

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.,	:	DEFENDANTS SIDLEY AUSTIN
	:	LLP AND DAVID HOFFMAN’S
	:	MOTION TO STRIKE
Defendants.	:	AFFIDAVITS SUBMITTED BY
	:	<u>PLAINTIFFS</u>

Defendants Sidley Austin LLP and David Hoffman move to strike, in whole or in part, fourteen of the fifteen affidavits attached to Plaintiffs’ May 8, 2017 Consolidated Memorandum in Opposition to Defendants’ Motions to Dismiss for Lack of Personal Jurisdiction and Forum Non Conveniens (“Consolidated Memorandum”). While the Court need not consider these affidavits to grant their motion to dismiss for lack of personal jurisdiction (Defs. Reply, pp. 1-2), the affidavits, nevertheless, contain improper and inadmissible assertions that should be struck.

Four of the affidavits are simply irrelevant to the issue of personal jurisdiction. Ten others should be struck, in part, for containing assertions that are (a) irrelevant to the issue of personal jurisdiction, (b) based on inadmissible hearsay, and (c) not otherwise based on the affiant’s personal knowledge. For the Court’s convenience, a chart detailing the specific infirmities in these ten affidavits is attached as Exhibit 1.

The following memorandum in support of this Motion further demonstrates why these affidavits must be struck. A proposed order granting this Motion is attached as Exhibit 2.

Respectfully submitted,

/s/ Erin E. Rhinehart

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MEMORANDUM IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP AND DAVID HOFFMAN'S MOTION TO STRIKE AFFIDAVITS SUBMITTED BY PLAINTIFFS

INTRODUCTION

Facing the prospect of dismissal for lack of personal jurisdiction, Plaintiffs submitted hundreds of pages of affidavits and exhibits in an effort to confuse the merits of their case with the threshold question of whether the Court can exercise jurisdiction over the Defendants. Defs. Reply, pp. 1-2.¹

Four of the affidavits should be struck in their entirety as irrelevant to the sole issue at hand – whether the Court has personal jurisdiction over each Defendant. Ten others should be struck, in part, because they contain factual assertions and exhibits that are (a) irrelevant to the issue of personal jurisdiction, (b) based on inadmissible hearsay, and (c) not otherwise based on the affiant's personal knowledge. Plaintiffs' failure to present *admissible* evidence to establish personal jurisdiction over each Defendant further demonstrates why their Complaint must be dismissed. *Great Am. Ins. Co. v. L&S Trucking Co.*, 2015 U.S. Dist. LEXIS 40683, at *6 (S.D. Ohio Mar. 30, 2015); *EnQuip Techs. Grp., Inc. v. Tycon Technoglass, S.r.l.*, 2d Dist. Greene Nos. 2009 CA 42 & 2009 CA 47, 2010-Ohio-28, ¶ 57.

ARGUMENT

Inadmissible evidence cannot support a finding of personal jurisdiction. The Supreme Court of Ohio has held it is “rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant.” *Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984). When a defending party challenges a court's exercise of personal jurisdiction, the

¹ See Defendants Sidley Austin LLP and David Hoffman's Reply in Support of Their Motion to Dismiss for Lack of Personal Jurisdiction or Forum Non Conveniens (filed concurrently with this Motion).

plaintiff must show that such jurisdiction is proper. *EnQuip Techs.*, 2010-Ohio-28, ¶ 57. Absent an evidentiary hearing, courts consider whether they can exercise personal jurisdiction either on the pleadings or with written evidence. *Reed Elsevier, Inc. v. Feder*, 2nd Dist. Montgomery No. 26680, 2015-Ohio-5013, ¶ 26; *Am. Office Servs. v. Sircal Constr., Inc.*, 8th Dist. Cuyahoga No. 82977, 2003-Ohio-6042, ¶¶ 6-7. When a court entertains *any* evidence on the issue of personal jurisdiction, that evidence *must* be admissible. *Great Am. Ins. Co.*, 2015 U.S. Dist. LEXIS 40683, at *6 (dismissing action where there was “no admissible evidence” of personal jurisdiction).

In addition, affidavits submitted on the issue of personal jurisdiction, like any other affidavit, must be based upon personal knowledge. *Howard v. Hogg*, 3d. Dist. Putnam No. 12-96-5, 1996 Ohio App. LEXIS 5533, at *8-10 (Nov. 19, 1996) (trial court erred in relying on affidavit to establish personal jurisdiction where “[n]othing in ... [the] affidavit establishes [the affiant’s] personal knowledge”). The Supreme Court of Ohio defines “personal knowledge” as “knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.” *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 26 (quoting Black’s Law Dictionary (7th Ed.Rev.1999) 875). *Accord:* Weissenberger’s Ohio Evidence (2002) 213, Section 602.1 (“The subject of a witness’s testimony must have been perceived through one or more of the senses of the witness... . [A] witness is ‘incompetent’ to testify to any fact unless he or she possesses firsthand knowledge of that fact.”). Any factual assertion that is *not* supported by the affiant’s personal knowledge “may be properly disregarded.” *Ohio Receivables, LLC v. Dallariva*, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, ¶ 16. *Accord:* *Kemper v. Saline Lectronics*, 348 F. Supp. 2d 897, 899

(N.D. Ohio 2004) (holding that “[t]he court will disregard averments of facts outside the affiants’ personal knowledge” when considering its personal jurisdiction).

I. Four of Plaintiffs’ Affidavits Must Be Struck in Their Entirety

Plaintiffs refer to the affidavits of Anton, Crow, Resnick, and Strickland in their Consolidated Memorandum for two reasons. First, Plaintiffs cite the affidavits of Anton and Strickland for the proposition that “APA’s Board included two members who were Ohio residents.” Consolidated Memorandum, p. 13. Not only is this assertion wholly irrelevant to the Court’s consideration of personal jurisdiction, neither affiant ever mentions Ohio – let alone the residence of any board member here. May 2, 2017 Affidavit of Barry Anton; April 25, 2017 Affidavit of William Strickland. Put differently, neither affidavit supports the proposition (whether appropriate or not) for which it is cited.

Second, Plaintiffs cite the affidavits of Crow and Resnick to show the Report at issue purportedly “contained many inaccuracies.” Consolidated Memorandum, p. 1. At this stage, however, whether the Report was accurate has no bearing whatsoever on whether Plaintiffs have established a prima facie case of jurisdiction. *EnQuip Techs. Grp., Inc. v. Tycon Technoglass, S.r.l.*, 2d Dist. Greene Nos. 2009 CA 42 & 2009 CA 47, 2010-Ohio-28, ¶ 57. Indeed, like Anton and Strickland, neither Crow nor Resnick ever refers to Ohio.

II. Ten Affidavits Must be Struck in Part for Failure to Comply with Admissibility Requirements

Ten other affidavits, *i.e.*, the affidavits of Behnke, Corrigan, James, Levant, Meyer, Mihura, Newman, Peters, Platoni, and Swenson, should be struck in part. As shown in the chart attached as Exhibit 1, these affidavits contain factual assertions that are (a) irrelevant to the issues of personal jurisdiction, (b) based on inadmissible hearsay, and (c) not otherwise based on the affiant’s personal knowledge. *Howard v. Hogg*, 1996 Ohio App. LEXIS 5533. The Court

cannot consider these inadmissible parts of the affidavits and should strike them. *Great Am. Ins. Co. v. L&S Trucking Co.*, 2015 U.S. Dist. LEXIS 40683, at *6 (S.D. Ohio Mar. 30, 2015).

CONCLUSION

For these reasons, the affidavits of Barry Anton, Bruce Crow, Robert Resnick, and William Strickland should be struck in their entirety, and the affidavits of Stephen Behnke, John Corrigan, Larry James, Ronald Levant, Gregory Meyer, Joni Mihura, Russell Newman, Wendy Peters, Katherine Platoni, and Elizabeth Swenson should be struck to the extent of their infirmities as identified in Exhibit 1.

Respectfully submitted,

/s/ Erin E. Rhinehart

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of June, 2017, I electronically filed the foregoing Defendants Sidley Austin LLP and David Hoffman's Motion To Strike Affidavit Submitted By Plaintiffs 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.

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PLAINTIFFS' AFFIDAVITS ARE INADMISSIBLE AND MUST BE STRUCK

<u>AFFIANT</u>	<u>NOT RELEVANT</u>	<u>LACK OF PERSONAL KNOWLEDGE</u>	<u>INADMISSIBLE HEARSAY</u>
<p>Behnke, Stephen</p>	<p>*Paragraphs 4–7: Assertions relating to role in John Leso ethics investigation.</p> <p>*Paragraph 8: Assertions relating to role in Larry James ethics investigation.</p> <p>*Paragraph 10: Assertions relating to role in PENS Task Force and methods of communication among its members.</p> <p>*Paragraphs 11–12: Assertions relating to continuing debate over the role of psychologists in interrogations.</p> <p>*Paragraph 13: Assertions relating to Dr. Kaslow’s awareness of whether “two of the main accusers” were working with a New York Times reporter.</p> <p>*Paragraph 14: Assertions relating to access to the Report and termination from APA.</p> <p>*Paragraph 15: Assertions relating to receipt of letter from advocate for ban on participation of psychologists in national security settings relating to the accuracy of the Report.</p>	<p>*In paragraph 3, “I viewed Ohio as an important constituency of the APA Ethics Office because there are over 2800 APA members in Ohio,” citing Exhibit A without authentication.</p> <p>*In paragraph 3, “Additionally, when I was terminated from my position at the APA in 2015, there were ten Council of Representative members from Ohio, more than from any state other than California and New York,” citing Exhibit B without authentication.</p> <p>*In paragraph 6, “At no point during the several-year period of time the Leso matter was open and Ms. Springer had access to the Leso filed did she indicate that the matter was not being handled in a proper fashion.”</p> <p>*In paragraph 7, “These members of the staff and the Board had full knowledge that the allegations made in the Hoffman Report regarding the handling of the Leso matter were false when they published the Report on multiple occasions,” citing Plaintiffs’ Complaint.</p> <p>*In paragraph 10, “Two members of the Board at that time were from Ohio – Ron Levant . . . and Sandra Shulman,” citing Levant’s affidavit and Exhibit D without authentication.</p> <p>*In paragraph 10, “[A]ll discussions between Task Force members took place on the listserv from their respective home or office locations via email.”</p> <p>*In paragraph 11, “Following the work of the</p>	<p>*In paragraph 9, “The Executive Director informed me that a group of lawyers had traveled to Ohio from Harvard Law School to discuss the complaint.”</p> <p>*In paragraph 9, “He told me that the Ohio Board of Psychology had investigated the complaint and did not find evidence that Dr. James had engaged in behaviors that would warrant sanction by the Ohio board.”</p> <p>*In paragraph 9, “He further stated that the lawyers from Harvard appeared to believe that the complaint had not been fully investigated for political reasons, rather than accepted there was no basis for sanction.”</p> <p>*Exhibit E: Statements regarding the accuracy of the Report by Linda Woolf.</p>

<u>AFFIANT</u>	<u>NOT RELEVANT</u>	<u>LACK OF PERSONAL KNOWLEDGE</u>	<u>INADMISSIBLE HEARSAY</u>
		<p>PENS Task Force and the adoption of the PENS Guidelines by the Board, considerable discussion and debate concerning psychologists' role in interrogation support continued within the APA, especially by the Council during meetings for the years 2006-2008 taking place at the annual APA conventions in New Orleans, San Francisco, and Boston, respectively," citing three websites without authentication.</p> <p>*In paragraph 13, "Dr. Kaslow was also fully aware that two of the main accusers of psychologists who participated in national security interrogations were working with the reporter from <i>The New York Times</i>, James Risen, whose allegations had sparked the investigation. I was shocked to learn that Dr. Kaslow and others gave a draft of the Report to Drs. Reisner and Soldz before I was given access to the report," with no explanation as to how that knowledge was obtained.</p>	
Corrigan, John	*Paragraph 4: Assertions relating to substance of the Report and learning in listserv discussion that Dr. Behnke might lose job.		*In paragraph 4, "I also recall that the Division listserv discussion made mention that Dr. Stephen Behnke, the Director of Ethics at APA, might lose his job as a result of the Report."
James, Larry	<p>*Paragraph 5: Assertions relating to role in PENS Task Force and methods of communication among its members.</p> <p>*In paragraph 6, "However, I was not provided any forum for responding to or lodging any objections to the Report's allegations and conclusions prior to it being published to Council. In spite of lodging my objections to the document, I was not given any notice that a Revised Report was being prepared, or given any</p>	<p>*In paragraph 5, "[A]ll discussions among Task Force members took place on the listserv by email and members of the Task Force participated from their home or work locations."</p> <p>*In paragraph 8, "It was well known that Drs. Soldz and Reisner had previously accused me quite publicly, on numerous occasions of wrongdoing and that they were collaborating with the reporter from <i>The New York Times</i>, whose book had sparked the investigation."</p>	<p>*In paragraph 8, "I was particularly surprised to learn from the news media and various posts on the Council listserv that Drs. Steven Resiner and Stephen Soldz were provided with access to a draft of the Report on Jun 27, and that they subsequently met with the Board to provide recommendations at the Board's July 2-3, 2015 meeting."</p> <p>*In paragraph 10, "In fact my Dean emailed me on July 13, 2015 expressing her concern that the</p>

<u>AFFIANT</u>	<u>NOT RELEVANT</u>	<u>LACK OF PERSONAL KNOWLEDGE</u>	<u>INADMISSIBLE HEARSAY</u>
	<p>chance to contribute to the document. That Revised Report was released by APA on September 4, 2015.”</p> <p>*Paragraph 7: Assertions relating to lack of opportunity to respond to the Report.</p> <p>*Paragraph 8: Assertions relating to access to the Report by Drs. Reisner and Soldz.</p> <p>*Paragraph 9: Assertions relating to posting of objections to the Report on APA website and listserv.</p> <p>*In paragraph 12, “The Fact that the public Report contained confidential information from my APA ethics complaint case file compounded matters. I had no notice that any of this would be released and it violates the rules of the APA ethics complaint process.”</p> <p>*In paragraph 12, “The situation was made all the more difficult by an article repeating the Report's false conclusions about me that appeared in the <i>National Psychologist</i>, a psychology trade newspaper published in Ohio, that was put into the mailboxes of each and every faculty member of my school.”</p> <p>*Paragraph 13: Assertions relating to the merits of the Report and allegedly false allegations filed by Dr. Bond.</p> <p>*Paragraphs 14–16: Assertions relating to legal actions by Dr. Bond.</p> <p>*Paragraph 17: Assertions relating to actions by Human Rights Watch.</p>	<p>*In paragraph 20, “Dr. Nadine Kaslow . . . knew about the repeated false allegations made by Dr. Bond, and their dismissal.”</p> <p>*In paragraph 20, “When Dr. Kaslow voted to publish the Report on behalf of APA, she knew that many of its allegations were completely false as did others on the Board, including Drs. Douce and Jennifer Kelly.”</p>	<p>Report’s finding of improper handling of the ethics complaint against me combined with my membership on the PENS Task Force would reopen old allegations made against me.”</p> <p>*In paragraph 11, “[T]he Ohio Psychological Association (OPA) sent an email to all of its members reporting it’s [sic] Executive Committee met on July 17 to discuss the Report and encouraging members to go to the APA website and read the Report.”</p> <p>*In paragraph 11, “The Ohio Board of Psychology also discussed the findings of the Report as reflected in its July 30, 2015 meeting minutes.”</p> <p>*In paragraph 20, “Shortly after the Report became public, Dr. Douce emailed and phoned me to tell me she knew that I had done nothing wrong and that she hoped I did not feel betrayed by her.”</p>

<u>AFFIANT</u>	<u>NOT RELEVANT</u>	<u>LACK OF PERSONAL KNOWLEDGE</u>	<u>INADMISSIBLE HEARSAY</u>
	<p>*Paragraph 18: Assertions relating to merits of the Report.</p> <p>*Paragraph 19: Assertions relating to lack of opportunity to respond to the Report.</p> <p>*In paragraph 21: “No matter what a Court, or legislative body holds, Dr. Bond and her colleagues continue to wrongly accuse me of the same allegations. Mr. Hoffman did not put any of this information in the Report, in spite of me giving it all to him during our multiple conversations-he simply repeated her false allegations once again.”</p>		
Levant, Ronald	<p>*Paragraphs 7–8: Assertions relating to merits of the Report.</p> <p>*Paragraphs 9–11: Assertions relating to personal difficulties of affiant following the Report.</p>	*In paragraph 9, affiant’s advisees and students working in his research lab “could not reconcile the Report’s depiction of me in comparison to the respected faculty member they had experienced me to be in their program.”	
Meyer, Gregory	<p>*Paragraph 3: Circulation of the Report by University of Toledo professor.</p> <p>*Exhibit A: Circulation of the Report by University of Toledo professor.</p>		*In paragraph 5, “In fact, the Department Chair’s email circulating the Report made it a point to say, ‘the head of the APA Ethics Office, Stephen Behnke, has been fired.’”
Mihura, Joni	<p>*Paragraph 3: Circulation of the Report by University of Toledo professor.</p> <p>*Exhibit A: Circulation of the Report by University of Toledo professor.</p>		*In paragraph 5, “[M]y Department of Psychology Chair . . . when circulating the Report, indicated that Dr. Behnke had been fired.”

<u>AFFIANT</u>	<u>NOT RELEVANT</u>	<u>LACK OF PERSONAL KNOWLEDGE</u>	<u>INADMISSIBLE HEARSAY</u>
Newman, Russell	<p>*Paragraph 3: Assertions relating to impression of Hoffman's investigation.</p> <p>*Paragraph 4: Assertions relating to involvement in PENS Task Force.</p> <p>*Paragraph 5: Assertions relating to access to the Report and ability to respond.</p> <p>*Paragraphs 6–7: Assertions relating to impact of the Report on work in California.</p> <p>*Paragraph 8: Assertions relating to merits of the Report.</p> <p>*Paragraph 9: Assertions relating to findings of APA, communication of the same to government officials and statements to the media.</p> <p>*Paragraph 13: Assertions relating to impact of the Report on work in California.</p> <p>*Paragraph 15-16: Assertions relating to Sidley Austin bar admissions and litigation.</p> <p>*Paragraph 17: Assertions relating to APA Board of Directors involvement in investigation and resulting the Report.</p>	<p>*In paragraph 12, “some in the psychology community [in Ohio] were particularly aware of the negative light in which the Report cast me,” citing Affidavit of John Corrigan.</p> <p>*In paragraph 14, has compiled “a list of witnesses who <i>we believe</i> have important information bearing on the issues related to this case” and “of the 33 so identified, five are from Ohio, more than from any other jurisdiction except California.” (Emphasis added.)</p> <p>*Paragraph 15: Assertions relating to where Sidley Austin practices and how many of its partners are admitted to practice before the U.S. Court of Appeals for the Sixth Circuit.</p> <p>*Paragraph 16: Assertions relating to Sidley Austin litigation in Ohio and the location of witnesses interviewed by Hoffman.</p> <p>*In paragraph 17, “<i>Board meeting minutes indicate</i>, the Board postponed discussion of the remaining Board motions related to the Report until a January 19, 2016, conference call when it voted to finalize remaining motions related to the Report.” (Emphasis added.)</p> <p>*Exhibit K: Assertions relating to APA contains in Ohio without showing of personal knowledge.</p>	<p>*In paragraph 8, “[W]hen Mr. Hoffman met privately with the APA Council of Representatives . . . he told the Council that “(b)ehind the scenes communication’ would have been a more accurate description than collusion.”</p> <p>*Exhibit F: No showing that document satisfies any hearsay exception.</p> <p>*Exhibit G: No showing that document satisfies any hearsay exception.</p> <p>*In paragraph 17, “<i>Board meeting minutes indicate</i>, the Board postponed discussion of the remaining Board motions related to the Report until a January 19, 2016, conference call when it voted to finalize remaining motions related to the Report.” (Emphasis added.)</p>
Peters, Wendy	<p>*Paragraph 3: Assertions relating to discussions among colleagues following the Report without mention of how they learned of it.</p>		

<u>AFFIANT</u>	<u>NOT RELEVANT</u>	<u>LACK OF PERSONAL KNOWLEDGE</u>	<u>INADMISSIBLE HEARSAY</u>
Platoni, Katherine	<p>*Paragraph 3: Assertions relating to merits of the Report.</p> <p>*Paragraph 4: Assertions relating to affiant's resignation from APA.</p>	<p>*In paragraph 3, stating that she "believed" Report assertions "to be false."</p> <p>*In paragraph 3, "Additionally, that the APA would readily accept such distorted findings and proceed to apologize for the actions of military psychologists that never occurred belied motivation <i>that seemed</i> more about face-saving than finding truth." (Emphasis added.)</p>	
Swenson, Elizabeth	<p>*Paragraph 5–8: Assertions relating to merits of the Report, personal impression of Dr. Behnke, discussion of Report among colleagues.</p> <p>*Paragraph 9: Assertions relating to conversations with Sidley Austin interviewers regarding handling of Dr. Gelles ethics investigation.</p>	<p>*In paragraph 9, "Sidley Austin interviewers had an agenda to characterize the APA Ethics Office as exercising undue influence over the Ethics Code Task Force and the Ethics Committee deliberations regarding Dr. Gelles."</p>	

1176774.1

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.	:	[PROPOSED] ORDER GRANTING
	:	DEFENDANTS SIDLEY AUSTIN
DAVID HOFFMAN, et al.,	:	LLP AND DAVID HOFFMAN'S
	:	MOTION TO STRIKE
Defendants.	:	AFFIDAVITS SUBMITTED BY
	:	PLAINTIFFS
	:	

Defendants Sidley Austin LLP and David Hoffman's Motion to Strike Affidavits Submitted by Plaintiffs ("Motion to Strike") is GRANTED. The affidavits of Barry Anton, Bruce Crow, Robert Resnick, and William Strickland are struck in their entirety, and the affidavits of Stephen Behnke, John Corrigan, Larry James, Ronald Levant, Gregory Meyer, Joni Mihura, Russell Newman, Wendy Peters, Katherine Platoni, and Elizabeth Swenson are struck, in part, to the extent identified in Exhibit 1 to the Motion to Strike.

IT IS SO ORDERED.

Judge Timothy N. O’Connell

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