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.	:	
	:	
DAVID HOFFMAN, *et al.*,	:	
	:	
Defendants-Appellees.	:	

BRIEF OF DEFENDANTS-APPELLEES
SIDLEY AUSTIN LLP AND DAVID HOFFMAN
ORAL ARGUMENT REQUESTED

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STATEMENT OF ASSIGNMENTS OF ERROR

The trial court dismissed all claims against Defendants-Appellees Sidley Austin LLP ("Sidley") and David Hoffman ("Hoffman"), a Sidley partner, for lack of personal jurisdiction. Plaintiffs-Appellants' ("Plaintiffs'") Second Assignment of Error asserts that the trial court's decision was erroneous. Pls.' Br. at 1. Because the decision was correct, this Court should affirm.[1]

STATEMENT OF ISSUES PRESENTED

This appeal presents two issues relevant to Sidley and Hoffman. The two issues track the first two parts of the three-part test for specific personal jurisdiction established in *Southern Machine Company, Inc. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968), and adopted by the Supreme Court of Ohio in *Kauffman Racing Equipment, L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 50. First, did Sidley and Hoffman "purposefully avail [themselves] of the privilege of acting in [Ohio] or causing a consequence in [Ohio]"? *So. Mach.*, 401 F.2d at 381. And second, do Plaintiffs' "cause[s] of action ... arise from [Sidley or Hoffman's] activities" in Ohio? *Id.*

STATEMENT OF THE CASE AND RELEVANT FACTS

The use of "enhanced interrogation techniques" in questioning national security detainees is one of the many contentious public issues that arose after the terrorist attacks that occurred on September 11, 2001. *E.g.*, D.1, Compl. ¶ 2; Report at 1.[2] One aspect of the controversy involves

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[1] The First Assignment of Error disputes the trial court's dismissal of all claims against Defendant-Appellee American Psychological Association ("APA") for lack of personal jurisdiction. *Id.*

[2] All citations to the "Report" are to the revised version of the Report submitted by Sidley and Hoffman to APA on September 4, 2015 (revising the earlier version dated July 2, 2015), which is referenced throughout Plaintiffs' Complaint, attached as Exhibit 2-A to trial court docket entry 40, and available at http://www.apa.org/independent-review/revised-report.pdf.

the conduct of APA, the leading U.S. professional organization for psychologists, which is based in Washington, D.C. In the years following the attacks, APA issued guidelines regarding whether and under what circumstances its roughly 120,000 member-psychologists around the country could ethically participate in national security interrogations. D.1, Compl. ¶ 47; Report at 1. Critics alleged that these guidelines were the product of collusion between APA and the U.S. government and were intended to assist the government in engaging in enhanced interrogation techniques. D.1, Compl. ¶¶ 2-3. In late 2014, *New York Times* reporter James Risen published a book on this subject. D.1, Compl. ¶ 3. One month later, APA engaged Sidley, an international law firm with offices in Chicago, Washington, D.C., and other cities (but not in Ohio) to investigate the allegations. *Id.* ¶¶ 3, 46; Report at 1.

APA engaged Sidley to examine "what happened and why." Report at 1. A Sidley team, led by Hoffman, conducted an extensive investigation. D.1, Compl. ¶ 45; Report at 5-7. The Sidley team reviewed more than 50,000 pages of documents, encompassing an "immense volume of emails, electronic files, and hard copy documents, including contemporaneous handwritten notes." Report at 6. These documents came from APA, government agencies, and other sources. *Id.* Sidley and Hoffman also conducted more than 200 interviews of 148 different witnesses. *Id.* at 7. These interviews took place in 14 different cities in 10 states and Washington, D.C., including in California, Illinois, Massachusetts, Michigan, Montana, New York, North Carolina, Ohio, Oregon, and Pennsylvania. *Id.* Only six of the 148 interviewees were Ohio residents and only two of the more than 200 interviews were conducted in-person in Ohio. *Id.*; D.1, Compl. ¶ 61; D.59, Levant Aff. ¶¶ 4-5.

Sidley and Hoffman ultimately prepared a written report based on their investigation and delivered it to their Washington, D.C.-based client APA. The Report is a single-spaced work of

542 pages with more than 2,500 footnotes and 6,000 pages of publicly available exhibits. D.1, Compl. at 1, nn.1, 2; Report at 527, 542. It tracks the actions and statements of dozens of individuals regarding events that took place and decisions that were made at APA in Washington, D.C. and in locations as far from Ohio as Iraq, Guantanamo Bay, and Afghanistan. *Id.* at passim. The focus of the Report was on the actions of APA, including the activity of APA's so-called "PENS" Task Force (the APA Presidential Task Force on Psychology and National Security (PENS)), which met in Washington, D.C. D.1, Compl. ¶ 43; Report at 206-344. Plaintiffs do not allege, and no one could claim, that Ohio was the focus of the Report. Indeed, the Report mentions Ohio just twice. Report at 7. Both references appear on the same page and refer only to interviews that took place in the state during the investigation and the related collection of documents there. *Id. None* of the underlying decisions or events discussed in the Report took place in, or relate to, Ohio, and Plaintiffs do not contend otherwise.

The Complaint alleges that Sidley and Hoffman delivered the Report to both a special committee of the APA board and the full APA board. D.1, Compl. ¶¶ 2, n.2, 245, 295. Plaintiffs also allege that members of the APA board were notified that they could access the Report via a link. D.58, Strickland Aff. ¶ 4. Based on a website printout reflecting each board member's professional affiliation, Plaintiffs contend that two of the 13 board members at the time were Ohio residents. D.54, Newman Aff. ¶ 17, Exh. J (page titled "2015 Board of Directors"). There is no allegation that Sidley or Hoffman themselves delivered the Report into Ohio, electronically or by other means. In the Report itself, Sidley and Hoffman noted that "[a]ny decisions about whether to disseminate this report beyond the APA Board of Directors are being made by the Board. We are providing our report to the APA Board, and then they will take whatever actions

regarding our report they believe are appropriate." Report at 6, n.1. APA did make the Report public and its conclusions were widely reported. D.1, Compl. ¶¶ 36, 240, 247.

Five psychologists, the Plaintiffs here, later filed suit in Ohio against Sidley, Hoffman, and APA, asserting claims of defamation and false light invasion of privacy. As to Sidley and Hoffman, the claims are based on statements made about the Plaintiffs in the Report. D.1, Compl. § X. The Complaint is 101 pages long with over 500 numbered paragraphs and it includes a 40-page, single-spaced "Exhibit A," which alleges an additional 219 sets of allegedly false statements. *Id.* at passim & Exh. A.

The Complaint alleges that one of the five Plaintiffs, Larry C. James, lives in Ohio and was interviewed by Sidley at his office in Ohio. D.1, Compl. ¶ 38. James, however, has lived all over the world, *id.*, and Plaintiffs make no allegation that any of James' activities discussed in the Report took place in Ohio, nor could they. The Report discusses James' participation in the PENS Task Force in Washington, D.C., and his service in Guantanamo Bay, Cuba and Abu Ghraib, among other activities, *see, e.g.*, Report at 142, 143, 192, 265, but discussed no activities in Ohio.[3]

The other four Plaintiffs, L. Morgan Banks, III, Stephen Behnke, Debra L. Dunivin, and Russell Newman, all live elsewhere—in North Carolina, Washington, D.C., or California, according to the Complaint. *Id.* ¶¶ 39-42. Plaintiffs do not allege that any of them engaged in any activities in Ohio discussed in the Report, nor could they. Nor do any of them even attempt to show that they suffered the brunt of any alleged reputational harm in Ohio as opposed to the

[3] Plaintiffs assert that an Ohio resident, Trudy Bond, was one of 148 people interviewed for the Report and that she had filed an ethics complaint against James with the APA Ethics Office and had also filed an ethics complaint against James in Ohio. Pls.' Br. at 6, 15-16. Plaintiffs fail to acknowledge, however, that her APA ethics complaint, received in 2007 and discussed in the Report, concerned James' activities in Guantanamo Bay, Cuba, not Ohio. Report at 518-21.

states in which they live and work. The connection between this lawsuit and the State of Ohio, therefore, as alleged in the Complaint and supplemented by the affidavits and exhibits Plaintiffs submitted in opposition to motions to dismiss, could not be more tenuous.

Sidley and Hoffman moved to dismiss for lack of personal jurisdiction or, in the alternative, on the ground of forum non conveniens. D.39, Motion. Sidley and Hoffman argued that general personal jurisdiction was unavailable because neither Sidley nor Hoffman are "at home" in Ohio within the meaning of recent United States Supreme Court precedents. *Id.* at 3. And they argued that specific personal jurisdiction was lacking because the lawsuit's insubstantial connections to Ohio were insufficient to establish purposeful availment or that Plaintiffs' claims arose from Sidley or Hoffman's in-state activities. *Id.* at 4-9. After full briefing and oral argument, the trial court agreed, granting the motion. D.83, Decision. Plaintiffs appealed, arguing that the trial court had specific personal jurisdiction, but abandoning any assertion that general jurisdiction applies. D.87.

Affirming the trial court's dismissal order will not leave Plaintiffs without a forum for their claims. Sidley, Hoffman, and APA conceded in the trial court that personal jurisdiction was available against them in Washington, D.C. D.39, Motion at 12-15; D.70, APA Reply at 17. After the trial court granted the motions to dismiss, Plaintiffs filed a complaint materially identical to their complaint in this case in Washington, D.C. (*Behnke et al. v. Hoffman et al.*, Case No. 2017 CA 005989 B, Superior Court for the District of Columbia.). Defendants have moved to stay that litigation pending the disposition of this case; that motion is currently pending.

STANDARD OF REVIEW

This Court reviews de novo the trial court's order dismissing all claims against Sidley and Hoffman for lack of personal jurisdiction. *Kauffman* at ¶ 27. Plaintiffs bear the burden of

establishing a prima facie case of personal jurisdiction, with reasonable inferences drawn in their favor. *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, 839 N.E.2d 67, ¶ 10 (10th Dist.). Each Plaintiff must separately satisfy this burden for each claim. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir. 2006); *Addelson v. Sanofi, S.A.*, No. 4:16CV01277, 2017 U.S. Dist. LEXIS 147359, at *8 (E.D. Mo. Oct. 25, 2016) (same) (collecting cases). Jurisdiction over one Plaintiff's claims does not establish jurisdiction over the claims of any other Plaintiff. *See Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1777 (2017).

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed all five Plaintiffs' claims for lack of specific personal jurisdiction. Sidley's and Hoffman's limited activities within Ohio in connection with their investigation and Report—a mix of in-person and telephone interviews with six Ohio residents (out of more than 200 interviews with 148 people) and collecting documents in Ohio—are far too random, attenuated, and fortuitous to support the exercise of personal jurisdiction. And Sidley's and Hoffman's delivery of a Report to their Washington, D.C. client that discussed the activities of dozens of individuals (including the five Plaintiffs) in Washington, D.C. and all over the world—but not in Ohio—fails completely to demonstrate the intentional targeting of *Ohio* that is needed to support specific personal jurisdiction in Ohio based on an out-of-state publication.

For decades, courts have recognized that the due-process limits on personal jurisdiction under the Fourteen Amendment to the U.S. Constitution protect nonresident defendants from the burden of litigating in states with which they have only random, fortuitous, or attenuated contacts. Rather, specific personal jurisdiction requires a sufficient connection between the defendant, the forum, and the litigation. More specifically, it requires that the defendant

"purposefully avail" itself of the privilege of acting in the forum state and that the plaintiffs' claims "arise from" the defendant's in-state activities. As the trial court correctly held, Plaintiffs can satisfy neither requirement.

1. Plaintiffs cannot establish purposeful availment. To do so, they must identify actions that Sidley and Hoffman took to engage deliberately with the State of Ohio. Plaintiffs offer two separate theories of purposeful availment, but neither satisfies this basic requirement. Plaintiffs first rely on the handful of interviews from the investigation and collection of documents that involved Ohio residents. But Sidley and Hoffman did not deliberately engage with Ohio in conducting these activities because the only reason they had anything to do with Ohio is that the interviewees chose to live in the state. Courts have consistently rejected attempts to establish purposeful availment by relying on third-parties' choices to engage with the forum rather than any purposeful action by the defendant.

Plaintiffs alternatively seek to establish purposeful availment by asserting that Sidley and Hoffman circulated the Report into Ohio. But this contention fails for two separate and independently sufficient reasons. First, as Plaintiffs acknowledge, Sidley and Hoffman merely sent their Report to the board of directors of their *Washington, D.C.*-based client. Pls.' Br. at 5. That two of 13 members serving on APA's board happened to live in Ohio does not mean that Sidley or Hoffman availed themselves of the privilege of acting in Ohio when they sent the Report to the board.

Second, the case law on establishing purposeful availment based on the out-of-state publication of allegedly defamatory statements, which uses terms such as the "effects" or "focal point" of the defendants' activities, *Calder v. Jones*, 465 U.S. 783, 789 (1984), requires more than just publication into the forum. It requires that the defendant intentionally target the forum,

including writing about the plaintiff's in-forum activities, such that the forum is both the focal point of the defendants' activities and the focal point of the alleged harm to the plaintiff, also known as the place where the brunt of the plaintiff's harm is felt. Plaintiffs' brief miscites the key authority on purposeful availment by ignoring entirely the requirement that the forum state be the focal point of the defendants' activities.

2. Plaintiffs cannot satisfy the "arise from" requirement. Plaintiffs bear the burden of establishing a substantial connection between their claims and Sidley's and Hoffman's in-state activities. Plaintiffs ignore this burden and, instead, offer only bald conclusions insufficient to satisfy the "arise from" requirement.

* * *

Specific personal jurisdiction requires more than a highly attenuated and insubstantial connection between a case and the forum state. The events underlying the Report have nothing to do with Ohio, the investigation barely touched the state, and only one of eight named parties is an Ohio resident. On its face, the Report shows a focus by Sidley and Hoffman on the activities of a Washington, D.C.-based organization as it considered how to deal with ethical issues arising from U.S. government national security interrogations in Guantanamo Bay, Iraq, Afghanistan, and elsewhere in the world. By contrast, Sidley's and Hoffman's limited contacts with Ohio in connection with their investigation and Report are precisely the kind of random, fortuitous, and attenuated contacts long held insufficient to establish personal jurisdiction. This Court should therefore affirm.

ARGUMENT

I. This Court Should Affirm the Dismissal of All Claims Against Sidley and Hoffman for Lack of Personal Jurisdiction Because Plaintiffs Cannot Show Purposeful Availment or a Substantial Connection Between Their Claims and Sidley's and Hoffman's In-State Activities

The Due Process Clause of the Fourteenth Amendment prohibits courts from exercising personal jurisdiction over defendants unless "either general or specific" jurisdiction is present over the claims against them. *Kauffman Racing Equipment, L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 46; *see also Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). Plaintiffs have abandoned any claim of general jurisdiction and now rely exclusively on specific jurisdiction. Pls.' Br. at 9-20. Specific jurisdiction "'is permissible only if a defendant's contacts with Ohio satisfy'" every part of "the three-part test ... established in *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)." *Kauffman* at ¶ 48 (quoting *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002)). The *Southern Machine* test requires that: "*First*, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. *Second*, the cause of action must arise from the defendant's activities there. [*Third*], the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *So. Mach.*, 401 F.2d at 381 (emphasis added).

The *Southern Machine* test's first two parts demand significant showings from plaintiffs. To establish purposeful availment, plaintiffs must show that a defendant's suit-related conduct created a "substantial connection" between the defendant and the forum state itself, not just between the defendant and people who live there. *Walden*, 134 S. Ct. at 1121-22. Similarly, the "arise from" requirement is only satisfied if "the cause of action, of whatever type, ha[s] a

substantial connection with the defendant's in-state activities." *Bird*, 289 F.3d at 875 (quotation marks and citations omitted).[4] Because Plaintiffs' showings on both these points are insufficient, this Court should affirm the trial court's dismissal for lack of personal jurisdiction.

A. Plaintiffs Have Not Established Purposeful Availment

The "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts" with that jurisdiction. *Kauffman* at ¶ 51 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). As the word "purposeful" suggests, the defendant must deliberately take action to engage with the forum state to create the substantial connection necessary for purposeful availment. *Id.* In other words, purposeful availment is only "present when the defendant's contacts with the forum state 'proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Kauffman* at ¶ 51 (emphasis in original) (quoting *Burger King* at 475). Sidley and Hoffman took no such purposeful actions here. They prepared a Report that had nothing to do with Ohio and provided it to a client based in Washington, D.C. What few, incidental contacts Sidley and Hoffman had with Ohio during the investigation that preceded the Report are precisely the kind of random, fortuitous, and attenuated contacts that fail to reflect purposeful availment. *Kauffman* at ¶ 51. As explained below, both of Plaintiffs' arguments to the contrary fail because they impermissibly seek to establish purposeful availment without identifying any deliberate action Sidley or Hoffman took to engage with Ohio.

1. A few interviews of Ohio residents do not establish purposeful availment

Plaintiffs first argue that six interviews (out of more than 200 conducted as part of the investigation) that involved Ohio residents (but did not involve discussions of Ohio-related

[4] When there is a lack of sufficient *suit-related* contacts, "specific jurisdiction is lacking regardless of the extent of a defendant's *unconnected* activities in the State." *Bristol-Myers Squibb Co.*, 137 S. Ct. 1773, 1781 (emphasis added).

activities) and the collection of some documents in Ohio is sufficient to establish purposeful availment. Pls.' Br. at 15-16. Plaintiffs are wrong.

The interviews do not establish purposeful availment because it was the choices of the interviewees to reside in Ohio, not any deliberate action by Sidley or Hoffman to engage with the state. Plaintiffs attempt to rely on the interviewees' contacts with Ohio—not Sidley's or Hoffman's contacts with Ohio, as required under the law. *See Kauffman* at ¶ 51. Courts have "consistently rejected attempts to satisfy the defendant-focused [purposeful availment] inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Walden*, 134 S. Ct. at 1122. Rather, the "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* Thus, a defendant's contact with an in-forum plaintiff or witness cannot establish purposeful availment if the only reason the contact involved the forum is that the plaintiff or witness chose to be there. *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 723 (6th Cir. 2000) (affirming dismissal for lack of personal jurisdiction because defendant's "phone, mail, and fax contact with [the plaintiff] in [the forum] and [the defendant's] physical visits there" did not create a substantial connection since they "occurred solely because [the plaintiff] chose to be headquartered in Ohio"); *see also Means v. United States Conference of Catholic Bishops*, 836 F.3d 643, 649-50 (6th Cir. 2016) (affirming dismissal for lack of personal jurisdiction because the only thing that "connect[s] [the defendant] to [the forum] are the actions ... of [a third party] (in being ... in the [forum])"). That is exactly the situation here: by relying on the interviews, Plaintiffs are impermissibly trying to establish purposeful availment based solely on Sidley's and Hoffman's connections to people who live in Ohio.

Moreover, even if the few interviews did represent deliberate engagement with Ohio by Sidley and Hoffman, they would still fail to establish purposeful availment because they cannot generate the required "*substantial* connection." *Kauffman* at ¶ 51 (emphasis added). The Ohio Supreme Court and Sixth Circuit both require more for a substantial connection than a handful of one-off contacts like the interviews here. Both courts have explained, when finding the requisite substantial connection, that they are not doing so based on "isolated transaction[s]" between the defendant and the forum. *Id.* at ¶ 68 (finding jurisdiction because "[w]e are not dealing with a situation in which jurisdiction is premised on a single, isolated transaction"); *see also AlixPartners, LLP v. Brewington*, 836 F.3d 543, 551 (6th Cir. 2016). What it takes is "a connection with [the forum] that was intended to be ongoing in nature, as opposed to a one-shot affair … ." *Id.* (internal quotations and citation omitted). These six interviews were isolated, not ongoing. They are precisely the kind of "'random,' 'fortuitous,' or 'attenuated' contacts" that fail to generate the substantial connection necessary for purposeful availment. *Kauffman* at ¶ 51 (citation omitted).

Indeed, multiple courts applying their versions of the *Southern Machine* test have held, as the trial court did, that small numbers of interviews do not add up to a connection sufficient enough to support the exercise of specific jurisdiction. *See, e.g., Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418, 420 (11th Cir. 1986) (sending agent to Alabama to interview job applicant "does not satisfy the principles espoused by the Supreme Court or the requisites of due process"); *Novak v. NanoLogix, Inc.*, No. 5:13-CV-01971, 2014 U.S. Dist. LEXIS 32222, at *13 (N.D. Cal. Mar. 11, 2014) ("[E]ven if it could be inferred that Mr. Barnhizer entered California with the intent to interview and hire Mr. Novak, that single meeting alone would not suffice ... ."); *Pace v. Platt*, No. 3:01-CV-471, 2002 U.S. Dist. LEXIS 21279, at *30 (N.D. Fla. Sept. 10, 2002)

(defendant conducted three interviews in Florida and the court found that those contacts were "so remote that he should not have reasonably anticipated that he would be haled into court in Florida as a result").

The case against purposeful availment is even stronger here than in the cases summarized above. The interviews of six Ohio residents were a small part of an investigation that lasted eight months and drew on more than 200 interviews of 148 people in 14 different cities. Report at 6-7. Even more than in the usual interview-based case, the circumstances here offer little reason to think that Sidley and Hoffman "reasonably anticipate[d] being haled into court" in Ohio because of a few interviews. *See Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)). The interviews therefore cannot establish a substantial connection.

Plaintiffs' remaining arguments to the contrary, Pls.' Br. at 15-16, are misplaced. They insist (in conclusory fashion) that the six Ohio witnesses had information that was especially important to Sidley's and Hoffman's investigation; but Plaintiffs do not explain how the relative importance of the information deepens the connection between Sidley and Hoffman and the State of Ohio. Plaintiffs do not assert that this supposedly special information is somehow tied to Ohio or even relates to conduct that occurred in Ohio. Nor do they assert that the information could only be obtained in Ohio. To the contrary, Sidley and Hoffman obtained information from four of the six witnesses without entering the state. Report at 7; D.1, Compl. ¶ 61; D.54, Newman Aff. ¶ 16. Only two interviews actually took place in Ohio. Report at 7. And Plaintiffs cannot suggest that, had those two witnesses insisted on speaking over the phone or meeting in another state, Sidley or Hoffman would have objected. Their goal was to conduct a comprehensive investigation—not to visit or conduct business in Ohio.

Neal v. Janssen, upon which Plaintiffs rely for the interview-based argument, does not help them. 270 F.3d 328, 331-33 (6th Cir. 2001). *Neal* was a fraud case, and the Sixth Circuit affirmed the trial court's finding of purposeful availment because the defendants' calls and faxes to the plaintiff in the forum contained the fraudulent misstatements that gave rise to the lawsuit. *Id.* The connection present in *Neal* between the Ohio-based activities and the claim is missing here. Plaintiffs do not claim they were defamed in any of the six Ohio interviews themselves.

2. The publication of the Report into Ohio does not establish purposeful availment

Plaintiffs' second argument for purposeful availment lumps Sidley and Hoffman together with APA. Plaintiffs assert that "Defendants" purposefully availed themselves of Ohio by deliberately publishing the Report into Ohio. Pls.' Br. at 10-15. Plaintiffs are wrong, for two separate and independent reasons.

a. Sidley did not circulate the Report into Ohio

First, as Plaintiffs allege in their Complaint and admit in their brief, Sidley and Hoffman did not widely publish or circulate the Report anywhere. Sidley and Hoffman merely sent the Report to the board of directors of its Washington, D.C. client. Pls.' Br. at 6, 12-13; D.1, Compl. ¶¶ 2, n.2, 245, 295; D.58, Strickland Aff. ¶ 4. Based on a website printout noting professional affiliations (not residences), Plaintiffs contend that two board members at the time resided in Ohio. D.54, Newman Aff. ¶ 17, Exh. J. Even if that is true, and two board members accessed the Report while in Ohio (facts Plaintiffs do not allege), that would have been their choice. At most, Plaintiffs have shown precisely the kind of attenuated contact between a defendant and a forum that has long been held insufficient to establish purposeful availment. *See Kauffman* at ¶ 51 (noting that purposeful availment requires more than "attenuated contacts"); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994).

It makes no difference that, as Plaintiffs acknowledge, APA eventually made the Report available to the public by posting it on its website or that Sidley and Hoffman could have foreseen that APA would do so. Pls.' Br. at 13. The "fact that the [defendant] could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction." *Reynolds*, 23 F.3d at 1120 (reversing finding of purposeful availment because "the defendant itself did not publish or circulate the report in Ohio; [others] disseminated the report [in Ohio]"). As they attempted with their argument about the interviews, Plaintiffs are trying to establish purposeful availment without any purposeful action directed at Ohio by Sidley or Hoffman. This attempt too must fail. *Kauffman* at ¶ 51.

b. Ohio is not the focal point of Sidley's and Hoffman's activities

Second, Plaintiffs' publication argument fails because it misstates the law. Even if Sidley had itself published the Report, mere publication in the forum state is insufficient to establish specific jurisdiction. For specific jurisdiction to be exercised in Ohio over an allegedly tortious out-of-state publication, a plaintiff must establish that defendants' activities intentionally targeted the forum state such that defendants intended the state to be the focal point of the publication and the focal point of the alleged harm to the plaintiff, also known as the location of the brunt of the harm. *See Reynolds*, 23 F.3d at 1120 (reversing trial court's denial of motion to dismiss a defamation case for lack of personal jurisdiction because the plaintiff failed to establish that the defendant intentionally targeted Ohio) (discussing *Calder v. Jones*). Thus, in *Kauffman*, the Supreme Court of Ohio emphasized the U.S. Supreme Court's holding in *Calder v. Jones*, 465 U.S. 783 (1984), a defamation case concerning an article about the California activities of a California entertainer, that personal jurisdiction was present because "'California [was] the focal point *both* of the story and of the harm suffered.'" *Kauffman* at ¶ 52 (quoting *Calder*, 465 U.S. at 788-89) (emphasis added). Likewise, in *Kauffman* itself, the Court held that personal jurisdiction

was present because the defendant's allegedly defamatory internet posts "concerned [plaintiff's] *activities in Ohio*" and Ohio, the location of plaintiff's business and of the dispute that was the topic of the posts, was where the defendant "knew, and in fact intended, that the brunt of the harm" would be felt. *Kauffman* at ¶ 68 (emphasis added).

Courts agree that establishing purposeful availment based on the publication of defamatory statements requires that the statements concern the plaintiff's relevant activities in the forum. *Reynolds*, 23 F.3d at 1120 (rejecting purposeful availment because the allegedly defamatory "press release concerned [the plaintiff's] activities in Monaco, not Ohio"); *see also Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010) (affirming dismissal based on lack of personal jurisdiction because "the statements did not concern activity in [the forum]"); *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (affirming grant of motion to dismiss for lack of personal jurisdiction) ("the article written by [the defendant] contains no reference to [the forum], nor does it refer to the [in-forum] activities of [the plaintiff]"). Plaintiffs cannot satisfy this requirement because the Report says nothing about any Plaintiffs' activities in Ohio.

Plaintiffs miscite relevant case law by focusing on only the requirement that a defendant intend for the brunt of the alleged harm to be felt in the forum state, *see* Pls.' Br. at 10-12, 14, while ignoring the requirement that the forum state must also be the focal point of the defendants' activities. For instance, Plaintiffs assert that *Kauffman* stands for the proposition that personal jurisdiction was present because "the focal point of the harm to the plaintiffs was in Ohio where he resided." *Id.* at 12 (citing *Kauffman* at ¶ 92-93). But they ignore the *Kauffman* Court's reliance on the posts' discussion of the "[plaintiff's] activities in Ohio" to supply the required intentional targeting by the defendant of the state as the focal point of the defendant's activities. *See Kauffman* at ¶ 68.

Exclusive reliance on the location of the brunt of a plaintiff's alleged harm has already been squarely rejected by the U.S. Supreme Court in its recent discussion of *Calder v. Jones* in *Walden v. Fiore*, 134 S. Ct. 1115 (2014). In *Walden*, the Supreme Court called such reliance "misplaced" because "*Calder* made clear that mere injury to a forum resident is not a *sufficient* connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. 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." *Walden*, 134 S. Ct. at 1125 (emphasis added).

As for the four Plaintiffs who do not live in Ohio—Banks, Behnke, Dunivin, and Newman—the trial court's dismissal must be affirmed because they can satisfy *no* part of the *Calder/Kauffman* focal point test. The Report did not concern any activities by them in Ohio and they do not claim the brunt of the harm to their reputation to have been felt in Ohio. Even under Plaintiffs' erroneous application of the focal point test, they cannot establish specific jurisdiction.

As for the one Plaintiff who lives in Ohio—James—the trial court's dismissal must be affirmed because proper application of the focal point test defeats his claims. He has failed to establish that the Report concerns any activities by him in Ohio, basing his case merely on the fact that he lives in Ohio, an argument that is contrary to the U.S. Supreme Court's holdings in both *Calder* and *Walden*. James' claims are instead like those of the plaintiff in *Reynolds*, who failed to establish personal jurisdiction over his libel claim despite the fact that he lived in Ohio because the press release that was the subject of his lawsuit concerned his activities in Europe, not Ohio. *See* 23 F.3d at 1120; *see id.* ("that the [defendant] could foresee that the report would be circulated and have an effect in [the forum] is not, in itself, enough to create personal

jurisdiction"); *see also Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 679 (6th Cir. 2005) ("[The] website does not demonstrate purposeful availment in Ohio. The website specifically refers to Cadle's activities in Massachusetts. .... Just as in *Reynolds*, while the 'content' of the publication was about an Ohio resident, it did not concern that resident's Ohio activities.").

For this reason, Plaintiffs' argument on behalf of the four non-Ohio Plaintiffs that "[t]he Report implicated all Plaintiffs equally in . . . alleged collusion," Pls.' Br. at 19, necessarily fails. Even if the Report alleged that all five plaintiffs were equally involved in alleged collusion (it does not), that does not permit the four non-Ohio plaintiffs to shoehorn their claims into Ohio's courts because Plaintiffs do not, and cannot, allege that the Report anywhere discusses any alleged collusion by any of the Plaintiffs that occurred in *Ohio*. An alleged discussion of collusion taking place entirely outside the state fails to establish Ohio as the focal point of the Report and cannot establish personal jurisdiction.

With no basis to assert intentional targeting of Ohio by Sidley and Hoffman (or APA), Plaintiffs retreat to the claim that the bare act of making a publication available in Ohio establishes personal jurisdiction there. Pls.' Br. at 10. By advocating that position, Plaintiffs ask this Court to rule contrary to every court to consider the issue before it that anyone who puts a statement on the Internet is subject to personal jurisdiction anywhere with Internet access. Such a doctrine of personal jurisdiction would not only eviscerate due process protections, it is also directly contrary to Supreme Court and Ohio Supreme Court precedent which, as discussed above requires that the defendant intentionally target the forum by discussing the activities of the plaintiff in the forum. *See Calder*, 465 U.S. at 789[5] (finding personal jurisdiction because

[5] Consistent with *Calder*, the federal courts of appeals, including the Sixth Circuit, have also consistently rejected Plaintiffs' position. *Scotts Co. v. Aventis S.A.*, 145 F. App'x 109, 113 n.1 (6th Cir. 2005); *Anzures v. Flagship Rest. Grp.*, 819 F.3d 1277, 1281-82 (10th Cir. 2016); *Forras*

defendants were "not charged with mere untargeted negligence [but with] actions [they] *expressly aimed* at California.") (emphasis added); *Walden*, 134 S. Ct. at 1124 (construing *Calder*) ("[T]he 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*, sufficed to authorize the California court's exercise of jurisdiction.") (emphasis added); *Kauffman* at ¶ 62, 67 ("[The allegedly defamatory] posts were premised solely on the activities of [the plaintiff] in Ohio. ... [Defendant] intended the effects of his conduct to be felt in Ohio. His statements were communicated with the very purpose of having their consequences felt by [the plaintiff] in Ohio.") (emphasis omitted). As the Ohio Supreme Court has explained: "While the effects of Internet conduct may be felt in many [forums], the intent requirement allows a court to find a particular focal point." *Id.* at ¶ 66.[6]

To make their case for the publication-only view, Plaintiffs misread *Calder* and *Kauffman* and rely on two decisions, neither of which supports their argument. *Fallang v. Hickey* was a dispute about the plaintiff's skill as a surgeon. 40 Ohio St.3d 106, 107, 532 N.E.2d 117 (1988). The plaintiff worked at a hospital in Ohio. *Id.* The defendant intentionally targeted Ohio because his allegedly defamatory statements—a letter that bore on the dispute about the plaintiff's surgical skills—targeted forum readers (it was addressed only to Ohioans) and focused solely on the plaintiff's in-state activities (his surgical practice). *Id.* Plaintiffs' other decision,

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v. Rauf, 812 F.3d 1102, 1108 (D.C. Cir. 2016); *Isaacs v. Arizona Bd. of Regents*, 608 F. App'x 70, 74-75 (3d Cir. 2015) (per curiam); *Johnson v. Arden*, 614 F.3d 785, 796-97 (8th Cir. 2010); *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 280 (4th Cir. 2009); *Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998).

[6] Other state courts of last resort have likewise rejected Plaintiffs' position. *See State ex rel. State Treasurer of Wyoming v. Moody's Inv'rs Serv., Inc.*, 349 P.3d 979, 985 (Wyo. 2015); *Shams v. Hassan*, 829 N.W.2d 848, 856 (Iowa 2013); *Abdouch v. Lopez*, 829 N.W.2d 662, 674 (Neb. 2013); *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1200 (Colo. 2005); *Griffis v. Luban*, 646 N.W.2d 527, 533-34 (Minn. 2002).

Keeton v. Hustler, is irrelevant. Personal jurisdiction in *Keeton* turned on the extent of "regular circulation of [the defendant's] magazines in the forum State [which] ... support[ed] an assertion of jurisdiction in a libel action based on the contents of the magazine." 465 U.S. 770, 773-74 (1984). It is irrelevant for cases like this one because this case involves a one-off Report and because Sidley and Hoffman did not publish or circulate the Report in Ohio. *Calder* and *Kauffman* control here. *See, e.g., Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 426 (5th Cir. 2005) ("Because [defendant] has insufficient circulation to satisfy jurisdiction under *Keeton*, its contacts must be analyzed in terms of the *Calder* effects test.").

In sum, Plaintiffs have not and cannot establish purposeful availment on the part of Sidley or Hoffman. Their burden required them to identify some purposeful action by Sidley and Hoffman that was intended to engage with the State of Ohio. They have not met this burden. This Court should therefore affirm the order of dismissal.

B. Plaintiffs Cannot Show That Their Claims Arise From Sidley's and Hoffman's Activities In Ohio

Even if Plaintiffs had shown purposeful availment, the judgment would still need to be affirmed for the independent reason that Plaintiffs cannot satisfy the second requirement of *Southern Machine*: a substantial connection between Sidley's and Hoffman's actions in Ohio and Plaintiffs' claims. *Bird*, 289 F.3d at 875. To establish that connection, Plaintiffs must show that Sidley's and Hoffman's "in-state conduct [] form[s] an important, or at least material, element of proof in the[ir] case." *United Elec. Workers. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (quoting *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986)) (internal quotations omitted). Plaintiffs have not even attempted to do so. Plaintiffs do not refer to

anything specific that Sidley or Hoffman did in Ohio.[7] By failing to explain how their claims have a substantial connection to the only activities that matter, Plaintiffs effectively conceded the correctness of the trial court's decision.

Plaintiffs try to fill the gap with the assertion that "Plaintiffs' claims all arise out of the publication of the Report [and t]he Defendants' contacts with Ohio ... all concern the Report." Pls.' Br. at 19. But that is a naked conclusion disguised as an argument. Plaintiffs fail to identify the alleged contacts with Ohio on which they rely, nor do Plaintiffs say anything about Sidley's and Hoffman's actual contacts with the state. They also do not address the fact that it was APA, not Sidley and Hoffman, that published the Report. It makes no difference that Sidley's and Hoffman's activities "concern" the Report. The question is not whether Sidley and Hoffman did *something* in Ohio that "concerns" the Report. The question is whether Sidley and Hoffman performed in-state activities that have a substantial connection to Plaintiffs' claims. Plaintiffs' argument ignores the relevant inquiry.

Plaintiffs also assert that unidentified activities of Defendants in Ohio "have the requisite substantial connections" to Plaintiffs' claims because "[t]he Report implicated all Plaintiffs equally in th[e] alleged collusion." Pls.' Br. at 19. Again, Plaintiffs fail to identify Sidley's and Hoffman's in-state activities and connect those activities to Plaintiffs' claims. They accordingly

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[7] Had Plaintiffs focused on Sidley's and Hoffman's actual in-state activities, it would have made no difference. The interviews lack a substantial connection to Plaintiffs' claims because, in defamation cases, the claims arise from the *publication* of the defamatory statements, not from interviews that precede publication. *McNell v. Hugel*, 1994 WL 264200, at *14 (D.N.H. May 16, 1994), *aff'd*, 77 F.3d 460 (1st Cir. 1996). And the email to the APA board does not count as an in-state activity given that Plaintiffs allege only that Sidley and Hoffman sent the Report to the board of directors of a Washington, D.C.-based client. *Walden*, 134 S. Ct. at 1123 ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State.") (quoting *Burger*, 471 U.S. at 475).

have not satisfied the second part of the *Southern Machine* test. This Court should therefore affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's dismissal of all claims against Sidley and Hoffman for lack of personal jurisdiction.

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Certificate of Service

I certify that on the 17th day of January, 2018, I filed the foregoing Brief of Defendants-Appellees Sidley Austin LLP and David Hoffman with the Clerk of Courts and I certify that I have served by electronic mail a copy of the same to the following parties:

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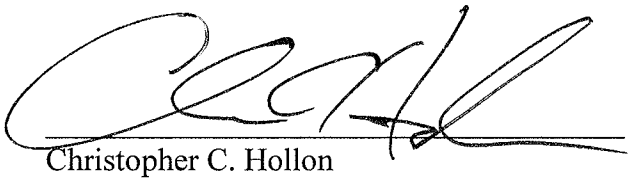

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