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

LARRY C. JAMES, *et al.*,	:	**CASE NO. 2017 CV 00839**
Plaintiffs,	:	**Judge Timothy N. O'Connell**
vs.	:	**DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR FORUM NON CONVENIENS AND SPECIAL MOTION TO DISMISS UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502**
DAVID HOFFMAN, *et al.*,	:	
Defendants.	:	
	:	
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INTRODUCTION

The American Psychological Association ("APA") is the largest scientific and professional organization representing psychology in the United States. APA's membership includes nearly 115,700 researchers, educators, clinicians, consultants and students. Incorporated and with a headquarters in Washington, D.C., APA has been a central clearinghouse for vigorous debate and controversy among mental health professionals on topics of contemporary interest.

One topic of extensive discussion among APA members for many years has been the extent of involvement of psychologists and psychology in national security-related activities. Within APA, there was lively discourse regarding the proper role of psychologists in connection with interrogations conducted by the government at federal security facilities following the events of September 11, 2001. In February 2005, APA convened a task force comprised of military and civilian psychologists to examine whether APA had been providing adequate ethical guidance to psychologists in national security settings and whether additional policies should be developed. The task force, called the Psychological Ethics and National Security, or PENS, Task Force, convened in Washington, D.C. over a weekend in June 2005 and drew up twelve specific recommendations concerning psychologists' ethical obligations in national security-related activities for the consideration of APA's Board of Directors and its larger governing body, the Council of Representatives (the "Council"). In July 2005, the APA Board of Directors adopted the Task Force Report as APA Policy, and at the Association's August 2005 Convention in Washington, D.C., the Council endorsed the Independent Review.

But the policy had its critics, within and without APA, including psychologists who urged the organization to adopt a more stringent policy that would bar psychologists from any activities at national security detention facilities. The controversy, often heated, was the subject

of extensive roiling debate within APA and public criticism. Arguments between and among individual psychologists and whole divisions,[1] ensued, with APA acting as the platform and clearinghouse for such debates.

The dispute among APA members, and psychologists generally, came to a head in 2014 when New York Times investigative reporter James Risen published a book titled *Pay Any Price,* which discussed the role of psychologists in national security interrogations and claimed that APA colluded with the United States Government to support enhanced interrogation techniques that amounted to torture. After the Risen book was published, APA engaged law firm, and co-Defendant, Sidley Austin LLP ("Sidley") to conduct an independent investigation into the allegations. That investigation was led by partner David Hoffman ("Hoffman"), also a co-Defendant here.

Sidley and Hoffman were eminently suited to the task. Sidley is a well-regarded law firm with its principal office in Chicago, substantial office in Washington, D.C., and eighteen (18) other offices in other national and international cities. It has an experienced internal investigations practice that has conducted many investigations in different fields. *See Internal Investigations*, Sidley, http://www.sidley.com/en/services/internalinvestigations.[2] Sidley partner Hoffman, a graduate of Yale University and the University of Chicago Law School, and a former

[1] APA's 54 divisions are interest groups organized by members. Some represent subdisciplines of psychology (*e.g.*, experimental, social or clinical) while others focus on topical areas such as aging, ethnic minorities or trauma. APA members, and even nonmembers, can apply to join one or more divisions which have their own eligibility criteria and dues. In addition, each division has its own officers, website, publications, email list, awards, convention activities, and meetings. Two prominent divisions in this debate have been Division 19 (Society for Military Psychology) and Division 48 (Peace Psychology Division). *See Divisions*, APA, https://www.apa.org/about/division/index.aspx.

[2] APA respectfully requests that this Court take judicial notice of the websites cited in this introduction and the information included therein, in accordance with Ohio Rule of Evidence 201. *See, e.g.*, *Malone v. Berry*, 174 Ohio App.3d 122, 2007-Ohio-6501, 881 N.E.2d 283, ¶ 13 (10th Dist.).

Supreme Court clerk, has extensive experience conducting internal investigations as a former Inspector General and federal prosecutor. He has directed hundreds of investigations and advised numerous public and private entities on ethics and compliance matters. *See David H. Hoffman*, Sidley, http://www.sidley.com/people/david-hoffman.

In retaining Sidley to do the internal investigation, APA's Board of Directors asked Sidley to consider and report as to whether APA colluded with the Bush administration, CIA, or U.S. military to support torture during the war on terror. Sidley was instructed to conduct the review in a fully independent manner, and to ascertain the truth wherever the evidence led. Compl. ¶¶ 15, 181. APA intended to make Sidley's work public in furtherance of the dialogue and free speech on the topic. Compl. ¶¶ 18-19.

Sidley conducted an extensive, eight-month investigation, interviewing 148 individuals, Compl. ¶ 269, and reviewing more than 50,000 documents. In late June 2015, Sidley presented to APA a 542-page report plus exhibits (the "Independent Review"), detailing Sidley's findings and conclusions. As APA was internally reviewing the report to prepare for its publication, on July 10, 2015, *The New York Times*, which had received a leaked copy of the Independent Review, posted a copy of the Independent Review on the *Times*'s website. Compl. ¶¶ 2, 27-29, 244, 246-47, 338, 359, 380, 419. Later that evening, APA also made the report available on its own website.

Plaintiffs in this action—all psychologists—are three former Army officials and two former APA employees who were interviewed by Sidley and identified in the Independent Review. Compl. ¶¶ 38–42; Independent Review at 533, 535, 538. Plaintiffs contend that statements made about them in the Independent Review are false and that some are defamatory or hold them in false light. Compl. ¶¶ 1, 79–153. Plaintiffs contend that APA's liability stems

from a few central actions—publishing the Independent Review without first carefully reviewing it and taking Plaintiffs' and others' opinions into account; failing to address Plaintiffs' complaints about the Independent Review; failing to publish a further report that would include commentary on certain military policies; and appointing a Special Committee to which Sidley reported that was not suited to the task. Compl. ¶¶ 89, 239–56, 275–84. As discussed in detail in connection with the Anti-SLAPP portion of this Memorandum, these grounds are insufficient for the Complaint to survive the instant Motion.

Plaintiffs' 530-paragraph Complaint, which includes as an exhibit a 45-page single-spaced chart identifying alleged errors in the Independent Review, is as fundamentally flawed as it is long. The instant Motion seeks dismissal of the Complaint on the basis of lack of personal jurisdiction over APA in Ohio and with prejudice pursuant to the District of Columbia's Anti-SLAPP Act, D.C. Code §§ 16-5501, *et seq.*, which applies here as a result of the Ohio conflict of laws analysis.[3]

First, the allegations in the Complaint fail to support this Court's exercise of personal jurisdiction over APA consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This Court lacks *general* jurisdiction over APA because APA is a Washington, D.C. corporation with a principal place of business in Washington, D.C. and is

[3] Although the parties have agreed that Defendants may have until May 22, 2017 to file responses to the Complaint, which stipulation was entered as an order by the Court on March 21, 2017, APA is filing the motion to dismiss for lack of personal jurisdiction and pursuant to the District of Columbia's Anti-SLAPP Motion (and Defendants Sidley and Hoffman are filing similar motions) at this earlier time because the District of Columbia's Anti-SLAPP Act requires that a motion thereunder be filed within 45 days of service of a Complaint, and such a motion could not wait until the later deadline agreed to by the parties. To make clear that APA is not waiving its personal jurisdictional objections by filing an Anti-SLAPP Motion, APA is also at this time filing a motion on the basis of the Court's lack of personal jurisdiction over APA. APA contemplates that it will be filing additional substantive motions regarding the Complaint on or before the May 22, 2017 deadline. APA intends no inconvenience to the Court by the filing of the motions at two different time periods.

not "at home" in Ohio. And this Court lacks *specific* jurisdiction over APA because the claims asserted by the Plaintiffs (only one of whom has any connection with Ohio) do not arise from APA's contacts with the State of Ohio. Indeed, the scant contacts with Ohio identified in the Complaint that pertain to the Independent Review are insufficient to provide a basis for this Court's jurisdiction over APA with regard to the Plaintiffs' claims. Because this Court's exercise of personal jurisdiction over APA would deprive APA of its right to due process of law under the Fourteenth Amendment, the Complaint should be dismissed with prejudice. Alternatively, APA joins Defendants Sidley and Hoffman in moving for dismissal on the basis of forum non conveniens.

Second, the Court should dismiss the Complaint with prejudice in accordance with the District of Columbia's Anti-SLAPP Act, D.C. Code §§ 16-5501–05 (the "D.C. Act"). That Act grants a District of Columbia speaker such as APA "substantive rights" to "fend off" strategic lawsuits against public participation ("SLAPPs")—such as the instant suit—that chill free speech and embroil speakers in meritless litigation. It does so by requiring plaintiffs who allege claims that arise from "an act in furtherance of the right of advocacy on an issue of public interest," such as defamation, to demonstrate at an early stage of the proceedings that they are "likely to succeed on the merits." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226–27 (D.C. 2016); *see* D.C. Code § 16-5502(a), (b). Ohio choice-of-law principles require this Court to apply the D.C. Act here, recognizing the substantive rights afforded to APA, a District of Columbia domiciliary, pursuant to the D.C. Act. APA's publication of the Independent Review constitutes an "act in furtherance of the right of advocacy on an issue of public interest" within the meaning of the D.C. Act, and Plaintiffs cannot demonstrate that they are "likely to succeed on the merits." D.C. Code §§ 16-5501(1), (3); 16-5502(a), (b).

Analyzing the Complaint under the D.C. Act, Plaintiffs' claims ultimately cannot succeed on the merits. Plaintiffs are all public officials or limited-purpose public figures, and have failed to allege, and cannot allege, that APA had "actual malice" in connection with the Independent Review. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 279–81 (1964). Plaintiffs cannot demonstrate that APA's few activities in connection with the Independent Review, including its publication, were undertaken with a "high degree of awareness of probable falsity" or with "serious doubts as to the truth," the well-established legal articulations of "actual malice." *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Nor can Plaintiffs meet the heightened proof standard of "clear and convincing" evidence required to prove defamation in the circumstances at bar. *Mann*, 150 A.3d at 1236; *see, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

APA respectfully moves this Court for an order dismissing the Complaint due to the absence of personal jurisdiction over APA in Ohio and, further, joins Defendants Sidley and Hoffman's in moving to dismiss for forum non conveniens. Alternatively, APA respectfully moves this Court to dismiss the Complaint with prejudice in accordance with the D.C. Act.[4]

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over APA.

When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff has the burden of demonstrating that the court may exercise personal jurisdiction over the defendant consistent with both the Ohio long-arm statute and companion Ohio Rule of Civil Procedure 4.3(A), and the Due Process Clause of the United States Constitution. *See, e.g.*, *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, ¶¶ 11, 12. The court must assess

[4] Should this Court decide that it lacks personal jurisdiction over APA, the Court will never need to reach the anti-SLAPP motion, addressed in Part III herein.

personal jurisdiction with respect to each claim against the non-resident defendant. *See, e.g.*, *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274 (5th Cir. 2006) (collecting cases).

Here, Plaintiffs allege personal jurisdiction over APA under Ohio's long-arm statute and Ohio Rule of Civil Procedure 4.3(A). But the Due Process Clause requires that a non-resident defendant like APA have sufficient contacts with a forum state before being haled into court here. Specifically, the Due Process Clause requires that this Court can exercise personal jurisdiction over a non-resident defendant only if that defendant has "minimum contacts" with a forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *accord Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 45. Personal jurisdiction consistent with the Due Process Clause can either be "general" or "specific." *See, e.g.*, *Kaufman Racing* at ¶ 46. Plaintiffs can satisfy neither here.

A. This Court Lacks General Jurisdiction Over APA.

For a court to exercise "general" jurisdiction, it must conclude that the defendant is "at home" in the forum state, *e.g.*, it is incorporated or has its principal place of business there. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court recently emphasized the limited scope of general jurisdiction, holding that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the state are so 'continuous and systematic' as to render them essentially at home in the forum State." 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe Co.*, 326 U.S. at 317); *see also Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (reaffirming that "the paradigm forum for the exercise of general jurisdiction . . . [is where] the corporation is fairly regarded as at home," including "the place of incorporation and principal place of business.").

Here, this Court may not exercise *general* jurisdiction over APA because APA's affiliations with Ohio are not so "continuous and systematic" as to render APA "essentially at home" in Ohio. *See Goodyear*, 564 U.S. at 919 (quoting *Int'l Shoe Co.*, 326 U.S. at 317). The Complaint makes clear that APA is incorporated and maintains its principal place of business in Washington, D.C. Compl. ¶ 47. It further alleges that APA's "daily operations are overseen by its senior staff at the APA headquarters [there, where it] has 500 staff members and is incorporated as a non-profit." *Id*. As a result, APA is not "fairly regarded as at home" in Ohio—notwithstanding its Ohio membership or accreditation activities. *See Daimler*, 134 S. Ct. at 760 (concluding that "the paradigm forum for the exercise of general jurisdiction . . . for a corporation . . . [is] one in which the corporation is fairly regarded as at home," which includes "the place of incorporation and principal place of business"). The alleged presence of over 1500 APA members licensed in Ohio, the accreditation of psychology programs in the state, and the residence of a Board member in Ohio do not confer general jurisdiction over APA in Ohio. *Id.*; *see also, e.g.*, *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 223 (2d Cir. 2014) (noting that *Daimler* "reaffirms that general jurisdiction extends beyond an entity's state of incorporation and principal place of business only in the exceptional case where its contacts with another forum are so substantial as to render it 'at home' in that state"). Accordingly, this Court lacks general jurisdiction over APA.

B. This Court Lacks Specific Jurisdiction Over APA.

In the absence of general jurisdiction, Plaintiffs evidently rely on *specific* jurisdiction over APA. For a court to exercise *specific* jurisdiction, a defendant's contacts with Ohio must satisfy the three-part test established by *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968):

> First, the defendant must purposefully avail himself of the

> privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002) (quoting *S. Mach. Co.*, 401 F.2d at 381); *accord Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002). Ohio courts have routinely applied the *Southern Machine* test when evaluating personal jurisdiction. *See, e.g.*, *Kauffman Racing*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶¶ 50–73 (applying *Southern Machine* test in defamation case where non-resident defendant allegedly defamed Ohio business with the hope "that his commentary would have a devastating effect" on plaintiff's business in Ohio). The third factor is crucial "because 'minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.'" *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 554 (6th Cir. 2007) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985)); *see Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir. 2005). "In determining whether the exercise of jurisdiction is reasonable," courts must consider: "(1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) other states' interest in securing the most efficient resolution of the policy." *Air Prods.*, 503 F.3d at 554–55 (citing *Intera Corp.*, 428 F.3d at 618). Here, Plaintiffs fail to meet the *Southern Machine* requirements, rendering this Court without specific jurisdiction over APA with respect to any of Plaintiffs' claims.

1. This Court Lacks Specific Jurisdiction Over the Claims of the Four Non-Resident Plaintiffs.

The Complaint fails to establish any plausible connection between Ohio and Plaintiffs Banks, Behnke, Dunivin, and Newman. None are Ohio residents. The Complaint contains no allegation connecting their claims against APA to Ohio, let alone an allegation that those Plaintiffs' claims "arise" from APA's Ohio "activities." *Southern Machine*, 401 F.2d at 381. And none have alleged either injury in Ohio or any bar to redress in their home states. *See Huizenga v. Gwynn*, --- F. Supp. 3d ---, 2016 WL 7385730, at *10 (E.D. Mich. 2016) (forum state did not have "an especially strong interest" in defamation suit brought by non-residents); *see also Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987) (forum state's legitimate interests "considerably diminished" where plaintiff is not a resident). Indeed, Plaintiffs—two of whom are from Washington, D.C.—allege that District of Columbia-based APA principally acted in the District of Columbia, and defamed Plaintiffs with respect to events that occurred in the District of Columbia.

On balance, the Complaint fails to allege purposeful availment, that these Plaintiffs' claims "arise from" APA's Ohio contacts, and, like in *Intera Corp.* and *Huizenga*, that APA has "a substantial enough connection" with Ohio "to make the exercise of jurisdiction over" APA reasonable. *See Intera Corp.*, 503 F.3d at 618–19; *Huizenga*, 2016 WL 7385730, at *1.[5] The claims brought by Banks, Behnke, Dunivin, and Newman should be dismissed for lack of personal jurisdiction.

2. The Court Lacks Specific Jurisdiction Over Plaintiff James's Claims.

Plaintiff James, the only Ohio resident, alleges in the Complaint with regard to APA (1)

[5] The Court may dismiss the complaint for unreasonableness without considering the first two *Southern Machine* factors. *See, e.g.*, *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499 (6th Cir. 2014); *Huizenga*, 2016 WL 7385740, at *11.

that Dr. Nadine Kaslow, former APA President, sent an e-mail to James in Ohio, asking him to cooperate with the investigation, Compl. ¶ 60; and (2) that the allegedly defamatory statements were published on APA's website to be circulated, viewed, and read nationwide, including by residents of Montgomery County, causing James to suffer harm in Ohio, Compl. ¶ 62.[6] These allegations fail to satisfy the *Southern Machine* requirements with respect to Plaintiff James's claims.

a. Dr. Kaslow's E-mail to James in Ohio.

The Complaint alleges that Dr. Nadine Kaslow, a former APA President, sent an e-mail to Plaintiff James "in Ohio" asking James to "cooperate" with Sidley's investigation. Compl. ¶ 60. This single e-mail fails to establish either that APA purposefully availed itself in Ohio or that James's claims "arose from" APA's activities in Ohio, *i.e.*, have a "substantial connection" with APA's activities in Ohio.

[6] Plaintiffs also appear to allege that Defendants Sidley and Hoffman's interview of James in Ohio should be imputed to APA for jurisdiction purposes. Compl. ¶¶ 59–62. Plaintiffs cannot, however, allege that Sidley's and Hoffman's actions are imputed to APA while simultaneously alleging that APA retained Sidley to conduct an "independent" investigation that "bec[a]me a rogue one." Compl. ¶¶ 162, 181. *Cf. Fraley*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, at ¶¶ 25–28 (rejecting statutory long-arm jurisdiction on basis of agency relationship where purported principal did not have requisite control over purported agent). Indeed, Plaintiffs cannot allege that Sidley acted as an "agent" of APA when Sidley interviewed James in Ohio because they do not allege that APA exercised control over Sidley when the location of the interview was chosen, when Sidley conducted the interview, or otherwise. *See, e.g.*, *Celgard*, *LLC v. SK Innovation Co.*, 792 F.3d 1373, 1379 (Fed. Cir. 2015) ("[T]o establish jurisdiction under the agency theory, plaintiffs must show that the defendant exercises control over the activities of the third-party."). And even if Sidley and Hoffman were agents of APA with respect to those events—which they were not—the interview of James in Ohio cannot be imputed to APA to demonstrate purposeful availment because APA did not "direct" Sidley to interview James in Ohio. *See Daimler*, 134 S. Ct. at 759 n.13 ("[A] corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there."). On the contrary, APA authorized Sidley to go where the evidence led. Compl. ¶¶ 15, 181. To the extent the interview is imputed to APA, it fails to satisfy *Southern Machine*'s requirements for all the reasons set forth in the Memorandum in Support of the Motion of Defendants Sidley Austin LLP and David Hoffman for Lack of Personal Jurisdiction or Forum Non Conveniens ("Sidley/Hoffman Jurisdiction Memorandum"), also filed today.

First, a single contact via e-mail with an Ohio resident, like Dr. Kaslow's e-mail to James, is insufficient to satisfy the purposeful availment requirement. Rather, it is precisely the type of "random," "fortuitous," or "attenuated" contact the purposeful availment requirement protects against. *Air Prods.*, 503 F.3d at 551. Many courts, including those in Ohio and the Sixth Circuit, have recognized that single, isolated, in-forum interactions, like e-mails, are insufficient. *See, e.g.*, *Kauffman Racing*, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 68 (finding jurisdiction because "[w]e are not dealing with a situation in which jurisdiction is premised on a single, isolated transaction"); *AlixPartners, LLP v. Brewington*, 836 F.3d 543, 551 (6th Cir. 2016) (finding jurisdiction where "[t]he facts of this case establish that [the defendant] knowingly created a connection with [the plaintiff's in-forum office] that was intended to be ongoing in nature, as opposed to a one-shot affair") (internal quotation marks omitted); *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 208 F. Supp. 2d 918, 926 (N.D. Ill. 2002) ("Generally, telephonic exchanges and mail correspondence from a foreign defendant outside the forum state to individuals within the forum state are insufficient to provide a basis for the exercise of personal jurisdiction under due process analysis."); *United Airlines, Inc. v. Zaman*, 152 F. Supp. 3d 1041, 1053 (N.D. Ill. 2015) ("single email chain and a single phone call over the course of two weeks" are "too sparse to create personal jurisdiction"). This is particularly so where there is no allegation in the Complaint that James actually received the e-mail while he was in Ohio, nor does it suggest that James took any particular action in Ohio as a result of the e-mail.

Second, the quality and nature of APA's purported contact with Ohio through Dr. Kaslow's email to James, even if an Ohio resident, fails the purposeful availment requirement. A defendant does not purposefully avail itself of a forum state's laws when its contacts with the

state are solely a function of "the plaintiff['s] cho[ice] to reside there." *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722–23 (6th Cir. 2000) (affirming dismissal for lack of personal jurisdiction where defendant's "phone, mail, and fax contact with [the plaintiff] in [the forum] and [the defendant's] physical visits there" did not create a substantial connection because they "occurred solely because [the plaintiff] chose to be headquartered in Ohio"). APA did not email James in order to avail itself of Ohio's laws, or with the aim of causing a consequence in Ohio. James's location in Ohio—and thus APA's purported contact with him there—was fortuitous. *Air Prods.*, 503 F.3d at 551. Fortuitous contacts cannot form the basis for purposeful availment of a particular state's law. *Id.* The Complaint also fails to allege that the "cooperation" requested of James required or even contemplated that he take any action in Ohio. Rather, any such "cooperation" could have been accomplished by phone, e-mail, or other means, in any location, without a connection to Ohio. It mattered none to APA.

Finally, no allegation in the Complaint demonstrates that James's claims "arise from" the e-mail from Dr. Kaslow. To demonstrate that a claim "arises from" in-state activities, the claim must "have a substantial connection with the defendant's in-state activities." *Bird*, 289 F.3d at 875. *Oasis Corporation v. Judd* is on point. 132 F. Supp. 2d 612 (S.D. Ohio 2001). There, a defendant was alleged to have defamed a product through comments made on its website. *Id*. at 622. Defendant's contacts with the forum state (Ohio) other than those based on the content of defendant's website, *e.g.*, phone calls, faxes, and e-mail messages sent to the Ohio plaintiffs, were "unconnected" with the plaintiffs' claims and, the court found, did not "arise from" those claims for purposes of *Southern Machine*. *Id*. at 622–23. Here, no Complaint allegation connects the purported e-mail from Dr. Kaslow seeking James's "cooperation" with Sidley's investigation to APA's posting of the Independent Review on APA's website.

b. James's alleged injury in Ohio does not confer personal jurisdiction.

James's allegation that the Independent Review was made available on APA's website and could be accessed in Ohio and therefore caused James harm in Ohio is also not sufficient to satisfy the requirements of *Southern Machine*.

First, James's allegations that the allegedly defamatory "statements were published . . . on the APA's website to be circulated, viewed, and read nationwide, including by residents of . . . Ohio," Compl. ¶¶ 2, 62, fail to satisfy the purposeful availment requirement. It is well-settled that the mere maintenance of a website "does not constitute purposeful availment of the privilege of acting" in a state. *Neogen*, 282 F.3d at 890; *see Bird*, 289 F.3d at 874; *Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 678 (6th Cir. 2005); *Oasis Corp.*, 132 F. Supp. 2d at 623. By posting the Independent Review on the APA website for informational purposes—even if the website was accessible from Ohio and "read nationwide," Compl. ¶ 62—APA has "no more benefit[ed] from the laws of [Ohio] than from the laws of any other state." *Neogen*, 282 F.3d at 890. Indeed, James does not assert that the APA website provided anything other than passive information, nor that APA's posting of the Independent Review was "interactive to a degree that reveals specifically intended interaction with" Ohio residents. *See id.* APA's contact with Ohio resulting from APA's passive posting of information to the Internet is "an 'attenuated' contact that falls short of purposeful availment." *Id.*

To establish purposeful availment-based harm resulting from allegedly defamatory statements, a plaintiff must show that the defendant intentionally targeted the forum, not just the plaintiff. *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994) (reversing trial court's denial of motion to dismiss for lack of personal jurisdiction because the defamation plaintiff failed to establish that the defendant intentionally targeted Ohio)

(distinguishing *Calder v. Jones*, 465 U.S. 783 (1984)). Here, the allegations are insufficient to show that APA intentionally targeted Ohio. Courts have found such targeting only where the allegedly defamatory publication "is directed at [forum] readers as distinguished from readers in other states." *Clemens v. McNamee*, 615 F.3d 374, 379–80 (5th Cir. 2010) (refusing to find purposeful availment because statements were not "directed to [forum] residents any more than residents of any state"); *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) ("[T]hat the [defendants'] websites could be accessed anywhere, including [the forum], does not by itself demonstrate that the [defendants] were intentionally directing their website content to a [forum] audience."). Plaintiffs' Complaint alleges only that "[t]he statements were published in *The New York Times* and on the APA's website to be circulated, viewed, and read *nationwide*, including by residents of Montgomery County, Ohio." Compl. ¶ 35 (emphasis added). The Complaint does not allege that APA targeted Ohio.

In addition, the alleged defamatory statements must concern Plaintiffs' activities in the forum. *Reynolds*, 23 F.3d at 1120. The court in *Reynolds* rejected purposeful availment because the allegedly defamatory "press release concerned [the plaintiff's] activities in Monaco, not Ohio." *Id.*; *see also Clemens*, 615 F.3d at 380 (affirming dismissal based on lack of personal jurisdiction because "the statements did not concern activity in [the forum]"); *Cadle Co.*, 123 F. App'x at 679 (affirming dismissal for lack of personal jurisdiction because, "while the 'content' of the publication was about an Ohio resident, it did not concern that resident's Ohio activities"); *Revell v. Lidov,* 317 F.3d 467, 473 (5th Cir. 2002) (affirming grant of motion to dismiss for lack of personal jurisdiction) ("the article written by [the defendant] about [the plaintiff] contains no reference to [the forum], nor does it refer to the [in-forum] activities of [the plaintiff]"). Here,

the Complaint contains no allegations that any actions reported in the Independent Review that were undertaken by James or any other Plaintiff occurred in Ohio.

3. Specific Jurisdiction Over APA Also Fails *Southern Machine*'s Reasonableness Test.

Even if the Complaint sufficiently pleaded either of the first two requirements under *Southern Machine* as to any of Plaintiffs' claims, which it does not, the Complaint fails to allege that APA had "a substantial enough connection" with Ohio in the circumstances "to make the exercise of jurisdiction over" APA reasonable. *Neogen*, 282 F.3d at 890 (quoting *S. Mach. Co.*, 401 F.2d at 381). APA would be "substantially burdened if . . . compelled to litigate this case in [Ohio] given the fact that" APA does not reside in Ohio. *Intera Corp.*, 428 F.3d at 618; *see Huizenga*, 2016 WL 7385730, at *10. APA has no offices in Ohio, its lead counsel are not from Ohio, and the bulk of evidence and witnesses are not there, rendering litigation in Ohio "inconvenient, costly, and inefficient" for APA. *Huizenga*, 2016 WL 7385730, at *10. Two of the four Plaintiffs are from Washington, D.C. Compl. ¶¶ 40-41. Plaintiffs allege that D.C.-based APA, acting principally in Washington, D.C., defamed them with respect to events that occurred in Washington, D.C. *See, e.g.,* Compl. ¶ 47. And Washington, D.C. has a substantial interest in applying the D.C. Act and developing a coherent body of law to protect its speakers on matters of public concern. *See infra* Part III. The Complaint fails to satisfy *Southern Machine*'s "reasonableness" test with respect to personal jurisdiction over APA in Ohio.

Because Plaintiffs have failed to satisfy the *Southern Machine* factors, APA respectfully requests that this Court decline to exercise personal jurisdiction over APA with respect to each Plaintiff, in accordance with APA's due process rights, and dismiss the case pursuant to Rule 12(B)(2) of the Ohio Rules of Civil Procedure.

II. The Court Should Dismiss the Complaint for Forum Non Conveniens.

Alternatively, if the Court finds personal jurisdiction over APA here, APA respectfully requests that the Court dismiss the case under the doctrine of forum non conveniens for the reasons stated in the Sidley/Hoffman Jurisdiction Memorandum. Section II of that Motion is incorporated by reference herein.

III. The Court Should Dismiss the Complaint With Prejudice in Accordance with D.C.'s Anti-SLAPP Act.

In the event that this Court concludes that it may exercise personal jurisdiction over APA with respect to any of the Plaintiffs' claims, APA respectfully requests that the Court dismiss those claims with prejudice, as required by the D.C. Act. *See* D.C. Code §§ 16-5501–05.

Ohio choice-of-law principles dictate that this Court should apply the D.C. Act because the Act confers a substantive right on APA that conflicts with Ohio law, which has no Anti-SLAPP Act, and the District of Columbia has a more significant relationship to the Anti-SLAPP issue than does Ohio. Application of the D.C. Act requires dismissal here because Plaintiffs' claims against APA arise from "an act in furtherance of the right of advocacy on issues of public interest" through the publication of the Independent Review, and Plaintiffs are not "likely to succeed on the merits." D.C. Code §§ 16-5502(a), (b). Indeed, Plaintiffs, who are all public officials or limited-purpose public figures, have not alleged, and cannot allege, that APA published any statements in the Independent Review with actual malice, and they cannot present clear and convincing evidence that APA had actual malice when publishing any statements in the Independent Review.

A. Overview of the D.C. Act

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing

points of view.'" *Mann*, 150 A.3d at 1226 (quoting D.C. Council, Comm. on Pub. Safety and the Judiciary, Report on Bill 18–893 (Nov. 18, 2010) (hereafter "Comm. Rept.")). The District of Columbia Council enacted the D.C. Act in order "to protect the targets of SLAPPs and encourage 'engag[ement] in political or public policy debates.'" *Doe No. 1. v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014) (quoting Comm. Rept.); *see* D.C. Code §§ 16-5501–05. The Act creates "substantive rights" so that a defendant can "fend off a SLAPP." *Mann*, 150 A.3d at 1226. Thus, "[f]ollowing the lead of a number of other jurisdictions, the statute creates a 'special motion to dismiss,' a procedural mechanism that allows a named defendant to quickly and equitably end a meritless suit." *Burke*, 91 A.3d at 1036 (citing D.C. Code § 16-5502).

Under the D.C. Act, "the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.'" *Mann*, 150 A.3d at 1227 (quoting D.C. Code § 16-5502(b)). The burden then "shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate that the claim is likely to succeed on the merits.'" *Id.* (quoting D.C. Code § 16-5502(b)). Failing that, "the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Id.* (citing D.C. Code § 16-5502(b)). "The court is required to hold an 'expedited hearing' on the motion and to issue a ruling 'as soon as practicable after the hearing.'" *Mann*, 150 A.3d at 1232 (quoting D.C. Code § 16-5502(d)). "If the plaintiff's opposition fails to meet the statutory standard, the Act requires the trial court to dismiss the complaint, with prejudice." *Id.* (citing D.C. Code § 16-5502(b), (d)).

Today, as many as twenty-eight states have enacted Anti-SLAPP laws that afford defendants special protections when speaking on matters of public importance. The State of

Ohio does not (yet) have an Anti-SLAPP law, though Ohio courts favor the same free-speech protections afforded by the Anti-SLAPP laws in other jurisdictions. *See Murray v. Chagrin Valley Publ'g Co.*, 2014-Ohio-5442, 25 N.E.3d 1111, ¶ 40 (8th Dist.) ("This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech.").

B. Ohio Choice-of-Law Principles Dictate that the D.C. Act Applies to the Plaintiffs' Claims.

Ohio choice-of-law principles dictate that this Court should apply the D.C. Act because it confers a substantive right on APA that conflicts with Ohio law, which has no Anti-SLAPP statute, and the District of Columbia has a more significant relationship to the Anti-SLAPP issue than does Ohio. As courts around the country have repeatedly held, the state where a defendant speaks or is domiciled—here, Washington, D.C.—has the most significant relationship and the greatest interest in the Anti-SLAPP issue, which aims to protect the speech of the state's citizens on matters of public importance.

Although no Ohio court appears to have considered the issue of the application of another's state's Anti-SLAPP law, courts in many other jurisdictions have held that the Anti-SLAPP law of a defendant's domicile state or of the state where the speech originated applies, even where another state's defamation law applies. *See, e.g.*, *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1320 (D. Utah 2015) (concluding that Utah's and California's respective Anti-SLAPP statutes conflict because they impose different burdens on the parties seeking protection, and applying California statute where the defendant was a citizen of California and posted the allegedly defamatory statements to a website while she was in California, because California has the "most significant relationship" to the Anti-SLAPP issue); *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720 (N.D. Ill. 2014) (holding that

Tennessee's Anti-SLAPP law applied where defendant was domiciled in Tennessee and allegedly posted defamatory content on a website from there); *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1035 (N.D. Ill. 2013) (holding that State of Washington's Anti-SLAPP law applied where defendants were citizens of Washington and speech originated in that state), *aff'd*, 791 F.3d 729 (7th Cir. 2015); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 802, 803 (N.D. Ill. 2011) (holding that Illinois Anti-SLAPP law applied where defendants were citizens of Illinois and their allegedly defamatory speech originated there); *Sharif v. Sharif*, No. 10-10223, 2010 WL 3341562, at *4–5 (E.D. Mich. Aug. 24, 2010) (holding, pending discovery, that Indiana Anti-SLAPP law applied in Michigan defamation case); *Glob. Relief Found. v. N.Y. Times Co.*, No. 01 C 8821, 2002 WL 31045394, at *12 (N.D. Ill. Sept. 11, 2002) (holding that California Anti-SLAPP law applied to California speakers although Illinois law applied to defamation claim). The courts' rationale underpinning these rulings is the recognition that states with Anti-SLAPP laws have "a strong interest in having [their] own [A]nti-SLAPP legislation applied to speech originating within [their] borders and made by [their] citizens." *Intercon Sols.*, 969 F. Supp. 2d at 1035; *see also Underground Sols.*, 41 F. Supp. 3d at 724 ("[A] speaker's location is a critical factor in determining choice of law in a case involving the urged application of an [A]nti-SLAPP statute.").

1. Ohio Choice-of-Law Principles Require Application of the D.C. Act.

In order not to burden the Court with repetitive argument, APA adopts and incorporates by reference the fulsome discussion of Ohio general choice of law principles as set forth in Defendants Sidley Austin and David Hoffman's Memorandum in Support for Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, DC St §16-5502 (the "Sidley/Hoffman Anti-SLAPP Memorandum") in Section I. As set forth with greater specificity in that memorandum, Ohio courts follow the Restatement (Second) of Conflict of Laws. Under

the Restatement's choice of law analysis, a court must first determine whether Ohio law actually conflicts with the law of a competing jurisdiction.[7] *See Glidden Co. v. Lumbermens Mut. Relief Cas. Co*., 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 25. In the event of a conflict, under the Restatement, the court must then determine the "state which, with respect to [the] issue, has the most significant relationship to the occurrence and the parties" applies. Restatement (Second) of Conflict of Laws § 145. Courts consider the following factors to determine which state has the most significant relationship: "(1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 [of the Restatement] which the court may deem relevant to the litigation." *Morgan v. Biro Mfg. Co.*, 15 Ohio St.3d 339, 342, 474 N.E.2d 286 (1984) (footnote omitted) (citing Restatement (Second) of Conflict of Laws § 145); *see also* Restatement (Second) of Conflict of Laws § 6 (factors relevant to choice of law include, *inter alia*, "the relevant policies of the forum," "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," "the protection of justified expectations," and "the basic policies underlying the particular

[7] For Ohio law to "conflict" with another state's law, it need not be adverse to the other jurisdiction's law. Instead, a conflict exists when both states have an interest in the parties and issues, and the laws of the states would differ or produce a different result. *See, e.g.*, *Elkins v. Am. Int'l Special Lines Ins. Co.*, 611 F. Supp. 2d 752, 761 (S.D. Ohio 2009) (applying Ohio choice-of-law principles, observing "where the jurisdictions involved would apply the same law, or would reach the same result under their respective laws, a choice-of-law determination is unnecessary and the laws of the forum state apply"); *Mecanique C.N.C., Inc. v. Durr Envtl., Inc.*, 304 F. Supp. 2d 971, 975 (S.D. Ohio 2004) (same); *Schmitz v. NCAA*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 44 ("Under Ohio law, if two jurisdictions apply the same law, or would reach the same result applying their respective laws, a choice of law determination is unnecessary because there is no conflict, and the laws of the forum state apply." (internal quotation marks omitted)); *Auto-Owners Ins. Co. v. McMahon*, 48 Ohio App.3d 38, 40, 548 N.E.2d 275 (6th Dist. 1988) ("Since application of either state's laws will frustrate advancement of the interest of the other state, a true conflict between the laws exists.").

field of law"). Section 145 of the Restatement (Second) of Conflict of Laws advises that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue."[8]

Each of these Restatement factors is discussed below as they apply to APA.

The first factor—the place where the alleged injury occurred—supports a finding that the District of Columbia has a more significant relationship than does Ohio with respect to the Anti-SLAPP issue. As an initial matter, the locus of a plaintiff's alleged injuries has "little, if any, relevance" in the Anti-SLAPP context. *Diamond Ranch*, 117 F. Supp. 3d at 1323, *see Intercon Sols.*, 969 F. Supp. 2d at 1035 (reasoning that "[a]lthough the place of injury is usually a central factor in determining what law governs a tort claim, this factor has been found to be 'less important' in the [A]nti-SLAPP context"); *Chi*, 787 F. Supp. 2d at 803 (same). Nonetheless, to the extent the place of alleged injury is relevant, all of the Plaintiffs' alleged harm derives from the publication of the Independent Review by APA in Washington, D.C. Moreover, Plaintiffs Behnke and Dunivin, both District of Columbia residents, contend that they suffered reputational harm in Washington, D.C.

[8] Under Ohio's choice-of-law doctrine, the laws of different states can govern different issues relating to the same claim. *See, e.g.*, *Am. Interstate Ins. Co. v. G & H Serv. Ctr., Inc.*, 112 Ohio St.3d 521, 2007-Ohio-608, 861 N.E.2d 524, ¶ 12 (explaining "[t]hat Section 185 of the Restatement requires application of Louisiana law to the workers' compensation insurer's subrogation claim does not mean that Louisiana law applies to all issues in the case"); *Mayse v. Watson*, No. 45499, 1985 WL 7613, at *2 (Ohio Ct. App. Sept. 27, 1985) ("With respect to appellants' last argument, appellants have failed to take notice of numerous cases which have applied the concept of depecage. Depecage is when a court treats different[ly] issues in a case by referring to laws of more than one state."); *see also Chartis Specialty Ins. Co. v. Lubrizol Corp.,* No. 1:11 CV 369, 2013 WL 12130642, at *9 (N.D. Ohio Mar. 29, 2013) ("Ohio courts tend to evaluate choice of law questions on an issue-by-issue basis."); *C.B. Fleet Co. v. Colony Specialty Ins. Co.*, No. 1:11-CV-0375, 2013 WL 1908098, at *6 & n.12 (N.D. Ohio May 7, 2013) (observing that "Ohio apparently recognizes a principle known as 'dépeçage,' which holds that different issues within a single case may be governed by the laws of different States"). This reflects the Restatement's approach. *See* Restatement (Second) of Conflict of Law § 145 cmt. d ("The courts have long recognized that they are not bound to decide all issues under the local law of a single state.").

The second factor—the place where the alleged conduct causing the injury occurred—also supports a finding that the District of Columbia has a more significant relationship than does Ohio with respect to the Anti-SLAPP issue. Plaintiffs' claims all allegedly arise from APA's publication of the Independent Review to its website from its offices in Washington, D.C. *See, e.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1323 (concluding that speech occurred in state where defendant posted the allegedly defamatory statements to the website); *Underground Sols.*, 41 F. Supp. 3d at 724 (concluding that alleged defamation originated in state where defendant posted defamatory material to website). Moreover, to the extent that Plaintiffs contend that APA's actions in retaining and interacting with Defendants Sidley and Hoffman are a basis for liability, those actions also occurred in the District of Columbia.

The third factor—the domicile, residence, nationality, place of incorporation, and place of business of the parties—also supports a finding that the District of Columbia has a more significant relationship than does Ohio with respect to the Anti-SLAPP issue. As noted above, two of the Plaintiffs, Behnke and Dunivin, reside in the District of Columbia, and APA is incorporated and domiciled there. Only one Plaintiff, James, resides in Ohio. For Anti-SLAPP purposes, it is well-settled that the place where the defendant's speech alleged occurred is of greater significance than the plaintiff's domicile. *See, e.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1323 ("[T]he place *where the allegedly tortious speech took place* and *the domicile of the speaker* are central to the choice-of-law analysis on this issue." (quoting *Chi*, 787 F. Supp. 2d at 803)); *Chi*, 787 F. Supp. 2d at 803 (noting that the policy goal of Anti-SLAPP law is to encourage and safeguard the "constitutional rights of citizens and organizations to be involved and participate freely in the process of government" and thus "the place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice-of-law

analysis on this issue" because "[a] state has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens, at least when . . . the speech initiated within the state's borders" (citation omitted)).

The fourth factor—the place where the relationship between the parties, if any, is located—also supports a finding that the District of Columbia has a more significant relationship than that of Ohio with respect to the Anti-SLAPP issue. The District of Columbia is the only situs in common to all parties. APA is incorporated in the District of Columbia. Compl. ¶ 47. APA's headquarters are in the District of Columbia, where it employs 500 people and from which APA's daily operations are run by its senior staff. *Id*. The PENS Task Force convened in the District of Columbia. Plaintiffs Behnke and Newman worked for APA in the District of Columbia. Compl. ¶¶ 40, 42. Plaintiff Dunivin as well as Plaintiff Behnke are both currently Washington, D.C. residents. Compl. ¶¶ 40-41. Numerous APA Council meetings at which the relevant policies were discussed and voted upon occurred in the District of Columbia. Defendant Sidley has an office in the District of Columbia, and many of the interviews by the law firm were conducted in the District.

Finally, the fifth factor—any factors under Section 6 of the Restatement that the court may deem relevant to the litigation—also supports a finding that the District of Columbia has a more significant relationship than does Ohio with respect to the Anti-SLAPP issue. The District of Columbia, which is the central locus for the events alleged in the Complaint, indisputably "has a strong interest in having its own [A]nti-SLAPP legislation applied to speech originating within its borders and made by its citizens." *Intercon Sols.*, 969 F. Supp. 2d at 1035. Although Ohio itself has no Anti-SLAPP statute of its own, Ohio courts recognize the utility in applying the laws of other states that prevent the chilling of speech on matters of public importance. *See*

Murray, 2014-Ohio-5442, 25 N.E.3d 1111, at ¶ 40 ("This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech.").

Based on the foregoing factors, Ohio choice-of-law principles dictate that this Court should apply the D.C. Act with regard to the Plaintiffs' claims against APA.

C. The D.C. Act Requires Dismissal of the Claims Against APA With Prejudice.

The D.C. Act requires dismissal here because Plaintiffs' claims against APA arise from "an act in furtherance of the right of advocacy on issues of public interest," APA's publication of the Independent Review, and plaintiffs are not "likely to succeed on the merits." D.C. Code §§ 16-5502(a), (b). APA adopts and incorporates by reference the arguments in the Sidley/Hoffman Anti-SLAPP Memorandum at Section II.

Indeed, Plaintiffs, who are all public officials or limited-purpose public figures, have failed as a matter of law to allege that APA published any statements in the Independent Review with "actual malice," and they cannot present "clear and convincing" evidence that APA had "actual malice" when publishing any statements in the Independent Review.

1. Because Plaintiffs' Claims "Arise[] from an Act in Furtherance of the Right of Advocacy on Issues of Public Interest," the D.C. Act Applies to those Claims.

Under the D.C. Act, once APA makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then a motion to dismiss must be granted unless "the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Code § 16-5502(b); *see Mann*, 150 A.3d at 1227 ("Once the prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate that the claim is likely to succeed

on the merits.'" (quoting D.C. Code § 16-5502(b)) (footnote omitted)).[9]

The D.C. Act expansively defines "[a]ct in furtherance of the right of advocacy on issues of public interest" to mean

> "(A) Any written or oral statement made: (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (ii) In a place open to the public or a public forum in connection with an issue of public interest; or (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1). In turn, "Issue of public interest," is defined to mean "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the marketplace." *Id.* § 16-5501(3).

Here, APA's publication of the Independent Review constitutes an "[a]ct in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5501(1). The publication of the Independent Review is a "written . . . statement" that APA allegedly made "[i]n a place open to the public or a public forum." *Id.*; *see Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 256 (D.D.C. 2013) (holding that a website is a "place open to the public" because "anyone with internet access can view it"). And APA published the Independent Review "in connection with an issue of public interest"—namely, "an issue related to health or safety" of detainees with whom psychologists and military interrogators interacted; "an issue related to . . . community well-being," such as the ethical guidelines that govern the practices of more than 100,000 APA members; and "an issue related to" the "public figure[s]" discussed in the Independent Review, including APA officials, among others. D.C. Code § 16-5501(1), (3). In the same way, APA's

[9] The Act further provides that, generally, "[u]pon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). The Court can permit discovery, but only if "it appears likely that *targeted* discovery will enable the plaintiff to *defeat* the motion and that the discovery will not be unduly burdensome." *Id.* § 16-5502(c)(2) (emphasis added). When a court does permit targeted discovery in this way, it may condition the order "upon the plaintiff paying the expenses incurred by the defendant in responding to such discovery." *Id.*

publication constitutes "expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest. *Id*. APA is a scientific membership organization dedicated to the discipline of psychology, and routinely comments and takes public positions on national and international issues of mental health. It is part of APA's institutional fabric that it is a forum for airing issues of public interest in the field of psychology. Its publication of the Independent Review is part and parcel of its mandate.

Because APA has made a prima facie showing that its publication of the Independent Review on its website constitutes an "act in furtherance of the right of advocacy on issues of public interest," the burden shirts to the Plaintiffs to demonstrate that their claims are "likely to succeed on the merits" in order to avoid dismissal with prejudice. *Id.* § 16-5502(b). Plaintiffs cannot satisfy that burden.

2. The Court Should Dismiss Plaintiffs' Claims With Prejudice Because the Claims Are *Not* "Likely to Succeed on the Merits."

Irrespective of which state law governs the elements of Plaintiffs' defamation and false-light claims, Plaintiffs cannot demonstrate that their claims are "likely to succeed on the merits" sufficient to avoid dismissal with prejudice. *Id.*; *see Mann*, 150 A.3d at 1232 ("[T]he court evaluates the likely success of the claim by asking whether the jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion.").

Among the many flaws that pervade the Complaint, Plaintiffs' claims ultimately fail because all of the Plaintiffs are public officials or limited-purpose public figures who cannot demonstrate as a matter of law that APA published any statements in the Independent Review with actual malice. *See Sullivan*, 376 U.S. at 279–81. It is well settled that where public officials or public figures allege defamation or false light, they bear a high standard of proof,

having to demonstrate that the defendant acted with actual malice, that is with a "high degree of awareness of probable falsity" or with "serious doubts as to the truth," *Harte-Hanks*, 491 U.S. at 667. Moreover, actual malice must be demonstrated by clear and convincing evidence. *Gertz*, 418 U.S. at 342. Plaintiffs here cannot meet that heavy burden.

a. Plaintiffs are public officials or limited-purpose public figures.

Plaintiffs Banks, Dunivin, and James are all public officials, and Plaintiffs Behnke and Newman are limited-purpose public figures, for the reasons stated in the Sidley/Hoffman Anti-SLAPP Memorandum at Section II.B.1, which are adopted here and incorporated by reference. As a result, to avoid dismissal under the D.C. Act, Plaintiffs' complaint must adequately allege that APA acted with actual malice when it published statements in the Independent Review, and Plaintiffs must present clear and convincing evidence to support those allegations. *See Mann*, 150 A.3d at 1236; *see also Gertz*, 418 U.S. at 342. Plaintiffs have not and cannot make such a showing as a matter of law.

b. The Actual-Malice Standard

In order to demonstrate actual malice, a plaintiff must establish by clear and convincing evidence that a defendant published a statement with a "high degree of awareness of probable falsity" or at least with "serious doubts as to the truth." *Harte-Hanks*, 491 U.S. at 667. The standard is "subjective," such that "the plaintiff must prove that the defendant actually entertained a serious doubt" about the statement's veracity. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996); *see Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 531 (6th Cir. 2014). Moreover, a plaintiff cannot "show actual malice in the abstract," and must instead "demonstrate actual malice *in conjunction* with a false defamatory statement." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987); *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 131 (2d Cir. 2013) (plaintiff must show that defendant "acted with

actual malice in making each statement").

It is well-settled that a defendant's failure to investigate a third party's statements before publishing those statements does *not* support a finding of actual malice. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 688 ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. . . . In a case . . . involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (internal quotation marks omitted)); *Gertz*, 418 U.S. at 332 ("[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."); *St. Amant v. Thompson*, 390 U.S. 727, 731, 733 (1968) (observing that Supreme Court case law is "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," and that "[f]ailure to investigate does not in itself establish bad faith"); *Dongguk Univ.*, 734 F.3d at 125–26 (noting that failure to investigate without more does not establish actual malice, and that "[t]he failure to discover a misstatement may demonstrate negligence but it does not establish actual malice"); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1089 (3d Cir. 1985) ("Failure to investigate, without more, does not demonstrate actual malice."); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) ("It is well established that evidence that a publisher failed to investigate prior to publication does not, by itself, prove actual malice."); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 918 (6th Cir. 1982) ("[U]nless there is a showing of actual doubt concerning the truth of the statements, mere evidence of incomplete investigation is insufficient to raise an inference of actual malice."); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977) (holding that "failure to conduct an elaborate independent investigation did not constitute reckless disregard for truth");

Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975) ("Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. . . . Negligent reporting methods are insufficient." (internal quotation marks omitted)); *Fodor v. Berglas*, No. 95 Civ. 1153 (SAS), 1995 WL 505522, at *5 (S.D.N.Y. Aug. 24, 1995) ("As long as a publisher has no serious doubts as to a story's truthfulness, there is no duty to make any independent investigation."); *Murray v. Bailey*, 613 F. Supp. 1276, 1280-81 (N.D. Cal. 1985) ("Not only was [defendant's] failure to investigate not reckless, it was not even unreasonable."); *McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467, 480 (Ct. App. 2007) ("The reckless disregard test is not a negligence test measured by whether a reasonably prudent person would have published, or would have investigated before publishing, the defamatory statement. Instead, the evidence must permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." (internal citations and quotation marks omitted)).

Moreover, a defendant's failure to investigate a third party's statements before publishing those statements does not evince actual malice even where the defendant knew that the third party had a bias against the plaintiff. *See St. Amant*, 390 U.S. at 731; *Hotchner*, 551 F.2d at 914. The Supreme Court's seminal decision in *St. Amant v. Thompson*, is illustrative of this well-settled principle. In *St. Amant*, a defendant candidate for office allegedly defamed the plaintiff sheriff during a televised speech, relying exclusively on information provided by a potentially hostile source. *St. Amant*, 390 U.S. at 731. The Supreme Court held that the defendant's exclusive reliance on that source, and his failure to investigate the source's information, did not constitute actual malice: "[F]ailure to investigate does not in itself establish bad faith." *Id.* at 733.

Similarly, in *Hotchner v. Castillo-Puche*, the Second Circuit held that a defendant publishing house's "failure to conduct an elaborate independent investigation" of one of its authors' statements about the plaintiff "did not constitute reckless disregard for truth," even if the publisher was "on notice" of the author's "animosity" toward the plaintiff. 551 F.2d at 913–14. The court concluded: "Knowledge of an author's ill-will does not by itself prove knowledge of probable falsity." *Id.* at 914.

Further, a defendant's "[r]eliance on the professional reputation of an author may help defeat an allegation of actual malice." *Marcone*, 754 F.2d at 1089. In *Marcone v. Penthouse International Magazine for Men*, the plaintiff alleged that the defendant magazine publisher defamed him when it published an article written by a free-lance author alleging that the plaintiff had purchased substantial quantities of drugs and then cooperated with investigators. *See id*. In concluding that the plaintiff had failed to prove actual malice by a preponderance of the evidence, much less by clear and convincing evidence as required, the Third Circuit reasoned that, "even if [defendant] had failed to investigate, its reasonable reliance on [the author] would have been sufficient to defeat plaintiff's attempt to show actual malice." *Id.* The court noted that the defendant publisher had "relied on the apparent reputation of" the author, and that "[t]he statement was not so 'inherently improbable' that defendant should have been put on notice as to its probable falsity." *Id.* at 1090 (citing *St. Amant*, 390 U.S. at 732).

Courts have also repeatedly declined to find actual malice when a defendant has commissioned an independent investigation by a law firm and then published the results of the investigation. For instance, in *Konikoff v. Prudential Insurance Co. of America*, a plaintiff appraiser sued a defendant real-estate-fund manager for defamation after the defendant publicly disseminated a report prepared by independent counsel at a "well-respected law firm" relating to

the funds' valuation practices, which indicated that one of plaintiff's appraisals was unreasonable. 234 F.3d 92, 94–95, 103 (2d Cir. 2000). The Second Circuit observed that "[i]t is not at all uncommon for a business entity to respond to charges of wrongdoing by preparing or commissioning from counsel or other experts a report on the allegations which is then disseminated to its shareholders, employees and the general public." *Id.* at 102. The Court concluded that "it was plainly reasonable for [defendant] to publish the full text of the independent report it had commissioned and the transcript of the related question and answer session in response to demands . . . that [defendant] address the charges." *Id.* at 103. The court reasoned:

> The purpose of releasing these documents was to inform the public about the assessment by independent investigators of the allegations against the company. [Defendant] could hardly have edited the reports to omit information [defendant] thought to be inaccurate while honoring its goal of publicly disclosing, *in haec verba*, what [independent counsel] thought to be the facts. [Defendant's] censorship of the reports, even for the purpose of sparing the reputation of third parties, would have undermined its justifiable objective of baring all that the investigation had to say about the results of their inquiry.

Id. The court accordingly concluded that the defendant's publication of the report did not rise to the level of being "grossly irresponsible"—a New York state law standard that the court observed was *less demanding* than the actual-malice standard. *See id.* at 104.[10]

[10] *See also Kamfar v. New World Rest. Grp.*, 347 F. Supp. 2d 38, 46–48 (S.D.N.Y. 2004) (concluding that plaintiff who sued for defamation could not establish that defendant acted in a "grossly irresponsible manner" where defendant made statements in reliance on outside counsel following "extensive investigation," observing that "courts have found that the company's reliance on a thorough, responsible investigation negated the existence of gross irresponsibility as a matter of law"); *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 875 (N.D.N.Y. 1995) (concluding that plaintiff who sued for defamation could not establish that defendants acted in a "grossly irresponsible manner" where they reported the results of an internal investigation conducted over two months by outside counsel, involving interviews and an "extensive review" of documents); *Post v. Regan*, 677 F. Supp. 203, 209 (S.D.N.Y.) (concluding that plaintiff who sued for defamation could not establish that defendants acted in a grossly responsible manner and thus could not "meet the higher standard of actual malice" where defendants spoke in reliance on an internal investigation conducted by counsel "over a two-month period, [which] was not done

Notably, a "plaintiff cannot rely on [a] defendant's failure to consult with him prior to . . . publication . . . as evidence of actual malice." *Secord v. Cockburn*, 747 F. Supp. 779, 789 (D.D.C. 1990). Indeed, "such a duty to consult . . . would be unduly burdensome," especially where a publication "involves statements of and concerning hundreds of different individuals and groups" and "review and comment would involve a substantial hindrance on the ability of writers and publishers to timely release information to the public." *Id.*[11]

These well-established tenets demonstrate that the circumstances surrounding APA's retention of Sidley to conduct the Independent Review, APA's publication of the Independent Review, and APA's actions after its publication do not and cannot constitute actual malice as a matter of law. There was no "high degree of awareness of probable falsity" or "serious doubts as to the truth" of the Independent Review's statements. *Harte-Hanks*, 491 U.S. at 667.

The circumstances in which APA published the Independent Review evince a commendable commitment to unbiased truth-seeking and honest reporting that belies Plaintiffs' conclusory assertion that APA acted with actual malice. In response to the allegations in Risen's book, APA engaged an elite law firm, Sidley, to investigate "allegations that had been made regarding APA's issuance of ethical guidance in 2002 and 2005, and related actions." Independent Review at 1; *see* Compl. ¶ 3. APA elevated objectivity over agenda, directing

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hastily," involving "interviews of relevant parties and reviews of . . . documents"), *aff'd*, 854 F.2d 1315 (2d Cir. 1988).

[11] Nor is "failure to retract . . . adequate evidence of malice for constitutional purposes." *Sullivan*, 376 U.S. at 286; *see McFarlane*, 91 F.3d at 1515 ("[Plaintiff] presents no authority, however, nor are we aware of any, for the proposition that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication."); *Liberty Lobby*, 720 F.2d at 643 n.19 ("It is also clear the failure to retract or correct a falsehood does not prove actual malice."); *N.Y. Times Co. v. Connor*, 365 F.2d 567, 577 (5th Cir. 1966) (observing that the "Supreme Court in *Sullivan* specifically held that failure to retract is not adequate evidence of malice for constitutional purposes and expressed doubt whether, or not a failure to retract may ever constitute such evidence" and holding that the failure to retract "did not constitute evidence of malice" (ellipsis and internal quotation marks omitted)).

Sidley to investigate "all the evidence" and go "wherever the evidence leads." Compl. ¶ 15. In an effort to avoid even the appearance of influence over the investigation or the resulting Independent Review, APA committed to making the resulting Independent Review public "without changes." Compl. ¶¶ 18, 35. APA delivered on its promise. Following Sidley's extensive and probing independent investigation—which lasted eight months, and involved more than 200 interviews and review of more than 50,000 documents—Sidley produced to APA an extensive report with 7,600 pages of exhibits, and APA published the Independent Review. *See* Independent Review at 6–7.

Plaintiffs do not criticize the hiring of Sidley to conduct the Independent Review, nor should they. As a prestigious national law firm, well-experienced in handling internal investigations, APA's choice to hire Sidley was entirely appropriate. APA's selection of Hoffman was similarly appropriate and evidences no actual malice by APA. As Plaintiffs themselves recognize, Hoffman was a Sidley partner with extensive experience in conducting independent reviews, having been a federal prosecutor and Inspector General of the City of Chicago. Compl. ¶ 45.

APA had no obligation to second-guess or investigate the findings or statements in the Independent Review—which itself was the product of an extensive investigation—before publishing the Report. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 688 ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *Gertz*, 418 U.S. at 332; *St. Amant*, 390 U.S. at 731; *Dongguk Univ.*, 734 F.3d at 125–26; *Marcone*, 754 F.2d at 1089; *Liberty Lobby*, 720 F.2d at 643; *Schultz*, 668 F.2d at 918; *Hotchner*, 551 F.2d at 914; *Vandenburg*, 507 F.2d at 1026; *Fodor*, 1995 WL 505522, at *5; *Murray*, 613 F. Supp. at 1280–81; *McGarry*, 64 Cal. Rptr. 3d at 480. Indeed,

there were no "obvious reasons to doubt the veracity of [Sidley] or the accuracy of [its] reports," *Harte-Hanks*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 731; *see Fodor*, 1995 WL 505522, at *5, especially given Sidley's esteemed reputation, *see Marcone*, 754 F.2d at 1089, and the extensive and thorough nature of the investigation. Indeed, APA did not "fabricate" the statements in the Independent Review, the findings in the Independent Review were not "so inherently improbable that only a reckless man would have put them in circulation," and there were no "obvious reasons to doubt the veracity" of Sidley or the accuracy of its findings. *St. Amant*, 390 U.S. at 732.

Plaintiffs' allegation that Sidley developed a bias against Plaintiffs or relied on Plaintiffs' critics also fails to support a finding of actual malice, even if APA was aware of a bias. *See id. at* 731 (exclusive reliance on potentially hostile source does not constitute actual malice); *Hotchner*, 551 F.2d at 913–14 (defendant publisher "had no cause for serious doubts" even if the publisher was "on notice of [the author's] animosity toward" the plaintiff because "[k]nowledge of an author's ill-will does not by itself prove knowledge of probable falsity").

APA was entitled to rely on the extensive investigation, findings, and conclusions of its independent counsel. *See Konikoff*, 234 F.3d at 103; *Kamfar*, 347 F. Supp. 2d at 46–48; *Mott*, 910 F. Supp. at 875; *Post*, 677 F. Supp. at 209. In fact, any attempt by APA to resist, revise, or delay the disclosure of the Independent Review prepared by independent counsel at Sidley would have undermined APA's promise to entrust a neutral and independent fact-finder with the investigation. Like in *Konikoff*, "[t]he purpose of releasing [the Independent Review] was to inform the public about the assessment by independent investigators of the allegations" relating to APA, and thus APA "could hardly have edited the [Independent Review] to omit information [APA] thought to be inaccurate while honoring its goal of publicly disclosing, *in haec verba*,

what [Sidley] thought to be the facts. [APA's] censorship of the [Independent Review], even for the purpose of sparing the reputation of third parties, would have undermined its justifiable objective of baring all that the investigation had to say about the results of their inquiry." *Konikoff*, 234 F.3d at 103. Accordingly, "it was plainly reasonable for [APA] to publish the full text of the independent report it had commissioned." *Id.*; *see Kamfar*, 347 F. Supp. 2d at 46–48; *Mott*, 910 F. Supp. at 875; *Post*, 677 F. Supp. at 209.

c. Plaintiffs cannot establish that APA acted with actual malice.

It is against this legal landscape that the allegations in the Complaint must be measured. As to APA, Plaintiffs allege seven disparate theories of actual malice, all unavailing. Specifically, the Complaint alleges as follows:

> 1. Because certain Board members were engaged in public debate on the issue of whether APA should ban psychologists from participating in national security interrogations, they had knowledge that two of the Independent Review's "primary conclusions" were false, or they acted with reckless disregard as to whether the conclusions were false. *See* Compl. ¶¶ 231–238.
>
> 2. APA published the Independent Review hastily and without adequate review, and permitted two of Plaintiffs' critics to see the Independent Review before publication. *See* Compl. ¶¶ 239–48.
>
> 3. APA failed to give Plaintiffs an opportunity prior to the Independent Review's publication to respond to its allegations. *See* Compl. ¶¶ 249–56.
>
> 4. One of the Special Committee members made her personal views about the Independent Review's allegations against the Plaintiffs clear to the media, thus greatly compounding the damage to Plaintiffs. Compl. ¶¶ 257–65.
>
> 5. Defendants APA, Sidley, and Hoffman made false claims of attorney-client privilege and work product protections with respect to documents gathered for use in preparing the Independent Review, which constituted an unfair attempt to shield from the Plaintiffs and the public evidence that could directly contradict Hoffman's conclusions. Compl. ¶¶ 266–74.
>
> 6. APA did not take effective steps to correct the factual distortions in the Independent Review or to adequately address the Plaintiffs' objections. Compl. ¶¶ 275–84.
>
> 7. APA announced that it had re-engaged Defendants Sidley and Hoffman for the limited

> purpose of reviewing only the military policies the Plaintiffs provided, despite a potential conflict among the interests of the APA Board, the APA membership, and Defendants Hoffman and Sidley. Compl. ¶¶ 285–89.

None of these allegations satisfy the legal standard to constitute actual malice.

First, —that APA Board members were involved in debate relevant to the events addressed in the Independent Review—fails to comply with the rule that a plaintiff "demonstrate actual malice *in conjunction* with a false defamatory statement." *See, e.g.*, *Tavoulareas*, 817 F.2d at 794; *Dongguk*, 734 F.3d at 131. There is no logical or legal reason why a Board member's alleged involvement in a *public* debate about whether APA should ban psychologists from participating in national security interrogations caused that Board member to have a high degree of awareness that the Independent Review, conducted by a law firm that intensively interviewed 148 individuals and reviewed thousands of documents over a period of eight months, contained false conclusions.

Second, with regard to APA's purported insufficient review of the Independent Review before publishing it, APA had no obligation to investigate the Independent Review before releasing it to the public. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 688 ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *St. Amant*, 390 U.S. at 733; *Dongguk Univ.*, 734 F.3d at 125–26; *Marcone*, 754 F.2d at 1089; *Liberty Lobby*, 720 F.2d at 643; *Schultz*, 668 F.2d at 918; *Hotchner*, 551 F.2d at 914; *Vandenburg*, 507 F.2d at 1026; *Fodor*, 1995 WL 505522, at *5; *Murray*, 613 F. Supp. at 1280–81; *see also Konikoff*, 234 F.3d at 103 (observing that "[t]he purpose of releasing [an independent report] [i]s to inform the public about the assessment by independent investigators of the allegations," and thus defendant "could hardly have edited the reports to omit information [defendant] thought to be inaccurate while honoring its goal of

publicly disclosing" the independent investigator's findings, "even for the purpose of sparing the reputation of third parties"); *Kamfar*, 347 F. Supp. 2d at 46–48; *Mott*, 910 F. Supp. at 875; *Post*, 677 F. Supp. at 209. APA's alleged publication to Plaintiffs' critics before public release of the Independent Review does not demonstrate or even suggest that APA had a "high degree of awareness of probable falsity" or at least with "serious doubts as to the truth." *Harte-Hanks*, 491 U.S. at 667.

Third, APA's alleged failure to provide Plaintiffs with a pre-publication opportunity to review and comment on the Independent Review similarly fails to demonstrate actual malice. It would have been unduly burdensome for APA to contact all of Sidley's 148 interviewees, and solicit and evaluate their feedback before publication. Such monumental efforts are not required as a matter of law. *Secord*, 747 F. Supp. at 789.

Fourth, a Special Committee member's alleged statements to the media echoing certain conclusions in the Independent Review are not probative of a "high degree of awareness of probable falsity" or "serious doubts as to the truth," of statements in the Independent Review at the time APA published it. *Harte-Hanks*, 491 U.S. at 667. To the contrary, any alleged repetition of the Independent Review's conclusions by a Special Committee member suggests that she fully believed the truth of Sidley's findings and saw no reason to doubt them. And APA was entitled to rely on the statements in the Independent Review. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 733; *Dongguk Univ.*, 734 F.3d at 125–26; *Marcone*, 754 F.2d at 1089; *Liberty Lobby*, 720 F.2d at 643; *Schultz*, 668 F.2d at 918; *Hotchner*, 551 F.2d at 914; *Vandenburg*, 507 F.2d at 1026; *Fodor*, 1995 WL 505522, at *5; *Murray*, 613 F. Supp. at 1280–81.

Fifth, Plaintiffs' contention that Defendants falsely asserted the attorney-client privilege

and work product doctrine occurred after APA published the Independent Review and any alleged improper assertion of privileges is irrelevant to APA's understanding at the time of publication. *See also* Sidley's Anti-SLAPP Motion at II.B.2.b.iv (noting that "that post-publication events have no impact whatever on actual malice" and that "the existence or non-existence of such malice must be determined as of the date of publication.").

Sixth, APA's alleged failure to take effective steps to correct errors in the Independent Review and to address Plaintiffs' complaints is similarly unavailing. On September 4, 2015, APA did in fact publish a supplemental version of the original Independent Review and corrected certain statements in the original. The fact that APA has not addressed Plaintiffs' objections demonstrates only that APA believes that they are not meritorious. *See also id.*

Seventh, APA's further reengagement of Sidley to provide conclusions regarding a review of military policies provided by Plaintiffs is, once again, post-publication and not relevant to APA's understanding at the time of the Independent Review's public release. The re-engagement of the law firm for that limited purpose has no bearing on the Independent Review. *Id.*

Accordingly, Plaintiffs' allegation that APA published statements in the Independent Review with actual malice fails as a matter of law, and the Complaint must be dismissed with prejudice under the D.C. Act. *See* D.C. Code § 16-5502(b).[12]

[12] Nor could Plaintiffs meet the heightened clear and convincing standard required to demonstrate actual malice. *See Mann*, 150 A.3d at 1236 (noting the "well-developed body of case law, originating with the Supreme Court, that establishes different levels of fault and proof that are designed to protect First Amendment rights," including "the requirement to prove actual malice by clear and convincing evidence when the claimant is a public official or . . . a limited public figure with respect to the issue that is the subject of speech claimed to be defamatory"); *see also Gertz*, 418 U.S. at 342 (limited-purpose public figures and public officials "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth"); *Tavoulareas*, 817 F.2d at 776 (explaining that the "clear and convincing" standard is "significantly more onerous than the usual preponderance of the evidence standard").

CONCLUSION

For the foregoing reasons, APA respectfully requests that this Court dismiss the Complaint in its entirety due to the absence of personal jurisdiction over APA in Ohio. In the event that this Court concludes that personal jurisdiction over APA is properly exercised, APA respectfully requests that this Court dismiss the Complaint with prejudice in accordance with the D.C. Anti-SLAPP Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 7th day of April, 2017, I electronically filed the foregoing Defendant American Psychological Association's Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction or Forum Non Conveniens and Special Motion Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 with the Clerk of Courts using the Court's electronic filing system, which will send electronic notification of such filing to participants in the electronic filing system, and I certify that I have served by electronic mail or U.S. Mail the document to the parties not participating in the electronic filing system.

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