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Via CM/ECF
Hon. Miroslav Lovric
Federal Building and U.S. Courthouse
15 Henry Street
Binghamton, New York 13901

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

Dear Magistrate Judge Lovric:

On behalf of the Defendants, we write regarding the Court's direction to request the Court stay discovery in this matter pending resolution of Defendant's dispositive motion at Docket No. 44, after conferring with Plaintiff upon the filing of that motion as directed in this matter's initial conference. The parties did not agree, and this request to stay timely follows.

The Court may control the proceedings before it "with economy of time and effort for itself, for counsel, and for litigants." *Salese v. JP Morgan Chase & Co.*, No. 23-CV-153 (GRB) (JMW), 2023 WL 5047890, at *1 (E.D.N.Y. Aug. 8, 2023) (*quoting Landis v. N. Am. Co*., 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). Fed. R. Civ. P. 26(c)(1) permits the stay of discovery in a pending matter by order of the Court for good cause. *Dunn v. Albany Med. College*, 2010 U.S. Dist. LEXIS 67827 (N.D.N.Y., Peebles, J.). "Good cause may be shown where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced by the stay. *See id.*

Among the non-exhaustive list of factors to be considered on a request to stay are "(1) whether the Defendants 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." *Amron v. 3M Minnesota Mining & Manufacturing Company*, No. 23-CV-8959 (PKC) (JMW), 2024 WL 263010, at *2 (E.D.N.Y. Jan. 24, 2024).

"[T]here can be little doubt that simplification of the issues and prejudice to the opposing party are more important than the case's state of completion." *OV Loop, Inc. v. Mastercard Inc.*, No. 23-CV-1773 (CS), 2023 WL 7905690, at *2 (S.D.N.Y. Nov. 16, 2023) (citation omitted).

Regarding the first factor, while it is understood that the Court "cannot attempt to predict the outcome" of the County Defendants' Motion in evaluating the present request to stay discovery, the fact that the Motion raises "substantial arguments for dismissal of . . . the claims asserted in this lawsuit" favors granting the requested stay. *Spencer Trask Software & Info Services v. RPost Int'l.,* 206 F.R.D. 367, 368 (S.D.N.Y. 2002). Defendant's dispositive motion addresses all claims in Plaintiff's Complaint in a series of 10 thoroughly argued points seeking dismissal of either or both for meritorious reasons. For example, against the two first amendment retaliation claims at issue, Defendant moves that Plaintiff has failed to sufficiently either plead protected conduct by either themselves or particularly identified willing speakers or any kind of adverse action, has failed to sufficiently plead any adverse actions, and did not adequately plead facts that constitute any real "gag order." Given the wording of the two limited claims at bar, and the simplicity of the facts after irrelevant allegations are stripped away, the merit of the arguments interposed in the motion is clear when considered against the many relevant standards of law discussed in the filing. Accordingly, this factor weighs in favor of a stay.

As to the second factor, Plaintiff has already admitted they will be seeking more depositions during discovery than the rules of this Court permit, approximately 25. See Docket No. 35 at 6. The burden such a number of depositions would place on Defendant is plain on its face, hence the Court's rules, and Defendant has indicated they will oppose discovery of this breadth. *See id*. At the outset, the filings on the Docket by the parties, even at this early stage, show a great burden to Defendant in responding to discovery. Plaintiff has further indicated their intent to engage in extensive specifically-designated electronic discovery, with "search terms," despite the limited relevant facts to the two claims at bar.

Indeed, the parties do not seem to agree as to what facts could lead to the discovery of relevant and admissible evidence in this case, with Plaintiff's Complaint containing many allegations of fact Defendant deems irrelevant to the two claims (as discussed in Defendant's filing at Docket No. 44). *See* Doc. No. 35 at 6-8. So, it seems Defendant will also bear a significant burden in written discovery as well as depositions, since without a narrowing of the issues, Plaintiff's demands will inevitably seek a great deal of information Defendant does not believe could possibly lead to relevant or admissible evidence. Plaintiff's position as a self-described media outlet puts an increased burden on Defendant during discovery, as without a narrowing or elimination of the issues, discovery can be used as a tool to gather information for publication on issues irrelevant to this litigation.

Finally, as to the second factor, the expense burden of Plaintiff's planned discovery on Defendants, in the event Plaintiff's claims are dismissed, cannot be ignored. 25 depositions and extensive paper and electronic discovery will cost Defendant's tens of thousands of dollars, when ultimately Plaintiff's claims could be dismissed. This calculus would be greatly affected even if Plaintiff's claims are just partially dismissed, and/or through a narrowing of the issues in any order on the currently pending dispositive motion. Engaging in discovery with a pending dispositive motion such as that at bar would be a wasteful use of manpower and financial resources for all

involved, given the comprehensive nature of that motion as discussed above. Would this be a pre-answer motion to dismiss, a stay would be automatically granted, given that the motion addresses all claims. The administrative time required by this municipal defendant away from providing public services in answering any discovery demands will also not be insignificant. Perhaps most importantly, should discovery proceed with 25 depositions and extensive paper and electronic demands, but the dispositive motion at issue is later granted, Defendants will have absolutely no recourse to recover the tens of thousands of dollars needlessly spent. Thus, the second factor weighs in favor of a stay.

When considering the third factor, the burden of a stay on the non-movant, it is important to note that Plaintiff's two retaliation claims are based on known, public, documented events which will not change by any passage of time. This is not a set of claims where witness memory has potential to go stale, given that they supposedly occurred in 2021 and 2022, and the nature of both entities at issue guarantee documentation will remain in the same state as present during the pendency of any stay. Plaintiff will not be effected in any way by a stay of discovery, and the issues can only be narrowed or disposed of by awaiting a decision on Defendant's dispositive motion.

Considering the above, Defendants hereby request a stay of discovery in the above matter, as their arguments on dispositive motion are many and meritorious, Plaintiff's admitted breadth of sought discovery will heavily burden Defendants, and Plaintiff is unable to show they will suffer any detriment, given the nature of both the parties and these claims. Further, if Defendants' motion is ultimately granted, the only remedy for the burdensome discovery expense they will incur is on this request, as Defendants have no ability to recoup their wasted resources after the fact. Therefore, we respectfully ask that this request be granted.

Very truly yours,

HANCOCK ESTABROOK, LLP

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cc: Counsel of Record (via CM/ECF)
Amy Merklen, Esq., Delaware County