IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Arnold Fleck Plaintiff, vs. Jack McDonald, President of the State Bar Association of North Dakota; Aubrey Fiebelkorn-Zuger, Secretary and Treasurer of the State Bar Association of North Dakota; Tony Weiler, Executive Director of the State Bar Association of North Dakota; and Penny Miller, Secretary-Treasurer of the State Board of Law Examiners, in their official capacities, Defendants.	)	Civil No. 1:15-CV-00013 **DEFENDANTS JACK MCDONALD, AUBREY FIEBELKORN-ZUGER, AND TONY WEILER'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Plaintiff Arnold Fleck, an attorney and member of the integrated State Bar Association of North Dakota ("SBAND") has requested SBAND be enjoined from collecting or expending any member dues during the pendency of this action on the alleged basis SBAND has inadequate minimum safeguards in place to assure his dues are not utilized for expenditures not necessarily or reasonably related to the regulation of attorneys or the improvement of the quality of legal services available to the people of North Dakota. Plaintiff asserts SBAND's utilization of mandatory member dues in opposition to initiated Measure 6 (pertaining to child custody determinations) in the fall of 2014, without his consent, violated his rights under the First and Fourteenth Amendments to the Constitution of the United States of America.

Plaintiff's request for injunctive relief is premised upon the false assertion SBAND's

opposition to Measure 6 related to the ideology underlying Measure 6. In other words, Plaintiff wrongly asserts SBAND was opposed to Measure 6 based upon a preference for the factors to be considered by the judicial system in making child custody determinations. This is false. Instead, SBAND opposed Measure 6 due to the adverse impact passage of Measure 6 would have had upon the quality of legal services available to the people of the State. Passage of Measure 6 would have made virtually all active court orders affecting child custody determinations subject to immediate challenge and re-determination, thereby overwhelming an already stressed judicial system in North Dakota, and adversely affecting the quality of legal services available to the public. Passage of Measure 6 would have also likely adversely affected the perception of the quality of legal services in the State, if not in fact adversely affecting the quality of legal services, by upending the reasonable expectation of the public regarding the finality of judicial determinations affecting child custody, unrelated to material changes in the circumstances of the family members involved. The consequences of such a radical shift from a best interests and welfare of the child focused approach, to a parental-rights focused approach, would have likely stressed North Dakota's judicial system to a breaking point.

SBAND's expenditure of moneys obtained from mandatory dues paid by Plaintiff were for a purpose reasonably related to improving the quality of legal services available to the people of North Dakota, and were therefore properly chargeable. As a result, the alleged defects in SBAND's procedural safeguards pertaining to the expenditure of mandatory dues for non-chargeable expenses, is a moot point. In addition, Plaintiff lacks standing to challenge SBAND's hypothetical future violation of his rights, and is improperly seeking an advisory opinion. Further, SBAND's established procedures are adequate to protect the interests of its members.

In the alternative, even assuming the Court were to conclude injunctive relief is justified,

SBAND requests the Court narrowly tailor any injunction to assure Plaintiff is provided adequate minimum safeguards, while still preserving to SBAND it's right to active participation in the legislative process on issues affecting its members, it's right to take positions on legislative and ballot measures, and it's right to fund and engage in its numerous other functions not at issue in this case.

II. RESPONSE TO PLAINTIFF'S FACTUAL BACKGROUND

SBAND is a professional association of members of the legal profession licensed to practice law in the State of North Dakota and of attorneys who, by virtue of holding judicial or other office, are exempt from such licensing. The SBAND was created by statute and is administered by a Board of Governors ("BOG") elected from its membership. The objectives of the SBAND are to improve professional competence, promote the administration of justice, uphold the honor of the profession of law and encourage cordial relations among members of the State Bar. (Exh. A[1] at Art. 2.) In recent history, SBAND has received approximately 65% of its total funding from its share of annual license fees paid by members (hereinafter "member dues"). By statute, $75 of each annual license is paid to the SBAND to fund the lawyer discipline system, with 80% of the remainder of each annual license being paid to SBAND "for the purpose of administering and operating the association." N.D.C.C. § 27-12-04. In part, the SBAND investigates complaints against attorneys and facilitates attorney discipline, promotes law related education and ethics, facilitates and administers a volunteer lawyers program and lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects, monitors and keeps members of the bar updated on the status of various legislative measures, and lobbies the legislature on matters affecting

[1] Unless otherwise stated, all exhibits referenced in this brief are attached to the *Affidavit of Tony Weiler, Executive Director of SBAND* dated March 20, 2015 ("Weiler Aff."), filed herewith

regulation of the legal profession and matters affecting the quality of legal services available to the people of the State of North Dakota.

Plaintiff challenges the collection and expenditure by SBAND of mandatory bar dues for alleged political or ideological activities associated with SBAND's opposition to North Dakota Statutory Initiated Measure 6, commonly referred to as the North Dakota Shared Parenting Initiative. Specifically, Plaintiff challenges contributions and support provided by SBAND to Keeping Kids First Ballot Committee ("KKF") which opposed Measure 6. SBAND contributed a net total of $46,525.85 to KKF pursuant to a duly authorized unanimous vote of the BOG on September 13, 2014, and in accordance with SBAND's Legislative Policy (exh. C), constitution (exh. A) and bylaws (exh. B). Pursuant to these governing documents, a vote of the members of the SBAND was not required to approve such contributions. Minutes from the July 30, 2014 BOG special meeting (exh. N) note the BOG was concerned if Measure 6 passed, it "would create more litigation and obviously become a financial burden on families going through divorce." Contributions were paid by SBAND to KKF on September 17, 2014 ($40,000) and October 14, 2014 ($10,000). The electorate overwhelmingly voted against passage of Measure 6 on November 4, 2014. KKF subsequently returned $3,474.15 to SBAND. To avoid duplication, additional facts pertaining to these meetings are discussed directly in the Argument below.

Plaintiff asserts he learned of SBAND's activities regarding Measure 6 on September 22, 2014. (Doc. 1 at ¶ 58.) Twenty-one days later, on October 15, 2014, Plaintiff first advised SBAND's Execute Director Weiler, by telephone and email, of his objection to SBAND's opposition to Measure 6 on the basis such constituted a violation of his constitutional rights. (Weiler Aff. at ¶¶ 37-38.) In a series of email communications, Mr. Weiler informed Plaintiff numerous times he was entitled to request a refund of Plaintiff's pro rata share of the

contributions made by SBAND to KKF in accordance with SBAND's Legislative Policy. (*Id.* at ¶ 39; Exhs. R, S, T, U, V, W.) Despite confirming his understanding he was entitled to request a refund, Plaintiff has never requested a refund from SBAND. (Weiler Aff. at ¶ 37.) Contrary to Plaintiff's allegation, Mr. Weiler did not tell Plaintiff he would be entitled to a refund of "around $6 and change." (*Id.* a ¶ 39.) Instead, in response to Plaintiff's inquiry in exploring his options, Mr. Weiler informed Plaintiff, as an example, that in relation to a request for a refund on a nearly identical Shared Parenting Initiative – Measure 3[2] in 2006, a refund in the amount of "around $6 and change" was offered to the member, however, the specific refund to which Plaintiff would be entitled in relation to SBAND's opposition to Measure 6 would need to be calculated. (*Id.*)

III. ARGUMENT

In reviewing a motion for preliminary injunction, the Court must consider four factors: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant if the injunction is not granted; (3) the balance between the harm and the harm to the non-moving party if the injunction is granted; and (4) the public interest. *Dataphase Systems., Inc. v. C. L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). No single factor is dispositive. *Id.* "A preliminary injunction is an extraordinary remedy . . . ." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). "The burden of proving that a preliminary injunction should be issued rests entirely on the movant." *Gott v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995). As discussed below, consideration of the factors, as a whole, weigh in SBAND's favor.

A. Plaintiff Is Unlikely to Prevail On the Merits

[2] SBAND also contributed approximately $30,000 in opposition to initiated Measure 3, commonly known as the 2006 Shared Parenting Initiative, on the basis of its anticipated adverse impact upon the infrastructure of the judicial system in North Dakota, i.e. impact upon the quality of legal services available to the people of the State. SBAND's opposition in this regard was widely publicized. (Exhs. G, H, I, J, K.)

1. SBAND's Expenditures In Opposition To Measure 6 Were Reasonably Incurred To Improve The Quality of Legal Services Available To The People Of North Dakota

Plaintiff asserts SBAND's contribution to the Keeping Kids First Ballot Committee, and general opposition to Measure 6, constituted a non-chargeable expense unrelated to the improvement of legal services through the regulation of attorneys. Plaintiff is incorrect.

As a preliminary matter, Plaintiff misstates the applicable standard established under *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). In *Keller*, the United States Supreme Court determined expenditures of an integrated bar are chargeable if they are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal services available to the people of the State.'" *Id.* at p. 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843, 81 S.Ct. 1826, 1838, 6 L.Ed.2d 1191 (1961)(plurality opinion))(underlining added). Plaintiff attempts to narrow the permissible purposes for which mandatory dues may be expended by twisting this language by asserting "SBAND's chargeable expenditures are limited to those germane to a mandatory bar's purpose of improving the quality of legal services through the regulation of attorneys." (Doc. 4 at p. 6.) As stated in *Keller*, regulation of the legal profession is only one of two separate permissible purposes. The improvement of the quality of legal services available to the people of the State is another permissible purpose for which mandatory dues may be expended without member consent.

Principally at issue in this case is SBAND's contribution of money to KKF, which opposed Measure 6. The primary problem with Plaintiff's position is the failure to distinguish between the political/ideological aspects of Measure 6, from the practical consequences of passage of Measure 6 upon the quality of legal services, including through the judicial system

itself, available to the people of North Dakota. Specifically, whether creating a presumption each parent is a fit parent and entitled to be awarded equal parental rights and responsibilities by a court unless there is clear and convincing evidence to the contrary, as proposed under Measure 6, would be good policy, is a separate issue from the logistical and procedural complications such a major change to long-standing law would have upon the legal profession and court system in North Dakota. Measure 6 sought to overturn and replace the long-standing child-focused "best interests and welfare of the child" standard codified at N.D.C.C. § 14-09-06.2, which has been applied in virtually all child custody determinations in North Dakota since its original enactment in 1979, with a parental rights focused standard – a major change. Had Measure 6 passed, virtually every active child custody order in North Dakota would have been subject to immediate challenge on the basis a whole new set of criteria are to be applied in awarding custody, and other family law matters. The quality of legal services available to the people of North Dakota would have been adversely impacted by passage of Measure 6.

First, the judicial system in North Dakota is already over-taxed, and passage of Measure 6 would have, in all probability, created a surge in demand for access to the courts for purposes of custody re-determinations under the new standards. As recently noted by Chief Justice Gerald VandeWalle of the North Dakota Supreme Court in his State of the Judiciary address to the 64th Legislative Assembly on January 7, 2015:

> I have made no secret of the fact we need additional help. In the past 10 years, the caseload in our courts has increased dramatically, particularly in the oil-impacted counties. In these counties, it is easy to see the connection to increased population, increased business activity, and increased law enforcement. In other areas of the state, most notably Burleigh and Morton counties, it has been more of a gradual increase, yet one that is so persistent that these two counties are now home to the most active courts in the state.
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> The lack of judges and court staff affects entire communities. Those charged with crimes sit in jail longer while they wait for their day in court and a judgment of guilt or

> innocence. This is disruptive to their own lives and those of their families; it is hard on the alleged victims and the witnesses who want to testify, and it costs the counties thousands of dollars in incarceration costs. But criminal cases, while a majority in the court system, are not the only cases. Without an adequate number of judges and staff, children wait to learn if they will remain in foster care or return home; adults wait in uncertainty for divorces to be finalized and issues of child custody and property division to be decided; businesses wait for contracts to be interpreted and enforced, and thousands of dollars go into trust accounts until heirs and mineral rights issues can be adjudicated.
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> The rule of law depends on courts being available in a timely manner and without additional resources we are losing the ability to meet on a timely basis the needs of those who come to the court for help. The lack of resources, particularly in the criminal arena, has led to a system of "conveyor-belt justice" where hearings are too often run by script and concluded in less than five minutes. We are requesting 4 additional judges and 15 additional court staff to meet the growing needs in Burleigh, Morton, Stark, McKenzie, Ward and Williams Counties.
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> As an aside, if the economy of North Dakota does slow down, experience has shown there is even greater demand on the courts when businesses fail, crime increases and the stresses on families result in more family law cases. In any event, should our need for judges diminish, last session you restored the authority of the court to eliminate judgeships when a vacancy in that office occurs and there is no need for the position in any location in the State.

(*Affidavit of Shawn A. Grinolds* dated March 20, 2015 at Exh. AA.) As stated by the Chief Justice, due to increasing case loads, North Dakota's judicial system is already in need of additional resources simply to keep up with the present needs. Chief Justice VandeWalle specifically noted the adverse impact insufficient judicial resources are having upon the quality of the legal services available to the people of North Dakota, including, but not limited to, in the context of child custody determinations. SBAND's contribution to KKF, and opposition to Measure 6, were not made or engaged in on the basis of the politics or ideology underlying Measure 6. Obviously, there are opposing views on virtually all subjects, with legal counsel generally willing to represent all sides on any particular issue. SBAND's contribution to KKF and opposition to Measure 6 was on the basis of the adverse impact Measure 6 would have upon the quality of legal services, including through the judicial system, available to the people of

North Dakota. An over-burdened judicial system adversely affects all citizens of North Dakota, as discussed by Chief Justice VandeWalle, including outside the context of child custody determinations. Passage of Measure 6 would have swamped an already over-taxed judicial system.

Second, passage of Measure 6 would have adversely affected the quality, or at least the perception of the quality of, legal services in North Dakota. It is reasonable to assume that individuals currently impacted by existing child custody determinations have, or at least deserve to have, a belief in the finality of child custody judicial determinations, barring a material change in circumstances of the child or the parties (unrelated to changes in the law). A great deal of resources in terms of time, money and emotions have been invested in securing existing child-custody determinations. If Measure 6 had passed, the public's perception of lawyers and the judicial system as a whole, and the concept of the finality of judgments, would have been materially diminished.

SBAND's contribution to KKF, and general opposition to Measure 6, involved chargeable expenditures reasonably incurred for the improvement of legal services available to the people of North Dakota. As a result, Plaintiff is unlikely to prevail on the merits of his claim, and injunctive relief should be denied. If the Court agrees SBAND's contributions to KKF and opposition to Measure 6 constitute chargeable expenses, the Court need not make any further inquiry in relation to Plaintiff's pending motion.

2. Plaintiff Lacks Standing To Challenge SBAND's Hypothetical Future Violations of Plaintiff's Rights – The Court Should Not Render Advisory Opinions

The only SBAND expenditures alleged by Plaintiff in this action to be non-chargeable pertain to SBAND's opposition to Measure 6, which, as discussed above, were reasonably

incurred to improve the quality of legal services available to the people of North Dakota, and thus, were properly chargeable. As the expenditures challenged by Plaintiff were properly chargeable (i.e. germane to SBAND's purpose), discussed above, Plaintiff's claims of inadequate minimum safeguards implemented by SBAND to assure his mandatory dues were not used for such expenditures are moot. In addition, to this day, Plaintiff has never actually requested a refund of his pro rata share of SBAND's expenditures in opposition to Measure 6, a remedy which was offered to him numerous times and has always been available to him. Plaintiff has not suffered an injury in fact.

In addition, Plaintiff lacks standing to prosecute claims of alleged violations of other member's constitutional rights. Plaintiff brings this action in his own capacity only, and only for an alleged violation of his First and Fourteenth Amendment rights, which are personal to him. *See Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975)("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from a putatively illegal action . . . ."; a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties")(citations omitted).

To the extent Plaintiff claims SBAND could potentially make future expenditures without adequate minimum safeguards in place, any such claims are not ripe for determination as there is no actual case-or-controversy presently before the Court. *See United Public Workers of America (C.I.O) v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947)(holding federal employees, seeking to enjoin enforcement of federal law prohibiting specified political

activities by federal employees, failed to present an actual case or controversy as they were only claiming a general threat of possible interference with their civil rights if specified things occurred - no actual interference with their civil rights had yet occurred). The Court should not issue advisory opinions by engaging in a "what if" analysis. *Id.* ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

Plaintiff also lacks standing to raise such a claim. The requirement of standing has been explained by the United States Supreme Court as follows:

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000). In the present case, Plaintiff has not presented evidence of an actual or imminent injury in fact, unlike the facts in *Keller*, *Hudson*, and similar cases. Plaintiff has not presented any evidence of any actual expenditure of his mandatory bar dues for a non-chargeable purpose, and Plaintiff simply speculates SBAND may do so at some unspecified time in the future, and further speculates SBAND will not provide him with advance notice of any such expenditures and an opportunity to opt-out. Plaintiff's claims are conjectural and hypothetical.

The United States Supreme Court has long held that courts should not rule upon constitutional questions if there is also present some other ground upon which the case may be disposed of. *E.g. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936). As discussed above, Plaintiff's claims should be disposed of on the bases of lack of standing, and the lack of an actual case or controversy.

3. SBAND Provides Adequate Safeguards With Respect To The Expenditure Of Mandatory Dues

Even assuming, arguendo, the Court feels compelled to examine the procedures implemented by SBAND to address non-chargeable expenditures, SBAND has implemented adequate minimum safeguards to assure mandatory dues are not utilized for non-chargeable expenditures in the event a member objects to such expenditure.

As a preliminary matter, Plaintiff misstates applicable law by asserting the procedures described in *Chicago Teachers Union, Local No. 1, v. Hudson*, 475 U.S. 272, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) are mandatory, when in fact, the *Keller* Court simply stated an integrated bar could meet its *Abood* obligation[3] by adopting the sort of procedures described in *Hudson*, but further expressly noted it was not deciding the issue of whether one or more alternative procedures would likewise satisfy that obligation. *Keller* at p. 17. Plaintiff also incorrectly argues an opt-in procedure is required, despite the fact controlling precedent specifically pertaining to integrated bar associations (*Keller*) holds an opt-out procedure, such as utilized in *Hudson*, is adequate.

The United States Supreme Court in *Keller* noted that a minimum set of procedures by which a union in an agency-shop relationship could meets its requirements under *Abood* were established in *Hudson*. In *Hudson*, at issue was the assessment of mandatory union dues upon nonunion members for purposes of collective bargaining. The Supreme Court noted it had

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[3] In *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) the United States Supreme Court concluded although the Constitution of the United States of America did not prohibit a union from spending funds for the expression of political views, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representatives, the Constitution did require that such expenditures be financed from charges, dues, or assessments paid by employees who did not object to advancing those ideas and who were not coerced into doing so against their will by the threat of loss of governmental employment. *Id.* at 234-36.

previously determined a pure rebate approach to mandatory union dues already expended for improper purposes was not adequate to safeguard First Amendment rights, because under such approach, "the union obtains an involuntary loan for purposes to which the employee objects." *Id.* at 303-04 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 443, 104 S.Ct. 1883, 1889 (1984)). The Court in *Hudson* also determined the utilized "advance reduction of dues" approach was inadequate because the union did not provide nonmembers with adequate information from which to gauge the propriety of the union's fee. In addition, the union's procedure did not provide for a reasonably prompt decision by an impartial decision maker upon any challenge. *Id.* at 307. The *Hudson* Court determined "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310. If less than the entire amount of the challenged fees were not escrowed, the limited escrow must be justified on the basis of an independent audit, and the escrow figure must be independently verified. *Id.* at 310 fn. 23. Again, the *Keller* Court did not say the specific procedures discussed in *Hudson* were mandatory, simply that such procedures would comply with the *Abood* obligation of assuring non-germane political or ideological expenditures be financed from charges, dues, or assessments paid by individuals who did not object to advancing those ideas.

Distinguishing *Hudson* from the present case is the fact that in *Hudson*, the nonunion members had no obligation to contribute money for any union expenses, aside from those necessary for collective bargaining, and there was no dispute the union incurred expenses unrelated to collective bargaining. In other words, it was clear that fees collected from nonunion members not reasonably necessary for collective bargaining would in fact be used for a purpose

other than collective bargaining. As a result, the procedures analyzed in *Hudson* focused upon the initial assessment of fees upon the nonunion members. In contrast, in the present case, all mandatory dues paid to SBAND are for chargeable expenditures – expenditures germane to SBAND's purpose of regulating the legal profession or improving the quality of legal services available to the people of North Dakota. As a result, it would make no practical sense to engage in a *Hudson* analysis when such fees are collected. Instead, in this context, minimum procedural safeguards should logically be applied only in those unusual circumstances where a non-chargeable expense is proposed.

What is clear under *Keller* (in the context of an integrated bar) is before mandatory dues may be utilized for non-chargeable expenditures, members must be provided sufficient information in advance of such expenditure to enable them to make an informed decision as to whether or not they want their dues expended for such non-germane purpose, and if they object to such use, a procedure must be in place to assure their funds are not used for such non-germane purpose, with any dispute to be resolved by an independent decision-maker, with the moneys at issue to be held in escrow pending resolution of the dispute.

SBAND has adopted an opt-out procedure through its Legislative Policy (exh. C), in compliance with *Keller*. SBAND's Legislative Policy provides, in relevant part:

> Any member of the Association who dissents from a position on any legislative or ballot measure matter and records that opposition in writing to the Executive Director may receive a refund of that portion of his or her dues which would otherwise have been used in the Association legislative or ballot measure activity complained of.

(Exh. C.) Notably, SBAND's policy essentially provides for an automatic refund of a member's pro rata share of any proposed expenditure on any legislative or ballot measure challenged by the member, regardless of whether a chargeable or non-chargeable expenditure is at issue. (Weiler Aff. at ¶ 12.) As a result, there is no need for an impartial decision maker. In addition, as the

refund is essentially automatic, there is no need for an escrow procedure. Plaintiff's allegations of a lack of impartial decision maker and lack of escrow procedure in relation to challenges to expenditures are simply not applicable in light of SBAND's refund policy.[4] With respect to the calculation of a member's pro rata share of the challenged proposed expenditure, no audit is necessary as the calculation is simple – divide the amount of member dues received by SBAND for the year by the total of all revenues received by SBAND for the year, then multiply the result by the amount of the proposed expenditure being challenged, then divide that result by the number of dues paying members. Further, although SBAND's procedure provides for a refund, such refund is not the same as a rebate which occurs after a challenged expenditure has already been made. SBAND's procedure is intended to afford members with notice of proposed non-chargeable expenditures before they are actually incurred to afford members an opportunity to object and receive a refund before challenged non-chargeable expenditures are incurred by SBAND. SBAND's refund procedure therefore does not involve a compelled loan from members for non-chargeable expenditures to which members object.

With respect to Plaintiff's claims, as discussed above, SBAND's opposition to Measure 6 involved properly chargeable expenditures of member dues, and as a result, no procedures for a refund associated with such expenditures are required under *Keller* and other applicable law. Regardless, upon written objection and request for refund, SBAND provides its members a refund of the member's pro rata share of any proposed SBAND expenditure on any legislative or ballot measure, regardless whether such expenditure involves a chargeable or non-chargeable expenditure.

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[4] No written request for a refund based upon an objection to a position taken by SBAND on any legislative or ballot measure has ever been denied to the knowledge of SBAND's Executive Director. (Wieler Aff. at ¶ 15.)

Plaintiff was also provided an opportunity to object to the challenged expenditures before the expenditures were made. Notices and agendas for meetings of the SBAND Board of Governors ("BOG") are published in advance on the North Dakota Secretary of State's ("SOS") website, and meeting minutes of the BOG are posted on the SBAND's website. On July 28, 2014, a notice of a special meeting of the BOG to be held on July 30, 2014 was published on the SOS website. (Exh. L.) While the agenda for the July 30, 2014 BOG special meeting was not posted on the SOS website through an oversight, the agenda was available to any member requesting it. (Weiler Aff. at ¶ 29.) The agenda specifically referenced "The Shared Parenting Initiative and SBAND's role – Action: As required" as the first of only two topics to be covered. (Exh. M.) Minutes for the July 30, 2014 BOG meeting (exh. N) were approved at the September 13, 2104 BOG regular meeting, and timely posted on the SBAND website shortly thereafter. (Weiler Aff. at ¶ 30.) The July 30, 2014 minutes evidence considerable discussion regarding support for KKF's opposition to Measure 6, and provide, in part, "It is anticipated that this initiative, if passed, would create more litigation and obviously become a financial burden on families going through divorce. The BOG will revisit the issue at its September meeting." (Exh. N.) The BOG voted in favor of supporting opposition to Measure 6 at the July 30, 2014 special meeting. (*Id.*)

In addition, notice of a September 13, 2014 regular meeting (exh. O) of the BOG was published on the SOS website on September 11, 2014, along with an agenda for the meeting (exh. Q). (Weiler Aff. at ¶¶ 32, 33.) The agenda included a conference call-in number to permit members of the SBAND to listen in, and listed "Initiated Measure 2015 – Keep Kids First (KKF) . . . Action: As required" as a matter to be discussed at the meeting. (Exh. Q; Weiler Aff. at ¶ 34.) As evidenced by the minutes of the September 13, 2014 meeting (exh. P), the BOG

unanimously approved a motion to financially support the opposition to Measure 6 in the amount of up to $50,000 during the September 13, 2014 meeting.

It should be noted SBAND is currently working towards implementation of additional procedures to further assure notice of proposed expenditures on legislative or ballot measure matters, whether involving a chargeable or non-chargeable expense, are provided to members in advance of such expenditures being made to afford time for members to make objections and receive refunds before such expenditures are incurred.

B. Plaintiff Is Not Suffering Irreparable Harm

Plaintiff alleges he is suffering irreparable harm through an alleged ongoing violation of his constitutional rights due to an alleged failure of SBAND to implement adequate minimum safeguards under *Keller* and *Hudson*. As discussed above, there has been no violation of Plaintiff's constitutional rights relative to SBAND's opposition to Measure 6 as all such support was reasonably provided to improve the quality of legal services available to the people of North Dakota, and therefore, SBAND was within its rights to expend mandatory dues for that purpose. In addition, SBAND's established procedures for an essentially automatic refund to members who oppose SBAND's position on any legislative or ballot measure are adequate under *Keller*. There is no ongoing violation of Plaintiff's constitutional rights, as alleged.

In addition, "a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown." 11A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2948.1 (3d ed. 1995). As discussed above, Plaintiff has not established any actual past injury, and Plaintiff simply speculates his rights may be injured in the future if SBAND, at some unspecified time, incurs an unspecified non-chargeable expense, and speculates SBAND will fail to provide adequate minimum safeguards in

relation to any such expenditure.

C. The Balance Of Harms Weighs In Defendants' Favor

In contrast to the lack of irreparable harm to Plaintiff, Plaintiff's requested injunctive relief would deprive SBAND of approximately 65% of its total revenues, and cause irreparable harm to SBAND and the vital interests of the State and the public served by SBAND. As discussed, SBAND investigates complaints against attorneys and facilitates attorney discipline, promotes law related education and ethics, facilitates and administers a volunteer lawyers program and lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects, monitors and keeps members of the bar updated on the status of various legislative measures, and lobbies the legislature on matters affecting regulation of the legal profession and matters affecting the quality of legal services available to the people of the State of North Dakota. Plaintiff is requesting SBAND be enjoined from collecting any further mandatory dues, or from spending any moneys obtained from mandatory dues, during the pendency of this action. If such a request were granted, SBAND would be unable to fulfill its numerous functions. The balance of harms weighs heavily against granting the requested injunction.

D. The Public's Interest Would Best Be Served By Denying The Requested Injunction

The important interests of the State served by the SBAND were discussed by the North Dakota Supreme Court in *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962), in part, as follows:

> The law creating the North Dakota Bar Association had for its purpose the regulation of the practice of the law in this State, in order to protect the public by eliminating from the practice those persons who are unfit to assume this privilege and those persons lacking proper training and qualifications necessary to perform the services of an attorney in the best interests of the public. In other words, the purpose of the Legislature in creating the State Bar Association was to protect the public interests. The Act creating the State Bar Association is based on the premise that the practice of law is a matter of vital interest to

> the general public, and that lawyers are engaged in the preservation and the protection of the fundamental liberties and rights of the people and in the administration of justice. Thus attorneys are constantly engaged in carrying out fundamental aims and purposes of any good government, and are a necessary aid to any good government in protecting the rights of its citizens.

Id. at pp. 296-97 (citation omitted). As noted by the North Dakota Supreme Court, the public's interest in maintaining an active bar association is without question. Plaintiff's requested injunctive relief would essentially render the SBAND largely inactive for the duration of this litigation even though the vast majority of SBAND's expenditures and activities are not even at issue. Even assuming, arguendo, a continuing violation of Plaintiff's constitutional rights is occurring, which is denied, Plaintiff's requested injunctive relief is simply overly broad.

In the event the Court concludes SBAND's current procedures are inadequate, and further concludes injunctive relief is warranted, SBAND requests such injunction be limited to addressing the conduct complained of by Plaintiff, yet preserving to SBAND its right to take positions on legislative and ballot measure matters. As previously stated, SBAND is currently in the process of formulating new notice procedures pertaining to expenditures on positions on legislative or ballot measure matters.

E. Considering Plaintiff's Requested Injunctive Relief Would Deprive SBAND Of Most Of Its Funding, Would Prevent Most Expenditures By SBAND, And Would Effectively Prevent SBAND From Performing Functions Not Reasonably In Dispute, Plaintiff Should Be Required To Post A Substantial Bond

As discussed above under paragraph III(A)(2), Plaintiff brings this action on his own behalf only, and he lacks standing to prosecute any claims belonging to others. As a result, the only money at issue is Plaintiff's mandatory dues paid to the SBAND of $244.00, which is the amount of said dues not restricted for attorney discipline use ($385 annual license fee less $75 restricted for attorney discipline system, with result multiplied plus 80%), and any similarly

calculated future member dues to be paid by Plaintiff. Therefore, any injunction should be limited to collections from Plaintiff, and expenditures of mandatory dues collected from Plaintiff.

In the event the Court grants Plaintiff the overly broad injunction requested by Plaintiff, Plaintiff should be required to post a bond of sufficient amount to compensate SBAND for all damages it may sustain as a result of the preliminary injunction. Plaintiff is requesting SBAND be enjoined from collecting any further mandatory dues, or from spending any moneys obtained from mandatory dues, during the pendency of this action. SBAND receives the majority of its funding from member dues. Essentially, if the preliminary injunction were granted, SBAND would be deprived of its ability to perform the functions for which it was established by the Legislature. Frankly, it is difficult to put a price tag on the amount of damage which would be caused to SBAND and to the interests of the State should SBAND be prevented from performing its numerous functions vital to the interests of the people of North Dakota. SBAND requests a bond in the amount of $5,000,000 be required in connection with the grant of a preliminary injunction as requested by Plaintiff.

III. CONCLUSION

For the foregoing reasons, SBAND Defendants request Plaintiff's motion for preliminary injunction be denied, in its entirety. In the alternative, SBAND Defendants request the Court narrowly fashion any injunction to assure Plaintiff is provided adequate minimum safeguards, while still preserving to SBAND its right to take positions on legislative and ballot measures, and to fund and engage in its numerous other functions not at issue in this case.

Dated this 20th day of March, 2015.

SMITH BAKKE PORSBORG
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2015, a true and correct copy of the foregoing **DEFENDANTS JACK MACDONALD, AUBREY FIEBELKORN-ZUGER, AND TONY WEILER'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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Memorandum-Opp-PI