Multiple Documents

Part	Description
1	18
2	Declaration of Michael Brisman in further support of preliminary injunction

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEUROLOGICAL SURGERY PRACTICE OF LONG ISLAND, PLLC, Plaintiff, vs UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; XAVIER BECERRA, in his official capacity as Secretary, United States Department of Health and Human Services; JANET YELLEN, in her official capacity as Secretary, United States Department of the Treasury; and JULIE A. SU, in her official capacity as Acting Secretary, United States Department of Labor, Defendants.	Case No. 1:23-cv-2977 Hon. Brian M. Cogan

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR DISMISSAL AND IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

PRELIMINARY STATEMENT

Plaintiff, Neurological Surgery Practice of Long Island, PLLC (the "Neurology") is one of the largest private neurosurgery practices in New York. It regularly provides medically necessary services on an out-of-network basis to enrollees of all the major health plans. Neurology's provision of these services since January 2022 has been governed in most cases by the No Surprises Act ("NSA"), 42 U.S.C. §§ 300gg-111, *et seq*.

Under the NSA, out-of-network providers are prohibited from billing patients for their services. Rather, health plans have the authority to initial determine whether, and what amount, to pay. The providers' only recourse is to use the independent dispute resolution (IDR) process established by the NSA.

Many of Neurology's services are governed by the NSA. Because health plans, if they pay at all, have decided to pay at rates far below what they historically paid – and far below the providers' costs for rendering the services – out-of-network providers have become heavily dependent on an efficient IDR process to avoid grievous harm.

Unfortunately, the IDR process has not been efficient. The Defendants have failed to honor the NSA's mandates regarding the IDR process and require adherence to statutory timelines and other requirements. This has put Neurology and other out-of-network providers in serious financial jeopardy, creating a disastrous impact on healthcare access, quality, and cost. Accordingly, Neurology has brought this lawsuit to compel Defendants to honor their statutory obligations

For all these reasons, it is vitally important for Defendants' illegal conduct to immediately cease. Accordingly, Neurology has brought the present preliminary injunction motion.

Defendants have responded by moving to dismiss Neurology's claims and opposing its preliminary injunction motion.

As we explain below, Defendants' dismissal and standing arguments are without legal basis. They are nothing more than roadblocks or "red herrings" to deter and divert the Court's attention away from Neurology's right to speedy relief.

Because Neurology has satisfied the requirements of Article III standing and stated valid legal claims, this Court should deny Defendants' motion to dismiss in its entirety. Additionally, because Neurology has established a likelihood of success on the merits, the existence of irreparable harm, a balancing of equities in its favor, and shown that the requested relief is in the public interest, this Court should grant Neurology's requested preliminary injunction.

ARGUMENT

I. Because The Complaint Sufficiently Demonstrates That Neurology Has Article III Standing To Assert Its Claims, Dismissal Under Rule 12(b)(1) Is Not Warranted

Defendants first seek dismissal of Neurology's claims under Rule 12(b)(1) based on an alleged lack of Article III standing. When considering Rule 12(b)(1) dismissal, this Court "must take all uncontroverted facts in the complaint ... as true and draw all reasonable inferences in favor of the party asserting jurisdiction." *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 146 (E.D.N.Y. 2017) (quoting *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014)).

To establish Article III standing, a plaintiff must show that (1) it suffered in injury in fact that is concrete, particularized, and actual, or imminent; (2) this injury in fact is fairly traceable to the challenged conduct of defendants; and (3) the injury would likely be redressed by a favorable judicial decision. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Defendants here do not contest that the Complaint alleges a sufficient injury in fact. Rather, they contend that this injury is neither fairly traceable to their challenged conduct nor likely to be redressed by a favorable judicial decision. Defendants are wrong.

A. Neurology Has Demonstrated Injuries-In-Fact Fairly Traceable To The Challenged Actions Of Defendants.

Article III standing requires a plaintiff to show it sustained injuries-in-fact "fairly traceable" to the challenged actions of defendants. *See Citizens for Responsibility & Ethics in Washington v. Trump*, 953 F.3d 178, 191-92 (2d Cir. 2019) (reversing district court's lack-of-standing dismissal).

Importantly, Article III standing does not require that defendants be the most immediate cause, or even a proximate cause, of plaintiffs' injuries; it requires only that those injuries be fairly traceable to defendants. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). "Even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019).

A plaintiff meets its burden through allegations providing more than "unadorned speculation" connecting, even indirectly, plaintiff's injury to defendants' challenged actions. *Citizens for Responsibility*, 953 F.3d at191-92; *Wilding*, 941 F.3d at 1125. There is no requirement to rule out all possible alternative explanations of a plaintiff's injury; the factual allegations simply must plausibly support a "substantial likelihood" that the plaintiff's injury was at least an indirect consequence of the defendant's allegedly unlawful actions. *Id.* As the Sixth Circuit recently stated, "[i]n the nebulous land of 'fairly traceable,' where causation means more than speculative but less than but-for, the allegation that a defendant's conduct was a motivating factor in the third party's

injurious actions satisfies the requisite standard." *Parsons v. United States Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015).

Neurological meets this requirement here. The NSA mandates Defendants to establish an IDR process. 42 U.S.C. § 300gg-111(c)(2)(A). It then details required features of this process, including deadlines and other requirements. *Id.* Defendants have utterly failed to follow or enforce these requirements, rendering the IDR process ineffective and illusory. Compl. ¶ 42-46, 48-49, 68-71. For example, a recent nationwide study reported that 91% of all IDR dispute claims commenced in 2022 remain open and unadjudicated. *See* Ctrs. For Medicare and Medicaid Servs., Federal Independent Dispute Resolution Process—Status Update (April 27, 2023), https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf (last visited on June 5, 2023). Of those small number of claims adjudicated favorably for a provider, 87% remain unpaid beyond the statutory deadline. *Id.*

The NSA prohibits out-of-network providers from billing or collecting directly from patients. 42 U.S. Code § 300gg–131(a)(1). Providers therefore depend upon IDR adjudications to obtain appropriate reimbursement for its services. Defendants' ineffective IDR process – including its long delays – has accordingly prevented Neurology from obtaining the reimbursement it needs to cover the costs of providing services.

Defendants contend that Neurology cannot meet the "fairly traceable" element of standing because, they say, Neurology's claimed injury results directly from the health plans and "arbitrators" participating in the IDR process and only indirectly from Defendants' actions. However, as even Defendants admit, standing can be established against parties who indirectly cause a plaintiff's injury. *See*, *e.g.*, *Citizens for Responsibility*, 953 F.3d at 191-92; *Wilding*, 941

F.3d at 1125. Indeed, the Second Circuit has recently stated that a plaintiff's burden in these circumstances is "relatively modest." *See Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013).

For example, in *Fulani v. League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989), a minor party presidential candidate sued the IRS seeking to compel it to revoke the tax-exempt status of the League of Women Voters, contending that the League had engaged in impermissible partisan activity when it denied the candidate the right to participate in Democratic and Republican presidential primary debates. After the district court dismissed the candidate's claim on the merits, she appealed, and the IRS raised lack of standing as a ground for affirmance. *Fulani*, 882 F.2d at 625.

Specifically, the IRS' argued that, even if the candidate could attribute her injuries from exclusion from the debates, that decision was made by the League, not the IRS, and, therefore, the injury flowing from debate exclusion was not fairly traceable to the IRS' tax exemption, but rather to the actions of the third-party League. The Second Circuit rejected this argument, pointing to federal regulations which limited debate sponsors only to tax exempt organizations. Because the League would not have been a position to exclude the candidate from presidential debates without the IRS' granting of the tax exemption, the Court found there was a sufficient nexus between the tax exemption and the candidate's claimed injury to render that injury fairly traceable to the IRS' conduct.[1] *Fulani*, 882 F.2d at 627; *see also Media v. Garcia*, 768 F.3d 1009, 1012-13 (9th Cir. 2014); *Toretto v. Donnelley Fin. Sols., Inc.*, 523 F. Supp. 3d 464, 473-74 (S.D.N.Y. 2021).

Here, it is the Defendants, not the managed care companies, who are statutorily mandated to establish an IDR process containing certain features. 42 U.S.C. § 300gg-111(c)(2). Accordingly, it is the Defendants who are responsible to ensure, and have failed to ensure, that this

[1] Although *Fulani* was decided in 1989, it has been cited with approval by the Second Circuit as recently as 2019, in *Citizens for Responsibility*, 953 F.3d at 214) (reversing district court's lack-of-standing dismissal).

process is effective and non-illusory. This is what caused the injury that Neurology seeks to redress; had Defendants complied with their statutory mandate, Neurology would not have sustained the documented irreparable harm. Thus, the Defendants are in the same position as the IRS in *Fulani* and the financial services company in *Toretto*; it is their conduct that opened the door for the injury to occur.[2] Accordingly, like the Second Circuit concluded in *Fulani* and this Court concluded in *Toretto*, the fairly traceable standing requirement has been satisfied here. *See Fulani*, 882 F.2d at 625; *Toretto*, 523 F. Supp. 3d at 473-74.

B. It Is Likely That Plaintiff's Claimed Injuries-in-Fact will Be Redressed By A Favorable Decision

Article III standing also requires a plaintiff to show that "it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit." *See Sprint Comms. Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008). Importantly, this does not require that court-ordered relief completely redress all injury, *see Knight First Amendment Inst. at Columba Univ. v. Trump*, 302 F. Supp. 3d 541, 561 (S.D.N.Y. 2018)[3], and it "is not a demand for mathematical certainty," *Mhany Mgmt., Inc. v. County of Nassau*, 819 F. 3d 581, 602 (2d Cir. 2016). "All that is required is a showing that such relief be reasonably designed to improve the opportunities of a plaintiff not otherwise disabled to avoid the specific injury alleged." *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391, 394 (2d Cir. 1982).

[2] The sole case that Defendants cite to support their standing argument is the Supreme Court's 1976 decision in *Simon v. E. Ky. Welfare Rgts. Org.*, 426 U.S. 26 (1976). The Second Circuit in *Fulani* and this Court in *Toretto* both distinguished the holding in *Simon* from their case because there was only "pure speculation" in *Simon* as to whether it was the defendant's action – as supposed to some other action – that opened the door for the injury to occur. *Simon* is distinguishable here for the same reason.

[3] The Second Circuit affirmed this decision in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019). After President Trump left office, the Supreme Court vacated judgment and remanded the case with instructions to dismiss as moot. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

Further, any relief provided need not be complete, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 n.4 (1992) (plurality opinion), and a plaintiff "need not show that a favorable decision will relieve his every injury," *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982). "[E]ven if [plaintiffs] would not be out of the woods, a favorable decision would relieve their problem 'to some extent,' which is all the law requires." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 903 (10th Cir. 2012).

Applying these principles here, Neurology has met the redressability requirement. Specifically, Neurology's claimed injury is that Neurology cannot obtain the reimbursement it needs to cover its costs of providing services. Compl. ¶¶ 74-77, 104, 121. As discussed above, this is due to the long delays and other issues rendering the IDR process ineffective. The relief Neurology seeks is a permanent injunction compelling Defendants (1) to follow the statutory deadlines and other mandatory requirements for the IDR process; (2) to remove various IDR process roadblocks; and (3) to require managed care plans and IDR entities subject to their jurisdiction to follow the IDR process deadlines and other requirements. Compl. ¶ 112

As a result of the complete failure of Defendants to follow or enforce the NSA's statutory deadlines and other requirements – as well as the existence of various IDR process roadblocks – 91% of all IDR dispute claims commenced in 2022 remain open and unadjudicated. *See* Emergency Department Practice Management Association ("EDPMA"), No Surprises Act Independent Dispute Resolution Effectiveness, https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-Resolution-Effectiveness-1.pdf (last visited on June 5, 2023). Through the granting of Neurology's requested relief, Defendants will be required to follow and enforce these deadlines and other requirements and remove the IDR

process roadblocks. These actions will, at the very least, reduce the 91% backlog, and increase the number of adjudicated IDR disputes. *Id*.

Since Neurology's current track record is that it obtains its requested additional reimbursement approximately 70% of the time when federal IDR disputes are adjudicated,[4] the reduction in IDR backlog and increase in IDR adjudications resulting from the granting of Neurology's requested relief will provide Neurology a substantial increase in reimbursement it needs to meet its costs of providing services. This more than satisfies the redressability requirement. *See Huntington Branch*, 689 F.2d at 394; *Knight First Amendment*, 302 F. Supp. 3d at 561.

Notwithstanding, Defendants contend that Neurology cannot establish redressability because the IDR backlog reduction and increased adjudication is dependent upon actions of the managed care companies and IDR entities. Defendants are wrong for two reasons.

First, Defendants ignore that among the relief Neurology seeks is a permanent injunction compelling Defendants (1) to follow the statutory deadlines and other mandatory requirements for the IDR process; and (2) to remove various IDR process roadblocks. These are actions that the Defendants can take that directly impact the IDR process. That these actions alone will not completely redress Neurology's injuries, or even that there potentially are other, additional causes for those injuries, do not defeat standing. *See, e.g.*, *Citizens for Responsibility*, 953 F.3d at191-92.

Second, Defendants' argument ignores that it is the Defendants, not the managed care companies or IDR entities, who are statutorily mandated to establish an IDR process containing certain features. 42 U.S.C. § 300gg-111(c)(2). Accordingly, it is the Defendants who are responsible to ensure, and have failed to ensure, that this process is effective and non-illusory. This

[4] *See* Second Supplemental Declaration of Michael Brisman ("Brisman Decl. II"), dated June 5, 2023, ¶¶ 4-6.

is what has caused the injury that Neurology seeks to redress; had Defendants complied with their statutory mandate, Neurology would not have sustained the documented injuries. And, through the NSA, Congress granted the Departments the tools – such as deadlines and other requirements – to carry out their mandate by ensuring that the process is not only established but operates effectively and efficiently. If the Departments uses these tools – as this lawsuit seeks to compel them to do – the managed care companies and IDR entities will be hampered in their ability to delay and derail the process. This meets the redressability requirement. *See, e.g.*, *Citizens for Responsibility*, 953 F.3d at191-92; *Consumer Data Indus.*, 678 F.3d at 905; *Knight First Amendment*, 302 F. Supp. 3d at 561.

Finally, Defendants also point to Neurology's commencement of lawsuits against several managed care companies who failed to comply with their obligation to pay additional reimbursement determined by the IDR process within 30 days, *see* 42 U.S.C. § 300gg-111(c)(6), as support for their argument that Neurology's remedy is with the managed care companies and not the Defendants. This is misplaced; that Neurology has been forced to commence costly federal court litigation against managed care companies to force them to comply with a clear statutory mandate that Defendants were obligated to enforce just further demonstrates Defendants' complete disregard of their responsibilities under the NSA. Neurology should not be required to expend its scarce financial resources to commence hundreds, if not thousands, of federal court lawsuits because Defendants have chosen to ignore a clear statutory mandate. In any event, this requirement to pay additional reimbursement is just one statutory mandate at issue in this lawsuit; even if Neurology was granted complete relief in these lawsuits, it would only address a small subset of Defendants' failures and Neurology's injury.

C. If Court Determines Complaint Does Not Satisfy Article III Standing Requirements, Plaintiff Should Be Granted Leave to Re-Plead

While Neurology vigorously contests that the Complaint fails to adequately establish standing, to the extent that the Court determines that there are any deficiencies in the Complaint, the appropriate remedy for any such defects is leave to re-plead, rather than dismissal.

This is because "[i] t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Laface v. E. Suffolk Boces,* 349 F. Supp. 3d 126, 163 (E.D.N.Y. 2018); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

Rule 15(a)(2) "reflects two of the most important principles behind the Federal Rules: pleadings are to serve the limited role of providing the opposing party with notice of the claim or defense to be litigated ... and `mere technicalities' should not prevent cases from being decided on the merits." *Id.*

Here, Defendants should not be permitted, as the result of mere technical defects, if any, in the Complaint, to escape its statutory obligations. Accordingly, leave to re-plead would be the proper remedy if the Court finds that Defendants have their extremely high burden here.

II. Because The Complaint Contains Sufficient Factual Matter To State Claims For Relief That Are Plausible On Their Face, Dismissal Under Rule 12(b)(6) Is Not Warranted

Defendants also seek Rule 12(b)(6) dismissal of all claims here. To survive dismissal, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This Court must "assess the legal feasibility of the complaint, not . . . the weight of the evidence which might be offered in support thereof." *CFTC v. Gorman*, 587 F. Supp. 3d 24, 38 (S.D.N.Y. 2022) (quoting *In re Columbia Pipeline, Inc.*, 405 F. Supp. 3d 494, 505 (S.D.N.Y. 2019)).

While a complaint must be dismissed where its factual allegations fail to render the claims facially plausible, here, the "factual content" of the Complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Accordingly, for the reasons below, this Court should deny Defendants Rule 12(b)(6) dismissal.

A. Plaintiff Has Alleged Sufficient Claims For Relief Under the APA and the All Writs Act

Neurology's first two claims for relief (Complaint ¶¶ 82-96) seek injunctive and declaratory relief under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*, and the All Writs Act ("AWA"), 28 U.S.C. § 1651(a).

APA § 702 states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. APA § 706 defines the scope of this review, providing that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be," inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706.

As the Complaint explains in detail, Neurology is entitled under both the APA and the AWA to a declaration and a writ of prohibition or mandamus for Defendants' violation of the No Surprises Act. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

In response, Defendants make three main arguments. First, that Neurology's claims do not allege that Defendants failed to take a discrete action that they are unambiguously required to take. Second, that Neurology is seeking review of the Defendants' enforcement decisions, which are committed to the agencies' discretion and, they allege, unreviewable. And third, that Neurology

"essentially" seeks is the wholesale improvement of the IDR process, which, they allege, is also unreviewable. As we explain below, Defendants' arguments are legally and factually incorrect.

1. Plaintiff Has Based Its Claims On Discrete Actions That Defendants Were Required, But Failed, To Take

As discussed above, Defendants argue that Rule 12(b)(6) dismissal is appropriate because Neurology does not allege, and cannot show, that Defendants failed to take a discrete action they are unambiguously required to take. This is incorrect.

APA § 706(1) authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This has been interpreted as requiring a showing that a federal agency failed to take "*discrete* agency action that [an agency] is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004); *Sharkey v. Quarantillo*, 541 F.3d 75, 89 n.13 (2d Cir. 2008); *Adueva v. Mayorkas*, 2021 U.S. Dist. LEXIS 149157, *14-*15 (E.D.N.Y. 2021); *Litvin v. Chertoff*, 586 F. Supp. 2d 9, 11 (D. Mass. 2008).

Through the NSA, Congress mandated that Defendants establish an IDR process to resolve disputes regarding the reimbursement of out-of-network medical claims. 42 U.S.C. § 300gg-111(c)(2)(A). The statutory language is clear: "Not later than 1 year after the date of the enactment of this subsection, [Defendants] *shall establish* by regulation one independent dispute resolution process . . . under which, . . . a certified IDR entity under paragraph (4) determines, . . . the amount of payment under the plan or coverage for such item or service furnished by such provider or facility." *Id*.

The NSA goes on to lay out, in detail, the required features of this IDR process, including deadlines by which certain actions must be taken. 42 U.S.C. § 300gg-111. For example. the NSA mandates initial health plan payments (or denials) be issued within 30 days. *Id.* §§ 300gg-111(a)(1)(C)(iv), 300gg-111(b)(1)(C). If there is a dispute between the health plan and the

provider regarding the proper reimbursement amount, the NSA then mandates a 30-day open negotiation period. *Id.* § 300gg-111(c)(1)(A). If open negotiations are unsuccessful, and there is no specified state law that applies to resolve the parties' dispute, the NSA then restricts the ability of either party to bring an IDR proceeding to a four-day period. *Id.* § 300gg-111(c)(1)(B). Once brought, the NSA mandates that decision be rendered within 30 days. *Id.* § 300gg-111(c)(5)(A). If the IDR entity grants additional reimbursement to the provider, the NSA mandates that this additional reimbursement be provided within 30 days of decision. *Id.* § 300gg-111(c)(6).

In addition to deadlines, the NSA sets forth other mandatory requirements of the IDR process. For example, the NSA mandates the criteria that Defendants must use to select IDR entities, including a requirement that the selection process "shall ensure" that the entity abides by and carries out the NSA's deadlines and other requirements. 42 U.S.C. § 300gg-111(c)(4). The NSA also mandates criteria that the Defendants must use when considering the batching of items and services. *Id.* § 300gg-111(c)(3). The NSA also establishes the definition of a "specified state law," that exempts an otherwise eligible dispute from the Act's IDR process in favor of a state IDR process. *Id.* § 300gg-111(a)(3)(I). The NSA mandates that all reimbursement payments be made to the providers and not the patients. *Id.* §§ 300gg-111(a)(1)(C)(iv)(II), 300gg-111(b)(1)(D).

As the Complaint alleges, the IDR process that Defendants have purported to establish has been a complete failure. More than 90% of the IDR proceedings initiated in 2022 remained unadjudicated as of March 2023. *See* Emergency Department Practice Management Association ("EDPMA"), No Surprises Act Independent Dispute Resolution Effectiveness, https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-Resolution-Effectiveness-1.pdf (last visited on June 5, 2023). More than 95% of IDR proceedings remained unadjudicated for over five months. *Id.* Fully 87% of payers

have failed to pay in accordance with IDR additional payment determinations at all. *Id*. In addition to this general evidence of failure, Neurology has provided specific evidence of failures of the process in its own experience. Brisman Decl. ¶¶ 12-14, Exh. B[5]. There is also extensive discussion in the press of the utter failure of the process. *See* https://www.jdsupra.com/legalnews/no-more-surprise-medical-bills-5705060/ (last visited on June 5, 2023); https://www.medpagetoday.com/opinion/second-opinions/104208 (last visited on June 5, 2023).

That the IDR process has failed should come as no surprise given Defendants' failure to follow the statutory deadlines and other mandatory requirements for the IDR process, to remove various IDR process roadblocks, and to require managed care plans and IDR entities to follow the IDR process deadlines and other requirements.

For example, notwithstanding the fixed, mandatory timelines established by Congress for the IDR process, it took months for Defendants' IDR portal to open, and it then failed to remain open for considerable periods of time thereafter. Compl. ¶¶ 46-47. Defendants likewise admit that they have certified only 26% of the IDR entities they needed based on estimated volume, and actual volume is 15.2 times what they anticipated. *See* Defs. Brief at pp. 7-8. Thus, the Departments' original estimate was that it needed 1 certified IDR entity for every 440 IDR proceedings, but currently, it has only certified enough IDR entities to have 1 certified IDR entity for every 25,756 proceedings. *Id*. The NSA became law in December 2020 and became effective in January 2022. Despite the time that has elapsed – 30 months from enactment and 18 months from effective date – the Defendants have not resolved these issues.

Defendants also have not taken appropriate steps to ensure that the health plans and IDR entities observe these mandatory deadlines and other requirements. As explained above, over

[5] The Supplemental Declaration of Michael Brisman ("Brisman Decl."), dated May 19, 2023 was filed under seal in accordance with the Court's directives.

90% of 2022 IDR proceedings remained unresolved as of March 2023. *See* Emergency Department Practice Management Association ("EDPMA"), No Surprises Act Independent Dispute Resolution Effectiveness, https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-Resolution-Effectiveness-1.pdf (last visited on June 5, 2023). More than 95% of the commenced IDR proceedings have remained pending for more than five months. *Id*. Fully 87% of payers have not paid in accordance with IDR entity decisions; 1/3rd of providers have not received reimbursement for any of their winning IDR decisions. *Id*. Despite this, only 14% of providers' complaints have even been acknowledged by CMS, and Defendants' own statistics report findings against health plans in only 7% of the complaints. *Id*.

Further, Congress has made it clear that the NSA's IDR process does not apply when a state has a specified state law that meets specified criteria regarding the provision of an alternative IDR process. 42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I). New York's specified state law is Financial Services Law §§ 601-08, which require disputes involving surprise bills be submitted to a New York IDR process if a New York-regulated health plan is involved. *Id.*

As alleged in the Complaint, New York has consistently taken the position that elective procedures, performed in a hospital, by an out-of-network provider, on a New York-regulated health plan beneficiary, who was aware before arriving in the hospital that the provider was out-of-network, but chose to proceed anyway, do not fall within the definition of a surprise bill under Financial Services Law § 603(h)(1) and are accordingly ineligible for New York IDR.

Because there is not a specified state law that applies, the No Surprises Act requires that these disputes be accepted for federal IDR. 42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I). However, Defendants admit that, when Neurology and other similarly situated out-

of-network providers have taken these cases to federal IDR, Defendants have refused to accept these disputes for federal IDR. Defendants' explanation for this refusal is that "[w]hen a specified state law, such as New York's surprise bill law, applies to a claim, it applies regardless of whether a patient has waived her state law balance billing protections by providing consent to receive out-of-network care, and the Act expressly excludes from its protections, in certain circumstances, patients who have provided notice and consent."

However, as discussed above, New York law expressly excludes from the definition of a surprise bill "a bill received for health care services when a participating provider is available and the insured has elected to obtain services from a non-participating provider." Financial Services Law § 603(h). Thus, in the situations at issue, where a patient is aware that there is a participating provider available but elects to obtain services from a non-participating provider, no surprise bill is created, state IDR is unavailable, and no specified state law applies. The No Surprises Act accordingly compels Defendants to accept these disputes in federal IDR.[6] Defendants' failure to do so states viable claims under the APA and the AWA.

In conclusion, Congress included a discrete provision in the No Surprises Act mandating the Departments to establish an IDR process. Congress also set forth, in detail, the essential features of that process, including mandatory deadlines and other requirements. The Departments, however, have completely failed to follow the statutory deadlines and other mandatory requirements established for the IDR process, and also failed to require managed care plans and IDR entities to similarly follow the IDR process deadlines and other requirements. The result is an IDR process with a 90%+ failure rate. Such a situation, created by Defendants, constitutes a

[6] Defendants suggest in their moving papers that these patients signed the notice and consent forms permitted under the No Surprises Act to exempt certain surprise bills from coverage of the Act. This is mere speculation by Defendants; the truth is that no such documents were obtained from the patients at issue.

complete abrogation of their mandate to establish an IDR process. A woefully and admittedly ineffective IDR process is no IDR process at all. Neurology has therefore stated a claim under both the APA and the AWA.

2. Plaintiff Is Not Challenging Defendants' Enforcement Decisions, But Rather Its Utter Failure To Comply With Congress' Directions When Enacting The No Surprises Act

Defendants' second argument for dismissal of the APA and AWA claims is that, to the extent that Neurology's claims are based on its contention that Defendants failed to require managed care plans and IDR entities to follow the IDR process deadlines and other requirements, Neurology is essentially challenging Defendants' enforcement decisions, which, they claim, are unreviewable based on *Heckler v. Chaney*, 470 U.S. 821 (1985). Defendants are wrong.

The situation here is far different than the situation presented in *Heckler.* In that case, the claim challenged the FDA's decision not to use its authority under the Food, Drug, and Cosmetic Act to take actions against drugs used in carrying out death sentences. The FDA was enforcing the provisions of the Act against many other drugs; it had just decided that an enforcement action was not warranted against the death sentence drugs for various policy reasons. The Court held that the FDA's decision was not reviewable under the APA because it was within the agency's discretion to decide which drugs warranted enforcement actions and which did not. *Heckler*, 470 U.S. at 838.

Here, Neurology's claim is not a challenge to Defendants' decision about which health plans and IDR entities warranted enforcement actions and which did not. Rather, Neurology's claim is that Defendants completely failed to do *anything* to enforce the statutory deadlines and other requirements that the Defendants themselves, the health plans, and the IDR entities were obligated to follow. *See* 42 U.S.C. § 300gg-111. There was no weighing of competing interests, or

an assessment of where enforcement authority is best placed. Put simply, there was no discretionary decision made, only a complete abdication of statutory responsibility.

Indeed, the Court in *Heckler* recognized that the facts there did not present a "situation where it could be justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities. *Heckler*, 470 U.S. at 834 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159 (1973) (*en banc*)). *Heckler* goes on to state "[a]lthough we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'" *Heckler*, 470 U.S. at 834 n.4.

Over the last three decades, courts have applied this *Heckler/Adams* exception to reject government arguments that it was engaging in unreviewable discretionary enforcement decisions in similar situations to here. *See, e.g.*, *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin*, 740 F.2d 21, 32. (D.C. Cir. 1984); *Texas v. United States*, 555 F. Supp. 3d 351, 413 (S.D. Tex. 2021); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018); *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 488-89 (S.D.N.Y. 1982).

The facts here fall squarely within the *Heckler/Adams* exception. Defendants completely failed to do anything to enforce the statutory deadlines and other requirements. So lacking have Defendants' enforcement efforts been that they only bother to respond to complaints 14% of the time. *See* Emergency Department Practice Management Association ("EDPMA"), No Surprises Act Independent Dispute Resolution Effectiveness, https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-Resolution-Effectiveness-1.pdf

(last visited on June 5, 2023). More than 95% of the pending IDR proceedings have been outstanding more than five months. *Id*. Managed care companies have failed to pay additional reimbursement required by the IDR determination in 87% of the proceedings. *Id*. This is not an issue of enforcement discretion; it is enforcement abdication, which is reviewable under the APA and AWA.

Congress enacted the NSA, which was signed into law by the President. It is the law of the land. Defendants are obligated therefore to carry it out. This Court should not countenance a situation where Executive Branch agencies are permitted to ignore or override valid Legislative Branch enactments simply by unilaterally choosing not to enforce them. Such a situation runs afoul of the basic Constitutional separation of powers doctrine. *See* U.S. Constitution, Art. II, § 3 (President "shall take Care that the Laws be faithfully executed"); *see also Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) ("[u]nder our system of government, Congress makes laws and the President, acting at times through agencies, . . . 'faithfully executes' them").

3. Plaintiff Is Not Seeking "Wholesale Improvement" Of A Governmental Program, But Rather To Have Defendants Honor Their Statutory Obligations

Defendants' third argument for dismissal of the APA and AWA claims is that the APA (and presumably the AWA) does not permit claims for "wholesale improvement" of a governmental program.

For support of this argument, Defendants cite two main cases, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 879 (1990). A close review of these cases, however, reveal that they simply stand for the proposition set forth in Defendants' first argument for dismissal: That to prevail on an APA § 706(1) challenge of "agency action unlawfully withheld or unreasonably delayed," plaintiff must show that a federal agency failed to take "*discrete* agency action that [an agency] is *required to take.*" *Norton*, 542

U.S. at 64 (2004); *see also Lujan*. 497 U.S. at 891. The reason for this requirement, as stated by the Supreme Court in *Norton* and *Lujan*, is that a challenger of governmental action "cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department, or the halls of Congress, where programmatic improvements are normal made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." *Norton*, 542 U.S. at 64 (quoting *Lujan*, 497 U.S. at 891).

Thus, the way to avoid running afoul of the prohibition against an APA claim seeking "wholesale improvement" of a governmental program is to tether its challenge to discrete agency action that the agency was required to take but did not. *Id.* As we explain in detail in Point II.A.1 above, that is precisely what the Complaint does here, showing that Congress included a discrete provision in the No Surprises Act mandating the Departments to establish an IDR process and also set forth, in detail, the essential features of that process, including mandatory deadlines and other requirements. The Departments, however, completely failed to follow the statutory deadlines and other mandatory requirements established for the IDR process and failed to require managed care plans and IDR entities to similarly follow the IDR process deadlines and other requirements. It is this that Neurology challenges here. That Neurology's challenge is broad and the relief it seeks is extensive is because Defendants completely abrogated many of their statutory mandates. To permit Defendants in this circumstance to evade review because it engaged in far-ranging and multiple violations of its statutory mandates would be to reward misconduct and encourage broad-ranging violations of statutory mandates by agencies.

For these reasons, this Court should reject Defendants' "wholesale improvement" argument here.

B. Plaintiff Has Alleged Sufficient Constitutional Claims For Relief

In addition to seeking Rule 12(b)(6) dismissal of Neurology's APA and AWA claims, Defendants also seek dismissal of Neurology's constitutional due process and taking claims. (Complaint ¶¶ 97-130.) Defendants' arguments for dismissal, however, are without merit and therefore should be rejected by this Court.

For example, Defendants first contend that these claims are subject to dismissal for the same reasons that they contend the APA and AWA claims are subject to dismissal. Since, as we explain in detail above, Defendants' proffered reasons why the APA and AWA claims are subject to dismissal are wrong on both the law and the facts, these reasons cannot serve as a basis for dismissal of the constitutional due process and taking claims.

Second, Defendants contend that this Court must dismiss Neurology's constitutional claims because the Court, in *Haller v. U.S. Dep't of Health & Human Servs.*, 621 F. Supp. 3d 343, 356-57 (E.D.N.Y. 2022), "already rejected the notion that 'a health care provider's entitlement to reasonable payment is a cognizable property interest for purposes of a due process claim' involving the No Surprises Act." (Def's Memo at 22.) Defendants, however, misstate *Haller*'s holding. *Haller* did not reject the concept that a health care provider's entitlement to payment is a cognizable property interest, it merely found that the claim was not ripe because, at that point, there was no showing that the plaintiff provider's reimbursement had been impacted by the government's conduct under the No Surprises Act. *See Haller*, 621 F. Supp. 3d at 356-57. This is certainly not the case here; as discussed above, there is an ample showing that Neurology's reimbursement has been impacted by Defendants' conduct.

In this Circuit, "[i]n order to assert a violation of procedural due process rights, a plaintiff must 'first identify a property right, second show that the [government] has deprived him of that right, and third show that the deprivation was effected without due process.'" *DeFabio v. E.*

Hampton Union Free Sch. Dist., 658 F. Supp. 2d 461, 487 (E.D.N.Y. 2009) (quoting *Local 342, Long Island Pub. Serv. Emps. v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994)).

As alleged in the Complaint, the property right as issue here is the right of a physician, after providing medically necessary services, to be compensated at least at the level of the cost for providing those services. New York law recognizes this property right. *See, e.g.*, *Huntington Hosp. v Abrandt*, 4 Misc 3d 1, 3 (App Term, 10th Jud Dist 2004); *Goldman v Ambro*, 134 Misc 2d 655, 656 (Nassau County Ct 1987); *Nassau Anesthesia Assocs. P.C. v Chin*, 32 Misc 3d 282, 283 (Nassau County Dist Ct 2011). The Complaint also alleges, in detail, how the Defendants have deprived him of that right without any effective procedure to challenge that deprivation.[7] Accordingly, Neurology has made out viable claim for constitutional due process and takings violations at the pleading stage.

C. If Court Determines Complaint Does Not Allege Sufficient Claims Under Rule 12(b)(6), Plaintiff Should Be Granted Leave to Re-Plead

While Neurology vigorously contests that the Complaint fails to legally viable claims under the APA, AWA, and for constitutional due process and takings violations, to the extent that the Court determines that there are any deficiencies in the Complaint, as discussed above, the appropriate remedy for any such defects is leave to re-plead, rather than dismissal. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.")).

[7] Defendants allege that, at least with respect to the failure to timely pay additional reimbursement due Neurology under the IDR process, it is the managed care companies, and not them, that are depriving Neurology of its alleged property rights. This misstates the relationship of the parties. As discussed above extensively, it is Defendants who have the ability and obligation to compel the managed care companies' compliance with deadlines and ensure that payments are made in accordance with the statutory mandate. This has not been done and therefore has caused the deprivation of Neurology's property rights.

III. Given The Grievous and Irreparable Injuries That Plaintiff Is Suffering Due To Defendants' Conduct, This Court Should Exercise Its Discretion To Grant The Requested Preliminary Injunction

As discussed above, Neurology here seeks a preliminary injunction to redress the irreparable harm caused it because of Defendants' failure to honor its statutory obligation to implement an effective IDR process.

Under Rule 65, a preliminary injunction is warranted when a party demonstrates (1) a clear or substantial likelihood of success on the merits; (2) irreparable harm absent injunctive relief; (3) the balance of equities tips in its favor; and (4) that the public's interest weighs in favor of granting an injunction. *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). As we explain below, Neurology has established all four requirements and, accordingly, this Court should issue the requested preliminary injunction

A. Plaintiff Has Demonstrated A Clear or Substantial Likelihood Of Success On The Merits

Neurology here asserts claims seeking injunctive and declaratory relief under the APA and the AWA. APA § 706(1) authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Through the NSA, Congress mandated that Defendants establish an IDR process. 42 U.S.C. § 300gg-111(c)(2)(A). The NSA goes on to lay out, in detail, the required features of this IDR process, including fixed, nonwaivable deadlines by which certain actions must be taken. *Id.* In addition to deadlines, the NSA sets forth other mandatory requirements of the IDR process, including those relating to the selection of IDR entities, the batching of items and services, the definition of a specified state law for determining with a dispute is subject to a state IDR process, and how reimbursement payments are made. *Id.*

Defendants cannot dispute that the IDR process has been a complete failure. More than 90% of the IDR proceedings initiated in 2022 remained unadjudicated as of March 2023. *See* Emergency Department Practice Management Association ("EDPMA"), No Surprises Act Independent Dispute Resolution Effectiveness, https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-Resolution-Effectiveness-1.pdf (last visited on June 5, 2023). More than 95% of IDR proceedings remained unadjudicated for over five months. *Id*. Fully 87% of payers have failed to pay in accordance with IDR additional payment determinations at all. *Id*. In addition to this general evidence of failure, Neurology has provided specific evidence of failures of the process in its own experience. *See* Brisman Decl. ¶¶ 12-14, Exh. B.

Given all the above, Defendants have utterly failed to honor Congress' statutory mandates regarding the establishment and operation of the NSA. Accordingly, Neurology is clearly and substantially likely to succeed on the merits of their APA and AWA claims. *See Sharkey*, 541 F.3d at 89 n.13; *Adueva*, 2021 U.S. Dist. LEXIS 149157, at *14-*15 (E.D.N.Y. 2021); *Litvin*, 586 F. Supp. 3d at 11.

Finally, this Court should reject Defendants' contention that the requested preliminary injunction here should be denied because it would, they contend, grant Neurology substantially all the relief that Neurology could recover at the conclusion of a full trial. Even if this were the case – which Neurology does not concede – the only consequence of seeking substantially all the relief is that the injunction is then evaluated using a heightened standard. *See Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) ("[A] mandatory injunction should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief. The clear or

substantial showing requirement … thus alters the traditional formula by requiring that the movant demonstrate a greater likelihood of success." This heightened standard "has also been applied where an injunction … will provide the movant with substantially all the relief sought" making it incapable of being undone and rendering a trial on the merits meaningless).

Here, as discussed above, Neurology has made a clear and substantial showing that it is entitled to the relief requested, and as explained below, it has demonstrated that extreme or very serious damage will result from a denial of preliminary relief. In any event, the concerns attendant with affording substantially all the relief on preliminary injunction are not present here given Defendants' acknowledgment that, as fundamentally an APA claim, there is no discovery, and the case accordingly will be ripe for merits adjudication right after the administrative record is filed.

B. Plaintiff Has Demonstrated It Is Likely To Suffer Irreparable Harm In The Absence of Preliminary Relief

The record evidence here demonstrates that Neurology is likely to suffer irreparable harm if the requested preliminary injunctive relief is not granted. Specifically, the NSA mandates Defendants to establish an IDR process to resolve disputes regarding the reimbursement of out-of-network medical claims and sets forth the required features of this process, including deadlines and other requirements. 42 U.S.C. § 300gg-111(c)(2)(A). Defendants have utterly failed to follow or enforce these deadlines or other requirements, rendering the IDR process ineffective and illusory.

As but one example, 91% of all IDR dispute claims commenced in 2022 remain open and unadjudicated. *See* Emergency Department Practice Management Association ("EDPMA"), No Surprises Act Independent Dispute Resolution Effectiveness, https://edpma.org/wp-content/uploads/2023/03/EDPMA-Data-Analysis-No-Surprises-Act-Independent-Dispute-

Resolution-Effectiveness-1.pdf (last visited on June 5, 2023). Of those small number of claims adjudicated favorably for a provider, 87% remain unpaid beyond the statutory deadline. *Id*.

Neurology's own experience is similar. For example, from January 1, 2022 through March 15, 2023, Neurology submitted 1,050 claims to No Surprises Act IDR. *See* Brisman Decl. ¶¶ 12-14, Exh. B. Of those submitted IDR claims, only 204 have been adjudicated, with the remainder – 81% -- remaining undecided. *See* Brisman Decl. ¶ 13, Exh. B. Of these claims, the IDR entity determined that the health plan owed Neurology additional reimbursement in 75. *Id*. Yet, Neurology has only received the additional reimbursement payments in only a handful of them. *Id*. Neurology is owed over $3,000,000 in additional reimbursement on these decisions. *Id*.

Neurology's irreparable harm arises from the fact that it is prohibited, under the No Surprises Act, from billing or collecting directly from patients. It therefore depends upon IDR adjudications to obtain appropriate reimbursement for its services. The IDR process delays, low initial reimbursements, and unpaid additional reimbursement awarded in IDR decisions, have all combined to place Neurology in serious financial jeopardy. *See* Brisman Decl. ¶¶ 17-27, Exh. B. The sealed Supplemental Declaration of Michael Brisman explains the dire nature of Neurology's finances, which are worsening at a rapidly increasing rate each day. *Id*.

This significant and sudden drop in revenues has created dire consequences for Neurology. It has, for example, forced Neurology to take urgent and drastic steps to cut expenses and services, including the termination of employee physicians, laying off staff, streamlining operations, reducing insurance premiums on officer life and disability coverage, and terminating subleases and leases for various locations. *See* Brisman Decl. ¶¶ 23-27. Neurology has also directed resources to conduct a comprehensive review of pricing, costs, billing procedures, and other financial aspects of operations to identify additional savings. *Id*. at ¶¶ 23-26.

No business – much less an independent medical practice in one of the most expensive regions of the country – can long sustain such financial difficulties. Unless the Court steps in and grants the requested injunctive relief, Neurology will be placed in severe financial jeopardy, which will have the serious impact of reducing the availability of high-quality and timely medically necessary health care services for the public in the New York area.

This record establishes irreparable injury. *See Kelco Disposal, Inc. v. Browning Ferris Indus*., 845 F2d 404, 408 (2d Cir. 1988) (recognizing that consistently low prices will drive businesses from market); *Fairfield County Med. Ass'n v. United Healthcare of New Eng*., 985 F. Supp. 2d 262, 271 (D. Conn 2013) (disruption of the physician-patient relationship can cause irreparable harm that justifies issuing preliminary injunctive relief).*see also Semmes Motor Co. v. Ford Motor Co*., 429 F.2d 1197 (2d Cir. 1970) (court upheld issuance preliminary injunction where defendant's actions would destroy plaintiff's business); *see also Henderson v. Bodine Aluminum, Inc*., 70 F3d 958, 961 (8th Cir. 1995) ("It is hard to imagine a greater harm than losing a chance for potentially life-saving medical treatment; *Samele v. Zucker*, 324 F. Supp3d 313, 333 (E.D.N.Y. 2018) ("Loss of medical care constitutes irreparable harm").

Defendants' response to this record is that Neurology should simply stand by and wait for the roadblocks alleviate and it gets its money. Given the very real risks to Neurology's survival, however, this is not a viable path. As stated in *Semmes*, the "contention that Semmes failed to show irreparable injury from termination is wholly unpersuasive. Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond. But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damage award. *Id.*

at 429 F.2d at 1205; *see also Tom Doherty*, 60 F.3d at 38 (irreparable harm found where the very viability of the plaintiff's business is threatened). Accordingly, this Court should grant the request preliminary injunction.

C. The Balance Of Equities Tips In Plaintiff's Favor And Is In The Public Interest

In the present case, the balance of equities undoubtedly favors Neurology as its business cannot be sustained in the current environment, which was created by Defendants' complete and utter failure to honor their statutory obligations under the No Surprises Act to the point where the IDR process they established has a failure rate of greater than 90%. Defendants have been aware of these issues – and tellingly do not dispute them – but admittedly have not taken any serious steps to rectify them.

Moreover, the requested injunction is in the public interest. All the injunction does is fundamentally compel the Defendants to do what they are statutorily obligated to do under the No Surprises Act. As Defendants themselves acknowledge, Congress enacted the Act with an important and laudatory purpose in mind; Defendants should be compelled to carry out that purpose.

D. This Court Should Advance The Final Merits Determination And Consolidate It With The Preliminary Injunction Hearing

Under Rule 65(a)(2), "before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." *D. L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 158-159 (2d Cir. 2002). Under the rule, the Court has "broad discretion" to order consolidation, *see Jet Experts, LLC v. Asian Pac. Aviation Ltd.*, 602 F. Supp. 3d 636, 644 (SDNY 2022), in circumstances – such as those present here – where "discovery has been concluded or if it is manifest that there is no occasion for discovery, consolidation may serve

the interests of justice." *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1035 (2d Cir. 1979).

Neurology satisfies all the requirements for this court to advance and consolidate the preliminary injunction with the final merits determination. Admittedly, discovery in this case – even at this early posture – is substantially completed. The parties have each submitted Declarations with exhibits confirming the allegations in the Complaint. Where all that remains is the Defendants to certify the administrative record,[8] the Court will soon be in a position to decide the legal issues that remain.

In addition, as shown above, this Court can advance a decision on the final merits because Neurology has demonstrated the need for expedition relief due to irreparable harm it continues to suffer as a result of Defendants' failure to comply with No Surprises Act. *See Maruzen Int'l Co. v. Bridgeport Merchandise, Inc.*, 1991 U.S. Dist. LEXIS 9233, *4 (SDNY July 10, 1991) ("the trial court should consider whether a real exigency has been shown that justifies giving the case preference over other disputes that already are on the docket.") Accordingly, this Court should issue an order pursuant to Rule 65(a)(2) to advance and consolidate the preliminary injunction with the final merits determination. *See Woe v. Cuomo*, 801 F.2d 627, 629 (2d Cir. 1986).

[8] *See* DE 14 (Additionally, the parties agree that a schedule for discovery and trial is not necessary in this case. This case is governed by the Administrative Procedure Act ("APA"), which authorizes judicial review of agency action alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or constitutional right. 5 U.S.C. § 706. In such cases, the "task of the reviewing court," should it reach the merits, "is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) and grant Plaintiff's request for injunctive relief, or in the alternative, issue an order pursuant Rule 65(a)(2) advancing and consolidating the hearing on the preliminary injunction with a determination on the final merits.

Dated: Uniondale, New York
June 5, 2023

HARRIS BEACH, PLLC
Attorneys for Petitioners

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NEUROLOGICAL SURGERY PRACTICE OF LONG ISLAND, PLLC,

Plaintiff,

-against-

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; XAVIER BECERRA, in his official capacity as Secretary, United States Department of Health and Human Services; JANET YELLEN, in her official capacity as Secretary, United States Department of the Treasury; and JULIE A. SU, in her official capacity as Acting Secretary, United States Department of Labor,

Defendant.

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Case No.: 1:23-cv-2977 (BMC)

SECOND SUPPLEMENTAL DECLARATION OF MICHAEL H. BRISMAN, M.D. IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

MICHAEL H. BRISMAN, M.D., declares under the penalties of perjury and pursuant to 28 U.S.C.§ 1746 that:

1. I am the Chief Executive Officer of the Plaintiff Neurological Surgery Practice of Long Island, PLLC (the "Practice" or "Plaintiff") and am fully familiar with the facts set forth in this Declaration, which I submit in further support of the Practice's currently pending motion for a preliminary injunction.

2. On May 11, 2023, I submitted my initial Declaration supporting the currently pending preliminary injunction motion. During an initial conference with the Court later that day, the Court gave the Practice the opportunity to set forth in more detail the reasons why it believes that it will suffer irreparable damage without the granting of the requested preliminary injunction.

Because making this showing necessitates the provision of confidential and proprietary Practice business information, this Court granted the Practice's request at the conference to permit this information to be provided under seal.

3. On May 19, 2023 I submitted a Supplemental Declaration outlining the irreparable harm that the Practice has – and continues – to experience due to the illusory IDR process implemented by the Defendants.[1]

4. In Defendants' moving papers, they cite to a CMS dataset that found a 71% success rate wherein claims were submitted to an IDR and the providers were successful in obtaining an IDR award of additional compensation. *See* Ctrs For Medicare and Medicaid Servs., Federal Independent Dispute Resolution Process—Status Report (April 27, 2023), https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf (last visited on June 5, 2023).

5. The purpose of this additional Supplemental Declaration is to demonstrate that that the hardships that Neurology is experiencing as a result of Defendants implementation of the No Surprises Act is in line with the national average.

6. In cases that Neurology has submitted to the federal IDR, and received a decision, Neurology is experiencing a 75% success rate in those cases, slightly up from the national average.[2]

7. However, even in those cases wherein Neurology was the prevailing party, only a handful of those claims have been fully paid and, those that were paid, were well beyond the 30-day statutory period pursuant to 42 U.S.C. § 300gg-111(c)(6).

[1] The Supplemental Declaration was submitted under seal in accordance with this Court's directives.
[2] *See* Ctrs For Medicare and Medicaid Servs., Federal Independent Dispute Resolution Process—Status Report (April 27, 2023), https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf (last visited on June 5, 2023).

8. As stated in my prior Declarations, the IDR process delays, low initial reimbursements, and unpaid additional reimbursement awarded in IDR decisions, have all combined to place the Practice in serious financial jeopardy.

9. For these reasons, and those stated in Plaintiff's initial moving papers, the Practice, has suffered significant and irreparable injury. We have been forced to confront a situation where, due to the Departments' actions, our reimbursements have been drastically reduced and delayed, at the same time our costs for providing their medically necessary services have significantly risen.

10. There is no adequate remedy at law for these irreparable injuries. While monetary damages may make up for lost revenue as a result of the Departments actions, the Practice's patients – and those patients of other similarly situated out-of-network providers – will suffer the loss of continuity of medical care, significant delays in the provision of care due to the lack of or restricted access to out-of-network physicians, potential exposures to surprise and balance bills, and significant increases in adverse health outcomes, including serious illness and the potential loss of life.

11. Due to the above, and the previously submitted papers, the Practice respectfully requests that this Court grant its motion for preliminary injunction, mandating that Defendants, during the pendency of this lawsuit:

a. Direct health plans subject to the No Surprises Act to either make an initial payment to the provider or issue of notice of denial of payment within 30 calendar days after the out-of-network provider transmits its bill to the health plan, and enforce compliance with this direction;

b. Direct health plans subject to the No Surprises Act to make all initial payments under the No Surprises Act to the out-of-network providers who rendered the medical services, as opposed to the patients, and monitor compliance with this direction;

c. Direct health plans subject to the No Surprises Act to ensure that (i) the explanation of benefits (EOB) forms required by the No Surprises Act be sent to the out-of-network providers who rendered the medical services; (ii) these EOBs clearly indicate the issuing health plan's understanding whether the case

is eligible for independent dispute resolution (IDR) under either federal or state law; and (iii) the EOBs report the health plans' proposed qualified payment amount (as defined according to the No Surprises Act) for each CPT code reflected on the EOB, and monitor compliance with these directions.

d. Devote sufficient monetary and other resources required to ensure that the IDR process time frames established by the No Surprises Act are complied with;

e. Direct health plans to take all steps necessary to ensure that the IDR process time frames established by the No Surprises Act are complied with, and monitor compliance with these directions;

f. Establish a streamlined process for determining threshold eligibility issues, along with providing an explanation for why a dispute is eligible or ineligible for IDR to eliminate roadblocks in the IDR processing system;

g. Allow a reasonable batching of similarly situated IDR claims;

h. Follow the provisions of the No Surprises Act and require that reimbursement disputes relating to elective procedures performed in a New York state-located hospital, by an out-of-network provider, on a fully insured or otherwise state regulated health plan beneficiary, who was aware before he or she came to the hospital that the provider was out of network, but chose to proceed anyway, be accepted by and decided through federal IDR process;

i. Direct health plans to pay additional reimbursement due providers, as determined through the IDR process, within 30 days, as required by the No Surprises Act, and monitor compliance with this direction; and

j. Require Defendants to provide a status report to the Court weekly regarding Defendants' compliance with this Order:

I declare under penalties of perjury that the foregoing is true and correct.

Dated: Uniondale, New York
June 5, 2023