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April 23, 2019

Patricia S. Dodszuweit  
Clerk of the Court  
United States Court of Appeal  
for the Third Circuit  
21400 U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106

Re: Defense Distributed v. Attorney General New Jersey  
No. 19-1729

Dear Ms. Dodszuweit:

This letter responds to Appellants' letter filed April 18, 2019, contending that this Court has appellate jurisdiction, under 28 U.S.C. § 1291(a)(1), over an appeal of the district court's order staying all proceedings ("the Stay Order"). Appellants' two principal arguments are unpersuasive. First, the order is not appealable under 28 U.S.C. § 1291(a)(1). Second, the mere presence of additional, nominal parties in this case does not confer jurisdiction over an otherwise unappealable order.

Appellants' contention that Judge Thompson's order granting a stay of proceedings is immediately appealable under 28 U.S.C. § 1291(a)(1) relies on *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), but that case is easily distinguishable. In *Rolo*, this Court held that an order staying plaintiffs' motion for a preliminary injunction barring two defendants from liquidating their assets was appealable under § 1291(a)(1) because the Court found that the order had the practical effect of denying plaintiffs' motion, might cause serious, irreparable harm, and could only be effectively challenged by immediate appeal. *Id.* at 697, 702-03.



Under the narrow exception created for interlocutory appeals under § 1291(a)(1), all of those factors must be present, and none of them are present here.

First, the Stay Order does not effectively deny Appellants' motion for a preliminary injunction. Unlike in *Rolo*, where plaintiffs were only seeking relief against defendants in the District of New Jersey and a stay effectively denied their motion and precluded them from obtaining injunctive relief anywhere, here Appellants are litigating the same case against Appellee in two jurisdictions. The Stay Order does not deny Appellants' motion, but instead requires that they obtain injunctive relief in the forum of their choosing, which for now is the Western District of Texas. Second, the Stay Order will not cause "serious, perhaps irreparable" harm. *See id.* at 702 (internal quotations omitted). In *Rolo*, staying plaintiffs' preliminary injunction motion deprived them of *any* opportunity to preserve defendants' assets. *Id.* at 703. That is not the case here. Appellants can seek to vindicate their alleged constitutional harms in the Western District of Texas, where they have voluntarily chosen to litigate. Third, because Appellants can continue to litigate their case against Section 3(l)(2) in the Western District of Texas, they cannot demonstrate that the district court's "effective denial" of their motion for a preliminary injunction can only be remedied by an immediate appeal of the Stay Order. Appellants' reliance on *Rolo* is inapposite, and the Stay Order entered here cannot be appealed under 28 U.S.C. § 1291(a)(1).

Appellants also argue that appellate jurisdiction is appropriate because there are several additional plaintiffs in New Jersey that are not present in the Texas litigation. However, the mere existence of new nominal plaintiffs does not serve to create appellate jurisdiction for two reasons. First, this is not a jurisdictional argument; rather it is an argument that, on the merits, the district court erred in granting the stay. Second, the argument, if accepted, goes too far and would create an unworkable rule. The additional plaintiffs in New Jersey voluntarily chose to join parties that were actively litigating in Texas. The plaintiffs are functioning as a group, represented by the same attorneys as in the Texas litigation and advance the same legal theories. They are fully aligned with the parties leading the Texas litigation who have control over when the Stay Order is lifted.<sup>1</sup> The additional

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<sup>1</sup> Appellants state that Defense Distributed and the Second Amendment Foundation ("SAF") do not control when the stay is lifted because only the Texas district court can "resolve" the case by ruling on their motion. (Appellants' Letter 6 n.1). This is incorrect; they are not at the mercy of the court. Counsel for Appellee has confirmed that the New Jersey Attorney General would consent to the stay being lifted if Defense Distributed and SAF withdrew their motion seeking to reopen the Texas

April 23, 2019

Page 3

plaintiffs are bound by their choice to voluntarily join this group. Under Appellants' theory, Defense Distributed and SAF could file the very same lawsuit and litigate it simultaneously in 50 different district courts, as long as they add a new nominal plaintiff in each jurisdiction. That surely cannot be the case.

Accordingly, the Stay Order is not appealable because it does not functionally deny Appellants' motion for a preliminary injunction, and the presence of additional parties in this case does not confer appellate jurisdiction over an otherwise unappealable order. For these reasons, this Court should find that it lacks jurisdiction to hear Appellants' appeal and dismiss the matter.

Respectfully submitted,

GURBIR S. GREWAL  
ATTORNEY GENERAL OF NEW JERSEY

By: /s Glenn J. Moramarco  
Glenn J. Moramarco  
Assistant Attorney General  
Melissa Medoway  
Deputy Attorney General

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litigation or that motion was denied and (i) Defense Distributed and SAF provided written confirmation that they would not appeal or (ii) the time for them to file a notice of appeal expired. (Exhibit A). Appellants Defense Distributed and SAF certainly control whether they withdraw their motion in Texas and whether they confirm that they will not appeal. Consequently, they can end the Texas litigation anytime they like.

# **Exhibit A**

**From:** [Glenn Moramarco](#)  
**To:** [Chad Flores](#)  
**Cc:** [Melissa Medoway](#); [Jeremy Feigenbaum](#)  
**Subject:** RE: Defense Distributed et al., v. Grewal, No. 3:19-cv-04753-AET-TJB (D.N.J.)  
**Date:** Friday, March 8, 2019 3:27:48 PM

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I have enclosed defendant's responses to your questions below.

Glenn

**From:** Chad Flores <Cflores@beckredde.com>  
**Sent:** Thursday, March 7, 2019 3:47 PM  
**To:** Glenn Moramarco <Glenn.Moramarco@law.njoag.gov>; Melissa Medoway <Melissa.Medoway@law.njoag.gov>; Katherine Gregory <Katherine.Gregory@law.njoag.gov>; Eric Boden <Eric.Boden@law.njoag.gov>  
**Cc:** Daniel L. Schmutter <dschmutter@hartmanwinnicki.com>; Hannah L. Roblyer <hroblyer@beckredde.com>; Daniel N. Hammond <dhammond@beckredde.com>; Josh Blackman <joshblackman@gmail.com>  
**Subject:** [EXTERNAL] Defense Distributed et al., v. Grewal, No. 3:19-cv-04753-AET-TJB (D.N.J.)  
**Importance:** High

Dear Counsel,

In light of the proceedings at today's status conference, the Plaintiffs need to confer with you about the issue of a stay and its relation to future proceedings in *Defense Distributed et al. v. Grewal et al.*, No. 1:18-cv-637-RP (W.D. Tex.) (hereinafter "*Defense Distributed II*"). Since time is of the essence, we ask that you examine the following items and respond as soon as possible with the Defendant's position.

1. Assuming that Judge Thompson enters a stay order in accordance with what was stated during the status conference, is the Defendant willing to comply with any of the conditions our motion for a preliminary injunction seeks to impose (i.e., the three conditions listed in Document 18-1 at page 40) during the duration of the stay? **No.**
2. Assuming that Judge Thompson enters a stay order in accordance with what was stated during the status conference, under what conditions would the Defendant agree to have the stay lifted and resume proceedings? Specifically:
  - a. Would the Defendant agree to lift a stay and resume proceedings if, in *Defense Distributed II*, the district court issued an order denying the Rule 59 motion? **No.**
  - b. Would the Defendant agree to lift a stay and resume proceedings if, in *Defense Distributed II*, Defense Distributed and the Second Amendment Foundation, Inc. withdrew their Rule 59 motion? **No.**
  - c. Would the Defendant agree to lift a stay and resume proceedings if, in *Defense*

*Distributed II*, both (1) the Rule 59 motion were withdrawn and/or denied, and (2) the Plaintiffs there file a written waiver of the right to appeal before the time to file a notice of appeal has expired? **Yes.**

d. Would the Defendant agree to lift a stay and resume proceedings if, in *Defense Distributed II*, both (1) the Rule 59 motion were withdrawn and overruled, and (2) the time for Plaintiffs to file a notice of appeal expires? **Yes.**

e. Is it correct to say that your position about a stay does *not* turn on how the *Defense Distributed II* action against defendants other than Gurbir Grewal is resolved? **Yes.**

3. Assuming that the stay is lifted, will the Defendants agree to resume the briefing deadlines without delay? If not, what amount of extra time would be demanded? For example, if the stay is entered today and lifted on Monday, we would expect the response to the preliminary injunction to be due on Tuesday unless extra time is demanded. **We will be prepared to file our papers without delay once the stay is lifted. We would, however, need to work out a new date with the Court for the hearing (since the Court requested a substantial period of time between the end of briefing and the hearing).**

Please don't hesitate to let me know if any of these inquiries are unclear so that we may clarify. That way we can be sure to give the court an accurate picture of the parties' positions when the next filings occur.

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Chad Flores  
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