**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO**
**CIVIL DIVISION**

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| **LARRY C. JAMES, *et al.*,** | : | **CASE NO. 2017 CV 00839** |
| | : | |
| **Plaintiffs,** | : | **Judge Timothy N. O'Connell** |
| | : | |
| **vs.** | : | **DEFENDANT AMERICAN** |
| | : | **PSYCHOLOGICAL** |
| **DAVID HOFFMAN, *et al.*,** | : | **ASSOCIATION'S REPLY IN** |
| | : | **SUPPORT OF ITS MOTION TO** |
| **Defendants.** | : | **DISMISS FOR LACK OF** |
| | : | **PERSONAL JURISDICTION OR** |
| | : | ***FORUM NON CONVENIENS*** |
| | : | |
| | : | **ORAL ARGUMENT REQUESTED** |

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## INTRODUCTION

Nothing in Plaintiffs' lengthy opposition to the Motion[1] of Defendant American Psychological Association ("APA") cures the fatal defect in their Complaint, which is that this Court lacks personal jurisdiction over APA. Plaintiffs have failed to (i) satisfy the requirement established in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) that APA is "at home" in Ohio for purposes of general jurisdiction, (ii) demonstrate either that APA purposefully availed itself in Ohio or that Plaintiffs' claims "arise from" APA's activities in Ohio, showings required under the *Southern Machine* test for specific jurisdiction, or (iii) establish that Ohio is a preferable forum to Washington, D.C. Accordingly, this Court should dismiss Plaintiffs' Complaint for lack of personal jurisdiction or, in the alternative, for *forum non conveniens*.

## I. Plaintiffs Have Failed to Establish General Jurisdiction over APA.

Plaintiffs argue in their Opposition that (i) contrary to the Supreme Court's holding in the seminal *Daimler* case, APA is "at home" in Ohio notwithstanding that the District of Columbia is its state of incorporation and principal place of business; and (ii) that APA's recent registration as an Ohio charity confers general jurisdiction over APA in Ohio. Each argument fails.

### A. Plaintiffs have failed to establish that APA is "at home" in Ohio.

Under *Daimler*, a corporation is "at home" for general jurisdiction purposes in the forum of its incorporation or its principal place of business—the "paradigm" forums. *Daimler*, 134 S. Ct. 760. *Daimler* recognizes a limited exception in an "exceptional case" where a corporate defendant's operations in another forum "may be so substantial and of such a nature as to render

[1] "Motion" and "APA Br." refer to APA's Motion to Dismiss for Lack of Personal Jurisdiction or for *Forum Non Conveniens*, filed on April 7, 2017. "Sidley and Hoffman" refers to Defendants Sidley Austin LLP and David Hoffman, and "Sidley Br." refers to Sidley and Hoffman's Motion to Dismiss for Lack of Personal Jurisdiction or *Forum Non Conveniens* also filed April 7, 2017. "Sidley Reply" refers to the reply brief submitted in support of the Sidley Motion.

the corporation at home in that State." *Id*. at 761 n.19; *see also BNSF Ry. v. Tyrrell*, U.S. No. 16-405, 2017 WL 2322834, at *10 (May 30, 2017). Those circumstances are not present here.

Plaintiffs make two arguments to avoid *Daimler*. First, they imply that *Daimler* can be ignored because APA is "a trade association" and is "[u]nlike a corporation" in that it lacks "a centralized, hierarchical structure in which a headquarters exercises control over branches or offices." Pls.' Br. at 38. None of those allegations are true. APA is not a "trade association."[2] It is a scientific, non-profit corporation chartered in the District of Columbia where it maintains a headquarters from which its "daily operations are overseen by its senior staff."[3] Compl. ¶ 47. *Daimler* provides the applicable standard, under which APA is not "at home" in Ohio unless Plaintiffs can demonstrate an "exceptional case." *Daimler*, 134 S. Ct. 761 n.19. They cannot.

Plaintiffs also argue that APA's "primary function is to support its membership around the country." Pls.' Br. at 38. This is also incorrect. Although APA is a scientific organization in which psychologists and affiliates are members, its mission is not to serve those members, but "to advance the creation, communication and application of psychological knowledge to benefit society and improve people's lives."[4] That some of APA's members are in Ohio fails to render APA at home here. As explained in *Daimler*, the general jurisdiction inquiry "calls for an appraisal of a corporation's activities in their entirety" and "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20.

Second, Plaintiffs argue that the presence of APA governance officials in Ohio renders APA "at home" here. Pls.' Br. at 6, 38. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S.

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[2] Even if Plaintiffs' characterization of APA as a trade association were accurate (and it is not), Plaintiffs cite to no case in which a court has held that a trade association is "at home" anywhere it has members.
[3] *See* http://www.apa.org/about/governance/index.aspx ("APA is a corporation chartered in the District of Columbia.").
[4] *See* http://www.apa.org/about/index.aspx ("Our mission is to advance the creation, communication and application of psychological knowledge to benefit society and improve people's lives.")

437 (1952), the single case Plaintiffs cite, provides the framework for an "exceptional case" where a corporation's forum contacts are "so substantial" as to render it at home in another forum. There, a mining company transferred its wartime business activities from the Philippines to Ohio, from where the company's president and general manager carried out "a continuous and systematic supervision" of the company's remaining activities. *Id*. at 448. The Supreme Court held that Ohio courts could exercise general jurisdiction because "Ohio was the corporation's principal, if temporary, place of business." *Daimler*, 134 S. Ct. at 756.

Not so here. APA's principal place of business has been and remains Washington, D.C., as acknowledged in the Complaint. Compl. ¶ 47 (APA's "daily operations are overseen by its senior staff … in Washington, DC."). Participation by one or two Ohio residents on APA's fourteen-member board of directors is incongruous with a "continuous and systematic supervision" of APA's activities from Ohio, as in *Perkins*. *See also BNSF Ry. Co.*, 2017 WL 2322834, at *10 (although defendant had over 2,000 miles of railroad track and more than 2,000 employees in forum state, court lacked general jurisdiction because defendant was not "so heavily engaged in activity in Montana as to render it essentially at home" there) (internal quotations and alteration omitted). Plaintiffs have not established an "exceptional case" as contemplated by *Daimler*, nor can they. Plaintiffs' general jurisdiction argument fails.

### B. APA's filing of a registration statement for purposes of soliciting donations in Ohio is insufficient to confer general jurisdiction in Ohio.

Plaintiffs also contend without legal authority that APA's registering as an Ohio charity is the equivalent of "doing business" in Ohio, granting Ohio courts general jurisdiction over APA. Pls.' Br. at 39. Again, Plaintiffs' argument fails. APA first registered with Ohio for charitable solicitation purposes in April 2017, months after Plaintiffs' Complaint was filed and years after the activities Plaintiffs allege are relevant to their claims took place. That fact alone

disposes of Plaintiffs' argument. *See, e.g., Freeman v. Specialty Retailers, Inc.*, S.D.Cal. No. 13-cv-1339-CAB (BGS), 2013 WL 12084292, at *4 (Nov. 20, 2013) (post-complaint registration by defendant to do business in forum state could "not be considered in the jurisdictional analysis").

Even if Plaintiffs could show that APA was registered as an Ohio charity during the applicable time period, R.C. 1716.16(C) does not support Plaintiffs' contention.[5] That provision merely confers authority on the attorney general to investigate and resolve violations of charitable solicitations laws. *See id.* It is irrelevant to lawsuits brought by private persons against an out-of-state charity, nor does it touch on alleged tortious conduct outside the scope of that chapter.

Nor do the cases cited by Plaintiffs support general jurisdiction over APA. Pls.' Br. at 39. Plaintiffs' cases stand merely for the proposition that, in some states, a business's compliance with a state requirement to designate an in-state agent to accept service of process may be considered consent to suit in that state.[6] Those courts concluded that general jurisdiction

[5] R.C. 1716.16(C) provides that, when "the attorney general has authority to institute an action or proceeding under this chapter, the attorney general may accept an assurance of discontinuance of any method, act, or practice that is in violation of this chapter . . . from any person alleged to be engaged in . . . the unlawful method, act, or practice." "This chapter" refers to Chapter 1716, which governs charitable organizations, not for-profit businesses.

[6] For example, in *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, 78 F. Supp. 3d 572 (D. Del. 2015), *aff'd*, 817 F.3d 755 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 625 (2017), the defendant had complied with Delaware corporation law and appointed an agent to accept service of process there. In view of the Delaware Supreme Court's holding that "[a] corporation that authorizes an agent to receive service of process … consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority," *id.* at 587 (internal quotations and citation omitted), the court concluded that the defendant had consented to the court's general jurisdiction. *Id.* at 587. *Accord Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199–1200 (8th Cir. 1990) (absent "words of limitation" to claims arising out of activities within the state, a Minnesota court had jurisdiction over an out-of-state defendant who had registered an agent in the state in accordance with state law); *Price v. Wheeling Dollar Sav. & Trust Co.*, 9 Ohio App. 3d 315, 318-19, 460 N.E.2d 264, 268 (1983) (concluding that out-of-state service was proper on a nonresident corporation because the complaint alleged that the corporation was "licensed to do business in Ohio and engages in substantial business transactions in Ohio," and the corporation had an "Ohio statutory agent appointed to receive service of summons").

was available on the basis of two factors not present here: (i) whether the corporate defendants designated an in-state agent to accept service of process there *and* (ii) whether the state law could reasonably be construed to "condition doing business in that state on an agreement to submit to the general jurisdiction of the courts." *Knowlton,* 900 F.2d at 1199-1200; *Acorda Therapeutics, Inc.*, 78 F.Supp.3d at 586. Here, the Ohio charitable solicitations laws do not require a registered charity to appoint a resident agent to accept service of process. They require only that charities intending to seek in-state donations file a registration statement and annual financial reports with the attorney general, *see* R.C. 1716.02, 1716.04, and refrain from making misleading statements in the course of soliciting donations, *see* R.C. 1716.14. Section 1716.15, the law's investigations provision, is narrowly drafted to permit inquiries into potential violations. Thus, the Ohio charitable solicitations laws contain "words of limitation" and do not "condition doing business in th[e] state on an agreement to submit to the general jurisdiction of the courts." *Acorda Therapeutics, Inc.*, 78 F.Supp.3d at 586.

## II. This Court Lacks Specific Jurisdiction over APA.

In the absence of general jurisdiction, Plaintiffs can maintain this action only by showing that the Court has specific jurisdiction over APA. Plaintiffs have failed to meet their burden to satisfy the *Southern Machine* test for specific jurisdiction.

### A. Plaintiffs have failed to demonstrate that APA purposefully availed itself of the benefits and protections of Ohio law.

As APA established in its Motion, Plaintiffs have failed to demonstrate that APA purposefully availed itself of the benefits and protections of Ohio law when it posted the independent review ("IR") to its website. *See* APA Br. at 10–16. To do so based on publication of allegedly defamatory statements, Plaintiffs must show that APA intentionally targeted Ohio. *Id*. Plaintiffs have made no such showing in their Complaint or Opposition. *See* Pls.' Br. at 13–

22. Instead, Plaintiffs propose a sweeping *new* "test" for determining purposeful availment in libel cases. *Id.* at 13. For a discussion of Plaintiffs' contentions and the misreading of cases[7] on which they are based, APA refers to and adopts the reasoning in Section II.B of the Sidley Reply.

**B. APA's "separate" Ohio contacts do not establish purposeful availment.**

In addition to their flawed "publication-only" theory, Plaintiffs point to two purported APA contacts with Ohio as providing a basis for this Court to exercise jurisdiction: The first is Dr. Kaslow's single email to Plaintiff James asking him to cooperate with the IR. Pls.' Br. at 25. Second, Plaintiffs newly contend that, "during the events discussed in the Report and during APA's decisions after the Report's publication, at least one Board member was a resident of Ohio and participated in the Board meetings and decisions by phone and email." *Id.* Neither, even if correct, demonstrates purposeful availment.

First, as APA established in its Motion, APA Br. at 12-13, the single Dr. Kaslow email is insufficient to establish purposeful availment because it was a "random," "fortuitous," or "attenuated" contact whose connection to Ohio was solely a function of James' decision to reside there. *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 551 (6th Cir. 2007); *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722–23 (6th Cir. 2000); *cf. Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994) ("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.*

[7] Plaintiffs argue in a footnote that *Kauffman* rejected the applicability of the "sliding-scale" approach developed in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), which evaluates the interactivity of a website, in cases involving non-commercial Internet activity. *See* Pls.' Br. at 14 n.6 & 22. Plaintiffs ignore that the Sixth Circuit has looked to the *Zippo* approach in assessing non-commercial web-based personal jurisdiction in other cases. *See, e.g., Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 678 (6th Cir. 2005). Moreover, the Court need not reach the *Zippo* question here; the *Calder* line of cases provides this Court all it needs to determine that APA has not purposefully availed itself of Ohio.

*of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177 (6th Cir. 1992) ("Telephone conversations and letters are insufficient to fulfill the first part of the *Southern Machine* test."). Plaintiffs cite no case law to support their argument to the contrary. Nor can they. The only instances where courts have held that such minimal contacts suffice are where the single contact itself "form[s] the bas[i]s for the action." *See, e.g.*, *Schneider v. Hardesty*, 669 F.3d 693, 702 (6th Cir. 2012). That is not the case here, where Plaintiffs do not allege that Dr. Kaslow's email was defamatory or is otherwise material to their claims. That Dr. Kaslow appears to have sent the email to all former members of the PENS Task Force and to other "witnesses," Pls.' Br. at 11, further demonstrates that APA did not intentionally target Ohio.

Second, Plaintiffs' assertion that one or more APA Board members who resided in Ohio purportedly participated in Board meetings and decisions by phone and email from here does not establish purposeful availment. Pls.' Br. at 25. Plaintiffs' only support for this assertion is a statement made by Plaintiff Newman that the 2005 and 2015 APA Boards "had two members from Ohio."[8] *See* Pls.' Br., Newman Aff. ¶ 17 & Ex. J. Plaintiffs, relying on sheer speculation, have provided no admissible evidence that any Board members who allegedly resided in Ohio *actually* participated in APA meetings pertaining to the IR from Ohio. The unsubstantiated *possibility* that certain Board members *may have* participated in APA meetings from their homes in Ohio is an insufficient basis on which to predicate jurisdiction. Moreover, even if some Board members did in fact participate in IR-related discussions while located in Ohio, such purported

[8] Plaintiff Newman's statement should be disregarded for purposes of the Court's analysis of APA's Motion to Dismiss. Plaintiff Newman's statement is not made on personal information and accordingly is not admissible to support Plaintiffs' Opposition.

contacts, like the single Dr. Kaslow email, are "random," "fortuitous," or "attenuated," and in any event did not give rise to Plaintiffs' claims.[9] *Air Prods.*, 503 F.3d at 551.

### C. Plaintiffs claims do not "arise from" APA's activities in Ohio.

Plaintiffs have also failed to establish the second requirement under the *Southern Machine* test for specific personal jurisdiction: that either James' or any other Plaintiff's claims "arise from" APA's Ohio contacts. Nothing in the voluminous materials Plaintiffs append to their Opposition refutes the fact that neither James nor any other Plaintiff has established that their claims "arise from" either Dr. Kaslow's e-mail to James in Ohio seeking cooperation or the presence of Ohio residents on APA's Board. *See* APA's Br. at 13, 15.[10]

As to Plaintiffs' argument regarding Ohio's purported "ancillary authority" to dispose of Plaintiffs' remaining claims, to which Plaintiffs have only half-heartedly attempted to establish an Ohio connection, APA refers to and adopts the reasoning in Section II.E of the Sidley Reply.

### D. This Court's exercise of jurisdiction over APA fails to satisfy *Southern Machine*'s reasonableness test.

Plaintiffs have also failed to establish that APA had "a substantial enough connection" with Ohio "to make the exercise of jurisdiction over" APA reasonable. *Southern Mach. Co.*, 401 F.2d 374, 381 (6th Cir. 1968); *see* APA Br. at 16. Plainly the District of Columbia has a more substantial connection to this dispute than does Ohio. APA and its lead counsel are based in Washington D.C., APA has no offices in Ohio, the bulk of the evidence and witnesses are

[9] Plaintiffs' sole citation is to *Kontar v. American Geophysical Union*, N.D.Ohio No. 3:15-cv-425, 2016 WL 2594160, at *1 (May 5, 2016), *aff'd in part, rev'd in part on other grounds*, 6th Cir. No. 16-3491 (Jan. 5, 2017), which addressed whether an individual's contacts—rather than an organization's—conferred jurisdiction in Ohio. To the extent *Kontar* is relevant, APA's contacts with Ohio are akin to those the *Kontar* court characterized as "isolated" and incapable of forming a basis for jurisdiction.

[10] Plaintiffs also contend that Defendants' contacts with Ohio include "multiple publications into Ohio" of the IR and damage to Plaintiff James in Ohio and that their claims "arise from" those contacts. Pls.' Br. 25-26. That argument amounts to a rehashing of their ineffective argument related to purposeful availment and relies on the same misreading of *Calder*, *Keeton*, *Fallang*, and *Kauffman*. *See* Section II.B, *supra*, Sidley Reply Section II.B.

outside of Ohio, and Washington, D.C. has a substantial interest in applying its Anti-SLAPP Act to defamation cases involving D.C.-based speakers who speak while in D.C. *See* APA Br. at 16. Plaintiffs' Opposition does not convincingly argue otherwise.[11] *See* Pls.' Br. at 29–34.

**1. Ohio has little or no interest in the non-resident Plaintiffs' claims, and has a diminished interest in Plaintiff James' claims.**

Plaintiffs' argument that Ohio has a substantial interest in the litigation because Plaintiff James allegedly suffered reputational harm in Ohio, and because non-party Dr. Trudy Bond and other Ohio residents have attacked James in Ohio, is also unpersuasive. *See* Pls.' Br. at 30–31. Plaintiffs essentially concede that Ohio lacks a substantial interest in the litigation brought by the four non-Ohio Plaintiffs by contending that Plaintiff James' connection to Ohio is enough to predicate jurisdiction for *all* Plaintiffs. *See id.*; *see also Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 104 (1987) (forum's legitimate interests in the dispute is "considerably diminished" where plaintiff was not a forum resident); *Huizenga v. Gwynn*, E.D.Mich. No. 16-cv-12001, 2016 WL 7385730, at *10 (Dec. 21, 2016) (forum state did not have "an especially strong interest" where defamation plaintiffs were non-residents).

As to James, the mere fact that he alleges injury in Ohio is insufficient on its own to confer jurisdiction. *Campinha-Bacote v. Wick*, S.D.Ohio No. 1:15-cv-277, 2015 WL 7354014, at *4–5 (Nov. 20, 2015) (that defendant "merely knew or should have known that her actions may

[11] Plaintiffs wrongly suggest that because "Hoffman and Sidley fail to address the reasonableness" factor in their opening brief, *see* Pls.' Br. at 30 n.12, their purported waiver of that argument should be "imputed" to APA. Plaintiffs are wrong on two counts. As a threshold matter, Sidley and Hoffman made clear in their opening brief that personal jurisdiction in Ohio would be unreasonable for the same reasons that Plaintiffs failed to satisfy the first two *Southern Machine* factors. *See* Sidley Br. at 4–5. Moreover, for all of the reasons set forth in Section III, *infra*, there is no basis for arguing that Sidley's and Hoffman's actions should be imputed to APA, whether those actions are relevant to the IR itself or to anything occurring after the IR, including the defense of this litigation. *Cf. Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 654 (5th Cir. 2002) (holding that a corporation's waiver of personal jurisdiction can be imputed to another corporation based only on an "alter ego" theory or where the latter is a "mere continuation" of the former).

have some effect in Ohio" was "not enough to show purposeful availment"). And even though James is an Ohio resident, Ohio's interest in his litigation against APA is "diminish[ed]" because APA did not publish the IR "within the geographical confines of" Ohio. *Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir. 2005); *accord Pay(q)r v. Sibble*, N.D.Ohio No. 5:5cv1038, 2015 WL 9583034, at *8 (Dec. 31, 2015). Even if Ohio residents read the IR, so too did residents of other states, further diluting Ohio's interest.[12]

As described in APA's Motion, Washington, D.C. has a strong interest in this litigation, *see* APA Br. at 16, and its courts are capable of redressing James' alleged reputational harm. That an Ohio court once declined to accept a case to overturn the Ohio Board of Psychology's ruling on a matter brought against James, Pls.' Br. at 18 n.7, does not demonstrate interest by the Ohio courts. As Plaintiff point out, non-party Dr. Bond and others have in the past filed since-resolved complaints against James in various forums in Ohio, as well as in Louisiana, Guam, and Washington, D.C. Compl. ¶¶ 56, 291, 472. These matters are irrelevant to Ohio's interest in *this* litigation, which involves different parties, claims, allegations, and issues.

**2. Litigation in Ohio would subject APA to a significant and undue burden.**

Plaintiffs contend that there is no burden on APA impeding the Court's exercise of jurisdiction because APA personnel can take a direct, inexpensive flight from Washington, D.C. to Ohio. Pls.' Br. at 31. That is not the test. "Instead, the constitutionally significant 'burden' to be analyzed relates to the mobility of the defendant's *defense*." *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (1980) (emphasis added). Thus, where the defendant "has no

[12] Plaintiffs append to their Opposition an Affidavit from the Alliance for Audited Media purporting to show the average *hard copy* circulation of the New York Times in Ohio for a twelve-month period ending on September 30, 2015. Even if accurate, it is wholly unclear what relevance this data has to any issue in the case, given that the New York Times published a copy of the IR *on its webpage*. This Affidavit should be disregarded by the Court in considering this Motion. None of the other affidavits appended to Plaintiffs' Opposition are relevant to the issues raised in APA's Motion and also should be disregarded.

offices and no employees" in the forum state; "[i]ts lead counsel is not [t]here"; "[t]he bulk of its evidence and witnesses" are located elsewhere; "[a]nd its home base is several hundred miles away"; it is "inconvenient, costly, and inefficient" to litigate in the forum, and the burden on the defendant is too substantial to render jurisdiction reasonable. *Huizenga*, 2016 WL 7385730, at *10; *Wiltz v. New Jersey*, S.D.Ohio No. 2:09-cv-00592, 2010 WL 3659038, at *8 (Sept. 14, 2010) (New Jersey defendants unduly burdened by having to litigate in Ohio, to where defendants, documents, and witnesses would have to travel).

APA would be similarly burdened if forced to defend in Ohio. APA—a Washington, D.C.-based not-for-profit corporation—has no physical presence in Ohio, and its witnesses and evidence would have to be transported here at APA's expense. *See Intera Corp.*, 428 F.3d at 618 (defendants "substantially burdened" if compelled to litigate where neither defendant resides); *see also Haley v. City of Akron*, N.D.Ohio No. 5:13–cv–00232, 2014 WL 804761, at *9 (Feb. 27, 2017) ("Describing the reasonableness factors, the Sixth Circuit has found, if defendants reside in other states, they are burdened by litigating in Ohio.").

If the first two elements of the *Southern Machine* test are lacking, and the defendant would be burdened by interstate travel, the exercise of jurisdiction is unreasonable. *See Haley*, 2014 WL 804761, at *10 ("[W]hen the first two prongs of the *Southern Machine* test are not met, plaintiff is not entitled to an inference of reasonableness."). Plaintiffs can neither establish purposeful availment nor show that their claims arise from APA's activities in Ohio. The burden of forcing APA to litigate in Ohio renders the Court's exercise of jurisdiction unreasonable.

**3. Plaintiffs' interest in obtaining relief in Ohio is minimal.**

Finally, Plaintiffs argue that they have an interest in obtaining relief in Ohio rather than other jurisdictions because they would prefer to litigate their claims in a single court, and because Washington, D.C. would be a more expensive forum than Ohio. *See* Pls.' Br. at 33.

These arguments are baseless. First, Plaintiffs' purported preference for a single forum has no bearing on whether APA is subject to personal jurisdiction in this Court. *Walden v. Fiore*, 134 S. Ct. at 1122 (personal jurisdiction protects "the liberty of nonresident defendant[s] – not the convenience of Plaintiffs…"). Moreover, as it is apparent that Plaintiffs Behnke and Newman should be compelled to arbitrate their disputes in the District of Columbia, as set forth in APA's Memorandum in Support of Its Motion to Compel Arbitration and Application to Stay Litigation (Dkt. ID 30937296), Plaintiffs' preferred courthouse forum is likely irrelevant. Even Plaintiff James' interest in obtaining relief in Ohio is minimal because, like the other Plaintiffs, relief "may be achieved by filing an action" in another forum such as Washington, D.C., which "would not be unduly burdensome." *Buckeye Check Cashing of Ariz., Inc. v. Lang*, S.D.Ohio No. 2:06-cv-792, 2007 WL 641824, at *11 (Feb. 23, 2007).[13] Plaintiffs' argument regarding expense is belied by the fact that Plaintiffs are represented by California and Washington, D.C. counsel, and that two of the four non-resident Plaintiffs reside or own property in Washington, D.C.

Second, Plaintiffs' contention that APA "inappropriately states that one consideration in the [jurisdictional] analysis should be the choice of law," Pls.' Br. at 33, misconstrues both *Keeton* and APA's argument. In *Keeton*, the Court concluded that "any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the Court to adjudicate the claims." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984). APA does not argue that it would be subject to unfairness if the case remained in Ohio due to the unavailability of the Anti-SLAPP Act. Indeed, that Act applies

[13] *See Sibble*, 2015 WL 9583034, at *8 ("[Plaintiff] has an interest in obtaining relief. But, it may obtain that relief in other fora (*e.g.*, California and Florida) that have an equally strong interest in seeing the case resolved, given that Defendants reside in those states where the actionable conduct is alleged to have occurred."); *Odeh v. Auto Club Ins. Ass'n*, N.D.Ohio No. 1:09 CV 1114, 2010 WL 319742, at *8 (Jan. 20, 2010) (personal jurisdiction was lacking in part because, although "plaintiff's interest in obtaining relief is substantial, . . . the Michigan forum is readily available to him").

in Ohio under Ohio's choice-of-law principles. *See* APA Br. at 19-25; Sidley Br. at 10-15. Rather, APA argues that courts in Washington, D.C. have an interest in applying the Act in cases involving speech on matters of public concern. The *Keeton* court, in noting that jurisdiction should be decided separately from choice-of-law, did not hold to the contrary. *See Keeton*, 465 U.S. at 778. Plaintiffs have failed to establish that the exercise of personal jurisdiction over APA in Ohio is reasonable.

## III. There Is No Factual or Legal Basis for "Imputing" Specific Jurisdiction over Sidley and Hoffman to APA.

Plaintiffs' alternative argument that Sidley's and Hoffman's activities in Ohio "should be imputed to APA for jurisdictional purposes," Pls.' Br. at 10, is rife with flaws, the most important of which is that this Court is without jurisdiction over Sidley and Hoffman. *See* Sidley Br. & Reply.

Plaintiffs identify three separate points in support of their argument that Sidley's Ohio contacts should be imputed to APA: (i) a law firm's actions are imputed to the client; (ii) the Special Committee "oversaw" the activities of Hoffman and Sidley; and (iii) Dr. Kaslow sent emails to Ohio interviewees asking for cooperation. *Id*. at 11. These arguments are without merit. As a threshold matter, it is undisputed that the fundamental principle underpinning APA's engagement of Sidley to conduct the IR was that Sidley was to operate entirely independent of APA. *Id.* at 11. Plaintiffs' own Complaint recognizes this, noting that the Sidley engagement letter makes clear that Sidley's review will be "fully independent" and comprises "an independent review of all available evidence, wherever that evidence leads." Compl. ¶ 181. The independent nature of Sidley's and Hoffman's work by itself negates any argument that their conduct of that work forms the basis for jurisdiction over APA.

While conceding that Sidley and Hoffman operated independently of APA, Plaintiffs nonetheless attempt to argue that Sidley's independence was "limited" to "the Report's content." Pls.' Br. at 11. This argument is meaningless, as "the Report's content" comprises the scope of APA's engagement of Sidley and Hoffman—"to conduct an independent review relating to allegations that, following the attacks of September 11, 2001, the APA colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad." Sidley Retainer Agreement, Pls.'s Br., Newman Aff., Ex. I. Plaintiffs have established no factual basis on which this Court may impute Sidley's and Hoffman's activities in conducting the IR to APA for jurisdictional purposes.

Plaintiffs' specific arguments also lack merit. First, the activities of a law firm hired to undertake an independent review on behalf of its client do not automatically subject the client to personal jurisdiction in any forum where the firm carries out that work. Tellingly, Plaintiffs cite no cases to support their novel theory, which is at odds with other case law. *See, e.g., Haar v. Amendaris Corp.*, 31 N.Y.2d 1040, 1041-42 (N.Y. 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).

The few cases Plaintiffs do cite are inapposite, and none pertain to the relationship between client and counsel. In *Stolle Machinery Co. v. Ram Precision Industries*, No. S.D. Ohio 3:10-cv-155, 2011 WL 6293323 (2011), a Chinese company was subject to jurisdiction in Ohio when it "capitalized" on trade secrets and other confidential materials misappropriated by its president during his employment at an Ohio company that suffered injury as a result. In *New York Marine Managers, Inc. v. M.V. Topor-1*, 716 F. Supp. 783 (S.D.N.Y. 1989), the court held

that a Turkish corporation was subject to personal jurisdiction in New York based on a finding that it shared an office with a New York company under "common control and ownership" and used another New York-based company under common ownership as "an American collection and disbursement office." *Id*. at 785-86. Neither of these cases have any applicability here.

*Palmieri v. Estefan*, 793 F. Supp. 1182 (S.D.N.Y. 1992), is no more helpful. There, the Court found that, in a copyright infringement case, foreign Sony affiliates were subject to jurisdiction in New York because Sony New York's activities were part of the affiliates' business in New York. These cases neither stand for the proposition that a law firm's contacts with a particular state should be imputed to its client as a basis for personal jurisdiction nor otherwise support Plaintiffs' arguments.

Second, Plaintiffs contend that the Special Committee "oversaw" the activities of Sidley and Hoffman. Pls.' Br. at 11. But Plaintiffs have failed to show that this purported oversight justifies the imputation of counsel's activities to APA for purposes of conferring jurisdiction over APA in Ohio. This is especially true given Plaintiffs' allegations that the Special Committee "failed to exercise effective oversight" and "allowed what was to have been an independent investigation to become a rogue one." Compl. ¶ 162. Plaintiffs cannot have it both ways.

Finally, Dr. Kaslow's emails to Ohio interviewees requesting their cooperation fails to demonstrate that counsel's actions may be imputed to APA. Dr. Kaslow's emails were fortuitously sent to Ohio, were also sent to non-Ohio "witnesses," Pls.' Br. at 11, and in any case were sent too early during the conduct of Sidley's and Hoffman's work to credibly evidence that Kaslow, let alone APA, knew about or ratified anything having to do with the IR. *See* Section II.B, *supra.*

Plaintiffs separately argue that the purported agency relationship between Sidley and APA was "further established" by APA's alleged "ratification" of the IR after Sidley and Hoffman completed it. Pls.' Br. at 11. Plaintiffs contend that APA "ratified" the IR and "adopted" Sidley's and Hoffman's activities by "accepting" the IR, posting it on its website, and "acting" on the IR by firing Dr. Behnke. In so arguing, Plaintiffs attempt to conflate APA's receipt of a document from its counsel as "acceptance" in a legal sense. *McSweeney v. Jackson*, 691 N.E.2d 303, 308 (Ohio Ct. App. 1996) (acceptance requires "the manifestation of assent"). Plaintiffs have pointed to no formal action on the part of APA, either by its Board or its Council of Representatives, to "accept" the IR.

And even if APA accepted the document and manifested its purported acceptance by initiating personnel action based on the IR's contents, those acts are insufficient to constitute ratification. Each of the cases Plaintiffs cited in support of this theory held that the party to whom jurisdiction is imputed had derived some benefit from the relationship with the party having the forum contacts. In *Stolle Machinery, supra*, the Chinese company "ratified" its president's conduct by knowingly using the trade secrets he misappropriated for its financial gain. In *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42 (1st Cir. 2002), the First Circuit found that a South Carolina law firm's Massachusetts contacts could be imputed to, and confer jurisdiction over, a Mississippi firm where the Mississippi firm "knowingly accepted the benefits" of information it received from the plaintiff. *Id*. at 60. Plaintiffs identify no such benefit to APA here. Moreover, APA's engagement with Sidley expressly contemplated that the document would be made public, negating any argument that making the IR available constitutes APA's acceptance. Sidley retainer agreement, Pls.' Br., Newman Aff., Ex. I. Plaintiffs' follow-on argument that Dr. Kaslow's statements to the media

"underlined" APA's purported ratification of the IR also fails to support the exercise of jurisdiction in Ohio. Neither of the two media interviews identified in Plaintiffs' Complaint are alleged to have occurred in Ohio.

## IV. The Court Should Dismiss This Case Under the Doctrine of *Forum Non Conveniens*.

Should this Court find that personal jurisdiction exists as to APA, APA asks in the alternative that it dismiss the case for *forum non conveniens*. For its response regarding the appropriate deference to be applied to Plaintiffs' choice of forum, and Plaintiffs' arguments regarding the location of Plaintiffs' witnesses, Plaintiffs' choice of counsel, and other public and private factors, APA refers to its arguments in Section II.D, *supra*, regarding Washington, D.C.'s connection to this matter and refers to and adopted the reasoning in Section IV of the Sidley Reply.[14]

As to Plaintiffs' argument regarding the location of documents, Plaintiffs overlook the importance of the physical location of APA's voluminous hard copy files, which cannot be turned over in discovery until they are located, identified, and produced for Plaintiffs' inspection and copying. Ohio R. Civ. P. 34. All or nearly all of that work will occur in Washington, D.C.

Regarding "the appropriateness of litigating a case in a forum familiar with the applicable law," *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 127, 519 N.E.2d 370, 374 (1988) supports dismissal here because D.C. courts are best positioned to apply the D.C. Anti-SLAPP Act. Plaintiffs rely on *dicta* in an unpublished Virginia federal district court case to deem the Act procedural and thus inapplicable in Ohio. *See* Pls.' Br. at 44 (citing *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, E.D.Va. No. 1:14-cv-1118, 2015 WL 12517012, at *3 (Apr. 21, 2015)). Plaintiffs are in error. They overlook the slew of cases holding that Anti-

[14] APA also notes that Plaintiffs' argument related to compulsory process is in response to Sidley's motion, rather than APA's. Pls.' Br. at 14.

SLAPP Acts are substantive, *see* APA Br. at 19–20; Sidley Special Mot. to Dismiss at 12, including the recent D.C. Court of Appeals case resolving any doubt by reaffirming that the Act is substantive. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) ("[T]he D.C. Anti-SLAPP Act was designed to protect targets of . . . meritless lawsuits by creating substantive rights with regard to a defendant's ability to fend off a SLAPP." (internal quotation marks and citation omitted)).

Plaintiffs also question "why District of Columbia law would be applicable to the three Plaintiffs who have no relationship to the District of Columbia." Pls. Br. at 45. Plaintiffs' question glosses over the fact that *all five* Plaintiffs have significant Washington, D.C. contacts. Plaintiff James served until recently as a member of APA's Council of Representatives, the larger governing body for D.C.-based APA, and traveled to Washington, D.C. for meetings once, sometimes twice, per year in connection with that position. Plaintiff Behnke is a Washington, D.C. resident, Compl. ¶ 40, and, along with Plaintiff Newman, was employed by APA for many years. Compl. ¶¶ 40, 42. Plaintiff Dunivan owns property in Washington, D.C., was at all relevant times a Washington, D.C. resident, Compl. ¶ 41, and, like Plaintiff James, served on and attended Washington, D.C. meetings of APA's Council of Representatives for several years. Compl. ¶ 40. Plaintiffs James, Behnke, Newman and Morgan Banks all attended the PENS Task Force meeting from June 24-26, 2005, an event key to many allegations in the Complaint. That meeting occurred at APA's headquarters building in Washington, D.C. And APA's Motion establishes that courts apply the Anti-SLAPP law of the defendant's domicile state or of the state where the speech originated, even where another state's defamation law applies, because of the Anti-SLAPP states' strong interest in seeing the laws applied to speech by their citizens

originating in their jurisdictions. *See* APA Br. at 19–20, 22 n.8 (collecting cases); Sidley Special Motion to Dismiss at 13, 15.

Regarding Plaintiffs' contention that, upon dismissal, they would be time-barred from bringing their claims in other forums, APA refers to and adopts the reasoning in Section II.C. of the Sidley Reply.

**V. The Court should reject Plaintiffs' requests for discovery and to lift stay**

Regarding Plaintiffs' requests in their Opposition for jurisdictional discovery and in their Proposed Order that the discovery stay be lifted and that Defendants be compelled to produce "notes and other documents generated during Defendants Hoffman and Sidley's investigation," APA refers to and adopts the reasoning in Section III of the Sidley Reply.

## CONCLUSION

Plaintiffs have (i) failed to refute the fact that APA is not "at home" in Ohio and therefore not subject to general jurisdiction here, (ii) failed to satisfy the three-part *Southern Machine* test required for establishing specific jurisdiction in Ohio, and (iii) have argued ineffectively, and without factual or legal support, that personal jurisdiction in Ohio over Sidley and Hoffman should be "imputed" to APA. Even if Plaintiffs have met their jurisdictional burden, this court should dismiss on grounds of *forum non conveniens* so that the case can proceed in Washington, D.C., which has a strong interest in its resolution. It is on these grounds that APA requests that this Court dismiss the Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of June, 2017, I electronically filed the foregoing Defendant American Psychological Association's Reply in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction of Forum Non Conveniens with the Clerk of Courts using the Court's electronic filing system, which will send electronic notification of such filing to participants in the electronic filing system, and I certify that I have served by electronic mail or U.S. Mail the document to the parties not participating in the electronic filing system.

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