

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)**

THE BALTIMORE SUN COMPANY;
DAVID NITKIN; AND MICHAEL
OLESKER,
The Baltimore Sun
501 N. Calvert Street
Baltimore, MD 21202

Plaintiffs,

vs.

Case No.

ROBERT L. EHRLICH, JR., in his
Official Capacity as Governor of Maryland;
SHAREESE DELEAVER, in her
official capacity as Press Secretary
to the Governor of Maryland and
GREGORY MASSONI, in his
official capacity as Deputy Director of
Communications and Press Secretary
to the Governor of Maryland;
State House
Annapolis, Maryland 21401-1925

SERVE:
J. JOSEPH CURRAN
Office of the Attorney General
200 St. Paul Place Baltimore, MD 21201

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The Baltimore Sun Company, publisher of *The Sun*, David Nitkin, and Michael Olesker (collectively referred to as “The Sun”) sue Robert L. Ehrlich, Jr., in his official capacity as Governor of Maryland; Shareese DeLeaver, in her official capacity as a Press Secretary to the Governor; and Gregory

Massoni, in his official capacity as Deputy Communications Director and Press Secretary to the Governor.

1. The Sun seeks injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 to halt the enforcement of an unconstitutional policy that prohibits every employee in the executive branch of the Maryland state government from providing information to Mr. Nitkin and Mr. Olesker, who are, respectively, a reporter and a columnist for *The Sun*. The Governor imposed the policy to retaliate against journalists who published articles and columns he did not like.

2. The policy will discourage speech by any citizen of Maryland who disagrees with the Governor, and it will leave the door open for any public official to punish any individual who says something the government does not like.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) providing for original jurisdiction in suits authorized by 42 U.S.C. § 1983. Furthermore, jurisdiction is available under 28 U.S.C. § 1331 because this action arises under the First and Fourteenth Amendments to the Constitution of the United States.

4. Venue in this District is proper under 28 U.S.C. § 1391(b). The claims arose and the Defendants reside in this District.

PARTIES

5. The Baltimore Sun Company, a Maryland corporation with its principal place of business in the State of Maryland, publishes *The Sun*, a newspaper of general circulation in Baltimore and throughout Maryland.

6. David Nitkin, a Maryland resident, is the State House Bureau Chief for *The Sun*. As such, Mr. Nitkin is involved in all aspects of *The Sun*'s news coverage of state government.

7. Michael Olesker, a Maryland resident, is a columnist for *The Sun*. Mr. Olesker regularly writes columns on issues involving state government.

8. Robert L. Ehrlich, Jr. is the Governor of Maryland (the "Governor") and an individual residing in Maryland. The Governor is empowered to carry out the duties of his office and is obligated to respect the constitutional rights of the citizens of Maryland, including *The Sun*. The Governor is sued in his official capacity.

9. Shareese DeLeaver is a Press Secretary to the Governor and an individual residing in Maryland. Ms. DeLeaver is empowered to carry out the duties of her office and is obligated to respect the constitutional rights of the citizens of Maryland, including *The Sun*. Ms. DeLeaver is sued in her official capacity.

10. Gregory Massoni is the Deputy Communications Director and Press Secretary to the Governor and an individual residing in Maryland. Mr. Massoni is empowered to carry out the duties of his office and is obligated to respect the constitutional rights of the citizens of Maryland, including *The Sun*. Mr. Massoni is sued in his official capacity.

11. At all times relevant to this complaint, the acts and practices of the Governor, Ms. DeLeaver, and Mr. Massoni, were performed in their positions as officers and officials of the State of Maryland. Therefore, these acts and practices were performed under color of state law and constitute state action within the meaning of the Fourteenth Amendment.

GENERAL ALLEGATIONS

12. *The Sun* is Maryland's largest daily newspaper, serving more than one million readers each week in Baltimore and its neighboring counties. Now in its 167th year, *The Sun* regularly publishes articles covering state government, as well as Governor Ehrlich and his policies.

13. On October 1, 2004, *The Sun* published the first in what turned out to be a number of articles by Mr. Nitkin relating to a proposed land transaction between the State of Maryland and Willard J. Hackerman that could have given him millions of dollars in tax breaks. Administration officials had been considering the “no bid” sale of an 836-acre forest to Mr. Hackerman for the same price paid by the state, which used land-preservation funds to make the purchase.

14. Several days after *The Sun* published an October 20 article relating to the proposed Hackerman land transaction, Governor Ehrlich pulled Mr. Nitkin aside after a press conference. The Governor firmly informed Mr. Nitkin that the Governor did not like the news reports relating to the transaction and viewed them as a personal attack.

15. On November 18, 2004, the Governor, through Ms. DeLeaver and Mr. Massoni, issued the following policy directive to every employee in the Maryland government:

Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads. Any questions or concerns can be directed to the following contact information:

Gregg Massoni
Press Secretary to Governor Ehrlich
410-974-2316
gmassoni@gov.state.md.us

16. The policy directive was communicated by way of a Memo distributed by e-mail from Ms. DeLeaver to Public Information Offices and the Executive Department. A true and correct copy of the Memo implementing the policy is attached hereto as Exhibit A.

17. Since the Governor issued the policy, he and others in his administration have provided varying explanations regarding the reason for the edict in addition to the reason stated in the November 18 Memo. All explanations have concerned publications in *The Sun*. Describing access to information about state government as “the only arrow in [his] quiver,” the Governor publicly stated that his order was “meant to have a chilling effect” on Mr. Nitkin and Mr. Olesker.

18. The policy prohibits individuals who are willing to speak to Mr. Nitkin and Mr. Olesker from exercising their right to do so. The Governor defended imposing the ban on all executive branch employees by saying, “That’s my government.”

19. Since the policy was adopted, state government employees in the Governor’s Office and agencies who previously spoke to Mr. Nitkin when he contacted them for purposes of newsgathering have refused to speak to him. Some have specifically cited the November 18 memo.

20. Since the policy was adopted, numerous state government employees have not returned telephone calls from Mr. Nitkin and Mr. Olesker, although messages were left. Many of these employees have spoken to Mr. Nitkin and Mr. Olesker in the past, before the ban was imposed.

COUNT I: FIRST AMENDMENT VIOLATION

21. This is an action pursuant to 42 U.S.C. § 1983.

22. The Sun realleges and incorporates by reference the preceding paragraphs.

23. The Governor, Ms. DeLeaver, and Mr. Massoni, acting under the color of state law, have violated The Sun's First Amendment rights.

24. The Governor, Ms. DeLeaver, and Mr. Massoni, have deprived Mr. Nitkin and Mr. Olesker of access to information which they previously had, and that the Governor and other executive branch employees continue to make routinely available to the public and to all other members of the press.

25. The policy was implemented for the express purpose of punishing and retaliating against The Sun for the exercise of its First Amendment rights.

26. The policy was intended to have and has had an impermissible chilling effect on The Sun's right to free expression.

27. The policy does not further any compelling interest of the government. The policy is not narrowly tailored to achieve any significant or compelling governmental interest.

28. As a result of the Governor's, Ms. DeLeaver's, and Mr. Massoni's implementation of the policy, The Sun, individually and jointly, has been chilled in the exercise of its fundamental rights under the First Amendment. Each of the Plaintiffs therefore has suffered and will continue to suffer irreparable harm for which there is no adequate remedy at law.

WHEREFORE, The Sun respectfully requests that this Court enter a permanent injunction enjoining the Governor, Ms. DeLeaver, and Mr. Massoni from violating the Plaintiffs' First Amendment rights and specifically enjoining enforcement of the policy; award attorney's fees and costs against the Governor, Ms. DeLeaver, and Mr. Massoni pursuant to 42 U.S.C. § 1988; and grant such other and further relief that the Court deems necessary and appropriate.

Dated: December 3, 2004

Respectfully submitted,

By Charles D. Tobin

Charles D. Tobin (Bar No. 15919)
Kara L. Daniels (Bar No. 14626)
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. Suite 100
Washington, D.C. 20006
(202) 955-3000 Phone
(202) 955-5564 Fax

Stephanie Abrutyn (Bar No. 09618)
Tribune Company Law Department
Publisher's Office
The Baltimore Sun
501 N. Calvert Street
Baltimore, MD 21202
(410) 332-6250 Phone
(410) 783-2511 Fax

Counsel for Plaintiffs

2438924_v1

JP Scholtes

From: Shareese DeLeaver
Sent: Thursday, November 18, 2004 11:10 AM
Subject: Memo from the Governor's Press Office

MEMO

DATE: November 18, 2004

TO: Public Information Offices and Executive Department

FROM: Governor's Press Office

RE: Baltimore Sun Reporters David Nitkin and Michael Olesker

Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads. Any questions or concerns can be directed to the following contact information:

Greg Massoni
Press Secretary to Governor Ehrlich
410-974-2316
gmassoni@gov.state.md.us

Thanks for your compliance to this request.

Shareese DeLeaver
Press Secretary
Office of the Governor
State House
Annapolis, MD 21401