

This decision generously provided by



Social Law Library members can access a
comprehensive database of
keyword searchable
Business Litigation Session decisions,
at

<http://www.socialaw.com>

Not a member and need access to the BLS databases?

[Join Social Law Today!](#)

Docket: 2018-0984-BLS1

Date: June 22, 2018

Parties: ROBERT LOWINGER, Individually and on Behalf of All Others Similarly Situated vs. SOLID BIOSCIENCES INC., and others

Judge: /s/Mitchell H. Kaplan Justice of the Superior Court

ORDER ON DEFENDANTS' MOTION TO STAY PROCEEDINGS

The plaintiff, Robert Lowinger, alleges that he purchased shares of the defendant Solid Biosciences Inc. (SBI) in an initial public offering and that the registration statement and prospectus that the company filed with the Securities Exchange Commission in advance of the IPO contained material misstatements and omissions causing him injury. He has pled claims for recovery under §§ 11 and 12(a)(2) of the Securities Act of 1933 (the 1933 Act) and seeks damages on behalf of a class of similarly situated purchasers of SBI shares. His complaint was filed in this court on March 28, 2018. (Hereafter, the complaint filed in this court will be referred to as Lowinger.) On the previous day, a very similar putative class action arising out of the purchase of shares of SBI was filed in the United States District Court for the District of Massachusetts: *Watkins v. Solid Biosciences Inc., and others*, No. 18-cv-10639 (Watkins).[1] The factual allegations in *Watkins*, are very similar to those in *Lowinger*, although *Watkins* does not include claims under § 12(a)(2) and does not name as many defendants. As the United States

[1] Other cases similar to *Watkins* were subsequently filed in the U.S. District Court; however, it is not clear that they are still pending.

-1-

Supreme Court has recently confirmed, state courts continue to have concurrent jurisdiction with federal courts to adjudicate claims asserting violations of the 1933 Act, and cases asserting such claims filed in state court may not be removed to federal courts, even when they are brought as class actions and the putative class contains more than 50 members. See *Cyan, Inc v. Beaver County Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018). Unable to remove this case to federal court where it could be consolidated with *Watkins*, the defendants have moved to stay this case in favor of *Watkins*. That motion is now before the court.

While having two cases involving largely the same causes of action and same factual allegations proceeding simultaneously in more than one forum always raises the risk of inconsistent rulings and additional costs to the parties, this risk arises in many cases where parties have filed closely related cases in state and federal courts or in more than one state court and jurisdiction is proper in each forum. While sometimes a case is stayed in one forum until the matter is adjudicated another, often there is no basis to deprive either plaintiff of its choice of forum. See, e.g., *Finch v. Thomas Asphalt Paving Co.*, 252 F. Supp. 2d 459 (N.D. Ohio 2002) and cases there described.

An important consideration in deciding whether to stay a case in favor of a proceeding in another forum is whether the forum in which the stay is sought is able to provide more expeditious resolution of the litigation than might be available in the alternative court. In this case, *Watkins* will unavoidably be delayed because it is subject to the Private Securities Litigation Reform Act and therefore the selection of a "lead-plaintiff," while that is not required in *Lowinger*. Further, *Lowinger* is pending in the Business Litigation Section of the Suffolk Superior Court which focuses on

the efficient resolution of business disputes of the type presented by this case.

-2-

There is, however, an overriding factor which makes litigation of this dispute in a Massachusetts state court impracticable. Plaintiff brings this action as a putative class action on behalf of all purchasers of SBI shares who can trace their shares to the IPO. As the Supreme Judicial Court (SJC) held in *Moelis v. Berkshire Life Ins. Co.*, [451 Mass. 483](#) (2008) (*Moelis*), generally, a nationwide class of plaintiffs may not be certified in Massachusetts state courts because due process requires that a class member must be provided with "the opportunity. . . to remove himself or herself from the class," (*id.* at 487) and Mass. R. Civ. P. 23 does not include an "opt out" provision. In the present case, the plaintiff suggests that this due process limitation can be cured by defining "the class to include only those eligible investors who, upon notice of an opportunity to remove themselves from the lawsuit, do not do so." [2] The court disagrees. In *Fletcher v. Cape Cod Gas Co.*, [394 Mass. 595](#), 602 (1985), the SJC stated: "there are no provisions in our Rule 23 . . . which would permit a judge to allow individual parties to 'opt out' of a class action. Moreover, the Reporters' Note to Mass. R. Civ. P. 23 (c) state that '[u]nlike Federal Rule 23, the Massachusetts class action rule does not. . . provide to members of the class the opportunity to exclude themselves." The individual plaintiff cannot, in effect, amend Rule 23 by the expedient of a using class definition that adds in the ability to opt out.

In this case, the plaintiff does not know if there are enough Massachusetts residents who purchased SBI shares traceable to the IPO to warrant class treatment and could not confirm at oral argument that he would wish to pursue this litigation, if it were not possible to certify a nationwide class. Further, without a nationwide class purchasers of SBI shares absent from this

[2] In *Moelis*, the SJC held that buying an insurance policy from a Massachusetts insurance company and mailing premium payments to Massachusetts was insufficient to establish sufficient contacts with Massachusetts to meet due process requirements. The purchase of shares in a Massachusetts based company appears quite similar to the conduct found insufficient in *Moelis*, and the plaintiff does not argue otherwise.

-3-

litigation could not be bound by a judgment entered in this case, or by a settlement. See *Moelis*, 451 Mass. at 486-487. [3] Under these circumstances, the court does not see a workable alternative to a stay of this litigation in favor of *Watkins*.

ORDER

For the foregoing reasons, the defendants' motion to stay this case is ALLOWED. The parties are directed to advise the court of the status of *Watkins* every six months. The plaintiffs may move to have the stay vacated and the case returned to the active docket for good cause shown, which could include delays in the timely completion of the *Watkins* case, although that would not affect the court's inability to certify a nationwide class of purchasers.

/s/Mitchell H. Kaplan Justice of the Superior Court

[3]The court could not certify a nationwide class for settlement purposes, again because there would be no mechanism for class members to opt out.

-4-