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April 18, 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 the Court's inquiry about appellate jurisdiction in the above-captioned matter. Appellants seek review of the District Court's order entered March 8, 2019, which granted a stay of the proceedings. The stay order is not a final appealable order under 28 U.S.C. § 1291 and is not otherwise appealable. Accordingly, this Court should dismiss the appeal.

The issue is uncomplicated. Appellants are attempting to litigate the same issues simultaneously against the same defendant in two separate forums—the Fifth Circuit and the Third Circuit. Judge Thompson recognized this was improper and ordered the latter case, filed in the District of New Jersey, to be stayed until the earlier-filed case, in the Western District of Texas, is either resolved or Appellants voluntarily abandon the earlier case and choose instead to litigate their claims in New Jersey. The stay is not a final order, and it is within Appellants' control to get the stay lifted and obtain a ruling in New Jersey on their motion for a preliminary injunction. Appellants simply have to choose to litigate in New Jersey, rather than in Texas.

Factual Background

In July 2018, Appellants Defense Distributed and the Second Amendment Foundation ("SAF") filed a complaint against Appellee and other state and local officials, in the District Court for the Western District of Texas ("the Texas Action"), seeking declaratory and injunctive relief that would permit the widespread dissemination of computer files that direct the automatic manufacture of dangerous firearms and firearm components using a 3D printer. (No. 1:18-00637, Dkt. 1).

Effective November 8, 2018, New Jersey made it illegal to manufacture or facilitate the manufacture of firearms or firearm components using a 3D printer. N.J. Stat. Ann. § 2C:39-9(*l*)(2) ("Section 3(*l*)(2)"). The next day, Appellants Defense Distributed and SAF filed a motion in the Texas Action, seeking a temporary restraining order ("TRO") enjoining Section 3(*l*)(2). (No. 1:18-00637, Dkt. 52). The court denied that TRO motion. (Dkt. 53). On December 4, 2018, appellants filed a second motion for a TRO and a motion for preliminary injunction ("PI"). (Dkt. 66 & 67). The Court denied these as well. (Dkt. 69, 101). On January 30, 2019, the Texas court dismissed the case, reasoning that Defense Distributed and SAF failed to establish personal jurisdiction over Defendant. (No. 1:18-00637, Dkt. 101).

On February 5, 2019, Appellants filed a complaint against the New Jersey Attorney General ("NJAG") in the District of New Jersey ("the New Jersey Action") seeking, among other things, a declaration that Section 3(*l*)(2) is unconstitutional. (No. 3:19-04753, Dkt. 1). On February 20, 2019, Appellants sought a PI enjoining enforcement of Section 3(*l*)(2). (Dkt. 18-1). Despite having just sought relief in the District of New Jersey, on February 27, 2019, Appellants Defense Distributed and SAF filed a Motion to Alter or Amend the Judgment in the Texas Action. (No. 1:18-00637, Dkt. 102). That motion has not yet been decided.

On March 3, 2019, Appellee NJAG requested a stay of all proceedings in the New Jersey Action because, by filing the Motion to Alter or Amend the Judgment in the Texas Action, Appellants were seeking to challenge the exact same law in two forums at the same time, in plain violation of well-settled law. (No. 3:19-04753, Dkt. 20); *see Chavez v. Dole Food Co.*, 836 F.3d 205, 220 (3d Cir. 2016). On March 7, 2019, following oral argument, the District Court agreed with the NJAG's position and entered an Order ("the Stay Order") staying all proceedings in the New Jersey action pending resolution of Appellants Defense Distributed and SAF's case in the Western District of Texas. (Dkt. 26). During argument, counsel for the NJAG affirmed that the State would consent to the stay being lifted if Defense Distributed

and SAF withdrew their motion seeking to reopen the Texas 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. Counsel confirmed the same in an email following oral argument.

Appellants have not abandoned their lawsuit in Texas. Instead, on April 1, 2019, they filed a notice of appeal from Judge Thompson's Stay Order in the New Jersey Action. (No. 3:19-04753, Dkt. 28). As a result, they continue to try to litigate their claims against the NJAG in two separate forums at the same time. This Court issued an order on April 4, 2019, requesting written responses on the question of appellate jurisdiction.

Legal Argument

The District Court's Order Granting A Stay Is Not Final And Is Not Otherwise Appealable.

The Stay Order is not appealable. First, it is not appealable pursuant to 28 U.S.C. § 1291 because it is not a final order. Second, it is not appealable pursuant to 28 U.S.C. § 1292(a)(1) because it does not actually or functionally deny a motion for an injunction. And third, it is not appealable pursuant to the collateral order doctrine because it does not finally resolve any issues and does not raise an important issue separate from the merits of the case. Consequently, this Court should dismiss the appeal.

To begin, the Stay Order is not appealable as a "final order" under 28 U.S.C. § 1291. In order to be considered final, a decision must have two effects—(1) it must "fully resolve all claims presented to the district court" and (2) after it has been issued, it must require nothing further of the district court. *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 557 (3d Cir. 1997); *see also N.J. Dep't of Treasury, Div. of Inv. v. Fuld*, 604 F.3d 816, 819 (3d Cir. 2010). "[T]here is no final order if claims remain unresolved and their resolution is to occur in the district court." *Aluminum Co. of America.*, 124 F.3d at 557; *see also Christy v. Horn*, 115 F.3d 201, 205 (3d Cir. 1997) ("If an order is not entered with the expectation that it will be the final word on the subject addressed, it is not immediately appealable." (Internal quotation omitted.)).

"[B]y definition an order that stays the proceedings for a finite period of time, would, without more, merely postpone a final disposition in the district court, and

therefore would lack the essential elements of finality." *Michelson v. Citicorp Nat. Services, Inc.*, 138 F.3d 508, 513 (3d Cir. 1998). A stay is only considered a final order where it is effectively a dismissal and forces the plaintiff out of court. *Id.* at 513-14. Appellants' preliminary injunction motion will be considered in the District of New Jersey, as will Appellants' additional claims, once the Texas Action is fully resolved. Clearly, Judge Thompson's grant of a stay is not a final order under § 1291.

The Stay Order is also not appealable under 28 U.S.C. § 1292(a)(1), which confers jurisdiction to the courts of appeals of "[i]nterlocutory orders of the district courts … granting, continuing, modifying, refusing or dissolving injunctions[.]" Appellants carry a "heavy burden" in establishing jurisdiction under this statute, which is "strictly construe[d]" in order to prevent an onslaught of appeals challenging pretrial orders and "frustrat[ing] the policy against piecemeal appeals." *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1072 (3d Cir. 1983).

This court does have jurisdiction under § 1292(a)(1) where a judgment has "the practical effect of granting or denying [an] injunction[.]" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988); *see also Gold*, 723 F.2d at 1072. For purposes of § 1292(a)(1) an "injunction" is "an order [1] directed to a party, [2] enforceable by contempt, and [3] designed to accord or protect some or all of the substantive relief sought by the complaint in more than a [temporary] fashion." *In re Pressman-Gutman Co., Inc.*, 459 F.3d 383, 392 (3d Cir. 2006) (internal quotations omitted).

Here, the Stay Order is neither literally, nor functionally, a denial of Appellants' motion for a preliminary injunction. The Stay Order is not designed to provide or deny the relief requested in the complaint. *See id.* By staying all proceedings in the District of New Jersey, Judge Thompson is simply directing Appellants to choose a single forum in which to litigate their claims, either Texas or New Jersey, but not both. *See Chavez*, 836 F.3d at 220 (Third Circuit "abstention jurisprudence has long directed district courts to stay [] potentially duplicative lawsuits" and "in the vast majority of cases, a court exercising its discretion under the first-filed rule should stay or transfer a second-filed suit."). The District Court's Stay Order does not fit within the narrowly construed terms of 28 U.S.C. § 1292(a)(1) and is not appealable.

Finally, the Stay Order is not appealable under the collateral order doctrine. This doctrine is a "'narrow exception' to the final judgment rule," under which the courts of appeals have jurisdiction over an order that "(1) finally resolves a disputed

question; (2) raises an important issue distinct from the merits of the case; and (3) is effectively unreviewable on appeal from a final judgment." *Christy*, 115 F.3d at 203-04. Failure to satisfy any these three element precludes jurisdiction by the appellate courts. *Id*. at 204. Of course, the Stay Order is not the "final word" on any issue and, in fact, resolves no issues before the district court, but merely puts all proceedings on hold until the Texas Action is resolved. *See Gold*, 723 F.2d at 1072 (finding that a scheduling order did not satisfy the "finality" element of the collateral order doctrine test where it was "simply a step in the process of bringing a case to final judgment"). Moreover, where, as here, an order "reflects merely the district court's imposition of a finite period of delay before the court completes its adjudication, the importance prong … is not satisfied." *Michelson*, 138 F.3d at 517.

Accordingly, the Stay Order is not appealable because it is not final order, it does not actually or functionally deny an injunction, and it is not otherwise appealable under the collateral order doctrine. Moreover, the District Court's Stay Order will be lifted whenever Appellants themselves voluntarily choose to litigate this case in New Jersey, rather than in Texas. As a result, there is no need for this Court's intervention. For all of these reasons, this Court should dismiss Appellants' appeal.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

By: /s ***Glenn J. Moramarco***
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CERTIFICATE OF SERVICE

I hereby certify that this letter in response to the Court's jurisdictional inquiry was served on opposing counsel on April 18, 2019, through this Court's ECF notification system.

By: /s ***Glenn J. Moramarco***
Glenn J. Moramarco