No. 20-cv-0318

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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L. Morgan Banks, III, Debra L. Dunivin, and Larry C. James,

Appellants,

v.

David H. Hoffman, Sidley Austin LLP, Sidley Austin (DC) LLP,
and American Psychological Association,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, 2017 CA 005989 B
Hon. Hiram E. Puig-Lugo, Associate Judge

BRIEF OF APPELLEE AMERICAN PSYCHOLOGICAL ASSOCIATION

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D.C. APP. R. 28(a)(2)(A) CERTIFICATE AS TO PARTIES

Counsel certifies that the following parties and intervenors appeared in the Superior Court of the District of Columbia:

- Bonny J. Forrest on behalf of L. Morgan Banks III, Debra L. Dunivin, Larry C. James, and Russell Newman, plaintiffs

- Williams Lopatto PLLC on behalf of L. Morgan Banks III, Stephen Behnke, Debra L. Dunivin, Larry C. James, and Russell Newman, plaintiffs
    - John B. Williams

- Clare Locke LLP on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, plaintiffs
    - Thomas A. Clare
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- Freeh Sporkin & Sullivan, LLP on behalf of Stephen Behnke, plaintiff
    - Louis J. Freeh

- Arent Fox LLP on behalf of American Psychological Association, defendant
    - Barbara S. Wahl
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- Williams & Connolly LLP on behalf of Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman, defendants
    - John K. Villa
    - Thomas G. Hentoff
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    - Eli S. Schlam
    - Krystal C. Durham
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- District of Columbia, intervenor
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    - Fernando Amarillas
    - Andrew J. Saindon
    - Robert Rich

Counsel certifies that the following parties are appearing in this court:

- Bonny J. Forrest on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, appellants

- Williams Lopatto PLLC on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, appellants
    - John B. Williams

- Arnold & Porter Kaye Scholer LLP on behalf of L. Morgan Banks III, Debra L. Dunivin, and Larry C. James, appellants
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- Arent Fox LLP on behalf of American Psychological Association, appellee
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    - Randall A. Brater
    - Michael F. Dearington

- Williams & Connolly LLP on behalf of Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman, appellees
    - John K. Villa
    - Thomas G. Hentoff
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DISCLOSURES PURSUANT TO D.C. APP. R. 26.1

Pursuant to D.C. App. R. 26.1(a), Defendant-Appellee American Psychological Association discloses that it is a District of Columbia non-profit organization and has no parent corporation.

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JURISDICTIONAL STATEMENT

This appeal is from a final order and judgment of the Superior Court of the District of Columbia dated March 12, 2020, dismissing all claims brought by Plaintiffs-Appellants against Defendants-Appellees, under the D.C. Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act of 2010, D.C. Code § 16-5502. Plaintiffs-Appellants filed a Notice of Appeal on April 6, 2020. This court has jurisdiction over the appeal pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES

1. Did the Superior Court correctly hold that the plaintiffs, Col. (Ret.) L. Morgan Banks III, Col. (Ret.) Debra L. Dunivin, and Col. (Ret.) Larry C. James ("Plaintiffs"), were public officials such that the *New York Times v. Sullivan* actual malice standard applied to their defamation and false light claims, when each held the rank of colonel in the U.S. Army and had leading roles in creating policies and procedures concerning national security interrogations?

2. Did the Superior Court correctly hold that Plaintiffs failed to proffer evidence from which a properly instructed jury could find, under the clear and convincing standard, that defendant American Psychological Association ("APA") made any allegedly false and defamatory statements about any Plaintiff with actual malice, when APA published a report ("Report") prepared after a thorough independent investigation by defendant Sidley Austin LLP and partner David

Hoffman ("Hoffman," and collectively with Sidley Austin LLP and Sidley Austin (DC) LLP, "Sidley")?

3. Did the Superior Court correctly hold that Plaintiffs failed to show that a properly instructed jury could find that APA republished the Report in August 2018, when APA (i) updated its website in a way that did not modify the Report itself or affect the version of the Report hosted on the website, and (ii) sent an email notifying its Council of Representatives of website changes, which merely referenced the Report?

4. Did the Superior Court correctly hold that the Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501–05, does not violate the Home Rule Act of 1973, D.C. Code §§ 1-201.01–1-207.71, or the First Amendment to the U.S. Constitution?

STATEMENT OF THE CASE

In November 2004, three years into the War on Terror that followed the September 11, 2001 attacks, the *New York Times* and other media outlets published reports that U.S. military psychologists had participated in abusive interrogations of national security detainees. JA258 ¶ 70, JA2443–44. The reports sent shockwaves through the psychologist community.

APA is the preeminent psychologist organization in the United States, with more than 122,000 members, and, among its actions, provides ethical guidance.[1] In

[1] *See* About APA, https://www.apa.org/about/ (last visited Apr. 22, 2021).

response to the media reports, APA formed the Presidential Task Force on Psychological Ethics and National Security ("PENS Task Force"). JA258 ¶ 71. The PENS Task Force, comprised of military and civilian psychologists, set out to examine the adequacy of APA's ethical guidance to psychologists in national security settings. JA258 ¶¶ 71–72, JA259 ¶ 73, JA2474–75. In 2005, the PENS Task Force issued a report that provided further ethical guidelines for psychologists in national security settings, which the APA Board adopted as official policy in July 2005. JA259 ¶¶ 75–77, JA2550. APA's governing body, the Council of Representatives, endorsed the PENS Task Force report in August 2005. JA260 ¶ 78.

The policy divided psychologists within and without APA, pitting APA divisions against each other. Some urged APA to adopt more stringent policies that would prevent psychologists from any participation in national security interrogations. JA2238. These polemics came to a head in 2014, when *New York Times* investigative reporter James Risen published *Pay Any Price*, which alleged that APA had colluded with the United States Government to support enhanced interrogation techniques that amounted to torture. JA237 ¶ 3, JA2238.

APA responded by retaining Sidley Austin LLP, an elite law firm with broad investigations experience, to conduct an independent review, with Sidley partner David Hoffman to lead the investigation. JA237 ¶ 2, JA2238. Hoffman, a graduate of Yale University and the University of Chicago Law School, and a former Supreme

Court clerk, had extensive experience conducting internal investigations, including as a former Inspector General and federal prosecutor. JA250–51 ¶ 46, JA1809. APA tasked Sidley with investigating whether APA had colluded with the Bush administration, CIA, or U.S. military to support torture during the War on Terror. JA2238. Upon completion of the independent review, APA intended to make Sidley's investigative report public, to promote free speech on the topic. JA241 ¶ 18. Over an eight-month period, a team of seven Sidley attorneys led by Hoffman conducted more than 200 interviews of 148 people, and reviewed more than 50,000 documents, JA2243–44, culminating in a 541-page Report, backed by 7,600 pages of publicly available exhibits. JA2223–778. APA published the Report on its website on July 10, 2015, and published a second version on its website with certain minor corrections on September 4, 2015. JA303 ¶ 251, JA311 ¶ 286, JA2223.

Plaintiffs Col. (Ret.) L. Morgan Banks III, Col. (Ret.) Debra L. Dunivin, and Col. (Ret.) Larry C. James were military psychologists who were interviewed by Sidley and mentioned in the Report. They disagreed with the Report's conclusions. Plaintiffs sued APA and Sidley in the Superior Court of the District of Columbia in August 2017, alleging in a twelve-count Complaint that the Report's findings and conclusions defamed them and held them in a false light. JA39–228. Plaintiffs filed a Supplemental Complaint in February 2019, asserting an additional count (asserted

as new Count 11), which alleged that changes made to APA's website in August 2018 republished the Report. JA233–431.[2]

APA and Sidley each moved to dismiss the Complaint in October 2017, and the Supplemental Complaint in March 2019, under the Anti-SLAPP Act. *See* D.C. Code § 16-5502. The Anti-SLAPP Act is a statute that aims to promote free speech by protecting a defendant's right to express views on issues of public interest from SLAPP suits brought to prevent such speech, by providing a right to early dismissal in situations where a suit is not likely to prevail on the merits. *See Competitive Ent. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016). Plaintiffs also moved to have the Superior Court void the Anti-SLAPP Act as violative of the Home Rule Act and the First Amendment.

In a January 23, 2020 opinion, following briefing by the parties and by intervenor the District of Columbia, the Superior Court correctly held that the Anti-SLAPP Act did not violate the Home Rule Act or the First Amendment, and thus refused to void the statute. JA2043–56.

In a March 12, 2020 opinion, the Superior Court correctly held that the Act required dismissal as to both APA and Sidley, finding that Plaintiffs were unable to

[2] In their Supplemental Complaint, Plaintiffs asserted Count 8 against APA alone, and Counts 2, 3, 5–7, 10, 11, and 13 against Sidley and APA. Plaintiffs asserted Counts 1, 4, 9, and 12 against only Sidley. References to the "Complaint" are to the Supplemental Complaint unless otherwise indicated.

meet the requisite standard of actual malice by clear and convincing evidence. JA2193–221.

The Superior Court held that APA and Sidley had made a prima facie showing that Plaintiffs' claims "arise[] from an act in furtherance of the right of advocacy on issues of public interest," which then shifted the burden to Plaintiffs to demonstrate that their claims were "likely to succeed on the merits" in order to avoid dismissal. D.C. Code § 16-5502(b); *see* JA2204–07. Plaintiffs do not challenge that ruling on appeal.

The Superior Court then correctly held that Plaintiffs could not satisfy their burden. The Superior Court found that Plaintiffs were public officials, and that they therefore had to satisfy the heightened actual malice standard under *New York Times v. Sullivan* and its progeny. JA2207–11. This meant Plaintiffs were required to prove by clear and convincing evidence that APA and Sidley published with actual malice, meaning knowledge of falsity or reckless disregard of the truth. JA2213–14. Plaintiffs failed to proffer evidence, however, from which a properly instructed jury could find that APA and Sidley published with actual malice under the clear and convincing standard. JA2213–20. As to Count 11 of the Supplemental Complaint, the Superior Court also concluded as a matter of law that APA and Sidley did not republish the Report when APA added to a Timeline on its website hyperlinks to letters that were critical of the Report, but did not modify the Report, and when APA

sent an email to its Council of Representatives notifying them of the changes to its website. JA2211–13. The Superior Court therefore dismissed Plaintiffs' claims with prejudice. JA2221.

This appeal followed.

STATEMENT OF FACTS

APA adopts and incorporates by reference the Statement of Facts set forth in the Sidley Brief, consistent with D.C. App. R. 28(j).

SUMMARY OF THE ARGUMENT

1. Plaintiffs do not challenge and therefore concede the Superior Court's ruling that APA made a "prima facie showing" that the Report, which resulted from an independent investigation by Sidley into collusion allegations against APA and government psychologists, was an "[a]ct in furtherance of the right of advocacy on issues of public interest" under the Anti-SLAPP Act. D.C. Code § 16-5501(1). The burden then shifted to Plaintiffs to demonstrate that their claims were "likely to succeed on the merits," consistent with the standard to defeat summary judgment, in order to avoid dismissal. *Id.* § 5502(b); *see Mann*, 150 A.3d at 1237. Plaintiffs failed to satisfy this standard because they failed to present any evidence, let alone clear and convincing evidence, that APA published with actual malice. The Superior Court therefore properly dismissed their claims under the Anti-SLAPP Act.

2. Plaintiffs are all psychologists who held the rank of Colonel in the U.S. Army during the time period covered by the Report. They admit in their Complaint that they had leading roles in creating and implementing policies for psychologists' support of national security interrogations during the War on Terror. They also admit in their Complaint that they were involved in APA's efforts in the mid-2000s to address the appropriate role for government psychologists supporting interrogations amid emerging controversies over government psychologists' involvement in abusive interrogations. As a result, all three Plaintiffs qualify as public officials under Supreme Court precedent.

3. As public officials, Plaintiffs had to satisfy a daunting standard by proving, with clear and convincing evidence, that APA published each allegedly false and defamatory statement concerning them with actual malice, meaning with knowledge of falsity or reckless disregard of the truth. To avoid dismissal, Plaintiffs were therefore required to proffer evidence from which a reasonable jury could find, under the clear and convincing standard, that APA published with actual malice.

4. As the Superior Court correctly held, Plaintiffs failed to proffer evidence of actual malice by APA. To the contrary, the record is clear that APA retained Sidley, an elite law firm with substantial experience conducting investigations, to independently review the allegations of collusion. Over an eight-month period, Sidley conducted nearly 200 interviews of roughly 150 people,

reviewed more than 50,000 documents, and produced a 541-page Report backed by 2,577 footnotes and 7,600 pages of public exhibits. Plaintiffs' attempts to demonstrate that APA published statements concerning Plaintiffs with knowledge of falsity or reckless disregard of the truth are meritless. As the Superior Court found, the affidavits on which Plaintiffs relied in opposition to the Anti-SLAPP motions disagreed with Sidley's investigative methods, findings, and conclusions – but were not evidence of actual malice by APA.

5. As to Count 11, the Superior Court also correctly held that Plaintiffs failed to present evidence from which a properly instructed jury could find that APA republished the Report when it added links to letters *critical* of the Report (which was not itself modified) to a Timeline on its website in August 2018, and when APA emailed its Council of Representatives regarding website changes and referenced the Report.

6. The Superior Court also properly rejected Plaintiffs' arguments that the Anti-SLAPP Act violates the Home Rule Act or the First Amendment to the U.S. Constitution.

ARGUMENT

I. STANDARDS OF REVIEW

APA adopts and incorporates by reference the Standards of Review set forth in the Sidley Brief, as it pertains to APA. *See* D.C. App. R. 28(j).

II. THE SUPERIOR COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS UNDER THE ANTI-SLAPP ACT.

A. The Anti-SLAPP Act applied to Plaintiffs' claims, and dismissal was therefore appropriate as Plaintiffs' claims were not likely to succeed on the merits.

The Superior Court correctly held that APA made "a prima facie showing" in its motion to dismiss that Plaintiffs' claims "arise[] from an act in furtherance of the right of advocacy on issues of public interest," which was the independent review of whether APA officials colluded with DoD, CIA, or other government officials by crafting ethical guidelines that allowed psychologists to participate in abusive interrogations used by those agencies in the wake of 9/11. D.C. Code § 16-5502(b). Plaintiffs do not challenge that ruling on appeal.

The burden then shifted to Plaintiffs to demonstrate that their claims were "likely to succeed on the merits." *Id.*; *see Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 504, 506 (D.C. 2020) ("[I]n opposing a special motion to dismiss, the plaintiff must shoulder the burden of showing that his claim is likely to succeed on the merits."), *cert. denied*, 141 S. Ct. 1074 (2021). To avoid dismissal under the Anti-

SLAPP Act, Plaintiffs had to make a showing sufficient to defeat summary judgment. *Mann*, 150 A.3d at 1236. Plaintiffs failed to make this showing.[3]

B. The Superior Court correctly held that Plaintiffs' claims were not likely to succeed on the merits because Plaintiffs failed to present evidence that APA published with actual malice.

Plaintiffs were all colonels in the U.S. Army during the periods covered in the Report, and have also admitted in their Complaint to taking leadership roles in creating and implementing policies for psychologists' support of national security interrogations during the War on Terror. As a result, all three Plaintiffs qualify as public officials under Supreme Court precedent, and were therefore required to proffer evidence from which a properly instructed jury could find that APA published with actual malice under the clear and convincing standard.

Plaintiffs could not satisfy this rigorous standard, as the Superior Court correctly concluded. JA2213–20. Instead, Plaintiffs proffered irrelevant evidence and opinions – predominantly consisting of disagreement with the Report's conclusions, voiced by Plaintiffs and others also critical of the Report – none of which showed that APA published with knowledge of falsity or reckless disregard

[3] To prevail on their claims, Plaintiffs had to satisfy the following elements: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Fridman*, 229 A.3d at 504 (internal quotation marks omitted).

for the truth, let alone clearly and convincingly. The court should therefore affirm the dismissal of the Complaint under the Anti-SLAPP Act.

1. Plaintiffs were public officials.

Plaintiffs were public officials, substantially for the reasons stated in Sidley Brief § I.A, which APA adopts and incorporates by reference. *See* D.C. App. R. 28(j).

2. As public officials, Plaintiffs were required to proffer evidence from which a reasonable jury could find clear and convincing evidence that APA published with actual malice.

As public officials, Plaintiffs had to "proffer evidence capable of showing by the clear and convincing standard that [the defendant] acted with actual malice in publishing." *Fridman*, 229 A.3d at 509; *see Mann*, 150 A.3d at 1252 (plaintiffs must present evidence from which a jury could "find actual malice with convincing clarity"); *see* Pl. Br. 16 (acknowledging that the plaintiff must present clear and convincing evidence of actual malice where the plaintiff is a public figure).

A defendant publishes with actual malice if he or she publishes "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968). Reckless disregard requires a "high degree of awareness of … probable falsity" such "that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. The actual malice standard is "subjective," so a "plaintiff must prove that the defendant

actually entertained a serious doubt" about the statement's veracity. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996); *accord Thomas M. Cooley L. Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 531 (6th Cir. 2014); *Secord v. Cockburn*, 747 F. Supp. 779, 785 (D.D.C. 1990).[4] It is therefore insufficient for a plaintiff merely "to show that [the] defendant should have known better; instead, the plaintiff must offer evidence that the defendant in fact harbored subjective doubt." *Jankovic v. Int'l Crisis Grp.* (*Jankovic II*), 822 F.3d 576, 589 (D.C. Cir. 2016).

The heightened standard also requires plaintiffs to "demonstrate actual malice *in conjunction* with a false defamatory statement," and not "in the abstract." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (en banc) (emphasis in

[4] Plaintiffs quote dicta from *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), where the Court opined in a footnote that "proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition." *Id.* (citation omitted); *see* Pl. Br. 21. But Plaintiffs fail to point out that the Supreme Court subsequently clarified that it meant only to acknowledge its "general reluctance to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 n.7 (1986) (internal quotation marks omitted). This court, and federal courts in the District of Columbia applying District of Columbia law, have also stated that summary disposition in defamation cases may be appropriate given the First Amendment interests at stake. *See Nader v. de Toledano*, 408 A.2d 31, 44 (D.C. 1979) ("Because of the compelling First Amendment interest at stake, we regard summary judgment as a useful method of disposing of constitutional libel actions [w]here appropriate."); *accord Harper v. Walters*, 822 F. Supp. 817, 823 (D.D.C. 1993), *aff'd*, 40 F.3d 474 (D.C. Cir. 1994); *see also Von Kahl v. BNA*, 856 F.3d 106, 109 (D.C. Cir. 2017) ("[T]he Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits.").

original); *see 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"). Thus, a plaintiff cannot prove actual malice merely by proving that the defendant knew of "collateral falsehoods" in a publication that were "unrelated to [the] plaintiff." *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1512–13 (D. Minn. 1988) (citing *Tavoulareas*, 817 F.2d at 794), *aff'd*, 881 F.2d 1426 (8th Cir. 1989). The plaintiff must also prove actual malice "at the time of publication." *Von Kahl*, 856 F.3d at 118.

The standard is even more difficult to meet where, as here, the plaintiff relies on circumstantial evidence. There are only three recognized scenarios "in which the circumstantial evidence of subjective intent could be so powerful that it could provide clear and convincing proof of actual malice." *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 50 (D.D.C. 2005). These are when the statement was: (i) fabricated by the defendant, (ii) the product of the defendant's imagination,[5] or (iii) based wholly on an unverified anonymous source or some other source that a defendant had obvious reason to doubt. *Id.*; *accord St. Amant*, 390 U.S. at 732; *Sheridan Square Press*, 91 F.3d at 1512–13; *Jankovic II*, 822 F.3d at 589–90. This

[5] This factor has also been described as "so inherently improbable that only a reckless person would have put [it] in circulation." *Jankovic II*, 822 F.3d at 589 (quoting *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003)).

high bar is meant "[t]o prevent the inquiry into the defendant's subjective state of mind from slipping into an open-ended review of the reasonableness of the defendant's investigation or his compliance with professional standards." *OAO Alfa Bank*, 387 F. Supp. 2d at 50.[6]

A plaintiff must present clear and convincing evidence of actual malice "separately with respect to each defendant," and actual malice "cannot be imputed from one defendant to another absent an employer-employee relationship." *Secord*, 747 F. Supp. at 787; *see, e.g.*, *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1303 (D.C. Cir. 1996) (holding that the plaintiff "may show [the defendant's] malice only through evidence of the information available to, and conduct of, its employees"); *AdvanFort Co. v. Maritime Executive, LLC*, No. 15–cv–220, 2015 WL 4603090, at *7 (E.D. Va. July 28, 2015) ("With respect to the agency theory, it is well established that actual malice must be proved with respect to each defendant.… [M]ultiple courts have held that actual malice cannot be imputed from one defendant to another absent an employer-employee relationship." (internal quotation marks omitted)). As

[6] Plaintiffs attempt to erode this standard by misleadingly quoting a footnote from *Herbert v. Lando*, 441 U.S. 153, 164 n.12 (1979), in which the Supreme Court noted the "many ways" that plaintiffs had tried to show actual malice in connection with "qualified privileges" that existed at common law *before* the Supreme Court established the constitutional actual malice standard in *New York Times v. Sullivan*. Pl. Br. 22 (quoting *Lando*, 441 U.S. at 164 n.12). Plaintiffs fail to acknowledge that this dicta relates to proof of actual malice at common law – not constitutional actual malice established in *New York Times v. Sullivan*, and at issue here.

a result, "[i]f [the author] is not an employee of [the publisher], independent evidence of [the publisher's] culpability is required." *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989).

The clear and convincing standard of proof is also "significantly more onerous than the usual preponderance of the evidence standard." *Tavoulareas*, 817 F.2d at 776; *accord Von Kahl*, 856 F.3d at 116. This "heightened" standard "helps prevent persons from being discouraged in the full and free exercise of their First Amendment rights." *Von Kahl*, 856 F.3d at 116 (internal quotation marks omitted).

For these reasons, courts have described the actual malice standard as "daunting," and as one that "[f]ew public figures" have satisfied. *Sheridan Square Press*, 91 F.3d at 1515. Plaintiffs failed to satisfy that standard here.

3. The Superior Court correctly held that Plaintiffs failed to present evidence of actual malice as to APA, let alone clear and convincing evidence.

The Superior Court correctly held that Plaintiffs failed to present evidence from which a properly instructed jury could find, under the clear and convincing standard, that APA published a false and defamatory statement concerning Plaintiffs with actual malice. JA2213–20.

In publishing the Report, APA was entitled to rely "on the professional reputation" of Sidley, a prestigious law firm, and Sidley partner Hoffman, a well-regarded and experienced former Inspector General and federal prosecutor, who

authored the Report following an extensive eight-month independent investigation. *Marcone v. Penthouse Int'l Mag. for Men*, 754 F.2d 1072, 1089 (3d Cir. 1985) ("[r]eliance on the professional reputation of an author may help to defeat an allegation of actual malice"); *cf. Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1032 (2d Cir. 1997) ("A publisher will not be liable for an article later shown to be false" under New York's "gross irresponsibility" standard "if it relies upon the integrity of a reputable author and has no serious reason to question the accuracy of the information provided by that author.").

For example, in *Marcone*, the plaintiff alleged defamation where the defendant magazine published an article written by a free-lance author alleging that the plaintiff had purchased illegal drugs and then cooperated with investigators. 754 F.2d at 1089. In holding that the plaintiff failed to prove actual malice, the court reasoned that, "even if [the 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).

Similarly, in *Jankovic II*, the D.C. Circuit held that clear and convincing evidence of actual malice was lacking where defendant the International Crisis

Group ("ICG") published defamatory statements from a report authored by a Balkans expert that concluded that the plaintiff Serbian businessman had supported the Milosevic regime in exchange for favorable treatment for his businesses. 822 F.3d at 591–92. The court reasoned that, in the absence of subjective serious doubts by ICG as to the veracity of the statement in the report, "[the author's] extensive background research and reporting on the Balkans, his understanding of the Serbian press, and his good faith belief [in the statement] belies actual malice." *Id.* at 597; *see also World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1264 (S.D.N.Y. 1989) (stating that the defendant was "entitled to rely on the research and experience of his co-author … especially when his co-author … is an award-winning journalist who has served as a writer, reporter, and editor" for "well-known publications").

Once Sidley presented the Report to APA for publication, moreover, APA had no duty to conduct a second investigation to confirm that it agreed with the Report's findings before publishing. The Supreme Court has repeatedly emphasized that a defendant's failure to investigate another's statements before publishing them does *not* support a finding of actual malice. *See, e.g., Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974) ("[M]ere proof of failure to investigate, without more, cannot establish reckless

disregard for the truth."); *St. Amant*, 390 U.S. at 731, 733 (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 "[f]ailure to investigate does not in itself establish bad faith").[7]

This principle applies *a fortiori* here where, consistent with its reputation, Sidley thoroughly investigated before presenting the Report to APA for publication. Over a period of eight months, a team of seven attorneys conducted more than 200 interviews of roughly 150 people, and reviewed more than 50,000 documents. JA2243–44. Sidley then provided its findings and conclusions in a 541-page Report, which included 2,577 footnotes, supported by 7,600 pages of exhibits. JA2223–778. Thus, far from giving APA "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, APA had reason to be confident in the accuracy of the Report.[8]

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[7] *Accord Dongguk Univ.*, 734 F.3d at 125–26; *Marcone*, 754 F.2d at 1089; *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 918 (6th Cir. 1982); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977); *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026 (5th Cir. 1975); *Fodor v. Berglas*, No. 95 Civ. 1153, 1995 WL 505522, at *5 (S.D.N.Y. Aug. 24, 1995); *Murray v. Bailey*, 613 F. Supp. 1276, 1280–81 (N.D. Cal. 1985).

[8] Courts have repeatedly declined to find fault where, as here, a defendant retained a law firm to conduct an independent investigation and then published the findings. *See, e.g., Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 94–95, 102–04 (2d Cir. 2000); *Kamfar v. New World Rest. Grp., Inc.*, 347 F. Supp. 2d 38, 46–48 (S.D.N.Y. 2004); *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 875-76 (N.D.N.Y. 1995), *aff'd*, 112 F.3d 504 (2d Cir. 1996); *Post v. Regan*, 677 F. Supp. 203, 209

Plaintiffs failed to point to any record evidence that demonstrates that APA knew a statement in the Report concerning Plaintiffs was false, or had reckless disregard as to its truth, when it published the Report prepared by Sidley. Plaintiffs' arguments to the contrary, addressed in turn below, are meritless.

4. The Superior Court correctly held that Plaintiffs failed to adduce "direct evidence" of actual malice.

Plaintiffs point to four categories of purported "direct evidence" of actual malice, none of which actually constituted direct evidence. Pl. Br. 24–34. This evidence principally consisted of complaints lodged by the Report's detractors, provided in affidavit form, that criticized Sidley's investigation and conclusions. None evinced actual malice as to APA, let alone clearly and convincingly.

a. No "Direct" Evidence

As a threshold matter, Plaintiffs attempt to evade the stringent requirements for proving actual malice using circumstantial evidence, *see OAO Alfa Bank*, 387 F. Supp. 2d at 50, by mischaracterizing four categories of evidence as "direct evidence." Pl. Br. 24–34.

(S.D.N.Y.), *aff'd*, 854 F.2d 1315 (2d Cir. 1988). To hold otherwise would not only contravene Supreme Court precedent, but also effectively impose on an entity like APA a duty to hire secondary and perhaps tertiary investigators to confirm the findings and conclusions of the initial investigators, exhausting resources and, in the event of disagreement with the first investigators, undermining the independence of the investigation, and ultimately, the willingness of organizations to examine their own conduct.

"'[D]irect evidence is evidence that, if believed by the fact finder, proves the particular fact in question without any need for inference.'" *Said v. Nat'l R.R. Passenger Corp.*, 317 F. Supp. 3d 304, 322 (D.D.C. 2018) (internal quotation marks omitted), *aff'd*, 815 F. App'x 561 (D.C. Cir. 2020); *see also* Standardized Civil Jury Instructions for the District of Columbia § 2.03 (rev. ed. 2021) ("When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts from which reasonable conclusions may be drawn is circumstantial evidence."). Thus, direct evidence of actual malice could include a statement by the defendant himself admitting that the defendant knew a defamatory statement was false at the time of publication. *See, e.g.*, *OAO Alfa Bank*, 387 F. Supp. 2d at 49 (stating that "plaintiffs have not come forward with any direct evidence of actual malice" where "[e]ach of the witnesses who was part of the decision-making process has testified that defendants believed the allegations … to be credible"); *Foretich v. Am. Broad. Cos.*, Nos. Civ. A. 93-2620, 94-0037, 1997 WL 669644, at *6 (D.D.C. Oct. 17, 1997) (concluding that "[p]laintiffs offer no direct evidence of actual malice," where the plaintiffs had presented no testimony or statements by the defendant that, if true, would prove actual malice).

Plaintiffs failed to present any "direct evidence" of actual malice, and each so-called category of "direct evidence" was actually circumstantial evidence that

failed to meet any of the three established criteria for proving actual malice using circumstantial evidence. *See OAO Alfa Bank*, 387 F. Supp. 2d at 50.

b. Alleged Admissions

Plaintiffs claim that APA made "admissions" on three occasions that demonstrated actual malice. Pl. Br. 24–26. Plaintiffs misstate the evidence as to each, none of which supports an actual malice finding.

First, Plaintiffs argue that the APA Board acknowledged during a meeting in August 2016 that the Report contained "many inaccuracies" and that there appeared to be "no evidence of collusion." *Id.* at 24 (citing JA1658 ¶ 14, JA1719–25, Ex. 1 ¶ 5); *see also* Pl. Br. 7. This misstates the evidence. Plaintiffs rely on a February 2019 affidavit in which one of the Report's detractors, Robert Resnick, stated his *impressions* from an August 2016 meeting attended by an unstated number of APA Board members (a "subset of the APA Board"), apparently not a quorum, at which *he* raised concerns about the Report. *See* JA1720 ¶¶ 4–5 (Resnick Affidavit); *see also* JA2672–77 (discussion of Resnick in Report). Resnick claimed in conclusory fashion that "some Board members … acknowledged that the Report contain[s] many inaccuracies," without identifying the APA Board members who made the statements or what they actually said that gave him that impression. JA1720 ¶ 5. Nor did Resnick state that these "acknowledgments" related to an allegedly defamatory statement concerning Plaintiffs, as opposed to some other aspect of the Report that

is unrelated to Plaintiffs' claims. *See Price*, 676 F. Supp. at 1512–13 (knowledge of "collateral falsehoods – false statements of fact unrelated to [the] plaintiff" do not establish actual malice as to a defamatory statement concerning the plaintiff (citing *Tavoulareas*, 817 F.2d at 794)); *Tavoulareas*, 817 F.2d at 794 (a plaintiff must "demonstrate actual malice *in conjunction* with a false defamatory statement" (emphasis in original)). Critically, the meeting also allegedly occurred in August 2016 – eleven months *after* APA published the September 2015 version of the Report – and thus fails to show the APA Board's knowledge at the time of publication. *See* JA1719–20 ¶¶ 3–5 (Resnick Affidavit); *see also Von Kahl*, 856 F.3d at 118 ("The actual malice inquiry focuses on the defendant's state of mind at the time of publication.").[9] Thus, Resnick's Affidavit fails to demonstrate that a majority of the APA Board made statements that constitute an admission[10] by APA that it knew at the time of the Report's publication that the Report contained inaccuracies pertaining to the Plaintiffs.

Plaintiffs also cite to Plaintiff Larry James's Affidavit, which stated that a single APA Board member emailed and phoned him on an unidentified date "*after*

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[9] Plaintiffs also cite the affidavit of Barry Anton in an effort to bolster the Resnick notes. JA1456 ¶ 8 (stating that notes taken by Robert Resnick and emailed to Anton, attached as Exhibit A, "are consistent with [Anton's] recollection of the meeting"). This evidence fails for the same reason that the Resnick Affidavit fails.

[10] *See* Fed. R. Evid. 801(d)(2)(A).

the Report was published" to tell him that she knew that he had done nothing wrong. JA1658 ¶ 14 (emphasis added).[11] James also claims that the APA President serving in 2016 said during a Council meeting in February 2016 – five months *after* the Report's publication – that "there was 'clear evidence' that Mr. Hoffman *may have* 'distorted' matters in the report," JA1658 ¶ 14 (emphasis added), without identifying those "matters" or opining that the Report *did* distort them, only that it was *possible*.[12] Like the Resnick Affidavit, however, this evidence does not constitute an admission by APA or show that the APA Board knew an allegedly defamatory statement concerning Plaintiffs was false at the time of publication, as required to show actual malice. *See Tavoulareas*, 817 F.2d at 794; *Von Kahl*, 856 F.3d at 118.[13]

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[11] The James Affidavit does not attach the alleged email, likely violating the Best Evidence Rule. *See Abulqasim v. Mahmoud*, 49 A.3d 828, 837 (D.C. 2012) ("'The best evidence rule requires that when the contents of a writing are to be proved the original must be produced unless its absence is satisfactorily explained.'" (quoting *Walker v. United States*, 402 A.2d 813, 813–14 (D.C. 1979))).

[12] Plaintiffs also contend, without citing record evidence, that an APA Associate General Counsel stated in February 2016 – six months after the Report's publication – that APA could not "do nothing" and would have a "fiduciary obligation to fix things if they became aware that something was wrong." Pl. Br. 24–25. In addition to the lack of evidentiary support for this statement, it is not evidence of actual malice and instead suffers from the same defects as the Resnick and James affidavits.

[13] The Resnick and James Affidavits also do not describe the views of the APA Board, but rather impressions from comments of two particular Board members in the case of the James Affidavit, and unidentified Board members in the case of the Resnick Affidavit. But Plaintiffs fail to show that the particular Board member(s) were involved in the decision to publish the Report and had actual malice at such time. *See 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

Second, Plaintiffs claim that "numerous former members of APA's governing bodies with first-hand knowledge of the events described in the Report have attested to its falsities." Pl. Br. 25 (citing JA1456 ¶¶ 6, 8); *see also* Pl. Br. 6–7 (citing *inter alia* JA1779). Again, Plaintiffs misstate the evidence. Plaintiffs cite the affidavit of Barry Anton, a former president of APA who was recused from matters regarding the investigation and Report. JA1455 ¶¶ 2–3. Anton stated that "when the Report was made public [he] began to hear from people who believed there were inaccuracies in the Report" regarding "interrogation policies." JA1456 ¶ 6. But this is far from evincing actual malice by APA at the time of publication. *See Von Kahl*, 856 F.3d at 118 ("The actual malice inquiry focuses on the defendant's state of mind at the time of publication."). The complaints Anton heard from unidentified third parties expressing their "beliefs" about inaccuracies, which Anton did not describe with any specificity, constitute inadmissible hearsay. *See, e.g.*, *Jones v. United States*, 17 A.3d 628, 632 (D.C. 2011) ("Hearsay is an out-of-court assertion of fact offered into evidence to prove the truth of the matter asserted. Generally, hearsay evidence is inadmissible at trial …."). Most problematic, such complaints were also

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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 113 (2d Cir. 2013).

not attributable to APA – as opposed to unidentified third parties who spoke to Anton following the Report's publication. In fact, the "people" Anton referred to may not have even been APA members, much less APA Board members. Moreover, this evidence related to the purported falsity of the Report's description of "interrogation policies," not a defamatory statement concerning Plaintiffs, and thus violates the requirement that actual malice be proven "*in conjunction* with a false defamatory statement." *Tavoulareas*, 817 F.2d at 794 (emphasis in original); *see Price*, 676 F. Supp. at 1512–13 (knowledge of "collateral falsehoods – false statements of fact unrelated to [the] plaintiff" do not establish actual malice as to a defamatory statement concerning the plaintiff).

Separate from the Anton Affidavit, Plaintiffs also point to letters on the APA website, outside the record, in which former APA ethics chairs and presidents critiqued the Report. Pl. Br. 6–7 (citing *inter alia* JA1779). Plaintiffs do not request or provide a basis to seek judicial notice for these letters, which constitute inadmissible hearsay. *See, e.g., Jones*, 17 A.3d at 632. Significantly, none of the letters demonstrates that any statements concerning Plaintiffs were false. *See, e.g.*, JA1779 n.12 (linking to letter purportedly from former APA ethics chairs containing "feedback" for the APA Board and "allegations" about "the Report's methods and conclusions," but "[w]ithout assuming the accuracy of any one of them"); *id.* n.14 (linking to letter purportedly from former APA presidents critiquing APA's response

to the Report, and acknowledging that "there are very real and honest differences of opinion regarding the [independent review]"). The letters are also irrelevant because they are dated the year *after* APA published the Report. *See Tavoulareas*, 817 F.2d at 794 (plaintiff must "demonstrate actual malice *in conjunction* with a false defamatory statement" about Plaintiffs (emphasis in original)); *Von Kahl*, 856 F.3d at 118 (plaintiff must prove actual malice "at the time of publication").

Third, Plaintiffs claim that APA's outside counsel, David Ogden, "would have known" that the Report's "assertions about the [Office of Legal Counsel] guidance in 2005 were inaccurate." Pl. Br. 26 (citing JA310, JA1456 ¶ 6). Plaintiffs' speculation about what Ogden "would have known," however, is without any support in the record. For this assertion about Ogden, Plaintiffs rely only on allegations in the complaint, JA310, as well as the Anton Affidavit's assertion that Ogden "acknowledged" that the Report failed to appreciate the nature of "interrogation policies" in force in 2005. JA1456 ¶ 6. Even if Ogden had made such a statement, that is not tantamount to a recognition by him – let alone APA – that APA published the Report with knowledge that the Report's discussion of interrogation polices was false, or that the discussion even pertained to a particular Plaintiff. Moreover, Plaintiffs' references to what Ogden knew or should have known all purportedly occurred *after* the publication of the Report, and could not reflect APA's knowledge at the time of publication. *See* JA310 (alleging that Ogden

"was specifically directed to material that undercut the majority of the Report's findings" in October 2015, which was *after* APA published the Report in July and September 2015); JA1456 ¶ 6 (Anton Affidavit alleging that Ogden "acknowledged" after "the Report was made public" that information about existing interrogation policies contradicted the Report's conclusions). Thus, this evidence does not support an actual malice finding. *See Tavoulareas*, 817 F.2d at 794 (plaintiff must prove actual malice "*in conjunction* with a false defamatory statement" (emphasis in original)); *Von Kahl*, 856 F.3d at 118 (plaintiff must prove actual malice "at the time of publication").

c. Alleged Documents and Testimony in Defendants' Possession

Plaintiffs contend that Defendants had documents and testimony in their possession that contradicted the Report's primary conclusions. Pl. Br. 26–34. This argument fails for multiple reasons.

First, Plaintiffs address this argument to Sidley, and not APA. *See, e.g.*, *id.* at 26 ("Plaintiffs' Supplemental Complaint specifically identifies … evidence that Sidley and Hoffman either knew about or deliberately avoided evidence that would have caused a truly independent investigator to doubt the truth of the allegations."). Plaintiffs have therefore waived this argument as to APA. *See, e.g.*, *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are

deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."). In any event, Plaintiffs also cannot impute Sidley's alleged state of mind to APA, *see, e.g.*, *Secord*, 747 F. Supp. at 787, and Plaintiffs do not argue otherwise.

Second, Plaintiffs place great weight on a 61-page "exhibit" attached to their Opposition brief below (Ex. A) – containing an assortment of factual assertions along with numerous links to Internet websites – that provided no support for an actual malice finding. *See* Pl. Br. 26–27 (citing JA1302–62). As an initial matter, Plaintiffs fail to demonstrate that the Superior Court erred by declining to analyze these extraneous arguments in its opinion, which Plaintiffs did not even develop in their Opposition brief. The 61-page "exhibit" also failed to demonstrate that any APA Board member published an allegedly defamatory statement concerning Plaintiffs with actual malice. In fact, the exhibit does not even purport to show evidence possessed by a single person who published the Report for APA, only "Evidence in Hoffman's Possession." JA1302–62 (title of third column).

Third, even if APA possessed all the same evidence as Sidley, that showing would not demonstrate actual malice as to APA. Plaintiffs fail to identify any record evidence that was in APA's files "at the time of publication," *Von Kahl*, 856 F.3d at 118, that demonstrates "actual malice *in conjunction* with a false defamatory

statement," *Tavoulareas*, 817 F.2d at 794 (emphasis in original). This is fatal to Plaintiffs' argument.

Fourth, Plaintiffs' argument misapprehends the actual malice standard. A defendant has no obligation to consult files, even its own, to determine whether a statement is false. *See, e.g.*, *Esquire Mag.*, 74 F.3d at 1304–05 (no obligation by defendant magazine to review its copies of transcriptions of reporter's interview notes); *Dongguk*, 734 F.3d at 126 ("[e]ven the failure to review one's own files is inadequate to demonstrate malice" (citing *N. Y. Times v. Sullivan*, 376 U.S. 254, 287–88 (1964))); *Libre by Nexus v. Buzzfeed*, No. 17-cv-1460, 2018 WL 6573281, at *3 (D.D.C. Dec. 13, 2018) (defendant's mere possession of ICE letter would not have caused it to question whether ICE had the legal authority to investigate plaintiff's business practices); *Parsi v. Daioleslam*, 890 F. Supp. 2d 77, 86 (D.D.C. 2012) ("Although defendant is obviously familiar with much of Parsi's work, there is no requirement that he track down every interview given, op-ed written, or conference attended …. Hence, the existence of these scattered statements cannot prove actual malice."); *LaPointe v. Van Note*, No. Civ. A 03-2128(RBW), 2006 WL 3734166, at *11–12 (D.D.C. Dec. 15, 2006) (defendant had no obligation to review a press release that allegedly would have demonstrated an article's false statement regarding the basis for the plaintiff's discharge). Thus, even if Plaintiffs could demonstrate that APA had documents or testimony in its possession that showed

certain statements in the Report to be false – and it cannot – that would not prove actual malice as to such statements.

d. Alleged Omission of Exculpatory Reports

Plaintiffs contend that Sidley omitted from the Report conclusions contained in "exculpatory reports" issued by government agencies. Pl. Br. 32–33 (citing JA1241–42, JA1249–50, JA1374). Plaintiffs limit their argument to Sidley, and have thus waived it as to APA. *See, e.g.*, *Comford*, 947 A.2d at 1188. Plaintiffs also cannot impute the Sidley attorneys' alleged states of mind to APA. *Secord*, 747 F. Supp. at 787. Plaintiffs' argument also fails for the reasons stated by Sidley, Sidley Br. § I.B.1.b, which APA adopts and incorporates by reference. *See* D.C. App. R. 28(j).

e. Alleged Knowledge of Falsity by APA Board Members

Plaintiffs assert that APA Board members had knowledge that many of the Report's allegations were false. Pl. Br. 33–34. This argument is meritless.

The sole alleged instance of such knowledge by APA's Board pertains to the APA Ethics Committee's decision to close the ethics complaint file of Lt. John Leso. Specifically, Plaintiffs assert that former APA President Nadine Kaslow commended the "thoroughness" of an ethics investigation involving Lt. John Leso, and that APA Associate General Counsel Ann Springer allegedly "signed off on closing" the ethics complaint file about Leso. *Id.* This, according to Plaintiffs, demonstrates that APA knew the Report's general conclusion that APA mishandled

ethics complaints in order to protect prominent national security psychologists from censure was false. Pl. Br. 33–34. Not so.

As an initial matter, APA's handling of the Leso file is unrelated to Plaintiffs, who had no role in APA's ethics complaint process generally or with the Leso file specifically. *See* JA2701–12, JA2730–58 (discussion of Leso file without mention of Plaintiffs). The evidence therefore fails to show actual malice "*in conjunction* with a false defamatory statement" concerning Plaintiffs. *Tavoulareas*, 817 F.2d at 794 (emphasis in original). Nor does this evidence actually undermine a conclusion in the Report. To the contrary, the Report's conclusion regarding the handling of ethics complaints involving "prominent" national security psychologists was unrelated to Leso, who was an "early career psychologist." JA2750–52. Kaslow's statement that the Leso review had been thorough, and the alleged closure of the Leso file and sign off by Springer, also do not demonstrate that APA believed the Report's conclusion regarding the general handling of ethics complaints involving prominent national security psychologists was false at the time of publication.

Plaintiffs also cite to an "exhibit" attached to their Opposition brief below (Ex. B), and argue in conclusory fashion that it "provides supporting evidence of the involvement of all but one APA Board member in the events discussed in the Report, in the form of APA Rosters, Council Minutes, and historical business records." Pl. Br. 34 (citing JA1444–52). Plaintiffs failed to develop this argument at the Superior

Court, or in their appellate brief, and Plaintiffs have therefore waived it. *Comford*, 947 A.2d at 1188. In any event, the exhibit principally identified instances when certain Board members *may have been* involved in events relevant to the Report, but did not establish the Board members' *actual* involvement in these events and their *actual* knowledge that their past participation rendered false a factual statement in the Report.[14]

* * * * *

In sum, the so-called "direct evidence" Plaintiffs highlight is actually tenuous circumstantial evidence that fails to satisfy any of the three criteria for proving actual malice through circumstantial evidence. *See OAO Alfa Ban*k, 387 F. Supp. 2d at 50.

5. The Superior Court correctly held that Plaintiffs failed to adduce "circumstantial evidence" of actual malice.

Plaintiffs also argue that six categories of purported "circumstantial evidence" demonstrate actual malice as to APA. This argument is also meritless, and the purported evidence does not approach satisfying any of the three criteria for proving actual malice through circumstantial evidence.[15]

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[14] To the extent the court considers these extraneous arguments, APA adopts and incorporates by reference the arguments in its Reply brief below, which further explains why the exhibit is unpersuasive. *See* JA1979–2010.

[15] Plaintiffs highlight the D.C. Circuit's statement that courts can consider not just direct evidence but also "the cumulation of circumstantial evidence," Pl. Br. 10 (quoting *Tavoulareas*, 817 F.2d at 789), but this principle is of no help to Plaintiffs. None of the purported circumstantial evidence Plaintiffs cite satisfies any of the

a. Alleged Adherence to a Preconceived Narrative, Purposeful Avoidance of the Truth, and Reliance on Unreliable Witnesses

Plaintiffs argue that, during its investigation, Sidley adhered to a "preconceived narrative," Pl. Br. 34–36, purposefully avoided the truth, Pl. Br. 36–37, and that Sidley "relied heavily" on four "biased and unreliable sources … while discounting or discarding" the views of "credible sources," Pl. Br. 37–38. Plaintiffs limit these arguments to Sidley, and have thus waived them as to APA. *See*, *e.g.*, *Comford*, 947 A.2d at 1188. Plaintiffs also cannot impute the Sidley attorneys' alleged states of mind to APA because the Sidley attorneys were not APA employees. *Secord*, 747 F. Supp. at 787. Plaintiffs' arguments also fail for the reasons stated by Sidley, Sidley Br. §§ I.B.2.a, I.B.2.b, I.B.2.c, which APA adopts and incorporates by reference.

b. Alleged Motive to Defame Plaintiffs and Bias and Ill Will Against Them

Plaintiffs argue that the APA Board had a motive to "scapegoat" Plaintiffs, and that Sidley "took on the role of a prosecutor" and also leaked the Report to the *New York Times*. Pl. Br. 39–40.

The argument that APA had a motive to scapegoat Plaintiffs is unavailing. Plaintiffs acknowledge that "evidence of motive to defame or bias and ill will is not

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criteria for proving actual malice by circumstantial evidence, either individually or in the aggregate.

enough in isolation to find actual malice." Pl. Br. 39 (citing *Harte-Hanks*, 491 U.S. at 668).[16] Indeed, the "caselaw resoundingly rejects the proposition that a motive to disparage someone is evidence of actual malice." *Parsi*, 890 F. Supp. 2d at 90. Plaintiffs also point to no evidence that the APA Board had reason to "scapegoat" Plaintiffs by publishing the Report. Pl. Br. 39 (citing JA280, JA1222). Plaintiffs point to allegations in their complaint that Kaslow "expressed distress [in 2013 or 2014] over allegations by a patient" that she had committed an ethical violation. *See* JA280. Kaslow's alleged distress would have been irrelevant to whether the APA Board knew a purported defamatory statement in the Report concerning Plaintiffs was false or entertained serious doubts as to its truth. Plaintiffs also note that the Sidley investigation and Report cost $4.3 million, JA1222, but fail to explain why the cost gave the APA Board a motive to "scapegoat" Plaintiffs and publish allegedly false and defamatory statements concerning them.[17]

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[16] *Palin v. N.Y. Times*, 940 F.3d 804, 814 (2d Cir. 2019), cited by Plaintiffs, Pl. Br. 33, is inapposite. In *Palin*, in stark contrast to here, the court reasoned that the author "had reason to be personally biased against [the plaintiff] and pro-gun positions," which was "more than sheer political bias," because the author's brother was a political opponent of the plaintiff who had himself been subjected to gun violence. *Id.* at 814–15. Also, unlike here, the defendant in *Palin* moved for dismissal under Rule 12(b)(6), not summary judgment, and the plaintiff therefore had only to satisfy the plausibility standard, without any evidentiary burden. *See id.* at 807; *see also id.* at 817 ("Naturally, we take no position on the merits of [the plaintiff's] claim.").

[17] Plaintiffs' other arguments concern Sidley only, and fail for the reasons stated in Sidley's brief. *See* Sidley Br. § I.B.2.d.

Plaintiffs do not assert the second argument – that Sidley acted like a prosecutor – as to APA, and have therefore waived it as to APA. *See Comford*, 947 A.2d at 1188. Nor can Sidley's alleged state of mind be imputed to APA for purposes of this argument, since the Sidley attorneys were not APA employees. *See Secord*, 747 F. Supp. at 787.

c. Alleged Failure to Adhere to Proper Investigation Practices

Plaintiffs contend that the independent review departed from proper investigation standards because APA Board members were "involved in the events the Report described" and had conflicts of interest, and that APA advised interviewees not to retain counsel. Pl. Br. 40–41 (citing JA1444–52, JA1265–66).[18] Plaintiffs are wrong on the facts and the law.

As to the facts, Plaintiffs fail to support their claim that APA Board members had conflicts of interest with record evidence, instead citing only their Opposition brief submitted to the Superior Court, JA1265–66, and an exhibit thereto, JA1444–52. Nor do Plaintiffs explain how APA departed from a professional standard, or even identify a professional standard from which APA allegedly departed. Plaintiffs' argument that non-Plaintiff Stephen Behnke was advised that it could "look bad" if

[18] Plaintiffs also argue that Sidley "failed to inform interviewees that they were potential targets," but do not assert these arguments against APA and have therefore waived them as to APA. *See Comford,* 947 A.2d at 1188.

he retained counsel, JA1478 ¶ 9, moreover, does not demonstrate that APA knew a statement in the Report was false or had serious doubts as to its truth.

Plaintiffs also misstate the law. The Supreme Court in *Harte-Hanks* held that "a public figure plaintiff must prove *more than* an extreme departure from professional standards" in order to prove actual malice. *Harte-Hanks*, 491 U.S. at 665; *see also St. Amant*, 390 U.S. at 731–32 (noting that "the standard of ordinary care" is insufficient to "protect against self-censorship and thus adequately implement First Amendment policies"). Thus, "even an 'extreme departure from professional standards' is insufficient to prove actual malice on its own." *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 241–42 (D.C. Cir. 2021); *see also Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 711–12 (4th Cir. 1991) (Supreme Court "went to some lengths to reaffirm that a departure from accepted standards alone does not constitute actual malice"). "[M]ore than a departure from reasonable standards of journalism; [t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Levan v. Cap. Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999) (internal quotation marks omitted).

Here, Plaintiffs failed to establish that APA departed from a professional standard, let alone demonstrate that APA published a defamatory statement

concerning Plaintiffs with knowledge that it was false or while entertaining serious doubts as to its truth. This argument therefore fails.

d. Alleged Refusal to Retract or Correct Defamatory Statements Despite Evidence of Their Falsity

Plaintiffs contend that APA's "refusal to correct or retract" the Report is evidence of actual malice. Pl. Br. 41–42 (citing JA1267–69). Plaintiffs' argument disregards settled precedent in the District of Columbia that holds to the contrary.

As a preliminary matter, Plaintiffs have never proffered evidence that defamatory statements in the Report concerning Plaintiffs are actually false, let alone that APA learned as much following the Report's publication such that it might have corrected or retracted the statement. Instead, Plaintiffs continue to conflate their own self-serving *ipse dixit* denials with proof of falsity.

In any event, it is well established that publication in the face of denials does not establish actual malice. *See, e.g.*, *Harte-Hanks*, 491 U.S. at 691 n.37 (noting that "denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error'"); *accord Tah*, 991 F.3d at 242; *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285 (D.C. Cir. 2003); *see also Dowd v. Calabrese*, 589 F. Supp. 1206, 1216 (D.D.C. 1984) (no actual malice by editor where object of story denied facts but reporter insisted that story was accurate, as shown by notes in substantial part); *Braden v. News World Commc'ns, Inc.*, No. CA-10689'89, 1991 WL 161497, at *11 (D.C.

Super. Ct. Mar. 1, 1991) ("[A]ctual malice cannot be inferred as a matter of law from printing the story in spite of such a general denial.").

In addition, even if APA had learned that the Report contained a false statement concerning Plaintiffs, APA would have had no duty to retract that statement or else face liability. *See, e.g.*, *Sheridan Square Press*, 91 F.3d at 1515 ("[The 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."); *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 93 (D.D.C. 2018) (holding that the defendant's "failure to correct her statement does not show that she had actual malice when she published it"); *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 56 (D.D.C. 2002) ("[T]here is no duty to retract or correct a publication ...."), *aff'd*, 350 F.3d 1272 (D.C. Cir. 2003). The refusal to retract does not demonstrate actual malice because "[t]he actual malice inquiry focuses on the defendant's state of mind at the time of publication," *Von Kahl*, 856 F.3d at 118, not subsequent to publication. Tellingly, Plaintiffs fail to cite any authority to the contrary except *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007), an outlier decision at odds with rulings from every other court that has addressed the issue, including in the District of Columbia. *See, e.g.*, *Sheridan Square Press*, 91 F.3d at 1508 ("[B]ecause the actual malice inquiry is subjective – that is, concerned with the defendant's state of mind when he acted –

the inference of actual malice must necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication."); *see also Von Kahl*, 856 F.3d at118 (requiring that actual malice be proven "at the time of publication").

Thus, APA's purported failure to retract the Report after Plaintiffs provided self-serving denials does not evince actual malice.

* * * * *

In sum, none of the arguments Plaintiffs assert against APA satisfies the criteria for proof of actual malice through circumstantial evidence. *See OAO Alfa Bank*, 387 F. Supp. 2d at 50. Accordingly, because no properly instructed juror could find clear and convincing evidence that APA published with actual malice, the court should affirm dismissal of the Complaint.

C. The Superior Court properly dismissed Count 11 because, as a matter of law, APA did not republish the Report in August 2018.

As to Count 11, Plaintiffs argue that the Superior Court erred by holding as a matter of law that APA did not republish the Report in August 2018. Pl. Br. 49–52. Specifically, Plaintiffs argue that APA republished the Report when the APA General Counsel sent an email notifying the APA Council of Representatives about changes to the website, and when APA posted on its website Timeline links to letters

critical of the Report. Neither constitutes republication, and the court should therefore affirm dismissal of Count 11.[19]

1. The Single-Publication Rule and Republication

The District of Columbia is a single-publication jurisdiction. *Jankovic v. Int'l Crisis Grp.* ("*Jankovic I*"), 494 F.3d 1080, 1087 (D.C. Cir. 2007). This means that "the single publication of a defamatory comment, regardless of the number of copies the comment appears in or the range of the publication distribution, constitutes only one publication and gives rise to only one cause of action." *Martin v. Daily News, L.P.*, 951 N.Y.S.2d 87, 2012 WL 1313994, at *2 (N.Y. Sup. Ct. 2012), *aff'd*, 990 N.Y.S.2d 473 (N.Y. App. Div. 2014). This widely adopted principle is consistent with public policy that encourages the free transmission of information and ideas, *Salyer v. S. Poverty L. Ctr., Inc.*, 701 F. Supp. 2d 912, 917 (W.D. Ky. 2009), and is aimed in part at "avoid[ing] a multiplicity of suits [and] harassment of defendants," *Stovell v. James*, 965 F. Supp. 2d 97, 102 (D.D.C. 2013) (internal quotation marks omitted); *see also Jankovic I*, 494 F.3d at 1087 (the single-publication rule applies to online publications, as well as to print media).

[19] Plaintiffs have abandoned their contention below that APA republished the Report "on the APA website at a new URL," and that APA added a new hyperlink to the Report on the Timeline webpage. JA340 ¶ 524 (Compl.); *see* JA1815 ¶ 6 (Harvey Affidavit), JA1821 ¶ 5 (Newman Affidavit). These allegations were demonstrably false, as the Superior Court found, JA2213, and Plaintiffs do not challenge that determination on appeal.

Republication of defamatory material constitutes a narrow exception to the single-publication rule that can give rise to separate liability after the original publication. *In re Phila. Newspapers, LLC*, 690 F.3d 161, 174 (3d Cir. 2012). Republication occurs when the defendant "has 'affirmatively reiterated' the statement," *Lokhova v. Halper*, 441 F. Supp. 3d 238, 254 (E.D. Va. 2020) (quoting *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016)), *aff'd*, Nos. 20-1368, 20-1437, 2021 WL 1418848, at *1, --- F.3d --- (4th Cir. Apr. 15, 2021), such as by updating or changing the content of the publication (other than technical changes) and affirmatively directing the publication to a new audience. *Jankovic I*, 494 F.3d at 1087–88; *Martin*, 2012 WL 1313994 at *3; *see also Penrose Hill, Ltd. v. Mabray*, 479 F. Supp. 3d 840, 850 (N.D. Cal. Aug. 18, 2020) ("Republication occurs when the original defamer repeats or recirculates his or her original remarks to a new audience." (internal quotation marks omitted)).

A defendant does not republish merely by continuing to host the allegedly defamatory content on its website, even if other aspects of the website are changed. *See, e.g.*, *Yeager v. Bowlin*, 693 F.3d 1076, 1082–83 (9th Cir. 2012) ("[O]nce a defendant publishes a statement on a website, the defendant does not republish the statement by simply continuing to host the website.… [L]eaving a statement unchanged while modifying other information on the URL should not trigger republication."); *Salyer*, 701 F. Supp. 2d at 917 ("[M]ere technical changes to a

website, such as changing the way an item of information is accessed, is not republication.").[20]

Nor does referencing or linking to an allegedly defamatory statement constitute republication. *See, e.g.*, *Lokhova*, 2021 WL 1418848, at *4 (4th Cir. Apr. 15, 2021) ("[C]ourts have consistently agreed that [m]erely linking to an article should not amount to republication …. The public policy supporting the single publication rule and the traditional principles of republication dictate that a mere hyperlink, without more, cannot constitute republication." (internal quotation marks omitted)); *In re Phila. Newspapers*, 690 F.3d at 175 ("[T]hough a link and reference may bring readers' attention to the existence of an article, they do not republish the article."); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 506-07 (6th Cir. 2015) ("Simply alerting a new audience to the existence of a preexisting statement does

[20] *See also Perlman v. Vox Media, Inc.*, No. N19C-07-235, 2020 WL 3474143, at *5, *6 (Del. Super. Ct. June 24, 2020) (holding that "[c]ontinued hosting of the communication does not constitute republication" and "[m]oving the communication to a new webpage in the same parent site, even with a new URL, does not constitute a new publication or comprise a new accrual date"), *aff'd*, No. 305, 2020, 2021 WL 1042985 (Del. Mar. 18, 2021); *see also Canatella v. Van De Kamp*, 486 F.3d 1128, 1135–36 (9th Cir. 2007) (no republication where defendant publishers changed Internet address of original post containing defamatory statement but content remained unchanged); *Kiebala v. Boris*, 928 F.3d 680, 688 (7th Cir. 2019) (no republication where defendant marked the original website post as "updated" but new version of post was otherwise "identical in content" to the original publication).

not republish it.").[21] Plaintiffs do not cite any authorities that have held to the contrary.[22]

Courts have therefore routinely rejected attempts by plaintiffs to argue that referencing or linking to an existing publication republishes it to a new audience. *See, e.g.*, *Lokhova*, 2021 WL 1418848, at *4 (holding that, "although creating hypertext links to previously published statements may technically direct audiences' attention to the prior dissemination of those statements, such links do not constitute

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[21] *See also Mirage Ent., Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 39 (S.D.N.Y. 2018) (rejecting the "contention that the Tweet was defamatory by linking to the E! News article" because "[a] hyperlink … does not duplicate the content of a prior publication; rather, it identifies the location of an existing publication"); *Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1137 (N.D. Ill. 2016) ("A hyperlink … does not duplicate the content of a prior publication; rather, it identifies the location of an existing publication and, if selected, instructs a search engine to retrieve that publication."); *Salyer*, 701 F. Supp. 2d at 916–17 (stating that "reference, without more, is not properly a republication" because it does not present the defamatory content of the article "in its entirety" to a "new audience," and holding that a "hyperlink is simply a new means for accessing the referenced article" and does not constitute republication); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02 CV 2258, 2007 WL 935703, at *7 (S.D. Cal. Mar. 7, 2007) (holding that "linking is more reasonably akin to the publication of additional copies of the same edition of a book, which is a situation that does not trigger the republication rule").

[22] In *Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249, 262 (D.D.C. 2013), cited by Plaintiffs, Pl. Br. 51, the court reasoned that a defamatory statement that linked to an article about the plaintiff's role in a public controversy was evidence that the statement was germane to the plaintiff's role in the controversy, since the link "incorporat[ed] that article by reference," and thus that the plaintiff was a limited purpose public figure. *Id.* The court did *not* hold that the link *republished* the article, however, which was not at issue in the case.

republication," and thus a *New York Times* article that linked to a past article did not republish the past article (internal quotation marks omitted)); *Clark*, 617 F. App'x at 506–07 ("Simply alerting a new audience to the existence of a preexisting statement does not republish it."); *Perlman*, 2020 WL 3474143, at *8 (a hyperlink directing readers to a previous article on the same website does not direct the previous article to a new audience, it merely "reshuffle[es] its existing audience"). The foregoing principles are dispositive here.

2. The Superior Court correctly held that APA did not republish the Report in August 2018.

Here, as the Superior Court correctly found, undisputed evidence demonstrated that APA merely continued to host the September 2015 version of the Report on its website in August 2018, without updating or changing its contents, belying republication. JA2213; *see, e.g.*, *Yeager*, 693 F.3d at 1082 ("[O]nce a defendant publishes a statement on a website, the defendant does not republish the statement by simply continuing to host the website."). Plaintiffs make two arguments to avoid this result, each of which is meritless.

First, Plaintiffs argue that an August 21, 2018 email from APA's General Counsel to the APA Council of Representatives describing changes to the APA website purportedly "directed [the Report] to a new audience." Pl. Br. 49, 51; *see* JA340 ¶ 524 (Compl.). Not so. The August 21, 2018 email did not attach, display, quote from, or even link to the Report, and Plaintiffs do not contend otherwise.

JA1818 (Harvey Affidavit, Ex. 2), JA1825 (Newman Affidavit, Ex. 2). Instead, the email merely informed the Council that, as a result of a Council motion, the Report no longer had its own landing page on the APA website, and could only be accessed via a preexisting link, among more than 170 links on an APA Timeline. JA1818 (Harvey Affidavit, Ex. 2), JA1825 (Newman Affidavit, Ex. 2), JA 1052–53 (Fredley Affidavit); *see also* Pl. Br. 50 (conceding that changes to the way "information is accessed" is not republication).[23] In addition, the email's mere *reference* to the Report, and link to the entire Timeline, is not tantamount to republication. *See, e.g.*, *Lokhova*, 2021 WL 1418848, at *4; *In re Phila. Newspapers*, 690 F.3d at 175; *Clark*, 617 F. App'x at 506-07; *Mirage Ent., Inc.*, 326 F. Supp. 3d at 39; *Doctor's Data, Inc.*, 170 F. Supp. 3d at 1137; *Salyer*, 701 F. Supp. 2d at 916–17.

Nor did the APA General Counsel's August 21, 2018 email to the Council of Representatives direct the Report to a new audience. *See, e.g.*, *Lokhova*, 2021 WL

[23] Plaintiffs' argument that the email was "devoted solely to accessing the Revised Report," Pl. Br. 50–52, is belied by the email itself, which updated the Council regarding implementation of changes to the website that *limited* access to the Report on the website pursuant to New Business Item 13D. JA313 ¶ 295 (email embedded in Complaint). But even if Plaintiffs' characterization were true, instructions as to how to access a document do not republish the document or reiterate the allegedly defamatory statements. *See, e.g.*, *Clark*, 617 F. App'x at 506–07 ("Simply alerting a new audience to the existence of a preexisting statement does not republish it."); *Lokhova*, 441 F. Supp. 3d at 254 ("[A]lthough 'creating hypertext links to previously published statements' may technically direct audiences' attention to the prior dissemination of those statements, such links do not constitute republication." (quoting *Clark*, 617 F. App'x at 505–07)).

1418848, at *4 ("[A]lthough creating hypertext links to previously published statements may technically direct audiences' attention to the prior dissemination of those statements, such links do not constitute republication." (internal quotation marks omitted)); *accord Clark*, 617 F. App'x at 506–07; *Perlman*, 2020 WL 3474143, at *8. Plaintiffs cite two affidavits, one from a former plaintiff in this case and one from an outspoken critic of the Report, which both assert that the email reached (unidentified) persons who were not part of the Council listserv when the Report first issued in 2015. Pl. Br. 51 (citing JA 1814-25); *see* J1815 ¶ 6, JA1821 ¶ 6. But a change in the Council's membership does not demonstrate that by sending an email to Council, APA sought to publicize the Report to a new audience. *See, e.g.*, *Lokhova*, 2021 WL 1418848, at *4; *Clark*, 617 F. App'x at 506–07; *Perlman*, 2020 WL 3474143, at *8.[24]

Second, Plaintiffs argue that APA republished the Report by adding to the APA Timeline hyperlinks to four letters that were critical of the Report, because the letters purportedly "substantively altered or added to" the Report. Pl. Br. 49–51. Again, Plaintiffs misstate the facts and misapply the law. As the Superior Court held,

[24] Far from "ignoring Plaintiffs' affidavit evidence," Pl. Br. 52, the Superior Court properly considered the affidavits and specifically found that "Plaintiffs' contention that Defendant APA sought a new audience by emailing its Council of Representatives exaggerates the available evidence." JA2213. *See also* Sidley Br. § I.C (refuting Plaintiffs' arguments that the Superior Court improperly weighed the evidence).

"there was no modification, or revision, to the Report," and the hyperlinked letters "did not appear on the same webpage as the Report." JA2213; *see* JA1053 ¶ 8 (Fredley Affidavit). Plaintiffs' contention that the letters "accompanied" the Report on APA's website is incorrect.[25] The letters, as the Superior Court noted, were accessible only via links *distinct from* the link to the Report, among 170 other links on the APA Timeline. JA2213. The letters did *not* "substantively alter[] or add[] to" the Report such that they could constitute republication of the Report. *Eramo*, 209 F. Supp. 3d at 879. Nor did the letters republish the Report merely by referencing it. *See, e.g.*, *Lokhova*, 2021 WL 1418848, at *4; *In re Phila. Newspapers*, 690 F.3d at 175; *Clark*, 617 F. App'x at 506-07; *Mirage Ent., Inc.*, 326 F. Supp. 3d at 39; *Doctor's Data, Inc.*, 170 F. Supp. 3d at 1137; *Salyer*, 701 F. Supp. 2d at 916–17. The hyperlinks to these letters therefore did not republish the Report.[26]

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[25] Plaintiffs' only citation in support of their claim that the letters "accompanied" the Report is to their own allegations in the complaint and an argument from their Opposition brief filed with the Superior Court. Pl. Br. 51 (citing JA313–15, JA1799).

[26] The three republication cases Plaintiffs rely on are inapposite, because each involved substantive changes to the allegedly defamatory material itself, which did not occur here. *See Eramo*, 209 F. Supp. 3d at 868, 879–80 (holding that there was a triable fact as to whether defendant Rolling Stone republished an article by publishing a new version of the article with an "Editor's Note" appended to it, because it "affected substantive changes" to the article itself); *In re Davis*, 347 B.R. 607, 610, 612 (W.D. Ky. 2006) (upholding a ruling that defendants republished an online website accusing the plaintiffs of being con-artists when defendants added "Breaking News!" and "Update!" sections to the website that described "additional nefarious activities" undertaken by plaintiffs, because the new sections effected substantive changes to the original publication); *Larue v. Brown*, 333 P.3d 767, 773

At bottom, Plaintiffs cite no evidence creating a triable issue as to Count 11, and undisputed evidence demonstrates that APA did not republish the Report via its August 21, 2018 email or its addition of hyperlinked letters to the Timeline on its website. Neither of these acts "affirmatively reiterated" the Report or any allegedly defamatory statements therein, *Lokhova*, 441 F. Supp. 3d at 254; *Eramo*, 209 F. Supp. 3d at 879, and they did not substantively update the Report or retransmit it to a new audience, *Jankovic I*, 494 F.3d at 1087; *Martin*, 2012 WL 1313994 at *3. Thus, the court should affirm the Superior Court's dismissal of Count 11.

III. The Anti-SLAPP Act is not void.

For the reasons stated in the Sidley Brief § II, which APA hereby adopts and incorporates by reference, the Superior Court also correctly held that the Anti-SLAPP Act does not violate the Home Rule Act or the First Amendment to the U.S. Constitution, and therefore is not void.

CONCLUSION

For all the foregoing reasons, the court should affirm the judgment of the Superior Court.

(Ariz. Ct. App. 1 2014) (holding that the defendants republished a website accusing plaintiffs of child abuse when they "added to and altered the substance of the original material by providing additional information in response to a reader's questions, and re-urging the truth of the original articles in response to another reader's criticism").

Date: April 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 26th day of April, 2021, that a true copy of the foregoing brief of Defendant-Appellee American Psychological Association was filed through the court's e-filing system and served upon all registered participants.

/s/ Barbara S. Wahl
Barbara S. Wahl

STATUTORY ADDENDUM

West's District of Columbia Code Annotated 2001 Edition
Division II. Judiciary and Judicial Procedure.
Title 16. Particular Actions, Proceedings and Matters. (Refs & Annos)
Chapter 55. Strategic Lawsuits Against Public Participation.

DC ST § 16-5501

§ 16-5501. Definitions.

Effective: September 26, 2012
Currentness

For the purposes of this chapter, the term:

(1) “Act in furtherance of the right of advocacy on issues of public interest” means:

(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.

(2) “Claim” includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) “Issue of public interest” means 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 market place. The term “issue of public interest” shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) “Personal identifying information” shall have the same meaning as provided in § 22-3227.01(3).

Credits
(Mar. 31, 2011, D.C. Law 18-351, § 2, 58 DCR 741; Sept. 26, 2012, D.C. Law 19-171, § 401, 59 DCR 6190.)

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Current through March 30, 2021

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West's District of Columbia Code Annotated 2001 Edition
Division II. Judiciary and Judicial Procedure.
Title 16. Particular Actions, Proceedings and Matters. (Refs & Annos)
Chapter 55. Strategic Lawsuits Against Public Participation.

DC ST § 16-5502

§ 16-5502. Special motion to dismiss.

Effective: September 26, 2012
Currentness

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section 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 the motion shall 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.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

Credits
(Mar. 31, 2011, D.C. Law 18-351, § 3, 58 DCR 741; Apr. 20, 2012, D.C. Law 19-120, § 201, 58 DCR 11235; Sept. 26, 2012, D.C. Law 19-171, § 401, 59 DCR 6190.)

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