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STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF THE PLASTIC SURGERY GROUP, P.C.,	:	Albany County Index No. 776-2016
Petitioner-Movant,	:	Appellate Division, Third Dept. No. 525023
-v.-	:	NOTICE OF MOTION FOR LEAVE TO APPEAL ON BEHALF OF PETITIONER
COMPTROLLER OF THE STATE OF NEW YORK,	:	
Respondent-Respondent.	:	

PLEASE TAKE NOTICE that upon the papers annexed hereto, petitioner, The Plastic Surgery Group, P.C., will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on June 18, 2018, for an order pursuant to NY CPLR 5602(a)(1)(i) granting it leave to appeal to the Court of Appeals from the memorandum and order of the Appellate Division, Third Department entered on November 22, 2017 (155 AD3d 1417), which (1) reversed, on the law, the order of the Supreme Court, Albany County (Ryba, J.), dated July 11, 2016, quashing the subpoena duces tecum served by the Comptroller of the State of New York on The Plastic Surgery Group; (2) denied the motion to quash; and (3) granted the Comptroller's cross-motion to compel compliance. Petitioner seeks leave to appeal from each and every part thereof.

PLEASE TAKE FURTHER NOTICE that opposing papers, if any, shall be filed with the Court and served upon the undersigned pursuant to Rule 500.21(c) [22 NYCRR 500.21(c)] of this Court.

Dated: June 8, 2018

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA, WOLF & CARONE, LLP

By: _____

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To: Barbara D. Underwood
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PROCEDURAL HISTORY

The Plastic Surgery Group seeks leave to appeal from the memorandum and order of the Appellate Division, Third Department dated and entered on November 22, 2017 (155 AD3d 1417), which (1) reversed, on the law, the decision and order of the Supreme Court (Ryba, J.) entered in Albany County on July 11, 2016, quashing the subpoena duces tecum served on The Plastic Surgery Group by the Comptroller and denying the Comptroller's cross-motion to compel compliance, (2) denied the motion to quash, and (3) granted the Comptroller's cross-motion to compel. (*See* Exh. A) The Third Department concluded that the Comptroller's subpoena to The Plastic Surgery Group for patients' medical records was validly issued in furtherance of the Comptroller's constitutional and statutory authority and obligation, as recognized by this Court in *Handler, M.D., P.C. v. DiNapoli*, 23 NY3d 239 (2014), to audit payments made by the State for medical services provided under the Empire Plan. The court further held that CPLR 3122(a)(2) does not apply to the Comptroller's subpoena duces tecum because that section only applies to a subpoena issued by a party to litigation seeking discovery under CPLR 3120 or 3121 after an action or proceeding is commenced.

TIMELINESS OF MOTION

The decision and order of the Supreme Court, Albany County (Ryba, J.), entered on July 11, 2016, was served by overnight delivery with notice of entry on July 22, 2016 (Exh. B). Thereafter, the Comptroller timely served its notice of appeal on August 16, 2016.

The Third Department's November 22, 2017, memorandum and order was served with notice of entry by regular mail on January 17, 2018. (Exh. A) The Plastic Surgery Group served its motion for leave to appeal in the Appellate Division on January 22, 2018.

By decision dated and entered March 2, 2018, the Third Department denied Plastic Surgery Group's motion for leave to appeal to the Court of Appeals. A copy of that decision with notice of entry was served by regular mail on May 16, 2018. (Exh. C)

This motion for leave to appeal is therefore timely pursuant to CPLR 5513(b).

JURISDICTION OF THE PROPOSED APPEAL

This Court has jurisdiction over the proposed appeal pursuant to CPLR 5602(a)(1)(i). This proceeding originated in Supreme Court and the order appealed from finally determines it under CPLR 5611. *See McCall v. Barrios-Paoli*, 93 NY2d 99 (1999) (order compelling City agencies to comply with subpoenas issued by Comptroller deemed final); Arthur Karger, The Powers of the New York Court of Appeals § 5:27 at 184-5 (3d ed rev 2005).

STATEMENT OF QUESTION PRESENTED FOR REVIEW BY THE COURT OF APPEALS

The plain language of CPLR 3122(a)(2) requires that a subpoena duces tecum issued to a medical provider requesting the production of a patient's medical records, other than a trial subpoena issued by a court, be accompanied by a written authorization from the patient and include a statement that the provider need not respond to the subpoena absent the written authorization. In the absence of any

other exception in the statutory language, does this section apply to a subpoena duces tecum outside the context of a pending action or proceeding issued by the Comptroller to a medical provider seeking patient records?

The Third Department answered this question in the negative.

The Third Department's memorandum and order limiting the application of CPLR 3122(a)(2) has implications far beyond the parties to this proceeding that affect residents and businesses throughout the state. It is respectfully submitted that the Court's memorandum and order has, under the guise of this Court's decision in *Handler*, altered an express legislative framework laid out in State Finance Law § 9, which is the source of the Comptroller's subpoena powers, and CPLR 3122(a)(2) through the inclusion of limitations that do not appear in the legislative text.

DISCLOSURE STATEMENT

The Plastic Surgery Group is a professional corporation with no parents, subsidiaries or affiliates.

FACTUAL BACKGROUND

The Plastic Surgery Group provides healthcare services to its patients. (R 14) It is a non-participating provider under the Empire Plan; it does not have a contract with the State or United Healthcare.

In July of 2015, the Comptroller announced its intention to review the state's payments under the New York State Health Insurance Program, of which the Empire Plan is the primary medical and surgical benefits program. The

Comptroller thereafter served upon The Plastic Surgery Group notice that "[a]uditors from [the Comptroller] will be visiting your office to inspect records supporting the accuracy and appropriateness of the State health care payments." There was no indication on this notice that any of The Plastic Surgery Group's patients had been notified that state auditors intended to review their confidential health information or that those patients had consented to such review. When the Plastic Surgery Group refused voluntarily to provide confidential patient records to the Comptroller, the Comptroller served the Group with a subpoena duces tecum.

That subpoena claims that it is issued "pursuant to Civil Practice Law and Rules, section 2302(a) and the Comptroller's subpoena power under State Finance Law, section 9." It is not disputed that the subpoena requests a broad range of confidential patient health information, including documents listing the names and addresses of any and all of The Plastic Surgery Group's patients insured under the Empire Plan for a nearly five-year period dating back to January 2011; any and all patient account records and ledgers for those patients; dates of service and procedure codes and/or descriptions; copies of any and all checks from or on behalf of any and all of those patients during the same five-year period; and correspondence between The Plastic Surgery Group and those patients.

The subpoena was not accompanied by written authorizations from the patients whose records were the focus of the Comptroller's subpoena. Nor did the subpoena contain any notification whatsoever – let alone a notice in conspicuous bold-faced type – that the patient records need not be provided by The Plastic

Surgery Group unless the subpoena is accompanied by a written authorization from the patient.

The Plastic Surgery Group responded to the subpoena by requesting that the Comptroller withdraw it. The Plastic Surgery Group reasoned that the subpoena requests patient medical records, and under CPLR 3122(a)(2), it need not respond to the subpoena because it was not accompanied by written authorizations from the patients whose protected health information was requested. The Comptroller, however, refused to withdraw the subpoena.

The Plastic Surgery Group commenced a special proceeding in Supreme Court, Albany County, seeking an order quashing the Comptroller's subpoena duces tecum. The Comptroller opposed the petition and cross-moved to compel compliance. The Supreme Court (Ryba, J.) granted The Plastic Surgery Group's petition, quashed the subpoena, and denied the Comptroller's cross-motion to compel on the ground that the subpoena did not comply with CPLR 3122(a)(2). The Comptroller appealed, and the Third Department, in the memorandum and order now sought to be appealed to this Court, reversed.

ARGUMENT

The Comptroller's authority to issue subpoenas flows from State Finance Law § 9, which provides that the "comptroller . . . may issue a subpoena or subpoenas requiring a person or persons to attend before the comptroller . . . and be examined in reference to any matter within the scope of inquiry or investigation being conducted by the comptroller, and, in a proper case, to bring with him, a book or

paper." State Finance Law § 9. But that authority is not without limit. State Finance Law § 9 further expressly states that any "subpoena issued under this section shall be regulated by the civil practice law and rules." *Id.* The Third Department concluded that the Comptroller's subpoena to The Plastic Surgery Group was properly issued pursuant to the Court's decision in *Handler*, which – in a different setting – recognized that the Comptroller is mandated under state law to ensure proper billing and payments for the Empire Plan. The Plastic Surgery Group does not deny that the Comptroller bears this responsibility, but that does not end the matter. In granting the Comptroller the power to issue subpoenas, the legislature necessarily intended that the power would only be exercised in furtherance of the Comptroller's enumerated powers in State Finance Law § 8. The subpoena power could not extend to matters outside the Comptroller's statutory and constitutional province. So, the fact that the Comptroller issued the subpoena duces tecum to The Plastic Surgery Group in furtherance of its constitutional and statutory authority to audit state payments is irrelevant to the issue of whether the Comptroller needed to comply with CPLR 3122(a)(2).

Nor is this case governed by *Handler*. While *Handler* also involved the Comptroller's effort to audit the state's payments to United Healthcare for services provided by an out-of-network provider to patients insured by the Empire Plan, that is where the commonalities end. Critical factual differences between the two cases yield entirely different legal issues. The key factual difference between this proceeding and *Handler* is that the latter did not involve the issuance of a subpoena

by the Comptroller. Rather, the provider in *Handler* had voluntarily provided the Comptroller with the requested patient records. Therefore, the only issue in that case was whether Article V, § 1 of the State Constitution authorized the Comptroller to review those records. *Id.* at 239 ("These cases require us to determine whether the State Constitution limits the State Comptroller's authority to review the billing records of private companies that provide health care to beneficiaries of a State insurance program. We find no such limitation in the Constitution.") This Court held that the Comptroller could as part of its constitutional obligation to audit the state's payments to health insurers.

This proceeding, on the other hand, does not involve any inquiry under the State Constitution. The issue here focuses on the manner in which the Comptroller may compel a provider to disclose patient medical records when the provider does not voluntarily provide them, as the petitioner in *Handler* had. While this Court in *Handler* observed in dicta that the legislature granted the Comptroller broad subpoena powers in furtherance of its audit functions (*id.* at 247), the Court did not have the opportunity to consider the express subjugation of the Comptroller's subpoena power to the requirements of the civil practice law and rules as set forth in State Finance Law § 9 or the requirement in CPLR 3122(a)(2) that any subpoena duces tecum to a medical provider for patient records must be accompanied by authorizations from the patient. *Handler* simply did not address the core question presented for review by the Court of Appeals here: whether the Comptroller must comply with NY CPLR 3122(a)(2) when issuing an investigative subpoena duces

tecum to a medical provider for patient records. That is the issue that The Plastic Surgery Group now requests permission to present to this Court.

The Third Department interpreted CPLR 3122(a)(2) together with 3122(a)(1) and concluded that 3122(a)(2) "only applies, by its terms, to subpoenas issued by a party to litigation seeking discovery under CPLR 3120 or 3121" and excused the Comptroller from adhering to its terms. This determination conflicts with an express legislative intent set forth in both State Finance Law § 9 and CPLR 3122(a)(2).

The legislature's application of the CPLR to subpoenas issued by the Comptroller was complete and unconditional. The legislature did not limit application of the CPLR only to particular sections, but rather applied the entirety of the statute and rules. Indeed, where the legislature has intended to limit the portions of the CPLR that apply to subpoenas issued pursuant to specific grants of authority, it has specified them. For example, Section 111-p of the Social Services Law – which authorizes the Department of Social Services, a child support enforcement unit coordinator, support collection unit supervisor of a social services district, or a designee thereof to issue subpoenas for information needed to establish paternity or establish or modify a support order – specifically states that the subpoena "shall be subject to the provisions of article twenty-three of the civil practice law and rules." Social Services Law § 111-p. Similarly, Section 58 of the Executive Law – which grants the inspector general for transportation subpoena

power – subjects subpoenas issued pursuant to that section to article 23 of the CPLR or articles 190 or 610 of the Criminal Procedure Law. Executive Law § 58(3).

Unlike Social Services Law § 111-p and Executive Law § 58, State Finance Law § 9 contains no limitation on the application of the CPLR. The absence of such limiting language reflects the legislature's intention to subject subpoenas issued by the Comptroller to the entirety of the CPLR, including CPLR 3122(a)(2). *See* Statutes § 240 ("[W]here a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned."). This broad inclusionary language must mean that the one section of the CPLR specifically addressing subpoenas duces tecum issued to medical providers for patient records applies to the Comptroller's subpoena to a medical provider for patient records.

Nor is there anything in the express language of CPLR 3122(a)(2) that supports reading it in conjunction with CPLR 3122(a)(1) or that it applies only to discovery requests under 3120 or 3121. Unlike other sections of the CPLR, there is no introductory provision of CPLR 3122(a) that unites its two subdivisions. Rather, subsection (a) is composed of two distinct subdivisions with no text applicable to both. *Contrast* CPLR 3122(a) *with e.g.* CPLR 5015(a) containing prefatory language applicable to subdivisions (a)(1), (a)(2), (a)(3), (a)(4) and (a)(5).

While subdivision (a)(1) sets forth the procedure that a "party or person" served with a notice or subpoena "pursuant to rule 3120 or section 3121" must follow when objecting to the notice or subpoena, subdivision (a)(2) does not refer to a

"party or person" or 3120 or 3121. Instead, CPLR 3122(a)(2) focuses exclusively and without qualification on a medical provider's response to a single document: a subpoena duces tecum. CPLR 2301 defines a subpoena duces tecum as requiring the production of books, papers and other things. There is no requirement within this definition conditioning a subpoena duces tecum on the existence of an action or proceeding.

Similarly, while subdivision (a)(1) refers expressly to CPLR 3120 or 3121, subdivision (a)(2) has no such reference. When the legislature wanted to refer to those two sections, it did so by express language. The absence of any reference to CPLR 3120 or 3121 in subdivision (a)(2) reflects the legislature's intention not to limit the scenarios in which patient authorizations must accompany non-judicial subpoenas duces tecum to medical providers for patient medical records.

If CPLR 3122(a)(2) is held not to apply in this case, the confidential medical records of hundreds of patients pertaining to sensitive medical procedures, which the patients may well want to keep private, will be revealed without their knowledge and without their having any means to object, though there may be far less intrusive means for the Comptroller to secure the information needed to conduct its constitutionally mandated audit than a blanket subpoena of all patient records covering a long period of time.

CONCLUSION

This case raises substantial issues regarding the application of the CPLR to subpoenas duces tecum issued by the Comptroller under State Finance Law § 9 and

as to the applicability of CPLR 3122(a)(2) to situations such as this, where no legal action has been commenced. It implicates both the powers of the Comptroller and the privacy interests of medical patients, which are protected under state and federal law.

Therefore, review by the Court of Appeals is necessary to provide guidance to the state at large as to the proper interpretation of these two statutes, as well as to review the other issues raised in the briefs to the Appellate Division and in the memorandum and order of that court.

Dated: June 8, 2018

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA, WOLF & CARONE, LLP

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A

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of THE PLASTIC SURGERY GROUP, P.C.,

Respondent.

v

NOTICE OF ENTRY

COMPTROLLER OF THE STATE OF NEW YORK,

Appellant,

AD. No. 525023

PLEASE TAKE NOTICE that the within is a true and complete copy of the Memorandum and Order duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Third Department on November 22, 2017.

Dated: Albany, New York
January 17 2018

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 22, 2017 525023

In the Matter of THE PLASTIC SURGERY GROUP, P.C.,
Respondent,
v MEMORANDUM AND ORDER

COMPTROLLER OF THE STATE OF NEW YORK,
Appellant.

Calendar Date: October 16, 2017

Before: Garry, J.P., Egan Jr., Rose, Mulvey and Rumsey, JJ.

Eric T. Schneiderman, Attorney General (Zainab A. Chaudhry of counsel), Albany, for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Lake Success (Matthew F. Didora of counsel), for respondent.

Mulvey, J.

Appeal from an order of the Supreme Court (Ryba, J.), entered July 11, 2016 in Albany County, which granted petitioner's application pursuant to CPLR 2304 to quash a subpoena duces tecum and denied respondent's cross motion to compel compliance.

In February 2016, respondent commenced an audit of health insurance claims paid to petitioner by United Health Care to determine if United had overpaid petitioner for claims submitted between 2011 and 2015. Petitioner failed to respond to or comply with respondent's requests to review a random sample of its

records related to such claims. Thereafter, respondent served petitioner with a subpoena duces tecum requesting certain specified documents pertaining to its patients between 2011 and 2015 who were members of the Empire Plan, the primary health insurance plan for the New York State Health Insurance Program (hereinafter NYSHIP). Petitioner is a nonparticipating health care provider[1] with respect to the Empire Plan that submitted millions of dollars in medical claims to United for patients enrolled in the Empire Plan. United is the private insurance company that contracts with the state to process and pay medical claims for state employees and retirees, among others, who are members of the Empire Plan. United pays the claims and related expenses using funds provided by the state, that is, "the [s]tate funds the Empire Plan as a self-insurer [and] United merely passes state money to the proper payees" (Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d 239, 243 [2014]).

Petitioner did not comply with the subpoena for its records and, instead, commenced this proceeding to quash the subpoena or, alternatively, for a protective order if disclosure were required (see CPLR 2304, 3103). Respondent answered and cross-moved to compel petitioner's compliance pursuant to CPLR 2308. Supreme Court granted the petition, quashed the subpoena and denied respondent's cross motion, holding that respondent lacked authority to issue the subpoena because it was not accompanied by the patients' written authorizations pursuant to CPLR 3122 (a). Respondent appeals.

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[1] Nonparticipating providers are providers that have not entered into a fee agreement with United. Before United will reimburse Empire Plan members for nonparticipating providers' services, the members are required to pay a deductible and are thereafter reimbursed for 80% of the reasonable and customary charge for the provided services. The deductibles and the remaining 20% of the reasonable and customary charge – known as "co-insurance" – must be collected by the health care provider, or the provider may be liable for insurance fraud (see Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d 239, 243 [2014]).

We reverse. We find that, contrary to petitioner's claims and the holding of Supreme Court, the subpoena was validly issued in furtherance of respondent's constitutional and statutory authority and obligation to audit payments made by the state for medical services provided under the Empire Plan (see NY Const, art V, § 1; Civil Service Law § 167 [7]; Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d at 242-243, 247). In Matter of Martin H. Handler, M.D., P.C. v DiNapoli (23 NY3d at 242-243, 245-248), decided well before the subject subpoena was issued, the Court of Appeals outlined the relationship between NYSHIP, United and the Empire Plan, the obligations of participating and nonparticipating health care providers with regard to billing patients, and respondent's independent authority and obligation to audit the state's payments to both categories of providers. As the Court of Appeals outlined, respondent is constitutionally obligated to audit state payments to health insurance vendors (id. at 245-246, citing NY Const, art V, §1) and, further, "the Legislature authorized [respondent] to audit payments to the [s]tate's health insurance vendors" (Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d at 247, citing Civil Service Law § 167 [7]). Importantly, while subpoenas were not in issue in Handler in that the providers permitted access to their records, the Court recognized that "the Legislature has granted [respondent] broad subpoena powers in furtherance of [its] investigatory functions under State Finance Law § 9" (Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d at 247). To that end, State Finance Law § 9 authorizes respondent to issue a subpoena or subpoenas "in reference to any matter within the scope of the inquiry or investigation being conducted by [respondent]" (see id.). The Court made clear that respondent is mandated to ensure proper billing and payments for the Empire Plan, and to prevent unauthorized payments and overpayments, and must audit the records of participating and nonparticipating providers alike as part of its responsibility to audit payments to medical providers (see id. at 247-248). Thus, the subpoena of petitioner's records here was well within respondent's constitutional and statutory authority and consistent with its legal obligations, and represented a valid exercise of its subpoena power (see NY Const, art V, § 1; Civil Service Law § 167 [7]; Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d at 245-248).

Supreme Court's reliance upon CPLR 3122 (a) (2) as a limitation on respondent's audit and subpoena authority is misplaced. CPLR 3122 (a) (2), which requires, among other things, that a patient's written authorization accompany any subpoena duces tecum issued to a medical provider for that patient's medical records, only applies, by its terms, to subpoenas issued by a party to litigation seeking discovery under CPLR 3120 or 3121, after an action or proceeding is commenced. The plain language of CPLR 3122 (a) (1) and (2), read together, makes clear that the provisions apply to subpoenas issued during the discovery phase of litigation, and are not applicable to the subpoena issued by respondent here pursuant to its authority under State Finance Law § 9 (see Matter of DeVera v Elia, 152 AD3d 13, 19 [2017]). Indeed, the conclusion urged by petitioner would lead to the untenable result that, unless health care providers voluntarily cooperate with respondent's requests for access to patient records for audit purposes, respondent would be unable to fulfill its statutory and constitutional obligations to audit payments to providers for health insurance claims unless it obtained prior written authorization from all patients whose records were requested. Since respondent's subpoenas are issued in accordance with its constitutional and statutory audit authority, and have no connection with discovery in an action or proceeding, the cited provisions of CPLR 3122 are not applicable.

We further conclude that disclosure of the records sought by respondent is not barred by the Health Insurance Portability and Accountability Act of 1996 (hereinafter HIPAA) (see 42 USC § 1320d et seq.). HIPAA's "[p]rivacy [r]ule forbids an organization subject to its requirements (a 'covered entity') from using or disclosing an individual's health information ('protected health information') except as mandated or permitted by its provisions" (Arons v Jutkowitz, 9 NY3d 393, 412-413 [2007]; see 45 CFR 160.103). However, HIPAA's privacy regulations provide that "[a] covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; . . . criminal proceedings or actions; or other activities necessary for appropriate oversight of . . . [e]ntities subject to government regulatory programs for which health information is necessary for

determining compliance with program standards," without the written authorization of the patient (45 CFR 164.512 [d] [1] [iii] [emphasis added]). A health oversight agency is defined, in relevant part, as "an agency or authority of . . . a [s]tate . . . that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance" (45 CFR 164.501 [emphases added]). We find that respondent falls squarely within HIPAA's definition of a health oversight agency (see People v Marcus Garvey Nursing Home, Inc., 57 AD3d 201, 201 [2008, Tom, J., concurring]; Matter of Signature Health Ctr. LLC v Hevesi, 13 Misc 3d 1189, 1193 [Sup Ct, Albany County 2006]). To the extent that petitioner argues that its disclosure is only permissive, not mandatory, because the regulation uses the term "may" (45 CFR 164.512 [d] [1] [iii]), we are unpersuaded, particularly given that the Court of Appeals has rejected such an interpretation under a comparable HIPAA exception (see Matter of New York City Health & Hosps. Corp. v New York State Commn. of Correction, 19 NY3d 239, 243, 246 [2012] [interpreting CFR 165.512 (a)]). In view of respondent's statutory and constitutional responsibility for oversight of NYSHIP and payments to health care providers, we discern no requirement for written authorizations by individual patients under HIPAA, as the regulations promulgated under that statute expressly permit disclosure of protected health information to a "health oversight agency" (45 CFR 164.512 [d] [1] [iii]).

While petitioner argued that portions of the subpoena were overly broad, it failed to satisfy its burden of demonstrating that respondent lacked authority to issue the subpoena, that it was issued without a factual basis or in an exercise of futility, or that the material requested was improper, utterly irrelevant or cumulative (see Matter of Empire Wine & Spirits LLC v Colon, 145 AD3d 1157, 1159 [2016]; Matter of Hogan v Cuomo, 67 AD3d 1144, 1145 [2009]; compare Mokay v Mokay, 124 AD3d 1097, 1099 [2015]). In support of its cross motion to compel compliance, respondent submitted an affidavit of its audit manager that explained, in detail, the importance and necessity to respondent's audit of the information requested in each paragraph of the subpoena. As respondent has a legal duty and obligation to conduct this type of audit in order to ascertain if there has

been an overpayment or unauthorized payment of state funds (see Matter of Martin H. Handler, M.D., P.C. v DiNapoli, 23 NY3d at 242-243, 247), and petitioner failed to establish that the information sought is utterly irrelevant to this proper inquiry, the subpoena should not have been quashed (see CPLR 2304) and respondent's cross motion to compel compliance with the subpoena should be granted (see CPLR 2308). To the extent that petitioner in its application requested a protective order against respondent, the State Comptroller (see CPLR 3103), we decline to issue such an order. We find that this relief is unnecessary given that, among other factors, respondent is fulfilling its constitutional and statutory duties in acquiring the information that is the subject of the subpoena and in conducting the audit, and petitioner has offered no basis for concern that disclosure should be curtailed to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person" (CPLR 3103 [a]; see Cynthia B. v New Rochelle Hosp. Med. Ctr., 60 NY2d 452, 463 [1983]; Brignola v Pei-Fei Lee, M.D., P.C., 192 AD2d 1008, 1009 [1993]).

Garry, J.P., Egan Jr., Rose and Rumsey, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, application to quash the subpoena denied and cross motion to compel compliance granted.

ENTER:

Robert D Mayberger

Robert D. Mayberger
Clerk of the Court

State of New York
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JAN 22 2018

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B

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

----------X

In the Matter of THE PLASTIC SURGERY GROUP, P.C.,

Petitioner,

-against-

THE COMPTROLLER OF THE STATE OF NEW YORK,

Respondent.

----------x

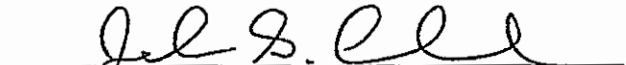
Index No. 776-2016

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the annexed is a true and correct copy of a Decision/Order, dated July 1, 2016 and duly entered in this action and filed in the office of the Clerk of Albany County on July 11, 2016.

Dated: Lake Success, NY
July 21, 2016

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN
FORMATO, FERRARA & WOLF, LLP



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ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of THE PLASTIC SURGERY GROUP P.C.,

Petitioner,

-against-

THE COMPTROLLER OF THE STATE OF NEW YORK,

Respondent.

DECISION/ORDER
Index No. 776-2016
RJI No. 01-16-120047
Hon. Christina L. Ryba, JSC

APPEARANCES:

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Albany, New York 12224-0341

RYBA, J.,

On February 4, 2016, respondent New York State Comptroller's Office served a subpoena duces tecum upon petitioner The Plastic Surgery Group PC in the context of respondent's audit to review payments made by the State for services provided by petitioner to patients who were members of the New York State Health Insurance Program's Empire Plan. The subpoena duces tecum demanded the production of certain documents relating to petitioner's billing practices including all documents, account records and ledgers listing certain identifying information for Empire Plan members such as

patient names, dates of services and descriptions of medical procedures. Petitioner declined to comply with the subpoena duces tecum on the ground of patient confidentiality and requested that respondent withdraw the subpoena. Respondent refused, prompting petitioner to commence this proceeding seeking an order quashing the subpoena duces tecum and issuing a protective order on grounds that the subpoena seeks the production of patient information protected from disclosure by the Health Insurance Portability and Accountability Act ("HIPAA"), is not accompanied by written authorizations from the patients consenting to the release of their medical records, and seeks over broad and irrelevant information. Respondent served an answer to the petition and cross moves for an order compelling petitioner's compliance with the subpoena duces tecum. Petitioner opposes the cross motion.

It is well settled that a subpoena duces tecum must be issued pursuant to legitimate authority and may seek only relevant and reasonably specific information that is not unduly burdensome (see, Matter of A'Hearn v Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn., 23 NY2d 916, 918 cert. denied 395 US 959 [1969]; Roemer v Cuomo, 67 AD3d 1169, 1170 [2009]). A motion to quash a subpoena duces tecum should be granted where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry (see, AnheuserBusch, Inc. v Abrams, 71 NY2d 327, 331 [1988] [internal quotation marks and citations omitted]; Matter of Abbruzzese v New York Temporary State Commn. on Lobbying, 43 AD3d 518, 519 [2007]). The person challenging a subpoena duces tecum bears the burden to establish that the information sought is irrelevant or that the subpoena is otherwise improper (see, Hogan v Cuomo, 67 AD3d 1144, 1145 [2009]).

Here, petitioner contends that respondent lacks authority to demand compliance with the subpoena duces tecum by virtue of CPLR 3122 (a) (2), which is intended to guard patient information

protected by HIPAA and states in relevant part:

> A medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a court, requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that written the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or has otherwise directed the production of the documents.

Here, it is undisputed that the subpoena duces tecum at issue requested the production of identifying information from patient records and was not accompanied by patient authorizations or otherwise authorized by the Court in advance. It is also undisputed that the subpoena duces tecum did not contain the conspicuous bold-faced language required by the statute. Accordingly, the Court concludes that petitioner has sufficiently established that the subpoena duces tecum fails to satisfy the statutory requirements of CPLR 3122 (a) (2) and is therefore deficient on its face.

However, respondent contends that the requirements of CPLR 3122 (a) (2) are inapplicable here in light of the broad subpoena power granted to the Comptroller's Office by State Finance Law § 9 for audit purposes and in view of the fact that the Comptroller's Office qualifies as a "health oversight agency" entitled to production of otherwise protected patient health information under HIPAA (45 C.F.R. § 164.512 [d]). While the Court acknowledges that respondent was previously found to qualify as a "health oversight agency" within the meaning of HIPAA in Matter of Signature Health Center LLC v Hevesi (13 Misc 3d 1189, 1193 [2006]), that decision is not binding precedent and, in any event, is factually distinguishable in that it addressed respondent's status with respect to audits of the Medicaid program. Inasmuch as there is no clear precedent for finding that respondent is a "health oversight agency" for the purpose of issuing subpoenas for petitioner's patient records in this case, and as the Court

is not persuaded that respondent is otherwise exempt from complying with the requirements of CPLR 3122 (a) (2), the petition to quash the subpoena duces tecum is granted. It necessarily follows that respondent's cross motion to compel compliance with the subpoena duces tecum is denied.

For the foregoing reasons, it is

ORDERED that the petition is granted, without costs, and it is further

ORDERED that the cross motion is denied.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants. The below referenced original papers are being transferred to the Albany County Clerk. The signing of this Decision and shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

ENTER.

Dated: July 1, 2016

HON. CHRISTINA L. RYBA
Supreme Court Justice

7/11/16 al

STATE OF NEW YORK }
COUNTY OF ALBANY CLERK'S OFFICE } SS.:

I, BRUCE A. HIDLEY, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy .decision.+.order..... with the original thereof filed in this office on the .....11th..... Day of .....July..... 2016 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this .....15th..... day of .....July..... 2016

Clerk

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of THE PLASTIC SURGERY GROUP, P.C., Index No. 608484/14

Petitioner,

-against-

THE COMPTROLLER OF THE STATE OF NEW YORK,

Respondent.

STATE OF NEW YORK)
)SS.:
COUNTY OF NASSAU)

AFFIDAVIT OF SERVICE

I, LISA M. BIANCO, being duly sworn depose and say: I am over the age of 18 years and I am not a party to this action. I am an employee of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, with offices at 1111 Marcus Avenue, Suite 107, Lake Success, New York 11042. On the 22nd day of July, 2016, I served the annexed **NOTICE OF ENTRY** upon the person(s) or parties designated below by mailing a true and complete copy of same in a postage pre-paid envelope via Fedex overnight delivery at the last known address(es) of the addressee(s) as set forth herein:

Eric T. Schneiderman
Attorney General of the State of New York
Justin L. Engel, Esq. (Assistant Attorney General, of Counsel)
Attorney for Respondent
The Capitol
Albany, NY 12224-0341

Lisa M. Bianco
LISA M. BIANCO

Sworn to before me on this
22nd day of July, 2016.

Adina L. Phillips
Notary Public

ADINA L. PHILLIPS
Notary Public, State of New York
No. 01PH6203262
Qualified in Nassau County
Commission Expires March 30, 2017

C

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of PLASTIC SURGERY GROUP, P.C.,

Respondent,

v

NOTICE OF ENTRY

COMPTROLLER OF THE STATE ON NEW YORK,

Appellant.

AD. No. 525023
OAG No. 16-202361

PLEASE TAKE NOTICE that the within is a true and complete copy of the Decision and Order on Motion duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Third Department on March 2, 2018.

Dated: Albany, New York
May 16, 2018

BARBARA D. UNDERWOOD
Acting Attorney General
State of New York
Attorney for Appellant
The Capitol
Albany, New York 12224

By: Zainab A. Chaudhry
ZAINAB A. CHAUDHRY
Assistant Solicitor General
of Counsel
Telephone (518)776-2031

To: Matthew Didora, Esq.
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3 Dakota Drive, Suite 300
Lake Success, New York 11042

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 2, 2018 525023

In the Matter of PLASTIC SURGERY GROUP, P.C.,

Respondent,

v

COMPTROLLER OF THE STATE OF NEW YORK,

Appellant.

DECISION AND ORDER ON MOTION

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Garry, P.J., Egan Jr., Mulvey and Rumsey, JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF THE PLASTIC SURGERY GROUP, P.C.,	:	Albany County Index No. 776-2016
Petitioner-Respondent,	:	
-v.-	:	Appellate Division, Third Dept. No. 525023
COMPTROLLER OF THE STATE OF NEW YORK,	:	
Respondent-Appellant.		

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

AFFIDAVIT OF SERVICE

I, MAUREEN PALMER, being duly sworn depose and say: I am over the age of 18 years and I am not a party to this action. I am an employee of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP with offices at 3 Dakota Drive, Suite 300, Lake Success, New York 11042. On the 8th day of June, 2018, I served two (2) copies of the NOTICE OF MOTION FOR LEAVE TO APPEAL ON BEHALF OF PETITIONER upon the attorney(s) below at the designated address below by Federal Express, priority overnight mailing.

Barbara D. Underwood
Acting Attorney General of the State of New York
The Capitol
Albany, New York 12224

Maureen Palmer
MAUREEN PALMER

Sworn to before me on this
8th day of June, 2018.

Andrea M. Brodie
Notary Public

ANDREA M. BRODIE
Notary Public-State of New York
No. 02BR6216784
Qualified in Nassau County
Commission Expires January 25, 2022

STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF THE PLASTIC SURGERY GROUP, P.C.,	:	Albany County Index No. 776-2016
Petitioner-Respondent,	:	
-v.-	:	Appellate Division, Third Department No. 525023
COMPTROLLER OF THE STATE OF NEW YORK,	:	
Respondent-Appellant.	:	

NOTICE OF MOTION FOR LEAVE TO APPEAL ON BEHALF OF PETITIONER

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**Not for Service*

Pursuant to 22 N.Y.C.RR Part 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry under the circumstances, (1) the presentation of the annexed document or the contentions contained therein are not frivolous as defined in 22 NYCRR 130-1.1(c) and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: _____ *Signature:* _____

Print Signer's Name: _____