

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

LARRY C. JAMES, et al., CASE NO. 2017-CV-839

Plaintiffs,

-vs-

TRANSCRIPT OF PROCEEDINGS
(MOTION HEARING)

DAVID HOFFMAN, et al.,

(Pages 1 - 93)

Defendants.

PRESIDING: Hon. Timothy N. O'Connell

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1 (Friday, August 25, 2017, 09:29 a.m.)

2 THE CLERK: This Court of Common Pleas in and for the
3 State of Ohio, County of Montgomery, is now in session, with
4 the Honorable Timothy N. O'Connell presiding.

5 THE COURT: Thank you. Please be seated. We're on the
6 record at this time in the case of Larry C. James and others
7 versus David Hoffman and others. This is case number 2017-CV-
8 839 in the Common Pleas Court of Montgomery County, Ohio.

9 This matter comes on today for hearing on the Defendants'
10 motion to dismiss for lack of personal jurisdiction and forum
11 non-conveniens.

12 Would the attorney for -- or attorneys for Plaintiff, or
13 Plaintiffs, identify themselves for the record?

14 MS. FORREST: Good morning, Your Honor, Bonny Forrest.

15 THE COURT: Good morning.

16 MR. GOSNELL: Good morning, Your Honor, Gerhardt "Gage"
17 Gosnell for the Plaintiffs.

18 THE COURT: Okay. Mr. Gosnell, are you representing
19 all of the Plaintiffs?

20 MR. GOSNELL: We do, Your Honor.

21 THE COURT: Ms. Forrest, you represent --

22 MS. FORREST: Mr. Free is not able to be here today and
23 I repre -- I'm going to speak for all the Plaintiffs today,
24 Your Honor.

25 THE COURT: Okay.



1 MS. FORREST: I technically represent four of them, but
2 I'll be speaking -- I'll be the lead attorney arguing today.

3 THE COURT: Okay. Thank you.

4 MS. FORREST: Thank you.

5 THE COURT: Would the attorney or attorneys for David
6 Hoffman identify themselves for the record?

7 MR. HENTOFF: Good morning, Your Honor. I'm Thomas
8 Hentoff and we are counsel for David Hoffman and Sidley Austin.

9 THE COURT: Thank you.

10 MR. IRELAND: And Your Honor, also, Jeff Ireland and
11 Erin Rhinehart and Chris Hollon behalf of Sidley Austin and the
12 Defendant.

13 THE COURT: Thank you. Would the attorney or attorneys
14 for American Psychological Association identify themselves for
15 the record?

16 MR. JUSTICE: Good morning, Your Honor, Steve Justice
17 for the American Psychological Association. I'd like to
18 introduce Barbara Wahl.

19 MS. WAHL: Good morning, Your Honor.

20 MR. JUSTICE: And Karen Carr with the Arent Fox firm.
21 Ms. Wahl will be lead counsel arguing this morning on behalf of
22 the American Psychological Association.

23 THE COURT: Thank you.

24 MR. JUSTICE: Thank you.

25 THE COURT: We're going to proceed with the Movants, so



1 it will be Defendants first, followed by Plaintiffs, who are
2 the Respondents to the motions, and then we'll have rebuttal
3 allowed for the Movants.

4 Let me ask; is there any exhibits, evidentiary matters, or
5 factual matters stipulated to?

6 MR. HENTOFF: Your Honor, Thomas Hentoff, no. There's
7 nothing stipulated to, but as we discussed on our status
8 conference on the telephone last week, we agree that the legal
9 standard here is that the Plaintiffs' burden is to make a prima
10 facie case of personal jurisdiction based upon the allegations
11 of the complaint, as supplemented by the allegations of the
12 affidavits, which we must accept as true in considering the
13 prima facie case.

14 THE COURT: Okay. So how do you intend to deal with
15 the exhib -- with the affidavits?

16 MR. HENTOFF: Well, Your Honor, I can explain. So we
17 had that issue with -- let me just pause for a second and say,
18 this morning, except when I'm talking about David Hoffman
19 separately, just for shorthand, I'll refer to both of our
20 clients as Sidley, if that's okay with the Court?

21 THE COURT: Yes.

22 MR. HENTOFF: So in order to address the issue that
23 came up last week with regard to the affidavits and exhibits,
24 we filed a notice this week in which we withdrew all of the
25 objections to the exhibits that were of the foundational



1 nature, such as hearsay or personal knowledge. So we have
2 completely withdrawn anything that could give Plaintiffs'
3 counsel impediment to talking about the exhibits that they
4 believe are important in the case.

5 In a bit of housekeeping, in our notice, we said the only
6 objections that we're not withdrawing are relevance and in the
7 notice I pointed the Court to the relevance objections as being
8 only the ones on the first column in our chart and Plaintiffs'
9 counsel helpfully pointed out to me this morning that in
10 addition, on page 3 of our motion, in section 1, we also make a
11 couple of relevance objections that are not listed in column
12 one.

13 So our proposal, I think all Defendants' proposal, Your
14 Honor, is let's just proceed with the substantive motions.
15 Everybody can argue whatever they want, and if the Court thinks
16 or the parties suggest after the substantive motions that
17 there's a need to take up the relevance objections, I propose
18 that we address that issue at that time.

19 THE COURT: Very well. Thank you. Do you agree,
20 Ms. Forrest?

21 MS. FORREST: I do, Your Honor. I think we all want to
22 proceed efficiently. You've got counsel here and I think
23 proceeding with the argument makes the most sense.

24 The one thing that we specified in our notice is that as
25 Your Honor -- if Your Honor takes under advisement various



1 affidavits that may or may not be mentioned today, that the
2 record be made very clear about what Your Honor chooses to rely
3 on and what he doesn't.

4 Now, that may mean and, you know, I understand that
5 Mr. Hentoff has been -- has graciously agreed to drop some of
6 the foundational issues, but during the argument, for example,
7 one of their cases brought up a new issue. So it may be that
8 we would need to continue the hearing to bring up that evidence
9 and provide witness testimony, Your Honor, if you choose to
10 rely on that.

11 And so, we would agree that we should proceed this morning
12 with the arguments, but if Your Honor wants more testimony as
13 we go through the argument or different sort of foundational
14 evidence, for example a certified copy or somebody to lay the
15 foundation about a record of APAs, then we would be prepared to
16 go forward with that at another time.

17 THE COURT: Very well.

18 MS. FORREST: Thank you.

19 THE COURT: Thank you. All right. Now, with regard to
20 the Defendants, will both counsel for Sidley wish to argue and
21 then separately counsel for the APA? Is that --

22 MR. HENTOFF: Yes, Your Honor, because the --

23 THE COURT: Okay.

24 MR. HENTOFF: -- the Defendants have different factual
25 allegations that relate to them separately.



1 THE COURT: All right. Okay. Have you reached the
2 agreement about who will go first? Sidley -- okay. All right.
3 Counsel, you can proceed.

4 DEFENDANT SIDLEY'S ORAL ARGUMENT

5 MR. HENTOFF: Good morning, Your Honor.

6 THE COURT: Good morning, sir.

7 MR. HENTOFF: May it please the Court, this is a
8 defamation case brought by five Plaintiffs. The five
9 Plaintiffs are among the dozens and dozens of people associated
10 with the APA, and that's my shorthand for the American
11 Psychological Association, the Department of Defense, the CIA,
12 or other federal governmental agencies who were discussed in
13 the Sidley report that is the subject of this case.

14 So Sidley provided to the APA a 540-page report of its
15 investigation and as the Plaintiffs allege, and as the report
16 states, over the course of several months, Sidley reviewed a
17 large number of documents, interviewed about 150 people, and
18 came up with a report.

19 The report was focused on allegations regarding the
20 actions that the APA took in the 2000s in connection with the
21 U.S. government's use of enhanced interrogation techniques
22 outside of the United States in the course of fighting two
23 wars. So this was an investigation that was focused on the
24 APA, which is an organization that is located in Washington, DC
25 and its relationship to a number of agencies of the federal



1 government. It was not in any respect, Your Honor, focused on
2 the State of Ohio.

3 Just to illustrate that point, I would like to quote from
4 two paragraphs at the very beginning of Plaintiffs' complaint,
5 because as we said, we accept as true the allegations of the
6 complaint. So in paragraph 2, at the very beginning, the
7 Plaintiffs say:

8 The lawsuit arises from an independent review and
9 report commissioned from Hoffman and Sidley by the
10 APA.

11 And David Hoffman, I should have said, was the lead Sidley
12 partner on this engagement.

13 The review was prompted and guided by claims that in
14 the aftermath of 911, the APA colluded with the Bush
15 administration, the Central Intelligence Agency, and
16 the U.S. military to support torture.

17 And then in paragraph 4, the Plaintiffs say:

18 As his review proceeded, however, it became a fishing
19 expedition spanning decades of events, not only
20 within the APA, but also within the government, the
21 military, and the CIA.

22 So the principal question on Sidley's motion is whether in
23 the course of this investigation and in the report that
24 discussed the findings and conclusions of the investigation, is
25 whether Sidley and David Hoffman's relevant contacts with the



1 State of Ohio are sufficient to satisfy the due process clause
2 of the U.S. Constitution, such as the State of Ohio, can
3 constitutionally exercise personal jurisdiction over these
4 Defendants.

5 So in my argument this morning, I would like to cover
6 three topics. The first is there's no general personal
7 jurisdiction over Sidley or David Hoffman in Ohio. Second, and
8 Your Honor, if you'd like me to slow down at any point, I'll do
9 that. Or speed up.

10 THE COURT: It's okay.

11 MR. HENTOFF: Second, there's no specific personal
12 jurisdiction over Sidley or Mr. Hoffman arising from their
13 contacts with the State of Ohio in connection with their
14 investigation and report.

15 Third and finally, under the doctrine of forum non-
16 conveniens, this case in any event should be dismissed so that
17 it can be refiled in the Superior forum, which is the District
18 of Columbia, which means that if the Court were to dismiss on
19 that basis, the case would not end. Plaintiffs would have an
20 avenue to assert their claims. It would be in Washington, DC.

21 A final bit of housekeeping is our motion does not
22 challenge jurisdiction under Ohio's long-arm statute. So I'm
23 not going to address that.

24 So with regard to -- I'm sorry, general jurisdiction, the
25 Supreme Court has made very clear in a series of cases in the



1 last four or five years that general jurisdiction over a
2 corporate entity is only proper under the constitution. Let me
3 pause for a second and back up.

4 So, there are two ways for a state to exercise
5 jurisdiction over a defendant. So general jurisdiction is
6 where the defendant is at home or essentially at home in the
7 jurisdiction and therefore anybody can sue them about anything.
8 So, maybe not a good example, but Williams & Connelly is a
9 Washington, DC law firm and if anyone wanted to sue Williams &
10 Connelly about anything, they could sue in Washington, DC.

11 So specific jurisdiction requires a lawsuit in which the
12 defendant's relevant contacts with the jurisdiction are such
13 that the claim arises out of those contacts. That's why it's
14 called specific jurisdiction instead of general jurisdiction.

15 So the Plaintiffs have alleged that in this case, there is
16 both general jurisdiction and specific jurisdiction against
17 Sidley and David Hoffman and so I'm taking up general
18 jurisdiction first.

19 I guess to cut to the chase on general jurisdiction, the
20 Supreme Court has made very clear and it has repeated itself in
21 recent years that absent truly extraordinary circumstances that
22 are not present here, a corporate entity can only be subject to
23 general jurisdiction where it's formed or incorporated and
24 where its principal place of business is.

25 As the complaint both alleges and acknowledges, Sidley is



1 an international law firm. It is based in Chicago. It has ten
2 offices in the United States, and it has no offices in Ohio.
3 Plaintiffs' factual allegations about Sidley's contacts with
4 Ohio are essentially that as a busy law firm, Sidley appears in
5 Ohio courts, represents Ohio defendants, appears in the Sixth
6 Circuit, and has some connections to institutions of higher
7 learning in this state.

8 So the Supreme Court has made clear that that's
9 insufficient as a matter of due process to justify general
10 jurisdiction over a defendant and it did it most starkly in the
11 BNSF Railway v. Tyrrell case, which came out right before our
12 reply brief was filed. So we cite that case in our reply
13 brief.

14 In that case the defendant railway operated railroads in a
15 number of states. It was headquartered in Texas and it was
16 incorporated in Delaware. An employee of the railway who did
17 not live in Montana and was not injured in Montana for some
18 reason sued the railway in Montana. The rationale was, well,
19 the railway's essentially at home in Montana even though it's
20 not headquartered or incorporated there because it has 2,000
21 employees in the state and it is responsible for maintaining
22 2,000 miles of railroad track in Montana. It is difficult to
23 imagine a more substantial and continuous connection that an
24 out of state defendant could have with the state.

25 The Supreme Court said that is insufficient. There's no



1 general jurisdiction over the railway in Montana. The
2 rationale in part was we need to give defendants some certainty
3 about -- so they can know where is it that they can be sued for
4 anything.

5 So based on that case, and the cases that we cite in our
6 briefs, there is no general jurisdiction over Sidley, whose
7 comings and goings in Ohio do not remotely approach the
8 significant and essentially permanent contacts that the railway
9 had in the Supreme Court case.

10 Then finally, Plaintiffs suggest in their opposition brief
11 that maybe the result would be different because Sidley is
12 formed as a partnership as opposed to a corporation. They
13 don't cite any authority for that proposition and we're not
14 aware of any.

15 Again, in this recent BNSF Railway case, the court pretty
16 strongly rejected a similar argument and it said that the
17 Fourteenth Amendment due process constraint that we're talking
18 about quote, does not vary with the type of claim asserted, or
19 the type of business enterprise sued. So for that reason,
20 there's no general jurisdiction over Sidley.

21 The case regarding David Hoffman is much simpler. As the
22 complaint alleges, he lives and works in Chicago, Illinois and
23 simply visiting Ohio for work is clearly insufficient to say
24 that an individual is subject to general jurisdiction in the
25 state. As the Supreme Court in the recent, relatively recent



1 Daimler case that we cite said, the paradigm for general
2 jurisdiction over an individual is the individual's domicile
3 and there's no reason to deviate from that paradigm in this
4 case.

5 So that's all I have on general jurisdiction unless the
6 Court has any questions.

7 THE COURT: No, sir.

8 MR. HENTOFF: So moving onto specific jurisdiction. I
9 want to start with an important point, which again relies on a
10 recent Supreme Court case, because the Supreme Court has been
11 actively involving itself in the law of personal jurisdiction
12 in recent years to provide guidance to courts and litigants.

13 An important point about specific jurisdiction as opposed
14 to general jurisdiction, and that's under the purposeful
15 availment test, which is a three-part test that in the Sixth
16 Circuit of Ohio is known as the Southern Machine test, but I'll
17 call it for shorthand the purposeful availment test.

18 The Supreme Court in June in the Bristol-Myers Squibb case
19 underscored the important point that if the defendant's
20 contacts with the state are not related to the defendant's
21 claim -- I'm sorry, not related to the plaintiff's claims, then
22 they're disregarded. They just don't count in the personal
23 jurisdiction analysis. It's only the contacts that relate to
24 the plaintiff's claims that count.

25 So in the Bristol-Myers Squibb, the Superior Court case,



1 the Supreme Court held that there was no specific personal
2 jurisdiction over Bristol-Myers over the claims of out of state
3 residents who claimed that outside of California, they had
4 taken the drug Plavix and had suffered injury. The Supreme
5 Court noted again Bristol-Myers Squibbs' substantial contacts
6 with the state of California, which included it had 410
7 employees in California. It had five research facilities in
8 California. It had a lobbying office in Sacramento and over
9 the course of six or seven years, it had generated \$900 million
10 in revenue from selling Plavix to California residents.

11 The Supreme Court ordered that the case should be
12 dismissed for lack of specific jurisdiction because the
13 plaintiff's claims had nothing to do with those extensive and
14 substantial California contacts.

15 So again, the much more intermittent unrelated Sidley
16 contacts that Plaintiffs talk about have no bearing on the
17 personal jurisdiction analysis.

18 We explain in our brief why there's no personal
19 jurisdiction, there's no specific personal jurisdiction over
20 any of the five Plaintiffs but I'm going to treat the
21 Plaintiffs in two separate groups. The first group is the four
22 Plaintiffs who do not live in Ohio and have not alleged --
23 they've alleged some connections to Ohio but I'll say they have
24 not alleged any substantial connection to Ohio. So you've got
25 Colonels Dunivin and Banks, and Doctors Behnke and Newman.



1 At the time the lawsuit was filed, Colonel Dunivin lived
2 in DC. She, according to an affidavit, she's now moved to
3 California. Dr. Newman lives in California. Colonel Banks
4 lives in North Carolina. So these are the four Plaintiffs who
5 do not have -- that do not live in Ohio.

6 Then the second, the way I'm grouping the Defendants
7 (sic), we have Colonel James, who lives in the Dayton area. So
8 although we argue and will demonstrate that Colonel James, the
9 Ohio resident, also is not able to establish specific
10 jurisdiction over Sidley. Even if he could, the law is also
11 clear that the other four Plaintiffs don't get to exercise --
12 have the state exercise specific jurisdiction over Sidley just
13 because there's another Plaintiff in the case who is able to do
14 that.

15 That was the key holding of that Supreme Court that I just
16 mentioned, the Bristol-Myers case. Essentially, there were a
17 lot of California residents who took Plavix and alleged that
18 they were injured in a case with a lot of plaintiffs. There
19 was no problem there. Those plaintiffs' case was permitted to
20 proceed.

21 But there were also a lot of out of state plaintiffs who
22 had sued in California in that case and the Supreme Court said
23 that the mere fact that in this case there were California
24 residents who had established personal jurisdiction quote, does
25 not allow the state to assert specific jurisdiction over the



1 non-residents' claims, unquote. So my point is each Plaintiff
2 has to establish Ohio's personal jurisdiction over their own
3 claims and I'm going to treat the four non-Ohio residents
4 together.

5 So we have a specific jurisdiction case in which the
6 Plaintiffs allege that Sidley purposefully availed itself of
7 the privilege of doing business in Ohio in essentially two
8 ways. So these are the contacts that Plaintiffs say are the
9 relevant and sufficient contacts for personal jurisdiction.

10 The first is publication by virtue of Sidley's role in
11 publishing the report that's at issue in this case. The second
12 is investigation, that in the course of doing the investigation
13 for the report, Sidley had contacts with the State of Ohio. So
14 I'm going to address those two types of contacts separately.

15 So a defamation case in which the allegation is the
16 defendant purposefully availed the privileges of doing business
17 in the state by virtue of publishing something from outside of
18 the state into the state, which is what we're talking about
19 here, as we've stated in our briefs, the legal analysis for
20 that kind of purposeful availment by publication has been set
21 forth by the Supreme Court in the Calder v. Jones case in 1984,
22 and that was a case involving the publisher of "National
23 Enquirer" who was sued by an actress in California about an
24 article the "National Enquirer" published alleging that she had
25 a drinking problem and it affected her professional career in



1 California.

2 So that test has been applied several times by both the
3 Ohio Supreme Court and the Sixth Circuit in cases that cite and
4 rely on each other. The two cases that I'm going to talk about
5 to illustrate this analysis are Reynolds v. IAAF, which is a
6 Sixth Circuit case from 1994, and Kauffman Racing Equipment v.
7 Roberts, which is an Ohio Supreme Court case from 2010.

8 Here is the test. This is the Calder test that courts in
9 Ohio and the Sixth Circuit apply. To begin with, the mere fact
10 that an allegedly defamatory statement is published or
11 republished by others into the state, in other words, there's
12 been a publication, the statement's in Ohio, that mere fact is
13 insufficient to satisfy due process over defendants. That's
14 not good enough.

15 Instead, the courts look to see whether the state, in this
16 case Ohio, qualifies as the focal point of the defendant's
17 allegedly defamatory out of state publication. To boil down
18 this focal point test, it requires a plaintiff to show that the
19 out of state defendant intentionally targeted the state because
20 of writing about the plaintiff's activities in the state and
21 the plaintiff feeling the brunt of the harm in the state, thus
22 making the state the focal point of the defendant's activities.

23 So here's a quote from the Ohio Supreme Court in Kauffman
24 that boils down this idea, and this is at -- actually, I don't
25 have the page number for this one, but this is a quote. This



1 analysis quote necessitates, necessitates conduct calculated to
2 cause injury in a focal point where the brunt of the injury,
3 the brunt of the injury is experienced. The court goes on to
4 say in the context of the internet, while the effects of
5 internet conduct may be felt in many forums, the intent
6 requirement allows the court to find a particular focal point.

7 So having said all that, in talking first about the four
8 non-Ohio Plaintiffs, under this focal point analysis which has
9 been conducted time and time again by courts in Ohio and the
10 Sixth Circuit, the four Plaintiffs who are not Ohio residents
11 cannot satisfy even any part of the focal point analysis in
12 Ohio because their claims do not have in any respect Ohio as a
13 focal point.

14 The way I would like to finally conclude this analysis is
15 to talk about the Reynolds case in the Sixth Circuit, and then
16 apply its analysis to the four non-Ohio Plaintiffs and then to
17 the one Ohio resident Plaintiff.

18 Reynolds was a track star who lived in Ohio. He ran in a
19 meet that was run by the defendant, the IAAF and it was in
20 Monaco. They applied -- they gave him a drug test, he failed
21 the drug test, and the -- this International Athletic
22 Association issued a press release telling everybody that he
23 had failed the drug test. I think it's important that it was a
24 press release because the defendant in that case was asking
25 everybody please circulate what we're saying. A press release



1 is telling the press please republish this.

2 So the plaintiff sued and he alleged that the
3 International Association had made defamatory statements about
4 him and he said that Ohio had specific jurisdiction over the
5 association because they knew he lived in Ohio and that he
6 would suffer harm there. Indeed, he alleged extremely
7 substantial reputational harm in the State of Ohio
8 specifically. He said that he had lost corporate endorsements
9 and appearance fees in Ohio alone that were worth \$4 million.

10 So the Sixth Circuit held that there was no specific
11 personal jurisdiction over his defamation claim against the
12 association even though he was an Ohio resident. The court
13 gave the following reasons, which I will then apply to the
14 Plaintiffs in this case.

15 So the first two points are related. The court said the
16 press release about the Ohio resident concerned his activities
17 in Monaco, not in Ohio. This ends up being a critical fact in
18 all the cases where courts either hold that there is no
19 personal jurisdiction or hold that there is, that the focus of
20 the communication that's at issue was activities in a different
21 state.

22 So here, for the four Plaintiffs who don't live in Ohio,
23 this -- to the extent the Sidley report talks about their
24 activities, it's not in Ohio. It's in another state. So they
25 can't satisfy that part of the analysis.



1 So now let's talk about Colonel James who lives in the
2 Dayton area. It's the same for him. The report talks about
3 conduct throughout the 2000s and there's no allegation in the
4 complaint, there's no statement in Colonel James' affidavit
5 that says the Sidley report was talking about my activities in
6 Ohio. So he too is in the same situation as the sprinter whose
7 activities outside the state were the subject of the, in that
8 case, the press release.

9 The related point that the controversy over the press
10 release was from a drug sample that was taken and analyzed in
11 Europe and that's essentially the same point that I just made
12 that the Sidley report is about Washington DC, the federal
13 government, and the conduct of the federal government overseas.

14 So the next point in the Reynolds analysis is that
15 Reynolds is an international athlete whose professional
16 reputation is not centered in Ohio. So even though he was an
17 Ohio resident, the court held he did not have a reputation
18 where the brunt of the harm is felt in Ohio.

19 So for the four non-Ohio Plaintiffs, that's self-evident.
20 They have not alleged that the brunt of any reputational harm
21 was felt in Ohio and nor can they. So there, Colonel James
22 departs from the non-Ohio Plaintiffs. He has alleged that the
23 brunt of his reputational harm is felt in Ohio. And so that
24 does distinguish him from the other Defendants (sic).

25 What I would say, however, is I looked at the complaint



1 and I looked at paragraph 38 of the complaint, and I won't take
2 the Court's time with it, but it's paragraph 38 of the
3 complaint and that paragraph talks about Colonel James' career
4 and the substantial international activities and activities in
5 Washington DC and Hawaii for which he is known.

6 So, next the Reynolds court said, well the International
7 Association did not publish or circulate the report in Ohio.
8 Ohio periodicals disseminated the report. In this situation,
9 again, it was a press release asking these publications to do
10 it. The same situation here as to Sidley.

11 As the complaint alleges, Sidley delivered the report to
12 its client, the American Psychological Association, a
13 Washington DC organization, knowing that APA intended to make
14 it public, that others would publicize it, and that it would be
15 circulated all over the country and discussed all over the
16 country. But Sidley did not do the publishing.

17 So and most certainly just to be as clear as I can, Sidley
18 was certainly not intentionally targeting Ohio of all places in
19 the United States and was not making Ohio the focal point when
20 it delivered the report to its client. So here again, that's
21 another part of the analysis that the four non-Ohio Plaintiffs
22 just can't satisfy. They can't make Ohio the focal point of
23 Sidley's activities for the report. In this regard, Colonel
24 James is in the same boat as the other Plaintiffs.

25 So finally, the court said although Reynolds lost -- well,



1 that Reynolds had significant reputational harm in Ohio in the
2 form of the lost endorsements, defendants didn't know that so
3 they weren't targeting Ohio to suffer the brunt of the harm.

4 Finally, the final part of the analysis. For the non-Ohio
5 Plaintiffs, it's the same situation. They can't say that the
6 brunt of the reputational harm was suffered in Ohio. And here,
7 again, as I said, that is something that Colonel James can
8 allege.

9 So where that leaves us is under the focal point analysis,
10 the non-Ohio Plaintiffs don't have anything to argue about.
11 They can sue somewhere else, but there's no personal
12 jurisdiction over their claims in Ohio.

13 Then with regard to Colonel James, he does have some parts
14 of the analysis in his favor in discussing personal
15 jurisdiction, but where his claim fails is that he doesn't
16 allege and he can't allege that the focus and the targeting by
17 Sidley was on his activities in Ohio. Instead, when it
18 discussed him, he doesn't allege it was about activities
19 elsewhere and again, Sidley did not publish the report into
20 Ohio. Others did.

21 So that leaves Colonel James in essentially the same
22 situation as Reynolds, and also the same situation as the
23 plaintiff in the Cadle case, that's C-A-D-L-E, which is a Sixth
24 Circuit case in which the plaintiff had loan collecting
25 activities. It was an Ohio plaintiff and it was an Ohio



1 company, and an attorney made derogatory comments about this
2 Ohio company about its loan collecting activities in
3 Massachusetts. It's very simple. Ohio plaintiff but
4 activities that were discussed were in Massachusetts and the
5 Sixth Circuit held that's insufficient for specific personal
6 jurisdiction.

7 I have one final point on publication before I turn very
8 briefly to investigation. Plaintiffs have cited a Supreme
9 Court case called Keeton v. Hustler, and that's a case that the
10 Supreme Court issued in tandem with the Calder case, which is
11 what we've been talking about. It was issued -- they both were
12 written by Justice Rehnquist and they both were issued on the
13 same day.

14 Keeton is irrelevant to this case. It is about a
15 publication that was in the business of exploiting in that case
16 the State of New Hampshire by -- on a regular basis, on a
17 monthly basis, its business was to send large quantities of the
18 magazine into the state to exploit business in the state every
19 single month. The cause of action, defamation cause of action
20 in that case, arose from this regular business activity by a
21 publication in the state.

22 That has no relevance to the claim against Sidley. As I
23 said, Sidley was not in the business of selling a magazine on a
24 regular basis in large quantities in Ohio. It delivered a
25 report, not to Ohio, but to its client in Washington DC.



1 The second reason why Keeton has no application here to
2 any of the Defendants is that a number of courts have first of
3 all recognized the fact that it was issued on the same day as
4 Calder and Calder provides the test that the courts have
5 followed, that Keeton is limited to the facts that I've
6 described. In our reply brief on page 9, we talk about a case
7 that recognizes that Keeton is limited to its facts.

8 I've taken a lot of time, Your Honor. I'll very briefly
9 talk about the investigation. What Plaintiffs allege
10 separately is that Sidley purposely -- purposefully availed
11 itself of the privilege of doing business in Ohio because it
12 conducted some interviews of people who lived in Ohio. At
13 least two interviews were in person, including collecting
14 documents, and other interviews were on the phone.

15 Now, as the Plaintiffs acknowledge, Sidley interviewed
16 about 150 people and they interviewed them in some cases where
17 they were. The principal case that we rely upon in this regard
18 is the Sixth Circuit case of Calphalon Corp. v. Roulette. That
19 was a case in which the plaintiff was an Ohio company. The
20 defendant was a sales rep who did work, you know, did work for
21 the company's markets in other states. He did not work in
22 Ohio. As part of their relationship, for the convenience of
23 the plaintiff in Ohio, the defendant sales rep would come into
24 Ohio and talk to them and have communications.

25 What the Sixth Circuit said was the sales rep was not



1 exploiting the privilege of doing business in Ohio. That just
2 happened to be where the company it worked for was and the
3 court characterized those contacts as quote, precisely the type
4 of random, fortuitous, and attenuated contacts that the
5 purposeful availment requirement is meant to prevent from
6 causing jurisdiction, unquote. So in brief on this point, the
7 interviews are just not nearly substantial enough to justify
8 personal jurisdiction.

9 I won't get into the forum non-conveniens argument because
10 of the time that I've taken. But I would just point out again
11 that there is a forum in which this case can go forward as to
12 every Plaintiff and that is Washington DC.

13 Does the Court have any questions for me?

14 THE COURT: Is there -- is this in the alternative?
15 Are you saying either dismiss for lack of personal jurisdiction
16 or grant out motion for forum non-conveniens?

17 MR. HENTOFF: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. HENTOFF: Thank you, Your Honor.

20 THE COURT: Thank you.

21 DEFENDANT APA'S ORAL ARGUMENT

22 MS. WAHL: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MS. WAHL: Barbara Wahl on behalf of American
25 Psychological Association. I just want to note that with me in



1 court today is not only my co-counsel, but a representative of
2 the APA, Jesse Raben, who is with the general counsel's office.

3 So I'll try not to duplicate anything that Mr. Hentoff has
4 said, but APA is a different Defendant and the allegations in
5 the complaint pertaining to APA are actually quite different.

6 APA is a scientific organization that is dedicated to the
7 furtherance of the field of psychology. It's a 501(c)(3)
8 charitable organization. It's incorporated in the District of
9 Columbia. It has its principal place of business in the
10 District of Columbia. It operates entirely out of its offices
11 in the District of Columbia. It has no office, no phone
12 number, and no real activities in Ohio.

13 In 2014, it retained the law firm of Sidley Austin to
14 conduct an investigation and Mr. Hentoff has described what the
15 focus of the investigation was. The retainer agreement has
16 been referenced in not only the complaint, but it's also
17 attached as Exhibit I to Plaintiff's Newman's affidavit.

18 The retainer agreement makes abundantly clear that APA has
19 hired Sidley to conduct an independent investigation. In fact,
20 it was rather unusual in not only referring repeatedly to this
21 work that Sidley was supposed to do as an independent
22 investigation, but it made clear that Sidley was operating
23 entirely independently. It was to follow the evidence wherever
24 it led and that APA intended to release the results of the
25 report, whether favorable or unfavorable, to the public



1 following the completion of the report.

2 The retainer of Sidley was a good thing. Sidley is a
3 well-respected Illinois law firm with offices throughout the
4 world. Mr. Hoffman was to head up the team. He had impeccable
5 credentials. Yale undergraduate, University of Ohio law
6 school, Justice Rehnquist law clerk, a former prosecutor. He
7 had conducted and participated in many, many investigations.

8 So Sidley got started on its work and it completed that
9 work sometime in July of 2015. As Mr. Hentoff said, Sidley
10 provided the report to APA. APA did the following things
11 following its commitment to the public and to its own members.
12 It took the report and first released it in a limited release
13 to its board and council of representatives. Now, just so Your
14 Honor has some comprehension of -- council is like a very large
15 board of directors. There's about 170 people who occupy
16 council and they are elected to that position. And then there
17 is the board, and they function like an executive committee of
18 a board of directors.

19 So the first thing that APA did was a limited release on a
20 secure website to first its board and then its council members.
21 In order to access the report, one had to go online, use a
22 special passcode that was provided, and then from wherever you
23 lived, whether it was in California or Ohio or elsewhere, you
24 could access the report if you choose to do so. It was not
25 emailed to anyone.



1 After the report was initially -- was released in that
2 limited fashion, APA again following its commitment, released
3 it in a broader disclosure. It put it on its website. The APA
4 website, APA.org, is available to anyone in the world. You
5 don't need to do anything. You just need to log on. But
6 again, you as the reader have to do that. You have to take
7 activity. You have to put your own fingers on the keys or on
8 the mouse and reach in and go to the APA website.

9 The report was not in and of itself interactive. The
10 report was simply posted. APA then tweeted a link to the
11 report on its Twitter feed. Now, I'm sure the Court is
12 probably familiar with how that works, but in order to receive
13 something from APA's Twitter feed, you have to again access
14 APA. The reader has to reach in, become a follower of APA, and
15 then you can read whatever APA tweets.

16 On Twitter, you're limited to 140 characters. So APA did
17 not tweet the report itself to its followers. It tweeted the
18 link. So anyone who wanted to read it had to first become a
19 follower, go and see what was tweeted, and then press on the
20 link.

21 After APA -- or I should say slightly before APA released
22 the report, it was leaked by someone, we don't know who, to the
23 "New York Times." APA had nothing to do with the "New York
24 Times" putting the report on its website or reporting about the
25 report.



1 After APA tweeted the report, there were others who
2 retweeted it. APA had nothing to do with those retweets. That
3 was done by individuals who chose to do so. Its website
4 remained, of course, available to everyone.

5 So let's talk for a minute about what this report looked
6 like. The report is massive. I think someone has alluded to
7 the 500 pages, and then another 1,000 pages of exhibits. In
8 it, Sidley concluded among other things that certain
9 individuals within APA had collaborated with members of the
10 military to ensure that APA policy would be consistent with
11 what the military wanted in connection with enhanced
12 interrogations of detainees following 911.

13 The report never mentions Ohio. The report never mentions
14 any activities in Ohio, and to the extent that anyone from Ohio
15 is referenced in the report, the fact that anybody lives,
16 works, or has an affiliations in Ohio is never mentioned in the
17 report.

18 As Mr. Hentoff said, we have here only one of the
19 Plaintiffs who has a connection to Ohio, that's Plaintiff
20 James. Although he has indicated -- or I should say the
21 Plaintiffs have indicated that he has also lived in other
22 jurisdictions, Louisiana and Hawaii among others. He's also
23 referenced those many other places where he's lived in his
24 book, "Fixing Hell," which is available on Amazon. I'm giving
25 Plaintiff a plug for the \$24.99 for the book.



1 So all the other four Plaintiffs, there's no indication
2 that they have had any connection to Ohio, that they feel any
3 connection to Ohio, or that there would be any result or any
4 effects of the report related to them in Ohio.

5 But really the focus on the Plaintiffs is a bit
6 unnecessary here because the case law is abundantly clear that
7 for purposes of jurisdiction, whether it's general or specific,
8 the focus really must be on the Defendant and whether there is
9 sufficient contacts between the Defendant and the forum so that
10 they can be expected to be haled into court here based on their
11 activities.

12 So I will briefly address general jurisdiction because
13 this one's easy. There isn't any. There isn't even any
14 plausible argument for APA to -- for there to be general
15 jurisdiction over APA in Ohio. Under the Daimler case, which
16 has been referenced in the parties' briefs, there really are
17 only two jurisdictions where a defendant is at home under the
18 paradigm, that's principal place of business or state of
19 incorporation, neither one of those is applicable to the APA.

20 There is an exception in our jurisprudence where once the
21 Supreme Court said okay, you, Benguet Consolidated Mining
22 Company, have moved your operations during World War II to the
23 State of Ohio and so we're going to say that even though you're
24 not incorporated in Ohio, and your principal place of business
25 isn't in Ohio, because you're really effectively functioning



1 and conducting all your operations in Ohio, we're going to let
2 Mr. Perkins sue you as a general jurisdiction matter in Ohio.
3 That's not our case. APA does not have operations in Ohio.
4 There's no reason for that Perkins exception to be applicable.

5 Plaintiffs, recognizing that general jurisdiction is not a
6 safe ground for them, has creatively argued that there ought to
7 be two reasons why the Court should exercise general
8 jurisdiction over APA anyway. The first is they say APA, while
9 it's a corporation, is really sort of a membership
10 organization, which is true. APA has over 115,000 members, but
11 that doesn't mean it's not a corporation. It is still a
12 corporation and that means it is still bound by the paradigm of
13 the Daimler case.

14 And in fact, the very language that Mr. Hentoff, stealing
15 my thunder, has quoted to you from the BNSF Railway case, May
16 2017 Supreme Court case, says that jurisdiction doesn't matter
17 for general jurisdiction purposes with the type of claim
18 asserted or the business enterprise sued. So even if APA were
19 considered a membership organization, or however the Plaintiffs
20 want to characterize it, that's not enough for general
21 jurisdiction (indiscernible).

22 Plaintiffs also claim that well, APA consented to
23 jurisdiction because it registered as a charity with the Ohio
24 Attorney General. That is true, it did register, but
25 Plaintiffs are wrong with regard to what that means. As a



1 preliminary matter, there's nothing in the Ohio statute that
2 says that by registration, a charity subjects itself to general
3 jurisdiction. It doesn't say it in the statute and there is no
4 case in Ohio that so holds.

5 Plaintiffs say well, wait a minute, there is a Delaware
6 that held under a different statute under different
7 circumstances that someone who registers to do business with
8 the state is consenting to general jurisdiction. A couple of
9 problems with that. The first -- and they cite, by the way --
10 the case that their citing is Acorda Therapeutics v. Mylan. A
11 couple of problems with that. One is that that was reversed on
12 appeal. The federal circuit did not address that when it found
13 jurisdiction. It said in fact that registration was a factor
14 but not the factor. Instead, the court found that jurisdiction
15 was predicated on specific jurisdiction.

16 In addition, the Ohio statute is completely different from
17 the Delaware statute that was at issue in the Acorda case. The
18 Ohio statute essentially says that as a charity registered to
19 do business in Ohio, APA has to file an annual report, it has
20 to provide some documentation, and maintain records of its
21 activities. In the event that the Ohio Attorney General
22 decides that there is something to pursue in terms of
23 investigation of contributions, that APA would have to
24 participate and cooperate. That's never happened, but it's a
25 much more limited statute. So in sum, there is no basis for



1 general jurisdiction over APA in Ohio.

2 With the Court's indulgence, I would like to talk about
3 next the only other type of jurisdiction available and that is
4 specific jurisdiction. With regard to the four non-Ohio
5 Plaintiffs, as Mr. Hentoff said, one is a North Carolina
6 resident, two at the time of the filing of this lawsuit were
7 District of Columbia residents, and the fourth is a California
8 resident. Stated bluntly, the Plaintiffs have alleged no
9 connection between those four individuals and activities of APA
10 in this jurisdiction.

11 As Mr. Hentoff said and we'll discuss, I will discuss more
12 fully, the analysis for specific jurisdiction focuses on the
13 Defendant's contacts in the jurisdiction for constitutional
14 purposes. What's fair? Why should the Defendant be expected
15 to be sued in this jurisdiction? There has to be connection as
16 Justice Thomas said in the Walden v. Fiore case.

17 There are three things that the Court needs to consider
18 when you're looking at specific jurisdiction. I think of it as
19 sort of a triangle. You've got the relationship between the
20 defendant, the jurisdiction, and the litigation. What are the
21 allegations? In that triangle, the Plaintiffs are not even
22 mentioned. But those three factors have to be analyzed. With
23 regard to the four non-Ohio residents, there's simply nothing
24 alleged in the complaint that connects them, the APA, and this
25 jurisdiction. Nothing at all.



1 Plaintiffs, more or less recognizing that there is no
2 specific jurisdiction over the four non-Ohio residents
3 creatively attempted to argue that well, it's good enough for
4 there to be jurisdiction over Plaintiff James. They know
5 Plaintiff James and they've got the same kind of claims as
6 Plaintiff James. So if you buy Plaintiff James having a claim
7 in Ohio, then you should accept the other four because it makes
8 sense to do it all here at the same time, it's more convenient,
9 and why not.

10 There are good reasons why not. There's no legal basis to
11 do that. Plaintiffs essentially are arguing that with regard
12 to the four non-Ohio residents that the Court should assume a
13 creative yet not recognized theory of sort of pendent personal
14 jurisdiction. There's no such thing as that that would operate
15 here.

16 As the Supreme Court said in the Bristol-Myers case that
17 Mr. Hentoff talked about, and in other cases, in fact every
18 jurisdiction that we've been able to find that's addressed the
19 topic, the courts have all said each plaintiff has to establish
20 its own jurisdictional basis. You can't glom onto somebody
21 else who has jurisdiction. You have to establish it for your
22 own claims against the defendant.

23 One thing I wanted to make sure the Court was clear on
24 that I think bears focus is that in the Bristol-Myers case, and
25 this was the case that the parties separately talked about in



1 supplemental briefing because it came out in June 2017, what
2 was at issue with this Plavix claim was that there were
3 California residents, but then there were 70 non-California
4 residents who, like the California residents all took Plavix,
5 all had the same complaints, all wanted to sue Bristol Myers
6 Squibb, and the Supreme Court said you can't do that. You have
7 to establish -- as the plaintiff you have to establish
8 jurisdiction over Bristol-Myers Squibb for yourself. You
9 cannot hook onto the California residents.

10 Accordingly, we submit Your Honor that there is no
11 jurisdiction over the American Psychological Association in
12 this court by the four non-Ohio Plaintiffs.

13 Last and absolutely not least, I want to address the
14 specific jurisdiction asserted by Plaintiff James. Mr. Hentoff
15 referred to the well-recognized Southern Machine three-part
16 test. The parties have all briefed this and I've sure the
17 Court has already seen how much ink we've spilled on this so I
18 won't belabor the law on each of these three points. But
19 essentially it's a three-part test.

20 The first is maybe the most important and that is that the
21 defendant has to have purposefully availed itself of the
22 privileged and honor of doing business in Ohio for there to be
23 specific jurisdiction. The second is that the cause of action
24 has to arise out of that specific contact with the jurisdiction
25 and the third is that there have to be substantial enough



1 connections between the defendant and Ohio for the court to
2 recognize and exercise jurisdiction.

3 There was a point raised by the Plaintiff in the brief
4 about whether we concede long-arm jurisdiction is found because
5 we've been focusing really on the minimal contacts and the
6 fairness test. We do not concede that there is long-arm
7 jurisdiction. We didn't separately brief it because it becomes
8 abundantly clear when you talk about these other issues that
9 there is no transaction of business by APA in Ohio. There is
10 no injury in the forum by actions outside the forum, et cetera.
11 But, for the purpose of today's argument, I would like to focus
12 on the due process aspects of this as the parties have done.

13 So let's first address the purposeful availment question.
14 I think Mr. Hentoff did a good job of describing the case law.
15 The Calder, it used to be called the effects test, now it's
16 really called the focal point test, and the subsequent case law
17 that narrowed it, the Walden v. Fiore case in the Supreme Court
18 and an abundance of Ohio cases and Sixth Circuit cases that
19 talk about what purposeful available is. And boiling it down,
20 it basically means that you cannot as the defendant be seen to
21 have purposefully availed yourself of the privilege of
22 transacting business or undertaking activities in the
23 jurisdiction if what you've done is more or less spread your
24 activities all over the place. You have to do something to
25 focus on and target Ohio in order for there to be purposeful



1 availment in Ohio.

2 There's a bunch of cases on this and I won't bore the
3 Court with them, but there's the Cattle (phonetic) case, or
4 Cadle case, the Huizenga case, and other Sixth Circuit,
5 including a number of defamation cases, which is important
6 because the Plaintiff I think is laboring under a
7 misunderstanding that because something is a libel case, it
8 gives Plaintiffs special rights in some way to attain
9 jurisdiction where it might not otherwise be able to do so.
10 That is absolutely not correct.

11 An intentional tort like defamation or any other
12 intentional tort or any tort is analyzed under the same set of
13 factors. There's nothing special about a libel case. This has
14 been held repeatedly by our jurisprudence including in the
15 Sixth Circuit.

16 But going back to purposeful availment, I think -- I won't
17 belabor what the cases specifically say. We've talked about
18 that. But I want to focus on what are the facts here. APA did
19 not purposefully avail itself of the privilege of doing
20 business in Ohio with regard to this report. As I described a
21 minute ago, how did it release this report? It did it on its
22 website to everyone in the world, including anybody who
23 happened to be accessing it from their home and/or desk in
24 Ohio. But certainly it didn't, APA did not reach into Ohio and
25 focus, target Ohio residents.



1 It released it on its Twitter feed, which, again, it's the
2 opposite. Followers have to reach over to APA to ask
3 permission to follow APA. It's not the other way around.
4 Again, there may be Ohio Twitter followers of APA, but APA sent
5 this tweet out to all of its followers without focusing on
6 Ohio.

7 It did nothing with regard to this report that focused on
8 anyone in Ohio, nor is there any allegation that the report was
9 specifically focused on Ohio. Instead, there really are only
10 two contacts that the Plaintiffs allege are relevant here to
11 demonstrate APA purposefully availing itself of the
12 jurisdiction.

13 The first is that they contend that the special
14 committee -- so I'll back up one minute. Once their -- once
15 APA hired Sidley to perform this report, it set up a special
16 committee who would interact with Sidley. This is a fairly
17 common thing. It's the representative of the organization.
18 One of the members of the special committee was Dr. Nadine
19 Kaslow and Dr. Kaslow, speaking on behalf of the special
20 committee, sent out dozens of emails, letters, to witnesses
21 that Sidley might want to interview asking for the witnesses to
22 cooperate. No question that she did that.

23 Plaintiff James says that he received an email from Dr.
24 Kaslow asking for him to cooperate. However, in his affidavit
25 he does not say where he received that request and the request,



1 which is attached to Dr. James' affidavit, doesn't show where
2 it was addressed. Even if he received it sitting at his
3 kitchen table in Dayton, it was completely fortuitous and that
4 should not be held to be a contact by which APA purposefully
5 availed itself of the jurisdiction.

6 We don't actually know where Dr. Kaslow sent an email to
7 Dr. James. He could have been accessing it in his phone
8 anywhere. We don't know. So that is fortuitous. It should
9 not be counted as a purposeful availment and certainly is a
10 fairly, in the scheme of things, insignificant contact given
11 the 150 witnesses, the many, many communications that went back
12 and forth.

13 The second contact which the Plaintiffs note is that Dr.
14 James reviewed the report online. Again, he choose -- from --
15 he contends, or he alleges, and we have no reason to doubt
16 this, he says that he read the report online from his home in
17 Dayton. Again, that was his choice, not APA's. The case is
18 very clear that if one -- if the Court is going to predicate
19 specific jurisdiction on contacts, it has to be the Defendants'
20 contacts, not those of the Plaintiff, not those of a third
21 party, and it makes sense. Again, it's the question of whether
22 it's due process for the Defendant, not what the Plaintiff did.

23 The third factor is not an activity that was undertaken by
24 APA, but one undertaken by Sidley and that is that Sidley
25 interviewed Plaintiff James and perhaps others in Ohio.



1 Plaintiffs allege well, Sidley was acting as your agent and so
2 you are tied to whatever Sidley did. That is as a legal matter
3 not correct. The retainer agreement, again that's Exhibit I to
4 Plaintiff Newman's affidavit, makes abundantly clear that this
5 was an entirely independent investigation. Sidley did what it
6 wanted where it wanted. There was no request that Dr. James or
7 anyone else be interviewed in Ohio. There was simply a request
8 for cooperation.

9 There's a few other allegations along these lines about
10 why Sidley's activities should be imputed to the Plaintiff, but
11 they are as flimsy as the other. One is the general notion
12 supported by absolutely no case law that a law firm's actions
13 are imputed to its clients. I think that would turn
14 malpractice cases on their head. There is not a single case
15 provided by the Plaintiff that cites a law firm being tied to
16 its client such that whatever the law firm does, the client is
17 bound by that.

18 Plaintiffs also allege that the special committee oversaw
19 the activities of Sidley, whatever that means. That has been
20 alleged in paragraph 162 of the complaint but again, we don't
21 know what that means. Overseeing doesn't necessarily mean
22 that -- there was no allegation that they went in, they said
23 yes, do this, go do it in Ohio. It's just a verb they stuck in
24 there. There's nothing in the record indicating that the
25 special committee directed Sidley to conduct any activities in



1 Ohio.

2 And Plaintiffs also alleged that Dr. Kaslow made
3 statements about the report indicating that she on behalf of
4 APA was ratifying the report. By Plaintiffs' own statement,
5 this doesn't hold water because they've alleged in the
6 complaint at paragraph 252 that the statements made by Dr.
7 Kaslow were personal. It says at paragraph 257, after the
8 report was published, Dr. Kaslow made her personal views about
9 the allegations against the Plaintiffs clear to the media.
10 Again, those are her personal views.

11 There are other contacts that are alleged by the Plaintiff
12 that APA has had with Ohio, but they are not in any way, shape,
13 or form relevant to the report, relevant to the Plaintiff
14 James, relevant to any other Plaintiff in this case.

15 The second Southern Machine prong is whether the claims
16 arise out of Ohio contacts. We can make short shrift of this
17 one because there really are no Ohio contacts. The claims of
18 the Plaintiffs cannot arise out them. Even Plaintiff James
19 doesn't allege that the interview that was conducted by Sidley
20 is the basis for his claims. He claims that the report defamed
21 him, but not the interview per se. There are no other
22 claims -- there are no other contacts with Ohio.

23 Last prong of Southern Machine is whether the exercise of
24 jurisdiction would be reasonable in Ohio under these
25 circumstances. Again, Mr. Hentoff talked about the focus test



1 that was first articulated in Ohio -- excuse me, in Calder and
2 was recently reiterated in -- very recently actually since the
3 parties finished their briefing, by a case called First
4 Franchise Capital v. Jack in Box. This is 2000 -- I think it
5 was August 1st, 2017, Southern District of Ohio case where
6 again they say the focal point has to be this triangle. The
7 defendant, the jurisdiction, and what are the allegations.

8 Here the focal point is not Ohio. Ohio, as nice of a
9 place as it is is just not where things happened in connection
10 with this report. Really the focal point here is the District
11 of Columbia because that was where APA, the client, hired
12 Sidley, that's where many of the meetings that are addressed in
13 the report took place, that's where the APA board met, that's
14 where many of the witnesses, two of the Plaintiffs, and many of
15 the documents reside, and I believe even Plaintiff James lived
16 and worked in the District of Columbia area for a period of
17 time during the issues relevant here.

18 So as the First Franchise case has made clear and others,
19 another Sixth Circuit case, that Calphalon case that
20 Mr. Hentoff referred to, it's the quality of the contacts at
21 issue, not their quantity. We would submit to the Court that
22 not only is there relatively few contacts with Ohio, but
23 certainly their quality is insignificant in the scheme of this
24 sprawling case with 150 witnesses, a 500-page report, et
25 cetera.



1 So in sum, we would submit that there is no basis for the
2 Court to exercise jurisdiction here over the American
3 Psychological Association. There are insufficient minimum
4 contacts between APA and the jurisdiction. We would request
5 that the Court dismiss the case.

6 THE COURT: Counsel, when did these activities take
7 place, the alleged collusion to get the APA to endorse enhanced
8 interrogation techniques? Is that over a number of years?

9 MS. WAHL: Yes.

10 THE COURT: A considerable number of years?

11 MS. WAHL: Yes. The report, and the complaint makes
12 this clear as well, really the activities were kicked off in
13 roughly 2004 and as alleged in the complaint and in the report
14 that's at issue, APA put together a presidential task force and
15 everybody referred to it as PENS, P-E-N-S. That's an acronym
16 for presidential task force. APA put together this task force
17 to come up with a policy about how the organization was going
18 to react to ever increasingly public criticism of what was
19 going on supposedly on black sites with detainees.

20 There were articles in the "New York Times." There was a
21 book published by a "New York Times" reporter that really
22 pushed things forward. That wasn't until later. But rumors
23 were starting to circulate that there was torture going on at
24 these black sites. APA was pressed into and anxious to make a
25 statement about having a policy.



1 So it put together this task force that had a number of
2 members, prominent people related to psychology, several of the
3 Plaintiffs were also involved, and the task force met in
4 Washington DC in 2005. So it really kicked off in 2005. There
5 were the beginnings of it, how the committee was selected, et
6 cetera is referenced in the report that started in 2004, but
7 this -- the activities at issue in this report roughly span
8 2005 to 2014 when Sidley was hired.

9 THE COURT: And all those activities are in places
10 other than Ohio?

11 MS. WAHL: That's correct, Your Honor.

12 THE COURT: Other than maybe -- were there
13 videoconferences or phone conferences where psychologists from
14 various places in the United States would talk with one
15 another, maybe in a meeting that was chaired or originated out
16 of Washington?

17 MS. WAHL: I am not --

18 THE COURT: Or do you know anything? Or are they
19 all --

20 MS. WAHL: I am not aware and the record -- I'm sorry.
21 I didn't mean to interrupt you.

22 THE COURT: Do you know anything about that, I should
23 say? Physically where these -- or were these all in person
24 meetings in Washington or at sites where APA might have been
25 having conferences or annual meetings, things like that. Do



1 you have any information on that?

2 MS. WAHL: I do, and I don't want to go beyond the
3 record or what's publicly available but what I can say is that
4 the activities that are referenced in the report and are the
5 subject of the complaint as well, the PENS task force met in
6 Washington. There were subsequent phone calls and there
7 were -- there was a list surf. So in cyber space and by phone
8 line they did communicate. There were no activities as the
9 record reveals related to the PENS task force in Ohio.

10 The Plaintiffs allege that during the time of the PENS
11 task force, there were two board members, APA board members who
12 lived in Ohio. But there's nothing in the record that shows
13 that they had anything to do with the activities of the PENS
14 task force. They were simply on the board.

15 Similarly, the Plaintiffs allege that there were two Ohio
16 board members in 2015 when the report was released, but there's
17 nothing in the record that shows that they had anything to do
18 with the release of the report. In fact, so many of the board
19 members had to recuse themselves that it's highly questionable
20 that they actually had anything to do with the voting on the
21 release of the report or its publication.

22 Your question about whether there were APA meetings where
23 people connected in from Ohio, there's nothing in the record
24 that reveals anything of that sort. There is a division, a
25 separately incorporated division -- so APA has sort of, I don't



1 want to call them chapters, they are divisions. Some of them
2 are geographic and some of them are subject matter related.
3 There is an Ohio-based separately incorporated division, that's
4 not a subsidiary. It's its own corporation. Other than that,
5 there is literally nothing in the record that connects APA with
6 any activities in Ohio pertaining to the report or the
7 complaint or the investigation.

8 THE COURT: Thank you.

9 MS. WAHL: Thank you, Your Honor.

10 THE COURT: It's about five minutes until 11. Let's
11 take a ten-minute recess.

12 THE CLERK: All rise. The court is in recess.

13 (Recess taken)

14 THE CLERK: All rise. The court is again in session.

15 THE COURT: Thank you. Please be seated. Ms. Forrest,
16 do you wish to proceed?

17 PLAINTIFFS APA'S ORAL ARGUMENT

18 MS. FORREST: Thank you, Your Honor. Good morning
19 again.

20 THE COURT: Morning.

21 MS. FORREST: Before I start, Your Honor, I want to
22 clear up where there were a couple of factual issues that you
23 asked questions on and there were -- I'm sure Mr. Hentoff and
24 Ms. Wahl didn't mean to mistake any facts, but I think it -- I
25 don't want it to feel like I'm going down the rabbit hole here,



1 but I think they're important.

2 So the first one, the minor one, none of my clients are
3 affiliated, nor Mr. Free's client with the CIA. And black
4 sites is a term of art, and enhanced interrogation techniques
5 refer only to the CIA. That's really important because one of
6 the problems with the report is that it conflates those issues
7 and as Your Honor may know, in fact there are two psychologists
8 who are non-APA members who are affiliated with the CIA doing
9 something completely different that had nothing to do with this
10 case, okay?

11 So it's very important to understand, Your Honor, in this
12 case, the Department of Defense was operating under different
13 legal guidance from as late as 2003 and into 2004, and
14 certainly by 2005 when these events started taking place.

15 Something else. Ms. Wahl represented to the Court that in
16 fact the report doesn't mention Ohio. In fact, on page 7, in
17 one of the only physical searches that the report calls out, it
18 says quote, we also met with the former APA president at his
19 home in Ohio, at his home, as in at home of APA at that point,
20 and searched his electronic and hard copy files to collect
21 relevant documents.

22 Now, a couple of other points, Mr. Hentoff said, he used
23 the word they collaborated. You know, if Mr. Hoffman would
24 have used that word in the report, we probably wouldn't be
25 here. In fact, at the insistence of the accusers, and we can



1 play the tape for Your Honor today because Mr. Hoffman was
2 hired and signed the engagement letter with APA on November
3 20th, Your Honor.

4 On December 2nd, right after Thanksgiving, his first
5 interview was with Nathaniel Raymond. He was one of four
6 accusers, one of which is based in Ohio, who has repeatedly and
7 as recently as last year attacked Colonel James, all of which
8 has been adjudicated by the psychology board in Ohio and the
9 courts in Ohio. All of the basis, all of the allegations, much
10 of which are similarly rehashed in the report were found to
11 baseless Your Honor in Ohio.

12 In fact, what's alleged in the report, and this was the
13 narrative supplied by Mr. Raymond, and the video says, we hope
14 that this is what the report does, that it will be used to
15 supply a RICO violation, racketeering influenced corrupt
16 organization. In fact, most of the material in here had
17 already been submitted to the Department of Justice, the FBI,
18 the Senate Arms Service Committee, the Select Intelligence
19 Committee, and all of it was found to be not a reason to have a
20 cause of action for criminal conduct.

21 So that's an important point. This isn't about just
22 hanging out together, or Colonel James hanging out with his
23 buddies. In fact PENS doesn't stand for presidential task
24 force. It stands for psychological ethics in national
25 security. What happened in late 2004 and 2005 is Ron Levant,



1 Dr. Levant, who you had an affidavit from who is here in Ohio
2 and other people on the basis of an article in the "New York
3 Times" said you know what, we're going to convene a task force
4 not to determine Your Honor if psychologists should be involved
5 in national security investigations, it was about how they were
6 going to do that.

7 The report basically has three sections, Your Honor. In
8 2005 and 2006, you have the actions of the task force. In
9 fact, many of those communications did take place by email.
10 There was only one two-day meeting during that PENS task force
11 which was in DC.

12 From 2006 to 2009, which is the middle part of the report,
13 Your Honor, those events took places -- and that's how APA is
14 different. It's a membership organization and its members
15 acting, including from Ohio, including Colonel James from Ohio,
16 including two board members from Ohio. Okay?

17 The next period that is lopped on at the end starts in
18 approximately 2007 and goes from 2014. That is really a rehash
19 of the ethics complaints including those against Colonel James
20 that had already been litigated and adjudicated in Ohio, all of
21 which Dr. James told Mr. Hoffman, none of which found its way
22 into the report, a narrative which was supplied by Dr. Trudy
23 Bond from Ohio, and she was one of the people that Mr. Hoffman
24 interviewed. Now, we don't know if that interview was in
25 person or by phone, but we know because she cited 47 times in



1 the report, Your Honor, that it was important and that's only
2 second to one of the other accusers in the report.

3 So those are just some basic facts. Two overall questions
4 before I get into my argument, Your Honor, that I think might
5 be helpful for grounding because this is a really fact
6 intensive case and it can be at times sort of a who did what
7 when. So two import -- I think these are two important
8 questions that are helpful for me when I go through the case.

9 What's the test in Ohio with respect to defamation?
10 Defendants in their paper talk about targeting. They talk
11 about targeting the Plaintiff, and targeting the forum. They
12 state that's the test and I'm going to talk to you about those
13 cases at the appropriate point of my argument and why I think
14 that isn't the test in Ohio as announced by the Ohio Supreme
15 Court both in Fallang v. Hickey and in Kauffman Racing. You
16 didn't hear targeting much today. You heard focal point.
17 They're sort of moving away from that.

18 I think the second question, Your Honor, is who published
19 what to whom and when. There's 12 counts in the complaint,
20 nine of those concern the report. There were three versions of
21 the report. You heard not about a draft I don't think today.
22 You did hear about a report from July 2nd to the final report
23 and you didn't hear about the revised report.

24 I want to clear up in case Your Honor's not on Twitter, I
25 don't want to presume anything, that you don't have to be a



1 follower to go on somebody's Twitter feed and see a report. It
2 just means that it shows up in my feed in the morning. I go
3 and search on Twitter every morning for something related to
4 this case by just putting in torture or some of the key words.
5 Being somebody's follower only means I get that fed to me, but
6 anybody can go view that and if you put in the key word or the
7 hashtag, which these folks learn to use, you get torture and
8 APA or Hoffman. There are a couple key words that people use
9 to follow those. Minor facts. Let's step back at the bigger
10 picture for a moment.

11 Before I start to talk about jurisdiction, I really want
12 to take just a very brief moment to tell you what's at stake
13 for my clients and Mr. Free's clients, and Mr. Gosnell's
14 clients, all of whom are here today. They were doing the right
15 thing, Your Honor. They were putting policies in place to
16 prohibited abusive interrogations of detainees and working with
17 their professional association, APA, to craft those policies so
18 that military psychologists could bring them to bear in the
19 field, in Iraq, Afghanistan, and Guantanamo.

20 They could have played it safe. It was a highly
21 contentious area, but they stepped up. Indeed, the two former
22 Army Surg -- U.S. Surgeon Generals, one of whom Mr. Hoffman
23 interviewed, said they didn't have to do this. We looked at
24 this extensively and they volunteered and stepped up for their
25 country and for their profession. For that, they've been



1 accused of enabling torture.

2 So let me turn to jurisdiction. This action was properly
3 initiated in Ohio by all of the Plaintiffs, including Colonel
4 James, who is a psychologist licensed in Ohio. He works at
5 Wright State University, and you heard reference to some emails
6 that were sent by Dr. Kaslow to him at Wright State University.
7 In fact, that's in the email address. In fact, Dr. Kaslow knew
8 that Dr. James was at Wright State University because he had
9 invited her to speak at the graduation for his school. And
10 that statement, Dr. Kaslow still has it on her Facebook page,
11 you can go read about that, when she came here to speak at the
12 graduation.

13 Dr. James lives in Montgomery County. This is in
14 paragraph 38 Your Honor of the complaint and paragraph 59 talks
15 about Colonel James being licensed in Ohio. There were six
16 interviews of Ohio residents. Colonel James picked up
17 Mr. Hoffman and his associate at the airport and they drove to
18 Mr. -- Colonel James' office at Wright State where he was
19 interviewed for six hours and there were subsequent phone
20 calls.

21 Along with his colleagues, they were all falsely accused
22 in the Hoffman report of participating with Colonel James in
23 this collusive joint enterprise that I discussed earlier. When
24 the Hoffman report was circulated and read in Ohio, all the
25 Plaintiffs' reputations were damaged and that's a key point.



1 Everybody was damaged in Ohio.

2 This Court has at least three grounds, Your Honor, to
3 exercise jurisdiction over this case and all the claims and
4 those encompass both specific and general. First, Your Honor,
5 both the U.S. Supreme Court and the Ohio Supreme Court have
6 stated unequivocally as recently as the case you heard about
7 Bristol-Myers Squibb, and if you look at the supplemental
8 authority and what we responded, they quote Keeton in that,
9 that if you circulate a report in the jurisdiction, everybody's
10 harmed.

11 If you go online, Your Honor, and actually listen to that
12 oral argument or if you pull up the transcript, page 34 to 38,
13 Chief Justice Roberts, Justice Ginsberg, and Justice Kennedy all
14 say defamation is sui generis. It's peculiar. It's different.
15 Why is that? Because everywhere the document or the statements
16 are made is published, the Supreme Court as recently as in BMS
17 has affirmed that plaintiffs are injured. In fact, Keeton
18 holds, issued on the same day as Calder, that a New Hampshire
19 resident could go sue -- I'm sorry, a non-New Hampshire can go
20 sue in New Hampshire if there's circulation there. That's the
21 key distinction in terms of the law that the Plaintiffs are
22 making versus the Defendants.

23 It's not about targeting the forum. Okay? And if you
24 look at all these cases, Your Honor, or if you go look at law
25 journal notes, you'll see a continuum. Defendants want this



1 Court to adopt the minority position which has been adopted by
2 the Fourth and the Fifth Circuits, but even they, if you look
3 at the cases, they're not even comfortable with it. Okay?

4 It's really about and Ohio Supreme Court has
5 operationalized this for His Honor very simply. If there is
6 evidence in the record that Ohio residents read the report,
7 which there is here, the Court can exercise jurisdiction.

8 Second, even if the publication to and reading by Ohio
9 citizens, Your Honor, was not enough, which we believe it is
10 under the Ohio Supreme Court and U.S. Supreme Court standard,
11 we've provided affidavits to demonstrate that Sidley, Hoffman,
12 and APA had sufficient additional contacts with Ohio to create
13 jurisdiction consistent with due process. I'm going to go into
14 those.

15 Third, this Court has jurisdiction over APA and Sidley and
16 therefore, Hoffman, which was acting both as Sidley's agent and
17 APA. Both Sidley and APA are registered and there is very
18 valid law in Ohio, some of it cited in the reply brief by
19 Sidley, holding that registration in the state in fact does
20 confer general jurisdiction and you don't even have to go into
21 the specific or general jurisdiction analysis, Your Honor.
22 We're going to talk about that in a minute.

23 In the next few minutes, I'm going to go into a little
24 more detail about the grounds for asserting jurisdiction, Your
25 Honor, over all the Defendants and I'll respond to some of what



1 I'll believe are the key cases that they dealt with,
2 specifically Reynolds. They spent a lot of time on that. I'm
3 going to distinguish that like the Kauffman court did and the
4 Ohio Supreme Court. I'm also just going to touch very briefly
5 on the forum non-conveniens argument.

6 Two preliminary points. First, the Ohio long-arm statute.
7 We briefed that not extensively but APA didn't mention it in
8 its first brief. Mr. Hentoff says he doesn't contest it.
9 2307.382 and civil rule 4.3, we think especially after Fallang,
10 if you intend -- if you commit an intentional tortious act,
11 you're subject to jurisdiction. That's not really contested in
12 Ohio. We're happy to brief that more or talk more about that,
13 Your Honor, if the Court so desires.

14 Second, at all times, Hoffman was acting in his capacity
15 as an agent of both the limited liability partnerships of
16 Sidley, and there's at least eight -- excuse me, there's at
17 least seven, there were eight, all registered to do business in
18 Ohio, and APA. APA expressly engaged Hoffman and Sidley to
19 conduct the investigation. The engagement letter is in
20 evidence.

21 APA board members, Dr. Nadine Kaslow and Dr. Susan
22 McDaniel, oversaw the activities of Hoffman and Sidley and Dr.
23 Kaslow emailed witnesses to ask for their cooperation with
24 Hoffman. Throughout Hoffman and Sidley's contacts with all the
25 witnesses, including the Plaintiffs, Mr. Hoffman repeatedly



1 used Dr. Kaslow's name and APA's name to gain access to
2 people's homes and offices.

3 That agency was further established, Your Honor, by APA's
4 ratification of the report after its completion. Now, at one
5 point in their brief they say it wasn't accepted, but at the
6 beginning of their papers they say it was endorsed.

7 Let's look at their actions. When APA accepted the
8 report, they posted it on their website. They also posted a
9 revised report. They acted on it immediately to fire Dr.
10 Behnke. It adopted those activities as its own. They never
11 questioned it. In fact, they sent a copy of the report, which
12 is still on APA's website, to the Senate Armed Services
13 Committee lauding Mr. Hoffman's investigation on their behalf.

14 Let me turn now to the application of the three-part
15 Southern Machine test, which I'm sure Your Honor is very
16 familiar with, purposeful availment, arising from, and
17 reasonableness.

18 First as to purposeful availment, Kauffman Racing. Let's
19 go back to that for a moment, Your Honor. The Ohio Supreme
20 Court stated that purposeful availment is present when the
21 defendant's contacts with the forum state proximately results,
22 so I can think back to my first year of law school, from the
23 actions by the defendant that create a substantial connection,
24 and that connection such that defendant -- such that the
25 defendant should reasonably anticipate of being haled into



1 court here. That's Kauffman at 49 to 51.

2 In fact, Mr. Hentoff was talking about Kauffman earlier
3 and he made another quote. His actual -- he couldn't remember
4 the paragraph number. Actually, it's paragraph 66 he was
5 quoting from and that's when the Kauffman court actually talks
6 about Calder. It adopts Calder, and it says there are
7 detractors. The quote referenced by Mr. Hentoff is actually
8 when the main portion of the opinion is talking about
9 weaknesses of the test they'd go onto adopt.

10 Under that standard of purposeful availment, defendants
11 each purposefully avail themselves of the privilege of acting
12 in Ohio. Now, Ms. Wahl also made reference, Your Honor, to
13 transacting business. This is tortious conduct. We're not
14 talking about unintended negligence, and if you go to the
15 contracts cases, Your Honor, contracts cases take a little more
16 than just a single fortuitous contact.

17 It actually -- in torts though and especially in
18 defamation, the Supreme Court has said all you need is one act
19 and that's enough. So Calder, Keeton, Fallang, and Kauffman,
20 those cases establish that given the special nature of the tort
21 of libel, purposeful availment occurs when defamatory
22 statements are published into a jurisdiction.

23 As Calder stated, what matters, Your Honor, is where the
24 effects of the defamation are felt and where the statements are
25 read by third parties. I can even talk to you about that test



1 and how it's stated in Kauffman. Kauffman, again, gave this
2 Court a really important way to operationalize the idea of
3 where the harm is suffered, and more importantly where the
4 report when it involves the internet is published. If Ohio
5 residents read it, it's published in the jurisdiction. They
6 said the Zippo test that Defendants talk about in their papers
7 doesn't really work in a non-commercial context and we're going
8 to do it this way in Ohio.

9 Here purposeful availment has been amply demonstrated by
10 the multiple publications in Ohio. Again, three versions of
11 the report nine times. First, Hoffman first published a draft
12 of the report to the APA board, his client. At that point, the
13 board included two Ohio board members. So the minute they got
14 the ability to read that report, it was published in Ohio.

15 Then the APA published the final report into Ohio on
16 several occasions. It gave electronic access to members of the
17 APA council, who included Ohio residents. It published it on
18 the APA website where it was read and commented on actively by
19 Ohio residents.

20 Ms. Wahl alluded to it being tweeted to Twitter followers,
21 1392 of those, Your Honor, were Ohio residents. The report was
22 given to the "New York Times" and again, we've alleged in the
23 complaint that Mr. Hoffman, when he urged the board to bring in
24 two of the most vocal accusers of Plaintiffs and he knew that
25 they were collaborating with the "New York Times," they just



1 published an article two months before on the front page of the
2 "New York Times" with James Risen, whose allegations had
3 sparked the whole thing. Yet, they knew it would be given to
4 the "New York Times."

5 It wasn't a question -- you could even take out the word
6 leaked, Your Honor. It was of not if it was going to the "New
7 York Times," it was a question of when. Everybody knew this
8 report was going to go to the "New York Times." Hoffman
9 interviews Risen. You don't ever read about any about that
10 interview, but Hoffman interviewed Risen, the "New York Times"
11 whose whole investigation sparked this and his book chapter.

12 Hoffman then distributed a revised report to the APA
13 board, again to two Ohio board members, and APA posted that
14 version again on its website. If you go to the APA website
15 today, you find two versions of the report. There was supposed
16 to be a third version of the report, Mr. Hoffman was rehired,
17 and that was due June 8th, and it's never surfaced. That was
18 done because APA acknowledged there were problems.

19 Finally, there's also a videotape Your Honor that's
20 alleged in the complaint. I'm not going to spend much time on
21 that. That was Dr. Kaslow, that was tweeted to 1,500 residents
22 of Ohio, where she says that the collusion that is described in
23 the report, and I'm paraphrasing Your Honor, enabled
24 psychologists to be involved where there were enhanced
25 interrogation techniques and abuse of interrogations.



1 Now, overall, just a partial tracking, Your Honor, of the
2 publications of the report into Ohio reveals that it was
3 circulated to over 40,000 residents. A publisher of a
4 defamatory restatement is libel for all foreseeable
5 publications.

6 Let me now address, Your Honor, one of the Defendants'
7 central arguments. Contrary to Defendants' assertions, in
8 cases with facts analogous to this one, the Ohio Supreme Court
9 has not said that you have to target the plaintiffs. This goes
10 back to the question I said keep in mind when I'm describing
11 the publications. In fact, they use the word target and they
12 describe it as describing the Reynolds case. The Reynolds case
13 never uses the word target or targeting.

14 In Kauffman, the Ohio Supreme Court as we've talked about
15 reiterated the effects test, and the five Ohio residents who
16 read it established publication. In fact here, even though
17 it's not discussed much in their papers, only three of the nine
18 publications alleged in our 12 counts involve internet
19 publications, Your Honor. The other six involve publications
20 by Hoffman to the board, his client, or counsel by sending an
21 email to Ohio board members who entered a code and accessed the
22 report, much as somebody would tear open an email, Your Honor.

23 Fallang said all you need is one letter and that's enough
24 to establish good jurisdiction, consistent with the due process
25 clause. In fact Fallang, which Kauffman later cites, went on



1 to say it takes a high degree of unfairness to construct a
2 barrier from the constitution to jurisdiction.

3 Some of the cases, Your Honor, second, the Defendants rely
4 on themselves make it clear that their holdings don't apply to
5 libel cases. We talked about that a little bit about
6 transacting business, contract cases don't apply. Some are
7 other jurisdictions. We talked about the Fourth and the Sixth
8 Circuit. Those are -- if you go in and look at that, those are
9 listed as minority jurisdictions. Others, clearly
10 distinguishable on the facts.

11 For example, the BMS case, Bristol-Myers Squibb, the
12 Supreme Court just looked at, they even cite Keeton and
13 circulation. But more importantly, think about it Your Honor
14 as a judge. If you got somebody and you don't know where they
15 took the pill, Plavix, it's a blood thinner, it's very hard to
16 hold somebody liable if you don't know where it was
17 manufactured, you've got a stream of commerce theory, and the
18 plaintiffs' injuries are all going to be different.

19 In fact, the plaintiffs, over 600 in that case, you
20 couldn't establish them as a class. Why? Because they weren't
21 typical. There was no typicality. Okay? We've got a
22 different case here and products liability is very different,
23 as the Supreme Court said during that oral argument.

24 Finally, those cases from Ohio or the Sixth Circuit Court
25 of Appeals were decided prior to Kauffman, which distinguishes



1 both Reynolds and the other cases on which the Defendants rely,
2 Your Honor. Since the Defendants rely heavily on Reynolds,
3 page 1120 in particular, Your Honor, I want to spend a few
4 moments on that.

5 Three points. The source for the report of Reynolds' drug
6 tests was a sample taken in Monaco, analyzed in France, and
7 confirmed by arbitration in Germany. Hoffman had six sources
8 in Ohio. Again, I'm on page 1120 of Reynolds. The defendant
9 distributed its press release in London, England, not in Ohio,
10 and that release in fact did not contain any defamatory
11 statements. The other publications did.

12 Each of the Defendants here distributed three versions of
13 the report in Ohio on several occasions. There was no
14 evidence, Your Honor, that the defendant knew of the Ohio
15 origin of the contract that the plaintiff in Reynolds lost as a
16 result of the defamatory remarks.

17 So in other words, if you've got an international athlete,
18 which Butch Reynolds was, he was a track star, okay, and you're
19 talking about Butch Reynolds, and you don't even know his
20 affiliation with Ohio, that makes sense that it's unfair to
21 bring him into Ohio. But not Mr. Hoffman, he interviewed
22 Colonel James at his office six hours, and five other
23 witnesses, one of whom supplied a good portion of his false
24 narrative.

25 Two points about that. Dr. Bond, whose continually



1 attacked Colonel James, supplied part of the narrative.

2 Another non-party named is Dr. Soldz. Dr. Soldz supplied a
3 good portion of the narrative and in fact, if you go to page --
4 to paragraph 173 of our complaint, Your Honor, that contains a
5 videotape which is still online of Ms. -- of Dr. Soldz joking
6 that when Mr. Hoffman needed a document, he called Dr. Soldz.
7 In fact, Dr. Soldz had been targeting Colonel James for quite
8 some time. He even said in an interview online that Dr. James
9 got his job at Wright State because he was black and he was
10 lazy, and basically doesn't show up to work.

11 At one point, literally fights almost broke out, the
12 rivalry among the accusers and their targets was so bad.
13 Indeed, paragraphs 43 and 44 of our complaint allege that the
14 Plaintiffs were targeted. Paragraph 62, and I won't restate
15 Mr. Hentoff's statement of our burden of proof, we don't
16 believe targeting is the standard but even if it wasn't, Your
17 Honor, paragraph 62, it's couched in terms of Dr. James' harm,
18 but it applies equally to all the Plaintiffs.

19 The statements were published in the "New York Times" and
20 on the APA's website to be circulated, viewed, and read
21 nationwide including by residents of Montgomery County, Ohio.
22 We alleged that they were targeted, and that they were targeted
23 in Ohio when the report was published in Ohio. We're entitled
24 to all reasonable inferences.

25 Cadle, you heard that briefly discussed. That was about



1 an attorney in a Manhattan -- or sorry, a Massachusetts debt
2 collection practice, Your Honor. All the comments were related
3 to Massachusetts and he was trying to sue in Ohio. The same
4 thing with Oasis, the Oklahoma residents. Again, those were
5 both distinguished by the Kauffman court.

6 Calphalon didn't mention each of the plaintiffs. Here,
7 each of the Plaintiffs was mentioned as a key player by name,
8 mentioned by name. The Calphalon case talked about you guys.
9 Nobody was named.

10 Now, I'll turn to the second prong, Your Honor, the
11 arising from. As the Sixth Circuit has stated, Your Honor,
12 this doesn't require much. It's a lenient standard. Only that
13 the claims have a substantial connection with the defendants'
14 in-state activities. Given that test, like the others,
15 Plaintiffs' causes of action all arise from the Defendants'
16 activities in the forum.

17 First, Hoffman's team, during the investigation, entered
18 Ohio at least three times to interview two witnesses in person
19 and examine that computer we talked about earlier. It also --
20 the team conducted telephonic interviews and follow up
21 interviews of Ohio residents.

22 One of those interviews, Your Honor, as we talked about
23 was Dr. Levant, also named as a key player in the collusion,
24 the APA president when it issued the PENS guidelines, and he
25 was operating from Ohio, the focus of the report's most



1 significant allegation.

2 We've talked about the important Hoffman places on this
3 interview. He doesn't ever mention the District of Columbia as
4 being one of the places he visits, but he does mention Ohio,
5 and he does mention that he searched Dr. Levant's computer.
6 Dr. Bond we've also talked about and the fact that she was
7 quoted 47 times.

8 Second, Colonel James' activities described in the report,
9 Your Honor, span a longer period than any of the other military
10 officers targeted as having colluded with APA to enable -- and
11 this allowed Hoffman to expand the scope and the years the
12 investigation covered so that it could be used to counteract
13 what was perceived as a statute of limitations problem under
14 RICO.

15 Hoffman could not have construed the entirety of his
16 narrative without alleging Colonel James' participation in that
17 joint venture and he couldn't have claimed as does to have
18 claimed -- as he claims to have done a thorough investigation.
19 Again, Dr. James and Dr. Levant, both Ohio residents, were both
20 named as key players.

21 Third, we've talked about the APA board and council number
22 of members in Ohio. The board and the council has continued to
23 act on the report with their members acting from Ohio. This is
24 not an organization where everybody gathers in DC. In fact, we
25 have an affidavit, Dr. Strickland's affidavit said nobody was



1 in DC. There's nobody in DC, Bonny. Staff's there, but
2 everybody was scattered. That's why they had to send an email
3 to us to get access to the report.

4 So even if the publication to Ohio readers alone was not
5 enough, Your Honor, these other contacts are more than
6 sufficient to exercise jurisdiction consistent with the due
7 process clause. Fallang held that even a single purposeful
8 contact is enough to satisfy the requirements for jurisdiction
9 when you're talking about intentional conduct targeting.

10 That's at page 108.

11 Now, let me turn briefly to the grounds that establish
12 jurisdiction for all the claims, not only those, Your Honor, of
13 Colonel James. First, given the jurisdictional standards
14 established by the U.S. Supreme Court in Keeton, this Court has
15 grounds for exercising jurisdiction over each of the
16 Plaintiffs' claims, Your Honor.

17 Keeton held that a state's interest in redressing torts
18 occurring within its borders could properly extend to torts
19 committed against non-residents. That's a really important
20 point. You can be a non-resident of the forum and go -- and
21 sue in another state.

22 Indeed, in the opinion in Bristol-Myers Squibb, which we
23 quote in our notice of supplemental authority response, Your
24 Honor, the court talked about Keeton, concluding that specific
25 jurisdiction was present.



1 We relied principally on the connection between the
2 circulation of the magazine in New Hampshire and
3 damage allegedly caused with the state. We noted
4 that false statements of fact harm both the subject
5 of the falsehood and the readers of the state. This
6 factor amply distinguishes Keeton from the present
7 case for here the non-residents' claims involve no
8 harm in California and no harm to California
9 residents.

10 So the focused on publication and the fact that in Chief
11 Justice Roberts' view, defamation is sui generis. It's
12 different.

13 Now, as the supreme court has held, once an Ohio, once an
14 Ohio court acquires personal jurisdiction over a non-resident
15 defendant for claims arising in Ohio, 18(a) permits joinder of
16 related claims of that party's that do not arise in Ohio.
17 Okay? That's the U.S. Sprint v. Mr. K's Foods case.

18 Whereas here, Your Honor, a defendant purposefully touches
19 a state with its activities we believe, and that's not about
20 pendent jurisdiction, which may or may not arise in the federal
21 courts, this Court has the power and the ancillary authority to
22 determine all claims and issues directly connected with those
23 activities. That's actually from a Supreme Court case,
24 Goodyear Dunlop Tires.

25 Here, Plaintiffs are all properly joined with respect to



1 20(a). You've got a common nucleus of facts. You've got
2 common issues of law. One joint venture, one investigation,
3 everything arising from the same publications.

4 Finally, with respect to the third prong of the due
5 process analysis, the exercise of jurisdiction of the Court
6 over the Defendants is imminently reasonable. As the Sixth
7 Circuit and other courts have found, when the first two
8 elements of a prima facie case are satisfied, then an inference
9 arises that this third factor is also present. In Kauffman,
10 the Ohio Supreme Court affirmed, as did Fallang, you've heard
11 me reference earlier, that a high degree of unfairness is
12 required to erect a constitutional barrier against
13 jurisdiction, Your Honor.

14 Deciding if it's reasonable requires this Court to look at
15 three factors. First, what is Ohio's interest in the
16 controversy? If Ohio's going to spend its tax dollars, why
17 should they do that and open the doors of the courtroom to
18 these plaintiffs? Both Ohio and U.S. law consistently confirm
19 that a state has a compelling interest in adjudicating injuries
20 and especially intentional torts, which occur within its
21 borders. This instance is even greater here, Your Honor, where
22 these matters have been partially adjudicated by the Ohio Board
23 of Psychology, and the magistrate who reviewed that finding,
24 and those findings were accepted by the Ohio court, and that
25 decision was not disturbed.



1 Second factor, burden on the Defendants. Litigating in
2 Ohio won't be a significant burden on them. Travel from DC,
3 pretty easy. Same thing from Chicago. It's where I flew in
4 from yesterday, a 40-minute flight. You can drive it.
5 Defendants will well be able to bear the cost.

6 Plaintiffs on the other hand, two of whom are without full
7 time employment because of these events banded together with
8 Colonel James, their fellow colluder according to Mr. Hoffman,
9 to maintain this lawsuit to clear their names. This is the
10 Sixth largest military town in the country, Your Honor. It's
11 especially important for Colonel James to clear his name here.

12 In a case cited by Defendants, Wilts v. New Jersey, page
13 11, it specifically states in fact that the Sixth Circuit has
14 made it clear that specific jurisdiction may be proper even
15 when the defendant is compelled to travel. That's in APA's
16 reply brief at page 11.

17 Moreover, the events have no center of gravity in DC.
18 Again, as Your Honor picked up on, most were conducted by email
19 or telephone by APA members who hale from states including
20 Ohio. Hoffman interviewees and the witnesses Plaintiffs will
21 depose, most of them are not located in DC. I think that's
22 important.

23 In fact, at one point, they allege that the Department of
24 Defense is in DC. It's actually in Virginia and that will come
25 later when we talk about applicability of law, but it has a



1 mailing address in DC, a post office box, because it's required
2 to by the federal government. But it's actually located in
3 Virginia. So for choice of law purposes, there's actually very
4 little relation of this case to DC.

5 And finally, I want to read something from the Ohio
6 Supreme Court.

7 We decline to allow a non-resident defendant to take
8 advantage of the conveniences of modern technology,
9 those convenience that affords and simultaneously be
10 shielded from the consequences of intentional
11 tortious conduct.

12 You can't use the internet to distribute something and
13 then say you're not subject to jurisdiction because it was on
14 the internet. Plaintiffs have met all three prongs of the due
15 process analysis.

16 General jurisdiction. Relatively quick, Your Honor,
17 Sidley. Carden v. Arkoma, the Supreme Court has said limited
18 liability partnerships, sorry, not corporations. Not the case.
19 In fact, and I'm going to get back to this in a minute, we
20 cited Price v. Wheeling, also a case that says good law,
21 registration in Ohio, valid basis for jurisdiction.

22 APA, a professional organization, current board member in
23 Ohio. At almost times of the events described at least one
24 board member in Ohio. 2,800 members here, we allege only 1,500
25 in the complaint. The archives of psychology, the home of



1 psychology is considered Akron, Ohio. It certifies programs
2 here. It accredits programs here.

3 Now, let me go again to jurisdiction. Sidley cites on
4 page 2 of its reply a case Grubb v. Day to Day Logistics, Your
5 Honor, and you heard both Mr. Hentoff and Ms. Wahl talk about
6 the BNSF case, which was recently decided by the Supreme Court.
7 In that case, on page 12, the court actually leaves open the
8 question of whether registration and consent is still good.
9 They decline to consider it because it wasn't brought up in the
10 lower court. In fact, if you go to the case that Sidley cites
11 in its own papers, the District Court for the Southern District
12 of Ohio, specifically on page 7, stated that consent by
13 registration after Daimler was still good law in the Sixth
14 Circuit.

15 The court in Grubb then collected cases, acknowledged
16 there's a split among circuits, and said this court is
17 convinced that under the laws of this circuit, the designation
18 of an agent under the Freight (sic) Motor Carrier Act which
19 requires designation of an agent for service of process for
20 registration to do business in the state operates as consent to
21 be sued in each state where it is filed. Again, Grubb v. Day
22 to Day Logistics, page 2 of the Sidley reply.

23 APA. To do business here and to solicit members here, if
24 you call the Ohio State Attorney General, they tell you that
25 you have to register to solicit members here and designate a



1 service agent.

2 Sidley partnerships. This is not entered into evidence
3 but if Your Honor wishes to explore this, we will happily
4 provide certified copies or do a 30(B)(5) deposition of a
5 Sidley partner. Seven limited liability partnerships.
6 Nobody's incorporated or organized in DC at Sidley. It's
7 actually organized under Delaware and Illinois and all of those
8 partnerships are qualified and registered as foreign limited
9 partnerships in Ohio.

10 Let me touch briefly on forum non-conveniens. Even if the
11 Court accepts personal jurisdiction, Defendants have argued
12 that you should dismiss this case under the doctrine of forum
13 non-conveniens, Your Honor. But the Ohio Supreme Court has
14 said the plaintiffs' choice of forum should rarely be
15 disturbed.

16 Now, a couple of tests. Burden on Defendants, I think
17 I've covered that. I won't belabor the point. Not
18 inconvenient for witnesses. In fact, much less expensive and
19 this is much more centrally located. Nothing in the nature of
20 this case can overcome Ohio's interest, Your Honor. We need to
21 adjudicate this once and for all in Ohio.

22 Defendants want it in DC because they want to apply DC
23 procedural law and in fact, Ohio courts have said we don't have
24 that law here and we're not free to apply that and we're
25 governed by the Ohio rules of civil procedure and the Ohio



1 law.

2 In summary, Plaintiffs believe that this Court has
3 multiple grounds of exercising jurisdiction over the Defendants
4 that are absolutely consistent with due process, Your Honor.
5 We ask that Plaintiffs' choice of forum not be disturbed.

6 We also request that His Honor lift the stay on discovery
7 so that we may be allowed to answer the Defendants' next
8 motions for summary judgment, which are before this Court.

9 Alternatively, if the Court believes we haven't
10 established a prima facie case, we would ask leave to file a
11 formal motion for limited jurisdictional discovery. I'm
12 prepared to argue that today or I can have the motion filed by
13 Monday morning.

14 For example, if you want more evidence about the Sidley
15 partnerships or APA doing business, although their allegations
16 have no weight today. Your Honor, may say I need more evidence
17 on that, Ms. Forrest, and I want to know more. If this Court
18 decides not to exercise jurisdiction, we talked about a case
19 (indiscernible) where we asked respectfully that it do so with
20 conditions to ensure that Plaintiffs have access for a forum.

21 We ask that these actions be stayed until we can find
22 counsel there. Although Mr. Free has an address there, he is
23 actually physically located in Wilmington, Delaware.

24 We thank you Your Honor for your time. We understand this
25 isn't an easy case, and our clients thank you for the



1 opportunity to be heard.

2 THE COURT: Thank you. It's 12 noon, so we'll recess
3 for lunch and we'll have rebuttal arguments at 1:15.

4 MR. HENTOFF: Thank you, Your Honor.

5 MS. WAHL: Thank you, Your Honor.

6 MS. FORREST: Thank you, Your Honor.

7 THE CLERK: All rise. The court is in recess.

8 (Recess taken)

9 THE CLERK: All rise. This is court in Montgomery
10 County is again in session.

11 THE COURT: Thank you. Please be seated. Defendants,
12 any rebuttal argument?

13 MR. HENTOFF: Thank you, Your Honor, yes. I'll go
14 first for Sidley and then Ms. Wahl will go for APA.

15 THE COURT: Okay.

16 DEFENDANT SIDLEY'S REBUTTAL ARGUMENT

17 MR. HENTOFF: Before I start, Your Honor, does the
18 Court have any questions for me?

19 THE COURT: No, sir.

20 MR. HENTOFF: First, the Plaintiffs' counsel spoke in
21 her presentation about what various third parties did to
22 Colonel James in Ohio and frankly in other states by filing
23 ethics complaints against him, which related to his time
24 several years earlier overseas. None of those states undermine
25 anything that we've said in our brief or our argument about the



1 insubstantial contacts of Sidley with the forum in the case.

2 The most important thing that I'm going to say in rebuttal
3 is that Plaintiffs made one very important misstatement of the
4 law of defamation and personal jurisdiction. Quoting the
5 Supreme Court, or referring to the Supreme Court Keeton case,
6 possibly quoting it, and the recent Supreme Court Bristol-Myers
7 case in which the court distinguished Keeton, Plaintiffs'
8 counsel said that mere evidence that people read the report in
9 Ohio is sufficient for personal jurisdiction. That is an
10 incorrect statement of the law.

11 What Keeton simply said, when it -- what Keeton said, when
12 an allegedly false and defamatory statement is published in a
13 state, there's been harm in that state. That's what Keeton
14 says, and what that means is that it has set off -- the
15 plaintiff has set off on the first step of the jurisdictional
16 analysis, not the last step. The first step, that there has
17 been some harm in the forum. Neither Keeton nor Calder ends
18 the analysis with the mere fact of publication in a forum. If
19 they did say that, Keeton and Calder would both be one sentence
20 long and I would have memorized both cases.

21 What Keeton on its own facts, and then Calder, Kauffman,
22 and Reynolds and the test that we talked about this morning,
23 all do is they then go to the next steps, which are what we
24 talked about in the morning. Again, it's so important where
25 Calder talks about as part of its test that the Court has to



1 look at where the brunt of the harm is felt. Well, if any harm
2 being felt was sufficient for personal jurisdiction, Calder
3 would never had said it.

4 Bristol-Myers, a recent Supreme Court case, we both talked
5 about it. It nearly distinguished Keeton on that first step.
6 In other words, it just said well, in Keeton, there is a harm
7 in the jurisdiction, but that doesn't mean there's personal
8 jurisdiction in the state. It just means there's a harm and
9 you can go to the next step of the jurisdictional analysis.
10 Therefore, it is not in any respect contrary to Calder or the
11 other focal point cases that we have cited.

12 Counsel noted that the Bristol-Myers court also talked
13 about the Keeton connection, the connection that "Hustler" had
14 to the forum and all that was referring to was is what I was
15 talking about this morning, "Hustler's" connection to the forum
16 with their regular large quantity publication of magazines
17 every month.

18 Finally on this point, the Court does not need to listen
19 to the Bristol-Myers Supreme Court oral argument to decide
20 whether or not defamation cases are special because our briefs
21 rely on defamation cases. That's what our personal
22 jurisdiction argument is based on.

23 Fundamentally, we and the Plaintiffs disagree on what the
24 key Ohio and Sixth Circuit cases say about the focal point test
25 for personal jurisdiction. You know, the Court will decide



1 who's right about that. I'll just say every one of these cases
2 either expressly says or is consistent with the proposition
3 that a defendant must intentionally focus on the plaintiff's
4 activities in the forum or the court will find there's no
5 personal jurisdiction.

6 THE COURT: Could you repeat that?

7 MR. HENTOFF: Sure. Under the focal point test, the
8 Plaintiffs have to show that the Defendants' publication
9 focused on the Plaintiffs' activities in the state.

10 THE COURT: Plaintiffs' activities?

11 MR. HENTOFF: Yes. In other words, it was an article
12 about the plaintiff and the article was about what the
13 plaintiff did in the state as opposed to somewhere else.

14 MS. WAHL: Defendant.

15 MR. HENTOFF: So for example, Plaintiffs' counsel talks
16 about the Fallang case as meaning one email into the
17 jurisdiction can be sufficient. But Fallang is consistent with
18 our test. It's a letter into Ohio allegedly making false and
19 disparaging statements about the conduct of an Ohio surgeon at
20 an Ohio hospital. So it fits completely with the test that the
21 Ohio Supreme Court and the Sixth Circuit talk about.

22 Plaintiffs make what I believe is a brand new allegation
23 on general jurisdiction that Sidley limited partnerships I
24 suppose within the overall Sidley partnership exists and have
25 registered in some fashion with Ohio. Importantly, none of



1 them are Ohio limited liability entities. They are not Ohio
2 entities, so the Supreme Court case law that we talked about
3 still prevents the exercise of general jurisdiction.

4 Ms. Wahl, and we did a tiny bit of preparation on this
5 issue over lunch, but I know from this issue coming up with
6 regard to the APA that Ms. Wahl talked about jurisdiction were
7 merely registering to do business does not mean that the state
8 requires you to consent to general jurisdiction.

9 So we found a case in Ohio called Avery Dennison Corp. v.
10 Alien Tech Corp., that's 632 F.Supp.2d 700. In talking about
11 Ohio law, the case says the mere designation of an agent in
12 compliance with the service of process statute does not
13 automatically eliminate the requirement of minimum contacts to
14 establish personal jurisdiction. That is our on the fly
15 response to this discussion of Sidley limited liability
16 partnerships.

17 Counsel said that Sidley published the report into Ohio
18 because two APA board members reside in Ohio. I have two
19 points about that. The first is the complaint doesn't say
20 that. The Plaintiffs are entitled to have us credit the
21 factual allegations of their complaint, but not go beyond them.
22 The complaint alleges that Sidley provided the report to the
23 special committee and to the board, but it doesn't allege that
24 Sidley directly sent the report by email to board members
25 wherever they were. That's just not allegation in the



1 complaint and it should not be credited.

2 In fact, Plaintiffs submitted an affidavit from a board
3 member, at least one, who described how he accessed the report
4 and he didn't say that Sidley sent him the report. Finally,
5 even if that had happened or had been properly alleged, it's
6 still not Sidley purposefully availing itself of Ohio. Its
7 client is in Washington DC. It's the APA. It's up to the
8 client to determine who's going to be on the board of
9 directors. That's not taking advantage of the State of Ohio.

10 Counsel also says that the complaint alleges that David
11 Hoffman recommended that the APA give the report before
12 publication to two APA critics knowing that they might leak it
13 to the "New York Times." That's not a publication by David
14 Hoffman or Sidley if they allege he didn't take care enough to
15 prevent third parties from leaking to the "New York Times."
16 Bless you.

17 Next, Plaintiffs' counsel says that U.S. Sprint, an Ohio
18 Supreme Court case, supports joining the personal jurisdiction
19 claims of the other Plaintiffs with Colonel James. The U.S.
20 Sprint case is not a case about multiple plaintiffs. It's just
21 a case about one plaintiff who had multiple claims. So it does
22 not support the proposition that Plaintiffs do not individually
23 have to establish their own case for personal jurisdiction in
24 Ohio.

25 To the extent that counsel cites state statutes or rules



1 of procedure in Ohio, they don't trump the Fourteenth Amendment
2 due process clause. That's why the inquiry doesn't end if a
3 plaintiff can satisfy the state long-arm statute.

4 I believe that counsel uses the Fallang case to create the
5 impression that for a defendant to defeat a showing of personal
6 jurisdiction, the defendant must show a high degree of
7 unfairness. I believe that that language from Fallang comes in
8 the third prong of the Southern Machine test where
9 reasonableness is the issue and we have not relied on the, at
10 least Sidley has not relied on the third prong in making its
11 argument.

12 So finally, Your Honor, we don't believe -- one more
13 thing. Plaintiffs' counsel said that what's coming up next are
14 summary judgment motions. You know, the Court and the parties,
15 we have an agreed schedule of what's coming up and its motions
16 to dismiss. There are a variety of motions to dismiss that are
17 in the process of being briefed and will be submitted.

18 But there is no reason to reopen discovery. The reasons
19 that caused the Court to stay discovery in the first place are
20 still 100 percent in place. We are proceeding along the
21 schedule we all agreed upon and if we get to any other motions
22 and if there's a basis for the Plaintiffs to seek limited
23 discovery in connection with that motion, I think the
24 Plaintiffs can meet and confer with us, file a motion for
25 appropriate limited discovery if it's a motion as to which



1 discovery is appropriate, but there's no basis to deviate from
2 the plan that we've agreed to and the path that we're on.

3 Finally, we don't agree that it's necessary or appropriate
4 to open up the personal jurisdiction prima facie motion to
5 discovery. If the Plaintiffs can't make a prima facie case
6 where we are agreeing with all of their factual allegations,
7 and they've put in 15 affidavits that we haven't rebutted, they
8 just can't make a prima facie case and this is a case that
9 should proceed in the District of Columbia.

10 Unless the Court has any questions, I'm done, Your
11 Honor.

12 THE COURT: Thank you.

13 MR. HENTOFF: Thank you.

14 DEFENDANT APA'S REBUTTAL ARGUMENT

15 MS. WAHL: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MS. WAHL: Having listened to Plaintiffs' presentation,
18 I think there are two fundamental problems with their argument.

19 The first is that they rely heavily on the fact that libel
20 is special and in fact, if I wrote the quote down properly, I
21 believe Ms. Forrest said quote, defamation is sui generis per
22 Chief Justice Roberts, and I believe she said she got that from
23 listening to the argument on a recent case.

24 I don't know if he said that, but I do know that if he
25 did, or anyone did, it would be contrary to long-standing



1 Supreme Court law because Calder v. Jones, back in 1988 said at
2 page 790 to 91, quote, we have already declined in other
3 contexts to grant special procedural protections to defendants
4 in libel and defamation actions in addition to the
5 constitutional protections embodied in the substantive laws.
6 In other words, there's nothing special about defamation cases.
7 They are what they are, like other intentional torts. The same
8 level of proof is required for establishing jurisdiction.

9 The second fundamental problem with Plaintiffs' argument
10 is that they repeatedly said just posting something on the
11 website is enough. That may not be the exact words, but that
12 was the tenor of the comments. That is actually contrary to
13 well-established law, including Kauffman, which they cite and
14 rely on, the Oasis case, the Reynolds case, the -- I have a
15 hard time with this one, Huizenga case. All of those cases
16 said otherwise. It is not enough to simply post something on
17 the website. There has to be some additional activity. There
18 has to be some focus, targeting, whatever language you want to
19 use on the forum.

20 The Kauffman case is a perfect example of this. In the
21 Kauffman case, which is a 2010 Ohio Supreme Court case, the
22 defendant was angry at Kauffman for selling him what he thought
23 was damaged goods and not taking them back and so he posted on
24 multiple websites statements to the effect that your product is
25 bad, you ripped me off, I'm going to get you, I'm going to make



1 you suffer in Ohio. I want damage to be done to you where you
2 do business in Ohio. The record is abundantly clear. The
3 court found that in that circumstance, the defendant absolutely
4 reached out and targeted the plaintiff in Ohio. No question.

5 You take the almost identical case, this is the Oasis
6 case, and the defendant in that case did pretty much the same
7 thing. They had -- they opened up a hate website, established
8 a hate website. They too felt they had been mistreated in
9 connection with a fire that was caused by Oasis' product. The
10 claim that the Oasis water cooler was responsible for burning
11 down the building that they occupied and they couldn't get
12 recompense, so they started a down with Oasis website, or
13 something to that effect. The key difference being that they
14 never said Oasis, we're going to get you. All they did was
15 saying in their website Oasis is bad, they ripped us off. We
16 haven't been able to get recompense. In that case, almost
17 identical, the court said no jurisdiction over the defendant.
18 Same kind of thing, a website posting. But the difference from
19 Kauffman is that in Kauffman, the defendant specifically said
20 I'm going to get you in Ohio.

21 So just posting is not enough. That has been shown not
22 only in the two cases I described, but the much talked about
23 case here, the Reynolds case and I won't belabor that. I'm
24 sure the Court has now heard enough about that.

25 I want to correct a few of the -- or respond to a few



1 other statements that Plaintiffs' counsel made. There was a
2 comment about this wasn't just a report. There was a draft
3 report, and a report, and a revised report, all of which were
4 available in Ohio. That's true. That doesn't mean that any of
5 those reports targeted people in Ohio. They were all
6 established -- or I should say they were all published by APA
7 in the same fashion. They were put up on a website.

8 Plaintiffs made the point about the Plaintiffs here are
9 doing the right thing but they are being accused of enabling
10 torture. Your Honor, nobody said that here. This is a motion
11 to dismiss on the basis of jurisdiction. It's not a referendum
12 on the merits, whether these are good people or bad people.
13 It's simply not at issue and we don't think that the Court
14 needs to go there. This is a question of whether the Court
15 should be exercising jurisdiction over these parties.

16 Ms. Forrest said that the Kaslow email, one of perhaps the
17 only direct tie that the Plaintiffs contend was done by APA
18 into the jurisdiction, Ms. Kaslow's email to Plaintiff James
19 was sent to him at Wright State and that shows that APA
20 intended to utilize the jurisdiction. That is incorrect.
21 Exhibit A to Plaintiff James' affidavit is the email that Dr.
22 James received. It is from Nadine Kaslow to Nadine Kaslow at
23 Emory Edu. It doesn't show any address for Dr. James or anyone
24 else for that matter. That's Exhibit A, Your Honor, to the
25 James Affidavit.



1 There was much discussion about the registration in state
2 and whether that confers jurisdiction. I won't belabor it and
3 I applaud Mr. Hentoff's lunchtime research. I will say only
4 this, that the Plaintiffs seem to be conflating general
5 jurisdiction with -- and registration to do business with
6 registering as a charity. The only thing that APA has done is
7 registered as a charity. It has not registered to do business.
8 It's different. Those are different statutes and it has not
9 consented to be available for jurisdiction.

10 Ms. Forrest made a point about how that's still an open
11 question. I would beg to differ based on Mr. Hentoff's case,
12 but she specifically said that the Supreme Court case, the BNSF
13 Railroad case, left open that question and I think she said
14 something to the effect that including that the Sixth Circuit
15 would recognize that jurisdiction could be predicated upon
16 consent. Actually the BNSF case said that the parties said
17 that BNSF has consented to personal jurisdiction in Montana.
18 The court does not address this contention. We do not reach
19 it. That's all they said. They certainly didn't say anything
20 about yes, we allow that, it's all good.

21 There was discussion by Ms. Forrest about pendent personal
22 jurisdiction. She made some comment about she didn't know
23 whether -- if I heard her correctly, she doesn't know whether
24 it's allowable or not in federal court or otherwise.
25 Regardless of -- clearly we would all agree that pendent



1 jurisdiction related to state versus federal claims is
2 something that happens and is discussed in federal court.
3 That's not what they're doing here.

4 What they're attempting to do is rely on the joinder rule,
5 rules of civil procedure, to say that if it arises from a
6 common nucleus of operative fact, that's enough for the Court
7 to accept jurisdiction over the non-Ohio residents. There's
8 not a single case that says that. The joinder rules are
9 specifically predicated on the notion that there is separate
10 jurisdiction, personal jurisdiction, over a party before they
11 can be joined.

12 This was made abundantly clear in the case that I can't
13 pronounce, the Huizenga case, and also in the Bristol-Myers
14 case, where defendants -- sorry, where the court said
15 specifically in those cases not -- that's not a concept we
16 accept. In fact, in the Huizenga case, the court specifically
17 said that where there are non-residents who are seeking to
18 utilize the court's jurisdiction, the forum actually has
19 diminished interest in helping them because they are not
20 residents of the forum.

21 Ms. Forrest said I believe that all the Court needs is one
22 act and that's enough to predicate jurisdiction. It's actually
23 not correct. Otherwise, the other cases that we've cited,
24 Reynolds, et cetera, those would not exist. There would have
25 been jurisdiction and in each of those cases, the court didn't



1 allow jurisdiction.

2 We also agree with Sidley that there is no reason for the
3 Court to entertain discovery, lift the stay on discovery. I
4 believe the way Ms. Forrest phrased it was if the Court doesn't
5 believe -- believes that there is further evidence that we
6 should supply to state a prima facie case, please allow us to
7 open up discovery. Plaintiffs have submitted five inches of
8 paper. We, as Mr. Hentoff said, have not contested whether
9 that's objectionable on the basis of hearsay, whether it's
10 authentic.

11 It's not for the Court to tell the Plaintiffs how to put
12 on their case. That's for the Plaintiffs. If the Plaintiffs
13 have not been able to establish a prima facie case of
14 jurisdiction, and we believe they have not, it's not the
15 Court's role to tell Ms. Forrest I hereby recommend and advise
16 that we reopen discovery so that you can make a better case.
17 It's not -- that's the Plaintiffs' role.

18 Last, what I'd like to do with the Court's indulgence is
19 use the flip chart, if I may, to just highlight a couple of
20 points.

21 THE COURT: Okay.

22 MS. WAHL: So, while Ms. Forrest was speaking, I took
23 down -- I took notes, and I hope they are correct, about what
24 she cites as -- I think she cites as contacts by APA with the
25 forum that would demonstrate that there is a reason for the



1 Court to exercise specific jurisdiction.

2 So the first one that she talked about was something about
3 an interview with Nathaniel Raymond. I don't know what that
4 has to do with this case. It had nothing to do with APA. It
5 didn't happen in Ohio. So that one's out.

6 I believe she said that in 2006 to 2009, there were board
7 members in Ohio. That's APA board members. What she doesn't
8 say and there's nothing in the record is whether any of those
9 board members have anything to do with anything in this case.
10 It's certainly not a predicate for general jurisdiction and
11 there's nothing in the record that shows that it had anything
12 to do with anything that would give rise to specific
13 jurisdiction.

14 She talked about board members in 2015. Same thing. No
15 indication that those board members had any role in releasing
16 or authorizing the report. So that one's out.

17 She said that there were ethics complaints filed against
18 Dr. James in Ohio. To be clear, these ethics complaints were
19 not filed by APA. They were filed by a private party and as I
20 understand from the Plaintiffs' statements, she filed these
21 complaints in Guam, New York, Louisiana, and also Ohio. But
22 that had nothing to do with APA. That's out.

23 Ms. Forrest talked about a fellow named Stephen Soldz and
24 he gave an interview. I truly was not really able to follow
25 what that was about, but there's nothing in the record that



1 indicates that that was in Ohio. Mr. Soldz lives in Boston and
2 he was not acting for the APA at the time he gave his
3 interview. At least, there's certainly nothing in the record
4 that indicates that. So that's out.

5 Ms. Forrest talked about the archives of psychology being
6 in Ohio. That's true, they are. But I believe she left the
7 wrong impression. APA does not run, operate, or do anything
8 with regard to the archives of psychology except like lots of
9 other people and organization, they give some money. That's
10 not a basis for specific jurisdiction and that's got nothing to
11 do with the report.

12 She talked about certification. I am advised by
13 Mr. Raben that APA actually doesn't certify. So that's
14 actually not even applicable. APA does accredit and there have
15 been perhaps some accreditation of classes, courses, et cetera
16 in Ohio, but that's got nothing to do with this case. So
17 that's out.

18 So on the basis of all of the contacts that have been
19 enumerated by the Plaintiffs, we would submit, Your Honor, that
20 there is no basis for specific jurisdiction. Thank you.

21 THE COURT: Thank you.

22 Thank you counsel. The Court will take the matter under
23 advisement at this time and I'll provide a written decision to
24 all the parties by virtue of the service of counsel. Thank you
25 for your appearances.



1 MS. FORREST: All rise.

2 MR. HENTOFF: Thank you, Your Honor.

3 THE CLERK: The court is adjourned.

4 (Proceedings concluded at 1:52 p.m.)

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C E R T I F I C A T E

I, JONNA LINKE, Transcriptionist, do hereby certify that the foregoing pages, 1 - 92, constitute a full, true and accurate transcript, from electronic recording, transcribed by me, of the proceedings had in the foregoing matter, LARRY C. JAMES, ET AL. VS. DAVID HOFFMAN, ET AL., Case No. 2017-CV-839, on the docket of the Montgomery County Common Pleas Court, a court of record, and all prepared to the best of my skill and ability.

SIGNED and dated this 24th day of September, 2017.



JONNA LINKE
Transcriptionist

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