UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

LINCOLN MEMORIAL UNIVERSITY DUNCAN SCHOOL OF LAW, Plaintiff, v. THE AMERICAN BAR ASSOCIATION, Defendant.	Case No. 3:11-CV-608 Hon. Thomas A. Varlan Magistrate Judge C. Clifford Shirley

DEFENDANT AMERICAN BAR ASSOCIATION'S
MEMORANDUM IN SUPPORT OF MOTION TO STAY

Defendant American Bar Association ("ABA") submits this Memorandum in support of its motion for a stay of the litigation in this matter. The ABA respectfully submits that a stay is appropriate at this time because plaintiff Lincoln Memorial University Duncan School of Law has publicly disclosed that it has filed an appeal under Rule 10 of the Rules of Procedure for Approval of Law Schools from the Council's decision denying provisional approval to the School. Ex. 1, "Lincoln Memorial files appeal with Bar Association," knoxnews.com, January 19, 2012.[1] Pursuant to Rule 10, the Appeals Panel's decision must be rendered no later than May 3, 2012. A stay of the litigation while the School exhausts its accreditation remedies, therefore, will "ensure[] that the expert agency 'has had a full opportunity to consider a petitioner's claims,' avoid[] 'premature interference with the agency's processes,' and allow[] the agency 'to compile a record which is adequate for judicial review.'" Doc. 35 (Memorandum Opinion and

[1] The School has also disclosed that it has separately asked the Council to waive the ten-month waiting period for the School to reapply for provisional approval. *Id*. The ten-month period runs from the date of the Council's December 20, 2011 letter reporting its decision. Rule 11(b), Doc. 21-2 at 11.

Order) at 15 (quoting *Bi Xia Qu v. Holder,* 618 F.3d 602, 609 (6th Cir. 2010)). *See also Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010) (recognizing district court's inherent power to stay proceedings to control its own docket and ensure that each matter is handled "with economy of time and effort for itself, for counsel, and for litigants." (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936)).[2]

The ABA confirms that on January 19, 2012, the School filed its appeal of the Council's decision. A notice of the School's appeal is posted on the Section's website, which states: "Lincoln Memorial University Duncan School of Law has appealed the Council's denial of its application for provisional approval. The Council's decision is stayed pending the decision of the Appeals Panel under Rule 10 of the Rules of Procedure for Approval of Law Schools." Council School Actions, available at www.americanbar.org/groups/legal_education.html (last visited February 7, 2012).

In this Court's Memorandum Opinion and Order denying the School's motion for preliminary injunction, this Court found, among other matters, that the School did not have a likelihood of success on the merits because the School failed to exhaust its administrative remedies prior to filing this litigation. Doc. 35 at 14-20. The Court concluded that exhaustion required that the School appeal the Council's decision to the Appeals Panel, as provided in Rule 10 of the Rules of Procedure for Approval of Law Schools. *Id*.

In its Memorandum Opinion and Order, the Court also discussed the School's asserted reasons for why it should not be required to exhaust its accreditation remedies, but concluded

[2] Under this Court's January 11, 2012 Order (Doc. 31), the ABA is to respond to the Complaint by February 8, 2012. To comply with the Court's Order, and in the event the Court does not grant the motion to stay, the ABA has concurrently filed a motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

that "none of the reasons, however, likely excuses the exhaustion requirement." Doc. 35 at 17-18 (citing *McCarthy v. Madigan,* 503 U.S. 140, 146-48 (1992) (identifying three sets of circumstances in which an individual's interests weigh heavily against requiring exhaustion: (1) where requiring exhaustion would give rise to undue prejudice in a later court action; (2) where there is some doubt as to whether the agency was empowered to grant effective relief; and (3) where the administrative body is shown to be biased or has otherwise predetermined the issue before it), *superseded on other grounds*, 42 U.S.C. § 1997(e)).

As to the School's assertions that it should not have to exhaust the appeals process because it is also asserting claims under the Sherman Act, the School admits that its antitrust claims are based on the same accreditation allegations that underlie its due process claims. Doc. 5 at 15. In addition, the Court found that "a review of the antitrust claims reveals that they do not challenge the appeals process itself." Doc. 35 at 18. Thus, "it appears there is no reason not to require exhaustion," *id.*, and the entire litigation should be stayed pending the Appeals Panel's decision in order to avoid piecemeal litigation.

As to the School's prior assertion that the appeals process is too long because it would preclude students from applying for the summer 2013 bar examination, the Court noted that a notice on the School's website states that it "makes no representation to any applicant that it will be approved by the American Bar Association prior to the graduation of any matriculating student." *Id.* (quoting Doc. 20 ¶ 114). Further, given the School's decision to wait to file its appeal nearly a full month after issuance of the December 20 letter reporting the Council's decision, the School should not now be permitted to claim that a stay until the Appeals Panel renders its decision would result in an unreasonable delay in this litigation.

As to the School's assertions that exhaustion would be futile, the Court recognized in its

Memorandum Opinion and Order that the Appeals Panel has the authority to affirm, amend or reverse the decision of the Council, and that the standard of review is whether the Council's decision was arbitrary and capricious and not supported by the evidence on record, or was inconsistent with the Rules of Procedure and that inconsistency prejudiced its decision. *Id.* at 20. The ABA asserts, first, that with the School's filing of its accreditation appeal, the School should be deemed to have waived its alleged arguments as to futility. Further, a stay of the litigation pending the Appeals Panel's decision is appropriate because that decision may have a substantial impact on the School's claims in this litigation: the decision may narrow or render moot some or all of the issues to be addressed by this Court and will give the Court the benefit of a complete administrative record should the School determine to continue this litigation following the appeal. Finally, as this Court noted, "federal law dictates that the Appeals Panel not be comprised of any 'current members of the agency's or association's underlying decisionmaking body that made the adverse decision,' and that it is subject to a conflict of interest policy." *Id.* at 19 (citing 20 U.S.C. § 1099b(a)(6)(C); 34 C.F.R. § 602.25(f)(1)). The Section's conflict of interest policy, Rule 19(h) of the Section's Internal Operating Procedures, moreover, provides that the dean of a law school under review may request, for good cause stated, that a member of the Appeals Panel recuse himself or herself from acting in that capacity with respect to the dean's law school. Doc. 21-3 at 13.

On the other hand, if this litigation is not stayed, judicial review will continue before the accreditation process is completed. As stated by the Sixth Circuit, the exhaustion doctrine "promotes a sensible division of tasks between the agency and the courts: parties are discouraged from weakening the position of the agency by flouting its processes and the court's resources are reserved for review and resolution of those matters where a dispositive solution is unavailable in

the administrative process." *Shawnee Coal Co. v. Andrus,* 661 F.2d 1083, 1092 (6th Cir. 1981). The exhaustion doctrine thus "'serves interests of accuracy, efficiency, agency autonomy and judicial economy.'" *Id.* (quoting *Ezratty v. Comm. of Puerto Rico,* 648 F.2d 770, 774 (1st Cir. 1981)). *See also Aikens v. Ingram*, 652 F.3d 496, 502 (4th Cir. 2011) (*en banc*) ("We have readily ordered a stay of an ongoing federal action pending exhaustion of administrative or state proceedings….").

The ABA respectfully submits that all of the considerations supporting a requirement that the School exhaust its accreditation remedies also support the entry of a stay in this litigation. The ABA therefore requests that this litigation be stayed pending a final decision by the Appeals Panel on the School's appeal.

Dated: February 8, 2012

Respectfully submitted,
By: s/ Howard H. Vogel

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CERTIFICATE OF SERVICE

I certify that on February 8, 2012, I properly served all parties with Defendant American Bar Association's Memorandum In Support Of Motion to Stay by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt and U.S. Mail.

By: s/ Howard H. Vogel (0001015)