STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

AARON MANOR REHABILITATION AND NURSING CENTER, LLC; ABSOLUT CENTER FOR NURSING AND REHAB AT ENDICOTT; ABSOLUT CENTER FOR NURSING & REHABILITATION AT SALAMANCA, LLC D/B/A SALAMANCA REHABILITATION & NURSING CENTER; AVON NURSING HOME, LLC; BAINBRIDGE NURSING & REHABILITATION CENTER, LLC; BEDFORD CENTER FOR NURSING AND REHABILITATION LLC; BRIDGEWATER CENTER; BRONX HARBOR HEALTH CARE COMPLEX INC. D/B/A KINGS HARBOR MULTICARE CENTER; CARDIFF BAY CENTER LLC; CARING FAMILY NURSING AND REHABILITATION CENTER; CCRNC, LLC D/B/A CROWN PARK; CNH OPERATING LLC D/B/A THE CHATEAU AT BROOKLYN REHABILITATION AND NURSING CENTER; CONESUS LAKE NURSING HOME; CORTLANDT OPERATIONS LLC D/B/A CORTLANDT HEALTHCARE; CREST MANOR LIVING AND REHABILITATION CENTER, INC. D/B/A CREST MANOR LIVING & REHABILITATION CENTER; CROWN HEIGHTS CENTER FOR NURSING AND REHABILITATION LLC; CSRNC, LLC D/B/A CAPSTONE CENTER; DEWITT REHABILITATION AND NURSING CENTER INC.; DRY HARBOR NURSING HOME; DUMONT OPERATING LLC; EASTCHESTER REHABILITATION AND HEALTH CARE CENTER, LLC; EAST HAVEN NURSING & REHABILITATION CENTER, LLC; EAST SIDE NURSING HOME, INC. D/B/A EAST SIDE NURSING & REHABILITATION CENTER; ELCOR NURSING AND REHABILITATION CENTER; 1 BETHESDA DRIVE OPERATING COMPANY, LLC D/B/A ELDERWOOD AT HORNELL; 1818 COMO PARK BOULEVARD OPERATING COMPANY, LLC D/B/A ELDERWOOD AT LANCASTER; 112 SKI BOWL ROAD OPERATING COMPANY, LLC D/B/A ELDERWOOD AT NORTH CREEK; 1019 WICKER STREET OPERATING COMPANY, LLC D/B/A ELDERWOOD AT TICONDEROGA; 185 OLD MILITARY ROAD OPERATING COMPANY, LLC D/B/A ELDERWOOD OF UIHLEIN AT LAKE PLACID; 37 NORTH CHEMUNG STREET OPERATING COMPANY, LLC D/B/A ELDERWOOD AT WAVERLY; FISHKILL CENTER FOR REHABILITATION AND NURSING; FOREST HILLS CARE CENTER LLC; FSNR SNF, LLC; GLENGARIFF OPERATING LLC; GOLD CREST CARE CENTER, INC.; GOLDEN GATE REHABILITATION & HEALTH

DECISION AND ORDER/JUDGMENT
Index No.: 905032-20
RJI No.: 01-20-ST1112

CARE CENTER; GOSHEN OPERATIONS LLC; GREENE MEADOWS NURSING AND REHABILITATION CENTER; HAMILTON MANOR NURSING HOME, LLC; HAMILTON PARK MULTI CARE CENTER, LLC; HARLEM CENTER FOR NURSING AND REHABILITATION, LLC; HAVEN MANOR HEALTH CARE CENTER, LLC; HBL SNF LLC D/B/A EPIC REHABILITATION AND NURSING AT WHITE PLAINS; HIGHLAND CARE CENTER, INC.; HIGHLAND NURSING HOME, INC.; HOLLIS PARK MANOR NURSING HOME, INC.; HRNC OPERATING LLC D/B/A HIGHLAND REHABILITATION AND NURSING CENTER; HUNTINGTON HILLS CENTER FOR HEALTH AND REHABILITATION; JBRNC, LLC D/B/A HUDSON PARK REHABILITATION AND NURSING; JSSG HEALTHCARE, LLC D/B/A FIDDLERS GREEN MANOR REHABILITATION AND NURSING CENTER; KING DAVID CENTER FOR NURSING AND REHABILITATION, LLC; LATTA ROAD NURSING HOME EAST, LLC; LATTA ROAD NURSING HOME WEST, LLC; LEROY VILLAGE GREEN RESIDENTIAL HEALTH CARE FACILITY, INC.; LINDEN CENTER FOR NURSING AND REHABILITATION LLC; MEADOW PARK REHABILITATION & HEALTH CARE CENTER LLC; MONTGOMERY OPERATING CO., LLC D/B/A MONTGOMERY NURSING AND REHABILITATION CENTER; MORNINGSIDE ACQUISITION I, LLC; MORNINGSTAR RESIDENTIAL AND NURSING CENTER; MOSHOLU PARKWAY NURSING & REHABILITATION CENTER, LLC; NCRNC, LLC D/B/A NORTHEAST CENTER FOR REHABILITATION AND BRAIN INJURY; NHRC ACQUISITION LLC D/B/A HUMBOLDT HOUSE REHABILITATION AND NURSING CENTER; NEW VANDERBILT REHABILITATION AND CARE CENTER; NEWARK MANOR NURSING HOME, INC.; NEWBURGH OPERATIONS LLC; ORRNC OPERATING LLC D/B/A ORCHARD REHABILITATION & NURSING CENTER; PALFFY GROUP LLC D/B/A ALPINE REHABILITATION AND NURSING CENTER; PALM GARDENS CARE CENTER, LLC D/B/A PALM GARDENS CENTER FOR NURSING AND REHABILITATION; PALM TREE CARE CENTER, LLC D/B/A THE HERITAGE REHABILITATION AND HEALTH CARE CENTER; PARK MANOR ACQUISITION II, LLC D/B/A MIDDLETOWN PARK REHABILITATION & HEALTH CARE CENTER; PENFIELD PLACE, LLC; PHARNEY GROUP LLC D/B/A TARRYTOWN HALL CARE CENTER; PINE HAVEN HOME; PINE VALLEY CENTER; PORT JEFFERSON OPERATING LLC D/B/A WATERS EDGE REHAB & NURSING AT PORT JEFFERSON; PUTNAM NURSING & REHABILITATION CENTER; RALEX SERVICES, INC. D/B/A

GLEN ISLAND CENTER FOR NURSING AND REHABILITATION; RAMAPO MANOR NURSING CENTER INC. D/B/A THE WILLOWS AT RAMAPO REHABILITATION AND NURSING CENTER; RIVER RIDGE OPERATING LLC D/B/A RIVER RIDGE LIVING CENTER; ROCKVILLE OPERATING LLC D/B/A THE GRAND PAVILION FOR REHAB & NURSING AT ROCKVILLE CENTRE; SAFIRE REHABILITATION OF NORTHTOWNS LLC; SAFIRE REHABILITATION OF SOUTHTOWNS LLC; SALEM ACQUISITION I, LLC D/B/A SALEM HILLS REHABILITATION AND NURSING CENTER; SANDS POINT CENTER FOR HEALTH AND REHABILITATION; SAPPHIRE CENTER FOR REHABILITATION AND NURSING OF CENTRAL QUEENS, LLC; SAPPHIRE NURSING AT WAPPINGERS, LLC; SENECA NURSING & REHABILITATION CENTER, LLC; SHORE VIEW ACQUISITION I LLC D/B/A SHORE VIEW NURSING & REHABILITATION CENTER; SILVER LAKE SPECIALIZED REHABILITATION AND CARE CENTER; SKY VIEW REHABILITATION AND HEALTH CARE CENTER, LLC; SOUTH SHORE REHABILITATION AND NURSING CENTER; ST JAMES OPERATING LLC; SUNHARBOR ACQUISITION I, LLC; SUNNYSIDE CARE CENTER, LLC; SUNRISE MANOR CENTER FOR NURSING AND REHABILITATION; THE BRIGHTONIAN, INC.; THE HURLBUT, LLC; THE PINES AT CATSKILL CENTER FOR NURSING AND REHABILITATION; THE PINES AT GLENS FALLS CENTER FOR NURSING AND REHABILITATION; THE PINES AT POUGHKEEPSIE CENTER FOR NURSING & REHABILITATION; THE PINES AT UTICA FOR NURSING AND REHABILITATION; 150 RIVERSIDE OP LLC D/B/A THE RIVERSIDE; VDRNC, LLC D/B/A VAN DUYN CENTER; THE SHORE WINDS, LLC; WATERVIEW HILLS REHABILITATION AND NURSING CENTER; WATERVIEW NURSING CARE CENTER, INC.; WATERVILLE RESIDENTIAL CARE CENTER; WAYNE CENTER FOR NURSING & REHABILITATION, LLC; WELLSVILLE MANOR CARE CENTER; WEST LAWRENCE CARE CENTER LLC; WEST LEDGE OP LLC D/B/A THE EMERALD PEEK REHABILITATION AND NURSING CENTER; WESTCHESTER CENTER FOR REHABILITATION & NURSING; WESTCHESTER PARK LLC; WILLIAMSVILLE SUBURBAN LLC; WMOP LLC D/B/A ACHIEVE REHAB; WOODSIDE MANOR NURSING HOME, INC.,

Plaintiffs-Petitioners,

V.

HOWARD ZUCKER, M.D., J.D. AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK OR HIS SUCCESSOR IN OFFICE, AND ROBERT MUJICA JR., AS DIRECTOR OF THE BUDGET,

Defendants-Respondents.

(Supreme Court, Albany County, Special Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Plaintiffs-petitioners Aaron Manor Rehabilitation and Nursing Center, LLC, Absolut Center for Nursing and Rehab at Endicott, Absolut Center for Nursing & Rehabilitation at Salamanca, LLC d/b/a Salamanca Rehabilitation & Nursing Center, Avon Nursing Home, LLC, et al. are 116 proprietary a/k/a for-profit residential health care facilities that operate nursing homes in New York State[1] (collectively "plaintiffs-petitioners"). They commenced this hybrid CPLR Article 78 proceeding and plenary action for declaratory and injunctive relief against defendants

[1] The caption includes a complete list of the plaintiffs-petitioners in this proceeding and action. Before the second amended verified petition and complaint was filed, plaintiffs-petitioners consisted of 107 for-profit residential health care facilities. Following the filing of the second amended verified petition and complaint, eleven (11) additional for-profit nursing homes were added as plaintiffs-petitioners. Additionally, two (2) plaintiffs-petitioners were removed as parties.

-respondents Howard A. Zucker, M.D., J.D., as Commissioner of Health of the State of New York ("Commissioner Zucker" or "Health Commissioner"), and Robert Mujica, Jr., as Director of the Budget ("Director Mujica" or "Budget Director") (collectively "defendants-respondents"), to challenge the action taken, or to be taken, by the New York State Department of Health ("DOH") and Commissioner Zucker to implement an amendment to Public Health Law ("PHL") § 2808(20)(d), enacted as part of the 2020-2021 State Budget, eliminating the payment factor for residual equity in the capital cost component of plaintiffs-petitioner's Medicaid reimbursement rates "for rate periods on or after April first, two thousand twenty" (*see* L. 2020, ch. 56, pt. NN, § 2 ["residual equity elimination clause" or "REEC"]).

After hearing oral argument on plaintiffs-petitioners' application for a preliminary injunction brought by Order to Show Cause (O'Connor, J.), dated August 24, 2020, this Court issued a Decision and Order, dated October 26, 2020, enjoining defendants-respondents from taking any action under Public Health Law § 2808(20)(d) to eliminate or allow the elimination of the residual equity factor from plaintiffs-petitioners' Medicaid reimbursement rates pending a final determination of this proceeding and action. Thereafter, defendants-respondents moved, pursuant to CPLR 2221(d), for leave to reargue their opposition to the preliminary injunction application and, upon reargument, seek an order vacating the Court's October 26, 2020 determination. Alternatively, defendants-respondents seek an order modifying the preliminary injunction to enjoin the implementation of the rate changes under PHL § 2808(20)(d) for rate periods prior to October 7, 2020, pending a final determination of this proceeding and action.

Defendants-respondents have also answered the second amended verified petition and complaint, oppose the requested relief, and move, pursuant to CPLR 3212, for an order granting summary judgment in their favor and dismissing the plaintiffs-petitioners' causes of action for

declaratory judgment and based on an equal protection violation.[2] Plaintiffs-petitioners oppose the summary judgment motion and have replied to the opposition to their second amended verified petition. Defendants-respondents replied to the opposition to their summary judgment motion and submitted a sur-reply in further opposition of the second amended verified petition. Plaintiffs-petitioners further opposed the motion for summary judgment in a sur-reply.

The parties virtually appeared for oral argument on the reargument/modification application, motion for summary judgment, and second amended verified petition on January 25, 2021, and rely on and incorporate by reference all prior arguments and submissions in this proceeding and action, and with respect to the pending applications. This matter and the pending applications have been fully briefed and submitted, and are ready for disposition.

Medicaid is "a joint federal-state program established pursuant to [T]itle XIX of the Social Security Act (42 USC § 1396 *et seq.*), [which] pays for medical care for those otherwise unable to afford it, including nursing home care for older people with low incomes and limited assets" (*Matter of Nazareth Home of the Franciscan Sisters v. Novello*, 7 N.Y.3d 538, 542 [2006]; *see Matter of Good Samaritan Hosp. Med. Ctr., Inc. v. New York State Dep't of Health*, 45 Misc.3d 844, 846 [Sup. Ct., Suffolk County 2014]). Under the program, "[t]he federal government normally covers 50% of New York's Medicaid costs, while the state and local governments share responsibility for the rest" (*Matter of Nazareth Home of the Franciscan Sisters v. Novello*, 7

[2] Defendants-respondents' answer, opposition to the second amended verified petition, and motion for summary judgment were initially filed on October 23, 2020. However, following issuance of Court's October 26, 2020 Decision and Order, granting the preliminary injunction, defendants-respondents requested an adjournment of the return date in this matter to afford them an opportunity to respond to points raised by the Court's preliminary injunction decision, and create a sufficient record upon which the Court can render a final determination on the petition. The Court granted the request, and defendants-respondents subsequently filed amended answering and opposition papers, and an amended motion for summary judgment on November 24, 2020.

N.Y.3d at 542; *Matter of Good Samaritan Hosp. Med. Ctr., Inc. v. New York State Dep't of Health*, 45 Misc.3d at 846).

"New York operates its own Medicaid program, setting its own guidelines for eligibility and services in conformity with federal statutes and rules" (*Matter of Nazareth Home of the Franciscan Sisters v. Novello*, 7 N.Y.3d at 542; *Matter of Good Samaritan Hosp. Med. Ctr., Inc. v. New York State Dep't of Health*, 45 Misc.3d at 846). The Department of Health ("DOH") is the single State agency responsible for administering New York's Medicaid Program and promulgating regulations to implement the Program (*see* Social Services Law § 363-a[1], [2]). "The vast majority of nursing home residents in New York State receive Medicaid benefits, and effectively every nursing home in New York State," including each plaintiff-petitioner, "is a Medicaid participant" (Second Am. Ver. Pet. & Compl., ¶ 12).

Pursuant to Article 28 of the Public Health Law, the Health Commissioner is charged with "determin[ing]" the Medicaid reimbursement rates for nursing homes participating in the State's Medicaid Program, and "certify[ing] to [the DOB Director]" that the Medicaid reimbursement rates for nursing homes "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" (Public Health Law § 2807[3]; *see* Public Health Law § 2808[3]). In accordance with Public Health Law § 2807, the DOB Director "is responsible for approving the Medicaid reimbursement rates determined and certified by the Commissioner of Health" (*Matter of Cabrini of Westchester v. Daines*, 23 Misc.3d 855, 856 [Sup. Ct., Westchester County 2009]).

A nursing home's Medicaid rate consists of two primary components: (1) reimbursement of operating costs, *i.e.*, non-capital costs, including direct, indirect, and noncomparable costs (*see* 10 N.Y.C.R.R. § 86-2.10; § 86-2.40); and (2) reimbursement of capital costs, including interest on

capital indebtedness, and the cost of and improvements to the building and equipment ("real property"), among other costs (*see* 10 N.Y.C.R.R. § 86-2.10; § 86-2.19; § 86-2.20; § 86-2.21; § 86-2.22; Foster Aff., ¶¶ 6-7, Sept. 2, 2020; Angelone Aff., ¶ 6, Aug. 19, 2020). Reimbursement for capital costs, including the cost of and improvements to the real property, is based on the underlying sponsorship of a residential health care facility's ownership (*see* Foster 9/2/2020 Aff., ¶ 7). Sponsorship of a facility includes for-profit (proprietary), voluntary (not-for-profit), and governmental (public) ownership (*see id.*, ¶ 8). "Voluntary or [g]overnmental sponsored owners are reimbursed for the real property based upon allowable depreciation reported in the cost reports" while facilities sponsored by for-profit owners, like plaintiffs-petitioners, "are reimbursed for the real property based upon the owner's equity that the asset cost represents" (*id.*).

Equity[3] reimbursement for proprietary nursing homes is computed in accordance with 10 N.Y.C.R.R. § 86-2.21, and is paid during a facility's initial useful life period of "40 years measured from the calendar year in which [the] facility commences operations as determined by the [Health] [C]ommissioner" (*see* Foster 9/2/2020 Aff., ¶ 9; 10 N.Y.C.R.R. § 86-2.21[a][7]). Before the Legislature amended PHL § 2808(20)(d) in 2020, the Health Commissioner had discretion to approve reimbursement to for-profit nursing homes for "continued capital costs" incurred after their initial forty-year useful life ended, referred to in regulation as "[r]esidual reimbursement" or herein as "residual equity reimbursement" (*see* 10 N.Y.C.R.R. § 86-2.21[e][7]). Specifically, DOH's regulations provide that

> [a]fter the expiration of the useful facility life, the [Health] [C]ommissioner may approve a payment factor for any facility for which he [or she] determines that continued capital cost reimbursement is appropriate; provided, however, that such

[3] "Equity," for purposes of capital cost reimbursement to for-profit nursing homes, is defined as "all cash or other assets, net of liabilities, invested by a facility or its operator in land, building and nonmoveable equipment" (10 N.Y.C.R.R. § 86-2.21[a][4]).

> payment factor shall not exceed one half of the capital cost reimbursement received by such facility in the final year of useful facility life (*id.*).

According to plaintiffs-petitioners, although permissive, "the [Health] Commissioner has approved a residual reimbursement factor for virtually all for-profit nursing homes that have reached the end of their useful life" (Second Am. Ver. Pet. & Compl., ¶ 22).

On April 1, 2020,[4] the DOH published notice in the New York State Register, proposing to amend the State Plan to eliminate funding associated with residual equity payments to for-profit nursing homes (*see* Foster 9/2/2020 Aff., Ex. B).[5] Thereafter, the Legislature amended PHL § 2808(20)(d), enacted as part of the 2020-2021 State Budget, to eliminate residual equity reimbursement in the capital cost component of for-profit nursing homes Medicaid rates (L. 2020, ch. 56, pt. NN, § 2). The amended statute provides that "for rate periods on and after April first, two thousand twenty, there shall be no payment factor for residual equity reimbursement in the capital cost component of Medicaid rates of payment for services provided by residential health care facilities" (*id.*). The statute, as amended, was signed into law on April 3, 2020, is "deemed to have been in full force and effect on and after April 1, 2020," and authorizes "the [D]irector of the [B]udget . . . , in consultation with the [C]ommissioner of [H]ealth, [to] delay the effective dates prescribed [t]herein for a period of time which shall not exceed ninety days following the conclusion or termination of an executive order issued pursuant to section 28 of the [E]xecutive [L]aw declaring a state disaster emergency for the entire [S]tate of New York" (L. 2020, ch. 56, pt. NN, § 3 ["delay clause"]).

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[4] A clarification of the language of the public notice was published in the June 3, 2020 New York State Register (*see* Foster 9/2/2020 Aff., Ex. B).

[5] The elimination of residual equity payments was part of a series of changes proposed by the Medicaid Redesign Team II, established and convened by the Governor on or about February 4, 2020 to develop a comprehensive set of recommendations for the Governor and the Legislature to find savings in the State's Medicaid Program (*see* Second Am. Ver. Pet. & Compl., ¶ 32).

On June 24, 2020, in accordance with Public Health Law § 2807 and § 2808, Commissioner Zucker, by the DOH's Medicaid Director, certified that the schedule of 2020 initial nursing home and adult day care fee-for-service capital rates for the period April 1, 2020 through December 31, 2020 "are reasonable and adequate to meet the cost which must be incurred by efficiently and economically operated facilities" (Tries First Supplemental Aff., Ex. B, Dec, 17, 2020). In certifying the 2020 rates, the Medicaid Director notified Director Mujica that "[t]he proposed capital rates for facilities . . . are being revised for rates effective April 1, 2020 through December 31, 2020," and that "residential health care facility . . . Medicaid capital reimbursement rates are being reduced to reflect the elimination of residual equity . . . pursuant to authorization included in [p]art NN of [c]hapter 56 of the Laws of 2020" (*id.*).

On or about June 30, 2020, the DOH submitted a State Plan Amendment ("SPA" or "SPA #20-0037") to the federal Centers for Medicaid and Medicare Services ("CMS") "propos[ing] to eliminate the reimbursement of residual equity for all nursing homes" (Foster 9/2/2020 Aff., Ex. B). SPA #20-0037 provides that "[e]ffective on April 2, 2020, and thereafter, the capital cost component of the rate for all residential heath care facilities will be adjusted to reflect the removal of residual equity reimbursement" (*id.*). On July 8, 2020, Director Mujica approved the capital reimbursement rates certified by Commissioner Zucker, through the DOH's Medicaid Director, and by "Dear Administrator" letter ("DAL"), dated August 7, 2020, the DOH notified nursing homes participating in the State's Medicaid Program, including plaintiffs-petitioners, that "[t]he April 2, 2020 rate eliminates residual equity payments in accordance with §2808-[20](d) of the Public Health Law" (*id.*, Ex. C). As of the date of the DAL, SPA #20-0037 had not been approved by CMS.

Plaintiffs-petitioners subsequently commenced this proceeding and action seeking an order and judgment: (1) barring defendants-respondents from implementing the residual equity elimination clause as violative of existing law and because defendants-respondents had not obtained SPA approval before taking action to eliminate residual equity reimbursement; (2) issuing a mandatory injunction requiring Director Mujica to delay implementation of the residual equity elimination clause for a period up to "ninety days following the conclusion or termination of an executive order issued pursuant to [S]ection 28 of the [E]xecutive [L]aw declaring a state disaster emergency for the entire [S]tate of New York" due to the COVID-19 pandemic, as provided for under the delay clause; (3) declaring the residual equity elimination clause to be violative of Public Health Law § 2807(3) and enjoining any action taken under the REEC; (4) declaring the residual equity elimination clause to be violative of Public Health Law § 2807(7) and enjoining any action taken under the REEC; and (5) enjoining the REEC as violative of plaintiffs-petitioners' equal protection rights under the New York State and United States Constitutions. Plaintiffs-petitioners also seek an award of reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988, in connection to their equal protection claim.

During the pendency of this proceeding and action, DOH was notified, by letter dated September 14, 2020, that CMS had approved SPA #20-0037 "effective April 2, 2020" (*see* Dague Letter, Ex. A, Sept. 15, 2020). The amended plan page of the approved SPA provides that "[e]ffective on April 2, 2020, and thereafter, the capital cost component of the rate for corporation and partnership-based residential health care facilities will be adjusted to reflect the removal of residual equity reimbursement," and that "[e]ffective on June 4, 2020, and thereafter, the capital cost component of the rate for all other residential health care facilities will be adjusted to reflect the removal of residual equity reimbursement" (*id.*).

Leave to Reargue or Modify the Preliminary Injunction

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the trial court (*see Peak v. Northway Travel Trailers Inc.*, 260 A.D.2d 840, 842 [3d Dep't 1999]), and may be granted only upon a showing that the court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Adderley v. State*, 35 A.D.3d 1043, 1043-1044 [3d Dep't 2006][internal quotation marks and citation omitted]; *see* CPLR 2221[d][2]; *In re Ida Q.*, 11 A.D.3d 785, 786 [3d Dep't 2004]; *Matter of Smith v. Town of Plattekill*, 274 A.D.2d 900 [3d Dep't 2000]), "or for some reason mistakenly arrived at its earlier decision" (*Coke-Holmes v. Holsey Holdings, LLC*, 189 A.D.3d 1162, 1164 [2d Dep't 2020]; *Matter of Mayer v. Nat'l Arts Club*, 192 A.D.2d 863, 865 [3d Dep't 1993]). The application "shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]), and "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Mazinov v. Rella*, 79 A.D.3d 979, 980 [2d Dep't 2010][further internal quotation marks and citation omitted]; *accord Haque v. Daddazio*, 84 A.D.3d 940, 942 [2d Dep't 2011]; *see Matter of Mayer v. Nat'l Arts Club*, 192 A.D.2d at 865; *Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dep't 1979]). Applying this standard and upon review of the record, defendants-respondents have failed to demonstrate that this Court overlooked or misapprehended any material facts, misapplied any controlling principle of law, or mistakenly arrived at its earlier decision.

Defendants-respondents assert that reargument is proper here because the law governing the advance notice requirements of PHL § 2807(7) and retroactive rate-making was not fully considered by the Court. In that regard, defendants-respondents contend that under both the PHL and settled case law, the advance notice requirements in PHL § 2807(7) do not apply when a

retroactive rate adjustment is authorized by the Legislature. Specifically, they argue that "both PHL § 2808(11) . . . and the 2020-2021 [State] Budget Law itself[ ] exempt DOH from the 60-day notice requirement in implementing the residual equity elimination amendment." Further, citing *Matter of Dry Harbor Nursing Home v. Zucker* (175 A.D.3d 770 [3d Dep't 2019], *appeal dismissed, lv. denied*, 35 N.Y. 3d 984 [2020]), *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of New York* (247 A.D.2d 136 [4th Dep't 1998], *lv. denied*, 93 N.Y.2d 803 [1999]), *Tioga Nursing Home v. Axelrod* (90 A.D.2d 570 [3d Dep't 1982], *aff'd*, 60 N.Y.2d 717 [1983]), and *Matter of Kaye v. Whalen* (44 N.Y.2d 754 [1978]), defendants-respondents submit that "PHL § 2807(7) does not bar [retroactive] rate adjustments, when, as here, they are authorized by statute."

Contrary to defendants-respondents' assertion, the Court did not "conclude[ ], mistakenly, that exceptions to the 60-day advance notice requirements are limited to those specified in PHL § 2807(7), namely, when DOH recalculates rates following judicial invalidation of rate or rate-setting methodologies." Although defendants-respondents maintain that "the Court did not consider . . . PHL § 2808(11), which sets forth a more comprehensive list of situations when the advance notice requirements of PHL § 2807(7) do not apply to retroactive . . . rate adjustments," they admit, and the record clearly shows, that their argument concerning the applicability of Public Health Law § 2808(11) was not presented in opposition to plaintiffs-petitioners' preliminary injunction motion (*see Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 375 [2d Dep't 2004][leave to reargue "is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented; *Haque v. Daddazio*, 84 A.D.3d at 942).[6] Instead, they "focused their argument mainly on the statutory construction of [PHL] §

[6] The Court rejects defendants-respondents' contention that "[w]hen arguing an interpretation of a statutory provision, it is not a 'new argument' to offer an additional provision of law, not previously considered, which directly governs the subject matter." They cite no authority in support of this contention. Furthermore, defendants-respondents are not simply drawing the Court's attention to controlling authority not considered in relation to their previously asserted

2807(7)." Indeed, if "PHL § 2808(11) is crucial in any discussion of § 2807(7)'s scope and applicability," as defendants-respondents contend, it was incumbent upon them to raise this claim in opposing the preliminary injunction, which they concededly failed to do. Thus, there was no mistake on the Court's part, and it was entirely proper for the Court to make its findings and base its conclusion on the arguments advanced by the parties on the original motion.

Defendants-respondents contend that "in rendering its finding on retroactivity, the Court did not consider the fact that the Legislature actually intended to authorize the elimination of residual equity reimbursement through retroactive adjustments to nursing home Medicaid rates, effective April 1, 2020." Notably, however, they did not argue, on the original motion as they do here, that "[s]ince [PHL § 2808(20)(d), as amended,] was not enacted until April 4, 2020 and expressly applies to rate periods as of April 1, 2020, the statutorily-mandated elimination of residual equity reimbursement had to be retroactive, by definition." Nor did they previously assert that the "mandated elimination of residual equity elimination reimbursement was made effective as of April 1, 2020–'[n]otwithstanding any contrary provision of law, rule, or regulation,'" that "[PHL] § 2807(7) is an inconsistent provision of law subject to the 'notwithstanding' clause in [§] 2808(20)(d)," and "[t]hus, [PHL § 2808(20)(d)] expressly exempts, through th[e] 'notwithstanding' language, the elimination of [residual equity] reimbursements from the 60-day avance-notice requirements of PHL § 2807(7)." Therefore, to submit that the Court did not consider the residual equity elimination clause, itself, in determining whether the statute was intended to apply retroactively is disingenuous.

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argument, i.e., that based on an interpretation of PHL § 2807(7), the 60-day notice requirements do not apply to the residual equity elimination clause. Rather, they are now arguing that an exception to PHL § 2807(7)'s notice requirements contained in PHL § 2808(11) is controlling, and that an interpretation of that statute supports a finding that the 60-day notice requirement doesn't apply to the REEC.

Moreover, defendants-respondents' claim that the Court "overlooked" *Matter of Dry Harbor Nursing Home v. Zucker* (175 A.D.3d 770 [3d Dep't 2019], *appeal dismissed, lv. denied*, 35 N.Y. 3d 984 [2020]), *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of New York* (247 A.D.2d 136 [4th Dep't 1998], *lv. denied*, 93 N.Y.2d 803 [1999]), *Tioga Nursing Home v. Axelrod* (90 A.D.2d 570 [3d Dep't 1982], *aff'd*, 60 N.Y.2d 717 [1983]), and *Matter of Kaye v. Whalen* (44 N.Y.2d 754 [1978]) on the preliminary injunction motion is without merit. Defendants-respondents' made no mention of this "binding appellate precedent" in their papers opposing plaintiffs-petitioners' application. In any event, the Court is not persuaded that these cases support reargument in these circumstances.

For these reasons, the Court adheres to its October 26, 2020 determination, and leave to reargue is denied. The Court also denies defendants-respondents' alternative request to modify the preliminary injunction.

"A preliminary injunction is a provisional remedy" and "[i]t's function 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" (*Wellbilt Equip. Corp. v. Red Eye Grill, L.P.*, 308 A.D.2d 411, 411 [1st Dep't 2003][internal quotation marks and citations omitted]). Nevertheless, "a court has inherent power to modify its equitable directives" (*id.*), and "[a] defendant enjoined by a preliminary injunction may move at any time, on notice to plaintiff, to vacate or modify it" (CPLR § 6314). "A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon 'compelling or changed circumstances that render continuation of the injunction inequitable'" (*Thompson v. 76 Corp.*, 54 A.D.3d 844, 846 [2d Dep't 2008] & *Thompson v. 76 Corp.*, 37 A.D.3d 450, 452-453 [2d Dep't 2007], both quoting *Wellbilt Equip. Corp. v. Red Eye Grill*, 308 A.D.2d at 411).

Defendants-respondents submit that if the Court adheres to its prior determination, the preliminary injunction is too broad and internally inconsistent, and must be modified. To that end, they maintain that because the basis of the injunction was an alleged violation of the 60-day advance notice requirement under PHL § 2807(7), at most the Court should have enjoined implementation of the revised rates until DOH gave nursing homes 60-days' notice of the rate revisions, eliminating residual equity reimbursement, which occurred in the August 7, 2020 DAL. Defendants-respondents further assert that enjoining DOH from "taking any action" to implement the residual equity amendment during the pendency of this proceeding and action "is inconsistent with the Court's own reasoning, which hinges on the provision of 60-days' notice" and "frustrates the Legislature's unambiguously-expressed intent that residual equity reimbursement shall be eliminated." As such, defendants-respondents argue that "there is no legal basis to enjoin the implementation of the statutorily-mandated [elimination of residual equity reimbursement] as of October 7, 2020–or 60-days after the notice was provided." The Court disagrees.

Notwithstanding defendants-respondents' arguments, the Court finds no compelling or changed circumstances in the record that would render continuation of the preliminary injunction inequitable in this case. On the contrary, the equities favor maintaining the *status quo ante* during the pendency of this proceeding and action to permit a full hearing of the merits of plaintiffs-petitioners' claims.

Motion for Summary Judgment and Second Amended Petition

As an initial matter, defendants-respondents' arguments in opposition to plaintiffs-petitioners' fifth cause of action, *i.e.*, their equal protection claim, are properly before the Court on the motion for summary judgment and will be considered, despite plaintiffs-petitioners' objection. Although defendants-respondents caption and reference their motion as one seeking summary

judgment on the declaratory judgment claims, the substance of their application makes clear that the motion includes plaintiffs-petitioners' equal protection cause of action. Furthermore, plaintiffs-petitioners were on notice, by defendants-respondents' briefing, that the motion for summary judgment motion is also addressed to their fifth cause of action, and plaintiffs-petitioners had a full and fair opportunity to argue the merits of their equal protection claim in opposing the motion. Moreover, plaintiffs-petitioners have not asserted any prejudice or surprise resulting from the Court's consideration of their equal protection claim in connection with defendants-respondents' summary judgment motion.

Next, the Court declines to dismiss this proceeding and action as against Director Mujica. While the second amended verified petition and complaint does not include any substantive allegations against the DOB Director, plaintiffs-petitioners seek, in connection with their second cause of action, a mandatory injunction requiring Director Muijica "to delay implementation of the [r]esidual [e]quity [e]limination [c]lause for a period up to 'ninety days following the conclusion or termination of an executive order issued pursuant to [S]ection 28 of the [E]xecutive [L]aw declaring a state disaster emergency for the entire [S]tate of New York' due to the COVID-19 pandemic, as provided for under the [d]elay [c]lause." Thus, the DOB Director has been properly included as a party (*see e.g., Leeman v. O'Connell*, 115 N.Y.S.2d 163, 164 [Sup. Ct., Albany County 1952]).

Furthermore, plaintiffs-petitioners' claims that "[a] SPA must be submitted to and approved by the federal Centers for Medicare and Medicaid Services . . . before any substantive change can be made to the New York Medicaid System" and because "[a]pproval for the SPA is still pending . . . . the State may not yet make the change to its State Plan reflected in the SPA" have been rendered moot. The record reveals that on September 14, 2020, CMS approved SPA

#20-0037, removing residual equity reimbursement from for-profit nursing homes' Medicaid rates. Plaintiffs-petitioners' assertion that "CMS only partially approved SPA[#] 20-0037" lacks merit. The record makes clear that the approved SPA eliminates residual equity reimbursement for proprietary nursing homes, despite the fact that the SPA proposed "to eliminate the reimbursement of residual equity for all nursing facilities." Additionally, that "the regulation requiring [d]efendants-[r]espondents to make residual equity payments, 10 N.Y.C.R.R. § 86-2.21(c)(7) is still effective" does not save plaintiffs-petitioners' SPA arguments, notwithstanding their assertion to the contrary. Moreover, plaintiffs-petitioners are mistaken in their contention that "[d]efendants-[r]espondents concede . . . they were required to promulgate regulations to effect any elimination of residual equity under PHL § 2808(20)(d)."

As to defendants-respondents' standing challenge, the Court recognizes that "[s]tanding is . . . a threshold requirement for a [party] seeking to challenge governmental action" (*New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 [2004]), and that if the issue of standing is raised, the party challenging governmental action must show, among other things, "'injury in fact,' meaning that [the party] will actually be harmed by the challenged [governmental] action[,]" (*New York State Ass'n of Nurse Anesthetists v. Novello,* 2 N.Y.3d at 211; *see Matter of Mental Hygiene Legal Serv. v. Daniels,* 33 N.Y.3d 44, 50 [2019]; *Civ. Serv. Emps. Ass'n, Inc., Loc. 1000, AFSCME, AFL-CIO v. City of Schenectady,* 178 A.D.3d 1329, 1331 [3d Dep't 2019]). The Court also recognizes that the harm must be more than "'tenuous,' 'ephemeral,' or 'conjectural[,]' [and] is sufficiently concrete and particularized to warrant judicial intervention" (*Matter of Mental Hygiene Legal Serv. v. Daniels,* 33 N.Y.3d at 50; *see New York State Ass'n of Nurse Anesthetists v. Novello,* 2 N.Y.3d at 214). However, even assuming, without deciding, that defendants-respondents' are successful in their standing

challenge and the Court dismissed the second amended petition and complaint as to the 56 identified nursing homes, this matter would still proceed with the 60 remaining facilities.

Turning to the merits of the remaining claims, in reviewing an administrative action such as the one taken here, the issue before the Court is whether the action "was affected by an error of law, was arbitrary or capricious or lacked a rational basis." (*Matter of Biggs v. Eden Renewables LLC*, 188 A.D.3d 1544, 1548 [3d Dep't 2020]; *accord Matter of 2–4 Kieffer Lane LLC v. County of Ulster*, 172 A.D.3d 1597, 1599–1600 [3d Dept' 2019]); *see* CPLR § 7803). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431[2009]; *accord Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 N.Y.3d 649, 652 [2013]; *see Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974]). A rational basis will be found where the action is supported "by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the action" (*Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d at 231 [internal quotation marks and citation omitted]). If the Court finds that the administrative action is supported by a rational basis, the action will be sustained (*see Matter of Peckham v. Calogero*, 12 N.Y.3d at 431; *Matter of Spence v. New York State Dep't of Agric. & Mkts.*, 154 A.D.3d 1234, 1238 [3d Dep't 2018], *aff'd*, 32 N.Y.3d 991 [2018]).

"Summary judgment is a drastic remedy" (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 [2012]), which should only be granted when it "clearly appear[s] that no material and triable issue of fact is presented" (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 315 [2004][internal quotation marks and citation omitted]; *see Andre v. Pomeroy*, 35 N.Y.2d 361, 364 [1974]).

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d 20, 25-26 [2019], quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see Deleon v. New York City Sanitation Dep't*, 25 N.Y.3d 1102, 1106 [2015]; *see also* CPLR 3212[b]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v. Restani Const. Corp.*, 18 N.Y.3d at 503, quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324 [emphasis omitted]; *see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]).

It is only when the moving party has demonstrated a right to judgment as a matter of law that the burden shifts to the party opposing the motion to establish, by admissible proof, the existence of a genuine issue of material fact requiring trial of the action, or to demonstrate an acceptable excuse for the failure to do so (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; CPLR 3212[b]). The Court's function on a motion for summary judgment is to view the "'facts . . . in the light most favorable to the non-moving party'" (*Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d at 25, quoting *Vega v. Restani Const. Corp.*, 18 N.Y.3d at 503 [internal quotation marks and further citation omitted]), and "decide only whether [any] triable issues have been raised" (*Barlow v. Spaziani*, 63 A.D.3d 1225, 1226 [3d Dep't 2009]; *see Boston v. Dunham*, 274 A.D.2d 708, 709 [3d Dep't 2000]). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d at 315; *accord Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d at 25).

Guided by these standards and upon a review of the record, the Court finds that defendants-respondents have sustained their burden of establishing, as a matter of law, that the actions taken to implement the residual equity elimination clause – Public Health Law § 2808(20)(d), as amended – do not conflict with Public Health Law § 2807(3) and that eliminating residual equity for proprietary nursing homes while leaving depreciation in place for not-for-profit facilities does not run directly contrary to the equal protection guarantees of the New York State and United States Constitutions. However, the Court finds that defendants-respondents have failed to demonstrate, as a matter of law, that the action taken to implement the residual equity elimination clause retroactively back to April 1, 2020 was consistent with Public Health Law § 2807(7) and not improperly retroactive.

Initially, the Court finds merit in defendants-respondents' assertion that the residual equity elimination clause is not incongruous with Public Health Law § 2807(3). "Public Health Law § 2807, which governs the reimbursement rate at which a facility can bill Medicaid for eligible residents, was enacted to implement a Medicaid reimbursement system in compliance with the requirements of [T]itle XIX of the Social Security Act (42 USC § 1396 *et seq.*)" (*Signature Health Ctr., LLC v. State of New York*, 92 A.D.3d 11, 15 [3d Dep't 2011]). "In response to skyrocketing medical costs that were consuming taxpayer funds at an alarming rate, the Legislature amended this statute in 1969 by what is known as the Hospital Cost Control Law (*see* L. 1969, ch. 957) . . . . alter[ing] the criteria for establishing the rates of reimbursement for various medical services from rates 'reasonably related to the costs of providing such service' (Public Health Law former § 2807[3], as added by L. 1965, ch. 957, § 1) to rates 'reasonably related to the costs of efficient production of such service' (Public Health Law former § 2807[3], as amended by L. 1969, ch. 957, § 4; *see People v.*

Woman's Christian Assn. of Jamestown, 56 A.D.2d 101, 103, 392 N.Y.S.2d 93 [1977])" (*id.*). In doing so, "the Legislature expressly declared 'that it is essential that an effective cost control program be established which will both enable and motivate hospitals to control their spiraling costs' (L. 1969, ch. 957, § 2; *see generally People v. Woman's Christian Assn. of Jamestown,* 44 N.Y.2d 466, 471, 406 N.Y.S.2d 272, 377 N.E.2d 725 [1978])" (*id.*).

Amended by the Legislature again in 1982 (L. 1982, ch. 536, § 3), Public Health Law § 2807(3), currently requires the Health Commissioner to "determine" the Medicaid reimbursement rates for nursing homes participating in the State's Medicaid Program, and "certify to [the DOB Director]" that the Medicaid reimbursement rates for nursing homes "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" (*see* Public Health Law § 2808[3]). To that end, PHL "[§] 2807(3) does not require rates to cover every nursing home's actual costs" (*Matter of Nazareth Home of Franciscan Sisters v. Novello*, 7 N.Y.3d 538, 546 [2006]). "Rates are 'reasonable and adequate' so long as they reimburse the necessary costs (i.e., the 'costs which must be incurred') of 'efficiently and economically operated facilities'" (*Matter of Nazareth Home of Franciscan Sisters v. Novello*, 7 N.Y.3d at 546).

Although plaintiffs-petitioners claim, in their affidavits proffered in support of the preliminary injunction motion, that in the absence of residual equity reimbursement, they would have no way to pay for crucial and necessary upgrades to their facilities, their financial stability would be negatively impacted, and in one case, the facility would have to close its doors, they have not shown, by any competent evidence, that their rates would be inadequate to cover their necessary, as opposed to actual, costs if residual equity reimbursement is eliminated in accordance with Public Health Law § 2808(20)(d), as amended. Further, there is nothing in the record to

support a finding that the elimination of residual equity reimbursement will render Medicaid rates unreasonable or inadequate to cover costs for "efficiently and economically operated facilities." Moreover, as residual equity reimbursement has always been addressed to the Health Commissioner's discretion, pursuant to 10 N.Y.C.R.R. § 86-2.21(e)(7), it is not a violation of Public Health Law § 2807(3) for defendants-respondents to comply with the Legislature's mandate even if, as plaintiffs-petitioners maintain, the DOH has historically provided plaintiffs-petitioners with such reimbursement.

For those reasons and because plaintiffs-petitioners' have not raised a genuine issue of material fact to overcome summary disposition, the part of the defendants-respondents' motion for summary judgment dismissing the third cause of action in the second amended petition and complaint is granted, and that cause of action is dismissed. The Court also grants that part of defendants-respondents' motion for summary judgment dismissing plaintiffs-petitioners' fifth cause of action. "Given [the] fundamental difference in the underlying economic purposes and incentives of proprietary and voluntary facilities, they are not similarly situated as they must be to sustain plaintiffs[-petitioners]' equal protection claim" (*Bay Park Ctr. for Nursing & Rehab., LLC v. Shah*, 111 A.D.3d 1227, 1229 [3d Dep't 2013]) in this case, notwithstanding plaintiffs-petitioners' assertions to the contrary. And because plaintiffs-petitioners' equal protection claim fails, they are not entitled to an award of reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

Turning to the remainder of defendants-respondents' summary judgment motion, Public Health Law § 2807(7) requires the Health Commissioner to "notify each residential health care facility and health-related service of its approved rates of payment which shall be used in reimbursing for services provided to persons eligible for payments made by state governmental agencies at least sixty days prior to the beginning of an established rate period for which the rate

is to become effective." "This provision, on its face, prohibits retroactive rate making" (*Matter of Jewish Home & Infirmary of Rochester, New York, Inc. v. Comm'r of New York State Dep't of Health*, 84 N.Y.2d 252, 260 [1994]; *see Matter of Jordan Health Corp. v. Axelrod*, 67 N.Y.2d 935, 936 [1986]).

Despite PHL § 2807(7)'s plain language, defendants-respondents argue that DOH's implementation of the residual equity elimination clause did not violate the 60-day advance notice requirements. Specifically, they submit that "Public Health Law § 2808(11) sets forth a more comprehensive list of situations when the advance[ ]notice requirements of PHL § 2807(7) do not apply," and "provides that 'the provisions of [PHL § 2807(7)] relating to advance notification of rates shall not apply to prospective or retroactive adjustments to rates . . . as otherwise authorized by law" (emphasis added). According defendants-respondents, "the presence and clarity of PHL § 2808(11) illustrates that the advance notice requirements do not apply to a rate change authorized by act of the Legislature." As such, they maintain that "the amendment of PHL § 2808(20)(d) with residual equity elimination, constitutes a law, and is[,] thus [,]exempted from PHL's advance notice requirements."

Defendants-respondents further assert that "the Legislature actually intended to authorize the elimination of residual equity reimbursement through retroactive adjustments to nursing home rates, effective April 1, 2020." Defendants-respondents point out that "PHL § 2808(20)(d), passed on April 4, 2020, had an implementation date of April 1, 2020, and contains the phrase 'notwithstanding' any inconsistent provision of law." They maintain that "[i]n adopting a law that applied to rate periods commencing three days *before* its enactment, the Legislature necessarily contemplated retroactive rate making," and further that "[t]he inclusion of the 'notwithstanding provision directly invalidates [plaintiffs-p]etitioners' argument for 60-day advance notice under

PHL § 2807(7), as the notice provision is inconsistent with PHL § 2808(20)(d)'s retroactive mandate, and, thus, is clearly inapplicable." Relying on *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of New York* (247 A.D.2d 136 [4th Dep't 1998], *lv. denied*, 93 N.Y.2d 803 [1999]), *Tioga Nursing Home v. Axelrod* (90 A.D.2d 570 [3d Dep't 1982], *aff'd*, 60 N.Y.2d 717 [1983]), *Matter of Kaye v. Whalen* (44 N.Y.2d 754 [1978]), and *Matter of Dry Harbor Nursing Home v. Zucker* (175 A.D.3d 770 [3d Dep't 2019], *appeal dismissed, lv. denied*, 35 N.Y. 3d 984 [2020]),defendants-respondents also contend that "retroactive rate adjustments made pursuant to statute . . . [are] permissible."

Moreover, defendants-respondents aver that the implementation of the residual equity elimination clause "necessarily required retroactive ratemaking," and therefore, "was incompatible with the ability to provide any advance notice." In that regard, they explain that under the existing statutory and regulatory scheme, nursing homes received advance notice of their January 1, 2020 Medicaid rates in November 2019, approximately six months before the REEC was enacted, that the statute "could not be implemented immediately because of administrative actions [that] needed to be taken by the DOH," including submitting the SPA to CMS for approval, recalculating rates, and uploading the new rates into the EMED-NY payment system.[7] According to defendants-respondents, "[n]o matter how quickly DOH performed these tasks, the rate revisions necessarily had to occur after April 1, 2020, the date as of which the statute mandated the elimination of residual equity reimbursement." As such, defendants-respondents claim that "to comply with the mandated elimination of residual equity reimbursement as of April 1, 2020, DOH had to retroactively revise rates back to April 1, 2020," as "[t]here is simply no other way the rate could

[7] "The EMED-NY system is a web[-]based application used to submit Medicaid transactions" (Foster 9/2/2020 Aff., 8).

be implemented other than retroactively" and that "[t]his was the expectation of the Legislature, which should be assumed to know that the process in updating Medicaid rates by DOH does not occur in real time and that the nursing home rates they sought to change as of April 1, 2020 were issued in November 2019."

As relevant here, "[t]he Legislature adopted Public Health Law § 2808(11) in 1992 to remedy a perceived flaw in Public Health Law § 2807(7) (a)[8] (*Matter of Jewish Home & Infirmary of Rochester, New York, Inc. v. Comm'r of New York State Dep't of Health*, 84 N.Y.2d at 262).[9] "At the time of the enactment[,] the sponsors of the remedial legislation asserted that 'the current statute restricts the capacity of DOH to recognize legitimate rate adjustments to an already published rate'" (*id.*, quoting Mem. in Support, Senator Tully and Assemblyman Gottfried, Bill Jacket, L. 1992, ch. 25 [internal brackets omitted]). Notably, the language of Public Health Law § 2808(11) "was the product of discussions between DOH officials and representatives of the residential health care industry," and "[t]he statute's terms represent the only exceptions to section 2807(7)(a) that both industry and Health Department officials [could] agree upon, and the situations identified in the bill [were] the ones in which . . . both industry and Health Department officials agree[d] retroactive rate setting is acceptable" (*id.* at 262-263 [underline in original] [internal quotation marks, brackets, ellipses, and further citations omitted]; *see* Bill Jacket, L. 1992, ch. 25).

[8] Public Health Law § 2807(7)(a) was renumbered to remove subparagraph (a) in 2015 (*see* L. 2015, ch. 57, pt. B, § 24).

[9] The flaw arose as a result of the Third Department's decision in *Matter of Wellsville Manor Nursing Home v. Axelrod* (142 A.D2d 311 [1988]) wherein the Court "applied section 2807(7)(a) to prohibit retroactive revision of a new facility's rates based on its actual experience and reported costs" (*Matter of Jewish Home & Infirmary of Rochester, New York, Inc. v. Comm'r of New York State Dep't of Health*, 84 N.Y.2d at 262).

Unlike "a case of mere legislative silence or inaction," this "is a case where the Legislature has addressed a subject and has, in fact, created a list of exceptions to the general rule" (*Matter of Jewish Home & Infirmary of Rochester, New York, Inc. v. Comm'r of New York State Dep't of Health*, 84 N.Y.2d at 262). Therefore, the maxim *expressio unius est exclusio alterius* would apply (*see id.*). "The maxim *expressio unius est exclusivo alterius* is applied in the construction of . . . statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (Statutes § 240).

By their argument, defendants-respondents are asking this Court to read into the language of Public Health Law § 2808(11) "as otherwise authorized by law" a proviso that excepts retroactive rate changes from PHL § 2807(7)'s advance notice requirements simply because they are authorized by an act of the Legislature. "To construe the statute as incorporating such a . . . proviso would be to overstep the bounds of statutory construction and enter the forbidden realm of judicial legislating" (*Matter of Jewish Home & Infirmary of Rochester, New York, Inc. v. Comm'r of New York State Dep't of Health*, 84 N.Y.2d at 264), which the Court declines do. The Legislature has spoken on the issue of exceptions to retroactivity. Therefore, if, in enacting the amendment to PHL § 2808(20)(d) to eliminate residual equity reimbursement, the Legislature intended it to be retroactively applied, as defendants-respondents argue, it would have amended PHL § 2808(11) to specifically exempt the REEC from the notice requirements of PHL § 2807(7) (*see id.*). Because it did not do so, the Court does not read such exception into the statute's "as otherwise authorized by law" language.

Furthermore, the Court rejects defendants-respondents claim that "the Legislature actually intended to authorize the elimination of residual equity reimbursement through retroactive

adjustments to nursing home rates, effective April 1, 2020," and contention that "in order to comply with the mandated elimination of residual equity reimbursement as of April 1, 2020, DOH had to retroactively revise rates back to April 1, 2020" because "[t]here is simply no other way the rate could be implemented other than retroactively." Public Health Law § 2808(d), as amended, provides for the elimination of residual equity reimbursement "for rate periods on and after April first, two thousand twenty." Assuming the residual equity elimination clause is interpreted as establishing an April 1, 2020 rate period, nothing in the plain language of the statute exempts defendants-respondents from providing the notice required by PHL § 2807(7), and the Court is not persuaded that the inclusion of the "notwithstanding" language invalidates the plaintiffs-petitioners' argument that 60-days' advance notice under PHL § 2807(7) was required in these circumstances. Indeed and as previously discussed, if the Legislature intended retroactive application of PHL §2808(20)(d), it would have expressly provided for an exception to PHL § 2807(7)'s notice requirements.

Moreover, defendants-respondents' reliance on *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of New York, Tioga Nursing Home v. Axelrod, Matter of Kaye v. Whalen* (44 N.Y.2d 754 [1978]), and *Matter of Dry Harbor Nursing Home v. Zucker* is misplaced. Contrary to their assertion, those cases do not stand for the blanket proposition that "retroactive rate adjustments made pursuant to statute . . . [are] permissible." As correctly noted by the plaintiffs-petitioners, *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of New York, Tioga Nursing Home v. Axelrod,* and *Matter of Kaye v. Whalen* stand for the proposition that adjustments to an established rate that are contemplated by the statutory reimbursement scheme do not constitute impermissible retroactive rate-making. Here, the record does not support a finding that the elimination of residual equity reimbursement from the capital component of plaintiffs-petitioners'

Medicaid rate was foreseen in the reimbursement scheme. Further, and contrary to the finding in *Matter of Dry Harbor Nursing Home v. Zucker*, the Court is unable to conclude that the retroactive application of the residual equity elimination clause was "clearly intended" in these circumstances (175 A.D.3d at 775).

For these reasons, the Court denies that part of the defendants-respondents' motion seeking summary judgment, dismissing the fourth cause of action in the second amended petition and complaint, and grants the fourth cause of action **only** to the extent of declaring that any change to plaintiffs-petitioners' Medicaid reimbursement rates to remove residual equity reimbursement, in accordance with Public Health Law § 2808(d), back to April 1, 2020 is improperly retroactive and violative of PHL § 2807(7), **and** grants the first cause of action **only** to the extent of barring defendants-respondents from taking any action to implement the residual equity elimination clause retroactively back to April 1, 2020.

Based on the foregoing, plaintiffs-petitioners' remaining cause of action – for a mandatory injunction requiring Director Mujica to delay implementation of the REEC – has been rendered moot and/or academic, and is denied on that ground.

Accordingly, it is hereby

ORDERED, that defendants-respondents' motion for leave to reargue or, alternatively, for an order modifying the preliminary injunction is denied for the reasons discussed herein; and it is further

ORDERED AND ADJUDGED, that those parts of defendants-respondents' motion for summary judgment, dismissing the third and fifth causes of action in the second amended petition and complaint is granted for the reasons stated herein; and it is further

ORDERED AND ADJUDGED, that the part of defendants-respondents' motion for summary judgment, dismissing the fourth cause of action in the second amended petition & complaint is denied for the reasons stated herein; and it is further

ORDERED, ADJUDGED, AND DECLARED, that the fourth cause of action in the second amended petition and complaint is granted **only** to the extent of declaring that any change to plaintiffs-petitioners' Medicaid reimbursement rates to remove residual equity reimbursement, in accordance with Public Health Law § 2808(d), back to April 1, 2020 is improperly retroactive and violative of PHL § 2807(7), **and** that the first cause of action is granted **only** to the extent of barring defendants-respondents from taking any action to implement the residual equity elimination clause retroactively back to April 1, 2020; and it further

ORDERED AND ADJUDGED, that the second cause of action in the second amended petition and complaint is denied as moot and/or academic.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those Rules with respect to filing, entry, service, and notice of entry of the original Decision and Order/Judgment.

SO ORDERED.

ENTER.

Dated: June 1, 2021
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

06/01/2021

Papers Considered:

1. Order to Show Cause (O'Connor, J), dated August 14, 2020; Summons, dated August 3, 2020; Notice of Petition, dated August 3, 2020; Affirmation of F. Paul Greene, Esq. in Support of Motion for Preliminary Injunction, dated August 20, 2020, with Exhibits A-J annexed; Affidavit of Kathleen Angelone, Health Care Consultant, in Support of Motion for Preliminary Injunction, sworn to August 19, 2020; Affidavit of Robert W. Hurlbut in Support of Motion for Preliminary Injunction, sworn to August 19, 2020; Affidavit of Patrick Russell in Support of Motion for Preliminary Injunction, sworn to August 19, 2020; Affidavit of Ralph Zimmerman in Support of Motion for Preliminary Injunction, sworn to August 19, 2020; Affidavit of Benjamin Goodman in Support of Motion for Preliminary Injunction, sworn to August 20, 2020; Affidavit of Stephen B. Hanse in Support of Motion for Preliminary Injunction, sworn to August 20, 2020, with Exhibit A annexed; Memorandum of Law in Support of Motion for Preliminary Injunction and to Amend the Verified Petition & Complaint, dated August 20, 2020;
2. Affidavit of Ann Foster, sworn to September 2, 2020, with Exhibits A-C annexed; Memorandum of Law in Opposition to the Motion for Preliminary Injunction, dated September 2, 2020;
3. Reply Affirmation of F. Paul Greene, Esq. in Support of Motion for Preliminary Injunction, dated September 4, 2020, with Exhibits A & B annexed; Reply Memorandum of Law in Support of Motion for Preliminary Injunction and to Amend the Verified Petition & Complaint, dated September 4, 2020;
4. Correspondence from C. Harris Dague, Esq., dated September 15, 2020, with Exhibit A annexed;
5. Correspondence from F. Paul Greene, Esq., dated September 16, 2020;
6. Correspondence from F. Paul Greene, Esq., dated October 13, 2020;
7. Correspondence from F. Paul Greene, Esq., dated October 15, 2020, with Exhibits A & B annexed;
8. Amended Verified Petition & Complaint, dated October 16, 2020, with Exhibit A annexed;
9. Correspondence from C. Harris Dague, Esq., dated October 20, 2020;
10. Verified Answer, dated October 23, 2020
11. Notice of Motion for Summary Judgment on the Declaratory Judgment Claims, dated October 23, 2020; Affidavit of Cynthia Tries, sworn to October 23, 2020, with Exhibit A annexed; Memorandum of Law in Opposition to the Amended Petition and in Support of Respondents Motion for Summary Judgment on the Declaratory Judgment Claims, dated October 23, 2020;
12. Correspondence from C. Harris Dague, Esq., dated October 29, 2020;
13. Correspondence from F. Paul Greene, Esq., dated November 12, 2020;
14. Notice of Motion, dated November 13, 2020; Affirmation of C. Harris Dague, Esq., dated November 13, 2020, with Exhibits 1-7 annexed; Respondents' Memorandum of Law in Support of their Motion to Reargue Pursuant to CPLR 2221(d);
15. Second Amended Verified Petition & Complaint, dated November 17, 2020, with Exhibit A annexed;

16. Verified Answer to Second Amended Petition, dated November 24, 2020;
17. Notice of Motion for Summary Judgment on the Declaratory Judgment Claims, dated November 23, 2020; Amended Affidavit of Cynthia Tries, sworn to November 24, 2020, with Exhibit A annexed; Respondents' Memorandum of Law in Opposition to the Second Amended Petition and in Support of their Motion for Summary Judgment on the Declaratory Judgment Claims, dated November 24, 2020;
18. Affirmation of F. Paul Greene in Opposition to Motion for Leave to Reargue, dated December 4, 2020, with Exhibits A & B annexed; Affidavit of Kathleen Angelone, Health Care Consultant, in Opposition to Motions for Leave to Reargue and Summary Judgment, dated December 2, 2020, with Exhibit A annexed; Memorandum of Law in Opposition to Defendants-Respondents' Motion for Leave to Reargue, dated December 4, 2020; Memorandum of Law in Opposition to Defendants-Respondents' Motion for Leave to Reargue, dated December 4, 2020;
19. Affidavit of Kathleen Angelone, Health Care Consultant, in Opposition to Motions for Leave to Reargue and Summary Judgment, dated December 2, 2020, with Exhibit A annexed; Memorandum of Law in Opposition to Defendants-Respondents' Motion for Partial Summary Judgment and in Further Support of Second Amended Verified Petition, dated December 4, 2020;
20. Correspondence from C. Harris Dague, Esq., dated December 7, 2020;
21. Correspondence from F. Paul Greene, Esq., dated December 9, 2020;
22. Correspondence from C. Harris Dague, Esq., dated December 9, 2020;
23. Correspondence from F. Paul Greene, Esq., dated December 14, 2020;
24. First Supplemental Affidavit of Cynthia Treis, sworn to December 17, 2020, with Exhibits A & B annexed; Defendants-Respondents' Reply Memorandum of Law in Further Support of their Motion to Reargue Pursuant to CPLR 2221(d), dated December 14, 2020;
25. First Supplemental Affidavit of Cynthia Treis, sworn to December 17, 2020, with Exhibits A & B annexed; Defendants-Respondents' Joint Reply Memorandum of Law in Further Support of their Partial Motion for Summary Judgment and in Sur-Reply in Further Opposition to the Amended Petition, dated December 14, 2020;
26. Correspondence from F. Paul Greene, Esq., dated December 22, 2020; *and*
27. Surreply Memorandum of Law in Opposition to Defendants-Respondents' Motion for Partial Summary Judgment.