IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

LARRY C. JAMES, *et al.*,	:	
	:	
Plaintiffs-Appellants,	:	Case No. CA 027735
	:	Trial Court Case No. 2017 CV 00839
v.	:	
	:	(Civil Appeal from
DAVID HOFFMAN, *et al.*,	:	Court of Common Pleas)
	:	
Defendants-Appellees.	:	ORAL ARGUMENT REQUESTED

BRIEF OF DEFENDANT-APPELLEE AMERICAN PSYCHOLOGICAL ASSOCIATION

J. Steven Justice (0063719)
Glen R. McMurry (0082600)
DUNGAN & LeFEVRE CO., L.P.A.
210 W. Main St.
Troy, OH 45373
Telephone: (937) 332-9640
Telecopier: (937) 335-4084
Email: justice@dunganattorney.com
gmcmurry@dunganattorney.com

Barbara S. Wahl, Esq., PHV-16150-2018
(pro hac vice pending)
Karen E. Carr, Esq., PHV-16141-2018
(pro hac vice pending)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Email: barbara.wahl@arentfox.com
karen.carr@arentfox.com

Attorneys for Defendant-Appellee
American Psychological Association

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ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

The Trial Court properly granted the Motion of American Psychological Association ("APA") to Dismiss the Complaint for Lack of Personal Jurisdiction ("Motion"). Appellants' First Assignment of Error contends that the Trial Court erred in dismissing Appellants' claims against APA. The Trial Court's ruling was correct, and APA asks that this court affirm.

ISSUES PRESENTED FOR REVIEW

Was the Trial Court correct in dismissing the case against APA for lack of specific personal jurisdiction where APA had only attenuated and fortuitous contacts with Ohio related to the subject of the Complaint and the Trial Court found it could not exercise jurisdiction in accordance with the Due Process Clause of the Fourteenth Amendment and the principles enunciated in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)?

STATEMENT OF THE CASE

In 2014, APA hired Sidley and Sidley partner Hoffman to conduct an independent review ("IR") of allegations by *New York Times* journalist James Risen that, following the attacks of September 11, 2011, APA had colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were held abroad. Report at 1.[1] APA and Sidley agreed that Sidley was to conduct the IR "in a fully independent manner" and to review "all available evidence" and go "wherever that evidence leads." Opp'n to Mot. to Dismiss, Newman Aff., Ex. I.

[1] "Report" citations are to the revised version of the Report prepared by Sidley, attached as Exhibit 2-A to trial court docket entry 40, and available at http://www.apa.org/independent-review/revised-report.pdf.

Sidley conducted an extensive, eight-month investigation, interviewing approximately 150 individuals, Compl. ¶ 269, and reviewing more than 50,000 documents. Report at 6. In late June 2015, Sidley presented to APA a single-spaced 542-page Report detailing Sidley's findings and conclusions, accompanied by 6,000 pages of exhibits. On July 10, 2015, *The New York Times*, which had received a leaked copy of the Report, posted a copy of the Report on the *Times*'s website. Compl. ¶ 28. Later that evening, APA also made the Report available on its own website. *Id.*

On February 16, 2017, five psychologists who were interviewed by Sidley and identified in the Report filed suit against APA, Sidley, and Hoffman in the Trial Court. Three Appellants are former Army officials and two are former APA employees. Compl. ¶¶ 38-42. Only one lives in Ohio. *Id.*

On April 7, 2017, APA moved to dismiss the Complaint (i) for lack of personal jurisdiction over APA in Ohio; (ii) for forum non conveniens, identifying Washington, D.C. as a superior forum; and (iii) with prejudice pursuant to the District of Columbia Anti-SLAPP Act.[2] Sidley filed similar motions.

On August 25, 2017, the Trial Court held a lengthy oral argument on both APA's and Sidley's motions to dismiss for lack of personal jurisdiction. Transcript, pp. 1-93. Later that day, the Trial Court entered the Dismissal Order, finding that it could not "exercise personal jurisdiction" over APA "consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Order Granting APA Motion to Dismiss ("Dismissal Order")

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[2] On May 30, 2017, APA also filed a motion to compel arbitration of the claims of Plaintiff Stephen Behnke and Plaintiff Russell Newman, who as APA employees had agreed to arbitrate disputes with APA. APA Motion to Compel Arbitration and Application to Stay Litigation, p. 2. APA also moved the Trial Court to stay the case as to the remaining Plaintiffs during the pendency of the arbitration proceeding. *Id.*, p. 4.

at 1. The Trial Court held that general jurisdiction over APA did not exist "because Ohio is neither its principal place of business nor its place of incorporation." Dismissal Order at 1.[3] The Trial Court further held that it did not have specific jurisdiction over APA because (i) as to the four Appellants who do not live in Ohio, specific jurisdiction "is inappropriate because they do not allege that their claims arose from anything that APA did in Ohio," Dismissal Order at 1, and (ii) as to Appellant James, the Ohio resident, Appellants failed to establish either that APA purposefully availed itself of the jurisdiction of Ohio or that James' claims "arose from" APA's conduct in Ohio. *Id.* at 1-2.

On September 22, 2017, Appellants filed the instant appeal.

STATEMENT OF RELEVANT FACTS

APA is the largest scientific and professional organization representing psychology in the United States. APA's membership includes nearly 115,700 researchers, educators, clinicians, consultants and students. Incorporated and with headquarters in Washington, D.C., APA has been a central clearinghouse of debate on topics of contemporary interest to psychologists. One such topic has been the extent of involvement of psychologists in national security-related activities. Within APA, there has been lively discourse regarding the proper role of psychologists in connection with government interrogations conducted at federal security facilities following the events of September 11, 2001.

In February 2005, APA convened a task force comprised of military and civilian psychologists to examine whether APA had been providing adequate ethical guidance to psychologists in national security settings and whether additional policies should be developed. Compl. ¶¶ 43, 70; Report at 230. The task force, called the Psychological Ethics and National

[3] Appellants have not contested this ruling in this appeal.

Security, or PENS, Task Force, convened in Washington, D.C. over a weekend in June 2005 and drew up twelve specific recommendations concerning psychologists' ethical obligations in national security-related activities for the consideration of APA's Board of Directors and its larger governing body, the Council of Representatives. *Id.* ¶ 74. In July 2005, the APA Board of Directors adopted the Task Force Report as APA Policy. *Id.* ¶ 76. At APA's August 2005 convention in Washington, D.C., the Council endorsed the policy. *Id.* ¶ 77.

But the policy had its critics, within and without APA, including psychologists who urged the organization to adopt a more stringent policy that would bar psychologists from any activities at national security detention facilities. The controversy, often heated, was the subject of extensive roiling debate within APA. The debate came to a head in 2014 when *New York Times* investigative reporter James Risen published a book titled *Pay Any Price,* which discussed the role of psychologists in national security interrogations. Report at 1; Compl. ¶ 3. Risen claimed that APA colluded with the Bush administration to support torture during the war on terror. Report at 1. Specifically, Risen alleged that APA supported the development and implementation of "enhanced" interrogation techniques that constituted torture, and was complicit with the CIA and U.S. military to that end. *Id.* After the Risen book was published, APA hired Sidley to conduct the IR to investigate the allegations. Report at 1; Compl. ¶ 3.

Sidley is a well-regarded law firm with its principal office in Chicago, a substantial office in Washington, D.C., and eighteen other offices in other national and international cities. https://www.sidley.com/en/locations/offices. None of Sidley's offices are in Ohio. It has an experienced internal investigations practice that has conducted many investigations in different fields. *See Internal Investigations*, Sidley, http://www.sidley.com/en/services/internalinvestigations. Hoffman, a graduate of Yale

University and the University of Chicago Law School, and a former Supreme Court clerk, has extensive experience conducting internal investigations as a former Inspector General and federal prosecutor. *See David H. Hoffman*, Sidley, http://www.sidley.com/people/david-hoffman.

After the extensive, eight-month IR, Sidley delivered the Report to APA in late June 2015. Report at 6. *The New York Times* posted a copy of the Report on its website on July 10, 2015. Compl. ¶¶ 2, 27-28. Shortly thereafter, APA made the Report available on its own website. This lawsuit followed in February 2017.

SUMMARY OF ARGUMENT

The Trial Court properly found that it could not exercise personal jurisdiction over APA consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Ohio courts lack specific jurisdiction over APA with regard to the non-resident Appellants because there is no connection of any kind between their claims and Ohio to satisfy the legal requirements of *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir.1968). Nor is there specific jurisdiction over APA with regard to the claims of Appellant James, an Ohio resident, because any contacts by APA with Ohio were the kind of "one-off, fortuitous, attenuated connection[s]" that were "insufficient to establish personal jurisdiction" and because Appellant James' claims do not arise from those contacts. Dismissal Order at 1-2. The Trial Court correctly held that the Due Process Clause of the Fourteenth Amendment precluded exercise of personal jurisdiction over APA and that dismissal of the Complaint was appropriate.

ARGUMENT

A. Legal Background.

A court's exercise of personal jurisdiction must comport with the Due Process Clause of the Fourteenth Amendment. That requirement is satisfied where a defendant has "minimum contacts" with a forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Walden v. Fiore*, ___ U.S. ___, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014), quoting *Internatl. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Personal jurisdiction consistent with the Due Process Clause can be either general or specific. *See, e.g., Kaufman Racing Equip., LLC v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 46.

Where specific jurisdiction is alleged, as it is here, courts measure the sufficiency of a defendant's contacts with Ohio by applying the three-part test established in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir.1968): (i) a defendant "purposefully avail[ed] himself of the privilege of acting in the forum state or causing a consequence in the forum state," (ii) the cause of action "arise[es] from the defendant's activities" in the forum state; and (iii) the "acts of the defendant or the consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." If any one of these requirements is not met, a court lacks jurisdiction and the matter must be dismissed. *Id.* The inquiry into whether a court may assert specific jurisdiction over a non-resident defendant focuses on the relationship between "the defendant, the forum, and the litigation." *Walden*, 134 S.Ct. at 1121 (citation omitted); *see also Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, 839 N.E.2d 67, ¶ 26 (10th Dist.) ("The due process clause protects a nonresident defendant's liberty interest in not being subject

to a court's judgment if the defendant has established no meaningful contacts, ties, or relations.") (internal quotations omitted).

Challenged by a motion to dismiss for lack of personal jurisdiction, a plaintiff bears the burden to demonstrate a prima facie case of personal jurisdiction. *Joffe* at ¶ 10. A plaintiff must establish personal jurisdiction as to each claim against each non-resident defendant. *See, e.g.*, *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir.2006) (collecting cases).

Personal jurisdiction is a question of law and is reviewed *de novo* on appeal. *Kaufman Racing* at ¶ 27. If a trial court decides a motion for lack of personal jurisdiction "without holding an evidentiary hearing, the trial court must view [the] allegations in the pleadings and the documentary evidence in a light most favorable to the plaintiff and resolve all reasonable competing inferences in favor of the plaintiff." *Joffe* at ¶ 10 (internal quotation marks and citation omitted).

Here, the Trial Court recognized that APA's contacts with Ohio failed to satisfy *Southern Machine*. The record is devoid of any connection between Ohio and the claims of the non-resident Appellants Banks, Behnke, Dunivin, or Newman. Dismissal Order 1-2. The connections between the claims of Appellant James, the Ohio forum, and APA are too insubstantial to meet the standard. *Id.*

B. The Trial Court Properly Dismissed the Claims of Non-Resident Appellants Banks, Behnke, Dunivin, and Newman Against APA.

Appellants contend that the Trial Court erred in finding that it was without specific personal jurisdiction over the claims of Appellants Banks, Behnke, Dunivin, or Newman. But the lack of any relationship between APA, Ohio, and those Appellants' claims preclude any such finding.

None of those Appellants are Ohio residents. At the time the Complaint was filed, two lived in Washington, D.C, one lived in North Carolina, and one lived in California.[4] The Report upon which Appellants' claims are based neither intentionally targeted Ohio for publication nor addresses any activities undertaken by APA with regard to those Appellants in Ohio. *Calder v. Jones*, 465 U.S. 783, 788-789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Section C.1, below. Any contacts APA had with Ohio were irrelevant to the non-resident Appellants' claims against APA. *Bristol-Myers Squibb v. Superior Court*, __ U.S. ___, 137 S.Ct. 1773, 1781, 198 L.Ed.2d 395 (2017). As the Trial Court found, the lack of connection between the non-resident Appellants' claims and Ohio precludes the exercise of specific personal jurisdiction over APA as to those claims. Dismissal Order at 1 (Appellants "do not allege that their claims arose from anything that APA did in Ohio.") Nor have the non-resident Appellants suffered any effects related to the Report in Ohio. *Huizenga v. Gwynn*, 225 F.Supp.3d 647, 658 (E.D.Mich.2016). These deficiencies precluded the Trial Court from exercising specific personal jurisdiction over APA.

Appellants have also contended that the Trial Court had jurisdiction over the non-resident Appellants' claims because the Appellants were all defamed by the Report in Ohio and because the Report alleged that Appellants had been engaged in a joint venture-enterprise. Appellants' Br., p. 19. But the recent Supreme Court case of *Bristol-Myers Squibb Co.* precludes such a finding. There, forum-resident plaintiffs, claiming to have been injured by a drug manufactured by a non-resident defendant over whom they had established personal jurisdiction, joined with non-resident plaintiffs, who also claimed injury, to sue the non-resident defendant. *Id.* at 1777-1778. Finding that the non-resident plaintiffs' claims had no substantial connection to the

[4] According to the Complaint, Appellant Dr. L. Morgan Banks, III lives in North Carolina; Appellants Stephen Behnke and Debra L. Dunivin live in Washington, D.C. Appellant Russ Newman is a California resident. Compl. ¶¶ 39-42.

defendant's activities in the forum state—although the non-resident defendant's in-state activities were substantial—the Supreme Court held that the trial court had no specific personal jurisdiction over the non-residents' claims and that its personal jurisdiction over the resident plaintiffs' claims "does not allow the state to assert specific jurisdiction over the non-residents' claims." *Id.* at 1781. Here, as in *Bristol-Myers*, the lack of a connection between the forum and the non-resident Appellants precludes the exercise of jurisdiction over APA as to the claims of the non-resident Appellants. *Id.* Accordingly, the Trial Court properly dismissed the non-Ohio Appellants' claims against APA, and that decision should be affirmed.

C. The Trial Court Properly Dismissed Appellant James' Claims Against APA for Lack of Personal Jurisdiction.

Appellant James, the only Ohio resident, contends that the Trial Court should have found that APA is subject to jurisdiction in Ohio for two principal reasons: first, because the Report was published in Ohio; and second, because APA had certain other contacts with Ohio. Publication in Ohio is an insufficient basis on which to predicate specific personal jurisdiction, and APA's other contacts are insufficiently connected to Appellant James' claims to constitute purposeful availment or otherwise satisfy *Southern Machine*. The Trial Court properly dismissed Appellant James' claims for lack of specific personal jurisdiction.

1. Appellants Cannot Establish that Ohio was the "Focal Point" of Publication of the Allegedly Defamatory Statements.

Appellant James contends that because APA posted the Report on its website, where it was accessed by Ohio residents, the Trial Court should have found that the purposeful availment prong of *Southern Machine* was satisfied because publication of allegedly defamatory statements in a defamation plaintiff's home jurisdiction "constitutes special evidence of purposeful availment." Appellants' Br., p. 10. Under that theory, any publication of a statement on the Internet would confer jurisdiction over the writer in every state. *See, e.g., Young v. New Haven*

Advocate, 315 F.3d 256, 263 (4th Cir.2002). The legal standard required to establish purposeful availment in the context of publication requires far more. To establish purposeful availment based on publication of allegedly defamatory material, a defendant must have intentionally targeted the forum, not just the plaintiff. *Reynolds v. Internatl. Amateur Athletic Fedn.*, 23 F.3d 1110, 1120 (6th Cir.1994) (no personal jurisdiction because defamation plaintiff did not show that defendant had intentionally targeted Ohio).

Calder v. Jones illustrates this principle. 465 U.S. at 788-789. There, a California actress sued two Florida residents for defamation in California arising from an article the defendants published in the *National Enquirer*. The *Calder* court held that California was the "focal point" of (i) the story, which concerned Jones' activities in California and was published in the state where the *National Enquirer*'s circulation was highest, and (ii) the harm, which was suffered by the plaintiff in California, where her career was centered. *Id.* (defendants "expressly aimed" their actions at California). Together, these critical components established California as the "focal point" and satisfied the purposeful availment requirement. *Walden*, 134 S.Ct. at 1124 ("injury to the plaintiff's reputation in the estimation of the California public ... combined with the various facts that gave the article a California focus" permitted the exercise of personal jurisdiction over the defendant in California). Ohio courts have similarly recognized that purposeful availment can be found where a defendant intentionally targets the plaintiff in the state and where Ohio is the focal point of the publication and the harm. *See, e.g., Reynolds,* 23 F.3d at 1120; *Cadle Co. v. Schlichtmann*, 123 Fed.Appx. 675, 679 (6th Cir.2005) (finding no intentional targeting and, therefore, no purposeful availment in Ohio).

Here, James argues that APA published the Report into Ohio in two ways: (i) by posting to APA's website; and (ii) by tweeting a link to the Report on its website to its Twitter followers,

including some in Ohio. Appellants' Br., p. 6. While these allegations demonstrate that the Report was made publicly available, it falls short of demonstrating purposeful availment. To satisfy that requirement under *Southern Machine*, James needed to show that APA intended the Report for Ohio readers specifically, as distinguished from readers in other states. *Calder*, 465 U.S. at 789-790 (focusing on actions "expressly aimed" at California, where publication had its widest distribution and was the focus of plaintiff's activities described in the allegedly defamatory article); *Kauffman Racing*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 69 (requiring intentional targeting); *Young*, 315 F.3d at 263 (speaker must "manifest an intent to target and focus on" the forum state's readers); *Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir.2010). Appellant James alleged that APA made the Report available on APA's public website, and to Twitter followers who had elected to follow APA's Twitter feed, and acknowledged that circulation was intended to be "nationwide, including ... Montgomery County, Ohio," Compl. ¶ 62. These allegations fall far short of intentional targeting Ohio. The Trial Court correctly found that APA had not "intentionally targeted" Ohio or "published the report to an Ohio-specific audience." Dismissal Order at 2.

The Trial Court's finding that the Report "does not discuss James's Ohio activities" is also well supported. *Calder* requires that Appellant James demonstrate a connection between the allegedly defamatory statements in the Report concerning Appellant James and his in-state activities. 465 U.S. at 788-789; *see also Cadle*, 123 Fed.Appx. at 679 (website at issue "does not demonstrate purposeful availment in Ohio" where it "specifically refers to Cadle's activities in Massachusetts"); *Reynolds*, 23 F.3d at 1120 (no intentional targeting where content of publication did not concern the plaintiff's Ohio activities). Rather, the activities undertaken by James identified in the Complaint as allegedly defamatory took place in Guantanamo, Cuba and

Abu Ghraib, Iraq. Compl. ¶ 38; Opp'n to Mot. to Dismiss, James Aff. ¶ 18. Like the non-resident Appellants, Appellant James cannot point to any activities identified in the Report that he purportedly undertook in Ohio. Under *Calder*, Ohio is not the focal point of the publication.

Appellants have also argued that APA satisfied *Southern Machine*'s purposeful availment requirement because APA knew "to a certainty" that the Report would be made public by various media, including the *New York Times*, which has Ohio readers. Appellants' Br., p. 13. Even if true, these allegations fail to demonstrate purposeful availment. The "certainty" of publication in the *New York Times* fails the *Calder* requirement to establish that any actions on the part of APA were expressly aimed at Ohio or Ohio readers of the *New York Times*, as opposed to *New York Times* readers generally. 465 U.S. at 788-789. These allegations were insufficient for the Trial Court to find purposeful availment.

Appellant James also argues that, given his residence and employment in Ohio, the defamatory statements caused injury in Ohio and that the Ohio injury, combined with publication into Ohio, satisfied the purposeful availment requirement. But under *Calder*, injury in the forum must be combined with intentional targeting of the forum for publication in order to satisfy purposeful availment. *Calder*, 465 U.S. at 788-789; *Walden*, 134 S.Ct. at 1125 ("The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."). *Reynolds* also holds otherwise. *Reynolds*, 23 F.3d at 1120. In that case, allegations that a defendant defamed an in-state resident and the resident suffered reputational harm in the forum was an insufficient basis to permit a finding of purposeful availment where the defendant had not intentionally targeted that forum for publication. *Id.* (Ohio was not the "focal point" of the allegedly defamatory press release, although it dealt with an Ohio resident, and fact that the defendant "could foresee that

the report would be circulated and have an effect in Ohio [was] not, in itself, enough to create personal jurisdiction"), *citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Because there are no facts to demonstrate that APA intentionally targeted Ohio for publication of the allegedly defamatory statements in the Report, Appellant James' alleged injury in Ohio is insufficient to show purposeful availment in Ohio. The Trial Court's ruling should be affirmed.

2. The Trial Court Properly Found that APA's "Other Contacts" With Ohio Are Insufficient to Show Purposeful Availment.

The Trial Court properly found that none of APA's other contacts with Ohio are sufficient to demonstrate that APA purposefully availed itself of the privilege of acting in Ohio in connection with the Appellants' claims.

First, Appellants allege that APA President Nadine Kaslow, Ph.D, sent an e-mail to Appellant James, who is employed by Wright State University, at his work e-mail address asking for his cooperation with Sidley's investigation. Appellants' Br., p. 18. There is no evidence in the record that Dr. Kaslow in fact sent an e-mail to James' e-mail address at Wright State University.[5] Opp'n to Mot. to Dismiss, James Aff. ¶ 3. Moreover, even if Dr. Kaslow had done so, it is well-established that a limited, one-off contact with a forum state is precisely the sort of "random," "fortuitous," or "attenuated" contact that is insufficient on which to predicate personal jurisdiction, and that more is needed. *See, e.g.*, *Reynolds* , 23 F.3d at 1119 ("use of interstate facilities such as the telephone and mail is a secondary or ancillary factor and cannot alone provide the minimum contacts required by due process" (internal quotation marks and citations omitted)); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177

[5] The e-mail attached to James' affidavit is not addressed not to James specifically, but to "All Former Members of the APA PENS Task Force." Opp'n to Mot. to Dismiss, James Aff., Ex A.

(6th Cir.1992) ("Telephone conversations and letters are insufficient to fulfill the first part of the *Southern Machine* test.").

For purposes of establishing purposeful availment, contacts with the forum must evidence an intent to target the forum, not merely an individual who happens to be in the forum. Otherwise, such contacts are insufficient to satisfy Appellants' burden to show that APA targeted Ohio, rather than James. *Walden*, 134 S.Ct. at 1122 ("our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there"); *Air Prods. & Controls, Inc. v. Safetech Internatl., Inc.*, 503 F.3d 544, 551 (6th Cir.2007); *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722–723 (6th Cir.2000). The Trial Court correctly held that Dr. Kaslow's e-mail failed to create specific personal jurisdiction over APA in Ohio. Dismissal Order at 1-2.

Second, Appellants allege that letters Dr. Kaslow sent to non-party Ohio residents Dr. Ron Levant and Dr. Elizabeth Swenson, seeking their cooperation with the IR, are also sufficient to establish that APA availed itself of the privilege of acting in Ohio. Appellants' Br., p. 18. But Appellants acknowledge that Dr. Kaslow sent "emails and letters" of this sort not just to James, Levant, and Swenson, but to other potential interviewees outside of Ohio with knowledge potentially relevant to Sidley's investigation. Appellants' Br., p. 5; Opp'n to Mot. to Dismiss at 11. Thus, as Appellants themselves acknowledge, Dr. Kaslow's communications about the IR did not target only individuals in Ohio, but numerous other witnesses in other locations, thereby negating purposeful availment. *Walden*, 134 S.Ct. at 1122.

Finally, Appellants contend that APA purposefully availed itself of the privilege of acting in Ohio because during certain events discussed in the Report, *i.e.*, the establishment of the PENS task force, and at the time of the Report's publication, two of APA's Board members were

Ohio residents and participated in certain Board meetings by phone and e-mail. Appellants' Br., p. 18. Appellants base this contention on a statement by Appellant Newman that the 2005 and 2015 APA Boards "had two members from Ohio." Opp'n to Mot. to Dismiss, Newman Aff. ¶ 17 & Ex. J. But absent from the record are facts tying the Board members to Appellant James' claims, *e.g.*, suggesting that any Board members who resided in Ohio actually participated from Ohio in APA Board meetings pertaining to "events discussed in the Report" or in any Board discussions regarding the Report. The vague possibility that Board members resident in Ohio may have participated in events, Board meetings, or in discussions or votes pertinent to the IR or the Report, do not connect APA to Ohio in the "meaningful way" that is required to predicate personal jurisdiction over APA in Ohio. *Walden*, 134 S.Ct at 1125. Moreover, any such unspecified possible contacts by Ohio resident Board members would not demonstrate APA's intent to target Ohio, but would instead merely constitute the types of "random," "fortuitous," or "attenuated" contacts that are insufficient to satisfy Appellants' burden of showing purposeful availment. *Id.*, 134 S.Ct. at 1123, quoting *Burger King Corp, v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

3. Sidley's Report-Related Activities Cannot Be "Imputed" to APA.

Appellants also argue that Sidley functioned as APA's agent in carrying out the IR and that Sidley's activities in Ohio may be "imputed to APA" for purposes of establishing jurisdiction. Appellants' Br., p. 17. Appellants contend that because (i) APA "expressly engaged" Sidley to conduct the investigation and prepare the Report; (ii) APA Board members "oversaw" Sidley's IR activities; (iii) former APA President Dr. Kaslow e-mailed witnesses to ask for their cooperation with Sidley's investigation; and (iv) Sidley "used APA's name as authority" for their activities, then Sidley was APA's agent for purposes of the IR. *Id.* The Trial

Court properly held that it was without jurisdiction over Sidley. Sidley Dismissal Order at 1-2. Lack of jurisdiction over Sidley leaves nothing to be "imputed" to APA.

But even assuming *arguendo* that Sidley were subject to jurisdiction in Ohio, Appellants' legal argument ignores a critical factual predicate: fundamental to APA's retention of Sidley was that Sidley would operate independently of APA. In Ohio, a principal-agent relationship exists "only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, 494 N.E.2d 1091 (1986). Appellants acknowledge that Sidley's review was to be "fully independent" and comprise "an independent review of all available evidence, wherever that evidence leads." Compl. ¶ 181; Opp'n to Mot. to Dismiss, Newman Aff., Ex. I. Sidley's independence from APA with respect to the IR, as acknowledged by Appellants, renders baseless any legal argument that Sidley acted as APA's agent for purposes of the IR and that Sidley's actions in conducting the IR can be imputed to APA.

The cases on which Appellants rely in support of their agency theory argument are inapposite. In *Stolle Machinery Co. v. Ram Precision Industries*, S.D. Ohio No. CV 10-155, 2011 WL 6293323 (Dec. 15, 2011), a Chinese national (An) employed at Stolle, an Ohio company, was alleged to have stolen trade secrets and other materials, which he then used to start a non-resident Chinese company to compete with Stolle. *Id.* at *1. The court exercised jurisdiction over the non-resident company, finding that because it had "capitalized" on the trade secrets and other confidential materials that An misappropriated from Stolle and thereby ratified An's conduct such that An's Ohio contacts could be imputed to the company. *Id.* at *8. Key to the court's finding was that the Chinese company had benefitted from An's substantial forum contacts, to the detriment of Ohio resident Stolle. That key factor—reliance on and benefit from

substantial contacts with the forum—is absent here where APA hired Sidley to prepare the Report based on its IR. There is no allegation that APA capitalized on or benefited from Sidley's few IR-related contacts in Ohio or gained a benefit from them. *Stolle Machinery*, therefore, does not support a finding that APA purposefully availed itself of the privilege of acting in Ohio.

New York Marine Managers and *Palmieri*, cited by Appellants, are similarly unhelpful. *New York Marine Mgrs., Inc. v. M.V. Topor-1*, 716 F.Supp. 783 (S.D.N.Y.1989); *Palmieri v. Estefan*, 793 F.Supp. 1182 (S.D.N.Y.1992). In *Marine Managers*, the court held that a Turkish corporation was "doing business in New York" and thereby subject to *general* personal jurisdiction there based upon a showing that the non-resident defendant had held itself out as having a New York office, which it shared with its agent, a New York company under "common control and ownership" that was carrying out business activities on the non-resident's behalf. *Id.* at 785-786. Similarly, in *Palmieri*, the court found that foreign Sony affiliate companies were conducting part of their business in New York through New York-based Sony Music, which was functioning as its agent, thereby subjecting the affiliates to *general* jurisdiction in New York. Neither of these cases address an independent counsel's work on behalf of a client, as is present here.

More generally, none of these cases support a finding that the activities of a law firm hired to undertake an independent review on behalf of its client automatically subject the client to personal jurisdiction in any forum where the firm carries out its work. The case law in fact holds otherwise. *See, e.g., Haar v. Amendaris Corp.*, 31 N.Y.2d 1040, 1041-1042, 294 N.E.2d 855 (App. 1973) (plaintiff-attorney could not compel non-resident client to litigate in New York where "plaintiff was relying on his own activities within the State rather than on defendant's"

and "the record in the present case failed to disclose any purposeful activity" by defendant in New York).

Appellants also contend that APA's Special Committee "oversaw" Sidley's activities, that Sidley "used APA's name" in connection with the IR, and that this oversight and name use provide a basis for Sidley's investigation-related contacts with Ohio to be imputed to APA. Appellants' Br., p. 17. As to oversight, Appellants' argument is negated by allegations in the Complaint that the Special Committee "allowed what was to have been an independent investigation to become a rogue one." Compl. ¶ 162. Moreover, Appellants have failed to provide any legal support for their argument that a law firm's mention of its client's name establishes an agent-principal relationship for jurisdictional purposes.

Nor do e-mails from Dr. Kaslow to potential Ohio interviewees requesting cooperation with the IR establish or evidence an agent-principal relationship to impute Sidley's investigation activities in Ohio to APA. Dr. Kaslow's e-mails do nothing to detract from the independent nature of Sidley's work and in fact reinforce it. *See* Opp'n to Mot. to Dismiss, James Aff., Ex. A (Sidley and Hoffman were retained to "conduct an independent review" into Risen's allegations and to "ascertain the truth ... following an independent review of all available evidence, where that evidence leads."). Moreover, Dr. Kaslow's e-mails encouraging cooperation were sent at the outset of the investigation—far too early during the conduct of Sidley's work to evidence that APA knew about or ratified any of the statements in the Report alleged by Appellants to be defamatory.

Appellants further argue that the purported agency relationship between Sidley and APA was "further established" by APA's alleged "ratification" of the Report after Sidley and Hoffman completed it. Appellants' Br., p. 17. Specifically, Appellants contend that APA "ratified" the

Report and "adopted" Sidley's activities by "accept[ing]" the Report, posting the Report on APA's website, and "acting" on the Report by firing Appellant Behnke. But a client's receipt of a document from its counsel does not constitute "acceptance" in a legal sense.[6] *McSweeney v. Jackson*, 117 Ohio App.3d 623, 632, 691 N.E.2d 303 (4th Dist. 1996) (acceptance requires "the manifestation of assent"). There is nothing in the record establishing that APA, either by its Board or its Council of Representatives, "accepted" the Report. Nor does the termination of Appellant Behnke on the basis of his actions that came to light during the IR constitute ratification of the Report permitting the imputation of Sidley's Ohio contacts to APA. *Stolle Machinery* and *Daynard*, the cases cited by Appellants, require that the party to whom contacts were imputed "ratify" an agent's acts by deriving some benefit from its relationship with the agent having the forum contacts. That factor is absent here.

Finally, Appellants argue that statements by APA President Dr. Kaslow to the media[7] regarding the Report "underlined" APA's ratification of the Report. Appellants' Br., pp. 17-18. Statements made to the media regarding the Report did not result in any benefit to APA derived from Sidley's IR-related contacts in Ohio and are therefore insufficient to support imputation of those contacts to APA for jurisdictional purposes. In sum, Appellants' imputation-of-contacts theory is inapplicable here, where there is no showing that APA and Sidley operated as principal-agent or that APA derived any benefit from Sidley's IR-related Ohio contacts.

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[6] APA's Rules for its Council of Representatives provide a mechanism by which the Council formally "receives" a report, which means that the majority of Council generally agrees with the contents of a report. Rule 30-6.2 (available at http://www.apa.org/about/governance/bylaws/rules-30.aspx). That procedure was not invoked here, and the Report has not been accepted, received, or in any way become the official policy of APA.

[7] Appellants acknowledged in the Complaint that Dr. Kaslow's media statements contained her "personal views" rather than those of APA. Compl. ¶ 257.

D. Appellants' Claims Do Not "Arise From" APA's Activities in Ohio.

Appellants also contend that their claims satisfy the second *Southern Machine* prong in that they "arise from" APA's conduct in Ohio. Appellants' Br., p. 18. To demonstrate that a claim "arises from" in-state activities, the claim must have a "substantial connection" with the defendant's in-state activities. *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir.2002). To constitute a "substantial connection," a defendant's in-state conduct must form a material element of proof in the plaintiff's case. *United Elec., Radio and Machine Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir.1992). That element is not present here.

Here, the Ohio contacts identified by Appellants are (i) an e-mail from Dr. Kaslow to Appellant James, seeking cooperation with Sidley's investigation, which may or may not have been delivered to an e-mail domain based in Ohio; (ii) letters from then APA President Dr. Kaslow to non-parties and Ohio residents Drs. Levant and Swenson, also asking for their cooperation with Sidley's investigation; and (iii) that two of APA's Board members in 2005 and 2015 were Ohio residents. As discussed in Section B, above, the non-resident Appellants' claims do not arise from these contacts. Nor do Appellant James'.

Neither the e-mail from Dr. Kaslow to Appellant James nor the letters from Dr. Kaslow to Drs. Levant and Swenson are substantially connected to James' claims that the Report contained defamatory statements. Claims for defamation arise out of publication of allegedly defamatory remarks. *See, e.g.*, *Reynolds*, 23 F.3d at 1119. There is no connection between the communications from Dr. Kaslow to Appellant James and non-parties Drs. Levant and Swenson, sent at the outset of the investigation and many months before Sidley had reached any conclusions or prepared the Report, to any defamatory statements allegedly contained in the Report. The presence of Ohio residents on the APA Board in 2005 and 2015 similarly lacks in any connection, let alone a "substantial" connection, to Appellant James' claims regarding

APA's publication of allegedly defamatory statements regarding James. Appellants have not connected any action on the part of those Board members to the publication of such statements. Without a substantial connection between Appellant James' claims and APA's Ohio contacts, the Trial Court could not exercise personal jurisdiction over APA as to those claims, and properly dismissed them.

E. Exercise of Jurisdiction over APA in Ohio Would Be Unreasonable.

Finally, Appellants contend that the exercise of personal jurisdiction over APA in Ohio is reasonable, as required under due process principles and established by the third prong of *Southern Machine*. To establish that the exercise of jurisdiction is reasonable, APA must "have a substantial enough connection" with Ohio "to make the exercise of jurisdiction over" APA reasonable under the circumstances. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir.2002), quoting *S. Mach. Co.*, 401 F.2d at 381. Courts evaluating whether the exercise of jurisdiction is reasonable analyze (i) the burden on the defendant; (ii) the interests of the forum state; (iii) the plaintiff's interest in obtaining relief; and (iv) other states' interest in securing the most efficient resolution of the policy. *Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir.2005).

Here, APA would be substantially burdened if compelled to litigate this case in Ohio. *Id.* APA is a District of Columbia non-profit. It has no offices or employees in Ohio. *See* Compl. ¶ 47. Its lead counsel are not in Ohio, and the bulk of evidence and witnesses are not in Ohio. Litigation in Ohio would therefore be "inconvenient, costly, and inefficient" for APA. *Huizenga*, 225 F.Supp.3d at 661.

Ohio has a limited interest in this matter. Only one of the five Appellants lives in Ohio. Compl. ¶¶ 38-42. None of the activities described in the Report that form the basis for Appellants' claims occurred in Ohio. *See* Sections B, C.1, above. And Ohio was neither the

intentional target nor the focal point of publication of the allegedly defamatory statements. *See* Section C.1, above.

Appellants' interest in obtaining relief in Ohio is similarly limited. Four of the five Appellants reside outside Ohio and none of those have alleged that they suffered injury in Ohio. *See* Section B, above. Appellants' lead counsel are based in California and Washington, D.C. Although Appellant James is an Ohio resident, Ohio's interest in his claims against APA is "dimish[ed]" because publication of the allegedly defamatory statements did not occur "within the geographical confines" of Ohio. *Intera Corp.*, 428 F.3d at 618.

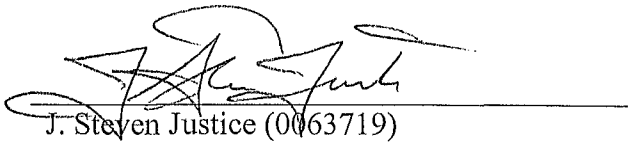
Having filed a case identical to this one in the District of Columbia on August 28, 2017, Appellants themselves have recognized the reasonableness of litigating in the District of Columbia and the superior interests of the District in this dispute. *Behnke et al. v. Hoffman et al.*, Case No. 2017 CA 005989 B, Superior Court for the District of Columbia. APA is incorporated in and maintains its principal place of business in Washington, D.C. Compl. ¶ 47. Sidley has a large office in the District. *See* Compl. ¶ 46. Many of the actions referenced in the Complaint occurred in the District of Columbia. Each of the Appellants availed themselves of the DC forum: two by being employed at APA's Washington, D.C. headquarters for at least ten years each; and the remaining three by serving in APA governance and/or a task force that met in person at APA headquarters in Washington, D.C. Compl. ¶¶ 38-42, 72-73. And the District has a strong and substantial interest in applying its Anti-SLAPP Act, based on which all defendants had sought to dismiss this matter, and in developing a coherent body of case law to protect its speakers on matters of public concern. D.C. Code § 16-5501 *et seq.* On balance, absent from the record is a sufficiently substantial connection between Ohio and APA to justify the exercise

of personal jurisdiction in Ohio as to Appellants' claims. The Trial Court properly found that it lacked jurisdiction over APA in Ohio.

CONCLUSION

For the reasons stated herein, this Court should affirm the Trial Court's judgment dismissing Appellants' claims against APA for lack of personal jurisdiction.

Respectfully submitted,



J. Steven Justice (0063719)
Glen R. McMurry (0082600)
DUNGAN & LeFEVRE CO., L.P.A.
210 W. Main St.
Troy, OH 45373
Telephone: (937) 332-9640
Telecopier: (937) 335-4084
Email: justice@dunganattorney.com
gmcmurry@dunganattorney.com

Barbara S. Wahl, Esq., PHV-16150-2018
(pro hac vice pending)
Karen E. Carr, Esq., PHV-16141-2018
(pro hac vice pending)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Email: barbara.wahl@arentfox.com
karen.carr@arentfox.com

Attorneys for Defendant-Appellee American Psychological Association

CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 2018, I filed the foregoing Brief of Defendant-Appellee American Psychological Association, and I certify that I have served by electronic mail or U.S. Mail the document to the parties.

James E. Arnold, Esq.
Gerhardt A. Gosnell, Esq.
JAMES E. ARNOLD & ASSOCIATES, LPA
115 West Main Street
Fourth Floor
Columbus, OH 43215
Email: jarnold@arnlaw.com
ggosnell@arnlaw.com
Attorneys for All Plaintiffs

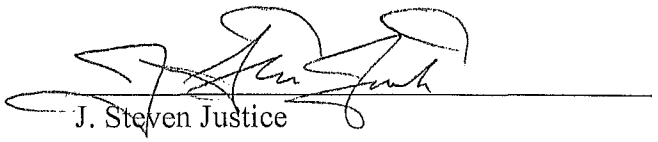
Bonny J. Forrest, Esq.
555 Front Street
Suite 1403
San Diego, CA 92101
Email: bonforrestna@aol.com
Attorney for Plaintiffs Larry James, L. Morgan Banks, Debra Dunivin, and Russell Newman

Louis J. Freeh, Esq.
2550 M St. NW
Second Floor
Washington, DC 20037
Attorney for Plaintiff Stephen Behnke

D. Jeffrey Ireland (0010443)
Erin E. Rhinehart (0078298)
Christopher C. Hollon (0086480)
FARUKI IRELAND COX RHINEHART & DUSING P.L.L.
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3710
Telecopier: (937) 227-3717
Email: djireland@ficlaw.com
erhinehart@ficlaw.com
chollon@ficlaw.com

John K. Villa (*pro hac vice*)
Thomas Hentoff (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Email: jvilla@wc.com
thentoff@wc.com

Attorneys for Defendants Sidley Austin LLP and David Hoffman



J. Steven Justice