

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

LARRY C. JAMES, et al., : **CASE NO. 2017 CV 00839**
Plaintiffs, : **Judge Timothy N. O’Connell**
vs. :
DAVID HOFFMAN, et al., : **MOTION OF DEFENDANTS**
Defendants. : **TO STAY DISCOVERY**

To further the efficient administration of justice, preserve party resources, and protect Defendants’ free speech rights under state and federal law, Defendants Sidley Austin LLP and David Hoffman (collectively, “Sidley”) and the American Psychological Association (“APA”) move to stay discovery pending resolution of potentially case-dispositive motions to dismiss the Complaint that Defendants intend to file on April 7, 2017 and May 22, 2017.¹

On February 16, 2017, Plaintiffs filed a 101-page Complaint alleging twelve counts of defamation and false-light invasion of privacy and identifying 219 allegedly false statements contained in an independent report, prepared and written by Defendant Sidley and delivered to Defendant APA. Attached to the Complaint are another 82 pages of exhibits, including Exhibit A, a single-spaced document that purports to identify hundreds of false statements. The independent report itself exceeds 540 pages and is supported by more than 7,600 pages of

¹ On March 21, 2017, this Court granted the Defendants’ and Plaintiffs’ joint motions for extensions of time, including a 60-day extension, to May 22, 2017, for Defendants to file motions in response to the Complaint. Defendants also anticipate filing by April 7, 2017 motions under the substantive law of the District of Columbia and/or California that permits special motions to dismiss or strike a complaint in order to protect speakers’ rights to freedom of speech.

publicly available exhibits. The report at the heart of Plaintiffs' Complaint resulted from several months of investigation, concerned events that spanned a decade, involved intelligence and military activities across the globe, and included an analysis of more than 50,000 documents and interviews of approximately 150 witnesses. The report concerned a matter of significant public interest: investigating and evaluating allegations that had been made regarding APA's issuance of ethical guidelines in 2002 and 2005, and related actions, which provided guidance as to whether and under what circumstances psychologists who were APA members could ethically participate in national security interrogations, like those that occurred in the 2000s in Iraq, Afghanistan, Guantanamo Bay, and elsewhere.

Defendants intend to file motions in response to the Complaint that could be case dispositive as to some or all of the five Plaintiffs or, alternatively, could greatly narrow the scope of the case going forward. If this case moves beyond the pleading stage, discovery may be extensive, imposing a burden not only on the parties and this Court, but also on numerous third parties located across the country. Therefore, as shown in the attached Memorandum in Support, a stay of discovery pending resolution of Defendants' motions will promote the efficient administration of justice, preserve party resources, and protect Defendants' free-speech rights.

In addition, given the scope of Plaintiffs' Complaint and Defendants' anticipated challenges to it, should the Court find it helpful, Defendants would welcome a status conference with the Court so the parties and the Court may discuss scheduling, motions and other matters that may aid the Court in managing the case effectively and efficiently.

Attached as Exhibit 1 is a proposed Order granting this Motion.

Respectfully submitted,

/s/ D. Jeffrey Ireland

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 pending*)
Thomas G. Hentoff (*pro hac vice pending*)
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

/s/ J. Steven Justice (per email authorization)

J. Steven Justice (0063719)
DUNGAN & LeFEVRE CO., L.P.A.
210 W Main St.
Troy, OH 45373
Telephone: (937) 339-0511
Telecopier: (937) 335-4084
Email: justice@dunganattorney.com

Barbara S. Wahl (*pro hac vice pending*)
Karen Ellis Carr (*pro hac vice pending*)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Telephone: (202) 857-6395
Telecopier: (202) 857-6395
Email: barbara.wahl@arentfox.com
karen.carr@arentfox.com

Attorneys for Defendant American
Psychological Association

**MEMORANDUM IN SUPPORT OF
MOTION OF DEFENDANTS TO STAY DISCOVERY**

Pursuant to this Court's inherent authority to control its docket, and in the interest of the efficient administration of justice, preservation of parties' resources, and protection of Defendants' rights of freedom of speech under state and federal law, Defendants move to stay discovery pending resolution of the potentially case-dispositive motions that Defendants plan to file by April 7, 2017 and May 22, 2017.

On February 16, 2017, Plaintiffs filed a 101-page Complaint alleging twelve counts of defamation and false-light invasion of privacy and identifying 219 allegedly false statements in an independent report, prepared and written by Defendant Sidley and delivered to Defendant APA. Attached to the Complaint is another 82 pages of exhibits, including Exhibit A, a single-spaced document that purports to identify hundreds of false statements. The independent report itself exceeds 540 pages and is supported by more than 7,600 pages of publicly available exhibits. The report at the heart of Plaintiffs' Complaint resulted from several months of investigation, concerned events that spanned a decade, and involved intelligence and military activities across the globe, and included an analysis of more than 50,000 documents and interviews of approximately 150 witnesses. The report concerned a matter of significant public interest: investigating and evaluating allegations that had been made regarding APA's issuance of ethical guidelines in 2002 and 2005, and related actions, which determined whether and under what circumstances psychologists who were APA members could ethically participate in national security interrogations, like those that occurred in the 2000s in Iraq, Afghanistan, Guantanamo Bay, and elsewhere.

Notwithstanding the length and breadth of Plaintiffs' allegations, defamation and false-light claims such as Plaintiffs' are often resolved at the motion to dismiss stage. *See, e.g., Vail v.*

Plain Dealer Publishing Co., 72 Ohio St.3d 279, 649 N.E.2d 182 (1995); *Harsh v. City of Franklin*, 2nd Dist. Montgomery No. 24331, 2011-Ohio-2428; *Thompson v. Stealth Investigations, Inc.*, 2nd Dist. Clark No. 2009 CA 86, 2010-Ohio-2844. Here, Sidley and APA anticipate filing motions in response to the Complaint including motions regarding (1) the Complaint’s failure to state a claim, (2) the Court’s lack of jurisdiction over certain claims and/or Defendants, and (3) for early disposition of the case based on substantive District of Columbia or California law permitting special early motions to dismiss in lawsuits that burden Defendants’ free-speech rights. As shown below, a stay of discovery will permit the parties to preserve resources in a case that could otherwise be dismissed or greatly narrowed at the initial motion stage, and avoid potentially needless and extensive discovery that itself could burden Defendants’ free-speech rights in connection with a matter of significant public interest.

ARGUMENT

The Supreme Court of Ohio has long held that, “[i]nherent within a court’s jurisdiction, and essential to the orderly and efficient administration of justice, is the power to grant or deny stays.” *State v. Hochhausler*, 76 Ohio St.3d 455, 464, 668 N.E.2d 457 (1996) (relying on *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). *Accord: Stavick v. Coyne*, 7th Dist. Mahoning No. 02 CA 24, 2003-Ohio-6999, ¶28 (“A trial court has broad discretion in regulating the discovery process.”). When determining whether to grant a stay, the Court should weigh competing interests, benefits, and hardships of the litigants and the Court, with a focus on promoting “economy of time and effort.” *Landis*, 299 U.S. at 254-55, 259. Ohio courts, including the Second District Court of Appeals, often stay discovery pending resolution of a motion to dismiss for these very reasons. *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶10 (2d Dist.) (“Considering that the motion to dismiss was based on the allegations in the complaint and might dispose of the litigation, the trial court acted within its discretion when it

granted the stay of discovery.”); *Thomson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-782, 2010-Ohio-416, ¶33 (affirming trial court’s order staying discovery pending resolution of a motion to dismiss). As shown below, a stay is necessary here.

A. A Stay Will Permit Defendants to Challenge Case-Dispositive Threshold Issues While Conserving the Resources of the Parties and this Court

Where jurisdictional, forum, and substantive deficiencies of a pleading may exist, stays of discovery are appropriate. *Cunningham v. Cox Media Group Ohio, Inc.*, Butler Cty. No. 2015-10-2494 (Jan. 20, 2017) (Brogan, J., sitting by assignment) (staying discovery pending motion to dismiss defamation claims based on eight allegedly false statements); *Playa Marel, P.M., S.A. v. LKS Acquisitions, Inc.*, S.D. Ohio No. C-3-06-366, 2007 U.S. Dist. LEXIS 16774, at *22-24 (Mar. 8, 2007) (granting stay of discovery pending resolution of plaintiff’s motion to dismiss where plaintiff presented “reasonable argument” that it would be “unnecessarily burdened” if discovery were permitted because motion to dismiss could result in “dismissal” of claims or “a narrowing of the discovery”). Indeed, Ohio courts often stay discovery when a motion to dismiss is pending because “[t]he completion of discovery is not relevant to the granting of a Motion to Dismiss.” *State ex rel. Sterling v. Haddox*, 5th Dist. Muskingum No. CT2001-0028, at 6 (Dec. 10, 2001) (alteration in original) (internal quotation marks and citation omitted); *Lindow v. City of N. Royalton*, 104 Ohio App.3d 152, 159, 661 N.E.2d 253 (8th Dist. 1995). *Accord: Grover*, 2006-Ohio-6115, at ¶10 (affirming the trial court’s decision to stay discovery pending a motion to dismiss).

In *Grover*, the Second District Court of Appeals affirmed the trial court’s grant of a protective order pending disposition of a motion to dismiss because “the motion to dismiss was based on the allegations in the complaint and might dispose of the litigation.” 2006-Ohio-6115, at ¶10. *Accord: Adlaka v. Giannini*, 7th Dist. Mahoning No. 05 MA 105, 2006-Ohio-4611, ¶30

(citing *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, ¶11 and *State ex rel. Pepple v. Montgomery*, 95 Ohio St.3d 1440, 767 N.E.2d 272 (2002)). Similar reasoning is applicable here.

Here, a stay is necessary to allow Defendants an opportunity to challenge the fatal jurisdictional, forum, and substantive deficiencies of Plaintiffs' Complaint—deficiencies that cannot be corrected by amendment. Specifically, Defendants anticipate filing motions challenging the allegations of Plaintiffs' Complaint, including, on behalf of Sidley, APA, or both (depending on the motion): (1) a motion to dismiss for failure to state a claim under Ohio R. Civ. P. 12(B)(6) for a number of reasons, including but not limited to statements not being defamatory as a matter of law, statements being protected from liability as pure opinion, statements not being reasonably susceptible of the meaning asserted in the Complaint, and statements not being “of and concerning” concerning certain plaintiffs; (2) motions addressing the Court's jurisdiction over certain claims and parties; and (3) special motions to dismiss or strike the Complaint in order to protect speakers' rights to freedom of speech. Defendants should have an opportunity to challenge the Complaint's voluminous allegations—challenges that could result in the claims of all or some Plaintiffs being dismissed in their entirety or alternatively, drastically limiting the scope of the case going forward.²

Moreover, here, the parties and the third parties who will be subject to subpoenas reside all over the country. The issuance of subpoenas for depositions and document production will be time consuming and expensive. Witnesses and parties should have to testify only once, when the issues have been framed after the Court has decided the justiciable claims and parties that will

² After Defendants have filed these motions, if Plaintiffs contend that any targeted discovery is necessary to oppose any of the motions, Defendants will meet and confer with Plaintiffs about the need for and scope of any such discovery in an effort to reach agreement.

remain in the case after initial motions practice. Discovery should be stayed until the Court has determined the scope of the litigation.

In addition, as this Court is well aware, discovery is costly and time-consuming. Indeed, discovery in this case may be extensive and burdensome, particularly if it commences before decisions on threshold issues that could at a minimum narrow the scope of the case and render certain discovery wasteful or unnecessary. In November 2014, APA retained Sidley to conduct an independent review of allegations that had been made regarding the APA's activities over the course of a decade in relation to ethical guidelines for national security interrogations. Over the course of an eight-month investigation, Sidley conducted interviews of approximately 150 people. The interviews were conducted in 14 different cities and 10 different states across the country. More than 50,000 documents were reviewed as part the investigation. Therefore, as early motion practice is likely to narrow the scope, if not eliminate the case altogether, a stay of discovery is appropriate.

B. A Stay of Discovery Is Particularly Appropriate in a Defamation Lawsuit Where Expensive and Time-Consuming Litigation May Itself Chill Speech

A stay of discovery is also particularly appropriate in defamation cases that, like this one, involve matters of public concern. As shown in this Memorandum, trial courts in Ohio often stay discovery in defamation lawsuits. *Adlaka* at ¶ 30 (holding in defamation case that “[t]here is no need for discovery in dealing with a dismissal for failure to state a claim because such dismissal can only be made on the face of the complaint”); *Cunningham, supra*. By staying discovery until deciding whether Plaintiffs’ allegations survive dismissal, the Court will mitigate the acute burden that defamation lawsuits themselves impose on the exercise of constitutionally-protected speech. *Murray v. Chagrin Valley Publ. Co.*, 2014-Ohio-5442, 25 N.E.3d 1111, ¶ 40 (8th Dist.) (recognizing the “chilling effect” of punitive litigation on “Ohio’s particularly strong

desire to protect individual speech, as embodied in its Constitution”); *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013) (“[S]ummary proceedings are essential in the First Amendment area because if a suit entails ‘long and expensive litigation,’ then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.”) (quoting *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)); *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 896 (W.D. Mich. 1980) (“[I]f lawsuits could be threatened every time someone advocated an unpopular opinion on a public issue then the existence of First Amendment rights could be seriously chilled.”); *Borislow v. Canaccord Genuity Grp. Inc.*, S.D. Fla. No. 14-80134-CIV, 2014 U.S. Dist. LEXIS 190681, at *3-4 (June 23, 2014) (holding that stay of discovery pending determination of whether defamation claims survive dismissal is “precisely when a stay of discovery is warranted”). *Accord: FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 455 (2007) (recognizing the “chilling” effect of “burdensome litigation” on First Amendment rights).

A stay is particularly appropriate in a defamation case like this one. In motions to be filed by April 7, Defendants intend to show that the instant case qualifies under District of Columbia or California substantive law as a strategic lawsuit against public participation—also known as a “SLAPP” suit. Specifically, Plaintiffs’ Complaint seeks to hold Defendants liable for exercising their constitutional right to speak about issues of public interest: the formulation of guidelines determining whether and to what extent psychologists may ethically participate in national security interrogations following the attacks of September 11, 2001. Delaying discovery until after the Court has decided whether it can resolve, or significantly narrow, this case helps protect against litigation that improperly chills constitutionally protected speech. Indeed, most states that have enacted anti-SLAPP legislation automatically stay discovery pending review of

an alleged SLAPP complaint.³ While Ohio has yet to enact such legislation, Ohio courts, as demonstrated above, have stayed defamation lawsuits pending resolution of motions to dismiss for similar reasons.

C. A Stay Will Prejudice No Party and Will Aid the Court's Orderly Management of the Case

Protecting the parties from undue burden and expense also constitutes good cause for issuing a stay of discovery. *Jefferson v. Creveling*, 9th Dist. Summit No. 24206, 2009-Ohio-1214, ¶22 (trial court's order to stay discovery was meant to prevent party from suffering unnecessary expenses responding to discovery requests). Defendants are aware of no reason why postponing discovery in this case will cause an undue hardship on, or unduly prejudice, the parties or this Court. For instance, Defendants are aware of no deposition that must be taken immediately for fear of a witness later becoming unavailable. No trial date has yet been set, nor has a discovery cutoff been established. A stay of discovery will allow the parties and this Court sufficient time to sort through the threshold jurisdictional issues and, if appropriate, Plaintiffs'

³ *E.g.*, D.C. Code § 16-1703(c)(1) (generally providing that “upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of”); Cal. Code Civ. Proc. § 425.16(g) (“All discovery proceedings in the [SLAPP] action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion.”); Ga. Code Ann. § 9-11-11.1(d) (“All discovery and any pending hearings or motions in the [SLAPP] action shall be stayed upon the filing of a motion to dismiss or a motion to strike made pursuant to subsection (b) of this Code section.”); Mass. Ann. Laws ch. 231, § 59H (“All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.”); Tex. Civ. Prac. & Rem. Code Ann. § 27.003(c) (“Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal [SLAPP] action is suspended until the court has ruled on the motion to dismiss”).

vast allegations without wasting resources on discovery and intruding upon the lives of third-party witnesses located across the country who may never need to be involved in this lawsuit.

* * *

Finally, given the scope of Plaintiffs' Complaint and Defendants' anticipated challenges to it, should the Court find it helpful, Defendants would welcome a status conference with the Court so the parties and the Court may discuss scheduling, motions and other matters that may aid the Court in managing the case effectively and efficiently.

CONCLUSION

For the forgoing reasons, the Court should grant this Motion to stay discovery.

Respectfully submitted,

/s/ D. Jeffrey Ireland

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 pending*)
Thomas Hentoff (*pro hac vice pending*)
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

/s/ J. Steven Justice (per email authorization)
J. Steven Justice (0063719)
DUNGAN & LeFEVRE CO., L.P.A.
210 W Main St.
Troy, OH 45373
Telephone: (937) 339-0511
Telecopier: (937) 335-4084
Email: justice@dunganattorney.com

Barbara S. Wahl (*pro hac vice pending*)
Karen Ellis Carr (*pro hac vice pending*)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Telephone: (202) 857-6395
Telecopier: (202) 857-6395
Email: barbara.wahl@arentfox.com
karen.carr@arentfox.com

Attorneys for Defendant American
Psychological Association

CERTIFICATE OF SERVICE

I certify that on the 27th day of March, 2017, I electronically filed the foregoing Motion of Defendants to Stay Discovery with the Clerk of Courts using the Court's electronic filing system, which will send electronic notification of such filing to participants in the filing system, and I certify that I have served by electronic mail the document to the parties not participating in the electronic filing system.

James E. Arnold (0037712)
Gerhardt A. Gosnell (0064919)
JAMES E. ARNOLD & ASSOCIATES, LPA
115 West Main Street
Fourth Floor
Columbus, Ohio 43215
Telephone: (614) 460-1600
Facsimile: (614) 469-1066
Email: jarnold@arnlaw.com
ggosnell@arnlaw.com

Attorneys for All Plaintiffs

Bonny J. Forrest, Esq. (*pro hac vice*)
555 Front Street, Suite 1403
San Diego, California 92101
Telephone: (917) 687-0271
Email: bonforrest@aol.com

Attorney for Plaintiffs Larry James, L. Morgan
Banks, Debra Dunivin, and Russell Newman

Louis J. Freeh, Esq. (*pro hac vice*)
2550 M St NW, Second Floor
Washington, DC 20037
Telephone: (202) 824-7139

Attorney for Plaintiff Stephen Behnke

J. Steven Justice (0063719)
DUNGAN & LeFEVRE CO., L.P.A.
210 W Main St.
Troy, OH 45373
Telephone: (937) 339-0511
Telecopier: (937) 335-4084
Email: justice@dunganattorney.com

Barbara S. Wahl (*pro hac vice pending*)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Telephone: (202) 857-6395
Telecopier: (202) 857-6395
Email: barbara.wahl@arentfox.com

Attorneys for Defendant American
Psychological Association

/s/ Christopher C. Hollon

Christopher C. Hollon

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

LARRY C. JAMES, <i>et al.</i>,	:	CASE NO. 2017 CV 00839
Plaintiffs,	:	Judge Timothy N. O'Connell
vs.	:	[PROPOSED] ORDER
DAVID HOFFMAN, <i>et al.</i>,	:	GRANTING MOTION OF
Defendants.	:	<u>DEFENDANTS TO STAY</u>
	:	<u>DISCOVERY</u>

The Motion of Defendants to Stay Discovery is GRANTED. Discovery in this case is stayed pending resolution of any motions by Defendants to dismiss the February 16, 2017 Complaint. If any claims remain following the final resolution of all pending motions to dismiss or in response to the Complaint ("Final Resolution"), then the Parties shall confer and contact this Court to schedule a status conference within thirty (30) days of the Final Resolution.

IT IS SO ORDERED.

Judge Timothy N. O'Connell

1161049.1

EXHIBIT 1