

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, <i>et al.</i> ,	:	Case 2017 CA 005989 B
	:	
Plaintiffs,	:	Judge Puig-Lugo
	:	
vs.	:	Status Conference
	:	May 8, 2019, 2:00 PM
DAVID H. HOFFMAN, <i>et al.</i> ,	:	Courtroom 317
	:	
Defendants.	:	

**PLAINTIFFS' OPPOSITION TO APA'S FIRST MOTION TO COMPEL
ARBITRATION IN RELATION TO THE ORIGINAL COMPLAINT**

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SUMMARY OF ARGUMENT

Defendant American Psychological Association (“APA”) moves to compel arbitration with Dr. Stephen Behnke and Dr. Russell Newman (“Plaintiffs”), its former employees, despite having rejected Plaintiffs’ earlier request that their claims be arbitrated before the parties incurred the expense of litigation. Having now changed its mind, APA asserts a right to arbitrate on the basis of arbitration clauses that have not survived expired employment agreements and for claims that do not arise under or rely upon the terms of those agreements.

Defendant’s motion should be denied on three separate grounds. First, no valid agreement to arbitrate Plaintiffs’ claims exists. Second, even if a valid agreement existed, Defendants waived any right to demand arbitration by their previous refusal to arbitrate and their continuing pursuit of litigation, including filing anti-SLAPP motions in Ohio and the District of Columbia. Third, even if there were a valid agreement to arbitrate that had not been waived, it would not apply to Plaintiffs’ defamation tort claims.

STANDARD OF REVIEW

“When considering a motion to . . . compel arbitration, the appropriate standard of review . . . is the same standard used in resolving summary judgment motions.” *Mariano v. Gharai*, 999 F. Supp. 2d 167, 171 (D.D.C. 2013); *see also Aliron Int’l, Inc v. Cherokee Nation Indus., Inc.*, 531 F.3d 863, 865 (D.C. Cir. 2008). That is, the movant bears the initial burden of demonstrating the absence of a genuine issue of fact; all factual matters must be viewed in the light most favorable to the plaintiff; and, if there are any unresolved factual issues, the motion to compel arbitration must be denied. *See Mariano*, 999 F. Supp. 2d at 171 (denying motion to compel arbitration because the summary judgment standard had not been met); *Camara v. Mastro's Rests. L.L.C.*, No. 18-cv-724, 2018 WL 5281906, at *51-52 (D.D.C. Oct. 24, 2018); *Hill v. Wackenhut Servs. Int’l*,

865 F.Supp.2d 84, 89 (D.D.C. 2012) (on a motion to compel arbitration, as with a motion for summary judgment, the moving party has the initial burden “of establishing that the merits of his case are so clear that expedited action is justified.”); *Alexander v. F.B.I.*, 691 F.Supp.2d 182 (D.D.C. 2010) (“even where a summary judgment motion is unopposed, it is only properly granted when the movant has met its burden.”); *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991) (the procedure to resolve denials of the existence of the agreement to arbitrate mirrors the summary judgment procedure). APA has failed to meet its burden and its motion should be denied.

ARGUMENT

I. APA HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT A VALID AGREEMENT TO ARBITRATE PLAINTIFFS’ CLAIMS EXISTS.

A. APA Must Establish Both that a Valid Agreement Existed When Plaintiffs’ Claims Arose and that the Agreement Encompassed Their Claims.

“A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*.” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (emphasis in original). “To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.” *Id.* In making this determination, courts engage in a two-part inquiry. *Nelson v. Insignia/ESG*, 215 F.Supp.2d 143, 149-50 (D.D.C. 2002). First, the court must decide whether there is a valid and enforceable arbitration agreement. *Nur v. K.F.C., USA, Inc.*, 142 F.Supp.2d 48, 50-51 (D.D.C. 2001). If there is, the court must then decide whether the arbitration agreement encompasses the claims. *Id.*

Under a summary judgment standard, APA has the burden of demonstrating that it has met both tests. And, contrary to APA’s assertion (APA Motion to Compel Arbitration (“APA Arb.”) 6), there is no presumption in favor of arbitration with respect to this issue. *See Masurovsky v. Green*, 687 A.2d 198, 205 (D.C. 1996) (“[T]his initial determination whether a ‘valid arbitration

agreement’ exists must be determined apart from the presumption.”); *Lopata v. Coyne*, 735 A.2d 931, 936 (D.C. 1999) (“Upon a finding of the existence of an enforceable arbitration clause, a presumption in favor of arbitration attaches”). This is because “arbitration is . . . a matter of contract between the parties: it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *Masurovsky*, 687 A.2d at 205.

APA’s Motion fails both prongs of the test. APA cannot establish that, at the time this dispute arose, the arbitration clauses in Plaintiffs’ expired employment agreements constituted valid and enforceable agreements to arbitrate. Nor can it demonstrate that the arbitration clauses encompass Plaintiffs’ claims. Neither Plaintiff is suing for wrongful termination or any violation of the agreements, and their defamation claims do not arise from or rely upon those agreements.

B. The Arbitration Clauses Are Not Enforceable With Respect to Plaintiffs’ Claims.

In the present case, because the agreements containing the arbitration clauses had expired or were terminated *prior* to the majority of acts which are the subject of Plaintiffs’ claims, the preliminary issue is whether a valid arbitration agreement existed at the time Plaintiffs’ claims arose. *See id.* (where issue was whether agreement was terminated, “[t]he underlying question here is whether, at the time the dispute arose, any valid agreement to arbitrate the dispute existed between the parties.”). In determining this question, courts are required to “apply ordinary state law principles that govern the formation of contracts.” *Nelson*, 215 F.Supp.2d at 150; *Lopata*, 735 A.2d at 936.

No D.C. precedent has been located on the precise question of whether an arbitration clause is enforceable with respect to extra-contractual tort claims arising after the contract expires or is terminated. However, a D.C. federal district court case involving contractual claims and applying U.S. Supreme Court precedent provides a framework for analyzing the question. In *IBEW, Local 1200 v. Det. Free Press, Inc.*, 923 F. Supp. 2d 199 (D.D.C. 2013), *aff’d*, 748 F.3d 355 (D.C. Cir.

2014), the suit involved wrongful termination in violation of the terms of a collective bargaining agreement. The court applied the standard set forth by the Supreme Court in *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991). Under *Litton*, “[a]rbitration of a dispute occurring after the expiration of a collective bargaining agreement may be compelled if the dispute ‘arises under the contract’” under the following test:

A dispute “arises under” an expired contract where: (1) the dispute “involves facts and occurrences that arose before expiration;” (2) the disputed action “infringes a right that accrued or vested under the agreement;” or (3) “[u]nder normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.”

IBEW, Local 1200, 923 F. Supp. 2d at 202-03.

Applying the first *Litton* factor, the court in *IBEW* focused on the timing of the *defendant’s* wrongful conduct and not, as APA would have it, plaintiff’s performance of his contractual duties. (APA Arb. 9). Because the termination letter (dated after the agreement had expired) stated that the employee’s layoff was related to “current” conditions, her termination did not involve facts or occurrences that arose before the agreement expired. *IBEW, Local 1200*, 923 F. Supp. 2d at 203. Consequently, the court held that, even in the case of a contractual claim arising out of the breach of a collective bargaining agreement, the plaintiff’s wrongful termination claim did not “arise under” the agreement.

In the present case, contrary to APA’s assertions, the relevant facts and occurrences are not the purported facts that the Hoffman Report describes, but the defamatory publications on which Plaintiffs’ claims are based and the Defendants’ state of mind when they repeatedly published the Reports. All of Plaintiff Newman’s claims and all but two of Plaintiff Behnke’s 13 claims (Counts 2 and 3 against APA) relate to defamatory statements made by APA after the contracts expired: Behnke’s contract effectively expired on July 7, 2015, and Newman’s contracts

expired on December 31, 2007, a full seven years before the Hoffman investigation began.¹ (Newman Aff. Ex. A) Consequently, Defendants cannot establish that the majority of Plaintiffs' claims involve facts and occurrences that arose before the agreements expired.

In applying the second *Litton* factor—whether the disputed action “infringes a right that accrued or vested under the agreement”—the *IBEW* court held that the plaintiff’s wrongful termination claim did not satisfy this factor since “[t]he contractual rights claimed by [plaintiff] are not the kind of rights that are presumed to accrue or vest under a collective bargaining agreement, and there is no language in the [agreement] indicating that the parties mutually intended the rights to be vested.” 923 F. Supp. 2d at 203. If a claim for wrongful termination is not the kind of right which accrues under a collective bargaining agreement, then Plaintiffs’ tort claims cannot be rights that accrue under an employment agreement. *See also, e.g., Aviation All. Ins. Risk Retention v. Polaris Enterp.*, No. 17-cv-35, 2017 WL 2799151, at *5 (D. Mont. June 27, 2017) (tort claims including defamation “do not concern rights that vested or accrued under the . . . Agreement or conduct that occurred during the Agreement. Because they do not ‘arise under’ the Agreement, [they] are not subject to arbitration.”).

Lastly, in analyzing the third *Litton* factor—whether the claims survived expiration of the contract “[u]nder normal principles of contract interpretation”—the *IBEW* court held that “the contractual rights claimed by [plaintiff] did not survive the expiration of the [agreement]. In sum, there is no language in the [agreement] indicating that the parties mutually intended these rights to

¹ Dr. Newman was employed half-time by the American Psychological Association Practice Organization (“APAPO”), a 501(c)(6) entity. He filled out weekly time cards allocating his work, including the work addressed in the Hoffman Reports, between that organization and APA. APA has failed to produce any agreement between Dr. Newman and the APAPO. Moreover, the one agreement APA has produced between Dr. Newman and APA is purportedly signed a year after its alleged effective date, is not properly attested to in the signature block, and involved at least one amendment that has not been produced. (Newman Aff. Ex. A).

survive.” *IBEW, Local 1200*, 923 F. Supp. 2d at 203.

Here too, there is no language in the agreements indicating that the parties mutually intended the arbitration clause to last forever. Had the parties wished to be bound by the arbitration provision after termination, they could have included such language as they did with respect to the non-compete and confidentiality clauses, which specified they were to survive for one year. *See, e.g., Gridsmart Techs., Inc. v. Marlin Controls, Inc.*, 701 F. App'x 488, 491 (6th Cir. 2017) (where agreement contained survivability language for some clauses but not for arbitration, court found a “clear implication in the [agreement] that the arbitration clause would not survive its termination”). *See also Stevens-Bratton v. Trugreen, Inc.*, 675 Fed. App'x. 563, 570 (6th Cir. 2017) (the arbitration clause did not have a survival clause; thus the agreement to arbitrate was completely expired); *Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78, 81 (2d Cir. 1983) (there is no duty to arbitrate a defamation claim arising after the termination of the agreement between the parties, even if the expired agreement included an arbitration clause).²

For both Plaintiffs, APA has failed to meet its burden as to all three of the *Litton* factors, and its Motion to Compel Arbitration therefore fails.

II. APA HAS WAIVED ANY RIGHT TO ARBITRATE THAT MAY HAVE EXISTED.

“The right to arbitration, like any contract right, can be waived.” *Nat’l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987). “[T]he question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context. The essential question is whether, under the

² In relying on *Wolff v. Westwood Mgmt. L.L.C.*, 503 F.Supp.2d 274, 280-81 (D.D.C. 2007), *aff’d*, 558 F.3d 517 (D.C. Cir. 2009) to assert that arbitration clauses typically survive the expiration of a contract (APA Arb. 8, ftn 4), APA omits key language: “It is well settled that an arbitration clause is enforceable after the expiration of a contract when the dispute is *over an obligation created by the expired contract*.” (emphasis added) APA ignores the italicized language.

totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.” *Id.* This is an inherently fact-bound inquiry: the court assesses factors such as whether a party timely sought arbitration and whether the party now moving for arbitration engaged in litigation activity that induced the other party to expend time and effort on disputes, the resolution of which would not move toward arbitration. *See Zuckerman Spaeder, L.L.P. v. Auffenberg*, 646 F.3d 919, 922-24 (D.C. Cir. 2011) (a party can overcome the presumption of having forfeited its right to a stay pending arbitration only if its conduct in litigation after the first responsive pleading imposed no or little cost upon opposing counsel and the courts).

Here, APA has waived any right to arbitration by rejecting Plaintiffs’ initial request for arbitration, by moving to arbitrate only after having engaged in litigation in the Ohio and D.C. courts, and by then continuing to engage in litigation activity that required Plaintiffs to expend substantial time and effort.

A. APA’s Initial Refusal to Arbitrate Constitutes a Waiver.

In an effort to avoid litigation, on October 26, 2015, Plaintiffs’ lead counsel requested a meeting with APA’s outside counsel, then WilmerHale, to discuss the evidence Plaintiffs had gathered demonstrating the falsehoods in the Hoffman Reports. When Plaintiffs met with APA in November 2015, they proposed the Honorable Patricia Wald as an arbitrator. Plaintiffs also called for the arbitration process publicly and posted that request widely and repeatedly on social media. (Forrest Aff. Ex. B) Thereafter, Divisions 19 and 13 of APA and APA’s former ethics chairs all requested that APA arbitrate Plaintiffs’ claims with a neutral third-party arbitrator. (Harvey, Kinscherff, Williams Affs. Ex. C-E). The APA Board and Council discussed those requests in February 2016. (Anton Aff. Ex. F; James Aff. Ex. G). On April 15, 2016, the Board announced that it had decided not to pursue arbitration and instead to rehire Hoffman. (Forrest Aff. Ex. B).

APA's initial refusal to arbitrate, which forced Plaintiffs to assume the expense of filing suit and ultimately to engage in motion practice in three jurisdictions, constitutes a waiver of its right to compel arbitration. *See, e.g., Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012-13 (9th Cir. 2005) (defendant's "refusal to arbitrate after being served with Brown's notice of intent to arbitrate was an act inconsistent with that right. . . . Brown . . . chose to arbitrate, and when she was rebuffed by Dillard's, she sued. . . . [T]he delay and costs incurred by Brown are prejudicial.")³

B. APA's Actions After Receiving Plaintiffs' Notices of Intent to Sue Also Constitute a Waiver.

Plaintiffs provided notice of their intent to sue the Defendants on June 8, 2016, and again on October 18, 2016, December 7, 2016, and January 11, 2017. For eleven months, APA took no steps to assert a right to arbitrate. (Forrest Aff. Ex. B).

- After Defendants received Plaintiffs' notices of intent to sue, Defendants responded not by demanding arbitration but, instead, by entering into tolling agreements (five total for

³*See also, e.g., In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41 (1st Cir. 2005) (defendant waived arbitral rights when he stated he did not consent to arbitration; plaintiff was prejudiced based on the expense of submitting the demand for arbitration, filing its complaint, and defending against motion for compelled arbitration); *Hammes v. AAMCO Transmissions*, 33 F.3d 774, 783 (7th Cir. 1994) ("having deliberately forgone a chance to arbitrate the dispute, and thus put Cooksey to the expense of bringing this suit, the defendants have waived their right to insist on arbitration now"); *Baker & Taylor, Inc. v. Alphacraze.com*, 602 F.3d 486, 491 (2d Cir. 2010) (defendants' "explicit disclaimer of any legal obligation to arbitrate and their refusal to do so effectively waives any [right to arbitrate]."); *Growtech Partners v. Accenture L.L.P.*, 118 F.Supp.3d 920 (S.D. Tex. 2015) (defendant's pre-suit letters stating that it refused to arbitrate because Abraham's claims were 'wholly non-arbitrable' and without merit indicated a waiver of arbitration); *BP Am. Prod. v. Chesapeake Expl., L.L.C.*, 747 F.3d 1253, 1259 (10th Cir. 2014) (defendants waived arbitration where protested authority of the arbitrator to adjudicate it and took action to prevent arbitration); *Whitwam v. JetCard Plus, Inc.*, 34 F.Supp.3d 1257, 1259-60 (S.D. Fla. 2014) ("Defendant may have voluntarily waived the entire arbitration provision by refusing to respond to Plaintiff's attempts to compel arbitration. . . . [Thus], the arbitration provision in the Contract does not preclude litigation brought in this Court, arising from the Contract, after failed attempts at initiating arbitration."); *Allied Sales Drivers & Warehousemen, Local No. 289 v. Sara Lee Bakery Grp.*, No. 10-cv-4975, 2012 WL 4470466, at *7 (D. Minn. Sept. 26, 2012) (defendants waived right to arbitration after initially refusing to attend arbitration and continuing with litigation).

each of Sidley and APA) that included provisions not applicable in arbitration. In exchange for those tolling agreements with APA, Plaintiffs expressly gave up their right to sue two individual APA Board members and toll the statute of limitations on behalf of Dr. Behnke for all claims. (Forrest Aff. Ex. B). Since Plaintiffs would have had no right to arbitrate against individual directors, this exchange clearly manifested APA's understanding that the tolling agreements related to litigation.

- In each of the first three amendments to the Plaintiffs' separate tolling agreements with APA and Sidley, Plaintiffs provided that they would give written notice of their "intent to sue" and not file a "lawsuit" before specified dates. These provisions were expressly requested by the Defendants. (Forrest Aff. Ex. B).
- After Plaintiffs filed suit in Ohio, APA did not move to compel arbitration but instead chose to file three motions: a motion to stay discovery on March 27, 2017, and two additional motions on April 7, 2017, one under the D.C. anti-SLAPP statute and another to dismiss based on lack of personal jurisdiction. In their replies to the jurisdictional motions, APA and Sidley specifically advised the Ohio court that the action should be dismissed so it could be *refiled* in D.C. (Forrest Aff. Ex. B).
- In March 2017, after Plaintiffs had filed their lawsuit, APA and Sidley first alluded vaguely in emails to arbitration. During the last week of March, Plaintiffs' counsel asked APA no fewer than three times for information about that assertion and requested copies of the relevant agreements. Defendants did not respond. (Forrest Aff. Ex. B).
- It was not until May 30, 2017, that APA first moved to compel arbitration. By then, APA and Sidley had filed their jurisdictional motions and anti-SLAPP motions without any assertion of a right to arbitration. Sidley never filed a motion for arbitration in Ohio

and represented to the Ohio Courts repeatedly that the D.C. courts were where Plaintiffs should “litigate” their claims. (Forrest Aff. Ex. B).

APA’s actions after Plaintiffs gave notice of their intent to sue and in the Ohio litigation constitute a further waiver of right to arbitration.

C. APA’s Filing of Anti-SLAPP Motions Is Inconsistent With Arbitration.

APA’s motions to dismiss the Complaint under D.C.’s Anti-SLAPP statute serve as an independent basis for a finding of waiver. (APA filed an anti-SLAPP motion in Ohio and another in D.C. on October 13, 2017, and it has stated its intention to file a supplemental motion.) The D.C. Circuit has consistently held that the “active participation in a lawsuit” constitutes a waiver of the right to arbitration. *See, e.g., Nat’l Found. for Cancer Research*, 821 F.2d at 775; *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 424-25, 428 (D.C. Cir. 2008). “Thus, when a party ‘has made a decision to take advantage of the judicial system,’ it has waived its right to arbitrate.” *Kambala v. Checchi & Co. Consulting, Inc.*, No. 1:17-cv-00451, 2017 WL 4564731, at *1 (D.D.C. May 4, 2017); *Hossain v. JMU Props., L.L.C.*, 147 A.3d 816, 822 (D.C. 2016) (judge properly decided whether there was a waiver and the judge properly relied on the D.C. Circuit standard).

In *Khan, supra*, the defendant moved to dismiss or, alternatively, for summary judgment or to compel arbitration. The Court held that by making a motion “including or referring to ‘matters outside the pleading,’ that party has made a decision to take advantage of the judicial system and should not be able thereafter to seek compelled arbitration.” *Khan*, 521 F.3d at 427. APA’s “request” that the Court address the motion to compel before addressing the anti-SLAPP motion (APA’s Arb. 1, n.1) does not serve to nullify its waiver. As was the case in *Khan*, once APA presented this Court with simultaneous motions, it “invited the court to consider the merits of [Plaintiffs’] claims and thereby waived its right to compel arbitration”:

We hold that, irrespective of other indicators of involvement in litigation, filing a motion for summary judgment based on matters outside of the pleadings is inconsistent with preserving the right to compel arbitration....

Id. at 429.

The *Khan* court relied on the reasoning of its earlier decision in *Nat'l Foundation*, finding that filing a summary judgment motion constituted an abandonment of the right to seek arbitration, which should not be used as a strategy to manipulate the legal process. *Nat'l Foundation*, 821 F.2d at 775-76. *See also Winston & Strawn, L.L.P. v. Doley*, 384 Fed.App'x. 1, 2 (D.C. Cir. 2010) (12(b)(6) motion included materials outside the pleadings, waiving arbitration).

In the present case, the simultaneous filing of a motion to compel arbitration and what amount to summary judgment motions under D.C.'s anti-SLAPP statute satisfies both aspects of the *Khan* analysis. First, such a motion, as interpreted by the D.C. Circuit, "mandates the production or proffer of evidence that supports the claim." *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016).⁴ Thus, by definition, the motion involves consideration of "matters outside the pleading." *Khan*, 521 F.3d. at 427. Second, the motion requires the court to consider the merits of the plaintiff's claims under a standard which is identical to a summary judgment motion. *See Mann*, 150 A.3d 1213.

The specific question of whether an anti-SLAPP motion constitutes a waiver of arbitration was squarely addressed in a recent California case:

By pursuing his anti-SLAPP motion to strike in this court, Mr. Chahal acted inconsistently with his right to arbitrate and substantially invoked the "litigation machinery." . . . "a courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration."

⁴ In *Mann*, the Court held that once the defendant makes a prima facie showing the burden shifts to the plaintiff and mandates the production of evidence that supports the claim. *Mann*, 150 A.3d at 1233.

Alonso v. Chahal, 2017 WL 3706556 (Cal. Super. 2017) (emphasis added) (citations omitted).

Although the D.C. Circuit has never required a finding of prejudice as a prerequisite for finding that a right to arbitration has been waived, it has stated that prejudice may be a “relevant consideration.” *Hossain*, 147 A.3d at 823. In this case, as a result of APA’s refusal to arbitrate, Plaintiffs have spent substantial time, effort, and resources. In an attempt to ensure they are not foreclosed from having their case heard somewhere after Defendants opposed jurisdiction in Ohio, they have been forced to file suit in three venues. As the court held in *Khan*, being compelled to bear the expense of proceedings constitutes prejudice. *Khan*, 521 F.3d. at 428.

III. PLAINTIFFS’ CLAIMS ARE OUTSIDE THE SCOPE OF THE NARROW ARBITRATION CLAUSE.

The arbitration clauses in the Behnke and Newman employment agreements provide in relevant part:

[T]he parties agree that, in the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this Agreement, the disputed issues shall be settled by . . . arbitration

APA’s attempt to argue that the arbitration clause at issue is “broad” is contrary to well-settled case law. While APA chooses to focus on the phrase “any dispute,” that is not the language that determines the breadth of the clause. What courts actually focus on is the descriptive phrase which immediately precedes the word “agreement,” the most common phrases being “arising under,” “arising out of,” and/or “relating to.” APA’s Motion to Compel Arbitration relies on “any dispute” without giving effect to the remaining language. (APA Arb. 8-10).

The phrase “arising under”—the phrase at issue here—is widely considered to characterize the *narrowest* clauses, extending only to claims relating to the literal interpretation and performance of the contract itself. *See Granite Rock*, 561 U.S. at 307. The “under this Agreement” limiting language has been construed as narrowing the scope of an arbitration clause by at least

eight of the 11 federal circuits that have directly addressed the issue.⁵ Consequently, where an arbitration clause employs the “arising under” language, as here, the question before a court is solely whether the plaintiffs’ claims relate to the performance or interpretation of the agreement. In making this determination, “courts . . . focus on whether adjudicating the claims would require construction of the contract.” *Armor All/STP Prods. Co. v. TSI Prods., Inc.*, 337 F. Supp. 3d 156, 170 (D. Conn. 2018). Moreover, where an “arbitration provision . . . is narrowly crafted, . . . the presumption of arbitrability [is] inapposite.” *Trap Rock Indus. v. Local 825, Int’l Union of Operating Eng’rs, AFL–CIO*, 982 F.2d 884, 888 n. 5 (3d Cir. 1992). Thus, if the claims in a plaintiff’s complaint do not depend on the terms of the agreement, the claims are not arbitrable. *See, e.g., Carro Rivera v. Parade of Toys, Inc.*, 950 F.Supp. 449, 453 (D.P.R. 1996) (“arising under” is “narrow”; “fraudulent inducement, bad faith, negligent misrepresentation and conversion do not relate to the interpretation and performance of a contract and therefore do not ‘arise under’” the agreement).⁶

⁵ *See, e.g., Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 226 (2d Cir. 2001) (“arising under” limits arbitration to “a literal interpretation or performance of the contract”); *Great Am. Ins. Co. v. Hinkle Contr. Corp.*, 497 Fed.App’x 348, 354 (4th Cir. 2001) (describing as “narrow” clause which “only encompass claims ‘arising under’ a contract”); *United States ex rel. Paige v. BAE Sys. Tech., Solutions & Services, Inc.*, 566 Fed.App’x 500, 504 (6th Cir. 2014) (“The arbitration provision in the Employment Agreement is narrower than those in cases addressing broadly-worded arbitration clauses because it explicitly limits the scope of the clause to the disputes arising ‘under the terms of this agreement’ and does not include claims ‘related’ to the agreement or that arise out of the relationship between the parties.”); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int’l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993) (“arising under” is distinguishable from and narrower than “arising out of”); *Cape Flattery Ltd. v. Titan Mar., L.L.C.*, 647 F.3d 914, 924 (9th Cir. 2011) (“under an arbitration agreement covering disputes ‘arising under’ the agreement, only those disputes ‘relating to the interpretation and performance of the contract itself’ are arbitrable.”); *Seaboard C.L.R. Co. v. Trailer Train Co.*, 690 F.2d 1343 (11th Cir. 1982) (“arising hereunder” language does not extend to matters outside of the contract).

⁶ *See also CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 175 (3d Cir. 2014) (“The resolution of these claims does not require construction of, or even reference to, any provision in the Agreement.”); *Benihana of Tokyo, L.L.C. v. Benihana Inc.*, 73 F.Supp.3d 238, 255 (S.D.N.Y.

All the cases cited by APA in support of its argument are inapposite since they involve clauses with language broader than the “arising under” language at issue here.⁷ Indeed, many of the cited cases involve clauses which encompass matters well beyond the contract, extending, for example, to the parties’ entire working relationship. *See, e.g., Pearce v. E.F. Hutton Grp., Inc.*, 828 F.2d 826, 832 (D.C. Cir. 1987) (employee’s defamation claim was arbitrable, where clause included “any controversy ... arising out of my employment”) (emphasis added).⁸

Here, in contrast, the clause at issue does not require arbitration with respect to all disputes arising out of Plaintiffs’ *employment*, as might have been required if the clause’s language had so specified. *See, e.g., Pearce*, 828 F.2d at 832. Rather, because the clause here is narrow and covers only those disputes “aris[ing] under ... Agreement,” arbitration is limited to only those issues which “require construction of the contract.” *Armor*, 337 F. Supp. 3d at 170. Plaintiffs’ defamation claims do not require any reference to, let alone construction of, the terms of the employment agreements. *See Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 28-29 (2d Cir. 1995) (defamation claim not covered even by “broad” arbitration clause because it was beyond the parties’ reasonable expectations and not contemplated at contract execution).

There is no foundation for APA’s suggestion that the employment agreements must be

2014) (“The...falsity of ... boasts ... has nothing to do with ... the terms ...of the ... Agreement ...”); *Brown v. T-Ink, L.L.C.*, No. 3190, 2007 WL 4302594, at *15 (Del. Ch. Dec. 4, 2007).

⁷*See Nanosolutions, L.L.C. v. Prajza*, 793 F.Supp.2d 46, 57 (D.D.C. 2011) (“any dispute ... *arising out of or relating to* this Agreement”); *Carter v. Cathedral Ave. Coop.*, 566 A.2d 716, 718-19 (D.C. 1989) (“any dispute. . . *in connection with or in relation to*” and other broad language); *Dowley v. Dewey Ballentine, L.L.P.*, No. 05-cv-622, 2006 WL 1102768, at *8 (D.D.C. Apr. 26, 2006) (“*arising out of* this Agreement”); *Parker v. K&L Gates, L.L.P.*, 76 A.3d 859, 867 (D.C. 2013) (“directly or indirectly concerning this Agreement . . . or the subject matter hereof”); *Stromberg Sheet Metal Works, Inc. v. Wash. Gas Energy Sys., Inc.*, 448 F.Supp.2d 64, 67 n.1 (D.D.C. 2006) (*all disputes* settled by arbitration).

⁸*See also, Wolff*, 503 F.Supp.2d at 281-83 (disputes during a specified *time period*); *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916 (D.C. 1992) (disputes arising out of the project).

interpreted to determine whether Plaintiffs properly performed their duties and obligations under those agreements. (APA Arb. at pp. 9-11) The employment agreements set forth generic duties applicable to any at-will employee, not any specific obligations.⁹ Indeed, the “duties” set forth in the Behnke and Newman agreements are *identical* although their jobs were quite different: Behnke was Director of the Office of Ethics; Newman was part of the APA Executive Management Group, the Executive Director for the APA Practice Directorate, and the head of the separate 501(c)(6) the APAPO. Nothing in these agreements requires “construction” by a court.

APA’s repeated attempt to argue that Behnke’s complaint includes a claim for “wrongful discharge” (APA Arb. at pp. 4, 9) is false: the 13-count complaint does not include any such claim. It is a sign of the weakness in APA’s position that it would seize upon a single word in a 500 plus-paragraph complaint in an attempt to force plainly irrelevant case law into its arguments. To be clear, Plaintiffs do not claim nor do they seek damages for wrongful discharge from APA, as the allegations and claims in the Complaint make clear.

Finally, APA omits D.C. Court of Appeals case law on point contradicting its core assertion. In *Byrd v. VOCA Corp.*, 962 A.2d 927, 940 (D.C. 2008), the Court interpreted a broader clause (“any difference or dispute arising out of or under this Agreement”) narrowly to cover only matters in dispute under the contract.

CONCLUSION

APA has failed to meet its burden to show that there is any valid agreement to arbitrate Plaintiffs’ claims, that any obligation to arbitrate has not been waived if it did exist, or that Plaintiffs’ defamation claims arise under the terms of the narrow arbitration clauses. The Court should deny APA’s motion to compel arbitration.

⁹See Newman Aff. Ex. A and Behnke Aff. Ex. H. for “Duties” provisions.

Dated: March 7, 2019

Respectfully submitted,

/s/ Bonny J. Forrest

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Attorney for all Plaintiffs

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Exhibit A

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	

**AFFIDAVIT OF RUSSELL NEWMAN IN SUPPORT OF PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL
MANDATORY ARBITRATION**

State of California)
) ss:
County of San Diego)

1. I, Russell Newman, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.

3. From August 12, 1993, to December 31, 2007, I was Executive Director for the APA Practice Directorate, working on behalf of the nation's practicing psychologists and the patients they serve. In that role, I implemented legislative, legal, public education, and marketplace strategies to support psychology practitioners and to increase access to psychological services.

4. At the time of the investigation, I was employed by Alliant International University and living in California. I voluntarily participated in the interview with Mr. Hoffman without compensation while employed at Alliant.

5. APA's Contested Motion to Compel Arbitration includes as Exhibit 1-B my amended employment agreement dated January 1, 2003. This agreement contains a compensation provision in ¶ 3 that was subsequently amended at least once, and a Personnel Action Form was completed at the time. APA has not produced an amended employment agreement that reflects this change.

6. In 2001, the APA created a legally separate companion organization known as the APA Practice Organization (hereinafter "APAPO"), a 501(c)(6) organization, the purpose of which was to promote the mutual professional interests of psychologists. As a 501(c)(6) organization, the APAPO had no limits on advocating, lobbying, and electioneering consistent with the rules of the Internal Revenue Service (heretofore "IRS") in contrast to IRS limits placed on the APA, a 501(c)(3) tax-exempt organization.

7. Once the APAPO was established, I became the Executive Director of the APAPO with 50% of my time devoted to overseeing its activities. I also continued as Executive Director of the APA Practice Directorate for 50% of my time and was required to complete two separate timecards each pay period, one for the APA and one for the APAPO.

8. I continued this 50%-50% arrangement with the APA and the APAPO until my departure in 2007, including the year (2005) during which I attended the PENS Task Force meeting as an observer, the activities of which are addressed in the Hoffman Report. Attached hereto as Exhibit 1 is a true and correct copy of the APAPO's IRS Form 990 filed for 2005. That document references my employment arrangement with both the APA and APAPO (p.12). Thus, half my time observing at the meeting would have been on behalf of the APAPO.

9. I understand that Defendant APA is unable to produce a separate employment agreement that specifies respective rights, duties and obligations regarding my work for the APAPO.¹ My purported employment agreement with APA provided as follows in ¶ 6:

DUTIES. From and after the effective date hereof, Employee during the continuance of Employee's employment by the Association shall: (i) Faithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of this Agreement; (ii) Devote the equivalent of full time to the business of the Association and perform such activities as may be assigned by the Chief Operating Officer/Deputy CEO, or as may be required, from time to time;

¹ At the February 8, 2019, hearing, Ms. Forrest raised the question of an "agreement [for Dr. Newman] which is referenced in the APA tax returns with another entity." (Transcript, p. 5, lines 4-5) Later in response Ms. Wahl stated, "With regard to Dr. Newman and this fictional, additional agreement, Ms. Forrest says that he was employed by an affiliate, the APA Practice Organization, which was a 501(c)(6). It is, in fact, separately incorporated." (Transcript, p. 35, lines 6-10)

any outside consulting or employment undertaken by Employee must be approved in writing in advance by APA's Chief Executive Officer; and (iii) Refrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of the Association.

10. With this lawsuit, I am attempting to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me and published by Defendants APA, Hoffman, and Sidley years after expiration of my employment agreement, most notably that I "colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." (Hoffman Report, p. 9)

11. I am not bringing this lawsuit to recover damages resulting from any APA breach or violation of my employment agreement. In fact, the actions for which I am bringing this lawsuit occurred more than seven years after I terminated my employment agreement with APA.

12. When I signed my amended employment agreement with APA, dated December 18, 2003, for the term of employment continuing through the end of 2007, I did not intend, contemplate, or even imagine that I was agreeing to arbitrate a dispute with the APA occurring many years after the expiration of my contract or a dispute that does not depend on the terms of the employment agreement. I had never heard of the law firm of Sidley Austin LLP at that time, so I certainly did not contemplate arbitrating anything, ever with them.

13. APA asserts in its Motion to Compel Arbitration (p. 13) that "at the heart of [my defamation] claim" is the statement in the Hoffman Report that I did not disclose a conflict of interest—my marriage to Army Colonel Debra Dunivin, a military psychologist—during my participation as an observer in the PENS Task Force meeting in June 2005. To the contrary, the "heart of" my claim is that false and defamatory statements were published and republished, starting in June 2015, alleging I colluded with DoD officials and was intimately involved in a coordinated effort to align APA actions with DoD preferences that would not constrain DoD from engaging in abusive or enhanced interrogation tactics.

14. Timing of the Defendants' defamatory statements aside, the Hoffman Report statement that I did not disclose a purported conflict of interest is not supported by the facts. As the Hoffman Report acknowledges, at the time I was requested to act as a non-voting observer to the PENS Task Force meeting, disclosures to Chief Executive Officer Norman Anderson, General Counsel Nathalie Gilfoyle, and members of the APA Board made them aware of my marriage to Colonel Dunivin. (Hoffman Report, p. 14)

15. In fact, in October 2002, the marriage was reported in the *Monitor*, the official publication of the APA which is sent to all members of the Association, with a captioned-picture listing my and Colonel Dunivin's positions, titles, and marital relationship.

Attached hereto as Exhibit 2 is a true and correct copy of the APA-published picture and caption.

16. Additionally, in November 2004, approximately six months prior to my being asked to be a PENS Task Force meeting observer, the APA General Counsel requested an opinion from PricewaterhouseCoopers (hereinafter "PWC") about whether the marriage constituted a conflict of interest that would prevent Colonel Dunivin from serving on the APA Finance Committee. The opinion concluded that the marriage itself did not create a conflict, that *potential* conflicts could be dealt with on a case-by-case basis, and disclosure would minimize the risks. A true and correct copy of a summary of that opinion can be found published by the APA at <http://www.apa.org/independent-review/binder-2.pdf>. (pp. 1401-1404)

17. Consistent with the PWC guidance and in order to prevent any potential conflict from actualizing, my role with the PENS Task Force was limited to that of an observer (not a member) to the task force meeting, I had no vote, I limited my speaking in the meeting to organizational, governance and process issues, and did not participate in the PENS listserv or other task force member deliberations external to the meeting.


18. The Hoffman Report does note that the conflict of interest issue had been previously raised concerning Colonel Dunivin's potential service on the Finance Committee (Hoffman Report, p. 219, fn 945) but it does not describe or discuss the document cited above, buried in the Hoffman Report's binders, that summarized the PWC opinion that the marriage itself did not create a conflict.

19. The Report provides no APA policy that it alleges I violated; therefore, the duties and responsibilities portion of my contract is irrelevant to any analysis of my defamation claims against Sidley and APA.

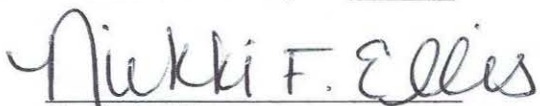
20. I did discuss the APA financial conflict policy with Mr. Hoffman during my interview which we agreed did not apply. He omits this from his Report.

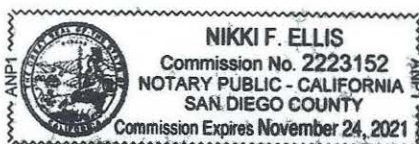
21. None of these claims or issues requires reference to my employment agreement for resolution.

I declare under penalty of perjury that the foregoing is true and correct.


Russell Newman

Sworn and subscribed to before a notary public in the State of California, this 6
day of March 2019.


Nikki F. Ellis
Notary Public



Form **990**Department of the Treasury
Internal Revenue Service**Return of Organization Exempt From Income Tax**

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

▶ The organization may have to use a copy of this return to satisfy state reporting requirements

OMB No 1545-0047

2005Open to Public
Inspection**A** For the **2005** calendar year, or tax year beginning and ending

B Check if applicable: <input type="checkbox"/> Address change <input type="checkbox"/> Name change <input type="checkbox"/> Initial return <input type="checkbox"/> Final return <input type="checkbox"/> Amended return <input type="checkbox"/> Application pending	Please use IRS label or print or type. See Specific Instructions.	C Name of organization AMERICAN PSYCHOLOGICAL ASSOCIATION PRACTICE ORGANIZATION		D Employer identification number 52-2262136
		Number and street (or P O box if mail is not delivered to street address) Room/suite 750 FIRST STREET, NE		E Telephone number 202-336-5913
		City or town, state or country, and ZIP + 4 WASHINGTON, DC 20002-4242		F Accounting method: <input type="checkbox"/> Cash <input checked="" type="checkbox"/> Accrual <input type="checkbox"/> Other (specify) ▶
		• Section 501(c)(3) organizations and 4947(a)(1) nonexempt charitable trusts must attach a completed Schedule A (Form 990 or 990-EZ).		

G Website: ▶ **WWW.APAPRACTICE.ORG****J** Organization type (check only one) ▶ ☒ 501(c) (6) ◀ (insert no) ☐ 4947(a)(1) or ☐ 527**K** Check here ☐ if the organization's gross receipts are normally not more than \$25,000. The organization need not file a return with the IRS, but if the organization chooses to file a return, be sure to file a complete return. Some states require a complete return.**H and I are not applicable to section 527 organizations.****H(a)** Is this a group return for affiliates? ☐ Yes ☒ No**H(b)** If "Yes," enter number of affiliates ▶ **N/A****H(c)** Are all affiliates included? **N/A** ☐ Yes ☐ No (If "No," attach a list)**H(d)** Is this a separate return filed by an organization covered by a group ruling? ☐ Yes ☒ No**I** Group Exemption Number ▶ **N/A****L** Gross receipts. Add lines 6b, 8b, 9b, and 10b to line 12 ▶ **5,524,155.****M** Check ☐ if the organization is **not** required to attach Sch. B (Form 990, 990-EZ, or 990-PF)**Part I Revenue, Expenses, and Changes in Net Assets or Fund Balances**

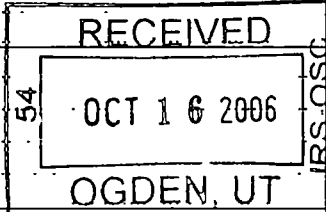
Revenue	1 Contributions, gifts, grants, and similar amounts received			1a	113,060.		
	a Direct public support			1b			
	b Indirect public support			1c			
	c Government contributions (grants)						
	d Total (add lines 1a through 1c) (cash \$ 113,060. noncash \$)					1d	113,060.
	2 Program service revenue including government fees and contracts (from Part VII, line 93)					2	407,998.
	3 Membership dues and assessments					3	4,864,363.
	4 Interest on savings and temporary cash investments					4	138,734.
	5 Dividends and interest from securities					5	
	6 a Gross rents			6a			
	b Less rental expenses			6b			
	c Net rental income or (loss) (subtract line 6b from line 6a)					6c	
7 Other investment income (describe ▶)					7		
Expenses	8 a Gross amount from sales of assets other than inventory	(A) Securities	(B) Other	8a			
	b Less cost or other basis and sales expenses			8b			
	c Gain or (loss) (attach schedule)			8c			
	d Net gain or (loss) (combine line 8c, columns (A) and (B))					8d	
	9 Special events and activities (attach schedule) If any amount is from gaming, check here <input type="checkbox"/>						
	a Gross revenue (not including \$ of contributions reported on line 1a)			9a			
	b Less direct expenses other than fundraising expenses			9b			
	c Net income or (loss) from special events (subtract line 9b from line 9a)					9c	
	10 a Gross sales of inventory, less returns and allowances			10a			
	b Less cost of goods sold			10b			
	c Gross profit or (loss) from sales of inventory (attach schedule) (subtract line 10b from line 10a)					10c	
	11 Other revenue (from Part VII, line 103)					11	
12 Total revenue (add lines 1d, 2, 3, 4, 5, 6c, 7, 8d, 9c, 10c, and 11)					12	5,524,155.	
Net Assets	13 Program services (from line 44, column (B))					13	
	14 Management and general (from line 44, column (C))					14	
	15 Fundraising (from line 44, column (D))					15	
	16 Payments to affiliates (attach schedule)					16	
	17 Total expenses (add lines 16 and 44, column (A))					17	4,985,696.
18 Excess or (deficit) for the year (subtract line 17 from line 12)					18	538,459.	
19 Net assets or fund balances at beginning of year (from line 73, column (A))					19	1,630,245.	
20 Other changes in net assets or fund balances (attach explanation)					20	0.	
21 Net assets or fund balances at end of year (combine lines 18, 19, and 20)					21	2,168,704.	

523001
02-03-06

LHA For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.

Form 990 (2005)

SCANNED OCT 27 2007

69
24

**AMERICAN PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION**

Form 990 (2005)

52-2262136 Page 2

Part II Statement of Functional Expenses

All organizations must complete column (A). Columns (B), (C), and (D) are required for section 501(c)(3) and (4) organizations and section 4947(a)(1) nonexempt charitable trusts but optional for others

Do not include amounts reported on line 6b, 8b, 9b, 10b, or 16 of Part I.		(A) Total	(B) Program services	(C) Management and general	(D) Fundraising
22	Grants and allocations (attach schedule) (cash \$554,774. noncash \$ 0.) If this amount includes foreign grants, check here <input type="checkbox"/>	22 554,774.		STATEMENT 2	
23	Specific assistance to individuals (attach schedule)	23			
24	Benefits paid to or for members (attach schedule)	24			
25	Compensation of officers, directors, etc.	25 0.			
26	Other salaries and wages	26			
27	Pension plan contributions	27			
28	Other employee benefits	28			
29	Payroll taxes	29			
30	Professional fundraising fees	30			
31	Accounting fees	31			
32	Legal fees	32 11,935.			
33	Supplies	33 2,529.			
34	Telephone	34 4,886.			
35	Postage and shipping	35 83,722.			
36	Occupancy	36			
37	Equipment rental and maintenance	37			
38	Printing and publications	38 130,362.			
39	Travel	39 22,564.			
40	Conferences, conventions, and meetings	40			
41	Interest	41			
42	Depreciation, depletion, etc. (attach schedule)	42			
43	Other expenses not covered above (itemize):				
a		43a			
b		43b			
c		43c			
d		43d			
e		43e			
f		43f			
g	SEE STATEMENT 1	43g 4,174,924.			
44	Total functional expenses. Add lines 22 through 43. (Organizations completing columns (B)-(D), carry these totals to lines 13-15)	44 4,985,696.			

Joint Costs. Check ☐ if you are following SOP 98-2.

Are any joint costs from a combined educational campaign and fundraising solicitation reported in (B) Program services? ☐ Yes ☒ No

If "Yes," enter (i) the aggregate amount of these joint costs \$ N/A, (ii) the amount allocated to Program services \$ N/A.

(iii) the amount allocated to Management and general \$ N/A, and (iv) the amount allocated to Fundraising \$ N/A

Form 990 (2005)

Part III Statement of Program Service Accomplishments (See the instructions.)

Form 990 is available for public inspection and, for some people, serves as the primary or sole source of information about a particular organization. How the public perceives an organization in such cases may be determined by the information presented on its return. Therefore, please make sure the return is complete and accurate and fully describes, in Part III, the organization's programs and accomplishments.

What is the organization's primary exempt purpose? ►

TO PROMOTE THE MUTUAL PROFESSIONAL INTERESTS OF PSYCHOLOGISTS.

All organizations must describe their exempt purpose achievements in a clear and concise manner. State the number of clients served, publications issued, etc. Discuss achievements that are not measurable. (Section 501(c)(3) and (4) organizations and 4947(a)(1) nonexempt charitable trusts must also enter the amount of grants and allocations to others.)

Program Service Expenses
(Required for 501(c)(3) and (4) orgs, and 4947(a)(1) trusts, but optional for others)

a STATEMENT 7

(Grants and allocations \$) If this amount includes foreign grants, check here ► ☐

b

(Grants and allocations \$) If this amount includes foreign grants, check here ► ☐

c

(Grants and allocations \$) If this amount includes foreign grants, check here ► ☐

d

(Grants and allocations \$) If this amount includes foreign grants, check here ► ☐

e Other program services (attach schedule)

(Grants and allocations \$) If this amount includes foreign grants, check here ► ☐

f Total of Program Service Expenses (should equal line 44, column (B), Program services) ►

Form 990 (2005)

**AMERICAN PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION**

Form 990 (2005)

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Part IV Balance Sheets (See the instructions.)

Note: Where required, attached schedules and amounts within the description column should be for end-of-year amounts only.

		(A) Beginning of year		(B) End of year
Assets	45 Cash - non-interest-bearing	624,400.	45	2,015,892.
	46 Savings and temporary cash investments	4,945,970.	46	3,358,163.
	47 a Accounts receivable	219,217.		
	b Less: allowance for doubtful accounts			
		19,096.	47c	219,217.
	48 a Pledges receivable			
	b Less: allowance for doubtful accounts		48c	
	49 Grants receivable		49	
	50 Receivables from officers, directors, trustees, and key employees		50	
	51 a Other notes and loans receivable			
	b Less: allowance for doubtful accounts		51c	
	52 Inventories for sale or use		52	
	53 Prepaid expenses and deferred charges	29,215.	53	20,218.
	54 Investments - securities	▶ <input type="checkbox"/> Cost <input type="checkbox"/> FMV	54	
	55 a Investments - land, buildings, and equipment: basis			
b Less: accumulated depreciation		55c		
56 Investments - other		56		
57 a Land, buildings, and equipment: basis				
b Less: accumulated depreciation		57c		
58 Other assets (describe ▶ SEE STATEMENT 3)	301,342.	58	827,523.	
59 Total assets (must equal line 74). Add lines 45 through 58	5,920,023.	59	6,441,013.	
Liabilities	60 Accounts payable and accrued expenses	388,261.	60	323,394.
	61 Grants payable		61	
	62 Deferred revenue	3,901,517.	62	3,948,915.
	63 Loans from officers, directors, trustees, and key employees		63	
	64 a Tax-exempt bond liabilities		64a	
	b Mortgages and other notes payable		64b	
	65 Other liabilities (describe ▶)		65	
66 Total liabilities. Add lines 60 through 65)	4,289,778.	66	4,272,309.	
Net Assets or Fund Balances	Organizations that follow SFAS 117, check here <input checked="" type="checkbox"/> and complete lines 67 through 69 and lines 73 and 74.			
	67 Unrestricted	1,541,855.	67	2,123,615.
	68 Temporarily restricted	88,390.	68	45,089.
	69 Permanently restricted		69	
	Organizations that do not follow SFAS 117, check here <input type="checkbox"/> and complete lines 70 through 74.			
	70 Capital stock, trust principal, or current funds		70	
	71 Paid-in or capital surplus, or land, building, and equipment fund		71	
	72 Retained earnings, endowment, accumulated income, or other funds		72	
	73 Total net assets or fund balances (add lines 67 through 69 or lines 70 through 72, column (A) must equal line 19; column (B) must equal line 21)	1,630,245.	73	2,168,704.
	74 Total liabilities and net assets/fund balances. Add lines 66 and 73	5,920,023.	74	6,441,013.

Form **990** (2005)

Form 990 (2005)

Page 6

Yes	No
-----	----

4

75b

75c

75d

X

X

(A) Name and address

(C) Compensation

(E) Expense
account and
other allowances

Part VI	Other Information (See the instructions)
----------------	---

Yes	No
-----	----

76

77

78a

N/A

78h

80a

☒

| 813

81b

Form 990 (2005)

**AMERICAN PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION**

Form 990 (2005)

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Part VI Other Information (continued)

		Yes	No
82 a Did the organization receive donated services or the use of materials, equipment, or facilities at no charge or at substantially less than fair rental value?	82a		X
b If "Yes," you may indicate the value of these items here. Do not include this amount as revenue in Part I or as an expense in Part II. (See instructions in Part III.)	82b		
	N/A		
83 a Did the organization comply with the public inspection requirements for returns and exemption applications?	83a	X	
b Did the organization comply with the disclosure requirements relating to quid pro quo contributions?	83b		
	N/A		
84 a Did the organization solicit any contributions or gifts that were not tax deductible?	84a	X	
b If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?	84b	X	
85 501(c)(4), (5), or (6) organizations. a Were substantially all dues nondeductible by members?	85a		X
b Did the organization make only in-house lobbying expenditures of \$2,000 or less? If "Yes" was answered to either 85a or 85b, do not complete 85c through 85h below unless the organization received a waiver for proxy tax owed for the prior year.	85b		X
c Dues, assessments, and similar amounts from members	85c		
	4,864,363.		
d Section 162(e) lobbying and political expenditures	85d		
	465,643.		
e Aggregate nondeductible amount of section 6033(e)(1)(A) dues notices	85e		
	291,862.		
f Taxable amount of lobbying and political expenditures (line 85d less 85e)	85f		
	173,781.		
g Does the organization elect to pay the section 6033(e) tax on the amount on line 85f?	85g		X
h If section 6033(e)(1)(A) dues notices were sent, does the organization agree to add the amount on line 85f to its reasonable estimate of dues allocable to nondeductible lobbying and political expenditures for the following tax year?	85h	X	
86 501(c)(7) organizations. Enter: a Initiation fees and capital contributions included on line 12	86a		
	N/A		
b Gross receipts, included on line 12, for public use of club facilities	86b		
	N/A		
87 501(c)(12) organizations. Enter: a Gross income from members or shareholders	87a		
	N/A		
b Gross income from other sources. (Do not net amounts due or paid to other sources against amounts due or received from them.)	87b		
	N/A		
88 At any time during the year, did the organization own a 50% or greater interest in a taxable corporation or partnership, or an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? If "Yes," complete Part IX	88		X
89 a 501(c)(3) organizations. Enter: Amount of tax imposed on the organization during the year under: section 4911 ▶ <u>N/A</u> , section 4912 ▶ <u>N/A</u> , section 4955 ▶ <u>N/A</u>			
b 501(c)(3) and 501(c)(4) organizations Did the organization engage in any section 4958 excess benefit transaction during the year or did it become aware of an excess benefit transaction from a prior year? If "Yes," attach a statement explaining each transaction	89b		
	N/A		
c Enter: Amount of tax imposed on the organization managers or disqualified persons during the year under sections 4912, 4955, and 4958		N/A	
d Enter: Amount of tax on line 89c, above, reimbursed by the organization		N/A	
90 a List the states with which a copy of this return is filed ▶ <u>NONE</u>			
b Number of employees employed in the pay period that includes March 12, 2005	90b		0
91 a The books are in care of ▶ <u>LILLIAN WHITE, C/O APA</u> Telephone no ▶ <u>202-312-6494</u> Located at ▶ <u>750 FIRST STREET, NE, WASHINGTON, DC</u> ZIP + 4 ▶ <u>20002-4242</u>			
b At any time during the calendar year, did the organization have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)? If "Yes," enter the name of the foreign country ▶ <u>N/A</u> See the instructions for exceptions and filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts.	91b		X
c At any time during the calendar year, did the organization maintain an office outside of the United States? If "Yes," enter the name of the foreign country ▶ <u>N/A</u>	91c		X
92 Section 4947(a)(1) nonexempt charitable trusts filing Form 990 in lieu of Form 1041- Check here and enter the amount of tax-exempt interest received or accrued during the tax year ▶ <u>92</u>		N/A	

Form 990 (2005)

**AMERICAN PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION**

Form 990 (2005)

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Part VII Analysis of Income-Producing Activities (See the instructions.)

	Unrelated business income		Excluded by section 512, 513, or 514		(E) Related or exempt function income
	(A) Business code	(B) Amount	(C) Exclu- sion code	(D) Amount	
93 Program service revenue:					
a <u>CERTIFICATION REVENUE</u>					276,439.
b <u>SERVICE CONTRACT REVENUE</u>					131,559.
c _____					
d _____					
e _____					
f Medicare/Medicaid payments					
g Fees and contracts from government agencies					
94 Membership dues and assessments					4,864,363.
95 Interest on savings and temporary cash investments			14	138,734.	
96 Dividends and interest from securities					
97 Net rental income or (loss) from real estate:					
a debt-financed property					
b not debt-financed property					
98 Net rental income or (loss) from personal property					
99 Other investment income					
100 Gain or (loss) from sales of assets other than inventory					
101 Net income or (loss) from special events					
102 Gross profit or (loss) from sales of inventory					
103 Other revenue:					
a _____					
b _____					
c _____					
d _____					
e _____					
104 Subtotal (add columns (B), (D), and (E))		0.		138,734.	5,272,361.
105 Total (add line 104, columns (B), (D), and (E))					5,411,095.

Note: Line 105 plus line 1d, Part I, should equal the amount on line 12, Part I.

Part VIII Relationship of Activities to the Accomplishment of Exempt Purposes (See the instructions.)

Line No.	Explain how each activity for which income is reported in column (E) of Part VII contributed importantly to the accomplishment of the organization's exempt purposes (other than by providing funds for such purposes)
▼	SEE STATEMENT 4

Part IX Information Regarding Taxable Subsidiaries and Disregarded Entities (See the instructions.)

(A) Name, address, and EIN of corporation, partnership, or disregarded entity	(B) Percentage of ownership interest	(C) Nature of activities	(D) Total income	(E) End-of-year assets
N/A	%			
	%			
	%			
	%			

Part X Information Regarding Transfers Associated with Personal Benefit Contracts (See the instructions.)

(a) Did the organization, during the year, receive any funds, directly or indirectly, to pay premiums on a personal benefit contract? ☐ Yes ☒ **No**

(b) Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract? ☐ Yes ☒ **No**

Note: If "Yes" to (b), file Form 8870 and Form 4720 (see instructions)

Please Sign Here	Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.			
	 Signature of officer	9/29/06 Date	CHARLES L. MICKEY VP & CFO Type or print name and title	
Paid Preparer's Use Only	 Preparer's signature	9/28/06 Date	<input type="checkbox"/> Check if self-employed	Preparer's SSN or PTIN
	Firm's name (or yours if self-employed), address, and ZIP + 4 CBIZ ACCOUNTING, TAX & ADVISORY SERVICES 7475 WISCONSIN AVENUE SUITE 700 BETHESDA, MARYLAND 20814-3417			EIN ▶ Phone no ▶ (301) 951-3636

FORM 990	OTHER EXPENSES			STATEMENT 1
DESCRIPTION	(A) TOTAL	(B) PROGRAM SERVICES	(C) MANAGEMENT AND GENERAL	(D) FUNDRAISING
CONTRACTED SERVICES	1,357,703.			
PAYROLL ACCRUAL	15,908.			
INSURANCE	36,388.			
CONTRACTUAL FIRMS	1,027,498.			
CONSULTING	181,422.			
AGENCY TEMPORARY	12,945.			
BOARD AND COMMITTEES				
EXPENSE	60,710.			
MISCELLANEOUS	33,589.			
DELIVERY/MESSENGER				
SERVICE	7,946.			
SPECIAL PROJECTS	380,139.			
OVERHEAD RECOVERY	1,060,676.			
TOTAL TO FM 990, LN 43	4,174,924.			

FORM 990	CASH GRANTS AND ALLOCATIONS			STATEMENT 2
CLASSIFICATION	DONEE'S NAME	DONEE'S ADDRESS	DONEE'S RELATIONSHIP	AMOUNT
SEE STATEMENT 2 ATTACHED	SEE STATEMENT 2 ATTACHED		NONE	554,774.
TOTAL INCLUDED ON FORM 990, PART II, LINE 22				554,774.

FORM 990	OTHER ASSETS			STATEMENT 3
DESCRIPTION				AMOUNT
DUE FROM AMERICAN PSYCHOLOGICAL ASSOCIATION				814,359.
DUE FROM APA TO EDUCATION ADVOCACY TRUST				13,164.
TOTAL TO FORM 990, PART IV, LINE 58, COLUMN B				827,523.

FORM 990

PART VIII - RELATIONSHIP OF ACTIVITIES TO
ACCOMPLISHMENT OF EXEMPT PURPOSES

STATEMENT 4

LINE EXPLANATION OF RELATIONSHIP OF ACTIVITIES

93A PRACTICE ASSESSMENTS AND CERTIFICATION REVENUES ARE USED
94 TO PROMOTE THE PROFESSION OF INDEPENDENT PRACTITIONERS
93B SERVICE CONTRACT REVENUE IS USED TO EVALUATE A THERAPY DEVICE AND TO
IDENTIFY AND VERIFY CREDENTIALS OF LICENSED PSYCHOLOGISTS TO AID THOSE
IN THE GULF COAST REGION

2005 CAPP GRANTS

Name	Address	Total	Description
Alabama Psychological Association	P O Box 97, Montgomery, AL 36101-0097	15,500	Organizational Development
Alaska Psychological Association	P O Box 241292, Anchorage, AK 99524-1292	14,800	Organizational Development
Arkansas Psychological Association	1123 S University, Ste 235, Little Rock, AR 72204-1618	18,500	Legislative Grant/Special Projects
California Psychological Association	3835 N Freeway Boulevard, Suite 240, Sacramento, CA 95834-1955	40,000	Emergency Grant
Colorado Psychological Association	6000 E Evans Avenue #3-205, Denver, CO 80222-5423	10,000	Special Projects/Organizational Dev
Council Provincial Assoc of Psychologists	343 Waverly Street, Winnipeg, Canada MB R3M 3K5	20,000	Organizational Development
DC Psychological Association	750 First Street, NE, Suite 7306, Washington, DC 20002-4241	10,000	Special Projects/Organizational Dev
Delaware Psychological Association	P.O. Box 718, Claymont, DE 19703-0718	8,000	Organizational Development
Florida Psychological Association	408 Office Plaza Drive, Tallahassee, FL 32301-2757	2,500	Special Projects
Georgia Psychological Association	1750 Century Circle, Ste 10, Atlanta, GA 30345-3032	7,000	Organizational Development
Georgia Psychological Association	1750 Century Circle, Ste 10, Atlanta, GA 30345-3032	(25,000)	Refund of Prior Year Grant
Hawaii Psychological Association	1188 Bishop St, #912, Honolulu, HI 96813-3304	40,000	Special Projects/Organizational Dev
Idaho Psychological Association	P O. Box 352, Boise, ID 83701-0352	11,000	Organizational Development
Kansas Psychological Association	1508 SW Topeka Blvd, Ste 203, Topeka, KS 66612-1887	10,000	Organizational Development
Kentucky Psychological Association	120 Sears Avenue, Suite 202, Louisville, KY 40207-5072	7,500	Special Projects
Louisiana Psychological Association	1003 Leycester Drive, Baton Rouge, LA 70802	71,000	Legislative/Emergency Grants
Maine Psychological Association	69 Sewall Street, Augusta, ME 04332	16,695	Special Projects/Organizational Dev
Massachusetts Psychological Association	195 Worcester Street, Suite 303, Wellesley, MA 02481-5568	4,000	Organizational Development
Michigan Psychological Association	2105 University Park Drive, Suite C-1, Okemos, MI 48864-4071	2,500	Special Projects
Mississippi Psychological Association	P O Box 16826, Jackson, MS 39236-6826	14,400	Organizational Development
Missouri Psychological Association	3340 American Avenue, Jefferson City, MO 65109-1079	10,000	Organizational Development
Montana Psychological Association	P O. Box 50247, Billings, MT 59105-0247	13,500	Organizational Development
Nebraska Psychological Association	1044 H Street, Lincoln, NE 68508-3169	10,000	Legislative Grant
Nevada State Psychological Association	75 Hunt Valley Trail, Henderson, NV 89052-6673	8,735	Organizational Development
New Mexico Psychological Association	2501 San Pedro NE, Ste 110, Albuquerque, NM 87110-4197	42,244	Organizational Development
North Dakota Psychological Association	419 E. Brandon Dr, Bismarck, ND 58503-0410	13,000	Organizational Development
Pennsylvania Psychological Association	416 Forster Street, Harrisburg, PA 17102-1714	13,000	Legislative Grant
Puerto Rico Psychological Association	Oficina Genral de Correos, Apartado 363435, San Juan, PR 00936-3435	5,000	Special Projects
Rhode Island Psychological Association	1643 Warwick Avenue, PMB 103, Warwick, RI 02889-1525	9,000	Organizational Development
South Carolina Psychological Association	P.O. Box 1417, Fort Mill, SC 29716-1417	12,750	Organizational Development
South Dakota Psychological Association	P O. Box 460, Sioux Falls, SD 57101-0460	11,750	Organizational Development
Tennessee Psychological Association	P.O Box 281296, Memphis, TN 38168-1296	55,000	Legislative Grant
Texas Psychological Association	1005 Congress Avenue, Suite 410, Austin, TX 78701-2491	7,500	Emergency Grant
Utah Psychological Association	275 East South Temple, #112, Salt Lake City, UT 84111-1245	12,000	Organizational Development/Special Projects
Vermont Psychological Association	100 State St, Ste 330, Montpelier, VT 05602-2847	14,900	Organizational Development/Special Projects
West VA Psychological Association	P.O Box 58058, Charleston, WV 25358-0058	14,000	Organizational Development
Wyoming Psychological Association	P O Box 1191, Laramie, WY 82073-1191	4,000	Organizational Development

TOTAL

554,774

Statement 2

2005 List of Officers, Directors, and Trustees and Key Employees

1. Ronald F. Levant, Ed.D., President, < 1 hr/wk
2. Gerald P. Koocher, Ph.D., President-Elect, < 1 hr/wk
3. Ruth Ullmann Paige, Ph.D., Recording Secretary, < 1 hr/wk
4. Carol D. Goodheart, Ed.D., Treasurer, < 1 hr/wk
5. Norman B. Anderson, Ph.D., CEO/Executive Vice President, < 1 hr/wk
6. L. Michael Honaker, Ph.D., Chief Operating Officer, < 1 hr/wk
7. Charles L. McKay, Chief Financial Officer, < 1 hr/wk

All officers or directors may be reached at the following address:

750 First Street, NE
Washington, DC 20002

CAPP Governance Members

The 2005 Committee for the Advancement of Professional Practice (CAPP) is responsible for the governance activity of the APAPO:

1. Katherine C. Nordal, Ph.D.
2. Rosalind S. Dorlen, Psy.D.
3. Elaine Orabona Mantell, Ph.D.
4. Stanley Moldawsky, Ph.D.
5. Laura H. Barbanel, Ed.D.
6. Michael O. Ranney, MPA
7. Bill Safarjan, Ph.D.
8. J. Paul Burney, Ph.D.
9. Glenn A. Ally, Ph.D.
10. Josephine D. Johnson, Ph.D.
11. Nanci C. Klein, Ph. D.
12. Carol D. Goodheart, Ed.D., ex officio

Key Employee:

Russell S. Newman, Ph.D., Executive Director, 18 hrs/wk
Dr. Newman's time is divided between the American
Psychological Association (APA) and the American
Psychological Association Practice Organization (APAPO).
The full compensation is paid and reported by APA.
APAPO reimburses APA for the portion of time spent by
Dr. Newman on APAPO activities.

AMERICAN PSYCHOLOGICAL ASSOCIATION PRACTICE ORGANIZATION
 EIN # 52-2262136
 COMPENSATION FROM RELATED ENTITIES
 For Period Ending December 31, 2005

<u>Name & Address *</u>	<u>Title & Office</u>	<u>Aggregate Hours per Week</u>	<u>Aggregate Compensation **</u>	<u>Contribution to Employee Benefit Plan</u>	<u>Expense Account & Other Allowances</u>
Norman B. Anderson, PhD	EVP/CEO	38	\$ 326,500	\$ 25,109	\$ 9,405
L. Michael Honaker, PhD	Deputy CEO/COO	38	\$ 235,664	\$ 29,473	\$ 3,462
Charles L. McKay	CFO/VP	38	\$ 234,101	\$ 29,473	\$ 6,825
Russell S. Newman, PhD	Executive Director, Practice	38	\$ 260,884	\$ 25,109	\$ 1,200

* Address of all employees:
 c/o American Psychological Association
 750 First Street, NE
 Washington, DC 20002-4242

** Compensation from related entity

APA PRACTICE ORGANIZATION 2005 PROGRAM SERVICE ACTIVITY

GOVERNMENT RELATIONS FEDERAL ADVOCACY

This program is responsible for the protection and advancement of psychologist's interests in the federal legislative and regulatory arena. This task is met through a set of advocacy activities focusing on Members of Congress and Administration on issues including Medicare, CHAMPUS, VA, SSA, long-term care, and health care reform.

Program Service Expenses: \$1,234,967

SLC/GRANTS

This program provides consulting services, resources, training and information to State, Provincial and Territorial Psychological Associations (SPPA's) through the State Leadership Conference (SLC), the CAPP Grant Program (for organizational development, legislative advocacy and other related needs of SPPA's), and other means.

Program Service Expenses: \$908,115

BUSINESS DEVELOPMENT

This program is responsible for developing, installing, integrating, managing, maintaining, and improving the Practice Organization's technology infrastructure and operations. The program also participates and contributes to technology policy activities affecting professional practice.

Program Service Expenses: \$704,748

GOVERNMENT RELATIONS LOBBYING

The Government Relations Lobbying Office advocates at federal or state legislatures the passage or defeat of legislation related to issues impacting the practice of psychology. This includes communications with APA members urging advocacy on behalf of proposed legislation.

Program Service Expenses: \$419,455

ADVOCACY OPERATIONS

The Advocacy Operations Office is responsible for the protection and advancement of psychologists' interests in the federal legislative and regulatory arenas. This task is met through a set of activities including advocacy of Members of Congress and the Administration on issues including Medicare, CHAMPUS, VA, SSA, long-term care, and patient protection.

Program Service Expenses: \$294,845

COLLEGE of PROFESSIONAL PSYCHOLOGY

The College promotes the profession of psychology by offering a variety of credentialing and credentials-related products on behalf of the APA Practice Organization.

Program Service Expenses: \$249,810

CORP. RELATIONS & BUSINESS STRATEGY

This program is responsible for positioning psychology in the health care marketplace by pursuing, for example, initiatives to influence employers and other purchasers about the value of psychological services.

Program Service Expenses: \$182,392

PRACTICE COMMUNICATIONS

The Practice Communications Department is responsible for promoting and communicating the value of psychological services to government, business representatives, the public, and the media, as well as ongoing communications with the practitioner constituency.

Program Service Expenses: \$181,058

LEGAL ADVOCACY

This program promotes, through legal advocacy, the advancements in the areas of licensing laws, managed care and market place issues that accurately reflect psychology's professional identity, professional role, and scope of practice. It advocates and develops psychology's freedom to participate and practice in all settings to the full extent of licensure and monitors the courts for any and all issues that facilitate and advance the practice of psychology.

Program Service Expenses: \$91,442

COMMITTEE for the ADVANCEMENT of PROFESSIONAL PRACTICE

This program coordinates governance-related functions and initiatives of the Committee for the Advancement of Professional Practice (CAPP) for the APA Practice Organization.

Program Service Expenses: \$77,296

NEW BUSINESS AND CONSTITUENT OPERATIONS

The New Business and Constituent Operations program is responsible for management of a variety of business and operational functions including non-revenue-generating direct mailing to practitioner constituents of the APA Practice Organization, online CE offerings, research related to constituent demographics, and other similar business and operational activities.

Program Service Expenses: \$77,190

PRACTICE ORGANIZATION PUBLIC RELATIONS

This program coordinates the public relations for the Practice Organization.

Program Service Expenses: \$36,491

PRACTICE ORGANIZATION PROFESSIONAL DEVELOPMENT

This program is responsible for initiatives to demonstrate the value of psychological services in the marketplace in ways that create specific opportunities for professional psychologists.

Program Service Expenses: \$18,000

Total Program Service Expenses: \$4,475,809

Statement 7

THE EDUCATION ADVOCACY TRUST

The American Psychological Association Practice Organization, a District of Columbia not-for-profit corporation ("Grantor"), hereby transfers to the Trustees listed on the execution page hereof, as Co-Trustees, the sum of one hundred dollars. Such property, and all other property transferred to the Trustees, including, without limitation, all investments and reinvestments thereof and all substitutions therefor, shall be referred to herein as the "Trust Property." The Trust Property shall be held subject to the provisions of this instrument. This instrument and the trust created hereunder shall be known collectively as the "Education Advocacy Trust," and shall constitute a trust under District of Columbia law.

ARTICLE ONE

CREATION OF SEPARATE TRUST

1.1 **Purpose.** The Trust will provide a vehicle to promote the mutual professional interests of psychologists in advancing psychology education and psychology's role in other areas of education. The Trust will affirmatively support the mission and respect the structure of the Grantor.

1.2 **Additional Trust Property.** As and when the Trustees receive any additional property, the Trustees shall add such property to the Trust. The Trust shall be administered as provided below.

1.3 **Education Constituents.** A person who makes the annually specified payment to the Education Trust shall be a member of APAPO, known as an Education Constituent, during the calendar year for which that payment is designated. Education Constituents shall not have voting rights.

ARTICLE TWO

TRUSTEE PROVISIONS

The following provisions shall apply to the office of Trustee:

2.1 **Trustees.** Those persons who are all of the members of the Board of Educational Affairs ("BEA") of the American Psychological Association from time to time shall serve as Trustees. The Treasurer of the American Psychological Association Practice Organization shall also serve as a non-voting Trustee. The chair of the BEA from time to time shall serve as Chair of the Trustees. The Chair shall preside at meetings of the Trustees.

2.2 **Meetings, Quorum and Voting.** Trustees may meet in person or by teleconference or other means at such times as may be determined by the Chair or by majority vote of the Trustees. Thirty days notice shall be required for a meeting in person and three days notice for other meetings. A majority of the Trustees shall constitute a quorum. Action may be taken by a majority of those Trustees voting at a meeting at which a quorum is present. Trustees may also take action by unanimous written ballot.

ARTICLE THREE

POWERS OF TRUSTEES

3.1 **In General.** The exercise of the rights, powers and discretions granted to the Trustees in this instrument shall be subject to the limitations expressly provided in this instrument and shall not be subject to prior court approval. In addition to the rights, powers, and discretions granted to the Trustees in this agreement, the Trustees shall have the rights, powers, and discretions conferred upon a Trustee by any applicable statute or court decision unless such rights, powers, discretions or immunities are inconsistent with the terms of this agreement.

3.2 **Basic Powers.** The Trustees shall have the following powers:

(a) **Expenditures.** To expend Trust property in furtherance of Trust purposes

(b) **Retention and Use Of Property.** To retain any property transferred to the Trust from any source and to use it to carry out the purpose of the Trust.

(c) **Management Of Property.** To hold, manage, operate, maintain, develop, improve, repair, insure and control all property which becomes part of the Trust Property. The Board of Directors of the American Psychological Association Practice Organization shall be responsible for overseeing the investment of any assets of the Trust.

(d) **Disposition Of Trust Property.** To sell, convey and otherwise deal with any Trust Property.

(e) **Payment Of Taxes And Expenses.** To pay all taxes, and all reasonable costs, charges and expenses incurred in the administration of the Trust created hereunder.

(f) **Other Powers.** To perform any and all other acts which the Trustees determine to be necessary or appropriate for the proper and advantageous management, investment and permitted use of the Trust Property; and to execute and deliver any and all documents which the Trustees determine to be necessary or appropriate to effectuate the foregoing powers.

3.3 **Limitations on Powers.** The Trustees may not engage in any activity which might, in the determination of the Grantor (i) be inconsistent with the purposes of or disadvantage the Grantor; (ii) be inconsistent with or jeopardize the Grantor's status under Section 501(c)(6) of the Internal Revenue Code; (iii) violate state or Federal lobbying or election law or other applicable laws or regulations; (iv) cause the Grantor to incur any penalty or excise tax; or (v) incur any debt or undertake any obligations which causes the total of Trust liabilities to exceed the value of cash or cash-equivalent investments held by the Trust.

ARTICLE FOUR

ADMINISTRATIVE PROVISIONS

4.1 **Operations.** The Trust shall enter into an agreement with the Grantor to address the provision of personnel and facilities for the day-to-day operation of the Trust.

4.2 **Rights And Powers Of Successor Trustee.** Each successor Trustee shall have the same rights, powers, duties, and discretions, and otherwise be in the same position, as if originally named a Trustee.

4.3 **Amendments.** This Education Trust may be amended by the Grantor without approval of the Trustees to comply with applicable law or to protect the assets or tax-exempt status of the Grantor. All other amendments require approval of a majority of the Trustees then in office.

4.4 **Instrument Revocable.** The Grantor retains all right, power and authority to alter, amend, modify, revoke or terminate this instrument in which event the Grantor will dispose the Trust property by transferring such property to the American Psychological Association (APA), or if APA no longer exists or is not exempt from Federal tax, to an entity which is exempt from Federal income tax under Sections 501(c)(3), or (6) of the Internal Revenue Code.

4.5 **Grantor Trust.** The Trust is intended to qualify as a grantor trust under the Internal Revenue Code of 1986, as amended.

4.4 **Governing Law.** The laws of the District of Columbia shall govern the interpretation and validity of the provisions of this instrument, and all questions relating to the management, administration and investment of the Trust created under this instrument.

**ARTICLES OF AMENDMENT
TO
ARTICLES OF INCORPORATION
OF
AMERICAN PSYCHOLOGICAL ASSOCIATION PRACTICE ORGANIZATION**

TO: Department of Consumer and Regulatory Affairs
Business and Professional Licensing Administration
Corporations Division
941 North Capitol Street, N.E.
Washington, DC 20002

Pursuant to the provisions of the District of Columbia Non-Profit Corporation Act, the undersigned adopts the following Articles of Amendment to its Articles of Incorporation:

FIRST: The name of the corporation is American Psychological Association Practice Organization.

SECOND: The following amendment of the Articles of Incorporation was adopted by the Corporation in the manner prescribed by the District of Columbia Non-Profit Corporation Act:

Article Fourth is amended in its entirety as follows:

FOURTH: The Corporation shall have two categories of members. One category of members, who are payers of the practice assessment, shall be known as "Practice Constituents". The second category of members, who are payers to the Education Trust, shall be known as "Education Constituents". Practice Constituents and Education Constituents shall not have voting rights.

THIRD: The amendment was adopted in the following manner:

The amendment was adopted at a meeting of the Board of Directors held on _____, 2005 and received the vote of a majority of the Directors in office, there being no members having voting rights in respect thereof.

Date. March _____, 2005

AMERICAN PSYCHOLOGICAL ASSOCIATION PRACTICE ORGANIZATION

By: _____

Its: President

ATTEST: _____

Its: Secretary

IN WITNESS WHEREOF, we have signed this instrument in counterparts on the dates
shown below.

AMERICAN PSYCHOLOGICAL ASSOCIATION
PRACTICE ORGANIZATION

Date: _____

By: _____
Its: _____

Trustees:

Date: _____

Date: _____

Date: _____

Date: _____

Date: _____

Date: _____

BYLAWS
OF THE
AMERICAN PSYCHOLOGICAL ASSOCIATION PRACTICE ORGANIZATION

ARTICLE I

The name of the Corporation shall be the American Psychological Association Practice Organization (APAPO).

ARTICLE II

PURPOSES

Section 1. Not For Profit. The corporation is organized under and shall operate as a District of Columbia nonprofit corporation, and shall have such powers as are now or as may hereafter be granted by the District Corporation Act, as amended.

Section 2. Purposes. The purpose of the Corporation is to promote the mutual professional interests of psychologists.

Section 3. Rules. The following rules shall conclusively bind the Corporation and all persons acting for or in behalf of it:

a. The Corporation shall not undertake activities that may adversely affect the American Psychological Association.

b. Notwithstanding any other provision of these bylaws, the Corporation shall not carry on any other activities not permitted to be carried on a) by a corporation exempt from Federal income tax under Section 501(c)(6) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

c. Upon the dissolution of the Corporation, the Board of Directors shall, after paying or making provision for the payment of all the liabilities of the Corporation, distribute any remaining assets of the Corporation to the American Psychological Association.

ARTICLE III

REGISTERED OFFICE AND AGENT

The Corporation shall have and continuously maintain in the District of Columbia a registered office and a registered agent whose office shall be identical with such registered office, and may have such other offices within or without the District of Columbia and such other registered agents as the Board of Directors may from time to time determine.

ARTICLE IV

MEMBERS

The Corporation shall have two categories of members. One category of members, who are payers of the practice assessment, shall be known as "Practice Constituents". The second category of members, who are payers to the Education Advocacy Trust, shall be known as "Education Constituents". Practice Constituents and Education Constituents shall not have voting rights.

ARTICLE V

OFFICERS

Section 1. Officers. The officers of the corporation shall be as follows: a President, a President-elect, a Past President, a Recording Secretary, a Treasurer, and a Chief Staff Officer. The officers of the Corporation shall be the same individuals who hold the respective offices in the American Psychological Association from time to time.

Section 2. President. During the term of office, the President shall serve as presiding officer of the Corporation, and the Board of Directors. The President shall perform such other duties as are prescribed in these bylaws, as are incident to the office, or as may be properly required of the President by the Board of Directors.

Section 3. President-Elect. During the term of office, the President-elect shall serve as presiding officer of the Corporation and the Board of Directors in the absence of the President.

Section 4. Recording Secretary. During the term of office, the Recording Secretary shall serve as Secretary of the Board of Directors and shall perform such other duties as may be prescribed in these bylaws. It shall be the duty of the Recording Secretary to keep the records of all meetings of the Board of Directors; to file and hold subject to call and to direct the publication of such records, reports, and proceedings as are authorized by these bylaws or the Board of Directors at any duly constituted meeting; and to perform all other secretarial duties for the Board of Directors as are not delegated to the Chief Staff Officer. In the case of the death or incapacity of the Treasurer, the Recording Secretary is authorized to perform the duties normally assigned to the Treasurer.

Section 5. Treasurer. During the term of office, the Treasurer shall serve as senior financial officer of the Corporation and shall perform such other duties as may be prescribed in these bylaws. The Treasurer shall have authority to sign checks and drafts on behalf of the Corporation for disbursement of funds for duly authorized purposes of the Corporation as provided by bylaws or by the Board of Directors. He/she shall deliver an audited report for each fiscal year to the Board of Directors. In the case of the death or incapacity of the Recording Secretary, the Treasurer is authorized to perform the duties normally assigned to the Recording Secretary.

Section 6. Chief Staff Officer. The Chief Staff Officer's official title shall be determined by the Board of Directors. The Chief Staff officer shall be responsible for the staff, their hiring, training, performance, and termination. The Chief Staff Officer shall perform such duties as may be assigned by the Board of Directors or as may be prescribed by these bylaws. During his/her term, the Chief Staff Officer shall not hold any other office within the Corporation.

Section 7. Bonding. The officers of the Corporation shall be bonded by an amount fixed by the Board of Directors.

ARTICLE VI

BOARD OF DIRECTORS

Section 1. General Powers. The affairs of the Corporation shall be managed by its Board of Directors.

Section 2. Composition. Tenure and Qualifications. The Board of Directors shall constitute the same individuals who serve on the Board of Directors of the American Psychological Association from time to time. Any Director who serves as a non-voting member of the Board of the American Psychological Association shall also serve as a non-voting member of the Board of the Corporation. If an individual serving on the Board of the American Psychological Association cannot, for any reason, sit on the Board of the Corporation, that individual may attend Board

meetings as an observer and, if such individual is an officer of the American Psychological Association, the other members of the Board of Directors of the Corporation shall select another Individual, from among the Board members, to serve in the vacant officer position.

Section 3. Regular Meetings. A regular annual meeting of the Board of Directors shall be held at such time and place as may be designed by resolution of the Board of Directors. The Board of Directors may provide by resolution the time and place, either within or without the District of Columbia, for the holding of additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the president or any two Directors. The person or persons authorized to call special meetings of the Board may fix any place, either within or without the District of Columbia, as the place for holding any special meeting of the Board called by them.

Section 5. Notice. Notice of any special meeting of the Board of Directors shall be given at least three days previously thereto by written notice delivered personally or by facsimile.

Section 6. Quorum. A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the Board, provided, that if less than a majority of the Directors are present at said meeting, a majority of the Directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. The act of a majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided by law or by these bylaws.

Section 8. Informal Action by Directors. Any action required to be taken at a meeting of the Board of Directors or any action which may be taken at a meeting of Directors may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the Directors entitled to vote with respect to the subject matter thereof.

ARTICLE VII

COMMITTEES

Section 1. Committees of Directors. The Board of Directors, by resolution adopted by a majority of the Directors in office, may designate one or more committees, each of which shall consist of two or more Directors, which committees, to the extent provided in said resolution, shall have and exercise the authority of the Board of Directors in management of the Corporation; but the designation of such committees and the delegation thereto of authority shall not operate to relieve the Board of Directors, or any individual director, of any responsibility imposed upon them by law.

Section 2. Other Committees. Other committees not having and exercising the authority of the Board of Directors in the management of the Corporation may be designated by a resolution adopted by a majority of the Directors present at a meeting at which a quorum is present. Except as otherwise provided in such resolution, members of each such committee shall be Directors of the Corporation, and the president of the Corporation shall appoint the members thereof. Any member thereof may be removed by the Board whenever in their judgment the best interests of the Corporation shall be served by such removal.

Section 3. Committee for the Advancement of Professional Practice. There shall be a Committee for the Advancement of Professional Practice whose responsibility it shall be to identify, plan and implement projects important to the protection, defense, and enhancement of professional practice and recommend to the Board of Directors the needed funding for such projects. The Committee for the Advancement of Professional Practice shall constitute the same individuals

who serve on the Committee for the Advancement of Professional Practice of the American Psychological Association from time to time.

Section 4. Term of Office. Each member of a committee, other than the Committee for the Advancement of Professional Practice, shall continue as such until the next annual meeting of the Board of Directors of the Corporation and until his or her successor is appointed, unless the committee shall be sooner terminated, or unless such member shall cease to qualify as a member thereof.

Section 5. Chairperson. One member of each committee shall be appointed chairperson.

Section 6. Vacancies. Vacancies in the membership of any committee may be filled by appointments made in the same manner as provided in the case of the original appointments.

Section 7. Quorum. Unless otherwise provided in the resolution of the Board of Directors designating a committee, a majority of the whole committee shall constitute a quorum and the act of a majority of the members present at a meeting at which a quorum is present shall be the act of the committee.

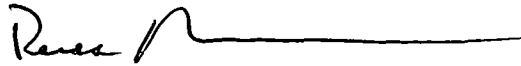
Section 8. Rules. Each committee may adopt rules for its own government not inconsistent with these bylaws or with rules adopted by the Board of Directors.

ARTICLE VIII

AMENDMENTS TO BYLAWS

These bylaws may be altered, amended or repealed and new bylaws may be adopted by a majority of the Directors present at any regular meeting or at any special meeting, provided that at least fifteen days' written notice is given of intention to alter, amend or repeal and to adopt new bylaws at such meeting, provided, that no amendment shall be effective unless approved by the Council of Representatives of the American Psychological Association.

The following conformed copy of the bylaws of American Psychological Association Practice Organization is a complete and accurate copy of the original document modified in August 2005.

A handwritten signature in black ink, appearing to read "Russ Newman", followed by a long horizontal line.

Russ Newman, PhD, JD
Executive Director

10/4/06

Date

Application for Extension of Time To File an Exempt Organization Return

OMB No. 1545-1709

▶ File a separate application for each return.

- If you are filing for an **Automatic 3-Month Extension**, complete only **Part I** and check this box ☒ **X**
 - If you are filing for an **Additional (not automatic) 3-Month Extension**, complete only **Part II** (on page 2 of this form).
- Do not complete Part II unless you have already been granted an automatic 3-month extension on a previously filed Form 8868.

Part I Automatic 3-Month Extension of Time - Only submit original (no copies needed)

Form 990-T corporations requesting an automatic 6-month extension - check this box and complete Part I only ☐

All other corporations (including Form 990-C filers) must use Form 7004 to request an extension of time to file income tax returns. Partnerships, REMICs, and trusts must use Form 8736 to request an extension of time to file Form 1065, 1066, or 1041.

Electronic Filing (e-file). Form 8868 can be filed electronically if you want a 3-month automatic extension of time to file one of the returns noted below (6 months for corporate Form 990-T filers). However, you cannot file it electronically if you want the additional (not automatic) 3-month extension, instead you must submit the fully completed signed page 2 (Part II) of Form 8868. For more details on the electronic filing of this form, visit www.irs.gov/efile.

Type or print	Name of Exempt Organization AMERICAN PSYCHOLOGICAL ASSOCIATION PRACTICE ORGANIZATION	Employer identification number 52-2262136
	Number, street, and room or suite no. If a P.O. box, see instructions 750 FIRST STREET, NE	
	City, town or post office, state, and ZIP code. For a foreign address, see instructions. WASHINGTON, DC 20002-4242	

Check type of return to be filed (file a separate application for each return):

- | | | |
|--|---|------------------------------------|
| <input checked="" type="checkbox"/> Form 990 | <input type="checkbox"/> Form 990-T (corporation) | <input type="checkbox"/> Form 4720 |
| <input type="checkbox"/> Form 990-BL | <input type="checkbox"/> Form 990-T (sec. 401(a) or 408(a) trust) | <input type="checkbox"/> Form 5227 |
| <input type="checkbox"/> Form 990-EZ | <input type="checkbox"/> Form 990-T (trust other than above) | <input type="checkbox"/> Form 6069 |
| <input type="checkbox"/> Form 990-PF | <input type="checkbox"/> Form 1041-A | <input type="checkbox"/> Form 8870 |

- The books are in the care of ▶ **LILLIAN WHITE, C/O APA**
Telephone No. ▶ **202-312-6494** FAX No. ▶
- If the organization does **not** have an office or place of business in the United States, check this box ☐
- If this is for a **Group Return**, enter the organization's four digit Group Exemption Number (GEN) . If this is for the **whole** group, check this box ☐ . If it is for part of the group, check this box ☐ and attach a list with the names and EINs of all members the extension will cover.

- 1 I request an automatic 3-month (6-months for a **Form 990-T corporation**) extension of time until **AUGUST 15, 2006** to file the exempt organization return for the organization named above. The extension is for the organization's return for:
▶ ☒ calendar year **2005** or
▶ ☐ tax year beginning , and ending
- 2 If this tax year is for less than 12 months, check reason: ☐ Initial return ☐ Final return ☐ Change in accounting period
- 3a If this application is for Form 990-BL, 990-PF, 990-T, 4720, or 6069, enter the tentative tax, less any nonrefundable credits. See instructions \$
- b If this application is for Form 990-PF or 990-T, enter any refundable credits and estimated tax payments made. Include any prior year overpayment allowed as a credit \$
- c **Balance Due.** Subtract line 3b from line 3a. Include your payment with this form, or, if required, deposit with FTD coupon or, if required, by using EFTPS (Electronic Federal Tax Payment System). See instructions \$ **N/A**

Caution. If you are going to make an electronic fund withdrawal with this Form 8868, see Form 8453-EO and Form 8879-EO for payment instructions.

LHA For Privacy Act and Paperwork Reduction Act Notice, see instructions.

Form 8868 (Rev 12-2004)

Form 8868 (Rev. 12-2004)

Page 2

- If you are filing for an **Additional (not automatic) 3-Month Extension**, complete only Part II and check this box ☒ **Note.** Only complete Part II if you have already been granted an automatic 3-month extension on a previously filed Form 8868.
- If you are filing for an **Automatic 3-Month Extension**, complete only Part I (on page 1).

Part II Additional (not automatic) 3-Month Extension of Time—Must File Original and One Copy.

Type or print File by the extended due date for filing the return. See instructions.	Name of Exempt Organization American Psychological Association Practice Organization	Employer identification number 52-2262136
	Number, street, and room or suite no. If a P.O. box, see instructions. 750 First Street, NE	For IRS use only
	City, town or post office, state, and ZIP code. For a foreign address, see instructions. Washington, DC 20002	

Check type of return to be filed (File a separate application for each return):

- | | | |
|--|---|------------------------------------|
| <input checked="" type="checkbox"/> Form 990 | <input type="checkbox"/> Form 990-T (sec. 401(a) or 408(a) trust) | <input type="checkbox"/> Form 5227 |
| <input type="checkbox"/> Form 990-BL | <input type="checkbox"/> Form 990-T (trust other than above) | <input type="checkbox"/> Form 6069 |
| <input type="checkbox"/> Form 990-EZ | <input type="checkbox"/> Form 1041-A | <input type="checkbox"/> Form 8870 |
| <input type="checkbox"/> Form 990-PF | <input type="checkbox"/> Form 4720 | |

STOP: Do not complete Part II if you were not already granted an automatic 3-month extension on a previously filed Form 8868.

- The books are in the care of **Lillian White**

Telephone No. **(202) 312-6494** FAX No. **(202) 336-5816**

- If the organization does not have an office or place of business in the United States, check this box ☐
- If this is for a **Group Return**, enter the organization's four digit Group Exemption Number (GEN) _____ If this is for the whole group, check this box ☐. If it is for part of the group, check this box ☐ and attach a list with the names and EINs of all members the extension is for.

- 4 I request an additional 3-month extension of time until **November 15**, 20**06**.
- 5 For calendar year **2005**, or other tax year beginning _____, 20____, and ending _____, 20____.
- 6 If this tax year is for less than 12 months, check reason: ☐ Initial return ☐ Final return ☐ Change in accounting period
- 7 State in detail why you need the extension **Additional time is required to file a complete and accurate return**

- 8a If this application is for Form 990-BL, 990-PF, 990-T, 4720, or 8069, enter the tentative tax, less any nonrefundable credits. See instructions \$ _____
- b If this application is for Form 990-PF, 990-T, 4720, or 6069, enter any refundable credits and estimated tax payments made. Include any prior year overpayment allowed as a credit and any amount paid previously with Form 8868 \$ _____
- c **Balance Due.** Subtract line 8b from line 8a. Include your payment with this form, or, if required, deposit with FTD coupon or, if required, by using EFTPS (Electronic Federal Tax Payment System). See instructions. \$ _____

Signature and Verification

Under penalties of perjury, I declare that I have examined this form, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete, and that I am authorized to prepare this form.

Signature **Charles J. M. K.** Title **VP & CFO** Date **5/4/06**

Notice to Applicant—To Be Completed by the IRS

- ☐ We have approved this application. Please attach this form to the organization's return.
- ☐ We have not approved this application. However, we have granted a 10-day grace period from the later of the date shown below or the due date of the organization's return (including any prior extensions). This grace period is considered to be a valid extension of time for elections otherwise required to be made on a timely return. Please attach this form to the organization's return.
- ☐ We have not approved this application. After considering the reasons stated in item 7, we cannot grant your request for an extension of time to file. We are not granting a 10-day grace period.
- ☐ We cannot consider this application because it was filed after the extended due date of the return for which an extension was requested.
- ☐ Other _____

Director

By: _____

Date _____

Alternate Mailing Address — Enter the address if you want the copy of this application for an additional 3-month extension returned to an address different than the one entered above.

Type or print	Name
	Number and street (include suite, room, or apt. no.) or a P.O. box number
	City or town, province or state, and country (including postal or ZIP code)

MONITOR

ON PSYCHOLOGY

GST# R127612802

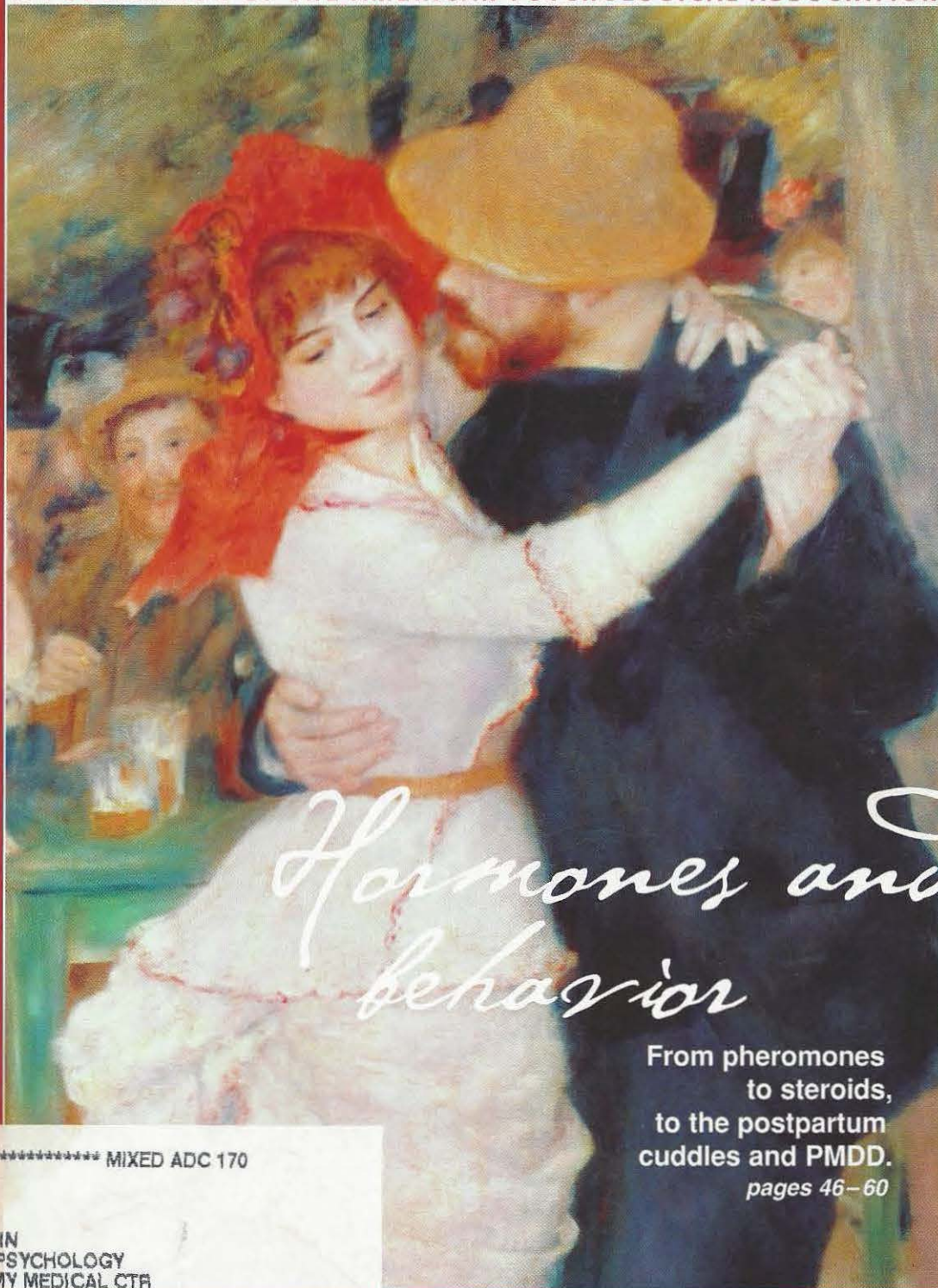
**APA appoints
a new CEO.....page 22**

Social cognitive theory is changing the lives of millions.....page 30

Pigeons as baggage screeners, rats as rescuers. . . .page 42

New ways to stop bullying.....page 64

When students have grievances, what do they do?.....page 68



Hormones and behavior

**From pheromones
to steroids,
to the postpartum
cuddles and PMDD.**
pages 46–60

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MON V33 NO 09

DEBRA L. DUNIVAN

MAJ DEBRA DUNIVIN

DEPARTMENT OF PSYCHOLOGY

WALTER REED ARMY MEDICAL CTR

WASHINGTON DC 20307-0001

S0327





PEOPLE

Cedric L. Alexander, PsyD, is the new deputy chief of the Rochester



Alexander

Police Department in Rochester, N.Y. As director of organizational development, his responsibilities include recruitment training and background investigation.

Prior to his appointment, Alexander was an instructor and Postdoctoral fellow at the University of Rochester Medical Center with a specialization in police psychology, family therapy, group process and multiculturalism.

In 1999, Alexander, a former deputy sheriff, combined his academic research and field experience and contributed to the work "Police Trauma: Psychology Aftermath of Civilian Combat," which detailed the psychological impact of police work.

APA's Div. 55 (The American Society for the Advancement of Pharmacotherapy) has established

the **Patrick H. DeLeon Prize** for an outstanding student dissertation or published paper in either clinical psychology or prescription authority advocacy. The \$500 prize will be awarded at the APA annual convention beginning in 2003.

The award was named after DeLeon, a former APA president and an advisor to Sen. Daniel K. Inouye (D-Hawaii).

New York State Senator Kemp Hannon presented **Thomas**



Demaria

Demaria, PhD, with the New York State Senate Liberty Award for Demaria's creation of a special bereavement and trauma counseling center for children

who lost family members in the World Trade Center disaster and for extensive services provided to schools, community groups, religious organizations and businesses traumatized by Sept. 11.

Founded in 2000, the liberty award is given to individuals who display exceptional heroic or humanitarian acts on the behalf of New Yorkers. Demaria is the administrative director of Behavioral Health Services at South Nassau Communities Hospital in New York. His specialties include marriage therapy, behavioral medicine, stress management and trauma counseling.

For 2002-03, **Celia B. Fisher, PhD**, will hold the position of



Fisher

bioethicist in residence at Yale University. Fisher is director of the Fordham University Center for Ethics Education. The center was created

in 1999 to encourage scholarly, scientific and public practices guided by respect for diversity within communities and nations. Her research topics include how teen-agers and parents from different ethnic backgrounds react to racial discrimination and the ability of adults and children with cognitive vulnerability to consent to treatment. Fisher is also professor of applied developmental psychology at Fordham University.

G. Frank Lawlis, PhD, a fellow of APA's Div. 12 (Society of Clinical



Lawlis

Psychology) and Div. 38 (Health), has been named supervisory psychologist of American Mensa in July. He replaces Abbie F. Salny, EdD.

Lawlis will be responsible for ensuring the integrity of American Mensa's testing program and evaluating new tests that determine admission to the organization.

Lawlis is a research professor at the department of rehabilitation, social



Dr. Debra Dunivin's new rank was pinned on by Sen. Daniel Inouye (left) and her husband Russ Newman, PhD, JD, APA's executive director for practice (right).

JUDY TAYLOR

Debra Dunivin, PhD, was promoted in July from the rank of Major to Lieutenant Colonel in the U.S. Army. The ceremony took place in the office of Sen. Daniel K. Inouye (D-Hawaii), where Dunivin worked as a Congressional Science Fellow from 1992 to 1994, prior to entering the Army when she was recruited to participate in the Psychopharmacology Demonstration Project.

Dunivin is currently serving

as deputy director of the department of psychology and director of training for the Clinical Psychology Residency Program at Walter Reed Army Medical Center in Washington, D.C. Other duties include a clinical practice in psychopharmacology and consultation to Walter Reed's Clinical Breast Care Project, conducting research in psycho-oncology and telehealth.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	Status Conference
	:	May 8, 2019, 2:00 PM
Defendants	:	Courtroom 317
	:	

**AFFADAVIT OF BONNY J. FORREST, ESQ. IN SUPPORT OF PLAINTIFFS’
MEMORANDUM IN OPPOSITION TO APA’S FIRST MOTION TO COMPEL
ARBITRATION IN RELATION TO THE ORIGINAL COMPLAINT**

State of California)
) ss:
County of San Diego)

1. I, Bonny J. Forrest, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I am the attorney for Plaintiffs Banks, Dunivin, James, and Newman in this action. I am duly admitted to practice law in the States of California and New York and admitted *pro hac vice* in this matter.
3. In November 2015, prior to initiating any litigation, I met with then-counsel for the American Psychological Association (hereinafter “APA”), WilmerHale, and requested that we engage in arbitration to resolve the matters now in dispute in this litigation. Consistent with that offer, I proposed the Honorable Patricia Wald (now deceased but who was alive and practicing at that time) as an arbitrator. Plaintiffs also publicly called for an arbitration process and posted that request widely on social media. Attached hereto as Exhibit 1 is a true and correct copy of the Plaintiffs’ public call for a neutral third-party which can also be found online at: <https://tinyurl.com/ydejhjpc>.
4. In addition, the leadership of APA Division 19 (Society of Military Psychology), former chairs of the APA Ethics Committee, and other members of APA called publicly for a neutral third-party arbitrator. (Harvey Affidavit (Exhibit C), Kinscherff Affidavit (Exhibit D), Williams Affidavit (Exhibit E)).

5. Both the APA Board of Directors and the Council of Representatives discussed these requests for a third-party arbitrator and rejected the requests in favor of re-hiring David Hoffman to do a self-review of his work. (Anton Affidavit (Exhibit F) and James Affidavit (Exhibit G)).

6. A press release announcing Hoffman's rehiring on April 15, 2016, is still available on the APA website at: <https://www.apa.org/news/press/releases/2016/04/independent-review>.

7. In June of 2016 and prior to initiating any litigation, Plaintiffs entered into separate tolling agreements with Sidley and APA. Those agreements were subsequently amended in July, October, December, and January.

8. In exchange for the APA tolling agreement, Plaintiffs expressly gave up their right to sue two individual APA Board members and toll the statute of limitations on behalf of Dr. Behnke for all claims. (See Exhibit 2)

9. In each of the first three of four amendments to the Plaintiffs' tolling agreements with APA and Sidley, Plaintiffs agreed that they would give written notice of their "intent to sue" on a specified date, and that they would not file a "lawsuit" before a date certain. These provisions were specifically requested by the Defendants. (See Exhibit 2, Amendments ¶1)

10. Pursuant to the tolling agreements, the Plaintiffs provided notice of their intent to sue, first on October 18, 2016 and, following an extension of the tolling agreement by amendment, again on December 7, 2016, and January 11, 2017. (See Exhibit 3 for representative examples) For eleven months, APA took no steps to assert a right to arbitrate.

11. In March 2017, after Plaintiffs had filed their lawsuit, APA and Sidley first alluded vaguely in emails to arbitration. During the last week of March, Plaintiffs' counsel asked APA no fewer than three times for information about that assertion and requested copies of the relevant agreements. Sidley's counsel was a party to those emails. Defendants did not respond to Plaintiffs' counsel's requests.

12. After Plaintiffs filed suit in Ohio, APA did not move to compel arbitration but instead filed a motion to stay discovery on March 27, 2017, and two additional motions on April 7, 2017, one under the D.C. anti-SLAPP statute and another to dismiss the suit based on lack of personal jurisdiction.

13. On April 7, 2017, Sidley also filed a special motion to dismiss based on the D.C. anti-SLAPP statute and a motion to dismiss based on lack of personal jurisdiction.

14. In Sidley's reply to Plaintiffs' Opposition to Sidley's motion to dismiss based on lack of personal jurisdiction Sidley specifically advised the Ohio court that the action should be dismissed so it could be *refiled* in D.C. (Sidley Reply, pp. 15;17). (Exhibit 4)

15. It was not until May 30, 2017, that APA first moved to compel arbitration. By then, APA and Sidley had filed their jurisdictional motions and anti-SLAPP motions without any assertion of a right to arbitration. Sidley never filed a motion for arbitration in Ohio.

16. On multiple occasions during the litigation in Ohio, Defendant Sidley argued that the Ohio Court did not have personal jurisdiction, Plaintiffs could refile in the District of Columbia which had "substantial interest" in the litigation, was a more convenient forum, and was the "superior" forum. Additionally, both Defendants asserted that Plaintiffs would be able to "litigate" their claims in the District of Columbia. (Exhibit 4)

I declare under penalty of perjury that the foregoing is true and correct.

Bonny J. Forrest
Bonny J. Forrest

Sworn and subscribed to before a notary public in the State of California, this _____
day of March 2019.

Notary Public

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA COUNTY OF San Diego
Subscribed and sworn to (or affirmed) before me on this 6 day of March,
2019 by Bonny J. Forrest

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Roxana Villagrana Escogido
(Signature of Notary)



**Hoffman's Key Conclusion
Demonstrably False:
The Omission of Key Documents
and Facts Distorts the Truth**

Colonel (Ret.) L. Morgan Banks
Colonel (Ret.) Debra L. Dunivin
Colonel (Ret.) Larry C. James
Dr. Russ Newman

October 2015

Conclusion

Mr. Hoffman asserts that he set out to “follow the evidence” wherever it led him. If that was indeed his aim, he failed. He omits key evidence, misstates facts, makes assertions backed by no evidence, and draws conclusions about intent and motives that are based on his own inferences rather than facts. Far from conducting an objective review, he has created a brief to support the charges leveled by those who attacked us and, more generally, attacked the role of psychologists in military interrogations. His bias has done untold damage to individual reputations and careers, and to the profession.

That damage has been compounded by the APA’s wholly uncritical acceptance of the report, its refusal to give those attacked a meaningful opportunity to respond, and its lack of any due process before taking actions on the basis of the report. We urge those of you concerned about our profession to press the APA to review the Hoffman report with the rigor we would hope all psychologists would apply to any document, much less one with such drastic consequences.

Most importantly, given that so many questions remain, a fair process is necessary to review the report, hear both sides, and separate fact from fiction. This process should not involve those in the APA governance structure or those who by word or action have already taken sides. Rather, it should involve a truly neutral third party such as a respected former judge without political leanings.

Please join us in requesting that the APA Board meet with those individuals most deeply affected by the report, along with their legal counsel, in order to work out a mutually acceptable process for moving forward to achieve a fair resolution. (We have supplied the Board members’ email addresses and the text of a suggested email to them in a separate cover letter to this document.)

We are in the process of drafting a more complete reply and will publish that as soon as possible.⁵⁰ In the meantime, we suggest that anyone who wants to read more about these issues can begin with the government investigations into detainee abuse set forth above, none of which support Mr. Hoffman’s version of the truth. In particular, the Senate Armed Services Committee and Church Reports provide an excellent context in which to view Mr. Hoffman’s factual inaccuracies.⁵¹

For ease of reference, we have attached and highlighted the relevant portions of documents that we have referenced. Here we also provide links to the full text of those documents where appropriate.

⁵⁰ That reply will also list the many documents that appear in duplicate in Mr. Hoffman’s binders, or lengthy documents that were unnecessarily included. We believe that, once those documents are stripped out, the relevant time periods made clear, and the CIA references deleted, Mr. Hoffman’s report rests on very thin support.

⁵¹ [Condensed Public Broadcasting Timeline of selected reports](#); [Senate Armed Service Committee Report](#); [Church Report](#).

TOLLING AGREEMENT

This Tolling Agreement (the "Tolling Agreement") is entered into by and between Colonel (Ret.) L. Morgan Banks, Colonel (Ret.) Debra L. Dunivin, Colonel (Ret.) Larry C. James, Dr. Russ Newman, and Dr. Stephen Behnke (collectively, "Claimants") and the American Psychological Association ("APA") as of June 26, 2016 (the "Effective Date"). Claimants and APA each are referred to herein as a "Party," and Claimants and APA collectively are referred to as "Parties."

WHEREAS, Claimants contend that they have potential claims as a result of the Report to the Special Committee of the Board of Directors of APA (the "Report"), which had been submitted to APA by Sidley Austin LLP on June 27, 2015;

WHEREAS, APA denies that it has any fault or liability for any potential legal claims asserted by Claimants;

WHEREAS, the Parties wish to preserve the *status quo* as of the Effective Date with respect to any applicable presently existing statutes of limitations, statutes of repose, and similar limitations periods, and any other defenses relating to the passage of time, including waiver, laches, estoppel, and late notice, and have agreed to execute this Tolling Agreement; and

WHEREAS, the Parties agree that the purpose of this Tolling Agreement is to afford Claimants an opportunity to present and APA an opportunity to hear the nature, substance, and merit of Claimants' potential claims and for APA to better understand the same;

NOW, THEREFORE, it is mutually agreed between the Parties that:

1. All causes of action, claims, and remedies that the Parties may have against each other based upon, relating to, arising out of, concerning, or involving the Report are hereby tolled and suspended as of the Effective Date (the "Tolled Claims"). The tolling and suspension of the applicable statute of limitations for the Tolled Claims shall continue until the Termination Date, as provided in Paragraph 5 below (the "Tolling Period").

2. The Parties hereby waive any applicable existing statutes of limitations, statutes of repose, tolling, and similar limitations periods, or other time deadlines and defenses relating to the passage of time relating to the Tolled Claims for the period of time from the Effective Date to the Termination Date, such that the Tolled Claims and defenses remain viable throughout the Tolling Period, except to the extent that such Tolled Claims or defenses are already barred as of the Effective Date. Each Party also expressly stipulates that it will not include any part of the Tolling Period in its calculations if it asserts that the Tolled Claims or defenses are barred, in whole or in part, by laches, waiver, estoppel, or by the expiration of any applicable limitations period or by other time-related defenses. During the Tolling Period, the Parties agree that the time to commence any and all claims, actions, or causes of action it may hold against each other, is tolled.

3. In exchange for and in consideration of the promises, covenants, and agreements set forth herein, Claimants hereby release any current or former officers and directors of APA from any and all manner of claims, demands, causes of action, obligations, damages, or liabilities whatsoever of every kind and nature, at law or in equity, known or unknown, and whether or not discoverable, which Claimants have, had, or may have against such current or former officers and directors in any way relating to the Report authored by Sidley Austin LLP, including, but not limited to the facts and circumstances discussed in the Report, and statements, personnel considerations, policy actions, or any other conduct in connection with the commissioning, drafting, receipt, distribution, publication, and response to any and all issues associated with the Report. Claimants irrevocably represent, warrant, covenant and agree not to, individually or collectively, bring, maintain, or otherwise institute any action against any current or former officers and directors of APA in any way relating to the Report. Nothing in this paragraph shall be construed as a release by Claimants of the Tolloed Claims against APA as an organization. APA agrees not to rely on this paragraph to assert a defense or bar to any Tolloed Claim brought against APA as an organization arising out of the actions, conduct, or inaction of any current or former officers or directors relating to the Report.

4. Nothing in this Tolling Agreement shall constitute or be construed as an admission by either Party or evidence that any claim could properly be asserted against it by the other Party, or that any such claim would have any basis in law or in fact. Except as expressly provided in this Tolling Agreement with respect to time-based defenses, this Tolling Agreement is not intended to and shall not have any effect upon any defense that either Party may assert to any claim brought by the other Party. Nothing in this Tolling Agreement shall constitute or be construed as an admission by either Party regarding whether or when any statute of limitations, laches, or other time-based defense has or has not begun to run on any potential claim or whether or not any potential claim is or is not already barred, impaired or limited by the passage of time. Nothing in this Tolling Agreement shall revive any claim, action suit, demand or cross-demand, or defense that is or would be barred as of the Effective Date, and nothing herein shall waive any claims or defenses any Party hereto may have as of such date.

5. The Tolling Period shall continue for a period of 29 days from the Effective Date, or until and including July 25, 2016 ("Termination Date"). No later than July 15, 2016, representatives of the Parties will confer in good faith to exchange their respective views whether it would be best to terminate or continue any discussions among them or any of them. The Parties agree that the provisions in Paragraph 3 shall survive termination of this Tolling Agreement and shall remain binding on Claimants.

6. During the Tolling Period, all Parties agree to preserve documents, records, and other potential evidence within their possession, custody, or control, relating to the Tolloed Claims and defenses.

7. All Parties agree that any discussions among them or any of them during the Tolling Period shall be covered by Federal Rule of Evidence 408, which states that any conduct

or statements made during such discussions shall not be admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or impeach by a prior inconsistent statement or contradiction.

8. This Tolling Agreement shall not be modified except by a writing signed by the Parties. No waiver of any of the promises, obligations, terms, or conditions herein shall be valid unless it is written and signed by the Party against whom the waiver is sought to be enforced.

9. Neither the execution of this Tolling Agreement nor anything contained herein is intended to be, nor shall be deemed to be, an admission of any liability or an admission of the existence of facts upon which liability could be based.

10. The Parties agree that this Tolling Agreement may be published to APA's Council of Representatives after execution.

11. This Tolling Agreement constitutes the single and entire agreement between the Parties with respect to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by either Party except as specifically set forth herein. All prior disclosures, negotiations, and agreements are merged and integrated into and superseded by this Tolling Agreement.

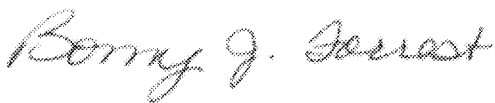
12. This Tolling Agreement shall be construed as if both Parties jointly prepared it and any uncertainty or ambiguity shall not be interpreted against either Party.

13. Claimants and APA represent, warrant, and state that (a) all legal actions necessary for the effectuation and execution of this Tolling Agreement have been validly taken; (b) this Tolling Agreement constitutes the legal, valid, and binding obligation of such Party, enforceable against such Party in accordance with its terms; and (c) counsel whose signatures appear below on behalf of each Party are duly authorized to execute this Tolling Agreement.

14. This Tolling Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one agreement.

ACCEPTED AND AGREED:

**For Claimants Col. (Ret.) L. Morgan Banks, Col. (Ret.) Debra L. Dunivin, Col. (Ret.)
Larry C. James, and Dr. Russ Newman**

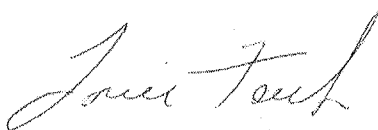


Bonny J. Forrest

06/26/16

Date

For Claimant Dr. Stephen Behnke



Louis J. Freeh

06/26/16

Date

For the American Psychological Association



David W. Ogden, Partner
Wilmer, Cutler, Pickering, Hale
and Dorr LLP

6/27/16
Date

AMENDMENT TO TOLLING AGREEMENT

Colonel (Ret.) L. Morgan Banks, Colonel (Ret.) Debra L. Dunivin, Colonel (Ret.) Larry C. James, Dr. Russ Newman, and Dr. Stephen Behnke (collectively, the "Claimants") and Sidley Austin LLP and David H. Hoffman (collectively, "Sidley") entered into a Tolling Agreement (the "Tolling Agreement" or the "Agreement") with an Effective Date of June 24, 2016. Claimants and Sidley are each referred to as a "Party," i.e., all five Claimants are deemed to be a single "Party," Sidley and Hoffman are deemed to be a single "Party," and Claimants and Sidley are collectively referred to as "Parties."

1. The Parties hereby agree to extend the Tolling Agreement by amending Paragraph 4 of the Agreement to change the Termination Date from July 25, 2016 to October 28, 2016 and to add the following sentence: Prior to filing any lawsuit against Sidley Austin LLP or David Hoffman, Claimants shall give written notice to Sidley of their intent to sue on October 18, 2016 and shall not file a lawsuit before October 25, 2016.

2. This Amendment to the Tolling Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one agreement.

ACCEPTED AND AGREED:

For Claimants Col. (Ret.) L. Morgan Banks, Col. (Ret.) Debra L. Dunivin, Col. (Ret.) Larry C. James, and Dr. Russ Newman

Bonny J. Forrest

Date

For Claimant Dr. Stephen Behnke

Louis J. Freeh

Date

For Sidley Austin LLP and David H. Hoffman

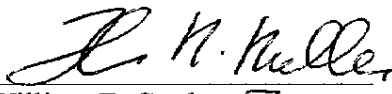

~~William F. Conlon~~ *Theodore N. Miller* 07/21/16 Date
~~Senior Counsel and Deputy General Counsel~~

Exhibit 3

Bonny J. Forrest, JD, Ph.D.
555 Front Street, Suite 1403
San Diego, CA 92101
917-687-0271

VIA ELECTRONIC DELIVERY

David W. Ogden, Esq.
Jeannie Rhee, Esq.
Jessica Leinwand, Esq.
WilmerHale
1875 Pennsylvania Ave NW
Washington, DC 20006

December 7, 2016

Re: Second Notice of Intent to Sue

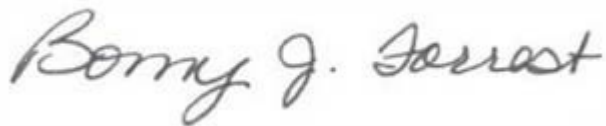
Dear David, Jeannie and Jessica,

This email is sent on behalf of all Claimants (Banks, Behnke, Dunivin, James, and Newman) pursuant to our tolling agreement and extensions with the American Psychological Association (APA) and constitutes notice of our intention to file a lawsuit against the APA.

Pursuant to that agreement, we will be filing our lawsuit between December 12, 2016, and December 15, 2016.

We remain open to a substantive discussion of a settlement.

Sincerely,

A handwritten signature in cursive script that reads "Bonny J. Forrest".

Bonny J. Forrest

cc: Louis J. Freeh, Esq.

Bonny J. Forrest, JD, Ph.D.
555 Front Street, Suite 1403
San Diego, CA 92101

VIA ELECTRONIC DELIVERY

David W. Ogden, Esq.
WilmerHale
1875 Pennsylvania Ave NW
Washington, DC 20006

October 18, 2016

Re: Notice of Intent to Sue

Dear David,

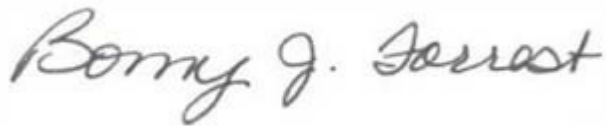
This email is sent on behalf of all Claimants (Banks, Dunivin, James, Newman and Behnke) pursuant to our tolling agreement and extension with the American Psychological Association (APA) and constitutes notice of our intention to file a lawsuit against the APA.

Pursuant to that agreement, we will be filing our lawsuit between October 25, 2016, and October 28, 2016.

Over the past year, we have offered you several options for statements and monetary settlements. Your failure to provide any substantive response to those offers has left us no alternative other than to seek resolution in the courts.

We remain open to a substantive discussion of a settlement.

Sincerely,

A handwritten signature in dark ink that reads "Bonny J. Forrest". The signature is written in a cursive, flowing style.

Bonny J. Forrest

cc: Louis J. Freeh, Esq.

Bonny J. Forrest, JD, Ph.D.
555 Front Street, Suite 1403
San Diego, CA 92101
917-687-0271

VIA ELECTRONIC DELIVERY

William F. Conlon, Esq.
Theodore N. Miller, Esq.

Sidley Austin LLP

One South Dearborn
Chicago, IL 60603

555 West Fifth Street
Los Angeles, CA 90013

December 7, 2016

Re: Notice of Intent to Sue

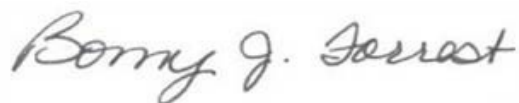
Dear Bill and Ted,

This email is sent on behalf of all Claimants (Banks, Behnke, Dunivin, James, and Newman) pursuant to our tolling agreement and extensions with Sidley Austin LLP and David Hoffman. It constitutes notice of our intention to file a lawsuit against you.

Pursuant to that agreement, we will be filing our lawsuit between December 12, 2016, and December 15, 2016.

We remain open to a substantive discussion of a settlement.

Sincerely,

A handwritten signature in dark ink that reads "Bonny J. Forrest". The signature is written in a cursive, flowing style.

Bonny J. Forrest

cc: Louis J. Freeh, Esq.

Exhibit 4

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

LARRY C. JAMES, <i>et al.</i>,	:	CASE NO. 2017 CV 00839
Plaintiffs,	:	Judge Timothy N. O’Connell
vs.	:	DEFENDANTS SIDLEY AUSTIN
DAVID HOFFMAN, <i>et al.</i>,	:	LLP AND DAVID HOFFMAN’S
Defendants.	:	REPLY IN SUPPORT OF THEIR
	:	MOTION TO DISMISS FOR
	:	LACK OF PERSONAL
	:	JURISDICTION OR FORUM NON
	:	CONVENIENS
	:	<u>ORAL ARGUMENT REQUESTED</u>

Plaintiffs could sue all three Defendants, that would not matter for personal jurisdiction, which is a constitutional doctrine that “limits [] the State’s adjudicative authority principally [to] protect the liberty of nonresident defendant[s] – not [for] the convenience of plaintiffs or third parties.” *Walden*, 134 S. Ct. at 1122. It therefore necessarily trumps the joinder-friendly statutes and rules referenced by Plaintiffs.

III. If the Court Finds Personal Jurisdiction, It Should Still Dismiss Under the Doctrine of Forum Non Conveniens.

As Sidley and Hoffman explained in their opening brief, “the Second District and other Ohio appellate courts have affirmed dismissals under [forum non conveniens] where an alternative forum presents a more convenient option and Ohio’s only connection to the controversy is that a party, or even all the parties, live here.” Sidley Br. at 13 (citing *Mitrovich v. Hammer*, 8th Dist. Cuyahoga No. 86211 & 86236, 2005-Ohio-5451, ¶ 2; *Watson v. Driver Mgmt., Inc.*, 97 Ohio App. 3d 509, 514 (2d Dist. 1994)). Plaintiffs make no effort to distinguish these cases. The Court should therefore dismiss for forum non conveniens if it finds personal jurisdiction, allowing Plaintiffs to refile in the District of Columbia.

Rather than contend with *Mitrovich* and *Watson*, Plaintiffs repeatedly assert that their choice of forum is entitled to deference. Pls.’ Br. at 41-42 (citing *Chambers v. Merrell-Dow Pharm., Inc.*, 35 Ohio St. 3d 123, 125-27 (1988)). But they do not mention that out-of-state plaintiffs, like four of the five here, deserve far less deference, *Chambers*, 35 Ohio St. at 127 (“[A] foreign plaintiff’s choice deserves less deference.”), or that even the deference owed to an in-state plaintiff like James is far from absolute. *Watson*, 97 Ohio App. 3d at 514 (affirming dismissal under forum non conveniens of Ohio-resident’s claims). Plaintiffs’ arguments on the public and private factors that bear on forum non conveniens are equally unconvincing.

claims. Moreover, given that the lawsuit concerns Department of Defense interrogation policies and the Department's collaboration with APA, the District of Columbia, which is home to both organizations, has a far more substantial interest in this litigation than Ohio. Plaintiffs' other point is an attack on Defendants' choice-of-law analysis in their anti-SLAPP motion. Plaintiffs' assertion that the District of Columbia's anti-SLAPP statute is merely procedural is baseless. Case law and legislative history make clear the District of Columbia intended the statute to enact forceful, substantive safeguards for free speech. Sidley Special Mot. at 11-12. The applicability of the District of Columbia's anti-SLAPP law weighs in favor of the District of Columbia as a more convenient forum.

C. Plaintiffs' Other Arguments Do Not Support Ohio.

Plaintiffs make two additional arguments, both run counter to the facts. First, there is nothing to Plaintiffs' claim that, if the case is dismissed, they will have no alternative forum because their claims will be time barred. Pls.' Br. at 41-42. Plaintiffs have failed to argue, let alone establish, that tolling would not apply under these circumstances. Even if tolling would not preserve Plaintiffs' claims, Sidley and Hoffman will not assert a statute of limitations defense if the Court dismisses the case and Plaintiffs re-file the claims alleged in their Complaint in Washington, D.C. within 60 days of this Court's order of dismissal.

Second, Plaintiffs complain about the expense and difficulty of hiring local counsel in Washington, D.C., Pls.' Br. at 41, even though Plaintiff Stephen Behnke's lawyer is based in the District of Columbia and two of the three lawyers on Plaintiffs' brief were admitted in Ohio *pro hac vice*. There is no reason to believe that Plaintiffs' counsel would have a harder time litigating this case in Washington, D.C., than in Ohio.

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

LARRY C. JAMES, et al., CASE NO. 2017-CV-839

Plaintiffs,

-vs-

TRANSCRIPT OF PROCEEDINGS
(MOTION HEARING)

DAVID HOFFMAN, et al.,

(Pages 1 - 93)

Defendants.

PRESIDING: Hon. Timothy N. O'Connell

APPEARANCES: ON BEHALF OF THE PLAINTIFFS

Bonny Forrest, Esq.

555 Front Street

San Diego, CA 92101

Gerhardt A. Gosnell, II, Esq.

James E. Arnold & Associates, LPA

115 West Main Street, 4th Floor

Columbus, OH 43215

ON BEHALF OF THE DEFENDANTSDAVE HOFFMAN AND SIDLEY AUSTIN, LLP

Thomas Hentoff, Esq.

Williams & Connolly LLP

725 Twelfth Street, N.W.

Washington, DC 20005

D. Jeffrey Ireland, Esq.

Erin E. Rinehart, Esq.

Christopher C. Hollon, Esq.

Faruki, Ireland, Cox, Rhinehart & Dusing

110 N. Main Street, Suite 1600

Dayton, OH 45402



1 State of Ohio are sufficient to satisfy the due process clause
2 of the U.S. Constitution, such as the State of Ohio, can
3 constitutionally exercise personal jurisdiction over these
4 Defendants.

5 So in my argument this morning, I would like to cover
6 three topics. The first is there's no general personal
7 jurisdiction over Sidley or David Hoffman in Ohio. Second, and
8 Your Honor, if you'd like me to slow down at any point, I'll do
9 that. Or speed up.

10 THE COURT: It's okay.

11 MR. HENTOFF: Second, there's no specific personal
12 jurisdiction over Sidley or Mr. Hoffman arising from their
13 contacts with the State of Ohio in connection with their
14 investigation and report.

15 Third and finally, under the doctrine of forum non-
16 conveniens, this case in any event should be dismissed so that
17 it can be refiled in the Superior forum, which is the District
18 of Columbia, which means that if the Court were to dismiss on
19 that basis, the case would not end. Plaintiffs would have an
20 avenue to assert their claims. It would be in Washington, DC.

21 A final bit of housekeeping is our motion does not
22 challenge jurisdiction under Ohio's long-arm statute. So I'm
23 not going to address that.

24 So with regard to -- I'm sorry, general jurisdiction, the
25 Supreme Court has made very clear in a series of cases in the



IN THE SUPREME COURT OF OHIO

LARRY C. JAMES, <i>et al.</i> ,	:	CASE NO. 2018-1086
	:	
Appellants,	:	On Appeal from the Montgomery
	:	County Court of Appeals, Second
vs.	:	Appellate District
	:	
DAVID HOFFMAN, <i>et al.</i> ,	:	Court of Appeals
	:	Case No. CA 027735
Appellees.	:	

**JOINT MEMORANDUM OF APPELLEES SIDLEY AUSTIN LLP, DAVID
HOFFMAN, AND AMERICAN PSYCHOLOGICAL ASSOCIATION
IN OPPOSITION TO MEMORANDUM OF APPELLANTS
LARRY C. JAMES, L. MORGAN BANKS III, DEBRA L. DUNIVIN, RUSSELL
NEWMAN, AND STEPHEN BEHNKE IN SUPPORT OF JURISDICTION**

Quite simply, in *Kauffman*, this Court addressed what constitutes purposeful availment by out-of-state defendants making allegedly defamatory statements that reach Ohio residents, and the trial and appellate courts below followed that well settled law in this case. Appellants' desire to re-litigate the same arguments they previously made to the lower courts is not a proper basis on which the Court may accept jurisdiction over their appeal.⁶

III. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

A. There is No Public or Great General Interest in this Case; nor Does this Case Involve a Substantial Constitutional Question

This Court is one of limited jurisdiction. This appeal is not a matter of right; therefore, Appellants must demonstrate either that a "substantial constitutional question" is presented or that the case is "of public or great general interest." Ohio Constitution Article IV, Section 2(B)(2)(e). *Accord*: S.Ct.Prac.R. 7.02(A), (C). Even if Appellants could meet this high bar, the Ohio Constitution gives this Court discretion in deciding whether to accept jurisdiction to hear the appeal. Ohio Constitution Article IV, Section 2(B)(2)(e) (providing that the Court "may review and affirm, modify, or reverse the judgment of the court of appeals") (emphasis added). This Court does not review lower court decisions merely to correct purported errors, but to decide cases presenting issues of importance *beyond* the particular facts and parties involved below. S.Ct.Prac.R. 7.02(C)(2) (requiring appellants to provide "[a] *thorough* explanation of why

⁶ Nor are Appellants at risk of being denied a forum where the merits of their claims can be litigated. After the trial court granted Appellees' motions to dismiss, Appellants voluntarily chose to file in the Superior Court for the District of Columbia a complaint that is substantively identical to the complaint filed in Ohio against the same Defendants. *Behnke, et al. v. Hoffman, et al.*, Case No. 2017 CA 005989 B, Superior Court for the District of Columbia. Defendants have not argued that the D.C. court lacks personal jurisdiction. On June 25, 2018, Appellants filed a third, substantively identical complaint in Massachusetts. *Behnke, et al. v. Soldz, et al.*, Case No. 1884CV01968, Suffolk Cty. Superior Court, Massachusetts. The Washington, D.C. case is stayed pending resolution of this case; a motion to stay the Massachusetts case is pending. Given the personal jurisdiction of the District of Columbia court over Appellees, there was no need for Appellants to seek relief from this Court, or the court in Massachusetts. Memo., p. 14.

Exhibit C

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	
	:	

**AFFIDAVIT OF SALLY HARVEY IN SUPPORT OF PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL
MANDATORY ARBITRATION**

State of Texas)
) ss:
County of Comal)

1. I, Sally Harvey, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. From January to December 2017, I was President of the Society of Military Psychology, Division 19 of the American Psychological Association (hereinafter "APA") in which the military plaintiffs in this litigation are members. As President-elect, I chaired the Division 19 Presidential Task Force charged with the careful examination of the Report of the Independent Review to APA (hereinafter "Report") and, in that role, provided a detailed response to the APA in November 2015. A true and correct copy of the Division 19 task force response can be found published by the APA online at https://www.militarypsych.org/uploads/8/5/4/5/85456500/tf19_response_to_the_hoffman_report_div19_excom_approved.pdf.
3. Our response found, among other things, no evidence that Division 19 or any Division 19 member supported torture or engaged in unethical behaviors with respect to interrogation support. It also found that many of those interviewed by Mr. Hoffman and Sidley felt their witness statements were mischaracterized and that Mr. Hoffman and Sidley had evidence in their possession that contradicted and negated their conclusions but failed to include that evidence in the Report.

4. In addition to submitting the report to the APA, the then-President of Division 19, Dr. Tom Williams, requested a response to a number of questions raised and recommendations made by the task force report. To date, despite multiple requests, Division 19 has yet to receive a response from the APA.

5. Among the specific requests made by the task force response to the APA was:

That a neutral party with the requisite competence and experience conduct a thorough, neutral review of the Hoffman Report in its entirety to include its methodology, given the report's demonstrated bias and known inaccuracies, with a response to this request for action received prior to 15 December 2015. (p. 6)

6. Similarly, in a letter to the APA dated November 6, 2015, Dr. Williams also made the following request:

Given that Hoffman acknowledges in the IR [Independent Review] that neither he nor members of his team understood the profession of psychology, in light of the inaccuracies and misrepresentations identified by the D19 TF report, appoint a knowledgeable, neutral third party to complete a thorough review of the IR and report back to the BOD [Board of Directors] their findings.

Attached hereto as Exhibit 1 is a true and correct copy of that letter which can also be found published by the Society of Military Psychology/Division 19 at: https://www.militarypsych.org/uploads/8/5/4/5/85456500/division_19_letter_to_apa_bod_d19_task_force_report_9nov15_1.pdf.

7. These requests were based on the task force's expectation that a third party arbiter with the requisite authority could work to resolve differences by determining where the Hoffman Report drew correct conclusions founded on accurate facts and where it did not. Numerous follow-up letters from the Division leadership to the APA Board of Directors proposing a meeting to discuss this and other recommendations of the task force report have been unsuccessful.

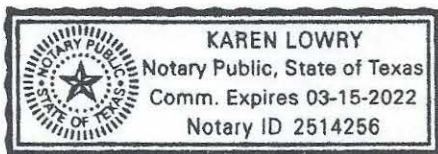
8. On April 15, 2016, the APA Board of Directors issued a communication following the re-hiring of Mr. Hoffman and Sidley which expressly rejected our request to hire a new independent neutral third-party to decide the issues (or to resolve the issues on their own as a fact-finder). Attached hereto as Exhibit 2 is a true and correct copy of that communication which can also be found published by the PsychCoalition online at: <http://psychcoalition.org/hoffman-report-articles/apa-board-of-directors-re-hires-david-hoffman-to-evaluate-and-validate-his-own-report>.

9. In the above communication, the APA President, on behalf of the Board, stated that the supplemental Report by Hoffman and Sidley was to be delivered by June 8, 2016. To date, no supplemental Report has ever been received by the APA membership.

I declare under penalty of perjury that the foregoing is true and correct.

Sally Harvey
Sally Harvey

Sworn and subscribed to before a notary public in the State of Texas, this 27 day
of December 2018.



Karen Lowry
Notary Public

EXHIBIT 1



SOCIETY FOR MILITARY PSYCHOLOGY

Division 19 of the American Psychological Association



November 9, 2015

Board of Directors
American Psychological Association
750 First Street, NE
Washington, DC 20002

In the aftermath of the leaking of the Hoffman Independent Review (IR), you, the American Psychological Association's (APA) Board of Directors (BOD), expressed an apology and announced a series of policy and procedural steps in an APA press release dated July 10, 2015. As a consequence of the serious concerns about the accuracy and completeness of the information contained in the IR report, and in consideration of even greater concern about how that flawed information was now being used by the BOD to drive significant organizational change in APA policies and procedures of relevance to Division 19 members of APA, I requested support from the Division 19 Executive Committee to appoint a Division 19 Task Force (D19 TF) to complete a thorough and comprehensive review of those IR findings.

We provided the D19 TF with a "Terms of Reference" (see Appendix A of their attached report) that described their purpose, objectives, and outlined their responsibilities to carefully assess the accuracy of the information pertaining to military psychology and the guidance that helped direct their actions (e.g., APA PENS) that served as the basis for a number of BOD and Special Committee actions taken on behalf of APA and our members.

The Division 19 Task Force (D19 TF) report is forwarded for your consideration and action, as appropriate. The findings contained in this report are quite disturbing. Using information readily available that the Hoffman team should have considered, and by highlighting misquotes, misrepresentations, and contradictions within the IR, this D19 TF report raises serious questions about the accuracy and completeness of the information the BOD and Council of Representatives (COR) used to take actions that have dramatically impacted our membership and our profession.

They also raise important concerns about the accuracy of the information that was provided to, and acted on, by the Co-Chairs of the APA's Special Committee and in their representations and recommendations to the BOD, as appointed representatives of the BOD. This also raises concerns about the accuracy and fidelity of the information the BOD has used in their deliberations and that has prompted various actions (and that was provided to and served to influence both the Council of Representatives (COR) and our members). Given the historical significance and threat posed to the credibility of our profession, it is critical that you, the BOD, have accurate information upon which to act in good faith in support of our collective interests.

Our Division 19 Executive Committee (EXCOM) has reviewed and fully endorses the D19 TF findings and recommendations detailed in pages 5-9 of the attached D19 TF report. We greatly appreciate the efforts of our D19 TF to highlight and identify these important findings in three months and with a budget of \$5000. Our Division 19 leadership is committed to taking those actions recommended that are within our Division's scope of responsibility and control. However, we have identified a number of recommendations that are within the scope of responsibility and control of the APA BOD which are briefly summarized below:

1. That the BOD ensures the APA Ethics Code focuses on behavior, not settings.
2. Given that Hoffman acknowledges in the IR that neither he nor members of his team understood the profession of psychology, in light of the inaccuracies and misrepresentations identified by the D19 TF report, appoint a knowledgeable, neutral third party to complete thorough review of the IR and report back to the BOD their findings.
3. That the BOD provide an explanation for actions that have had a deleterious impact on Division 19 members. To wit;
 - a. The justification and basis the BOD relied on for not establishing processes to allow those Division 19 members most harmed by the alleged findings in the IR an opportunity to review it prior to its release.
 - b. What considerations and legal analysis the BOD relied upon to determine the impact of displacing the U.S. government determinations of compliance with "international law" with the United Nations.
 - c. The justification by BOD for recommendation to COR that they adopt the August 2015 resolution prohibiting psychologists' involvement in interrogation in the absence of any credible claim or evidence that any DoD psychologist engaged in unethical interrogation related activity in the decade following APA's adoption of the PENS report.
 - d. The BOD deliberation and justification for support to August 2015 resolution prohibiting military psychologists from working in detention facilities unless they are working *directly for the detainee* or "for an independent third party" since however unintended, this precludes actions by military psychologists since they work "directly for" DoD but provide mental health care "on behalf" the detainee.
 - e. The BOD justification to allow two non BOD members to have access to and to review the IR prior to its release, and for those individuals to dictate actions to the BOD members.
 - f. The BOD justification to take actions and/or support calls for recusal of BOD members in the absence of any conflict of interest.
 - g. The justification and process by which the BOD decided to allow information about an ethics complaint to get revealed to the public, in apparent violation of the APA Bylaws and Ethics Committees "Rules and Procedures."
 - h. The justification and basis for decision by members of the Special Committee, representing the BOD, to apologize to detainees and their families during the APA Town Hall (disregarding the negative allegations regarding military psychologists such an apology represented).
 - i. What steps the BOD took, consistent with exercising their fiduciary responsibility to monitor the costs associated with the IR.

- j. What justification the BOD has for allowing the Hoffman team to recently "revise" portions of the IR after its release without alerting and affording membership of this action to allow those named in the report a commensurate opportunity to "correct" errors in light of the concerns. Failing to do so creates an appearance of quietly cooperating with the Hoffman team to allow them to protect their legal interests (i.e., potential legal liability for inaccuracies or misrepresentations).
 - k. What actions the BOD will take to correct the Hoffman IR to ensure it accurately addresses DoD policies related to interrogation; conveys accurate information about how interrogations are conducted and supported; reflects military cultural awareness; and is free from bias against military psychology and military psychologists.
4. That the BOD take steps, in the interest of accountability and transparency, to release all material referenced in the Hoffman IR. While the legal opinion to not do so may protect the BOD members from legal liability for their actions, as the owner of that "privilege" and as representatives of those members alleging harm that is now hidden by that privilege, is not the same "duty" to open up "all its electronic and hard copy files" that was provided to the Hoffman team the same "duty" now owed to those who now allege they were harmed by those findings?
 5. That the BOD share the basis for its determination and assertion that military psychologists were "given insufficient guidance" regarding the conduct of interrogations in its 17 September 2015 response to Dr. Brian Baird.

Many will read these recommendations and requests for information and question, why? They may want to "just move on" since this has been such a painful episode for professional psychology. However, leaders of organizations cannot just wish problems away. As our leaders, as those who serve as the "persons of trust" (i.e., fiduciaries) of our organization, we look to you to exercise your moral and legal obligation for your duty of care that demands you carefully analyze and act on the facts, not just react to the fervor evoked from misinformation, innuendos, and misrepresentations contained in the IR.

The D19 TF findings offer you a more factually sound explanation and basis for many of the IR's findings related to the PENS report and to military psychologists and their support to interrogations that have prompted APA BOD and COR policy actions (and concerns within our membership). In light of those actions already taken, and out of concern for those being considered, the attached report provides you with compelling evidence that the IR information used as the basis for the decision-making process and that served as the basis for those and others being considered, was flawed and incomplete.

In addition, while many may be tempted to assert or argue that we all should be passive recipients of the information contained in the IR, that is not appropriate for our leadership. Taking that approach would deny the BOD the ability to exercise their responsibility to make decisions with the requisite care to act in good faith based on the facts (and not based on their personal interests out of fear for, and/or to avoid being attacked or accused of "collusion" if they raise any legitimate opposition to, or concerns about, the IR findings).

Previous calls to address the real and legitimate concerns about the accuracy of the findings in the IR should have alerted you to the need for due diligence and appropriate, deliberative action to address those concerns. A number of these concerns were detailed in the July 29th 2015 letter to the two Co-Chairs of APA's Special Committee and have never been addressed.

The attached D19 TF report will no doubt create a dilemma: it persuasively reveals the flawed nature of much of the relevant information contained in the IR about the PENS report and related to psychologists' support to interrogation, and the information that was used to act on by the BOD and COR. The dilemma is that while some members of APA may emphatically state, "it doesn't matter," since they are opposed to any support to interrogations, the BOD has a legal responsibility to take actions based on an informed basis, in good faith, and with the honest belief that their decisions and actions are based on facts, and not in response to inaccurate misinformation that is used to stir and evoke emotional recriminations about actions that did not happen.

The D19 TF report reinforces "our core values" and the need to ensure that actions taken by our BOD and COR are based on accurate and complete information. As those in whom we place our trust to act in good faith to represent our interests, we encourage your action on these recommendations to help ensure that our "way forward" is one that rests on a foundation of truth, honesty, and accuracy. Our Division leadership stands ready to assist the BOD in their next steps related to these D19 TF revelations.

Thomas J. Williams

Thomas J. Williams, Ph.D.
President
Division 19
Society for Military Psychology

EXHIBIT 2

Dear Council Colleagues:

We would like to inform you that the Board of Directors, after lengthy discussions following Council's input, has decided to re-engage David Hoffman and the law firm Sidley Austin on a very limited basis to examine certain matters brought to our attention by Division 19 (Society for Military Psychology) and several psychologists mentioned in the *Independent Review* (Drs. Morgan Banks, Debra Dunivin, Larry James, and Russ Newman). The Division and these psychologists issued reports raising questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings and conclusions of the *Independent Review* but do not appear to have been addressed. The Board determined that a supplemental review focused on the DoD policies cited in the reports best serves the Association and our members.¹

In deciding on this course of action, the Board seriously considered the concerns expressed by Council members at this past February meeting. We would like to share with you the rationale for the Board's decision.

Once information regarding these DoD policies was brought to the Board's attention, we considered four options for moving forward: 1) take no action; 2) review both reports and available historical data and, on our own, assess the implications of the DoD policies that have been identified; 3) re-engage Mr. Hoffman to examine the significance of the DoD policies at issue; or 4) hire a new independent investigator to do so.

Given the important, though narrow, questions to consider, and in the interest of getting answers in a timely and efficient manner, the Board determined that it would best serve the Association and our members to re-engage Mr. Hoffman in a limited fashion. He is uniquely suited to conduct a supplemental review of the DoD policies that have been recently identified and to evaluate their effect on the findings and conclusions reflected in the *Independent Review*.

His supplemental review will address only the following three questions:

- (1) the extent to which he considered the DoD policies at issue in writing his *Independent Review*;
- (2) the extent to which those DoD policies are relevant to the issues, findings, and/or conclusions addressed and reflected in the *Independent Review*; and
- (3) whether any modifications of the *Independent Review* are warranted in light of the DoD policies.

To be clear, the Board is not seeking an "investigation of the investigation." The intent of this supplemental review is to consider factual information that has recently come to light and which, in our view, requires further examination in the context of the *Independent Review*. The Board's

¹ Two Board members recused themselves and one abstained.

decision to re-engage Mr. Hoffman was driven by our fiduciary responsibility to the Association and our members to recognize and understand the role of the DoD policies in the independent review.

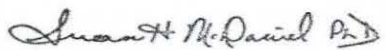
Mr. Hoffman shares APA's interest in ensuring that his *Independent Review* is accurate. He has already demonstrated his willingness to correct factual inaccuracies that are brought to his attention. As you will recall, Mr. Hoffman issued an Amended Final Report in September based on feedback he received from APA members mentioned in the *Independent Review*, as well as released an accompanying errata sheet noting his revisions.

The Board shares the Council's concern about the financial implications of this decision, and has taken a number of critical steps to manage the time and expense to be incurred. Because Mr. Hoffman will be reviewing a discrete set of issues, he expects to complete the review **by June 8**. He has agreed to update APA every two weeks on his progress. He has also agreed that if it appears that this deadline cannot be met, he will inform the Board no later than May 15 and will discuss with the Board the need for an extension and provide a date by which his report can be expected to be received.

Mr. Hoffman and the Board have agreed that the supplemental review should cost no more than \$200,000. He will report his progress to the Board midway through his work to ensure that the Board can properly oversee its scope and cost.

We thank Council for your input and hope that this letter adequately conveys the very careful deliberation that the Board underwent in deciding upon this course of action to address significant concerns raised by our members related to the *Independent Review*. The Board takes very seriously our fiduciary responsibility to our members and our Association to learn and assess the facts when presented with challenging situations and to act accordingly.

Best regards,



Susan H. McDaniel, Ph.D.
2016 President
American Psychological Association

Exhibit D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF ROBERT KINSCHERFF IN SUPPORT OF PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL
MANDATORY ARBITRATION

Commonwealth of Massachusetts)
) ss:
County of SUFFOLK)

1. I, Robert Kinscherff, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I am currently an Associate Vice President and Associate Professor in the Doctoral Clinical Psychology Program at William James College in Newton, Massachusetts. I have authored or co-authored sixty-five chapters, articles, and monographs, including a book on professional ethics in psychology published by the American Psychological Association (APA) and cited by Mr. Hoffman in the Report of the Independent Review to the APA (hereinafter "Report"). I have served in a number of roles in the APA including, as a member and two-term Chair of the Ethics Committee (1998-2001) and as a member and Chair of the Committee on Legal Issues (2002-2004). I have provided and continue to provide ethics training for the APA Continuing Education Program, including a dedicated day-long ethics workshop in the pre-convention offerings of the APA annual convention, a webinar ethics series, and day-long ethics workshops offered as APA webinars.
3. Following publication of the Report in July 2015, I and other former Chairs of the APA Ethics Committee became concerned with the growing number of allegations concerning the Report, the process by which the Report had been developed and the manner in which it had been released. As a group, we wrote and sent an open letter to the APA Board of Directors

(Board) on February 16, 2016 detailing these concerns. We also expressed concern that the Report's finding that the Ethics Committee or its members had acted improperly in ethics cases involving military psychologists reflected a significant misunderstanding or mischaracterization of Committee procedures.

Attached hereto as Exhibit A is a true and correct copy of that open letter which can also be found online at:

<http://www.hoffmanreportapa.com/resources/letter%20from%20former%20Ethics%20Committee%20chairs%202-16-16.pdf>.

In fact, on July 1, 2015, immediately prior to the release of the Report, we had written the Board to request an opportunity to review the Report to assure the accuracy of any characterizations of the operations and processes of the Ethics Committee or APA organizational processes regarding ethics issues more broadly. We received an acknowledgment that the Board had received the letter but we did not receive a substantive response to our request and were not given an opportunity to review the Report to ensure its accuracy regarding its description and characterization of the APA ethics program.

4. In light of the cumulative effect of the concerns about the Report, an important purpose of our February 2016 open letter to the Board was to request an independent assessment that would be a "transparent and thoughtful review of the Report itself."

5. On April 2, 2016, we received a response to our letter, in which APA clearly rejected our request for an independent third party to review the matter. In direct contrast to APA's current assertions that they are required to review through mandatory arbitration APA policies and practices relating to Drs. Behnke's and Newman's employment (see "Defendant American Psychological Association's Memorandum of Points and Authorities in Support of its Contested Motion to Compel Arbitration" filed in this lawsuit), the APA took the position in its response to us that at issue in the Report was solely Mr. Hoffman and Sidley's fact-findings, not APA's interpretation or factual findings related to any issues set forth in the Report. In fact, the Board's response expressly stated that the APA was "preclude[d]" from reviewing the findings of the Report:

[Y]our letter suggests the need to conduct a "transparent and thoughtful review" of Mr. Hoffman's Amended Final Report in light of recent substantive criticism....As you know, the Board of Directors commissioned the *Independent Review* in response to the public controversy surrounding psychologists' participation in military interrogations, including the portrayal of APA in James Risen's book, "Pay any Price: Greed, Power, and Endless War." Because the Association's objectivity and credibility on this issue had been repeatedly called into question—by the established media and by APA-member critics—the Board of Directors determined that a wholly independent review was necessary to appropriately assess APA's conduct. As the Board Resolution makes clear, APA personnel and governance members were not to play any fact-finding role in this independent investigation. The Board provided Mr. Hoffman broad and independent authority to review "all

available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to APA....In accordance with the Board Resolution, the Association relied on Mr. Hoffman's findings and accepted his conclusions after carefully reviewing the draft report—which totaled over 500 pages—and the key documents cited therein. Although the Board of Directors was briefed on Mr. Hoffman's investigative process and received updates on his progress during the course of the engagement, it has not undertaken an investigation of the investigation or sought to independently analyze each of Mr. Hoffman's findings to identify possible factual omissions or inaccuracies. Doing so would undermine the very purpose for which the *Independent Review* was commissioned—to preclude APA from assessing its own conduct.

Attached hereto as Exhibit B is a true and correct copy of the Board's letter which can also be found online at:

<http://psychcoalition.org/uploads/3/4/9/5/34959080/responsefromapaboardtopastheticscmtchairs04.02.16.pdf>.

6. On April 15, 2016, APA announced that it had rehired David Hoffman “to review and respond to questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings of the *Independent Review* the association released last year.” The announcement stated that “DoD policies and their potential relevance to the findings and conclusions of the *Independent Review* were raised in two reports submitted to APA by members of the association's Div. 19 (Society for Military Psychology) and several individual psychologists who were mentioned in Hoffman's original review.” The announcement also stated that the information “requires further examination in the context of the *Independent Review*” and that “The Board's decision to re-engage Mr. Hoffman was driven by our fiduciary responsibility to the association.” (A true and correct copy of that announcement published by the APA on its website is available at <https://www.apa.org/news/press/releases/2016/04/independent-review.aspx>.)

7. On May 15, 2016, in response to the APA Board re-hiring Mr. Hoffman to review his own work, and to follow up on our February 2016 letter, we wrote another open letter to the Board again calling for an independent assessment of the investigation conducted by Mr. Hoffman and the resulting Report. In the letter, we specifically addressed the Board's position that rehiring Mr. Hoffman to review his own Report “does not constitute a conflict of interest on his part or that of the Board.” Our letter stated:

Acknowledging serious missteps that would substantively challenge the investigation itself or the conclusions and recommendations it generated could have potentially grave professional and legal implications for both Mr. Hoffman and Sidley Austin. It cannot be simply assumed that Mr. Hoffman and Sidley Austin now share any interest on the part of the APA that the *Independent Review* is “fair and accurate.”

...it is naïve to not recognize the potential or real conflicts of interest arising from retaining Mr. Hoffman to assess his *Independent Review* in light of “factual information” which was reportedly readily available during the original investigation.

As past Ethics Chairs, we have previously called for an independent assessment of the investigation conducted by Attorney Hoffman and the subsequent *Independent Review* report. We again call for a timely initiation of this independent assessment as in the best interests of the Association.

Attached hereto as Exhibit C is a true and correct copy of that open letter which can also be found online at:

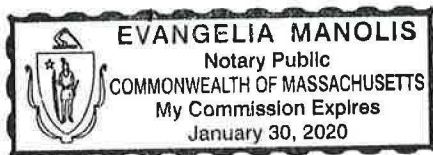
<http://www.hoffmanreportapa.com/resources/APA%20Second%20Letter%20Ethics%20Chairs.pdf>.

8. The Board responded to the letter by indicating that it did not perceive re-hiring Mr. Hoffman to investigate his own work as constituting a conflict of interest. Subsequently I engaged in a one-to-one email exchange with Dr. Susan McDaniel, APA President. In this exchange Dr. McDaniel stated that she personally did not view re-hiring Mr. Hoffman to investigate his own work as constituting a conflict of interest, and she made clear that the Board was not going to hire a third-party for the purpose of assessing Mr. Hoffman’s *Independent Review*.

I declare under penalty of perjury that the foregoing is true and correct.


Robert Kinscherff

Sworn and subscribed to before a notary public in the Commonwealth of Massachusetts,
this 30th day of November 2018.




Notary Public

Exhibit A

February 16, 2016

An Open Letter to the APA Board of Directors from Former Chairs of the APA Ethics Committee:

The report on the Independent Review conducted by Attorney Hoffman and his colleagues ("Hoffman Report") was released in July 2015. A group of former Chairs of the Ethics Committee had written the Board on July 1, 2015 before the Report was released requesting an opportunity to review the report prior to its public release. This request was intended to assure the accuracy of any characterizations of the operations and processes of the Ethics Committee itself or APA organizational processes regarding ethics issues more broadly, or in any other constructive fashion identified by the BOD of APA. We deeply respect the goals of our association and had hoped to offer constructive feedback. We never intended to advance any preconceived agenda or interfere with the independent review. Now that the Hoffman report has been made available for review, perhaps our feedback to APA would contribute to an informed and transparent process about how best to implement changes that reflect the best interests of our association and society. While the Board acknowledged receipt of the letter, we never received any substantive response and again request an opportunity to contribute.

This has been an extraordinarily difficult time for the Association. The APA has been deeply challenged at every level by the circumstances giving rise to retaining an independent investigator, the Report's release when it was prematurely "leaked" before persons named in the report had an opportunity to review and respond, and the still ongoing impact upon persons, the Association and our profession following its release. We collectively write as past Chairs of the Ethics Committee to support the Board's stated goal of a transparent search for the truth, identification of any core organizational problems giving rise to initiating the Report and responding to it, and opportunities for action to effectively address any identified problems.

This follow-up letter is even more relevant than the previous one when considering the cumulative effect of a number of allegations, reports and responses to the Report. This letter does not assume their accuracy but we

believe that taken together they warrant a transparent and thoughtful review of the Report itself and consideration of what such a review may mean for decisions by Association leadership as APA moves forward. These include:

- Substantive concerns raised about the processes and procedures relied upon by Attorney Hoffman and his colleagues during the course of the investigation;
- The process by which the Report was completed and prematurely “leaked,” including what steps the Association has taken to identify who improperly released the report;
- The process by which a decision was seemingly made following the premature release of the Report to set aside the previously articulated process by which persons named in the report would be individually contacted and provided an opportunity to submit comments or suggested revisions by an established deadline;
- Reports that a number of individuals interviewed during the course of the investigation—both psychologists and non-psychologists—have indicated that the information they provided was mischaracterized or that relevant information they provided was not included in the final Report;
- Reports that some individuals whose information and actions would have been relevant to the investigation were not interviewed (including some Chairs of the Ethics Committee whose terms were during the relevant time period);
- Concerns that the Report’s characterization of Ethics Committee actions involving military psychologists who had complaints filed against them reflected a significant misunderstanding or mischaracterization of Committee procedures in finding that the Committee or its members had acted improperly in those cases;
- Allegations that persons who had been influential in prompting the Association to retain an independent investigator were essentially given preferential access to Attorney Hoffman in a manner which could be viewed as introducing a risk of investigatory bias and later invited to meet with the Board prior to the Report’s release to discuss recommended courses of action;

- The implications of documents generated by individuals and groups subsequent to the release of the Report which, if substantially accurate, would sharply undercut the asserted factual basis for the conclusions of the Report and Mr. Hoffman's core "theory of the case" when he alleges active and improper "collusion" between some Association staff and members with some members of the military.

Other allegations or reports could be included but we believe that those cited above are sufficient grounds for asking the BOD to consider our feedback. Without assuming the accuracy of any one of them or predetermining their impact on decisions to be made going forward, some of them are of sufficient gravity that a good-faith and transparent effort should be made to examine the Report's methods and conclusions, and considering courses of action already taken or planned on the basis of the Report in light of what is learned in revisiting it.

Additionally, because there has been so much intense discussion of the issues related to the report findings we respectfully suggest that the Board provide a clear explanation about the following: the process by which decisions were made in appointing members to the special Ethics Commission; who was invited to review and comment upon nominees; and why the appointment process has been so prolonged. Given the significance of the questions and the potential impact upon APA and the field of psychology, it would be prudent to be as transparently thoughtful as possible.

We appreciate that these have been challenging months for the Board and the Association and that the months ahead likely hold more challenges related to the circumstances giving rise to the Report and to the Report itself. We anticipate and hope that the Board will offer a substantive response to this letter which demonstrates a willingness to consider a process by which the Report is revisited in a thoughtful, meaningful and transparent manner. We are prepared to communicate with the Board about what such a process might entail and particularly in reviewing the Ethics Office and the Ethics Committee

Respectfully submitted,

Robert T. Kinscherff, Ph.D., J.D., Chair 2000, 2001

Steven Sparta, Ph.D., ABPP, Chair 2002

Michael D. Roberts, Ph.D., Chair 2003

Katherine Di Francisca, Ph.D., Chair, 2005

Robin M. Deutsch, Ph.D., ABPP, Chair 2007

W. Brad Johnson, Ph.D. 2008

Jeffrey Barnett, Ph.D., Chair 2009

Nancy McGarrah, Ph.D., Chair 2010

Nadya A. Fouad, Ph.D., Chair, 2012

James N. Bow, Ph.D., ABPP, 2013

Exhibit B



AMERICAN
PSYCHOLOGICAL
ASSOCIATION

April 2, 2016

Dear Former Chairs of the APA Ethics Committee:

2016 APA Board of Directors

President

Susan H. McDaniel, PhD, ABPP

President-Elect

Antonio E. Puente, PhD

Past President

Barry S. Anton, PhD, ABPP

Recording Secretary

Jennifer E. Kelly, PhD, ABPP

Treasurer

Bonnie Mathiam, PhD, PsyD

Interim Chief Executive Officer and

Interim Executive Vice President

Cynthia D. Belar, PhD, ABPP

Members-at-Large

Linda F. Campbell, PhD

Helan L. Coons, PhD, ABPP

Richard M. McGraw, PhD

Diana L. Prescott, PhD

Sandra L. Shulman, PhD

Frank C. Worrell, PhD

APAGS Member

Christine M. Jolivé, PhD

Thank you for your February 16, 2016, Open Letter regarding the *Independent Review* conducted by David Hoffman and his law firm, Sidley Austin LLP. The Board of Directors appreciates your collective service to APA and welcomes the opportunity to engage with you on these important issues. Your letter raises a number of concerns regarding the findings of the *Independent Review*, the process by which it was conducted, and the corrective action undertaken by the Board of Directors subsequent to its publication.¹ We address each of these issues in turn below.

First, your letter suggests the need to conduct a “transparent and thoughtful review” of Mr. Hoffman’s Amended Final Report in light of recent substantive criticism—specifically, that Mr. Hoffman mischaracterized or omitted information provided to him during interviews; that the Report reflects a misunderstanding of Ethics Committee policies and procedures; and that documents have been published that “sharply undercut the asserted factual basis” for Mr. Hoffman’s conclusions. As you know, the Board of Directors commissioned the *Independent Review* in response to the public controversy surrounding psychologists’ participation in military interrogations, including the portrayal of APA in James Risen’s book, “Pay any Price: Greed, Power, and Endless War.”² Because the Association’s objectivity and credibility on this issue had been repeatedly called into question—by the established media and by APA-member critics—the Board of Directors determined that a wholly independent review was necessary to appropriately assess APA’s conduct. As the Board Resolution makes clear, APA personnel and governance members were not to play any fact-finding role in this independent investigation. The Board provided Mr. Hoffman broad and independent authority to review “all available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to APA.”³

¹ As noted in your letter, Mr. Hoffman’s Report was initially released in July 2015. An Amended Final Report was published on September 4, 2015.

² The Board Resolution noted that the allegations in Risen’s book “created concern and confusion for the public and APA members,” and that it was “in the best interests of APA to authorize an independent review by outside legal counsel to carefully consider the allegations and ascertain the truth with respect to them.” APA Board of Directors Resolution Regarding Independent Review, Nov. 12, 2014.

³ *Id.* 750 First Street, NE
Washington, DC 20002-4242
(202) 336-6074
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(202) 336-6123 TDD

Web: www.apa.org



In accordance with the Board Resolution, the Association relied on Mr. Hoffman's findings and accepted his conclusions after carefully reviewing the draft report—which totaled over 500 pages—and the key documents cited therein. Although the Board of Directors was briefed on Mr. Hoffman's investigative process and received updates on his progress during the course of the engagement, it has not undertaken an investigation of the investigation or sought to independently analyze each of Mr. Hoffman's findings to identify possible factual omissions or inaccuracies. Doing so would undermine the very purpose for which the *Independent Review* was commissioned—to preclude APA from assessing its own conduct.

APA instead has invited extensive public comment on the Report, as discussed in more detail below, to ensure Mr. Hoffman's methodology, findings, and conclusions are critically examined. APA members likewise were able to raise factual inaccuracies or misstatements in the Report directly to and for consideration by Mr. Hoffman. Mr. Hoffman took members' feedback into account, as reflected in his Amended Final Report and accompanying errata sheet published on September 4, 2015.

Second, your letter references allegations that certain APA members were given preferential access to Mr. Hoffman, "introducing a risk of investigatory bias," whereas others with information potentially relevant to the *Independent Review* were not consulted. For the reasons discussed above, the Board of Directors is not in a position to evaluate the process by which Mr. Hoffman conducted his *Independent Review*. We note, however, that Mr. Hoffman considered a range of viewpoints during his investigation; his Report was based on over 200 interviews of 148 people, including military psychologists, prominent critics of APA, and nine former Chairs of the Ethics Committee.⁴ In addition, at the outset of the investigation, Sidley Austin established a special email address and phone line that anyone could use to share information with the investigators.⁵ Sidley Austin reportedly received nearly 300 emails to the special email address and more than 30 phone calls to the confidential phone line.⁶

Third, your letter addresses the premature "leak" of Mr. Hoffman's Report to the *New York Times* and the Association's response thereto. Prior to its public release, APA's Board of Directors transmitted the *Independent Review* to Council for its confidential review on July 8, 2015.⁷ The Board took steps to guard against release of the Report without authorization, including by providing restricted access to a labeled draft via a secure website. The document became public two days later, on July 10, 2015, when it was leaked to the *New York Times*. We note that the final pdf posted by the *New York Times* was not the restricted watermarked version that APA posted on its secure website. APA has been unable to identify who improperly released the Report. Although the Board of Directors considered investigating the leak, we were informed that such investigations are enormously expensive and rarely successful. The Board has no mechanism to compel the *New York Times* to disclose the source of the leak. Nor can

⁴ David Hoffman, *Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture*, Sept. 4, 2015, at 7.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ The Board Resolution authorizing the *Independent Review* directed the Special Committee to transmit the final report "without modification to the COR, APA members, and the public." APA Board of Directors Resolution Regarding Independent Review, Nov. 12, 2014.

APA collect or review the personal communications of individuals affiliated with those trusted parties who had access to the Report prior to its public release. Although APA could interview all of those individuals—including the 170 Council members who received the Report on July 8—that process is unlikely to yield additional information.

Fourth, and relatedly, your letter questions the Board’s purported failure to afford those individuals named in the Report the opportunity to review and submit comments or suggested revisions by an established deadline. We regret that premature release of the *Independent Review* prevented us from sharing it with those mentioned in the Report before it became publicly available. Once the Report had been published by the *New York Times*, however, the Board decided to release it and the 1,100 supporting documents on APA’s website immediately. APA also invited public comment on the Report via its website, and by Monday, July 13, had established an online forum where those involved in the underlying events could “post a response based on the fact presented . . . or provide [their] own account of the issues and events pertaining to [them].”⁸ Mr. Hoffman was also asked to address questions regarding his findings and methodology during APA’s Annual Convention in August 2015.

Fifth, your letter points to criticism that “persons who had been influential in prompting the Association to retain an independent investigator . . . were later invited to meet with the Board prior to the Report’s release to discuss recommended courses of action.” Doctors Reisner and Soldz, to whom we presume your letter refers, were asked to present their perspectives on the *Independent Review* to the Board as representatives of APA’s prominent critics—a constituency that Mr. Hoffman identified as having been marginalized and ignored in the past. The Board viewed this meeting as an important corrective measure and an opportunity to take diverse points of view into account moving forward.

Sixth, your letter asks for an explanation of the process by which APA members have been appointed to the APA Commission on Ethics Processes (“Ethics Commission” or “Commission”), which the Association established in response to the findings and conclusions reflected in the *Independent Review*. The Ethics Commission has been charged with reviewing the processes and procedures of the APA Ethics Office and benchmarking them against those of other professional associations. The Commission also has been asked to ensure APA’s ethics processes comport with applicable human rights principles.

In light of these critical objectives, the Board of Directors took great care in selecting psychologists and non-psychologists with subject matter expertise to serve on the Ethics Commission.⁹ After publishing a call for nominations on APA’s website, the Board established a Vetting Group to independently review and rate each nominee on several “matrix variables,” including subject matter expertise, other desired expertise, practice settings, and

⁸ Responses from Those Mentioned in the Report, <http://www.apa.org/independent-review/responses.aspx>.

⁹ APA specified that nominees were to have substantial expertise in one or more of the following areas: ethics experience; ethics philosophy and pedagogy; international ethics; science, bioethics, and healthcare; legal issues and implications of ethical standards. See APA Commission on Ethics Processes: Call for Nominations, <http://www.apa.org/independent-review/ethics-processes.aspx>.

diversity variables (career stage, race, ethnicity, gender, LGBT, disability, religion, and non-APA membership).¹⁰ After each nominee was rated by three different Vetting Group members, an average rating sheet was compiled for each nominee. These ratings, along with the nominee's letters of interest and other relevant materials, were circulated to the entire Vetting Group, which discussed each nominee, his or her ratings and diversity variables, and assigned each nominee a rating score. Lists of the top scoring applicants in the psychologist and non-psychologist subgroups were provided to APA's Board and Council Leadership Team.

Seventeen distinguished psychologists and ethics experts from other disciplines have been selected to serve on the Ethics Commission. The work of the Commission is expected to be completed later this year. The Commission will provide a progress report during the August 2016 Board and Council meetings, with a final report planned for the February 2017 meetings of the APA Board of Directors, Council Leadership Team, and Council of Representatives.

We have advised the Ethics Commission of your interest in contributing to the review of APA's ethics policies and procedures. As former Chairs of the Ethics Committee, we recognize that you have unique perspectives on the complex issues the Commission will consider over the coming months. While this is not our decision, we believe your input into this process would be very valuable.

Thank you again for your thoughtful feedback on the Association's response to the *Independent Review*. We look forward to continuing to work together to serve the best interests of the Association.

Sincerely yours,



Susan H. McDaniel, PhD, ABPP
President

¹⁰ The Vetting Group consisted of Jennifer F. Kelly, PhD, (Chair), Louise A. Douce, PhD, Richard M. McGraw PhD, and Emily A. Voelkel, PhD representing the Board of Directors; Douglas C. Haldeman, PhD, Bonnie R. Strickland, PhD, and David Mills, PhD representing the Council Leadership Team; and Andrea Barnes, JD, PhD and Linda K. Knauss, PhD representing the Ethics Committee.

Exhibit C

Open Letter from Former Chairs of the APA Ethics Committee to the Board of Directors Perceived, Potential or Actual Conflicts of Interest in Attorney Hoffman Self-Review

May 15, 2016

The Board of Directors again retained Attorney David Hoffman in April 2016. He is to review his previously released and once amended report (referred to as the *Independent Review*). On May 10, 2016 a communication was released to the Council listserve by APA President Susan McDaniel noting that Mr. Hoffman had been “engaged for the limited purpose of analyzing certain Department of Defense (“DoD”) policies recently brought to the Board’s attention in reports by the Association’s Division 19 and several psychologists discussed in the *Independent Review*.” Mr. Hoffman is to specifically “review the relevant policies and assess the extent to which they bear upon the issues, findings, and/or conclusions reflected in the *Independent Review*.” He reportedly “also intends to indicate in his report whether any modifications or clarifications to the *Independent Review* are appropriate in light of these policies.”

President McDaniel characterizes Mr. Hoffman’s current activities as a “supplemental review” that “is a continuation of Mr. Hoffman’s prior work, based on the existence of factual information that has recently been called to our attention.” Mr. Hoffman is described as “shar[ing] APA’s interest in ensuring that his *Independent Review* is fair and accurate.” President McDaniel relies upon these in concluding that new review of his prior work does not constitute a conflict of interest on his part or that of the Board.

A conflict of interest arises when an individual has real or reasonably perceived duties to more than one person or organization which may or does compromise their ability to address potential or actual adverse interests. This includes circumstances in which an individual’s own personal or professional concerns or interests may be or are inconsistent or even adverse to those of a client and/or an organization with whom that individual has a relationship (e.g., employee, an ownership stake, another client). Conflicts of interest may be stark and actions taken clearly self-serving or self-protecting at the cost of the interests of clients or organizations with whom the individual has a relationship. Conflicts of interest may also be more insidious by leading the individual to ignore or discount information in a less conscious process of confirmatory bias or less conscious adoption of self-serving or self-protection rationalizations for decisions or actions which have the result of being self-serving or self-protective at the expense of other parties.

The message from President McDaniel holds that Mr. Hoffman is not being asked to conduct “an investigation of [his] initial investigation” and is instead “a continuation of Mr. Hoffman’s prior work, based on the existence of factual information that has recently been called to our attention.” As a result, Dr. McDaniel asserts that Mr. Hoffman’s re-engagement, to evaluate his prior work, cannot constitute a conflict of interest.

This assertion is problematic in several respects. First, it assumes that a person cannot be in a conflict of interest when being asked to review their own previous work. This not a correct assumption. For example, an attorney being asked to review their own work in a case may be in a conflict of interest if that review may or does reveal evidence of possible legal malpractice. A

physician being asked to review their own work in a case may be in a conflict of interest if that review may or does reveal evidence of injurious medical error. An attorney or physician in these circumstances may intentionally choose to ignore or mischaracterize that evidence, or perhaps even more problematically, engage in well-described processes of confirmatory bias, minimization or rationalization that compromise their ability to identify or to appreciate their earlier missteps.

Second, President McDaniel reports that Mr. Hoffman's review of his own work is prompted, at least in part, "on the existence of factual information that has recently been called to our attention." This "factual information" may have been "recently" called to the attention of the Board but the challenge this information poses is that it was reportedly readily available at the time of the investigation through means as easy as a simple internet search. If so, possibilities are raised about Mr. Hoffman and his investigation that include: (a) the investigation did not attempt to access this readily available information; (b) the information was accessed and Mr. Hoffman failed to recognize the potential relevance of that information and so did not incorporate it into his investigation or even report that he had accessed it; or, (c) decisions were made to ignore the potential implications of this information for his analysis and conclusions and to not report that it had been accessed during the course of the investigation.

Each of these raises potential issues such as a failure of due diligence given the focus and context of the report (a, above), the possibility of significant confirmatory bias that led him to not identify or appreciate the relevance of the information or a need to report that he had reviewed it (b, above), or deliberate exclusion and failure to report accessing information which would have undermined the inferences and conclusions of his report (c, above).

We want to make it clear that we have no idea whether any of these processes were involved and are not alleging that any of them were involved. However, asking Mr. Hoffman to review his own work for potential evidence of any of these and to report this evidence to the Board clearly places him in at least a perceived conflict of interest and perhaps an actual one.

Third, the potential consequences for Mr. Hoffman and the Sidley Austin law firm with whom he is affiliated would be significant if he were to acknowledge witting or unwitting missteps which will now substantively alter the conclusions and recommendations of the *Independent Review*. Under the circumstances, there are factors which could reasonably be expected to contribute to confirmatory bias, unwitting self-protection (minimization, rationalization), or intentional (self-protective advocacy) efforts to affirm the quality, independence and conclusions of the *Independent Review*. Acknowledging serious missteps that would substantively challenge the investigation itself or the conclusions and recommendations it generated could have potentially grave professional and legal implications for both Mr. Hoffman and Sidley Austin. It cannot be simply be assumed that Mr. Hoffman and Sidley Austin now share any interest on the part of the APA that the *Independent Review* is "fair and accurate."

Again, we want to clearly state that we do not know whether any of the potentially problematic processes were involved in the original investigation or the *Independent Review*, and we are not alleging any intentional misconduct or unwitting missteps on the part of Mr. Hoffman, his

investigation team, or Sidley Austin. However, it is naïve to not recognize the potential or real conflicts of interest arising from retaining Mr. Hoffman to assess his *Independent Review* in light of “factual information” which was reportedly readily available during the original investigation. This is particularly the case since there are potentially significant professional, legal and other consequences for him and Sidley Austin should he now acknowledge that failure to identify, appreciate or incorporate this “factual information” will now substantively alter the conclusions and recommendations in the *Independent Review*.

Additionally, any acknowledgement on his part that the *Independent Review* is flawed in any substantive way would also have implications for APA. This report was relied upon to terminate the employment of APA staff, encourage the transitions of others, limit the involvement of psychologists in national security and/or military settings, direct revision of the Ethics Code, and take other steps which have had or could have substantial organizational, professional and legal consequences. The *Independent Review* has resulted in the personal and professional integrity of APA staff, members and others to be directly or indirectly called into question in ways that have had significant consequences for those individuals.

Under these circumstances, an observer could reasonably wonder whether the interests of the recent past-President the current President and the Board are aligned with the interests of Mr. Hoffman and Sidley Austin in determining that the “factual information” he is now asked to consider would have had minimal or no impact upon his investigation or the conclusions of the *Independent Report*.

This potential alignment of interests among APA senior governance, Mr. Hoffman, and Sidley Austin has already created a perception of conflict of interest among some APA members and may constitute a potential or actual conflict of interest between these elements of senior governance and the broad APA membership and APA’s internal constituencies. The interests of APA members and of APA as an organization may diverge—by perception and/or reality—from those of the recent past-President, Dr. McDaniel, and the Board. This potential divergence of interests would be magnified should there ever be (which still could occur) lawsuits against APA or filing of ethics and/or licensure complaints against individuals in APA governance arising from steps taken in reliance upon the *Independent Review*. Yet, APA Presidents and the APA Board of Directors have a prevailing duty to serve the best interests of the membership and the organization and not their own professional, organizational or personal interests.

It is always professionally and organizationally prudent to avoid perceived, potential or actual conflicts of interest whenever possible. Retaining Mr. Hoffman to review his own work raises difficult and potentially unresolvable potential or actual conflicts of interest.

As past Ethics Chairs, we have previously called for an independent assessment of the investigation conducted by Attorney Hoffman and the subsequent *Independent Review* report. We again call for timely initiation of this independent assessment as in the best interests of the Association. Under the current circumstances, simply the perceived potential or actual conflicts of interest arising from the Board retaining Mr. Hoffman to review his own investigation and

report are unlikely to yield an outcome viewed as credible among many APA members or constituencies, or by many external parties.

Respectfully,

Robert Kinscherff, Ph.D., J.D., Chair 2000, 2001

Steven Sparta, Ph.D., ABPP, Chair 2002

Michael D. Roberts, Ph.D., Chair 2003

Katherine Di Francisca, Ph.D., Chair 2005

Robin M. Deutsch, Ph.D., ABPP, Chair 2007

W. Brad Johnson, Ph.D., Chair 2008

Jeffrey Barnett, Ph.D., Chair 2009

Nancy McGarrah, Ph.D., Chair 2010

Nadya A. Fouad, Ph.D., Chair 2012

James N. Bow, Ph.D., ABPP, Chair 2013

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	

**AFFIDAVIT OF THOMAS J. WILLIAMS IN SUPPORT OF PLAINTIFFS'
MEMORANDUMS IN OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO
DISMISS UNDER D.C. ANTI-SLAPP ACT AND MOTION TO COMPEL MANDATORY
ARBITRATION**

State of Texas)
) ss:
County of Harris _____)

1. I, Thomas J. Williams, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I was first contacted by email by a representative of the law firm of Sidley Austin LLP representing Mr. David Hoffman and asked to provide information in an ongoing independent review being conducted on behalf of the American Psychological Association (hereinafter "APA") regarding the post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements including the Psychological Ethics in National Security (hereinafter "PENS") Task Force. The Report of the Independent Review (hereinafter "Report") indicates that I was interviewed by an attorney from Sidley Austin on April 30, 2015 and I have no reason to dispute that date.

3. During the telephonic interview, I was asked about two issues: membership on the PENS Task Force and whether I thought there was a *quid pro quo* between APA and the Department of Defense (hereinafter "DoD") related to the DoD Psychopharmacology Demonstration Project (hereinafter "PDP").

4. The representations in the Report offer conjecture but do not accurately state the reasons I offered for me not being selected for membership on the PENS Task Force (i.e., APA's need to

include a U.S. Navy representative to ensure more Joint Service representation). During the interview, I explained that I assumed the task force was looking for a broad representation across the services and there were likely enough Army representatives already selected. I related to the interviewer that I would *expect* representation across the services and that the Society for Military Psychology (APA's Division 19) supported Joint Service representation.

5. Rather than relating my representations, the Report offers conjecture on p. 239:

It is unclear from any of the notes, emails, and interviews why Tom Williams's name was crossed out and replaced by Lefever. Williams was a top-ten choice by Behnke and the Science Directorate in mid-January 2005, Dunivin endorsed him, and he was Division 19's top choice. There is also no indication from the emails Sidley collected that Williams was ever offered a position on the task force and declined. Williams confirmed with Sidley that no one had reached out to him about the PENS Task Force after he had submitted his nomination. It is possible, however, that Behnke may have wanted an active duty Navy representative on the task force.

This account of the selection process completely omitted my stated understanding of the selection process by indicating that it was "unclear" why my name had been "crossed out and replaced by Lefever," the very thing I had clarified for the interviewer regarding Joint Service representation. The wording in the Report seems to create intrigue where none exists; it is reasonable and appropriate to have Joint Service representation on an issue that would likely impact all of the DoD.

6. The Report is completely quiet on the second issue about which I was asked: the representation that I made that there was no *quid pro quo* between APA and the DoD PDP. For example, I was asked about the APA's support for military interrogations as a possible "pay back" for the military's support for prescription privileges for psychologists. I did not believe this was the case. Although I related to the interviewer that I had served as the last Director of the PDP, the Report does not even mention that fact. Even if they missed that fact during the interview, my connection to the PDP is conspicuously displayed on the final report of the PDP, which should have been easily discoverable.

7. The implication of this line of questioning appeared to be that APA's actions were typically intended to curry favor with the military, but I was not asked this directly. And, indeed, the Report leaves the impression that the APA universally supported positions of the DoD. Had I been asked directly, I would have said that in my experience, this is not an accurate perception of the APA.

8. For example, in the 1997-98 timeframe (and prior to the PENS Task Force), the APA Practice Directorate was strongly and actively advocating for the integration of Army, Navy and Air Force mental health services in the Washington capital area--ostensibly as a model for increasing efficiencies in mental health care delivery. At the time, I was serving in dual positions as both the Chief, Department of Psychology and as the Chief, Strategic Planning Division, Walter Reed Army Medical Center and Healthcare System (hereinafter "WRAMC"). From my dual positions, the integration proposal was counter to both WRAMC's strategic future and more directly, would adversely impact the WRAMC psychology internship program. I made that crystal clear to APA's

Practice Directorate and actively took steps to ensure WRAMC leadership understood the negative consequences of the integration plan. We subsequently did not adopt the integration for which APA had been strongly advocating.

9. During my tenure as President of the Society of Military Psychology/APA Division 19, I convened a Division Presidential Task Force charged with the careful examination of the Report. The task force provided a detailed response to the APA in November 2015. A true and correct copy of the Division 19 task force response can be found published by the APA online at https://www.militarypsych.org/uploads/8/5/4/5/85456500/tf19_response_to_the_hoffman_report_div19_excom_approved.pdf.

10. Following The Division's issuance of that response, I wrote to the APA Board of Directors to request that:

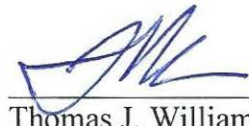
Given that Hoffman acknowledges in the IR [Independent Review] that neither he nor members of his team understood the profession of psychology, in light of the inaccuracies and misrepresentations identified by the D19 TF report, appoint a knowledgeable, neutral third party to complete a thorough review of the IR and report back to the BOD [Board of Directors] their findings.

Attached hereto as Exhibit 1 is a true and correct copy of that letter which can also be found published by the Society of Military Psychology/Division 19 at: https://www.militarypsych.org/uploads/8/5/4/5/85456500/division_19_letter_to_apa_bod_d19_task_force_report_9nov15_1.pdf.

11. This request was based on the Division's expectation that a third party arbiter could work to resolve differences by determining where the Hoffman Report drew correct conclusions founded on accurate facts and where it did not. Numerous follow-up letters from the Division leadership to the APA Board of Directors proposing a meeting to discuss this and other recommendations of the task force response have been unsuccessful.

12. On April 15, 2016, the APA Board of Directors issued a communication following the re-hiring of Mr. Hoffman and Sidley which rejected our request to hire a new independent neutral third-party to decide the issues (or to resolve the issues on their own as a fact-finder). Attached hereto as Exhibit 2 is a true and correct copy of that communication which can also be found published by the PsychCoalition online at: <http://psychcoalition.org/hoffman-report-articles/apa-board-of-directors-re-hires-david-hoffman-to-evaluate-and-validate-his-own-report>.

I declare under penalty of perjury that the foregoing is true and correct.


Thomas J. Williams

Sworn and subscribed to before a notary public in the State of Texas, this 2 day of
~~January~~ 2019.
February




Notary Public

EXHIBIT 1



SOCIETY FOR MILITARY PSYCHOLOGY

Division 19 of the American Psychological Association



November 9, 2015

Board of Directors
American Psychological Association
750 First Street, NE
Washington, DC 20002

In the aftermath of the leaking of the Hoffman Independent Review (IR), you, the American Psychological Association's (APA) Board of Directors (BOD), expressed an apology and announced a series of policy and procedural steps in an APA press release dated July 10, 2015. As a consequence of the serious concerns about the accuracy and completeness of the information contained in the IR report, and in consideration of even greater concern about how that flawed information was now being used by the BOD to drive significant organizational change in APA policies and procedures of relevance to Division 19 members of APA, I requested support from the Division 19 Executive Committee to appoint a Division 19 Task Force (D19 TF) to complete a thorough and comprehensive review of those IR findings.

We provided the D19 TF with a "Terms of Reference" (see Appendix A of their attached report) that described their purpose, objectives, and outlined their responsibilities to carefully assess the accuracy of the information pertaining to military psychology and the guidance that helped direct their actions (e.g., APA PENS) that served as the basis for a number of BOD and Special Committee actions taken on behalf of APA and our members.

The Division 19 Task Force (D19 TF) report is forwarded for your consideration and action, as appropriate. The findings contained in this report are quite disturbing. Using information readily available that the Hoffman team should have considered, and by highlighting misquotes, misrepresentations, and contradictions within the IR, this D19 TF report raises serious questions about the accuracy and completeness of the information the BOD and Council of Representatives (COR) used to take actions that have dramatically impacted our membership and our profession.

They also raise important concerns about the accuracy of the information that was provided to, and acted on, by the Co-Chairs of the APA's Special Committee and in their representations and recommendations to the BOD, as appointed representatives of the BOD. This also raises concerns about the accuracy and fidelity of the information the BOD has used in their deliberations and that has prompted various actions (and that was provided to and served to influence both the Council of Representatives (COR) and our members). Given the historical significance and threat posed to the credibility of our profession, it is critical that you, the BOD, have accurate information upon which to act in good faith in support of our collective interests.

Our Division 19 Executive Committee (EXCOM) has reviewed and fully endorses the D19 TF findings and recommendations detailed in pages 5-9 of the attached D19 TF report. We greatly appreciate the efforts of our D19 TF to highlight and identify these important findings in three months and with a budget of \$5000. Our Division 19 leadership is committed to taking those actions recommended that are within our Division's scope of responsibility and control. However, we have identified a number of recommendations that are within the scope of responsibility and control of the APA BOD which are briefly summarized below:

1. That the BOD ensures the APA Ethics Code focuses on behavior, not settings.
2. Given that Hoffman acknowledges in the IR that neither he nor members of his team understood the profession of psychology, in light of the inaccuracies and misrepresentations identified by the D19 TF report, appoint a knowledgeable, neutral third party to complete thorough review of the IR and report back to the BOD their findings.
3. That the BOD provide an explanation for actions that have had a deleterious impact on Division 19 members. To wit;
 - a. The justification and basis the BOD relied on for not establishing processes to allow those Division 19 members most harmed by the alleged findings in the IR an opportunity to review it prior to its release.
 - b. What considerations and legal analysis the BOD relied upon to determine the impact of displacing the U.S. government determinations of compliance with "international law" with the United Nations.
 - c. The justification by BOD for recommendation to COR that they adopt the August 2015 resolution prohibiting psychologists' involvement in interrogation in the absence of any credible claim or evidence that any DoD psychologist engaged in unethical interrogation related activity in the decade following APA's adoption of the PENS report.
 - d. The BOD deliberation and justification for support to August 2015 resolution prohibiting military psychologists from working in detention facilities unless they are working *directly for the detainee* or "for an independent third party" since however unintended, this precludes actions by military psychologists since they work "directly for" DoD but provide mental health care "on behalf" the detainee.
 - e. The BOD justification to allow two non BOD members to have access to and to review the IR prior to its release, and for those individuals to dictate actions to the BOD members.
 - f. The BOD justification to take actions and/or support calls for recusal of BOD members in the absence of any conflict of interest.
 - g. The justification and process by which the BOD decided to allow information about an ethics complaint to get revealed to the public, in apparent violation of the APA Bylaws and Ethics Committees "Rules and Procedures."
 - h. The justification and basis for decision by members of the Special Committee, representing the BOD, to apologize to detainees and their families during the APA Town Hall (disregarding the negative allegations regarding military psychologists such an apology represented).
 - i. What steps the BOD took, consistent with exercising their fiduciary responsibility to monitor the costs associated with the IR.

- j. What justification the BOD has for allowing the Hoffman team to recently “revise” portions of the IR after its release without alerting and affording membership of this action to allow those named in the report a commensurate opportunity to “correct” errors in light of the concerns. Failing to do so creates an appearance of quietly cooperating with the Hoffman team to allow them to protect their legal interests (i.e., potential legal liability for inaccuracies or misrepresentations).
 - k. What actions the BOD will take to correct the Hoffman IR to ensure it accurately addresses DoD policies related to interrogation; conveys accurate information about how interrogations are conducted and supported; reflects military cultural awareness; and is free from bias against military psychology and military psychologists.
4. That the BOD take steps, in the interest of accountability and transparency, to release all material referenced in the Hoffman IR. While the legal opinion to not do so may protect the BOD members from legal liability for their actions, as the owner of that “privilege” and as representatives of those members alleging harm that is now hidden by that privilege, is not the same “duty” to open up “all its electronic and hard copy files” that was provided to the Hoffman team the same “duty” now owed to those who now allege they were harmed by those findings?
 5. That the BOD share the basis for its determination and assertion that military psychologists were “given insufficient guidance” regarding the conduct of interrogations in its 17 September 2015 response to Dr. Brian Baird.

Many will read these recommendations and requests for information and question, why? They may want to “just move on” since this has been such a painful episode for professional psychology. However, leaders of organizations cannot just wish problems away. As our leaders, as those who serve as the “persons of trust” (i.e., fiduciaries) of our organization, we look to you to exercise your moral and legal obligation for your duty of care that demands you carefully analyze and act on the facts, not just react to the fervor evoked from misinformation, innuendos, and misrepresentations contained in the IR.

The D19 TF findings offer you a more factually sound explanation and basis for many of the IR’s findings related to the PENS report and to military psychologists and their support to interrogations that have prompted APA BOD and COR policy actions (and concerns within our membership). In light of those actions already taken, and out of concern for those being considered, the attached report provides you with compelling evidence that the IR information used as the basis for the decision-making process and that served as the basis for those and others being considered, was flawed and incomplete.

In addition, while many may be tempted to assert or argue that we all should be passive recipients of the information contained in the IR, that is not appropriate for our leadership. Taking that approach would deny the BOD the ability to exercise their responsibility to make decisions with the requisite care to act in good faith based on the facts (and not based on their personal interests out of fear for, and/or to avoid being attacked or accused of “collusion” if they raise any legitimate opposition to, or concerns about, the IR findings).

Previous calls to address the real and legitimate concerns about the accuracy of the findings in the IR should have alerted you to the need for due diligence and appropriate, deliberative action to address those concerns. A number of these concerns were detailed in the July 29th 2015 letter to the two Co-Chairs of APA’s Special Committee and have never been addressed.

The attached D19 TF report will no doubt create a dilemma: it persuasively reveals the flawed nature of much of the relevant information contained in the IR about the PENS report and related to psychologists' support to interrogation, and the information that was used to act on by the BOD and COR. The dilemma is that while some members of APA may emphatically state, "it doesn't matter," since they are opposed to any support to interrogations, the BOD has a legal responsibility to take actions based on an informed basis, in good faith, and with the honest belief that their decisions and actions are based on facts, and not in response to inaccurate misinformation that is used to stir and evoke emotional recriminations about actions that did not happen.

The D19 TF report reinforces "our core values" and the need to ensure that actions taken by our BOD and COR are based on accurate and complete information. As those in whom we place our trust to act in good faith to represent our interests, we encourage your action on these recommendations to help ensure that our "way forward" is one that rests on a foundation of truth, honesty, and accuracy. Our Division leadership stands ready to assist the BOD in their next steps related to these D19 TF revelations.

Thomas J. Williams

Thomas J. Williams, Ph.D.

President

Division 19

Society for Military Psychology

EXHIBIT 2

Dear Council Colleagues:

We would like to inform you that the Board of Directors, after lengthy discussions following Council's input, has decided to re-engage David Hoffman and the law firm Sidley Austin on a very limited basis to examine certain matters brought to our attention by Division 19 (Society for Military Psychology) and several psychologists mentioned in the *Independent Review* (Drs. Morgan Banks, Debra Dunivin, Larry James, and Russ Newman). The Division and these psychologists issued reports raising questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings and conclusions of the *Independent Review* but do not appear to have been addressed. The Board determined that a supplemental review focused on the DoD policies cited in the reports best serves the Association and our members.¹

In deciding on this course of action, the Board seriously considered the concerns expressed by Council members at this past February meeting. We would like to share with you the rationale for the Board's decision.

Once information regarding these DoD policies was brought to the Board's attention, we considered four options for moving forward: 1) take no action; 2) review both reports and available historical data and, on our own, assess the implications of the DoD policies that have been identified; 3) re-engage Mr. Hoffman to examine the significance of the DoD policies at issue; or 4) hire a new independent investigator to do so.

Given the important, though narrow, questions to consider, and in the interest of getting answers in a timely and efficient manner, the Board determined that it would best serve the Association and our members to re-engage Mr. Hoffman in a limited fashion. He is uniquely suited to conduct a supplemental review of the DoD policies that have been recently identified and to evaluate their effect on the findings and conclusions reflected in the *Independent Review*.

His supplemental review will address only the following three questions:

- (1) the extent to which he considered the DoD policies at issue in writing his *Independent Review*;
- (2) the extent to which those DoD policies are relevant to the issues, findings, and/or conclusions addressed and reflected in the *Independent Review*; and
- (3) whether any modifications of the *Independent Review* are warranted in light of the DoD policies.

To be clear, the Board is not seeking an "investigation of the investigation." The intent of this supplemental review is to consider factual information that has recently come to light and which, in our view, requires further examination in the context of the *Independent Review*. The Board's

¹ Two Board members recused themselves and one abstained.

decision to re-engage Mr. Hoffman was driven by our fiduciary responsibility to the Association and our members to recognize and understand the role of the DoD policies in the independent review.

Mr. Hoffman shares APA's interest in ensuring that his *Independent Review* is accurate. He has already demonstrated his willingness to correct factual inaccuracies that are brought to his attention. As you will recall, Mr. Hoffman issued an Amended Final Report in September based on feedback he received from APA members mentioned in the *Independent Review*, as well as released an accompanying errata sheet noting his revisions.

The Board shares the Council's concern about the financial implications of this decision, and has taken a number of critical steps to manage the time and expense to be incurred. Because Mr. Hoffman will be reviewing a discrete set of issues, he expects to complete the review **by June 8**. He has agreed to update APA every two weeks on his progress. He has also agreed that if it appears that this deadline cannot be met, he will inform the Board no later than May 15 and will discuss with the Board the need for an extension and provide a date by which his report can be expected to be received.

Mr. Hoffman and the Board have agreed that the supplemental review should cost no more than \$200,000. He will report his progress to the Board midway through his work to ensure that the Board can properly oversee its scope and cost.

We thank Council for your input and hope that this letter adequately conveys the very careful deliberation that the Board underwent in deciding upon this course of action to address significant concerns raised by our members related to the *Independent Review*. The Board takes very seriously our fiduciary responsibility to our members and our Association to learn and assess the facts when presented with challenging situations and to act accordingly.

Best regards,

A handwritten signature in dark ink, reading "Susan H. McDaniel Ph.D." with a stylized flourish at the end.

Susan H. McDaniel, Ph.D.
2016 President
American Psychological Association

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF BARRY ANTON IN SUPPORT OF PLAINTIFFS'
REQUESTS FOR LIMITED DISCOVERY IN OPPOSITION TO DEFENDANTS'
MOTIONS TO COMPEL MANDATORY ARBITRATION

State of Washington)
) ss:
County of Pierce)

1. I, Barry Anton, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I was President-elect of the American Psychological Association (APA) when the Board of Directors hired Mr. David Hoffman and Sidley Austin LLP to conduct the Independent Review, and I was President during the majority of time the review was being conducted. The original sole purpose of the review was to carefully consider the allegations in James Risen's book, "Pay Any Price: Greed, Power and Endless War," which alleges that APA colluded with the Bush administration, the CIA and the U.S. military to support torture during the war on terror and to ascertain the truth and factual accuracy of those allegations.
3. There was no pending litigation threatened or other legislative threats of action related to these allegations.
4. Plaintiffs have neither asked me to disclose any information I obtained which could be considered privileged or confidential. I was recused from much of the deliberations surrounding the Report of the Independent Review, and all information contained in this affidavit is appropriately shared with the Court. I rotated off the Board of Directors (Board) at the end of 2016.


5. Following publication of the Report, the APA Division 19 (Society for Military Psychologists) and the psychologists named in the Report who are now plaintiffs in this lawsuit issued reports that, among other things, raised questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings and conclusions of the *Independent Review*. The Board specifically considered how to handle this development on a March 2, 2016, conference call. A true and accurate copy of the approved minute from the Board's action on that conference call is attached as Exhibit A to this declaration. Those full Board minutes are official business records of the Association and publicly available here: <http://www.apa.org/about/governance/board/16-march-minutes.pdf>

6. The discussion by the Board focused on whether to hire someone to objectively review the Report and the information brought forward by Division 19 and those individuals named in the Report to determine what impact it might have on the findings and conclusions of the Report, or to rehire Mr. Hoffman to issue a supplement to the original Report.

7. The Board received multiple requests from members, divisions, and the former ethics chairs, to hire a neutral third-party arbitrator to review the issues raised by the plaintiffs and others regarding the findings in the Report.

8. The Board discussed the matter at length and rejected the requests. The Board instead voted to rehire Mr. Hoffman (from which I recused myself).

I declare under penalty of perjury that the foregoing is true and correct.


Barry Anton

Sworn and subscribed to before a notary public in the State of Washington, this 14th
day of November 2018.



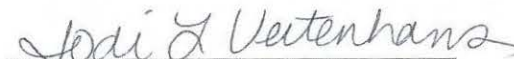

Notary Public

Exhibit A

AMERICAN PSYCHOLOGICAL ASSOCIATION OPEN SESSION

BOARD OF DIRECTORS

March 2, 2016

CONFERENCE CALL APPROVED MINUTES

Board Members Present: Susan H. McDaniel, PhD, ABPP; Barry S. Anton, PhD, ABPP; Antonio E. Puente, PhD; Jennifer F. Kelly, PhD, ABPP; Bonnie Markham, PhD, PsyD; Cynthia D. Belar, PhD, ABPP; Linda F. Campbell, PhD; Helen L. Coons, PhD, ABPP; Christine M. Jehu, PhD; Richard M. McGraw, PhD; Diana L. Prescott, PhD; Sandra L. Shullman, PhD

Board Member Absent: Frank C. Worrell, PhD

Council Leadership Team Observers Absent: Douglas C. Haldeman, PhD; Jean Lau Chin, EdD

A. The Board, after lengthy discussions following Council's input, voted to re-engage David Hoffman and the law firm Sidley Austin on a very limited basis to examine certain matters brought to the Board's attention by Division 19 (Society for Military Psychology) and several psychologists mentioned in the *Independent Review* (Drs. Morgan Banks, Debra Dunivin, Larry James, and Russ Newman). The Division and these psychologists issued reports raising questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings and conclusions of the *Independent Review* but do not appear to have been addressed. The Board determined that a supplemental review focused on the DoD policies cited in the reports best serves the Association and our members. Drs. Anton and Shullman recused themselves from voting on the item. Dr. Campbell abstained from voting on the item.

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	

**AFFIDAVIT OF LARRY JAMES IN SUPPORT OF PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL
MANDATORY ARBITRATION**

State of Louisiana)
) ss:
Parish of Orleans)

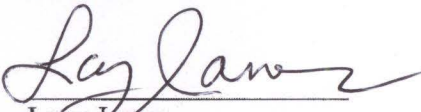
1. I, Larry James, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.
3. From January 2015 through February 2016, I was the Society for Military Psychology/APA Division 19 Representative to the APA Council of Representatives. In that capacity, I attended the 2016 winter meeting of the Council occurring February 19-21, 2016.
4. An item for discussion at that meeting was the APA Board's expressed intention to re-engage David Hoffman and the law firm Sidley Austin to examine issues brought to the attention of the Board by Division 19 and Dr. Bonny Forrest concerning omissions, misrepresentations, and distortions in the Hoffman Report.

5. Some members of the Council expressed the opinion that for Mr. Hoffman to review his own work would be a conflict of interest¹ and he should not be rehired for that review.

6. The APA President, who presides over the Council of Representatives meeting, indicated that the Board had considered several options to address the concerns that had been raised about the Hoffman Report, including the 'Plaintiffs' and Division 19's respective requests to hire a neutral third-party to arbitrate the issues. See Exhibit 1.

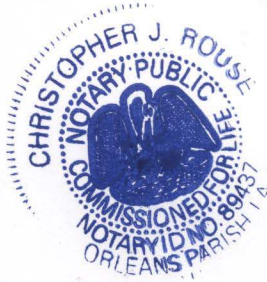
7. The Board's ultimate decision, communicated by an April 15, 2016, posting to the Council listserv, was to reject the option of a neutral third-party and to re-engage David Hoffman. Attached hereto as Exhibit 1 is a true and correct copy of that communication which can also be found published by the PsychCoalition online at: <http://psychcoalition.org/hoffman-report-articles/apa-board-of-directors-re-hires-david-hoffman-to-evaluate-and-validate-his-own-report>.


I declare under penalty of perjury that the foregoing is true and correct.


Larry James

Sworn and subscribed to before a notary public in the State of Louisiana, this

06 day of March 2019.




Notary Public

¹Following the Council meeting and the Board's actual rehiring of Mr. Hoffman, several former chairs of the APA Ethics Committee wrote an open letter to the Board expressing their concern that this type of self-review presented "perceived, potential or actual conflicts of interest." Attached hereto as Exhibit 2 is a true and correct copy of that open letter which can also be found online at: <http://www.hoffmanreportapa.com/resources/APA%20Second%20Letter%20Ethics%20Chairs.pdf>.

Exhibit 1

To: COR <COR@LISTS.APA.ORG>
Sent: Fri, Apr 15, 2016 11:00 am
Subject: [COR] **Sidley Austin Re-engagement**

Dear Council Colleagues:

We would like to inform you that the Board of Directors, after lengthy discussions following Council's input, has decided to re-engage David Hoffman and the law firm Sidley Austin on a very limited basis to examine certain matters brought to our attention by Division 19 (Society for Military Psychology) and several psychologists mentioned in the *Independent Review* (Drs. Morgan Banks, Debra Dunivin, Larry James, and Russ Newman). The Division and these psychologists issued reports raising questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings and conclusions of the *Independent Review* but do not appear to have been addressed. The Board determined that a supplemental review focused on the DoD policies cited in the reports best serves the Association and our members.¹

In deciding on this course of action, the Board seriously considered the concerns expressed by Council members at this past February meeting. We would like to share with you the rationale for the Board's decision.

Once information regarding these DoD policies was brought to the Board's attention, we considered four options for moving forward: 1) take no action; 2) review both reports and available historical data and, on our own, assess the implications of the DoD policies that have been identified; 3) re-engage Mr. Hoffman to examine the significance of the DoD policies at issue; or 4) hire a new independent investigator to do so.

Given the important, though narrow, questions to consider, and in the interest of getting answers in a timely and efficient manner, the Board determined that it would best serve the Association and our members to re-engage Mr. Hoffman in a limited fashion. He is uniquely suited to conduct a supplemental review of the DoD policies that have been recently identified and to evaluate their effect on the findings and conclusions reflected in the *Independent Review*.

His supplemental review will address only the following three questions:

- (1) the extent to which he considered the DoD policies at issue in writing his *Independent Review*;
- (2) the extent to which those DoD policies are relevant to the issues, findings, and/or conclusions addressed and reflected in the *Independent Review*; and
- (3) whether any modifications of the *Independent Review* are warranted in light of the DoD policies.

¹ Two Board members recused themselves and one abstained.

To be clear, the Board is not seeking an “investigation of the investigation.” The intent of this supplemental review is to consider factual information that has recently come to light and which, in our view, requires further examination in the context of the *Independent Review*. The Board’s decision to re-engage Mr. Hoffman was driven by our fiduciary responsibility to the Association and our members to recognize and understand the role of the DoD policies in the independent review.

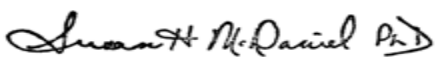
Mr. Hoffman shares APA’s interest in ensuring that his *Independent Review* is accurate. He has already demonstrated his willingness to correct factual inaccuracies that are brought to his attention. As you will recall, Mr. Hoffman issued an Amended Final Report in September based on feedback he received from APA members mentioned in the *Independent Review*, as well as released an accompanying errata sheet noting his revisions.

The Board shares the Council’s concern about the financial implications of this decision, and has taken a number of critical steps to manage the time and expense to be incurred. Because Mr. Hoffman will be reviewing a discrete set of issues, he expects to complete the review **by June 8**. He has agreed to update APA every two weeks on his progress. He has also agreed that if it appears that this deadline cannot be met, he will inform the Board no later than May 15 and will discuss with the Board the need for an extension and provide a date by which his report can be expected to be received.

Mr. Hoffman and the Board have agreed that the supplemental review should cost no more than \$200,000. He will report his progress to the Board midway through his work to ensure that the Board can properly oversee its scope and cost.

We thank Council for your input and hope that this letter adequately conveys the very careful deliberation that the Board underwent in deciding upon this course of action to address significant concerns raised by our members related to the *Independent Review*. The Board takes very seriously our fiduciary responsibility to our members and our Association to learn and assess the facts when presented with challenging situations and to act accordingly.

Best regards,

A handwritten signature in black ink, reading "Susan H. McDaniel Ph.D.", enclosed in a thin black rectangular border.

Susan H. McDaniel, Ph.D.
2016 President
American Psychological Association

Open Letter from Former Chairs of the APA Ethics Committee to the Board of Directors
Perceived, Potential or Actual Conflicts of Interest in Attorney Hoffman Self-Review

May 15, 2016

The Board of Directors again retained Attorney David Hoffman in April 2016. He is to review his previously released and once amended report (referred to as the *Independent Review*). On May 10, 2016 a communication was released to the Council listserve by APA President Susan McDaniel noting that Mr. Hoffman had been “engaged for the limited purpose of analyzing certain Department of Defense (“DoD”) policies recently brought to the Board’s attention in reports by the Association’s Division 19 and several psychologists discussed in the *Independent Review*.” Mr. Hoffman is to specifically “review the relevant policies and assess the extent to which they bear upon the issues, findings, and/or conclusions reflected in the *Independent Review*.” He reportedly “also intends to indicate in his report whether any modifications or clarifications to the *Independent Review* are appropriate in light of these policies.”

President McDaniel characterizes Mr. Hoffman’s current activities as a “supplemental review” that “is a continuation of Mr. Hoffman’s prior work, based on the existence of factual information that has recently been called to our attention.” Mr. Hoffman is described as “shar[ing] APA’s interest in ensuring that his *Independent Review* is fair and accurate.” President McDaniel relies upon these in concluding that new review of his prior work does not constitute a conflict of interest on his part or that of the Board.

A conflict of interest arises when an individual has real or reasonably perceived duties to more than one person or organization which may or does compromise their ability to address potential or actual adverse interests. This includes circumstances in which an individual’s own personal or professional concerns or interests may be or are inconsistent or even adverse to those of a client and/or an organization with whom that individual has a relationship (e.g., employee, an ownership stake, another client). Conflicts of interest may be stark and actions taken clearly self-serving or self-protecting at the cost of the interests of clients or organizations with whom the individual has a relationship. Conflicts of interest may also be more insidious by leading the individual to ignore or discount information in a less conscious process of confirmatory bias or less conscious adoption of self-serving or self-protection rationalizations for decisions or actions which have the result of being self-serving or self-protective at the expense of other parties.

The message from President McDaniel holds that Mr. Hoffman is not being asked to conduct “an investigation of [his] initial investigation” and is instead “a continuation of Mr. Hoffman’s prior work, based on the existence of factual information that has recently been called to our attention.” As a result, Dr. McDaniel asserts that Mr. Hoffman’s re-engagement, to evaluate his prior work, cannot constitute a conflict of interest.

This assertion is problematic in several respects. First, it assumes that a person cannot be in a conflict of interest when being asked to review their own previous work. This not a correct assumption. For example, an attorney being asked to review their own work in a case may be in a conflict of interest if that review may or does reveal evidence of possible legal malpractice. A

physician being asked to review their own work in a case may be in a conflict of interest if that review may or does reveal evidence of injurious medical error. An attorney or physician in these circumstances may intentionally choose to ignore or mischaracterize that evidence, or perhaps even more problematically, engage in well-described processes of confirmatory bias, minimization or rationalization that compromise their ability to identify or to appreciate their earlier missteps.

Second, President McDaniel reports that Mr. Hoffman's review of his own work is prompted, at least in part, "on the existence of factual information that has recently been called to our attention." This "factual information" may have been "recently" called to the attention of the Board but the challenge this information poses is that it was reportedly readily available at the time of the investigation through means as easy as a simple internet search. If so, possibilities are raised about Mr. Hoffman and his investigation that include: (a) the investigation did not attempt to access this readily available information; (b) the information was accessed and Mr. Hoffman failed to recognize the potential relevance of that information and so did not incorporate it into his investigation or even report that he had accessed it; or, (c) decisions were made to ignore the potential implications of this information for his analysis and conclusions and to not report that it had been accessed during the course of the investigation.

Each of these raises potential issues such as a failure of due diligence given the focus and context of the report (a, above), the possibility of significant confirmatory bias that led him to not identify or appreciate the relevance of the information or a need to report that he had reviewed it (b, above), or deliberate exclusion and failure to report accessing information which would have undermined the inferences and conclusions of his report (c, above).

We want to make it clear that we have no idea whether any of these processes were involved and are not alleging that any of them were involved. However, asking Mr. Hoffman to review his own work for potential evidence of any of these and to report this evidence to the Board clearly places him in at least a perceived conflict of interest and perhaps an actual one.

Third, the potential consequences for Mr. Hoffman and the Sidley Austin law firm with whom he is affiliated would be significant if he were to acknowledge witting or unwitting missteps which will now substantively alter the conclusions and recommendations of the *Independent Review*. Under the circumstances, there are factors which could reasonably be expected to contribute to confirmatory bias, unwitting self-protection (minimization, rationalization), or intentional (self-protective advocacy) efforts to affirm the quality, independence and conclusions of the *Independent Review*. Acknowledging serious missteps that would substantively challenge the investigation itself or the conclusions and recommendations it generated could have potentially grave professional and legal implications for both Mr. Hoffman and Sidley Austin. It cannot be simply be assumed that Mr. Hoffman and Sidley Austin now share any interest on the part of the APA that the *Independent Review* is "fair and accurate."

Again, we want to clearly state that we do not know whether any of the potentially problematic processes were involved in the original investigation or the *Independent Review*, and we are not alleging any intentional misconduct or unwitting missteps on the part of Mr. Hoffman, his

investigation team, or Sidley Austin. However, it is naïve to not recognize the potential or real conflicts of interest arising from retaining Mr. Hoffman to assess his *Independent Review* in light of “factual information” which was reportedly readily available during the original investigation. This is particularly the case since there are potentially significant professional, legal and other consequences for him and Sidley Austin should he now acknowledge that failure to identify, appreciate or incorporate this “factual information” will now substantively alter the conclusions and recommendations in the *Independent Review*.

Additionally, any acknowledgement on his part that the *Independent Review* is flawed in any substantive way would also have implications for APA. This report was relied upon to terminate the employment of APA staff, encourage the transitions of others, limit the involvement of psychologists in national security and/or military settings, direct revision of the Ethics Code, and take other steps which have had or could have substantial organizational, professional and legal consequences. The *Independent Review* has resulted in the personal and professional integrity of APA staff, members and others to be directly or indirectly called into question in ways that have had significant consequences for those individuals.

Under these circumstances, an observer could reasonably wonder whether the interests of the recent past-President the current President and the Board are aligned with the interests of Mr. Hoffman and Sidley Austin in determining that the “factual information” he is now asked to consider would have had minimal or no impact upon his investigation or the conclusions of the *Independent Report*.

This potential alignment of interests among APA senior governance, Mr. Hoffman, and Sidley Austin has already created a perception of conflict of interest among some APA members and may constitute a potential or actual conflict of interest between these elements of senior governance and the broad APA membership and APA’s internal constituencies. The interests of APA members and of APA as an organization may diverge—by perception and/or reality—from those of the recent past-President, Dr. McDaniel, and the Board. This potential divergence of interests would be magnified should there ever be (which still could occur) lawsuits against APA or filing of ethics and/or licensure complaints against individuals in APA governance arising from steps taken in reliance upon the *Independent Review*. Yet, APA Presidents and the APA Board of Directors have a prevailing duty to serve the best interests of the membership and the organization and not their own professional, organizational or personal interests.

It is always professionally and organizationally prudent to avoid perceived, potential or actual conflicts of interest whenever possible. Retaining Mr. Hoffman to review his own work raises difficult and potentially unresolvable potential or actual conflicts of interest.

As past Ethics Chairs, we have previously called for an independent assessment of the investigation conducted by Attorney Hoffman and the subsequent *Independent Review* report. We again call for timely initiation of this independent assessment as in the best interests of the Association. Under the current circumstances, simply the perceived potential or actual conflicts of interest arising from the Board retaining Mr. Hoffman to review his own investigation and

report are unlikely to yield an outcome viewed as credible among many APA members or constituencies, or by many external parties.

Respectfully,

Robert Kinscherff, Ph.D., J.D., Chair 2000, 2001

Steven Sparta, Ph.D., ABPP, Chair 2002

Michael D. Roberts, Ph.D., Chair 2003

Katherine Di Francisca, Ph.D., Chair 2005

Robin M. Deutsch, Ph.D., ABPP, Chair 2007

W. Brad Johnson, Ph.D., Chair 2008

Jeffrey Barnett, Ph.D., Chair 2009

Nancy McGarrah, Ph.D., Chair 2010

Nadya A. Fouad, Ph.D., Chair 2012

James N. Bow, Ph.D., ABPP, Chair 2013

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

STEPHEN BEHNKE, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, <i>et. al.</i> ,	:	
	:	
Defendants	:	
	:	

**AFFIDAVIT OF STEPHEN BEHNKE IN SUPPORT OF PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL
MANDATORY ARBITRATION**

State of Illinois)
) ss:
County of Cook)

1. I, Stephen Behnke, having been first duly cautioned and sworn, state the following based upon personal knowledge:
2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.
3. I was Director of the Office of Ethics at the American Psychological Association from November 2000 until the effective expiration of my contract on July 7, 2015. In that position I monitored the activities of the APA Ethics Office. These included administrative support for ethics case adjudication, providing staff support to the APA Ethics Committee, supporting APA governance-based policy development in the area of ethics, and providing education about psychological ethics to the profession and the public. Also, as part of my job responsibilities, I provided staff support to the PENS Task Force in 2005.

4. With this lawsuit, I am attempting to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me and published by Defendants APA, Hoffman and Sidley. In particular, Defendants have falsely stated that I: “colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines;” “engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad;” “effectively formed an undisclosed joint venture with a small number of DoD officials to ensure that APA’s statements and actions fell squarely in line with DoD’s goals and preferences;” and engaged in “improper” handling of ethics complaints “against prominent national security psychologists...in an attempt to protect these psychologists from censure.” (Hoffman Report, pp. 9-10)

5. When I signed my employment agreement with the APA, dated December 8, 2011, I did not intend, contemplate or even imagine that I was agreeing to arbitrate a dispute with the APA or Sidley that does not rely on the terms of the employment agreement and a dispute that relates to defamatory statements published by APA after my contract was terminated. I had never heard of the law firm of Sidley Austin LLP at that time so I certainly did not contemplate arbitrating anything, ever with them.

6. Contrary to Defendant APA’s Motion to Compel Arbitration (p. 9), I am not bringing this lawsuit to recover damages resulting from “wrongful termination,” or from any APA breach or violation of my employment agreement. Also contrary to that Motion (p. 9), I am not making a claim for “economic damages” in the form of additional payment of compensation expressly prohibited by ¶ 6(ii) of my terminated employment agreement. Rather, as Plaintiffs’ Complaint asserts, my claim is for compensatory and punitive damages resulting from the false and defamatory statements published and republished by Defendants beginning in June 2015 and continuing after my contract expired.

7. Defendant APA’s demand to arbitrate misdirects the focus of the dispute to the time of performance of certain of my contractual duties¹ and obligations *rather than the timing of their defamatory conduct against me*, which is what the dispute is actually about.

¹ My APA employment agreement provided for job duties as follows in ¶ 6: DUTIES. From and after the effective date hereof, Employee during the continuance of Employee's employment by the Association shall: (i) Faithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of this Agreement; (ii) Devote the equivalent of full time to the business of the Association and perform such activities as may be assigned by the Chief Operating Officer/Deputy CEO, or as may be required, from time to time; any outside consulting or employment undertaken by Employee must be approved in writing in advance by APA's Chief Executive Officer; and (iii) Refrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of the Association.

8. Further, in an effort to support its demand for arbitration, the APA attempts to attribute to me employment-related duties and obligations that were not mine to begin with (and that I never did undertake). The APA then points to the Hoffman Report's allegations that I carried out those obligations improperly, shifts the burden to me of showing that I carried out those duties and obligations properly, and then claims that the need to discuss those job duties and obligations is the focus of the dispute which triggers the arbitration clause. For the purposes of this motion, on a summary judgement standard, all allegations in the complaint are assumed to be true.

For example:

- The Motion singles out my claim about the Hoffman Report's defamatory conclusion that I handled ethics complaints in an improper fashion. Specifically, the Motion states (pp. 9-10) that my actions to inappropriately protect from censure prominent national security psychologists "touches upon [my] Ethics Director duties," and confirms that "the Complaint refers to particular ethics investigations [I] conducted, placing [my] rights, duties, or obligations as Ethics Director directly at issue."
- In fact, it was never in my job authority to determine the outcome of ethics complaints. The authority for adjudicating ethics complaints is vested in the Ethics Committee pursuant to APA Rule 20-2.3. A true and correct copy of the APA Rule can be found published by the APA online at <https://www.apa.org/about/governance/bylaws/rules-20>.
- Similarly, the Motion (Exhibit 4) singles out the Hoffman Report's (pp. 41-42) defamatory allegation that I "engaged in a wide variety of actions to intentionally delay and obstruct efforts to amend Ethics Standard 1.02, despite increasingly clear calls to do so" which it then claims "pertain[s] to my performance of rights, duties, and obligations as an APA employee."
- In fact, the responsibility for review of the Ethics Code is assigned to the Ethics Committee pursuant to APA Rule 20-2.4, not to the Director of Ethics. A true and correct copy of the APA Rule is published by APA online at <https://www.apa.org/about/governance/bylaws/rules-20>.
- The Hoffman Report (pp. 450-461) itself shows the timeline and series of actions taken by the Ethics Committee between 2005-2009 leading to revision of the Standard. Importantly, the APA Board and Council of Representatives were fully apprised of the lengthy and thorough review undertaken by the Ethics Committee leading to the eventual revision of Standard 1.02 and, therefore, knew that the Report's charge was false. A true and correct copy of the business item sent and passed by Council can be found published by the APA at <https://www.apa.org/ethics/code/august09-council-item.pdf>. (See especially Exhibit 2, pp. 53-64, PDF pp. 11-22)

None of these issues requires reference to my employment agreement for resolution.

9. In further effort to support its demand for arbitration, the APA Motion singles out a number of assertions in the Hoffman Report that falsely accuse me of inappropriate behavior without any supporting evidence or often in the face of contradictory evidence, shifts the burden to me of proving those accusations false, and then labels the effort to show that I acted appropriately as confirmation that the dispute “touches upon” my job duties and falls within the scope of the employment agreement’s arbitration clause. Again, for purposes of this motion, all allegations in the complaint are accepted as true under a summary judgement standard.

For example:

- The APA Motion (p. 11) attempts to shift to me the burden of disproving an unsupported false conclusion in order to trigger the arbitration clause by singling out the Report’s allegation that I deleted emails in violation of “APA policy and employment agreement provisions regarding the maintenance, preservation, and destruction of documents.”
- In fact, my email inbox retained an archived file labeled “deleted emails” available for review during the investigation, and the Hoffman Report itself (pp. 394-395) quotes allegedly deleted emails.

None of these issues requires reference to my employment agreement for resolution. I am not suing for wrongful termination under my employment agreement.

10. Yet another example is the Motion’s (p. 12) singling out the Report’s false statements that I disclosed confidential information. The Motion cites three false statements from the Report identified in the Complaint (Exhibit A) where sharing of confidential information is alleged: false statements #161, #163, #173.

- With respect to false statement #161, the Report’s binders contain the very email communication being described in the Report’s narrative (p. 366) as “confidential.” There is no indication in the email communication itself that it is part of a “confidential internal discussion.” True and correct copies of the emails can be found published by the APA at <http://www.apa.org/independent-review/binder-1.pdf>. (pp. 1476-1478)
- False statement #163 refers to communications described in the Hoffman Report (p. 368) as “*presumably* intended to be confidential,” and there is no evidence supporting its confidential nature. (emphasis added)
- False statement #173 refers to emails contained within the Report’s binders and described by the Hoffman Report as “confidential information regarding internal Board discussions.” (Report, p. 386)

- In fact, these emails are communications *external* to the Board and *about* the Board, not confidential discussions *from* the Board. A true and correct copy of the emails can be found published by the APA at <http://www.apa.org/independent-review/binder-2.pdf>. (p. 133)

None of these issues requires reference to my employment agreement for resolution.

11. Lastly, the APA Motion (p. 12) singles out the Hoffman Report's (p. 37, fn 22; p. 359, fn 1675) purposely left unanswered question of whether or not I remitted to APA payments received from teaching DoD ethics workshops consistent with APA policies and practices, assumes "*arguendo*" this to be defamatory as my claim asserts, and then labels any effort to litigate this defamation claim as "touch[ing] upon" my employment agreement as an APA employee and, therefore, subject to arbitration. In fact, there exists requisite invoices for the workshops I conducted, a clear paper trail of the two payments I remitted to APA, and photocopies of the two repayment checks I wrote to APA.

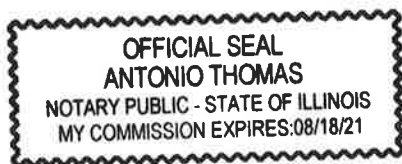
12. True and correct copies of those checks are within the complaint and do not require reference to my employment agreement with APA to resolve or prove Mr. Hoffman's allegations false. Nor I am I suing for wrongful termination or breach of my employment contract.

I declare under penalty of perjury that the foregoing is true and correct.

Steph Behnke
Stephen Behnke

Sworn and subscribed to before a notary public in the State of Illinois, this 6 day
of March 2019.

[Signature]
Notary Public



STATE IL COUNTY COOK
SIGNED BEFORE ME 6 DAY MARCH 2019
NOTARY PUBLIC [Signature]
Antonio Thomas

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, <i>et al.</i> ,	:	Case 2017 CA 005989 B
	:	
Plaintiffs,	:	Judge Puig-Lugo
	:	
vs.	:	Status Conference
	:	May 8, 2019, 2:00 PM
DAVID H. HOFFMAN, <i>et al.</i> ,	:	Courtroom 317
	:	
Defendants.	:	

[PROPOSED] ORDER

Defendant American Psychological Association (“APA”) moves to compel arbitration with Dr. Stephen Behnke and Dr. Russell Newman (“Plaintiffs”), its former employees.

As a preliminary matter, it is for the Court to determine whether a valid agreement to arbitrate exists, and if a valid agreement to arbitrate exists whether the matters or claims before the Court fall within the arbitration clause at issue. Whether a party has waived arbitration by its litigation conduct is also properly an issue decided by the Court under state contract law principles. *Hossain v. JMU Props., LLC*, 147 A.3d 816, 822 (D.C. 2016).

The procedure to resolve denials of the existence of the agreement to arbitrate mirrors the summary judgment procedure. *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991).

APA has failed to meet its burden and its Motion is **DENIED** on three separate grounds:

First, no valid agreement to arbitrate Plaintiffs’ claims exists. Each of the agreements at issue had expired at the time of Plaintiffs’ lawsuit and the arbitration clause contained no survivability clause. *IBEW, Local 1200 v. Det. Free Press, Inc.*, 923 F. Supp. 2d 199 (D.D.C. 2013).

Second, even if a valid agreement existed, Defendants waived any right to demand

arbitration by their previous refusal to arbitrate and their continuing pursuit of litigation, including filing anti-SLAPP motions in Ohio and the District of Columbia. *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 424–25, 428 (D.C. Cir. 2008).

Third, even if there were a valid agreement to arbitrate that had not been waived, it would not apply to Plaintiffs’ defamation tort claims. The arbitration clause at issue is narrow. *See, e.g. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 225 (2d Cir. 2001) (“arising under” language limits arbitration to “a literal interpretation or performance of the contract”). In *Byrd v. VOCA Corp.*, 962 A.2d 927, 940 (D.C. 2008) the court held that even a broader clause (“any difference or dispute arising out of or under this Agreement”) covered only matters in dispute under the contract.

SO ORDERED.

/s/Judge Hiram E. Puig-Lugo
Judge Hiram E. Puig-Lugo

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John Villa, Esq.
Counsel for Defendants David Hoffman, Sidley Austin, LLP, and Sidley Austin LLP, DC

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2019, a true and correct copy of the foregoing Plaintiffs' Opposition to APA's First Motion to Compel Arbitration was filed through the Court's Case File Express electronic filing system, which will automatically send a Case File Express Electronic Notice to Defendants' counsel of record that this filing is completed and available for download at their convenience.

/s/ John B. Williams
John B. Williams