

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

LARRY C. JAMES, *et al.*, :
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 :
 Plaintiff-Appellants, : Case No. CA 027735
 :
 :
 v. :
 :
 :
 DAVID HOFFMAN, *et al.*, :
 :
 :
 Defendant-Appellees. :

BRIEF OF PLAINTIFF-APPELLANTS

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Assignments of Error.....	1
Statement of Issues Presented.....	1
Statement of the Case	2
Statement of Relevant Facts	4
Argument	8
I. The Trial Court erred in granting the Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction and in granting the Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction. [Appellants’ First and Second Assignments of Error Combined]	8
A. This Court reviews <i>de novo</i> whether Plaintiffs made a prima facie showing of jurisdiction, construing the evidence in the light most favorable to Plaintiffs	8
B. The Trial Court had specific jurisdiction over the Defendants	9
1. The Defendants purposefully availed themselves of the privileges of Ohio	10
a. Defendants purposefully availed themselves of Ohio by publishing the Report into Ohio	10
b. Hoffman and Sidley’s other contacts with Ohio concerning the Report are sufficient to establish purposeful availment	15
c. The APA’s other contacts with Ohio concerning the Report are sufficient to establish purposeful availment.....	17
2. The Defendants purposefully availed themselves of the privileges of Ohio	18
3. Exercising jurisdiction over defendants would be reasonable.....	19
Conclusion	21
Certificate of Service	23

TABLE OF AUTHORITIES

Cases

<i>Air Products & Controls, Inc. v. Safetech Int'l, Inc.</i> , 503 F.3d 544 (6th Cir. 2007).....	20
<i>Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.</i> , 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed.2d 92 (1987).....	20
<i>Austin Miller Am. Antiques, Inc. v. Cavallaro</i> , 10th Dist. No. 11AP-400, 2011-Ohio-6670, 2011 WL 6835024	8
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	10, 16
<i>Calder v. Jones</i> , 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).....	10, 20
<i>City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.</i> , 399 F.3d 651 (6th Cir. 2005)	19, 20
<i>Cole v. Mileti</i> , 133 F.3d 433 (6th Cir. 1998)	20
<i>CompuServe, Inc. v. Patterson</i> , 89 F.3d 1257 (6th Cir. 1996)	18
<i>Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.</i> , 290 F.3d 42 (1st Cir. 2002).....	17
<i>Fallang v. Hickey</i> , 40 Ohio St.3d 106 (1988).....	8, 12
<i>First Nat'l Bank of Louisville v. J.W. Brewer Tire Co.</i> , 680 F.2d 1123 (6th Cir. 1982)	20
<i>Goldstein v. Christiansen</i> , 70 Ohio St.3d 232, 638 N.E.2d 541 (1994)	8
<i>Hanson v. Denckla</i> , 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).....	9
<i>Helicopteros Nacionales de Colombia, S.A. v. Hall</i> , 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, fn. 8 (1984)	9
<i>Internatl. Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)	9
<i>Kauffman Racing Equip., L.L.C. v. Roberts</i> , 126 Ohio St.3d 81, 2010-Ohio-2551	<i>in passim</i>
<i>Keeton v. Hustler</i> , 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).....	11, 12, 19
<i>Neal v. Janssen</i> , 270 F.3d 332 (6th Cir. 2001)	15
<i>New York Marine Managers, Inc. v. M.V. "Topor-1"</i> , 716 F.Supp. 783 (S.D.N.Y. 1989).....	17

Palmieri v. Estefan, 793 F.Supp. 1182 (S.D.N.Y. 1992).....17

Southern Machine Company v. Mohasco Industries, Inc., 401 F.2d 374
(6th Cir. 1968) *in passim*

Stolle Mach. Co. v. RAM Precision Indus., S.D. Ohio Case No. 3:10-CV-155,
2011 WL 6293323, at *8 (S.D. Ohio Dec. 14, 2011)17

Theunissen v. Matthews, 935 F.2d 1454 (6th Cir. 1991).....8

STATEMENT OF ASSIGNMENTS OF ERROR

- I. The Trial Court erred in granting the Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction. [August 25, 2017 Order Granting Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction.]
- II. The Trial Court erred in granting the Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction. [August 25, 2017 Order Granting Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction.]

STATEMENT OF ISSUES PRESENTED

1. Did the Trial Court have specific personal jurisdiction over the Defendant American Psychological Association in accord with the Due Process Clause of the Fourteenth Amendment to the United States Constitution? [Appellants' First Assignment of Error.]
2. Did the Trial Court have specific personal jurisdiction over the Defendants David Hoffman and Sidley Austin LLP in accord with the Due Process Clause of the Fourteenth Amendment to the United States Constitution? [Appellants' Second Assignment of Error.]

STATEMENT OF THE CASE

Appellants-Plaintiffs, five psychologists, filed this action on February 16, 2017, against the Defendant-Appellees, the American Psychological Association (“APA”) and the law firm of Sidley Austin LLP (“Sidley”) and one of its partners David Hoffman (“Hoffman”) (together the “Sidley Defendants”). The Complaint alleged claims for defamation arising out of three versions of a Report (“Report (s)”) commissioned by the APA, written by Hoffman, and published in a variety of ways, including on the APA website,¹ and arising out of statements made concerning the Reports, made by an APA representative.

The Report accused the Plaintiffs (two of whom were executives of APA and three of whom were military psychologists) of participating in a collusive “joint venture or enterprise” to enable the U.S. military to use interrogation techniques that amounted to torture. (*See generally* Complaint). In fact, all of the Plaintiffs worked persistently and effectively to prevent abusive interrogations. (*See generally* Complaint). One of the Plaintiffs is Colonel (Ret.) Larry James, a psychologist licensed in Ohio who works at Wright State University and resides in Montgomery County. (Complaint ¶38; Affidavit of Larry C. James (filed 5/8/2017) (“James Affidavit”), ¶3).

On April 7, 2017, the Defendants moved to dismiss the case for lack of personal jurisdiction. (*See* 4/7/17 Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction or Forum Non Conveniens; 4/7/17 Defendant American Psychological Association’s Motion to Dismiss for Lack of Personal Jurisdiction or Forum Non Conveniens and Special Motion Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502). The Defendants did not challenge personal jurisdiction under Ohio’s Long Arm Statute, R.C. 2307.382. Rather, the Defendants contended that personal jurisdiction

¹ All page references to the Report are to the first official version dated July 2, 2015, available at: <https://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf>.

was lacking under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Defendants submitted no evidentiary material in support of their Motions; instead, they rested on the contention that the allegations contained in Plaintiffs' Complaint, standing alone, were insufficient to establish personal jurisdiction.

On May 8, 2017, the Plaintiff's filed their Memorandum in Opposition to the Defendants' motions to dismiss. (*See* May 8, 2017 Consolidated Memorandum In Opposition To Defendants' Motions to Dismiss For Lack Of Personal Jurisdiction and Forum Non Conveniens). In addition, Plaintiff's submitted 15 affidavits containing evidentiary support for personal jurisdiction over the Defendants.²

The Trial Court held an oral argument on the Defendants' motions on August 25, 2017. On that same date, the Court issued two orders granting the Defendants' motions. (*See* Aug. 25, 2017 Order Granting Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction ("APA Order"); Aug. 25, 2017 Order Granting Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction ("Sidley Order")).

As to the APA, the Trial Court ruled that general jurisdiction was not available because Ohio was neither its principal place of business nor its place of incorporation. (APA Order at p.1). The Court ruled that specific jurisdiction over the APA by the four non-Ohio residents was unavailable because they did not allege that their claims arose from anything that APA did in Ohio. (*Id.*). The Court ruled that specific jurisdiction over the claims brought by Plaintiff James (an Ohio resident) was also unavailable because: (1) the Complaint's allegation that the APA president sent an email to Plaintiff James in Ohio asking him to cooperate with Hoffman's

² Citations herein to materials contained in the affidavits are made by reference to the last name of the affiant as follows: "[Last Name] Affidavit."

investigation “was the kind of one-off, fortuitous, attenuated connection that is insufficient to establish personal jurisdiction;” (2) the Report did not discuss James’ activities in Ohio; and (3) that publishing the Report on its website did not establish purposeful availment because the Report’s publication was not intentionally targeted to an Ohio audience. (*Id.* at pp. 1-2).

As to Sidley and Hoffman, the Court ruled that general jurisdiction was not available because Hoffman was not domiciled in Ohio and because neither Sidley’s principal place of business nor its place of incorporation was Ohio. (Sidley Order at p. 1). As to specific jurisdiction, the Trial Court ruled that specific jurisdiction as to the four non-Ohio residents was inappropriate because they did not allege that their claims arose from anything that Sidley or Hoffman did in Ohio. (*Id.*). The Court ruled that specific jurisdiction over the claims brought by Plaintiff James (an Ohio resident) was also unavailable because: (1) the Complaint’s allegation that James was interviewed by Hoffman and Sidley in Ohio “was the kind of one-off, fortuitous, attenuated connection that is insufficient to establish personal jurisdiction;” (2) the Report did not discuss James’ activities in Ohio; and (3) they did not intentionally target the Report’s publication to an Ohio audience. (*Id.* at pp. 1-2).

On September 22, 2017, the Plaintiff-Appellants timely filed their Notice of Appeal. (*See* 9/22/17 Plaintiffs’ Notice of Appeal).

STATEMENT OF RELEVANT FACTS

On November 20, 2014, the APA engaged Hoffman and Sidley to conduct an “independent review relating to allegations that, following the attacks of September 11, 2001, the APA colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad.” (Newman Affidavit, ¶15 & Ex. I thereto; *see generally* Complaint, ¶2). As part of the engagement, Hoffman and Sidley were to prepare a

report to the APA of their findings. (*Id.*). The APA Board resolution authorizing the hiring of Hoffman and Sidley and the Defendants' engagement letter specified that the Report would be made public. (Complaint, ¶18; Newman Affidavit, ¶15 & Ex. I thereto).

Ultimately, Hoffman delivered a draft Report to the APA Board on June 27, 2015. (Complaint, ¶295). The APA published a final version on its website on July 10, 2017, and a revised version on September 4, 2017. (Complaint, ¶¶419-20, 465-57). The complaint describes nine publications of three versions of the Report (*see* Complaint, Counts 1-7; 9-11) and statements made concerning the Report's contents made by an APA representative (*see* Complaint, Count 8). Binding together the Report's 500-plus pages is an overarching false and defamatory narrative: from 2005 to 2014, Plaintiff-Appellants and others "colluded" to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations. (Complaint, ¶5).

In support of Hoffman and Sidley's preparation of the Report, the APA, primarily through its then Board Chair Dr. Nadine Kaslow, sent emails and letters to possible witnesses encouraging their cooperation with Hoffman and his investigation. Several of these email and letters were sent to witnesses in Ohio, including Plaintiff James, former APA President Dr. Ron Levant, and Professor Elizabeth Swenson at John Carroll University. (*See* Complaint, ¶164; James Affidavit, ¶3; Levant Affidavit, ¶3; Swenson Affidavit, ¶2).

Hoffman and Sidley interviewed a total of six Ohio residents during the preparation of the Report. (Report, Attachment A (Interviews conducted or attempted); Newman Affidavit at ¶16). At least two of these interviews were in-person in Ohio. Plaintiff James was interviewed by Hoffman and his team in his office in Dayton on May 1, 2015. (Complaint, ¶61; James Affidavit, ¶4). Hoffman and an associate also interviewed Dr. Levant in Ohio and even sent a

person to Ohio to search his computer and files. (Levant Affidavit, ¶¶3-4). Another Ohioan, Dr. Trudy Bond, who had spent years attacking Plaintiff James in a variety of forums, was also interviewed by Hoffman. (Complaint, ¶¶56, 291, 472, 492, 505).

The Defendants affirmatively and purposefully published the Report into Ohio multiple times. When the Report was first published by Hoffman and Sidley to the APA Board on June 27, 2015, members of the APA Board were notified by email that they could access the Report from a secure website from their home or work computers. (See Anton Affidavit, ¶ 4; Strickland Affidavit, ¶4). Two of the APA Board members were Ohio residents. (See Complaint, ¶¶ 2 n.2, 59, 295, 247, 337; Newman Affidavit, at ¶17 & Exhibit J thereto). The APA Board and Council continued to act on the contents of the Report via email and phone calls with governance members who reside in Ohio. (Newman Affidavit ¶17 (referencing the APA Board Minutes)).

On July 10, 2015, the APA “tweeted” the Report, which directly reached approximately 1,392 active followers in Ohio. (See Newman Affidavit, ¶11 & Ex. G thereto (identifying 1,392 Ohio followers of APA’s twitter account)).

The APA published the document on its website twice (on July 10, 2015 and September 4, 2015), where it became accessible to the world, including the residents of Ohio generally and the 1500 members of APA licensed to practice psychology in Ohio. (Complaint at ¶¶2 n.2, 59, 419-20, 456-57, 477-78). APA’s membership in Ohio received notice that the Report was available online, and it was read by members of the APA, and the general public in Ohio. (See Corrigan Affidavit, ¶3 (stating that he accessed the Report online from his home in Columbus, Ohio on July 10, 2015, when he received an email from the APA notifying him that the Report was available online); Peters Affidavit, ¶2 (stating that she accessed the Report online and read it from her home and office in Dayton, Ohio, after receiving notice from the APA governance

listserv about the availability of the Report); Meyer Affidavit, ¶2 (stating that he first read the Report online from his office in Toledo Ohio when after he received an email from APA leadership that the Report was available on the APA website); Mihura Affidavit, ¶2 (stating that she read the Report online from her office in Toledo after she received an email from APA leadership that the Report was available on the APA website); Platoni Affidavit, ¶2 (stating that she read the Report online from her home in Beavercreek Ohio)).

The publication of the Report has caused severe damage to the professional and personal reputations of all the Plaintiffs. (Complaint, ¶35). Plaintiff Behnke was fired as the director of the APA Ethics Office, a position he held for almost 15 years. (*Id.*). Plaintiff Newman was forced to resign his position as Provost and Senior Vice President of Academic Affairs of Alliant International University. (*Id.*). Plaintiffs have been the objects of a barrage of negative media coverage. (Complaint, ¶36). Critics of Plaintiffs have relied on the Report to urge criminal and war-crime prosecutions against the Plaintiffs. (Complaint, ¶37).

With regard to Plaintiff James, the focal point and brunt of the harm has been experienced in Ohio. The publication of the Report has caused considerable negative media coverage of Plaintiff James in Dayton and around the entire state of Ohio. (James Affidavit, ¶21). Even a congressional candidate for John Boehner's southern Ohio congressional seat in a special primary election in September 2015, tweeted to his approximately 346 Ohio followers that "[t]wo key players involved in the @apa-CIA/DOD torture scheme were Ohioans: Larry James @wrightstate and Ron Levant at @uakron. (July 11, 2015)" (Newman Affidavit, Ex. E).

Plaintiff James immediately received inquiries from other Ohio residents who read the Report, including his boss at Wright State University, who specifically focused on the fact that the Report mentioned the ethics complaints previously adjudicated against James in Ohio. (*See*

James Affidavit at ¶10 (describing July 13, 2015 email from Interim Dean Winfrey expressing concern that Report might reopen old allegations against Plaintiff James). Shortly after the Report was published, the Ohio Psychological Association sent an email to all of its members encouraging them to go the APA website to read the Report. *Id.* at ¶11.

ARGUMENT

I. The Trial Court erred in granting the Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction and in granting the Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction. [Appellants' First and Second Assignments of Error Combined].

A. This Court reviews *de novo* whether Plaintiffs made a prima facie showing of jurisdiction, construing the evidence in the light most favorable to Plaintiffs.

“Personal jurisdiction is a question of law that appellate courts review *de novo*.” *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, ¶27. Upon a defendant's motion to dismiss, the plaintiff bears the burden of establishing that the trial court has personal jurisdiction over the defendant. *Id.*, (citing *Fallang v. Hickey*, 40 Ohio St.3d 106, 107 (1988)). Where, like here, the Trial Court determines a Civ.R. 12(B)(2) motion to dismiss without an evidentiary hearing, “the plaintiff need only establish a prima facie showing of personal jurisdiction.” *Austin Miller Am. Antiques, Inc. v. Cavallaro*, 10th Dist. No. 11AP-400, 2011-Ohio-6670, 2011 WL 6835024, ¶7. In resolving the motion, the court must view the allegations in the pleadings and the evidence presented in the light most favorable to the plaintiff and make all reasonable inferences in the plaintiff's favor. *Kauffman Racing*, at ¶27 (citing *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 638 N.E.2d 541 (1994)).

Here, this Court must review the Trial Court's determination *de novo* taking all of the allegations of the Plaintiffs' Complaint and those set forth in the Affidavits submitted by Plaintiffs to be true. *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991) (“The

pleadings and affidavits submitted must be viewed in a light most favorable to the plaintiff,” and the court should “not weigh the controverting assertions of the party seeking dismissal.”). Based upon that standard, Plaintiff-Appellants more than met their burden.

B. The Trial Court had specific jurisdiction over the Defendants.

Due process is satisfied if the defendant has “minimum contacts” with the forum state such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *Internatl. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The minimum-contacts requirement is met when a nonresident defendant “purposefully avails [himself] of the privilege of conducting activities within the forum State.” *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state. General jurisdiction is proper only where a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state. *Kauffman Racing, supra*, at ¶46 (internal quotations omitted). Specific jurisdiction applies when ““a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.”” *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404, fn. 8 (1984)).

Specific jurisdiction is permissible only if a defendant's contacts with Ohio satisfy the three-part test established in *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). *Kauffman, supra*, at ¶49-50. First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum

state. Second, the cause of action must arise from the defendant's activities in the forum state. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Id.* at ¶49. All three requirements are established here.

1. The Defendants purposefully availed themselves of the privileges of Ohio.

The first prong of the test, purposeful availment, is the “sine qua non” for personal jurisdiction. *Southern Machine*, 401 F.2d at 381-82. It “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous’ or ‘attenuated’ contacts or of the ‘unilateral activity of another party or third person.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). “Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.” *Id.* (citation omitted and emphasis in original).

a. Defendants purposefully availed themselves of Ohio by publishing the Report into Ohio.

This is a defamation case. United States and Ohio Supreme Court precedent provides that publication of defamatory statements into the plaintiff's jurisdiction constitutes special evidence of purposeful availment, given the nature of the tort of defamation and the fact that a person's reputation is centered in the community in which he or she resides. In other words, jurisdiction is proper in the forum state based on the “effects” of the defamatory statements being published there.

For example, in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), plaintiff brought a libel action in California against a *National Enquirer* reporter and editor based in Florida. The U.S. Supreme Court held that California could assert jurisdiction based on the “effects” in California of the article's publication, although the “conduct” of its research and

writing took place almost exclusively in Florida. *Calder*, 465 U.S. at 788-790. As the Court explained, the defendants wrote and edited an article that they knew would have a potentially devastating impact upon the plaintiff and knew that the brunt of that injury would be felt by Plaintiff in California where she lived and worked and where National Enquirer had its largest circulation. *Id.* at 789-90. As the Supreme Court stated, “[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.” *Id.* at 789-790.

Similarly, In *Keeton v. Hustler*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), a defamation case decided on the same day as *Calder*, the U.S. Supreme Court found that *Hustler*, an Ohio corporation with its principal place of business in California, purposefully directed its conduct into New Hampshire simply because it distributed between 10,000 and 15,000 magazines into the state per month. *Id.* at 781 (“Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.”). As in *Calder*, the publication of defamation into the forum states could not be considered to constitute merely random, isolated, or fortuitous contacts if defendant clearly knew that his actions could injure the plaintiff’s reputation in the forum state.

Significantly, in *Keeton*, the court recognized that jurisdiction was proper in New Hampshire even though the plaintiff was a resident of New York, and “undoubtedly that the bulk of the harm done to [plaintiff] occurred outside of New Hampshire.” *Id.* at 780. As the Court explained, “that will be true in almost every libel action brought somewhere other than the plaintiff’s domicile.” *Id.* Given that the defendant’s magazine had a nationwide audience, there

was “no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.”

Consistent with these U.S. Supreme Court precedents, the Ohio Supreme Court in *Fallang v. Hickey*, 40 Ohio St.3d 106 (1988), similarly held that “[t]he tort of libel occurs in the locale where the offending material is circulated (published) by the defendant to a third party.” *Id.* at 107 (citing *Keeton v. Hustler Magazine, Inc.*). It therefore found that an out-of-state defendant was subject to the jurisdiction of an Ohio court on the basis of a single defamatory letter mailed to an Ohio resident that injured the personal and professional reputation of the plaintiff, also an Ohio resident. *Id.* at 108. “[A] single purposeful contact is enough to satisfy the requirements of due process.” *Id.*

Finally, and particularly relevant here, in *Kauffman Racing, Equip., L.L.C. v. Roberts*, *supra*, the Ohio Supreme Court addressed the purposeful availment test in the context of a defamatory statement made, like here, on the internet about an Ohioan and read by Ohioans. In *Kauffman Racing*, an out-of-state defendant posted defamatory statements about the plaintiff, an Ohio resident, on the Internet, “ostensibly for the entire world to see.” *Kauffman*, 12 Ohio St.3d 81, ¶42. The Ohio Supreme Court found the constitutional due-process prong of the jurisdictional inquiry was satisfied because the defendant knew the plaintiff was an Ohio resident, at least five Ohio residents in addition to the plaintiff read the defamatory statements, and the focal point of the harm to the plaintiff was in Ohio where he resided. *Id.* at ¶68. The analysis and conclusion of *Kauffman Racing* applies equally here.

First, the Report was purposefully published into Ohio on multiple occasions directly by Defendants, not simply by a third party. The Report was first published by Hoffman and Sidley on June 27, 2015, to APA’s Board which included two members who were Ohio residents. (*See*

Complaint, ¶¶ 2 n.2, 59, 295, 247, 337; Newman Affidavit, ¶17 & Exhibit J thereto). Members of the APA Board were notified by email that they could access the Report from a secure website from their home or work computers. (See Anton Affidavit at ¶ 4; Strickland Affidavit at ¶4).

On July 10, 2015, the APA “tweeted” the Report, directly reaching approximately 1,392 active followers in Ohio. (See Newman Affidavit, ¶11 & Ex. G thereto (identifying 1,392 Ohio followers of APA’s twitter account)).

The APA published the document on its website twice (on July 10, 2015 and September 4, 2015), where it became accessible to the world, including the residents of Ohio, not least of which included the 1500 members of APA licensed to practice psychology in Ohio. (Complaint, ¶¶2 n.2, 59, 419-20, 456-57, 477-78). APA’s membership in Ohio received notice that the Report was available online, and it was read by members of the APA in Ohio. (See Corrigan Affidavit, ¶3; Peters Affidavit, ¶2; Meyer Affidavit, ¶2; Mihura Affidavit, ¶2; Platoni Affidavit, ¶2 (all stating that they read the Report online in Ohio after receiving notice from APA that it was available)).

The Board resolution authorizing the hiring of Hoffman and Sidley and the Defendants’ engagement letter specified that the Report would be made public. (Complaint, ¶18; Newman Affidavit, ¶15 & Ex. I thereto). Given the controversy surrounding the allegations against the APA and Plaintiffs, Defendants knew to a certainty that the Report’s contents would be circulated nationwide and world-wide by the media – as promptly happened, by among others, *The New York Times*. *The New York Times* republication was particularly foreseeable, given that APA, at Hoffman’s suggestion, provided a draft of the Report to two of Hoffman’s sources, knowing that they had collaborated with the *Times* reporter whose accusations sparked the investigation and to whom the Report was leaked before APA made it public. (Complaint, ¶¶ 26-

28, 296). *The New York Times* has approximately 34,993 readers in Ohio. (See Affidavit of Alliance for Audited Media).

Second, Defendants knew that their defamatory statements would cause injury in Ohio. Plaintiff James was an Ohio resident when they published the defamatory statements into Ohio, and like in *Kauffman Racing*, the focal point of the harm to his reputation is in Ohio. (Complaint, ¶62). He is a psychologist licensed in Ohio and a member of the faculty of Wright State University. (Complaint, ¶38, James Affidavit, ¶2). Defendants knew that the Ohio Psychological Association had previously investigated the Complaints against Dr. James, filed by Ohio residents, and found no wrongdoing and further knew that an Ohio Court reviewing that decision found no reason to disturb it. (James Affidavit, ¶¶13-16). The publication of the Report by Defendants has caused considerable negative media coverage of Plaintiff James in Dayton and around the entire state of Ohio. (James Affidavit, ¶21). In fact, James immediately received inquiries from other Ohio residents who read the report, including his boss at Wright State University, who specifically focused on the fact that the Report mentioned the ethics complaints previously adjudicated against James in Ohio. (See James Affidavit, ¶10 (describing a July 13, 2015 email from Interim Dean Winfrey expressing concern that Report might reopen old allegations against Plaintiff James). Shortly after the Report was published, the Ohio Psychological Association sent an email to all of its members encouraging them to go the APA website to read the Report. (*Id.*, ¶11).

Other reactions by Ohio residents made clear the Report's impact on Col. James' reputation in Ohio. Steven Fought, a candidate for Congressman John Boehner's congressional seat in a special primary election in September 2017, tweeted to his approximately 346 Ohio followers, among other things, that "Two key players involved in the @apa-CIA/DOD torture

scheme were Ohioans: Larry James @wrightstate and Ron Levant at @uakron. (July 11, 2015).” (Newman Affidavit, Ex. E).

In short, Defendants purposefully published the defamatory Report about the Plaintiffs, including an Ohio resident, into Ohio causing reputational harm in Ohio. Under these circumstances, Defendants should have reasonably anticipated being haled into court in Ohio.

b. Hoffman and Sidley’s other contacts with Ohio concerning the Report are sufficient to establish purposeful availment.

In its decision, the Trial Court only addressed Hoffman’s interview with Plaintiff James in Ohio, finding that it was the “kind of one-off, fortuitous, attenuated connection that is insufficient to establish personal jurisdiction.” (Sidley Order at 2). In so doing, however, the Trial Court ignored the other evidence that demonstrates that Hoffman’s conduct with Ohio concerning the Report was not so attenuated.

As the Hoffman Report itself states, Mr. Hoffman and Sidley interviewed a total of six Ohio residents during the preparation of the Report. (Report, Attachment A (Interviews conducted or attempted); Newman Affidavit at ¶16). At least two of these interviews were in-person in Ohio, including Plaintiff James, who was interviewed by Hoffman and his team in his office in Dayton on May 1, 2015. (James Affidavit, ¶4). In addition, Hoffman and an associate also interviewed Dr. Ron Levant, a former APA president, in Ohio and even sent a person to Ohio to search his computer and files. (Levant Affidavit, ¶3-4). Another Ohioan, Dr. Trudy Bond, who had spent years attacking Col. James in a variety of forums, was also interviewed by Hoffman. (Complaint ¶56, 291, 472, 492, 505).

Moreover, it is the quality of the contacts, not just the quantity, that determines whether purposeful availment is satisfied. *See Neal v. Janssen*, 270 F.3d 332 (6th Cir. 2001). Here, Plaintiff James and Dr. Levant were not minor witnesses within a long list of interviewees. On

the contrary, the Report alleges they were key players in the collusive activity of which Plaintiffs were accused. (Report at pp. 12-13, 36, 363, 386).

Dr. Levant was the APA President when it issued the Psychological Ethics and National Security Guidelines (“PENS”) Guidelines, the focus of the Report’s most significant allegation. (Levant Affidavit, ¶2). The importance Hoffman places on his interview with Dr. Levant is reflected in his summary of his research: Levant is the only individual interviewee he singles out, aside from interviews with the critics of the APA who sparked his investigation. (Report at p. 7).

Plaintiff James’ activities described in the Report span a longer period than those of any other military officer accused of the collusion, thus enabling Hoffman to expand the scope of the alleged wrongdoing. Hoffman could not have constructed the entirety of his narrative without alleging Col. James’ participation in the collusive “joint venture-enterprise,” and he could not have claimed, as he does, to have conducted a thorough investigation without interviewing both Col. James and Dr. Levant. (*See* Report, at pp. 10, 36, 65, 340, 388, 429, 446).

Moreover, Dr. Bond, who had previously filed a complaint against Col. James with the Ohio Board of Psychology which was found by the Board to warrant no action (James Affidavit, ¶13 & Ex. D and E thereto), was a key source for Hoffman’s defamatory discussion of the APA’s handling of ethics claims against Col. James and others. The Report cites her 47 times, more often than all but one of the other long-standing critics of Plaintiffs. (*See* Report at pp. 494, 497, 498, 501-504, 520).

Simply put, Hoffman and Sidley’s contacts with Ohio in the preparation of the Report were not “‘random,’ ‘fortuitous’ or ‘attenuated’ contacts or of the ‘unilateral activity of another party or third person.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

c. The APA's other contacts with Ohio concerning the Report are sufficient to establish purposeful availment.

As to the conduct of the APA, the actions of Hoffman and Sidley should be imputed to APA for jurisdictional purposes. "An agent's contacts with a forum may be imputed to the principal for purposes of establishing personal jurisdiction." *Stolle Mach. Co. v. RAM Precision Indus.*, S.D. Ohio Case No. 3:10-CV-155, 2011 WL 6293323, at *8 (S.D. Ohio Dec. 14, 2011). To come within the rule, a plaintiff need demonstrate neither a formal agency agreement, *see, e.g., New York Marine Managers, Inc. v. M.V. "Topor-1"*, 716 F.Supp. 783, 785 (S.D.N.Y. 1989), nor that the defendant exercised direct control over its agent, *see, e.g., Palmieri v. Estefan*, 793 F.Supp. 1182, 1194 (S.D.N.Y. 1992).

In this case, Hoffman and Sidley were agents of APA. APA expressly engaged Hoffman and Sidley to conduct the investigation and write the Report. (Newman Affidavit, Exhibit I: Sidley Engagement Letter). APA Board members Drs. Kaslow and Susan McDaniel oversaw the activities of Hoffman and Sidley, and Dr. Kaslow emailed witnesses to ask for their cooperation with Hoffman. Throughout Hoffman and Sidley's contact with Plaintiffs, Hoffman used APA's name as authority for his activities. (*See generally* Complaint ¶¶ 18, 49-50, 154-56, 164, 181, 183- 188).

The agency relationship was thereafter cemented by APA's ratification of the Report after its completion. "Whether or not an agent is initially authorized to act on behalf of a principal, the agent's actions may be attributed to the principal, for purposes of personal jurisdiction, if the principal later ratifies the agent's conduct." *Stolle*, 2011 WL 6293323, at *8 (quoting *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 55 (1st Cir. 2002)). When APA accepted the Report, posted it on its website, and acted on it to fire Dr. Behnke, it adopted the activities of Hoffman and Sidley as its own. That ratification was

underlined by Dr. Kaslow in her interviews with the media. (Complaint, ¶¶ 183, 262-264, 282, 456, 477). In short, for purposes of establishing personal jurisdiction, therefore, the Court should impute Hoffman and Sidley's actions to APA.

Moreover, APA also had its own separate contacts that reinforce the sufficiency of its contacts to establish jurisdiction. Dr. Kaslow emailed Plaintiff James at his place of employment in Ohio to ask him to cooperate with Hoffman's investigation. (James Affidavit, ¶ 3). Dr. Kaslow also sent a letter to Dr. Levant to his home in Ohio asking that he cooperate in the Hoffman investigation. (Levant Affidavit, ¶3). Dr. Kaslow sent a similar letter to Dr. Elizabeth Swenson in Ohio asking that she cooperate in the Hoffman investigation. (Swenson Affidavit, ¶2). Given the importance of Plaintiff James and Dr. Levant for Hoffman's narrative, these communications into Ohio were not trivial.

Second, during the events discussed in the Report and during APA's decisions after the Report's publication, at least two Board members were residents of Ohio and participated in the Board meetings and decisions by phone and email. (Newman Affidavit, ¶16, Exhibit J thereto).

2. Plaintiffs' claims arise out of the activities of the Defendants in Ohio.

The second prong of the *Southern Machine* test asks whether Plaintiffs' claims arise from Defendants' contacts with Ohio. "If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts." *Kauffman Racing, supra*, at ¶70 (quoting *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996)). This "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the causes of action, of whatever type, *have a substantial connection with* the defendant's instate activities'" *Id.* (internal quotation and citations omitted) (emphasis added). Further, a "lenient standard ...

applies when evaluating the ‘arising from’ criterion.” *Id.* (internal quotation and citations omitted).

Here, Plaintiffs’ claims all arise out of the publication of the Report. The Defendants’ contacts with Ohio outlined above all concern the Report – APA’s efforts to encourage Ohioans to participate in the investigation, Hoffman’s investigation leading up to the Report, and the repeated publication of that Report into Ohio by all of the Defendants, with evidence the Report was read by Ohio residents (Alliance for Audited Media, Corrigan, Levant, Meyer, Mihura, Newman, Peters, Platoni and Swenson Affidavits).

Moreover, all of the Plaintiffs were defamed by the Report’s publication into Ohio. The Report alleged a collusive joint venture-enterprise engaged in by all Plaintiffs, as key players who spoke on behalf of their respective organizations over many years – not a series of discrete, unrelated acts by each Plaintiff separately. The Report implicated all Plaintiffs equally in that alleged collusion. Therefore, the activities of the Defendants in Ohio have the requisite substantial connections with all of their claims and the joinder of those Plaintiffs was appropriate. *Cf. Keeton*, 465 U.S. at 780 (“The victim of libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has certain minimum contacts... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”) (internal citations omitted); *see also*, Ohio Rule of Civil Procedure Rule 20)

3. Exercising jurisdiction over defendants would be reasonable.

The final prong of the due process analysis ensures that the assertion of jurisdiction is fair and reasonable. In determining whether the exercise of jurisdiction is reasonable over Defendants, the Court is to balance a number of factors: (1) the interests of the forum state, (2) the burden on the defendant, and (3) the plaintiff’s interest in obtaining relief. *City of Monroe Emps. Ret. Sys. v.*

Bridgestone Corp., 399 F.3d 651, 666 (6th Cir. 2005) (quoting *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 111, 107 S. Ct. 1026, 1031, 94 L. Ed.2d 92 (1987)).

Importantly, where like here, the first two elements of the *Southern Machine* test are satisfied, an inference arises that the third element is also established. *Kauffman Racing, supra*, at ¶71; *Cole v. Mileti*, 133 F.3d 433, 436 (6th Cir. 1998) (when a defendant purposefully availed himself of the forum and the cause of action arose directly from that contact, “we presume the specific assertion of personal jurisdiction was proper”). In fact, only the “unusual case” will outweigh this inference. *Kauffman Racing*, at ¶71; *First Nat'l Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982) (noting that only unusual cases will outweigh this inference). Indeed, Defendants “must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Air Products & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 554 (6th Cir. 2007); *Calder v. Jones*, 465 U.S. at 788-789 (“a high degree of unfairness is required to erect a constitutional barrier against jurisdiction.”). Here, this is not the “the unusual case” where the exercise of jurisdiction over Defendants would be unfair or unreasonable.

First, Defendants presented no evidence that defending themselves in Ohio will cause any burden on them that is specific, unique, or greater than any well-heeled, out-of-state defendant routinely faces in our modern legal landscape. Travel from Washington, D.C. (where APA is headquartered) and Chicago (where Sidley is headquartered) to Ohio is quick and inexpensive, with direct flights from both cities, and Defendants are well able to bear the costs of that travel. Lawyers from Sidley and the non-Ohio firms representing Defendants litigate constantly around the country. In APA’s engagement letter with Sidley, it agreed that any claims between them

would be litigated in Illinois, which is farther from the District of Columbia than is Dayton. (*See Newman Affidavit, Exhibit I*).

Second, “Ohio has a legitimate interest in protecting the business interests of its citizens ...” *Kauffman Racing, supra*, at ¶72. Plaintiff Col. James is an Ohio citizen and the injury to his reputation has occurred, amongst many places, in Ohio. While the other Plaintiffs are not Ohio citizens, they too suffered reputational harm in Ohio. Ohio therefore has an interest in redressing these harms.

Third, Plaintiffs’ interest in repairing the damage to their reputations and their ability to work in their professions is best served by litigating their claims in a single court. The claims arise from the same core set of facts, the same actions by Defendants, and the same theories. Plaintiffs have chosen Ohio not only because it is Col. James’ domicile, but also because the expense of litigating there will be less than the costs in locations such as Washington or Chicago.

In sum, the exercise of jurisdiction over the Defendants is fundamentally fair and reasonable.

CONCLUSION

For the foregoing reasons, the orders of the Trial Court granting the Motion of Defendant American Psychological Association to Dismiss for Lack of Personal Jurisdiction and granting the Motion of Defendants Sidley Austin LLP and David Hoffman to Dismiss for Lack of Personal Jurisdiction should be reversed.

Respectfully submitted,



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The undersigned certifies that on November 27, 2017 a true and correct copy of the foregoing Brief of Plaintiff-Appellants was served via email upon the following:

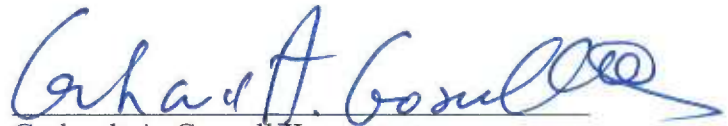
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