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Defendants Syracuse University and James Boenheim (collectively, “Defendants”) respectfully submit this memorandum of law in opposition to the Order to Show Cause brought by plaintiffs Robert Davis and Michael Lang (collectively, “Plaintiffs”) on January 30, 2012, without prior notice or consultation with Defendants.

PRELIMINARY STATEMENT

Plaintiffs should not be permitted to use an emergency application – purportedly related to Defendants’ Venue Motion – as a way to bootstrap requests for discovery to which they have no right at this time and which they may never need. The purpose of an automatic stay is to avoid the time, expense, and intrusiveness of discovery when a dispositive motion is pending, and Plaintiffs have not cited – and cannot cite – a single case that supports lifting the discovery stay under current circumstances. Plaintiffs’ request for discovery on the residency of potential *non-party* witnesses cannot conceivably give rise to any exigency, given that the sole basis for Defendants’ Venue Motion is that *no party* resides in New York County – a requirement for proper venue. Therefore, this untimely application and request to lift the stay should be rejected.

To the extent this case were to survive Defendants’ Motion to Dismiss, and prior to the case being tried, Plaintiffs would have a full opportunity to try to develop an appropriate record in an effort to support a permissive venue motion based on the convenience of non-party witnesses. But Plaintiffs have not shown why they should be permitted to obtain emergency discovery at this early stage, in the face of the general rule that a dispositive motion stays all discovery.

Plaintiffs' application is particularly inappropriate in that it seeks information that is not material or necessary to *any* claim or defense in this action. The proposed interrogatories target irrelevant information relating largely to Laurie Fine's alleged sexual activity dating back many years. As reflected in Plaintiffs' Complaint, this defamation action involves statements of opinion by Coach Boeheim, made on two days in November 2011, in which he expressed doubts about Plaintiffs' allegations of past sexual abuse by Bernie Fine and questioned their motives in making these allegations. What Boeheim or others allegedly knew about supposed adulterous affairs by Laurie Fine or others – none of which is referenced in the Complaint – has no bearing on what Boeheim supposedly knew about alleged abuse of minors by Bernie Fine. Plaintiffs' application is nothing more than a transparent effort to generate headlines through the gratuitous publication of irrelevant sexually explicit allegations and should be denied.

BACKGROUND

Plaintiffs commenced this defamation action on December 13, 2011 in the Supreme Court of the State of New York, New York County, and they served Defendants on December 15, 2011. (Exs. A, B.)¹ The parties stipulated to extend Defendants' time to respond to the Complaint until January 20, 2012. (Ex. C.)

By designating the venue of New York County, in which no party resides, Plaintiffs knowingly selected an improper venue under C.P.L.R. § 503(a). (Levine Aff.

¹ Citations to "Ex." refer to exhibits to the accompanying Affirmation of Andrew M. Levine dated February 8, 2012 ("Levine Aff.").

¶ 5.) In response to Defendants' demand to transfer venue, Plaintiffs did not, nor could they, offer any showing that New York County was a proper venue for bringing their lawsuit or that Onondaga County would be improper under C.P.L.R. § 503(a). (Ex. E.) Accordingly, on January 17, 2012, Defendants moved to change the venue of this action to Onondaga County, the residence of plaintiff Davis and both Defendants, where venue is proper. (Ex. F.) Defendants filed this motion in Onondaga County, as permitted by C.P.L.R. § 511(b), and the Onondaga Court has set a return date of February 21, 2012. (Levine Aff. ¶ 9.)

In an effort to streamline this litigation and obtain clarity on where to file subsequent papers, Defendants sought Plaintiffs' consent for a stay of proceedings, pursuant to C.P.L.R. § 511(c), until resolution of the Venue Motion. Plaintiffs refused. (*Id.* ¶ 10.) On January 19, 2012, Defendants therefore sought a stay from the Onondaga Court, which set a return date of February 7, 2012, after the deadline for Defendants to respond to the Complaint. (Ex. G.)

On January 20, 2012, pursuant to C.P.L.R. § 3211(a)(7), Defendants moved to dismiss the Complaint in its entirety for failure to state a claim upon which relief may be granted. (Ex. H.) In essence, Plaintiffs' Complaint fails as a matter of law because Boenheim asserted no objective facts about Plaintiffs, and his expression of opinion fell squarely within the absolute right to express one's thoughts without risking liability under defamation law, a protection guaranteed by the New York State and Federal Constitutions. As the service of the Motion to Dismiss automatically stayed discovery

under C.P.L.R. § 3214(b), Defendants withdrew their prior request for a stay. (Levine Aff. ¶ 13.)

On January 30, 2012, Plaintiffs submitted the instant Order to Show Cause in New York County, requesting that this Court lift the automatic discovery stay and require Defendants to answer interrogatories that Plaintiffs claim are relevant to the pending Venue Motion. Plaintiffs did not provide any notice to Defendants before filing this application, which needlessly contained graphic sexual references regarding consensual sex not mentioned in the Complaint. (*Id.* ¶ 14.)

ARGUMENT

I. Plaintiffs' Request For Discovery On Discretionary Venue Factors Is Premature, and No Exigency Exists That Would Justify This Court Lifting The Automatic Stay.

In a case such as this one, the purpose of an automatic stay of discovery “is to prevent the unwarranted resort to disclosure” where a motion to dismiss could resolve the entire case and dispense with the need for incurring the time and expense of any discovery at all. *Rappaport v. Blank*, 99 Misc. 2d 1020, 1021 (N.Y. Sup. Ct.) (refusing to permit discovery while a motion to dismiss was pending), *rev'd on other grounds*, 72 A.D.2d 717 (1st Dep't 1979). For this reason, whether there is a pending motion to dismiss or a motion for summary judgment, the established “general rule” is that “a dispositive motion stays all discovery.” *Socrates Psych. Servs. v. Progressive Cas. Ins. Co.*, 7 Misc. 3d 642, 651 (N.Y. Civ. Ct. 2005) (upholding the automatic discovery stay while a summary judgment motion was pending); *see also Signature Bank v. 1775 E.*

17th St., LLC, No. 12299/10, 2011 WL 4056071, at *11 (N.Y. Sup. Ct. Sept. 8, 2011) (“[T]he purpose of C.P.L.R. § 3214(b), which stays disclosure until determination of a summary judgment motion, is to prevent unnecessary disclosure in the event that its motion for summary judgment is granted.”).

For a court to disturb the automatic stay, there must be a “legitimate need” for the discovery in question. *Jacoby v. Loper Assocs., Inc.*, 249 A.D.2d 277, 279 (2d Dep’t 1998); accord *Reilly v. Oakwood Heights Cmty. Church*, 269 A.D.2d 582, 582 (2d Dep’t 2000). Plaintiffs have demonstrated no such “legitimate need” at this time for the discovery that they seek, especially where, as here, Defendants’ pending Venue Motion turns entirely on the residence of the parties under C.P.L.R. § 503(a). The locations of *non-parties* who might or might not be relevant witnesses cannot change the fact that Plaintiffs improperly laid venue in a county in which no party resides. In fact, Plaintiffs do not dispute that no party resides in New York County. Accordingly, Defendants are entitled to a transfer of the action as of right, C.P.L.R. § 511; see, e.g., *Lopez v. K Angle K, Inc.*, 24 A.D.3d 422, 422-23 (2d Dep’t 2005); *Uruchima v. Burns*, No. 3484/04, 6 Misc. 3d 1022(A), 2005 WL 356502, at *2-3 (N.Y. Sup. Ct. 2005), and Plaintiffs’ discovery application serves “no practical purpose” at this time, *Rappaport*, 99 Misc. 2d at 1021.

If what Plaintiffs are really seeking is information they think might be helpful in seeking a discretionary change of venue based on “the convenience of material witnesses,” under C.P.L.R. § 510(3), they have presented no legal support for why it would be appropriate to permit such discovery at this time. The automatic stay will

terminate if Defendants' Motion to Dismiss is denied, and Plaintiffs can seek to gather appropriate evidence through the ordinary course of discovery to support a discretionary motion to change venue and bring such motion at a "reasonable time" prior to trial.

Jason v. Dumel, No. 15199/02, 3 Misc. 3d 1101(A), 2004 WL 914636, at *4 (N.Y. Sup. Ct. 2004).

Such a permissive venue motion would need to be based on much more than just speculation that one or more potential witnesses might reside in a desired county, further demonstrating the unreasonableness of Plaintiffs' emergency discovery requests. *See id.* at *3. A party seeking a permissive transfer of venue based on the convenience of **material** witnesses must: (1) demonstrate that the witnesses are willing to testify; (2) summarize their proposed testimony to show its likely relevance and admissibility; and (3) demonstrate that the witnesses would be actually inconvenienced by trial in another county. *Id.*; *see Goonan v. Shapiro*, 49 A.D.2d 728, 728-29 (1st Dep't 1975) (rejecting a plaintiff's request to retain venue based on convenience of witnesses where the "materiality" and "competence of [the plaintiff's witnesses'] proffered testimony ha[d] not been satisfactorily established"). In seeking to establish the evidentiary foundation required for a permissive venue motion, Plaintiffs presumably will need formal discovery from non-party witnesses. *See Brevetti v. Roth*, 114 A.D.2d 877, 878 (2d Dep't 1985). Such discovery would likely include non-party depositions, which by rule take place within the counties in which the witnesses reside, C.P.L.R. § 3110(2), eliminating any argument of inconvenience as to the non-parties. For these reasons, the urgency that Plaintiffs have asserted in bringing this application is entirely manufactured.

Plaintiffs do not cite a single case that actually supports their request to lift the stay of disclosure while Defendants' Motion to Dismiss is pending. Plaintiffs cite *Erbach Finance Corp. v. Royal Bank of Canada*, 199 A.D.2d 87 (1st Dep't 1993), where the court lifted a stay to enable disposition of a matter in which a party was of advanced age. There is no indication here that a party to the action or a subject of the discovery sought is at risk of sudden unavailability or incapacity. Plaintiffs' other citation to *East 75th Street Diagnostic Imaging v. Clarendon National Insurance Co.*, 934 N.Y.S.2d 636 (Dist. Ct. 2011), where the defendant ignored discovery requests made "long before" it moved for summary judgment and then relied on the automatic stay, is similarly unavailing. *Id.* at 638. In the instant action – pending now for only about eight weeks – the stay of discovery preceded Plaintiffs' interrogatories, and there is absolutely no prejudice to Plaintiffs in waiting to seek such discovery until after the court rules on Defendants' Motion to Dismiss.

Plaintiffs also fail to cite any persuasive authority in support of expediting discovery in these circumstances. The only case cited by Plaintiffs concerning expedited discovery, *Congel v. Malfitano*, 84 A.D.3d 1145 (2d Dep't 2011), did not even involve an automatic stay; the court simply accelerated the schedule for ongoing discovery. *Id.* at 1146. In short, none of Plaintiffs' authorities justifies disturbing the automatic stay to require discovery, and Plaintiffs should not be permitted to obtain what is essentially merits discovery at this time, by inaccurately labeling it as venue discovery.

II. In Any Event, Plaintiffs Seek Discovery That Is Not Material and Necessary To The Claims and Defenses In This Case.

While all of Plaintiffs' discovery requests are inappropriate under the rules and premature, the substance of the requested discovery concerning the alleged sexual relations of Laurie Fine and another unnamed coach's wife is also plainly not "material and necessary" to prove Plaintiffs' claim. C.P.L.R. § 3101(a). Simply put, whether or not Laurie Fine and another woman had consensual sexual relationships with of-age Syracuse basketball players between 1992 and 1997 is irrelevant to Boheim's state of mind in 2011, when he made the statements that Plaintiffs claim were defamatory. Presumably, Plaintiffs previously recognized this complete irrelevance, given the absence of these allegations from their Complaint.

Even putting aside the current stay of discovery and the undisputed legal basis for the Venue Motion, Plaintiffs would not, in any event, be entitled to engage in fishing expeditions for irrelevant information. The discovery sought by Plaintiffs as to Laurie Fine and the unnamed coach's wife involves salacious gossip, and Plaintiffs' proposed interrogatory regarding contact information for all members of the Syracuse University basketball team, dating back fifteen to twenty years (from 1992 to 1997), clearly relates only to alleged affairs by others, not conduct by Bernie Fine. Discovery is not the "limitless carte blanche" that Plaintiffs seem to think that it is. *Batra v. Wolf*, 32 Misc. 3d 456, 460 (N.Y. Sup. Ct. 2010). In sum, particularly in light of the automatic stay of disclosure triggered by Defendants' Motion to Dismiss and the nature of the Venue Motion, Plaintiffs' efforts to obtain such discovery should be swiftly rejected out of hand.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' request to lift the automatic stay and require expedited discovery from Defendants be denied in its entirety.

Dated: February 8, 2012

Respectfully,

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