SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GOVERNMENT EMPLOYEES INSURANCE CO., GEICO INDEMNITY CO., GEICO GENERAL INSURANCE CO. and GEICO CASUALTY CO.,

Plaintiffs,

- against -

AVANGUARD MEDICAL GROUP PLLC,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 16313/11
Motion Seq. No.: 01
Motion Date: 03/08/12
XXX

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmations and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Memorandum of Law and Exhibits	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 2201, for an order staying all pending actions, arbitrations and proceedings commenced by the defendant as against plaintiffs wherein defendant seeks to recover No-Fault benefits for facility fees; and move, pursuant to CPLR §§ 6301 and 6311, for a order enjoining defendant from commencing any new actions, arbitrations or proceedings against plaintiffs seeking reimbursement for facility fees pending resolution of this within action. Defendant opposes the motion.

In November of 2011, plaintiffs commenced the within declaratory judgment action as

against defendant. Defendant is an accredited "Office Based Surgical Facility" ("OBS") and domestic professional service corporation formed under section 230-d of the Public Health Law. *See* Plaintiffs' Affirmation in Support Exhibit A ¶¶ 3, 6-11; Plaintiffs' Affirmation in Support Exhibit D ¶¶ 16-17.

According to plaintiffs, over the past several years they have received some three hundred (300) No-Fault claims from defendant, in which defendant has requested approximately $1.3 million in non-physician generated, "facility" fees or "office-based" costs – claims which plaintiffs have to date declined to pay. *See* Plaintiffs' Affirmation in Support ¶¶ 3-4; Plaintiffs' Affirmation in Support Exhibit A ¶¶ 26-28.

Plaintiffs' denials are predicated on the assertion that, pursuant to allegedly governing regulations promulgated by the Department of Health ("DOH"), only providers duly licensed under Article 28 of the Public Health Law are authorized to bill No-Fault carriers for office-based facility fees. *See* Plaintiffs' Affirmation in Support Exhibit A ¶¶ 30-38; New York State Insurance Law, §§ 5102(a)(l), 5108; 10 NYCRR §§ 86-4.1(a), 709.5(b)(3)(b); 11 NYCRR §§ 65-3(a)(12), 65-3.16(a)(12), 68.1(a); Plaintiffs' Emergency Affirmation ¶¶ 3-5. Although defendant is an accredited, physician-owned OBS – in which certain surgical procedures may be performed – there is no dispute that it is not an Article 28-licensed surgical facility or hospital. *See* Plaintiffs' Affirmation in Support Exhibit A ¶ 38; Defendant's Memorandum of Law p. 5. *See also* 10 NYCRR § 86-4.1(a); Public Health Law §§ 230–d(1)(c)-(h), 2801, 2801-a.

In light of plaintiffs' refusal to pay the disputed facility fees, defendant has commenced a series of lawsuits and arbitrations arising out of the unpaid bills, including to date, some one hundred eighty (180) New York City Civil Court actions and thirty (30) arbitrations, all of which, plaintiffs claim, are currently pending. *See* Plaintiffs' Affirmation in Support Exhibit A

¶¶ 28-29; Plaintiffs' Reply to Counterclaim, ¶ 1st Affirmative Defense.

By Order to Show Cause with temporary restraining order, plaintiffs previously moved for: (1) a stay of all the currently pending arbitrations and lawsuits; and (2) a preliminary injunction enjoining defendant from commencing any further no-fault arbitrations and lawsuits pending the resolution of the subject, facility fee dispute.

Upon the submission of plaintiffs' Order to Show Cause, Nassau Supreme Court Justice Karen V. Murphy temporarily granted the foregoing relief pending the hearing of the underlying motion, which is now before this Court. The motion should be denied.

Preliminarily, although plaintiffs cite to, *inter alia,* CPLR § 2201 as authority for their application, CPLR § 2201 generally applies to stays issued in matters actually pending before the motion Court (*e.g.*, *Peluso v. Red Rose Rest., Inc.,* 78 A.D.3d 802, 910 N.Y.S.2d 378 (2d Dept. 2010); *St. Paul Travelers Ins. Co. v. Nandi*, 15 Misc.3d 1145(A), 841 N.Y.S.2d 823 (Supreme Court, Queens County 2007); Siegel, New York Practice (4th ed), § 256 at 435-436. *See also New York Cent. Mut. Ins. Co. v. McGee*, 25 Misc.3d 1232(A), 906 N.Y.S.2d 774 (Supreme Court, Kings County 2009), *modified on different grounds*, 87 A.D.3d 622, 928 N.Y.S.2d 360 (2d Dept. 2011). Since here, the motion is to enjoin actions and arbitrations pending in different fora, the motion is properly viewed as one for a preliminary injunction. *See St. Paul Travelers Ins. Co. v. Nandi, supra.*

"A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor." *Perpignan v. Persaud*, 91 A.D.3d 622, 936 N.Y.S.2d 261 (2d Dept. 2012). *See also Berkoski v. Board of Trustees of Inc. Vil. of*

Southampton, 67 A.D.3d 840, 889 N.Y.S.2d 623 (2d Dept. 2009); *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 800 N.Y.S.2d 48 (2005); *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748, 536 N.Y.S.2d 44 (1988).

"The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." *91-54 Gold Road, LLC v. Cross-Deegan Realty Corp.*, 93 A.D.3d 649, 939 N.Y.S.2d 555 (2d Dept. 2012); *Cooper v. Board of White Sands Condominium*, 89 A.D.3d 669, 931 N.Y.S.2d 696 (2d Dept. 2011).

With these principles in mind, and upon the exercise of its discretion, the Court agrees that plaintiffs have failed to establish their entitlement to the drastic injunctive relief requested.

Plaintiffs' claims are primarily based on the theory that, although duly created as an OBS facility pursuant to Public Health Law § 230-d, defendant should nevertheless be viewed as "free standing ambulatory center" for the purposes of assessing its entitlement to a facility fee – a distinct type of health care provider for which an Article 28 operating licence is required. *See* Plaintiffs' Affirmation in Support Exhibit A ¶¶ 20-24; Public Health Law §§ 2801, 2801-a; 10 NYCRR §§ 86-4.40(b), 86-4.1(a) and (b), 600.8, 709.5(b)(3), 755.1; 11 NYCRR § 52.5;12 NYCRR § 329.5. *See also* Department of Health, "Office Based Surgery – Frequently Asked Questions," ¶¶ 33-34 (June 5, 2008 revision); *cf. New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 778 N.Y.S.2d 123 (2004).

Plaintiffs thereafter claim that, since defendant does not possess an Article 28 license (which an OBS is not required to have, in any event), it is therefore an unlicensed entity within the meaning of No-Fault regulations and cannot accept assignments or recover the disputed facility fees from No-Fault carriers. *See* 11 NYCRR § 65-3.16(a)(12), 65-3.11(a), and (b)(2); *One Beacon Ins. Group, LLC v. Midland Medical Care, P.C.*, 54 A.D.3d 738, 863 N.Y.S.2d 728

(2d Dept. 2008). Plaintiffs further reason that the regulations governing the recovery of facility fees authorize only Article 28-licensed facilities to bill for these expenses and that defendant cannot do so because it does not have an Article 28 license. *See* Plaintiffs' Affirmation in Support Exhibit A ¶¶ 32-36. *See also* 10 NYCRR §§ 86-4.1(a), 86-4.40, 709.5(b)(3); *One Beacon Ins. Group, LLC v. Midland Medical Care, P.C.*, *supra*; *cf. State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313, 794 N.Y.S.2d 700 (2005). Plaintiffs' claims are unpersuasive.

More specifically, plaintiffs' foundational contention lacks support in the record, *i.e.*, its assertion that defendant – an OBS-accredited facility – is in effect actually an Article 28, "free standing surgical center" which, plaintiffs then circuitously claim, lacks a proper license. *See* Plaintiffs' Affirmation in Support Exhibit A ¶¶ 29-30. Defendant, however, is not a "free standing ambulatory surgery" within the meaning of the Public Health Law. *See* 11 NYCRR § 65-3.16(a)(12), 65-3.11(a) and (b)(2); 10 NYCRR 709.5(b)(3). *See also* Public Health Law § 231-d. Nor is defendant an unlicensed entity. There is no dispute that defendant has complied with whatever State-imposed accrediting requirements are applicable to OBS facilities and that it possesses the appropriate operating approvals.

Further, and as the differing licensing, accrediting and oversight requirements suggest, an OBS facility is a statutorily distinct species of health care provider, separately constituted pursuant to § 230-d of the Public Health Law, in which specified surgical and non-surgical procedures may be performed. *E.g.*, Public Health Law §§ 230-d(1)(c)-(h), 2998-e; Education Law § 6530(48). *See also* Department of Health, "Office Based Surgery – Frequently Asked Questions," *supra* ¶¶ 4, 8-22, 33-34. Article 28 facilities, on the other hand, include, *inter alia*, hospitals, diagnostic/treatment centers and "free standing" ambulatory surgery centers, which are subject to distinct licensing and oversight requirements. *See* Department of Health, "Office

Based Surgery – Frequently Asked Questions," *supra* ¶ 33.

Significantly, plaintiffs do not dispute that defendant is a duly accredited OBS entity, whose status as such generally qualifies it as a health care provider entitled to bill carriers for No-Fault expenses pursuant to Insurance Law § 5102(a)(1). Nor do plaintiffs claim that facility fees, in general, are not among those included within the definition of "Basic economic loss" as defined by section § 5102(a)(1) of the Insurance Law. *See Upper East Side Surgical, PLLC v. State Farm Ins. Co.*, *supra* at 2. Rather, plaintiffs claim, in substance, that allegedly applicable regulations and fee schedules do not authorize facility fee recoveries other than to entities licensed pursuant to Article 28.

Although the regulations on which plaintiffs rely contain Workers Compensation-derived "PAS" fee schedules which apply to Article 28 licensed entities (*see* Insurance Law § 5108(a) and (b); 10 NYCRR §§ 86-4.40, 86-4.1(a), 800.8; 11 NYCRR § 68.1(a)), the regulations do not state that they are applicable to OBS facilities. Similarly, they do not provide that only Article 28 facilities are entitled to bill for facility fees under Insurance Law § 5102(a)(1) or that an OBS entity – or any other No-Fault provider – is precluded from recovering facility fees except pursuant to their specified terms and rate schedules. *See Upper East Side Surgical, PLLC v. State Farm Ins. Co.*, 34 Misc.3d.1219(A), 2012 WL 335774 (District Court, Nassau County 2012); Defendant's Affirmation in Opposition Exhibit C.

Nor is the absence of a pre-existing rate schedule applicable to OBS facilities dispositive of defendant's recovery rights. Notably, 11 NYCRR § 68.5(b) provides, in sum, that if a health service is reimbursable under Insurance Law § 5102(a)(1) – but the superintendent has not established a fee schedule applicable to that specific provider – reimbursement is then to be made in conformity "with the prevailing fee [rate] in the geographic location of the provider..." *See Upper East Side Surgical, PLLC v. State Farm Ins. Co., supra*; *cf. Great Wall*

Acupuncture v. GEICO Gen. Ins. Co., 16 Misc.3d 23, 842 N.Y.S.2d 131 (Supreme Court Appellate Term, Second Department 2007).

Recently, in *Upper East Side Surgical, PLLC v. State Farm Ins. Co., supra,* the Court considered essentially the same OBS-facility fee issue raised here. The Court noted that the PAS fee schedules were, by their terms, applicable only to Article 28 facilities, but that OBS facilities were nevertheless legally entitled to recover facility fees pursuant to Insurance Law § 5102(a)(1). Since, however, fee schedules applicable to OBS providers had not been issued, the facility rate issue effectively defaulted to the provisions of § 68.5(b) – under which fees would then be payable based on prevailing rates in the involve geographic area. *See Upper East Side Surgical, PLLC v. State Farm Ins. Co., supra* at 3.

Contrary to plaintiffs' assertions, the fact that defendant allegedly utilized the PAS fees codes in submitting bills does not establish that it is therefore an Article 28 facility or that OBS entities in general are not entitled to recover facility fees from No-Fault providers. *See id.*. The three-sentence, Civil Court holding relied upon by plaintiffs contains no factual content or explanatory legal analysis and is therefore lacking in precedential import and authority. *E.g. Synergy First Medical PLLC v. GEICO*, __ Misc.3d __, (Civil Court, Bronx County 2011).

Finally, plaintiffs' reliance on a 2006 opinion letter issued by General Counsel for the DOH (*see* Plaintiffs' Memorandum of Law Exhibit C-3) – which predates the 2008 enactment of the "OBS statute" (Public Health Law § 230-d) – is unpersuasive. A review of the opinion letter reveals that it does not address No-Fault reimbursement issues, where statutory mandates compel carriers to pay properly reimbursable expenses. *See* Insurance Law § 5102(a)(1). In any event, and as to the matters it did consider, the DOH took the position that facility fees are permissibly recoverable to the extent contractually agreed upon by the parties involved. Specifically, the DOH observed that "[w]hether a third party insurer will pay a facility fee is a

matter of negotiation between the insurer and the OBS practice." *See* Office Based Surgery; "Frequently Asked Questions, ¶ 43 *accord*, General Counsel Opinion 10-16-2008 (#1), New York Insurance General Counsel Opinion No. 10-16-2008 (2008).

The Court has considered plaintiffs' remaining contentions and concludes that they do not support an exercise of the Court's discretion in favor of granting the injunctive relief sought.

Accordingly, it is,

ORDERED that the plaintiffs' motion, pursuant to CPLR § 2201, for an order staying all pending actions, arbitrations and proceedings commenced by the defendant as against plaintiffs wherein defendant seeks to recover No-Fault benefits for facility fees; and, pursuant to CPLR § § 6301 and 6311, for a order enjoining defendant from commencing any new actions, arbitrations or proceedings against plaintiffs seeking reimbursement for facility fees pending resolution of this within action is hereby **DENIED**. And it is further

ORDERED that the previously granted temporary restraining order contained in plaintiffs' February 2012 Order to Show Cause is hereby **VACATED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

XXX

ENTERED

MAY 08 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
May 3, 2012