IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS CONTESTED SPECIAL MOTION TO DISMISS UNDER THE D.C. ANTI-SLAPP ACT, D.C. CODE § 16-5502

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INTRODUCTION

In the instant lawsuit, five individual psychologists contend that some statements made about them as part of a report published by Defendant American Psychological Association ("APA") on its website and prepared by Defendants Sidley Austin LLP and Sidley partner David Hoffman are defamatory or hold them in false light. The report concerned Sidley's investigation as to whether APA had colluded with U.S. military officials to enable the torture of detainees in off-shore locations following the events of September 11, 2001. This topic had been the subject of intense scrutiny and debate not only within the psychological community but also nationally. APA's publication of the report was an act in furtherance of the right of advocacy on an issue of public interest, and thus within the scope of the District of Columbia's Strategic Lawsuits Against Public Participation ("Anti-SLAPP") Act, D.C. Code §§ 16-5501 *et seq*. Because Plaintiffs cannot demonstrate that APA published the report with actual malice, under the Anti-SLAPP Act, this lawsuit must be dismissed with prejudice.

FACTUAL BACKGROUND

APA, a District of Columbia non-profit corporation with its principal place of business also in the District of Columbia, 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. 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. Following the events of September 11, 2001, within APA, there was lively discourse regarding the proper role of psychologists in connection with interrogations conducted by the government

at federal security facilities. 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 PENS Task Force's report as APA official policy, and at APA's August 2005 Convention in Washington, D.C. the Council endorsed the policy.

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 participating in any activities at national security detention facilities. The controversy, often heated, was the subject of both extensive roiling debate within APA and in public discourse generally. Arguments between and among individual psychologists and whole APA 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

[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.

colluded with the United States Government to support enhanced interrogation techniques that amounted to torture. Following the publication of the Risen book, and after a thorough vetting process, APA hired Sidley to conduct an Independent Review (the "IR"), to be spearheaded by Sidley partner David Hoffman ("Hoffman"; collectively, "Sidley"). Compl. ¶ 3. APA and Sidley agreed, and the Sidley retainer agreement made clear, that Sidley was to conduct the IR with complete independence, and wholly separate and apart from APA. *Id*. at 1. Sidley and Hoffman were eminently suited to the task. Sidley is a well-regarded law firm with a 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 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.

[2] APA respectfully requests that this Court take judicial notice of the websites cited in this introduction and the information included therein. *See In re Estate of Barfield*, 736 A.2d 991, 995 n.8 (D.C. 1999) (noting that "the trial court is entitled to take judicial notice of matters of public record"). *See also Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 188 F. Supp. 3d 22, 43 n.13 (D.D.C. 2016) (taking judicial notice of information "publicly available" on the USPTO's website, reasoning that "a court may judicially notice a fact that is not subject to reasonable dispute because it 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned'" (quoting Fed. R. Evid. 201(b)(2))) *appeal pending*, No. 17-7075 (D.C. Cir. May 3, 2017); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 167 (S.D.N.Y. 2015) ("[A] court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and it is capable of accurate and ready determination." (internal quotation marks omitted)).

In retaining Sidley to conduct the IR, 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 IR in a fully independent manner, and to ascertain the truth wherever the evidence led. Compl. ¶¶ 15, 181. Upon completion of the IR, APA intended to make Sidley's work public in furtherance of the dialogue and free speech on the topic. Compl. ¶ 18.

Sidley conducted an extensive, eight-month investigation, interviewing approximately 150 individuals, Compl. ¶ 273, and reviewing more than 50,000 documents. In late June 2015, Sidley presented to APA a 541-page report ("Report") plus exhibits, 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 Report, posted a copy of it on the *Times*'s website. Compl. ¶¶ 2, 27-30, 247, 250-51, 344-45, 365, 386, 424. Later that evening, APA also made the Report available on its own website.

Plaintiffs contend that APA's liability stems from a few central actions: publishing the Report without first carefully reviewing it or taking Plaintiffs' and others' opinions into account; failing to address Plaintiffs' complaints about the Report; 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. ¶¶ 90, 242-60, 279-89. These grounds are insufficient for the Complaint to survive the instant Motion.

The instant Motion seeks dismissal of the Complaint with prejudice pursuant to the District of Columbia's Anti-SLAPP Act, D.C. Code §§ 16-5501, *et seq.* (the "Act"). The Act grants a District of Columbia speaker such as APA "substantive rights" to "fend off" strategic lawsuits against public participation ("SLAPPs")—including 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 issues 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). APA's publication of the Report constitutes an "act in furtherance of the right of advocacy on issues of public interest" within the meaning of the Act, and, as shown below, Plaintiffs cannot demonstrate that they are "likely to succeed on the merits." D.C. Code §§ 16-5501(1), (3); 16-5502(a), (b). Plaintiffs are all public officials or limited-purpose public figures, and have failed to allege, and cannot allege, that APA acted with "actual malice" in connection with the Report. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–81 (1964). Plaintiffs cannot demonstrate that APA's few activities in connection with the Report, 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) (citations omitted). Nor can Plaintiffs meet the heightened proof standard of "clear and convincing" evidence required to prove defamation here. *Mann*, 150 A.3d at 1236; *see, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

ARGUMENT

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

The claims against APA arise from "an act in furtherance of the right of advocacy on issues of public interest" through the publication of the Report, 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 Report with actual malice, nor can they present clear and convincing evidence that APA had actual malice when publishing any statements in the Report.

A. Overview of the 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 Act is intended "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. at 4); *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 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 § 165502(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)).

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

The 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 Report, 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 Sections I, 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 Report with "actual malice," nor can they present "clear and convincing" evidence that APA had "actual malice" when publishing any statements in the Report.

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

Under the 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))[3].

[3] The Act further provides that "upon 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

The 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 Report constitutes an "[a]ct in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5501(1). The publication of the Report 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 Report "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 Report, including APA officials, among others. D.C. Code § 16-5501(1), (3). In the same way, APA's 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

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added). When a court does permit targeted discovery in this way, it may condition the order "upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." *Id.*

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 Report is part and parcel of its mandate. Because APA has made a prima facie showing that its publication of the Report on its website constitutes an "act in furtherance of the right of advocacy on issues of public interest," the burden shifts to Plaintiffs to demonstrate that their claims are "likely to succeed on the merits" and can 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."

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 Report 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.A, which are adopted here and incorporated by reference. As a result, to avoid dismissal under the Act, Plaintiffs' complaint must adequately allege that APA acted with actual malice when it published statements in the Report, 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.*, 320 U.S. App. D.C. 40, 47, 91 F.3d 1501, 1508 (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*, 260 U.S. App. D.C. 39, 71, 817 F.2d 762, 794 (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 and citations 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 and citations 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 that case, 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 29-30. 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 to defeat an allegation of actual malice." *Marcone*, 754 F.2d at 1089. In *Marcone v. Penthouse International Magazine for Men*, the plaintiff alleged defamation where defendant magazine publisher 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] arguably 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 report 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 investigators 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.[4] 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

[4] *See also Kamfar v. New World Rest. Grp., Inc.*, 347 F. Supp. 2d 38, 46–48 (S.D.N.Y. 2004) (concluding that defamation plaintiff 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, 875-76 (N.D.N.Y. 1995) (concluding that defamation plaintiff 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), *aff'd*, 112 F.3d 504 (2d Cir. 1996); *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 hastily," involving "interviews of relevant parties and reviews of . . . documents"), *aff'd*, 854 F.2d 1315 (2d Cir. 1988).

"review and comment would involve a substantial hindrance on the ability of writers and publishers to timely release information to the public." *Id.*[5]

These well-established tenets demonstrate that the circumstances surrounding APA's retention of Sidley to conduct the IR, APA's publication of the Report, 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 Report's statements. *Harte-Hanks*, 491 U.S. at 667.

The circumstances in which APA published the Report 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." Report at 1; *see* Compl. ¶ 3. APA elevated objectivity over agenda, directing 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 IR or the resulting Report, APA committed to making the resulting Report public "without changes." Compl. ¶¶ 18, 36. APA delivered on its promise. Following Sidley's extensive and probing independent investigation—which lasted eight months, and involved interviews of approximately 150 people and review of more than 50,000

[5] Nor is "failure to retract . . . adequate evidence of malice for constitutional purposes." *Sullivan*, 376 U.S. at 286; *see McFarlane*, 320 U.S. App. D.C. at 54, 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)).

documents—Sidley produced to APA an extensive report with 7,600 pages of exhibits, and APA published the Report. *See* Report at 6–7.

Plaintiffs do not criticize the hiring of Sidley to conduct the IR, 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. ¶ 46.

APA had no obligation to second-guess or investigate the findings or statements in the Report —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 732; *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 Report; the findings in the Report 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 730 (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 875-76; *Post*, 677 F. Supp. at 209. In fact, any attempt by APA to resist, revise, or delay the disclosure of the Report 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 Report] 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 [Report] 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 [Report], 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 875-76; *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 or others were engaged either in public debate on the issue of whether APA should ban psychologists from participating in national security interrogations or events addressed in or relevant to the Report, they had knowledge that two of the Report's "primary conclusions" were false, or they acted with reckless disregard as to whether the conclusions were false. *See* Compl. ¶¶ 231–41.
>
> 2. APA published the Report hastily and without adequate review, and permitted two of Plaintiffs' critics to see the Report before publication. *See* Compl. ¶¶ 242-52.
>
> 3. APA failed to give Plaintiffs an opportunity prior to the Report's publication to respond to its allegations. *See* Compl. ¶¶ 253-60.
>
> 4. One of the Special Committee members made her personal views about the Report's allegations against the Plaintiffs clear to the media, thus greatly compounding the damage to Plaintiffs. Compl. ¶¶ 261-69.
>
> 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 Report, which constituted an unfair attempt to shield from Plaintiffs and the public evidence that could directly contradict Hoffman's conclusions. Compl. ¶¶ 270-78.
>
> 6. APA did not take effective steps to correct the factual distortions in the Report or to adequately address the Plaintiffs' objections. Compl. ¶¶ 279-89.
>
> 7. APA announced that it had re-engaged Defendants Sidley and Hoffman for the limited purpose of reviewing only the military policies Plaintiffs provided, despite a potential conflict among the interests of the APA Board, the APA membership, and Defendants Hoffman and Sidley. Compl. ¶¶ 290-94.

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 Report—fails to comply with the rule that a plaintiff "demonstrate actual malice *in conjunction* with a false defamatory statement." *See, e.g.*, *Tavoulareas*, 260 U.S. App. D.C. at 71, 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 and were the subject of the Report caused that Board member to have a high degree of awareness that the IR, conducted by a law firm that intensively interviewed approximately 150 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 Report before publishing it, APA had no obligation to investigate the Report 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 732-33; *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 is] 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 875–76; *Post*, 677 F. Supp. at 209. APA's alleged publication to Plaintiffs' critics before public release of the Report does not demonstrate or even suggest that APA had a "high degree of awareness of … probable falsity" or 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 Report similarly fails to demonstrate actual malice. It would have

been unduly burdensome for APA to contact all of Sidley's approximately 150 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 Report are not probative of a "high degree of awareness of … probable falsity," or "serious doubts as to the truth," of statements in the Report at the time APA published it. *Harte-Hanks*, 491 U.S. at 667; *Secord*, 747 F. Supp. 2d at 792; Sidley's Anti-SLAPP Motion at Section II.B.2.d. To the contrary, any alleged repetition of the Report'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 Report. *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; *see also* Sidley's Anti-SLAPP Motion at Section II.B.2.d (noting "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").

Fifth, Plaintiffs' contention that Defendants falsely asserted the attorney-client privilege and work product doctrine occurred after APA published the Report. Any alleged improper assertion of privileges is irrelevant to APA's understanding at the time of publication. *Id.*; *Secord*, 747 F. Supp. 2d at 792; *New York Times Co. v. Sullivan*, 376 U.S. at 286 (malice must be shown "at the time of publication"); Sidley's Anti-SLAPP Motion at Section II.B.2.d.

Sixth, APA's alleged failure to take effective steps to correct errors in the Report and to address Plaintiffs' complaints is similarly unavailing. On September 4, 2015, APA did in fact publish a revised version of the original Report in which Sidley had corrected certain statements in the original. But in any case, APA's post-publication conduct is irrelevant to the actual malice analysis, rendering Plaintiffs' allegations unavailing. *Secord*, 747 F. Supp. at 792 ("the existence or non-existence of such malice must be determined as of the date of publication); *see also* Sidley's Anti-SLAPP Motion at Section II.B.2.d.

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 Report's public release. The re-engagement of the law firm for that limited purpose has no bearing on the Report. *Id.*

Eighth, Plaintiffs' allegations that the Special Committee members or others should have known of the falsity of the Report because they allegedly participated in some of the underlying activities is not only vague and conclusory, but insufficient to show actual malice. That some of the Special Committee members or others may have had personal experiences that bore on some of the issues addressed in the Report in a much more thorough, encompassing, detailed and contextual analysis than any individual member personally experienced falls far short of the type of explicit knowledge of falsity that is required for the purposes of demonstrating actual malice. *See, e.g.*, *Palin v. New York Times Co.*, No. 17-cv-4853 (JSR), 2017 WL 3712177, at *7, --- F. Supp. 3d --- (S.D.N.Y. Aug. 29, 2017) (holding that "the complaint fails on its face to adequately allege actual malice, because it fails to identify any individual who possessed the requisite knowledge and intent and, instead, attributes it to the [organization] in general"); *Dongguk Univ. v. Yale Univ.*, 873 F. Supp. 2d 460, 465 (D. Conn.

2012) ("Moreover, when the defendant is an organization, a plaintiff must prove that a particular agent or employee of the defendant acted with actual malice at the time that agent or employee participated in the publication of the statement in question; an organizational defendant is not charged with the collective knowledge of all its agents and employees for purposes of the actual malice inquiry." (citing *Sullivan*, 376 U.S. at 287)), *aff'd*, 734 F.3d at 113 (2d Cir. 2013); *see also St. Amant*, 390 U.S. at 731 ("There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication." (emphasis added)); *Jankovic v. Int'l Crisis Grp.*, 422 U.S. App. D.C. 259, 822 F.3d 576, 589 (D.C. 2016) ("[I]t is not enough to show that defendant should have known better; instead, the plaintiff must offer evidence that the defendant in fact harbored subjective doubt."), *cert. denied*, 137 S. Ct. 1434 (2017).

Accordingly, Plaintiffs' allegation that APA published statements in the Report with actual malice fails as a matter of law, and the Complaint must be dismissed with prejudice under the Act. *See* D.C. Code § 16-5502(b).[6]

[6] Nor can 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*, 260 U.S. App. D.C. at 53, 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 with prejudice in accordance with the D.C. Anti-SLAPP Act.

Respectfully submitted,

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