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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MAZUMA CAPITAL CORP. a Utah corporation, Plaintiff, vs. ORTHO-CLINICAL DIAGNOSTICS, INC., a New York corporation, and ORTHO-CLINICAL DIAGNOSTICS S.A., a Luxembourg corporation, Defendants.	**ORTHO-CLINICAL DIAGNOSTICS, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY THE COMPLAINT AND MEMORANDUM IN SUPPORT THEREOF** Civil No. 2:18-cv-00591-DBP Magistrate Judge Dustin B. Pead

Pursuant to Federal Rule of Civil Procedure 12(b), Defendant Ortho-Clinical Diagnostics, Inc. ("Ortho" or "Defendant") respectfully submits this Motion to Dismiss, or in the Alternative, Stay the Complaint and Memorandum in Support Thereof.

SUMMARY

Defendant Ortho respectfully moves to (a) dismiss this action (the "Utah Action") filed by Plaintiff Mazuma Capital Corp. ("Mazuma" or "Plaintiff") because a parallel action was previously filed in the United States District Court for the Western District of New York (the "WDNY Action") by Ortho against Mazuma, or, alternatively, stay the Utah Action pending the resolution of the WDNY Action, and (b) dismiss Mazuma's replevin cause of action for failure to state a claim upon which relief can be granted.

The WDNY Action and the Utah Action involve the same parties and interrelated claims. The "first-filed" rule, which promotes judicial economy and the avoidance of inconsistent results, gives the New York District Court priority to consider the case. Although Mazuma has filed a motion to dismiss the WDNY Action, that motion will merely determine where Ortho will proceed as a plaintiff against Mazuma. Specifically, in considering Mazuma's motion, the New York District Court will either deny the motion and retain jurisdiction over the WDNY Action, or transfer it to this Court. Either way, Mazuma will be required to assert the claims it alleges in the Utah Action as compulsory counterclaims, rendering the Utah Action entirely duplicative. Thus, the first-filed rule counsels this Court to dismiss the Utah Action at the outset. Otherwise, at the very least, this Court should stay the Utah Action until the first filed WDNY Action is resolved.

Furthermore, even if this Court merely stays rather than dismisses the Utah Action, outright dismissal of Mazuma's replevin cause of action is nevertheless appropriate. Because Mazuma's replevin claim seeks possession of property that is located in New York, this Court lacks jurisdiction to adjudicate the claim.

Accordingly, Ortho respectfully requests that this Court (a) dismiss the Utah Action or, alternatively, stay the Utah Action until the New York District Court has resolved the WDNY Action, and (b) dismiss Mazuma's replevin claim.

STATEMENT OF FACTS

1. Ortho is an in vitro diagnostics company that manufactures, sells, and distributes a variety of products, reagents, and diagnostic equipment used to test for various diseases, conditions, and substances in both humans and animals. *See* Declaration of Amy F. Sorenson ("Sorenson Decl."), Ex. 1 (Complaint ¶ 10, *Ortho-Clinical Diagnostics, Inc. v. Mazuma Capital Corp.*, No. 6:18-cv-06416-CJS (W.D.N.Y. June 7, 2018), ECF No. 1 ("WDNY Complaint")).[1] Ortho is a New York corporation, and operates a large research and development facility in Rochester, New York, which manufactures a variety of products utilized around the world. *Id.* ¶¶ 4, 10.

2. On or about June 20, 2016, Ortho entered into a series of agreements to effectuate a sale and leaseback transaction (collectively, the "Lease Agreements") with Mazuma, a privately-owned leasing company that provides equipment financing. *Id.* ¶¶ 1, 2, 5. The Lease Agreements concern equipment (the "Property") that was assembled, installed, and operated at Ortho's plant in Rochester, New York. *Id.* ¶ 12.

3. As part of the transaction, Ortho received $27 million in cash and $9 million held back as a security deposit (the "Security Deposit"). *Id.* ¶ 13.

[1] In support of this motion, Ortho relies upon pleadings and briefs filed in the WDNY Action as well as Mazuma's Complaint filed in the Utah Action to demonstrate the timing of the filings, the procedural posture of the cases, and the similarity of the issues raised in the two actions. This Court may take "judicial notice of the pleadings and other documents of public record filed" in other courts. *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1298 n.2 (10th Cir. 2014) (citing Fed. R. Evid. 201(b)(2)).

4. The Lease Agreements were for a Base Period of twenty-four months from July 1, 2016 through June 30, 2018 with payments of $1,507,967.38 per month for a total of $36,191,217.12, along with a security deposit of approximately $9 million, which Ortho paid. *Id.* ¶ 49.

5. Ortho made payment in full in cash for all amounts due in monthly rental payments and other payments under the Lease Agreements during the two-year term (*i.e.*, Base Period). *Id.* ¶ 50.

6. Section 21(k) of the Master Lease Agreement ("Section 21(k)"), one of the documents comprising the Lease Agreements, includes an automatic renewal provision, which is the subject of the dispute among the parties. *Id.* ¶ 19. According to Mazuma, under Section 21(k), the Lease Agreements automatically renew unless Ortho gives 150 day advance notice of its intent to negotiate a purchase of the equipment and the parties mutually agree on a purchase price. *Id.*

7. As explained in more detail below and as set forth in Ortho's WDNY Complaint, New York's General Business Obligations Law strictly proscribes the enforcement of such clauses and New York has evidenced a strong public policy against the improper use of such clauses.

8. Nevertheless, with the end of the Lease Agreements approaching, on May 23, 2018, Ortho sent Mazuma a letter (i) requesting that Mazuma return the Security Deposit pursuant to the Lease Agreements; and (ii) offering a purchase price of $2,375,000.00 for the Property. *Id.* ¶ 53. The purchase price was derived as a result of consultation with an outside equipment appraisal professional and represents an internal rate of return ("IRR")

of 10.1%. *See id.*; Sorenson Decl., Ex. 2 (Certification of John K. Sanders ¶ 4, No. 6:18-cv-06416-CJS (W.D.N.Y. July 16, 2018), ECF No. 8 ("Sanders Cert.")).

9. Mazuma rejected Ortho's offer to purchase the Property for $2,375,000.00 and proposed a counteroffer to sell the Property to Ortho for $18,168,281.56—representing Mazuma's calculation of the maximum purchase amount permitted under the terms of the Lease Agreements. WDNY Compl. ¶ 54. Because Ortho had already paid Mazuma a total of $36,191,217.12 pursuant to the Lease Agreements, under Mazuma's purchase offer, Mazuma would receive over $18,000,000 in additional financing charges on a two year fully secured agreement. This would amount to an internal rate of return of **56%**. Sanders Cert. ¶ 5. Stated another way, Mazuma was demanding to receive approximately $54,000,000 on a $36,000,000 two year lease back transaction. Mazuma also stated that if Ortho did not pay Mazuma the full purchase price it was demanding, the Lease Schedules would automatically renew for an additional eighteen months and Ortho would be in default of the Lease Agreements.[2] *Id.*

10. Thus, according to Mazuma's unreasonable demand, if Ortho did not accept its purchase price, the Lease Agreements would renew for at least an additional eighteen months, which equates to payment of an additional approximately $24,000,000. This would have Ortho paying Mazuma over $60,000,000 over 42 months for an original $27,000,000 advance—an IRR of over **74%**. *Id.* ¶ 6.

[2] According to Mazuma, Section 21(k) provides for an automatic renewal of twelve months if no agreement is reached by the parties. However, under the same clause, after the twelve month automatic renewal, there is an additional six month automatic renewal. WDNY Compl. ¶ 19 ("At the maturity of the initial twelve (12) month renewal period provided above, the Schedule shall continue in effect at the rate specified in the respective Schedule for successive periods of six (6) months . . . .").

11. In response, Ortho advised Mazuma that its position was unreasonable, in violation of New York law and public policy, and that Ortho had met its obligations under the Lease Agreements by electing to negotiate a purchase of the equipment which under the terms of the Lease Agreements ensures such the Lease Schedules would not automatically renew. WDNY Compl. ¶ 56. Specifically, by letter dated May 31, 2018, Ortho advised Mazuma as follows:

> Lessor [Mazuma] failed to comply with applicable New York Law which required Lessor to provide written notice of its intent to re-lease the property and specifically call attention to the renewal provision. See NY Gen. Oblig. §§ 5-901; 5-903. Lessor did not provide Lessee with the requisite statutory notice. Therefore, the renewal provision in the Master Lease Agreement is unenforceable as a matter of law.

See Sorenson Decl., Ex. 3 (Certification of Adam K. Derman, Ex. A (May 31, 2018 Letter), No. 6:18-cv-06416-CJS (W.D.N.Y. July 16, 2018), ECF No. 7-1 ("Derman Cert.")).

12. Thereafter, Mazuma continued to refuse to substantively revise its position and showed no willingness to engage in good faith negotiations grounded in the value of the Property to be acquired by Ortho—*i.e.*, Mazuma insisted on an $18,168,281.56 purchase price. WDNY Compl. ¶ 57. Rather, Mazuma again reiterated its extortive position that if Ortho did not agree to Mazuma's required purchase price, the Lease Schedules would automatically renew and Ortho would be in default of the Lease Agreements if it did not make a monthly lease payment immediately thereafter. *Id.* ¶ 58.

13. Mazuma also continued to refuse Ortho's demand to return the Security Deposit. *Id.*

14. Notwithstanding its immovable position and extortive demands, Mazuma apparently recognized the applicability of New York's General Obligations Law and that it had failed to comply with this law. Specifically, on June 7, 2018, Mazuma delivered the notice to Ortho that is required for all automatic renewal leases. *See* Derman Cert., Ex. C (June 7, 2018 Letter), ECF No. 7-3. This letter came directly from Mazuma and included in bold block print at the top the following notice:

NOTICE UNDER N.Y. GOB § 5-901 AND § 5-903

15. Mazuma's notice was untimely; the statute specifically requires that such notice be given in advance of the 150-day deadline set forth in Section 21(k). Mazuma's notice was over 120 days late. Thus, Mazuma should not be able to enforce the automatic renewal provisions in its Lease Agreements for this reason alone.

16. On June 7, 2018, Ortho filed the WDNY Complaint against Mazuma. The WDNY Complaint lists the following causes of action: (1) declaratory judgment that Ortho has complied fully with its contractual obligations under the Lease Agreements, (2) declaratory judgment that Section 21(k) of the Lease Agreements is unenforceable, (3) breach of contract based on Mazuma's refusal to release the Security Deposit, (4) specific performance requiring Mazuma to return the Security Deposit, (5) conversion based on Mazuma's refusal to release the Security Deposit, and (6) breach of good faith and fair dealing based on Mazuma's refusal to negotiate in good faith for the purchase of the Property. *See* WDNY Compl. ¶¶ 59–110.

17. Five days later, on June 12, 2018, Mazuma filed a complaint in the Utah district court, Third Judicial District (Salt Lake County) against Ortho, seeking a declaratory judgment

that it was entitled to keep Ortho's Security Deposit. *See* Complaint, June 12, 2018, ECF No. 6-1. Mazuma never served this complaint on Ortho.

18. Subsequently, on June 14, 2018, Mazuma filed an amended complaint against Ortho in the same court, alleging additional claims (the "Utah Complaint"). *See* Amended Complaint, June 12, 2018, ECF No. 6-12. The Utah Complaint's causes of action are: (1) declaratory judgment that Mazuma is entitled to retain the Security Deposit, (2) breach of Lease Agreements, (3) breach of guaranty against Ortho-Clinical Diagnostics S.A. based on Ortho's alleged defaults under the Lease Agreements, (4) replevin for possession of the Property, and (5) injunction to prevent Ortho from using the Property. *See id.* ¶¶ 24–57.

19. Mazuma did not serve Ortho with the Utah Complaint until June 26, 2018. Derman Cert., Ex. E (CT Corp., Service of Process Notification), ECF No. 7-5.

20. On July 2, 2018, Mazuma moved to dismiss the WDNY Complaint arguing that a forum selection clause in the Lease Agreements designates Utah as the venue for disputes arising out of the Lease Agreements. Sorenson Decl., Ex. 4 (Def.'s Mot. to Dismiss, No. 6:18-cv-06416-CJS (W.D.N.Y. July 2, 2018), ECF No. 5).

21. As set forth in Ortho's opposition brief, Ortho believes that Mazuma's motion will be denied in the first instance because—as specifically prescribed in the United States Supreme Court case of *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas.*, 571 U.S. 49, 55 (2013)—enforcement of forum selection clauses is not a proper basis to dismiss a case where venue is otherwise proper. Rather, the proper procedure is to move to transfer, which Mazuma did not do outright or in the alternative. Sorenson Decl., Ex. 5 (Pl.'s Memo. in Opp. to Mot. to Dismiss, No. 6:18-cv-06416-CJS (W.D.N.Y.

July 16, 2018), ECF No. 9). Even if the Court were to *sua sponte* convert Mazuma's motion to dismiss into a motion to transfer under 28 U.S.C. § 1404, the forum selection clause is unenforceable because, among other reasons, Section 21(k)'s automatic renewal provision violates New York's General Obligations Law § 5-901 and is, accordingly, unenforceable as against New York public policy. *See id.*

22. On July 27, 2018, Mazuma filed its reply brief. Sorenson Decl., Ex. 6 (Def.'s Reply to Response to Mot. to Dismiss, No. 6:18-cv-06416-CJS (W.D.N.Y. July 27, 2018), ECF No. 14). In the reply brief, Mazuma (for the first time) seeks the alternative relief of transferring the WDNY Complaint to Utah. *See id.*

23. On July 25, 2018, Ortho removed the Utah Action from state court to this Court. Notice of Removal, July 25, 2018, ECF No. 2.

24. For the reasons set forth below, Ortho respectfully requests that this Court dismiss Mazuma's Utah Complaint or, in the alternative, stay the Utah Action until the WDNY Action is resolved. Additionally, Ortho respectfully requests that this Court dismiss Mazuma's replevin claim for lack of jurisdiction.

ARGUMENT

I. THE FIRST-FILED RULE REQUIRES DISMISSAL OR STAY OF THE UTAH ACTION PENDING RESOLUTION OF THE WDNY ACTION

A. The First-Filed Rule Is Applicable to the WDNY and Utah Actions.

Ortho's motion to dismiss or stay the Utah Action should be granted based on the "first-filed rule." Under this judicially-developed doctrine, when two actions are filed in different federal district courts involving substantially the same parties and issues, "the first federal district court which obtains jurisdiction of parties and issues should have priority and the second court

should decline consideration of the action until the proceedings before the first court are terminated." *Anschutz Corp. v. Natural Gas Pipeline Co. of Am.*, 632 F. Supp. 445, 454 (D. Utah 1986) (quoting *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir. 1965)); *see also Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir. 1982) ("[T]he general rule [is] that when two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case."). The first-filed rule applies where there is "substantial overlap" between the claims alleged in the two actions. *Black Diamond Equip., Ltd. v. Genuine Guide Gear*, No. 2:03-CV-01041, 2004 WL 741428, at *1 (D. Utah Mar. 12, 2004). Under such circumstances, the court with the second-filed action "has discretion to transfer, stay, or dismiss the second case." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 679 F. Supp. 2d 1287, 1297 (D. Kan. 2010) (quotation omitted).

The purposes served by the first-filed rule, which is "a doctrine of federal comity," include "avoid[ing] conflicting decisions and promot[ing] judicial efficiency." *ClearOne, Inc. v. Shure Inc.*, No. 2:17-CV-00322-CW, 2017 WL 2105063, at *2 (D. Utah May 15, 2017) (quotation omitted)); *see also Black Diamond Equip.*, 2004 WL 741428, at *1 ("The rule is intended to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." (quotation omitted)); *Anschutz*, 632 F. Supp. at 454 ("The simultaneous prosecution in two different courts of cases relating to the same parties and issues 'leads to the wastefulness of time, energy and money.'" (quoting *Cessna Aircraft*, 348 F.2d at 692)).

The WDNY Action is indisputably the first-filed action because Ortho filed the WDNY Complaint before Mazuma filed not only the Utah Complaint, but even the unserved original

complaint in Utah state court. *See ClearOne*, 2017 WL 2105063, at *2 ("The filing date of an action derives from the filing of the complaint." (quotation omitted)). Ortho and Mazuma are parties in both actions, and the claims that the parties assert in each action "substantially overlap" because they arise out of the same facts and the same Lease Agreements. Indeed, both parties allege claims focused on the validity of the Lease Agreements, the rightful possession of the Property, and the status of the Security Deposit. Permitting both this action and the WDNY Action to proceed simultaneously would be a waste of judicial resources. Moreover, it could produce inconsistent results. For example, the New York District Court could decide that the automatic renewal provisions of the Lease Agreements are unenforceable or that Ortho has complied fully with its contractual obligations under the Lease Agreements while this Court could find that Ortho breached the Lease Agreements or that they have automatically renewed. Thus, this Court should apply the first-filed rule and decline to consider this Utah Action.

B. Dismissal of the Utah Action Is Appropriate Under the First-Filed Rule.

In this case, outright dismissal rather than a mere stay of the Utah Action is proper because "staying the action would be an idle act" where Mazuma will ultimately assert its claims as a counterclaim. *Anschutz* 632 F. Supp. at 454 (dismissing rather than staying second-filed action because the first-filed action "will resolve all of the issues involved in this action"); *Black Diamond Equip.*, 2004 WL 741428, at *3 (dismissing rather than transferring second-filed action). In *Shilling Construction Company, Inc. v. Arr-Maz Products, L.P.*, a complaint was first filed in federal district court in the Northern District of Oklahoma, and a second complaint was filed in the federal district court of Kansas. No. 12-4077-JTM, 2012 WL 6100231, at *1 (D. Kan. Dec. 7, 2012). Ruling on a motion to dismiss for lack of personal jurisdiction and *forum non conveniens*, the Oklahoma court found that the Oklahoma action was properly venued in that

court and retained jurisdiction. *Id.* at *2. The Kansas Court subsequently decided to dismiss, rather than transfer or stay, the second-filed action, noting that the claims in the second-filed action were required to be asserted as compulsory counterclaims under Federal Rule of Civil Procedure 13(a) in the first-filed action. *Id.* at *3. Therefore, the court held, transferring the same claims to the Oklahoma action would be duplicative. *Id.* The same is true here.

As set forth in the Statement of Undisputed Facts, Mazuma contends that the forum selection clause in the Lease Agreements requires that this Court resolve any disputes arising out of the Lease Agreements, including Ortho's affirmative claims in the WDNY Action. The enforceability of the forum selection clause is the subject of Mazuma's motion to dismiss currently pending before the New York District Court in the WDNY Action. No matter what decision the New York District Court makes with respect to the motion to dismiss the WDNY Action,[3] the Utah Action is duplicative of the WDNY Action.

One option is for the New York District Court to deny Mazuma's motion and decline to enforce the forum selection clause, thereby retaining jurisdiction over the WDNY Action. In this scenario, Mazuma must assert the claims it alleges in the Utah Action as compulsory counterclaims in the WDNY Action pursuant to FRCP 13(a). That rule provides, in relevant part:

> A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

[3] As discussed *infra* in Section I.C., the New York District Court has priority over this Court to decide the issue of venue.

Mazuma's claims in the Utah Action all meet the requirements of FRCP 13(a) because they arise out of the same transaction and circumstances that are the subject matter of Ortho's WDNY Action. Since Mazuma will be required to assert all of its claims as counterclaims in the WDNY Action, the Utah Action is duplicative.

Alternatively, the New York District Court may enforce the forum selection clause, as Mazuma has argued in support of its motion to dismiss, and transfer the WDNY Action to this Court. In this scenario, too, Mazuma must assert the claims it alleges in the Utah Action as compulsory counterclaims in the transferred WDNY Action pursuant to FRCP 13(a), and the Utah Action again is duplicative.[4] Thus, regardless of the outcome of the motion to dismiss pending in the New York District Court, this Utah Action is duplicative of the WDNY Action and, accordingly, should be dismissed. *Shilling Constr. Co.*, 2012 WL 6100231, at *3.

Nevertheless, even if this Court chooses not to dismiss the Utah Action now, the first-filed rule counsels that, at the very least, a stay of the Utah Action is appropriate pending resolution of the WDNY Action. *ClearOne*, 2017 WL 2105063, at *2 (staying second-filed action in accordance with first-filed rule); *Johnson v. Pfizer, Inc.*, No. 04–1178–MLB, 2004 WL 2898076, at *5 (D. Kan. Dec. 10, 2004) (same); *Ed Tobergte Assocs., Inc. v. Xide Sport Shop of Ohio, Inc.*, 83 F. Supp. 2d 1197, 1199 (D. Kan. 1999) (same).

[4] Pursuant to the *Atlantic Marine Construction Co.* case cited above, if venue is otherwise proper pursuant to 28 U.S.C. § 1391, the Court should not dismiss a case on the ground that there is a forum selection clause. 571 U.S. at 55. Rather, if a party wishes to attempt to enforce a forum selection clause, it is required to do so through a motion to transfer pursuant to 28 U.S.C. § 1404. *Id.*

C. The Forum Selection Clause Does Not Affect the Application of the First-Filed Rule.

Finally, to the extent Mazuma will contend that the forum selection clause in the Lease Agreements prevents the New York District Court from exercising jurisdiction over the WDNY Action and, therefore, the first-filed rule should not apply here to give that court priority over this Court, that argument should be rejected. Under Tenth Circuit Court of Appeals precedent, even where a forum selection clause may render the first-filed court an inappropriate venue to consider the first-filed action, the first-filed court nevertheless is the proper court to determine venue. In *Hospah Coal Company*, the Tenth Circuit addressed the first-filed rule where a complaint was first filed in federal district court in the Northern District of Texas, and a second complaint was filed in the federal district court for the District of New Mexico. 673 F.2d at 1162. The actions concerned, in part, a contract that contained a venue selection clause designating venue in New Mexico. *Id.* The court applied the first-filed rule despite this venue selection clause and held that "the court which first obtains jurisdiction should be allowed to first decide issues of venue." *Id.* at 1164; *see also CAO Grp., Inc. v. Discus Dental, LLC*, No. 2:07–CV–909, 2008 WL 314559, at *2–3 (D. Utah Feb. 4, 2008) (staying second-filed action in Utah pending resolution of first-filed action in California despite existence of forum selection clause designating Utah as exclusive venue); *Ed Tobergte Assocs., Inc.*, 83 F. Supp. 2d at 1199 ("[A] challenge to the jurisdiction in the first court should not change the rule that the court which first obtained jurisdiction should have priority to decide the issues." (citing *Cessna Aircraft*, 348 F.2d at 692)).

This is particularly true where the first-filed court has already been presented with the opportunity to consider the venue issue. For example, in *ClearOne*, a complaint was first filed in

federal district court in the Northern District of Illinois, and a second complaint was filed in the federal district court for the District of Utah. 2017 WL 2105063, at *1. The Utah court refused to address the merits of the parties' forum dispute because that issue was raised in the Illinois District Court before it was raised in the Utah federal court. *Id.* at *2. This Court noted that if it reached the merits of the forum dispute, "the resulting order may conflict with the Northern District of Illinois' anticipated ruling." *Id.*; *cf. Black Diamond Equip.*, 2004 WL 741428, at *3 (second-filed court rejecting argument that first-filed rule does not apply when first-filed court should transfer action pursuant to statute because transfer analysis was pending before first-filed court, in order to avoid "the risk of duplicating efforts and handing down inconsistent rulings"). The same is true here: The parties have already addressed the enforceability of the forum selection clause in their briefing on Mazuma's pending motion to dismiss before the New York District Court. Because the New York District Court has priority to determine whether the clause is enforceable, this Court should not hesitate to apply the first-filed rule despite the existence of the clause.

II. MAZUMA'S REPLEVIN ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Even if this Court stays, but does not dismiss, the entire Utah Action under the first-filed rule, Ortho respectfully requests outright dismissal of Mazuma's replevin claim. A "replevin action must be brought in the jurisdiction in which the collateral is located." *Orix Credit All. v. Riccio*, No. 94 Civ. 4049 (PKL), 1994 WL 512542, at *3 (S.D.N.Y. Sept. 20, 1994); *see also Prou v. Giarla*, 62 F. Supp. 3d 1365, 1378 (S.D. Fla. 2014) (dismissing Florida replevin action for lack of subject matter jurisdiction because property was located in California); *Gillen v. Keenan*, No. N13C–09–250 RRC, 2014 WL 6676139, at *1 (Del. Sup. Ct. Nov. 7, 2014) (finding

no *in rem* jurisdiction over replevin action in Delaware when property was located in Pennsylvania despite having personal jurisdiction over defendant because "[a]n action for replevin cannot be successfully maintained unless the property is within the state and is subject to the jurisdiction of the courts"); *Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc.*, 656 So.2d 541, 543–44 (Fla. Dist. Ct. App. 1995) ("An action for replevin cannot be successfully maintained unless the property is *within the state* and subject to the jurisdiction of its courts." (emphasis in original)); *Marston v. Rose-Elash*, 720 S.W.2d 783, 784 (Mo. Ct. App. 1986) (finding no subject matter jurisdiction pursuant to Missouri replevin statute over property located in Maine even though court had personal jurisdiction over defendant because "[t]he very theory of replevin as a possessory action bespeaks of having in rem jurisdiction over the subject matter").

Mazuma's Utah Complaint includes an action for replevin of the Property, and in its "Prayer for Relief," Mazuma seeks the "immediate issuance of a writ of replevin (i) directing defendant Ortho Inc. to deliver, or cause to be delivered, the Property to a location to be designated by Mazuma, or such other locations as agreed by the parties; (ii) directing that the Property be immediately and permanently seized and taken from possession of defendant Ortho Inc.; and (iii) directing that the Property be delivered to Mazuma or its designated agent." Utah Compl. ¶¶ 43–47, p. 15. Because the Property is located in New York, WDNY Compl. ¶ 12, this Court lacks jurisdiction to decide Mazuma's replevin claim. Accordingly, the replevin claim should be dismissed.

CONCLUSION

For all of the foregoing reasons, Ortho respectfully requests that the Court enter an Order dismissing this action or, alternatively, staying this action pending the resolution of the WDNY

Action; dismissing Mazuma's replevin cause of action for lack of jurisdiction; and granting such other and further relief as is just and proper.

DATED: August 15, 2018.

SNELL & WILMER L.L.P.

/s/ *Amy F. Sorenson*
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