IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS

CIVIL DIVISION

LARRY C. JAMES, *et al.*,	:	**CASE NO: 2017 CV 00839**
	:	
Plaintiffs,	:	**Judge Timothy N. O'Connell**
	:	
vs.	:	
	:	
DAVID HOFFMAN, *et al.*,	:	
	:	
Defendants.	:	
	:	

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page**

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

Plaintiffs are five psychologists whom Defendants accused of having participated in a collusive "joint enterprise," with the goal of enabling the U.S. military to employ interrogation techniques that amounted to torture. Two Plaintiffs were executives of the Defendant American Psychological Association ("APA"); three were APA members who, as military psychologists, worked persistently and effectively to prevent abusive interrogations.

The defamatory accusations were made in a draft and two official versions of a report ("Report" or "Hoffman Report") commissioned by the APA and written by Defendants David Hoffman (Hoffman) and Sidley Austin LLP (Sidley) (collectively, the Defendants).[2] The Report was repeatedly published in Ohio and elsewhere in 2015. After the Report's publication, Dr. Nadine Kaslow, the chair of the APA committee that oversaw APA's engagement with Hoffman, also made defamatory statements on behalf of APA in media interviews that were distributed in Ohio and elsewhere. The Report and Kaslow's subsequent statements contained factual assertions that have been proven false by documents and by an increasing number of witnesses who have come forward since the Report's publication. (*See*, *e.g.*, Crow Affidavit[3])

Members of the APA Board have admitted that the Report contained many inaccuracies. (Resnick Affidavit) The Board even re-hired Hoffman and Sidley to fix the Report with a supplement that was due by June 8, 2016, but has yet to emerge. Hoffman himself has admitted

[1] On April 20, 2017, the Court approved a revised briefing schedule filed by the parties that included a stay on all briefing of motions pending except for the jurisdictional motions. Accordingly, this consolidated opposition addresses the Hoffman and Sidley Motion to Dismiss for Lack of Personal Jurisdiction and pages 1-17 of APA's Combined Motion, both of which were filed on April 7, 2017.

[2] All page references to the Report are to the first official version dated July 2, 2015, available here: https://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf. Upon request Plaintiffs will make hard copies of each of version of the Report available for the Court.

[3] This memo is supported by 15 affidavits identified by the last name of each affiant and filed individually with the Court alphabetically by last name.

that "behind-the-scenes communication" – in other words, the normal exchanges within an organization – more accurately describes the events at issue than "collusion," a word he uses throughout the Report. (Newman Affidavit)

Others who are not aligned with the Plaintiffs and have first-hand knowledge of the events have pointed out the Report's factual misstatements. For example, the Report accuses Plaintiffs of having colluded to block the APA from banning psychologists from participating in the interrogation process. A professor of psychology and international human rights who was involved in the debates and supported such a ban has written: "The Hoffman Report totally disregarded some events and took other events and bent them to fit a destructive narrative." She was "stunned," she wrote, by the Report's "misinformation" and "mischaracterization." (Behnke Affidavit)

This suit is not about bruised feelings, differing perspectives, or disagreements about policy issues. It is about conclusions falsely presented as fact and then woven into a narrative about collusion that has also been proven false – a narrative Hoffman adopted from dedicated critics of APA and Plaintiffs. (Newman Affidavit)

Many documents and witnesses demonstrate that Defendants, including APA, knew the statements were false when they were published or at a minimum acted with reckless disregard. The factual allegations in Plaintiffs' Complaint plead precisely the evidence that courts have accepted as demonstrating actual malice: a preconceived storyline, intent to injure, conscious disregard of contradictory evidence, failure to interview obvious sources, inadequate investigation, and post-publication conduct. *See Eramo v. Rolling Stone, LLC*, 2016 WL 5234688, *5-7 (W.D. Va. Sept. 22, 2016) (collecting cases on what constitutes relevant circumstantial evidence of actual malice).

This action was properly initiated in Ohio by Colonel (Ret.) Larry James, a psychologist licensed in Ohio who works at Wright State University and resides in Montgomery County. (Complaint ¶38 and James Affidavit) Defendants' defamatory statements have damaged his professional and personal reputation among his colleagues, to whom the Report has been widely circulated, as well as more broadly. Colonels (Ret.) L. Morgan Banks, III, and Debra L. Dunivin and Drs. Stephen Behnke and Russell Newman (collectively with Col. James, the Plaintiffs), who were also falsely accused of participating in the collusive joint enterprise, are nonresident co-plaintiffs. Drs. Behnke and Newman lost their jobs as a direct result of the Report, and all have had their reputations damaged in Ohio and elsewhere. (Behnke, James, Newman Affidavits; (collectively the "Plaintiffs' Affidavits"))

All of Plaintiffs' claims share a common nucleus of facts arising out of the Report, the investigation on which it was based, and the consequences of its publication.

This Court has multiple grounds for exercising personal jurisdiction over all claims in the case, and Ohio is the most appropriate forum. In arguing to the contrary, Defendants ignore or minimize the jurisdictional factors found by the Ohio Supreme Court to apply specifically to defamation cases. In such cases, the tort occurs where the defamatory statements are published and the relevant contacts for jurisdictional purposes consist primarily of publications. Defendants try to treat the case as a contracts or stream-of-commerce case. Even in that context, they omit many of their contacts with Ohio that would create jurisdiction. They also mischaracterize the case's connection with the District of Columbia, the forum they favor, and ignore the fact that parties, witnesses, and documents are distributed around the country, including in Ohio. (Behnke Affidavit)

Plaintiffs' defamation and false light claims meet all the requirements for both general and specific jurisdiction:

Specific jurisdiction. The tortious injuries at the heart of this action fall easily into the scope of Ohio's long-arm statute, a point Defendants did not contest, and there are no due-process obstacles to applying the statute to this case. It satisfies all prongs of the firmly established *Southern Machine* due-process standard. *See Southern Mach. Co. v. Mohasco Industries, Inc*., 401 F.2d 374 (6th Cir. 1968).

First, the Defendants purposefully availed themselves of the forum. In defamation cases, the Ohio Supreme Court has emphasized publication rather than other types of contacts with a forum. It has also held that a single publication of a defamatory statement into Ohio is enough to create jurisdiction. *See Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988) (a case Defendants do not cite). In fact, Defendants published the Report into the forum on several occasions, to thousands of Ohio residents, as Plaintiffs' affidavits demonstrate. (Plaintiffs' Affidavits; Alliance for Audited Media ("AAM") Affidavit; Newman Affidavit; Corrigan, Levant, Meyer, Mihura, Peters, Platoni, and Swenson Affidavits (collectively, the "Ohio Residents' Affidavits"))

Even if other types of contacts were essential in a defamation case, all Defendants had other contacts with Ohio that meet the minimum-contacts standard. Defendants Hoffman and Sidley incorrectly assert that their only relevant contact was a single interview with Col. James (Hoffman and Sidley Motion, p. ii). As the Report shows, Hoffman conducted six interviews with Ohio residents, at least two of them in person in Ohio (with former APA President Dr. Ron Levant and Col. James). He also sent a computer technician to examine Dr. Levant's computer in Ohio (Report, p. 7, Attachment A; Levant, Swenson, and Newman Affidavits). Three of those interviewed, including Dr. Levant and Col. James, were critical to the investigation. (Complaint

¶¶ 56, 78, 291, 472, 492, 505) As Hoffman was APA's agent, his contacts are attributable to APA. (Complaint ¶¶ 45, 49, 50, 348, 429, 439)

Second, the claims arise from the Defendants' contacts with the state. That is clearly true as to the publication of the Report into the state, the critical series of contacts in a defamation case. In addition, Hoffman could not have created his over-arching narrative of "collusion," or have claimed that it was based on a thorough investigation, but for the interviews of key witnesses in Ohio. (Complaint ¶¶ FN #2, 240, 295, 296, 316, 337, 359, 380, 399, 419, 439, 456, 477, 503, 505, 524)

Third, the exercise of jurisdiction is eminently reasonable. It serves Ohio's interests in adjudicating events that have severely damaged one of its citizens (Col. James), who has also been unsuccessfully attacked by other Ohio residents before the Ohio Board of Psychology and the Court of Common Pleas in Franklin County. (James Affidavit) Moreover, it imposes no significant burden on the Defendants.

Given the jurisdictional standards established by the U.S. Supreme Court in *Keeton v. Hustler*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), this Court has grounds for exercising jurisdiction over each of the Plaintiffs' claims. *Keeton* held that a state's interest in redressing torts occurring within its borders could properly extend to torts committed against nonresidents. *Id*. at 777. Ohio law also favors the joinder of related claims and parties. If the Court has jurisdiction over Col. James' claims, it should exercise jurisdiction over Plaintiffs' other claims in the interests of judicial efficiency and to ensure they have their day in court.

General jurisdiction. Defendants mistakenly assert that they can be "at home" only in Sidley's and APA's places of incorporation or principal places of business and, in Hoffman's case, in his domicile. The law does not so hold. Even for conventional corporations, the U.S.

Supreme Court has made clear that the "at-home" test is not so rigid. This is certainly the case for a global law firm such as Sidley. Its lawyers litigate around the country, and it takes pains not to present itself as a Chicago-based firm. (Newman Affidavit) It is also the case for a professional association such as APA, whose function is to serve its members around the country and whose governance bodies consist of members in many jurisdictions. Both APA and Sidley have enough continuous and systematic affiliations with Ohio to render them at home here, and Sidley's affiliations should be attributed to Hoffman, a member of its partnership.

Finally, Defendants argue that, even if this Court accepts personal jurisdiction, it should dismiss the case under the doctrine of forum non conveniens. According to the Ohio Supreme Court, "the plaintiff's choice of forum should rarely be disturbed…." *Chambers v. Merrell-Dow Pharmaceuticals, Inc*., 519 N.E.2d 370, 373 (1988). There are no grounds for disturbing it in this case.

Litigating in Ohio would create no significant burden for the Defendants or their two non-Ohio law firms, all of whom are based within easy reach of Ohio. One cannot imagine Sidley or the major national firms representing Defendants telling clients that it is burdensome for their lawyers to litigate in other jurisdictions. Neither would Ohio be less convenient than any other forum for potential witnesses. Contrary to Defendants' assertions, those witnesses, and the relevant documents, are located around the country, not primarily in the District of Columbia. Of the six witnesses Plaintiffs consider most important, two are in Ohio: Dr. Ron Levant, the APA president at the time of critical events, and Dr. Trudy Bond, the main source of the accusations against Col. James and a necessary component of Hoffman's overarching narrative. The others are in California, Georgia, Illinois, and New York. (Plaintiffs' Affidavits; Levant and Newman Affidavits)

Nothing in the nature of the case can overcome Ohio's interest in redressing an injury to its citizen that occurred in the state. The Defendants' choice of the District of Columbia as a forum appears to rest primarily on their preference for having the case governed by the District of Columbia's Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. Since that statute is procedural rather than substantive – despite Defendants' strenuous attempts to argue otherwise – a court in Ohio, which has no equivalent statute, would not apply it. S*ee Tri-County Concrete Co. v. Uffman-Kirsch*, No. 76866, 2000 WL 1513696, at *6 (Ohio Ct. App. Oct. 12, 2000). Defendants' preference for the District of Columbia's laws should have no effect on the jurisdictional analysis. *Keeton v. Hustler*, 465 U.S. 770, 778-779 (1984).

Defendants have not established that the District of Columbia or any other forum provides an adequate alternative. Plaintiffs – who, unlike Defendants, have no deep pockets – would be put to the expense of finding new counsel in another jurisdiction. In fact, if the logic of Defendants' argument that claims must be treated separately for jurisdictional purposes is followed to its end, the case would have to be litigated in five separate jurisdictions.

The case should be tried in Ohio. This Court has multiple grounds for exercising jurisdiction, and Defendants have presented no convincing reasons for disturbing Plaintiffs' choice of forum. However, if the Court decides not to exercise jurisdiction, Plaintiffs respectfully request that it do so with conditions that ensure Plaintiffs have access to a court: Defendants must consent to be sued in another jurisdiction, agree to make any necessary documents or witnesses available in that jurisdiction, and waive any statute-of-limitations defense. We also respectfully request that, in this circumstance, the Court require Defendants to comply with Plaintiffs' outstanding informal discovery requests.

ARGUMENT

I. Plaintiffs Need Make Only a Prima Facie Showing of Jurisdiction, Construing the Evidence in the Light Most Favorable to Plaintiffs.

Where a court decides a motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, plaintiffs' burden is minimal: They need make only a *prima facie* showing that personal jurisdiction exists. *See CompuServe, Inc. v. Patterson,* 89 F.3d 1257 (6th Cir. 1996). In deciding the motion, the court is not confined to the allegations contained in the complaint, but may also consider such other submissions as the affidavits that accompany this response to Defendants' motion. *See id.*

Moreover, when such a motion is decided without an evidentiary hearing, "[t]he pleadings and affidavits submitted must be viewed in a light most favorable the plaintiff," and the court should "not weigh the controverting assertions of the party seeking dismissal.'' *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991).[4] Where, as here, the Defendants have not presented any evidence to the contrary, the Court should treat the facts stated in the Complaint as uncontested. If a plaintiff produces evidence from which personal jurisdiction could be found by a reasonable person, the court must refuse to dismiss, absent an evidentiary hearing. *See Giachetti v. Holmes,* 471 N.E.2d 165 (Ohio Ct. App. 1984).[5]

To meet their burden, therefore, Plaintiffs need only establish "with reasonable particularity sufficient contacts between [the defendant] and the forum state to support

[4] Soon after Plaintiffs attempted to schedule the depositions of six non-party witnesses and renewed their two-year request for the witness interview notes and other documents relied on by Hoffman and Sidley, Defendants moved for a stay of discovery, which the Court granted. Although Plaintiffs believe they have satisfied their burden without that discovery, in the alternative Plaintiffs ask the Court to allow the noticing of those depositions and to compel Defendants to produce those documents.

[5] Plaintiffs respectfully request that this Court take judicial notice of a number of pieces of evidence cited in this Consolidated Opposition Memorandum and accompanying Affidavits, in accordance with Ohio Rule of Evidence 201.

jurisdiction." *Neogen Corp. v. Neo Gen Screening, Inc.,* 282 F.3d 883, 887 (6th Cir. 2002). In the light of the facts alleged in Plaintiffs' Complaint and recited in the attached affidavits, Plaintiffs have more than met their burden.

II. This Court Has Specific Personal Jurisdiction over Each of the Defendants.

Personal jurisdiction takes two forms: specific and general. The Supreme Court recently observed that "specific jurisdiction has become the centerpiece of modern jurisdiction theory…." *Daimler v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 755, 187 L.Ed.2d 624, 632 (2014). This Court has both specific and general personal jurisdiction over Defendants.

This Court has specific jurisdiction over Hoffman because of his activities within Ohio. Hoffman was acting on Sidley's behalf and his activities therefore bind the partnership for purposes of specific jurisdiction. The Court has specific jurisdiction over APA, both because of its activities within Ohio and because Hoffman's and Sidley's activities may be imputed to APA as a result of their agency relationship.

For an Ohio trial court to properly exercise personal jurisdiction over a nonresident defendant, it must engage in a two-step analysis: (1) whether the Ohio long-arm statute and the relevant Ohio Rules of Civil Procedure confer jurisdiction and, if so, (2) whether the exercise of that jurisdiction would deprive the defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution. *See Fallang v. Hickey* 532 N.E.2d 117 (Ohio 1988).

A. Ohio's Long-Arm Statute Confers Jurisdiction over This Case.

Defendants' Motions do not confront the Ohio long-arm statute, dealing instead only with the due-process question. They appear, therefore, to have conceded that the long-arm statute is satisfied. (APA Motion, pp. 7-8; Hoffman and Sidley Motion pp. 3-4).

The statute, R.C. 2307.382, provides in relevant parts:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
> (1) Transacting any business in this state; …
> (3) Causing tortious injury by an act or omission in this state;
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; …
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

Ohio Rev. Code § 2307.382(A)(1), (3), (4), & (6). Plaintiffs' Complaint ¶ 63.

In brief, this case meets those tests for the following reasons:

- Both APA and Sidley, for whom Hoffman is an agent, were transacting business in Ohio when they conducted the investigation and published multiple versions of the Report;
- Defendants caused tortious injury in Ohio by their interviews in Ohio and the repeated publication of defamatory statements into the state;
- Defendants engage in a "persistent course of conduct" in the state and derive substantial revenue from it; and
- Defendants committed acts for the purpose of causing tortious injury to Plaintiffs in Ohio.

If the Court wishes, Plaintiffs are prepared to demonstrate more fully that the case meets those tests.

B. Hoffman's and Sidley's Activities Are Imputed to APA for Jurisdictional Purposes.

This Court has both specific and general personal jurisdiction directly over APA based upon APA's own activities in Ohio. However, even if that were not the case, 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).

Hoffman and Sidley acted as agents of APA. APA expressly engaged Hoffman and Sidley to conduct the investigation and write the Report. APA Board members Drs. Nadine 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. (Complaint ¶¶ 18, 169, 181, 270; Newman Affidavit, Exhibit I: Sidley Engagement Letter) While APA asserts that Hoffman and Sidley acted independently (APA Motion, p. 11), that is true only in the limited sense that APA could not dictate the Report's content.

The agency relationship was further established 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)). *See also Daimler* at FN 13. 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 FN 1, ¶¶ 183, 247, 262-264, 281, 419, 456, 477; Newman Affidavit, Letter to the Senate Armed Services Committee from APA naming Hoffman),

For purposes of establishing personal jurisdiction, therefore, the Court should impute Hoffman and Sidley's actions to APA.

C. This Court's Exercise of Jurisdiction over Each of the Defendants Comports with Due Process.

This Court's exercise of personal jurisdiction over the Defendants will not violate their constitutional rights to due process. In the context of a defamation action or, even, outside that context, Defendants have the requisite minimum contacts with Ohio, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice.

The Defendants' contacts with Ohio satisfy the three-part test for exercising specific jurisdiction established by the Sixth Circuit in *Southern Machine Company v. Mohasco Industries, Inc*., 401 F.2d 374, 381 (6th Cir. 1968), and adopted by the Ohio Supreme Court in *Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784 (2010).

The *Southern Machine* test requires:

- "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state." *Kauffman,* 930 N.E. 2d at 793. Defendants' activities meet both standards.
- "Second, the cause of action must arise from the defendant's activities" in the forum state. This requires only that "a defendant's contacts with the forum state are related to the operative facts of the controversy." *CompuServe, Inc. v. Patterson,* 89 F.3d 1257, 1267 (6th Cir. 1996). The cause of action need not formally arise from a defendant's contacts with the forum; instead, there must be only a substantial connection between the defendant's instate activities and the cause of action. A "lenient standard … applies when evaluating the 'arising from' criterion." *Kauffman,* 930 N.E.2d at 797. That standard is met here: The libel arose from the Report's

publication into the state, and the Report could not have taken its full form but for the Ohio interviews.

- "Finally, the acts of the defendant or the 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." *Southern Mach. Co.,* 401 F.2d at 381. When the first two prongs of the statute are met, as is the case here, an inference is established that a court's exercise of jurisdiction is reasonable. Additionally, Ohio courts find this final prong met when, as here, Ohio has a substantial interest in providing the relief sought. *See Kauffman,* 930 N.E.2d at 797.

1. Defendants Purposefully Availed Themselves of the Privilege of Acting in Ohio.

Under this prong, purposeful availment is present when a defendant's contacts with the forum "proximately result" from actions by the defendant himself that create a substantial connection with the forum. The defendant should reasonably anticipate being sued in Ohio. *See generally Kauffman,* 930 N.E.2d at 791-96. That test has been met in this case in at least three ways.

First, in defamation cases, courts have consistently found that the publication of defamatory statements into a jurisdiction constitutes special evidence of purposeful availment, given the special nature of the tort of libel and the fact that a person's reputation is centered in the community in which he or she resides. Here, under such a test, purposeful availment has been amply demonstrated. Hoffman first published the Report to APA. APA's Board included two members who were Ohio residents. (Newman Affidavit, Exhibit J; Complaint FN 2, ¶¶ 59, 240, 247, 281, 295, 380, 456, 477; Anton and Strickland Affidavits; APA Motion, p. 3; Hoffman and Sidley Motion, p.1). The APA then published it into Ohio on several occasions: giving electronic

access to members of the APA Council who included Ohio residents, publishing it on the APA website twice where it was read and commented on by Ohio residents, and tweeting it to its Twitter followers who include approximately 1,392 Ohio residents. (Behnke, Newman, and Ohio Residents' Affidavits)

Contrary to Defendants' assertions, in cases with facts analogous to this case's facts, the Ohio and U.S. Supreme Courts have not held that the libelous publication must be "targeted" at the forum state. The Ohio Supreme Court has expressly ruled that, when applying the "effects" test established in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), the analysis may take account of Ohio residents' reading of the defamatory remarks on the Internet. [6]

Second, even leaving aside the Report's publications into Ohio, Hoffman's and APA's purposeful contacts in Ohio are sufficient in themselves to constitute purposeful availment. Contrary to Defendants' characterization of the facts, and as described earlier in this Memorandum, those contacts go substantially beyond a single interview with Col. James or a single email from Dr. Kaslow. During Hoffman's investigation, his team entered Ohio at least three times to interview witnesses and examine a computer, in addition to conducting telephonic interviews. (James, Levant and Swenson Affidavits; Report, p.7) After the Report's publications, the APA Board and Council have continued to act on the contents of the Report via email and phone calls with governance members who reside in Ohio. (Newman Affidavit, Board Minutes)

[6] On page 14 of their motion, APA seems to suggest that this Court should engage in a passive-versus-active analysis of the APA website, known in some jurisdictions as the "*Zippo"* test from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*., 952 F. Supp. 1119 (W.D. Pa. 1997). Ohio expressly rejected that test in Internet cases in *Kauffman*. *Kauffman* at ¶26. Even if the Court chose to undertake that analysis, here APA touted the fact that members of the public could comment on the website, and at least one Ohio resident other than Colonel James (Dr. Levant) commented on that site. The key inquiry under *Kauffman* is if the libelous statements were read by Ohio residents. (Newman Affidavit; Ohio Residents' Affidavits)

a. Purposeful Availment Is Established by the Publication of the Report into Ohio by All Defendants.

The United States and Ohio Supreme Courts have addressed purposeful availment in regard to jurisdiction in defamation cases in four cases: *Calder v. Jones*; *Keeton v. Hustler Magazine, Inc.; Fallang v. Hickey*; and *Kauffmann Racing Equip. v. Roberts*. Those cases are dispositive in this case. They establish that purposeful availment occurs when defamatory statements are published into a jurisdiction, as was the case with the multiple publications of two versions of Hoffman's Report. They also suggest that, even if other types of contacts were essential in defamation cases, the minimum-contacts requirement can be easily met.

Calder v. Jones was a libel action brought in California against a *National Enquirer* reporter and editor based in Florida. The reporter argued that, as he researched the allegedly libelous article about a California resident, his only contacts with California were one trip to gather information and a few telephone calls. Nevertheless, the court found 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, 104 S.Ct. at 1493, 79 L.Ed.2d at 807. Because publication to third parties is a necessary element of libel, the tort actually occurred in the forum state, not in Florida.

Calder considered the *National Enquirer* to be a national publication. Its distribution was therefore not targeted at California, but took place across the country.

In *Keeton v. Hustler*, a defamation case decided on the same day, the Supreme Court found that Hustler, an Ohio corporation, purposefully directed its conduct into New Hampshire and inevitably affected persons in the state because it distributed between 10,000 and 15,000 magazines into the state. As in *Calder,* the distribution was not targeted specifically at the forum

state. According to the Court, that circulation could not be considered to constitute merely random, isolated, or fortuitous contacts.

In *Keeton,* the Court also found that New Hampshire's interest in redressing torts occurring within its borders could properly extend to torts committed against nonresidents. Thus, after *Keeton*, a plaintiff could bring suit in any state in which the publisher has deliberately circulated its publications, as long as the state's long-arm statute allows suit by a nonresident and the court can find a state interest in the litigation. If the defendant clearly knew that his actions would injure the plaintiff's reputation in the forum state, the state should be able to assert jurisdiction.

In *Fallang v. Hickey*, the Ohio Supreme Court 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 188 (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 defamatory letter mailed to an Ohio resident that injured the personal and professional reputation of the plaintiff, also an Ohio resident.

Although *Fallang* dealt with "publication" into Ohio, albeit of a single letter, a more recent Ohio case affirms that purposeful availment is satisfied when the defamatory publication is not aimed solely at Ohio but is read by Ohio residents. In *Kauffman Racing Equip., L.L.C. v. Roberts*, 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*, 930 N.E.2d at 791. "[A]t least five Ohioans saw" the defendant's statements. *Id*. Based on that fact, the Ohio Supreme Court held that the "allegedly defamatory statements were published in Ohio, [the defendant's] alleged tort was committed in Ohio, and that he fell within the grasp" of the Ohio

long-arm statute and Rule 4.3. *Id.* The court then found the constitutional due-process prong of the jurisdictional inquiry 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. *See id.*

As with the defamatory statements in *Fallang* and *Kauffman*, Hoffman's defamatory statements regarding Col. James have been read repeatedly by residents of Ohio as a result of their initial and subsequent publications to the APA Board and Council of Representatives, through the APA website twice, and through "tweets" by APA and others to Ohio residents. (Ohio Residents' Affidavits; Newman Affidavit)

Defendants Hoffman and Sidley, who initially published the Report to the APA Board of Directors, are liable for subsequent republications into Ohio by APA because those republications were not only foreseeable but also certain: Defendants' engagement letter specified that the Report would be made available to the public. All Defendants are liable for the subsequent republication on the website of *The New York Times*, which has approximately 34,993 readers in Ohio. (AAM Affidavit) That republication was foreseeable once APA, at Hoffman's suggestion, provided an 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.

Overall, just a partial tracking of the publication of the Report into Ohio reveals that it was circulated to over 40,000 residents. (AAM Affidavit, Newman Affidavit, Exhibit G)

Defendants knew that Col. James is an Ohio resident when they published the defamatory statements into Ohio, and the focal point of the harm to his reputation is in Ohio. He is a psychologist licensed in Ohio and a member of the faculty of Wright State University, and he has

been unsuccessfully attacked by another resident of Ohio, Dr. Trudy Bond, before the Ohio Board of Psychology and in Ohio courts for alleged actions related to the actions discussed in Hoffman's Report. (Complaint ¶¶ 38, 56, 78, 291, 472, 492, 505, James Affidavit)[7] Consequently, Defendants committed the tort of defamation in the State of Ohio, and that alone is sufficient to bring the Defendants within the reach of Ohio's long-arm statute and Rule 4.3.

The cases cited by Defendants deal with significantly different factual situations.

In *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L.Ed.2d 12 (2014), cited by Defendants to support their argument that Plaintiffs have not demonstrated the "substantial connection" necessary for purposeful availment, the Supreme Court went out of its way to distinguish that case from an action for libel, and reiterated that the "effects" test in *Calder* was still good law.

> The crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. …. Accordingly, the reputational injury caused by the defendants' story would not have occurred *but for* the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. …. (Emphasis added.) *Id.*

Although the Sixth Circuit Court of Appeals applied the *Calder* "effects" test narrowly in *Reynolds v. Internat'l. Amateur Athletic Fed'n.*, 23 F.3d 1110 (1994), it is readily distinguishable. Butch Reynolds, an Olympic gold-medal-winning track star from Ohio, brought the action against the International Amateur Athletic Federation ("IAAF") for publishing a press release in London, England, announcing that Reynolds had tested positive for banned substances

[7] The Board of Psychology found no basis for taking action against Col. James, and the Ohio Court of Common Pleas found Dr. Bond and the other Ohio residents who sued the Board lacked standing to disturb its ruling. Hoffman and APA omitted that information in the Report, their statements concerning its findings, and their Motions. This omission ignores a significant factor that reinforces Ohio's interest in adjudicating the renewal of the attacks against Dr. James in the Report.

in Monte Carlo following a track meet there. Reynolds alleged personal jurisdiction against the nonresident defendant, IAAF, solely because its defamatory acts had injured him in Ohio.

However, the initial press release published by the defendants was not defamatory and, in any case, was not published in the forum or on the Internet. There were no allegations that Ohio residents viewed the allegedly defamatory remarks in the press release itself or on the Internet. Instead, the defamatory remarks occurred only in subsequent media reports into the United States.

Reynolds involved causes of action for breach of contract, breach of contractual due process, defamation, and tortious interference with business relations. The court analyzed the causes of action under both the "transacting business" and "tortious injury" portions of the Ohio long-arm statute. With respect to the tort actions, the court distinguished *Calder* for the following reasons:

- The source for the report of Reynold's test results was the sample taken in Monaco, analyzed in France, and confirmed by arbitration in Germany.
- Reynolds was an international athlete, whose professional reputation was not centered in Ohio.
- The defendant distributed its press release in London, England, not in Ohio, and the release did not contain any defamatory statements. Ohio periodicals disseminated the defamatory statements.
- There was no evidence that the IAAF knew of the Ohio origin of the contract that plaintiff lost as a result of the remarks.
- The release concerned events that all occurred in Monaco.

The present case is much closer to *Calder* than to *Reynolds.*

First, unlike Reynolds, who ran races throughout the world, Col. James' reputation is centered in Ohio. The Report directly damaged his reputation in the forum where it mattered most. (James and Ohio Residents' Affidavits)

Not surprisingly, James immediately received inquiries from other Ohio residents who read the report, including his boss at Wright State University. She focused on the fact that the Report mentioned the ethics complaints previously adjudicated in Ohio (James Affidavit):

From: "Winfrey, La Pearl Logan"[Interim Dean and Professor, School of Professional Psychology, Wright State University]
Date: 07/13/2015 18:45 (GMT-05:00)
To: "James, Larry C."
Subject: RE: Psychological Association's Board Urges Ban on Members' Role in Military Interrogations

Larry,
I am concerned that the finding of improper handling of the ethics complaint against you and simply your membership on the PENS Task Force, given the conclusions of the report, will indeed re-open the door on some of the old allegations. As a heads up, I have shared a copy of the report with Robert Sweeney who will consult with the university attorney.

Other reactions by Ohio residents made clear the Report's impact on Col. James' reputation in Ohio. Steven Fought, a candidate for John Boehner's congressional seat in a special primary election in September 2017, tweeted to his approximately 346 Ohioan followers and others (Newman Affidavit):

- "This will be a test of the Ohio delegation if they can convince DOJ to begin a criminal investigation into the @apa-CIA torture racket." (July 11, 2015)
- "Two key players involved in the @apa-CIA/DOD torture scheme were Ohioans: Larry James @wrightstate and Ron Levant at @uakron. (July 11, 2015)
- "Major players in the American Psychological Association @APA torture scandal hail from Ohio – Dayton, Toledo and Akron. Ohio press silent." (August 8, 2015)

Second, the Report was published into Ohio on multiple occasions directly by Defendants, not by a third party. Those publications included publication individually to two APA Board members residing in Ohio. (Complaint FN 2, ¶¶ 240, 245, 247, 281, 295, 337, 359, 419, 456, 477; Newman Affidavit, Exhibit J). Additionally, on July 10, 2015, when APA

"tweeted" the Report, it did so directly to approximately 1,392 active followers in Ohio; it later tweeted the revised Report to the same audience. When APA published the document on its website twice, it became accessible to the world, including residents of Ohio, who read it. The document was then redistributed by many Ohioans. (Newman and Ohio Residents' Affidavits)

Third, the Board resolution authorizing the hiring of Hoffman and Sidley and the Defendants' engagement letter specified that the Report would be made public. 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. In addition, Dr. Kaslow knew to a certainty that the interviews she gave would be widely distributed. They were tweeted broadly by media outlets, including directly to 1,573 Ohio residents. (Newman Affidavit, Exhibits I and G)

Under these circumstances, Defendants should have reasonably anticipated being haled into court in Ohio. An individual injured in Ohio need not go to the District of Columbia to seek redress for injuries sustained from Defendants' actions in Ohio. See *Calder*, 465 U.S. at 789-790, 104 S.Ct. at 1494, 79 L.Ed.2d at 808.

In addition to citing *Walden* and *Reynolds*, Defendants rely on other cases that include infringement, products liability, and contract as well as defamation cases.

As to the non-defamation cases, the U.S. Supreme Court in *Calder*, and the Ohio Supreme Court in *Kauffman* at ¶¶ 42-44; 52-56 and *Fallang* at ¶5, have held that the tort of libel must be analyzed differently than other types of cases. In 2014, the U.S. Supreme Court in *Walden* validated the *Calder* "effects" analyses to be undertaken in defamation cases. The Ohio Supreme Court relied on *Calder* in deciding *Fallang* and, in 2010, on *Calder* and *Fallang* in deciding *Kauffman*. Accordingly, there is no reason to believe that it would decide *Kauffman* and

Fallang any differently today. Consequently, the non-defamation cases cited by Defendants in this case are unhelpful. *See, e.g*., *AlixPartners, LLP v. Brewington*, 836 F.3d 543 (6th Cir. 2016); *Celgard, LLC v. SK Innovation Co*. 792 F.3d 1373 (Fed. Cir. 2015); and *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9.

The defamation cases Defendants cite are primarily from other jurisdictions. Those from Ohio or the Sixth Circuit Court of Appeals were decided prior to *Kauffman,* which distinguishes both *Reynolds* and the other cases on which Defendants rely. *Kauffman* at ¶¶ 57-64 (analyzing *Oasis Corp. v. Judd*, 132 F. Supp.2d 612 (S.D. Ohio 2001) (no evidence to suggest the communications were received by anyone in Ohio) and *Cadle Co. v. Schlichtmann*, 123 Fed. App'x. 675 (6th Cir. 2005) (communications were directed to Massachusetts, not Ohio)).

The defamation cases Defendants cite from the Fifth and Fourth Circuits are equally unhelpful. Those cases are distinguishable because of the level of Defendants' activities in Ohio, including the interviewing of witnesses, the repeated publication of the Report, and the express naming of an Ohio resident, Col. James, as a key player in the alleged collusion. For example, in *Herman v. Cataphora*, 730 F.3d 460 (5th Cir. 2013), the court transferred jurisdiction to California after finding that it was unclear who the targets of the allegedly defamatory statements were. In *Clemens v. McNamee*, 615 F.3d 374 (5th Cir. 2010) and *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the court found that no Texas sources were involved in the writing of the articles at issue, nor were the statements at issue made in Texas. Finally, in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), the court used a "*Zippo*" analysis, which was expressly rejected in *Kaufman* ¶¶ 23-26, to find that the defendant Connecticut newspapers were focused on non-Virginian readers and were writing about an issue of Connecticut policy. The court in *Young*, moved away from the "effects" test of *Calder*, to the "targeting" test advanced by the

Defendants in this case. On those grounds, the court found personal jurisdiction in Virginia to be inappropriate. But the Ohio Supreme Court in *Kauffman* did not adopt the *Young* "targeting" analysis.

b. Purposeful Availment Is Established by Hoffman's Contacts with Ohio.

In their discussion of purposeful availment, Defendants Hoffman and Sidley address only Hoffman's interview with Col. James in Ohio, not his interviews with other Ohio witnesses or the publication of two versions of the Report to the two Ohio Board members and other Ohio residents. (Newman Affidavit, Exhibit J) As the Hoffman Report states, however, Hoffman and members of his team traveled to Ohio not only to interview Col. James, but also to interview Dr. Ron Levant, a former APA president, and to search his computer for documents. (Report, p. 7; Levant Affidavit) Hoffman also conducted four other interviews with Ohio residents, including one with Dr. Trudy Bond, who had spent years attacking Col. James in a variety of forums. (Complaint ¶56) Two of those interviews were by telephone (Drs. Lauritzen and Swenson); Plaintiffs do not know how the two others were conducted (Drs. Bond and Naugle). Defendants' Motions nowhere acknowledge that Hoffman conducted those interviews, all of which are listed in Attachment A of his Report. (Newman Affidavit)

Defendants assert that Col. James' interview did not create purposeful availment because James "chose to live" in Ohio and because Hoffman would have agreed to an interview by phone or to meeting elsewhere. To the contrary, in a February 26, 2015, email, Hoffman said "We'll probably want to talk both in person and by phone …." In a later email, he proposed a time to meet in Col. James' office. It was clearly Hoffman's decision to meet in Ohio. (James Affidavit, Exhibit A) Defendants' suggestion that it was Col. James' decision because he did not ask to meet in another state (Hoffman and Sidley Motion, pages 6-7) fails the test of common sense.

In the Sixth Circuit, it is the quality of the contacts, not the quantity, that determines whether they constitute purposeful availment. *See Neal v. Janssen*, 270 F.3d, 332 (6th Cir. 2001). Col. 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, pp. 12-13, 36, 363, 386)

Dr. Levant was the APA President when it issued the PENS Guidelines, the focus of the Report's most significant allegation. The importance Hoffman places on his interview with Dr. Levant is reflected in his summary of his research: It is the only individual interview he singles out, aside from interviews with the critics of the APA who sparked his investigation. (Report, p. 7)

Col. 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. (James Affidavit) Hoffman could not have constructed the entirety of his narrative without alleging Col. James' participation in the collusive "joint venture," and he could not have claimed, as he does, to have conducted a thorough investigation without interviewing both Col. James and Dr. Levant. (Report, pp. 10, 36, 65, 340, 388, 429, 446)

Moreover, Dr. Bond was a key source for Hoffman's defamatory discussion of the APA's handling of ethics claims against Col. James and others. He cites her 47 times in the Report, more often than all but one of the other long-standing critics of Plaintiffs. (Report, pp. 494, 497, 498, 501-504, 520)

Those contacts are more than sufficient to create jurisdiction. Even a single purposeful contact is enough to satisfy the requirements of due process if it creates a "substantial connection" to the forum state. *Fallang,* 532 N.E.2d at 108.

c. Purposeful Availment Is Established by APA's Contacts with Ohio.

As APA's agent, Hoffman's contacts with Ohio are imputed to APA. However, beyond its several publications of the Report into Ohio, APA also had its own separate contacts that reinforce the sufficiency of its contacts to establish jurisdiction. First, Dr. Kaslow emailed Col. James at his place of employment in Ohio to ask him to cooperate with Hoffman's investigation. (James Affidavit) Given the importance of Col. James for Hoffman's narrative, that email was not trivial. Second, during the events discussed in the Report and during APA's decisions after the Report's publication, at least one Board member was a resident of Ohio and participated in the Board meetings and decisions by phone and email. (Newman Affidavit, Exhibit J)

In sum, it was clearly foreseeable that Defendants could be haled into Court in Ohio given the number and quality of their contacts in Ohio, the publishing of the defamatory Report to Ohio residents on multiple occasions, and their knowledge of the certain impact of that defamation on the reputation of Col. James in his home state. *See also Kontar v. American Geophysical Union*, 2016 U.S. Dist. LEXIS 59803, (N.D. Ohio 2016) (finding purposeful availment where a defendant solicited the defamatory remarks).

2. Plaintiffs' Causes of Action Arise from Defendants' Activities in Ohio.

a. Plaintiff James' Claims Arise from Defendants' Activities 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." *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'" *Third Natl. Bank in Nashville v. Wedge Group*, 882 F.2d 1087, 1091 (6th Cir. 1989) (quoting *Southern Machine Co. v. Mohasco*, 401 F.2d at 384, fn. 27). Further, a "lenient standard … applies when evaluating the 'arising from' criterion." *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002).

Plaintiffs have made a *prima facie* showing that meets that standard.

First, Defendants' contacts with Ohio include the multiple publications into Ohio of the Report on which Plaintiffs' claims are based. (Complaint ¶¶ FN #1, 25, 28, 62, 151, 231, 238, 240, 247, 295, 316, 327, 337, 359, 380, 399, 419, 456, 477) Those publications directly resulted in damage to Col. James' reputation in Ohio, where he is licensed as a psychologist, and put at risk his career in Ohio. (James Affidavit) Although Defendants focus on Hoffman's physical presence in Ohio, *Calder*, *Keeton*, *Fallang*, and *Kauffman* make clear that, in defamation cases, the tort arises primarily from publication into the forum.

Second, even if physical contacts were dispositive, those contacts were more numerous and important than Defendants disclose, as this Memorandum previously demonstrated and the Report details.

The cases cited by Defendants are not controlling. For example, in *McNell v. Hugel,* 1994 WL 264200 (D.N.H. May 16, 1994) involved a New Hampshire action where the comments at issue were not published in New Hampshire.

b. Ohio and U.S. Law Favors Joining the Claims of All Plaintiffs.

When, as here, a defendant purposefully touches a state with its activities, it gives that state the power to adjudicate a litigation about those activities. That power includes the ancillary authority to determine all claims and issues directly "connected with" those activities – whether

they concern in-state injuries or not. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011).

This principle is expressly supported by Ohio Civ. R. 18(A),[8] 3(E),[9] and 20(A),[10] which govern cases involving multiple parties and multiple claims for relief.

"Once an Ohio court acquires personal jurisdiction over a nonresident defendant for claims arising in Ohio, Civ. R. 18(A) permits joinder of related claims that do not arise in Ohio, as long as granting jurisdiction for all claims does not deprive defendant of the right to due process of law." *U.S. Sprint Communications Company Limited Partnership, v. Mr. K's Foods, Inc.,* 624 N.E.2d 1048, 1050 (1994). The principle was also affirmed in *Keeton,* in which the U.S. Supreme Court found that New Hampshire shared an interest with other states, just as Ohio does here, in providing a single forum for the efficient adjudication of defamation suits. *Keeton,* 465 U.S. at 777, 104 S.Ct. at 1479, 79 L.Ed.2d at 796.

Thus, once the Court finds jurisdiction as to Plaintiff James' claims, it need not even undertake an analysis of whether the other Plaintiffs' claims "arise from" Defendants' actions. In a case such as this one, where the claims all arise out of a common nucleus of operative facts and

[8] Ohio Civ. R. 18(A): A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

[9] Ohio Civ. R. 3(E): In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief. Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties.

[10] Ohio Civ. R. 20 (A): Permissive Joinder of Parties (A) Permissive joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

involve essentially the same witnesses and same theories, judicial efficiency will be advanced by taking jurisdiction over the case as a whole. If Defendants' insistence on a claim-by-claim analysis for each Plaintiff were to prevail, there would be no single jurisdiction where the Defendants would be amenable to jurisdiction in a lawsuit brought by these Plaintiffs.

Defendants do not cite a single authority in Ohio to support their argument, because they cannot. The cases they cite, all from other jurisdictions, involve facts easily distinguished from the facts in this case.

For example, a Fifth Circuit case cited by each of Defendants, *Seiferth v. Helicopteros Atuneros*, 472 F.3d 266 (5th Cir. 2006), involved a suit by one plaintiff in Mississippi against two nonresident defendants under a stream-of-commerce theory, not for defamation.[11] The court held that, given the facts of the case, a plaintiff must establish specific jurisdiction for each claim *if* the claims arise from different contacts or facts of the defendant. Here, Plaintiffs' claims arise from the same contacts, share a common nucleus of facts, and are based on the same theories of liability.

Huizenga v. Gwynn, __ F.Supp.3d __, 2016 WL 7385730 (E.D. Mich. Dec. 21, 2016), also cited by Defendants, underlined the importance of a plaintiff's domicile for jurisdictional purposes. A California plaintiff sued the *New York Post* and a Michigan resident for statements made in the *Post*. The court found that the newspaper's 237-person readership in Michigan could be sufficient to satisfy the personal jurisdiction analysis, but that jurisdiction was unreasonable because the *Post* had primarily a New York readership. The court strongly suggested the

[11] Defendants cite two other products cases in support of their claims, *Addelson v. Sanofi S.A.*, 2016 WL 6216124 (E.D. Mo. Oct. 25, 2016) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). Neither of those cases is dispositive with regard to a defamation analysis.

appropriate forum for the action was the plaintiff's home forum, California – just as Ohio, Col. James' home, is an appropriate forum for this case.

c. The Additional Plaintiffs' Claims Also Arise from Defendants' Activities in Ohio.

The Hoffman Report alleged a collusive joint enterprise engaged in by all Plaintiffs over many years – not a series of discrete, unrelated acts by each Plaintiff separately. As demonstrated above, Hoffman's construction of that narrative depended substantially on his characterization of the roles of Col. James and Dr. Levant, his reliance on Dr. Bond's allegations, and his ability to assert that he conducted a thorough investigation by having interviewed all the key players. In particular, Col. James is the only military officer among the alleged "colluders" whose actions span the entire period Hoffman described in the Report. But for Col. James' alleged role and the testimony of Dr. Bond, Hoffman could not have built his overarching, multi-year narrative.

Hoffman implicated all Plaintiffs equally in that alleged collusion, and his activity in Ohio therefore has the requisite substantial connections with all of their claims. Moreover, all were defamed by the Report's publication into Ohio. *See Keeton,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).

Thus, even if this Court would require each Plaintiff's claims to arise directly from the Defendants' purposeful activities in Ohio, the Plaintiffs all meet that standard.

3. Exercise of Jurisdiction by This Court over the Defendants Is Reasonable.

Under the third and final prong of the *Southern Machine* test, to render exercise of jurisdiction over defendants reasonable, the acts of a nonresident defendant or consequences caused by the defendant must have a substantial connection with the forum state. However, when "the first two elements of a prima facie case [are satisfied] then an inference arises that this third factor is also present." *CompuServe, Inc.*, 89 F.3d at 1268, citing *Am. Greetings Corp. v. Cohn*,

839 F.2d 1164, 1170 (6th Cir. 1988). "[O]nly the unusual case will not meet this third criterion." *Am. Greetings*, 839 F.2d at 1170 *(*quoting *First Natl Bank of Louisville v. J.W. Brewer Tire Co.,* 680 F.2d 1123, 1126 (C.A. 6 1982)). In *Kauffman,* the Ohio Supreme Court affirmed "that a high degree of unfairness is required to erect a constitutional barrier against jurisdiction." *Kauffman* at 797 (quoting *Calder v. Jones*, 465 U.S. at 788-789, 104 S.Ct. at 1494, 79 L.Ed.2d at 808).

Deciding whether the exercise of jurisdiction over a foreign defendant is reasonable requires balancing a number of factors: the interests of the forum state, the burden on the defendant, and 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.,* 480 U.S. at 113).[12]

a. Ohio's Interest in the Controversy.

Both Ohio and U.S. law consistently affirms that a state has a compelling interest in adjudicating injuries that occur within the state. "[I]t is beyond dispute that [a forum state] has a significant interest in redressing injuries that actually occur within the State." *Keeton*, 465 U.S. at 776, 104 S.Ct. at 1478, 79 L.Ed.2d at 794. "Ohio has a legitimate interest in protecting the business interests of its citizens …." *Kauffman,* 930 N.E.2d at 797 (citing *Bird*, 289 F.3d at 875).

The injury to Col. James' reputation has occurred in Ohio, and Ohio therefore has an interest in redressing that harm. This interest is even greater when the alleged libel potentially interferes with a citizen's ability to find gainful employment. It is also increased by the state's interest in bringing to a close the expenditure of judicial time and expense dealing with the

[12] Defendants Hoffman and Sidley fail to address the reasonableness portion of the analysis. Therefore, Plaintiffs' choice of forum in Ohio should be deemed reasonable as to Hoffman and Sidley once the Court finds the first two prongs of the test satisfied. Furthermore, since Hoffman and Sidley were acting as APA's agents, personal jurisdiction over APA should also be deemed reasonable.

attacks against Col. James by Dr. Bond and other Ohio residents. Dr. Bond's actions make clear those attacks have not ended. (James Affidavit) Consequently, Ohio taxpayers and psychologists have an interest in seeing the issues involving Col. James adjudicated once and for all.

b. The Burden on the Defendants.

Litigating in Ohio will not be a significant burden on Defendants. As demonstrated in the section on forum non conveniens, travel from Washington, D.C. and Chicago 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. And, 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. (Newman Affidavit, Exhibit I)

In contrast, the burden on Plaintiffs would be substantial if the District of Columbia were the case's forum. The primary attorney for four Plaintiffs resides in California, as do two of the Plaintiffs. (In addition to Dr. Newman, Col. Dunivin now lives in California.) (Newman Affidavit) Four plaintiffs do not have counsel admitted in the District of Columbia and, in the case's early stages, were unable to find counsel there or in Illinois willing to represent them against a firm such as Sidley. If Defendants are forced into another forum, there is a substantial likelihood they could not maintain their suit.

Defendants' assertion that the events described in the Report principally occurred in the District of Columbia is without merit. Most of the events in the Report were conducted by email or telephone by APA members who hail from many states. Each of the Report's three main conclusions involved members' actions in their respective states as well as elsewhere outside the District of Columbia. (Newman Affidavit, Exhibit H)

- Regarding the PENS Task Force, a central focus of the Report, its members communicated by email for three months prior to convening in the District of Columbia for three days, and continued to communicate by email for a year afterward. During that time, various APA members involved in the process would have been working from Ohio, including Drs. Levant and Shullman. (James Affidavit; Newman Affidavit, Exhibit J)
- Regarding the Report's second conclusion relating to a proposed ban against psychologists' participation in national-security interrogations, the Report describes debates about the proposal at Council meetings for the years 2006-2008 at the annual APA conventions in New Orleans, San Francisco, and Boston. (Behnke Affidavit)
- Regarding the third conclusion about the allegedly improper handling of ethics complaints, the APA decision makers on the complaint against Col. James were both outside the District of Columbia, one in Massachusetts and the other in North Carolina. (Behnke Affidavit)

Moreover, Hoffman's interviewees, and the witnesses Plaintiffs will depose or examine at trial, are scattered around the country, not concentrated in the District of Columbia. Hoffman does not even list the District of Columbia among the 10 states where his interviews took place. (Report, p. 7, Attachment A) The relevant documents are also in many locations, not primarily in Washington. Hoffman had documents sent to him from around the country, and documents essential to Plaintiffs' case will also be drawn from around the country.

Defendants focus on the District of Columbia because they mistakenly believe its anti-SLAPP statute is in their favor. In fact, a no-weaker case could be made for Illinois. That is where Hoffman resides and where the Report was presumably largely written, and it is the

jurisdiction that Defendants selected in their engagement letter as the forum for resolving disputes between them. But Illinois law would not be favorable to them.

c. Plaintiffs' Interests in Obtaining Relief.

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 addition, because Col. James has been subject to ongoing attacks in Ohio (by Dr. Bond and other Ohio residents), it is particularly important that the allegations against him be addressed once and for all. (James Affidavit)

Defendants cannot show that litigating in Ohio is unreasonable. The cases on which APA relies are not helpful to it. *Intera Corp. v. Henderson*, 428 F.3d 605 (6th Cir. 2005) was a misappropriation of trade secrets case in which the actions of the defendants were not committed in the proposed forum. The court found that the first two prongs of the *Southern Machine* test were not met, and therefore an inference of reasonableness was not appropriate. In *Beydoun v. Wataniya Rest. Holding*, *Q.S.C*, 768 F.3d 499 (6th Cir. 2014) – also not a defamation case – the court found that all the underlying events occurred in Qatar and that the plaintiffs made no argument that Michigan had any interest in exercising its jurisdiction.

APA inappropriately states that one consideration in the analysis should be the choice of law (APA Motion, p. 16). In *Keeton*, the Supreme Court stressed that choice-of-law concerns should have nothing to do with the jurisdictional inquiry. *Id* (citing *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

Defendants have articulated no interests specific to the citizens of the District of Columbia that warrant choosing it over Ohio as a forum. In contrast, Ohio has a strong interest in protecting its citizens from tortious acts committed in the state by nonresidents. If Defendants believe the case implicates free-speech issues, a position Plaintiffs strongly dispute, those issues can just as well be litigated in this Court as elsewhere.

III. The Court Has General Jurisdiction Over Each of the Defendants.

Plaintiffs accept Defendants' description of the standard for asserting general jurisdiction: The proper inquiry is whether a nonresident defendant's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Fern Exposition Serv., LLC v. Lenhof*, 1st Dist. No. C-130791, 2014-Ohio-3246, ¶ 19 (quoting *Daimler*, ___ U.S., 134 S.Ct. at 754, 187 L.Ed.2d at 631). However, Defendants fail to conduct that inquiry as it applies to Sidley, a global law firm, or the APA, a professional organization. Instead, they simply assert that, under *Daimler*, Hoffman can be at home only in his domicile, Sidley only in its place of incorporation or principal place of business, and APA only in its place of incorporation.

Daimler does not so hold. In a case where the underlying events took place in Argentina, the *Daimler* Court was concerned to prevent the expansion of general jurisdiction beyond its reasonable scope. It noted approvingly, however, that *Goodyear Dunlop Tires Operations, S.A. v. Brown* "did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." *Daimler*, ___ U.S., 134 S.Ct. at 759, 187 L.Ed.2d at 635. As the Court also noted, *International Shoe* recognized that "some single or occasional acts of the corporate agent in a state [. . .], because of their nature and quality and the circumstances of their

commission, may be deemed sufficient to render the corporation liable to suit." *International Shoe Co. v. Washington,* 326 U. S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed. 95, 98 (1945).

Speaking in its own voice, the *Daimler* Court did "not foreclose the possibility that a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, it stated, "presents no occasion to explore that question …." This suit, however, requires that analysis.

A. The Court Has General Jurisdiction over Defendant Sidley

Like most cases deciding jurisdictional issues, *Daimler* dealt with typical corporate entities that have, for example, an important and readily identifiable headquarters location. Like most modern global law partnerships, Sidley – a limited liability partnership – is an entirely different kind of organization, to which the paradigm of a place of incorporation or principal place of business should not apply. Sidley's website presents the firm as a global network of offices and its lawyers as capable of working around the globe. Although Chicago is its original and largest office, the website goes out of its way to avoid presenting Chicago as its current "home" or principal place of business. (Newman Affidavit)[13]

Consequently, this case should not be forced into traditional corporate paradigms that do not fit its facts. Instead, the jurisdictional analysis should consider whether Sidley's activities in Ohio render it "at home" in the state. In fact, Sidley regularly and systematically chooses to practice law in Ohio, as well as maintaining other professional contacts in the state. These activities go far beyond "random, fortuitous, or attenuated contacts." Specifically:

- Sidley represents major clients (such as Duke Energy) in Ohio and acts as their attorneys regularly and continuously. (Newman Affidavit)

[13] https://www.sidley.com/en/global/?regionChange=true

- Sidley litigates frequently before Ohio courts and the Sixth Circuit. At present, it is participating in a suit before the U.S. District Court for the Southern District of Ohio alleging that Ohio has violated the Americans with Disabilities Act. According to Sidley's website, 56 of its partners are admitted to practice before the Sixth Circuit. (Newman Affidavit)
- Sidley communicates directly to clients and potential clients in Ohio to market its services. (Newman Affidavit)
- The firm sponsors a yearly lecture series at Ohio State and its managing partner, Carter Phillips, is an elected member of Ohio State's Board of Directors. (Newman Affidavit)

The cases cited by Defendants Hoffman and Sidley do not support their position. In *Fern Exposition Serv. LLC v. Lenhof*, 1st Dist. Hamilton No. C-1300791, 2014-Ohio-3246, the court held that it had general jurisdiction over the defendant, an employee of an Ohio-based company, when the employee resided elsewhere and his only physical contact with the state was attending a single business meeting.

Roxane Labs., Inc. v. Vanda Pharms., Inc., 2016 WL 7371267 (S.D. Ohio Dec. 20, 2016) involved a patent dispute in which the court refused to take jurisdiction because the defendant, a corporation, had no corporate presence in Ohio. The corporate paradigm is inapposite for a law firm that prides itself on practicing across the country, and frequently in Ohio.

Defendants also cite *PNY Technologies, Inc. v. Miller, Kaplan, Arase & Co., LLP*, 2015 WL 1399199 (D.N.J. Mar. 24, 2015) for the proposition that a corporate entity is at home in its place of incorporation or principal place of business. In fact, the court held that, in the context of jurisdiction over partnerships, any one partner's contact in a state is attributed to all partners for jurisdictional purposes. It therefore exercised personal jurisdiction over an entire partnership based on the contacts of one of its partners, although it ultimately transferred the case because of a forum selection clause. (Because this case was labeled "not for publication," under the rules of the New Jersey court it may not be cited for precedential value.)

The other case cited by Defendants, *Burnham v. Superior Court of Cal. Marin County*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), provides no greater guidance. It merely upheld personal service on a litigant in a divorce action.

B. The Court Has General Jurisdiction over Defendant Hoffman.

Although Defendants Hoffman and Sidley's Motion asserts that recent Supreme Court decisions "suggest" that general jurisdiction over individuals is available only in an individual's domicile (Hoffman and Sidley Motion, p. 3), those cases make it clear that domicile is only the paradigm, not the rule. *Daimler*, ___ U.S., 134 S.Ct. at 760, 187 L.Ed.2d at 636. For Hoffman as for Sidley, the analysis requires more.

Hoffman is being sued not as an unaffiliated individual, but as a partner of Sidley. Sidley is registered as a limited liability partnership. As the firm's owners, all of its partners share in its profits and are liable jointly and severally for its obligations. Therefore, just as jurisdiction over one partner should provide jurisdiction over the partnership, so should Ohio's general jurisdiction over Sidley extend to a partner who practiced law on its behalf in Ohio.

Moreover, although few cases have considered non-paradigmatic situations involving general jurisdiction over individuals, the analysis in a New York case is relevant. In that case, the court held that it had general jurisdiction over a nonresident individual under the relevant statute when he did business in the state "to suit his various commercial activities and interests. In fact his professional mobility is such that he makes appearances and does business in other parts of the United States, as well as Europe." *ABKCO Indus. v. Lennon,* 377 N.Y.S.2d 362, 367 (1975). That conclusion is directly applicable to Hoffman as an individual, not only as a member of a partnership over which Ohio has general jurisdiction. He is professionally mobile, litigating around the country in the conduct of his practice. It should not surprise or inconvenience him to defend against a suit in an Ohio court. *See also Conn v. Zakhorav*, 667 F.3d 705 (6th Cir. 2012)

(not finding general jurisdiction over the individual but discussing the applicability of the concept as applied to an individual).

C. The Court Has General Jurisdiction over Defendant APA

APA is a trade association. Unlike a corporation, it does not have a centralized, hierarchical structure in which a headquarters exercises control over branches or offices. Its primary function is to support its membership across the country, including over 2,800 residents of Ohio. (Behnke Affidavit) (Plaintiffs' Complaint initially put this number at 1,500.) Its elected governance bodies consist of members from many states, including Ohio. Its business is conducted by its Board and its 160-plus member Council, both of which have Ohioans as members. (Newman Affidavit)

Consequently, APA's reliance on jurisdictional analyses in the corporate context is as inapposite as was Sidley's. Contrary to APA's assertion, its affiliations and activities in Ohio, taken in the context of a trade association's purpose and structure, are sufficient to render it "at home" in the state.

1. Key Governance Officials Are Based in Ohio.

During many of the events at issue in the Hoffman Report, the APA President was Dr. Ron Levant, who lives in Akron, Ohio, and conducted APA business from Ohio. Another 2005 Board member was also an Ohio resident. In 2015, when the Report was published to the Board, two Board members resided in Ohio. At that time, many of the Board's decisions related to the Report were made by conference call. (Newman Affidavit).

At present, Dr. Sandra Shullman, a current Board member, resides in Ohio and participates regularly in Board meetings telephonically from Ohio. She was also a member of the Board when some of the major events described in the Report occurred. Moreover, a number of

members of the APA Council, its governing body, reside in Ohio. (Behnke and Newman Affidavits)

In *Daimler,* the Court discussed *Perkins v. Benguet Consolidated Mining Co*., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), as being a "text-book" case where a court could exercise general jurisdiction over a company that had not consented to jurisdiction. The *Perkins* court agreed that Ohio could assert general jurisdiction over a Filipino corporation, even though the events at issue took place solely in the Philippines, because the company's president had moved temporarily to Ohio during World War II and conducted the company's business from there. The *Perkins* principle should apply equally to a situation where, as here, the activities of key governance members take place consistently from Ohio, and the organization's president resided in Ohio for much of the relevant period.

2. APA is Registered in Ohio as a Charity and Conducts Continuous Activities in the State.

APA is registered to do business in Ohio as a charity and is therefore subject to the investigative powers of the Attorney General and the jurisdiction of the courts in Ohio. See Ohio R.C. 1716.16 (C). "[A] Court may exercise general jurisdiction over [a defendant] based on [its] consent, consent which [the defendant] gave when it complied with the … business registration statute…" *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, 78 F. Supp. 3d 572 (D. Del. 2015); *see also Knowlton v. Allied Van Lines, Inc*., 900 F.2d 1196, 1200 (8th Cir. 1990); and *Price v. Wheeling Dollar Sav. & Trust Co*., 460 N.E.2d 264, 269 (Ohio App. 1983).

APA also conducts other extensive activities and has extensive affiliations in the state (Newman Affidavit):

- The Ohio Psychological Association is an APA affiliate with a seat on the APA Council of Representatives. The Executive Officer of the Midwestern Psychological Association, an APA affiliate, is located in Kent, Ohio.
- Ohio psychology licensing requirements expressly rely on APA accreditation of doctoral programs, pre-doctoral internships, and specialty retraining programs, as well as its approval of continuing education courses and post-doctoral supervision. APA accredits 13 doctoral programs, 20 internships, and four postdoctoral programs in the state.
- The General Counsel of APA has consistently intervened in cases involving Ohio public policy issues, filing at least ten briefs in recent years, including three before the U.S. Supreme Court or the 6th Circuit Court of Appeals in 2014 and 2015.
- APA supports the maintenance of the archives of the history of American psychology in Akron, Ohio.

IV. Ohio Is the Most Appropriate Forum for this Case.

The Ohio Supreme Court has stated that "the plaintiff's choice of forum should rarely be disturbed…." *Chambers v. Merrell-Dow Pharmaceuticals, Inc*., 519 N.E.2d 370, 373 (Ohio 1988) (quoting *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1059, (1947)). Other courts have echoed that principle. For example, the Third Circuit has held that a court should not dismiss a case on forum non conveniens grounds unless the defendant shows that retaining jurisdiction will cause manifest injustice. *See Hoffman v. Goberman*, 420 F.2d 423 (1975).

In considering a forum non conveniens motion, a court first determines the degree of deference owed to the plaintiff's choice of forum. Generally, the plaintiff's choice is afforded deference because the court may reasonably assume the chosen forum is convenient for the plaintiffs. Second, the court considers whether the defendant has established an adequate alternative forum and shown that the plaintiff's choice is unnecessarily burdensome, based on public and private interests. *See Chambers,* 519 N.E.2d at 126.

In this case, Plaintiffs' choice of forum warrants even more than the usual deference. Plaintiffs are private individuals with limited resources who bear the costs of litigation out of

their own pockets. As a direct result of Defendants' defamatory statements, two lost their jobs and a third has been unable to find steady employment. If the case were moved to another jurisdiction, they would have to hire new local counsel in that jurisdiction, an expense they can ill afford – if they could find counsel at all. (Behnke and Newman Affidavits)

In contrast, Defendants are two large organizations with deep pockets and a partner in one of those organizations, a law firm with average annual profits per partner of approximately $2.1 million (American Lawyer, February 22, 2017)[14] They are represented by two of the country's major law firms, each of which litigates in Ohio and elsewhere around the country, as well as by two Ohio firms.

Moreover, far from establishing "an adequate alternative forum," Defendants fail to disclose that, if the Court dismisses this action, Plaintiffs could be left without any redress. The statute of limitations has run in each of the other possible jurisdictions (Illinois, California, North Carolina and the District of Columbia). It is difficult to imagine a result less suited to serve "ends of justice," a primary goal of the forum non conveniens doctrine. *Chambers*, 519 N.E.2d at 127. The Ohio Court of Appeals has held that "[t]he availability of an alternative forum is one of the factors to be considered in determining whether to dismiss a case on the basis of forum non conveniens." *Stidham v. Butsch,* 837 N.E.2d 433, 437 (Ohio Ct. App. 2005).

Even if the court were not to give deference to the Plaintiffs' choice of forum, a review of all the facts, not only those summarily asserted by Defendants, demonstrates that a weighing of the private interests of the litigants and of Ohio's public interest should lead this Court to deny Defendants' motion for dismissal. Contrary to Defendants' assertions, the District of Columbia is not a more convenient or efficient forum for this litigation – except for the Defendants' law

[14] http://www.americanlawyer.com/id=1202779708384/Sidley-Keeps-Revenue-Profits-Rising-Despite-Tougher-Market

firms. Nor is Ohio's connection to the case nearly as limited as Defendants assert, as this Memorandum has specified.

A. Private Factors Weigh in Favor of Keeping the Case in Ohio.

Private interests to be considered in a forum non conveniens analysis all point to Ohio as a proper forum. Those factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Chambers,* 519 N.E.2d at 126-27 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508, 67 S.Ct. at 843, 91 L.Ed. at 1059).

First, contrary to Defendants' assertions about the location of third-party witnesses, the bulk of potential witnesses are outside of the District of Columbia. (Newman Affidavit, Exhibit H) Of the approximately 30 witnesses Plaintiffs intend to depose, five reside in Ohio; four reside in the District of Columbia. Other than a few APA staff who had limited involvement in the events at issue, none of the potential APA witnesses is located in the District of Columbia.

Second, the documents in this case will be produced electronically, so the physical location of the APA's files has no bearing on the choice of forum. Even if physical location were relevant, Hoffman's files are presumably located in Chicago, not in the District of Columbia.

Third, four of the five Plaintiffs live outside the District of Columbia and three have no connection to it.[15] Two now reside in California, as does the lead attorney for four Plaintiffs; one resides in North Carolina; Dr. James resides in Ohio. There is no plausible argument that the District of Columbia is a more convenient or less expensive jurisdiction for them.

[15] Col. Dunivin now lives in California, although she still owns property in the District of Columbia.

Fourth, despite Defendants' assertion that "many, perhaps most" third-party witnesses would not be subject to compulsory process in Ohio (APA Motion, p. 13), an Ohio court can just as easily compel witnesses across the country as a court sitting in the District of Columbia.

Finally, Defendants' argument that the District of Columbia is a better forum because it is easier to reach shows an East Coast bias. It is not easier to reach for three of the Plaintiffs and their lead attorney. Travel from Chicago, where Defendants Hoffman and Sidley are located, to Dayton is easy and inexpensive. The only people who might be inconvenienced are the non-resident attorneys for Defendants, who are located in the District of Columbia, but a flight to Dayton takes less than two hours.

B. Public Factors Support Keeping the Case in Ohio.

Public interest factors to be considered in a forum non conveniens analysis include "the administrative difficulties and delay to other litigants caused by congested court calendars, the imposition of jury duty upon the citizens of a community which has very little relation to the litigation, a local interest in having localized controversies decided at home, and the appropriateness of litigating a case in a forum familiar with the applicable law." *Chambers*, 519 N.E.2d at 127 (citing *Gilbert*, 330 U.S. at 508-09, 67 S.Ct. at 843, 91 L.Ed. at 1059).

With regard to first factor, litigating in an Ohio court creates no greater risk of difficulties and delays than litigating in the District of Columbia.

With regard to the second and third factors, Ohio has a substantial interest in deciding a controversy that has profoundly affected the reputation and career of one of its citizens, and that involves issues – Plaintiff James' involvement in national-security interrogations – that have been disposed of previously before the Ohio Board of Psychology and the Ohio courts. Ohio has a public interest in seeing the issue of Plaintiff James' reputation settled once and for all.

In the context of a defamation case, the Ohio Supreme Court has recognized that Ohio "has an especial interest" in providing a forum for the redress of wrongs committed against its citizens within its borders. *Fallang v. Hickey,* 532 N.E.2d 117 (Ohio 1988); *see also Burger King v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 537 (1985) ("A state generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.").

As to the fourth factor – "the appropriateness of litigating a case in a forum familiar with the applicable law" – Defendants' reliance on it is unfounded for two reasons.

First, it is incorrect to assert that an Ohio court would be compelled to apply the District of Columbia's anti-SLAPP statute. Courts around the country have repeatedly held that anti-SLAPP laws are procedural in nature. In fact, one case cited by Defendants as standing for the proposition that "courts in defamation (and false light cases) regularly apply the anti-SLAPP protections of another state" (Hoffman and Sidley Anti-SLAPP Motion, pp. 10-11) actually affirms that the D.C. anti-SLAPP statute is procedural: It "does not create a substantive right but rather provides a procedural mechanism for review." *ABLV Bank v. Ctr. for Advanced Def. Studies Inc*., No. 1:14-cv-1118, 2015 WL12517012 (E.D. Va. Apr. 21, 2015).

For matters of procedural law, state courts, including the courts of Ohio, routinely apply their own procedural law. *See Tri-County Concrete Co. v. Uffman-Kirsch*, No. 76866, 2000 WL 1513696, at *6 (Ohio Ct. App. Oct. 12, 2000) ("The Ohio General Assembly has not yet chosen to enact anti-SLAPP legislation, and this court is constrained from recognizing such an action at this time. Beside, any party faced with this kind of lawsuit may avail herself of the frivolous lawsuit statute, which affords to the grievant ample relief . . . .").

Second, Defendants have made no showing as to why District of Columbia law would be applicable to the three Plaintiffs who have no relationship to the District of Columbia. A conflicts-of-law analysis requires analyzing the factors applicable to defamation cases, which provide that in multi-state defamation cases the law of the plaintiffs' domiciles controls. The Defendants do not undertake this analysis.

C. If the Court Dismisses the Action for Forum Non Conveniens, It Should Do So with Conditions that Ensure Plaintiffs' Access to Another Forum.

Plaintiffs respectfully request that, if the Court dismisses on forum non conveniens grounds, it includes the conditions outlined in *Stidham,* supra: Defendants must consent to be sued in another jurisdiction, agree make any necessary documents or witnesses available in that jurisdiction, and waive any statute-of-limitations defense. Plaintiffs also respectfully request that, in this circumstance, the Court require Defendants to comply with Plaintiffs' outstanding informal discovery requests.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss for Lack of Personal Jurisdiction and Forum Non Conveniens should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 8, 2017 a true and correct copy of the foregoing *Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss for Lack of Personal Jurisdiction and Forum Non-Conveniens* was filed using the Clerk of Court's cm/ecf system which by its operation will give notice of this filing to all registered users. Parties may access the filing through that system.

/s/ Gerhardt A. Gosnell II
Gerhardt A. Gosnell II

EXHIBIT 1

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS

CIVIL DIVISION

LARRY C. JAMES, *et al.*,	:	
	:	**CASE NO: 2017 CV 00839**
Plaintiffs,	:	
	:	**Judge Timothy N. O'Connell**
vs.	:	
	:	
DAVID HOFFMAN, *et al.*,	:	
	:	
Defendants.	:	

[PROPOSED] ORDER

The Motions of Defendants American Psychological Association (APA) David Hoffman (Hoffman) and Sidley Austin LLP (Sidley) to dismiss for lack of personal jurisdiction are DENIED. This Court may exercise personal jurisdiction over Defendants consistent with the Ohio Long-Arm Statute (2307.382) and the Due Process Clause of the Fourteenth Amendment.

Specific jurisdiction is appropriate as to Plaintiff James, an Ohio resident, because he was harmed by the publication of the Defendants' Report to Ohio residents and because Defendant Hoffman had several contacts with Ohio during his investigation, including interviewing witnesses in Ohio. *Kaufman Racing Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784 (2010), cert. denied, 131 S.Ct. 3089 (2011). As to the four Plaintiffs who do not reside in Ohio, jurisdiction over their claims is appropriate pursuant to Ohio Civ. Rules 18 (A) and 20 (A). It is also appropriate under the standards established by *Keeton v. Hustler, Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) and *U.S. Sprint Communications Company Limited Partnership, v. Mr. K's Foods, Inc.*, 624 N.E.2d 1048 (1994)

General jurisdiction is also appropriate. Neither Sidley nor APA is an organization that should be regarded as being "at home" only in its place of incorporation or principal place of business, and both conduct sufficient business in Ohio to be regarded as at home in the state. General jurisdiction is appropriate as to Defendant Hoffman because he is a partner in the Sidley partnership.

Defendants' alternative motions for dismissal under the doctrine of forum non conveniens are also DENIED.

The Stay on Discovery is hereby lifted, and Defendants are hereby ordered to produce the notes and other documents generated during Defendants Hoffman and Sidley's investigation and previously requested by Plaintiffs.

IT IS SO ORDERED.

Judge Timothy N. O'Connell