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 OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

By Order entered July 17, 2023, this Court dismissed the original Complaint in this lawsuit 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. (*Id.*)

Since 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 physicians were able to obtain an IDR determination awarding them additional reimbursement, in

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

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 Departments 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 protected property right that was deprived without due process or taken without just compensation.

The Court granted the Practice leave to amend its Complaint to state a claim upon which relief can be granted. Accordingly, the Practice filed this Amended Complaint on July 31, 2023

(Dkt 22.) The 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)

While the Departments here seek dismissal of these amended claims under Fed. R. Civ. P. 12(b)(6), these claims sufficiently state claims for relief under federal law. As we explain in detail below, contrary to the Departments' arguments, neither of these amended claims were asserted in the original Complaint, and, therefore, the amended claims are unaffected by the Court's July 17th dismissal Order.

Further, the claim based on the Departments' failure to certify a sufficient number of IDR entities falls squarely within the purview of APA § 706(1), which permits this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This is because, as we explain below in Point I, the Practice has identified a discrete statutory action – the certification of a sufficient number of IDR entities to ensure the timely and efficient provision of IDR determinations – that the Departments are required, but failed, to take.

Likewise, the claim based on the Departments' wrongfully determination of the New York Surprise Bill Law as 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," also falls squarely within the purview of APA § 706. This is because, as we explain below in Point II, the

Departments is rendering a legally incorrect determination that contradicts with the plain language of the NSA.

Finally, the Amended Complaint alleges that, through the enactment and implementation of the NSA, the federal government – including the Departments – deprived the Practice of its federally protected constitutional right to be paid, at least *something*, for providing medically necessary services to a patient, under either an express or implied contractual theory. This is because, upon implementation of the NSA, the Practice, and other similarly situated out-of-network providers, were barred from seeking or pursuing payment under these theories.

Having deprived the Practice of its federally protected constitutional right to pursue payment for its services on its own, the Departments had a constitutional obligation to provide the Practice with a fair and reasonable procedure to obtain payment. However, as alleged in the Amended Complaint, the Departments failed to provide the Practice with this fair and reasonable IDR procedure, but instead took a series of actions (and inactions) that rendered the IDR process untimely, ineffective, and inefficient. For these reasons, and as we explain below in Point III, the Practice has sufficiently alleged a Fifth Amendment procedural due process claim against the Departments.

ARGUMENT

I. THE PRACTICE HAS SUFFICIENTLY STATED ITS CLAIM THAT THE DEFENDANTS BREACHED THEIR EXPRESS STATUTORY OBLIGATION TO CERTIFY A SUFFICIENT NUMBER OF 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." (Amended

Complaint ¶¶ 36-45, 80(a), citing 42 U.S.C. § 300gg-111(c)(4)(E).) As a result, the Practice seeks to compel the Departments to undertake all steps necessary to comply with this statutory mandate in accordance with APA § 706(1), which permits this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).[2]

In response, the Departments seek to dismiss this claim under Fed. R. Civ. P. 12(b)(6), based on two grounds: the Departments contend that (1) this Court already dismissed this claim in its July 17, 2023 Order dismissing the Practice's original Complaint with leave to replead; and (2) the Practice has failed to identify a "discrete agency action that [the Departments are] required to take," which is required to make out a claim under APA § 706(1). *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004). As we explain below, the Departments are wrong on both grounds and, accordingly, the Practice's first claim is sufficiently plead to withstand Rule 12(b)(6) dismissal.

A. The Practice's Amended Complaint Does Not Run Afoul Of The Court's July 17th Order

Contrary to the Departments' contention, nothing in this amended claim runs afoul of this Court's July 17th Order. The amended claim is based on the statutory mandate to the Departments requiring the Departments to certify a sufficient number of IDR entities to ensure the timely and efficient provision of IDR determinations (42 U.S.C. § 300gg-111(c)(4)(E)). This statutory mandate is neither cited in the original Complaint nor the July 17th Order. Indeed, 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

[2] The Practice also brings this claim under the All Writs Act.

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 (citing 42 U.S.C. § 300gg-111(c)(4)(A).) This, however, is a different section than the 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).

Accordingly, the Court's July 17th Order does not address, much less dismiss, the Practice's amended claim based on the statutory mandate to have sufficient IDR entities set forth in section 300gg-111(c)(4)(A). Indeed, this Court recognized as such when it terminated the Practice's motion for reconsideration as moot given the filing of the Amended Complaint.

B. The Practice's Amended Complaint Adequately Identifies A Discrete Agency Action That The Departments Were Required, But Failed, To Take

The second ground advanced by the Departments to support dismissal of this claim, that that the Practice has failed to identify a "discrete agency action that [the Departments are] required to take," *SUWA*, 542 U.S. at 63-64, is also wrong.

The Departments are correct that, to state a claim under APA § 706(1), the Practice must identify a discrete statutory action that the Departments are required, but failed, to take. *See, e.g.*, *SUWA*, 542 U.S. at 64; *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); *Adueva v. Mayorkas*, 2021 U.S. Dist. LEXIS 149157, *14-*15 (E.D.N.Y. 2021); *Manker v. Spencer*, No. 3:18-cv-372 (CSH), 2019 U.S. Dist. LEXIS 193434, *40-41 (D. Conn. Nov. 7, 2019); *Litvin v. Chertoff*, 586 F. Supp. 2d 9, 11 (D. Mass. 2008). However, the Practice has met this requirement in the Amended Complaint.

Specifically, the Practice's amended claim rests on 42 U.S.C. § 300gg-111(c)(4)(E), which provides that the Departments "*shall ensure* that a sufficient number of [IDR] entities are certified . . . *to ensure* the timely and efficient provision of [IDR] determinations." *Id.* (emphasis added). The Practice, therefore has, in compliance with *SUWA*, identified a discrete agency action – the certification of a sufficient number of IDR entities – that the Departments are required to take. 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.*

Here, the Departments have failed to comply with this express and discrete statutory mandate. Indeed, the Departments have admitted – *in this lawsuit* –that they have certified only 26% of the IDR entities that they anticipated needing when the No Surprises Act became effective in January 2022, and actual IDR volume, and actual volume has turned out to be 15.2 times what

they initially anticipated. (Amended Complaint ¶ 39.) Thus, the Departments' original estimate was that they needed one certified IDR entity for every 440 IDR proceedings. Currently, however, the Departments have only certified enough IDR entities to have one certified IDR entity for every 25,756 proceedings. (*Id.* ¶ 39.).

The No Surprises Act became law in December 2020 and became effective in January 2022. The Departments therefore have had ample time to comply with this express and discrete statutory mandate yet have utterly failed to do so. Indeed, since the Practice filed the original Complaint in May 2023, the Departments have failed to certify a single additional IDR entity. *See* https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list (last accessed on August 28, 2023). Put simply, the Departments estimated that they needed 50 IDR entities based on the initial volume of claims, but has only certified 13 entities since the statute's enactment.[3]

As alleged in the Amended Complaint, this failure to have sufficient IDR entities in place has been a major contributing factor to the substantial delays that the IDR process has experienced. (Amended Complaint ¶¶ 42-44.) For example, as of March 2023, of the 200,000+ IDR claims filed in 2022, more than 91% remained unadjudicated, with 95.6% of these claims more than five months old. (*Id.* ¶ 44.) The Practice's experience has been similar to this national survey. (*Id.* ¶ 45.) Accordingly, there are sufficient allegations in the Amended Complaint that the Departments were required, but failed, to take a discrete statutory action. *See, e.g.*, *Litvin*, 586 F. Supp. At 11.

[3] *See* https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list (last accessed on August 21, 2023)

The Departments, in a clear and cynical attempt to overcome express statutory mandate and the impact of these undisputed allegations, advance the argument that the only way that the Practice could maintain an APA claim under *SUWA* is if the statute required a certain number of IDR entities to be certified. This, though, is an incorrect reading of *SUWA*.

In *SUWA*, the plaintiff environmental groups alleged that the failure of the Bureau of Land Management to ban off-road vehicles from a Utah Wilderness Study Area violated a statutory provision obligating the Bureau to "continue to manage [Wilderness Study Areas] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness." *SUWA*, 542 U.S. at 65 (quoting 43 U.S.C. § 1782(c)). The *SUWA* Court dismissed this claim, concluding that plaintiffs had not based their claim on a discrete statutory action that the Bureau was required, but failed, to take. *Id.* The Court stated that the statute "is mandatory as to the object to be achieved, but it leaves [the Bureau] a great deal of discretion in deciding how to achieve it. It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of [off-road vehicle] use." *Id.*

When the statutory language at issue in *SUWA* is compared with the language at issue here, it becomes clear that the *SUWA* statutory language is vaguer and far more discretionary than the clear and unambiguous direction Congress gave to the Departments regarding the certification of IDR entities. For example, the language at issue in *SUWA* vaguely directed the Bureau of Land Management to continue to manage the Wilderness Study Area, thus creating ambiguity as to whether the Bureau was required to take any new, additional action at all, and what actions constitute management. *SUWA*, 542 U.S. at 65. By contrast, 42 U.S.C § 300gg-111(c)(4)(E) clearly directs the Departments to take new and specific action – the certification of IDR entities. Unlike in *SUWA,* there is no ambiguity as to what is required.

Similarly, the statutory language at issue in *SUWA* provides a vague and largely immeasurable metric for determining whether the statutory obligation is met: the continuation of management by the Bureau is to be "in a manner so as not to impair the suitability of such areas for preservation as wilderness." *SUWA*, 542 U.S. at 65. These leaves lot of subjective room open for interpretation. In the No Suprises Act, on the other hand, the metric for determining whether the statutory obligation is met is clear and capable of measurement: there must be a "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). It is easy to objectively measure the number of certified IDR entities, the timeliness of IDR determinations, and the backlog of undecided IDR proceedings. And, as to these measures, as discussed above, it is objectively clear that the Departments have failed to satisfy these metrics: while the Departments anticipated needing needed one certified IDR entity for every 440 IDR proceedings, they currently have certified only enough entities to have one certified IDR entity for every 25,756 proceedings. More than 91% of 2022 IDR proceedings nationally remained unadjudicated in March 2023, with 95.6% of these proceedings more than five months old. (Amended Complaint ¶ 39.)

Additionally, as the *SUWA* Court noted, there is a substantial question as to the relationship between the requested relief – an exclusion of off-road vehicles – and the statutory mandate requiring the Bureau of Land Management to continue to manage the Wilderness Study Area "in a manner so as not to impair the suitability of such areas for preservation as wilderness." *SUWA*, 542 U.S. at 65. Here, however, the requested relief – requiring that the Departments certify additional IDR entities – is directly and inextricably related to the statutory mandate of requiring 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).

Accordingly, contrary to the Departments' contentions, the *SUWA* decision does not support dismissal of the Practice's claim here. Indeed, this case is similar to the court's decision in *Litvin v. Chertoff*, 586 F. Supp. 2d 9 (D. Mass. 2008). In that case, the plaintiff immigrant filed an action to compel the government to process what he contended was his long-delayed naturalization application, contending that, under 5 U.S.C. § 706(1), the government was required to, but failed, to undertake the discrete statutory action of processing his naturalization application. *Litvin*, 586 F. Supp. 2d at 9-10. The government moved to dismiss, contending, like what the Departments contend here, that because the statute at issue did not establish fixed deadline for processing the naturalization application, *SUWA* required dismissal of the section 706(1) claim. *Id.* The *Litvin* court rejected this argument, holding that notwithstanding the absence of a fixed deadline, the government had a non-discretionary statutory obligation to process the naturalization application, which it could not avoid through unreasonable delay. *Id.* at 11. The same principle applies here: the Departments have a non-discretionary statutory obligation to certify sufficient IDR entities to ensure the timely determination of IDR proceedings. The Departments cannot ignore this obligation just because Congress did not fix a minimum number of IDR entities to certify.

Finally, the Departments suggest in their motion to dismiss that they have discharged their statutory mandate by establishing, through regulation (45 C.F.R. § 149.510(e)(1,)) a process for certifying IDR entities. The problem with this argument, however, is that the No Surprises Act does not simply require that the Departments have a procedure for certifying IDR entities; it expressly mandates that they have a procedure for ensuring "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(a)(4)(e). And, as discussed above, the Practice has sufficiently alleged that,

notwithstanding the regulation, the Departments have not even come close to meeting this statutory requirement in the 20+ months since the No Surprises Act became effective. [4]

II. THE PRACTICE HAS SUFFICIENTLY STATED ITS CLAIM THAT THE DEFENDANTS ACTED CONTRARY TO LAW WHEN DETERMINING WHAT CONSTITUTES A SPECIFIED STATE LAW FOR NEW YORK CLAIMS

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 alleged in the Amended Complaint, the Department is rendering a legally incorrect determination that contradicts with the plain language of the NSA and thereby violates 5 U.S.C. § 706.[5]. 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. The Department has publicly issued a legally incorrect determination 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

[4] In their motion to dismiss papers, the Departments seem to speculate that a potential cause of the insufficient number of certified IDR entities is "an insufficient number of interested businesses submitting applications to be certified." The Departments, however, provide no evidentiary support for this assertion and, even if they had, this is material that is outside of the record for purposes of this Rule 12(b)(6) motion to dismiss. Such material, finally, is, in any event, a defense to the Practice's claim and would not be relevant to whether the Practice has stated a claim in the first place/

[5] Specifically, the Departments' actions violate 5 U.S.C. § 706(2)(A), which prohibits the Departments from acting arbitrarily, capriciously, in abuse of discretion, or otherwise not in accordance with law. The Departments' actions, to the extent that they have refused to correct their erroneous determination also violate 5 U.S.C. § 706(1), because they are unlawfully withholding or unreasonably delaying agency action. Finally, the Departments are acting in excess of statutory jurisdiction or limitations and are therefore also violating 5 U.S.C. § 706(2)(C).

violation of the NSA (42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I)). This is because New York's Surprise Bill 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." N.Y. Financial Services Law § 603(h).

The wrongful determination that the Practice challenges is set forth in subregulatory guidance issued on the Departments' public NSA website. As alleged in the Amended Complaint, 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. (Amended Complaint ¶¶ 46-62.)

The principal argument that the Departments make to support their dismissal of this claim is that this Court dismissed the same claim in its July 17, 2023 Order dismissing the original Complaint . This is wrong.

In the original Complaint, the Practice never raised this 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." (July 17, 2023 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, however, the Practice does not seek any order compelling that these claims be submitted to federal IDR. Rather, the Amended Complaint simply seeks a finding under 5 U.S.C. § 706 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).

Specifically, The NSA's IDR process does not apply when a state has a specified state law that meets certain criteria regarding the provision of an alternative IDR process. 42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I). The NSA defines a "specified State law" as:

> The term "specified State law" means, with respect to a State, an item or service furnished by a nonparticipating provider or nonparticipating emergency facility during a year and a group health plan or group or individual health insurance coverage offered by a health insurance issuer, a State law that provides for a method for determining the total amount payable under such a plan, coverage, or issuer, respectively (to the extent such State law applies to such plan, coverage, or issuer, subject to section 514 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1144]) in the case of a participant, beneficiary, or enrollee covered under such plan or coverage and receiving such item or service from such a nonparticipating provider or nonparticipating emergency facility

U.S.C. § 300gg-111(a)(3)(I).

Since 2015, New York has had in effect its Surprise Bill and Emergency Medical Services Law, which is codified at article 6 of the New York Financial Services Law. It applies primarily to fully insured health plans in New York where the care underlying the dispute is rendered under circumstances that would meet the definition of a surprise bill or emergency medical services. *See* N.Y. Financial Services Law §§ 601-08. Disputes involving surprise bills and emergency medical

services are submitted to a New York IDR process overseen by the New York Department of Financial Services.

Elective non-emergency procedures, performed in a hospital or ambulatory surgery center, by an out-of-network provider, on a fully insured health plan beneficiary, who was aware before he or she came to the in-network hospital or ambulatory surgery center that the provider was out-of-network, but chose to proceed anyway, do not fall within the definition of a surprise bill or emergency medical services under article 6 of the Financial Services Law. Indeed, Section 603(h) of Financial Services Law states that a "'Surprise bill' means a bill for health care services, other than emergency services, with respect to":

> an insured for services rendered by a non-participating provider at a participating hospital or ambulatory surgical center, where a participating provider is unavailable or a non-participating provider renders services without the insured's knowledge, or unforeseen medical services arise at the time the health care services are rendered; provided, *however, that a surprise bill shall not mean 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,*

N.Y. Financial Services Law § 603(h)(1); *see also* New York State Department of Financial Services, Circular Letter No. 10 (2021) (issued Dec. 17, 2021) (Amended Complaint Exh. C).

Applying this provision, the New York State Department of Financial Services has expressly stated in its Surprise Bill Guidelines that, for non-emergency services provided by out-of-network providers in an in-network hospital or ambulatory surgery center, "[i]t will not be a surprise bill if the out-of-network service was preauthorized in advance and the patient received notice that the service was out-of-network and other disclosures required by the Insurance Law. . . ." (Amended Complaint Exh. D.)

Thus, contrary to the Department's findings, these types of elective non-emergency procedures are not covered by a specified state law, as that term is defined in the NSA. Accordingly, disputes involving these services are subject to NSA IDR. 42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I).[6]

Accordingly, the Departments have issued subregulatory guidance that is legally wrong and must be corrected. This is well within the authority of this Court. *See* 5 U.S.C. § 706(2)(A, C); *see also Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("Executive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation . . . and if that authority is exceeded it is open to judicial review"); *Texas v. United States*, 497 F.3d 491, 506, 509 (5th Cir. 2007) (invalidating agency action that "constitute[d] an unreasonable interpretation of Congress's intent"); *Make the Rd. N.Y.*, 475 F. Supp. 3d at 259-60; *New York*, 408 F. Supp. 3d at 342.

This relief is particularly apt given the multiple decisions in the last year holding that the Departments have misinterpreted or misapplied various provisions of the NSA. *See, e.g.*, *Texas Medical Ass'n v. U.S. Dep't of Health & Human Servs.*, 2023 U.S. Dist. LEXIS 149393 (E.D. Tex. Aug. 24, 2023) (invalidating portions of Qualified Payment Amount regulations); *Texas Medical Ass'n v. U.S. Dep't of Health & Human Servs.*, 2023 U.S. Dist. LEXIS 135310 (E.D. Tex. Aug. 3, 2023) (invalidating fee increase and batching provisions in regulations); *Texas Medical Ass'n v. U.S. Dep't of Health & Human Servs.*, ___ F. Supp. 3d ___, 2023 U.S. Dist

[6] In its motion-to-dismiss papers, the Defendants contend that the Practice has failed to provide any proof that, in fact, there are elective, non-emergency claims ineligible for New York IDR but for which a patient has not signed a notice-of-consent that exempts the claim for NSA IDR eligibility. This argument, however, ignores the fact that the Amended Complaint alleges that there are claims caught up in this very Catch-22. (Amended Complaint ¶¶ 58-62.) The Departments' argument also glosses over the fact that it is completely up to the provider to determine whether to ask the patient to sign a notice and consent, and up to the patient to decide whether or not to sign it. *See* 42 U.S.C. 300gg-111.

LEXIS 19526 (E.D. Tex. Feb. 6, 2023) (invalidating portions of Qualified Payment Amount regulation); *Texas Medical Ass'n v. U.S. Dep't of Health & Human Servs.*, 587 F. Supp. 3d 528 (E.D. Tex. 2022) (invalidating various portions of Departments' IDR regulations as inconsistent with NSA).

For these reasons, this Court should reject the Departments' dismissal arguments regarding these claims.

III. THE PRACTICE HAS SUFFICIENTLY ALLEGED A VIABLE PROCEDURAL DUE PROCESS CLAIM

The Amended Complaint finally re-pleads the Practice's claim that the Departments have denied the Practice its property without due process of law, in violation of the Fifth Amendment to the United States Constitution. (Amended Complaint ¶¶ 92-109.) The Departments allege, in their motion to dismiss, that the Practice's amended procedural due process claim still fails to sufficiently state a claim to avoid Rule 12(b)(6) dismissal. The Departments are wrong.

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 supports this position. (*Id.*)

The Amended Complaint, however, alleges a different and far 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 contractual

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.

Additionally, the Departments, in their motion to dismiss, contend that the Practice has failed to establish a deprivation of this constitutionally protectable property rights at the hands of the federal government. This, too, is incorrect[7].

Regarding the issue of deprivation, the Due Process Clause contained in both the Fifth and Fourteenth Amendments was "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). Procedural due process requires that government action depriving an individual of substantial interest in life, liberty, or property "be implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see also Ying Li v. City of New York*, 246 F. Supp. 3d 578, 625 (E.D.N.Y. 2017). Accordingly, a procedural due process violation occurs when the government deprives a person of a protected life, liberty, or property interest without first providing notice and an opportunity to be heard. *See Ying Li*, 246 F. Supp. 3d at 625; *B.D. v. DeBuono*, 130 F. Supp. 2d 401, 432-33 (S.D.N.Y. 2000).

The Departments' argument regarding deprivation misses one key point: as alleged in the Amended Complaint, the deprivation of the Practice's federally protected constitutional right to be paid, at least *something*, for providing medically necessary services to a patient, under either

[7] The Departments, in their motion to dismiss, contend that the issue of deprivation was already addressed in the Court's July 17th Order. The Court, however, addressed deprivation in connection with the procedural due process claim asserted in the original Complaint, which, as discussed herein is significantly different than the procedural due process claim asserted in the Amended Complaint, in terms of the federally protected constitutional right alleged and the theory of how, and who, deprived that right. Given these changes, this motion is the first time that the Court has had before it the exact issues raised by the Amended Complaint's procedural due process claim.

an express or implied contractual theory, occurred when the NSA became effective, and the Practice, and other similarly situated out-of-network providers, were barred from seeking or pursuing payment under these theories. (Amended Complaint ¶¶ 100-03.)

Contrary to the Departments' motion-to-dismiss arguments, this deprivation was clearly at the hands of the federal government. It was Congress that passed the NSA and the President who signed it into law. It was then the Departments that implemented the provisions of the NSA. Neither the health plans nor the IDR entities had the ability to enact and implement the NSA or bar the Practice from seeking or pursuing payment.[8]

Having deprived the Practice of its federally protected constitutional right to pursue payment for its services on its own, the government had a concomitant constitutional obligation to provide the Practice with a fair and reasonable procedure – due process – to obtain payment. *See Salerno*, 481 U.S. at 746; *Ying Li*, 246 F. Supp. 3d at 625; *DeBuono*, 130 F. Supp. 2d at 432-33. As the Supreme Court stated in *Mathews v. Eldridge,* 424 U.S. 319 (1976), "[t]he fundamental requirement of due process is the right to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Mertik v. Blalock*, 983 F.2d 1353, 1364 (6th Cir 1993). Likewise, "procedural due process is an absolute right protected by our Constitution, and an opportunity to be heard on an issue is an essential element of procedural due process. The denial of an opportunity to litigate can never be harmless error. A party must have his day in court." *Parker v. Williams*, 862 F.2d 1471, 1481-482 (11th Cir. 1989).

[8] This direct evidence of deprivation at the hands of the federal government distinguishes this amended claim from those claims at issue in the cases cited in the Departments' motion to dismiss as well as those cited in the July 17th Order. In those cases, it was non-governmental entities who deprived the plaintiffs of their federally protected constitutional rights. *See, e.g.*, *DeShaney v. Winnebago Cnty Dep't of Soc. Servs*., 489 .U.S. 189 (1989); *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008),

Here, Congress intended the IDR process to be the due process afforded the Practice and other similarly situated out-of-network providers given the NSA's deprivation of those providers right to obtain payment directly from patients and payers. No doubt following the holdings of *Mathews* and *Parker*, Congress attempted to ensure due process by, among other things, setting strict timelines for the IDR process, and mandating that the Departments certify sufficient IDR entities to ensure the timely and efficient provision of IDR determinations. *See* 42 U.S.C. § 300gg-111.

There can be no question based on the record before this Court that the IDR procedure, as implemented, has been anything but due process and that the Practice, and other similarly situated out-of-network providers, have been denied the right to heard on their reimbursement claims at a meaningful time and in a meaningful matter. As discussed above, IDR proceeding delay rates exceed 90%. Backlogs are being measured in multiple months and now, years. There are *58 times* the number of proceedings per certified IDR entity than the Departments originally determined was adequate. And the problem is worsening; the Departments' NSA IDR portal has been closed since August 24, 2023. (https://www.cms.gov/NOSURPRISES (accessed Aug. 29, 2023).) This is the result of the court decision in *Texas Medical Ass'n v. U.S. Dep't of Health & Human Servs.*, 2023 U.S. Dist. LEXIS 149393 (E.D. Tex. Aug. 24, 2023), which invalidated portions of the Departments' Qualified Payment Amount regulations as violating the NSA.

While other parties (such as the health plans and the IDR entities themselves) have contributed to these delays, it is the Departments who have been the major contributing factor in these delays. As alleged in the Amended Complaint, the Departments took a series of actions (and inactions) that rendered the IDR process untimely, ineffective, and inefficient. (Amended Complaint ¶ 104.) Contrary to the Departments' motion-to-dismiss argument, it was the

Departments who have the legal ability to ensure that the IDR procedure works appropriately, and it was the Departments who have failed to undertake this responsibility. This includes the Departments failing to honor their own statutory mandates, such as failing to ensure a sufficient number of certified IDR entities, failing to observe the tight time frames established by the NSA for the IDR process,[9] and failing to adopt procedures to monitor health plan compliance with the IDR timelines. (*Id.*)

Accordingly, it is the Departments who have failed to provide the Practice and other similarly situated out-of-network providers with due process to remedy the deprivation of their federally protected constitutional right to payment for the services that they rendered. For these reasons, the Practice has more than adequately alleged a procedural due process claim that is sufficient to withstand Rule 12(b)(6) dismissal. *See Salerno*, 481 U.S. at 746; *Ying Li*, 246 F. Supp. 3d at 625; *DeBuono*, 130 F. Supp. 2d at 432-33.

[9] The Departments, in their motion to dismiss, contend that the Practice lacks Article III standing to assert a claim that the Departments have failed to enforce the IDR proceeding deadlines against health plans and IDR entities, based on *United States v. Texas*, 143 S. Ct. 1964 (2023). The Departments' argument, however, misses the point. While it is true that, under this case, the Practice lacks standing to pursue an APA or All Writs Act claim seeking to compel the Departments to enforce the deadline, that is not what the Practice is seeking in this claim. Rather, the Practice is merely citing the failure to enforce, among other actions and inactions, as support for its contention that the Departments have failed to provide the Practice and other similarly situated out-of-network providers with due process to remedy the deprivation of their federally protected constitutional right to payment.

CONCLUSION

For the reasons set forth above, this Court should deny the Departments' Rule 12(b)(6) motion to dismiss in its entirety. Alternatively, if this Court determines that the Practice has failed to sufficiently plead any of its three claims in the Amended Complaint, the Practice respectfully requests the opportunity to re-plead in accordance with Fed. R. Civ. P. 15, and for such other relief that the Court deems proper.

Dated: Uniondale, New York
August 29, 2023

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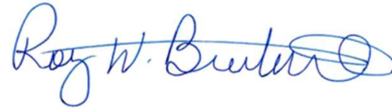

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