19-1649-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

v.

CIOX HEALTH LLC, as successor in interest of IOD Inc., and THE NEW YORK AND PRESBYTERIAN HOSPITAL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York, No. 1:17-cv-04039-DLC

REPLY BRIEF OF PLAINTIFF-APPELLANT HECTOR ORTIZ

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. The New York Appellate Division's Conclusion That PHL § 18(2)(e) Affords a Private Right of Action Should Be the Basis for This Court Finding the Same 3

A. The Decision, Affirmed and Adopted by the Appellate Division, Rejected Defendants' Argument That an Article 78 Proceeding Is the Only Remedy Available to a Private Citizen 7

B. The Decision, Affirmed and Adopted by the Appellate Division, Found an Implied Private Right of Action Under New York's Three-Part Test 9

1. The Decision Concluded That Recognition of an Implied Private Right of Action Will Promote the Legislative Purpose 9

2. The Decision Concluded That Creation of an Implied Private Right of Action Is Consistent with the Legislative Scheme 11

C. Defendants Point to No Persuasive Data That New York's Highest Court Would Rule Contrary to the Appellate Division 13

D. Disregarding *Feder* Would Erode Legal Stability and Cause Disruption to Long Pending Cases 14

II. The District Court Erred in Dismissing the Unjust Enrichment Claim 15

A. Plaintiff Did Not Waive His Unjust Enrichment Claim 16

CONCLUSION 23

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)..25

TABLE OF AUTHORITIES

Cases

Ader v. Guzman,
23 N.Y.S.3d 292 (2d Dep't 2016) 12

Carter v. CIOX Health, LLC,
260 F. Supp. 3d 277 (W.D.N.Y. 2017) 14

Casillo v. St. John's Episcopal Hospital, Smithtown,
580 N.Y.S.2d 992 (Sup. Ct. Suffolk Cty.1992) 10

Charles v. Orange County,
925 F.3d 73 (2d Cir. 2019) 21

Cyber Media Group, Inc. v. Island Mortgage Network, Inc.,
183 F. Supp. 2d 559 (E.D.N.Y. 2002) 17

D'Amato v. Five Star Reporting, Inc.,
80 F. Supp. 3d 395 (E.D.N.Y. 2015) 17

Davis v. Shah,
821 F.3d 231 (2d Cir. 2016) 20

DiBella v. Hopkins,
403 F.3d 102 (2d Cir. 2005) .... passim

Feder v. Staten Island University Hospital,
Index. No. 601049/98 (Sup. Ct. NY Cty.1999).................... passim

Feder v. Staten Island University Hospital,
711 N.Y.S.2d 719 (1st Dep't 2000).................... passim

Gerel Corp. v. Prime Eastside Holdings, LLC,
783 N.Y.S.2d 355 (1st Dep't 2004)....................12

Gray v. Beverly Enterprises-Mississippi, Inc.,
390 F.3d 400 (5th Cir. 2004) 5

Henry v. Isaac,
632 N.Y.S.2d 169 (2d Dep't 1995) 12

Hochman v. LaRea,
789 N.Y.S.2d 300 (2d Dep't 2005)..19

Hornbeck v. Towner,
208 N.Y.S.2d 785 (N.Y. Sup. Ct. 1960), *rev'd on other grounds*,
218 N.Y.S.2d 270 (3d Dep't 1961),*amended*,
218 N.Y.S.2d 532 (3d Dep't 1961) 8

Lebron v. Nat'l Railroad Passenger Corp.,
513 U.S. 374 (1995) 19

Maimonides Med. Ctr. v. First United Am. Life Ins. Co.,
981 N.Y.S.2d 739 (2d Dep't 2014) 12

Mandarin Trading Ltd. v. Wildenstein,
16 N.Y.3d 173 (2011)..22

McCracken v. Verisma Sys., Inc.,
2017 WL 3187365 (W.D.N.Y. July 27, 2017) 14, 20

Pins v. State Farm Fire & Cas. Co.,
476 F.3d 581 (8th Cir. 2007) 5

Ruzhinskaya v. HealthPort Technologies, LLC,
291 F. Supp. 3d 484 (S.D.N.Y. 2018), *vacated and remanded*,
942 F.3d 69 (2d Cir. 2019) 20

Ruzhinskaya v. HealthPort Technologies,, LLC,
942 F.3d 69 (2d Cir. 2019) 14

Spiro v. Healthport Technologies, LLC,
73 F. Supp. 3d 259 (S.D.N.Y. 2014) 20

Sutera v. Go Jokir, Inc.,
86 F.3d 298 (2d Cir. 1996) 3

Thompson Bros. Pile Corp. v. Rosenblum,
993 N.Y.S.2d 353 (2d Dep't 2014)..21

Trovato v. Galaxy Sanitation Servs. of N.Y., Inc.,
99 N.Y.S.3d 427 (2d Dep't 2019).. 19, 21

TZ Manor, LLC v. Daines,

815 F.Supp.2d 726 (S.D.N.Y. 2011), *aff'd,* 503 Fed. App'x 82 (2d Cir. 2012) 4

United States v. Navarro,
800 F.3d 1104 (9th Cir. 2015) 4

United States v. Pallares–Galan,
359 F.3d 1088 (9th Cir. 2004) 19

Yee v. Escondido,
503 U.S. 519 (1992) 19

Zaretsky v. William Goldberg Diamond Corp.,
820 F.3d 513 (2d. Cir. 2016) 4

Zimmerli Textil AG v. Kabbaz,
2015 WL 5821523 (E.D.N.Y. Sept. 30, 2015)..19

Statutes

Federal Rule of Appellate Procedure 27 1

Federal Rule of Evidence 201 1

PHL § 18 .... passim

INTRODUCTION

Private claimants, like Plaintiff-Appellant Hector Ortiz ("Plaintiff" or "Ortiz"), have been bringing actions under New York Public Health Law ("PHL") § 18(2)(e) in state and federal court since its enactment in its present form in 1991. Although the Court of Appeals of New York has not addressed the issue, the First Department affirmed a lower court's decision that PHL § 18(2)(e) affords a private right of action in *Feder v. Staten Island University Hospital*, 711 N.Y.S.2d 719 (1st Dep't 2000). Defendant-Appellee Ciox Health LLC ("Ciox") and Defendant-Appellee The New York and Presbyterian Hospital ("NYPH"; collectively with Ciox, "Defendants") attempt to minimize the import of the First Department's ruling by arguing the Appellate Division summarily affirmed a lower court decision that was unpublished. Of course, the fact that the lower court's opinion was unpublished does not make it unknowable or take it outside of this Court's consideration. That decision is a public record, and this Court may and should take judicial notice of it.[1]

The text of the Decision makes clear that the lower court thoroughly and

[1] Ortiz has filed a separate motion, pursuant to Federal Rule of Appellate Procedure 27 and Federal Rule of Evidence 201(b)(2) and (c)(2), for this Court to take judicial notice of the Decision and Order by the Honorable Beverly S. Cohen, dated November 30, 1999, and entered on December 8, 1999, in *Feder v. Staten Island University Hospital*, Index. No. 601049/98, in the Supreme Court of the State of New York – New York County (the "Decision"), and permit the filing of same as a supplemental appendix.

thoughtfully considered the history and text of PHL § 18 and its relationship to other provisions of the Public Health Law. Based on this careful analysis, Justice Cohen rejected the argument that the only remedy available to a private citizen for a violation of PHL § 18 is an Article 78 proceeding. Decision at 10-11. Justice Cohen then applied the three-part *Sheehy* test and determined that, although PHL § 18(2)(e) does not explicitly provide for a private right of action, it does imply such a right. She found that "there is no question that plaintiffs are part of the class for whose benefit the statute was enacted." *Id.* at 11. She also concluded that "permitting plaintiffs to sue to enforce [§ 18(2)(e)] would promote the legislative purpose of the amendment." *Id.* at 12-13. Finally, Justice Cohen held that "affording plaintiffs a private cause of action does not conflict with the legislative scheme underlying the Public Health Law." *Id.* at 13. Based on Justice Cohen's 21-page decision, the Appellate Division "unanimously affirmed for the reasons stated by Cohen, J." *Feder*, 711 N.Y.S.2d at 719.

A federal court cannot disregard decisions by the Appellate Division in determining how the highest court of New York would rule on a question of state law "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *DiBella v. Hopkins*, 403 F.3d 102, 111-12 (2d Cir. 2005). Here, the reasoned basis for the Appellate Division's affirmance is clear and cogent, and Defendants can point to no decisions or other "persuasive data" to

suggest that the New York Court of Appeals would decline to similarly find a private right of action under § 18(2)(e). The consensus among courts and sophisticated litigants is that a private plaintiff can seek damages for a violation of PHL § 18. The District Court is the first court, either federal or state, at the trial or appellate level, to conclude otherwise. For this Court to affirm the District Court's novel ruling would erode legal stability and improperly disregard a decision of the New York Appellate Division, which squarely has concluded that New York's PHL § 18(2)(e) provides for an implied private right of action.

The District Court's dismissal of Plaintiff's claim for unjust enrichment also should be reversed. Plaintiff never alleged the existence of an agreement in his First Amended Complaint ("FAC"). Neither Ciox nor NYPH argued before the District Court that the unjust enrichment claim should be dismissed due to the existence of a contract, and Plaintiff had no opportunity to counter any such argument. The District Court nonetheless found that the existence of a contract precluded Plaintiff's unjust enrichment claim. The District Court erred in dismissing that claim as well.

ARGUMENT

I. The New York Appellate Division's Conclusion That PHL § 18(2)(e) Affords a Private Right of Action Should Be the Basis for This Court Finding the Same

This Court has held that "no deference to the district court's determination of New York law" is due. *Sutera v. Go Jokir, Inc.,* 86 F.3d 298, 301 (2d Cir. 1996).

In contrast, rulings from state intermediate appellate courts "are a basis for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *DiBella*, 403 F.3d at 113 (internal quotations and citations omitted); *accord Zaretsky v. William Goldberg Diamond Corp.*, 820 F.3d 513, 521 (2d. Cir. 2016). Defendants nonetheless ask this Court to give no weight to the decision of the First Department, which affirmed a lower court decision that PHL § 18(2)(e) affords a private right of action.

NYPH argues that *Feder* cannot be relied upon "because the affirmed opinion was not published, so no subsequent court can examine its premises." NYPH Brief at 16. Ciox similarly argues that the First Department's summary affirmance is not helpful because it does not "expressly articulate any position, let alone provide reasoning in support." Ciox Brief at 34. Defendants seem to believe that judicial decisions somehow disappear from the public domain if they are not published. Regardless of publication, an opinion of a court can be judicially noticed. *See, e.g.*, *TZ Manor, LLC v. Daines*, 815 F.Supp.2d 726, 730 n.1 (S.D.N.Y. 2011) (taking judicial notice of unpublished orders of the New York Supreme Court), *aff'd,* 503 Fed. App'x 82 (2d Cir. 2012); *United States v. Navarro*, 800 F.3d 1104, 1109 n.3 (9th Cir. 2015) (taking judicial notice of unpublished orders denying motions for sentence reduction); *Pins v. State Farm*

Fire & Cas. Co., 476 F.3d 581, 585 (8th Cir. 2007) (granting "motions to take judicial notice of unpublished state court proceedings and orders"); *Gray v. Beverly Enterprises-Mississippi, Inc.*, 390 F.3d 400, 407 n.7 (5th Cir. 2004) (granting motion "to take judicial notice of numerous unreported Mississippi state court records and decisions and unpublished authority from federal district courts in Mississippi").

Indeed, the Decision cannot be disregarded in providing insight into how New York's highest court would rule on the issue of whether its state statute, PHL § 18, provides a private right of action. Thus, NYPH's argument that unpublished opinions are problematic in serving as precedent misses the point. *See* NYPH Brief at 17 ("The use as precedent of an unpublished opinion, to which even the average man with counsel does not have access, would make the law capricious and unpredictable." (citation omitted)). Whether or not the "average man" has access to the Decision, the Decision is a public record, and this Court can and should consider the Decision as the basis for the Appellate Court's unanimous affirmance "for the reasons stated by Cohen, J." *Feder*, 711 N.Y.S.2d at 719.

This Court's decision in *DiBella* is instructive. Although the highest court in New York had not ruled on the standard of proof for falsity in a libel claim, the Court concluded:

> [I]n light of existing authority from New York and elsewhere on this matter, we must undertake the imprecise but necessary task of

> predicting on a reasonable basis how the New York Court of Appeals would rule if squarely confronted with this issue.

DiBella, 403 F.3d at 111-12. This Court further elaborated: "Principally, we consider the language of the state intermediate courts to be helpful indicators of how the state's highest court would rule." *Id.* at 112. Importantly, the Court "principally" relied on Appellate Division cases even though they were not "entirely persuasive." *Id.* at 112-13. The Appellate Division cases reviewed by the Court stated the law "without citing any relevant authority," and much of the discussion was in dicta. *Id.* The Court, nonetheless, relied upon those cases to conclude that New York's highest court would follow the uniform view of the New York Appellate Division. The Court held:

> It would be inappropriate for a federal court to disregard these cases based solely on the lack of authoritative support for the assertions they contain. Whether or not the Appellate Divisions have articulated a reasoned basis for concluding that New York requires clear and convincing proof of falsity, there can be no doubt that those courts believe that to be the appropriate standard. Even though these cases do not totally persuade us that New York requires clear and convincing proof of falsity, it is plain that New York's intermediate appellate courts believe that is the appropriate standard of proof, and we consider this a helpful indicator of how the New York Court of Appeals would rule on this issue.

DiBella, 403 F.3d at 113.

Here, reliance upon *Feder* is on far firmer ground. The Decision and its affirmance squarely addressed the central issue at hand. The 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. The Decision then determined that a private right of action for a violation of PHL § 18(2)(e) is implied. And the Appellate Division "unanimously affirmed for the reasons stated" in the Decision. Defendants, on the other hand, can point to no "persuasive data that the highest court of the state would decide otherwise," and the affirmed and adopted Decision expressly rejected virtually all of Defendants' arguments against a private right of action. This Court can and should rely upon *Feder* as a compelling indicator that the New York Court of Appeals would rule that § 18(2)(e) provides an implied private right of action.

A. The Decision, Affirmed and Adopted by the Appellate Division, Rejected Defendants' Argument That an Article 78 Proceeding Is the Only Remedy Available to a Private Citizen

Defendants spill much ink in arguing that a violation of PHL § 18 is limited to only two remedies: (1) a proceeding under Article 78 of the CPLR and (2) the imposition by the Commissioner of Health of civil penalties with the option for injunctive relief prosecuted by the Attorney General. *See* NYPH Brief at 12-13; Ciox Brief at 14-32. Justice Cohen expressly rejected this argument. First, she restated the defendant's position, which essentially is identical to Defendants' position here:

> NYPH[2] alternatively argues that even if the statute prevents

[2] NYPH also was a defendant in the *Feder* case.

> defendants from charging more than the actual cost per copy, the only remedy available to a private citizen for a violation of Public Health Law § 18 is an Article 78 proceeding. In support of this argument, NYPH points to section 13 of the Public Health Law. . . . NYPH also asserts that Public Health Law § 12, which provides for civil penalties and injunctive relief to be imposed by the Department of Health or enforced by the Attorney General for violations of the Public Health Law, is an exclusive enforcement mechanism for violations of the statute.

Next, Justice Cohen systematically refuted the defendant'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 . . . ."

Decision at 10-11 (underscore and ellipse in original); *see also Hornbeck v. Towner*, 208 N.Y.S.2d 785 (Sup. Ct. 1960), *rev'd on other grounds*, 218 N.Y.S.2d 270 (3d Dep't 1961), *amended*, 218 N.Y.S.2d 532 (3d Dep't 1961) (a violation of the Public Health Law gives rise to a private cause of action for damages despite the availability of civil penalties under § 12). Whereas Ciox argues that "*Hornbeck*'s reasoning is incomplete, unconvincing, and has been undercut by subsequent rulings from the Court of Appeals" (Ciox Brief at 14 n.4), this simply

cannot be said about Justice Cohen's statutory analyses. *Feder* is complete, convincing, and still valid.

B. The Decision, Affirmed and Adopted by the Appellate Division, Found an Implied Private Right of Action Under New York's Three-Part Test

Justice Cohen held that:

> Because Public Health Law § 18 does not explicitly provide for a private right of action, a three part test must be applied to determine whether such a right can be applied. The factors to be considered are: (1) whether the plaintiff is one of the class for which whose benefit the statute was enacted; (2) whether the recognition of a private right of action would promote the legislative purposes of the statute; and (3) whether creation of such a right would be consistent with the legislative scheme.

Decision at 11. This is commonly referred to as the *Sheehy* test, and it is the same test that the parties in this case all agree applies. Defendants do not seriously contest that Ortiz meets the first part of the test, and Justice Cohen similarly concluded that "there is no question that plaintiffs are part of the class for whose benefit the statute was enacted." *Id.* Justice Cohen then found that the other two parts of the test also were met.

1. The Decision Concluded That Recognition of an Implied Private Right of Action Will Promote the Legislative Purpose

Ciox argues that the fee provision at issue, "rather than being intended as a tool to protect requestors from high fees, was intended as a tool to protect providers from the costs associated with creating the theretofore non-existent right

of patient access." Ciox Brief at 9. Similar arguments were made in *Feder*: "NYPH argues that the purpose of the amendment to Public Health Law § 18 was to limit judicial involvement by defining a maximum cost per page, and that this action is contrary to this purpose." Decision at 11. Justice Cohen considered and rejected this argument:

> This argument, however, ignores that the Legislature did not alter the language of the statute requiring that "[t]he provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such a provider." Instead, it chose to add a proviso which limited the cost which could be imposed to seventy-five cents per page.
>
> The amendment thus 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.

Decision at 11-12.

Justice Cohen not only cited the statutory language and legislative history to support her conclusion, but also specifically addressed *Casillo v. St. John's Episcopal Hospital*, 580 N.Y.S.2d 992, 998 (Sup. Ct. Suffolk Cty. 1992), cited by the District Court and Defendants, and the argument that a private right of action will increase medical costs. *See* A0096 (May 7, 2019 Order at 22); NYPH Brief at 10-12; Ciox Brief at 11-12. Justice Cohen stated:

> 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.

Decision at 12 n.7.

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." *Id.* at 12-13. Thus, she concluded that the second *Sheehy* factor is met because a private right of action under PHL § 18 directly supports the legislative purpose of capping per-page charges for medical records so that excessive charges do not hinder access to those records.

2. The Decision Concluded That Creation of an Implied Private Right of Action Is Consistent with the Legislative Scheme

Justice Cohen found that the last prong of the *Sheehy* test was met because "affording plaintiffs a private cause of action does not conflict with the legislative scheme underlying the Public Health Law." Decision at 13. She explained:

> As indicated above, the Public Health Law does not limit the remedies a plaintiff may pursue, and a private right of action has been implied for violations of other sections of the Public Health Law (see, Medicare Beneficiaries Defense Fund v. Memorial Sloan-Kettering Cancer Ctr., 159 Misc 2d 442 [Sup. Ct. NY County 1993], lv to appeal dismissed, 83 NY2d 846 [1993] [finding private cause of

> action under PHL § 19 to recover refund for overcharges in connection with the Medicare program); Doe v. Roe, 190 AD2d 463 [4th Dept 1993] [implying a private cause of action based on breach of confidentiality provision of Public Health Law § 2782]).

Decision at 13; *see also* Decision at 10-11. As held by Justice Cohen and affirmed on appeal in *Feder*, nothing in the text or history of PHL § 18 indicates the Legislature's decision to deny individuals a right to sue and recover damages from medical providers that overcharge them in violation of PHL § 18(2)(e). Moreover, Justice Cohen cites case law supporting her conclusion that a private right of action is implied. *See also* Plaintiff's opening brief at 25-30 for discussion of additional case law support, including *Ader v. Guzman*, 23 N.Y.S.3d 292, 295 (2d Dep't 2016); *Maimonides Medical Center v. First United American Life Ins. Co.*, 981 N.Y.S.2d 739, 745–46 (2d Dep't 2014); *Gerel Corp. v. Prime Eastside Holdings, LLC*, 783 N.Y.S.2d 355, 360 (1st Dep't 2004); and *Henry v. Isaac*, 632 N.Y.S.2d 169, 173 (2d Dep't 1995).

Ciox's contention that an Article 78 proceeding would fully redress Ortiz's injury is disingenuous. *See* Ciox Brief at 14-20. Ciox cannot seriously argue that Ortiz's core claim for damages could somehow be covered by availability of "incidental restitution" in an Article 78 proceeding when Plaintiff's decedent was able to obtain copies of her medical records and therefore had no need to compel production. And Justice Cohen expressly rejected Ciox's argument (Ciox Brief at 21-24) 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.

Decision at 13.

C. Defendants Point to No Persuasive Data That New York's Highest Court Would Rule Contrary to the Appellate Division

There can be no question that New York courts are in the best position to interpret New York statutes, and the Decision provides a comprehensive basis of statutory history, statutory language, policy reasons, and case law for concluding that PHL § 18(2)(e) provides for an implied private right of action. The Decision was unanimously affirmed and adopted by the First Department. These rulings constitute "existing authority from New York" that clearly are "helpful indicators of how the state's highest court would rule." *DiBella*, 403 F.3d at 112.

In contrast, Defendants have no persuasive data – not one case in New York, not one case in any other jurisdiction, not one commentary or scholarly article – that suggests that the New York Court of Appeals would take a contrary position with respect to PHL § 18(2)(e). Instead, Defendants rely on a tortured analysis of the statute, to borrow the words of NYPH, that relies on "murky or ambiguous legislative history." NYPH Brief at 18; *see generally* Ciox Brief at 7-24. As held in *Feder*, nothing in the text or history of PHL § 18 suggests that the Legislature

intended to leave overcharged recipients of medical records like Ortiz without recourse. Moreover, because there are no conflicting authorities on this issue and no reason to believe that the Court of Appeals would rule differently than the First Department in *Feder*, this case simply does not present any of the "exceptional circumstances that would justify using the certification procedure." *DiBella*, 403 F.3d at 111.

D. Disregarding *Feder* Would Erode Legal Stability and Cause Disruption to Long Pending Cases

For this Court to affirm the District Court's novel ruling that no private right of action exists under PHL § 18 would erode legal stability, would cause inconsistency among cases brought under that statute, and would be disruptive and costly for litigations that have proceeded well beyond the motion to dismiss stage and have been pending for years. *See, e.g.*, *Ruzhinskaya v. HealthPort Technologies, LLC*, 942 F.3d 69 (2d Cir. 2019) (vacating summary judgment and remanding to reinstate Beth Israel as a party and to adjudicate the case to a final judgment); *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); *Carter v. CIOX Health, LLC*, 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).

Defendants downplay these pending cases, arguing that the litigants failed to

raise the defense that an implied private right of action does not exist. *See* NYPH Brief at 19-20 ("Courts frequently do precisely what the *Ruzhinskaya* court did – assume the existence of an implied right of action when the parties do not challenge its existence . . . ."); Ciox Brief at 37 ("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.").[3] However, there is no denying that a decision by this Court that PHL § 18(2)(e) does not afford a private right of action, after years of litigation and numerous decisions both at the trial and appellate level, would be immensely disruptive. This Court has no reason to create turmoil in what has been a stable legal landscape in light of the well-grounded and persuasive *Feder* decision, which provides a "reasonable basis of how the New York Court of Appeals would rule if squarely confronted with this issue." *DiBella*, 403 F.3d at 111-12.

II. The District Court Erred in Dismissing the Unjust Enrichment Claim

The District Court dismissed Plaintiff's claim for unjust enrichment, finding that the claim was precluded because the "FAC is premised on the existence of an

[3] They also ignore the awkward fact that, just as NYPH was a defendant in *Feder*, CIOX, or its predecessor-in-interest HealthPort Technologies, LLC, is the defendant in two of the pending federal cases. The defendants in all these cases are sophisticated parties with significant resources, represented by competent counsel. Presumably after due consideration of all viable defenses, they declined to assert the defense that the statute affords no private right of action.

agreement between Ortiz and defendants to pay $1.50 per page for copies of medical records." A0045 (February 22, 2018 Order at 13). The District Court's order was erroneous. The FAC is ***not*** premised on the existence of an agreement, and the FAC does ***not*** allege a breach of contract. Tellingly, Defendants can point to nothing in the FAC alleging an agreement, and Defendants themselves argued below that there was no binding contract between the parties.

Ciox raises two main arguments. First, it claims that Plaintiff forfeited his right to raise his arguments on appeal because Plaintiff argued the existence of a contractual relationship to defend against dismissal of a different claim. Ciox also argues that Plaintiff's unjust enrichment claim is improper because Plaintiff is seeking relief pursuant to PHL § 18. *See* Ciox Brief at 38-42. NYPH likewise raises two arguments in its opposition. First, it claims that the unjust enrichment claim should be barred because there was an implicit agreement between Plaintiff and Defendants to be billed for the medical records, and Plaintiff paid for the records. NYPH also argues that the relationship between Plaintiff and NYPH is too remote to sustain an unjust enrichment claim. *See* NYPH Brief at 20-21. None of these arguments has any merit.

A. Plaintiff Did Not Waive His Unjust Enrichment Claim

Ciox argues that Plaintiff forfeited his right to assert his unjust enrichment cause of action. Ciox's position is factually and legally untenable. Among other

claims, Plaintiff pled unjust enrichment, which is quasi-contractual and "generally exist[s] only where there is no express agreement between the parties." *D'Amato v. Five Star Reporting, Inc.*, 80 F. Supp. 3d 395, 421 (E.D.N.Y. 2015). Plaintiff also pled the alternative claim of breach of the implied covenant of good faith and fair dealing, which requires a contractual relationship. *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F. Supp. 2d 559, 582 (E.D.N.Y. 2002); *see* A0025–30 (FAC ¶¶ 67-97).[4] However, Plaintiff never alleged a breach of contract or alleged the existence of an agreement in the FAC, and Defendants themselves contested the existence of a contract in seeking dismissal of Plaintiff's claim for breach of the implied covenant of good faith and fair dealing. *See* SA0018 ("Plaintiff's breach claim must also be dismissed because she has not alleged the existence of a contractual relationship between herself and Defendant. Nor is there such a relationship."); SA0073 ("Plaintiff . . . does not allege facts sufficient to show that she entered into any contractual arrangement with [NYPH] . . . .").

In its motion to dismiss, Ciox made ***no*** arguments with respect to Plaintiff's unjust enrichment claim. It simply failed to address this claim. S*ee* SA001-0031. NYPH's only argument was that Plaintiff's unjust enrichment claim was flawed because it was predicated upon Public Health Law § 18's definition of "unjust." *See*

[4] In this appeal, Plaintiff does not challenge the District Court's dismissal of his claims for fraud and for breach of the implied covenant of good faith and fair dealing.

SA0076. Thus, neither Ciox nor NYPH ever argued below that the unjust enrichment claim should be dismissed due to the existence of a contract, and, not surprisingly, Plaintiff did not address this issue in his opposition.

Even though neither Defendant argued that the unjust enrichment claim should be dismissed due to the existence of a contract and Plaintiff had ***no*** opportunity to counter any such argument, the District Court *sua sponte* found that the existence of a contract precluded Plaintiff's unjust enrichment claim. A0045 (February 22, 2018 Order at 13). Thus, the District Court did exactly what Ciox elsewhere argues cannot be done. *See* Ciox Brief at 37 ("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."). Under these circumstances, Plaintiff did not waive his unjust enrichment cause of action and should be allowed demonstrate to this Court why the District Court erred in dismissing that claim. Indeed, the cases Ciox relies upon to argue waiver specifically state that waiver is predicated on the party having had "ample opportunity" to make the point in the trial court, which Plaintiff clearly did not.

Moreover, the mere fact that Plaintiff argued – in the context of opposing a dismissal of his breach of the implied covenant of good faith and fair dealing claim (*see* SA0086) – that he obtained a contract for the release of medical records, does not, and cannot, serve to establish that Plaintiff waived his wholly different claim for

unjust enrichment. Plaintiffs are permitted to plead alternative, even contradictory, claims of liability. *See, e.g.*, *Zimmerli Textil AG v. Kabbaz*, No. 14-CV-1560(JS)(AYS), 2015 WL 5821523, at *6 (E.D.N.Y. Sept. 30, 2015) ("[A]t the pleading stage, plaintiff is not required to guess whether it will be successful on its contract, tort, or quasi-contract claims." (internal quotation and edits omitted)); *Trovato v. Galaxy Sanitation Servs. of N.Y., Inc.*, 99 N.Y.S.3d 427, 430 (2d Dep't 2019) ("[T]he plaintiff may allege a cause of action to recover damages for unjust enrichment as an alternative to a cause of action alleging breach of contract."); *Hochman v. LaRea*, 789 N.Y.S.2d 300, 301-02 (2d Dep't 2005) ("[A] plaintiff may proceed upon a theory of quasi-contract as well as breach of contract, and will not be required to elect his or her remedies."). Accordingly, Plaintiff cannot be deemed to have waived one claim simply by defending another alternative claim.

Finally, parties are permitted to make different ***arguments*** on appeal so long as the ***claim*** was made below. "[I]t is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares–Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (allowing new argument not made below to support a consistent claim). *See also Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 378–79 (1995) (argument that petitioner expressly disavowed before the lower courts, and did not raise until after certiorari was granted, was not waived because it was "a new argument to support what has been his consistent claim"); *Yee v. Escondido*, 503 U.S. 519, 534

(1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Because Plaintiff consistently asserted his claim of unjust enrichment in his FAC and before the lower court, he is permitted to raise new arguments to defend that claim.[5]

B. The Unjust Enrichment Claim Is Not Duplicative of the Public Health Law Claim

Ciox next argues, in reliance upon the District Court's decision in *Ruzhinskaya v. HealthPort Technologies, LLC*, 291 F. Supp. 3d 484 (S.D.N.Y. 2018), *vacated and remanded*, 942 F.3d 69 (2d Cir. 2019), that Plaintiff's unjust enrichment claim should be dismissed because it is not independent of a violation of PHL § 18. Ciox Brief at 40-42. This argument can be quickly dispensed. In *Feder*, the Appellate Division affirmed Justice Cohen's decision that permitted the plaintiffs' unjust enrichment claim to proceed along with their PHL § 18 claim. Decision at 20. *See also McCracken*, 2017 WL 2080279, at *8 ("[T]he Court finds that Plaintiffs' unjust enrichment claim is not 'duplicative' of their NYPHL § 18 claim, but rather is an alternative theory of liability."); *Spiro v. HealthPort Technologies, LLC*, 73 F.

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[5] Even if a colorable argument for waiver could be made, which Ciox has not made, this Court still may exercise discretion to address an issue not raised before the District Court. *Davis v. Shah*, 821 F.3d 231, 246 (2d Cir. 2016). This Court is most likely to exercise such discretion where the issue, as here, is purely legal and there is no need for additional fact-finding. *Id.*

Supp. 3d 259, 275-276 (S.D.N.Y. 2014) (plaintiffs stated claim under PHL § 18 and for unjust enrichment).

C. NYPH's Arguments Are Similarly Without Merit

NYPH concedes that Plaintiff's decedent "indisputably had no contract with CIOX or the Hospital for obtaining copies at seventy-five cents per page," but argues that "she did have an implicit agreement based on the amount she was billed and paid." NYPH Brief at 20. This cannot be the basis for dismissing Plaintiff's unjust enrichment claim. Dismissal is proper only if, after accepting all the allegations in the Complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails to allege any set of facts that would entitle him to relief. *See Charles v. Orange County*, 925 F.3d 73, 81 (2d Cir. 2019). Here, Plaintiff has never alleged the existence of an express or implicit agreement in its FAC. At a minimum, the existence of an implicit agreement is a contested issue, and dismissal was improper. *See Trovato*, 99 N.Y.S.3d at 430 (because parties dispute the existence of an agreement, plaintiff may allege a cause of action for unjust enrichment); *Thompson Bros. Pile Corp. v. Rosenblum*, 993 N.Y.S.2d 353, 355 (2d Dep't 2014) (same).

What the FAC does allege is that "Defendants have engaged and continue to engage in an ongoing practice of overcharging persons such as Plaintiff for copies of their medical records in excess of the statutorily permissible amounts." A0015 (FAC ¶ 3). The FAC also alleges "Defendants have obtained and continue to obtain

substantial profits and windfalls and have been unjustly enriched, while Plaintiff and the members of the Class suffered and continue to suffer actual damages and remain at risk for being damaged in the future." A0025 (FAC ¶ 65). This was held in *Feder* to be sufficient to support a claim for unjust enrichment. *See* Decision at 20 ("[A]llegations that defendants profited at the expense of plaintiffs and Members of the class, by overcharging them for medical records are sufficient to state a claim for unjust enrichment.").

NYPH also argues that the relationship between Plaintiff and NYPH is too remote to sustain an unjust enrichment claim. *See* NYPH Brief at 21. The sole support for this argument is *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 (2011). In *Mandarin*, the Court of Appeals explained that, to set forth a valid unjust enrichment claim, a plaintiff is not required to alleged privity between the parties, but the complaint must set forth a connection between the parties that is not too attenuated. Here, the FAC sets forth the relationship between Plaintiff, NYPH, and Ciox, and alleges that Defendants engaged in conduct designed to overbill Plaintiff and the class members for medical records. The FAC also alleges that NYPH and Ciox benefitted from the overbilling. *See, e.g.*, FAC ¶¶ 8, 9, 50-53, 63, 65. Again, this is sufficient to support a claim for unjust enrichment. *See* Decision at 20.

Plaintiff's unjust enrichment claim should be reinstated.

CONCLUSION

For the reasons set forth above and as set forth in Plaintiff's opening brief, the Court should:

(i) reverse the Judgment of the District Court of May 7, 2019;

(ii) reverse the District Court's Opinion & Order of May 7, 2019, insofar as it held that New York Public Health Law § 18(2)(e) does not give rise to an implied private right of action and dismissed Plaintiff's claim for violation of § 18(2)(e);

(iii) reverse the District Court's Opinion & Order of February 22, 2018, insofar as it dismissed Plaintiff's claim for unjust enrichment; and

(iv) remand the case for further proceedings.

Date: December 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 5908 words (excluding, as permitted by Federal Rule of Appellate Procedure 32(f), the cover page, the table of contents, the table of authorities, the certificate of compliance, and the signature block), as counted by the Microsoft Word processing system used to produce this brief.

Date: December 11, 2019

By: *_/s/ Sue J. Nam_*
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