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.

NOTICE OF MOTION FOR RECONSIDERATION

Case No. 23-cv-02977-BMC

(Judge Cogan)

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law In Support of Plaintiff's Motion for Reconsideration, dated July 31, 2023; and all the prior proceedings had herein, the Plaintiff, Neurological Surgery Practice of Long Island, PLLC, by its attorneys, Harris Beach PLLC, will move this Court, before The Hon. Brian M. Cogan, United States District Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, at a date a time fixed by the Court, for an Order under Local Civil Rule 6.3 anting reconsideration or re-argument of the Court's Order entered July 17, 2023 (Dkt 21) to the extent that Plaintiff's Amended Complaint, dated July 31, 2023, conflicts with said Order, and for such other relief that

the Court deems just and proper.

Dated: Uniondale, New York
July 31, 2023

HARRIS BEACH PLLC
Attorneys for Plaintiff

By:_____
Roy W. Breitenbach
Daniel Hallak
Hannah Levine
333 Earle Ovington Boulevard, Suite 901
Uniondale, New York 11553
(516) 880-8484

TO: ANNA DEFFEBACH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
(202) 305-8356

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. 23-cv-02977-BMC

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT

HARRIS BEACH PLLC
Roy W. Breitenbach, Esq.
333 Earle Ovington Blvd., Suite 901
Uniondale, New York 11553
(516) 880-8484

Attorneys for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

MOTION FOR RECONSIDERATION STANDARDS 4

TO THE EXTENT THAT THIS COURT DETERMINES THAT THEAMENDED COMPLAINT CONFLICT WITH THE COURT'S JULY 17TH ORDER, THIS COURT SHOULD RECONSIDER THAT ORDER 5

1. The Practice's Claim Regarding Insufficient IDR Entities. 5

2. The Practice's Specified State Law Claim. 8

3. The Practice's Procedural Due Process Claim. 9

CONCLUSION 14

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Am. Transit Ins. Co. v. Bilyk,
514 F. Supp. 3d 463 (E.D.N.Y. 2021) 4

Baez v. City of N.Y., No. 17-cv-1767
(BMC)(PK), 2017 U.S. Dist. LEXIS 176117 (E.D.N.Y. Oct. 23, 2017) 4

Benzman v. Whitman,
523 F.3d 119 (2d Cir. 2008) 6

Board of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 10, 11

Drapkin v. Mafco Consol. Grp., Inc.,
818 F. Supp. 2d 678 (S.D.N.Y. 2011) 4

Fourteenth Amendment." Sealed v. Sealed,
332 F.3d 51 (2d Cir. 2003) 11

Funk v. Belneftekhim & Belneftekhim USA, Inc., No. 14-cv-376
(BMC), 2020 U.S. Dist. LEXIS 173314 (E.D.N.Y. Sep. 21, 2020) 4

Giuffre v. Maxwell, No. 15-cv-7433,
2020 U.S. Dist. LEXIS 33236, 2020 WL 917057 (S.D.N.Y. Feb. 26, 2020) 4

Golden v. City of Columbus,
404 F.3d 950 (6th Cir. 2005) 10

Kelly Kare, Ltd. v. O'Rourke,
930 F.2d 170 (2d Cir. 1991) 11

Kornmann v. City of N.Y. Bus. Integrity Comm'n, No. 17-cv-2328
(BMC), 2020 U.S. Dist. LEXIS 269514 (E.D.N.Y. Sep. 25, 2020) 4

Lawson v. Rubin, No.
17-cv-6404 (BMC) (SMG), 2019 U.S. Dist. LEXIS 181192 (E.D.N.Y. Oct. 17, 2019) 4

Ledgerwood v. Ocwen Loan Servicing LLC,
2016 U.S. Dist. LEXIS 2363 (E.D.N.Y. Jan. 7, 2016) 4

Make the Rd. N.Y. v. Pompeo,
475 F. Supp. 3d 232 (S.D.N.Y. 2020) 9

Manker v. Spencer, No. 3:18-cv-372
(CSH), 2019 U.S. Dist. LEXIS 193434 (D. Conn. Nov. 7, 2019) 7

New York v. U.S. Dep't of Homeland Sec.,
408 F. Supp. 3d 334 (S.D.N.Y. 2019) 9, 10

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004) 7

Perry v. Sindermann,
408 U.S. 593 (1972) 10

RR Village Ass'n v. Denver Sewer Corp,
826 F.2d 1197 (2d Cir. 1987) 12

RRI Realty Corp. v. Incorporated Vill. of Southampton,
870 F.2d 911 (2d Cir. 1989) 12

Salazar v. King,
822 F.3d 61 (2d Cir. 2016) 7

Sharkey v. Quarantillo,
541 F.3d 75 (2d Cir. 2008) 7

the Due Process Clause. Yale Auto Parts, Inc. v. Johnson,
758 F.2d 54 (2d Cir. 1985) 11

the Due Process Clause. Memphis Light, Gas & Water Div. v. Craft,
436 U.S. 1 (1978) 11

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 11

Federal Statutes

5 U.S.C. § 706 9

42 U.S.C 12

42 U.S.C. § 300gg-111 ..... *passim*

42 U.S.C. §§ 300gg-111 ..... 3, 8, 9, 12

§ 300gg-111 ..... 7, 12-13

§ 300gg-111(c)(4)(A) 7

§§ 300gg-111 12-13

State Cases

Crouse Irving Hosp. v City of Syracuse,
283 App. Div. 394, 128 NYS2d 433 (4th Dept 1954) 10, 12

McGuire v Hughes,
207 N.Y. 516, 101 N.E. 460 (1913) 10, 12

Mercy Flight Cent., Inc. v Kondolf,
41 Misc. 3d 483, 973 N.Y.S.2d 521 ..... 10, 12

United Healthcare Servs., Inc. v. Asprinio,
49 Misc. 2d 985, 16 N.Y.S.3d 139 (Sup. Ct. Westchester County 2015) 10, 12

Rules

Fed. R. Civ. P. 12 1
Rule 6.3 ..... 3, 4, 14

PRELIMINARY STATEMENT

By Order entered July 17, 2023, the Court dismissed the Complaint without prejudice under Fed. R. Civ. P. 12(b). (Dkt 21.) The Complaint, filed on April 2023 (Dkt 1), asserted claims against the Defendant federal agencies (the "Departments") regarding their failure to properly implement the independent dispute resolution ("IDR") provisions of the No Surprises Act ("NSA"). The NSA, enacted in 2021 and effective in 2022, prohibited out-of-network physicians – such as the Practice[1] – from seeking payment for their medically necessary services from patients. 42 U.S.C. § 300gg-111. Rather, it is up to the patients' health plans, in the first instance, to determine whether and how much to pay the out-of-network physicians for their services. If the providers dispute the plans' actions, then there is an expedited IDR process to determine the proper reimbursement.

Since, as the Complaint alleges, the health plans either failed to make any initial payment –or an abysmally low initial payment – in most cases, out-of-network physicians like the Practice are heavily dependent on a timely and efficient IDR process Congress accordingly established tight time frames for the IDR process, specifically mandated that the Departments certify sufficient number of IDR entities to properly handle the caseload, and charged the Departments with oversight of the entire process.

There is no dispute between the parties that the IDR process has been an abject failure. More than 90% of all IDR proceedings commenced in 2022 remained undecided as of March 2023. Despite the NSA's requirement that IDR proceedings be completed within 30 days, more than 95% of open IDR claims remain unresolved after five months. And, even if out-of-network

[1] The Practice refers to the Plaintiff, Neurological Surgery Practice of Long Island, PLLC.

physicians were able to obtain an IDR determination awarding them additional reimbursement, in 87% of these determinations, the health plans failed to the additional reimbursement within the required periods.

Based on the above, the Practice commenced this lawsuit seeking to compel the Department to honor their statutory mandate to implement an effective IDR process and observe the timelines and requirements of the NSA. The Practice also sought to compel the Departments to enforce the NSA's statutory deadlines and other requirements against the health plans and the IDR entities. The Practice specifically asserted claims under the Administrative Procedure Act ("APA") and the All-Writs Act, as well as claims that the Departments' actions constituted a deprivation of the Practice's constitutional right to procedural due process as well as an unconstitutional taking without just compensation.

This Court's July 17th Order (Dkt 21) granted the Departments' motion to dismiss, finding, first, that the Practice lacked Article III standing to challenge the Departments' failure to enforce the NSA's statutory deadlines and other requirements against the health plans and other IDR entities. This Court further found that the Practice did have standing to challenge the Departments' failure to take actions on their own account, but nevertheless concluded that the Practice did not state a claim under the APA because, in its view, the Practice failed to identify a discrete action that the Departments were required to take but did not. The Court also dismissed the Practice's constitutional procedural due process and taking claims, finding, primarily, that the Practice failed to identify a federally protective property right that was deprived without due process or taken without just compensation.

Notwithstanding the dismissal, this Court did grant the Practice leave to amend its Complaint to state a claim upon which relief can be granted. Accordingly, the Practice today has filed an Amended Complaint. This Amended Complaint narrows the previously asserted claims to claims that the Departments violated the APA and the All Writs Act by:

- Failing to obey the Congressional mandate that the Departments "shall ensure that a sufficient number of [IDR] entities are certified . . . to ensure the timely and efficient provision of [IDR] determinations." 42 U.S.C. § 300gg-111(c)(4)(E).
- Wrongfully determining that the New York Surprise Bill Law is a specified state law under the NSA for all "non-emergency services provided by an out-of-network provider at an in-network facility or surgical center," in direct violation of the NSA, . 42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I)

The Amended Complaint finally alleges that out-of-network physicians have a federally protected property right in receiving payment for their services, and that the Departments through their failure to ensure a timely and efficient IDR process – the only method through which the physicians can secure their right – have deprived the physicians of this right in violation of the Fifth Amendment.

The Practice believes that these claims asserted in the Amended Complaint sufficiently state claims for relief under applicable law, and cure the deficiencies found in the Court's July 17th Order. Nevertheless, in an abundance of caution, the Practice makes this motion for reconsideration or re-argument under Local Civil Rule 6.3, asking this Court, to the extent that it determines that the claims asserted in the Amended Complaint conflict with the Court's findings in its July 17th Order, reconsider that Order to find that the claims asserted in the Amended Complaint sufficiently state a claim upon which relief can be granted.

MOTION FOR RECONSIDERATION STANDARDS

The Practice here makes a motion for reconsideration or re-argument under Local Civil Rule 6.3. "A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Drapkin v. Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011). "Such motions are properly granted only if there is a showing of: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) a need to correct a clear error or prevent manifest injustice." *Giuffre v. Maxwell*, No. 15-cv-7433, 2020 U.S. Dist. LEXIS 33236, 2020 WL 917057, at *1 (S.D.N.Y. Feb. 26, 2020).

Applying this standard, this Court has granted motions for reconsideration in various contexts. *See, e.g.*, *Am. Transit Ins. Co. v. Bilyk*, 514 F. Supp. 3d 463, 470 (E.D.N.Y. 2021) (granting reconsideration of default judgment motion); *Kornmann v. City of N.Y. Bus. Integrity Comm'n*, No. 17-cv-2328 (BMC), 2020 U.S. Dist. LEXIS 269514, at *4 (E.D.N.Y. Sep. 25, 2020) (granting reconsideration of *in limine* motion); *Funk v. Belneftekhim & Belneftekhim USA, Inc.*, No. 14-cv-376 (BMC), 2020 U.S. Dist. LEXIS 173314, at *34 (E.D.N.Y. Sep. 21, 2020) (granting in part reconsideration of *in limine* motion); *Lawson v. Rubin*, No. 17-cv-6404 (BMC) (SMG), 2019 U.S. Dist. LEXIS 181192, at *14 (E.D.N.Y. Oct. 17, 2019) (granting reconsideration of motion to vacate sealing); *Baez v. City of N.Y.*, No. 17-cv-1767 (BMC)(PK), 2017 U.S. Dist. LEXIS 176117, at *2 (E.D.N.Y. Oct. 23, 2017) (granting reconsideration of order dismissing action); *Ledgerwood v. Ocwen Loan Servicing LLC,* 2016 U.S. Dist. LEXIS 2363, at *16-17 (E.D.N.Y. Jan. 7, 2016) (granting reconsideration of motion to dismiss).

TO THE EXTENT THAT THIS COURT DETERMINES THAT THEAMENDED COMPLAINT CONFLICT WITH THE COURT'S JULY 17TH ORDER, THIS COURT SHOULD RECONSIDER THAT ORDER

1. **The Practice's Claim Regarding Insufficient IDR Entities.**

The Practice's first claim in the Amended Complaint is that the Departments failed to obey the Congressional mandate that they "shall ensure that a sufficient number of [IDR] entities are certified . . . to ensure the timely and efficient provision of [IDR] determinations." 42 U.S.C. § 300gg-111(c)(4)(E). (Amended Complaint ¶¶ 36-45, 80(a).) As alleged in the Amended Complaint, there can be no dispute that the Departments have failed to ensure a significant number of IDR entities were certified to ensure the timely and efficient provision of IDR determines, given that the Departments have admitted – *in this lawsuit* –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. (Amended Complaint ¶ 39.) Thus, the Departments' original estimate was that it needed one certified IDR entity for every 440 IDR proceedings, but currently, it has only certified enough IDR entities to have one certified IDR entity for every 25,756 proceedings. (*Id.* ¶ 39.) There also can be no dispute that, in part, this has led to the long delays in the IDR process, such that more than 90% of all IDR proceedings commenced in 2022 remained undecided as of March 2023 and more than 95% of open IDR claims remain unresolved after five months, despite the NSA's requirement that IDR proceedings be completed within 30 days, (*Id.* ¶¶ 42-45.)

These allegations, we believe, make out a sufficient claim under APA § 706(1). As this Court stated in its July 17th Order, a court under section 706(1) may compel agency action unlawfully withheld or unreasonably delayed but may only do so if the plaintiff identifies a discrete agency action that the agency is required to take. (Order at 9.) This Court went on to

state that "§ 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" (*Id.* (quoting *Benzman v. Whitman*, 523 F.3d 119, 130 (2d Cir. 2008))).

This is precisely what the Practice alleges in the Amended Complaint: The Departments are required under the NSA to ensure that a significant number of IDR entities are certified to ensure the timely and efficient provision of IDR determinates. This is a discrete agency action that the Departments are required to take. And the Amended Complaint simply seeks a judgment from the Court directing the Departments to take steps to comply with this statutory mandate without directing the Departments what steps they should take to comply. (Amended Complaint ¶¶ 36-45, 80(a).)

Nothing in this amended claim runs afoul of this Court's July 17th Order. The Practice's original Complaint does not cite the statutory mandate to the Departments requiring the certification of a significant number of IDR entities (42 U.S.C. § 300gg-111(c)(4)(E)). There is only one passing reference in the original Complaint to the Departments' "failure to have sufficient IDR entities on board to meet the demand." (Complaint ¶ 48). This reference, however, is in a list of factors the Practice alleges have caused delays in the IDR process; there are no allegations that the Departments breached any statutory mandate regarding the sufficiency of IDR entities.

The Court, in its Order, does reference "language in the NSA that requires defendants to 'ensure' that a certified IDR entity 'has (directly or through contracts or other arrangements) sufficient medical, legal, and other expertise and sufficient staffing. . . ." (Order at 12 (42 U.S.C. § 300gg-111(c)(4)(A).) This, however, is a different section than the discrete statutory mandate

than the one on which the Amended Complaint relies and thus is not directly relevant or controlling upon the Amended Complaint.

The Order, in reference to this other subsection of the NSA, states, without citing any authority, that it "does not mandate any discrete actions to 'ensure' compliance with these requirements, and plaintiff does not point to any provision requiring defendants to certify a certain number of IDR entities." (Order at 13.) This statement, however, does not apply to the statutory mandate at issue in the Amended Complaint, which is 42 U.S.C. § 300gg-111(c)(4)(E). As discussed above, the statement in the Order applies to a different subsection, which is § 300gg-111(c)(4)(A).

To the extent, however, this Court determines that the statement in the Order does apply to § 300gg-111(c)(4)(E), this Court should reconsider the statement's applicability to support a finding that the Practice failed to state a claim. Indeed, the Court cited no authority for its statement that, to be an enforceable statutory mandate under the APA, the subdivision had to require a certain number of IDR entities to be certified. All that is required under the APA is that the Amended Complaint identify a discrete action that the Departments are required to take. *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *Salazar v. King*, 822 F.3d 61, 82 n.13 (2d Cir. 2016); *Sharkey v. Quarantillo*, 541 F.3d 75, 89 n.13 (2d Cir. 2008); *Manker v. Spencer*, No. 3:18-cv-372 (CSH), 2019 U.S. Dist. LEXIS 193434, *40-41 (D. Conn. Nov. 7, 2019).

Section 300-gg-111(c)(4)(E) meets this *SUWA* requirement. It identifies a discrete action – the certification of a sufficient number of IDR entities – that the Departments are required to take. Congress made this plain when it said that the Departments "*shall ensure* that a sufficient

number of [IDR] entities are certified. . . ." 42 U.S.C. § 300gg-111(c)(4)(E). Congress also provided a standard by which to measure sufficiency: enough IDR entities for there to be a "timely and efficient provision of [IDR] determinations." *Id.* As alleged above, there is no question that the Departments, based on the admitted facts, have failed to ensure enough certified IDR entities to even remotely ensure the timely and efficient provision of IDR entities.

For these reasons, this Court should grant reconsideration of its July 17th Order to the extent necessary for a finding that its claims in the Amended Complaint regarding the sufficiency of IDR entities state claims for relief under the APA and the All-Writs Act.

2. The Practice's Specified State Law Claim.

The Practice's second claim in the Amended Complaint is that the Defendants, in violation of the APA and the All Writs Act, wrongfully determined that the New York Surprise Bill Law is a specified state law under the NSA for all "non-emergency services provided by an out-of-network provider at an in-network facility or surgical center," in direct violation of the NSA (42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I)). (Amended Complaint ¶¶ 46-62, 80(b, c).)

As the Amended Complaint alleges in detail, the wrongful determination that the Practice challenges is set forth in subregulatory guidance on the Departments' public NSA website. IDR entities and health plans have relied upon this guidance to determine ineligible for NSA IDR disputes which are properly eligible for IDR under the NSA, thereby placing these disputes in a limbo where they remain unresolved. (*Id.* ¶¶ 46-62.)

In the original Complaint, the Practice never raises the issue of incorrect subregulatory guidance. Rather, the original Complaint alleges that the Departments have "unlawfully allowed

federal IDR entities to reject . . . claims as ineligible for federal IDR based on an erroneous conclusion that the New York law serves as a 'specified state law' that precludes federal IDR review – leaving plaintiff without a forum to arbitrate these claims." (Order at 13-14.) This Court then went on to explain that this "claim fails because plaintiff has not pointed to any provision of the act that requires defendants to compel arbitration of these claims. In any event, it is the IDR entities, not defendants, who are charged with making eligibility determinations under the act." (*Id.* at 14.)

In the Amended Complaint, as discussed above, the Practice does not seek any order compelling that these claims be submitted to federal IDR. Rather, the Amended Complaint simply seeks a finding that the Departments' subregulatory guidance is legally incorrect and, accordingly, mandating that the Departments correct this subregulatory guidance. This is well within the authority of this Court under the APA. *See* 5 U.S.C. § 706(2)(A, C); *see also Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 259-60 (S.D.N.Y. 2020); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 342 (S.D.N.Y. 2019).

Accordingly, we do not believe that the claim in the Amended Complaint on this issue runs afoul of the July 17th Order's findings. To the extent that it does, for the reasons above, the Practice requests that the Court reconsider its prior Order.

3. The Practice's Procedural Due Process Claim.

Turning finally to the Practice's procedural due process claim, the Court, in its July 17th Order, found that the Practice's "due process claim fails because it has failed to identify a federally protected property right." (Order at 14.) The Practice's original Complaint based its constitutional claims on its contention that it had a right to be compensated *at cost* by health

plans for services it provides to patients. This Court, in its July 17th Order, concluded that none of the Practice's cited cases support this position. (*Id.*)

The Amended Complaint, however, alleges a more fundamental property right. As it alleges, "it is well recognized under New York law that, even in the absence of an express contractual agreement, a physician is entitled to be reimbursed when the services have been rendered at the request of the patient." (Amended Complaint ¶ 94, citing *McGuire v Hughes*, 207 N.Y. 516, 521-22, 101 N.E. 460 (1913); *Crouse Irving Hosp. v City of Syracuse*, 283 App. Div. 394, 128 NYS2d 433 (4th Dept 1954), *aff'd*, 308 N.Y. 844, 126 N.E.2d 179 (1955); *UnitedHealthcare Servs., Inc. v. Asprinio*, 49 Misc. 2d 985, 993, 16 N.Y.S.3d 139 (Sup. Ct. Westchester County 2015); *Mercy Flight Cent., Inc. v Kondolf,* 41 Misc. 3d 483, 973 N.Y.S.2d 521 (Canandaigua City Ct 2013).)

The Practice believes that these allegations cure the deficiencies identified by the Court and establish a federally protected property right that cannot be deprived under due process of law. The Supreme Court has held that constitutionally protected property rights are determined by reference to "an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (constitutionally protected property interest can derive from express or implied contracts); *Golden v. City of Columbus*, 404 F.3d 950, 955 (6th Cir. 2005) (recognizing "two bases for such non-unilateral legitimate claims of entitlement: state statutes and contracts, express or implied, between the complaining citizen and the state or one of its agencies.").

"Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). A protected property interest "may take many forms" and "extends well beyond actual ownership of real estate, chattels, or money[.]" *Roth*, 408 U.S. at 576, 571-72. It must, however, have "some ascertainable monetary value." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005).

For the Practice to assert a property interest in payment for providing medical services, it must show "more than an abstract need or desire for it. [It] must have more than a unilateral expectation of it. [It] must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. "Where the administrative scheme does not require a certain outcome but merely authorizes actions and remedies, the scheme does not create 'entitlements' that receive constitutional protection under the Fourteenth Amendment." *Sealed v. Sealed*, 332 F.3d 51, 56 (2d Cir. 2003). Where the state has significant discretion regarding whether a particular benefit will be conferred, a potential recipient of the benefit will only in "the rare case . . . be able to establish an entitlement to that benefit." *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175 (2d Cir. 1991).

Applying this principle, in deciding whether the Practice has a legitimate claim of entitlement to payment for medical services, the test is "whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the" payment would have been made. "Otherwise, the application would amount to a mere unilateral expectancy" outside the protection of the Due Process Clause. *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985). This entitlement test focuses "on the degree of discretion enjoyed by the issuing

authority, not the estimated probability that the authority will act favorably in a particular case." *RRI Realty Corp. v. Incorporated Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989). In *RR Village Ass'n v. Denver Sewer Corp*, 826 F.2d 1197 (2d Cir. 1987), the court noted that "when an official action is truly discretionary under local law, one's interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection." *Id.* at 1202.

Taking all of this into account, the fact that for, over a century, New York courts have routinely and invariably enforced the right of a physician to be paid, at least *something*, for providing medically necessary services to a patient, under either an express or implied contractually theory, *see McGuire*, 207 N.Y. at 521-22; *Crouse Irving*, 283 App. Div. 394; *Asprinio*, 49 Misc. 2d at 993; *Mercy Flight,* 41 Misc. 3d 483, we submit is more than sufficient under applicable Second Circuit case law to establish a constitutionally protectable property right. To the extent that the July 17th Order found otherwise, we respectfully submit that reconsideration should be granted.

Finally, the July 17th Order further found that the original Complaint had not alleged any deprivation of a federally protected right at the hands of the government. (Order at 15.) Here, however, the Amended Complaint clearly alleges that the there was a clear deprivation of the right of a physician to be paid, at least something, for providing medically necessary services to patients. Specifically, the Amended Complaint alleges that, for services governed by its provisions, the NSA prohibits out-of-network providers, such as the Practice, from balance billing or otherwise pursuing payments from health plan members. (Amended Complaint ¶ 99, citing 42 U.S.C. §§ 300gg-131(a), 300gg-132.) Given this balance billing ban, the NSA requires health plans, within 30 days to either make an initial payment to the provider or issue a notice of denial of payment. (Complaint ¶ 100, citing 42 U.S.C> §§ 300gg-111(a)(1)(C)(iv), 300gg-

111(b)(1)(C).) Since the NSA became effective in January 2022, however, in many circumstances, the health plans have simply denied payment to the Practice. (Amended Complaint ¶ 101.)

Accordingly, the only way that the Practice can receive payments the medically necessary services it provided to patients is through the IDR process established by the NSA. Yet, as alleged in the Complaint, the way that the Departments have completely and utterly failed to enforce the deadlines and other requirements under the NSA to ensure that the Practice, and other similarly situated out-of-network providers, can be paid at least something for their services.

While the Court, in its July 17th Order, concludes that much of this deprivation is at the hands of the health plans, the undisputed facts indicate that, if the Departments enforce the deadline, the ability of out-of-network providers to be paid at least something for their services is dramatically increased. Indeed, the record in this case establishes that, once an IDR proceeding does to determination, there is greater than 70% likelihood that the provider will be awarded additional reimbursement. Thus, the motivating factor for the deprivation is the Departments failure to enforce the deadlines and other requirements to have a timely and efficient IDR process.

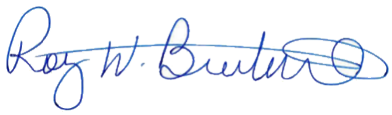
Accordingly, to the extent that the Court's July 17th Order finding regarding deprivation is interpreted as precluding the Practice's procedural due process claim in the Amended Complaint, this Court should reconsider that finding for the reasons set forth above.

CONCLUSION

For the reasons set forth above, this Court should grant the Practice's Local Rule 6.3 reconsideration motion to the extent that it determines that the claims asserted in the Amended Complaint conflict with the Court's findings in its July 17th Order., and for such other relief that the Court deems proper.

Dated: Uniondale, New York
July 31, 2023

HARRIS BEACH PLLC
Attorneys for Plaintiff



By:_____
Roy W. Breitenbach
Daniel Hallak
Hannah Levine
333 Earle Ovington Boulevard, Suite 901
Uniondale, New York 11553
(516) 880-8484

TO: ANNA DEFFEBACH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
(202) 305-8356