THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. RICHARD CARRIER,	:	Case No. 2:16-cv-00906-MHW-EPD
	:	
Plaintiff,	:	Judge Michael H. Watson
	:	
v.	:	
	:	
FREETHOUGHTBLOGS NETWORK, PAUL Z. MYERS, PH.D., THE ORBIT, STEPHANIE ZVAN, SKEPTICON, INC., LAUREN LANE, and AMY FRANK-SKIBA,	:	
	:	
Defendants.	:	

REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JURISDICTIONAL DISCOVERY AND FOR AN EVIDENTIARY HEARING

Defendants Freethoughtblogs Network, Paul Z. Myers, Ph.D., The Orbit, Stephanie Zvan, Skepticon, Inc., Lauren Lane, and Amy Frank-Skiba filed their Motion to continue the preliminary Conference, to take jurisdictional discovery, and for the Court to hold an evidentiary hearing on the issue of personal jurisdiction. Plaintiff Opposed and Defendants hereby reply.

1.0 INTRODUCTION

Plaintiff filed this as a SLAPP[1] suit. As an Ohio appellate court recognized, "These suits, referred to as strategic lawsuits against public participation ('SLAPP'), can be devastating to individual defendants or small news organizations and act to chill criticism and debate." *Murray v. Chagrin Valley Publ'g. Co.*, 8th Dist. Cuyahoga No. 101394, 2014-Ohio-5442, ¶ 40.

[1] SLAPP is an acronym for Strategic Litigation Against Public Participation. It refers to cases brought to silence critics rather than to remedy actual damages.

Plaintiff knows that the real goal of his suit is to try and chill dialog of his much-discussed (and self-admitted) sexual misconduct. He also knows that the development of a factual record will require him to prove jurisdiction by a preponderance of the evidence.[2] He will need to do this at trial anyway, so why not now?

One need look no further than the first several sentences of Plaintiff's Opposition to understand the value of holding an evidentiary hearing on jurisdiction. Carrier proclaims, "[e]very defendant knew that Plaintiff, Dr. Carrier … 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." Plaintiff's Brief in Opposition to Defendants' Motion for Jurisdictional Discovery and for an Evidentiary Hearing (Carrier Opp'n), Dkt. No. 27, p.1 §1. Carrier provides nothing more than his own self-serving pronouncement of what Defendants knew.

Despite his unqualified pronouncement that **Defendants knew** Carrier had ties to Ohio,[3] record evidence contradicts this statement – namely that Dr. Carrier had a well-established affiliation with SSA and Camp Quest. On June 15, 2016, on his own blog, Dr. Carrier flatly denied any significant affiliation with SSA or Camp Quest, writing, "**I am not an employee of either Camp Quest or the SSA, or any of their affiliates. Nor am I on their boards of directors or speakers' bureaus. I have rarely even volunteered for them.**" Defs' Motion, Ex. 1, Dkt. No.

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[2] Plaintiff's resistance might be ill-placed anyhow. At this point, the factual record is so well developed that jurisdiction should be reviewed at a preponderance of the evidence standard. *See Grayson v. Anderson*, 816 F.3d 262 (4th Cir. 2016) (the preponderance standard may apply even when the court does not hear live testimony at the hearing).

[3] Defendants do not concede the relevance of Dr. Carrier's ties to Ohio, as the record evidence shows that those are questionable too. Nevertheless, the relevant inquiry at this time is the Defendants' ties to Ohio – there are none.

23-1, p.3. In the blog post, Dr. Carrier was clearly distancing himself from SAS and Camp Quest. Moreover, Dr. Carrier made these statements on June 15, 2016, and alleges in the Complaint that the Defendants published their statements on June 15, June 20, June 21, and June 26. *See* Complaint, Dkt. No. 1, at ¶¶ 7, 10, & 15. Now that it serves his SLAPP suit, he claims he has important ties to them – and moreover, the Defendants should have known about those ties. This is but one example of the need for a hearing to evaluate Carrier's credibility and to make determinations of fact where allegations are currently in direct contradiction. Of course, Carrier's own published statements disavowed ties to these organizations, thus the court may simply find at this point that Carrier's statements are so lacking in credibility that an evidentiary hearing could not rehabilitate them.

"[A] defendant who alleges facts that would defeat the court's personal jurisdiction can invoke the court's discretion to order a pretrial evidentiary hearing on those facts. If the written submissions raise disputed issues of fact or seem to require determinations of credibility, the court retains the power to order an evidentiary hearing, and to order discovery of a scope broad enough to prepare the parties for that hearing. *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989) (internal citations omitted). Discovery "should be granted where pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary." *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430, fn. 24 (9th Cir. 1977), citing *Kilpatrick v. Texas & P. Ry.*, 72 F. Supp. 635, 638 (S.D.N.Y.1947). Plaintiff argues that the Court should not allow jurisdictional discovery or a hearing because it would be "unfair" to him and because the relevant issues are closely intertwined with the case in chief. However, he provides no analyses to support this assertion. Even cursory review of the

relevant elements reveals that the factual allegations Plaintiff will need to prove relevant to jurisdiction in no way relate to factual issues relevant to the case in chief.

Limited discovery and a short evidentiary hearing will allow the Court to make an informed decision as to whether Plaintiff can meet his burden of establishing the elements of personal jurisdiction

2.0 BURDEN OF PROOF

While the plaintiff must initially simply allege jurisdictional facts, the burden of proving jurisdiction is not a static at the "well pled complaint" standard. "[A] plaintiff's burden shifts from a 'relatively slight' burden to a more significant burden based upon the development of the factual record, i.e., the more developed the factual record, the higher the plaintiff's burden becomes." *VM Servs. v. Two Men & A Truck/International, Inc.*, 2008 U.S. Dist. LEXIS 98648, *4 (W.D. Mich. Dec. 5, 2008) (citing cases).

This case is atypical. The Plaintiff clearly lacked confidence in his claims of personal jurisdiction from the inception of the case. He went quite far in establishing a factual record in the complaint itself, attaching twenty-seven exhibits to the Complaint. Dkt. Nos. 1-1 to 1-27. At this point, the Plaintiff himself established a thick factual record. The Defendants responded with their own significant factual record which included ten exhibits [Dkt. Nos. 10-1 to 10-10], and the Plaintiff then packed the factual record even more with thirty additional exhibits. Dkt. Nos. 17-1 to 17-30. At this point, the Court has sixty-seven exhibits of 300 pages before it.

When considering a challenge to its jurisdiction, a court may receive and weigh affidavits. 5 Wright and Miller, Federal Practice and Procedure § 1351, at 565 (1969). If the Court is at all inclined to consider the Plaintiff's evidentiary fabrications and conclusory statements, then it would be proper for it to require him to submit to cross examination.

In this case, there are issues of credibility and disputed issues of fact that require resolution. The Plaintiff must, by virtue of the existing significant and burgeoning factual record, show that jurisdiction exists by a preponderance of the evidence. *See John Welsh & Flo-Start, Inc. v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980).

Defendants understand and acknowledge the great advantage to Plaintiff of being subjected to a *prima facie* evidence standard rather than a preponderance of the evidence standard.

> Where…the district court relies solely on written submissions and affidavits to resolve a Rule 12(b)(2) motion, rather than resolving the motion after either an evidentiary hearing or limited discovery, the burden on the plaintiff is "relatively slight," *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988), and "the plaintiff must make only a prima facie showing that personal jurisdiction exists in order to defeat dismissal," *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). In that instance, the pleadings and affidavits submitted must be viewed in a light most favorable to the plaintiff, and the district court should not weigh "the controverting assertions of the party seeking dismissal." *Id*. at 1459.

Air Prods. & Controls, Inc. v. Safetech Int'l, Inc. 503 F.3d 544, 549 (6th Cir. 2007)

Plaintiff likely knows that he could never meet the higher standard and therefore he stolidly argues a hearing is not necessary. Plaintiff argues that he can meet the *prima facie* standard if the court views his statements in a light most favorable to him and therefore it would not be fair to him for the Court to hear Defendants' evidence and accordingly subject him to a heighten burden of proof. Plaintiff confuses what is *fair* with what is *advantageous*.

What the Plaintiff fails to understand, and the reason he should perhaps *welcome* jurisdictional discovery and an evidentiary hearing, is that he currently has not even met the *prima facie* standard.

For example, a *prima facie* case to meet Ohio's long-arm statute must include factual elements that demonstrate Defendants knew Carrier had recently moved to Ohio. *See* Ohio Rev. Code § 2307.382(A)(6). That is not all Plaintiff needs to prove, but it is essential and if Defendants did not know of the move, jurisdiction fails. Plaintiff says he can establish this, but currently the

only support for his assertion is that he publicly mentioned his move in a few on-line postings. He has no evidence Defendants read those postings. He simply presumes that people who clearly do not like Dr. Carrier were fixated on following his Facebook page. His assertion that Defendants knew he had recently moved to Ohio is nothing more than a hunch. A hunch is not a sufficient basis for jurisdiction. In fact, a hunch cannot even support a *plaintiff's* request for jurisdictional discovery. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) ("The denial of [plaintiff's] request for discovery, which was based on little more than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of discretion."). Plaintiff should be cautious in opposing this motion.

Defendants' position is simple; if the Court disagrees with Defendants and finds that Dr. Carrier's hunch is sufficient to establish a *prima facie* case for personal jurisdiction, then Defendants should be given the opportunity to test his hunch through the exchange and examination of testimony. Of course, in light of the lack of evidence supporting jurisdiction, the Court could grant Defendants' Motion to Dismiss now, even before Defendants' file their reply. Plaintiff would not be prejudiced since he opposes jurisdictional discovery and an evidentiary hearing.

Moreover, Plaintiff fails to understand the reason for the shifting burden of proof. In some ways, it is a chicken and egg problem. If a defendant challenges jurisdiction on purely legal grounds, or if she challenges the factual basis for jurisdiction but fails to muster evidence to dispute jurisdictional facts, then the court must apply the prima facie standard construing all facts in the light most favorable to the plaintiff. Accordingly, no hearing is necessary. However, where a defendant successfully calls a plaintiff's jurisdictional allegations into question, as Defendants have done here, the court should apply a preponderance of the evidence standard and a hearing is necessary to give the plaintiff an opportunity to present evidence to meet the standard. *See Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1160 (D. Nev. 2009) (concluding that "the

Court should grant discovery when the jurisdictional facts are contested or more facts are needed"). The preponderance standard may apply even when the court does not hear live testimony at the hearing. *See Grayson v. Anderson*, 816 F.3d 262 (4th Cir. 2016).

Plaintiff rightfully acknowledges that Defendants do not waive their personal jurisdiction defense even if the Court rules in favor of Plaintiff at this stage of the proceedings, and argues that he should not have to bear the "overwhelming burden" and additional "monetary and emotional" costs that an evidentiary hearing would entail. Meanwhile, Plaintiff picked this fight, in this venue, and most certainly should have been prepared for a dispute over jurisdiction. If "monetary and emotional" concerns are to come into play, perhaps resolving jurisdiction now – rather than at trial, would be to everyone's benefit.

Presented with evidence contradicting Plaintiffs factual claims relating to jurisdiction, the Court would do well to resolve this issue now either by granting Defendants' Motion to Dismiss now, or by holding a hearing first and then ruling on jurisdiction. Since Plaintiff opposes the hearing, perhaps the better course is to grant the motion now. By doing so, the Court not only ensures that the Defendants will not be forced to defend an action in a foreign jurisdiction where they should never have been called into court in the first instance, but also protects the Plaintiff from expending time and treasure only to ultimately be thwarted on an issue the Court can resolve at this early stage. An early determination thus ensures that the parties and the Court do not waste time an energy trying a case that does not belong in this Court.

3.0 JURISDICTIONAL FACTS NOT INTERTWINED WITH CASE IN CHIEF

Plaintiff argues that if jurisdictional facts are intimately intertwined with the parties' disputes on the merit, the court should delay the jurisdictional dispute until the case in chief. Plaintiff claims that, "the jurisdictional facts are so closely related to the Plaintiff' 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." However, nowhere does Plaintiff explain how jurisdictional facts are intertwined with facts concerning the case in chief. He offers absolutely no analysis in support of his claim. Nor could he.

To succeed on a defamation claim, a public figure must prove actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). In turn, actual malice requires a showing, by clear and convincing evidence, that a defendant made a false statement with knowledge of the falsity or with reckless disregard for the truth. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986).

To establish jurisdiction under Ohio's long-arm statute, Plaintiff must show that Defendants acted with a reasonable expectation that someone would be injured in Ohio. Ohio Re. Code § 2307.382(A)(6). The factors establishing liability for defamation in no way rely on the location of the injured party. In other words, if Defendants are liable for defamation, they are liable regardless of where Plaintiff suffered the brunt of his injuries. Plaintiff can present his case in chief with no discussion whatsoever about where he was living at the time the Defendants published their statements.

Similarly, under a Due Process analysis, Plaintiff must demonstrate that Defendants knowingly targeted Ohio. They could not have targeted Ohio without knowing Dr. Carrier had moved there. Dr. Carrier *suspects* that each of the Defendants knew he moved, since he made a couple of posts to his Facebook page about the move. Defendants deny having such knowledge. Jurisdictional discovery will allow the parties to ask for any additional documentation to resolve this question of fact.

Likewise, to prove his tortious interference with a business expectancy cause of action, Plaintiff may discuss the location of various businesses, but he does not have to prove they are in

Ohio. They could be located anywhere. Nor do Plaintiff's emotional distress claims involve any elements that are coextensive with jurisdictional requirements.

An evidentiary hearing will allow the Court to weigh the evidence and determine if Plaintiff can establish that Defendants knew of his move to Ohio by a preponderance of the evidence, which he will eventually have to do in any event.

4.0 PLAINTIFFS' REQUEST FOR DISCOVERY IS LIMITED

4.1. Knowledge of Move

Carrier makes the conclusory statement that each Defendant knew he had moved to Ohio prior to publishing statements about him.

Carrier bases his assumption on the fact that his move was in his words "well publicized" "through various means." Those means are primarily his Facebook page. It seems illogical for a victim of sexual assault to be Facebook friends with her assailant, but that seems to be Carrier's position – that after being sexually assaulted, his victim would choose to be his buddy on social media. In fact, Defendants did not know of the move and therefore deny the claim. Dkt Nos. 10-2, 10-3, 10-5, 10-6, & 16. Defendants wish to take discovery of facts and documents in Carrier's possession in support of his claim that Defendants knew of his move (or a lack thereof). They suspect there are none. Discovery will allow them to confirm this for themselves and for the Court.

4.2. Ohio Affiliations

Carrier makes the conclusory statement that "every defendant" knew that he had "ongoing professional relationships and valid business expectancies with Ohio organizations." Meanwhile, the Defendants have provided evidence that they knew no such thing.

Carrier states that "[m]ost 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." Meanwhile, at the same time the Defendants published their statements, Carrier himself has made it clear that he rarely did anything for these organizations, and what he did, he did in California.

Carrier seems to take the position that since he had a vaguely-defined "affiliation" with organizations that have their headquarters in Ohio, that transforms to the purposeful direction and full knowledge required by the Ohio long-arm statute and the Due Process clause. This is an incorrect statement of the law. Jurisdictional analysis examines a **defendant's** ties to a state, not the plaintiff's. Otherwise, every family member and business associate or political ally of the late Senator John Glenn could sue for defamation in Ohio, since after all, they are "affiliated" with an Ohio based individual. If the Court accepts Plaintiff's position that Plaintiff's own ties to Ohio are relevant, then Plaintiffs wish to—and should be permitted to—take discovery on the full extent of those ties, as well as discovery into Plaintiff's evidence supporting his assertion that Defendants were aware of his ties to Ohio.

4.3. Google Trends

As stated earlier, Plaintiff knew he faced a mighty burden to establish personal jurisdiction over these Defendants. Accordingly, he peppered the Complaint with Google trends data allegedly demonstrating that people in Ohio searched for information about him.

This information is largely irrelevant. It shines no light on whether Defendants knew Dr. Carrier had moved to Ohio (necessary to establish personal jurisdiction under Ohio's long-arm Statute) or on whether Defendants targeted Ohio (necessary under a Due Process analysis).

However, to the extent the Court believes searches for "carrier" generated from within Ohio on the specified dates are relevant to the question of jurisdiction, Defendants wish to examine the reliability of that data and the methodology for gathering it. Further, Defendants wish to depose

Carrier on how he came up with that methodology, and why he searched for "Richard Carrier" instead of "Dr. Richard Carrier," which yields less advantageous results.

5.0 CONCLUSION

This case does not belong in this Court. Plaintiff only recently moved to Ohio and Defendants have nothing to do with the state of Ohio. Plaintiff made rank allegations that cannot support a *prima facie* case for personal jurisdiction over these Defendants. The Court should either grant Defendants' Motion to Dismiss or allow jurisdictional discovery and hold an evidentiary hearing.

Dated this 9th day of February, 2017.

Respectfully submitted,

/s/ Jeffrey M. Nye

Jeffrey M. Nye (0082247)
STAGNARO, SABA & PATTERSON CO. L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208
(513) 533-6714
(513) 533-6711-facsimile
jmn@sspfirm.com

Marc J. Randazza (*Pro Hac Vice*)
D. Gill Sperlein (*Pro Hac Vice*)
RANDAZZA LEGAL GROUP, PLLC
4035 South El Capitan Way
Las Vegas, NV 89147
(402) 420-2001
(305) 437-7662 -facsimile
ecf@randazza.com

Attorneys for Freethoughtblogs Network, Paul Z. Myers, Ph.D., The Orbit, Stephanie Zvan, Skepticon, Inc., Lauren Lane, and Amy Frank-Skiba

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served upon all parties via CM/ECF on February 9, 2017.

/s/ Jeffrey M. Nye
Jeffrey M. Nye (0082247)