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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.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT ORTHO-CLINICAL DIAGNOSTICS, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY THE COMPLAINT** Civil No. 2:18-CV-00591-DBP

Plaintiff Mazuma Capital Corp ("Mazuma"), by and through its counsel, respectfully submits this Memorandum in Opposition to Defendant Ortho-Clinical Diagnostics, Inc.'s ("Ortho") Motion to Dismiss, or in the Alternative, Stay the Complaint ("Motion to Dismiss"). For the reasons set forth herein, Ortho's Motion to Dismiss should be denied.

INTRODUCTION

Mazuma provided over $36 million in equipment financing to Ortho pursuant to a written Master Lease (defined below) and related lease schedules. A dispute arose between the parties regarding Ortho's obligations under the written lease documents. Pursuant to express terms of Section 21(e) of the Master Lease, any such dispute is required to be filed and litigated in the State of Utah. Ortho does not and cannot dispute the validity of this forum-selection clause. Nonetheless, Ortho has wrongfully and in bad faith attempted to do an end run around the forum-selection clause.

More specifically, after the aforementioned dispute had arisen, the parties engaged in earnest settlement negotiations, as evidenced by several written proposals. On June 5, 2018, because of the settlement negotiations, Ortho and Mazuma agreed that neither party needed to "run to the courthouse" and that the parties would take the month of June to negotiate a resolution. Ortho confirmed that agreement by email on June 5, 2018, and on June 7, 2018, Ortho sent Mazuma a written Standstill Agreement further confirming this agreement. Consistent with the agreement made June 5, 2018, in the proposed Standstill Agreement both parties represented that they had not commenced any legal action and both parties agreed not to commence or institute any legal action during the month of June 2018. On that same day, Mazuma returned the Standstill Agreement to Ortho with a few handwritten suggestions to clarify the nature of the dispute, but not changing the "standstill" period. However, Mazuma subsequently discovered that Ortho filed the WDNY Action (defined below) two days after agreeing to a standstill and **on the exact same day** (i.e., June 7, 2018) that Ortho sent the written Standstill Agreement to Mazuma! Ortho's actions—i.e., lulling Mazuma into delaying filing this

matter by agreeing to a standstill on June 5, 2018 and sending Mazuma a written Standstill Agreement on June 7, 2018, and surreptitiously rushing to the courthouse **on that same day** to file the WDNY Action—are indefensible and constitute bad faith.

Ortho's Motion to Dismiss this matter based on the first-filed rule fails for the following independent reasons. First, because this action was filed on the third business day after the WDNY Action was filed (and the day on which Mazuma learned of the WDNY Action), the actions are considered contemporaneously filed and the WDNY Action is accorded no deference as being the first-filed. Second, even if the WDNY Action was considered to be the first-filed action, the first-filed rule does not apply in this case because: (a) the forum-selection clause between the parties precludes the application of the first-filed rule; and (b) Ortho's inequitable litigation tactics preclude the application of the first-filed rule (which is an equitable doctrine and therefore requires clean hands to invoke the same). Accordingly, this Court should use its clear discretion not to apply the first-filed rule to this matter.

In addition to moving to dismiss and stay this action based on the inapplicable first-filed rule, Ortho has also moved to dismiss Mazuma's replevin claim. Ortho's motion to dismiss the Mazuma's replevin claim also fails because it ignores Utah law which provides that a writ of replevin may order Ortho, over whom this court clearly has jurisdiction, to deliver property in its possession to Mazuma.

RESPONSE TO ORTHO'S STATEMENT OF FACTS

Ortho's Motion includes a seven page "Statement of Facts" that incorporates nearly 300 pages of exhibits. This Statement of Facts is largely irrelevant to the current motion, is argumentative, and is disputed by Mazuma. Although Ortho has burdened the court with seven

pages of facts and nearly 300 pages of exhibits, the only facts relied on, or referred to, by Ortho in its argument are that Ortho filed an action in New York three business days prior to this action being filed in Utah. Nevertheless, Mazuma responds to Ortho's Statement of Facts so that the Court has an accurate understanding of the underlying facts and attaches this response as Exhibit A hereto.

RELEVANT FACTS

1. On or about June 20, 2016, Ortho, as lessee, executed and delivered to Mazuma, as lessor, a Master Lease Agreement No. MCC1355, dated June 20, 2016 (the "**Master Lease**"), a copy of which is attached as Exhibit "A" to the Amended Complaint and is incorporated by this reference.

2. In the Master Lease, Ortho expressly agreed that any suit regarding the Lease or the relationship of the parties must be filed in Utah. Section 21(e) of the Master Lease expressly states:

> THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE STATE OF UTAH; ANY SUIT OR OTHER PROCEEDING BROUGHT BY EITHER PARTY TO ENFORCE OR CONSTRUE THIS LEASE (AS DEFINED IN SECTION 1 HEREIN), OR TO DETERMINE MATTERS RELATING TO THE PROPERTY OR THE RELATIONSHIP BETWEEN THE PARTIES HERETO SHALL BE BROUGHT ONLY IN THE STATE OR FEDERAL COURTS IN THE STATE OF UTAH. . . . FURTHERMORE, LESSEE WAIVES THE DEFENSE OF FORUM NON CONVENIENS.

(Emphasis added.)

3. A dispute arose between the parties regarding Ortho's obligations under the written lease documents. After this dispute arose, the parties began engaging in earnest settlement negotiations.

4. More specifically, as disclosed in the exhibits filed by Ortho with its Motion to Dismiss, Ortho and Mazuma exchanged correspondence in the latter part of May 2018 and early June 2018 regarding this dispute. These communications were sent primarily between Justin Nielsen, the Chief Executive Officer of Mazuma, and John Sanders, Vice-President and Treasurer of Ortho. (*See* Declaration of Justin Nielsen (hereafter "Nielsen Decl.") at ¶¶ 5-7, a copy of which is filed herewith.)

5. In particular, Ortho sent a letter to Mazuma dated May 23, 2018; Mazuma sent a letter to Ortho dated May 25, 2018; Ortho sent a letter to Mazuma dated May 31, 2018; and Mazuma, through counsel, sent a letter to Ortho dated June 1, 2018. (Nielsen Decl. at ¶ 6 and Exs. A - D.)

6. In those letters, Ortho and Mazuma made demands, stated positions, and made proposals to resolve the current dispute. (Nielsen Decl. at ¶ 7 and Exs. A - D.)

7. John Sanders of Ortho and Justin Nielsen of Mazuma spoke by telephone on Tuesday, June 5, 2018. The call lasted approximately 20 minutes. (Nielsen Decl. at ¶ 10.)

8. In that telephone call, Mr. Sanders and Mr. Nielsen discussed the positions of Ortho and Mazuma and explored possibilities to resolve the matter. John Sanders suggested several possible solutions, which he described as "straw man" possibilities, that he would need to discuss further with his management. (Nielsen Decl. at ¶ 11.)

9. Towards the end of that call, Justin Nielsen stated to John Sanders that the parties should agree to take the month of June to try to negotiate a resolution and that neither party needed to "run to the courthouse." John Sanders agreed that neither party needed to "run to the

courthouse" and Mr. Sanders and Mr. Nielsen agreed that they would not file suit but would continue negotiations at least through the end of the month of June. (Nielsen Decl. at ¶ 12.)

10. Before ending this call, Mr. Sanders and Mr. Nielsen scheduled a follow-up call for June 12, 2018 at noon mountain time. (Nielsen Decl. at ¶ 13.)

11. Later that day (June 5, 2018), Mr. Sanders sent an email to Mr. Nielsen in which he said "I think it would be a good idea for us to document our verbal agreement to continue negotiations (we said until the end of the month, I'm hoping to wrap it up well prior)." Mr. Sanders also offered to "put together a 'simple' letter." (Nielsen Decl. at ¶ 14 and Ex. E.)

12. Mr. Nielsen responded by email later that same day saying "Yes, I agree. Lets work during June to finalize an agreement. If you would feel more comfortable documenting that, send something over for review." (Nielsen Decl. at ¶ 15 and Ex. E.)

13. Consistent with the agreement made by telephone call and confirmed by email, two days later, on Thursday, June 7, 2018, Mr. Sanders sent an email to Mr. Nielsen with a proposed written Standstill Agreement. The written Standstill Agreement was consistent with the telephone call two days earlier and provided for a "standstill" period until the end of June. Mr. Sanders' email stated "if you are in agreement, please sign and return. Otherwise, please let me know your comments and I will discuss with my team. Looking forward to speaking with you next week." (Nielsen Decl. at ¶ 16 and Ex. E.)

14. At 2:29 p.m. mountain time that same day (4:29 eastern time), Mr. Nielsen replied to Mr. Sanders' email, returning to him the written Standstill Agreement, with a few handwritten suggestions to clarify the nature of the dispute, but not changing the "standstill" period. (Nielsen Decl. at ¶ 17 and Ex. F.)

15. Mr. Sanders did not immediately respond, but, based on the agreement made in the June 5, 2018 telephone conversation, as confirmed in the emails sent that day, and further on the proposed written Standstill Agreement sent by Ortho and the telephone call scheduled for June 12, 2018, Mr. Nielsen reasonably assumed that Ortho and Mazuma had an agreement, as reflected in the June 5 conversation and emails and the Standstill Agreement. (Nielsen Decl. at ¶ 18.)

16. On Tuesday, June 12, 2018, Mr. Nielsen called Mr. Sanders, as previously arranged. In this conversation, Mr. Sanders expressed less willingness to resolve the dispute and Mr. Nielsen specifically asked Mr. Sanders if Ortho was intending to file some lawsuit. Mr. Sanders refused to directly answer that question. (Nielsen Decl. at ¶ 19.)

17. Shortly after this phone call, at approximately 1:30 p.m. mountain time on June 12, 2018, Mr. Nielsen received from Mr. Sanders, by email, a copy of a Complaint that Ortho had filed in New York (the "WDNY Action") on June 7, 2018 (two days after Ortho agreed to a standstill and on the very day that Ortho had sent to Mazuma the proposed written Standstill Agreement confirming this agreement). (Nielsen Decl. at ¶ 20.)

18. That same day, after learning that Ortho had deceived Mazuma and had filed an action in New York, Mazuma filed its Complaint in this action,[1] which had been previously prepared, but was not filed earlier because of the Standstill Agreement. (Nielsen Decl. at ¶ 21.)

ARGUMENT

I. THE WDNY ACTION IS NOT ENTITLED TO FIRST-FILED STATUS AS BOTH ACTIONS WERE FILED CONTEMPORANEOUSLY.

When similar actions are filed in different states within the same general time period,

[1] Mazuma's Complaint was initially filed in the Third Judicial District (Salt Lake County) but Ortho thereafter removed this action from state court to this Court.

courts will not hesitate to consider those actions as having been contemporaneously filed instead of according deference to one action as being first-filed. *See, e.g., St. Paul Fire and Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1168 (10th Cir. 1995) (affirming district court's dismissal of a declaratory judgment action in part because plaintiff filed its declaratory judgment action one day prior to the date on which plaintiff knew defendant was planning on filing its action in another court); *Ontel Prods., Inc. v. Project Strategies Corp.*, 899 F.Supp. 1144, 1153 (S.D.N.Y. 1995)(first-to-file rule "usually disregarded where the competing suits were filed merely days apart."); *Affinity Memory & Micro v. K & Q Enter.*, 20 F.Supp.2d 948, 954-955 (E.D.Va. 1998)(transfer to second court when second action filed only two weeks after first action); *Serco Servs. Co. v. Kelley Co.*, 51 F.3d 1037, 1039 (Fed. Cir. 1995)(upholding a district court's decision dismissing a declaratory judgment action in favor of an infringement suit filed three days later); *S. Union Co. v. Sw. Gas Corp.*, 165 F. Supp. 2d 1010, 1045 (D. Ariz. 2001)(treating cases filed three days apart as "filed contemporaneously" for purposes of first-to-file analysis); *In re Chambers Dev. Co., Inc. S'holders Litig.*, 1993 WL 179335, at *7 (Del. Ch. May 20, 1993) (indicating that a Delaware action filed two weeks after an action pending in a foreign jurisdiction was "filed at least in the same general time period" so as to be considered contemporaneous).

In this case, Mazuma filed this action on the third business day after Ortho clandestinely filed the WDNY Action (unbeknownst to Mazuma) while Ortho feigned participation in a standstill arrangement that Ortho had expressly agreed to. Mazuma filed this action on the day that it learned of Ortho's deceitful filing in New York. Consequently, this Court should not give first-filed status to the WDNY Action. *See In re IBP, Inc. v. Tyson Foods, Inc.*, 2001 WL

406292 at 8 fn. 18 (Ch. Ct. Del. April 18, 2001)("courts will not give first-filed status to actions filed in a trivially faster manner, especially where the first-filing party rushed into court without giving prior notice of its decision to eschew a non-litigious resolution to the problem facing the parties.")

II. EVEN IF THE WDNY ACTION IS CONSIDERED THE FIRST-FILED ACTION, THE FIRST-FILED RULE DOES NOT APPLY TO THIS MATTER.

Even if the WDNY Action is considered the first-filed action, the first-filed rule does not apply in this case. Contrary to Ortho's suggestion, the first-to-file "rule" is not a rigid, invariable mandate that automatically requires dismissal of a second-filed action (i.e., the present Utah Action) in favor of an earlier-filed case (i.e., the WDNY Action) or that automatically reserves the question of which venue is proper to the first-filed court (i.e., the WDNY Action). *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183-84 (1952). According to the Supreme Court, the first-to-file "rule" is an equitable doctrine, grounded in basic principles of comity, fairness, and sound judicial administration, that permits a district court in its discretion and experience to decline jurisdiction where an earlier-filed action raising substantially similar issues is pending in another district between similar parties. *Id*. Tenth Circuit cases, including the *Hospah* case cited by Ortho, are in accord with the Supreme Court's *Kerotest* decision. *See, e.g., Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1164 (10th Cir. 1982) (agreeing with *Kerotest*); *O'Hare Int'l Bank v. Lambert*, 459 F.2d 328, 331 (10th Cir. 1972) ("The rule of comity is a self-imposed restraint upon an authority actually possessed. The abstention doctrine is not an automatic rule; it rather involves a discretionary exercise of the court's equity powers where there exist special circumstances prerequisite to its application on a case-by-case basis.") (citations omitted).

Thus, if the plaintiff in the second-filed action establishes that it is more appropriate to proceed in the second-filed forum, any presumption in favor of the earlier-filed action does not apply. *See Employers Ins. of Wausau v. Fox Entertainment Group, Inc.*, 522 F.3d 271, 275 (2d Cir. 2008). Indeed, both this Court and the Tenth Circuit have consistently held that courts "may decline to follow" the rule when an exception applies. *See, e.g., Buzas Baseball, Inc. v. Bd. of Regents of the Univ. of Ga.*, No. 98-4098, 1999 U.S. App. LEXIS 21630, 1999 WL 682883, at *3 (10th Cir. Sept. 2, 1999); *Primary Children's Med. Ctr. Found. v. Scentsy, Inc.*, 2012 WL 591670, at *2-4 (D. Utah Feb. 22, 2012)(refusing to follow the first-filed rule where one party filed an anticipatory action in an attempt to take advantage of the other party who had delayed filing suit to attempt to pursue settlement negotiations); *Medspring Group, Inc. v. Atl. Healthcare Group, Inc.*, 2006 WL 581018 *3. (D. Utah Mar. 7, 2006). In this case, there are two separate and well-established exceptions that apply—each one of which standing alone is sufficient to defeat Ortho's Motion to Dismiss. Specifically, the first-filed rule does not apply here because: (a) the parties entered into an agreement containing a valid, mandatory forum-selection clause; and (b) Ortho's inequitable litigation tactics preclude application of the first-filed rule.

A. THE FORUM-SELECTION CLAUSE PRECLUDES APPLICATION OF THE FIRST-FILED RULE.

"[I]t is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court." *National Equipment Rental, Limited v. Szukhent*, 375 U.S. 311, 315-316, 84 S. Ct. 411, 414, 11 L. Ed. 2d 354 (1964). The Supreme Court of the United States has directed courts to give full effect to forum-selection clauses. *See The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)(*cited in New Moon Shipping Co. v. Man B & W Diesel AG,*

121 F.3d 24, 29 (2d Cir. 1997)("*M/S Bremen* requires us to consider the validity and enforceability of a forum-selection clause, giving substantial deference to the parties' selected forum.")). Accordingly, both Utah and the Tenth Circuit similarly enforce and encourage forum-selection clauses. *See, e.g., Prows v. Pinpoint Retail Sys.*, 868 P.2d 809, 812 (Utah 1993) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable."); *Am. Soda, LLP v. U .S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 927 (10th Cir. 2005) ("when venue is specified, such as when the parties designate a particular county or tribunal, and the designation is accompanied by mandatory or obligatory language, a forum selection clause will be enforced as mandatory.").

Here, the subject forum-selection clause clearly mandates each party to bring claims in the state and federal courts located in Utah. The clause reads as follows:

> THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE STATE OF UTAH; ANY SUIT OR OTHER PROCEEDING BROUGHT BY EITHER PARTY TO ENFORCE OR CONSTRUE THIS LEASE (AS DEFINED IN SECTION 1 HEREIN), OR TO DETERMINE MATTERS RELATING TO THE PROPERTY OR THE RELATIONSHIP BETWEEN THE PARTIES HERETO SHALL BE BROUGHT ONLY IN THE STATE OR FEDERAL COURTS IN THE STATE OF UTAH. . . . FURTHERMORE, LESSEE WAIVES THE DEFENSE OF FORUM NON CONVENIENS.

(Am. Compl. Ex. A § 21(e) (emphasis added).) Ortho has not and cannot challenge the validity of this forum-selection clause.[2]

Instead, Ortho has attempted to do an end run around the same by lulling Mazuma into delaying filing this matter by agreeing to a standstill arrangement, sending a written Standstill Agreement and feigning engagement in settlement negotiations while it underhandedly rushed to

[2] Indeed, not only is Ortho a very sophisticated party, it was represented by outside legal counsel that reviewed and made changes to the Master Lease before Ortho initialed the very page containing the forum-selection clause and executed the contract in whole.

the courthouse to file the WDNY Action (as discussed in subsection II(B) below). As the party seeking to avoid the forum-selection clause, Ortho bears the "heavy burden of proof" and must "clearly show that enforcement would be unreasonable and unjust." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16-17 (1972); *See also Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992) (forum-selection clauses are "prima facie valid and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances"). Ortho has not and cannot meet this heavy burden.

Rather, Ortho simply contends that the forum-selection clause does not affect the application of the first-filed rule. (*See* Motion to Dismiss at pp. 14-15.) Ortho's contention is directly contradicted by well-established case law in which courts have routinely held that a party cannot circumvent a valid forum-selection clause simply by filing a lawsuit in a different forum and then asserting, as Ortho does here, that the first-filed doctrine prevents a subsequent lawsuit in the proper forum. *See, e.g., Megadance USA Corp. v. Kristine Knipp*, 623 F.Supp.2d 146,, 149 (D. Mass. 2009) (stating "[i]t is improper for a party to invoke the first filed doctrine in the face of a clearly articulated forum selection clause.")(citing *Wellons v. Numerica Savings Bank, FSB*, 749 F.Supp. 366, 338 (D. Mass. 1990)); *TDY Industries, Inc. v. Hamilton Sundstrand Corp.*, 2007 WL 1740855 *5 (W.D. Pa. June 14, 2007) (determining that plaintiff in first-filed lawsuit was bound by the forum selection provision requiring litigation to occur in the forum of the second-filed lawsuit); *Universal Operations Risk Mgmt., LLC v. Global Rescue LLC*, 2012 WL 2792444, at *5-6 (N.D. Cal. July 9, 2012)("the first-to-file rule is not a legitimate basis for permitting the individual Plaintiffs to escape a contractual obligation to litigate claims in the

parties' agreed upon forum."); *Automated Solutions, Inc. v. Fadal Machining Centers, LLC*, 2011 WL 2182457, at *5 (D. Idaho 2011) ("Although Plaintiffs were the first to file, the Court finds that should not defeat an otherwise valid and enforceable forum selection clause which Plaintiffs have not shown to be unreasonable nor does the Court find it to be."); *Hy Cite Corp. v. Advanced Marketing Intern., Inc.*, 2006 WL 3377861, at *4 (W.D.Wis. 2006) ("The interests of justice mandate that the first-to-file rule should not be applied to plaintiffs' action because of the forum selection clause contained within [the] agreements.")); *National Union Fire Insurance Company of Pittsburgh v. Las Vegas Professional Football Limited*, 2010 WL 5141229, *3 (2nd Cir. 2010) ("The district court also properly determined that the first-filed rule did not apply" given the agreement at issue contains a clause that "any action . . . may be brought only in a court of competent jurisdiction in [New York]."); *New York Marine and Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 113 (2nd Cir. 2010) (New York choice of law clause and Southern District of New York forum selection clause favor disregarding first-filed rule); *Samson Offshore Company v. Chevron U.S.A.*, 2011 WL 1238435 (N.D. Okla. March 30, 2011)(declining to apply the first to file rule, emphasizing that "[s]trict application of the 'first-filed' rule would allow plaintiff to avoid application of the parties' dispute resolution procedure merely by filing this case first.")**.**

The foregoing case law is legion and uniform and Ortho has not and cannot cite case law to the contrary. Instead, Ortho cites to *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161 (10th Cir. 1982). (*See* Motion to Dismiss p. 14.) *Hospah*, however, does not indicate that a party can avoid a valid forum-selection clause by simply filing an action first in a different forum. Rather, *Hospah* allowed the court that first obtained jurisdiction to decide the contested

issue of venue. *Id.* at 1164. In any event, *Hospah* is readily distinguishable from this case.

For example, in *Hospah*, the court noted that it was not clear that the forum-selection clause controlled the analysis because the first-filed complaint alleged a conspiracy commencing on or about 1974, while the lease containing the forum-selection clause was not entered into until 1977. *Id.* at 1163 n.2. Moreover, the alleged conspiracy included parties who had not signed the lease. Thus, the *Hospah* court reasoned that it was not readily apparent that the lease containing the forum-selection clause was binding on the parties to the first-filed lawsuit who were not parties to the lease. *Id.* In short, the forum-selection clause at issue in *Hospah* is very different from the forum-selection clause at issue in this case because the *Hospah* forum-selection clause did not bind all of the parties and claims—whereas, here, the forum-selection clause encompasses all of the parties and all of the subject claims.

The only other case cited by Ortho that involved a forum-selection clause is *CAO Grp., Inc. v. Discus Dental, LLC*, No. 2:07–CV–909, 2008 WL 314559, at *2–3 (D. Utah Feb. 4, 2008) and, like *Hospah*, that case is distinguishable from this matter. Specifically, in *CAO Grp.*, the second-filed case was not filed until over 2 months after the first-filed case (whereas, here, the two cases were filed within three business days of each other). *Id.* at *1. Moreover, unlike here, *CAO Grp.* involved claims under an agreement that did not have a forum-selection clause. *Id.* (stating that only two of the three subject agreements contained forum-selection clauses). Furthermore, the party wanting to invoke the forum-selection clause in the second-filed action filed a counterclaim in the first-filed action. *Id.* Here, Mazuma has not asserted any substantive claim in the WDNY Action nor has it even answered the Complaint. Rather, Mazuma has moved to dismiss the WDNY Action based on the forum-selection clause. Thus, the cases cited

by Ortho are either inapplicable and/or are clearly distinguishable from this matter.

The other cases cited by Ortho do not support Ortho's contention that a forum selection clause does not affect the application of the first-filed rule and are also distinguishable from this matter. Indeed, the following cases cited by Ortho do not even involve a forum-selection clause— *Ed Tobergte Assocs., Inc. v. Xide Sport Shop of Ohio, Inc.*, 83 F. Supp. 2d 1197, 1199 (D. Kan. 1999); *ClearOne, Inc. v. Shure Inc.*, No. 2:17-CV-00322-CW, 2017 WL 2105063, at *2 (D. Utah May 15, 2017); *Black Diamond Equip., Ltd. v. Genuine Guide Gear*, No. 2:03-CV-01041, 2004 WL 741428, at *3 (D. Utah Mar. 12, 2004)—rather these cases simply involved a dispute regarding jurisdiction or venue between two courts and, in such cases, it is generally proper for the first-filed court to decide such issues. In contrast, in this case, no dispute exists as to whether this Court properly has jurisdiction and venue over this matter because the subject forum-selection clause makes this issue abundantly clear

Ortho's argument that the court in the WDNY Action must decide the issue of venue is not correct. The cases cited by Ortho that allowed the first-filed court to decide the venue issues did so to avoid "the risk of duplicating efforts and handing down inconsistent rulings" *Black Diamond Equip.*, 2004 WL 741428, at *3 (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."); *see also ClearOne, Inc.*, 2017 WL 2105063 at *2. In this case, Mazuma has filed a motion to dismiss the WDNY Action and that motion is not set for hearing until January 17, 2019. In the event that the Utah Court has not ruled on Ortho's motion to dismiss prior to that date, Mazuma will file a motion to stay the WDNY Action to properly allow this Court to decide the venue issues. Consequently, there is no risk of duplicating efforts or inconsistent rulings by

this Court proceeding in this matter.

More importantly, Ortho's position, manipulating the first-filed rule to defeat a valid and enforceable mandatory forum-selection clause, would improperly "encourage a race to the courthouse door in an attempt to preempt a later suit in another forum." *Primary Children's*, 2012 WL 591670, at *2; *see also Universal Operations*, 2012 WL 2792444, at *6 ("would encourage parties to rush to the courthouse to file lawsuits for the purpose of circumventing their agreed-upon promises."). This cannot be the case. The first-filed rule does not permit Ortho to avoid the mandatory forum-selection provision in the written agreement with Mazuma, nor should it permit Ortho to require Mazuma to be subject to a ruling in a forum not agreed to by the parties. This matter is properly litigated in the state and federal courts of Utah, only.

In sum, under Supreme Court authority, as acknowledged by the Tenth Circuit and other federal circuits, the second-filed court possesses the authority to decide this issue and can decline to apply the first-filed doctrine for reasons of equity and fairness, or may find that an exception to the first-filed doctrine is warranted. *Kerotest*, 342 U.S. at 183-84; *Micron Tech., Inc. v. MOSAID Techs., Inc.*, 518 F.3d 897, 904 (Fed. Cir. 2008); *O'Hare*, 459 F.2d at 331; *Cherokee Nation v. Nash*, WL 2690368, at *7 (N.D. Okla. July 2, 2010). When considering this doctrine in cases involving a forum-selection clause, it is especially important for the second-filed court to consider whether the first-filed action was filed in violation of the forum-selection clause. Otherwise, the forum-selection clause may be rendered completely meaningless, contrary to the strong federal policy favoring enforcement of such clauses. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (federal policy favors enforcing forum-selection clauses). Accordingly, this Court should decline to apply the first-filed rule pursuant to the forum-

selection clause agreed to by Ortho.

B. ORTHO'S INEQUITABLE LITIGATION TACTICS PRECLUDE APPLICATION OF THE FIRST-FILED RULE.

In addition to the forum-selection clause precluding the first-filed rule, Ortho's Motion to Dismiss also fails because Ortho's inequitable litigation tactics preclude application of first-filed rule. As indicated above, the first-filed rule "is not a 'rigid or inflexible rule to be mechanically applied' because it is grounded in principles of equity." *Maertin v. Armstrong World Industs., Inc.*, 241 F.Supp.2d 434, 453 (D.N.J. 2002) (quoting *Equal Employment Opportunity Comm'n v. Univ. of Penn.*, 850 F.2d 969, 976-77 (3d Cir. 1988), *rev'd on other grounds*, 490 U.S. 1015 (1989)). Thus, in exercising its discretion, the Court "must act 'with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *EEOC*, 850 F.2d at 977 (citing *Langnes v. Green*, 282 U.S. 531, 541 (1931)). Courts have consistently recognized that the first-filed rule should not apply when the party seeking to enforce the rule has engaged in "inequitable conduct, bad faith, or forum shopping. *Id.* at 972. "[F]orum shopping ha[s] always been regarded as proper bases for departing from the [first-filed] rule." *Id.* at 976 (citing *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 n.4 (2d Cir. 1965)). Courts have routinely refused to apply the first-filed rule, when, as here, the first-filed action is an improper race to the courthouse in anticipation of a complaint to be filed by the other party. *See, e.g., Boatmen's First Nat'l Bank of Kansas City v. Kansas Public Employees Ret. Sys.*, 57 F.3d 638, 641 (8th Cir. 1995) (reversing injunction on second-filed suit given that second-filing party gave notice of intent to sue and first suit primarily sought declaratory relief); *Factors Etc., Inv. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978) (allowing the second-filed suit to go forward when the first suit was filed in anticipation of

second suit to be filed in allegedly unfavorable forum) (abrogated on other grounds in *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990)).

In this instance, even if there was not a valid forum-selection clause between the parties (which there clearly is), Ortho's inequitable litigation tactics alone warrant a denial of the application of the first-filed rule. More specifically, the parties engaged in earnest settlement negotiations, as evidenced by several written proposals. (*See* Nielsen Dec. at ¶¶ 5 - 7.) On June 5, 2018, because of the settlement negotiations, both Mazuma and Ortho agreed that neither party needed to "run to the courthouse" and both parties would take the month of June to negotiate a resolution, and this agreement was confirmed by an email sent by Ortho that day. (*See id.* at ¶¶ 12 and 14 and Ex. E.)

Two days later, on June 7, 2018, pursuant to the foregoing agreement, Ortho sent Mazuma a written Standstill Agreement. (*Id.* at ¶ 16.) In the Standstill Agreement, both parties represented that they had not commenced any legal action and both parties agreed not to commence or institute any legal action during the month of June 2018. (*See* proposed Standstill Agreement at the fifth "WHEREAS" clause and at § 1 on p. 1, a copy of which is attached as Exhibit F to Nielsen Dec.) On that same day (i.e., June 7th), Mazuma sent back the written Standstill Agreement to Ortho with a few handwritten suggestions to clarify the nature of the dispute, but not changing the "standstill" period previously agreed to. (Nielson Dec. at ¶ _.)

Three business days later, Mazuma discovered that Ortho filed the WDNY Action two days after Ortho had agreed to a standstill and **on the exact same day** (i.e., June 7th) that Ortho sent the written Standstill Agreement to Mazuma! (*Id.* at ¶ 20.) Ortho is a large, sophisticated business enterprise with considerable resources at its disposal and experienced legal counsel

advising it. Ortho's rushed and covert filing of the WDNY Action was not inadvertently done, but was an orchestrated effort to impose New York venue in direct contradiction to the valid forum-selection clause. Accordingly, Ortho's actions—i.e., lulling Mazuma into delaying filing this matter by agreeing to a standstill arrangement and proposing a written Standstill Agreement while Ortho surreptitiously rushed to the courthouse on that same day to file the WDNY Action—are indefensible and preclude the application of the first-filed rule (even if there was not a valid forum-selection clause). *See, e.g., Natural Gas Pipeline Co. of North America v. Union Pacific Resources Company*, 750 F. Supp. 311, 314 (N.D. Ill. 1990) (the District Court declined to invoke the first filed rule where the first suit was filed as a "pre-emptive strike" before the expiration of a published grace period.); *Telebrands Corp. v. martFIVE, LLC*, 2013 WL 4675558 *6 (D.N.J. Aug. 30, 2013)(refusing to apply the first-filed rule where plaintiff filed an anticipatory action before the expiration of the deadline set by the defendant in a demand letter); *Primary Children's Med. Ctr. Found. v. Scentsy, Inc.*, 2012 WL 591670, at *2-4 (D. Utah Feb. 22, 2012)(refusing to follow the first-filed rule where one party filed an anticipatory action in an attempt to take advantage of the other party who had delayed filing suit to attempt to pursue settlement negotiations).

Mazuma filed this action on the day that it learned of Ortho's surreptitious filing of the WDNY Action. Indeed, Mazuma had previously prepared its Complaint and was ready to file the same until the parties agreed to a standstill arrangement on June 5, 2015. (*Id.* at ¶ 21.)

In sum, even if the WDNY Action is considered the first-filed action (rather than contemporaneously filed), this Court should use its clear discretion not to apply the rule because of: (a) the forum-selection clause mandating venue in this Court; and (b) Ortho's inequitable

litigation tactics.

III. THIS COURT HAS JURISDICTION TO HEAR MAZUMA'S REPLEVIN CLAIM.

Ortho's argument that Mazuma's Fourth Claim for Relief for replevin must be dismissed ignores Utah law governing replevin. Indeed, Ortho's Motion relies solely on cases from other jurisdictions and cites no Utah case law or Utah rule. Rule 64 of the Federal Rules of Civil Procedure provides that remedies, such as replevin, attachment or garnishment, are available "under the law of the state where the court is located." Rule 64(a), F.R.C.P. The Utah law providing for replevin is found in Rule 64B of the Utah Rules of Civil Procedure, which states that a "writ of replevin is available to compel delivery to the plaintiff of specific personal property held by the defendant." Rule 64B, U.R.C.P. By contrast, under Utah law, a "writ of attachment is available to seize property in the possession or under the control of the defendant." Rule 64C, U.R.C.P. Under this Utah law, a writ of replevin may be issued compelling a defendant to deliver to the plaintiff property that is in the possession of the defendant Ortho. Thus, in connection with Mazuma's replevin cause of action, this court (to which Ortho consented to jurisdiction) could enter an order compelling Ortho to deliver the leased property that is in its possession to Mazuma pursuant to Rule 64B of the URCP. If Ortho failed to comply with any such order, this court could hold Ortho in contempt, for failure to obey the order of the court. If necessary, Mazuma could seek domestication of the order for replevin on the contempt order for enforcement in New York. This court has jurisdiction to issue a writ of replevin consistent with Rule 64B of the Utah Rules of Civil Procedure.

CONCLUSION

Ortho's Motion to Dismiss should be denied. This action and the WDNY Action are considered contemporaneously filed and the WDNY Action is accorded no deference as being the first-filed. In any event, the first-filed rule does not apply in this case because the express forum-selection clause agreed to by the parties and Ortho's inequitable litigation tactics both preclude the application of the first-filed rule. Accordingly, this Court is the appropriate court to rule on the issue of venue, and should do so by denying Ortho's Motion to Dismiss.

DATED: September 12, 2018.

RAY QUINNEY & NEBEKER P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2018, a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT ORTHO-CLINICAL DIAGNOSTICS, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY THE COMPLAINT** was electronically filed with the Court using the CM/ECF system, which sent notification of such to the following:

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