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October 16, 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, et al. v. Gurbir Grewal, Attorney General New Jersey, C.A. Nos. 19-1729 & 19-4753
Motion for Summary Action & Stay of Briefing Schedule

Dear Ms. Dodszuweit:

Please accept this letter as the Appellee's motion for summary action to affirm the District Court's interlocutory decision granting a discretionary stay because these two consolidated appeals present no substantial question for appeal. *See* Third Circuit Local Rule 27.4. Appellee also requests that this Court grant a stay in the briefing schedule until 30 days after this motion is decided.

The issue is straightforward. Appellants are attempting to litigate the validity of a recently-passed New Jersey firearms law simultaneously in two separate forums—the Western District of Texas and the District of New Jersey. The Attorney General of New Jersey ("NJAG") does not dispute that the District of New Jersey would be an appropriate federal judicial forum for Appellants' claims. But in order to prevent vexatious duplicative litigation, the NJAG requested a stay of the proceedings in the District of New Jersey while the litigation in the Western District of Texas remains ongoing. The Honorable Anne E. Thompson, U.S.D.J., exercised her discretion and granted the stay request. She ordered the New Jersey case stayed

until the earlier-filed case, in the Western District of Texas, is resolved or until Appellants voluntarily abandon that case. It was clearly within Judge Thompson's discretion to grant a stay of the proceedings in a second-filed case while Appellants continue to litigate the same claims against the NJAG in their earlier-filed action. There is no substantial question presented in these consolidated appeals.

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 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). (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 the NJAG. (No. 1:18-00637, Dkt. 101). The dismissal was "without prejudice," and the Court noted that "Plaintiffs may pursue their claims in a court of proper jurisdiction." (Dkt. 100 at 15).

On February 5, 2019, Defense Distributed, SAF, and five additional plaintiffs filed a complaint against the 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 preliminary injunction enjoining enforcement of Section 3(*l*)(2). (Dkt. 18-1). While that motion was pending in the District of New Jersey, on February 27, 2019, Defense Distributed and SAF filed a Motion to Alter or Amend the Judgment in the Texas Action. (No. 1:18-00637, Dkt. 102).

On March 3, 2019, in light of Defense Distributed and SAF's decision to continue litigating in the Western District of Texas, the NJAG requested a stay of all

proceedings in the New Jersey Action. App. 968-69 (DNJ No. 3:19-04753, Dkt. 20). 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 different federal judicial forums at the same time. Appellants filed their response on March 4, 2019, opposing the stay, arguing that the NJAG's requested relief was not in compliance with all applicable district court procedural rules. A970-73 (Dkt. No. 21).

On March 7, 2019, following oral argument, the District Court agreed with the NJAG's position and entered an 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. App. 3-4 (Dkt. 26). At the hearing, counsel for Appellants suggested that if a stay was granted, Defense Distributed and SAF would likely "let the [Texas] case go and disclaim any appeal immediately so as to proceed here in New Jersey. So we will be back almost immediately." App. 1001. In direct response to a written query from Appellants' counsel, the NJAG confirmed in writing 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. *See* CA3 No. 19-1729 (Letter to Clerk dated April 23, 2019, at Exhibit A).

But Defense Distributed and SAF chose instead to continue litigating against the NJAG in Texas. After the District Court in the Western District of Texas denied their motion for reconsideration on July 1, 2019 (Dkt. 109), Defense Distributed and SAF filed a notice of appeal to the Fifth Circuit on July 31, 2019, again keeping their Texas litigation against the NJAG alive (Dkt. 110).

On April 1, 2019, Appellants filed a notice of appeal from Judge Thompson's stay order in the New Jersey Action. App. 1-2 (Dkt. 28). Then, on August 28, 2019, Judge Thompson *sua sponte* entered what appears to be a docket-cleaning order, dismissing *without prejudice* Appellants' motion for a preliminary injunction and stating that "Plaintiffs may refile this Motion once the stay has been lifted in this action." App. 1018 (Dkt. 33). Appellants have appealed that order as well. App. 1019-21 (Dkt. 34). The stay remains in place, and the District Court remains ready to consider Appellants' new or renewed request for injunctive relief once Appellants voluntarily abandon their litigation in Texas or that case is otherwise resolved.[1]

[1] The Third Circuit Clerk has referred to the merits panel the question of whether appellate jurisdiction exists for these two appeals. The NJAG reserves its right to

Legal Argument

There Is No Colorable Argument That The District Court Abused Its Discretion In Granting A Stay Of The New Jersey Case While Defense Distributed And SAF Continue To Litigate Their Claims In The Texas Case.

Judge Thompson's decision to grant a stay in this case in the second-filed New Jersey Action—a stay that lasts only during the pendency of the earlier-filed Texas Action—follows from an established rule of judicial economy known as the first-filed rule. The first-filed rule, the Third Circuit has explained, "is a comity-based doctrine stating that, when duplicative lawsuits are filed successively in two different federal courts, the court where the action was filed first has priority." *Chavez v. Dole Food Co.*, 836 F.3d 205, 210 (3d Cir. 2016). The rule gives second-filed courts the authority to "stay, transfer, or dismiss the case before it." *Id.* Indeed, this Court held, "in the vast majority of cases, a court exercising its discretion under the first-filed rule *should* stay or transfer a second-filed suit." *Id.* at 220 (emphasis added). That makes sense: "Because a stay confines litigants to the first forum until proceedings there have concluded, a stay will generally avoid wasted judicial efforts, conflicting judgments, and unnecessary friction between courts." *Id.*; *see also, e.g., EEOC v. Univ. of Pa.*, 850 F2d 969, 971 (3d Cir. 1988) ("The first-filed rule encourages sound judicial administration and promotes comity among federal courts of equal rank."), *aff'd* 493 U.S. 182 (1990); *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941) (same). And even when an appellate judge may not have chosen to stay a case, it is beyond dispute that a district court has substantial discretion in determining whether to stay a case because of duplicative proceedings. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952) (Frankfurter, J.).

That is all that Judge Thompson did here. As Judge Thompson made clear in the record below, she is ready, willing, and able to address the merits of this case if and when the Appellants choose New Jersey as their federal forum of choice. But as long as they continue to insist on litigating against the NJAG in Texas, *which is their choice*, she will stay the New Jersey action. Otherwise, Judge Thompson would be forced to engage in the precise "wasted judicial efforts, conflicting judgments, and unnecessary friction between courts" that this court has warned against. The District Court thus did what *Chavez* urges courts to do—and at the very least, Judge Thompson in no way abused her substantial discretion in making this choice.

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address jurisdictional issues if merits briefing is required.

Appellants' primary response on appeal is to recast this case as one about federal abstention jurisprudence, Brief at 29-30, but their arguments miss the mark. Appellants idea is simple—that because a significant body of federal law that makes clear whether and when federal courts may abstain from deciding cases out of respect for *state courts*, the same doctrine must apply when a federal court has decided to *stay* its resolution of a case while another case remains pending in *federal court*. But nothing could be further from the truth.

The Wright & Miller treatise, on which Appellants rely, is instructive. *See* 17A Charles A. Wright & Arthur R. Miller et al., Federal Practice & Procedure § 4247 (3d ed. West 2019). Section 4247 of Wright & Miller, "Avoiding Duplicative Litigation," first discusses the three most common types of abstention—*Pullman* abstention, *Burford* abstention, and *Thibodaux* abstention—all of which involve a federal court's decision to stay its proceedings in light of federalism concerns. The treatise then describes when courts should consider staying or dismissing actions in light of other proceedings in state court as compared to other proceedings in federal court. While there are limits on the former—known as *Colorado River* abstention—Wright & Miller explain that "it is well settled that if the same issues are presented in an action pending *in another federal court*, one of these courts may stay the action before it or even in some circumstance enjoin going forward in the other federal court." 17A Fed. Prac. & Proc. Juris. § 4247 (3d ed.) (emphasis added). And that is precisely the rule that governs here. This is not an abstention case involving issues of state-federal comity, as for *Pullman*, *Burford*, *Thibodaux*, and *Colorado River* abstention. Rather, both cases here are proceeding in federal court, and so this is a straight-forward application of the well-established "first-filed" rule.

The Supreme Court has made precisely the same point that Wright & Miller did in their treatise. In *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976) (the case from which *Colorado River* abstention gets its name), the Court described this distinction as follows:

> Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. *As between federal district courts*, however, though no precise rule has evolved, *the general principle is to avoid duplicative litigation*. This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the

> virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.

Colorado River, 424 U.S. at 817-18 (emphasis added) (internal citations and quotation marks omitted). The test the Court laid out is thus simple: if a first-filed case is proceeding in state court it "is no bar to proceedings concerning the same matter in the Federal court having jurisdiction," but if a first-filed case is proceeding in federal court "the general principle is to avoid duplicative litigation." This case, as noted above, falls squarely in the latter camp.

Appellants cannot cite any case to the contrary. While Appellants cite *Doran v. Salem Inn, Inc*., 422 U.S. 922 (1975), in the mistaken belief that it is helpful to their case, *Doran* similarly distinguishes between applying abstention doctrine when federalism issues are implicated and applying a distinct set of rules if the question of avoiding duplicative litigation arises within the unitary federal system:

> We think that the interest of avoiding conflicting outcomes in the litigation of similar issues, *while entitled to substantial deference in a unitary system*, must of necessity be subordinated to the claims of federalism in this particular area of the law. . . . The same may be said of the interest in conservation of judicial manpower. *As worthy a value as this is in a unitary system*, the very existence of one system of federal courts and 50 systems of state courts, all charged with the responsibility for interpreting the United States Constitution, suggests that on occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time, and location to *justify being heard before a single judge had they arisen within a unitary system*.

Doran, 422 U.S. at 927–28 (emphasis added).

As a result, no complicated analysis under abstention doctrines need be conducted here. There simply are no federalism concerns in this case, which is what animates abstention jurisprudence. Rather, this is a simple question of whether a federal court may avoid duplicative and vexatious litigation when plaintiffs attempt to simultaneously litigate duplicative lawsuits against a defendant in multiple jurisdictions within the unitary federal judicial system. The only rule this Court thus needs to apply is the one already described above, *i.e.*, that "in the vast majority of

cases, a court exercising its discretion under the first-filed rule *should* stay or transfer a second-filed suit." *Chavez*, 836 F.3d at 220 (emphasis added).

Grasping at straws, Appellants make a number of other arguments. First, they attempt to make much of the fact that their lawsuit in New Jersey involves some additional plaintiffs who are not present in the Texas lawsuit. But Judge Thompson did not abuse her discretion in concluding that this fact did not require her to change her calculus. The additional plaintiffs voluntarily joined in the new lawsuit brought by the original Texas litigants. Under Appellants' theory, they are entitled to bring this lawsuit simultaneously in 94 different federal district courts, as long as they can find a new plaintiff to join with them in each federal judicial district. That cannot be the law. When a district court exercises its discretion to stay a case because it is duplicative, the court is permitted to take into account the fact that any additional plaintiffs voluntarily joined, and are acting in concert with, the original plaintiffs in the earlier-filed case.

Appellants also argue that Judge Thompson failed to accord them adequate notice and due process before issuing the stay. Not so. While resolution of the stay issue proceeded on an expedited timeframe, there was a perfectly good reason for that: the NJAG only learned that Appellants were continuing to litigate the Texas Action even when they sought relief in New Jersey only shortly before the scheduled preliminary injunction hearing in the New Jersey case. App. 990. The NJAG's letter to the District Court made it plain that it was seeking a stay of proceedings, A968-69 (Dkt. 20), and Appellants filed their response the next day, App. 970-73 (Dkt. 21). At the hearing, Appellants argued their procedural objections as well as their objections to the stay on the merits. App. 992-1003. In response, Judge Thompson noted that motion practice schedules were not necessary for stay requests, and she told Appellants that she was "confident that you could respond, and I'd really like you to do so, as to why a stay in this case would be unfair." App. 995. The relief the NJAG was seeking was to avoid having to litigate this case in two forums at once, and Appellants' desire to stick with a standard motions briefing schedule would have postponed a decision on the stay until *after* the preliminary injunction hearing in the New Jersey Action. A federal judge has the discretion to deal with a request for a stay on an expedited basis. Judge Thompson noted that she was "confident that you [Appellants] could respond" on the merits, and counsel responded, "I'd be happy to." App. 995. Appellants had ample opportunity to and did indeed present their arguments in opposition to the stay. App. 995-1003.

Finally, Appellants fare no better when they rely on the unremarkable fact that the opinion in the Western District of Texas stated that they "may pursue their claims in a court of proper jurisdiction." (Dkt. 100 at 15). Through this language, the order simply made plain that the Court was dismissing the case "without prejudice"; it did not purport to give Appellants license to pursue their claims in multiple federal judicial districts at the same time. *Id*.

At the end of the day, the most important fact is that the Appellants can get the stay in New Jersey lifted *any time they desire*. Judge Thompson has made plain that she is ready, willing, and able to address the merits of this case. But as long as Appellants continue to insist on litigating against the NJAG in two forums at once, the stay will continue. As a result, Appellants' claim of "massive irreparable harm," rings hollow. After initially suggesting they would likely drop the Texas litigation, App. 1001, Appellants declined to do so. Appellants are gaming the system, trying to get "two bites at the apple" and see which federal court may be more favorable. Judge Thompson was not required to indulge this behavior. There are no federalism concerns implicated here, and a federal judge can always exercise her discretion to avoid duplicative litigation within the federal court system.

As this Court has made clear, "Courts must be presented with exceptional circumstances before exercising their discretion to depart from the first-filed rule." *EEOC v. Univ. of Pa.*, 850 at 979. There is simply no colorable claim that the District Court here abused its discretion in following the first-filed rule.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s ***Glenn J. Moramarco***
Glenn J. Moramarco
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that this motion for summary action and stay of the briefing schedule was served on opposing counsel on October 16, 2019, through this Court's ECF notification system.

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