SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THEC INTERNATIONAL-HAMDARD CORDOVA GROUP-NAZARI CONSTRUCTION COMPANY, LTD. JOINT VENTURE	:	
FAIZI MASROOR CONSTRCUTION COMPANY-THEC INTERNATIONAL CORPORATION-HAMDARD CONSTRUCTION COMPANY JOINT VENTURE	:	
HAMDARD CARDOVA GROUP	:	
NAZARI CONSTRUCTION COMPANY, LTD.	:	
FAIZI MASROOR CONSTRCUTION COMPANY	:	
DR. ABDULLAH FAIZI	:	
GUL RAHMAN HAMDARD	:	
Plaintiffs,	:	**Case No. 2017 CA 002122 B**
v.	:	**Judge Robert R. Rigsby**
COHEN MOHR, LLP.	:	
ANDREW K. WIBLE	:	
WILLIAM F. SAVARINO	:	
Defendants.	:	

OMNIBUS ORDER

Before this Court is Defendants' Motion to Dismiss the First Amended Complaint, filed on June 30, 2017, and Defendants' Motion for Costs and to Stay Litigation, filed on June 30, 2017. For the reasons stated below, and upon consideration of the entire record herein, the Court **GRANTS IN PART** Defendants' Motion to Dismiss and **DENIES** Defendants' Motion for Costs and to Stay Litigation.

BACKGROUND

Plaintiffs present the following facts in their Amended Complaint filed on May 27, 2017: In October 2009, Faizi Masroor Construction Company ("FMCC"), THEC International Corporation ("THEC") and the Hamdard Cordova Group ("HCG") formed a joint venture, the "FTH" joint venture, to perform a subcontract for International Relief & Development, Inc. ("IRD")[1] as part of a USAID road construction project in Afghanistan. FTH established a management board comprised of Dr. Abdullah Faizi, owner of FMCC, Gul Rahman Hamdard, owner of HCG, and Abdul Hadi Rakin, owner of THEC, to deal with major decisions.

On August 8, 2010, FMCC dropped out of the FTH joint venture and was replaced by the Nazari Construction Company ("NCCL"). This led to the creation of a new joint venture, the THN joint venture. The FTH joint venture still had a skeletal existence but all construction obligations were done by the THN joint venture. THN did not formally replace FTH on any IRD subcontract paperwork, but NCCL was added to the FTH bank account that was used by IRD to pay out the subcontract. It is unclear if IRD knew about or consented to the replacement of FMCC by NCCL. THN formed a new management board, comprised of Gul Rahman Hamdard,

[1] Neither THEC nor IRD is a party in this lawsuit.

owner of HCG, Abdul Hadi Rakin, owner of THEC, and Shir Mohammad Nazari, designated representative of NCCL. Though Abdul Rahman Nazari was the owner of NCCL, his brother Shir Mohammad was the designated representative for the management board because Abdul Nazari could not read or write English.

On March 1, 2011, IRD terminated the subcontract for convenience and became obligated to pay a final payment for the completed work and preparations. Rakin sent Hamdard an email on July 27, 2013 recommending they hire a lawyer. On September 24, 2013, Rakin hired Defendant law firm Cohen Mohr LLP to represent FTH during the negotiations with IRD. The representation of FTH was handled by two Cohen Mohr attorneys: associate Andrew Wible and partner William F. Savarini. Plaintiffs HCG and NCCL contend that they never consented to the hiring of Cohen Mohr LLP as legal counsel for negotiations with IRD, that THN had superseded FTH before Rakin retained Cohen Mohr, and that—in any event—Rakin was not the sole authorized representative for the FTH joint venture. Nonetheless, Defendants Cohen Mohr LLP, Andrew Wible, and William Savarino (collectively "Cohen Mohr" or "Defendants"), in fact negotiated for and obtained a settlement from IRD on behalf of the FTH joint venture for a purported final payment of $3,690,563.75. Despite their respective roles on the management boards of the THN and FTH joint ventures, Plaintiffs were never consulted by Cohen Mohr throughout the negotiations. Rather, Cohen Mohr exclusively communicated with Rakin, and was paid through THEC's U.S.-based bank account.

Rakin then sought consent for the authorization and transfer of the final payment from IRD. Despite knowing that Abdul Nazari could not read English and that his brother, Shir Mohammad, was the authorized representative of NCCL, he sent the "Authorization to Disburse Final Payment" to Abdul Nazari. He also called Abdul Nazari directly and assured him that

Hamdard of HCG had already signed the document. Rakin had, in fact, sent the authorization form to Hamdard as well. However, upon receipt of Rakin's email containing the "Authorization to Disburse Final Payment," Hamdard did not sign the document. Hamdard instead called Barazan Ismaeel, Chief of Party for IRD and stated that the bank account listed on the form was THEC's personal account and not the joint venture account. Ismaeel told Hamdard to contact IRD's general counsel, Jason Matechak. Hamdard emailed Matechak who replied that he had received a release signed by all members of the joint venture. Cohen Mohr attorney Wible was copied in the "cc" line of that email. The release was signed by Rakin for THEC, Abdul Nazari for NCCL, and Yama M. Eamen for HCG. Neither Abdul Nazari nor Yama Eamen was authorized to sign the form by their respective companies. According to the amended complaint, Yama Eamen had left his employment at HCG "long-ago." Nonetheless, IRD transferred the settlement funds of $3,690,563.75 into THEC's U.S.-based bank account.

On April 27, 2014, Bahir Sayed Zada, Business Development Manager of HCG, sent an email to Jason Matechak and copied Andrew Wible. Zada stated in the email that HCG did not sign a release and requested that Matechak transfer the money to the joint venture bank account. Defendants allegedly took no action in response to the emails they were copied on. HCG's legal counsel then reached out to Cohen Mohr directly. Andrew Wimble replied on August 14, 2015 that FTH was a client and invited counsel to meet with him. However, this meeting never took place, allegedly because it was canceled by Defendant Savarino. Then, Plaintiffs assert, Defendants refused requests from HCG's legal counsel for copies of the retention agreement and evidence that Rakin was authorized to represent the joint venture. On August 21, 2015, Andrew Wimble sent an email to HCG's legal counsel that Cohen Mohr's contact with the FTH joint venture has always been through its authorized representative, Mr. Rakin.

Plaintiffs filed an amended complaint on May 27, 2017, alleging that between 2013 and present day, Cohen Mohr aided and abetted THEC's fraud, aided and abetted THEC's conversion of $3,690,563.75, aided and abetted THEC's breach of fiduciary duty, tortiously interfered with a contract, breached the standard of care (legal malpractice), breached the standard of conduct (fiduciary duty), committed fraud, committed a breach of contract, and necessitated injunctive relief. Defendants Cohen Mohr, LLP, Andrew Wible and William Savarino filed a Motion to Dismiss on June 30, 2017, contending that pursuant to Sup. Ct. Civ. R.12(b)(6), the Plaintiffs' Complaint failed to state a claim upon which any relief can be granted and should be dismissed with prejudice. On June 30, 2017, Defendants' also filed a Motion for Costs and to Stay Litigation under Super. Ct. Civ. R. 41(d).

CHOICE OF LAW

Under District of Columbia law, a choice of law determination requires the court to establish whether there is any conflict among the potentially applicable legal standards. *Young Women's Christian Ass'n of the Nat'l Capital Area v. Allstate Ins. Co. of Canada*, 275 F.3d 1145, 1150 (D.C.Cir.2002) (citing *Eli Lilly & Co. v. Home Ins. Co.*, 764 F.2d 876, 882 (D.C.Cir. 1985)). Plaintiffs plead that they are governed by the laws of Virginia while Defendants allege that D.C. law governs. District of Columbia choice of law rules state that the jurisdiction that has the "more substantial interest" in the resolution of the issues governs. *Id.* Courts typically consider elements such as (1) "the place where the injury occurred," (2) "the place where the conduct causing the injury occurred," (3) "the domicile, residence, nationality, place of incorporation and place of business of the parties," and (4) "the place where the relationship" was centered. *Herbert v. Dist. of Columbia*, 808 A.2d 776, 779 (D.C. 2002). Neither party argues that the law of Afghanistan applies. Cohen Mohr, LLC resides in the District of Columbia and

the District of Columbia is the place where the conduct causing the injury occurred. Thus, District of Columbia law applies for the purposes of this case.

STANDARD OF REVIEW

I. Motion to Dismiss

A motion to dismiss pursuant to Rule 12 (b)(6) challenges the legal sufficiency of a Complaint. *Luna v. A.E. Eng'g Servs., LLC*, 938 A. 2d 744, 748 (D.C. 2007). A plaintiff's Complaint must, at a minimum, contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Sup. Ct. Civ. R. 8(a)(2). Such a statement must give the opposing party fair notice of the substance of the claim and the grounds upon which it rests. *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 963 (D.C. 2008). In reviewing the Complaint, the Court must accept all factual allegations are true, and construe all facts and inferences in a light most favorable to the non-moving party. *Chamberlain v. Am. Honda Fin. Corp*., 931 A.2d 1018, 1023 (D.C. 2007).

Dismissal for failure to state a claim is warranted only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of their claim. *Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 316 (D.C. 2008). At the same time, factual allegations must raise a right to relief above a speculative level. *Clampitt v. Am. Univ*., 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Although a Complaint does not require detailed factual allegations, it will not suffice if it tenders naked assertions devoid of further factual enhancement. *Grayson v. AT&T Corp*., 980 A.2d 1137, 1144 (D.C. 2009). Thus, to survive a motion to dismiss under Rule 12 (b) (6), a plaintiff must provide more than a recitation of the elements of a cause of action or conclusory statements couched as fact. *Id.*

II. Collateral Estoppel

"Collateral estoppel bars relitigation of an issue of fact or law when '(1) the issue is actually litigated; (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the determination was essential to the judgment, and not merely dictum.'" *Walker v. FedEx Office & Print Servs., Inc.*, 123 A.3d 160, 164 (D.C. 2015) (quoting *Hogue v. Hopper*, 728 A.2d 611, 614 (D.C.1999)). An arbitration award is considered a final judgment on the merits for purposes of collateral estoppel. *Id.* Collateral estoppel may be invoked defensively by a defendant who was not a party to the original proceedings to prevent a plaintiff from relitigating an issue that the plaintiff had previously litigated unsuccessfully. *Id.*

DISCUSSION

A. The International Court of Arbitration Decision

Defendants assert that many of Plaintiffs' counts are precluded by a Final Award recently issued by the International Chamber of Commerce International Court of Arbitration after arbitration between THN, HCG, NCCL (claimants), THEC (respondent), and IRD (the additional party). *See* Case No. 22065/RD/MK, ¶¶ 1-10 (ICC Int'l Ct. Arb. June 25, 2017). The arbitration concerned the same underlying subcontract with IRD and the THN joint venture, as well the same underlying injury. Claimants claimed that "THEC conspired with IRD improperly and fraudulently to procure that a final payment made by IRD for work carried out in respect of a road-building project in Afghanistan was deposited in an account controlled by THEC, rather than in an account controlled by members of the THN joint venture." *See id.* ¶ 46. The claims were advanced under theories of breach of contract, fraud, conspiracy, and unjust enrichment. In its Final Award, the tribunal determined that "neither HCG nor NCCL succeeded to the rights of

FTH under the IRD Subcontract [and that] THN itself had no legal capacity to take over the IRD Subcontract." *Id.* ¶ 128. In addition, it found that "[n]o approval was given by IRD or USAID to HCG or NCCL succeeding to the rights of FTH under the IRD Subcontract, either by assumption, assignment or otherwise." *Id.* ¶ 130.

In this case, Plaintiffs styled their complaint by dividing claims between the FTH Plaintiffs (Counts 1-11) and the THN Plaintiffs (Counts 12-18). Due to the findings of the tribunal in its Final Award, all counts alleging injury to THN (Counts 12-18), as well as claims made by HCG and NCCL as individual corporate entities, are properly barred by the doctrine of collateral estoppel. These plaintiffs have already unsuccessfully litigated and received a final judgment on the merits of whether they were directly entitled to any part of the final payment made by IRD arising out of the subcontract with FTH. *See Walker*, 123 A.3d at 164. The tribunal's findings necessarily preclude the possibility that Cohen Mohr, through its alleged acts or omissions relating to the negotiations and transfer of that final payment during its representation of the FTH joint venture, could have injured THN, HCG, or NCCL. It is irrelevant that Cohen Mohr was not a party to the arbitration. "[T]his jurisdiction permits a defendant in an action to invoke collateral estoppel based on a prior determination rejecting a plaintiff's claim against other parties, even in the absence of privity." *Id.* at 165. Moreover, the Court is permitted to take judicial notice of related proceedings. *Id.* at 164. Therefore, Counts 12-18 are dismissed.[2]

[2] As discussed below, the Court finds additional independent grounds to dismiss some of these claims.

B. Aiding and Abetting (Counts 1-3)

Plaintiff's first three counts allege that Cohen Mohr aided and abetted THEC's fraud, conversion of $3,690,563.75, and THEC's breach of fiduciary duty. Defendant's claim that aiding and abetting is not a valid claim under the law of the District of Columbia. Contrary to Defendants' assertions, however, the Court's statement in *Sundberg v. TTR Realty, LLC* that the District of Columbia has "not recognized the tort of aiding and abetting" was merely an acknowledgment that none of the court's prior cases had recognized the tort, not an affirmative statement about the current state of tort law in the District of Columbia. *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. App. 2015); *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 16-CV-00333 (APM), 2017 WL 1194333, at *25 (D.D.C. Mar. 30, 2017); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 (D.C. 2013); *Baker v. Gurfein*, 744 F. Supp. 2d 311, 317 (D.D.C. 2010).

Aiding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct. *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983). Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983); *see Investors Research Corp. v. SEC,* 628 F.2d 168, 178 (D.C. Cir. 1980), *cert. denied* 449 U.S. 919 (1980); *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 94–95 (5th Cir. 1975); *Landy v. Federal Deposit Insurance Corp.,* 486 F.2d 139, 162–63 (3d Cir.1973), *cert. denied* 416 U.S. 960 (1974). Plaintiffs have alleged that Defendants helped

THEC illegally gain money intended for the joint venture. Because of emails exchanged between parties, Defendants plausibly had knowledge that Rakin's actions were illegal yet still assisted him by preparing the settlement documents. As such, the Court will not dismiss Counts 1-3.

C. Tortious Interference with Contracts between and amongst the FTH joint venture, IRD, FMCC, HCG, NCCL and THN (Counts 4 & 15)

A plaintiff making a claim of tortious interference must establish (1) the existence of a contract, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of the contract's breach, and (4) damages resulting from the breach. *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012); *Cooke v. Griffiths–Garcia Corp.,* 612 A.2d 1251, 1256 (D.C.1992). Count 4 alleges that Cohen Mohr tortiously interfered with either FTH or THN's contract with IRD. However, Plaintiffs' fail to allege how this contract with IRD was breached and allege no specific facts as to Cohen Mohr's intent. This defect is also present in Plaintiffs' allegation in Count 15 concerning contracts between the joint venture members. As to the requirement of intentional procurement of breach, the Amended Complaint only states that Defendants caused the breach of IRD's contractual obligation and caused the FTH joint venture to breach its contractual obligations to HCG and NCCL. Assuming a breach occurred, it is unclear that the breach is a result Defendants' intentionally procured. As intent is one of the material elements of a tortious interference claim, Plaintiffs' claims of tortious interference must be dismissed. Accordingly, Counts 4 and 15 are dismissed.

D. Multiple Claims for breach of the standard of care and breach of the standard of conduct, plead as breach of fiduciary duty and legal malpractice (Counts 5, 6, 9, 10, 17 & 18)

To state a claim for breach of fiduciary duty, a plaintiff must allege facts sufficient to establish that the defendant owed plaintiff a fiduciary duty. *Paul v. Jud. Watch, Inc*., 543 F. Supp. 2d 1, 5–6 (D.D.C. 2008). Similarly, to establish legal malpractice, a plaintiff must show that defendants had a duty to plaintiff. *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 75 (D.D.C. 1998). In Count 5 and 6, Plaintiffs allege that the required procedures for hiring Defendants to represent the FTH joint venture were not observed, and that this failure resulted in there being no attorney-client relationship between Defendants and the FTH joint venture. Am. Compl. ¶¶ 226-227. Plaintiffs have plead that Defendants were not acting as the lawyers for the FTH Plaintiffs and thus have failed to plead an important element of both breach of the standard of care and breach of the standard of conduct. As such, Counts 5 and 6 are dismissed.

However, Counts 9 and 10 allege that if it was determined that Defendants served as legal counsel to the FTH joint venture, Defendants owed a duty of care and conduct to the FTH Plaintiffs. Am Complaint ¶ 280. These Counts allege the requisite duty and will not be dismissed.

The Court also finds defects in Counts 17 and 18, which the Court already dismissed based on the doctrine of collateral estoppel. Count 17 alleges that Defendants were not in privity of contract with THN Plaintiffs but that notwithstanding the lack of privity, Defendants breached their duty of care to the THN Plaintiffs as a third party. Complaint ¶ 350. It is well established that "the general rule is that the obligation of the attorney is to his client, and not to a third

party." *Needham v. Hamilton,* 459 A.2d 1060, 1061 (D.C.1983) (quoting *National Savings Bank v. Ward,* 100 U.S. 195, 200, 25 L.Ed. 621 (1880)). However, the Court may allow legal malpractice suits by "third parties notwithstanding a lack of privity where the impact upon the third party is not an indirect or collateral consequence, but the end and aim of the transaction." *Scott v. Burgin*, 97 A.3d 564, 566 (D.C. 2014). In the present situation, the direct and intended beneficiary of the attorney-client relationship was FTH, the joint venture that officially had a contract with IRD and whose bank account IRD had been paying into, not THN. As THN was not the direct and intended beneficiary of the contracted services, Count 17 must be dismissed.

Similarly, Count 18 alleges that Defendants breached their duty of conduct to the THN Plaintiffs even though the parties were not in privity of contract. The Amended Complaint states, "Positioning themselves so that the THN Plaintiffs and their future rights were completely vulnerable to them, . . . Defendants not only failed to warn the THN Plaintiffs about THEC's approaching round-house punch, Defendants equipped THN with the brass knuckles that ensured a 'knock-out' punch." Am. Compl. ¶ 360. This is much too vague; it is unclear why Defendants were required to observe a standard of conduct towards the THN Plaintiffs. Defendants were hired to represent FTH and the IRD contract was between FTH and IRD, even if in reality THN was executing the construction. Given this, there was no breach of the standard of conduct as no fiduciary duty existed. Counts 17 and 18 are dismissed.

Count 7: injunctive relief

Plaintiffs' advance a claim for injunctive relief, requesting the Court order Cohen Mohr release a complete copy of its file relating to representation of the THN joint venture to the Plaintiffs for use in their International Court of Arbitration claim against THEC and IRD. Injunctive relief, however, is not a freestanding cause of action, but rather is a form of relief to

redress the other claims asserted by Plaintiff. *Base One Techs., Inc. v. Ali*, 78 F. Supp. 3d 186, 199 (D.D.C. 2015); *see Guttenberg v. Emery*, 41 F. Supp. 3d 61, 70 (D.D.C. 2014); *Fitts v. Fed. Nat. Mortgage Ass'n,* 44 F.Supp.2d 317, 330 (D.D.C. 1999), *aff'd,* 236 F.3d 1 (D.C. Cir. 2001). This Court will thus dismiss Count 7 as it states a form of relief and not a cause of action. This action, however, does not preclude Plaintiffs from seeking injunctive relief in the event that one or more of their claims ultimately prevail.

Count 8: Fraud

Fraud is never presumed. *See* Super. Ct. Civ. R. 9(b). It must be pleaded with particularity. *Virginia Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs.*, Inc., 878 A.2d 1226, 1233 (D.C. 2005). Plaintiffs allege that Defendants were under a duty to disclose to the FTH Plaintiffs that it was hired to represent the joint venture and of THEC's actions. Am. Compl. ¶ 264. They explain that under this affirmative duty to inform Plaintiff's regarding material facts, Defendants were silent, and thus, committed fraud against the FTH Plaintiffs. Am. Compl. ¶ 269. To sustain Plaintiffs' fraud claim, they must show (1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation. *Schiff v. Am. Ass'n of Retired Persons*, 697 A.2d 1193, 1198 (D.C. App. 1997); *Howard v. Riggs Nat'l Bank,* 432 A.2d 701, 706 (D.C. 1981). Nondisclosure or silence, as well as active misrepresentation, may constitute fraud. *Bennett v. Kiggins*, 377 A.2d 57, 59–60 (D.C. App. 1977); *see St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 412 F.Supp. 45 (E.D.Mo.1976). When pleading fraud, a plaintiff must allege such facts as will reveal the existence of all the requisite elements of fraud and enable the court to draw an inference of fraud. *Bennett v. Kiggins*, 377 A.2d 57, 59–60 (D.C.1977). Applying these standards to the record

before the Court, this Court finds insufficient factual allegations to show that the alleged misrepresentation constituted fraud. Plaintiffs have not demonstrated that the Defendants' silence was made with an intention to deceive nor have they proffered evidence that they took any action in reliance upon Plaintiff's silence. Given these factual defects, Count 8 will be dismissed.

E. Count 11: Breach of Contract

Plaintiffs allege that Defendants breached their contract with the FTH joint venture by failing to meet with the governing board of the FTH joint venture and subsequently acting against the best interests of the FTH joint venture in connection to IRD's termination of the FTH subcontract for convenience. This alleged breach of contract resulted in Plaintiffs never receiving their final payment as the money ended in a THEC bank account instead of a FTH joint venture account. To prevail on a claim for breach of contract, Plaintiffs must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. App. 2009); s*ee San Carlos Irrigation & Drainage District v. United States,* 877 F.2d 957, 959 (Fed.Cir.1989). On this record, the Breach of Contract claim will not be dismissed.

III. Motion for Costs and to Stay Litigation

Defendants Cohen Mohr, LLC., et al moved pursuant to Rule 41(d) of the D.C. Superior Court Rules of Civil Procedure for costs, including all expenses and attorneys' fees, because Plaintiffs had previously dismissed an action in the U.S. District Court for the District of Columbia and because the present action is based upon or includes the same claim against Defendant Cohen Mohr as the earlier action.

D.C. Superior Court Rules of Civil Procedure 41(d) provides,

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such

> order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order. Sup. Ct. Civ. R 41(d).

As is apparent from the text, Rule 41 does not explicitly permit attorney's fees and whether and under what circumstances Rule 41(d) permits an award of attorneys' fees as a component of "costs," is an open question in this Circuit. *Irons, LLC v. Brandes*, CIV.A.06 0904 JR, 2007 WL 495802, at *1 (D.D.C. Feb. 15, 2007), *aff'd,* 275 Fed. Appx. 18 (D.C. Cir. 2008)(unpublished). While Sup. Ct. Civ. R 41(d) may permit the award of attorneys' fees under certain circumstances, those circumstances are not present here. *See Andrews v. America's Living Centers, LLC*, 827 F.3d 306, 308 (4th Cir. 2016); *Irons, LLC v. Brandes*, 2007 WL 495802, at *1. The purpose of Sup. Ct. Civ. R 41(d) is meant not only to prevent vexatious litigation, but also to prevent forum shopping. *Rogers v. Wal-Mart Stores, Inc*., 230 F.3d 868, 874 (6th Cir. 2000). Given the text of Sup. Ct. Civ. R 41(d), it does not appear that Rule 41(d) was intended to alter the "American Rule," under which attorney's fees are not usually recoverable as part of costs. *See Irons*, 2007 WL 495802, at *1 ("the most recent appellate decision on the point and easily the best-reasoned and most persuasive, holds that attorney's fees are *not* available under Rule 41(d), for the simple reason that the Rule does not explicitly provide for them"); *Andrews v. America's Living Centers, LLC*, 827 F.3d 306, 310 (4th Cir. 2016); *Alyseka Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)).

A court may, within its discretion, award attorneys' fees where it makes a specific finding that the plaintiff has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Andrews v. America's Living Centers,* 827 F.3d at 311; *Alyeska*, 421 U.S. at 258–59, 95 S.Ct. 1612; *see Kreager v. Solomon & Flanagan*, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985); *Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 543 (4th Cir. 2002). Plaintiffs' present Complaint is more

detailed than both the Complaint and the proposed Amended Complaint in the previous action. The Amended Complaint now also includes HCG and NCCL as plaintiffs and adds Andrew Wible and William Savarino as defendants. The Complaints, while similar, are not verbatim and, as such, are not vexatious or wanton. There is no indication that Plaintiffs have acted in bad faith nor have Defendants given explicit reasons to believe Plaintiffs have acted in bad faith. Given Plaintiffs' conduct was not undertaken in bad faith, vexatiously, wantonly, or for oppressive reasons, Defendant's request to include an award of attorney's fees is denied.

Notwithstanding the attorneys' fees, Defendants' have moved for sanctions for general costs and a stay of litigation. Although costs are generally awarded as a matter of course, the court has discretion in allowing, disallowing, or apportioning costs. *See Guevara v. Onyewu*, 943 F. Supp. 2d 192, 195 (D.D.C. 2013); *Moore v. Nat'l Ass'n of Secs. Dealers, Inc.,* 762 F.2d 1093, 1107 (D.C. Cir. 1985). At this point in the proceedings, the Court will deny Defendants' motion for costs and to stay litigation. None of Plaintiffs' proceedings seem to have been maintained in bad faith or without substantial justification, actions that would justify compensating the Defendants. *See Worsham v. Greenfield*, 978 A.2d 839, 848 (Md. Spec. App. 2009), *aff'd*, 78 A.3d 358 (Md. 2013). The Defendants' cite to *Randall v. Merrill Lynch* to support the assertion that because Plaintiffs dismissed and then re-filed a nearly-identical litigation, Cohen Mohr is entitled to its costs incurred. However, in *Randall*, the U.S. Court of Appeals affirmed the lower court's decision to allow Plaintiffs to voluntarily dismiss their case for a second time. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1322 (D.C. Cir. 1987). While acknowledging the hardships this put on the defendant, Merrill Lynch, the U.S. Court of Appeals stated, "Additional legal costs, however, are the inevitable result whenever a judgment is vacated." *Id.* at 1321. Therefore, Defendants' Motion for Costs and to Stay Litigation is denied.

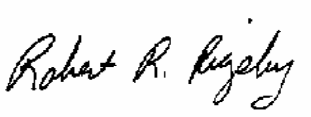
CONCLUSION

Upon consideration of the Motion to Dismiss and Motion for Costs and to Stay Litigation, and based on the entire record herein, it is hereby this 31st day of August 2017,

ORDERED that the Motion to Dismiss is hereby **GRANTED IN PART** as set forth above, and that Counts 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, 17, and 18 are **DISMISSED**, and **DENIED IN PART** as set forth above, and that Counts 1, 2, 3, 9, 10, and 11 will not be dismissed; and it is further

ORDERED that the Motion for Costs and to Stay Litigation is **DENIED.**

SO ORDERED.



Robert R. Rigsby
Associate Judge
Superior Court of the District of Columbia
(signed in chambers)

Copies to all counsel of record.