IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL CASE NO. 2:12-cv- 00184-wks
	)	
KENNETH L. MILLER, et al.,	)	
	)	
Defendants.	)	

DEFENDANT LINDA M. WALL'S MOTION TO STAY DISCOVERY PENDING RESOLUTION OF THE MOTIONS TO STRIKE AND TO DISMISS

Defendant Linda M. Wall, by and through counsel, moves this Court for an order staying discovery pending resolution of the motions to strike and motions to dismiss filed by Ms. Wall and others. *See* dkt # 242, 242-1 (Wall's motion to dismiss and memorandum in support thereof), 243, 243-1 (Wall's motion to strike and memorandum in support thereof), 227, 228 (motion and memo by Zodhiates Defendants), 237 (motion by Liberty University), 238, 239, 240 (motions and memos of Liberty Counsel Defendants). As grounds, Ms. Wall states that the motions at least raise substantial issues concerning the merits of Plaintiffs' claims and that entry of a stay "will help secure the just, speedy, and inexpensive determination of the action." L.R. 26(a)(3). The grounds for this motion are more fully set forth in the Memorandum of Law filed simultaneously herewith, as well as in the memorandum in support of the Liberty Counsel Defendants' motion for stay, which is incorporated herein by reference.

WHEREFORE, Defendant Linda M. Wall moves the Court for entry of an order staying discovery pending resolution of the motions to dismiss and to strike, and for such other and further relief to which she may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Norman C. Smith, Esq., attorney for Defendant Linda Wall, certify that, on June 19, 2017, I served the foregoing Motion to Stay through the CM/ECF system on the following individuals:

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DEFENDANT LINDA M. WALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY DISCOVERY PENDING RESOLUTION OF THE MOTIONS TO STRIKE AND TO DISMISS

Defendant Linda M. Wall, by and through counsel, submits this memorandum of law in support of her motion to stay discovery pending resolution of the motions to strike and motions to dismiss filed by Ms. Wall and others. The motions raise serious concerns as to the validity of Plaintiffs' claims, include dispositive motions, and include motions to strike pursuant to Vermont's anti-SLAPP Act which includes a mandatory stay pending determination of the motion to strike. *See* 12 Vt. Stat. Ann. §1041(c)(1) ("The filing of a special motion to strike under this section shall stay all discovery proceedings in the action."). Defendants would suffer great prejudice if discovery were not stayed, and Plaintiffs would suffer virtually no harm if the stay were entered. Under these circumstances, discovery should be stayed pending expeditious resolution of the motions to dismiss and to strike.

ARGUMENT

Entry of a stay is appropriate where, as here, it "will help secure the just, speedy, and inexpensive determination of the action." L.R. 26(a)(3). Plaintiffs have chosen to sue a number of unrelated individuals and entities, most of whom are located hundreds of miles from Vermont.

The grounds for Plaintiffs' alleged conspiracy are shaky at best, and subjecting Defendants to invasive, burdensome and expensive discovery while dispositive motions to dismiss are pending would be neither just, nor speedy nor inexpensive. Accordingly, a stay should be entered.

I. THE VERMONT ANTI-SLAPP ACT APPLIES HERE.

In addition to the compelling reasons set forth in the motion and memorandum of the Liberty Counsel Defendants, which are incorporated herein by reference, the Vermont anti-SLAPP statute provides a useful guide for situations such as these. The general rule is that state substantive law applies but federal procedural rules apply. *See, e.g., Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The question then becomes whether an anti-SLAPP statute is procedural or substantive, and federal appellate courts have disagreed on that question. *Compare Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1336 (D.C. Cir. 2015) (anti-SLAPP rules are procedural and so do not apply) and *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1361 (11th Cir. 2014) (same) *with Godin v. Schencks*, 629 F.3d 79, 85-86 (1st Cir. 2010) (anti-SLAPP rules apply because statute includes both substantive and procedural rules inextricably intertwined); *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) (applying anti-SLAPP analysis without addressing possible conflict with federal procedural rules); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (applying anti-SLAPP provisions after finding no "direct collision" with federal rules).

The Second Circuit has upheld application of anti-SLAPP statutes in federal courts sitting in diversity. In *Liberty Synergistics, Inc. v. Microflo, Ltd.*, 718 F.3d 138 (2d Cir. 2013), the Second Circuit reversed the Eastern District New York court when it found that a California anti-

SLAPP statute[1] did *not* apply in federal court in New York. The Second Circuit held that the state anti-SLAPP law applied under *Erie* because the state policy "favoring special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity" was substantive. *Id.* at 148. Moreover, the court stated that the right afforded was to be free from litigation altogether, and such a right would be lost if the movant were forced to litigate the case before its motion to strike were decided. *Id.* at 147. Therefore, after a lengthy analysis, the Second Circuit held that under federal choice-of-law principles, the district court erred by failing to apply the California anti-SLAPP law. *Id.* at 157.

Similarly, in *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014), the court began its analysis by observing that "[**m]any** courts have held that these statutes, **including the one here**, are to be applied federally in such circumstances." *Id* at 809 (citing *Godin*, *supra*, *Henry*, *supra*, *Lockheed Missiles*, *supra*, and *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 276 (9th Cir. 2013) (Paez, J., concurring)). It then noted that the specific provisions of the Nevada statute before it, namely immunity from civil liability and mandatory fee shifting, were "unproblematic." *Id.* The Second Circuit went on to state that those provisions would apply if the case had been filed in state court, and that they did not conflict with federal law in any event. The court also found that those rules were not procedural, but rather "substantive within the meaning of *Erie* [*v. Tompkins R Co.*]". *Id.*

As to the stay, the Second Circuit found it a "closer question," but ultimately found that it need not decide the issue because the district court had denied discovery under Federal Rule 56. *Id.* Nevertheless, the Second Circuit's analysis and insights are useful here. First, it upheld the general application of Nevada's anti-SLAPP statute in federal court. This is consistent with most other courts that have addressed the issue. *See, e.g., Steinmetz v. Coyle & Caron, Inc.*, Civil

[1] The Vermont anti-SLAPP statute is modeled on the California statute. *See Ernst v. Carrigan*, 814 F.3d 116, 121 (2d Cir. 2016).

Action 15-cv-13594-DJC (D. Mass. 2016) (citing *Adelson*) (observing that failure to apply anti-SLAPP statute would increase likelihood of forum shopping, as did *Adelson*). Moreover, the Second Circuit recognized the need to respect state immunity laws in a diversity setting. *Adelson*, 774 F.3d at 809 (citing *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) ("[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense ofimmunity, unless, of course, the state rule is in conflict with federal law.")).[2]

Under the circumstances presented here, the anti-SLAPP statute is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010). In other words, to pick and choose which parts of the statute should apply in federal court and which should not would be to destroy the state-created right to immunity from suit altogether. Accordingly, both the stay and the other provisions of Vermont's statute should apply here. After all, Vermont's law provides immunity from the burdens of litigation, not just liability. To allow Plaintiffs to proceed with costly and burdensome discovery would defeat the very purpose of the anti-SLAPP law, and discovery should be stayed pending resolution of the special motion to strike and motions to dismiss.[3]

[2] The Second Circuit also recognized the lower court's application of Vermont's anti-SLAPP statute in federal court in *Ernst v. Carrigan*, 814 F.3d 116 (2d Cir. 2016). The court determined that the appeal was premature, however, and thus did not analyze the statute in detail. Significantly, however, the Second Circuit did *not* reverse the lower court's determination that the anti-SLAPP statute applied.

[3] To the extent Plaintiffs might argue that they are unable to respond to the motions to strike without conducting some limited discovery directly related to the issues raised in those motions, the statute provides for such a contingency, but only "on motion and for good cause shown." *See* Vt. Code Ann. §1041(c)(2) ("The court, on motion and for good cause shown, may order that limited discovery be conducted for the purpose of assisting its decision on the special motion to strike.") Again, however, the burden is on the Plaintiffs to demonstrate good cause. Plaintiffs are unable to meet that burden here, and in any event have not so moved.

Respectfully submitted,

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