IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

COMMON CAUSE et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No: 5:18-cv-589
REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING et al.,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER CONFIRMING APPLICABILITY OF STAY OF JUDGMENT UNDER RULE 62(a)

Plaintiffs' opposition to the Legislative Defendants and State of North Carolina's ("Defendants") Motion for Order Confirming Applicability of Stay of Judgment under Rule 62(a) is legally and factually unfounded. The motion should be granted because (A) jurisdiction has not yet transferred, (B) the State Defendants' right to appeal is not "from" the grant or denial of injunction, (C) Rule 62(a) is in no way limited to money judgments, and (D) the automatic stay window should not be shortened.

A. Jurisdiction Has Not Yet Transferred

Plaintiffs' representation that the Clerk of Court has mailed the removal order to the North Carolina state court is entirely unsubstantiated. Plaintiffs cite only a phone call with the Clerk of Court in support of this factual assertion, but they do not state who in the Clerk's office made the representation, who in their three separate law offices spoke with that representative, or

what was said in the discussion—e.g., to demonstrate that both sides understood clearly the subject of discussion. No mailing was served on counsel or filed on the Court's docket.[1] Nor is it clear that the requirements of the statute, such as that the mailing contained a "certified copy" of the order, were satisfied. 28 U.S.C. § 1447(d).

Even if the mailing occurred, this was plainly an inadvertent act with no legal significance. The erroneous mailing does not transfer jurisdiction because the remand order was (as discussed below) automatically stayed under Rule 62(a). Plaintiffs are wrong that a transmission of the remand order in violation of a stay is effective.[2] *See Eisenman v. Cont'l Airlines, Inc.*, 974 F. Supp. 425, 428 (D.N.J. 1997). *Eisenman*—unlike Plaintiffs' cases—directly addressed a clerk's mailing of a remand order in violation of a stay and concluded that it had no legal effect. *Id.* at 429. Even though a *lawful* mailing is treated as a "key jurisdictional event," that is only true, the court explained, where the underlying remand order is itself an "effective remand order," which is not yet true where the underlying order is stayed. *Id.* at 428-29 (quotations omitted). Just as "a cook uses a meat thermometer to determine if [a roasting] turkey is done," the mailing normally "tells the court when the remand is 'complete.'" *Id.* at 429. But if "there was no turkey in the oven," it is of no independent significance that the thermometer

[1] Ordinarily, when jurisdiction passes, e.g., from a district court to a court of appeals, there are a series of filings providing notice to all counsel of record that jurisdiction passed successfully. Nothing like that is present here.

[2] Plaintiffs are wrong [D.E. 47 p. 3] that the State Defendants waived any argument that an *unauthorized* and *unlawful* mailing of the certified notice is ineffective. The State Defendants acted "out of an abundance of caution" and moved the Court to act to avoid "the possibility of inadvertent transmission" and "potential confusion" such an act would entail. [D.E. 46, p. 3.] That is the very opposite of suggesting approval or a concession of legal significance of an inadvertent or unauthorized transmission. By acting promptly to avoid even "potential confusion," the State Defendants staked out a position that unlawfully mailing the certified notice would be just that—unlawful—and the State Defendants' concession that a *valid* mailing would transfer jurisdiction does nothing to change that.

"rang"; in that instance, the mailing is meaningless. *Id.* That is the situation where, as here, the underlying order is subject to a stay. *Id.* Because the Clerk in this case did not transmit an effective order, it did not transfer jurisdiction, and the Court retains jurisdiction to confirm that this is so.

Plaintiffs' cases do not involve orders subject to stays, but rather the transmission of valid orders. *Eisenmann* distinguished Plaintiffs' authorities, *Campbell v. International Business Machines*, 912 F. Supp. 116 (D.N.J. 1996) and *City of Jackson v. Lakeland Lounge*, 147 F.R.D. 122 (S.D. Miss. 1993), because they involved valid remand orders. As *Eisenmann* explained, even though, in both cases, the clerk wrongly mailed the notice, there "existed . . . an effective remand order" in conjunction with the "'physical' mailing," thus the orders themselves had taken full legal force and effect.[3] 974 F. Supp. at 429. That is materially different from a scenario where a remand order has no effect at the time of mailing because it is stayed.[4]

B. Defendants' Right To Appeal Is Not a Right To Appeal "From" the Grant or Denial of an Injunction

Plaintiffs are wrong that Rule 62(a) is inapplicable to stay the Court's remand order—which they concede can form the basis of a federal-court appeal—simply because they seek an injunction in the underlying case. This misreads Rule 62. Plaintiffs are correct that no automatic

[3] It is telling that the courts in both *Campbell* and *City of Jackson* first analyzed whether a magistrate has authority to issue a remand order. *See Campbell*, 912 F. Supp. at 118–19; *City of Jackson*, 147 F.R.D. at 124–25. The necessity of that initial step confirms that an order lacking independent validity cannot transfer jurisdiction, even if mailed by the clerk. An automatically stayed order, during the stay, lacks independent validity.

[4] Moreover, the Fourth Circuit has expressly declined to determine the efficacy of a remand order issued incorrectly or inadvertently. *Three J. Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112, 115 (4th Cir.1979). One of Plaintiffs' authorities oddly cites to *Three J. Farms* for the proposition that it is "settled" that mistakenly issued remand mailings are legally effective, *Wyatt v. Walt Disney World, Co.*, 1999 WL 33117255, at 6 (W.D.N.C. July 26, 1999), when *Three J. Farms* indicates that the issue is the opposite of "settled."

stay applies "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction." Fed. R. Civ. P. 62(d). But an appeal under 28 U.S.C. § 1447(d) is not "*from*" such an order. It is from a remand order that neither grants nor denies an injunction. In other words, it is the nature of the order forming the basis of the right to appeal, not an abstract characterization of the case, that determines the scope of the automatic stay.

Plaintiffs invoke Rule 62(c)(1) for their contrary view, claiming its reference to "an action for an injunction" concerns the relief it seeks in the underlying case, not the order from which an appeal can be taken. But Rules 62(d) and 62(c)(1) are simply two sides of the same coin: Rule 62(c)(1) provides for no automatic stay in appeals from injunctions "unless the court orders otherwise," and Rule 62(d) provides the mechanism for courts to order otherwise, via a stay or injunction. *See* Committee Notes on Rules—2018 Amendment ("The provisions *for staying an injunction, receivership, or order* for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d).") (emphasis added); *see also* Fed. R. Civ. P. 62(a) (automatic stay applies "[e]xcept as provided in Rule 62(c) and (d)"). And, as the 2008 advisory comment observes, the language of both Rule 62(c) and (d) was carefully crafted to match the language in 28 U.S.C. § 1292(a)(1), which provides for appeals *from* injunctions—not generically in cases involving injunctions. Thus, Rule 62(c)(1)'s reference to "an action for an injunction" necessarily entails a requirement that the right of appeal be tied to that injunction as contemplated under Section 1292(a)(1).

Indeed, Plaintiffs' contrary reading of Rule 62(c)(1) as exempting any appeal in a case *involving* in some way an injunction would mean that the automatic stay would *not* apply in cases seeking both injunctive and monetary relief, even to the injunctive portion of the relief. But

courts have differentiated between those aspects of a judgment *within* a given case—looking to the nature of the relief forming the basis of the appeal, not the overall characterization of the case. Courts therefore apply the automatic stay to the monetary portion and not to the injunctive portion of the order forming the basis of appeal. *See, e.g.*, *Ruff v. Cty. of Kings*, 2009 WL 5195966, at *2 (E.D. Cal. Dec. 21, 2009). The proper focus, then, is the nature of relief from which the appellant has a right to appeal—here, it is *not* an injunction. Plaintiffs' contrary argument is at odds with the entire body of law interpreting these provisions.

C. Rule 62(a) Is Not Limited to Money Judgments

Plaintiffs' argument that Rule 62(a) is limited to appeals from money judgements reads new language into the text: Rule 62(a) says "judgment," not "money judgment." A "judgment" is "any order from which an appeal lies." Fed. R. Civ. P. 54(a). Plaintiffs seize on the word "execution" in trying to limit an *expressly defined* term, but to no avail. To "execute" is simply "[t]o perform or complete" or to "make…valid." Black's Law Dictionary 649 (7th Ed.) Their reliance on the word "enforcement" fares no better, as to "enforce" is simply "[t]o give force or effect to" or "to compel obedience." *Id.* at 608. Neither word hints in the least that money judgments alone are referenced. Because the express definition of the Rule covers *"any* order from which an appeal lies," Plaintiffs' attempt to re-write the Rule must fail. *See, e.g.*, *INS v. Hector*, 479 U.S. 85, 90 (1986) (forbidding courts from adopting a "functional approach to defining" terms when the meaning is defined expressly).

Further, Plaintiffs' reliance on the advisory comments supports the State Defendants' position, not theirs, because those comments expressly state that Rule 62(a) reaches beyond money judgment, observing that a stay may, in a court's discretion, be dissolved "to allow immediate enforcement of a judgment that *does not involve a payment of money*." Committee

Notes on Rules—2018 Amendment (emphasis added). The drafters of the Rules unsurprisingly adhered to the plain language against Plaintiffs' money-only view.

Plaintiffs' extensive reliance on *Arnold v. Garlock, Inc.*, 278 F.3d 426, 436-37 (5th Cir. 2001), is misplaced because that case was resolved before Congress made remand orders under Section 1443 appealable—i.e., rendered them "judgments" under the definition of Rule 54(a). *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3180775, at *2 (E.D. Va. June 7, 2016). Plaintiffs' argument (at 6) that the non-appealability of the remand order in *Arnold* was not the "basis for its holding," misreads the case, which held: "A remand of an ongoing case is not a final judgment following a full adjudication of a claim, the result of which may be appealed." *Arnold*, 278 F.3d at 437. The decision's discussion of money judgments is the portion that is dictum, and, in all events, it does not excuse this Court from applying the word "judgment" according to its express definition in the Rules—as any order from which an appeal lies. Fed. R. Civ. P. 54(a).

D. The Automatic Stay Window Should Not Be Shortened

Finally, Plaintiffs have no good argument for shortening the 30-day automatic stay window. They attempt to argue a stay opposition in their briefing on this motion, but the point of the post-judgment window is to allow the losing party an opportunity to assess the merits of such post-judgment motions. And Plaintiffs direct the Court to *their* briefing for its assessment of the State Defendants' prospects for success rather than to the Court's *own memorandum opinion*, which rejects Plaintiffs' view that the State Defendants' remand effort was "baseless." The Court did not cite Plaintiffs' briefing; instead, it recognized that the State Defendants provided an "objectively reasonable basis" for removal and "exercised their rights under that law to assert grounds for removal to this court." [D.E. 48 p. 17.] Plaintiffs now want to deprive the State Defendants of any opportunity even to *consider* a post-judgment motion. That is simply unfair.

Meanwhile, their asserted need for speed is undermined both by their more-than-one-year delay in filing this case and the fact that no elections will occur in North Carolina in 2019. Allowing, as Rule 62(a) provides, an additional few days for the State Defendants to evaluate their rights is highly unlikely to have any impact on Plaintiffs' ability to obtain relief—should their highly speculative state-law theories ever be vindicated.

CONCLUSION

The State Defendants' motion should be granted, and the full 30-day window before transmission of the case should be honored.

Respectfully submitted this 14th day of January, 2019.

OGLETREE, DEAKINS, NASH,
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Attorneys for Legislative Defendants and the State of North Carolina
**Notice of Appearance under Local Rule 83.1 forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the forgoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record for all parties in this matter.

This the 14th day of January, 2019.

By: /s/ Phillip J. Strach
Phillip J. Strach