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

PLAINTIFFS CARING PROFESSIONALS, INC. AND CONSUMER DIRECTED PERSONAL ASSISTANCE ASSOCIATION OF NEW YORK STATE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiffs Caring Professionals, Inc. ("Caring Professionals") and Consumer Directed Personal Assistance Association of New York State ("CDPAANY") (together, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for a temporary restraining order restraining and enjoining Defendants New York State Department of Health ("DOH"), James V. McDonald ("McDonald"), and Michael Lewandowski ("Lewandowski") (together, "DOH Defendants"), and all those acting in concert or in participation with DOH Defendants, including Public Partnerships LLC ("PPL") (together with DOH Defendants, "Defendants") from imposing on Caring Professionals or any of the member financial intermediaries within CDPAANYS (the "Member FIs") any sanction, penalty, or adverse action for failing to comply with the January 15, 2025 deadline imposed by DOH Defendants in their memorandum, dated December 6, 2024, including but not limited to the sanction threatened by DOH on December 23, 2024 of terminating and excluding Caring Professionals and the Member FIs from the Medicaid Program. Plaintiffs also seek a preliminary injunction as follows:

1. Restraining and enjoining DOH Defendants from enforcing DOH Defendants' directive for the transfer of certain data and records for Consumers (defined below) or personal assistances served by Caring Professionals or any of the Member FIs;

2. Alternatively, restraining and enjoining DOH Defendants from compelling the turnover of the demanded data and records without sufficient proof of safeguards in place to protect and secure this private and sensitive information.

3. Restraining and enjoining DOH Defendants from enforcing against Caring Professionals or any of the Member FIs any sanction, penalty, or adverse action for failing to comply with the January 15, 2025 deadline imposed by DOH Defendants for the transfer of certain data and records for Consumers or personal assistants served by Caring Professionals or any of the Member FIs, including but not limited to the sanction threatened by DOH on December 23, 2024 of terminating and excluding Caring Professionals or any of the Member FIs from the Medicaid Program; and

4. Such other and further relief as the Court may deem just and proper.

PRELIMINARY STATEMENT

For the past year, DOH Defendants have engaged in a legislative campaign to drive out of business the hundreds of Fiscal Intermediaries ("FIs") facilitating the delivery of Medicaid-funded home health care assistants to New York State's most vulnerable populations through the Consumer Directed Personal Assistance Program ("CDPAP"). Through years of financial investment and tireless devotion to these populations, Caring Professionals and the Member FIs serve as the necessary liaison between a group of loyal patients that they cultivated (known as "Consumers"), many of whom are elderly, disabled, and impoverished, and their chosen caretakers who the FIs painstakingly helped to recruit for the Consumers and whose services the FIs administer, known as Personal Assistants ("PAs"). Defendants' collective collusion has a singular purpose, which is to create an illegal five-year, $9 billion (per year) monopoly for FI services in an out-of-state entity, PPL, which has a history of misrepresentations and mismanagement, no experience providing these services within New York State, and according to the Department of State website does not even appear to be licensed to do business in New York State. So serious was the issuing of this $9 billion monopoly contract to PPL, leading Nassau County politicians, whose statements have been cited throughout the contemporaneously filed First Amended Complaint and in this memorandum, have come out in protesting against the award of this monopoly contract to PPL without any "vetting" by the Medicaid program.

But this lawsuit does not seek to challenge the validity of the 2024 amendments to CDPAP laws that seek to permit this $9 billion monopoly. Numerous other Courts are presently addressing that issue. Instead, this lawsuit concerns the unlawful directives issued by DOH Defendants in December 2024. These directives were issued under the guise of implementing the amendments to the CDPAP, but in reality, are unlawful attempts to strong-arm Plaintiffs into turning over their

valuable Consumer and PA lists and data, and to market PPL's services, on PPL's behalf, through notices that existing CDPAP laws actually require the DOH, not Plaintiffs, to issue.

Indeed, it is now evident that PPL was utterly unqualified and unprepared to assume the most important step in its massive undertaking of managing its monopoly-control over $9 billion in CDPAP funds. Defendants ignored the single greatest task to perform in assuming this statewide responsibility—a plan to transition the services of the hundreds of thousands of vulnerable Consumers who would depend on the home health care services entrusted. Defendants had no plan for obtaining the names of the Consumers who are the recipients of the services that they now seek to force Plaintiffs and other similarly situated FIs to disclose to them. Likewise, Defendants had no plan to ascertain the identity of their caretakers, the PAs who provide such home health care services, in time for the rollout of the new CDPAP monopoly framework.

Having recognized they had no transition plan to obtain this vital information on their own, Defendants instead colluded to misuse and abuse DOH Defendants' authority to attempt to strong-arm the information from Caring Professionals and Member FIs. In a December 6, 2024 memorandum to CDPAP FIs, DOH Defendants demanded that Caring Professionals and other similarly situated FIs, among other things, transmit their lists of Consumers and PAs and all personnel files to DOH Defendants and undertake the burden that was imposed on Defendants by the amendments to the CDPAP and notify the Consumers that PPL would be taking over their services. Essentially, the same FIs whose businesses that PPL's monopoly stands to either decimate or severely cripple are being forced to turn over to PPL—*for free*— valuable, proprietary, and sensitive information. These lists are themselves proprietary and valuable, cultivated through millions of dollars in investment and years of business that Caring Professionals and other Member FIs spent years and extensive time, efforts, and energy building. The requested data also includes

social security numbers and personnel files, and under the Amendments to the CDPAP statute, the same may not be disclosed absent consent. On behalf of the industry, including the Member FIs, CDPAANYS objected to such illegal conduct and requested that DOH Defendants withdraw the directives. By letter to FIs industry wide on December 23, 2024, the eve of the holidays, designed to strong arm compliance, DOH Defendants threatened that if Plaintiffs and other FIs do not comply, DOH Defendants would impose sanctions, including the termination and expulsion of any non-complying FI from the Medicaid program.

The immediate and emergent issue before the Court on this application for a temporary restraining order is the threat made to Plaintiffs by DOH Defendants as retaliation for Plaintiffs' objections to DOH Defendants' unlawful directives is catastrophic and illegal. That sanction is directly contrary to the limits on sanctions and penalties imposed by New York Social Services Laws and the Medicaid statues themselves, which do not permit sanctions under these circumstances at all. But more importantly, the sanctions are a nuclear option that extend far beyond the limits of CDPAP. Sanctions, especially these, would assure destruction of the $150 million Medicaid-funded services that Caring Professionals renders to thousands of Consumers outside of CDPAP and put Caring Professionals out of business. There is nothing equitable about driving Caring Professionals and other Member FIs completely out of business ever, but certainly not while serious issues are being litigated here.

As for the remainder of the Motion, Plaintiffs are entitled to a preliminary injunction staying the DOH Defendants from taking the threatened adverse Medicaid actions against Plaintiffs while the legality of the directives is litigated. Additionally, Plaintiffs are also entitled to a preliminary injunction staying their obligation to make these unlawful disclosures because these directives would (i) compel violations of the Health Insurance Portability and Accountability Act

("HIPAA"), (ii) run afoul of the First and Fifth Amendment to the U.S. Constitution regarding compelled speech and takings without due process, (iii) violate the plain terms of other related statutes and regulations, and (iv) result in the turnover of personal health information and other private information to PPL, an entity that does not have safeguards in place to properly regulate this information.

STATEMENT OF FACTS

A. History and Purpose of the CDPAP and the Parties

One of the most impactful programs implemented by DOH Defendants is New York's longstanding CDPAP, which was established pursuant to Title XIX of the Social Security Act, 42 U.S.C. Ch. 7 (the "Medicaid Act"). Am.Compl. ¶¶ 30-31. The Medicaid Act is a joint state-federal program which provides comprehensive healthcare coverage to vulnerable populations. *Id.* ¶ 31. States are authorized to develop personal care services as an optional state Medicaid plan service pursuant to Section 1905(a)(24) of the Social Security Act and subject to various federal and statutory requirements. *Id.* ¶ 32. Such federal requirements are necessary to protect the interests of Medicaid recipients. *Id.* Within the Medicaid program, the Centers for Medicare & Medicaid Services ("CMS") operates with a purpose of guarding against fraud, waste, abuse, arbitrary state action, and ensures a competitive procurement process as it relates to Medicaid. *Id.* ¶ 33.

New York first adopted its Medicaid program in 1967. *Id.* ¶ 34. In 1995, the New York legislature passed Social Services Law § 365-f and implemented the State's first CDPAP for its residents. *Id*. The purpose of CDPAP is to allow chronically ill and/or physically disabled individuals receiving home care under Medicaid "greater flexibility and freedom of choice" when obtaining services from various home health care aides and selecting FIs. *Id.* ¶ 35; *see* New York Social Services Law § 365-f (3). The scope of services that are authorized under CDPAP include most tasks that can be provided by a personal care aide, home health aide, Licensed Practical

Nurse, or Registered Professional Nurse. Am.Compl. ¶ 36. As a result, Medicaid recipients participating in CDPAP, also known as "Consumers," (see 18 NYCRR § 505.28) are empowered to recruit, hire, and direct their own home care workers—including eligible family members and friends. Am.Compl. ¶ 36. Today, CDPAANYS estimates that approximately 280,000 Medicaid beneficiaries are currently enrolled in New York's CDPAP and that they are served by approximately 440,000 PAs working for over 600 different FIs. *Id.* ¶ 37.

Caring Professionals is an organization overseeing home health care services for many of New York's diverse and vulnerable communities. These include various ethnic and racial groups, seniors, people with disabilities, LGBTQ+ individuals, veterans, Holocaust survivors, and others. *Id*. ¶ 15. FIs are essential organizations that assist with the financial and administrative aspects of CDPAP, including managing payroll and taxes, overseeing benefit administration, processing payments, managing personnel records, and more. *Id.* ¶ 23. New York Social Services Law § 365-f(4). Since FIs are responsible for managing personnel records for residents participating in CDPAP, it is crucial that they remain faithful to their confidentiality obligations and trustworthy when guarding proprietary information. *Id*. ¶ 24.

Caring Professionals is the brainchild of an immigrant nurse from Moscow, Russia who saw a void in care for various vulnerable groups aging around her. *Id.* ¶ 16. Related to its work as an FI, Caring Professionals has also operated a licensed home care services agency ("LHCSA") in the State of New York since 1994. *Id.* ¶ 17. As a LHCSA, Caring Professionals primarily provides personal care services through personal care aides and home health aides to patients who are in need of home care services. *Id.* ¶ 19. Caring Professionals contracts with Medicare certified-home health agencies ("CHHAs") to provide home health aides via the contract to the CHHA patients who are receiving skilled home health services. *Id.* ¶ 20. The CHHA is the payor for the services,

but the funding source for the CHHA is most often Medicare or Medicaid. *Id*. The LCHSA also contracts with Medicaid Managed Long Term Care ("MLTC") plans to provide personal care services to the MLTC members through personal care aides or home health aides. *Id.* ¶ 21. In the counties where the Caring Professionals LHCSA operates, any CHHA patient who is dually eligible (payors are Medicare and Medicaid) must transition to an MLTC after receiving 120 days of services in the CHHA. *Id.* ¶ 22. The LHCSA is enrolled with New York Medicaid to be able to contract with, and receive payments from, the CHHAs and the MLTCs. *Id*.

Caring Professionals offers services to its clients in over ten (10) languages. *Id.* ¶ 17. Importantly, Caring Professionals takes a unique approach to care provided in the home by prioritizing individual needs and cultural values. *Id.* ¶ 18. Caring Professionals is an impactful and well-respected FI in the New York caregiving industry. *Id*. ¶ 25. Because it is one of the most trusted services operating across New York State, Caring Professionals has entered into twenty-three (23) contracts with approximately twenty-one (21) MLTC plans in a majority of lower Hudson Valley counties and south in New York, and services over 5,000 New York residents, including more than 500 in Nassau County. *Id.* ¶ 26.

Defendant DOH is the division of state government responsible for protecting public health by, among other things, implementing various regulations which benefit the community at large. *Id.* ¶ 11. McDonald is the current Commissioner of Health for the DOH. *Id.* ¶ 12. Lewandowski is the representative of DOH's Office of Health Insurance Programs who has been designated as the person at the DOH responsible for the initial implementation of the CDPAP regulatory scheme effective April 2025 and, pursuant to the DOH RFP #20524 (discussed below), is the representative at DOH responsible for all communications related to the submission of written bids, questions, and debriefings in connection with the new CDPAP scheme. *Id.* ¶ 13.

B. The Role of the FIs under Existing Framework of CDPAP

When a local department of social services ("LDSS") receives a request from a Consumer applying to participate in CDPAP, the DOH or a Medicaid Managed Care Organization ("MMCO") must assess the Consumer's eligibility and determine a plan of care based on the type of care needed and the number of hours of assistance required. *Id.* ¶ 38; *see* 18 NYCRR §§ 505.28(d)-(e). Once a plan of care is developed, FIs provide support services to the Consumers as set forth in the DOH regulations. Am.Compl. ¶ 39; 18 NYCRR § 505.28(j). These services include:

(i) processing each Consumer directed PA's wages and benefits including establishing the amount of each assistant's wages; processing all income tax and other required wage withholdings; and complying with worker's compensation, disability and unemployment insurance requirements;

(ii) ensuring that the health status of each Consumer directed PA is assessed prior to service delivery pursuant to 10 NYCRR § 766.11(c) and (d) or any successor regulation;

(iii) maintaining personnel records for each Consumer directed PA, including time sheets and other documentation needed for wages and benefit processing and a copy of the medical documentation required pursuant to 10 NYCRR § 766.11(c) and (d) or any successor regulation;

(iv) maintaining records for each Consumer including copies of the social services district's authorization or reauthorization;

(v) monitoring the Consumer's or, if applicable, the Consumer's designated representative's continuing ability to fulfill the Consumer's responsibilities under the program and promptly notifying the social services district of any circumstance that may affect the Consumer's or, if applicable, the Consumer's designated representative's ability to fulfill such responsibilities;

(vi) complying with the department's regulations at 18 NYCRR § 504.3, or any successor regulation, that specify the responsibilities of providers enrolled in the medical assistance program;

(vii) entering into a contract with the social services district for the provision of FI services; and

(viii) entering into a department approved memorandum of understanding with the Consumer that describes the parties' responsibilities under the Consumer directed PA program.

See 18 NYCRR § 505.28(j); Am.Compl. ¶ 39.

There are two courses of reimbursement for FIs participating in CDPAP. If the Consumer being serviced is enrolled in a Fee-For-Service Medicaid program ("FFS") through his/her county LDSS, FIs receive Medicaid reimbursement based on (1) the number of direct care hours of Consumer directed personal assistance services authorized for that Consumer in a particular month and (2) the different levels in FI administrative costs associated with each tier of authorization. 18 NYCRR at § 505.28(j)(3); Am.Compl. ¶ 40. In contrast, FI compensation for Consumers enrolled in the CDPAP through a Medicaid Managed Care ("MMC") program is governed by the terms of an underlying contract between the MMCO and FI. *Id*. ¶ 41. Under the current CDPAP, Caring Professionals has contracts with both LDSS and private MMCOs. *Id.* ¶ 42.

C. Caring Professionals' Significant Investment in Developing Valuable Customer and Provider Lists

Two of the most valuable assets that Caring Professionals owns are its proprietary list of Consumers and PAs. *Id*. ¶ 43.

Caring Professionals has been a community agency for over thirty (30) years and through that time has grown with the company and the community in which it serves. *Id.* ¶ 44. Through brand awareness, community involvement, acquisitions, marketing campaigns, client referral programs, incentive programs, and more, Caring Professionals has invested millions, if not tens of millions, of dollars to create and enact growth opportunities when it comes to advertising services and having a trusted name in the industry. *Id.* ¶ 45. Through these efforts and expenses, Caring Professionals has been able to develop its own proprietary system which manages and houses all information related to company operations. *Id.* ¶ 46.

This has not been merely transactional; it has been transformative. *Id*. Caring Professionals has cultivated deep, meaningful relationships with clients, caregivers, care managers, managed care organizations, advocacy groups, and countless other stakeholders throughout the homecare continuum. *Id.* ¶ 47. These relationships, rooted in trust and collaboration, are the foundation of Caring Professionals' success and the health of the communities and people it serves. *Id.* ¶ 48.

Caring Professionals' data management was developed and is maintained with constant development and a strong security infrastructure. *Id.* ¶ 49. These systems are not cheap to maintain and receive regular maintenance and continued development fees. *Id.* ¶ 50. Moreover, other significant monetary investments associated with such data management include social media expenses, association dues, platform maintenance fees, development fees, marketing expenses, referral fees, incentive fees, acquisitions, costs associated with training and education on the platform, as well as salaries for its support staff. *Id.* ¶ 51.

Relationships with the Consumers served, and PAs employed and documented in Caring Professionals' record, are also the result of significant recruitment efforts inextricably intertwined with Caring Professionals' business and is accomplished in a multitude of different ways, each of which is also the result of significant and expensive investments. *Id.* ¶ 52. Caring Professionals has excellent brand recognition within the space, advertises across many mediums, works with many social agencies, and gets referrals from current employees or through the community itself. *Id.* ¶ 53. The vetting process for PAs is to ensure the worker is able to fulfil the Consumers' obligations and that they satisfy pre-work standards set forth in regulations *Id.* ¶ 54. Someone from Caring Professionals speaks to the PA to verify they are in compliance within the program rules, instructs on how to complete requirements to start working, and discusses the technology and time keeping requirements. *Id.* ¶ 55. From there Caring Professionals walks the Consumer (the one

receiving service), through the program regulations and their responsibilities. *Id.* ¶ 56. Once that is completed, Caring Professionals walks the Consumer through the relevant contract, which again lays out the rights and responsibilities of the consumer who is participating in this program. *Id.* ¶ 57.

Caring Professionals also has many lines of service offerings within the home and community-based services industry; if a PA's ability to fulfill his or her obligations under CDPAP changes, Caring Professionals can work to address the Consumer's needs by assisting with a transition to LHCSA services and providing certified workers who are well vetted, having completed extensive background checks and training. *Id.* ¶ 58. With this ability, Caring Professionals is able to provide the highest level of continuity of care possible without disruption to the services or Consumer themselves. *Id.* ¶ 59.

Caring Professionals has carefully developed and cultivated its CPDAP FI and LHCSA business over the years, spending upwards of $25-30 million among advertisements, administrative salaries, community involvement, system engineers and developers, IT personnel, and security operations. *Id.* ¶ 60. In short, Caring Professionals has developed a valuable business with its Consumer and PA data as one of its most significant assets, developed through years of hard work and cost. *Id*. ¶ 61.

D. Corrupt Changes to the CDPAP

Caring Professionals has served as an FI since 2015. *Id.* ¶ 62. In April 2024, the State Fiscal Year 2024-25 Enacted Budget included an amendment to Social Services Law Section 365-f(4-a), that did not get introduced through the typical budget process and was a late addition circumventing the typical process, purporting to overhaul CDPAP on the false pretext that it would save the State money. *Id.* ¶ 63. In June 2024, DOH Defendants began efforts to eliminate the current system of highly competitive and localized FIs into a single company monopoly by issuing

Request for Proposals #20524: New York State Fiscal Intermediary Services (the "RFP"). Am.Compl. ¶ 64, Ex. A. The amended terms effectively nullified all of the private contracts FIs have with both MMCOs and LDSSs, demanded that all existing FIs stop providing CDPAP services effective April 1, 2025, and required the Commissioner of Health to contract with a single statewide fiscal intermediary ("SFI") to provide FI services to CDPAP Consumers—ultimately replacing approximately 600 FIs located throughout the state. *Id.* ¶ 65.

In an unprecedented departure from New York State fiscal policy, "[t]he CDPAP Amendment…exempts the Statewide Fiscal Intermediary bid process and contract award from State Comptroller involvement and review and from the detailed procurement process requirements of State Finance Law section 163, which generally apply to all service contracts with a State agency in any amount over $50,000." Affirmation of Edward Wipper, Ex. 2, at pp. 13-14 ¶ 33 (internal citations omitted). "This one-time exemption for a multibillion-dollar contract is particularly surprising in light of the fact that the Legislature in December 2022 affirmatively restored the Office of the State Comptroller's review of certain state contracts which had previously been removed, with the Comptroller noting at the time that 'independent contract review is an essential and important deterrent to waste, fraud and abuse in the state's procurement process. By reviewing contracts before they are awarded, my office protects taxpayers and state agencies by uncovering significant fiscal and integrity issues and helps to ensure a level playing field for vendors.'" *Id.* (internal citations omitted).

The RFP allegedly sought "competitive proposals from qualified bidders to provide Statewide Fiscal Intermediary services." Am.Compl. ¶ 66, Ex. A. The bidding criteria outlined in the RFP strategically disqualified nearly all successful New York State FIs from even bidding by requiring eligible FIs to be providing services on a statewide basis in at least one other state. *Id.*

¶ 67, Ex. A at § 3.1(a). DOH Defendants tactically issued the RFP to favor their desired SFI, intentionally excluded mention of a transparent scoring system, and failed to provide any meaningful information on how offers would be scored despite being asked by concerned, existing FIs. *Id.* ¶ 68, Ex. B. Indeed, in August 2024 Caring Professionals served a Freedom of Information Law ("FOIL") request to DOH asking about the RFP's bidding and scoring process. *Id.* ¶ 69. This FOIL request has been pending for five (5) months, and Caring Professionals was advised that it will not receive an answer before April 2025—after the amendments to the CDPAP are in effect. *Id*. Despite these hurdles, over one hundred (100) existing New York FIs submitted proposals to serve as the SFI, including Caring Professionals. *Id.* ¶ 71.

For months, the public anticipated the contract would be awarded PPL, even prior to the issuance of the RFP. *Id*. ¶ 71. PPL is a Georgia based company that allegedly worked closely with New York State Public Employees' Union SEIU 1199. *Id*. ¶ 72. Union SEIU 1199 has a longstanding history with Governor Hochul. *Id*. ¶ 73. In fact, Union SEIU 1199 has for many decades regularly endorsed (through money and campaign labor efforts) candidates for the New York State Legislature and for Governor, including Governor Hochul. *Id*. Furthermore, Union SEIU 1199 strongly supported the statutory amendments and the selection of PPL. *Id*. ¶ 74.

DOH Defendants made little effort to disguise that the criteria of the RFP were tailored for PPL, and PPL was well aware of its pre-selection well before the SFI was announced. *Id*. ¶ 75. On June 20, 2024, one day before the RFP was issued and three months before the award was announced, Union SEIU 1199 invited FIs with which Union SEIU 1199 had relationships to a meeting to discuss PPL as the SFI. *Id*. ¶ 76. Shortly thereafter, according to an article written by Amanda D'Ambrosio, titled "Georgia-Based Company Makes Moves to Administer New York's Multibillion-Dollar Home Care Program," PPL started to proactively reach out to existing fiscal

intermediaries in New York, offering them a potential subcontract" and "[was] hiring [for] a director to oversee financial management services in New York."[1] *Id*. at ¶ 77. PPL also posted a job listing for a New York "Director, Market Implementation" position on or before August 26, 2024 seeking a "Director [who] will oversee the New York market and Consumer implementation function and ensure the Customer Experience Operations department's goals and responsibilities are met in New York." *Id*. ¶ 78, Ex. C. Unsurprisingly, on September 30, 2024, the Governor of New York awarded the $9 Billion contract to PPL as the exclusive SFI vendor. *Id.* ¶ 79.

E. DOH Defendants and PPL Fail To Plan For A Transition

While conspiring to direct the SFI contract to PPL, DOH Defendants did nothing to prepare for the transition of 280,000 Consumers and 440,000 Personal Assistants to the SFI. The initial RFP, issued on June 17, 2024 contained no provisions regarding the transition from the existing 600 FIs to the SFI. *Id.* ¶ 89. Belatedly, on August 7, 2024, DOH published its Third Amendment to the RFP with a section entitled "Initial Transition." *Id.* ¶ 90, Ex. H. Under the Amended RFP, the awarded SFI's transition tasks included "[c]ontacting every managed care plan and Local Department of Social Services to determine the consumers that need to be transitioned and the fiscal intermediaries they currently work with;" "[c]ontacting each consumer to educate them about the transition;" and "[a]ssisting consumers with educating their personal assistants about the transition." *Id.* ¶ 91, Ex. H.

The Third Amendment did not address the legal authority under which the SFI would obtain Consumer and PA information to make these contacts. *Id.* ¶ 92. This failure to address the legal authority is important because FIs are covered entities under HIPAA therefore must comply

[1] "Georgia-Based Company Makes Moves to Administer New York's Multibillion-Dollar Home Care Program," Amanda D'Ambrosio, Aug. 22, 2024, available at https://www.crainsnewyork.com/health-pulse/public-partnerships-makes-moves-nab-large-state-home-care-contract (last visited Jan. 21, 2025).

with the HIPAA Privacy Rule set forth in 45 CFR Part 160 and Part 164, Subparts A and E (referred to herein as "HIPAA Privacy Rule"). *Id.* ¶ 93. In their capacities as covered entities under HIPAA, FIs are restricted from using and disclosing protected health information ("PHI"), as that term is defined in 45 CFR § 160.103, other than as permitted or required by the HIPAA Privacy Rule. *See* 45 CFR § 164.512 (a) (1), Am.Compl. ¶ 94.

Further, each covered entity is limited to disclosing or using only the PHI necessary to meet the requirements of the law that compels the use or disclosure. 45 CFR § 164.506; Am.Compl. ¶ 95. When a request for PHI is made, a covered entity is obligated to assure that the disclosure is the minimum "reasonably necessary to accomplish the purpose" of the disclosure. 45 CFR § 164.514 (d)(3)(ii)(A); Am.Compl. ¶ 96. To accomplish this objective, a covered entity must "verify the identity of a person requesting [PHI] and the authority of any such person to have access to [PHI]." 45 CFR § 164.514 (h)(i), Am.Compl. ¶ 97. HIPAA also contains specific provisions regarding marketing, requiring that "a covered entity must obtain an authorization for any use or disclosure of [PHI] for marketing. 45 CFR § 164.508 (a)(3)(i); Am.Compl. ¶ 98. "Marketing" is in turn defined as "to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service" 45 CFR § 164.501; Am.Compl. ¶ 99.

In addition to their obligations under HIPAA, FIs must comply with the provisions of New York General Business Law § 399-ddd, which provides in relevant part that:

> 4. Any person, firm, partnership, association or corporation having possession of the social security account number of any individual shall . . . provide safeguards necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number.

Further, the CDPAP authorizing statute, Social Services Law § 365-f, permits transfer of records only "upon request and consent" of the consumer. Social Services Law § 365-f(d)(iii), Am.Compl. ¶¶ 100-101.

F. FIs, Consumers, Politicians, and Advocates React With Outrage and Litigation

As a result of the award of the SFI contract to PPL, various FIs, Consumers, providers, and others have filed lawsuits seeking to enjoin the implementation of the new CDPAP program due to concerns of unlawful bid rigging and violations of constitutional rights.[2] *Id.* ¶ 80. Furthermore, the public understands DOH Defendants' selection of PPL to patently violate state bid rigging, anti-corruption, and procurement laws. *Id.* ¶ 81. In a report published by The Center for Disability Rights, Inc., the organization expressed that it is "deeply concerned about the quality of services that will be provided by PPL under this state-sanctioned monopoly, which eliminates any incentive to provide good customer service. Such concerns are consistent with the experience of Disabled individuals who have been forced to use PPL in other states." *Id.* ¶ 82, Ex. D.

Similarly, in December 2024, United States Representative Ritchie Torres (NY 15th Dist.) directly requested an "investigat[ion of] alleged attempts by the Hochul Administration to put the $9 billion CDPAP program in the hands of a single out of-state vendor with a questionable track record and to do so under false pretenses." *Id.* ¶ 83, Ex. E. Representative Torres also expressed his dissatisfaction with DOH's decision to "exempt the award of a 9-billion dollar contract from review by the Office of the New York State Comptroller—an unprecedented assault on the independence of the Comptroller and the integrity of New York government writ large." *Id.* ¶ 84,

[2] *See Freedom Care LLC v. NYS Dept of Health et al.*, Index No. 161036/2024 (Sup Ct, NY Cty.); *Empire Center for Public Policy v. NYS Dep.'t of Health*, Index No. 912159-24 (Sup Ct, Albany Cty.); *Marks Homecare CDPAP, LLC d/b/a Pella Care CDPAS v. NYS Dept. of Health, et al.*, Index No. 912081-24 (Sup Ct, Albany Cty.); *Glidedowan, LLC d/b/a All-American Homecare Agency, Inc. v. NYS DOH et al.*, Index No. 6:24-cv-06731 (W.D.N.Y.); *Glidedowan, LLC d/b/a All-American Homecare Agency, Inc. v. NYS DOH et al.*, Index No. 000009-2025 (Sup. Ct., Livingston Cty.).

Ex. E. Skeptical of the lawfulness of the bidding process, Representative Torres requested that Governor Hochul "release all communications with PPL, release all the bids for the single statewide FI, and otherwise show the world that [Governor Hochul has] nothing to hide." *Id.* ¶ 85, Ex. F.

Representative Torres' is not alone in his concern about this new legislative monopoly scheme. *Id.* ¶ 86. Several other members of Congress, namely Michael Lawler (NY 17th Dist.), Marcus Molinaro (NY 19th Dist.), Nicholas Langworthy (NY 23rd Dist.), Claudia Tenney (NY 24th Dist.), Nick LaLota (NY 1st Dist.), Nicole Malliotakis (NY 11th Dist.), Andew Garbarino (NY 2nd Dist.), and Anthony D'Esposito (NY 4th Dist.) stated, "with PPL's track record [of fraudulent activity in other states] coupled with the out-of-state company's lack of experience in New York, some have raised questions about how PPL was awarded the contract in the first place." *Id.* ¶ 86, Ex. G. These members of Congress "agree that this plan has not been properly vetted by the federal government, and to implement such a significant change in New York would be unprecedented, irresponsible, and dishonest." *Id.* ¶ 87, Ex. G.

G. DOH Demands Unlawful December 6, 2024 Directives to Existing FIs

Without citing to any legal authority, on December 6, 2024, DOH Defendants issued a memorandum to current FIs in New York State to "provide transition guidance for current fiscal intermediaries that were not selected as the Statewide Fiscal Intermediary (SFI) pursuant to Request for Proposals (RFP) #20524: New York State Fiscal Intermediary Services" (the "DOH Memorandum"). Am.Compl. ¶ 106, Ex. I. The DOH Memorandum contains at least two unlawful directives: data transfer requirements and the notice requirements.

1. Illegal Data Transfer Directive, Which Include HIPAA Protected PHI

The language of the DOH Memorandum gives the misimpression that it mirrors language in Social Services Law § 365-f. *Id.* ¶ 63. But the DOH Memorandum deviates in an important way. *Id.* ¶ 107. Specifically, Social Services Law § 365-f (4-d) states:

> (a) 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. Within five business days of receipt of the notice, the local social services district or managed care plan shall acknowledge the notice and provide the affected Consumers with a list of other fiscal intermediaries operating in the same county or managed care plan network as appropriate;

However, the law does not require current FIs to provide such notifications when a FI has failed to submit an offer for a contract or has been denied a contract, as is requested here. Am.Compl. ¶ 109. Rather, it directs the DOH to make such announcements. *Id.* Specifically, Social Services Law § 365-f (4-d)(c) states:

> (c) Where a fiscal intermediary is suspending or ceasing operation pursuant to an order under subdivision four-b of this section, or has failed to submit an offer for a contract, or has been denied a contract under this section, all the provisions of this subdivision shall apply except subparagraph (i) of paragraph (a) of this subdivision, notice of which to all parties shall be provided by the department as appropriate.

Thus, whereas the statute required DOH to notify Consumers and providers, the DOH Memorandum requires that current FIs cease operations and shifts the burden of notifying participating Consumers and providers from DOH onto the FI. Am.Compl. ¶ 109.

The DOH Memorandum also directs FIs to transfer confidential, proprietary information. *Id.* ¶ 111. More specifically, the directive to transfer provides as follows:

> Data Transfer and Procedures
>
> No 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. Data transfer to the Department will be through HCS [Health Commerce System]. Data must include:
>
> *Full names of CDPAP Consumer
> *Consumer CIN
> *Designated Representative and Contact Information (if applicable)
> *Consumer Contact Information (phone number email address)
> *Consumer preferred language
> *PA(s) for each Consumer
> *PA contact information (phone number email address)
> *PA wage information

Am.Compl., Ex. I. A template accompanying the DOH Memorandum, which DOH directed FIs to follow when transferring data, also directs the transfer of Social Security Numbers, dates of birth, and physical addresses of Consumers. Am.Compl. ¶ 113, Ex. J. Yet, Social Services Law § 365-f(4-d), governing fiscal intermediaries ceasing operation, states:

> (a) Where a fiscal intermediary is ceasing operation or will no longer serve the Consumer's area, the fiscal intermediary shall:
>
> (iii) upon request and consent, promptly transfer all records relating to the individual's health and care authorizations, and personnel documents to the fiscal intermediary or personal care or home health care provider chosen by the Consumer and assume all liability for omissions or errors in such records.

This provision of law requires that health and personnel records may be transferred in accordance with federal and state law only upon request and consent *of the Consumer*. Am.Compl. ¶ 116. Unsurprisingly, a large number of FIs concluded that DOH Defendants' compelled notices and data transfer is both unlawful and beyond the authority of DOH Defendants. *Id.* ¶ 117. As a result of these concerns, on December 13, 2024, CDPAANYS wrote to DOH outlining the many legal deficiencies with the December 6, 2024 directive. *See* Ex. L.

2. Illegal Directives to Compel Speech to Promote PPL's Business

In addition to these data transfer requirements, the Transition Policy for Current FIs requires FIs to deliver letters to Consumers and Personal Assistants using the specific language stated by DOH in the referenced templates. Am.Compl. ¶ 114, Ex. K.

Under the "FI Discontinue Services Template FI to Consumer," FIs are required to state that: "This letter is to inform you that effective <Month, Day, Year>, <name of FI> will no longer provide Fiscal Intermediary (FI) services under the Consumer Directed Personal Assistance Program (CDPAP)" without mentioning that the FI is required to cease operations due to the statutory change depriving them of their right to continue to serve as an FI. *Id*. at Ex. K. The template then requires the FI being forced out of business to give assurances to each Consumer that: "Your plan of care, hours of service, and your right to choose your personal assistant(s) is not affected by our change in operations." *Id*. The template further requires FIs to provide an endorsement of the selected SFI, with these exact words: "There are many ways that you and your personal assistant(s) will be able to register with PPL . . . No matter which way you choose to register with PPL, *they will be here to help*." *Id.*

The "FI Discontinue Services Template FI to PAs," which DOH has required Current FIs to send to Personal Assistants, states 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 Personal Assistant services, as directed by the CDPAP consumer you now serve." *Id*. The template further requires Current FIs to state: "No matter which way you choose to register with PPL, they will be here to help." *Id*.

The requirement that Current FIs make these affirmative statements about PPL violates First Amendment prohibitions on compelled speech as DOH Defendants are requiring Current FIs to attest to the efficacy of a competitor, and not merely any competitor, but the competitor replacing them. *Id*. No Current FI has the knowledge upon which they can make such

representations. Moreover, the directed Consumer template is only in English and the required templates do not address communication with Consumers whose primary language is not English and/or who may be visually impaired or blind, subjecting Current FIs to liability under federal and state laws protecting Consumers with Limited English Proficiency and with visual impairments. *See id.* at Ex. K. Thus, the requirement that FIs make such statements violates the First Amendment's prohibition of compelled speech.

H. Strong Arm Tactics From the State to Force Compliance with the Illegal Directives by January 15, 2025

On December 23, 2024, instead of responding to the CDPAANYS letter, the DOH issued an "Update: Notification to Current Fiscal Intermediaries Regarding Data Transfers" (the "DOH Update"). *Id*. ¶ 119, Ex. M. The DOH Update was another effort to coerce FIs into complying with improper disclosure policies. *Id.* ¶ 120. Indeed, the DOH Update claims that "HIPAA allows the sharing of protected health information between 'covered entities' for purposes of healthcare operations without individual consent" and that current FIs, the DOH, and MMC Programs are covered under this rule making disclosure appropriate. *Id.* ¶ 121, Ex. M. Such explanation does not account for the incoming SFI—PPL—which is not a "covered entity," and which would use and disclose of provided information at its discretion, once provided by the DOH. *Id.* ¶ 122.

Knowing that its conduct violates HIPAA, PPL, through DOH Defendants, is using county departments of social services to harvest confidential health information on its behalf. *Id.* ¶ 123. For example, the Cayuga County Department of Social Services issued correspondence to CDPAP Consumers advising, in part, that "Public Partnerships LLC (PPL) has been provided your name, address phone number; however, they will be asking for additional information regarding your current caregivers. PPL will then contact the caregivers to have them register with PPL." Am.Compl. ¶ 123, Ex. N. These types of collection efforts fall squarely within the definition of

prohibited marketing communications under HIPAA. *See* 45 C.F.R. §§ 164.501, 164.508(a)(3); Am.Compl. ¶ 128. As a qualifying marketing communication, FIs (and others implicated by CDPAP's guidelines) are barred from disclosing such protected information without first obtaining the individual's consent. 45 C.F.R. §§ 164.501, 164.508(a)(3); Am.Compl. ¶ 129.

Despite such an obvious concern, the DOH chose instead to compel compliance by threatening current FIs with "penalties and other sanctions, including exclusion from the Medicaid program" if they do not comply with the data transfers and notices required by the DOH Memorandum. Am.Compl. ¶ 130, Ex. M. Certainly, such a threat is something that many FIs (including Caring Professionals and the Member FIs), particularly those that provide services beyond CDPAP, find deeply troubling. *Id.* ¶ 132.

STANDARD OF REVIEW

CPLR § 6301 authorizes a preliminary injunction "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 Caring Professionals's rights respecting the subject of the action, and tending to render the judgment ineffectual." "It is well settled that the ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." *Spectrum Stamford, LLC v. 400 Atl. Title, LLC*, 162 A.D.3d 615, 616 (1st Dept 2018) (citations omitted); *see also Max v. ALP, Inc.*, 222 A.D.3d 594, 595 (1st Dept 2023). A Court must award a preliminary injunction where the movant demonstrates (a) irreparable harm ***and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation*** and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Gasoline Heaven at Commack, Inc. v. Nesconset Gas Heaven, Inc.*, 191 Misc. 2d 646, 649, (Sup Ct, NY County 2002) (quoting *Blaich Associates v. Coach/Blaich Real Estate of Manhasset*, 186 Misc.2d 594

(2000)) (internal quotations omitted) (emphasis added); *see also Fifteenth Ave. Food Corp. v. Sibstar Bread Inc.*, 16 Misc. 3d 1102(A) (Sup Ct, Kings County 2007), *Wyndham Co. v. Wyndham Hotel Co.*, 176 Misc. 2d 116, 123 (Sup Ct, NY County 1997), *aff'd sub nom. Wyndham Co. v. Wyndham Hotel Corp.*, 261 A.D.2d 242 (1999); *Saunders v. Monks' Bread Distributors, Inc*., 18 Misc. 2d 476, 478, 186 N.Y.S.2d 200, 203 (Nassau Cty. 1959).

CPLR § 6313 also mandates "a temporary restraining order pending the hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." "To be successful, a must establish a showing of urgency that the requested temporary relief is needed to protect the *status quo*, lest the defendant act in such a way as to render the desired final outcome an impossibility." *Edery v. Edery*, 79 Misc. 3d 1215(A), 190 N.Y.S.3d 670 (Kings Cty. 2023) (citation omitted).

ARGUMENT

Plaintiffs seek three preliminary injunctions and one temporary restraining order. Each of the three preliminary injunctions is independent of the other and could be granted in its own right, regardless of whether the others issue. The first preliminary injunction is the broadest. It seeks an injunction staying enforcement of the directives in the DOH Memorandum. The second preliminary injunction, in the alternative, is narrower and seeks a stay of the data transfer until Defendants provide proof that the highly-sensitive information they seek—which includes the social security numbers and personnel information of these extremely vulnerable population of Consumers and PAs—is safeguarded and restricted except as would be necessary for its purpose.

The third preliminary injunction and the sole temporary restraining order that Plaintiffs seek is the narrowest and targeted at the most immediate irreparable harm. This preliminary injunction seeks to stay the adverse Medicaid actions threatened by DOH Defendants in the DOH Update, which included a threat that if Caring Professionals and the Member FIs did not capitulate

to DOH's directives, they faced expulsion from Medicaid. The Third Injunction seeks to stay any sanctions for failure to comply, including but not limited to the sanction of expulsion or termination of Caring Professionals or the Member FIs from participation in the Medicaid Program. Staying the obligations to comply with the DOH directives contained in the DOH Memorandum could be granted if the Court finds a likelihood of success on any of the First through Sixth Causes of Action. There, Plaintiffs assert causes of action seeking declaratory and permanent injunctive relief against enforcement of the directive on various grounds. They include violations of Plaintiffs' First Amendment and Fifth Amendment rights against compelled speech and a taking of Plaintiff's property, its Consumer and PA data, without just compensation, forced violations of HIPAA and Social Services Law 365-f, and a violation of New York General Business Law § 399-ddd (hereinafter, "GBL § 399-ddd"). Plaintiffs also seek, in the alternative, that if the Court does not agree that the DOH Memorandum should not be enforced, Defendants should be permanently enjoined from compelling, receiving, and/or using Caring Professionals and the Member FIs' Consumer and PA data until and unless such time as Defendants demonstrate sufficient safeguards in place to guaranty no privacy laws will be violated in the transfer.

Most critically here for purposes of immediate relief, in its Seventh Cause of Action, Plaintiffs also assert that DOH Defendants' threat of sanctions and removal from the Medicaid Program as a consequence for failure to adhere to the directives in the DOH Memorandum violates Social Services Law § 364 and 18 NYCRR§ 515.2.

Nonetheless, in seeking a preliminary injunction, Plaintiffs meet all three prongs with respect to each of their delineated causes of action.[3]

[3] Plaintiffs also brings a cause of action against PPL for tortious interference, but does not specifically seek a preliminary injunction against PPL at this juncture. In refraining to so move, Plaintiffs do not waive any argument regarding entitlement to a preliminary injunction regarding this cause of action.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THE FIRST THROUGH SEVENTH CAUSES OF ACTION OR, AT A MINIMUM, THERE ARE SUFFICIENTLY SERIOUS QUESTIONS REGARDING DOH AND PPL'S ENTITLEMENT TO THE DATA MAKING IT A FAIR GROUND FOR LITIGATION THAT MANDATES A PRELIMINARY INJUNCTION AND TRO

A. Likelihood of Success on the Merits of Plaintiffs' Seventh Cause of Action for a Permanent Injunction and a Temporary Restraining Order Against Sanctions Including Termination from Medicaid

Plaintiffs claim in the Amended Complaint that DOH Defendants' threat to impose consequences on Caring Professionals or any Member FI for failure to adhere to the directives regarding data transfer and notice provisions in the DOH Memorandum, including sanctions and expulsion from the Medical Program, violates Social Services Law § 364 and 18 NYCRR § 515.2.

Social Services Law § 364(2)(b) governs the imposition of sanctions and permits DOH to create standards for such sanctions, whereas 18 NYCRR § 515 defines the scope of the sanction authority, provides for procedural guidelines, etc. Social Services Law § 364(2)(b) states that the DOH shall be responsible for:

> establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title, including but not limited to procedural standards relating to the revocation, suspension, limitation or annulment of qualification for participation as a provider of care and services, on a determination that the provider is an incompetent provider of specific services or has exhibited a course of conduct which is either inconsistent with program standards and regulations or which exhibits an unwillingness to meet such standards and regulations, or is a potential threat to the public health or safety pursuant to section two hundred six of the public health law;

Critically, 18 NYCRR § 515.2(a) defines an "unacceptable practice" as one that is contrary to

> (1) the official rules and regulations of the department;
> (2) the published fees, rates, claiming instructions or procedures of the department;
> (3) the official rules and regulations of the Departments of Health, Education and Mental Hygiene, including the latter department's offices and divisions, relating to standards for medical care and services under the program; or
> (4) the regulations of the Federal Department of Health and Human Services promulgated under title XIX of the Federal Social Security Act.

In other words, only a violation of regulations is the basis upon which a sanction can be imposed. Indeed, imposing sanctions and expulsion from Medicaid undoubtedly fall within this statutory and regulatory framework. While the DOH Memorandum is a directive, it is not a regulation, and there is no evidence that Plaintiffs are "incompetent providers of specific services," are violating any "program standards and regulations," or that Caring Professionals or any Member FI's conduct is a "threat to public health or safety." Were any memorandum from the DOH to be considered as a regulation, then the DOH could bypass all judicial process, which is certainly impermissible. Thus, Plaintiffs are likely to succeed on the merits of this cause of action or it is, a minimum, a serious question warranting litigation.

B. Likelihood of Success on the Merits of their Constitutional Causes of Action

Plaintiffs have alleged causes of action for relief related to federal constitutional violations in connection with DOH Defendants' directives that Plaintiffs turn over PA and Consumer data *and* notify these parties with a form dictated by DOH Defendants. Specifically, Plaintiffs have asserted that the required notices to its Consumers and PAs violates Plaintiffs' First Amendment regarding compelled speech and the required data transfer is an unconstitutional taking under the Fifth Amendment. Plaintiffs can demonstrate either likelihood of success on the merits or a serious question warranting litigation, such that a preliminary injunction is appropriate.

1. The Takings Clause.

"The Takings Clause of the Fifth Amendment, which is made applicable to New York through the Fourteenth Amendment… provides that 'private property [shall not] be taken for public use, without just compensation.'" *Greater Chautauqua Fed. Credit Union v. Marks*, 600 F. Supp. 3d 405, 425 (S.D.N.Y. 2022), *modified sub nom. Greater Chautauqua Fed. Credit Union v. Quattrone*, No. 1:22-CV-2753 (MKV), 2023 WL 6037949 (S.D.N.Y. Sept. 15, 2023) (internal citations and quotations omitted). Moreover, this prohibition on takings for public use without just

compensation includes physical *and* regulatory takings. *Id.* (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005)). It is long settled that contracts and trade secrets constitute property and are susceptible to a "taking" within the meaning of the Fifth Amendment. *Lynch v U.S.*, 292 U.S. 571, 57(1934). Moreover, that government disclosure of proprietary data violated the Takings Clause when confidentiality of the data protected by law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013-14 (1984).

Here, Caring Professionals and the Member FIs have a proprietary interest in the Consumer and PA lists they have developed over years of operation, which they have kept confidential, pursuant to HIPAA and other privacy-related statutes and regulations. This includes confidential data such as names, contact information, social security numbers, and health records. The DOH Memorandum directs that Caring Professionals and the Member FIs transfer of this compiled proprietary information to DOH Defendants, and, eventually, to PPL without providing just compensation or any legal basis. The compelled transfer of this proprietary data constitutes a taking because it involves a direct appropriation of private property for the benefit of a third-party entity (PPL). Defendants' actions fail to provide compensation, violating the Takings Clause. Moreover, the DOH Defendants' directives regarding data transfer do not serve a legitimate public purpose; they are instead designed to benefit PPL, a private corporation, rather than the public, rendering the action unconstitutional. Thus, Plaintiffs are likely to succeed on the merits of their Fifth Amendment claim or there is at least a serious question making it a fair ground for litigation.

2. Compelled Speech

Plaintiffs' claim for a violation of the First Amendment asserts that DOH Defendants' directive to notify their Consumers and PAs of the transition to PPL using state-drafted templates, which effectively endorse PPL, is compelled speech which contravenes established constitutional protections.

It is well settled that "the creation dissemination information are within the meaning the First Amendment." *Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011). In determining the standard applied to compelled speech, courts distinguished between content-neutral and content-based regulations. Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "As a general matter, such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (internal citations and quotations omitted). "The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices alter the content of their speech." *Id.* (citations and quotations omitted).

Here, at a minimum it is a serious question as to whether the DOH-directed notice requirements of the DOH Memorandum is a content-based regulation of speech and, if so, whether it meets the strict scrutiny required. DOH Defendants direct that Caring Professionals and the Member FIs provide notices to their Consumers and PAs with specific language that Caring Professionals and the Member FIs may either disagree with or be unable to verify. For example, the notice states that FI will no longer provide FI services and does not include an explanation that the FI was not part of such a decision. *See* Am. Compl. ¶ 113, Ex. K. Another example, Caring Professionals and the Member FIs are required to inform their 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." *Id*. Plaintiffs have no way to verify this information and are, thus, forced to disclose content it does not even know to be

true. And, of course, this is all notwithstanding that the purpose of these notices is to compel Consumers and PAs to sign up with PPL, which Caring Professionals and the Member FIs should not be required to endorse. Forcing Caring Professionals and the Member FIs to disseminate messages that it does not agree with constitutes compelled speech subject to strict scrutiny. DOH Defendants' directives fail to meet the requirements of strict scrutiny, as they are neither narrowly tailored nor supported by a compelling government interest. Indeed, the record reveals that PPL has a documented history of operational failures in other states, raising significant concerns about its qualifications. Am.Compl. ¶ 203. Forcing Caring Professionals and the Member FIs to endorse such an entity undermines their credibility and autonomy, constituting an impermissible infringement on its speech rights. Thus, Plaintiffs are likely to succeed on the merits of its First Amendment claim or there is at least a serious question making it a fair ground for litigation.

C. Likelihood of Succeed on the Merits on Plaintiffs' First, Second, and Fourth, Causes of Action or That There is, At Least, a Sufficiently Serious Question Meriting an Injunction

Plaintiffs are also likely to succeed on the merits of their statutory claims (first, second, and fourth)—violation of HIPAA, General Business Law 399-ddd, and Social Services Law 365-f, or there is at the very least a serious question such that it is fair grounds for litigation. In each of these claims, Plaintiffs assert that the directives in the DOH Memorandum would force Caring Professionals and the Member FIs to violate each of these provisions by complying.

1. HIPAA Violation

Under HIPAA, FIs are prohibited from disclosing "protected health information," except where permitted by law. 45 C.F.R. § 164.502. "Health information means any information, including genetic information, whether oral or recorded in any form or medium, that: (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) Relates to the past, present, or future

physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." *Id.* § 160.103.

There can be no question that the Consumer information requested by Defendants is "protected health information" under 45 C.F.R. § 160.103 because the information concerns Consumers, who receive healthcare services as part of CDPAP, and their PAs, who provide those services. FIs are compelled and permitted to disclose protected health information to another covered entity under a few circumstances. Covered entities, which includes Caring Professionals and the Member FIs, are *required* to disclose protected health information if (a) a Consumer requests access to it or an accounting of disclosure of it, or (b) the federal Department of Health and Humas Services is undertaking a compliance or review or enforcement action. *See* 45 C.F.R. § 164.502(a)(2). Here, Consumers have not requested the information be provided, nor is this a compliance review or enforcement action by the DOH. In the DOH Update, DOH Defendants explained that the sharing of Consumer and PA data by FIs was authorized because DOH is a covered entity. Am.Compl. ¶ 121, Ex. M. Even though DOH Defendants are compelling the disclosure, the mandatory disclosure provision is inapplicable because neither the Consumers is requesting the disclosure nor is DOH requesting the disclosure for "compliance or review or enforcement action."

On the other hand, a covered entity *may* disclose protected health information to someone other than the individual (here, the Consumer) in a few circumstances, the most relevant is "for treatment, payment or health care operations, as permitted by and compliance with § 164.506." 45 C.F.R. § 164.502(a)(1)(ii). However, under 45 C.F.R. § 164.506(c)(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" either for the covered entity's "own treatment, payment, or health care operations" or for the "treatment activities of a health care provider." 45 C.F.R. §§ 164.506(c)(1), (2), (4).

In the DOH Update, the DOH explained that the sharing of Consumer and PA data by FIs was authorized because DOH is a covered entity. Am.Compl. ¶ 121, Ex. M. However, Plaintiffs maintain that the disclosure is not permitted because it is unrelated to Caring Professionals and the Member FIs's (or DOH's) treatment, payment, or healthcare operations—indeed, with the selection of PPL as the SFI, Caring Professionals and the Member FIs are not disclosing this information in connection with their ability to provide CDPAP services, but to allow for a transition for PPL to do so. Moreover, while DOH may itself be entitled to this information, as a "covered entity" itself, DOH has admitted that it is disclosing the information to PPL, another entity that does not already have a relationship with the individual Consumers. Am.Compl. ¶¶ 123-126, Exs. N, O. While DOH may be entitled to such information and, in all likelihood already has the ability to discern such information from its own system, it is at least a sufficiently serious question making it fair grounds for litigation as to whether Caring Professionals and the Member FIs may lawfully transfer their Consumers' data to the DOH when they knows that the DOH is further transferring it to PPL, an entity that does not already have such a relationship with each of the Consumers. As of yet, DOH Defendants have articulated no convincing legal argument addressing this issue. See *id.* at Exs. I, L.

In addition, HIPAA contains specific provisions regarding marketing, requiring that "a covered entity must obtain an authorization for any use or disclosure of protected health

information for marketing, except if the communication is in the form of: (A) A face-to-face communication made by a covered entity to an individual; or (B) A promotional gift of nominal value provided by the covered entity." 45 C.F.R. § 164.508 (a)(3)(i). "Marketing" is in turn defined as "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. The sole purpose of the requested Consumer and PA data is so that PPL can market its services and register Consumers and PAs with the new CDPAP, as facilitated by PPL, making the use of the PA and Consumer data from Caring Professionals and the Member FIs improper. Am.Compl. at Exs. I, N, O.

Thus, Plaintiffs are likely to succeed on the merits of their HIPAA claim or, at a minimum, it is a serious question warranting litigation.

2. GBL § 399-ddd

Plaintiffs claim that the directives in the DOH Memorandum to transfer their PAs' data violate GBL § 399-ddd. This law prohibits a business' widespread dissemination of social security numbers. Among the information requested by the DOH are all PAs' social security numbers.

GBL § 399-ddd (2)(a) dictates that Plaintiffs 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. This paragraph shall not apply to any individual intentionally communicating to the general public or otherwise making available to the general public his or her social security account number." Moreover, Plaintiffs are required to secure the social security numbers rightfully in its possession. Indeed, GBL § 399-ddd(4) requires that Plaintiffs must "take reasonable measures to ensure that no officer or employee has access to such number for any purpose other than for a legitimate or necessary purpose related to the conduct of such business or trade and provide safeguards necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number." Further, Plaintiffs are

not permitted to "file any document available for public inspection with any state agency, political subdivision, or in any court of this state that contains a social security account number of any other person, unless such other person is a dependent child, or has consented to such filing, except as required by federal or state law or regulation, or by court rule." GBL § 399-ddd(6).

Here, DOH Defendants would have Caring Professionals and the Member FIs transmit to them, in an unsecure fashion, all the social security numbers of its PAs without regard for any security measures in place by the receiving part, particularly who has access. Further, it is clear that transmitting this information will result in transmittal to PPL, a party with whom the PAs have no preexisting relationship, and Caring Professionals and the Member FIs lack appropriate authorization from PAs to transfer their social security numbers to the DOH and/or PPL. Thus, it is at least a serious legal question as to whether Caring Professionals and the Member FIs will violate another New York statute in transferring the data compelled by DOH Defendants.

3. Social Services Law 365-f

Plaintiffs also assert that the DOH Memorandum requiring notice to their Consumers and PAs violates specific CDPAP-law. Social Services Law § 365-f (4-d) (c) provides that where an FI "has failed to submit an offer for a contract or has been denied a contract under this section, all the provisions of this subdivision shall apply except subparagraph (i) of paragraph (a) of this subdivision, ***notice of which to all parties shall be provided by the department as appropriate***." (emphasis added). Said otherwise, in this situation, the DOH, not the FI, must make any required notifications. Moreover, Social Services Law § 365-f (4-d) (iii) requires that when a FI "is ceasing operation or will no longer serve the Consumer's areas, the [FI] shall…***upon request and consent***, promptly transfer all records relating to the individual's health and care authorizations, and personnel documents ***to the fiscal intermediary or personal care or home health care provider chosen by the Consumer***…." (emphasis added). Said otherwise, in this situation, where Caring

Professionals and the Member FIs applied for but were denied the SFI contract and are, as a result of such, are ceasing operation as FIs to their Consumers and PAs (through no fault of their own), it is the DOH that is to notify the Consumers and PAs and Caring Professionals and the Member FIs can only transfer the relevant records upon request of the Consumer and PA to the FI chosen by the Consumers.

Here, the DOH Memorandum requiring Caring Professionals and the Member FIs to notify their Consumer and PAs of the transition to PPL *and* to transfer all the data of the Consumers and PAs *without consent* is a blatant violation of Social Services Law § 365-f. Thus, Plaintiffs are likely to succeed on the merits of this claim or, at a minimum, there is a serious question warranting litigation.

D. Likelihood of Success on the Merits of Fifth Cause of Action that Defendants Must Provide Safeguards

Plaintiffs' fifth cause of action in connection with the requested preliminary injunction, stated in the alternative, is to enjoin DOH Defendants from compelling the transfer of the PA and Consumer data, and for PPL to be enjoined from using any such data, *until and unless* such time as Defendants prove that sufficient safeguards are in place to protect and secure this private and sensitive information.

Here, a communication from PPL has been circulated in which PPL acknowledges that it has access to all CDPAP PAs in the program, presumably due to DOH's providing such information, but asking its' "Facilitators" to "refrain from contacting PAs simply because they are visible in the system" and to "[o]nly reach out to PAs you know are directly associated with your Consumers." *See* Am.Compl. ¶¶ 123-126, Ex. O. Certainly, this communication is an acknowledgement that should Caring Professionals and the Member FIs provide the requested Consumer and PA Data to DOH, it will ultimately be transmitted and/or visible to PPL without

requisite permission from the Consumers and PAs, which is a HIPAA violation (or at least it is a serious legal question). Further, with respect to Consumers, the email states: "We will be receiving additional Consumer data from MCOs soon and will update your files accordingly," confirming that the Consumer data required to be transferred to managed care organizations is being retransmitted to PPL. *Id*. at Ex. O.

HIPAA demands that covered entities safeguard protected health information and limit disclosures to those entities, including DOH and/or MCOs, unless for a required purpose. *See* 45 C.F.R. § 164.502(b)(1) ("Minimum necessary applies. When using or disclosing protected health information or when requesting protected health information from another covered entity or business associate, a covered entity or business associate must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."). The PPL email communication confirms that the demanded disclosures were not for authorized purposes under HIPAA and that disclosed data is not being protected consistent with the requirements of HIPAA. Thus, to the extent this Court is disinclined to stay the data transfer and other obligations in the DOH Memorandum until determination of the merits of this lawsuit, the Court should enjoin enforcement of the DOH Memorandum, and the DOH Defendants from inflicting adverse consequences on Plaintiffs for failing to comply with such deadline, until such time as Defendants develop sufficient safeguards in place that will protect against any HIPAA and GBL § 399-ddd violations. Such safeguards would be to sanitize the social security numbers of all individuals included in the data transfer, to allow that such data is only viewed by authorized individuals at PPL who will immediately communicate with these individuals for the purpose of obtaining consent to obtain the rest of the protected information. *See* Am.Compl. ¶¶ 177-178.

"A…covenant of trust and confidence may be inferred in business dealings. Indeed, it is well established under New York law that 'a fiduciary duty arises, even in a commercial transaction, where one party reposed trust and confidence in another who exercises discretionary functions for the party's benefit or possesses superior expertise on which the party relied."' *Daly v Metro. Life Ins. Co.*, 4 Misc 3d 887, 892 (N.Y. Cty. 2004) (denying motion to dismiss because, among other things, defendant violated its implied duty to protect plaintiff's personal information and prevent third parties from having unfettered access to such information). Thus, Plaintiffs are likely to succeed on the merits of their cause of action that Defendants should prove sufficient safeguards in place to warrant transfer of such sensitive data *before* such transfer can be compelled and, thus, whether an injunction is required. *See also Shapiro v City of New York*, 94 CIV. 8135 (JFK), 1999 WL 64290 (S.D.N.Y. Feb. 8, 1999) (finding NY Finance Department's practice of requesting social security numbers on property tax returns as violating Section 7 of the Privacy Act but finding injunction no longer necessary since Finance Department "has since amended its instruction form for Real Property Transfer Tax Returns to provide the disclosures required by § 7(b).")

Thus, the first prong of the preliminary injunction analysis is met with respect to all asserted causes of action.

II. DEFENDANTS' CONDUCT IS HARMING AND WILL CONTINUE TO IRREPARABLY HARM PLAINTIFFS ABSENT AN INJUNCTION

A preliminary injunction and temporary restraining order are appropriate because Plaintiffs will suffer irreparable harm absent such relief. Irreparable harm, within the context of a motion for preliminary injunction, means any injury for which money damages are insufficient. *See DiFabio v. Omnipoint Commc'ns, Inc.*, 66 A.D.3d 635 (2d Dept 2009); *Matter of Walsh v. Design Concepts*, 221 A.D.2d 454 (2d Dept 2009); *McLaughlin, Piven, Vogel v. Nolan & Co.*, 114 A.D.2d 165 (2d

Dept 1986). New York courts recognize at least two forms of irreparable harm that are relevant here. First, "the alleged violation of a constitutional right...triggers a finding of irreparable harm…. no further showing of irreparable injury is necessary." *Jones v. Wolfe*, 467 F.Supp. 3d 74, 93 (W.D.N.Y. 2020) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)) (internal quotation marks omitted); *see also Gallivan v. Cuomo*, 71 Misc. 3d 589, 594 (Sup Ct, Erie County 2021) ("where 'violation of important principles contained in the New York Constitution' is alleged, "[t]his is precisely the situation in which a preliminary injunction should be granted'") (quoting *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dept 1976))). Second, New York courts also recognize the "total destruction of a business" as irreparable harm as a matter of law. *Blossom S., LLC v. Sebelius*, No 13-CV-6452L, 2013 WL4679275, at *1 (W.D.N.Y. Aug. 30, 2013). Both kinds of irreparable harm occur here.

A. Plaintiffs Are Irreparably Harmed by DOH Defendants' Threats of Sanctions and Expulsion from Medicaid in Contravention of Social Services Law § 364 and 18 NYCRR § 515.2.

The most urgent and pressing threat of irreparable harm at play here, and the reason a temporary restraining order is sought, along with the preliminary injunctions, are DOH Defendants' threats of adverse consequences advanced by DOH Defendants in the DOH Update for Caring Professionals and the Member FIs' failure to submit to the data transfer directive. DOH Defendants have stated that failure of any PI to abide by the data transfer and notice requirements in the DOH Memorandum "can carry penalties and other sanctions, ***including exclusion from the Medicaid program***." Am.Compl. ¶ 141, Ex. M (emphasis added). Such a penalty, which is wholly unwarranted, would be catastrophic for Plaintiffs, particularly Caring Professionals.

As explained above, in addition to its role as a CDPAP FI, Caring Professionals has business other that is entrenched in the Medicaid Program—its work as a LHCSA. Am.Compl. ¶¶ 17-19. If DOH expels Caring Professionals from the Medicaid as a punishment for failure to

obey the DOH Memorandum, the result would be catastrophic for what remains of Caring Professionals' business (as a LHCSA). *Id.* ¶ 142. Without the Medicaid enrollment for the LHCSA side of its business, and without the business as an FI, Caring Professionals would only be able to serve an extremely limited population of CHHA patients whose funding source is not Medicaid or a Managed Medicaid plan (if the CHHA would even continue to contract with Caring Professionals after it would lose its Medicaid provider number). *Id.* ¶ 143. In fact, a provider must be enrolled with Medicaid to contract with MLTCs, and Caring Professionals would not be able to continue to conduct any business with the MLTCs if it loses its Medicaid provider number. *Id.* ¶ 144. Nearly half of Caring Professionals' revenue is generated through its work as a LHCSA where Medicaid is the payor. *Id.* ¶ 145. Nearly every aspect of Caring Professionals' business, as an LHCSA or FI, relies on Medicaid funding. *Id*. After losing its FI business as a result of DOH Defendants' decision to create a CPPAP FI monopoly, headed by PPL, if DOH Defendants terminate Caring Professionals from the Medicaid program, less than 5% of its business would be left. *Id.* ¶ 146. Said otherwise, should DOH Defendants make good on their threats, Caring Professionals will be functionally unable to operate. This means, DOH Defendants are strong-arming Caring Professionals into transferring data, which violates federal and state laws, under threat of losing further business. Such harm would certainly be irreparable. Other Member FIs are likely in the same boat.

Thus, not only do Plaintiffs meet the irreparable harm prong pertinent to the preliminary injunction analysis, but a temporary restraining order enjoining DOH Defendants from punishing Caring Professionals or any of the Member FIs for failure to comply with the directives of the DOH Memorandum is warranted because of such irreparable harm.

B. Plaintiffs Are Irreparably Harmed Because of Constitutional Violations.

Plaintiffs have asserted that the required notices to their Consumers and PAs are a violation of the First Amendment regarding compelled speech, and the required data transfer is an unconstitutional takings under the Fifth Amendment. As such, the compelled disclosures constitute a repeated violation of Caring Professionals and the Member FIs' constitutional rights-clear irreparable harm. *See Bronx Household of Faith v. Bd. Of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003) ("[V]iolations of First Amendment rights (in particular) are presumed to be irreparable.").

Further, Caring Professionals and the Member FIs will suffer a total destruction of their business by the takings and compelled notices. At least 45% of Caring Professionals' revenue is generated through its work as a FI in the CDPAP, and the utmost important thing in the homecare industry is the list of customers and the individuals who serve them. Am.Compl. ¶ 133. CDPAP Consumers will not—and should not—accept any FI; they want and need someone they can trust. *Id.* ¶ 134. Thus, the data that Caring Professionals and the Member FIs hold regarding their lists of PAs and Consumers is immensely valuable; indeed it is confidential and proprietary and, in many case, has taken years to compile. *Id.* ¶ 135. Defendants seek for Caring Professionals and the Member FIs to just hand over this information in connection with the transition of the current CDPAP structure to the PPL as the singular SFI. In other words, DOH Defendants have overhauled CDPAP, taken away Caring Professionals and the Member FIs' ability to operate as FIs, and now seek for them to turn over their confidential and proprietary data, wrapped up on a bow, and for free. Thus, unless Caring Professionals and the Member FIs are duly compensated, the taking of such data constitutes irreparable harm.

Further, the process by which PPL was awarded the SFI contract is being specifically litigated in various state and federal proceedings. While DOH Defendants presume the legality of

the process, the reality is that the award of the SFI contract to PPL is far from over, and it remains entirely likely that such a decision will not stand. *Id.* ¶ 136. Should things change for PPL, and Caring Professionals and the Member FIs remain as FIs, they will have handed over among their most valuable assets—their customer lists—to a competitor, thus torpedoing their business. *Id.* ¶ 137. Thus, forcing Caring Professionals and the Member FIs to transfer all of their PA and Consumer data without just compensation and *before* the legality of the process and award of the SFI contract to PPL can be fully litigated would irreparably harm Plaintiffs.

With respect to the First Amendment compelled speech, in addition to the presumption of irreparable harm due to a constitutional violation, forcing Caring Professionals and the Member FIs to provide the DOH-directed notices will irreparably harm Caring Professionals and the Member FIs because they are being forced to make statements that they do not agree with or cannot independently verify, as explained above, which may result in its PAs and Consumers losing faith in Caring Professionals and the Member FIs. Caring Professionals and the Member FIs have worked tirelessly to develop relationships with Consumers and PAs, and to require such a notice that the entire program has been upended, without any explanation or other personalized notification from Caring Professionals and the Member FIs will jeopardize their goodwill, particularly for any remaining part of their business. And, of course, to the extent the award of the SFI contract to PPL, or the DOH's bidding process, is deemed to have been improper, particularly in light of the numerous lawsuits making such an argument, Caring Professionals and the Member FIs may have lost the good will of the very customers they will seek to retain, should they be permitted to continue as a CDPAP FI. "[I]t is well settled that the 'loss of goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive relief.'" *Asprea v. Whitehall Interiors NYC, LLC*, 206 A.D.3d 402, 403 (1st Dep't 2022) (quoting

Advent Software, Inc. v. SEI Global Servs., Inc., 195 A.D.3d 498, 499 (1st Dept. 2021)). Thus, Plaintiffs are irreparably harmed by the compelled speech, making a preliminary injunction proper.

C. Plaintiffs Are Irreparably Harmed by Being Compelled to Disclose and Notify Consumer and PAs in Violation of HIPAA, GBL § 399-ddd, and Social Services Law § 365-f.

Additionally, as discussed in Plaintiffs' Amended Complaint and above, the requested transfer of PA and Consumer data is in violation of HIPAA, NY GBL § 399-ddd, and Social Services Law § 365-f. Should Caring Professionals and the Member FIs do as they have been directed by DOH Defendants, Caring Professionals and the Member FIs risk being found to have violated these very statutes and subject to both further legal action by DOH, as well as becoming targets of civil suits by any of the individuals whose information has been disclosed improperly. This is particularly true if Caring Professionals and the Member FIs are compelled to transfer the Consumer and PA data before Defendants have sufficient safeguards in place to protect such sensitive data. Certainly, being forced to choose between potentially violating statutory law, when there are no procedural safeguards in place to assure Consumers' and PAs' private information is kept private or face adverse consequences from DOH Defendants constitutes irreparable harm.

III. THE BALANCE OF EQUITIES FAVORS INJUNCTION

A. Plaintiffs Will Suffer Irreparable Harm From a Transfer of Information and Forced Marketing on PPL's Behalf, Whereas DOH Defendants Merely Maintain the Status Quo, and thus the Equities Favor An Injunction.

As demonstrated above, the harm to Caring Professionals and the Member FIs' businesses by forcing them to turn over their data related to their Consumers and PAs, particularly in light of the pending litigations against Defendants, under threat of removal from the Medicaid Program or other adverse consequences is imminent, immeasurable, and permanent. Should Caring Professionals and the Member FIs comply with the DOH Memorandum, they will have lost their confidential and proprietary client list and, more importantly, set themselves up for statutory

violations and related litigation all *before* these issues can be fully litigated. On the other hand, should Caring Professionals and the Member FIs refuse to turn over such information, Caring Professionals and the Member FIs might find themselves disqualified from the Medicaid Program, as DOH Defendants have threatened to do.

DOH Defendants, on the other hand, are not prejudiced by a preliminary injunction and temporary restraining order, pending resolution of the legal issues, because all that will happen is that the status quo will be maintained. Moreover, Plaintiffs are seeking to enjoin DOH Defendants from taking the threatened adverse action for a temporary period of time—while the legality of the DOH Memorandum and directives are litigated or, in the alternative, until such time as Defendants can demonstrate sufficient safeguards are in place to protect and secure private and sensitive information. Thus, DOH Defendants, have little to lose by this delay given that the changes to CDPAP do not take effect until April 2025—leaving several months for the judicial system to evaluate the legality of its program and Defendants to develop safeguards to protect sensitive, personal information. As such, the equities undoubtedly favor Plaintiffs. *Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 5 Misc. 3d 285 (Sup. Ct., N.Y. County 2004) (balance of the equities favors enjoining use of confidential and proprietary information in direct competition); *Garvin GuyButler Corp. v. Cowen & Co.*, 155 Misc.2d 39 (Sup. Ct., N.Y. County 1992) (prohibition of usage of confidential information is not prejudicial, but rather maintains the status quo).

B. <u>The Threatened Expulsion from Medicaid is Also a Disproportionate and Illegal Administrative Penalty Making an Injunction and Immediate TRO Necessary to Prevent Injustice While the Parties Litigate Whether the Threatened Sanction is Illegal.</u>

The balance of equities tips even stronger in favor of an immediate restraining order and preliminary injunction against the nuclear sanctions that the DOH Defendants threatened in retaliation for the objections that CDPAANYS raised with the DOH in December. *See* Am.Compl.

Exs. L, M. Those penalties, which include and expressly mention expulsion from the Medicaid program ensures the destruction of the entirety of Caring Professionals' business and the business of the Member FI's that remains after the unlawful $9-billion monopoly contract was awarded to PPL. While this alone should tip the equities far in favor of maintaining the *status quo* pending a hearing and pending the end of litigation, Caring Professionals and the Member FIs are not the only ones who stand to suffer harm if DOH is permitted to impose this disproportionate sanction. Thousands of Consumers who receive Medicaid funded home health care services through the LHCSA Program (which amounts to approximately $150 million in Caring Professionals' business) would be immediately stopped if the DOH Defendants were permitted to act on the threat contained in the DOH Update. Nothing that Defendants stand to lose if no sanction issues compares to the catastrophe that would befall Caring Professionals and the Member FIs if such a sanction is imposed. This is independent of the fact that the sanction that DOH has threatened is also illegal under Medicaid and New York State law, which is what the parties are litigating in the Seventh Cause of Action.

Looking past a common-sense approach to the imbalance in the equities, as a matter of law, the Court is empowered to enjoin a disproportionate administrative penalty "that [] shocks one's sense of fairness." *Stolz v. Board of Regents*, 4 A.D.2d 361, 364 (3rd Dept. 1957). The determination of whether a penalty is disproportionate enough to require judicial intervention "involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general." *Matter of Kelly v Safir*, 96 N.Y.2d 32, 38 (2001). Honoring this standard, New York courts understand that an indefinite suspension of rights or access, particularly when an ongoing legal proceeding exists challenging the alleged wrongful conduct, is generally a "draconian [] penalty that warrants

judicial intervention." *Zuntag v. City of New York*, 18 Misc 3d 210, 213 (Richmond Cty. 2007) (granting request for preliminary injunction finding the "open-ended penalty imposed [was] disproportionate to the offense committed" and that maintaining the penalty would be inappropriate in light of the "legal limbo" associated with the underlying conviction).

The New York Medicaid Program is a $31.3 billion industry[4] that FIs, including Caring Professionals and the Member FIs, need to maintain the livelihood of their businesses, as articulated above. This widespread reliance on participation in the Medicaid program demands Court intervention to prevent the imposition of a penalty which would exclude Caring Professionals and the Member FIs from the entire Medicaid program if they do not initially comply with DOH Defendants' directives to turn over sensitive, personal information related to Consumers and PAs in violation of the U.S. Constitution and several state laws and regulations.

As explained above, Caring Professionals relies heavily relies on its participation in the Medicaid program to support its role as an FI in the CDPAP, and its operations as a LHCSA. As a result, exclusion from the Medicaid program not only jeopardizes Caring Professionals' business operations through the CDPAP but would leave less than 5% of its' entire business operative. Am.Compl. ¶ 146. Consequently, the proposed penalty of indefinite exclusion from the Medicaid Program is not narrowly tailored to concern DOH Defendants' enforcement of the amended CDPAP. Instead, the proposed penalties, when combined with the loss of the FI business, will effectively tank all aspects of the business of Caring Professionals, and likely others of the Member FIs, even those unrelated to the CDPAP FI program. Furthermore, compliance with DOH Defendants' directives will expose Caring Professionals and the Member FIs to additional litigation from PAs and Consumers given that the validity of Defendants' policies is actively being

[4] Officer of the New York State Comptroller, Public Health, https://www.osc.ny.gov/reports/finance/2023-fcr/public-health (last accessed January 17, 2024).

litigated. Said otherwise, the punishment does not fit the purported crime, and thus the equities favor injunctive relief pending full determination of the rights and obligations of the parties pertaining to the directed disclosure of data and notices.

Moreover, this is similar to what the Second Circuit decided in *Aguayo v Richardson*, 473 F.2d 1090 (2d Cir 1973). There, a group of individuals challenged the implementation of the Social Security Administration's policy that limited the eligibility for welfare benefits, which they argued was discriminatory and violated their constitutional rights. *Id.* The plaintiffs sought an injunction to stay the thirty-day suspension of welfare benefits that had been imposed on certain individuals, which was a part of a broader policy affecting eligibility for benefits. *Id.* The thirty-day suspension meant that for that period of time, certain recipients would not receive their welfare benefits, and the plaintiffs argued that this suspension would cause significant and irreparable harm to those affected. *Id.* As a result, they sought an injunction to prevent the enforcement of the suspension during the legal proceedings. *Id.* The Second Circuit found the plaintiffs showed irreparable harm would occur if the policy were allowed to continue while the legal challenge was ongoing. *Id.*

The same result should occur here. DOH Defendants seek to compel the transfer of data and notices while a challenge is pending. As was the case in *Aguayo*, DOH Defendants seek to impose a penalty against Caring Professionals and the Member FIs—sanctions and termination from the Medicaid program—for failure to comply with a directive that is presently challenged under numerous legal theories, and in multiple litigations. Like the plaintiffs in *Aguayo*, Caring Professionals and the Member FIs will be irreparably harmed if either forced to comply with the DOH directives regarding data transfer and notices or if expelled from Medicaid for failure to comply. Because there is a proceeding challenging the DOH directives, it is wholly proper to enjoin enforcement of the DOH directives regarding data transfer and notices or, at a minimum,

enjoin the DOH from issuing any punishment on Caring Professionals and the Member FIs for failure to comply.

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that the Court grant the motion in all respects.

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CERTIFICATION OF COMPLIANCE

In accordance with Section 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, I certify that that the foregoing Memorandum of Law contains 14,688 words, exclusive of the Table of Contents, Table of Authorities, the cover page, and the signature block, based on a Word Count check performed by our word processing system. Plaintiffs are aware that this brief exceeds the limitations of the aforementioned rule and are simultaneously requesting permission from the Court to file an oversized brief.

*/s/ Edward C. Wipper*_____
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