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ELLIOT DOLBY-SHIELDS
192 Lexington Avenue, Suite 802
New York, NY 10016

Roth & Roth LLP

Curtin, Timothy
CITY OF ROCHESTER

Total Fees Paid: \$0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
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JAMIE ROMEO

MONROE COUNTY CLERK



SUPREME COURT OF THE 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.

INDEX NO.: E2020009862

REPLY AFFIRMAITON IN
FURTHER SUPPORT OF
PETITION

ELLIOT D. SHIELDS, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am associated with the law firm ROTH & ROTH, LLP, and I am fully familiar with the facts and circumstances surrounding the within matter based on the files maintained in my office and our investigation of the within incident.

2. I submit this Affirmation in reply to Respondent’s opposition and in further support of the within Petition.

3. First, this motion was made after we repeatedly requested that the City of Rochester agree that, for the time being due to the COVID-19 pandemic, all 50h hearings be conducted safely—meaning virtually, as there is no way to ensure that the virus is not spread when multiple people are in an enclosed room.

4. We sent two letters to the Corporation counsel asking that the City comply with the executive and judicial orders. The City refused and insisted that their vendor, Alliance Court Reporting, has “spacious” offices, and so the risk of transmission would be minimal.

5. The fact is that the only way to ensure zero risk of transmission is to conduct the 50-h hearings virtually. Notably, Alliance Court Reporting offers virtual videoconferencing for depositions and 50-h hearings. (See: <https://www.alliancecourtreporting.net/services.html>).

6. After we sent the two letters on November 6, 2020 and November 17, 2020 (Exhibits “G” and “A” to the Petition), the petition was ripe, and we filed this action to protect the health and safety of all claimants and attorneys, including attorneys from our office, the City and the County, court reporters and the general public.

7. On November 3, 2020, my office served approximately 20 Notices of Claim on behalf of individuals who were injured at protests following the deaths of George Floyd and Daniel Prude. Each of these notices of claim were filed jointly against the City of Rochester and the County of Monroe. (See, e.g., **Exhibit “A”**, Notice of Claim of Kevonna Buchanan).

8. On or about January 20, 2021, the County of Monroe served notices pursuant to General Municipal Law § 50-h to take the sworn testimony of each claimant for whom we served Notices of Claim on November 3, 2020. (See **Exhibit**

“B”, County Notices of 50-h hearing). The County agreed to conduct each hearing “virtual by video.” (*Id.*).

9. Every other government entity with whom our office has had 50-h hearings from around New York State throughout the pandemic has conducted them remotely. (*See* Exhibit “O” to the Petition).

10. Although it should not have been included in Mr. Beath’s papers, and violates my confidentiality rights pursuant to Judiciary Law § 90(10)—which only I can waive and I expressly do not waive—on October 15, 2020, Deputy Corporation Counsel Patrick Beath sent me an email accusing me of violating Rule of Professional Conduct 4.2. (Exhibit “E” to Beath affirmation, NYSCEF Doc. No. 39).

11. Without waiving any confidentiality herein, I disputed said claim and explained that the subject matter of his issue was protected speech under the First Amendment, which protects the rights of individuals, including attorneys, to communicate with elected officials regarding matters of public interest and concern. I attached a copy of a recent decision by Magistrate Judge Vera M. Scanlon of the United States District Court for the Eastern District of New York, which also involved alleged violations of Rule 4.2 by a partner in the firm, David Roth. In that case, Mr. Roth spoke to the president of the New York City Transit Authority about certain public safety issues that were tangentially related to claims being litigated in that case. (Scanlon decision is annexed hereto as **Exhibit “C”**).

12. Magistrate Judge Scanlon held that Mr. Roth’s communication with Mr. Byford was permitted by Rule 4.2(a):

“The rights to complain to public officials and to seek administrative and judicial relief from their actions are protected by the First Amendment.” *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002). Although “not all speech is of equal First Amendment importance,” *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758, 105 S. Ct. 2939, 2944 (1985), “speech on matters of public concern . . . is at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 562 U.S. 443, 451-52, 131 S. Ct. 1207, 1215 (2011) (internal quotation marks & citations omitted) (quoting *Dun*, 472 U.S. 749, 758-759, 105 S. Ct. 2939 (1985)); see *Ragbir v. Homan*, No. 18-1597, 2019 U.S. App. LEXIS 12348, at *30 (2d Cir. Apr. 25, 2019) (speech on matters of public concern “implicates the apex of protection under the First Amendment”). “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public[.]” *Snyder*, 562 U.S. at 453 (citations & internal quotation marks omitted).

13. To date, I have received no notice of any grievance.

14. 22 NYCRR 1240.7[c] requires that “[t]he Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint.”

15. 22 NYCRR 1240.7[d][1][i] states that, “[t]he Chief Attorney may, after initial screening, decline to investigate a complaint for reasons including but not limited to . . . the allegations, if true, would not constitute professional misconduct.”

16. If the Chief Attorney declines to investigate the complaint, then he or she shall provide a brief description of the disposition to both the complainant and the respondent; however, there is no time period within which the Chief Attorney is required to provide notice of any such disposition. (22 NYCRR 1240.7[d][1][iii]).

17. In his affirmation, Mr. Campolieto admits that “if at any time, due to the course of questioning, [my mask] slipped below my nose I immediately pulled it back up over my nose.” (NYSCEF Doc. No. 40, ¶ 3).

18. During the 50-h examination of Tobias Massey on October 16, 2020, Mr. Campolieto’s mask did in fact slip below his nose on numerous occasions throughout the hearing and he did not immediately pull it back over his nose. He may have immediately pulled it back over his nose after he noticed it, but I noticed that it was off his nose for much of the hearing as it was repeatedly slipping down, which made me uncomfortable.

19. Respondents do not deny in their papers that they in fact had an outbreak of COVID-19 in their offices in November 2020. This suggests that their attorneys and staff generally do not follow proper precautions.

20. It also demonstrates that even if they did follow proper COVID-19 precautions in their offices, as they claim, that proper precautions are not enough to prevent the person-to-person transmission of the virus. City Hall is a large and spacious building where its attorneys and staff should be able to properly socially distance. But they still fell victim to an outbreak of COVID-19.

21. Upon information and belief, Respondents attorneys are mostly working from home at this point, or at least with a limited capacity in office, on a rotating basis.

22. Pursuant to an executive order by Mayor Lovely Warren, the City is not accepting personal service of legal papers at this time due to the risk of person-to-person transmission of the COVID-19 virus.

23. Thus, Respondents have demonstrated that there is no safe way to conduct in-person 50-h hearings and have admitted by the Mayor's executive order that person-to-person contact, even for short periods of time, is unsafe.

24. A true and correct copy of this Court's December 18, 2018 holding in *Forsyth v. City of Rochester* is annexed hereto as **Exhibit "D"**.

25. A true and Correct copy of the December 28, 2019 Decision and Order by Justice James Pimpiano in *Roth & Roth, LLP v. City of Rochester, et ano.*, is annexed hereto as **Exhibit "E"**.

26. Lastly, Respondents and Mr. Beath should be sanctioned pursuant to 22 N.Y.C.R.R. 130-1.1 for advancing frivolous arguments to the Court that were primarily intended to harass and maliciously injure me, as explained in the memorandum of law submitted herewith.

WHEREFORE, Petitioner respectfully request that this Court issue an order:

- a) Granting the Petition in its entirety;
- b) Sanction Respondents and Patrick Beath pursuant to 22 NYCRR §130-1.1 for engaging in frivolous conduct; and
- c) Award such other and further relief as this Court may deem just and proper.

Dated: New York, New York
February 6, 2021

~//s//~

ELLIOT D. SHIELDS