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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

RENEE IVCHENKO and ANDREW IVCHENKO, wife and husband, Plaintiffs, v. DAVID S. GINGRAS, et al., Defendants.	Case No. CV2021-093562 **REPLY IN SUPPORT OF MOTION TO STAY** (Assigned To Hon. Peter Thompson)

I. PREFATORY COMMENTS

The issue here is extremely simple: there is existing litigation pending in federal court between virtually the same parties involving identical claims and issues arising from the same events/incidents. The question is: should this Court allow a *second*, later-filed action to proceed simultaneously and in parallel with the earlier-filed federal case, or should this proceeding be stayed until the federal case is resolved?

This is a yes-or-no question. And to avoid doubt: a stay is *not* compulsory; i.e., a stay is not *mandatory* or required under any existing rule; it is discretionary.

This Court has discretion to grant or deny a stay as it deems proper. As previously explained in the initial motion, when a pre-existing federal case is pending between the same parties involving the same issues arising from the same events, the best course of action is not to dismiss the later-filed action, but rather to grant a stay, "if the circumstances warrant". That decision requires an application of the six factors set forth in *Tonnemacher v. Touche Ross & Co.*, 186 Ariz. 125, 920 P.2d 5 (App. 1996).

Rather than focusing on the relevant *Tonnemacher* factors, Plaintiff Andrew Ivchenko does something else—he engages in a venomous, hate-filled *ad hominem* attack against the undersigned and the Grant Family, accusing them of "declaring war on our citizenry". This tirade is nothing new; it is something Mr. Ivchenko has done in virtually every pleading he has filed in the last 2 ½ years of litigation between the parties.

Fortunately, most of Mr. Ivchenko's personal attacks are irrelevant to the question of whether a stay is appropriate. For that reason, most of Mr. Ivchenko's insults will receive no response, save one: Mr. Ivchenko accuses the undersigned of lying to the Court in the Motion to Stay. Specifically, Mr. Ivchenko alleges: "Defendant Gingras blatantly lied to this Court in stating that Plaintiff Andrew Ivchenko 'commenced and/or instigated' nearly 'a dozen' lawsuits, including 'eight such cases against the Grant Family here in Arizona.' *The magnitude of this lie is dizzying*." Opp. at 12:3–6 (emphasis added).

In reply, this Court must understand two key points. First, the undersigned has not lied about anything (this point will be explained further *infra*). Second, there is an uncomfortable truth that must be confronted: there is substantial reason to believe Mr. Ivchenko is seriously mentally ill, and his bizarre and baseless attacks against the undersigned and the Grant Family appear to be a direct result of this illness.

Make no mistake—the undersigned recognizes how serious this statement is. For any lawyer to suggest opposing counsel is "mentally ill" is, at the very least, an extraordinary thing to say. In most cases, this type of statement would not only be unprofessional, but arguably unethical.[1] Still, this statement about Mr. Ivchenko's mental health is not intended to be pejorative or demeaning in any way, nor is this statement based only on the undersigned's unsupported personal opinions.

[1] Rule ER 4.4 of the Arizona Rules of Professional Conduct mandates that: "In representing a client, *a lawyer shall not use means that have no substantial purpose other than to embarrass*, delay, or burden any other person …." (emphasis added).

Similarly, Arizona Supreme Court Rule 41(b)(7) imposes a duty on all lawyers: "to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the duties to a client or the tribunal."

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Rather, the statement concerning Mr. Ivchenko's mental condition is based on concrete facts. These facts suggest Mr. Ivchenko is suffering from a condition that makes it impossible for him to distinguish fantasy from reality. Again, that is not a matter of personal opinion; it is a statement of fact.

Consider this one point: Mr. Ivchenko accuses the undersigned of "blatantly lying" about the number of lawsuits "filed or instigated" by Mr. Ivchenko against the Grant Family. The specific disputed statement was that in the course of seeking revenge against his perceived enemies, Mr. Ivchenko: "commenced and/or instigated nearly a dozen lawsuits, including eight such cases against the Grant Family here in Arizona." Mr. Ivchenko suggests this is a "dizzying" lie offered solely to make him look bad. To rebut that point, Mr. Ivchenko avows he "initiated only one brief case against the Grant Defendants on behalf of his wife, Plaintiff Renee Ivchenko." Opp. at 12:6–8.

So who is telling the truth? Did Mr. Ivchenko really commence and/or instigate eight lawsuits against the Grant Family or just one? As a starting point, the Motion to Stay included a table listing eight of the cases in question. For ease of reference, this table (created using a screenshot from the Court's website) is shown again below.

	Case Number	Party / Business Name
1	CV2019-015355	Grant, Travis - DOB: N/A
2	CV2019-090493	Grant, Travis - DOB: N/A
3	CV2020-055202	Grant, Travis - DOB: N/A
4	CV2020-055722	Grant, Travis - DOB: N/A
5	CV2020-093006	Grant, Travis - DOB: N/A
6	CV2021-090059	Grant, Travis - DOB: N/A
7	CV2021-090710	Grant, Travis - DOB: N/A
8	CV2021-093562	Grant, Travis - DOB: N/A

Of these eight cases filed against Travis Grant and his family, Mr. Ivchenko was counsel of record in five of the matters: Cases 2, 5, 6, 7 & 8. In another matter (Case 1 – which was actually the *second* chronological suit filed) Mr. Ivchenko was a party-

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plaintiff (he was co-plaintiffs with his wife).[2] Mr. Ivchenko was thus either counsel of record for the plaintiffs, or he was an individual party plaintiff, in six separate suits against the Grant Family, not "*one brief case*" as he now claims.

As for the remaining two matters—Case 3 (CV2020-055202) and Case 4 (CV2020-055722), those actions *were* commenced by a different law firm (Rosenstein Law Group). This change in counsel occurred after Mr. Ivchenko filed, and then voluntarily dropped, the first two suits. However, in pleadings filed in other matters, Mr. Ivchenko stated the plaintiffs in Cases 3 were his "former clients"[3], and he repeatedly claimed he was "working with" and "coordinating efforts" with Rosenstein Law during the prosecution of Cases 3 and 4. This is why the term "instigated" was used to refer to Mr. Ivchenko's role in those two matters; because that is what occurred.

> 9. Two of my former clients are represented by The Rosenstein Law Group, PLLC in lawsuits filed in this Court against Defendants (Case Nos. CV2020-055202, filed September 24, 2020, and CV2020-055722, filed November 6, 2020).

From: Andrew Ivchenko <aivchenkopllc@gmail.com>
Sent: Friday, November 20, 2020 1:33 PM
To: David Gingras <david@gingraslaw.com>
Subject: Case management matters

David,

Now that case no. 2:20-cv-01142 has been dismissed, we need to discuss the next steps for those 20 clients whom I represent.

As stated in my last email, I will be coordinating my efforts in these cases with the Rosenstein law firm, so that the legal arguments are properly presented and considered by the courts. Before I formalize that relationship on behalf of these 20 clients, I want to see if there is any agreement on some procedural matters so that I can determine the appropriate nature and extent of that relationship. Bear in mind that the wishes of the client come first here.

[2] The case numbers of Cases 1 & 2 are not in chronological order. Case 2 on the list (CV2019-090493) was the first action filed on May 9, 2019, while Case 1 (CV2019-015355) was filed several months later on December 17, 2019.

[3] The first screenshot above shows a statement made in a declaration filed by Mr. Ivchenko which was attached as Exhibit 3 to a pleading entitled "Plaintiff's Motion to Waive Appearance At Future Proceedings And To Proceed Under Pseudonym" filed on January 22, 2021 in *Doe v. Grant*, CV2021-090059.

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Based on these facts, Mr. Ivchenko's statement that he pursued just "one brief case" against the Grant Family is 100%, categorically false. And that is what is so disturbing—Mr. Ivchenko seems unable to refrain from making provably false statements, even when the truth is easily ascertainable by referring to matters of record, and even when the falsehood relates to a relatively small or collateral issue.

Indeed, consider the context here: for the purposes of deciding whether to stay this proceeding, it actually does not matter whether Mr. Ivchenko filed one case, two cases or ten cases against the Grant Family. The *Tonnemacher* court never suggested a stay should only be granted in cases where an uncommonly vexatious plaintiff exceeds a certain fixed number of prior suits. Rather, *Tonnemacher* establishes a flexible rule that permits the Court to consider many practical factors, including whether a stay would help prevent "harassment by repeated suits involving the same subject matter …." *Tonnemacher*, 186 Ariz. at 130 (emphasis added).

Because avoiding harassment is a relevant consideration, the Motion to Stay explained Mr. Ivchenko has a well-documented history of using vexatious litigation to harass and attack people he is angry with. Again, this is a statement of fact, not opinion. In addition to suing the Grant Family at least *six* separate times in Arizona (*eight* if we include the two other matters instigated by Mr. Ivchenko), Mr. and Mrs. Ivchenko have also filed groundless litigation against other victims including:

1.) City of Scottsdale Police; *see Renee Ivchenko v. City of Scottsdale*, Ariz. Dist. Court Case No. 19-CV-5834 (case dismissed based on a finding Scottsdale Police had probable cause to arrest Mrs. Ivchenko);

2.) An alcohol treatment facility where Mrs. Ivchenko sought care; *see Renee Ivchenko v. The River Source Treatment Center*, Maricopa County Superior Court Case No. CV2018–092390 (case dismissed);

3.) An anonymous person who posted Mrs. Ivchenko's mugshot on Twitter; *see Renee Ivchenko v. Jennifer Becker*, Maricopa County Superior Court Case No. CV2020-093379.[4]

[4] Notably, *Ivchenko v. Becker* is also assigned to this Department, and it includes claims which were previously dismissed with prejudice in Case 1. Accordingly, Mrs. Ivchenko's claims in *Ivchenko v. Becker* are all groundless because they are barred by *res judicata*.

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Adding those three cases to the eight listed in the original motion gives us eleven (11) prior actions filed by Mr. and/or Mrs. Ivchenko in this state alone. Mr. Ivchenko is also participating *as a witness* in yet another case currently pending against the Grant Family, *Doe v. Grant, et al.,* Case No, 2021–CA–00960 filed in Seminole County, Florida. Among other things, Mr. Ivchenko submitted a declaration in support of the plaintiff in that case and several of the pleadings filed in the case appear to have been written by Mr. Ivchenko (or by whomever is drafting Mr. Ivchenko's pleadings).

But again, whether Mr. Ivchenko has filed six, eight, eleven or twelve cases against the Grant Family is largely irrelevant to the question of whether a stay is warranted. If Mr. Ivchenko's personal attacks against the undersigned and the Grant Family are placed aside, all the *Tonnemacher* factors (including the avoidance of harassment) weigh heavily in favor of staying this case. That is what matters.

And to be clear—Mr. Ivchenko's suggestion that the Grant Family (and the undersigned) are somehow trying to "derail" this proceeding or to "escape responsibility" is not just wrong, it seriously mischaracterizes the relief requested here. Keep in mind: if a stay is granted, that does not mean Mr. and Mrs. Ivchenko will be barred from pursing their claims. A stay cannot possibly result in anyone "escaping" responsibility.

Rather, a stay would simply mean Mr. and Mrs. Ivchenko will have to pursue their claims in a *single* consolidated action, rather than in two parallel proceedings. There is nothing remotely unfair or surprising about such a result. Requiring parties to litigate related claims in a single proceeding is exactly why Rule 13(a) exists, and asking Mr. Ivchenko to comply with that common-sense rule is hardly "pugnacious".

For all these reasons, the request for a stay should be granted.

II. DISCUSSION

a. The Abatement Doctrine Is Irrelevant Here

Nearly half of Mr. Ivchenko's response brief (pages 3–9) is devoted to explaining why the "abatement doctrine" does not apply to this case. This is unfortunate, because the Motion to Stay never argued abatement as a basis for a stay.

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Instead, the motion relied entirely on *Tonnemacher* where the Court of Appeals explained an earlier-filed federal case does **not** automatically abate a later-filed state action. But as the *Tonnemacher* court also held, even when the abatement doctrine does not apply, a state court *can and should* consider an alternative option—it should grant a stay of the later-filed action if the facts and circumstances warrant.

While his argument is less than clear, it appears Mr. Ivchenko believes a stay under *Tonnemacher* is only available *if* the moving party first shows the abatement doctrine *also applies*. For instance, Mr. Ivchenko suggests: "Defendants gloss over these issues that are prerequisites to the application of the abatement doctrine, and skip right to the factors that could, within the discretion of the court, warrant a stay assuming that the abatement doctrine event applies." Opp. at 6:1–3 (emphasis in original).

The error in this argument is obvious: Mr. Ivchenko mistakenly believes the rule of abatement and the power to grant a stay are the same thing, or perhaps that a finding of abatement is a necessary precondition to a stay. This argument is just plain wrong as a matter of law. On this point, *Tonnemacher* could not be any clearer.

In *Tonnemacher* the court discussed the abatement doctrine and observed "The pendency of a prior action sometimes abates a subsequently filed action." *Tonnemacher*, 186 Ariz. at 128 (citing *Allen v. Superior Court*, 86 Ariz. 205, 209, 344 P.2d 163, 166 (1959)). But the *Tonnemacher* court also recognized abatement does not always apply in every situation, and it conclude abatement did not apply under the facts of that case.

Despite holding abatement inapplicable, the *Tonnemacher* court did not end the analysis (as Mr. Ivchenko asks this Court to do). Instead, the Court of Appeals explained even if the abatement rule is inapplicable, the Superior Court *always* has inherent authority and discretion to grant a stay. That is why abatement was not argued here; because a threshold finding of abatement is *not necessary* to justify a stay.

To be clear—if the Grant Family's malicious prosecution action against Mr. and Mrs. Ivchenko had been filed in *state* court, the abatement rule probably would apply here and would mandate dismissal of this action. But because the Grant Family has

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chosen a federal forum for their claims (as occurred in *Tonnemacher*), the abatement doctrine likely does not apply here, for the same reasons explained in *Tonnemacher*.

Thus, even assuming Mr. Ivchenko is correct, and even assuming abatement does not apply, that point is completely irrelevant. This is so because abatement and discretionary stays are two entirely distinct concepts. Accordingly, there is no need for this Court to analyze the rules of abatement. Instead, this Court should simply consider the factors described in *Tonnemacher* to decide whether a stay is warranted.

b. The Federal And State Proceedings Are Not "Entirely Different"

Hoping to avoid a stay, Mr. Ivchenko repeatedly argues "the parties, facts, and causes of action in the two cases are entirely different." Opp. at 5:13–14 (emphasis in original). Mr. Ivchenko further suggests: "With different parties, fact patterns, and causes of action, it is unlikely that any ruling will have a res judicata effect on the other … ." Opp. at 8:12–13. These arguments are not well-taken.

First, the Motion to Stay explained the two cases involve identical parties with only one minor exception: the undersigned is not currently a party to the federal action. Aside from that one minor difference, the parties are identical.

Second, the claims in each case arise from the same events and are substantially identical. In the federal proceeding, the Grant Family allege Mr. and Mrs. Ivchenko engaged in malicious prosecution and abuse of process during their prosecution of "Case 2" (CV2019-015355), *inter alia*, because the entire action was groundless and was pursued with malice and for improper purposes. *See* Verified First Amended Complaint, attached as Exhibit A to the Motion to Stay at ¶¶ 107–144. In this state court action, Mr. and Mrs. Ivchenko counter by accusing the Grant Family (and the undersigned) of abuse of process committed in the exact same lawsuit (Case 2). *See* Ivchenko Complaint ¶ 49.

Of course, because Mr. and Mrs. Ivchenko did not prevail in Case 2 (the Grant Family were the prevailing parties), the Ivchenkos have not asserted claims for malicious prosecution relating to Case 2 because malicious prosecution only exists when the original defendant prevails in the underlying action. But aside from that technical

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difference, both actions arise from the same prior litigation, and both actions will require an evaluation and determination regarding the merits of Case 2.

For example, in their malicious prosecution Complaint, the Grant Family alleges "Each and every claim asserted in the Complaint in Case 2 lacked probable cause, either factually, legally, or both." Motion to Stay, Exhibit A, at ¶ 116. Of course, in his Complaint, Mr. Ivchenko takes exactly the opposite allegation; he claims "Defendants … committed abuse of process by employing vexatious litigation and 'scorched earth' tactics designed to drain Plaintiffs' financial resources and also to intimidate them to drop the lawsuit [Case 2], knowing that the entire action had merit." Compl. ¶ 148 (emphasis added).

Clearly, although the elements of malicious prosecution and abuse of process are not identical, as these claims are pleaded in the federal and state actions, both claims will require a court to determine whether the claims asserted by Mr. and Mrs. Ivchenko in Case 2 were groundless (as the Grant Family alleges), or whether those claims had merit (as Mr. Ivchenko argues). There is absolutely no valid reason for *two separate courts* to undertake that same burdensome task at the same time. This single point strongly supports a stay under factors 1, 2, 3, 4 and 6 of *Tonnemacher*.

Similarly, in this action, Mr. and Mrs. Ivchenko assert numerous claims arising from the fact that Travis Grant published Mrs. Ivchenko's mugshot on his website, along with Scottsdale Police bodycam footage of Mrs. Ivchenko's arrest. Based on those acts, Mrs. Ivchenko pleads claims for invasion of privacy, unlawful appropriation/right of publicity, false light invasion of privacy, civil conspiracy, aiding and abetting tortious conduct, and intentional infliction of emotional distress.

By comparison, the federal action includes a claim for declaratory relief arising from exactly the same facts/issues. This claim seeks a declaratory judgment finding Mr. Grant's publication of Mrs. Ivchenko's mugshot and arrest information "is protected speech under the First Amendment and is not unlawful under any legal theory recognized in the State of Arizona." Motion to Stay, Exhibit A at ¶ 259.

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Bizarrely, after initially claiming that the federal and state cases are "entirely different", Mr. Ivchenko contradicts himself by suggesting the Grant Family's claim for declaratory relief is somehow barred because it involves the *same issues* pending in this case. Specifically, Mr. Ivchenko argues declaratory relief in the earlier-filed federal action is barred by this *later-filed* state proceeding because "[The Grants'] … request for Declaratory Relief fails as a matter of law in that it improperly seeks declaratory relief involving issues pending in another forum." Opp. at 14:10–12 (emphasis added).

To support his circular argument, Mr. Ivchenko cites *Merritt-Chapman & Scott Corp. v. Frazier*, 92 Ariz. 136, 375 P.2d 18 (Ariz. 1962) for the rule that declaratory relief cannot be used "for the purpose of trying issues involved in cases *already pending*." Opp. at 14:17 (emphasis in original) (quoting *Merritt-Chapman*, 92 Ariz. at 139. But *Merritt-Chapman* does not support Mr. Ivchenko's position. This is so because in that case, the declaratory relief action was filed in state court after an earlier proceeding was commenced in federal court involving the same issues. In other words, *Merritt-Chapman* rejected the *offensive* use of declaratory relief in a second-filed case when the purpose of the claim was to derail the resolution of the same issues in an *earlier-filed* action.

That is precisely the *opposite* of this case. Here, the Grant Family's claim for declaratory relief was filed first, not second, and Mr. Ivchenko's claims arising from the same matters were filed months later. Thus, the Grant Family is *not* using improperly their claim for declaratory relief to roadblock claims in an *earlier-filed* case. Rather, the Grant Family is using their declaratory relief claim exactly for its intended purpose—to resolve an existing dispute between the parties. Mr. Ivchenko cannot retroactively block this relief simply by filing a *second* action involving the same issues.

c. Defendants Are Not Attempting to Delay This Lawsuit

On pages 15–17 of his response, Mr. Ivchenko presents a bizarre and deeply paranoid argument comparing the Grant Family to "rats preparing to jump from a sinking ship". Without a scintilla of evidentiary support, Mr. Ivchenko claims all three members

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of the Grant Family "committed perjury" when they swore that only Travis Grant held an ownership interest in his websites, and that his brother, Kyle Grant, was simply an employee who performs "administrative/customer service tasks". Mr. Ivchenko also suggests his slew of lawsuits (i.e., the multiple cases he initially denied bringing) "represent extinction events for the Grant Defendants", and that these "facts" somehow warrant denial of a stay. Oh, how very dramatic.

Rather than responding directly to these childish arguments, the undersigned simply reminds this Court of an undisputed fact: as explained on pages 4–6 of the Motion to Stay, out of the first four lawsuits Mr. Ivchenko filed against the Grant Family, three were voluntarily dismissed by Mr. Ivchenko, and the fourth action (CV2021-090059) was dismissed on the merits after the court found all claims were barred by federal law. Given that Mr. Ivchenko has either **abandoned or lost** every single case he has pursued against the Grant Family (excluding only this current case and the "class action" case which remains unserved) it should be obvious the Grant Family has literally zero concerns about Mr. Ivchenko prevailing.

On the other hand, the Grant Family is deeply concerned that Mr. Ivchenko's vexatious, bizarre, and harassing conduct appears to be worsening. They are also concerned Mr. Ivchenko has demonstrated a willingness to literally "fight to the death" against anyone who stands in his way. It is time for this conduct to stop, and it is time for this Court to inform Mr. Ivchenko, in no uncertain terms, that the judicial system is not a plaything he can use to gleefully bludgeon anyone he dislikes.

III. CONCLUSION

For the reasons stated above, the undersigned respectfully requests that this matter be stayed pending the outcome of the existing federal litigation.

DATED: September 15, 2021.

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