SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

CARING PROFESSIONALS, INC. and CONSUMER DIRECTED PERSONAL ASSISTANCE ASSOCIATION OF NEW YORK STATE,

Plaintiffs,

v.

NEW YORK STATE DEPARTMENT OF HEALTH, JAMES V. MCDONALD, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL LEWANDOWSKI, in his official capacity as a representative of the New York State Department of Health's Office of Health Insurance Programs, and PUBLIC PARTNERSHIPS LLC,

Defendants.

Index No. 601181/2025

Motion Sequence 1

Hon. Jerome C. Murphy, J.S.C.

STATE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Defendants New York State Department of Health ("DOH" or the "Department"), James V. McDonald, and Michael Lewandowski (collectively, the "State Defendants") respectfully submit this memorandum of law in opposition, pursuant to Rule 6301 of the New York Civil Practice Law and Rules ("CPLR"), to Plaintiffs' motion for a preliminary injunction. State Defendants' opposition is based on Plaintiffs' failure to demonstrate the essential elements of likelihood of success on the merits of their claims or irreparable harm, and because the equities weigh heavily against imposing the injunction they seek.

PRELIMINARY STATEMENT

Plaintiffs assert an indirect challenge to duly enacted legislation of the State of New York by seeking to prevent DOH from carrying out its statutory duties to administer the State's Medicaid program, including recent amendments to the Social Services Law ("SSL") which are set to take effect April 1, 2025. Disregarding grave risks to vulnerable Medicaid consumers, Plaintiffs ask this Court to exempt them from: (1) transferring data which State Defendants need, and are entitled to under State and federal law, to ensure there is no interruption in Medicaid services; and (2) notifying, as they are required to do under State law, Medicaid consumers and their personal assistants of information they need regarding the amendment to SSL effective April 1, 2025. Plaintiffs also seek an injunction against sanctions for their non-compliance with DOH guidance, even though there is no allegation or evidence of any sanctions even being proposed.

Plaintiff Caring Professionals, LLC is a fiscal intermediary ("FI") under the Medicaid Consumer Directed Personal Assistance Program ("CDPAP"); and Plaintiff Consumer Directed Personal Assistance Association of New York State ("CDPAANYS") is an organization that has FIs as members. CDPAP is a program within Medicaid, set forth in SSL § 365-f, that allows greater freedom of choice for qualifying chronically ill and/or physically disabled consumers of home

health care services. *See* SSL § 365-f(1). CDPAP FIs, such as Plaintiffs herein, manage administrative services, including wage and benefit processing for the personal assistants ("PA") providing homecare services to CDPAP consumers, ensuring that the health status of PAs is assessed, and maintaining records of consumers' eligibility for services. SSL § 365-f(4-a). FIs are responsible for complying with regulations established by the commissioner specifying the responsibilities of fiscal intermediaries providing services in CDPAP. SSL § 365-f(4-a)(2)(H). Currently there are more than 600 separate FIs operating throughout the State.

On April 20, 2024, the Governor signed legislation passed by the New York State Legislature that enacts amendments to SSL § 365-f (the "CDPAP Amendments"), pursuant to which, beginning April 1, 2025, a single Statewide FI will perform the requisite administrative functions for the entire CDPAP. SSL § 365-f(4-a)(i). To effectuate this change, from the current 600+ FIs to a Statewide FI, DOH, which is the sole State agency charged with administering Medicaid programs including CDPAP, issued guidance in a memorandum dated December 6, 2024 that FIs must transmit, to DOH and to Managed Care Organizations ("MCO"), certain data related to consumers and their personal assistants ("PA"). The guidance further directs that FIs must provide notice to the consumers and PAs they serve that they will be ceasing operations as of April 1, 2025. It is the December 6, 2024 guidance that Plaintiffs herein challenge.

On December 23, 2024, in response to inquiries regarding privacy concerns, DOH issued a memo explaining that the data transfer guidance is lawful under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and reminding FIs that they must comply with all Medicaid laws and guidance, and that failure to comply with the law, as a general matter, can result in sanctions, including removal from the Medicaid program. Inaccurately characterizing this as a

"threat," Plaintiffs further seek an injunction against purported sanctions, even though they assert no allegation or provide evidence that any sanction has been proposed against a single FI.

In their First Amended Verified Complaint dated January 21, 2025 ("Compl.," NYSCEF Doc. No. 21), Plaintiffs assert seven causes of action against the State Defendants: (1) alleged violations of HIPAA, Compl. ¶¶ 150-54; (2) alleged violations of New York's General Business Law ("GBL") § 399-ddd, *id.* ¶¶ 156-59; (3) compelled speech in violation of the First Amendment to the U.S. Constitution, *id.* ¶¶ 161-64; (4) alleged violations of notice and data transfer requirements set forth in SSL § 365-f(4-d), *id.* ¶¶ 166-73; (5) an alternative injunction requiring DOH to "prove" that sufficient safeguards are in place to protect the data, *id.* ¶¶ 175-79; (6) alleged violations of the Takings Clause of the Fifth Amendment to the U.S. Constitution, *id.* ¶¶ 181-88; and (7) a permanent injunction barring DOH from imposing sanctions on Plaintiffs for their failures to follow the law, *id.* ¶¶ 190-96. Plaintiffs assert an eighth cause of action against Co-Defendant Public Partnerships, LLC ("PPL"), which is the entity chosen pursuant to an open bidding process to be the Statewide FI. The cause of action against PPL is not addressed herein.

Plaintiffs cannot satisfy the first essential element for entitlement to a preliminary injunction, a showing of likelihood of success on the merits. *First*, because HIPAA does not allow for a private right of action, Plaintiffs lack standing to assert their HIPAA claim; and the disclosures are expressly permitted under several provisions of HIPAA. *Second*, GBL § 399-ddd is not implicated here because Plaintiffs are *not* required to transfer social security numbers. In addition, that statute does not provide for a private cause of action. *Third*, the notices at issue are consistent with the First Amendment, as numerous courts have found when examining similar notice requirements, because they involve factual assertions and are related to the important State interest of ensuring that consumers and PAs receive information that they need in order to continue

in the CDPAP program as of April 1, 2025. *Fourth*, the plain language of SSL § 365-f(4-d)(a)(i) makes clear that Plaintiffs are required to provide notice to consumers and PAs that they will, by operation of the CDPAP Amendments, be ceasing operations, and SSL § 365-f(4-d)(a)(iii) does not apply to data transfers between FIs and DOH. *Fifth*, Plaintiffs are not entitled to require DOH to "prove" that it is imposing adequate safeguards for the data transfers. Federal and State law, as well as the statewide data privacy policy by which DOH is bound to abide, provide for adequate safeguards. *Sixth*, Plaintiffs fail to show that the required data transfers constitute a taking under the Fifth Amendment because they cannot show that the data is their private property, that they have been deprived of such property, or that any action by the State Defendants deprived the data of its value to Plaintiffs as FIs. *Seventh*, and finally, Plaintiffs are not entitled to a permanent injunction exempting them from any sanctions for their failures to comply with the law. In any event, Plaintiffs fail to show that any sanctions are likely, much less imminent, as they are required to do to qualify for injunctive relief.

Plaintiffs also cannot satisfy the essential element of irreparable harm. The harms alleged by Plaintiffs are speculative at most. Plaintiffs show no imminent risk of any sanctions being imposed on them, much less a risk of being disenrolled from Medicaid. Plaintiffs' FI services will necessarily cease, by operation of law, as of April 1, 2025. To the extent Plaintiffs also provide home care services through a separate entity (a licensed home care services agency, or "LHCSA"), there is no basis for their assertion that their LHCSA faces imminent harm of potential disenrollment from Medicaid. Plaintiffs' second theory of irreparable harm, that they will suffer constitutional harms, is entirely without merit. To show a constitutional harm, Plaintiffs must show a likelihood of success on their constitutional claims, which they fall far short of doing. Plaintiffs cannot rely, as they are doing, on groundless claims of constitutional violations. Plaintiffs' third

theory of irreparable harm is equally illusory. Plaintiffs' fear that they will be sued by consumers, PAs, or DOH for complying with the law arises from speculation. As thoroughly demonstrated herein, the data transfer guidance complies with state and federal law, and any fear of being sued for complying with the law is groundless.

Moreover, if Plaintiffs were actually concerned that the requested information could not be transmitted to DOH without prior consent, there was nothing stopping Plaintiffs from acquiring that consent and *then* transferring the data to DOH. Plaintiffs had from December 6, 2025 to January 15, 2025 to gain the consent from the consumers, with whom they are in regular contact. Plaintiffs make no allegation that they did not already have any requisite HIPAA consent on file or that they attempted, but were unable, to gain the consent they claim to need.

Finally, the equities weigh heavily toward State Defendants' interest in a smooth transition to the Statewide FI, to ensure continuity of home care services, rather than allowing Plaintiffs to jeopardize the transition by their refusal to comply with lawful directives.

RELEVANT LEGISLATIVE AND REGULATORY BACKGROUND

A. Medicaid program and CDPAP Amendments

The Medicaid program is a joint federal and state program to provide medical care to those who are otherwise unable to afford it. Affirmation of Amir Bassiri ("Bassiri Aff.") ¶ 3. The federal government contributes a percentage of funding, while New York and its local governments contribute the remainder. *Id.* DOH is the sole state agency responsible for administering Medicaid in New York; to that end, it is empowered to promulgate all necessary regulations and guidelines for the administration of the New York State Medicaid Program. *Id*. ¶ 4.

One of the various programs operating under the umbrella of the New York State Medicaid program is the at-issue CDPAP, under which chronically ill or physically disabled individuals

(consumers) can select and retain their own PA to assist with home care needs. *Id*. ¶ 5. For the administrative aspects of their employment of PAs—including wage and benefit processing, and employment record maintenance and reporting—consumers work with FIs (fiscal intermediaries). *Id*. ¶ 7. FIs function as intermediaries between consumers and the Managed Care Organizations ("MCOs") and local departments of social services ("LDSS"), which oversee the process of qualifying consumers for their benefits. In New York, where FIs are not required to be licensed or to register with the State or DOH, it is estimated that there are over 600 FIs statewide. *Id*. ¶¶ 8, 14.

While other states also have CDPAP-style programs, the structure of virtually all these other states' programs differs radically from New York's with regard to the number of FIs. Bassiri Aff. ¶¶ 9, 23. Most states that have a CDPAP-style program have fewer than three FIs statewide, and many states have a single statewide FI. *Id*.

Their vast numbers have made it difficult for DOH to effectively regulate FIs, resulting in consumers receiving false and misleading advertising information about eligibility for Medicaid benefits, and confusing solicitations about benefits for which they are ineligible. *Id*. ¶¶ 10-11. In addition, New York pays an excessively high administrative rate to FIs, resulting in CDPAP becoming prohibitively expensive. *Id.* ¶ 13. New York's administrative rate is more than double the average rate paid by other state Medicaid agencies in states with similar programs and costs of living, such as Massachusetts. *Id*.

These bloated administrative costs have not only caused CDPAP's costs to rise in recent years, but have restricted New York's ability to pay for actual healthcare, such as personal care services, hospitals, physician salaries, and group homes for the intellectually and developmentally disabled. Bassiri Aff. ¶ 19-21. For example, funding for FI services—which are purely administrative—exceeds the entirety of NYS Medicaid payments to nursing facilities. *Id*. ¶ 21.

Previous efforts have been made to rein in the costs associated with New York's FI structure, with unsatisfactory results. Bassiri Aff. ¶¶ 15-16. Then, in April 2024, these efforts met with more success, when the New York State Legislature passed, and Governor Hochul signed into law, the CDPAP Amendments, reforming the existing FI system by creating an FI model that reflected the statewide system employed by other states. *Id*. ¶ 17. Under the CDPAP Amendments, a single Statewide FI performs the requisite administrative functions for the entire CDPAP to reduce costs and permit better DOH oversight and program integrity. *Id*.

The State Legislature set a deadline of April 1, 2025 for full implementation of the CDPAP Amendments. *See* SSL § 365-f (4-a-1)(a) ("Except for the statewide fiscal intermediary and its subcontractors, as of April first, two thousand twenty-five, no entity shall provide, directly or through contract, fiscal intermediary services."). The CDPAP Amendments are projected to save $500 million in taxpayer money annually. Bassiri Aff. ¶ 22; *see also* FY 2025 New York State Enacted Budget Final Plan, at p. 35 (true and correct copy of cited excerpt annexed as Exhibit 1 to Bassiri Aff.).

B. Bid process and selection of Statewide FI

To effectuate the CDPAP Amendments, in June 2024, DOH issued a Request for Proposal ("RFP"), setting forth the bidding requirements for entities interested in serving as the Statewide FI. Bassiri Aff. ¶ 28; *see also* New York State Department of Health Request for Proposal RFP #20524, New York State Fiscal Intermediary Services (June 17, 2024) (true and correct copy thereof annexed as Exhibit 7 to Bassiri Aff.). Prior to issuing the RFP, DOH conversed with the federal Centers for Medicare and Medicaid Services ("CMS") and representatives of other state Medicaid programs to explore the challenges other states have faced when making CDPAP program changes. *Id*. The RFP's criteria reflect aspects of a would-be statewide entity's structure

and operation that DOH considered important for appropriate administration of statewide FI services. *Id.*

The criteria included, *inter alia*, a requirement that the statewide FI subcontract with at least four regional FIs, one in each of New York's four Medicaid rate-setting regions. Bassiri Aff. ¶ 28; Ex. 7. The subcontracting requirement ensures that at least some other FI entities remain in place to assist the statewide entity in assuming statewide oversight. *Id.*

Following a review of the 136 bids received in response to the RFP, DOH selected PPL, a financial management service company with experience providing administrative services for self-directed care (like CDPAP) in twenty-one states, as New York's statewide FI. Bassiri Aff. ¶ 29. In light of its selection as New York's statewide FI, PPL has committed to moving their company headquarters to Albany, and to opening six other offices throughout the state, which is expected to create 1,200 new jobs for New Yorkers. Bassiri Aff. ¶ 31.

C. DOH's transition guidance

On December 6, 2024, DOH issued a memorandum entitled, "[CDPAP] Statewide Fiscal Intermediary Transition Policy for Current Fiscal Intermediaries." Bassiri Aff. ¶ 47; *see also* Consumer Directed Personal Assistance Program (CDPAP) Statewide Fiscal Intermediary Transition Policy for Current Fiscal Intermediaries (Dec. 6, 2024) (true and correct copy annexed as Exhibit 4 to Bassiri Aff.). In this guidance memo, DOH informed current FIs without approved facilitator subcontracts that they "must cease providing fiscal intermediary services as of March 31, 2025," and must "provide written notice at least forty-five (45) calendar days before discontinuing [FI] services to the affected CDPAP consumers," PAs, LDSSs, and MCOs, by using templates provided by Defendant DOH. Ex. 4 at 2.

The December 6, 2024 guidance memo further provides that "[n]o later than January 15, 2025, Current FIs must transfer data related to the CDPAP consumers they serve and their PAs to the Managed Care Plans for managed care enrollees and the Department for fee-for-service members." Ex. 4 at 3. DOH further explained that the data transfer would occur via DOH's "HCS," which is the Health Commerce System, a HIPAA-compliant and secure online communications system operated by DOH. Bassiri Aff. ¶ 59. Such data must include: (a) full names of CDPAP consumer; (b) consumer CIN; (c) designated representative and contact information if appliable; (d) consumer contact information; (e) consumer preferred language; (f) PA(s) for each consumer; (g) PA contact information; and (h) PA wage information. Ex. 4 at 3.

On December 23, 2024, after receiving several inquiries citing privacy concerns under HIPAA and New York's Personal Privacy Protection Law ("PPPL," N.Y. Public Officers Law Article 6-a), DOH issued an updated memorandum to "provide additional information regarding data transfers from current FIs to the Department and Medicaid managed care plans (MMCPs)." Bassiri Aff. ¶ 48; *see also* Notification to Current Fiscal Intermediaries Regarding Data Transfers (Dec. 23, 2024) (true and correct copy annexed as Exhibit 5 to Bassiri Aff.). The December 23, 2024 memorandum reiterated that, "[a]s stated in the Department's Memo issued on December 6, 2024, no later than January 15, 2025, current FIs must provide data related to [CDPAP consumers and PAs] to the MMCPs for managed care enrollees and the Department for fee-for-service members." Ex. 5 at 1. DOH noted its appreciation for these concerns, but assured current FIs that "HIPAA allows the sharing of protected health information between 'covered entities' for purposes of healthcare operations without individual consent," while the state PPPL applies to state agencies,[1] not current FIs. Ex. 5 at 1.

[1] New York State Personal Privacy Protection Law (PPPL), N.Y. Pub. Officers Law Art. 6-a, regulates how state agencies collect and use personal information and is not applicable to private entities

DOH issued templates that FIs could use to notify the consumers and PAs they serve. Bassiri Aff. ¶ 34; *see also* FI Discontinue Services Template FI to Consumer; and FI Discontinue Services Template FI to PAs (true and correct copy of each annexed as Exhibit 2 to Bassiri Aff.). DOH subsequently made amended notices available to all FIs, including Plaintiffs, which they are free to use as alternatives to the original templates provided. Bassiri Aff. ¶ 34; *see also* [Option 2] FI Discontinue Services Template FI to Consumer; and [Option 2] FI Discontinue Services Template FI to PAs (true and correct copy of each annexed as Exhibit 3 to Bassiri Aff.). The revised notices omit the language to which Plaintiffs object. *Id*.

STANDARDS ON MOTION FOR PRELIMIMARY INJUNCTION

A preliminary injunction

> may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

CPLR 6301.

"Although the determination whether to grant a motion for a preliminary injunction pursuant to CPLR 6301 rests within the sound discretion of the Supreme Court, a preliminary injunction may not issue unless the moving party demonstrates a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balance of equities in that party's favor." *St. Michael's Home v. Valmas*, 230 A.D.3d 1320, 1322 (2d Dep't 2024) (citing *Nobu Next Door, LLC v. Fine Arts Hous., Inc*., 4 N.Y.3d 839, 840 (2005); *Jones v. State Farm Fire & Cas. Co*., 189 A.D.3d 1565, 1566 (2d Dep't 2020)).

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such as FIs.

ARGUMENT

POINT I: PLAINTIFFS FAIL TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS

Plaintiffs cannot show likelihood of success on the merits any of their claims. The overriding consideration that defeats all of Plaintiffs' claims at the outset is that there is clear statutory authority for the guidance in the December 6, 2024 memorandum.

DOH's entitlement to consumer and PA data is well established under State law. SSL § 363-c(4) provides that "recipients of medical assistance program funds," which include FIs such as the Plaintiffs, "***shall*** make available to the commissioner . . . all fiscal and statistical records and reports, other contemporaneous records demonstrating their right to receive payment, and all underlying books, records, documentation and reports." SSL § 363-c(4) (emphasis added). The law thus recognizes DOH's right to request data that it "determine[s] necessary to manage and oversee the Medicaid program." *Id.* It is notable that FIs are mandated under the CDPAP regulations to maintain the records now subject to the data transfer. *See* 18 NYCRR § 505.28(j)(1)(i)-(viii).

Plaintiffs themselves all but admit that DOH is entitled to the data. *See* Pls.' Mem. (NYSCEF Doc. No. 38), at 31. Accordingly, Plaintiffs' challenge to the directive to transfer consumer and PA data fails under any legal theory.

Furthermore, upon ceasing operations or no longer serving a consumer's area, FIs have always been required to "deliver written notice forty-five calendar days in advance to the affected consumers, consumer representatives, [and] personal assistants," except in certain circumstances such as if their contract was terminated by DOH for failing to comply with their statutory obligations. SSL § 365-f(4-d)(a)(i). As discussed further below, *see infra* Point I(D), Plaintiffs are still required to provide such notice under the amended version of the law.

A. Plaintiffs cannot succeed on their HIPAA claim.

Plaintiffs cannot succeed on their HIPAA claim for multiple reasons. *First*, Plaintiffs' HIPAA claim will have to be dismissed at the outset because HIPAA does not recognize the type of private cause of action asserted here. *Second*, the HIPAA regulations cited by Plaintiffs do not prohibit them from sharing the consumer and PA data. *Third*, other HIPAA provisions, ignored by Plaintiffs, authorize the data transfers. *Fourth*, because Plaintiffs all but admit that the data transfer to DOH is lawful, what Plaintiffs actually complain of is the potential *future* transfer of data from DOH to the Statewide FI. Not only do Plaintiffs lack standing to assert this claim about future data transfers, but any data transfer from DOH to the Statewide FI is lawful.

1. Plaintiffs' HIPAA claim will have to be dismissed because HIPAA does not recognize the private cause of action Plaintiffs assert.

There is no private right of action under HIPAA. *Meadows v. United Servs., Inc.*, 963 F.3d 240, 244 (2d Cir. 2020) (agreeing with courts in various jurisdictions that "there is no private cause of action under HIPAA, express or implied"); *see also Mathie v. Womack*, No. 14-cv-6577, 2015 WL 419802, at *2 (E.D.N.Y. Jan. 29, 2015); *Warren Pearl Const. Corp. v. Guardian Life Ins. Co. of Am.*, 639 F. Supp. 2d 371, 377 (S.D.N.Y. 2009) (citing cases from numerous jurisdictions, holding "courts have held that HIPAA does not provide for either an express or implied private right of action"); *Ames v. Grp. Health Inc.*, 553 F. Supp. 2d 187, 192 (E.D.N.Y. 2008) (holding private plaintiffs "cannot bring a HIPAA enforcement action due to improper disclosures of medical information").

"Instead, HIPAA provides for penalties to be imposed by the Secretary of the Department of Health and Human Services." *Meadows*, 963 F.3d at 244 (citing 42 U.S.C. § 1320d-5(a)(1)); *see also Ames*, 553 F. Supp. 2d at 192 ("In fact, HIPAA limits enforcement of the statute to the Secretary of Health and Human Services." (citing 42 U.S.C. §§ 1320d–5, d-6)). The grant of

exclusive enforcement authority to the Secretary of the Department of Health and Human Services ("HHS") means that that no private right of action may be implied under the statute. *Meadows*, 963 F.3d at 244 ("By delegating enforcement authority to [HHS], the statute clearly reflects that Congress did not intend for HIPAA to create a private remedy.").

Because HIPAA does not recognize a private cause of action, Plaintiffs can show no likelihood of success whatsoever on their HIPAA claim, which will have to be dismissed. *Meadows*, 963 F.3d at 244 ("Accordingly, because HIPAA confers no private cause of action, express or implied, we must dismiss [the plaintiffs' HIPAA] claims.")

2. The HIPAA provisions relied on by Plaintiffs do not prohibit them from disclosing consumer or PA data to DOH.

Plaintiffs cite various HIPAA provisions, but they fail to show that any of those provisions excuse them from their obligations to provide the data.

45 C.F.R. § 164.506(c)(4):

Plaintiffs cite, *inter alia*, 45 C.F.R. § 164.506(c)(4), but they fail to demonstrate that they are restricted under that provision from disclosing the data.

45 C.F.R. § 164.506(c)(4) provides:

> (4) A covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is:
>
> (i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations.

45 C.F.R. § 164.506(c)(4).

Plaintiffs argue that the data is not sought for health care operations, *see* Pls.' Mem. at 31, but they are wrong. The data transfer at issue is unquestionably related to health care operations.

The definition of "health care operations" includes, in relevant part, "case management and care coordination," as well as "related functions that do not include treatment." 45 CFR § 164.501. Ensuring that consumers do not experience an interruption in services and that PAs are paid for their work are both related to "case management and care coordination," and well as to "related functions that do not include treatment." Plaintiffs cannot reasonably contest this.

Accordingly, 45 C.F.R. § 164.506(c)(4) authorizes the data transfers at issue.

45 C.F.R. § 164.514(d)(3)(ii)(A):

Plaintiffs cite 45 C.F.R. § 164.514(d)(3)(ii)(A), which requires a covered entity making disclosures to: "(A) Develop criteria designed to limit the protected health information disclosed to the information reasonably necessary to accomplish the purpose for which disclosure is sought; and (B) Review requests for disclosure on an individual basis in accordance with such criteria." Compl. ¶¶ 96-98. However, this provision is followed immediately by additional provisions establishing that the "reasonably necessary" requirement *is* satisfied under the circumstances presented here.

To wit, the HIPAA regulations further clarify, in relevant part, that:

(iii) A covered entity may rely, if such reliance is reasonable under the circumstances, on a requested disclosure as the minimum necessary for the stated purpose when:

(A) Making disclosures to public officials that are permitted under § 164.512, if the public official represents that the information requested is the minimum necessary for the stated purpose(s); [or]

(B) The information is requested by another covered entity.

45 C.F.R. § 164.514(d)(3)(iii)(A), (B). Here, the request is being made by a "public official[]," and the requests are permitted under § 164.512(a)(1) (providing that "[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law. . . ."). Plaintiffs acknowledge this. *See* Compl. ¶ 94 (explaining that Plaintiffs are restricted

from disclosing protected information *except* where permitted or required under 45 C.F.R. 164.512).

In any event, the "reasonably necessary" requirement is satisfied here because the data is, as is not disputed, being requested by a covered entity, *i.e.*, DOH. *See* Pls.' Mem. at 31 (acknowledging DOH is a covered entity).

45 C.F.R. § 164.508(a)(3)(i):

Plaintiffs further argue that the data transfers are restricted by 45 C.F.R. § 164.508(a)(3)(i) because, as they incorrectly assert, the data will be used for marketing purposes. *See* Pls.' Mem. at 31-32. Plaintiffs refute their own argument when they cite the definition under HIPAA of the term marketing, which is "to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service." *Id.* § 164.501; *see* Pls.' Mem. at 32.

The data will not be used to communicate with consumers or PAs to encourage them to purchase or use a product or service. The data will be used to facilitate the transition to a Statewide FI by notifying consumers and PAs that, pursuant to the CDPAP Amendments, they need to register with the Statewide FI. Under the CDPAP Amendments, as of April 1, 2025, the Statewide FI is the only vendor permitted to operate as an FI in CDPAP. This is not marketing of a product or service. This is administration of the CDPAP program with the essential aim of ensuring continuity of care for vulnerable populations.

3. The data transfer is permitted under other HIPAA provisions which Plaintiffs ignore.

45 CFR § 164.512(d):

The data may be transferred pursuant to 45 C.F.R. § 164.512(d), which provides, in relevant part:

> A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:
>
> (i) The health care system;
>
> (ii) Government benefit programs for which health information is relevant to beneficiary eligibility; [or]
>
> (iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

45 C.F.R. § 164.512(d). Here, disclosure of consumer and PA information is necessary for DOH's oversight of the Medicaid program because DOH must ensure that every CDPAP consumer will be able to continue to receive homecare services as of April 1, 2025. Bassiri Aff. ¶¶ 33-35.

45 CFR § 164.506(c)(3):

Plaintiffs are also authorized to transfer the data under 45 CFR § 164.506(c)(3), which permits disclosure "to another covered entity or a health care provider for the payment activities of the entity that receives the information." 45 C.F.R. § 164.506(c)(3). Plaintiffs acknowledge that DOH is a covered entity. *See* Pls.' Mem. at 31. And Plaintiffs cannot reasonably dispute that the data is related to payment activities of DOH, the receiver of the data. The data is needed for the transition to the Statewide FI who will handle administrative functions, including payroll for PAs.

4. Subsequent disclosures from DOH to the Statewide FI are also permitted under HIPAA.

Plaintiffs all but admit that DOH is entitled to the data transfers. Plaintiffs state, "DOH may itself be entitled to this information, as a 'covered entity' itself. . . ." Pls.' Mem. at 31. That admission dispenses with all of Plaintiffs' claims, including any HIPAA claim (even if Plaintiffs

were able to assert a private right of action, which they are not). Plaintiffs' argument that HIPAA is violated because DOH may transmit the data to the Statewide FI cannot save their HIPAA claim.

First, nothing in HIPAA addresses potential future disclosures of data. Plaintiffs do not have standing to challenge a potential future disclosure of information between two separate entities that do not include Plaintiffs. Indeed, Plaintiffs lack statutory standing to assert their HIPAA claims in the first place. *See, e.g.*, *Meadows*, 963 F.3d at 244 (holding there is no express or implied private cause of action under HIPAA). Therefore, it is clear that how tthe question of potential transfers of data from DOH to the Statewide FI are not properly before the Court.

In any event, any future transfer of the data between DOH and the Statewide FI will be fully HIPAA compliant, just as data transfers between current FIs and DOH are HIPAA compliant. The Statewide FI entered into a contract with the State on December 20, 2024 to be the single statewide FI CDPAP vendor. *See* Bassiri Aff. ¶¶ 29, 38.

Under the terms of the contract between the State and the Statewide FI, the Statewide FI must "comply fully with all current and future NYS privacy, confidentiality, and security policies and standards, as well as with all applicable State and federal requirements." Section 4.9 of the RFP, entitled "Privacy, Security and Confidentiality Requirements," provides that:

> The awarded Statewide FI [which is PPL] will comply fully with all current and future NYS privacy, confidentiality, and security policies and standards, as well as with all applicable State and federal requirements, in performance of this contract. This shall include all privacy and security policies and procedures of the Department (https://its.ny.gov/eiso/policies/security) and applicable state and federal law, rules, regulations, and administrative guidance with respect to the performance of this contract. The awarded Statewide FI will comply fully with all current and future updates of the security procedures of the DOH, as well as with all applicable State and Federal requirements, in performance of this contract.

Ex. 8 at § 4.9.[2] Section 4.9 of the RFP further provides:

[2] The statewide Office of Information Technology Services' Policies page, https://its.ny.gov/eiso/policies/security, sets forth the data security requirements for all State agencies, including DOH.

> Medicaid data may not be used for purposes other than the administration of the Medicaid program. The awarded Statewide FI may not, without written authorization from the DOH, divulge to third parties any confidential information obtained by the awarded Statewide FI or its agents, distributors, resellers, subcontractors, officers or employees while performing contract work. DOH will have absolute authority to determine if, and when, any other party may be allowed to access information. Confidentiality is the concept that data will be viewable only by those who are explicitly permitted to view it.

Id.

For all of these reasons, Plaintiffs cannot succeed on their HIPAA claim.

B. Plaintiffs cannot succeed on their claim of a violation of GBL § 399-ddd.

Plaintiffs allege that the December 6, 2024 memorandum directs them to transmit social security numbers in violation of GBL § 399-ddd, but this claim will have to be dismissed for several reasons.

First, Plaintiffs' GBL § 399-ddd claim will have to be dismissed because that statute does not provide for a private right of action. Instead, the New York State Attorney General has exclusive jurisdiction over alleged violations of GBL § 399-ddd.

GBL § 399-ddd provides, in relevant part:

> Whenever there shall be a violation of this section, application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations[.]

Id. § 399-ddd(4). This subsection makes clear that the New York State Attorney General has exclusive jurisdiction to seek injunctive relief for alleged violations of this statute. Accordingly, Plaintiffs lack statutory standing to assert this claim.

Second, the December 6, 2024 memo does *not* require Plaintiffs to transmit social security numbers. The December 6, 2024 memo and the linked spreadsheets make clear that social security number are not required to be entered, either for consumers or PAs. *See*

https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fhealth.ny.gov%2Fhealth_care%2Fmedicaid%2Fredesign%2Fmrt90%2F2024%2Fdocs%2Fcdpap_fi_data_tranfer_template.xlsx&wdOrigin=BROWSELINK (the "Required" column in both consumer and PA spreadsheets, stating "N," meaning social security numbers are *not* required).

Third, even if their GBL § 399-ddd claim did not fail at the outset, which it does, Plaintiffs cannot succeed on this claim because they fail to show that any provision of § 399-ddd would be violated by the data transfer guidance. Plaintiffs cite GBL§ 399-ddd (2)(a), pursuant to which they may not "[i]ntentionally communicate to the general public or otherwise make available to the general public in any manner an individual's social security account number." GBL § 399-ddd(2)(a); *see* Pls.' Mem. at 32. But this provision is not implicated here because Plaintiffs are not required to disclose social security numbers at all, much less make them public. *See* Ex. 6 at 3. Plaintiffs further cite § 399-ddd(4), which requires them to "provide safeguards necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number," and § 399-ddd(6), pursuant to which they may not "file any document available for public inspection with any state agency" that contains a social security number. *See* Pls' Mem. at 32; Compl ¶ 100. These provisions are not implicated for the same reasons.

Accordingly, Plaintiffs have no viable GBL § 399-ddd claim.

C. Plaintiffs cannot succeed on their claim of compelled speech in violation of the First Amendment.

Plaintiffs allege that the templates for FIs to provide notice informing consumers and PAs, that they will no longer serve as FIs after March 31, 2025 constitute compelled speech in violation of the First Amendment. However, Plaintiffs show no likelihood of success on the merits of their First Amendment claim.

As an initial matter, the disclosures at issue are subject a deferential rational basis review, which applies to a subset of commercial speech involving notice requirements, such as those at issue here, requiring the provision of "purely factual and uncontroversial information." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010); *CompassCare v. Hochul*, 125 F.4th 49, 64 (2d Cir. 2025) ("The Supreme Court has subjected mandatory disclosures in advertising—a form of "commercial speech" entitled to lesser First Amendment protection—to a level of scrutiny resembling rational basis review." (citing *Zauderer*)).

Such notice requirements are consistent with the First Amendment as long as they are "reasonably related" to a state interest and are not "unduly burdensome." *Zauderer,* 471 U.S. 626, 651. This analytical framework of rational basis review exists because of the importance of ensuring that individuals are informed, and a more deferential approach is appropriate because factual disclosures are not viewpoints.

Zauderer rejected a First Amendment challenge to a requirement that attorney advertisements provide information explaining the contingent fee arrangement. 471 U.S. at 633. As *Milavetz* explained, the *Zauderer* rational basis test makes sense because "First Amendment protection for commercial speech is justified in large part by the information's value to consumers," and a speaker's "constitutionally protected interest in *not* providing the required factual information is minimal." *Milavitz*, 559 U.S. at 249-50 (quoting *Zauderer*, 471 U.S. at 651). Like the lawyer in *Zauderer*, Plaintiffs' interest in withholding the required information, which is purely factual information, is minimal. Under this framework, disclosure requirements comport with the First Amendment as long as they are related to the State's interest in preventing consumers from being misinformed. *Id.* Here, the disclosure requirements easily clear rational basis review because

they are related to the government interest in assuring that consumers and PAs are informed about what they need to do to ensure continuity of services under the CDPAP program.

Plaintiffs argue that two aspects of the notice templates violate the First Amendment. First, they object that the notice templates do not include an explanation that the FI providing the notice was not part of the decision that it will be ceasing operations. Pls.' Mem. at 28. This allegation has nothing to do with compelled speech. Nothing in the notice templates suggests that the change is the result of an individual decision of any FI, and there is nothing preventing Plaintiffs from separately communicating to their consumers and PAs that they were not involved in the decision to enact the CDPAP Amendments.

Plaintiffs' other objection is to the statement to PAs that, "as long as you register with PPL no later than March 28, 2025, this change will not affect your ability to continue to provide [PA] services as directed by the CDPAP Consumer you now serve." Pls.' Mem. at 28. However, Plaintiffs are not required to make this statement—DOH has provided the option to use a template letter *without* this language. *See* Ex. 5 ("Option 2" template for notice from FI to PA).

Plaintiffs' argument that the notices are content-based speech requiring strict scrutiny fails. Plaintiffs rely on *National Inst. of Family and Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018), but the notices at issue there are sharply distinct from those at issue here. The Court considered the notices at issue in *Becerra* to require more than purely factual and uncontroversial information because the challengers were required to provide information on where patients could obtain state-sponsored abortion services, which the Court considered a controversial issue. *Id.* at 768. Here, while Plaintiffs may disapprove of the CDPAP Amendments, the notices merely convey the indisputable fact that Plaintiffs will cease operations in CDPAP before April 1, 2025.

The notices at issue here are akin to numerous laws involving mandatory disclosures that have withstood constitutional scrutiny in various contexts. *See* *CompassCare*, 125 F.4th at 64 (upholding mandatory notice in employee handbook of legal protections regarding reproductive health care); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (applying *Zauderer* standard to uphold required calorie information on restaurant menus); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001) (applying *Zauderer* standard to uphold state-mandated mercury warning labels on light bulbs). In addition, notice requirements exist throughout state law. *See, e.g.*, N.Y. Real Prop. L. § 462 (sellers' disclosure regarding pipes, asbestos, and toxic substances); N.Y. Lab. Law § 198-d (employee rights regarding illegal wage deductions); 9 NYCRR § 466.1(a) (employee anti-discrimination rights); 12 NYCRR § 142-2.8 (employee information on minimum wage rights). By providing these notices, the disclosing party is not required to endorse any views. These notice requirements exist for important policy goals, even though many of these required disclosures may be adverse to the disclosing party's interests.

Plaintiffs cannot succeed in showing that the notice requirements violate the First Amendment.

D. Plaintiffs cannot succeed on their claim of a violation of SSL § 365-f(4-d).

Plaintiffs claim that SSL § 365-f (4-d)(c) exempts them from the requirement to provide written notice that they will be ceasing operations after March 31, 2025. *See* Pls.' Mem. at 33-34. Plaintiffs' argument is based on a misreading of that provision. As of April 1, 2025, the Plaintiffs' FI businesses will be "ceasing operation or . . . no longer serv[ing] the consumer's area," because of the CDPAP Amendments, and are therefore required to deliver written notice to consumers and PAs forty-five days prior thereto, *i.e.*, by February 14, 2025. *See* SSL § 365-f (4-d)(a)(i).

Section § 365-f (4-d)(c) does not exempt Plaintiffs from sending the required notices. That subsection applies only "[w]here a fiscal intermediary is suspending or ceasing operation pursuant to an order under [§ 365-f(4-b)] or has failed to submit an offer for a contract, or has been denied a contract under this section," *id.,* none of which applies here.

On April 1, 2025, any contracts Plaintiffs have to provide FI services will terminate by operation of law due to the CDPAP Amendments. *Id.* § 376-f. Those contracts will *not* terminate pursuant to an order under § 365-f(4-b) (which applies where an FI's registration is revoked or suspended). In addition, Plaintiffs will cease operating as FIs not because Plaintiffs failed to submit an offer for a contract or that a contract was denied. Plaintiffs will be ceasing FI services by operation of law due to the CDPAP Amendments. Contrary to Plaintiffs' incorrect interpretation of § 365-f (4-d)(c), the notice requirement under § 365-f (4-d)(a)(i) derives from termination of Plaintiffs' *existing contracts*, and has nothing to do with an offer for a future contract, which is what § 365-f(4-d)(c) applies to.

The section that applies, and with which Plaintiffs must comply, is § 365-f(4-d)(a)(i), which states:

> Where a fiscal intermediary is ceasing operation or will no longer serve the consumer's area, the fiscal intermediary shall:
>
> (i) deliver written notice forty-five calendar days in advance to the affected consumers, consumer representatives, personal assistants, the department, and any local social services districts or managed care plans with which the fiscal intermediary contracts

SSL § 365-f(4-d)(a)(i). As stated, Plaintiffs will be ceasing operations as of April 1, 2025, by operation of the CDPAP Amendments (not because of any reason stated in § 365-f(4-d)(c)). Therefore, they were required to provide notice to the consumers and PAs they serve by February 14, 2025, which is 45 days prior to the March 31, 2025 deadline.

Plaintiffs also argue that the data transfer directive violates SSL § 465-f(4-d)(a)(iii) (*see* Pls. Mem. at 32-33), but that section has no relevance here. That section applies solely to the transmission of records from one FI to another FI. Here, the December 6, 2024 guidance directs the transfer of contact information, not records, and the contact information is to be transmitted to DOH. *See* Ex. 4.

Notably, FIs are prohibited from taking "any action that would prevent a personal assistant from moving to a new fiscal intermediary." SSL § 365-f (4-d)(a)(ii). Plaintiffs are taking such prohibited action by refusing to provide DOH with contact information for consumers and PAs, while simultaneously refusing to notify those consumers and PAs of the statewide transition. The consumers and PAs currently served by Plaintiffs are imminently set to stop receiving Plaintiffs' services once Plaintiffs can no longer lawfully operate as FIs as of April 1, 2025. Those consumers and PAs, in order to continue under the CDPAP, will need to move to the Statewide FI. Under the SSL, those consumers and PAs are entitled to written notice informing them of what they need to do in order to continue to receive services.

E. Plaintiffs are not entitled to proof from DOH regarding DOH's compliance with HIPAA and other privacy protection laws.

Plaintiffs cannot succeed on their fifth "cause of action," seeking an alternative injunction requiring DOH to prove that "sufficient safeguards" will be in place to protect the data. As an initial matter, this is not a cause of action at all; rather, it is merely an alternative request for injunctive relief. As with their other requests for injunctive relief, Plaintiffs are required to show that they are likely to succeed on the merits of their claims, that they will suffer irreparable harm absent an injunction, and that the equities favor the injunctive relief sought. Plaintiffs cannot satisfy any of those elements. In any event, Plaintiffs are not entitled to such relief, for several reasons.

First, Plaintiffs do not allege that DOH's HCS fails to comply with HIPAA or any of New York State's data protection statutes or policies. In addition, to the extent Plaintiffs' fifth claim could be considered a "cause of action," the allegations therein are duplicative of Plaintiffs' HIPAA claim. *See* Pls.' Mem. at 35. As set forth above, *see supra*, Point I(A), Plaintiffs' HIPAA claim fails on all fronts because Plaintiffs do not have a private right of action under HIPAA in the first place, and because HIPAA permits the required data transfers. Plaintiffs cannot circumvent the lack of a private cause of action under HIPAA by repackaging their HIPAA claim as an "alternative" request for injunctive relief. These allegations, just like Plaintiffs' HIPAA claim, are based on the incorrect premise that DOH is not entitled to share Medicaid participant data with its own contracted vendor. The Statewide FI needs the names and contact information for CDPAP consumers and PAs so that it can perform the administrative functions that Plaintiffs currently perform but will no longer be able to lawfully perform as of April 1, 2025. *See supra*, Point I(A)(4).

Plaintiffs offer no basis for their demand for proof from DOH that it is complying with privacy protection laws. Instead, they rely on an internal PPL email discussing outreach to PAs. *See* Pls.' Mem. at 35; Pls.' Ex. O. But nothing in that email contains any suggestion that any data is being shared outside of PPL. As set forth above, *see supra,* Point I(A)(4), the RFP for the Statewide FI binds PPL to comply fully with all State and federal privacy protection requirements, as well as the statewide privacy protection policies (https://its.ny.gov/eiso/policies/security) that DOH is bound by.

In any event, Plaintiffs are not entitled to demand proof from DOH regarding data security. DOH is mandated to comply with the Statewide data protection policies. *See* https://its.ny.gov/eiso/policies/security. The State's HCS (the Health Commerce System), the

system FIs are directed to use to transmit the data, is a secure system that complies with HIPAA and the State's privacy protection policies. Bassiri Aff. ¶ 59.

Moreover, the State Legislature has entrusted DOH with securing the confidentiality of the data. SSL § 363-c(4), the same statute that mandates Plaintiffs to comply with the December 6, 2024 guidance, provides, in relevant part, that "any personally identifying information obtained pursuant to this subdivision shall remain confidential and shall be used solely for the purposes of this subdivision." SSL § 363-c(4). State Defendants are presumed to be in compliance with this statute. *Gae Farms, Inc. v. Diamond*, 40 A.D.2d 909, 909 (3d Dep't 1972) ("Administrative actions are presumed to have been regular").

In addition, Plaintiffs' request for an alternative injunction mandating DOH to provide proof that it has adequate safeguards in place is a mandatory injunction, which requires them to meet a higher burden. "Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits.'" *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (internal quotation marks omitted)).

As set forth herein, Plaintiffs cannot even meet the lower standard for a prohibitory injunction, much less the high standard for a mandatory injunction. Plaintiffs are not entitled to their demand for proof from DOH that it is complying with privacy protection laws.

F. Plaintiffs cannot succeed on their claim of a taking in violation of the Fifth Amendment.

Plaintiffs' cannot succeed on their takings claim because they cannot show that the consumer and PA contact information is their private property or that they have been deprived of anything of value. In addition, Plaintiffs cannot show that being required to transfer the consumer

an PA contact information to DOH interfered with their legitimate investment-backed expectations.

"[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const., amend. V. "Property" includes both real and personal property. *Horne v. Dep't of Agric.*, 576 U.S. 350, 358-59 (2015). To state a takings claim, a plaintiff must show that: (1) they have a property interest protected by the Fifth Amendment; (2) they were deprived of that interest by the government for public use; and (3) they were not afforded just compensation. *Ganci v. N.Y.C. Transit Auth.*, 420 F. Supp. 2d 190, 195 (S.D.N.Y.), *aff'd*, 163 F. App'x 7 (2d Cir. 2005); *see also Knick v. Twp. of Scott, Penn.*, 588 U.S. 180, 184 (2019). "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden." *James Square Assocs. LP v. Mullen*, 21 N.Y.3d 233, 247 (2013).

A taking may be physical or regulatory. For a regulation to effect a taking, its effect must be "functionally equivalent to the classic taking in which government directly appropriates private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The question of whether a regulation has effected a taking depends on consideration of: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Rochester Gas & Elec. Corp. v. Pub. Serv. Com.*, 71 N.Y.2d 313, 324 (1988) (*citing Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)); *see Matter of Nelson v. City of N.Y.*, 117 A.D.3d 1221, 1224 (3d Dep't 2014), *lv denied* 24 N.Y.3d 909 (2014).

1. The data transfer guidance is not a physical taking.

The data transfer guidance is not a physical taking. Plaintiffs do not have a property interest in the consumer and PA contact information. CDPAP consumers are not customers in an open

market; they are participants in a publicly funded Medicaid program. Plaintiffs argue that their consumer and PA lists are proprietary because they have kept the data confidential. Pls.' Mem. at 27. But Plaintiffs have kept that data confidential because they are required to pursuant to State and federal law, not because they own the data. Plaintiffs admit they kept the data confidential pursuant to "HIPAA and other privacy-related statutes and regulations." *Id.* Plaintiffs cite *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), but that case does not support their argument. *Monsanto* involved scientific data, not contact information for Medicaid consumers and caregivers, and the parties therein stipulated that the scientific data constituted trade secrets. *Id.* at 1001. The Court ruled that trade secrets can be considered property for purposes of the Takings Clause. *Id.* at 1003-04. But Plaintiffs, while making vague references to trade secrets, do not actually argue that the contact information for the consumers and PAs they serve constitutes trade secrets. And, notably, the *Monsanto* court held that even where a taking had occurred (which, the Court ruled, had occurred with respect to a subset of the data), the remedy was *not* an injunction. *Id.* at 1016. Instead, it was to subsequently seek compensation. *Id.* at 1016, 1020.

And any argument that Plaintiffs have a property interest in the consumer and PA contact information is entirely undermined by the fact that Plaintiffs do not have a property interest in continued participation as FIs in the Medicaid program. "Medicaid providers have no property interest in or contract right to reimbursement at any specific rate or, for that matter, to continued participation in the Medicaid program at all." *Concerned Home Care Providers, Inc. v. State*, 108 A.D.3d 151, 157 (3d Dep't 2013) (internal quotation marks omitted); *see also Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 91-92 (2d Cir. 2015) (no property interest in Medicaid reimbursement or provider's continued participation in Medicaid); *Tekkno Lab'ys, Inc. v. Perales*,

933 F.2d 1093, 1098 (2d Cir. 1991) (same); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 582 (2d Cir. 1989) (no property interest in continued participation in Medicaid).

Because the consumer and PA data is not Plaintiff's property, their takings claim fails at the outset, and Plaintiffs necessary cannot satisfy the other elements of a physical taking, *i.e.*, that they were deprived of the property (which they do not own) or that they were not justly compensated (for data that has no monetary value to FIs pursuant to the CDPAP Amendments, not pursuant to any action taken by State Defendants).

2. The data transfer guidance is not a regulatory taking.

Nor is data transfer guidance a regulatory taking. First, the economic impact of the data transfer guidance is non-existent. Any economic impact to Plaintiffs and other FIs would be caused by the enactment of the CDPAP Amendments, not by the guidance directing the transfer of the data. As of April 1, 2025, Plaintiffs will no longer operate as FIs pursuant to a statutory amendment, not pursuant to any action taken by DOH.

Second, Plaintiffs have no legitimate investment-backed expectation in being permitted to refuse to share the consumer and PA lists. Plaintiffs have been required at all times to transmit data to DOH on request pursuant to SSL § 363-c. In addition, because Plaintiffs' do not have a legitimate investment backed expectations in continued participation in the Medicaid program, *see, e.g.*, *Concerned Home Care Providers*, 108 A.D. at 157, they necessarily cannot have a legitimate investment backed expectation in concealing from DOH information about consumers and PAs they serve under CDPAP.

The third consideration in evaluating a regulatory takings claim, the character of the government's action, also shows that the data transfer guidance is not a taking. The character of the data transfer guidance is that it was made under express statutory authority, *i.e.*, SSL § 363-

c(4), and it was made in furtherance of the critical government interest of ensuring a smooth transition to the statutorily mandated Statewide FI system so that vulnerable consumers do not experience a disruption in their home care services.

G. Plaintiffs cannot succeed on their request for an injunction against non-existent sanctions.

Plaintiffs' seventh "cause of action" is not a cause of action at all—it is an additional request for injunctive relief. Accordingly, to succeed in showing they are entitled to this relief, Plaintiffs must show that they are likely to succeed on the merits of their actual causes of action. Plaintiffs cannot make this showing. *See supra*, Point I(A)-(F).

In any event, Plaintiffs are not entitled to an injunction barring sanctions that do not exist. Plaintiffs' refusal to comply with the data transfer guidance is a refusal to comply with the law because Plaintiffs are obligated under SSL § 363-c to comply promptly with requests for data made by DOH. *See* SSL § 363-c(4). However, Plaintiffs do not allege or produce any evidence that DOH has provided any of them with a notice of proposed sanctions or otherwise taken any steps toward initiating sanctions actions against them or any other FI.[3]

Plaintiffs' seventh "cause of action" is premised entirely on assertions by DOH, issued in a memorandum dated December 23, 2024, that: (1) FIs are "required to comply with all Medicaid statutes, regulations, and guidance as a condition of participation in the program"; and (2) failure to comply with Medicaid statutes, regulations, and guidance "can carry penalties and other sanctions, including exclusion from the Medicaid program." *See* Ex. 7. Nowhere do Plaintiffs allege that DOH has taken any steps to implement sanctions against them or any other FI. And

[3] 18 NYCRR Part 515 sets forth the requirements for sanctioning persons under the Medicaid program. Part 515 provides for a notice period and various due process protections including a hearing at the agency level. 18 NYCRR § 515.6. Plaintiffs have not alleged any such action is being taken against them much less that they have exhausted administrative remedies in any conceivable manner that would enable them to sue DOH on this basis.

nowhere do Plaintiffs demonstrate any "threat" of sanctions. The statement by DOH that violations of the law carry the risk of potential negative repercussions is general and uncontroversial. Plaintiffs are not entitled to an injunction barring non-existent sanctions proceedings. This alone defeats a showing of irreparable harm. *See* *Fam.-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 (2d Dep't 2010) ("The movant must show that the irreparable harm is "imminent, not remote or speculative.'").

In addition, while the data transfer guidance is issued to FIs only, *see* Ex. 6; Ex. 7, the only feared sanction Plaintiffs identify would be to their LHCSA businesses. Pls.' Mem. at 37-38. This is a *non sequitur* because the LHCSA segment of their business is not directed to comply with the data transfer or notice guidance. *See* Ex. 6; Ex. 7. Any chance that the LHCSA segment of Plaintiffs' businesses would be dis-enrolled from the Medicaid program based on FIs' non-compliance is beyond "remote and speculative." It is entirely manufactured by Plaintiffs.

Plaintiffs fall far short of showing they will be irreparably harmed by the general principle that lawbreakers may sometimes be faced with sanctions.

POINT II: PLAINTIFFS FAIL TO DEMONSTRATE IRREPARABLE HARM

Plaintiffs' motion for a preliminary injunction should be denied for the additional, independent reason that Plaintiffs fail to demonstrate irreparable harm.

Plaintiffs first argue that they will be harmed by the "threat" of sanctions for their failure to comply with the law. Pls.' Mem. at 37-38. This argument is entirely duplicative of their seventh "cause of action," and is equally meritless. As stated above, *see supra*, Point I(A)(G), Plaintiffs do not allege any facts to support their claim. They do not allege that they have received a notice of proposed sanction or that DOH has taken any action toward imposing sanctions on any FI. And, the only sanctions Plaintiffs' fear are to their LHCSA businesses, whereas the data transfer and

notice guidance are directed to FIs, not to LHCSAs. Plaintiffs allege that DOH's reminder in its December 23, 2024 memorandum that FIs are required to comply with the law was a "threat," but nothing in the December 23, 2024 memorandum, or the December 6, 2024 memorandum containing the transition guidance, concerns LHCSAs. Plaintiffs fail to show any imminent threat of sanctions beyond pure speculation. *See supra*, Point I(A)(G).

Plaintiffs next argue that they will be irreparably harmed by constitutional violations. Pls.' Mem. at 39-41. This argument fails because Plaintiffs offer nothing more than unsupported allegations of constitutional violations. It is well established that "the mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm." *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996); *see also Blakeman v. James*, No. 2:24-cv-1655, 2024 WL 3201671, at *18 (E.D.N.Y. Apr. 4, 2024) ("[A] bare assertion of a constitutional injury . . . is insufficient to automatically trigger a finding of irreparable harm."). Rather, where "Plaintiffs allege violations of their constitutional rights as the irreparable injury suffered, they must show a likelihood of success on the merits of their constitutional claims to meet the irreparable injury prong to merit a preliminary injunction." *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 389 (S.D.N.Y. 2023) (finding plaintiffs failed to meet their burden to show irreparable harm despite allegations that plaintiffs would be deprived of their constitutional rights under the First, Second, and Fourteenth Amendments). Plaintiffs cannot show likelihood of success on their First Amendment or their Fifth Amendment claims. *See supra* Point I(C), (F) (demonstrating Plaintiffs' failure to show likelihood of success on First Amendment compelled speech claim and Fifth Amendment takings claim, respectively). Accordingly, Plaintiffs fail to demonstrate irreparable harm based on alleged constitutional harms.

Third, Plaintiffs argue that they will be irreparably harmed if they provide the required data to DOH because they may potentially be sued by consumers, PAs, or DOH for violations of GBL § 399-ddd and SSL § 365-f. Pls.' Mem. at 41. As set forth above, *see supra*, Point I(B), (D), Plaintiffs will not be violating either of these statutes by transferring the data to DOH. As for GBL § 399-ddd, that statute applies only to disclosures of social security numbers, but, as discussed above, *see supra*, Point I(B), FIs are not required to transfer social security numbers of consumers or PAs. *See* https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fhealth.ny.gov%2Fhealth_care%2Fmedicaid%2Fredesign%2Fmrt90%2F2024%2Fdocs%2Fcdpap_fi_data_tranfer_template.xlsx&wdOrigin=BROWSELINK. Moreover, Plaintiff's fears are groundless because GBL § 399-ddd allows only the New York State Attorney General to assert a claim thereunder. GBL § 399-ddd(4).

As for SSL § 365-f, Plaintiffs offer no basis for their speculation that they could be sued for violations of that statute if they transfer the data to DOH. Plaintiffs fail to explain how transferring the data would violate SSL § 365-f. Plaintiffs argue that complying with the data transfer guidance would violate SSL § 365-f(4-d)(a)(iii), but that statute applies only to transfers from one FI to another FI, whereas the data transfer guidance requires data to be transferred only from FIs to DOH. Thus, as explained above, *see supra* Point I(D), SSL § 365-f(4-d)(a)(iii) is of no relevance here. In any event, Plaintiffs' argument that DOH would take action against them for complying with the data transfer guidance is pure fantasy. The December 6, 2024 guidance and State Defendants' arguments herein establish that, in complying with the data transfer guidance, Plaintiffs would be complying with the law, not violating it.

Plaintiffs fail to demonstrate the essential element of irreparable harm. For this additional, independent reason, Plaintiffs' motion for a preliminary injunction should be denied.

POINT III: THE EQUITIES FAVOR DENYING PLAINTIFFS' REQUESTED INJUNCTION

Another independent reason exists for denying the injunctive relief sought by Plaintiffs. There can be no real question that the equities weigh heavily in favor of requiring FIs to provide contact information to DOH and notice to CDPAP consumers and PAs. Vulnerable Medicaid recipients in need of home health care are at risk of suffering an interruption in their essential services if the transition to the Statewide FI is delayed or disrupted. And those consumers' PAs risk being cut off from payroll, leaving them with the impossible choice of working without compensation or being unable to work. The equities weigh heavily against Plaintiffs being permitted to facilitate these injustices against the consumers and PAs that they purportedly serve.

DOH is statutorily charged with administering New York's Medicaid program. The State Legislature has directed that DOH "shall act as the single state agency to supervise the administration of [Medicaid] in this state." SSL § 363-a(1). To enable DOH to fulfill its mandate, the Legislature has further empowered DOH to "make such regulations, not inconsistent with law, as may be necessary to implement this title." SSL § 363-a(2). Now, in light the CDPAP Amendments, *see* SSL § 365-f, DOH is also responsible for coordinating a smooth transition to the Statewide FI by the Legislature's deadline of April 1, 2025. Bassiri Aff. ¶¶ 4, 18, 33-35. The transition to a Statewide FI necessarily entails the transfer of consumer and PA contact data, plus notice to those individuals; DOH's instructions and notice templates merely address the documentation needed to accomplish those tasks. *Id*. ¶¶ 33-35. Notably, FIs are prohibited from taken any action interfering with a consumer's or PA's transition to a new FI. SSL § 365-f(4-d)(a)(ii). That is what Plaintiffs here are doing.

The data transfer procedures and the notice requirements are lawful and in furtherance of DOH's statutorily mandated mission to facilitate the transition to the Statewide FI vendor. If Plaintiffs prevail in their attempts to disrupt this process, consumers could suffer an interruption in their essential home care services and PAs could go without pay. Those very real harms greatly outweigh any monetary loss or other remote and speculative harm that Plaintiffs are claiming.

The equities weigh strongly against the injunctive relief sought by Plaintiffs. For all of these reasons, Plaintiffs' motion for a preliminary injunction should be denied.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction, in its entirety, and grant such other and further relief that the Court deems just and equitable.

Dated: Mineola, New York
February 18, 2025

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CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-b

The undersigned, an attorney duly admitted to practice before this court, hereby certifies that the foregoing Memorandum of Law contains 10,926 words. This word count excludes the caption, tables, and signature block, but includes all headings and footnotes, and was conducted using the word-count function of our office's word processing system. Plaintiffs and State Defendants (Defendants New York State Department of Health, James V. McDonald, and Michael Lewandowski) have entered into a stipulation, electronically filed with the Court on February 14, 2025, consenting to allow State Defendants' memorandum of law and Plaintiffs' reply memorandum of law to exceed the 7,000 word limit, to a maximum of 12,000 words, and those parties respectfully seek the Court's permission pursuant to the provision in 22 NYCRR § 202.8-b(a)(i) allowing an enlargement of the 7,000-word limit upon leave of court.

Dated: Mineola, New York
February 18, 2025

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