COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
NO. 1884CV01968

STEPHEN BEHNKE, L. MORGAN BANKS, III, DEBRA L. DUNIVIN, LARRY C. JAMES AND RUSSELL NEWMAN,

Plaintiffs,

v.

STEPHEN SOLDZ, DAVID H. HOFFMAN, SIDLEY AUSTIN LLP, SIDLEY AUSTIN (NY) LLP, AMERICAN PSYCHOLOGICAL ASSOCIATION and JOHN and/or JANE DOES 1-50,

Defendants.

REPLY OF DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (NY) LLP, DAVID H. HOFFMAN, AND AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF MOTION TO STAY THIS ACTION IN FAVOR OF THE SUBSTANTIVELY IDENTICAL FIRST-FILED LAWSUITS IN OHIO AND THE DISTRICT OF COLUMBIA

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Plaintiffs' Opposition fails to refute that Massachusetts courts commonly exercise discretion to control their own dockets by staying cases before them in favor of substantively identical first-filed cases pending in other courts, including those of other states. Plaintiffs instead confuse the "first-filed" *stay* requested here with inapplicable motions for *injunctions* against foreign lawsuits or *transfers* to other jurisdictions. Plaintiffs also cannot show that adding a new defendant and new counts based on the same operative facts transforms this case into one substantially different from plaintiffs' two earlier-filed actions, all three of which arise from the Report Sidley provided to APA. Plaintiffs do not even try to dispute that they seek to litigate all three cases at the same time, or that they filed this case to avoid defendants' pending D.C. anti-SLAPP motion and the stay imposed in the D.C. Action—the very tactical forum shopping the first-filed rule exists to prevent. Finally, under well-recognized precedent, defendants' motion to stay is properly addressed to this Court.

I. Massachusetts Courts Apply the First-Filed Rule to Actions in Different States.

Plaintiffs argue that Massachusetts courts do not enter stays based on the first-filed rule when the first-filed case is pending in a different state court. Opp. 3, 9-13. Plaintiffs are incorrect.[1] As demonstrated by the cases plaintiffs themselves discuss, Opp. 3, 4, 10, 11, and 17, Massachusetts state courts routinely apply the first-filed rule when the first- and second-filed cases are in different state courts. *See, e.g., Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-3973-B, 2010 WL 5071848, at *3 (Mass. Super. Ct. Oct. 27, 2010) (the "first-filed rule is a

[1] Plaintiffs quote *EMC Corp. v. Donatelli*, No. 091727BLS2, 2009 WL 1663651, at *5 (Mass. Super. Ct. May 5, 2009), for the supposed proposition that "the first-filed rule 'was never meant to apply where the two courts involved are not courts of the same sovereignty.'" Opp. 3. But that quotation refers to a California court's refusal to *enjoin* a case in another state based on sovereignty concerns, not a court's decision to *stay* its *own* proceedings. *See also Auerbach v. Frank*; 685 A.2d 404, 409 (D.C. 1996); *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231 (Cal. 2002). The difference is significant. Courts have broad discretion to control their own dockets, but are usually reticent to control the docket of another court. *Advanced Bionics*, 59 P.3d at 236 ("The significant principles of judicial restraint and comity inform that we should use that power [to enjoin other court actions] sparingly.").

presumption" where first case was pending "in the Superior Court of California"); *see also Davenport v. Benhamou,* No. 07379323F, 2007 WL 4711512 (Mass. Super. Ct. Dec. 20, 2007) (Massachusetts and Delaware); *Vista Prop. Mgmt., LLC v. Liberty Mut. Fire Ins. Co.*, No. 2012-4620-C, 2013 WL 4027421 (Mass. Super. Ct. June 28, 2013) (Massachusetts and New York); *Tanzman, Rock & Kaban, LLC v. MarketXT Holdings Corp.*, No. 035928BLS, 2004 WL 504737 (Mass. Super. Ct. Mar. 1, 2004) (same); *Raytheon Co. v. Exelon Mystic Dev., LLC,* No. 034183BLS, 2003 WL 23016863 (Mass. Super. Ct. Nov. 25, 2003) (same).[2]

Plaintiffs concede that in *Raytheon* a Massachusetts court applied the first-filed rule in favor of a pending state court case. Opp. 11; *Raytheon*, 2003 WL 23016863. But they attempt to distinguish *Raytheon* by contending that the court applied New York law. *Id.* This is incorrect. While it found that New York law would apply to the dispute's merits, the *Raytheon* court applied Massachusetts law to the first-filed determination before ever reaching them. In dismissing the case, the court found "compelling" the pendency of two other cases involving the same parties and the same dispute in New York, where motions were pending. *Id.* at *4.[3]

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[2] Plaintiffs repeatedly misrepresent the case holdings of the first-filed cases cited by defendants. For example, plaintiffs contend that *Sussman v. Vieau,* No. MICV 201201917, 2012 WL 11893990 (Mass. Super Ct. Sept. 18, 2012), addressed consolidation. Opp. 10 n.18. That is incorrect. In *Sussman*, the court stayed the second-filed Massachusetts case "because only one case should go forward at this time, and there is no convincing reason to depart from that presumption [in favor of the first-filed case]." 2012 WL 11893990, at *2. Similarly, *Van Edmen Management Corp. v. Marsh & McLennan*, No. 05-0066-A, 2005 WL 2456737, at *2 (Mass. Super. Ct. Sept. 21, 2005), did not concern consolidation but rather the court's stay of the second-filed Massachusetts case in favor of the first-filed New Jersey multi-district litigation. Plaintiffs wrongly contend that *Tanzman, Rock & Kaban, LLC*, 2003 WL 23016863, had nothing to do with the first-filed rule because it was dismissed on the merits. Opp. 10 n.14. But there, the court acknowledged and applied first-filed rule principles to dismiss the Massachusetts case in favor of the first-filed New York state case.

Plaintiffs' assertion that four cases cited by defendants should be ignored because they pre-date Massachusetts' first-filed rule, Opp. 10 n.15, is also incorrect. In each of those four cases, Massachusetts courts applied first-filed rule principles, *Alonzi v. HMK Enters., Inc.*, No. 927737D, 1993 WL 818739 (Mass. Super. Ct. June 25, 1993), *Jacoby v. Babcock Artificial Kidney Ctr., Inc.*, 364 Mass. 561 (1974), or specifically discussed application of the rule itself. *Travenol Labs., Inc. v. Zotal, Ltd.*, 394 Mass. 95 (1985); *Storagenetworks, Inc. v. Metromedia Fiber Network Serv., Inc.*, No. 012898, 2001 WL 1334881 (Mass. Super. Ct. Aug. 13, 2001).

[3] Massachusetts cases acknowledging but declining to apply the first-filed rule do prove that it is recognized in Massachusetts. *See, e.g., Exxon Mobile Corp. v. Attorney General*, 479 Mass. 312, 329 (2018) (acknowledging but declining to apply the first-filed rule where there was only partial overlap between cases filed only 1 day apart); *FTI, LLC v. Duffy*, No. 1684CV03176BLS2, 2017 WL 3251514, at *2 (Mass. Super. Ct. May 4,

II. This Case Is Substantively Identical to the Ohio and D.C. Actions.

Plaintiffs' own Background section makes clear that the three cases plaintiffs have elected to initiate in three separate jurisdictions are substantively identical—with near-complete overlap of parties, operative facts, legal claims, and issues, all arising from the Report. Opp. 5-7. The first-filed rule should therefore be applied to stay this third-filed case.

Plaintiffs assert that their Massachusetts Complaint adds counts alleging additional distributions of the same Report, precluding a stay here. *Id.* at 15-16. But those insubstantial additions cannot erase the overwhelming factual and legal overlap of the three cases. *Sussman*, 2012 WL 11893990, at *1 (requiring only "substantial overlap between the facts and arguments" to justify first-filed rule's stay presumption). Plaintiffs' strained argument that adding Dr. Soldz as a party and two new counts that pertain to him differentiates this Complaint, Opp. 15, also falls well short. Plaintiffs do not dispute, or even address, defendants' case law holding that the addition of a new party and new counts does not warrant deviation from the first-filed rule. Defs.' Mem.15-16. The Complaint here alleges defamation by all defendants, including Dr. Soldz, arising out of the Report, Compl. ¶¶ 368-409, 471-491, 672-690, as set forth in Exhibit A to the Complaint in all three jurisdictions.[4] Clearly the addition of Dr. Soldz as a defendant, eighteen months after the Ohio case was commenced, is an afterthought.

2017) (acknowledging first-filed rule but denying stay because overlap between Massachusetts and California state cases was "limited").

[4] Plaintiffs' contention that Exhibit A does not pertain to the alleged defamation by Dr. Soldz, Opp. 15-16, is contrary to the Complaint's allegations. *See* Compl. ¶ 370 (Count 3, against Dr. Soldz alone, states: "The Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A."); ¶ 392 (Count 4, against the Institutional Defendants and Dr. Soldz, states: "The Report and Soldz's statements to the Board and press following the Report contained the false and defamatory statements concerning the Plaintiffs as set forth in this Complaint, including Exhibit A."); and ¶ 476 (same allegation for Count 8 against the Institutional Defendants and Dr. Soldz).

III. The Equities Weigh Strongly in Favor of a Stay of this Third-Filed Action.

Other factors strongly support the presumption in favor of staying this later-filed action under the first-filed rule. Plaintiffs' admission that they filed this action to avoid defendants' D.C. anti-SLAPP motion and the D.C. court's stay, Opp. 2, 3, is the type of tactical forum shopping the first-filed rule seeks to prevent. *Exxon,* 479 Mass. at 329. Plaintiffs' new allegations that some events occurred in Massachusetts (among other states), Opp. 17-18, do not outweigh that plaintiffs *themselves* chose to file in D.C. and that many key events allegedly took place there. Compl. ¶¶ 86, 268, 271, 290. Plaintiffs' naked assertion that Massachusetts is likely to be the only state with jurisdiction over all parties is incorrect. Opp. 14. All the defendants in the D.C. Action have already conceded personal jurisdiction there. Personal jurisdiction in Massachusetts over Sidley (Illinois and New York entities with principal places of business in Illinois and New York), David Hoffman (domiciled in Illinois), and APA (a D.C. corporation whose sole place of business is in D.C.) is unlikely. Personal jurisdiction over Dr. Soldz, who is alleged to have acted in D.C., Compl. ¶¶ 268, 271, 290, is untested.[5]

IV. The Request to Stay this Case Is Properly Addressed to this Court.

Plaintiffs' contention that this motion should be addressed to the D.C. court, Opp. 19, is incorrect. Plaintiffs entirely ignore the many *second-filed* Massachusetts cases presumptively favoring a stay of their own proceedings in support of comity between courts. Defs.' Mem. 11, n.7. The D.C. case law cited by Plaintiffs is consistent. *See Auerbach,* 685 A.2d at 409 ("[C]oncerns such as duplication of parties and issues, the expense and effort of simultaneous litigation in two courts, and the danger of a race to judgment and inconsistent adjudications . . . are better addressed through motions in the [second] court to stay . . . . "). The cases cited by

[5] This Court has ruled that a personal jurisdiction motion to be filed at a later time by defendants is preserved.

plaintiffs, Opp. 19, are inapposite, as all arose in federal court and consider motions to dismiss or transfer,[6] or for injunctive relief.[7] A stay should be granted here.

Respectfully submitted,

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Dated: August 23, 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 8/23/2018

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[6] *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125 (D. Mass. 2012); *Onebeacon Am. Ins. Co. v. Celanese Corp.*, C.A. No. 14-13992-FDS, 2015 WL 1962168 (D. Mass. May 1, 2015); *Dana-Farber Cancer Inst., Inc., v. Ono Pharm. Co.*, 186 F. Supp. 3d 22 (D. Mass. 2016).

[7] *Dunkin' Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221 (D. Mass. 2014). *White v. Microsoft*, No. 05-0731-WS-M, 2006 WL 843872 (S.D. Ala. Apr. 3, 2006), quoted extensively by plaintiffs, is an Alabama federal case that has nothing to do with Massachusetts law. Opp. 19. In the only other case cited by plaintiffs, *TransCanada Power Marketing, Ltd, v. Narragansett Electric Co.*, 402 F. Supp. 2d 343, 347 (D. Mass. 2005), the court did not actually address which court should decide where litigation should proceed.