IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
(Auburn/Syracuse Division)

Raoul XXXXX	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Case No.
	:	
Beth Ann YYYYY XXXXX	:	
	:	
Respondent	:	

RESPONDENT'S REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS OR STAY THIS ACTION

Respondent Beth YYYYY-XXXXX ("YYYYY") respectfully submits this reply in further support of her motion to dismiss or stay this action.

Preliminary Statement

In his opposition to YYYYY's motion to dismiss, the Petitioner relies heavily on allegations of legal conclusions to support his claim, while ignoring precedent under the Hague Convention on the Civil Aspects of International Child Abduction.

I. PETITIONER IGNORES THE HOLDING IN *GITTER v. GITTER*, UNDER WHICH THE PETITION LACKS SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT A FINDING THAT ITALY BECAME THE CHILD'S PLACE OF HABITUAL RESIDENCE.

In her motion to dismiss, YYYYY cited to *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005), in which the Second Circuit held that the habitual residence of a family from the United States did not change to a foreign country merely because they moved there for approximately a year, at least in the absence of the child(ren) becoming sufficiently acclimatized to the foreign country. *Id.* at 135. The Petitioner makes nothing more than a passing reference to *Gitter* in his opposition papers, claiming that *Gitter* stands only for the proposition that "habitual residence is

to be decided on a case by case basis after fact-specific inquiry." Opp. to Mot. to Dismiss or Stay ("Opp.") at 6. The Petitioner has not identified, however, any portion of the *Gitter* opinion, or any other authority, that relieves him of his obligation to allege sufficient facts to support his claim.

In his opposition, the only paragraphs of the Petition to which the Petitioner cites are 4, 6 8 and 13. *See* Opp. at 6-8. Excluding allegations of *legal conclusions*, those paragraphs refer only to the fact that the parties are the parents of the child, and that YYYYY obtained travel documents in order to leave Italy. The other paragraphs relied upon by the Petitioner state only a *legal conclusion* that the child was habitually resident in Italy and that the Petitioner had rights of custody under Italian law. *See id.* Under controlling Second Circuit law, allegations of legal conclusions cannot be relied upon to support a claim. *Achtman v. Kirby, McInerny & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss"). The Petitioner also cites to certain exhibits that contain his version of why the parties moved to Italy and where they chose to live while there, *id.*at 7, but such information does not suffice under *Gitter* to establish a change in habitual residence. Nowhere in his opposition papers does the Petitioner identify a single fact in the Petition reflecting that YYYYY *unconditionally agreed* to live in Italy indefinitely. Also, nowhere in his opposition papers does the Petitioner identify a single fact that could support a finding that the child became acclimatized to Italy.

The absence of meaningful *facts* in the Petition is not a mere technical error. As part of the Verification accompanying the Petition, the Petitioner has acknowledged, as he must, that the child had lived with both parents in several different places in the past five years, including several addresses in New York and Florida. There is also no dispute that the parties met and

married in the United States, the child was born in the United States, and the child is a United States citizen. Under such circumstances, the Petitioner must bear the burden of alleging facts from which this Court could find that the habitual residence changed from the United States to Italy. The mere fact that the parties moved to Italy for approximately a year, in connection with the Petitioner's employment, is not remotely sufficient. *See Gitter*, 396 F.3d at 135.

In sum, the Petitioner has failed to allege YYYYY's unconditional agreement to move to Italy indefinitely and failed to allege any facts suggesting that the child had become acclimatized to Italy. Accordingly, the Petition fails to state a claim under the Hague Convention because it lacks sufficient facts from which to find that the child's place of habitual residence was Italy when YYYYY brought him back to the United States.

II. THE PETITION FAILS TO ALLEGE THAT ANY UNDERTAKINGS COULD PROTECT THE CHILD FROM THE EFFECTS OF DOMESTIC VIOLENCE.

When, as here, a respondent raises a defense under Article 13(b) of the Hague Convention, based on the grave risk of harm a child faces if relocated to the Petitioner's country, the Petitioner bears the burden of proving the sufficiency of any undertaking that would suffice to protect the child in the foreign country. *See Danaipour v. McLarey*, 286 F.3d 1, 15-16, 21 (1st Cir. 2002) (holding that "the proponent of the undertaking bore the burden of showing" that the undertaking could be fulfilled in the foreign country, and there had been an error by the trial court "in the allocation of evidentiary burdens" on the issue of undertakings). With regard to unpled and belatedly raised undertakings, the First Circuit explained: "We do caution district courts that they must be careful not to prejudice the process of proving grave risk." *Id.* at 16. Here, the Petitioner has neither pleaded any undertaking that could protect the child in Italy, nor pleaded that no undertaking is necessary.

On the pleadings, the Petitioner has simply ignored the obvious issues of domestic violence in this action. At trial, the Petitioner will face significant proof of his domestic violence, including reports of a past arrest, and a pattern of violent behavior. The Hague Convention has never been intended to serve as a vehicle by which a batterer can exert more control over a spouse and child by forcing them to adopt his choice to live in a foreign country, after a temporary effort to reside there did not work (in part because of his physical and emotional abuse). This Court should not accept the Petitioner's invitation to turn the Hague Convention into the latest weapon, in a pattern of domestic violence, by which to force a spouse to accept a permanent change in the family's country of residence. There are no undertakings that could adequately protect the child if relocated to Italy, and the Petitioner has failed to plead them. Consistent with Article 13(b) of the Hague Convention, the Petition should be dismissed.

Conclusion

Based on the foregoing, the Hague Convention claims should be dismissed and the custody proceedings in state court should proceed.

Respectfully submitted,

BETH ANN YYYYY XXXXX,

By her attorneys,

Diane Martin-Grande
LAW OFFICES OF DIANE MARTIN-GRANDE
301 Black River Blvd.
Rome, New York 13440
(315) 336-1410

Barry S. Pollack (Bar Roll No. 514239)
SULLIVAN & WORCESTER LLP
1290 Avenue of the Americas
New York, NY 10104
(617) 338-2910; fax: (617) 338-2880

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