NEW YORK SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

In the Matter of the Application of MEDICAL PROFESSIONALS FOR INFORMED CONSENT, INC., Individually and on Behalf of its Members, KRISTEN ROBILLARD, M.D., ZARINA HERNANDEZ-SCHIPPLICK, M.D., MARGARET FLORINI, A.S.C.P., OLESYA GIRICH, RT(R), and ELIZABETH STORELLI, R.N., Individually and on Behalf of Others Similarly Situated,

Petitioners/Plaintiffs-Respondents,

v.

MARY T. BASSETT, in her Official Capacity as Commissioner of Health for the State of New York, KATHLEEN C. HOCHUL, in her Official Capacity as Governor of the State of New York, and the NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents/Defendants-Appellants.

Affirmation in Response to Motion to Vacate Stay

AD No. CA 23-00161

JONATHAN D. HITSOUS, an attorney licensed to practice in New York, affirms the following subject to the penalties of perjury:

1. I am an Assistant Solicitor General in the office of Attorney General Letitia James, attorney for appellants Mary Bassett, Governor Kathleen Hochul, and the New York State Department of Health,

collectively referred to herein as "DOH." I am assigned to handle the above-captioned appeal.

2. I submit this affirmation in response to the motion of plaintiffs-respondents to vacate the order of this Court, entered February 27, 2023, staying the judgment of Supreme Court, Onondaga County (Neri, J.), to the extent it barred DOH from "implementing or enforcing" 10 N.Y.C.R.R. § 2.61.

3. Appellants do not oppose plaintiffs' request to vacate the stay of enforcement.

4. Subject to limited exceptions, 10 N.Y.C.R.R. § 2.61 provided that healthcare facilities designated "covered entities" could not hire or retain employees unless those employees presented proof that they had received COVID-19 vaccines. Because Supreme Court had enjoined DOH from enforcing this provision, this Court's February 2023 order had the effect of continuing, pending the outcome of DOH's appeal, the requirement that covered facilities maintain a fully vaccinated workforce in accordance with that rule.

5. During oral argument on May 24, 2023, I advised this Court that DOH had begun preparations to repeal 10 N.Y.C.R.R. § 2.61.

Although the repeal would need to be effectuated in compliance with SAPA procedures, the matter was moot because, *effective immediately*, DOH would no longer enforce that rule pending its formal repeal. In response to the question from this Court whether "as of right now, as we speak . . . there is no vaccine requirement for healthcare workers in the State of New York?" I answered that this was an accurate statement. (Gibson aff., Ex. 3 at 3.)

6. The following day, as a post-argument submission, I submitted DOH's notice to covered healthcare providers that, effective May 24, 2023, DOH would no longer enforce 10 N.Y.C.R.R. § 2.61. (Gibson aff., Ex. 4.)

7. An order vacating this Court's stay of enforcement would simply cause Supreme Court's injunction to spring back into effect, which would bar DOH from enforcing its rule that healthcare workers be vaccinated against COVID-19 as a condition of obtaining or retaining employment at covered facilities. But DOH has already publicly committed to a policy of non-enforcement of that rule pending a formal repeal. Thus, vacatur of the stay would do no more than bind DOH to a course of action to which it is already committed.

8. Although DOH does not oppose an order vacating the stay in general, it offers clarifying remarks on three inaccurate statements or insinuations plaintiffs have advanced in their motion papers.

9. First, plaintiffs maintain that DOH's announcement that it would repeal 10 N.Y.C.R.R. § 2.61 has produced confusion that has led multiple hospitals to continue excluding unvaccinated individuals from their workforces. (Gibson aff. ¶¶ 22-26.) DOH fails to apprehend how confusion can arise from its unambiguous representations, made to this Court, that at this time "there is no [COVID-19] vaccine requirement for healthcare workers in the State of New York." (*See* Gibson aff. Exs. 3, 4.) Of course, healthcare facilities are always free to impose their own vaccination requirements on their staff. But instead of relying on evidence from hospitals themselves attributing personnel decisions to confusion about *DOH* rules as opposed to other reasons, plaintiffs rely on hearsay and speculation. (*See, e.g.*, Gibson aff. Ex. 5 ¶ 20 (DOH's "guidance *may* be to blame for this") (emphasis added).

10. Second, and relatedly, plaintiffs repeatedly complain that despite DOH's announcement that it would repeal 10 N.Y.C.R.R. § 2.61, many hospitals remain "unwilling" to rehire unvaccinated workers

(Gibson aff. ¶¶ 27, 31, Ex. 5 ¶¶ 14, 18-19, Ex. 7 ¶ 6.) But no judicial resolution to this litigation will resolve those complaints, because, as noted above, healthcare facilities always have the right to impose immunization requirements for their employees that go beyond the requirements that DOH rules impose as statewide minimums. In other words, even if an order lifting the stay removes an obstacle for facilities that would be willing to hire unvaccinated healthcare workers but for "confusion" about the current state of the law, that order would not forbid facilities from refusing to hire unvaccinated healthcare workers based on *their own* immunization rules.

11. Finally, DOH clarifies that neither its upcoming repeal of 10 N.Y.C.R.R. § 2.61 nor an order lifting the stay will settle any ongoing employment disputes, as plaintiffs suggest. (Gibson aff. ¶¶ 34-47.) The matter before this Court did not arise out of an individual dispute between an employee and an employer. If anything, plaintiffs' attempt to inject such disputes into the litigation, at this late juncture, fittingly illustrates why this Court should vacate Supreme Court's order to prevent a judgment that is unreviewable for mootness from spawning unintended legal consequences. *See Matter of Hensley v. Williamsville*

Cent. Sch. Dist., 206 A.D.3d 1655, 1657 (4th Dep't 2022); *Matter of Pharaohs GC, Inc. v New York State Liq. Auth.*, 197 A.D.3d 1010, 1011 (4th Dep't 2021); *Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 A.D.3d 1557, 1559 (4th Dep't 2021). If any of those disputes independently raise live controversies, the aggrieved parties may commence future civil actions for future courts to resolve.

12. With these comments, DOH expresses no opposition to plaintiffs' request for an order from this Court lifting its February 2023 stay pending appeal.

Dated: June 20, 2023
Albany, New York

JONATHAN D. HITSOUS