UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK DIMONDSTEIN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13-1228
	)	
AMERICAN POSTAL WORKERS UNION,	)	
	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment should be denied for two reasons. First, APWU's legal analysis is faulty. As argued in plaintiffs' memorandum in support of their motion for a preliminary injunction, and in their reply memorandum, the undisputed facts that the union's membership database has email addresses for roughly 27,000 members, that the union maintains a list of roughly 21,000 members to whom it sends a weekly email about legislative affairs, and that the union has produced lists of 5,000, 3,739, and 2,435 email addresses for the use of its Retiree Department, are alone sufficient to warrant granting plaintiffs the relief they seek under section 401(c). Because APWU has not demonstrated that it is entitled to judgment as a matter of law, and because plaintiffs have not been afforded an opportunity to conduct even informal discovery, this Court should deny defendant's motion for summary judgment.

Review of Plaintiffs' Response to APWU's Statement of Material Facts reveals that, in many respects, APWU seeks summary judgment based on "facts" that are not material, not supported by the evidence cited in APWU's Statement, or contradicted by APWU's own evidence or by evidence presented by plaintiffs. Plainly, the union has not satisfied its burden of demonstrating that there are no genuine issues of material fact in dispute.

Perhaps most importantly, defendant seeks summary judgment based on affidavits from witnesses whom plaintiffs have been unable to question, even informally. At the August 13, 2013, status conference, the Court anticipated that problem by urging the parties to sit down with the union's fact witnesses to try to resolve any factual questions so that the case could be ripe for summary judgment. Undersigned counsel Mr. Levy reported that, while the Court had been off the line, he and the union's counsel had discussed the same issue and had agreed that it was essential that plaintiffs' counsel be able to talk to defendant's staff who have knowledge of the technical facts. Union counsel did not disagree with this characterization.

But after the hearing, when plaintiff sought to talk to the relevant APWU staff, APWU counsel indicated that he was too busy preparing his papers, and said that counsel could discuss access to the staff on August 16 after the papers were due. The papers, in fact, contained a motion for summary judgment, statement of material facts, memorandum opposing a preliminary injunction and supporting summary judgment, and four affidavits (including one filed after defendant's August 16, 2013, deadline). Taking up the suggestion from union counsel that they resume discussions on Friday afternoon about access to the witnesses, Mr. Levy asked to talk to them. Despite a number of requests by undersigned counsel, union counsel refused to produce his affiants even for informal questioning. Levy Second Affidavit ¶ 4 and Exhibit X. In effect, the union seeks summary judgment based on affidavits with no opportunity for any discovery, even informal discovery. The attached Affidavit from Mr. Levy is submitted, in part, as a Rule 56(d) affidavit.

This Court may deny summary judgment where the non-moving party has sought but been denied **any** discovery whatsoever. *See* Fed. R. Civ. P. 56(d)(1). For example, in *Khan v. Parsons Global Servs.*, 428 F.3d 1079 (D.C. Cir. 2005) , the defendant removed to federal court and moved

for summary judgment just one week later. The Court of Appeals reversed summary judgment, stating that "a party opposing summary judgment needs a 'reasonable opportunity' to complete discovery before responding to a summary judgment motion and . . . 'insufficient time or opportunity to engage in discovery' is cause to defer decision on the motion." *Id.* at 1087 (citation omitted). *See also Scarborough v. Harvey*, 493 F. Supp. 2d 1, 17 (D.D.C. 2007) (denying motion for summary judgment because "the parties have not engaged in any discovery whatsoever, and the plaintiffs' submissions amply detail the need for some development of the factual record."). Here, as plaintiffs' reply memorandum in support of their motion for a preliminary injunction demonstrates, plaintiffs' affidavits, in addition to evidence proffered by the union's affidavits, as well as inferences that can be drawn from omissions in the affidavits as well as from the union's refusal to allow their affiants to be questioned, not only provide ample grounds for this Court to grant preliminary injunctive relief, but also raise factual issues on which further development of the record is necessary.

Consequently, plaintiffs respectfully suggest that it is not practical for the Court to address the APWU's summary judgment motion which may, in the end, have been a ploy to obtain a sur-reply brief on the motion for a preliminary injunction. Although it would surely be desirable to conclude this case promptly, granting summary judgment to defendant in a situation where the motion was filed one week after the complaint was filed, and before any opportunity to question defendant's witnesses, where plaintiffs had to file their opposition brief on barely 72 hours' notice because the summary judgment motion was combined with an opposition to a motion for a preliminary injunction, would place too much stress on finality at the expense of fair procedure.

CONCLUSION

For the foregoing reasons, the Court should deny defendants' motion for summary judgment.

Respectfully submitted,

/s/ Paul Alan Levy

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