COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

Superior Court No. 1884CV01968

STEPHEN BEHNKE, ET AL.,

Plaintiffs,

v.

STEPHEN SOLDZ, ET AL.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY THIS ACTION IN FAVOR OF THE SUBSTANTIVELY IDENTICAL FIRST-FILED LAWSUITS IN OHIO AND THE DISTRICT OF COLUMBIA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND STATUTORY MATERIALS

INTRODUCTION

This action is the third substantively identical defamation and false-light lawsuit these five plaintiffs have filed against defendants Sidley Austin LLP, Sidley Austin (NY) LLP, Sidley partner David H. Hoffman (collectively, "Sidley"), and American Psychological Association ("APA").[1] Sidley and APA hereby move, under the "first-filed rule," for this Court to stay this third-filed suit until the resolution of the plaintiffs' two earlier-filed lawsuits in Ohio and Washington, D.C. against substantially the same group of defendants.

When plaintiffs file and seek to pursue a lawsuit in a second jurisdiction that substantively overlaps with a previously filed lawsuit in another jurisdiction against substantially the same defendants, courts in the second jurisdiction properly stay the second case under the doctrine known as the first-filed rule. Courts stay the second (and, in the rare instance, third) case to promote judicial efficiency, preserve court and party resources, respect comity between jurisdictions, avoid races to judgment and potentially inconsistent and conflicting rulings, and prevent strategic forum shopping. These considerations are especially compelling where, as here, plaintiffs seek to litigate their own *third*-filed action.

The key question addressed by the first-filed rule is whether the core issues and allegations of each case are substantially similar. Exact similarity of parties and causes of action is not required, lest plaintiffs tactically introduce nominally "new" defendants and counts in subsequent suits to evade the rule.

Before filing the instant action, the five plaintiffs in this case[2] had initially filed and

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[1] This motion is joined by all defendants except Dr. Stephen Soldz, who movants understand was served on July 25, 2018.

[2] The five plaintiffs are Dr. Stephen Behnke, Col. (Ret.) L. Morgan Banks, Col. (Ret.) Debra L. Dunivin, Col. (Ret.) Larry C. James, and Dr. Russell Newman.

pursued litigation in state court in Dayton, Ohio arising from a report prepared by Sidley for APA. Three days after the Ohio court dismissed the Ohio complaint for lack of jurisdiction over the defendants, plaintiffs filed a nearly identical second lawsuit in the Superior Court for the District of Columbia. The Washington, D.C. court then stayed that lawsuit—under the first-filed rule—until the conclusion of the first-filed Ohio lawsuit, which is still pending. Prior to the D.C. court's order staying the case in its entirety, discovery in D.C. was already stayed automatically by the defendants' filings of special motions to dismiss the complaint under the D.C. Anti-SLAPP Act, D.C. Code § 16-5501.[3]

Here in Massachusetts, plaintiffs have now filed a *third* substantively identical lawsuit against substantially the same group of defendants (adding the New York LLP that operates Sidley's Boston office and an individual defendant, Dr. Stephen Soldz, who figures prominently in plaintiffs' two earlier-filed complaints). This lawsuit includes the same defamation and false-light claims arising from the same 219 sets of allegedly false statements contained in the report prepared by Sidley for APA, a fact not changed by plaintiffs' tactical addition of Dr. Soldz as a defendant.

Under the same principles underlying the first-filed stay already ordered by the D.C. court, this Court should stay this third-filed lawsuit pending the resolution of plaintiffs' two earlier-filed cases. A stay is justified, among other reasons, to promote comity—respecting the jurisdiction of the D.C. Superior Court—and to protect defendants from plaintiffs' attempt to evade the judicial and statutory stays of discovery in the D.C. Superior Court by filing this new

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[3] One of the First Amendment protections provided by that Act is the prohibition of discovery from a SLAPP-suit defendant (with limited exceptions for discovery related to the anti-SLAPP motion itself) until the D.C. court makes the threshold determination that the lawsuit may proceed. *See* D.C. Code § 16-5502(c). ("SLAPP" stands for strategic lawsuit against public participation.)

action and seeking in this forum the discovery two other courts have denied as premature.

BACKGROUND

In this lawsuit, five plaintiffs have filed a nineteen-count, 151-page Complaint asserting claims for defamation and false-light invasion of privacy against Sidley, APA, and Dr. Stephen Soldz. The Complaint attaches an additional 80 pages of exhibits, including an Exhibit A containing 219 sets of statements plaintiffs allege are false.

The Complaint principally focuses on an independent report Sidley delivered to APA in July 2015, titled "Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogatories, and Torture" ("Report"). Albano Ex. 1.[4] The Report is 541 pages long and accompanied by more than 7,600 pages of publicly available exhibits. It resulted from several months of investigation, concerned events that spanned more than a decade, involved intelligence and military activities across the globe, and included analysis of more than 50,000 documents and interviews of approximately 150 witnesses. The Report involved investigating and evaluating allegations regarding APA's issuance of ethical rules and/or guidelines in 2002 and 2005, and related actions, which determined whether and under what circumstances psychologists who were APA members could ethically participate in national security interrogations, like those that occurred in the 2000s in Iraq, Afghanistan, Guantanamo Bay, and elsewhere.

[4] Sidley provided APA a revised version of the Report in September 2015. A copy of the revised version is attached to the accompanying declaration of Jonathan M. Albano, as Albano Ex. 1. All other Exhibits referenced herein are similarly attached.

These same plaintiffs previously filed substantively identical complaints against the same principal defendants, based on the same allegations of false and defamatory statements, in state courts in Ohio and D.C. The Ohio and D.C. cases are still pending and plaintiffs have made clear they intend to attempt to litigate all three cases at the same time.[5]

1. **Ohio:** The five plaintiffs in this case initially filed a substantively identical version of this complaint against Sidley (excluding the New York LLP that operates Sidley's Boston office), Hoffman, and APA in the Ohio Court of Common Pleas on February 16, 2017, styled *James v. Hoffman*, Case No. 2017 CV 00839 (the "Ohio Action"). The action "asserts claims of defamation *per se*, defamation by implication, and false light," which plaintiffs allege "arise from an independent review and report commissioned from Hoffman and Sidley by the APA." Albano Ex. 2 ("Ohio Compl.") ¶¶ 1, 2. Exhibit A attached to the Ohio complaint specifically identifies 219 sets of allegedly false statements made by defendants in the Report. Shortly after filing the Ohio complaint, plaintiffs' counsel represented that plaintiffs intended to immediately take five depositions, including that of Dr. Soldz.

Defendants responded with three types of threshold motions. APA and Sidley filed motions to dismiss for lack of personal jurisdiction and *forum non conveniens*, and special motions to dismiss pursuant to the District of Columbia Anti-SLAPP Act.[6] APA also filed a motion to compel arbitration of the claims of the two plaintiffs who had been APA employees.

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[5] Plaintiffs recently submitted a document in the D.C. case offering to proceed in one rather than all three jurisdictions, but only if defendants agree to conditions prejudicial to defendants' rights and interests. "Praecipe Regarding Developments in this Case," Albano Ex. 3, at ¶ 9. For example, plaintiffs assert that they will *consider* dismissing their Ohio appeal if defendants first set aside their currently pending case-dispositive anti-SLAPP motions in D.C. and file Rule 12(b)(6) motions to dismiss plaintiffs' massive complaint that includes 219 sets of allegedly false statements, and plaintiffs conclude D.C. would be a preferable forum. *See id.*

[6] Defendants argued that the Ohio court should apply D.C. anti-SLAPP protections under Ohio's conflict-of-laws principles.

The Ohio court stayed discovery while these threshold motions were addressed. The court then suspended briefing on all motions—including Sidley's joining the motion to compel arbitration—while it took up the personal jurisdiction/*forum non conveniens* issues.

On August 25, 2017, the court dismissed the Ohio complaint for lack of personal jurisdiction. Albano Ex. 4 ("Ohio Personal Jurisdiction Order"), at 1. Plaintiffs appealed that ruling, which the Ohio Second District Court of Appeals affirmed on June 22, 2018. *James v. Hoffman*, Appellate Case No. 27735. Albano Ex. 5 ("Ohio Ct. App. Order").

Plaintiffs' application to the Ohio Supreme Court to hear a discretionary appeal of the dismissal, called a "jurisdictional appeal" under Ohio procedure, is due by August 6, 2018. Plaintiffs have represented that it is their intention to file such an appeal.

2. **District of Columbia:** On August 28, 2017, three days after the Ohio trial court dismissal, the same five plaintiffs filed a second, substantively identical defamation and false-light complaint against the same defendants in D.C. Superior Court (adding the LLP that operates Sidley's D.C. office as an additional defendant), styled *Behnke v. Hoffman*, Case No. 2017 CA 005989 B (the "D.C. Action"). The District of Columbia area is where one plaintiff currently lives (Behnke), Albano Ex. 6 ("D.C. Compl.") ¶ 40, and three of the other four plaintiffs formerly lived and worked (Newman, Dunivin, and James), *id.* ¶¶ 41-43. D.C. is APA's principal place of business—indeed, its "only place of business"—and place of incorporation, *id.* ¶ 48. Sidley has a sizable office there from which it conducted substantial activity in its investigation and creation of the Report, *id.* ¶ 47. A substantial amount of documents in hard copy are located in D.C. given the location of APA's offices. A number of the activities that are central to all of the complaints occurred in D.C., such as the meeting of the PENS task force, meetings between Sidley and APA's special litigation committee, and

numerous interviews in connection with the Report, including interviews with plaintiffs Behnke and Dunivin. *Id.* ¶¶ 65, 75, 202, 273.

The D.C. Action, like the Ohio Action before it, "asserts claims of defamation *per se*, defamation by implication, and false light," which plaintiffs claim "arise from an independent review and report commissioned from Hoffman and Sidley by the APA." D.C. Compl. ¶¶ 1, 2. The D.C. complaint contains the same claims as those in the Ohio Action, and the same Exhibit A reciting the same 219 sets of statements that plaintiffs allege are false. *Id.*

In the D.C. Action, plaintiffs also sought extensive document, interrogatory, and deposition discovery, including the deposition of Massachusetts co-defendant Dr. Stephen Soldz, who is not a defendant in the D.C. Action. Albano Ex. 7 ("D.C. Discovery Requests"). As noted, the D.C. court stayed the case, including all discovery propounded by plaintiffs.

APA and Sidley filed motions to compel arbitration of the claims brought by the two plaintiffs who had been APA employees, as well as special motions to dismiss the complaint against all plaintiffs under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502. The filing of the anti-SLAPP motions automatically stayed discovery even before the D.C. Court ordered the stay of the entire case, *see* D.C. Code § 16-5502(c). The D.C. Act automatically stays discovery based on a determination that a core aspect of protecting defendants' First Amendment rights is shielding them from burdensome discovery that accompanies lawsuits brought to chill speech. *See* D.C. Council, Comm. Pub. Safety & Judiciary, Report on Bill 18-893, "Anti-SLAPP Act of 2010" (Nov. 18, 2010), at 1.

On February 16, 2018, the D.C. Superior Court granted a stay of the case in its entirety based on the "well-established . . . first-to-file rule," and held all other motions in abeyance. Albano Ex. 8 ("D.C. Stay Order"), at 2. The D.C. court noted that the plaintiffs "had previously

filed an essentially identical defamation and false light complaint" in Ohio. *Id.* The court found that the Ohio Action was "filed first" and "concerns the same issues essentially between the same parties," those issues being defamation claims "focuse[d] on an independent review and report that Sidley delivered to the APA in July 2015." *Id.* at 2-3. The court also determined that plaintiffs had brought suit "against the same Defendants" for purposes of the first-filed rule, although the D.C. Action included new party Sidley (DC) LLP. *Id.* at 2. The court held that a stay was needed to "conserv[e] the resources of the parties," avoid "the wasteful expenditure of energy and money," particularly by the defendants, which would be subject to the burden of litigating two essentially identical cases at once, and prevent "two courts of equal authority . . . hear[ing] the same case simultaneously" and the possibility of "inconsistent results from simultaneously-pending lawsuits." *Id.* at 3-5. Accordingly, the D.C. court ordered a stay lasting "until the Ohio action has concluded." *Id.* at 5.

Defendants informed the D.C. court of the appellate affirmance of dismissal of the Ohio Action; plaintiffs responded on July 3, 2018, filing a document in the D.C. Action that (1) affirmed that they would be filing a jurisdictional appeal in Ohio; (2) asked nevertheless to lift the stay of the D.C. Action so that discovery could occur in D.C. while the Ohio Action is still pending; and (3) notified the D.C. court that they had filed this third lawsuit in Massachusetts. Albano Ex. 9 ("Response to Praecipe").

3. **Massachusetts:** On June 25, 2018, plaintiffs filed the Massachusetts Complaint, attempting service on the moving defendants on July 5 and 6. Plaintiffs have once again filed a substantively identical complaint against these same defendants (swapping out the D.C. Sidley LLP with the New York Sidley LLP). The action again "asserts claims of defamation *per se*, defamation by implication, and false light," which plaintiffs again claim "ar[ose] from an

independent review and report commissioned from Hoffman and Sidley by the APA." Mass. Compl. ¶¶ 1, 2. The Complaint includes the same Exhibit A with the same 219 sets of allegedly false statements. *See* Albano Ex. 6 ("D.C. Compl."). *Compare* D.C. Compl. ¶¶ 22 (citing 219 sets of statements in Complaint's Exhibit A), 39-48 (identifying named parties), 56 (identifying non-party Stephen Soldz), *with* Mass. Compl. ¶¶ 31 (citing 219 sets of statements in Complaint's Exhibits A), 49-59 (identifying named parties, including Dr. Soldz).

Plaintiffs have added some detail in support of some of their claims and attempted to tailor their personal jurisdiction allegations to Massachusetts, *see* Mass. Compl. ¶¶ 70-79, but the defamation and false-light claims against Sidley and APA are the same as in the prior cases. Plaintiffs have also added five counts about distributions of copies of the Report (such as APA emailing links to the Report to their members) and articles discussing the Report that were already cited in the earlier complaints. *Compare* D.C. Compl. ¶¶ 1 ("This action . . . asserts claims of defamation *per se*, defamation by implication, and false light."), 300-535 (complaint counts), *with* Mass. Compl. ¶¶ 1 ("This action . . . asserts claims of defamation *per se*, defamation by implication, and false light."), 328-725 (complaint counts). Plaintiffs have also added a new defendant, Massachusetts resident Dr. Stephen Soldz, whose alleged actions were extensively discussed in the Ohio and D.C. complaints. *See* D.C. Compl. ¶¶ 28, 56, 79, 173, 175, 176, 243, 244, 247, 299, 322, 333, 343; *see also* Albano Ex. 2 ("Ohio Compl.") ¶¶ 55, 78, 176, 240, 241, 316, 317, 327, 337, 338. As noted above, plaintiffs stated their intention to take Dr. Soldz's deposition in the Ohio Action and sought to compel Dr. Soldz's deposition in the D.C. Action.

Plaintiffs served with the Complaint a number of broad discovery requests, including five sets of wide-ranging document requests and three deposition notices. These requests seek much

of the same discovery requested in the previously filed lawsuits, including Sidley's interview notes, documents that pertain to the leak of the Report to *New York Times* reporter and author of *Pay Any Price* James Risen, legal analyses provided to APA, and the deposition of Dr. Soldz. Albano Ex. 7 ("D.C. Discovery Requests"). Given the substantial overlap between the discovery served in Massachusetts and D.C., the discovery served with the Massachusetts Complaint flouts the D.C. Superior Court's February 2018 Stay Order, as well as the protections afforded defendants under the D.C. Anti-SLAPP Act.

Seeking to preserve their rights, defendants on July 20, 2018 filed an emergency motion in this Court to stay all discovery and the deadline for the filing of threshold motions in response to the Complaint until this Court had decided this first-filed stay motion. On July 24, 2018, this Court granted defendants' emergency motion (without prejudice to any later argument by the then-unserved defendant Soldz).

ARGUMENT

The Court should stay this case under the well-established first-filed rule, until the conclusion of the lawsuits plaintiffs are actively litigating against defendants in Ohio and the District of Columbia. Here, plaintiffs seek to litigate substantively identical cases in three different jurisdictions, tripling the burden on defendants. This is particularly objectionable where litigation is likely to ultimately proceed on the merits in only one jurisdiction, and where plaintiffs are attempting to use this third case to avoid the automatic and court-ordered stays of discovery in the D.C. case and avoid application of the D.C. anti-SLAPP statute.

Massachusetts courts follow the first-filed rule and routinely exercise their discretion to stay a later-filed case in favor of a substantially similar earlier-filed action. Because plaintiffs' Massachusetts case is substantively identical to their first-filed lawsuits pending in Ohio and

D.C., the first-filed rule presumptively applies to justify a stay of this case. Well beyond the application of any presumption, the additional interests considered under the first-filed rule—the interests of comity, judicial efficiency, preservation of court and party resources, avoidance of inconsistent rulings, prevention of forum shopping, and courts' comparative expertise—all strongly support a stay of this case.

I. Where Duplicative Lawsuits Are Filed at Different Times in Different Jurisdictions, Courts Stay the Later-Filed Case Until the First-Filed Case Is Resolved.

It is well settled that a court's inherent power to control its docket includes the discretion to stay proceedings pending the outcome of another lawsuit. *Travenol Labs., Inc. v. Zotal, Ltd.*, 394 Mass. 95, 97 (1985); *Town of Danvers v. Wexler Const. Co.*, 12 Mass. App. Ct. 160, 164 (1981); *see also Williams v. FedEx Ground Package Sys., Inc.*, No. 062344C, 2007 WL 3013266, at *1 (Mass. Super. Ct. Sept. 20, 2007) (power to stay proceedings "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). Trial courts often exercise their broad discretion to stay proceedings where doing so would promote "judicial interest in the efficient disposition of cases [and] principles of comity." *Van Emden Mgmt. Corp. v. Marsh & McLennan Cos.*, No. 05-0066-A, 2005 WL 2456737, at *2 (Mass. Super. Ct. Sept. 21, 2005).

"[T]he usual practice is for the court that first had jurisdiction to resolve the issues and the other court to defer." *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 186 F. Supp. 3d 22, 24 (D. Mass. 2016) (internal quotation marks omitted) (quoting *TPM Holdings, Inc. v. Intra-Gold Industries, Inc.*, 91 F.3d 1, 4 (1st Cir. 1996)). The court presiding over the later-filed action will typically defer to the court with the earlier-filed action where there is "substantial overlap between the facts and arguments" of plaintiffs' pending suits. *Sussman v. Vieau*, MICV201201917, 2012 WL 11893990, at *1 (Mass. Super. Ct. Sept. 18, 2012); *see also TPM*

Holdings, 91 F.3d at 4 (same). Massachusetts courts favor the first-filed rule, staying the "later-filed action . . . pending final resolution of the first-filed action" where such overlapping cases were "filed in different jurisdictions at materially different times." *FTI, LLC v. Duffy*, No. 1684CV03176BLS2, 2017 WL 3251514, at *1 (Mass. Super. Ct. May 4, 2017); *see also Davenport v. Benhamou*, No. 07379323F, 2007 WL 4711512, at *2 (Mass. Super. Ct. Dec. 20, 2007) (granting motion for stay of proceedings pending first-filed Delaware action).[7]

The first-filed rule is grounded in basic principles of American jurisprudence. The rule promotes "principles of comity" between jurisdictions. *Van Emden*, 2005 WL 2456737. It prevents "a waste of judicial and party resources." *Davenport*, 2007 WL 4711512, at *2. And it removes "the potential for different declarations by two separate judges . . . on identical issues of law and fact." *Seidman*, 2003 WL 369678, at *2 (citing *Jacoby v. Babcock Artificial Kidney Cent., Inc.*, 364 Mass. 561, 563-64 (1974)).

Massachusetts courts have adopted the first-filed rule and applied it as a general practice. *Sussman*, 2012 WL 11893990, at *1; *see also Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-

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[7] Massachusetts state courts commonly apply the first-filed rule. *See, e.g.*, *Sussman*, 2012 WL 11893990, at *2 (staying Massachusetts case in favor of first-filed action); *Davenport*, 2007 WL 4711512, at *2 (same); *Williams*, 2007 WL 3013266, at *1 (same); *Van Emden*, 2005 WL 2456737, at *2 (same); *Seidman v. Central Bancorp, Inc.*, Nos. 030547BLS, 030554BLS, 2003 WL 369678, at *3 (Mass. Super. Ct. Feb. 3, 2003) (same); *Alonzi v. HMK Enters., Inc.*, No. 927737D, 1993 WL 818739, at *4 (Mass. Super. Ct. June 25, 1993) (same); *see also Vista Prop. Mgmt., LLC v. Liberty Mut. Fire Ins. Co.*, No. 2012-4620-C, 2013 WL 4027421, at *7 (Mass. Super. Ct. June 28, 2013) (dismissing case on combined first-filed and *forum non conveniens* grounds); *Tanzman, Rock & Kaban, LLC v. MarketXT Holdings Corp.*, No. 035928BLS, 2004 WL 504737, at *5 (Mass. Super. Ct. Mar. 1, 2004) (dismissing case under first-filed rule); *Raytheon Co. v. Exelon Mystic Dev., LLC*, No. 034183BLS, 2003 WL 23016863, at *5 (Mass. Super. Ct. Nov. 25, 2003) (same). This is also a common practice by Massachusetts federal courts. *See, e.g.*, *Dana-Farber*, 186 F. Supp. 3d at 24 (staying case in favor of first-filed federal case); *Chedester v. Town of Whately*, 279 F. Supp. 2d 53, 58 (D. Mass. 2003) (staying case in favor of first-filed state case); *Dupont Pharms. Co. v. Sonus Pharms., Inc.*, 122 F. Supp. 2d 230, 230 (D. Mass. 2000) (transferring case in favor of first-filed action).

3973-B, 2010 WL 5071848, at *3 (Mass. Super. Ct. Oct. 27, 2010) ("[T]he first-filed rule is a presumption," and "the general rule favors the forum of the first-filed action"); *Seidman*, 2003 WL 369678, at *2 ("forum in a first filed action is generally preferred"). While the stay of a subsequently filed case is the preferred and usual course, Massachusetts courts also balance a number of other considerations to ensure that the first-filed stay "will better serve the interests involved," *FTI*, 2017 WL 3251514, at *1 (quoting *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125, 127 (D. Mass. 2012)), including whether the case involves "procedural gamesmanship" and forum shopping, *Vista Prop.*, 2013 WL 4027421, at *2, the potential for inefficient use of "judicial and litigant economy," *Ethicon*, 2010 WL 5071848, at *4 (quoting *Dupont*, 122 F. Supp. 2d at 230), particularly where there is "[t]he possibility of duplicative discovery," *Dupont*, 122 F. Supp. 2d at 231, and whether the case involves the application of Massachusetts statutes, *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 330 (2018) (citing *Provanzano v. Parker*, 796 F. Supp. 2d 247, 257 (D. Mass. 2011)).

Concerns over intrastate comity and burden on the defendants necessarily weigh even more heavily here, where plaintiffs seek to pursue three substantively identical cases at once, and a first-filed stay is therefore even more important to address such concerns.

II. This Case Should Be Stayed Under the First-Filed Rule, as Plaintiffs Are Litigating Substantively Identical Suits in Ohio and D.C.

As shown above, prior to filing their Complaint in Massachusetts, plaintiffs filed two substantively identical lawsuits in two different states. Because plaintiffs seek to litigate all three suits simultaneously, this Court should defer to the first-filed litigation and stay the case pending the final outcomes of the Ohio and D.C. lawsuits.

Plaintiffs filed the Ohio complaint in February 2017 and the D.C. complaint in August 2017—sixteen and ten months earlier than this action, respectively. This action should therefore

be subject to a presumption of a stay pending the outcome of those substantially similar matters. *See, e.g.*, *Vista Prop.*, 2013 WL 4027421, at *3 (where N.Y. action filed three-and-a-half months earlier before Massachusetts action, N.Y. action considered materially first filed).

The Ohio and D.C. Actions are well underway. The Ohio Action has proceeded past the Court of Appeals' affirmance of the trial court's dismissal for lack of personal jurisdiction over the defendants and plaintiffs will file their jurisdictional appeal before the Ohio Supreme Court on or before August 6. In D.C., the defendants have filed extensive and potentially dispositive threshold motions, while plaintiffs have sought to compel discovery, some of which is identical to discovery requested here. *See Vista Prop.*, 2013 WL 4027421, at *3 (N.Y. case substantially first-filed where plaintiff has already "initiated discovery" in N.Y.). The D.C. court has stayed the entire case, including discovery, and held all pending motions in abeyance until the conclusion of the Ohio Action. The parties should not have to replicate those filings here. Plaintiffs waited years after the alleged defamation occurred to file in Massachusetts, and plaintiffs' "own substantial delay in commencing suit in Massachusetts confirms that this was no breathless race to the courthouse" in which the first-filed suit was a nominal placeholder. *Id.*; *Transcanada Power Mktg., Ltd. v. Narragansett Elec. Co.*, 402 F. Supp. 2d 343, 348 (D. Mass. 2005) (that a lawsuit was first filed means there was no "race to the courthouse"). Indeed, plaintiffs' choice of filing this third action now appears to be deliberate forum shopping in order to further their litigation strategy.

Where, as here, the subject matter of each of the three lawsuits is substantively identical and the parties are substantially the same, the first-filed rule unquestionably applies. The "cases need not be literally identical" to warrant a first-filed stay. *Dunkin' Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221, 233 (D. Mass. 2014). Rather, "it suffices if

they are substantially similar." *Id.* Where the earlier-filed and later-filed actions contain "substantial overlap between the facts and arguments in each case," *Sussman*, 2012 WL 11893990, at *1, and therefore share a "similarity of the allegations" such that "the complaint in [later-filed] case tracks . . . statements from the [first-filed] complaint," *Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171, 172 (D. Mass. 2009), the first filed case should move forward and the second filed case should be stayed. Accordingly, courts have applied the first-filed rule where plaintiffs have alleged defamation based upon the same underlying publication and operative facts, even where the defendants were not identical across lawsuits. *See, e.g.*, *Chadwick v. Metro Corp.*, No. 44, 2004, 2004 WL 1874652, at **1-2 (Del. Aug. 12, 2004) (applying first-filed rule where two suits "involve[d] substantially similar parties and issues" and both actions were based on "virtually all of the [same] allegedly defamatory statements" and "common nucleus of operative facts"); *Schepers v. Terex Corp.*, 441 F. Supp. 2d 1004, 1008-09 (N.D. Iowa 2006) (applying first-filed rule to defamation case, where defendants differed in part, due to "same operative set of facts").

Here, the overlap between the pending cases goes well beyond the mere similarity of allegations typically required for a first-filed stay. Each of the lawsuits was brought on behalf of the same five plaintiffs against Sidley and APA. Each "asserts claims of defamation *per se*, defamation by implication, and false light." Ohio Compl. ¶¶ 1, 2; D.C. Compl. ¶¶ 1, 2; Mass. Compl. ¶¶ 1, 2. Each bases such claims on the same Report and Report statements summarized in identical Exhibit A's to each complaint.[8] As the D.C. Superior Court noted in applying a first-

[8] Plaintiffs have added additional counts in the Massachusetts suit alleging additional instances in which the Report was made available to people or reported on. *See* Compl. ¶ 494 (Count 9, concerning *The Guardian*'s independent reporting on Report); ¶ 536 (Count 11, concerning APA's e-mailing of Report to its members); ¶ 560 (Count 12, concerning *The Boston Globe*'s independent reporting on Report); ¶ 650 (Count 16, concerning APA's e-mailing of

filed stay in this litigation, the similarities in the cases are unmistakable: plaintiffs have filed "essentially identical defamation and false light complaint[s]," "focuse[d] on an independent review and report that Sidley delivered to the APA in July 2015." Albano Ex. 8 ("D.C. Stay Order"), at 2-3. Given such "substantial overlap" between the complaints, there is "no reason – not even a moderately strong one – for departing from the default, i.e. the 'first-filed' rule." *Sussman*, 2012 WL 11893990, at *1.

That plaintiffs have named Dr. Soldz as an additional defendant in Massachusetts does not change the first-filed analysis. The first-filed rule "turn[s] on which court first obtains possession of the subject of the dispute, not the parties of the dispute," and therefore the "exact identity of the parties" need not be the same. *Time Warner Cable, Inc. v. GPNE Corp.*, 497 F. Supp. 2d 584, 589 (D. Del. 2007) (quotation mark omitted).

Accordingly, in Massachusetts, a discretionary stay is proper even if there are "additional claims and parties in each case" so long as "the thrust of all three actions is essentially identical." *Seidman*, 2003 WL 369678, at *2-3; *see also Alonzi*, 1993 WL 818739, at *3-4 (stay in favor of first-filed case even where "plaintiffs in the two actions are not strictly identical"). Otherwise, parties could "frustrate the purpose" of Massachusetts's preference for first-filed actions "by naming more [parties], . . . in a subsequent action" because the first-filed preference "could be easily undermined through the addition of interested parties *seriatim*, in successive lawsuits" to

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Report to its governance members); ¶ 675 (Count 17, concerning statements allegedly made by defendant Soldz regarding the Report). These "new" counts are based on the *same* underlying conduct alleged in all three suits—and accordingly do not in any respect change the first-filed analysis. *See Wiley*, 667 F. Supp. 2d at 171 & n.1 (applying first-filed rule where plaintiff "has also added claims . . . not included in the" first-filed action without changing the underlying "similarity of allegations"). For the first-filed rule, "overlapping subject matter is the key; exact identity of claims is not required." *Catanese v. Unilever*, 774 F. Supp. 2d 684, 689 (D.N.J. 2011).

manufacture an empty distinction. *O'Donnell v. O'Donnell*, No. 354787 (HMG), 2008 WL 639696, at *1 (Mass. Land Ct. Mar. 10, 2008); *see also Fromm v. City of Boston*, No. 13-P-246, 2014 WL 349309, at *1 (Mass. App. Ct. Feb. 3, 2014) ("The naming of a new defendant . . . in the current action does not render [a second case] separate and distinct for purposes of" first-filed rule under analogous Mass. R. Civ. P. 12(b)(9)); *Herer v. Ah Ha Pub., LLC*, 927 F. Supp. 2d 1080, 1089 (D. Or. 2013) (applying first-filed rule where plaintiff had added a defendant to the new case, observing that "if parties were required to be identical, then the rule and its benefits could be easily avoided simply by adding a party or a claim to the later-filed action").

Moreover, plaintiffs' allegations in the Massachusetts complaint against Dr. Soldz as a party are largely the same ones they made against him as a non-party in the Ohio and D.C. Actions. Plaintiffs alleged in those first-filed cases that Dr. Soldz was interviewed by Hoffman, Ohio Compl. ¶ 55, D.C. Compl. ¶ 56, that Hoffman relied heavily on his interview with Dr. Soldz in the Report, Ohio Compl. ¶ 78, D.C. Compl. ¶ 79, that APA published the Report to Dr. Soldz and then met with him, Ohio Compl. ¶¶ 240, 241, D.C. Compl. ¶¶ 243, 244, and that APA has allowed Dr. Soldz to make false and defamatory statements about the plaintiffs, D.C. Compl. ¶ 299. Both the Ohio and D.C. complaints set forth defamation counts against APA and Sidley based upon publication of the Report to Dr. Soldz. Ohio Compl. ¶ 316, D.C. Compl. ¶ 322. There is no difference in the operative allegations against the defendants in the three cases when it comes to the allegations regarding Dr. Soldz's involvement in the investigation and Report.

All considerations support application of the first-filed rule here. Accordingly, this Court should stay this suit pending the Ohio and D.C. Actions.

III. The Court's Additional Interests in Comity, Thwarting Forum Shopping, Litigant and Judicial Economy, and Other Factors Strongly Support a Stay.

In determining whether to stay a subsequently filed case, courts consider whether a stay furthers effective and efficient litigation of the parties' dispute. Courts thus routinely consider the effect a stay would have on our system of litigation as a whole, such as promoting "the just and effective disposition of disputes" and the interests of "judicial and litigant economy," including the comparative expertise of the courts involved as to the applicable legal questions. *Storagenetworks, Inc. v. Metromedia Fiber Network Serv.*, No. 012898, 2001 WL 1334881, at *2 (Mass. Super. Ct. Aug. 13, 2001) (quoting *Dupont*, 122 F. Supp. 2d at 231). Here, consideration of those factors mandates stay of this lawsuit.

A. A First-Filed Stay Would Preserve Comity by Preventing Plaintiffs from Evading the D.C. Anti-SLAPP Act and the Orders of the D.C. Court.

In considering whether to enter a stay based on the first-filed rule, "comity among the states is to be encouraged; each state should have respect for the capabilities of another's tribunals." *Davenport*, 2007 WL 4711512, at *2. And courts must also determine whether a first-filed stay prevents parties from forum shopping and evading unfavorable jurisdictions. *Exxon*, 479 Mass. at 329 (2018) (citing *Bacardi Int'l Ltd. v. V. Suarez & Co.*, 719 F.3d 1, 15 (1st Cir. 2013)).

Here, plaintiffs appear to have filed this lawsuit in an attempt to evade a stay of the D.C. Action entered by the D.C. Superior Court to protect defendants from the burden of duplicative litigation and an automatic stay of discovery required under the D.C. Anti-SLAPP Act. *Compare* D.C. Code. § 16-5502 ("upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of"), *with* G.L. c. 231 § 59H ("[a]ll discovery proceedings shall be stayed upon the filing of the special motion to dismiss). Plaintiffs also are pursuing this suit in hopes of evading a decision on the merits on

defendants' *currently pending* D.C. anti-SLAPP motions. They have even admitted this motivation in the D.C. Action, where they attempted to justify bringing this lawsuit in Massachusetts by complaining to the court about defendants' pending D.C. anti-SLAPP motions: "[T]he D.C. Anti-SLAPP Act [could] block[] Plaintiffs' access to court in D.C.," plaintiffs stated, and they therefore sought "access to a court in at least one jurisdiction." Albano Ex. 9 ("Response to Praecipe"), at 4–5.[9]

A first-filed stay is necessary to protect defendants' rights and respect the jurisdiction of the D.C. court, a jurisdiction in which plaintiffs saw fit to file an earlier action and where the core of this case is centered. *See supra* pp. 5-6. It is also necessary to prevent the risk of "inconsistent rulings on issues of discovery" and other issues of comity in D.C. and Massachusetts. *Van Emden*, 2005 WL 2456737, at *3. And it is needed to prevent plaintiffs from continuing to file new cases where, as here, they discover a perceived roadblock to victory in one jurisdiction and therefore attempt to decamp to another.

B. Staying this Case Would Shield Defendants from Plaintiffs' Attempts at Burdensome Triplicate Litigation.

In considering whether to apply the first-filed rule, courts also consider whether such a stay would protect defendants against duplicative and burdensome litigation tactics. *Salomon S.A. v. Scott USA Ltd.*, 117 F.R.D. 320, 321 (D. Mass. 1987).

Forcing defendants to simultaneously defend plaintiffs' three substantively identical lawsuits will be time-consuming, expensive, and impose an unfair burden. In addition to retaining local counsel in Ohio and in Massachusetts, defendants have already shouldered the burden and expense of numerous motions in the Ohio and D.C. Actions, including first-filed stay

[9] In point of fact, the D.C. Anti-SLAPP Act does not block plaintiffs' *access* to court; it gives defendants the opportunity to obtain expedited dismissal *on the merits, with prejudice.*

motions, personal jurisdiction motions, anti-SLAPP motions, and arbitration motions, some of which were filed in both jurisdictions. Many of those motions would also need to be filed in this Court. A stay is particularly appropriate where defendants would suffer the burden of unnecessary "additional motion practice before th[e] courts" that could result in expense and curtail defendants' attempts to vindicate their rights. *Van Emden*, 2005 WL 2456737, at *3.

C. Plaintiffs' Complaint Does Not Allege Legal Issues Within the Particular Expertise of Massachusetts.

A court addressing a request for a first-filed stay also considers the comparative expertise of each court in resolving the dispute given the legal claims at issue. *FTI*, 2017 WL 3251514, at *2. Where the claim "is brought under a Massachusetts statute . . . , Massachusetts courts [may] have a comparative advantage in deciding that claim" compared to the court in the first-filed action attempting to apply Massachusetts law. *Id.*

Plaintiffs' Complaint, however, is not directed to the particular expertise of Massachusetts courts or couched in Massachusetts law. Plaintiffs' defamation claims sound in tort under common law. To the extent state laws differ, Massachusetts' choice of law analysis would likely call for analysis of these issues under the law of states other than Massachusetts. *See McKee v. Cosby*, 874 F.3d 54, 59-60 (1st Cir. 2017) (affirming application of Michigan law to defamation claim under Massachusetts conflict-of-law approach). This factor as well supports a stay of this case. *Davenport*, 2007 WL 4711512, at *2 (staying case, because while Massachusetts courts are "capable of interpreting and applying [the first-filed state's law], . . . it is not unreasonable to defer to the [first-filed state] court's greater expertise in dealing with its own laws."); *Raytheon*, 2003 WL 23016863, at *5 (preferable to defer to first-filed case where later-filed court must apply another state's law, and judge in first-filed case "can interpret his own state's laws and whose rulings [that state's] appellate courts can review").

CONCLUSION

For the foregoing reasons, this Court should stay this case in its entirety until the first-filed Ohio and D.C. Actions are both resolved.

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Certificate of Service

I hereby certify that on July 26, 2018 I served this document by email on all counsel of record and on defendant Stephen Soldz.

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