

IN THE SUPERIOR COURT OF WASHINGTON, D.C.  
CIVIL DIVISION

STEPHEN BEHNKE, <i>et al.</i> ,	:	CASE NO. 2017 CA 005989 B
	:	Judge Hiram Puig-Lugo
Plaintiffs,	:	Next Event:
vs.	:	May 8, 2019
	:	Status Hearing
DAVID H. HOFFMAN, <i>et al.</i> ,	:	
Defendants.	:	

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DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S  
CONTESTED MOTION TO COMPEL ARBITRATION OF  
CLAIMS IN FIRST SUPPLEMENTAL COMPLAINT

Defendant American Psychological Association (“APA”) moves for an order compelling Plaintiffs Stephen Behnke (“Behnke”) and Russell Newman (“Newman”) to submit their claims against APA to arbitration in accordance with their employment agreements with APA pursuant to D.C. Code § 16-4407(a), and to stay the entire action pending final resolution of the arbitration proceedings and related litigation.

Behnke’s and Newman’s employment agreements require them to arbitrate “any dispute that may arise regarding their respective rights, duties or obligations” as APA employees. *See* Behnke Emp’t Agmt., Ex. 1-A to the Mem. in Support of Defendant American Psychological Association’s First Mot. to Compel Arbitration (“FMTCA”), ¶ 14; Newman Emp’t Agmt., Ex. 1-B to FMTCA, ¶ 15. These broad arbitration provisions encompass Behnke’s and Newman’s defamation and Behnke’s false-light claims against APA. Those claims are, at their core, disputes over whether Behnke’s and Newman’s performance as APA employees was consistent with their “rights, duties or obligations” under their employment agreements. *Id.* To resolve

them, the Court will need to consult their employment agreements and decide whether they faithfully and diligently discharged their duties, performed unsatisfactorily, misused APA resources, or violated APA policies. Exs. 1-A ¶¶ 5(i)-(iii), 6(ii), 8 to FMTCA; 1-B ¶¶ 6(i), (iii), 9 to FMTCA. Behnke's and Newman's claims necessarily touch upon their employment agreements with APA and, accordingly, are arbitrable. In further support of its Motion, APA respectfully refers the Court to APA's Memorandum in Support of Its Motion to Compel Arbitration of Claims in the First Supplemental Complaint, submitted contemporaneously with this Motion.

**ORAL HEARING REQUESTED**

Respectfully submitted,

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**Rule 12-I(a) Certification**

Pursuant to D.C. Sup. Ct. R. Civ. P. 12-I(a), APA's undersigned counsel certifies that Plaintiffs did not consent to the relief sought in this Motion.

/s/ Barbara S. Wahl  
Barbara S. Wahl

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of February, 2019, a true and correct copy of the foregoing Contested Motion to Compel Arbitration, Memorandum of Points and Authorities in Support, and Proposed Order were filed through the Court's electronic filing system, which will automatically send copies to counsel for Plaintiffs and Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and Sidley Austin LLP partner David Hoffman.

/s/ Barbara S. Wahl \_\_\_\_\_  
Barbara S. Wahl

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

<b>STEPHEN BEHNKE, et al.,</b>	:	<b>CASE NO. 2017 CA 005989 B</b>
	:	<b>Judge Hiram Puig-Lugo</b>
<b>Plaintiffs,</b>	:	<b>Next Event:</b>
<b>vs.</b>	:	<b>May 8, 2019</b>
	:	<b>Status Hearing</b>
<b>DAVID H. HOFFMAN, et al.,</b>	:	
<b>Defendants.</b>	:	

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**[PROPOSED] ORDER GRANTING CONTESTED MOTION OF DEFENDANT  
AMERICAN PSYCHOLOGICAL ASSOCIATION TO COMPEL ARBITRATION**

Upon consideration of the Motion to Compel Arbitration filed by the American Psychological Association (“APA”) pursuant to D.C. Code § 16-4407(a), the supporting documentation, and any opposition thereto, it is hereby **ORDERED** that:

1. APA’s Motion to Compel Arbitration is **GRANTED**.
2. Plaintiffs Behnke and Newman shall arbitrate the claims they have asserted against APA in the instant litigation in an arbitration proceeding to be held in Washington, D.C.
3. Plaintiffs Behnke and Newman are required to commence an arbitration action in the District of Columbia before the American Arbitration Association within thirty (30) days following the entry of this Order.
4. The entire action is stayed pending final resolution of the arbitration proceedings and related litigation.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge Hiram Puig-Lugo

**Copies will automatically be sent to the following attorneys through the Court's electronic filing system:**

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DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S  
MEMORANDUM IN SUPPORT OF ITS  
CONTESTED MOTION TO COMPEL ARBITRATION OF  
CLAIMS IN FIRST SUPPLEMENTAL COMPLAINT

## **I. Introduction**

Defendant the American Psychological Association (“APA”) respectfully submits this Memorandum in support of its Contested Motion to Compel Arbitration of the claims of Plaintiffs Stephen Behnke (“Behnke”) and Russell Newman (“Newman”) in their First Supplemental Complaint (the “Supplemental Complaint”).

Behnke and Newman agreed to arbitrate any dispute that arises regarding the performance of their employment duties and obligations. In the instant lawsuit, they allege that APA defamed them by publishing false statements regarding their conduct as APA employees. Because their disputes with APA fit squarely within the parties’ arbitration clauses, the Court must order Behnke and Newman to arbitrate their claims against APA.<sup>1</sup>

## **II. Background**

Plaintiffs Behnke and Newman are both former employees of APA who agreed to arbitrate “any dispute that may arise regarding [the parties’] respective rights, duties or obligations” under their employment agreements. *See* First Motion to Compel Arbitration (“FMTCA”) at 3.<sup>2</sup> Nonetheless, on August 28, 2017, Behnke and Newman filed the instant action against APA in D.C. Superior Court, alleging that APA, the law firm Sidley Austin LLP, and Sidley partner David Hoffman (collectively, “Sidley”) defamed them by publishing false statements in an Investigative Report (the “Report”) authored by Sidley regarding their conduct

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<sup>1</sup> APA intends to file a Special Motion to Dismiss the Supplemental Complaint under the District of Columbia’s Anti-SLAPP Act, D.C. Code § 16-5502. As with its initial Motion to Compel Arbitration, filed with regard to the initial Complaint, APA requests that the Court rule on its arbitration motion prior to addressing any motion involving the Anti-SLAPP Act.

<sup>2</sup> APA hereby adopts and incorporates by reference the FMTCA, filed on October 13, 2017 in response to Plaintiffs’ initial Complaint, as well as all exhibits thereto. All references in the FMTCA to paragraphs in the initial Complaint shall refer for purposes of this memorandum to the analogous paragraphs in the Supplemental Complaint.

as APA employees. FMTCA at 3–4. APA had retained Sidley to investigate whether APA had a role in supporting enhanced interrogation techniques used by the military on detainees in security facilities following the September 11, 2001 attacks.

On October 13, 2017, APA moved to compel arbitration of Behnke’s and Newman’s claims in the Complaint in accordance with the parties’ arbitration agreements. *See generally* FMTCA. On February 16, 2018, the Court stayed this action and ordered that briefing on the pending FMTCA be held in abeyance while Plaintiffs appealed an Ohio trial court’s dismissal on personal jurisdiction grounds of their nearly identical first-filed action. After the Ohio appellate court affirmed the dismissal, and the Ohio Supreme Court declined jurisdiction over Plaintiffs’ appeal therefrom, on February 4, 2019, Plaintiffs filed the Supplemental Complaint, which is now the operative complaint in this action.

The Supplemental Complaint is substantially similar to the initial Complaint, except that it includes a new count (Count XI) alleging that APA defamed Plaintiffs by republishing the Report in August 2018. APA is alleged to have done so by notifying members of an APA Council of Representatives email listserv that the Report would remain on the APA website at a link on a timeline, and by including that timeline link in APA Meeting Minutes that were posted to the APA website. Suppl. Compl., ¶¶ 295–305, 523–51 (Count XI).<sup>3</sup>

On February 14, 2019, the Court entered an order permitting APA to file this motion to compel arbitration of Behnke’s and Newman’s claims in the Supplemental Complaint.

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<sup>3</sup> The Supplemental Complaint also includes two new paragraphs that allege that APA has attempted to prevent unidentified witnesses from supporting Plaintiffs’ suit by threatening to exclude those who have submitted affidavits to support Plaintiffs from participating in privileged discussions of APA’s defense of this case, but these allegations do not appear to support any of Plaintiffs’ claims. *See* Suppl. Compl., ¶¶ 315–16.



**III. Behnke and Newman Must Arbitrate Their Claims Against APA in the Supplemental Complaint That Were Previously Pleaded in the Complaint.**

For all of the reasons set forth in the FMTCA, the Court should order Behnke and Newman to arbitrate their original claims against APA that have been repleaded in the Supplemental Complaint. *See supra* n.2.

**IV. Behnke and Newman Must Arbitrate Their New Claims against APA in Count XI of the Supplemental Complaint.**

Behnke's and Newman's new claims against APA in Count XI of the Supplemental Complaint are also subject to arbitration for substantially the same reasons as their original claims, and the Court should compel arbitration of the new claims. *See generally* FMTCA. Although APA adopts the full reasoning in its FMTCA as to why Behnke and Newman must arbitrate their new claims, *see id.*, APA reiterates key principles that confirm that conclusion.

As stated in the FMTCA, the Court's review of APA's motion is limited to determining whether the dispute is arbitrable. *See Stromberg Sheet Metal Works, Inc. v. Wash. Gas Energy Sys., Inc.*, 448 F. Supp. 2d 64, 69 (D.D.C. 2006); *see also* FMTCA at 6.

The U.S. Supreme Court recently reaffirmed the Court's limited role in determining arbitrability, holding that "[w]hen the parties' contract delegates" a dispute "to an arbitrator, the courts must respect the parties' decision as embodied in the contract" and "may not override the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528–29 (2019). Indeed, the "court has no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 529 (internal quotation marks omitted). The Court's narrow mandate is limited to deciding "whether the parties entered into a valid and enforceable arbitration agreement," and, if so, "whether the arbitration agreement encompasses the claims raised in the complaint" such that they must be arbitrated. *Stromberg*, 448 F. Supp. 2d at 68.

In deciding arbitrability, the Court takes into account that the Federal Arbitration Act (“FAA”), which applies to the employment agreements here, *see* FMTCA at 5–6, creates a “strong presumption” in favor of enforcement with “[a]ny doubts . . . resolved in favor of arbitration.” *Stromberg*, 448 F. Supp. 2d at 67 (internal quotation marks omitted). The FAA requires the Court to order arbitration unless it can say 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).

Arbitration provisions that cover “any dispute” arising under an agreement—like the provisions in Behnke’s and Newman’s employment agreements—are “extremely broad.” *Nanosolutions*, 793 F. Supp. 2d at 57; *see* FMTCA at 6–7. Such provisions require arbitration of a dispute absent “[o]nly the most forceful evidence of a purpose to exclude the claim from arbitration.” *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 923 (D.C. 1992) (internal quotation marks omitted).

A dispute must be arbitrated under such an agreement if the claims “touch upon” the agreement in any way. *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). This includes disputes sounding in tort that touch upon the agreement, such as defamation-related claims. *See, e.g., Pearce v. E.F. Hutton Grp.*, 828 F.2d 826 (D.C. Cir. 1987) (ordering plaintiff employee to arbitrate defamation claims against defendant, an affiliate of plaintiff’s employer, whose independent investigator allegedly defamed plaintiff in a report that discussed plaintiff’s conduct as an employee).

Here, Behnke’s and Newman’s new defamation claims are subject to arbitration because they “touch upon” their employment agreements, their rights, duties, and obligations as

employees of APA, and their positions as employees of APA. *See* Suppl. Compl., Count XI, ¶¶ 523–51; FMTCA at 8–14.

Behnke alleges that APA’s republication of the Report defamed him by resurrecting the same Report narrative with respect to his conduct and activities while employed as APA’s Ethics Director, which was pursuant to his employment agreement with APA. *See* Suppl. Compl., ¶¶ 298, 523–51; FMTCA at 9, Ex. 4 (identifying allegedly defamatory statements that describe and critique Behnke’s performance of duties and obligations as Ethics Director). He claims that he was defamed by alleged statements in the Report asserting that, as Ethics Director, he mishandled ethics complaints and also “colluded” with Department of Defense (“DoD”) officials. Those claims necessarily touch upon his duties and obligations as Ethics Director and will require him to prove, *inter alia*, that he handled ethics complaints appropriately and in compliance with APA policies, and that he did not violate his contractual duty of loyalty to APA by “colluding” with DoD officials. *See* FMTCA at 9–11. He also claims that he was defamed by alleged statements in the Report asserting that he destroyed emails from APA servers to conceal inappropriate collaboration and disclosed confidential APA information. Those claims also touch upon his duties and obligations as Ethics Director and will require him to prove, *inter alia*, that he complied with APA policies and/or employment agreement provisions regarding data retention and confidentiality and did not violate his contractual duty of loyalty to APA. *See id.* at 11–12. And he claims that he was defamed by alleged statements in the Report that questioned whether he remitted to APA payments he received from DoD workshops, a claim that touches upon his duties and obligations as Ethics Director and that will require him to prove, *inter alia*, that he complied with his contractual agreement to work full time for APA and to

obtain prior written approval from APA's CEO before accepting outside consulting positions or employment, and that he complied with APA policies. *See id.* at 12.

Newman similarly alleges that APA's republication of the Report defamed him with respect to his conduct and activities as APA Practice Directorate head, which was pursuant to his employment agreement with APA. *See* Suppl. Compl., ¶¶ 298, 523–51; FMTCA at 13–14, Ex. 5 (identifying allegedly defamatory statements that describe and critique Newman's performance of duties and obligations as APA Practice Directorate head). Newman claims that he was defamed by alleged statements in the Report that asserted that he inadequately disclosed a conflict of interest while participating in the PENS Task Force. *See* FMTCA at 13. This claim touches upon his duties and obligations as APA Practice Directorate head, and will also place at issue whether he complied with APA's conflict-of-interest policies. *See id.* at 13–14. Newman also claims that he was defamed by alleged statements in the Report that asserted that he colluded with DoD officials to maintain loose APA policies that would not constrict DoD psychologists, a claim that also touches upon his conduct as APA Practice Directorate head and his duties and obligations under his employment agreement. *See id.* at 14.

#### **V. The Court Should Compel Arbitration under D.C. Code § 16-4407.**

Under the District of Columbia Revised Uniform Arbitration Act (the "D.C. Act"), which governs arbitration procedures, "[o]n a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement . . . the court shall 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).

Here, there can be no dispute that Behnke's and Newman's employment agreements, which included agreements to arbitrate, are valid and binding, and that their claims against APA

are subject to arbitration. Thus, consistent with the D.C. Act, the Court should order Behnke and Newman to arbitrate their claims against APA.

**VI. Conclusion**

For the foregoing reasons, along with the reasons set forth in the FMTCA, 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 final resolution of the arbitration proceedings and related litigation.

Respectfully submitted,

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