SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| TWO RIVERS PUBLIC CHARTER SCHOOL,<br><br>Plaintiff,<br><br>v.<br><br>ROBERT WEILER, JR.,<br>JONATHAN DARNEL,<br>LAUREN HANDY,<br>RUBY NICDAO,<br>LARRY CIRIGANO,<br>JOHN DOE 1,<br>JOHN DOES, &<br>JANE DOES,<br><br>Defendants. | Civil Action No. 2015 CA 009512 B<br>Calendar 7<br>Judge Jeanette Clark<br><br>Next Event:<br>Mediation<br>November 9 – December 9, 2016<br><br>PLAINTIFF'S CONSOLIDATED OPPOSITION TO THE MOTION FOR A STAY, OR IN THE ALTERNATIVE TO EXTEND THE TIME TO ANSWER, OF DEFENDANTS LARRY CIRIGNANO, JONATHAN DARNEL, RUBY NICDAO, AND ROBERT WEILER |

**PLAINTIFF'S CONSOLIDATED OPPOSITION TO THE MOTION TO STAY, OR IN THE ALTERNATIVE TO EXTEND THE TIME TO ANSWER, OF DEFENDANTS LARRY CIRIGNANO, JONATHAN DARNEL, RUBY NICDAO, AND ROBERT WEILER**

Plaintiff Two Rivers Public Charter School files this consolidated opposition to Defendants' requests for a stay of all proceedings in this Court pending the resolution of their interlocutory appeal, which has yet to be accepted by the Court of Appeals. Defendants do not, however, meet the requirements for a stay and accordingly the case should proceed, Defendants should immediately answer the complaint and should be prepared to substantively respond to pending discovery under the rules of this Court.

## PROCEDURAL BACKGROUND

On December 9, 2015, plaintiffs brought this action in the District of Columbia Superior Court seeking to enjoin defendants and others from, *inter alia*, entering school property, blocking the students' safe passage to school, focused picketing of Two Rivers' students, and using signs larger than 11" x 17" in the presence of students under twelve years of age. Verified Compl. at 25-28.

In response, defendants filed motions to dismiss based on challenges to plaintiffs' standing and under the DC Anti-SLAPP.[1] On April 29, 2016, after a full

[1] *See* Def. Ruby Nicdao's Special Mot. to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed Jan. 29, 2016; Def. Ruby Nicdao's Mot. to Dismiss Under 12(b)(1) and (6), filed Jan. 29, 2016; Def. Larry Cirignano's Special Mot. to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed Feb. 1, 2016; Def. Robert Weiler, Jr.'s Special Mot. to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed Feb. 5, 2016; Def. Larry Cirignano's Mot. to Dismiss Under 12(b)(1) and (6), filed Feb. 5, 2016; Def. Robert Weiler, Jr.'s Special Mot. to Dismiss 12(b)(1) and DC Anti-SLAPP, filed Feb. 6, 2016; Def. Jonathan Darnel's Mot. to Dismiss Under 12(b)(1), filed Feb. 23, 2016;

hearing on the motions during which defendants were each afforded oral argument and rebuttal, the Court granted in part and denied in part defendants' motions to dismiss: (1) dismissing the Two Rivers Board of Trustees as a plaintiff, and (2) denying the special motions to dismiss. The Court reviewed each of plaintiffs' claims and the relief sought and concluded that plaintiff was "likely to succeed on the merits." Apr. 29, 2016 Hearing Tr. ("Apr. 29 Tr.") at 78:17-25.

On May 5, 2016, Defendant Ruby Nicdao filed her notice of appeal stating that "[t]he Order appealed from is not final, but an immediate appeal nonetheless may be taken under the collateral-order doctrine. *See Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014)." In citing *Doe v. Burke*, defendants' notice made no other qualifications about the D.C. Court of Appeals' decision. Defendants Larry Cirignano, Jonathan Darnell, and Robert Weiler followed suit by filing notices of appeal and citing the same authority, also with no qualification.

When the Court denied defendants' motions to dismiss on April 29, 2016, it triggered an affirmative obligation for them to file a responsive pleading by May 13, 2016 under the applicable rules. SCR 12(a)(4)(A) ("[I]f the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the Court's action."). Rather than answer, defendants chose instead to forestall their obligation to respond by filing motions for a stay of the proceedings pending the outcome of their highly

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and Def. Jonathan Darnel's Special Mot. to Dismiss Under 12(b)(6) and DC Anti-SLAPP, filed Feb. 23, 2016. On January 8, 2016, prior to filing his motions, Defendant Robert Weiler, Jr. filed an Answer.

speculative intermediate appeal of this court's denial of defendants' special motions to dismiss under the D.C. Anti-SLAPP Act.

## ARGUMENT

### I. The Court should deny the motion for a stay because Defendants' basis for its interlocutory appeal is insufficient.

Interlocutory appeals are the exception, not the rule. The D.C. Court of Appeals has "emphasized that the reach of the collateral order doctrine is 'modest' and the test for applying it is 'stringent.'" *Doe*, 91 A.3d at 1037 (citation omitted). Likewise, the United States Supreme Court has found there are only a "'small class' of collaterally appealable orders" that must be kept "narrow and selective in its membership." *Will v. Hallok*, 546 U.S. 345, 350 (2006).

In their Notice of Appeal, Defendants assert that "[t]he Order appealed from is not final, but an immediate appeal nonetheless may be taken under the collateral-order doctrine. *See Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014)." This, in its best light, is an over-simplification of the Court of Appeals' decision in *Doe v. Burke*. Although *Doe v. Burke* serves as the centerpiece of defendants' interlocutory appeal, they gloss over both what the D.C. Court of Appeals held and how it arrived at its final decision.

First, *Doe v. Burke* expressly did not address the situation presented here. As the Court of Appeals noted, the issue in *Doe v. Burke* was whether an order denying a *special motion to quash* under D.C. Code § 16-5503(a) was immediately appealable. *Doe*, 91 A.3d at 1036. Section 16-5503(a), which provides special protections for anonymous speech, is not at issue here. The Court of Appeals stated

that "[w]e do not address the related but separate question of whether an order denying a special motion to dismiss under the Anti-SLAPP Act is immediately appealable." *Id.* at 1036 n.6. What the Court of Appeals stated it was not addressing in *Doe v. Burke* is precisely what is at issue here. Defendants' notices make no reference to this aspect of the *Doe v. Burke* decision.

Defendants in their motions, somewhat grudgingly, acknowledge the issue presented here "technically is a question of first impression." Nicdao Memo in Supp. of Mot. for Stay at 3. Courts have recognized that the "'mere presence of a disputed issue is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.'" *Republic of Colombia v. Diageo N. Am. Inc.,* 619 F. Supp. 2d 7, 11 (E.D.N.Y. 2007) (quoting *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)). There were no difficult or otherwise novel issues in this case that would change the analysis. *Id.* This is a tort case in which plaintiff seeks injunctive relief. That it implicates the First Amendment does not somehow make review of a final judgment out of reach. *See Snyder v. Phelps*, 562 U.S. 443 (2011) (affirming post-trial reversal of verdict against protestors who asserted First Amendment defense throughout district court proceedings); *see also United States v. Hsia*, 176 F.3d 517, 526 (D.C. Cir. 1999) (explaining the First Amendment does not provide "rights to avoid trial altogether").

Second, the Court of Appeals' decision in *Doe v. Burke* was rooted in the City Council's inclusion of the special motion to quash for anonymous speakers. Although the D.C. Anti-SLAPP Act is substantially similar to the California statute,

the D.C. Act's provision expressly covering anonymous speech sets it apart where D.C. Code § 16-5503(a) provides heightened protection for anonymous speakers. The Court of Appeals, in *Doe v. Burke*, found "it significant" that the "constitutional right of anonymous speech is specially protected in the District Anti-SLAPP statute." *Doe*, 91 A.3d at 1039.

In contrast to the Court's Order here, in *Burke v. Doe No. 1*, No. 2012-CA-7525, the trial court's order denied defendant's special motion to dismiss solely because the defendant had failed to "present a prima facie case that the writings at issue are protected under the D.C. Anti-SLAPP statute." *Burke v. Doe No. 1*, No. 2012-CA-7525, 2013 WL 5526107 (Super. Ct. D.C. Jan 30, 2013). The court then went through the reasons the issues and parties did not fall within the purview of the D.C. Anti-SLAPP statute. *Id.* Although the *Burke* court indicated that the plaintiff was likely to succeed on the merits, the court's primary finding was, as a matter of law, that the defendant could not meet its prima facie case for protection under the statute.

In the Court's ruling here, there is no room for doubt that Defendants were afforded the full complement of procedural and substantive protections provided under the Anti-SLAPP Act. In issuing its opinion, this Court carefully parsed plaintiff's claims and evaluated the entire record in concluding it met the "likely to succeed on the merits" standard. Apr. 29 Tr. at 79:11-83:10. As a result, defendants are appealing on grounds that were expressly not at issue in *Doe v. Burke,* which addressed only whether the Anti-SLAPP Act applied to the case at all. The Court's

further affirmative finding in this case that plaintiff is likely to succeed on the merits means that *Doe. v. Burke* alone provides an inadequate basis for defendants' request for an interlocutory appeal and for a stay of these proceedings pending an appeal.

## II. Defendants' notice of motion to take an interlocutory appeal does not divest this Court of jurisdiction.

Defendants' request for an interlocutory appeal does not divest this court of jurisdiction and therefore the court can and should deny any request to stay the case and should order defendants to answer the complaint and respond to pending discovery. A party ordinarily "is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

In their notice of appeal, defendants rely exclusively on the collateral order doctrine as grounds for appeal. As they must, defendants acknowledge that the Court's order denying their special motions to dismiss was not a final judgment. *See,* e.g., Nicdao Notice of Appeal at 1 ("The Order appealed from is not final, but an immediate appeal nonetheless may be taken under the collateral-order doctrine. *See Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014).").

Although there is no final judgment, Defendants insist "this Court no longer possesses jurisdiction over these proceedings in any capacity." Nicdao Mem. in Supp. of Mot. for Stay at 7). The two cases Defendants rely upon to support this proposition, *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982) and

*Abrams v. Abrams*, 245 A.2d 843 (D.C. 1968), are inapposite. Nicdao Mem. in Supp. of Mot. for Stay at 7. Each of Defendants' cases involves appeals from final judgments. *Griggs*, 459 U.S. at 57 (noting "the District Court entered an order pursuant to Federal Rule of Civil Procedure 54(b) directing that a final judgment be entered"); *Abrams*, 245 A.2d at 844 (stating "[a]fter a trial before a judge without a jury, the court found for appellant, and, after the time for filing a motion for a new trial had expired, judgment was entered.").

As the District of Columbia Court of Appeals noted in *Aurell v. Furst*, 539 A.2d 1081 (D.C. 1988), Defendants' request for an interlocutory appeal does not deprive the trial court of jurisdiction:

> The filing of the [interlocutory] appeal did not automatically deprive the trial court of all jurisdiction to act with respect to further pretrial proceedings. *See Carter v. Cathedral Ave. Co-op., Inc.*, 532 A.2d 681, 684 n.7 (1987) ("the line that marks the division between what the trial court may and may not do [while appeals are pending] . . . is subject to a common-sense flexibility in application"); 15 , C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3911 at 497 (1976) ("there is no reason to treat [a collateral order appeal] as transferring the entire litigation to the court of appeals").

*Aurell*, 539 A.2d at 1081; *see also In re S.C.M.,* 653 A.2d 398, 402-03 (D.C. 1995) (*quoting* 9 J. MOORE, MOORE'S FEDERAL PRACTICE, § 203.11, at 3-53 (1994) ("The application of the general rule is limited to situations in which the order appealed from disposes of the case in its entirety. '[I]f an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the [trial] court from proceeding with matters not involved in the appeal.'")). It remains in this Court's discretion whether or not to issue a stay of discovery while Defendants seek interlocutory review of the Court's April 29, 2016

Order. Given that the Defendants do not meet the requirements for issuing a stay, the court should deny the motion.

## III. Defendants do not meet the requirements for the issuance of a stay.

Even if the Court of Appeals grants Defendants' request for an interlocutory appeal, to prevail on a motion for a stay pending appeal, the Defendants must show they are "likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay." *Barry v. Washington Post Co.,* 529 A.2d 319, 320-21 (D.C. 1987) (c*iting In re Antioch Univ.,* 418 A.2d 105, 109 (D.C.1980)). Defendants do not meet these factors and therefore plaintiff respectfully submits the court should not exercise its discretion to stay this matter and should instead deny the motion to stay and allow discovery to proceed.

### A. Even if the defendants are granted an interlocutory appeal, they are not likely to succeed on the merits of their appeal from the trial court's decision.

To meet this requirements for a stay, defendants must show that the Court of Appeals is likely to agree (1) the Anti-SLAPP Act subject to an intermediate appeal and (2) that plaintiff has failed to show a likelihood of success on the merits of its claims for intentional infliction of emotional distress, and the attendant claim of private nuisance, despite this court's clear decision to the contrary on both of these counts.

### 1. Defendants cannot show that the Anti-SLAPP Act should apply to this case where plaintiffs do not seek to silence defendants through this lawsuit.

First, this Court correctly decided that this case, where defendants have intentionally and repeatedly targeted elementary and middle school students outside of the schools by yelling at them, following them as they enter the school and displaying large banners depicting gruesome images of dis-membered fetuses, is not the type of case the Anti-SLAPP Act protected. Apr. 29 Tr. at 77:5-79:13. As stated in the legislative history of the statute, in cases where the Anti-SLAPP Act would apply, it is widely believed that the "goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence." Comm. on Pub. Safety & the Judiciary, Council of D.C. Rep. on Bill 18-893, "Anti-SLAPP Act of 2010," at 4 (2010).

The goal of this litigation is neither to punish nor intimidate defendants. The school has repeatedly clarified that it seeks narrowly-tailored injunctive relief with the only goal of allowing its students to enter the school safely and to allow the school to focus their resources on educating students. Notably, plaintiffs' *do not* seek to entirely prevent Defendants from using their gruesome images. Plaintiffs *do not* seek to prevent them from ever using signs containing words such as "Kill" or "Murder." Likewise, plaintiffs *do not* seek to prevent defendants from protesting near the school. Rather, plaintiffs seek only to keep the protesters and others like them, regardless of their cause, a safe distance from the school during certain key times of the school day so the students have a reliably safe and non-traumatic

passage to school. This case is exclusively about plaintiffs fulfilling their statutory and common law duties and nothing else.

#### 2. Defendants cannot show that plaintiff has failed to set forth legally sufficient claims to survive the special motion to dismiss.

Even without the benefit of additional discovery or an evidentiary hearing contemplated by the Anti-SLAPP Act, plaintiff could show this court it was likely to succeed on the merits of its claims. *See* Apr. 29 Tr. at 79:13-83:10. The complaint and briefing on the motions to dismiss set forth evidence that allowed this Court to conclude that plaintiff has "stated and substantiated a legally sufficient claim" and is therefore likely to succeed on its claim that defendants' intentional actions in targeting school children as they tried to get to school in the morning resulted in emotional distress and harm to both the students and the school, which is charged with protecting students' physical and mental well-being. To succeed in their appeal, Defendants must convince the Court of Appeals this determination by the trial court was erroneous. That one of the defendants has not returned to the school since she was last there in November, when she was targeting students, is not a basis on which to determine the merits of the entire case nor is it a basis on which to grant a stay. As this court correctly determined, plaintiff met the standard to survive the special motion to dismiss and applying the same standard to the same facts alleged by plaintiff, the Court of Appeals will agree. Defendants cannot show a likelihood of success on the merits of their appeal to warrant a stay while its notice of appeal is pending.

### B. Defendants will not suffer irreparable harm if discovery is allowed to proceed pending an appeal.

Because this Court retains jurisdiction, whether or not to permit discovery to proceed pending an appeal lies within its sound discretion. *See* Section II *supra*. And, defendants will suffer no irreparable harm if they are made to proceed with an answer and discovery.

Although the D.C. Anti-SLAPP Act provides for a stay of general discovery during the pendency of the special motion to dismiss, the Act also expressly provides a basis for a plaintiff to seek early discovery as part of the motion to dismiss process. The court can permit discovery from a defendant if "it appears likely that targeted discovery will enable the plaintiff to defeat the [special] motion." D.C. Code § 16-5502(c)(2).[2] On April 13, 2016, Two Rivers moved this Court to take discovery of defendants. *See* Pl.'s Mot. for Leave of Court to Serve Targeted Discovery on Defs. (Apr. 13, 2016). Plaintiff's motion to take discovery related to the special motions to dismiss was "denied as moot" in light of the Court's resolution of Defendants' special motions to dismiss. Apr. 29 Tr. at 90:15-16. However, Defendants filed the special motions to dismiss under the Anti-SLAPP statute, knowing that the statute could subject them to discovery and an evidentiary hearing. They can hardly argue now that they will suffer harm by

[2] Allowing a plaintiff to take discovery, as is permitted in the D.C. Anti-SLAPP Act, is not permitted in all similar statutes. *Compare* Maine, Ch. 203, tit. 14, § 556 ("All discovery proceedings are stayed upon the filing of the special motion under this section, except that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery remains in effect until notice of entry of the order ruling on the special motion.") with Nevada, NRS 41.660.3(e) ("Stay discovery pending: (1) A ruling by the court on the motion; and (2) The disposition of any appeal from the ruling on the motion").

having to participate in discovery *after* their motions have been fully briefed, argued, and denied.

The pending discovery requests are narrow in scope and extend little beyond what plaintiff would have sought and likely been entitled to under their special motion to dismiss. The items sought through this discovery are all documents and communications in the possession of or generated by defendants and implicate no substantial burdens or costs in gathering and producing them to plaintiff. *See*, *e.g.*, Pl.'s Disc. Req. to Def. Nicdao, RFP No. 3, attached hereto as Ex. A ("Please produce copies of all Documents and Communications You sent between and among the Defendants in this matter (whether electronic or hard copy) discussing the protests at Two Rivers, including but not limited to any exchanges that occurred before or after November 23, 2015 or any dates identified in response to Interrogatory 6.); RFP No. 7 ("Please produce copies of all photos, videos, or voice recording You are in possession of concerning the protests at Two Rivers."); RFP No. 8 ("Please produce copies of all social media posts (including any photographs or videos) You made or caused to be made Related to the protests at Two Rivers."); *see also* Pl.'s Disc. Req. to Def. Cirignano, Ex. B; Pl.'s Disc. Req. to Def. Darnel, Ex. C; Pl.'s Disc. Req. to Def. Weiler, Ex. D. This is not some far-flung fishing expedition nor is it a document-intensive case that would require the production of thousands of pages.

Under Rule 26(c), the Court may render "any order which justice requires to protect a party or person from . . . undue burden or expense." SCR Rule 26(c). There

is no danger of undue burden or expense in this litigation where discovery is narrow and the documents sought are easily within defendants' control.

The issues presented here – the safety of school children, some as young as three years old – far outweigh any potential burdens associated with defendants' participation in discovery in a matter that has survived a special motion to dismiss. This seems particularly true given the narrow path they have for obtaining interlocutory appeal – the collateral order doctrine.

### C. A stay of the proceedings will harm plaintiff.

This case has been pending for nearly six months without a responsive pleading and, given the interests at stake, needs to stay on a path towards final resolution. To inject further delay into these proceedings would undoubtedly prejudice plaintiff as it threatens the efficient resolution of this matter. SCR Rule 1 (These Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). While the current school year is its final weeks, the new school year starts a few short months from now.

On May 24, 2016, plaintiffs propounded individually-tailored discovery to each defendant. The return date for defendants' responses is approximately June 23, 2016. Plaintiff has a vested interest in keeping this litigation moving forward as every day these issues remain unresolved means further harm to Two Rivers. Two Rivers remains on high alert, and the situation has not been resolved as evidenced by plaintiff's recent motion for another preliminary injunction against defendant Larry Cirignano. *See* Pl.'s Mot. for Prelim. Inj. (May 9, 2016). A stay will render

even more remote the injunctive relief plaintiff seeks – to reasonably limit defendants' protests so they do not target or endanger children. Having survived the special motion to dismiss, plaintiff should be able to proceed with this case unless the Court of Appeals decides otherwise.

**D. The public interest does not favor granting a stay.**

The public interest is not served by allowing defendants to avoid further participation in this case. In a case such as this, involving the safety of children and their right to enter school without being harassed, resolving the case on the merits is paramount. That was clear when this court denied all of the motions to dismiss and immediately set a trial date.

The public is not served by letting these issues linger when the stakes are so high. Plaintiff does not seek relief that greatly burdens defendants' free speech rights. Any argument this suit marks the end of the First Amendment as we know it, and therefore the public interest lies with the defendants, is supercilious. Instead, this is a case of a school trying to protect is students and allow them to go to school unimpeded by protestors.

## CONCLUSION

Because Defendants fail to meet the requirements for a stay, the court should deny defendants' request and should order them to immediately answer the complaint.

June 7, 2016

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *PLAINTIFF'S CONSOLIDATED OPPOSITION TO THE MOTION TO STAY, OR IN THE ALTERNATIVE TO EXTEND THE TIME TO ANSWER, OF DEFENDANTS LARRY CIRIGNANO, JONATHAN DARNEL, RUBY NICDAO, AND ROBERT WEILER* was served upon the following:

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by e-mail via the Court's electronic filing system, this 7th day of June, 2016.

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