

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	)	Civil Action
Plaintiff,	)	No. 13-4165 (NGG)
vs.	)	
STATE OF NEW YORK,	)	
Defendant.	)	CIVIL HEARING
-----	)	Brooklyn, New York
RAYMOND O'TOOLE, et al.,	)	Date: March 22, 2017
Plaintiffs,	)	Time: 11:00 a.m.
vs.	)	
ANDREW M. CUOMO, in his	)	
official capacity as Governor	)	Civil Action
of the State of New York, et	)	No. 13-4166 (NGG)
al.,	)	
Defendants.	)	

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TRANSCRIPT OF CIVIL HEARING  
HELD BEFORE  
THE HONORABLE JUDGE NICHOLAS G. GARAUFGIS  
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

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	-and-
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(Appearances continued on next page)

COURT REPORTER: Annette M. Montalvo, CSR, RDR, CRR  
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## 1 APPEARANCES: (Cont'd)

2

3 For the Defendant Matthew J. Lawson, Esq.  
4 State of New York Jason Brown, Esq.  
5 in Case No. 13-CV-4165 Kent T. Stauffer, Esq.  
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8 For the Plaintiff Class Andrew Gordon, Esq.  
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13 -and-  
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(Appearances continued...)

## 1 APPEARANCES: (Cont'd)

2 Jeffrey Richard Senter, Esq.  
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7 in Case No. 13-CV-4166: 518-527-1918

8  
9  
10 ALSO PRESENT:

11 Robert L. Begleiter, Esq., Constantine Cannon LLP  
12 Howard A. Zucker, M.D., J.D.,  
Commissioner of Health for the State of New York  
13 Faith Masterson, Paralegal,  
Paul, Weiss, Rifkind, Wharton & Garrison, LLP  
14 Alphonso B. David, Esq.  
Michael Bass, Esq.  
15 Paul Francis  
Ann Marie Sullivan  
16 Mark Noordsy

17  
18  
19  
20 Proceedings reported by machine shorthand, transcript produced  
21 by computer-aided transcription.

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22 Court Reporter: Annette M. Montalvo, CSR, RDR, CRR  
23 Official Court Reporter  
24 United States Courthouse, Room N375  
25 225 Cadman Plaza East  
Brooklyn, New York 11201  
718-804-2711

1 (Open court.)

2 COURTROOM DEPUTY: All rise.

3 THE COURT: Please be seated in the back. Everyone  
4 at the tables may stand.

5 COURTROOM DEPUTY: Civil cause for a Hearing.  
6 Counsel, please state your appearances.

7 MR. GOLDBERGER: Good morning, Your Honor.  
8 Michael Goldberger, Assistant United States Attorney, for  
9 the United States.

10 MS. DERMODY: Good morning, Your Honor. Eliza  
11 Dermody from the Department of Justice.

12 MR. ZUCKER: Good morning. Cliff Zucker,  
13 Disability Rights of New York, for the plaintiff class.

14 MR. SENTER: Jeff Senter for the Urban Justice  
15 Center, for the plaintiff class.

16 MS. MATHIS: Jennifer Mathis, Bazelon Center for  
17 Mental Health Law, for the plaintiff class.

18 MS. MUELLER: Roberta Mueller, New York Lawyers  
19 for the Public Interest, for the plaintiff class.

20 MS. MASTERSON: Faith Masterson. I'm a paralegal  
21 at Paul Weiss.

22 MR. O'LOUGHLIN: Robert O'Loughlin from Paul  
23 Weiss, for the plaintiff class.

24 MS. LOEWENSTEIN: Nina Loewenstein, Disability  
25 Rights of New York, for the plaintiff class.

1 MS. BORGMANN: Jota Borgmann, MFY Legal Services,  
2 for the plaintiff class.

3 MR. CHEPIGA: Geoff Chepiga, Paul Weiss, for the  
4 plaintiff class.

5 MR. GORDON: Andrew Gordon, Your Honor, Paul  
6 Weiss, for the plaintiff class.

7 THE COURT: Thank you.

8 MR. LAWSON: Matthew Lawson, Assistant Attorney  
9 General with the New York State Office of the Attorney  
10 General.

11 MR. BROWN: Jason Brown, Chief Deputy of the New  
12 York Attorney General's office.

13 MR. STAUFFER: Kent Stauffer, Executive Deputy  
14 Attorney General.

15 THE COURT: Please be seated.

16 Let me just start by asking the defense whether it  
17 has received the letter from Mr. Gordon, dated March 21st,  
18 2017, that was filed last night.

19 MR. BROWN: We have, Your Honor.

20 THE COURT: And let me ask Mr. Stauffer --

21 MR. STAUFFER: Yes, Your Honor?

22 THE COURT: -- you're the only one who's going to  
23 speak for the state. You're it. I'm not hearing from  
24 anybody else today. I don't care. You sent me the  
25 affidavit. You're going to speak for the state, because I

1 don't know what's going on.

2 MR. STAUFFER: Well, respectfully, Your Honor --

3 THE COURT: Excuse me. I'm not finished.

4 MR. STAUFFER: Sorry.

5 THE COURT: I'm going to read to you from the  
6 transcript of the last proceeding, so you have an  
7 understanding of why I'm not going to hear from this  
8 gentleman over here.

9 But let me start with this. Are the following  
10 people here? Alphonso B. David, is he here?

11 MR. DAVID: Yes, Your Honor. I'm here.

12 THE COURT: Thank you.

13 MR. DAVID: You're welcome.

14 THE COURT: Paul Francis, is he here?

15 MR. FRANCIS: Yes, Your Honor.

16 THE COURT: Thank you.

17 Keith Starlin, is he here?

18 MR. BROWN: Because he's a witness, he's outside  
19 the courtroom, Your Honor.

20 THE COURT: All right.

21 Howard A. Zucker?

22 MR. ZUCKER: Yes, Your Honor. I'm here.

23 THE COURT: Michael Bass?

24 MR. BASS: Yes, Your Honor.

25 THE COURT: Ann Marie Sullivan?

1 MS. SULLIVAN: Yes, Your Honor.

2 THE COURT: And Mark Noordsy?

3 MR. NOORDSY: Yes, Your Honor.

4 THE COURT: Thank you.

5 I think the best place to start is at the  
6 beginning. I don't quite understand how we've gotten where  
7 we are today. I also see that the Solicitor General is  
8 here. She was here at the beginning, too.

9 I welcome you, ma'am.

10 The State Attorney General has made a motion to  
11 withdraw as counsel in this case, correct?

12 MR. STAUFFER: Yes. Correct, Your Honor.

13 THE COURT: In order to place the Attorney  
14 General's motion to withdraw as counsel in its proper  
15 context, I believe it would be useful for me to briefly  
16 document the long history of this complex litigation,  
17 particularly in view of the fact that there are so many  
18 quote, players, in this situation who weren't here at the  
19 beginning or the middle.

20 In 2002, the *New York Times* featured a series of  
21 articles on the deplorable condition in many New York City  
22 adult homes. The articles documented the dangerously poor  
23 care afforded residents, the vermin and squalor present in  
24 the facilities and the mismanagement of residents' funds  
25 entrusted to administrators. The investigative journalist

1 who wrote these stories, Clifford J. Levy, was awarded a  
2 Pulitzer Prize in 2003 for reporting on this subject.

3 In 2003, Disability Advocates, Inc. brought a suit  
4 to vindicate the rights of individuals with mental illness  
5 residing in or at risk of entry into New York City adult  
6 homes. The lawsuit named as defendants the governor of New  
7 York, the New York Department of Health and the New York  
8 Office of Mental Health, and the commissioners of DOH and  
9 OMH, whom I will refer to collectively as the "state  
10 defendants" or "the state."

11 The Office of the Attorney General began its  
12 representation of the state defendants in 2003, when this  
13 lawsuit was filed. Following years of litigation, including  
14 extensive discovery, multiple expert reports and a five-week  
15 bench trial, during which 29 witnesses testified, more than  
16 300 exhibits were admitted into evidence and the excerpts  
17 from the deposition transcripts of 23 additional witnesses  
18 were entered into the record.

19 The Court issued a 210-page Memorandum and Order,  
20 setting forth findings of fact and conclusions of law. The  
21 Court found that the state had violated the Americans With  
22 Disabilities Act of 1990 and the Rehabilitation Act by  
23 failing to serve adult home residents in the most integrated  
24 setting appropriate for their needs.

25 The Court gave the state an opportunity to submit



1 a proposed remedy to address these civil rights violations.  
2 Finding the state's proposal to be egregiously deficient,  
3 the Court subsequently adopted the plaintiff's remedial  
4 proposal with minor modification and over the state's  
5 objections, appointed a court monitor to oversee the  
6 implementation of the remedy.

7 The state appealed, and in April 2012, the Second  
8 Circuit vacated the Court's decision after determining that  
9 Disabilities Advocates, Inc. lacked associational standing.  
10 The Second Circuit noted, however, that the United States  
11 would have standing to sue the defendants on the same  
12 underlying claims, should it choose to pursue the matter.

13 The Court of Appeals expected that should the  
14 United States or individual plaintiffs with standing refile  
15 the action, the undersigned -- meaning this Court -- would  
16 preside over that new case, noting the following in its  
17 decision: Quote, we are not unsympathetic to the concern  
18 that our disposition will delay the resolution of this  
19 controversy and impose substantial burdens and transaction  
20 costs on the parties, their counsel and the courts. Should  
21 that situation arise, we are confident that the experienced  
22 and able district judge, as a consequence of his familiarity  
23 with the prior proceedings, can devise a way to lessen those  
24 burdens and facilitate an appropriate, efficient  
25 disposition, end quote.

1           On July 23, 2013, the United States filed an  
2 enforcement action against the state of New York for failing  
3 to provide individuals with mental illness residential  
4 opportunities in the, quote, most integrated setting, end  
5 quote, suited to their needs as required by the Title II of  
6 the Americans With Disabilities Act of 1990, Section 504,  
7 and Section 504 of the Rehabilitation Act, and their  
8 implementing regulations as interpreted in *Olmstead v. LC*,  
9 527 US 581, 1999.

10           A group of adult home residents simultaneously  
11 filed an action on behalf of themselves in a class of  
12 individuals with serious mental illness who reside in 23,  
13 quote, impacted adult homes, end quote, in New York City,  
14 against the governor of New York, DOH, OMH, and the  
15 commissioners of each of these agencies, seeking injunctive  
16 and declaratory relief on the same grounds. The two cases  
17 were consolidated and assigned to this Court. The Attorney  
18 General of the state of New York represents the state  
19 defendants in this consolidated action. The parties  
20 immediately filed a joint proposed Stipulation and Order of  
21 Settlement.

22           On November 20, 2013, the Court certified the  
23 class as, quote, all individuals with serious mental illness  
24 who reside in impacted adult homes in New York City with a  
25 certified capacity of 120 or more beds and a mental health

1 census of 25 percent or more of the resident population or  
2 25 persons, whichever is less, end quote.

3           On March 17th, 2014, after ordering two separate  
4 revisions of the agreement and conducting a fairness  
5 hearing, the Court "so ordered" the amended Stipulation and  
6 Order of Settlement. The Attorney General signed the  
7 settlement agreement on behalf of the state defendants, and  
8 has since represented the state defendants in their  
9 implementation of the settlement agreement.

10           Clarence Sundram, an experienced disability rights  
11 advocate, was appointed to serve as the independent  
12 reviewer, and is tasked with monitoring implementation of  
13 the settlement agreement.

14           At the fairness hearing, the Court heard from  
15 numerous individuals, and I'd like to read for your benefit,  
16 for those of you who were not present at that hearing, the  
17 statement of one of the speakers.

18           Speaker Number 117, quote, I'd like to speak about  
19 what I miss the most about living on my own. I miss my  
20 recliner where I used to sit in Sunnyside, Queens. I would  
21 sit, watch my TV, eat Chinese food takeout and sit with my  
22 cats.

23           I miss cooking. I miss skirt steak in my toaster  
24 oven. I miss hot chocolate in my microwave. I miss the  
25 spoonful of ice cream every now and then from my big fridge

1 that I bought for myself. I miss so many things.

2 I miss cut flowers that I could afford to buy  
3 every now and then. There's so many things that I miss.  
4 And it's something that I want again. With support, I think  
5 I can do that. I had a rent-stabilized apartment and lost  
6 it in the fire. And that led me to being where I am, and I  
7 feel stuck. And with support, I think I can go back to  
8 being where I was. And I'd like the opportunity to do that.  
9 Thank you.

10 And there were many other statements of that type  
11 during the fairness hearing.

12 Now, under the settlement agreement, the state  
13 agreed to take various steps to assist adult home residents  
14 who desire to transition out of impacted adult homes and  
15 into supported housing in the community. The state must  
16 provide a minimum of 2000 supported housing units for  
17 current adult home residents and any additional units that  
18 are necessary.

19 Adult home residents have the opportunity to  
20 undergo individual assessments to evaluate their eligibility  
21 for supported housing, identify housing in the most  
22 integrated setting appropriate for their needs, and  
23 determine what mental health services they would need in  
24 this setting.

25 To help adult home residents make an informed

1 decision about whether to move, supported housing providers  
2 conduct, quote, in-reach, unquote, to explain the benefits  
3 of supported housing, detail the options available and  
4 address any concerns. Eligible residents who choose to  
5 transition into supported housing or other housing that is  
6 appropriate to their needs receive services to aid with  
7 their move and transition into the community. The  
8 settlement agreement does not require any individual to move  
9 or undergo assessment against his or her will.

10           The settlement contains certain milestones that  
11 the state must meet. By the end of the fourth year of the  
12 agreement, the state must have assessed at least 2500 adult  
13 home residents and if appropriate, have transitioned those  
14 who desire into supported housing. By the end of year five,  
15 the state must provide all class members the opportunity to  
16 move into supported housing.

17           The deadline for the four-year milestone is fast  
18 approaching in July 2017, and the state is far from hitting  
19 its numbers. According to the last quarterly report filed  
20 by the state on December 22nd, 2016, the state had assessed  
21 1,545 class members, and as of the last status conference  
22 held on February 22nd, 2017, the state had transitioned only  
23 472 residents from impacted adult homes to supported  
24 housing.

25           And I'm advised that -- by Mr. Sundram, that

1 number is approaching five hundred, as of today.

2 The settlement agreement also references certain  
3 regulations that were promulgated by the Department of  
4 Health and the Office of Mental Health in 2013, after the  
5 Second Circuit vacated the decision in the DAI 1 case.

6 And in advance of the United States and the class  
7 plaintiffs filing the second iteration of the case in DAI 2,  
8 the regulations provide that: One, adult homes with  
9 certified capacity of 80 or more and a mental health census  
10 of 25 percent or more of the resident population shall not  
11 increase the mental health census of the facility, i.e.,  
12 shall not admit additional individuals with serious mental  
13 illness; and two, psychiatric inpatient units of hospitals  
14 and freestanding psychiatric facilities licensed by the  
15 Office of Mental Health shall not discharge individuals with  
16 serious mentality illness to adult homes whose mental health  
17 census is 25 percent or more.

18 Pursuant to the settlement agreement, if  
19 enforcement of these regulations is enjoined by a Court or a  
20 Court finds the regulations to be invalid, the parties must  
21 meet and confer in good faith at least three times during a  
22 period of 120 days after such court order, to determine  
23 appropriate modifications to the settlement agreement. If  
24 at the end of the 120-day period, the parties cannot agree  
25 on modifications to the settlement agreement, the agreement

1 becomes null and void.

2           Several actions have been filed challenging the  
3 regulations, including *Residents and Families United to Save*  
4 *Our Adult Homes versus Zucker*, which is before this Court,  
5 which was removed to this Court, and also the following  
6 state court actions: *Oceanview Home For Adults, Inc. V.*  
7 *Zucker*, in Albany; *Hedgewood Home for Adults v. Zucker* in  
8 Dutchess County, and *John Doe v. Zucker*, in Albany County.

9           Until recently, the Attorney General represented  
10 the state defendants in these actions. It is my  
11 understanding that the Attorney General has withdrawn from  
12 its representation of the state agencies in the state court  
13 cases.

14           Now, that's out of my control, but the Attorney  
15 General is still counsel for the state defendants in this  
16 case before me, including residents and families. One of  
17 these state court actions is of particular importance to  
18 today's hearing, *John Doe v. Zucker*.

19           John Doe, an individual with serious mental  
20 illness and a former resident of the Oceanview Manor Adult  
21 Home, transitioned to supported housing and now wishes to  
22 return to the adult home. Doe filed an action against  
23 Howard Zucker, M.D., in his official capacity as  
24 Commissioner of the Department of Health, and Ann Marie  
25 Sullivan, M.D., in her Official Capacity as Commissioner of

1 the Office of Mental Health, challenging the regulations  
2 which limit admission of individuals with serious mental  
3 illness into certain adult homes.

4 On February 14th, 2017, Doe filed a motion for a  
5 preliminary injunction, requesting that the state court  
6 enjoin enforcement of certain regulations which are  
7 referenced in the DAI settlement agreement. Two days later,  
8 on February 16th, 2017, Judge Hartman of the State Supreme  
9 Court in Albany, entered a temporary restraining order  
10 enjoining enforcement of the regulations pending a  
11 determination on the Motion for a Preliminary Injunction.

12 None of the parties to the John Doe action  
13 informed this Court of the development in the state court at  
14 the time that it occurred; however, on its own initiative,  
15 this Court held a hearing with the DAI parties to discuss  
16 consequences of the TRO on the settlement agreement in the  
17 case that is before this Court.

18 At the hearing, a representative of the Attorney  
19 General's office informed the Court that the Department of  
20 Health and the Office of Mental Health -- who were  
21 represented by the Attorney General's office at the time of  
22 the hearing before the state judge in Albany -- had  
23 consented to the entry of the Temporary Retraining Order.

24 Kent T. Stauffer, Executive Deputy Attorney  
25 General for State Counsel, has since submitted a declaration



1 which documents the events surrounding the TRO hearing. At  
2 today's hearing, we will examine some of those events more  
3 closely.

4           Entry of the TRO triggered Section 0 of the  
5 settlement agreement in this case. Accordingly, the parties  
6 in DAI are now in a 120-day period, where they must meet and  
7 confer in good faith and work to make appropriate  
8 modification to the settlement agreement. This is a  
9 critical time in the present litigation. If the parties do  
10 not reach an agreement on the modifications, the settlement  
11 agreement becomes null and void.

12           The Court has set a date for a new trial, July  
13 10th, 2017, but is cautiously optimistic that the parties  
14 will come to an agreement, avoiding the need for a trial  
15 which would, in fact, be largely duplicative of the one held  
16 in 2009.

17           The Department of Health and the Office of Mental  
18 Health consented -- consented to the entry of a  
19 five-month-long temporary restraining order, which put this  
20 settlement agreement in jeopardy and has also prompted the  
21 Attorney General to file a motion to withdraw as counsel for  
22 the state defendants.

23           With that important background setting the stage  
24 for further steps here today and after today, I'm going to  
25 turn to the plaintiffs, and I'm going to start with Mr.

1 Gordon.

2 MR. GORDON: Thank you, Your Honor.

3 Let me start by saying why I'm here. As Your  
4 Honor knows, in ten years of litigation, I have not been  
5 here all that often, allowing other more junior people in  
6 our office to handle a lot of the work, but --

7 THE COURT: Let me just say this. The people who  
8 did the work, who did the trial and have been involved in  
9 this case from Paul Weiss, working pro bono, have done an  
10 excellent job and I've complimented them repeatedly.

11 And I would say that, generally speaking, until  
12 this turn of events, the attorneys for all the parties have  
13 done a creditable job, but what's happened now is a  
14 completely new situation.

15 MR. GORDON: Well, that's why I'm here, Your  
16 Honor.

17 I don't even know how to catalog my outrage. I  
18 mean, whether it's the Court's efforts, Paul Weiss' efforts  
19 over the last ten years, whether it is the fact that it  
20 appears that a federal order of this Court has been ignored,  
21 whether it is the fact that the Department of Health and the  
22 Office of Mental Health -- who are charged with protecting  
23 one of the most vulnerable populations -- appears to be in  
24 cahoots with the adult home industry. I don't even know  
25 where to start, Your Honor.

1           And we thought long and hard about submitting that  
2 letter yesterday. I don't take things lightly. In twenty  
3 years of practice, I haven't seen as much as a lot of people  
4 in this room, but I've seen enough. I've never accused an  
5 adversary of misrepresentation. I've never used the words  
6 "fraud on the Court" in a letter, but we have a problem  
7 here, Your Honor. And let me tell you what we know, tell  
8 you what we don't know, and how we think we need to proceed,  
9 longer term.

10           On Monday, we received a document production from  
11 both Mr. Sherrin, who is one of the defense counsel in the  
12 residents' case and from the state. And I'd like to just  
13 briefly review the chronology of what those documents show,  
14 so you know what we know.

15           On November 3rd, Mr. Sherrin sent Mr. Bass a  
16 letter. He had already filed the Oceanview case. It's one  
17 of the oddest letters I've ever seen in private practice  
18 because -- and I think Mr. Sherrin admits it -- he says,  
19 while an attorney does not usually telegraph his or her game  
20 plan to opposing counsel, I'm doing so here. And he makes  
21 it clear that his plan is to challenge the regulations by  
22 finding various plaintiffs, including plaintiffs who have  
23 left a home, gone into supported housing and now want to get  
24 back, in bringing actions against the state.

25           So Your Honor, when you were told last time by the

1 state that they were seeing a specific set of facts that the  
2 state was seeing for the first time, Mr. Sherrin had told  
3 the state on November 3rd exactly what he was going to do,  
4 which was to bring actions challenging adult home residents  
5 who had left, had gone into supported housing and had come  
6 back.

7           By November 6th, three days after receiving this  
8 letter which invited settlement discussions, the state  
9 begins to have settlement discussions with Mr. Sherrin.  
10 From Mr. Sherrin's perspective, the goal was absolutely  
11 clear and quite simple. It was to get rid of the challenge  
12 regs. He made that very clear from day one.

13           On November 8th, the state entered into a tolling  
14 agreement that was done with the knowledge of the Office of  
15 the Attorney General, who had reviewed that tolling  
16 agreement. So everybody here on the defense side knew  
17 exactly what was going on.

18           On November 10th, drafts start exchanging,  
19 settlement -- Mr. Sherrin is quite clear again. We need to  
20 remove the regs. From November, December, January, the  
21 drafts are exchanged.

22           That is always a central premise of those drafts  
23 and Your Honor, it is also clear that Mr. Sherrin and the  
24 state realize they have a problem -- and I say this with all  
25 due respect to you. It's you. They know they need to avoid

1 you. Mr. Sherrin, in his letters, says things like, we  
2 can't settle the removed action because we'd have to come to  
3 this Court for approval. Mr. Sherrin implores them to move  
4 faster because they're afraid of pressure that this Court  
5 would put on the state.

6 So two things are clear, Your Honor, from these  
7 documents: One, they wanted to get rid of the regs and the  
8 state was going along with it; and two, they wanted to get  
9 rid of you and the state was going along with it.

10 And Your Honor, on December 27th, a settlement  
11 agreement -- and we can show you this later -- was commented  
12 on about -- and emails were exchanged about confirming there  
13 would be no further enforcement of the regs, and the  
14 Metadata for those documents show that the AG reviewed that  
15 draft.

16 So, Your Honor, I don't know who knows what at the  
17 AG's office, and I don't want accuse anybody who spoke at  
18 the last time, but this notion that this all came as a  
19 shock, you know, to use a bad analogy, it reminds me of  
20 *Casablanca*, in the scene where one character remarks he's  
21 shocked to see gambling going on here.

22 Your Honor, from January to February, there's a  
23 gap. I don't know what happened, and we need to find out.  
24 I suspect somebody finally realized that a settlement  
25 agreement wasn't going to get away -- going to make a

1 federal consent order go away. We don't have the documents  
2 that show what happened there because the state and Mr.  
3 Sherrin also didn't want to put things in email. And they  
4 meet for lunches and coffees to discuss things. They know  
5 what's going on here and where this is going to lead, but  
6 it's interesting.

7           On February 14th, it appears the settlement  
8 dialogue has broken down, for whatever reason and Mr.  
9 Sherrin and Mr. Bass arrange for a lunch. And Mr. Sherrin  
10 writes Mr. Bass, "Is it okay if I bring the associate who is  
11 preparing the papers in the lawsuit on February 14th?" And  
12 they meet thereafter. Mr. Bass says, "Sure. Why not?"

13           On February 15th -- February 15th -- that was a  
14 Friday. On that Monday, the TRO is filed at 11:16, the  
15 state gets served. So the state knew -- because I assume  
16 when they said, who is preparing the papers, the state knew  
17 that TRO was going to be filed.

18           On February 16th, by 9:23, the emails that have  
19 been put in front of Your Honor about the settlement and  
20 agreement to the TRO have been exchanged and by 10:30, Judge  
21 Hartman has entered the TRO for five months.

22           But Your Honor, you were told at the hearing by  
23 Mr. Bass last time that, "I do not think it was contemplated  
24 by any of the attorneys in that room" -- meaning the  
25 courtroom -- "that this particular order on this very

1 specific case was going to throw out this settlement."

2 Your Honor, since November, the whole point of the  
3 interaction between Mr. Sherrin and the state was to get rid  
4 of the regs which are obviously a crucial component of the  
5 settlement. It was the whole game plan, Your Honor.

6 So that's what we know. And that's bad enough,  
7 but obviously, it raises some real questions in our mind,  
8 Your Honor, about the extent of the collusion, the extent to  
9 which parties were evading the consent judgment, the extent  
10 to which misrepresentations have been made to this Court,  
11 whether or not a fraud on this Court has been perpetrated.  
12 We are really quite concerned, Your Honor. And so, let me  
13 tell you our proposal, to what end, where we think we should  
14 go.

15 Well, I know Your Honor wants to get some  
16 testimony today, and I don't want to get in the way of that.  
17 We feel on the plaintiff's side, for the class, that we need  
18 more discovery. We have only received documents from two  
19 custodians, Mr. Bass and Mr. Zahn letter. That production  
20 is clearly incomplete, because Mr. Sherrin, who we also  
21 subpoenaed, has produced documents that the state has not  
22 produced.

23 We don't believe that only two custodians at the  
24 state have responsive documents. We would like to know more  
25 about who's been involved, who has documents, whether the --

1 what extent the Office of Attorney General had knowledge of  
2 what was going on, the governor's office. We have been  
3 promised a privilege log. We have not received it yet. We  
4 have questions about, given the facts and circumstances of  
5 this case, whether the state could even inappropriately  
6 assert privilege.

7           And we would like depositions, Your Honor.  
8 Cross-examination today is not the best place to conduct a  
9 deposition. Quite frankly, it would prolong and waste your  
10 time and we would like to conduct real depositions of quite  
11 a number of people.

12           And what we would propose is 30 to 45 days of that  
13 discovery, that Your Honor would set a May hearing, and that  
14 we would come back, Your Honor, and if the facts play out  
15 the way the tip of the iceberg that we have indicate they  
16 are going to play out, we're going to ask you to strike  
17 Section 0 because that section was not put in there so the  
18 state could collusively enter into a TRO to get rid of a  
19 federal consent judgment.

20           And I believe, Your Honor -- we believe, Your  
21 Honor, that you have the equitable powers to do so. You  
22 have the ability to do so, given this is a federal consent  
23 order. You have the ability to do so, given the breach, the  
24 clear breach of this consent order. And that is what we  
25 propose to do.



1           And let me just close, Your Honor, by saying I  
2 think oftentimes, you know, lawyers forget there are real  
3 people here and I'm glad Your Honor read the quote you read.  
4 There are real people here, Your Honor. There are people  
5 who have been waiting for years to get out of these adult  
6 homes and we have been negotiating in good faith with the  
7 state under this -- what turns out I think semi-false  
8 premise that the state actually cared that these people were  
9 in the adult homes.

10           And we have been negotiating and we have been  
11 hearing about how hard it is to transition people and move  
12 people and this and that, and we've accepted that. It's the  
13 state. When they tell you something, I don't know. I don't  
14 view them as just another private litigant.

15           But it turns out since November, while the state  
16 has been having negotiations with us, they have been in a  
17 scheme with Mr. Sherrin to jettison the regulations,  
18 jettison the settlement agreement and totally ignore the  
19 class of people that they're charged with protecting. And I  
20 think we should all remember before we go forward today that  
21 these are very real people with very real issues.

22           So, Your Honor, that's our proposal for a way to  
23 go forward, and we hope Your Honor would schedule a, you  
24 know, a mid-May hearing. I think, quite honestly, Your  
25 Honor, if we're going to get this done in 30 to 45 days, we

1 may need a special master appointed because the state has --  
2 took us from March 2nd until this past Monday to get  
3 documents. I mean, you know, I'm just not really ready to  
4 twist myself up in a pretzel to get the state to do what it  
5 should do, given that it's a litigant in federal court.  
6 Thank you.

7 MR. GOLDBERGER: Your Honor, on behalf of the  
8 United States, we would echo much of what Mr. Gordon just  
9 said. I think it's quite clear that there has been a lot  
10 going on that has not been disclosed to this Court, has not  
11 been disclosed to the parties who have negotiated in good  
12 faith or attempted to negotiate with the state around  
13 various issues, to get done what needs to be done for the  
14 people in the adult homes.

15 The critical point I think that I want to pick up  
16 on from what Mr. Gordon just said is that there have been  
17 all of these negotiations. We have been negotiating a  
18 variety of things with the state for a long time and we have  
19 been before this Court most recently in February, and we  
20 have represented to the Court before that that the parties  
21 had come to some conclusion jointly, that we were in a place  
22 where the existing system was not working to transition  
23 people into the adult homes -- out of the adult homes,  
24 excuse me. And that there needed to be structural reform of  
25 the process.

1           And we were told by the state in January and we  
2 represented that to the Court in January, that we were in a  
3 place where the parties really were going to get together  
4 and combine their efforts and combine their collective  
5 intelligence to try to work something out, so that we could,  
6 in fact, expedite and accelerate the process of  
7 transitioning people into the adult homes. The state was  
8 essentially acknowledging that it was failing in its efforts  
9 and failing in its obligations under the agreement.

10           And yet when faced with an attack on the  
11 regulations which are a critical part -- from the state's  
12 perspective, a critical part of this agreement because it  
13 closed the front door to the adult homes, rather than  
14 defending this consent judgment, rather than saying to the  
15 Court and to the world at large, we are standing up for this  
16 consent judgment. We are standing up for what is right and  
17 what is true and what is in that consent judgment, what we  
18 have agreed to, the state seems to have done something else.

19           As Mr. Gordon points out, we don't have all the  
20 facts yet. We certainly need to collect them fully. But if  
21 at the end of the day, the facts continue to play out the  
22 way that Mr. Gordon's letter suggests, the way that the  
23 facts seem to indicate from the discovery that that have  
24 received, the relief that Mr. Gordon is suggesting --  
25 striking Section 0 -- is the appropriate relief here because

1 the state can't have it both ways, Your Honor. It cannot  
2 represent to the world that it is trying to do good and then  
3 undermine that very good.

4 THE COURT: Mr. Stauffer?

5 MR. STAUFFER: Your Honor, first, may I just make  
6 an application that Mr. Brown be permitted to address this  
7 issue? He is a direct report to the Attorney General. The  
8 Attorney General has asked him to address these issues  
9 directly. I report to him.

10 THE COURT: That's fine.

11 MR. STAUFFER: And he's prepared to do it.

12 THE COURT: But I'm also interested in knowing  
13 about your -- in light of what has been learned, your  
14 affirmation, which would appear to be, if nothing else,  
15 incomplete, as to the activity of the Attorney General's  
16 office in connection with these discussions with Mr.  
17 Sherrin, who represents -- and has forever during this  
18 litigation -- the nursing home operators, who are synonymous  
19 at least in the Court's mind with the adult home operators  
20 in their interests.

21 Mr. Brown, welcome, sir. Thank you.

22 MR. BROWN: I'll follow the example. I'm used to  
23 speaking from here, but --

24 THE COURT: Please.

25 MR. BROWN: Jason Brown. I'm the Chief Deputy of

1 the New York Attorney General's office, as Mr. Stauffer  
2 has --

3 THE COURT: Who did you replace?

4 MR. BROWN: Harlan Levy. I'm sorry, Your Honor.  
5 Harlan Levy.

6 THE COURT: A distant memory, I take it?

7 MR. BROWN: Yeah. Not a distant memory, but as I  
8 always say, they lost about a foot when I came in --

9 THE COURT: A little more. Go ahead.

10 MR. BROWN: -- when I did replace Mr. Levy. And  
11 Mr. Schneiderman did ask me to be here today.

12 THE COURT: All right.

13 MR. BROWN: Let me start by saying we are very  
14 much here between a rock and a hard place and let me start  
15 with a point that you raised with Mr. Stauffer at the outset  
16 about his declaration being incomplete.

17 There's a reason for that, Your Honor. We have an  
18 attorney/client privilege that is held, as the Court knows,  
19 by the state, not by us. We do not have the unilateral  
20 authority to waive that privilege and to disclose to the  
21 Court facts that may be relevant to those proceedings.

22 THE COURT: Would you prefer to have the parties  
23 involved disclose them to a grand jury? Because that's  
24 where we're headed here.

25 MR. BROWN: I completely understand, Your Honor,

1 which is why we have a direct and irreconcilable conflict  
2 with the state.

3 We did not -- we did not make the motion to  
4 withdraw as counsel lightly. We represent the state in  
5 thousands of cases. This is a highly unusual, extremely  
6 problematic case, for the reasons that Mr. Stauffer's  
7 declaration --

8 THE COURT: Well, why wasn't I told about this on  
9 January 18th that you wanted to withdraw or February 22nd?  
10 Why are we sitting in March, after the disclosure of the --  
11 some limited discovery with a situation where your office  
12 has been engaged or peripherally engaged in what could be  
13 described as a conspiracy to up-end a settlement which the  
14 governor took credit for when it was issued. All right? As  
15 something that he wanted, that your client wanted? Why are  
16 we doing this in March? And why wasn't I being told about  
17 it in January or before January?

18 I don't understand that. You could have made your  
19 application a long time ago, sir, and you didn't. So don't  
20 tell me about your obligations. You have a preliminary,  
21 primary and essential obligation to this Court that you  
22 shouldn't be putting your assistants in a position to tell  
23 the Court incomplete statements or possibly erroneous  
24 statements. That's your obligation.

25 And the buck stops with Mr. Schneiderman. Maybe

1 he should be spending more time working on his day job and  
2 not issuing press releases.

3 MR. BROWN: We totally understand the Court's  
4 frustration.

5 THE COURT: No, you don't understand it. I've  
6 been doing this case since 2003. These people, these four  
7 thousand people at any one given moment have rights. The  
8 state fought this case with your help -- your office's  
9 help -- and got the Second Circuit to reverse this Court on  
10 Article III standing. You didn't come back and say, well,  
11 you know, the facts of the case are such, we want to resolve  
12 the case on a settlement.

13 Now, you weren't in the Attorney General's office.  
14 Mr. Schneiderman wasn't there, but Ms. Underwood was there.  
15 She's in the courtroom today. She went up to the Second  
16 Circuit -- which is the state's right.

17 And then we came back. Years go by. Years go by.  
18 And now I find that there's some sort of a deal, allegedly,  
19 between the Department of Health and the Office of Mental  
20 Health and the nursing home industry. That's how it  
21 appears. And we're going to find out exactly what the deal  
22 is because if there is deal, I would consider it a fraud on  
23 the Court.

24 MR. BROWN: And that's where our conflict comes  
25 in. I totally understand Mr. Gordon saying --

1 THE COURT: Well, I'm not going allow the governor  
2 to decide who the lawyer is for the state of New York, where  
3 the lawyer he chose has a website that indicates that the  
4 firm represents 150 nursing homes. It doesn't pass the  
5 laugh test.

6 MR. BROWN: A practical question, Your Honor, what  
7 do we do about the irreconcilable conflict about the  
8 attorney/client privilege here? It's our not our privilege.  
9 We're prepared to waive it. We're prepared to say that  
10 Section 0 has not been triggered by this TR0. We're  
11 prepared to say many things that our client very well may  
12 not be prepared to say.

13 THE COURT: Why don't you sit down for a minute  
14 while I talk to the Commissioner of Health?

15 Sir, why don't you come on up here. I want to  
16 talk to you.

17 COMMISSIONER ZUCKER: (Complies.)

18 THE COURT: I'm not going to put you under oath  
19 today. You can do that later.

20 COMMISSIONER ZUCKER: Okay.

21 THE COURT: But what I am going to do is indicate  
22 to you that I've learned certain things about previous  
23 individuals who have been placed in supported housing under  
24 this settlement, and I'm going to give you a directive.

25 Hi. You are?



1 MR. BEGLEITER: I am Robert Begleiter. I have  
2 been asked to represent the commissioners today in front of  
3 Your Honor.

4 THE COURT: Oh, thank you.

5 MR. BEGLEITER: You're welcome.

6 THE COURT: Who asked you?

7 MR. BEGLEITER: I've been asked by the  
8 commissioners, by the state of New York.

9 THE COURT: Welcome.

10 MR. BEGLEITER: In their personal capacity only.

11 THE COURT: Okay.

12 MR. BEGLEITER: Excuse me, their official capacity  
13 only.

14 THE COURT: Thank you.

15 MR. BEGLEITER: And I'm not representing the  
16 departments.

17 THE COURT: That's fine. I just need to know.

18 MR. GORDON: You need a chair?

19 THE COURT: Let him stand there. He knows how to  
20 stand. Mr. Begleiter is always well received in our court.

21 MR. BEGLEITER: Thank you. I hope it remains that  
22 way.

23 (Continued on the next page.)

24

25

1 THE COURT: Just a moment, sir. I wanted to ask  
2 Mr. Sundram.

3 Mr. Sundram, are you aware of any cases of members  
4 of the class who went through the process of being placed in  
5 supported housing, who have been permitted to return to the  
6 adult homes where they had resided prior to being placed in  
7 supported housing?

8 MR. SUNDRAM: Yes, Your Honor. In the course of  
9 preparation of my annual report to the court, I requested  
10 information from the New York State Department of Health about  
11 the individuals who had left an adult home, had gone to  
12 supported housing, and subsequently returned to the adult  
13 home, either the one they were in or another one, over a  
14 period of time. There's been eight such individuals that I  
15 know of, as of December.

16 THE COURT: All right. Thank you very much.

17 Commissioner, it would appear that exceptions have  
18 been made to the regulations by your department and the Office  
19 of Mental Health permitting a handful of adult home members of  
20 the class who have transitioned to supported house, who found  
21 it difficult to make the adjustment, that they were permitted  
22 to return to their adult home so that they could not feel that  
23 they were under some stress. And, of course, these are people  
24 with mental illness. So our job, collectively, is to do  
25 what's best for them.

1           Does your agency have any objection to this John Doe  
2 returning to the -- which one is it?

3           MR. GORDON: Oceanview Manor.

4           THE COURT: Oceanview Manor?

5           COMMISSIONER ZUCKER: The department, obviously,  
6 would do whatever's best for individuals, whether they are out  
7 in the community or back at the home. And that's where our  
8 goal is, to make sure that those who are served in the best  
9 capacity as possible.

10          THE COURT: So we don't know who this person is,  
11 it's a John Doe. But I take it from what you said, reading  
12 between the lines, which I must do under the circumstances  
13 because you didn't give me a direct answer, that the  
14 department would not have an objection in an appropriate case.

15          COMMISSIONER ZUCKER: Right.

16          THE COURT: Well, I am exercising my equitable  
17 powers, equitable supervisory powers in this case to direct  
18 you to make that accommodation with respect to John Doe. And  
19 I am also directing the State Attorney General to advise the  
20 court in Albany that this matter has been resolved and that  
21 the case is moot. And the TRO will therefore be rescinded  
22 because there is no case involving this John Doe once that  
23 person is permitted to return. And then we can get on with  
24 the rest of this.

25                 And the purpose of all this is not to embarrass the

1 commissioners or the State. The purpose of what we're going  
2 to do now, next, is to get to the bottom of what Mr. Gordon  
3 has sketched in for us. So I want you to understand the Court  
4 appreciates that you are here, and that your fellow  
5 commissioner is here, and the counsel for the governor is  
6 here, but you have to understand that the authority of this  
7 Court cannot be lightly breached, especially in a situation  
8 where we have been attempting since 2003 to help people who  
9 cannot help themselves.

10 That's why we have federal courts, that's why we  
11 have judges who serve for life. I am trying to outlive this  
12 case, and the State is not making it easy. But the message  
13 that has to go back, I think to Albany, is whatever has  
14 happened, it needs to be fixed in a way that doesn't create  
15 the clear impression that there's a -- there is a -- there's  
16 an atmosphere in Albany that you can sort of jiggle the  
17 system, use the courts in such a way that the people who are  
18 being protected by this settlement are going to be undermined.  
19 This is about them. That's why I read that statement.

20 You have many things on your plate, as does your  
21 fellow commissioner. But I am asking you, I am asking  
22 Commissioner Sullivan, and I am asking the Governor through  
23 Mr. David, to put the politics of the State capitol aside and  
24 to deal with the really difficult lives that these people have  
25 to live.

1           If I sound dramatic, it is because it is dramatic.  
2 It's about them. It's about 4,000 people. And I don't want  
3 to micromanage your work or the work of your staff, many of  
4 whom have done an excellent job. But I will not allow the  
5 kind of political, legal activity that is going on in this  
6 case behind my back and the behind the backs of the plaintiffs  
7 to continue. So I am asking you to make this your priority.  
8 I doubt that you have been advised on every last detail what's  
9 been going on, I'm not asking you to answer that question.  
10 But it's got to stop.

11           And as far as the law firm that the State has  
12 identified to be substituted for the Attorney General, I am  
13 holding your motion in abeyance and the Attorney General's  
14 motion.

15           On their web site they say they represent 150  
16 nursing homes. Where did they come from? To represent the  
17 interests of the State Department of Health and the State  
18 Office of Mental Health. I doubt that's ever going to happen  
19 in this court. Ever, ever, ever. You've got to do better  
20 than that.

21           Thank you for coming in. You may be seated.

22           COMMISSIONER ZUCKER: Thank you.

23           MR. BEGLEITER: Can I speak for a moment, Your  
24 Honor?

25           THE COURT: Yes, sure.

1           MR. BEGLEITER: I have been in this case since  
2 Friday, which is a lot less than everybody else has been, but  
3 maybe I can add some value and clear some air.

4           You can get a commitment, Your Honor, if you wished  
5 it today, from the commissioners. It is more than a  
6 commitment, it's already happened, that they will continue  
7 with the core relief in the settlement. In other words,  
8 assessments, in-reaches, and transitionings for those who want  
9 it --

10          THE COURT: In-reaches.

11          MR. BEGLEITER: -- and they will do it, they will do  
12 it even after the 120 days. In other words, there's no  
13 intention to stop that. I hope that makes Your Honor feel  
14 there's some sort of receptivity on the part of the  
15 commissioners and the people I represent today in their  
16 official capacities. I want that out in the open. There's no  
17 question about that. This will continue, I have been told. I  
18 don't know -- again, I don't know what impact that has on  
19 Your Honor, but I think it is something that is important for  
20 the very group, for the class that you are talking about.

21          As far as Your Honor's order regarding the return  
22 on -- using your equitable powers, I have no authority to  
23 agree or disagree with that. I think the State may want to  
24 submit some kind of -- I don't know what it would be, I don't  
25 know what the position's going to be, but they may want to

1 submit something on that. It won't be from me.

2 THE COURT: Well --

3 MR. BEGLEITER: There's counsel.

4 THE COURT: Ms. Underwood's here.

5 MR. BEGLEITER: That's true.

6 THE COURT: Mr. Brown's here. But my view is that I  
7 have certain equitable powers to oversee this litigation, and  
8 if this can be done in such a way that the case in Albany is  
9 moot, the TRO is dissolved, that would be the best way to  
10 handle it, since we're talking about a human being, I think,  
11 although I don't have a name to put to a face, who would be  
12 benefitted by returning, according to Mr. Sherrin, by  
13 returning to an adult home. And I don't think that the  
14 situation for one individual should implicate the entire  
15 settlement for 4,000 people. And I am sure that even though  
16 there was no transcript kept of the proceeding before the  
17 judge in Albany, which is interesting, and the judge was  
18 apparently never told about this litigation, which is  
19 interesting, and the Attorney General was in the room when the  
20 TRO was issued, which is interesting, it wouldn't have been a  
21 violation of the lawyer-client privilege to indicate that the  
22 State of New York is in a litigation in New York City before a  
23 federal court, with a settlement, so at least the state judge  
24 could ask questions about what was going on down here. That  
25 didn't happen apparently. What do you think the Court thinks

1 when it is all like hocus-pocus and here we are? So don't  
2 tell me, please, about whether they should allow this  
3 individual to go back to the adult home.

4 MR. BEGLEITER: You haven't heard that argument from  
5 me, Your Honor. All I'm saying --

6 THE COURT: No, but the implication is, maybe yes  
7 and maybe no. You don't know, so don't say it. I told --

8 MR. BEGLEITER: All I'm saying is --

9 THE COURT: Excuse me.

10 MR. BEGLEITER: Okay.

11 THE COURT: I told your client what to do.

12 MR. BEGLEITER: Right.

13 THE COURT: I told him that it was in my equitable  
14 powers, overseeing this case, if the State of New York wants  
15 to bar this individual who wants to go back to the adult home  
16 from the adult home, in order to preserve a TRO that lasts  
17 from February until July -- you know, in this court, in the  
18 federal court, you know how long a TRO can last? You know.

19 MR. BEGLEITER: I know.

20 THE COURT: How long? Tell me.

21 MR. BEGLEITER: It can last up to 20 days.

22 THE COURT: Yeah.

23 MR. BEGLEITER: That's right. Ten days plus ten  
24 days.

25 THE COURT: So how does a state judge on consent



1 impose a TRO for months and months and months? Because the  
2 parties agreed to it. Why should the judge have any concern?  
3 There may be reasons for it. They don't want to litigate it.  
4 They just want to impose it. And the Assistant Attorney  
5 General was in the room. The Assistant Attorney General,  
6 who's here, rather, Mr. Bass from your department, was in the  
7 room.

8 MR. BEGLEITER: Correct. They were in the room with  
9 the judge.

10 THE COURT: And I want to know what was going on in  
11 the other rooms, and I want the Paul Weiss firm and the other  
12 lawyers here to dig into it. Because if there are going to be  
13 sanctions, I will be presiding at that trial.

14 MR. BEGLEITER: Your Honor, I just wanted to say  
15 that my consent does not imply -- my silence does not imply  
16 consent.

17 THE COURT: I understand that.

18 MR. BEGLEITER: And the other thing is, you're quite  
19 right. There are --

20 THE COURT: You have been doing this since Friday.  
21 I have been doing it since 2003.

22 MR. BEGLEITER: That's right.

23 THE COURT: That's the difference between the two of  
24 us.

25 MR. BEGLEITER: And the other thing is, I will say,

1 is that the witnesses are prepared to give an explanation  
2 today, but I understand from the Paul Weiss lawyer, he doesn't  
3 want to do it.

4 THE COURT: No, I think it would be better to hold  
5 off on that, and I don't want to waste everybody's time, but  
6 we'll decide at a later time who should testify at a hearing,  
7 if we have a hearing.

8 MR. BEGLEITER: Okay.

9 THE COURT: You know, there is another way of  
10 dealing with this, for the commissioner's and the Governor's  
11 office, is to find a solution.

12 MR. BEGLEITER: That's right.

13 THE COURT: Is to find a solution.

14 MR. BEGLEITER: And there's --

15 THE COURT: And I think that the parties -- you  
16 know, we already had a solution. It may not have moved  
17 quickly, but we had a solution. And the question is, has  
18 there been good faith in implementing the solution. So we  
19 will find out about that. Thank you.

20 MR. BEGLEITER: If I may, Your Honor, there's a  
21 conference -- there's a meet and confer this afternoon, a  
22 settlement conference this afternoon, and the hope is that  
23 some progress can be made in getting to a final solution,  
24 getting to a solution here.

25 THE COURT: I am going to authorize discovery. I

1 don't care that you are going to have a meeting. Meetings can  
2 be worthless, if there's bad faith. I am not interested in  
3 people getting together, although apparently there are people  
4 in the Attorney General's office and the Department of Health  
5 who like to have lunch to talk about my case and how to  
6 undermine it. So let them have their lunches in Albany, but  
7 they have to come down here and explain to me what's going on.

8 MR. BEGLEITER: I understand.

9 THE COURT: Thank you.

10 MR. BEGLEITER: I assume that the Attorney General  
11 remains as counsel while the motion is being held in abeyance?

12 THE COURT: I just said, I am not going to take any  
13 action on this at the present time.

14 MR. GOLDBERGER: Your Honor, if I may, for a moment.

15 THE COURT: Thank you.

16 MR. GOLDBERGER: Recognizing the limitations that  
17 Mr. Begleiter has on his representation with Mr. Zucker in  
18 connection with his official capacity, I want to put what  
19 Mr. Begleiter said together with something that Mr. Brown  
20 said, as a possible, at least temporary, fix for some of the  
21 problems that we're facing here today.

22 If the State is, as Mr. Begleiter represented just  
23 now, truly committed to continuing the process that exists  
24 under the consent, Judge, and as Mr. Brown suggests, the AG's  
25 office is probably willing to find some way to not trigger a

1 Section 01, for lack of a better term, than the solution is  
2 right in front of us, Your Honor. We have engaged in good  
3 faith negotiations, we will continue to engage in good faith  
4 negotiations, but if Section 01 were to be rescinded,  
5 Your Honor, and this is not to take anything away from the  
6 need to find out exactly what happened here, but if Section 01  
7 were rescinded by agreement of the parties and order of the  
8 Court, then we would be in a position where we could have good  
9 faith negotiations. It would be a good faith offer by the  
10 State to say to us, "We don't want to undermine this  
11 agreement, we don't want to undermine the judge's consent  
12 order. We want to have a good faith discussion about how we  
13 can make this process better for everyone."

14 If that were something the State were willing to  
15 consider, I am hearing some indications the State's willing to  
16 continue to do what it's been doing under this consent order,  
17 then that may be a solution.

18 THE COURT: Your point's been made. This is  
19 something that the parties should discuss. I understand that  
20 the Attorney General has a difficult problem. But the fact of  
21 the matter is, that some of the stuff that has been going on  
22 apparently has involved the Attorney General's office. It is  
23 not that they have clean hands in this situation. And so I  
24 think it is time for the parties to like figure it out. In  
25 the meantime, we're going to have discovery.

1           You said you need about six weeks?

2           MR. GORDON: That would be great, Your Honor. And I  
3 also question Your Honor whether Your Honor wants us running  
4 to this court to deal with issues or whether --

5           THE COURT: I am going to have you deal with the  
6 magistrate judge, Judge Levy. I tried to reach him this  
7 morning and wasn't able to reach him. He may have been on the  
8 bench. And Judge Levy is assigned. Judge Go had been  
9 assigned, she retired, and so Judge Levy's been assigned, and  
10 I will be talking to him.

11           Let me give you a date for completion of discovery.  
12 Friday, April 5 -- May 5. I'm sorry. May 5.

13           MR. GORDON: Your Honor?

14           THE COURT: Yes.

15           MR. GORDON: Just to clarify, that is for the  
16 discovery related to this discrete issue --

17           THE COURT: Yes.

18           MR. GORDON: -- obviously, with the July trial,  
19 there's a lot of other stuff that needs to happen.

20           THE COURT: Right. And so that's -- I am glad you  
21 mentioned the July trial. You know, we don't have to have a  
22 July trial if you work this all out. I would much rather do  
23 something else in July.

24           But I set May 5. And then I am on trial in the  
25 Middle District of Alabama the week of May 8. So we can have

1 this -- we can have a hearing here on May 17 at 10:00 a.m. on  
2 the issues that -- whatever the issues are that you wish to  
3 bring to the Court's attention.

4 MR. GORDON: And, Your Honor, can we take the April  
5 conference off in light of this?

6 THE COURT: You can take that off.

7 MR. GORDON: Thank you, Your Honor.

8 THE COURT: And the other thing is that when we have  
9 a trial in July, should we have a trial, all the named  
10 parties, defendant, will be required to sit at this trial.  
11 Because if I have to do this again, the commissioners are  
12 going to do it with me. I am not going to sit here in the  
13 middle of the summer while everybody else is on vacation. So  
14 you're forewarned.

15 Anything else from the plaintiffs?

16 MR. GORDON: Your Honor, I hate to keep jumping up,  
17 but while we're here, can we get a very quick date by which  
18 you will order privilege logs to be produced?

19 THE COURT: What date would you like?

20 MR. GORDON: I would like in about five minutes,  
21 but, I mean --

22 THE COURT: Well, I mean, understanding that that's  
23 not reasonable. How about a week from today?

24 MR. GORDON: A week from today. Thank you.

25 THE COURT: By 5:00 p.m.

1 MR. C. ZUCKER: Your Honor?

2 THE COURT: Yes, sir.

3 MR. C. ZUCKER: There is a pending motion regarding  
4 the Elizabeth Jones matter. I don't know if that's gotten  
5 lost with all that's happened here.

6 THE COURT: Well, I will look at it.

7 MR. C. ZUCKER: Thank you, Your Honor.

8 THE COURT: Mr. Brown?

9 MR. BROWN: Your Honor, at the risk of raising more  
10 issues, I do apologize, but I have to. I have to.

11 We understand the Court's order to proceed with  
12 discovery, and we will certainly comply in any way that we  
13 can. It doesn't -- and I understand the Court has held in  
14 abeyance our motion to withdraw as counsel, but for the  
15 reasons I articulated before, and I am willing to repeat  
16 again, it's impossible for us, particularly now that the  
17 notion of sanctions has been raised, we are in bed with the  
18 State or somebody, I think there were words to that effect  
19 that one of the parties mentioned.

20 It's impossible for us both to adequately represent  
21 the State during this discovery process and represent  
22 ourselves. I am telling the Court that there is a direct  
23 irreconcilable conflict, and we don't know what to do about  
24 that.

25 THE COURT: Right. With regard to the process of

1 doing this discovery, if the State defendants want to obtain  
2 counsel -- not the Abrams firm. They're out at this point,  
3 until we have a hearing on whether they're conflicted. But if  
4 there is a law firm somewhere out there that isn't busy in the  
5 lobby of the State Senate and State Assembly, and on the  
6 second floor doing business for the nursing home industry, and  
7 that's where we are right now, then I need to know who it is.  
8 Because I am not going to tolerate a situation where the State  
9 defendants are represented by an entity that represents  
10 parties who have an adverse interest to this settlement.

11           So if you can find them, Mr. David, I want to know  
12 who they are, and I will let you know whether it's acceptable  
13 to the Court. Certainly you have a right to have counsel for  
14 the agencies.

15           The other thing I will make very clear is that it's  
16 important that the -- that anybody who may have a problem  
17 based on the evidence that may be divulged about complicity  
18 between the nursing home industry and the State actors, any of  
19 the State actors, that person or persons, they are -- it is  
20 recommended that they consult private counsel.

21           I am directing the Attorney General to advise the  
22 Court when the issue of the TRO and the rights of Mr. John Doe  
23 to return to the adult home have been resolved. And if they  
24 aren't resolved, or if the State decides to do something else  
25 about it, then we'll take it up in due course.



1 Sir?

2 MR. GORDON: Sorry to keep popping up, Your Honor,  
3 but I just want to put one thing on the record in terms of our  
4 position. If the bringing in of new counsel slows this up by  
5 one minute, because I see already the movie, which is --

6 THE COURT: No. Let me explain. The purpose of the  
7 new counsel is not the general representation of the State  
8 actors. The purpose of the new counsel is to deal with the  
9 discovery. We're going ahead on July 10. The commissioners  
10 and I are going ahead on July 10, if we need to go ahead on  
11 July 10. But I can't deny the concern of the Attorney General  
12 that based on what's happened thus far, some of which was its  
13 own doing, apparently, by being involved in these discussions  
14 behind the back of the Court, that there may be an  
15 irreconcilable conflict. They'll need their own attorney,  
16 potentially.

17 MR. GORDON: Yes. I don't disagree with any of  
18 that, Your Honor.

19 THE COURT: I've never heard of this before.

20 MR. GORDON: You and I both. But I am concerned  
21 that we're going to hear from --

22 THE COURT: Oh, no.

23 MR. GORDON: -- new counsel that the next week for  
24 privilege logs, and the May 17 date, Your Honor, and the  
25 discovery --

1 THE COURT: Nothing --

2 MR. GORDON: I just want to make sure we are full  
3 steam ahead.

4 THE COURT: I've advised the counsel to the  
5 Governor. He's in the room.

6 Did you hear me, Mr. David?

7 MR. DAVID: Yes, Your Honor, I heard you.

8 THE COURT: Thank you.

9 MR. DAVID: You're welcome.

10 THE COURT: It's the best I can do.

11 MR. BEGLEITER: Your Honor, I want to say something,  
12 so the Court is not misled. As I understand the situation  
13 today, Mr. Doe could return to the nursing home. That is the  
14 impact of the TRO. As I understand it. If I've got it wrong,  
15 then someone should tell me. That's my understanding.

16 THE COURT: Look. I am not getting into the  
17 weeds --

18 MR. BEGLEITER: Okay.

19 THE COURT: -- on the TRO. I am just saying that if  
20 Mr. Doe goes back to the nursing home, then there would be no  
21 need to set aside the regulations.

22 MR. BEGLEITER: Mooted.

23 THE COURT: It would moot the regulation, it would  
24 moot the injunction in effect. This injunction that was done  
25 without a hearing. Because it went from being a TRO to being

1 a preliminary injunction, under State law, the way I remember  
2 it, when I was an Assistant New York State Attorney General.

3 But normally you need a hearing. You don't just do  
4 it with a wink and a nod. This is not justice. So don't  
5 parse these things. If the commissioner is willing to waive  
6 the regulation --

7 MR. BEGLEITER: I understand.

8 THE COURT: -- then there's no need for a TRO. The  
9 only thing standing in the way of this person going back was  
10 that there was a regulation that prohibited it. Now there  
11 isn't a problem, is what I am saying.

12 MR. BEGLEITER: I understand.

13 THE COURT: I think that the Attorney General can  
14 handle that, if the commissioner is willing.

15 MR. BEGLEITER: Correct.

16 THE COURT: Is the commissioner willing? You're his  
17 lawyer.

18 MR. BEGLEITER: This is -- I would have to consult  
19 with him.

20 THE COURT: Well, go consult with him. We'll wait.

21 MR. BEGLEITER: Okay.

22 (Short pause.)

23 THE COURT: Mr. Bass, you wait there. You are not  
24 going anywhere. He's got a lawyer.

25 MR. BEGLEITER: I have spoken to Commissioner

1 Zucker. He has no problem doing that.

2 THE COURT: Okay. Thank you. Thank you, sir.

3 There's no conflict on that.

4 MR. BROWN: Glad to hear it.

5 THE COURT: Me, too.

6 Anything else from plaintiffs?

7 MR. GOLDBERGER: One thing, Your Honor. We have a  
8 date, at this point, of April 1 to report back to the Court  
9 regarding negotiations. All of this that has come up in the  
10 last couple weeks has sort of delayed things a little bit. We  
11 do intend to have a meeting today, so we would like to push  
12 that back a couple weeks, if that's okay with the Court.

13 THE COURT: As long as Mr. Sundram is a participant,  
14 and as long as I get a prompt report.

15 MR. GOLDBERGER: Absolutely, Your Honor.

16 THE COURT: Thank you.

17 Anything else from the State?

18 MR. BROWN: No, Your Honor.

19 THE COURT: Oh, by the way. Let me talk about the  
20 Attorney General's duties as a State elected official. The  
21 Attorney General under State statute is to represent the State  
22 of New York. In the case that the federal government has  
23 brought, they sued the State of New York. There is a real  
24 question about whether the Attorney General can withdraw as  
25 the representative of the sovereign. And I know I have been

1 provided with some case law, which is not particularly helpful  
2 to me.

3           But the fact is that the Attorney General was  
4 elected to be the attorney for the sovereign, and there is an  
5 issue which we may take up later, maybe not, about whether  
6 even if he withdraws as the attorney for the commissioners, or  
7 the governor, or State employees, whether he can relinquish  
8 his responsibility to be the attorney for the sovereign. And  
9 I just wanted to lay that on the table as an issue, because it  
10 may come into play at a later date.

11           Thank you, everyone. Have a nice day.

12           (WHEREUPON, at 12:24 p.m., the proceedings were  
13 concluded.)

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