SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

In the Matter of the Application of

ROTH & ROTH, LLP

Petitioner,

-against-

TIMOTHY CURTIN, as Corporation Counsel of the City of Rochester, and CITY OF ROCHESTER,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION

Index No.: E2020009862

PRELIMINARY STATEMENT

Petitioner, a law firm out of New York City, brings this Article 78 proceeding to compel the City of Rochester to take any General Municipal Law § 50-h examinations only by virtual, rather than in-person, mean throughout the rest of the COVID-19 pandemic. Petitioner lacks standing to maintain this suit and, even if it had standing, the Verified Petition should be dismissed because the claims are not ripe and they fail on the merits.

STATEMENT OF FACTS

Beginning in March 2020, the State of New York and City of Rochester declared states of emergency related to the COVID-19 pandemic. *See* https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york; https://www.cityofrochester.gov/coronavirus/#Emergency_Proclamation_and_Local_Emergency_Order. These declarations of emergency remain in effect to this day. Since March 2020, the prevalence and severity of the coronavirus that causes COVID-19 has ebbed and surged at various times in Monroe County, as it has in different regions of New York State. *See* Monroe

County Daily COVID-19 updates at https://www.monroecounty.gov/health-COVID-19-archive; New York State Percentage Positive Results by Region Dashboard at https://forward.ny.gov/percentage-positive-results-region-dashboard. As infection rates and severity have fluctuated, New York State, through Governor Cuomo's executive orders, has issued various directives requiring social distancing, mask wearing and occupancy and cleaning standards for different business and facilities. *See* Governor Cuomo's Executive Orders 202.1 through 202.92 available at https://www.governor.ny.gov/executiveorders.

Throughout the COVID-19 Emergency, the City of Rochester's Law Department has continued to prosecute and defend the various litigations with which the City is involved. It has also continued to receive notices of claim filed pursuant to General Municipal Law § 50-e, and to notice examinations of claimants pursuant to General Municipal Law § 50-h. When undertaking depositions and 50-h examinations during the COVID-19 outbreak, City attorneys have determined on a case-by-case basis whether to conduct the examination in person, by virtual means, or in a hybrid fashion, where some participants attend in person while others attend virtually.

During this same period, petitioner—through its associate, Elliot D. Shields—has attended in-person depositions and 50-h examinations of clients that it represents against the City. In July of 2020, Mr. Shields attended three in-person depositions in the matter of *Casaccia v. City of Rochester, et al.*, 17-cv-6323 (WDNY). In October of 2020, Mr. Shields attended an in-person 50-h examination of Tobias Massey taken at Rochester City Hall.[1]

[1] In the Shields Affirmation submitted in support of the Verified Petition, Mr. Shields contends that, during the Massey 50-h examination, municipal attorney John Campolieto did not wear a mask properly. This allegation is false and is inconsistent with Mr. Shields' own prior actions and representations. As set forth in greater detail in the Campolieto Affirmation, submitted herewith, Mr. Campolieto wore his mask properly throughout the Massey 50-h examination, as

After October 2020, however, petitioner took the inflexible position that it would no longer attend in-person depositions or 50-h examinations and insisted that the City conduct all such examinations virtually. This decision, initially expressed in a November 6, 2020 letter from Mr. Shields to Deputy Corporation Counsel Patrick Beath, coincided with petitioner's filing of what would be dozens of notices of claim related to protests that took place in the City of Rochester during the summer of 2020. On November 6, 2020—the same day as the Shields letter objecting to in-person hearings—the City received 20 claims from petitioner. This was followed by another 13 claims received on December 2, 2020; 32 more on December 8; and another 32 on December 10. Claims have continued to come in from claimants represented by petition through late January 2021, presently totaling 111.

After receiving petitioner's November 6, 2020 letter requesting that all future 50-h examinations take place virtually, the City recognized the legitimate concerns expressed therein and informed Mr. Shields that it was willing to hold the in-person 50-h examinations at Alliance Court Reporting, which had spacious facilities and was following all COVID-19 social distancing, filtration and masking requirements. Deputy Corporation Counsel also invited Mr.

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did the other three individuals in the room. The room was also adequately sized at 9 feet by 15 feet, allowing sufficient room for all four individuals to keep at least 6 feet apart. Notably, according to the transcript, at no point during the examination did Mr. Shields—who interjected multiple times—ever raise any issue with the room size, ventilation or manner that anyone wore their masks. Further, in a November 6, 2020 letter to the undersigned, Mr. Shields directly the addressed the October 16 Massey 50-h examination, alleging that "one or more individuals in the room were not wearing their face masks properly." Tellingly, though the November 6, 2020 letter was addressed to the undersigned, who is Mr. Campolieto's supervisor, it did not identify Mr. Campolieto has having improperly worn his mask. In short, Mr. Shields' latent and self-serving claims in this matter that Mr. Campolieto did not wear his mask properly and that the room in which the Massey 50-h examination took place was too small appear to be outright falsehoods.

Shields to join him for a walkthrough of the Alliance Court Reporting facility. Mr. Shields did not accept that offer, choosing, instead, to commence this action. .

The City remains willing to negotiate on a case by case basis whether to conduct 50-h examinations in-person, remotely, or in a hybrid fashion in which some parties attend in person and others remotely depending on the circumstances, as it has done to date. In undertaking such a case-by-case determination, the City considers a number of factors, including (1) the availability of appropriate facilities for in-person examinations; (2) the specific health situation of all who are to be present for the examination; (3) the availability of appropriate technology to those who are to be present for the examination; (4) whether there are other factors that would make a virtual examination undesirable.

One of the other factors that weigh against undertaking a virtual examination of claimants represented by petitioner, is the City's concern about the ethically questionable past conduct of Mr. Shields himself. In the recent past, there have been two occasions that gives the City reason to believe that petitioner and/or Mr. Shields may have acted unethically. The first concerns petitioner's representation of Tameshay Prude before the Monroe County Surrogate's Court and the Western District of New York regarding the administration of the Estate of Daniel Prude; the second concerns Mr. Shields' inappropriate and unauthorized direct communications with City Officials concerning matters that he is presently prosecuting against the City.

As to petitioner's representation of Tameshay Prude, filings in the federal civil rights action brought by the Prude Estate in the Western District of New York indicate that Ms. Prude made material misrepresentations before the New York Surrogate's Court in her application to have letters of administration issued to her. Ms. Prude was represented by the petitioner, and in particular Mr. Shields, in the Surrogate's Court action and in the federal action.

Specifically, two of Daniel Prude's children, Tashyra and Junera Prude, moved to intervene in the federal action, arguing that Tameshay Prude—Daniel Prude's sister—had falsely indicated in her petition before the Surrogate's Court that Daniel Prude had no children. Petitioner opposed this motion, arguing that Tameshay Prude was the proper administrator and that there was no basis for the intervention. In reply, the intervenors pointed to additional facts known to Tameshay Prude and to her counsel, the petitioner here, that, at the time that Tameshay Prude and petitioner filed papers in the Surrogate's Court denying that Daniel Prude had any offspring, they were in fact aware that Junera and Tashyra Prude were his children. Copies of papers in the federal intervention motion are annexed to the Beath Affirmation, provided herewith.

While the intervention motion of Tashyra and Junera Prude was pending in the federal action, Tameshay Prude was removed as estate administrator by the Surrogates Court due to her misrepresentations, and another child of Daniel Prude, Nathaniel McFarland, was issued letters of administration. Thereafter, Nathaniel McFarland sought to be substituted as the plaintiff in the federal civil rights matter in place of Tameshay Prude. Mr. McFarland's intervention motion, like the intervention motion earlier filed by Tashyra and Junera Prude, avers that Tameshay Prude had "falsely listed decedent's father as the only surviving distributee" when, in fact, Daniel Prude had been survived by five children. *See* Affirmation of Stephen G. Schwarz, annexed to the Beath Affirmation as Exhibit D. The federal court, thereafter, substituted Mr. McFarland for Ms. Prude as plaintiff in that action.

Given the foregoing, respondents in the instant matter are concerned that, in the context of their representation of Tameshay Prude, petitioner Roth & Roth, LLP, and its associate, Mr. Shields, appear to have engaged in unethical behavior. At a minimum, they failed to engage in

appropriate diligence before filing papers with the Surrogate's Court and Western District of New York; at worst, they knowingly filed papers containing material factual misrepresentations.

Petitioner's representation of Tameshay Prude is not the only instance of questionable ethics that gives the City pause. In October of 2020, the undersigned learned that Mr. Shields had had direct email communication with a Rochester City Councilmember concerning a number of cases that Mr. Shields was then actively litigating against the City. On October 15, 2020, the undersigned emailed Mr. Shields, summarizing the City's concerns that his communications with a City Councilmember about litigation that petitioner had brought against the City, without first obtaining permission from the Corporation Counsel for such communications, was a plain violation of Rule 4.2 of New York's Rules of Professional Conduct. *See* Email Correspondence of October 15, 2020, annexed to the Beath Affirmation as Exhibit E. Mr. Shields, in response to the undersigned's October 15, 2020 email, was unapologetic about his improper communications. Consequently, the undersigned filed a formal grievance about Ms. Shields' conduct with the Appellate Division.

Based on the foregoing, respondent City has serious concerns about the seemingly unethical conduct of petitioner and its associate Mr. Shields. In light of this, and in the context of a virtual 50-h examination, the City is concerned that Mr. Shields may have inappropriate communications with his client which the City attorney will not be able to discern because a fully virtual examination limits what is available to be seen by the examiner. This concern of coaching by Mr. Shields is assuaged where the 50-h examination is held in person, and the examiner can see and hear whether claimant and counsel are conferring and can see whether claimant is reading from a phone or other device.

In short, there are many reasons why the parties might decide to hold a 50-h examination in person, virtually, or in hybrid fashion with some individuals appearing in person and others

virtually. The City has been and remains willing to discuss the appropriate manner of taking a 50-h examination on a case by case basis, but is unwilling to agree to conduct all further 50-h examinations by virtual means through the remainder of the COVID-19 pandemic.

For the reasons set forth below, plaintiff's application for an Order directing that the City conduct all 50-h examinations for the remainder of the pandemic by virtual means should be denied.

ARGUMENT

I. Petitioner Does not Have Standing to Maintain This Suit

Petitioner, a law firm, is not, in this suit, representing a claimant who has filed a claim against the City. Rather, petitioner files this matter on its own behalf, and represents itself. But petitioner, itself, has not filed a claim against the City or been noticed to sit for a 50-h examination. In short, petitioner does not have a stake in the proposed remedy because it is not, itself, a claimant against the City and, therefore, will not be noticed to attend an in-person 50-h examination. Because petitioner does not have a legal interest in the remedy that it seeks, it is without standing to maintain this proceeding.

To have standing, the petitioner must be able to demonstrate the existence of an injury in fact. "The existence of an injury in fact -- an actual legal stake in the matter being adjudicated -- ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution'" (*Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991][quoting *Schlesinger v Reservists Comm. to Stop the War*, 418 US 208, 220-221 [1974]]). "To this essential principle of standing, the courts have added rules of self-restraint, or prudential limitations: a general prohibition on one litigant raising the legal rights of another; a ban on adjudication of generalized grievances more appropriately

addressed by the representative branches; and the requirement that the interest or injury asserted fall within the zone of interests protected by the statute invoked" (*id.* at 773).

Here, petitioner does just what the Court of Appeals says it cannot: it raises a claim that involves not its own legal rights, but "the legal rights of another"—the legal rights of the claimant, not the claimant's attorney. Said differently, the relief that petitioner seeks is outside of its zone of interests.

> "The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action. Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted"

(*Socy. of Plastics Indus.*, 77 NY2d at 773 [1991][citing *Lujan v National Wildlife Fedn.*, 497 US 871, 883 [1990]]). It is the claimant alone who is directed by the City to attend an in-person 50-h examination. The General Municipal Law makes no provision concerning the attorneys of the claimant. Accordingly, there is no reason that petitioner, as the claimant's attorney, could not virtually attend a 50-h hearing where the City and the claimant appear in person.[2] Petitioner, therefore, faces no injury in fact when a claimant represented by petitioner[3] is noticed to undergo an in-person 50-h examination as petitioner may still attend the examination virtually.

[2] The City would not object to an arrangement whereby petitioner virtually attends an in-person 50-h examination between the City and the claimant who petitioner represents. Because the claimant would be present in person the City's ethical concerns would be minimized because they could observe whether claimant was communicating with petitioner by phone or other device during the examination.

[3] That petitioner lacks standing is made clearer when one considers that the relief petitioner requests is not limited to 50-h examinations of claimants who are represented by the petitioner. Rather, petitioner asks this Court to restrain the City from taking in-person 50-h examinations of any claimant during the pendency of the COVID pandemic. It cannot be more clear that

Because petitioner's claim addresses the interests of claimants and potential claimants, not their attorneys, and because petitioner has experienced no injury in fact as a result of the City noticing in-person 50-h examinations of petitioner's clients, petitioner lacks standing and this matter should be dismissed.

II. Petitioner's Claims are Not Ripe

Even if petitioner had standing to bring this proceeding, its claims are not ripe. "Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. In the context of challenges to administrative action, the concepts of finality and ripeness are closely related, such that for an administrative determination to be final, and thus justiciable, it must be ripe for judicial review" (*Matter of Vil. of Kiryas Joel v County of Orange*, 181 AD3d 681, 685 [2d Dept 2020][internal citations and quotations omitted]). "Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract" (*NY State Inspection, Sec. & Law Enforcement Emples., Dist. Council 82 v Cuomo*, 64 NY2d 233, 240 [1984]).

Here, the matter is not ripe because the City has not yet noticed 50-h examinations of the great majority of claimants represented by petitioner and because the future impacts of the COVID-19 pandemic on the ability to hold in-person examinations is speculative.

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petitioner does not have standing to seek this relief on behalf of claimants and claimants-to-be with whom petitioner has no relationship nor, indeed, even any knowledge of their existence.

According to the materials submitted by petitioner, only two individual claimants, Alyssa Sadwick and Mary Adams (neither of whom is a party to this matter), have been noticed for 50-h examinations. Pursuant to the General Municipal Law, the City is to notice any 50-h examinations within 90 days of receipt of a claim, and the examination is to take place within 90 days of the notice.[4] As such, it is possible that approximately six months could pass from the date that the claim is filed until the 50-h examination is taken. Further, as set forth in respondents' papers (and, to some extent, petitioner's) the severity of the COVID-19 outbreak has varied in the Rochester area over time, as has medical guidance and legal requirements concerning social distancing, indoor occupancy and face covering. Six months ago—on August 3, 2020—the 7-day average COVID-19 positivity rate in Monroe County was just 0.9% according to the Monroe County COVID-19 Dashboard (https://mappingmonroe.maps.arcgis.com/apps/opsdashboard/index.html#/217749730f174776a3896b3e8950e03b). Three months later, on November 3, 2020, it had risen to 2.3%, before spiking at 10.1% on January 2, 2021. Now, just one month later, that rate has fallen to 3.2%. Presumably this will fall at an even faster rate as more people are vaccinated against the coronavirus that causes COVID-19.

In sum, because the City has not yet noticed 50-h exams for most of the claims filed by petitioners, and because, due to the changeable nature of the pandemic "the harm sought to be enjoined is contingent upon events which may not come to pass," petitioners' claims are not ripe and should be denied.

[4] The parties may also agree to extend these timelines.

III. By Noticing In-Person 50-h Examinations, The City Has Not Failed to Perform a Duty Enjoined By Law

Petitioner's first claim contends that, by noticing in-person 50-h examinations, the City has "failed to perform a duty enjoined upon it by law." The laws that plaintiff contends enjoin upon the City a duty to take 50-h examinations by virtual means only are Governor Cuomo's Executive Orders, Chief Judge DiFiore's Directives and the Operating Protocols of the Seventh Judicial District. Plaintiff points to no portion of any of these purported bodies of law that address the noticing or taking of 50-h examinations.

> "Inasmuch as plaintiffs seek to test the action or inaction of a public officer, their sole available remedy lies . . . in a CPLR article 78 proceeding seeking mandamus to compel. Mandamus is available, however, only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law. Thus, mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial. A discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."

(*NY Civ. Liberties Union v State*, 4 NY3d 175, 183-184 [2005]). Here, petitioner altogether fails to point to anything in the Governor's executive orders that would require the City to take 50-h examinations by virtual means only. And the other two purported bodies of law—the Directives of the Chief Judge and the Operating Protocols of the Seventh Judicial District—govern operations of the Unified Court System. A 50-h examination is taken pursuant to the General Municipal Law pre-suit, before the jurisdiction of the Seventh Judicial District has been invoked. As Court of Appeals Judge Fahey recently observed:

> "The purpose of an oral examination conducted pursuant to section 50-h, otherwise known as a '50-h hearing,' is to grant municipal defendants a protection that private tort defendants generally are not afforded: to examine the allegedly injured individual with respect to the claim before an action is commenced. The 50-h hearing allows the municipal defendant an opportunity to early

> investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement"

(*Colon v Martin*, 35 NY3d 75, 83 [2020][Fahey, J., concurring][internal quotations and citations omitted]). Accordingly, the Chief Justice's Directives and the Operating Protocols of the Seventh Judicial District do not govern the noticing or taking of 50-h examinations.

By noticing in-person 50-h examinations the City has not failed to perform a duty enjoined on it by law.

IV. The City's Decision To Notice In-Person 50-h Examinations of Claimants Represented by Petitioner is Not Arbitrary and Capricious or an Abuse of Discretion

In determining whether an administrative action is arbitrary and capricious or an abuse of discretion under Article 78, the court employs an "extremely deferential" standard:

> "The courts cannot interfere with an administrative tribunal's exercise of discretion unless there is no rational basis for its exercise or the action complained of is arbitrary and capricious, a test which chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact"

(*Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]). "Administrative action is irrational or arbitrary and capricious if it is taken without sound basis in reason or regard to the facts" (*Matter of Madison County Indus. Dev. Agency v State of NY Auths. Budget Off.*, 33 NY3d 131, 135 [2019]). Here, the City's choice to notice claimants represented by petitioner was not arbitrary and capricious nor was it an abuse of discretion.

First, as a general matter, an in-person examination is preferable to a remote deposition for a number of reasons. An in-person examination allows better observation of the witness to assess his or her credibility. It makes it easier to identify, authenticate and have the witness mark

documents. Taking the examination in person obviates the risk of technological glitches and ensures that there will not be any issue with the witness having access to the technology.

Second, current health guidelines and the Governor's emergency orders provide means to allow in-person examinations that present minimal health risk: physical distancing, occupancy limitations, wearing face coverings, employing filtration or ventilation. Indeed, numerous essential businesses have remained open throughout the entirety of the pandemic after implementing these protections, and most non-essential business have been able to operate throughout the majority of the pandemic. The City of Rochester implements these protections by taking in-person depositions at Alliance Court Reporting. Although petitioner originally insisted on these protections in the November 6, 2020 letter from Elliot Shields, it later balked when the undersigned indicated that Alliance Court Reporting met these criteria—suggesting that it is this petitioner's arguments in this proceeding that are arbitrary and capricious, not the City's noticing of in-person 50-h examinations.

Third, the City has serious ethical concerns about petitioner and Mr. Shields' past conduct, which makes the City more hesitant still to agree to virtual 50-h examinations of claimants represented by petitioner. Those ethical concerns are set forth in the fact section above and in the Affirmation of Patrick Beath, submitted herewith.

Finally, the City is willing to take virtual 50-h examinations where appropriate. Indeed, in November the undersigned took a 50-h examination of another claimant concerning a claim related to the May 30, 2020 protest that took place in the City of Rochester. The City initially noticed the claim to take place in person, then agreed to schedule it remotely after learning about claimant's health concerns and the fact that claimant's attorney was based in California. The decision whether or not to conduct a virtual 50-h examination should be based on the facts in play at the time of service of the notice and taking of the examination.

In sum, petitioner cannot demonstrate that the City's noticing of in-person 50-h examinations is arbitrary and capricious or an abuse of discretion.

CONCLUSION

For the foregoing reasons, respondents request that the Court enter judgment dismissing the Verified Petition, and granting respondents such other relief as the Court deems just.

DATED: February 3, 2021

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BY: /s/

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