

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 10-767, 10-1190

Caption [use short title]

Motion for: Strike Response of NYCQAL in Support of Defts-Appellants' Motion For Stay Pending Appeal

Disability Advocates, Inc., Plaintiff-Appellee
and United States, Plaintiff-Intervenor-Appellee
v. David A. Paterson, et al., Defendants-Appellants

Set forth below precise, complete statement of relief sought:

The United States requests that the Court strike the Response of the New York Coalition for

Quality Assisted Living, Inc. in Support of Defendants-Appellants' Motion For Stay Pending Appeal

because the Coalition is not a party in the appeal from the district court's judgment.

In the alternative, the United States requests leave to respond to the Coalition's submission.

MOVING PARTY: United States of America

OPPOSING PARTY: New York Coalition for Quality Assisted Living, Inc.

- Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Teresa Kwong

OPPOSING ATTORNEY: Patricia A. Millett

[name of attorney, with firm, address, phone number and e-mail]

U.S. Department of Justice, Civil Rights Division, Appellate Section
Ben Franklin Station, P.O. Box 14403
Washington, D.C. 20044-4403
202/514-4757; teresa.kwong@usdoj.gov

Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave. NW
Washington, D.C. 20036
202/887-4450; pmillett@akingump.com

Court-Judge/Agency appealed from: E.D.N.Y. (Garafis, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Opposing counsel's position on motion:

- Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:

- Yes No Don't Know

Is oral argument on motion requested?

- Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

- Yes No If yes, enter date: _____

Signature of Moving Attorney:

Date: 4/16/10

Has service been effected? Yes No [Attach proof of service]

s/ Teresa Kwong

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 10-767, 10-1190

DISABILITY ADVOCATES, INC.,

Plaintiff-Appellee

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

DAVID A. PATERSON, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES' MOTION TO STRIKE RESPONSE OF
NEW YORK COALITION FOR QUALITY ASSISTED LIVING, INC.
IN SUPPORT OF DEFENDANTS-APPELLANTS'
MOTION FOR STAY PENDING APPEAL OR, ALTERNATIVELY,
LEAVE TO RESPOND TO THE COALITION'S SUBMISSION

On April 6, 2010, the New York Coalition of Quality Assisted Living, Inc.
(the Coalition) filed a purported response to the defendants-appellants' (State's)
motion for stay of the district court's remedial order pending appeal. The

Coalition is not a party in the State's appeal and may not submit a brief, addressing the merits of this appeal and raising new arguments not asserted by the State, in support of the stay motion. Accordingly, this Court should strike the Coalition's brief and the supporting Declaration of Stephanie Gilbert, and not consider the Coalition's submission in determining whether a stay pending appeal is warranted.

1. This appeal arises from an action by Disability Advocates, Inc. (DAI), a disability rights organization, against, *inter alia*, New York mental health agencies for violation of the integration mandate of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794, as expressed in 28 C.F.R. § 35.130(d). DAI claimed that the State discriminated against adults with mental disabilities residing in, or at risk of entering, twenty-one adult homes¹ in New York City, by failing to offer them placement in the most integrated setting appropriate to their needs. See *Olmstead v. L.C.*, 527 U.S. 581 (1999) (failure to provide services in the most integrated setting appropriate is discrimination under Title II of the ADA).

After a bench trial, the district court found that the State's administration of mental health services for DAI's constituents violated the integration mandate. See *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 188 (E.D.N.Y.

¹ Adult homes are for-profit adult care facilities licensed and regulated by the State of New York that provide long-term care and supervision for people with mental or physical disabilities.

2009) (Trial Decision). The district court subsequently issued a remedial order, requiring the State to move qualified and willing adult home residents to supported housing, a more integrated setting where individuals with mental disabilities live in rental apartments scattered among various buildings throughout the community and receive services from the State to support their living in the community. See Doc. 405 (Remedial Order & Judgment) (Mar. 1, 2010) (Remedial Order); see also *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2010 WL 786657 (E.D.N.Y. Mar. 1, 2010) (Remedial Decision).² The State has appealed from the judgment.

Prior to issuing the Remedial Order, the district court granted the United States' motion to intervene as a plaintiff, see *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2009 WL 4506301 (E.D.N.Y. Nov. 23, 2009), but denied motions to intervene by the Coalition and the Empire State Association of Assisted Living (ESAAL), two non-profit trade associations representing the interests of assisted living residences and adult homes in New York. See *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2009 WL 5185807, at *7 (E.D.N.Y. Dec. 23, 2009). Earlier, the district court allowed both associations to file amicus briefs. *Id.* at *1. The Coalition and ESAAL appealed the denials of

² "Doc. ____" indicates the docket entry number of documents filed in the district court.

intervention. The Coalition also filed a protective notice of appeal with respect to the judgment in this case.

2. On April 6, 2010, the Coalition filed a “response” in support of the State’s motion to stay the district court’s Remedial Order pending appeal. The submission purports to be a “response” in support of the State’s stay motion, but it introduces new arguments not raised in the State’s stay motion. Indeed, the Coalition asserts (Br. 8) that “[i]n addition to the State’s arguments, the State and the Coalition are likely to prevail for three more reasons.” The brief then specifically addresses (Br. 8-17) the merits of the State’s appeal.

As the Coalition concedes (Br. 2), it is not a party in this case. Accordingly, the Coalition has no standing at this time to challenge the district court’s order. See *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (“The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.”). This Court should strike the Coalition’s brief and supporting declaration.

Although a non-party may submit a merits brief in an appeal from a final judgment pending resolution of its appeal of a denial of intervention, this Court generally does not consider a non-party’s argument on the merits until it resolves whether the denial of intervention was an abuse of discretion. See, e.g., *Drywall Tapers & Pointers, Local Union 1974 v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 95-

96 (2d Cir. 2007) (affirming denial of intervention before holding that union may not adjudicate merits of district court's injunction). In some cases, the Court has decided both appeals at the same time. See, e.g., *Mastercard Int'l Inc. v. VISA Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 384-385, 390 (2d Cir. 2006) (reviewing district court's failure to join VISA as a necessary party and VISA's appeal of the denial of intervention at the same time).

Here, the Coalition seeks to have the Court depart from its usual practice by having the Court consider its submission addressing the merits of the district court's Trial Decision and Remedial Order *before briefing has even commenced* in its appeal of the denial of intervention and months before any determination of whether the denial of intervention was an abuse of discretion. In support of this extraordinary request, the Coalition argues (Br. 2) that it "has standing as a nonparty to appeal and seek a stay of [the Remedial Order]" because the order "imposes obligations on Coalition members and directly and adversely affects their legal interests." The single case the Coalition cites, *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127 (2d Cir. 2009), cert. denied, ___ S. Ct. ___, 2010 WL 680713 (U.S. Mar. 1, 2010), does not support the Coalition's arguments. That case involved a district court's orders of attachment and execution over Argentine social security funds which, under proposed Argentine legislation, were to be transferred to a government agency to administer. *Id.* at

123-124. This Court allowed the government agency, although not a party, to challenge the district court orders on appeal because, as the Court stated, the agency, “as the entity that manages the funds, has a[] * * * direct interest in the property” and the agency’s “property [was] at stake.” *Id.* at 128.

By contrast, the Coalition’s interest in the case—its interest in continuing to do business as usual—is not the subject of the State’s appeal. Moreover, unlike in *Aurelius*, 584 F.3d at 124, the Coalition’s relationship with the State does not render it a subcomponent of the State. See also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 82 (2d Cir. 2002) (allowing the Republic of Indonesia to intervene in an appeal of an arbitral award against an agency of Indonesia because the Republic “own[ed] the property encompassed by the garnishment order”), cert. denied, 539 U.S. 904 (2003).³ Indeed, the State did not even assert the Coalition’s interest at trial or in its stay motion.

Contrary to the Coalition’s assertions (Br. 2), it does not have an interest affected by the judgment sufficient to confer non-party standing on appeal.

³ *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 184 (2d Cir. 1991), where non-parties affiliated with the Teamsters were allowed to appeal an order affecting their contractual rights, is similarly distinguishable. The Court stated that the non-parties, joint councils and local unions affiliated with the Teamsters, were bound by the consent decree between the government and the Teamsters because the Teamsters represented the collective Teamsters’ membership. *Id.* at 179-180.

Hispanic Society of the New York City Police Department Inc. v. New York City Police Department, 806 F.2d 1147 (2d Cir. 1986), aff'd sub nom., *Marino v. Ortiz*, 484 U.S. 301 (1988), is analogous to this case. In *Hispanic Society*, this Court dismissed an appeal by non-party police officers who challenged an employment discrimination settlement on the grounds that it would harm their promotion opportunities. *Id.* at 1152. The Court held that the non-party officers' interests were not affected by the judgment because, *inter alia*, they had no right to a promotion under state law. *Ibid.* Similarly, the Coalition's members, adult home providers, have no legally-protected interest in keeping adult home residents at their facilities in perpetuity. In fact, state law authorizes the State to close adult homes or consolidate under-utilized adult homes. See Trial Decision at 297. Accordingly, the Court should not consider the Coalition's submission in deciding the State's stay motion.

3. The Coalition requests (Br. 3 n.2) that, if the Court determines that the submission is not a proper response to the State's stay motion, the Court accept its submission as an amicus brief in support of a stay. The Coalition's brief, however, fails to comply with the rules regarding amicus briefs. It is twice as long as any permitted amicus brief in support of a motion for a stay, see Fed. R. App. P. 29(d). In addition, the Coalition failed to request the parties' consent or file a motion for permission to file an amicus brief, see Fed. R. App. P. 29(a), (b).

* * *

Because the Coalition is not a party in the State's appeal and its brief does not qualify as an amicus brief, the Court should not consider the Coalition's submission in deciding the State's pending motion for a stay pending appeal. If the Court denies the motion to strike, the United States respectfully requests fourteen days to respond to the Coalition's arguments.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

/s/ Teresa Kwong
JESSICA DUNSAY SILVER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
teresa.kwong@usdoj.gov
(202) 514-4757

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2010, a copy of the foregoing United States' Motion To Strike Response Of New York Coalition For Quality Assisted Living, Inc. In Support Of Defendants-Appellants' Motion For Stay Pending Appeal Or, Alternatively, Leave To Respond To The Coalition's Submission was served by CM/ECF on:

Patricia A. Millett
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036

Cecelia C. Chang
New York State Office of the Attorney General
120 Broadway, 25th Floor
New York, New York 10271

Anne Raish
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019

/s/ Teresa Kwong
TERESA KWONG