SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 152754/2023

MOTION DATE 08/08/2023

MOTION SEQ. NO. 001, 002

In the Matter of

BAYCHESTER PAYMENT CENTER, CHALLENGER CHECK CASHING CORP., CHALLENGER II CHECK CASHING CORP., CHECK CHANGERS NY, LLC, DAVID'S CHECK CASHING, INC., RITE CHECK CASHING, INC., and FINANCIAL SERVICE CENTERS OF NEW YORK,

Petitioners/Plaintiffs,

- v -

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and ADRIENNE HARRIS, in her official capacity as Superintendent of the New York State Department of Financial Services,

Respondents/Defendants.

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DECISION, ORDER, and JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for PRELIMINARY INJUNCTION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 141, 142, 144, 145, 146, 147, 148, 150

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)/X-MOTION TO DISMISS COMPLAINT

In this hybrid CPLR article 78 proceeding and action for declaratory relief, the petitioners/plaintiffs (hereinafter the petitioners) seek judicial review of the respondents/ defendants' (hereinafter the respondents) January 18, 2023 amendment to 3 NYCRR 400.11, which governs the maximum rates that check-cashing businesses may charge their customers

(first, second, and third causes of action) (MOT SEQ 002), and a seek a judgment declaring that the promulgation of the amendment effected an unconstitutional deprivation of property without due process of law (fourth cause of action). The respondents answer the petition and simultaneously cross-move pursuant to CPLR 3211(a)(7) to dismiss the fourth cause of action for failure to state a cause of action. The petitioners oppose the cross motion. The first, second, and third causes of action set forth in the petition are denied, the proceeding is dismissed, the respondents' cross motion is deemed to be a cross motion for a declaration in the respondents' favor, and the cross motion is thereupon granted. In addition, upon the commencement of the proceeding and action, the petitioners had moved pursuant to CPLR 6301, 6311, and 6312 to preliminarily enjoin the respondents from enforcing the amended regulation pending the hearing of the petition (MOT SEQ 001). The respondents oppose the motion for a preliminary injunction. Inasmuch as the proceeding/action is being resolved in the respondents' favor, the motion for a preliminary injunction is denied as academic.

The petitioners alleged that the amendment to the subject regulation, which reduced the percentage rate that check cashing facilities may charge to their customers from 2.27% to 2.2% for most checks, and 1.5% for government-issued benefit checks, and limited the time before a check-cashing facility could seek the establishment of a new rate, was arbitrary and capricious, violated the stated purposes of the Banking Law, and deprived them of property without due process of law.

Banking Law article 9 establishes a regimen for the existence, licensing, and regulation of check-cashing facilities. Banking Law § 369(1) provides that:

> "[i]f the superintendent [of Financial Services] shall find that the financial responsibility, experience, character, and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this article, and if the superintendent shall find that the granting of such application will promote the convenience and advantage of the area in which such business is to be conducted, and if the superintendent shall find that the

> applicant has available for the operation of such business for each location and for each mobile unit specified in the application liquid assets of at least ten thousand dollars, the superintendent shall thereupon execute a license in duplicate to permit the cashing of checks, drafts and money orders in accordance with the provisions of this article at the location or in the area specified in such application."

Banking Law § 372(1), in turn, provides that,

> "[t]he superintendent shall, by regulation, establish the maximum fees which may be charged by licensees for cashing a check, draft, or money order. No licensee shall charge or collect any sum for cashing a check, draft, or money order in excess of that established by the superintendent's regulations; provided, however, that no maximum fee shall apply to the charging of fees by licensees for the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons."

Financial Services Law § 102 provides, in relevant part, that the Department of Financial Services (DFS) was established and authorized, among other things,

> "(a) [t]o encourage, promote and assist banking, insurance and other financial services institutions to effectively and productively locate, operate, employ, grow, remain, and expand in New York state; [and]
>
> "(b) To establish a modern system of regulation, rule making and adjudication that is responsive to the needs of the banking and insurance industries and to the needs of the state's consumers and residents."

Where a private industry is regulated by, and subject to, a state agency's rate-setting authority, the regulatory agency generally must set rates that are just, reasonable, and rational (*see Matter of Niagara Mohawk Power Corp. v Public Serv. Commn. of State of N.Y.*, 69 NY2d 365, 369 [1987] [applying Public Service Law § 72, which mandates that regulated utilities realize "a reasonable average return upon capital actually expended"]; *cf. Carey Transp. v. Triborough Br. & Tunnel Auth.*, 38 NY2d 545, 550 [1976] [where a state public authority fixes bridge and tunnel toll rates applicable to otherwise unregulated businesses, the only question is "whether the [a]uthority in the operation of its facilities may fix tolls and charges which in its judgment will best serve its economic goals and public policy goals"]). While the Legislature has found and declared that "check cashers provide important and vital services to New York citizens" and that "it is in the public interest to promote the stability of the check cashing

business for the purpose of meeting the needs of the communities that are served by check cashers" (L 1994, ch 546, § 1), neither the Banking Law nor the Financial Services Law provides any guarantee of a particular level of profitability (*cf.* Public Service Law § 72 [utility rates must allow "reasonable average return upon capital"]; Transportation Corporations Law § 121 [requiring municipalities to set "fair, reasonable and adequate rates" for sewage-works corporations that provide sewage services to those municipalities]; Admin. Code of City of N.Y. § 25-302 [allowing alteration to landmarked real property only where owner can show that it otherwise could not realize a reasonable rate of return on investment]; Admin. Code of City of N.Y. § 20-335[b] [requiring reasonable rate of return to municipally regulated commercial waste-collection licensees]).

On January 18, 2023, the respondents promulgated an amendment to 3 NYCRR 400.11, which thereafter provided that,

> "(a) Except with respect to the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons, a licensee shall be permitted to charge or collect a fee for cashing a check, draft or money order not to exceed:
>
> > "(1) 1.5 per centum of the amount of the check issued by a Federal or State government agency for the payment to the bearer of Federal or State monetary assistance, Social Security, unemployment compensation, retirement, veteran's benefits, emergency relief or housing assistance, or a tax refund; or
> >
> > "(2) $1 or 2.2 per centum of the amount of all other checks, drafts or money orders, whichever is greater.
>
> "(b) Effective January 31, 2027, and every five years thereafter, licensees may request an increase in the maximum fees established by this section. Any such request must be supported in writing by annual information, for each of the preceding five years, showing each licensee's costs and expenditures (including rent, wages, information technology and compliance costs), profitability (including all sources of revenue, such as those from other lines of business, as well as other conditions impacting each licensee's financial condition, such as capital needs, cost of capital and payments to owners or senior managers) and any other information the department may request. The superintendent may review any fee request submitted by licensees and, in his or her discretion, approve, modify or deny a request for an adjustment to the maximum fee stated in subdivision (a) of this section.

> "(c) No maximum fee shall apply to the charging of fees by licensees for the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons."

In connection with the determination to approve the amendment of that regulation, the respondents found that the actual average charge by check-cashing facilities during 2021 was 2.17%, despite a cap of 2.27%, that there were two formulas pursuant to which the average amount of checks cashed by check-cashing facilities could be calculated (the mean amount of all checks that had been cashed at check-cashing facilities, and the mean amount of the averages of several categories of check), that the limitation of the maximum rate to 2.2% was reasonable, and that the 2.2% limitation would serve the frequently penurious customer base of the check-cashing industry, while having a minimal adverse effect on constituent members of that industry. They also found that the permissible five-year period for the submission of rate-increase requests served the public interest and provided for stability in the industry.

The petitioners thereafter commenced this hybrid CPLR article 78 proceeding and action for declaratory relief, contending that the check-cashing industry already is in decline, that check-cashing volume is decreasing, that costs are increasing, that many check-cashing facilities are operating at a loss, and that the amended regulation would directly cause several check-cashing facilities to go out of business. They further contended that the methodology that the DFS employed to calculate the average check amount was irrational, and that the data upon which it relied in analyzing the appropriate limitation of the rate increase were not explicitly made public. The petitioners thus asserted that the amendment was arbitrary and capricious and constituted a violation of the Banking and Financial Services Laws. The petitioners further asserted that the respondents violated the State Administrative Procedure Act by failing to conduct an adequate assessment of the regulation's anticipated effects on small businesses in its Regulatory Flexibility Analysis and in failing to issue a Regulatory Impact Statement (RIS) summarizing the analyses that served as the basis for the amendment. In addition, they

asserted that the promulgation of the amendment constituted an unconstitutional deprivation of private property in the absence of due process of law.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]).

The arbitrary and capricious standard specifically applies to judicial review of agency rulemaking (*see generally Festa v Leshen*, 145 AD2d 49, 55 [1st Dept 1989]) and, more particularly, to rulemaking involving the setting of rates for regulated industries (*see Matter of Prometheus Realty Corp. v New York City Water Bd.*, 30 NY3d 639, 646 [2017] [water rates]; *Stein v Rent Guidelines Bd.*, 127 AD2d 189, 194-195 [1st Dept 1987] [apartment rental annual rate increases]). "A petitioner's task in demonstrating that the rate-setting agency's determination is unreasonable is appropriately described as a 'heavy burden'" (*Matter of Prometheus Realty Corp. v New York City Water Bd.*, 30 NY3d at 646 [applying that standard to a challenge to public water utility's rule setting rates]; *Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d 538, 544 [2006] [Medicaid reimbursement rates]; *Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995] [same]; *Matter of Wayne Ctr. for Nursing & Rehabilitation, LLC v Zucker,* 197 AD3d 1409, 1413-1414 [3d Dept 2021] [same]). A challenge to an agency's methodology in setting rates presents an issue of law (*see Stein v Rent Guidelines Bd.*, 127 AD2d at 198). "'Generally, rate-setting actions of the Commissioner, being quasi-legislative in nature, may not be annulled except upon a compelling showing that the calculations from which [they] derived were

unreasonable'" (*Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d at 544, quoting *Matter of Society of N.Y. Hosp. v Axelrod*, 70 NY2d 467, 473 [1987] [internal quotation marks omitted]). Crucially, where an agency or board is engaged in quasi-legislative decision making such as rate setting, that agency or board is "not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise" of the agency or board (*Stein v Rent Guidelines Bd.*, 127 AD2d at 198, quoting *Matter of Catholic Med. Ctr. v Department of Health*, 48 NY2d 967, 968-969 [1979]).

Where an agency's commissioner is authorized to set rates, that agency is entitled to a "'high degree of judicial deference, especially when. . . act[ing] in the area of its particular expertise,' and thus petitioners bear the 'heavy burden of showing' that [the agency's] rate-setting methodology 'is unreasonable and unsupported by any evidence'" (*Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d at 544, quoting *Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d at 331-332; *see Matter of Apartment House Council of Nassau County, Inc. v Nassau County Rent Guidelines Bd.*, 52 AD3d 702, 703 [2d Dept 2008]).

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Consequently, an agency determination is arbitrary and capricious where the agency provides only a "perfunctory recitation" of relevant statutory factors or other required considerations as a basis for its conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.,* 130 AD3d 71, 78 [1st Dept

2015]; *see Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] ["perfunctory discussion"]), provides no reason whatsoever for its determination (*see Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]; *Matter of Jones v New York State Dept. of Corrections & Community Supervision*, 2016 NY Misc LEXIS 15778, *1-2 [Sup Ct, Erie County, Jul. 28, 2016]), or provides only a post hoc rationalization therefor (*see Matter of New York State Chapter, Inc., Associated Gen. Contrrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56, 756 [1996]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 135 [1st Dept 2009]).

Although judicial review of the entirety of an agency's administrative record in a CPLR article 78 proceeding sometimes is warranted (*see generally Matter of Benson v McCaul,* 268 AD2d 756, 760 [3d Dept 2000]), where the agency has generated or accumulated massive technical documentation, consideration of the entire record is not always appropriate (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 422 [1986]).

In *Jackson*, a CPLR article 78 proceeding challenging an agency's determinations of environmental impact pursuant to the State Environmental Quality Review Act (ECL 8-0101, *et seq.*; hereinafter SEQRA), the Court of Appeals concluded that nothing in that statute or its implementing regulations "requires that an agency make raw data available to the public" (*id.* at 422). And, although the Court concluded that the very purpose underlying SEQRA was to inform the public of potential environmental impacts of governmental projects or permitting activities, the state agency in that case did not violate SEQRA because the "studies, methodology, and tables and illustrations summarizing data" that it included in the administrative records "was sufficient to allow informed consideration and comment on the issues" that the petitioners raised in connection with the subject project's environmental impact (*id.*). Thus, although the petitioners' consultant had complained that "'presumably extensive supporting technical memoranda' were unavailable" (*id.*) for him to review, the draft environmental impact (DEIS) that the agency had generated by, among other things, incorporating the information in

those technical memoranda, "was sufficiently informative to allow him and others to criticize extensively its treatment of traffic and air quality, which could not have been offered unless the DEIS in the first instance was thorough, as it appears to be" (*id.*). As the Appellate Division, First Department, explained in *Matter of Rent Stabilization Assn. of NYC, Inc. v New York City Rent Guidelines Bd.* (37 AD3d 374, 375 [1st Dept 2007]), "where the guidelines" of a rate-setting board "are challenged on the ground of rational basis, the Explanatory Statement, together with the entire record of the Board's proceedings, provides sufficient detail for judicial review."

Here, contrary to the petitioners' contention that the administrative record that the DFS has submitted was insufficient, and deprived this court of the opportunity for meaningful judicial review because its economic assumptions on which the rate calculation was based could not be verified (*see, e.g., Matter of Richmond Children's Ctr., Inc. v Delaney*, 190 AD3d 1129, 1131 [3d Dept 2021]), it is not necessary for the court to review all of the voluminous technical, economic analyses undertaken by the respondents in setting the maximum fees that the petitioners could charge customers for cashing checks.

In any event, Banking Law § 36(10) provides that:

> "All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authenticated copy or copies thereof in the possession of any . . .licensed casher of checks, . . . or the department [of Financial Services], shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event the superintendent may publish or authorize the publication of a copy of any such report or any part thereof in such manner as may be deemed proper or unless such laws specifically authorize such disclosure."

For the purposes of Banking Law § 36(1), "reports of examinations and investigations, and any correspondence and memoranda concerning or arising out of such examinations and investigations," include

> "any such materials of a bank, insurance or securities regulatory agency or any unit of the federal government or that of this state any other state or that of any

> foreign government which are considered confidential by such agency or unit and which are in the possession of the department or which are otherwise confidential materials that have been shared by the department with any such agency or unit and are in the possession of such agency or unit"

(*id.*; *see Matter of Davenport v New York State Dept. of Financial Servs.*, 2023 NY Slip Op 33980[U],.2023 NY Misc LEXIS 18289 [Sup Ct, N.Y. County, Nov. 9, 2023] [dismissing CPLR article 78 proceeding to review DFS's denial of freedom of information request that had sought records of investigation of bank]). To the extent that the technical documents here arose from investigations into check-cashing facilities' operations and profitability, those documents must remain confidential and, thus, need not be included in the administrative record of a rate-setting procedure.

The court concludes that the amended regulation at issue here has a rational basis and is supported by the administrative record. The petitioners have not established that the amended regulation was promulgated without sound basis in reason or without regard to the facts, or that the DFS engaged in rulemaking that was devoid of any economic or other analysis justifying the new maximum charge for cashing checks or the five-year waiting period for seeking rate increases (*cf. Matter of New York State Land Title Assn., Inc. v New York State Dept. of Financial Servs.*, 169 AD3d 18, 31-32 [1st Dept 2019] [no rational basis or public policy justification for discriminatory DFS regulations that imposed absolute ban on the collection of certain fees by in-house real-estate closers, while permitting independent closers to collect those same fees, and that capped fees for certain ancillary title-closing searches at 200% of the out-of-pocket costs of those searches or 200% of certain other measures in the absence of any out-of-pocket costs]).

"Courts have rarely singled out error of law by name . . . as a question for consideration in an Article 78 proceeding" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7803:1). "The question of whether an administrative agency's determination is affected by an error of law is often implicit in the nature of the grievance, and

will often turn on the underlying substantive law applicable to the determination" (*Matter of Held v State of New York Workers' Compensation Bd.,* 2008 NY Slip Op 52741[U], *7, 2008 NY Misc LEXIS 10881, *20-21 [Sup Ct, Albany County, Jul. 7, 2008]; *see also* 14-7803 Weinstein-Korn-Miller, NY Civ Prac P 7803.01[3]). Hence, an administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d 86, 92 [1976]; *see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]), or where its determination violates some other statutory or constitutional provision (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d at 93 [Fuchsberg, J., concurring] ["an order which is specifically and expressly forbidden by . . . statute is an error of law"]).

The respondents did not violate Banking Law § 369(1), and the court rejects the petitioners' contention that the new maximum rate somehow violates the precatory language set forth in the legislative findings provision of that section (L 1994, ch 546, § 1).

The court further concludes that the respondents substantially complied with the procedural requirements of the State Administrative Procedure Act. The court agrees with the respondents that the State Administrative Procedure Act was designed to ensure that regulators adopt rules "for the purely practical purpose of attempting to make a legislative program work" (*Matter of Medical Socy. of State of N.Y. v Levin*, 280 AD2d 309, 310 [1st Dept 2001]), that courts should not annul a rule or regulation that was promulgated in "substantial compliance" with the requirements of the State Administrative Procedure Act § 202-a and § 202-b (*see* State Administrative Procedure Act § 202[8]; *see also Matter of Owner Operator Ind. Drivers Assn., Inc. v. New York State Dept. of Transp.*, 205 AD3d 53, 64 [3d Dept 2022]), and that the administrative record here reflects that there was no procedural defect in the rule-making process. Contrary to the petitioner's contentions, the DFS did, in fact, issue a detailed RIS and Regulatory Flexibility Analysis that were in substantial compliance with its obligations under

State Administrative Procedure Act § 202-a(3)(b), as the RIS clearly stated the purpose, necessity, and benefits of the amendment, included detailed explanations and summaries of DFS's process for promulgating the amendment, including its analysis of its methodology for incorporating Consumer Price Index for All Urban Consumers. The RIS also articulated a proper and rational explanation of the work undertaken by the DFS's study committee in determining the fee caps, which included the identification of specific data categories and inputs that the committee had considered, such as industry, academic, and consumer advocate roundtable, a list of specific conclusions from that process, and how those conclusions informed the DFS's determination of the fee maximums and other elements of the amendment. Hence the CPLR article 78 cause of action challenging the respondents' determination on the ground that it was reached in the absence of proper procedure must be denied.

While, generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone (*see Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 74 AD3d 980, 980-981 [2d Dept 2010]), a court nonetheless may reach "the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy]'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011], quoting *Hoffman v City of Syracuse*, 2 NY2d 484, 487 [1957]; *see Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (Siegel, NY Prac § 440 [5th ed]; *see Lanza v Wagner*, 11 NY2d 317, 334 [1962]; *Minovici v Belkin BV*, 109 AD3d at 524; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150). Since there are no questions of fact presented by the declaratory judgment cause of action, but only pure issues of law as to whether the amended regulation constituted an unconstitutional deprivation of property in the absence of due process,

the court will deem the cross motion to dismiss the fourth cause of action to be a cross motion for a declaration in favor of the respondents on that issue. Upon deeming the cross motion to be one seeking a declaration, the court grants the cross motion, and declares that the amended regulation did not constitute a deprivation of property in the absence of either procedural or substantive due process (*see Matter of Presidents' Council of Trade Waste Assns. v City of New York,* 142 Misc 2d 135, 140 [Sup Ct, N.Y County 1988]; *see generally Brightonian Nursing Home v Daines*, 21 NY3d 570 [2013]; *Health Ins. Assn. of Am. v Harnett*, 44 NY2d 302 [1978]; *Matter of New Rochelle Water Co. v Public Serv. Commn. of State of N.Y.*, 31 NY2d 397 [1972]; *cf. RR Vill. Assn. v Denver Sewer Corp.*, 824 F2d 1197 [2d Cir 1987] [members of homeowners' association had no property interest in rates approved by a municipal agency for sewerage services to be provided in the future]).

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in its favor (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.,* 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012]; *Gilliland v Acquafredda Enters., LLC,* 92 AD3d 19, 24 [1st Dept 2011]; *Spinale v 10 W. 66th St. Corp.*, 193 AD2d 431, 431 [1st Dept 1993]). Inasmuch as the court is dismissing the petition and making a declaration in the respondents' favor, the request for preliminary injunctive relief has been rendered academic. Hence, the petitioner's motion for that relief is denied.

In light of the foregoing, it is,

ORDERED that the CPLR article 78 petition (MOT SEQ 002), comprising the first, second, and third causes of action in the petitioners/plaintiffs' pleading, is denied; and it is,

ADJUDGED that the CPLR article 78 proceeding is dismissed; and it is further,

ORDERED that the respondents/defendants' cross-motion to dismiss the fourth cause of action in the petitioners/plaintiffs' pleading (MOT SEQ 002) is deemed to constitute a cross

motion for a declaration that the promulgation of the amendment to 3 NYCRR 400.11 did not deprive the petitioners/plaintiffs of property in the absence of due process, and the cross motion is thereupon granted; and it is further,

ADJUDGED and DECLARED that the promulgation of the amendment to 3 NYCRR 400.11 did not deprive the petitioners/plaintiffs of property in the absence of due process; and it is further,

ORDERED that the petitioners/plaintiff's motion to preliminarily enjoin the enforcement of the amendment to 3 NYCRR 400.11 (MOT SEQ 001) is denied as academic.

This constitutes the Decision, Order, and Judgment of the court.

12/7/2023
DATE

JOHN J. KELLEY, J.S.C.

MOTION 1:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE
MOTION 2:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE
	[ ]				[ ]		[ ]	
CROSS MOTION:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE
	[ ]				[ ]		[ ]	