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BY EFILE

The Hon. Thomas P. Griesa  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1630  
New York, New York 10007-1313

Re: Rivera, et al. v. Mattingly, et al., 06 Civ. 7077 (TPG)(HBP)

Hon. Judge Griesa:

We represent J.C., one of three minor plaintiffs in the above-captioned action. We write to request that this Court relieve The Legal Aid Society and Hughes Hubbard & Reed LLP (J.C.'s Current Counsel) from representing J.C. as counsel pursuant to Local Civil Rule 1.4 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York. In addition, for the reasons set forth below, we respectfully request that this Court discharge Andrea Zellan, Next Friend for J.C., from her duties under Rule 17(c) of the Federal Rules of Civil Procedure.

#### Facts and Procedural History

The original complaint in this case was filed on September 14, 2006, on behalf of all plaintiffs by the law firm of Lansner & Kubitschek (ECF Docket # 1). On December 4, 2006, this Court endorsed the parties' Stipulation and Order substituting The Legal Aid Society and Hughes Hubbard & Reed LLP as counsel for J.C., and appointing Andrea Zellan as Next Friend for J.C. (ECF Docket # 22). At that time, J.C. was 9 years old.

Discovery and motion practice followed. The parties engaged in extensive document discovery and conducted numerous depositions. On March 24, 2009, this Court denied Defendant John Johnson's Motion for Judgment on the pleadings (ECF Docket # 86), and on May 13, 2009, this Court denied Defendant Johnson's Motion for Reconsideration of its March 24, 2009, Opinion (ECF Docket # 91). Subsequently, in September and October of 2010, Plaintiffs and Defendants Andrea Cummings, Rehema Bukenya and Family Support Systems Unlimited, Inc. (collectively, "FSSU Defendants"), filed Cross Motions for Summary Judgment (ECF Docket #s 102-106, 109-124, 127-137).

On September 12, 2011, this Court granted FSSU Defendants' Motion for Summary Judgment and dismissed all claims against FSSU Defendants (ECF Docket # 139). In the same Opinion, this Court denied Plaintiffs' Cross Motions for Summary Judgment against FSSU Defendants. Plaintiffs jointly moved for reconsideration, and this Court denied Plaintiffs' Motion in a January 10, 2012, Opinion (ECF Docket # 153).

Following the January 10, 2012, Opinion, the remaining parties completed discovery while also discussing the possibility of settlement. This Court held a status conference on November 29, 2012, and the parties reported that they anticipated filing motions for summary judgment but would also continue to pursue settlement. A briefing schedule was set, and thereafter extended several times with this Court's approval.

In July 2013, Plaintiff J.C., through her Current Counsel, and her Next Friend reached an agreement with City Defendants regarding settlement. However, before a motion could be filed seeking this Court's approval of the settlement pursuant to Local Civil Rule 83.2,<sup>1</sup> J.C. informed her counsel and Next Friend by telephone that she no longer wished to be represented by J.C.'s Current Counsel and Next Friend, but wanted to be represented by Plaintiffs Mable and Anthony Rivera, who had adopted her on June 25, 2007, and their counsel, Lansner & Kubitschek. J.C.'s Next Friend, Andrea Zellan, and J.C.'s Current Counsel wrote to this Court requesting guidance concerning whether their representation of J.C. should be discontinued. A series of letters to the Court from the parties followed which raised concerns about the proposed settlement and J.C.'s representation (ECF Docket #s 167-170).

On November 20, 2013, this Court referred this matter to Magistrate Judge Henry B. Pitman. A status conference was held before Judge Pitman on December 10, 2013, and the matter was adjourned to January 8, 2014, for a settlement conference. Because the question of J.C.'s representation remained unresolved, Judge Pitman determined that, for the purpose of the settlement conference only, J.C. should be jointly represented by Andrea Zellan and J.C.'s Current Counsel, and by her parents and their counsel. Unfortunately, the parties were not able to come to an agreement regarding settlement. Following the settlement conference, the parties have been discussing a briefing schedule for summary judgment motions, but the Court in the meantime has set a September 15, 2014, trial date.

#### Motion to Be Relieved

Andrea Zellan, J.C.'s Next Friend, wrote to this Court on September 30, 2013, requesting guidance as to whether her representation of J.C. should be terminated because J.C., now 16 years old, has told her she no longer wishes to be represented by Ms. Zellan, but prefers to be represented by her parents, Plaintiffs Mable and Anthony Rivera (ECF Docket # 167). During September 2013, J.C. expressed this position to both Ms. Zellan and her Current Counsel. Prior to the December 2013 conference with Magistrate Judge

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<sup>1</sup> Local Civil Rule 83.2 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York provides that an action on behalf of a minor or incompetent may not be settled or otherwise terminated except by court order, judgment or decree.

Pitman, we attempted to speak with J.C. again, but were unsuccessful. Since that time, we have made efforts to arrange a meeting with J.C., to no avail. Neither J.C. nor her parents have responded to our calls or letters.

Although, pursuant to Rule 17 of the Federal Rules of Civil Procedure, J.C. lacks capacity, due to her age, to sue on her own behalf, as a 16 year old with no developmental limitations she has the ability to participate in her own representation. Subdivision (c) of Rule 17 requires that a minor without a duly appointed representative be represented in an action by a next friend or guardian ad litem, but the Rule is silent with respect to the right of a minor to choose her representative. We submit that, in light of J.C.'s age and abilities, her wishes should be taken into account by this Court in assigning her representatives.

When this litigation commenced, J.C. was in the custody and guardianship of Family Support Systems Unlimited, Inc.<sup>2</sup> That guardianship ended when the Riveras adopted J.C. on June 25, 2007. The Riveras have now been J.C.'s legal parents for nearly seven years. We have no reason to believe that her parents will make decisions on J.C.'s behalf that they do not believe are in her best interests.

Under all of the circumstances, we respectfully request that this Court relieve The Legal Aid Society and Hughes Hubbard & Reed LLP from representing Plaintiff J.C., and discharge Andrea Zellan from her duties as Next Friend for J.C.<sup>3</sup>

Respectfully submitted,



Theresa B. Moser

cc: (By ECF)  
Reuben L. Borman, Esq.  
Charles Carey, Esq.  
Robert L. Kraft, Esq.  
Carolyn A. Kubitschek, Esq.

(By U.S. MAIL)  
J.C.

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<sup>2</sup> Family Support Systems Unlimited, Inc, previously a defendant in this matter, became J.C.'s guardian in 2005 upon Family Court approval of a judicial surrender of parental rights by J.C.'s biological mother in accordance with NY Social Services Law § 383-c.

<sup>3</sup> The Legal Aid Society and Hughes Hubbard & Reed LLP will not be asserting a retaining or charging lien. See Local Civil Rule 1.4.