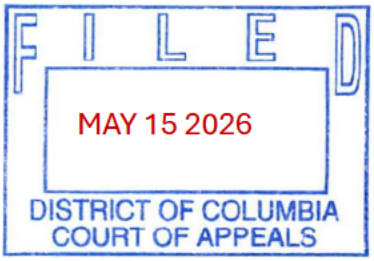
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-CV-0318

MORGAN BANKS, *et al.*, APPELLANTS,

v.

DAVID H. HOFFMAN, *et al.*, APPELLEES.



Appeal from the Superior Court
of the District of Columbia
(2017-CA-005989-B)
(Hiram E. Puig-Lugo, *Judge*)

(Remanded to the Division November 13, 2025 Decided May 15, 2026)

Before BLACKBURNE-RIGSBY, *Chief Judge*, HOWARD, *Associate Judge*, and THOMPSON, *Senior Judge.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This case returns to this division of the court after the en banc court rejected appellants' argument that the discovery limitations they faced when responding to appellees' special motions to dismiss, as established by D.C. Code §§ 16-5502(a)-(c), were violative of the Home Rule Act. *See Banks v. Hoffman*, 346 A.3d 665 (D.C. 2025) (en banc), as amended, (January 29, 2026), *cert. denied*, No. 25-951, 2026 WL 795160 (2026). We now address appellants' argument that the Superior Court erred in granting the special motions to dismiss.

For the reasons that follow, we conclude that the Superior Court did err in ruling that the evidence appellants presented was insufficient to permit a jury properly instructed on the applicable legal principles and constitutional standards to reasonably find in appellants' favor on any of their claims of defamation per se, defamation by implication, and false light invasion of privacy. We reach this conclusion while assuming (without deciding) that appellants were public officials during the relevant time period, such that the constitutional standard that applies to their claims is actual malice rather than negligence. We therefore reverse the order granting the special motions to dismiss and remand the case to the Superior Court

for the litigation to proceed "in the normal course." *Competitive Enterprise Instit. v. Mann*, 150 A.3d 1213, 1232 (D.C. 2016).[1]

Because we are reversing the order granting the special motion to dismiss and remanding the case for further proceedings to include standard discovery, (1) we decline to decide definitively whether any or all of the three appellants were public officials at the relevant time(s), and instead direct the Superior Court to revisit that issue, for each appellant individually, after any relevant discovery has been completed, and with attention to "the extent to which the inherent attributes of a position define it as one of influence over issues of public importance," "the position's special access to the media as a means of self-help," and "the risk of diminished privacy assumed upon taking the position," *Mandel v. Bos. Phoenix*, *Inc*., 456 F.3d 198, 204 (1st Cir. 2006) (citing *Kassel v. Gannett Co*., 875 F.2d 935, 939-40 (1st Cir. 1989)); (2) for the reasons set out in Part II.C of the original division opinion, we again decline to resolve appellants' Count 11 claim and direct the Superior Court to revisit the issue of republication after any relevant discovery (including discovery directed at whether, through alleged changes to its website on August 21, 2018, APA "intended to, or actually did, reach a new audience") has been completed; and (3) we deem moot, and therefore do not further discuss, appellants' claim that the discovery limitations and attorneys fee award they initially faced infringed upon their constitutional right to have meaningful access to the courts to seek redress (for what this memorandum opinion holds are claims that meet the applicable "likely to succeed" standard, D.C. Code § 16-5502(b)).

I. Applicable Law

Our review of the Superior Court's grant of the special motions to dismiss is de novo. *Mann*, 150 A.3d at 1240. To prevail in opposing the special motion to dismiss, appellants were required to demonstrate that they were "likely to succeed" on the merits of their claims as we construed that term in *Mann*. *Id.* at 1236. Meeting the "likely to succeed" standard required appellants to present evidence that was "legally sufficient to permit a jury properly instructed on the applicable legal and constitutional standards to reasonably find in [their] favor . . . in light of the evidence that [was] produced or proffered in connection with the motion." *Id.* at 1221, 1232; *see also id.* at 1238 n.32 (explaining that the "likely to succeed" standard "mirror[s]" and is "substantively the same" as the Federal Rule of Civil Procedure 56 summary

[1] We deny as moot appellees' motion to establish a supplemental briefing schedule.

judgment standard); *Fells v. SEIU*, 281 A.3d 572, 580 (D.C. 2022) (referring to the "likely to succeed" standard articulated in *Mann* as the "refined standard").

Which constitutional standard was applicable depends on whether the appellants were public figures or (as appellees claim here) public officials rather than private individuals. *Mann*, 150 A.3d at 1236 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986)). If, as we assume for purposes of our analysis, appellants were public officials at the relevant time(s), appellants' burden would be to "persuade the fact[]finder that the [defendants/appellees] acted with actual malice in publishing the [(allegedly)] defamatory statements by clear and convincing evidence." *Id.* at 1251-52. "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685 (1989). "A plaintiff may prove actual malice by showing that the defendant either (1) had 'subjective knowledge of the statement's falsity,' or (2) acted with 'reckless disregard for whether or not the statement was false.'" *Mann*, 150 A.3d. at 1252 (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014)). While defamation "[p]laintiffs are entitled to an aggregate consideration of all their evidence," it is not enough for them to "show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *Tavoulareas v. Piro*, 817 F.2d 762, 794 n.43 (D.C. Cir. 1987) (en banc) (emphasis in the original).

"Clear and convincing" evidence is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 426 n.7 (D.C. 2006) (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)). Whether evidence meets the "clear and convincing" standard is a question of law that we review de novo. *Lewis v. Estate of Lewis*, 193 A.3d 139, 144 (D.C. 2018). The "clear and convincing" standard is an elevated one, but it "does not mean clear and unequivocal." *In re W.E.T.*, 793 A.2d 471, 478 n.15 (D.C. 2002) (internal quotation marks omitted). It also "does not mean 'undisputed' or 'undisputable' evidence." *Samra v. Shaheen Bus. & Inv. Group, Inc.*, 355 F. Supp. 2d 483, 494 (D.D.C. 2005). In determining whether a plaintiff's evidence meets the "clear and convincing" standard so as to enable the plaintiff to avoid summary judgment, a court must draw all possible inferences in the plaintiff non-movant's favor. *Nader v. de Toledano*, 408 A.2d 31, 50 (D.C. 1979); *Zerangue v. TSP Newspapers, Inc*., 814 F.2d 1066, 1071 (5th Cir. 1987); *see also Am. Studies Ass'n v. Bronner*, 259 A.3d 728, 740 (D.C. 2021) (recognizing that an Anti-SLAPP special motion to dismiss is "essentially an expedited summary judgment motion").

The following legal principles also guide our analysis. A statement is defamatory "if it tends to injure [the] plaintiff in his trade, profession or community

standing, or lower him in the estimation of the community." *Mann*, 150 A.3d at 1241 (internal quotation marks omitted). "In determining the defamatory character of the language, . . . the social station of the parties in the community, the current standards of moral and social conduct prevalent therein, and the business, profession or calling of the parties are important factors." Restatement (Second) of Torts § 614 comment (d) (1977). "Thus an imputation may be defamatory as to one person at a given time and place, although it would not be derogatory of another person at a different time or in a different place." *Id.* "If it appears that the statements are at least capable of a defamatory meaning, whether they were defamatory and false are questions of fact to be resolved by the jury." *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990).

"A defamation by implication stems not from what is literally stated, but from what is implied." *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990). "Defamation by implication requires a showing that defendant (1) juxtapose[d] a series of facts so as to imply a defamatory connection between them, or (2) create[d] a defamatory implication by omitting facts." *Conley v. City of W. Des Moines*, 157 F.4th 946, 958 (8th Cir. 2025). "Even if conveying only true facts, a communication can be defamatory by implication if, 'by the particular manner or language in which the true facts are conveyed, [the communication] supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference.'" *Armstrong v. Thompson*, 80 A.3d 177, 184 (D.C. 2013) (quoting *White*, 909 F.2d at 520)).

"An invasion of privacy-false light claim requires a showing of: (1) publicity; (2) about a false statement, representation, or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be highly offensive to a reasonable person." *Close It! Title Servs. v. Nadel*, 248 A.3d 132, 140 (D.C. 2021); *see also Klayman v. Segal*, 783 A.2d 607, 614-15, 615 n.8 (D.C. 2001) (explaining that to establish liability for false light invasion of privacy, the plaintiff must prove that "the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed").

II. The Allegations and Counts of the Complaint, the Allegedly False Statements that are the Focus of Our Analysis, the Report's Primary Conclusions, and our Analytical Approach

With the exception of the allegations in Count 8, all of the allegations of appellants' thirteen-count (supplemental) complaint are based on publication or republication of statements made in the *Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture*

(the Hoffman Report or the Report), written by appellees David Hoffman and the Sidley Austin LLP law firm and commissioned by appellee the American Psychological Association (APA).[2] Appellants assert that the Hoffman Report "branded them as 'Psychologists Who Greenlighted Torture,'" a reference to a headline that appeared in the press after the Report was released. Their complaint alleges defamation per se (Counts 1-11, which, taken together, are asserted against all of the appellees by each of the appellants); defamation by implication (Count 12, brought against appellees Hoffman and Sidley by each of the appellants); and false light invasion of privacy (Count 13, brought against all of the appellees by appellants Dunivin and James).

Our case law on Anti-SLAPP special motions to dismiss instructs that a plaintiff's likelihood of success must be evaluated on a "claim-by-claim basis." *See Bronner*, 259 A.3d at 734-43 (concluding that the trial court erred in not evaluating on a claim-by-claim basis the plaintiffs' likelihood of success on their claims of breaches of fiduciary duties, ultra vires acts and breaches of contract, violations of the Nonprofit Corporation Act, corporate waste, tortious interference with contract, and aiding and abetting breach of fiduciary duty); *Mann*, 150 A.3d at 1243-62 (evaluating plaintiff's likelihood of success by separately analyzing different types of allegedly defamatory statements made by different authors in a series of separate articles cited in the complaint). In this case, however, with the exception of Count 8, the counts are all based on publication or republication of the Hoffman Report (to the APA Special Committee, the APA Board, Drs. Steven Reisner and Steven Soldz, James Risen, *The New York Times*, the APA website, or the world, on June 27, June 28, July 2, July 7, July 8, July 10, or September 4, 2015, or August 21, 2018) that allegedly damaged appellants' reputations in the community. Each of the counts of the complaint "repeats and re-allege[s] each of the foregoing paragraphs [of the complaint] as if set forth fully herein." Thus, except as they are asserted against different defendants (Hoffman/Sidley and APA) and except for Count 8, the defamation per se, defamation by implication, and false light counts of the complaint are not claims whose likelihood of success we must (or even can) evaluate separately. *See Mar-Jac Poultry, Inc. v. Katz*, 773 F. Supp. 2d 103, 115 (D.D.C. 2011) ("A plaintiff can assert a defamation per se claim even when the alleged defamation is by implication."); *Moldea v. New York Times Co*., 15 F.3d 1137, 1151 ("Publicity

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[2] Count 8 alleges that then-APA President and Board Chair Dr. Nadine Kaslow made false, misleading, and defamatory statements to the public on behalf of the APA when discussing the Hoffman Report. Appellants contend in a recent filing that APA did not assert Anti-SLAPP protection for Kaslow's statements to the press, but this appears to be a new argument that appellants did not raise in their opening brief.

that is actionable in a false light claim generally will be actionable in defamation as well"; "a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion."), *modified*, 22 F.3d 310 (D.C. Cir. 1994); *see also Blodgett v. Univ. Club*, 930 A.2d 210, 223 (D.C. 2007) ("W]here the plaintiff rests both his defamation and false light claims on the same allegations, . . . the claims will be analyzed in the same manner."). We therefore can primarily focus our analysis on appellants' defamation-by-implication and false-light-invasion-of-privacy counts (which the complaint does not tie to particular dates of publication), rather than on appellants' relatively bare-bones defamation-per-se counts (all of which allege a specific incident of publication or republication of the Report).

The gravamen of the complaint's Count 12 defamation-by-implication claim by all appellants against Hoffman and Sidley is set out in the complaint as follows:

> Hoffman omits from the Report the details of the crucial military history in late 2003, 2004 and early 2005 and the development and implementation of strict and clear "DoD interrogation guidelines." That omission causes the reader to conclude that the out of date guidelines and OLC opinions presented by Hoffman were still in effect and allowed for abusive interrogations. Had Hoffman and Sidley included the facts he intentionally omits from the Report, each of his primary conclusions, and a majority of his false statements would have been directly and substantially contradicted by those intentionally omitted facts. A reader would have been able to reach non-defamatory conclusions of and concerning the Plaintiffs.

The gravamen of the Count 13 false light invasion of privacy claim is set out in the complaint as follows:

> The defamatory statements alleged herein constitute false light invasion of privacy in that they have subjected [p]laintiffs . . . Dunivin[] and James to unreasonable and highly objectionable publicity by falsely attributing to them characteristics, conduct or beliefs that place them in a false light before the public.

An attachment to the complaint lists 219 allegedly defamatory statements (or passages) contained in the Report. We have reviewed each of those statements or passages but conclude, for several reasons, that to assess whether appellees' special

motion to dismiss was erroneously granted, we need not consider most of them in detail. The first reason is that many of the allegedly defamatory statements are about former plaintiff/appellant Stephen Behnke, who at relevant times was the APA's Ethics Director; or about other APA officials (such as former plaintiff/appellant Russell Newman) rather than about remaining plaintiff/appellants Banks, Dunivin, and/or James.[3] We have focused our analysis on the (much smaller number of) statements that are about (or that impute actions, motives, or beliefs to) the remaining appellants.

Secondly, we are able to narrow our task by focusing primarily on the allegedly defamatory material relating to what the Hoffman Report identifies as its first "principal finding[]": that "key APA officials . . . 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 at 9. **(**Appellants' complaint characterizes this "principal finding" as the Report's "primary conclusion" that appellants "colluded" "in 2005, [to] ensur[e] that the guidelines issued for psychologists involved in the interrogation process were no

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[3] As noted in the original division opinion, Drs. Behnke and Newman were referred to arbitration pursuant to their employment contracts with the APA. Appellants resist the conclusion that the allegedly defamatory statements about Behnke and Newman are no longer relevant to appellants' claims, arguing that "each [p]laintiff is defamed by statements alleging actions taken by any other named participant in the so-called collusive enterprise." However, while certain statements—e.g., statements asserting that Behnke courted the favor of the Department of Defense (DoD) in derogation of his duty to the APA and its members, and statements asserting that Newman had a conflict of interest because his wife, Dunivin was involved in interrogations—may have been defamatory as to those APA officials, in our view those statements do not in any obvious way impugn the reputation of appellants (all of whom were employed by DoD at the relevant time and might have been expected to be protective of DoD interests). We have in mind, for example, the statement in the Hoffman Report that APA leadership's coordination or "collusion" with DoD members of the PENS Task Force "could easily be described as improper or dishonest, because it constituted the development . . . of APA ethics policy not based solely on an independent judgment of what policy was best for APA, but in very substantial part based on what policy was best for DoD." *See Mann*, 150 A.3d at 1241 ("[A]n imputation may be defamatory as to one person at a given time and place, although it would not be derogatory of another person at a different time or in a different place.").

more restrictive than 'existing' military guidelines which, Hoffman falsely asserts, were too loose to constrain abuses that amounted to torture[.]").

The Hoffman Report's second principal finding was that appellants secretly collaborated with APA officials to "defeat efforts . . . that would have definitively prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad." Hoffman Report at 9. Although appellants' opening brief discusses allegedly defamatory statements related to this finding, we do not focus on the second "principal finding" or related passages in the Report because, given that appellants acknowledge that they were involved with the interrogation process and believe psychologists had a proper role to play in national-security interrogations, we do not readily discern that the statements were capable of defamatory meaning as to appellants. *See Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 503 (D.C. 2020) ("[I]t is quite possible that speech may have a defamatory meaning in some circumstances, but not in others.").

We also do not discuss the Report's third principal finding: that "ethics complaints against prominent national security psychologists [including appellant James] w[ere] handled [by APA] in an improper fashion, in an attempt to protect these psychologists from censure." Hoffman Report at 10. We do not discuss the allegedly defamatory statements related to this principal finding (most of which relate to the alleged mishandling of an ethics complaint filed against James Leso, allegations that appellants claim APA President and Board Chair Kaslow knew were false) because appellants were non-APA employees who had no role in "handl[ing]" ethics complaints filed with the APA.[4]

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[4] We acknowledge James's claim that the Hoffman Report placed him in a false light through its statements about APA's mishandling of ethics complaints and omission of any mention that "all of the state licensing board complaints against [James] for [his] interrogation support work (no fewer than nine reviews by ethics committees, licensing boards, and courts) were found to be without merit"—an omission that appellants claim was in reckless disregard of information that James "specifically provided to Mr. Hoffman [during the Sidley] interviews."). It is not clear, however, that James can satisfy the actual-malice standard with respect to the omitted-from-the-record licensing-board findings; as the Superior Court reasoned, the record lacks information about what "ethical or procedural rules" those government agencies applied "in reaching their conclusions." We leave it to the trial court to address in the first instance whether, if the negligence standard applies as to James, that standard is met. *Cf. Fell v. SEIU*, 281 A.3d, 572, 588 (D.C. 2022). Although the Superior Court addressed negligence in a single footnote (discussing

Our analysis below is guided by the principle that the ultimate issue we decide in this case is "whether the defendant[s/appellees are] entitled to immunity from trial." *Mann*, 150 A.3d at 1230. We conclude that appellants are entitled to proceed, and appellees are not entitled to immunity from trial, so long as appellants' evidence establishes that they are "likely to succeed," as to each appellee, on at least one of their theories of recovery.[5]

Considering all the foregoing, and applying the rule that appellants "must demonstrate actual malice *in conjunction* with a [particular] false defamatory statement," *Tavoulareas*, 817 F.2d at 794, we focus on what appellants have captioned "False Statement[s]" Nos. 20 and 22, which encapsulate the Hoffman Report's first principal finding—what appellants refer to as the Report's "cornerstone," "foundation," and "overarching false statement" that they and APA officials "engaged in a long-running collusive joint venture to protect abusive interrogations." Of the 219 allegedly defamatory passages listed in the attachment to the complaint, the passage consisting of "False Statement[s]" 20 and 22 exemplifies, as well as any of the listed passages, appellants' allegations of defamation and false light.

"False Statements" No. 20 and 22 are as follows:

> [False Statement No. 20:] Banks closely collaborated [with Behnke] to emphasize points that followed then-existing DoD guidance (which used high-level concepts and *did not prohibit techniques such as stress positions and sleep deprivation*) . . . . They were aided in that regard by other DoD members of the task force [a group that included James] . . . . [False Statement No. 22:] The other DoD official who was significantly involved in the confidential coordination effort was Debra Dunivin, the

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appellants' "fail[ure] to proffer evidence" that appellees "fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others"), the court did not consider negligence in connection with appellants' false light or defamation-by-implication counts.

[5] *Cf. Schopler v. Bliss*, 903 F.2d 1373, 1378 (11th Cir. 1990) ("If we find that appellants must stand trial for at least some of their alleged misdeeds under at least one cause of action for damages, then . . . their claims of immunity will not be considered); *see also Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002) (characterizing immunity from suit as an "entitlement not to face…the…burdens of litigation," which is lost if a case is permitted to proceed to trial).

> lead psychologist supporting interrogation operations at Guantanamo Bay at the time who worked closely with Banks on the issue of psychologist involvement in interrogations. [Emphasis added]

Appellants contend that the first sentence of this passage (which, as convenient shorthand, we hereafter refer to in the singular as "False Statement" No. 20) was "demonstrably false," mischaracterized "then-existing . . . guidance," and falsely implied that appellants supported the use of abusive interrogation techniques.

III. Analysis

Our task is "not to anticipate whether the jury will decide in favor of appellants," *Mann*, 150 A.3d at 1258, or to say whether appellants' evidence has proven to us "actual malice with convincing clarity," *Nader*, 408 A.2d at 49, but "to assess whether, on the evidence of record produced or proffered in connection with the special motion to dismiss, a jury *could* find" in appellants' favor. *Mann*, 150 A.3d at 1258. For the reasons discussed below, we agree with appellants that the evidence they presented "create[d] one or more triable disputes of fact regarding actual malice" with respect to Hoffman's and Sidley's publication of the Report in 2015 and the APA's (alleged) republication of the Report in 2018.

A. Claims Against Hoffman and Sidley

Focusing on statements such as "False Statement" No. 20, the Hoffman/Sidley brief argues that appellants did not meet their burden to overcome the special motion to dismiss because "False Statement" No. 20 and similar statements were accurate. In particular, the Hoffman/Sidley brief asserts that the Report "never said [as Count 12 of the complaint alleges] that [it was] DoD policies governing interrogators" that "'used high-level concepts'" and that "'did not prohibit techniques such as stress positions and sleep deprivation.'" Rather, the Sidley/Hoffman brief contends, the Report's observation was that then-existing "DoD interrogation guidelines for psychologists supporting interrogations" used "'high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation.'"

It is difficult to square that explanation with the considerable attention the Report devotes to the guidance on interrogations that the Bush Administration issued in the wake of September 11, 2001 (which the Report states "defined 'torture' in a very narrow fashion,") and to similar permissive guidance on interrogations that the Department of Justice Office of Legal Counsel (OLC) provided to the CIA in May

2005.[6] The Report juxtaposes its discussions of that guidance alongside criticism of the PENS Task Force's product. *Cf. Conley,* 157 F.4th at 958 (explaining that defamation by implication can entail juxtaposing "a series of facts so as to imply a defamatory connection between them"); *Fells*, 281 A.3d at 587 (reasoning that plaintiff had a likelihood of success on claim that defendant portrayed him in a false light when it mentioned his termination in conjunction with termination of another employee against whom there were claims of sexual misconduct).

But we can assume for purposes of our analysis that the Report's statements about appellants' steering the PENS Task Force to follow "'then-existing DoD guidance'" that used "'high-level concepts'" and "did not prohibit techniques such as stress positions and sleep deprivation" was, as the Hoffman/Sidley brief contends, an observation about DoD interrogation guidelines for psychologists. Even on that assumption, the Hoffman/Sidley brief does not explain how that statement in the Report can be reconciled with the March 28, 2005, DoD interrogation guidance for psychologists (the "Behavioral Science Consultation Team Standard Operating Procedures for Guantanamo") (hereafter, the March 2005 SOP document) that the Hoffman/Sidley team had in their possession.

The March 2005 SOP document states that it is DoD psychologists' responsibility to "adhere to the UCMJ [Uniform Code of Military Justice], Geneva Conventions, applicable rules of engagement, local policies, as well as professional standards of psychological practice." The implications of some of those references may not be apparent from the face of the document, but the reference to adherence to the "Geneva Conventions" is significant—or so a reasonable juror could conclude (upon, presumably, hearing expert testimony about what the Geneva Conventions proscribe)—because torture is a "grave breach[]. . .of the 1949 Geneva Conventions," *Ghaleb Nassar Al-Bihani v. Obama*, 619 F.3d 1, 28 (D.C. Cir. 2010), and because sleep deprivation and stress positions are "widely recognized as torture." *Paracha v. Trump*, 453 F. Supp. 3d 168, 189 (D.D.C. 2020).[7] Because the

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[6] For example, the Report states that "[a]t the time [of the PENS Task Force], narrower definitions of torture prevailed through pronouncements from the OLC. The head of the OLC at the time of PENS, Steven Bradbury, had written a series of memos in May 2005 to the CIA permitting the continued use of waterboarding and other harsh techniques. Thus, psychologists could arguably participate in waterboarding sessions since they did not violate the way the law was interpreted at the time."

[7] *See also, e.g.*, *No Sleep for the Wicked: A Study of Sleep Deprivation as a Form of Torture*, 81 Md. L. Rev. 694, 737 (2022) (noting that "the United States has

Hoffman Report refers with seeming approval to the "non-DoD voting members of the task force [who] made some efforts to push for definitions based on the Geneva Conventions," Hoffman Report at 12, we infer that the Sidley team understood that the Geneva Conventions prohibit the abusive interrogation techniques that the Report said DoD guidelines (or DoD guidelines for psychologists) did not. The March 2005 SOP document's reference to the UCMJ is likewise significant because, per the Hoffman Report, its prohibition against assault would be violated by waterboarding. *See supra* note 7.

Appellants assert—and appellees have not disputed—that the March 2005 SOP document was drafted by appellant Dunivin in consultation with appellant Banks. In addition, the record indicates that the March 2005 SOP document—four copies of it, according to appellants' opening brief—is contained in Sidley's investigation binders. And, according to the affidavit of James Bow, the March 2005 SOP document was provided to and reviewed by the Sidley interviewers (a claim that Sidley and Hoffman do not dispute). Also, according to appellant James's affidavit, he referred to the importance of the obligation to follow "local policies" (such as the March 2005 SOP document pertaining to Guantanamo) that "may be more restrictive than those issues at the DoD level" in several posts on the PENS Task Force listserv that were reviewed and analyzed by the Sidley team, and he told the Sidley team about those local policies.

The Hoffman/Sidley brief acknowledges that the March 2005 SOP document is not discussed in the Report.[8] The brief does not suggest that the document was

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historically identified sleep deprivation as a tool of torture"); *Salim v. Mitchell*: *A First in Accountability for Victims of the United States Torture Program*, 18 Santa Clara J. Int'l L. 214, 221 & n.25 (2020) (describing stress positions and sleep deprivation as torture methods); *In re G-A* , 23 I. & N. Dec. 366, 370 (BIA 2002) ("Common methods of torture include . . . sleep deprivation.").

[8] The omission—which the Superior Court did not discuss in its analysis—was more than just omission of a "comment here or an opinion there," as the Superior Court suggested. Further, the March 2005 SOP document was not merely one of the "government reports" the Sidley team had in their possession that were the focus of the Superior Court's reasoning that appellants "fail[ed] to explain whether the entities that issued those governmental reports had access to the same documents, email exchanges and witnesses used as sources for the Report," whether the reports "were commissioned with mandates comparable to the directive that APA provided to Sidley & Austin for the internal review," and whether the reports "focused on the

inadvertently overlooked; rather, the brief explains the omission with the observation that the March 2005 SOP document "was substantively the same as 'draft DoD guidance' [specifically, a draft article entitled *Purpose of Psychological Support to Interrogation and Detainee Operations*] that [the Hoffman Report] already discussed in detail." But the March 2005 SOP document differs from that draft article in ways that a reasonable juror could find to be substantive and significant. As the Hofffman/Sidley brief notes, the "*draft* DoD guidance" (drafted by Banks but, according to Dunivin, without participation by her) would merely have "tasked psychologists with *being familiar with* applicable law and rules," while, as noted above, the March 2005 SOP document mandated psychologists' responsibility not only to "familiarize themselves with" but also to "*adhere to* the UCMJ, Geneva Conventions, applicable rules of engagement, local policies, as well as professional standards of psychological practice" (emphasis added). Further, the March 2005 SOP document directs psychologists to "[*i*]*mmediately* report any suspicions of abuse of detainees."

We are persuaded that a reasonable juror could find by clear and convincing evidence that (i) Hoffman and Sidley, apprised of the March 2005 SOP document, knew that, to the extent that appellants caused the PENS Task Force to adopt "then-existing DoD guidance" for psychologists, appellants did not thereby advocate guidance that would permit stress positions, sleep deprivation, or other forms of torture; or (ii) Hoffman and Sidley at least recklessly disregarded whether it was true that appellants sought to prevent such harsh interrogation techniques from being prohibited; and further that a reasonable juror (iii) could find by a preponderance of the evidence[9] that Hoffman and Sidley defamed one or more of the appellants by implication, or presented one or more of appellants in a false light, when, through statements such as "False Statement" No. 20, they implied in the Report that appellants did seek to prevent such harsh interrogation techniques from being

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same issues explored in that investigation or applied different ethical or procedural rules in reaching their conclusions."

[9] *Mann* confirms that, in the special-motion-to-dismiss context, the preponderance-of-the evidence standard applies to a determination of whether the statements were defamatory. *See* 150 A.3d at 1262 ("Dr. Mann has supplied sufficient evidence for a reasonable jury to find, by a preponderance of the evidence, that statements in the articles written by Mr. Simberg and Mr. Steyn were false, defamatory, and published by appellants to third parties, and, by clear and convincing evidence, that appellants did so with actual malice.").

prohibited.[10] Thus, appellants' proffered evidence sufficiently establishes that they are "likely to succeed" (as *Mann* construes that refined standard) on their claim that Hoffman and Sidley acted with actual malice in making those and similar statements (a claim that a reasonable juror could reasonably find is corroborated by other evidence appellants presented in support of their claims, including some of the evidence discussed by the Superior Court).[11] *Cf. Mann*, 150 A.3d at 1258 (concluding that a jury could find that the defendant's defamatory statements were made with actual malice where investigatory reports that unanimously concluded that there was no misconduct by plaintiff were known to defendants prior to their articles that accused plaintiff of misconduct based on the same matter the reports had investigated); *Nader*, 408 A.2d at 53 (reasoning, in libel action, that Senate Report's "explicit unambiguous finding" that Nader had acted in good faith in making an "unsafe" charge against an automobile afforded "a sufficient evidentiary basis from which a reasonable inference" could be drawn that journalist's statement that Nader had "falsified and distorted evidence" had been published with actual malice).

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[10] The Hoffman Report states (in what appellants call "False Statement" No. 32) that Banks interpreted the "safe, legal, ethical and effective" formula used in the PENS Task Force report as "a malleable, high-level formula that easily allowed for subjective judgments" such as a judgment that "the formula . . . permit[s] stress positions and sleep deprivation in some circumstances." Hoffman Report at 18**.** The Report also attributes to Banks the view "some stress positions [such as the 'push up' position] were 'safe' and therefore might be properly used as interrogation techniques" (an assertion that appellants label "False Statement" No. 140). Hoffman Report at 306. Banks disputes these accounts, and, although the Hoffman Report cites to a "Banks interview" for some of what it asserts about Banks, it provides no citation for "False Statements" 32 and 140. We acknowledge all the foregoing as a preface for repeating the principle that, to be "clear and convincing," the evidence supporting appellants' position need not be unequivocal or undisputed. *W.E.T.*, 793 A.2d at 478; *Samra*, 355 F. Supp. 2d at 494. The parties' dispute is grist for a jury. *See Moss*, 580 A.2d at 1023. And, in any event, this dispute pertains to Banks; it does not appear to implicate Dunivin's or James's false-light claim.

[11] We repeat the caveat we issued in *Mann*: "Our legal conclusion is based on the evidence that has been presented at this juncture, in connection with the special motion to dismiss. Once discovery is completed, the legal conclusion that the evidence is sufficient to go to trial could change." 50 A.3d at 1258 n.60.

B. Claims Against the APA

We agree with the APA that appellants have not pointed to record evidence that demonstrates that the APA Board, Special Committee (formed to oversee the Hoffman/Sidley investigation), or General Counsel knew that "False Statement" No. 20 or similar statements in the Hoffman Report were false, or acted with reckless disregard as to the truth of such statements, when it published the Hoffman Report on various dates in 2015 (see Counts 2, 3, 5, 6, 7, and 10). *Cf. Nader*, 408 A.2d at 58 (evidence did not support inference of actual malice by company that syndicated/distributed journalist's column). We have not, for example, identified in the record evidence that, as of those dates, APA officials were aware of the March 2005 SOP document discussed above. However, considering the omission of any discussion in the Hoffman Report of the March 2005 SOP document and other omissions that we identify below (and that were brought to the APA's attention before 2018), a reasonable juror could find that APA's republication (if that's what it was) of "False Statement" No. 20 (and similar statements in the Report) in 2018 was done with actual malice.

The documentary record indicates that by July 2016, appellants provided to appellees' counsel an October 2015 document entitled "Hoffman's Key Conclusion Demonstrably False: The Omission of Key Documents and Facts Distort the Truth," to which they attached a number of standard-operating-procedure (SOP) documents (including the March 2005 SOP document) applicable to interrogations of detainees in Guantanamo, Iraq, and Afghanistan. These documents evince, inter alia, that by the time of the PENS Task Force, DoD guidance specifically required "that detained persons are allowed adequate sleep"; prohibited deprivation of sleep, sleep management and stress positions; and mandated compliance with the Geneva Conventions.[12] The documentary evidence also shows that, by February 2016, the APA Board recognized that there needed to be an evaluation of whether the omission of any discussion of these SOP documents had an impact on the Report's conclusions. *See* February 5, 2019, affidavit of Robert J. Resnick, ¶ 3; *see also* affidavit of former APA President Barry Anton, ¶ 6 (stating that as soon as the Hoffman Report was made public, individuals brought to the APA's attention "relevant interrogation policies in place at the time of the PENS Task Force that contradicted the conclusions of the Report but were not included or analyzed in the

[12] It is not clear to us from the record whether these SOP documents (other than the March 2005 SOP document) were in Sidley's possession or drawn to the Sidley team's attention before the Report was issued. If they were, that would be additional support for the conclusion we reach in Section A above.

Report"). According to the Resnick affidavit, no supplemental report with a re-evaluation had been forthcoming by the date of his affidavit, and yet the APA (allegedly) republished the Hoffman Report in August 2018 even though its Board was skeptical about some of the Report's conclusions. On this record, we cannot conclude as a matter of law that a reasonable juror asked to deliberate on appellants' Count 11 defamation-by-republication claim (which this memorandum opinion reinstates at least pending discovery) would not be able to find that the foregoing is clear and convincing evidence that APA republished the allegedly defamatory statements such as "False Statement" No. 20 with serious doubt about whether what it implied about appellants, and whether the light in which it portrayed appellants, were true.

Finally, we address Count 8, which is asserted by all of the appellants against APA and which alleges "defamation per se for the false and misleading statements made by Dr. Nadine Kaslow on behalf of APA to the public." Count 8 alleges inter alia that APA President and Board Chair Kaslow referred during an interview to "a small underbelly" of psychologists who steered the PENS Task Force toward "loose ethical guidelines that may have allowed for psychologists to engage in enhanced interrogations," so as to "deflect accountability" from herself. The Superior Court did not specifically mention Count 8 and did not, as our case law requires, separately evaluate whether appellants' proffered evidence established a likelihood of success on the claim it asserts. *See Bronner*, 259 A.3d at 750. Accordingly, we remand for the Superior Court to resolve that issue in the first instance. *See id.*; *Fells*, 281 A.3d at 588.

IV. Conclusion

For all the foregoing reasons, we reverse the order granting the special motions to dismiss and remand for further proceedings.

So Ordered.

ENTERED BY DIRECTION OF THE COURT:

Jason LaVey for
JULIO A. CASTILLO
Clerk of the Court

Copies emailed to:

Honorable Hiram E. Puig-Lugo

Director, Civil Division
QMU

Copies e-served to:

Bonny J. Forrest, Esquire

Thomas G. Hentoff, Esquire

Barbara S. Wahl, Esquire

Laura R. Handman, Esquire

Katie Townsend, Esquire

Caroline S. Van Zile, Esquire
Solicitor General for the District of Columbia

Lauren R.S. Mendonsa, Esquire

Landis Cox Best, Esquire

Bilal Sayyed, Esquire