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Hon. Miroslav Lovric
U.S. Magistrate Judge
Federal Building and U.S. Courthouse
15 Henry Street
Binghamton, NY 13901

VIA CM/ECF

***Re:* Decker Advertising Inc. v. Delaware County, New York, et al.**
Civil Action No.: 3:23-cv-01531- AMN-ML

Dear Magistrate Judge Lovric:

As counsel to Plaintiff Decker Advertising Inc. ("The Reporter"), we write to oppose Defendants' letter motions for a stay of discovery and all other case management deadlines during the pendency of their motion for judgment on the pleadings. *See* Doc. Nos. 43, 45. Defendants' motion should be denied because none of the relevant factors for the exceptional relief of a stay weigh in Defendants' favor. Taking the allegations as true, Defendants cannot demonstrate that the Complaint's prima facie evidence of First Amendment retaliation is insufficient to survive a motion for judgment on the pleadings, where County officials did nothing to hide their retaliatory conduct in de-designating *The Reporter* for coverage they deemed objectionable. Defendants not only demanded in a letter leaked to another newspaper that *The Reporter* make immediate changes to its coverage, but also issued a gag directive prohibiting employees from speaking to *The Reporter* after a *New York Times* article made County officials' retaliatory actions national news. While Defendants argue at length that a stay is warranted due to the purported scope of discovery here, Defendants cannot demonstrate that the document discovery they contest would be unduly burdensome, given that much of the discovery at the heart of this case is not only subject to disclosure under state public records law but also was requested *nearly 14 months ago*. Defendants also cannot demonstrate that a delay in discovery would not unfairly prejudice *The Reporter* and be against the public interest by further delaying its reinstatement as an official newspaper, the lifting of the gag directive against employees, and an award of compensatory and punitive damages and attorney's fees and costs.

A court in its discretion may stay discovery upon a showing of "good cause." Fed. R. Civ. P. 26(c). Courts in the Second Circuit routinely find that "a stay of discovery is not warranted, without more, by the mere pendency of a dispositive motion." *Ruocchio v. Panera LLC*, No. 220CV02564DGJMW, 2023 WL 2403627, at *2 (E.D.N.Y. Mar. 8, 2023) (citation omitted); *see Long Island Hous. Servs., Inc. v. Nassau Cnty. Indus. Dev. Agency*, No. 14CV3307ADSAKT, 2015 WL 7756122, at *2 (E.D.N.Y. Dec. 1, 2015) (collecting cases). Courts consider the following factors in determining whether a stay of discovery is appropriate with respect to "the particular circumstances and posture of each case": "(1) whether the defendant has made a strong showing that the plaintiff's claim is unmeritorious; (2) the breadth of discovery and the burden of responding to it; and (3) the risk of unfair prejudice to the party opposing the stay." *Long Island Hous. Servs.*, 2015 WL 7756122, at *2 (citations omitted).

These factors weigh against a stay here. As set forth below, there is no good cause for the Court to issue a stay of discovery or other deadlines pending resolution of Defendants' motion for judgment on the pleadings.

I. Defendants Have Not Demonstrated Strong Support That *The Reporter*'s Claims Fail To Survive a Rule 12(c) Motion

The first factor weighs against a stay because Defendants have not shown strong support for the dispositive motion on the merits. Defendants claim that "[g]iven the wording of the two limited claims at bar, and *the simplicity of the facts after irrelevant allegations are stripped away*[,]" they have made substantial arguments for dismissal in their "series of 10 thoroughly argued points" concerning the alleged failure to sufficiently plead "protected conduct," "particularly identified willing speakers," "adverse actions" or "any real 'gag order.'" Doc No. 43 at 2 (emphasis added). But Defendants cannot pick and choose which of the Complaint's allegations apply in the Rule 12(c) motion context or introduce allegations outside the Complaint as they have done here. That is because "[t]he standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that [for granting] a Rule 12(b)(6) motion[.]" *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020).

To survive a Rule 12(c) motion, the Complaint's allegations, "accepted as true," must "state a claim to relief that is plausible on its face[.]" *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, (2009)). "The assessment of whether a complaint's factual allegations plausibly give rise to an entitlement to relief . . . calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal conduct." *Lynch*, 952 F.3d at 75 (internal quotation marks omitted). In making this assessment, the court must "draw all reasonable inferences in [the plaintiff's] favor." *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009).

The Complaint's allegations of County officials de-designating *The Reporter* for coverage they did not like and imposing a gag order on employees on the heels of *The New York Times*' coverage of officials' retaliatory tactics, taken as true, unquestionably "raise a reasonable expectation that discovery will reveal evidence of illegal conduct." *Lynch*, 952

F.3d at 75; *see* Compl. Ex. O (featuring the controversy leading to this lawsuit in a *Times*' article titled *How Local Officials Seek Revenge on Hometown Newspaper*). As the United States Supreme Court made clear over 50 years ago in *Perry v. Sindermann*, a governmental entity "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597 (1972). This doctrine applies even where, as here, a newspaper had no "right" to the government benefit generally and it could have been denied otherwise for any number of legitimate reasons. *Id.* Courts time and again have found that it is "clearly" unconstitutional for government officials to withdraw government advertising from newspapers in response to critical coverage—and for good reason. *El Dia, Inc. v. Governor Rossello*, 165 F.3d 106, 109-10 (1st Cir. 1999) ("It would seem obvious that using government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government would run afoul of the First Amendment."). Permitting the government "to withhold public patronage, in the form of its advertising," in response to a newspaper's reporting "would allow the government to produce a result which [it] could not command directly, that is, denying the [newspaper] business in retaliation for its protected speech." *N. Mississippi Commc'ns, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986); *see also Rev. Publications, Inc. v. Navarro*, No. 89-1187-CIV-KEHOE, 1991 WL 252962, at *9 (S.D. Fla. June 26, 1991) (awarding newspaper over $220,000 in attorney's fees in addition to award of $22,710 in compensatory damages after sheriff terminated legal notice advertising in retaliation for editorial coverage).

To meet its burden of demonstrating that the County's actions amount to First Amendment retaliation, *The Reporter* need only prove that the County's actions were "motivated or substantially caused by" the "exercise of [First Amendment rights]" by providing "[s]pecific proof of improper motivation." *Abel v. Morabito*, No. 04CIV07284(PGG), 2009 WL 321007, at *2 (S.D.N.Y. Feb. 10, 2009). There can be no real question that *The Reporter* has amply alleged County officials' retaliatory animus through both direct and circumstantial evidence. The temporal proximity of the two-week timeframe between a news article being published that the County complained about and the de-designation supports a causal connection. *See* Compl. ¶¶ 34, 39-41. But *The Reporter* does not need to rely on circumstantial evidence of the County's unconstitutional intent — the County's demand letter sent a week prior to the de-designation explicitly announced its disapproval of the Editor of *The Reporter*'s articles, claiming coverage "undermin[ed] [readers'] confidence in our County government by disparaging its actions and casting its leaders in a materially false light[.]" *See id.* ¶ 36. And, the day after the de-designation, the Chair of the County Board of Supervisors told *The Reporter*'s Co-owner that the newspaper's Editor was one of the reasons why the County de-designated the newspaper. *See id.* ¶ 43.

The County demonstrated its retaliatory animus again one year later in its March 2023 letter by openly admitting that the newspaper's reporting was "one of the reasons" the County de-designated *The Reporter*. *See id.* ¶ 60. And only days after unfavorable coverage of this very issue appeared in *The New York Times*, a County official issued a directive that on its face prohibited County employees from speaking with *The Reporter* on any matter of

public concern and attempted to limit *The Reporter*'s own speech as well. *See id.* ¶¶ 76-83 (directing *The Reporter*'s Editor in seeking comment for a story unrelated to the de-designation that "any and all communication should go through your attorney" and be routed solely through the County Attorney's office). That gag directive violated *The Reporter*'s First Amendment right to receive information. *See Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988). It also violated *The Reporter*'s First Amendment right of "equal access" to news sources with "equal convenience." *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976). By issuing the directive only to *The Reporter* and not to other local news outlets, the County discriminated between media outlets in violation of the First Amendment's requirement of equal access information. These actions together "effectively chilled the exercise of [the newspaper's] First Amendment right." *Abel*, 2009 WL 321007, at *2.

Because all of these allegations, taken as true, are sufficient to "raise a reasonable expectation that discovery will reveal evidence of illegal conduct," *Lynch*, 952 F.3d at 75, the Court should "find[], without deciding the [] Rule 12(c) motion, that [Defendants] ha[ve] not made a strong showing that the Plaintiffs' claims are without merit." *Long Island Hous. Servs.*, 2015 WL 7756122, at *3.

II. Defendants Have Not Shown That Discovery Would Be Unduly Burdensome or Overbroad Where Much of the Discovery Could Otherwise Be Obtained Through Public Records Requests

The second factor weighs against a stay of all discovery because much of the same information that *The Reporter* seeks in this instance "might also be obtained through a public records request" that *The Reporter* sent to the County nearly 14 months ago. *Roth v. President & Bd. of Trustees of Ohio Univ.*, No. 2:08-CV-1173, 2009 WL 2579388, at *2 (S.D. Ohio Aug. 18, 2009). But the County has persistently flouted its disclosure obligations by not only failing to fulfill the paper's public records requests but by not even deigning to respond as required to *The Reporter*'s July 2023 appeal of the constructive denial of the requests. *See* Compl. ¶¶ 52-55. The requests seek records concerning the March 2023 letter that 39 County officials sent to the publishers of *The Reporter* demanding that the paper "make immediate changes" to its coverage of the County. Compl. ¶¶ 52, 57-58; Ex. G. They also seek records concerning the County Board of Supervisors' de-designation of *The Reporter* as an official paper following County officials' brazen admission that an alleged "flagrant manipulation of facts and the manner in which [the] paper reports county business was one of the reasons the Board of Supervisors opted to change the official county paper to the Hancock Herald in 2022." Compl. ¶ 61; Ex. G. And while the requests were filed prior to the issuance of the gag directive, they seek access to communications concerning *The Reporter* and news coverage that would encompass these records as well. Compl. Ex. F.

Defendants claim that the County would nonetheless "bear a significant burden in written discovery" because "Plaintiff's demands will inevitably seek a great deal of information Defendant does not believe could possibly lead to relevant or admissible

evidence." Doc. No. 43 at 2. They additionally claim, with no basis whatsoever, that *The Reporter*'s status as a news outlet "puts an increased burden on Defendant" because "discovery can be used as a tool to gather information for publication on issues irrelevant to this litigation." *Id.* Where, as here, "no discovery requests have been served" yet, this Court should not indulge Defendants' mere speculation as to the supposed burden of written discovery. *Brooks v. Macy's, Inc.*, No. 10 CIV 5304 BSJ HBP, 2010 WL 5297756, at *2 (S.D.N.Y. Dec. 21, 2010). Defendants claim, for example, that it would purportedly be a "great burden" "to engage in . . . electronic discovery, with 'search terms,'" despite electronic discovery's ubiquity in the modern era. Doc. No. 43 at 2. *See, e.g.*, *Long Island Hous. Servs.*, 2015 WL 7756122, at *4 (finding second factor weighed against a stay where the parties could first "confer to limit the scope" of "nine search terms" if they in fact "yield an unwieldy number of results" or ask for the Court's assistance). This conclusory and unpersuasive objection to standard ESI discovery protocols is a transparent attempt to shield from disclosure contemporaneous evidence that will in all likelihood expose Defendants' retaliatory actions in violation of the First Amendment. Because there is no basis to conclude that written discovery would be overly burdensome, the Court should instead determine "that the most appropriate resolution is to permit document requests and interrogatories to be served at this time[.]" *Id.*

Because much of the discovery could be obtained through public records requests, and Defendants have not demonstrated an undue burden in proceeding with discovery that has not yet been promulgated, the Court should at least find that document requests and interrogatories should be served at this time. If the Court chooses, it may determine in its discretion to stay depositions until the motion is decided, given that *The Reporter* expects it may need up to 25 due to the large number of named Defendants. *See id.*

III. *The Reporter* Would Suffer Prejudice in Obtaining the Relief It Seeks If a Stay is Granted

Defendants baldly contend that *The Reporter* would "not be effected [*sic*] in any way" if a stay is granted merely because the Complaint's allegations "are based on known, public, documented events which will not change by any passage of time." Doc. No. 43 at 3. To the contrary, *The Reporter* continues to lose revenue stemming directly from the ongoing de-designation, seeks to ensure that future designations are made based on articulable and content-neutral coverage criteria, and continues to suffer other serious adverse effects from this and other retaliatory actions taken against the paper.

As the Complaint demonstrates, Defendants have taken a series of actions since the de-designation that clearly run afoul of the First Amendment by retaliating against *The Reporter* for unfavorable news coverage, including leaking a letter to another newspaper publicly demanding that *The Reporter* make immediate changes and issuing a gag directive. To this day, the County refuses to acknowledge the existence of a gag directive, despite e-mails to the contrary, *see* Compl. ¶¶ 76-83, and likewise refuses to rescind the directive. These allegations, taken as true, chill County employees seeking to exercise their First Amendment rights to speak on matters of public concern and violate *The Reporter*'s right

to receive information and its right of equal access to news sources with equal convenience. In addition to the First Amendment rights at stake mandating the swift resolution of this suit,[1] an award of compensatory and punitive damages and attorney's fees and costs remains outstanding.

The Reporter's efforts to positively affect how future designations are made, deter future First Amendment retaliation, and its outstanding damage claims plainly demonstrate that it "still ha[s] a substantial interest in seeing [its] case . . . move forward." *Long Island Hous. Servs.*, 2015 WL 7756122, at *4. This Court should thus find Defendants' assertion that *The Reporter* would not be prejudiced by a further delay of discovery to be without merit.

In sum, *The Reporter* requests that Defendants' motion for a stay of all discovery and other case management deadlines be denied because none of the relevant factors weigh in Defendants' favor here, where Defendants have not made a strong showing of support for their 12(c) motion, much of the so-called burdensome discovery they object to is subject to disclosure under the state public records law, and a discovery delay would prejudice *The Reporter* and the public interest by further delaying (1) its reinstatement as an official newspaper, (2) the lifting of the gag directive against employees, and (3) an award of compensatory and punitive damages and attorney's fees and costs.

Respectfully submitted,

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[1] Courts have repeatedly emphasized that delays in access to information to the detriment of an informed public raise serious First Amendment concerns because it is only while information is "current news that the public's attention can be commanded." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly"); *Paulsen v. Cnty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) ("our historical commitment to expressive liberties dictates that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'") (citation omitted); *O'Malley v. City of Syracuse*, 813 F.Supp. 133, 140 (N.D.N.Y. 1993) (noting that the loss of First Amendment rights "for even one evening . . . would *per se* constitute irreparable injury").