IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989 B**
Plaintiffs,	:	**Judge Todd E. Edelman**
v.	:	**Next Event:** **Initial Scheduling Conference** **December 1, 2017**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

DEFENDANTS' REPLY IN FURTHER SUPPORT OF
DEFENDANTS' CONTESTED MOTION (1) TO STAY THIS ACTION IN FAVOR OF THE IDENTICAL FIRST-FILED LAWSUIT IN OHIO AND (2) TO EXTEND THE TIME TO FILE RULE 12(b)(6) MOTIONS IN RESPONSE TO THE COMPLAINT

Defendants moved this Court to stay this case until the appeal in the Plaintiffs' first-filed, substantively identical suit in Ohio is resolved, so that the parties are not litigating the same case in two courts at the same time.[1] Defendants also moved the Court to delay the briefing and consideration of their Rule 12(b)(6) motions to dismiss until after the Court decides the motion to stay and the potentially dispositive anti-SLAPP and arbitration motions. Plaintiffs do not dispute that the actions are identical, and they agree that the parties should not litigate identical cases in different courts at the same time. Pls. Opp. at 1. Nevertheless, Plaintiffs oppose a stay of this case, as well as staging of the Rule 12(b)(6) motions, contending that they need to review Defendants' anticipated Rule 12(b)(6) motions before deciding whether to pursue their Ohio appeal. Plaintiffs offer no basis for this demand other than their desire to hedge their bets and ultimately select the forum they deem the most advantageous to their case. This Court should grant a stay and reject Plaintiffs' invitation to promote forum shopping over judicial economy and comity.

I. Plaintiffs Fail to Rebut Defendants' Argument That the Court Should Stay this Action During the Pendency of the Ohio Appeal.

To conserve judicial and party resources and promote comity, this Court should stay this action until resolution of the first-filed Ohio action, rather than requiring the parties to litigate the same case in two forums at the same time. *See* Defs. Mem. at 4–6. Plaintiffs concede, as they must, that this case is substantively identical to the first-filed Ohio action. They also admit, as they must, that "two essentially identical lawsuits should not proceed simultaneously in two

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[1] Defendants do not respond here to the factual misstatements and erroneous legal assertions that pepper Plaintiffs' Opposition, as they are not germane to the instant motion. *See, e.g.*, Pls. Opp. at 5–6 (challenging Defendants' arbitration motions), 8–11 (challenging Defendants' anti-SLAPP motions). Defendants will respond to these contentions if and when Plaintiffs properly raise them in opposition to Defendants' anti-SLAPP and/or arbitration motions. Defendants oppose special briefing on choice of law related to their anti-SLAPP motions, as that issue should be addressed in Plaintiffs' anti-SLAPP opposition and Defendants' replies.

courts." Pls. Opp. at 1; *see also, e.g.*, *Biochem Pharma Inc. v. Emory Univ.*, 148 F. Supp. 2d 11, 13 (D.D.C. 2011). Nonetheless, Plaintiffs advance three meritless arguments why a stay of this case -- one of two identical cases they continue to advance simultaneously -- is inappropriate.

First, Plaintiffs doubt the Court's authority to enter a stay because Plaintiffs see no support in this Court's rules. *See* Pls. Opp. at 6. Plaintiffs' argument ignores well-established jurisprudence on this issue. Courts have inherent discretion to enter stays to manage their dockets. *See* Defs. Mem. at 4–5; *see also, e.g.*, *In re H.B.*, 855 A.2d 1091, 1097 (D.C. 2004). The Court's entry of a stay in this case is squarely within its discretion, as Plaintiffs appear to concede later in their Opposition. *See* Pls. Opp. at 6.

Second, Plaintiffs argue that the first-filed rule is inapplicable here where Defendants are not trying to defeat Plaintiffs' original choice of forum. *See id.* at 6–7 (attempting to distinguish *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970), where a defendant filed a second action to defeat Plaintiffs' choice of forum). Plaintiffs entirely miss the main thrust of *McWane*, in which the court endorsed the line of cases holding that a court should freely exercise discretion "in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and completed justice, involving the same parties and the same issues…." *Id*.

Plaintiffs also argue that even if the first-filed ruled were applicable, this Court need not apply it because each sovereign state has unrestricted powers. Pls. Opp. at 7-8. This general principle is unavailing here where the question is whether the Court should exercise its *discretion* to enter a stay under the circumstances. Neither case cited by Plaintiffs actually supports their argument. In *In re Old American County Mutual Fire Insurance Co.*, an unpublished decision from Texas, the court upheld the denial of a stay because the case involved *different* pleadings

and parties than the first-filed action. No. 03-12-00588, 2012 WL 6699052, at *2 (Tex. Ct. App. Dec. 20, 2012). The court noted that a party to a later-filed suit *can* show "entitlement to a stay" where, as here, "the two suits involve the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief." *Id.*[2] And in *Advanced Bionics Corp. v. Medtronic*, the California Supreme Court held that a California court should carefully consider comity in assessing whether to stay a first-filed case—not that California courts should decline to stay actions identical to ones already pending in other states. 59 P.3d 231, 237 (Cal. 2002).[3]

II. Plaintiffs Fail to Rebut Defendants' Argument That this Court Should Stage Briefing to Preserve Judicial and Party Resources.

Defendants have already demonstrated why delaying the briefing and consideration of Defendants' Rule 12(b)(6) motions until *after* the Court decides the trio of pending motions—the motion to stay and the potentially dispositive anti-SLAPP and arbitration motions—would conserve judicial and party resources. *See* Defs. Mem. at 7–10. Plaintiffs' arguments against this sensible and orderly way to proceed with the case are without merit.

First, Plaintiffs contend that waiting until their review of Defendants' Rule 12(b)(6) motions will assist Plaintiffs in deciding whether to pursue their Ohio appeal.[4] *See* Pls. Opp. at 1. This is a transparent attempt at forum shopping, *i.e.* determining in which forum—Ohio or the

[2] *See also In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007) ("When a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit.").

[3] *See also Leadford v. Leadford*, 8 Cal. Rptr. 2d 9, 12 (Ct. App. 1992) ("Where, as here, the actions are pending in courts of different states, the determination whether to stay the later-filed action is discretionary . . . [and] considerations of comity and the prevention of multiple and vexatious litigation will most often militate in favor of a stay.").

[4] Plaintiffs argue that the Ohio action is not "active." Pls. Opp. at 1, 6. This is incorrect. On October 16, Plaintiffs moved for an extension of time to file their opening brief in the Ohio appeal, from October 24 to November 21, 2017. Accordingly, Defendants will soon begin drafting their opposition briefs.

District of Columbia—Plaintiffs believe they have the best chance of surviving Defendants' dispositive motions. And even if this request were proper, despite twelve pages of briefing Plaintiffs never explain *why* they need to see Defendants' motions before deciding whether to drop their Ohio appeal. *See* Defs. Mem. at 7–9. There is no legitimate need for them to do so. The Ohio trial court's ruling was based entirely on its finding that the Defendants had insufficient contacts with Ohio for personal jurisdiction in that state, which involved a self-contained set of facts and arguments that was fully briefed and argued before the Ohio court. In contrast, Defendants' Rule 12(b)(6) motions will address why Plaintiffs' claims fail to state viable causes of action, including, for example, that the allegedly defamatory statements constitute non-actionable opinion, do not adversely affect the Plaintiffs' reputations (and accordingly are not defamatory), and/or that they are true. Nothing in the Rule 12(b)(6) motions will affect the Ohio personal jurisdiction appeal. Consequently, there is no need for Plaintiffs to review the Rule 12(b)(6) motions before selecting the forum in which they want to currently proceed. They could make that selection today.[5]

Second, Plaintiffs argue that Defendants' Rule 12(b)(6) motions were due October 4, 2017 and that the filing of such motions now would be out of time. Pls. Opp. at 2, 8. Plaintiffs are incorrect. Per the Court's October 6 Order, Defendants had until October 13, 2017 to respond to the Complaint. They did so by filing a Special Motion to Dismiss pursuant to the DC Anti-SLAPP Act. Plaintiffs offer no support for their argument that with that motion pending, Defendants are also required to answer or file an additional motion to dismiss. Additionally, before October 13, 2017 Defendants also filed this motion seeking to stage the Rule 12(b)(6)

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[5] Even if there were a valid reason why Plaintiffs needed to know the Rule 12(b)(6) arguments Defendants intend to make before deciding whether to proceed with the Ohio appeal, Defendants have now twice stated what 12(b)(6) arguments they intend to make. *See* Defs. Mem. at 7–9.

motion after resolution of the pending dispositive motions, and a date for the filing of a Rule 12(b)(6) motion has not yet been set by the Court.

Third, Plaintiffs argue that the Court's concurrent adjudication of Defendants' anti-SLAPP and Rule 12(b)(6) motions will conserve judicial resources because "the SLAPP Act standard should be held to subsume the Rule 12(b)(6) standard." *Id.* at 9 (citing *Competitive Enters. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016)).[6] This ignores that the *grounds* for dismissal under the Rule 12(b)(6) motions here will be entirely different from those under the anti-SLAPP and arbitration motions, regardless of the applicable standards. Unlike in *Mann*, Defendants' anti-SLAPP motion focuses solely on Plaintiffs' failure to satisfy the required element of actual malice, whereas their Rule 12(b)(6) motions would challenge the extensive Complaint and 219 sets of allegedly false statements on different grounds on which the Court would not yet have ruled in adjudicating their anti-SLAPP motions. Requiring the parties to brief both motions and have the Court consider them now would be a waste of party and judicial resources.

CONCLUSION

For the reasons set forth in Defendants' opening brief and herein, this Court should grant a stay and order staged briefing as requested in Defendants' motion.[7]

[6] In *Mann*, the anti-SLAPP arguments and those asserted under Rule 12(b)(6) were the same. *See Mann*, 150 A.3d at 1221 n.2.

[7] Ignoring Rule 12-I(d) and (e), in footnote 5 of their Opposition, Plaintiffs have requested an extension for the time to file their oppositions to Defendants' anti-SLAPP and arbitration motions until 21 days after the Court has ruled on the instant motion. Pls. Opp. at 12 n.5. Plaintiffs' attempt to submit an Opposed Motion in this manner violates Local Rule 12-I and this Court's Supplement to the General Order. Plaintiffs should have filed a motion and memorandum and proposed order that comply with Rule 12-I(d) and (e). Procedural defects aside, Defendants oppose Plaintiffs' request on the merits as Plaintiffs, who evidently intend to file a motion for discovery, should not be permitted to delay briefing on Defendants' motions while moving forward with discovery that is precluded by the pending anti-SLAPP motions. At such time that Plaintiffs file a proper motion for an extension of the time to respond to the arbitration and anti-SLAPP motion, Defendants will timely file oppositions.

Dated: October 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2017, a true and correct copy of the foregoing Reply in Further Support of Defendants' Contested Motion (1) To Stay This Action in Favor of the Identical First-Filed Lawsuit in Ohio and (2) To Extend the Time to File Rule 12(b)(6) Motions in Response to the Complaint was filed through the Court's electronic filing system, which will automatically send copies to counsel for Plaintiffs and Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and Sidley Austin LLP partner David Hoffman.

/s/ Barbara S. Wahl
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