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AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
DEPUTY

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND – BALTIMORE DIVISION

ALBERT SNYDER,

Plaintiff,

vs.

Case No. 1:06-cv-1389-RDB

FRED W. PHELPS, SR.;
SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS; and,
WESTBORO BAPTIST CHURCH, INC.

**MEMORANDUM IN SUPPORT OF
MOTION FOR STAY OF DISCOVERY**

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly move the Court for a stay of discovery in this matter, until such time as they complete and file, and the Court rules on, motions to dismiss and for other relief, including

pursuant to Rule 12(b)(6) and other appropriate legal theories, which will challenge the Complaint in this matter, including this Court's jurisdiction over these defendants and the subject matter of this case, and the failure of the Complaint to state claims for relief. Defendants submit the following in support of this motion:

1. This motion is made pursuant to Rule 26(c), Fed.R.Civ.P., and the inherent powers and authority of this Court to control the course of the case and discovery.
2. Defendants were served with a Complaint in this case on March 26, 2007.
3. Defendants have filed a motion for additional time to May 7, 2007, to file motions to dismiss and for other appropriate relief. Defendants expect to have any motion(s) completed and filed perhaps before but no later than May 7, 2007.
4. Defendants will raise issues related to the Court's jurisdiction over this matter, including personal jurisdiction over the defendants based on lack of minimum contacts; and issues related to the Court's subject matter jurisdiction over the matters asserted in the Complaint, among other reasons, on the grounds that the statements and actions which these defendants engaged in, and about which plaintiff complains, were statements and actions of religious opinion and belief, which are protected by the First Amendment; were statements of opinion rather than statements of fact, not susceptible to proving or disproving, and which are therefore not actionable; were privileged with regard to the alleged torts because of their protected nature; and were pertaining to matters of public interest, conducted in pure public arenas or fora; and as such can not, as a matter of law

constitute invasion of privacy; and can not, as a matter of law, form the basis for a cause of action on any tort theory. Defendants will respectfully submit, with supporting authorities, that this matter of vital public interest (to wit, the deaths of this nation's soldiers in battle, soldiers' funerals, and related issues), on which defendants commented and acted on public sidewalks and Internet space, about matters which were open and available to the public, cannot be topics on which any person's words, no matter how dissenting in their viewpoint or disagreeable to the hearer, constitute the basis for a cause of action. See, e.g., *Showler v. Harper's Magazine Foundation*, Slip Copy, 2007 WL 867188 (10th Cir. 2007); *Barnhart v. Paisano Publications*, ---- F.Supp.2d ----, 2006 WL 2986531 (D.Md. 2006).

5. Defendants will ask that the Court review these issues before allowing the case to proceed to discovery on the claims asserted here. This is so because defendants respectfully submit that the issues they will raise are significant First Amendment issues and raise other substantial legal questions, which if resolved will dispose of the case. Therefore, based on considerations of fairness and efficiency, defendants submit it is more appropriate to stay discovery while these issues are addressed. Defendants submit that the issues they will raise, e.g., whether as a matter of law invasion of privacy can occur on a public sidewalk hundreds of feet from the building where a funeral is occurring; whether as a matter of law the funeral of plaintiff's son was a matter of public interest and therefore speech thereon is protected; whether as a matter of law the words

complained of by plaintiff are words of opinion not fact and therefore not actionable; whether an intent to engage in religious speech can, as a matter of law, ever satisfy the intent required for outrage; and so forth; will be so specific, irrefutable through discovery, and/or law-based, that it is unlikely any discovery would further enlighten the issue. Therefore, defendants believe it is appropriate to stay discovery on the claims herein until these issues are addressed by the Court. Further, it is appropriate to stay discovery when the Court's jurisdiction is challenged, until those issues are resolved.

6. Courts possess broad discretion to control the scope of discovery. While motions to stay discovery may not generally be favored, Rule 26(c) grants the Court the authority to enter a protective order on a showing of good cause to protect a party from undue burden or expense. Although a motion to dismiss does not automatically constitute good cause for a stay, where it may dispose of the entire action and where discovery is not needed to rule on such a motion, the balance generally favors granting a motion to stay. *Norfolk Southern Railway Company v. Power Source Supply, Inc.*, Slip Copy, 2007 WL 709312 (W.D.Pa. 2007). See also *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming decision to stay discovery not required to address issues raised by motion to dismiss).

In *Moldea v. New York Times Company*, 137 F.R.D. 1, 1-2 (D.C.D.C. 1990), the Court granted a motion to stay discovery while First Amendment issues were addressed, saying:

The NYT moves pursuant to Federal Rule of Civil Procedure 26(c) for a stay of all discovery in this case pending a ruling on its recently filed motion for

summary judgment. Under Rule 26(c) a trial court has discretion to issue protective orders upon a showing of good cause. The Court finds that the NYT has met its burden.

**** The NYT principally argues that this case raises First Amendment interests, and that the threat to the First Amendment is sufficient good cause to stay the discovery process pending resolution of a dispositive motion. The NYT further argues that a stay would be appropriate so that it could avoid the time and expense of responding to inquiries that will have no effect on the resolution of the forthcoming motion. ****

In reaching the conclusion that the motion for stay should be granted, the Court has considered several factors. First, the Court is mindful of the significant First Amendment issues raised in this case-although this factor standing alone would not automatically entitle defendant to a stay of discovery. Second, having had an opportunity to review the motion for summary judgment, the Court is not of the view that further discovery is necessary to sustain an opposition to the motion. The gravamen of the NYT's motion for summary judgment is its argument that the Court must determine as a matter of law whether the words or phrases contained in the book review are sufficiently factual to be susceptible of being proved true or false. In this case, Moldea has not persuasively shown in its opposition to this motion that such a determination requires scrutiny beyond the challenged publication. Finally, the Court anticipates that any stay entered would be brief. ****

7. Defendants are eager to have this case resolved, and anticipate the Court will not want undue delay. Even so, defendants respectfully submit that no matter how strongly any person may disagree with their religious expressions, there are significant legal issues that require attention at the outset of this case, that are not suitable for discovery, and that do not require substantial factual inquiry for resolution. These issues will be set forth in detail in filings by May 7, and defendants request that the Court consider those issues before proceeding to a scheduling conference and order, and discovery herein.

WHEREFORE, defendants Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper request that the Court enter its order staying discovery in this matter, until the defendants file and the Court rules on motions to dismiss and related items.

Respectfully submitted,



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CERTIFICATE OF SERVICE

We hereby certify that the foregoing Memorandum in Support of Motion for Stay of Discovery was served on April 12, 2007, as follows:

Original + 2 copies, with 2-hole punch, by regular mail, with return envelope, to:
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