IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	)	
	)	
***Plaintiffs*,**	)	**CASE NO. 2017 CA 005989 B**
	)	
v.	)	**Judge Hiram Puig-Lugo**
	)	
DAVID H. HOFFMAN, *et al.*,	)	**Next Scheduled Event: Status Conference**
	)	**September 14, 2018**
***Defendants*.**	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' PRAECIPE

1. As Defendants informed the Court in their June 29, 2018, praecipe, the Ohio Court of Appeals (Second Appellate District) has affirmed an Ohio trial court's dismissal of Plaintiffs' action for lack of personal jurisdiction.

2. For the reasons more fully explained below, Plaintiffs now respectfully request this Court to take the following steps:

a) Lift the February 16, 2018, stay issued in this matter pending the decision of the Ohio Court of Appeals. Although Plaintiffs will appeal that decision to the Ohio Supreme Court, lifting the stay comports with relevant D.C. precedent (*Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996)) and will ensure that the case moves forward expeditiously in this jurisdiction, which Defendants have represented to Ohio Courts to be the appropriate jurisdiction.

b) Rule on Plaintiffs' pending request for expedited discovery (Motion for Limited Discovery, filed November 30, 2017) pursuant to D.C. Super. Court Rul. Civ. Proc. 56(d) and the provisions of the Anti-SLAPP Act, D.C. Code § 16–5502 (c)(2). Discovery is necessary to obtain information in Defendants' sole possession that will enable Plaintiffs to respond fully to Defendants' Motions to Compel Arbitration and

Special Motions to Dismiss Under the D.C. Anti-SLAPP Act. Plaintiffs have limited their requests to four interrogatories, seven non-burdensome document requests, and four depositions.

c) Pursuant to D.C. Super. Court Rule of Civ. Proc. 16(b)(4)(B), order Defendant American Psychological Association to preserve on its website documents and information relevant to this dispute (with the exception of the Hoffman Reports, the removal of which Plaintiffs have requested). On or about June 22, 2018, the APA removed from its website a document relied on extensively in Plaintiffs' Complaint.[1] Although Plaintiffs have a copy of the document, its continued presence on the APA's website as an official and readily available APA policy was a component of Plaintiffs' case. The website contains other documents relevant to this litigation.

3. Additionally, Plaintiffs ask this Court to use the Status Conference scheduled for September 14, 2018, as an initial scheduling conference pursuant to Rule 16(b). On November 28, 2017, due to the Court's schedule, the Court rescheduled the December 1, 2017, initial scheduling conference for February 23, 2018. As a result of the stay and the transfer of the case, however, that meeting became the May 18, 2018, status conference. Consequently, the parties have never had the benefit of the mandatory D.C. Super. Court Rule of Civ. Pro. 16(b)(1) scheduling and settlement conference. Nor has a 16(b)(3) scheduling order been issued.

4. Such a conference would be particularly useful because, at this point, there are five motions pending before the Court: Plaintiffs' Motion for Limited Discovery, APA's Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, Sidley and Hoffman's Special Motion to Dismiss

[1] https://www.apa.org/404-error.aspx?url=http://www.apa.org/pubs/info/reports/pens.pdf. The document, the Psychological Ethics in National Security (PENS) Guidelines, is at the center of two of the three main findings in the investigatory report that gave rise to this lawsuit.

Under the D.C. Anti-SLAPP Act, APA's Motion to Compel Arbitration, and Sidley and Hoffman's Motion to Compel Arbitration. In addition, after the Court resolves the discovery motion, Plaintiffs will file two Motions to Strike pursuant to Rule 12(f), one with respect to each Defendant's Anti-SLAPP Motion, contending that Defendants' affirmative defenses in those motions are insufficient as a matter of law. Moreover, Defendants' failure to file 12(b)(6) motions in conformity with Rule 12(g) has significantly prejudiced Plaintiffs' ability to conduct their case. Neither Defendants' Anti-SLAPP motions nor their arbitration motions are provided for in the D.C. Superior Court Rules of Civil Procedure as a means of "responding" to Plaintiffs' Complaint.

5. For the Court's ease of reference, Plaintiffs have summarized below the course of this dispute, its current status in Ohio and Massachusetts as well as the District of Columbia, and the rationale for the actions they request.

Course of the Dispute

6. As Plaintiffs' Complaint for defamation and false light sets forth, at the center of this dispute are three versions of an investigative report (the "Hoffman Reports") written by David Hoffman, a partner of Sidley Austin LLP licensed to practice law only in Illinois, and statements made in the media from Georgia by the then-APA President after the Reports' initial release in 2015. APA had hired Hoffman to investigate allegations that it had colluded with the Bush administration to enable psychologists' participation in abusive interrogations, including the torture, of national-security detainees after 9/11. The Hoffman Reports falsely accused Plaintiffs, among others, of such collusion.

7. Based on affidavits from those Hoffman interviewed, testimony from those with first-hand knowledge of the events he investigated, documents he ignored or mischaracterized, and other evidence described in the Complaint, on February 16, 2017, Plaintiffs filed suit in Ohio, where

Plaintiff James resides, for defamation and false light.

8. During argument about jurisdictional issues before the Montgomery County, Ohio, Court of Common Pleas, Defendants represented:

> this case in any event should be dismissed so that it can be refiled in the Superior [sic] forum, which is in the District of Columbia, which means that if the Court were to dismiss on that basis, the case would not end. Plaintiffs would have an avenue to assert their claims. August 25, 2017, Oral Argument Transcript, p. 11.

9. When the Ohio court dismissed the case for lack of personal jurisdiction, therefore, Plaintiffs promptly filed suit on August 28, 2017, in the Superior Court for the District of Columbia. The District of Columbia action was stayed until the Ohio Court of Appeals decided the appeal of the trial court's jurisdiction decision.

10. During the pendency of these actions, Plaintiffs gathered further evidence of the role of Massachusetts residents in events leading up to and during the investigation, in the crafting of the Reports, and in their aftermath. These residents include a psychologist who was a primary source for Hoffman's defamatory statements, who continues to defame Plaintiffs in his own published statements, and over whom a District of Columbia court is unlikely to have jurisdiction.

11. On June 25, 2018, therefore, Plaintiffs filed suit in the Superior Court of Suffolk County, Massachusetts, against Sidley, Hoffman, the APA, and two new defendants: the Massachusetts psychologist, Stephen Soldz, and Sidley Austin (NY) LLP, the Sidley partnership that encompasses the Boston office from which Hoffman worked while conducting interviews in Massachusetts.

12. The Massachusetts complaint incorporates seven new counts and significant new evidence, including metadata evidence suggesting that Hoffman leaked an advance copy of his Report to the media. In addition to these substantive reasons prompting the Massachusetts suit, given the Ohio Court's decision and Defendants' assertion that the D.C Anti-SLAPP Act blocks Plaintiffs'

access to courts in D.C., Plaintiffs wish to ensure that they have access to a court in at least one jurisdiction.

13. Before and during these litigations, beginning in August 2015, Plaintiffs have repeatedly offered to work towards a settlement and engaged in lengthy discussions with Defendants' counsel towards that end. For example, in November 2015 Plaintiffs' counsel met with the APA's outside counsel to request the hiring of a neutral third-party arbitrator (the Honorable Patricia Wald). The APA Board rejected that request, as the minutes of its March 2016 meeting reflect. In June of 2016, Plaintiffs' counsel proposed a settlement consisting of a public statement and monetary compensation; that offer has been renewed as recently as September 2017. Although Plaintiffs are no longer willing to accept arbitration given the resources already consumed by this litigation after Defendants initially rejected arbitration, they have expressed ongoing willingness to mediate, which Defendants have also rejected.

Status of Pending Litigation: Ohio, Massachusetts, and the District of Columbia

The Ohio Litigation

14. Before Defendants filed their October 11, 2017, motion to stay this lawsuit and again in response to that motion, Plaintiffs offered in writing to dismiss their Ohio appeal if Defendants filed their 12(b)(6) motion in accordance with D.C. Super. Court Rul. Civ. Proc. 12(g), and if that motion demonstrated that Plaintiffs would not be prejudiced by abandoning the Ohio appeal. This offer was not accepted.

15. Plaintiffs will request that the Ohio Supreme Court accept an appeal from the Ohio Appeals Court decision on the grounds that the lower courts ignored or misapplied Ohio and U.S. Supreme Court law governing personal jurisdiction in defamation cases. Under that law, the tort of defamation occurs where a defamatory statement is published (as shown by residents having read

the statements) – in contrast to the test for personal jurisdiction used by the Ohio Court of Appeals, which applies when the tort occurs outside the jurisdiction and only its effects are felt within the jurisdiction.

The Massachusetts Litigation

16. The Massachusetts Complaint was filed on June 25, 2018, and Defendants are being served during the week of July 2.

The District of Columbia Litigation

The Stay

17. Plaintiffs opposed the stay granted on February 16, 2018, on the ground, among others, that it flew in the face of governing precedent in *Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996). There, the Court of Appeals quoted approvingly from *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 235 U.S.App. D.C 207, 224-25:

> "the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction." (Citation omitted)

18. Plaintiffs cited this case (and another that cited it) in their brief opposing the stay and in their response to Defendants' praecipe renewing their request for a stay. However, the case was not discussed or cited by Defendants in their papers or, when the stay was ordered, by the Court. At this point, when it is not certain whether the Ohio Supreme Court will accept an appeal of the Ohio decision, and after Hoffman and Sidley's counsel represented to the Ohio Court of Appeals that Plaintiffs would have a forum in this Court if the Ohio Court dismissed the matter, it is time for the case to proceed in the jurisdiction of the Defendants' choosing.

Defendants' Pending Motions

19. At present, Defendants have before the Court four motions that, if granted, would deny Plaintiffs a hearing on the merits of their claims:

APA's and Hoffman and Sidley's Special Motions to Dismiss

20. To decide these motions, as Plaintiffs' proposed motions to strike will argue, the Court will be called on to address some and potentially all of the following threshold questions:

21. *Choice of law.* Before the D.C. Anti-SLAPP Act can be applied, a choice-of-law analysis will first have to be applied on a count-by-count basis. As the APA argued in its Ohio motion papers: "…courts in many other jurisdictions have held that the Anti-SLAPP law of a defendant's domicile state or of the state where the speech originated applies, even where another state's defamation law applies." APA Special Motion to Dismiss under the D.C. SLAPP Act filed in Ohio, p. 19.

22. Under that standard, the D.C. Anti-SLAPP Act does not apply in this case. All but one of the 12 causes of action are based on speech or statements that originated in Illinois, where Hoffman wrote the Reports, or in Massachusetts, the residence of two of his four primary sources for his defamatory statements. (The remaining cause of action, Count 8, is based on statements by Dr. Nadine Kaslow on behalf of the APA that originated from Georgia.) Moreover, Illinois is Sidley Austin LLP's principal place of business, Hoffman's domicile and state of licensure, and one of Sidley's two places of organization (the other is Delaware). The APA and Sidley also agreed in their engagement letter that Illinois law would govern any claims between them.

23. The choice-of-law decision is significant. The Illinois and Massachusetts Supreme Courts have both held that their anti-SLAPP statutes cannot apply where, as here, Plaintiffs are attempting to redress harm to their reputations through appropriate access to the courts. *Blanchard*

v. Steward Carney Hosp., Inc., 75 N.E.3d 21, 156-61 (Mass. 2017); *Sandholm v. Kuecker*, 962 N.E.2d 418, 428-432 (Ill. 2012).

24. *Public official or limited public figure analysis.* Defendants' anti-SLAPP motions are premised entirely on a decision the Court has not yet made about whether Plaintiffs are public officials or limited public figures. In claiming that they are not, Defendants are asserting an affirmative defense. They have the burden, therefore, of proving the claims by clear evidence, even in the context of an anti-SLAPP motion. *See, e.g, Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 869 (W.D. Va. 2016) ("The court starts with a presumption that Eramo was a private individual at the time of publication, subject to defendants' burden of proving that plaintiff was a public official or limited-purpose public figure."); *Wilson v. Daily Gazette Co*, 588 S.E.2d 197, 215-18 (W. Va. 2003); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015) ("Although the anti-SLAPP statute 'places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'" (internal citation omitted)).[2]

25. In their proposed motions to strike, Plaintiffs will demonstrate that they are all private citizens and, therefore, are required to establish only negligence on the part of the Defendants. Complaint ¶¶ 39-45. Plaintiffs assert that they were mid-level officials within their organizations who did not have the ability to create policy, rather than implementing policy set by others; the military Plaintiffs participated in the events Hoffman investigated only as private citizens who could not speak for the military; and the APA Plaintiffs could not set or vote on APA policy.

[2] In *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1251 n.51 (D.C. 2016), the only D.C. Court of Appeals case that has interpreted the Anti-SLAPP Act, plaintiff's status was conceded: "The parties agree, as do we, that Dr. Mann is a limited public figure …."

26. *Private-interest analysis.* Plaintiffs will assert that the D.C. Anti-SLAPP Act does not apply to private interests[3] such as here, where an attorney was hired to review the internal actions and governance matters of a client.[4]

27. *Prima-facie analysis.* Under the Anti-SLAPP Act, Plaintiffs bear the initial burden of identifying all activity protected by the Act in each of Plaintiffs' 12 claims. D.C. Code § 16–5502(b).[5] Defendants will assert that Plaintiffs have failed to meet their burden. Defendants Sidley and Hoffman have not admitted to any action that is covered by the statute: they have denied publishing the statements at issue, asserting instead that they "contemplated" the APA would make the Reports public, which is not an ***act*** covered by the express language of the statute. (Hoffman and Sidley Anti-SLAPP Motion, p. 10.) The APA has claimed protection for only one of its multiple publications, identified in only one of the Complaint's twelve Counts (Count 7). (APA Anti-SLAPP Motion, p. 8.) The APA has not made any claims for protection for the other publications set forth in Plaintiffs' Complaint, including the statements made from Georgia by the head of the APA Special Committee as set forth in Count 8.

28. *D.C. Home Rule Act.* The D.C. anti-SLAPP statute was never adopted as part of the D.C. Superior Court Civil Rules. The statute creates a new procedure not contained in the Federal

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[3] D.C. Code § 16–5501 (3) "Definitions. The term 'issue of public interest' shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance."

[4] *Cardno Chemrisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1187-91 (Mass. 2017) ("…one seeking the protection of the statute must show that he or she has 'petition[ed] the government on [his or her] own behalf ... in [his or her] status as [a] citizen.'") (internal citation omitted)

[5] *Baral v. Schnitt*, 376 P.3d 604, 617 (Cal. 2016), discusses the procedure to be used by courts under the California statute which the D.C. Court of Appeals looked to in the one decision it has rendered interpreting the D.C. Anti-SLAPP Act: "As the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 n.31 (D.C. 2016).

Rules of Civil Procedure, rules which the D.C. Superior Court must follow unless a new rule is formally approved. As a result, Plaintiffs will assert, the statute violates the D.C. Home Rule Act.[6]

29. *Constitutionality.* For reasons articulated by courts in other jurisdictions, including Illinois and Massachusetts, if the provisions of the D.C. anti-SLAPP statute were to be applied to Plaintiffs, the provisions would violate their First Amendment Rights to access the courts and petition for redress.[7]

APA's and Sidley and Hoffman's Motions to Compel Arbitration

30. Despite the APA's previous refusal to arbitrate these matters with Plaintiffs, Defendants have filed motions to compel arbitration with Plaintiffs Behnke and Newman, both former APA employees, relying on two expired employment agreements that do not have a survivability clause. In their response to these motions, Plaintiffs are prepared to demonstrate that Defendants have no right to arbitration.

Plaintiffs' Pending Motion for Discovery to Answer Defendants' Motions

The Arbitration Motions

31. The employment agreements relied on by the APA are not mentioned in Plaintiffs' Complaint. According to D.C. Sup. Court Rul. Civ. Proc. 12(d), if the Court considers matters outside the pleadings, such as the purported employment agreements, it must treat Defendants' motions as summary judgment motions and allow for appropriate discovery, as is evident from cases

[6] See *Woodroof v. Cunningham,* 147 A. 3d 777, 783-784 (D.C. 2016); "D.C. Code § 11–946 ('The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23)' or as modified in accordance with the statute) …." Plaintiffs will be required to provide notice of a motion challenging the Anti-SLAPP Act on these grounds to the Attorney General of the District of Columbia, who has the right to intervene pursuant to D.C. Sup. Court Rul. Civ. Pro. 5.1.

[7] *Blanchard v. Steward Carney Hosp., Inc.*, 75 N.E.3d 21, 156-61 (Mass. 2017); *Sandholm v. Kuecker*, 962 N.E.2d 418, 428-432 (Ill. 2012).

cited by the Defendants in their own motions.

32. Moreover, Plaintiff Newman was employed by two entities within the APA, including a 501(c)(6) advocacy entity. Defendants have failed to provide the relevant employment agreement for that entity or any information about the terms of employment, despite requests.

The Anti-SLAPP Motions

33. Discovery is authorized by the express terms of the Anti-SLAPP Act, D.C. Code § 16–5502 (c)(2): "When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted." In this case, the discovery Plaintiffs request is necessary to further demonstrate that their claims are likely to succeed on their merits, a defense against an anti-SLAPP motion. D.C. Code § 16–5502 (b).

34. As described in Plaintiffs' Complaint, Defendants have refused to give Plaintiffs access to notes of Hoffman and Sidley's interviews, although fewer than 20 of the 148 interviews were conducted with APA constituents who could be said to be "clients" of Hoffman and Sidley, as would be necessary to claim privilege. Moreover, Sidley's engagement letter with the APA states that "the work we do to gather facts and evidence in order to conduct our independent review and prepare the Final Report (the 'Fact Finding Work') will not be covered by, and the APA does not expect to assert a claim of, the attorney-client communication privilege as to those matters." Even if there were any privilege to be claimed, it has been waived. *Doe v. Hamilton County Board of Education*, Case No. 1:16-CV-373, 2018 WL 542971 (ED Tenn. Jan. 24, 2018) (disclosure of an investigative report and reference to witness interviews waives any privilege as to the entire scope of the investigation and all materials, communications, and information provided to the attorney as part of her investigation). In addition, as two affidavits from former directors establish, there was no

pending or threatened litigation that would make work-product protections available. *Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64, 71 (D.D.C. 2017) ("Work-product privilege is dependent on a finding that the documents were created 'in anticipation of litigation.'" (internal citation omitted))

35. The discovery Plaintiffs have requested is even more necessary because the APA has attempted to intimidate witnesses who are otherwise willing to provide Plaintiffs with affidavits. As Plaintiffs are prepared to demonstrate through several statements, one affidavit, and one email they have received, the APA's general counsel, Deanne Ottaviano, has threatened to exclude those providing affidavits from participating in meetings of the APA Council, its governing body. Additionally, on January 30, 2017, at a meeting in Washington, DC, then-APA President Dr. Antonio Puente told a leader of the APA's military psychology division, to which the three military Plaintiffs belong, that he would see to it that the division suffered adverse consequences if it helped the Plaintiffs.[8]

36. Plaintiffs are cognizant of the need to use the Court's time and resources efficiently and are prepared to confer with Defendants about a briefing, discovery, and hearing schedule conducive to that efficiency. After the Court rules on the pending discovery and anti-SLAPP motions, Plaintiffs are prepared to file two consolidated replies to the arbitration motions and any remaining anti-SLAPP issues.

37. At the same time, Plaintiffs respectfully ask the Court to ensure that Defendants do not employ the Anti-SLAPP Act simply to exhaust Plaintiffs' resources, which are much more limited than theirs. As the D.C. Court of Appeals has stated, the Act "is not a sledgehammer meant

[8] http://www.hoffmanreportapa.com/resources/TF19%20Response%20to%20the%20Hoffman%20Report.pdf

to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1239 (D.C. 2016) The conduct of the case to date raises concerns that Defendants are attempting to use the Act to gain procedural advantages. For example, although Plaintiffs did not oppose Defendants' request for more time to file their anti-SLAPP and arbitration motions, Defendants refused Plaintiffs' request to delay briefing their replies until after the Court ruled on the Motion to Stay. Moreover, in their Reply on that Motion, Defendants wrongly asserted that any discovery by Plaintiffs should proceed simultaneously with their having to answer Defendants' motions – an assertion that defeats the entire point of the discovery necessary to respond to the motions. (See *e.g.*, Reply, p. 5, fn. 7)

Dated: July 3, 2018

Respectfully submitted,

/s/ Bonny J. Forrest
Bonny J. Forrest, Esq. (pro hac vice)
555 Front Street, Suite 1403
San Diego, California 92101
(917) 687-0271
Attorney for Plaintiffs Banks, Dunivin, James and Newman
bonforrest@aol.com

/s/ Louis J. Freeh
Louis J. Freeh, Esq. (D.C. Bar No. 332924)
Freeh Sporkin & Sullivan, LLP
2550 M St NW, First Floor
Washington, DC 20037
(202) 390-5959
Attorney for Plaintiff Behnke
bescript@freehgroup.com

/s/ James R. Klimaski
James R. Klimaski, Esq. (D.C. Bar No. 243543)
Klimaski & Associates, P.C.
1717 N St NW
Washington, DC 20036
(202) 296-5600
Attorney for all Plaintiffs
Klimaski@Klimaskilaw.com

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Hiram Puig-Lugo
vs.	:	Next Event [Status] [Initial] Conference September 14, 2018
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

[PROPOSED] ORDER

Upon consideration of Defendants' praecipe and Plaintiffs' response, it is hereby **ORDERED** that:

The stay in this matter is lifted and the Court will proceed to consider Plaintiffs' Motion for Limited Discovery filed on November 30, 2017.

All parties are required to preserve evidence in this matter, including electronically stored information on any relevant websites (with the exception of the Hoffman Reports which Plaintiffs have requested be removed from the American Psychological Association's website).

All further briefing in this matter is suspended until after consideration of Plaintiffs' Motion for Limited Discovery and the issuance of the Scheduling Order which will be discussed at the September 14, 2018, conference. That conference will be used as the required initial hearing and settlement conference pursuant to D.C. Superior Court Rule of Civil Procedure 16(b).

SO ORDERED.

/s/Judge Hiram Puig-Lugo
Judge Hiram Puig-Lugo

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, a true and correct copy of the foregoing Plaintiffs' Response to Defendants' Praecipe was filed through the Court's Case File Express electronic filing system, which will automatically send a Case File Express Electronic Notice to Defendants' counsel of record that this filing is completed and available for download at their convenience.

/s/ James R. Klimaski
James R. Klimaski