To Be Argued By:
Sue J. Nam
Time Requested: 30 Minutes

CTQ-2020-00004

Court of Appeals

STATE OF NEW YORK

HECTOR ORTIZ, in his capacity as Temporary Administrator of the Estate of Vicky Ortiz, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

against

CIOX HEALTH LLC, as successor in interest to IOD Inc., and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants-Appellees,

and

IOD INC. and COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

On Question Certified by the United States Court of Appeals for the Second Circuit (USCOA Docket No. 19-1649-cv)

BRIEF FOR PLAINTIFF-APPELLANT HECTOR ORTIZ, IN HIS CAPACITY AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF VICKY ORTIZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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Date Completed: August 24, 2020

STATUS OF RELATED LITIGATION

There is no related litigation.

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QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals for the Second Circuit certified the following question to this Court: Does Section 18(2)(e) of the New York Public Health Law provide a private right of action for damages when a medical provider violates the provision limiting the reasonable charge for paper copies of medical records to $0.75 per page?

JURISDICTION

This Court accepted the certified question on June 23, 2020 pursuant to Rules of the Court of Appeals (22 NYCRR) § 500.27.

PRELIMINARY STATEMENT

It is rarely a happy occasion that precipitates a request for copies of medical records. Such requests often are made when something has gone tragically wrong to you or your loved one. Under such fraught circumstances, Respondents systematically overcharged Appellant and other persons for their medical records well over the statutory limit of $0.75 per page. The limited discovery in this case has shown that in just a four-year period alone, Respondents overcharged on approximately 86,500 invoices, enriching themselves millions of dollars.

Respondents argue that the only remedy available to a private citizen for a violation of Public Health Law ("PHL") § 18(2)(e) is an Article 78 proceeding, which permits damages or restitution that is "incidental" to the "primary" injunctive

relief sought. CPLR § 7806. However, leaving New York citizens, who already received their medical records, holding the bill for excessive charges—despite the express statutory limit on per-page charges for copies—cannot be what the Legislature intended. A private right of action is implied because Appellant is one of the class for whose particular benefit the statute was enacted; the recognition of a private right of action promotes the legislative purpose of ensuring affordable access to medical records; and the creation of such a right is consistent with the legislative scheme. PHL § 18(2)(e) has no extensive enforcement mechanism. The existing methods of enforcement expressly were not intended to be exclusive and do not address Appellant's direct and personal harm. An implied private right of action to enforce the statutory limit of $0.75 per page for medical records furthers the legislative goal and coalesces smoothly with the existing statutory scheme.

The need to curtail profiteering on medical records is more crucial now than ever. For many terrible weeks, New York was the epicenter of a global pandemic where tens of thousands of people died and fell ill. New York citizens should not be left without a private right of action for damages when they allege the systemic overcharging for their medical records.

I. Factual Background

Vicky Ortiz, the original plaintiff, was a citizen of New York. She brought this action against Defendants-Respondents CIOX Health LLC ("CIOX"), as

successor in interest to IOD Inc., and The New York and Presbyterian Hospital ("NYPH"), named in the First Amended Complaint ("FAC") as Columbia Presbyterian Medical Center.

In October 2016, Vicky Ortiz, through her attorney, made a written request to NYPH for medical records. A0022 (FAC ¶ 50). At that time, NYPH contracted with IOD Inc., a predecessor in interest to CIOX, to provide copies of NYPH medical records and to bill NYPH's patients for those copies. A0023 (FAC ¶ 52). Ms. Ortiz was charged $1.50 per page for her medical records, double the statutory maximum. *See* A0016 (FAC ¶ 7); A0023 (FAC ¶ 56). She, through her attorney, paid the bill, even though it was in excess of the $0.75-per-page statutory maximum, because she needed the medical records in an active litigation. A0024 (FAC ¶ 57). Based on the overcharge, Ms. Ortiz filed a class action complaint in state court on February 24, 2017. CIOX removed the action to federal court, asserting federal jurisdiction under the Class Action Fairness Act of 2005. *See* A0003 (ECF No. 1).

On May 12, 2018, Vicky Ortiz died. Ms. Ortiz's counsel so informed the District Court on May 14, 2018. A284 (ECF No. 51). On October 16, 2018, the District Court granted the application to substitute Hector Ortiz as the plaintiff in his capacity as temporary administrator of the Ortiz estate. A0010 (ECF No. 62). Mr. Ortiz now is the Appellant-Plaintiff in this matter.

II. Relevant Procedural History

A. Plaintiff-Appellant Filed the First Amended Complaint, and Defendants-Respondents Moved to Dismiss It

On June 22, 2017, both CIOX and NYPH filed motions to dismiss the original complaint. A0004-05 (ECF Nos. 8 and 12). In response, Ortiz filed the FAC on July 14, 2017. A0014-32 (ECF No. 19). Ortiz alleged Defendants-Respondents are "healthcare providers," as defined in PHL § 18(1). A0016 (FAC ¶ 6). At the heart of her claims, Ortiz alleged:

> 7. Defendants have charged more than their actual costs for copies of the medical records requested of them by Plaintiff and the members of the Class. Defendants have, individually, collectively and/or through use of agents and associations, deliberately engaged in a practice of fixing and charging standard or uniform fees for such medical records at or about one dollar and fifty cents per page ($1.50), in violation of [PHL § 18] and the public policy of the State of New York.
>
> 8. As a result of their wrongful and unlawful conduct, Defendants have obtained substantial profits and windfalls and have [been] unjustly enriched at the expense of Plaintiff and members of her Class, who have been charged for copies of medical records in excess of the legally permissible statutory limits and have suffered substantial damages.
>
> 9. Defendants have engaged in a deliberate, fraudulent and concerted effort to overcharge Plaintiff and the Class members and obtain fees [for] furnishing copies of medical records which exceed that which is legally permissible fees they can charge in the State of New York.

A0016 (FAC ¶¶ 7–9).

Ortiz alleged (1) violation of PHL § 18; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; (4) unjust enrichment; and (5) enjoinment.

A0025-30 (FAC ¶¶ 67–97). Ortiz brought her action on behalf of a class "of all Plaintiffs who attempted to process an authorization for medical records in New York between 2011 and 2017 and have been charged more than seventy-five cents ($0.75) per page for copying medical records." A0020 (FAC ¶ 45).

On August 3, 2017, CIOX filed a motion to dismiss and moved to strike allegations in the FAC that named CIOX employees. *See* A134-198. CIOX asked the District Court to dismiss the entirety of the FAC because the statewide class was improper and because the voluntary payment doctrine barred Ortiz's claims. CIOX also argued that Plaintiff's claim for injunctive relief should be dismissed for lack of standing, and Plaintiff's claims for fraud, unjust enrichment, and breach of the implied covenant of good faith and fair dealing should be dismissed for failure to state a claim. In addition, CIOX argued that the District Court should dismiss with prejudice any claims brought by any members of the proposed class that predated February 24, 2014, because such claims sought damages for actions dating beyond the three-year statute of limitations applicable to Plaintiff's claims for violation of PHL § 18 and for unjust enrichment. CIOX did not argue that PHL § 18(2)(e) provides no private right of action.

NYPH filed a motion to dismiss on August 4, 2017. NYPH based its motion on lack of standing, mootness, and failure to state a claim. NYPH also did not argue that PHL § 18(2)(e) provides no private right of action. *See* A199-220.

B. The District Court Denied Defendants-Respondents' Motion to Dismiss Plaintiff-Appellant's PHL § 18(2)(e) Claim

By its February 22, 2018 Order, the District Court found Ortiz had established standing to seek both monetary and injunctive relief and denied dismissal based on mootness. A0036-41 (February 22, 2018 Order at 4–9.)

The District Court explained:

> After Ortiz filed this action, CIOX unilaterally refunded the overcharge Ortiz alleges she paid by refunding the amount to her attorney's credit card. Based on this refund, NYPH moves to dismiss the FAC on the grounds that there is no longer a live controversy between the parties
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> * * * *
>
> In a situation such as this, it is the plaintiff's choice, 'not the defendant's or the court's, whether the satisfaction of her individual claim, without redress of her viable classwide allegation, is sufficient to bring the lawsuit to an end.'
>
> * * * *
>
> These reservations apply with full force here. Individual plaintiffs bringing claims under Public Health Law § 18 are unlikely to be entitled to more than a few hundred dollars in damages, making such claims easy targets to be 'picked off' individually. Accordingly, NYPH's motion to dismiss on mootness grounds is denied."

A0039-41 (February 22, 2018 Order at 4–9.)

The District Court then allowed a single claim, for a violation of PHL § 18(2)(e), to go forward but dismissed Plaintiff's other four claims. A0041-42 (February 22, 2018 Order at 9-10). The District Court held that a three-year statute of limitations applied so that "Ortiz may only obtain relief for overcharges after February 24, 2014, three years before her original complaint was filed." A0047-48

(February 22, 2018 Order at 15–16).

The parties began discovery pursuant to the District Court's Pretrial Scheduling Order, dated March 27, 2018. A258-59. Plaintiff learned through discovery that CIOX issued more than 86,600 invoices in New York in which the requester was charged in excess of $0.75 per page during a portion of the alleged class period. Letter dated May 11, 2018 from CIOX to the District Court. A281-282 ("CIOX has produced two confidential spreadsheets showing the invoices issued in New York during the alleged class period in which the requester was charged in excess of $0.75 per page. These spreadsheets contain more than 86,600 invoices through the end of February 2018.").

C. Defendants-Respondents Moved for Judgment on the Pleadings on the PHL § 18(2)(e) Claim, Which the District Court Granted

On October 31, 2018, CIOX and NYPH filed motions for judgment on the pleadings to dismiss the remaining cause of action for violation of PHL § 18(2)(e). NYPH argued for the first time that PHL § 18(2)(e) does not provide a private right of action. *See* A367-90. CIOX made other arguments in its motion for judgment on the pleadings but joined NYPH's argument that PHL § 18(2)(e) does not provide a private right of action. *See* A285-365.

By its May 7, 2019 Order, the District Court dismissed Plaintiff's remaining claim. The District Court acknowledged, "in several other cases, courts appear to have assumed that § 18(2)(e) accords qualified persons a private right of action for

damages." A0096 (May 7, 2019 Order at 22). The District Court, however, concluded the "instant case appears to be the first case to squarely present the issue for judicial resolution." *Id.* The District Court concluded that "a private right of action would not be consistent with the legislative scheme" because the New York Legislature provided two mechanisms to enforce PHL § 18(2)(e) but did not expressly provide for a private cause of action. A0089-92 (May 7, 2019 Order at 15–18). The District Court thus held "a private right of action cannot fairly be implied by the text and legislative history of § 18(2)(e)" and dismissed Plaintiff's remaining claim. A0096-97 (May 7, 2019 Order at 22–23).

D. The District Court Entered Judgment, Plaintiff-Appellant Appealed, the Second Circuit Certified the Question, and This Court Accepted the Question

On May 7, 2019, the case was closed, and Judgment was entered. A0098. Plaintiff-Appellant filed a Notice of Appeal on June 1, 2019. A0099-100. On June 5, 2020, the Second Circuit certified the question of whether PHL § 18(2)(e) implies a private right of action to this Court. A122-33. This Court accepted the question.

ARGUMENT

III. PHL § 18(2)(e) Affords A Private Right of Action

A. To Find Otherwise Would Erode Legal Stability and Consistency, and Would Be Disruptive to Litigation Already Pending for Years

Public Health Law Section 18(2)(e) states in relevant part: "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs

incurred by such provider . . . . However, the reasonable charge for paper copies shall not exceed seventy-five cents per page." PHL § 18(2)(e).

Private claimants have been bringing actions under PHL § 18(2)(e) in state and federal court since its enactment in its present form in 1991 and have proceeded well past the motion to dismiss stage. Indeed, the present case is not the first case to squarely address the question of whether there is a private right of action under PHL § 18(2)(e).

In *Feder v Staten Island Hospital*, No. 601049/98 (N.Y. Sup. Ct. 1998), the plaintiffs brought a putative class action claim for damages, alleging they were charged fees for copies of medical records in excess of the amount allowed by PHL § 18(2)(e), the very same claim at issue here. Notably, one of the defendants in *Feder* was Respondent NYPH. In recounting the procedural history of the case, the trial court stated:

> After the complaint was filed in 1998, the defendants moved to dismiss. Justice Beverly Cohen of this court dismissed a number of plaintiff's causes of action, but held that plaintiffs could assert a private right of action under PHL § 18 and that the complaint made out the elements of such a claim. "[A]llegations that defendants are automatically charging a seventy-five cent fee per copy, no matter what their actual costs, are sufficient to state [a] claim for violation of the statute." (*Feder v. Staten Island Hospital*, Sup Ct, NY County, November 30, 1999, Cohen, J., Index No. 601049/98). She also held that plaintiffs had pleaded a claim for unjust enrichment. This decision was upheld by the First Department for the reasons stated by Justice Cohen.

Feder, 2002 WL 34358059 (N.Y. Sup. Ct. Feb. 1, 2002), at *3–4.

The plaintiffs in *Feder* moved for class certification, which was granted. *Feder*, 2002 WL 34358059, at 17. On appeal for the second time, having already affirmed the private right of action, the First Department reversed the trial court's certification of the class. *Feder v. Staten Island Hospital*, 304 A.D.2d 470 (1st Dep't 2003). The case was remanded, continued as an individual action, and ultimately settled. *See* Docket Report of *Feder v. Staten Island Univ. Hosp.*, No. 601049/98, *available at* https://iapps.courts.state.ny.us/webcivil/FCASSearch.

Although Justice Cohen's 1999 decision that PHL § 18(2)(e) affords a private right of action was not published, it is publicly available. *See Feder v. Staten Island Hospital*, Sup Ct, NY County, November 30, 1999, Cohen, J., Index No. 601049/98 A0101-21 (the "*Feder* Decision"). After this decision, defendants in plenary actions for damages pursuant to PHL § 18(2)(e) did not assert the defense that the statute affords no private right of action for nearly 20 years until Respondent NYPH did so in this case.

The *Feder* Decision carefully and thoroughly reviewed the statutory history and language of the relevant sections of the New York Public Health Law and analyzed the three-part test applicable under New York law to determine if a private right of action exists. The *Feder* Decision then determined that a private right of action for a violation of PHL § 18(2)(e) is implied. Importantly, the First Department affirmed the lower court's decision "for the reasons stated by Cohen, J." *See Feder*

v. Staten Island Univ. Hospital, 273 A.D.2d 155 (1st Dep't 2000) ("Order, Supreme Court, New York County (Beverly Cohen, J.), entered December 8, 1999, unanimously affirmed for the reasons stated by Cohen, J., without costs or disbursements.").

In addition to the *Feder* litigation, numerous putative class actions alleging a violation of PHL § 18(2)(e) have been filed in state and federal court. Again, none of these cases have been dismissed on the ground that there is no private right of action, and three such cases have proceeded beyond the motion to dismiss stage. *See, e.g.*, *Carter v. CIOX Health, LLC*, 14–CV–6275–FPG, 260 F. Supp. 3d 277, 289–90 (W.D.N.Y. 2017) (denying motion to dismiss in part to permit claim for damages for violation of PHL § 18 to proceed); *McCracken v. Verisma Sys., Inc.*, No. 6:14-cv-06248-MAT, 2017 WL 3187365 (W.D.N.Y. July 27, 2017) (certifying class in action alleging violation of PHL § 18); *Ruzhinskaya v. Healthport Techs., LLC*, 14 Civ. 2921 (PAE), 2015 WL 9255562 (S.D.N.Y. Dec. 17, 2015) (granting motion for class certification).

These cases all have been litigated over several years, survived dispositive motions with parties engaging in extensive discovery and pre-trial motion practice. *McCracken* and *Carter* continue to be litigated. Thus, the consensus among courts and litigants, including these very Respondents, is that a private right of action can be asserted under PHL § 18.

CIOX, a sophisticated party with significant resources, represented by competent counsel, did not independently contest a private right of action before the District Court and has not contested a private right of action in any other cases filed against it by private litigants asserting a violation of PHL § 18(2)(e). *See*, *e.g.*, *Shelton v. CIOX Health, LLC*, 1:17-CV-00808 (ENV) (BL), 2018 WL 4211447 (E.D.N.Y. July 20, 2019); *Carter v. CIOX Health, LLC*, 260 F. Supp. 3d at 289-90. Like other defendants in plenary actions for damages pursuant to PHL § 18(2)(e), CIOX, presumably after due consideration of all viable defenses, declined to assert the defense that the statute affords no private right of action.

NYPH was the only party to substantively argue before the District Court that there is no private right of action, and only after it lost on its initial motion to dismiss, where it did not raise the argument. Instead, NYPH raised this defense for the first time on a motion for judgment on the pleadings, but did not disclose that it had already lost on this very argument both at the state trial and appellate level in *Feder*.

For this Court to now rule on NYPH's third bite at the apple that no private right of action exists would erode legal stability, would cause inconsistency among cases brought under PHL § 18, and would be disruptive for litigations that have been pending for years.

B. Public Policy Considerations Support Finding a Private Right of Action

Public policy considerations also support the finding of a private right of

action. The reality is that people who need their medical records – the seriously ill, injured, infirm and/or dying – often do not have the luxury of time, resources, or emotional or physical ability to object or fight when they are overcharged by the corporations that process requests for medical records. Yet it is clear that enforcement of PHL § 18(e)(2) by private litigants is necessary to curtail the widespread overcharging by healthcare providers. The technological advances in data storage and imaging in the last 30 years since PHL § 18(e)(2) was enacted have made copiers and printers affordable and ubiquitous, yet providers like Respondent CIOX still charge far more than the $0.75 per-page statutory cap.

As discussed below in more detail, allowing a private right of action for damages when providers violate PHL § 18(e)(2) promotes the purpose of the statute and is consistent with the legislative scheme. On the other hand, a decision from this Court that no private right of action exists will allow Respondents to escape liability for the tens of thousands of New Yorkers they have overcharged in the past. It also will give license to Respondents and all other providers of medical records going forward to systematically overcharge patients and other "qualified persons" under PHL § 18(e)(2) with the assurance that they cannot be sued by those whom they overcharge and they will not have to disgorge their ill-gotten gains. This is a time to protect the vulnerable from excessive medical charges, not to leave them further exposed to predatory practices.

C. Statutory Analysis of PHL § 18 Supports Finding a Private Right of Action

As affirmed by the First Department in *Feder*, 273 A.D.2d at 155, the statutory analysis of PHL § 18 supports allowing a private right of action to enforce PHL § 18(2)(e).

Although the text of PHL § 18 is silent on a private cause of action, that silence does not settle the issue. "In the absence of an express private right of action, plaintiffs can seek civil relief in a plenary action based on a violation of the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013) (internal quotation and citation omitted). This determination is predicated on three factors: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 633 (1989).

Each of the three *Sheehy* factors is satisfied here.

1. Appellant Is One of the Class for Whose Particular Benefit PHL § 18 Was Enacted

Appellant clearly is within the class of persons that the New York Legislature intended to benefit. PHL § 18(2)(e) authorizes health care providers to "impose a

reasonable charge for all inspections and copies [of patient information by qualified persons], not exceeding the costs incurred by such provider" and, critically here, states that "the reasonable charge for paper copies" of the patient information "shall not exceed seventy-five cents per page." PHL § 18(2)(e). The statute, by its plain text, confers particular benefits on "qualified persons," who request copies of medical records, by imposing a mandatory maximum charge for those copies of $0.75 per page. *Id.* Both Appellant's decedent and her attorney are "qualified persons" under PHL § 18(1)(g), and they are the very people that the statute seeks to protect from excessive charges.

Thus, the first *Sheehy* factor is met. *See also* A0111 (*Feder* Decision at 11) ("[T]there is no question that plaintiffs are part of the class for whose benefit the statute was enacted."). *Cf.*, *Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 229-30 (2019) (no implied private right of action in PHL § 230(11)(b) because plaintiff physician did not fall within class legislature intended to be benefited by provision); *Matter of Stray from the Heart, Inc. v Department of Health & Mental Hygiene of the City of N.Y.*, 20 N.Y.3d 946 (2012) (Animal Shelters and Sterilization Act did not create an implied private right of action because petitioner, an animal rescue organization, does not belong to the class for whose specific benefit the law was enacted).

2. Recognizing an Implied Private Right of Action Will Promote the Legislative Purpose

The second *Sheehy* factor also is met because a private right of action directly supports the legislative purpose of capping per-page charges for medical records to provide affordable patient access to medical records.

Justice Cohen explained:

> The amendment . . . was intended to create a statutory limit on what medical providers could charge because litigation on what constituted a "reasonable charge" was burdensome and usually resulted in favorable results for hospitals and physicians. As a result, medical providers were turning the copying of records into a profit center and effectively limiting patient access to medical records (see, Casillo v. St. John's Episcopal Hosp., Smithtown, 151 Misc 2d 420, 425-426 [Sup Ct Suffolk County 1992] [noting that the Public Health Law was amended to impose a seventy-five cent cap 'because the Legislature has decided to recognize hospital and physician cupidity in providing a patient with his or her medical records']).

A 0112 (*Feder* Decision at 12). *See also* New York Public Interest Research Group's submission included in the Bill Jacket:

> [P]hysicians and hospitals have made access to these records extraordinarily difficult for some consumers through excessive charges for copying these records. Consumers are paying up to $2 per page in copying costs to receive their own medical records.
>
> This bill caps those charges at $.75 per page. While we believe that more analysis needs to be done to see if this charge will continue to limit consumer access to medical records, we do believe that such a cap will ensure a much broader access to medical records than is currently available.
>
> We believe that this section of the bill is worthy of support and is a significant consumer victory.

Bill Jacket, L. 1991, ch. 165, at 63 (underline in original).

In explaining the legislative purpose of the $.75 cap, Justice Cohen analyzed the statutory language and the legislative history.

> Prior to the passage of Public Health Law § 18 in 1986, patients did not have a full right of access to their own medical records. As originally enacted, Public Health Law § 18 permitted medical providers to "impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such providers . . . ." This first version of the statute resulted in litigation concerning what constituted a "reasonable charge," in which medical providers usually succeeded in justifying the amounts charged for medical records . . . In 1991, the Legislature amended Public Health Law §18 (and Public Health Law § 17) to limit the reasonable charge for copy fees to seventy-five cents per page.

A0107-08 (*Feder* Decision at 7-8) (footnote omitted).

She also considered and rejected the argument that the amendment to the Public Health Law was designed to eliminate litigation:

> The court in Casillo also wrote that the amendment capping reasonable charge at seventy-five cents "was not intended to create a plethora of litigation where courts would be forced to determine what is an allowable fee in this case or in that case" 151 Misc 2d at 429. However, although the intent of the amendment was not to create more litigation, that does not mean that individuals should be denied the right to sue when doing so would prevent medical providers from charging them excessive costs for medical records, the very wrong intended to be corrected by the amendment.

A0112 (*Feder* Decision at 12 n.7); *see also* A0110 (*Feder* Decision at 10) (Although some of defendants' arguments raise interesting policy issues, they are insufficient to avoid the language of Public Health Law §18, which clearly mandates that

medical providers charge qualified persons who request medical records no more than the cost incurred in providing such records, but in no event more than seventy-five cents per copy.").

Thus, after careful consideration of PHL § 18(2)(e)'s language, legislative history, policy context, and relevant case law, Justice Cohen held that permitting plaintiffs to sue to enforce PHL § 18(2)(e) "would promote the legislative purpose of the amendment." A0112-13 (*Id.* at 12-13). Justice Cohen's reasoning, as affirmed by the First Department, remains sound. Individuals should not be denied the right to sue to vindicate excessive charging for medical records, the very wrong intended to be corrected by the amendment.

3. Creation of an Implied Private Right of Action Is Consistent with the Legislative Scheme

The third and most important *Sheehy* factor also is satisfied because a private right of action is consistent with the legislative scheme.

a. PHL § 18 Has No Extensive Enforcement Mechanism

PHL § 18 on its face has no enforcement mechanism for the situation at hand, where access to medical records has been provided and the medical records are accurate. Section 18(2) mandates that under certain circumstances, a health care provider "shall" provide access to medical records. Specifically, Section 18(2)(d) requires as follows: "Subject to the provisions of subdivision three of this section, upon the written request of any qualified person, a health care provider ***shall*** furnish

to such person, within a reasonable time, a copy of any patient information requested, and original mammograms requested, which the person is authorized to inspect pursuant to this subdivision." PHL §18(2)(d) (emphasis added). Section 18(2)(e) then requires in relevant part: "the reasonable charge for paper copies ***shall not*** exceed seventy-five cents per page." PHL §18(2)(e) (emphasis added).

Although PHL § 18 provides limited procedures where access to medical records are denied (*see* PHL § 18(3)-(5)), or where medical records are challenged as inaccurate, (*see* PHL § 18(8)), PHL § 18 does not speak to the situation here, where health care providers supplied the requested medical records but charged more than $0.75 per page in contravention of the per-page cap. This is a "case where the Legislature has simply prohibited or required certain conduct, and left the mechanism of enforcement to the courts." *McLean v. City of New York*, 12 N.Y.3d 194, 201 (2009). Thus, the present case is readily distinguishable from the cases in which this Court concluded that there was no private right of action because "the statutes in question already contained substantial enforcement mechanisms, indicating that the legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted." *Cruz*, 22 N.Y.3d at 71 (citing cases) .

As this Court has held, a "private right of action may at times further a legislative goal and coalesce smoothly with the existing statutory scheme." *Uhr v.*

East Greenbush Cent. School Dist., 94 N.Y.2d 32, 40 (1999) (citing *Doe v. Roe,* 190 A.D.2d 463, 471 (4th Dep't 1993)).

In *Doe v. Roe*, cited approvingly by this Court, the Fourth Department concluded that the plaintiff had a private cause of action under PHL § 2782. The Fourth Department expressly rejected the argument that a private right of action may not be implied "because the Legislature's provision of remedies in the nature of criminal sanction and a civil penalty and its failure to include additional remedies indicates an intent to limit the remedies to those expressed." *Doe v. Roe,* 190 A.D.2d 463 at 471.

A private right of action also has been implied for violations of PHL § 19. *See Sterling v. Ackerman*, 244 A.D.2d 170 (1st Dep't 1997) (rejecting claim that the plaintiff does not have a private right of action to enforce PHL § 19); *Medicare Beneficiaries Defense Fund v. Memorial Sloan-Kettering Cancer Ctr.*, 159 Misc. 2d 442 (Sup. Ct. NY County 1993) (finding private cause of action under PHL § 19 under *Sheehy* analysis).

Like *Doe v. Roe*, an implied private cause of action here furthers a legislative goal and coalesces smoothly with the existing statutory scheme.

b. The Legislature Made Clear PHL § 12 and § 13 Were Not Intended to Be the Exclusive Means of Enforcement

The only two mechanisms of enforcement for PHL § 18(2) are not specific to

this provision but rather for any violation of the Public Health Law. They are (1) a civil penalty imposed by the Commissioner of Health under PHL § 12 or (2) an action pursuant to Article 78 under PHL § 13. Neither the text nor the history of PHL § 18 suggests that they were intended to be the exclusive remedies for violation of PHL § 18(2)(e).

PHL § 13 states only that the Public Health Law "may" – not "shall" – be enforced by an Article 78 proceeding. Moreover, the current text of PHL § 12, effective as of April 2020, expressly states that this section is intended to provide "additional and cumulative remedies, and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing." PHL § 12(6).

Private litigants have been bringing plenary actions in the 30 years since PHL § 18(2)(e) was enacted, and prior to the District Court's decision, no court – state or federal, trial or appellate – had ever held that there is no private right of action for violations of PHL § 18(2)(e). To the contrary, Justice Cohen squarely decided that PHL § 18(2)(e) affords a private right of action, and the First Department affirmed her decision. And it is in this context of decades of litigation asserting a private right of action for violations of PHL § 18(2)(e) that the Legislature made an amendment to make clear that nothing in PHL § 12 "shall abridge or alter rights of action or remedies now or hereafter existing." PHL § 12(6).

In her decision, Justice Cohen expressly rejected NYPH's position, which

essentially is identical to Respondents' position here that the only remedy available to a private citizen for a violation of Public Health Law § 18 is an Article 78 proceeding. Justice Cohen systematically refuted NYPH's argument with textual support from the statute itself:

> NYPH's position is without merit. First, that Public Health Law § 13 gives a private citizen the right to seek Article 78 relief does not bar such a person from commencing a plenary action. Notably, the provision states that the Public Health Law may be enforced by an Article 78 proceeding, but does not require it. Likewise, the enforcement powers afforded to the Department of Health and Attorney General under Public Health Law § 12 are not exclusive. Indeed, subsection 6 of that provision states that "[i]t is the purpose of this section to provide additional and cumulative remedies, and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing . . . ."

A0110-11 (*Feder* Decision at 10-11) (underscore and ellipse in original).

Thus, nothing in the text or legislative history of PHL § 18 indicates the Legislature expressly considered but declined to promulgate a private right of action for a violation of § 18(2)(e). *Cf.*, *e.g., Cruz*, 22 N.Y.3d at 73-74 ("While clearly expressing an intent to hold judgment creditors liable – even permitting the imposition of a penalty in addition to actual damages – the legislature said nothing comparable in relation to financial institutions."); *Uhr*, 94 N.Y.2d at 41 (no private cause of action because there was "persuasive evidence as to the Legislature's intent to immunize the school districts for both nonfeasance and misfeasance"); *Sheehy*, 73 N.Y.2d at 636 (no private right of action could be implied for the defendant's

violation of General Obligations Law § 11–101 because the court found that the Legislature had specifically considered but declined to provide such a right).

To the contrary, the amendment to PHL § 12, effective as of April 2020, indicates the Legislature's clear expression not to curtail plenary actions. Despite individuals filing actions for violations of PHL § 18(2)(e) over the course of decades, the Legislature did not act to limit these cases but rather affirmed "rights of action or remedies now or hereafter existing." *See Casillo*, 151 Misc. 2d at 428 ("The Legislature, when enacting or amending statutes, is presumed to know the existing body of law and does not act in a vacuum."). This is hardly a situation where the Legislature hid "elephants in mouseholes." *Cruz*, 22 N.Y.3d at 72.

Justice Cohen also rejected the argument that the provision of private rights of action elsewhere in the PHL suggests that the Legislature intended to deny it for PHL § 18:

> Contrary to NYPH's argument[,] that the Public Health Law provides a remedy of "refund" in connection with excessive Medicare charges [under PHL § 19], but not for overcharges for medical records, does not indicate the Legislature's decision to deny a private cause of action for individuals overcharged for medical records.

A0113 (*Feder* Decision at 13). Similarly, PHL § 18(3) addresses only the rights of practitioners, providers, and qualified persons when access to medical records are denied, a situation not at issue here.

c. An Implied Private Right of Action Would Enhance the Existing Enforcement Devices, Which Do Not Address Appellant's Harm

By its plain text, PHL § 18(2)(e) confers particular benefits on "qualified persons" who receive paper copies of medical records, by imposing on providers a mandatory maximum charge per page. Yet the two remedies expressly available under PHL § 18(2)(e) do not adequately address the direct and personal harm Appellant suffered from a violation of the statute. Payment of fines to the state does not compensate individuals for the amounts they paid in excess of the statutory cap of $0.75 per page. And, an Article 78 proceeding seeking injunctive relief pursuant to PHL § 13 does not address the situation before the Court, in which Appellant's decedent was able to obtain copies of her medical records and therefore had no need to compel production.

It would be disingenuous for Respondents to argue that an Article 78 proceeding would fully redress Ortiz's overpayment. It would not. CPLR § 7806 makes abundantly clear that restitution or damages can be granted only when two requirements are met:

> Any restitution or damages granted to the petitioner [1] must be incidental to the primary relief sought by the petitioner, and [2] must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

CPLR § 7806 (underline and bracketed numbers added).

First, damages are Appellant's core claim here and not "incidental to the primary relief sought by the petitioner." Appellant was able to obtain her medical records by paying the inflated amount. Accordingly, an Article 78 proceeding is not available here.

Second, Respondents' position here is that Appellant cannot "otherwise recover [damages] on the same set of facts in a separate action" because PHL § 18(2)(e) does not permit a private right of action.

Had Appellant tried to recover the overcharges for her medical records in an Article 78 proceeding, Respondents undoubtedly would have argued that her claim does not fit the narrow requirements for damages or restitution under Article 78. Respondents already attempted to obviate Appellant's class action claims by unilaterally refunding her overcharge. *See* Opinion and Order dated February 22, 2018 ("Individual plaintiffs bringing claims under Public Health Law § 18 are unlikely to be entitled to more than a few hundred dollars in damages, making such claims easy targets to be 'picked off' individually. Accordingly, NYPH's motion to dismiss on mootness grounds is denied.").

In addition, when there is no primary claim to compel access to medical records as here, the procedural requirements of an Article 78 proceeding, such as the need to exhaust administrative remedies and the four-month statute of limitations, make no sense and are unnecessarily onerous on individuals who have overpaid for

medical records that they already received. Indeed, the requisite exhaustion of administrative remedies and a four-month statute of limitations for an Article 78 proceeding is particularly harsh given that would-be petitioners include those who are seriously ill, injured, infirm and/or dying.

Without a private right of action for damages on behalf of "qualified persons," there simply is no remedy for persons like Ortiz and the tens of thousands of persons similarly situated, who received copies of their medical records but were gouged by inflated amounts charged by Respondents, well over the statutory maximum per-page limit of $0.75. Yet these are the very individuals for whose behalf the statute imposes the cap. Thus, a private right of action for damages for a violation of PHL § 18(2)(e) enhances the legislative scheme and allows for the redress of the direct and personal harm that Respondents caused Appellant's decedent and other "qualified persons" like her, who were damaged by Respondents when they violated the per-page cap of PHL § 18(2)(e). Moreover, there can be no question that the threat of recoupment of any overcharge for copies of medical records incentivizes providers to comply with PHL § 18(2)(e) and to stop systematically profiteering on the most vulnerable – people who require medical records and are not in a position to object to the pricing.

In sum, the last prong of the *Sheehy* test is met because, as held by Justice Cohen and affirmed on appeal in *Feder*, "affording plaintiffs a private cause of

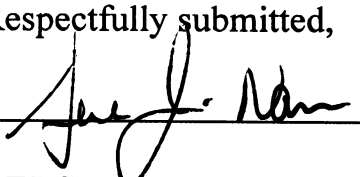
action does not conflict with the legislative scheme underlying the Public Health Law." A0113 (*Feder* Decision at 13). Justice Cohen's statutory analyses with respect to all three prongs of the *Sheehy* test is convincing and still valid.

CONCLUSION

For the reasons set forth above, the Court should answer the certified question in the affirmative, that Section 18(2)(e) of the New York Public Health Law does provide a private right of action for damages when a medical provider violates the provision limiting the reasonable charge for paper copies of medical records to $0.75 per page.

Date: August 24, 2020

Respectfully submitted,

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: August 24, 2020

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