SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Pennsylvania State University Department of Meteorology University Park, PA 16802, Plaintiff, v. NATIONAL REVIEW, INC., 215 Lexington Avenue New York, NY 10016, - and - COMPETITIVE ENTERPRISE INSTITUTE, - and - RAND SIMBERG, - and - MARK STEYN, Defendants.	Case No. 2012 CA 8263 B Judge Fredrick Weisberg No Scheduled Events

NATIONAL REVIEW'S MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING APPEAL

Defendant National Review, Inc. ("National Review") hereby moves for an order staying all discovery and related proceedings pending resolution of National Review's appeal on its special motion to dismiss under the D.C. Anti-SLAPP Act. While National Review's appeal is pending, this Court lacks jurisdiction to conduct any proceedings on the claims underlying the Anti-SLAPP motion. Discovery should be stayed for that reason alone. In addition, under D.C. Superior Court Civ. R. 26(c), "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, this court . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense . . . ." Here, it would impose undue burden and expense on National Review to proceed with discovery because the Court of Appeals may yet dismiss the case. As this Court has previously ruled, "discovery and related proceedings in the trial court should be stayed to await a ruling by the Court of Appeals on Defendants' pending interlocutory appeals." Order at 3, Oct. 2, 2013. (Exhibit A).

Dated: March 19, 2014

Respectfully submitted,

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
macarvin@jonesday.com
Anthony J. Dick (D.C. Bar No. 1015585)
ajdick@jonesday.com
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939

Attorneys for National Review

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2014, I caused a copy of the foregoing to be served by CaseFileXpress upon the following and by mail service where the recipient is not served by CaseFileXpress:

John B. Williams
Williams Lopatto PLLC
Email: jbwilliams@williamslopatto.com
Telephone: (202) 296-1611

Catherine Rosato Reilly
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
Telephone: (202) 912-4800
Email: crreilly@cozen.com

Bernard S. Grimm
Law Office of Bernard S. Grimm
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006

Peter J. Fontaine
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
Telephone: (856) 910-5043
Email: pfontaine@cozen.com

Andrew Grossman
Washington Square
Suite 1100
1050 Connecticut Ave.
Telephone: (202) 861-1500
Email: agrossman@bakerlaw.com

Mark Steyn
P.O. Box 30
Woodsville, New Hampshire 03785

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
Anthony J. Dick (D.C. Bar No. 1015585)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Pennsylvania State University Department of Meteorology University Park, PA 16802, Plaintiff, v. NATIONAL REVIEW, INC., 215 Lexington Avenue New York, NY 10016, - and - COMPETITIVE ENTERPRISE INSTITUTE, - and - RAND SIMBERG, - and - MARK STEYN, Defendants.	Case No. 2012 CA 8263 B Judge Fredrick Weisberg No Scheduled Events

PROPOSED ORDER

Upon consideration of Defendants' Motion for a Protective Order Staying Discovery Pending Appeal, and good cause appearing therefore,

IT IS HEREBY ORDERED that all discovery and related proceedings in this case are stayed until further order of this Court.

DATED this __ day of _____, 2014.

_____
Fredrick Weisberg
JUDGE
(Signed in Chambers)

COPIES TO:

Michael A. Carvin
Anthony J. Dick
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
macarvin@jonesday.com
ajdick@jonesday.com

John B. Williams
Williams Lopatto PLLC
Email: jbwilliams@williamslopatto.com
Telephone: (202) 296-1611

Catherine Rosato Reilly
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
Telephone: (202) 912-4800
Email: crreilly@cozen.com

Bernard S. Grimm
Law Office of Bernard S. Grimm
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006

Peter J. Fontaine
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
Telephone: (856) 910-5043
Email: pfontaine@cozen.com

Andrew Grossman
Washington Square
Suite 1100
1050 Connecticut Ave.
Telephone: (202) 861-1500
Email: agrossman@bakerlaw.com

Mark Steyn
P.O. Box 30
Woodsville, New Hampshire 03785

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Pennsylvania State University Department of Meteorology University Park, PA 16802, Plaintiff, v. NATIONAL REVIEW, INC., 215 Lexington Avenue New York, NY 10016, - and - COMPETITIVE ENTERPRISE INSTITUTE, - and - RAND SIMBERG, - and - MARK STEYN, Defendants.	Case No. 2012 CA 8263 B Judge Fredrick Weisberg No Scheduled Events

MEMORANDUM IN SUPPORT OF NATIONAL REVIEW'S MOTION FOR A PROTECTIVE ORDER STAYING DISCOVERY PENDING APPEAL

Plaintiff Michael Mann filed the present lawsuit against Defendant National Review, Inc. ("National Review") and three co-defendants[1], alleging defamation and intentional infliction of emotional distress. National Review filed a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq*. After this court denied that motion, National Review filed a notice of appeal seeking review in the D.C. Court of Appeals, as did co-defendants Rand Simberg and the Competitive Enterprise Institute. That appeal remains pending. Under the same circumstances, in this very case, this Court has already ruled that "discovery and related proceedings in the trial court should be stayed to await a ruling by the Court of Appeals on Defendants' pending interlocutory appeals." Order at 3, Oct. 2, 2013. (Exhibit A). Nonetheless, Plaintiff Michael Mann has now renewed his discovery requests against National Review. In light of this Court's prior ruling, National Review respectfully requests an order confirming that all discovery and related proceedings in the trial court should be stayed until the appeal is resolved.

BACKGROUND

Plaintiff filed his original complaint on October 22, 2012. National Review filed a special motion to dismiss under the D.C. Anti-SLAPP Act on December 14, 2012, which imposed an automatic stay of discovery proceedings "until the motion has been disposed of." D.C. Code § 16-5502(c)(1). After a hearing on the Anti-SLAPP motion before Judge Natalia Combs Greene, Plaintiff filed an amended complaint on July 10, 2013. On July 24, National Review filed an Anti-SLAPP motion to dismiss the amended complaint.

[1] National Review's co-defendants are Mark Steyn, Rand Simberg, and the Competitive Enterprise Institute (CEI).

Meanwhile, on July 19, notwithstanding the filing of Plaintiff's amended complaint, Judge Greene issued an order denying National Review's first motion to dismiss the original complaint. National Review asked this Court to certify an interlocutory appeal of that order, but this Court denied that request on September 12. National Review then filed a notice of appeal seeking review in the D.C. Court of Appeals under the collateral-order doctrine. While that appeal was pending, Plaintiff served National Review with discovery requests and requests for the admission of documents. National Review and its co-defendants then filed a joint motion for a protective order, seeking to enforce the stay of discovery until their Anti-SLAPP motions could be finally resolved. In conjunction with their motion for a protective order, National Review and its co-defendants also filed a "Joint Notice Regarding Jurisdiction," arguing that their appeal divested the trial court of jurisdiction to conduct any proceedings relating to the issues under review in the Court of Appeals.

In response, this Court ruled that "discovery and related proceedings in the trial court should be stayed to await a ruling by the Court of Appeals on Defendants' pending interlocutory appeals." Order at 3, Oct. 2, 2013. (Exhibit A). In its order, the Court explained that it would "'make[] no sense for trial to go forward while the court of appeals cogitates on whether there should be one.'" *Id.* (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)). That was especially true given the purpose of the Anti-SLAPP statute, which was designed specifically "to insulate certain defamation defendants from the burdens of discovery and trial." *Id.* The court acknowledged that it remains unclear whether "orders denying Anti-SLAPP Act special motions to dismiss" are "immediately appealable," but recognized that "the question remains open and Defendants' appeals are not plainly frivolous or taken solely for purposes of delay." *Id.*

Accordingly, the court concluded, the proper course was to stay all proceedings in the trial court to await a ruling by the Court of Appeals.

Plaintiff filed a motion for partial reconsideration of the stay of discovery, arguing that, notwithstanding the pending appeal on the motion to dismiss the *original* complaint, this Court should decide National Review's Anti-SLAPP motion to dismiss the *amended* complaint, so that the Court of Appeals could consider all of the pending Anti-SLAPP issues at the same time. This Court rejected Plaintiff's motion, reiterating that it would "follow the normal rule that trial and appellate courts should not be acting in the same case at the same time." Order at 1, Oct. 9, 2013. Acknowledging both the prudential and jurisdictional reasons underlying its decision to stay discovery, the Court stated that "it should not—and perhaps cannot—rule on Defendants' motions to dismiss the amended complaint until the Court of Appeals returns the matter to the trial court." *Id.* at 3.

In making that decision, this Court acknowledged "the possibility that the Court of Appeals will not rule on the jurisdictional issue or on the merits [of National Review's appeal], but will dismiss the appeal as moot, concluding that the trial court should not have denied the motions to dismiss the first complaint **after** the Plaintiff had filed his amended complaint." *Id.* at 2 (emphasis in original). "In that event," the Court explained, it "would rule on the pending motions to dismiss the amended complaint and, if the court denies the motions, defendants would not be precluded from attempting another interlocutory appeal." *Id.* In contemplating that possibility, the Court expressly "recognize[d] that this is the one outcome likely to inject further delay into the case, which Plaintiff seeks to avoid," but the Court nonetheless determined that a stay was the appropriate course. *Id.* at 2 n.1.

On December 19, 2013, the Court of Appeals did exactly what this Court had predicted, entering an order dismissing National Review's appeal without prejudice on the ground that Plaintiff's original complaint (and National Review's corresponding motion to dismiss) had been rendered moot by Plaintiff's filing of his amended complaint. As a result, the focus of the case shifted back to the trial court, where National Review's special motion to dismiss the amended complaint remained pending. On January 22, 2014, this Court issued an order denying National Review's special motion to dismiss the amended complaint. National Review then filed its second notice of appeal, once again seeking review under the collateral-order doctrine. That appeal remains pending today.

Although National Review's co-defendant, Mark Steyn, initially joined National Review's Anti-SLAPP motion, Steyn subsequently withdrew from that motion and opted not to file a notice of appeal. National Review's other co-defendants, Rand Simberg and CEI, filed a separate Anti-SLAPP motion to dismiss, which this Court also denied. They have both filed a notice of appeal, which remains pending.

On January 30, 2014, Plaintiff renewed his discovery requests against National Review. National Review responded by e-mail on February 7, reminding Plaintiff's counsel that this Court had already ruled that discovery should be stayed until its Anti-SLAPP motion could be finally resolved in the Court of Appeals. In response, Plaintiff's counsel indicated that while he did not agree with National Review's position, he would not press the issue of discovery for the time being. A few weeks later, however, on March 6, Plaintiff's counsel called National Review's counsel to renew his discovery requests yet again. Plaintiff's counsel explained that he felt obliged to renew discovery because National Review's co-defendant, Mark Steyn, had decided not to pursue an appeal, and had instead indicated his desire to proceed with discovery

against Plaintiff. Thus, according to Plaintiff's counsel, it would be impracticable to proceed with discovery between himself and Steyn without the involvement of the other co-Defendants.

National Review's counsel responded by e-mail on March 11, explaining that the best solution would be for Plaintiff to seek an agreement with Steyn to stay discovery until National Review's appeal could be resolved. Alternatively, National Review indicated that it would support Plaintiff in filing a motion to stay discovery between Plaintiff and Steyn while National Review's appeal of the anti-SLAPP motion remained pending. Shortly thereafter, Plaintiff's counsel responded in a phone call that National Review was obligated to respond to Plaintiff's discovery requests. National Review then contacted Defendant Steyn through one of his associates to see if he would agree to a stay of discovery for all parties, but he indicated that he would not consent to any such agreement.[2] Consequently, National Review is obliged to file the present motion.

ARGUMENT

National Review respectfully asks this Court to enter a protective order staying discovery and related proceedings pending resolution of its Anti-SLAPP appeal. This Court has already given an apt explanation for why a stay of discovery is appropriate under the present circumstances:

> Defendants have appealed from the court's denial of their special motions to dismiss under the Anti-SLAPP Act. The purpose of that statute is to insulate certain defamation defendants from the burdens of discovery and trial. It is unclear whether the collateral order doctrine permits the appeals in this case. Even if the Court of Appeals ultimately concludes that orders denying Anti-SLAPP Act special motions to dismiss are not immediately appealable, the question remains open and Defendants' appeals are not plainly frivolous or taken solely for purposes of delay. The court therefore

[2] National Review also contacted counsel for defendants CEI and Simberg, who indicated that they would consent to a stay of discovery. Counsel for CEI and Simberg also indicated, however, that Plaintiff has not yet renewed his discovery requests against those two defendants.

> concludes that discovery and related proceedings in the trial court should be stayed to await a ruling by the Court of Appeals on Defendants' pending interlocutory appeals.

Order at 3, Oct. 2, 2013 (citations omitted). That analysis tracks the reasoning of the D.C. Circuit, which recently held that a district court could not "permit discovery to proceed" against a defendant who had filed an appeal "rais[ing] a non-frivolous argument that the District of Columbia's Anti-SLAPP Act provides . . . protections that are in the nature of immunity from trial." Order at 1, *Sherrod v. Breitbart*, No. 11-7088 (D.C. Cir. Nov. 29, 2012).[3] Under those circumstances, the court held, "continuation of proceedings before the district court would be in conflict with this court's consideration of that issue on appeal." *Id.*

More generally, this Court's prior decision to stay discovery is plainly correct for a number of reasons. When National Review filed its notice of appeal on January 30, it divested this Court of jurisdiction to conduct any proceedings in connection with the underlying issues pending resolution by the Court of Appeals. For that reason alone, discovery should be stayed. In general, a "trial court loses jurisdiction to proceed with a case when a notice of appeal is filed." *Arthur v. Arthur*, 452 A.2d 160, 162 (D.C. 1982) (citations omitted). This rule applies equally to interlocutory appeals, barring superior court action regarding "the matter[s] pending in the appeal court." *Stebbins v. Stebbins*, 673 A.2d 184, 189 (D.C. 1996); *see also id.* at 190 (reciting examples).[4] Moreover, as this Court previously recognized, when "the very issue being

[3] Here, this Court has already determined that, "for the purposes of determining this court's power to act during the pendency of Defendants' interlocutory appeal, the Act's protections can be treated as analogous to a claim of qualified immunity." Order at 2 n.2, Oct. 2, 2013.

[4] The only exception is "where it is plain that the notice of appeal is a premature act or otherwise untimely (as from a nonappealable order)." *Horton v. United States*, 591 A.2d 1280, 1284 n.7 (D.C. 1991) (quotation marks omitted) (emphasis in original). But "this qualification should be considered inapplicable where . . . there is significant doubt about the question of appealability, and the matter is under active consideration by the appellate court." *Id*.

appealed is the defendant's right not to be sued," "there may be added reason for the trial court to stay its hand until the appellate court can decide whether the suit can proceed." Order at 2, Oct. 2, 2013.

Even if National Review's Anti-SLAPP appeal did not divest this Court of jurisdiction, this Court should still exercise its discretion to issue a stay. Under D.C. Superior Court Civ. R. 26(c), "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, this court . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense . . . ." Here, proceeding with discovery would impose undue burden and expense on National Review because the Court of Appeals may yet dismiss this case under the Anti-SLAPP Act. In the words of Judge Easterbrook, already quoted by this Court, it would "'make[] no sense for trial to go forward while the court of appeals cogitates on whether there should be one.'" Order at 3, Oct. 2, 2013 (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)). That concern is particularly weighty here because, as both this Court and the D.C. Circuit have already noted, the whole "purpose of [the anti-SLAPP] statute is to insulate certain defamation defendants from the *burdens of discovery* and trial." *Id.* at 2 (emphasis added).

For this reason, the California Supreme Court has held that an appeal from an order denying an anti-SLAPP motion automatically stays all further trial-court proceedings on the underlying claims. *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 966-67 (Cal. 2005). As the Court explained in that case, "[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights." *Id.* at 967 (citation omitted). Accordingly, a stay of discovery is necessary because "[t]he protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large

measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process." *Id.* (quoting *Fabre v. Walton*, 766 N.E. 2d 474, 479 (Mass. 2002)).

In recent discussions, Plaintiff's counsel has suggested that a stay of discovery is no longer appropriate here because National Review's co-defendant, Mark Steyn, has decided not to pursue an appeal, and has instead expressed his desire to proceed to discovery. Under D.C. law, however, each "party" that "file[s] a special motion to dismiss" is entitled to protection from the burdens of trial-court proceedings until the Anti-SLAPP process has run its course. D.C. Code § 16-5502(b). Thus, this protection cannot somehow be waived by the actions of one's co-defendant.

In any event, Plaintiff's concern about conducting discovery without the participation of all parties can be fully addressed by staying discovery for all parties during the Anti-SLAPP appeal. If National Review's appeal succeeds, then the claims against Steyn will almost certainly need to be dismissed as well, thus vitiating the need for any discovery at all. Alternatively, if National Review's appeal fails, then proceedings can move forward for all parties. An order staying discovery for all parties is well within this court's discretionary power under D.C. Superior Court Civ. R. 26(c), which authorizes "*any order* which justice requires to protect a party or person from . . . undue burden or expense" (emphasis added). Thus, it is certainly within the Court's power to stay discovery for all parties to ensure that National Review (along with the two other co-defendants pursuing an appeal) has a fair opportunity to pursue its Anti-SLAPP appeal without first forfeiting the protections of the Anti-SLAPP Act against the burdens of discovery.

Dated: March 19, 2014

Respectfully submitted,

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
macarvin@jonesday.com
Anthony J. Dick (D.C. Bar No. 1015585)
ajdick@jonesday.com
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939

Attorneys for National Review

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2014, I caused a copy of the foregoing to be served by CaseFileXpress upon the following and by mail service where the recipient is not served by CaseFileXpress:

John B. Williams
Williams Lopatto PLLC
Telephone: (202) 296-1611
Email: jbwilliams@williamslopatto.com

Catherine Rosato Reilly
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
Telephone: (202) 912-4800
Email: crreilly@cozen.com

Bernard S. Grimm
Law Office of Bernard S. Grimm
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006

Peter J. Fontaine
Cozen O' Connor
1900 Market Street
Philadelphia, PA 19103
Telephone: (856) 910-5043
Email: pfontaine@cozen.com

Andrew Grossman
Washington Square
Suite 1100
1050 Connecticut Ave.
Telephone: (202) 861-1500
Email: agrossman@bakerlaw.com

Mark Steyn
P.O. Box 30
Woodsville, New Hampshire 03785

/s/ Michael A. Carvin

Michael A. Carvin (D.C. Bar No. 366784)
Anthony J. Dick (D.C. Bar No. 1015585)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D.,	)	Case No. 2012 CA 8263 B
Plaintiff,	)	Judge Frederick H. Weisberg
v.	)	
NATIONAL REVIEW, INC. *et. al.*,	)	
Defendants.	)	

ORDER

This matter is before the court on Defendants' Motion for a Protective Order to Enforce the Stay of Discovery Proceedings pursuant to D.C. Code § 16-5502(c). Given the procedural posture of the case, the court must first address whether Defendants' interlocutory appeal from the court's denial of their motions to dismiss divests the court of jurisdiction to grant the motion.

On July 10, 2013, Plaintiff filed his amended complaint. Thereafter, on July 19, 2013, the court (Combs Greene, J.) entered orders denying the Defendants' motions to dismiss the original complaint under the Anti-SLAPP Act, D.C. Code §§ 16-5501–5505, and lifting the accompanying stay of discovery. On July 24, Defendants filed Anti-SLAPP Act motions to dismiss the amended complaint. In the interim, Plaintiff served Defendants with discovery requests. On August 22, Defendants filed a motion for a protective order staying discovery, arguing that their renewed Anti-SLAPP Act motions to dismiss the amended complaint triggered another automatic stay of discovery. On September 12, the court declined to certify for interlocutory appeal the July 19 orders denying the motions to dismiss. D.C. Code § 11-721(d).

Nonetheless, on September 17, Defendants appealed the court's July 19 orders to the Court of Appeals without a section 11-721(d) certification.[1]

I. This Court's Jurisdiction During a Collateral Order Appeal

The general rule is that the filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). However, for interlocutory appeals, in particular those under the collateral order doctrine, "the fact that the issues on appeal are separate from the merits of the case may mean that the pendency of the appeal does not oust the district court's jurisdiction to proceed with the case." 16A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3949.1, at 63 (4th ed. 2008). Indeed, one rationale for the doctrine is that collateral orders are immediately appealable precisely because they are ancillary to the central issues involved in the litigation. On the other hand, sometimes the very issue being appealed is the defendant's right not to be sued, as is true in cases involving a claim of absolute or qualified immunity.[2] In such cases, there may be added reason for the trial court to stay its hand until the appellate court can decide whether the suit can proceed.

The Seventh Circuit addressed this issue in *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (Easterbrook, J.). In that case, defendants appealed from a district court order denying

[1] It is not clear to the court why the appeal is not moot or, for that matter, why the motions to dismiss the complaint were not moot, because Plaintiff filed his amended complaint before Judge Combs Greene entered her order dismissing the original complaint.

[2] The protection afforded defendants under the Anti-SLAPP Act is technically not an absolute or qualified immunity because it is clear that speech defaming a public figure with knowledge of its falsity or reckless disregard of whether it is true or false is not protected by the First Amendment. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). Rather, the Anti-SLAPP Act places an extra burden on a defamation plaintiff to show the strength of his case **before** requiring the defendant to proceed with discovery, so as to give the widest possible berth to debate on issues of public interest, the protection of which is at the core of the First Amendment. However, for the purposes of determining this court's power to act during the pendency of Defendants' interlocutory appeal, the Act's protections can be treated as analogous to a claim of qualified immunity.

summary judgment based on a claim of qualified immunity and from an order refusing to postpone the trial until the appeal was decided. The Seventh Circuit held that, with few exceptions, the trial court ordinarily should not act on the case during the pendency of a non-frivolous interlocutory appeal raising the issue of whether the defendant enjoys an absolute or qualified immunity from suit. *Id*. at 1338-39. "It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one. . . . It follows that a proper [qualified immunity] appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial." *Id*. at 1338 (internal quotations omitted).

In this case, Defendants have appealed from the court's denial of their special motions to dismiss under the Anti-SLAPP Act. D.C. Code § 16-5502. The purpose of that statute is to insulate certain defamation defendants from the burdens of discovery and trial. It is unclear whether the collateral order doctrine permits the appeals in this case. *See Newmyer v. Sidwell Friends School*, 2012 D.C. App. LEXIS 733, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished). Even if the Court of Appeals ultimately concludes that orders denying Anti-SLAPP Act special motions to dismiss are not immediately appealable, the question remains open and Defendants' appeals are not plainly frivolous or taken solely for purposes of delay. *See Apostol*, 870 F.2d at 1339; *Horton v. United States*, 591 A.2d 1280, 1283 n.7 (D.C. 1991). The court therefore concludes that discovery and related proceedings in the trial court should be stayed to await a ruling by the Court of Appeals on Defendants' pending interlocutory appeals.

II. Defendants' Motion for a Protective Order

Because the court has concluded that a stay of all proceedings in the trial court is appropriate, the separate question of whether to stay discovery pursuant to D.C. Code § 16-5502 (c)(1) is largely academic. If the Court of Appeals takes jurisdiction and reverses, there will be

no discovery except, perhaps, on the one new defamation claim that was added in the amended complaint. If the Court of Appeals denies jurisdiction or affirms,[3] the case will proceed in the trial court. In that event, the court will rule promptly on the pending motions to dismiss and, if the motions are denied, another interlocutory appeal would be unlikely and discovery would proceed. A separate stay of discovery to cover the period between a ruling in Plaintiff's favor in the Court of Appeals and a ruling by this court on the special motions to dismiss the amended complaint would protect the Defendants temporarily from the burden of discovery while doing little harm to the Plaintiff's legitimate right to move his case forward if it is determined that he has a right to proceed.

Notwithstanding the pending appeals, the trial court is not prohibited from resolving ancillary matters that are not inextricably intertwined with the issues on appeal if it is more efficient to do so. *See Stebbins v. Stebbins*, 673 A.2d 184, 189 (D.C. 1996) ("[T]he issue is whether it is judicially efficient for the trial court to take a particular action in the face of the particular matter pending before the appellate court."). Ruling on the section 16-5502(c)(1) motion to stay discovery will not affect the issues on appeal. As noted, discovery will be stayed in any event until the appeal is decided; and, if the Court of Appeals rules that the case should proceed, a further stay long enough for this court to rule on the second round of special motions to dismiss will not add any appreciable delay.

The question presented by Defendants' section 16-5502(c)(1) motion to stay discovery is whether the automatic stay provisions of the statute apply to the entire amended complaint or merely to the one new count Plaintiff added to those he plead in the original complaint. While the court presumably could decide that "undercard" question even as the "main event" is concurrently before the Court of Appeals, it is not significantly more efficient to decide it now

[3] Alternatively, the Court could dismiss the appeal as moot. See note 1, *supra*.

rather than later; and, depending on the decision of the appellate court, it may be unnecessary to decide it at all.

Accordingly, it is this **2nd** day of **October, 2013**,

ORDERED that all other proceedings in this case are stayed pending the decision of the District of Columbia Court of Appeals on the Defendants' interlocutory appeals.

Judge Frederick H. Weisberg

COPIES TO:

All Counsel listed in CaseFileXpress