

# COMMONWEALTH OF VIRGINIA



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## Sixteenth Judicial Court

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Jason C. Schwartz, Esquire  
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Theodore J. Boutrous, Jr., Esquire  
333 South Grand Avenue  
Los Angeles, California 90071

Re: Devin G. Nunes v. The McClatchy Company et al  
Case No.: CL19-629

Dear Mr. Biss, Mr. Schwartz, Mr. Boxler and Mr. Boutrous:

Defendant The McClatchy Company (“McClatchy”) has moved to dismiss the complaint against it in the above-referenced case for lack of personal jurisdiction. In order to survive a motion to dismiss, the plaintiff needs to make a *prima facie* showing of personal jurisdiction and the court “must draw all reasonable inferences and resolve all factual disputes in plaintiff’s favor.” See *Massey Energy Co. v. UMW*, 69 Va. Cir. 118 (Va. Cir. Ct. 2005) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)).

McClatchy is a Delaware corporation that is headquartered in California. To exercise general jurisdiction over a non-resident defendant, the plaintiff must prove the defendant has fairly extensive, continuous, and systematic contacts with Virginia. *Witt v. Reynolds Metals Co.*, 240 Va.452 (1990).

The primary issue presently before the Court is whether McClatchy, as opposed to its subsidiaries, transacts business in Virginia. The separate corporate entities of corporations will

be observed by the courts unless a corporation is shown to be the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation. There is no allegation in the complaint that McClatchy Newspaper, Inc. ("MNI") who publishes *The Fresno Bee* or *The Fresno Bee* itself is a creature, device, stooge or dummy of McClatchy. Thus, the allegations in the complaint attributable to MNI or *The Fresno Bee* would not impute to McClatchy. *PBM Capital Invs., LLC v. Gen. Elec. Co.*, No. 3:15CV00037, 2016 U.S. Dist. LEXIS 96055, at \*3 (W.D. Va. July 22, 2016).

The complaint seems to conflate McClatchy, *The Fresno Bee* and MNI, Inc when describing contacts with Virginia. For example, paragraph 8 of the complaint lists statistics summarizing "McClatchy media companies, and their digital platforms. The paragraph continues to address "McClatchy's media companies" and does not individually address McClatchy. Paragraph 9 alleges the use of Twitter by McClatchy and its media companies, including *The Fresno Bee*. " In paragraph 10 of the complaint, the article in question is alleged to have been published by McClatchy but it appears it was written and published by *The Fresno Bee*. In paragraph 13, the fraudulent practices alleged are by the executive editor of *The Fresno Bee*. The Twitter account named in paragraph 15 is the twitter account of *The Fresno Bee*. The articles which serve as the basis for the conspiracy are articles shown in the complaint to be published by *The Fresno Bee*, even though the allegation is the articles were published by McClatchy. Other than the conclusion "McClatchy continued to exhibit a reckless disregard for the truth," there are no facts stating what action are specifically attributed to McClatchy in these paragraphs.

By contrast, it is alleged in paragraph 21 that McClatchy specifically owns real property and investments in Charlottesville, Virginia;" and, "McClatchy publishes hundreds of stories every year on matters of unique concern to Virginia;" and, McClatchy derives substantial revenue from its property and business in Virginia."

The defense vehemently denies these allegations and submitted two declarations in support of the motion to dismiss to show some of the plaintiff's statements are false. However, this Court is not aware of any Virginia caselaw that permits it to determine this issue based on sworn declarations. For this reason, the Court is going to permit the parties to do limited discovery on personal jurisdiction after Court approval subject to a protective order.

Plaintiff's proposed discovery was attached to the defense Memorandum in Support of The McClatchy Company's Motion for a Protective Order. The Court orders discovery to be answered by and as to The McClatchy Company only and not for its subsidiaries. The following interrogatories submitted in the plaintiff's discovery are to be answered by the defense: Interrogatories 4, 6, 7, 8. Interrogatory 5 is to be answered until the words business activity. McClatchy is not required to produce any financial documentation pursuant to the language in interrogatory 5.

McClatchy is to answer request for production of documentation nos. 5, 6, and 7.

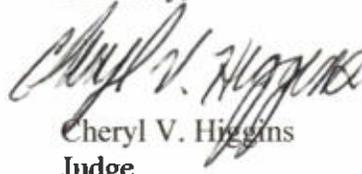
The defense may also submit discovery, but it will need to be reviewed by the Court for the Court to designate which matters are to be answered by the plaintiff. All discovery is to be

submitted to the opposing party within 30 days of this opinion letter. Please remember to allow time for this Court's review.

The Court questions whether all the necessary information on this issue can be established by discovery or whether it will require additional testimony. In consideration of the possibility that additional oral testimony may be necessary, counsel is to set another hearing date between April 15<sup>th</sup> and May 15<sup>th</sup> for additional oral testimony if necessary or for any additional argument and ruling by the Court.

Mr. Boutrous is to prepare the Order of the Court. Mr. Biss is to endorse the Order as he sees fit and forward to the Court for entry.

Sincerely,

A handwritten signature in black ink, appearing to read "Cheryl V. Higgins". The signature is written in a cursive style with some loops and flourishes.

Cheryl V. Higgins  
Judge