UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, Plaintiff, -against- STATE OF NEW YORK, Defendant.	13-CV-4165 (NGG) (RML)
RAYMOND O'TOOLE, et al., Plaintiffs, -against- ANDREW M. CUOMO, et al., Defendants.	13-CV-4166 (NGG) (RML)
RESIDENTS AND FAMILIES UNITED TO SAVE OUR ADULT HOMES, et al., Plaintiffs, -against- HOWARD ZUCKER, et al., Defendants.	16-CV-1683 (NGG) (RER)

THE NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN SUPPORT OF ITS REQUEST TO WITHDRAW AS COUNSEL

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The New York State Office of the Attorney General ("OAG") respectfully submits this memorandum of law in support of its request to withdraw as counsel pursuant to Local Civil Rule 1.4 of the U.S. District Courts for the Southern and Eastern Districts of New York ("Rule 1.4")

PRELIMINARY STATEMENT

The Court should grant the OAG's request to withdraw as counsel. A motion to withdraw under Rule 1.4 is appropriately granted if (i) the movant presents "satisfactory reasons" for withdrawal and (ii) withdrawal would not disrupt the prosecution of the proceeding or prejudice the client given the current procedural posture of the case.

The requisite "satisfactory reasons" for withdrawal are present here. As set forth below, the facts surrounding the issuance of a TRO in *Doe v. Zucker*, Index No. 07079/2016 (Sup. Ct. Albany Cty.), demonstrate that there are irreconcilable differences between the OAG and its clients regarding fundamental questions of strategy in the three above-captioned cases. The representation here has also been beset by significant communications breakdowns between the OAG and its clients—a fact that also justifies withdrawal here.

Finally, the procedural posture of the three above cases does not defeat withdrawal. The trial scheduled in *United States v. New York* and *O'Toole v. Cuomo* is still several months away, and the merits of the *Residents and Families* action have barely been litigated. The active involvement of Department of Health and Office of Mental Health agency counsel in the *United States v. New York* and *O'Toole v. Cuomo* matters, and the availability of the previous trial record from the predecessor *DAI* case, also serve to dispel any concerns about potential prejudice.

STATEMENT OF FACTS

The facts giving rise to this motion arose in connection with *Doe v. Zucker*, Index No. 07079/2016 (Sup. Ct. Albany Cty.), a related Article 78 proceeding now pending in New York Supreme Court in Albany County (Declaration of Kent T. Stauffer in Support of OAG's Request to Withdraw as Counsel, dated February 28, 2017 ("Stauffer Decl.") ¶¶ 1, 3, 4). The OAG represents the two named respondents in *Doe:* Howard A. Zucker, M.D., Commissioner of the New York State Department of Health ("DOH"), and Ann Marie T. Sullivan, M.D., Commissioner of the New York State Office of Mental Health ("OMH") (*id.* ¶¶ 1, 3).

The petitioner in *Doe* alleges that certain adult home regulations promulgated by DOH and OMH have prevented him from returning to Oceanview Home for Adults, where he formerly resided until he moved out approximately two years earlier (*id.* ¶ 4). Mr. Doe alleges that he cannot take care of himself in supported housing, which lacks some services which were available in the adult home (*id.*). He requests, among other things, that the Court declare the challenged regulations to be arbitrary and capricious, discriminatory, and unenforceable (*id.*). The adult home regulations challenged in *Doe* have also been challenged in the *Residents and Families* action, and those regulations are referenced in the Settlement Agreement in *United States v. New York* and *O'Toole v. Cuomo* (*id.*). The respondents have not yet answered the Article 78 petition in *Doe* (*id.*).

On February 8, 2017, Assistant Attorney General Keith Starlin, counsel of record for the respondents in *Doe*, spoke with the petitioner's counsel, Jeffrey J. Sherrin of O'Connell & Aronowitz (*id.* ¶ 5). During this telephone conversation, Mr. Sherrin informed Mr. Starlin for the first time that the petitioner might seek short-term injunctive relief, and in particular, a

preliminary injunction to permit Mr. Doe to return to the Oceanview home (*id.*). Mr. Sherrin did not suggest during this call that he would seek to enjoin the adult home regulations themselves in his motion (*id.*). Moreover, while Mr. Starlin had further communications with Mr. Sherrin about the injunctive relief the petitioner planned to seek, Mr. Sherrin again did not state—or even imply—that he intended to seek an immediate suspension of the adult home regulations (*id.*).

On February 15, 2017, the OAG received a proposed order to show cause and temporary restraining order ("TRO"), along with supporting papers, prepared by Mr. Sherrin in the *Doe* case (*id.* ¶ 6). The proposed TRO broadly sought to restrain and enjoin DOH and OMH from enforcing or implementing the adult homes regulations (*id.*). Moreover, the TRO application was set to be heard at 10:30 a.m. the following morning—less than 24 hours later (*id.*). After reviewing the TRO papers, the OAG made plans to articulate its opposition to the TRO before the Honorable Denise Hartman at the hearing the next day (*id.* ¶ 7).

At approximately 9:03 a.m. on February 16 (less than an hour and a half before the TRO hearing), Michael G. Bass, an in-house attorney who is the Director of the Bureau of Litigation at DOH, sent an email directly to the petitioner's lawyer, Mr. Sherrin, stating that:

> DOH cannot consent to enjoin all of the regulations you list in your proposed TRO. We can consent to the following language for the contested regulations to be enjoined "The regulation of NYSDOH now codified at 18 NYCRR section 487.4(c) that reads "No operator of an adult home with a certified capacity of 80 or more and a mental health census, as defined in Section 487.13(b)(4) of this part, of 25 percent or more of the resident population shall admit any person whose admission will increase the mental health census of the facility.; 18 NYCRR sections 487.13(c), 487.13(d), 487.13(e), 487.13(f) and 487.13(g)"
>
> I'm fine with whatever grammatical edits you want to make, as long as the right regulations are listed.

Id. ¶ 8.

A few minutes later, at approximately 9:23 a.m., Mark Noordsy, Deputy Counsel for Litigation at OMH, replied on the same thread, stating, "Also, both OMH reg cites need (2) added at the end. Thanks" (*id.* ¶ 9). Mr. Starlin did not respond or otherwise participate in the email thread, in which the representatives of the agency clients directly communicated their consent to an injunction against their own regulations (*id.* ¶ 10).

Immediately prior to the TRO hearing that same morning (February 16), OAG lawyers participated in various communications regarding these issues and the upcoming hearing with, among others, various attorney representatives of the client agencies (*id.* ¶ 11).[1]

The OAG concluded that it could not consent to the issuance of the TRO (*id.* ¶ 12). However, because the TRO hearing was only minutes away, the OAG determined that, as counsel of record, it was obligated to appear, since withdrawing as counsel at that time—when there was no opportunity to arrange for substitute counsel—would not have been possible (*id.*).

Assistant Attorney General Starlin attended the 10:30 a.m. hearing before Judge Hartman (*id.* ¶ 13). Mr. Bass of DOH and Mr. Noordsy of OMH also attended the hearing (*id.*). Mr. Sherrin appeared on behalf of the petitioner (*id.*). After Mr. Sherrin presented his arguments in favor of the TRO, Mr. Bass told Judge Hartman that DOH and OMH consented to the TRO (*id.* ¶ 14). Assistant Attorney General Starlin did not offer any argument in favor of or in opposition to the TRO request (*id.* ¶ 15). Moreover, Mr. Starlin did not himself

[1] Because of its obligation to protect the attorney-client privilege, the OAG cannot disclose the substance of these or other relevant attorney-client communications—a fact that limits the amount of evidence the OAG is able to present on this motion.

consent to the TRO, and when Judge Hartman asked for Mr. Starlin's opinion on the matter, he stated only that he deferred to his agency clients (*id*.).

With the agreement of Mr. Bass and Mr. Noordsy, Mr. Sherrin thereafter handed Judge Hartman a revised copy of the TRO that had not previously been provided to the OAG—and that the OAG had not seen (*id*. ¶ 16). Judge Hartman signed this revised version of the TRO (*id*. ¶ 17). There was no transcript of the conference before Judge Hartman (*id*.).

At approximately 3:22 p.m. that same day, Mr. Bass emailed a copy of the TRO to plaintiffs' counsel in the *United States v. New York* and *O'Toole v. Cuomo* cases (*id*. ¶ 18). Mr. Bass did not copy anyone from the OAG on this email, and the OAG did not learn that the email had been sent until the following day (*id*.).

ARGUMENT

Under Local Civil Rule 1.4 of the U.S. District Courts for the Southern and Eastern Districts of New York, the Court may grant a motion to withdraw as counsel "upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien."[2]

A court considering whether to grant a motion to withdraw under Rule 1.4 "must analyze two factors: the reasons for withdrawal and the impact of the withdrawal on the timing of the proceeding." *Winkfield v. Kirschenbaum & Phillips, P.C.*, No. 12 CV

[2] The OAG is not asserting a retaining lien over the clients' files nor a charging lien. A charging lien would be inappropriate here in any event as the OAG does not bill its clients and because it represents the defendants in these actions. *See United States v. Brook*s, No. 06 CR 0550, 2013 WL 5522856, at *1 (E.D.N.Y. Oct. 3, 2013) ("[a]n attorney who represents a defendant cannot have a charging lien in the absence of a counterclaim") (internal quotes omitted).

7424, 2013 WL 371673, at *1 (S.D.N.Y. Jan. 29, 2013); *accord Karimian v. Time Equities, Inc.*, No. 10 CV 3773, 2011 WL 1900092, at *2 (S.D.N.Y. May 11, 2011).

While the decision to grant or deny a motion to withdraw as counsel is within the discretion of the Court, *see Stair v. Calhoun*, 722 F. Supp. 2d 258, 264 (E.D.N.Y. 2010), "where an attorney desires to withdraw from a case, he will in most cases be allowed to do so." *Karimian*, 2011 WL 1900092, at *3; *see also id.* ("[W]hat amounts to specific performance by an attorney has been required, but such cases are extremely rare") (quoting *Moolick v. Natwest Bank, N.A.*, No. 95 CV 2226, 1996 WL 411691, at *2 (S.D.N.Y. July 23, 1996)).

I. THERE ARE SATISFACTORY REASONS FOR WITHDRAWAL

The first part of the Rule 1.4 inquiry requires an assessment of whether there are "satisfactory reasons" for the withdrawal. As detailed below, such reasons clearly exist here.

A. There Are Irreconcilable Differences Between the OAG and Its Clients

The existence of irreconcilable differences between attorney and client is a proper basis for withdrawal under Rule 1.4. *See United States v. Lawrence Aviation Indus.*, No. 06 CV 4818, 2011 WL 601415, at *1 (E.D.N.Y. Feb. 11, 2011); *Nielsen v. New York City Dep't of Educ.*, No. 04 CV 2182, 2007 WL 1987792, at *1 (E.D.N.Y. July 5, 2007) ("Hostility or irreconcilable differences between the attorney and the client are sufficient to warrant a withdrawal") (Garaufis, J.); *Karimian*, 2011 WL 1900092, at *2 ("an irreconcilable conflict between attorney and client is a proper basis for the attorney to cease representing his client");[3] *see also* N.Y. Rule of Prof'l Conduct 1.16(c)(4) (22 NYCRR § 1200).

[3] While some decisions use the phrase "irreconcilable conflict" rather than "irreconcilable differences," *see, e.g., Karimian*, 2011 WL 1900092, at *2, these two phrases appear to be interchangeable in their application. The standard does not require the existence of a formal conflict of interest.

Here, there are irreconcilable differences between the OAG and its clients regarding the proper course to pursue in the related adult homes cases. Ever since the *Residents and Families* proceeding was filed in state court in 2013, the OAG has made significant efforts to defend DOH's and OMH's adult home regulations against legal challenges. Among other things, the OAG prepared, filed, and argued motions to dismiss in *Residents and Families* and in the previously separate *Empire* proceeding. *See, e.g.,* Case No. 16 CV 01683, ECF 21 at p. 5 n.6 (discussing the motion to dismiss in the *Residents and Families* case). More recently, the OAG removed the *Residents and Families* proceeding to this Court, and it thereafter successfully opposed motions to remand that proceeding back to state court (Stauffer Decl. ¶ 24). The OAG also filed a pre-motion letter in support of an anticipated motion to dismiss in that case (*id.*). And in the past few months, the OAG prepared and filed lengthy motions to dismiss in two related lawsuits in New York state court that also challenge the adult home regulations (*id.* ¶ 25). *See Oceanview Home for Adults, Inc. v. Zucker*, Index No. 6012/2016 (Sup. Ct. Albany Cty.); *Hedgewood Home for Adults, LLC v. Zucker*, Index No. 52782/2016 (Sup. Ct. Dutchess Cty.).

In *Doe*, however, the OAG's agency clients consented to a temporary restraining order against those very same regulations. This decision had wide-ranging consequences that extend not only to the *Residents and Families* case but to *United States v. New York* and *O'Toole v. Cuomo* as well. During the February 22, 2017 status conference in those cases, the Court found that the entry of the TRO in *Doe* triggered a 120-day "period of review" under the Settlement Agreement. Pursuant to the Court's ruling, if the parties are unable to agree to appropriate modifications during this time, they will be required to proceed to trial in July 2017.

In sum, there are irreconcilable differences between the OAG and its clients. This fact alone provides a satisfactory reason for withdrawal. *See Winkfield*, 2013 WL 371673, at *1 (permitting withdrawal where counsel demonstrated that there were "irreconcilable differences between his firm and Plaintiff, and that they have different views of the merits of the case and the potential recovery."); *see also* N.Y. Rule of Prof'l Conduct 1.16(c)(4) (permitting withdrawal where "the client insists upon taking action with which the lawyer has a fundamental disagreement.").

B. The Representation Has Been Beset by Damaging Communications Breakdowns

"[A] client's lack of cooperation—including lack of communication with counsel constitutes a satisfactory reason to withdraw." *Batres v. Valente Landscaping Inc.*, No. 14 CV 1434, 2016 WL 4991595, at *2 (E.D.N.Y. Sept. 15, 2016) (internal quotes omitted). Here, the OAG's clients bypassed the OAG and directly communicated their consent to the TRO to opposing counsel (Stauffer Decl. ¶ 26). Agency counsel also notified opposing counsel in *United States v. New York* and *O'Toole v. Cuomo* about that TRO without copying the OAG on the email (*id.* ¶ 18). These and other communications breakdowns have made it unreasonably difficult for the OAG to carry out the representation effectively. *See also* Rule of Prof'l Conduct 1.16(c)(7) (permitting withdrawal where the client "fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively"). Withdrawal would be warranted for this independent reason.

II. THE PROCEDURAL POSTURE OF THESE CASES DOES NOT DEFEAT WITHDRAWAL

A court entertaining a motion to withdraw must also consider "the posture of the case," and whether "the prosecution of the suit is [likely to be] disrupted by the withdrawal

of counsel." *Karimian*, 2011 WL 1900092, at *3; *accord Battino v. Cornelia Fifth Ave., LLC*, No. 09 CV 4113, 2013 WL 4779635, at *1 (S.D.N.Y. June 26, 2013). "The Court may also examine likely prejudice to the client, whether the motion is opposed, and whether the unpaid representation has become a severe financial hardship to the firm." *Karimian*, 2011 WL 1900092, at *3 (quoting *Stair*, 722 F. Supp. 2d at 265)).

Here, the procedural posture of the three-above captioned cases does not demonstrate undue prejudice or otherwise defeat withdrawal. "Where discovery in a case has not yet closed and the case is not on the verge of trial readiness, prejudice is unlikely to be found." *Karimian*, 2011 WL 1900092, at *3 (internal quotes omitted). Discovery has not closed in any of the three above-captioned cases. In fact, the Plaintiffs in *United States v. New York* and *O'Toole v. Cuomo* served new discovery requests as recently as February 28, 2017. And while the Court has set a trial date of July 10, 2017 in those cases, that date is still several months away. *Karimian*, 2011 WL 1900092, at *3 (permitting withdrawal where "trial [was] still several months away").

Any potential for prejudice is also mitigated by the fact that agency counsel for the defendants have been actively involved in the defense of the *United States v. New York* and *O'Toole v. Cuomo* cases and, in addition, have borne the primary responsibility for conducting the implementation of the consent decree in those cases (Stauffer Decl. ¶ 27). And as the Court noted during the conference before it on February 22, the parties would have available the record, or at least portions of it, from the last trial for use as appropriate (*id.*). Moreover, the OAG would of course comply with its obligation under N.Y. Rule of Professional Conduct 1.16(e) to assist in the transition to substitute counsel in all three cases (*id.*). Finally, as this Court previously pointed out, the merits "have barely been litigated" in

Residents and Families. *See, e.g.*, Case No. 16 CV 01683, ECF 21 at p. 17. The procedural posture of the *Residents and Families* case thus raises no concerns at all.

As to the question of "whether the motion is opposed," *Karimian*, 2011 WL 1900092, at *3, the OAG understands that its clients consent to the withdrawal, and it expects it will soon be in a position to submit written confirmation of that consent to the Court.[4]

CONCLUSION

For the foregoing reasons, the OAG's request to withdraw as counsel should be granted.

[4] Assuming the OAG's clients decide to retain substitute counsel and to consent to the withdrawal, such facts would lessen the importance of the OAG's showing with respect to "satisfactory reasons" and the procedural posture of the case. In contrast to contested withdrawals, agreed substitutions of counsel are often accomplished without any detailed fact-finding upon the submission and so-ordering of a single-page form order.

Dated: New York, New York
March 6, 2017

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