

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**JOSEPH THOMAS; VERNON AYERS;
and MELVIN LAWSON**

PLAINTIFFS

v.

NO. 3:18-cv-00441-CWR-FKB

**PHIL BRYANT, Governor of the State of
Mississippi; DELBERT HOSEMANN,
Secretary of State of the State of Mississippi;
and JIM HOOD, Attorney General of the
State of Mississippi, all in the official capacities
of their own offices and in their official
capacities as members of the State Board
of Election Commissioners**

DEFENDANTS

**SUPPLEMENTAL MEMORANDUM OF DEFENDANTS PHIL BRYANT
AND DELBERT HOSEMANN IN SUPPORT OF
MOTION FOR STAY OF FINAL JUDGMENT PENDING APPEAL**

Governor Phil Bryant and Secretary of State Delbert Hosemann, two of the defendants herein (“Defendants”), respectfully submit this supplemental memorandum in support of their Motion to Stay Final Judgment Pending Appeal [Dkt. #80] to address jurisdictional and evidentiary issues raised by the Court in its Order issued on February 28, 2019 [Dkt. # 85]. In that Order, the Court cited two issues “that warrant discussion at a hearing.”¹ [Dkt. #85 at 2]. The first issue is whether the Court “has jurisdiction given the two Notices of Appeal that have already been filed.” [*Id.*]. Second, “[i]f jurisdiction is proper, the parties should address whether additional evidence can be considered, since it is not “newly discovered” and, for that matter, comes from a non-party that has not intervened in this litigation.” [*Id.*].

¹ On February 28, 2019, the Court issued a text order scheduling a hearing to address Defendants’ Motion for Stay on Monday, March 4, 2019 at 9:00 am.

JURISDICTION

Defendants have now filed two Motions for Stay and Notices of Appeal in the Court's docket.² The first notice of appeal [Dkt. #62] and motion for stay [Dkt. #63] resulted from the Court's February 16, 2019 Memorandum Opinion and Order [Dkt. #61]. The Court denied [Dkt. #75] the first motion to stay and the Fifth Circuit held that it lacked jurisdiction to consider the first appeal as the issues were rendered moot by virtue of this Court's subsequently-entered Final Judgment on February 26, 2019 [Dkt. #76]. In response, Defendants filed their second notice of appeal [Dkt. #78] and motion to stay [Dkt. #80]. The second stay motion is the one currently pending before the Court. Accordingly, the first issue to consider is what effect the filing of the second notice of appeal has on the jurisdiction of the District Court to consider the pending motion to stay.

As a general rule, the filing of a notice of appeal divests a district court of jurisdiction over aspects of the case involved in the appeal. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982). "The filing of a valid notice of appeal from a final order of the district court divests that court of jurisdiction to act on the matters involved in the appeal, except to aid the appeal, correct clerical errors, or enforce its judgment so long as the judgment has not been stayed or superseded." *Fed. Ins. Co. v. Singing River Health Sys.*, 2015 WL 6674868, at *4 (S.D. Miss. Nov. 2, 2015) (quoting *Ross v. Marshall*, 426 F.3d 745, 752 (5th Cir. 2005)); *see also Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989) (citing the "general rule[] [that] a notice of appeal ousts the district court of jurisdiction over the judgment or order appealed[]").

Defendants are seeking a stay pursuant to Rule 62(c) of the Federal Rules of Civil

² The record is replete with correspondence, orders and other pleadings evidencing the sequence of events occurring since the conclusion of the trial on the merits. Thus, Defendants will forego a lengthy reiteration and narrow the focus to the salient facts.

Procedure, which provides an exception to the general rule. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 578–79 (5th Cir. 1996). Rule 62(c) provides, in part: “[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” In discussing application of Rule 62(c) in the midst of a pending appeal, the Fifth Circuit has held that the district court’s authority does not extend to the dissolving the injunction and any modification or alteration of the same is strictly limited to “maintaining the status quo.” *Id.* at 578 (citing *Coastal Corp.*, 869 F.2d at 819-20). The rationale behind such limitation is clear: dissolving the injunction or modifying it beyond the status quo would divest the court of appeals from jurisdiction while the matter remained pending before it. *Id.* at 820.

Here, since an injunction has issued ordering a remedy via final judgment and that judgment is now on appeal, the Court’s purview under Rule 62(c) is limited to suspending or modifying such injunction. And, any modification to the court-ordered remedial plan beyond maintaining the status quo is prohibited. In fact, Plaintiffs are in agreement that this Court has jurisdiction to issue a stay pending appeal even after the filing of a notice of appeal as they have set forth in their Response in Opposition to Defendants’ Motion for Stay. *See* [Dkt. #87]. Accordingly, Defendants move the Court to suspend the remedial injunctive relief via a stay pending the appeal.

EVIDENCE

In analyzing whether to suspend the injunctive relief via granting Defendants’ Motion for Stay, evidence which is relevant to the factors the Court must consider is admissible. Irreparable

harm and interest of the public are certainly factors in the stay analysis.³ The evidence submitted by Defendants as part of their Motion for Stay is straightforward factual evidence of candidates who have qualified to run for the current District 22 and 23 senate seats. The effect of the remedy issued by the Court is to move two of the candidates who have qualified for the District 22 seat into District 23. Defendants had no way of anticipating what specific relief the Court would ultimately grant given the variations of districts that could be adopted. And, having informed the Court that the Senate desired to enact a plan redrawing District 22 in the event a stay was denied cast further uncertainty on any ultimate remedy. This evidence could not have been presented before the final judgment nor should it have been presented given the Defendants' lack of ability to predict what would be the ultimate remedy. This evidence is relevant to support Defendants' harm and injury resulting from the imposition of the Court's remedy and should therefore be considered by the Court in determining whether to grant their Motion for Stay.

CONCLUSION

Pursuant to Rule 62(c), this Court has limited jurisdiction to consider whether to suspend the injunctive relief sought in Defendants' Motion for Stay. The Court may consider any evidence relevant to the factors for determining the propriety of granting the Motion for Stay. For the reasons set forth herein, Defendants respectfully request that the Court grant their Motion for Stay of Judgment Pending Appeal.

³ The Court's Order [Dkt. 85] questions whether the affidavit attached to Defendants' Motion to Stay can be considered, since it is not "newly discovered[.]" However, the "newly discovered" requirement comes from Rule 60(b) concerning relief from a final judgment, which is not the requisite rule at issue herein. Instead, Defendants are utilizing Rule 62(c) to seek injunctive relief pending appeal. As stated, part of the analysis for determining whether a stay is appropriate is to consider the harm to Defendants and the interest of the public. The affidavit attached to Defendants' stay motion sets forth those very requirements for the Court's needed consideration. *See* Fed. R. App. Pro. 8(a); *Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. 1981) (finding that under Rule 8(a) the district court should have the opportunity to rule on evidence presented with the motion to stay).

This the 1st day of March, 2019.

Respectfully submitted,

s/ Tommie S. Cardin

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CERTIFICATE OF SERVICE

I, Tommie S. Cardin, hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification to all counsel of record.

This the 1st day of March, 2019.

s/ Tommie S. Cardin

Tommie S. Cardin

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