

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' RESPONSE TO THE  
COURT'S MAY 30, 2018 ORDER TO  
SHOW CAUSE**

**BACKGROUND**

On April 30, 2018, Defendants filed a timely notice of appeal to the United States Court of Appeals for the Ninth Circuit from this Court’s Order of April 13, 2018, Dkt. 233, striking Defendants’ motion to dissolve the preliminary injunction. Dkt. 236. On that same day, Defendants filed in this Court a Motion to Stay the Preliminary Injunction Pending Appeal and requested an expedited ruling by May 4, 2018. Dkt. 238. On May 4, 2018, because this Court had declined to issue an expedited ruling and stated that it would not rule on the motion until after the May 18, 2018 noting date, Dkt. 240, and because of the importance to Defendants of the military interests at stake and the expedited nature of the appeal, Defendants filed a separate Motion for a Stay Pending Appeal in the Ninth Circuit, pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A). *Karnoski v. Trump*, No. 18-35347 (9th Cir. May 4, 2018), Dkt. 3; *see also* Defendants-Appellants’ Reply in Support of Motion for Stay Pending Appeal 2 n.2, *Karnoski v. Trump*, No. 18-35347 (9th Cir. May 4, 2018), Dkt. 28-1 (explaining why Defendants’ motion in the Ninth Circuit is procedurally proper). The Ninth Circuit has yet to issue a ruling.

On May 30, 2018, this Court ordered the parties “to show cause why Defendants’ Motion to Stay the Preliminary Injunction should not be renoted until after the Ninth Circuit enters a ruling or otherwise disposes of the appeal.” Order 2, Dkt. 274. As set forth below, this Court retains jurisdiction to rule on Defendants’ stay motion, regardless of Defendants’ filing of a notice of appeal and a separate motion for a stay in the Ninth Circuit and, accordingly, that motion need not be renoted until after the Ninth Circuit enters a ruling or otherwise disposes of the appeal.

**DISCUSSION**

Federal Rule of Appellate Procedure 8(a)(2)(A) contemplates that motions for a stay of an injunction pending appeal may be brought in both the district court and court of appeals when an appeal is pending. The rule provides that the party seeking such relief “must ordinarily move first in the district court,” but also that a motion for such relief “may be made to the court of appeals.” Fed. R. App. P. 8(a)(1),(2). When a motion is brought in the court of appeals, the moving party must “show that moving first in the district court would be impracticable,” or “state

1 that, a motion having been made, the district court denied the motion or failed to afford the relief  
2 requested,” and set forth any reasons given by the district court for its action. Fed. R. App. P.  
3 8(a)(2)(A)(i),(ii). But, as described further below, the filing of a motion to stay an injunction in  
4 the court of appeals does not divest the district court of jurisdiction over the same pending motion  
5 in district court.

6 To begin, while “the filing of a notice of appeal generally ‘confers jurisdiction on the  
7 court of appeals and divests the district court of its control over those aspects of the case  
8 involved in the appeal,’” Order 2 (quoting *Griggs v. Provident Consumer Discount Co.*, 459  
9 U.S. 56, 58 (1982)), “[t]he principle of exclusive appellate jurisdiction is not . . . absolute.”  
10 *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). For  
11 example, an appeal from the grant or denial of a preliminary injunction does not divest the trial  
12 court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is  
13 pending. See 11A Wright and Miller, Federal Practice and Procedure § 2962 (3d ed.). In  
14 addition, Federal Rule of Civil Procedure 62(c) specifically provides that while an appeal is  
15 pending, the district court may “suspend, modify, restore, or grant an injunction,” thus  
16 codifying this exception to the jurisdictional transfer principle. Fed. R. Civ. P. 62(c);  
17 *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001); see also 11A Wright and Miller,  
18 Federal Practice and Procedure § 2962 (“The only restriction on the trial court’s power occurs  
19 if the appellate court enters an order staying the lower court until the appeal has been  
20 completed.”). Therefore, the district court retains jurisdiction to suspend an injunction even  
21 when an appeal of that injunction is pending.

22 The filing of a motion to stay an injunction pending appeal does not alter this conclusion.  
23 A motion to stay an injunction filed in the court of appeals is not a separate appeal that has the  
24 potential to deprive the district court of jurisdiction. Such a motion does not seek to “appeal” the  
25 district court’s denial of a motion for a stay and does not seek review of the district court’s  
26 decision to deny a stay. Rather, as reflected in Federal Rule of Appellate Procedure 8, a stay  
27 motion filed in the court of appeals is an entirely separate request to preserve the status quo  
28 pending appeal. See *UFCW Local 880-Retail Food Emp’rs Joint Pension Fund v. Newmont Min.*

1 *Corp.*, 276 F. App'x 747, 749 (10th Cir. 2008) (dismissing “appeal” of district court’s denial of  
2 stay pending appeal for lack of jurisdiction and explaining that appellants should have “re-  
3 urge[d]” the stay motion in the court of appeals pursuant to Federal Rule of Appellate Procedure  
4 8(a) instead of “inappropriately” attempting to appeal the district court’s denial of the stay  
5 pending appeal); *see also Shiley, Inc. v. Bentley Labs., Inc.*, 782 F.2d 992, 993 (Fed. Cir. 1986)  
6 (dismissing “appeal” of district court’s denial of motion to stay injunction pending appeal,  
7 holding that “a denial of a stay of a post-trial injunction pending an appeal on the merits is neither  
8 a ‘final decision,’ 28 U.S.C. § 1295(a), nor within [the appellate] court’s jurisdiction over  
9 interlocutory orders,” and explaining that defendant had already exhausted proper procedure for  
10 seeking a stay of injunction pending appeal as set forth in Federal Rule of Appellate Procedure  
11 8(a)).

12 Consistent with this authority, Federal Rule of Appellate Procedure 8(a) contemplates  
13 that parties seeking to stay an injunction pending appeal may seek relief from an appellate court  
14 even if the district court has not ruled—confirming that a motion for a stay in the appellate court  
15 is not an appeal of the district court’s decision that would divest the district court of jurisdiction  
16 over the motion. Indeed, Federal Rule of Civil Procedure 62(c) and (g), read in tandem, make  
17 clear that *both* the district court and the appellate court have authority to stay an injunction  
18 pending appeal, and one is not mutually exclusive of the other. *See* 11 Wright and Miller, Federal  
19 Practice and Procedure § 2908 Power of Appellate Court, (3d ed.) (“[S]ubdivisions (c) and (g)  
20 of Rule 62 are read together, and the power to act with regard to an injunction pending an appeal  
21 exists in both the trial and appellate courts[.]”); *cf. Rakovich v. Wade*, 834 F.2d 673 (7th Cir.  
22 1987) (“[T]he district court’s power to grant a stay of its judgment pending appeal . . . is vested  
23 in the district court by virtue of its original jurisdiction over the case and continues to reside in  
24 the district court until such time as the court of appeals issues its mandate[.]”).

25 Accordingly, district courts have ruled on motions to stay while such stay motions were  
26 also pending in the courts of appeals. For example, in *Batalla Vidal v. Nielsen*, No. 16-cv-4756  
27 (E.D.N.Y. Aug. 25, 2016), Defendants filed a motion in the district court for a stay of record  
28 supplementation and discovery pending resolution of an interlocutory appeal on December 28,

1 2017. *Batalla Vidal v. Nielsen*, No. 16-cv-4756 (E.D.N.Y.), Dkt. 219. Two days later, on  
2 December 30, 2017, Defendants similarly moved for a stay pending interlocutory appeal in the  
3 Second Circuit, noting that Defendants had filed a motion for a stay in the district court but that  
4 the district court had not yet ruled on Defendants' request for a stay. *In re: Nielsen*, No. 17-3345  
5 (2d. Cir.), Dkt. 174. While the motion for a stay was pending in the Second Circuit, the district  
6 court granted Defendants' motion for a stay. *See In re: Nielsen*, No. 17-3345 (2d. Cir.), Dkt.  
7 176-2. Defendants then notified the Second Circuit of the district court's ruling and withdrew  
8 their motion to stay in the Second Circuit. *See In re: Nielsen*, No. 17-3345 (2d. Cir.), Dkt. 176-  
9 1. Similarly, in *Hill v. S.E.C.*, No. 15-cv-1801 (N.D. Ga. May 19, 2015), Defendants filed a  
10 motion in the district court for a stay of the preliminary injunction pending appeal on June 24,  
11 2015. *Hill v. S.E.C.*, No. 15-cv-1801 (N.D. Ga.), Dkt. 33. Before the district court ruled on the  
12 stay motion, Defendants filed a stay motion in the Eleventh Circuit on July 2, 2015, noting that  
13 a motion for a stay pending appeal was still pending in the district court. *Hill v. S.E.C.*, No. 15-  
14 12831, (July 2, 2015). While the motion for a stay was pending in the Eleventh Circuit, the  
15 district court considered the merits of Defendants' motion to stay, noting that "Federal Rule of  
16 Civil Procedure 62(c) governs the granting of a stay of an injunction pending appeal," and denied  
17 Defendants' request for a stay. Order at 2, 4, *Hill v. S.E.C.*, No. 15-cv-1801 (N.D. Ga. Aug. 4,  
18 2015), Dkt. 44. The Eleventh Circuit later denied Defendants' motion for a stay. *Hill v. S.E.C.*,  
19 No. 15-12831, (August 10, 2015).

20 In sum, although the Ninth Circuit need not await a decision by this Court before ruling  
21 on Defendants' motion for a stay of the preliminary injunction pending appeal, this Court has  
22 jurisdiction to rule on Defendants' motion. If this Court were to grant Defendants' motion for a  
23 stay before the Ninth Circuit rules, that would obviate the need for the Ninth Circuit to consider  
24 the issue. *See In re: Nielsen*, No. 17-3345 (2d. Cir.), Dkt. 176-1. And if this Court denies  
25 Defendants' motion before the Ninth Circuit rules, the Ninth Circuit would have the benefit of  
26 this Court's reasoning, as contemplated by Federal Rule of Appellate Procedure 8(a)(2)(A)(ii).

**CONCLUSION**

For the foregoing reasons, the Court retains jurisdiction to rule on Defendants’ pending motion to stay the preliminary injunction pending appeal, and Defendants respectfully request that the motion be granted for the reasons they have previously set forth. *See* Dkt. 238.  
Dated: June 6, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2018, I electronically filed the foregoing document, causing a notice of filing to be served upon all counsel of record.

Dated: June 6, 2018

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