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

BRIEF OF PLAINTIFF-APPELLANT HECTOR ORTIZ

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JURISDICTIONAL STATEMENT

The District Court had original subject matter jurisdiction over this putative class action under 28 U.S.C. § 1332(d)(2) because there is minimal diversity and the amount in controversy exceeds $5 million, exclusive of interest and costs. Minimal diversity exists because Vicky Ortiz, the original plaintiff, was a citizen of New York[1]; Defendant CIOX Health LLC is a citizen of Georgia; and Defendant The New York and Presbyterian Hospital is a citizen of New York.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because Plaintiff appeals from a final decision of the District Court, namely, the District Court's dismissal with prejudice of Plaintiff's sole remaining claim on May 7, 2019, pursuant to Federal Rule of Civil Procedure 12(c), *see* A0075–97 ("May 7, 2019 Order"), as well as from the final Judgment the District Court entered on the same day, *see* A0098. Plaintiff also appeals an earlier order dismissing his other four claims pursuant to Federal Rule of Civil Procedure 12(b)(6), which the District Court entered on February 22, 2018. A0033–48 ("February 22, 2018 Order").

Plaintiff filed his notice of appeal on June 1, 2019, less than 30 days after the District Court entered Judgment on May 7, 2019. A0099. Thus, this appeal is timely. FED. R. APP. P. 4(a)(1)(A).

[1] Upon Ms. Ortiz's death, the current Plaintiff, Hector Ortiz, was substituted as the named plaintiff in his capacity as the temporary administrator for the estate of Ms. Ortiz.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Plaintiff's claim for violation of New York Public Health Law ("PHL") section 18(2)(e) on the grounds that it affords no private right of action, where a private right of action consistently has been recognized for violation of section 18(2)(e) in state and federal court and where Plaintiff is one of the class for whose particular benefit the statute was enacted, the recognition of a private right of action promotes the legislative purpose, and the creation of such a right is consistent with the legislative scheme.

2. Whether the District Court erred in dismissing Plaintiff's claim for unjust enrichment based upon its conclusion that the existence of a contract precludes Plaintiff's claim of unjust enrichment, even though Plaintiff has not asserted any claim for breach of contract and Defendants disputed the existence of any contractual arrangement.

STATEMENT OF THE CASE

Plaintiff appeals from (i) a decision of May 7, 2019, by the Honorable Denise L. Cote, United States District Judge, granting motions by Defendants for judgment on the pleadings, *Ortiz v. CIOX Health LLC*, 386 F. Supp. 3d 308 (S.D.N.Y. 2019); (ii) the District Court's Judgment for Defendants of May 7, 2019; and (iii) a decision by Judge Cote granting in part and denying in part motions by Defendants to dismiss Plaintiff's Amended Complaint, *Ortiz v. Ciox Health LLC*,

No. 1:17-cv-04039-DLC, 2018 WL 1033237 (S.D.N.Y. Feb. 22, 2018).

Plaintiff filed the Amended Complaint on July 14, 2017, alleging Defendants overcharged Plaintiff and other similarly situated persons for paper copies of their medical records in violation of PHL section 18(2)(e) by charging more than the statutory maximum of $0.75 per page for copies of the records. Defendants moved to dismiss on August 3, 2017, and August 4, 2017, and the District Court granted the motions in part and denied them in part on February 22, 2018. Defendants moved for judgment on the pleadings on October 31, 2018, and the District Court granted the motions on May 7, 2019. The District Court entered Judgment the same day, and Plaintiff appealed on June 1, 2019. For the reasons set out below, the Court should reverse the District Court's Judgment; reverse the May 7, 2019 Order insofar as it dismissed Plaintiff's claim for violation of PHL section 18(2)(e); reverse the February 22, 2018 Order insofar as it dismissed Plaintiff's claim for unjust enrichment; and remand the case for further proceedings.

I. Factual Background

Plaintiff brings this action against CIOX Health LLC ("CIOX"), as successor in interest to IOD Inc., and against The New York and Presbyterian Hospital ("NYPH"), named in the First Amended Complaint ("FAC") as Columbia Presbyterian Medical Center.

In October 2016, Vicky Ortiz, through her attorney, made a written request

to NYPH for medical records. A0022 (FAC ¶ 50). Under PHL § 18(2)(e), NYPH could not charge more than $0.75 per page for copies of the medical records, and Ortiz's request so informed NYPH. A0023 (FAC ¶ 51).

At that time, NYPH contracted with IOD Inc., a predecessor in interest to CIOX, to provide copies of NYPH medical records and to bill NYPH's patients for those copies. A0023 (FAC ¶ 52). Ortiz was charged $1.50 per page for her medical records. *See* A0016 (FAC ¶ 7); A0023 (FAC ¶ 56). Ortiz paid the bill even though it was in excess of the $0.75-per-page statutory maximum because she needed the medical records in an active litigation. A0024 (FAC ¶ 57). Ortiz then filed this class action. Shortly thereafter, CIOX unilaterally refunded Ortiz's credit card the amount charged above the $0.75-per-page statutory maximum.

II. Procedural History

A. Plaintiff Filed Her Complaint, and Defendants Moved to Dismiss

Ortiz filed her original complaint in New York state court on February 24, 2017. CIOX removed the action to federal court, asserting federal jurisdiction under the Class Action Fairness Act of 2005. *See* A0003 (ECF No. 1). On June 22, 2017, both Defendants filed motions to dismiss the original complaint. A0004 (ECF Nos. 8 and 12). In response, Ortiz filed the FAC on July 14, 2017. A0014 (ECF No. 19). Ortiz alleged Defendants are "healthcare providers," as defined in PHL § 18. A0016 (FAC ¶ 6). At the heart of her claims, Ortiz alleged:

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

A0016 (FAC ¶¶ 7–9).

Ortiz alleged (1) violation of PHL § 18; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; (4) unjust enrichment; and (5) enjoinment. A0025–30 (FAC ¶¶ 67–97). Ortiz brought her action on behalf of a class "of all Plaintiffs who attempted to process an authorization for medical records in New York between 2011 and 2017 and have been charged more than seventy-five cents ($0.75) per page for copying medical records." A0020 (FAC ¶ 45).

On August 3, 2017, CIOX filed a motion to dismiss and moved to strike allegations in the FAC that named CIOX employees. *See* A0005 (ECF No. 22).

CIOX asked the District Court to dismiss the entirety of Plaintiff's FAC because the statewide class was improper and because the voluntary payment doctrine barred Plaintiff's claims. CIOX also argued Plaintiff's claim for injunctive relief should be dismissed for lack of standing, and Plaintiff's claims for fraud, unjust enrichment, and breach of the implied covenant of good faith and fair dealing should be dismissed for failure to state a claim. In addition, CIOX argued the District Court should dismiss with prejudice any claims brought by any members of the proposed class that predated February 24, 2014, because such claims sought damages for actions dating beyond the three-year statute of limitations applicable to Plaintiff's claims for violation of PHL § 18 and for unjust enrichment.

NYPH filed a motion to dismiss on August 4, 2017. A0006 (ECF No. 25). NYPH based its motion on lack of standing, mootness, and failure to state a claim.

Neither Defendant disputed that Defendants are "healthcare providers" as defined in PHL § 18.

B. The District Court Granted Defendants' Motion to Dismiss Four of Five Claims

By its February 22, 2018 Order, the District Court found Ortiz had established standing to seek both monetary and injunctive relief and denied dismissal based on mootness. A0036–41 (February 22, 2018 Order at 4–9.) The District Court then allowed a single claim, for a violation of PHL § 18(2)(e), to go forward but dismissed Plaintiff's other four claims. A0041 (February 22, 2018

Order at 9).

The District Court dismissed Ortiz's claim for breach of the implied covenant of good faith and fair dealing, concluding that this claim is duplicative of her claim for violation of PHL § 18(2)(e) and that the FAC does not assert that Defendants deprived Ortiz of the benefit of a contract with NYPH to obtain copies of her medical records. A0042–43 (February 22, 2018 Order at 10–11).

The District Court dismissed Ortiz's claim for fraud for failure to plead reasonable reliance on a false statement of Defendants. A0043–45 (February 22, 2018 Order at 11–13).

The District Court then dismissed Ortiz's claim for unjust enrichment, finding that the existence of an agreement between Ortiz and Defendants precluded Plaintiff's claim of unjust enrichment under New York law. A0045 (February 22, 2018 Order at 13).

The District Court denied as moot CIOX's motion to strike. A0046–47 (February 22, 2018 Order at 14–15).

Finally, the District Court held that a three-year statute of limitations applied so that "Ortiz may only obtain relief for overcharges after February 24, 2014, three years before her original complaint was filed." A0047–48 (February 22, 2018 Order at 15–16).

C. Hector Ortiz Is Substituted as Plaintiff

On May 14, 2018, Ortiz's counsel informed the District Court that Vicky Ortiz had died. A0008 (ECF No. 51). On October 16, 2018, the District Court granted Plaintiff's application to substitute as the plaintiff Hector Ortiz, in his capacity as temporary administrator of the Ortiz estate. A0010 (ECF No. 62).

D. Defendants Moved for Judgment on the Pleadings on the Final Remaining Claim, Which the Court Granted

On October 31, 2018, CIOX and NYPH filed motions for judgment on the pleadings or to dismiss the remaining cause of action for violation of PHL § 18(2)(e) based on three arguments. *See* A0010–11 (ECF Nos. 63, 67). First, Defendants asserted Plaintiff lacks standing to pursue either damages or injunctive relief. Second, Defendants argued PHL § 18(2)(e) does not provide a private right of action. Third, Defendants argued Plaintiff's proposed class is overbroad. In addition, Defendants argued CIOX's copying costs are not at issue in this litigation.

By its May 7, 2019 Order, the District Court again concluded Plaintiff had established Article III standing. The District Court found that even though Vicky Ortiz has died, it is plausible that her estate, represented by Plaintiff, will need to obtain copies of her medical records in connection with the administration of her estate. A0078–80 (May 7, 2019 Order at 4–6). The District Court, however, dismissed Plaintiff's remaining claim, concluding PHL § 18(2)(e) does not afford

Plaintiff a private right of action. A0080–97 (May 7, 2019 Order at 6–23). The District Court concluded that "a private right of action would not be consistent with the legislative scheme" because the New York Legislature provided two mechanisms to enforce PHL § 18(2)(e) but did not expressly provide for a private cause of action. A0089–92 (May 7, 2019 Order at 15–18).

Based on its conclusion that there is no private right of action under PHL § 18(2)(e), the District Court dismissed Plaintiff's remaining claim and directed the Clerk of the Court to close the case. A0096–97 (May 7, 2019 Order at 22–23). The District Court did not reach Defendants' other arguments that Plaintiff's proposed class is overbroad and that CIOX's copying costs are not at issue in the litigation. A0077 (May 7, 2019 Order at 3).

E. The Court Enters Judgment, and Plaintiff Appeals

On May 7, 2019, the case was closed, and Judgment was entered. A0098 (ECF No. 83). Plaintiff filed a Notice of Appeal on June 1, 2019. A0099 (ECF No. 84).

SUMMARY OF ARGUMENT

The District Court's decisions are the product of clear errors of law. In its May 7, 2019 Order, the District Court held there is no implied private right of action for violation of PHL § 18(2)(e) and dismissed Plaintiff's claim. A0096–97 (May 7, 2019 Order at 22–23). In so doing, the District Court disrupted a stable

body of law – in state and federal courts, at the trial and appellate level – that consistently has recognized a private right of action for violation of § 18(2)(e).

The District Court also erred in its statutory analysis of PHL § 18. The District Court's decision leaves Plaintiff and others similarly situated without a means of recovering the overcharges Defendants imposed upon them for copies of their medical records, despite the fact that Defendants had charged twice the mandatory cap that the New York Legislature expressly set forth in PHL § 18(2)(e). Leaving overcharged recipients of medical records holding the bill for the excessive charges—despite the plain statutory limit on per-page charges for copies—simply cannot be what the Legislature intended. A private right of action is implied because Plaintiff is one of the class for whose particular benefit the statute was enacted; the recognition of a private right of action promotes the legislative purpose; and the creation of such a right is consistent with the legislative scheme. There is no question that an implied private right of action for damages would augment the existing enforcement devices, which do not address Plaintiff's direct and personal harm. Moreover, PHL § 18 has no extensive enforcement mechanism, and the existing methods of enforcement were not intended to be exclusive.

The District Court also erred in its February 22, 2018 Order. In that order, the District Court dismissed Plaintiff's unjust enrichment claim on the ground that

the existence of a contract between Ortiz and Defendants to pay $1.50 per page for copies of medical records precludes a claim for unjust enrichment. A0045 (February 22, 2018 Order at 13). However, Plaintiff has not asserted any claim for breach of contract, and Defendants disputed that there was a contract with Ortiz.

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. *See* A0042–45 (February 22, 2018 Order at 10–13).

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's grant of a motion to dismiss and grant of a motion for judgment on the pleadings, accepting as true all factual allegations in the complaint and drawing all inferences in favor of the plaintiff. *Charles v. Orange County*, 925 F.3d 73, 81 (2d Cir. 2019). As this Court explained, "At this stage, [the Court] need decide only whether Plaintiffs' claims are facially plausible." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, plausibility does not require probability. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 556 (2007).

II. The District Court Made an Error of Law by Concluding That PHL § 18(2)(e) Affords No Private Right of Action

A. Affirming the District Court's Ruling Would Erode Legal Stability and Consistency and Would Be Disruptive and Costly for Litigation Pending for Years

Public Health Law Section 18(2)(e) states in relevant part: "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider . . . . However, the reasonable charge for paper copies shall not exceed seventy-five cents per page." PHL § 18(2)(e).

The District Court acknowledged, "in several other cases, courts appear to have assumed that § 18(2)(e) accords qualified persons a private right of action for damages." A0096 (May 7, 2019 Order at 22). The District Court, however, concluded the "instant case appears to be the first case to squarely present the issue for judicial resolution." *Id.* The District Court then held "a private right of action cannot fairly be implied by the text and legislative history of § 18(2)(e)" and dismissed Plaintiff's remaining claim. A0096–97 (May 7, 2019 Order at 22–23).

That there is no published decision directly on point does not mean this is uncharted territory. Private claimants have been bringing actions under PHL § 18(2)(e) in state and federal court since its enactment in its present form in 1991 and have proceeded well past the motion to dismiss stage. Indeed, in *Feder v Staten Island Hospital*, No. 601049/98, 2002 WL 34358059 (N.Y. Sup. Ct. Feb. 1,

2002), the plaintiffs brought a putative class action claim for damages, alleging they were charged fees for copies of medical records in excess of the amount allowed by PHL § 18(2)(e), the very same claim at issue here. Notably, one of the defendants in *Feder* was Defendant NYPH. In recounting the procedural history of the case, the trial court stated:

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

Feder, 2002 WL 34358059, at 3–4 (emphasis added); *see also Feder v. Staten Island Univ. Hosp.*, 711 N.Y.S.2d 719 (1st Dep't 2000) ("Order, Supreme Court, New York County (Beverly Cohen, J.), entered December 8, 1999, unanimously affirmed for the reasons stated by Cohen, J., without costs or disbursements."). The plaintiffs in *Feder* moved for class certification, which was granted. *Feder*, 2002 WL 34358059, at 17. On appeal for the second time, having already affirmed the private right of action, the First Department reversed the trial court and decertified the class. *Feder v. Staten Island Hosp.*, 758 N.Y.S.2d 314 (1st Dep't 2003). The case was remanded, continued as an individual action, and ultimately settled. *See*

Docket Report of *Feder v. Staten Island Univ. Hosp.*, No. 601049/98, *available at* https://iapps.courts.state.ny.us/webcivil/FCASSearch.

Thus, the present case is not the first case to squarely address the question of whether there is a private right of action under PHL § 18(2)(e), and this Court should apply the law as interpreted by the First Department, which affirmed that PHL § 18(2)(e) affords a private right of action. *See V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010) ("This Court is bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion.").

In addition, several putative class actions alleging a violation of PHL § 18(2)(e) have been filed in or removed to this Circuit. Again, none of these cases have been dismissed on the ground that there is no private right of action, and three such cases have proceeded beyond the motion to dismiss stage. *See, e.g.*, *Ruzhinskaya v. Healthport Techs., LLC*, 291 F. Supp. 3d 484 (S.D.N.Y. 2018) (granting summary judgment based on statutory interpretation not at issue here), *appeal pending sub nom*, *Spiro v. Healthport Techs., LLC*,[2] Docket No. 18-1034 (2d Cir. argued April 15, 2019); *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.

[2] Defendant CIOX is the successor in interest to HealthPort Technologies, LLC.

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).

The consensus among courts and sophisticated litigants, ***including these very Defendants in other cases***, is that a private right of action can be asserted under PHL § 18. For this Court to affirm the District Court's novel ruling that no private right of action exists would erode legal stability, would cause inconsistency among cases brought under PHL § 18, and would be disruptive and costly for litigations that have been pending for years. Under the doctrine of *stare decisis*, this Court should not disrupt what has been a stable body of law. As the U.S. Supreme Court explained:

> *Stare decisis* – the idea that today's Court should stand by yesterday's decisions – is "a foundation stone of the rule of law." Application of that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

Kimble v. Marvel Entertainment, LLC, – US –, 135 S. Ct. 2401, 2409 (2015) (internal citations omitted).

The three pending cases in this Circuit – *Spiro*, *McCracken*, and *Carter* – are instructive. These cases all have been litigated over five years, survived dispositive motions with parties engaging in extensive discovery and pre-trial motion practice.

In *Carter*, this Court reversed the district court's grant of a motion to dismiss a putative class action claim brought under PHL § 18(2)(e), and the litigants and this Court assumed that the statute provides for a private right of action. *See Carter v. Healthport Technologies, LLC*, 822 F.3d 47 (2d Cir. 2016). The circumstances are the same in the pending appeal in *Spiro*.[3]

Importantly, the First Department affirmed the conclusion that PHL § 18(2)(e) affords a private right of action. *Feder*, 2002 WL 34358059, at 2; *Feder*, 711 N.Y.S.2d at 719. To now conclude, after years of litigation and numerous decisions both at the trial and appellate level, that PHL § 18(2)(e) does not afford a private right of action would be immensely disruptive and certainly would not promote "the evenhanded, predictable, and consistent development of legal principles." *Kimble*, 135 S. Ct. at 2409 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827–828 (1991)).

B. The District Court Erred in Its Analysis of PHL § 18

A statutory analysis of PHL § 18 supports the state and federal case law allowing a private right of action to enforce PHL § 18(2)(e).

Although the text of PHL § 18 is silent on a private cause of action, "that

[3] In *Spiro*, the central issue is whether PHL § 18(2)(e), which limits the amount a "healthcare provider" can charge a patient for requested medical records, allows an action directly against the sole remaining defendant, Healthport Technologies, LLC (now CIOX), which contracted with a "healthcare provider" to provide medical records but is not itself a "healthcare provider."

silence does not settle the issue." *Sackin v. TransPerfect Glob., Inc.*, 278 F. Supp. 3d 739, 752 (S.D.N.Y. 2017). Where a statutory provision does not explicitly provide for a private right of action, the court must determine whether the New York Legislature impliedly authorized a private right of action. *See Uhr v. E. Greenbush Cent. Sch. Dist.*, 720 N.E.2d 886, 890 (N.Y. 1999). The District Court correctly recited the standard that the New York Court of Appeals has articulated to govern this inquiry: "Courts must determine '(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.'" A0081 (May 7, 2019 Order at 7) (quoting *Cruz v. TD Bank, N.A.*, 2 N.E.3d 221, 226 (N.Y. 2013)). These factors are commonly referred to as the *Sheehy* factors, after a seminal decision of the New York Court of Appeals, *Sheehy v. Big Flats Community Day, Inc.*, 541 N.E.2d 18 (N.Y. 1989).

Each of the three *Sheehy* factors is satisfied here, and the District Court erred in concluding otherwise.

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

The District Court correctly concluded that "[a]s a threshold matter, there is no dispute that the first factor weighs in favor of recognizing a private right of action for violations of § 18(2)(e)." A0086 (May 7, 2019 Order at 12). Plaintiff

clearly is within the class of persons that the New York Legislature intended to benefit.

PHL § 18(2)(e) authorizes health care providers to "impose a reasonable charge for all inspections and copies [of patient information by qualified persons], not exceeding the costs incurred by such provider" and, critically here, states that "the reasonable charge for paper copies" of the patient information "shall not exceed seventy-five cents per page." PHL § 18(2)(e). The statute, by its plain text, confers particular benefits on "qualified persons" who receive paper copies of medical records, by imposing a mandatory maximum charge for those copies of $0.75 per page. *Id.* Both Plaintiff's decedent and her attorney are "qualified persons" under PHL § 18(1)(g). The District Court, therefore, correctly ruled that the first *Sheehy* factor is met.

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

As to the second *Sheehy* factor, the District Court concluded: "It is less clear that the recognition of a private right of action would promote the legislative purpose in enacting the statute . . . ." A0086 (May 7, 2019 Order at 12). The District Court noted:

> Two submissions included in the Bill Jacket -- one from the New York State Office for the Aging and one from the New York Public Interest Research Group -- addressed the price-per-page provision in § 18 specifically. Both submissions supported the amendment as a means of curbing fees associated with access to medical records.

A0087 (May 7, 2019 Order at 13). The District Court, nonetheless, found:

> Because the threat of an additional enforcement mechanism -- civil lawsuits against health care providers -- would add to the growth in medical costs, it is debatable whether recognition of a private right of action would promote the legislative purpose . . . .

A0087–88 (May 7, 2019 Order at 13–14). This reasoning simply does not hold water.

It is highly speculative, first, that a qualified person's cost of obtaining medical records would increase because providers of those records would have to defend civil lawsuits when they violate the statute and, second, that such potential overhead costs of compliance could even be recognized as "costs incurred" under the statute.[4] Moreover, given the $0.75 cap imposed by PHL § 18(2)(e), the statute ensures that qualified persons cannot be charged more than $0.75 per page whether or not health care providers incur additional costs in defending civil lawsuits and whether or not additional compliance costs could even be passed on to qualified persons. In this case, there is no dispute that Ortiz was charged $1.50 per page (or more, taking into account the other fees Ortiz was charged).

[4] The issue of how the "cost incurred" by the provider should be calculated is before this Court in *Spiro*, Docket No. 18-1034. However, that is not an issue in this case, as Plaintiff brings this case on behalf of a class of persons who were charged more than the $0.75 per page limit. A0020 (FAC ¶ 45).

The recognition of a private right of action to enforce the $0.75 per page limit undoubtedly will promote the objective of curbing the price-per-page charge to no more than $0.75 per page, thereby ensuring that excessive costs are not a barrier to access. The New York Public Interest Research Group's submission, which the District Court noted but did not quote, supports this conclusion. It states in relevant part:

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

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

The second *Sheehy* factor clearly is met here because a private right of action directly supports the legislative purpose of capping per-page charges for medical records so that excessive charges do not hinder access to those records. The District Court erred in considering speculative "growth in medical costs," which by statute cannot be passed beyond the $0.75-per-page cap on to the class of persons that the New York Legislature intended to benefit.

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

a. An Implied Private Right of Action Would Augment the Existing Enforcement Devices, Which Do Not Address Plaintiff's Harm

In holding there is no private right of action under PHL § 18(2)(e), the District Court relied upon the third *Sheehy* factor. The District Court found the New York Legislature intended to limit the scope of remedies and thereby foreclose the recognition of a private right of action by providing two mechanisms to enforce all provisions of the Public Health Law. The District Court explained:

> Since at least 1953, when the Public Health Law was recodified to reflect its current organization, the law has provided two mechanisms to enforce its provisions: a civil penalty, imposed by the Commissioner of Health [under § 12], or an action pursuant to Article 78 of the Civil Practice Law and Rules [under § 13].

A0081–82 (May 7, 2019 Order at 7–8).

As an initial matter, neither Section 12 nor Section 13 are remedies specific to the violations of PHL § 18 at issue here. Both are general provisions applicable to any violation of the Public Health Law. Given the weight the District Court gave to these provisions, Plaintiff quotes the entirety of these sections below:

> **§ 12. Violations of health laws or regulations; penalties and injunctions**
> 1. [Eff. until April 1, 2020, pursuant to L.2008, c. 58, pt. A, § 32. See, also, subd. 1 below.] (a) Except as provided in paragraphs (b) and (c) of this subdivision, any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto for which a civil penalty is not otherwise

expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation.
(b) The penalty provided for in paragraph (a) of this subdivision may be increased to an amount not to exceed five thousand dollars for a subsequent violation if the person committed the same violation, with respect to the same or any other person or persons, within twelve months of the initial violation for which a penalty was assessed pursuant to paragraph (a) of this subdivision and said violations were a serious threat to the health and safety of an individual or individuals.
(c) The penalty provided for in paragraph (a) of this subdivision may be increased to an amount not to exceed ten thousand dollars if the violation directly results in serious physical harm to any patient or patients.

Effective on and after April first, two thousand eight the comptroller is hereby authorized and directed to deposit amounts collected in excess of two thousand dollars per violation to the patient safety center account to be used for purposes of the patient safety center created by title two of article twenty-nine-D of this chapter.

1. [Eff. April 1, 2020, pursuant to L.2008, c. 58, pt. A, § 32. See, also, subd. 1 above.] Any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto for which a civil penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation.
2. The penalty provided for in subdivision one of this section may be recovered by an action brought by the commissioner in any court of competent jurisdiction.
3. Nothing in this section contained shall be construed to alter or repeal any existing provision of law declaring such violations or any of them to be misdemeanors or felonies or prescribing the penalty therefor.
4. Such civil penalty may be released or compromised by the commissioner before the matter has been referred to the attorney general, and where such matter has been referred to the attorney general, any such penalty may be released or compromised and any action commenced to recover the same may be settled and

> discontinued by the attorney general with the consent of the commissioner.
> 5. It shall be the duty of the attorney general upon the request of the commissioner to bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto; provided, however, that the commissioner shall furnish the attorney general with such material, evidentiary matter or proof as may be requested by the attorney general for the prosecution of such an action.
> 6. It 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, nor shall any provision of this section, nor any action done by virtue of this section, be construed as estopping the state, persons or municipalities in the exercising of their respective rights to suppress nuisances or to prevent or abate pollution.
>
> **§ 13. Enforcement: against officers**
> The performance of any duty or the doing of any act enjoined, prescribed or required by this chapter, may be enforced by a proceeding pursuant to article seventy-eight of the civil practice law and rules at the instance of the department or of a local board of health, or of any citizen of full age resident of the municipality where the duty should be performed or the act done.

With respect to a civil penalty imposed under Section 12, New York courts have long held that section does not preclude a private right of action. In *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), the court expressly concluded that Section 12 does **not** limit a private right of action for damages based on a violation of the Public Health Law. The court explained:

> Defendant contends that the limit of liability for a violation of Sections 1115 and 1116 of the Public Health Law is a civil penalty in

> favor of the State of not to exceed $250 by virtue of Section 12 of the Public Health Law. That section provides such a penalty for the violation of any provision of the Public Health Law.
>
> Similar provisions in other laws of this state have been held not to be the sole and exclusive remedy for their violation.

Id. at 786. After analyzing various other state statutes, the court concluded that a violation of the Public Health Law gives rise to a private cause of action for damages despite the availability of civil penalties under Section 12. *Id.* at 787–88. And no court, either state or federal, had held otherwise for almost 60 years until the District Court's ruling.

Importantly, Section 12 was amended on April 1, 2008, effective April 1, 2020, to provide: "***It 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*** . . . ." PHL § 12(6) (emphasis added). The New York Legislature made clear its intent not to limit remedies for violation of the Public Health Law, yet the District Court merely mentions this amendment without comment in a footnote. A0082 n.2 (May 7, 2019 Order at 8 n.2).

Indeed, under New York law, the ability of regulatory bodies to enforce a statutory provision does not defeat the existence of a private right of action. Instead, "[w]here the legislature clearly contemplated administrative enforcement of the statute, the question then becomes whether, in addition to administrative

enforcement, an implied private right of action would be consistent with the legislative scheme." *Ader v. Guzman*, 23 N.Y.S.3d 292, 295 (2d Dep't 2016) (internal quotation marks omitted). And New York courts have held that when a statute is directed toward protecting the health and well-being of a particular class of individuals, a private right of action is fully consistent with the legislative enforcement scheme. S*ee, e.g.*, *id.*; *Maimonides Med. Ctr. v. First United Am. 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); *Henry v. Isaac*, 632 N.Y.S.2d 169, 173 (2d Dep't 1995).

Thus, in determining whether an implied private right of action would be consistent with a legislative scheme, New York courts focus on whether the statute at issue is primarily designed to provide a mechanism for preventing harm to the public in general or directed toward protecting the specific rights of individuals. Courts recognize 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.

In *Maimonides*, 981 N.Y.S.2d at 741, the New York appellate court considered whether a private right of action exists under Insurance Law Section 3224-a, known as the Prompt Pay Law, which imposes standards upon insurers for

the "prompt, fair and equitable" payment of claims for health care services. The Second Department held that a private right of action would be consistent with the legislative scheme even though the statute delegates enforcement to a regulatory body. The court first determined, "the Prompt Pay Law is not simply remedial in nature, but affords health care providers and patients certain rights, and imposes an affirmative duty upon insurers to timely pay or dispute claims." *Id.* at 746. The court then found: "Violations directly affect the health care providers and patients who do not receive timely payment or notice of a disputed claim. The remedies available to the Superintendent do not adequately address this individual harm." *Id.* Following the reasoning of *Henry v. Isaac*, the court concluded:

> The recognition of a private right of action on behalf of health care providers and patients here would likewise 'augment the existing enforcement devices and enhance a legislative scheme which, in part, imposes affirmative duties for the protection of those very individuals.'

Id. at 747 (quoting *Henry*, 632 N.Y.S.2d at 172).

Here, the two remedies expressly available under PHL § 18(2)(e) simply do not adequately address the direct and personal harm Plaintiff suffered from a violation of the statute. Payment of fines to the state does not compensate individuals for the amounts they paid in excess of the statutory cap of $0.75 per page. And, an Article 78 proceeding seeking injunctive relief pursuant to PHL § 13 would not address the situation before the Court, in which Plaintiff's decedent *was*

able to obtain copies of her medical records and therefore had no need to compel production. Damages are a core component of Plaintiff's case. Without a private right of action for damages on behalf of "qualified persons," there would be no remedy for persons like Ortiz, who received copies of their medical records but were charged well over the statutory maximum per-page limit of $0.75. Yet these are the very individuals for whose behalf the statute imposes the cap.

In concluding that the reasoning of *Maimonides* is not applicable here, the District Court distinguished that case as applying only to statutes that provide for a remedies provision, as opposed to a standards provision like PHL § 18(2)(e). The District Court erred in so narrowly limiting *Maimonides.* New York appellate court decisions in *Ader v. Guzman*, 23 N.Y.S.3d at 295, and *Gerel Corp. v. Prime Eastside Holdings, LLC*, 783 N.Y.S.2d at 360, are instructive.

In *Ader*, the plaintiff commenced an action against a landlord to rescind a lease and recover the amounts paid under the lease based on the premises lacking a valid rental permit in violation of Town Code § 270-3 of the Town of Southampton. That code provided that "no owner shall cause, permit or allow the occupancy or use of a dwelling unit as a rental property without a valid rental permit." *Ader*, 23 N.Y.S.3d at 294. That provision, like PHL § 18(2)(e), used mandatory language that imposes an affirmative duty but not a remedy for a violation of that duty.

The defendant argued that Town Code § 270-3 did not afford a private right of action. The Second Department rejected this argument. The Second Department reasoned:

> Town Code § 270 is directed toward protecting the health, safety, and well being of persons renting homes in the Town of Southampton. In that regard, Town Code § 270-6 requires that prior to the issuance of a rental permit, the enforcement authority must "make an on-site inspection of the proposed rental property" to ensure that the property complies with the New York State Uniform Fire Prevention and Building Code and the Code of the Town of Southampton" (Town Code § 270–6). ***Although Town Code § 270 is intended to be enforced by designated Town officials and provides for penalties and fines, "without the threat of recoupment of rent, aside from the possibility of administrative enforcement, there is no incentive for a landlord to obtain a license, which is an overriding concern of the Town."***

Id. at 295 (quoting *Schwartz v. Torrenzano*, 16 N.Y.S.3d 697, 705 (Sup. Ct., Suffolk Cty. 2015)) (emphasis added).

Similarly, in *Gerel*, 783 N.Y.S.2d at 360, the First Department concluded that General Obligations Law § 7-105 affords successor landlords with a private right of action. General Obligations Law § 7-105 provides that anyone who has received a security deposit from a tenant "shall . . . [t]urn over" the security deposit to a purchaser of the premises. *Id.* at 357–38. General Obligations Law § 7-109 provides that the Attorney General is specifically empowered to bring an action to compel compliance with the statute. *Id.* In finding a private right of action, the First Department explained:

> On its face, General Obligations Law § 7–105, in providing that upon conveying or assigning leased property, the owner or lessee shall "[t]urn over to [the] grantee or assignee" the tenants' security deposits, protects successors in interest to those owners or lessees who have received such deposits but fail to turn them over.

Id. at 359. It then concluded that a private right of action is compatible with the enforcement mechanism chosen by the Legislature. The court explained:

> That the Attorney General has standing to institute an action under General Obligations Law § 7–105 for a violation does not, in and of itself, defeat the existence of a private right of action. . . . In this regard, the Legislature could not have intended that the Attorney General be involved in every landlord / tenant security dispute throughout the State; nor could it have intended that the Attorney General monitor the transfer of security deposits from one landlord to another. ***Were that the case, the budget and staff of that office would be so burdened as to nullify the legislative scheme, ultimately resulting in the loss by successor landlords and tenants of security deposits in the hands of former landlords.***

Id. at 360 (emphasis added). The court thus concluded, "When a statute imposes a duty, any person having a special interest in the performance thereof may sue for a breach which caused him damage." *Id.* (internal quotation marks omitted).

The reasoning of *Maimonides*, *Henry*, *Ader*, and *Gerel* applies here without limitation. By its plain text, PHL § 18(2)(e) confers particular benefits on "qualified persons" who receive paper copies of medical records, by imposing on providers a mandatory maximum charge per page. *Compare* statutes in *Ader* ("no owner ***shall*** cause, permit or allow the occupancy or use of a dwelling unit as a rental property without a valid rental permit" (emphasis added)) *and Gerel* (anyone

who has received a security deposit from a tenant "***shall*** . . . [t]urn over to his or its grantee or assignee . . . the sum so deposited" (emphasis added)), *with* PHL § 18(2)(e) ("reasonable charge for paper copies ***shall*** not exceed seventy-five cents per page" (emphasis added)). As in *Maimonides*, *Henry*, *Ader*, and *Gerel*, a private right of action for damages for a violation of PHL § 18(2)(e) enhances the legislative scheme and allows for the redress of the direct and personal harm that Defendants caused Plaintiff's decedent and other "qualified persons" like her, who were provided with copies of medical records but were charged more than the $0.75 per-page cap in violation of PHL § 18(2)(e). The Legislature could not have intended that the Commissioner of Health be involved in monitoring every billing for copies of medical records. Were that the case, the budget and staff of that office would be so burdened as to nullify the legislative scheme. Moreover, there can be no question that the threat of recoupment of any overcharge for copies of medical records incentivizes providers to comply with PHL § 18(2)(e). In sum, the District Court erred in concluding that the New York Legislature intended to limit the scope of remedies for a violation of PHL § 18(2)(e) to civil penalties imposed by the Commissioner of Health under Section 12 or an action pursuant to Article 78 of the Civil Practice Law and Rules under Section 13.

b. PHL § 18 Has No Extensive Enforcement Mechanism, and the Existing Methods of Enforcement Were Not Intended to Be Exclusive

Courts also consider "whether the statute has a potent or extensive enforcement mechanism and whether that method of enforcement was intended to be exclusive" to determine whether a private right of action is consistent with the legislative scheme. *Rhodes v. Herz*, 920 N.Y.S.2d 11, 18 (1st Dep't 2011). Here, as the District Court acknowledged, the only two mechanisms of enforcement for PHL § 18(2)(e) are not specific to this provision but rather for any violation of the Public Health Law. A0081–82 (May 7, 2019 Order at 7–8). Moreover, neither the text nor the history of PHL § 18 suggests that the civil penalty imposed by the Commissioner of Health under PHL § 12 or an action pursuant to Article 78 under PHL § 13 were intended to be exclusive. *See Ruzhinskaya v. Healthport Techs., LLC*, 311 F.R.D. 87, 97 (S.D.N.Y. 2015) (Section 18's "text and history are silent as to the manner in which a requester's right not to be overcharged may be vindicated in court").

Indeed, the current text of PHL § 12, amended as of 2008 and effective as of 2020, expressly states that this section is intended to provide "additional and cumulative remedies." Moreover, court decisions have long recognized a private right of action for violations of PHL § 18(2)(e), yet the Legislature did not specially exclude a private right of action for a violation of this provision when it

repeatedly amended the Public Health Law. The District Court itself noted that almost 30 years ago, the court in *Casillo v. St. John's Episcopal Hospital, Smithtown*, 580 N.Y.S.2d 992, 998 (Sup. Ct. 1992), recognized the risk that "[t]he 1991 amendments capping copying costs within the definition of 'reasonable charge'" may result in "a plethora of litigation where the courts would be forced to determine what is an allowable fee in this case or that case." A0096 (May 7, 2019 Order at 22). Yet, despite individuals filing actions for violations of PHL § 18(2)(e), the Legislature has not acted to curtail these cases. *See Casillo*, 580 N.Y.S.2d at 998 ("The Legislature, when enacting or amending statutes is presumed to know the existing body of law and does not act in a vacuum."). Thus, Plaintiff's case simply is not factually in line with the cases upon which the District Court relied in finding no private right of action.

In *Rhodes*, which the District Court cited, A0088 (May 7, 2019 Order at 14), the plaintiff entered into a contract with employment agencies. The plaintiff sought to void the contract between her and the defendants and to recover all monies paid to the defendants during the contract's term. The plaintiff premised this relief on the ground that the defendants acted as her employment agents without a license, thereby violating General Business Law Section 172, and that by simultaneously acting as her employment agents, managers, and attorneys, the defendants also violated General Business Law Section 187(8). The First Department concluded

that the plaintiff could not bring claims under Article 11 (which encompasses Sections 172 and 187) because a private right of action would be inconsistent with the legislative scheme. In so holding, the court pointed to amendments to the statute that "eroded and ultimately eliminate the private right of action once prescribed and delegate all enforcement to the Commissioner." *Rhodes*, 920 N.Y.S.2d at 20. The court further stated:

> While an enforcement mechanism can always be made more potent, article 11's enforcement mechanism vesting the commissioner with broad investigatory, adjudication, and sanctioning power is quite extensive (General Business Law § 189), even exposing violators to imprisonment for up to one year (General Business Law § 190). The 1975 amendment itself is perhaps the most compelling evidence that the Legislature intended that the sole recourse for article 11's violation would be that enumerated therein. ***With the 1975 amendment, the Legislature not only delegated to the commissioner the power to initiate the previously prescribed private action against a licensed employment agency, but also declined to promulgate any express private right of action, despite the fact that we had recently declined to find such right.***

Id. (emphasis added); *see also Schlessinger v. Valspar Corp*, 686 F.3d 81, 87–88 (2d Cir. 2012) (noting in *dicta* that "the legislature did not evince the requisite intent to private right of action to void provisions that were contrary to § 395-a" of General Business Law because the General Business Law "is usually very specific in declaring that certain contractual provisions are unenforceable as against public policy" and because New York Legislature specifically amended another section of the General Business Law to provide a private right of action but not § 395-a);

Uhr, 720 N.E.2d at 890 (no private cause of action because education law at issue had a detailed scheme for administrative enforcement and in enacting the statute the Legislature had taken measures to insulate schools from liability and minimize their costs); *Sheehy*, 541 N.E.2d at 21–22 (no private right of action could be implied for the defendant's violation of General Obligations Law § 11–101 because the court found that the Legislature had specifically considered but declined to provide such a right).

In *McLean v. City of New York*, upon which the District Court relied, A0091–92 (May 7, 2019 Order at 17–18), the plaintiff sued the City of New York under Social Services Law Section 390, under the theory that the City had been negligent in permitting a certain day care facility to be "registered" under Social Services Law Section 390 when the facility failed to comply with the registration requirements; the plaintiff relied upon that registered status to place her daughter in the facility; and the plaintiff's daughter was injured at the facility. In concluding that a private right of action would be inconsistent with the legislative scheme of the statute, the court explained the extensive enforcement mechanisms of the statute at issue:

> ***Social Services Law § 390 is a detailed statute, with 13 subdivisions and many more subparts, occupying 10 pages of McKinney's Consolidated Laws.*** It specifies which child care providers shall be licensed and which only registered (Social Services Law § 390 [2] [a]-[c]); sets out some prerequisites for registration (*id.* § 390 [2] [d] [ii] [B]); requires OCFS [the office of children and family services] to

> establish, by regulation, requirements for licensed and registered providers (*id.* § 390 [2-a]); provides for inspections and investigations (*id.* § 390 [3] [a], [d], [e] [iii]; [4] [a]); requires certain information to be available to the public (*id.* § 390 [8]); authorizes OCFS to prevent noncompliant providers from caring for children (*id.* § 390 [3] [e] [ii]); provides for denial, suspension and revocation of licenses and registrations for violations of law (*id.* § 390 [10]); and requires OCFS to establish civil penalties for such violations (*id.* § 390 [11]). Social Services Law § 389 (1) imposes criminal liability for willful violations of the provisions of the Social Services Law, including section 390.

McLean v. City of New York, 905 N.E.2d 1167, 1171–72 (N.Y. 2009) (emphasis added). It was against this detailed regulatory background, which is quite different from PHL § 18, that the court concluded, "It is fair to infer that the Legislature considered carefully the best means for enforcing the provisions of Social Services Law § 390, and would have created a private right of action against erring government agencies if it found it wise to do so." *Id.* at 1172.

In *Signature Health Center, LLC v. State of New York*, 935 N.Y.S.2d 357 (3d Dep't 2011), which the District Court cited, A0090 (May 7, 2019 Order at 16), the claimant commenced an action against the State of New York seeking consequential damages, including lost profits, arising from the State's delay in publishing and paying the revised reimbursement rates for claimant, a Medicaid provider, under Public Health Law Section 2807(3). Public Health Law Section 2807(3) requires the Commissioner of Health to establish reimbursement rates for payments to hospitals for hospital and health-related services that are "reasonable

and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." The court first concluded, unlike here, that a private right of action would contravene a key purpose of the statute:

> [T]he legislative intent was to control the spiraling cost of Medicaid services that were consuming taxpayer dollars at an alarming rate. To permit Medicaid providers to bring a private right of action for recovery of consequential damages—including lost profits—against defendant for its negligent failure to provide reimbursement would therefore contravene the key cost containment purposes of the statute.

Signature Health Ctr., LLC, 935 N.Y.S.2d at 361. The court then noted the extensive regulatory scheme that the Legislature incorporated into Public Health Law Section 2807 "is sufficiently detailed so as to suggest that no private right of action was intended."

> ***Through those comprehensive provisions of the Public Health Law***, the Legislature charged DOH [the Department of Health] with the responsibility for setting Medicaid reimbursement rates and, pursuant to that broad delegation of authority, DOH promulgated detailed regulations with respect to the rate-setting for hospitals and other Medicaid providers (*see* 10 NYCRR subpart 86-4 [reimbursement provisions for, among other facilities, "diagnostic and/or treatment centers" such as claimant]; *see also* Public Health Law § 2807[2][b]). Pursuant to its delegation of authority, DOH also established an administrative process to challenge the reimbursement rates (*see* 10 NYCRR 86–4.16, 86–4.17).

Id. at 361–62 (emphasis added).[5]

[5] *McClean* and *Signature Health Center* also evidence the reluctance of New York courts to allow individuals to sue an agency of government. "[A]n agency of the government is not liable for the negligent performance of a governmental function

In the instant matter, nothing in the text or legislative history of PHL § 18 indicates the Legislature expressly considered but declined to promulgate a private right of action. To the contrary, the Legislature has done nothing to curtail the private actions for damages being filed in state and federal court pursuant to PHL § 18(2)(e), despite the many amendments it has made to the Public Health Law since the $0.75-per-page cap was enacted in 1991. Moreover, PHL § 18 does not provide a detailed or extensive enforcement mechanism. The District Court found legislative intent to limit the scope of remedies in the provisions of PHL § 18(3), which addresses a qualified person's denial of access to medical records, a situation not at issue here. A0090–91 (May 7, 2019 Order at 16–17). However, the narrow scope of that subsection merely confirms that PHL § 18 does not have the type of comprehensive enforcement mechanism as was provided for in the statutes respectively at issue in *Sheehy*, *McLean*, and *Signature Health Center*.

The District Court's conclusion that there is no private right of action for

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unless there existed a special duty to the injured person, in contrast to a general duty owed to the public." *McLean*, 905 N.E.2d at 1171 (internal quotation marks and citation omitted) (no private right of action against City of New York); *Signature Health Ctr.*, 935 N.Y.S.2d at 359 (no private right of action against State of New York); *see also Franza v. State of New York*, 83 N.Y.S.3d 361, 362–63 (3d Dep't 2018) (inmate had no private right of action against State of New York). Neither *Signature Health Center* nor *Franza* (which the District Court also cited, A0090, A0092 (May 7, 2019 Order at 16, 18)), nor any other case has held that having recourse under CPLR Article 78, in and of itself, is evidence that a private right of action is inconsistent with the legislative scheme.

violations of PHL § 18(2)(e) leaves Plaintiff without a means of recovering the overcharges Defendants imposed for copies of medical records, despite the fact that Defendants had charged Plaintiff twice the mandatory cap that the New York Legislature expressly set forth in PHL § 18(2)(e). Nothing in the text or legislative history of PHL § 18 suggests that the Legislature intended to leave overcharged recipients of medical records like Plaintiff without recourse. The District Court's decision was in error and should be reversed.

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

In the February 22, 2018 Order, the District Court correctly recites black letter law, namely: "A party may not recover in unjust enrichment where the parties have entered into a contract that governs the subject matter." A0045 (February 22, 2018 Order at 13) (quoting *Wilson v. Dantas*, 80 N.E.3d 1032, 1040 (N.Y. 2017) (Wilson, J., dissenting)). However, the District Court incorrectly applied the law to the facts of this case. The District Court dismissed Plaintiff's claim for unjust enrichment, finding that the "FAC is premised on the existence of an agreement between Ortiz and defendants to pay $1.50 per page for copies of medical records." *Id.*

The District Court's order was clearly erroneous.

The FAC is ***not*** premised on the existence of an agreement, and the FAC does ***not*** allege a breach of contract. In other words, Plaintiff does not allege that the subject matter of the decedent's claims, what amount Defendants may legally

charge for her medical records, is governed by any express contract. Rather, the FAC alleges "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). Moreover, the FAC alleges that "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).

Thus, no contract governs Defendants' overcharging of Plaintiff in excess of the statutorily permissible amount, and Plaintiff's unjust enrichment claim is not duplicative of any other of his claims. *See, e.g.*, *McCracken v. Verisma Sys., Inc.*, No. 6:14-CV-06248(MAT), 2017 WL 2080279, at *8 (W.D.N.Y. May 15, 2017) (plaintiff stated non-duplicative claim for unjust enrichment for overcharge for copies of medical records); *Spiro v. Healthport Tech., LLC*, 73 F. Supp. 3d 259 (S.D.N.Y. 2014) (plaintiffs stated claim for unjust enrichment because "the FAC plausibly asserts that [the defendant] received a windfall by charging $0.75 per page to make copies, more than its actual costs, and that, as a result, plaintiffs suffered financial loss").

Here, the District Court's misapplication of the law is highlighted by the fact that Defendants contested the very existence of a binding contract between the

parties. In addressing Plaintiff's claim for breach of the implied duty of good faith and fair dealing, Defendants specifically argued there is no binding contract between the parties. CIOX stated:

> 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.

See Defendants' CIOX Health LLC's and IOD Inc.'s Memorandum of Law in Support of Their Motion to Dismiss the Complaint at 11, *Ortiz v. CIOX Health, LLC*, No. 1:17-cv-04039-DLC (S.D.N.Y. Aug. 3, 2017), ECF No. 23. Similarly, NYPH argued:

> Plaintiff . . . does not allege facts sufficient to show that she entered into any contractual arrangement with [NYPH] concerning the treatment of her postdischarge request for copies of her medical records. Indeed, the absence of such contractual arrangements may best explain the enactment of Public Health Law § 18. The Legislature set up a statutory framework to regulate a circumstance that plainly is not the subject of any contractual arrangement.

See Memorandum of Law in Support of Defendant The New York and Presbyterian Hospital's Motion to Dismiss Amended Complaint at 8, *Ortiz v. CIOX Health, LLC*, No. 1:17-cv-04039-DLC (S.D.N.Y. Aug. 4, 2017), ECF No. 26. Plaintiff now agrees with Defendants that the FAC does not allege a contract relationship with Defendants. Accordingly, he does not appeal the District Court's dismissal of his claim for breach of the implied covenant of good faith and fair dealing because the lack of contractual arrangement between Plaintiff's decedent

and Defendants is an alternative basis to affirm the District Court's dismissal of that claim.[6]

The District Court erred in dismissing Plaintiff's unjust enrichment claim. Plaintiff has not alleged a contractual arrangement with Defendants, the existence of which is required to preclude the claim under New York law, and Plaintiff has otherwise pled the elements of the claim.

CONCLUSION

For the reasons set forth above, 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 section 18(2)(e) does not give rise to an implied private right of action and dismissed Plaintiff's claim for violation of section 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.

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[6] In dismissing Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, the District Court relied upon its finding that "the FAC does not assert that the defendants deprived Ortiz of the benefit of her contract with NYPH . . . ." A0043 (February 22, 2018 Order at 11).

Date: August 21, 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 10,780 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: August 21, 2019

By: */s/ Sue J. Nam*
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