**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(Filed: December 4, 2012)**

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| **JEFFREY J. MELFORD and TINA S. MELFORD** | : | |
| | : | **C.A. No. PC 11-1172** |
| **v.** | : | |
| **ABEX CORPORATION, et al.** | : | |

**DECISION**

**GIBNEY, P.J.** Before this Court is a Motion to Stay Proceedings (the "Motion"), brought by Jeffrey J. Melford ("Melford") and Tina S. Melford ("Tina") (collectively, "Plaintiffs"), arising out of Plaintiffs' asbestos litigation filed against numerous defendants, among them Mack Trucks, Inc. and fifteen other joined defendants[1] (collectively, "Defendants"). Plaintiffs seek to stay this case (the "Rhode Island matter") in favor of recently-filed parallel proceedings in Louisiana (the "Louisiana matter") on the ground of forum non conveniens. Defendants oppose Plaintiffs' Motion, arguing that the litigation should continue in Rhode Island, the Plaintiffs' first choice of forum. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

**I**

**Facts and Travel**

In Plaintiffs' Sixth Amended Complaint ("Pls.' Sixth Am. Compl."), Plaintiffs allege that Melford was exposed to various asbestos-containing products from the mid-

[1] The fifteen defendants joined with Mack Trucks, Inc. are Arvin Meritor, Inc.; CNH America LLC; CRA Trailers, Inc.; Cummins, Inc.; Daimler Trucks North America LLC; Dana Co., LLC; Fontaine Trailer Co.; Ford Motor Co.; Isuzu Motors America LLC; Kelsey-Hayes Co.; Kubota Tractor Corp.; Navistar, Inc.; Nissan North America, Inc.; PACCAR, Inc.; and Standard Motor Products, Inc.

1960s through 1990 during his employment as a shop mechanic and foreman at an automotive garage, a worker at two oil refineries, and from numerous home renovation projects, all located in Louisiana. Plaintiffs claim that Defendants and their agents, employees, and distributors sold the asbestos-containing products to Melford, his employers, and his co-workers despite knowing that the products were inherently dangerous. As such, Plaintiffs allege, Defendants failed to warn Melford and others of the dangers of exposure to asbestos-containing products, breached duties of reasonable care that they owed to Melford and others, breached various warranties, and engaged in a conspiracy to injure Melford and others. Plaintiffs contend that Melford developed pleural mesothelioma and related pathologies as a result of Defendants' conduct, incurring substantial pain and suffering and other damages.

Plaintiffs filed suit against Defendants and numerous other parties in Providence County Superior Court on February 25, 2011. After engaging in approximately nine months of discovery and trial preparation here, Plaintiffs filed parallel proceedings against Defendants and others in Louisiana on May 2, 2012. Plaintiffs now seek to stay the Rhode Island matter in favor of the Louisiana matter, arguing that a stay is warranted by the doctrine of forum non conveniens. Defendants respond that forum non conveniens, in fact, favors proceeding in the Rhode Island matter. Furthermore, Defendants argue, the "first-to-file" rule also supports proceeding in Rhode Island.

## II

## Discussion

### A

### Forum Non Conveniens

Plaintiffs argue that although the doctrine of forum non conveniens is not "directly applicable" to a motion to stay, the doctrine nonetheless supports staying the Rhode Island matter in favor of the Louisiana matter for a number of reasons. First, Plaintiffs assert that while they did not sue all of the defendants from the Rhode Island matter in the Louisiana matter, the Louisiana matter includes seven defendants over whom this Court cannot exercise jurisdiction. Next, they contend that the Rhode Island matter has stalled because none of the defendants has attempted to complete discovery or obtain a trial date in the past nine months. Plaintiffs further assert that all of the discovery work and preparation that they and Defendants have already performed in the Rhode Island matter would not need to be duplicated in the Louisiana matter. Moreover, Plaintiffs argue, they have strong contacts with Louisiana because they are domiciliaries of Louisiana, alleging a cause of action arising entirely within that state's borders. Plaintiffs further state that all of their witnesses, with the exception of experts, are located within Louisiana as well. Finally, Plaintiffs aver that Louisiana law applies to this case, and, as such, a Louisiana court is the best forum to apply that law.[2]

[2] Specifically, Plaintiffs assert that "[t]he application of Louisiana's law to the case where a long latency disease occurs after multiple exposures occurring over multiple years is a question which even Louisiana courts with their greater familiarity with the laws of Louisiana stumble on." (Pls.' Br. at 3-4.) Thus, they argue, "it is unfair to ask this Court to engage in a study of Louisiana law and apply principles of civilian interpretation when the Louisiana Court has these same issues before it . . . ." Id. at 4.

Defendants respond that the forum non conveniens analysis tilts against staying the Rhode Island matter. At the outset, Defendants contend that staying the Rhode Island matter in favor of the Louisiana matter is convenient only for Plaintiffs' counsel because he recently moved his practice to Louisiana—a consideration, they believe, that should not be part of this Court's forum non conveniens inquiry. Defendants further assert that while Plaintiffs are Louisiana residents and could have brought suit in Louisiana, they affirmatively chose to file the instant matter in Rhode Island. Therefore, Defendants aver, this Court should defer to Plaintiffs' first choice of forum.

Moreover, Defendants maintain that the recent lack of progress in the Rhode Island matter is attributable to two factors. First, they argue, Plaintiffs carry the burden of prosecuting the action but have failed to proceed after filing the Louisiana matter. Second, Defendants assert that they limited their activity in the Rhode Island matter once Plaintiffs filed the Louisiana matter to avoid expending resources in both jurisdictions simultaneously. In any event, Defendants state, they are prepared to go to trial in the Rhode Island matter.

Defendants further argue that denying Plaintiffs' Motion will not prejudice Plaintiffs' ability to proceed against all potential defendants because Plaintiffs are currently proceeding in Louisiana against the seven defendants over whom this Court cannot exercise jurisdiction. Furthermore, Defendants contend, proceeding in Louisiana will force Defendants to duplicate much of the discovery and preparation work that they have already done in the Rhode Island matter, contrary to Plaintiffs' assertions.

Finally, Defendants argue that concluding that Louisiana law applies to this case is premature at best as the choice of law issue has not yet been briefed or decided. Even

if Louisiana law does apply, Defendants aver that this Court can employ Louisiana law because it has successfully applied foreign law in many prior asbestos cases.

**a**

**Forum Non Conveniens in Rhode Island**

Forum non conveniens is an ancient common-law doctrine "founded in considerations of fundamental fairness and sensible and effective judicial administration." Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1179 (R.I. 2008). It "allows a court to decline to exercise jurisdiction when the plaintiff's chosen forum is significantly inconvenient and the ends of justice would be better served if the action were brought and tried in another forum." Id. at 1178. Thus, a court may invoke the doctrine to "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Gulf Oil Co. v. Gilbert, 330 U.S. 501, 507 (1947); Kedy, 946 A.2d at 1178-79. Courts are invested with this inherent power because "[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." Gulf Oil Co., 330 U.S. at 507; see Kedy, 946 A.2d at 1178, 1180; see also 14D Wright & Miller § 3828 at 6. Therefore, courts apply the doctrine to ensure that "the plaintiff [does] not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Gulf Oil Co., 330 U.S. at 508; see Kedy, 946 A.2d at 1182-83 (citing American Dredging Co. v. Miller, 510 U.S. 443, 447-48 (1994)).

The "defendant [traditionally] invoke[es] forum non conveniens . . . [to] oppos[e] the plaintiff's chosen forum." Kedy, 946 A.2d at 1183 (quoting Sinochem International

Co., Ltd. v. Malaysia International Shipping Corp., 549 U.S. 422, 430 (2007)). (Emphasis added.) "[T]he defendant [also] bears the burden of persuading the court that the plaintiff's choice of forum is sufficiently inconvenient to warrant dismissal." Gulf Oil Co., 330 U.S. at 508. This is a heavy burden in Rhode Island, and the defendant carries it "at each stage of the forum non conveniens inquiry." Kedy, 946 A.2d at 1183.

A Rhode Island court tasked with applying the forum non conveniens doctrine must conduct a two-step analysis. Id. First, the court "must decide whether an alternative forum exists that is both available and adequate to resolve the disputed legal issues." Id. An alternative forum is "available" when "the defendant is 'amenable to processes in the other jurisdiction." Id. (quoting Piper Aircraft Co., 454 U.S. at 255 n.2). An alternative forum is "adequate" even when the possibility exists that the alternative forum's pertinent substantive law differs from that of the first forum. Id. at 1184 (citing Piper Aircraft Co., 454 U.S. at 249). However, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight." Id. (quoting Piper Aircraft Co., 454 U.S. at 254); see also 14D Wright & Miller § 3828.3 at 677-82.

Second, the court must "focu[s] on the inconvenience of continuing in the chosen forum by weighing private- and public-interest factors." Id. Our Supreme Court has enumerated the private-interest factors:

> (1) the relative ease of access to proof; (2) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) possibility of view of premises, if view would be appropriate to the action; (4) and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. (quoting Gulf Oil Co., 330 U.S. at 508). Other factors include the "enforceability of a judgment in the alternative forum, and the advantages and obstacles to a fair trial." Id. at 1184-85. "The convenience of access by counsel to a plaintiff's chosen forum ordinarily is [also] not given appreciable weight in the private-interest calculus." Id. at 1185. The Court has also noted that the pertinent public-interest factors include avoiding docket congestion, refraining from burdening local communities with jury duty when the communities have no relation to the litigation, preventing the application of unfamiliar and obtuse foreign law, and promoting the "local interest in having localized controversies decided at home." Id. (quoting Gulf Oil Co., 330 U.S. at 508-09).

When considering both the private- and public-interest factors together, "central emphasis should not be placed on any one private- or public-interest factor" because "the doctrine requires flexibility." Id. at 1184. Nonetheless, a court will not find that the plaintiff's first choice of forum is inconvenient unless the defendant demonstrates that both types of convenience factors favor dismissal. Id. (Emphasis added.) Thus, the defendant necessarily fails to carry his or her heavy burden of persuasion when the convenience factors, taken together, stand in "equipoise" to each other. See Adelson v. Hananel, 510 F.3d 43, 54 (1st Cir. 2007) (finding that the factors stand in "equipoise" to each other and the defendant fails to carry the burden of persuading the court that the plaintiff's chosen forum is inconvenient); see also Windt v. Qwest Communications International, Inc., 529 F.3d 183, 192 (3rd Cir. 2008).

Additionally, the majority of state courts also consider "[t]he status of a case with respect to discovery, motion practice, and trial scheduling" when conducting a forum non conveniens analysis. Baypack Fisheries, L.L.C. v. Nelbro Packing Co., 992 P.2d 1116,

1119 (Ala. 2000). "[I]f extensive discovery on the merits has taken place or if the court has expended significant resources on the case, considerations of judicial economy weigh in favor of retaining the action." Similarly, "whenever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal . . . greatly increases." Id. (quoting Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 614 (3rd Cir. 1991); see also Deupree v. Le, 402 A.2d 428, 429 (D.C. App. 1979); Kinney System, Inc. v. Continental Ins. Co., 674 So.2d 86, 94 (Fla. 1996); Marchman v. N.C.N.B Texas National Bank, 120 N.M. 74, 87 (1995). Thus, the forum non conveniens doctrine requires a fact-intensive analysis. See 14D Wright & Miller § 3828.4 at 718.

**b**

**Application**

At the outset, Plaintiffs assert as a threshold issue that "the analysis of forum non conveniens is not directly applicable to a motion to stay proceedings," presumably because the doctrine is traditionally asserted in a motion to dismiss. However, the United States Supreme Court has held that the forum non conveniens doctrine is equally applicable to both motions to dismiss and motions to stay. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 28 (1983) (holding that "a stay is as much a refusal to exercise federal jurisdiction as a dismissal. When a district court decides to dismiss or stay . . . it presumably concludes that the parallel . . . litigation will be an adequate vehicle for the complete resolution of the issues between the parties."); see also American Cyanamid Co. v. Picaso-Anstalt, 741 F. Supp. 1150, 1154 (D.N.J. 1990) (recognizing, similarly, that there is "little practical difference" between motions to stay

and motions to dismiss in the forum non conveniens context); Aveta, Inc. v. Colon, 942 A.2d 603, 608 (C.C. Del. 2008) (finding same). Thus, this Court will analyze Plaintiffs' Motion using the same forum non conveniens inquiry that it would use to consider a motion to dismiss.

Next, this Court questions whether a plaintiff may properly utilize the forum non conveniens doctrine as a basis for a motion to stay in the first instance. The policy principles underlying the doctrine appear at first glance to preclude a plaintiff from asserting the forum non conveniens in any context. The United States Supreme Court has determined that the purpose of the doctrine is to prevent harassment of defendants. See Piper Aircraft Co., 454 U.S. at 249 n.15; see also Ferruzzi Italia, S.p.A. v. Trade & Transport, Inc., 683 F. Supp. 131, 135 (D. Md. 1988). Because the plaintiff has the choice of forum in the first instance, allowing a plaintiff to assert the forum non conveniens against a defendant to stay or dismiss an action frustrates the doctrine's purpose and undermines traditional notions of fairness and judicial economy. See Soghanalian v. Soghanalian, 693 F. Supp. 1091, 1095 (S.D. Fla. 1988).

However, some courts will allow a plaintiff to assert the doctrine, albeit only against a defendant's counterclaims because "the plaintiff, is of course, the defendant" at that point. Salton, Inc. v. Philips Domestic Appliances & Pers. Care, 391 F.3d 871, 876 (7th Cir. 2004). The traditional policies underlying forum non conveniens are not thwarted in this situation. Id.; see also Olin Corp. v. Fisons PLC, 47 F. Supp. 2d 151, 159 (D. Ma.1999); Trujillo v. Banco Central Del Ecuador, 35 F. Supp. 2d 908, 916 (S.D. Fla.1998). Moreover, even in states like New York that have adopted statutes allowing "any party" to bring a motion to stay or dismiss based on forum non conveniens, see, e.g.,

N.Y.C.P.L.R. 327(a), a plaintiff is also limited to asserting the doctrine against a defendant's counterclaims. See MCF CPLR § 2:190; Sparta Florida Music Group, Ltd. v. Chrysalis Records, Inc., 552 F. Supp. 44, 46-47 (S.D.N.Y. 1982); Kissimmee Memorial Hospital v. Wilson, 188 A.D. 2d 802, 804, 591 N.Y.S. 2d 239, 241 (3d Dep't 1992). Otherwise, a plaintiff asserting the forum non conveniens doctrine could use the doctrine "as a shield" to frustrate a defendant's case. Kissimmee Memorial Hospital, 188 A.D. 2d at 804, 591 N.Y.S. 2d at 241. Though this Court questions whether a plaintiff may assert the forum non conveniens doctrine to stay an entire case, because none of the cited precedents is controlling on this issue, this Court will consider Plaintiffs' Motion using our Supreme Court's two-step forum non conveniens framework.

**1**

**Is There an Alternative Forum That is both "Available" and "Adequate?"**

Plaintiffs must first demonstrate that Louisiana is an "available and adequate" forum to resolve this litigation. Louisiana is "available" if Defendants may be sued there, and it is "adequate" if its substantive law provides Plaintiffs with a potential remedy, even if that law differs from Rhode Island's law. However, this Court will give "substantial weight" to differences in the two forums' substantive law if "the remedy provided by [Louisiana] is so clearly inadequate or unsatisfactory that it is no remedy at all." Kedy, 946 A.2d at 1183-84 (quoting Piper Aircraft Co., 454 U.S. at 254); see also 14D Wright & Miller § 3828.3 at 677-82.

This Court finds that Plaintiffs have shown that Louisiana is an "available" and "adequate" forum to resolve the instant matter. Louisiana is "available" because Defendants may be sued there. See Kedy, 946 A.2d at 1186. In fact, Defendants have

already been properly served with process in Louisiana and are currently engaged there in parallel asbestos litigation with Plaintiffs. (La. Tr. at 5-6.) Louisiana is also an "adequate" forum because its laws provide Plaintiffs with the ability to potentially recover damages from Defendants.[3] Therefore, this Court finds that Plaintiffs have met their burden of persuasion for the first step of our forum non conveniens analysis. See Kedy, 946 A.2d at 1186.

**2**

**Weighing the Private- and Public-Interest Factors**

The second step of the forum non conveniens analysis requires this Court to weigh the private- and public-interest factors to assess "the inconvenience of continuing in the plaintiff's chosen forum, [Rhode Island]." Id. at 1183. Plaintiffs bear the heavy burden of persuading this Court that both the private- and public-interest factors support staying the Rhode Island matter in favor of the Louisiana matter. Id. at 1184.

[3] It is undisputed that many plaintiffs have successfully litigated asbestos cases in Louisiana in recent years. See, e.g., Rando v. Anco Insulations, Inc., 16 So.3d 1065 (La. 2009); Cole v. Celotex Corp., 599 So.2d 1058 (La. 1992); Spillman v. Anco Insulations, Inc., 994 So.2d 132 (La. App. 2008); Chaisson v. Avondale Industries, Inc., 947 So.2d 171 (La. App. 2006); Abadie v. Metro. Life Ins. Co., 784 So.2d 46 (La. App. 2001). Thus, even if this Court assumes that differing versions of Louisiana's laws will apply to different defendants, that assumption is not enough to show that Louisiana law provides Plaintiffs with a "clearly inadequate" remedy. See Kedy, 946 A.2d at 1186. Additionally, this Court finds that Plaintiffs' choice to file suit in Louisiana and seek a stay of the Rhode Island matter in favor of the Louisiana matter is some additional evidence that they, like many past plaintiffs, believe that Louisiana's laws provide them with "adequate" potential relief in the asbestos liability context.

**i**

**The Private-Interest Factors**

This Court finds that Plaintiffs fail to demonstrate that the private-interest factors favor staying the Rhode Island matter. Our Supreme Court has noted that the private-interest factors include ease of access to evidence, the availability and amenability of witnesses, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." Kedy, 946 A.2d at 1184. Other factors include the "enforceability of a judgment in the alternative forum, and the advantages and obstacles to a fair trial." Id. at 1184-85. Counsels' access to the chosen forum, however, is not a significant consideration. Id. at 1185.

Concerning the ease of access to evidence, neither Plaintiffs nor Defendants allege, nor is there any evidence to demonstrate, that the parties have not had easy access to evidence and other proof in prosecuting the Rhode Island matter thus far. See Elling v. State Farm Mutual Auto. Ins. Co., 683 N.E.2d 929, 933 (Ill. App. 1997) (refusing to dismiss an action for forum non conveniens because, among other factors, the moving party failed to demonstrate that its access to relevant evidence was obstructed or more difficult in Illinois). While it is true that this Court lacks the power to subpoena witnesses living in Louisiana, both Plaintiffs and Defendants have already deposed numerous witnesses domiciled outside Rhode Island,[4] and there is no evidence to suggest

[4] Specifically, both Plaintiffs and Defendants deposed Melford over nine days and deposed Tina and Melford's brother Daniel Melford over a shorter period of time. (R.I. Tr. at 12 ¶¶ 8-14; 34 ¶¶ 13-15.) All three depositions took place in Louisiana. Id. at 34 ¶¶ 16-18. Moreover, both Plaintiffs and Defendants deposed Plaintiffs' expert Dr. Kradin in Boston, Massachusetts, and Dr. Millette in Atlanta, Georgia. Id. at 12 ¶¶ 14-16; 34 ¶¶ 18-20.

that continuing with this practice will be too burdensome or costly in the future.[5] See Erwin ex rel. Erwin v. Motorola, Inc., 945 N.E.2d 1153, 1169 (Ill. App. 2011) (failing to dismiss a matter for forum non conveniens even though the court could not subpoena many of the moving party's witnesses because the moving party failed to specify any foreign witness who would be unwilling to testify in the current forum, and the court was "unwilling to speculate" on the witnesses' availability).

Moreover, both parties have engaged in nine months of discovery and other preparatory activities in the Rhode Island matter, including propounding and answering interrogatories, deposing witnesses, seeking the production of relevant documents, and exchanging expert witness lists. See Pls.' Br. at 1-3; Defs.' Br. at 3, 5-7; Civil Docket Sheet, PC-2011-1178 at 19-20; see also Lugones v. Sandals Resorts, Inc., 875 F. Supp. 821, 823 (S.D. Fla. 1995) (recognizing that "[i]f a [party] files a forum non conveniens objection for the first time after [that party] has answered, deposed witnesses, and caused the [opposing party] to incur expense in preparing for trial, then the court may deny the [party's] motion"). Thus, the parties have already dealt with many of the "practical problems that make trial of a case easy, expeditious and inexpensive" in the Rhode Island matter. Kedy, 946 A.2d at 1184 (quoting Gulf Oil Co., 330 U.S. at 508); cf. Bybee v. Oper der Standt Bonn, 899 F. Supp. 1217, 1223 (S.D.N.Y. 1995) (finding that

[5] Plaintiffs assert that Defendants now seek to depose numerous other Louisiana residents, including Melford's mother, the Louisiana Department of Environmental Quality, and an individual named Steven Billbright. (R.I. Tr. at 13 ¶¶ 22-25; 14 ¶ 1). They argue that because this Court lacks personal jurisdiction over these Louisiana witnesses, the subpoena process will entail letters rogatory and be a time- and resource-consuming process here. However, Defendants have already successfully deposed several Louisiana witnesses by letters rogatory in the Rhode Island matter, and this Court sees no reason why they cannot do so in the future. See Civil Docket Sheet, PC-2011-1178 at 13.

dismissal of a New York action in favor of a German one based on forum non conveniens was warranted because the parties had not yet dealt with any of the "practical problems" of trying a case, and they were more easily dealt with in Germany than in New York).

Additionally, this Court finds that a final judgment in the Rhode Island matter will have preclusive effect against most of the defendants in the Louisiana matter. Plaintiffs are proceeding against approximately eighty-three defendants in the Rhode Island matter and twenty-five defendants in the Louisiana matter. See Civil Docket Sheet, PC-2011-1172 at 1-4; Pls.' Sixth Am. Compl. at 1-4; Pls.' First Amended Petition for Damages (Pls.' First Am. Pet.) at 1-3. However, sixteen of the twenty-five defendants in the Louisiana matter are duplicated in the Rhode Island matter. See Pls.' Omnibus Opposition to Defs.' Exceptions of Lis Pendens (Pls.' Omnibus Pet.) at 1-3.

Plaintiffs concede that a judgment in the Rhode Island matter would have preclusive effect in the Louisiana matter against these duplicated defendants. (R.I. Tr. at 15 ¶¶ 2-16.) They cite Domingue v. ABC Corp., 682 So.2d 246 (L.A. App. 1996) for the proposition that the seven Louisiana Defendants have the ability to implead any of the duplicated defendants as third-party defendants in the Louisiana matter without regard to the preclusive effect of a Rhode Island judgment. (R.I. Tr. at 15 ¶¶ 17-25; 16 ¶¶ 1-17.) Thus, Plaintiffs argue, the duplicated defendants would not be shielded from proceeding in the Louisiana matter by res judicata. (R.I. Tr. at 16 ¶¶ 17-21.)

Plaintiffs' reliance on Domingue is misplaced. There, ten defendants sued as principal defendants in a second-filed case were impleaded as third-party defendants in the first-filed case. Thus, any judgment obtained against them in the first-filed case would not have preclusive effect on their liability as principal defendants in the second-

filed case. Here, the duplicated defendants are principal defendants in both the first-filed Rhode Island matter and the second-filed Louisiana matter. Applying the reasoning of Domingue, any judgment obtained against the duplicated defendants in Rhode Island would have preclusive effect against them in Louisiana. This outcome, in fact, counsels in favor of proceeding in the Rhode Island matter.

Finally, though it would be more convenient for Plaintiffs' counsel to prosecute the instant matter in Louisiana than in Rhode Island,[6] our Supreme Court has expressly held that "[t]he convenience of access by counsel to a plaintiff's chosen forum ordinarily is not given appreciable weight in the private-interest calculus." Kedy, 946 A.2d at 1185. Thus, this Court finds that Plaintiffs fail to demonstrate that the private-interest factors favor staying the Rhode Island matter. Cf. Kedy, 946 A.2d at 1187-88 (determining that the private-interest factors, on the whole, favored dismissal of thirty-nine asbestos cases filed in Rhode Island by Canadian plaintiffs).

**ii**

**The Public-Interest Factors**

Next, this Court finds that Plaintiffs have demonstrated that the public-interest factors support staying the Rhode Island matter in favor of the Louisiana matter. Our Supreme Court has noted that the public-interest factors include having local disputes adjudicated locally, and avoiding docket congestion, burdening local communities with jury duty when those communities have no relation to the litigation, and applying unfamiliar or obtuse foreign law. Kedy, 946 A.2d at 1185.

[6] Plaintiffs' counsel asserts that Louisiana is the more convenient forum because, among other reasons, he resides there. (R.I. Tr. at 27 ¶¶ 22-25.)

At the outset, this Court finds that the instant matter does not unduly burden or complicate this Court's asbestos docket. However, Plaintiffs are domiciliaries of Louisiana, while Defendants' connection to Rhode Island is based entirely upon their business activities here. Plaintiffs also assert that the conduct allegedly giving rise to Melford's injuries arose entirely in Louisiana as well. It is also likely, albeit not yet determined, that Louisiana law applies to this case.[7] Therefore, a Rhode Island jury hearing this case would "have to sit through a complicated trial that literally has no connection to Rhode Island besides a generalized interest . . . in preventing asbestos-related diseases." Kedy, 946 A.2d at 1188. Based on these factors, this Court finds that Plaintiffs have demonstrated that the public-interest factors favor staying the Rhode Island matter. See id.

**iii**

**Considering the Factors Together**

Our Supreme Court has counseled that Rhode Island courts should examine the private- and public-interest factors together when conducting this second step of the forum non conveniens inquiry. Kedy, 946 A.2d at 1185. Moreover, the majority of state courts also consider "[t]he status of a case with respect to discovery, motion practice, and trial scheduling" when conducting a forum non conveniens analysis. Baypack Fisheries, L.L.C., 992 P.2d at 1119; see also Marchman, 120 N.M. at 87; Kinney System, Inc., 674 So.2d at 94.

[7] While Plaintiffs aver that Louisiana law applies to the Rhode Island matter, Defendants correctly assert that the choice of law issue has not yet been decided here. Nonetheless, this Court assumes without deciding that Louisiana law likely applies to the Rhode Island matter in order to properly complete the forum non conveniens analysis.

Considering the private- and public-interest factors together, this Court finds that the private-interest factors weigh against staying the Rhode Island matter while the public-interest factors favor staying the Rhode Island matter. Thus, the two types of factors stand in "equipoise" to each other, and Plaintiffs necessarily fail to persuade this Court that the convenience factors favor staying the Rhode Island matter. See Adelson, 510 F.3d at 54; Windt, 529 F.3d at 192.

This Court finds that the progress of the litigation also weighs against staying the Rhode Island matter. "[I]f extensive discovery on the merits has taken place or if the court has expended significant resources on the case, considerations of judicial economy weigh in favor of retaining the action." Baypack Fisheries, L.L.C., 992 P.2d at 1119. Similarly, "whenever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal . . . greatly increases." Id. (quoting Lony, 935 F.2d at 614); see also Kinney System, Inc., 674 So.2d at 94; Marchman, 120 N.M. at 87. The parties disagree on the current extent of discovery in the Rhode Island matter. Defendants assert that discovery has been extensive enough to go to trial by early 2013. (R.I. Tr. at 34 ¶¶ 7-8.) Plaintiffs, on the other hand, contend that discovery has not been as significant as Defendants represent. Id. at 12 ¶¶ 5-6. They argue that, while the parties have deposed several Louisiana witnesses, Plaintiffs have not yet deposed any of Defendants' experts or corporate witnesses, save those from Borg Warner Corp. Id. at 14 ¶¶ 1-6. Plaintiffs also aver that none of the documents they seek have been produced yet. Id. at 14 ¶¶ 6-10.

The record demonstrates that Plaintiffs and Defendants have already propounded and answered interrogatories, deposed witnesses in Louisiana, sought relevant

documents, and exchanged expert witness lists in the Rhode Island matter. See Civil Docket Sheet, PC-2011-1178, at 19-20. Thus, both parties have expended meaningful time, effort, and resources preparing the Rhode Island matter for trial, weighing against staying the matter. This Court therefore finds that Plaintiffs have not carried their burden of persuasion at the second level of Rhode Island's two-step forum non conveniens analysis.

**B**

**The "First-to-File" Rule**

Defendants also argue that this Court should deny Plaintiffs' Motion based upon the "first-to-file" rule. Specifically, they contend that while our Supreme Court has not expressly adopted the "first-to-file" rule in the context of parallel suits filed in two different states' courts, it has applied the rule to determine the priority of parallel suits filed in two different Rhode Island courts. Defendants also assert that this Court has already applied the "first-to-file" rule in one of its prior decisions to dismiss a second-filed Rhode Island suit in favor of a first-filed Florida action.

Plaintiffs respond generally that factors of convenience balance in favor of proceeding in Louisiana. Plaintiffs contend that as domiciliaries of Louisiana, all of the conduct giving rise to their claims occurred in Louisiana, all of their witnesses, except experts, are located in Louisiana, and Louisiana law likely applies to this case. Thus, they conclude, Louisiana is the most convenient forum to resolve the litigation.

**a**

**The "First-to-File" Rule's Applicability in Rhode Island**

Our Supreme Court has applied the "first-to-file" rule in situations where the same or similar plaintiffs have filed two parallel actions in Rhode Island courts. See Lippman v. Kay, 415 A.2d 738, 741-42 (R.I. 1980) (recognizing the "first-to-file" rule and holding that a plaintiff who filed two actions seeking delinquent child support payments from her ex-husband, one in Family Court and one in Superior Court, could maintain both actions because the plaintiff actually sought different types of relief in each one). While it is true that the Court has not had occasion to apply the "first-to-file" rule in the context of parallel suits filed in two different state's courts, a number of state courts have consistently applied the rule in that context. See, e.g., Wamsley v. Nodak Mut. Ins. Co., 341 Mont. 467, 475-76 (2008); Yancoskie v. Delaware River Port Authority, 78 N.J. 321, 322, 395 A.2d 192, 193 (1978); Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp., 666 N.E. 2d 571, 577-79 (Ohio App. 1995). Thus, this Court finds it appropriate to apply the "first-to-file" rule to the instant case.

**b**

**The "First-to-File" Rule in the First Circuit**

Our federal courts recognize that the "first-to-file" rule is an analog of the forum non conveniens doctrine because the rule seeks to remedy the same problems as the doctrine; namely "wasted resources because of piecemeal litigation, the possibility of conflicting judgments, and a general concern that the courts may unduly interfere with each other's affairs." TPM Holdings, Inc. v. Intra-Gold Industries, Inc., 91 F.3d 1, 4 (1st Cir. 1996); see also 32A Am. Jur. 2d Federal Courts § 1277 (explaining that factors

bearing on the first-to-file rule's application "include many of the factors ordinarily determinative of whether to grant a change of venue for convenience, or in the interest of justice"). Thus, our federal courts have held that "[w]here identical actions are proceeding concurrently in two federal courts, entailing duplicative litigation and a waste of judicial resources, the first-filed action is generally preferred in a choice-of-venue decision." Transcanada Power Marketing, Ltd. v. Narragansett Electric Co., 402 F. Supp. 2d 343, 347 (D. Ma. 2005); see also Provanzano v. Parker, 796 F. Supp. 2d 247, 256 (D. Ma. 2011). This rule is not rigid, mechanical, or inflexible. 32A Am. Jur. 2d Federal Courts § 1277. Accordingly, application of "the first-to-file rule is a matter of trial court discretion." Angela Adams Licensing, LLC v. Dynamic Rugs, Inc., 463 F. Supp. 2d 82, 86 (D. Me. 2006); see also Nortek, Inc. v. Molnar, 36 F. Supp. 2d 63, 69 (D.R.I. 1999).

In applying the "first-to-file" rule, a court must first determine whether there is "a substantial overlap of parties and issues" between the parallel actions. McGlynn v. Credit Store, Inc., 234 B.R. 576, 581 (Bankr. D.R.I. 1999). "Where the overlap between the two suits is nearly complete, the usual practice is for the court that first had jurisdiction to resolve the issues and the other court to defer." TPM Holdings, 91 F.3d at 4. However, "where the overlap between suits is less than complete, the judgment is made case by case, based on such factors as the extent of overlap, the likelihood of conflict, the comparative advantage and the interest of each forum in resolving the dispute." Id.

When a court finds that there is "substantial overlap" between the two suits, "the forum where an action is first filed is given priority over subsequent actions unless there is 'a showing of balance of convenience in favor of the second action,' or there are special circumstances which justify giving priority to the second." Feinstein v. Brown,

304 F. Supp. 2d 279, 283 (D.R.I. 2004) (quoting SW Industries, Inc. v. Aetna Casualty and Surety Co., 653 F. Supp. 631, 634 (D.R.I. 1987)); Transcanada Power Marketing, Ltd., 402 F. Supp. 2d at 347; see also 17 Moore's Federal Practice 3D ¶ 111.13(1)(o)(ii)(B). The moving party carries the burden of demonstrating that one or both of the exceptions applies. Veryfine Products, Inc. v. Phlo Corp., 124 F. Supp. 2d 16, 21 (D. Ma. 2000) (citing Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 719 (1st Cir. 1996)).

The first exception (the "special circumstances" exception) applies "where a party has won the race to the courthouse by misleading his opponent into staying his hand in anticipation of negotiation, or by reacting to notice of imminent filing by literally sprinting to the courthouse the same day." Transcanada Power Marketing, Ltd., 402 F. Supp. 2d at 348; see also Biolitec, Inc. v. Angiodynamics, Inc., 581 F. Supp. 2d 152, 158 (D. Ma. 2008). The second exception (the "balance of convenience" exception) applies "where the defendant can show that its choice of forum is substantially more convenient than that chosen by plaintiff." Transcanada Power Marketing, Ltd., 402 F. Supp. 2d at 351 (quoting Holmes Group, Inc. v. Hamilton Beach/Proctor Silex, 249 F. Supp. 2d 12, 17 (D. Ma. 2002)). Courts determine the applicability of the "balance of convenience" exception "on an individualized, case-by-case basis," "look[ing] to the forum non conveniens factors to make this decision." Veryfine Products, Inc., 124 F. Supp. 2d at 24; see also Transcanada Power Marketing, Ltd., 402 F. Supp. 2d at 351 n.14.

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**Application**

This Court finds that the Rhode Island matter should not be stayed under the First Circuit's approach to the "first-to-file." At the outset, this Court finds that the overlap of parties between the Rhode Island and Louisiana matters is not "nearly complete." See TPM Holdings, Inc., 91 F.3d at 4. Plaintiffs are currently commencing suit against approximately eighty-three defendants in the Rhode Island matter[8] and approximately twenty-five defendants in the Louisiana matter.[9] This Court does not have jurisdiction

[8] Plaintiffs are currently proceeding in Rhode Island against the following: Abex Corp.; AB Volvo; Agco Corp.; American Honda Motor Company Inc.; Arvin Meritor Inc.; Audi of America Inc.; Bendix Corp.; Blue Bird Body Co.; Bombardier Motor Corp.; Borg Warner Corp.; Briggs & Stratton Corp.; Browne & Sharpe Inc.; BRP US Inc.; Carlisle Co., Inc.; Caterpillar Inc.; Certainteed Corp.; Clark Equipment Co.; Clubman; CNH America LLC; Cooper Industries LLC; Crane Co.; Crower Cams & Equipment Co.; Cummins Inc.; Daimler Trucks North America; Dana Holding Corp.; Deere & Co.; Dorsey Trailers Inc.; Eaton Corp.; Fontaine Trailer Co.; Ford Motor Co.; Fruehauf Corp.; Gardner Denver Inc.; Genuine Parts Company Inc.; The Goodyear Tire & Rubber Co.; Goulds Pumps Incorporated; Grinnel Corp.; Harley Davidson Inc.; H B Fuller Co.; Hollingsworth & Vose Co.; Honeywell Int'l Inc.; Howden Buffalo Inc.; Industrial Holdings Corp.; Int'l Truck & Engine Corp.; Isuzu Motors America; Kelsey-Hayes Co.; Kubota Tractor Corp.; Lufkin Industries Inc.; Mack Trucks Inc.; Maniac Inc.; The Maremont Corp.; McCord Gasket; Meadwestvaco Corp.; Metropolitan Life Ins. Co.; Murray Industries, Inc.; Navistar Inc.; Neles-Jamesbury, Inc.; Nissan Motor Co. Ltd.; Paccar Inc.; Packings & Insulations Corp.; Parker-Hannifin Corp.; Percora Corp.; Peterbilt Motors Co.; Pneumo Abex Corp.; R T Vanderbilt Co. Inc.; Reitnouer Inc.; Standard Motor Products Inc.; STI Holdings Inc.; Strick Corp.; The Trane Co.; Thomas Built Buses; Toyota Motors North America; Trail King Industries; Trailstar Manufacturing Corp.; Transitional Holdings Inc.; Tube City IMS; Twin Disc Inc.; Union Carbine Corp.; Utility Trailer Manufacturing Co; Wabash Nat'l Corp.; Wells Cargo Inc.; and Yamaha Motor Corp. USA. See Civil Docket Sheet, PC-2011-1172 at 1-4; Pls.' Sixth Am. Compl. at 1-4.

[9] Plaintiffs are currently proceeding in Louisiana against Automotive Clutch & Brake Co., Inc.; Caterpillar Inc.; CNH America, LLC; CRA Trailers, Inc.; Cummins, Inc.; Daimler Trucks North America, LLC; Dana Holding Corp.; Eaton Corp.; Eagle, Inc.; Fontaine Trailer Co.; Ford Motor Co.; Harvey Ford, LLC; Isuzu Motors America, LLC; Kelsey-Hayes Co.; Kubota Tractor Corp.; Leson Chevrolet Co., Inc.; Louisiana

over seven of the defendants in the Louisiana matter (the "Louisiana Defendants").[10] (La. Tr. at 14-18.) Thus, there is not "complete identification" of defendants in both suits. See McGlynn, 234 B.R. at 580-81.

However, this Court finds that "substantial overlap" of the parties nonetheless exists here based on the particular facts and circumstances of the instant matter. See TPM Holdings, Inc., 91 F.3d at 4. Plaintiffs are the same individuals in both suits. Second, Plaintiffs assert that, of the approximately eighty-three defendants in the Rhode Island matter, there are "approximately 29 defendants in the Rhode Island suit for which there is product identification and testimony of exposure which are relevant to this exception." (Pls.' Omnibus Pet. at 1-3.) Sixteen of the twenty-five defendants in the Louisiana matter, including Defendants, are represented among these twenty-nine defendants so identified by Plaintiffs.[11] Thus, this Court finds that there is "substantial overlap" of the principal parties in the two matters. See Fuller v. Abercrombie & Fitch Stores, Inc., 370 F. Supp. 2d 686, 688-91 (E.D. Tenn. 2005) (citing TPM Holdings, Inc., 91 F.3d at 4, and finding "substantial overlap" between the parties of two parallel suits where the defendant was identical in both suits but similar classes of plaintiffs contained some

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Machinery Co., LLC; Mack Trucks, Inc.; Marshall Bros. Lincoln LLC; Meritor, Inc.; Navistar, Inc.; Nissan North America, Inc.; PACCAR, Inc.; Standard Motor Products, Inc.; and Taylor-Seidenbach, Inc. See Pls.' First Am. Pet. at 1-3.

[10] The seven Louisiana Defendants are Automotive Clutch & Brake Co., Inc.; Eagle Inc.; Leson Chevrolet Co. Inc.; Louisiana Machinery Co. LLC.; Marshall Bros. Lincoln Inc.; Matairie Capital LLC; and Taylor-Seidenbach Inc. See Pls.' First Am. Pet. (La.) at 1-3.

[11] The sixteen duplicated defendants are Arvin Meritor, Inc.; CNH America, LLC; Cummins Inc.; Daimler Trucks North America, LLC; Dana Co., LLC; Eaton Corp.; Fontaine Trailer Co.; Ford Motor Co.; Isuzu Motors America, LLC; Kelsey-Hayes Co.; Kubota Tractor Corp.; Mack Trucks, Inc.; Navistar, Inc.; Nissan North America, Inc.; PACCAR Inc.; and Standard Motor Products, Inc. See Pls.' Omnibus Pet. at 1-3.

different members); OpenLCR.com v. Rates Technology, Inc., 112 F. Supp. 2d 1223, 1231 (D. Colo. 2000) (citing TPM Holdings, Inc., 91 F.3d at 4, and holding that "substantial overlap" existed between the parties of parallel actions where the plaintiffs were identical and there were similar principal defendants in both actions); see also Mercado-Salinas v. Bart Enterprises International, Ltd., 669 F. Supp. 2d 176, 187-89 (D.P.R. 2009).

Plaintiffs also assert nearly identical tort- and warranty-based claims in both matters, seeking to recover damages for Melford's mesothelioma and related injuries and expenses. The wording and language of the two complaints are also similar. Compare Pls.' Sixth Am. Compl. at 6-8 with Pls.' First Am. Pet. at 4-8. Therefore, this Court finds that there is "substantial overlap" of the issues in the Rhode Island and Louisiana matters as well. See Mazzantini v. Rite Aid Corp., 829 F. Supp. 2d 9, 10-11 (D. Ma. 2011); McGlynn, 234 B.R. at 581; see also Mercado-Salinas, 669 F. Supp. 2d at 187-88.

Next, this Court must presumptively give priority to the first-filed action unless Plaintiffs can demonstrate that either the "special circumstances" or "balance of convenience" exceptions apply in favor of the second-filed suit. See Feinstein, 304 F. Supp. 2d at 283. Concerning the "special circumstances" exception, Plaintiffs do not allege or otherwise demonstrate that they or Defendants engaged in a "race to the courthouse," induced each other to file anticipatorily, or "react[ed] to notice of imminent filing by literally sprinting to the courthouse the same day." Transcanada Power Marketing, Ltd., 402 F. Supp. 2d at 348. The record evinces that Plaintiffs filed their case after careful consideration of the facts and the law and Defendants timely answered

after being served with process.[12] Thus, this Court finds that Plaintiffs fail to show that the "special circumstances" exception applies to the instant matter. See Learning Networks, Inc., 11 Fed. App. at 301 (finding that "there can be no race to the courthouse when only one party is running").

This Court finds that Plaintiffs also fail to demonstrate that the "balance of convenience" exception favors staying the Rhode Island matter. When considering the "balance of convenience" exception, this Court looks to the same private- and public-interest factors it utilizes in the forum non conveniens context. See Veryfine Products, Inc., 124 F. Supp. 2d at 24; see also Transcanada Power Marketing, Ltd., 402 F. Supp. 2d at 351 n.14. In applying the private- and public-interest factors to the instant matter, this Court must consider the factors together and not ascribe undue significance to any one particular factor. See Kedy, 946 A.2d at 1185.

As this Court has already determined, the private- and public-interest factors stand in "equipoise" to each other in the instant matter. First, the private-interest factors weigh against staying the Rhode Island matter because the parties have engaged in discovery and are nearing trial. Counsels' convenience is also not a significant consideration. See Kedy, 946 A.2d at 1186. Thus, the parties have already dealt with depositions, witnesses,

[12] Melford was diagnosed with pleural mesothelioma in December 2010 and filed the Rhode Island matter on February 25, 2011. Two defendants answered the complaint on the same day, but neither of those defendants is a party to the instant matter. See Civil Docket Sheet, PC-11-1172 at 4. The first of the Defendants to answer Plaintiffs' complaint, Navistar Inc., did so one week after the complaint was filed. Id. at 5. The other Defendants filed answers through July 2011. Id. at 5-10. Accordingly, neither Plaintiffs nor Defendants have alleged, nor does the record indicate, that any party was induced to file prematurely or threatened with litigation to participate in this case. See Learning Networks, Inc. v. Discovery Communications, Inc., 11 Fed. App. 297, 301 (4th Cir. 2001).

and many of the "other practical problems that make trial of a case easy, expeditious and inexpensive." Id. at 1184 (quoting Gulf Oil Co., 330 U.S. at 508).

Second, the public-interest factors weigh in favor of staying the Rhode Island matter despite the progress of the litigation here. On one hand, Plaintiffs reside in Louisiana and allege that the conduct giving rise to Melford's injuries occurred entirely in Louisiana. It is also likely that Louisiana law applies to the instant matter.[13] On the other hand, Defendants' ties to Rhode Island are based solely on their doing business here. Therefore, a Rhode Island jury hearing this case would "have to sit through a complicated trial that literally has no connection to Rhode Island besides a generalized interest . . . in preventing asbestos-related diseases." Kedy, 946 A.2d at 1188.

Because the private-interest factors weigh against staying the Rhode Island matter while the public-interest factors favor staying the Rhode Island matter, the convenience factors stand in "equipoise" to each other and Plaintiffs necessarily fail to demonstrate that the convenience factors favor staying the Rhode Island matter. See Adelson, 510 F.3d at 54; Windt, 529 F.3d at 192. The Rhode Island matter has already progressed through our court system for nineteen months, and both Plaintiffs and Defendants have expended time, effort, and resources in discovery and preparing the case for trial. This factor, encompassing both private and public interests of convenience, also counsels in favor of proceeding in the Rhode Island matter. See Baypack Fisheries, L.L.C., 992 P.2d at 1119; Marchman, 120 N.M. at 87; Kinney System, Inc., 674 So.2d at 94. Accordingly, this Court finds that the Rhode Island matter should not be stayed under the First Circuit's approach to the "first-to-file" rule.

[13] Again, this Court assumes without deciding that Louisiana law applies to the instant matter in order to conduct the within inquiry.

## III

## Conclusion

For the above reasons, this Court finds that Plaintiffs have failed to demonstrate that a stay of proceedings in the Rhode Island matter is warranted under the doctrine of forum non conveniens. Moreover, this Court finds that the "first-to-file" rule also weighs against staying the Rhode Island matter. Both Plaintiffs and Defendants have conducted significant discovery and trial preparation work in the instant case and should therefore litigate this dispute in Rhode Island. The parties are invited to request a trial date from this Court at their earliest convenience. This Court therefore denies Plaintiffs' Motion to Stay Proceedings.

Counsel shall submit the appropriate Order for entry.