

No. 21-5256

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TIGER LILY LLC, et al.

Plaintiffs-Appellees,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, et al.

Defendants-Appellants.

On Appeal from the U.S. District Court for the Western District of Tennessee

**PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION
TO DEFENDANTS-APPELLANTS'
EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR
IMMEDIATE ADMINISTRATIVE STAY
OR, IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME**

S. JOSHUA KAHANE
jkahane@glankler.com

AUBREY B. GREER
agreer@glankler.com

GLANKLER BROWN, PLLC
6000 Poplar Ave., Suite 400
Memphis, Tennessee 38119
Telephone: (901) 576-1701
Facsimile: (901) 525-2389

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

I. INTRODUCTION1

II. PROCEDURAL HISTORY3

III. ARGUMENT.....6

 A. The Defendants’ Motion Should be Denied Because it Does Not
 Comply with Fed. R. App. P. 86

 B. In the Alternative, Plaintiffs Seek an Extension of Time to File a
 Comprehensive Opposition Memorandum on the Merits9

IV. CONCLUSION.....9

CERTIFICATE OF COMPLIANCE11

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

FEDERAL RULES

Fed. R. App. P. 81, 2, 6, 7, 8, 9, 10
Fed. R. App. P. 8(a)6
Fed. R. App. P. 8(a)(2)(A)6
Fed. R. App. P. 8(a)(2)(B)6
Fed. R. App. P. 27(a)(3)(B)2, 9
6 Cir. R. 8, Page 166

CASES: UNITED STATES SUPREME COURT

Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission,
260 U.S. 212, 219, 43 S.Ct. 75, 67 L.Ed. 217 (1922)6

CASES: UNITED STATES CIRCUIT COURTS OF APPEAL

Baker v. Adams Country/Ohio Valley School Bd.,
310 F.3d 927 (6th Cir. 2002).....6, 7
M.M.V., et al. v. Barr,
459 F. Supp. 3d 1 (D.D.C. 2020).....6
S.E.C. v. Dunlap,
253 F.3d 768 (4th Cir. 2001).....7

OTHER SOURCES

Center for Disease Control and Prevention. “Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19.” September 1, 2020, 1985 Fed. Reg. 552923, 4, 5, 8

INTRODUCTION

Plaintiffs-Appellees, Tiger Lily, LLC, Hunter Oaks Apartments Utah, LLC, North 22nd Flat, LLC, Cherry Hill Gardens, LLC, Churchill Townhomes, LLC, Brittany Railey, and Applewood Property Management, LLC (collectively, the “Plaintiffs”) hereby submit their Response in Opposition to the collective Defendants’ Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay¹ (the “Sixth Circuit Stay Motion”) filed with this Honorable Court on March 18, 2021. Defendants’ Sixth Circuit Stay Motion is premature and does not comply with the requirements of Fed. R. App. P. 8.

On March 17, 2021, Defendants filed with the United States District Court for the Western District of Tennessee a Motion² with an *identical title* seeking the *identical relief* and making the *identical arguments* (the “District Court Stay Motion”). Defendants’ District Court Stay Motion evidences that moving first in the District Court was wholly practicable for Defendants and, since no ruling denying Defendants’ District Court Stay Motion has yet been issued by the District Court, any consideration of Defendants’ instant Motion by this Honorable Court **now** is pre-mature and unripe.

¹ [Defendants’ Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay, Page ID # 1-71].

² (*See* Motion for Stay, RE 106, Page ID # 2911-2918).

Moreover, despite Defendants' subsequent act of filing another Stay Motion in the Sixth Circuit after first filing substantially the same Stay Motion in the District Court, Defendants made no request that this Honorable Court ignore Fed. R. App. P. 8, nor that this Honorable Court precipitately subvert the long-standing authority of District Courts to **first** consider and rule upon non-prevailing parties' stay requests **prior** to any such consideration at the appellate level. Instead, and to the contrary, the Defendants concede that the Sixth Circuit Stay Motion is to be considered **only after** the District Court acts on the District Court Stay Motion.

For these reasons, Plaintiffs respectfully request that this Honorable Court DENY the Sixth Circuit Stay Motion.

In the alternative, should this Honorable Court determine that short-circuiting Fed. R. App. P. 8's ordinary procedures is necessary at this time, Plaintiffs respectfully request and move, pursuant to Fed. R. App. P. 27(a)(3)(B), for an extension of time in which to file a comprehensive response on the merits, addressing the factual and legal bases for why this Honorable Court should deny the Defendants' requested stay of the District Court's March 16, 2021, Judgment beyond the procedural issue at bar and presented herein.³ An extension is appropriate given the importance of the issues involved and because the Plaintiffs are currently in the process of briefing these issues before the District Court.

³ (Judgment, RE 104, Page ID # 2906-2907).

PROCEDURAL HISTORY

Plaintiffs recognize that the salient facts underlying this litigation were fully plead in the District Court filings and are likely well known to this Honorable Court. For judicial efficiency, and because at this juncture, Plaintiffs' opposition to Defendants' Sixth Circuit Stay Motion is predicated upon procedural grounds, Plaintiffs forego a detailed recitation of the relevant facts necessary to contextualize the underlying litigation and, instead, simply incorporate by reference all facts as set forth in the District Court record; however, should this Honorable Court believe that a detailed recitation of the facts would be helpful for its consideration herein, upon request by this Honorable Court, Plaintiffs will immediately supplement this Response in Opposition.

For nearly 200 days, real property owners including these Plaintiffs labored under the effects of targeted and deliberate unlawful administrative action taken by the Centers for Disease Control and Prevention (the "CDC")⁴ in its Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19 (the "Halt Order"). *See* 85 Fed. Reg. 55292-55291; (Halt Order, RE 1-12, Page ID # 68-73). The Halt Order indiscriminately strips real property owners—from large real estate investment trusts to individual homeowners renting a room— of the right to use, enjoy, control, and enforce contracts related to their real property. At its core, the

⁴ In coordination with, or through enforcement powers allegedly conferred to, the other named Defendants.

Halt Order deprives property owners (including the Plaintiffs herein) of their constitutionally protected rights to control their own property and presents an absolute bar to availing themselves of the eviction procedures lawfully enacted by the state legislatures. In addition, the Halt Order threatens all property owners with criminal prosecution, including the imposition of large fines and up to one (1) year in jail, for any attempt to exercise their constitutionally protected property rights and state property laws.

The Halt Order undermines the Plaintiffs' fundamental rights, compromises their livelihood, and exposes them to extreme civil and criminal penalties, including imprisonment. Potentially even more dangerous, the Government's promulgation and enforcement of the Halt Order was, and is, an unlawful exercise of administrative agency power under the enabling statute⁵, undertaken without authority, in violation of both the substantive and procedural requirements of the Administrative Procedures Act, 5 U.S.C. §§ 501, *et seq.* ("APA"), afoul of basic separation-of-powers principles, and in contravention of Plaintiffs' legal and constitutional rights and liberties.

Plaintiffs timely challenged the Halt Order on September 16, 2020. After several months of extensive briefing and lengthy hearings, the District Court issued its Order Granting Plaintiffs' Motion for Judgment on the Administrative Record

⁵ 42 U.S.C. § 264.

and Denying Defendants' Motion for Judgment on the Pleadings. (See Order, RE 103, Page ID # 2886-2905). Restoring the *status quo ante* and preventing further irreparable harm, the District Court held Congress did not grant the CDC the sweeping powers it sought to exercise and rejected the CDC's attempts to dramatically expand its statutory authority. On March 16, 2021, the District Court issued its associated Judgment:

*The Court hereby **DECLARES** that the nationwide eviction moratorium promulgated by the CDC in orders dated September 4, 2020, and January 19, 2021, and referred to by this court as the "Halt Order," exceeds the statutory authority of the Public Health Act, 42 U.S.C. § 264; is ultra vires; and is unenforceable in the Western District of Tennessee.⁶*

In response, on March 17, 2021, trial counsel for the Defendants, Leslie Cooper Vigen and Steven Myers, filed a Notice of Appeal⁷ **and the District Court Stay Motion**. That same day, Plaintiffs filed a Notice⁸ with the District Court stating their intent to file a comprehensive Response in Opposition within the time prescribed by the Local Rules for the Western District of Tennessee.

The following day, on March 18, newly appearing appellate counsel for the Defendants, Alisa B. Klein and Brian J. Springer, filed the Sixth Circuit Stay Motion with an *identical title* seeking the *identical relief* and making the *identical arguments* as the already filed and pending District Court Stay Motion. On March 19, 2021,

⁶ (Judgment, RE 104, Page ID # 2907).

⁷ (Notice of Appeal, RE 105, Page ID # 2908-2909).

⁸ (Notice, RE 107, Page ID # 2920-2921).

this Honorable Court's Case Manager directed Plaintiffs to file a Response in Opposition to Defendants' Sixth Circuit Stay Motion by no later than 5:00 p.m. EST on Monday March 22, 2021.

ARGUMENT

C. THE DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE IT DOES NOT COMPLY WITH FED. R. APP. P. 8.

Fed. R. App. P. 8(a) provides that before seeking a stay from this Honorable Court, a party "must ordinarily move first in the district court." Fed. R. App. P. 8(a)(1). To seek relief from this Honorable Court directly, the moving party must either "show first that moving in the district court would be impracticable" or "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2)(A); *see also* Cir. R. 8, page 16. A motion for stay must include not only the "reasons for granting the relief requested," but also the "relevant parts of the record" and "affidavits or other sworn statements supporting facts subject to dispute." Fed. R. App. P. 8(a)(2)(B).

Because a stay pending appeal intrudes on the ordinary processes of administration and judicial review, *see M.M.V. v. Barr*, 459 F. Supp. 3d 1 (D.D.C. 2020), the "cardinal principle" that a movant must first seek relief from the district court and afford the district court an opportunity to decide the request is well established. *Baker v. Adams Country/Ohio Valley School Bd.*, 310 F.3d 927, 930

(6th Cir. 2002) (citations omitted); *see also Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922) (“the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore is familiar with the record.”). The requirement that application be first made to the district court is the case law rule.

When a movant fails to make the showing that Fed. R. App. P. 8 requires, the motion should be denied. *See Baker*, 310 F.3d at 930 (denying motion for stay pending appeal because movant failed to comply with Rule 8); *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (noting that a failure to comply with Rule 8 cannot be “properly ignore[d]”).

The Defendants in this case have not satisfied Fed. R. App. P. 8’s essential requirements. They have made no showing that moving in the District Court would be impracticable. Indeed, Defendants already applied to the District Court for the relief they seek here and concede, by their own statements in their Sixth Circuit Stay Motion, that this Honorable Court **should only** consider their Sixth Circuit Stay Motion **after** the District Court acts on the District Circuit Stay Motion.

*As required by Rule 8 of the Federal Rules of Appellate Procedure, the government filed a motion for stay pending appeal in the district court. See, RE 106. Page ID #2911-2918. We will inform the Court promptly when the district court acts in that motion*⁹

⁹ [Defendants’ Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay, Page ID # 8, fn. 2].

There is likewise no showing that the District Court ruled on the Defendants' motion or otherwise "failed to afford the relief requested." In addition, the Defendants failed to submit "affidavits or other sworn statements" in support of the need for the relief sought.

The Defendants' failures to comply with Fed. R. App. P. 8 cannot be "properly ignored" and there is no basis to dispense with the ordinary rules of procedure. *Dunlap*, 253 F.3d at 774. Instead, the Defendants should return to this Honorable Court only after their request for a stay has been properly presented to and considered by the District Court. Following the proper procedures will likely narrow and focus the issues remaining to be decided by this Honorable Court.

Allowing the District Court to consider the stay request in the first instance is especially appropriate given the irreparable harm being caused by the Halt Order and the strong public interest in protecting citizens from unlawful exercises of administrative authority that far exceed the powers granted by Congress. Because the District Court's order protects the status quo by restoring the Plaintiffs' property rights under, *inter alia*, state law and by rejecting the CDC's *ultra vires* attempt to dramatically expand its authority, it will surely aid this Honorable Court to see the District Court's response to the Defendants' request for stay relief. Enforcing Fed. R. App. P. 8 will also avoid unnecessary prejudice to the Plaintiffs, who should not be forced to litigate a two-front war—at the same time—attempting to brief the

issues before this Honorable Court contemporaneously with responding to the motion filed before the District Court.

As such, the Defendants' Sixth Circuit Stay Motion should be DENIED.

D. IN THE ALTERNATIVE, PLAINTIFFS SEEK AN EXTENSION OF TIME TO FILE A COMPREHENSIVE OPPOSITION MEMORANDUM ON THE MERITS.

If this Honorable Court decides to overlook the Defendants' departure from Fed. R. App. P. 8's essential requirements, then the Plaintiffs respectfully request¹⁰ an extension of time in which to file a comprehensive opposition memorandum to address the factual and legal bases for denying Defendants' stay request, beyond the procedural issue(s) presented herein. An extension is justified given the importance of the issues involved and the fact that the Plaintiffs are simultaneously preparing their response to the stay request filed in the District Court.

Accordingly, while the Plaintiffs are prepared to file a response on whatever reasonable schedule is directed by this Honorable Court, they respectfully request additional time to prepare a response on the merits in the event the Court deems one is now appropriate, notwithstanding the Defendants' violation of Fed. R. App. P. 8.

CONCLUSION

Plaintiffs respectfully request that this Honorable Court DENY the Defendants' Sixth Circuit Motion for Stay because it does not comply with Fed. R. App. P. 8.

¹⁰ Pursuant to Fed. R. App. P. 27(a)(3)(B).

In the alternative, should this Honorable Court elect to exercise its authority despite the mandates of Fed. R. App. P. 8, Plaintiffs would respectfully request an extension of time in which to file its comprehensive opposition memorandum to address the factual and legal bases upon which this Honorable Court should deny Defendants' requested stay of the District Court's March 16, 2021, Judgement.

Respectfully Submitted,

/s/ S. Joshua Kahane
S. JOSHUA KAHANE
jkahane@glankler.com

AUBREY B. GREER
agreer@glankler.com

GLANKLER BROWN, PLLC
6000 Poplar Ave., Suite 400
Memphis, Tennessee 38119
Telephone: (901) 576-1701
Facsimile: (901) 525-2389

Dated: March 22, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response in Opposition complies with the word limit of Fed. R. App. P. 27(d)(2)(A) as the Response in Opposition contains 2,388 words.

The Response in Opposition further complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and (6) as it has been prepared using Microsoft Word 365 and proportionally spaced 14-point Times New Roman typeface.

/s/ S. Joshua Kahane
S. JOSHUA KAHANE

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2021, I electronically filed the foregoing Response in Opposition with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished through the appellate CM/ECF system.

/s/ S. Joshua Kahane
S. JOSHUA KAHANE