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August 3, 2017

VIA ECF

Hon. Katherine Polk Failla
United States District Court
Southern District of New York
40 Foley Square, Courtroom 618
New York, NY 1007

Re: *Matthew Christiansen v. Omnicom Group Inc. et al.*, 15 CV 3440 (KPF)

Dear Judge Failla:

This firm represents Defendants Omnicom Group Inc. (“Omnicom”), DDB Worldwide Communications Group, Inc. (“DDB”), Peter Hempel (“Hempel”) and Chris Brown (“Brown”) (collectively, “Defendants”) in the referenced case.

We write in response to Plaintiff’s counsel’s July 28, 2017 letter (the “Letter”) to the Court requesting that the stay Your Honor ordered on July 18, 2017 (the “Stay”) pending the Second Circuit’s resolution of *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017), *reh’g en banc granted*, No. 15-3775 (2d Cir. May 25, 2017) be lifted, or alternatively, that the Court hold a pre-motion conference and/or permit briefing on the issue of lifting the Stay. For the reasons below, Plaintiff’s request should be denied.

First, Your Honor was correct to stay this case pending the Second Circuit’s decision in *Zarda*. Contrary to what Plaintiff’s counsel asserts in the Letter, sex discrimination based on sex stereotyping and sexual orientation discrimination are fundamentally different legal theories, and the uncertainty as to whether Title VII protects against sexual orientation discrimination¹ will significantly impact the parties’ motion practice (including the unresolved motion to dismiss on the basis of the statute of

¹ The degree of uncertainty over this issue is underscored by the fact that two branches of our government – the U.S. Department of Justice (“DOJ”) and the Equal Employment Opportunity Commission (“EEOC”) – have taken completely opposite positions on this matter, with the DOJ adding that the EEOC does not speak for the United States and is not entitled to *any* deference with respect to its view that Title VII does protect against sexual orientation discrimination. *See* Brief of the United States as Amicus Curiae filed by U. S. Department of Justice at 1, *Zarda* (2d Cir. July 26, 2017), ECF No. 417. It is also underscored by the fact that the defendant in the *Zarda* case has taken the position that the Second Circuit is precluded from deciding the Title VII issue *en banc* because *Zarda* never made a Title VII claim to the EEOC on the basis of sexual orientation discrimination, only on the basis of sex stereotyping. *See generally* Brief of Defendants-Appellees, *Zarda* (2d Cir. July 28, 2017), ECF No. 436.

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limitations and/or motions for summary judgment), discovery, and trial preparation. The motion to dismiss on the basis of the statute of limitations – an issue Your Honor did not address in the Court’s March 9, 2016 opinion – may very well turn on what the last act was that started the statute of limitations and that may depend on what the Second Circuit decides regarding which causes of action are available to Plaintiff in this action. As such, waiting a few more months for this uncertainty to be resolved by the Second Circuit would best serve the interests of judicial efficiency.

Second, although Plaintiff asserts that the case is “over two years old” and “[p]arties and witnesses are relocating and will be hard to find,” he fails to identify any parties or witnesses who are relocating and will be hard to find. Moreover, even if Your Honor allowed discovery to move forward in this case at this time, witness depositions would have to be postponed until *Zarda* is decided as the types of questions posed during such depositions would depend on whether Title VII is found to cover sexual orientation or not. Finally, Defendants are willing to produce relevant information about their insurance policy at this time so that Plaintiff can “review [D]efendants’ insurance coverage.”

Accordingly, Plaintiff’s request that the Court lift the Stay, or permit motions on the issue of lifting the Stay, should be denied.

Respectfully submitted,

/s/ Howard J. Rubin

Howard J. Rubin

cc: All counsel (via ECF)