

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

No. 19-1715

v.

SHEILA J. POOLE, in her official capacity as  
Acting Commissioner for the Office of Children  
and Family Services for the State of New York

Defendant-Appellee

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**DECLARATION OF LAURA ETLINGER IN  
OPPOSITION TO APPELLANT'S MOTION TO  
FILE A SURREPLY**

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family (“appellee” or “OCFS”). I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and

appellant's counsel. This declaration is submitted in opposition to the motion of appellant New Hope Family Service's ("New Hope") for permission to file a surreply in opposition to OCFS's motion, which seeks removal of the appeal from the Expedited Appeals Calendar (XAC) or, in the alternative, an extension of the deadline for the filing of OCFS's brief.

2. The motion should be denied because the proposed surreply relies on a mischaracterization of OCFS's motion seeking to remove the appeal from the XAC.

3. Contrary to New Hope's assertion, 2d Cir. No. 19-1715, ECF 46, at 2-3, 9, the parties' negotiations regarding a potential partial stay of enforcement was *not* "material to OCFS's justification for its motion to remove this matter from the Expedited Appeals Calendar." In fact, in its motion to remove the appeal from the XAC, OCFS argued that the appeal is not well-suited to expedited review for two other reasons: (1) the appeal implicates important public policies that merit sufficient time for briefing, argument, and decision, and (2) the district court's decision did not rest on a review of the sufficiency of the factual allegations but rather resolved the legal issue whether the claims

stated a basis for relief under governing law. *See* 2d Cir. No. 19-1715, ECF 36, at 3, 6-7; ECF 41, at 2. OCFS described the then ongoing negotiations regarding a partial stay of enforcement only as relevant to an amelioration of any potential impact on New Hope of the 30-day extension that OCFS sought as alternative relief if the appeal remained on the XAC. *See* 2d Cir. No. 19-1715, ECF 36, at 8-9.

4. Notwithstanding New Hope's contrary assertions, *see* 2d Cir. No. 19-1715, ECF 46, at 10, 12, OCFS negotiated in good faith and promptly notified New Hope of its changed position. *See* Exhibit A (email dated August 6, 2019). Indeed, as soon as it appeared that OCFS might not ultimately accept a partial stay, I promptly notified opposing counsel of that development, even though a final decision had not yet been made. And I thereafter acceded to counsel's request to notify the Court immediately of that interim development, rather than wait for a definitive determination from OCFS, which I expected shortly. Yet New Hope now criticizes my resulting communication to the Court as "cryptic." 2d Cir. No. 19-1715, ECF 46, at 3.

5. Finally, New Hope's argument that the appeal should not be removed from the XAC because of the effect on New Hope of OCFS's

proposed enforcement measures, 2d Cir. 19-1715, ECF 46, at 5-6, is more appropriately resolved in the motion for emergency injunctive relief that New Hope has indicated it will be filing. Indeed, my alternative request for a 30-day extension is even more critical if the appeal remains on the XAC, because I will have to devote a portion of the limited briefing time to responding to that motion.

6. For all of these reasons, New Hope's motion for permission to file the proposed surreply should be denied.

Dated: Albany, New York  
August 13, 2019

/s/ Laura Etlinger  
LAURA ETLINGER  
Assistant Solicitor General

# Exhibit A

## **Etlinger, Laura**

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**From:** Roger Brooks <rbrooks@adflegal.org>  
**Sent:** Tuesday, August 6, 2019 8:59 PM  
**To:** Etlinger, Laura  
**Subject:** RE: New Hope Family Services

Laura, I just saw this after sending my last. I'll call you tomorrow morning to discuss.

Regards,

Roger G. Brooks  
Senior Counsel  
Alliance Defending Freedom  
(207) 864-2054



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**From:** Etlinger, Laura [mailto:Laura.Etlinger@ag.ny.gov]  
**Sent:** Tuesday, August 6, 2019 7:04 PM  
**To:** Roger Brooks <rbrooks@adflegal.org>  
**Subject:** New Hope Family Services

Dear Roger,

I just tried to call but did not leave a message as it seemed to be your home number. I was calling to give you a heads up that I may not be able to get final approval for the stay agreement after all. I will share more concrete information as soon as I am can, but wanted to let you know now that things may not work out with the agreement.

Laura

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