

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

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

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**DEFENDANT LINDA M. WALL'S REPLY IN SUPPORT OF HER  
MOTION TO STAY DISCOVERY**

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Defendant Linda M. Wall, by and through counsel, submits this Reply in support of her motion to stay discovery pending resolution of the motions to dismiss.

**ARGUMENT**

Plaintiffs complain that Defendants' motions are redundant and intended only to delay these proceedings, apparently forgetting that it is the Plaintiffs, not Defendants, who continue to file amended pleadings and add new parties. There is nothing redundant in Ms. Wall's motion to dismiss. In fact, this Court has never addressed the anti-SLAPP arguments raised by Ms. Wall and by the Liberty Counsel Defendants, and Plaintiffs' re-fashioned causes of action are new to both Defendants and the Court. It is therefore difficult to understand how Plaintiffs can make their arguments of redundancy in good faith, or assert that the law of the case doctrine precludes consideration of these arguments.

**I. THE STAY SHOULD ENTER BECAUSE THE MOTIONS TO DISMISS COULD BE DISPOSITIVE, DISCOVERY WOULD BE BURDENSOME TO DEFENDANTS, AND PLAINTIFFS HAVE NOT SHOWN PREJUDICE.**

A stay of discovery is appropriate where, as here, the motion “could be dispositive, the costs of discovery will be burdensome to Defendants, and the Plaintiffs have not shown prejudice from the relatively short stay.” *Spinelli v. National Football League*, 092916 NYSDC, 13 Civ. 7398 (S.D.N.Y. 2016) (citing *Spencer Trask Software & Info. Servs., LLC v. RPost Int’l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002)). That the motions to dismiss could be dispositive is obvious. The first prong of this threefold analysis is thus easily satisfied.

**A. Discovery Would be Burdensome to Defendants.**

The second prong of the test is also easily met here. The severe and undue prejudice to Ms. Wall that would result from forcing her to undergo the rigors of expensive, invasive, and onerous discovery while her well-founded motion to dismiss is pending cannot be gainsaid. And while Plaintiffs complain that Defendants have introduced factual assertions in their motions and therefore Plaintiffs should be allowed discovery (Plaintiffs’ Opposition at p. 6), Plaintiffs fail to point to a single specific item of discovery needed for their response to Ms. Wall’s motion to dismiss. Nor should they -- after all, Ms. Wall’s motion adduces no new facts other than to flesh out the thin and baseless allegations against her and to demonstrate that what Plaintiffs have mischaracterized as nefarious was in fact nothing of the sort. *See, e.g.*, Wall’s Memo. in Supp. of Mot. to Strike (dkt #242-1) at 4 (providing link to television ad produced by Protect Isabella Coalition, urging public support for petitioning government for relief); *id.* at 5 (providing link to online news account reporting on what Ms. Wall actually said in alleged “Harriet Tubman” comments).

**C. Plaintiffs Would Suffer no Prejudice.**

The third prong of the test, lack of prejudice to Plaintiffs, is also satisfied here. As a matter of fact, all factual material that Ms. Wall introduced in her motion to strike was readily available to Plaintiffs at all times, both before and after Ms. Wall filed her motion. Discovery was never necessary in order to access or review these materials. It is true that Ms. Wall also relied on her Declaration in her recent motion, but that Declaration was filed years ago in this case, and has been in Plaintiffs' possession ever since. In short, the provision in the federal rules concerning an opponent's right to undertake discovery before responding to a dispositive motion contemplates a need to obtain discovery *in order to fashion a response* to the motion, not simply to engage in a blind fishing expedition. Plaintiffs have not shown any legitimate need for discovery, much less actual prejudice that would result from a brief stay. Accordingly, because the motions to dismiss could be dispositive, serious prejudice would be visited upon Defendants absent a stay, and virtually no prejudice would accrue to Plaintiffs by entry of a stay, the motion should be granted.

**II. PLAINTIFFS' REMAINING ARGUMENTS ARE WITHOUT MERIT.**

**A. Plaintiffs' Federal Claim does not Change the Analysis.**

Plaintiffs also make much of the fact that they have included a federal claim in addition to their state law claim and that the anti-SLAPP Act does not apply to the federal claim. Plaintiffs' Opp. at 8-9. While it is true that the anti-SLAPP Act does not apply against Plaintiffs' federal claim, Plaintiffs' argument nevertheless misses the mark. The operative facts giving rise to both of Plaintiffs' claims are identical. In Ms. Wall's case, they involve her assisting Ms. Miller in attempting to obtain legal relief in a Virginia court from what Ms. Wall believed to be an unjust and unconstitutional order of a Vermont court, and from Ms. Wall's vocal efforts to

enlist fellow Virginians to petition their legislature to uphold a provision in the Virginia State Constitution. *See* Ms. Wall's Memo. in Supp. of Mot. to Strike at 3-7. Plaintiffs' Revised Second Amended Complaint makes no differentiation and adduces no new facts to support their federal claim. *See generally* Plaintiffs' Revised Second Amended Complaint (dkt #223). Indeed, Plaintiffs concede that discovery will be "virtually identical" under both counts. Plaintiffs' Opp. at 9.

Under these circumstances, to permit discovery to proceed as to one claim would be for all intents and purposes to allow discovery as to all claims, thereby defeating the intent of the anti-SLAPP Act altogether. As four Ninth Circuit judges warned,

If we ignore how states have limited actions under their own laws, we not only flush away state legislatures' considered decisions on matters of state law, but we also put the federal courts at risk of being swept away in a rising tide of frivolous state actions that would be filed in our circuit's federal courts. Without anti-SLAPP protections in federal courts, SLAPP plaintiffs would have an incentive to file or remove to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP defendant's speech-related activities. Encouraging such forum shopping chips away at "one of the cornerstones of our federalism."

*Makaeff v. Trump Univ. LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (Wardlaw and Callahan, JJ., joined by Fletcher and Gould, JJ., concurring in denial of rehearing en banc) (quoting *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (footnotes omitted)). It may be argued here that Plaintiffs threw in their federal claim only in order to avoid the penalties they would (and should) face under Vermont's anti-SLAPP statute. Allowing discovery while such weighty and dispositive motions remain undecided would be to punish Defendants like Ms. Wall regardless how meritorious her motion. And while Plaintiffs assert without argument or authority that the numerous motions to dismiss the federal claims are unmeritorious (Pltfs' Opp. at 5-6), they have yet to submit their response in opposition to those motions, and in fact have sought and

obtained additional time in order to prepare the response. Were the motions as baseless as Plaintiffs claim they would not require so much time for response. That Plaintiffs need so much time would suggest that there was more substance to the motions, thus in turn suggesting a strong basis for granting the stay.

In addition, the protection of fundamental First Amendment rights, which Vermont's anti-SLAPP Act seeks to accomplish, is of paramount importance not only to Vermont state courts but also to this Court. Ms. Wall has asserted, on an abundance of both legal authority and factual evidence, that Plaintiffs' lawsuit is a direct assault on Ms. Wall's constitutional rights of free speech, free press, and right to petition the government for redress of grievances. To allow Plaintiffs to engage in broad and invasive discovery *before Ms. Wall's motion is decided* would essentially be to give Plaintiffs all they wanted even if their lawsuit is ultimately determined to be baseless. This would be a grave miscarriage of justice.

**B. The Anti-SLAPP Act Assuredly Applies Here.**

Plaintiffs further assert in a footnote that they do not concede that Vermont's anti-SLAPP Act "could apply" to Count I. *Id.* at 9, n.1. As the Second Circuit has written, however, "[m]any courts have held that these [anti-SLAPP] statutes . . . are to be applied federally." *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (collecting cases) (emphasis added). In fact, the Second Circuit itself applied at least a portion of the Nevada anti-SLAPP statute before it in *Adelson*, finding its provisions "unproblematic" despite the case being in federal court. *Id.* The Second Circuit also found the fee-shifting provision and the immunity from civil liability provision to be substantive, not procedural. *Id.*

This is especially significant because Plaintiffs cite the Rules Enabling Act, 28 U.S.C. §2072, to argue that Vermont's stay of discovery provision conflicts with the Federal Rules of

Civil Procedure and therefore does not apply here. Pltfs' Opp. at 9-10. The better reasoned cases, though, show that anti-SLAPP statutes such as Vermont's do not directly conflict with the federal rules, but rather provide additional alternatives. *See, e.g., Makaeff*, 736 F.3d at 1182 ("California's anti-SLAPP statute, by creating a separate and additional theory upon which certain kinds of suits may be disposed of before trial, supplements rather than conflicts with the Federal Rules.") (Wardlaw and Callahan, concurring in the denial of rehearing en banc).

Additionally, Plaintiffs fail to mention that under §2072(b) of the Rules Enabling Act, the Federal Rules of Civil Procedure cannot "abridge, enlarge or modify any substantive right." *Id.* "The failure to enforce the anti-SLAPP laws would arguably enlarge state law causes of action and abridge state law speech protections." *Makaeff, supra*, 736 F.3d at 1187 n.8 (citing *Shady Grove Orthopedic Assoc's v. Allstate Ins. Co.*, 559 U.S. 393, 416-17 (2010) (Stevens, J., concurring in part and concurring in judgment) (agreeing that "there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the State's definition of the substantive rights and remedies"). The question then becomes, would application of the federal *procedural* rules operate in such a manner that they would abridge the state *substantive* anti-SLAPP law and thereby violate the Rules Enabling Act?

The Second Circuit in *Adelson* recognized this danger and chose not to make any final determination because the case could be resolved without reaching the issue. *Adelson* 774 F.3d at 809. Ms. Wall and some of the other Defendants have moved for entry of a stay under *both* the anti-SLAPP law *and* the federal rules. It is therefore possible for this Court to enter the stay without reaching the issue *Adelson* left unresolved as well. But if the Court does not enter a stay under the federal rules argument, then it should in all events enter the stay pursuant to the Vermont anti-SLAPP statute. Failure to do so, as Justice Stevens counseled in *Shady Grove*,

would be to defeat Vermont's *substantive* law and so violate the Rules Enabling Act. Accordingly, the stay should enter.

For all of the foregoing reasons, as well as those set forth in the Liberty Counsel Defendants' Reply, the motion to stay discovery should be granted pending resolution of the motions to dismiss.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I, Norman C. Smith, Esq., attorney for Defendant Linda Wall, certify that, on July 6, 2017, I served the foregoing Reply in Support of Motion to Stay Discovery through the CM/ECF system on the following individuals:

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