

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MAXWELL HODGKINS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION No. 3:06-CV-2114-B
	§	
ALBERTO GONZALES,	§	
Attorney General for the United	§	
States,	§	
	§	
Defendant.	§	

**DEFENDANT’S MOTION TO STAY PROCEEDINGS RELATED TO PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, TO
EXTEND TIME FOR RESPONSE**

Defendant Alberto Gonzales, by and through his undersigned counsel, respectfully moves to stay any proceedings related to Plaintiffs’ Motion for Partial Summary Judgment, filed April 30, 2007, until after the Court decides Defendant’s Motion to Dismiss or, in the Alternative, Transfer for improper venue. In the alternative, Defendant moves to extend the time for his response until July 13, 2007. In support of this motion, Defendant submits the accompanying memorandum.¹

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

¹Pursuant to Local Rule 7.1(a), counsel for Defendant consulted with counsel for Plaintiffs prior to the filing of this motion. Plaintiffs oppose the motion for a stay, but do not oppose the request for an extension.

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	§	
Defendant.	§	

**DEFENDANT’S MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY
PROCEEDINGS RELATED TO PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE, TO EXTEND TIME FOR RESPONSE**

INTRODUCTION

In their Motion for Partial Summary Judgment, Plaintiffs ask the Court to address the merits of their claims, notwithstanding the outstanding and logically antecedent question concerning the propriety of Plaintiffs’ chosen venue raised by Defendant’s pending Motion to Dismiss, or, in the Alternative, Transfer. Addressing the merits before the issue of venue has been determined not only completely undermines the venue statute, it risks wasting resources by beginning a process that might imminently be mooted by a ruling on Defendant’s pending motion. The Court has the inherent authority to “control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. North American Co., 299 U.S. 248, 254 (1936). It should exercise that authority to delay any further briefing on Plaintiffs’ Motion for Partial Summary Judgment until after Defendant’s Motion to

Dismiss or, in the Alternative, Transfer is resolved. In the alternative, Defendant asks this Court grant Defendant's unopposed request to extend the time for Defendant's response.

BACKGROUND

Plaintiffs filed this lawsuit challenging the constitutionality of certain federal gun control provisions on November 15, 2006. On January 16, 2007, Defendant filed his Motion to Dismiss or, in the Alternative, to Transfer. Defendant argued in his memorandum in support thereof that Plaintiffs had filed this lawsuit in an improper venue and that dismissal was therefore appropriate pursuant to Rule 12(b)(3), Fed.R.Civ.P. and 28 U.S.C. § 1406(a). In the alternative, Defendant argued that the case should be transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a). Plaintiffs filed their Opposition to Defendant's Motion to Dismiss ("Pl. Opp.") on February 5, 2006. Defendant filed its Reply on February 20, 2007.

This motion was still pending on April 30, 2007, when Plaintiffs filed a Motion for Partial Summary Judgment seeking entry of judgment in their favor on the merits. Pursuant to Local Rule 7.1(e), Defendant's response and brief "must be filed within 20 days from the date the motion is filed," or by Monday, May 21, 2007.

ARGUMENT

Defendant's request to stay proceedings related to Plaintiffs' Motion for Partial Summary Judgment is grounded on well-established principles of law. According to the Supreme Court, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel, and for litigants." Landis, 299 U.S. at 254. This power is most appropriately exercised in cases such as this, where granting the requested stay will avoid a "clear case of hardship or inequity in [requiring the movant] to go forward," but will not "work damage" to the other party. Id. at 255.

As Defendant argued in its memoranda in support of its motion to dismiss, Plaintiff's chosen venue fails to meet any of the requirements of 28 U.S.C. § 1391(e), the relevant venue statute. Specifically, neither the Plaintiffs nor the Defendant reside in this district and venue is therefore not proper pursuant to § 1391(e)(1) or (3). Likewise, Plaintiffs have not identified any "events or omissions giving rise to the claim" that have "occurred" in this district that could justify Plaintiffs' chosen venue under § 1391(e)(2). Instead, Plaintiffs defend their chosen venue by invoking principles of standing, arguing that "the events or omissions giving rise to the claim are the plaintiff's own action (or inaction) in failing to violate the law." Pl. Opp. at 5 (internal citations and quotations omitted). The United States District Court for the Southern District of Ohio recently rejected this precise argument in a virtually identical case brought by Plaintiff SAF and another individual plaintiff, holding that "[a]llegations that [plaintiff] is complying with an unconstitutional law for fear of prosecution in this judicial district cannot support venue under § 1391(e)(2)." Dearth v. Gonzales, Case No. 2:06-cv-1012, 2007 WL 1100426, at *4 (S.D. Ohio

April 10, 2007).² As in Dearth, this district “is an improper venue for the instant case because ‘a substantial part of the events or omissions giving rise to the claim’ have not occurred here.” Id.

Plaintiffs’ attempt to litigate the merits of their claims in this venue before this Court has determined its propriety, imposes on Defendant considerable “hardship [and] inequity,” and does so for no discernable reason. As the Supreme Court has stated, “the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.” Leroy v. Great Western United Corp., 443 U.S. 173, 183-86 (1979). Plaintiffs have chosen this venue as part of a coordinated campaign to challenge federal gun control provisions³ presumably because “[t]he Fifth Circuit holds that the Second Amendment secures individual rights,”⁴ but “[t]he venue statute was not intended to permit forum-shopping, by . . . permitting test cases far from the site of the actual controversy.” Reuben H. Donnelly Corp. v. FTC, 580 F.2d 264, 267 (7th Cir. 1978) (quoting Hartke v. Federal Aviation Administration, 369 F.Supp. 741, 746 (E.D.N.Y. 1973)). Defendant has not consented to suit in this district, and therefore “he has a right to invoke the protection which Congress has afforded him” in enacting the venue statute. Olberding v. Ill. Central R.R. Co., 364 U.S. 338, 340 (1953); see also Gogolin & Stelter v. Karn’s Auto Imports, Inc., 886 F.2d 100, 104 (5th Cir. 1989) (quoting Olberding). By forging ahead to the merits when a substantial challenge to the venue is

²Defendant submitted the district court’s opinion and order on April 12, 2007 as the exhibit to Defendant’s Notice of District Court’s Opinion in Related Case, which is docket entry 21.

³See, e.g., Pl. Opp. at 1 n.1 (describing Plaintiff SAF’s intention to have the Sixth Circuit revisit some of its Second Amendment decisions), id. at 19 n. 7 (describing the efforts of plaintiffs’ Virginia counsel to have the D.C. Circuit hold that the Second Amendment secures individual rights).

⁴See Pl. Opp. at 19 (citing United States v. Emerson, 270 F.3d 203 (5th Cir. 2001)).

still pending, Plaintiffs are attempting to deprive Defendant of his rights. Staying proceedings while the venue issue remains unresolved is therefore supported by principles of equity.

A stay would also prevent the considerable waste of time and resources that a response to Plaintiffs' motion for partial summary judgment would require. Plaintiffs have challenged the constitutionality of a federal law on multiple grounds and have done so under Fifth Circuit precedent. Responding to these challenges will consume considerable time and attention that will have been expended for no reason if this case is ultimately dismissed or transferred to an appropriate venue in a different judicial circuit. This Court should employ its inherent power to prevent this waste of party and judicial resources. See, e.g., Moody v. U.S.P.S., Case No. 03-872 (D.D.C. September 2, 2003) (Order dismissing motion for summary judgment as premature because motion to dismiss for lack of jurisdiction was still pending) (attached as Exhibit A).

Finally, a stay would not prejudice the Plaintiffs in any manner. If this Court ultimately denies Defendant's motion to dismiss or to transfer, the parties can turn to the merits. The short delay associated with the requested stay is not significant, given the likelihood that the ultimate resolution of the merits of Plaintiffs' constitutional challenges is likely to take years. See, e.g., United States v. Emerson, 46 F.Supp.2d 598 (N.D.Tex. 1999) (indictment unsealed December 10, 1998), rev'd and vacated, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002). Furthermore, Plaintiff Hodgkins has not claimed any concrete plans to visit this district, and will not be deprived of firearms if he does because he will be able to access his "securely stored" firearms. Compl. ¶ 7. Plaintiff SAF has not alleged that any of its members are even subject to the provisions at issue. Compl. ¶ 2. Accordingly, granting the requested stay does not present a hardship for Plaintiffs.

In summary, because staying any proceedings related to Plaintiffs' motion for partial summary judgment is the just, sensible and appropriate course, Defendant asks this court to grant Defendant's requested relief. If Defendant's pending motion to dismiss or transfer is denied, Defendant will advise the court within ten days, after conferring with Plaintiff, of a proposed schedule for addressing the issues raised by Plaintiff's motion for summary judgment.

In the alternative, if this Court denies this motion to stay proceedings, Defendant respectfully requests a continuation of its obligation to submit a brief in response until July 13, 2007. This request is based on the significant litigation commitments of Defendant's counsel in other cases, the significant time required to respond to the issues raised by Plaintiffs' Motion for Partial Summary Judgment, and Defendant's counsel's planned absence of at least three weeks to care for his wife and first child, due on May 12, 2007. Plaintiffs do not oppose this request.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests this Court to grant Defendant's Motion to Stay Proceedings Related to Plaintiffs' Motion for Partial Summary Judgment or, in the Alternative, to Extend the Time for Defendant's Response.

Dated: May 2, 2007

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that, on May 2, 2005, I had a telephone conference with Alan Gura, counsel for Plaintiffs, regarding this Motion. Mr. Gura indicated that Plaintiffs oppose Defendant's Motion to Stay Proceedings Relating to Plaintiffs' Motion for Partial Summary Judgment.

s/ John R. Coleman

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2007, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following individuals who have consented in writing to accept this Notice as service of this document by electronic means:

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