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
REPLY IN SUPPORT OF MOTION TO STAY

Defendant American Bar Association ("ABA") submits this reply in support of its motion for a stay of the litigation in this matter (Docs. 41-42). The School's response (Doc. 45) makes only two arguments in opposition to the motion to stay, neither of which is meritorious.

First, based solely on the timing of the appointment of the Appeals Panel, the School asserts that it should not be required to complete the accreditation process and, accordingly, a stay is not warranted. Doc. 45 at 1. Repeating the arguments made in its Motion to Reconsider (Docs. 38-39), the School again asserts that this Court should reconsider its finding that the School did not have a likelihood of success on the merits because it failed to exhaust its administrative remedies (Doc. 35 at 14-20).

The ABA has addressed the School's arguments in multiple briefs, including the ABA's Notice of Supplementation of the Record (Docs. 37, 37-1), and the ABA's response to the School's Motion to Reconsider (Doc. 47 at 3-14).[1] In short, the School asserts that the timing of

[1] The majority of the School's arguments consists of cross-references to its memorandum in support of its motion to reconsider. The ABA accordingly incorporates by reference that portion

(Footnote continued)

the appointment of the Appeals Panel has "deprived [the School] of its right to an impartial and meaningful administrative appeal and any such appeal is futile." Doc. 45 at 3. However, the School does not—and cannot—assert that the appointment timing will delay resolution of the School's appeal: the Appeals Panel will render its decision no later than May 3, 2012, on the schedule required by Rule of Procedure 10(i). Doc. 21-2 at 9-10. Further, the School does not dispute the qualifications of the Appeals Panel members, who are a Dean of three law schools, a former New Mexico Supreme Court Chief Justice and an ex-journalist working in the private nonprofit sector, who are appointed for a general term that will end in August 2012. The School also does not dispute that two members of the Appeals Panel previously served on the 2010-11 Appeals Panel as a member or alternate. Finally, the School does not claim that any Panel member should be recused under the Section's Internal Operating Procedure 19(h), which provides: "For good cause stated, the dean of a law school . . . under review may request that a member of . . . the Appeals Panel . . . recuse himself or herself from acting in such capacity with respect to the dean's law school." Doc. 21-3 at 13.

It is well settled that a departure from an accrediting agency's rules will not violate due process unless it has "resulted in any fundamental unfairness arising out of the process employed." *Hiwassee Coll., Inc. v. S. Ass'n of Colls. & Schs*., 490 F. Supp. 2d 1348, 1351 (N.D. Ga. 2007), *aff'd* 531 F.3d 1333 (11th Cir. 2008). There simply is no "fundamental unfairness" arising from the timing of the appointment of the Appeals Panel, and the School should be required to complete the appeals process.

Second, the School asserts that even if exhaustion is required and this Court accordingly

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of its response to the motion to reconsider that addresses the School's arguments on exhaustion (Doc. 47 at 3-14).

stays the School's due process claims, the antitrust claims should not be stayed. This assertion, however, ignores the School's admission that its antitrust claims are grounded in the identical allegations concerning the accreditation process that underlie its due process claims. Doc. 5 at 15. In fact, the School stated in its Memorandum in Opposition to Defendant's Motion to Dismiss, filed on February 29, 2012: "Here, DSOL's [antitrust] allegations constitute precisely the type of injury that [*Mass. Sch. of Law v. ABA,* 107 F.3d 1026 (3d Cir. 1997)] contemplated the antitrust laws were designed to handle – injuries flowing from the ABA's own internal processes and conduct [in enforcing its standards]." Doc. 48 at 29. Although an inaccurate characterization of *Massachusetts School of Law*, it is undisputed that the appeals process is an integral part of the accreditation "internal processes and the conduct," and the School should complete those processes before litigating its antitrust claims. Because the antitrust claims—by the School's own admission—are derivative of the accreditation process, the School's antitrust claims also should be stayed until the appeals process is concluded.

Further, the cases cited by the School do not support its contention that its antitrust claims should be allowed to proceed even if its due process claims are stayed. In *Tate v. Chiquita Brands Int'l, Inc.*, 2009 U.S. Dist. LEXIS 68670 (S.D. Ohio Aug. 6, 2009), defendants argued, *inter alia, t*hat plaintiff's age discrimination claim should be stayed until plaintiff exhausted his administrative remedies as to his ERISA claim. *Id*. At *8. The court, however, concluded that the first question to be answered was whether the benefit plans in contention were properly classified as ERISA plans and, accordingly, denied defendants' motions as to *all* of plaintiff's claims. *Id*. at *8. In *Bell v. Hercules Lifeboat Co., LLC*, 2011 U.S. Dist. LEXIS 76756 (M.D. La. July 15, 2011), defendant moved to stay the action, arguing that plaintiff's retaliation claim was governed by the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.,* which

required exhaustion of administrative remedies. The court denied defendant's motion to stay based on plaintiff's assertion that her retaliation claim arose solely under state law, which did not have an exhaustion requirement. Neither case, accordingly, supports the School's claim that, if this Court stays the School's due process claims its antitrust claims nevertheless should be allowed to proceed.

Finally, a stay of this entire litigation would ensure that this matter is handled "with economy of time and effort for [the court], for counsel, and for litigants." *Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010) (citation omitted); *see also Melville Capital, LLC v. Tenn. Commerce Bank*, 2011 U.S. Dist. LEXIS 139062, at *2-3 (M.D. Tenn. Dec. 2, 2011) (same). A stay, further, would properly balance the three factors to be considered: (i) the potential prejudice to the non-moving party; (ii) the hardship and inequality to the moving party if the action is not stayed; and (iii) the judicial resources that would be served by a stay. *Melville Capital,* 2011 U.S. Dist. LEXIS 139062, at *2-3. As to the first factor, the School would not suffer prejudice, since its status as an unaccredited law school would remain unchanged during a brief stay until the Appeals Panel renders its decision no later than May 3, 2012. *See also Shawnee Coal Co. v. Andrus,* 661 F.2d 1083, 1092 (6th Cir. 1981); *Aikens v. Ingram*, 652 F.3d 496, 502 (4th Cir. 2011) (*en banc*) (authorizing stay pending exhaustion of administrative proceedings); Doc. 42 at 4-5. Second, permitting a continuation of either part or all of the litigation pending completion of the appeals process would harm the ABA because it will necessarily result in the "weakening [of] the position of the agency by flouting its processes" as well as the "sensible division of tasks between the agency and the courts." *Shawnee Coal Co.,* 661 F.2d at 1092 Third, a stay will serve judicial resources because the conduct of the appeal and its ultimate decision will clarify, limit or eliminate some or all of the accreditation issues on which both the due process and the

antitrust claims are based. A short stay of the litigation until after the issuance of the Appeals Panel's decision, accordingly, will simplify the litigation and reduce the burden of litigation on both the parties and the Court.[2]

CONCLUSION

The ABA again respectfully submits that the entire litigation of this matter should be stayed pending the final decision by the Appeals Panel on the School's appeal.

Dated: March 5, 2012

Respectfully submitted,
By: s/ Howard H. Vogel
Howard H. Vogel (001015)
Jeffrey R. Thompson (20310)
P. Alexander Vogel, TN (023944)
O'Neil, Parker & Williamson, PLLC
7610 Gleason Drive, Suite 200
Knoxville, TN 37919
(865) 546-7190

Patricia J. Larson*
Stephanie Giggetts*
American Bar Association
321 N. Clark Street
Chicago, IL 60654
(312) 988-5000

Anne E. Rea*
Michael P. Doss*
Linda R. Friedlieb*
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
Attorneys for Defendant

*Pro hac vice

CERTIFICATE OF SERVICE

I certify that on March 5, 2012, I properly served all parties with Defendant American Bar Association's Reply 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)

[2] As noted in the ABA's opening memorandum (Doc. 42), the motion to stay was filed concurrently with the ABA's motion to dismiss, which was filed to comply with scheduling requirements and should be addressed in the event the Court does not grant the motion to stay.