

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

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U.S. DISTRICT COURT
DISTRICT OF MARYLAND
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UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
JOHN BAPTIST KOTMAIR, JR.,)
and SAVE-A-PATRIOT FELLOWSHIP,)
)
Defendants.)

Civil No. **WMN05CV1297**

MOTION FOR STAY PENDING DETERMINATION BY DISTRICT
JUDGE OF OBJECTION TO ORDER OF MAGISTRATE JUDGE

COME NOW, Defendants John Baptist Kotmair Jr., *pro se*, and Save-A-Patriot Fellowship, represented by its counsel, George Harp, who jointly move this court for a stay of the Magistrate's ORDER filed and entered on May 16, 2006. This motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure ("FRCP"). An OBJECTION to said ORDER shall be filed timely by defendants.

SUMMARY:

Magistrate Judge James K. Bredar was assigned the task of deciding

discovery issues. See Docket entry 33: “Order on Motion to Compel,” filed and entered 05/16/2006. The Plaintiff in this action moved to compel Defendants Save-A-Patriot Fellowship (“SAPF”) and John B. Kotmair Jr. (“Kotmair”) to provide, *inter alia*, the names, contact information, and other documents/information with respect to all SAPF members. Magistrate Bredar, without reliance upon any evidence, concluded that SAPF was a business, merely because it raises money through the sale of certain items and services. Magistrate Bredar then uses that erroneous conclusion to justify disregarding Defendants’ Constitutional objections to Plaintiff’s discovery requests. However, selling things and receiving funds are not the determining factor for whether or not an entity is a business. After all, even organizations like Parent-Teacher Associations raise money through bake sales and such. Instead, the determining factor is the profit motive.

Save-A-Patriot Fellowship does not exist for the purpose of turning a profit. See Kotmair affidavit in support of this motion, ¶ 3.¹ Said affidavit is incorporated by reference thereto. The fact is, SAPF is a *political* advocacy organization. This fact is made abundantly clear in its Mission Statement, as

¹ More precisely, the affidavit is styled: “AFFIDAVIT OF JOHN B. KOTMAIR, JR., IN SUPPORT OF DEFENDANTS SAPF AND KOTMAIR’S NOTICE OF OBJECTION/APPEAL OF ORDER OF MAGISTRATE JUDGE; and in support of MOTION FOR STAY PENDING DETERMINATION BY DISTRICT JUDGE OF OBJECTION TO ORDER OF MAGISTRATE JUDGE

discussed hereinafter. Moreover, as pointed out in Defendant SAPF's Brief in Opposition to Motion to Compel, obtaining membership lists of political advocacy organizations has a permanent chilling effect upon the free speech of the members thereof. See "Memorandum in Opposition to United States Motion to Compel Defendants' Discovery Responses."

Magistrate Bredar states that Plaintiff provided a "myriad of authorities" rebutting Defendants' claims to constitutional protection of its membership list, and "there is no attempt [by Defendants] to distinguish those cases." Yet, Defendants did indeed distinguish the cases cited by Plaintiff, in particular with respect to the fact that SAPF, unlike the entities in all those cases, is not a business. Magistrate Bredar merely disregards Defendants' claims on the basis of his erroneous conclusion to the contrary.

In 1957, the Supreme Court had this to say about the rights of political associations:

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who

innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society. Sweezy v. State of New Hampshire, 354 U.S. 234, 250-251 (1957).

See also: NAACP v. Button, 371 U.S. 415, 431 (1963); (“*And we have refused to countenance compelled disclosure of a person's political associations ...*”).

These cases demonstrate the protection afforded political speech, and the individuals who make up a membership organization such as SAPF. Plaintiff cites no authorities which supersede the constitutionally protected rights referred to above, or in Defendants’ response briefs to the Plaintiff’s Motion to Compel.

Accordingly, Defendants move this court to stay the order of Magistrate Beddar pending the resolution of Defendants’ objection to that order. The four criteria of the injunction standard of Rule 65 of the Federal Rules of Civil Procedure have been satisfied, so as to warrant a stay of Magistrate Beddar’s determination, including irreparable harm, as shown hereinafter.

ARGUMENT:

“Bursting Bubble Theory”

Black’s Law Dictionary defines “Bursting Bubble Theory” thusly:

Bursting-bubble theory. Evidence. The principle that a pre-

sumption disappears once the presumed facts have been contradicted by credible evidence.

Once the truth of the matter is acknowledged: that (1) SAPF is not a business; and (2) SAPF is a First Amendment political advocacy group (See Kotmair affidavit, ¶ 2) that advocates orthodox political views, Magistrate Bredar's decision ceases to have any basis in fact or law.

Black's Law Dictionary defines a "business" thusly:

"Business. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain."

SAPF is not a for-profit operation. The funds it raises are used in furtherance of its advocacy of the political views of its members, and the education of the general public on matters important to the health and vitality of our Constitutional Republic. The fact is, SAPF often needs to solicit donations just to keep its doors open. See Affidavit of John B. Kotmair, Jr. ¶ 3. In other words, even though businesses sell things, and SAPF also sells things, that does not make SAPF a business. The essential element of a business—profit motive—is missing. Therefore, SAPF is merely a political advocacy organization, in contradistinction to a "business." As such, its members are entitled to the protection of their right to freely associate and to freely speak on any matters of concern to them.

Injunction Standard:

The power of a federal trial court to stay its proceedings, even for an indefinite period of time, is beyond question. *See Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 165-66, 81 L.Ed. 153 (1936). This power springs from the inherent authority of every court to control the disposition of its cases. *Id.* At 254, 57 S.Ct. at 165. When and how to stay proceedings is within the sound discretion of the trial court. *Id.* at 254-55, 57 S.Ct. at 165-66; see also, *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1341 (Fed.Cir.1983).

When considering a motion for a stay, the court must assess the propriety of a stay in view of the following four factors: (1) whether the stay applicant will suffer irreparable injury absent a stay; (2) whether a party will suffer substantial injury if a stay is issued; (3) whether the stay applicant has demonstrated a substantial possibility of success on appeal; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir.1992).

Irreparable injury:

Magistrate Bredar's order declared SAPF to be a "business," and seeks to compel SAPF to turn over a list of all its members and produce

documents and records pertaining to them. If this information is given to the government, the result, real or perceived, would be harassment and intimidation of all SAPF members. This in no way would serve any legitimate purpose of the government in enjoining SAPF from its activities. Indeed, harassment and intimidation are, by their very nature, “irreparable injury,” just as infringement of the free exercise of political speech is. Therefore, it cannot be reasonably denied that turning over such information rises to the level of irreparable injury to the rights of Defendants and of all SAPF members.

If this court were to deny this motion for stay of the Magistrate’s Order, it would be a departure from what our courts have decided over the years. Under the circumstances, it behooves this court to show objectivity, and allow this case to be tried on the merits, rather than in the discovery phase. Indeed, “Objectivity is best obtained from a review of the precedent on which the court relied.” See, *United States v. Eastern Air Lines, Inc.*, 923 f.2d 241, 244 (2d cir.1991).

No substantial injury to Plaintiff if stay granted:

As established in Defendant's pleadings in connection with Plaintiff's Motion to Compel, the information ordered by the Magistrate to be provided is irrelevant to the resolution of the instant case. Plaintiff already has the

names, addresses and other identification of scores of SAPF members, as evidenced by the 9,000 or so pages of letters written on behalf of such members which were provided by Plaintiff in discovery. The identity of more of them has no purpose but to harass and intimidate them. If Defendant believes that crimes have been committed by any non-parties to this injunction suit, then the government already has the means by which to investigate such potential crimes. But, using the discovery process in a suit alleging crimes by SAPF is not the means to do so.

Plaintiff has alleged no fact in the complaint which could be determined to be more or less probable by this information. Therefore, the information is even outside the scope of discovery. Further, the other reasons Plaintiff gives for needing a membership list are also not relevant to the resolution of the injunction suit, since they would apply only if an injunction is ultimately issued. Therefore, no injury, let alone substantial injury, would be incurred by Plaintiff by not receiving a list of SAPF's members before the resolution of Defendants' OBJECTION TO ORDER OF MAGISTRATE JUDGE.

Status quo:

Further, in ruling on a motion to stay an order, the district court's objective is to preserve the *status quo* during the pendency of an appeal.

Kidder, Peabody & Co., Inc. v. Maxus Energy Corp., 925 F.2d 556, 565 (2d Cir.), cert. denied, 501 U.S. 1218, 111 S.Ct. 2829, 115 L. Ed.2d 998 (1991); 7 James W. Moore et al., Moore's Federal Practice p 62.05 (2d ed. 1993). Accordingly, it is only proper that no action be ordered that will permanently impair the rights of association and speech of Defendants, when Plaintiff will not be injured even temporarily if the order is stayed. Given this set of circumstances, the best the court can do is balance the hardships.

In doing so, it behooves this court to acknowledge that a stay during the pendency of Defendants' Objection would not burden Plaintiff at all. Plaintiff alleges that members of SAPF *might* be breaking tax laws, which is inconsistent with the American doctrine of being "innocent until proven guilty." Yet there has been no specific allegations made in the complaint of any such law-breaking by such members. And, as discussed above, Congress gave the IRS all the powers it deemed necessary to accomplish its purposes, so Plaintiff is, even without a list of SAPF's members, as well equipped to investigate possible crimes as Congress ever intended. Indeed, granting this motion in favor of Defendants would constitute maintaining the status quo and adherence to the United States Constitution, consistent with the intentions of the Founders and Framers, who advocated the right to free

speech—and particularly, personal, religious and political speech.²

Chances of success on the merits:

Next, this court need consider the question of whether the Defendants have a strong probability of obtaining a reversal of Magistrate Bredar's order. Defendants bear the burden of showing a substantial possibility, although less than a likelihood, of success on appeal. *Hirschfeld*, supra, 984 F.2d at 39. All things considered, Defendants do indeed have a substantial possibility of prevailing on the merits here.

First, the information lies outside the scope of discovery, in that it neither narrows the issues for trial, nor makes any fact alleged in the complaint more or less probable. Second, compelling SAPF, a membership organization (and not a “business”) engaged in political speech, to reveal the identities of all of its members, is an infringement of their rights of free speech and association. Third, Magistrate Bredar based his erroneous conclusion that SAPF is a business on the false premise that an entity which sells goods or services is, per se, a business, rather than on the distinguishing character of businesses—the profit motive. Fourth, because of that erroneous conclusion, Magistrate Bredar improperly disregarded Defendants' constitutional claims. Thus, Defendants have a substantial expectation of

² Actually, there are religious aspects to the Free Speech that SAPF currently enjoys. Civil liberty is a principle that comes right out of the Christian Bible.

having Magistrate Bredar's faulty conclusions corrected, and having his order reversed.

Interests of the public:

Probably the most relevant criterion of all, is that concerning the interest of the public. On the one hand, the public has an interest in seeing that the laws are complied with; on the other hand, they also have an interest in preserving their 1st Amendment rights to freely assemble, associate, and speak to the issues of the day. Yet, while the effect on the latter is immediate, the effect of the former is not. That it, enforcing compliance with the tax laws has virtually no time constraints—if some crime is not uncovered today, it will be uncovered tomorrow, or next week, or next year. Whenever it is uncovered, it must still be investigated before any action can be taken.

The Internal Revenue Service (through the Secretary of the Treasury) has been granted such authorities as Congress deems necessary and proper to accomplish its purposes in investigating tax crimes or underpayment of taxes. Those authorities have been sufficient in the past to allow the IRS to bring many criminals to justice and to collect many millions of dollars of delinquent taxes. So, even if Plaintiff never gets any list of SAPF members, it will have the exact same processes to collect delinquent taxes and

prosecute tax crimes as it always has. Thus, the public's interest in punishing possible tax scofflaws will be protected even if the Magistrate's Order is reversed.

On the other hand, the public's interest in protecting their 1st Amendment rights does not fare nearly so well. The detrimental effects on those rights will be immediate and everlasting. Once the right to freely associate or freely speak is breached, there is no putting the genie back in the bottle. The damage is done forever. To become subject to investigation merely because you joined with like-minded citizens in a political advocacy group, which is subsequently accused of violating some law, is the ultimate in the restraint of free speech. Certainly, members of the public will be significantly less anxious to associate with others to make their opinions heard—especially when their views are unpopular with the government—if they know that their names, addresses, phone numbers and email addresses might be ordered to be provided to the government on mere accusation of wrong-doing. Since it is impossible to prevent false accusations, no group's membership list could ever be safe from government prying.

So far, all that has happened in this case is that Defendants have been accused of violating various laws; but in the eyes of the law, Defendants are innocent of those crimes until proven guilty in a court of law. At the same

time, the members of SAPF are not even accused of any crimes in the instant case. To subject SAPF members to possible intimidation and harassment (and surely they might expect to suffer the same hardships now being put upon Defendants), as a result of forcing Defendants to release private information about them, would be a rank injustice. Certainly, the public has a substantial interest in having real justice done.

This is especially so here, where Plaintiff's stated need for the membership information it seeks is to investigate the tax affairs of those members, and to monitor compliance with any injunction it manages to get. However, neither of these reasons present any immediate need. Plaintiff sustains no injury by being made to wait until its allegations are proven before obtaining a list of SAPF members. On the other hand, SAPF, as well as its members, will sustain irreparable injury, if forced to comply with Magistrate Bredar's Order, especially while Defendants' objection to said Order is pending.

WHEREFORE, for the reasons stated herein, these defendants request a Stay of the ORDER compelling compliance with the discovery requests of the Plaintiff, during the pendency of the Defendants' objection of said ORDER.

Respectfully submitted on this 24th day of May, 2006.

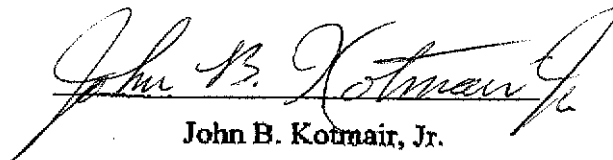

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CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Motion for Stay Pending Determination By District Judge of Objection to Order of Magistrate Judge" was sent to counsel for the plaintiff, Thomas Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 7238, Washington, D.C., 20044, by first class U.S. Mail with sufficient postage affixed this 24th day of May, 2006.


John B. Kotmair, Jr.