IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	**:**	**CASE NO. 2017 CA 005989 B**
	:	**Judge Hiram Puig-Lugo**
Plaintiffs,		
	:	**Oral Argument Not Scheduled**
vs.	**:**	**Courtroom 317**
DAVID H. HOFFMAN, *et al.*,	**:**	
Defendants.	**:**	

DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S REPLY IN FURTHER SUPPORT OF ITS CONTESTED SPECIAL MOTION TO DISMISS COUNT 11 OF THE SUPPLEMENTAL COMPLAINT UNDER THE D.C. ANTI-SLAPP ACT, D.C. CODE § 16-5502

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Plaintiffs' attempt to avoid the application of the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 (the "Act"), to the Supplemental Complaint rests on two fundamentally flawed theories.

First, Plaintiffs assert that the American Psychological Association ("APA") failed to make a prima facie showing that Plaintiffs' claims "aris[e] from an act in furtherance of the right of advocacy on issues of public interest." In doing so, Plaintiffs (i) invent their own definition of "advocacy" that is entirely untethered from the statutory definition; (ii) ignore the myriad ways in which the Supplemental Complaint alleges that APA "publicly" published the Report; and (iii) misconstrue the standard for what constitutes a "public" forum.[1]

Second, Plaintiffs assert that modifications to the APA website—which left the Report itself intact, on the same URL, and merely refer viewers of APA's website to links to other resources that favor the Plaintiffs—republished the alleged defamatory statements in the Report. Plaintiffs' argument disregards a well-settled body of law holding uniformly that such modifications fall within the single publication rule and thus are not republications as a matter of law. The Act requires that the Supplemental Complaint in its entirety be dismissed with prejudice.[2]

ARGUMENT

I. Plaintiffs Cannot Defeat APA's Prima Facie Showing that the Claims Meet the Statutory Elements of Arising from an Act in Furtherance of the Right of Advocacy, and Publication Open to the Public or in a Public Forum.

APA's opening briefs made a prima facie showing that Plaintiffs' claims "aris[e] from an act in furtherance of the right of advocacy on issues of public interest," as that term is defined in

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[1] These arguments seem intended to apply to the claims against the Sidley Defendants as well as to APA, and as such, APA's arguments on these points are also asserted on behalf of the Sidley Defendants.

[2] APA's initial Motion concerned only Count 11 of the Supplemental Complaint, but since Plaintiffs' Opposition to this motion addresses the Supplemental Complaint as a whole, APA does so likewise here.

the Act, thereby shifting the burden of proof to Plaintiffs to demonstrate a likelihood of success on the merits. *See* APA First Mot. to Dismiss at 7-9; APA Second Mot. to Dismiss at 5. Plaintiffs make several strained arguments in an effort to rebut APA's showing and sidestep their burden.

A. The Definition of "Advocacy" Offered by Plaintiffs Is Contrary to the Act.

Plaintiffs contend that the Report is not a work of "advocacy" that can support a prima facie showing under the Act because APA engaged Sidley to draft the Report based on an "objective" investigation intended to "ascertain the truth" about whether APA officials colluded with Department of Defense ("DoD") officials to facilitate torture. An objective assessment, Plaintiffs insist, cannot constitute a "work of advocacy." Opp. to Mots. to Dismiss Supp. Compl. at 10-11. This argument is unpersuasive.

Plaintiffs' suggestion for what the term "advocacy" should mean is irrelevant here because "advocacy" is part of a statutorily defined term and is not a separate statutory requirement. *See* D.C. Code § 16-5501(1). The Act does not contain a separate definition of "advocacy," but broadly refers to the purpose of the Act to protect "the right of advocacy on issues of public interest," which includes:

> (A) Any written or oral statement made: . . . (ii) In a place open to the public or a public forum in connection with an issue of public interest; or . . . (B) Any other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1)(A)(ii). Plaintiffs are not free to create their own definition of "advocacy" or engraft onto the statute a requirement that is not present. "When a legislature defines the language it uses," as it did here, "its definition is binding upon the court." *Dist. of Columbia v. Jerry M.*, 717 A.2d 866, 871 (D.C. 1998) (citation and internal quotation marks omitted). In these circumstances, courts "must follow th[e] definition," because "[s]tatutory

definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129-30 (2008) (internal quotation marks omitted). The only pertinent question here is whether APA's publication of the Report meets the statutory definition of an "[a]ct in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5501(1).

This case falls squarely within the statutory definition in Section 16-5501(1). *See id.* APA's publication of the Report satisfies the statute for two separate reasons. First, it is an "[a]ct in furtherance of the right of advocacy on issues of public interest" because it is a "written . . . statement made . . . [i]n a place open to the public or a public forum"—including the Internet—"in connection with an issue of public interest," *i.e.*, detainee interrogations and the role that psychologists play. *Id.* § 16-5501(1)(A); *see* APA First Mot. to Dismiss at 8-9; APA Second Mot. to Dismiss at 5. Second, it constitutes "expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1)(B). Plaintiffs make no argument that can defeat this prima facie showing.

Plaintiffs urge upon the Court a narrow definition that would supplant the D.C. Council's intent in passing the statute. The D.C. Council stated at the time of the Act's enactment that the Act is meant to help defendants "fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Report on Bill 18-1893, "Anti-SLAPP Act of 2010," at 1 (Nov. 18, 2010), http://lims.dccouncil.us/Download/23048/B18-0893-CommitteeReport1.pdf. Nothing in the D.C. Council's expression of intent suggests that the Act was intended to be read narrowly to pertain only to the promotion of specific ideas or singular points of view. And Plaintiffs cite no

legal authority that so holds, or any legal authority at all that supports their definition of "advocacy." Opp. to Mots. to Dismiss Supp. Compl. at 10-12.

B. Plaintiffs Cannot Defeat APA's Prima Facie Showing that Publication Was within the Meaning of the Statute.

Plaintiffs contend that because APA argued in part that publications to the Internet are statements made in a public forum and to members of the public, APA made a prima facie showing only as to Count 7 of the Supplemental Complaint, which Plaintiffs contend is the only Count that pertains to publication of the Report on the Internet. *See* Opp'n to Mots. to Dismiss Supp. Compl. at 16-17. This argument is meritless.

All but five of the thirteen counts of the Supplemental Complaint expressly allege release of the Report to the public at large: **Count 3** – publication to the N.Y. Times, Supp. Compl. ¶ 366; **Count 6** – publication by the N.Y. Times to "the world," *id*. ¶¶ 427-28; **Count 7** – publication on APA's website, *id.* ¶¶ 446, 447; **Count 8** – Dr. Kaslow's statements to the public, *id.* ¶¶ 262-67, 466; **Count 10** – publication of another version of the Report on the APA website, *id.* ¶¶ 504-05; **Count 11** – republication on APA's website, *id.* ¶¶ 524-25; **Count 12** – in the alternative, defamation by implication through public release, *id.* ¶¶ 563, 567; and **Count 13** – false light by objectionable publicity because of the Report's publication, *id.* ¶¶ 579-86. Plainly these claims pertain to direct releases of alleged defamatory statements to the world at large.

Plaintiffs cite to four counts in which world-wide publication is not expressly alleged, contending that for these counts Defendants cannot make a prima facie showing under the statute because the Report was not made in a "public forum." *See* Opp'n to Mots. to Dismiss Supp. Compl. at 12-14. Each nonetheless complains of publication to more than one person *as part of the process* of APA making the Report public to the world at large: **Count 1** – Hoffman's and Sidley's publication of the preliminary version of the Report to the APA Special Committee and

to the Board, and by Risen on the N.Y. Times website, *id*. ¶¶ 323-24, 333; **Count 4** – Hoffman's and Sidley's publication of the July 2015 version of the Report to the Special Committee and the Board, *id.* ¶¶ 387-88; **Count 5** – APA's publication of the Report to the Council, *id.* ¶¶ 408-09; and **Count 9** – Hoffman's and Sidley's publication of the September 2015 version of the Report to the Special Committee and to the Board, *id.* ¶¶ 483-84. As Plaintiffs themselves have expressly pleaded, each of these interim publications resulted in publication to the world. *Id*. ¶¶ 324, 388, 409, 484.

Because the statute protects the "right of advocacy," and not just specific statements, the Act's protections extend to not just the final, public statement, but also to the process of developing a statement that is publicly released. All of the publications alleged in the Supplemental Complaint were part of the process of APA's promised release of the investigation's findings to the public.[3] The Sidley Defendants' communications of versions of the Report to APA's Special Committee and Board, and APA's Special Committee and Board's communication of versions of the Report to the Council, constitute "expression or expressive conduct" that "involve[d]" communicating views to members of the public because each was a deliberate and necessary part of the process that led to APA's publication of the Report to its website, and thus to the public. Plaintiffs cannot strip APA of its protections under the Act merely by targeting an intermediate step in the path toward publishing the Report to the Internet, because that step still constitutes "expressive conduct" aimed at eventually communicating the

[3] At the time of APA's retention of Sidley, APA announced publicly that it would release the result of the investigation to the public, without modification. Stat. of APA Board of Dirs: Outside Counsel to Conduct Independent Review of Allegations of Support for Torture (Nov. 12, 2014), https://www.apa.org/news/press/releases/2014/11/risen-allegations. The retainer agreement between APA and Sidley also expressly referenced APA's intent to "make [the] final report available to the APA Council of Representatives, APA members, and the public." http://www.hoffmanreportapa.com/resources/Sidleyengagementletter.pdf.

Report to members of the public. *See, e.g.*, *Averill v. Superior Court*, 50 Cal. Rptr. 2d 62, 65 (Cal. Ct. App. 1996) (rejecting argument that private conversation did not implicate California Anti-SLAPP Act where the defendant made public comments); *Tamkin v. CBS Broad., Inc.*, 122 Cal. Rptr. 3d 264, 267, 271 (Cal. Ct. App. 2011) (writer's use of plaintiffs' names in a synopsis of the TV show episode being written entitled to anti-SLAPP statute protection because it "helped to advance or assist in the creation, casting, and broadcasting of an episode of a popular television show"); *Ruiz v. Harbor View Comm. Ass'n*, 37 Cal. Rptr. 3d 133, 141 (Cal. Ct. App. 2005) (anti-SLAPP statute with same language as the Act required dismissal of plaintiff's defamation complaint regarding letters exchanged between counsel where letters were part of a dialogue with the homeowner association); *Dowling v. Zimmerman*, 103 Cal. Rptr. 2d 174, 181, 184 (Cal. Ct. App. 2001) (attorney's letter to property manager and five others qualified for anti-SLAPP protection because it was intended to commence a dialogue, which ended in litigation).

C. Disclosure to the APA Council Meets the Act's Requirement of Publication.

Plaintiffs argue that APA's publication of the Report to the APA Council of Representatives alleged in Count Five was "private" and to a "non-public audience," and therefore cannot constitute "an act in furtherance of the right of advocacy on issues of public interest." *See* Opp'n to Mots. to Dismiss Supp. Compl. at 12-14.[4] Plaintiffs' argument is meritless, and APA's alleged publication of the Report to the Council meets the definition in Section 16-5501(1) in two ways.

First, the publication to the Council constituted a written statement made in a "public forum" under the Act. The Council is the governing body of APA that consists of more than 170

[4] Plaintiffs make this argument as to Counts One, Four, Five, and Nine. Plaintiffs apparently concede, as they must, that the remaining counts against Defendants involved statements made in a public forum or to members of the public sufficient to satisfy Section 16-5501(1).

psychologists from around the country who collectively represent the interests of more than 100,000 psychologist-members of APA. *See* Supp. Compl. ¶ 408 (noting that the Council consists of roughly 170 psychologists); Compl. ¶ 387 (same). As the governing body, the Council has significant power and authority over APA's affairs and funds, including the power to review the actions of any board, committee, division, or affiliated organizations. *See* Council of Representatives, APA, https://www.apa.org/about/governance/council/. It is also accountable to APA's members, and it publicly posts its meeting minutes and summaries to APA's website, keeping APA members and the public at large apprised of its activities. *Id.*

Although D.C. courts have not had occasion to interpret the public-forum requirement, courts in California have held under the California Anti-SLAPP Act that meetings of an organization's governing board constitute "public forums." *See, e.g.*, *Lee v. Silveira*, 211 Cal. Rptr. 3d 705,714-15 (Cal. Ct. App. 2016); *Cabrera v. Alam*, 129 Cal. Rptr. 3d 74, 81-82 (Cal Ct. App. 2011); *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205, 209-10 (Cal. Ct. App. 2000). This is because such organizations "functioned similar to a governmental body," are responsible for "promulgation and enforcement of rules" affecting its members, and the meeting itself can affect members. *Cabrera*, 129 Cal. Rptr. 3d at 82 (holding that homeowners association board meeting "constituted a public forum"). Courts have also held that "communicating a message about public matters to a large and interested community," even in a private newsletter, constitutes a statement in a "public forum." *Damon*, 102 Cal. Rptr. 2d at 211. These principles apply with equal force to APA's publication of the Report to the Council, which serves as a "public forum" representing the interests of psychologists across the country.[5]

[5] Plaintiffs cite a host of cases applying California's Anti-SLAPP Act, which purportedly support their position that publications to APA's Special Committee, Board, and Council were not made in public forums. *See* Opp'n to Mots. to Dismiss Supp. Compl. at 13 n.30. But Plaintiffs mis-

Second, even if the Council were not a "public forum," APA's publication of the Report to the Council nonetheless constitutes "expression or expressive conduct that involves . . . communicating views to members of the public." D.C. Code § 16-5501(1)(B). The expression or expressive conduct need not satisfy the public-place-or-forum requirement in the first prong of Section 16-5501(1), so long as it involves communicating views to members of the public. *See* D.C. Code § 16-5501(1)(B) (applying to "[a]ny *other* expression or expressive conduct" not already covered by Section 16-5501(1)(A) (emphasis added)).

D. Plaintiffs' Estoppel Argument Is Unpersuasive.

Plaintiffs erroneously argue that because APA took the position that the claims of two former plaintiffs in this case—Drs. Behnke and Newman—were subject to arbitration clauses, APA is estopped from asserting that its publication of the Report was an "act in furtherance of the right of advocacy on issues of public interest." Opp'n to Mots. to Dismiss Supp. Compl. at 11-12. This argument is easily dispatched because there is no contradiction between application of the Act in this case and the Court's ruling that the claims of Drs. Behnke and Newman must be adjudicated in an arbitration forum, as they had agreed while APA employees. Simply

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cite these cases, which do not so hold. *See, e.g.*, *Turnbull v. Lucerne Valley Unified Sch. Dist.*, 234 Cal. Rptr. 3d 488, 495 (Cal. Ct. App. 2018) (delivery of a medical note to another person was not a violation of the plaintiff's right of privacy (not a defamation claim)); *Contiki U.S. Holdings, Inc. v. DiLanzo*, No. B247620, 2015 WL 412997, at *4 (Cal. Ct. App. Feb. 2, 2015) (declining to rule on whether statements in private emails and on a private restricted web forum were statements in a public forum because even private statements fall within the protection of the statute if they concern a matter of public interest); *Mazzaferri v. Mazzaferro*, No. A131261, 2011 WL 5412959, at *5 (Cal. Ct. App. Nov. 9, 2011) (acknowledging that Recorder's Office was a public forum but that the statute did not apply because Recorder's Office was not a forum for debate or discussion on issues of public interest); *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 391 (Cal. Ct. App. 2003) (declining to find that private newsletter was a public forum where plaintiff had failed to adduce evidence on that point, acknowledging that court came to the opposite conclusion in *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205 (Ct. App. 2000)). These cases are therefore easily distinguishable from the circumstances here, where the statements were made to dozens of Council members.

because the forum for the adjudication of the parties' disputes is a private one, doesn't mean that the Report does not constitute an "expression or expressive conduct that involves . . . communicating views to members of the public." D.C. Code § 16-5501(1)(B).[6] Plaintiffs' argument conflates APA's interest in publicly debating the role of psychologists in interrogation, on one hand, with APA's interest in resolving lawsuits with former employees Behnke and Newman through confidential arbitration, on the other hand. Because these positions are consistent, Plaintiffs' estoppel argument is meritless.

II. Count 11 Must Be Dismissed Because APA's August 2018 Publication Did Not Constitute Republication As a Matter of Law.

Plaintiffs' Count 11 of the Supplemental Complaint must be dismissed because, under well-established case law, the modifications to APA's website do not constitute a republication of the Report as a matter of law. Plaintiffs contend that APA republished the Report by (i) disabling the Report's previous landing page so that the Report was only available through a hyperlink on the "Timeline" page on the APA website, *see* Supp. Compl. ¶ 524, Opp'n to Mots. to Dismiss Supp. Compl. at 3-4; (ii) adding to the APA website hyperlinks to documents that support Plaintiffs' position, and a statement that Plaintiffs had filed a lawsuit against APA, *see* Supp. Compl. ¶¶ 298-99, 526; and (iii) posting to the Council listserv an e-mail notifying Council of the change. *See* Opp'n to Mots. to Dismiss Supp. Compl. at 3-4. None of these constitutes republication.

[6] While the arbitration proceedings are private, once the arbitrator has made a ruling, the parties have the statutory right to enforce or challenge that ruling in court. *See* Federal Arbitration Act, 9 U.S.C. §§ 9, 10, 11.

A. Continuing to Make the Report Available Through a Hyperlink on the Timeline Is Not Republication.

As explained in APA's opening memorandum, Plaintiffs' assertion, repeated in its Opposition, that the Report was published "on separate occasions" and "on different locations" on the APA website, *see* Opp'n to Mots. to Dismiss Supp. Compl. at 21, is simply incorrect. Repetition of the erroneous does not make it correct. Plaintiffs have not refuted, and cannot refute, the explanation of the August 2018 changes to the APA website provided by APA's Director of Digital Strategy and Services: "Both before and after the August 2018 Council meeting, the Report could always be accessed by a link to the Report from the Timeline," and "[i]ts URL is the same." APA Second Mot. to Dismiss Ex. A, Fredley Aff. ¶ 4. The only change made as a result of the August 2018 Council meeting was to remove the Report's previous landing page—thereby making the Report more difficult to access—and to include links on the Timeline to other documents that support the positions taken by Plaintiffs or merely note the existence of the lawsuit. *See* APA Second Mot. to Dismiss at 3-4; Ex. A, Fredley Aff. ¶ 5.[7] These changes do not constitute republication.

Every court to have considered the issue has held that the mere reference to an allegedly defamatory statement through a hyperlink on a website, without affirmatively restating or altering the statement itself, does not constitute republication. *See, e.g.*, *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 505-07 (6th Cir. 2015) ("Simply alerting a new audience to the existence of a preexisting statement does not republish it" because the "test of whether a statement has

[7] Even if the URL had changed, and it did not, courts have held uniformly that moving an alleged defamatory statement to a new URL is not republication. *See, e.g.*, *Yeager v. Bowlin*, 693 F.3d 1076, 1083 (9th Cir. 2012) (noting that "adding a verbatim copy of a statement to a different URL does not trigger republication"); *Canatella v. Van de Kamp*, 486 F.3d 1128, 1134 (9th Cir. 2007) (rejecting argument that "posting [plaintiff's] disciplinary record at a second place on the California Bar's website" constitutes republication).

been republished is if the speaker has *affirmatively reiterated it* in an attempt to reach a new audience" (emphasis added)); *Yeager*, 693 F.3d at 1083 ("[L]eaving a statement unchanged while modifying other information on the URL should not trigger republication."); *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 916-17 (W.D. Ky. 2009) (concluding that "the common thread of traditional republication is that it *presents the material, in its entirety*, before a new audience," and while a URL reference "may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory contents* of the article to that audience"); *see generally* APA Second Mot. to Dismiss at 6-9.

B. Adding Hyperlinks to Other Non-Defamatory Documents on the Timeline Is Not Republication.

The addition of hyperlinks to other documents that are sympathetic to Plaintiffs' position does not change the calculus, as APA did not restate or substantively add to the Report. *See Clark*, 617 F. App'x at 505 ("revising other information at the URL at which the allegedly defamatory statement is found, *but leaving the statement itself intact*" is not republication (emphasis added)). As the inclusion of hyperlinks to allegedly defamatory material does not rise to the level of republication, no republication can exist when the new documents are themselves not alleged to be defamatory. *See United States ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012) (no republication where defendant provided a URL to allegedly defamatory statements because "a finding of republication hinge[s] on the defendant's communication of the *contents* of the original, allegedly defamatory statements"); *Life Designs Ranch, Inc. v. Sommer*, 364 P.3d 129, 138 (Wash. Ct. App. 2015) (no republication where defendant published on his website "For more info click or cut and paste the link" to the alleged defamatory article); *cf. Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016) (republication requires that "the speaker has '*affirmatively reiterated*' the statement" and does

not occur "unless *the statement itself is substantively altered or added to*" (emphasis added)); *Larue v. Brown*, 333 P.3d 767, 773 (Ariz. Ct. App. 2014) (republication occurred where defendants "re-alleged the substance of the original articles" and "added to and altered the substance"); *In re Davis*, 347 B.R. 607, 611 (W.D. Ky. 2006) ("changing the way an item of information is accessed, is not republication").

Plaintiffs' contention that the additional hyperlinks added to the Timeline in August 2018 republish the Report is without merit because Plaintiffs do not (and cannot) allege that those additional materials are also defamatory. The alleged defamatory statement itself—the Report—remains unchanged, both in content and its location and access on the APA website. *See Doctors Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1137 (N.D. Ill. 2016) (hyperlink not republication where it "does not duplicate the content of a prior publication"); *Firth v. State*, 98 N.Y.2d 365, 371 (N.Y. 2002) ("The justification for the republication exception has no application at all to the addition of unrelated material on a Web site, for it is not reasonably inferable that the addition was made either with the intent or the result of *communicating the earlier and separate defamatory information to a new audience.*" (emphasis added)); *cf. Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 277 (S.D.N.Y. 2016) (republication occurred because subsequent posts "contain[ed] *additional statements which ESG alleges are themselves defamatory*" (emphasis added)).[8]

[8] Plaintiffs appear to cite *Eramo* for the proposition that adding favorable information to a defamatory statement can still effect a republication, but this case is not helpful to Plaintiffs. *Eramo* involved the subsequent publication of an Editor's Note, which was appended to, and acknowledged some discrepancies in, the original article. *See* 209 F. Supp. 3d at 879. The court denied summary judgment to the defendants on the question of republication because there was "a genuine dispute regarding whether the defendants 'affirmatively reiterated' the challenged statements" or made "substantive changes" to the challenged statements by effectively retracting only some of the alleged statements. *See id.* at 879-80 ("The republication exception is meant to give plaintiffs an additional remedy when a defendant *edits and retransmits* the defamatory

In support of their argument, Plaintiffs cite to cases in which the posting of a hyperlink to a document on a webpage was deemed to incorporate that document by reference. Opp'n to Mots. to Dismiss Supp. Compl. at 22-23. These cases are inapposite, however, as none involve *republication*, much less hold that including a hyperlink to a webpage can overcome the single publication rule. *See Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 262 (D.D.C. 2013) (noting that second allegedly defamatory article included a hyperlink to first allegedly defamatory article for purposes of determining whether the plaintiff qualified as a limited purpose public figure); *Adelson v. Harris*, 973 F. Supp. 2d 467, 483-84 (S.D.N.Y. 2013) (hyperlink to a news report could "satisf[y] the attribution requirement of the fair and accurate report privilege"); *Nestle Purina Petcare Co. v. Blue Buffalo Co.*, No. 14 CV 859 RWS, 2015 WL 1782661, at *11 (E.D. Mo. Apr. 20, 2015) (complaint sufficiently alleged that defendants "made the allegedly false statements through their participation in the creation of the Honesty website and social media posts" without discussion of republication or incorporating effect of hyperlinks in its analysis). Indeed, most of the cases Plaintiffs cite are not even defamation cases. *See Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1019 (9th Cir. 2004) (trademark infringement claim that "Nissan Computer traded on the goodwill of Nissan Motor by offering links to automobile-related websites"); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1202 (9th Cir. 2006) (declaratory judgment action on whether non-defamation-related French orders were enforceable, noting that Yahoo! webpage was accessible in France by clicking a link); *see also Werner v. Hewlett-Packard Co.*, No. 13-cv-10287, 2015 WL 1005332, at *2 (E.D. Mich. Mar. 5, 2015) (breach of contract case where sales

material[.]"). There can be no similar dispute here, however, because as a matter of law a mere hyperlink to preexisting information, without more, is not an affirmative restatement of defamatory material and thus is not republication.

letter incorporated a compensation policy through an electronic link); *Barton v. Hewlett-Packard Co.*, No. 130cv-554, 2014 WL 6966986, at *1 (W.D. Pa. Dec. 9, 2014) (same); *Rosado v. eBay Inc.*, 53 F. Supp. 3d 1256, 1260 & n.1 (N.D. Cal. 2014) (false advertising, unfair competition, and breach of contract claims involving rules linked to eBay user agreement). Even if the new hyperlinks added to the Timeline were deemed to be content incorporated onto that page, there was still no republication of the Report because Plaintiffs have not shown, and cannot show, that the new documents "substantively altered or added to" the alleged defamatory statements in the Report. *See, e.g.*, *Yeager*, 693 F.3d at 1082.

C. APA's E-Mail Notification to Council Is Not Republication.

Similarly meritless is Plaintiffs' contention that APA republished the Report by sending an e-mail notifying the Council of the August 2018 changes to the Timeline because this communication "included people who would not have received its similar communications in 2015." Opp'n to Mots. to Dismiss Supp. Compl. at 19. This argument is also legally unsupportable. The e-mail to the Council, which did not attach the Report or even provide a hyperlink to it on the APA website, was a "mere reference" to alleged defamatory content, which only "call[s] the *existence* of the article to the attention of a new audience" but "does not present the *defamatory contents* of the article to that audience." *See Salyer*, 701 F. Supp. 2d at 916. That "reference, without more, is not properly a republication." *Id.* That more or different people may now ultimately read the Report does not transform a mere reference into a republication. *See Martin v. Daily News, L.P.*, No. 103129/11, 2012 WL 1313994, at *3 (N.Y. Sup. Ct. Feb. 10, 2012) ("Notwithstanding the fact that hyperlinks . . . arguably increase the number of people who may ultimately read the 2007 Article, DNLP's targeted audience consists of visitors to its website. This is not a new audience[.]"), *aff'd,* 990 N.Y.S.2d 473 (N.Y. App. Div. 2014); *Life Designs Ranch, Inc.*, 364 P.3d at 138 (web post directing viewers to click on

link to alleged defamatory article was not republication). This is the quintessential "case where a single publication reached a single, large audience, thus warranting application of the single-publication rule." *See* Opp'n to Mots. to Dismiss Supp. Compl. at 21.

CONCLUSION

In sum, APA has made a prima facie showing that Plaintiffs' claims "aris[e] from an act in furtherance of the right of advocacy on issues of public interest," as that term is defined in the Act, which Plaintiffs have failed to rebut. Plaintiffs have also failed to satisfy their burden to demonstrate a likelihood of success on the merits on their republication-based claim or otherwise. The Supplemental Complaint should therefore be dismissed with prejudice.

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 Special Contested Motion to Dismiss Count 11 of the Supplemental Complaint Under 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