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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION**

Town of Browning,)	
a Montana Municipal Corporation)	
)	
Plaintiff,)	CAUSE NO.: CV-14-24-6F-BMM-RKS
)	
v.s.)	Defendants' Brief in Support of
)	Objections to Magistrate's
Willie A. Sharp, Jr.; Forrestina Calf)	Findings and Recommendations
Boss Ribs; Paul McEvers; William)	and Order (ECF 140)
Old Chief; Cheryl Little Dog;)	
Shawn Lahr; Alvin Yellow Owl;)	
Derek Kline; Harry Barnes; Iliff Kipp;)	
Joe McKay; Earl Old Person; Tyson)	
Running Wolf; and Nelse St. Goddard;)	
)	
Defendants.)	

INTRODUCTION

The Defendants have appealed (ECF 124) the district court's order finding

subject matter jurisdiction (ECF 123). Defendants have also moved to stay the proceedings in the district court during the pendency of the appeal. (ECF 133 and 134) Last week, Defendants also submitted, in the 9th Circuit, their opening brief on appeal. (Cause No. 14-36009, Doc. 4-1). The 9th Circuit appeal focuses the fundamental question of this court's subject matter jurisdiction. Id.

ARGUMENT

1. Because of the Jurisdictional Challenge Now On Appeal, This Court And The Magistrate Lack Jurisdiction To Enter Orders That Are The Subject of The Appeal

“[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over the aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, (1982). The Supreme Court has determined that denial of an immunity defense is a “final” decision at either the dismissal stage or summary judgment stage, for the purpose of appellate jurisdiction under 28 U.S.C. §1291. *Behrens v. Pelletier*, 516 U.S. 299, 306, (1996); *Chuman v. Wright*, 960 F. 2d 104 (9th Cir. 1992).

Defendants agree with the magistrate that Plaintiff has not stated claims for

relief for the damages claims that it asserts against the Defendants.¹ However, because of the pending appeal, Defendants respectfully assert that this court lacks jurisdiction to enter such an order.

The magistrate's recommendation (ECF 140) interferes with aspects of the case now on appeal, contrary to *Griggs* and *Behrens*. If this court lacks subject matter jurisdiction (which is the issue presently on appeal), then neither the magistrate nor this court have authority to rule on the Rule 12(b)(6) motion for which the magistrate made a recommendation (ECF 140).

Moreover, the magistrate's recommendation adopts this court's determination that Plaintiff has stated an *Ex Parte Young* claim. Defendants contest that determination as a fundamental issue in the pending appeal. See Defendants' Opening Brief in the 9th Circuit. (Cause No 14-36009, Doc. 4-1)

Proceeding further in this court directly conflicts with the issues on appeal, and neither the magistrate nor this court presently has jurisdiction to do so. See, e.g., *Bryant v. Crum & Forster Specialty Ins. Co.*, 502 Fed. Appx. 670 (9th Cir. 2012) (Even though the district court denied the post appeal motion to intervene on substantive grounds, the district court lacked authority to rule on motion to intervene in light of pending appeal.); *Townley v. Miller*, 693 F.3d 1041, 1042 (9th

¹ Defendants, however, object to the court's jurisdiction over Count 1 for the reasons stated in their motions to dismiss for lack of subject matter jurisdiction. But the court's jurisdiction over Count 1 is the subject of the appeal.

Cir. 2012) (appeal of preliminary injunction order divested the district court of control over the preliminary injunction); *Small v. Operative Plasterers' and Cement Masons' International Ass'n. Local 200, AFL-CIO*, 611 F.3d 483, 495 (9th Cir. 2010) (once an injunction order is appealed, district court lacks jurisdiction to alter the injunction order).

In summary, neither the magistrate nor this court have subject matter jurisdiction over the issues now on appeal. Those issues involve subject matter jurisdiction. Thus, neither the magistrate nor this court have authority over the pending injunction motion. The only matter the court may rule upon is Defendants' motions to stay under Fed. R. App. P. 8(a)(1). (ECF 133 and 135)

CONCLUSION

Based on the foregoing, the district court should enter an order that it and the magistrate lack jurisdiction until the resolution of Defendants' appeal.

Respectfully submitted this 9th day of March 2015.

/s/ Lawrence A. Anderson
Lawrence A. Anderson

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that Defendants' Reply Brief in Support of Motion to Dismiss Amended Complaint Under Rule 12(b)(1) is double spaced, proportionately spaced, typed in Times New Roman, has a typeface of 14 points, and contains less than 647 words.

/s/ Lawrence A. Anderson
Lawrence A. Anderson