SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

_____

PLAINTIFFS' OPPOSITION TO
HOFFMAN'S AND SIDLEY'S MOTION TO COMPEL ARBITRATION

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SUMMARY OF ARGUMENT

Defendants David H. Hoffman, Sidley Austin LLP, and Sidley Austin (DC) LLP (collectively, "Sidley") have asked this Court to compel two Plaintiffs, Drs. Stephen Behnke and Russell Newman, to arbitrate against Sidley on the basis of arbitration clauses in expired employment contracts with the American Psychological Association ("APA"), their former employer. As Plaintiffs' First Opposition to APA's Motion to Compel Arbitration demonstrates, no valid agreement to arbitrate existed at the time Plaintiffs' claims arose. Even if the arbitration clauses were deemed to have survived the employment contracts' termination, Defendants have waived any rights to arbitrate and, in any case, the clauses would not apply to Plaintiffs' defamation claims. (Plaintiffs' First Opposition is hereby incorporated by reference.) Sidley's Motion to Compel is therefore moot.

Even if that were not the case, however, Sidley may not compel arbitration on the basis of contracts to which it is a stranger and on which Plaintiffs do not rely for their claims against Sidley. In arguing otherwise, Sidley asserts that the Court should apply a so-called "alternative" equitable estoppel theory that has never been adopted or applied by a District of Columbia court. Even if this Court accepted the theory, each of Sidley's arguments for applying it is contradicted by the relevant case law, including cases Sidley cites as well as cases Sidley omits, that rule against Sidley's interpretation and application of the alternative equitable estoppel theory.

As a preliminary matter, in relying on federal law applied by D.C. federal courts (Sidley's Motion to Compel Arbitration ("Sidley Arb.") 8), Sidley fails to note the U.S. Supreme Court's holding in *Arthur Andersen L.L.P v. Carlisle*, 556 U.S. 624, 630-32 (2009): the question of whether a stranger to an arbitration agreement may invoke arbitration is governed not by federal common law, as courts had generally assumed, but by *state contract law*. Sidley does not cite this case. The

federal cases on which Sidley relies either predated *Arthur Andersen* or improperly relied on federal common law despite the Supreme Court's ruling.[1] (Section I) Consequently, those cases cannot be considered good law in the District of Columbia courts.

Even assuming the alternative equitable estoppel theory is deemed viable in this Court and the Court draws on the reasoning of federal courts, each of Sidley's three primary arguments fails in light of that case law:

First, courts have consistently held that an arbitration clause that specifically references the signatories to the agreement, as do the clauses at issue here, may not be read to encompass claims against nonsignatories. (Section IIA) Sidley is incorrect, therefore, in asserting that the test is whether "the plaintiff's arbitration clause does not expressly prohibit arbitration of disputes against a nonsignatory." Sidley Arb. 8. If this argument fails, their remaining arguments are moot.

Second, to establish that alternative equitable estoppel applies, Sidley must establish that the issues between Plaintiffs and Sidley are "intimately founded in and intertwined with the obligations" in the employment agreements at issue *and* that the entities involved had a "sufficiently close" relationship. *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947, 948 (11th Cir. 1999); *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). *See also Ragone v. Atl. Video*, 595 F.3d 115, 127 (2d Cir. 2010). Sidley has not met either prong of that test. (Section IIB) It is not sufficient, as Sidley asserts, to show that the plaintiff is bringing "identical claims against both the signatory and nonsignatory defendants, arising from Plaintiffs'

[1] For the proposition that "federal court decisions construing and applying the federal arbitration act may be regarded as persuasive authority" on the scope of arbitrability, Sidley cites a D.C. Court of Appeals case decided 18 years before *Arthur Andersen* (*Hercules & Co. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1072-73 (D.C. 1991)), without citing *Arthur Andersen.*

underlying employment." Sidley Arb. 2, 8.[2]

Third, to rely on the so-called "concerted misconduct" version of alternative estoppel, Sidley must show that the allegations of concerted misconduct are "intimately founded in and intertwined with the obligations imposed" by the employment contracts at issue. *Goldman v. KPMG, L.L.P.*, 173 Cal. App. 4th 209, 224 (2009). Here, that is not the case. The complaint neither alleges that the agreements were breached nor cites to any provision in them. It is not enough, as Sidley asserts, to show that a plaintiff alleges interdependent misbehavior. Sidley Arb. 13-15.

STANDARD OF REVIEW

"When considering a motion to . . . compel arbitration, the appropriate standard of review . . . is the same standard used in resolving summary judgment motions[.]" *Mariano v. Gharai*, 999 F. Supp. 2d 167, 171 (D.D.C. 2013); *see also Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.,* 531 F.3d 863, 865 (D.C. Cir. 2008). That is, the movant bears the initial burden of demonstrating the absence of a genuine issue of fact; all factual matters must be viewed in the light most favorable to the plaintiff; and, if there are any unresolved factual issues, the motion to compel arbitration must be denied. *See Mariano*, 999 F. Supp. 2d at 171 (denying motion to compel arbitration because the summary judgment standard had not been met); *Camara v. Mastro's Rests. L.L.C.*, No. 18-724 (JEB), 2018 WL 5281906, at *51-52 (D.D.C. Oct. 24, 2018); *Hill v. Wackenhut Servs. Int'l,* 865 F.Supp.2d 84, 89 (D.D.C. 2012) (on a motion to compel arbitration, as with a motion for summary judgment, the moving party has the initial burden "of establishing that the merits of his case are so clear that expedited action is justified."); *Alexander v. F.B.I.,* 691 F.Supp.2d 182

[2] In fact, the claims against the Defendants, which involved separate acts of publication and republication, are different, as APA conceded in Ohio. (Ohio hearing transcript, Wahl, B., p. 28; Ex. A.) For example, only Sidley and Hoffman are named in Counts 1, 4, and 9 of Plaintiffs' Supplemental Complaint; only APA is named in Count 8.

(D.D.C. 2010) ("even where a summary judgment motion is unopposed, it is only properly granted when the movant has met its burden."); *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991) (the procedure to resolve denials of the existence of the agreement to arbitrate mirrors the summary judgment procedure). Sidley has failed to meet its burden and its motion should be denied.

ARGUMENT

I. Sidley's Argument Rests on Federal Cases Whose Reliance on Federal Law Has Been Abrogated by *Arthur Andersen.*

As Sidley concedes, no reported D.C. Court of Appeals case has applied any version of the alternative equitable estoppel theory. While Sidley states that this Court may regard federal court cases relying on federal law as "persuasive authority" (Sidley Arb. 8), that reliance has been abrogated by *Arthur Andersen*'s holding that state contract law, not federal common law, governs the question of whether a litigant not a party to an arbitration agreement may invoke arbitration.

All cases cited by Sidley either predated *Arthur Andersen* or improperly relied on federal law.[3] *See, e.g., Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) ("equitable estoppel is applied in order to fulfill federal pro-arbitration policy"); *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011) ("[T]he Supreme Court's 2009 decision in [*Arthur Andersen*] . . . clarifies that state law governs that question, and to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by [*Arthur Andersen*.]"); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 261-62 (5th Cir. 2014) ("prior decisions allowing non-signatories to compel arbitration based on federal common law, rather than state contract law, such as *Grigson*, have

[3]Sidley cites only one state court case: *Lash & Goldberg L.L.P. v. Clarke*, 88 So. 3d 426 (Fla.Dist. Ct.App. 2012). Sidley Arb. 14. *Lash* relied on other cases that themselves relied on federal court decisions predating *Arthur Andersen* and failing to consider state contract law.

been modified to conform with *Arthur Andersen"*).

Of the D.C. federal court decisions cited as "persuasive authority" by Sidley:

- In *Khan v. Parsons Glob. Servs., Ltd.*, 480 F.Supp.2d 327, 340-41 (D.D.C. 2007), *rev'd on other grounds*, 521 F.3d 421 (D.C. Cir. 2008), the district court expressly rejected plaintiff's argument that California contract law applied and decided the case under federal law. That approach would not be permissible under *Arthur Andersen.*
- In *Fox v. Comput. World Servs. Corp.*, 920 F.Supp.2d 90, 103 (D.D.C. 2013), the district court relied on the reasoning in *Khan,* and thus on federal law.
- In *Kelleher v. Dream Catcher, L.L.C.*, 278 F. Supp. 3d 221, 225 (D.D.C. 2017), which was not decided on estoppel grounds, the court noted that "[c]ourts in this jurisdiction have recognized" the estoppel theory but cited only another federal court decision, which itself cited to *Khan* and *Fox* as authority.

Similarly, all but one of the federal court decisions from other jurisdictions relied upon by Sidley predate *Arthur Andersen* and were decided under federal common law. *See Grigson*, 210 F.3d at 528; *CD Partners, L.L.C. v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005); *MS Dealer Serv. Corp., v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).[4] The one case that postdates *Arthur Andersen*, *Ragone,* 595 F.3d 115, has been sharply criticized for its failure to mention, let alone abide by, *Arthur Andersen's* directive to apply state contract law. *See Crawford Prof'l Drugs, Inc.*, 748 F.3d at 262 n. 9 (specifically criticizing *Ragone* for "fail[ing] to mention *Arthur Andersen* and fail[ing] to cite to any particular state law").

[4] Other cases cited by Sidley were not decided based on an equitable estoppel theory. *See Sherer v. Green Tree Servicing L.L.C.*, 548 F.3d 379, 383 (5th Cir. 2008) (declining to apply equitable estoppel as unnecessary since terms of the arbitration clause itself required arbitration of any claims arising from the signatory's relationship with the nonsignatory); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 36 (2d Cir. 2002) (third-party beneficiary theory).

II. Sidley Has Failed to Demonstrate that Any Version of the "Alternative" Estoppel Theory May Be Applied to This Case.

Sidley relies on what it asserts to be two bases for applying alternative estoppel: "the plaintiff has raised identical claims against all defendants arising from a plaintiff's underlying employment," and "the plaintiff has alleged substantially interdependent and concerted misconduct by all defendants." Sidley Arb. 10-11. Neither basis, even if it were present here, warrants the application of alternative estoppel. Moreover, Sidley fails to meet its burden of showing that the arbitration clauses in Plaintiffs' employment contracts do not preclude their application to a nonsignatory, which it acknowledges to be a threshold issue.

A. Sidley Fails to Demonstrate that the Terms of the Arbitration Clauses Do Not Preclude Its Enforcement by a Nonsignatory.

As Sidley acknowledges, under *Fox* and *Khan* the "first step" in establishing the first basis for alternative estoppel is demonstrating that the terms of the arbitration clause at issue do not limit enforcement to the signatories. Sidley Arb. 8-9. The relevant portion of the arbitration clauses is:

> ARBITRATION.[5] . . . the parties agree that, in the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator . . .

Sidley attempts to characterize this clause's language as "broad" and then to argue that, as a result, it does not preclude the clause's application to nonsignatories. That characterization is incorrect and, in any case, irrelevant to the question of whether the clause, broad or narrow, may encompass nonsignatories.

As demonstrated in Plaintiff's Opposition to APA's Motion to Compel Arbitration (Pltffs'

[5] The Behnke and Newman arbitration clauses are identical except that they reference different paragraph numbers for the agreements' breach, confidentiality, and non-compete clauses.

First Opp. APA, 12-15), the claim that this clause's language is broad is contrary to well-settled law. The key phrase at issue, "arising under," is widely considered as identifying the *narrowest* of arbitration clauses, limiting their scope to claims relating to the literal interpretation and performance of the contract itself. *See, e.g., Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 307 (2010). The case cited by Sidley, *W&T Travel Servs., L.L.C. v. Priority One Servs., Inc.*, 69 F. Supp. 3d 158, 167 (D.D.C. 2014), involves broader language: "all claims, disputes and matters in question arising out of, *or relating to,* this Subcontract." (emphasis added) Sidley Arb. 8-9. Similarly, the cases cited by APA to argue that the clauses at issue are broad involved language broader than the "arising under" language here. Pltffs' First Opp. APA, ftns. 7-8.

More important, however, the question of whether an arbitration clause is broad as applied to its signatories is distinct from the question of whether the clause is broad enough to extend to nonsignatories. In this regard, "[c]ourts have generally drawn a distinction between arbitration clauses that are restricted to the parties specifically identified in the agreement and broadly worded arbitration clauses, which are not restricted to the signatories to the agreement." *Clarendon Nat'l Ins. Co. v. Lan*, 152 F. Supp. 2d 506, 520 (S.D.N.Y. 2001) (cited by Sidley). The critical question is not, as Sidley asserts, whether the language of the clause expressly prohibits its application to nonsignatories. Instead, if the clause "specifically references" the signatories, it does not encompass claims against a nonsignatory:

> The agreement specifies that arbitration will occur "between the Fund and the insurer [Riscorp]." They are the only parties to this agreement. Other language in the agreement . . . . specifies that "each party" shall appoint an arbitrator. This Court has consistently held that a limited arbitration clause, such as the one before us, that specifically references only the signing parties, does not encompass nonsignatory defendants.

Norman v. Occupational Safety Ass'n of Ala. Workmen's Comp. Fund, 776 So. 2d 788, 791 (Ala.

2000). [6] *See also, e.g., In re Liberty Refund Anticipation Loan Litig.*, MDL No. 2334, 2014 WL 3639189, at *4-5 (N.D. Ill. July 23, 2014) (where clause required arbitration of all disputes "against the Bank and/or [certain specified third parties]," court held that "the fact that the arbitration clause expressly limits its scope to disputes against the bank and certain specified third parties suggests that the clause was not intended to cover disputes against other third parties such as [defendant]").

No case relied upon by Sidley involved the narrow language at issue in this arbitration clause. Instead, the clauses referred generally to all matters "arising out of" or "relating to" the contract, transaction, or relationship.[7] By contrast, as in *Norman*, the arbitration clauses in the present case are expressly limited to disputes between the parties under the employment agreement: "the *parties* agree that, in the event *they* are unable to resolve amicably any dispute that may arise regarding *their* respective rights, duties or obligations *under* this Agreement, the

[6] The arbitration clause in *Norman* provided in relevant part: "Any dispute or other matter or question between the Fund and the insurer arising out of or relating to the formation, performance or breach of the Agreement . . . shall be settled by arbitration." *Norman*, 776 So. 2d at 790.

[7] *See, e.g., Khan,* 480 F.Supp.2d at 339 n. 14 (covering "any controversy or claim aris[ing] out of this Assignment Agreement or the breach hereof or in any other way related hereto or otherwise related to or arising out of" plaintiff's employment with the company); *Fox,* 920 F.Supp.2d at 94 (covering "all claims, disputes or controversies ("Claims"), whether or not arising out of my employment, or its termination . . . [including] Claims for wages or other compensation due; Claims for breach of any contract or covenant (express or implied); tort Claims; Claims for discrimination of any kind . . . and Claims for violation of any federal, state, or other governmental law, statute, regulation, ordinance"); *Ragone,* 595 F.3d at 118 (covering "any and all claims or controversies arising out of my employment"); *CD Partners, L.L.C.,* 424 F.3d at 797 (covering "any claim, controversy or dispute arising out of or relating to Franchisee's operation of the Franchised business under the Agreement."); *Grigson,* 210 F.3d at 526 (covering "any dispute or controversy relating to any of the matters referred to in clauses (d)(i),(ii), or (iii), above"); *MS Dealer Serv. Corp.,* 177 F.3d at 944 (covering "[a]ll disputes and controversies of every kind and nature between the parties hereto arising out of or in connection with this contract"); *Sherer*, 548 F.3d at 380 (covering "[a]ll disputes, claims, or controversies arising from or relating to this Agreement or the relationships which result from this Agreement"); *Clarendon Nat'l Ins. Co.*, 152 F. Supp. 2d at 521 (covering "any dispute arising out of [the respective agreements] or the enforcement hereof").

disputed issues shall be settled by . . . arbitration." (emphasis added).

B. Sidley Fails to Demonstrate that the Elements of Equitable Estoppel Exist.

In formulating its first basis for applying "alternative" equitable estoppel ("the plaintiff has raised identical claims against all defendants arising from a plaintiff's underlying employment" (Sidley Arb. 10)), Sidley presents an inaccurate statement of the elements of equitable estoppel. In first adopting the theory, the D.C. district court in *Khan* relied upon the Second Circuit's approach in *Thomson-CSF, S.A.*:

> [A] signatory [may be] bound to arbitrate with a nonsignatory at the nonsignatory's insistence because of "the close relationship between the entities involved, *as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract* . . . and [the fact that] the claims [are] "intimately founded in and intertwined with the underlying contract obligations."

64 F.3d at 779. (emphasis added) (citations omitted)

Consequently, to establish that equitable estoppel applies, even as it was applied in pre-*Arthur Andersen* cases, Sidley must establish (1) that the issues between Plaintiffs and Sidley are "intimately founded in and intertwined with the obligations" in Plaintiffs' employment agreements with APA and (2) that the entities involved had a sufficiently "close relationship."[8]

[8] Sidley asserts instead that two other tests are key (Sidley Arb. 11):

1. Are the plaintiff's "claims against the signatory and non-signatory defendants . . . identical"?
2. Did the "claims ar[i]se from one plaintiff's employment with [the signatory] defendants," therefore relating back to the employment agreement and arbitration clause?

Fox, 920 F. Supp. 2d at 103 (quoting *Khan*, 480 F. Supp. 2d at 341) (quotation omitted)
As the case law demonstrates, the first is not sufficient. As to the second, Sidley cherry-picks from the court's language. In *Fox,* the broad arbitration clause covered "any disputes arising out of the employment relationship." *Id.* at 94. Mirroring the language of the arbitration clause, the court found that the wrongful termination claims against the nonsignatory (plaintiff's "co-employer") arose from plaintiff's employment "*and are thus intertwined with his employment offer letter*." *Id.* at 94, 103-04 (emphasis added). Sidley omits the latter part of that statement.

1. Sidley Has Failed to Establish That Plaintiffs' Claims Against Sidley Are Intimately Founded In and Intertwined With Obligations Set Forth in Their Employment Contracts with APA.

Sidley asserts that, to meet the first prong of the test, the defendant "may show that the plaintiff is bringing identical claims, arising out of his employment, against the signatory defendant and the nonsignatory defendant." Sidley Arb. 8. This articulation of the test is incorrect in two respects: it misconstrues the core of the equitable-estoppel theory, and it misstates the "arising out of" standard.

First, in a decision involving Sidley that included a case-by-case analysis of many of the cases Sidley cites here, a court explained the core of the equitable-estoppel principle:

> Equitable estoppel generically "'precludes a party from asserting rights "he otherwise would have had against another" when his own conduct renders assertion of those rights contrary to equity.'" So, if a plaintiff relies on the terms of an agreement to assert his or her claims against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that very agreement. . . . "[t]he linchpin for equitable estoppel is equity—fairness.". . . [Consequently], the *sine qua non* for application of equitable estoppel as the basis for allowing a nonsignatory to enforce an arbitration clause is that the claims the plaintiff asserts against the nonsignatory must be dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause.

Goldman, 173 Cal. App. 4th at 217-18, 220 (citations omitted).

As a pre-*Khan* D.C. federal court explained:

> "The plaintiff's *actual dependence on the underlying contract in making out the claim* against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel."

DSMC, Inc. v. Convera Corp., 273 F. Supp. 2d 14, 29 (D.D.C. 2002) (emphasis added) (citation omitted).

In contrast, as the *Goldman* court stated, when the claims against the nonsignatory "are fully viable without reference to the terms of the [agreement]," as is the case here, no grounds exist to estop the plaintiff. In rejecting Sidley's equitable estoppel argument, the *Goldman* court stated:

> The allegations depend solely on the actions of . . . Sidley, not on the terms of the . . . agreements, for their success. . . . These allegations reveal no claim of any violation of any duty, obligation, term or condition imposed by the . . . agreements. . . . [T]he claims are fully viable without reference to the terms of those agreements. *That being so, the basis for equitable estoppel—relying on an agreement for one purpose while disavowing the arbitration clause of the agreement—is completely absent.*

173 Cal.App.4th at 230 (emphasis added). *See also, e.g.*, *DSMC,* 273 F. Supp. 2d at 29-30 ("[N]one of the [tort or copyright] claims . . . are 'inextricably intertwined' with [the] contractual obligations . . . Convera's obligation to [plaintiff] should one be proven to exist, does not arise out of that contract . . . [and does not] turn on this Court's interpretation of the agreement."); *Kelleher,* 278 F. Supp. 3d at 225 (an example is "where there would be no claim against the nonsignatory defendant but for the contract.").

In another case involving Sidley, the firm was retained by a financial-services firm to provide an opinion attesting to the propriety of a tax shelter. Sidley was named as a co-conspirator in the allegedly fraudulent transaction. In rejecting Sidley's estoppel argument, the court stated:

> The Stechlers' claims against [Sidley] are not "intertwined" with the Agreements "to a degree sufficient to work an estoppel." Their claims "can hardly be characterized as arising out of or being integrally related to" the Agreements; nor do they "'make[] reference to or presume[] the existence of'" the Agreements. "Were this Court to find the Agreement[s] void, invalid, or unenforceable, Plaintiffs would still have valid causes of action against the [Sidley] Defendants."

See Stechler v. Sidley, Austin Brown & Wood, L.L.P., 382 F. Supp. 2d 580, 591-92 (S.D.N.Y. 2005) (citations omitted). The court noted that "no term in the Agreements *directly* gives rise to the Stechlers' injuries." *Id*. at 592 n.86 (emphasis in original).

Second, Sidley's argument that Plaintiffs' claims arise from their employment with APA (Sidley Arb. 8, 13) misses the mark. Whether the claims arise out of Plaintiffs' *employment* with APA is irrelevant. Sidley is required to demonstrate that the claims are "inextricably intertwined" with "the underlying *contractual obligations,*" as well as Plaintiffs' "actual *dependence* on the

underlying contract in making out the claim against Sidley." *DSMC,* 273 F. Supp. 2d at 29 (emphasis added).

Plaintiffs' defamation claims against Sidley all arise solely out of the publications and republications of the Hoffman Report. To prove that the statements are defamatory and false, Plaintiffs need not depend in any way upon the obligations under the employment agreements, and the allegations in their Complaint make no reference to and do not presume the existence of the APA agreements. *See Stechler,* 382 F. Supp.2d at 591-92. In short, as in *Stechler,* "[w]ere this Court to find the Agreement void, invalid, or unenforceable, Plaintiffs would still have valid causes of action against the [Sidley] Defendants." *Id.* at 592.[9]

2. Sidley Fails to Establish a Relationship Between the Parties Sufficiently Close to Warrant Equitable Estoppel.

As explained by cases Sidley cites, estoppel requires "a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement." *Ragone,* 595 F.3d at 127. *See also, e.g., CD Partners,* 424 F.3d at 798 (*citing MS Dealer,* 177 F.3d at 947). Indeed, the *Ragone* court found even a close relationship between the defendants insufficient, holding that there is a "further necessary circumstance" of a close relationship between the *plaintiff* and the nonsignatory. *Id.* at 127-28 (finding that plaintiff's relationship with the nonsignatory, which approached an employer-

[9] The D.C. federal cases Sidley cites are distinguishable. The breach of contract claim in *Kelleher* and the wrongful termination claim in *Fox* were dependent upon the obligations in the agreements. Likewise, the personal injury claims in *Khan,* which arose out of defendants' mishandling of a kidnapping negotiation (s*ee Khan v. Parsons Glob. Services, Ltd.*, 428 F.3d 1079 (D.C.Cir. 2005)), were, as the court held, breaches of duties necessarily undertaken in the defendants' role as the plaintiff's employer and/or the employer's nonsignatory *subsidiaries* and thus were deemed to have been intertwined with the employment agreement. *Khan,* 480 F.Supp.2d at 341.

employee relationship, satisfied this requirement).

Prior to this lawsuit, there was no relationship between the Plaintiffs and Sidley. Nor is the relationship between APA and Sidley, which Defendants have repeatedly described as "independent," sufficiently close to warrant estoppel. The mere fact that Sidley was retained to act as APA's attorney for a particular matter is not enough, especially when Sidley was hired not to represent APA but to conduct an independent investigation. The nature of this relationship is reflected in Sidley's initial engagement letter with APA, in which Sidley refers to "Our Independence." Sidley Engagement Letter, p. 1; Ex.B.

In both *Khan* and *Fox*, cases cited by Sidley, the co-defendants had a much closer and more direct relationship. As the court in *Khan* noted, the nonsignatories were "either direct or indirect *subsidiaries* of [the defendant/signatory]." *Khan*, 480 F.Supp.2d at 341 n. 16. In *Fox*, "[t]he relationship between CWS and C2 [was] governed by a joint employment agreement whereby C2 act[ed] as a *'co-employer'* and 'share[d] many employer liabilities' with CWS." *Fox*, 920 F.Supp.2d at 94. *See Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 640 (Tex. 2018) ("Second Circuit's alternative-estoppel cases compelling arbitration typically involve some corporate affiliation between a signatory and nonsignatory, not just a working relationship.")

In denying Sidley's motion to compel arbitration, the *Stechler* court emphasized that Sidley's role as an "outside, independent legal advisor" did not create a sufficiently close relationship with the other defendants:

> . . . there is no indication in the record of any willingness on the Stechlers' part to arbitrate their disputes with [Sidley]. There is no sign that the Stechlers could have imagined that, in entering into an arbitration agreement with DGI and Alpha, they were also entering into an arbitration agreement with [Sidley]. Indeed, it is the Stechlers' claim, unrefuted by [Sidley], that they understood [Sidley] to be acting independently of the other defendants, as an independent, outside legal advisor.

Stechler, 382 F. Supp.2d at 592.

Here, as in *Stechler,* Sidley was, by its own admission, an independent outside entity conducting services for a particular matter. Indeed, in the Ohio litigation APA represented that for purposes of determining personal jurisdiction, Sidley operated "entirely independently"[10]

C. Sidley Fails to Demonstrate that the "Concerted Misconduct" Theory Should Apply to This Case.

Citing *Grigson* and *MS Dealer*, Sidley asserts that, to successfully compel arbitration under the "concerted misconduct" version of the alternative equitable estoppel theory, all that is necessary is that there be allegations of interdependent and concerted misconduct between signatories and nonsignatories.[11] Sidley Arb. 13. However, as the *Goldman* court noted after a careful case-by-case analysis of *Grigson* and *MS Dealer* as well as other cases:

> [C]ontrary to the contentions of [Sidley], . . . mere allegations of collusive behavior between signatories and nonsignatories to a contract are not enough to compel arbitration between parties who have not agreed to arbitrate*: those allegations of collusive behavior must also establish that the plaintiff's claims against the nonsignatory are "'intimately founded in and intertwined with the obligations imposed by the [contract]'"*

Goldman, 173 Cal.App.4th at 223 (emphasis added) (citing *MS Dealer Serv. Corp.*, 177 F.3d 942, 948 (11 Cir. 1999); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000).

Sidley has not demonstrated that Plaintiffs' claims are "intimately founded in and intertwined with the obligations imposed by the agreements." (*See* Section IIB-1) Without meeting

[10]"The retainer agreement makes abundantly clear that APA has hired Sidley to conduct an independent investigation. In fact, it was rather unusual in not only referring repeatedly to this work that Sidley was supposed to do as an independent investigation, but it made clear that Sidley was operating entirely independently." (Ohio hearing transcript, Wahl, B., p. 28; Ex. A.)

[11] The only other case cited by Sidley with regard to the "concerted misconduct" theory is *Lash & Goldberg L.L.P.*, 88 So. 3d at 427-28. A review of the cases cited in *Lash* demonstrates that the reasoning employed is based on the *MS Dealer* case which, as stated above, should be rejected. *Specht*, 306 F.3d at 36, cited by Sidley is irrelevant. The defendant did not argue an estoppel theory.

this fundamental requirement, no estoppel claim holds water, since "[Plaintiffs] are not relying … on the . . . agreements to make their claims against [Sidley], while at the same avoiding the arbitration clauses of those agreements—and, at bottom, *that is the only basis upon which they may be equitably estopped from refusing to arbitrate when they have not agreed to do so*." *Goldman,* 173 Cal.App.4th at 233 (emphasis added).[12]

Sidley's final argument is that "the concerted-misconduct doctrine protects a defendant who has signed an arbitration agreement from defending against plaintiff's allegations in multiple forums." Sidley Arb. 14. That argument must also be rejected, as it was in *Goldman*:

> The proposition that a court should compel arbitration … to avoid duplicative litigation, is…simply wrong.. . . But no principle of law—and certainly not the doctrine of equitable estoppel—allows us to decide that a plaintiff who did not agree to arbitrate with a defendant must do so simply because he alleges a conspiracy, and without regard to whether his conduct 'renders assertion of [his right to a judicial forum] contrary to equity.' While . . . Sidley repeatedly note[s], federal policy favors arbitration, that policy simply does not apply to parties who have not agreed to arbitrate.[13]

Id. at 233-34 (citations omitted). Indeed, while "federal policy favor[ing] arbitration" was at least deemed a factor in pre-*Arthur Anderson* cases such as *Goldman*, that is no longer the case.

CONCLUSION

Sidley has failed to set forth any rationale for forcing Plaintiffs, "parties who have not agreed to arbitrate," to arbitrate against their will. Plaintiffs respectfully request that the Court deny Sidley's Motion to Compel Arbitration.

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[12] *See Fairman v. District of Columbia*, 934 A.2d at 443 (D.C. 2007) (not cited by Sidley) ("The equitable estoppel doctrine provides that 'a party with full knowledge of the facts, which accepts the benefits of a . . . contract . . . may not subsequently take an inconsistent position to avoid the corresponding obligations or effects.'") (citations omitted).

[13] Plaintiffs do not rely on a conspiracy theory of liability between Sidley and APA but instead simply rest on whether the subsequent publication of the Hoffman Report by APA was foreseeable to Sidley given their engagement letter. *Caudle v. Thomason*, 942 F. Supp. 635, 639 (D.D.C. 1996) (each publication of a defamatory statement, including each republication, is a separate tort and the publisher may be responsible for reasonably expected republications).

Dated: March 7, 2019

Respectfully submitted,

/s/ Bonny J. Forrest
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Exhibit A

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

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

Plaintiffs,

-vs- **TRANSCRIPT OF PROCEEDINGS**
(MOTION HEARING)

DAVID HOFFMAN, et al.,

(Pages 1 - 93)

Defendants.

PRESIDING: Hon. Timothy N. O'Connell

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS
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San Diego, CA 92101

Gerhardt A. Gosnell, II, Esq.
James E. Arnold & Associates, LPA
115 West Main Street, 4th Floor
Columbus, OH 43215

ON BEHALF OF THE DEFENDANTS
DAVE HOFFMAN AND SIDLEY AUSTIN, LLP
Thomas Hentoff, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005

D. Jeffrey Ireland, Esq.
Erin E. Rinehart, Esq.
Christopher C. Hollon, Esq.
Faruki, Ireland, Cox, Rhinehart & Dusing
110 N. Main Street, Suite 1600
Dayton, OH 45402

court today is not only my co-counsel, but a representative of the APA, Jesse Raben, who is with the general counsel's office.

So I'll try not to duplicate anything that Mr. Hentoff has said, but APA is a different Defendant and the allegations in the complaint pertaining to APA are actually quite different.

APA is a scientific organization that is dedicated to the furtherance of the field of psychology. It's a 501(c)(3) charitable organization. It's incorporated in the District of Columbia. It has its principal place of business in the District of Columbia. It operates entirely out of its offices in the District of Columbia. It has no office, no phone number, and no real activities in Ohio.

In 2014, it retained the law firm of Sidley Austin to conduct an investigation and Mr. Hentoff has described what the focus of the investigation was. The retainer agreement has been referenced in not only the complaint, but it's also attached as Exhibit I to Plaintiff's Newman's affidavit.

The retainer agreement makes abundantly clear that APA has hired Sidley to conduct an independent investigation. In fact, it was rather unusual in not only referring repeatedly to this work that Sidley was supposed to do as an independent investigation, but it made clear that Sidley was operating entirely independently. It was to follow the evidence wherever it led and that APA intended to release the results of the report, whether favorable or unfavorable, to the public

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

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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 FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

[PROPOSED] ORDER

Defendants David H. Hoffman, Sidley Austin LLP, and Sidley Austin (DC) LLP (collectively, "Sidley") have asked this Court to compel two Plaintiffs, Drs. Stephen Behnke and Russell Newman, to arbitrate against Sidley on the basis of arbitration clauses in expired employment contracts with the American Psychological Association ("APA"), their former employer.

The procedure to resolve denials of the existence of the agreement to arbitrate mirrors the summary judgment procedure. *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991). Sidley has failed to meet its burden and the motion is therefore **DENIED** on four separate grounds.

First, no valid agreement to arbitrate existed at the time Plaintiffs' claims arose. Even if the arbitration clauses were deemed to have survived the employment contracts' termination, Defendants have waived any rights to arbitrate and, in any case, the clauses would not apply to Plaintiffs' defamation claims. Sidley's Motion to Compel is therefore moot.

Second, even if Sidley's motion were not moot, courts have consistently held that an arbitration clause that specifically references the signatories to the agreement, as do the clauses at issue here, may not be read to encompass claims against nonsignatories. *See Clarendon Nat'l Ins.*

Co. v. Lan, 152 F. Supp. 2d 506, 520 (S.D.N.Y. 2001)

Third, to establish that alternative equitable estoppel applies, Sidley must establish that the issues between Plaintiffs and Sidley are "intimately founded in and intertwined with the obligations" in the employment agreements at issue, and that the entities involved had a sufficiently close relationship. *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 948 (11th Cir. 1999); *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995*). See also Ragone v. Atl. Video*, 595 F.3d 115, 127 (2d Cir. 2010). That is especially true in this case where APA has conceded the claims against each of the Defendants are not identical.

Finally, to rely on the "concerted misconduct" version of alternative estoppel, Sidley must show that the allegations of concerted misconduct are "intimately founded in and intertwined with the obligations imposed" by the employment contracts at issue. *Goldman v. KPMG, L.L.P.*, 173 Cal. App. 4th 209, 224 (2009). Here, that is not the case. The complaint neither alleges that the agreements were breached nor cites to any provision in them.

SO ORDERED.

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

Copies to:

Fara Kitton, Esq.
John Williams, Esq.
Counsel for Plaintiffs Morgan Banks, Stephen Behnke, Debra Dunivin, Larry James, and Russell Newman

Bonny Forrest, Esq.
Counsel for Plaintiffs Morgan Banks, Debra Dunivin, Larry James, and Russell Newman

Louis Freeh, Esq.
Counsel for Plaintiff Stephen Behnke

Karen Carr, Esq.
Barbara Wahl, Esq.
Counsel for Defendant American Psychological Association

Alexander Kasner, Esq.
Krystal Commons, Esq.
Thomas Hentoff, Esq.
John Villa, Esq.
Counsel for Defendants David Hoffman, Sidley Austin, LLP, and Sidley Austin LLP, DC

CERTIFICATE OF SERVICE

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

/s/ John B. Williams
John B. Williams