COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS Superior Court No. 1884CV01968

STEPHEN BEHNKE, ET AL.,

Plaintiffs,

v.

STEPHEN SOLDZ, ET AL.,

Defendants.

PLAINTIFFS' LIMITED OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR A TEMPORARY STAY

On July 20, 2018, all Defendants except Stephen Soldz moved for an emergency order staying this case until the Court rules on Defendants' forthcoming "first-filed" motion. Plaintiffs oppose the motion only to the extent that, if granted, it would delay the depositions of two Massachusetts residents – Soldz and Nathaniel Raymond, who is not currently a party to the suit – and the related document discovery from them. Plaintiffs also request that their briefing in response to the first-filed motion be delayed until after they have obtained those two depositions and the related documents.

Plaintiffs expect this limited discovery to be directly relevant to the Court's first-filed analysis, which must consider whether "a later-filed action … will better serve the interests involved …." *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312 (2018), 2018 Mass. LEXIS 235, SJC-12376 (Apr. 13, 2018). That relevance will be demonstrated below in Section I of the Argument. The discovery will also be relevant to several of the other motions Defendants propose to file if their first-filed motion is denied (Defendants' Emergency Motion, pp. 13-14). Moreover, this discovery would eventually proceed even if the Court were to dismiss Hoffman, Sidley, and the APA from the suit and it were to continue only against Soldz.

This limited discovery will not be burdensome to Sidley, Hoffman, or the APA. Their counsel do not represent Soldz and Raymond and, therefore, they will not be required to defend the depositions or produce documents. They will simply attend two depositions in Boston. Soldz and Raymond are perfectly capable of objecting to the discovery propounded to them if they choose to do so.

BACKGROUND

Although Defendants' Motion asserts that "[t]he Complaint fails to disclose … that plaintiffs are seeking to actively litigate the same case in three different jurisdictions at the same time" (Emergency Motion, p. 1), the Complaint states clearly that Plaintiffs have filed three actions in their attempts to have the merits of their case heard by a court in at least one jurisdiction (Complaint, p. 27, fn 14).

Defendants' assertion that Plaintiffs are forum-shopping (Emergency Motion, p. 2) turns truth on its head. Plaintiffs have repeatedly offered to proceed in only one jurisdiction if Defendants agree to allow the case to proceed to its merits in that jurisdiction, and they have offered to mediate rather than litigate the dispute. Instead, as the case's history demonstrates, Defendants have engaged in a serial attempt to block courts from addressing its merits, and they have been particularly intent on blocking discovery.

Defendants' allegation that Plaintiffs are engaged in "tactical multiplication of proceedings" (Emergency Motion, p 2) is implausible on its face. The Plaintiffs are private individuals with very limited financial resources. Other than local counsel, they are represented by a solo practitioner and by Louis Freeh, whose 14-person firm engages primarily in legal counseling and analysis rather than litigating cases. Plaintiffs simply do not have the resources to engage in tactical gamesmanship for its own sake. They are proceeding in more than one

jurisdiction only because they cannot risk being left with no jurisdiction that will hear the case's merits. If they were to delay proceeding in Massachusetts, they would risk being foreclosed from filing here by the statute of limitations.

A. History of the Dispute

At the center of this dispute are multiple publications of three versions of an investigative report (the "Report(s)") written by Hoffman, a Sidley Austin partner; statements made in the media by the then-APA President after the Report's release; and statements and actions by Soldz before, during, and after Hoffman's investigation.

Hoffman had been asked by the APA to investigate the truth of allegations in a book, *Pay Any Price*, written by *The New York Times* reporter James Risen and published by Houghton Mifflin Harcourt in late 2014. (Raymond was an anonymous source for Risen, and he has since acknowledged that he supplied Risen with his narrative for the book chapter most relevant to Hoffman's investigation.) The APA Board authorized Hoffman "to conduct an independent review of whether there is any factual support for the assertion that APA engaged in activity that would constitute collusion with the Bush administration to promote, support or facilitate the use of 'enhanced' interrogation techniques by the United States in the war on terror."

Although Hoffman found no support for the bulk of Risen's allegations, on the instruction of the APA Special Committee overseeing his work and in collaboration with Raymond and Soldz, he vastly expanded the investigation's scope. In his Report, he made a series of demonstrably false and defamatory factual statements about the Plaintiffs.

Within two weeks of the Report's publication, Plaintiffs began to present Defendants with documents and other evidence that contradicted its conclusions. Since then, many APA members, including former presidents and former chairs of the APA Ethics Committee, have

publicly contradicted Hoffman's "facts" based on their first-hand knowledge of the underlying events. The accumulated evidence demonstrates that Defendants acted with knowledge that Hoffman's conclusions were false or in reckless disregard of whether they were true. For example, the evidence shows that Hoffman had in his possession but ignored evidence and testimony from witnesses that contradicted his conclusions, that he purposefully avoided lines of inquiry that would have undercut his narrative, and that many APA Board members who authorized the Report's publication were intimately involved in the underlying events and therefore knew the Report falsified those events.

So clear and widely acknowledged were the Report's false statements that, in February 2016, a member of the APA's legal staff told the APA Council, its governing body, that it had a fiduciary duty to fix the Report. The APA then re-hired Hoffman to review his own work and to produce a supplemental report by June 8, 2016. That report has never emerged.

As a result of the Report's publication and the APA's actions surrounding it, two of the Plaintiffs lost their jobs and all suffered severe damage to their professional and personal reputations. Contrary to Defendants' assertion that this suit falls into the category of "lawsuits brought to chill speech" (Emergency Motion, p. 5), the suit has been brought to repair the damage done to private individuals without access to the media by large organizations who have broadcast their defamations through the media for years.

B. Relevant Procedural History

Ohio: In February 2017, Plaintiffs filed an action in Ohio against Hoffman, Sidley, and the APA. The Ohio Court of Common Pleas dismissed the action for lack of personal jurisdiction, and the dismissal was upheld by the Ohio Court of Appeals on June 22, 2018. Plaintiffs have until August 6 to ask the Ohio Supreme Court to accept a discretionary appeal of the jurisdictional dismissal.

District of Columbia: Before the Ohio Court of Common Pleas, Defendants represented that the District of Columbia was the "superior" forum for the case and that the Ohio action should be dismissed in part on that basis. Consequently, when the Ohio court dismissed the case on August 25, 2017, Plaintiffs filed a substantially similar complaint in the District of Columbia on August 28. (Transcript Oral Argument, Ohio Court of Common Pleas, August 22, 2018, p. 14).[1]

In February 2018, the D.C. court granted the Defendants' motion to stay the D.C. lawsuit pending the resolution of the Ohio appeal. Although Plaintiffs were confident the stay warranted reconsideration on the basis of precedent not cited by Defendants or the D.C. court, they did not attempt to disturb the ruling to avoid the "tactical multiplication of proceedings."

Before Defendants filed their D.C. motion to stay and again in response to that motion, Plaintiffs offered to dismiss the Ohio appeal and proceed only in D.C. if Defendants filed all of their pre-answer motions, including their 12(b)(6) motion, in accordance with D.C. Superior Court Rule of Civil Procedure 12(g). Plaintiffs could not have safely dismissed the Ohio appeal without first seeing if the 12(b)(6) motion contained a defense which they could remedy only in Ohio. Defendants did not respond to those repeated offers. Moreover, the APA rejected Plaintiffs' offer to move to mediation, and Sidley did not respond to it. As a result, Plaintiffs had no choice but to proceed in Ohio before the deadline for filing an appeal passed.

Massachusetts: As of this date, there is no certainty that the Ohio Supreme Court will agree to hear an appeal of the jurisdictional dismissal, and the stay in D.C. continues in place. When and if it is lifted, if the D.C. court were to eventually grant Defendants' motions to dismiss under the D.C. Anti-SLAPP statute, it would then be too late to file in Massachusetts within the Commonwealth's three-year statute of limitations. Consequently, Plaintiffs could have no

[1] http://www.hoffmanreportapa.com/resources/transcript%20of%20hearing.pdf

jurisdiction in which to pursue their claims.

Plaintiffs' offers to conserve resources. To reduce the prospect of this case proceeding in multiple jurisdictions, Plaintiffs will dismiss any duplicative actions once they are able to obtain a forum certain to address the merits of their claims. In particular, they are willing to:

- Drop all current defendants except Soldz from the Massachusetts suit if Defendants agree to the lifting of the D.C. stay and to the limited discovery Plaintiffs have requested in D.C. to address Defendants' anti-SLAPP and arbitration motions.
- Alternatively, dismiss the D.C. suit if Defendants consent to personal jurisdiction in Massachusetts and stipulate that Massachusetts law applies to all matters set forth in Plaintiffs' complaint, including any perceived statute of limitations issues.
- Alternatively, dismiss the Ohio appeal and dismiss the APA, Hoffman, and Sidley from this action in Massachusetts if they file their 12(b)(6) motion in D.C. so that Plaintiffs can be certain they have a secure forum there in which to address their claims.

ARGUMENT

I. The Court Should Permit Discovery that May Affect Its Decision on Defendants' First-Filed Motion

In response to Defendants' first-filed motion, Plaintiffs will assert that the first-filed principle does not apply to parallel proceedings in different states: "… the first-filed rule 'was never meant to apply where the two courts involved are not courts of the same sovereignty.'" EMC Corp. v. Donatelli, No. 09-1727-BLS2, 2009 Mass. Super. LEXIS 120, at *18-19, 2009 WL 1663651 (Mass. Super. Ct. May 4, 2009)(Neel, J.), quoting from Advanced Bionics Corporation v. Medtronic, 29 Cal.4th 697 (2002).

Even if the first-filed principle were to apply, Massachusetts courts have repeatedly held that the principle does not always entail that the "first" jurisdiction prevails. *See Exxon Mobil Corp. v. Attorney Gen.*, *infra,* 479 Mass. 312 (2018), 2018 Mass. LEXIS 235, SJC-12376 quoting *EMC Corp. v. Parallel Iron, LLC,* 914 F. Supp. 2d 125, 127 (D. Mass. 2012) ("Exceptions to the [first-filed] rule are not rare . . . . [A court] has discretion to give preference to a later-filed action when that action will better serve the interests involved"); *Ethicon Endo-Surgery v. Pemberton*, 27 Mass L. Rptr. No. 28, 541 (January 17, 2011) (Lauriat, J)(Attached as Exhibit A)("However, the first-filed rule is a presumption, and it is 'not unrebuttable' (citation omitted) …. When exercising its discretion on this matter, the court must consider the following factors: 'judicial and litigant economy, the just and effective disposition of disputes, the possible absence of jurisdiction over all necessary and desirable parties, as well as a balancing of conveniences that may favor the second forum.'" (citation omitted)); *Storagenetworks v. Metromedia Fiber,* 3 Mass. L. Rptr. No 28, 640 (November 26, 2011)(Fahey, J.)(Attached as Exhibit B)("Nevertheless, '[t]he practice of determining priorities between pending actions on the basis of dates of filing is a general rule, not to be applied in a mechanical way, regardless of other considerations.'"(citation omitted)

The limited discovery that Plaintiffs now request is relevant not only to their claims against Soldz, but also to several factors in the first-filed analysis.

First, the discovery may lead to the addition of Raymond and Houghton Mifflin Harcourt, a Boston-based publishing company, as defendants, based on their roles in contributing to the defamatory narrative constructed by Hoffman and, in Raymond's case, collaborating with Hoffman and Soldz to construct that narrative. Plaintiffs must decide whether to add defendants by October 6, 2018, at present the last date for bringing a claim within the statute of limitations

period. Raymond was the first witness Hoffman met with when he began his investigation and remained a primary source for Hoffman's defamatory statements. Houghton Mifflin Harcourt published the book whose false and defamatory allegations prompted the APA to hire Hoffman to conduct his investigation, and then republished it on October 6, 2015, after the publication of Hoffman's Reports. Through Raymond's deposition and documents in his possession, Plaintiffs seek information that may reflect that he and Risen knew that allegations in the book were false when it was published or, at a minimum, when Houghton Mifflin republished it.

Even without the addition of these potential defendants, Massachusetts is the only jurisdiction likely to have personal jurisdiction over Soldz as well as the other Defendants. With the probable addition of Raymond and the possible addition of Houghton Mifflin as defendants, two other defendants may also be subject to personal jurisdiction only in Massachusetts. If this Court determines that it has jurisdiction over the APA, Hoffman, and Sidley, it will be the only court in a position to exercise jurisdiction over all the parties, so that Plaintiffs can obtain complete relief in one action and avoid proceeding in multiple states.

Second, the discovery is likely to further demonstrate the extent of the Defendants' activities in Massachusetts, the extent of Hoffman's collaboration with Soldz and Raymond, and, in particular, the extent to which he relied on them to construct a pre-conceived narrative that served their goal of subjecting Plaintiffs to the threat of criminal prosecution. (That reliance is one aspect of Plaintiffs' proof that Hoffman acted with actual malice.) As a result, the discovery may lead to additional claims for which Massachusetts would be the appropriate jurisdiction. As it is, only eight of the current 19 causes of action in the Massachusetts action are substantially similar to those in the D.C. action based on the proof of fault at the time of each publication.

For these reasons, this limited discovery should be allowed to proceed. "[C]ourts generally frown on motions to stay discovery and deny them in the absence of compelling reasons." *Evans v. Yum Brands, Inc*., *et al.,* 326 F. Supp. 2d 214, 226 (D.N.H. 2004) "[Plaintiff] has represented that she will seek only three depositions and 'other limited discovery' on the issue of class certification. Accordingly, the defendants will not be put in the potentially unfair position of having to respond to onerous discovery requests from Evans despite their strong conviction that they will prevail as a matter of law." *Id.* Here Plaintiffs are seeking only two depositions and related discovery from two parties not represented by APA, Hoffman, or Sidley. *See also Microfinancial v. Premier Holidays Intern*, 385 F.3d 72, 76 (1st Cir. 2004) (the court found that the defendants had engaged in delaying tactics and further delay quite likely would have caused prejudice); *Kron Medic. Corp. v. Groth*, 119 F.R.D. 636, 637-38 (M.D.N.C. 1988) (noting motions which seek to delay discovery are "not favored" and that, "[i]n considering such motions, the Court is to remain mindful of its responsibility to expedite discovery and minimize delay.").

The cases cited by APA, Hoffman and Sidley are inapposite, mischaracterized, or easily distinguishable.

For example, *Town of Danvers v. Wexler Canst. Co.,* 12 Mass. App. Ct. 160, 164 (1981) (Emergency Motion, p. 8) involved a stay where some of the parties agreed that the claims at issue were subject to arbitration as between them and it was found that the stay would not materially harm other parties' interests. In this case, there is no such agreement. In November 2015, Plaintiffs requested that the APA agree to arbitrate these matters, but the request was

rejected.[2] Thus, APA has waived any rights to arbitration that may have existed. Moreover, the two Plaintiffs whom Defendants now contend should arbitrate their claims assert that there is no valid agreement to arbitrate. Their employment agreements expired long ago (in one case over a decade ago), the agreements contain no survivability clauses, and the arbitration clauses are very narrow and would not cover defamation claims.

Defendants also cite *Williams v. FedEx Ground Package System, Inc.,* No. 062344C, 2007 WL 3013266, at * 1 (Mass. Super. Ct. Sept. 20, 2007) (Emergency Motion, p. 8). That case involved state and federal claims each within Massachusetts, not actions proceeding in different states.

Defendants cite *FTI, LLC v. Duffy, et. al.,* No. I684CV03176BLS2, 2017 WL 3251514, at *1 (Mass. Super. Ct. May 4, 2017) for the proposition that where "entirely duplicative lawsuits are filed in different jurisdictions at materially different times, typically the later-filed action is stayed pending final resolution of the first-filed action." (Emergency Motion, p. 8) But that case actually *denied a motion for a stay.* The Court denied the defendant employees' motions to stay (based on a first-filed suit in California) and to dismiss for lack of personal jurisdiction, and enforced the employer's choice of law clause in a non-compete case. The court rejected the argument that the case should be heard in California because the employees' new employer was located in California and evidence showed that the employees were likely working in or reporting to a California office. The court reasoned that the plaintiff employer was based in

[2] The APA Board's rejection of that offer in March of 2016 is reflected in publicly accessible APA Board minutes on the APA website. Plaintiffs respectfully request that the Court take judicial notice of those minutes: http://www.apa.org/about/governance/board/16-march-minutes.pdf

Massachusetts, and the defendants challenging jurisdiction had sufficient ties to Massachusetts for the case could be heard there.

Similarly, in *Davenport v. Benhamou,* No. 07379323F, 2007 WL 4711512, at *2 (Mass. Super. Ct. Dec. 20, 2007) (Emergency Motion, p. 8), it was uncontroverted that the law of Delaware, where five additional lawsuits had been filed, would be applied in all of the relevant actions. Therefore, the court found it reasonable to refer the matter to the Delaware courts. Here, Plaintiffs' Complaint contends, based on the activities conducted in the state by Hoffman and Sidley on the APA's behalf, that (a) Massachusetts law will govern this lawsuit, and (b) Hoffman and Sidley have sufficient ties to Massachusetts for this Court to take jurisdiction over them. Moreover, the stay issued by the *Davenport* court was appropriately limited, running only until class certification was resolved in Delaware. Here the APA, Hoffman, and Sidley seek an unreasonably broad and prejudicial stay that would be in place until the case is resolved in D.C. (including potentially years-long appeals of the results of their motions) and the Ohio discretionary appeals are completed.

Defendants cite *Sussman v. Vieau*, No. MICV201201917, 2012 WL 11893990, at * 1 (Mass. Super. Ct. Sept. 18, 2012), for the proposition that staying this case would help avoid the waste of judicial and party resources, police duplicative litigation and tactical forum shopping, and remove the opportunity for two separate judges to issue different and conflicting decisions on identical issues of law or discovery disputes. (Emergency Motion, p. 8) In *Sussman*, the court found that a Massachusetts state court action should be stayed in favor of a Massachusetts federal class action in which the plaintiff was a member of the class. The case is distinguishable on several grounds. First, neither court had expertise in applying the Delaware law relevant to the actions. Here, Plaintiffs contend that Massachusetts law would apply to the APA, Hoffman,

Sidley, and Soldz's defenses, as well as to those of the possible additional defendants (Raymond and Houghton Mifflin). Second, the state Court noted that there was no way to predict which action would proceed more expeditiously. Here, Ohio will reach the merits only if its Supreme Court agrees to hear the appeal and decides in Plaintiffs' favor, an outcome that may be measured in years rather than months. In D.C., it is unclear when the stay may be lifted. Third, there is no danger that the D.C. and Massachusetts courts will reach inconsistent rulings. The causes of actions pertaining only to Soldz are unique to Massachusetts. (Complaint, Counts 3, 17) As to other causes of action, Plaintiffs will agree to stay the D.C. action if the Massachusetts action proceeds to the case's merits.

Defendants cite *Fromm v. City of Boston,* No. 13-P-246, 2014 WL 349309, at *1 (Mass. App. Ct. Feb. 3, 2014) for the proposition that Massachusetts courts have rejected the tactical addition of a new defendant to evade the first-file rule. (Emergency Motion, p. 9) The addition of Soldz was not a "tactical" decision, but based on evidence discovered since the filing of the D.C. complaint almost a year ago and on his continuing defamatory statements. Moreover, *Fromm* involved a later filed action in Massachusetts where the parties and the subject matter were identical to a pending action in the Commonwealth, and the Court rejected the addition of the additional party in the pending action. Soldz likely could not be joined in D.C. because the D.C. Superior Court would not have jurisdiction over him. (Complaint, Counts 3, 17)

Most strikingly, Defendants cite *Cardno ChemRisk, LLC* v. *Foytlin,* 68 N.E.3d 1180 (Mass. 2017) for the proposition that Plaintiffs' discovery requests "undermine the Anti-SLAPP Act's protection for defendants from the cost of burdensome discovery that may chill their constitutional rights of freedom of speech and petition." (Emergency Motion, p. 11) But Massachusetts Supreme Judicial Court decisions make it very clear that the Massachusetts anti-

SLAPP law, if applicable to this case as Plaintiffs contend it would be, would not be invoked when the defendant is not petitioning on his or her own behalf. *Cardno* at 1187. Here, Hoffman and Sidley were acting as attorney-agents for the APA, not exercising their own petitioning rights, when they created the defamatory statements and published and republished them on the APA's behalf. In addition, the Massachusetts Supreme Judicial Court has held that the anti-SLAPP act will not apply where, as here, Plaintiffs are seeking damages for the personal harm to their reputations. *See Blanchard v. Steward Carney Hosp., Inc.*, 477 Mass. 141, 160 (2017) ("… the nonmoving party must establish, such that the motion judge may conclude with fair assurance, that its primary motivating goal in bringing its claim, viewed in its entirety, was 'not to interfere with and burden defendants' ... petition rights, but to seek damages for the personal harm to [it] from [the] defendants' alleged ... [legally transgressive] acts'" (citations omitted).) (See Complaint, ¶ 327)

II. The Limited Discovery Will Be Directly Relevant to Defendants' Other Proposed Motions

Motions to Dismiss for Lack of Personal Jurisdiction: Although Plaintiffs will assert that there is more than sufficient evidence to establish personal jurisdiction over all Defendants, the limited discovery will address an issue directly relevant to personal jurisdiction over Hoffman and Sidley: the extent to which they collaborated with Raymond and Soldz, both acting from Massachusetts, as Hoffman conducted the investigation and wrote his Report. In addition, since Hoffman and Sidley acted as the APA's agent during the investigation, as the Ohio Court of Appeals found, this discovery will also be relevant to personal jurisdiction over the APA. *See Daynard v. Ness, Motley, Loadholt, Etc,* 290 F.3d 42, 55 (1st Cir. 2002) ("For purposes of personal jurisdiction, the actions of an agent [attorney] may be attributed to the principal. Whether or not an agent is initially authorized to act on behalf of a principal, the agent's actions

may be attributable to the principal, for purposes of personal jurisdiction, if the principal later ratifies the agent's conduct [through publication].")

Plaintiffs will agree for now not to oppose Defendants' requests to stay (a) their document requests to Hoffman and Sidley related to their Massachusetts activities during the investigation and (b) their one deposition and document request for the APA's President, a Massachusetts resident. However, to determine the full nature and extent of the APA's, Hoffman's and Sidley's business activities and conduct of interviews for the Report in Massachusetts, Plaintiffs will renew their requests for that discovery when Defendants file their personal-jurisdiction motions.

Statute of Limitations and Choice of Law: The extent to which Hoffman and Sidley undertook activities in Massachusetts on behalf of the APA, including collaborating with Raymond and Soldz, is also directly relevant to the choice of law analysis and, therefore, to the statute of limitations analysis. Plaintiffs assert in their Complaint that, because Massachusetts has the most substantial interest in this case, its laws should apply. The location of the events at issue is a key element of the substantial-interest test: "Massachusetts courts have … considered the location of events that constitute the alleged wrongdoing as essential for the substantial interest analysis." *In Re Fresenius Granuflo/naturalyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d 294, 307 (D. Mass. 2015).

III. Plaintiffs' Discovery Requests Have Been Limited and Reasonable

Defendants invite the Court to consider Plaintiffs' discovery requests in the false light of what Defendants claim is a tactic of unduly burdensome and overreaching requests. The requests themselves do not support that claim.

In Ohio, Plaintiffs never filed a request for discovery. In the District of Columbia, they have asked the Court for four depositions (all of non-parties), seven document requests (one with

subparts), and four very simple interrogatories, primarily designed to demonstrate "actual malice" pursuant to APA and Sidley's Anti-SLAPP Motions. All but two of the document requests will likely lead to a statement that there is no responsive document or to the production of one document. One other request asked for an electronic copy of the mirror image of Plaintiff Behnke's hard drive made by a forensic team hired by Hoffman. Copying that information onto a thumb drive is an easy process. Plaintiffs have never sought any depositions of Sidley witnesses or of Hoffman.[3]

Plaintiffs' requested discovery in Massachusetts was similarly reasonable, despite Defendants' assertions to the contrary. For example, Defendants assert that "plaintiffs seek '[a]ny and all documents' relating to 'all activities undertaken in MA by MA residents on behalf of APA.'" (Emergency Motion, p. 12) In fact, Plaintiffs request only documents relevant to the Hoffman Report and the APA's handling of the investigation and Report, as they would be glad to clarify if it is not clear from the face of the request.

Defendants' assertion that Plaintiffs "seek much of the same discovery requested in the previously filed lawsuits" is also incorrect. (Emergency Motion, p. 11)

- In D.C., Plaintiffs served a total of seven document requests on Hoffman, Sidley, and the APA. Only one of those seven requests overlaps with Plaintiffs' requests in Massachusetts: In D.C., Plaintiffs asked for all of Hoffman's interview notes. In Massachusetts, Plaintiffs have asked for Hoffman's interview notes only for the ten witnesses

[3] Copies of Plaintiffs' Replies to Hoffman, Sidley and APA's Oppositions to Discovery demonstrating both relevance and the limited nature of those requests are available here:
http://www.hoffmanreportapa.com/resources/reply%20to%20Sidley.pdf
http://www.hoffmanreportapa.com/resources/reply%20to%20apa.pdf

he interviewed in Massachusetts, many in Sidley's Boston office. Those notes include Soldz's and Raymond's interviews.

- In D.C., Plaintiffs sought five depositions of one APA witness and four non-parties, and subsequently dropped the request to depose the APA witness. Only one deposition, that of Soldz, has been requested in both D.C. and Massachusetts. The other two depositions requested in Massachusetts, those of Raymond and Dr. Jessica Henderson Daniel, are specific to Plaintiffs' jurisdictional and other Massachusetts claims.

- In D.C., Plaintiffs served a total of four interrogatories to the APA. Plaintiffs served no interrogatories in Massachusetts.

Again, the cases cited by Defendants are inapposite, mischaracterized, or readily distinguishable.

For example, Defendants cite *Sandoval v. RLI Ins. Co.,* No. 17-120S4-JGD, 2017 WL 6447866, at *1 (D. Mass. Dec. 18, 2017) for the proposition that a stay of discovery is favored when a newly filed case is substantially the same as a lawsuit already ongoing in another forum, making it unlikely that the later-filed case will ever reach the merits. (Emergency Motion, p. 11) But the facts of *Sandoval* make it readily distinguishable. That case involved a claim for unfair settlement practices which was stayed until the underlying tort claim had been resolved. The Court found that resolving the unfair settlement practices claim prior to the trial of the underlying tort claim would be approaching the two claims in the wrong order. Here, there is no such question of priority between different claims. And, given the ongoing stay in D.C. and the uncertain fate of the jurisdictional appeal in Ohio, there is every likelihood that, if the case is not stayed in Massachusetts, Massachusetts may reach the merits of the case before any other jurisdiction.

Defendants cite *Dicenzo v. Mass. Dept. of Corrections,* 2016 WL 158505, at *2 for the proposition that the action should be stayed because Plaintiffs' discovery is not relevant to this lawsuit and disproportionate to the needs of the case. (Emergency Motion, p. 11) In *Dicenzo,* however, all parties had already filed their dispositive motions, including the plaintiff, a *pro se* prisoner.

MacKnight v. Leonard Morse Hosp., 828 F.2d 48,50,52 (lst Cir. 1987) (Emergency Motion, p 12) is inapplicable. It involved a summary judgment action where the court found that the plaintiff made no attempts to cure deficiencies in her affidavits and did not demonstrate why discovery was justified. Here, Plaintiffs have clearly demonstrated why discovery is necessary to counter Defendants' motions. For example, Hoffman, Sidley, and the APA have repeatedly denied Plaintiffs access to the notes of their interviews, which are highly relevant both to jurisdiction and to actual malice, especially as the actual malice issue relates to actions involving Soldz and Raymond. (Complaint, ¶¶ 297-305)

CONCLUSION

Having agreed to all other aspects of Defendants' Emergency Motion, Plaintiffs now request only the depositions of two witnesses and limited discovery from them. If these depositions take place promptly, their testimony will be relevant to the first-filed analysis. It may also enable Plaintiffs to add claims to their Complaint before the statute of limitations expires.

The prejudice to Plaintiffs in not being allowed to conduct that discovery is far greater than any burden on the APA, Hoffman, and Sidley. Their counsel do not represent Soldz and Raymond and need do no more than attend the depositions through local counsel, if they so choose. Especially since the D.C. action has been stayed and the Ohio action is dormant, that burden is *de minimis.*

Since the requested discovery may affect the resolution of Defendants' proposed first-filed motion, Plaintiffs also request that their briefing related to that motion be delayed until after they have obtained the two depositions and the related documents and have had an opportunity to amend the Complaint on the basis of that discovery.

Plaintiffs will file a copy of this Opposition and Defendants' motion and supporting affidavit in a praecipe with the D.C. Court, so that both courts are fully apprised of proceedings in both jurisdictions. We will also provide a copy of that filing to Defendants' Massachusetts counsel.

Dated: July 23, 2018

Respectfully submitted,

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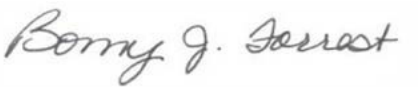

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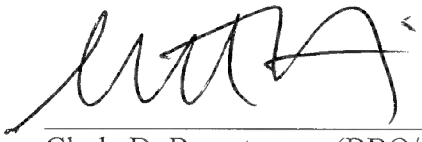

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PROPOSED ORDER DENYING IN PART AND GRANTING IN PART A TEMPORARY STAY

This matter came before me on the emergency motion of defendants Sidley Austin LLP, Sidley Austin (NY) LLP, and David H. Hoffman (collectively, "Sidley"), and American Psychological Association ("APA") for an order temporarily staying this action until the Court rules on defendants' proposed motion to stay this action under the "first-filed" rule. The requested stay would include discovery and the dates by which Mass. R. Civ. P. 12(b) motions and other threshold motions responding to the complaint are due.

Upon consideration of the parties' submissions, it is hereby ordered as follows:

1. Plaintiffs shall be entitled to proceed with the depositions and discovery related to two Massachusetts residents (Nathaniel Raymond and Dr. Stephen Soldz) whose actions took place in Massachusetts. Sidley and APA's counsel do not represent either individual. Consequently, the burden on APA, Hoffman, and Sidley is minimal when balanced against Plaintiffs' need to obtain information that may affect their claims against those parties before the statute of limitations runs in October 2018 with regard to potential causes of action. That limited discovery may also be relevant to the Court's consideration of the first-filed motion Defendants will be filing.

2. Plaintiffs have agreed not to oppose APA, Hoffman, and Sidley's request for a temporary stay with respect to discovery directed toward them until such time as they file a personal jurisdiction motion, which would necessitate an analysis of their activities in the Commonwealth.

3. Plaintiffs have agreed not to oppose APA, Hoffman and Sidley's request to delay their briefing of their proposed dispositive motions until after the Court rules on their anticipated first-filed motion.

4. Any briefing by Plaintiffs related to APA, Hoffman and Sidley's first-filed motion will be stayed until October 31, 2018, after Plaintiffs have obtained the depositions of Raymond and Soldz and the related documents and had an opportunity to amend the complaint if necessary. That discovery shall be completed by September 14, 2018, unless such dates are extended by the parties by mutual agreement, which shall not be unreasonably withheld.

5. If appropriate, after ruling on APA, Hoffman and Sidley's proposed first-filed motion, the Court will work with the parties to set a reasonable briefing schedule for the remainder of APA, Hoffman, and Sidley's proposed motions.

So ordered this ___ day of July 2018

_____

Associate Justice, Superior Court

I conclude that even absent the clear intent of the legislature in c. 26, §60 the amendment does not apply retroactively.

As for the MBTA's alternative claim that it is entitled to relief from post-judgment interest beginning on November 1, 2009, that argument is also unavailing. The MBTA relies on *Mirageas v. MBTA*, 391 Mass. 815 (1984). That case, however, is distinguishable from the present situation. Significantly, in *Mirageas* the Court held that an emergency amendment to G.L.c. 231, §6B was applicable to a plaintiffs case where the amendment was passed and took effect three months *before* final judgment in the case. See *id.* at 820, 821. Here, the relevant amendment went into effect approximately one month *after* final judgment in the case. See Mass.R.Civ.P. 54 (judgments under Rule 58 are final judgments). Because final judgment had entered, post-judgment interest is controlled by the law as it existed on the date of final judgment and is not cut off by §123 going into effect on November 1, 2009.

Because I find that there was an express intent on the part of the Legislature that the amendment take effect on November 1, 2009, and because the amendment impairs Smith's substantive rights and is not within the narrow set of remedial laws that are given retrospective effect, I conclude that the amendment does not apply retroactively to relieve the MBTA of its obligation to pay costs and interest.

ORDER

For the foregoing reasons, defendant MBTA's Motion for Relief from Judgment as to costs and interest is DENIED.

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[1]With permission from the Appeals Court.

[2]Chapter 25 was entitled, "An Act Modernizing the Transportation Systems of the Commonwealth."

[3]Section 123 states in relevant part, "Section 1 of chapter 258 of the General Laws, as so appearing, is hereby amended by inserting after the word "including," in line 40, the following words:—the Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts Turnpike Authority and."

[4]The relevant sections of chapter 25 read as follows:

SECTION 182. The board of the Massachusetts Department of Transportation shall have the power to exercise its powers under chapter 6C and other provisions of this act on November 1, 2009.

SECTION 183. Sections 108, 144 and 145 shall take effect on November 1, 2009.

SECTION 184. Sections 133, 134 to 139, inclusive, and 141 to 143, inclusive, shall take effect on January 1, 2010.

SECTION 185. Except as otherwise provided in this act, this act shall take effect on July 1, 2009. The relevant section of chapter 60 read as follows:

SECTION 60. Senate, No. 2087 is hereby further amended by striking out Sections 183, 184 and 185 and inserting in place thereof the following 3 sections:

Section 183. Sections 14, 33, 34, 35, 68, 70, 71, 72, 79, 81, 82, 130, 141, 143, 146, 149, 162, 163, 164 and 168 shall take effect on July 1, 2009.

Section 184. The provisions of Sections 8 and 9 that relate to powers and responsibilities of the Massachusetts Department of Transportation with respect to the Maurice J. Tobin Memorial Bridge shall take effect on January 1, 2010.

Section 185. Except as otherwise provided herein, this act shall take effect on November 1, 2009.

[5]"For example, retrospective application has been given to legislation extending the time for filing for an application for a tax abatement, *Lindberg v. State Tax Comm'n* 335 Mass. 141, 143 (1956); to legislation modifying the requirements for filing an application for a tax abatement, *Wynn v. Assessors of Boston* 281 Mass. 245, 249 (1932); and to legislation providing direct access to the courts to enforce preexisting legal rights, *Selectmen of Amesbury v. Citizens Elec. St. Ry.*, 199 Mass. 394, 395 (1908)." *Fontaine*, 415 Mass. at 319.

Ethicon Endo-Surgery, Inc. v. Robert Pemberton et al.

Superior Court, Suffolk, SS
No. 103973B
Memorandum Dated October 27, 2010

Contracts – Effect and Validity – Noncompete Agreements – Opinion Enforces a Noncompete Agreement Between a Surgical Supplies Manufacturer and a Former Sales Employee.

Master and Servant – Employment Agreements – Noncompete Agreements – Opinion Enforces a Noncompete Agreement Between a Surgical Supplies Manufacturer and a Former Sales Employee. This opinion enforces a noncompete agreement between a surgical supplies manufacturer and a former salesperson who has resigned to work with a competitor as a sales manager. The noncompete agreement precludes employment worldwide with any competitor for 18 months. The agreement contains the unusual feature of a clause obligating the former employer to pay any loss of income resulting from the former employee's inability to find noncompeting employment. The opinion holds that the agreement is reasonable and therefore enforceable, except with respect to its geographic scope. The opinion enjoins employment for 18 months with any competitor, but only in the geographic area serviced by the employee while in the plaintiff's employment (New Hampshire, Massachusetts and Maine, the same area to be serviced in the new position).

Contracts – Effect and Validity – Noncompete Agreements – Choice of Law Clause in a Noncompete Agreement Specifying Application of New Jersey Law Is Enforceable in an Action Against a California Employer for Services to Be Provided Outside California, Even Though California Has a Strong Public Policy Against the Enforcement of Noncompete Agreements.

Master and Servant – Employment Agreements – Noncompete Agreements – Choice of Law Clause in a Noncompete Agreement Specifying Application of New Jersey Law Is Enforceable in an Action Against a California Employer for Services to Be

Provided Outside California, Even Though California Has a Strong Public Policy Against the Enforcement of Noncompete Agreements. A choice of law clause of an employment noncompete agreement specifying application of New Jersey law, the home state of the employer, is enforceable with respect to a former employee hired by a California company to provide sales services in Massachusetts, even though California law has a strong public policy against the enforcement of noncompete agreements. The opinion notes that the California policy does not override New Jersey's public policy in favor of reasonable noncompete agreements, at least where the employment services are to be provided in a location outside of California.

Actions – Prior Pending Action – Misc. Cases – "First to File" Rule Does Not Bar a Massachusetts Action to Enforce a Noncompete Agreement Even Though an Action by the New Employer Was Commenced Before the Employee Announced the Departure.

Contracts – Effect and Validity – Noncompete Agreements – "First to File" Rule Does Not Bar a Massachusetts Action to Enforce a Noncompete Agreement Even Though an Action by the New Employer Was Commenced Before the Employee Announced the Departure.

Master and Servant – Employment Agreements – Noncompete Agreements – "First to File" Rule Does Not Bar a Massachusetts Action to Enforce a Noncompete Agreement Even Though an Action by the New Employer Was Commenced Before the Employee Announced the Departure. The "first to file" rule, pursuant to which the courts of one state will generally defer acting on a complaint asserting a cause of action already pending in litigation in another state, does not bar a Massachusetts action seeking enforcement of a noncompete agreement against a former employee brought shortly after the employee's departure to work for a competitor, even though the employee and the new employer had commenced a declaratory judgment action to challenge the noncompete clause before the employee formally resigned from the plaintiff. The opinion notes that it would be unfair to apply the rule with respect to a first action brought even before the former employer was aware of the existence of any dispute.

Contracts – Effect and Validity – Noncompete Agreements – Fact that an Employment Termination Was Initiated by the Employee Weighs in Favor of Enforcing a Noncompete Agreement.

Master and Servant – Employment Agreements – Noncompete Agreements – Fact that an Employment Termination Was Initiated by the Employee Weighs in Favor of Enforcing a Noncompete Agreement. For purposes of evaluating the hardship of an injunction enforcing a noncompete agreement against a former employee, the fact that it was the employee rather than the employer that ended the employment relationship weighs in favor of enforcement of the agreement.

LAURIAT, PETER M., J. Ethicon Endo-Surgery, Inc. ("EES"), a medical device company, has brought this action against a former employee, Robert Pemberton ("Pemberton"), asserting claims of breach of contract, breach of implied covenant of good faith and fair dealing, and misappropriation and threatened misappropriation of trade secrets. EES has also brought suit against Pemberton's new employer, Intuitive Surgical, Inc. ("Intuitive"), asserting claims of tortious interference with contract and violation of Chapter 93A.

The matter is now before the court on EES's Motion for a Preliminary Injunction. EES seeks to bar Pemberton from working for Intuitive pursuant to a non-competition agreement contained in the employment contract between EES and Pemberton. For the reasons stated below, EES's Motion for a Preliminary Injunction is allowed.

BACKGROUND

The preliminary determinations summarized below are "based on the affidavits, attached exhibits, and motions furnished by the parties, as well as reasonable inferences from that evidence." *Fazio v. Bank of America*, Middlesex Civil Action No. 2010-1255, 2010 WL 2432024 (Mass.Super. 2010) [27 Mass. L. Rptr. 81]. The court also relies on the parties' oral arguments.

A. The Competitive Companies and Products

EES is an Ohio corporation with its principal place of business in Ohio. Its parent company, Johnson & Johnson, is a New Jersey corporation with its principal place of business in New Jersey. EES manufactures and sells medical devices for both traditional surgery and minimally invasive surgery. EES's minimally invasive surgical devices are typically single-use, disposable instruments, such as staplers, trocars, and scalpels.

Intuitive is a Delaware corporation with its principal place of business in California. Its "flagship" product is the da Vinci Surgical System (the "da Vinci system"), which permits surgeons to perform minimally invasive surgeries using robotics technology.[1] The da Vinci system has four robotic arms per unit, and at the end of each arm is an "EndoWrist" instrument.

Although EES does not sell any robotic systems, EES alleges that the da Vinci system competes with EES's minimally invasive surgical devices on a macro level, in that it is designed for minimally invasive surgical procedures in which EES specializes, such as gynecological and thoracic procedures. In particular, EES alleges that Intuitive's EndoWrist instruments directly compete with some of EES's devices, such as EES's trocars, clip appliers, and graspers. Thus, EES claims that Intuitive is a "CONFLICTING COMPANY"

later, EES filed the present action against Intuitive and Pemberton.

At Intuitive, Pemberton was to be employed as a sales manager. For the first seven weeks of his employment at Intuitive, Pemberton would complete an online training program from his home office. Thereafter, he would begin marketing the da Vinci system to three or four hospitals in the Boston area. Pemberton would have a base salary of $65,000 per year, with substantial bonuses and commissions. He claims that if he were to meet all of his sales targets, he would earn $244,000 per year. At EES, as an Educational Strategist, Pemberton received a salary of $111,999 per year, plus stock grants and other benefits.

EES alleges that Pemberton could use EES's confidential information, such as sales tactics, product data, and customer data to facilitate sales of Intuitive's products.[2]

DISCUSSION

A. First-Filed Action Rule

Intuitive argues that this court should give effect to the first-filed rule and dismiss EES's complaint so that it's action against EES may continue in California. "As between a mirror-image declaratory judgment action and an affirmative [ ] action . . . , the general rule favors the forum of the first-filed action." *DuPont Pharmaceuticals Co. v. Sonus Pharmaceuticals, Inc.*, 122 F.Sup.2d 230 (Mass. 2000) (citation omitted). However, the first-filed rule is a presumption, and it is "not unrebuttable." *Id.* When exercising its discretion on this matter, the court must consider the following factors: "judicial and litigant economy, the just and effective disposition of disputes, the possible absence of jurisdiction over all necessary and desirable parties, as well as a balancing of conveniences that may favor the second forum." *Id.*

It is true that Intuitive's complaint was filed before EES's. Pemberton and Intuitive were able to file first, however, because Pemberton did not inform EES of his employment with Intuitive until after Intuitive filed suit. While this court appreciates that discovery has already begun in the four consolidated actions from April and May 2010, it cannot condone Intuitive's behavior by dismissing EES's action under the first-filed rule.[3]

Pemberton and Intuitive urge this court to "consider the California Order [in the Mewborn case] and apply appropriate principles of comity, to avoid conflicting orders in this case." Quite simply, principles of comity do not require this court to follow the California court's decision, particularly given that California has a public policy against noncompetition agreements that Massachusetts does not share. Indeed, as Intuitive's counsel admitted in oral arguments, California is an "outlier" among the states in its refusal to enforce noncompetition agreements. See *Advanced Bionics Corp. et al. v. Medtronic, Inc.*, 29 Cal.4th 697 at 706 (2002) (noting California's policy against noncompetition agreements); Cal. Bus. & Prof. Code §16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void"); but see *id.* §17200 (allowing noncompetition agreements to the extent needed to protect trade secrets). Compare *Solari Industries, Inc. v. Malady*, 55 N.J. 571, 576 (N.J. 1970) (noting that noncompetition agreements are now generally accepted).

Moreover, this court is not bound by the laws or judicial system of California. See *Advanced Bionics Corp.*, 29 Cal.4th at 706-07 (holding that a California trial court could not issue a temporary restraining order prohibiting parties in another state from enforcing a noncompetition agreement, due to principles of state sovereignty and comity concerns). Nor can this court rely upon the California court's rationale for its Order, as the rationale for the Order was not explained.

B. Choice of Laws Provision in the Agreement

"Massachusetts courts give effect to the law reasonably chosen by the parties to govern their rights under contracts." *Shipley Co., Inc. v. Clark*, 728 F.Sup. 818, 825 (Mass. 1990) (citing *Morris v. Watsco, Inc.*, 385 Mass. 672, 674-75 (1982)). In the present case, the Agreement stipulates that New Jersey law controls. Intuitive argues that the parties' choice of law provision should not be given effect and that, instead, California law should apply.

A choice of law provision "will not be honored . . . where its application 'would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.' " *Id.* (quoting Restatement (Second) of Conflict of Laws, §187(2)(b) (1971)).

In other words, for California law to apply, "a) [California] must have a fundamental policy against no-compete agreements; b) [California] must have a materially greater interest than [New Jersey] in the determination of the issue; and c) [California] law would have applied in the absence of the express provision." *Id.* (brackets added).

While California does indeed have a fundamental policy against non-competition agreements, it is difficult to conceive of how its interest is "materially" greater than New Jersey's. Intuitive argues that the New Jersey choice of law provision is unreasonable because the parties' only connection to New Jersey is the location of the headquarters of EES's parent company, Johnson & Johnson. This argument is disingenuous because the parties' only connection to California is the location of Intuitive's headquarters.[4] Since their interest is essentially the same, California's interest is not "materially" greater than New Jersey's.

In any event, Intuitive's argument fails at the third prong of the test because if there were no choice of law provision, the law of Massachusetts would apply, not that of California. The events took place in Massachusetts between a Massachusetts resident and two companies doing business in Massachusetts. Massachusetts would seem, consequently, to have the strongest interest in the case. Neither party argues for Massachusetts law to apply, however. The court finds the choice of law provision enforceable and will apply New Jersey law to the question of the non-competition agreement's validity.

C. Validity of Non-competition Agreement under New Jersey Law

Under New Jersey law, non-competition agreements are "given effect if they are reasonable in view of all the circumstances of the particular case." *Solari Industries*, 55 N.J. at 576. Such an agreement will be found reasonable, in general, if it "simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." *Id.* When analyzing the first prong, the employer's legitimate interests, "three additional factors should be considered in determining whether the restrictive covenant is overbroad: its duration, the geographic limits, and the scope of activities prohibited." *Community Hosp.Group, Inc. v. More*, 183 N.J. 36, 58 (2005).

In the present case, the EES non-competition agreement satisfies these tests. *Johnson & Johnson v. Biomet*, Superior Court of New Jersey, C.A. No. C-107-07, Letter Op. on Motion for Prelim. Inj. Relief, at 17 (Dec. 6, 2007) (finding that the same Agreement as in this case, although in the context of a different Johnson & Johnson subsidiary, "m[et] the general requirements of New Jersey law as set forth in Solari, Whitmyer, and Karlin").

Since this noncompetition agreement does not implicate the public interest, the court focuses on the first two factors.

1. Legitimate Interests of the Employer

Employers have no legitimate interest in preventing competition "as such." *Whitmeyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33-34 (1971). They do, however, have a legitimate interest in protecting confidential business information, as well as trade secrets. *Id.* at 33. "General knowledge within the industry may not be classified as trade secrets or confidential information entitled to protection nor will routine or trivial difference in practices and methods suffice to support restraint of the employee's competition." *Id.* at 33-34. Intuitive alleges that Pemberton has received very little, if any, trade secrets or confidential information from EES, especially in his position as an Education Strategist. EES, on the other hand, alleges that in both of his positions, Pemberton received confidential information about "target customers, emerging technologies and surgical trends, EES's strategy to address robotic surgery, clinical and regulatory plans, EES market share data, and integrated business strategies." If true, these data are clearly not "general information within the industry" nor are they "routine and trivial differences in practices and methods." Although there are some differences in their products, EES has alleged enough to show that the two companies are competitors, i.e., that their products conflict under the non-competition agreement.

As for the other three factors, the court agrees with Intuitive that the Agreement is somewhat overbroad. A non-competition agreement may be "enforced as written, or, if appropriate, reduced in scope." *More*, 183 N.J. at 64. Eighteen months, while long, is not *per se* an unreasonable length of time. See, e.g., *id.* (two years).

However, the court is concerned by the nationwide scope of the Agreement. The likelihood of Pemberton using EES's confidential information or trade secrets, whether intentionally or unintentionally, seems greatest when he is working in the same area of the country in which he worked for EES. Pemberton is a salesperson and educational strategist, not a scientist. Thus, the court finds it appropriate to modify the Agreement so that Pemberton is prohibited from working for a "CONFLICTING COMPANY" only in the geographic areas in which he has worked for EES, that is, Maine, New Hampshire, and Massachusetts.

2. Undue Hardship to the Employee

Under this prong, it is first necessary to inquire as to "the likelihood of the employee finding work in his field elsewhere." *Karlin v. Weinberg*, 77 N.J. 408, 423 (N.J. 1978). With the non-competition modified as above, Pemberton has a substantial likelihood of finding work in his field. Secondly, "where the breach results from the desire of an employee to end his relationship with his employer rather than from any wrongdoing by the employer, a court should be hesitant to find undue hardship." *Id.* at 423-24. Although Pemberton alleges he had legitimate reasons for leaving EES, it was still his decision to do so. Perhaps most importantly, however, Pemberton will not suffer from financial harm because EES will compensate him for every month in which he cannot work due to the non-competition agreement.[5] As modified by this court, the court concludes that the non-competition agreement is fair and valid under New Jersey law.

D. Preliminary Injunction

A preliminary injunction may be granted if a three-part test is met. First, it must be reasonably likely that the movant will succeed on the merits of its claims; second, the movant must suffer irreparable harm in the absence of injunctive relief; and third, such harm must outweigh any injury the other party may sustain if the injunction is granted. *Packaging Industries v. Cheney*, 380 Mass. 609, 617 (1980). In some circum-

stances, the court must also consider whether the public interest will be adversely affected by the granting of the injunction. *Roll Systems, Inc. v. Shupe*, 1998 U.S.Dist.LEXIS 3142 (D.Mass. 1998); *Alexander & Alexander, Inc. v. Danahy*, 21 Mass.App.Ct. 488, 501 (1986).

Since the non-competition is reasonable under New Jersey law, EES has demonstrated a likelihood of success on the merits of their claim. The remaining questions are whether the harm to EES would be irreparable and whether any such harm to EES outweighs any harm that may occur to Intuitive or Pemberton. The public interest is not implicated by this Agreement.

1. Irreparable Harm to EES

The disclosure of trade secrets or confidential information would cause irreparable harm to EES. It is not necessary to pinpoint a specific amount of damages that EES would suffer. *Kroeger v. Stop & Shop Co.*, 13 Mass.App.Ct. 310, 322 (1982). Indeed, the difficulty in quantifying money damages is a basis for equitable relief.

The defendants argue that EES cannot possibly suffer from irreparable harm because Pemberton will only be in training for the first seven weeks of his employment. It is true that "[i]rreparable harm is absent if trial on the merits can be conducted before the injury occurs." *Packaging Industries*, 380 Mass. at 617 n.11. Even if it were possible to conduct a trial on the merits within the next seven weeks, however, Pemberton could reveal confidential information in staff meetings, planning sessions with supervisors, or other preparatory matters that are not strictly sales. See *Johnson & Johnson*, C.A. No. C-107-07 at 20 ("During the time the litigation is taking place, the former employee . . . would be sitting in the same sort of meetings she attended for DePuy and talking about the same sort of issues she discussed at DePuy meetings, with knowledge of DePuy confidential information fresh in her mind, but the meetings would be for the benefit of a competitor . . .").

2. Balancing of the Equities

As described above, Pemberton should easily be able to find a position in his field outside the proscribed geographic area, will suffer no serious financial harm, and made the decision himself to terminate his employment with EES. Intuitive's harm, if any, has not been shown. Since EES is likely to suffer irreparable harm and since the defendants have not alleged the same, the equities favor granting the preliminary injunction. See *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 714 (1990).

Since EES will be paying Pemberton's salary, the court will not require EES to post a bond at this time. See Mass.R.Civ.P. 65(c). This decision is made without prejudice, however, to the defendants applying for a bond at a later time.

ORDER

For the forgoing reasons, it is *ORDERED* that a preliminary injunction shall enter:

1. requiring Pemberton to abide by the terms of his Non-competition Agreement with EES;

2. restraining Pemberton from working for, or rendering services to Intuitive Surgical, Inc., in Massachusetts, New Hampshire, or Maine;

3. restraining Pemberton, and all persons acting in concert with him, including any officer, agent, employee, and/or representative of Intuitive Surgical, Inc., from directly or indirectly:

(a) using, disclosing, or transmitting EES's confidential or trade secret information for any purpose (including, without limitation, engaging in competition with EES or soliciting EES's customers or employees); and

(b) directly or indirectly soliciting any business from any account, customer or client of EES with whom Pemberton had contact within the last twelve months of his employment with EES.

4. The defendants, and all persons acting in concert with them, must return to EES, within ten days of actual notice of the Court's Order, all originals, copies, or other reproductions, in any form whatsoever, of any record or document containing, in whole or in part, any confidential information belonging to EES.

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[1]The system apparently consists of a surgeon's console, a patient-side cart with four interactive robotic arms, a "vision system," and the EndoWrist instruments. The vision system is described as an "[a]dvanced 3D HD visualization with up to 10x magnification and an immersive view of the operative field."

[2]EES also alleges that Intuitive has engaged in a pattern of aggressively recruiting EES's employees in order to obtain EES's confidential information and trade secrets. EES has submitted cases from Ohio and North Carolina in which a preliminary injunction and a temporary restraining order, respectively, were granted against Intuitive and the former employees. The court does not reach this issue, but notes that these cases provide a telling counterweight to the decision of the California court.

[3]The defendants' actions cannot even be compared to a race to the courthouse, since they failed to even notify EES that there was a race until they had already crossed the finish line and hoisted the trophy.

[4]Intuitive has occasionally alleged that Pemberton will perform some of his work in California, without specifics. The assertions are too vague to be creditable.

[5]Pemberton argues that he is still harmed financially because he would have earned more income at Intuitive that he earned at EES. He asserts that if he meets all of his sales targets, he will earn $244,500. The court finds this speculative. In addition, during the first seven weeks of his employment, Pemberton would be in the online training program. During this time, Pemberton would receive only his base salary of $65,000 plus the first quarter of a $25,000 "guarantee bonus" or $6,250. This would have been well below his salary at EES of $111,999.

This amendment was motivated by a desire that parties "increase compliance with discovery orders by making it easier for parties to achieve, and judges to award, sanctions for the failure to comply with a discovery order." Reporter's Notes to Mass.R.Civ.P. 37. Under the amended rule, discovery sanctions were considered a tool of efficient case management committed to the sound discretion of the trial judge and would be upheld unless the sanctions "were characterized by arbitrary determination, capricious disposition, whimsical thinking, or idiosyncratic choice." *Greenleaf v. Massachusetts Bay Transportation Authority*, 22 Mass.App.Ct. 426, 429 (1986). Actions falling short of willful conduct, even those seemingly due to counsel's "bumbling," were no longer immune to sanctions. *Id.* at 430.

Constitutional due process considerations "may limit the sanction of dismissal where there is an inability to comply." *Gos v. Bernstein*, 403 Mass. 252, 257 (1988). In such a case, a judge's actions must be based "on a finding of wilfulness, bad faith, or fault, unless it is clear from the record that such a determination was implied or warranted." *Id.* at 257. An implied determination of wilfulness "will be found on a pattern of recalcitrance in violation of court orders and the rules of civil procedure." *Melo-Tone Vending, Inc. v. Sherry, Inc.*, 59 Mass.App.Ct. 315, 320 (1995). Sanctions less severe than dismissal may be imposed without further findings or explication. *Gos* at 257.

The key consideration linking analyses under both pre-amendment and post-amendment case law is a party's ability to comply with the court's order and its failure to explain its non-compliance.[1] In *Partlow v. Hertz Corp.* 370 Mass 787 (1976), dismissal of the plaintiff's action was affirmed where the plaintiff failed to provide complete answers to interrogatories, failed to explain why he had not made complete responses, and the necessary information was available to the plaintiff. In those circumstances, the Court determined that "[c]ompliance with the rules of civil procedure is not accomplished if the parties make of answers to interrogatories some kind of game, and in these days of heavily burdened civil dockets, the courts are not to be expected to be subjected to that type of abuse." *Partlow* at 790. Aware of the severity of the sanction of dismissal, the Court nevertheless found the result justified when "occasioned by . . . lack of diligence and apparent failure to take seriously the responsibility of conducting litigation in compliance with the rules of civil procedure." *Id.* at 790.

In the circumstances of the present case, consideration of the sanction of dismissal is appropriate because an order issued pursuant to Mass.R.Civ.P. 37(b)(2)(B) or pursuant to Mass.R.Civ.P. 37(b)(2)(C) in response to the Manoses' failure to obey the court's Order of May 29, 2001, would necessitate the same result. That is, the court could preclude the Manoses from introducing any evidence in support of their claims, thereby effectively ending this action against KLI, or it could order the Manoses' complaint against KLI dismissed. Although the court is generally reluctant to end litigation on the basis of a party's failure to comply with a discovery order, in this case that remedy is both appropriate and reasonable.

Accordingly, Defendant Kerivan Lane, Inc.'s Motion To Dismiss George Manos' Complaint For Failure To Comply With Court Order is *ALLOWED*, and Defendant Kerivan Lane, Inc.'s Motion To Dismiss Marcelina Manos' Complaint For Failure To Comply With Court Order is *ALLOWED*. It is further *ORDERED*, pursuant to Mass.R.Civ.P. 37(b)(2)(C), that the complaint filed by George Manos and Marcelina Manos against Kerivan Lane, Inc. in this action be, and the same is hereby *DISMISSED*.

[1]There are pre-amendment cases which consider prejudice to the party seeking discovery a factor in determining the appropriateness of sanctions. See, e.g., *Litton Business Telephone Systems, Inc. v. Schwartz*, 385 Mass. 1103 (1982). However, post-amendment, "even a lack of prejudice [to the party seeking discovery] will not make sanctions unreasonable." *Roxse Homes Limited Partnership v. Roxse Homes*, 399 Mass 401, 406 (1987).

Storagenetworks, Inc. v. Metromedia Fiber Network Service, Inc.

Superior Court, Middlesex, SS
No. 012898
Memorandum Dated August 13, 2001

Actions – Prior Pending Actions – In General – Mass. Action Should Not Be Dismissed in Favor of a "Placeholder" Suit—an Action Filed But Not Served to Assure a Favorable Forum in the Event Pending Settlement Negotiations Break Down. A breach of contract action filed in Massachusetts need not be dismissed under the "first filed" rule based on the pendency of another action—described by the court as a "placeholder" suit—filed in another jurisdiction but not served while settlement negotiations were being held, to assure a favorable forum in the event that the negotiations broke down. The opinion follows the rule applied by several other jurisdictions that when applying the "first filed" rule a court should consider not only which party was first to file, but also equitable factors including discouraging procedural gamesmanship.

FAHEY, J. The plaintiff, Storagenetworks, Inc. ("StorNet") brought this suit against the defendant, Metromedia Fiber Networks Services, Inc. ("Metromedia") alleging, *inter alia*, that Metromedia breached the terms of an agreement between the parties pursuant to which StorNet agreed to lease fiber optic cable from Metromedia. Prior to the filing of this action, however, Metromedia filed suit against StorNet in New York state court alleging that StorNet breached this agreement. Metromedia now moves to dismiss on the grounds that the New York court has exclusive juris-

diction because it filed suit there first. After hearing, for reasons set forth below, Metromedia's motion to dismiss is *DENIED*.

BACKGROUND

Under the terms of the parties' Fiber Optic Private Network Agreement dated October 18, 1999 (the "Agreement"), StorNet agreed to lease an aggregate of five thousand miles of Metromedia's cable over a period of twenty years. The agreement provides, in relevant part:

"THIS AGREEMENT WILL BE INTERPRETED AND CONSTRUED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO ITS PRINCIPLES OF CONFLICTS OF LAWS." Agreement ¶13.1 (emphasis in original).

By letter dated January 3, 2001, StorNet notified Metromedia that StorNet intended to terminate the Agreement. On February 9, 2001, Metromedia filed a complaint in New York state court against StorNet alleging anticipatory breach of contract. Metromedia, however, never served the February 9, 2001 complaint on StorNet. Meanwhile, the parties entered into settlement negotiations. Thus, during these negotiations, StorNet did not know that Metromedia had already filed suit. On June 4, 2001, Metromedia refiled its New York complaint because the 120-day service deadline had expired on its first complaint. Again, Metromedia took no action to serve the complaint and settlement negotiations continued with StorNet unaware that Metromedia had filed suit.

In July 2001, settlement negotiations reached an impasse and StorNet filed the present suit. Immediately thereafter, StorNet served its Massachusetts complaint upon Metromedia. On July 12, 2001, after receiving service of the present action, Metromedia served its June New York complaint on StorNet.

DISCUSSION

Metromedia contends that under the first-filed rule, this action should be dismissed in favor of the New York action. Conversely, StorNet contends that this action should not be dismissed because the February and June New York complaints were merely placeholder suits. The court agrees with StorNet.

Although Massachusetts courts have not addressed the first-filed rule, other jurisdictions have addressed it. For example, under the federal formulation:

> the court which first has possession of the subject must decide it . . . This policy is based on principles of equity and comity, and empowers a trial judge to exercise his or her discretion and dismiss an action, where an action involving the same issues between the same parties is already pending in another forum.

White Light Productions, Inc. v. On the Scene Productions, Inc., 231 A.D.2d 90, 96-97, 660 N.Y.S.2d 568, 572-73 (quoting *Moore Corp. Ltd. v. Wallace Computer Servs.*, 898 F.Sup. 1089, 1098-99 (D.Del. 1995)).

Nevertheless, "[t]he practice of determining priorities between pending actions on the basis of dates of filing is a general rule, not to be applied in a mechanical way, regardless of other considerations." See *White Light Productions, Inc.*, 231 A.D.2d at 97, 660 N.Y.S.2d at 573 (quoting *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F.Sup. 563, 568 (S.D.N.Y. 1979)). Apart from who filed first, other factors to be considered in exercising this discretion include "judicial and litigant economy, the just and effective disposition of disputes, the possible absence of jurisdiction over all necessary parties, as well as a balancing of conveniences that may favor the second forum." *Dupont Pharmaceuticals Co. v. Sonus Pharmaceuticals, Inc.*, 122 F.Sup.2d 230, 231 (D.Mass. 2000). In short, "[w]hile priority in the bringing of actions is a factor to be considered in choice of forum litigation, it is not controlling, especially when commencement of the competing action has been reasonably close in time. *White Light Productions, Inc.*, 231 A.D.2d at 99, 660 N.Y.S.2d at 574 (quotation omitted).

Notably, courts are unwilling to reward a party "merely for wining a race to the courthouse" and frown upon "procedural gamesmanship" aimed at subjecting an unwitting opponent to an unfavorable forum. See *White Light Productions, Inc.*, 231 A.D.2d at 98, 660 N.Y.S.2d at 573-74, and cases cited.

Significantly, New York follows these principles. See *White Light Productions, Inc.*, 231 A.D.2d at 98-99, 660 N.Y.S.2d at 573-74. Although Massachusetts procedural law governs this dispute despite the Agreement's choice of law provision, see *Steranko v. Inforex, Inc.*, 5 Mass.App.Ct. 253, 270 (1977), where the parties previously agreed that New York law should govern, and the procedural rule raised by the parties' dispute has not been addressed in Massachusetts but can be readily answered by resorting to New York law, the court, in its discretion, finds application of the New York rule particularly fitting.

Applying these principles, Metromedia's motion must be denied. Although both the present action and the New York case appear to involve the same subject matter, and Metromedia filed the New York case first, Metromedia's "procedural gamesmanship" must not be rewarded. It is clear that Metromedia filed its New York complaints merely to serve as forum placeholders and that it did not intend to seriously pursue litigation at the time of those filings; otherwise it would have promptly served StorNet. StorNet, on the other hand, promptly served its complaint after negotiations broke down and did not hesitate in serving Metromedia. Thus, rather than reward Metromedia's hedging and punish StorNet, the court declines to apply the first-filed rule "in a mechanical way, regardless of other considerations." See *White Light Productions, Inc.*, 231 A.D.2d at 97, 660 N.Y.S.2d at 573 (quotation omitted).

The issue remains as to whether other considerations, apart from who filed first, mandate dismissal. Here, the parties have not adequately addressed the issue of which forum is better, Massachusetts or New York. Although defense counsel referred to forum non conveniens in his oral argument as an alternative grounds warranting dismissal, Metromedia's motion and supporting papers did not address that issue and thus StorNet has had no opportunity to respond to that basis. The proper vehicle for the defendant to raise this issue is through a motion to dismiss based on forum non conveniens. Therefore, Metromedia's motion to dismiss will be denied without prejudice to the filing of a future motion to dismiss on forum non conveniens grounds.

ORDER

For the reasons set forth above, the defendant's motion to dismiss is *DENIED* without prejudice.

Waste Management of Rhode Island, Inc. v. PennAtlantic Group, Inc.

Superior Court, Middlesex, SS
No. 996017
Memorandum Dated August 14, 2001

Brokers – Finders and Business Brokers – Statute of Frauds – "Business Brokers Statute" Applies to a Contract for the Resale of Landfill Space to Individual Waste Haulers. The statute requiring that "any agreement to pay compensation for services as a broker or finder" be in writing, M.G.L.c. 259, §7, applies to a contract for the purchase of space at a landfill for resale to individual waste haulers. The opinion states that the definition of "broker" under the Business Brokers' Statute of Frauds should be broadly construed.

BRASSARD, J. The plaintiff, Waste Management of Rhode Island, Inc. ("Waste Management") alleges that the defendant, PennAtlantic Group, Inc. ("PennAtlantic") materially breached its waste brokering contract with Waste Management by refusing to pay invoices for landfill spaces purchased on account (Count I). PennAtlantic has filed a counterclaim alleging that Waste Management breached a verbal contract between PennAtlantic and Waste Management for the hauling of processed demolition material (Count I).

The court now has before it cross motions for summary judgment. Waste Management contends that there is no dispute as to the amount of money PennAtlantic owes under the terms of the waste brokering contract, and that the alleged verbal agreement is void under the Statute of Frauds, and therefore it is entitled to judgment as a matter of law as to its claim and PennAtlantic's counterclaim. In opposition, Penn Atlantic argues that summary judgment as to Waste Management's claim must be denied because the amount owed under the waste brokering contract remains disputed. PennAtlantic also moves for summary judgment on its counterclaim, contending that the Statute of Frauds is inapplicable and the verbal contract is valid. Having heard the parties and examined the papers, Waste Management's motion for summary judgment as to Count I is *ALLOWED* in part and *DENIED* in part. Both Waste Management and PennAtlantic's motions for cross summary judgment on the counterclaim are *DENIED*.

BACKGROUND

Count I: Breach of Contract

Waste Management is a corporation that sells space at its landfills to waste haulers and waste brokers by charging per ton of waste. PennAtlantic's business involves buying space at landfills and reselling that space to waste haulers at a higher price.

From June of 1998-February 1999, PennAtlantic maintained an account with Waste Management whereby PennAtlantic purchased landfill space and resold that space to third parties. Waste Management invoiced PennAtlantic on a weekly basis for those purchases. In 1998, PennAtlantic notified Waste Management of various discrepancies in Waste Management's invoices and billing procedures. Waste Management, however, did not correct these errors.

Count I Counterclaim: Breach of Contract

PennAtlantic contends that it entered into a separate, verbal contract with Waste Management for the hauling of processed demolition material from Rhode Island to New Hampshire. According to PennAtlantic, the parties agreed to a long-term hauling contract under which PennAtlantic would be provided with 3 to 6 loads per day for a period of up to 18 months. PennAtlantic claims that because it relied on the verbal contract, it refused offers for other jobs, purchased equipment, and obtained permits totaling $190,000.00. PennAtlantic contends that Waste Management breached its obligations under the oral contract by failing to provide the contracted number of loads of material each day and by failing to pay PennAtlantic for the work performed thereunder.

Waste Management maintains that a verbal contract never existed. Alternatively, Waste Management contends that even if a verbal agreement did exist, it was an at-will contract that did not specify the amount of time or number of loads, and therefore Waste Management was not obligated to provide PennAtlantic with promised work. Waste Management further contends that it contracted with PennAtlantic to provide services as a waste broker, not as a waste hauler.

DISCUSSION

This court grants summary judgment where there are no genuine issues of material fact and where the summary record entitles the moving party to judgment as a matter of law. See *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community*