UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: No. 07-6373, *John B., et al v. M. Goetz, Jr., et al*
Originating Case No. 98-00168

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this appeal.

Sincerely yours,

s/Diane Schnur
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cc: Honorable William J. Haynes Jr.
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Enclosure

No. 07-6373

UNITED STATES COURT OF APPEALS
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LEONARD GREEN, Clerk

JOHN B., et al.,

Plaintiffs-Appellees,

v.

M. D. GOETZ, JR., Commissioner, Tennessee Department of Finance and Administration; DARIN GORDON, Assistant Commissioner, Bureau of TennCare; and VIOLA P. MILLER, Commissioner, Tennessee Department of Children's Services,

Defendants-Appellants.

ORDER

Before: DAUGHTREY, GILMAN, and COOK, Circuit Judges.

In this litigation, the plaintiffs challenge the state of Tennessee's compliance with federal requirements regarding Early Periodic Screening, Diagnosis and Treatment (EPSDT) within its TennCare program. The matter comes to this court in a dispute over discovery. Before the court is the defendants' emergency motion for a stay pending appeal and/or a petition for a writ of mandamus. The plaintiffs respond in opposition, and the defendants reply in support. In a prior order, we granted a temporary stay to allow time for responsive pleadings to the request for relief in mandamus and for consideration of the defendants' request.

After that order was filed, the district court entered a memorandum and order denying the defendants' motion to stay that had been made in that court. The defendants now move to file a supplemental brief addressing that ruling. The plaintiffs have filed a supplemental response as

requested in our prior order. Also, the states of Ohio, Kentucky, and Michigan have filed a brief as amici curiae in support of the petition for mandamus. The plaintiffs have moved for leave to respond to that brief and have tendered their response. We have considered these supplemental filings.

In the two orders sought to be stayed, the district court directed the plaintiffs' computer expert and the court-appointed monitor to inspect the state's computer system and the computers of 50 key custodians to ascertain whether any production of information has been impaired or compromised. The second order denies reconsideration of the first and directs that the prior order be executed forthwith. The orders will require the forensic copying of the hard drives of the identified computers, not only those at work stations of the key custodians but also of any computer on which the custodians may have performed or received work relating to the TennCare program. All information on those drives, whether related to TennCare or not, will then be subject to search.

Generally, an order granting or denying discovery is not immediately appealable because a party may resist production, be found in contempt, and appeal from that judgment. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 444 F.3d 462, 471-72 (6th Cir. 2006); *Fed. Deposit Ins. Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990); *Dow Chem. Co. v. Taylor*, 519 F.2d 352, 354 (6th Cir.), *cert. denied*, 423 U.S. 1033 (1975). Notwithstanding this general rule, we conclude that this court has jurisdiction because the orders in question do not lend themselves to a simple citation for contempt from which appeal may be taken. In this action, three state officials are the named defendants. The orders apply not only to computers within the state's control but also to others that are privately owned. Therefore, many individuals – most of them nonparties – are subject to the actual requirements of production. This gives the orders some of the markings of immediate appealability that the Supreme Court has articulated in *Perlman v. United States*, 247 U.S. 7, 13 (1918) (exception to nonappealability where party was "powerless to avert the mischief of the

order"); *see also Ross v. City of Memphis*, 423 F.3d 596, 599 (6th Cir. 2005) (relying upon *Perlman* to find jurisdiction where party could not prevent a nonparty from complying with discovery order). Further, our authority in mandamus permits the correction of certain discovery orders that are clearly erroneous as a matter of law, particularly when information is "claimed to be protected from disclosure by privilege or other interests in confidentiality." *In re Perrigo Co.*, 128 F.3d 430, 436 (6th Cir. 1997); *see also In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005), *cert. denied*, 547 U.S. 1092 (2006); *Chesher v. Allen*, 122 Fed. App'x 184 (6th Cir. 2005); *cf. Cheney v. U.S. District Court*, 542 U.S. 367 (2004).

We therefore turn to the defendants' request for a stay pending the resolution of this discovery issue on appeal. The factors to be balanced are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). In considering the defendants' request, we conclude that all of these factors weigh strongly in favor of a stay.

The orders in this case trigger a number of special concerns. They are directives to government officials of a state and therefore raise issues of federalism and comity not presented in the typical civil discovery dispute. Further, the orders are extremely broad. They require the production of hard drives not only of computers owned and located within state government offices, but also of those privately owned by government officials and workers. As a result, some information that may be discoverable will be commingled with private, personal information. The orders will be executed at a tremendous financial cost with at least some disruption to state business. Finally, although the forensic copying of computer drives and servers may sometimes fall within the

parameters of acceptable discovery, the emerging case law in this area cannot be read as establishing a routine right of access to such material. *See, e.g., In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (rejecting unrestricted, direct access to database compilations). All of these factors counsel in favor of a stay and the assignment of this case to the court's regular oral-argument calendar.

Therefore, the motion to stay is **GRANTED**. The clerk is directed to expedite the briefing and submission of this appeal.

ENTERED BY ORDER OF THE COURT

Clerk