SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Todd E. Edelman
vs.	:	Initial Conference February (TBD), 2018, 9:30 AM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 212
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OPPOSED MOTION FOR LIMITED DISCOVERY IN RESPONSE TO DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND DISMISS UNDER THE D.C. ANTI-SLAPP ACT

RULE 12-I CERTIFICATION

Pursuant to Plaintiffs' 12-I obligation, in March, September, and again, through multiple emails on November 28-29, 2017, Plaintiffs requested that Defendants stipulate to the proposed discovery. In the case of Hoffman's and Sidley's notes, as Plaintiffs' complaint details, they have requested those materials be released by Defendants for over two years. Defendants have alternatively, not responded to Plaintiffs' requests, or refused to stipulate or agree to the requested discovery, often citing general "relevancy" objections. On one occasion, Defendants' rushed into Court to obtain a stay during Plaintiffs' good-faith attempts to schedule depositions.

Most recently, before agreeing to any of the discovery requested by Plaintiffs in this motion, Defendants insisted they needed further clarifications as to why Plaintiffs would be entitled to any discovery with respect to their arbitration motions, and they requested Plaintiffs justify three of Plaintiffs' deposition requests (one of which was related to their SLAPP Motions). Cases cited by Defendants in their own motions make it clear that Plaintiffs are entitled to discovery to answer the arbitration motions under a summary judgment standard. Similarly, the D.C. Anti-SLAPP statute expressly provides in § 16-5502 (c)(2) that the Court will determine the appropriateness of Plaintiffs' discovery requests. Plaintiffs also encouraged Defendants to engage in at least minimal investigation with respect to their own motions, which we believe would also readily reveal the relevancy and propriety of Plaintiffs' requests.

For example, in late March, Plaintiffs' counsel requested copies of Dr. Newman's (and Dr. Behnke's) employment agreements. Defendants did not respond to Plaintiffs' requests to provide those agreements. Dr. Newman was employed by two separate entities within APA, but APA has attached only one employment agreement to its motion to compel

arbitration. APA's affiant attests that agreement is "the Employment Agreement between Russell Newman and APA, dated on or about January 1, 2003." But that agreement is signed in December of 2003, almost a full year after its effective date. Additionally, every member of the APA Board was a member of the second organization's Board employing Dr. Newman, and so they, along with the former Chief Operating Officer (COO) of APA, would be keenly aware of the most basic terms of Dr. Newman's joint employment, which Defendants have now placed at issue. Plaintiffs seek any employment agreements in Defendants' possession on which they intend to rely in seeking arbitration, and the depositions of APA's affiant and the former COO of APA (a signatory to the Behnke employment agreement).

In the absence of any forthcoming response from the Defendants', and their failure to proffer all of the relevant agreements or documents in support of their motions, Plaintiffs are left with no alternative than to believe that their good faith attempts to resolve this issue are simply being met with further delays and obfuscation of the issues. Plaintiffs again invite Defendants to stipulate to any of these requests. Plaintiffs now seek intervention by the Court.

Plaintiffs are filing this motion for discovery, to preserve their rights under the D.C. Anti-SLAPP and Arbitration statutes. Although Plaintiffs initially proposed to the Court in October, that they would file this discovery request five days after the Court's ruling on Defendants' pending Motion for a Stay, recent events prompted Plaintiffs to reevaluate that position:

1) Defendants wrongly assert in their Reply to their Motion for a Stay, that the discovery requested under the relevant statutes should proceed simultaneously with Plaintiffs having to answer Defendants' motions (see e.g., fn. 7); and
2) the Court's rescheduling of the initial conference from December to February.

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SUMMARY OF ARGUMENT

Under D.C. Code § 16–5502 (c)(2) and D.C. Superior Court Rules of Civil Procedure 26 and 56(d), Plaintiffs are entitled to focused discovery of material in Defendants' possession or not otherwise obtainable to assist in defeating Defendants' motions under the D.C. Anti-SLAPP Act ("SLAPP Motions") and both the D.C. Uniform Arbitration Act and Federal Arbitration Act ("Arbitration Motions").

As to the SLAPP Motions, the Anti-SLAPP Act provides an exception to the discovery stay triggered by filing such motions "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome …." D.C. Code § 16–5502 (c)(2). Plaintiffs' discovery requests meet both conditions: they have been narrowly focused to avoid becoming burdensome, and they are likely to uncover facts that demonstrate actual malice and additional publication on the part of the Defendants.

As to the Arbitration Motions, D.C. Superior Court Rule of Civil Procedure 56 provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: … (2) allow time to obtain affidavits or declarations or to take discovery …." Super. Ct. Civ. R. 56(d). As Section 2 below discusses, the Arbitration Motions should be considered as summary judgment motions for the purpose of deciding whether discovery is needed and, therefore, the Rule 56(d) standard applies to that decision.

On September 11-13, 2017, Plaintiffs served two deposition notices and four document and interrogatory requests with their Complaint. Under D.C. Superior Court Rule of Civil Procedure 26, the responses would now be due, absent a stay claimed by Defendants on the filing of the SLAPP Motions. After having reviewed Defendants' motions, Plaintiffs now seek three additional depositions and three additional document requests related to Defendants'

motions.

This discovery is focused and non-burdensome. Allowing it to proceed will aid in moving rapidly to resolve Defendants' motions.[1]

A. Under the D.C. Anti-SLAPP Act, Plaintiffs Are Entitled to the Limited Discovery They Request.

When Plaintiffs respond to Defendants' SLAPP Motions, they will demonstrate that, under a choice-of-law analysis, Illinois rather than D.C. anti-SLAPP laws should apply. Even if that analysis favored D.C., the D.C. Anti-SLAPP Act would not apply because the investigatory report that defamed Plaintiffs, a report claiming to establish proven facts about Plaintiffs' private conduct, was not an act "in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16–5502 (a). Additionally, if the D.C. Anti-SLAPP Act does apply, Defendants have failed to meet their initial burden under the SLAPP Act for any of Plaintiffs' claims. Defendants have only filed a SLAPP motion which seeks protection for acts described in one claim, of 12 Counts, in Plaintiffs' Complaint.

However, to move forward a dispute that has dragged on for more than two years, thus further damaging Plaintiffs' reputations and livelihoods, Plaintiffs need to proceed with the discovery that would allow them to defeat the SLAPP Motions even if the Court disagrees with the Plaintiffs' positions described above. Plaintiffs therefore request targeted discovery from the Court as provided for by §16-5502 (c)(2). As set forth in the affidavit of Louis J. Freeh and Bonny J. Forrest attached hereto and its accompanying exhibit, each discovery request relevant to the SLAPP Motions goes directly to meeting Plaintiffs' burden under the

[1] Plaintiffs further reserve the right to request limited additional discovery pending the Court's ruling on the admissibility of any evidence they proffer in connection with a response or evidentiary hearing. D.C. Code § 16–5502 (d).

D.C. Anti-SLAPP Act and, in particular, to establishing actual malice on the part of each Defendant or the publications alleged in Count 3 of the Complaint.[2]

1. Plaintiffs Are Entitled to Discovery to Prove that Defendants Acted with Actual Malice.

Defendants' SLAPP Motions contend that the "actual malice" standard will apply to Plaintiffs' defamation claims, and assert that Plaintiffs cannot succeed under this standard because they cannot prove by clear and convincing evidence that, when Defendants made the statements at issue, they either knew that they were false or uttered them with "reckless disregard" for their truth or falsity. Plaintiffs should not be required to show actual malice because they are private individuals. For the purpose of opposing Defendants' SLAPP Motions, however, Plaintiffs must assume that the Court may find otherwise.

The need for discovery in relation to a dispositive motion is especially important when the motion raises factual issues about motive, intent, knowledge, or credibility and the moving party has exclusive control over those facts. Indeed, the United States Supreme Court has noted that, because a finding of malice implicates a defendant's state of mind, it "does not readily lend itself to summary disposition" in any circumstance. *Hutchinson v. Proxmire*, 443 U.S. 111, 120, 99 S. Ct. 2675, 61 L.Ed.2d 411 (1979); *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 250, n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) and see e.g., *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Without discovery, Plaintiffs cannot fully respond to Defendants' bare and unsupported assertions that they were not aware that any

[2] Defendants' have sought to limit their motions in some aspects to one element of Plaintiffs' case. There is no provision in the statute, or in the case law, for a "partial" SLAPP Motion to stay all discovery, on all of Plaintiffs claims, or to Defendants' separate Motions to Compel Arbitration. Under the express language of the statute Plaintiffs are entitled to all discovery related to showing a "claim" will succeed on the merits. § 16–5502 (b) § 16–5501 (2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

defamatory statement was made with reckless disregard for its truth or falsity. Nor can Plaintiffs more fully explore an equally critical question: when the defamatory statements were published and republished, on multiple occasions, what additional facts did Defendants possess that demonstrated the statements were not true? Plaintiffs' targeted discovery thus goes to the very heart of their response to the SLAPP Motions.

For two years, Plaintiffs have made all reasonable attempts to obtain relevant discovery without the need to petition the Court by requesting that Defendants agree to provide limited discovery of non-privileged material.

2. Plaintiffs Are Entitled to Discovery to Show that Hoffman and One of His Sources Published the Report to *The New York Times*, Demonstrating Publication and Actual Malice.

The APA gave electronic access to the Hoffman Report to Dr. Stephen Soldz, a long-time critic of the Plaintiffs and a key source for Hoffman, on June 28, 2015. Plaintiffs have significant, credible evidence that, between June 28, 2015 and July 3, 2015, Dr. Soldz gave electronic access thereby publishing the Report to James Risen, a *New York Times* reporter. Plaintiffs also have significant evidence that Hoffman gave a Word file of the document to *The New York Times* between July 2, 2015 and July 7, 2015, in direct contrast to his public statements concerning the leak of the Report. To confirm the evidence of publication, alleged in one claim of Count 3 of the Complaint, Plaintiffs need the deposition of Dr. Soldz and answers to the four interrogatory questions they served with the Complaint. Those publications, aimed at creating national publicity for the Report before it had been fully considered by the APA or released by it, also provides further evidence of actual malice.

B. Plaintiffs Are Entitled to Limited Discovery to Aid in Defeating Defendants' Motions to Compel Arbitration.

Plaintiffs will oppose the Motions to Arbitrate on several grounds that require the

discovery of additional facts: (1) no valid agreement to arbitrate exists between APA and Drs. Behnke and Newman; (2) even if the arbitration clauses in their employment agreements had survived, they would not apply to the claims in this case; (3) Defendants waived any obligation to arbitrate by their litigation conduct, including, when APA refused Plaintiffs' request to arbitrate in November 2015, by telling the Ohio Court on several occasions, that Plaintiffs litigation should be dismissed in Ohio so it could be refiled in D.C. on behalf of all five Plaintiffs with no objection by Defendants, and when, before asserting a right to arbitrate, both Defendants asked the Ohio court to proceed on the merits by applying the anti-SLAPP law; and (4) even if Drs. Behnke and Newman were obligated to arbitrate with APA, that obligation cannot extend to Sidley and Hoffman, third-party non-signatories to their employment contracts who acted as "independent" counsel for Hoffman's investigation.[3]

Under the District of Columbia Revised Uniform Arbitration Act, when a party opposes a motion to compel arbitration, "the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." D.C. Code § 16–4407 (a)(2); (citing 9 U.S.C. § 4 (1988)) (comparable provision in federal arbitration statute) "Summarily" does not mean, however, without regard to necessary evidence. The District of Columbia Court of Appeals has found that "[proceeding] 'summarily' means that the court initially determines whether material issues of fact are disputed and, if such factual disputes exist, then conducts an 'expedited evidentiary hearing' to resolve the dispute." *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C.

[3] In the Ohio litigation, APA represented to the Court that it was so "independent" from Hoffman and Sidley, that Hoffman's and Sidley's acts in Ohio could not be attributed to APA for purposes of establishing jurisdiction over APA.

1991), citing *Merrill Lynch Pierce Fenner & Smith v. Melamed*, 425 So.2d 127, 128-29 (Fla.Dist.Ct.App. 1982), review denied, 433 So.2d 519 (Fla. 1983); also citing *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 6-7 (2d Cir. 1981) (same procedure under federal arbitration statute).

1. APA's Motion to Compel Should Be Decided Under Summary Judgment Standards that Require Appropriate Discovery

Because APA's Motion relies on documents and facts external to the Complaint, it should be considered a motion for summary judgment. Pursuant to D.C. Superior Court Rule of Civil Procedure 56(d), when a party opposing summary judgment shows by "declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . defer considering the motion" and allow that party time to obtain discovery.

The Court of Appeals has provided relevant guidance in other situations where a motion requires consideration of matters external to the complaint:

> When the trial court decides a Rule 12(b)(6) motion by considering factual material outside the complaint, the motion shall be treated as if filed pursuant to Rule 56, which permits the grant of summary judgment if there are no material facts in dispute and the movant is entitled to judgment as a matter of law. Before a Rule 12(b)(6) motion may be thus acted upon, however, the express language of the Rule requires that "all parties be given a reasonable opportunity to present material relevant to the Rule 56 motion before it is decided." *Kitt v. Pathmakers, Inc.*, 672 A.2d 76, 79-80 (D.C. 1996) (citing *Vincent v. Anderson*, 621 A.2d 367, 372-73 (D.C. 1993)).

Similarly, in *Bernay v. Sales*, 435 A.2d 398, 402 (D.C. 1981), a case cited in *Kitt,* the Court held that, when treating a Rule 12(b)(6) motion as a motion for summary judgment because outside factual material is not excluded, the trial court must give "the parties notice of its intention to consider summary judgment and an adequate opportunity to present affidavits or other matters appropriate to a ruling on such a Motion." *Bernay*, infra, at n.4.

In *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991), the Court of Appeals found that the procedure to resolve "deni[als] of the existence of the agreement to arbitrate" under the Arbitration Act mirrors the familiar summary judgment procedure."

Further guidance is provided by the Third Circuit: "[i]f the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue," then Rule 56's summary judgment procedures should be applied. *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 776 (3d Cir. 2013). Under either scenario, "the non-movant must be given the opportunity to conduct limited discovery on the narrow issue concerning the validity of the arbitration agreement." *Id.* at 774 (internal quotation marks omitted). See *Keeton v. Wells Fargo Corp*, 987 A.2d 1118, 1122 (D.C. 2010) ("On remand, the trial court should allow discovery, followed by an evidentiary hearing to determine the unconscionability of the arbitration clause.")

In this case, both of *Guidotti's* conditions have been met.

First, it is not apparent on the face of the Complaint that Behnke's or Newman's defamation or false light claims are subject to arbitration. The Complaint neither explicitly mentions nor incorporates their employment agreements with APA, and neither is suing the Defendants for wrongful termination under those agreements. Neither of the two agreements attached to APA's Motion is referred to in the pleadings (or in the Hoffman Report).

Second, Plaintiffs can present facts that place at issue the claim that there is an agreement to arbitrate, and discovery is likely to uncover further facts. Those facts include, for example, the existence of other employment agreements covering the period in dispute, the parties' understanding at the time the agreements were signed of the scope and duration

of any arbitration clauses, and the reasons for which Dr. Newman's agreement upon which APA relies purports to be effective a year before it was actually signed. (Behnke and Newman Affidavits)

Accordingly, Plaintiffs are entitled to the limited, non-burdensome discovery requested in the Freeh and Forrest Affidavit and accompanying Exhibit to oppose APA's Motion to Compel Arbitration.

2. Hoffman's and Sidley's Motion to Compel Arbitration Based on Their Relationship with APA Requires Discovery of As-Yet Undisclosed Documents About that Relationship.

Hoffman and Sidley assert a right to arbitrate with Plaintiffs Behnke and Newman derivatively, relying on an alternative estoppel theory based on the Plaintiffs' expired employment agreements with APA. That theory assumes that Hoffman and Sidley's relationship with APA is so intertwined that, if Plaintiffs must arbitrate with APA, they must also arbitrate with Hoffman and Sidley. The nature of that relationship is therefore a key fact.

In its motion papers, APA has contended that Sidley was acting at all times as "independent" legal counsel. *See e.g.*, APA's SLAPP Motion pp. 3, 4, and 13. Similarly, the Hoffman Report notes Hoffman and Sidley's "independence" repeatedly (Hoffman Report, cover page: "Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture; pp. 1, 67; and the running header on each page: "Independent Review to APA").

The first engagement agreement between Sidley and APA, which has been made public to members of its governing Council, ended in October 2015. That agreement does not come close to meeting an "intertwined" standard; in contrast, it asserts Sidley's

independence in key respects.[4] However, APA has stated publicly that it has entered into at least one supplemental agreement with Sidley. If Sidley is relying on the nature of its relationship with APA for arbitrability, then Plaintiffs will need to see all subsequent agreements. Plaintiffs therefore request all agreements between APA and Sidley to ascertain the full nature of their past and current relationship with each other.

3. Plaintiffs Should Not Be Required to Pay Defendants' Discovery Expenses.

Plaintiffs further ask that they not be required to pay Defendants' expenses for the discovery necessary to defend against their SLAPP Motions. The D.C. Anti-SLAPP Act provides that an order for discovery "**may** be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." (emphasis added) D.C. Code § 16–5502 (c)(2). The facts do not warrant such a condition.

To the extent that the D.C. Superior Court Rule 26 conflicts with the procedures under the D.C. Anti-SLAPP Act and the D.C. Anti-SLAPP Act creates new procedures governing the work of the Superior Court, Plaintiffs will contend in a separate motion that the Act's stay and discovery provisions, in addition to the other procedures required under the statute, are void and unenforceable under the Home Rule Act and D.C. Code 11-946. Plaintiffs will also contend that the Act is unconstitutional because it violates Plaintiffs' First Amendment free speech rights and rights to access the courts. However, the Court need not reach those issues to decide the issue of discovery costs.

Plaintiffs are individuals without substantial resources who have already borne the

[4] That engagement agreement also provides that Illinois law will govern any dispute in litigation related to the engagement. See a copy of the engagement letter attached hereto as Exhibit B. The authenticity of that agreement was verified when APA submitted it as Exhibit 3 to its Motion to Compel Arbitration in the Ohio Action. Consequently, the Court is asked to take judicial notice of that document.

expense of an extended litigation. They are litigating to mitigate the severe damage done to their careers and livelihoods, not only to their reputations. Plaintiffs, in contrast, are large, wealthy organizations who have filed multiple motions that have delayed a resolution of this dispute.

Moreover, as the D.C. Court of Appeals has stated, the "provisions of the Anti-SLAPP Act impose requirements and burdens on the claimant that significantly advantage the defendant." *Comp. Enter. Inst. v. Mann,* 150 A.3d 1213, 1237 (D.C. 2016). Among other advantages, "[t]he Act also places the initial burden on the claimant to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection." *Id* (internal citation omitted).

The burden on Plaintiffs should not be further heightened, especially given the disparity between the parties' resources. Defendants should bear their own expenses for the limited discovery Plaintiffs have requested.

CONCLUSION

Under D.C. Superior Court Rules of Civil Procedure 26 and 56 (d) and the D.C. Anti-SLAPP Act § 16-5502 (c)(2), Plaintiffs are entitled to the limited and targeted discovery set forth in the accompanying declaration and Exhibit A thereto in order to defeat Defendants' motions. Defendants' should bear the extremely limited costs associated with those discovery items.

Dated: November 30, 2017

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Todd E. Edelman
vs.	:	Initial Conference February (TBD), 2018, 9:30 AM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 212
Defendants.	:	

DECLARATION OF LOUIS J. FREEH, ESQ. AND BONNY J. FORREST, ESQ. IN SUPPORT OF LIMITED DISCOVERY REQUESTS PURSUANT TO DEFENDANTS' ANTI-SLAPP AND ARBITRATION MOTIONS

Louis J. Freeh and Bonny J. Forrest declare as follows:

1. We are the attorneys for the Plaintiffs in this action. Mr. Freeh, who represents Stephen Behnke, is duly admitted to practice law in New York and the District of Columbia. Ms. Forrest, who represents the other four Plaintiffs, is duly admitted to practice law in the States of California and New York and admitted *pro hac vice* in this matter.

2. We make this declaration in support of Plaintiffs' Motion for Discovery to respond to Defendants' Arbitration and Anti-SLAPP Motions. Without discovery, Plaintiffs cannot fully respond to those pending Motions.

3. As to the Arbitration Motions, Plaintiffs request discovery under D.C. Superior Court Rule of Civil Procedure 56. Given that Defendants rely in these Motions on matters outside the Complaint (two expired employment agreements with no arbitration survivability clauses and an affidavit verifying those documents), the Motions should be treated as Motions for Summary Judgment. There has been no opportunity for

discovery in the current matter.

4. As to the Anti-SLAPP Motions, Plaintiffs request discovery under the D.C. Anti-SLAPP Act, D.C. Code § 16–5502 (c)(2): "When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted …."

5. Upon review of Defendants' motions and considering the facts needed to oppose those motions, we determined that it will be essential to discover information regarding each of the items listed in the attached Exhibit, for the specific reasons stated for each items in the Exhibit. This information is necessary to:

    - fully rebut Defendants' arguments that Plaintiffs cannot prove actual malice and publication by clear and convincing evidence,
    - demonstrate the publication alleged in Count 3 of the Complaint,
    - demonstrate that no valid arbitration agreement exists that applies to the claims in this case, and
    - demonstrate that Sidley and APA do not have a relationship so "intertwined" that, if a valid agreement to arbitrate with APA were to exist, Plaintiffs would also be compelled to arbitrate with Sidley.

6. Plaintiffs served four document requests, four interrogatories and two deposition notices with the Complaint. Except for the stay of discovery triggered by the Anti-SLAPP Motions under the D.C. Code, the responses would now be due under D.C. Superior Court Rule of Civil Procedure 26. On October 30, 2017, citing no D.C. Superior Court Rule of Civil Procedure, and a stay in place pursuant to the D.C. Anti-

SLAPP Act: D.C. Code § 16–5502, Defendants declined to respond to Plaintiffs' pending discovery requests served with the Complaint in this matter.

7. Plaintiffs' review of Defendants' Anti-SLAPP Motions leads them to request one additional deposition of a non-party who is responsible for publishing the Reports.

8. Plaintiffs' review of the Arbitration Motions leads them to request two additional depositions and to make three additional document requests, all related to Drs. Behnke and Newman's employment agreements with APA and to the parties' intent to arbitrate.

We declare under the penalty of perjury that the foregoing is true and correct to the best of our knowledge.

Executed on this 30th day of November, 2017.

/s/ Louis J. Freeh
Louis J. Freeh

/s/ Bonny J. Forrest
Bonny J. Forrest

EXHIBIT A TO FREEH AND FORREST DECLARATION

DISCOVERY REQUESTS AND THEIR RELATIONSHIP TO PLAINTIFFS' BURDEN IN OPPOSING DEFENDANTS' SLAPP AND ARBITRATION MOTIONS

The discovery Plaintiffs request amounts to five depositions, four interrogatories, and seven document requests, all but one of which are extremely limited. This Exhibit describes the relevance of each request to a specific aspect of the evidence Plaintiffs must proffer to respond to Defendants' SLAPP and Arbitration Motions.

In summary, the discovery will produce facts that will assist Plaintiffs to demonstrate, if they are required to do so, that:

1. Defendants acted with actual malice when they published the false and defamatory statements at issue;[1]
2. As Count 3 of the Complaint alleges, before the Hoffman Report's official release Defendants published a leaked copy to *The New York Times,* knowing that the resulting publicity would be highly prejudicial and damaging to Plaintiffs;
3. Plaintiffs Behnke and Newman are not obligated to arbitrate the claims at issue with APA (there is no valid agreement to arbitrate, nor do Plaintiffs' claims arise under those employment agreements); and

[1] According to the D.C. Court of Appeals, "'To state a cause of action for defamation, a plaintiff must allege … (1) that the defendant made a false or defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.'" *Payne v. Clark*, 25 A.3d 918, 924 (D.C. 2011). In this case, given Defendants' contentions, Plaintiffs must be prepared to demonstrate actual malice, not only negligence, as to the claims of any Plaintiffs the Court determines to be public figures.

4. Even if they were, they could not be required to arbitrate with Hoffman and Sidley, third-party non-signatories to the Plaintiffs' employment agreements.

Plaintiffs therefore respectfully ask this Court to order the discovery listed below.

I. Discovery Relevant to the Anti-SLAPP Motions

A. Four Interrogatories to APA (served with the Complaint)

Relevance: Count 3 allegation that Defendants Hoffman and Sidley published the July 2, 2015, version of the Hoffman Report to The New York Times reporter James Risen on or about July 7, 2015 in violation of his fiduciary duties and in order to obtain wide-spread distribution of the document:

1. Please identify those persons associated with APA who, between July 2, 2015, and July 7, 2015 (inclusive), had access to a Microsoft word file of or relating to the July 2, 2015, Hoffman Report (the July 2 Hoffman Report) that could be emailed to a third-party in an electronic format.

2. For each of those persons identified in paragraph 1 above, please identify any person, inside or outside APA, with whom that person shared the July 2 Hoffman Report between July 2, 2015, and July 7, 2015.

   [Defendant APA represented to the Court in the Ohio proceeding that no such email sharing occurred.]

3. Please identify any person associated with APA who had any conversations or communications with James Risen between July 2, 2017, and July 7, 2015, inclusive.

4. Please identify how the cover letter from David H. Hoffman to the Special Committee for the July 2, 2015, Hoffman Report was transmitted to APA.

B. Documents Requested from Hoffman and Sidley (served with the Complaint)

Relevance: Plaintiffs' potential burden to demonstrate actual malice.

1. A mirror image copy of all electronic data contained on the personal computer and hard drive of Dr. Stephen Behnke and retrieved by Sidley on or about February 5, 2015, as part of its investigation of APA. The mirror image should include active files, deleted files, deleted file fragments, hidden files, directories, all desktop folders, and any other data contained on the computer or stored on the APA back-up server.

   [Dr. Behnke's computer will contain email traffic that refutes many of Hoffman's factual assertions and conclusions, including Dr. Behnke's intent to delete emails.]

2. Any factual reports created by LDiscovery for Sidley regarding the contents of Dr. Stephen Behnke's computer and any analyses of the computer files or deleted files by LDiscovery.

3. Any conflict of interest policy, or any correspondence concerning such a policy, regulating the conduct of APA staff or APA governance members in 2005 received or reviewed during Sidley's investigation of APA.

   [Although Hoffman asserts that Dr. Newman's actions constituted a conflict of interest, he discloses no specific APA policy that Dr. Newman allegedly violated. Moreover, although Hoffman apparently received and discussed with Dr. Newman a financial conflict-of-interest policy, his Report does not mention it.]

4. All witness interview documents, memoranda, summaries, correspondence, or notes created during the investigation by Sidley.

   [Plaintiffs have ten affidavits from witnesses Hoffman interviewed stating that his Reports significantly distorted the substance of their interviews. The interview notes will provide additional direct evidence that the Defendants acted with actual malice by distorting evidence to fit into a false narrative. See e.g. *Eramo v. Rolling Stone, LLC,* 209 F.Supp.3d 862, 871-872 (W.D. Va. 2016).

   Of the 148 witnesses interviewed, fewer than 20 could possibly be considered as speaking on behalf of APA, such that they would be considered a client of Sidley. Moreover, APA and Sidley agreed in their engagement letter that no privilege would be claimed except for very limited exceptions, none of which were applicable here. See Exhibit B, p. 2. As the attached Anton and Strickland Affidavits establish, there was no litigation threatened or pending at the time of the investigation. Even if any notes or other documents were privileged or protected by the work-product doctrine, those protections have been waived; Hoffman and Sidley quote extensively and selectively from those interviews and communications throughout the Reports. See e.g., *Banneker Ventures, LLC v. Graham,* 257 F.Supp.3d 64 (D.D.C 2017).

C. Depositions

Relevance: direct evidence of actual malice by each Defendant.

1. Heather O'Beirne Kelly, PhD, an APA employee, will testify that she confronted Hoffman during the investigation because he was omitting anything from their interview that was favorable to her, APA, or Plaintiffs. During the investigation, she also told APA staff, including General Counsel Nathalie Gilfoyle, that Hoffman would produce a report that was false and defamatory. She later reiterated that

knowledge and other relevant information concerning actual malice to APA staff. (Deposition requested with the Complaint.)

2. Jennifer F. Kelly, PhD, was on the APA Board or in significant governance positions during the events discussed in the Hoffman Report, and participated in a majority of those events. Dr. Kelly was neither interviewed for the investigation nor recused after the Report was issued. She had knowledge that the Report's accusations were false, given her participation in the underlying evens, and she was obligated to share her knowledge with her fellow Board members. Pursuant to the D.C. Nonprofit Corporation Act's provisions regarding directors' duties, her knowledge invalidated her ability to rely on Hoffman and Sidley. D.C. Code § 29-406.30. (Deposition requested with the Complaint.)

3. Michael Honaker is the former Chief Operating Office of APA. He will testify as to his conversations with Hoffman during the investigation which were omitted or distorted in the Report. He will also testify to the parties' intent with respect to Plaintiffs Behnke's and Newman's alleged obligations to arbitrate.

4. Dr. Stephen Soldz is a long-time critic of Plaintiffs who was a key source for Hoffman and for *The New York Times* reporter James Risen. https://www.youtube.com/watch?v=i9u1EOgeEqw Risen's reporting prompted the Hoffman investigation, and he published a leaked version of the Report. Plaintiffs have a third-party statement that Dr. Soldz published the Report to Risen through electronic access before its official release. (See Count 3 of Plaintiffs' Complaint.) APA knew of Soldz's false allegations against Plaintiffs, his desire for criminal prosecutions of Plaintiffs, and his relationship with Risen when it gave him advance access to the Report, as did Hoffman when he encouraged APA to take that step.

II. Discovery Relevant to the Arbitration Motions

A. Documents requested from APA and Sidley

Relevance: Facts about Sidley and APA's relationship are necessary to oppose Sidley's "alternative estoppel" theory (and to counter claims of privilege for the notes; see I-B-4 above).

The November 14, 2014, engagement letter between APA and Sidley terminated as of October 2015. In emails and public statements, the APA Board of Directors have referred to at least one later agreement and to "opinions" about the terms of the engagement. Plaintiffs therefore request all additional written agreements between APA and Sidley after the November 14, 2014, agreement, including, but not limited to:

a. the subsequent engagement of Hoffman and Sidley to issue a Supplemental Report pursuant to the APA announcement on April 15, 2016;

b. any agreements concerning allocation of liability or agreements to jointly defend these matters that may affect the "independence" of Sidley and Hoffman from APA; and
c. copies of all written opinions delivered by WilmerHale and Sidley Austin LLP with regard to this matter to which the Board of Directors referred in their October 30, 2015, email to the Council of Representatives.

B. Documents requested from APA

1. Any employment agreements with Dr. Behnke covering his initial date of hire until December 31, 2011, on which Defendants rely to assert an obligation to arbitrate.

2. A copy of Plaintiff Newman's expired employment agreement without sentences obscured by copying and any other agreement with any APA entity affecting Dr. Newman's terms or conditions of employment.

C. Deposition

1. Theresa McGregor, APA's affiant for the attached employment agreements. Ms. McGregor has stated that the employment agreements attached to APA's Motion to Arbitrate are true and correct copies of employment agreements between APA and Drs. Behnke and Newman. But Dr. Behnke had additional employment agreements which are not attached to the motion, Dr. Newman was also employed by a separate entity within APA, and the agreement with Dr. Newman to which Ms. McGregor attested is signed a year after the alleged effective date. The deposition will explore these factual issues.

   The deposition of Michael Honaker requested in Section I above will also be relevant to the alleged obligations to arbitrate.

Exhibit B

SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN STREET
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

David H. Hoffman
Partner

David.hoffman@sidley.com
(312) 853-2174

BEIJING
BOSTON
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HONG KONG
HOUSTON
LONDON
LOS ANGELES
NEW YORK
PALO ALTO
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

November 20, 2014

Nathalie Gilfoyle, Esq.
General Counsel
American Psychological Association
750 First Street, N.E.
Washington, DC 20002

Dear Ms. Gilfoyle:

We are pleased that the American Psychological Association ("the APA" or "you") has asked us to serve as its counsel in order to conduct an independent review relating to allegations that, following the attacks of September 11, 2001, the APA colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad. This letter governs the terms of your engagement of us in this matter ("the Matter").

If the terms of engagement and the other matters set forth in this letter are acceptable to the APA, please sign a copy of this letter and return it to me.

Client; Scope of Representation. The client in this Matter will be the APA, and not any APA division, affiliated organization, or individual APA director, officer, employee, or member. Sidley Austin LLP ("we" or "Sidley") will provide legal advice and assistance to the APA in connection with, and the scope of our engagement and duties to the APA shall relate solely to, this Matter (the "Representation"). We will report to the Special Committee of the Board of Directors ("the Special Committee"), whose authority and purpose is set out in the Resolution of the APA Board of Directors dated November 12, 2014.

Our Independence; Privileges; Certain Witness Communications. We understand that it is the intent of the APA that we conduct this review in a fully independent manner, and we will do so. We have been instructed that the sole objective of our review will be to ascertain the truth about the allegations described above, following an independent review of all available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to APA. At the conclusion of our independent review, we will present our final report to the Special Committee ("the Final Report"). We understand that the Board of Directors will subsequently make our final report available to the APA Council of Representatives, APA members, and the public.

We and the APA agree as follows with regard to the application of privileges to this Representation. First, except as provided in the sentences in parentheses that follow this sentence, the Final Report, and the work we do to gather facts and evidence in order to conduct our independent review and prepare the Final Report (the "Fact Finding Work"), will not be covered by, and the APA does not expect to assert a claim of, the attorney-client communication privilege as to those matters. (However, our review of documents with a pre-existing privilege will be covered by the attorney-client communication privilege and will not constitute a waiver of the privilege as to those documents, unless the Board or the Special Committee on behalf of the Board waives the privilege as to specific documents. If we decide that our Final Report should include, quote, describe or cite any such privileged documents, we will let the Special Committee know and request that the privilege be waived so that we can use the document in the Final Report.) Decisions regarding disclosure, if any, of any non-privileged factual materials collected in connection with the review that are not part of the Final Report will be made by the APA Board of Directors. Second, internal work product prepared by us as part of this work, including but not limited to notes, memos, drafts, and internal emails, will be presumptively considered by us and the APA as covered by the attorney work product doctrine as applicable. Third, other than the Final Report and communications of a factual nature that are part of the Fact Finding Work, all communications between us and (i) the Special Committee, and/or (ii) any in-house and external counsel assisting the Special Committee with regard to this Matter, will be presumptively considered by us and the APA as covered by the attorney-client communication privilege as applicable. Any decisions about waiver of attorney-client or work product privilege will be made by the APA Board of Directors, in consultation with Sidley with respect to the work product privilege that is applicable to any work product created by Sidley other than the Final Report.

We and the APA agree as follows with regard to our communications with individuals who wish to provide information to us during our independent review while limiting our knowledge or disclosure of their identity. First, if an individual wishes to provide us with information anonymously during our independent review (an "Anonymous Witness"), we may accept that information. Second, if an individual other than an APA director, officer or employee, who identifies himself or herself to us wishes to provide us with information while keeping his or her identity confidential from the APA or other entity (a "Confidential Witness"), we are authorized to agree, and to communicate to the person, that we will not provide his or her ~~identity to the APA or other~~ entity, unless ordered by a court to do so. In our independent review, the information provided by an Anonymous Witness or a Confidential Witness will be given the evidentiary weight that is appropriate under all the circumstances, including the anonymity or confidentiality of the witness' identity.

Fees and Expenses. Our fees relating to this Matter will be based on the 2014 billing rate, less a 15% discount, for each attorney and paralegal (as well as any other relevant timekeeper), as applicable, devoting time to this Matter. We will continue to base our fees on our 2014 billing rates for all work through June 30, 2015; for any work in 2015 after that date,

we will base our fees on our 2015 billing rates. The principal partners working on this matter will be David Hoffman and Danielle Carter. If other partners are going to perform substantial work on this matter, we will let you know in advance, along with their billing rates. Associates and paralegals will also work on this matter. We have provided you with the billing rates for Mr. Hoffman and Ms. Carter, and the range of billing rates for our associates and paralegals.

We will include on our bills charges for performing services such as messenger and overnight courier service, actual costs of reasonably necessary long-distance telephone, facsimile and telecopy, search and filing fees, and internal litigation and practice support services. Travel costs for Sidley attorneys or staff will be billed to APA at 50% of actual costs. If applicable, and if agreed to in advance by the APA, fees and expenses of others (such as outside experts, consultants, other non-legal professionals and local co-counsel) generally will not be paid by us, but will be billed directly to the APA. More detailed information with respect to our expense recovery policies and procedures, which are an integral part of our agreement with the APA as reflected in this letter, can be accessed on our website at: http://www.sidley.com/costrecoveryandpreadmittancebillingratepolicy/us/. These policies and procedures take into account, among other things, a number of special programs that we have entered into with certain of our vendors and independent service providers.

We will bill you monthly, and respectfully request that our bills be paid within 30 days after receipt, except as may be otherwise agreed by us.

Term of Engagement; Retention, etc. of Documents. Either the APA or Sidley may terminate this Representation at any time for any reason by written notice, subject on our part to applicable rules of professional conduct. If we terminate this Representation before it is concluded, we will take such steps as are reasonably practicable to protect the APA's interests in the Matter. Although it is not anticipated, if a court's permission were to be required for withdrawal from this Representation, we will promptly apply for such permission, and the APA will cooperate in such application and will engage successor counsel to represent the APA in the Matter.

Unless previously terminated, our Representation in this Matter will terminate upon the earlier of (i) the completion by us or abandonment by the APA of the Matter or (ii) our sending our final statement for services rendered in the Matter. Following such termination, if we have retained any otherwise nonpublic information that the APA has supplied to us in connection with the Matter, we will keep such information confidential in accordance with applicable rules of professional conduct. If, upon termination, the APA wishes to have any documents relating to this Matter and then in our possession delivered to the APA, you should so advise us. As used in this letter, "documents" means documents in any format, including hard copy documents and electronic documents (including emails). We reserve the right to retain copies of any documents delivered to the APA.

All of Sidley's work product in connection with the Representation is owned by Sidley, although all Sidley work product provided to the APA pursuant to this matter will be jointly owned by the APA and Sidley. Solely within Sidley, Sidley may use and permit others within Sidley to use such work product in whole or in part in other projects to the extent that such use is consistent with Sidley's confidentiality obligations to the APA. Such work product that Sidley provides to the APA may also be used by the APA, except to the extent that Sidley expressly states otherwise with respect to particular documents.

Upon the APA's request at the termination of the Representation, Sidley will provide the APA with Sidley's file relating to the Representation, including any documents or other property that the APA provided to Sidley in connection with the Representation. To the extent permitted by applicable law and ethical rules, the APA agrees that such file will not include Sidley's administrative records, time and expense reports, personnel and staffing materials, credit and accounting records, and internal Sidley work product (such as drafts, notes, and internal memoranda and emails), except to the extent such work product was previously provided by Sidley to the APA. The APA agrees that such file will not include any information revealing the identity of any Confidential Witness, as described above, unless ordered by a court. Sidley may make and retain a copy of the file provided to the APA.

If Sidley is required to respond to a subpoena or other formal request from a third party or a governmental agency for records or other information relating to the Representation, or to testify by deposition or otherwise concerning the Representation (a "Request"), Sidley will first, to the extent permitted by applicable law, consult with the APA as to whether it is the APA's wish that Sidley comply with the Request or resist it, to the extent that there is a basis for doing so. The APA will reimburse Sidley for its time and expense incurred in responding to any such Request, including time and expense incurred in reviewing documents, appearing at depositions or hearings, and otherwise addressing issues raised by the Request, and search and photocopy costs.

We reserve the right to transfer documents to the personnel responsible for administering our records retention program, for initial retention in accordance with our records retention procedures. For various reasons, including the minimization of unnecessary storage expenses, we also reserve the right to destroy or otherwise dispose of any documents retained by us, including documents transferred as described in the preceding sentence and documents otherwise retained by us. We may exercise the rights described in the preceding two sentences from time to time, whether or not in connection with the termination of the Representation, but our exercise of such rights will be subject to applicable rules of professional conduct and to any applicable written agreement between us and the APA. Except as otherwise described above, we have no obligation to retain or otherwise preserve any documents relating to the Matter.

After completion of this Representation, changes may occur in applicable laws or regulations that could have an impact on the APA's future rights and liabilities. Unless the APA

actually engages us after the completion of this Representation to provide additional advice on issues arising from this Representation, and we accept such engagement in writing, we will have no continuing obligation to advise the APA with respect to future legal developments.

Unless otherwise agreed to by us in writing, our Representation will not involve insurance coverage issues; if applicable, the Firm will not provide advice concerning any notification of insurance carriers, and will not be responsible for notifying such carriers or for follow-up communications with the carriers regarding the status of the matter.

Conflicts. We have numerous clients, and many of these clients rely upon us for general representation. Although we hope that it never happens, it is possible that an adverse relationship (including litigation) may develop in the future between the APA and one of our other current or future clients. If we are not representing the APA in that matter, and the matter in which the APA and another client have adverse interests is not substantially related to our representation of the APA in this Matter, the APA agrees that we may represent the other client, the APA waives any conflict arising from such representation, and the APA agrees it will not seek to disqualify or otherwise seek to prevent us from representing such other client. The APA acknowledges that it has had an opportunity to consult with other counsel (in-house or otherwise) prior to agreeing to this waiver, and has made its own decision about whether to do so.

You agree that this Representation of the APA does not give rise to an attorney-client relationship between us and any APA division or affiliated organization unless we have agreed otherwise in writing. You also agree that, during the course of our representation of the APA, we will not be given any confidential information regarding any APA division or affiliated organization. Accordingly, our representation of the APA in this Matter will not give rise to any conflicts of interest if our representations of any of our other clients are adverse to any APA division or affiliated organization.

Consent Regarding Privileged Sidley Communications. When issues arise concerning Sidley's professional duties and rights, including under applicable professional conduct rules, Sidley may seek confidential counsel from internal Sidley lawyers with responsibility or expertise in the areas in question, and in some instances from outside counsel as well. In such circumstances, some courts have concluded that a conflict of interest arises between a law firm and its clients, and have refused to recognize the law firm's communications as privileged. Sidley believes that it is in the mutual interest of Sidley and its clients that Sidley receive expert and confidential legal advice regarding its professional duties and rights in such circumstances. Accordingly, the APA consents to such consultation, waives any claim of conflict of interest that could result from such consultation, and agrees that this Representation will not be a basis for a waiver of any privilege that Sidley would otherwise have for such confidential consultation.

Privacy, Data Protection, and Confidentiality. Our applicable policies with respect to privacy, data protection and information security relating to personal information can be

accessed on our website at http://www.sidley.com/admin/onlineprivacy.asp. Subject to those policies and to applicable ethical confidentiality obligations, and unless otherwise directed by the APA, Sidley may use a variety of electronic communication systems in communicating internally with the APA and with others during the Representation, including cellular or satellite telephone calls, emails, facsimile transmissions, video conferencing and other forms of evolving electronic communications. Sidley uses outsourced nonlawyer personnel in its offices for a variety of support functions, including mailroom, photocopy, information technology and word processing, who are required by Sidley to agree to maintain the confidentiality of information relating to Sidley's clients.

Publicity. Unless instructed otherwise by the APA, Sidley may disclose that it is representing or has represented the APA in this Matter if the Matter has been publicly disclosed, such as by the APA's issuance of a press release or a filing with a court or regulatory authority. Unless the APA consents to the inclusion of additional information, Sidley's disclosure will be limited to the APA's name, the name of the other party or parties (if applicable), and a short description of the matter that contains only publicly-available information. Unless otherwise authorized by the APA, Sidley will make such disclosures only in Sidley's marketing materials, on its website, and in reports to information and ranking agencies such as Thomson Reuters and Chambers.

Governing Law and Choice of Forum. This letter shall be governed by, and construed in accordance with, the laws of the State of Illinois. Any claim arising under or relating to this Engagement Letter shall only be brought in the state or federal courts in such State, and the APA and Sidley each agree to submit to the jurisdiction of such courts.

Arbitration of Disputes. Except to the extent otherwise provided by law, any dispute or claim arising out of or in any way relating to an engagement governed by this letter or our relationship with the APA (including, without limitation, any claim of malpractice, breach of contract or relating to fees or charges for the Representation) shall be finally resolved by arbitration. The arbitration shall be conducted in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration (Effective November 1, 2007), except as they may be modified herein or by mutual agreement of the parties. The arbitration shall take place in Washington, D.C., or such other location as agreed to by the parties. Notwithstanding the foregoing, the parties consent to the jurisdiction of the federal or state courts having jurisdiction in the location where the arbitration is conducted as to judicial proceedings relating to any aspect of the arbitration, including motions to confirm, vacate, modify or correct an arbitration award.

The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets. The arbitration shall be conducted by one arbitrator, who shall be selected by agreement of the parties or, failing such agreement within 30

days after the initiation of the arbitration, by the CPR. The parties shall be responsible for paying the costs of the arbitration in accordance with CPR rules. The parties agree that the arbitration shall be kept confidential and that the existence of the proceeding and any element of it shall not be disclosed beyond the tribunal, the parties and their counsel, and any person necessary to the conduct of the proceeding. The confidentiality obligations shall not apply if disclosure is required by law or in judicial or administrative proceedings, or to the extent that disclosure is necessary to enforce the rights arising out of the award, provided that the parties agree to use best efforts to keep such disclosure confidential and agree, subject to court approval, to submit such disclosure to a court only under seal. Claims may not be brought in the arbitration proceeding by or on behalf of a purported class of claimants who are not parties to this engagement letter.

This agreement to arbitrate shall constitute an irrevocable waiver of each party's right to a trial by jury, as well as of any right to an appeal that would customarily be available in a judicial proceeding but that may be limited or unavailable in connection with such an arbitration. You acknowledge that you have had the opportunity to consult with other counsel (in-house or otherwise) prior to agreeing to this waiver, including regarding the waiver of jury trial and appeal rights, and have made your own decision about whether to do so.

Severability. If any provision of this letter is held to be unenforceable or invalid for any reason, the remaining provisions of this letter will continue in full force and effect.

We appreciate and look forward to the opportunity to work on this Matter.

Very truly yours,

David H. Hoffman

Agreed and Accepted:

By:

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Todd E. Edelman
	:	
DAVID HOFFMAN, *et. al.*,	:	Initial Conference
	:	Dec. 1, 2017, 9:30 AM
Defendants	:	Courtroom 212
	:	

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

Barry Anton

Sworn and subscribed to before a notary public in the State of Washington, this 18th day of October 2017.

Notary Public
State of Washington
G M DIEFFENBACH
My Appointment Expires Feb 10, 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, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Todd E. Edelman
	:	
DAVID HOFFMAN, *et. al.*,	:	Initial Conference
	:	Dec. 1, 2017, 9:30 AM
Defendants	:	Courtroom 212
	:	

DECLARATION OF WILLIAM STRICKLAND IN SUPPORT OF PLAINTIFFS' MOTION FOR LIMITED DISCOVERY REQUESTS PURSUANT TO DEFENDANTS' ANTI-SLAPP AND ARBITRATION MOTIONS

State of Virginia)
) ss:
County of Fairfax)

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

2. I was a member of the American Psychological Association Board of Directors (APA) from 2013-2015, during the time that Sidley Austin LLP was hired to conduct the Independent Review. I was a member of the Board during the time that the review was being conducted and the Report was published to the Board. The original 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.

2. At the time of the Independent Review, there was no litigation pending or threatened or other legislative threats of action related to these allegations.

3. 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, and all information contained in this affidavit is appropriately shared with the Court. I rotated off the Board of Directors at the end of 2015.

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

William Strickland

Sworn and subscribed to before a notary public in the State of Virginia, this 6th day of November 2017.

Notary Public

CHANDRA L DUPLANTIS COMMONWEALTH OF VIRGINIA NOTARY PUBLIC

Chandra L Duplantis
NOTARY PUBLIC
Commonwealth of Virginia
Reg. #7520023
My Commission Expires
July 31, 2020

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Todd E. Edelman
vs.	:	Initial Conference Dec. 1, 2017, 9:30 AM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 212
Defendants.	:	

DECLARATION OF STEPHEN BEHNKE IN SUPPORT OF LIMITED DISCOVERY REQUESTS PURSUANT TO DEFENDANTS' ANTI-SLAPP AND ARBITRATION MOTIONS

State of New York)
) ss:
County of Erie)

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

2. I was Director of the Office of Ethics at the American Psychological Association (APA) from November 2000 through July 7, 2015.

3. There are no employment agreements regarding my employment at APA prior to January 2012 attached as exhibits to Defendant American Psychological Association's Memorandum of Points and Authorities In Support of Its Contested Motion to Compel Arbitration.

4. My computer will contain a number of emails and documents providing information that will show both falsity and actual malice on behalf of APA, Hoffman and Sidley.

5. For example, during the course of the Independent Review, I asked to meet with David Hoffman for an impromptu, unscheduled meeting. Mr. Hoffman agreed to this meeting and I met with him and Danielle Carter, another Sidley investigator, at the APA building. This meeting lasted approximately 45 minutes. I asked specifically whether APA staff would be expected to explain or defend Bush administration policies adopted during the War on Terror. I explained to Mr. Hoffman that I raised this concern because of the intense criticism these Bush administration policies had received within the APA. Mr. Hoffman assured me repeatedly and emphatically that the Independent Review was

not examining Bush administration policies, but was examining solely the actions of the APA. This statement was not true. The Report of the Independent Review (hereinafter "Report") cites Bush administration policies extensively and relies on them to reach its central conclusions.

6. The meeting and discussion referred to above are described in emails I sent to Mr. Hoffman that would be available on my computer hard drive and in his notes of our interview.

7. It was never my intention to arbitrate this matter with APA, Hoffman, or Sidley.

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

Stephen Behnke

Sworn and subscribed to before a notary public in the State of New York, this 29th day of November 2017.

Notary Public

STEVEN M VAN KNAPP
Notary Public, State of New York
No. 01VA6339580
Qualified in Erie County
Commission Expires 04/04/2020

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Todd E. Edelman
vs.	:	Initial Conference Dec. 1, 2017, 9:30 AM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 212
Defendants.	:	

DECLARATION OF RUSSELL NEWMAN IN SUPPORT OF LIMITED DISCOVERY REQUESTS PURSUANT TO DEFENDANTS' ANTI-SLAPP AND ARBITRATION MOTIONS

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 served as Executive Director for Professional Practice of the American Psychological Association (hereinafter "APA") and for a companion organization to the APA, from 1993 until my departure in December 2007.

3. In 2001, the APA created a legally separate companion organization--the APA Practice Organization (hereinafter "APAPO") with the purpose, described in the 2015 APA Annual Report, to "engag[e] in advocacy to advance and protect the professional and economic interests of practicing psychologists."(p. S15) A true and accurate copy of the Annual Report can be found on APA's public website at http://www.apa.org/pubs/info/reports/2015-report.pdf .

4. From the time of APAPO's creation until my departure in 2007, I was employed for 50% of my time as Executive Director of the APAPO and 50% time as Executive Director of the APA Practice Directorate. This role and organizational distinction is not reflected in Exhibit 1-B of Defendant American Psychological Association's Memorandum of Points and Authorities In Support of Its Contested Motion to Compel Arbitration.

5. Additionally, the contract attached to Defendants' motion purports to take effect a full-year before my signature appears on the document; there is no employment agreement

attached to Defendants' motions reflecting my APAPO employment.

6. Dr. Michael Honaker, Deputy Chief Executive Officer of APA at the time of the aforementioned events, would have knowledge of my split employment by APA and APAPO.

7. In February 2015, while I was employed at Alliant International University, I was contacted by email by Dr. Nadine Kaslow of the APA, and then by Mr. David Hoffman, of the law firm Sidley Austin LLP on April 15, 2015, and asked to *voluntarily* provide information in an ongoing "independent" review being conducted on behalf of APA. I agreed to participate and was interviewed in person by Mr. Hoffman in my office in San Diego, California on April 29, 2015 and then again by telephone on June 15, 2015. I was not paid for my time spent preparing for or participating in the interviews, nor was I acting as an employee on behalf of APA at the time of the interview pursuant to any agreement with APA.

8. It was never my intention to arbitrate this matter with APA, Hoffman or Sidley.

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 California~~, this 28 day of November 2017.

Notary Public

ANP1 ERIKA K. DA LUZ Commission No. 2178687 NOTARY PUBLIC - CALIFORNIA SAN DIEGO COUNTY Commission Expires January 7, 2021 ANP1

PLEASE SEE ATTACHED NOTARIZED FORM

JURAT

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 (or affirmed) before me on this 9th Day of January, 2017, by Russell Newman proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Notary's Signature

Erika K. Da Luz – Notary Public
Commission Expires on January 7, 2021

ERIKA K. DA LUZ
Commission No. 2178687
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
Commission Expires January 7, 2021

OPTIONAL

DESCRIPTION OF ATTACHED DOCUMENT

Title of Type of Document: Superior Court Document
Document Date: N/A Number of Pages Including this One: 3
Additional Information: N/A

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2017, a true and correct copy of the foregoing Plaintiffs' Opposition was filed through the Court's Case File Express electronic filing system, which will automatically sends a Case File Express Electronic Notice to Defendants' counsel of record that this filing is completed and available for download at their convenience.

/s/ James R. Klimaski
James R. Klimaski

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Todd E. Edelman
vs.	:	Initial Conference February (TBD), 2018, 9:30 AM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 212
Defendants.	:	

ORDER

Upon consideration of Plaintiffs' Contested Motion for Discovery pursuant to D.C. Superior Court Rules 26 and 56(d) and D.C. Code §16-5502(c)(2), it is hereby **ORDERED** that:

Plaintiffs are granted the following discovery:

- Depositions of Drs. Michael Honaker, Heather O'Beirne Kelly, Jennifer F. Kelly and Stephen Soldz and Ms. Theresa McGregor.
- Answers to the four interrogatories served previously on Defendants.
- Four document requests previously served on Defendants and three additional document requests (one with subparts) regarding Defendants' agreements regarding the nature of their business relationship and copies of Plaintiffs' Behnke's and Newman's employment agreements.
- Continued suspension of opposition briefing in this matter until completion of the above ordered discovery.

SO ORDERED.

/s/Judge Todd E. Edelman
Judge Todd E. Edelman