UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. RICHARD CARRIER Plaintiff, -vs- FREETHOUGHTBLOGS NETWORK, PAUL Z. MYERS, PH.D., THE ORBIT, STEPHANIE ZVAN, SKEPTICON, INC., LAUREN LANE, and AMY FRANK-SKIBA Defendants	:	Case No. 22:16-cv-00906-MHW-EPD JUDGE Michael H. Watson **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JURISDICTIONAL DISCOVERY AND FOR AN EVIDENTIARY HEARING**

Plaintiff **Dr. Richard Carrier** (hereinafter "Dr. Carrier" or "Plaintiff"), hereby submits the following Brief in Opposition to Defendants' Motion for Jurisdictional Discovery and for an Evidentiary Hearing.

I. INTRODUCTION

Every Defendant knew that Plaintiff, Dr. Carrier, a Ph.D. in the history of philosophy from Columbia University, author of numerous scholarly books and articles, and published by prominent publishing houses, had ongoing professional relationships and valid business expectancies with Ohio organizations. Most notably, and among numerous other Ohio organizations was Dr. Carrier's well-established affiliation with the Secular Student Alliance ("SSA") and Camp Quest, both headquartered in Columbus. *See* Plaintiff's Brief In Opposition Defendants' Motion to Dismiss (hereinafter "Carrier BIO"), Dkt. No. 17, *Exhibit 1* (hereinafter "Carrier Aff."), pp. 4-5, at ¶¶ 25-28, p. 8, at ¶ 42, p. 10, at ¶ 51, p. 12, at ¶ 69, and p. 14 at ¶ 79. *Also see* Carrier BIO, Dkt. No. 17, *Exhibits D-F*, and *Exhibit H*. Dr. Carrier became a citizen of Ohio by June 1, 2016. *See* Carrier Aff., Dkt. No. 17-1, p. 7 at ¶ 36. Plaintiff's move was well

publicized through various means. *See* Carrier Aff., Dkt. No. 17-1, pp. 5-7, at ¶¶ 29-35. *Also see* Carrier BIO, Dkt. No. 17, *Exhibits* I-P, and *Exhibit* BB. Subsequent to taking up residence in Ohio, Defendants published multiple tortious statements including false allegations of sexual harassment, a crime involving moral turpitude, and published statements concerning Dr. Carrier's professional acumen and character. Defendants' statements have been repeated and re-broadcast within Ohio and nationwide.

On September 20, 2016, Plaintiff filed his well-pled Complaint alleging causes for defamation, tortious interference with a business expectancy, and both intentional and negligent infliction of emotional distress. *See* Complaint, Dkt. No. 1. On December 1, 2016, Defendants then filed their Motion to Dismiss, pursuant to Fed.R. 12(b)(2) and 12(b)(3). *See* Dkt. No. 10. Defendants did not request jurisdictional discovery, nor did Defendants request an evidentiary hearing. Accordingly, on December 22, 2016, Plaintiff then briefed and filed his opposition to Defendants Motion to Dismiss. *See* Carrier BIO, Dkt. No. 17. The Plaintiff stipulated to an extension of time, until January 31, 2017, for Defendants to file their reply. *See* Dkt No. 18 & 19. On January 27, 2017, Defendants' deadline to reply to their Motion to Dismiss was stayed, pending resolution of Defendants' Motion for jurisdictional discovery and for an evidentiary hearing. *See* Dkt. No. 26.

Plaintiff has not stipulated to jurisdictional discovery. Plaintiff already made a *prima facie* case that this Court has personal jurisdiction over the Defendants by his well-pled complaint, sworn affidavits, and numerous exhibits. *See* Complaint, Dkt. No. 1. Plaintiff subsequently briefed the matter in meticulous detail, in his opposition to Defendants' Motion to Dismiss, with a supplemental affidavit, and numerous supporting exhibits. *See* Dkt. No. 17.

Plaintiff's position, therefore, is that neither jurisdictional discovery nor an evidentiary hearing are required, but would be unduly burdensome.

The Plaintiff would of course expect that both parties will "propound limited written discovery and will conduct depositions by telephone or videoconference" as the case proceeds. *See* Defendant's Motion for Jurisdictional Discovery and Evidentiary Hearing Dkt. No. 23, PAGEID #: 456, *quoting* Plaintiff's Rule 26(f) Report, Dkt. No. 22, PAGEID #: 451. However, Plaintiff strongly believes that jurisdictional discovery would be unnecessary, inefficient, and unfair. The facts in this case are intertwined in such a way that do not allow for "limited" jurisdictional discovery, or for an evidentiary hearing, but would require Plaintiff to argue his case-in-chief prematurely. What's more, even if the Court denies Defendants' Motion to Dismiss, Defendants still do not waive their right to assert a lack of personal jurisdiction at trial.

The Plaintiff asks this Court to deny both Defendants' Motion to Dismiss and their Motion for Jurisdictional Discovery and an Evidentiary Hearing.

II. LAW AND ARGUMENT

Fed. R. Civ. P. 12(d) "provides that a motion to dismiss brought under Fed. R. Civ. P. 12(b)(2) may be heard and determined before trial, but that the court has the power to defer hearing of evidence and a ruling on the motion until trial. Fed. R. Civ. P. 12(d). 'As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.'" *Serras v. First Tenn. Bank Nat'l Ass'n*. 875 F.2d 1212, 1214 (6th Cir. 1989) citing *Gibbs v. Buck*, 307 U.S. 66, 71-72, 59 S.Ct. 725 (1939). A court may decide a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) using the three different procedural alternatives. It may decide the motion upon the affidavits alone, it may permit limited discovery in aid of its decision, or the court may conduct an evidentiary hearing.

Serras v. First Tenn. Bank Nat'l Ass'n. 875 F.2d 1212, (6th Cir. 1989). When a court decides a 12(b)(2) motion to dismiss on the affidavits alone, the Plaintiff's burden is to establish a *prima facie* showing that personal jurisdiction exists. The court views the pleadings and affidavits before it in the light most favorable to the Plaintiff. Even if the court allows for limited jurisdictional discovery, the Plaintiff's burden remains a showing of a *prima facie* case that personal jurisdiction exists. However, if the Court allows for an evidentiary hearing on personal jurisdiction, the Plaintiff's burden rises to a preponderance of the evidence, the same standard if the matter were deferred to trial. *Wuliger v. Positive Living Res.*, 410 F. Supp. 2d 701 (N.D. Ohio 2006). But even if the court issues a pretrial order denying Defendants' Motion to Dismiss, Defendants still won't waive the issue of personal jurisdiction at trial. The Court in *Serras* explains that "even if the court issues a pretrial order denying defendant's 12(b)(2) motion, the defendant may proceed to trial without waiving the defense." *Serras v. First Tenn. Bank Nat'l Ass'n*. 875 F.2d 1212, 1214 (6th Cir. 1989).

A. Plaintiff Has Met the Burden of Showing this Court Enjoys Personal Jurisdiction Over Defendants by His Well-Pled Complaint and Other Pleadings, and by Plaintiff's Affidavits and Exhibits.

When Defendants filed their Motion to Dismiss, they failed to request jurisdictional discovery or an evidentiary hearing. The Plaintiff responded accordingly to Defendants' Motion, in his Brief in Opposition, and provided the Court an abundance of facts, exhibits, and affidavits to supplement his already well-pled Complaint and exhibits attached thereto, all of which plainly establish this Court enjoys personal jurisdiction over Defendants. At the very least, the Plaintiff established a *prima facie* showing that this Court has personal jurisdiction over the Defendants. In this case, since the Plaintiff already satisfied the burden, neither jurisdictional discovery nor an evidentiary hearing are necessary, nor would they be fair. Dr. Carrier has already shown,

through written submissions and sworn affidavits, that personal jurisdiction is proper because, (1) Ohio's long arm statute is satisfied, and (2) the Court's exercise of personal jurisdiction over the Defendants does not violate their Constitutional right to due process. Defendants readily claim the belief that Dr. Carrier was still living in California. But none of the Defendants themselves reside in California and so, in any event, Defendants would still have been required to litigate away from home. Defendants' collusion spans multiple states, and it's not as though Defendants can propose a more suitable venue than Ohio, wherein their wrongful conduct was calculated to cause injury.

By the Plaintiff's well-pled Complaint, and through his other pleadings, exhibits, and affidavits, he lays the factual foundation for this Court's personal jurisdiction over Defendants. The Plaintiff established that by June 1, 2016, his move to Ohio was complete. *See* Carrier Aff., Dkt. No. 17-1, p. 7 at ¶ 36. The Plaintiff, through sworn statements and exhibits, established that his move was clearly disclosed and widely publicized for months before the move, including announcements on various social media, on his personal webpage, by word of mouth, and through other varied means. *See* Carrier Aff., Dkt. No. 17-1, pp. 5-7 at ¶¶ 29-35. *Also see*, Carrier BIO, Dkt. No. 17, *Exhibits* I-P and *Exhibit* BB. Dr. Carrier has shown that Defendants' statements were intentional and tortious, calculated to cause injury in Ohio. The Plaintiff, in his Complaint, and in his Brief in Opposition to Defendant's Motion to Dismiss, declares that he derives much of his speaking and direct sales income from professional relationships with other Ohio-based organizations, including, but not limited to, the Secular Student Alliance ("SSA") and the SSA's hundreds of campus affiliates. *See* Carrier Aff., Dkt. No. 17-1, pp. 4-5, at ¶¶ 25-28, p. 7 at ¶ 38, p. 10, at ¶ 51, p. 12, at ¶ 69, and p. 14, at ¶ 79. *Also see,* Carrier BIO, Dkt. No. 17, *Exhibits* D-F and *Exhibit* H.

Defendants make misleading arguments about what they claim the Plaintiff attests in his affidavits and pleadings. According to Defendants, in Exhibit 1 to their Motion for Jurisdictional Discovery and Evidentiary Hearing, they claim to show the Plaintiff stated he was neither an employee nor volunteer for the SSA or Camp Quest. However, Dr. Carrier never did claim or testify that he was an employee or volunteer for the SSA or Camp Quest. He has, however, pled that his income comes from speaking engagements and from direct sales, and that he had developed business expectancies and professional relationships with the SSA, SSA affiliates, Camp Quest, and with numerous other university organizations in Ohio. *See* Complaint, Dkt. No. 1 at PAGEID #: 28, at ¶ 100, and Carrier Aff., Dkt. No. 17-1, pp. 4-5, at ¶ 25, and p. 16, at ¶ 84.

B. The Court Should Not Consider Defendants' Self-Serving Statements, but Should View the Pleadings in the Light Most Favorable to the Plaintiff.

In their Motion, Defendants claim they were "blindsided" by this suit in Ohio. Fittingly, each Defendant has offered a "declaration stating that he or she did not know Dr. Carrier had moved to Ohio or that he was intending to move to Ohio." However, as Plaintiff argued in his Brief in Opposition to Defendants Motion to Dismiss, the court in *Theunissen* held, "the court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal . . . We adopted this rule in *Serras* in order to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts . . . " *Theunissen v. Matthews*, 935 F.2d 1454,1459 (6th Cir.1991). The court's reasoning is sound, and avoids disingenuous or false statements to avoid personal jurisdiction, especially, as here, when the Plaintiff offered not only a sworn affidavit, but also exhibits in support of his Complaint, specifically showing the Plaintiff's move was announced for several months, through all of his social media profiles and his professional website, months before the defamation began. *See* Carrier Aff., Dkt. No. 17-1, pp. 5-7, ¶¶ 29-36. *Also see*, Carrier BIO, Dkt. No. 17, *Exhibits* I-

P, and *Exhibit* BB. It may reasonably be expected that Defendants claiming to be journalists investigating Dr. Carrier conducted a cursory Internet search, where his current residence was indeed ascertainable. *See* Complaint, Dkt. No. 1, p. 4, at ¶¶ 8 & 9. *Also see* Carrier Aff., Dkt. No. 17-1, p. 11, at ¶ 56.

Defendants argue that an evidentiary hearing is needed because they "challenge the authenticity and reliability of Google Trends Reports" that, they claim, the Plaintiff "heavily" relied upon. *See* Defendants' Motion for Jurisdictional Discovery and Evidentiary Hearing, Dkt. No. 23, PAGEID #: 458. Defendants' argument is misleading because they fail to offer the Court a direct comparison of the Plaintiff's research methods, and fail to acknowledge the Plaintiff's sworn statements explaining the Google® Trends methodology and algorithms. *See* Carrier Aff., Dkt. No. 17-1, pp. 1-4, ¶¶ 3-24. *Also see*, Carrier BIO, Dkt. No. 17, *Exhibits* A-C, and *Exhibits* Z-AA; Complaint Dkt. No. 1, *Exhibits* 20-21. Of note, Google® Trends is a public service, available for anyone to confirm, in no way dependent upon testimony from Dr. Carrier, and is verifiable by merely following the procedure outlined in the Plaintiff's affidavit. *See* Carrier Aff., Dkt. No. 17-1

C. The Jurisdictional Facts in This Case are so Intertwined with the Plaintiff's Case-in-Chief that Requiring the Plaintiff to Expose His Case on the Merits, Prior to Trial, is Unjust and Unnecessary. Defendants' Right to Challenge Jurisdiction at Trial will not be Waived.

While the Plaintiff has already satisfied the burden to establish personal jurisdiction over Defendants, "Rule 12(d) provides that a motion to dismiss brought under Fed.R.Civ.P. 12(b)(2) may be heard and determined before trial, but that the court has the power to defer hearing of evidence and a ruling on the motion until trial." *Serras v. First Tenn. Bank Nat'l Ass'n, 875 F.2d 1212, 1214 (6th Cir. 1989).* Defendants assert their "request for jurisdictional discovery is narrowly tailored and limited in nature." *See* Defendants' Motion for Jurisdictional Discovery

and Evidentiary Hearing, Dkt. No. 23, PAGEID #: 456. However, the jurisdictional facts are so closely related to the Plaintiff's legal claims, and to the facts on which he'll rely to prove his case, so as to make it virtually impossible to "narrowly tailor" jurisdictional discovery. For all practical purposes, the Plaintiff would be required to present virtually all the same facts that he'll later be asked to present at trial.

> "The court's solicitude for defendants who object to its personal jurisdiction is always tempered, however, by its concern that the door to a federal courtroom not be slammed in the face of a plaintiff seeking to invoke its powers where there is, in fact, no defect in personal jurisdiction. Particularly where the disputed jurisdictional facts are intimately intertwined with the parties' dispute on the merits, a trial court should not require plaintiffs to mount "proof which would, in effect, establish the validity of their claims and their right to relief sought.""

Serras v. First Tenn. Bank Nat'l Ass'n, 875 F.2d 1212, 1215 (6th Cir.1989), quoting *Milligan v. Anderson*, 522 F.2d 1202, 1207 (10th Cir. 1975).

Here, Defendants seek jurisdictional discovery and an evidential hearing on facts that are central to the merits of the Plaintiff's claims, prior to trial, which will prejudice Plaintiff's claims. "Judicial resources may be more efficiently deployed if the court holds but one hearing on the contested facts. And more fundamentally, as the Second Circuit has noted, postponing proof till trial allows a plaintiff to present all her proof "in a coherent, orderly fashion and without the risk of prejudicing his case on the merits." In many cases, then, a district court may find sound reasons to rule, on the basis of written submissions, that the plaintiff has made her *prima facie* showing that the court has personal jurisdiction over a defendant, and to reserve all factual determinations on the issue for trial." *Id.* at 1214, *citing Data Disc. 557 F2d at 1285-86 n.2*.

Finally, such discovery or preparation for an evidentiary hearing presents the Plaintiff with an overwhelming burden. Defendants claim that jurisdictional discovery "shall not

prejudice any Party from taking full factual depositions after jurisdiction has been resolved." However, Defendants fail to acknowledge the additional monetary and emotional costs that jurisdictional depositions would impose upon the Plaintiff. More notably, Defendants fail to explain to the Court what additional information, ostensibly narrowly tailored, it is they seek that cannot already be had by the pleadings, motions, and sworn affidavits. Defendants fail to justify the Plaintiff's added burden, over and above the burden he's already suffered by Defendants' wrongful conduct.

III. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for Jurisdictional Discovery and an Evidentiary Hearing, and should deny Defendants' Motion to Dismiss for lack of personal jurisdiction, on the grounds that the Plaintiff made a *prima facie* showing of facts sufficient to justify specific jurisdiction over all Defendants in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2'nd day of February 2017, a copy of the foregoing was filed using the CM/ECF that will send a notice of electronic filing to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail, postage prepaid.

By: /s/ Jeffrey T. Perry
Jeffrey T. Perry
Supreme Court No.: 0088989

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Dr. Richard Carrier, Ph.D.