

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, et al.,
Plaintiffs,
v.
SUTTER HEALTH, et al.,
Defendants.

Case No. 18-CV-02067-LHK

**ORDER REGARDING MOTION TO
WITHDRAW; PRO SE PROGRAM;
SERVICE OF COMPLAINT; CASE
MANAGEMENT CONFERENCE; AND
DISCOVERY STAY**

Re: Dkt. No. 24

This case is a *qui tam* action alleging violations of the federal and California False Claims Acts. Plaintiff-Relator Judy Jones (“Jones”) commenced this action *pro se* on April 4, 2018. ECF No. 1. Counsel Barry Himmelstein (“Himmelstein”) filed a notice of appearance on May 24, 2018. ECF No. 9. An Amended Complaint was filed on October 19, 2018. ECF No. 13. Before the Court is the motion for order permitting withdrawal (“motion”) of Himmelstein, counsel for Plaintiff-Relator Jones. ECF No. 24. The Court held a hearing on the motion on Thursday, October 3, 2019.

I. LEGAL STANDARD

“An attorney may not withdraw as counsel except by leave of court.” *Darby v. City of*

1 *Torrance*, 810 F. Supp. 275, 276 (C.D. Cal. 1992). Permission to withdraw is discretionary. *See*
2 *United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009). In ruling on a motion to withdraw,
3 courts have considered: “1) the reasons why withdrawal is sought; 2) the prejudice withdrawal
4 may cause to other litigants; 3) the harm withdrawal might cause to the administration of justice;
5 and 4) the degree to which withdrawal will delay the resolution of the case.” *CE Res., Inc. v.*
6 *Magellan Group, LLC*, 2009 WL 3367489, *2 (E.D. Cal. Oct. 14, 2009); *Das v. WMC Mortg.*
7 *Corp.*, 2011 WL 13239055, at *1 (N.D. Cal. Oct. 14, 2011) (same).

8 In addition, attorneys seeking to withdraw must “comply with the standards of professional
9 conduct required of members of the State Bar of California.” Civil Local Rule 11-4(a)(1). Under
10 the California Rules of Professional Conduct, withdrawal may be appropriate if the client “renders
11 it unreasonably difficult for the member to carry out the employment effectively.” Cal. R. Prof.
12 Conduct 3-700(C)(1)(d). Before withdrawing for any reason, an attorney must take “reasonable
13 steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due
14 notice to the client, allowing time for employment of other counsel, complying with rule 3-
15 700(D), and complying with applicable laws and rules.” Cal. R. Prof. Conduct 3-700(A)(2). The
16 Civil Local Rules also require an attorney to provide written notice of her intent to withdraw
17 “reasonably in advance to the client and to all other parties who have appeared in the case.” Civil
18 Local Rule 11-5(a).

19 Where withdrawal by an attorney is not accompanied by simultaneous appearance of
20 substitute counsel or agreement of the party to appear *pro se*, leave to withdraw may be subject to
21 the condition that papers continue to be served on counsel for forwarding purposes until the client
22 appears by other counsel or *pro se*. Civil Local Rule 11-5(b).

23 **II. DISCUSSION**

24 **A. Motion to Withdraw**

25 In the instant case, Himmelstein stated in his declaration in support of his motion that he
26 was discharged by Jones. ECF No. 24 at 5. At the hearing on the motion, Himmelstein read from
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1 March 2019 texts in which Jones and Himmelstein discussed executing a substitution of counsel
2 form when Jones obtained new counsel. During the hearing Himmelstein stated that Jones
3 discharged Himmelstein on March 25, 2019. Himmelstein stated that he waited to file his motion,
4 so that Jones could obtain new counsel.

5 Himmelstein also stated that he filed his motion and Statement in Lieu of Joint Case
6 Management Conference Statement—which requested a continuance of the June 19, 2019 initial
7 case management conference—on June 14, 2019. Himmelstein stated that he did so because the
8 Joint Case Management Conference Statement was due on June 12, 2019, and he could no longer
9 wait for Jones to obtain new counsel.

10 At the hearing on the motion, Jones stated that she never discharged Himmelstein and that
11 she wanted Himmelstein to continue to represent her. Jones said that Himmelstein only wanted to
12 discontinue his representation of Jones because the federal and state governments declined to
13 intervene and that Himmelstein did not have the resources to litigate the case without government
14 intervention. Jones stated that Himmelstein and Jones had misunderstandings, but that Jones and
15 her business counsel hoped to work them out with Himmelstein. Jones stated that before the
16 federal and state governments declined to intervene, Jones had requested that Himmelstein
17 perform certain tasks.

18 Himmelstein stated that the declinations of the federal and state governments to intervene
19 in the instant case had no bearing on the motion and that the performance of the tasks Jones
20 requested would not be consistent with Himmelstein’s professional ethical obligations such that
21 Himmelstein could not continue his representation of Jones.

22 The Court need not determine whether Himmelstein’s or Jones’ version of events is true.
23 Clearly, there is a breakdown in the attorney-client relationship such that this representation
24 cannot continue. *VBS Distribution, Inc. v. Nutrivita Labs., Inc.*, 2018 WL 5279542, at *1 (C.D.
25 Cal. June 29, 2018) (granting motion to withdraw due to “complete breakdown in trust and
26 confidence”); *Heilman v. Silva*, 2017 WL 822164, at *2 (S.D. Cal. Mar. 2, 2017) (finding good
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1 cause for withdrawal because plaintiff and counsel “maintain differing opinions and positions
2 regarding the handling of Plaintiff’s case to the point that they have irreconcilable differences and
3 cannot amicably carry on the attorney-client relationship”). Therefore, the Court GRANTS the
4 motion for order permitting withdrawal. Himmelstein is ordered to deliver the entire case file to
5 Jones by Monday, October 7, 2019.

6 During the hearing, Jones requested 30 days to obtain new counsel. Jones may obtain new
7 counsel at any time, but she must proceed *pro se* in the interim. Indeed, Jones filed the initial
8 complaint *pro se* on April 4, 2018, ECF No. 1. Moreover, Jones texted Himmelstein about
9 executing a form to replace Himmelstein as counsel in March 2019, seven months ago.

10 Furthermore, Himmelstein’s motion, filed on June 14, 2019, requested that the June 19,
11 2019 initial case management conference be continued up to 60 days in which Jones would obtain
12 new counsel. That 60-day period expired two months ago, and Jones has failed to obtain new
13 counsel. The federal and state governments declined to intervene on June 11, 2019. ECF Nos. 23
14 and 29. This case, which has been pending since April 4, 2018, must proceed.

15 Kevin Knestrick (“Knestrick”) of the Federal Pro Se Program attended the October 3, 2019
16 hearing. During the hearing, the Court referred Jones to Knestrick and encouraged Jones to make
17 an appointment with Knestrick. Although Knestrick provided his phone number during the
18 hearing, the Court repeats it here for Jones’s convenience: (408) 297-1480.

19 At the October 3, 2019 hearing, Jones represented that she has a medical doctorate degree
20 and has completed one year of law office legal studies, which she represented is the equivalent of
21 one year of law school. Jones represented that she is effectively a second-year law student.
22 Although Jones may have some legal training, the Court strongly encourages Jones to obtain new
23 counsel or make an appointment with Knestrick.

24 **B. Service of Complaint and Initial Case Management Conference**

25 The Court ORDERS Jones to serve the First Amended Complaint and summons on the
26 defendants. The Court sets an initial case management conference for January 8, 2020 at 2:00
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1 p.m. The parties shall file a joint case management conference statement by January 1, 2020.

2 **C. Stay of Discovery**

3 From 2014 to 2017, Jones sued all the same defendants except for Sutter Health and Sutter
4 Bay Medical Foundation in the Superior Court of California, County of Santa Clara, for personal
5 injury and medical malpractice. The Superior Court dismissed that case in November 2017. Jones
6 represents that the dismissal was without prejudice. Himmelstein represents that the litigation was
7 extensive over a period of years, the docket is very long, and that Jones obtained the medical
8 billing data for the instant case from the discovery in the state court litigation. In the instant case,
9 the First Amended Complaint includes snapshots of deposition testimony, deposition transcripts,
10 and special interrogatory requests and responses from the state court litigation. The Court hereby
11 STAYS discovery in the instant case until the Court orders otherwise.

12 **III. CONCLUSION**

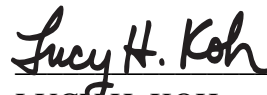
13 For the foregoing reasons, the Court GRANTS Himmelstein's motion to withdraw as
14 counsel for Plaintiff-Relator Jones. The Court strongly encourages Jones to obtain new counsel or
15 make an appointment with Knestrick of the Federal Pro Se Program.

16 Furthermore, the Court ORDERS Jones to serve the First Amended Complaint and
17 summons on the defendants. The parties shall file a joint case management conference statement
18 by January 1, 2020 for the case management conference set for January 8, 2020 at 2:00 p.m.

19 Finally, the Court STAYS discovery in the instant case until the Court orders otherwise.

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21 **IT IS SO ORDERED.**

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23 Dated: October 4, 2019

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25 LUCY H. KOH
26 United States District Judge