IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ROBERT KLEIN ENGLER, and DR. GENE A. REISINGER,	)	
Plaintiffs,	)	No. 08 CV 3696
v.	)	Honorable Milton I. Shadur
VILLAGE OF OAK PARK,	)	
Defendant.	)	

MOTION TO HOLD FEE PROCEEDINGS IN ABEYANCE

NOW COME the Plaintiffs in the case of *Otis McDonald, et al v. City of Chicago*, docketed in this Court as 08 CV 3645, OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC. and ILLINOIS STATE RIFLE ASSOCIATION, by and through LAW FIRM OF DAVID G. SIGALE, P.C. and GURA & POSSESSKY, PLLC, their attorneys, and moves this honorable Court to hold the fee proceedings currently pending in this case, and in 08 CV 3697, in abeyance until the *McDonald* Plaintiffs have had an opportunity to file their motion for fees and costs, or to otherwise be heard regarding the prevailing party question before this Court. In support thereof, the *McDonald* Plaintiffs state as follows:

1. The *McDonald* case was filed on June 26, 2008. The instant case (and a third case captioned *National Rifle Association, et al v. City of Chicago*, 08 CV 3697) was filed on June 27, 2008. Early in the litigation, pursuant to the Defendant's Motion, the Court reassigned all three cases to its docket as related under Local Rule 40.4. Until the Court granted judgment for the Defendant in

December, 2008, the three cases were tracked together for litigation purposes.

2. On June 28, 2010, the United State Supreme Court, in direct response to the Petition for *Certiorari* filed by Plaintiffs, held that the Second Amendment to the United States Constitution applied to state and local governments by operation of the Fourteenth Amendment to the United States Constitution. The holding was based on both the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses, both arguments advanced by the *McDonald* Plaintiffs.

3. Shortly after this favorable ruling in the Supreme Court, counsel for the *McDonald* Plaintiffs contacted the attorneys for the Defendant regarding the fee issue contained in 42 U.S.C. § 1988. Plaintiffs provided the fee and cost information requested by Defendant in August, 2010. In turn, Defendant offered no information and no offer, stating only in general terms they would "get back" to Plaintiffs' counsel. Plaintiffs repeatedly demanded a response to their fees and costs information, but Defendant consistently deferred the matter, promising that a response would be forthcoming but never actually delivering any sort of response whatsoever.

4. The *McDonald* Plaintiffs' counsel and Defendant's counsel have been in near-constant communication for the last number of months, both over the fee issue in this case, and regarding the rather frantic litigation in the case of *Rhonda Ezell, et al v. City of Chicago*, 10 CV 5135, currently pending before the Seventh Circuit Court of Appeals and before Judge Kendall.

5. Pursuant to Local Rule 54.3, last week Plaintiffs' counsel contacted Defendant's counsel about the 70th-day Joint Statement the two sides were required to complete.

6. Then, for the <u>first time</u>, on December 17, 2010, counsel for Defendant notified *McDonald* counsel of the existence of the instant fee proceedings by NRA, the existence of a

prevailing party "issue" before the Court, and the existence of a briefing schedule regarding said issue.

7. Following that revelation, *McDonald* Plaintiffs' counsel pulled the last Court Order and the briefs filed before this Court on December 15, 2010.

8. Until December 17, 2010, Plaintiffs' counsel never heard of any of this, including that there was a Court status on the issue on December 21, 2010.

9. The issues pending in the NRA's fee proceedings directly affect the *McDonald* Plaintiffs, including all the factual and legal issues included in the analysis of "prevailing party status." It is legally prejudicial, and simply unfair, to the *McDonald* Plaintiffs that all this activity has been going on, in a case they won, and they have had no knowledge of the pendency of any of it, especially since Defendant knew the *McDonald* Plaintiffs were undertaking the required steps to file their own fee Petition. It is woefully obvious the Defendant was hoping this Court would rule on an issue materially affecting the *McDonald* Plaintiffs' interests (1.) before their own fee Petition could even be filed, and (2.) without the *McDonald* Plaintiffs finding out about it until it was too late.

10. *McDonald* Plaintiffs' counsel assert they have been deliberately misled by the Defendant. The Defendant will claim in court that it offered to agree to a Motion to an extension of time to allow the *McDonald* parties additional time to prepare a fee motion, but this is completely unacceptable. Defendant has defaulted on its obligations under Rule 54.3 and must bear the consequences for that default. Meanwhile, the solution is not to delay *McDonald* Plaintiffs' fee request – which has been deliberately ignored for nearly five months – any further, and assure that *McDonald* Plaintiffs are further prejudiced by being completely excluded from the

determination of whether they are prevailing parties.

11. To the contrary: the Court should ensure that *McDonald* Plaintiffs have a meaningful opportunity to be heard. The Seventh Circuit has ordered that Plaintiffs "may file appropriate motions in the district court" for attorney fees and costs, Order, No. 08-4244, at 2 (Aug. 25, 2010), and that order presupposes that Plaintiffs be afforded a meaningful hearing and opportunity to participate on the attorney fee question. The prejudice from this request to NRA would be non-existent: *McDonald* Plaintiffs will file their fee motion within the deadline NRA seeks to extend. The only prejudice to Defendant is that it will have to litigate *McDonald* Plaintiffs' entitlement to attorney fees against the *McDonald* Plaintiffs – a circumstance Defendant should not be able to circumvent.

WHEREFORE, the Plaintiffs in *Otis McDonald, et al v. City of Chicago*, docketed as 08 CV 3645 in this Court, OTIS McDONALD, ADAM ORLOV, COLLEEN LAWSON, DAVID LAWSON, SECOND AMENDMENT FOUNDATION, INC. and ILLINOIS STATE RIFLE ASSOCIATION, pray this honorable Court hold the fee proceedings in 08 CV 3696 and 3697 in abeyance until such time as (A.) the *McDonald* Plaintiffs have an opportunity to brief the prevailing party issue pending in their case, and/or (B.) the *McDonald* Plaintiffs file their own fee Petition. The *McDonald* Plaintiffs also request any and all further relief as this Court deems just and proper.

Respectfully submitted,

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By: /s/ Alan Gura
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Attorneys for Plaintiffs

CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On December 21, 2010, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;

2. Pursuant to F.R.Civ.P. 5, the undersigned faxed this document to Stephen A. Kolodziej, Lance C. Malina and Jacob Karaca. The undersigned certifies that, to his best information and belief, there are no other non-CM/ECF participants in this matter.

/s/ David G. Sigale
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OTIS McDONALD, et al.,	)	Case No. 08-C-3645
	)	
Plaintiffs,	)	**DECLARATION OF**
	)	**ALAN GURA**
v.	)	
	)	
CITY OF CHICAGO,	)	
	)	
Defendant.	)	
	)	
	)	

DECLARATION OF ALAN GURA

I, Alan Gura, am competent to state and declare the following based on my personal knowledge:

1. Shortly following the Supreme Court's decision in this case, I contacted Chicago Corporation Counsel Mara Georges to initiate settlement discussions relating to our claim for fees and costs. Ms. Georges referred me to Assistant Corporation Counsel Michael Forti. Mr. Forti asked me to provide him with our expenses, hours, and rates.

2. On August 6, 2010, I provided Mr. Forti with the requested information. We subsequently spoke again, and Forti asked for additional clarification regarding our firm's rates. I followed through on August 30, 2010, with an additional email explanation, which we discussed. It was our mutual understanding that the City, having now received our claim, would respond to it. Mr. Forti promised a response would be forthcoming.

3. Unfortunately, despite repeated requests for the City's position regarding settlement, Mr. Forti steadfastly declined to provide *any* response to our initial demand and information.

4. Mr. Forti and I (along with Mr. Sigale) are opposing counsel in another matter before this Court, and we have interacted with each other at some length in the course of that litigation. However, whenever I would remind Mr. Forti that we were awaiting a response relating to our fees and costs claim in this matter, he always deferred the issue to some indefinite later date, claiming that he would get back to me eventually.

5. I had repeatedly advised Mr. Forti that his failure to respond is interpreted by us to mean that Defendant's position is "zero." Mr. Forti steadfastly denied that his position would be zero, and suggested a meaningful number was always around the corner. I have told Mr. Forti I would believe him when I saw it. In the absence of an impending filing deadline, it soon became pointless to keep reminding Mr. Forti that he needed to respond to us.

6. With the deadline approaching for us to complete the joint statement envisioned by Local Rule 54.3(e), I wrote Forti on December 16 reiterating our demand that some effort be made to engage in settlement discussions and respond to our positions, which had now been outstanding for over four and a half months.

7. On December 17, 2010, Forti emailed me back, stating, "It is true that you laid out your proposal several months ago and I have not officially gotten back to you." Forti expressed surprise that I had not contacted him regarding the briefing ordered in the NRA case regarding prevailing party status.

8. This was the first I had ever heard of such briefing. We had received no notice of that order, or of the briefing, from anyone – not from the NRA, not from the City, and not from the Court – notwithstanding the fact that the cases were related, and notwithstanding the fact that we had been demanding for some time that the city respond to our fees and costs position.

9. Mr. Forti said he would engage in settlement discussions if these would be kept confidential, which of course, I agreed to because that is a basic feature of any settlement discussion. Forti had suggested we speak on December 21 at 11:00 a.m. central, which, I soon discovered, was immediately *after* this court's status conference in the NRA matter. I emailed Forti back, stating that we wanted a good faith settlement number well before that hearing. It was not acceptable that the city refuse to discuss settlement with us for over four and a half months, until the moment just after which the Court might rule on the issue of whether we are prevailing parties – without our participation.

10. On the morning of December 20, Forti emailed me back, suggesting we speak but declining to confirm whether any settlement number would be provided at all.

11. On the afternoon of December 20, Forti emailed again. He made no effort to engage in any settlement discussion, but suggested that we seek to extend the time to prepare a joint statement and related materials, as the Court may rule as to whether we are even entitled to fees in the context of the NRA case.

12. It has long been obvious that Defendant has no intention of complying with any provision of Rule 54.3, or of engaging in *any* good faith discussion of the attorney fees and costs issue.

13. We object to the Court making any decision purporting to control our right to recover attorney fees without our participation, especially in light of Defendant's conduct. Respectfully, we should have been provided notice as we are parties in the related case, as the prevailing party determination in the NRA's litigation potentially impacts our rights, and considering that we were the parties who actually won the case at the Supreme Court.

14. It would be manifestly unfair to set about the determination of our right to recover attorney fees and costs without providing us notice or hearing our position on the matter, while the Defendant continues to pretend that a settlement offer is just around the corner—until the very right to fees is determined.

15. On the other hand, there is no reason to rush into a decision regarding fee entitlement before we can be heard. Neither the City nor NRA would be prejudiced in the least in having the NRA matter held in abeyance pending our ability to participate meaningfully in the process.

I declare under penalty of perjury that the foregoing is true and correct.

This the 20th day of December, 2010.

/s/ Alan Gura
Alan Gura