 31, 2005. Based on the current year loss, it appears as though the contribution rates are approximately 7% short to cover the fixed and variable expenses of the Trust. It is noted that the Trust had expenses over 100% of the contributions earned in each year, leaving no reserves for the development of future claims! The Workers' Compensation Board found that the Trust was underfunded and any and all sanctions described should be considered.

Shortly thereafter, it came to the attention of the Board that the actuarial reports of SGRisk, Inc. may underestimate Trust liabilities by as much as 250%, and an independent actuarial review raised concerns over the actuarial assumptions and data used by SGRisk to develop the ultimate liabilities. This was documented in a letter dated December 5, 2006, which apparently went to the Trustees of the TRIWCT Trust. On March 26, 2007, the Board entered into an agreement with the Trust, whereby the Trust would pay the expenses of an independent actuarial review. As of December 31, 2006, the member deficit, at that time, was found to be $6,132,240, or a 30% deficit to contribution estimate. The Trust equity ratio was 73.85%. The Trust was grossly underfunded, and, at that time, the Trust was undergoing a Level II, Tier II actuarial review by an independent consultant. The BST report of July 12, 2010 shows reconstructed members' deficits as follows:

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12/31/01....$586,169

12/31/02....$3,002,501

12/31/03....$7,468,382

12/31/04....$16,259,976

12/31/05....$39,429,999

12/31/06....$41,600,841

12/31/07....$31,859,690

Total.......$140,207,558

These reconstructed members' deficits raised the issue that as of August 4, 2004 when the Workers' Compensation Board performed a Level II evaluation, and PricewaterhouseCoopers also evaluated the activities of the Trust, how those entities could have missed members' deficits by almost $130,000,000. BST's revisions include reliance on a supposed audited financial statement of TRIWCT done by Firley, Moran, Freer and Eassa. However, the statement appears not to be an audited financial statement, as they made the concession in the statement that "we are unable to express, and we do not express an opinion on the financial statements referred to above (for the years ending December 31, 2008 and December 31, 2009)". That report also reports:

> *...The methodology used by the Trust (defined as the New York State Workers' Compensation Board) to determine the New York State Workers' Compensation Board assessments is not consistent with the legislation enacted. In our opinion, accounting principals generally accepted in the United States of America require that the assessment be recognized based on a general understanding of the current legislation.*

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The issues before the Court then crystalize by the Firley, Moran, Freer and Eassa financial statement, inasmuch as the statement is apparently not certified, and the statement specifically makes note that the assessments are unlawful. That, combined with the Board's obvious admission that at the time that the deficit assessments were issued terminated GSIT's were subject to continued assessments under the Workers' Compensation Law §15(8) and §151. On April 1, 2011, the Workers' Compensation Law was amended to eliminate Workers' Compensation Law §15(8) and §151 assessments for inactive self-insurers, effective January 1, 2011 (*see,* L.2011 Ch. 57 pt. G §§ 1,7 and 10). The Board advises the Court that they are reworking the members pro-rata share thereof so as to not include the estimated liability for future Workers' Compensation Law §151 and §15(8) assessments. This Court has not been apprised whether this recalculation has occurred as of this time.

That notwithstanding, the Board argues that if the Court were to hold that this amendment invalidated the existing deficit assessments against the members of insolvent GSIT's the Board would have no other available funding mechanism other than Workers' Compensation Law §50(5)(g), thereby imposing greater financial burdens on closed, non-defaulted GSIT's, and that in particular, all private self-insured employers in general would have to carry the deficits. The Board argues that this would be contrary to the expressed legislative intent and that the easy result here would be to simply have the petitioners/plaintiffs simply sign agreements agreeing to their pro-rata shares of the TRIWCT's deficit amounts without the estimated liability for future §151 and §15(8) assessments. This Court finds otherwise.

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Petitioners/plaintiffs have shown a likelihood of success on the merits of their claims. A stay and/or other injunctive relief should be issued.

B. HAVE THE PETITIONERS/PLAINTIFFS THROUGH THE DOCUMENTS AND ARGUMENTS PRESENTED TO THIS COURT ESTABLISHED IRREPARABLE HARM?

Irreparable harm is adequately demonstrated where a movant establishes that a respondent/defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of petitioners/plaintiffs' rights respecting the subject matter of the action. (CPLR §6301). In the present case, petitioners/plaintiffs contend that the imminent nature of the Board's action here is self-explanatory. Three of the petitioners/ plaintiffs have already been the subject of Board judgments pursuant to Workers' Compensation Law §26. Two of the judgments were obtained without any prior notice at all. As a result, the petitioners/plaintiffs' contend that in absence of a stay, the petitioners/ plaintiffs would be at the mercy of the Board as to when these judgments will be enforced, and what enforcement technique would be used. As to the remaining petitioners/plaintiffs, they contend that the Board can, on a whim and without notice, obtain a judgment for an arbitrarily assessed amount that they allege to be determined by S.A.F.E., LLC. They contend that given the amount of the Trust's alleged deficit and the fact that the Board has already obtained judgments against other TRIWCT former members, it is only a matter of time before the Board takes judgments against the remaining Trust members.

The petitioners/plaintiffs argue that absent the grant of stay pursuant to this motion, petitioners/plaintiffs will be deprived of their due process rights, as they are

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afforded no other means to challenge the Board's ability to seek and enforce deficit judgments, and that consequently, nothing is in place to preserve the status quo pending the resolution of their claims. Petitioners/plaintiffs allege that this, in and of itself, demonstrates irreparable harm. *Citing, Lily Pond Lane Corp. v. Technicolor, Inc.*, 98 Misc.2d 853 (Supreme Court, New York County, 1979). *See also, Ciocca v. Clinton County*, 1999 U.S. Dist. LEXIS 22401 (NDNY, 1999). Petitioners/plaintiffs contend that apart from this motion, there is no other adequate remedy at law. The moment the Board obtains or enforces a judgment against them without notice, or an opportunity to be heard, petitioners/plaintiffs, at that time, they contend, are denied the constitutional rights to due process of law.

Petitioners/plaintiffs also argue that the imminent injury to them is real and not illusory or speculative. *Citing, Destiny USA*, 69 AD3d at 223, petitioners/plaintiffs argue that they lack the fundamental protections of procedural and substantive due process, and are powerless to protect themselves against state actions that threatens their very existence as commercial entities. All petitioners/plaintiffs have the same or similar claims, and each face the same or similar harm that may come about by the Board's actions. Thus, petitioners/plaintiffs argue that because of the filing and entry of a judgment against them that is a public document, that immediately impacts their credit worthiness and their ability to borrow money, obtain lines of credit, and otherwise be competitive. *(Citing,* McLaughlin Affidavit, Tripi Affidavit, Mix Affidavit, and White Affidavit). Petitioners/plaintiffs further argue that the judgments, once taken and filed, must be disclosed to the state which severely impacts each petitioners/plaintiffs ability to effectively bid for state projects, which is a significant portion of their business.

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(Citing, McLaughlin Affidavit, Tripi Affidavit, Mix Affidavit, and White Affidavit). Each of the petitioners/plaintiffs also contend that the filing and entry of judgments will inevitably lead to the destruction of their company and the loss of hundreds of jobs, not to mention the valuable commercial services each provides in a struggling economy. *(Citing,* McLaughlin Affidavit, Tripi Affidavit, Mix Affidavit, and White Affidavit).

The courts of this state have routinely granted interlocutory relief of the type and kind requested by petitioners/plaintiffs in this case. For example, in *Li Gang Ma v. Hong Quang Hu*, 2009 NY Slip.Op. 30607(U) (Supreme Court, Queens County, January 5, 2009), a preliminary injunction was granted where injunctive relief would prevent the potential dissolution of an existing valuable asset or some comparable potential irreparable harm.

In *Mister Natural, Inc. v. Unadulterated Food Products, Inc.*, 152 AD2d 729 (2nd Dept. 1989), a preliminary injunction was deemed necessary to maintain the status quo despite factual disputes as to the merits of claims where there was no assurance that the plaintiff would be able to stay in business pending trial and was in real danger of losing its business or suffering dissolution if injunction relief were not imposed. Similarly, in *US Ice Cream Corp. v. Carvel Corp.*, 136 AD2d 626 (2nd Dept. 1988), a preliminary injunction was necessary to maintain the status quo where there was no assurance that the plaintiffs would be able to stay in business pending the trial, with the court noting that interference with an ongoing business warranted injunctive relief even where factual disputes existed. In *People by Abrams v. Anderson*, 137 AD2d 259 (4th Dept. 1988), the court held that the defendant's interference with the plaintiff's business could not adequately be compensated by monetary damages because of the difficulty in

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proving how many individuals would have been deterred from patronizing those businesses as a direct result of defendant's conduct.

The same results have come from the federal courts in the Second Circuit, applying New York law. For example, in *Legacy Health Care, LLC v. New York*, 2010 US Dist. LEXIS 98329 (WDNY, September 20, 2010), the court held that the treat of closure of a nursing home by the New York State Department of Health was, by itself, sufficient to establish irreparable harm. In *Galvin v. New York Racing Association,* 70 F.Supp.2d 163 (EDNY, 1998), the court found that an injunction was warranted where the absence of such relief would seriously compromise the company's ability to continue in its current form, before an assessment of claims of substantive and procedural due process could be litigated and resolved. In *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2nd Circuit, 1984), the Second Circuit found that the loss of plaintiff's distributorship, and ongoing business representing many years of effort and the livelihood of its owners, constitutes irreparable harm. There, the court found that what the plaintiff stands to lose cannot be fully compensated by subsequent monetary damages. The same result was reached in *Semmes Motors, Inc. v. Ford Motor Company*, 429 F.2d 1197 (2nd Circuit, 1970) where the court in granting injunctive relief found that the plaintiff's right to continue a twenty-year old dealership was not measurable entirely in monetary terms. In *Jacobson Co. v. Armstrong Cork Co.*, 548 F.2d 438 (2nd Circuit, 1977), the court found that the plaintiff presented ample evidence to show a threatened loss of goodwill and customers, both present and potential, neither or which could be rectified by monetary damages, and as a result the Second Circuit affirmed a finding of irreparable harm. In *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales*

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Corp., 992 F.2d 430 (2nd Circuit, 1993), the Second Circuit found that a major disruption of a business can be as harmful as termination, and a threat to the continued existence of a business can constitute irreparable injury.

The issue of irreparable harm to the petitioners/plaintiffs in this case is a hotly contested issue in this matter. Petitioners/plaintiffs contend, through the affidavits that were submitted in support of their request, that Workers' Compensation Law §26 allows the Board to take judgments against the petitioners/plaintiffs, and at the same time should they so choose, to issue cease work orders if the judgments are not paid. These judgments are of the type and kind that are determined solely by the Board, without any input or hearing prior to their issuance. Additionally, it is admitted by the Board that the most recent total "short fall" of over one hundred forty-two million dollars ($142,000,000)is excessive and inaccurate, given the most recent amendment to the Workers' Compensation Law that excludes IBNR (incurred but not reported) claims and other administrative assessments. Presumably, the Board seeks authority to go ahead and enter pro-rata judgments as against each of the petitioners/plaintiffs for the entire amounts as determined to be due by S.A.F.E., LLC, without given the petitioners/plaintiffs any right to be heard on the nature, extent, or amount of said judgments. The Board has admitted to this Court that they have not turned over all of the information necessary for the petitioners/ plaintiffs to review the methodology upon which S.A.F.E., LLC determined the amounts that the Board seeks to enforce, but rather has offered to turn the information over assuming that the petitioners/plaintiffs signed an agreement to pay current assessments as due. Clearly, the application of a one hundred forty-two million dollar ($142,000,000) plus assessment, lends each of the

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petitioners/plaintiffs in jeopardy of losing their businesses particularly when Workers' Compensation Law §26 gives the Board the power to stop the petitioners/plaintiffs from going about their business.

The Board argues that the moving papers are utterly devoid of any showing that petitioners/plaintiffs will suffer any harm, let alone irreparable harm if the requested stay is not granted. They point to the six affidavits (Lewis Tripi, Christopher Mix, Thomas McLaughlin, David White, Russell Yates, and Samuel Chiodo), and arrive at the conclusion that there is no proof that any of the companies involved would suffer irreparable harm.

Respondents/defendants seek to impress upon this Court that the well-settled rule of law that mere economic loss, without more, which is compensable by money damages, does not, under any circumstances, constitute irreparable harm. In espousing that rule, they cite *Ed Cia Corporation v. McCormick,* 44 AD3d 991 (4th Dept. 2007); *Winkler v. Kingston Housing Authority*, 238 AD2d 711 (3rd Dept. 1997); *Dhillon v. Health Now New York*, 32 AD3d 1197 (4th Dept. 2006). The respondents/defendants assert to the Court that the petitioners/plaintiffs should pay the Workers' Compensation Law §26 judgments entered against them, and if they do, cease work orders will not be levied, and if they win, there monies will be refunded. Indeed, if the various companies are unable to pay the Workers' Compensation Law §26 judgments against them, the Workers' Compensation Board might issue stop-work order, seize the companies' assets, or restrain their bank accounts and otherwise cause significant harm. Through the presentation of the Board, the end result here is simple. Just have the petitioners/plaintiffs pay the judgments, and there won't be any seizure of assets,

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restraining of bank accounts, or any stop-work orders, satisfactions of judgments will issue, and they will not have duty to report the judgment to potential creditors or other governmental entities. The Board goes on to assert that the judgments already taken together with proposed assessments are such that the petitioners/ plaintiffs should be able to pay them. If anything, the response of the Board with regard to these issues creates nothing more than a question of fact.

The fact remains clear to this Court through the documents and arguments submitted in opposition to the request for stay, that through the forensic accounting done by BST in July of 2010 and the report that was entitled "Deficit Reconstruction in 2010 Assessment for TRIWCT", that the net deficit liabilities of TRIWCT as of December 31, 2009 were approximately one hundred forty-two million dollars ($142,000,000) (Exhibit "ZZ", Schedules 2, 3 and 4). The Board takes the position that the amounts claimed owed by the petitioners/plaintiffs are included in Schedule 5 and summarized in Schedule 6 attached to the BST determinations as of December 31, 2009, which were reported in July, 2010. The Board then allegedly, by virtue of the Board's July 29, 2010 letter to each of the petitioners/plaintiffs provided each TRIWCT member with an assessment invoice which billed the member for the presumed amount of its pro-rata share of TRIWCT's deficit as reflected on Schedule 5 of the Deficit Reconstruction and Assessment, less any credits already paid. Invoices were likewise sent and offers of repayment plan options were given.

There is no significant information before this Court, nor, apparently, was there any given to the petitioners/plaintiffs as to why and how the proposed assessment based on underestimated TRIWCT liabilities grew from eleven million dollars ($11,000,000)

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on January 8, 2008 to approximately sixty-six to sixty-eight million dollars ($66,000,000 - $68,000,000) in 2009 (at a time when the Board sued CRM and others) to one hundred forty-two million dollars ($142,000,000) by the end of 2009 (as set forth in BST's report).[27]

The Board takes the position that such an increase is to be expected. Further, the Board takes the position that whether the amount stated is accurate or not (particularly given the non-inclusion of the IBNR claims) (and other assessments disallowed by the 2011 legislation) that the petitioners/plaintiffs should simply pay the amount of the assessment, and worry about any refund at a later date.

The Board's July 29, 2010 letter asked each former member to execute an agreement which would acknowledge its "joint and several liability" for the TRIWCT Workers' Compensation obligations, and agree to pay its pro-rata share of such liability under a repayment plan that would be acceptable to the member as presented by the Board. Each member was then advised that upon its failure to execute and return the agreement with the first payment within forty-five days, that the assessment would be considered in default status and subject to enforcement and collection as authorized by law, including referral to the Attorney General for collection and/or filing of a judgment and other such remedies as allowed by Workers' Compensation Law §26.

In doing so, the Board relied on the June, 2010 amendment to Workers' Compensation Law §50(3-a)(7)(b), which the Board says "clarified" the provisions of

[27] It must be mentioned that TRIWCT's deficit was reported as $13,400,000 as of June of 2010 when the Task Force on Group Self Insurance made its report to the Governor and the Legislature (see Task Force on Group Self Insurance Report to Governor Paterson and The New York Legislature, June, 2010, p. 43).

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Workers' Compensation Law §26 providing the Board with authority to enter judgment against any member of an insolvent GSIT which does not pay a member assessment. A judgment entered against a former member of an insolvent GSIT, pursuant to Workers' Compensation Law §26 and Workers' Compensation Law §50(3-a)(7)(b) allegedly is limited to the amount of the Workers' Compensation payments made by the Board pursuant to awards issued against the employer for compensation to its injured employees from the date that the Board started paying its Workers' Compensation obligations of the insolvent GSIT.

It is clear that the Board wanted the TRIWCT former members to recognize joint and several liability for the TRIWCT's Workers' Compensation obligations which arose during their periods of participation.

The Board then had a meeting on August 13, 2010 where they contend that the "methodologies" used to generate the forensic program audit and the deficit reconstruction were made known to the former members. The Board then takes the position that that meeting was enough to adequately provide the documentation necessary that explained the calculation of the deficit amount in each members' pro-rata share thereof, including the deficit reconstruction assessment, BYNAC's actuarial report as of December 31, 2009, and the "audited" financial statement issued by Firley, Moran, Freer and Eassa, as of December 31, 2009.

The Board then offered the former members the option of entering into a MOU agreement where they would make the documents relied upon by BST available to the members' experts in consideration for the members entering into an interim repayment agreement designed to provide the Board with funding needed to meet the TRIWCT's

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current claims obligations pending the outcome of the expert's review. The Board indicated that it would extend the forty-five day deadline set forth in their July 29, 2010 letter while the specific terms of the MOU were negotiated.

The Board takes the position that this is enough to give the former members of the TRIWCT the necessary input and grounds to comply with procedural due process. This Court sees a substantial question with regard to the substantial due process afforded to the members by the Board's actions.

The materials that have been submitted to this Court establish the likelihood that the petitioners/plaintiffs will suffer irreparable harm if the Board is allowed to enforce the deficit assessments pending judicial review.

These judgments are authorized to be filed when a member neglects or fails to pay an assessment. *See*, Workers' Compensation Law §50(3-a)(7)(b). The judgments are unappealable, and serve as a mechanism to coerce payment of a members' entire share of the alleged deficit. The judgment amounts represent a portion of that deficit share. Based upon the materials submitted to this Court, petitioners/plaintiffs have marshaled cogent reasons and clear evidence, including the Board's own admissions, which establish that the process attending the deficit assessments was fraught with heightened risk of error, and thus wholly incompatible with the demands of procedural due process.

Petitioners/plaintiffs in this case contest the propriety and accuracy of the deficit, including any portion attributable to compensation awards, and procedural due process guarantees them a right to wage that contest before an impartial judicial tribunal prior to the depravation of their property. *Sharrock v. Dell Buick-Cadillac*, 45 NY2d 152

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(1978); *Fuentes v. Shevin*, 407 US 67 (1972). The Board's position is that the petitioners/plaintiffs will not suffer irreparable harm because they surrendered what might be constitutional rights. As the Supreme Court stated in *Fuentes v. Shevin*:

> *...no later hearing an no damage award (or refund) can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not...embraced the general proposition that a wrong may be done if it can be undone.* (*Fuentes, supra,* 407 US at 82).

The respondents/defendants assertion that the real issue in this case is whether the former TRIWCT members are financially able to pay the Workers' Compensation Law §26 judgments is not a viable theory. This assertion was soundly rejected in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 US 601 (1975). In the *North Georgia Finishing* case, the supreme court struck down statutes authorizing the prejudgment garnishment of a corporation bank account absent a prior opportunity to be heard. There, the United States Supreme Court held:

> *It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among the different kinds of property in applying the Due Process Clause.* (*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 US 601 at 608).

Based on the foregoing, the respondents/defendants pay/refund argument cannot be countenanced by this Court as it appears to be at odds with settled principals of procedure due process.

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The Board's argument, as set forth in the briefs before this Court, somehow rely upon alleged amounts of their previous (i.e., 2006-2007) contributions to the Trust and annual payrolls. Given the case law above, such argument seems irrelevant. Secondly, the assertion is one of argument by respondents/defendants' counsel, with no real current support submitted to the extent that the petitioners/plaintiffs have the ability to simply "pay" the judgments. This Court cannot make a finding at this time that the petitioners/plaintiffs have the ability to pay such staggering judgment amounts based on nothing more than a five or six year old payroll data. The facts submitted by the petitioners/plaintiffs principals, together with the initial reply to this Court show the petitioners/plaintiffs companies are at grave risk of bankruptcy, shutdown, or ceasing operations with the attendant loss of thousands of jobs and dire social consequences if the Board's position is sustained. Thus, the Board's attempt to enforce what otherwise is an already admitted excessive alleged liability, at least as it is reviewed under current law, without the petitioners/plaintiffs having the ability to have the significant assessment reviewed by a court of competent jurisdiction, with the appropriate discovery, cannot be countenanced by this Court.

In the exercise presented by the Board to show that there would be no irreparable harm if a stay was not in place, the position taken by the Board is that all that needs to happen is that if Sunshine, the petitioners/plaintiffs and the proposed intervenors simply pay the Workers' Compensation Law §26 judgments entered against them, the Board will file satisfactions of judgment and there will be no repercussions as a result of the judgments. The Board further takes the position that on that chance, the employers will not have to report they have a judgment against them to their creditors or

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governmental entities, and they will not be subject to any stop-work orders, seizure of assets, or restraining orders on any of their accounts.

The Board then takes that premise to another level when it specifically delineates the purported amount of the assessment and judgments against the petitioners/ plaintiffs, in an effort to show that each of the petitioners/plaintiffs can easily pay the Workers' Compensation Law §26 judgments. For example, the Board took a judgment against AT & A on May 23, 2011 in the amount of $72,877.83. The Board's position is that this assessment, if paid, would be easily done by AT & A and that the appropriate satisfaction of judgment would be filed with no subsequent seizures or enforcement proceedings. However, as of July 29, 2010, the total assessment against AT & A was $391,685.40, together with additional charges that call for a total deficit assessment as against AT & A of $396,760.65.

Also, on May 9, 2011, the Board took a §26 judgment as against Sunshine in the amount of $50,584.24. Again, the Board uses the same logic to show how easy it would be for Sunshine to pay this amount, particularly when Sunshine paid $164,000 in member contributions to TRIWCT. The July 29, 2010 deficit assessment against Sunshine was in the amount of $387,688.41, together with additional charges, or a total of $402,072.21. The assessment against another Sunshine entity at the same time was $552,082.33, or in all, close to $1 million dollars is being claimed by the Board against the Sunshine companies by way of deficit assessment. Similarly, with Pariso, Inc., the Board took a judgment on May 23, 2011 in the amount of $111,099.73. The Board again asserts that it would be easy for Pariso, Inc. to pay that judgment in return for a release

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and no further enforcement worries of the Workers' Compensation Law §26 judgment. However, the July 29, 2010 assessment with regard to Pariso, Inc. is $1,196,389.16.

With regard to TransCare, the Board submits that there has been no Workers' Compensation Law §26 judgment filed against them, but the Board would seek a judgment in the amount of compensation payments made by the Board on TransCare's behalf pursuant to awards issued against TransCare for compensation to its injured employees from the date that the Board starting paying TRIWCT's Workers' Compensation obligations. The Board estimates that that amount would be approximately $700,000. However, the deficit assessment of July 29, 2010 alleges that TransCare has a total deficit assessment of $13,710,445.23. The same is true for most of the other petitioners/plaintiffs. For example, the Board indicates that the amount necessary to bring Riccelli to date with regard to its compensation obligations paid from the Board's administrative funds would be $143,000, and the Board again indicates how easy it would be for Riccelli to pay that amount. However, the total July 29, 2010 deficit assessment as against Riccelli was $5,626,718.77.

It is the larger numbers that the Board seeks to have the petitioners/plaintiffs agree to pay through the deficit assessment contractual agreement ("DACA") found at Exhibit "FFF", which agreement includes language that admits the appropriateness of the allocation methodology, waives the petitioners/plaintiffs' rights to any challenge in any form or proceeding, and calls for the petitioners/plaintiffs to fully acknowledge the application of joint and several liability to the deficit assessments, and acknowledge the Board's authority to pursue joint and several liability. The memorandum of understanding (Exhibit "HHH") calls for a monthly payment of a portion of the

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assessment against the petitioners/plaintiffs "...of the amount claim owed by the Board for each Former TIWCT [TRIWCT] Member, as set forth in the TIWCT 2010 final assessment for each Former TIWCT Member." *(See* Exhibit "HHH", pg. 3). It was with the signing of this agreement that the Board has indicated that it would share with the petitioners/plaintiffs the information necessary to fully review the contentions and claims made with regard to the total deficit assessment of $142,530,734.

This Court is also struck by the nature of the increase in the deficit assessment between 2008, 2009, and 2011.

The report shows that the deficit assessment amount reported, at least as of the time that the task force on group self-insurance reported to Governor Paterson and the New York State Legislature in June of 2010 for the entire TRIWCT was $13,400,000, of which $1,826,500 was collected as of May 17, 2010. This Court sits with wonder to determine how the assessment from that date grew over tenfold to $142,530,734.

This Court finds that the petitioners/plaintiffs have shown that there would exist a significant hardship creating irreparable harm if the enforcement proceedings of the Board are not stayed.

This Court finds that the petitioners/plaintiffs have succeeded in establishing the fact that if injunctive relief through a stay is not granted in this case, that irreparable harm will occur. For these reasons, a stay of enforcement until all issues are finally determined, is necessary.

C. BALANCING OF THE EQUITIES INVOLVED

This Court, through its decision to this point, is satisfied that the movants in their request for stay pursuant to §7805 of the CPLR have established the likelihood of

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irreparable injury as well as a likelihood of success for many of the claims presented on their behalf. The next step is to evaluate the multiple factors otherwise known as "balancing the equities" to determine whether the balance of equities favors the plaintiff. If so, a stay should be granted. *WT Grant Co. v. Srogi*, 52 NY2d 496, 438 NYS2d 761 (1981); *State v. Premium Color of NY, Inc.*, 285 AD2d 544, 728 NYS2d 86 (2nd Dept. 2001). Like the first two prongs of the threshold examination, it is the plaintiff who bears the burden of proof on this issue. *Nobu Next Door, LLC v. Fine Arts Housing*, 4 NY3d 839, 800 NYS2d 48 (2005).

In balancing the equities, the court's focus must be on the impact of granting or denying the stay upon all of the immediate parties to the application, and if it is shown that the irreparable injury to be sustained by the petitioners/plaintiffs is more burdensome to the petitioners/plaintiffs than the harm caused to the respondents/defendants through the imposition of the stay, then the court should grant the stay or request for relief. *See, McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan and Co.*, 114 AD2d 165, 498 NYS2d 146 (2nd Dept. 1986); *Nassau Roofing and Sheet Metal Co. v. Facilities Development Corporation*, 70 AD2d 1021, 418 NYS2d 216, Appeal dismissed, 48 NY2d 654 (1979); *Fingerlakes Health Systems Agency v. St. Joseph's Hospital*, 81 AD2d 403, 442 NYS2d 219 (3rd Dept. 1981); *Roche v. Bruder*, 108 Misc.2d 523, 437 NYS2d 823 (Supreme Court, Westchester County, 1978). In order to balance the equities, the duty of the court is to carefully analyze the parties' status and gage the effect of the injunctive relief or stay upon that status. If the petitioners/plaintiffs show significant injuries or irreparable harm, absent the injunctive relief or stay, is both irreparable and more burdensome than the harm than the defendant would suffer from

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an injunctive stay. The court, in its discretion then, will issue an injunctive stay. *Borenstein v. Rochel Properties, Inc.*, 176 AD2d 171, 574 NYS2d 192 (1st Dept. 1991); *Metropolitan Package Store Association, Inc. v. Koch,* 80 AD2d 940, 437 NYS2d 760 (3rd Dept. 1981); *Tanzer Economic Associates, Inc. v. Universal Food Specialities, Inc.,* 87 Misc.2d 167, 383 NYS2d 472 (Supreme Court, New York County, 1976); 13 Weinstein-Korn-Miller, NY Civ Prac, §6301.05(4).

In the search to balance the equities, the court must take into account the public interests, if any, involved in the outcome; the fairness of the situation as between the parties; the availability of other remedies; as well as other considerations. Many times, the task of balancing the equities blends with the irreparable harm that would follow should the injunctive relief/stay not be granted. *Town of Porter v. Chem-Trol Pollution Services, Inc.*, 60 AD2d 987, 401 NYS2d 646 (4th Dept. 1978); *Continental Tell Corp. v. Continental Tell Supply*, 29 AD2d 513, 285 NYS2d 407 (1st Dept. 1967). The balancing approach, thus taken by the court, will not necessarily lead to either a grant or denial of the requested stay, but given the equities involved, the court may fashion a remedy that will be fair to both sides. *See, Eastern Business Systems, Inc. v. Specialty Business Solutions, LLC,* 292 AD2d 336, 739 NYS2d 177 (2nd Dept. 2002). The balancing of the equities does not take place in a vacuum. Many cases seeking injunctive relief turn on the court's assessment of the fairness of conduct of one or both of the parties to the proceeding. *See, Brintec Corp. v. Akzo, NV*, 129 AD2d 447, 514 NYS2d 18 (1st Dept. 1987); *Four Times Square Associates, LLC v. Cigna Investments, Inc.*, 306 AD2d 4, 764 NYS2d 1 (1st Dept. 2003). In *Four Times Square Associates, LLC v. Cigna Investments, Inc.*, the plaintiff moved for a preliminary injunction seeking to preclude the defendant

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holder of mortgage from declaring the movant in default for failing to obtain additional terrorism insurance coverage, and to stop the defendant from transferring funds from a lockbox account to the separate account to obtain terrorism coverage. The lease provided that the plaintiff would provide insurance coverage on the mortgaged premises located in Manhattan. The mortgage did not specifically mention insurance against acts of terrorism. Plaintiff had obtained insurance that included acts of terrorism, but after September 11, 2001, the renewal policy specifically excluded acts of terrorism. It was upon this act that the defendant sought to declare the movant in default for failing to obtain additional terrorism coverage and sought to transfer the funds from the lockbox account so as to obtain such coverage. The court concluded that the balance of equities were in the movant's favor stating:

> *...The equities demand that (the movant) should not be forced to purchase terrorism insurance until there is a final determination on the contractual rights and obligations of the parties.*
>
> (*Four Times Square Associates, LLC v. Cigna Investments, Inc.*, 306 AD2d 4 at 6, 764 NYS2d 1 at 3).

In the case at bar, respondents/defendants take the position that the equities are firmly in their favor. The respondents/defendants contend that unless they are allowed to go forward and execute the Workers' Compensation Law §26 judgments and/or use whatever §26 collection tolls they may have, then they, as the Workers' Compensation Board, would be unable to fulfill the obligations of the TRIWCT to the injured workers who were employed by the participants of the TRIWCT. Respondents/defendants assert the fact that there is a significant public purpose and public interest in assuring that

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injured employees are covered for their injuries, and that they have the resources to provide for the Workers' Compensation disability payments and medical bill payments.

There is no doubt that there is a significant public interest in making sure that all employees have Workers' Compensation coverage, and that they are protected in the case of an injury or accident at work. That significant public purpose forms the Rosetta Stone upon which the Workers' Compensation system was built, with the Board given the necessary tools to enforce the main mandate - that all workers within the State of New York have adequate Workers' Compensation coverage in case of an accident.

However, in this case, the petitioners/plaintiffs contend that because of the Board's actions in the formation and acceptance of an illegal Trust, and their lack of regulation over that Trust during the course of time that the Trust was active, that has caused severe and potentially dire circumstances to the members of TRIWCT should the deficit assessments be enforced. Petitioners/plaintiffs contend that the ability that the Board has to obtain such judgments without hearing, notice, or proof violates constitutional due process, and that it is innately unfair to allow the Board to make them pay significant deficit assessments when they never had a chance to contest the assessments, and were only trying to fulfill their obligations under the Workers' Compensation Law.

Indeed, the $142,530,734 deficit assessment sought to be levied upon the TRIWCT members, in this Court's opinion, creates significant hardship and quite possibly would mean the end of many of the organizations, and their business, if enforcement activities go forward.

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There is a significant public interest in keeping these companies alive and in business, not only because of the services which they provide, but also for the number of jobs that each of these companies provide to residents of the State of New York. Petitioners/plaintiffs allege, *inter alia*, that they were duped into joining TRIWCT by CRM, actively, and by the Workers' Compensation Board, at least passively and more than likely, perhaps actively. They contend that when they joined TRIWCT that they never imagined that they would receive deficit assessments amounting to $142,530,734. They contend that a deficit assessment applied pro rata with the application of joint and several liability would cause utter devastation to the transportation industry, the markets that they serve, and the employees that the have work for them.

If the Board is enjoined or stayed from executing upon the deficit assessments, and otherwise stayed from any collection activities pending the resolution of this case, it will be the State of New York that will pay the interim price of keeping injured employees current with their Workers' Compensation payments. If, in fact, the trier of fact finds the Board's actions complicit, then it would be manifestly unjust to allow the Board to go forward with enforcement activities against the former TRIWCT members. Justice would demand that if the Board contributed to the shortfalls, then the State should be the one to be responsible for the payment of the Workers' Compensation expenses. Inherently, the State has the power to tax, and such amounts can and will be recouped by that power.

Petitioners/plaintiffs bring to this Court significant issues worthy of final determination, for which they have proven - at least to a great extent - a likelihood of success. Issues such as whether the Trust was initially formed properly and/or whether

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the Trust must be considered void, *ab initio*, with the resultant issue of whether or not each of them should be responsible jointly and severally for the $142,530,734 deficit assessments are two of the initial issues that need to be addressed and deserve judicial scrutiny. Additionally, the issue of what role the Workers' Compensation Board has to regulate entities such as GSIT's, and what action should be taken by them in their regulatory capacity to stop what clearly could be a disaster developing of a lack of adequate funds to fully pay the Workers' Compensation claims brought to TRIWCT, are issues which deserve definitive review and answers. Additional issues surrounding the wind down of TRIWCT, together with the actions of the Board taken after the TRIWCT stopped functioning, including whether the Board should have allowed CRM to continue for the next eight months until the Board took over with S.A.F.E., LLC as the administrator, and then the determination by S.A.F.E., LLC upon whatever methodology was used to determine the ultimate assessment of $142,530,734.

There is a significant public interest in having a court review the activities taken by the Board and their role in the creation, regulation, operation and eventual destruction and wind down of TRIWCT. Petitioners/plaintiffs bring to the table a number of salient issues that must be decided given the history of GSIT's and the State of New York. For yet another example, issues surrounding the Board's actions that occurred at a time after the employer group left the Trust are significant issues that must be decided.

In determining whether the probable irreparable injury to be sustained by the petitioners/plaintiffs in this case is more burdensome to them than the harm caused to the respondents/defendants through the imposition of the injunction or stay becomes,

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in the end, rather obvious to see and rather easy to decide. Given the analysis of irreparable harm, the likely loss of the commercial lives of the petitioners/plaintiffs, the difficulty that they will have in operating their businesses, the nature of the fallout with mass unemployment caused by their demise, ultimate financial ruin, and the total alleged injustice otherwise caused by the failure to have their claims heard by a reliable finder of fact or a jury of their peers, all speak loudly to equities weighing in their favor. Given these possible and/or probable outcomes, any final judgment in their favor at the end of litigation will be entirely ineffectual if a stay is not issued. This Court finds that without a stay or other injunctive relief that the movants will be faced with imminent, irreparable injury to established and prospering enterprises. This fact alone outweighs the possible injuries or damages to the Workers's Compensation Board and the State of New York. Additionally, the significant constitutional challenges and the implications of those challenges weigh in favor of a stay. Indeed, the adverse economic effects that would result from enforcement of the deficit assessments, if found to be in violation of due process, tip the equities squarely in petitioners/plaintiffs' favor. *See, Destiny USA, supra*, 69AD2d at 222-223; *Yonkers Racing Corp. v. Catskill Regional Off Track Betting Corp.*, 159 AD2d 615 (2nd Dept. 1990); *Red Earth, LLC v. United States,* 657 F.3d 138 (2nd Circuit 2011); *State of New York v. City of New York*, 275 AD2d 740. This Court finds that the denial of injunctive relief in this case would render any final judgment likely ineffectual, and that the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner.

The main harm that the Board would suffer, given the injunctive relief, should it ultimately prevail, is one of timing. All injured workers have been and will continue to

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be compensated for their injuries. Should petitioners/plaintiffs' claims ultimately fail, any monetary damages assessed to them would directly, by statute, be refunded or credited to the employers who are currently assessed with the payments of those amounts, given the effect of Workers' Compensation Law §50(5)(e). So if, in fact, the Board must assess other entities to make the payments to the injured employees or TRIWCT, that ultimately will be redressed if the Board is successful.

History shows that prior to the 2006/2007 fiscal year, there had never been a self-insured group default in New York State, according to the Task Force on Group Self Insurance. The §50-5 assessment was, up until that time, only imposed for the administrative costs of running a self-insurance program, and the defaults of several individuals self-insurers. The total industry wide assessment annually was below $10,000,000. (*See,* Task Force on Group Self-Insurance, Report to Governor Paterson and the New York State Legislature, June, 2010). For the first time in history of the program, in 2006/2007 several groups were closed due to financial concerns. In 2007/2008 those groups, plus several additional groups became insolvent. Due to a growing level of unfunded claims costs related to the insolvent groups, the deficit assessments for 2007/2008 almost doubled from the previous year. Additional groups defaulted, and the level of unreserved claims grew even further, causing the assessment to grow even higher. The Workers' Compensation Board's first priority is to insure that every claimant receives the full benefits to which they are entitled regardless of the funding position of any GSIT that is liable for those benefits.

As of June of 2010, fifteen GSIT's met the criteria of insolvency. The projections at that time indicated that the fifteen GSIT's had a combined deficit of $498,000,000.

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(*See,* Task Force on Group Self-Insurance, Report to Governor Paterson and the New York State Legislature, June, 2010 at p. 31). It is inconceivable to this Court that from the June, 2010 time period where TRIWCT had a purported deficit assessment of $13,400,000 out of the global $498,000,000 of combined deficit assessments from the group that only one year later, some three years after the Trust stopped conducting business, that the total deficit assessment of the Trust members would grow to $142,530,734. That deficit assessment alone would represent almost 30% of the total combined deficit of insolvent GSIT's as of June, 2010. (*See,* Task Force on Group Self-Insurance, Report to Governor Paterson and the New York State Legislature, June, 2010 at pp. 31, 43). The investigation of the Task Force is further telling with regard to the issues of joint and several liabilities applied to GSIT members. Most members have no idea of the depth of liability they are agreeing to, particularly in the face of marketing material designed to convince them otherwise. (*Id.*, Exhibit "D" at p. 6). They report as follows:

- Joint and Several Liability - The unlimited joint and several liability on group members for the group's obligations coupled with the long term nature of workers' compensation claims. Members often times do not even understand the risk of joint and several; they are under the impression they bought a traditional policy. In addition, the ability of unscrupulous actors to manipulate the operation of groups for their own benefit to the member's detriment. These conflicting components result in group members being jointly and severally liable for claims long after the claims were actually incurred and/or long after their period of membership in the group may have ended. It is difficult, if not impossible, for an employer to accurately weigh the risks/benefits of joining a group as opposed to other types of coverage allowed under the WCL.

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- Mismanagement - The management of much of a group's operations is often left to key agents including administrators, brokers, accountants and actuaries. However, these agents do not assume joint and several liabilities as do the employer members.

  The weakness in this structure is that the bulk of the decision making is being done by individuals whose interests do not always align with those of the members. In fact, in the short term, these key agents may actually stand to benefit by being overly optimistic with much of the operating decisions including developing rates, setting reserves, and issuing dividends. These key agents are often paid based upon the size of the group. The healthier the group appears the more members join and the more compensation the key agents receive. When the inadequate rates and reserves materialize the key agents are not jointly and severally liable for the shortfall.

In the catastrophic failure of GSIT's that occurred in 2007-2008, CRM was responsible for 76% of the total deficits reported over eight (8) trusts that they managed (Task Force, *id.*, at pp. 33-34). Eighty-two percent (82%) was directly attributable to CRM and a sister company CRS (*id.* at p.34). Such a series of incidents that have affected thousands of innocent employers in this State must be worthy of judicial review. TRIWCT members are entitled to such a review.

For this, and all other reasons previously set forth, this Court finds that the equities weigh heavily in favor of the petitioners/plaintiffs. A stay of enforcement should issue.

CONCLUSION

The petitioners/plaintiffs have proven to this Court's satisfaction the likelihood of success upon the claims made in this action, the irreparable harm that will follow if a

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stay is not ordered, and that the balancing of the equities are squarely in favor of the petitioners/plaintiffs. As a result, and for all other reasons set forth in this decision, the petitioners/plaintiffs' request for stay must be GRANTED. As a result, this Court orders that all enforcement proceedings as against all former members of TRIWCT be stayed, effective immediately, and that said stay shall remain in effect pending a final resolution of the issues presented in this litigation.

Because no party has requested that a bond be posted, this Court does not, at this time, order any undertaking. This Court will consider such a request upon the application of any party to this proceeding.

A conference with the Court is hereby set for **Monday, June 4, 2012 at 11:00 a.m.**, for purposes of (1) determining a discovery schedule leading to an expedited trial of these matters; (2) determining - as best as possible at this time - the depth of discovery; (3) establishing a trial date; and (4) exploring the possibilities of settlement, if any. Counsel shall meet and confer on these and other salient issues before the conference and advise the Court - at least five (5) days before the conference of the results of such discussions.

Counsel for the petitioners/plaintiffs are hereby directed to submit a proposed order, consistent with the findings of this decision, to the Court upon notice to the attorneys for the respondents/defendants.

DATED: April 30, 2012.

s/ John C. Cherundolo
Hon. John C. Cherundolo, A.J.S.C.

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