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October 30, 2019

Patricia S. Dodszuweit
Clerk of the Court
United States Court of Appeals
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
Reply In Support of Summary Action Motion

Dear Ms. Dodszuweit:

Appellants assert that the New Jersey Attorney General's (NJAG's) motion for summary affirmance is "an obvious delay tactic." Appellants' Response at 1. They are wrong. The NJAG can avoid litigating this case in two separate federal courts at the same time only by seeking some form of summary action—either summary affirmance of the district court's order or summary dismissal of the appeal. Appellants are frustrating the intent of the District Court's order with their continued insistence on litigating this case in both the Third Circuit and the Fifth Circuit simultaneously. Judge Thompson recognized this was wrong and unfair, and summary action is an appropriate remedy to vindicate her eminently sound discretionary judgment. We respond briefly to the principal arguments raised by Appellants in their Response.

First, contrary to Appellants' contention, the motion for summary action is not too late. Appellants' Response at 1. Local Rule 27.4(b) expresses a preference for filing a motion for summary action prior to the time when "appellant's brief is



October 30, 2019

Page 2

due.” But there was no briefing schedule issued in this case. Rather, the Clerk’s Office listed this case for possible dismissal due to a jurisdictional defect immediately after Appellants filed a notice of appeal. It was not until October 9, 2019, that the Clerk’s Office opted to submit the jurisdictional issues to a merits panel. The NJAG filed its motion for summary action on October 16, 2019, only seven days after the Clerk’s decision. Since there was no briefing schedule in place, Appellants’ brief was not yet “due” when the NJAG filed its motion for summary action. And contrary to Appellants’ assertion, Response at 1, the NJAG did not file a previous request for summary action. The NJAG merely responded to the Clerk’s jurisdictional defect inquiry and argued that appellate jurisdiction was lacking.

Second, Appellants’ argument that the District Court’s orders cannot be affirmed or this appeal dismissed without first deciding the jurisdictional issues presented is without merit. In similar circumstances, the Supreme Court in *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422 (2007), held that a district court was not required to establish jurisdiction before dismissing a suit on grounds of *forum non conveniens*. The Court noted that a federal court “has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff’s convenience, or the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal problems.” *Id.* at 429 (internal quotation marks and ellipses omitted). Just as a district court “may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant,” *id.* at 432, so too this Court can dismiss this appeal where there is an alternative forum with jurisdiction to hear the case, and rely on the same considerations of convenience, fairness, and judicial economy.

Third, Appellants are incorrect in asserting that *Rolo v. General Development Corp.*, 949 F.2d 695 (3d Cir. 1991), is helpful to their case. In *Rolo*, this Court examined two orders entered by the District Court. First, as here, the District Court issued a stay order pending the disposition of other proceedings, which in *Rolo* involved bankruptcy court proceedings. The District Court issued the stay, as here, to conserve judicial resources and to avoid the possibility of inconsistent judgments. *Id.* at 699. This Court held there was no appellate jurisdiction to review that stay order. *Id.* at 700-02.

October 30, 2019

Page 3

In *Rolo*, this Court did hold that it had jurisdiction to review the District Court's separate order staying the Rolos' application for a preliminary injunction. This Court treated that order as an appealable "refusal" to grant a preliminary injunction. But the Court made it plain that "the Rolos must show more than that the order has the practical effect of refusing an injunction. Unless they can demonstrate that the district court order might have a serious, perhaps irreparable consequence, and that the order can be effectively challenged only by an immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." 949 F.2d at 703 (internal citations and quotation marks omitted). This Court stressed that the district court "deferred consideration of the preliminary injunction application for an indeterminate period in the face of affidavits tending to show that irreparable injury will in fact occur." *Id.* Here, Appellants cannot show that the relief they seek can only be obtained through an immediate appeal in the Third Circuit, as they are seeking relief simultaneously in the Fifth Circuit. And the stay is not for "an indeterminate period," since they can end it at any time of their choosing. Moreover, they have not shown irreparable injury, but instead can show only a delay in the exercise of their claimed right to distribute dangerous 3D printable firearms files.

Finally, contrary to the argument Appellants presented in their motion for a preliminary injunction, *Rolo* conclusively demonstrates that Appellants are wrong in asserting that they need not show a likelihood of success on the merits of their underlying claim to be entitled to an injunction pending appeal. *See* 949 F.2d at 704 ("The Rolos, of course, are not entitled to a preliminary injunction unless they make the requisite showing of a likelihood of success on the merits, irreparable injury, a favorable balance of hardships, and consistency with the public interest. Because the district court did not address the merits of the Rolos's application and the defendants have not formally responded to it, we will vacate the May Order and remand with instructions that the district court address the Rolos's motion for a preliminary injunction without delay.").

Summary affirmance, or summary dismissal of this appeal, is the only way to vindicate the NJAG's right to not have to litigate this case challenging the validity of an important State law in two separate federal judicial forums at the same time.

October 30, 2019

Page 4

Respectfully submitted,

GURBIR S. GREWAL
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By: /s/ Glenn J. Moramarco
Glenn J. Moramarco
Assistant Attorney General

cc: Counsel of Record (via ECF)