

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
Civil Action No. 5:18-CV-589

COMMON CAUSE et. al.	)
	)
	)
Plaintiffs,	)
	)
v.	)
	)
REPRESENTATIVE DAVID R. LEWIS, IN HIS	)
OFFICIAL CAPACITY AS SENIOR CHAIRMAN	)
OF THE HOUSE SELECT COMMITTEE ON	)
REDISTRICTING; et al.	)
	)
Defendants.	)

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

Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the North Carolina House Timothy K. Moore, and President Pro Tem of the North Carolina Senate, Philp E. Berger (“Legislative Defendants”) and the State of North Carolina<sup>1</sup> (collectively “Defendants”) respectfully move the Court for an order affirming that the 30-day post-judgment stay period of Rule 62(a) applies to the Court’s remand order and ensuring that the Clerk of Court does not mail the remand order to the clerk of the North Carolina Superior Court during that 30-day window. Although 30-day stay period of Rule 62(a) applies of its own force, the Defendants tender this motion out of an abundance of caution to confirm that Rule’s applicability to this case and to deter any inadvertent transmission of the remand order. As shown below,

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<sup>1</sup> As stated in the Notice of Removal filed on December 14, 2018 (D.E. 1), pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the “State of North Carolina” in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government.

because a remand order denying removal under 28 U.S.C. § 1443 is an appealable order, the Court's order remanding this case is a "judgment" within the meaning of Rule 54(a) and is subject to its limited automatic-stay provision. That short stay period allows Defendants an opportunity to evaluate appeal and post-judgment options. The motion therefore should be granted.

### **BACKGROUND**

On November 19, 2018, Plaintiffs filed this redistricting case in North Carolina state court, challenging redistricting plans enacted over a year earlier. They filed an amended complaint nearly three weeks later on December 7. One week later, on December 14, the Legislative Defendants and the State of North Carolina removed the case to this Court, stating bases of removal under 28 U.S.C. §§ 1443(2) and 1441(a).

On January 2, 2019, this Court issued a short order remanding the case to North Carolina state court. ECF No. 44. The order stated that a memorandum opinion is forthcoming. The order directed the Clerk of Court to close the case but did not make any statement either requiring or forbidding the Clerk of Court to mail the remand order to the state court.<sup>2</sup> As of this time, the parties do not know the Court's reasons for remanding.

### **ARGUMENT**

"Pursuant to 28 U.S.C. § 1447(c), an order remanding to State court "is not self-executing." *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3180775, at \*1 (E.D. Va. June 7, 2016) (quotations omitted). Instead, jurisdiction over the case is transmitted when "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court." 28 U.S.C. § 1447(c). Only then may the "State court...proceed with such a case."

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<sup>2</sup> Plaintiffs' motion to remand sought attorneys' fees and costs, and the Court's January 2nd order denied that request.

*Id.* “This provision creates legal significance in the mailing of a certified copy of the remand order in terms of determining the time at which the district court is divested of jurisdiction.” *Northrop Grumman*, 2016 WL 3180775, at \*1 (quotations omitted).

In this case, that transmission must not occur for 30 days because, under Rule 62(a), “execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.” Fed. R. Civ. P. 62(a). The Court’s order to remand is a “judgment” because a “judgment” is “any order from which an appeal lies.” Fed. R. Civ. P. 62(a). Although an appeal does not usually lie from an order remanding a case to state court, the federal removal statute provides that “an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.” 28 U.S.C.A. § 1447(d); *see also Wood v. Crane Co.*, 764 F.3d 316, 320 (4th Cir. 2014); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997).

Thus, because Defendants removed under 28 U.S.C. § 1443(2), the Court’s remand order is appealable, and it qualifies as a “judgment” under Rules 62(a) and 54 of the Federal Rules of Civil Procedure. Multiple courts have therefore concluded that the stay period of Rule 62(a) prevents transmission of the remand order during the stay window under these circumstances. *Northrop*, 2016 WL 3180775, at \*2; *Tennessee ex rel. Slatery v. Tennessee Valley Auth.*, 2018 WL 3092942, at \*1 & n.3 (M.D. Tenn. June 22, 2018); *cf. Humphries v. OneBeacon Am. Ins. Co.*, 2014 WL 1330034, at \*1 (E.D. La. Apr. 2, 2014) (applying stay principles of Rule 62 to appealable remand order because, due to its appealability, it “is treated like any other final judgment”) (quotations omitted).

To be sure, this motion is arguably superfluous because the 30-day stay period operates automatically. However, due to the possibility of inadvertent transmission of the stay order and

potential confusion as to the governing principles, Defendants have filed this motion out of an abundance of caution. *See Tennessee Valley Auth.*, 2018 WL 3092942, at \*1 (noting that motion sought an order “confirming that execution of the remand Order is automatically stayed”).<sup>3</sup>

Finally, although Rule 62(a) references the Court’s power to “order[] otherwise” and alter the stay period, there is no basis for that here. As the Advisory Comment suggests, courts are afforded authority to shorten the automatic stay to prevent irreparable harm, such as where there “may be a risk that the judgment debtor’s assets will be dissipated.” Fed. R. Civ. P. 62 advisory committee’s note to 2018 amendment. Here, the possibility of irreparable harm weighs in favor of the 30-day default rule and against shortening it in any way. Defendants have not yet received the Court’s memorandum opinion and therefore have been unable to evaluate possible post-judgment-motion or appeal options. Transferring the case on an expedited basis would prejudice Defendants’ ability to do that while this Court retains jurisdiction—and therefore capacity to act. For example, in the *Northrop* case, the court ultimately issued a stay pending appeal, *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int’l LLC*, 2016 WL 3346349, at \*7 (E.D. Va. June 16, 2016), which would not have been possible had the remand been consummated, *see SFA Grp., LLC v. Certain Underwriters at Lloyd’s, London*, 2017 WL 7661481, at \*2 (C.D. Cal. Jan. 6, 2017).

Against that prejudice, Plaintiffs can claim only paltry interests. A 30-day stay is a small fraction of the time they spent delaying before bringing this case, and, if the Court’s remand order stands, they will ultimately be able to proceed in state court with their claims. A short delay to allow Defendants the opportunity to receive and evaluate this Court’s ruling on the

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<sup>3</sup> The former Rule 62 stay period of 14 days was extended to 30 days under recent amendments to the Federal Rules.

remand motion and pursue post-judgment options as the Rules contemplate will avert serious, irreparable harm to the Defendants and afford at most a small delay to Plaintiffs' belated claims.

### **CONCLUSION**

The Court should confirm that Rule 62(a)'s 30-day stay period applies to this case and instruct the Clerk of Court not to transmit the remand order to the North Carolina state court under 28 U.S.C. § 1447(d) until, at earliest, February 4, 2019.

Respectfully submitted this 3rd day of January, 2019

OGLETREE, DEAKINS, NASH,  
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By: /s/ Phillip J. Strach

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\*Notice of Appearance under Local Rule 83.1  
forthcoming

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I electronically filed the foregoing 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 3rd day of January, 2019.

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