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September 9, 2021

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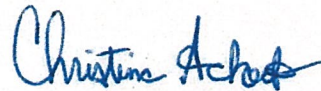
RE: Futurecare - Old Court,LLC. &  
Futurecare - Courtland,LLC.

MOSH No.: T8477-014-20  
MOSH No.: T8477-016-20

Dear Mrs. Witherup:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned manner.

Sincerely yours,



Christina Schaefer  
Administrative Officer  
Division of Labor and Industry

Enclosure:

cc: Matthew Helminiak, Commissioner of Labor  
Jenny Baker/Sarah Harlan, Assistant Attorneys General  
Nicholas C. Sokolow, MOSH Assistant Attorney General  
MOSH Office of Review

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**REGULAR & VIA EMAIL – READ RECEIPT REQUESTED**

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IN THE MATTER OF

\* BEFORE THE

\* COMMISSIONER OF LABOR

FUTURECARE - OLD COURT, LLC

\* AND INDUSTRY

and

\*

FUTURECARE - COURTLAND, LLC

\* MOSH CASE NO. T8477-014-20 and

\* MOSH CASE NO. T8477-016-20

\* OAH CASE NO. 41-21-02655

\* OAH CASE NO. 41-21-02464

\* \* \* \* \*

**FINAL DECISION AND ORDER**

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. The Maryland Occupational Safety and Health Unit (“MOSH”) issued a citation to FutureCare -- Old Court LLC and an identical citation to FutureCare - Cortland, LLC (collectively “FutureCare” or “Employer”) following remote inspections of both work sites.<sup>1</sup> FutureCare contested the citations and a hearing was conducted via Webex video conferencing by the Office of Administrative Hearings. Jennifer Gresock, Administrative Law Judge presided as the Hearing Examiner (“HE”). The citations were for other than serious violations of 29 C.F.R. § 1910.134(c)(1); 29 C.F.R. § 1910.134(c)(3); 29 C.F.R. § 1910.134(e)(2)(ii); and 29 C.F.R. § 1910.134(e)(5)(iii). The HE issued a proposed decision recommending that the citations be affirmed. FutureCare requested review and a review hearing was held before the Commissioner of Labor and Industry on August 24, 2021. Based

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<sup>1</sup> Pursuant to a Joint Motion to Consolidate and for a Remote Hearing, the cases were consolidated before the Office of Administrative Hearings. As noted by Administrative Law Judge Jennifer Gresock, FutureCare - Old Court LLC and FutureCare - Courtland, LLC are two separately incorporated entities but are under common ownership and control. Both entities utilize the same set of safety policies and procedures. OAH Decision p. 1, footnote 2.

upon a thorough review of the factual record, and the arguments made by both parties, the Commissioner vacates the citations.

### FINDINGS OF FACT

There is no dispute about the facts in this case. FutureCare operates long-term health care facilities that provide nursing care, rehabilitation, and respiratory care. In response to COVID-19 cases in Maryland in March of 2020, FutureCare formed a task force to consider State and federal guidance on personal protective equipment, to consult with experts, and to evaluate company policies and procedures. FF 5. Additionally, in March of 2020, the Employer decided to implement the use of N95 masks which had not previously been used at its facilities. FF 6. N95 masks are negative-pressure masks that are 95% effective in filtering particles of .3 microns or greater. FF 7.

FutureCare developed a policy entitled "Interim Policy for Suspected or Confirmed Coronavirus - COVID 19" (Interim Policy). MOSH Ex. 6. As part of this policy, employees were required to wear N95 masks (1) when collecting and handling specimens in certain circumstances; (2) during any aerosol-generating procedures; and (3) when an outbreak occurs. FF 10. Prior to using the N95 masks, employees were required to complete a Respirator Medical Evaluation Questionnaire ("Questionnaire") and be fit-tested. FF 11. The Questionnaire did not include questions regarding broken ribs, previous chest injuries, surgeries or other lung problems. FF 12. The Questionnaire also did not include the following statement: "Would you like to talk to the health care professional who will review this questionnaire about your answers to the questionnaire: Yes/No." FF 13. FutureCare acknowledges that it did not develop and provide to a physician or other health care professional a copy of a respiratory protection program. FF 15. Additionally, the Employer did not develop and implement a written respiratory

MOSH further argues that the respiratory standard has been in place for many years, that it is easily accessed, and there is even a sample questionnaire with specific medical questions contained in the appendix. MOSH contends that once the employer decided to implement the use of N95 masks, it was obligated to follow the required standards. MOSH points out that the importance of the regulations is to have a consistent application of the program by a single person to ensure that N95 masks are being used appropriately and properly. MOSH also notes that all of the medical questions on the questionnaire are important.

The Respiratory Standard, 29 C.F.R. 1910.134, requires that an employer provide respirators for its employees when respirators are necessary to protect an employee's health. 29 C.F.R. §1910.134(a)(2). Prior to March of 2020 when the first COVID-19 cases were identified, FutureCare had not implemented the use of N95 masks. As noted by the MOSH Compliance Officer, Gavin Anderson, the purpose of the respiratory protection program is to ensure that when an employer uses N95 masks, the masks are used properly and that there is a proper fit which is of particular concern. Tr. at 81. FutureCare employees were medically evaluated as well as fit tested prior to use of the N95 masks. Tr. at 82. FutureCare trained its employees on the use of N95 masks and also created a medical questionnaire (albeit incomplete) for employees to complete prior to using the mask. Tr. at 122-23. The policies for training, the medical questionnaire and fit testing were all developed but were not put into one document entitled respiratory protection program. Tr. 126. It was not until October of 2020, five months after the citations were issued that OSHA issued specific guidance for long-term care facilities. Tr. at 109.

In the meantime, FutureCare, in consultation with infectious medicine experts and industrial hygienists, created and implemented an Interim Policy addressing COVID-19 based upon the rapidly changing information from the Centers for Disease Control (CDC), the

protection program with site specific procedures and elements for required respirator use. FF 16. FutureCare's Interim Policy required that all staff receive training on the use of personal protective equipment. FF 14. In October of 2020, the Occupational Safety and Health Administration (OSHA) issued guidance to long-term care facilities on respiratory protection and FutureCare incorporated that guidance into its policies. FF 22.

### DISCUSSION

While MOSH bears the burden of proof that an employer has committed an alleged violation, in this case there is no dispute that FutureCare did not comply with the cited provisions of the respiratory protection standard, 29 C.F.R. 1910.134. The Employer argues on review that the Commissioner should consider the unprecedented and unique circumstances of the global pandemic at the time of the issuance of the citations and the fact that long-term care facilities were faced with particularly unique challenges. The Employer took many steps toward compliance including conferring with infectious disease experts, developing an Interim Policy, requiring N95 masks with each employee completing a respiratory questionnaire (albeit incomplete) as well as fit testing. The Employer contends that its efforts were motivated by the desire to protect its workers and that while it may not have complied with each provision of the cited standard, its employees were more safe with the N95 masks than they would have been if the Employer had only required a cloth mask. FutureCare also argues that while no monetary penalty was assessed, the company is nevertheless penalized because the violation will remain on FutureCare's record which may increase monetary penalties if there is a repeat subsequent violation. In essence, the Employer is arguing that substantial compliance should suffice given the exigent circumstances and the employer's sincere desire to protect its employees. MOSH responds by asserting that the law does not provide any exception for exigent circumstances.

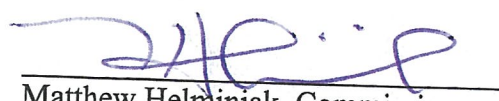
Maryland Department of Health, and other sources. Tr. at 113. The Commissioner appreciates MOSH's argument that the standard in question had been in effect for more than 20 years. The reality, however, is that the employer had to make significant decisions about the health and safety of its employees and residents in a relatively short period of time early in a global pandemic. The Employer did not do this in a vacuum--it sought out expert advice and guidance and followed it. These actions by FutureCare demonstrate that it attempted in earnest to comply with the standard at a time when there was conflicting and shifting guidance from the Centers for Disease Control, OSHA, State health departments, and State and local executive orders. In light of FutureCare's substantial compliance, the efforts to protect its employees and the company's good faith attempt to comply during an extraordinary global pandemic, the Commissioner vacates the citation. In doing so, the Commissioner notes that this determination is unique to these specific facts and circumstances only.

**ORDER**

For the foregoing reasons, the Commissioner of Labor and Industry on this 9th day of September 2021, hereby ORDERS:

Citation 1, Items 1-4 alleging other than serious violations of 29 C.F.R. 1910.134(c)(1), 29 C.F.R. 1910.134(c)(3), 29 C.F.R. 1910.134(e)(2)(ii), 29 C.F.R. 1910.134(e)(5)(iii) with no penalty is vacated.

This Order becomes final 15 days after issuance. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, 5-215, Annotated Code of Maryland, and the Maryland Rules, Title 7, Chapter 200.



Matthew Helminiak, Commissioner of Labor and Industry