SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

NEW YORK STATE NURSES ASSOCIATION, *Petitioner,* - against - NEW YORK STATE DEPARTMENT OF HEALTH and HOWARD A. ZUCKER, NEW YORK STATE COMMISSIONER OF HEALTH, in his official capacity, *Respondents.*	:	Index No.:

HYBRID PETITION PURSUANT TO CPLR ARTICLE 78, COMPLAINT FOR DECLARATORY JUDGMENT, COMPLAINT FOR ABATEMENT OF PUBLIC NUISANCE, AND APPLICATION FOR PRELIMINARY INJUNCTION

Petitioner New York State Nurses Association ("NYSNA" or "the Union") for its hybrid petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), complaint for declaratory judgment pursuant to CPLR § 3001, action to abate a public nuisance and application for preliminary injunction pursuant to CPLR § 6301, alleges as follows:

INTRODUCTION

1. Nurses and other medical professionals across New York State are currently fighting on the frontlines of a global pandemic with no precedent in the last century, and while there may be a glimmer of hope at the moment, there is no realistic end in sight.

2. Regrettably, the New York State Department of Health ("DOH"), through the actions and inactions described herein, has failed in its core duty to protect health care workers and the public at large.

3. DOH has abdicated its statutory responsibility to safeguard the public health and assure the safe and sanitary condition of New York hospitals by failing to ensure that

RNs in those hospitals are provided with even minimally adequate personal protective equipment while caring for COVID-19 patients. Most recently, even though Governor Cuomo's COVID-19 task force recently declared that healthcare workers must receive an N95 respiratory mask on a daily basis, DOH has done nothing to enforce that pronouncement and hospitals are ignoring it.

4. DOH has also issued a directive to health care providers that nurses and other health care workers infected with COVID-19 may return to work after seven days, even though newly-enacted legislation specifically aimed at mitigating the crisis provides that workers with COVID-19 are entitled to fourteen paid sick days.

5. DOH's neglect of its statutory duties and disregard for the laws of this state have exacerbated rather than mitigated the ongoing crisis. This has caused serious illness and death for nurses and other frontline health care workers and created a state-wide public State and beyond.

6. NYSNA thus brings this hybrid petition pursuant to CPLR §§ 7801-7806, complaint for declaratory judgment pursuant to CPLR § 3001, and action to abate a public nuisance to challenge two facets of DOH's unlawful actions and inaction: (1) its directive to hospitals and other health care providers that health care workers, including members of NYSNA, who contract COVID-19, should return to work after seven days, even though the recently-enacted NYS emergency legislation to address COVID-19 provides that employees with the virus are entitled to fourteen days of paid sick leave; (2) its failure to fulfill its mandate to protect the health of the public, and healthcare workers in particular, by refusing and neglecting to enforce its regulations and guidance concerning the issuance and safe use of personal protective equipment ("PPE") in the health care setting.

7. Ironically, in a complaint it filed against the United States Department of Labor ("DOL")[1] last week, the State of New York touts the importance of "encouraging sick or potentially exposed workers to stay home without economic penalty," citing with approval a Congresswoman's statement that "no one should have to choose between getting a paycheck or infecting other people." *Id.* ¶¶ 51, 53. The State alleges and claims that a rule promulgated by the DOL is unlawful because its definition of "health care provider" improperly excludes nurses and others from the guaranteed fourteen days of sick leave provided by the federal law enacted in response to the COVID-19 pandemic. *Id.* ¶¶ 69-77.

8. The State also argues that the DOL's rule harms New York's interests in the health and well-being of adults and children within the state because "limiting the availability of paid sick leave…will likely cause more people to become infected with coronavirus" and that the denial of paid sick leave results in a "greater chance of contracting coronavirus and an increase in the spread of illness due to workers who are economically compelled to be at work despite experiencing symptoms of illness." *Id.* ¶¶ 96, 100.

9. NYSNA wholeheartedly agrees with the State on those points. It is of paramount importance to the public health that workers infected with, or suffering symptoms associated with, the deadly coronavirus be permitted to stay home until they have fully recovered and can no longer spread the virus, and not be forced to come back to work either by employer directive or economic pressure.

10. It is no less crucial that nurses treating COVID-19 patients, and those treating other patients in hospitals with COVID-19 patients, have access to adequate and

[1] Docket No. 1, State of New York v. United States Department of Labor, Case 1:20-cv-03020 (S.D.N.Y. April 14, 2020) (the "Complaint") copy attached as Exhibit A.

properly-fitted PPE lest the hospitals become petri dishes where the virus can fester and then spread to other health care workers, the patients, and the general population.

11. Unfortunately, when it comes to nurses and health care workers, these well-founded considerations have fallen by the wayside. DOH's directive that nurses return to work when they are still symptomatic and contagious, and its inattention to the PPE crisis, fly in the face of the medical science it cites and the arguments makes in its suit against the DOL.

12. DOH's actions are contrary to state law, arbitrary and capricious. DOH's unlawful guidance and failure to enforce the Public Health Law and its regulations have also facilitated the spread of COVID-19 throughout the health care worker community and the registered nurse workforce. In turn, infected health care workers have become vectors of virus transmission to their families and the public at large. DOH's actions have thus created a nuisance to public health, which, although acutely injurious to frontline nurses, has endangered the public at large.

13. NYSNA therefore seeks an injunction requiring DOH to immediately abate its contributions to this public nuisance and health crisis, rescind its directive that health care professionals with COVID-19 should return to work after seven days, and an order declaring that DOH's actions are contrary to the newly-enacted COVID-19 Sick Leave Law and the Public Health Law.

14. It also seeks an order directing DOH to fulfill its statutory duty to protect the public health and abate the public nuisance it has created, by ensuring that the health care facilities it supervises provide safe and adequate PPE.

THE PARTIES

15. Petitioner New York State Nurses Association is a union of 42,000 frontline nurses standing together for strength at work, their practice, safe staffing, and

healthcare for all. NYSNA is New York's largest union and professional association for registered nurses and is the collective bargaining representative for registered nurses at hospitals and other healthcare facilities throughout New York State.

16. Respondent New York State Department of Health ("DOH") is a public state agency charged with protecting and promoting the health, productivity and well-being of all New Yorkers.

17. Respondent Dr. Howard A. Zucker is the Commissioner of DOH.

JURISDICTION AND VENUE

18. This Court has jurisdiction pursuant to CPLR §§ 7801-7806 to review actions by bodies or officers who have failed to perform a duty enjoined upon them by law and have made a determination affected by an error of law.

19. This Court also has jurisdiction pursuant to CPLR § 3001.

20. Venue is proper in New York County pursuant to CPLR § 7804(b) and 506(b), and Public Health Law § 13 as this is one of the counties where DOH's challenged directive is in effect, where the public nuisance that it has created exists, and where it has refused to perform a duty prescribed by the Public Health Law.

FACTS

I. THE COVID-19 PANDEMIC

21. The COVID-19 pandemic first came to attention via reports of its impact in Wuhan, Hubei province, China. After initial reports in December 2019 in the Wuhan province, the virus rapidly spread throughout Europe and, by late January, arrived in the United States. On January 30, 2020, the World Health Organization designated the burgeoning pandemic a Public Health Emergency of International Concern.

22. Although the first United States cases of COVID-19 appeared in Washington State, the State of New York, and particularly New York City, quickly became the epicenter of the virus in the United States. The first case of COVID-19 in the state was confirmed on March 1, 2020, and a cluster of cases in New Rochelle in Westchester County resulted in the creation of a "containment zone," enforced by the National Guard, in New Rochelle in early March.

23. On March 7, 2020, recognizing both travel-related cases and community spread contact transmission of COVID-19, Governor Andrew Cuomo declared a state of emergency for New York. New York City Mayor Bill De Blasio, Westchester County Executive George Latimer and other local officials across the state followed suit soon after.

24. On March 13, 2020, President Donald Trump declared a national state of emergency.

25. Given the novelty of the virus, much is still unknown regarding transmission of COVID-19. However, we do know that the virus is highly contagious and the United States Center for Disease Control ("CDC") has issued guidance stating that its incubation period (the time between exposure to development of symptoms) may last up to 14 days. This uncertain and often prolonged incubation period has contributed to the virus's ability to rapidly transmit throughout the world's population.

26. COVID-19 appears to spread mainly through person-to-person contact (initial guidance specified a safe distance was approximately 6 feet, but more recent guidance is 12-13 feet), through respiratory droplets produced when an infected person coughs or sneezes, and by skin-to-skin contact such as shaking hands or hugging.

27. On April 13, 2020, Governor Cuomo announced that the virus may also be transmitted via airborne particles, very small aerosolized water droplets generated by simply exhaling, rather than only through coughing, sneezing, or speaking. This is a particularly acute risk for RNs, as the air in the environment where COVID-19 patients are present can become pervasively contaminated.

28. COVID-19 may also be transmitted via contaminated surfaces or objects. Depending on the type of material, the virus may survive hours or even days on an object or surface. Recent studies have also shown that persons infected with COVID-19 may transmit the virus to others even during periods of time when they are asymptomatic.

29. Initial missteps, from faulty test kits to delays in laboratory approval, have stunted U.S. efforts to test possible carriers. Governor Cuomo and other state and local officials have repeatedly complained of an ongoing shortage of diagnostic tests, hindering the nation's ability to track the virus's path. Recent DOH guidance states that only nurses who have been hospitalized have testing priority, even though nurses are more likely than anyone to be exposed to the virus. Nurses who have been exposed and have COVID-19 symptoms (and thus may be vectors of virus transmission) have been forced to acquire testing on their own after being denied by their employer hospital.

30. In an effort to slow the spread of COVID-19 and the unprecedented surge in cases and resultant strain on the state's healthcare system, Governor Cuomo has issued executive orders implementing significant social distancing measures, shuttering all but essential businesses, and closing schools statewide. Residents not engaged in essential work have been urged to remain at home unless obtaining essential food or medicine, and have been instructed to wear masks and maintain at least six feet of social distance in public.

31. Most recently, on April 12, recognizing the widespread health problem created by hospitals requiring nurses to use and re-use a single N95 respirator for five or more days, Governor Cuomo declared that an N95 respiratory mask had to be provided on a daily basis to any healthcare worker who requested one. Nonetheless, to date, DOH has taken no action to enforce this or even issue guidance to the hospitals. While DOH's website mentions the Governor's directive, issued on the same date, that all employers are to provide a cloth or surgical masks to employees who interact with the public,[2] there is no mention of his pronouncement regarding surgical masks for health care workers. Again, in failing to enforce this critical safety measure for nurses, the DOH has been derelict in its duty to protect the public health and safety.

32. COVID-19 has already surpassed any other pandemic in the last century, inflecting and killing more people than the 1967 influenza pandemic, SARS, or H1N1. To date, more than two million people worldwide have tested positive for the virus. The United States has reported over 700,000 confirmed cases with approximately a third of those in New York State. New York City alone has more than 100,000 confirmed cases. More than 150,000 people have perished worldwide, more than 30,000 people in the United States, and a staggering 13,362 people in New York State. Even though Governor Cuomo pronounced that "the worst is over," on April 12, and the number of daily fatalities in the state is no longer increasing, the absolute numbers continue to rise and the heretofore unheard of strain on the health care system, and the frontline nurses, is likely persist for months.

[2] *See* https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-issues-executive-order-directing-employers

II. NEW YORK'S COVID-19 PAID SICK LEAVE LAW

33. On March 18, 2020, Governor Cuomo signed legislation providing for certain benefits for employees subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19 ("NYS COVID-19 Paid Sick Leave Law"). A true and correct copy of the text of the NYS COVID-19 Paid Sick Leave Law is attached hereto as Exhibit B.

34. As justification for its passage, the New York State legislature noted that paid sick leave is "one of the most effective tools at protecting public health and stopping the spread of illnesses" and that it "alleviates the financial pressure for people that feel they must go to work sick to keep their job, curbing the spread of their illness to coworkers and commuters."

35. Under the NYS COVID-19 Paid Sick Leave Law, employees subject to a quarantine order issued by the State of New York, DOH, local board of health, or any governmental entity duly authorized to issue such order are entitled to job protection for the duration of the order and a varying number of paid sick days depending on the size of their employer.

36. Public employees and employees that work for employers with 100 or more employees who are subject to a mandatory or precautionary order "shall be provided with at least fourteen days of paid sick leave during any mandatory or precautionary order of quarantine or isolation" and the leave taken may not be charged against the employee's accrued sick leave "bank." *See* Exh. B §1.1(b), (e).

37. Unlike the federal Families First Coronavirus Relief Act, which allows employers to exclude health care providers from coverage (and the scope of which exclusion, as interpreted by DOL, prompted the State's recent lawsuit), the NYS COVID-19 Paid Sick Leave Law includes no exemption or exclusion of health care workers.

38. On March 27, 2020, after significant delays in the issuance of quarantine orders, DOH issued guidance to Local Health Departments ("LHDs") charged with issuing the orders. A true and correct copy of this guidance is attached hereto as Exhibit C.

39. The March 27 guidance instructed LHDs unable to immediately provide an employee with a COVID-19 quarantine/isolation order to 1) "inform the employee that they may provide their employer and/or employer's insurance carrier with documentation from a licensed medical provider indicating the employee qualifies for a precautionary or mandatory quarantine/isolation order due to COVID-19," 2) "[i]nform the employee that the LHD will provide the requested COVID-19 quarantine/isolation order within 30 days," and 3) "keep a record of all such requests and provide the COVID-19 quarantine/isolation order within the specified timeframe."

40. Additionally, on March 30, DOH and the NYS Department of Labor ("DOL") issued a joint bulletin for employees and employers entitled "Obtaining an Order for Mandatory or Precautionary Quarantine under Governor Cuomo's New COVID-19 Paid Sick Leave Law." A true and correct copy of the quarantine bulletin is attached hereto as Exhibit D.

41. The DOH/DOL bulletin informs employees unable to immediately obtain a quarantine order from their LHD that they may submit documentation to their employer from a licensed medical provider attesting that the employee qualifies for the order. The bulletin further provides that employees sent home by their employer on a precautionary quarantine are entitled to job protection and COVID-19 sick leave benefits for the duration of their quarantine.

III. DOH'S UNLAWFUL DIRECTIVE FOR HEALTH CARE PERSONNEL TO RETURN TO WORK AFTER SEVEN DAYS

42. Despite the requirement of *at least* 14 days of paid sick leave for public employees and employees of employers with 100 or more employees under the NYS COVID-19

Paid Sick Leave Law, on March 28, 2020, DOH issued a document entitled "Protocols for Personnel in Healthcare and Other Direct Care Settings to Return to Work Following COVID-19 Exposure or Infection."

43. Three days later, on March 31, 2020, DOH issued a slightly revised version of these protocols. The March 28 and March 31 protocols are referred to herein as the "Return to Work Directive." A true and correct copy of the Return to Work Directive is attached hereto as Exhibit E.

44. The Return to Work Directive sets forth conditions under which employees who have a confirmed or suspected case of COVID-19, or who have been exposed to a confirmed case of COVID-19, should return to work.

45. With apparent disregard for the possibility of asymptomatic transmission, DOH permits health care providers to require asymptomatic healthcare personnel exposed to a confirmed case of COVID-19 to continue working.

46. Worse, despite COVID-19's fourteen-day incubation period, DOH allows health care providers to require healthcare personnel with confirmed or suspected COVID-19 to return to work only seven days after the illness's onset so long as the employee has not had a fever for at least 72 hours (without the use of fever reducing medications) and the employee's other symptoms are improving.

47. Acknowledging that these employees may still be infectious, DOH provides that such employees should self-isolate at home when not at work.

48. Uniformly following these protocols, both public and private hospitals have issued policies requiring registered nurses with COVID-19 exposure to continue working

and requiring employees with confirmed or suspected COVID-19 to return to work after just seven days.

49. As noted, in a recent complaint filed against the United States Department of Labor in federal court, the State of New York alleges that a United States Department of Labor regulation unlawfully "narrows workers' eligibility" for federal emergency family leave and paid sick leave" by "denying vital financial support and exposing millions [of] American workers and their communities to further transmission of infectious disease in the of a once-in-a-century pandemic." Exh. A ¶ 1.

50. The State of New York, for purposes of that action at least, purports to recognize the critical importance of paid sick leave in "assuring that employees will not suffer economic hardship as a result of taking the necessary steps to protect themselves, their families, and their communities from devastating harm." *Id.* ¶ 13. The State of New York notes that the federal paid sick leave law "reflects Congress's judgment that people who are sick with or exposed to an infectious disease should stay home instead of go to work." *Id.* ¶ 12.

IV. THE IMPACT OF THE CRISIS AND DOH'S FAILURE TO PROTECT NURSES

51. As it became clear that the COVID-19 crisis would place unprecedented and severe burdens on New York's nurses, NYSNA implemented a system to compile information reported by its member nurses concerning risks to their safety and health and challenges to their ability to perform and provide safe and effective care to patients, both with COVID-19 and other medical needs.

52. NYSNA's information-gathering focused on four primary areas concerning nurses, patients, and the public health: (i) the availability and utility of personal protective equipment (PPE) to inhibit the spread of COVID-19; (ii) the adequacy and availability of testing for COVID-19; (iii) the impact of re-deploying, or "floating," nurses from their usual

areas of medical practice to treat patients with COVID-19, without appropriate training, and related medical challenges; (iv) the ability of nurses infected with the virus to quarantine and recover to safeguard their health and minimize the spread of the virus to their co-workers, families, patients, and the broader population.

53. NYSNA has compiled data tracking the awful toll the pandemic has taken on NYSNA RNs. NYSNA's membership survey results reflect that 11% of RNs have tested positive for COVID-19, and New York State estimated that 22% of patients testing positive have been hospitalized. While admittedly an extrapolation from self-reported data (given the lack of data from any other source) NYSNA estimates that up to 1,000 NYSNA RNs could be hospitalized during the course of the outbreak. Moreover, given the current New York mortality rate of 5.4% for COVID-19 positive patients, NYSNA estimates that up to 250 RN members could die. April 17, 2010 Affidavit of Lisa Baum ("Baum Aff.") ¶ 7. In addition, 72% of NYSNA members responding to the survey report having been exposed to COVID-19 at work. Notably, these statistics reflect only data from NYSNA membership, and do not include the thousands of RNs in the state who are not represented by NYSNA. *Id.*

54. Throughout this crisis, NYSNA RNs have documented their experiences to protect themselves, their patients and the public at large. First, NYSNA RNs submit Protest of Assignment ("POA") forms. RNs complete POAs to document being given an unsafe patient care assignment, including when they are assigned more patients than they can safely care for. NYSNA staff has also created a POA form that is specific to COVID-19 which documents, among other things, whether RNs have inadequate PPE, when certain PPE is not fit-tested, when nurses have been required to work outside their competencies with COVID-19 patients without adequate training, and how many staff or visitors are exposed as a result of these unsafe

conditions. RNs submit these POA forms to management at their facilities, as well as to NYSNA, to create a record of their constant struggle to keep themselves and their patients safe during this crisis and to protect their RN license. To date, NYSNA has received approximately 1,281 COVID POA forms from frontline RNs. Many of these POAs document instances where RNs have no or completely inadequate PPE, or are assigned critically ill patients, some on ventilators, for whom the RNs do not have the necessary competencies or training. *Id.* ¶ 12.

55. NYSNA also created COVID-19 diary entries, which are web-based forms that NYSNA RNs may submit to document their day-to-day experiences working during the COVID-19 pandemic. To date, NYSNA has received approximately 7,453 COVID-19 diary entries from frontline RNs. NYSNA staff reviews these narratives to monitor the experiences of RNs and then compiles a report to analyze the responses. *Id.* ¶ 11.

56. Further, during the past few months, NYSNA has heard from countless RNs regarding the very serious health and safety issues they are experiencing on a daily basis during the COVID-19 pandemic, including the lack of PPE, lack of adequate training, employers' refusals to test nurses for COVID-19, and the widespread practice of employers forcing RNs with COVID-19 symptoms to return to work when they are still sick. *Id.* ¶ 12.

57. NYSNA has also received numerous reports of facilities directing RNs who are COVID-19 positive to return to work before they have adequately recovered. While members of the general public are directed to self-quarantine for fourteen days, and if their employer has 100 or more employees, receive sick pay to recover during this period, virtually all health care facilities, following the DOH's directive, are requiring health care workers to return to work after seven days, even when they are still symptomatic. *Id.* ¶ 13. This inevitably has

serious health and safety consequences for the sick RNs, their patients and their coworkers who could be exposed. *Id.*

58. NYSNA's information, both in the aggregate and through the experiences of individual nurses, shows an utter failure of the Department of Health to ensure that nurses are protected from unnecessary exposure to COVID-19, receive testing priority to protect both their own health and that of the public, are safeguarded from being forced to engage in aspects of medical practice beyond their training, which jeopardizes patient care, and are granted adequate time to recover and quarantine in the event of infection.

59. As described below, not only has DOH flouted the law with its return-to-work Directive, its neglect, specifically with respect to personal protective equipment and quarantines, has operated to exacerbate the crisis, facilitated the spread of COVID-19, and in so doing created a nuisance to the public health and welfare.

60. As a result of the crisis, coupled with DOH's failure to protect New York's frontline workers combatting it, to date 954 NYSNA RNs have tested positive for the virus, 84 have been hospitalized, and eight have tragically died.

A. *Violations of the COVID-19 Paid Sick Leave Law*

61. Unsurprisingly, given that DOH has directed hospitals and other health care providers to violate the NYS COVID-19 Paid Sick Leave Law and bring COVID-19-quarantined health care workers back to work after 7 days, virtually all of the hospitals have done so.

62. Pamella Brown-Richardson, a nurse at Montefiore Medical Center in the Bronx ("MMC") and who, as described below, has COVID-19 and resultant pneumonia, first developed symptoms on March 16, and reported her symptoms to MMC management and was sent home that same day. April 17, 2020 Affidavit of Pamella Brown-Richardson ("Brown-

Richardson Aff.") ¶ 6. A few days later she learned she had tested positive, and on March 30, after several attempts, she reported her condition to MMC. *Id.* ¶¶ 7-8. Despite her continuing symptoms, management told her she should have come back to work seven days after she went home. *Id.* ¶ 8. MMC also required her to use her accrued sick leave for the time she was out, and she was paid for only 3 days. *Id.* ¶ 11.

63. Cristal Torres, a nurse at Staten Island University Hospital ("SIUH") became ill with COVID-19 symptoms on April 5, was tested on April 7, and learned she had tested positive a few days later. April 15, 2020 Affidavit of Cristal Torres ("Torres Aff.") ¶ 5. When she informed SIUH management that she had tested positive and provided medical documentation, she was told that she would have to use her accrued sick leave for any time off, even though the COVID-19 Sick Leave Law was in effect. *Id.* ¶ 6.

64. Torres was told that she was expected to return to work after seven days off if she had no fever for 72 hours, even though she still had symptoms that were not improving. Torres Aff. ¶¶ 7-8. She still felt unwell after seven days so stayed home and took additional leave that she fears will be unpaid since she has no remaining sick leave in her bank. Id. ¶¶ 6-8.

65. Helen Yeaman, a staff nurse at Long Island Jewish Valley Hospital ("LIVJH") was similarly unlawfully treated. A week after experiencing COVID-19 symptoms, Yeaman received a call from employee health and was informed that she was expected back to work the next day. April 17, 2020 Affidavit of Helen Yeaman ("Yeaman Aff.") ¶ 7. Yeaman was told that if she did not return to work, she would have to take a leave of absence without pay. *Id.* She was also informed that she would get no more than 7 days of furlough time. *Id.* At the time of this phone call, Yeaman had a fever of 103 degrees, as well as other COVID-19-related symptoms. *Id.* Yeaman did not return to work because she still was ill. *Id.* Yeaman

notified the hospital that she had tested positive for COVID-19 and provided medical documentation, yet she has still not been credited for any additional sick time pursuant to the NYS COVID-19 Paid Sick Leave Law, despite repeated requests. Yeaman Aff. ¶ 8

B. *PPE Available to Nurses is Inadequate and Nurses Have Been Forced to Use it In an Unsafe Manner.*

66. Title 10, § 405.11 of the New York Code, Rules, and Regulations tasks the NYS DOH with ensuring that hospitals provide a "sanitary environment to avoid sources and transmission of nosocomial infections and of communicable disease which may lead to morbidity or mortality in patients and hospitals personnel."

67. PPE is a nurse's first line of defense against infection by COVID-19. By creating a physical protective barrier around an RN, it prevents the virus particles present on an infected patient's skin, or in the air due to the patient's coughing, sneezing, or breathing, from entering a nurse's eyes, nose, and mouth and thus infecting the nurse.

(1) Respiratory Protection

68. In order to safely care for COVID-19 patients, RNs must have respirators that protect them from both aerosolized droplets and smaller airborne particles. Surgical masks, the only mouth and nose covering given many NYSNA RNs, are not respirators and are not effective in protecting RNs from aerosolized droplets and airborne particles from COVID-19 patients. Although there are effective reusable respirators such as powered air purifying respirators ("PAPRs"), and elastomeric cartridge respirators, NYSNA is not aware of any health care facility with NYSNA-represented RNs that is regularly using reusable respirators. Baum Aff. ¶ 15.

69. The normal standard of care in the United States is that disposable N95 respirators must be discarded after each patient care session. But employers have directed RNs

to continue to use the same N95 respirator for an entire week, during which time they are exposed to countless COVID-19 patients, and also potentially exposing non-COVID-19 patients. The RNs are routinely directed to store their N95 in a paper bag for a week when they are not using it. The week-long storage and reuse of disposable N95 respirators has created a major infection control issue. Most major disposable N95 manufacturers have not approved methods to decontaminate their respirators because it has yet to be proven that they can be decontaminated without impairing the fit and filtering integrity of the respirator or exposing the wearer to cleaning chemical residue. This puts not only the health and life of RNs at risk, but also risks infecting patients who do not have COVID-19. *Id.* ¶ 16.

70. OSHA directs that health care facilities first explore using reusable respirators, such as PAPRs and Elastomeric respirators, prior to reusing disposable N95 respirators. However, NYSNA is not aware of any facility that has followed this direction. Baum Aff. ¶ 17.

71. Governor Cuomo asserted in a press conference on March 26, 2020 that the State's hospitals have sufficient PPE for safe treatment of COVID-19 patients:

> There's no doubt in the past few days, you know, there's maybe — the distraction is a little start-and-stop — but we have enough PPE and the New York City officials say they have enough PPE for the New York City hospitals.

72. Whatever the Governor may be hearing from local officials, it is simply not true that nurses and other healthcare workers had, or have, sufficient PPE to protect themselves during the COVID-19 crisis.

73. For example, Cristal Torres, a Staff Nurse at Staten Island University Hospital worked in that hospitals medical-surgical unit prior to the COVID-19 outbreak. Approximately one month ago, her unit was converted to a COVID-19 unit. She has been

provided one N95 mask per week, which is stored in a paper bag in a bin with other N95 respirators when she is not working. There is no sanitation of the respirators between shifts. Torres Aff. ¶ 3.

74. Similarly, Helen Yeaman, at LIJVH, spent approximately a week working in the Emergency Department to assist in the hospital's COVID-19 response. Yeaman was given only one N95 to use for an entire week, which was stored in a brown paper bag. When Yeaman requested a new N95 prior to the end of the week, she was told that she would not receive a new one unless the respirator was soiled. There were no protocols or procedures for sanitizing the masks between shifts. Yeaman Aff. ¶ 3.

75. Since the outbreak began, WMC nurses have been instructed to use one N95 per week, store them in paper bags between shifts, and there is no sanitization procedure. April 16, 2020 Affidavit of Mary-Lynn Boyts ("Boyts Aff.") *Id.* ¶ 6; April 16, 2020 Affidavit of David Long ("Long Aff.") ¶ 4; April 17, 2020 Affidavit of Debra Cava ("Cava Aff.) ¶ 6; April 17, 2020 Affidavit of Margaret Brown ("Brown Aff.") ¶ 5; April 16, 2020 Affidavit of Liesl van Ledjte (van Ledjte Aff.) ¶¶ 6-7. Prior to the outbreak, the practice was to use one N95 per patient visit, because the respirators are not designed or intended for extended use. Long Aff. ¶ 6; Cava Aff. ¶ 7. WMC management has instructed nurses that they may obtain a new N95 respirator only if theirs becomes soiled or fails to hold form. Long Aff. ¶ 5; Cava Aff. ¶ 9. One WMC nurse was even denied a replacement respirator after the strap on hers broke. Long Aff. ¶ 10.

76. Nurses at Vassar Brothers Medical Center ("VBMC") in Poughkeepsie are similarly at risk due to being unable to obtain safe respiratory protection. RN Hilary Schneck works on a unit that has been converted to care for COVID-19 patients. She was required by

VMBC management to wear the same respirator on her shifts from March 21 through March 24. April 17, 2020 Affidavit of Hilary Schneck ("Schneck Aff.") ¶ 6. Usual practice at VMBC was to discard an N95 after each patient visit, and use for multiple visits violated VMBC's infection control protocol. *Id.*

77. Ciji Churchill, a nurse at Ellis Medicine, a hospital in Schnectady, normally works in a neurological intensive care and critical care unit, but a portion of it was converted to a unit for treatment of COVID-19 patients on March 11, 2019. April 16, 2020 affidavit of Ciji Churchill ("Churchill Aff.") ¶¶ 1-2. At the time, Churchill and her supervisor discussed that Churchill would have a PAPR because usual respiratory masks do not fit her. Although she did have a PAPR the first day COVID-19 patients were treated on her unit, she was thereafter repeatedly denied when she asked for one, and instead told to wear two surgical masks (not even N95 respiratory masks). *Id.* ¶¶ 3-4.

78. Jee Kim and other nurses at Terence Cardinal Cooke, a long-term care facility in Harlem, have been required to use the same N95 for an entire week starting on March 10, 2020. Management has instructed the nurses to sanitize the masks,,but has provided no training or materials for doing so. April 16, 2020 Affidavit of Jee Kim ("Kim Aff.") ¶¶ 3-4. Kim is concerned that she will become infected and infect her family; she also rides the subway to and from work and is concerned that she will become a carrier of the virus and spread it to others. *Id.* ¶ 12.

79. At MMC in the Bronx, nurses were informed on March 8 that due to a PPE shortage, PPE would be reserved only for care for patients known or suspected to have tested positive for COVID-19. Brown-Richardson Aff. ¶ 4.

80. Pamella Brown-Richardson, a MMC nurse practitioner, spent the next week and a half caring for patients who had COVID-19 symptoms but was never provided PPE, even though she asked for it every day; instead Brown-Richardson was provided with a surgical mask, which she was forbidden to use unless the patient had a cough (for which it is inadequate protection) because management believed doing so would alarm patients. *Id.* ¶ 5.

81. Unsurprisingly, on March 16, 2020, Brown-Richardson developed COVID-19 symptoms. MMC would not test her because it said her exposure was not "significant," so she obtained a test at WMC and tested positive. *Id.* ¶¶ 6-7. A colleague who works alongside her also testified positive. *Id.* ¶ 7. Brown-Richardson developed double-lobe pneumonia as a result of her exposure to COVID-19 and inadequate protective equipment. *Id.* ¶¶ 9. Brown-Richardson also infected her husband, and fears she has or will infect her asthmatic daughter. *Id.*

82. Brown-Richardson's colleague, Benny Matthew, worked in a unit that, as of the second week of March, was primarily for patients under investigation for having COVID-19, a majority of whom were diagnosed with the virus. Even though Matthew performed direct patient care for these patients, she was not given any more protection than a surgical mask. April 17, 2020 Affidavit of Benny Matthew ("Matthew Aff.") ¶ 3. Matthew asked his supervisor for an N95 mask but was told they were not recommended by the CDC. *Id.* ¶ 4. Matthew developed COVID-19 symptoms on March 21 and MMC refused to test him, until he checked in as a patient and received a test, which was positive. *Id.* ¶ 5-6.

83. On April 13, 2020, Governor Cuomo stated: "When a direct caregiver in a hospital asks for a new N95 mask they will receive one at least once a day." To date, however, DOH has issued no directive embodying this pronouncement nor taken any action to enforce it.

84. OSHA and PESH both require health care facilities to fit-test the model of the N95 respirators that they distribute to RNs. Fit-testing is a process where a technician measures whether there is a tight seal between the respirator and the RN's face. There are different models and sizes of N95 respirators and, if an RN fails a fit-test on one size or model, it is imperative that the employer continue fit testing with different sizes and models until there is a proper fit. *Id*. ¶ 19.

85. Many RNs have not been fit-tested on the N95 respirator models that their employers are providing. Further, many RNs have failed fit tests yet their employers gave refused fails to provide an alternative model or size of N95 respirator. The consequence of this is that RNs are being needlessly exposed to COVID-19 through improperly fitting N95 respirators. *Id*. ¶ 20. For example, Torres was never fitted for an N 95 respirator, and when she failed the fit test she was not provided with an alternative model. *Id*. ¶ 4. Long at WMC has never been fit-tested, putting him at risk of infection. Long Aff. ¶ 4. van Ledjte used an ill-fitting N95 for weeks. van Ledjte Aff. ¶¶ 6-7. On April 7, Churchill was fit-tested for an N95 mask, but failed the test, so on April 9, she was provided with a Honeywell North Half Mask Respirator. *Id.* ¶ 9. After Matthew returned to work after his COVID-19 illness, still symptomatic, he was never fit-tested, creating risk for his colleagues. *Id.* ¶ 10.

86. RNs have also notified NYSNA that there is a lack of face shields available to protect their eyes from COVID-19 infection and that certain face shields provided are not fitting properly and are slipping off. Baum Aff. ¶ 21; Brown-Richardson Aff. ¶ 5. Staten Island University Hospital initially issued face shields, but soon stopped when it ran out of supplies. Torres Aff. ¶ 3. Further, certain cleaning methods used by health care facilities have negatively impacted the face shield band, which can prevent a proper fit. Baum Aff. ¶ 21.

(2) Body Covering

87. To protect against COVID-19, it is essential that health care facilities provide RNs with fluid-resistant or impermeable gowns or body coverings that are changed after caring for each infectious patient. RNs have reported that many facilities are providing gowns that are neither fluid resistant nor impermeable. Further, the vast majority of facilities require RNs to use the same gown for multiple patients, some of who are and other who may not yet be COVID-19 positive. This is a serious infection control problem, which could result in new COVID-19 infections of patients and RNs. Baum Aff. ¶ 22.

88. Yeaman, for example, was directed to use the same gown with multiple patients, including COVID-19 patients and patients who were not confirmed to have COVID-19. The accepted practice when treating patients with an infectious disease is to change gowns between patients. Further, LIJVS did not provide shoe covers. Yeaman Aff. ¶ 4.

89. WMC has failed to provide liquid-impermeable gowns, such that if a patient coughs, sneezes, spits, vomits, or otherwise transfers bodily secretions to the nurse, the virus will be transferred to the nurse's scrubs. Cava Aff. ¶ 9. This is particularly dangerous for nurses in the psychiatric ward, where many patients suffer from mental illness, often do not understand or adhere to social distancing, and may spit on nurses or otherwise intentionally transfer bodily fluids. van Ledtje Aff. ¶ 8. Another WMC nurse, David Long, requested a suit which encloses the wearer's entire body, after observing a physician wearing one while treating a COVID-19 patient, and was denied. Long Aff. ¶ 7. Instead he was issued a yellow linen gown that is not fluid-resistant, and thus will not protect him in the event he gets a patient's bodily secretions on it. *Id.* ¶ 8. Prior to the COVID-19 outbreak, nurses were required to discard gowns after treating one patient. Now, in spite of how easily it is to transmit COVID-19, nurses are being instructed that it is not necessary to change them. *Id.* ¶ 8.

90. Kim at Terrence Cardinal-Cooke uses a gown that is not liquid-impermeable, and does not fit properly or cover all of her clothing. Kim Aff. ¶ 8. Ellis Medicine issued Churchill a body covering that was so flimsy that it tore. Churchill Aff. ¶ 8. MMC has also failed to provide impermeable gowns, goggles, or face shields. Brown-Richardson Aff. ¶ 5

91. Further, RNs report that some facilities are also not providing an adequate designated changing area for donning and doffing PPE, including gowns. In order to safely remove PPE after use, a space must be used (or created) that allows PPE to be doffed without contaminating "clean" areas. Negative pressure rooms often are designed with antechambers that accomplish this goal. Space can also be created using prefabricated portable units or creating spatial division using fire-rated plastic with zippers. Without proper donning and doffing areas, there is a risk that non-COVID-19 areas can become contaminated, needlessly putting RNs and non-COVID-19 patients at risk. Baum Aff. ¶ 23.

92. Brown asked her supervisor at WMC if nurses would receive training in donning and doffing, and offered to provide it because, as an Operating Room nurse, she is experienced in that area. Brown Aff. ¶¶ 2-3. She was told there was no need for training. *Id.* ¶ 3. Cava asked WMC's Director of Infection Control to train WMC nurses in safe donning and doffing, and no such training has occurred. Cava Aff. ¶ 11.

93. On March 10, 2020, the Director of NYSNA's Legal Department, Claire Tuck, sent an email to DOH reporting that RNs at Montefiore Hospital - New Rochelle (where the outbreak in the state started) were being directed to re-use N95 masks and had run out of foot coverings and some sizes of N95 masks, and requested that DOH make an on-site visit. DOH responded that Tuck should "consider the matter referred to DOH." On March 26, 2020, DOH sent a further response that it was "aware that due to national shortages of PPE, health care

facilities are providing directions to staff about strategies to conserve or ration supplies," and that DOH would issue "guidance" about acceptable policies. In the interim, DOH advised that concerns should be brought to a hospital's "infection control leadership in your facility." A true and correct copy of this correspondence is attached hereto as Exhibit F.

C. *Other Factors Exacerbated by DOH's Actions Contributing to the Crisis*

94. DOH's violation of the law and neglect of its statutory duties are made worse by other failings of the national health care system and insufficient nurse staffing. While relief of these aspects of the crisis is beyond DOH's power, they have combined with its unlawful and negligent conduct in creating an acute threat to the health and safety of nurses, their patients, and the public.

(1) Inadequate Testing

95. In its March 31 return-to-work directive, DOH provided only that *hospitalized* healthcare professionals should receive priority of testing, but made no reference to prioritizing testing for the many other healthcare workers with COVID-19 symptoms not severe enough to require hospitalization. In contrast, the March 31 DOH return-to-work guidance for essential personnel states that testing should be prioritized for all essential personnel with symptoms.

96. Despite experiencing symptoms consistent with COVID-19, numerous nurses and other health care workers have been denied testing.

97. NYSNA has received reports from nurses with coughing, chills, fever, and shortness of breath after treating patients with confirmed COVID-19 who have been unable to receive a COVID-19 test despite repeated requests. This is a major public health problem because RNs who do not know their COVID-19 status will infect others, and an employer who

does not know which employees are positive for the virus will not be able to conduct an adequate health and safety risk assessment for the rest of their staff and patients. Baum Aff. ¶ 25.

98. Nurses who have been sent home due to COVID-19 symptoms or with COVID-19 positive test results have not been retested before returning to work. In many cases, due to the DOH directive, these nurses have been required to return after just seven days of leave while still experiencing symptoms.

99. For example, when Yeaman requested a test after experiencing symptoms of COVID-19, she was informed that she had to find testing on her own. Yeaman Aff. ¶ 6. A few days later, Yeaman was tested at CityMed urgent care and learned that she had tested positive for COVID-19. *Id*.

100. Similarly, after being sent home by the Director of Employee Health due to COVID-19 symptoms, Devlin was given a list of test sites to call on her own, but was unable to obtain a test at any of these sites. Devlin Aff. ¶ 7-8. Devlin also called the Center for Disease Control, but did not receive a return call. *Id.* ¶ 11. Devlin did not receive an appointment for testing until two days later after she again spoke to the Director of Employee Health and had been instructed by her manager to work additional shifts. Devlin Aff. ¶¶ 7-8, 11-12.

101. Moreover, the March 31 DOH return-to-work guidance for healthcare personnel provides no re-testing requirement before infected nurses return to the workplace and no requirement to test asymptomatic nurses who have been exposed and may unknowingly spread the virus to patients and coworkers. The March 28 DOH guidance for releasing individuals from home isolation provides that asymptomatic individuals with confirmed COVID-19 should remain in self-isolation for at least 7 days after a confirmed test.

(2) <u>Re-Deployment</u>

102. In response to the increased patient load and staffing shortages as health workers and community members succumb to COVID-19 symptoms, many hospitals have begun to redeploy or "float" nurses to areas outside their regular assignments.

103. Title 8, Section 29.1(b)(9) of the New York Code, Rules and Regulations states that it is unprofessional conduct for a healthcare professional to "practice beyond the scope permitted by law or to accept and perform professional responsibilities when the licensee knows that she or he is not competent to perform them."

104. Moreover, Title 8, Section 29.1(b)(1) of the New York Codes, Rules and Regulations provides that a healthcare professional engages in unprofessional conduct by "delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience or by licensure, to perform them."

105. Nevertheless, NYSNA has received numerous reports from RNs without prior intensive care unit experience assigned to treat multiple COVID-19 patients on ventilators in the intensive care unit without proper training.

106. Assignments out of a nurse's competency put critically-ill patients at risk and jeopardize nurses' professional licenses.

FIRST CAUSE OF ACTION AGAINST NYS DOH: THE NYS DOH'S DETERMINATION TO ISSUE PROTOCOLS REQUIRING HEALTH CARE WORKERS SICK WITH COVID-19 TO RETURN TO WORK IN SEVEN DAYS WAS ARBITRARY AND CAPRICIOUS AND AFFECTED BY AN ERROR OF LAW

107. Petitioner repeats and realleges the preceding paragraphs as though fully set forth herein.

108. CPLR § 7803 permits the Court to review and rescind a determination by a public body that is affected by an error of law or arbitrary and capricious.

109. As detailed above, the NYS Paid Sick Leave Law requires public employer and employers with 100 employees or more to provide employees subject to a quarantine or isolation order with at least 14 days of paid leave.

110. On March 28 and March 31, 2020, DOH issued return-to-work protocols for healthcare personnel that require nurses and healthcare workers to return to work after just 7 days as long as they have not had a fever for 72 hours and their other symptoms are improving.

111. In accordance with this directive, both public and private hospitals throughout New York State have required nurses with confirmed COVID-19 to return to work before their 14-day leave entitlement has elapsed, generally within seven days, and while still experiencing symptoms and possibly contagious.

112. DOH's determination regarding healthcare personnel's eligibility to return to work after 7 days is in direct conflict with the NYS COVID-19 Paid Sick Leave Law and dangerously heightens the risk of exposure for, as of yet, uninfected coworkers, patients, and other community members.

113. For this reason, the Court should find that DOH's determination and protocols providing that nurses and other healthcare professionals are fit for duty after just 7 days of recovery, despite scientific evidence and explicit state law to the contrary, is arbitrary and capricious and affected by an error of law.

SECOND CAUSE OF ACTION: THE NYS DOH FAILED TO PERFORM A DUTY ENJOINED BY LAW BY FAILING TO ENSURE A SAFE AND SANITARY WORKING ENVIRONMENT FOR HEALTH CARE WORKERS

114. Petitioner repeats and realleges the preceding paragraphs as though fully set forth herein.

115. CPLR § 7802 further provides that the Court may review whether a public body has failed to perform a duty enjoined upon it by law.

116. Section 206(b) of the Public Health Law provides that the Commissioner shall "exercise general supervision over the work of all local boards of health and health officers."

117. Section 206(d) of the Public Health Law commands the Commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health."

118. Section 206(f) of the Public Health law directs the Commissioner to "enforce the public health law."

119. Title 10, § 405.11 of the New York Code, Rules and Regulations tasks the NYS DOH with ensuring that hospitals provide a "sanitary environment to avoid sources and transmission of nosocomial infections and of communicable disease which my lead to morbidity or mortality in patients and hospitals personnel."

120. By failing to ensure adequate PPE and diagnostic testing for health care workers, mandating the premature return of contagious and symptomatic employees, and permitting hospitals to redeploy staff to areas outside their competency, without adequate training, the Court should find that the NYS DOH has fallen woefully short of fulfilling its duty to ensure a safe and sanitary environment for healthcare workers and their patients.

THIRD CAUSE OF ACTION: THE NYS DOH'S UNLAWFUL RETURN TO WORK PROTOCOLS AND FAILURE TO ENSURE SAFE AND SANITARY WORKING ENVIRONMENTS HAVE CREATED A PUBLIC NUISANCE

121. Petitioner repeats and realleges the preceding paragraphs as though fully set forth herein.

122. By directing healthcare personnel to return to work while still symptomatic and potentially contagious, failing to provide sufficient PPE and diagnostic testing, and allowing healthcare facilities to place nurses in areas outside their competency without

adequate training, DOH has engaged in conduct and/or omissions which offend, interfere with and cause damage to public right to health and safety.

123. DOH's negligent actions and omissions have exacerbated the spread of COVID-19, a highly infectious and at times lethal virus, throughout not just New York State healthcare facilities, but also throughout the community at large.

124. Nurses represented by NYSNA have suffered particular injury as a result of DOH's creation of this public nuisance including, but not limited to, serious illness and in some cases death as a result of COVID-19 infection, risk of loss of licensure due to working outside of competency and in compromised physical conditions, and emotional distress resulting from treatment of highly compromised patients without sufficient PPE or training.

REQUEST FOR RELIEF

WHEREFORE, for all the foregoing reasons, NYSNA respectfully requests that the Petition be granted and that this Court:

(A) Declare and adjudge, pursuant to CPLR § 3001, that the DOH March 28 and 31 return-to-work protocols are not in accordance with the requirements of the New York COVID-19 Paid Family Leave;

(B) Issue an order pursuant to Article 78 of the CPLR requiring the immediate rescission of the challenged provisions of the DOH's March 28 and 31 return-to-work protocols as inconsistent with the New York Paid Family Leave Law;

(C) Issue an order pursuant to Article 78 of the CPLR directing DOH to ensure the immediate provision of sufficient PPE to nurses and healthcare personnel;

(D) Issue an order pursuant to Article 78 of the CPLR requiring DOH to ensure diagnostic testing for all nurses and other healthcare personnel who request testing;

(E) Issue a preliminary injunction providing for the above relief in order to avoid irreparable harm until the Court is able to arrive at a final determination;

(F) Issue a temporary restraining order providing for the above relief in order to avoid irreparable harm pending a hearing on this application;

(G) Award NYSNA its reasonable fees, costs, and expenses, including attorneys' fees; and

(H) Grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 20, 2020

Respectfully submitted,

/s/ Joshua J. Ellison

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VERIFICATION

State of New York)
) ss.
County of Richmond)

Patricia Kane, being duly sworn, states that she is the Executive Director of Petitioner New York State Nurses Association ("NYSNA"), that she has read the foregoing Petition and that the contents thereof are true to the best of her knowledge, except as to matters therein that are stated upon information and belief, and as to those matters, she believes them to be true.

/s/Patricia Kane
Patricia Kane
Executive Director
New York State Nurses Association

NOTARY SITUATED IN THE COUNTY OF NEW YORK

Pursuant to Governor Andrew Cuomo's Executive Order 202.7, I attest that on this 19th day of April 2020, Patricia Kane appeared before me by live audio-video technology, proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to this instrument, affirmatively represented that she was physically situated in the County of Richmond, NY, by her signature executed the same in her capacity, and sent a true electronic copy of the same signed, executed instrument to me in the County of New York, New York.

Marie B Hahn

Marie B. Hahn, Esq.

Notary Public State of New York
Qualified in New York County
Notary Registration No. 02HA6374367
Notary Commission Valid to 04/30/2022