IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL A. UMBERT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 18-1336-TSC
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO THE MOTION TO DISMISS IN PART, FOR SEVERANCE OF REMAINING CLAIMS AND TO STAY FURTHER RESPONSE TO AMENDED COMPLAINT

This action originally was brought in June 2018 by five Plaintiffs, Daniel Umbert, Troy Chodosh, Errol Eaton, Chase Bickel and Gary LeComte. On July 10, 2018, Plaintiffs amended the Complaint to add three additional Plaintiffs, Justin Bargeron, Kevin Borquez, and Charles Stewart. (ECF No. 6)

As explained in Defendants' motion to dismiss in part, three of these Plaintiffs (Bickel, Chodosh and Stewart) are no longer reflected in the information available to the NICS System as prohibited from purchasing firearms. Because they have received the relief they seek in this action, their claims should be dismissed as moot. The remaining claims arise from the particular circumstances of each of the individual Plaintiffs and, for that reason, have been improperly joined in a single lawsuit. Those claims should be severed into separate lawsuits, and any further responsive pleading to the Amended Complaint with respect to these claims should be stayed pending the outcome of this motion.

I. PLAINTIFFS ARGUMENTS AGAINST MOOTNESS LACK MERIT

A. PLAINTIFFS CHODOSH, BICKEL AND STEWART HAVE RECEIVED FULL RELIEF

As already explained in the Defendants' motion to dismiss, Plaintiffs Chodosh, Bickel and Stewart have been provided with full relief in this case. However, Plaintiffs argue that they have not been granted full relief because: (1) Plaintiffs Chodosh and Stewart have not been granted Unique Personal Identifying Numbers (UPINs) (Bickel was provided with a UPIN); and (2) they speculate that a mistake or delay in future firearms purchases could occur.

As explained in Defendants' motion to dismiss, a UPIN will be issued under FBI administrative policy[1] in those cases where a person submits a Voluntary Appeal File (VAF)[2] application, including fingerprints to NICS, and NICS administratively determines that no prohibiting information exists. (ECF No. 12-4, Barker Decl. ¶¶ 6-7; *see also* Barker Decl. (Nov. 2, 2018) ¶ 2) A UPIN is not an appeal of a specific denied firearm transaction;[3] it is a separate administrative procedure that is linked to the applicant (i.e., a *person*, not a specific firearm transaction).

In the case of Mr. Bickel, who has received a UPIN, he chose to apply for entry into the VAF, submitting his fingerprints and giving permission to NICS to retain his transaction records, and was approved for a UPIN through that process. (Barker Decl. (Nov. 2, 2018) ¶ 3) However, Plaintiffs Chodosh and Stewart are not eligible at this time for receipt of a UPIN since they have not applied for entry into the VAF. (*Id.* ¶ 4) Pursuant to NICS policy, the VAF process is the

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[1] *See generally* the NICS regulations, 28 CFR §§ 25.1 – 25.11, at 28 C.F.R. § 25.10(g); *see also* Barker Decl. (Nov. 2, 2018) ¶ 2.

[2] *See* https://www.fbi.gov/file-repository/vaf-form-25.pdf/view, and the downloadable form at: https://www.fbi.gov/file-repository/vaf-form-25.pdf.

[3] *See* 28 CFR § 25.2, defining appeal: "*Appeal* means a formal procedure to challenge the denial

only administrative procedure for issuance of a UPIN. (*Id.* ¶ 2). Without a signed application from them and fingerprint card, this relief cannot be provided. Thus, having failed to avail themselves of that process at the time the Complaint was filed, the receipt of a UPIN is not a form of relief available to them in this action. Accordingly, the fact that neither has received a UPIN is not a basis to avoid dismissal of their claims on mootness grounds.

Plaintiffs Chodosh, Bickel and Stewart also allege that their cases are not moot because they have a legitimate concern that "the FBI could still erroneously deny Plaintiffs" or that the FBI will "stop appeals again as they previously have." (Opp. at 3) Neither of these arguments is grounds for avoiding dismissal.

Plaintiffs' concern about a risk of mistake is entirely speculative and, therefore, not a basis to avoid dismissal on mootness grounds. *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) ("A case is moot if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'") As explained in the Barker affidavits attached to Defendants' motion to dismiss, there is no meaningful risk of an erroneous denial based on Plaintiffs' existing record as evidenced by the verification audit that has been conducted. (ECF No. 12-3, Barker Decl. ¶ 5 (Plaintiff Stewart); ECF No. 12-4, Barker Decl. ¶ 8 (Plaintiff Bickel); ECF No. 12-5, Barker Decl. ¶ 4 (Plaintiff Chodosh)) Plaintiffs now have a *highly minimized* risk of an erroneous denial, compared to any other NICS check transactions.

Plaintiffs' argument that NICS might suspend the processing of appeals at some point in the future also is purely speculative. Indeed, effective March 2018, Congress has now statutorily

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of a firearm transfer." [Italics in original, underline added.]

mandated NICS to process new appeals within 60 days.[4] Historically, Congress had not placed a specific timeframe in which NICS appeals were required to be processed allowing the FBI more discretion in the balancing of competing missions with limited resources. The only requirement was that upon receipt of information, from the prospective transferee, "to correct, clarify, or supplement records of the system with respect to the prospective transferee, the [NICS] shall immediately consider the information, investigate the matter further, and correct all erroneous Federal records relating to the prospective transferee and give notice of the error to any Federal department or agency or any State that was the source of such erroneous records." *See* Brady Act, section 103(g), codified at 34 U.S.C. § 40901. This changed with the signing of the Consolidated Appropriations Act, *supra* note 4, which requires a 60-day determination on appeals once NICS receives information to correct, clarify, or supplement the record. This provision reduces the future possibility of delay in processing appeals about which Plaintiffs speculate. In any event, Plaintiffs' speculation is not a basis for avoiding dismissal on mootness grounds.

II. THE PLAINTIFFS' ARGUMENTS REGARDING JOINDER ARE UNPERSUASIVE

Plaintiffs claim in their opposition that they have "alleged at the very minimum level some commonality of facts which should survive severance." (Opp. at 5) To the contrary, Plaintiffs have alleged virtually no commonality among their claims, *i.e.*, only that Plaintiffs have engaged in firearms transactions involving NICS checks, while pointedly ignoring the litany of differences between their cases identified in the Defendants' motion to dismiss. Plaintiffs' inability to meaningfully respond to those arguments is a tacit acknowledgement that they fail to meet the

[4] This provision is contained in the Consolidated Appropriations Act, 2018 Pub. L No. 115–141, which was signed into law on March 23, 2018. Included in this Act is the "Fix NICS Act" which is a modification to the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), codified in relevant part at 18 U.S.C. § 922(t) (Brady Act).

standard for joinder under Rule 20 of the Federal Rules of Civil Procedure.

Contrary to their assertion, Plaintiffs also will not be prejudiced by having their claims severed into separate actions. Plaintiffs claim that it will somehow prolong the litigation to sever their claims. But this argument overlooks the obvious – that cases that will be delayed by severance would already have been delayed while joined, due to the simple fact that the joint cases can only proceed at the pace of the slowest Plaintiff's case. On the whole, severance is more likely to lead to the efficient resolution of these claims because each case can proceed at the pace appropriate to its level of complexity.

Rule 20 of the Federal Rules of Civil Procedure establishes minimum requirements for joining multiple plaintiffs in a single case. Rule 20(a)(1) provides that multiple plaintiffs may be joined in a single case only if: "(A) they assert any right to relief . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; *and* (B) any question of law or fact common to all plaintiffs will arise in the action." Because Plaintiffs have failed to meet both prongs of this test as established in Defendants' motion, severance is appropriate.

III. PLAINTIFFS' ARGUMENT AGAINST A STAY ARE WITHOUT MERIT

The Plaintiffs oppose a stay of the proceedings "because Defendants' argument that the case should be stayed pending resolution of their Motion ignores that four of the Plaintiffs (Borquez, Eaton, Umbert and Bargeron) have zero appeal rights/remedies under the FBI's current policy of not allowing appeals for NICS denials for National Firearms Act (NFA) registered firearms[]." (Opp. at 7) The Defendants acknowledge that it is the position of the FBI that ATF NFA transfers do not fall within the purview of the NICS provisions of the Brady Act (now codified at 34 USC § 40901). However, this acknowledgement is not a "procedural delay tactic" as alleged by the Plaintiffs. Instead, it is Defendant FBI's position regarding the issue in

question.

Ultimately, whether or not these plaintiffs have administrative appeal rights is not relevant to the question of whether a stay is warranted pending resolution of the motion to sever. As explained in Defendants' motion, a stay is warranted because the Court's decision regarding the motion to sever may impact the scope of this lawsuit and the manner in which it proceeds. Accordingly, Defendants should not be required to further respond to the Amended Compliant until the Court resolves the pending motion.

Respectfully submitted,

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