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.*,	:	**REPLY OF DEFENDANTS SIDLEY AUSTIN LLP AND DAVID HOFFMAN IN SUPPORT OF MOTION TO STRIKE AFFIDAVITS SUBMITTED BY PLAINTIFFS**
Defendants.	:	

Personal jurisdiction is a threshold issue that must be decided before the Court, and the Parties, wade into the merits of Plaintiffs' allegations. Jurisdictional issues are not collateral distractions intended to delay or obscure the merits. Absent jurisdiction, this Court cannot decide the case.[1] Instead of focusing on this threshold issue, however, Plaintiffs attempt to muddy it with hundreds of pages of affidavits and exhibits that they concede "contain statements relevant to issues *other than* personal jurisdiction." Opposition, p. 7 (emphasis added). Plaintiffs' protestations when dealing with this fundamental issue are telling. As shown in

[1] *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. __ (2017) (slip op., at 5) ("Because a state court's assertion of jurisdiction exposes defendants to the State's coercive power, it is subject to review for compatibility with the Fourteenth Amendment's Due Process Clause . . . which limits the power of a state court to render a valid personal judgment against a nonresident defendant.") (internal quotation marks and citations omitted).

Sidley's Motion and this Reply, Plaintiffs' affidavits must be struck, in whole and in part, because they are inadmissible and irrelevant to Court's jurisdictional inquiry.

ARGUMENT

I. The Court has Inherent Authority to Strike Inadmissible Affidavits

Contrary to Plaintiffs' assertion otherwise, the Court has the authority to strike inadmissible affidavits. The Rules of Civil Procedure's silence on this specific issue does not mean that courts lack such power. Ohio courts have long recognized their *inherent* authority to strike improper filings and exclude inadmissible evidence – a power that is routinely exercised. *Oakbrook Realty Corp. v. Blout*, 48 Ohio App.3d 69, 70 (10th Dist. 1988) ("Generally, a trial court is vested with broad discretion in the admission or exclusion of evidence. . . . Thus, even in the absence of an objection, *the trial court has the inherent power to exclude or strike evidence on its own motion.*") (emphasis added); *Wells Fargo Bank, N.A. v. Bing*, Wayne No. 12-CV-0273, 2012 Ohio Misc. LEXIS 1657 ("While the language of Civ.R. 12(F) does not explicitly state a pleading may be struck in its entirety, absent some express ruling to the contrary, *Ohio courts continue to be vested with the power to strike a pleading in its entirety in an appropriate case.*") (emphasis added).[2]

Plaintiffs' reliance on *Zep Inc. v. Midwest Motor Supply*, 726 F. Supp. 2d 818 (S.D. Ohio 2010), is misplaced; in fact, *Zep* supports Sidley's Motion to Strike. The Opposition (p. 4) quotes the following sentence from *Zep*: "Federal Rules of Civil Procedure do not provide for a motion to strike documents or portions of documents other than pleadings." Plaintiffs, however,

---

[2] *Accord*: *Tomaydo-Tomahhdo L.L.C. v. Vozary*, 8th Dist. Cuyahoga No. 104446, 2017-Ohio-4292, ¶ 15 n.2 (leaving intact the trial court's decision to *strike an affidavit* for containing inadmissible hearsay) (emphasis added); *Neal v. Hamilton*, 87 Ohio App.3d 670, 680 (1st Dist. 1993) ("Whether to exclude or admit evidence *sua sponte* is discretionary with the court.").

fail to quote the very next sentence, which states: "Instead, trial courts make use of their *inherent power* to control their dockets . . . when determining whether to strike documents or portions of documents." *Id.* at 822 (citation omitted) (emphasis added). The *Zep* court struck the document in question; the case supports Defendants' Motion. *Id.* at 823.

Plaintiffs, in any event, concede that the Court may "disregard" their affidavits and exhibits to the extent they are inadmissible—inviting the Court to engage in an unnecessary game of semantics. Opposition, p. 4 (citing *Lomard v. MCI Telecommunications Corp.*, 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998) ("The Court has . . . *excluded from its consideration* those portions of the exhibits that are hearsay, not based on personal knowledge, irrelevant, or otherwise inadmissible.") (emphasis added)). Plaintiffs provide no logical reason for this Court to "disregard" inadmissible evidence but refuse to "strike" such evidence.

II. Plaintiffs' Opposition Fails to Rebut Sidley's Showing that Four Affidavits Should Be Struck in Their Entirety

As shown in the Motion to Strike, the affidavits of Barry Anton, Bruce Crow, Robert Resnick, and William Strickland should be struck in their entirety as irrelevant to whether the Court may exercise personal jurisdiction over Plaintiffs' claims against Defendants. Memo. in Support Mot. to Strike, p. 3. First, Plaintiffs concede (p. 7) that the affidavits of Messrs. Crow and Resnick are cited *only* to show that the Report contains inaccuracies – an issue irrelevant to personal jurisdiction. *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994) (to show purposeful availment based on the publication of allegedly defamatory statements, a plaintiff must show that the defendant intentionally targeted the forum). *Accord*: *Kauffman Racing Equip. v. Roberts*, 126 Ohio St. 3d 81, 88 (2010) (noting that purposeful availment requires more than "attenuated contacts"). Plaintiffs fail to explain (nor can they) how

the truth or falsity of the Report has "any tendency" to show that Defendants intentionally targeted this state. Ohio Evid. R. 401. Indeed, neither Mr. Crow nor Mr. Resnick even mentions Ohio. Therefore, their affidavits must be struck.

Second, Plaintiffs' sole defense of Messrs. Anton and Strickland's affidavits is that they purportedly show that the Report was published to the board of the Washington, D.C.-based American Psychological Association, which the Opposition asserts included two Ohio residents. Opp., p. 5. Yet, Plaintiffs cite no legal authority for the proposition that a board member's home state has *any* tendency to show intentional targeting of that state when a statement is published to the board itself. Nor can they. *Reynolds*, 23 F.3d at 1120 (a plaintiff's publication must intentionally target the forum to show purposeful availment). The affidavits of Anton and Strickland must be struck.

III. Plaintiffs' Opposition Fails to Save Ten Other Affidavits from Being Stuck in Part

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, in part, because they are (a) irrelevant to the issues of personal jurisdiction, (b) based on inadmissible hearsay, or (c) not otherwise based on the affiant's personal knowledge. Memo. in Support Mot. to Strike, p. 3, Ex. 1. Again, Plaintiffs' Opposition fails to show otherwise.

A. Plaintiffs' Opposition Concedes the Irrelevance of Several Affidavits

Various factual allegations in several affidavits are irrelevant to the jurisdictional issues before the Court because they concern the *merits* of the Report (*i.e.*, its truth or falsity). Affidavit of James, ¶ 13 and 18; Affidavit of Levant, ¶7-8; Affidavit of Newman, ¶ 3; Affidavit of Platoni, ¶ 3; Affidavit of Swenson, ¶ 5-8. As with the affidavits of Crow and Resnick, the

Opposition fails to connect such statements to the Court's current jurisdictional analysis. *E.g.*, Plaintiffs' Chart, pp. 1, 2, 8, 11, 12, 13, 17, and 18 (arguing that several affidavits show the Report's conclusions are not non-actionable "opinions"). Sidley has moved to strike these portions of the affidavits, and Plaintiffs offer only conclusory justifications that fail to support their admissibility.

B. The Opposition All But Ignores Sidley's Showing of Inadmissible Hearsay

The Opposition fails to overcome Sidley's showing of hearsay. First, Plaintiffs argue that some statements are not offered to prove the truth of the matter asserted (Plaintiffs' Chart, pp. 5, 6, 9, 10, 11, and 12). If true, then such statements are irrelevant to the Court's jurisdictional analysis. *E.g.*, Affidavit of Behnke, ¶ 9; Plaintiffs' Chart, p. 5 (arguing that statements as to the beliefs of Harvard Law School lawyers are offered "to establish the nexus between the current action and the former ethics complaints filed against James by Ohio residents" without any explanation as to why that assertion is relevant to the issue of personal jurisdiction).

Second, Plaintiffs rely on various hearsay exceptions without providing any evidentiary support. For example, Plaintiffs state (Chart, pp. 5-6) that a letter from Linda Woolf attached to the Affidavit of Behnke is not hearsay because it is a "verbal act," without any explanation of its "independent legal significance" to justify their reliance on that exception. Plaintiffs also argue, in the alternative, that Woolf's two-page letter is a present sense impression under Ohio Evid. R. 803(1). Plaintiffs' Chart, p. 6. The Second District Court of Appeals, however, recently refused to apply that exception to a letter because it applies only to a "statement describing or explaining an event or *condition made while the declarant was perceiving the event or condition, or immediately thereafter*." *State v. Dillon*, 2nd Dist. Clark No. 2014-CA-36, 2016-Ohio-1561, ¶ 25.

Implicitly acknowledging these evidentiary deficiencies, Plaintiffs ask the Court to take judicial notice of several facts. However, Plaintiffs fail to make any attempt, as required under Ohio Evid. R. 201(B), to show that those "facts" are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Plaintiffs' Chart, pp. 3 (requesting judicial notice of a listserv of PENS Task Force members published by ProPublica), 5 (requesting judicial notice of a *New York Times* article on "evidence that Sidley relied on in the Reports"), and 16 (requesting judicial notice of the analyses conducted by Demographics Pro of the residence of a Twitter accounts' followers); Opposition, p. 12 (requesting judicial notice of a *Washington Post* article on the length of a single sexual-discrimination case to show that District of Columbia courts are "clogged" and that "Ohio is a better forum for this action"). The hyperlinks provided by Plaintiffs fail to supply information in a manner that allows for judicial notice of discrete facts without further inquiry and, therefore, their requests must be denied. *Rude v. NUCO Educ. Corp.*, 9th Dist. Summit No. 25549, 2011-Ohio-6789, ¶ 16.

C. Plaintiffs' Opposition Fails to Demonstrate the Requisite Personal Knowledge

Plaintiffs concede that "a mere assertion of personal knowledge satisfies the personal knowledge requirement," *only* "if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit." Opposition, p. 8 (citing *Bank One, N.A. v. Lytle*, 9th Dist. Lorain No. 04CA008463, 2004-Ohio-6547, ¶ 13). Indeed, "[i]f particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts . . .

something more than a conclusory averment that the affiant has knowledge of the facts is required." *Bank of Am., N.A. v. Loya*, 9th Dist. Summit No. 26973, 2014-Ohio-2750, ¶ 12 (internal quotation marks and citation omitted). A court "cannot infer personal knowledge from the averment of personal knowledge alone." *Id.* (quotation marks and citation omitted).

As Plaintiffs' Chart shows, several factual allegations in the affidavits are not based on the affiant's personal knowledge. Plaintiffs' Chart, p. 2 (admitting that information in the Affidavit of Behnke was drawn from various documents), 14 (admitting that the potential witnesses identified in Affidavit of Newman as Ohio residents was based on "an internet search for the location of those witnesses"). Moreover, several statements are made only on "belief" and are, therefore, inadmissible. *State ex rel. Sekermestrovich v. City of Akron*, 90 Ohio St.3d 536, 538 (2001) (affidavits on "belief" are not based on "personal knowledge"). *See* Plaintiffs' Chart, pp. 14 (statement that certain witnesses have "important information" in Affidavit of Newman based on belief), 17 (statement regarding alleged falsity of Report in Affidavit of Plantoni based on belief).

IV. Conclusion

For these reasons, and those in Defendants Sidley Austin LLP and David Hoffman's June 2, 2017 Motion to Strike Affidavits Submitted by Plaintiffs, 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 demonstrated in Exhibit 1 to that Motion.

Respectfully submitted,

s/ Erin E. Rhinehart
D. Jeffrey Ireland (00110443)
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, PHV - 15083
(pro hac vice)
Thomas G. Hentoff, PHV-15081
(pro hac vice)
Eli S. Schlam, PHV - 15089
(pro hac vice)
Krystal R. Commons, PHV - 15093
(pro hac vice)
Alexander J. Kasner, PHV-15084
(pro hac vice)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5804
Telecopier: (202) 434-5029
Email: jvilla@wc.com
thentoff@wc.com
eschlam@wc.com
kcommons@wc.com
akasner@wc.com

Attorneys for Defendants
Sidley Austin LLP and David Hoffman

CERTIFICATE OF SERVICE

I certify that on the 27th day of June, 2017, I electronically filed the foregoing Reply of Defendants Sidley Austin LLP and David Hoffman in Support of Motion to Strike Affidavits 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 or U.S. mail the document to the parties not participating in the electronic filing system:

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

Attorneys for All Plaintiffs

Bonny J. Forrest, Esq.
555 Front Street
Suite 1403
San Diego, California 92101
Email: bonforrest@aol.com

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

Louis J. Freeh, Esq.
2550 M St. NW
Second Floor
Washington, DC 20037

Attorney for Plaintiff Stephen Behnke

J. Steven Justice
Glen R. McMurry, Esq.
DUNGAN & LeFEVRE CO., L.P.A.
210 W Main St.
Troy, OH 45373
Email: justice@dunganattorney.com
gmcmurry@dunganattorney.com

Barbara S. Wahl, Esq.
Karen E. Carr, Esq.
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Email: barbara.wahl@arentfox.com
karen.carr@arentfox.com

Attorneys for Defendant American Psychological Association

s/ Christopher C. Hollon
Christopher C. Hollon