

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION**

David D. BACH,

Plaintiff,

v.

Civil Action No.1:02-cv-1500 NAM/DRH

George E. PATAKI, in his official capacity as Governor of New York; Eliot SPITZER, in his official capacity as Attorney General of New York; James W. MCMAHON, in his official capacity as Superintendent, New York State Police; J. Richard BOCKELMANN, in his official capacity as Ulster County Sheriff,

Defendants.

**Plaintiff's Brief in Support of his Motion to Advance and Consolidate
the Trial on the Merits with the Hearing
on the Preliminary Injunction**

Plaintiff moves, in accordance with Rule 65(a)(2) of the Federal Rules of Civil Procedure, and Local Rule 7.1(b)(2), that this Court advance the trial on the merits and consolidate it with the hearing on the preliminary injunction. If the trial on the merits is consolidated, plaintiff asks the Court to treat Plaintiff's Brief in Support of his Application for Preliminary and Permanent Injunction, and Declaratory Relief as its opening brief.

Statement of the Case

On November 29, 2002, Bach filed an application seeking declaratory and injunctive relief before the United States District Court for the Northern District of New York. The defendants Attorney General Spitzer and Superintendent of State Police McMahon were duly served on November 29, 2002. The defendants Governor Pataki and Ulster County Sheriff Bockelmann were duly served on December 2, 2002.

The case has been set for a hearing at 10:00 a.m., January 8, 2003 before District Judge Norman A. Mordue in Syracuse. The pretrial conference is scheduled for 9:00 a.m., April 8, 2003 in Albany before Magistrate Judge David R. Homer.

On December 9, 2002, plaintiff conferred with counsel for the State and agreed to an extension for the filing of the State's Answer until December 26, 2002. The State however, has indicated that it likely would oppose a motion to consolidate but is still reviewing the matter.

Argument and Authorities

Rule 65(a) of the Federal Rules of Civil Procedure states pertinent part:

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible on the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

Subdivision (a)(2) provides express authority for consolidating the hearing of the application for preliminary injunction with the trial on the merits.¹ The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the

¹ See Note entitled "1966 Amendment," Rule 65 of the Federal Rules of Civil Procedure, p.243, West Group (2002 Ed.).

trial proper.² Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for preliminary injunction, since the evidence will be directed to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings.³ Further, to consolidate the proceedings will tend to expedite the final disposition of the action thus advancing the interests of the parties and the interests of judicial economy.

The present case offers an opportunity to consolidate the trial on the merits with the hearing on the preliminary injunction scheduled for January 8, 2003. Because the salient issues before the Court are legal rather than factual in nature, there appears to be little, if anything to be gained from a subsequent trial. It is anticipated that the January 8 hearing will mainly involve oral argument directed at the legal issues presently before the Court. The plaintiff does not intend to call any witnesses at this time. To the extent that the defendants might wish to proffer live testimony, such testimony can be heard during the January 8 proceeding. The present case thus not only qualifies for consolidation, but to do so will relieve the parties of unnecessary costs in litigation expenses and will lead to expedited resolution of all issues. Therefore, in the interests of judicial economy, and the avoidance of repetitive evidence, proceedings, motions, and opinions by the Court, plaintiff requests that the trial on the merits be advanced and consolidated with the hearing on the preliminary injunction thereby disposing of all relevant issues in a single proceeding.

Respectfully submitted,

Dated: December 10, 2002

By: _____
David D. Bach, Esq.
PA Bar # 44337
632 Secotan Road
Virginia Beach, VA 23451
(757) 396-7779 (W)
(757) 491-1457 (H)

² *Id.*

³ *Id.*