IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S
REPLY IN FURTHER SUPPORT OF ITS
CONTESTED MOTION TO COMPEL ARBITRATION OF
CLAIMS IN COMPLAINT

The three arguments made by Plaintiffs Behnke and Newman in their Opposition to APA's First Motion to Compel Arbitration ("Opp.") are meritless and will not allow them to avoid arbitration.[1]

A. The Arbitration Agreements Are Enforceable, Notwithstanding Expiration or Termination of the Employment Agreements.

Although Plaintiffs do not dispute that the arbitration agreements they signed are valid,[2] they argue that they are unenforceable because Behnke's employment agreement was terminated[3] and Newman's expired before certain of their defamation claims arose. Opp. at 2–6. These arguments fail. The arbitration provision in Behnke's employment agreement is still applicable after his termination. Similarly, the arbitration provision of Newman's employment agreement is also applicable to his claims here, which solely arise from his duties as an APA employee.

Courts apply a "presumption in favor of postexpiration arbitration of matters unless negated expressly or by clear implication." *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 204 (1991) (internal quotation marks omitted); *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 521 (D.C. Cir. 2009).[4] Plaintiffs contend that because the agreements do not expressly state that

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[1] Plaintiffs filed two Oppositions: one in response to APA's Contested First Motion to Compel Arbitration ("FMTCA"), addressed here, and one in response to APA's Second Contested Motion to Compel Arbitration ("SMTCA"), regarding the Supplemental Complaint, addressed by APA's separate Reply. The Reply in support of the SMTCA demonstrates that the issue of arbitrability itself must be arbitrated, and is incorporated herein.

[2] Plaintiffs contend that Newman's employment agreement was signed a year after its effective date, was "not properly attested to in the signature block," and lacks an amendment. Opp. at 5 n.1. But Newman does *not* argue that the agreement is invalid, nor was it. Plaintiffs also contend that "Newman was employed half-time" by APAPO, an APA affiliate, and APA produced no agreement for that employment. *Id.* But no such agreement exists because APAPO did not employ Newman, and instead merely paid APA for staffing costs at times. *See* Ex. 1, Affidavit of Archie L. Turner ¶¶ 3–5. All of Newman's work at issue here, including participation in the PENS Task Force, was on behalf of APA, and APAPO is not even a defendant in this suit. *See id.*

[3] Contrary to Plaintiffs' Opposition, APA terminated Behnke's employment agreement on July 8, 2015, not July 7, 2015. *See* Ex. 1, Affidavit of Archie L. Turner ¶ 9; Behnke Affidavit, FMTCA, Ex. 2 ¶ 14.

[4] *See also, e.g.*, *Huffman v. Hilltop Cos.*, 747 F.3d 391, 398 (6th Cir. 2014); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1275 (10th Cir. 2010); *In re Rarities Grp.*, 434 B.R. 1, 8 (D. Mass 2010); *Berkery v. Cross Country Bank*, 256 F. Supp. 2d 359, 368 & n.8 (E.D. Pa. 2003); 4 Am. Jur. 2d Alternative Dispute Resolution § 59.

the arbitration provisions survive termination or expiration of the agreements, there is no agreement to arbitrate the instant dispute. Opp. at 6. But courts have routinely rejected this argument, especially where, as here, other clauses that survive the agreement's termination or expiration are not so designated, such as the integration and severability clauses.[5]

Plaintiffs' argument that their disputes are not arbitrable under the *Litton* factors is equally unpersuasive. *Litton* is inapplicable here because the parties are not subject to a narrow arbitration clause in a collective-bargaining agreement. *See Litton*, 501 U.S. at 206. And even if *Litton* were instructive, the disputes plainly "involve[] facts and occurrences that arose before expiration" of the employment agreements, and thus satisfy the first of the three disjunctive factors discussed in *Litton. Id.* Behnke's claims are based on statements in the Report about facts and occurrences that *all* predate the July 8, 2015 termination of his employment agreement. *See* FMTCA at 4, 9–12. Indeed, the alleged "wrongful discharge" that Behnke has complained about (Suppl. Compl. ¶ 468) was effectuated pursuant to his employment agreement. *See* Ex. 1, Turner Aff. ¶ 9. Newman's claims are also based on statements in the Report about facts that predate the December 31, 2007 expiration of his employment agreement. *See* FMTCA at 4, 13–14.[6] Behnke's and Newman's conduct as employees will be a core issue in this case. *See* FMTCA at 9–14.

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[5] *See, e.g.*, *Huffman*, 747 F.3d at 398; *Bonner v. Michigan Logistics Inc.*, 250 F. Supp. 3d 388, 396 (D. Ariz. 2017); *Brachfeld v. Hopkins*, No. CV1701443SJOSSX, 2017 WL 10436075, at *5 (C.D. Cal. Dec. 11, 2017); *Aviation All. Ins. Risk Retention Grp. v. Polaris Enter. Grp.*, No. CV 17-35-M-DWM, 2017 WL 2799151, at *3 (D. Mont. June 27, 2017); *OwnZones Media Network, Inc. v. Sys. in Motion, LLC*, No. C14-0994JLR, 2014 WL 4626302, at *7 (W.D. Wash. Sept. 15, 2014); *West-Liberty Foods, L.L.C. v. Moroni Feed Co.*, 753 F. Supp. 2d 881, 889 (S.D. Iowa 2010); *Symyx Techs., Inc. v. Stargate Mobile L.L.C.*, No. 06-12632, 2006 WL 2943301, at *2–3 (E.D. Mich. Oct. 13, 2006); *Shipp v. XA, Inc.*, No. 06 C 1193, 2006 WL 2583720, at *7 (N.D. Ill. Aug. 31, 2006).

[6] Plaintiffs ask the Court to ignore all of the pre-expiration facts that their claims involve and instead look only at whether the tort itself allegedly occurred after expiration of the agreements, but that would contravene the first *Litton* factor, which instructs courts to determine whether the disputes "involve" pre-expiration facts. *Litton*, 501 U.S. at 206. The district court's decision in *IBEW v. Detroit Free Press, Inc.* does not hold otherwise, and merely applied *Litton* to a dispute that only involved post-expiration facts. 923 F. Supp. 2d 199 (D.D.C. 2013), *aff'd*, 748 F.3d 355 (D.C. Cir. 2014).

Thus, this Court has no reason to depart from the well-established principle that post-employment defamation claims are abitrable under expired or terminated agreements.[7]

B. No Facts or Law Support a Waiver of Arbitration by APA.

Plaintiffs also argue that APA waived its right to arbitrate by acting "inconsistently" with that right. Opp. at 7–10. This argument mischaracterizes the facts and misapplies the law.

Plaintiffs contend that APA's counsel rejected arbitration in a meeting in November 2015, before plaintiffs filed their first lawsuit in Ohio. In support of this argument, Bonny Forrest, Esq., counsel for Newman, states that she met with counsel for APA in 2015, "requested that [the parties] engage in arbitration," and proposed the late Judge Patricia Wald as an arbitrator. *See id.*, Ex. B ¶ 3. But Ms. Forrest's 3.5-year-old recollection is incorrect. As demonstrated by APA's counsel's sworn statement, which is supported by a contemporaneously created summary, at a meeting in November 2015, Ms. Forrest merely floated the possibility of a second independent review of the facts underlying the Report's conclusions by someone like Judge Wald—not formal arbitration of specific legal claims against APA. *See* Ex. 2, Affidavit of David W. Ogden ¶¶ 6–11.[8]

Plaintiffs' argument that APA waived arbitration by its "active participation in a lawsuit"

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[7] *See, e.g.*, *Hobley v. Ky. Fried Chicken, Inc.*, 168 F. App'x 443, 444 (D.C. Cir. 2005) (post-employment defamation claim arbitrable because dispute concerns facts about employee performance); *Fleck v. E.F. Hutton Grp.*, 891 F.2d 1047, 1053 (2d Cir. 1989) (post-contract defamation claim arbitrable because "[p]roving the truth or falsity of those statements [would] require . . . evidence integrally related to [employee's] performance"); *Aspero v. Shearson Am. Express, Inc.*, 768 F.2d 106, 109 (6th Cir. 1985) (post-contract defamation claim arbitrable because "the proper question is whether resolution of the claim depends upon evaluation of a party's performance" as employee); *accord Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1167 (8th Cir. 1984); *Weinstein v. Equitable Life Assurance Soc. of the United States*, No. Civ. A. 96-3614, 1996 WL 557321, at *3 (E.D. Pa. Sept. 26, 1996).

[8] Nor are the parties' tolling agreements or their amendments evidence of waiver, as they contained no agreement that the parties would litigate in court, and instead merely sought to toll the statute of limitations. The affidavits of Drs. Harvey, Anton, Williams, Kinscherff and Ms. Forrest and exhibits to those affidavits also do not show that APA ever considered the possibility of arbitration and that its Board rejected the idea. *See* Opp. at Exs. B–F. Nothing in any of Plaintiffs' supporting materials actually uses the word "arbitration" or even refers to a process like arbitration. *Id.* In any event, "a party's refusal to settle a matter informally—rather than through either litigation or arbitration—is not regarded as intrinsically inconsistent with the right to arbitration such that it constitutes waiver." *Partridge v. Am. Hosp. Mgmt. Co.*, 289 F. Supp. 3d 1, 17 (D.D.C. 2017).

through an Ohio jurisdictional motion and D.C. and Ohio Anti-SLAPP motions, Opp. at 10–12, fares no better. APA filed its motion to compel arbitration "at the first available opportunity" in both cases, and thus cannot have waived or forfeited its right. *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011). In addition, a motion to dismiss on jurisdictional grounds "can in no way be construed as submitting a case to the court for a decision that resolves the dispute." *Kawasaki Heavy Indus., Ltd v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 995 (7th Cir. 2011). And APA's filing an Anti-SLAPP motion to meet a statutory deadline[9]—while clearly indicating to the Court that the motion should *not* be decided unless arbitration is denied—does not indicate that APA wished to waive its arbitration right. *See* FMTCA at 1 n.1; SMTCA at 1 n.1.

Plaintiffs' reliance on *Khan v. Parsons Global Services, Ltd.*, 521 F.3d 421 (D.C. Cir. 2008), is misplaced. In that case, the court held that a defendant waived arbitration by filing a motion for summary judgment based on evidence outside the pleadings—not an Anti-SLAPP motion based only on the pleadings—and by moving for arbitration only "in the alternative," not as a threshold motion. *See id.* at 427–28.[10] Unlike the defendant in *Khan*, APA is not trying to use arbitration to get a "a second bite" at the apple on merits questions on which the Court has already ruled unfavorably, *id.* at 426–27, and instead wants an arbitrator alone to resolve the merits, as APA has contended throughout this case.[11]

In sum, APA has undertaken no action that is inconsistent with its right to arbitration.

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[9] The Anti-SLAPP Act, D.C. Code § 16-5502(a), requires the filing of a special motion to dismiss under the Act within 45 days of service of a claim.

[10] *See Khan*, Mot. Dismiss at 16, 2003 WL 24252639 (D.D.C. July 29, 2003) (requesting arbitration in final argument "[t]o the extent that" defendant's motion to dismiss and motion for judgment are denied on the merits).

[11] Plaintiffs' reliance on *Alonso v. Chahal*, No. CGC-16-551721, 2017 WL 3706556 (Cal. Sup. Ct. Mar. 13, 2017), is also misplaced. There, unlike here, a court ruled that a defendant waived arbitration by filing an Anti-SLAPP motion and Answer, and setting a trial date, all without even *mentioning* arbitration until he lost on part of the Anti-SLAPP motion. That case is therefore inapposite.

APA has never "intentional[ly] relinquish[ed] or abandon[ed]" its right to arbitrate. *Zuckerman*, 646 F.3d at 922.[12]

C. The Court Should Decline Plaintiffs' Invitation to Disregard the Broad Language in the Arbitration Clauses.

Plaintiffs' final argument is that the Court should ignore the broad language of the arbitration clauses and read "any dispute that may arise regarding their respective rights, duties or obligations under this Agreement" as "any dispute under this Agreement." Opp. at 12–14. But that is not what the clause says, and "[s]o narrow a reading of such encompassing language is unwarranted." *Pearce v. E.F. Hutton Grp.*, 828 F.2d 826, 832 (D.C. Cir. 1987). The clause's express application to "any dispute regarding" the parties' rights or obligations under the agreement is substantially similar to clauses that apply to disputes "with respect to," "relating to," or "concerning" an agreement or its provisions, which courts have defined as broad. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131, 1134 (9th Cir. 2000); *Int'l Union of Operating Engineers v. Indiana Constr. Corp.*, 13 F.3d 253, 257 (7th Cir. 1994). The Court must consider the broad language agreed to by the parties and cannot rewrite their agreement. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) ("courts must respect the parties' decision as embodied in the contract").

In light of the breadth of the arbitration clauses, and the concomitant presumption of arbitrability, Plaintiffs' defamation claims are plainly arbitrable because they are based on statements about their actions and performance as APA employees. *See* FMTCA at 10–14.[13]

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[12] Nor have Plaintiffs been prejudiced in any fashion. Here there was no "conduct constituting waiver which could have prejudiced" them. *Kawasaki*, 660 F.3d at 998. Moreover, Plaintiffs have filed *three* lawsuits despite knowledge that APA intended to arbitrate. As APA filed its arbitration motion in October 2017, and Plaintiffs proceeded to litigate this case for another 17 months without responding to that motion, Plaintiffs cannot identify any expense or prejudice resulting from APA's arbitration motion.

[13] Plaintiffs cite *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 28–29 (2d Cir. 1995), to argue

Respectfully submitted,

/s/ Barbara S. Wahl
Barbara S. Wahl (D.C. Bar No. 297978)
Karen E. Carr (D.C. Bar No. 975480)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Telephone: (202) 857-6000
Telecopier: (202) 857-6395
Email: barbara.wahl@arentfox.com
karen.carr@arentfox.com

Attorneys for Defendant American Psychological Association

that the defamation claims are outside the scope of the arbitration clauses. But that ruling was based on the fact that the alleged defamatory statements, unlike here, had nothing to do with the parties' contractual relationship. *See id.* Here, just the opposite is true. The alleged defamatory statements are about Plaintiffs' actions and performance as APA employees under their employment agreements, and are thus abitrable. *See, e.g.*, *supra* note 7 (collecting cases); *see also Pearce*, 828 F.2d at 832; *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 724 (9th Cir. 1999); *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 22–23 (2d Cir. 1995).

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2019, a true and correct copy of the foregoing Reply in Further Support of APA's Contested Motion to Compel Arbitration of Claims in Complaint was filed through the Court's electronic filing system, which will automatically send notification 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

EXHIBIT 1

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989 B**
	:	**Judge Puig-Lugo**
Plaintiffs,		
	:	**Next Event:**
v.		**Status Conference**
	:	**May 8, 2019**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.		
	:	

City of Washington)
) ss:
District of Columbia)

AFFIDAVIT OF ARCHIE L. TURNER IN SUPPORT OF AMERICAN PSYCHOLOGICAL ASSOCIATION'S MOTION TO COMPEL ARBITRATION

I, Archie L. Turner, having been duly sworn, state as follows:

1. I am more than 18 years of age and make this affidavit voluntarily and from my own personal knowledge.

2. I am currently the Chief Operating Officer and Chief Financial Officer of the American Psychological Association, and have been employed by APA since 2008.

3. I have reviewed a portion of the Plaintiff's Opposition to APA's First Motion to Compel Arbitration in Relation to the Original Complaint and an affidavit of Dr. Russell Newman in which Dr. Newman states that he was employed half time by the American Psychological Association Practice Organization ("APAPO"), and that he filled out weekly time cards allocating his work between APA and the American Psychological Association Practice Organization ("APAPO"), now known as APA Services, Inc. Dr. Newman has criticized APA for not producing a separate employment agreement between APAPO and Dr. Newman. There

was no separate employment agreement between APAPO and Dr. Newman because APA serves as the employer for both organizations and no APAPO employee has a separate agreement. The only employment agreement related to Dr. Newman's services for APAPO was Dr. Newman's employment agreement with APA.

4. At all relevant times, APAPO (now APA Services, Inc.) was a District of Columbia corporation that is tax exempt under Section 501(c)(6) of the United States Internal Revenue Code. The APA and the APAPO are affiliated organizations that have shared staff, facilities and equipment. *See* Reimbursement Agreement between APA and APAPO, attached here as Exhibit 1, at 1. APAPO's chief purpose has been to take public positions to advocate on behalf of psychologists. As of January 1, 2019, the corporation became known as APA Services, Inc.

5. The Reimbursement Agreement has been the governing document between APA and APAPO with regard to expenses. It states in pertinent part that "APA serves as the employer for both organizations. Staff providing services to either organization are employees of the APA and are required to complete a bi-weekly timesheet on which time worked is charged through the payroll system to the various APA and APAPO programs." Reimbursement Agreement, Exh. 1, at 1 (emphasis added).

6. While I was not employed at APA in 2005, I note that a Form 990 tax return for APAPO for 2005, was attached as an exhibit to Dr. Newman's affidavit and shows that APAPO contracts for its employees. In the category of "contracted services" in the amount of $1,357,703, the tax return shows that APAPO employee compensation is contracted for through APA. APAPO has never had any employees, and Dr. Newman was at all times a full-time employee of APA.

9. APA terminated Dr. Stephen Behnke for cause on July 8, 2015, effective on that date. Dr. Behnke was terminated "due to multiple instances of misrepresentation, deception, collusion, behavior in violation of APA policies, and behavior causing direct harm to APA as set forth in the Independent Review Relating to APA Ethics Guidelines, National Security, Interrogation and Torture commissioned by the APA Board of Directors." Termination letter of July 8, 2015, from me to Dr. Behnke.

The hereby certify that foregoing is true and correct.

Archie L. Turner

Subscribed and sworn to before me this 13th day of March 2019.

Theresa McGregor
Notary Public, District of Columbia

My commission expires: March 31, 2020

Reimbursement Agreement
(October 2004)

This Agreement is entered into between the American Psychological Association (the "APA") and the American Psychological Association Practice Organization (the "APAPO"). The APA and the APAPO are affiliated organizations that share staff, facilities and equipment, and engage in inter-company transactions. This Agreement outlines the terms pursuant to which the APA and the APAPO share costs and provide for reimbursement of expenses.

Payroll
The APA serves as the employer for both organizations. Staff providing services to either organization are employees of the APA and are required to complete a bi-weekly timesheet on which time worked is charged through the payroll system to the various APA and APAPO programs.

Benefits will be allocated as part of the overhead (as discussed below).

Inter-company Transactions
All inter-company transactions between the APA and the APAPO are reflected in the due to/due from accounts maintained in the general ledger of both organizations. As a convenience to both organizations, an inter-company account is used for the major transactions between the APA and the APAPO, monthly Practice Assessments collected through the APA dues statement and the monthly staff costs and chargebacks borne by APA for the benefit of the APAPO.

Monthly throughout the year, the APAPO will receive interest on the account balance from APA or will pay/receive interest on the account balance to/from APA.

Bank Accounts
The APA and APAPO maintain a separate operating (checking) account and separate reserve account. The APA maintains the payroll account. Cash transfers for operations, as necessary, will be made between the APA and APAPO separate accounts (as governed by a separate Lending and Repayment Agreement).

Deposits
All Practice Assessments received through the APA dues collection process (via in-house, lockbox or internet), are deposited daily into the APA bank account. The APAPO is credited for the funds collected on its behalf through monthly entries into the inter-company account. All funds received outside the dues collection process will generally be deposited directly into the owning organizations' bank account.

Disbursements
Generally, disbursements will be made by the organization that incurs the cost. It is imperative that invoices are made to the APAPO as payee for its direct expenses (and sales and use taxes accrued as applicable). In those instances where costs are shared, but must be paid by one organization or the other, the inter-company account may be utilized to apply the charge to the appropriate organization or each organization may pay its respective share directly. Since all staff are APA employees, all payroll transactions and any chargeback items will be invoiced to the APAPO and recorded in the inter-company account.

Occupancy Cost
Occupancy costs will be allocated as part of the overhead.

Furniture and Equipment
All office equipment, office furniture, and computer equipment utilized by the APA and APAPO is owned by the APA. The APA charges APAPO for the use of these assets via the overhead allocation (by including depreciation expenses).

Benefit Allocation
All benefits offered by the APA are available to all employees. Given that few staff, if any, will be charged exclusively to APAPO, benefit costs will be allocated to APAPO as part of the overhead calculation (in a ratio of c(6) salaries to total salaries).

Indirect Cost Allocations
The support programs are all organized and managed within APA. As stipulated by APA Association Rule 210-2.1, the total net cost of the support programs shall not exceed 15% of the total expenses of the APA.

APA overhead will be allocated to the APAPO based on the total support pool less certain costs in the pool that do not benefit the APAPO. Overhead will be allocated during the year based on the prior year's actual experience and adjusted as needed once APA's books are audited.

Reimbursements
The effect of the above transactions results in a net due to/due from one organization to the other at the end of any accounting period. Normally, these intercompany accounts will be cleared on a monthly basis with a comprehensive reconciliation being done no less than quarterly. All intercompany activity will be reconciled, audited, and cleared at the end of each year.

Amendment and Termination
This Agreement may be amended on the mutual written agreement of both parties. Either the APA or the APAPO may terminate this Agreement upon 60 days written notice to the other party.

Binding Nature and Interpretation
This Agreement shall be binding on both parties and their successors and assigns. This Agreement shall not be assigned without the written consent of the non-assigning party. This Agreement shall be interpreted in accordance with the laws of the District of Columbia.

Execution
The Parties agree that this Agreement was in effect as of October 2004 and remains in effect as of this date.

Norman Anderson, APA CEO

Date: 9/7/07

Russ Newman, APAPO Executive Director

Date: 9/7/07

EXHIBIT 2

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989 B**
	:	**Judge Puig-Lugo**
Plaintiffs,		
	:	**Next Event:**
v.		**Status Conference**
	:	**May 8, 2019**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.		
	:	

City of Washington)
) ss:
District of Columbia)

AFFIDAVIT OF DAVID W. OGDEN IN SUPPORT OF AMERICAN PSYCHOLOGICAL ASSOCIATION'S MOTION TO COMPEL ARBITRATION

I, David W. Ogden, having been duly sworn, state as follows:

1. I am more than 18 years of age and make this affidavit voluntarily and from my own personal knowledge.

2. At all relevant times, I have been a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"), and my office is in the District of Columbia. A copy of my firm biography is attached as Exhibit 1 hereto.

3. I have been counsel to the American Psychological Association ("APA") on various matters for a number of years. In particular, I provided certain legal services to APA during the period of the Fall of 2015 that are relevant to the case before the Court. Among other things, I and others of my colleagues provided legal services to APA in connection with certain aspects of the independent review conducted by the law firm Sidley Austin LLP ("Sidley") in 2014-2015.

4. I am aware that Drs. Morgan Banks, Stephen Behnke, Debra Dunivin, Larry James, and Russell Newman have filed a lawsuit against APA and Sidley in the Superior Court of the District of Columbia asserting defamation claims. I am further aware that APA and Sidley have moved to have the claims of Dr. Behnke and Dr. Newman arbitrated. I have reviewed the plaintiffs' opposition to APA's motion to compel arbitration, including the attached affidavit of plaintiffs' counsel, Bonny Forrest, Ph.D.

5. Paragraph 3 of Dr. Forrest's affidavit states as follows:

> In November 2015, prior to initiating any litigation, I met with then-counsel for the American Psychological Association (hereinafter "APA"), Wilmer Hale, and requested that we engage in arbitration to resolve the matters now in dispute in this litigation. Consistent with that offer, I proposed the Honorable Patricia Wald (now deceased but who was alive and practicing at that time) as an arbitrator. Plaintiffs also publicly called for an arbitration process and posted that request widely on social media. Attached hereto as Exhibit 1 is a true and correct copy of the Plaintiffs' public call for a neutral third-party which can also be found online at: https:///tinyurl.com/ydejhjpe.

6. The statement that Dr. Forrest suggested that APA and the plaintiffs engage in arbitration to resolve the matters now in dispute in this litigation is incorrect. Dr. Forrest never made any such suggestion. Nor did Dr. Forrest propose that the Honorable Patricia Wald act as an arbitrator. Nor did I reject on APA's behalf any proposal to arbitrate the parties' legal dispute.

7. I met with Dr. Forrest on November 20, 2015 in a conference room at WilmerHale's offices in Washington, D.C. Present with me and Dr. Forrest were my colleagues Jeannie Rhee and Jessica Leinwand, both lawyers with WilmerHale at the time. Ms. Leinwand took detailed notes of the meeting, and prepared a summary of what transpired. The summary was prepared for the purpose of providing legal advice to APA, and was made in anticipation of possible litigation with Dr. Forrest's clients, and is accordingly protected by both the attorney-client privilege and the work product doctrine. My recollection of the November 20, 2015

meeting has been confirmed by reviewing the summary prepared by Ms. Leinwand. Dr. Forrest did not appear to take notes during the meeting

8. Dr. Forrest stated that she had reached out to me in order to find a productive path forward. She reiterated that neither she nor her clients wanted to sue APA, and that they preferred to reach a resolution with APA that corrected the errors they perceived to be in the Report and that they would "deal with Hoffman separately." I therefore understood that the purpose of the meeting was to explore whether there was a basis to reach agreement between her clients and APA that would avoid litigation of legal claims, whether through a lawsuit or an arbitration.

9. To that end, Dr. Forrest suggested that her clients and APA could issue a joint statement identifying aspects of the Report that were incorrect. Dr. Forrest also suggested that APA might wish to engage a former judge (she mentioned Judge Patricia Wald as the sort of person she had in mind) to review Mr. Hoffman's report and consider plaintiffs' allegations. I understood Dr. Forrest's proposal concerning Judge Wald not as proposing arbitration of possible legal claims the five individuals who are now plaintiffs had against APA, but instead as suggesting establishment of a process designed to produce a new set of factual findings to replace the ones she disagreed with. I understood this to be a proposal, essentially, for a re-investigation of the same subjects Sidley had addressed, with the product being a new report by a different investigator.

10. I attempted to focus the discussion of potential options on a solution that would be acceptable to both APA and Dr. Forrest's clients. I said that her suggestion that APA should retain another person such as a former judge, to conduct another investigation, and go over the same ground that Mr. Hoffman had covered, drawing its own conclusions

from that further investigation, was unappealing for a host of reasons, although we did not conclusively reject the idea. I made some other suggestions for discussion, such as a "platform" for Dr. Forrest's clients to present their objections and a process that would focus exclusively on proof of any documentable errors in the Report, rather than on more subjective or judgmental findings.

11. At no time either before, during or after this meeting with Dr. Forrest did I ever perceive that she was suggesting that the parties could engage in arbitration of her clients' legal claims. The idea of arbitrating legal claims was the opposite of the whole point of the meeting, which was to find ways to avoid adversity between APA and Dr. Forrest's clients. The discussion concerned how, if merited, the public record might be corrected and litigation avoided, and there was no discussion of processes to arbitrate any legal claims for damages that Dr. Forrest's clients, and Dr. Behnke, might assert.

I certify that the foregoing is true and correct.

David. W. Ogden

Subscribed and sworn to before me this 13th day of March, 2019.

Notary Public

My commission expires: 7/31/21

JODY CARLSON NOTARY PUBLIC EXP. 7-31-21 DISTRICT OF COLUMBIA

Exhibit # 1

WILMERHALE

David W. Ogden

PARTNER
Chair, Government and Regulatory Litigation Practice Group

WASHINGTON DC
+ 1 202 663 6440
DAVID.OGDEN@WILMERHALE.COM

A nationally recognized litigator and counselor with more than thirty years' experience, David Ogden focuses his practice on complex disputes with serious financial implications. He served as the Deputy Attorney General of the United States from 2009 to 2010 and as Assistant Attorney General for the Civil Division, United States Department of Justice, from 1999 to 2001. Mr. Ogden is chair of the firm's Government and Regulatory Litigation Group.

Principal areas of practice include:

- civil litigation and government enforcement actions under regulatory regimes such as the False Claims Act, fair lending and other anti-discrimination laws, the antitrust or competition laws, securities laws, fraud, consumer protection, financial services, and environmental laws;
- matters raising issues of public and private international law, such as transnational litigation in US courts, transnational regulation and enforcement, investor-state disputes, enforcement of foreign judgments, injunctions against foreign litigation, and controversies outside the United States;
- administrative law and other litigation involving defects in government regulations or other official actions;
- litigation to restrain the enforcement of federal or state statutes, including first amendment, federal preemption, Commerce Clause, equal protection, due process, and expropriation issues;
- development and advocacy of policy reforms relating to litigation and enforcement issues; and
- Supreme Court and appellate litigation.

Mr. Ogden is consistently highly ranked by leading publications such as *Chambers USA*, which describes him as a "fabulous litigator" with extensive experience in both civil and criminal litigation. Clients say he "gets right to the heart of a point and at the same time can see the whole picture and look for areas of legal risk." *Best Lawyers in America* in its 2017 edition rated him first among all regulatory enforcement litigators in Washington DC, naming him its "Lawyer of the Year" in that category. Additionally, *U.S. News - Best Lawyers* reported in its 2016 "Best Law Firms" rankings that Mr. Ogden "is both a great litigator and a great counselor. He understands that litigation is a tool and

not an end in itself. He is highly strategic, great at seeing around corners, and a pleasure to work with to boot." In 2017, Mr. Ogden was named an Acritas Star Lawyer following an independent survey of general counsel and other legal executives who commented that "he is a brilliant lawyer who sees strategic issues very clearly and has always tried to keep an eye on practicalities in litigation and complex matters." He is also a recognized authority on corporate compliance issues and enforcement, serving presently as the corporate monitor to a national health care company, on the Board of the Ethics and Compliance Initiative, and recognized as an "Attorney Who Matters" by *Ethisphere Magazine*.

His clients have included leading companies in the pharmaceutical, petrochemical, technology, retail, insurance, defense, financial, manufacturing, airline, automotive, rail, media, entertainment, and government services industries, as well as major trade and professional associations, nonprofit foundations, and individuals.

Government Experience

Mr. Ogden served as the Deputy Attorney General of the United States from 2009 to 2010. In that position, he was the second ranking official of the United States Department of Justice and its chief operating officer, supervising the Justice Department's 110,000 employees, almost $30 billion budget, and all of its components and operations. Among the components reporting to Mr. Ogden were the Federal Bureau of Investigation and other law enforcement agencies, the 93 United States Attorneys Offices, and all of the Justice Department's national litigating divisions including the Criminal Division, National Security Division, Civil Division, Civil Rights Division, Antitrust Division, Environment and Natural Resources Division, and Tax Division. He led major Justice Department and Executive Branch initiatives addressing healthcare fraud, financial and mortgage fraud, international organized crime, Mexican drug cartels, immigration, international tax enforcement, the government's compliance with criminal and civil discovery, and law enforcement in Indian Country. He worked regularly with the leaders of foreign justice and interior ministries on international disputes and national security and law enforcement matters.

Earlier, Mr. Ogden served as the Assistant Attorney General for the Civil Division (1999-2001), where he directed the Justice Department's largest litigating unit representing federal agencies and officials in major civil litigation, including the government's largest regulatory, constitutional, international, national security, administrative, government contract, commercial, fraud and false claims, tort, immigration, and consumer matters. He also served as Chief of Staff and Counselor to former Attorney General Janet Reno (1997-1999), Associate Deputy Attorney General (1995-1997), and Deputy General Counsel and Legal Counsel at the United States Department of Defense (1994-1995).

Professional Activities

- Public Member, Administrative Conference of the United States, 2010-2016
- Senior Fellow, Administrative Conference of the United States, 2016-present
- Board Member, District of Columbia Bar Foundation, 2015-present
- Member, Janet Reno Endowment National Advisory Committee, McCourt School of Public Policy, Georgetown University, 2016-present

Solutions

- Administrative Law
- Appellate and Supreme Court Litigation
- Big Data
- Consumer Financial Services
- False Claims Act
- Government and Regulatory Litigation
- International Arbitration
- Life Sciences
- Media and Entertainment
- Anti-Discrimination
- Bank Regulation and Enforcement
- Class Actions
- Crisis Management and Strategic Response
- Federal Inspector General Investigations
- Government Contracts
- International Litigation
- Litigation
- National Security

Experience

- **INTERNATIONAL DISPUTES**
  - Obtaining for a US petrochemical company judicial declarations that foreign judgments totaling more than $500 million are unenforceable in the United States
  - Successfully managing for US pharmaceutical and international petro-chemical companies high-stakes litigations in foreign courts raising issues of judicial corruption and investor-state protections
  - Representing an American company in litigation against a foreign state under the expropriation and commercial activities exceptions to the Foreign Sovereign Immunities Act
  - Representing a foreign sovereign in US litigation with another foreign sovereign concerning ownership of mineral rights
  - Successfully defending foreign airlines in two separate US antitrust litigations seeking more than $50 billion in damages, and managing related litigation worldwide
  - Successfully representing an international law firm in a civil racketeering suit brought by a former adversary in international arbitration
  - Representing corporate clients in investor-state arbitration under ICSID and UNCITRAL Rules
  - Representing a former US Secretary of State in Alien Tort Statute litigation
- **GOVERNMENT AND PUBLIC POLICY LITIGATION AND INVESTIGATIONS**
  - Successfully representing an international law firm in a civil RICO action
  - Representing defense, retail and entertainment industry clients in *qui tam* actions brought under the False Claims Act
  - Representing insurance, pharmaceutical, technology, banking, and, government

service companies in Justice Department False Claims investigations

- Representing financial institutions in CFPB investigations under fair lending, RESPA, and other regulatory regimes
- Representing manufacturing, legal services, and financial services entities in SEC investigations
- Obtaining on behalf of a major national mortgage lender dismissal with prejudice of a putative nationwide discrimination class action and representing an investment bank in similar litigation
- Representing a major insurance company in fair lending investigation by a state regulatory authority
- Obtaining for a trade association summary judgment striking down on Commerce Clause and preemption grounds a state price control statute
- Obtaining for a trade association summary judgment striking down on preemption grounds a state statute that invalidated arbitration clauses in certain agreements
- Advising a major insurance company and other financial institutions with respect to Dodd-Frank issues, including the Financial Stability Oversight Council
- Submitting amicus briefs for a major professional and scientific association and a major industry association in the US Supreme Court and other appellate courts

Recognition

Washington DC Lawyer of the Year for Litigation - Regulatory Enforcement

Best Lawyers in America®

2017

Leading Lawyer for Litigation

Chambers USA

2013-2018

Recommended for Commercial Disputes

The Legal 500 United States

2018

- Selected as a leading lawyer for his work in the litigation field in the 2013-2018 editions of *Chambers USA: America's Leading Lawyers for Business*
- Selected by his peers for inclusion in the 2015-2019 editions of *Best Lawyers in America* for Litigation - Regulatory Enforcement (SEC, Telecom, Energy), and was named the Washington DC "Lawyer of the Year" in Litigation - Regulatory Enforcement in the 2017 edition
- Named a 2017 Acritas Star Lawyer, an independent survey of general counsel and other legal executives around the world to identify exemplary outside counsel
- Recommended in the 2018 edition of *The Legal 500 United States* in the area of

commercial disputes and in the 2017 edition in the areas of energy: regulatory, commercial litigation and energy law

- Named to The Ethisphere Institute's 2015 and 2017 lists of Attorneys Who Matter in the Private Practice and Consulting category.
- Recommended as a litigation star in Washington DC in Benchmark Litigation's *The Guide to America's Leading Litigation Firms and Attorneys* (2008, 2012-2016)
- Edward H. Levi Award for Outstanding Professionalism and Exemplary Integrity, US Department of Justice (2010)
- Named a 2007-2009 and 2013-2018 *Washington DC Super Lawyer* for business litigation
- One of *Washington Business Journal*'s "Top Washington Lawyers" in the area of corporate litigation (2006)
- *National Law Journal* Pro Bono Award (2006)
- Outstanding Legal Service Award, National Coalition to Abolish the Death Penalty (2005)
- Edmund J. Randolph Award for Outstanding Service, US Department of Justice (2001)
- Attorney General's Medallion, US Department of Justice (1999)
- Department of Defense Medal for Distinguished Public Service (1995)

Credentials

EDUCATION

JD, Harvard Law School, 1981

magna cum laude

Editor, Harvard Law Review

BA, University of Pennsylvania, 1976

summa cum laude

Phi Beta Kappa

ADMISSIONS

District of Columbia

CLERKSHIPS

The Hon. Harry A. Blackmun, US Supreme Court, 1982 - 1983

The Hon. Abraham D. Sofaer, US District Court for the Southern District of New York, 1981 - 1982

GOVERNMENT EXPERIENCE

Department of Defense

Office of the Secretary of Defense

Deputy General Counsel

Department of Defense

Office of the Secretary of Defense

Legal Counsel

Department of Justice

Office of the Attorney General

Chief of Staff and Counselor to Attorney General Janet Reno

Department of Justice

Office of the Deputy Attorney General

Deputy Attorney General

Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Department of Justice

Civil Division

Assistant Attorney General