

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

Superior Court No. 1884CV01968

STEPHEN BEHNKE, ET AL.,

Plaintiffs,

v.

STEPHEN SOLDZ, ET AL.,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR  
TEMPORARY STAY PENDING RULING ON FORTHCOMING MOTION TO STAY  
LAWSUIT IN FAVOR OF THE FIRST-FILED RULE**

Plaintiffs agree that this Court may stay this case, including briefing on threshold motions and the discovery against Defendants Sidley Austin LLP, Sidley Austin (NY) LLP, Sidley partner David Hoffman (collectively, "Sidley"), and American Psychological Association ("APA") until such time as the Court has decided their forthcoming "first-filed" stay motion. Plaintiffs contend, however, that they should be permitted to proceed now with discovery of defendant Dr. Stephen Soldz, and third party Nathaniel Raymond, neither of whom have yet been served with process.<sup>1</sup> Plaintiffs assert two reasons why they are entitled to this discovery. First, plaintiffs argue that this will support plaintiffs' allegations of personal jurisdiction over all defendants in Massachusetts, thereby providing support for plaintiffs' (third) choice of litigation in Massachusetts when responding to a motion to dismiss for lack of personal jurisdiction. Opp.

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<sup>1</sup> Plaintiffs also seek an order continuing defendants' first-filed stay motion until October 31, 2018. *See* Plfs' Proposed Order. Defendants oppose such a request, particularly given that plaintiffs have not agreed that defendants' filing of a first-filed stay motion by July 26, 2018 is without prejudice to defendants' preservation of their threshold motions, including anti-SLAPP motions to dismiss and motions to dismiss for lack of personal jurisdiction/*forum non conveniens* and to compel arbitration. *Id.*

at 8. Second, plaintiffs argue that they have only until October 6, 2018 to determine whether they should sue third parties Mr. Raymond and publishing company Houghton Mifflin Harcourt (“Houghton”) and need additional information in order to make that decision. Opp. at 7-8.

Neither of these purported reasons justifies the broad discovery plaintiffs seek during the limited period before this Court decides defendants’ first-filed motion.<sup>2</sup>

**A. Discovery Against Dr. Soldz and Mr. Raymond to Support Plaintiffs’ Basis for Jurisdiction in Massachusetts Is Improper.**

Plaintiffs contend that the depositions of and documents requests to Dr. Soldz and Mr. Raymond will demonstrate the extent of defendants’ activities in Massachusetts, thereby supporting plaintiffs’ claim for personal jurisdiction over Sidley and APA here, and may lead to additional claims for which Massachusetts may be the appropriate jurisdiction. Opp. at 8.

Neither of these purported grounds for discovery is a justification for opposing a temporary stay of the case.

First, personal jurisdictional discovery is premature. Should this Court grant defendants’ forthcoming first-filed stay motion, there will be no need for some time, if ever, for the Court to examine the jurisdictional basis for plaintiffs’ Complaint. Before this Court would have to address personal jurisdictional challenges, the Ohio and D.C. Actions would both have to be resolved. On the basis of plaintiffs’ stated intention to pursue legal proceedings in both Ohio and D.C. simultaneously,<sup>3</sup> despite the stay of the D.C. action, this Court may never have to address

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<sup>2</sup> Defendants object to the numerous inaccurate factual representations made in plaintiffs’ opposition, but for purposes of this Reply focus on deficiencies in the key arguments on which plaintiffs’ Opposition relies. Defendants reserve all rights with regard to the factual assertions and legal contentions in the Opposition.

<sup>3</sup> Plaintiffs have proposed in both the Ohio and D.C. actions to dismiss the lawsuits in other forums if defendants will agree to a series of terms and conditions that include relinquishing their rights to file threshold motions and surrendering themselves to whichever state’s law plaintiffs

the personal jurisdiction motions or any other threshold motion. If the Ohio or D.C. case is resolved on the merits, there will be nothing for plaintiffs to litigate in Massachusetts against the moving defendants.

Second, seeking to proceed with deposition and document discovery from Dr. Soldz and Mr. Raymond so plaintiffs can decide if it is advantageous for them to sue in Massachusetts is merely more forum shopping. Plaintiffs' decision-making about claims they may ultimately choose to bring against third parties has nothing to do with defendants' forthcoming first-filed motion, which concerns a comparison of the three simultaneously pending lawsuits that plaintiffs have already filed in Ohio, Washington, D.C., and Massachusetts.

Third, plaintiffs' argument that defendants need not participate in the two depositions misunderstands the nature of litigation. Plaintiffs have sued defendants for defamation and false-light invasion of privacy and the testimony they take in the Soldz and Raymond depositions can be used against defendants Sidley and APA. Accordingly, if the depositions are permitted to proceed, defendants will have to prepare for and participate in them, thus losing the protection of the D.C. Superior Court stay and the stay that the forthcoming first-filed motion seeks to provide.

**B. A Possible Suit Against Mr. Raymond and Houghton Does Not Justify Discovery.**

Houghton is the publisher of James Risen's 2014 book, *Pay Any Price*. Plaintiffs assert that they should be permitted to proceed immediately with the Raymond deposition because they "seek information that may reflect that [Mr. Raymond] and Risen knew that allegations in the book were false when it was published or, at a minimum, when Houghton Mifflin republished it." Opp. at 8. Plaintiffs' possible claims against Mr. Raymond and Houghton are not the proper

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find most favorable to their claims. Such conditions, which ask defendants to litigate against themselves in an act of self-sabotage, are obviously unacceptable.

subject of discovery in this lawsuit, which alleges defamation and false-light invasion of privacy against Sidley and APA arising from the Report.

It is impermissible for plaintiffs to use discovery in the instant action to try to set up other litigation against third parties. *See, e.g., E.A. Miller, Inc. v. S. Shore Bank*, 405 Mass. 95, 100, 102 (1989) (“[D]iscovery cannot be used as a vehicle for discovering a right of action. Parties may not ‘fish’ for evidence on which to base their complaint ‘in hopes of somehow finding something helpful to [their] case in the course of the discovery procedure.’” (internal quotation marks omitted)); *Alphas Co. v. Kilduff*, 72 Mass. App. Ct. 104, 114 (2008) (“Parties may not ‘fish’ for evidence on which to base their complaint ‘in hopes of somehow finding something helpful to their case in the course of the discovery procedure.’”).

Nor do the document requests attached to the deposition notice for Mr. Raymond actually concern potential claims against Mr. Raymond and Houghton. The twelve broad categories of requests seek a vast array of documents. This discovery has been the target of plaintiffs’ keen interest since they commenced the first case in Ohio in February 2017. The discovery plaintiffs seek from Mr. Raymond include his communications with Sidley (requests 2, 3, and 4), his relationship and activities with Dr. Soldz and other “Accusers” (requests 8 and 9); and his efforts to generate a criminal investigation (requests 6, 7, 9, and 12). Two of the categories seek documents regarding to Mr. Raymond’s interactions with Mr. Risen as they pertain to *Pay Any Price* (requests 1 and 10), which are irrelevant to this lawsuit as they concern hypothetical claims that plaintiffs say that are considering against others four years after publication of *Pay Any Price*.

**CONCLUSION**

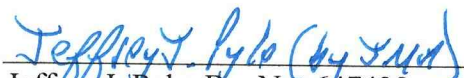
For the reasons set forth herein, as well as in defendants' previously filed motion and memorandum, defendants request that their motion for temporary stay be granted.

**AMERICAN PSYCHOLOGICAL  
ASSOCIATION**


**SIDLEY AUSTIN LLP, SIDLEY AUSTIN  
(NY) LLP, and DAVID H. HOFFMAN,**

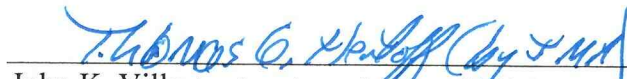
By its attorneys,

By their attorneys,

  
Jeffrey J. Pyle, Bar No. 647438  
jpyle@princelobel.com  
**PRINCE LOBEL TYE LLP**  
One International Place, Suite 3700  
Boston, MA 02110  
Telephone: +1.617.456.8143  
Facsimile: +1. 617.456.8100

  
Jonathan M. Albano, Bar No. 013850  
jonathan.albano@morganlewis.com  
**MORGAN, LEWIS & BOCKIUS LLP**  
One Federal Street  
Boston, MA 02110-1726  
Telephone: +1.617.341.7700  
Facsimile: +1.617.341.7701

  
Barbara S. Wahl (*pro hac vice application to be filed*)  
barbara.wahl@arentfox.com  
Karen E. Carr (*pro hac vice application to be filed*)  
karen.carr@arentfox.com  
**ARENT FOX LLP**  
1717 K Street, N.W.  
Washington, D.C. 20006  
Telephone: +1. 202.857.6415  
Facsimile: +1. 202.857.6395

  
John K. Villa (*pro hac vice application to be filed*)  
Thomas G. Hentoff (*pro hac vice application to be filed*)  
thentoff@wc.com  
Alexander J. Kasner (*pro hac vice application to be filed*)  
akasner@wc.com  
**WILLIAMS & CONNOLLY LLP**  
725 Twelfth Street, N.W.  
Washington, D.C. 20005  
Telephone: +1.202.434.5804  
Facsimile: +1. 202.434.5029

Dated: July 24, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail-hand on e-mail on July 24, 2018

