IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	**CASE NO. 2017 cv 005989B**
Plaintiffs,	:	**Judge Hiram E. Puig-Lugo**
vs.	:	**Next Scheduled Event: Sep. 14, 2018 Status Hearing**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO PLAINTIFFS' PRAECIPE SUBMISSIONS

On February 16, 2018, this Court, through Judge Edelman, granted defendants' contested motion to stay this action in favor of the substantively identical lawsuit that plaintiffs had filed in February 2017 in Ohio state court in Dayton, Ohio. This Court stayed this action "until the *final resolution*" of the Ohio lawsuit. Feb. 16, 2018 Order ("Order") at 1 (emphasis added). The Court also directed that the parties "shall file a Praecipe updating the Court" on "any rulings . . . made" by the Court of Appeals of Ohio in the first-filed litigation. *Id.* at 5. Defendants accordingly filed a Praecipe on June 29, 2018, notifying the Court that the Court of Appeals of Ohio, Second Appellate District, affirmed the trial court's dismissal for lack of personal jurisdiction. Dfs' June 29, 2018 Praecipe (citing *James v. Hoffman*, Appellate Case No. 27735).[1] On July 3 and July 23, 2018, plaintiffs subsequently filed two documents with the Court labeled "Response to Defendants' Praecipe," and a "Praecipe Regarding Developments in this Case," respectively. Defendants submit this response to plaintiffs' submissions, which are procedurally improper in a number of ways.

[1] Defendants had invited plaintiffs to join them in notifying this Court of the Ohio appellate ruling, but plaintiffs declined to do so, stating that they would make their own submission.

Rather than simply update the Court on the status of the Ohio litigation, plaintiffs' July 3 and July 23 submissions request a number of types of relief, preview arguments they may make in the future, and attempt to explain why they have filed three substantively identical cases in three different jurisdictions, to be litigated simultaneously. Included in their submissions are plaintiffs' request that the Court lift the stay despite plaintiffs' admission that the Ohio lawsuit has not yet reached final resolution because they are appealing their case to the Ohio Supreme Court. Plfs' July 3, 2018 Response, at 1-2. Plaintiffs also ask that the Court rule on plaintiffs' own D.C. discovery motion currently held in abeyance as part of the stay, that the upcoming September 14, 2018 status hearing be converted to a Rule 16(b) initial scheduling conference, and that defendant American Psychological Association ("APA") be required to take certain actions with regard to documents on its website. *Id.* at 1-2.[2] Plaintiffs make these requests without the benefit of briefing before the Court and without complying with the rules of this Court for motions.[3]

As an initial matter, plaintiffs' contention that the stay of this case should be lifted now is based on a stark misstatement of this Court's stay Order. Plaintiffs represent that the stay of the D.C. action lasts "until the Ohio Court of Appeals decided the appeal of the trial court's jurisdiction decision." Plfs' July 3, 2018 Response, at 4; *see also id.* at 1 (stay of D.C. Action in place "pending the decision of the Ohio Court of Appeals"). To the contrary, this Court's February 16, 2018 Order explicitly directed this action stayed "until the *Ohio action has*

[2] Plaintiffs further attach a "[Proposed] Order" to the July 3 submission that grants plaintiffs relief even beyond that requested in the submission.

[3] Plaintiffs also take the opportunity to preview potential arguments in opposition to defendants' pending motions. *Id.* at 7-10; Plfs' July 23, 2018 Praecipe, at 3. The Court stayed any such briefing, and such arguments are particularly improper for what is labeled a praecipe.

concluded," or, put another way, "until the *final resolution*" of the Ohio lawsuit. Order, at 1, 5 (emphasis added).

The Ohio action has not concluded. Rather, it is still ongoing on appeal at plaintiffs' election, and this case therefore remains stayed under the terms of this Court's Order.[4] As plaintiffs said they would in their July 23, 2018 Praecipe, they filed a jurisdictional appeal to the Ohio Supreme Court on August 3, 2018, asking for review of the appellate court's affirmance. Defendants filed their opposition in the Ohio Supreme Court on September 4, 2018. It will likely take the Ohio Supreme Court until at least the end of 2018 to decide whether to accept jurisdiction and hear plaintiffs' appeal. If the Ohio Supreme Court declines to hear the case, the Ohio case will have concluded, unless plaintiffs elect to file a certiorari petition with the U.S. Supreme Court in an attempt to keep this case in Ohio state court.[5]

Moreover, making numerous substantive requests for relief in a praecipe rather than by motion is entirely inconsistent with the rules and procedures of this Court. *See D.C. Super. Ct. General Order*, at 1 ("All requests must be by written motion . . . . The Court will not act on

[4] It further follows that plaintiffs' requested relief in their submissions beyond the lifting of the stay is premature and not properly before this Court, insofar as consideration of other D.C.-case-related matters is not proper while this case is still stayed.

[5] Plaintiffs also argue that this Court inappropriately stayed this case in the first instance, as the order "flew in the face of governing precedent in *Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996)." Plfs' July 3, 2018 Response, at 6. This assertion misstates the law. In *Auerbach*, the D.C. Court of Appeals held that D.C. courts should generally not issue an "antisuit injunction" enjoining parties from litigating a parallel case in another state's court and thereby "restrict the foreign court's ability to exercise its jurisdiction." *Auerbach*, 685 A.2d at 407. That is not what the Court did here; it merely stayed its *own* case in favor of another state's first-filed action. Further, *Auerbach* held that the "better" course of action than an antisuit injunction is a "motion[] in the [later-filed] court to stay"—*precisely what was done here*—as an uncontroversial exercise of the D.C. court's discretion to control its own docket. *Id.* at 409; *see also* Order, at 4 ("[D]iscretion should be exercised freely in favor of . . . stay where a prior action is pending elsewhere involving the same parties and issues.").

informal correspondence."). Plaintiffs have not filed a motion that complies with this Court's rules. For example, plaintiffs have not met and conferred with defendants on any of the requests for relief made in their July 3 and July 23 submissions. *See* Sup. Ct. Rule 12-I(a)(1). Nor did they file a Rule 12-I certification with their submissions stating that they sought consent from defendants for the relief requested. Sup. Ct. Rule 12-I(a)(3); *see also D.C. Super. Ct. General Order*, at 2; *J. Puig-Lugo Suppl. to General Order*, at 2. Nor did they title their filings as motions or even memoranda of law.

Nor is there any reason for the September 14, 2018 status hearing to address any issue other than what this Court intended—that is, the current status of plaintiffs' appeal in Ohio from the dismissal of their case for lack of jurisdiction. Any other issue presented or relief sought by plaintiffs is not properly before this Court.

Dated: September 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 10th day of September, 2018, that a true copy of the foregoing was filed through the Court's ECF system and served upon all registered participants.

/s/ Thomas G. Hentoff
Thomas G. Hentoff