COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS Superior Court No. 1884CV01968

STEPHEN BEHNKE, ET AL.,

Plaintiffs,

v.

STEPHEN SOLDZ, ET AL.,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY UNDER THE "FIRST-FILED" RULE

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INTRODUCTION

Plaintiffs respectfully request this Court to deny Defendants' Motion to Stay or, in the alternative, require Defendants to turn to the District of Columbia (D.C.) court to decide the question of the appropriate suit to go forward, as precedent cited by Defendants and discussed in Argument Section IV below provides.[1]

Defendants' motion should fail because the first-filed rule is not intended to apply to actions in the courts of two states and was not so applied by any Massachusetts case that Defendants cite. Moreover, even if the rule applied to parallel state-court actions, it could not be appropriately applied to this case because of the substantial differences between the parties and claims in the pending actions, differences the Defendants fail to acknowledge. Finally, even absent those differences, the action falls squarely within the exceptions to the rule that, in situation where it is intended to apply, authorize Massachusetts courts to give preference to a later-filed action in the interests of resolving a dispute efficiently and fairly.

At the outset, Defendants mischaracterize this case's history and the reasons for which Plaintiffs have been compelled to file the present action. Defendants' attempt to portray the action as "deliberate forum shopping" (Motion to Stay, p. 13) substitutes rhetoric for analysis. The case's history has been driven by the two manifest prongs of Defendants' strategy: to drag the case out, and to pursue the case in a jurisdiction, D.C., where the anti-SLAPP legislation – if D.C. law applies to this case, which Plaintiffs deny – makes it far more difficult than does anti-SLAPP legislation in other jurisdictions for defamed individuals to seek redress. *See Blanchard v. Stewart Carney Hosp., Inc.,* 477 Mass. 141 (2017)

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[1] In this Opposition, "Defendants" refers to the defendants who filed the Motion to Stay. Dr. Stephen Soldz will be referred to by his name.

Given Plaintiffs' limited resources, they do not want to litigate in multiple jurisdictions. They were prepared to proceed in Ohio if Defendants had accepted jurisdiction there. Instead, Defendants represented to the Ohio court that D.C. was the "superior" forum. When Ohio dismissed for lack of jurisdiction, Plaintiffs acquiesced in Defendants' preference and re-filed in D.C. Once in D.C., Plaintiffs were prepared to drop their Ohio appeals if Defendants filed their 12(b)(6) motion at the same time as their anti-SLAPP motion (in accordance with D.C. Superior Court Rule of Civil Procedure 12(g) which requires all pre-answer motions to be filed at the same time), so Plaintiffs could be assured they need not respond to defenses that could be addressed only in Ohio. Plaintiffs also offered to mediate. None of these offers was accepted.

At the Defendants' request, the D.C. case was stayed pending an appeal to the Ohio Second District Court of Appeals.[2] Before the stay, Defendants had asked the D.C. court to dismiss the case under the D.C. Anti-SLAPP Act. Plaintiffs contend that D.C. law does not apply and, even if it did, the Act does not apply to the facts of this case. (The D.C. court has not determined which law applies. Counsel for Dr. Stephen Soldz concedes that Massachusetts law applies to the four causes of action against him, two of which also name Defendants. (Soldz Response to Co-Defendants' Motion to Stay, pp. 1-2)) However, given the unpredictability of the D.C. action's timing, Plaintiffs' attorneys would have verged on malpractice if they had not filed in Massachusetts within the three-year statute of limitations for defamation claims.

In the three years since the defamatory statements were published, Plaintiffs have moved promptly, initially by discussing a settlement and then in court. Defendants have preferred to delay, including resisting any discovery. At this point, "the just and effective disposition" of this

[2] The Ohio Court of Appeals has affirmed the case's jurisdictional dismissal. Plaintiffs' discretionary appeal to the Ohio Supreme Court should not be cause for further delay. On July 3, 2018, Plaintiffs asked the D.C. court to lift the stay, and that request is pending.

dispute, as well as "judicial and litigant economy," favor proceeding without further delays. *Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-3973-B, 2010 WL 5071848 at *3, (Mass. Super. Ct. Oct. 27, 2010).[3] Plaintiffs should be allowed to proceed in at least one court and, for the reasons discussed below, Massachusetts is the most appropriate jurisdiction.

The first-filed rule does not apply to actions filed in courts of different sovereignties. The first-filed rule, which was developed in federal courts to consolidate and transfer cases within the federal judicial system,[4] should not apply to state-court actions filed in different states. As a Massachusetts court has held: "... 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*, 25 Mass.L.Rptr. 399, 2009 WL 1663651 (Mass. Super. Ct. May 5, 2009), quoting from *Advanced Bionics Corporation v. Medtronic*, 59 P.3d 231 (2002). The District of Columbia Court of Appeals has reached the same conclusion, and Defendants have cited no case where a Massachusetts court has held to the contrary.[5]

Strikingly, of the 19 state and 16 federal cases cited by the Defendants **not a single case** involved a Massachusetts state court applying the first-filed rule to stay an action as a result of a pending parallel state action in a different state. (See Argument Section I below.) In the one case cited by Defendants where a Massachusetts state court stayed an action because of

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[3] *See also Nanologix, Inc. v. Novak*, No. 4:13-CV-1000, 2013 WL 6443376 at *7 (N.D. Ohio Dec. 9, 2013) ("... the Court concludes that a stay would further delay an overlong conflict. .... and continuing to defer discovery serves no purpose."). Plaintiffs' D.C. motion for discovery has been pending since November. No scheduling order is entered.

[4] *See, e.g., Wiley v. Gerber Products Company*, 667 F. Supp. 2d 171, 173 (D. Mass. 2009).

[5] *Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996) ("...the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction.").

litigation in another state court, it relied on a *forum non conveniens* analysis in a case to be decided largely under the laws of another state and involving issues not involved in the Massachusetts action. *Raytheon Co. v. Exelon Mystic Dev., LLC,* 17 Mass.L.Rptr. 86 (Mass. Super. 2003) Here, in contrast, the Massachusetts action has the broader scope; moreover, Plaintiffs contend that D.C. law does not apply and that Massachusetts law will apply, as Dr. Soldz has acknowledged in regard to the causes of action against him.

Even if the first-filed rule applied to actions in the courts of different states, Massachusetts courts have consistently emphasized that it may not be applied mechanically or routinely. As stated by the Supreme Judicial Court, "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." *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 329-30 (2018), quoting *EMC Corp. v. Parallel Iron, LLC,* 9114 F. Supp. 2d 125, 127. *See Braintree Labs., Inc. v. Bedrock Logistics, LLC,* No. 16-11936-IT, WL 7173755 (D. Mass. December 8, 2016) at *2 ("Indeed, the First Circuit at one point 'found no case where [the rule] has carried the day against factors pointing in the other direction.'").

The D.C. and Massachusetts actions differ substantially and substantively.[6] Even if the first-filed rule did apply to actions in the courts of different sovereignties, the rule should not be applied to this case. As Argument Section II below demonstrates, the parties and claims in

[6] The Ohio action could not be part of a first-filed analysis, even if such an analysis were appropriate, because Ohio has not accepted jurisdiction. A discretionary appeal of a jurisdictional decision is not an appropriate part of a first-filed analysis. *See Somasekharan v. Lawrence & Associates, Inc.*, No. 07-cv-208, 2007 WL 26809547 (C.D. Ill. July 13, 2007) at *2 ("… dismissed claims do not constitute currently pending claims even if the suit in which those claims were originally brought has not yet proceeded to a final judgment" (citation omitted)). *See also Aei Life, LLC v. Lincoln Benefit Life Co.*, No. 14-CV-6449, WL 9286283 (E.D.N.Y. December 21, 2015) ("It is not the case first filed that has precedence; rather, it is *the court that first obtains jurisdiction* …." (emphasis added) (citation omitted)).

Massachusetts differ substantially from those in D.C. Ten counts are new or substantially revised to reflect new information. (The D.C. Complaint contains 12 counts; the Massachusetts Complaint contains 19.) None of the D.C. counts names Dr. Soldz as a defendant; four of the Massachusetts counts now seek to hold him responsible for his defamatory statements.

Massachusetts law favors the later-filed action when it better serves the interests involved. Even if the actions were not so different, Massachusetts law favors the later-filed action when there are persuasive reasons for that choice, including judicial economy, jurisdiction over the parties, the connection between the forum and the issues, and the just and effective disposition of a dispute. As Argument Section III below demonstrates, those factors favor Massachusetts. For example, it is the only forum likely to have jurisdiction over all Defendants, thus avoiding duplication of effort and potentially conflicting results. Moreover, many of the people, actions, and events relevant to Plaintiffs' claims were centered in Massachusetts. (Complaint, pp. 27-35)

Finally, even if this Court were to find that the first-filed rule applies to this case, it is the first-filed court that should decide which action should go forward, as the relevant precedent cited in Argument Section IV makes clear. *See, e.g., Dunkin-Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221, 233 (D. Mass. 2014)[7]

BACKGROUND

Contrary to Defendants' assertion that this suit falls into the category of "lawsuits brought to chill speech" (Defendants' Emergency Stay Motion, p. 5), the suit has been brought to repair the damage done to private individuals by defendants who have easy access to the

[7] Plaintiffs note that, as Dr. Soldz is not a party to the D.C. lawsuit, he will have no right to participate in the D.C. Court's decision about which action should move forward.

media and have broadcast their defamations through the media for years, including in the *Boston Globe* and through WBUR, Boston, as well as in such publications as *The New York Times*.[8] The Plaintiffs have had no platform except this lawsuit. From the beginning, their goal has been to clear their names and mitigate the damage to their careers and livelihoods. Anti-SLAPP laws were never intended to be wielded by large, rich organizations in cases such as this as a club against individuals looking to the courts for redress of an injustice – as Massachusetts' anti-SLAPP law makes clear. *Blanchard v. Stewart Carney Hosp. Inc.,* 477 Mass. 141 (2017)

A. History of the Dispute

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

Hoffman had been asked by the APA to investigate allegations in *Pay Any Price*, a book published by *The New York Times* reporter James Risen in 2014. The APA Board authorized Hoffman to conduct an independent review of whether there was factual support for the allegation that the APA colluded with the Bush administration to support or facilitate the use of "enhanced' interrogation" techniques by the United States in the war on terror.

Although Hoffman found no support for Risen's allegations, on the instruction of the APA Special Committee overseeing his work and in collaboration with Dr. Soldz and Nathaniel

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[8] As recently as August 9, 2018, during the APA annual convention, Dr. Soldz was quoted in major publications, including the *San Francisco Chronicle*: https://www.sfchronicle.com/health/article/Military-psychologists-still-banned-from-13142887.php

Raymond, another long-standing critic of the Plaintiffs and the APA who was until recently a Massachusetts resident, he vastly expanded his investigation's scope.[9] At its conclusion, his Report made a series of false and defamatory factual statements about the Plaintiffs.

Within days of the Report's publication, Plaintiffs began to present the APA with documents and other credible evidence that contradicted Hoffman's 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. On August 10, 2018, the APA's governing body voted to post some of these documents on the APA website next to the Report, with a reference to this litigation.

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's Report omitted evidence in his possession and testimony from witnesses that contradicted his conclusions, that he purposefully avoided lines of inquiry that would have undercut his allegations, and that he set out to make a case to support a pre-conceived narrative drawn largely from Soldz and Raymond. The evidence also shows 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 was the falsity of the Report's allegations that the APA re-hired Hoffman to review his own work and produce a supplemental report by June 8, 2016. It has never emerged.

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[9] The day after the Court entered the temporary stay in this matter, Mr. Raymond announced that he was relocating to take a job in Connecticut.
https://twitter.com/nattyray11/status/1022149418139754497

B. Relevant Procedural History

Ohio: After 18 months of negotiations initiated by Plaintiffs to settle this matter without litigation, 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. On August 3, Plaintiffs asked the Ohio Supreme Court to accept a discretionary appeal of the jurisdictional dismissal. No Ohio Court currently has jurisdiction over the Defendants.

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. (Transcript Oral Argument, Ohio Court of Common Pleas, August 22, 2018, p. 11)[10] Consequently, when the Ohio court dismissed the case on August 25, 2017, Plaintiffs filed a substantially similar complaint in D.C. on August 28.

In February 2018, the D.C. court granted the Defendants' motion to stay 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 (*Auerbach v. Frank, supra* p. 3, fn 5), they did not attempt to disturb the ruling to avoid burdensome motions practice. On July 3, 2018, Plaintiffs requested that the D.C. Court lift the stay, given that the Ohio Court of Appeals had affirmed lack of jurisdiction over the Defendants and that there was no certainty the Ohio Supreme Court would accept an appeal from that decision. The D.C. court has not yet ruled on that request. A status conference is scheduled for September 14, 2018.

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

ARGUMENT

I. Under Massachusetts Precedent, The First-Filed Rule Should Not Be Applied to Actions in State Courts of Different States

Because the "... 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, supra*), Defendants' Motion to Stay should be denied for that reason alone. [11]

Defendants' assertion that "Massachusetts state courts commonly apply the first-filed rule" (Motion to Stay, p. 11, fn. 7) is incorrect in regard to cases filed in the courts of other states. Of the 19 state court cases cited by Defendants, *none* applied the Massachusetts first-filed rule to stay an action also filed in another state court.

Of those 19 cases, ten did not involve the application of the first-to-file rule. Of those ten cases, three were decided under Mass. Rule 12(b)(9),[12] two were decided based on *forum non*

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[11] Although federal courts in Massachusetts have not, for the obvious reason, ruled on whether the first-filed rule may apply to two state-court actions in different states, they have held that, in the federal context, the rule applies only to two identical actions proceeding in two *federal* courts – in other words, courts of the same sovereignty. This result supports the principle underlying the conclusion reached in *EMC Corp. v. Donatelli, supra. See Dunkin' Donuts Franchised Rests. LLC v. Nader*, Civil Action No. 13-13023-LTS, 5 (D. Mass. 2014) ("the First Circuit and various trial courts in this jurisdiction consistently have defined the first-filed rule as follows: 'Where identical actions are proceeding concurrently ***in two federal courts*** ... the first filed action is generally preferred in ***a choice-of-venue decision***.'" (citation omitted)) *See Oscomp Sys., Inc. v. Bakken Express, LLC*, 930 F. Supp. 2d 261, 274 (D. Mass. 2013) ("the Texas Litigation is pending in state court, not federal court. Consequently, the first-filed rule does not apply.").

[12] *Fromm v. City of Boston*, 84 Mass.App.Ct. 1133 (Mass. App. 2014); *O'Donnell v. O'Donnell*, No. 354787 (HMG), 2008 WL 639696 (Mass. Land Ct. Mar. 10, 2008); *Seidman v. Central Bancorp, Inc.*, 15 Mass.L.Rptr. 642 (Mass. Super. 2003). Although the *Seidman* court acknowledged that Rule 12(b)(9) was not a "proper vehicle" for dismissal because the prior action was not pending in a Massachusetts court, as required under Rule 12(b)(9), the court's analysis nevertheless improperly relied upon the statute.

conveniens,[13] one was dismissed on the merits,[14] and at least four arose before the first-filed rule had even been addressed, let alone applied, by Massachusetts courts.[15]

Of the remaining nine cases cited by Defendants that did involve the first-to-file rule, one was a clearly nonbinding Delaware case, decided under Delaware law which has developed an analysis for staying a case different from the federal first-filed rule.[16] Of the eight Massachusetts cases involving the rule, none of which involved courts in two states, at least four *denied* the motion.[17] Another four involved a derivative or class action suit whose very purpose was to consolidate multiple actions by class members in one forum.[18]

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[13] *Vista Prop. Mgmt., LLC v. Liberty Mut. Fire Ins. Co.*, 31 Mass.L.Rptr. 325 (Mass. Super. 2013); *Raytheon Co. v. Exelon Mystic Dev., LLC*, 17 Mass.L.Rptr. 86 (Mass. Super. 2003)

[14] *Tanzman, Rock & Kaban, LLC v. Market XT Holdings Corp.*, 18 Mass.L.Rptr. 390 (Mass. Super. 2004). In a decision not cited by Defendants, a Massachusetts Superior Court granted a motion to dismiss in favor of a Texas state-court action on the basis of a forum-selection clause. Although the judge briefly referenced the first-filed doctrine, the decision rested on the forum clause. *Wells Fargo Dealer Servs. v. Auto Gallery Grp., Inc.*, No. WO2015-CV-0304-D, 2016 WL 618643 (Mass. Super. Ct. Feb. 1, 2016)

[15] *Alonzi v. HMK Enters., Inc.*, No. 927737D, 1993 WL 818739 (Mass. Super. Ct. June 25, 1993); *Travenol Labs., Inc. v. Zotal, Ltd.*, 394 Mass. 95 (1985); *Town of Danvers v. Wexler Constr. Co.*, 12 Mass.App.Ct. 160 (1981); *Jacoby v. Babcock Artificial Kidney Cent., Inc.*, 364 Mass. 561 (1974). *See also Storagenetworks, Inc. v. Metromedia Fiber Network Serv.*, 13 Mass.L.Rptr. 640 (Mass. Super. 2001) (noting that "Massachusetts courts have not addressed the first-filed rule").

[16] *See Chadwick v. Metro Corp.*, 856 A.2d 1066 (Del. Supr. 2004). In *Chadwick*, the court applied the *McWane* doctrine developed by Delaware courts. Under that doctrine, a judge may stay or dismiss a later-filed suit where a substantially similar first-filed suit is pending in a court capable of administering prompt and complete justice. Here the additional counts and the addition of Dr. Soldz as a defendant would prohibit that doctrine's application. Moreover, in *McWane* the Court found the litigation had a tenuous relationship to Delaware and was brought to evade a civil contempt order in another state, neither of which factors is relevant here.

[17] *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312 (2018); *FTI, LLC v. Duffy*, No. 1684CV03176BLS2, 2017 WL 3251514 (Mass. Super. 2017); *Storagenetworks, Inc. v. Metromedia Fiber Network Serv.*, 13 Mass.L.Rptr. 640 (Mass. Super. 2001); *Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-3973-B, 2010 WL 5071848 9 (Mass. Super. Ct. Oct. 27, 2010).

[18] *See Sussman v. Vieau*, MICV201201917, 2012 WL 11893990 (Mass. Super. 2012); *Williams v. FedEx Ground Package Sys., Inc.*, 23 Mass.L.Rptr. 192 (Mass. Super. 2007); *Davenport v.*

Of all of the cases cited by Defendants, *Raytheon* is the **only** case in which a stay was granted regarding two state court actions. But *Raytheon* does not help Defendants. The court granted a stay based on a *forum non conveniens* analysis. Moreover, the case was to be decided in large part under New York law, and the New York action involved issues not involved in the Massachusetts action, thus making the New York court better equipped to handle the case. Here, in contrast, it is the *Massachusetts* action that involves not only additional issues, but also an additional defendant over whom only Massachusetts has jurisdiction. Moreover, Dr. Soldz has acknowledged that Massachusetts law applies to the claims against him, and Plaintiffs will argue it applies more generally. (Soldz Response, pp. 1-2) [19]

Defendants also assert that applying the first-filed rule is "a common practice by Massachusetts federal courts." (Motion to Stay, p. 11, fn 7) That assertion is also overstated.

Defendants cite 15 federal cases with respect to the first-filed rule and one case regarding the choice of law in a defamation action.[20] Four of the federal cases are non-Massachusetts cases. Two of those were decided under the Third Circuit standard for the first-filed rule, which conflicts with the First Circuit standard. (The Third Circuit has stated that exceptions to the rule are "rare," while the First Circuit has stated that exceptions are "not

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Benhamou, 23 Mass.L.Rptr. 436 (Mass. Super. 2007); *Van Emden Mgmt. Corp. v. Marsh & McLennan Cos.*, 20 Mass.L.Rptr. 79 (Mass. Super. 2005)). The courts were loath to interfere with class-action litigation involving parties and issues not before the court. *See, e.g., Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171, 174 (D. Mass. 2009) ("when a plaintiff brings suit on behalf of a nationwide class, her forum choice deserves considerably less weight.").

[19] Even in the other cases where stays were granted on grounds other than the first-filed rule, most were limited to the resolution of specific issues before the prior court. *See, e.g., Williams, supra* fn. 18 (stay pending determination of employment classification); *Davenport, supra* fn. 18 (stay pending class certification); *Seidman v. Central Bancorp, Inc.,* 15 Mass.L.Rptr. 642 (Mass. Super. 2003) (stay pending resolution of a motion seeking an injunction).

[20] *McKee v. Cosby*, 874 F. 3d 54, 60 (1st Cir. 2017) (which held plaintiff's residence controls the choice-of-law analysis, contrary to the Defendants' position before the D.C. court.).

rare."[21]) Another case was decided under the Ninth Circuit first-filed rule as between two federal causes of action, and the remaining Eighth Circuit case was decided under the *Colorado River* abstention doctrine.[22]

Of the 11 Massachusetts District Court or First Circuit cases cited by defendants, six did not involve application of the "first-to-file" rule. Three were decided under the *Colorado River* abstention doctrine,[23] one was decided under the federal Declaratory Judgment Act,[24] one was a motion to transfer pursuant to 28 U.S.C. § 1404(a),[25] and one was a motion to stay counterclaims in simultaneously filed actions in the *same court*.[26]

Of the five remaining Massachusetts federal cases that did involve the first-to-file rule, three either denied the motion or did not determine that the rule applied.[27] In the two remaining cases, the court stated that the first-filed court should decide the motion.[28]

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[21] *Compare Catanese v. Unilever*, 774 F. Supp. 2d 684, 687 (D.N.J. 2011) (3rd Circuit) (noting that under Third Circuit law, "exceptions to the rule are rare") and *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312 (2018) ("[e]xceptions to the [first-filed] rule are not rare," citing *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125,127 (D. Mass. 2012).). *See also Braintree Labs., Inc. v. Bedrock Logistics*, LLC, No. 16-11936-IT, WL 7173755 (D. Mass. December 8, 2016); *Time Warner Cable, Inc. v. GPNE Corp.*, 497 F. Supp. 2d 584 (D. Del. 2007) (3rd Circuit).

[22] *Herer v. Ah Ha Pub., LLC*, 927 F. Supp. 2d 1080 (D. Or. 2013) (9th Circuit); *Schepers v. Terex Corp.*, 441 F. Supp. 2d 1004 (D. Iowa 2006) (8th Circuit under *Colorado River* abstention doctrine).

[23] *Bacardi Int' I Ltd. v. V. Suarez & Co.*, 719 F.3d 1 (1st Cir. 2013); *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 186 F. Supp. 3d 22 (D. Mass. 2016); *Provanzano v. Parker*, 796 F. Supp. 2d 247 (D. Mass. 2011).

[24] *Chedester v. Town of Whately*, 279 F. Supp. 2d 53 (D. Mass. 2003) (case decided under Declaratory Judgment Act).

[25] *Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171 (D. Mass. 2009) (motion to transfer pursuant to 28 U.S.C. § 1404(a)).

[26] *Salomon SA. v. Scott USA Ltd.*, 117 F.R.D. 320 (D. Mass. 1987).

[27] *TPM Holdings, Inc. v. Intra-Gold Industries, Inc.*, 91 F.3d 1 (1st Cir. 1996); *Dupont Pharms. Co. v. Sonus Pharms., Inc.*, 122 F. Supp. 2d 230 (D. Mass. 2000); *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125 (D. Mass. 2012).

In sum, Defendants have cited no precedent at all for applying the first-filed rule to parallel actions in the courts of different states, and certainly no support for their assertion that it is "common" or "general" practice. (Motion to Stay, p. 11).

Even if this Court were to hold that the rule applied to actions in different sovereignties, a stay would still be inappropriate. First, the Massachusetts and D.C. actions differ too significantly. Second, this action should proceed in Massachusetts because it falls squarely within exceptions to the rule that authorize Massachusetts courts to give preference to a later-filed action when that preference would lead to a more efficient and just resolution of a dispute.

II. The Massachusetts Complaint Involves Substantially Different Claims and a New Defendant

The Supreme Judicial Court has stated that "where there is only a partial overlap in the subject matter of two actions, a judge has considerable discretion when deciding whether to grant a stay." *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 343 (2018). *See, e.g., Norman v. Brown, Todd & Heyburn*, 693 F. Supp. 1259, 1261 (D. Mass. 1988) ("Although the complaints and the claims in this action and the Pennsylvania actions are to some extent similar, there is no identity of parties or issues. Under these circumstances, the 'first-filed' rule does not apply."); *Euro-Pro Operating LLC v. Dyson Inc.*, Civil Acton No. 14-cv-13720-IT, 2015 U.S. Dist. LEXIS 20558 (D. Mass. February 19, 2015) ("Euro-Pro fails to demonstrate sufficient similarity between the Massachusetts and Illinois actions to warrant an injunction in this case."); *World Energy Alternatives, LLC v. Settlemyre Industries*, 671 F. Supp. 2d 215, 218 (D. Mass. 2009) ("Because the 'first-filed rule' is only implicated when two competing suits are 'identical,' it is not applicable ....").

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[28] *Transcanada Power Mktg., Ltd. v. Narragansett Elec. Co.*, 402 F. Supp. 2d 343 (D. Mass. 2005); *Dunkin' Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221 (D.Mass. 2014).

The Massachusetts and the D.C. actions differ too significantly to permit the application of the first-filed rule, even if it could be applied to actions in courts of different sovereignties.

First, the addition of Dr. Soldz creates a significant difference between the actions. He is not a bit player who has been added only to create a Massachusetts connection; nor has he been added only as an additional defendant on counts identical to those in the D.C. Complaint. Since that Complaint was filed almost a year ago, even without the benefit of discovery evidence has emerged of his central role in the construction of the Hoffman Report's defamatory allegations, as well as in initiating and continuing to fuel the barrage of attacks against the Plaintiffs in the media after the Report's publication. (*See, e.g.*, Massachusetts Complaint, ¶¶6-18, 44-46; Count 17.) This evidence strongly suggests that, without the information and "story line" Dr. Soldz provided Hoffman, Hoffman could not have constructed the Report's false narrative. It also suggests that, without Dr. Soldz's role in leaking the Report to *The New York Times,* the APA would not have been rushed into a response that included firing Plaintiff Behnke – a response that members of its Board have acknowledged was "impulsive." (Complaint, ¶39)[29]

Thus, Dr. Soldz has both collaborated with Hoffman to produce Hoffman's defamatory statements and defamed Plaintiffs himself. He is named as a Defendant in four counts solely in Massachusetts, not in D.C. or Ohio. (Complaint, Counts 3, 4, 8, 17)

No other state is likely to assert personal jurisdiction over Dr. Soldz. Thus, Massachusetts is likely the only forum that can assert jurisdiction over all Defendants, thus avoiding an inefficient and problematic bifurcation of the case.[30]

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[29] http://www.hoffmanreportapa.com/resources/Resnick%20Affidavit.pdf

[30] For example, Dr. Soldz has repeatedly stated that *all* APA officials named in the Report, not merely the Plaintiffs, were directly involved in the collusive activities the Report alleges. (*See Declaration of David A. Kluft in Support of Defendant Stephen Soldz Response,* Exhibit 1, pp.

Second, the causes of action in Massachusetts differ substantially from those in D.C. Of the 19 counts, seven are new and three include significant new allegations.

- Two counts (3 and 17) against Dr. Soldz alone are new.
- Five new counts (6, 9, 11, 12, and 16) against some or all of the other Defendants allege additional acts of publication, based on newly obtained evidence. For example, Count 6 is based on a metadata expert's analysis of a file containing the Report that Plaintiffs allege was leaked to *The New York Times* by David Hoffman and then re-published internationally by *The Guardian* (Count 9).
- Two counts (4 and 8) relating to the Report's leak to *The New York Times* are now against Dr. Soldz as well as the other Defendants, based on new information.
- One count (12) against the APA alleges a new publication in the *Boston Globe*.

As purported evidence of the similarity between the Complaints, the Defendants note that both include the same exhibit listing 219 false statements in the Hoffman Report. They fail to note two critical facts. First, that list includes only statements in the Report, not the other defamatory statements alleged in the Complaints, including those by Dr. Soldz. *See, e.g.,* Complaint ¶45. Second, the Defendants' reliance on this list evinces a basic misunderstanding of defamation law. A defamation action requires plaintiffs to prove the statements at issue were published to a third party with the requisite degree of fault (negligence or actual malice, depending on whether the Plaintiffs are deemed private or public figures). A defamation action relies, therefore, on evidence of the state of mind of those who published defamatory false

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3-10) Those statements are in direct conflict with the APA's defense in the D.C. action, where it asserts that APA officials could not have been aware of the falsity of Hoffman's allegations because they had not been involved in the underlying events. A result reached in D.C. as to the APA's defense may become *res judicata* in Massachusetts as to the defamatory nature of Dr. Soldz's statements as they relate to the Plaintiffs.

statement at the time of publication. The fact that some (but not all) of the statements remain the same is, therefore, of little relevance. The question for the jury will be the state of mind of the Defendants at the time of publication, including the new publications alleged in the Massachusetts Complaint.[31]

III. Even if This Court Were to Decide that the First-Filed Rule Applies to This Case, the Equities Weigh in Favor of the Massachusetts Action Proceeding.

Massachusetts courts have held that, even when the first-filed principle is found to apply, it should not be applied mechanically and without regard to factors that favor the later-filed action. In a statement quoted approvingly by the Supreme Judicial Court, the District Court for the District of Massachusetts said "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." *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125, 127 (D. Mass. 2012), cited in *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312 (2018). *See also A123 Sys. v. Hydro-Quebec*, 657 F. Supp. 2d 276, 279 (D. Mass. 2009) ("... trial court's discretion tempers the presumption favoring the first-filed action, when giving preference to the later-filed action will better serve the interests involved.")[32]

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[31] For example, Count 12 alleges a new publication to the *Boston Globe* in July 2015 after Plaintiffs' counsel contacted APA with evidence of the Report's falsities. *See Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007), quoting the Restatement (Second) of Torts § 580A, cmt. d (2006): "Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard." *See also Murphy v. Boston Herald Inc.*, 449 Mass. 42, 58 (2007).

[32] *Holmes Group, Inc. v. Hamilton Beach/Proctor Silex*, 249 F. Supp. 2d 12, 15 (D.Mass. 2002) ("While the general rule favors the forum of the first-filed action, 'exceptions... are not rare, and are made when justice or expediency requires ....'" (citation omitted)); *see also Storagenetworks v. Metromedia Fiber,* 3 Mass. L. Rptr. No 28, 640 (November 26, 2011) ("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)); *TPM Holdings, Inc. v. Intra-Gold Indus., Inc.*, 91 F.3d 1, 4 (1st Cir. 1996)

When a court is deciding whether to exercise its discretion, it "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) *Ethicon Endo-Surgery v. Pemberton*, No. 10-3973-B, 2010 WL 5071848 9 (Mass. Super. Ct. Oct. 27, 2010)[33]

Here, these factors weigh heavily in favor of proceeding in Massachusetts.

- It is the only state where "the possible absence of jurisdiction over all necessary and desirable parties" can be avoided.
- Although the Defendants assert that the "core" of this case is centered in D.C. (Motion to Stay, p. 18), D.C.'s primary connection with the case is simply that it is the site of the APA's headquarters.[34] Most actions of the APA Board members that are at issue took place not in D.C., but by telephone or email from other locations. (Complaint, pp. 27-35) The APA's current President, who took part in the collusive activities Hoffman describes in the Report, lives in Massachusetts. Hoffman, who is licensed and based in Illinois, wrote the Report there and published it to the APA Board from there, as shown by metadata in the file. (Complaint, ¶253) He conducted

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("where the overlap between two suits is less than complete, the judgment is made case by case").

[33] *See also Dunkin' Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221, 233 (D. Mass. 2014) ("A special circumstance also exists when the forum of the subsequently filed case is 'substantially more convenient' than the forum of the first-filed case. Assessing convenience consists of weighing: (1) the plaintiff's choice of forum, (2) the relative convenience of the parties, (3) the convenience of the witnesses and location of documents, (4) any connection between the forum and the issues, (5) the law to be applied and (6) the state or public interests at stake. *Id.* at 17" (citation omitted)).

[34] *See, e.g., Obras Civiles, S.A. v. ADM Securities, Inc.*, 32 F. Supp. 2d 1018, 1020 (N.D. Ill. 1999) (holding that Arizona law applied because "[t]he only connection of Illinois to this case is the location in that state of the corporate headquarters of defendants.")

interviews which included nine Massachusetts residents. (Complaint, ¶¶57, 77) His collaboration with Soldz and Raymond, which is important to the issue of actual malice, was centered in Massachusetts. All but one cause of action is based on speech or statements that originated in Illinois or Massachusetts, not D.C.

- Although the Defendants prefer D.C. law because of their affection for the D.C. version of anti-SLAPP laws, that choice is unlikely to prevail. In fact, the case they cite as controlling precedent over this Court's choice of law analysis (Defendants' Motion, p. 19), *McKee v. Cosby*, 874 F. 3d 54, 60 (1st Cir. 2017), held that a *Plaintiff's domicile* is the correct state in a choice of law analysis. Under that standard, Plaintiffs' claims would be governed by the laws of Ohio, North Carolina, and, for two Plaintiffs, California, as well as D.C. To further complicate the analysis, in a case such as this, the choice-of-law determination is likely to be made on an issue-by-issue basis. *See, e.g., Sibley v. KLM Dutch Airlines*, 454 F. Supp. 425, 428 (D. Mass. 1978) (citing *Pevoski v. Pevoski,* 71 Mass. 358, 360 (1976)); *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285 (1963) (performing conflicts analysis issue by issue). It is highly unlikely, therefore, that D.C. law will apply to the issues in this case.
- Massachusetts residents have twice proposed legislation that is still pending regarding the statements made in the Report and by Dr. Soldz. (Complaint, ¶79)[35] Massachusetts therefore has a significant interest in the issues at stake in this case.

[35] https://malegislature.gov/Bills/190/S1194

IV. The Defendants' Motion Is Filed with the Wrong Court.

Finally, even if the first-filed rule did apply to this case, the motion to stay should be filed in D.C., not Massachusetts. When a court's analysis of parallel proceedings leads it to conclude that the first-filed rule might be applicable, courts traditionally *defer to the first court* to decide which action should take priority. That is the established federal approach:

> The first-to-file rule has generally been interpreted to dictate not only which forum is appropriate, but also which forum should *decide* which forum is appropriate. Courts in nearly every circuit have held that the court in which the second action was filed should generally defer to courts in the first-filed action. .... The First Circuit seems to have adopted this rationale as well. (citations omitted)
> *Onebeacon Am. Ins. Co. v. Celanese Corp.*, Civil Action No. 14-13992-FDS, 13 (D. Mass. 2015) (collecting cases)

See also opinions cited by Defendants for other purposes: *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 186 F. Supp. 3d 22 (D. Mass. 2016) ("... while the court in the later-filed action may decide whether there is a 'likelihood of substantial overlap,' the court in the first-filed action should determine 'whether there actually [is] substantial overlap.'" (citations omitted)); *EMC Corp. v. Parallel Iron, LLC,* 914 F. Supp. 2d 125 (D. Mass. 2012); *Transcanada Power Mktg., Ltd. v. Narragansett Elec. Co.*, 402 F. Supp. 2d 343 (D. Mass. 2005); *Dunkin' Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221 (D.Mass. 2014).

The rationale behind this principle has been clearly explained by a federal district court:

> Logically bound up in that priority [for the first-filed court] to decide a case is the priority to decide whether the first-filed rule applies to that case. It would be ironic, to say the least, for this Court to usurp the first-filed court's authority by preemptively ruling on the application of the first-filed rule to these proceedings, all under the guise of honoring principles of comity obliging it to defer to the first-filed court. This Court declines to turn the first-filed rule on its head by dictating to the first-filed forum whether or not it must apply the first-filed rule to this dispute.
> *White v. Microsoft Corporation*, No. 05-0731-WS-M., 2006 WL 8437872 at *4 (S.D. Ala. Apr. 3, 2006)

CONCLUSION

The Defendants' Motion should be denied or, in the alternative, these proceedings should be temporarily stayed and Defendants required to file their motion in the D.C. court.

Dated: August 13, 2018

REQUEST FOR A HEARING

In accordance with Superior Court Rule 9A(c)(2), Plaintiffs respectfully request a hearing on this motion.

Respectfully submitted,

Plaintiffs,
By Their Attorneys,

Clyde D. Bergstresser (BBO# 039200)
Richard J. Zabbo (BBO#658601)
Scott M. Heidorn (BBO#661787)
52 Temple Place
Boston, MA 02111
Tel: (617) 682-9211

Attorneys for All Plaintiffs
Clyde@bergstresser.com
Rich@bergstresser.com
Scott@bergstresser.com

Louis J. Freeh, Esq. (pro hac vice)
Freeh Sporkin & Sullivan, LLP
2550 M St NW, First Floor
Washington, DC 20037
(302) 824 7139

Attorney for Plaintiff Behnke
bescript@freehgroup.com

Bonny J. Forrest, Esq. (pro hac vice)
555 Front Street, Suite 1403
San Diego, California 92101
(917) 687-0271
Attorney for Plaintiffs Banks, Dunivin, James and Newman
bonforrest@aol.com

CERTIFICATE OF SERVICE

I, Julia Myers, hereby certify that on August 13, 2018 I have served a copy of the foregoing document, by emailing a copy to all counsel of record. I have also provided an original and copy via hand delivery to Jonathan M. Albano, Esq. as well sent a paper copy by regular mail to Jeffrey J. Pyle, Esq. and David A. Kluft, Esq.

Date: August 13, 2018

Julia M. Myers, Esq.