IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Hiram E. Puig-Lugo
vs.	:	Oral Argument - Not scheduled
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 317
Defendants.	:	

DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S REPLY IN SUPPORT OF ITS CONTESTED SPECIAL MOTION TO DISMISS THE COMPLAINT UNDER THE D.C. ANTI-SLAPP ACT, D.C. CODE § 16-5502

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Plaintiffs Morgan Banks, Debra Dunivin, and Larry James ("Plaintiffs") have sued the American Psychological Association ("APA") contending that they were defamed by statements about them in the Report.[1] Plaintiffs Banks and Dunivin apparently contend that the Report falsely concludes that they coordinated with APA officials to ensure that APA policies aligned with the interests of the Department of Defense ("DoD"). Compl. ¶¶ 131-32, 210. Plaintiff James also alleges that the Report concludes that the ethics complaints against him were mishandled. Compl. ¶¶ 134-36. Yet none of the "proof" Plaintiffs have offered in their Opposition addresses any of these allegations. Instead, Plaintiffs provide convoluted arguments about APA's purported knowledge of *other* events in the association's history, not even pertinent to Plaintiffs, which allegedly gave some of the APA Board members who made the determination to release the Report in 2015 knowledge that statements in the Report conflicted with those other events. Plaintiffs' "proof" centers almost entirely on past events that involve APA former Ethics Director, Dr. Stephen Behnke, who was, but no longer is a plaintiff here. Aside from self-serving affidavits, the record Plaintiffs have submitted in connection with their Opposition makes scant reference to them and provides no evidence that demonstrates clearly and convincingly that APA knew at the time of the Report's publication that statements in the Report about them were false. The Court should accordingly grant APA's special motion to dismiss Plaintiffs' Complaint.[2]

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[1] References to the Report are to 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," dated September 4, 2015, and errata thereto.

[2] Because APA's initial Special Motion to Dismiss the Complaint under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 ("APA's First anti-SLAPP motion"), was filed before Plaintiffs filed their Supplemental Complaint, the two versions of the Complaint are the subject of separate Special Motions to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502. APA has contemporaneously filed a separate Reply in support of its Special Motion to Dismiss the Supplemental Complaint under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502. For purposes

INTRODUCTION

To survive APA's anti-SLAPP motion, Plaintiffs, who are public officials,[3] must prove through admissible evidence that APA published the Report with actual malice. Plaintiffs have failed to meet their burden. "[T]he standard of actual malice requires proof not merely that the defamatory publication was false, but that the defendant either knew the statement to be false or that the defendant 'in fact entertained serious doubts as to the truth of his publication.'" *Tavoulareas v. Piro*, 817 F.2d 762, 775–76 (D.C. Cir. 1987) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). In their 83-page Opposition, Plaintiffs' argument and "proof" regarding APA's actual malice is limited to discussion on a single page and Exhibit B, a chart in which they identify thirty-four (34) prior events ("Actions") involving APA committees, its Board of Directors ("Board"), or Council of Representatives ("Council"), that purportedly "conflict" with one or more of the 219 statements[4] Plaintiffs have identified in Exhibit A to the Complaint (the "Statements").[5]

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of this Reply, APA refers to "Complaint" as encompassing the Supplemental Complaint.

[3] Arguments regarding Plaintiffs' public officials status, the actual malice standard, and choice of law are set forth in Sidley's Reply in support of its anti-SLAPP Motion regarding the initial Complaint, and in its opening brief. Those arguments are incorporated here by reference.

[4] Plaintiffs have failed to address the vast majority of the statements identified in Exhibit A to their Complaint, and arguments they may have had (if any) regarding those statements are now waived. Accordingly, the following Statements are no longer part of this case as to APA: 3, 7, 8, 9, 12, 13, 14, 16, 17, 19-27, 30-38, 40-50, 52-58, 60-65, 68-71, 73-84, 86-117, 119-144, 146-151, 154-164, 170-186, 189-205, and 210-219. Each of the Statements that Plaintiffs cite in their Opposition, and on which they rely to demonstrate APA's actual malice, are appended here as an Exhibit for the Court's ease of reference.

[5] Plaintiffs' argument as to APA's actual malice requires a gymnastic-type exercise to understand, where the reader must (1) refer to Exhibit B, which identifies the APA Board member who allegedly had the knowledge of the Report's Statement; (2) determine which general category of false conclusion is at issue; (3) analyze the identified record support, whether affidavit or link to a document on Plaintiffs' website or otherwise; and (4) compare the alleged Action identified on Exhibit B with the purported Statement. This chaotic methodology constitutes Plaintiffs' "proof" for each of the thirty-four Actions they contend demonstrate that APA had actual malice. This tortured methodology fails to prove APA's alleged actual malice, as none of the specific Actions match up with the Statements to show APA's knowledge of

This is insufficient to demonstrate APA's actual malice. Plaintiffs are unable to show, even by circumstantial evidence, that the alleged Actions subjectively caused APA to know at the time of publication that any Statements about these Plaintiffs were false. Plaintiffs' arguments also suffer from other defects: mischaracterizations of actual Report Statements; purported proof that does not show the facts alleged; citation to purported collateral falsehoods about non-parties not applicable to these Plaintiffs; and misstatements of events that are consistent with the Statements. Although Plaintiffs cobble together dozens of documents and affidavits, it is not enough to provide by clear and convincing evidence that APA knew at the time of publication that Report Statements about the Plaintiffs were false.

Moreover, Plaintiffs must separately prove **APA's** actual malice, and not simply lump together all Defendants and allege that they collectively knew the Report's statements were false at the time of publication. "Actual malice must be proved separately with respect to *each defendant*, and cannot be imputed from one defendant to another[.]" *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990) (emphasis added) (internal citations omitted). Plaintiffs therefore must show that APA acted with actual malice based solely on APA's subjective state of mind, independent of Sidley. *See McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1303 (D.C. Cir. 1996) (authorship of allegedly defamatory article could not be attributed to Esquire because "actual malice is … predicated on [the author's own] subjective state of mind"). Yet Plaintiffs repeatedly refer to Defendants collectively, failing to distinguish their distinct actions and elements of proof. *See, e.g.*, Opp'n 25-35, 39-46, 51-54. APA did not, and was not obligated to, conduct its own investigation. Instead, it hired Sidley, a well-regarded law firm, and its partner David Hoffman, an experienced lawyer with

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alleged falsity, among the other reasons described herein.

excellent credentials, to spearhead the investigation. *See, e.g.*, *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("failure to investigate before publishing" is not actual malice); *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 103 (2d Cir. 2000) ("it was plainly reasonable for [defendant] to publish the full text of the independent report it had commissioned" from a "well-respected law firm"). Notwithstanding Plaintiffs' references to Defendants collectively, in this Reply, APA addresses only the specific allegations that Plaintiffs have made pertinent to APA.

As demonstrated below, Plaintiffs cannot meet their burden of proof to show that they are likely to prevail on the merits, and thus the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, requires that Plaintiffs' Complaint be dismissed with prejudice.

ARGUMENT

Plaintiffs' theory of actual malice is fundamentally flawed. Plaintiffs have (i) alleged that collateral falsehoods—*i.e.*, false statements about others, principally Dr. Behnke, are somehow imputed to Plaintiffs, such that APA knew that the Report's statements about **Plaintiffs** were also false; (ii) contended that information in APA's files or experiences of Board members caused APA to know that Report Statements were false; and (iii) asserted that actions taken by APA governance bodies "conflict" with Report Statements such that Board members considering whether to disclose the Report knew certain Statements were false.[6] There are myriad problems with these theories.

[6] Plaintiffs have not tied, and cannot tie, to specific Board members the Board's decision to disclose the Report, making hypothetical any connection between any prior Action and a Board member's consent to release the Report. Moreover, even if Plaintiffs could show that any of the five identified 2015 Board members knew that a Statement in the Report was false, Plaintiffs have provided no evidence that all of the sixteen members of the 2015 Board had that knowledge. Knowledge of falsity is not imputed, and must be proved. *Secord*, 474 F. Supp. at 786.

Plaintiffs cannot demonstrate that any Board member who voted to publish the Report actually read a specific provision of the 541-page Report and knew that a statement contained therein was false at the time of the Report's publication. Plaintiffs have not demonstrated, and cannot demonstrate that, in 2015, when any specific Board member agreed to publication of the Report, he or she recalled an Action, which perhaps occurred many years prior, and understood that that Action rendered a Report Statement false. Moreover, Plaintiffs have not shown that any Statement and an allegedly conflicting Action were mutually exclusive; that is, that the existence of one entirely negated the other. Finally, as to APA, Plaintiffs themselves had relatively little actual interaction with the APA processes that Plaintiffs invoke—*e.g.*, the ethics complaint process, and the APA resolutions and amendment to Ethics Standard 1.02— on which Plaintiffs focus in their Opposition. To fill this void, Plaintiffs have pointed to Dr. Behnke's actions in an effort to tie the Report's Statements about him to APA's actual malice as to them. But collateral falsehoods about a third party cannot demonstrate actual malice as to these Plaintiffs.

A. Plaintiffs' Circumstantial Evidence Fails to Show Actual Malice by Clear and Convincing Evidence.

It is axiomatic that unless the evidence in Plaintiffs' Opposition demonstrates APA's actual malice by clear and convincing evidence, APA's motion must be granted. *Doe v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014). Plaintiffs must demonstrate that at the time APA published the Report, it knew that statements in the Report were false or had doubts about their truthfulness. *St. Amant,* 390 U.S. at 731. This "daunting" task, *McFarlane*, 74 F.3d at 1308, requires Plaintiffs to establish by admissible evidence that APA subjectively knew that specific statements in the Report pertaining to Plaintiffs were false. *Secord,* 747 F. Supp. at 785. Although APA's state of mind can be shown by circumstantial evidence, *OAO Alfa*

Bank v. Ctr. for Pub, Integrity, 387 F. Supp. 2d 20, 50 (D.D.C. 2005), case law has strictly constrained what is admissible and sufficient to show a defendant's knowledge of falsity to situations where the statement is (i) fabricated by the defendant, (ii) the product of his imagination,[7] or (iii) based wholly on an unverified anonymous source. *St. Amant*, 390 U.S. at 732. These are the only three scenarios that courts have theorized could be "so powerful that it could provide clear and convincing proof of actual malice." *OAO Alfa Bank*, 387 F. Supp. 2d at 50. [8]

The instant case does not involve fabrication of a story, imagined facts, or an unverified anonymous source, so Plaintiffs have resorted to three alternative methodologies in an effort to demonstrate APA's actual malice **through inference**. *First*, Plaintiffs allege that collateral Statements made in the Report about people **other than** Plaintiffs constitute proof that APA had actual malice about statements pertaining to Plaintiffs.[9] *Second*, Plaintiffs contend that information in APA's voluminous files, or events that specific Board members experienced in prior years, caused APA to know that Statements in the Report were false.[10]

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[7] This factor has also been described as "so inherently improbable that only a reckless person would have put [it] in circulation." *See, e.g., Jankovic v. In'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016), (quoting *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003).

[8] Courts have routinely rejected other circumstances as proof of actual malice, including departures from ordinary procedure (*OAO Alfa Bank*, 387 F. Supp. 2d at 55); departure from professional standards, even when coupled with ill motive (*Harte-Hanks* , 491 U.S. at 664-65); mistake (*Bose Corp. v. Consumers Union of the United States, Inc*., 466 U.S. 485, 512 (1984)); and misinterpretation (*Kahl v. Bureau of Nat'l Affairs, Inc*., 856 F.3d 106, 117 (D.C. Cir. 2017).

[9] *See, e.g*., Action 23 and Statement 11, regarding supposed mishandling by Dr. Behnke of ethics complaints made about Lt. John Leso.

[10] *See, e.g*., Action 3 and alleged false Statement 169, that "Behnke also plotted to arrange a controlled, well-staged speech from a DoD official who would send a message to the Council about the humane treatment of detainees," which Plaintiffs contend "conflicts" with an announcement regarding the 2006 presentation by Army Surgeon General Kevin Kiley to APA Council (the content of which is not provided). Plaintiffs contend that nine years after that presentation, Board members Drs. Kaslow, McDaniel, Kelly, and Douce (for whom there is no admissible evidence that they attended the presentation) knew that Statement 169 about Dr. Behnke was false.

Third, Plaintiffs allege that prior actions taken by APA's Council, Board, or committees were incompatible with Statements in the Report, thereby causing APA to know that the Report contained falsehoods.[11] Plaintiffs' "proof" of APA's actual malice based on these three methodologies is insufficient both as a matter of law and as a matter of fact.

None of the cases cited by Plaintiffs permit inference to be substituted for proof of actual malice. Opp'n 23. Plaintiffs cite *Zerangue v. TSP Newspapers, Inc*., 814 F.2d 1066, 1070 (5th Cir. 1987), for the idea that failure to acknowledge contradictory information can support an inference of knowledge of falsity sufficient for actual malice. It does not so hold. The *Zerangue* court held that a plaintiff must show one of the three *St. Amant* circumstances to prove actual malice and found no actual malice where a reporter's error was based on his faulty recollection. *Id*. at 1071. Similarly, in *Schiavone Constr. Co. v. Time, Inc.,* 847 F.2d 1069, 1073 (3d Cir. 1988), the Third Circuit rejected the argument that inference could be used to prove actual malice, reversing summary judgment in the plaintiff's favor on the ground that the "sting" of the article did not support a finding of the defendant's actual malice. Finally, in *Tomblin v. WHCS-TV8*, 434 F. App'x 205, 211 (4th Cir. 2011), the Fourth Circuit reversed summary judgment for the defendant television station where a reporter, covering an incident between two small children in a day care center, deliberately and sensationally referred to the incident as "sexual abuse," thereby implying predatory behavior by the day care center while ignoring a governmental agency report and witness statements. The court did not *infer* actual malice, but instead relied on the reporter's intentional disregard of the facts. None of the three methodologies employed by Plaintiffs to infer APA's actual

[11] *See, e.g*, Plaintiffs' allegation that an APA board's rejection of a resolution in 2007 proved that APA knew when it published the Report in 2015 that statements in the Report contending that Dr. Behnke was working behind the scenes to ensure that resolution language was to DoD's liking were false. *See* Action 5 and Statements 6, 10, 51, 66 and 187.

malice are legally supportable.

First, with regard to Plaintiffs' use of collateral evidence regarding a non-party, such evidence does not support a finding of actual malice. It is well settled that evidence of actual malice must be direct and probative of the plaintiff's alleged defamatory statement. *Tavouleareas*, 817 F.2d at 794 (defamation plaintiffs "must demonstrate actual malice *in conjunction* with a false defamatory statement." (emphasis in original)). That is, circumstantial evidence must directly connect a false statement to the defendant's subjective knowledge that the statement was false. *Parsi v. Daioleslam*, 890 F. Supp. 2d 77, 86 (D.D.C. 2012) (no actual malice where plaintiff failed to show that affidavit statements were actually known to defendants at the time of publication); *Tah v. Global Witness Publ'g, Inc.*, C.A. No. 18-2109 (RMC), 2019 WL 4737116, at *10 (D.D.C. Sept. 27, 2019) (alleged preconceived story line, failure to show facts molded to fit preconceived story line, ignoring plaintiffs' prepublication denials and alleged intentional omissions from the article were "only strands of evidence" and did not constitute actual malice), *appeal filed*, No. 19-7132 (D.C. Cir. Sept. 10, 2018); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 262-63 (D.D.C. 2013) (general denials that plaintiff was not a warlord were insufficient to prove actual malice, as plaintiff had adduced no facts to demonstrate that defendants knew that description was false).

Courts have specifically rejected Plaintiffs' contention that defendants' knowledge of false statements about one aspect of a publication can be used as proof of actual malice about another. *See, e.g., Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988), *aff'd,* 881 F.2d 1426 (8th Cir. 1989). In *Price*, an FBI agent sued the author and publisher of a book about the history of government policies toward and treatment of American Indians. The book included statements that the plaintiff was believed to have been involved in the murder

of certain activists. In an effort to show defendants' actual malice, plaintiff asserted that "collateral falsehoods – false statements of fact unrelated to the plaintiff" proved the author's reckless state of mind and actual malice about the plaintiff. 676 F. Supp. at 1512-13. The court expressly rejected this approach, holding that "collateral falsehoods" could not provide a basis for proving actual malice as to this plaintiff, citing *Tavoulareas'*s requirement that actual malice must be shown *in conjunction* with a specific false statement. *Id*. Noting that even if the author "had subjective doubts" about another aspect of the book's content, that "would not establish an inference of actual malice with respect to his statements concerning plaintiff." *Id*. at 1513.

Here, Plaintiffs' purported proof of APA's knowledge of the Report's alleged falsehoods about others centers on the conduct of third parties, which as a matter of law fails to establish that APA knowingly published false statements about Plaintiffs. To the extent that any of the Statements can be said to refer to Plaintiffs, they fail to explain how participation in Actions or documents related to them are mutually exclusive of certain Statements. There is no proof regarding APA's actual malice as to these Plaintiffs pertaining to APA's handling of the Leso ethics complaints (Actions 21, 23, 24, 25, 26, and 28), pertaining to APA's "open debate" on proposals that are not mutually exclusive with Dr. Behnke's behind-the-scenes coordination with DoD (Actions 1, 2, 3, 4, 5, 6, 8, 11, 16-20, and 27), and pertaining to APA's history of resolutions and amendment of its Ethics Standard 1.02 (Actions 7, 9-10, and 12-15).[12]

Second, Plaintiffs' assertion that information in APA's files demonstrates the Board's

[12] Remaining Actions 22 and 29-34 should also not be considered by the Court because Plaintiffs have failed to refer to them as having any connection to any particular Statement. *See* Sections B(2)(h) (i)-(vii), *infra.*

knowledge of Statements is also unsupportable as a matter of law. A defendant has no obligation to consult files, even its own, to determine whether a statement is false. *See, e.g.*, *LaPointe v. Van Note*, No. Civ. A 03-2128(RBW), 2006 WL 3734166, at *11-12 (D.D.C. Dec. 15, 2006) (defendant had no obligation to review press release that allegedly would have demonstrated article's false statement regarding basis for plaintiff's discharge); *McFarlane*, 74 F.3d at 1304-05 (no obligation by defendant magazine to review its copies of transcriptions of reporter's interview notes); *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 126 (2d Cir. 2013) ("[e]ven the failure to review one's own files is inadequate to demonstrate malice," *citing N. Y. Times v. Sullivan*, 376 U.S. 254, 287-88 (1964)); *Parsi*, 890 F. Supp. 2d at 86 ("[a]lthough defendant is obviously familiar with much of Parsi's work, there is no requirement that he track down every interview given, op-ed written, or conference attended …. Hence, the existence of these scattered statements cannot prove actual malice."); *Libre by Nexus v. Buzzfeed*, Case No. 17-cv-1460 (APM), 2018 WL 6573281, at *3 (D.D.C. Dec. 13, 2018) (defendant's mere possession of ICE letter would not have caused it to question whether ICE had the legal authority to investigate plaintiff's business practices). It is not enough for a plaintiff to show that a document exists to charge the defendant with the knowledge of that document for actual malice purposes. *Parsi*, 890 F. Supp. 2d at 86. Plaintiff must show that the defendant actually saw and understood the statements that prove falsity. *Id*.

Here, Plaintiffs have not shown, and cannot show, that Board members actually read and understood certain documents, or recalled or even participated in the Actions that allegedly prove Statements to be false. For example, in Action 4, Plaintiffs contend that Dr. Douce, a 2015 Board member, who in 2007 was a member of APA's Board of Educational Affairs ("BEA"), had knowledge of the alleged falsity of the Report's conclusion that Dr.

Behnke had colluded with DoD because in 2007 the BEA asked for military psychologists' views on a proposed resolution reaffirming APA's stance against torture. This "proof" is far too attenuated, remote, and insubstantial to constitute knowledge of falsity under a clear and convincing standard.

Third, to prove actual malice, Plaintiffs must demonstrate that the Statement was expressly refuted by APA's directly contrary knowledge, which negates the truth of a specific Statement. *See, e.g., Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 144 (D.D.C 2017) ("[e]ven if more information had been included about Deripaska's business interests in Ukraine, it would not have undermined the conclusion that he was also engaged in advancing Russian interests more broadly, because. . . '**the two are not mutually exclusive**.'") (emphasis added). It is not sufficient for Plaintiffs to show that Actions were incompatible or inconsistent with a Statement in the Report. *Id*. To demonstrate actual malice, the facts of the prior event and those in the Report must be "mutually exclusive." *Id.*

Here, Plaintiffs do not point to any Actions that are incompatible or inconsistent with, let alone mutually exclusive of, a Report Statement. For example, Plaintiffs cite to numerous debates within APA about the adoption of an amendment to Ethics Standard 1.02 as evidence that Sidley's conclusion that Dr. Behnke colluded with DoD to preclude APA's passage of a ban on military psychologists' participation in detainee interrogations was false. *See, e.g.*, Actions 7, 9, 10, and 12-15. But open debate within APA is not at odds with the possibility that Dr. Behnke in fact collaborated and colluded with DoD officials behind the scenes so that the APA debate was impacted by their unseen activities.

Plaintiffs have therefore failed to prove that APA had actual malice with regard to any Statement.

B. None of the Evidence Plaintiffs Advance Demonstrates Falsity or APA's Knowledge of Falsity.

None of Plaintiffs' cited Actions demonstrate that APA knew statements in the Report were false at the time of publication. All of Plaintiffs' purported "proof" fails to show that APA acted with actual malice.

1. The Board's Knowledge of the Ethics Committee's Closing of the Leso Ethics Complaint File Does Not Demonstrate that the Board Knew Any Statement about Plaintiffs Was False.

Plaintiffs' Opposition cites the APA Ethics Committee's decision to close the ethics complaint file of Lt. John Leso[13] (the "Leso file") as proof of APA's knowledge of the falsity of the Report's general conclusion that ethics complaints were mishandled in order to protect prominent national security psychologists from censure. Opp'n 38. Plaintiffs contend the 2014 Board, different in composition than the 2015 Board that determined to publish the Report, knew that Sidley's conclusion that APA had mishandled certain ethics complaints was false because it had been briefed about the Ethics Committee's decision to close the Leso file. *Id*. Plaintiffs' specific citation to the handling of the Leso file as an example of APA's actual malice is meritless for myriad reasons. Plaintiffs' initial premise of defamation is incorrect, compounded by citation to documents and affidavits that do not support their thesis.

First, APA's handling of the Leso file is completely irrelevant to Plaintiffs, who had no role in APA's internal ethics complaint process generally or with the Leso file specifically. The Report extensively describes the policies, practices, and methodologies of the Ethics Office, as led by Dr. Behnke, and the seven-year investigation of complaints against Lt. Leso, Report at 464-75, 494-520, including the three complaints made against him, how they were

[13] The Report discusses the three separate ethics complaints against Lt. Leso, related to his actions at Guantanamo Bay. The Leso investigation took place between August 2006 and December 2013. The ethics complaints alleged that Lt. Leso had personally engaged in, been present for, or enabled the torture of detainees at Guantanamo. Report at 493, 495-512.

handled, what the investigators and Ethics Committee members thought of the charges, and ultimately how and why the Leso file was closed. *Id.* Plaintiffs are never mentioned. Nor does the Report identify any improprieties in connection with the handling of the Leso file, or find that it was improperly closed to protect Lt. Leso from sanctions.[14]

Second, although the Report does not conclude that the Ethics Office mishandled or improperly closed the Leso file, Plaintiffs mischaracterize a general statement in the Report's executive summary regarding that Office's mishandling of other unidentified ethics complaints as applicable to Lt. Leso.[15] The Report's actual reference to the mishandling of ethics complaints pertains to "**prominent**" national security psychologists, which did not include Lt. Leso. As the Report states, and Plaintiffs have not contested, Lt. Leso was an inexperienced, "early career psychologist trained as a health care provider, [who] did not request to become involved with detainee interrogations but was rather informed that he would be in the role of behavior science consultant ('BSC') only after he arrived in Guantanamo Bay…"; he was not a "major player." Report at 513-15.

Third, Plaintiffs contend that the statement by APA's Special Committee member/Board member Dr. Nadine Kaslow at the time the Ethics Committee closed the Leso file that "as complete and careful a review of the available evidence was undertaken as possible," and that the review was kept insulated from political pressures, demonstrates actual malice. Opp'n 38 n.104. Nothing in these statements demonstrates that Dr. Kaslow knew

[14] Dr. Behnke did not even have a material role in the Leso investigation at the time of the file's closure. Lindsay Childress-Beatty, the Ethic Office's Deputy Director, not Dr. Behnke, was primarily responsible for reviewing the Leso complaints toward the later years. Report at 518.

[15] Plaintiffs state in their Opposition that: "Plaintiffs colluded … from 1999 to 2014, mishandling ethics complaints to protect national-security psychologists from censure." Opp'n 23-34. The Report's generalized conclusion on this point was actually materially different: "we found that the handling of ethics complaints against **prominent** national security psychologists was handled in an improper fashion, in an attempt to protect these psychologists from censure." Report at 10 (emphasis added).

that Sidley's conclusion regarding APA's mishandling of ethics complaints to protect prominent national security psychologists, which had nothing to do with Lt. Leso, was false. To the contrary, Dr. Kaslow's statements *support* the discussion in the Report that the Leso file process was hampered because pertinent information was classified and unavailable to the investigators, who had to rely largely on scant publicly available information; and that the role of the behavioral scientists at offshore sites had become highly politicized and controversial. Report at 499-500, 516, 518. Nothing in Dr. Kaslow's statement about the Leso file demonstrates that at the time of the publication of the Report, she knew that Sidley's general statement about ethics complaints being improperly handled referred or applied to Statements about Plaintiffs, who had nothing to do with the Leso ethics complaint process or APA's ethics process more generally.

Plaintiffs' further "proof" of actual malice is that Board member Dr. Jennifer Kelly allegedly attended Ethics Committee and Board briefings regarding the closing of the Leso file. Opp'n 38. Dr. Kelly's attendance at those briefings fails to prove that she knew at the time of the Report's publication that Sidley's conclusion regarding mishandled ethics complaints was false. Plaintiffs reiterate this same allegation about Dr. Kelly in Action 21, and elaborate on these allegations by citing to affidavits of Dr. James Bow and Dr. Behnke. But these additional materials are of no greater assistance to Plaintiffs, as these affidavits state little more than that Dr. Kelly attended the Ethics Committee and Board meetings where the closing of the Leso file was discussed, and do not demonstrate that Dr. Kelly (i) had in fact read Statement 11; (ii) understood it to pertain to Plaintiffs; and (iii) believed that it was false in light of her understanding of APA's handling of the Leso file. Dr. Bow's and Dr. Behnke's statements that Dr. Kelly did not raise any objection to the closing of the Leso file, Bow Aff.

¶ 7 (Ex. C-5), Behnke Aff. ¶ 27 (Ex. C-4), do not constitute proof that Dr. Kelly *agreed* with the Ethics Committee's recommendation to close the Leso file, or with Dr. Bow's rationale for doing so. *See, e.g.*, *In re DeCelis*, 349 B.R. 465, 467 (Bankr. E.D.Va. 2006) (bankruptcy trustee's argument "that 'consents' and 'fails to object' are synonymous. They are not."). Similarly, Dr. Behnke's assertions that Sidley did not ask him about Dr. Kelly's role in closing the Leso file, and that the Report does not mention Dr. Kelly's "role in the Leso matter," Behnke Aff. ¶ 27, do not prove APA's actual malice. Dr. Kelly had no role in the processing of the Leso file, and Sidley had no reason to inquire about Dr. Kelly in that context.

Plaintiffs' contention that APA Assistant General Counsel Ann Springer allegedly "signed off on the closing of the Leso ethics complaint," Opp'n 38, also fails to demonstrate that APA had actual malice in publishing Sidley's general statement regarding the mishandling of ethics complaints pertaining to prominent national security psychologists. Ms. Springer was not a member of the Board or the Ethics Committee and had no role in the decision to close the file. Report at 514-19. In an effort to try to tie APA through Ms. Springer to the Leso file process, Dr. Behnke states in his Affidavit that she provided written comments on the draft closing memorandum and did not point out any inconsistences with the procedures of the ethics review process, or that the Leso file process was handled improperly. Behnke Aff. ¶ 28. This alleged absence of action or comment by Ms. Springer also fails to demonstrate that APA knew that the Report's statement was false. To the contrary, Plaintiffs' "proof" shows only that Ms. Springer: (i) provided comments on the closing memorandum, the substance of which is unknown; and (ii) was silent regarding possible inconsistencies with the usual ethics procedures and on the handling of the Leso file. Ms. Springer's silence

cannot be construed as knowledge of falsity, as the scope of her knowledge about the Leso file and what information and/or legal advice she provided to the Board have not been adduced by Plaintiffs. Plaintiffs' "proof" falls far short of demonstrating that Ms. Springer knew that the Report's general statement implicated Plaintiffs, that it incorrectly depicted the ethics process applicable to the Leso complaints, and that she communicated her supposed knowledge to the Board at the time of publication.

In sum, Plaintiffs have failed to provide, and cannot provide, proof that APA knew the general statement in the Report regarding the mishandling of ethics complaints was applicable to Lt. Leso, implicated Plaintiffs, and was false.

2. Exhibit B Fails to Provide Proof that APA Knew Statements in the Report Were False.

In an effort to expand their 88-page limit, Plaintiffs attach to their Opposition Exhibit B, which cites thirty-four (34) separate instances in which APA committees, Board, or Council took alleged Actions that demonstrate APA's actual malice. As shown here, however, none of the thirty-four Actions constitute admissible evidence of APA's actual malice. For ease of discussion, the Actions are grouped together by category.

a. APA's Handling of Ethics Complaints.

Plaintiffs identify Actions 21, 23, 24, 25, 26, and 28 as pertaining to Plaintiffs' purported third false conclusion in the Report – that "from 1999 to 2014, [APA] mishandl[ed] ethics complaints to protect national-security psychologists from censure."[16] These Actions pertain solely to APA's handling of the Leso file. As discussed above, *supra*, none of these Actions pertain to Plaintiffs, who had no role whatsoever in the APA ethics procedures, including those against Lt. Leso.[17] APA Board members' purported knowledge regarding the

[16] As set forth in section B(1), *supra*, Plaintiffs mischaracterize the Report's actual statement on this point. Report at 10.

[17] Although the ethics complaints against Plaintiff James are discussed in the Report, *see* Report

handling of the Leso file is collateral to Plaintiffs and does not provide proof that APA had actual malice with regard to any statement in the Report as to them. *Price,* 676 F. Supp. at 1512-13. Despite that, Plaintiffs contend that these alleged Actions "conflict" with, and therefore demonstrate that, APA knew that Statements 11 and 66 were false. Statement 66, which pertains to collusion between APA and DoD, is irrelevant to the mishandling of ethics complaints, and need not be considered for purposes of the Actions identified by Plaintiffs that allegedly show APA's actual malice on that issue. Statement 11 also is unrelated to Plaintiffs, and should also be disregarded.

Even if the Court were to consider these alleged Statements, Plaintiffs' "proof" does not demonstrate that APA had actual malice regarding any Statements in the Report pertaining to Plaintiffs. Plaintiffs' "proof" is discussed here briefly to demonstrate why it nonetheless fails to show APA's actual malice.[18]

(i) The 2014 Board, including Drs. Kaslow, McDaniel, Kelly, Douce and Prescott, received briefings on the closing of the Leso file from Dr. Bow, which purportedly "conflicts" with Statements 11 and 66, and Conclusion 3 (Action 24).

Plaintiffs cite to minutes of the APA February 2014 Board meeting, which recount that in December 2013, Dr. Bow gave the Board an "overview" regarding the Ethics Committee's decision to close the Leso file and that the Board issued a statement on that topic. Plaintiffs also refer to a 2014 Report by the Ethics Committee that makes no reference at all to the Leso matter but provides complaint statistics and describes the general methodology utilized by the Ethics Office in investigating ethics complaints. This evidence

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at 520-22, Plaintiffs do not cite any instances of alleged actual malice by APA as pertains to the ethics charges against him.

[18] Plaintiffs also designated Actions 21 and 23 regarding Dr. Kelly's attendance at Ethics Committee and Board meetings, and statements issued by Dr. Kaslow as related to the ethics process. They have been discussed in section B(1), *supra*, and will not be repeated here.

does not demonstrate that the identified Board members knew Sidley's statement regarding the mishandling of ethics complaints was applicable to Lt. Leso, or that Statements 11 and 66 were false. That some Board members obtained a briefing from Dr. Bow about the closing of the Leso file does not mean that they understood it had not been mishandled (indeed, the Board's statement suggests that the process was unusual and atypical for APA). Plaintiffs also cite Dr. Behnke's affidavit, which, as demonstrated above, does not establish that Dr. Kelly or Ms. Springer knew that Sidley's statement was false. And none of these materials mention or pertain to Plaintiffs.

(ii) The 2014 Board, including Drs. Kaslow, McDaniel, Kelly, Douce and Prescott, released a statement on the closing of the Leso file that purportedly "conflicts" with Statements 11 and 66, and Conclusion 3 (Action 25).

Plaintiffs cite to a Board press statement released after Dr. Bow's presentation, along with a list of the 2014 Board members as the sole proof of Plaintiffs' argument on this point. This evidence does not demonstrate that any Board members knew that Sidley's statement regarding the mishandling of ethics complaints was applicable to Lt. Leso, or that the Sidley conclusion regarding the mishandling of ethics complaints was false. The Board's statement simply reported what it was told by the Ethics Committee and did not certify that the Leso investigation had not been mishandled. The 2014 Annual Report makes no reference to Lt. Leso and does not indicate that Board members knew that Sidley's conclusions regarding the mishandling of ethics complaints was false. And none of these materials mention or pertain to Plaintiffs.

(iii) APA critic Dr. Steven Reisner wrote Dr. Kaslow regarding the closing of the Leso file, referring to Dr. Kaslow as representing the Board on this matter, which purportedly "conflicts" with Statements 11 and 66, and Conclusion 3 (Action 26).

An email purportedly attaching a letter (not provided) from Dr. Reisner to Dr. Kaslow,

the Board chair, stating that Dr. Kaslow represented the Board, does not prove APA's actual malice. If Plaintiffs' point is that Dr. Kaslow was seen by a third party as an agent for APA, that does not demonstrate that she knew that Sidley's statement regarding the mishandling of ethics complaints pertained to Lt. Leso, that the statement was false, or that she passed on her supposed knowledge of falsity to the rest of the Board, which acted with that knowledge of falsity. And none of these materials mention or pertain to Plaintiffs.

(iv) Dr. Kaslow directed APA staff to draft talking points and correspondence regarding the closing of the Leso file, which purportedly "conflicts" with Statements 11 and 66, and Conclusion 3 (Action 28).

As a threshold matter, if Dr. Kaslow had directed APA staff to draft statements for her, that is not proof that she had actual knowledge of the alleged falsity of Sidley's statement regarding the mishandling of ethics complaints. Moreover, the "proof" that Plaintiffs provide, an amalgam of some forty (40) emails among Dr. Kaslow, APA staff members, and third parties covering three separate topics unrelated to Lt. Leso, does not demonstrate any directive by Dr. Kaslow for the staff to draft emails about ethics complaints on her behalf.[19] None are to or from Plaintiffs, mention Plaintiffs, or even pertain to Lt. Leso or the APA ethics complaint process. In the highlighted May 3, 2014 emails, Dr. Kaslow appears to be asking a group of staff members (the addressees are not shown) if they could create a letter for Division 39 for her, incorporating information from a letter from DoD. Dr. Garrison responded that Dr. Behnke would be "taking the first run at [it]," but that she would be assisting. Plaintiffs provide nothing further to demonstrate that Dr. Behnke and Dr. Garrison actually provided such a letter, whether Dr. Kaslow edited the letter, or even sent one out at all. Similarly, in a June 29, 2014 email, Dr. Kaslow stated to Dr. Behnke on the subject of a

[19] This collection of exhibits would not in any event be admissible, as they do not constitute authenticable business records, are incomplete, and have been cut and pasted together in a way not found in the business records of APA.

pending new business item ("NBI"): "I assume you can write a note to this effect," but there is no proof that Dr. Behnke did so, whether Dr. Kaslow edited or sent out the note, or whether she was requesting Dr. Behnke to send out the note under his own name. In a July 5, 2014 email, Dr. Behnke, unasked, provided a draft response to Dr. Arrigo for Dr. Kaslow to consider, on the subject of the NBI. The final email provided by Plaintiffs regarding alleged ghostwritten communications is dated August 1, 2014, from Dr. Behnke to Drs. Kaslow and Garrison, and copying Mses. Farberman, Gilfoyle, Moore and O'Brien, volunteering the staff to draft a response to Dr. Arrigo regarding the NBI. Action 28 at 17. Dr. Kaslow responded "[h]i, gosh that would be so so helpful and most appreciated. Nadine." *Id*. None of the emails provided by Plaintiff are applicable to the mishandling of ethics complaints, concern any of the Plaintiffs, and constitute proof of APA's actual malice.

b. NBI Entitled "Torture and Cruel, Inhuman, or Degrading Treatment or Punishment" Submitted February 2006.

Plaintiffs contend that "open work" by Council on an NBI submitted by APA's peace psychology division seeking to clarify psychologists' role with respect to torture (the "2006 Resolution") "conflicts" with certain Statements and therefore demonstrates APA's actual malice as to Plaintiffs. Specifically, Plaintiffs contend that four Board members having been members of Council at the time of the February 2006 Council meeting (Action 2) and the August 2006 Council meeting (Action 3), where Council addressed the 2006 Resolution, constitutes admissible evidence that APA knew that Conclusion 2 and Statements 6, 10, 39, 51, 66, and 165-69, were false, and that APA therefore published the Report with actual malice. Plaintiffs have not supported their contention with *any* evidence and have therefore failed to meet their burden of proof.

(i) "Open work" of Council, which included Drs. Kaslow, McDaniel, Kelly and Douce, received the 2006 Resolution, which "conflicts" with Statements 6, 10, 51 and 66, and Conclusion 2 (Action 2).

Plaintiffs allege that four members of the 2015 Board were members of Council at the time of the February 2006 Board meeting, when sponsors of the 2006 Resolution submitted the 2006 Resolution to Council, and that Council's "open work" on the resolution demonstrates that those Board members knew that Statements 6, 10, 51, and 66, and Conclusion 2 were false at the time of the Report's publication. Action 2. Nothing regarding Council's "open work" on the NBI "conflicts" with those Statements that address Dr. Behnke's behind-the-scenes work with DoD. Open debate and deliberations by Council on issues pertaining to psychologists' role in interrogations of detainees does not disprove that Dr. Behnke was working with "DoD officials" at the same time. Plaintiffs have failed to make any of the requisite links between the Statements alleged to be false and the activities or knowledge of Board members to establish APA's actual malice.

Plaintiffs' documentary "proof" purports to show (i) the content of the 2006 Resolution; (ii) the co-signatures of Council representatives, including two (Drs. Kaslow and Douce) of the four 2006 Council members who were members of the Board; and (iii) a 2006 roster of Council members that included four 2015 Board members. Plaintiffs have failed to identify any statement in the 2006 Resolution itself that is "mutually exclusive" of any of the identified Statements. *Deripaska*, 282 F. Supp. 3d at 144. Rather, Statements 6, 10, 51 and 66 address activities that were outside the view of Council and by their nature could not have been included in its "open work" on the NBI. The co-signatures and Council roster likewise fail to support Plaintiffs' argument, as neither document demonstrates that any Board member actually attended the February 2006 meeting and participated in the "open work" on the NBI; that Drs. Kelly and

McDaniel gleaned specific knowledge from the meeting that made them realize that a Report Statement was false, and shared that knowledge with the other Board members at the time of the decision to publish the Report.

(ii) APA's announcement regarding, and "open work" on, the 2006 Resolution purportedly "conflicts" with Statements 6, 10, 39, 51, 66, and 165-69, and Conclusion 2 (Action 3).

The defects in Plaintiffs' argument regarding Action 2 are also present for Action 3, the August 2006 Council meeting at which Plaintiffs allege that Council: (i) heard a series of presentations regarding psychologists' involvement in military interrogations; and (ii) "[d]iscussed, amended, and adopted" the NBI. Nothing in or cited in Exhibit B as pertaining to Action 3 supports Plaintiffs' contention that Board members actually knew that Report Statements and conclusions about Plaintiffs were false at the time of the Report's publication.

Nothing regarding Council's discussions, amendment, or adoption of the 2006 Resolution "conflicts" with Statements 6, 10, 51, 66, or 165-69, or Conclusion 2. Council's "open" debate and deliberations on APA policy is not mutually exclusive of the Report's findings regarding Dr. Behnke's simultaneous behind-the-scenes work with DoD, shaping of APA's message regarding psychologists' role as to interrogations, and creation of the appearance that peace psychologists, rather than Dr. Behnke, led aspects of the resolution effort. Although Plaintiffs cite the text of the 2006 Resolution passed by Council, they have failed to identify any specific content of the 2006 Resolution that is mutually exclusive of the specific cited Statements. Thus, Plaintiffs have failed to link Council's "open work" on the 2006 Resolution, or its content, to the alleged falsity of any Statement or any Board member's knowledge of such alleged falsity at the time of the Report's publication nearly ten years later, in 2015.

Plaintiffs separately contend that an APA announcement, dated August 10, 2006, regarding presentations about the 2006 Resolution and its adoption by Council, "conflicts" with Statements 39 and 169. Action 3. This contention is incorrect, as Statement 39 plainly reflects Sidley's opinion about the rationale of the 2006 Resolution's supporters, and Statement 169 is directed to a scheme by Dr. Behnke that would have been unknown to Board members. Moreover, the announcement's confirmation that Army Surgeon General Kiley spoke at a meeting does nothing to disprove the Report's conclusions that he did so as a result of Dr. Behnke's activities.

Finally, Plaintiffs have failed to establish that any Board member actually attended the August 2006 Council meeting, that those proceedings imparted to any Board member specific facts demonstrating that Statements 6, 10, 39, 51, 66, and 165-69 and Conclusion 2 are false, and that that knowledge was shared with the rest of the Board at the time of the Report's publication.

c. The 2007 "Reaffirmation Resolution"

Actions 4, 5, 6, and 8 all pertain to the 2007 "Reaffirmation Resolution," which, in its original form, sought a moratorium on psychologists' participation in offshore national security sites. Report at 396. In August 2007, Council declined to pass the moratorium but passed a related resolution that, after later amendment, prohibited psychologists from "direct or indirect participation" in "'all techniques' considered torture or [cruel, inhumane, or degrading] under various international human rights standards." *Id*. at 426-28. None of these Actions, or the "proof" Plaintiffs identify in connection with them, establish APA's actual malice with respect to any of the Statements or Conclusion 2.

(i) Request by Board of Educational Affairs Committee, of which Dr. Douce was a member, for additional information from military psychologists regarding the proposed moratorium purportedly "conflicts" with Statements 6, 10, 51, and 66, and Conclusion 2 (Action 4).

Plaintiffs allege that Action 4 demonstrates that Dr. Douce, a member of the BEA in 2007, knew in 2015 that Statements 6, 10, 51 and 66 and Conclusion 2 (APA's collusion with DoD) were false because the BEA requested at its March 2007 meeting military psychologists' views regarding the 2007 Reaffirmation Resolution.

Nothing in the evidence adduced by Plaintiffs shows that Dr. Douce, who is merely listed on the BEA 2007 roster, attended the March 2007 BEA meeting, joined in requesting additional information from military psychologists, or participated in the committee's discussions or in the preparation of the memorandum requesting additional comment. Dr. Douce's name is not in the memorandum, nor have Plaintiffs proffered any evidence linking her to it. Moreover, nothing in Plaintiffs' evidence shows that military psychologists did provide additional information to the BEA, that such information in any way conflicted with the cited Statements, that Dr. Douce understood in 2015 that those Statements were false, and that she shared that understanding with the other Board members.

(ii) Rejection of Reaffirmation Resolution by Board of Professional Affairs, chaired by Dr. Kelly, purportedly "conflicts" with Statements 6, 10, 51, 66; and 187 and Conclusion 2 (Action 5).

Action 5 addresses a March 2007 meeting of APA's Board of Professional Affairs ("BPA"), at which the group recommended that the Board withdraw or reject the Reaffirmation Resolution. Again, Plaintiffs have failed to prove actual malice.

Plaintiffs have failed to establish that Dr. Kelly, listed on the 2007 BPA roster, attended the 2007 BPA meeting, was aware of the resolution or proposed moratorium, or participated in BPA's discussion, preparation of the minutes, or their transmission to Dr. Behnke. Dr. Kelly's name appears nowhere on the document. None of the "proof" provided by Plaintiffs demonstrates the falsity of Statements 6, 10, 51, 66, or 187 or the relevance of the BPA

proceedings. And in any case, that an APA committee determined not to support the moratorium does not disprove that Dr. Behnke was operating behind the scenes to prevent its passage.

(iii) Information and open discussion at mini-convention on ethics and interrogations and discussion, deliberation and debate by Council, including Drs. Kaslow, McDaniel, Kelly, Douce, and Prescott, regarding the Reaffirmation Resolution, purportedly "conflict" with Statements 6, 10, 51, 66, and 187, and Conclusion 2 (Actions 6 & 8).

In Action 6, Council discussed the Reaffirmation Resolution at a mini-convention on ethics and interrogations and at the August 2007 Council meeting. Plaintiffs contend that the "[d]iscussion, deliberation, and debate" by Council "conflicts" with Statements 6, 10, 51, 66, and 187; and Conclusion 2. In purported support, Plaintiffs cite to a transcript of the August 2007 Council meeting and a copy of the Reaffirmation Resolution.

Action 8 covers the February 2008 Council meeting at which Council "discussed and amended the 2007 Reaffirmation Resolution." Action 8. Plaintiffs contend that "Council deliberation" on the amendment to the 2007 Reaffirmation Resolution (the "2008 Resolution") conflicts with Statements addressing Dr. Behnke's behind-the-scenes work with DoD officials. Plaintiffs cite in support the 2008 Resolution itself, and the 2008 Council roster, showing that certain 2008 Council members were subsequently Board members in 2015.

Council's ultimate passage of the 2008 Resolution against torture, the debates, and the events leading up to the passage of the 2008 Resolution do not prove that Dr. Behnke and others were not colluding behind the scenes in an effort to stymie, affect, or control the outcome of the vote. Moreover, Plaintiffs have failed to establish that 2015 Board members Drs. Kaslow, McDaniel, Kelly, Prescott, and Douce attended, participated in, or had any other specific involvement with the August 2007 or February 2008 Council meetings or the mini-convention; that if they had attended, what facts they learned during the meeting or convention that were relevant to the five cited Statements; that they recalled and understood, at least seven years after

these events, that the events were mutually exclusive with the five Statements in the 541-page Report; or that they consented to publish the Report notwithstanding specific knowledge of those alleged false Statements, which they shared with their Board colleagues.

d. 2009 Petition Resolution

Action 11 addresses Council's adoption in 2009 of a member petition resolution called "Psychologists and Unlawful Detention Settings with a Focus on National Security" (the "2009 Resolution"), which Plaintiffs contend demonstrates that APA published false Statements 6, 10, 51, 66, 206 and 207, and Conclusion 2 with actual malice. In essence, Plaintiffs' contention is that Council deliberations about the petition somehow negate the Report's conclusions that APA colluded regarding its policies to accommodate DoD's preferences.

(i) Deliberations by 2009 Council, including Drs. Kaslow, McDaniel, Kelly, Douce, and Prescott, on the 2009 Resolution "Psychologists and Unlawful Detention Settings with a Focus on National Security" purportedly "conflicts" with false Statements 6, 10, 51, 66, 206, and 207, and Conclusion 2 (Action 11).

Plaintiffs fail to connect Council's public debate about the 2009 Resolution and the designated Statements in the Report. Statements 6, 10, 51, and 66 are Sidley's summary conclusions that Dr. Behnke was interested in helping those at DoD. But Council's deliberations regarding where psychologists are permitted to work do not contradict the notion that Dr. Behnke was coordinating with DoD personnel behind the scenes. Nor does APA's deliberation about the 2009 Resolution show that six years after its debate and passage, APA Board members recalled the discussion, understood it somehow pertained to Plaintiffs, contradicted specific statements in the Report, and shared that understanding with the other Board members.

Statement 206 notes that in Dr. Behnke's interview with Sidley, he stated that the 2009 Resolution's use of the term "unlawful" had no practical significance because the legality of Guantanamo had not yet been determined at the time of the resolution. The Report determined

that Dr. Behnke's explanation was disingenuous because emails evidenced that he in fact knew at the time of the Council meeting that military psychologists would interpret "unlawful" not to apply to Guantanamo. Report at 448 n.2133. Plaintiffs fail to make any connection between the Council discussion of the 2009 Resolution and the Board members' purported knowledge that the Report's recitation of Dr. Behnke's understanding regarding military psychologists' interpretation of the term "unlawful" was false.

Statement 207 provides that, even as of 2009, "as the political climate changed and the DoD's use of psychologists in interrogation roles became less critical, Behnke's 'big picture' still focused on the bottom line needs of his partners in DoD." Plaintiffs do not explain, nor do their cited documents show, how Council's debate and adoption of the 2009 Resolution disproves the Report's allegations that Dr. Behnke had DoD interests in mind, how Board members knew the alleged falsity of those Statements, and shared their knowledge with other Board members at the time of the Report's publication. Report at 443-48.

e. Changes to Ethical Standard 1.02

Plaintiffs cite Actions 7, 9, 10, 12, 13, 14, 15, 16, and 17, which pertain to APA's efforts to amend Standard 1.02 of the *APA Ethical Principles of Psychologists and Code of Conduct* (2002) (the "2002 Ethics Code"), as purported evidence that the Report's conclusion regarding collusion with DoD was false. Under the 2002 Ethics Code, Standard 1.02 prescribes how psychologists must act when faced with a legal obligation that conflicts with their ethical responsibilities, and NBI #34E sought to clarify that conflict. *See* www.apa.org/ethics/code/august09-council-item.pdf (hereinafter "NBI #34E Materials"), at 44. The Introduction and Applicability section of the 2002 Ethics Code—deemed aspirational rather than enforceable—was similar, but included a qualification that psychologists must resolve

ethical conflicts "in keeping with the basic principles of human rights," language not included in Standard 1.02.

The NBI #34E Materials explain that, in August 2005, after the Board adopted the PENS Task Force report,[20] Council requested that the Ethics Committee review the discrepancy between Standard 1.02 and the aspirational language, and recommend whether to add the phrase "in keeping with basic principles of human rights" to Standard 1.02. *Id.* at 43-44. Council also directed that other boards and constituencies make recommendations to Council. *Id.* at 44.

Between 2005 and 2008, the Ethics Committee "considered suggested changes" and "reached out to various constituencies," but no recommended language was submitted to the Board. *See id.* NBI #34E thus came before Council in August 2008. In the main motion, Council directed the Ethics Committee "to form an ad hoc committee to move forward expeditiously to recommend language to Council that would resolve the discrepancy," and to "make a formal recommendation for immediate action at the August 2009 meeting of Council." *See id.* at 43.

Eighteen governance groups weighed in. Those in favor of amending Standard 1.02 sought to ensure that the Ethics Code would not permit torture. *Id.* at 58. Those opposing opined that addressing "basic principles of human rights" would be "overly difficult to operationalize and/or vague in the context of an enforceable standard." *Id.* at 59. In February 2010, the Board voted to amend Standard 1.02 to confirm it could not be used as a defense to torture.

Plaintiffs contend that Actions 7, 9, 10, 12, 13, 14, 15, 16, and 17 demonstrate that in 2010, Council members who were later on the 2015 Board participated in the debate regarding Standard 1.02, and that APA therefore knew that those Statements, which concerned Dr.

[20] For discussion regarding the PENS Task Force and its Report, *see* Report at 10-35.

Behnke's attempts to reject or delay amendments to Standard 1.02 and behind-the-scenes coordination with DoD in that effort, are false.[21] However, none of these Actions contradict the Statements that Plaintiffs contend are false, nor do they even pertain to Plaintiffs. Instead, each of these Actions pertains to Dr. Behnke's conduct vis-à-vis APA, not the Plaintiffs.[22]

(i) Opposition by Committee for the Advancement of Professional Practice, which included Dr. McDaniel, to revisions to Standard 1.02 purportedly "conflicts" with Statements 6, 10, 51, 66, 208, 209, 212, and 214; and Conclusion 2 (Action 7).

Action 7 deals with an October 2008 meeting of APA's Committee for the Advancement of Professional Practice ("CAPP") and its memorandum dated October 28, 2008 to Dr. Behnke. According to the memorandum, CAPP considered and declined to support the proposed changes to Standard 1.02, but was open to considering alternative language. Citing to a 2008 roster of CAPP members that shows that Dr. McDaniel was a CAPP member in 2008, Plaintiffs suggest that Dr. McDaniel knew that the Statements about Dr. Behnke's behind-the-scenes manipulations regarding the amendment of Standard 1.02 were false.

This is insufficient to prove actual malice on the part of APA with respect to the Report. Nothing cited by Plaintiffs establishes that Dr. McDaniel participated in the October 2008 CAPP meeting; that she saw the memorandum (her name does not appear on it); that she agreed with its sentiments; that seven years later, when she read the Report, she understood that eight Statements in the 541-page Report were false; that those Statements pertained to Plaintiffs, and that she shared her knowledge of the Statements' alleged falsity with the other Board members. That an APA committee determined not to support any of the options presented to amend Standard 1.02 does not disprove that Dr. Behnke acted to oppose and delay the amendment.

[21] Plaintiffs contend that these Actions conflict with Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214, and Conclusion 2.

[22] Although the record shows that Dr. Behnke requested the assistance of Plaintiffs Banks and Dunivin in delaying amendment efforts, Plaintiffs have adduced no evidence that Plaintiffs Banks and Dunivin did so, or if they even responded to that request.

Report at 460. And once again, these activities have nothing to do with the Plaintiffs in this action.

(ii) APA statement following Council's receipt of NBI regarding Ethical Standard 1.02 (with Drs. McDaniel and Douce as signatories and Dr. Kelly as a "Mover" of the item) purportedly "conflicts" with Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214, and Conclusion 2 (Action 9).

Action 9 addresses the August 2009 Council meeting at which Council received NBI #34E. Plaintiffs contend that an "APA statement" relevant to that Council meeting "conflicts" with Statements 6, 10, 51, 66, 208-09, and 212-14. However, Plaintiffs have failed to identify any specific APA statement relevant to that Council meeting that they contend demonstrates the falsity of any Report Statements. Instead, they appear to be relying solely on a copy of the NBI submitted to Council, and the presence on that document of signatures of Council members who later became members of the 2015 Board. None of these materials, or Council's receipt of NBI #34E, constitutes admissible evidence that (i) future Board members participated in the debate regarding whether and how to amend Standard 1.02; (ii) that those Board members knew that statements in the Report concerning Dr. Behnke's attempts to reject or delay amendments to Standard 1.02, and his behind-the-scenes coordination with DoD in that effort, are false, and (iii) that they shared that knowledge with the rest of the Board. In addition, each of the Statements pertain to Dr. Behnke's conduct, rather than Plaintiffs', who had no role in proposing amendments to the Ethics Code or the cited Actions.

(iii) Recommendation of the BEA, which included Dr. Douce, against revising Ethical Standard 1.02 purportedly "conflicts" with Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214, and Conclusion 2 (Action #10).

Among the constituencies to oppose NBI #34E was the BEA, on which Dr. Louise Douce sat. Plaintiffs cite the BEA roster from July-August 2008 and a November 2008 BEA memo

concluding that adding a requirement that psychologists act "in keeping with basic principles of human rights" was not advisable because "APA has yet to define what constitutes 'basic principles of human rights.'" NBI #34E Materials at 70. Plaintiffs assert that BEA's opposition "conflicts" with Statements that APA officials—primarily Dr. Behnke—coordinated with members of DoD "to defeat efforts by [Council] to introduce and pass resolutions that would have definitively prohibited psychologists from participating in interrogations." Statement 6. Plaintiffs also contend that BEA's opposition "conflicts" with the Report's conclusion that Dr. Behnke sought to "delay taking any action to revise the Ethics Code for as long as possible" and that "it was not until late 2008 … that the association began to seriously engage with APA members and Council representatives." Statement 208. Plaintiffs appear to argue that, because a Board member was involved in the discussions about a possible amendment of Standard 1.02, she presumably knew that the Report's identified Statements were false.

Such discussions by APA constituencies do not demonstrate that the Report's allegations, which address Dr. Behnke's collaboration with DoD, are false, or that members of APA would even have reason to know whether that collaboration had occurred. Plaintiffs fail to connect the BEA memorandum to Dr. Douce, whose name does not appear on it. Plaintiffs identify no evidence that she participated in the discussion or agreed with the conclusion.

BEA's opposition to the Ethics Code revision as unworkable does not refute the Report's assertion that Dr. Behnke asked Plaintiffs Dunivin and Banks to "encourag[e] folks to comment," on the amendment. *See* Statement 213. The two are not mutually exclusive: BEA's November 2008 memo does not disprove that Dr. Behnke asked Plaintiffs Dunivin and Banks to

encourage commentary on the proposal. Nor have Plaintiffs shown that Plaintiffs Dunivin or Banks did so,[23] or that BEA members knew of Dr. Behnke's request.

Moreover, the BEA memo supports the Report's Statement that discussions with APA on this issue did not begin in earnest until "late 2008." *Compare* Plaintiffs' NBI #34E Materials at 70 *with* Statement 208. All of the APA constituencies who commented on NBI #34E submitted their positions to Dr. Behnke between September and December 2008. The BEA memo is also consistent with the Report's conclusion that those within APA believed that "human rights" was too vague a phrase to put into an enforceable code section. Report at 116. This evidence thus does not demonstrate that Dr. Douce knew that the Statements were false at the time of the Report's publication.

> *(iv) Directive of Council, including Drs. Kaslow, McDaniel, Kelly, Douce and Prescott, to the Ethics Committee to propose language to amend Standard 1.02 purportedly "conflicts" with Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214, and Conclusion 2 (Action 12).*

Plaintiffs cite Council's 2009 directive to the Ethics Committee to propose language for amending Standard 1.02, and the "complete history of thorough and lengthy review of [the] Ethics Committee at the request of Council in 2005" leading to the 2009 revision process as evidence that APA knew that Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214 were false and that APA had not colluded with DoD. This "complete history" includes the APA constituencies' comments, as well as the Ethics Committee's August 2009 recommendation that

[23] The Report does not state that Sidley concluded that Dr. Behnke colluded with Plaintiffs, or any other national security psychologists to obstruct or delay Standard 1.02's amendment. Instead, the Report is clear that **Sidley found no evidence of collusion** relevant to Standard 1.02's amendment, but concluded that it was likely that Dr. Behnke undertook efforts to obstruct and delay on his own, because he thought doing so would benefit national security psychologists. Report at 461. The only reference to any Plaintiff on the amendment of Standard 1.02 is the assertion that Dr. Behnke asked Plaintiffs Banks and Dunivin to encourage commentary. Statement 213. As stated above, the record is devoid of any evidence as to how, or if they did, respond. Thus Plaintiffs' characterization of the Report as it relates to collusion with regard to amendment of Standard 1.02 is incorrect.

Council reject the motion to amend Standard 1.02. The Ethics Committee—led by Dr. Behnke—concluded that the requested language "has implications across a broad range of psychologists' work that ha[s] yet to be fully explored," and recommended "a full Ethics Code revision process" to assess whether further changes were appropriate. NBE#34E Materials at 60, 64-65.

As with Action 10, Plaintiffs' proffered evidence does not show the Statements are false. The Report concluded that Dr. Behnke sought to delay Ethics Code revisions after the issue first arose in 2005. As the NBI #34E Materials confirm, he succeeded because efforts on the amendment did not ramp up until "late 2008" when he recommended "a full revision of the Ethics Code, a process that would have taken years longer." Report at 449. The Report observed that the effort ultimately "took close to five years." *Id.* The NBI #34E Materials, which state expressly that Council first requested a recommendation on amending Standard 1.02 in August 2005, support this assertion. When no recommendation was forthcoming for several years, in 2009 Council directed the relevant parties "to move forward expeditiously to recommend language to Council," and requested "that this entire process be completed in time for the Ethics Committee to make a formal recommendation to Council in time for the August 2009 meeting." *See* NBI #34E Materials at 43-44, 64-65. Nothing in the NBI #34E Materials shows what the Ethics Committee, or others within APA, were doing to facilitate efforts to amend Standard 1.02 between 2005 and 2008, or offers another explanation besides Dr. Behnke's delay tactic of recommending a complete overhaul of the Ethics Code that is expressly cited in the NBI # 34E Materials. Moreover, Plaintiffs cite no evidence that APA Board members had any basis to believe those Statements were false at the time of the publication of the Report.

(v) Discussion and recommendation of 2010 Board members, which included Drs. Kaslow and Kelly, that Council approve amendments to Standard 1.02 purportedly "conflict" with Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214, and Conclusion 2 (Action 13).

Plaintiffs cite minutes from a February 2010 Board meeting at which the Board recommended that Council approve an amendment to Standard 1.02 to clarify that the Standard could not "be used to justify or defend violating human rights" under any circumstance as evidence that the Board knew that Dr. Behnke had not colluded with DoD officials to keep APA's Ethics Code consistent with DoD's preferences. Action 13. That the APA Board—five years after first raising the issue—ultimately agreed to recommended language to amend Standard 1.02 does not render false the Report's allegation that Dr. Behnke delayed the adoption of any amendment, or that he consulted with members of DoD in doing so.

(vi) Discussion and recommendation of Council, including Drs. Kaslow, Kelly, McDaniel, Douce, McGraw, and Prescott, that Council approve amendments to Standard 1.02 "conflict" with Statements 6, 10, 51, 66, 208, 209, 212, 213, and 214, and Conclusion 2 (Action 14).

Plaintiffs cite minutes from a February 2010 Council meeting at which it ultimately adopted the Board-recommended amendment to Section 1.02, and to a 2010 Council roster as evidence of Dr. Behnke's purported collusion regarding amendment of Standard 1.02. Action 14. Not only do Plaintiffs fail to show that any of the identified Council members were present at the specific meeting or whether they agreed with Council's decision, Plaintiffs fail to connect how the amendment demonstrates that the Report's Statements are false, or that the Board knew they were false when the Report was published.

(*vii) Letter from 2015 Board, including Drs. Kaslow and Kelly, concerning Standard 1.02 purportedly "conflicts" with Statements 6, 10, 51, 66, 152, 153, 208, 209, 212, 213, and 214, and Conclusion 2 (Action 15).*

Plaintiffs cite a December 2011 letter from the APA Board responding to a letter from the Psychologists for an Ethical APA ("PEAPA"), inquiring about **2002** amendments to Standard 1.02, and requesting that the PENS Report be rescinded and that APA conduct an investigation of its Ethics Office as evidence that APA knew that Statements 6, 11, 51, 66, 152, 153, 208, 209, 212, 213, and 214 are false, and that APA did not collude with DoD. Action 15. APA's responsive letter provided no such notice to the Board members. In its response to PEAPA, the Board stated that with regard to the 2002 amendments to Standard 1.02, which the PEAPA had inquired about, "there was absolutely no connection between the drafting and adoption of Ethical Standard 1.02 in 2002 and the September 11, 2001 terrorist attacks" and that originally Standard 1.02 "was written largely in response to conflicts regarding confidentiality that arise most often when courts issue subpoenas for psychologists' records." Dec. 11 Letter at 2.

Action 15 does not establish that APA published the cited Statements with actual malice. First, the Report states specifically that the evidence Sidley reviewed did not support APA critics' argument that the 2002 revisions to Standard 1.02 "were the product of collusion with the government and had the effect of providing psychologists with a defense to torture." Report at 55-56 ("[t]he evidence shows that the primary motivation for the revision to Standard 1.02 was to protect psychologists who faced difficult choices when their ethical obligations of confidentiality conflicted with legal directives in the form of subpoenas or court orders that required disclosure of confidential patient information"). Second, Plaintiffs fail to explain how the Ethics Committee's drafting of Standard 1.02 *before* the events of 9/11 could contradict allegations that Dr. Behnke sought to delay further amendments eight years later, when the 2010 amendment was enacted.

(viii) Receipt by 2011 Board, which included 2015 Board members Drs. Kaslow and Kelly, of a member-initiated proposal purportedly "conflicts" with Statements 6, 10, 51, and 66, and Conclusion 2 (Action 16).

In 2011, a member-initiated task force comprised of five APA members sought to develop "a unified, comprehensive, and consistent APA policy related to torture, ethics, detainee welfare, and interrogation." *See* Action 16, Report of the APA Member-Initiated Task Force to Reconcile APA Policies Related to Psychologists' Work in National Security Settings, at 4. The task force issued a report that aimed to replace the PENS Report and related Council resolutions with a single document that would combine various APA policy documents relating to torture and interrogation. *Id.* at 2.

Plaintiffs assert that the Board's receipt of and alleged support for the member-initiated proposal and its report conflicts with the Report's statements that APA coordinated with members of DoD to defeat proposals that would prohibit psychologists from participating in interrogations. The member-initiated task force and its report plainly have no bearing on the Report's conclusions or whether in 2015 APA published the Report with actual malice. The member-initiated task force was not sponsored by or under the purview of APA's Board or any other governing body, and its report did not constitute APA policy. The task force report also contains no discussion of APA's efforts to amend Standard 1.02, aside from mentioning that amendment had occurred.

Moreover, Plaintiffs cite minutes from a December 2011 Board meeting as evidence that APA approved of the task force and its report, but these minutes do not even refer to—let alone support or adopt—either the task force or its report. *See* Action 16, Dec. 2011 APA Bd. Mtg. Minutes. A report initiated and conducted by APA members outside the purview of APA governance bodies that does not address the substance of the Statements cannot demonstrate that they were published with APA's actual malice with regard to Plaintiffs.

(ix) Encouragement by the 2012 Board, which included Drs. Kaslow, McDaniel, and Kelly, of the 2011 member-initiated proposal purportedly "conflicts" with Statements 6, 10, 51, and 66, and Conclusion 2 (Action 17).

It is unclear how Action 17 differs from Action 16. Plaintiffs assert that, in 2012, the APA Board "encourage[d] two groups of APA members to "develop . . . a unified, comprehensive, and consistent APA policy related to torture, ethics, detainee welfare, and interrogation," and that the Board's support for the member-initiated proposal conflicts with Statements 6, 10, 51, and 66, and Conclusion 2. Action 17. In support, Plaintiffs only cite the member-initiated task force report referenced in Action 16. Plaintiffs did not identify the second group of APA members purportedly encouraged by the Board, or offer evidence of Board action in 2012 acknowledging or supporting the task force's efforts. As a result, Plaintiffs fail to connect this report to the Statements, to any APA Board member, or explain how the task force report demonstrates that APA published the Report with actual malice with regard to the Statements, or that the Statements are applicable to Plaintiffs.

f. Rescission of PENS Report and Reaffirmation Resolution, and Adoption of New Policy.

In connection with Actions 18, 19, and 20, Plaintiffs contend that the Council's 2013 decision to rescind the PENS Report and the 2007 Reaffirmation Resolution (and 2008 amendment thereto) and to adopt a new policy regarding psychologists' work in national security settings "conflicts" with Statements 6, 10, 51, and 66, and Conclusion 2, which assert that Dr. Behnke secretly collaborated with DoD officials between 2006 and 2009 to prevent passage of resolutions that would ban psychologists' participation in detainee interrogations. Plaintiffs also contend that Action 27, a letter and press release regarding the 2013 rescissions and adoption of the new policy, "conflicts" with Statements 1, 2, 15, 59, 72, and 145, and Conclusion 1, which assert that Dr. Behnke secretly collaborated with DoD officials to ensure that the PENS Report

did not constrain DoD more than existing DoD interrogation guidelines. But Plaintiffs provide no explanation as to how these Actions demonstrate that the Board knew Sidley's conclusions were false.

Nor can they. None of the Actions even discusses or relates in any way to the issue of collaboration between APA and DoD officials between 2006 and 2009 to influence resolutions, or in 2005 in issuing the PENS Report, let alone conclusively establishes that no such secret collaboration occurred such that the Board knew that the Statements were false. Action 18 merely cites to February 2013 Council Minutes that state that the Board referred an NBI, "Reconciliation of Policies Related to Psychologists' Work in National Security Settings," to certain APA boards and committees, but the minutes say nothing more about this topic. Action 19 consists of June 2013 Board minutes that state that the Board voted to recommend that Council rescind the PENS Task Force Report and the 2007 Reaffirmation Resolution (and its 2008 amendment) and adopt new policy. But these minutes say nothing about secret APA and DoD collaboration. Action 20 consists of minutes from a meeting where Council accepted the Board recommendation, but also say nothing about secret APA-DoD collaboration. Action 27 is a February 2014 letter from Dr. Kaslow to DoD discussing these recent Council decisions, as well as a press release announcing a letter and similar letters informing federal agencies of these events. These Actions also provide no support for Plaintiffs' argument that the Board knew that Sidley's conclusion that APA officials secretly collaborated with DoD officials was false.

g. The PENS Report and Related Motions

(i) Review and discussion by Council, including Dr. Kelly, of the PENS Report, and passage of eleven motions relating to the PENS Report, "conflicts" with Statements 1, 2, 5, 10, 15, 18, 28, 29, 59, 67, 72, 85, 118, and 145, and Conclusion 1 (Action 1).

Plaintiffs cite (i) APA's 2005 press release describing Council's endorsement of the PENS Task Force Report, (ii) a 2005 Council member roster that includes Dr. Kelly, and (iii) a

printout of a single page of what appears to be August 2006 Council meeting minutes as "proof" that the Report's Statements about collusion between APA and DoD officials to keep APA guidelines loose, as not to restrict DoD interrogations of detainees, are false. The press release states only that the PENS Report "prohibits psychologists from any participation whatsoever in … abusive behaviors and places an ethical obligation on psychologists to be alert to and report abusive behaviors to authorities," and references Council's directive to the Ethics Committee to consider NBI #34E. The minutes contain eleven motions that reaffirmed APA's 1986 resolution against torture, endorsed a mechanism for interested individuals to comment, and requested the Ethics Committee to, *inter alia*, "examine the goodness of fit between the Ethics Code and this area of research and practice" and make a recommendation on NBI #34E. This "proof" does not establish actual malice by APA with regard to any of the cited Statements because Plaintiffs fail to show that Dr. Kelly participated in the August 2005 meeting, agreed with Council's conclusions, and understood Council's statements in its press release and the meeting minutes to directly contradict the Report ten years later. Plaintiffs further fail to explain how Council's adoption of the PENS Report and request for Ethics Code refinements refutes the Report's Statements that APA's policy decisions were influenced by its close relationship with DoD, or by Dr. Behnke's collusion with DoD officials to ensure the outcome DoD favored.[24]

Similarly, that APA's press release characterizes the PENS ethical guidelines for psychologist participation in interrogations as "strict" is nonetheless consistent with the Report's statement that the "principal purpose" of the PENS Task Force was "to state that psychologists could in fact engage in interrogations consistent with the Ethics Code." Statement 145. The

[24] Plaintiffs' reference to Statement 2, which is merely Sidley's characterization of APA critics' opinion on the PENS Report, is misplaced. Statement 2, which is clearly a summary of the critics' position, also states the contrary point of view articulated by defenders of APA's actions. Report at 2.

Report's point is that APA sought "to create a positive-sounding policy statement" to "respond to the pressure of negative press reports," and thus issued "misleading public statements." Statements 85, 145. The Actions cited by Plaintiffs do nothing to contradict the cited Statements.

h. Miscellaneous

Finally, as proof of APA's actual malice, Plaintiffs include a number of events that they ascribe to the Board that do not constitute proof of any of the false conclusions/false Statements that Plaintiffs have identified in their Exhibit A. These Actions are standalone entries without a purpose.

(i) The Board adopted a resolution to review claims in the book Pay Any Price, established a Special Committee (and recused one of its original members and replaced him with another Board member), and hired Sidley to conduct an investigation (Action 29).[25]

This has no bearing on any alleged Statement in the Report and accordingly does not constitute proof of APA's actual malice.

(ii) In June 2015, the Special Committee received the Report (Action 30).

[25] Plaintiffs' have included in their criticisms of Sidley's work that Plaintiffs and interviewees were not informed that Sidley had expanded the scope of its investigation. Plaintiffs contend in connection with Action 29 that the cited materials demonstrate mission creep for which they were not provided notice. This, however, has not been tied to any Statement, nor to any of Plaintiffs' claims of actual malice. Moreover, such a claim would be entirely without merit. As APA Special Committee member Dr. Susan McDaniel explained in a January 22, 2016 letter to critics of the Report, cited by Plaintiffs (*see* Plaintiff's link https://tinyurl.com/y49q85kd), the charge that Sidley expanded its mission is incorrect. Dr. McDaniel stated: "The expansive nature of the Board's charge was clear from the outset: 'the sole objective of the review [is] to ascertain the truth about the allegations . . . *following an independent review of all available evidence, wherever that evidence leads . . . .*' The Special Committee therefore did not unilaterally expand the scope of Mr. Hoffman's charge; rather, consistent with the Board Resolution authorizing the Independent Review, the Special Committee 'provide[d] the necessary support to [Mr. Hoffman] . . . to ensure the independence of [his] review." (emphasis in original). Moreover, as a matter of law, Defendants had no duty to inform Plaintiffs or any witness even if the scope of the investigation had changed. *See, e.g, Secord,* 747 F. Supp. at 788; *Parsi*, 890 F. Supp. 2d at 90.

Plaintiffs' statement that in light of the prior events described, the "Board [was] aware that the Report's conclusions are false" is a generalized statement, unsupported by specific admissible evidence, and fails to show actual malice.

(iii) The Board gave the Report to APA critics Dr. Steven Reisner and Dr. Stephen Soldz under a promise of confidentiality prior to informing Council that the Report was complete (Action 31).

Plaintiffs do not cite to any specific false conclusion for this Action but contend that it shows the "special role" of the APA critics and that reliance on them in the investigation led to the preconceived narrative in the Report. Action 31. This is not "proof" of APA's knowledge that the Report was false, nor have Plaintiffs even alleged that APA, as opposed to Sidley, had a preconceived narrative. *See, e.g.,* Compl. ¶¶ 15, 197, 208, and 210. Nor does a preconceived narrative constitute actual malice. *Tah* , 2019 WL 4737116, at *10. Moreover, Plaintiffs' own document, linked at https://tinyurl.com/y49q85kd, explains why the Board met with Drs. Reisner and Soldz shortly after receipt of the Report:

> Drs. Reisner and Soldz were asked to make a presentation of their views to provide the Board with the perspective of APA's prominent critics. In his *Independent Review*, Mr. Hoffman observed that the Association's critics had not adequately been heard on this issue. In light of this observation a meeting with the representatives of the critics was deemed to be an important initial gesture."

January 22, 2016 letter from Susan McDaniel to Dr. T. Williams at 4-5 (emphasis in original) (linked at https://tinyurl.com/y49q85kd) Nothing in the record refutes this assertion.

(iv) The Board provided the Report to APA's Council on July 8, 2015 (Action 32).

Plaintiffs' assertion that the Board published the Report to Council and beyond "despite knowing information and conclusions contained in it are false" is a generalized statement, unsupported by specific admissible evidence, and fails to show APA's actual malice.

(v) Council voted to prohibit psychologists from participation in national security interrogations (Action 33).

This vote by Council occurred *after* publication of the Report, and fails to show APA's actual knowledge of alleged falsity of any Report Statement. Post-publication actions cannot be considered regarding APA's actual malice at the time of publication of the Report. *Secord*, 747 F. Supp. at 792 ("it is hornbook libel law that post-publication events have no impact whatever on actual malice … since the existence or non-existence of such malice must be determined as of the date of publication").[26]

(vi) The Board rehired Hoffman to produce a supplemental report (*Action 34)*.

This Action, a year after the Report's publication, fails to demonstrate APA's actual knowledge of false Statements in the Report at the time of publication. *Id.* Moreover, Plaintiffs misstate the limited basis for which Sidley was hired, as described in the press release to which Plaintiffs themselves cite: [27]

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[26] Plaintiffs contend that APA's failure to retract the Report both before and after the September 4, 2015 version was published is evidence of APA's actual malice. Opp'n 53-54. But D.C. precedent on this point soundly rejects that argument, making clear that in determining actual malice, retraction has little bearing. *See Lohrenz v. Donnelly,* 223 F. Supp. 2d 25, 56 (D.D.C. 2002)*, aff'd,* 350 F.3d 1272 (D.C. Cir. 2003); *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 93 (D.D.C. 2018); *Kahl*, 856 F.3d at 118; *see also N. Y. Times*, 376 U.S. at 286. Plaintiffs' citation to *Tavoulareas,* 763 F.2d at 1477, fails to note that the D.C. Circuit reversed that point in a subsequent ruling. *Tavoulareas,* 817 F.2d at 795.

Moreover, none of the alleged requests for retraction, as cited by Plaintiffs, actually identify what information in the Report Plaintiffs supposedly told APA and its counsel was false. Opp'n 53-54 and footnotes therein. Plaintiffs' assertions that their counsel gave APA's counsel notice of specific factual errors is unsupported by Plaintiffs' cited "evidence." *Id.* at nn. 162, 163 and 164). Plaintiffs' allegation that at a February 2016 Council meeting APA acknowledged errors in the Report and that its Associate General Counsel said that APA had a "fiduciary duty" to fix the Report's errors if they become known (*id*. at nn. 169 and 170), is completely unsupported by Plaintiffs' purported "proof" – an inadmissible document, prepared by an unidentified author for unidentified recipients, that is replete with misspellings and grammatical errors. Even if Plaintiffs had provided APA with specific notice of the Report's supposed errors, APA was nonetheless entitled to rely on Sidley's investigation. *Lohrenz*, 350 F.3d at 1285.

[27] *See* www.apa.org/news/press/releases/2016/04/independent-review.aspx. Plaintiffs mischaracterize the purpose for the rehiring of Hoffman, stating: "[k]nowing there are errors in the Report, Board rehires Hoffman to prepare a supplement despite conflict of interest with him reviewing his own work." Action 34. Hoffman was not hired to review his own prior work, but

> The American Psychological Association has re-engaged attorney David Hoffman and the law firm Sidley Austin on a limited basis to review and respond to questions regarding specific Department of Defense (DoD) policies that may be relevant to the findings of the *Independent Review* the association released last year…. The intent of this supplemental review is to consider factual information that has recently come to light and which in our view, requires further examination in the context of the *Independent Review*, APA President Susan H. McDaniel, PhD, said in a letter to the association's governing Council of Representatives.

(vii) Former APA President Dr. Nadine Kaslow's email to APA personnel (Action 22).

Dr. Kaslow is alleged to have sent an email to APA personnel in January 2014 stating: "[m]y goals /[l]imit the interrogation/[l]imit the torture." Action 22. Plaintiffs claim that this "conflicts" with Statement 4, that the Report stated that Sidley had been tasked with going "where the evidence would lead." But Dr. Kaslow's statement does not contradict Sidley's. They are consistent. While Dr. Kaslow may have had personal goals, the investigation was totally in the hands and control of Sidley, who alone determined what evidence to collect, witnesses to interview, and the conclusions reached.

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instead to review certain specific DoD policies and comment on them, if appropriate. Hoffman and Sidley did not ultimately undertake this project or provide a supplement.

CONCLUSION

For the foregoing reasons, those set forth in its 2017 Memorandum, and in the accompanying Reply in Support of Second Anti-SLAPP Motion, as well as for the reasons set forth in the Sidley Defendants' briefs, APA respectfully requests that the Court dismiss the Supplemental Complaint with prejudice in accordance with the D.C. Anti-SLAPP Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2019, a true and correct copy of the foregoing Reply in Further Support of APA's Contested Special Motion to Dismiss the Complaint Under D.C. Anti-Slapp Act, D.C. Code § 16-5502 was filed through the Court's electronic filing system, which will automatically send notification to counsel for Plaintiffs and Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and Sidley Austin LLP partner David Hoffman.

/s/ Barbara S. Wahl
Barbara S. Wahl