IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

MEMORANDUM OF POINTS AND AUTHORITIES IN 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

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INTRODUCTION

This motion seeks two types of relief to preserve judicial and party resources by avoiding potentially duplicative, time-consuming, and unnecessary proceedings.

First, Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and Sidley Austin partner David Hoffman (collectively, "Sidley") and American Psychological Association ("APA") (collectively, "Defendants") move to stay this second-filed defamation lawsuit by Plaintiffs until the final resolution of Plaintiffs' substantively identical first-filed defamation lawsuit, which is currently pending on appeal in Ohio's Second District Court of Appeals.[1] Over Plaintiffs' opposition, the Court of Common Pleas for Montgomery County, Ohio dismissed the lawsuit for lack of personal jurisdiction on August 25, 2017. Plaintiffs appealed that ruling on September 22, 2017. Before filing their appeal in Ohio, however, Plaintiffs filed this virtually identical lawsuit in the District of Columbia on August 28, 2017, served it on September 13, 2017, and have sought to press forward, including serving discovery requests.

Defendants believe the Ohio appellate court should affirm the ruling that Ohio lacks personal jurisdiction. But they further believe permitting Plaintiffs' two lawsuits to proceed at the same time in two different forums would be an unwarranted waste of judicial and party resources that could lead to inconsistent results. Accordingly, pursuant to the discretionary "first-filed" rule that courts apply to avoid such consequences, and the Court's inherent power to control its

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

docket, Defendants ask this Court to stay these proceedings until the Ohio proceedings have terminated. If Plaintiffs prevail on appeal in Ohio, their Ohio case will proceed and this case need not continue. If Defendants prevail on appeal in Ohio, then this case should move forward.[2]

Second, if this case is not stayed, Defendants move to extend the time for filing their Rule 12(b)(6) motions to dismiss the Complaint for failure to state a claim until the resolution of two threshold motions responding to the Complaint that Defendants will file on October 13, 2017.[3]

Specifically, Defendants will file (1) special motions to dismiss the Complaint under the D.C. Anti-SLAPP Act, D.C. Code §16-5502, that if successful will dispose of the entire case on the merits, and (2) motions to compel arbitration that if successful will require two of the five Plaintiffs to arbitrate their claims. Rather than file another substantive motion to be briefed and decided now, Defendants request that if the Court denies the motion to stay, it extend the time for Defendants to submit Rule 12(b)(6) motions to dismiss until after this Court has issued an Order denying Defendants' anti-SLAPP and arbitration motions.

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[2] Plaintiffs oppose this motion and say they will respond by October 18, 2017 to Defendants' request that they instead voluntarily dismiss their Ohio appeal. If any action by Plaintiffs moots any part of this motion, Defendants will promptly notify the Court.

[3] On October 6, 2017, this Court granted Defendants' unopposed motion for an extension of nine days, to October 13, 2017, to file these responses to the Complaint: (1) special motions to dismiss the Complaint under the D.C. Anti-SLAPP Act, D.C. Code §16-5502, and (2) motions to compel arbitration of the claims brought by the two Plaintiffs who are former employees of APA, Drs. Stephen Behnke and Russell Newman.

Notwithstanding this stay motion, Defendants are timely filing these two motions as a precaution to avoid any waiver argument. *See, e.g.*, D.C. Code § 16-5502(a) ("A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim."). Defendants' request to stay the District of Columbia action in favor of the first-filed Ohio action includes staying further briefing of these two motions.

As explained below, Plaintiffs' voluminous Complaint alleges, among other things, that 219 sets of statements in the 541-page Sidley independent report at issue herein are false. Separate and apart from the dispositive anti-SLAPP motions to dismiss, the Defendants' Rule 12(b)(6) motions will argue that the five Plaintiffs' claims regarding these 219 sets of statements are subject to dismissal as a matter of law based on a combination of defamation doctrines that together cover every statement as to every Plaintiff. Given the size of the Complaint, preparing, opposing, and deciding such motions would be substantial undertakings that may never be necessary depending on the outcome of the other motions before the Court. To preserve judicial and party resources, Defendants accordingly request an extension to file their Rule 12(b)(6) motions until 45 days after any Order denying the pending motions.

BACKGROUND

Five Plaintiffs have filed a twelve-count, 104-page Complaint asserting claims for defamation and false light invasion of privacy against Sidley and APA. The Complaint attaches an additional 80 pages of exhibits, including a single-spaced 45-page Exhibit A that alleges that 219 sets of statements are about the Plaintiffs and are false. *See* Ex. 2-A, at Exhibit A.

The Complaint principally focuses on an independent report Sidley delivered to APA in July 2015, titled "Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture" ("Report"). The Report is 541 pages long and is accompanied by more than 7,600 pages of publicly available exhibits. It resulted from several months of investigation, concerned events that spanned a decade, involved intelligence and military activities across the globe, and included analysis of more than 50,000 documents and interviews of approximately 150 witnesses. The Report involved investigating and evaluating allegations that had been made regarding APA's issuance of ethical rules and/or guidelines in 2002 and 2005,

and related actions, which determined whether and under what circumstances psychologists who were APA members could ethically participate in national security interrogations, like those that occurred in the 2000s in Iraq, Afghanistan, Guantanamo Bay, and elsewhere.[4]

The same Plaintiffs previously filed an essentially identical defamation and false light complaint against the same Defendants (omitting only the LLP that operates Sidley's D.C. office, an additional defendant in this action) in the Ohio Court of Common Pleas on February 16, 2017, *James v. Hoffman*, Case No. 2017 CV 00839. *See* Ex. 2-B. On August 25, 2017, the Ohio court dismissed that complaint for lack of personal jurisdiction. On September 22, Plaintiffs appealed the dismissal to the Ohio Second District Court of Appeals, where it is pending as matter number CA 27735. On October 4, 2017, the Ohio appellate court notified the parties that the record on appeal is complete, meaning that under the applicable Ohio court rules Plaintiffs' opening appeal brief is currently due in late October 2017. *See* Ex. 2-D.

Plaintiffs' appeal of the dismissal of the first-filed Ohio case while also pursuing this identical second-filed case in the District of Columbia is causing the same dispute between the same parties to be litigated in two different forums simultaneously.

ARGUMENT

I. This Lawsuit Should Be Stayed in Favor of the First-Filed Ohio Action.

It is well settled that "[a] court has control over its own docket. . . . In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same." *Am. Life ins. Co. v. Stewart*, 300 U.S. 203, 215

[4] Sidley provided APA a revised version of the Report in September 2015. A copy of that version is attached as Exhibit 2-C.

(1937). The power to stay proceedings "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quotation omitted). Thus, "[a] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Nat'l Shopmen Pension Fund v. Folger Adam Sec., Inc.*, 274 B.R. 1, 3 (D.D.C. 2002) (quotation omitted).

Where, as here, a party seeks to pursue two identical actions, involving the same parties, in two different forums at the same time, courts "have the discretion to stay or dismiss a pending suit when confronted with parallel litigation of factually related cases filed in two separate forums." *Furniture Brands Int'l, Inc. v. ITC*, 804 F. Supp. 2d 1, 4 (D.D.C. 2011). Doing so avoids wasting judicial and party resources with duplicative litigation, potentially inconsistent results between courts in two different jurisdictions, and procedural fencing by the parties seeking to gain advantages in each forum. Thus, "[c]onsiderations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *WMATA v. Ragonese*, 617 F.2d 828, 830, 199 U.S. App. D.C. 246 (D.C. Cir. 1980).

"When lawsuits involving the same controversy are filed in more than one jurisdiction, the general rule is that the court that first acquired jurisdiction has priority." *Biochem Pharma, Inc. v. Emory Univ.*, 148 F. Supp. 2d 11, 13 (D.D.C. 2001). Courts call this application of discretion the "first-filed rule." *Furniture Brands Int'l*, 804 F. Supp. 2d at 4. In determining whether or not to follow the first-filed rule, courts may balance equitable considerations. *See*

Stone & Webster, Inc. v. Georgia Power Co., 965 F. Supp. 2d 56, 60 (D.D.C. 2013). Those considerations include the timing of the filing of the two lawsuits, the convenience and efficiency of proceeding in each forum, and the procedural stage of each case. *Id*. at 61.

Courts have long applied the rule in a number of circumstances, including where the two cases are pending in the state courts of two different states. For example, the Delaware Supreme Court ordered the stay of a second-filed Delaware breach of contract action in favor of a case that was first-filed in Alabama. The court observed that by applying the first-filed rule "there is avoided the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts." *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970). The court added: "Also to be avoided is the possibility of inconsistent and conflicting rulings and an unseemly race by each party to trial and judgment in the forum of its choice. Public regard for busy courts is not increased by the unbusinesslike and inefficient administration of justice such situation produces." *Id.*; *accord Thomson, Inc. v. Cont'l Cas. Co.*, 976 N.E.2d 763, 766 (Ind. Ct. App. 2012) (citing cases).

Sometimes circumstances, not present here, justify staying or dismissing the first-filed case in favor of the second-filed case, such as when the first case is an anticipatory declaratory judgment action filed for purposes of forum shopping. *See, e.g., Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113, 117 (D.D.C. 2008). But courts agree that whichever case goes forward, considerations such as preserving judicial and party resources, and avoiding potentially inconsistent results warrant staying one of the cases. *See, e.g.*, *Ragonese*, 617 F.2d at 830.

Here, the Ohio lawsuit was filed first, more than seven months ago, is substantively identical to this lawsuit, and is currently on appeal with briefing set to begin this month. If Plaintiffs insist on maintaining both the Ohio and the District of Columbia cases at the same time, it would be most efficient for this Court to stay this second-filed case until the Ohio case is resolved. If Plaintiffs prevail on their appeal in Ohio, then, subject to any further appeals to the Ohio Supreme Court, the case will return to the Montgomery County, Ohio Court of Common Pleas and there will be no reason for this case to proceed. If the appellate court affirms the personal jurisdiction dismissal, then, subject to any further appeals to the Ohio Supreme Court, the Ohio case will be over and this case can proceed. Such an approach will avoid the waste of resources and other problems discussed in cases like *McWane*. For these reasons, the Court should stay this case until the final resolution of the Ohio case.

II. The Deadline for Defendants' Rule 12(b)(6) Motions Should Be Delayed as Part of a Staging of the Motions Responding to the Complaint.

Shortly, the following three sets of motions will be on file: (1) this motion for a stay in favor of the Ohio proceedings, (2) potentially case-dispositive anti-SLAPP motions to dismiss, and (3) arbitration motions regarding the claims of two of the five Plaintiffs. Delaying the filing, briefing, and consideration of a fourth set of motions—Defendants' Rule 12(b)(6) motions for failure to state a claim upon which relief can be granted—until after the Court resolves the other motions would avoid potentially wasting Court and party resources and would be the most efficient way to address the numerous issues raised by Plaintiffs' voluminous Complaint.

As previously noted, Plaintiffs' lengthy Complaint attaches a 45-page single-spaced Exhibit A that alleges, in addition to other allegations, that 219 sets of statements from Sidley's 541-page Report are purportedly false. *See* Ex. 2-A, at Exhibit A. Defendants' anticipated Rule

12(b)(6) motions will raise legal arguments about each of the 219 sets of allegedly false statements. Defendants' motions will establish that, as a matter of law, as to *each* of the five Plaintiffs, *each* of the 219 sets of statements fails to satisfy at least one of the required elements of a defamation claim. These include the following elements, the failure of a plaintiff to establish any one of which defeats his or her claim: whether each challenged statement is (1) defamatory, *see, e.g.*, *Howard Univ. v. Best*, 484 A.2d 958, 988-89 (D.C. 1984); (2) reasonably susceptible of a defamatory meaning, *see*, *e.g. Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 313 (D.C. 2006); (3) "of and concerning" the particular Plaintiff, *see*, *e.g.*, *Jankovic v. Int'l Crisis Group*, 494 F.3d 1080, 1088-89, 377 U.S. App. D.C. 434 (D.C. Cir. 2007); (4) protected opinion rather than an actionable statement of fact, *see*, *e.g.*, *McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 159 (D.D.C. 2014); and (5) materially false or "substantially true," *see*, *e.g.*, *Carpenter v. King*, 792 F. Supp. 2d 29, 34 (D.D.C. 2011), among others.

Given the multitude of statements that the Complaint has placed at issue, Defendants expect this briefing necessarily to be extensive, and will require Defendants to seek a substantial enlargement of this Court's page limit of fifteen pages for memoranda. Among other reasons, resolving the Rule 12(b)(6) motions will require the parties and the Court to analyze all of the statements challenged by Plaintiffs, including the 219 sets of statements attached as Exhibit A to the Complaint.[5] Staging the motion practice in this case by delaying the filing of Rule 12(b)(6) motions conserves judicial resources by allowing the Court to address threshold, potentially dispositive issues first.

[5] Defamation lawsuits are commonly disposed of at the Rule 12(b)(6) stage. *See, e.g.*, *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983) ("In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function.").

By contrast, the anti-SLAPP motions that Defendants will file on October 13, 2017 will focus on an entirely different required element of a defamation and false-light cause of action and a different standard of review, whether Plaintiffs can "demonstrate[] that the[ir] claim is likely to succeed on the merits." D.C. Code § 16-5502(b). Defendants' anti-SLAPP motions will argue that Plaintiffs are public officials or public figures and that the Complaint's allegations even if proved are insufficient to establish that Defendants published allegedly false statements with actual malice. *See, e.g.*, *Von Kahl v. BNA, Inc.*, 856 F.3d 106, 116, __ U.S. App. __ (D.C. Cir. 2017). The anti-SLAPP motions, therefore, will not require the parties or the Court to engage in the task of analyzing each statement in the 219 sets of allegedly false statements alleged in the Complaint. If the Court agrees that Plaintiffs cannot satisfy the actual malice standard, that would end the case.[6] Accordingly, Court and party resources would be preserved by holding in abeyance the filing and briefing of Rule 12(b)(6) motions and briefing regarding those challenged statements.

In the Ohio case, staging the initial motions in this manner already proved effective for fairly and efficiently dealing with the various issues presented by the Complaint. In that case, the same Plaintiffs and Defendants jointly proposed, and the court ordered, a schedule in which Defendants initially filed motions to dismiss for lack of personal jurisdiction and other threshold motions. The order suspended the Plaintiffs' obligation to respond to then-pending anti-SLAPP and arbitration motions until the court decided the personal jurisdiction motions, and then called

[6] In addition, upon Defendants' filing of the anti-SLAPP motions, which are directed at the entire case, discovery will automatically be stayed pursuant to the D.C. Anti-SLAPP Act except to the extent Plaintiffs can demonstrate to the Court the need for targeted, not unduly burdensome discovery that will enable them to defeat the anti-SLAPP motions. *See* D.C. Code § 16-5502(c).

for Defendants to file further motions to dismiss the complaint only if the court denied the personal jurisdiction motions. The order also staggered the due dates for this later briefing. *See* Ex. 2-E. The order thus preserved judicial resources and ensured that neither the Plaintiffs nor the Defendants had to brief multiple motions at the same time, including some motions that the court might never have to reach. Indeed, on August 25, 2017, the Ohio court granted Defendants' personal jurisdiction motions, thus mooting all the other motions referenced in the staging order.

The same benefits of staging the motions exist here. As in the Ohio case, Defendants' proposed schedule will conserve judicial and party resources and allow the Court to resolve dispositive threshold issues first.

Delaying the Rule 12(b)(6) motions also comports with the policy behind the District of Columbia's Anti-SLAPP Act, which is to protect defamation defendants who have communicated about matters of public interest from having to "dedicate a substantial[] amount of money, time, and legal resources" before having the opportunity for the Court to rule on a special motion to dismiss at the outset of the case. Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18–893, at 1 (Nov. 18, 2010); *see also Competitive Enters. Institute v. Mann*, 150 A.3d 1213, 1231 (D.C. 2016). Additionally, the Court of Appeals has held that if a court denies a defendant's anti-SLAPP motion, there is an immediate right of appeal, *see Mann*, 150 A.3d at 1227-28, which further counsels in favor of delaying briefing on Defendants' Rule 12(b)(6) motions that may prove to be unnecessary.

If the Court disagrees that the Defendants' Rule 12(b)(6) motions should be delayed until the disposition of the threshold motions that will be pending as of October 13, Defendants request in the alternative the Court address a due date for the 12(b)(6) motions at the December 1, 2017 initial scheduling conference.

CONCLUSION

For the foregoing reasons, this case should be stayed in favor of the first-filed Ohio action and the Court should stage the filing of Defendants' Rule 12(b)(6) motions.

Dated: October 11, 2017

Respectfully submitted,

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