IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Eden Rogers et al., Plaintiffs, v. United States Department of Health and Human Services et al., Defendants.	Civil Action No. 6:19-cv-01567-TMC **DEFENDANT HENRY MCMASTER'S REPLY IN SUPPORT OF THE MOTION TO STAY PROCEEDINGS**

Defendant Henry McMaster, in his official capacity as Governor of South Carolina, respectfully files this Reply in support of his Motion to Stay Proceedings (ECF No. 31). The Governor's Motion to Stay explained why this court, as an exercise of its inherent power to control its docket and in the interests of economy of time and effort, should stay proceedings in this suit pending the resolution of Motions to Dismiss in a related action. (*See id.* at 6–10.) Nothing in the substantive legal analysis portion of Plaintiffs' Response (ECF No. 38 at 5–12) alters that conclusion or necessitates a reply.

Plaintiffs' Response does, however, contain an erroneous and potentially misleading claim that warrants a reply, namely that "[d]uring the pendency of a stay," Plaintiffs would "face practical barriers to their ability to foster a child," which falsely implies Plaintiffs are unable to be foster parents unless and until this litigation is resolved. (*Id.* at 9–10.) Not so. This assertion is both untrue and belied by their own pleading. There was no barrier preventing them from becoming foster parents prior to the outset of this suit, and there is no barrier preventing them today. As Plaintiffs admit in their Complaint (and as is readily ascertained by a Google search),[1] there are other private providers in their immediate vicinity, in addition to DSS itself, that will gladly work with any

[1] The first page of results from a Google search for "foster care agencies in Greenville SC" returns information for (i) multiple local agencies (or the upstate offices of statewide or national agencies) that partner with any parent to provide regular foster care; (ii) yet other agencies that support any parent providing regular *or* "therapeutic" foster care; and (iii) yet other agencies that support parents who foster-to-adopt.

qualified prospective foster parent. (ECF No. 1 ¶¶ 24–25, 82.) Had they chosen to pursue fostering through one of those providers or through DSS rather than (or in addition to) pursuing litigation, they could most likely be fostering a child right now. The fact that Plaintiffs have apparently *chosen* not to foster a child when nothing prevents them from doing so reveals their claims are but a pretext for their true motivation, which is to litigate ideological disagreements.

Plaintiffs' Response also asserts a novel procedural argument that warrants a reply, namely the argument that the Governor's Motion to Stay and Motion for Extension of Time should be denied as "untimely." (ECF No. 38 at 4–5.) This argument rests on three misapprehensions, each of which is discussed below. *First*, Plaintiffs incorrectly argue that because Governor McMaster previously moved, with their consent, for an extension of time to file a responsive pleading, he thereby "*agreed* to the deadline he now seeks to stay" and is thus forbidden from now seeking to extend the deadline or to stay the proceeding. (*See id.* at 1, 4 (emphasis in original).) Plaintiffs cite no authority in support of this proposition, and counsel is aware of none. Indeed, the argument is facially untenable because, under Plaintiffs' reasoning, any defendant who files a consent motion for an extension of time has "agreed to" a deadline and is barred from seeking a further extension of it (whether by another motion for extension of time or by a motion for a temporary stay). Neither the Rules, case law, nor common practice support such a conclusion, and Plaintiffs' creative theory is not a viable reason to deny the pending motions.

Second, Plaintiffs argue the motions are untimely because the Governor was supposedly "dilatory" in filing them. (*See id.* at 5, 12.) According to Plaintiffs, the Governor was aware of the basis for seeking a stay "from the day the Complaint in this case was filed," and thus (in their view) was required to file the motion *immediately* at the outset of the suit. (*Id*. at 1, 4–5, 12.) This assertion is both factually incorrect and without any support in the Rules or litigation practice. For one, a defendant's awareness of a lawsuit (and its overlap with any other pending lawsuits) and his duty to respond arises not on the day the suit is filed but, at the earliest, at the time he is served

with the suit. *See generally Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (stating "one becomes a party officially, and is required to take action in that capacity, only upon service of a summons" (citations omitted)). Further, as Plaintiffs' counsel knows from telephone and email correspondence, but fails to acknowledge to the court, administrative requirements associated with retaining outside counsel prevented the Governor from retaining counsel in this suit until late June, so counsel was unable to review and advise him regarding Plaintiffs' Complaint until that time. (*See* email correspondence between M. Coleman and S. Dunn (June 27, 2019), attached here to as **Exhibit A**.) Having retained counsel, it was only around three weeks later, after review and analysis of the Complaint, that the Governor moved to stay this suit. That modest "delay" was hardly an egregious one or a basis on which to deny the pending motions.

Further, and contrary to Plaintiffs' argument, this *de minimis* delay did not violate Local Civil Rule 7.03 (D.S.C.). Rather, it is *Plaintiffs'* argument—based on a hyper-literal reading of Local Rule 7.03—that is diametrically at odds with common practice and relevant requirements. Under Plaintiffs' interpretation of Rule 7.03, for example, motions to dismiss pursuant to Fed. R. Civ. P. 12(b) that are filed on or shortly before their filing deadline should always be denied as untimely. That has never been the practice of this court, and it would fly in the face of the Federal Rules of Civil Procedure. Similarly, in Plaintiffs' view, a defendant wishing to remove a complaint from state court to the District of South Carolina would have to do so *immediately* when the complaint was filed. The law, of course, does not require that. *See* 28 U.S.C. § 1446(b). Further, Plaintiffs' hyper-literal interpretation of Local Rule 7.03 stands at odds with Fed. R. Civ. P. 6, which governs motions for extension of time. *See e.g.*, *ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 9:15-cv-00304-DCN-MGB, 2016 WL 11200705, at *8 (D.S.C. Dec. 12, 2016) (refusing to consider whether filing was timely under Local Rule 7.03 because it was timely under Fed. R. Civ. P. 6(b)). It is likewise at odds with Local Rule 7.02 (D.S.C.), which requires consultation with other parties before filing most motions. If parties had to file motions *immediately* in the manner Plaintiffs suggest, how could they first

confer? Indeed, at least part of the time eaten up in filing the instant motions was due to Plaintiffs' counsel's delay in conferring among themselves and with Defendant's counsel. (*See* email correspondence between M. Coleman and S. Dunn (July 23, 2019), attached here to as **Exhibit B**.) In sum, Local Civil Rule 7.03 does not render the Governor's motions untimely.

Third, the cases Plaintiffs rely on to support their "untimeliness" argument are distinguishable from the instant proceeding. In *CresCom Bank v. Terry*, 269 F. Supp. 3d 708 (D.S.C. 2017), for example, the plaintiffs had filed a motion *after* the court's deadline for doing so had expired. Here, in contrast, no deadline for filing the Motion to Stay had ever been set, let alone expired, and Governor McMaster filed the second motion for extension well before the expiration of the time for filing a responsive pleading had expired. Further, although the *Terry* court believed a motion filed "well after" the court's deadline was untimely under Local Rule 7.03, the court nevertheless proceeded to address the merits of the motion. *Id*. at 710–11. Neither *Terry* nor, it appears, any other South Carolina federal court has ever denied a motion solely on this basis. Plaintiffs ask this court to be the first to do so, and in circumstances significantly distinguishable from *Terry*.

Plaintiffs' reliance on two out-of-state cases fares no better. Both involved prisoner litigation and, obviously, did not involve Local Civil Rule 7.03 (D.S.C.). Both are procedurally distinguishable from this suit as well. In *Hoffman v. Price*, No. 2:15-cv-1527 DBP, 2019 WL 498991, at *5 (E.D. Cal. Feb. 8, 2019), the suit had been pending for more than three years when, near the end of the discovery period, the *pro se* plaintiff sought a stay based on another lawsuit that had also been pending for three years but which had never previously been mentioned in the *Hoffman* litigation. Here, in contrast, Plaintiffs' lawsuit had been pending for less than two months when the Governor sought a stay on the basis of a pending suit that Plaintiffs' own filings admit is a related case. The other case Plaintiffs rely on—*Tolonen v. Heidorn*, No. 12-cv-782-BBC, 2013 WL 6183828, at *1 (W.D. Wis. Nov. 26, 2013)—is also distinguishable. In *Tolonen*, the court denied the *pro se* plaintiff's motion seeking to stay the proceedings so he could obtain further discovery—a motion he

filed after the completion of discovery and after the defendant had filed a motion for summary judgment. In the instant proceeding, in contrast, no dispositive motions have been filed, no discovery has occurred, and the pending motions were filed before, not after, the relevant deadline had passed.

Governor McMaster's Motion to Stay and Motion for an Extension of Time were not untimely under Local Civil Rule 7.03 or any other Rule, and a stay will not prevent Plaintiffs from pursuing their alleged desire to foster a child. For the reasons explained in the motions, this court should grant the motions.

Respectfully submitted

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Greenville, South Carolina
August 13, 2019

Rogers et al. v. U.S. Dept. of Health & Human Servs. et al.
Civil Action No. 6:19-cv-01567-TMC

Exhibit A

to Governor Henry McMaster's Reply in Support of the Motion to Stay Proceedings and Second Motion for Extension of Time

Correspondence between Governor McMaster's Counsel and Plaintiffs' Counsel (June 27, 2019)

Miles Coleman

From: Susan Dunn <sdunn@aclusc.org>
Sent: Thursday, June 27, 2019 1:59 PM
To: Miles Coleman
Subject: RE: Rogers v. HHS et al. -- request for consent to an extension

Dear Miles:

We look forward to working with you on this case.

Yes, we consent to your request for an extension until July 30 to answer or otherwise plead.

Susan K. Dunn
Interim Executive Director and
Legal Director
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she/her/hers

From: Miles Coleman <Miles.Coleman@nelsonmullins.com>
Sent: Thursday, June 27, 2019 12:14 PM
To: Susan Dunn <sdunn@aclusc.org>
Subject: Rogers v. HHS et al. -- request for consent to an extension

Susan,

We have recently been retained to represent Governor McMaster in *Rogers v. U.S. Dept. of Health & Human Servs. et al*. (civil action no. 6:19-cv-01567-TMC). Because the Governor's deadline to file a responsive pleading is only a few days away, I plan to move to extend that deadline to July 30, 2019. Do you, on behalf of Plaintiffs and their counsel, consent to that extension?

Thank you for your consideration of this request.

Miles

MILES COLEMAN PARTNER
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Rogers et al. v. U.S. Dept. of Health & Human Servs. et al.
Civil Action No. 6:19-cv-01567-TMC

Exhibit B

to Governor Henry McMaster's Reply in Support of the Motion to Stay Proceedings and Second Motion for Extension of Time

Correspondence between Governor McMaster's Counsel and Plaintiffs' Counsel (July 23, 2019)

Miles Coleman

From: Susan Dunn <sdunn@aclusc.org>
Sent: Tuesday, July 23, 2019 1:06 PM
To: Miles Coleman
Subject: RE: Rogers v. HHS et al. -- question re: Motion to Stay

Dear Miles:

We cannot consent to the extension in this circumstance as that would effectively grant a temporary stay.

Normally we would not object to extensions, but this presents a peculiar situation.

Susan

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From: Miles Coleman <Miles.Coleman@nelsonmullins.com>
Sent: Tuesday, July 23, 2019 9:46 AM
To: Susan Dunn <sdunn@aclusc.org>
Subject: Rogers v. HHS et al. -- question re: Motion to Stay

Susan,

I hope you have a good weekend. I wanted to follow up on our call last week and inquire if you'd had an opportunity yesterday to discuss with your co-counsel whether Plaintiffs in the *Rogers* suit consent to the Motion to Stay we had discussed. I plan to file the Motion later today, and will state in it whether you are or are not able to consent to it.

In addition, because our deadline to file a responsive pleading is one week away, and because I would like to allow the Court time to rule on the Motion to Stay before that deadline arrives, I also plan to file a motion for a 30-day extension of time to file the responsive pleading. Seperate from the Motion to Stay, do you consent to the motion for an extension of time?

Thanks for considering,

Miles

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