IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

David Kliss,	: No. 1:10-CV-01945
Plaintiff	: (Complaint filed 09/16/2010)
	:
	: (Judge Christopher C. Conner)
v.	:
	: JURY TRIAL DEMANDED
East Hanover Township,	:
Light-Heigel & Associates, Inc.	:
Defendant	: (Electronically Filed)

BRIEF OF DEFENDANT, EAST HANOVER TOWNSHIP IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Dated: September 28, 2010

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COUNTERSTATEMENT OF THE FACTS

According to the Complaint, Plaintiff Kliss put a sign on his property on or about July 14, 2010. On July 22, 2010, Light-Heigel & Associates, Inc. ("Light-Heigel"), East Hanover Township's appointed Zoning Officer, issued an "Enforcement Notice" to Mr. and Mrs. Kliss concerning the sign in question. (Complaint, Exhibit B.) The Enforcement Notice listed five ways in which the sign[1] violated provisions of the East Hanover Township Zoning Ordinance and requested that the sign(s) be removed within five (5) days of the notice. The Enforcement Notice included language setting forth Plaintiff's right to appeal to the Township's Zoning Hearing Board. The Enforcement Notice also included specific language of potential penalties in the event of a violation of the Zoning Ordinance. The Enforcement Notice states specifically that "no judgment shall commence or be imposed, levied or be payable until the date of the determination of a violation by the District Justice." No action was commenced before a District Justice attempting to enforce the Zoning Ordinance against the Plaintiff.

Of the five reasons cited by the Township Zoning Officer in the Enforcement Notice, three of them were content-neutral. According to the Plaintiff, the sign was removed by Mr. Kliss. (Complaint, ¶16.) There is no indication from the pleadings

[1] The Complaint asserts that only 1 sign was put up on July 14, 2010; the Enforcement Notice refers to "signs." East Hanover Township will assume for purposes of this argument that only 1 sign was involved.

that Mr. Kliss made any effort whatsoever to appeal the Enforcement Notice to the East Hanover Township Zoning Hearing Board.

Sometime after the Plaintiff received the Enforcement Notice, the Plaintiff put up a new sign ("New Sign"). The Plaintiff's New Sign omitted the word about which a Township parent had complained. At this time, there is no Enforcement Notice or other action of the Township with respect to the New Sign. The New Sign is not subject to any Township enforcement effort whatsoever.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

A. WHETHER PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED AS A MATTER OF LAW BECAUSE THERE IS NO JUSTICIABLE CASE OR CONTROVERSY?

[SUGGESTED ANSWER: YES]

B. WHETHER PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED AS A MATTER OF LAW IN THAT PLAINTIFF CANNOT ESTABLISH THE REQUISITE ELEMENTS FOR THE EXTRAORDINARY RELIEF SOUGHT IN THAT MOTION?

[SUGGESTED ANSWER: YES]

ARGUMENT

A. STANDARDS GOVERNING A MOTION FOR PRELIMINARY INJUNCTION.

The decision whether to enter a preliminary injunction is committed to the sound discretion of the trial court. *South Co. Inc. v. Kannebridge Corp.*, 258 F.3d

148, 150 (3d Cir. 2001). The standard for evaluating a Motion for a Preliminary Injunction is as follows:

> 1. Whether the movant has shown a reasonable probability of success on the merits;
>
> 2. Whether the movant will be irreparably injured by denial of the relief;
>
> 3. Whether granting preliminary relief will result in greater harm to the non-moving party; and
>
> 4. Whether granting the preliminary relief will be in the public interest.

United States v. Bell, 414 F.3d 474, 476 n. 4 (3d Cir. 2005); *Crissman v. Dover Downs Entertainment Inc.*, 239 F.3d 357, 364 (3d Cir. 2001); *B.P. Chemicals, Ltd. v. Formosa Chemical and Fiber Corp.*, 229 F.3d 254, 263 (3d Cir. 2000).

This Honorable Court has described the burden of a Plaintiff seeking injunctive relief as follows:

> The Plaintiff seeking injunctive relief "must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly tracable to the challenged action of the Defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury."

Democracy Rising Pa. v. Celluci, 603 F. Supp. 2d 780, 790 (M.D. Pa. 2009); *Summers v. Earth Island Inst.*, _____ U.S. _____, 129 S. Ct. 1142, 1149

(2009)(quoting, *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (toc), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)(declining to relax the standing requirement for Plaintiff seeking prospective relief).

B. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED AS A MATTER OF LAW BECAUSE THERE IS NO JUSTICIABLE CASE OR CONTROVERSY.

In *Democracy Rising Pa v. Celluci*, 603 F.2d 780, 780 (M.D. Pa. 2009), this Honorable Court addressed the justiciability requirement under Article III as follows:

> Article III of the Constitution "limits the 'judicial power' to the resolution of 'cases' and 'controversies'" *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93, 225, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the existence of which "is a perquisite to all federal actions, including those for declaratory or injunctive relief," *Peachlum v. City of York*, 333 F.3d 429, 433 (3d Cir. 2003). The case or controversy requirement ensures that the judiciary's function is confined to "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, ____ U.S. _____, 129 S. Ct. 1142, 1148, 173 L. Ed. 2d 1, (2009). In fact, the Supreme Court has declared that "no principal is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 2562, 168 L. Ed. 2d 424 (2007). The case or controversy requirement mandates that: (1) the Plaintiff has standing to bring the action and (2) the Plaintiff's claim is ripe for adjudication and (3) the claim does not suffer from mootness."

1. There is no justiciable case or controversy with respect to the new sign and Plaintiff's suit is not ripe for adjudication.

The purpose of the ripeness doctrine is to prevent a Plaintiff from prematurely litigating a case. *Chodara Environmental, Inc. v. Blakey*, 376 F.3d 187, 196 (3d Cir. 2004). In applying the ripeness doctrine, a District Court considers such factors as whether: (1) both the parties are in a 'sufficiently adversarial posture to be able to present their positions vigorously'"; (2) "the facts of the case are 'sufficiently developed to provide the Court with enough information on which to decide the matter conclusively,'" and (3) "a party is 'genually aggrieved so as to avoid expenditure of scarce judicial resources on matters which have caused harm to no one.'" *Id*., quoting, *Peachlum v. City of York*, 333 F.3d 429, 435 (3d Cir. 2003).

The Plaintiff replaced the original sign with a new sign ("New Sign.") The Plaintiff's claim as to the New Sign is not ripe because there is no enforcement action pending with respect to the New Sign.

Because the Plaintiff's claims are barred with respect to the original sign, and because that sign was subject to content-neutral enforcement action regardless of its content, the Court should next discern whether the Plaintiff has any currently cognizable claim based on the New Sign. Simply put, there is no justiciable controversy before the Court. The current state of facts, according to the Plaintiff, is that the Plaintiff has a New Sign in place in his yard. The sign appears to

conform in all respects with East Hanover Township's Zoning Ordinance. There is no Enforcement Notice or other administrative enforcement action pending or threatened against the Plaintiff. While the Plaintiff may believe, based on the July 22 Enforcement Notice with respect to his original sign, that a modification of his New Sign *might* result in some enforcement action, it is simply not the factual case before the Court.

It is pure conjecture at this point that the Zoning Officer "might" in the future interpret the Ordinance in a specific way. It is also conjecture that, were the Plaintiff to restore the word in question to his New Sign, he would be subject to enforcement from the Zoning Officer in the absence of any content-neutral bases for enforcement. In short, there is nothing before the Court to decide; the Plaintiff's New Sign appears to be in compliance and he has not been threatened with any enforcement action as to the New Sign.

If the Plaintiff changes his sign, he can wait to see whether an Enforcement Notice will be issued by the Zoning Officer. If an Enforcement Notice is issued from the Zoning Officer, the Plaintiff has an adequate state remedy by appealing the Zoning Officer's decision to the Zoning Hearing Board and on through the Commonwealth's State court system. This review provides adequate due process protections to the Plaintiff in order to avail himself of his rights under the facts presented at that time.

At the current moment, however, there is no controversy before this Court to decide. The award of preliminary injunctive relief to the Plaintiff as to a complying sign in the absence of any Enforcement Notice is completely speculative, non-justiciable, and certainly not ripe.

2. Plaintiff's claims arising out of the placement of the original, illegal sign are moot.

As this Honorable Court noted in *Democracy Rising Pa. v. Celluci*, 603 F. Supp. 2d 780, 792 (M.D. Pa. 2009):

> The mootness doctrine necessitates that a litigant maintain standing to prosecute his or her lawsuit throughout the duration of the litigation. *See, United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980); *See also, Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). If at any point a claim ceases to "present a live case or controversy, the claim is moot and the Federal Court lacks jurisdiction to hear it. *Nextell West Corp. v. Unity Twp.*, 282 F.3d 257, 261 (3d Cir. 2002).

It is undisputed in this case that the original sign was posted by the Plaintiff in contravention of the requirements under the Township's ordinance with respect to the placement of signs. Both Plaintiff's Complaint (¶16), as well as his unsworn declaration (¶16) acknowledge that the placement of the sign violated the content neutral provisions of §314 of the ordinance. Plaintiff then removed that sign and replaced it with one that "did not transgress any other provisions of the sign ordinance invoked by the Defendants in the enforcement notice." Plaintiff's

voluntary removal of the original sign and the posting of a new sign renders moot the claims arising out of the posting of the original sign.

3. The Plaintiff's Claim is barred for failure to exhaust available administrative remedies before pursuing relief in Federal Court.

The Plaintiff's original sign was subject to a valid enforcement action on a content-neutral basis because it violated at least three provisions of the East Hanover Township Zoning Ordinance. Regardless of the content of the sign, the original sign was subject to removal because it otherwise violated the Zoning Ordinance. Merely adding political speech to an otherwise illegal sign does not render the sign protected; spray-painting "down with the mayor" on city hall does not make the graffiti legal.

The Plaintiff's proper remedy at the time he received the Enforcement Notice was to appeal the Enforcement Notice to the East Hanover Township Zoning Hearing Board. Accordingly the Plaintiff both conceded the illegal nature of the sign and also failed to pursue his available state remedies.

In *Younger v. Harris*, 401 U.S. 37, 41, 44-45 (1971), the Supreme Court held that Federal Court should abstain from exercising their jurisdiction where such exercise would interfere with pending state proceedings. The doctrine reflects a strong policy against federal intervention in the absence of great and

irreparable injury to the federal Plaintiff. *Moore v. Sims*, 442 U.S. 415, 423 (1979).

Although the *Younger* doctrine originated the context of state criminal proceedings, it has been extended to civil actions brought by the state to vindicate important state interests. The Supreme Court has expanded *Younger* to prohibit federal injunctions of civil proceedings that were quasi-criminal in nature, or in support of a state's authority to enforce its orders. *See, Hoffman v. Pursue, L.T.D.*, 420 U.S. 592 (1975)(state nuisance proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (state civil enforcement proceedings to recover fraudently obtained welfare payments).

Zoning and land use issues are of traditional significance to the states. *Addiction Specialists v. Township of Hampton*, 411 F.3d 399, 410 (3d Cir. 2005); *Farms, Inc. v. Solebury Township*, 671 F.2d 743, 747 (3d Cir. 1982). The state's interests extend beyond the enforcement of policies supporting land use statutes and include the processes it has put in place to enforce them. In *Huffman v. Pursue*, 420 U.S. 592 (1975), the court applied *Younger* to prevent federal interference with state action to enforce a nuisance statute. The Court explained that the state's interest was not limited to the effectuation of its substantive

policies, but included "the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies."

Under Pennsylvania law, Plaintiff had an opportunity to raise federal claims in any appeal of the issuance of the enforcement notice (had he appealed rather than complied). The Third Circuit has noted that the Pennsylvania Municipalities Planning Code empowers local zoning boards to consider substantive challenges to the validity of any zoning and/or land use ordinance, including challenges under the ADA and the Rehabilitation Act. *Addition Specialist, Inc.*, 411 F.3d at 412; 53 P.S. §10909.1. In *Addiction Specialist*, the Third Circuit held that the federal district court properly abstained from actions for declaratory and injunctive relief relating to the validity of the portions of the municipalities planning code and a local township ordinance. 411 F.3d at 412.

Similarly, 53 P.S. §11006-A grants the Court of Common Pleas power in land use appeals to invalidate zoning ordinances. Additionally, Pennsylvania's local agency law allows "a party who proceeded before a local agency under the terms of a particular statute" to question the validity of that statue and in appeal of the agency's action. 2 Pa. C.S. §753. Specifically, 2 Pa. C.S. §754(b) allows for reversal of administrative action by the reviewing court if there has been a violation of constitutional rights. Therefore, Pennsylvania law has afforded Plaintiff ample processes and forums within which to challenge the legality of

§314.2.13 of the Township ordinance. Pursuant to the holding in *Huffman, Younger* abstention applies and this Honorable Court should abstain from consideration of this case.

Since Plaintiff seeks equitable relief, abstention under the Burford doctrine also applies. In *Burford v. Sun Oil Company*, 319 U.S. 315 (1943), the Supreme Court held that where a complicated regulatory scheme is at issue, "a sound respect for the independence of state action requires the federal equity court to stay its hand." *Id* at 334; *see also, Samuels v. Mackell*, 401 U.S. 66, 72 (1971). The district court should abstain where the "exercise of federal review of the question in the case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Quackenbus v. AllState, Inc.*, 517 U.S. 706, 726-27 (1996); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 814 (1976). As the Commonwealth and the Township have important interests in this subject matter and in the processes established and since Plaintiffs may raise federal constitutional challenges in those proceedings, abstention is appropriate.

In this case, the Preliminary Injunction should be refused because the Plaintiff failed to exhaust his state remedies. In *Moore v. City of Asheville, North Carolina*, 396 F.3d 285 (4th Circuit 2005), the Court held that a Plaintiff's First

Amendment claim in federal court is barred by the *Younger* abstention doctrine where the Plaintiff failed to exhaust his state court remedies.

Under the rationale of *Moore*, the state judicial system should be allowed to correct any legal deficiencies before a plaintiff is permitted to turn to the federal court for relief. Just as in this case, in *Moore* the plaintiff commenced his federal action even though no state proceedings were pending and the times for appealing the citations had elapsed. Nonetheless, the Fourth Circuit Court of Appeals held that the *Younger* Doctrine applied, stating "[w]e believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions as specified in *Younger*." 396 F.3d at 394 Further, the Fourth Circuit Court of Appeals held that federal court intervention sought by the plaintiff would be duplicative, would disrupt the State's substantive policies, would offend the State's appellate processes, and would undo what the State has done by a now non-appealable order. The Court concluded that the *Younger* Doctrine applies to bar federal court reconsideration of state coercive proceedings even when the state proceedings have ended, as long as the federal proceedings cast dispersions on state proceedings or annuls their results. 396 F.3d at 394-395.

Here, federal court intervention would preclude East Hanover Township's Zoning Hearing Board's ability to interpret its own Township ordinances and balance the rights of the public versus the asserted constitutional rights of the Plaintiff.

Because the Plaintiff failed to exhaust his administrative remedies, the case as to the original sign is subject to dismissal under the *Younger* and/or *Burford* abstention doctrine and, therefore, the Plaintiff does not have a clear right to relief warranting the imposition of a Preliminary Injunction.

C. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED AS A MATTER OF LAW IN THAT PLAINTIFF CANNOT ESTABLISH THE REQUISITE ELEMENTS FOR THE EXTRAORDINARY RELIEF SOUGHT IN THAT MOTION.

1. Plaintiff cannot establish a likelihood of prevailing on the merits.

a. Plaintiff's Motion must be denied because Plaintiff seeks equity with unclean hands.

As a threshold matter, the Township contends that Plaintiff's Motion for a Preliminary Injunction must be denied because plaintiff seeks equity with unclean hands. The unclean hands doctrine mandates that "he who comes into equity must come with clean hands". *Medpointe Health Care, Inc. v. H. Tech. Pharmacal Company*, 380 F. Supp. 2d 457 (D.N.J. 2005). In applying the unclean hands doctrine, the Third Circuit "has generally been clear that the connection between

misconduct on the claim must be close." *In re: New Valley Corp.*, 181 F.3d 517, 523 (3d Cir. 1999).

In this case, Plaintiff chose to post a sign on his property in disregard for the requirements of the Township's ordinance. It would be readily apparent to Plaintiff from even a cursory review of the Township's ordinance (available on the Township's website) that he could not post the sign in the manner and/or location selected. In response to the July 22, 2010 Enforcement Notice, Plaintiff conceded the illegal nature of the sign by removing it and replacing it with a new sign in a new location. To the extent that Plaintiff's request for injunctive relief arises out of the posting of an admittedly illegal sign, Plaintiff's claim for injunctive relief is barred by application of the doctrine of "unclean hands". Moreover, Plaintiff opted to ignore the appeal options available to him under the ordinance and state law before seeking relief in federal court.

b. There is no cognizable claim that the ordinance is unconstitutionally vague and/or overly broad.

An ordinance is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited by law. *Commonwealth v. Brandon*, 872 A.2d 239 (Pa. Cmwlth. 2005). The Third Circuit has cautioned that when considering a facial challenge to a municipal ordinance, it is necessary to proceed with caution and restraint, as invalidation may

result in unnecessary interference with a state regulatory program. *Conchatta Inc. v. Miller*, 458 F.3d 258, 262-63 (3d Cir. 2006). Moreover, the invalidation of an ordinance on overbreadth grounds is "strong medicine" to be used "sparingly and only as a last resort." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Section 314.2.13 of the Township ordinance is not overly broad or unduly vague. Subsections A and B provide examples which place the words "loud" "vulgar" "indecent" or "obscene" in the proper context and provide examples of the materials which are prohibited. Consequently, a reasonable person of ordinary intelligence would know which activities fall within the prescription of Section 314.2.13 of the ordinance. Moreover, Section 314.2.13 of the ordinance on its face does not vest unbridled discretion in the Township zoning officer. Consequently, Plaintiff cannot establish a reasonable probability of success on his facial challenge to the ordinance.

c. Plaintiff's as applied challenges fail as a matter of law.

Defendant Township incorporates the arguments advanced in III(B)(1-3), above as if fully set forth at length herein. The Township contends that Plaintiff's as-applied challenges to the ordinance do not establish a justiciable case or controversy; are moot with respect to the original sign; and are not ripe for adjudication with respect to the new sign or any additional sign that Plaintiff may erect in the future.

2. Plaintiff cannot establish the requisite irreparable injury.

Establishing a risk of harm is not enough. *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). The moving party has a burden of proving a "clear showing of immediate irreparable injury." *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)(citation omitted). The "requisite feared injury or harm must be irreparable not merely serious or substantial," and "must be of a peculiar nature, so that compensation and money cannot atone for it. *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977). Further, the irreparable harm must be actual and imminent, not merely speculative. *See, Raiport v. Provident National Bank*, 451 F. Supp. 522, 530 (E.D. Pa. 1978). Such relief is not appropriate to "eliminate the possibility of a remote injury…." *Id.*, (quoting, *Holiday Inns of America v. B & B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969).

Nor is the threat of harm imminent. As stated in the Enforcement Notice as to the original sign, "no judgment shall commence or be imposed, levied or be payable until the date of the determination of a violation by the District Justice." No action even was commenced before a District Justice attempting to enforce the zoning ordinance against the Plaintiff. Simply stated, Plaintiff has not established an imminent and/or irreparable injury under the circumstances of this case.

3. Likelihood of harm to Defendant

The regulation of zoning and land use is a fundamental state interest. *Addiction Specialist, Inc. v. Township of Hampton*, 411 F.3d 399, 409 (3d Cir. 2005). Absent the ability to enforce the provisions of the ordinance regulating the placement of signs within its borders, the Township is without means to ensure the protection of the health, safety and welfare of the public as set forth in Section 314.1 of the ordinance.

4. Public interests

The public interest will be harmed by the issuance of a preliminary injunction in this case. The Plaintiff's original sign was subject to a valid enforcement action on a content neutral basis because it violated at least three provisions of the East Hanover Township zoning ordinance. Here, federal court invention would preclude the Township's Zoning Hearing Board's ability to interpret its own Township ordinances and balance the rights of the public versus the asserted constitutional rights of the Plaintiff. Moreover, it is pure speculation at this point that the zoning officer "might" in the future interpret the ordinance in a specific way. Finally, Plaintiff seeks to circumvent the appeal processes and procedures available to him under the municipalities planning code and the Township's ordinance.

WHEREFORE, Defendant, East Hanover Township, respectfully requests that the Preliminary Injunction be refused and that the Complaint be summarily dismissed.

Respectfully submitted,

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Dated this 28th day of September, 2010

CERTIFICATION OF COUNSEL

The undersigned counsel hereby certifies that the foregoing Brief complies with the word count limitations set forth in Middle District of Pennsylvania L.R. 7.8. The brief contains 3,935 words. Counsel relied upon the word count feature of the word processing system used to prepare the brief in obtaining the foregoing number.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Megan L. Renno, an employee with the law firm of Lavery, Faherty, Young & Patterson, P.C., do hereby certify that on this 28th day of September, 2010, I served a true and correct copy of the foregoing Brief in Opposition to Plaintiff's Motion for Preliminary Injunction via the U.S. Middle District Court's Electronic Case Filing system, addressed as follows:

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This document has also been electronically filed and is available for viewing and downloading from the ECF system.