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March 7, 2022

By ECF
Honorable Nicholas G. Garaufis
United States District Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

RE: *Roberts et al. v. Bassett et al.*, 22-CV-710

Dear Judge Garaufis:

This Office represents defendant Mary T. Bassett, Commissioner of the New York State Department of Health ("DOH"), in the above-captioned matter. I am writing in response to the Court's March 4, 2022 electronic Order directing DOH to provide a date by which the new guidance referenced in DOH's March 4, 2022 letter to the Court will be issued, and to indicate whether it will supersede the DOH guidance issued in late December 2021 that Plaintiffs seek to enjoin ("December 2021 Guidance").

DOH issued new guidance, entitled "Test Soon And Treat Early To Improve Outcomes From COVID-19," on March 4, 2022 (hereinafter, "March 4, 2022 Guidance") to health care facilities, providers, and practitioners in New York using DOH's Integrated Health Alerting and Notification System. A copy of the March 4, 2022 Guidance is attached as Exhibit A to this letter.

The March 4, 2022 Guidance does not supersede the December 2021 Guidance but acts an update to it, informing practitioners that there is currently no shortage of supplies constraining their ability to prescribe the antiviral and monocloncal antibody treatment therapies at issue in this case ("the Therapies") if they determine that treatment is clinically appropriate. The purpose of the March 4, 2022 Guidance is to remind practitioners of the COVID-19 treatment options available, including the Therapies; to inform practitioners that "COVID-19 treatment options are available and there are no current shortages"; and to encourage practitioners "to evaluate all treatment options as early as possible." *See* Ex. A. The March 4, 2022 Guidance further states: "Starting the week of March 7th, we anticipate new sites will open in New York State through President Biden's Test to Treat program. These Test to Treat sites will provide increased availability of immediate testing and early treatment and will also be displayed on the COVID-19 Therapeutics Locator." *Id.*

The Therapies remain subject to the Emergency Use Authorizations issued by the United

States Food and Drug Administration ("FDA"). At present, the FDA has authorized the Therapies to treat patients with mild-to-moderate COVID-19 who are at high risk for progression to severe disease. Thus, the December 2021 Guidance advises that practitioners consider patients' risk factors for severe disease when determining whether to prescribe the Therapies. Moreover, although the Therapies "are now widely available and there are no current shortages in supply," *id.*, the December 2021 Guidance recommends the prioritization of patients based on their level of risk of progressing to severe COVID-19 during times of resource limitations.

Respectfully submitted,

/s/
Erin Kandel
Assistant Attorney General

cc: All counsel via ECF