19-1649

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

VICKY ORTIZ, Individually and on behalf of all others similarly situated,

Plaintiff,

HECTOR ORTIZ, in his capacity of Temporary Administrator of THE ESTATE OF VICKY ORTIZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

—against—

CIOX HEALTH LLC, successor in interest IOD INC., NEW YORK PRESBYTERIAN HOSPITAL,

Defendants-Appellees,

IOD INC., COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE CIOX HEALTH LLC, SUCCESSOR IN INTEREST TO IOD INC.

JAY P. LEFKOWITZ
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
(212) 446-4800
lefkowitz@kirkland.com

JODYANN GALVIN
HODGSON RUSS LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202
(716) 848-1485
jgalvin@hodgsonruss.com

Attorneys for Defendant-Appellee
Ciox Health LLC, successor in interest to IOD Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Defendant-Appellee Ciox Health LLC makes the following disclosure:

Ciox Health LLC is a wholly owned subsidiary of Smart Holdings Corp., a Delaware corporation. No publicly held corporation owns 10 percent or more of Smart Holdings Corp.

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I. STATEMENT OF THE ISSUES

1. Whether this Court should affirm the District Courts' ruling dismissing Appellant's claim for violation of New York Public Health Law ("PHL") section 18(2)(e), where § 18's history, purpose, and plain text make clear that the New York Legislature did not intend to permit a private right of action to enforce § 18's statutory right of access?

2. Whether this Court should affirm the District Courts' ruling dismissing Appellant's claim for unjust enrichment, where Appellant forfeited the argument it now makes on appeal and where, in any event, Appellant improperly seeks to leverage the doctrine of unjust enrichment to enforce a failed statutory claim?

II. STATEMENT OF THE CASE

Unsatisfied with the various remedies that the New York Legislature expressly provided to enforce the statutory right of access that the Legislature created to secure patients' ability to obtain their medical records under § 18 of the New York Public Health Law ("PHL"), Appellant here seeks to have this Court fashion yet another remedy—a private right of action—that Appellant presumably considers more attractive, but which the Legislature declined to extend. Because,

however, the remedies that the Legislature did create more than suffice to redress Appellants' alleged injury of (briefly) being overcharged for her medical records, this Court has neither the reason nor the mandate judicially to fashion a new cause of action for overcharge. Such a remedy, which does not exist at common law in New York, would undermine the purpose of § 18's fee limit to reduce medical costs in New York and is inconsistent with the Legislature's specific articulation of how the statutory right of access may be enforced. It is not reasonable to conclude that the Legislature silently intended to permit an additional, unstated means of enforcement of the provision from which it was excluded. Significantly, it would work no injustice to accord due respect to the Legislature's considered decision-making here, as the Article 78 remedy that the Legislature expressly conferred would permit Appellant—indeed, any patient or qualified requestor—both to compel the delivery of the documents at a statutorily compliant rate and to recover any overcharge imposed in excess of that rate. The District Court correctly resolved as much, and this Court should not disturb that well-reasoned conclusion.

A. Factual Background

Defendant-Appellee Ciox Health LLC fulfills requests for the release of medical records for persons or entities. (*See* A0018 ¶ 29; A0023 ¶¶ 52–53; A0027 ¶ 79.) Ciox, through its predecessor entity, IOD Incorporated, serviced The New York Presbyterian Hospital (the "Hospital") and responded to requests directed to the Hospital on its behalf during the time at issue here. (A0023 ¶¶ 52–54.)

In October 2016, Appellant Vicky Ortiz's attorney ordered copies of her medical records from the Hospital in connection with her pending personal injury litigation. (A0022 ¶ 50.) Ciox fulfilled this request on the Hospital's behalf and issued an invoice to her counsel reflecting a charge of $1.50 per page. (A0016 ¶ 7; A0023 ¶¶ 52, 56; A0024 ¶ 57.) Through her attorney, Ortiz paid the amount charged for her medical records. (A0023 ¶ 56; A0024 ¶ 57; Appellant Br. 4.)

Ortiz alleged that her attorney advised the Hospital of the $0.75 per-page charge set forth in PHL § 18(2)(e) when her attorney requested the medical records. (A0022–23 ¶¶ 50–51.) But, through her attorney, Ortiz paid the full amount of fees charged. (A0023–24 ¶¶ 51, 56–57.) She did not allege that her counsel disputed the charge after it was imposed,

informed IOD or Ciox about the alleged erroneous charge, or paid the charge under protest.

Rather, Ortiz quickly filed the instant action on behalf of a putative class, alleging that Ciox charged her attorney more for her medical records than the per-page amount permitted under § 18(2)(e). (A0014 ¶ 1; A0023–24 ¶¶ 56–57.) Under § 18, a health care provider may impose on patients or their attorneys (*i.e.*, qualified persons) a "reasonable charge" for copies of medical records, not exceeding the actual costs incurred by the provider. (A0014–15 ¶¶ 2, 4.) Section 18 sets the maximum charge at $0.75 per page. (A0014–15 ¶ 2.) Ortiz alleged that her attorney was charged more than the $0.75 per-page charge and estimates her per-page charge as $1.50. (A0016 ¶ 7; A0023–24 ¶¶ 56–57.) Ortiz admits that upon learning of this suit, Ciox refunded the erroneously charged difference in per-page charges. (Appellant Br. at 4.)

B. Procedural History

On June 22, 2017, Ciox moved to dismiss Ortiz's original complaint, as did the Hospital. (A0004.) On June 26, 2017, the Court permitted Ortiz to amend her complaint "to address issues raised by [defendants'

initial] motions to dismiss." (A0004–05.) Ortiz then filed an amended complaint, which added a fraud claim and named Ciox personnel as individual defendants. (A0024 ¶ 58; A0026–29 ¶¶ 58, 76–89.) The amended complaint contained causes of action for (1) violation of § 18; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) fraud; and (5) enjoinment (*i.e.*, injunctive relief). (A0025–30.) Ciox and the Hospital moved to dismiss the amended complaint. (A0005–06.) Judge Cote dismissed Ortiz's unjust enrichment claim, and all other claims, except the one arising under § 18. (A0006; A0033–48.)

Ortiz subsequently passed away, and her estate was substituted in her place. (A0010.) Judge Cote invited further submissions to narrow the issues in the case, and on October 31, 2018, Ciox moved for judgment on the pleadings or to dismiss. (A0010–11.) The Hospital moved for judgment on the pleadings or to certify orders for interlocutory appeal. (A0011.) On May 7, 2019, Judge Cote granted Ciox's and the Hospital's motions for judgment on the pleadings, holding that there is no private right of action under § 18. (A0012; A0075–97 ("May 7, 2019 Order").)

III. ARGUMENT

A. Section 18 of the Public Health Law Does Not Permit a Private Right of Action.

The parties agree that while the text of § 18 does not expressly foreclose a private right of action, neither does it provide for one. In such circumstances, "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.*, 2 N.E.3d 221, 226 (N.Y. 2013) (quoting *Carrier v. Salvation Army*, 667 N.E.2d 328, 329 (N.Y. 1996)). Courts in New York consider a three-part test to determine whether, notwithstanding that statutory silence, the court should infer a legislative intent to permit a private right of action. Under the so-called *Sheehy* test, the court asks "(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 Cmty. Day, Inc.*, 541 N.E.2d 18, 20 (N.Y. 1989).

The first prong is considered "most easily satisfied" and relatively unimportant, while the third factor is "most important[]." *Id.* at 20–21 ("[R]egardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme."); *Carrier*, 667 N.E.2d at 329 (holding that a finding that private right of action "would be inconsistent with both the enforcement means chosen by the Legislature and the basic purposes underlying" the statute "is determinative"). Ciox agrees with the District Court that Appellant meets the first prong. As explained below, however, Appellant cannot meet the second or third prong, so the Court should not infer a private right of action under § 18.

1. The Recognition of a Private Right of Action Would Be Inconsistent with the Legislative Purpose.

When § 18 was added to the Public Health Law in 1986 to create the patient's right to access to their medical records—which, until then, were considered under New York law to be solely the property of the health care provider, *see* N.Y. State Assembly Mem. in Support of Legis., Bill Jacket, S. 9346, ch. 497 at 12—the cost of the measure was forefront

in the minds of the bill's sponsors and commenters.[1] Supporters and opponents alike raised the concern that imposing these additional obligations on providers would be unduly burdensome and costly, but proponents replied by noting that, per subsection (2)(e), the reasonable, actual costs of the request would be borne by the requestor, thereby negating much of the cost. *See* Letter from the N.Y. Ass'n of Homes & Servs. for the Aging, Bill Jacket, S. 9346, ch. 497 at 47 (noting the "financial cost to the residential health care facilities" that will have to hire additional staff to deal with "litigious attorneys knocking down their doors to obtain records"). In particular, the Legislature's budget report noted that the combination of the fee provision with the requirement to provide records for free to indigent requestors meant that "access to medical records for Medicaid recipients could result in a negligible budget impact" to the state. *Id.* at 8.

Indeed, the totality of the submissions make clear that the fee provision, rather than being intended as a tool to protect requestors from

1 As the District Court noted, New York courts rely on the submissions in the Bill Jacket as a source for divining legislative intent. (May 7, 2019 Order, A0086.)

high fees, was intended as a tool to protect providers from the costs associated with creating the theretofore non-existent right of patient access. And to ensure further that the right of access not be transmogrified into a means of subjecting providers to unending costly litigation or civil proceedings, the Legislature added that "[n]o proceeding shall be brought or penalty assessed, except as provided for in this section, against a health care provider, who in good faith, denies access to patient information." § 18(11) (1986).[2]

As part of the Legislature's 1991 "massive overhaul to the Public Health Law" (May 7, 2019 Order, A0086), § 18(2)(e) was amended to set a seventy-five cent cap on what could be deemed a reasonable fee. As the comments to the amendments indicate, the seventy-five cent cap was the Legislature's estimation of what the actual, reasonable costs associated with providing medical records should be, with the aim of preventing providers from utilizing the fee provision—initially envisioned as a way to protect providers from swallowing too much of the cost of providing

2 The following year, the Legislature further amended § 18 to add that "[n]o health care provider shall be subjected to civil liability arising solely from granting or providing access to any patient information in accordance with this section." § 18(12) (1987).

records—as a means of profiting off those records. *See* Letter from the N.Y. State Office for the Aging, June 17, 1991 at 7, Bill Jacket, L. 1991, ch. 165 (supporting the measure and asserting that "[t]he reasonable cost of providing many medical records is less than seventy-five cents per page"); Letter from the N.Y. Public Interest Research Grp., June 7, 1991 at 1, Bill Jacket, L. 1991, ch. 165 (supporting the measure and asserting that "physicians and hospitals have made access to these records extraordinarily difficult for some consumers through excessive charges for copying these records," sometimes as high as $2 per page). Given comments indicating that actual costs were, in fact, significantly lower, the legislative history supports the conclusion that the Legislature continued to adhere to its conception of the fee provision as providing patients with reasonable access to their records without requiring providers completely to shoulder the financial burden of the undertaking. Such an attempt to rationalize and constrain the costs that both providers and patients had to pay for ensuring access to medical records was in keeping with the overarching purpose of the 1991 amendments "to restrain the rapid growth in costs of the Medicaid system," Senate Mem., Bill Jacket, L. 1991, ch. 165 at 183.

The judicial creation of a private right of action, by contrast, is inconsistent with that purpose. By requiring patients to pay for their own access and later capping the maximum fee at a cost that was, at least at the time, allegedly above actual costs, the Legislature announced a clear intent to assure patient access while controlling the providers' costs associated with furnishing those records. And, as described more below, in addition to limiting expressly providers' liability for their good faith attempts to provide access, the Legislature selected efficient, low-cost enforcement mechanisms to address instances where providers did not meet those standards. *See, e.g.*, *Finley v. Giacobbe*, 79 F.3d 1285, 1292 (2d Cir. 1996) ("The primacy of article 78 proceedings conserves public money by forcing a quick and efficient resolution of claims against state agencies."); *Fine v. State*, 10 Misc. 3d 1075(A), at *6, 814 N.Y.S.2d 890 (Ct. Cl. 2005) (explaining that where, similar to here, "the statutory framework provides for immunity from civil actions (unless actual malice is shown)," the Legislature has "signaled that a private cause of action is not appropriate").

As the District Court correctly noted, subjecting providers to a rash of unrestricted litigation in state and federal court will necessarily result

in increased costs for providers and, ultimately, translate into higher medical costs for all New Yorkers as providers shift resources to defending against costly litigation (A0087–88). *Cf. Mark G. v. Sabol*, 717 N.E.2d 1067, 1071 (N.Y. 1999) (explaining analogously that permitting a private right of action for money damages against social services would lead to "[a]llocations of money and government resources [being] rechanneled, no longer to be based on administrative judgments, but driven, at least in part, by tort law principles").[3] Such a backwards result cannot be squared with the New York Legislature's intent when creating and revising the § 18 right of access. Appellant is incorrect that this element of the *Sheehy* test "clearly is met." (Appellant Br. at 20.)

3 This empirical phenomenon is also matter of common sense, and Appellant misses the mark when she calls such a result "highly speculative." (Appellant Br. at 19.) In any event, she misunderstands the nature of the cost feedback loop. The point is not, as Appellant seems to suggest, that the litigation costs would be counted among the actual costs in providing the records to the specific requestor. *Id.* Rather, as study after study has found, a medical provider faced with increasing costs—be they the result of administrative or litigation expenses—will have to pass them on to patients in the form of higher procedure costs, or else shut down.

2. The Recognition of a Private Right of Action Would Be Inconsistent with the Legislative Scheme.

The third *Sheehy* factor—whether a private right of action would be consistent with the legislative scheme—is generally treated by New York courts as dispositive and "most important." *Cruz*, 2 N.E.3d at 226. And on this pivotal question Appellant's theory is at its weakest.

There is no common law right or cause of action recognized under New York law for a patient to access his or her own records. *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 458 N.E.2d 363, 368 n.3 (N.Y. 1983); *Gotkin v. Miller*, 514 F.2d 125, 128–29 (2d Cir. 1975). Through PHL §§ 12 and 13, however, the New York Legislature provided two means of enforcing the *statutory* right of access and fee limits in § 18(2)(e). Under § 12, the Commissioner of Health may impose civil penalties on a provider that charges above the fee limit or—starting in 2020—refer the matter to the Attorney General for an injunction. And under § 13, "any citizen of full age resident of the municipality where the duty should be performed"—which Appellant does not contest includes Ms. Ortiz—can initiate an Article 78 proceeding to enforce "any act . . . required by this chapter," which includes abiding by the seventy-five cent per-page fee limit.

The District Court correctly held that "[t]he authorization of enforcement by the Commissioner of Health and the provision of a remedy pursuant to Article 78 are each sufficient to foreclose the recognition of a private right of action" (A0090). *See, e.g.*, 97 N.Y. Jur. 2d, Statutes § 247 ("Where a new right is created or a new duty imposed by statute, if a remedy is given by the same statute for its violation or nonperformance, the remedy given is exclusive."); *Drinkhouse v. Parka Corp.*, 143 N.E.2d 767, 769 (N.Y. 1957).

a. An Article 78 proceeding would fully redress Appellant's alleged injury.

Appellant relies primarily on the repeated and fundamentally flawed assertion that—notwithstanding the comprehensive statutory enforcement scheme—absent a private right of action under § 18, Appellant would be "without a means of recovering the overcharges Defendants imposed for copies of medical records." (Appellant Br. at 38; *id.* at 10 ("[T]he existing enforcement devices . . . do not address Plaintiff's direct and personal harm."); *id.* at 27 ("Without a private right of action for damages . . . there would be no remedy for persons like Ortiz").)[4]

4 Given that the District Court also concluded that the express § 12 remedy itself precluded finding a private right of action, Appellant

briefly challenges that conclusion, too. (*See* Appellant Br. at 23–24.) Citing a single nearly 60-year-old New York Supreme Court case, Appellant contends that "New York courts have long held that" the Legislature's providing for a civil enforcement mechanism in "section [12] does not preclude a private right of action." (*Id.* at 23 (citing *Hornbeck v. Towner*, 208 N.Y.S.2d 785 (Sup. Ct. 1960)).) But *Hornbeck*'s reasoning is incomplete, unconvincing, and has been undercut by subsequent rulings from the Court of Appeals. It is incomplete because it recognized a private right of action based on ad hoc analogies to other statutes, but did not apply the three-part test that now controls under New York law. It is unconvincing because based only on its determination that the existence of the civil penalty did not *preclude* a private right of action, it concluded that "it seems clear" that such a remedy was warranted, without so much as considering the existence of the Article 78 remedy or whether it would comport with the Legislature's intent. *Id.* at 787. And its major premise—that the existence of a civil penalty, standing alone, should not be considered "the sole and exclusive remedy for [the statute's] violation," *id.* at 786—is contrary to the view of the New York Court of Appeals, which regularly rejects private rights of action in statutes where "the legislature chose to assign enforcement exclusively to government officials." *Schlessinger v. Valspar Corp.*, 991 N.E.2d 190, 192 (N.Y. 2013); *see also, e.g.*, *Carrier v. Salvation Army*, 667 N.E.2d 328, 330 (N.Y. 1996) (same where "statutory enforcement authority . . . is expressly vested only in the Department [of Social Services], with additional equitable enforcement remedies available 'upon the request of the [D]epartment' through the Attorney-General"); *Town of Wilson v. Town of Newfane*, 181 A.D.2d 1045, 1045 (4th Dep't 1992) ("Because the Environmental Conservation Law specifically authorizes the Attorney-General to enforce 'any rule or regulation promulgated pursuant' to ECL article 27, we conclude that the statute does not confer a private cause of action."); *Byng v. Campbell*, 2010 WL 681374, at *18–*19 (N.D.N.Y. Feb. 24, 2010) (holding that there was no private right of action for professional misconduct based on PHL § 230-a because § 12's assignment of prosecutorial power to the Department of Health and Attorney General set forth all available remedies). Rather, where, as

Specifically, Appellant matter-of-factly asserts that "an Article 78 proceeding seeking injunctive relief pursuant to PHL § 13 would not address" her claim because she does not seek the production of the documents (Ciox already provided those), but instead seeks the reimbursement for the seventy-five cent overcharge above the statutory limit that Ciox allegedly improperly collected (and then reimbursed). (Appellant Br. 26–27.) In other words, Appellant argues that without a private right of action, the legislative enforcement scheme would fail to live up to Appellant's view of the legislative purpose. Setting aside Appellant's erroneous understanding of § 18's purpose, the law in New York is clearly to the contrary.

Rather, as decades of New York law have conclusively established, a petitioner in an Article 78 proceeding is entitled to obtain restitution incidental to the primary relief they seek. C.P.L.R. § 7806; *Gross v. Perales*, 527 N.E.2d 1205, 1206 (N.Y. 1988). The District Court explicitly recognized the same. (A0089–90.) As would be applicable here, the

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here, the Legislature has expressly created an enforcement mechanism and has not indicated any intent to permit a private right of action, courts are obligated to respect the Legislature's clear election of remedies. *Sheehy*, 541 N.E.2d at 22; *Cruz*, 2 N.E.3d at 227.

primary relief sought is the provider's compliance with § 18's access requirements, specifically the fee provision in § 18(2)(e). Incidental to that primary relief of limiting providers to charging only seventy-five cents per page is requiring the provider to repay any amount of overcharge improperly invoiced and withheld. *Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Comm'n*, 115 A.D.3d 521, 523–24 (1st Dep't 2014) (holding that incidental damages would include "amounts [respondent] should have paid to the petitioner or its retention of amounts it should not have collected"). Thus, as the Court of Appeals has held, where an Article 78 petitioner asks the court to direct the respondent to reduce its charges to be consistent with its statutory obligation, the court may, "consistent with the petition," direct the respondent "to make the reimbursement directly to those [individuals] who in fact were overcharged." *Health Care Plan, Inc. v. Bahou*, 462 N.E.2d 128, 129 (N.Y. 1984); *see also Signature Health Ctr., LLC v. State*, 92 A.D.3d 11, 17 (3d Dep't 2011) ("[T]here is no dispute that Medicaid providers can obtain incidental monetary damages—as claimant did here—in the context of a CPLR article 78 proceeding

challenging the withholding of Medicaid reimbursement payments."); *Pearlstein v. Axelrod*, 103 A.D.2d 921, 921 (3d Dep't 1984).

The availability of these incidental fees is further confirmed by the text of § 18 itself. As the District Court noted, in § 18(3)(f)—which establishes the procedures for challenging a provider's denial of access to medical records—the Legislature specified that any relief available under Article 78 "shall be limited to a judgement requiring the provider to make available" the requested records, with no recovery of incidental damages. (A0084–85.) Tellingly, no such limitation of the Article 78 remedies was included in § 18(2)(e). Appellant's brief does not address any of this settled case law or explain how it is inapplicable to § 18.

Notably, although a petitioner in an Article 78 special proceeding is entitled to obtain incidental restitution, there is no entitlement to prejudgment interest or other damages beyond those specified in Article 78. *See Gross v. Perales*, 133 A.D.2d 37, 38 (1st Dep't 1987), *aff'd*, 527 N.E.2d 1205 (N.Y. 1988) (reversing award of interest on improper penalty assessment because "[t]he right to interest is purely statutory. Under CPLR 7806, which specifies what relief may be granted in a judgment in a special proceeding, only restitution or damages which are incidental to

the primary relief sought by the petitioner may be awarded."). Nor is there a right to compensatory damages. *See Antonsen v. Ward*, 943 F.2d 198, 204 (2d Cir. 1991) (discussing *Gross*). And consistent with its purpose to serve as a speedy and cost-effective means of adjudicating disputes, claims amenable to an Article 78 proceeding have a four-month limitations period. Little wonder that Appellant—whose amended complaint seeks all those unavailable benefits (A0030–31)—would prefer to proceed with a private right of action.

It would, however, contravene the Legislature's carefully crafted enforcement scheme to graft a private right of action whose sole purpose would be to provide costly benefits that the Legislature plainly did not want to extend. *See Sheehy*, 541 N.E.2d at 22 ("Where the Legislature has not been completely silent but has instead made express provision for a civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage . . . ."). Where, as here, the Legislature has "expressly provided for enforcement mechanisms"—including for both civil penalties and specifically delineated civil remedies—but has not also expressly provided for a private cause of action, courts in New

York will conclude that the Legislature had no intent to provide one. *Cruz*, 2 N.E.3d at 226; *Jones v. State*, 171 A.D.3d 1362, 1365 (3d Dep't 2019) ("Given that the inmate grievance program exists to address inmates' complaints and allegations of discriminatory treatment [in violation of the Correction Law], and that judicial review may proceed pursuant to CPLR article 78, we do not find that implying a private right of action here would be consistent with the legislative scheme."); *Franza v. State*, 164 A.D.3d 971, 973 (3d Dep't 2018) (holding that "a private action may not be fairly implied" where "[t]he Legislature provides recourse under CPLR article 78" to remedy the failure to satisfy a statutory obligation); *Signature Health*, 92 A.D.3d at 17 ("Given that the Legislature has established procedures for judicial review of DOH's administrative rate-setting determinations and payment of reimbursement rates, it is fair to infer that had it intended to create a private right of action against governmental agencies, it would have specifically done so.").[5]

5 *See also, e.g.*, *O'Neil v. City of New York*, 10 Misc. 3d 30, 31–32, 807 N.Y.S.2d 782, 784 (App. Term 2005) ("There is no indication that there was any legislative intent to confer a private right of action against a government agency through CCA 203; on the contrary, CPLR article 78 was enacted for this purpose."); *Warburton v. State*,

b. The Legislature provided for private rights of action elsewhere in the PHL.

The fact that the Legislature explicitly provided for a comprehensive enforcement mechanism that would completely redress Appellant's injuries is itself sufficient to foreclose her claim. But there is more, because although the Legislature gave no indication that it desired to include a private right of action in § 18, it did just that elsewhere in the PHL, including in the immediate next section that was promulgated the following year. (*See* May 7, 2019 Order, A0094–95.) There—in § 19(1), establishing the maximum allowable charges to Medicare beneficiaries—the Legislature used the exact prohibitory "shall not exceed" language used in § 18, but unlike in § 18 added that "where the

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173 Misc. 2d 879, 882, 662 N.Y.S.2d 706, 708 (Ct. Cl. 1997) ("Here, the Legislature has given a civil remedy by way of an article 78 proceeding with counsel fees and court costs available, as well as a criminal sanction. To go beyond those remedies to create a private cause of action for money damages for a violation of FOIL would be improper judicial usurpation of the legislative function, a step the Court declines to take."); *Lawrence v. State*, 180 Misc. 2d 337, 342, 688 N.Y.S.2d 392, 395 (Ct. Cl. 1999) ("Where, as here, the Legislature addressed the issue of civil remedies [by providing for an Article 78 proceeding] and chose not to clearly create a new private right of action in the statute, it would be imprudent for a court to add by implication a provision that it is reasonable to assume the Legislature intentionally omitted.").

provisions of this section have been violated, the physician shall refund to the beneficiary the amount collected in excess of the limitations set forth in subdivision one of this section," § 19(4). Based on this extra language that created not only a general duty to not overcharge but also a specific duty to reimburse, courts have found that the Legislature intended to create a private right of action. *See, e.g.*, *Medicare Beneficiaries Def. Fund v. Mem'l Sloan-Kettering Cancer Ctr.*, 603 N.Y.S.2d 1016, 1018 (Sup. Ct. 1993) (explaining that § 19(4) "directs that physicians refund collected overcharges to Medicare beneficiaries. It is the latter provision—not the imposition of a penalty for a violation of the statute—which plaintiffs seek to enforce by this suit."). Various other provisions across the PHL likewise provide for private rights of action. *See, e.g.*, PHL § 2801-d ("Private actions by patients of residential health care facilities"); *Doe v. Roe*, 190 A.D.2d 463, 470–71 (4th Dep't 1993) (recognizing private right of action in PHL § 2783(3), which precludes a "cause of action for damages" for a subset of violations of Article 27-F, indicating that a right of action exists for non-exempted violations). Conspicuously absent *anywhere* in § 18 is a comparable language imparting a remedial duty or right of action.

Especially where, as here, the Legislature expressly prescribes its desired means of enforcement of a particular provision of a law and omits a different means of enforcement that it *does* manifest an intent to include in other provisions of the same law, it is not reasonable to conclude that the Legislature silently intended to permit the unstated means of enforcement in the provision from which it was excluded. *See, e.g.*, *Varela v. Inv'rs Ins. Holding Corp.*, 615 N.E.2d 218, 219 (N.Y. 1993); *Schlessinger v. Valspar Corp.*, 686 F.3d 81, 88 (2d Cir. 2012) (explaining that where the Legislature specifically amended one provision of a regulatory scheme to include a private right of action, "[i]n doing so, it evinced an intent to exclude a private right of action in other portions" of the regulation), *certified question answered on these grounds*, 991 N.E.2d 190 (N.Y. 2013); *People ex rel. Spitzer v. Grasso*, 42 A.D.3d 126, 138 (1st Dep't 2007) ("A due respect for the competence of the Legislature requires us to conclude that the [different] remedial choices it made were considered choices.").

The New York Court of Appeals' decision in *Varela* is particularly instructive on this point. There, the Court of Appeals looked across the entirety of the General Business Law—spanning 46 Articles and many

hundreds of sections—to determine the Legislature's intent to provide a private right of action.[6] That analysis revealed that the Legislature had provided "for private causes of action in other portions of the General Business Law" but had included no "similar provision for enforcing" the section at issue. *Varela*, 615 N.E.2d at 219. The Court concluded based on this holistic review that "the Legislature did not intend to create a private cause of action for violations of [that] article." *Id.* A review of the PHL and § 18 compels the same conclusion.

3. Appellant's Arguments Are Unpersuasive.

Appellant's attempts to downplay the significance of the comprehensive statutory enforcement and remedial scheme are unavailing, especially in light of her complete failure to engage with the availability of an Article 78 proceeding as a complete remedy to her alleged injuries.

6 Appellant is therefore incorrect when she implies that this Court is constrained to look only at PHL § 18 to make such a determination. (*See* Appellant Br. at 21, 31, 37.)

a. No other remedies are needed to protect Appellant's rights as granted by § 18.

While fastidiously ignoring that the Article 78 remedy serves this exact purpose, Appellant argues that "where a statute affords individuals specific rights and a violation directly affects those individuals, a private right of action is necessary to fully address the direct and personal harm a particular individual suffers from a violation of the statute." (Appellant Br. 25.) But the various cases upon which Appellant relies to support her claim all share a common feature that is missing from § 18(2)(e): an affirmative statutory declaration of the individual's right to a *particular remedy*. This line of cases therefore actually supports Ciox and the District Court's view that there is no implied right of action in § 18, which lacks such an express remedy. For example, implying a private right of action in § 19(4) in a circumstance where the Legislature expressly identifies the physician's duty to provide a monetary remedy is, unlike in the § 18(2)(e) context, consistent with the broader PHL regulatory scheme that already includes an Article 78 remedy. This is because money damages in an Article 78 proceeding may only be obtained to the extent it is incidental to the primary duty to be enforced, rather than the primary duty itself. Given that an Article 78 proceeding cannot be the

means of effectuating the Legislature's intent in specifying the monetary remediation duty, it is reasonable to infer in such a case that the Legislature intended the remediation duty to be enforceable via a private right of action. As the District Court rightly explained (*see* A0092–94), Appellant's reliance on *Medicare Beneficiaries* and *Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*, 116 A.D.3d 207 (2d Dep't 2014)—cases interpreting statutes that include specific remedial duties in addition to the underlying prohibition—do not support her claim.[7]

7 The same is true regarding the other cases Appellant cites: *Henry v. Isaac*, 214 A.D.2d 188 (2d Dep't 1995), and *Gerel Corp. v. Prime Eastside Holdings, LLC*, 12 A.D.3d 86 (1st Dep't 2004). In *Henry*, the court was clear that a private right of action was appropriate because, in addition to imposing enforceable prohibitions upon the regulated party, the regulations at issue also "afford[ed] the residents various rights and impose[d] an affirmative duty on the operators of adult care facilities to provide specified services and care." 214 A.D.2d at 193. Similarly, *Gerel* dealt with a statute creating an affirmative remedial duty requiring that landlords "shall . . . turn over" a tenant's security deposit to successor landlords. 12 A.D.3d at 92–93. Like the affirmative remedial duties in *Medicare Beneficiaries* and *Maimonides*, the Legislature's inclusion of an affirmative duty—rather than just establishing a prohibition against failing—to provide services or forward security deposits supported a reasonable inference that the duty is enforceable by a private right of action.

b. Section 18's enforcement scheme is potent and extensive.

Finally, Appellant contends that the PHL's enforcement scheme, which encompasses "only two mechanisms of enforcement" that "are not specific to" § 18 is not as extensive or detailed as the schemes in cases that denied private rights of action.[8] Of course, the determination of the sufficiency of a remedial scheme is not just a game of tallying avenues of redress (although even one express enforcement mechanism is regularly considered enough to preclude a private right of action, *see supra n*ote 4). But a review of the cases shows that § 18 and its complete enforcement mechanisms easily satisfy the criteria that New York courts consider when determining whether "the statute has a potent or extensive enforcement mechanism" that would be inconsistent with a private right of action. *Rhodes v. Herz*, 84 A.D.3d 1, 11 (1st Dep't 2011). Generally

8 That § 18's enforcement provisions are not found in § 18 itself is entirely irrelevant. The same is true in myriad statutes concerning which courts decline to infer a private right of action, including *Byng v. Campbell*, 2010 WL 681374, at *18–*19 (N.D.N.Y. Feb. 24, 2010), which actually deals with PHL § 12, and *Rhodes v. Herz*, 84 A.D.3d 1, 8–11 (1st Dep't 2011), which Appellant cites favorably and which rejected a private right of action for alleged violations of various sections of Article 11 of the General Business Law, all of which are subject to § 189 "the article's enforcement section."

speaking, when courts have found that a comprehensive statutory enforcement scheme forecloses a private right of action, the scheme has had the following characteristics: (1) a detailed statute; (2) delegation to a specific party or parties; and (3) the ability to bring claims to redress the violation. *See, e.g.*, *Cruz*, 2 N.E.3d at 229; *see also McLean v. City of New York*, 905 N.E.2d 1167, 1171 (N.Y. 2009); *Hammer v. Am. Kennel Club*, 803 N.E.2d 766, 768–69 (N.Y. 2003); *Signature Health Ctr., LLC v. State,* 92 A.D.3d 11, 16–17 (3d Dep't 2011).

Section 18 is a detailed 13-part provision, situated in a carefully crafted multi-section Article, which is itself one of over fifty Articles making up the Public Health Law. The Legislature dedicated significant attention to crafting the various rights and remedies within § 18 itself and its surrounding provisions, and elected to constrain the § 18(2)(e) remedies to those provided in §§ 12 and 13, while taking different approaches to other closely related provisions. *E.g.*, § 18(3)(f) (limiting incidental fees recoverable under § 13); § 19(5) (indicating intent to permit private right of action for reimbursement). Appellant's argument that § 18 is not sufficiently detailed merely because it is allegedly less

detailed than some other statutes that *also* lack private rights of action is both incorrect and unpersuasive.

Nor, as Ciox has explained above, is Appellant correct that §§ 12 and 13 would leave Appellant or similarly situated plaintiffs unable to address their injuries. To the contrary, providers are subject to stiff monetary penalties and potential injunctions for any violation of § 18(2)(e), and via § 13's provision of an Article 78 proceeding, patients may compel furnishing records at the statutory compliant price and obtain reimbursement for any overpayments. Those cases upon which Appellant relies that have implied private rights of action in the face of similarly comprehensive enforcement schemes faced situations where, unlike here, the enforcement scheme does not vindicate some part of the legislative purpose.[9]

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9 *See, e.g.*, *Gerel*, 12 A.D.3d at 92–93 (finding that despite statute granting Attorney General enforcement powers, a private right of action was needed to effectuate purpose of protecting successor landlords because the Attorney General could not plausibly be involved in "every landlord/tenant security dispute throughout the State"); *Henry*, 214 A.D.2d at 193 (noting that although the "supervisory and enforcement powers given to DSS are indeed broad and comprehensive . . . the remedies available to DSS do not adequately address the harm that a particular individual may suffer"); *Ader v. Guzman*, 135 A.D.3d 671, 673 (2d Dep't 2016) (concluding, in dicta, that a regulation prohibiting leases without a

Here, despite her best efforts to ignore the breadth of the Article 78 remedy, Appellant simply cannot plausibly contend that an enforcement scheme that both redresses any potential injury related to § 18's purpose of ensuring patients' access to their medical records and incentivizes providers' compliance via threat of civil penalty is neither "potent" nor "extensive." Under governing law, § 18's comprehensive enforcement scheme precludes the judicial invention of yet another enforcement mechanism through a private right of action.

c. The soon-to-be effective amendments to § 12 do not imply the existence of a private right of action.

Appellant seizes onto § 12(6), a not-yet in effect provision of § 12 that, starting in April 2020, will establish 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." Appellant argues that through this forthcoming

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rental permit carried a private right of action to recover the $216,000 plaintiffs paid for a three-and-a-half month summer rental because the regulatory scheme did not otherwise permit for "recoupment of rent," so other than the threat of fines, there would otherwise be "no incentive for a landlord to obtain a license, which is an overriding concern of the Town" (quoting *Schwartz v. Torrenzano*, 16 N.Y.S.3d 697, 705 (Sup. Ct. 2015))).

amendment—passed in 2008—"[t]he New York Legislature made clear its intent not to limit remedies for violation of the Public Health Law." (Appellant Br. at 24.) Setting aside whether an as-yet ineffective provision that the Legislature expressly enacted with a *twelve-year* rollout can provide insight into how the Legislature views the in-effect language of the statute, Appellant's gloss on § 12(6) is simply incorrect.

Rather, the New York Legislature has inserted similar caveats into numerous statutory provisions, and courts consistently recognize that the purpose of such disclaimers is to make clear that the addition of the statutory remedy "does not in any fashion narrow rights or remedies against . . . that exist separate from [the statute] and that involve acts that may fall within the prohibitions of [the statute]." *Lawrence v. State*, 688 N.Y.S.2d 392, 395 (Ct. Cl. 1999). Such provisions "do[] not, however, explicitly create a separate right of action premised solely upon an alleged violation of" the statutory right. *Id.*; *Henry v. Isaac*, 214 A.D.2d 188, 191 (2d Dep't 1995) (explaining that when the "Legislature specifically provided that '[n]o existing right or remedy of any character shall be lost, impaired or affected by reason of this act,'" it meant to preserve the "right to seek relief pursuant to any existing common-law or

other statutory cause of action"). In other words, § 12(6) makes clear that notwithstanding the civil penalty under § 12, a person can still bring a cause of action that pre-existed at common law or that arises under another statute, even if it *also* would fall within the ambit of § 12.[10] Of course, there was and is no such pre-existing right at common law in New York. And such language manifestly does not mean that the Legislature intended to permit additional means of enforcing the statutory rights *granted by the PHL itself*, contrary to the express statutory scheme. It is not reasonable to impart so significant a consequence to such boilerplate language: "legislative bodies generally do not 'hide elephants in mouseholes.'" *Cruz*, 2 N.E.3d at 228 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)).

10 In fact, New York courts have found it significant for the third *Sheehy* factor analysis whether the asserted right also exists in some form at common law or is instead purely a creature of the statute from which the plaintiff seeks to derive his or her right of action. In the latter scenario—which is the case here—the express creation of a statutory right with a "limited scope" supports the conclusion "that the Legislature did not intend to create a private right of action for violations of" that discrete statutory provision. *Carpenter v. City of Plattsburgh*, 105 A.D.2d 295, 299 (3d Dep't), *aff'd*, 488 N.E.2d 839 (N.Y. 1985).

4. The First Department's Summary Decision in *Feder* Does Not Require Reversal.

In the face of the mountain of evidence establishing under the applicable *Sheehy* standard that there can be no private right of action to enforce § 18(2)(e), Appellant points to a one-line, unpublished, unreasoned, and uncited memorandum order from the First Department that "for the reasons stated" therein, apparently affirmed a lower court's decision recognizing a § 18 private right of action. *Feder v. Staten Island Univ. Hosp.*, 273 A.D.2d 155, 155 (1st Dep't 2000). But the lower court's opinion is nowhere to be found. Appellant assures this Court and Appellees of the meaning of the First Department's decision in *Feder* by reference to a later trial court ruling in that case that described the prior opinion as having "held that plaintiffs could assert a private right of action under PHL § 18." *Feder v. Staten Island Hosp.*, 2002 WL 34358059 (N.Y. Sup. Ct. Feb. 1, 2002). The pages of the New York Reports are otherwise silent on the issue.

Based on this dubious record, Appellant contends that the law in New York is settled and this Court must conclude that a private right of action exists under § 18. (Appellant Br. at 12–14.) To be sure, this Court has long held that, generally speaking, where the Court of Appeals—the

only authoritative source of New York law—is silent, "[d]ecisions of New York's intermediate appellate courts are 'helpful indicators' of how the Court of Appeals would decide." *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 133 (2d Cir. 2007). However, this Court is "not 'strictly bound' by decisions of the Appellate Division, particularly when we have 'persuasive data' that the Court of Appeals would 'decide otherwise.'" *Id.* (quoting *DiBella v. Hopkins*, 403 F.3d 102, 112 (2d Cir. 2005)).

As applied here, the First Department's decision in *Feder* should bear little weight in the Court's analysis. It is unclear exactly what the court there decided, so its summary order is not a "helpful indicator" of how the Court of Appeals would treat the question. Whereas this Court in *Dibella* cautioned against requiring that the appellate division supply "a reasoned basis" sufficient to convince the federal court of the soundness of the state court's view, at a minimum it must be clear that, for whatever reason, "those courts believe that" the position for which they are being cited is "the appropriate" one. 403 F.3d at 113. The same cannot be said of the *Feder* opinion. The First Department did not expressly articulate *any* position, let alone provide reasoning in support.

Instead, it without comment adopted the opinion of the trial court, the substance of which is not recorded. It is not even clear what part of the trial court's decision was challenged on appeal and thus reviewed by the appellate division. Based on this record, it is impossible to divine whether the appellate division specifically adopted the trial court's view of § 18, whether the trial court properly applied the applicable *Sheehy* test for making such a determination, or whether the trial court considered the full scope of the Article 78 remedy. Without such basic information, the *Feder* opinion is simply not helpful. As Ciox has articulated herein, however, even if such information were available, it is clear that applying the *Sheehy* test, and in light of the express and complete remedial scheme afforded for violations of § 18, the Court of Appeals would disagree with *Feder*'s apparent conclusion.[11]

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11 Although Ciox believes that the history and purpose behind § 18 and the clarity of its enforcement scheme make this a straightforward case, to the extent this Court has any doubts about this conclusion, it has the option of certifying the issue to the New York Court of Appeals. *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211, 221 (2d Cir. 2003). On this point, Ciox draws the Court's attention to *Spiro v. HealthPort Technologies, LLC*, No. 18-cv-1023, Dkt. 90-1 (2d Cir. Nov. 1, 2019), a just-issued decision by the Court in a case concerning two different provisions of PHL § 18: whether § 18 imposes a duty on companies like Ciox and how "costs incurred" are to be calculated. In *Spiro*, this Court

5. Neither Res Judicata nor Stare Decisis Bar Ciox's Defense.

Appellant also argues that, as a result of various earlier cases in which the parties did not challenge, and the court did not consider, whether § 18 carries a private right of action, res judicata and stare decisis require this Court to reverse. (Appellant Br. at 14–15 (citing, *inter alia*, *Ruzhinskaya*, 291 F. Supp. at 484; *McCracken v. Verisma Sys., Inc.*, 2017 WL 3187365 (W.D.N.Y. July 27, 2017); *Carter v. Ciox Health, LLC*, 260 F. Supp. 3d 277 (W.D.N.Y. 2017)).)

It almost goes without saying, but this is pure sophistry. The terms res judicata (lit: "a matter judged") and stare decisis (lit: "to stand by things decided") presuppose that a court has actually "judged" or "decided" the merits of the matter or things. *See Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1993 (2017) ("[T]his Court has long made clear that where, as here, we have not 'squarely addressed [an] issue, and have at most assumed [one side of it to be correct], we are free to address the

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expressed its intent to certify these two questions to the New York Court of Appeals and remanded to the district court to develop a fuller record on one of the questions. Accordingly, given that this Court will already be certifying a number of questions concerning § 18, if this Court wishes to certify the instant question on appeal as well, it may be efficient to do so together.

issue on the merits.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993))); *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1128 (2d Cir. 1989) ("The doctrine of stare decisis is limited to actual determinations in respect to litigated and necessarily decided questions."); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). But other than the *Feder* opinion—which only arguably did so—Appellant concedes that none of these other cases even considered, let alone issued a judgment or decision regarding, a § 18 private right of action. (Appellant Br. at 12.) That litigants in another case failed to raise this defense is certainly not an admission that it is unavailable, nor is the defense something that a court could raise *sua sponte* where the parties have not done so.[12]

12 For the same reason, Appellant is wrong to draw any inferences from the New York Legislature's failure to clarify, in light of these and similar cases, that § 18 contains no private right action. (*See* Appellant Br. at 32.) Although "in amending the statute . . . the Legislature was presumably aware of all existing decisions interpreting it," *People v. Robinson*, 733 N.E.2d 220, 223 (N.Y. 2000), Appellant concedes that there are, in fact, *no* cases actually interpreting whether § 18 carries a private right of action. *See also Knight-Ridder Broad., Inc. v. Greenberg*, 511 N.E.2d 1116, 1119 (N.Y.

B. Appellant's Unjust Enrichment Claim Was Properly Dismissed.

1. Appellant Forfeited Her Argument on Appeal by Raising the Contrary Argument Below.

Before the District Court, Appellant expressly argued that she "obtained a contract for the release of [her] records" and "alleged that Defendant IOD [now Ciox] was an agent of Defendant Presbyterian *with whom Plaintiff contracted*." (SA0086 (emphasis added).) Defendants challenged that Appellant had failed to plead such a contractual relationship. (SA0018; SA0073.) Based on Appellant's representation regarding a specifically contested issue, the District Court properly concluded that Appellant's complaint was "premised on the existence of an agreement between Ortiz and defendants" and dismissed Appellant's unjust enrichment claim as duplicative of her claim for breach of the implied covenant of good faith and fair dealing. (A0045.) Now, for the first time on appeal, Appellant reverses herself and "now agrees with Defendants that the [amended complaint] does not allege a contract relationship with Defendants." (Appellant Br. at 40.)

1987) (applying the presumption "[w]here the interpretation of a statute is well settled and accepted across the State").

This concession comes too late, and is forfeited. Even were Appellant not contradicting her earlier representations, this Court "generally do[es] not consider arguments not raised below." *Caiola v. Citibank, N.A.*, 295 F.3d 312, 327 (2d Cir. 2002). But this is especially true where the particular argument was not merely omitted, but was consciously disregarded before the district court. As this Court has repeatedly reaffirmed, "where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal." *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977). This Court recently dealt with a similar issue in *Aretakis v. First Financial Equity Corporation*, 744 F. App'x 741 (2d Cir. 2018). There, the appellant appealed an order compelling his case to arbitration. Before the district court, the appellant had argued that the arbitration clause was unenforceable because it was situated in an invalid contract, but on appeal he switched course and sought to challenge the validity of the arbitration clause itself. This Court ruled that the district court "properly" ruled based on the arguments presented to it, and the

alternative unraised theory was "forfeited." *Id.* at 742. The same result is compelled here. In the face of Defendant's express factual and legal challenges, Appellant was adamant that she had pled that a contract existed between the parties. Granting Appellant all the reasonable inferences in her favor, as it was required to do, the District Court accepted that allegation. Appellant does not dispute that based on those alleged facts the District Court correctly ruled that the unjust enrichment claim was precluded.

2. Unjust Enrichment Is Unavailable to Enforce Failed Statutory Claims.

Even taking Appellant's new theory on the merits, it is an improper attempt to circumvent the limited remedies available for § 18 violations.[13]

"[U]njust enrichment is not a catchall cause of action to be used when others fail." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012); *see also Ruzhinskaya v. HealthPort Techs., LLC*, 291 F.

13 This Court "may . . . affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 193 (2d Cir. 2019) (quoting *Name.Space, Inc. v. Network Sols., Inc.*, 202 F.3d 573, 584 (2d Cir. 2000)).

Supp. 3d 484, 502 (S.D.N.Y. 2018) (citing *Corsello* and holding that plaintiffs could not assert an unjust enrichment claim against HealthPort based on a violation of § 18 where that provision did not provide a cause of action against HealthPort), *judgment vacated and remanded on other grounds*, 2019 WL 5656144 (2d Cir. Nov. 1, 2019). Rather, unjust enrichment is "available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello*, 967 N.E.2d at 1186.

Accordingly, a party may not maintain an unjust enrichment claim to recover for alleged violation of a statute for which no private right of action exists if the pleading "does not allege any actionable wrongs independent of the requirements of the statute." *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 203 (2d Cir. 2005) (quoting *Han v. Hertz Corp.*, 12 A.D.3d 195, 196 (1st Dep't 2004)). To hold otherwise would be to allow a party to "circumvent the legislative preclusion of private lawsuits for violation of the statute." *Id.* (quoting *Han*, 12 A.D.3d at 196). As detailed above, the District Court correctly held that § 18 does not imply a private right of action. Ortiz's unjust enrichment claim can only survive, then, if

it states a claim for relief independent of a § 18 violation. But New York recognizes no common law right of access, and Appellant's complaint, and all the relief sought therein, is based on alleged violations of the statute. (*See* A0014 ¶ 1; A0015 ¶ 3; A0017 ¶ 13; A0019 ¶ 38; A0020 ¶ 44; A0024 ¶ 60.) Appellant's unjust enrichment claim was properly dismissed.

IV. CONCLUSION

For all of the reasons set forth above, the Court should affirm.

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KIRKLAND & ELLIS LLP

By: */s/ Jay P. Lefkowitz*

Jay P. Lefkowitz, P.C.
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
lefkowitz@kirkland.com

HODGSON RUSS LLP
Jodyann Galvin
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202
(716) 856-4000
jgalvin@hodgsonruss.com

Attorneys for Ciox Health LLC

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,197 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Microsoft Office Word and a proportionately spaced, serif font (Century Schoolbook, 14 point).

By: */s/ Jay P. Lefkowitz*

KIRKLAND & ELLIS LLP
Jay P. Lefkowitz, P.C.
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
lefkowitz@kirkland.com

HODGSON RUSS LLP
Jodyann Galvin
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202
(716) 856-4000
jgalvin@hodgsonruss.com