

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

STEPHEN BEHNKE, <i>et al.</i>,	:	CASE NO. 2017 CA 005989 B
	:	Judge Todd E. Edelman
Plaintiffs,	:	Next Event:
vs.	:	December 1, 2017
	:	Initial Scheduling Conference
DAVID H. HOFFMAN, <i>et al.</i>,	:	
Defendants.	:	

**DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS
CONTESTED MOTION TO COMPEL ARBITRATION**

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I. INTRODUCTION

Plaintiffs Stephen Behnke (“Behnke”) and Russell Newman (“Newman”) are former employees and parties to employment agreements with the American Psychological Association (“APA”) that contain broad arbitration provisions requiring arbitration of any dispute arising regarding the rights, duties, or obligations under those agreements.¹ In this lawsuit, Behnke and Newman contend that they were defamed by statements in a report (the “Report”) authored by law firm Sidley Austin, LLP, which was retained by APA to investigate APA’s role in supporting enhanced interrogation techniques used by the military on detainees in security facilities following September 11, 2001. The statements identified by Behnke and Newman as defamatory are based on performance of their rights, duties, or obligations as employees of APA. Their conduct as APA employees is central to the litigation and forms the basis for their claims. Pursuant to their employment agreements and well-settled law, Behnke and Newman’s claims in this lawsuit must be arbitrated.²

II. FACTUAL BACKGROUND

A. APA and the Employment Agreements of Behnke and Newman

APA is the leading scientific and professional organization representing psychology in the United States, with more than 115,700 researchers, educators, clinicians, consultants, and

¹ APA has submitted this motion at the same time as a special motion to dismiss under the District of Columbia’s Anti-SLAPP Act. Because arbitrability is generally considered a threshold issue, APA requests that the Court address the arbitration motion first.

² The Behnke and Newman arbitration provisions require arbitration in the District of Columbia before a single arbitrator pursuant to rules agreed upon by the parties. *See* Ex. 1, Aff. of Theresa McGregor; Ex. 1-A, Behnke Emp’t Agmt. ¶ 14; Ex. 1-B, Newman Emp’t Agmt. ¶ 15. Absent the parties’ agreement, the American Arbitration Association must appoint an arbitrator, and the American Arbitration Association Employment Dispute Resolution Rules govern. *Id.* APA requests that in ordering Behnke and Newman to arbitrate, the Court give the parties twenty-one (21) days to agree on an arbitrator and rules to govern the arbitration, and, in the event they cannot agree, by the thirtieth (30th) day following the Court’s order, Behnke and Newman be required to commence an arbitration proceeding in the District of Columbia before the American Arbitration Association. *See* APA’s proposed Order, attached.

students as its members nationally. See <http://www.apa.org/about/index.aspx>. Its mission is to advance the creation, communication, and application of psychological knowledge to benefit society and improve people’s lives by, among other things, improving the qualifications and usefulness of psychologists by establishing high standards of ethics, conduct, education, and achievement. *Id.* APA is incorporated and has its headquarters in the District of Columbia.

Behnke was employed by APA from November 2000 to July 8, 2015 as Director of the Office of Ethics (“Ethics Director”). See Ex. 2, Aff. of Stephen Behnke (“Behnke Aff.”) in Supp. of Pls’ Consol. Mem. in Opp’n to Defs.’ Mots. to Dismiss for Lack of Personal Jurisdiction and Forum Non Conveniens in *James v. Hoffman*, 2017 CV 00839 (Mont. Co., Ohio Ct. C. P.) (“Ohio Motion”) ¶ 2.³ His duties included “administration of ethics case adjudication, providing staff support to the APA Ethics Committee, supporting APA governance-based policy development in the area of ethics, and providing education about psychological ethics to the profession and the public” and “staff support to the Presidential Task Force ... for Psychological Ethics and National Security (PENS) in 2005.” *Id.* Behnke conducted or provided staff support for the ethics investigations that are central to the Report. *Id.* ¶¶ 3, 4, 8.

Newman was employed by APA from 1994 to 2007, Compl. ¶ 43, and at all times relevant to this litigation was Executive Director for the APA Practice Directorate. Compl. ¶ 43; Ex. 3, Aff. of Russell Newman (“Newman Aff.”) in Supp. of Ohio Motion ¶ 12. In that position, Newman implemented legislative, legal, public education, and marketplace strategies to support psychology practitioners and to increase access to psychological services, and participated in the

³ This Court can review affidavits and other evidence offered in support of a motion to compel arbitration to determine whether the dispute is arbitrable. See, e.g., *Friend v. Friend*, 609 A.2d 1137, 1139 (D.C. 1992) (“When a motion to compel arbitration (or its equivalent, a motion to dismiss) is supported by an affidavit identifying an arbitrable dispute, the affidavit . . . was sufficient to compel the submission of the dispute to an arbitrator, as the agreement provided.”). The Court can also take judicial notice of filings made by Plaintiffs in other legal proceedings. See *S.S. v. D.M.*, 597 A.2d 870, 880 (D.C. 1991); see also *Flanagan v. Islamic Republic of Iran*, 87 F. Supp. 3d 93, 96 & n.3 (D.D.C. 2015).

PENS Task Force and attended its June 24–26, 2005 in-person meeting. Newman Aff. ¶ 4, Compl. ¶ 43.

Behnke and Newman were parties to employment agreements with APA, which required the arbitration of “any dispute that may arise regarding their respective rights, duties or obligations” and other provisions pertinent to their claims. *See* Ex. 1-A ¶¶ 5, 6(ii), 8, 14; Ex. 2 ¶¶ 6, 9, 15.

B. The Investigation and IR

In 2014, APA determined to hire counsel to conduct an independent review (the “IR”) relating to allegations that, following the attacks of September 11, 2001, APA had colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad. Compl. ¶ 270. APA hired Sidley Austin LLP (“Sidley Austin”) to conduct the IR independent of APA. *Id.* In the course of its work, Sidley interviewed Behnke, then Ethics Director, and Newman, about their work at APA. Compl. ¶ 31, 40, 43, 201.

C. The Complaint Alleges that APA Defamed Behnke and Newman in Connection with their Rights, Duties, or Obligations as APA Employees.

The Complaint alleges that Defendants made defamatory statements about Behnke and Newman relating specifically to their employment with APA. *See generally* Compl. ¶¶ 36, 40 (noting that Behnke was Ethics Director from 2000 to 2015, when APA terminated his employment), ¶ 43 (noting that Newman worked as Executive Director for the APA Practice Directorate from 1994 to 2007). Behnke and Newman have conceded that Sidley’s work as to Behnke and Newman was undertaken in connection with “their roles as APA employees or persons who were appointed by APA to become involved in its activities.” *Id.* ¶ 205.

1. *Behnke*

The Complaint alleges that APA wrongfully discharged and defamed Behnke by falsely asserting that, as Ethics Director, he mishandled ethics complaints to protect Department of Defense (“DoD”) psychologists from censure. *See id.* ¶¶ 19, 135–50, 446, Ex. A Statement Nos. 11, 56, 57, 98, 217. According to the Complaint, any “flaws” in Behnke’s handling of ethics complaints identified in the Report “were flaws in the processes created by the APA Board” Compl. ¶ 148. The Complaint further contends that APA defamed Behnke by falsely suggesting that, while Ethics Director, he “colluded” with DoD psychologists to influence APA policy in favor of the DoD, and helped to “issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines.” *Id.* ¶¶ 87, 210, 220, Ex. A Statement Nos. 5–8, 10, 45–46, 51, 114, 127, 135, 151, 158, 204. The Complaint also alleges that Behnke was defamed in connection with an extensive array of other matters pertinent to his employment. Ex. 4.

2. *Newman.*

As Newman himself admits, he “was asked by the Task Force chair to serve as a non-voting observer owing to [his] role at the APA” as Executive Director for the APA Practice Directorate, “responsible for addressing professional practice issues on behalf of the Association’s membership.” Ex. 3 ¶ 4; Compl. ¶ 43. The Complaint alleges that the Report defamed Newman with regard to his rights, duties, or obligations as an APA employee. Ex. 5.

III. ARGUMENT

A. **Behnke and Newman Must Pursue their Claims in Arbitration in Washington, D.C.**

Behnke’s and Newman’s employment agreements with APA contain broad arbitration clauses. Under federal arbitration law governing arbitrability, their claims must be arbitrated.

And under the District of Columbia Revised Uniform Arbitration Act (the “D.C. Act”), which governs the arbitration procedures, the Court should compel Behnke and Newman to arbitrate.

1. *The FAA Supplies the Court’s Arbitrability Standards.*

Federal substantive law of arbitrability governs whether Behnke’s and Newman’s claims are within the scope of their arbitration agreements and therefore subject to arbitration. The Federal Arbitration Act (“FAA”) applies to arbitration clauses in contracts involving interstate commerce. *See* 9 U.S.C. §§ 1, 2. The Behnke and Newman employment agreements involve interstate commerce, as plainly alleged in the Complaint and in Behnke’s and Newman’s own affidavits. *See, e.g.*, Behnke Aff. ¶¶ 2, 3; Compl. ¶ 43. And as Behnke and Newman have acknowledged, APA routinely engages in interstate commerce. Compl. ¶¶ 40, 43, 48.

When an employee’s duties involve interstate activity, the FAA governs the arbitrability of that employee’s disputes. *See, e.g., Dowley v. Dewey Ballantine, LLP*, No. 05-622 (EGS), 2006 WL 1102768, at *2 (D.D.C. Apr. 26, 2006) (FAA applies to employment contracts involving interstate commerce); *Brown v. Dorsey & Witney, LLP*, 267 F. Supp. 2d 61, 69 (D.D.C. 2003) (same); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (agreements involved interstate commerce where one party “engaged in business throughout the southeastern United States”); *CarMax Auto Superstores California LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1101 (C.D. Cal. 2015) (employment agreement subject to the FAA when employee facilitates interstate business). Thus, the federal substantive law of arbitrability governs the scope of Behnke and Newman’s arbitration clauses. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (directing courts to apply the “federal substantive law of arbitrability” where the FAA applies); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (the FAA governs arbitrability in state or federal

court), *superseded by statute on other grounds, as stated in Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

2. *There Is a Strong Presumption of Arbitrability.*

When a party moves to compel arbitration, the court's review is limited to determining whether the dispute is arbitrable. *Stromberg Sheet Metal Works, Inc. v. Wash. Gas Energy Sys., Inc.*, 448 F. Supp. 2d 64, 69 (D.D.C. 2006). This inquiry is twofold: the court first "must decide whether the parties entered into a valid and enforceable arbitration agreement." *Id.* at 68. If yes, "the second step is to determine whether the arbitration agreement encompasses the claims raised in the complaint." *Id.* at 68. "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dowley*, 2006 WL 1102768, at *3 (citation omitted).

Under the FAA, a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Where parties have agreed to arbitrate, courts apply a "strong presumption" in favor of enforcement with "[a]ny doubts ... resolved in favor of arbitration." *Stromberg Sheet Metal Works, Inc.*, 448 F. Supp. 2d at 67 (internal and citation quotation omitted). In such a case, arbitration "should not be denied unless it may be said with *positive assurance* that the arbitration clause is *not susceptible of an interpretation that covers the asserted dispute.*" *Nanosolutions, LLC v. Prajza*, 793 F. Supp. 2d 46, 54 (D.D.C. 2011) (emphasis added).

This is so particularly where an arbitration clause is broad, covering "any dispute" that arises out of an agreement. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.* 475 U.S. 643, 650 (1986); *Nanosolutions, LLC*, 793 F. Supp. 2d at 57 (arbitration clause covering "any dispute" arising from agreement is "extremely broad"). "[O]nly the most forceful evidence of a

purpose to exclude the claim from arbitration can prevail” over a broad arbitration clause.

Hercules & Co. v. Shama Rest. Corp., 613 A.2d 916, 923 (D.C. 1992) (emphasis added) (internal quotation marks and citation omitted); *Carter v. Cathedral Ave Co-op., Inc.*, 566 A.2d 716, 718-19 & n.8 (D.C. 1989).

3. *Arbitration is Required if the Claims in the Litigation “Touch Upon” the Contract Containing the Arbitration Provision.*

Where a contract broadly calls for arbitration of “any dispute” arising from the contract, arbitration is required so long as the claims “touch upon” the contract. *See Wolff v. Westwood Mgmt. LLC*, 503 F. Supp. 2d 274, 282 (D.D.C. 2007), *aff’d*, 558 F.3d 517 (D.C. Cir. 2009) (“[B]road arbitration clauses encompass all matters that ‘touch’ upon the contract.” (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 624 n.13)); *Dowley*, 2006 WL 1102768, at *7 (same). This “touch upon” test includes alleged torts that arise involving parties to an arbitration agreement, as well as “all claims that are germane to the subject matter of the contract.” *See Dowley*, 2006 WL 1102768, at *9 & n.11 (ERISA claim was arbitrable because disputed benefits plan flowed from Partnership Agreement, which contained an arbitration provision); *Parker v. K & L Gates, LLP*, 76 A.3d 859, 867 (D.C. 2013) (all contract, tort, or statute claims were arbitrable because arbitration provision applied to “[a]ny controversy, claim or dispute” concerning employment agreement). Defamation claims are squarely within the scope of arbitration agreements. *See, e.g., Pearce v. E.F. Hutton Grp., Inc.*, 264 U.S. App. D.C. 246, 252, 828 F.2d 826, 832 (1987) (employee’s defamation claim based on job performance allegations was arbitrable).

4. *Behnke’s and Newman’s Claims Are Arbitrable under the Arbitration Clauses in their Employment Agreements.*

Here, Behnke’s and Newman’s claims are arbitrable.⁴ The broad arbitration provisions to which their claims are subject require arbitration of “*any dispute* that may arise regarding their respective rights, duties or obligations under this Agreement,” giving rise to a strong presumption of arbitrability. Ex. 1-A ¶ 14; Ex. 1-B ¶ 15 (emphasis added). It is well-settled that this “any dispute” language in an arbitration agreement is the touchstone of a broad arbitration clause, encompasses torts that pertain to the employment, and entitles claims to a presumption of arbitrability. *See, e.g., Pearce*, 264 U.S. App. D.C. at 249, 828 F.2d at 829 (“any dispute” included defamation claim); *Nanosolutions, LLC*, 793 F. Supp. 2d at 57; *Carter*, 566 A.2d at 718-19 & n.8. Neither Behnke nor Newman can overcome that presumption. *See, e.g., Nanosolutions, LLC*, 793 F. Supp. 2d at 54; *Shama Rest. Corp.*, 613 A.2d at 923. And their arbitration clauses are devoid of an “express provision excluding” defamation or false-light claims from their scope, the only basis on which the presumption of arbitration can be overcome. *See Shama Rest. Corp.*, 613 A.2d at 923. Behnke and Newman can neither demonstrate that the parties intended to exclude their claims because no exclusions were agreed to, nor provide “the most forceful evidence of a purpose to exclude the claim[s] from arbitration” or establish “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers” their claims. *See id.*; *Nanosolutions, LLC*, 793 F. Supp. 2d at 54. Behnke’s and Newman’s claims touch upon their employment agreements and their rights, duties, or obligations as employees of APA and fall squarely within the arbitration clause.

⁴ An arbitration agreement typically survives the expiration or termination of the rest of a contract. *See Wolff*, 503 F. Supp. 2d at 280-81 (“It is well settled that an arbitration clause is enforceable after the expiration of a contract . . . because it is a ‘structural provision’ that relates to remedies and dispute resolution, and not an obligation concerning performance.”).

a. *Behnke’s claims are arbitrable because they touch upon his rights, duties, or obligations under his employment agreement.*

Behnke’s claims are arbitrable because they “touch upon” his employment agreement and his position as an APA employee and rights, duties, or obligations as Ethics Director, which are integral to the allegations of Defendants’ wrongdoing. *Wolff*, 503 F. Supp. 2d at 282.

The Report’s allegedly defamatory statements regarding Behnke relate to his conduct and activities as Ethics Director. *See generally* Compl. ¶ 205. That conduct “touches on” Behnke’s employment and employment agreement with APA. *See Wolff*, 503 F. Supp. 2d at 282. Exhibit 4 hereto identifies the many allegedly defamatory statements that describe (and critique) Behnke’s performance of duties and obligations fundamental to his job as Ethics Director. Those claims must be arbitrated. *See Pearce*, 264 U.S. App. D.C. at 252, 828 F.2d at 832.

Behnke also seeks to establish that he was “wrongful[ly] discharge[d]” by APA. Compl. ¶ 446; *see id.* ¶ 269. To do so, he will have to demonstrate the absence of, *inter alia*, “dereliction of duty,” “continued unsatisfactory performance,” and “behavior in violation of APA policies,” Ex. 1-A ¶ 6(ii), and introduce evidence regarding his conduct as an APA employee, job duties and responsibilities, and interactions with his superiors, colleagues, and third parties. *See Hogley v. Kentucky Fried Chicken, Inc.*, No. 04-7202, 2005 WL 3838163, at *1 (D.C. Cir. Dec. 22, 2005) (plaintiff’s false accusation claim, which “would entail consideration of numerous facts concerning [plaintiff’s] employment relationship and performance” was arbitrable). Behnke’s claim for economic damages also “touches on” his employment agreement because that agreement precludes economic damages where termination is for cause. Compl. ¶¶ 35, 40, 185, 254–55, 446; Ex. 1-A ¶ 6(ii).

Behnke’s claim that he was defamed by the Report’s statements that he mishandled ethics complaints also touches upon his Ethics Director duties. To prove that claim, Behnke must refer

to his employment agreement and position as an APA employee and demonstrate, *inter alia*, that the factual statements in the Report were made with actual malice, were false, and that he appropriately handled ethics complaints. See Compl. ¶¶ 19, 135–50, Ex. A Statement Nos. 11, 56, 57, 98, 217; see also *Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013) (defamation defendant entitled to summary judgment where plaintiff failed to “raise[] a genuine issue” that defendant’s statements were false); *Hobley*, 2005 WL 3838163, at *1 (determination of claim “would entail consideration of numerous facts concerning appellant’s employment relationship” and job performance and was arbitrable). Behnke will have to establish that he handled ethics complaints fairly and in accordance with APA’s protocols and practices, and that he conducted investigations “[f]aithfully and diligently” and “refrain[ed] from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of” APA. Ex. 1-A ¶ 5(i), (iii). The Complaint refers to particular ethics investigations Behnke conducted, placing his rights, duties, or obligations as Ethics Director directly at issue. Compl. ¶¶ 135–51. Behnke claims he will show that he followed APA policies governing employees, which policies “were flaw[ed].” *Id.* ¶ 148. These allegations place at issue Ethics Office operations, policies, and practices, Behnke’s conduct in investigating ethics complaints, and interactions with Ethics Office employees, Board members, APA’s associate general counsel, complainants, complainees, and third parties.

Behnke’s role as an APA employee is also intrinsic to his claim that he was defamed by the Report’s conclusion that he “colluded” with DoD officials. Even if that conclusion were actionable and not opinion,⁵ Behnke’s defamation claim touches upon his employment

⁵ See, e.g., *Armstrong*, 80 A.3d at 184 (“[W]hile statements of fact may be the basis for a defamation claim, a statement of pure opinion cannot.” (internal quotation marks and citation omitted)). The Report statements regarding collusion constitute opinion and cannot provide the basis for a defamation claim. See, e.g., *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256 (D.C. 2012) (explaining that a statement of opinion—where “a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise”—is not an actionable defamation).

agreement and his position as an APA employee. Behnke will have to demonstrate that Defendants made a false statement of fact about him with actual malice and that, as Ethics Director, he did not collude with DoD officials. Compl. ¶¶ 87, 183, 210, 220; *see also id.* Ex. A Statement Nos. 5–8, 10, 45–46, 51, 114, 127, 135, 151, 158, 204. At issue will be Behnke’s authority and/or ability to influence APA policy, his actions undertaken in his position as Ethics Director, his communications with Plaintiffs and DoD representatives, and his sharing of APA information with individuals outside of APA. These matters necessarily involve Behnke’s “rights, duties or obligations” as an APA employee, as well as his compliance with the duty of loyalty required under his employment agreement. *See* Ex. 1-A ¶¶ 5, 14; *cf. Pearce*, 264 U.S. App. D.C. at 252, 828 F.2d at 832. Any effort by Behnke to prove that his degree of contact with DoD in the performance of his job duties was “normal,” Compl. ¶ 133, will put at issue the policies and practices of APA’s Ethics Office and management, as well as his personal conduct—all under the umbrella of his employment agreement. *See* Ex. 1-A ¶ 5.

Similarly, Behnke’s claim regarding the Report’s allegedly defamatory conclusion that “the facts ‘strongly’ suggest that [emails] were destroyed in an attempt to conceal . . . collaboration” also touches upon Behnke’s employment agreement and his position as an APA employee. Compl. ¶ 213, Ex. A Statement Nos. 183, 184. The emails at issue were on APA’s server and involved APA policy. *Id.* ¶ 214. Behnke apparently intends to establish that he “archived all of his e-mails and placed them in a folder on the APA server.” *Id.* ¶ 214; *see* Ex. A Statement Nos. 183, 184. Any evidence probative of this assertion involves his conduct as an APA employee and his compliance with APA policy and employment agreement provisions regarding the maintenance, preservation, and destruction of documents. *See* Ex. 1-A ¶ 6(ii) (grounds for termination for cause include destruction of APA property, behavior in violation of

APA policies, falsification of records, and misuse of APA resources), ¶ 5 (duty to “[f]aithfully and diligently” perform job functions and “[r]efrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of [APA]”).

Behnke’s claim that he was defamed by the Report statement that he disclosed APA’s confidential information, Compl. Ex. A Statement Nos. 161, 163, 173, also turns on an analysis of Behnke’s job duties. Behnke’s employment agreement prohibits disclosure of confidential APA information. *See* Ex. 1-A ¶¶ 5(iii), 8. To prove his claim, Behnke would need to show, among other things, either that the information he provided was not confidential or that its disclosure was approved by APA’s Chief Executive Officer—all within the scope of his employment. *Id.* ¶ 8.

Behnke also contends that he was defamed by the Report’s questioning whether he remitted to APA payments he received from teaching DoD ethics workshops. Compl. ¶¶ 216–19, Ex. A Statement Nos. 49, 157. Assuming *arguendo* that the statement qualifies as defamatory, this claim necessarily touches upon Behnke’s employment agreement and position as an APA employee. *See id.* Behnke’s classes for DoD and his payments for that work were governed by his employment agreement. *See* Ex. 1-A ¶ 5(ii) (employee required to devote full time to the business of APA, and outside consulting or employment must be approved in writing in advance by APA’s CEO). Litigation of this claim will require the parties to delve into APA’s policies and practices with regard to employees providing services outside APA; whether Behnke attended these sessions within the scope of his APA duties; and whether DoD was permitted to pay transportation costs not remitted to APA. Compl. ¶ 216.

b. *Newman’s claims are arbitrable because they touch upon his rights, duties, or obligations under his employment agreement.*

All of Newman’s defamation claims are also arbitrable because they touch upon his employment agreement and his position as an APA employee. *Wolff*, 503 F. Supp. 2d at 282. Each of the statements in the Report alleged by Newman to be defamatory relate to his conduct and activities in his capacity as APA Practice Directorate head. *See generally* Compl. ¶ 205.

Newman contends that his participation in the PENS Task Force, which is the fulcrum of his claims, was a function of his job duties. Newman Aff. ¶ 4; Compl. ¶¶ 74, 229. Newman claims that the Report defamed him by asserting that, while involved in the PENS Task Force, he had inadequately disclosed a conflict of interest—his marriage to Plaintiff Dunivin, a military psychologist with an allegedly strong preference for APA policy to conform to DoD interrogation practices. Compl. ¶¶ 45, 224–28, Ex. A Statement Nos. 13, 24, 25, 86, 88, 100-02, 108, 148. In support, Newman seeks to establish that “APA had no conflict of interest policy” at the relevant time period that “prohibited” his “participation in the Task Force,” and that he nonetheless “disclosed the marriage to his Board and his superiors” *Id.* ¶ 225. The Complaint also alleges that APA had obtained an earlier opinion that Newman’s marriage to Dunivin may require disclosure on a case-by-case basis but was not by itself a conflict of interest. Compl. ¶¶ 226, 227. At the heart of this claim are APA’s conflict of interest policies and practices, including what qualifies as a conflict and for what purposes; what, to whom, and when disclosures must occur and in what format; whether Newman was obligated to and did comply with those policies; and APA’s obligations regarding conflicts. But for APA policy and practice, and Newman’s employee obligations, there could be no claim that the Report incorrectly concluded that Newman acted wrongly. Newman’s claim against APA regarding his conflict of interest is plainly arbitrable. Ex. 1-B ¶ 15; Compl. ¶¶ 45, 224-29, Ex. A Statement

Nos. 13, 24, 25, 86, 88, 100-02, 108, 148; *see Pearce*, 264 U.S. App. D.C. at 252, 828 F.2d at 832.

Newman has also asserted that other Report conclusions defame him. *See* Ex. 5. Each of these allegations go directly to the “rights, duties or obligations” Newman owed to APA under his employment agreement, which are fundamental to the resolution of his claims, making them arbitrable. *See Holey*, 2005 WL 3838163, at *1.

Finally, Newman also contends that the Report contains defamatory assertions that he colluded with DoD officials to maintain loose APA ethics policies that would not constrain DoD, Compl. ¶¶ 5, 19, 87, Ex. A Statement Nos. 5-8, 10, 19, 87, 127. Those claims also implicate Newman’s rights, duties, or obligations as an APA employee. *See* Section III.A.4.a, *supra*.

B. The Court Should Compel Arbitration under D.C. Code § 16-4407.

Although federal law applies in determining whether the claims are arbitrable, the D.C. Act supplies the procedural mechanisms for enforcing arbitration. *See Parker*, 76 A.3d at 869-70 (explaining that arbitration statutes are procedural, rather than substantive, and District of Columbia courts will apply the D.C. Act notwithstanding other substantive law that may govern the relationship between the parties); *accord Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984).⁶ Under the D.C. Act, “[o]n motion of a person showing an agreement to arbitrate and alleging another person’s refusal to arbitrate pursuant to the agreement . . . the court shall

⁶ District of Columbia courts agree that the FAA and the D.C. Act are substantially the same. *See Hercules & Co. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1072 (D.C. 1991) (“[t]he federal arbitration act is ‘substantially similar’ to the District’s act....”).

proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.” D.C. Code § 16-4407(a)(2).⁷

Thus, an order compelling the parties to arbitrate is mandatory under the D.C. Act once the court finds that a valid arbitration agreement covers the dispute. *Beltway Carpet Serv.*, 592 A.2d at 1072 (after a finding of arbitrability, “a trial court can do nothing further on the merits of the case except to compel arbitration and stay the court proceedings until the arbitration has ended.”). Here, as demonstrated above, Behnke’s and Newman’s claims against Defendants are clearly arbitrable. *See supra*, Section III.A. And there can be no dispute that the Behnke and Newman employment agreements are valid and binding. *See Nelson v. Insignia/Esg, Inc.*, 215 F. Supp. 2d 143, 151 (D.D.C. 2002) (absent special circumstances, where “plaintiff signed the employment agreement that contained an arbitration clause, the Court must find that the agreement is valid and enforceable...”); *Parker*, 76 A.3d at 865-66; *see also* Exs. 1-A, 1-B. The Court should compel arbitration of their claims. D.C. Code § 16-4407(a)(2); *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991).

IV. CONCLUSION

For the foregoing reasons, APA respectfully requests that this Court grant APA’s motion to compel arbitration and order Plaintiffs Behnke and Newman to arbitrate their claims against APA in Washington, D.C., in accordance with the arbitration provisions in their employment agreements; and stay the entire action pending finality of the arbitration proceedings and any related litigation.

⁷ The FAA contains a similar mechanism: “A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate ... may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4.

Respectfully submitted,

/s/ Barbara S. Wahl
Barbara S. Wahl (D.C. Bar No. 297978)
Karen E. Carr (D.C. Bar No. 975480)
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Attorneys for Defendant American
Psychological Association

EXHIBIT 1

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

STEPHEN BEHNKE, et al.,	:	CASE NO. 2017 CA 005989 B
	:	Judge Todd E. Edelman
Plaintiffs,	:	Next Event:
vs.	:	December 1, 2017
	:	Initial Scheduling Conference
DAVID H. HOFFMAN, et al.,	:	
Defendants.	:	

AFFIDAVIT OF THERESA MCGREGOR

I, Theresa McGregor, being duly sworn, deposes and states as follows:

1. I am the Manager of Legal Research & Administration at the American Psychological Association (“APA”). I am authorized to speak on behalf of APA with regard to the matters set forth in this affidavit.

2. I am over the age of eighteen and competent to testify regarding, and have personal knowledge of, the matters set forth in this affidavit.

3. Attached hereto as Exhibit 1-A is a true and correct copy of the Employment Agreement between Stephen Behnke and APA, dated on or about January 1, 2012.

4. Attached hereto as Exhibit 1-B is a true and correct copy of the Employment Agreement between Russell Newman and APA, dated on or about January 1, 2003.

I affirm, under penalty of perjury, that the foregoing affidavit is true and accurate to the best of my knowledge.

DATED: October 13, 2017


Theresa McGregor

EXHIBIT 1-A

EMPLOYMENT AGREEMENT

EMPLOYMENT AGREEMENT ("Agreement"), made and entered into between the American Psychological Association (hereinafter referred to as "the Association") and Stephen H. Behnke, JD, PhD, hereinafter referred to as "Employee").

WITNESSETH:

WHEREAS, the Association represents the nation's scientific and professional psychological interests before the public and Government and carries out other functions on a nonprofit basis; and

WHEREAS, the Association employs certain professionals and other staff personnel to assist it in performing its activities; and

WHEREAS, the Association desires to continue to employ the Employee on the terms provided herein; and the Employee desires to be an employee of the Association on the terms provided herein;

WHEREAS, the Association desires to continue to assign the Employee to the position of Director of Ethics;

NOW, THEREFORE, the Association and Employee agree as follows:

1. **EMPLOYMENT.** The Association hereby continues to employ Employee and Employee hereby accepts employment subject to and on the terms and conditions set forth herein.

2. **TERM AND RENEWAL.** The term of the employment under this Agreement commences on January 1, 2012 and shall continue until December 31, 2016, subject to early termination as is hereinafter provided. Any renewal of this employment Agreement shall be in writing and contain such terms and conditions as are mutually agreed upon in writing by the Association and Employee at that time. (Hereafter, the term "Agreement" shall include any renewal thereof unless the provision is modified in the written renewal agreement.) Any non-renewal decision shall be communicated in writing by the Association and shall be transmitted to Employee at least three months prior to the end of the term of this Agreement. Employee shall be paid regular compensation and benefits as specified in paragraphs 3 and 4, during such three months notice period regardless of whether notice is timely given by the Association. However, any failure by the Association to give Employee such three-months' notice shall not extend the term of this Agreement, require Employee to work beyond the term of this Agreement, or otherwise entitle Employee to any additional compensation other than that provided herein. In addition, if Employee remains ready and willing to renew the employment at the end of the term of this Agreement on terms and conditions acceptable to APA and APA determines that it will not renew, Employee shall be paid a lump sum amount equivalent to six (6) months of Employee's base annual salary at the rate in effect on the Employee's last day. The Association shall also pay the full cost of COBRA health benefits for three (3) months. If Employee does not continue to render services through the end of the term of this Agreement, then, Employee will not be entitled to the additional six (6) months compensation and three (3) months payment for COBRA as set forth in this subsection unless the Association waives the Employee's obligation to work.

3. COMPENSATION. For all services rendered by Employee under this Agreement, the Association shall pay Employee a base annual salary of \$218,354 per year, payable in accord with APA's payroll policies as amended from time to time. Employee's base annual salary shall be reviewed periodically.

4. BENEFITS. The Association shall provide Employee with the standard benefits package, including leave accumulation and insurance, as described in the Employee's Policy and Procedures Manual, which is subject to change from time to time.

5. DUTIES. From and after the effective date hereof, Employee during the continuance of Employee's employment by the Association shall:

- (i) Faithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of this Agreement;
- (ii) Devote the equivalent of full time to the business of the Association and perform such activities as may be assigned by the Chief Operating Officer/Deputy CEO, or as may be required, from time to time; any outside consulting or employment undertaken by Employee must be approved in writing in advance by APA's Chief Executive Officer; and
- (iii) Refrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of the Association.

No later than the end of each calendar year of this Agreement, the Chief Operating Officer/Deputy CEO, shall conduct an annual review of Employee's performance.

6. TERMINATION. This Agreement shall terminate at the end of the term of employment, as set forth in Paragraph 2 hereof, or at the end of any renewal term, or may be terminated in the following manner:

- (i) Without cause, Employee may terminate this Agreement at any time upon three (3) months' written notice to the Association, or, if by mutual written agreement, upon less than three months' written notice. In such event, Employee, if requested by the Association in writing, shall continue to render Employee's services and shall be paid Employee's regular compensation up to date of termination at which time Employee shall also be compensated for unused leave. If Employee does not give the Association three (3) months written notice of intent to terminate or if Employee does not comply with the Association's request to continue rendering services to the date of termination, then the termination will be treated as one under subparagraph (ii) immediately below. The notice requirement of this subparagraph may be waived by the Association in the event of extenuating circumstances;

- (ii) The Association may terminate this Agreement with cause at any time by sending written notice to Employee specifying the cause of termination. Acts constituting grounds for termination with cause shall include, but not be limited to: insubordination; destruction of APA property; dereliction of duty; continued unsatisfactory performance; misuse of Association resources; behavior in violation of APA policies; falsification of records; violent, abusive or disruptive behavior; harassment; conduct in violation of state or federal laws; fraud or other acts of moral turpitude. In the event of a termination with cause, this Agreement shall terminate on the date of the mailing of such notice, the Association shall pay regular compensation up to the date of termination, and the Association shall not be obligated to make any additional payment of compensation of any kind to Employee, except unused leave or as required by law
- (iii) The Association may terminate this Agreement without cause only upon three (3) months' written notice to Employee. In such event, Employee shall be paid regular compensation and benefits as specified in paragraphs 3 and 4, up to the date of termination, which shall be a date three months after receipt of written notice by Employee (Date of Termination). In addition, after the Date of Termination, Employee shall be paid a lump sum amount equivalent to six (6) months of Employee's base annual salary at the rate in effect on the Date of Termination. The Association shall also pay the full cost of COBRA health benefits for three (3) months. If Employee does not continue to render services through the Date of Termination (i.e., during the notice period), then, Employee will not be entitled to the additional six (6) months compensation and three (3) months payment for COBRA as set forth in this subsection unless the Association waives the Employee's obligation to work during the notice period.
- (iv) If during the term of this agreement Employee should die, or become Disabled (as defined below), this agreement shall terminate. In such event, Employee (or Employee's estate) shall be paid Employee's compensation in accordance with Paragraph 3 for three (3) months after the date of termination. This provision does not limit any rights to short or long term disability benefits provided under the Association policies at the time disability occurs.

For purposes of this Paragraph 6(iv), Disabled shall mean Employee is unable to engage in any substantial gainful activity by reason of any medically-determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, or Employee is by reason of any medically-determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, receiving income replacement benefits for a period of not less than three (3) months under an accident and health plan covering employees of the Association.

Upon termination of this Agreement for any reason, Employee shall cease using the title of Director of Ethics or in any other fashion holding himself out as an employee or agent of the Association.

7. **NON-COMPETITION.** Employee agrees that during the term of Employee's employment and for so long as Employee is receiving compensation from the Association, Employee will not engage in any activity in any capacity (including as a principal, agent, officer, employee or consultant) that competes or may compete, either directly or indirectly, with any activities of the Association. Employee further agrees that for one year after the latter of (a) the termination of that employment, whether with or without cause, and (b) the termination of Employee's receipt of compensation from the Association, Employee will not engage in any activity in any capacity that competes for the actual or potential membership of the Association.

8. **CONFIDENTIALITY.** Employee agrees that Employee will not at any time disclose confidential or proprietary information of the Association without the written approval of APA's Chief Executive Officer.

9. **BREACH.** If Employee breaches the terms of paragraph 7 or paragraph 8 of this Employment Agreement, the Association shall have no further obligation to make any additional payments of compensation of any kind to Employee, or to provide any further benefits, except as required by law. In addition, Employee acknowledges that a violation by Employee of the terms of paragraphs 7 or 8 would be a material breach of this Agreement, and Employee agrees that, in the case of such a violation, the Association would be entitled to injunctive relief from the courts. The parties agree that the provisions of this paragraph and paragraphs 7 and 8 are necessary and reasonable for the protection of the business and goodwill of the Association and that the violation of those provisions would cause irreparable harm to the Association. The parties further agree that the provisions of this paragraph and paragraphs 7 and 8 shall survive the termination of this Agreement.

10. **ASSIGNMENT.** This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors, and assigns. Neither Employee nor Employee's spouse/domestic partner, however, shall assign any part of Employee's or spouse's/domestic partner's rights under this Agreement unless the Association agrees thereto in writing. In the event of a merger, consolidation or reorganization involving the Association, this Agreement shall continue in force and become an obligation of the Association's successor and/or successors.

11. **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement of the parties and supersedes any and all previous agreements between the parties. It may not be changed orally, but only by an agreement in writing between the parties. Any notice required or permitted to be given under the Agreement shall be sufficient if in writing and sent by registered mail to Employee's residence, or to the principal office of the Association. The parties to this Agreement hereby acknowledge that there exist no agreements, promises or understandings except as set forth herein.

12. **SEVERABILITY/WAIVER.** In the event that any provision of this Agreement shall be held invalid or illegal, the remaining provisions shall remain in force and effect and shall in all respects be binding on the parties. If either party waives a breach of this Agreement by the other party, that waiver will not operate or be construed as a waiver of later similar breaches.

13. GOVERNING LAW. This Agreement shall be deemed to have been made and executed in the District of Columbia and the legality, interpretation, construction, performance, obligations, and enforceability of this Agreement shall be determined under the substantive law of the District of Columbia.

14. ARBITRATION. Except as provided in Paragraphs 7, 8, and 9, the parties agree that, in the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this Agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules. In either case, the sole arbitrator may grant any relief as may be just and equitable, including specific performance and declaratory relief. The parties further agree that the situs of such arbitration shall be Washington, D.C., that the judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof, and that the losing party shall pay the arbitrator's fees.

15. LEGAL COUNSEL. Employee acknowledges he has read this Agreement and understands it, and that he has had the opportunity to consult with any attorney of Employee's choice prior to signing it and has done so.

16. EFFECTIVE DATE. This Agreement shall become effective on January 1, 201²₁ *AMH*
SIB

IN WITNESS WHEREOF, Employee and the Association, by its duly authorized officer, have caused this Agreement to be executed and have subscribed their names on this _____ day of _____.

Stephen H. Behnke
Stephen H. Behnke, JD, PhD
Employee

12/8/11
Date

[Signature]
Witness

L. Michael Honaker
L. Michael Honaker, PhD
Chief Operating Officer and
Deputy CEO

12/8/11
Date

[Signature]
Witness

Norman B. Anderson
Norman B. Anderson, PhD
Executive Vice President and
Chief Executive Officer

12/9/11
Date

Cassandra E. Kemp
Witness

EXHIBIT 1-B

EMPLOYMENT AGREEMENT

AMENDED EMPLOYMENT AGREEMENT, made and entered into effective as of January 1, 2003, between the American Psychological Association (hereinafter referred to as "the Association") and Russell S. Newman, PhD, JD, (hereinafter referred to as "Employee").

WITNESSETH:

WHEREAS, the Association represents the nation's scientific and professional psychological interests before the public and Government and carries out other functions on a nonprofit basis; and

WHEREAS, the Association employs certain professionals and other staff personnel to assist it in performing its activities; and

WHEREAS, the Association desires to continue to employ the Employee on the terms provided herein; and the Employee desires to continue to be an employee of the Association on the terms provided herein;

NOW, THEREFORE, the Association and Employee agree as follows:

1. EMPLOYMENT. The Association hereby continues to employ Employee and Employee hereby accepts employment subject to and on the terms and conditions set forth herein.

2. TERM AND RENEWAL. The term of the employment shall continue until December 31, 2007 ("Contract Termination Date"), subject to early termination as is hereinafter provided. Any renewal of this employment agreement shall be in writing and contain such terms and conditions as are mutually agreed upon in writing by the Association and Employee at that time. Any non-renewal decision shall be communicated in writing by the Association and shall be transmitted to Employee at least six months prior to the end of the term of this agreement, or any renewal thereof. However, any failure by the Association to give Employee such six-months' notice shall not extend the term of this agreement. However, if the Association fails to give Employee six-months' notice of a decision not to renew his contract, the Employee shall be entitled to Compensation and benefits as set forth in Paragraphs 3 and 4 for a period of six months after the Employee has been notified that his contract will not be renewed. At the conclusion of the six-month period, Employee shall then begin the Executive Leave Period as provided in Paragraph 5.

3. COMPENSATION. For all services rendered by Employee under this agreement, the Association shall pay Employee a base

annual salary of \$195,000 per year and a salary supplement of \$50,000 per year ("Compensation"), payable in accord with ~~APA's~~ the Association's payroll policies as amended from time to time. Employee's base annual salary shall be reviewed periodically.

4. BENEFITS. The Association shall provide Employee with the standard benefits package, including leave accumulation and insurance, as described in the Employee's Policy and Procedures manual, which is subject to change from time to time. In addition, the Association shall pay the entire premium cost of that health and dental insurance. The Association shall also provide a parking space at no cost to Employee for Employee's personal use only.

5. PERSONAL TIME OFF (PTO) AND EXECUTIVE LEAVE. Employee will earn one month of executive leave for each twelve months of employment beginning with October 1, 1992, up to 12 months of leave. During Employee's term of employment, accrued executive leave shall be taken by the Employee solely to the extent such leave is consistent with the Employee's duties at the Association and the needs of the Association and subject to the approval of the Chief Executive Officer. On the Contract Termination Date, Employee will forfeit any unused PTO accumulated in accordance with Paragraph 4. Employee will remain employed following the Contract Termination Date until all remaining accrued executive leave has been exhausted ("Executive Leave Period"). During the Executive Leave Period, Employee will remain available to provide services to the Association and will continue to receive Compensation and benefits in accordance with Paragraphs 3 and 4. Employee's employment will terminate at the conclusion of the Executive Leave Period. If during the Executive Leave Period Employee is engaged in other activities or employment which make it not possible or appropriate for Employee to continue as an employee of the Association, or which cause Employee to be out of compliance with Paragraphs 6 or 8, Employee's employment shall cease upon written notice from APA. In such case, Association shall then make either a one-time payment, or monthly payments (the Association shall determine whether the payment shall be one-time or monthly), to Employee for the Compensation due through the end of the Executive Leave Period, but Employee shall not be entitled to benefits that would have been payable during the remainder of the Executive Leave Period.

6. DUTIES. From and after the date hereof, Employee during the continuance of Employee's employment by the Association shall:

- (i) Faithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of this agreement;

- (ii) Devote the equivalent of full time to the business of the Association (except as provided in Paragraph 5) and perform such activities as may be assigned by the Chief Executive Officer or as may be required, from time to time; any outside consulting or employment undertaken by Employee must be approved in writing in advance by APA's Chief Executive Officer; and
- (iii) Refrain from engaging in any activity, which is, or may be, contrary to the welfare, interests, or benefits of the Association.

No later than the end of each calendar year the Chief Executive Officer shall conduct an annual review of Employee's performance.

7. TERMINATION. This agreement shall terminate on the Contract Termination Date, as set forth in Paragraph 2 hereof, (as extended through the Executive Leave Period as set forth in Paragraph 5) or at the end of any renewal term, or may be terminated in the following manner:

- (i) Without cause, Employee may terminate this agreement at any time upon six (6) months, written notice to the Association. In such event, Employee, if requested by the Association in writing, shall continue to render Employee's services and shall be paid Employee's Compensation up to date of termination at which time Employee shall then enter into the Executive Leave Period pursuant to Paragraph 5. If Employee does not give the Association six (6) months written notice of intent to terminate or if Employee does not comply with the Association's request to continue rendering services to the date of termination, then the termination will be treated as one under subparagraph (ii) immediately below. The notice requirement of this subparagraph may be waived by the Association in the event of extenuating circumstances;
- (ii) The Association may terminate this agreement with cause at any time by sending written notice to Employee specifying the cause of termination. Acts constituting grounds for termination with cause shall include, but not be limited to: insubordination; destruction of Association property; dereliction of duty;

continued unsatisfactory performance; misuse of Association resources; behavior in violation of Association policies; falsification of records; violent, abusive or disruptive behavior; harassment; conduct in violation of state or federal laws; fraud or other acts of moral turpitude. In the event of a termination with cause, this agreement shall terminate on the date of the mailing of such notice, the Association shall pay Compensation and provide benefits up to the date of termination, in accordance with Paragraphs 3 and 4, and the Association shall not be obligated to make any additional payment of Compensation of any kind to Employee, including Executive Leave under Paragraph 5, except unused leave as specified in Paragraph 4, or as otherwise required by law;

- (iii) The Association may terminate this agreement without cause only upon six (6) months written notice to Employee. In such event Employee shall be paid Compensation and provided benefits as specified in Paragraphs 3 and 4, up to the date of termination, which shall be a date six months after receipt of written notice by Employee, (Date of Termination). In addition, after the Date of Termination, Employee shall be paid Compensation at the rate in effect on the Date of Termination for the lesser of (a) the remaining term of the agreement or (b) six months, provided that Employee shall exercise Employee's best effort to secure other reasonable employment and that the Compensation payable to Employee after the Date of Termination shall be reduced by any amounts received by Employee from other employment. If, during this period, Employee accepts other employment with Compensation equal to or greater than the Compensation Employee would have earned under this agreement, the Association's obligation to pay such Compensation after the Date of Termination will cease. Furthermore, if Employee does not continue to render services through the Date of Termination (i.e., during the notice period), then, Employee will not be entitled to Compensation after the Date of

Termination as set forth in this subparagraph (iii) unless the Association waives the obligation to work during the notice period. In any event Employee will be given at least six (6) months notice of termination without cause and at least six (6) months notice of a decision not to renew this agreement. In addition, Employee shall receive a one-time payment, or monthly payments (the Association shall determine whether the payment shall be one-time or monthly), equal to the Compensation that would have been payable to Employee during the Executive Leave Period that was accumulated as of the Date of Termination.

- (iv) If during the term of this agreement Employee should die, or become unable to perform the essential functions of the position with reasonable accommodation, this agreement shall terminate. In such event, Employee (or Employee's estate) shall be paid Employee's Compensation in accordance with Paragraph 3 for three months after the date of termination and shall be paid for all unused Executive Leave accumulated pursuant to Paragraph 5. This provision does not limit any rights to short or long term disability benefits provided under APA policies at the time disability occurs.

Upon termination of Employee's employment for any reason, Employee shall cease holding himself out as an employee or agent of the Association.

8. NON-COMPETITION. Employee agrees that during the term of Employee's employment and for so long as Employee is receiving Compensation from the Association (including during the Executive Leave Period), Employee will not engage in any activity in any capacity (including as a principal, agent, officer, employee or consultant) that competes or may compete, either directly or indirectly, with any activities of the Association. Employee further agrees that for one year after the later of (a) the termination of that employment, whether with or without cause, or (b) the termination of Employee's receipt of Compensation from the Association, Employee will not engage in any activity in any capacity that competes for the actual or potential membership of the Association.

9. CONFIDENTIALITY. Employee agrees that Employee will not at any time disclose confidential or proprietary information of

the Association without the written approval of The Association's Chief Executive Officer.

10. BREACH. If Employee breaches the terms of Paragraph 8 or Paragraph 9 of this agreement, the Association shall have no further obligation to make any additional payments of Compensation of any kind to Employee, or to provide any further benefits, except as required by law. In addition, Employee acknowledges that a violation by Employee of the terms of Paragraphs 8 or 9 would be a material breach of this agreement, and Employee agrees that, in the case of such a violation, the Association would be entitled to injunctive relief from the courts. The parties agree that the provisions of this Paragraph and Paragraphs 8 and 9 are necessary and reasonable for the protection of the business and goodwill of the Association and that the violation of those provisions would cause irreparable harm to the Association. The parties further agree that the provisions of this Paragraph and Paragraphs 8 and 9 shall survive the termination of this agreement.

11. ASSIGNMENT. This agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors, and assigns. Neither Employee nor Employee's spouse/domestic partner, however, shall assign any part of Employee's or his/her rights under this agreement unless the Association agrees thereto in writing. In the event of a merger, consolidation or reorganization involving the Association, this agreement shall continue in force and become an obligation of the Association's successor and/or successors.

12. ENTIRE AGREEMENT. This agreement constitutes the entire agreement of the parties and supersedes any and all previous agreements between the parties. It may not be changed orally, but only by an agreement in writing supplied by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought. Any notice required or permitted to be given under the agreement shall be sufficient if in writing and sent by registered mail to Employee's residence, or to the principal office of the Association. The parties to this agreement hereby acknowledge that there exist no agreements, promises or understandings except as set forth herein.

13. SEVERABILITY/WAIVER. In the event that any provision of this agreement shall be held invalid or illegal, the remaining provisions shall remain in force and effect and shall in all respects be binding on the parties. If either party waives a breach of this agreement by the other party, that waiver will not operate or be construed as a waiver of later similar breaches.

14. GOVERNING LAW. This agreement shall be deemed to have been made and executed in the District of Columbia and the legality, interpretation, construction, performance, obligations,

and enforceability of this agreement shall be determined under the substantive law of the District of Columbia.

15. ARBITRATION. Except as provided in Paragraphs 8,9, and 10, the parties agree that, in the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules. In either case, the sole arbitrator may grant any relief as may be just and equitable, including specific performance and declaratory relief. The parties further agree that the situs of such arbitration shall be Washington, D.C., that the judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof, and that the losing party shall pay the arbitrator's fees.

16 LEGAL COUNSEL. Employee acknowledges that he has read this agreement and understands it, and that he has had the opportunity to consult with any attorney of Employee's choice prior to signing it and has done so.

17. EFFECTIVE DATE. This agreement is effective as of January 1, 2003.

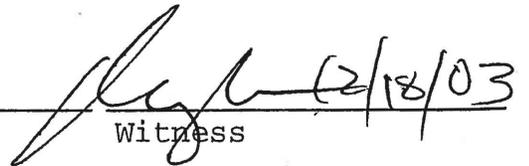
IN WITNESS WHEREOF, Employee and the Association, by its duly authorized officer, have caused this agreement to be executed and have subscribed their names on this ___ day of _____ 2003.



Russell S. Newman, PhD, JD

12/18/03

Date



Witness



Norman B. Anderson, Ph.D.
Executive Vice President and
Chief Executive Officer

12/19/03

Date



Witness

EXHIBIT 2

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 2017 CV 00839
	:	
v.	:	
	:	
DAVID HOFFMAN, <i>et al.</i> ,	:	Judge Timothy N. O'Connell
	:	
Defendants.	:	

**AFFIDAVIT OF
STEPHEN BEHNKE**

and

Exhibits A - E

In Support Of

**PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION
AND FORUM NON CONVENIENS**

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, et. al.,	:	CASE NO: 2017 CV 00839
	:	
Plaintiffs,	:	Judge Timothy N. O'Connell
	:	
vs.	:	
	:	
DAVID HOFFMAN, et. al.,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF STEPHEN BEHNKE

District of Columbia) ss:

1. I, Stephen Behnke, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I was Director of the Office of Ethics at the American Psychological Association (APA) from November 2000 to July 2015. In that position I oversaw all activities of the APA Ethics Office. These included the administration of ethics case adjudication, providing staff support to the APA Ethics Committee, supporting APA governance-based policy development in the area of ethics, and providing education about psychological ethics to the profession and the public. Also as part of my job responsibilities, I provided staff support to the Presidential Task Force (Task Force) for Psychological Ethics and National Security (PENS) in 2005.
3. In addition to adjudication, my work in the Ethics Office involved considerable education and consultation around the country to state psychological associations, state boards of psychology and to the public. I travelled to Ohio for the purpose of consultations and workshops on multiple occasions. My work in Ohio was facilitated by the Ohio Psychological Association (OPA) with which I collaborated to conduct ethics workshops for Ohio psychologists. I also collaborated with the executive director of the Ohio Board of Psychology to offer workshops on ethics and law in Ohio. I viewed Ohio as an important constituency of the APA Ethics Office because there are over 2800 APA members in Ohio. [Exhibit A] 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. [Exhibit B]
4. One specific example of my staff work was the support I provided for the investigation of the ethics complaint against John Leso. During the adjudication of the

Leso matter, I was available to the ethics office investigator, Lindsay Childress-Beatty, for consultation. Childress-Beatty and I had numerous conversations about the Leso matter.

5. When the Leso matter was closed in December 2013 after approximately seven years of investigation, it was important to explain the outcome of an ethics matter that had drawn widespread attention. Communications were being prepared from the APA President, Nadine Kaslow, and the Board of Directors to the Council of Representatives (Council) and to the membership and the public at large. I was asked by President Kaslow to help draft those communications. I also briefed her on numerous occasions about the evidence and work done on behalf of the ethics office to adjudicate the Leso matter. Dr. Jennifer Kelly, also an APA Board member, was fully briefed on the Leso matter both during an APA Board of Directors meeting and during an ethics committee meeting which she attended as the Board of Directors Liaison to the Ethics Committee.

6. The APA in-house counsel, Ann Springer, fully reviewed the Leso file and worked with me and Lindsay Childress-Beatty to draft notifications that the matter had been closed. At no point during the several-year period of time the Leso matter was open and Ms. Springer had access to the Leso file did she indicate that the matter was not being handled in a proper fashion.

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. (See Plaintiffs' Complaint Counts 1-12 detailing each publication.)

8. Another example of my staff work was the support I provided for the investigation of the ethics complaint against Larry James. The complaint was filed in December 2007 and closed in May 2008. Despite the Hoffman Report's conclusion that ethics cases were handled improperly, the Report also indicates that the handling of the James case was "technically" correct. In fact, the decision makers on this case—Dr. Stan Jones from North Carolina and Dr. Robin Deutsch from Massachusetts [Exhibit C]—were exceedingly careful to conduct the process consistent with the rules and procedures governing the ethics adjudication process.

9. When I was in Ohio for the purpose of conducting a law and ethics workshop with the Executive Director of the Ohio Board of Psychology, the Executive Director and I discussed a licensing board complaint brought against Larry James in Ohio. The Executive Director informed me that a group of lawyers had traveled to Ohio from Harvard Law School to discuss the complaint. 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. He further stated that the lawyers from Harvard appeared to believe that the complaint had not been fully investigated for political reasons, rather than accepting there was no basis for sanction.

10. When the PENS Task Force was convened by then-APA President Ron Levant, I was asked to provide the staff support for the Task Force as it worked on the charge given to it by the 2005 Board of Directors. Two members of the Board at that time were from Ohio—Ron Levant (See Levant Affidavit) and Sandra Shulman [Exhibit D]. One of my first tasks was to establish a listserv exclusively for discussion among PENS members, which I did on April 22, 2005. The listserv continued to be operational until June 26, 2006 and, with the exception of the three days (June 24-26, 2005) during which time the Task Force met in person, all discussions between Task Force members took place on the listserv from their respective home or office locations via email.

11. Following the work of the 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.

<http://www.apa.org/news/press/releases/2006/05/convention.aspx>

<http://www.apa.org/news/press/releases/2007/05/convention.aspx>,

<http://www.apa.org/news/press/releases/2008/05/convention.aspx>.

12. The continuing debate concerning psychologists role in interrogation support led to the decision by the Board in November 2014 to conduct an independent review of allegations in James Risen's book, "*Pay Any Price: Greed, Power and Endless War*," that the APA colluded with the Bush administration to support torture during the war on terror. Nadine Kaslow was President and chair of the Board at the time the decision was made to undertake the independent review and to hire David Hoffman of the law firm Sidley Austin LLP to conduct it.

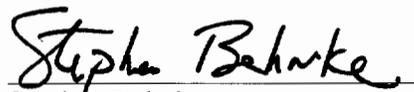
<http://www.apa.org/about/governance/board/independent-review.aspx>

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 *The New York Times*, 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.

14. I was provided with electronic access to the Report of the independent review on July 1, 2015. On Saturday, July 4, I received an email message from Archie Turner, acting CEO, asking that I meet with him and Ann Springer, from the Office of General Counsel, on Monday, July 6. When I informed Archie Turner that I was traveling on Monday, July 6, we agreed to a conference call. When I stated that I wished my attorney to participate in the call, Ms. Springer said that it was not appropriate for my attorney to participate in the call and she cancelled the call. She said that it would be more "efficient" to handle the matter if I were to give her my correspondence address. I received a letter from the APA dated July 8, 2015, terminating me from my job. I received this letter after I had received a phone call from an ethics office staff member distraught that I had been terminated. Prior to receiving this phone call I was not aware that the APA had fired me.

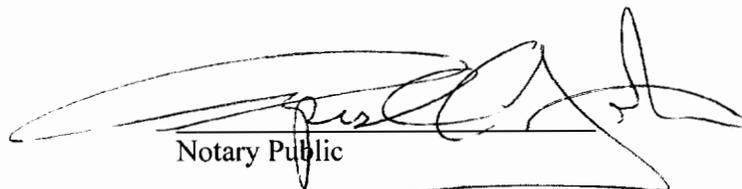
15. Almost immediately after the Report was published, I received an unsolicited email, followed up by a letter from one of the most vocal advocates for a ban on the participation of psychologists in national security settings stating that the Report had considerable misinformation, mischaracterizations and many false conclusions. [Exhibit E]

FURTHER AFFIANT SAYETH NOT.


Stephen Behnke

Sworn and subscribed to before a notary public in the District of Columbia, this

5 day of May 2017.


Notary Public

APRYL C. GATES
Notary Public, District of Columbia
My Commission Expires May 31, 2020

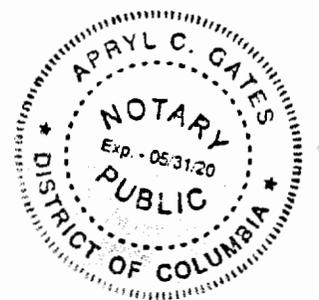


EXHIBIT 3

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 2017 CV 00839
	:	
v.	:	
	:	
DAVID HOFFMAN, <i>et al.</i> ,	:	Judge Timothy N. O'Connell
	:	
Defendants.	:	

**AFFIDAVIT OF
RUSSELL NEWMAN**

and

Exhibits A - K

In Support Of

**PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION
AND FORUM NON CONVENIENS**

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, et. al.,	:	CASE NO: 2017 CV 00839
	:	
Plaintiffs,	:	Judge Timothy N. O'Connell
	:	
vs.	:	
	:	
DAVID HOFFMAN, et. al.,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF RUSSELL NEWMAN

State of California)
) ss:
County of San Diego)

1. I, Russell Newman, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I was first contacted on February 26, 2015 by email by Dr. Nadine Kaslow, of the American Psychological Association (APA), and then by Mr. David Hoffman of the law firm Sidley Austin LLP on April 15, 2015 and asked to provide information in an ongoing independent review being conducted on behalf of the APA regarding the post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements including the Presidential Task Force (Task Force) for Psychological Ethics in National Security (PENS). I was interviewed in person by Mr. Hoffman in my office in San Diego, California on April 29, and then again by telephone on June 15, 2015.
3. Based on communications from both Dr. Kaslow and Mr. Hoffman in advance of being interviewed, I was led to expect that the review process being under taken would be an objective review, and that Mr. Hoffman was serving as an independent, neutral and objective third party in conducting the review. I was never advised that the review could be adverse to my interests. [Exhibit A]
4. After the PENS Task Force had been convened in April 2005 and the PENS listserv had been initiated, I was asked by the Task Force chair to serve as a non-voting observer owing to my role at the APA as Executive Director for Professional Practice, responsible for addressing professional practice issues on behalf of the Association's membership. I was never subscribed to the PENS listserv, either before or after the June 24-26, 2005

meeting of the Task Force, but did attend the in-person meeting of the Task Force. Because I was not a subject matter expert in the area of psychologist activities in national security, my role as an observer at the meeting was as a resource for the members of the Task Force. I was focused on general practice issues, APA governance procedures and helping the Task Force develop a clear and coherent response to the many questions being raised, both inside and outside of the Association, about psychologists' activities in the national security arena. I explained this to Mr. Hoffman during my interview, although the Report of the independent review mischaracterizes my involvement as, among other things, working to assure the Task Force would issue loose and high-level guidance to military psychologists engaged in interrogation support and being more concerned about the Association's public relations than the appropriate work of psychologists.

5. The APA Board (including Drs. Douce and Shulman from Ohio [Exhibit B]) did not provide me with an opportunity to review the Report before it was published, nor even give me notice that it was about to be released, despite the fact that the Board and the Council had received it prior to it being posted on the APA website. [Exhibit C] I actually first learned that the Report was published from the July 10, 2015 article by James Risen in *The New York Times (NYT)*, and initially read the Report on the *NYT* website. Even after the Report was released, I was given no opportunity to meaningfully respond to the allegations against me.

6. At the time the Report was published, I was Provost and Senior Vice President for Academic Affairs at Alliant International University (Alliant) based in San Diego, California. My boss, the President of Alliant, contacted me on July 12 after reading the Report and indicated that I was being placed on administrative leave pending a review by the Alliant Board of Trustees (Trustees). He specifically indicated the concern that the Report indicated that I had played a bigger role in the events being investigated than I had previously disclosed.

7. I had previously informed my employer about the ongoing review as it was described in the initial email to me from Nadine Kaslow--an independent review of the allegations made in James Risen's book, *"Pay Any Price: Greed, Power and Endless War,"* that the APA colluded with the Bush administration to support torture during the war on terror. I had also informed my employer of my participation as an observer on the Task Force, my belief that there had never been any such collusion, and that my wife, an Army Colonel at the time, had worked to provide interrogation support as a part of a behavioral science consultation team. However, I had been unaware that the scope of the independent review had expanded to cover more than initially described. Following an Alliant Trustees sub-committee review on July 13, I was told by my President that the Trustees would not second-guess the Report, and I was forced to resign my positions.

8. Despite the repeated allegations of "collusion" against me and others in the Report, when Mr. Hoffman met privately with the APA Council of Representatives (Council), he told the Council that "(b)ehind the scenes communication" would have been a more accurate description than collusion. [Exhibit D] Yet, the language used in the Report

followed from the actions and discourse that had been part of the APA critics' campaign for years.

https://www.democracynow.org/2014/12/23/weaponizing_health_workers_how_medical_professionals; <http://www.hoffmanreportapa.com/resources/David%20Hoffman.pdf>

9. Upon receipt of the Report, APA officials adopted the findings and communicated those findings to, among others, influential government officials, including Congress. <http://www.apa.org/news/press/statements/senate-armed-services.pdf> Media coverage and public discussion of the Report was considerable following distribution of the Report and in light of statements made to the press by officials of APA. <http://www.news1.in/video/20150713/3079902/Former-APA-President-Says-Stephen-Behnke-Was-Terminated.htm> Social media compounded the public's awareness of the Report's false conclusions. [See, for example, Exhibit E]

10. The impact of that social media is measureable through Demographics Pro (DP) (<http://www.demographicspro.com>). DP provides a methodology to estimate or infer the likely demographic characteristics of, among other things, the followers of messages, or "tweets," placed online through someone's Twitter account. According to DP, the methodology is "data-centric, relying on multiple data signals from three primary areas: networks, consumption and language" and is capable of estimating a demographic characteristic, such as location of a Twitter account follower, at a 95% confidence level.

11. The Twitter account designations of 21 individuals or media outlets known to have communicated about the Hoffman Report and its various conclusions or in response to former APA President Nadine Kaslow's public statements about the Report were input into the DP methodology. A true and correct copy of the webpage produced in response to one of those inputs and identifying the sizable relative impact of one individual's tweets in Ohio compared to other states is contained in Exhibit F. The overall number of Ohio residents who follow the 21 accounts of those who have tweeted to Kaslow statements or a version of the Hoffman Report was determined by DP to be 9,384 individuals. [Exhibit G]

12. Additionally, in Ohio where I had lived and worked for a number of years as well as visited many times on behalf of APA as Executive Director for Professional Practice, some in the psychology community were particularly aware of the negative light in which the Report cast me. [See Corrigan Affidavit]

13. Because of the damage to my reputation from the Report, I have been unable to find employment in the fields of psychology or higher education. My wife, Colonel (Ret) Debra Dunivin, a psychologist who previously worked and lived in Washington, DC has similarly been unable to find steady employment since the Report was published and is now living in California.

14. I have collaborated with Plaintiffs' attorney to compile a list of witnesses who we believe have important information bearing on the issues related to this case. [Exhibit H]

It is notable that of the 33 so identified, five are from Ohio, more than from any other jurisdiction except California.

15. According to the Sidley Austin LLP website ("Contact Us"), the firm is "a global law firm with 1900 lawyers in 20 offices in the key business and financial centers around the globe," with no reference to a specific city or state of practice. <https://www.sidley.com/en/contact-us> The Sidley Austin engagement letter with APA contains 18 different locations for the firm in the letterhead. [Exhibit I] Additionally, according to the website, 56 of its partners are admitted to practice before the Sixth Circuit. <https://www.sidley.com/en/us/people/?letter=A¤tviewid=83e3dcaa-1264-4226-8ee6-380c20e95bea&reload=false&scroll=845>

16. Other activities of Sidley relate to Ohio: they are currently suing the state of Ohio, (<https://www.disabilityrightsohio.org/news/dro-and-partners-file-class-action-lawsuit-on-behalf-of/>); they maintain an annual lecture series at Ohio State University (OSU) (<http://moritzlaw.osu.edu/registrations/event/sidley-austin-distinguished-lecture/>); Carter Phillips is on the OSU Board of Trustees (<https://osu.edu/giving/donor-communities/foundation-board/board-directors/>); and they represent Duke Energy (<http://www.leagle.com/decision/In%20FDCCO%2020160427970/WILLIAMS%20v.%20DUKE%20ENERGY%20INTERNATIONAL,%20INC.>). Ohio was also not an infrequent location for witnesses interviewed by Mr. Hoffman during the preparation of the Report, with Drs. Lauritzen, Swenson Naugle, Bond, James and Levant all being Ohio residents. (See Hoffman Report "ATTACHMENT A (INTERVIEWS CONDUCTED OR ATTEMPTED)")

17. Lastly, the 2005 APA Board of Directors which voted to establish the PENS Task Force and then approved the Guidelines and the 2015 Board of Directors which has been heavily involved with the independent review and resulting Report each had two members from Ohio. [Exhibit J] In fact, as the December 11-13, 2015, Board meeting minutes indicate, 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. <https://www.apa.org/about/governance/board/15-december-minutes.pdf>

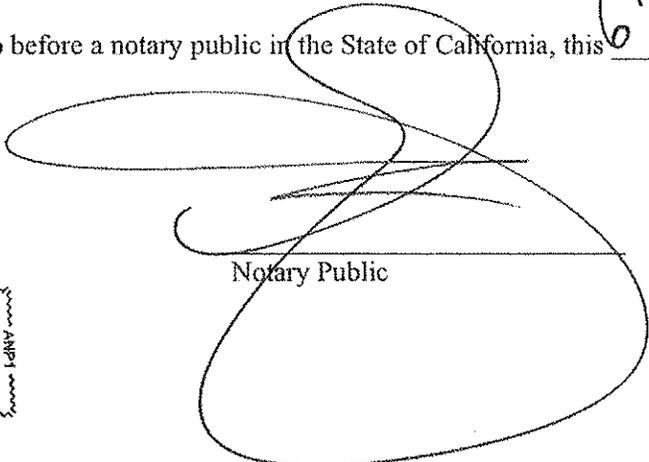
18. Additional significant APA contacts with Ohio include: the Ohio Psychological Association as a state affiliate of the APA; the Midwestern Psychological Association as a regional affiliate of the APA with its Executive Officer in Kent, Ohio; multiple APA amicus briefs for the Ohio or Sixth Circuit Courts; and Ohio psychology licensing requirements relying on APA accreditation of doctoral programs, pre-doctoral internships and post-doctoral programs, APA-approved continuing education, APA standards related to supervision of psychologists and the APA Ethics Code. [Exhibit K]

FURTHER AFFIANT SAYETH NOT.



Russell Newman

Sworn and subscribed to before a notary public in the State of California, this 6th
day of May 2017.


Notary Public

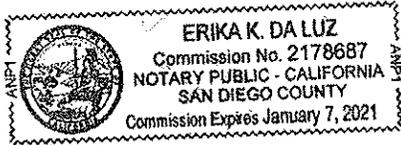


EXHIBIT 4

Exhibit 4

Complaint Allegations Pertaining to Plaintiff Stephen Behnke’s Performance of Rights, Duties, and Obligations as an APA Employee

Allegation	Reference to Complaint and/or Exhibit A to Complaint
Handling of ethics complaints	¶¶ 19, 135–50, Ex. A Statement Nos. 11, 56, 57, 98, 217
Participation in the PENS Task Force	¶¶ 44, 73, Ex. A Statement Nos. 20, 37, 44
Drafting of the PENS report language	¶¶ 75, 88, Ex. A Statement Nos. 35, 42, 45, 106, 113, 123–25, 133, 154
Drafting of a letter to the New York Times for Dr. Levant’s signature (APA’s then-President)	Ex. A Statement No. 45
Communications and work with others inside and outside of APA regarding the policies articulated in the PENS report	¶¶ 5, 87, Ex. A Statement Nos. 20, 50, 105, 106, 114, 126, 128, 135, 142–44, 151, 154, 158, 160, 162–64, 172
Speaking engagements that pertained to APA’s policies regarding enhanced interrogation	Ex. A Statement No. 169
Participation in politicking involving Council resolutions that were designed to undermine or water down the policy adopted by the PENS report	Ex. A Statement Nos. 166– 68, 193–200
Authoring of an APA casebook involving APA’s position on enhanced interrogation	Ex. A Statement Nos. 84, 152, 153
Attendance at a DoD training program for Behavioral Science and Consultation Team psychologists at Fort Huachuca, Arizona (paid for by DoD, which payments Behnke contends he remitted to APA, less reimbursement for his travel expenses)	¶¶ 216–19, Ex. A Statement Nos. 49, 157
Alleged sharing of APA confidential internal discussions and strategy with DoD contacts in violation of APA policy	Ex. A Statement Nos. 161, 163, 173
Speaking with reporters regarding APA policy on enhanced interrogation	Ex. A Statement No. 163
Visit to Guantanamo in March 2007 as an APA employee	Ex. A Statement Nos. 173, 174
Use of his APA email account to communicate with others, including	¶¶ 210–15, Ex. A Statement Nos. 47, 48, 82, 142, 166, 188, 210

Plaintiffs, Dr. Gerald Koocher, and DoD representatives, regarding APA's enhanced interrogation policies and issues	
Receipt of a request from Plaintiff Banks to delete Behnke's communications with Plaintiff Banks on the APA server	¶¶ 213–15, Ex. A Statement Nos. 183, 184
Receipt of three sets of documents and other DoD policies from a psychologist involved in Survival, Evasion, Resistance and Escape techniques	Ex. A Statement No. 191
Invitation to Joel Dvoskin to write a "con" statement to a petition being considered by APA's Council of Representatives to change the APA policy on enhanced interrogations that would have undermined the PENS principles, including a DoD Directive and Instruction and policies relating to behavioral science consultants and interrogations	Ex A. Statement Nos. 196–200
Selection of members of a Presidential Advisory Group on the Implementation of the Petition Resolution	Ex. A Statement Nos. 201–03
Revision of Standard 1.02 of the APA Ethics Code, and the criticism of him for not doing so promptly	Ex. A Statement Nos. 50, 55, 150, 208–14
Alleged request to DoD, and to Plaintiffs Dunivin and Banks, to encourage comments regarding revisions to Standard 1.02 of the APA Ethics Code	Ex. A Statement No. 213
Communications and interactions with DoD psychologists in his capacity as an APA employee	¶ 87, Ex. A Statement Nos. 20, 46–48, 50, 53, 106, 130, 144, 151, 158, 161, 163–64, 172, 180–83, 188, 190, 192

EXHIBIT 5

Exhibit 5

Complaint Allegations Pertaining to Plaintiff Russell Newman’s Performance of Rights, Duties, and Obligations as an APA Employee

Allegation	Reference to Complaint and/or Exhibit A to Complaint
Involved with the PENS Task Force in his capacity as an APA employee	¶¶ 45, 75, 229, Ex. A Statement Nos. 25, 37-38, 86, 102, 117
Intimately involved in the coordinated effort to align APA actions with DoD preferences, along with other APA officials	Ex. A Statement No. 21
Obvious conflict of interest in working on the PENS Task Force because his wife, Plaintiff Dunivin, was one of the DoD psychologists who would be affected by APA policy on the issue of enhanced interrogation and had a strong bias on the issue	¶¶ 45, 224–28, Ex. A Statement Nos. 24, 25, 86, 100, 102, 108, 148
Inserted himself in and influenced the PENS Task Force process and the outcome in important ways	Ex. A Statement No. 25
As a member of the PENS Task Force, Newman spoke forcefully about the importance of achieving APA’s public relations goals in a manner that was inconsistent with the efforts of non-DoD psychologists who pushed for stricter, more specific ethical guidelines	Ex. A Statement No. 33, 37, 38, 99, 108
Agreed with the strategy of deferring to DoD’s preferences agreed with the strategy of deferring to DoD’s preferences	Ex. A Statement No. 114
In 2004, before the PENS Task Force was established, APA obtained a “clearly relevant” opinion from PricewaterhouseCoopers that the Newman-Dunivin marriage did not in itself create a conflict, but full disclosure, on a case-by-case basis, was necessary to minimize risks	¶¶ 226-227
“Colluded” with DoD psychologists to influence APA policy in favor of the DoD, helping to issue ethical guidelines that would not constrain DoD’s interrogation techniques	¶¶ 5, 19, 87, Ex. A Statement Nos. 5–8, 10, 127