IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ST. MICHAEL'S MEDIA, INC., Plaintiff, v. THE MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.,* Defendants.	Case No. 1:21-cv-02337-ELH **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY THE SIGNING OF A CONTRACT PENDING APPEAL**

Plaintiff St. Michael's Media, Inc. ("Plaintiff" or "St. Michael's") hereby files its Opposition to Defendants Mayor and City Council of Baltimore, Brandon M. Scott, and James Shea's (collectively, the "City Defendants") Motion to Stay the Signing of a Contract Pending Appeal of Preliminary Injunction (Doc. No. 61).

1.0 Introduction

The day after Defendants protested that they have *not* interfered with SMG and Plaintiff trying to arrange a peaceful prayer rally, Defendants came to this Honorable Court, seeking to have this Court do what the City is not allowed to *overtly* do. The City moves for an Order from this Court to *prevent* SMG from engaging in the ceremonial act of putting ink to paper. This does not even seem to be a proper "stay" of anything, and is itself more of a motion for a preliminary injunction, by the City, against St. Michael's *and against SMG.* Why is the City moving for an order to prevent SMG and St. Michael's from doing anything? How is the City solicitor both representing the City and SMG, yet seeking an order *against* SMG?[1] The "stay" or "preliminary injunction" (which is more what this is) should be denied. SMG **is free to sign the contract**

[1] The Plaintiff has argued, ad nauseum, that this is a conflict. The Plaintiff does not waive this position, but unless the Court invites further discussion of it, the Plaintiff will accept the apparent law of the case that Maryland permits counsel to take actions contrary to the interests of its client, if that counsel is employed by another client who desires those actions to be taken.

without the City's interference, either overt, covert, or cleverly implied. SMG should be unbound from the City's shackles – not bound by an order of this Court.

Let us presume, for a moment, that SMG has a more reverent view of the First Amendment than the City of Baltimore and its' management has a conscience, the desire to rent the pavilion, and the desire to be released from this lawsuit, and the desire to avoid discovery into its practices and records for the pendency of this case. Let us also presume, for the sake of argument, that the City of Baltimore did the right thing and told SMG "*go ahead and sign it, if you want to, we will not interfere with your decision in any way*." What would happen then? If the City prevails at the Fourth, as it is so confident that it will, then the City would regain the right to cancel the event. The Motion seems to have no purpose.

The City claims that failing to impose this relief would have the effect of *forcing* SMG to enter into a contract with St. Michael's. (Doc. No. 61 at 3.) Exactly! The Plaintiff and SMG are in a contract. All that is left is the symbolic act of signing the contract. Signatures are not *necessary* for a contract to exist, but they do remove the doubt that both parties have fully assented. *See NeighborCare Pharmacy Servs., Inc. v. Sunrise Healthcare Ctr., Inc.*, No. JFM-05-1549, 2005 U.S. Dist. LEXIS 34404, 2005 WL 3481346, at *2 (D. Md. Dec. 20, 2005). "'The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.'" *Id*. (quoting 17A Am. Jur. 2d Contracts § 34 (2004)). The Parties should be permitted to remove that doubt with a simple piece of ink on paper – which would not impact the City's rights whatsoever.

At the hearing on October 14, the general manager of SMG, Frank Remesch, made it clear that the only thing remaining was the formality of a signature:

> **Q: So you testified that it was your understanding that the City was telling you not to sign the contract?**
>
> **A: Per the email, correct.**
>
> **Q: Absent that, would you have signed the contract?**

A: I probably would have spoken to counsel, . . . SMG's counsel.

. . .

Q: Other than signing it, is there something else that needs to be done on it?

A: No, I think that would be it.

(*See* transcript of October 14, 2021 hearing on Motion for an Order to Show Cause, attached as **Exhibit 1**, at 53:9-21.)[4]

Similarly, Michael Voris of St. Michael's Media considered the final signature to be the only remaining act. (*See* transcript of September 30, 2021 preliminary injunction hearing, attached as **Exhibit 2**, at 199:12-23 (Mr. Voris testifying that "I'm of the I think pretty solid understanding that you don't have to physically sign a piece of paper for there to be a contract. That's more or less just ceremonial") and 250:7-12 (Mr. Voris testifying that, prior to August 5, 2021, Plaintiff considered the contract with SMG to be a "done deal"). Both parties have demonstrated mutual assent and mutual understanding that there is a contract in place.

What the City calls an "additional term" was, in reality, an inducement offered by St. Michael's in order to remove SMG from this lawsuit. (*See* Emails to City and Rider to Pier Six Pavilion Use License Agreement, attached as **Exhibit 3**, at ¶ 1.) This does not mean that the entire contract had been refuted by anyone, not SMG and not St. Michael's. The only entity who wants to refute the contract is the City of Baltimore.

With the ceremonial act of the second signature[5] on the contract, all that will remain to be done will be to determine if the Fourth Circuit will permit the City to kibosh the contract. If the Fourth Circuit contradicts this Court's First Amendment analysis, then the City will flex it's power with the imprimatur of the mighty Court of Appeals. The only "harm" that will come to anyone from the ceremonial act of adding a final signature will be that St. Michael's will be forced to

[4] The Court found Mr. Remesch's testimony credible. (*Id*. at 58:8-9.)

[5] As a reminder, SMG did, in fact, provide a new, final contract, for nothing more but a final signature, after the Court issued its Temporary Restraining Order. (Doc. No. 31-2.) St. Michael's filed suit so that it could move forward without City interference. There is no uncertainty as to the intent of the parties to this contract nor a single material term.

retreat, tell its members to cancel their reservations, and likely lose face and a lot of money.[6] Why does the City insists that St. Michael's not take this risk?

The City is confident that the Fourth Circuit will overturn the existing injunction, at which point they will presumably have the right to prohibit the event – with the Fourth Circuit's blessing. They are not harmed by SMG doing what it wants to do, absent the City's unconstitutional interference. Just as in August 2021, and at all subsequent times, the sole impediment to the parties formalizing their assent to the contract is the City's unconstitutional viewpoint-based interference.

2.0 The "stay" would not *preserve* the status quo.

The City argues that the "status quo" in this case is what it created by violating the First Amendment. This misstates what the purpose of an injunction is. Injunctions, like the one the Court ordered, may restore the prior status quo, when the nonmoving party has unlawfully disturbed it. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012).

The City Defendants argue that "the status quo prior to the action was that no contract existed." (Motion, at 3.) Incorrect. There was a contract,[8] with only execution as a remaining formality. The City's tortious interference disturbed that contract/execution. The Court's Preliminary Injunction *restored the status quo* that existed before the City Defendants interfered with Plaintiff's discussions with SMG – discussions that had been so fruitful that the only thing remaining to be done was the fixture of a signature. (**Exhibit 1** at 53:9-21.) That is the simplest

[6] SMG will, however, be exposed to an amended complaint alleging damages for breach of contract and promissory estoppel. Its only justification for backing out of the contract is that the City told them not to. But, the only contractual clause in the record that ostensibly gives the City the right to cancel the contract is, by its very terms, inapplicable. It gives the City the right to cancel the contract for one reason only – if the party renting the facility had complaints last time, and security issues could not be managed. (Doc. No. 14-3.) There is no record evidence of a complaint. Accordingly, the City's interference is not only unconstitutional, but ultra vires. This was argued at the Injunction hearing, but the Injunction did not address it. (Transcript of October 1, 2021 hearing on preliminary injunction, attached as **Exhibit 4**, at 22:19-24:1; 26:23-27:17; 49:7-20). This is a likely source of concern for the City as well – and this realization may be what precipitated this Motion.

[8] St. Michael's acknowledges that the Court disagrees, but it respectfully maintains its position in order to prevent any argument that it has waived or retreated from this position.

analysis. The City Defendants interfered with the status quo – a public forum being governed under the principles demanded by the First Amendment. Restoring the status quo means SMG executes the document and the event proceeds. The City just cannot seem to accept the fact that injunctions do more than freeze things in time, after wrongdoing, for the benefit of the wrongdoer.

The status quo is that SMG and the St. Michaels have a contract, and the only roadblock to the prayer rally taking place is the City's insistence that it can prohibit it, because the City government does not like two of the people scheduled to speak at it. When the City of Baltimore decided to interfere with the agreement between SMG and St. Michael's two days later, it was interfering with an agreement that had already been confirmed by conduct. Regardless of whether the actual written piece of paper had ink on it, the parties to the agreement – SMG and St. Michael's – had agreed to each and every contractual condition that would govern the November 2021 rally. There was a contractual agreement, and the only reason that it was not fully executed is that the City Defendants forbade SMG from doing so.

As stated, injunctive relief can either maintain the status quo or **restore it prior to a defendant's unlawful or unconstitutional actions**. *See Aggarao v. MOL Ship Mgt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (holding that "it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions … such an injunction restores, rather than disturbs the status quo ante"); *see also Savoie v. Merchants Bank*, 84 F.3d 52, 58-59 (2d Cir. 1996) (upholding preliminary injunction that restored the status quo by ordering bank to escrow $500,000, noting logistical hurdles to restoring status quo were "properly laid at the doorstep of the Bank, which acted precipitously, not the plaintiffs, who appropriately pursued their legal remedies"); *United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987) (upholding preliminary injunction requiring defendant to resume paying insurance premiums, in part because during the "last uncontested status," defendant had paid premiums).

In this case, the "last uncontested status" occurred when SMG and St. Michaels' were working together, before the City Defendants forbade SMG from placing a signature on the

contract, pursuant to paragraph 11 of the Contract between SMG and the City.[9] The City Defendants tore the contract from the two willing parties' hands, for unlawful reasons. The City cannot violate the Constitution to create a new status quo, in its own censorious image, necessitating a lawsuit, and then claim that injunctive relief disturbs the status quo that it unlawfully created. If that were the case, then St. Michael's could simply go occupy the MECU Arena, and then claim that its de facto possession of the pavilion is the "status quo." Nevertheless, the City persists that the status quo is what the City created – not what lawful citizens were engaged in prior to its unconstitutional actions.

3.0 The City Defendants are not likely to succeed on the merits.

The City Defendants acknowledge there is essentially no chance the Court will change its mind on the issue of whether they violated Plaintiff's First Amendment rights. Their arguments have already been addressed in Plaintiff's briefing, which is incorporated by reference. (*See* Doc. No. 15 at 8-9 & 12; Doc. No. 31 at 4-19.)

There is one factual development that **has occurred** since the Court's Preliminary Injunction Order, however, that presumably has raised the City's concern enough to file this Motion. During the October 14, 2021 hearing on Plaintiff's Motion for an Order to Show Cause, SMG's General Manager, Frank Remesch, testified that the only thing remaining for a formal contract for Plaintiff's use of the MECU Pavilion was a signature. (**Exhibit 1** at 53:9-21.) Everyone involved had already expressed their assent to all of the terms.

Under Maryland law, "[t]he formation of a contract requires mutual assent (offer and acceptance), an agreement definite in its terms, and sufficient consideration." *CTI/DC, Inc. v. Selective Ins. Co. of Am.*, 392 F.3d 114, 123 (4th Cir. 2004) (citing *Peer v. First Fed. Sav. and Loan Ass'n of Cumberland*, 273 Md. 610, 331 A.2d 299, 301 (Md. 1975)). "An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract,

[9] The validity of this use of Paragraph 11 was contested at oral argument. (**Exhibit 4** at 22:19-24:1; 26:23-27:17; 49:7-20.) But, the Court did not address this issue in its Preliminary Injunction. The City's use of this Paragraph appears to be *ultra vires* nonetheless.

is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Hercules, Inc. v. United States*, 516 U.S. 417, 424, 116 S. Ct. 981, 134 L. Ed. 2d 47 (1996) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597, 43 S. Ct. 425, 67 L. Ed. 816, 58 Ct. Cl. 709 (1923)).

Here, SMG and St. Michael's had an agreement implied in fact, at latest, by August 2, 2021. SMG sent St. Michael's the final, draft contract for review on July 14, 2021. (Doc. No. 16-2, at 30.) On July 15, 2021, St. Michael's responded that it had one "slight correction" to the agreement and informed SMG that it was in the process of obtaining a certificate of insurance and the remaining deposit amount. (Doc. No. 16-2, at 29.) Thereafter, SMG and St. Michael's had some discussion on a modification – how much it would cost to open the doors earlier than anticipated and to remain at the rally site for a few hours after the rally concluded. (*See* Doc. No. 16-2, at 25-28.) This is not a "re-negotiation" nor a refutation of the terms already agreed upon. The parties did not contemplate that the doors would open earlier or there would be no rally. The parties agreed that there would be a rally, and at this point they were simply sharpening the point on what time and what price for the extra time.

On July 20, 2021, SMG informed St. Michael's that, as a private event, it was not permitted to sell tickets to the rally – that ticket sales must go through Ticketmaster. (Doc. No. 16-2, at 24.) St. Michael's responded that it would change what it was doing, and proceed as directed by SMG. (Doc. No. 16-2, at 24.) Nothing here seems to suggest anything but Plaintiff's detrimental reliance on SMG moving forward. **SMG even enforced that term of the contract** and St. Michael's changed its conduct based on SMG's enforcement of this term. St. Michael's immediately complied with this material term of the contract, upon notice from SMG that its actions were contrary to it. There was already a contract that was being complied with.

Thereafter, on August 2, SMG requested some additional details. (Doc. No. 16-2, at 17-18.) St. Michael's agreed to each and every remaining issue posed by SMG, and SMG sent St. Michael's the finalized agreement, which contained the terms the parties had already confirmed were contained in their final agreement. (Doc. No. 16-2, at 17-18.)

In addition to controlling law very clearly establishing that a signature is not necessary for the existence of a contract,[10] the admission from SMG's general manager during the October 14 hearing is a new fact that predicated this Motion – this admission by SMG ends the City's ability to claim that there is no contract. SMG has not claimed a lack of a contract or that it would be damaged by having to sign it – only the City has.

4.0 Plaintiff will be injured if the Motion is granted.

While St. Michael's and SMG did not have a signed contract in 2018 until "a few weeks before its last meeting at the same venue" (Doc. No. 61 at 6), Plaintiff's witnesses testified extensively that this 2021 event would be significantly bigger than the 2018 event and would require significantly more planning and logistics work. (*See* **Exhibit 2**, at 189:3-191:1.) This cuts both ways. The court, *sua sponte*, raised the issue that this would be a bigger rally than 2018. (*See* **Exhibit 4** at 17:7-17.) This also means that logistics and planning is more complicated.

The City Defendants are attempting to delay continued performance and certainty so that St. Michael's will be handicapped in holding its rally regardless of the outcome of its appeal to the Fourth Circuit. The City Defendants' continued interference has already made it significantly more difficult to hold the November 16 prayer rally as planned, and this difficulty compounds each day the City continues to forbid SMG from signing the agreement in violation of this Court's Orders. Apparently now, the City wants a court order against its co-defendant and the plaintiff from continuing their fruitful and collegial discussions and arrangements.

The City Defendants misrepresent that St. Michael's is only seeking to have the contract executed now because it "wants to have a breach of contract claim if it loses its constitutional

[10] It is a true statement of the law that parties can enter into contractual negotiations with the caveat that there is no deal at all until signatures are affixed, making the signature of each party a condition precedent to the formation of the contract. *See All State Home Mortg., Inc. v. Daniel*, 187 Md. App. 166, 181 (2009). **This is an exception that proves the rule, however, as the existence of a signature is not normally considered a condition precedent**. *Id*. Here, there is nothing in the record suggesting that such a term is in the contract, or was even hinted at during the creation of the contract. The customary term that would be expected to contain such a provision, Paragraph 19(c), only requires that amendments be executed.

claim." (Motion, at 6.) Strangely, SMG is not the movant – the City is. St. Michaels' understands that if the City can cancel the contract, then SMG might not have any choice but to back out, and thus this would be a *force majeure*. However, St. Michael's already offered a rider to SMG that would excuse SMG entirely in the unlikely event that the City Defendants prevail before the Fourth Circuit. (*See* **Exhibit 3** at ¶ 1) (stating that "[i]n the event the City of Baltimore prevails in the Appeal or the said injunction is ever vacated prior to the Event, and the City of Baltimore is permitted to deny the Event…, such shall be deemed to excuse SMG's performance of the Use License Agreement.") The City will not permit SMG to even agree to this, and wants this Court to essentially enter an injunction against SMG and Plaintiff to stop them from this reasonable agreement. Why? Why do we need injunctive relief from this Court to stop that?

That Plaintiff has given SMG an "out" if the City Defendants prevail before the Fourth Circuit.[11] All this motion seeks is an Order that arrests both SMG and Plaintiffs from doing what they both want to do. Where is the City's authority to request this? Paragraph 11? That has been shown to be inapplicable, despite being what the City relied upon.

5.0 A stay is not in the "public interest."

The public interest almost always "favors protecting First Amendment rights." *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 632 (S.D. W.V. 2013); *see also Carey v. FEC*, 791 F. Supp. 2d 121, 135-36 (D. D.C. 2011); *Mullin v. Sussex Cty., Del.*, 861 F. Supp. 2d 411, 428 (D. Del. 2012). The City Defendants believe that there is a "political opposition to the speaker" exception to the First Amendment. If the City is allowed to infringe on the Plaintiff's rights, they will undoubtedly use that permission to infringe the rights of others. Further, the Motion seeks to ask the Court to stop two parties from entering into, or performing on (depending on your point of view) a Contract. There is no public interest in the Government interfering with a contract in this scenario.

6.0 The balance of equities favors Plaintiff.

[11] Due to the existence of this "out" for SMG, the City Defendants' argument that their appeal would become "moot" if SMG signs a contract with Plaintiff is meritless.

If the City's Motion is granted, the City Defendants will use that to prevent Plaintiff's rally from occurring regardless of the results of its appeal. If the City is released from any restraint on its conduct to prevent the prayer rally, what other underhanded actions does it have in mind, other than holding SMG hostage? The Plaintiffs could not have imagined that a City, much less a City that is in sight of the hallowed ground of Fort McHenry, would so brazenly trample on the First Amendment.

If the Motion is denied, as the City argues, the other parties will be "forced" to move forward with a peaceful prayer rally. Of course, St. Michael's has offered a rider that gives SMG a hard "out" from holding the rally if the City Defendants prevail in that appeal, and that offer has not been revoked. SMG could sign it right now, and St. Michael's would be bound by it.

In other words, the City Defendants (and SMG) lose nothing if the Motion is denied.

7.0 Conclusion

For the foregoing reasons, the Court should deny the Motion to Stay (or for an effective injunction) and allow SMG and Plaintiff to enter into a contractual relationship for use of the MECU Pavilion, as they have been trying to do for months.

Dated: October 18, 2021.

Respectfully Submitted,

/s/ Marc J. Randazza

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CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of October, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Marc J. Randazza
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