


# Arnold & Porter

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WAKE CO., C.S.C.

BY \_\_\_\_\_ 

January 18, 2019

**VIA EMAIL AND U.S. MAIL**

*kellie.z.myers@nccourts.org*

The Honorable Paul C. Ridgeway  
Senior Resident Judge  
Wake County Justice Center  
300 S. Salisbury Street  
Raleigh, NC 27602

The Honorable Alma L. Hinton  
Senior Resident Judge  
Halifax County Courthouse  
357 Ferrell Lane  
Halifax, NC 27839

The Honorable Joseph N. Crosswhite  
Senior Resident Judge  
Hall of Justice  
226 Stockton Street  
Statesville, NC 28677

Re: *Common Cause v. Lewis*, 18CV14001 (N.C. Super.)

Dear Judges Ridgeway, Hinton, and Crosswhite:

I write on behalf of Plaintiffs to advise that the federal district court yesterday denied Legislative Defendants' motion seeking a stay of the January 2, 2019 order remanding this case to this Court. In its decision, which is attached, the federal court confirmed that jurisdiction has transferred from the federal court back to this Court. Plaintiffs respectfully request that this Court, at its earliest convenience, set a schedule for expedited discovery and trial and enter a Case Management Order. Plaintiffs appreciate that there are many pressing matters before the Court, but Plaintiffs respectfully submit that this case is a matter of immense public importance and requires prompt resolution. Delay threatens the ability to provide effective relief to Plaintiffs and millions of North Carolina voters.

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To provide effective relief in this case, there must be sufficient time before the candidate filing period begins to resolve the merits of Plaintiffs' claims in this Court, to allow for any appeals, and, if the current districting plans are found unconstitutional, to develop and implement remedial plans. Time is of the essence, especially since Legislative Defendants have moved up the candidate filing period for the 2020 primaries to December 2019. The worst possible outcome would be for the state's courts to determine that the current plans violate the constitutional rights of millions of citizens, but for those citizens nonetheless to be forced to vote in unconstitutional districts because there was insufficient time to develop and implement a remedy. That has already happened multiple times this decade in North Carolina, and all measures should be taken to ensure it does not happen again.

Plaintiffs filed this action challenging the districting plans for the North Carolina state House and state Senate on November 13, 2018. Plaintiffs filed their Motion to Expedite a week later, on November 20, 2018. It is now two months later and Legislative Defendants still have not responded to the motion. On December 12, 2018, the trial administrator of this Court emailed counsel for Legislative Defendants noting they had not responded and inquiring whether they consented to the motion or, if not, to a telephonic hearing. Rather than respond substantively to the motion or the trial administrator's inquiry, Legislative Defendants removed the case to federal court two days later, on December 14, 2018. The removal was baseless and a transparent attempt to delay the progress of this case.

On January 2, 2019, after expedited briefing, the federal district court concluded that it lacked subject matter jurisdiction and remanded the case to this Court. This Court received the federal court's certified remand order on January 7, 2019. It is hornbook law that, having received the certified remanded order, this Court has regained jurisdiction over this action and "may . . . proceed with [the] case." 28 U.S.C. § 1447(c).

In the meantime, on January 3, 2019, Legislative Defendants filed a motion with the federal court seeking a stay to block transmittal of the certified remand order to this Court. This motion too was meritless and a transparent effort to pile delay on delay. The certified remand order had already been transmitted and no stay applied in any event. After more expedited briefing, the federal court denied the motion yesterday, eliminating any conceivable doubt that this Court has jurisdiction and may proceed with the case.

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Legislative Defendants have not responded to the Motion to Expedite in the two months since it was filed. Accordingly, Plaintiffs respectfully request that the motion be deemed submitted and the Court promptly resolve it. Alternatively, Plaintiffs request that the Court schedule a hearing on the motion at the Court's earliest convenience. Plaintiffs thank the Court for its consideration of and prompt attention to this matter.

Sincerely,

*R. Stanton Jones / CPM with permission*

R. Stanton Jones

*Edwin M. Speas, Jr. / CPM with permission*

Edwin M. Speas, Jr.

Cc: All Counsel of Record

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

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH )  
CAROLINA DEMOCRATIC; PAULA )  
ANN CHAPMAN; HOWARD DUBOSE; )  
GEORGE DAVID GAUCK; JAMES )  
MACKIN NESBIT; DWIGHT JORDAN; )  
JOSEPH THOMAS GATES; MARK S. )  
PETERS; PAMELA MORTON; )  
VIRGINIA WALTERS BRIEN; JOHN )  
MARK TURNER; LEON CHARLES )  
SCHALLER; EDWIN M. SPEAS, JR.; )  
REBECCA HARPER; LESLEY BROOK )  
WISCHMANN; DAVID DWIGHT )  
BROWN; AMY CLARE OSEROFF; )  
KRISTIN PARKER JACKSON; JOHN )  
BALLA; REBECCA JOHNSON; AARON )  
WOLFF; MARY ANN )  
PEDEN-COVIELLO; KAREN SUE )  
HOLBROOK; KATHLEEN BARNES; )  
ANN MCCRACKEN; JACKSON )  
THOMAS DUNN, JR.; ALYCE )  
MACHAK; WILLIAM SERVICE; )  
DONALD RUMPH; STEPHEN )  
DOUGLAS MCGRIGOR; NANCY )  
BRADLEY; VINOD THOMAS; )  
DERRICK MILLER; ELECTA E. )  
PERSON; DEBORAH ANDERSON )  
SMITH; ROSALYN SLOAN; JULIE )  
ANN FREY; LILY NICOLE QUICK; )  
JOSHUA BROWN; and CARLTON E. )  
CAMPBELL, SR., )

Plaintiffs, )

v. )

REPRESENTATIVE DAVID R. LEWIS )  
In his official capacity as Senior Chairman )  
of the House Select Committee on )

ORDER



This matter is before the court on motion (DE 45) by the Legislative Defendants<sup>1</sup> for an order confirming applicability of stay of judgment under Rule 62(a). Plaintiffs responded in opposition, and the Legislative Defendants replied. In this posture, the issues raised are ripe for ruling. For the following reasons, the motion is denied in part and dismissed in part for lack of jurisdiction.

### **BACKGROUND**

Plaintiffs commenced this action in Superior Court of Wake County on November 13, 2018. The Legislative Defendants filed a notice of removal in this court, on December 14, 2018, on the basis of 28 U.S.C. §§ 1441(a) and 1443(2). Plaintiffs filed an emergency motion to remand on December 17, 2018; the Legislative Defendants responded in opposition on December 28, 2018; and plaintiffs replied in support of remand on December 30, 2018. On January 2, 2019, the court granted plaintiffs' motion to remand, stating:

This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

(Order (DE 44) at 3). The court entered a memorandum opinion memorializing the court's reasoning for its decision on January 7, 2019.

In the meantime, on January 3, 2019, the Legislative Defendants filed the instant motion, in which they seek "an order affirming that the 30-day post-judgment stay period of Rule 62(a) applies

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<sup>1</sup> The court adopts and incorporates herein by reference the definition of the term "Legislative Defendants" as explained at page four of the court's January 7, 2019, Memorandum Opinion, and the court maintains the caption also as explained at footnote three therein.

to the Court’s remand order and ensuring that the Clerk of Court does not mail the remand order pursuant to 28 U.S.C. § 1447(d) to the clerk of the North Carolina Superior Court during that 30-day window, i.e., at the earliest, February 4, 2019.” (Mot. (DE 45) at 1). The Legislative Defendants filed a proposed order and a memorandum in support thereof.

The court ordered response to the instant motion on or before January 10, 2019. Plaintiffs responded in opposition on January 4, 2019. The Legislative Defendants replied on January 14, 2019. Plaintiffs filed a notice regarding status of state court proceedings on January 15, 2019, including a copy of the court’s certified copy of remand order transmitted to the state court.

### **COURT’S DISCUSSION**

The Legislative Defendants seek two forms of relief in their motion, which the court addresses in turn below.

#### **A. Mailing of Remand Order**

One form of relief sought in the motion is an order “ensuring that the Clerk of Court does not mail the remand order pursuant to 28 U.S.C. § 1447(d) to the clerk of the North Carolina Superior Court” until February 4, 2019, at the latest. (*Id.*). In their memorandum in support of the motion, defendants similarly seek to have the court “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.” (Mem. (DE 46) at 5) (emphasis added).

This part of the instant motion is denied as moot, because the clerk of court has informed the undersigned that it mailed a certified copy of the court’s January 2, 2019, remand order to the Wake County Superior Court on January 2, 2019. (See also Notice, Exhibit (DE 52-1) at 3). In any event, the court denies the Legislative Defendants’ request to “ensure” or “instruct” that the court’s January

2, 2019, remand order not be mailed before February 4, 2019. (Mot. (DE 45) at 1; Mem. (DE 46) at 5). The controlling statute, 28 U.S.C. § 1447(c) provides, in pertinent part:

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . . A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c) (emphasis added). The remand in this instance proceeded in accordance with the plain language of the statute, and there is no basis in the statute for ensuring or instructing the clerk to delay mailing of the remand order.

The Legislative Defendants suggest that the court has the authority and the obligation to ensure that the remand order is not mailed until the 30-day “Automatic Stay” period set forth in Federal Rule of Civil Procedure 62(a) has expired. The Legislative Defendants’ interpretation of Rule 62(a) in these circumstances, however, is at odds with the plain language of § 1447(c), which requires the court to remand the case as soon as it appears the court lacks subject matter jurisdiction and requires the clerk to mail the remand order, without qualification.

The Legislative Defendants’ interpretation of Rule 62(a) also is in conflict with Fourth Circuit case law, in which the Fourth Circuit has stated: “A remand is effective when the district court mails a certified copy of the remand order to the state court, see 28 U.S.C. § 1447(c), or, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered.” Bryan v. BellSouth Commc’ns, Inc., 492 F.3d 231, 235 n. 1 (4th Cir. 2007) (citing In re Lowe, 102 F.3d 731, 734-36 (4th Cir.1996)) (emphasis added).

Legislative Defendants suggest nonetheless that the court’s remand order was not an “effective remand order” because it was automatically stayed under Rule 62(a), citing the case Eisenman v. Cont’l Airlines, Inc., 974 F. Supp. 425, 429 (D.N.J. 1997). Eisenman, however, is



inapposite in addition to lacking any precedential value in this circuit. As an initial matter, Eisenman did not apply Rule 62(a). There, a magistrate judge entered a remand order that itself expressly stayed the order until disposition of an appeal thereof in the district court, further extending and reconfirming the stay in subsequent orders spanning a five month period of time. See id. The instant case involves neither a magistrate judge remand order nor any order expressly staying the remand pending appeal. Moreover, the court’s reasoning in Eisenman conflicts with the Fourth Circuit rule that a remand order is effective upon entry when based upon a lack of subject matter jurisdiction. See Bryan, 492 F.3d at 235 n. 1; In re Lowe, 102 F.3d at 734-36.

In sum, that part of the instant motion seeking an order “ensuring that the Clerk of Court does not mail the remand order” until February 4, 2019, is denied as moot and for lack of merit.

B. Confirming 30-Day Stay

The Legislative Defendants also seek in the instant motion an order “confirming” or “affirming that the 30-day post-judgment stay period of Rule 62(a) applies to the Court’s remand order.” (Mot. (DE 45) at 1). The court does not have jurisdiction to grant the relief sought by defendants in this part of the motion, as presented here, because doing so would amount to an advisory opinion. See Ostergren v. Cuccinelli, 615 F.3d 263, 287 (4th Cir. 2010). Where the Legislative Defendants assert that an “Automatic Stay” applies to this court’s remand order under Rule 62(a), an order by this court “confirming” or “affirming” that legal interpretation of Rule 62(a) does not alter whether such automatic stay applies or does not apply in this instance, nor would it accomplish any result in the instant matter.

Apparently in the alternative, the Legislative Defendants suggest in their proposed order that they have moved “for a stay of judgment under Rule 62(a).” (Proposed Order (DE 45-1) at 1). In


this respect the instant motion may be construed, in part, as a motion under Rule 62(a) for the court to enter an order staying its January 2, 2019, remand order, or to modify the January 2, 2019, remand order so that it expressly includes a stay of its effect until February 4, 2019, at the earliest. For the reasons stated in section A., above, the court denies this apparent alternative request for stay of the court's January 2, 2019, remand order. In so holding, the court expresses no opinion whether, under Rule 62(a) or otherwise, the court in its January 2, 2019, order could have imposed at that time a stay of the effect and transmittal of the remand order, because that issue is not presently before the court.

In sum, that part of the instant motion seeking an order "confirming" or "affirming that the 30-day post-judgment stay period of Rule 62(a) applies to the Court's remand order," (Mot. (DE 45) at 1), is dismissed in part for lack of subject matter jurisdiction and denied in alternative part on the merits.

### CONCLUSION

Based on the foregoing, Legislative Defendants' motion (DE 45) for an order confirming applicability of stay of judgment under Rule 62(a), is DENIED IN PART and DISMISSED IN PART for lack of jurisdiction.

SO ORDERED, this the 17th day of January, 2019.

  
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LOUISE W. FLANAGAN  
United States District Judge