At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of April, 2024.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

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OMEGA ACUPUNCTURE, PC, RAF SPORTS CHIROPRACTIC PC, ROSS A. FIALKOV, DC, PAWEL GIERUKI, LAC, SILVER NEEDLE ACUPUNCTURE PC, NEW HEALTH ACUPUNCTURE PC, JOSEPH GAMBINO, DC, JJ&R CHIROPRACTIC PC, JOSEPH GAMBINO DC PC, WOO YUP KANG DC, BALDWIN CHIROPRACTIC PC, BO-KWAN KANG, PT, YOO & KANG PHYSICAL THERAPY PC,

Petitioners,

-against-

LINDA LACEWELL, in her official capacity as the Superintendent of the New York Department of Financial Services; the NEW YORK DEPARTMENT OF FINANCIAL SERVICES; CLARISSA M. RODRIGUEZ, in her official capacity as the Chair of the New York Workers' Compensation Board; and the NEW YORK WORKERS' COMPENSATION BOARD,

Respondents.

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Index No. 522601/2020

DECISION & ORDER

Mot. Seq. 4

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion, Affidavits (Affirmations) and Memorandum of Law	99-101
Opposing Affidavits (Affirmations) and Memorandum of law	102
Reply Affidavits (Affirmations) And Memorandum of Law	104

Upon the foregoing papers in this Article 78 proceeding, Petitioners Omega Acupuncture, PC, RAF Sports Chiropractic PC, Ross A. Fialkov, DC, Pawel Gieruki, LAC, Silver Needle Acupuncture PC, New Health Acupuncture PC, Joseph Gambino, DC, JJ&R Chiropractic PC, Joseph Gambino DC PC, Woo Yup Kang DC, Baldwin Chiropractic PC, Bo-Kwan Kang, PT, and Yoo & Kang Physical Therapy PC (collectively, Petitioners) move (mot. seq. no. 4) for an order, pursuant to CPLR 2221(d), for leave to reargue, and upon reargument, vacating or modifying the court's September 19, 2023 order dismissing Petitioners' cause of action alleging that Respondents New York Department of Financial Services (DFS), Linda Lacewell, in her official capacity as the Superintendent of DFS (Superintendent), New York Workers' Compensation Board (WCB) and Clarissa M. Rodriguez, in her official capacity as the Chair of the WCB (Chair; collectively, Respondents) violated the State Administration Procedure Act (SAPA), and deeming that the Amended Petition was timely filed with respect to the causes of action therein (NYSCEF Doc No. 99).

Petitioners, who are health providers, commenced this Article 78 proceeding by order to show cause by filing a Verified Petition challenging regulations concerning the nature and amount of fees reimbursable by insurers to health providers for treatment (including medical care, physical therapy, chiropractic care, and acupuncture) provided to patients injured in a motor vehicle accident. Specifically, petitioners challenged what they refer to as the 12 Relative Value Units (RVU) Ground Rules and the Treatment Scope Ground Rules contained in the Fee Schedules.

By decision and order dated August 16, 2021, Justice Partnow granted Respondents' cross-motion to dismiss to the extent that the court permitted the retroactive filing of an amended petition and extended Respondents' time to file an answer. The branch of Respondents' cross-motion seeking dismissal of the Amended Petition based on statute of limitations grounds and Petitioners' order to show cause were held in abeyance pending the filing of Respondents' answer and Petitioners' reply, if any (NYSCEF Doc No. 58 at 23-24). By order dated September 19, 2023, the court granted the branch of Respondents' cross-motion (mot. seq. no. 2) seeking dismissal of the Amended Petition as time-barred and denied, as moot, Petitioners' order to show cause (mot. seq. no. 1) and Respondents' cross-motion to strike the arguments improperly raised for the first time in Petitioners' reply memorandum of law (mot. seq. no. 3). As is relevant here, the decision held

> "that the relation-back doctrine does not apply and petitioners' SAPA claim must be dismissed as untimely since it challenges the procedures and administrative mechanics of rule promulgation

> rather than what was challenged in the original petition, that the enacted rules were arbitrary and capricious in that the government action was taken without sound basis in reason or regard of the facts (*see generally Matter of Peckham v Calogero*, 12 NY3d 424 [2009]). Contrary to petitioners' contentions in opposition to the instant cross motion, the allegations in the original petition gave no notice of the facts, transactions, and occurrences giving rise to the newly asserted SAPA cause of action as the original petition contested the substance of the fee schedules and did not raise any issues regarding the procedures the agencies followed when promulgating the regulations at issue…" (NYSCEF Doc No. 90 at 17-18).

Petitioners filed the instant motion to reargue on November 20, 2023; thereafter, opposition and reply papers were filed and oral argument was held on February 14, 2024.

In support of its motion, Petitioners contend that the court erred by granting Respondents' cross-motion to dismiss the SAPA cause of action because the court had already denied the motion in a prior order, which violates the law of the case doctrine (NYSCEF Doc No. 101 at 5). Petitioners argue that the August 16, 2021 decision ruled on this exact issue when the court denied "the branch of respondents' cross-motion (mot. seq. no. two) seeking to dismiss the amended petition as improperly filed without leave of court," ruled that Petitioners' SAPA cause of action "related-back" to the claims in the original Petition, and accepted the Amended Petition as filed (NYSCEF Doc No. 58 at 23; NYSCEF Doc No. 101 at 6). Next, Petitioners assert that the SAPA cause of action was timely filed because Respondents admitted as much (NYSCEF Doc No. 101 at 7-8, citing NYSCEF Doc No. 43 at 14). Petitioners further contend that the Amended Petition was improperly dismissed as the court did not apply the statute of limitations to the 2019 Fee Schedules (*id.* at 10-17). Additionally, Petitioners argue that the Amended Petition should not have been dismissed because the Chiropractic Fee Schedule was amended, effective January 1, 2020, which revised the 2018 Chiropractic Fee Schedule on January 1, 2020, via the July 3, 2019 State Register (*id.* at 15).

In their memorandum of law in opposition, Respondents argue that the law of the case doctrine does not apply because the August 16, 2021 decision only ruled on the petition amendment and did not address the limitations arguments. Respondents contend that Petitioners mischaracterize the nature of the August 16, 2021 order since it only ruled on the propriety of Petitioners' amendment to the Petition and explicitly did not rule on the limitations issue, saving that analysis for the subsequent decision ultimately made by the court (NYSCEF Doc No. 102 at

4). Respondents assert that Petitioners' law of the case argument was never presented to the court during briefing on the prior motions and cannot be done now as a motion for leave to reargue is not designed to permit Petitioners to present arguments different from those originally presented (*id.* at 4).

Additionally, Respondents contend that to the extent the August 16, 2021 decision discussed notice or prejudice to the Respondents, it was in the context of explaining the court's rationale for granting discretionary leave to amend and that no plausible interpretation of the order exists as implicitly determining the statute of limitations issue, or the applicability of the relation-back doctrine (*id.* at 5). Respondents highlight that the August 16, 2021 decision did not decide the limitations question or relation-back doctrine particularly when it stated that "the court will address the[] merits, as well as respondents' cross motion to dismiss based on the statute of limitations, after issue has been joined" (*id.* at 4-5; NYSCEF Doc No. 58 at 23). Respondents further cite to the portion of the August 16, 2021 decision that ordered that "the branch of respondents' cross motion … seeking to dismiss the amended petition based on the statute of limitations is held in abeyance until after respondents' have filed an answer to the amended petition and petitioners have filed their reply, if any" to support their argument (NYSCEF Doc No. 58 at 23).

Next, Respondents argue that Petitioners' second argument is a rehash of their first argument and, in any event, Petitioners' SAPA claim is untimely as the relation-back doctrine is inapplicable since the newly added claim puts forth a fundamentally new theory (NYSCEF Doc No. 102 at 7). Respondents note that the Petitioners do not attempt to convince the court that the relation-back doctrine should apply, even though it was their burden to carry (*id.* at 8). Furthermore, Respondents contend that Petitioners did not challenge the 2019 WCB Fee Schedules despite their instant attempt to recontextualize this case as always having been about WCB's 2019 Fee Schedules. Respondents note that the Amended Petition makes no mention of any challenge to the 2019 WCB Fee Schedules, and thus gave no notice that it was Petitioners' intent to challenge them as opposed to the 2018 WCB Fee Schedules they specifically mentioned (*id.* at 9). Respondents claim that while they repeatedly pointed out that the Petitioners had not challenged the 2019 Fee Schedules, Petitioners never argued otherwise; nor did their Amended Petition add any language specifying a challenge to these particular fee schedules (*id.*; NYSCEF Doc No. 23 at 15, n. 5).

Respondents assert that if the Petitioners' case were a challenge to the 2019 Fee Schedules, they surely would have mentioned it in their opposition to Respondents' cross-motion which specifically noted that "[t]he Amended Petition does not purport to challenge the 2019 Fee Schedules" (NYSCEF Doc No. 102 at 10, citing NYSCEF Doc No. 43 at 11, n. 3). However, Petitioners' opposition only mentioned the 2018 WCB Fee Schedules and the DFS regulations and their applicability to no-fault insurance (*id.*). Respondents once again claimed that the Amended Petition does not purport to challenge the 2019 Fee Schedules in their Memorandum of Law in Support of the Respondents' Verified Answer to the Amended Petition (*id.*, citing NYSCEF Doc No. 63 at 20, n 12). Respondents therefore argue that the court did not err by failing to apply Petitioners' challenge to the 2019 Fee Schedules, since Petitioners failed to raise that challenge in their Petition or Amended Petition, despite having been put on notice that their pleading did not contain any language to that effect (*id.*). Lastly, Respondents note that the court's September 19, 2023 decision mentioned that the Petitioners did not purport to challenge the 2019 WCB Fee Schedules (*id.*, citing NYSCEF Doc No. 91 at 8).

In reply, contrary to Respondents' assertion, Petitioners maintain that the August 16, 2021 decision, which accepted the Amended Petition, held that the SAPA claims in the Amended Petition relate to the claims in the original Petition (NYSCEF Doc No. 104 at 2). According to Petitioners, the August 16, 2021 decision "thoroughly analyzed the issue of whether the SAPA claims relate to the original claims and whether to accept the Amended Petition with those claims intact" (*id.* at 3). Petitioners contend that the court improperly revisited the issue in its September 19, 2023 decision as the August 16, 2021 decision is straightforward (*id.*). Petitioners further contend that Respondents' claim that Petitioners should have presented the law of the case argument to the court during briefings is "absurd" because the court had not yet violated the doctrine until it issued its September 19, 2023 decision and "sua sponte raised an already adjudicated issue" (*id.* at 6).

"A motion for leave to reargue is directed to the trial court's discretion and, to warrant reargument, the moving party must demonstrate that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law" (*Fuentes v 257 Toppings Path, LLC*, ___ AD3d ___, 2024 NY Slip Op 01534, *2 [2d Dept 2024]; *see also Robinson v Viani*, 140 AD3d 845 [2d Dept 2016]; CPLR 2221[d]). "A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior

motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]; *see also Emigrant Bank v Kaufman*, 223 AD3d 650, 651 [2d Dept 2024]). "While the determination to grant leave to reargue lies within the sound discretion of the court…a motion for leave to reargue 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" (*Emigrant Bank*, 223 AD3d at 651-652; *see Degraw Construction Group, Inc. v McGowan Builders, Inc.*, 178 AD3d 772 [2d Dept 2019]; *see McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]; *see Jaspar Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d 582 [2d Dept 2020]).

In this case, after reviewing the documents and after oral argument, Petitioners' motion to reargue is granted, and upon reargument, the court adheres to its original determination but will clarify the September 19, 2023 decision. In doing so, the court notes that the prior August 16, 2021 decision ruled that the Petitioners were permitted to file an amended petition, without leave of court, since it was filed within the time permitted by CPLR 3025 (a) (NYSCEF Doc No. 58 at 22). The decision further stated that "[e]ven if amendments in Article 78 proceedings are only permitted with leave of the court, leave to amend shall be freely given, as a matter of law, and thus, this court exercises its discretion and accepts the amended petition as filed" stating that "the newly added SAPA claim relates to the original claims" (NYSCEF Doc No. 58 at 22-23). As to that branch of Respondents' cross motion which sought to dismiss the Amended Petition on statute of limitations grounds, the court held that portion in abeyance until after Respondents filed an answer and Petitioners filed a reply (*id.* at 23). Contrary to Petitioners' contention, the August 16, 2021 decision did not hold that the relation-back doctrine applies to Petitioners' newly added SAPA claim. To the extent the court's language pertaining to the SAPA claim can be construed otherwise, such language is at best merely dicta. It is well settled that "expressions of dicta…do not trigger the doctrines of res judicata, collateral estoppel, or law of the case" (*Matter of B.Z. Chiropractic, P.C. v Allstate Insurance Company*, 197 AD3d 144 [2d Dept 2021], citing *Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332 [2d Dept 2005] [holding that the Supreme Court properly dismissed a subsequent action on the ground that the statute of limitations had expired even though a decision in the prior action dismissed the case and incorrectly stated that plaintiff's remedy was to start a new action]). In fact, the August 16, 2021 decision specifically noted that "respondents' cross motion to dismiss based on the statute of limitations" would be addressed on its merits "after

issue has been joined" and thus made no determination as to the applicability of the relation-back doctrine to Petitioners' SAPA claim (NYSCEF Doc No. 58 at 23).

In any event, "the sine qua non of the relation-back doctrine is notice" and "where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint, the doctrine is unavailable" (*Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]; *see Carlino v Shapiro*, 180 AD3d 989, 990 [2d Dept 2020] [holding that the allegations of the amended complaint, which asserted a cause of action alleging negligence, failed to give notice of a potential public nuisance cause of action which was alleged in the proposed second amended complaint]). Indeed, "[t]he linchpin of the relation-back doctrine is whether the new defendant had *notice* within the applicable limitations period" rather than if the cause of action *relates* to the original complaint (*Mignone v Nyack Hospital*, 212 AD3d 802, 803 [2d Dept 2023] [emphasis added]). Thus, to clarify the September 19, 2023 decision, which addressed Respondents' argument that the statute of limitations barred Petitioners' claims, the August 16, 2021 decision did not preclude this court from holding that the relation-back doctrine did not apply to the newly added SAPA cause of action.

Additionally, the court will clarify its holding as to Petitioners' purported 2019 WCB Fee Schedule claims. "New York's pleading standard is embodied in CPLR 3013, which provides that statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (*Silvers v Jamaica Hosp.*, 218 AD3d 817, 817 [2d Dept 2023]; *see also Oliver v Donovan*, 32 AD2d 1036 [2d Dept 1969] [holding that a petition in an article 78 proceeding must comply with the rules for a complaint including CPLR 3013]).

In this case, the Amended Petition did not have adequate or sufficiently particular statements to give the court and parties notice of their intent to challenge the WCB's 2019 Fee Schedules. In Respondents' Memorandum of Law in Support of Respondents' Verified Answer to the Amended Petition, Respondents specifically noted that "[t]he Amended Petition does not purport to challenge the 2019 Fee Schedules, *see* [Amended Petition] ¶¶ 32-34 (specifying only the fee schedule adopted in December 2018 as the subject of this special proceeding), nor does it argue that the Daily RVU Cap should exempt acupuncture while covering related disciplines" (NYSCEF Doc No. 63 at 20, n 12). Similarly, in Respondents' Memorandum of Law in Support

of the Respondents' Cross-Motion to Dismiss the Amended Petition, Respondents noted that the Petition does not purport to challenge the 2019 Fee Schedules (NYSCEF Doc No. 43 at 11, n3).

"Where a party fails to oppose some or all matters advanced on a motion…the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists" (*114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 761-762 [2d Dept 2019]). The court finds that the Petitioners did not sufficiently give the court and parties notice of their intent to challenge the WCB's 2019 Fee Schedules or respond to Respondents' assertion that the Amended Petition did not purport to challenge the 2019 Fee Schedules, thus there was no need for the court to address the WCB 2019 Fee Schedules in the September 19, 2023 order since it was not sufficiently pled in the Amended Petition. Furthermore, assuming arguendo that the claim was sufficiently pled, it was abandoned by Petitioners' failure to oppose Respondents' assertions (in mot. seq. nos. 1 and 2) that it was not at issue in this proceeding (*see 114 Woodbury Realty, LLC,* 178 AD3d at 763 [holding that plaintiff's failure to submit any opposition to the branch of defendants' motion to dismiss certain causes of action results in their abandonment]).

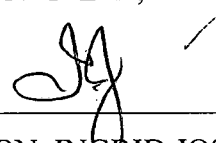
All arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this court and are either without merit or moot, regardless of whether they are specifically discussed herein.

Accordingly, it is hereby

ORDERED that Petitioners' motion (mot. seq. no. 4) is granted, and upon reargument, the court adheres to its prior determinations.

This constitutes the decision and order of the court.

E N T E R,



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice