SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
NOTICE OF APPEAL (_____CROSS APPEAL)
TAX, CIVIL, FAMILY COURT - (EXCEPT JUVENILE CASES), AND PROBATE

Superior Court Case Caption: Stephen Behnke, et. al. v. David H. Hoffman, et. al.

Superior Court Case No.: 2017 CA 005989 B

A. Notice is given that (person appealing) Plaintiffs Morgan Banks, Debra Dunivin, and Larry James is appealing an order/judgment from the:

☐ Tax Division ☒ Civil Division ☐ Family Court ☐ Probate Division

1. Date of entry of judgment or order appealed from (if more than one judgment or order appealed, list all):
   see attached list
2. Filing date of any post-judgment motion: March 25, 2020 (Joint consent motion for stay of any fee motion)
3. Date of entry of post-judgment order: March 27, 2020
4. Superior Court Judge: Hiram E. Puig-Lugo
5. Is the order final (*i.e.*, disposes of all claims and has been entered by a Superior Court Judge, not a Magistrate Judge)? ☒ YES ☐ NO

   If no, state the basis for jurisdiction: _____

   Has there been any other notice of appeal filed in this case: ☐ YES ☒ NO

   If so, list the other appeal numbers: _____
6. If this case was consolidated with another case in this court, list the parties' names and the Superior Court case number: N/A

B. Type of Case: ☐ Civil I ☒ Civil II ☐ Landlord and Tenant ☐ Neglect

☐ Termination of Parental Rights ☐ Adoption ☐ Guardianship ☐ Mental Health

☐ Probate ☐ Intervention ☐ Domestic Relations ☐ Mental Retardation

☐ Paternity & Child Support ☐ Other: _____

C. Indicate Status of Case: ☒ Paid ☐ In Forma Pauperis ☐ CCAN

Was counsel appointed in the trial court? ☐ YES ☒ NO

(COMPLETE REVERSE SIDE)

D. Provide the names, addresses, and telephone numbers of all parties to be served. For persons represented by counsel, identify counsel and whom the counsel represents. For each person, state whether the person was a plaintiff or defendant in the Superior Court. *Attach additional pages if necessary.

Name	Address	Party Status (Plaintiff, Defendant)	Telephone No.
see attached sheet	see attached sheet	see attached sheet	see attached sheet

E. Identify the portions of the transcript needed for appeal, including the date of the proceeding, the name of the Court Reporter (or state that the matter was recorded on tape if no Court Reporter was present), the courtroom number where the proceeding was held, and the date the transcript was ordered, or a motion was filed for preparation of the transcript. *Attach additional pages if needed.

Date of Proceeding/Portion	Reporter/Courtroom No.	Date ordered
entire transcript-see attached for hearing dates		
and all other required information		

☐ **Check this box if no transcript is needed for this appeal.**

F. Person filing appeal: ☐ Plaintiff Pro Se ☐ Defendant Pro Se

☐ Third Party/Intervenor ☐ Counsel for Plaintiff

☐ Counsel for Defendant

ATTACH A COPY OF THE ORDER, JUDGMENT OR DOCKET ENTRY FROM WHICH THIS APPEAL IS TAKEN

John B. Williams	/s/ John B. Williams	257667
Print Name of Appellant/Attorney	Signature	Bar No.

1200 New Hampshire Avenue, NW, Suite 750 Washington, DC 20036	(202) 296-1665
Address	Telephone Number

*Appellant is responsible for ordering and paying the fee for transcript(s) in the Court Reporting and Recording Division, Room 5500. If appellant has been granted In Forma Pauperis status, or had an attorney appointed by the Family Court, *and* transcript is needed for this appeal, appellant must file a Motion for Transcript in Court Reporting and Recording Division, Room 5500. That office number is (202) 879-1009. If that motion is granted, transcript will be prepared at no cost to appellant.

Orders and Rulings from Which Plaintiffs Appeal:

- **February 8, 2019** (refusal to grant all discovery requested in motion for limited discovery, including all witness interview notes (two 56(d) affidavits filed November 30, 2017; motion filed January 8, 2019)). Docket entry and attached transcript of hearing.

- **September 6, 2019** (limitations placed on documents Plaintiffs were allowed to proffer in support of their opposition to the Defendants' four Strategic Lawsuits Against Public Participation (Anti-SLAPP) motions; reiterated in hearing on November 1, 2019). Docket entry and attached transcript of hearing.

- **September 17, 2019** (refusal in advance of briefing to allow surreplies; the order failed to include, as requested in Defendants' proposed order, the express limitations the Court had placed during its September 6, 2019, hearing on evidence Plaintiffs were allowed to proffer in support of their oppositions to Defendants' Anti-SLAPP motions). Order attached.

- **September 24 and 25, 2019** (*sua sponte* order disallowing previously ordered depositions and disallowing request from Plaintiffs' counsel to be heard on the matter). Orders attached.

- **January 23, 2020** (order finding the D.C. Anti-SLAPP statute to be valid and constitutional). Order attached.

- **February 21, 2020** (at hearing on Defendants' motions, including, but not limited to, refusal to allow Plaintiffs to proffer three additional affidavits). Transcript of hearing attached.

- **March 11, 2020**; amended **March 12, 2020** (orders granting Defendants' four anti-SLAPP motions). Orders attached.

List of Hearings Taped and Transcripts Ordered:

Plaintiffs were informed by the court reporting division that the transcripts of all hearings were ordered on the day of the hearing by Defendants, with the exception of the hearing on 2/21/2020 for which the transcript was ordered by Defendants on or about 2/25/2020.

Plaintiffs ordered copies of each transcript within 24 hours of Defendants' ordering of the transcripts.

9/14/2018-tape	Courtroom 317
2/8/2019-tape	Courtroom 317
2/14/2019-tape	Courtroom 317
9/6/2019-tape	Courtroom 317
11/1/2019-tape	Courtroom 317
2/21/2020-tape	Courtroom 302

Appellants will request that all relevant transcripts be sent to the Court of Appeals as soon as practicable, given the current situation, and will keep the Court of Appeals clerk apprised of all information received from the court reporting division.

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This appeal questions the validity and constitutionality of a statute: D.C. Code §§ 16-5501-5505.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

- - - - - - - - - - - - - - - x
STEPHEN BEHNKE, ET AL., : Docket Number: 2017 CAB 005989
:
Plaintiffs, :
:
vs. :
:
SIDLEY AUSTIN LLP, ET AL.,:
Defendants. : Friday, February 8, 2019
- - - - - - - - - - - - - - - x Washington, D.C.

The above-entitled action came on for a hearing before the Honorable HIRAM PUIG-LUGO, Associate Judge, in Courtroom Number 317.

APPEARANCES:

On Behalf of the Plaintiffs:

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On Behalf of Defendant Sidley Austin LLP:

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On Behalf of Defendant APA:

BARBARA S. WAHL, Esquire
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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, now calling the matter of Stephen Behnke, et al. vs. Sidley Austin, LLP, et al., case number 2017-CA-5989. Parties stand and state your name for the record.

MS. FORREST: Bonny Forrest, Your Honor, for the plaintiffs.

THE COURT: Good afternoon, Ms. Forrest.

MR. WILLIAMS: Your Honor, John Williams also on behalf of plaintiffs.

THE COURT: Sir.

MR. FREEH: Louie Freeh, Your Honor, for Steve Behnke.

THE COURT: Sir.

MR. SULLIVAN: Gene Sullivan, Your Honor.

THE COURT: Good afternoon.

MR. HENTOFF: Good afternoon, Your Honor. Thomas Hentoff for the Sidley defendants and with me is Alex Kasner.

THE COURT: Okay.

MS. WAHL: Good afternoon, Your Honor. Barbara Wahl on behalf of the American Psychological Association. With me is my partner, Karen Carr and the general counsel of the American Psychological Association, Deanne Ottaviano.

THE COURT: All right. Good afternoon, everyone. As I understand it, there's a number of things that we need to talk about. But first of all, what's happening in Massachusetts? Was there some litigation going on there?

MS. FORREST: The judge has stated, Mr. Hentoff, please interrupt if you think I'm not saying it accurately. I believe the Court has a copy of the order on file. The judge has stated pending what happens here today, and we're prepared to move forward here today, Your Honor, and that was all dependent on us dropping Ohio, which the Court also here reiterated to drop Ohio. We've done that and we're prepared to move forward. We'll file a status report with the judge there on the 28th of this month, Your Honor.

THE COURT: As I understand it, the only motion that's been fully briefed is the one related to the plaintiff's request for limited discovery.

MS. FORREST: That's correct, Your Honor.

THE COURT: Everything else is partially briefed but oppositions are due. Is that correct?

MS. FORREST: We would contend oppositions aren't due until the discovery motion's ruled on because the discovery motion is obviously to answer those two other motions, so --

THE COURT: Right. So let me just be precise about the language. What we're talking about is setting dates for additional pleadings that may be filed.

MS. FORREST: Correct, Your Honor.

THE COURT: Correct? Okay. Now, Ms. Forrest, is there anything else you'd like to say regarding the opposed motion for limited discovery?

MS. FORREST: No, Your Honor. Just that we would, we think that's the threshold motion. We believe we've limited it with the latest concession and defendants papers, we're talking about three depositions and five limited discovery requests, two of which we believe will require no documents. And then --

THE COURT: I thought there were four depositions. Are you --

MS. FORREST: There were just three. We had dropped one. Originally, we had asked for Theresa McGregory, Your Honor, and then we dropped that because they stated in their papers that she had no other knowledge concerning Dr. Newman's employment with the second APA entity.

THE COURT: But Ms. McGregor had to do with the motion to compel arbitration.

MS. FORREST: Correct. And that would be under an employment agreement. They contend that there's a

valid agreement to arbitrate. We contend there is no valid agreement to arbitrate. But most importantly, Dr. Newman had an agreement which is referenced in the APA tax returns with another entity.

THE COURT: Okay. We're talking about two things. We're talking about discovery for purposes of the anti-SLAPP litigation and discovery for purposes of the motion to compel arbitration.

MS. FORREST: Right.

THE COURT: Okay. So how many depositions are you seeking?

MS. FORREST: For the SLAPP?

THE COURT: Yes.

MS. FORREST: Three, Your Honor.

THE COURT: In your motion you state four individuals. Which one are you no longer interested in deposing?

MS. FORREST: I don't, I believe one of them was with respect to the other motion, Your Honor. That's why, I apologize, I got confused. Let me just be clear about what we're asking for in the SLAPP. Dr. Heather Kelly, who is an employee of APA, Dr. Michael Honneker, who is a former employee, and Dr. Stephen Solts, who is also a defendant in Massachusetts but he, we allege he supplied the false narrative to Mr. Hoffman.

THE COURT: Okay. But I thought there was a fourth person, first name Heather.

MS. FORREST: That's Heather Kelly. We were deposing, at one point, Dr. Jennifer Kelly.

THE COURT: Jennifer Kelly.

MS. FORREST: A bit confusing. We've dropped her deposition because what we've done, and we said we would stipulate if, unless the defendants were uncomfortable, we've summarized 15 years of business records of APA to show Dr. Jennifer Kelly's involvement in each of the matters that were dealt with here in the report and she voted to release the report so she would have known it was false. And so we said if they're willing to stipulate to the business records in our summary, we'll drop her deposition, Your Honor.

THE COURT: Mr. Hentoff?

MR. HENTOFF: Yes, Your Honor. So the defendants would like the opportunity to submit one more brief on the plaintiff's discovery motion. That motion, before the case was stayed, was fully briefed back in December of 2017. And while the case was stayed, the plaintiffs have filed more and more briefs in support of their fully briefed motion, including just in their January 8th scheduling conference motion, an exhibit and an affidavit with single spaced and all sorts of new

arguments. And we'd like the opportunity, now that the case is going to be un-stayed, to just have one short brief to respond to a lot of new written arguments that have been made since the motion was fully briefed.

THE COURT: We're going to resolve the motion for discovery today and if there's anything else that you would like to file that you haven't filed already, you're welcome to do so but I'm ready to proceed with that motion. Is there anything else you'd like to add to what you've submitted?

MR. HENTOFF: Yes, Your Honor. I'd like to address both the arbitration motion and the anti-SLAPP motion. Does Your Honor have a preference?

THE COURT: Are we talking about the merits of those motions or the issue of discovery?

MR. HENTOFF: Solely the issue of discovery, Your Honor.

THE COURT: Okay. Yes, sir.

MR. HENTOFF: I'll start just briefly with the arbitration motion. The basis of Sidley's alternative estoppel motion to compel arbitration is quite simply look at the employment agreements that are already in front of the Court and look at the allegations of the complaint and see whether, as we say, the allegations of the complaint either sufficiently allege identical causes of action

against both the signatory, APA, and the non-signatory, Sidley, or the complaint's allegations allege sufficiently intertwined concerted misconduct that both cases should go forward in arbitration. So the plaintiffs make two arguments as to why they should get the arbitration discovery as to Sidley that they're seeking. The first is they make an argument that there's a different type of equitable estoppel that the Court should apply instead and under that type of equitable estoppel, one still actually looks at the allegations of the complaint but the Court looks to see whether the allegations against the non-signatory defendant are sufficiently intertwined with the agreement that contains the arbitration provision. We don't think that that should apply but even so, the Court still has all the information in front of it and doesn't need any discovery. What the plaintiffs want are any agreements that may exist between APA and Sidley that were entered into after the report was, that Sidley's report was provided. And those have nothing to do with the arbitration motion and they have nothing to do with the employment agreements that have the arbitration provisions. And so that's the sum total of my additional argument on the arbitration motion.

So with regard to the anti-SLAPP motion, in the discovery that plaintiffs seek, I've just got a couple of

points that I'd like to focus on. The first is plaintiffs don't need any discovery at all. Because as we have clearly stated in our anti-SLAPP motion, the premise of our anti-SLAPP motion is that the non-conclusory factual allegations of plaintiff's complaint are true and those allegations, nevertheless, fail to rise to the level of establishing actual malice. Therefore, the premise of the motion is based on the complaint. Plaintiff's have made their best argument in their own complaint and there is no need for any discovery.

In the Mann case, which DC Court of Appeals decided back in 2016 and recently has modified a little bit, the Court of Appeals reiterated that on a DC anti-SLAPP motion, the plaintiffs have to make a showing that this is a valid case and that showing is usually done without discovery. And there's nothing about Sidley's motion and also APA's motion that would call for any discovery to permit plaintiffs to make the argument that their complaint does sufficiently allege actual malice.

THE COURT: But if that's all that's required, why would the anti-SLAPP legislation allow for targeted discovery?

MR. HENTOFF: Because the Anti-SLAPP Act does allow for targeted discovery in those cases where plaintiffs can show that the discovery would likely permit

them to defeat the motion. So for instance, if we had supported our motion with affidavits and then plaintiffs might say, well, we need to discovery to address and defeat the points that are made in the affidavits. But we very, you know, specifically said assume to be true all the non-conclusory allegations in the complaint. And beyond that, the discovery has to be, in any event, has to be targeted and it has to be non-burdensome. And the plaintiffs have asked for all of the documents that Sidley created in this eight month investigation in which they interviewed 150 people 200 times. And that is completely inconsistent with the notion of targeted and non-burdensome discovery and plaintiffs have not cited a case that allows anything like the discovery they're seeking in an anti-SLAPP case.

And then the final point is plaintiffs have asked the Court to be allowed to engage in discovery. And before that occurs, they're asking for documents that were created by a law firm for its clients. So in addition to the burden of just --

THE COURT: Is she correct when she writes in her motion that the agreement between APA and Sidley essentially waived certain privileges?

MR. HENTOFF: That's correct, Your Honor.

THE COURT: Okay.

MR. HENTOFF: The agreement waived attorney client privilege as to very significant, important aspects of the investigation. It did not waive attorney client privilege as to advice that Sidley may give that wasn't part of the investigation and the agreement very expressly preserved work product immunity. And then on top of that you just have working attorneys at a law firm who are creating documents and have that client, they've got other clients, and as we all know, when one has to do a document production, particularly involving lawyers, there has to be very careful and extensive privilege review, which really makes the whole exercise quite expensive and quite burdensome and then I'll just conclude by repeating that our argument is they've made the factual allegations, that doesn't state a valid case in an actual malice case and you even see this in federal courts that don't, where they don't have an anti-SLAPP act but they do apply the Iqbal and Twombly gatekeeper function on a 12(B)(6). And basically, I think every federal court to look at it on an actual malice case has said the real, you know, forget the actual, forget the Anti-SLAPP Act, you know, the courts who have looked at them have said the Court has to perform a gatekeeper function in an actual malice case to make sure that the factual allegations are sufficient. And that's just the basis of our motion and it's a motion that

can be very readily addressed by the plaintiffs.

THE COURT: What is the standard that I use when I look at things from a 12(B)(6) perspective?

MR. HENTOFF: Your Honor, I think that the standard is to accept as true the non-conclusory factual allegations and the reasonable inferences from those factual allegations and then see whether, basically under the actual malice case law, whether the plaintiffs have stated a valid case.

THE COURT: If I publish my work, to what extent have I waived any privilege over it?

MR. HENTOFF: Your Honor is saying if Your Honor were a lawyer doing an investigation?

THE COURT: Yes.

MR. HENTOFF: I believe that when we get to discovery, the defendants are going to be in a position to say here's what is not, here's what's possibly, say waiver, maybe waiver then, maybe waiver now, just to present the materials. But I would say when you, what I would say is I think there is some waiver and it's not our intention in this case to say that the plaintiffs cannot have the interview memos that were, you know, cited in the report or at least the parts of those memos that are cited in the report. But we haven't gotten to that point where our clients have to make that decision, but that is my

expectation.

THE COURT: Okay. Thank you, Mr. Hentoff. Ms. Wahl, anything you would like to add?

MS. WAHL: Yes, Your Honor. And unfortunately, quite a bit, and I apologize for that but the arbitration issue is one that I think the Court has to take a careful look at. And that is because the recent Henry Shine case issued by the Supreme Court on January 8th, 2019 somewhat changed the landscape of what the Court actually can even look at and should decide in connection with an arbitration motion. And before the Shine case, there, that's a Supreme Court case, that ironically it came out the same exact day, January 8th, that the plaintiffs filed their scheduling motion and somewhat changed their discovery requests regarding arbitration. But the Shine case is unambiguous that the Court's sole look at this issue of arbitrability is whether there is an extant arbitration agreement. The Court is not supposed to decide whether there's been a waiver, whether there were limitations, whether there was incompetence, none of those things are before the Court. It's a very narrow look. And that was already pretty much what the DC case law was but the Shine case made that unambiguous. So what the plaintiffs have asked for here is the following discovery related to arbitration, and that is a deposition from Dr.

Honneker, who was one of the signatories of the employment agreements of Dr. Behnke and the signatory of the agreement, the employment agreement of Dr. Newman. They say that their discovery of Dr. Honneker on the arbitration issue would show that he did not intend to arbitrate a defamation case. We would submit to you, Your Honor, that there are multiple reasons why that would be completely irrelevant to the Court's inquiry, including that what Dr. Honneker thought or didn't think at the time he signed the agreement is immaterial when you have an extant agreement that the Court should be evaluating on its face. And the --

THE COURT: Is there any ambiguity about the language in the arbitration agreement?

MS. WAHL: We do not believe so, Your Honor, nor have the plaintiffs so alleged. They've alleged some other reasons why they think Dr. Honneker's deposition would be of interest to them, meaning his intent, but they've never said that there's ambiguity about the meaning of the agreement, at least not in the five iterations on the arbitration discovery that we have seen to date. But your point is exactly the next one that I was going to make, which is extraneous extrinsic evidence pertinent to a document is only relevant if, in fact, there's any ambiguity. We would submit to you there is no

ambiguity nor have the plaintiffs so alleged. The language of the agreement is abundantly clear and it says it arises, if a dispute arises regarding the parties' respective rights, duties or obligations under the agreement. There's no question that the allegations of the complaint were that Dr. Newman and Dr. Behnke were defamed in connection with their exercise of employment duties. And there's DC case law right on this point that says defamation claims are covered notwithstanding the fact that it is an employment type agreement. Unfortunately, sorry. I can give you that case if that is of interest to you.

THE COURT: Sure.

MS. WAHL: It's Pierce vs. EF Hutton, 828 F.2d 826, pin cite is 833 and that's a DC Circuit 1987 case. So that would be Dr. Honneker's deposition, which we submit to you is irrelevant and unnecessary.

They have also asked for all of the employment agreements of Dr. Behnke and Dr. Newman. We have provided those already. They have been produced. Whether Dr. Newman was employed by a subdivision of APA or not is immaterial. We have produced everything already and we stand on the agreements that we've already provided.

Mr. Hentoff touched on the other category of documents that they've requested which are the APA Sidley

agreements and here I think that they have attempted some facial appeal of that. Well, we need to know everything about why APA and Sidley are intertwined in order to know if there is an estoppel argument related to intertwinement. But that's the wrong formulation of intertwinement. The question for arbitrability concerns is whether the claims are intertwined, not the parties. And here it is unambiguous that the defamation claims being asserted against the defendants are all intertwined. They have alleged that APA hired Sidley to prepare the report that APA, Sidley prepared the report, introduced, interviewed the witnesses, APA then published the report. And according to them, so did Sidley. This is all of a piece and intertwined. We have already provided, they have and they've submitted it, the retainer agreement between APA and Sidley and that preceded, kicked off the engagement. So that's most relevant document. They seem to be fishing for joint defense agreements, liability allocation agreements. Those would all be, if they existed, all post the filing of the litigation and would not be relevant to any intertwinement argument, whatsoever.

Last but not least, and this one truly has me baffled, they are looking for legal opinions that were referred to an e-mail internal to APA regarding legal

advice that was provided after the report was issued by Sidley and Wilmer Hale. We would submit, Your Honor, that that has nothing to do with anything in this case. That's simply fishing for something. Has nothing to do with either the arbitration motion or the anti-SLAPP motion.

In sum, there's not even, just to go back, maybe, to the beginning, neither the DC Arbitration Act nor the Federal Arbitration Act has anything provision for discovery.

THE COURT: But she's saying you need to treat this as a motion for summary judgment, Rule 56 governs.

MS. WAHL: She does say that but she misapprehends what the references to Rule 56 are. There are a number of cases that refer to Rule 56 standard. So what that means, and the cases are really clear about this and I can cite you one about that, is that, can cite you several ones about that, is that the Court is to make its ruling about arbitration based on whether there are undisputed facts. Forget the legal arguments, but undisputed facts, clearly, the Rule 56 standard. And of course, under Rule 56(D) if there's a dispute as to facts, the party disputing gets some limited targeted discovery so that there can be a determination as to whether the facts alleged are, in fact, disputed. That's clearly a very different process than what's envisioned here. All

the cases refer to two things. One is that the Court is to make a decision about arbitrability based on whether there is an extant agreement to arbitrate. If there's any question about that, the Court can hold an evidentiary summary hearing and --

THE COURT: That's what I would hold after, like you say, the opposition has been filed and the issue has been briefed. We're here a step ahead of that --

MS. WAHL: We are.

THE COURT: -- okay.

MS. WAHL: We are. But there is no case law in the District of Columbia or that we have found elsewhere in the federal system that, DC Federal Courts, that says if you are arguing about the extent of arbitrability, you get discovery about that. In fact, that's where the Shine case is important because to the extent that there --

THE COURT: But isn't that what the Court of Appeals said in Haynes vs. Kuder?

MS. WAHL: The Court of Appeals in Haynes vs. Kuder said you can only decide this narrow question. No discovery was allowed in Haynes vs. Kuder. In fact, what I believe happened there was the court --

THE COURT: They say you look at Rule 56.

MS. WAHL: They did say you look at Rule 56. Let me pull the case, if you don't mind. There was an

evidentiary hearing, they said that an evidentiary hearing was not needed because the Court was able to resolve the disputes on the papers.

THE COURT: Right. But that's separate from the issue of discovery.

MS. WAHL: Well, there is not a case except for one, which was a consumer adhesion contract, in which discovery has been permitted in the District of Columbia, that we found. And there has been no allegation here that this is an adhesion contract, and more specifically, the Court, in a look see on this, shouldn't be looking at the contract as a whole but arbitration. So we would submit to you, Your Honor, that there's no reason for that discovery in any regard and that Rule 56, as applied here, in the Haynes case and others, does not allow a discoverability. It does allow, in the event of a dispute about whether there is an arbitration agreement, an evidentiary hearing, but there is no dispute here. They have not contested that there is a valid arbitration agreement in a valid contract. So we would submit, Your Honor, that there should be no arbitration discovery.

As to the anti-SLAPP question, I would echo Mr. Hentoff's comments only in one further regard. This is not, the plaintiffs need to show, in order to get anti-SLAPP discovery under the DC Anti-SLAPP Act, that

they will, if they get this discovery, win their motion.

THE COURT: Isn't that putting the cart before the horse?

MS. WAHL: Well, it's one of three categories that the SLAPP statute provides.

THE COURT: Will enable to defeat. Not that they will prevail.

MS. WAHL: Will enable to defeat and will prevail is a semantic issue, I would submit to you, Your Honor.

THE COURT: No. I think it's a slight, you're right, it's cutting it close but will enable. Okay. Please continue.

MS. WAHL: I think that the point here is not only about it's not supposed to be burdensome and, yes, it's supposed to be targeted but it's not supposed to be a sort of frolic and detour through whatever the parties have. And it's supposed to enable the plaintiff to win. Or the language of the statute, of we defeat, whatever the exact language, some, yes. The depositions and documents that the plaintiffs here have requested are much broader than that. As Mr. Hentoff said, essentially for purposes of the anti-SLAPP motion we're conceding the facts that underscore their actual malice argument. What else is there to discover? They want to take the deposition of

Dr. Heather Kelly, who will say I emerged, according, this is their papers, I don't know that Dr. Kelly would say such a thing, I emerged from an interview with Mr. Hoffman and felt that he hadn't listened to me and I warned APA about that. I don't know how that's actual malice, as the statute provides, and even if it is, that's effectively conceded in our motion. Similarly with regard to, I think the question about Dr. Honneker is the same, which is he would say I didn't feel like Hoffman listened to me. Same problem. The opinions of various interviewees, we would submit, Your Honor, are really not relevant to an analysis of actual malice. The facts alleged in the complaint are deemed by us to be admitted and now we're just arguing about where you conclude from that.

THE COURT: But isn't there a difference between what's discoverable and what's admissible? What you are saying is that essentially it wouldn't be admissible because it would be inappropriate opinion.

MS. WAHL: Well, for purposes of ruling on this anti-SLAPP motion, I don't know that we're talking about admissibility at all. We're talking about, that's a more, less a trial concept.

THE COURT: Right.

MS. WAHL: We're saying for purposes of the motion, everything you've said in the complaint, all the

facts that you've said in the complaint are true. And we can line up 100 of the witnesses who were interviewed by Mr. Hoffman who feel like they were accurately quoted and we can line up another 42 who think they were --

THE COURT: Oh. Don't worry. That's not going to happen.

MS. WAHL: It's not a swearing contest like we use to have in Old English Law. So our position on this point, Your Honor, is that given the stance that we've taken in our anti-SLAPP motions, it's superfluous to order that type of discovery. We've already conceded those facts, in effect.

THE COURT: Okay. Thank you, Ms. Wahl. Ms. Forrest, have you received the employment agreements between Dr. Behnke, you said Dr. Newman, as well?

MS. FORREST: We have. Both Dr. Behnke and Dr. Newman. For Dr. Behnke, yes, we have all the employment agreements and we contest that those terminated and the acts of publication, which are issue here, happened in a majority after the agreement was terminated and that's the Leader Tech's case that we cited in our papers and also the first reply, Your Honor, we would refer the Court. As --

THE COURT: But I'm not ruling on the motion, I'm not ruling on the merits of the motion to compel

arbitration. We're simply talking about what discovery, if any, should be allowed.

MS. FORREST: Correct. But we contest the ability of the agreement is what I'm trying to get at. So the, once the agreement expired, we are contending there is no valid agreement to arbitrate for purposes of the discovery, Your Honor. Just trying to clarify that. So for Dr. Behnke, we do have all those agreements. For Dr. Newman, in 2005, and we can provide this agreement with the Court, there was a, it's not a subsidiary of APA. APA had a sister organization that it was a 501(c)(6), it still exists. It's an advocacy organization. Dr. Newman, in 2005, actually signed the tax return and that references a side agreement. We also know, and Dr. Honneker would testify, there was at least one modification. We don't know if that was in writing, Your Honor, or if it was done through a personal action form. That's why we want to specifically depose Dr. Honneker.

THE COURT: But I, Dr. Honneker is essentially parol evidence if we're making an analogy here to contract law, considering the agreement is a contract. The issue is whether or not the language is clear.

MS. FORREST: Well, we would argue under the arbitration agreement there's three issues, Your Honor. In Shine, we would contend on page six of the Westlaw

cite, at least, from my memory, in fact, says we will not decide today, the Supreme Court said we will not decide today whether this particular agreement requires the arbitrator versus the court to decide arbitration. So set that aside for a minute. We would contend with respect to Dr. Newman, he had a whole separate employment. Half of his work was for the 501(c)(6) on a summary judgment Rule 56 standard, they haven't produced an agreement to arbitrate. If they say that doesn't exist, then they don't have an agreement for half of his work, any agreement they've produced to arbitrate. Set that issue aside. The next issue the Court will go to would be waiver, Your Honor. And with waiver, we offered them arbitration with Honorable Patricia Weld, they turned us down. We have an affidavit from a director at the time who said we considered that and turned, we turned them down as the board. We also believe Khan v. Global Parsons makes it very clear that once you file a summary judgment like motion with a motion to compel arbitration, you waive your right to arbitration.

And then finally, the arbitration clause, itself, very narrow. Eleven of 13 circuits have found this particular clause very narrow. Only certain issues under the agreement are arbitrable. And that's very clear from the case law. And we've provided those cases in our

papers. To go to the Sidley arbitration for a moment --

THE COURT: Just a second.

MS. FORREST: Okay.

THE COURT: Are you saying that the anti-SLAPP motion is analogous to a motion for summary judgment?

MS. FORREST: The Court of Appeals has said that, Your Honor, a footnote, and that's in our papers. They said it's the analogous, the analogy to the Rule 56 motion and also just about every circuit now, including the DC Circuit said that.

THE COURT: So the Court of Appeals from the DC, are you talking about the Court of Appeals or the DC Circuit?

MS. FORREST: I'm talking about both. Mann said it's a summary judgment in a footnote. It said it's the equivalent of a summary judgment. Mann was decided, as I'm sure Your Honor knows, after a boss which was written by then Judge Kavanaugh, now Justice Kavanaugh, and they said the Court, DC Circuit has never held where they said basically they've never held that it's equivalent of a summary judgment. Then Mann gets decided and it says, they said we've never held that this is like a summary judgment motion, we do so now. And they say that in a footnote, Your Honor.

THE COURT: But at this point we're talking

about the issue of limited discovery. We're not talking about the merits of the motion.

MS. FORREST: Correct.

THE COURT: Okay.

MS. FORREST: We believe that the discovery standard from Mann is in old footnote 52, which became just now footnote 53. And it said, can is discovery, discovery allowable to defeat the motion. We believe that the complaint alleges five theories of actual malice, although we contend, and we want to do a private individual motion, that none of these folks are going to ever have to show actual malice because they're private individuals. But if you go back --

THE COURT: Aren't they limited public figures?

MS. FORREST: No. No, Your Honor, they're not.

THE COURT: Doesn't the law of defamation apply to anti-SLAPP definitions?

MS. FORREST: It does but they're not public figures, Your Honor, and that would be, that's why we need a private individual motion. We would refer the Court to a case that was decided in Federal Court just a few weeks ago, January 14th, Freedman vs. Bean, and I'm happy to provide the citation. But in that Court, but that case, which is very analogous, they filed an anti-SLAPP motion. Judge said I can't decide it on affidavits. If plaintiffs

contest this, this is an affirmative defense that you have to prove and you're not able to do it just on your affidavits. We've got problems with a number of the affidavits they submitted and that's why we would want to go in on a separate motion to show these are private individuals, Your Honor.

THE COURT: Okay.

MS. FORREST: I have three other issues that I wanted to address if Your Honor, unless Your Honor's --

THE COURT: Are they related to the motion that I'm talking about or are they separate issues that you'd like to discuss?

MS. FORREST: They are, they're related to what the defendant said.

THE COURT: Okay.

MS. FORREST: So with respect to the relevance of the depositions, Your Honor, specifically, we've alleged that Mr. Hoffman got a false narrative from Dr. Solts, in particular, and that he distorted the evidence. We have evidence that, in fact, he fit that evidence into a false narrative. That's Eramo vs. Rolling Stone. Dr. Kelly, which we understand from a third party witness they verified, will, in fact, say --

THE COURT: Which Dr. Kelly?

MS. FORREST: My apologies, Your Honor. Dr.

Heather Kelly.

THE COURT: Heather Kelly. Okay.

MS. FORREST: Yes. Will say that I confirm this was false and defamatory, that this should not happen, that this needed to be stopped. In fact, the investigation was changed at one point because of her concerns and then they started the investigation again. We would cite --

THE COURT: If you know all this stuff, why are you asking for limited discovery?

MS. FORREST: Because we believe the way the SLAPP works is that it's cumulative evidence. And so while we have some affidavits, we believe those, that evidence in the notes, in particular, and we believe, first of all, less than 20 of these people, 148 interview, were clients. There's no privilege for most of them. Attorney work product was waived. They cite the interviews over 200 times. We want those interviews to show how far distorted. You heard Ms. Wahl say that, in fact, it's just their opinion that they didn't like it. Maybe it's opinion if it was four or five, Your Honor. At the point that over 20 percent of the witnesses say he distorted, falsified or otherwise created a false narrative, that's actual malice.

THE COURT: Are you saying there's more than 10

witnesses from whom you've gotten affidavits?

MS. FORREST: We have 18 affidavits, Your Honor.

THE COURT: Okay.

MS. FORREST: And we're prepared to --

THE COURT: Please continue.

MS. FORREST: -- probe for those. We actually have them here in a notebook today.

THE COURT: Okay. I'm sorry. Please continue.

MS. FORREST: Work product. We're going to have a choice of law issue. Mr. Hoffman's only admitted in Illinois. Let's assume DC applies and I'll argue that. But Illinois has some of the least stringent work product restrictions of anywhere. And especially when he talks about his work, cites to the credibility, cites to what they said exactly, you can't then shield it and say you don't get it, that it's still work product.

Couple quick points about the arbitration, Your Honor. First of all, we talked about the Shine case. The Sidley case, in our reply papers to Sidley in November, Your Honor, sorry, in December, three cases against Sidley, directed at Sidley, articulating the standard they're citing here, which the Court, each one said that's not the standard. The standard is that you're intertwined to rely on the agreement. The reason you treat this like a Rule 56 motion, Your Honor, they provided the employment

agreements. We didn't even have them. So I couldn't have relied on them when we prepared the complaint. So like it's treated like a Rule 56 and not 12(B)(6) because they relied on documents external to the complaint. Therefore, at that point, that's why the discovery issue comes in.

Two minor issues with respect to public minutes with respect to privilege after the fact, those actually were APA minutes that wasn't in the internal document, where he claims privilege. Hoffman and APA's lawyer then claims privilege. After the fact, after he got rehired to redo the report, because I had met with our counsel to show him the policies. Okay? So we want that agreement. They represented to Ohio that there was no jurisdiction over each of them because their relationship was so separate. Under the tests that we've articulated in our papers, they have to be intertwined and intertwined with the underlying agreement.

THE COURT: Again, but that goes to the merit of the motion, not the scope of discovery, if any.

MS. FORREST: Well, but if we need the agreement to show what their relationship is, Your Honor. That's what, that's the issue. But the test relies on how close their relationship for equitable estoppel, which we believe it does, and they've claimed they're separate but they have an agreement that claims privilege subsequently

and they've been defending jointly the true nature of their relationship, they've put it at issue by arguing equitable estoppel.

THE COURT: Who carries the burden of proof in terms of the motion to compel arbitration?

MS. FORREST: They do, Your Honor. That's under a summary judgment standard.

THE COURT: Okay.

MS. FORREST: Thank you.

THE COURT: Thank you.

MR. HENTOFF: Your Honor, may I respond to a few points?

THE COURT: Yes, but at some point this conversation’s going to have to come to an end so I can rule, okay?

MR. HENTOFF: Okay. Thank, Your Honor. Plaintiffs’ counsel talked about plaintiffs’ argument that they’re not public officials or limited public figures. That, that’s a legal argument. They have not asked for any discovery on that issue so when it’s time for them to oppose the anti-SLAPP motion, they can make the argument that our, we should lose on actual malice because the plaintiffs are not public officials or limited purpose public figures.

THE COURT: We’re not there yet.

MR. HENTOFF: Right, it's, it's not a discovery issue. The plaintiffs now have 18 affidavits, which I would say again they, they can load all of that into their opposition, and we can evaluate them finally and see if we're right that what those affidavits say don't, you know, don't rise to the level of actual malice because as we say in our anti-SLAPP motion and it's, you know, this is, everyone agrees it's the law. It's very difficult to establish actual malice. You have to show that the defendant either knew what they were saying is false or went forward with a high degree of subjective doubt as to, as to truth and, and went forward anyway. And just for one example, so they've, they haven't shown us all these affidavits that they say are so important but in the plaintiffs' reply brief back in December of 2017, they linked to two affidavits that they already had filed in the Ohio case. One of them was of a Dr. Swenson (phonetic sp.), okay? And then they say Dr. Swenson said she wasn't listened to; they got it all wrong. Well, you know, I looked at that affidavit. It's public and she says, you know, I told Sidley that I didn't feel any pressure to close a particular ethics investigation. Okay, I went through the Sidley report. I looked for Dr. Swenson and essentially it says Dr. Swenson said she didn't feel any pressure so that's in, you know, what she said is actually

in the report. So I don't know what those 17 affidavits say but they don't meet the plaintiffs' burden of showing that discovery from Sidley will and these depositions will enable, is likely to enable them to defeat the motion.

And my final point on that is there's really a giant missing thing in plaintiffs' argument here, which is this is a defamation case. In defamation cases there's a false statement of fact and as we cite in our opposition brief to the motion to compel, the Tabloreis (phonetic sp.) case says there's not actual malice in the abstract. There's a false statement of fact, and the plaintiff has to be able to show that the defendant made that false statement of fact with the appropriate mental state. All of the documents that they've filed they don't even actually quote anything in the report. The, the complaint, as to the report the complaint, you know, has 219 separate paragraphs that they say are false. It takes 45 single-spaced pages but there's nothing that says we, there's a specific statement and that statement was made with actual malice and just for that reason, the plaintiffs have failed to meet their burden.

And my final point, Your Honor, on the motion is that with regard to arbitration, again, the Sidley case, the cases involving Sidley Austin that plaintiff cited in the reply brief involve other jurisdictions and those

cases did rule against Sidley under a different equitable estoppel standard and in all of those cases, there was no discovery. The Court ruled based upon the law, the agreement that contained the arbitration provision, and the allegations of the complaint and as I said in that law, the Court doesn't look to other agreements that happened later. It's just the, the, the intertwining is the agreement that has the arbitration provision. Thank you, Your Honor.

THE COURT: Thank you. Ms. Wahl?

MS. WAHL: Briefly, Your Honor. I don't know what Ms. Forrest is talking about the Schein case saying let's leave things to another day. It's absolutely unambiguous. The Court said, quote, to be sure before referring a dispute to an arbitrator, the Court determines whether a valid arbitration exists. But if a valid agreement exists and if the agreement delegates the arbitrability issue to an arbitrator, a Court may not decide the arbitrability issue. No question that here there's an arbitration delegation. The AAA Rules, which are referred to in the parties' employment agreements, and the employment is referred to in the complaint at paragraphs 40 and paragraph 43, they are appropriately incorporated by reference. AAA Rules say with regard to jurisdiction of the arbitrator, Rule 7(a), the arbitrator

shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim. They agreed to that.

With regard to Dr. Newman and this fictional, additional agreement, Ms. Forrest says that he was employed by an affiliate, the APA Practice Organization, which was a 501(c)(6). It is, in fact, separately incorporated. It is not a defendant in this case. It is an advocacy group and to the extent that there are any claims about Dr. Newman himself in the complaint, it is that he was defamed because he did, in fact, disclose that there was a conflict of interest between himself and his wife being involved with the same task force back in 2005 when he was an APA employee. He was attending that conference not as an advocate, not as a lobbyist, but as an APA employee, so that's just a red herring. The defendants, we have properly provided all of the employment agreements that pertain to this case.

Dr., Dr. Forrest referred to a waiver in the Khan (phonetic sp.) case, and the Khan case says as soon as you file a Rule 56 motion, there is a waiver. I will quibble with that, with her about that at some point, but we did not file a Rule 56 motion. We filed an anti-SLAPP

motion, and the reason we did it was because we had to. The question about whether you could go past the statutory timeframe is open in the District of Columbia, and we did not want to risk that by getting extension, getting an extension of time. We might have had a problem down the road by somebody saying well you've done it too late. Ms. Forrest referred to arbitration being narrowed by a group of federal cases. Obviously we don't agree with that interpretation. We'll get to that at some point but not for today.

Dr. Soltz (phonetic sp.) and his deposition is one thing we haven't talked about. Dr. Soltz has been a bit of a moving target in the plaintiffs' five different briefs. He is not a party here. He is in the Massachusetts case. In their original filing on November 30, 2017, they said we need to have Dr. Soltz's deposition because he's the one who leaked the report. We have evidence that he's the one who leaked the report, and we need to confirm that. Now in the January 8, 2019, document that they filed, they've said, no, no, we need Dr. Soltz's information because there's some tie between him and APA, and he might be relevant for actual malice purposes. There's no need for Dr. Soltz's deposition one way or the other either on actual, well I guess he's being submitted for so-called actual malice. He was not even a

member of APA management during all the operative times here so even if he did all the dastardly things that the plaintiffs have alleged that he'd, he's done, that's still not a tie to APA. He was not a member of the counsel. He was not a member of the board. He was an APA member but there's no indication, there's not even any allegation in the even the supplemental complaint that you just allowed that indicates that he told APA's management or special committee anything about that would indicate there was improper, something improper going on. So we would submit, Your Honor, that again there's no need for any of this, this discovery.

THE COURT: Ms. Forrest, anything you'd like to say that you haven't said already?

MS. FORREST: No, thank, Your Honor.

FINDINGS OF THE COURT

Thank you. The issue to resolve today is the request for limited discovery on the one hand to address the motion to dismiss under the D.C. Anti-SLAPP Act; on the other hand, to respond to the arbitration, I'm sorry, to the motion to compel arbitration. The D.C. Anti-SLAPP Act provides D.C. Code Section 16-5502(c)(2), quote, when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the Court may order that

specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery. As far as D.C. Superior Court Rule of Civil Procedure 55(d) is concerned, quote, when facts are unavailable to the non-movant, if a non-movant shows by affidavit or declaration that for specified reasons it cannot present the facts essential to justify its opposition, the Court may (1) defer considering the motion or deny it; allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate relief. These matters are committed to obviously based on the language the sum discretion of the trial Court.

Now as far as ensuring that the process afforded in this case is fair to everybody who is part of this conversation is concerned, the motion for limited discovery will be granted in part and denied in part. As far as the discovery relevant to the Anti-SLAPP motions, the request is granted as to the four interrogatories as to the mirror-image copy of all electronic data contained on the personal computer and hard drive of Dr. Behnke. As far as the notes that were generated, the discovery will be limited to any notes from interviews or communications with the 18 witnesses from whom the plaintiffs have received affidavits; otherwise, the request for additional

notes generated in preparing the report is denied. Any other requests related to the Anti-SLAPP motion as far as discovery is concerned is denied but for the depositions. Let's talk about the depositions. You said at this point you're withdrawing your request to depose Dr. Jennifer Kelly, is that correct?

MS. FORREST: That's correct, Your Honor.

FINDINGS OF THE COURT

All right, the request to depose Dr. Heather O'Beirne Kelly is granted. Your request to depose Dr. Michael Honaker is granted but will not include anything related to arbitration because that would be extraneous evidence to the agreement and doesn't seem to be appropriate here. The request to depose Dr. Soltz is granted. As far as the discovery relevant to the arbitration motions, the request for any employment agreements with Dr. Behnke and any employment agreements with Dr. Newman are granted; otherwise, they're denied. I understand that these are five individuals who are suing two large institutions; however, they've been able to do so simultaneously in three jurisdictions, so any discovery that has been authorized to occur today will occur at the expense of the plaintiffs.

So my understanding is that there are various additional matters that require setting some deadlines.

Obviously the discovery, the limited discovery, needs to occur before both the motion to dismiss under the D.C. Anti-SLAPP Act and the motion to compel arbitration are resolved, so how much time are we talking about before you can file your opposition to the Anti-SLAPP request?

MS. FORREST: We're happy to do that within eight weeks of completing the discovery and obviously the discovery they're going to have to produce it so whatever date they say they'll say produce discovery, within eight weeks we're prepared to file both oppositions, Your Honor, understanding Your Honor will have two additional motions and they are both a choice of law motion and a private individual motion.

THE COURT: Let me ask you something.

MS. FORREST: Yes, Your Honor.

THE COURT: Is it your position that if the D.C. Anti-SLAPP legislation does not apply for whatever reason, that the applicable law would be the Illinois Anti-SLAPP provision?

MS. FORREST: Illinois or Massachusetts, most likely Illinois because they agreed in their agreement that Illinois law would apply to any matters under their engagement. Correct, Your Honor.

THE COURT: Thank you. Ms. Wahl, did you want to say anything?

MS. WAHL: Yeah, I'm, I'm sorry, Your Honor, and I know we're on scheduling. I, I wanted to clarify something. I believe that Ms. Forrest said that they withdrew their request for interrogatories from APA.

THE COURT: You did?

MS. FORREST: We said that if they would stipulate to what we provided in our motion, Your Honor, and that's the stipulation of our expert that, in fact, the metadata from *The New York Times* article online shows that, in fact, it was given. The last people in, in the document were Mr. Hoffman (phonetic sp.) and that the inference is, therefore, that he leaked the document to *The New York Times*. That's relevant to actual malice because there's a specific case on point that says wide distribution with the intent to create a criminal problem or to go after criminal indictment would be equal to actual malice.

THE COURT: The issue is whether or not there's a need to provide a response to those. Let me be precise about the language interrogatories. Is that matter been resolved or not?

MS. FORREST: That can be withdrawn if they stipulate to our metadata expert.

MS. WAHL: Your Honor, I have no idea what she's talking about.

THE COURT: Well let me put it this way. The motion to compel discovery is granted to include responding to the four interrogatories unless the parties agree otherwise.

MS. FORREST: Thank you.

MS. WAHL: Thank you.

THE COURT: Mr. Hentoff, did you want to say anything?

MR. HENTOFF: Yes, Your Honor. Possibly in the interest of time and, and to make this an orderly process, I might propose that the parties present a stipulation within several days to the Court about the schedule so we can meet and confer and if we have some differences of opinion, it can all be in one document that the Court can just review and decide on. I, I have a couple of specific points to make --

THE COURT: When you're talking about schedule, are you talking about the discovery process, or are you talking the scheduling order for the entirety of the case?

MR. HENTOFF: Just the discovery process, just to get to the conclusion of the discovery process and, and I would like to make a couple of points that are relevant to this. The first is Ms. Forrest said is in addition to our opposition to the Anti-SLAPP motion and in, to plaintiffs' opposition to the Anti-SLAPP motion, in

plaintiffs' motion to invalidate the D.C. Anti-SLAPP Act, Ms. Forrest said that plaintiffs also will file two additional motions, a choice of law motion in that the plaintiffs are not public officials or public figures. Normally that's just an opposition to an Anti-SLAPP motion and if the plaintiffs really are saying that they're going to win on choice of law, if the plaintiffs are really saying that they're going to defeat our case on choice of law, why isn't that the first motion then? I mean I, I don't understand it. We're, we're talking about a lot of, a lot of time and energy.

With regard to the schedule, what I would like to propose and, and I could, you know, put it in a, in a scheduling submission with the plaintiffs is just we'll proceed very timely but we want to have the opportunity to interpose appropriate objections to the discovery the plaintiffs are now allowed consistent with the Court's order so that our clients don't risk waiving privilege but totally consistent with the Court's order. It's just that we'll be producing documents that need to have a privilege review and, you know, we can, we can do that. Given what the Court's order is, I'd like to be able to go back and take a look at what we have for those 18 witnesses so I can make a, a judgment about how long it'll take to do that review and plaintiffs, of course, have to give us the

18 affidavits. And then a related point, we'll do this in a timely fashion, Your Honor, but if documents are going to be produced, we're going to meet and confer with the plaintiffs and propose a protective order to cover the production of documents in this case. It's especially important where Dr. Behnke, who was the head of the Ethics Department at APA, his entire hard drive is like 20 gigabytes of, of, you know, e-mails and things like that and it has, you know, you know my understanding is it has ethics investigations that never were made public. I mean it's, you know, it's not a, I mean it's a simple thing to, to give it up but it's, there's a ton of, of, you know, e-mails on that that, that when he worked at APA, he was responsible for but they, they don't have anything to do, you know, with this case. So it's, it's, it's really a giant production although I understand the Court has ruled but I think the parties need to kind of figure out like what they're going to provide or, or what protective order is required to, to, you know, protect the privacy of the people who were involved.

So one additional point the plaintiffs filed a supplemental complaint on, on February 8th, right? So the, they have a new count in their supplemental complaint regarding an August 2018 activity that they allege is a republication. So I'd like to make a proposal about that

because that's in the case now and I propose that we deal with that as sort of its own thing. It's a supplement. It's self-contained. We now have a clock running on us under the D.C. Anti-SLAPP Act. We got 45 days and, of course, we're going to, you know, file our arbitration motions as it relates to that one single count with those new allegations and, and I'd suggest that we set a schedule for dealing with that so that it, you know, as we resolve the case, we resolve everything.

THE COURT: And what schedule do you suggest?

MR. HENTOFF: Well I think we could file our motions in three weeks to address, to address the new allegations, you know, while we're doing everything else.

THE COURT: Let's set a schedule to provide limited discovery, okay? Let's put aside any other potential motions. How much time do you need to provide the limited discovery that's been approved?

MR. HENTOFF: I would like to be able to review the documents and come back with a report to the Court early, early next week.

THE COURT: Okay, because we're talking about 18 witnesses. Do you know who those witnesses are?

MR. HENTOFF: No, that's a mystery to us. I'm anxious to find out.

THE COURT: Then you need to disclose the

identity of those witnesses.

MS. FORREST: Yes, Your Honor.

THE COURT: Okay.

MS. FORREST: Your Honor?

THE COURT: Yes, Ms. Forrest?

MS. FORREST: May I say one other thing? In that 18, we haven't included the plaintiffs, and we don't have plaintiffs' witness interviews either.

THE COURT: You haven't included the plaintiffs?

MS. FORREST: In those 18, correct. Those are 18 additional witnesses of the 148. The 148 includes five of the plaintiffs and I didn't include in that number --

THE COURT: Sorry, you didn't include them?

MS. FORREST: That doesn't include affidavits from the plaintiffs, but we would ask that the Court consider also allowing us their witness interview notes.

THE COURT: You already have that information.

MS. FORREST: I don't have what Mr. Hoffman has, which is the interview notes that he disclosed in the report and that he says they didn't provide.

THE COURT: Seems to be cumulative of the complaint that you filed in the information that was available to you when you drafted that complaint, so the request to include the notes from the plaintiff is denied.

MS. FORREST: Thank you.

THE COURT: Okay? Time is of the essence here because the act requires that these matters be addressed expeditiously so on the one hand, I want to make that the parties have the information they need to fairly litigate this case; on the other hand, it's going to be as focused as possible to comply with the time requirements. Today's the 8th. When are you willing to be back here?

MR. HENTOFF: Your Honor, sometime next week and we can just do scheduling.

MS. FORREST: I don't know that we need to do scheduling here, Your Honor. I think we can try to do a stipulation and work that out and submit it to the Court. I don't know that Mr. Hentoff was saying that we would be here. As far as coming back, I would --

THE COURT: Well I just want to make sure. I don't know what interaction is between you. I don't want you to walk out and then somebody calls chambers on Monday saying we can't agree which way is up and which way is down so you tell me whether what you propose is reasonable.

MR. HENTOFF: Your Honor, I think, I think it's a good idea because we can submit a joint stipulation and where we have disagreements, we'll just say, you know, plaintiff says this and defendants say that and, and the Court can decide.

MS. FORREST: I guess, Your Honor, I'm more inclined to just say let's give them two or three months for discovery. We'll brief eight weeks. I can't imagine that discovery would take more than three months.

THE COURT: Are you talking eight weeks after discovery concludes?

MS. FORREST: Correct, because I don't know how much they're going to produce. That's the point. I'm giving you the broadest because I don't know what they're going to produce because they've now said that we've going to, they're going to have various protective orders, et cetera.

THE COURT: Ms. Wahl?

MS. WAHL: Oh, Your Honor, the, the, Dr. Behnke's e-mails and this imaging is going to be, it's going to pose some challenges. I don't know. I, I trust Dr., I mean Mr. Hentoff's statement about it being so many gigabytes but I do know that we have to for privacy reasons be very careful about that and we can't just turn it over with a claw back. We're going to have to review the materials in there. I don't have any idea whether 90 percent of it's related to this case or 20 percent of it, but we do need enough time to be able to do that.

THE COURT: Is there any way to sort of focus which information within Dr. Behnke's personal computer

and hard drive should be turned over?

MS. FORREST: Your Honor, just to sort of tie the loop on that, LDiscovery, which is now Kroll, imaged Mr. Behnke's hard drive on the evening of February 5th during the investigation. All of his, yeah, evidence, all of his hard drive with no confidentiality protections or anything else that they're now alluding to were given to Mr. Hoffman full-fledged, so it's all part of the investigation.

THE COURT: So if you have it all, why can't they have it all?

MS. WAHL: Because, Your Honor, as Mr. Hentoff said, part of what Dr. Behnke's job was was to review ethics complaints and the process within APA is that sometimes ethics complaints are filed for political reasons, nonpolitical reasons, and the subjects of those investigations were sometimes not told. In fact, they're not told, so he may have material on his database that the subjects of these complaints don't even know about.

THE COURT: Wouldn't a protective order take care of that?

MS. WAHL: I would hope so but we need to negotiate that and we need to be careful about that and everything that was imaged by this group L was provided only to counsel. It's not like, you know, we took out an

ad and said here's all of Dr. Behnke's Rue La La ad e-mails that he receives. It's, some of it's going to be chaff and some of it's going to be important and I can't in good faith say that we can just give them everything and then we'll argue about it. We could --

THE COURT: I understand but when you give it over, can't a protective order be part of what you give over?

MS. WAHL: It --

MS. FORREST: Absolutely, absolutely we'll agree to that.

MS. WAHL: It, it could be, and I would certainly entertain the idea that we could talk about search terms. That would be fine but until I know what's in there and I don't know what's in there. For example, I don't know that there aren't some very sensitive issues related to U.S. security. I don't know that one way or the other but if there are, I think I at least need to get a handle on what there is.

MR. HENTOFF: So, Your Honor, so I think this is an example of where we could benefit from having a little bit of time to meet and confer and --

MS. WAHL: Yeah.

THE COURT: -- issue a report. For instance, I know the plaintiffs have a theory, okay, that there are

deleted e-mails that a, that an additional investigation could, could show so, for instance, part of the meet and confer we could say, okay, you can get your own independent expert, right? The independent expert signs a confidentiality, the confidentiality. Independent expert makes a judgment and sees if that, that person can find the e-mails so that's just an idea that I just had. So I think we could without taking the Court's time give us a little time to talk among ourselves and issue a report to the Court.

THE COURT: You're not taking up my time. This is what I'm supposed to do.

MR. HENTOFF: All right.

THE COURT: So tell me when you want to come here to let me know where things are?

MR. HENTOFF: In, in that case, Your Honor, I, I would say we could come back for another status report two months or three months and see where we are.

THE COURT: I will see you on February the 14th at 9:30, and you let me know where things are in terms of your conversations regarding what's going to be turned over with what necessary protective steps and if you can't figure it out, then I'll figure it out for you because that's what I'm supposed to do.

MR. HENTOFF: Thank you, Your Honor.

THE COURT: Okay?

MS. FORREST: Thank, Your Honor.

THE COURT: Is there anything else, any other issues? February 14th at 9:30, thank you.

MS. FORREST: Thank, Your Honor.

MS. WAHL: Thank you.

THE DEPUTY CLERK: By order, this Honorable Court now stands adjourned. Parties, you are excused.

(Thereupon, the proceedings were concluded.)

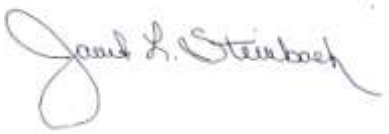
√ Digitally signed by Janet Steinbach

ELECTRONIC CERTIFICATE

I, Janet Steinbach, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of STEPHEN BEHNKE, ET AL. V. SIDLEY AUSTIN, LLP, ET AL., Case No. 2017 CAB 005989 in said Court, on the 8th day of February 2019.

I further certify that the foregoing 52 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 12th day of February 2019.



Transcriber

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

- - - - - - - - - - - - - - - - - x

STEPHEN BEHNKE, ET AL., : Docket Number: 2017 CAB 005989

:

Plaintiffs, :

:

vs. :

:

SIDLEY AUSTIN, ET AL., :

:

Defendants. : Friday, September 6, 2019

- - - - - - - - - - - - - - - - - x Washington, D.C.

The above-entitled action came on for a hearing before the Honorable HIRAM E. PUIG-LUGO, Associate Judge, in Courtroom Number 317.

APPEARANCES:

On Behalf of the Plaintiffs:

BONNY FORREST, Esquire
Washington, D.C.

On Behalf of Defendant Sidley Austin:

THOMAS G. HENTOFF, Esquire
Washington, D.C.

ALEXANDER J. KASNER, Esquire
Washington, D.C.

On Behalf of Defendant American Psychological Association:

BARBARA S. WAHL, Esquire
Washington, D.C.

19-04446

APPEARANCES CONTINUED:

KAREN ELLIS CARR, Esquire
Washington, D.C.

On Behalf of the Intervenor:

ANDREW J. SANDON, Esquire
Washington, D.C.

P R O C E E D I N G S

THE DEPUTY CLERK: Now calling number 18, Stephen Behnke, et al. versus Sidley Austin, LLP, et al., case number 2018 CA 005989, Docket Number 18.

(Pause.)

THE COURT: Okay. All right. Parties, state your names for the record, beginning with the plaintiffs.

MS. KITTON: Fara Kitton.

THE COURT: I'm sorry, what did you say?

MS. KITTON: Fara Kitton.

MS. FORREST: Bonny Forrest, Your Honor.

THE COURT: Ms. Forrest.

MR. HENTOFF: Your Honor, Thomas Hentoff with Alex Kasner for the Sidley defendants.

THE COURT: Mr. Hentoff.

MS. WAHL: Barbara Wahl on behalf of the American Psychological Association. With me is my partner, Karen Carr, and Dianno Taviano (phonetic sp.), who is the general counsel of this psychological association.

THE COURT: Okay, thank you. Who else?

MR. SANDON: Good morning, Your Honor. Andrew Sandon on behalf of intervenor District of Columbia.

THE COURT: Anybody else from the District?

MR. SANDON: No, sir.

THE COURT: Okay, thank you. Where are things at when it comes to litigation in other jurisdictions?

MS. FORREST: We're on hold in Massachusetts, Your Honor. We filed, as we said in our praecipe that we filed with the Court on Tuesday, we filed the motion solely to supplement that complaint, come consistent with the complaint here, Your Honor, and file the -- a cause of action against what we allege is a republication. The defendants have asked us for an extra month of time to respond to that, which I, depending on the schedule today, I think we're inclined to give them. But that there's a stay in place. We have a status conference with that judge October 29th, I believe it is, Your Honor.

THE COURT: When you say amended complaint, that's only in Massachusetts or --

MS. FORREST: Supplement the complaint.

THE COURT: Supplement.

MS. FORREST: To make it consistent. If Your Honor remembers, January 8th, we supplemented the complaint here. We have not supplemented the complaint in Massachusetts. We told the Court we were going to do that, but we were trying to delay that.

THE COURT: All right. So, I'm simply trying to determine whether there's any supplemental pleadings, as far as this litigation is concerned in the District of

Columbia.

MS. FORREST: There was on January 8th.

THE COURT: But that's already been done?

MS. FORREST: Correct.

THE COURT: At least of --

MS. FORREST: As of right now, no. The next on docket is the discovery.

THE COURT: Okay. Now, there are five pending motions that have been stayed. Four of them relate to ANTI-SLAPP litigation. The fifth one is a motion a motion to declare the D.C. ANTI-SLAPP Act void and unconstitutional. Other than Massachusetts, is there litigation pending or ongoing in any other jurisdiction?

MS. FORREST: No, Your Honor.

THE COURT: And please remind me because it's been a while, what happened in Ohio?

MS. FORREST: Ohio, the Supreme Court did not take the case, Your Honor. It was only solely on the issue of jurisdiction.

THE COURT: So what did the trial court rule in Ohio?

MS. FORREST: The trial court ruled that the plaintiffs -- because the plaintiffs -- there wasn't enough contacts between plaintiffs in the jurisdiction, that in fact, that this was -- and based on

representations of the defendants -- that D.C. was the superior. That this should be -- it should be litigated somewhere else, not Ohio.

THE COURT: Now, when it comes to choice of law, what is your position, Ms. Forrest?

MS. FORREST: A couple things, Your Honor. First of all, we believe --

THE COURT: Well, let me, let me focus the question. Because I don't want to open it -- I don't want the doors to open wide. Which law do you believe should be applicable here?

MS. FORREST: Illinois.

THE COURT: Is the jurisdiction here premised on diversity?

MS. FORREST: No.

THE COURT: Would the application of Illinois law stem from any agreement between the parties?

MS. FORREST: Yes.

THE COURT: What would that agreement be?

MS. FORREST: The defendants, in their engagement letter, agreed that Illinois would apply to any issues with respect to the engagement between Sidley and APA. I'm not quoting verbatim, Your Honor, from the document. I'd have to pull it up.

THE COURT: Okay. Is that correct, Mr. Hentoff?

MR. HENTOFF: Your Honor, no. The defendants have not agreed that Illinois would apply in this case.

THE COURT: May I see the document that you maintain supports your position, Ms. Forrest?

(Pause.)

MS. FORREST: The choice of law provision in the Sidley engagement letter --

THE COURT: May I please see the document?

MR. HENTOFF: Your Honor, may I approach?

THE COURT: Yes, sir.

MR. HENTOFF: Okay. I'm going to try to make this easier to read. Your Honor, it's governing law and choice of forum.

THE COURT:

> "This letter shall be governed by and construed in accordance with the laws of the State of Illinois. Any claim or rights under and relating to this engagement letter shall only be brought in the state or federal courts in such state, and the AP and Sibley each agree to submit to the jurisdiction of such courts."

So, based on what you're telling me, it -- if your reading is correct, this litigation should be in Illinois, not even here.

MS. FORREST: We agree. That's part of the reason we brought it out of the Midwest. But we did it on the context based on the jurisdiction --

THE COURT: But you didn't -- I'm sorry, the problem is that your actions are inconsistent with what you maintain today. Because you file a lawsuit in Ohio. You file a lawsuit in Massachusetts. You file a lawsuit in the District of Columbia. And you don't go anywhere near Illinois, other than Ohio. So --

MS. FORREST: Your Honor, if I may?

THE COURT: Yes.

MS. FORREST: The defendants asked to be sued in D.C. and they said that's the place they would consent to jurisdiction. And I'm happy to show you where that is. Otherwise, we would have gone to Illinois as opposed to Ohio. But it's the only place where we felt we could get jurisdiction over the parties.

THE COURT: But they didn't consent to applying Illinois law to jurisdiction to litigation brought to the District of Columbia, did they?

MS. FORREST: But I don't think -- no.

THE COURT: No.

MS. FORREST: The answer is no.
THE COURT: Okay.
MS. FORREST: But I don't think that changes the choice of law of what applies to interpret -- what law applies to the issue.
THE COURT: Well, how would the -- you're talking about the ANTI-SLAPP litigation, correct?
MS. FORREST: Correct.
THE COURT: So why did you file a motion contesting the constitutionality of the D.C. ANTI-SLAPP statute?
MS. FORREST: Because that's all they argued in their motion. They didn't argue that Illinois -- they argued in Ohio --
THE COURT: You're the one who filed --
MS. FORREST: -- that there was a choice of law analysis necessary.
THE COURT: You're the one who filed the motion to declare the D.C. ANTI-SLAPP void and unconstitutional, not them.
MS. FORREST: Right.
THE COURT: Right.
MS. FORREST: Because that was in response to their ANTI-SLAPP motion, which doesn't do a choice of law analysis. Since the first document in this case was filed

by us on 10/18, and in the complaint, we allege that Illinois law applies.

THE COURT: So tell me how applying the Illinois law would make a difference in the outcome here.

MS. FORREST: Illinois has said that if you're regressing your rights under the First Amendment to the Constitution, that in fact, you can't apply the Illinois statutes. They've already gone through the constitutional analysis. They've said --

THE COURT: Are you saying that the courts in Illinois have found their ANTI-SLAPP law unconstitutional?

MS. FORREST: They've modified it to withhold -- to make it upstand constitutionality. So it's the exact argument that we're bringing here about the D.C. sector, Your Honor.

THE COURT: But again, tell me what impact Illinois law would have on litigation here.

MS. FORREST: SLAPP wouldn't apply.

THE COURT: I'm sorry?

MS. FORREST: SLAPP wouldn't apply to this case. It would proceed through the rules of civil procedure normally. We'd get full discovery. You wouldn't have a motion before you which makes a claim in a truncated proceeding that my folks have to prove a higher standard. And you'd go through the regular process of the D.C. Rules

of Civil Procedure, Your Honor.

THE COURT: So, let me see if I got this right. You're saying that the Illinois courts have held that ANTI-SLAPP -- their ANTI-SLAPP statute does not apply when a person's exercising their First Amendment rights?

MS. FORREST: You're right. That's correct, Your Honor. Sand Home v. Cook Home (phonetic sp.), and I cite it in our papers, Your Honor.

THE COURT: But that doesn't make any sense, because that's what ANTI-SLAPP litigation is all about. It's the exercise of First Amendment rights. But then you tell me that they're -- they still continue to have an ANTI-SLAPP provision in their, in their code?

MS. FORREST: It's basically not used very much. Same thing in Massachusetts, same thing in Maine, Your Honor. Every federal circuit that's had a look at this has ruled this is procedural and has a problem. Most of them have ruled it conflicts with the Federal Rules with the exception of the D.C. Court of Appeals. And the First Circuit, which says it's procedural as well. So, a lot has changed since we filed that motion. And the case law has changed dramatically in our favor. Within the First Circuit, Maine has found the First Amendment right to petition of plaintiff's has to be considered. As has Massachusetts. As -- New Hampshire has said nothing at

all.

THE COURT: Right. But what you're basically saying -- let's put all that aside.

MS. FORREST: Yeah.

THE COURT: Because everything we're talking about relates to what impact the law in Illinois, if we use it, would have on this litigation. But you're -- what essentially saying is that the parties agreed to use Illinois law in litigation.

MS. FORREST: Illinois applies to anything relating to the engagement letter, which this lawsuit relates to Hoffman's engagement. They agreed in advance that Illinois law applies. And if Illinois law applies, their SLAPP statute, they have not argued -- they've only -- they assumed in the motion here, unlike what they filed in Ohio, they assumed D.C. was applying. I immediately filed something with the Court that said no, that's wrong, that's not what applies. That was October 18th. And said, this is Sand Home v. Cook Home, Your Honor. This doesn't apply.

THE COURT: So, your answer is yes. You're hanging your hat on the fact that the engagement letter provides for Illinois law to apply.

MS. FORREST: That's only part of the analysis. This is Defacage (phonetic sp.) and that's what D.C.

follows. And it's a complicated analysis but that's part of it.

THE COURT: It ain't that complicated, Ms. Forrest.

MS. FORREST: Choice of law analysis, we, we think it's a fairly complicated issue, if you think it's not, Your Honor.

THE COURT: There's an engagement letter.

MS. FORREST: Okay.

THE COURT: And it seems to me -- like, frankly, that's why I asked you all those other questions. Because as far as this choice of law dispute, it's very straightforward. So, what are we going to do with the pending motions?

MR. HENTOFF: Your Honor, may I respond to a couple of the points that were just discussed?

THE COURT: Yes, sir.

MR. HENTOFF: All right. First, let me just back up a little bit. And there is one more proceeding. The Court in the spring granted defendant's motion that plaintiffs Banks and Newman must arbitrate their claims.

THE COURT: Correct.

MR. HENTOFF: And in late August, the -- those two plaintiffs did serve on -- did file and serve an arbitration demand. So I just wanted to note that.

Secondly, the choice of law provision, by contract regarding two parties to the contract, does not govern the choice of law either on plaintiffs' torts -- plaintiffs, strangers to the contract, their tort claims against Sidley and APA. And it doesn't govern a choice of law under -- when ANTI-SLAPP Act applies.

THE COURT: So, what you're saying here is that neither Banks, Dunvin, or James were parties to that engagement law --

MR. HENTOFF: Correct.

THE COURT: -- I mean, the engagement letter?

MR. HENTOFF: That's correct.

THE COURT: Okay. What it seems that engagement letter looks like, Ms. Forrest, is that if any dispute arose between Hoffman and Sidley Austin means that any dispute between them -- I know you're shaking your head, but I'm letting you know what we're going to do. Okay? We're going to set briefing schedules for the pleadings that need to be filed. If you want to raise the choice of law concern, Ms. Forrest, you can do so within the context of the response that you filed regarding the motion to dismiss under the D.C. ANTI-SLAPP Act. But for the sake of efficiency, be concise and brief about it. Another issue that you have put on the table has to do with whether plaintiffs Banks, Dunvin, and James are private

individuals or public figures. Is that correct?

MS. FORREST: That's correct, Your Honor.

THE COURT: Now, as I understand it, all three of them are -- or were, at the time, high ranking officials within the Army, different aspects of the Army. Is that correct?

MS. FORREST: That's incorrect, Your Honor.

THE COURT: So Banks was not Director of Psychological Application for the Army's Special Operations Command?

MS. FORREST: The relevant time is the time of the publication of the report. They were all retired at that point.

THE COURT: Okay. Did Dr. Banks ever fill that position?

MS. FORREST: What was the title? Because the title has been gotten wrong four or five times.

THE COURT: Director of Psychological Applications for the Army's Special Operations Command.

MS. FORREST: Yes.

THE COURT: How about plaintiff Dunvin, Chief of the Department of Psychology at Walter Reed Army Medical Center?

MS. FORREST: Ten years prior to the whole incident.

THE COURT: Which incident?

MS. FORREST: That's the question, Your Honor. That's part of the issue. What's the relevant date?

THE COURT: Well --

MS. FORREST: It has nothing to with her time in Guantanamo or Iraq.

THE COURT: Okay. Now, as far as plaintiff James, Chief of the Department of Psychology at Walter Reed Army Medical Center, Director of Behavior Science at Abu Ghraib. Is that correct?

MS. FORREST: I don't think the title at Abu Ghraib is correct.

THE COURT: Okay. What was the title at Abu Ghraib?

MS. FORREST: I'd have to go back and get it, Your Honor. Because there's three separate titles the defendants have referred to in their papers. So I'd have to get it correctly from Dr. James at the time.

THE COURT: Let's, let's put their job descriptions aside. Did any of the three of them engage in any discourse related to the applicability of special measures or torture when it came to interrogations? Did any of them engage in any dialogue or discussion regarding the viability of those strategies?

MS. FORREST: I don't -- I want to make sure --

first of all, you have to understand something, Your Honor. Some of these things are classified, so I'm not even allowed to know them because I don't have classification. So for me to represent to you, I have to be careful. I do not believe that that's accurate. I do know that they were given by generals, okay? Including two Army Surgeon Generals, who are prepared to come and testify at the hearing on this matter, that they were told to implement policies on the ground. And the policy was set at a very high level by the Surgeon General. And that those policies were to be implemented with local regional policies on the ground. And that that was after --

THE COURT: So, you don't even know if your clients were part of this conversation?

MS. FORREST: I can tell you that they were part of the conversation to not implement those strategies.

THE COURT: Ms. Wahl, Mr. Hentoff, what are your representations regarding your understanding?

MR. HENTOFF: Okay, Your Honor, a couple of things. To determine a plaintiff's status as a public official, the relevant time period is -- if there's, like, a report or an article, it's the time the article was writing about. So, if the report, as is the case, was writing about a time when all three plaintiffs were, I think lieutenant colonels in the Army, then that's the

relevant period for the actual malice, actual malice analysis, actual malice analysis. And we are prepared in our reply brief to cite all the case law that establishes that point. With regard to these plaintiffs' involvements in the issues relating to enhanced interrogations, that's a large part of what this report is about. You just need to read the report, and read the complaint. And you see that's -- that these plaintiffs were involved with that conversation.

THE COURT: Which is what I was asking you, Ms. Forrest.

MS. FORREST: I think you got a -- Your Honor, I appreciate that. But what's happened on page six and 12 and 13 of their motion is they've cherry-picked portions of the complaint. If you look at Paragraph 39, if you look at Paragraph 41, if you look at Paragraph 42, if you look at Paragraph 221, if you look at Paragraph 222 --

THE COURT: Are you talking about the complaint?

MS. FORREST: Yes, I am, Your Honor.

THE COURT: Okay. Please continue.

MS. FORREST: If you look at each of those, what's done is they've cherry-picked portions of that to say people drafted policies and were senior officials. They weren't. Let me go back to a moment, something Mr. Hentoff said. Mr. Hentoff will have his cases. I have a

Supreme Court case that leaves open the time period very specifically and says, we don’t know what the time period is, but we're not deciding it for you. So that's why, Your Honor, we think that deserves a separate motion.

THE COURT: Wait, they didn't decide it?

MS. FORREST: They didn't decide it.

THE COURT: Okay.

MS. FORREST: That's why the issue, we believe, is what the -- and so, we believe they were retired at the time. But even if you didn't, let's assume for a minute you decide against me. Okay? Let's assume for a minute it's a different time period. They don't have the status. They're never the level of public official. The defendants have cited five cases in their brief. None of which are at the level of a lieutenant colonel, that these folks -- that they allege that they are. They just weren't.

THE COURT: You don’t have a -- you don't need a rank and you don't need a job title to insert yourself into a matter of public discourse, and in the process, make yourself a public figure.

MS. FORREST: That's actually the test for a limited purpose public figure, Your Honor. The test for a public official --

THE COURT: Then why wouldn't be --

MS. FORREST: -- is somewhat different.

THE COURT: Then why wouldn't there be a limited, a limited purpose public --

MR. HENTOFF: Your Honor --

MS. FORREST: They haven't alleged that in their motion, Your Honor. They've alleged that they're public officials.

THE COURT: But I have to apply the law of the District of Columbia. Isn't that in the statute?

MS. FORREST: No.

MR. HENTOFF: Your Honor, may --

MS. FORREST: No.

MR. HENTOFF: Can I clarify?

THE COURT: Yes, sir.

MR. HENTOFF: So there's two things, Your Honor. There's, there's the question of, in the statute, there's the threshold requirement where the -- I'm sorry, where the defendant, we have to make a showing that our speech is a -- on a matter of public concern. And one of the ways in which we can do it is that our speech concerned public figures. So Your Honor is correct. But there are a lot of other ways in which we can establish that our speech was on a matter of public concern. And we've laid that our in our pending motion. Okay? So the second question is, then the plaintiff has to establish that they

can win -- you know, that they have a reasonable chance of winning the case, et cetera. Right? And that's where we say the plaintiffs -- the remaining plaintiffs are public officials. And they cannot establish that Sidley or APA acted with actual malice. So when we filed the motion, there were five plaintiffs. We argued that three of them -- the three colonels were public officials. And two of them, the two former employees of the APA, were limited purpose public figures. So, Your Honor, you'll see in our motion we talked about both tests. And the test for public official, I'm not going to get it exactly right, but you had to have a certain amount -- you know, you work for the government, you work for a government entity. And you've a certain amount of impact over people's lives. There's a particular test. I didn't say it exactly right. But we laid it out in our brief. And my point is, we laid it out in our brief as part of our ANTI-SLAPP motion. And the plaintiffs should oppose it with all their best case authority and then we'll reply.

MS. FORREST: We agree with that, Your Honor. That's why we suggest we brief that.

THE COURT: Okay.

MS. FORREST: Because that's going to impact --

THE COURT: You know, then you do it within the context of filing your opposition to their motion to

dismiss under --

MS. FORREST: Here's the issue on --

THE COURT: No. We're -- that's what we're going to do. We're going to be efficient. We're going to move this through. We're not going to have scattershot litigation. I'm telling you right now that you can address the issue, but you need to do -- address it within that context. Because it would be essentially a defense to, to the allegations that they're making in their motion to dismiss. You look confused. Should I repeat what I said or try to clarify it?

MS. FORREST: I -- Your Honor, I'm, I'm at a -- sort of not certain what to do. Because I don't agree.

THE COURT: Okay.

MS. FORREST: I'm going to need to ask for different pages.

THE COURT: Then -- okay. No. You don’t agree with me, that's fine. But here's what you're going to do, as far as this motion is concerned. Because like I said, this is not going to be a scattershot litigation. You can address the issue of whether or not your clients are private or public figures. But you will do it within the context of filing your opposition to their motion. There's not going to be a separate parallel conversation on that issue. You can disagree with me, that's fine.

But I'm giving you a chance to raise the issue and make a record about it. That's how we're going to do it. Okay? So, let's set dates here.

MS. FORREST: So we have three depositions that need to occur, Your Honor.

THE COURT: Okay.

MS. FORREST: And there's issues with respect to those. So, we've tried to do, for example, an affidavit for Dr. Honnacker (phonetic sp.) and Ms. Wahl objected to that, would not allow him to sign an affidavit as opposed to doing a deposition.

THE COURT: An affidavit's not a deposition. You don’t get to ask questions of a witness who signs an affidavit.

MS. FORREST: It would be a violation of his contract and separation agreement, which he alleged to his attorney, and that they would withdraw his ability to collect payments under the agreement or hold him in a problem with that agreement. So --

THE COURT: A deposition's a deposition. It needs to happen.

MS. FORREST: Thank you.

THE COURT: What else needs to happen as far as discovery is concerned?

MS. FORREST: Two other depositions, one in

Massachusetts, two in D.C.

THE COURT: The -- is that for Mr. Stephen (phonetic sp.) --

MS. FORREST: Dr. Solts (phonetic sp.).

THE COURT: Dr. Solts.

MS. FORREST: Correct.

THE COURT: Stephen Solts, right?

MS. FORREST: Correct.

THE COURT: Okay. He's not a party here, right?

MS. FORREST: Correct, but you ordered his deposition on February 8th.

THE COURT: Okay. And what's happening with that one?

MS. FORREST: We will notice it right after you -- if you're -- assuming that you're okay with going forward with depositions based on the order, great. We're going forward. No discovery was allowed during this time period.

THE COURT: How long will it take you to depose Dr. Solts?

MS. FORREST: We would like to do all these depositions in September. I've tentatively -- Ms. Kitton is going to -- my apologies. Ms. Kitton is going to notice these, go back and notice these on Monday. We're noticing the dates the 17th, the 25th and 26th. Pending

scheduling issues with the other side. The last time, Ms. Wahl refused to accept service for a witness. I'm assuming that that will not be an issue this time for Dr. Kelly. That she will accept service.

THE COURT: Is that the third witness?

MS. FORREST: It will be either the 25th or 26th, Your Honor.

THE COURT: Right. So we're talking about Dr. Solts and Dr. Kelly.

MS. FORREST: We also have Dr. Honnacker.

THE COURT: Right.

MS. FORREST: So we're going to notice three dates. That's right now what we're planning. The last time, Dr. Solts' counsel kicked up his heels and wanted to put it off for a month. So. We will proceed. We're prepared to proceed. That's why we're just going to notice the dates, and if they want to object, they can object.

THE COURT: Okay, thank you. Ms. Wahl?

MS. WAHL: Your Honor, we have given some thought to a proposed schedule. Taking into account the depositions. And I have a proposed schedule that I could hand up to you, if that would be preferable.

THE COURT: Have you discussed that with Ms. Forrest?

MS. WAHL: I have not yet, but I can.

THE COURT: Please.

MS. WAHL: Okay. So -- well, I'll just hand this over. And one to Mr. Sandon, to Ms. Forrest. So, our proposal would be that discovery consistent with what Ms. Forrest just proposes is the first we've heard of this. That discovery would take place through October 9th. So, between September 9th and October 9th. That seems consistent with what Ms. Forrest has said. Of course, assuming that the witnesses are available. We propose October 31st as the deadline for the plaintiffs to file their opposition to the defendants' ANTI-SLAPP motions. So those are the four that are -- that we filed initially. Not the constitutionality, but the straightforward ANTI-SLAPP motions. There are two on the original complaint and two on the supplemental complaint. That would -- so that would be the date when the plaintiffs would file their opposition. That would also be the date when the defendants and the District of Columbia would file their oppositions to the plaintiffs' constitutionality motion. So we get it all done at the same time. Then the next deadline would be November 22nd. And those would be the reply dates for the defendants to file the replies in favor of their four ANTI-SLAPP motions. And the plaintiffs would file the reply in

support of their constitutionality motions. And then, should the Court wish to have oral argument, which might be helpful on this, we suggest that the Court set a date in early 2020, January or February.

THE COURT: What's the District of Columbia's position here? Since you're intervening in this matter.

MR. SANDON: Thank you, Your Honor. October 31st is fine for us to file our motion opposing the ANTI-SLAPP Act.

THE COURT: A motion to oppose declaring the ANTI-SLAPP Act void and unconstitutional, right?

MR. SANDON: That's right, Your Honor. Ms. Forrest?

MS. FORREST: I think that's fine, Your Honor. I've got a procedural issue on filing our -- the October 31st motion, which I can talk to you about now or I can talk to you about later. Your choice.

THE COURT: What do you want to do?

MS. FORREST: So, we have approximately 5,000 documents that we'll be submitting in support of that motion What we've done right now is that if Your Honor is aware of Exhibit A to the motion, which is all the 219 false statements. So, we have at least one, and sometimes as many 20, documents that we're submitting that was in APA or Mr. Hoffman's possession when he wrote the report.

Which gave them knowledge that the -- what they were writing is false. In case you rule against me and decide I'd have to show actual malice, Your Honor. Okay? So I have all that. What I've done -- but you're going to need to tell me whether this will work for the Court -- is right now, there's a fifth column and a sixth column. The fifth one being, in that document -- or it's a fourth and fifth. There's the fourth one that has we can put it all up on a CD or we can put it up online. And we can make a link to it so you can just -- we call it in California an exploding brief. I don't really like that term. But you could link in as opposed to me --

THE COURT: It's an interesting concept.

MS. FORREST: Yeah. You can link into the document and it's all online for you as opposed to me submitting 5,000 documents. We can happily submit all the documents in boxes. I'll bring them here myself to the courthouse. But that way, you'd have it. The next column goes to the admissibility, which we considered before we ever filed the complaint. So, it speaks to either a hearsay exception because it says -- because even though the statute doesn't address it, because the D.C. Court of Appeals has applies a Rule 56, sort of, standard to this motion, it's got to be admissible evidence. So, we've addressed the admissibility already in a proposed reply,

Your Honor.

THE COURT: Okay. So, your procedural question has to do with the format of the exhibits that you intend to introduce.

MS. FORREST: Right. It -- it's going to be right now -- that document is several hundred pages without even the -- so the exhibit -- so Exhibit A, we've pulled in all those documents. And so to do that, that document is now several hundred pages itself. And that will be an exhibit to our reply.

THE COURT: Mr. Hentoff and Ms. Wahl, who would like to go first?

MR. HENTOFF: I'll go first, Your Honor. We filed a 25 page brief with exhibits. If the plaintiffs are going to file hundreds of pages with thousands of exhibits, I don't think it's going to be possible to respond to it in three weeks.

THE COURT: Yeah, that's -- that seems a little bit over the top, Ms. Forrest. I'm sorry.

MS. FORREST: I'm not going to file the exhibit. That's why I'm going to do it this way. But I have a clear and -- if you rule against me on the actual malice, I have a clear and convincing standard. And so, if they want to waive any argument that I haven't submitted enough information, Your Honor, I'll give up that fight.

THE COURT: How long was the conversation between the entities here? How long did this -- the stuff that led up to the report which resulted in the litigation once the report was made public. How long did the dialogue go on?

MS. FORREST: the investigation was seven months. The report itself is 546 pages. It's attached -- a couple thousand worth of the pages of exhibits to that report. So, that's what I have to go after, Your Honor. The problem is, is that I'm going -- and the period of time, they've brought in communications from 2005 and 2006.

THE COURT: Wait, wait a second. The ANTI-SLAPP -- the discovery provisions of ANTI-SLAPP are limited. We're not going to proceed with discovery as if this were a hearing on the merits of the litigation.

MS. FORREST: I'm not proceeding with discovery, this is all publicly available information that he had, and he's -- most of it, he's put into binders and they've put up on their website.

THE COURT: I understand that. But it's one thing what people post online. It's another thing what's evidence admitted in the litigation. And again, the discovery provision of the ANTI-SLAPP legislation is fairly limited. This is not a blow the roof off the case

so we can consider everything that would have come in during a trial on the merits.

MS. FORREST: I'm not aware, Your Honor -- I've got a copy of the statute with me, which I'm happy to share with you, that it limits what I can submit I fighting motion. It just limits what depositions or discovery I can take. This is --

THE COURT: But it's discovery.

MS. FORREST: Right. So, why is, why is --

THE COURT: Because your attachments are part of --

MS. FORREST: They're not part of discovery.

THE COURT: Have those been exchanged with you? Do you know what she's talking about?

MS. WAHL: I am completely lost, Your Honor. So I appreciate you seeking --

MS. FORREST: Your Honor, that's -- they're not completely lost. We just had a mediation where I went through all this.

MS. WAHL: May I, Your Honor? On --

THE COURT: You guys can't all be talking about the same thing, because you're giving me very different interpretations of it. And that -- that's problematic.

MS. WAHL: I'm not sure what is being requested procedurally. If I'm understanding Ms. Forrest, she wants to submit thousands of documents, some of --

THE COURT: No. You cite the relevant portions of those documents in your opposition.

MS. FORREST: That --

THE COURT: I'm not going to sit there and read through five boxes of materials to make a decision where the law allows for limited discovery, number one. And number two, that essentially goes to the merits of this whole thing.

MS. FORREST: I have to defeat the motion on the merits. That's part of the problem with the statute.

THE COURT: And I'm telling you, I understand that. But you're going to be selective. You're not going to give me stuff to read that I have no business spending hour after hours, myself or my staff, pouring over. So you be selective about, and strategic about how you approach your opposition. Then that begs the question, since we need to get this stuff on the record, obviously putting something on -- posting something on line, I don't know if that would be considered --

MS. FORREST: It's not -- let me be clear, Your Honor. These are his binders, which we only have access to because the APA posted them online. These are his binders that support his conclusion, which has over 6,000 pages in it.

THE COURT: Okay. Okay. Then you select --

MS. FORREST: These are evidence.

THE COURT: -- you select, of those 6,000 pages -- because you know what? I ain't going to read them.

MS. FORREST: I appreciate that, Your Honor.

THE COURT: And the burden is on you to be selective. To include those portions that support your opposition. I'm not going to humor people and read stuff that I don't have to read, simply because it's part of the broader litigation.

MS. FORREST: Appreciate that. May I ask the favor?

THE COURT: It depends on what the favor is.

MS. FORREST: May I, then, attach, so I have it on the record, we have been -- and say, we have been selected at the request of the Court -- selective at the request of the Court, but we believe all these other documents -- and just list them as an attachment -- Your Honor doesn't necessarily, if Your Honor doesn't want to list them, we want to make sure it's on the record.

THE COURT: No.

MS. FORREST: Because I don't know if I've got a clear and convincing standard, Your Honor, or if I'm briefing on the negligence?

THE COURT: Well, assume the worst.

MS. FORREST: Which I'm going to. Which is why

I believe that I have a duty to my clients to submit in evidence at a clear and convincing standard.

THE COURT: You're not going to file 6,000 pages of documents.

MS. FORREST: I don't want to, Your Honor. That's not what I'm asking.

THE COURT: Then don't.

MS. FORREST: That's not what I'm asking.

THE COURT: Then don't. You're asking that it be attached.

MS. FORREST: I'm saying, can I list those in the document? You're limiting what I can submit in opposition to the motion. And I'm saying, I need to make a record.

THE COURT: No, you're misunderstanding me. I'm telling you to be selective and focus on the stuff that best support your position. Just because it's on a document that they gave you doesn’t meant that it should be attached or be part of your opposition.

MS. FORREST: I have not yet asked for a single excess page in any of this proceeding, Your Honor. I've worked very hard to be brief. And I will continue to do that.

THE COURT: That's not what I'm talking about.

MS. FORREST: And I will continue to do it.

THE COURT: You're being non-responsive to the point that I made.

MS. FORREST: I will continue to be selective in what I cite, but we believe we have a right, under the statute to present everything. You're telling me to limit it. I will follow what you're saying and limit what I submit to the Court. But I need to have a record that shows I have all this evidence --

THE COURT: I doubt that all those 6,000 pages don't overlap with each other. It could be repetitive. It could be cumulative. It could be irrelevant. I don't want to see it. I don’t need to hear about it.

MS. FORREST: And cumulative is exactly the standard Tolorris v. Pirro (phonetic sp.) and the D.C. Circuit has used. They said we're right --

THE COURT: I'm telling you what we're going to do.

MS. FORREST: -- we have the right -- I'm sorry?

THE COURT: I'm telling you what we're going to do.

MS. FORREST: Okay. Okay, Your Honor. I appreciate that.

THE COURT: So, when do you want to file your opposition to the motion?

MS. FORREST: Some of this doesn't -- deadline

for plaintiffs to file -- when does Your Honor want to deal with discovery issues, protective order issues, and the work product privileges dealt with -- claimed by Sidley?

THE COURT: Ms. Wahl, Mr. Hentoff?

MR. HENTOFF: Your Honor, plaintiff wants to bring a motion to compel. As plaintiff suggested in the praecipe, they should contact me, we should meet and confer. And if they need to bring a motion, they can bring a motion. I don't think that relates to the schedule right now.

MS. FORREST: We've got evidence in some of those statements, and I can give Your Honor two or three examples right now, and we can argue it right now if we'd like.

THE COURT: No, we're not going to do that.

MS. FORREST: Okay.

THE COURT: What's your response to Mr. Hentoff's suggestion?

MS. FORREST: I don't want to bring a separate motion to compel because we're going to be trying to do discovery. We'll try to work it out with him. What I'd like to do is come back and have a hearing in a month to deal with protective order issues. Also, work product issues. We anticipate that Dr. Solts will argue about

scope up in the deposition in Massachusetts. And so, I'd like to work those out in one hearing and then file our opposition after that.

THE COURT: Mr. Hentoff, Ms. Wahl?

MR. HENTOFF: Your Honor, I'd like to wait and see if there's ever -- if there actually is ever a need to involve the Court. I don't think we should schedule something right now.

THE COURT: But if she does say that you have made some of those arguments already.

MS. WAHL: Well, there was an order issued by this Court with regard to Dr. Solts. So, I'm not sure what else there is to talk about with him. With regard to the documents, I think a dialogue between counsel is completely appropriate. That's the way it always works. Try to figure it out, and if we can't figure it out, we file a motion.

THE COURT: Ms. Forrest?

MS. FORREST: I think we need to deal with work product. You also are going to have to make some decisions about what I can file in papers and what I can't. So they've listed a number of documents as confidential and highly confidential, which are all very public. And which Mr. Hoffman had. We don’t think those should need to be filed under seal, because that's a whole

nother separate process and more documents for the Court. Okay? I think, given the history between the parties here, and the fact that, you know, we -- the objections have already been raised, we're going to do our best to work them out and not involve you. But that's not been the history here. So if we have to -- so, for example, Dr. Solts' counsel has already objected on scope. I anticipate sitting in the deposition and them refusing to answer questions. At which point, I'm going to have to come back in, unless Your Honor wants me to call him from the deposition. So, I think the schedule needs to anticipate what the past behavior has been.

THE COURT: Counsel?

MS. WAHL: Well, again, I don't mean to repeat myself, but you've already issued a protective order with regard to Dr. Solts.

THE COURT: I don't understand. You're saying that his lawyer's going to refuse to abide by the protective order?

MS. FORREST: It's not the protective order that's the issue. It's the scope of the deposition, Your Honor.

THE COURT: Well, the protective order sort of sets the parameter of what can be discussed.

MS. FORREST: I think we're going to argue over

what's related to the defeat of the ANTI-SLAPP motion because we don’t even agree on the standard of actual malice.

THE COURT: No, no, no. That's a whole different issue. We're talking about the scope of Dr. Solts' deposition and the protective order already sets those parameters.

MS. FORREST: The protective order, I believe, that the order for the deposition was that anything to defeat the SLAPP motion is game.

THE COURT: Okay. Then I will make myself available by phone.

MS. FORREST: Thank you. I appreciate that. Would you like us to just call chambers if there's an issue?

THE COURT: Yes. But you need to give me the dates once they're set.

MS. FORREST: As soon as I have a date, I'll call chambers and let you know, Your Honor.

THE COURT: Okay.

MS. FORREST: So, then what we will try to do is, I will try to make a list of work product. After that deposition, I'll make any other issues that we -- I'll list any other issues that we have on the scope. Hopefully with Your Honor available, we won't have any.

And then I'll also talk about protecting -- the way I read the protective order now, you have to make a decision on whether something's covered or not. And so, I'll do all those in one motion if we need it. If we set a date now, I know I -- we have the time and I have to do that by that date. And then we can come in and, and I think October -- based on that schedule, October 31st would work if we set a scheduled date with you in October.

THE COURT: Mr. Hentoff, Ms. Wahl?

MR. HENTOFF: Your Honor, I don't have an objection to having the date open if there's a need to resolve discovery disputes.

THE COURT: Can we do October 30th?

MS. FORREST: That’s fine with me, Your Honor.

MR. HENTOFF: Your Honor, October 3-0?

THE COURT: Yes, sir. Ms. Wahl?

MS. WAHL: That's fine, Your Honor.

MS. FORREST: Based on that, Your Honor, I would then ask for two weeks to file the opposition.

THE COURT: Instead of the -- okay. Let's see. So you would file your opposition within two weeks.

MS. FORREST: Of that hearing. Yes, Your Honor.

THE COURT: Oh, okay. Not two weeks from today.

MS. FORREST: Yeah. No, that hearing -- because you're going to make a decision about what I can and

cannot put in that opposition at that hearing. If there's anything. If we can put it off --

THE COURT: If there's anything. What if there isn't anything?

MS. FORREST: If there isn't, then we'll put it off and we can do it differently. But I would just say -- I'm just asking for a two weeks difference in schedule. That we put the scheduling on November 15th. So if we need a hearing, we have built-in time.

THE COURT: So you're asking until November 15th to file your opposition, which would be essentially 15 days beyond October 31st.

MS. FORREST: What they've proposed. Yeah.

THE COURT: Ms. Wahl, Mr. Hentoff?

MS. WAHL: We don’t have any objection to that. The question is whether, as I had proposed, everything is then tied to that date. Meaning we had proposed that that's also the day when the defendants would file their opposition to the constitutionality.

THE COURT: Yes.

MS. WAHL: Okay. Yeah, we don't have any problem with that.

MR. HENTOFF: Then Your Honor, we'd like more time to file our replies because the Thanksgiving holiday is then.

THE COURT: Right. The reply is now due on the 22nd. That reply would have to be -- would December the 6th work?

MR. HENTOFF: Your Honor, I'd like another week because of the Thanksgiving holiday falling in between.

MS. FORREST: And we would get another week on our reply as well. That's fine.

THE COURT: Okay.

MS. FORREST: what I would ask is after this hearing, if everybody -- sorry, Mr. Hentoff, if you could distribute just a revised schedule for us all to agree to? And then we submit it to the Court so those are put on the docket, that would be helpful to me.

MR. HENTOFF: Your Honor, we have no objection to that.

MS. FORREST: And before that gets submitted to the Court, it comes to us to make certain we're all in agreement based on what he said here today.

THE COURT: Okay.

MS. FORREST: Thank you.

THE COURT: All right. So we are setting a hearing date on October 30th? Or was October 30th for you to submit --

MS. FORREST: That's on the protective order issues and the other thing.

THE COURT: The protective order.

MS. FORREST: So the hearing date, I assume, is going to be had -- that you're going to need time to read the papers. So if I'm, I'm submitting my -- if we're submitting all our oppositions and replies 1st of December, I would expect the hearing date be in December, Your Honor. Unless we're losing you in December to another court.

THE COURT: I thought it was November 15th, December 13th, December 20th?

MS. FORREST: Mr. Hentoff just asked for extra time because of Thanksgiving.

THE COURT: Right.

MR. HENTOFF: Your Honor, there was some --

THE COURT: So, that would be -- that would take us through the -- to the 13th.

MR. HENTOFF: I believe --

MS. FORREST: Of December.

THE COURT: Yes, ma'am.

MS. FORREST: Right. So I'm saying a hearing date on the motion in December.

THE COURT: Which of the motions?

MS. FORREST: Sorry. Two hearing dates.

THE COURT: Okay.

MS. FORREST: One is for the protective order

issues and any discovery issues, assuming we can't work it out. Which we all hope we do.

THE COURT: Is that October 30th?

MS. FORREST: Correct. Yes.

THE COURT: We're setting October 30th for that purpose. Okay.

MS. FORREST: That's what I understood, Your Honor.

THE COURT: Okay. What time would you like to set it, 9:30?

MS. FORREST: Whatever's convenient for the Court. Thank you.

MR. HENTOFF: That's fine with me, Your Honor.

MS. WAHL: I would just note for the Court --

MS. FORREST: It's set beyond the --

MS. WAHL: No, we have a status conference in Boston the day before at two o'clock.

MS. FORREST: Irrelevant.

MS. WAHL: So assuming that we don’t have any problems getting back --

MR. HENTOFF: Could we do the afternoon?

THE COURT: The afternoon? The afternoon?

MS. WAHL: It'd be better for us to do it in the afternoon in case there are flight problems.

THE COURT: That's fine.

(Pause.)

THE COURT: The afternoon probably makes sense. And then I can wrap up the trial by that Monday -- that Wednesday morning if necessary. So --

(Pause.)

THE COURT: How about November the 1st? I'm not sitting for trial on Fridays.

MS. WAHL: That's fine for me, Your Honor.

MR. HENTOFF: Same here, Your Honor.

THE COURT: Ms. Forrest?

MS. FORREST: I'm looking, Your Honor, thanks.

(Pause.)

THE COURT: Do you have your own personal private plane?

MS. FORREST: I wish, Your Honor. Not so much. That's fine.

THE COURT: That's fine? Okay. November 1st.

MS. FORREST: Keeping in mind what you've said today, I've heard you, Your Honor, loud and clear. When I come in for the discovery issue, I will make my request then, based on the number of pages I'll need, since I'll be responding to three major issues in that motion. Because I'll obviously need more than 15 pages.

THE COURT: Yes.

MS. FORREST: Would Your Honor like a

consolidated reply to the APA to some of these motions? Or does -- do you want separate?

THE COURT: Consolidated reply.

MS. FORREST: Consolidate everything I can? Okay.

THE COURT: Yes.

MS. FORREST: Then I'll come back in and -- would you like me to do a praecipe in advance of the hearing to tell you, sort of, the pages I need and why that? Is that helpful or would you rather do it in here?

THE COURT: Are you talking in advance of the November 1st hearing?

MS. FORREST: Correct. Or no -- yes, correct.

THE COURT: Well, we'll discuss any pertinent issues to the protective order.

MS. FORREST: The protective order and any discovery issues, but I'll also anticipate at that point, I'll know what from the depositions are. So I'll know a little bit more what my replies are going to look like. And our opposition. So I'm going to need to know then how many pages I'm going to need from you, extra, beyond 15.

THE COURT: Okay.

MS. FORREST: And what you told me is, Ms. Forrest, I want you to consolidate all your replies. So I know already, one's going to go from 15 to 30. So the

question is, is whether I ask you for certain pages and give you justification to that in advance of the November 1st hearing or whether we just come and talk about it?

THE COURT: Okay. Mr. Hentoff, Ms. Wahl?

MR. HENTOFF: Your Honor, I'd be fine with just talking about pages at the November 1st hearing. And we could also then talk about pages for the reply briefs.

THE COURT: We can discuss it at that point, Ms. Forrest. I mean, just to be clear, my concern is not so much the page limit of your reply, but the attachments. Because if it's really important, it should be part of your reply.

MS. FORREST: I -- Your Honor, I really am trying to listen to you and I'm not trying to question you. Here's my -- the practicalities of the statute are problematic.

THE COURT: I understand that.

MS. FORREST: And so, what it says is, I have to show up with evidence.

THE COURT: I understand that. But you have to show up with evidence, not all the evidence you want. They're two different things.

MS. FORREST: And I've heard that. And so, I'm going to go back and look at that. The problem is, is that the clear and convincing standard is a bit amorphous.

So what overcomes clear and convincing? Now, what you've told me is that you're very aware the standard isn't the merits issue. That the standards is, if there's a credibility issue, you resolve it in our favor. That's the summary judgment standard. So that's going to inform what I put in the motion. Based on what you've told me today.

THE COURT: Okay. All right. We'll discuss it on the 1st then.

MS. FORREST: Thank you. Anything else, Ms. Forrest?

MS. FORREST: Thank you, Your Honor.

THE COURT: Mr. Hentoff?

MR. HENTOFF: Nothing from me, Your Honor.

THE COURT: Mr. Wahl?

MS. WAHL: Nothing, Your Honor. Thank you.

THE COURT: I'm sorry, Ms. Wahl. Anything on behalf of the District government?

MR. SANDON: No, Your Honor. November 15th is our deadline to file our opposition?

THE COURT: Are you still asking -- are you -- have you started to ask yourself what you're doing here?

MR. SANDON: No, Your Honor. I thought malice analysis would be a good name for a band. But I'm just happy to focus on our brief November 15th.

THE COURT: Okay, very well. Anything else from anyone? Okay, November 1st. Can we make it -- I don't know, two o'clock?

MS. WAHL: That's fine.

THE COURT: I'll have a morning calendar and see -- and I'm pretty much covered through at least noon.

MS. FORREST: Your Honor, do you know if we're going to have you beyond December yet?

THE COURT: I'm sorry?

MS. FORREST: Do you now if we're going to have you beyond December yet?

THE COURT: I don't know yet. My suspicion, given -- my suspicion, given the timelines here, is that even if I were to rotate out of the civil division, this matter would come with me for the resolution.

MS. FORREST: Thank you, Your Honor.

THE COURT: Okay? All right. Thank you.

MS. KITTON: Thank you.

MR. HENTOFF: Thank you, Your Honor.

MR. KASNER: Thank you, Your Honor.

(Thereupon, the hearing was concluded.)

√ Digitally signed by Jennifer D. Pylant

ELECTRONIC CERTIFICATE

I, Jennifer D. Pylant, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of STEPHEN BEHNKE, ET AL. V. SIDLEY AUSTIN, ET AL., Case No. 2017 CAB 005989 in said Court, on the 6th day of September 2019.

I further certify that the foregoing 49 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 9th day of September, 2019.

Transcriber

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*,	)	
	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	Next Event: Status Hearing: 11/1/19
DAVID D. HOFFMAN, *et al.*,	)	

ORDER

Upon consideration of Defendants' Opposed Motion for Entry of Order, filed September 13, 2019, and Plaintiffs' Opposition, filed September 16, 2019, it is this 17th day of September, 2019, hereby:

ORDERED that Defendants' Opposed Motion for Entry of Order is **GRANTED IN PART**; and it is further

ORDERED that Plaintiffs will file their consolidated opposition to (1) Defendant American Psychological Association's Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code 16-5502, filed October 13, 2017; (2) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code 16-5502, filed October 13, 2017; (3) Defendant American Psychological Association's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, filed March 21, 2019; and (4) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502, filed March 21, 2019, **by November 15, 2019**; and it is further

ORDERED that Defendants shall file their consolidated opposition to Plaintiffs'

Opposed Motion to Declare the D.C. Anti-SLAPP Act Void and Unconstitutional, filed January 8, 2019, **by November 15, 2019**; and it is further

ORDERED that Intervenor District of Columbia shall file its opposition to Plaintiffs' Opposed Motion to Declare the D.C. Anti-SLAPP Act Void and Unconstitutional, filed January 8, 2019, **by November 15, 2019**; and it is further

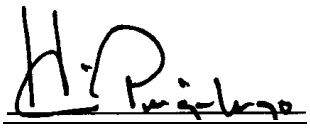
ORDERED that Defendants shall file consolidated replies in support of their respective anti-SLAPP Motions by **December 13, 2019**; and it is further

ORDERED that Plaintiffs shall file their reply in support of their Void and Unconstitutional Anti-SLAPP Act Motion **by December 13, 2019**; and it is further

ORDERED that the docket entry noting "Responses to the replies are due by 12/20/19" is **stricken**; and it is further

ORDERED that no party is permitted to file a sur-reply as anything deemed important enough to necessitate the filing of a sur-reply should be included in the parties' oppositions.

SO ORDERED.



Honorable Hiram E. Puig-Lugo
Associate Judge
Signed in Chambers

Copies to:
All Counsel of Record

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	
DAVID D. HOFFMAN, *et al.*,	)	
	)	
Defendants.	)	

ORDER

On September 6, 2019, the parties appeared before this Court for a status hearing. At that time, the parties disagreed on the scope of a deposition to be scheduled for Dr. Soldz. Attorney Wahl, counsel for Defendant American Psychological Association, took the position that a protective order applicable to Dr. Soldz resolved the issue. In contrast, Plaintiffs' Attorney Forrest anticipated that the history of disagreements between the parties could present an issue as to the appropriate scope of the inquiry. At Attorney Forrest's request, the Court agreed to be available by phone when the parties deposed Dr. Soldz to resolve potential disputes.

On September 24, 2019, Ms. Forrest called judicial staff and noted that separate deposition dates had been set for a total of three witnesses.[1] Shortly thereafter, Ms. Wahl called judicial staff and represented that the Court had agreed to be available only for one deposition. Subsequently, Ms. Forrest called chambers again and requested a hearing on this matter.

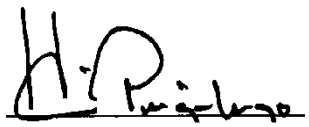
After reviewing the September 6, 2019 transcript, it is clear that this Court agreed to be available by telephone only for a deposition of Dr. Soldz to occur sometime during the month of September. This Court was not asked and did not agree to be available when the parties deposed Dr. Kelly and Dr. Honaker. Similarly, this Court was not asked and did not agree to be available for any deposition during the month of October.

Upon further reflection, the Court finds that it is in everyone's best interest for the parties to follow the protective order issued in this case and to resolve any disputes between themselves. It is inappropriate for this Court to give the litigants in this case special treatment and to set a precedent that will allow other litigants to request telephone access in resolving disputes related to depositions.

[1] Ms. Forrest relayed that on October 11, 2019, Dr. Soldz would be deposed in Massachusetts at 10:00 a.m., on October 17, 2019, Dr. Kelly would be deposed at 10:00 a.m. in the District of Columbia, and on October 30, 2019, Dr. Honaker would be deposed at 11:00 a.m. in the District of Columbia.

The attorneys for all parties are directed to comport themselves as mature professionals and not rely on calling chambers to present their competing positions to judicial staff. The rules of ethics would deem such conversations as inappropriate *ex parte* communications in contravention of relevant ethical guidelines. If the parties need clarification on an issue related to the scope of a deposition, they must consult the pertinent protective order and respect the parameters described in that document. The protective order speaks for itself and will not be turned into an avenue for the parties to engage in unproductive, wasteful and endless bickering. Failure to comply with this Order or with the pertinent discovery rules may result in evidentiary and/or financial sanctions.

IT IS SO ORDERED.



Judge Hiram Puig-Lugo
Signed in Chambers

Copies via CasefileXpress to all counsel of record.

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*, Plaintiffs,	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	Status Hearing: November 1, 2019
DAVID D. HOFFMAN, *et al.*, Defendants.	)	

ORDER

On its own initiative, and upon further consideration of the relevant law, the Court vacates its order dated February 8, 2019 to the extent that it provides for depositions at this procedural stage of the case.

Under D.C. Code § 16-5502(c)(2), "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion **and that the discovery will not be unduly burdensome**, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery" (emphasis added). Further, under D.C. Code § 16-5502(d), "[t]he court shall hold an expedited hearing on the special motion to dismiss and issue a ruling **as soon as practicable after the hearing**. If the special motion to dismiss is granted, dismissal shall be with prejudice" (emphasis added).

Plaintiffs filed their original complaint in this case on August 28, 2017. Defendants' filed their original special motion to dismiss on October 13, 2017. On February 4, 2019, Plaintiffs filed their first supplemental complaint and Defendants filed the respective special motion to dismiss on March 21, 2019. On February 8, 2019, this Court ordered that Plaintiffs may conduct targeted discovery and may depose Dr. Kelly, Dr. Honaker and Dr. Soldz in the process.

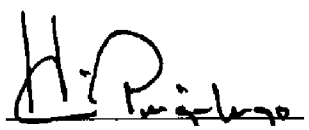
Although it initially appeared that permitting depositions would not prove to be unduly burdensome, recent events have proven otherwise. As such, it is not consistent with D.C. Code § 16-5502(c)(2) to proceed with depositions within the "targeted discovery" permissible under the statute. Moreover, the process of scheduling and conducting these depositions, as reflected in the contradictory interpretations between the parties of a protective order, is proving to be unduly burdensome to everyone and unnecessarily prolonging this litigation. In fact, the exchange of thousands of documents underscores the cumulative nature of depositions for purposes of litigating the special motion to dismiss that awaits resolution. As a result, the discovery process has contributed to delays in resolving the special motion after "an expedited hearing" as required under D.C. Code § 16-5502(d). In sum, this case began over two (2) years ago in several jurisdictions and about six (6) months have passed since the Defendants filed their most recent special motion to dismiss. It is time to move this process along consistent with the legislative intent and statutory guidance.

Accordingly, it is this 25th day of September, 2019, hereby:

ORDERED, that this Court's February 8, 2019 Order is **VACATED IN PART**; it is further

ORDERED, that the targeted discovery permitted to resolve the Defendants' Special Motion to Dismiss will be limited to the documents already exchanged or previously requested between the parties.

IT IS SO ORDERED.



Judge Hiram Puig-Lugo
Signed in Chambers

Copies via CasefileXpress to all counsel of record.

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	
DAVID D. HOFFMAN, *et al.*,	)	
	)	
Defendants.	)	

ORDER

The Plaintiffs have moved this Court to declare void and unconstitutional the D.C. Anti-SLAPP Act of 2010. Specifically, they contend that the Anti-SLAPP Act (1) violates the Home Rule Act, (2) contravenes the First Amendment because it is "grossly overbroad," and (3) creates impermissible barriers to finding recourse in the Courts. For the reasons discussed below this motion is denied.

Background

On August 28, 2017, the Plaintiffs filed claims of defamation *per se*, defamation by implication and false light against the Defendants.[1] At that time, the Plaintiffs included former Army Colonels L. Morgan Banks, III, Debra L. Dunivin, Larry C. James, and Drs. Russell Newman and Stephen Behnke.[2] The Defendants are attorney David Hoffman, his law firm Sidley Austin LLP, its District office Sidley Austin (DC) LLP, and the American Psychological Association ("APA") (collectively, the "Defendants").

The dispute between the parties is based on the contents of an independent review and report that APA commissioned from Hoffman and Sidley Austin. The review and report resulted

[1] On February 4, 2019, Plaintiffs filed a supplemental complaint adding an additional count of defamation *per se.*
[2] Dr. Newman and Dr. Behnke have been ordered to arbitrate their claims as provided in their contractual relationships with the American Psychological Association.

from an investigation into concerns that, in the aftermath of September 11, 2001, the APA colluded with the Bush Administration, the Central Intelligence Agency ("CIA") and the U.S. military to support participation of mental health professionals in the torture of military detainees. The Plaintiffs contend that the investigation did not find evidence to support the allegations described in the Defendants' report and resulted in the publication of a series of demonstrably false and defamatory allegations against them.

In response to the Plaintiffs' Complaint, the Defendants filed separate special motions to dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 ("Anti-SLAPP Act"), which are currently pending before the Court. For their part, the Plaintiffs opposed the separate requests for dismissal and countered with a motion to declare the D.C. Anti-SLAPP Act void and unconstitutional.

The Court notes that this lawsuit is the second of three substantively similar lawsuits against the Defendants filed in Ohio, the District of Columbia, and Massachusetts, arising from the aforementioned publication of Sidley Austin's independent investigative report to the APA. The Ohio case was dismissed for lack of personal jurisdiction and the Massachusetts case is currently stayed in favor of the D.C. action under the first-filed rule.

DISCUSSION

The D.C. Anti-SLAPP Act of 2010 culminated a legislative process which began with a proposed bill introduced in June that year. After a public hearing, a mark-up hearing and a detailed report from the Council's Committee on Public Safety and the Judiciary, the Council unanimously approved the bill. *See* Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report, Report on Bill 18-893, "Anti-SLAPP Act of 2010,"

November 18, 2010 (Comm. Rep.)[3]. After the period of congressional review required under the Home Rule Act ("HRA"), the legislation became effective on March 31, 2011. 58 D.C. Reg. 3699 (Apr. 29, 2011).

The Anti-SLAPP Act, D.C. Law 18-351, *codified at* D.C. Code §§ 16-5501, *et seq.*, "incorporates substantive rights with regard to a defendant's ability to 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." Comm. Rep. at 1. More specifically, the Council described the "background and need" for the legislation as follows:

> Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to 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. Such lawsuits, often referred to as strategic lawsuits against public participation – or SLAPPs – have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially (sic) amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Id.

The law provides that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Code § 16-5502(a). "If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the

[3] The Committee Report is available online at http://lims.dccouncil.us/Download/23048/B18-0893-CommitteeReport1.pdf (Jan. 10, 2020).

merits, in which case the motion shall be denied." D.C. Code § 16-5502(b). "When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." D.C. Code § 16-5502(c)(2). If it does not appear likely that targeted discovery will enable the plaintiff to defeat the motion and/or that discovery will be unduly burdensome, discovery proceedings on the claim shall be stayed until the motion is resolved. D.C. Code § 16-5502(c)(1). Moreover, the Act mandates that the "Court hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing." D.C. Code § 16-5502(d). "If the special motion to dismiss is granted, dismissal shall be with prejudice." *Id*.

The goal of the Anti-SLAPP provisions cited above is to ensure that "District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Comm. Rep. at 4. Similarly, the Act seeks to prevent "the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by [the] act." *Id*.

It is notable that the Committee Report prepared for the Anti-SLAPP Act emphasizes that the law was designed to follow the model set forth in a number of other jurisdictions, Committee Report at 1, and that the D.C. Court of Appeals often accords significant weight to such reports. *Boley v. Atl. Monthly Group*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013) (citations and internal quotations omitted). "Where appropriate, then, the Court will look to decisions from other jurisdictions (particularly those from California, which has a well-developed body of anti-

SLAPP jurisprudence) for guidance in predicting how the D.C. Court of Appeals would interpret its own anti-SLAPP law." *Id*.

I. The Anti-SLAPP Act and the Home Rule Act.

The Plaintiffs argue that the Anti-SLAPP Act exceeds the authority granted to the D.C. Council under the Home Rule Act and creates new procedures applicable to D.C. Courts without having followed appropriate procedures. Both issues are discussed sequentially below.

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise exclusive Legislation over the District of Columbia. *Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). In 1973, Congress delegated the bulk of this authority to the District through enactment of the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201 *et seq.*). The Home Rule Act reserves for Congress a layover period of thirty statutory days to review legislation enacted in the D.C. Council, and the legislation will become law if Congress does not pass a joint resolution disapproving the legislation within that time frame. *Bliley*, 23 F.3d at 508.

When it enacted the Home Rule Act, Congress intended, in relevant part, "to delegate certain legislative powers to the government of the District of Columbia; … grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a). In addition, Congress directed that "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the

states by the 10th section of the 1st article of the Constitution of the United States." D.C. Code § 1-203.02. However, that delegation of legislative authority is not without limitation.

The Home Rule Act specifies that the D.C. Council shall have no authority to enact any act, resolution, or rule related to the organization and jurisdiction of the District of Columbia courts as required under Title 11. D.C. Code § 1-206.02(a)(4). The legislative history of the HRA indicates that "the purpose of this [provision] was the very strong argument made by the court and supported by members of the bar . . . that the Reorganization Act had just gone into effect. Therefore, the *structure* of the courts should have an opportunity for that Reorganization Act to be completely carried out." Staff of House Committee on the District of Columbia, 93d Cong., 2d Sess., Home Rule for the District of Columbia, 1973-1974, 1081 (Comm. Print 1974) (emphasis added).

The D.C. Court of Appeals has construed D.C. Code § 1-206.02(a)(4) narrowly to mean that "the Council is precluded from amending Title 11 itself" but that the Council retains "broad legislative power" to implement the purpose of the Home Rule Act. *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 845 (D.C. 2019). Where a litigant challenges the validity of legislation under this provision, that party must demonstrate an actual conflict between the law and the terms of Title 11 governing the courts' jurisdiction and organization. *See Hessey v. Burden,* 584 A.2d 1, 7 (D.C. 1990) (the "test is whether local legislation attempts to confer jurisdiction that would conflict with the terms of title 11"). Otherwise, the limitation found in D.C. Code § 1-206.02(a)(4) does not restrict the authority of the D.C. Council to enact or to alter the substantive law applied in D.C. courts.

Moreover, the D.C. Court of Appeals has held that "the D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland*

Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment, 550 A.2d 331, 334 (D.C. 1988). Thus, statutes should be construed to avoid any doubt as to their validity "when it is not compelled by the language or the purpose of the statute." *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723-24 (D.C. 1995). The language or the purpose of the Anti-SLAPP provision does not compel a finding a violation of the Home Rule Act here.

The Anti-SLAPP Act does not alter the jurisdiction of the courts, or otherwise interfere with the court's structure or core functions contrary to the Home Rule Act. The legislative history of the Act explains that it was intended to create new "substantive rights." The D.C. Court of Appeals approved this position when it concluded that the Act created ***substantive rights*** designed to protect the targets of meritless lawsuits intended to restrict participation in issues of public concern. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (citations and internal quotations omitted) (emphasis added). Although the Plaintiffs focus on a letter from a former Attorney General for the District of Columbia opining that the legislation which became the Anti-SLAPP Act "may run afoul of section 602(a)(4)" of the Home Rule Act, that opinion preceded enactment of the final version of the statute, was based on a preliminary review of the initial bill and thus carries limited precedential weight in this conversation. Subsequently, the legislation was amended, the Mayor signed it, and Congress did not pass a joint resolution stating its disapproval prior to the legislation becoming law. Applying section 602(a)(4) of the Home Rule Act as Plaintiffs suggest, where the composition, structure and jurisdiction of the courts are not at issue, would take that provision beyond what Congress intended when it limited the legislative authority of the D.C. Council.[4] Therefore, the D.C. Anti-SLAPP Act does not contradict the terms of Title 11 in violation of the Home Rule Act.

[4] The D.C. Courts have routinely and consistently concluded that the HRA does not prevent the Council from changing the District's substantive law. *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016).

Plaintiff also invokes D.C. Code § 11-946 to challenge the legality of the Anti-SLAPP Act. This provision requires that "[t]he Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules." *Id*. [5]

However, aside from creating substantive rights in circumstances where the right of advocacy on issues of public interest is involved, the Anti-SLAPP Act does not amend or modify the Federal Rules of Civil Procedure. What it does is establish a framework to balance the competing interests of adversarial parties in a particular set of circumstances which is "not a redundant relative to the rules of civil procedure." *Competitive Enterprise Inst. v. Mann,* 150 A.3d 1213, 1238 (D.C. 2016). Even if there were a conflict between the Act and Superior Court rules, the Act would prevail since a rule "may not supercede an inconsistent provision of the District of Columbia Code." *Ford v. ChartOne, Inc.,* 834 A.2d 875, 879 (D.C. 2003). Thus, the Anti-SLAPP Act does not modify federal rules and does not create new procedures contrary to the directive found in D.C. Code § 11-946.

II. The Constitutionality of the Anti-SLAPP Act:

Plaintiffs contend that the Anti-SLAPP Act limits the content of speech and therefore is subject to strict scrutiny. However, the Supreme Court has not said "that strict scrutiny is called

[5] *See,* General Rules of the Family Division, Rules Governing Parentage and Support Proceedings, Rules Governing Domestic Relations Proceedings, Rules Governing Proceedings in the Domestic Violence Division, and Rules Governing Abuse and Neglect Proceedings for examples of rules where D.C. Court of Appeals approval is not required.

for whenever a fundamental right is at stake." *Heller v. District of Columbia,* 670 F.3d 1244, 1256 (D.C. Cir. 2011). In reality, the Anti-SLAPP Act does not on its face address or restrict the ability of a plaintiff to file a lawsuit. *Nat'l Ass'n for the Advancement of Multijurisdictional Practice v. Roberts,* 180 F. Supp. 3d 46, 53, (D.D.C. 2015). Thus, absent any precedential authority to the contrary, strict scrutiny does not apply to the Anti-SLAPP Act.

a. The Anti-SLAPP Act is not Unconstitutionally Overbroad

A statute will be found overbroad on its face only if "a substantial number of applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Sandvig v. Sessions,* 315 F. Supp. 3d 1, 28 (D.D.C. 2018) (quoting *United States v. Stevens,* 559 U.S. 460, 473 (2010)). In such circumstances, there must be a realistic danger that the statute itself will significantly compromise First Amendment protections for parties not before the Court for the statute to be facially challenged on over breadth grounds. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). "Broad, facial challenges to the constitutionality of a statute impose a heavy burden on the parties and rarely succeed. This is so because "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [a]ct would be valid,' *i.e*., that the law is unconstitutional in all of its applications." *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009) (citations omitted).

Here, the Plaintiffs claim that the Anti-SLAPP Act "impinges unconstitutionally on the rights of the plaintiffs to bring legitimate suits to redress wrongs to their reputations," but fail to identify any specific and potential applications of the Act that would render it unconstitutional. Pl. Mem. at 6. Yet, the D.C. Court of Appeals has determined that the Anti-SLAPP satisfies constitutional guidelines:

> The immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards. Thus, the special motion

> to dismiss in the Anti-SLAPP Act must be interpreted as a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial; it is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act.

Competitive Enter. Inst. v. Mann, 150 A.3d at 1213, 1239 (D.C. 2016).

Similarly, the California Supreme Court has found that a motion filed under that state's Anti-SLAPP law is not "a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances." *Equilon Enters. v. Consumer Cause, Inc.,* 52 P.2d 685, 693 (Cal. 2002). It emphasized that the remedy identified in California law "is not available where a probability exists that the plaintiff will prevail on the merits." *Id.* This position coincides with the D.C. Court of Appeals conclusion that dismissal under the D.C. Anti-SLAPP Act is only appropriate where a plaintiff cannot show "an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Mann,* 150 A.3d 1239, 1261-62. In essence, both the California Supreme Court and the D.C. Court of Appeals concur in the conclusion that dismissing a meritless claim does not violate the First Amendment.[6]

The Plaintiffs misconstrue the legislation in their argument that the Anti-SLAPP Act does not satisfy constitutional requirements. The Act specifically directs a court to determine, at an early stage, whether the plaintiff has legally valid claim. The Act distinguishes between meritless and meritorious claims, by allowing the plaintiff to overcome a prima facie showing of protected advocacy through showing that his or her claim is likely to succeed on the merits. As noted in *Mann*, this standard "achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent

[6] The Plaintiffs cite jurisprudence from Massachusetts and Illinois in their challenge to the D.C. Anti-SLAPP Act. Contrary to local legislation, the pertinent laws in those states did not provide plaintiffs with an opportunity to show the likelihood of success on the merits. *See, e.g., Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156, 165, (1998); *Sandholm v. Kuecker,* 962 N.E.2d 418, 431 (Ill. 2012).

with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Mann*, 150 A.3d at 1232-33.

The Plaintiffs have not met their burden of showing that the Anti-SLAPP Act is unconstitutionally overbroad on its face. The claim that the Anti-SLAPP Act impinges unconstitutionally on the rights of plaintiffs to bring legitimate lawsuits to redress real wrongs to their reputations, because it does not provide a mechanism for determining whether a suit is a strategic lawsuit against public participation (SLAPP) before applying its sanctions is without merit. The Act explicitly gives all plaintiffs the opportunity to demonstrate that their grievance is legitimate by making a preliminary showing regarding the merits of their defamation claims after providing for targeted, non-burdensome discovery where appropriate. In this litigation, the Plaintiffs received voluminous discovery under the limited discovery provision of the statute and will have an ample opportunity to advance the merit of their claims within the framework established under the Anti-SLAPP Act.

b. The Anti-SLAPP Act does not Infringe on the First Amendment's Right to Petition

The First Amendment's Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I. The right to petition extends to all departments of the Government and the right of access to the courts is but one aspect of the right of petition. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). "[T]he First Amendment does not provide plaintiffs with the right to receive a government response to or official consideration of their petitions." *We the People Found, Inc. v. United States*, 485 F.3d 140, 142 (D.C. Cir. 2007). Additionally, the First Amendment Right to Petition does not immunize litigants from pursuing baseless litigation. *In re Yelverton*, 105 A.3d 413, 421 (D.C. 2014). In fact, "First Amendment rights may not be used as the means or

the pretext for achieving 'substantive evils' which the legislature has the power to control." *Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1133 (D.C. 2012).

When "a person petitions the government" in good faith, "the First Amendment prohibits any sanction on that action." *Venetian Casino Resort, L.L.C. v. NLRB*, 793 F.3d 85, 89 (D.C. Cir. 2015). To clarify, the U.S. Supreme Court has differentiated "sanctions" imposed for First Amendment purposes from common litigation sanctions imposed by courts themselves -- such as those authorized under Rule 11 of the Federal Rules of Civil Procedure -- or provisions that merely authorize the imposition of attorney's fees on a losing plaintiff. *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002) ("nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves -- such as those authorized under Rule 11 of the Federal Rules of Civil Procedure -- or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.").

The Anti-SLAPP Act does not bar plaintiffs from bringing legal actions. It only requires that plaintiffs demonstrate that a claim is "likely to succeed on the merits" only after defendants make a prima facie showing that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). This burden-shifting scheme is designed to protect free speech only in situations where a court finds that a party is using litigation as a weapon to chill or silence expression. *See Doe v. Burke,* 133 A.3d 569, 571 (D.C. 2016) (citation omitted). Otherwise, the party seeking redress is free to proceed.

Federal courts have found that requiring plaintiffs to prove their cases early in the litigation process is not only *appropriate* to protect free speech but also that summary proceedings are *essential* in the First Amendment area. *See Farah v. Esquire Magazine,* 736

F.3d 528, 534 (D.D.C. 2013) (quoting *Wash. Post. Co. v. Keough,* 365 F.2d 965, 968 (D.C. Cir. 1966)) (summary proceedings are essential in First Amendment cases "because if a suit entails `long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails"); *see also Coles v. Washington Free Weekly,* 881 F. Supp. 26, 30 (D.D.C. 1995) (appropriate to scrutinize defamation lawsuits and determine whether dismissal is warranted at an early stage to avoid the threat of non-meritorious actions infringing on First Amendment rights).

The Anti-SLAPP Act does not limit the First Amendment right to petition the courts. The law does not, on its face, bar plaintiffs from bringing suit. As previously stated, the Anti-SLAPP Act was interpreted as a "tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to the First Amendment protections and of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial." *Mann*, 150 A.3d at 1239. *See also, Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015) (law that does not restrict ability to file a petition does not violate First Amendment right to petition). Therefore, Plaintiffs' facial and/or as-applied challenge to the Anti-SLAPP Act fails on these grounds as well. Indeed, Plaintiffs are not barred from bringing their claims and the burden-shifting requirements under the Anti-SLAPP Act do not violate their First Amendment Right to Petition.

Finally, the allowance for reimbursement of reasonable attorneys fees incurred when prosecuting a motion to dismiss under the Anti-SLAPP act does not produce an opposite result. As quoted above in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002), the award of

reasonable attorney's fees against a losing party is neither a "sanction" nor an impermissible award under the First Amendment.

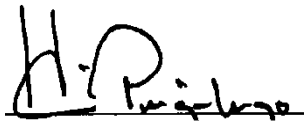
CONCLUSION

Based on the pleadings, the entire record herein, relevant law, and for the above reasons, it is this 23rd date of January, 2020, hereby:

ORDERED, that Plaintiffs' Opposed Motion to Declare the D.C. Anti-SLAPP Act Void and Unconstitutional is **DENIED**; it is further

ORDERED, that Plaintiffs and Defendants appear on February 21, 2020 at 2:00 p.m. for a hearing on the pending motions to dismiss under the D.C. Anti-SLAPP Act. Counsel for Intervenor, District of Columbia, is excused from further proceedings.

IT IS SO ORDERED.



Judge Hiram Puig-Lugo
Signed in Chambers

Copies via Casefile Xpress to all counsel of record.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, ET AL., Plaintiffs,	:	Docket Number: 2017 CAB 005989
vs.	:	
SIDLEY AUSTIN, LLP, ET AL., Defendants.	:	
	:	Friday, February 21, 2020
	:	Washington, D.C.

The above-entitled action came on for a hearing before the Honorable HIRAM E. PUIG-LUGO, Associate Judge, in Courtroom Number 302.

APPEARANCES:

On Behalf of the Plaintiff:

THOMAS A. CLARE, Esquire
JOHN B. WILLIAMS, Esquire
BONNY FORREST, Esquire
JOSEPH OLIVERI, Esquire
Washington, D.C.

On Behalf of Defendant American Psychological Association:

BARBARA S. WAHL, Esquire
Washington, D.C.

On Behalf of the Sibling Defendants:

THOMAS G. HENTOFF, Esquire
Washington, D.C.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, calling number six on the calendar, 2017 CA 5989, Stephen Behnke, et al versus Sidley Austin, LLP, et al. Parties please step forward and identify yourself for the record.

MR. HENTOFF: Good morning, Your Honor. This is Thomas Hentoff for the Sibley defendants.

THE COURT: Mr. Hentoff.

MS. FORREST: Good morning, Your Honor. Bonny Forrest for the plaintiffs, Tom Clare for the plaintiffs, Joel Oliveri for the plaintiffs, and John Williams for the plaintiffs.

THE COURT: Okay, good morning.

MS. WAHL: Good morning, Your Honor. Barbara Wahl on behalf of the American Psychological Association. With me is the general counsel Deanne Ottaviano.

THE COURT: Okay, thank you very much. Please have a seat. Let's start out by placing on the record the reason that we are here.

On April -- I'm sorry. On August the 28th, 2017, the plaintiffs filed a complaint against defendants, American Psychological Association, Sidley Austin, LLP, Sidley Austin, D.C. LLP and David Hoffman, Esquire.

They raised concerns regarding defamation per

se, defamation by implication and false light invasion of privacy.

On October 13th, 2017, the defendant, American Psychological Association and defendant Sidley Austin, LLP, Sidley Austin D.C. LLP and David Hoffman, Esquire filed separate contested special motions to dismiss under the D.C. Anti-Slap Act.

Now, at the time there were related cases in the Ohio court system and in the Massachusetts court system. So, at some point subsequent to the filing of the motions to dismiss under the Anti-Slap Act, a stay was granted, and we waited for matters to continue in the other jurisdictions. Eventually the stay was lifted.

There was some discovery provided. On February the 4th, 2019, the plaintiffs filed a supplemental complaint adding an additional claim of defamation per se. That supplemental complaint resulted in a second set of motions to dismiss under the D.C. Anti-Slap Act. Both motions, one on behalf of each set of defendants were filed on March the 21st, 2019.

Now, the plaintiffs filed two opposition motions, one to each set of special, contested special motions to dismiss under the D.C. Anti-Slap Act.

Counsel for the plaintiff attempted to file both of them on November the 15th. One was accepted, the

other was not. So, interestingly the consolidated opposition to the second set was filed on November 15th, 2019, and a consolidated opposition to the first set was filed, technically, three days later on November the 18th.

On December the 13th each defendant, and by each I mean the American Psychological Association and separately Sidley Austin, LLP, Sidley Austin D.C. LLP and David Hoffman, Esquire filed replies to a different oppositions that were filed against both sets of contested special motions to dismiss under the Anti-Slap litigation. I'm sorry, under the Anti-Slap Act.

Now, I have all your pleadings with me. It is the defendants who started the Anti-Slap portion of this litigation with their respective filings. So, Mr. -- let's do it alphabetically since they were both filed in the same day. Ms. Wahl, anything you'd like to add to the APA's motions to dismiss under the D.C. Anti-Slap Act?

MS. WAHL: Your Honor, our papers I think are rather full and you've been able to get through them we appreciate that and the only thing I would add for purposes of oral argument is to emphasize certain points, or answer any questions that the Court has.

THE COURT: What points would you like to

emphasize?

MS. WAHL: With regard to the original complaint, I'll start there. It is the APA's position, for the reasons stated in our papers collectively because we've relied on the papers filed by the Sidley defendants as well that the defendants -- sorry, excuse me -- the plaintiffs are public officials, and that an actual malice standard is appropriate here, and that basically all APA did here was to hire an excellent law firm and for a specific project, an independent review. The Sidley team was headed up by a lawyer of excellent repute. Not even the plaintiffs have criticized APA for hiring Sidley and hiring Mr. Hoffman.

And then APA was entitled, and still is entitled to rely on the results of that report, which as the briefing has indicated was extensive, and I know that the Court has read in the, every brief we filed how extensive it is. I will not belabor that.

The retainer agreement was very specific. It said that Sidley essentially had carte blanche to go anywhere it wanted, to be fully independent, go wherever the evidence led, and that the report was going to be made public, and Sidley's assignment was very specific. It was to conduct an independent review relating to allegations that following the attacks of September 11,

2001, the APA colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad. Obviously, the focus here was on APA, the client.

The standard that the defendants, or I should say the plaintiffs have to meet the actual malice standard is a very difficult one, and they have to prove, obviously, pursuant to well established Supreme Court precedent that at the time of the publication of the report APA entertained subjective doubts as to the truth of specific statements in the 542 page report. It can't be that Sidley had doubts. It has to be that APA did.

The plaintiffs will show this by clear and convincing evidence and that evidence must be admissible, and it must be proved specifically as to APA. St. Amant is instructive on this point because recognizing that that is a very difficult standard for plaintiff to meet, the Court has nonetheless said there are three circumstances where a plaintiff can make that showing. One if the statement is fabricated, two if it's the product of the defendant's imagination, or three if it's based wholly on an unverified source. None of those circumstances are present here, and the plaintiffs have alleged none of those circumstances.

Instead what they have attempted to do is to

cobble together specific circumstances that the courts have uniformly said do not constitute actual malice when viewed independently, and instead what they have said is, well, let's try to aggregate each of these independent instances and see if the sum can be greater than the individual parts, and just by way of brief introduction those are the following circumstances, all of which have been rejected as circumstances that show actual malice by either the D.C. courts or related courts.

Departure from professional standards, ill motive, mistake, misinterpretation, failure to check files, collateral evidence pertaining to another plaintiff, or another person, and the fact that the evidence is not mutually exclusive. In other words, it has to be, the statement has to be clearly mutually exclusive to the truth. If they could be consistent that's not good enough.

So, the plaintiffs here have attempted to cobble these together and gone through each of these non-actual malice factors and tried to make a case against APA.

So, the first, the preconceived narrative, they don't even allege that as against APA. That's actually a Sidley matter.

Animus or motive, they have alleged in the

complaint that APA was trying to blame a small group of psychologists to deflect blame from the bigger group. Specifically they cite to two radio interviews given by Dr. Nadine Kaslow who was the chair of the special committee, and they say, see, she made these comments about how it was a small group, a small underbelly. If the Court listens to those interviews you will see that the plaintiffs have actually mischaracterized Ms., Dr. Kaslow's comments.

What she said, very clearly, is that the report finds that there is a small group at issue here. That was not her own opinion, and that is not enough for action of malice.

They also criticized the AP Board, APA Board for meeting with two of the critics of the plaintiffs, allegedly of the plaintiffs, right after the report was first published, and they say that that is, was somehow improper. What they fail to note, but the report makes clear is that these critics were also critics of the APA itself, and Dr. Susan McDaniel, who was the president elect of APA at the time has stated, and this is in the record, that the reason why we met with them was because we had been criticized for not paying enough attention to the critics, and this was our effort to hear them out, and to heal the organization. That too does not

constitute actual malice.

The plaintiffs have alleged that APA departed from professional standards. Are rather oblique about this, but they seem to indicate there was some sort of conflict of interest because the special committee members had also participated in activities that were addressed in the report. They don't cite why that is a conflict of interest, and we don't believe that it is.

I note that they also have indicated elsewhere in their brief that because of those special committee's members earlier participation in APA activities, that that should have given them knowledge that the report was false. So, they can't have it both ways. You can't allege that it was wrong to do it, and then also allege, oh, but we rely on it, and we're glad that you were there.

They fault APA for failing to consult with the plaintiffs before publication. There is no obligation to do so. The Cecord v. Cochran (phonetic sp.) case, D.C. 1990 case makes that very clear and in fact Sidley and Mr. Hentoff I'm sure will address this, did in fact consult with the plaintiffs extensively before publication.

They also criticize APA for rushing to publish the Talovarious (phonetic sp.) case makes clear that that

is not a factor for ill will. They also criticize APA for failing to advise that Sidley had expanded the scope of the investigation, but as the Sidley retainer agreement stated, Sidley would go anywhere. It was supposed to follow the evidence where it led. There was --

THE COURT: Failure to advise who?

MS. WAHL: Unclear. Apparently the plaintiffs, but they haven't made that clear because part of their briefing, Your Honor, has to do with matters pertaining to Dr. Newman and Dr. Behnke who are no longer plaintiffs in this case. In fact, when we get to that section pertaining to their complaints of mishandling of the ethics process within APA, it's entirely focused on Dr. Behnke, which has nothing to do with these plaintiffs.

They -- so, they complain about effectively, Mission Creep as I'll call it, but there was no Mission Creep because it was open season everywhere pertaining to this.

They have criticized APA for its refusal to retract the report, or to make corrections that they thought ought to be made. In fact, APA, there was an errata sheet that was issued, and there was a second report that was issued, and there were corrections that were made. The fact that the plaintiffs were not

satisfied with those corrections does not constitute actual malice.

And last but not least they accuse APA of purposeful avoidance of the truth. That is clearly not the case. APA, after publication, opened up its website to any critical comments, responses, commentary that anybody wanted to make. In fact, there were two separate places where you could do that. One was for individuals who were mentioned in the report. Another was for any member of the public who wanted to comment and they did. As the defendants themselves posted commentary and their own division, the Division 19, the Society for Military Psychologists published an extensive report, which is actually on the APA website responding to the Sidley report.

THE COURT: The plaintiffs responded?

MS. WAHL: The plaintiffs --

THE COURT: Okay.

MS. WAHL: -- themselves did respond. Yes, Your Honor. They did by posting commentary on the website and then they did also through their own division.

None of these criticisms, none of these circumstances, individually or in the aggregate, support a finding of actual malice. Simply insufficient.

The plaintiffs have organized their commentary, their criticisms of the report itself into three big picture items, and these have been referred to in all of the parties briefing just by shorthand and reference. The first has to do with the Pens Task Force Report. They contend that the report's conclusion that there was collusion between the APA and certain Department of Defense officers to create high level guidelines that would permit the military to do what it wanted to do in terms of interrogations was false.

The second category is that in the period 2006 to 2009 the effort, the report found that there were efforts to delay or prevent the passage of various APA polices that would have precluded psychologists from participating in interrogations of detainees.

And the third big picture is the mishandling of ethics complaints. As eluded to a moment ago the third category we can get rid of right here because the mishandling of ethics complaints was focused entirely on an ethics issue involving a Lieutenant Lesso (phonetic sp.), and all, all of the arguments made by the plaintiffs about that third conclusion are focused on that these plaintiffs had nothing to do with that. They were not employees of the APA, they were not even involved, according to the report, and in the Lesso

investigation, and there is nothing indicating their involvement. So, that should be right off the table.

With regard to conclusions one and two, the plaintiffs have tried valiantly but unsuccessfully to thread the needle about how to make an argument. Of course, their task is to demonstrate that APA, and that would be the APA board in 2015, that made the decision to issue the report, publish the report, that at the time they did so they subjectively had serious doubt as to the truth of matters, specific matters in the report.

So, the way the plaintiffs try to prove this is a sort of guilt by association, and we submit to you, Your Honor, that they fall very far short from proving anything whatsoever.

What they do, and this is what they have shown on their Exhibit B to their opposition to the Anti-Slap motion, this is the first complaint, they take members of the 2015 board and they make an assumption that these individuals read the report, understood what the 542 page report said, and that they voted in favor of this release. There is nothing in the record that demonstrates any of those three points.

Then they go to the next aliup (phonetic sp.) position, which is that they then take some of those board members and they say, well, you were on APA

committees that had to do with some of the issues that are discussed in the report, and there are a number of these. The 2005 PENS report, the 2007 resolution, the 2007 Ray Affirmation Resolution, the 2007 resolution, the 2009 petition resolution, and a proposal by a member driven task force. What they say is because you served on committees that had something to do with these proposals, we're going to make the assumption that you knew that there was something going on related to that, that is not true in the report.

How this all is supposed to tie in they don't explain, and there's a problem. They can't demonstrate that any individual who served on the 2015 board, and who also served on a committee, perhaps in 2006, that their, they participated in whatever was being discussed, that they voted in favor of it, that they understood nine years later that there was a mutually exclusive position taken by that committee in 2006, and some statement in the extensive report. There is no proof there.

And then last but not least, they try to identify a statement in the report that the claim is mutually exclusive, and I have spent a lot of time focusing on that, Your Honor, and so does our brief. There is nothing that is mutually exclusive. There is simply nothing. None of this works. It falls apart at

each step, step.

The plaintiffs have not been able to adduce admissible evidence to demonstrate that APA subjectively understood that there was anything false about the report when they published it.

So, in sum, they, APA hired a law firm of good repute headed by a lawyer whose credentials are impeccable and they were entitled to entrust the mission that they tasked the law firm with to handle, and they did. The factors that the plaintiffs have attempted to aggregate don't add up.

I suppose last but not least I do want to say one thing about the board. They have taken the position that one board, the 2005 board, that one board member's knowledge of falsity is imputed to the entire board, and they cite a D.C. statute for that position, and they actually miscite the statute.

There is nothing that says that one board member's knowledge actually is imputed to everybody else on the board and there is no case law that they have provided that would say that. Instead the statute that they have cited, which D.C. Code Section 29-406.30 says that,

> "A director shall disclose information if he or she believes it's material to the

discharge of their decision making, and other board members can rely on that."

But they haven't made the case here that anything qualifies, or that anybody on the 2015 board knew or understood there were any falsehoods. These juxta positions, you were on a committee, maybe you knew, maybe you understand, don't equal actual malice.

And I can go on to re-publication if the Court would like, or we can allow others to speak as you prefer.

THE COURT: I defer to you, but I appreciate that if you have any arguments to make, you make them all at one time before I hear from anybody else.

MS. WAHL: So, I'll go briefly on to re-publication.

This is the addition to the supplemental complaint. There was a new, new count 11 in which the plaintiffs contended that changes to the APA website constituted re-publication of the report.

Just so the record is clear on this and I believe it is but I'm going to -- you asked me what I wanted to emphasize, and this is what I'd like to emphasize. There were no changes to the report. It stayed substantively content-wise exactly the same. There were no additions or subtractions. It's URL did

not change. It stayed on the website.

It's landing page was deleted but the content of the report itself remained the same. No new audience was sought for the report. It was still available to the public just as it had been. There was no act by APA, which is one of the two critical pieces for re-publication by which the audience was expanded.

The other activities that, or I should say the other additions to the website -- sorry -- to the timeline. So, just to back up a minute. These materials are all found by links on a timeline on the APA website. The documents themselves are not posted on the APA website. They are all paper links.

After 2000 -- August 2018, as a result of this motion, which I'll talk about in a moment, they following or added to the timeline. These were all links. A letter from prior ethics chairs that was critical of the report. A letter from prior APA presidents that was critical of the report. A report from Division 19, that is the Society of Military Psychologists, critical of the report. A notation, just a statement, not a hyper-link, that five members of, the five plaintiffs had filed the instant lawsuit.

Five plaintiffs filed a lawsuit against the association rising out of the publication of the

independent review. The semiquinone of re-publication is the two factors, that there be a change in content and that a new audience was sought. Neither thing happened here. In fact, one could argue that the opposite was the case. By removing the landing page that might be viewed as restricting the readership, and certainly the materials that are critical of the report do not add and emphasize the report itself.

And under the case law even they had, even if they make reference to the report, that is insufficient for re-publication. Our briefs document the many, many cases that state that just simply referring to a document is insufficient for re-publication.

The plaintiffs also allege that a memorandum, actually it was just a, an e-mail from the general counsel to the counsels list serve letting them know about the passage of this motion and the changes to the website, and gave a link to the timeline, not to the report, that that somehow is re-publication. It is not. Again, just referring not even to the documents, just to the timeline.

And last but not least the posting of the counsel minutes where this motion was passed, on the APA website, which they always do, this is routine practice, that again references only the changes and does not

constitute re-publication.

It is noteworthy, we believe, as to how this, how these changes came about. Supporters of the plaintiffs had brought a motion seeking to have the report removed in its entirety from the APA website. Again, I should be specific. The report is not on the website. It's a link. They wanted the link to be removed.

There was an amendment proposed to that motion, and the amendment suggested the modifications that I have just described to you. That amendment passed, and that is how these changes came to be. The, there were no modifications to the report, no audience that expanded the viewership of these materials.

Plaintiffs have cited a few cases where re-publication has occurred, but these -- the Aramo (phonetic sp.) case for example, the Larue (phonetic sp.) case, these are cases where there weren't additions, modifications, and new material added to the allegedly defamatory statements. That is not what we have here.

So, it's our position that there is no re-publication, and count 11, and actually everything, all of the additional material added to the supplement complaint should be dismissed pursuant to the special motion.

THE COURT: Thank you, Ms. Wahl.

MS. WAHL: Thank you, Your Honor.

THE COURT: Mr. Hentoff, anything you'd like to add to your written submission?

MR. HENTOFF: Yes, Your Honor. Thank you. Will we have an opportunity to respond to plaintiffs arguments?

THE COURT: Yes, sir.

MR. HENTOFF: All right, thank you. I just want to start with a couple of points of clarification. So, with regard to the actual malice standard, the issue for the Court to consider is what was the defendant's state of mind at the time of publication.

So, in this case, for Sidley, the last publication for which Sidley was responsible was the revised report with the eratta sheet on September the 4th, 2015, and that's the report that we have provided to the Court as an exhibit, and Ms. Wahl referred to that as a second report was issued. I just want to make sure it's clear that there was an eratta sheet, and changes made pursuant to the eratta sheet, and that's the revised report that we presented to the Court as an exhibit.

Also, with regard to the three primary allegations that the plaintiffs briefing talks about, and the third one being what Sidley found with regard to

ethics adjudications. At least with regard to the briefing involving Sidley, plaintiffs did complaint about additional adjudications beyond the Lesso adjudication. One of the adjudications they complained about was the adjudication as it related to plaintiff James, and we talk about all of that fully in our reply brief, and I, and I am satisfied with the arguments that we made and presented in our reply brief.

So, so, beyond that I would like to talk about the big picture a little bit, and answer any questions the Court may have, but I'll defer to the Court on what's the best use of time here.

THE COURT: I don't have any questions at this point. I'm just giving you a chance to supplement your submissions.

MR. HENTOFF: Well, a couple of things then. So, as the Court can tell from all the written submissions there are a number of issues that these two motions raise for the Court to decide. They include, does the, does the D.C. Anti-Slap Act protect the Sidley report.

Let me just back up for a second, of course. Under the D.C. Anti-Slap Act the defendants have to make the threshold showing that their speech is protected by the act, and then once they've done that the burden

shifts to the plaintiffs to show that they can show a likelihood of success, which as the Court knows the D.C. Court of Appeals in Mann (phonetic sp.) says, that effectively a summary judgment standard, and that the summary judgment standard applying the applicable evidentiary burden.

Our motion, our original motion is based on the plaintiffs inability to establish actual malice, which they have to do, by clear and convincing evidence, which is a very high evidentiary burden.

So, the issues that are raised by the motion, and which we have fully briefed are, does the act protect the speech, are plaintiffs public officials subject to the actual malice standard, have plaintiffs presented sufficient evidence of direct or circumstantial actual malice in order to meet their burden, and then on the Count 11, have they shown that Sidley had any involvement in the APA website changes that could subject Sidley to any liability for publication or re-publication of the, in connection with the August 2018 website changes. And then finally, plaintiffs make a choice of law argument, and we set forth clearly in our reply brief why D.C. law should apply.

So, those are the issues, and I would just like to take moment to talk about the big picture.

The reason we're here is that in November 2014, APA faced a big controversy, and the controversy came about because a New York Times author published a book that accused psychologists and the APA of colluding with the Bush Administration, military CIA colluding to support enhanced interrogation techniques that amounted to torture. And APA decided they needed to have an independent party come in, do an independent investigation and report what happened, and APA committed, at that time, that they would make that report public, and in November of 2014 they hired Sidley and David Hoffman to conduct a definitive, independent and objective review of the allegations against APA and look at all relevant evidence.

Sidley conducted that review, reached the conclusions that we've been talking about in this case, and APA made good on its word and made the report public.

This is precisely the type of important speech on matters of the most significant public concern, that is the reason why the D.C. city council enacted the D.C. Anti-Slap Act to avoid chilling speech with litigation that lacks merit.

Even today the issue of psychologists participation in national security interrogations is all over the news. There was testimony in Guantanamo last

month by the psychologist James Mitchell.

So, we've shown in our papers that the defendants met their threshold burden of showing the protection of the Anti-Slap Act, and that then shifts the burden, burden to the plaintiff to establish, with regard to the main motion, that they can show that Sidley published false statements about the plaintiffs with actual malice, which means that Sidley knew statements about the plaintiffs were false, were highly aware that they were probably false, or made false statements about the plaintiffs with serious subjective doubts as to, as to falsity.

As we discuss in our briefs --

THE COURT: Is it serious subjective doubts or subjective doubts?

MR. HENTOFF: I believe it's serious subjective doubts, Your Honor, but I'll stand on our papers as to where I, where we wrote it.

As we have discussed, Sidley was brought in because it was independent. It worked eight months on this report. It reviewed tens of thousands of documents. Sidley interviewed 150 people, and I think most significantly, for all of plaintiffs arguments, Sidley conducted 50 follow-up interviews. This was not checking the box. And then Sidley provided the report to the APA

board of directors, the board made the report public, along with the report was over 540 pages, and it was provided to the public along with more than 7000 pages of supporting exhibits.

This is so far from all the case law that the plaintiffs have presented about circumstantial evidence of actual malice. What it's most like is the Tally case in the 10th Circuit, which his a case that came out in 2019 after our original brief were filed, and we talk about the Tally case in our reply brief.

There reporters for Sports Illustrated engaged in a much less extensive investigation than this, but a serious investigative report, and the 10th Circuit went over all the serious attempts that Sports Illustrated did to investigate, and I would they are sort of like a mini version of what Sidley here did, and the Court also went over various attempts to establish circumstantial evidence of actual malice and rejected them.

And, again, as far as the circumstantial evidence goes, as we show in our reply brief, every, every area of circumstantial evidence that plaintiffs allege is wrong in two respects. The first is, they get the law wrong about the weight that that kind of evidence gets on the way to establishing that they could show actual malice by clear and convincing evidence, and then

secondly when the facts are examined they fall apart.

And just to give one example, the plaintiffs alleged that, and we talk about this in our brief, but the plaintiffs alleged on page one that Sidley had a preconceived narrative. Number one the law says, merely setting forth with a preconceived narrative is not evidence of actual malice, but they can't even provide any evidence that Sidley did, did come into this with a preconceived narrative, and the evidence that plaintiffs provide on page on of their opposition is a quote of David Hoffman saying, we set out to make our case, and the plaintiff said, see, they didn't set out to find the truth, they set out to make their case.

Well, they linked to an exhibit, which was a newsletter from APA, which reported on David Hoffman's talk to the APA counsel in August of 2015, and we attached that exhibit again to our reply brief and we showed the plaintiffs had just baldly misquoted what Mr. Hoffman said. We actually said is we did our investigation. We reached our conclusions, and then when we set out to write it out, we set out to make the case that we found.

So, that's just one example of the plaintiffs factual allegations of actual malice, not, not withstanding scrutiny. We have more in our reply brief.

And I guess the final point that I would make is that plaintiffs also present what they call, so-called direct evidence of, of actual malice, and in all cases what they call direct evidence is, they allege that there is information that Sidley had, which contradicts statements that Sidley made in the report, and I have two things to say about that and then I'll be done.

Just give me one moment. Okay, so, the first is, as we presented in our briefing, merely having contradictory evidence, is not evidence that you made false statements about someone believing them to be false. Any complex investigation is going to come up with contradictory evidence.

It's probably why there is an investigation in the first place, and defendants are permitted to evaluate the contradictory information and make their judgments. So, I refer the Court to a case that we cite in our briefs, the D.C. Circuits Lorens v. Donnelly (phonetic sp.) at 350 F.3d 1272 at 1284, and the Court says, the mere proffering of purportedly credible evidence that contradicts the publisher's story is just not enough for that reason.

And then my final point is, just like with the circumstantial evidence of actual malice, this evidence of so-called direct, direct evidence of actual malice

just falls away when you look at it, and we present it in detail in our reply brief and I won't repeat it here, but in each case the plaintiffs say the report says something, and then we show in our reply brief that the report doesn't say what the plaintiff says it says, and therefore, all the evidence that they present as contradicting it doesn't, and therefore, doesn't even meet that first step of even showing that there is a contradiction, which as I've said it isn't enough.

So, unless the Court has any questions for me at this time I'm happy to let the plaintiffs go.

THE COURT: What's the outcome if the actual malice standard doesn't apply?

MR. HENTOFF: I apologize, Your Honor. I didn't hear you.

THE COURT: What is the outcome of your motion if the actual malice standard is not the correct one to apply?

MR. HENTOFF: Our motion is entirely based on the actual malice standard. We do not make a negligence argument.

THE COURT: And you're not going to make one.

MR. HENTOFF: The whole point of this quick look under the Anti-Slap Act, is to take a look as to whether the case has merit, and I don't think a

negligence case is an appropriate motion to bring on an Anti-Slap motion, but what I would say is, so that's the answer to your question.

And the law is very clear. I think that it's, I think the law couldn't be clearer that these three plaintiffs, all colonels in the military at the time, who talked about their significant responsibility with regard to detainee interrogation, and their work in drafting creating policies, they are quintessential public officials.

The plaintiffs make three arguments in this regard, or really they mostly make two. So, the first argument they make is time of publication. It's only relevant if you're a public figure at the time of publication.

We address that fully in our reply brief. The leading defamation treatise says, you know, it's, it's conceivable that there might be some, you know, passage of time in some strange circumstance in which too much time has passed, but that's not -- I'm not aware there was even a case that ever held it, and in here we're talking about what happened in the, in the, in the 2000's with APA, and all of the plaintiffs were colonels at the time in the military, and all the cases that actually have a holding as opposed to dictum say, you look at

their status at the time.

Secondly, the plaintiff said, well, we're not high enough. You have to be a really high official to be considered a public official, and the case law just doesn't say that.

The most important case is the Supreme Court case in Rosenblatt in 1966, and it basically says, if the nature of your responsibilities are such that they affect people, you qualify as a public official. And so, we present case law about all sorts of different types of government officials who qualify as government officials.

And, again, we've got people here who are, you know, managing, and supporting psychologists working with interrogations setting policies. These are people who are way above in terms of their responsibilities, any plaintiff who was ever successful in getting a finding that they were not a public official. And then plaintiffs also in passing say, well, we weren't speaking for the Department of Defense when we were involved in, in the PENS Task Force therefore we're not public officials.

But as we present in our reply brief, they talked about their work when they were involved in the APA, and Sidley talked about them talking about their work, and Sidley talked about their work, and the

plaintiffs alleged that they were defamed, that they were accused by Sidley of supporting abusive interrogations.

This report is not about their, is not about their life outside of their responsibilities as, as colonels in the military with responsibility for, you know, for psychologists supporting interrogations. That's what this report is about.

So, in every respect the plaintiffs are squarely qualified as public officials such that the actual malice standard applies.

THE COURT: Thank you, Mr. Hentoff. Ms. Forrest, anything you'd like to add to your written submissions? Okay, then I guess it's not going to be Ms. Forrest. You are Mr. Clare?

MR. CLARE: I'm Mr. Clare, yes. Yes, Your Honor, from the law firm Clare Locke, and it's --

THE COURT: Okay, Mr. Clare.

MR. CLARE: -- my first opportunity to appear before Your Honor. I appreciate the opportunity to speak very briefly. I'm going to turn it over to Ms. Forrest in just a moment, and she is going to walk through the evidence that supports --

THE COURT: Okay, just so we're clear, I'm giving you an opportunity to supplement. You're not going to reargue all of this because this has already

been examined, okay.

MR. CLARE: Of course not. Of course not.

THE COURT: All right, please proceed.

MR. CLARE: I think that some of the arguments that Your Honor has heard this morning, and in some of the defendants papers, there is a misapprehension of the applicable law to establish actual malice. And to establish actual malice, at this preliminary stage of the proceeding, actual malice, just like any other culpable state of mind in the law, can be proven a variety of different ways with competent evidence.

It is a demanding standard, but it is not prohibitively high, and it is especially not prohibitively high at this stage of the proceedings.

The key issue that has to be decided by the Court is whether at this preliminary stage the plaintiffs have proffered sufficient evidence of actual malice, and what types of evidence the Court is allowed to consider in that. As Mr. Hentoff said, we have offered both direct and circumstantial evidence of actual malice.

The role of the Court at this stage is vital. It is a summary judgment standard. The Mann case is very clear that this is not a, a tryer of fact role for the Court. It is, quote, it is not the Court's role at the preliminary stage of ruling on a special motion to

dismiss to decide the merits, close quote.

And so, the Court is not sitting as a trier of fact, but rather playing the gatekeeper role that the Court is familiar with on a summary judgment standard, is do we have enough where a reasonable juror, with all evidentiary inferences in our favor, could find actual malice, if that is the applicable culpable standard for the law.

And in the defamation arena the Supreme Court has recognized that it is especially challenging for a defamation plaintiff to establish actual malice because you're talking about the state of mind of a defendant, and no defendant says, yes, I harbored subjective doubts about this when I published this news article, or this report. No defendant will admit that I acted with reckless disregard of the truth.

And so, the courts, the Supreme Court says, plaintiffs, just like any other culpable state of mind in the law, are entitled to prove actual malice through the use of circumstantial evidence. That's the Herbert v. Lando case, 1979. A defendant cannot simply prevail by testifying that it acted in good faith, and you heard some argument this morning from Ms. Wahl about the St. Amant case, where she described the three factors that can, where actual malice can be found.

Those are absolutely a non-exclusive list of ways that actual malice can be found. Sure, fabrication can establish actual malice, if you have that evidentiary foundation, but what the courts have said in every single defamation case, starting with the Supreme Court after St. Amant, is that the court must take a holistic approach to evaluating the evidence, and that plaintiffs are entitled at every stage, to an aggregate consideration of that evidence in order to determine whether that burden is met.

Each individual piece cannot fairly be judged individually, and so, what you've heard this morning, and what you see in the defendants briefs, is an effort to try to take each one of these pieces of evidence and point to a case where it was found, standing alone, not to be sufficient evidence of actual malice, and in the very highly fact specific situations of those cases, that may or may not have been the right decision.

What we are saying, Your Honor, is that it is the aggregate consideration of all of the circumstantial evidence, with all of the inferences from that -- with any reasonable inference from that evidence being drawn in the plaintiffs favor, is more than enough to get over the hurdle of demonstrating, at this preliminary stage, actual malice.

And I would invite the Court's attention to the, again, the Herbert v. Lando case. It's a 1979 case decided 11 years after St. Amant, and the Supreme Court was very clear, in rejecting exactly this argument that you need to look with a, a very myopic focus on individual buckets of evidence. The Court said quote, any competent evidence, either direct or circumstantial can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, including prior or subsequent defamations, subsequent, meaning post publication statement of the defendant, post publication actions. So, even things that took place after the publication can be considered as whether it bears circumstantially on the defendant's state of mind.

Returning to the quote, circumstances indicating the existence of rivalry, ill will or hostility between the parties, and facts tending to show a reckless disregard of the plaintiffs rights. That's the Herbert v. Lando case.

And so, Mr. Hentoff and Ms. Wahl are correct in one very myopic sense of arguing to the Court that there are cases where the plaintiffs evidence was such where they said, yep, we have ill will, or bias, or malice, and that's our evidence of malice is they didn't like us when they published this article, and the Court has said,

under the very specific facts, that, yes, ill will and bias, standing alone, may not be sufficient of evidence of actual malice, but those cases do not stand for the proposition that that's not competent evidence, or in aggregate when considered with all of the other body of evidence, cannot establish actual malice.

So the analogy that I think is an apt one, is that it's like building a wall, it's a brick wall of actual malice or filling a cup with evidence of malice. The Court may say in one case, actual bias or ill will standing alone, that one brick, may not be enough to establish actual malice, but when you have that brick and you have purposeful avoidance of the truth, and you have evidence of a preconceived narrative, and you have the purposeful avoidance of information that contradicts that preconceived story line that each of those bricks when assembled, are high enough to demonstrate that you've met your threshold showing of actual malice, and that's exactly the circumstance that we found ourselves here today.

The types of circumstantial evidence that Courts have said can be considered are effectively the six buckets. A preconceived narrative or a plan to meline the defendants. The jury could find, a reasonable juror could find that if you set out to find a certain

fact or a certain conclusion, that's confirmation bias has infected the investigation. If you're able to demonstrate that with reasonable inferences from the evidence, an investigator -- it applies equally if it's a reporter or an investigator -- it says this is the thesis of my article.

THE COURT: Let me ask you something. So from your perspective, does that mean that if I'm conducting an investigation and I interview 100 people, 95 of those say A, five of those say B, and I concluded that A happened, I'm liable for liable because the other five said B and I didn't credit those five?

MR. CLARE: That is one element that if the five people that provided a contrary view were not appropriately considered, were not factored into the --

THE COURT: I considered them, I just didn't believe what they had to say. I conclude along the lines of what the other 95 told me, or the opposite way. I interview 100 people, 5 of them I deemed credible, the other 95 I couldn't credit them as far as I could toss them, and I write a report agreeing with the five that I found credible. Would I be liable for liable?

MR. CLARE: It's not a mathematical exercise.

THE COURT: I know, but I'm asking you to answer my question.

MR. CLARE: So under the facts, either of the scenarios that Your Honor has put forward, under either of them, if there has been a purposeful avoidance of the minority view or the majority view even, where it says this does not fit.

THE COURT: But is the purposeful avoidance the same thing as not crediting?

MR. CLARE: No, it's not, it's not. Purposeful avoidance means not giving the same weight to evidence that doesn't support the thesis. So for example --

THE COURT: If I don't credit it, what weight do I give it? You give it a weight based on how credible you find it to be.

MR. CLARE: It's a fact specific question. I don't mean to dodge the question.

THE COURT: So am I liable for liable?

MR. CLARE: You could be liable for liable if under that fact, the reason for your not crediting the evidence that doesn't fit, if the reason you're not providing the credit is one that is supported by other facts and other information, and is a reasonable judgment to make, then perhaps that cuts against the actual finding of malice. However, if your reason for not crediting the contrary viewpoint has more to do with the objective that you set out to achieve, or other reasons,

or a method of logical failure in the way that you've chosen to do your investigation, under those facts, it could very well be a purposeful avoidance of the truth. This dialog that we're having, I think is very instructive because it is -- jurors are allowed to, it's the province of the jury in order to make those sorts of fact specific inquiries. Under the particular facts, whether the decision not to credit the minority view or the majority view, that was difference from what you concluded --

THE COURT: Right, but at this stage, the inquiry that I have to make relates to as a matter of law, not in terms of credibility determinations, correct?

MR. CLARE: That's correct, and as a matter of law, what you would have to determine is that in the aggregate of all of the circumstantial evidence, no reasonable juror could conclude that there is actual malice, given all of these things. And so you don't just look at purposeful avoidance in a vacuum, you look at all of the other factors and say, could a juror conclude reasonably that they had reckless disregard for the truth. So a juror may not be persuaded by the preconceived narrative aspect of it, but you say no, I do think that they started with a confirmation bias in the way that they approached this. Then you look at their

failure to retract, and you look at some of the other factors that are considered by the Court, and a juror could say in the aggregate, these factors lead me to believe that they have reckless disregard for the truth, in an objective way. And this is way there really isn't anything magic about this actual knowledge standard, just like an intent case, a battery case, where you're proving the intent of the defendant through his or her circumstantial actions before, during and after the actual event.

So a juror could conclude, based on the aggregate of evidence that we've assembled, that they acted with actual malice, and you can't just isolate these particular factors. For example, the affidavits and other materials, Ms. Forrest will get into this in much more detail, but where people said who were being interviewed, I told the investigators point X, point Y, point Z, and that information doesn't even make its way into the investigative file. It doesn't make its way into the interview notes, it is being rejected --

THE COURT: Isn't it the province of an investigator to determine what they're going to include in a report after they've conducted an investigation, and not have to say each and every nuance that comes up during the course of an investigation involving 200

interviews and hundreds of pages of documents?

MR. CLARE: Certainly, but of course they're under no obligation to report an encyclopedia recitation of all of them, but when things that are said by witnesses and who are being interviewed, do not even make their way into interview notes, for example, where that perspective was not considered, or not reflected even in the deliberation process that you've described, or deciding the weak and the trap. A juror could conclude from that and say, yeah, we have witnesses that said, we told investigators all of these things, and there was no follow-up on that particular point, or it wasn't considered, or it wasn't even considered and then rejected in a summary way, and that's the evidence that we have here.

A juror could move from that, combined with all of the factors that actual malice is established. Deliberately avoiding sources or information that you know will run a contrary view, fits into that mold. You asked about crediting sources and so I want to be responsive to that. The Supreme Court has said repeatedly that in factoring in whether or not crediting a particular source is reasonable, or could be evidence of actual malice, is if there are reasons that doubt what those 95 people are saying that are known to the

investigators. If you have objective reasons where you should be questioning, is this the point of view that is being expressed reasonable, or is it not, that, that could be evidence of actual malice as well. And that's another way where if you're doubting, if you have reasons to doubt, but you don't doubt, that can persuade a juror that you have that confirmation virus.

Bias and ill will, obviously there are cases that say standing alone, that is not sufficient to demonstrate actual malice, and I agree with that, it isn't, but if there is evidence of bias in the process or a flawed investigative process where there's a methodological failure in the way that you go about doing it. That may be deliberate, it may be reckless, it may be negligence, but the point is, that it is a factual determination for a juror to make in deciding that, just as a juror would decide any other culpable state of mind.

The departure from accepted standards of professional conduct where for example, just taking it out of this context in a media setting, where a reporter does something that is gross violation of the journalistic standard in the way a reporter would do their job, that's evidence that a jury is entitled to consider. And so in this setting, when you've got improper investigation conduct, or conflicts of interest,

or things that are extreme departures from what you would establish, or what we could argue to be an extreme departure, a jury is entitled to consider that in reaching that evidence. So unless the Court has any other questions, I'm going to pass to Ms. Forrest who will address some of the evidence that fits those buckets.

THE COURT: Thank you, Mr. Clare.

MS. FORREST: Good morning, Your Honor, I'm going to try to just hit some of the highlights. I assume you've read the papers, obviously if you have any questions, or if I talk too fast, you'll stop me. We've never had a problem with stopping before.

THE COURT: It's a bad habit I have.

MS. FORREST: You engage, that's what I care more about. A couple of key issues at the beginning that I think are important. First of all, you heard Mr. Hentoff talk about CIA psychologists, very important here. Pages 9 through 12 focus on the key conclusions in this report, and page 9 --

THE COURT: Of which document?

MS. FORREST: Of the report, my apologies.

THE COURT: Report, okay.

MS. FORREST: Page 9, which we quote on page 26 of our opposition. Very particularly lay out what was

said, pages 9 through 12 says that APA and DOD colluded to allow policies to be put in place on behalf of the DOD that allowed for stress positions and sleep deprivation. I have pages 9 through 12 here if Your Honor would like a copy of those from the report, if you'd like to refer to them while I talk, if that's helpful.

THE COURT: No, that's okay.

MS. FORREST: Okay. The Sidley document actually says we don't quote directly from those language in their document, we do. We also quote from those statements in Exhibit A, and we give evidence with respect to each of the 219 statements that was in Sidley's and APA's possession at the time they made the statements, that showed they had evidence that was false. The key issue, Your Honor, in Mann for example, they have four Government reports that contradicted its conclusions. And at that point, the D. C. Court of Appeals says, you can make all these credibility or arguments about the report didn't say enough, or it didn't do this, or it didn't do that, which is essentially in their briefs, our position of what they're doing, that they are making credibility or factual arguments about the reports.

THE COURT: Just so we're clear, when you're talking about a statement, are you talking about the

summary of an interview, or are you talking about a specific assertion?

MS. FORREST: I'm talking about the 219 statements we're suing on in Exhibit A, Your Honor.

THE COURT: I understand that, but so these are individual specific assertions, because that's what I saw in your exhibit?

MS. FORREST: That's correct, Your Honor.

THE COURT: Okay, please proceed.

MS. FORREST: So start there. Secondly, another key point, the defendant's filed their motion for arbitration at the same time they filed their motion for Slap Statutes. If they wanted to make the argument that just didn't pertain to all the plaintiffs, they should have made it in their Slap motion, because in paragraph 6 of our complaint, we allege this is a joint venture and each of the plaintiffs was named as a key player in a joint venture. So for example, page 393 of the Hoffman Report says this wasn't just a partnership between banks and banking, no. This in fact was a partnership, a joint enterprise, page 393, between APA and the DOD, Your Honor.

THE COURT: I'm sorry, are Mr. Newman and Mr. Behnke still parties to this litigation?

MS. FORREST: They're not parties to the

litigation, but they are part of -- the reason it becomes relevant, is we've sued on the basis of the joint venture between the entities.

THE COURT: I understand that, I just --

MS. FORREST: And so APA is still party to the document.

THE COURT: I just don't see the relevance of the request to proceed without rotation against those two former plaintiffs to this conversation.

MS. FORREST: My point is that if they wanted to allege it was an other than concerning, they should have filed it in their original Slap motion, they didn't do that. They're trying to in this motion, say it's not oven concerning because it's about a certain plaintiff, and my point is, when you make one statement because it's about a joint enterprise or a joint venture, it's about all the plaintiffs, regardless of who they work for.

THE COURT: But there's a difference between what the report says and who are the parties to this litigation, right?

MS. FORREST: Right.

THE COURT: There's a whole bunch of people mentioned in that report who are not party to this litigation.

MS. FORREST: We've got five, well set aside

parties of litigation of where it started versus now, five of the twelve key players of the joint venture. I actually have an affidavit too from an additional member of the key players of the joint venture who have had conversations with APA and Mr. Hentoff over the last year or two years, about their statements to them about what the report said or did not say, including a few weeks ago after we filed our motion or our opposition. So go back to that a minute, but it's oven concerning because it's about the joint venture. Happy to list all of those references for you, it's about the entity and the partnership between the two entities, not just the individuals. You look puzzled, Your Honor.

THE COURT: You may continue.

MS. FORREST: Okay, thank you. Direct evidence, circumstantial evidence. Exhibit A we've talked about briefly. Exhibit B, Board members from APA, summary chart here, key minutes, documents that show people in attendance participated in the events which were summarized by Sidley. Number one, why weren't they recused? The recusal standard was, did you participate in any of the events. Part of our allegation is they weren't recused, so Doctor Caslow could blame a small under belly, to use her comments, were entitled to the inference that they were there, but I also have in Mr.

Cucher's affidavit, two things. One is not only were we all there, not only did we all understand this --

THE COURT: Have you provided opposing counsel with those affidavits?

MS. FORREST: I will do so shortly at the end of the hearing, Your Honor.

THE COURT: Why aren't you doing so now, how can I consider it when you haven't provided it to them prior to this argument?

MS. FORREST: I'm happy to do it when I get to that part of the argument, Your Honor, I brought copies.

THE COURT: I'm sorry, you're not going to blind-sight anybody here.

MS. FORREST: Not trying to blind-sight, Your Honor, it's a new argument that was admitted and so my understanding is, it was an evidentiary hearing and I've got copies for everybody, not blind-sighting anybody.

THE COURT: I believe you misunderstood. You may continue Ms. Forrest.

MS. FORREST: Okay. Senate Armed Services Committee Report, the Slushinger Report, the Martinez-Lopez Report, a book by Jack Goldsmith, former Assistant Attorney General, Office of Legal Counsel withdrew various memos. The Inspector General Report that Colonel Banks was part of, discussed in response to Hoffman, 13

Government reports all in Hoffman and APA's possession. It didn't just put the plaintiffs in a different light, they found no collusion. They found no reason, ethics complaints filed in Ohio, Guam, Louisiana, no reason to censor anybody, Your Honor. Omits key pieces of information. Withdrawal of Bush administration guidance defining torture. Got the timeline here, you've got not just one document. Sidley tries to portray that as one document in the Slushinger Report. Not only is it not one document, it's two years of history.

I lived in D. C. during 2005 when these events played out, this was on C-Span every day, they just omitted. Vice Admiral Church, Senator McCain, March 2005, policies in place that prohibited abuses, I'm very clear about that. 2014 APA statements about the timeline of the withdrawal. Committee on legal issues, a memorandum from Milstein which says critics have their timeline wrong. These policies were withdrawn. Internal documents also make reference to the Office of Professional Responsibility Report. That report, David Ogdon, who is at Wilmer, Hale, who is APA's previous lawyer, was over that report when he was at the Bush administration.

We're going to talk about this in a minute when I talk about retractions, but Mr. Ogden then admits to a

Board member, Mr. Anton, Doctor Anton, that in fact the policies that exited at the time didn't allow what Mr. Hoffman says they did. Interrogation, Standard Operating Procedures, four to Five times in place. I've got the policy here that they they're now playing with an Interrogation Policy, it wasn't. First of all, it wasn't existing which page 9 of the report says it was an existing.

It was a draft book chapter, it even refers to itself as a pamphlet. Happy to provide the Court with a copy, if you'd like to see it. It wasn't existing until 2006, it wasn't an interrogation policy, Your Honor, it's a training policy. How do you train psychologists who are doing national security work to do that work. Hans Lisner, five times, Larry James, Doctor James, who'd been sent to ALBI Grade, who in his book talks about policies he drafted and the specific policies that should be prohibited, the specific behaviors that should be prohibited, five times. Doctor James goes into the interview, picks up Ursula Teepee and Mr. Hoffman at the airport and says their policies are in place, this is all done, says that on the Pens Listener.

Mr. Hoffman quotes portions of that and then leaves out the exculpatory information. Key language, Penn Statement four, they say in their papers, no, that

only says follow the law. Look at statement four, what does statement four say? It says you will go follow the local policies, that's paraphrasing, they recently changed in Iraq, Afghanistan, and Guantanamo. You have a responsibility to know those and follow those, very important. Annotated Penn's Guidelines, Jean Reareo, tape from her time at Penn's, says they wanted a standard operating procedure. Remember, Colonel James goes to ALBI Grade, he says there's policies in place, those policies get incorporated in statement for appends. He picks LaTifi and Hoffman up at the airport, says there's policies in place. He's not the only one that say there's no evidence of anybody telling him.

Jennifer Bryson interview notes, interrogator at Guantanamo, this is all changed, this wasn't what was going on at that time. Paragraph six of her affidavit, paragraph six of Colonel James' affidavit, all evidence, he knew this, he excludes it intentionally. Statement two, Wolfe e-mails, Wolfe letter, this was all an open process. Everything was projected on the screens, no collusion, no backdoor meetings. You heard Mr. Hentoff disagree with Ms. Wahl's interpretation of what was actually discussed. The epic complains again about Colonel James. The epic complaints were supposedly decided or handled in a way that would not censor

National Security Psychologist. Lots of evidence that that's not what was decided or what was told to the APA Board. Doctor Caslow makes a statement, this was fully investigated. Jennifer Kelly, another Board member, fully investigated.

Those statements are still on the APA website. Exhibit B, we've talked about that briefly, but APA's responses fall into four general categories. Did not involve the plaintiffs, paragraph six, we've talked about that, evidence of a joint venture and joint enterprise. We're entitled to all reasonable inferences, they didn't move on that in their original motion that it wasn't concerning, and they could have. No proof a Board member was at the event, even if listed in the minutes as attending, were entitled to that reasonable inference. Again, it doesn't have to be the inference, Your Honor, it only needs to be a reasonable inference. You can't show any of them knew.

If you put out a statement about something being fully investigated, I can show that you knew, but if they were there and they put out different statements, and they were involved in it, it's a reasonable inference, Your Honor, to conclude that they understood what they were doing at the time. No proof that when they published, they realized or remembered that they

were involved. Again, all reasonable inferences in our favor. That's the direct evidence. Circumstantial evidence, 20 affidavits of 34. Sammons, Bow, Bryson, Callahan, Sorbonne, Deutch, Fine, Hensherf, Maderazo, Maderazo, II, because his son who is a lawyer was there as well during the interview. Shummy, Swenson, Headily, LaFever, Newman, Banks, James, Donovan and Behnke.

THE COURT: So 20 affidavits and five of those have been plaintiffs in this case.

MS. FORREST: Yes.

THE COURT: Okay, please proceed.

MS. FORREST: But not self-serving, Your Honor, there's a great new case out of California, it was just decided a few weeks ago that says when you have an affidavit on a Slap, you're entitled to all reasonable inferences. And even if it's a plaintiff, that overcomes a Slap motion. In that case, they had one. Let me talk a minute about purposeful avoidance. Great case, Jackson City v. Columbus, one of my favorite. In that case, they showed 946 pages of look at how thorough this is. There was a problem. They didn't ask the main witness whether he'd had a vasectomy, and the allegation in the report was that he impregnated somebody. So you can have all the interviews you want, you can introduce all the evidence you want.

THE COURT: I'm sorry I disrupted you, you were talking about the 20 affidavits?

MS. FORREST: Right, I'm now onto other affidavits about how thorough. So the 20 affidavits it about purposeful avoidance, and so Lieutenant Colonel Donovan, and we're going to get to people's ranks in a minute because they've still have them wrong today. Lieutenant Colonel Donovan, five times says I need clearance, I need you to give me the questions so I can talk about the policies. No, no, I'm not going to talk about that. Talks about an outdated policy in 2003 with her extensively though. We've provided those e-mails to the Court. Things that were omitted, purposeful avoidance, Your Honor, and it's ironic because Mr. Hoffman on page 67 of his report talks about a delivered avoidance or an Ostridge of instruction, because the goal was to take this joint enterprise, I think Your Honor's done work with the Hague with children's work. The Hague pioneered in Yugoslavia, the use of the Joint Enterprise concept and in crimes.

So that was the key, that was the goal, and in fact, James Risen had talked to people who were with the ICC, that was the goal to get this back to the ICC, or to get a civil complaint. That's what we allege was the reason for using those terms. Information omitted from

interviews, this isn't about trying to place you in a different light, it directly contradicts what he said. So we're entitled to an inference that you distorted or omitted the policy because you knew it was false. That's Mann, several times, and that's Nader v. D. Torodito. Both of those cases deal with Government reports where you cite portions of it and you omit others. The D. C. Court of Appeals says both times, you're entitled to the reasonable inference that you knew, and that's actual malice.

Omitted evidence, Banks, Bow, Sorbonne, Donovan, Fine, LeFever, Levant, Newman, Williams. Williams is particularly interesting, we got the interviews, you gave us 18 interview notes. Williams' interview notes, basically four sentences, Your Honor, half of that gets redacted as work product, the half that we see, page 294 on the report, let me double check that reference in a minute, my apologies, let me double check that. It cites the right date in the report. It says Colonel Williams, who was one of the first people into Iraq, they never asked Colonel Williams anything about the policies, number one, not in the interview. They say in the report, we wanted Colonel James because he'd been to ALBI Grade and helped clean things up.

It's not in the interview notes. Don't know

where that came from, that's actually helpful to us, but again, the interview notes don't even support what's said in the report at times. We've talked about the interview with Doctor Donovan, plaintiff Behnke says go interview Lieutenant General Eric Schoolmaker, he'll tell you he deployed us. Wanted to be able to get affidavits of all the military people, we're not allowed by DOD to do that. Bryson told him what the policies were. Lieutenant General Hood, Lieutenant General Abbasid, Dan Leven, Eric Schoolmaker, will all testify and add to what plaintiffs have briefed in terms of what the policies were, when they were, what the prohibited.

The key issue there, and Jennifer Bryson alludes to this in her, not alludes to it, she says in the affidavit, the key issue is, Your Honor, Geneva and the Uniform Code of Military Justice applied. The minute you apply those, sleep deprivation and stress positions go out the window. As of late 2003, that happened, and I can walk Your Honor through that timeline, but there were specifically prohibited by order in May of 2004 when it talked about retractions in the minutes, but the first thing I present to them, and David Ogdon, who again had reviewed all of this for the Obama administration, who used to be APA's lawyer, I go through all of that evidence and the various policies, it's all there. It

wasn't even a close call. It had been changed a year earlier. So they say no, it was just the Slushinger Report, one document. This was almost two years of documents that show the policies were withdrawn in their possession, in their possession.

THE COURT: Are you saying you're a witness in this case?

MS. FORREST: I'm sorry?

THE COURT: Are you saying that you're a witness in this case?

MS. FORREST: No, I'm not saying I'm the witness, but we're going to be retraction, what they had in their possession. Retraction under the restatement, failure to retract, is key evidence of actual malice. So at the point they're given various things along the way and they refuse to retract, that becomes an issue and I can point to documents about that. I'm not saying I'm a witness, but what I am saying is evidence in their possession along the way, the explanation about the policies has changed multiple times, and that I point to public documents, not to my testimony. David Ogdon, state to Barry Anton, yes the existing policies prohibited these things essentially. I'm paraphrasing. Plenty of external evidence, I don't have to testify to that.

Bias against them, Sidley had actually sued or gone after James Risen before because of the sources. Sidley had hoped to establish in the D. C. Circuit, the standards for getting witnesses and sources from a reporter. They knew James Risen was biased, they knew the critics were biased against our clients. APA Board members had refuted those allegations for years. Again, we don't think it has to be just B inference, it's an inference, we believe that most of this, especially with the APA brief, are all factual issues. Happy to move briefly to the first prong of the Anti-Slap and public official.

THE COURT: Okay.

MS. FORREST: Which one would you like to hear first?

THE COURT: You may decide where you want to go..

MS. FORREST: Okay, page 6, first motion of Sidley. Sidley is the only one to deal with the public official argument. Page 6, page 12, 13 of the original motion, Your Honor. They say that all these folks were lieutenant colonels. We go into mediation, they find out that's wrong, so here in their papers, they say we concede that everybody is a colonel. That's not accurate either. Their own report details in several places,

Doctor Donovan was a lieutenant colonel. Each of them were consultants to commanders at the time. They were put on special assignment by various people. I'm going to leave you to the briefs on the temporal element. The key issue, even in Rosenblatt v. Bear, is whether they had substantial responsibility. So Sidley concedes for us that in fact, they have the burden. What evidence have they introduced? Turn to portions of the complaint, paragraphs 39, 41, 42, they ran reference page 36. Paragraphs 122, 123, and I have copies of these, Your Honor, if you'd like to see them while I'm talking.

THE COURT: I have everything.

MS. FORREST: 124, 125, 126, 127, 128, 129 and 190. They omit two key paragraphs, 221 and 222. All of those, and I'd like to read those for the Court. All of the military plaintiffs were mid-level DOD personnel with no ability to commit the DOD to policy positions, to speak for it, or to give pre-clearance on its behalf. Banks, the senior leader to whom Hoffman refers, could have easily been accurately described as an informal liaison between the APA and one of its important constituents military psychologists. He could not speak for the constituency of course, without taking into account military protocols and preferences. We also cite to Lieutenant General Kiley and former Army Sargent

General Eric Schoolmaker, each of whom will testify that they had no ability to make policy. Saying somebody took a policy that a General made and wrote what we call a SOP or Standing Operating Procedure, doesn't mean you created policy in the vein of Rosenblatt v. Bear. Every case Sidley cites, the person involved had greater substantial policy making decisions, so they set the policy and the reason they have to decide, they're subject to actual malice, is because they assume the risk when you're that high that people are going to talk about your position. Our folks didn't make policy, they were sent by the Government to clean things up after the policies were changed. Let me move briefly then to the first prong, the Anti-Slap unless Your Honor has any additional questions on my matter.

THE COURT: Proceed.

MS. FORREST: I am prepared to argue, Your Honor, and I would refer you, you asked Mr. Hentoff if he was prepared to argue the negligence issue. I would refer the Court to Pierce v. E. F. Hutton, 664 F.Supp. 1490, Your Honor, and my apologies, that was reversed later on in an arbitration issue, not on this issue. That report quotes Rodney Smallness, law of defamation, Treaties 3.283, Your Honor, is the reference. It gives eight criteria in an independent investigation of which

would constitute actual malice. Failure to pursue an investigation, I believe we've made that in our papers. Unreasonable reliance on sources, certainly the Government's created that in the papers. Unreasonable formulation of conclusions, inferences or interpretation, why were you using criminal language when you tell your client about that interview of and Nadine Caslow. He found no criminal activity, but we're still talking about referring it to the FBI. Misuse of legal terminology, Joint Enterprise was not appropriate, no collusion, he admits that in an interview after the fact that he found no collusion.

It would have been better to use words like secret collaboration. Mechanical or typographical errors, I can list those. Unreasonable screening or checking procedures, once you investigate, and you find evidence that creates an issue, you have a duty to investigate, that's clear. Houlihan, we cite that in our papers. Failure to follow established internal practices and policies, we've shown that even by his own partner's standards, this is a problem. I'm going to move to first prong, and I've got copies of this if it's helpful, but you don't seem in the mood for exhibits, so I'll hold.

THE COURT: I have everything that you filed.

MS. FORREST: Yes, it's filed, but I thought it

might be helpful while I'm making the argument to be able to look at it. So these are the various 13 counts. With their filing of the supplemental motion, they concede it's a count-by-count, claim-by-claim motion. Number one, Hoffman and Sidley to APA Board of Directors, including Special Committee. We know from APA's interrogatory answers, that was a private communication up on Sidley's server, that wasn't a public forum. Again, referencing the language of the statute about what's a public forum in a place open to the public or a public forum, any other expressive, or expressive conduct expressing views to members of the public in connection with this date. Sidley's first motion, pages 9 through 10. Sidley and APA contemplated that APA would make the report public, and APA posted the report on its website in 2015. Sidley contemplated, that's not inept, it's not inept of its course of conduct, it's not a written oral statement.

We've alleged in paragraph one that they published it. We know from APA's interrogatory answers that they did publish it. Two and three, Boards of Riser and Shultz, again, not a public communication. And the case law from California is illustrative on this, although it's important to note that the California statute is substantially different. Here is, we talk

about in our motion, the California statute uses the terms free speech. It was amended in 1997, Your Honor, to include very broadly, and the legislature said very broad, and remember the legislature in California can make procedural law.

So the California legislature says, we want free speech protected. ACLU comes in, page 4 of the legislative history, free speech is too broad. You need to change the term to an act of advocacy. We want the male meaning given to the bill, Legislative History, page 4. Again, each of these publications, private. Final Hoffman report, Hoffman and Sidley to the Board Special Committee, that's not a place where you can exchange views.

So in California, you actually have a stat right now among Appellate Courts that says a newspaper isn't even a public forum, because you can't have a debate. The newspaper controls the content. APA comes in, in a brief and says Damon the Ocean Hills, if it's a homeowner's association, that works. The problem with that is, is in California, we have a Code of Regulations, I live in a hi-rise in California, when we have our Board meetings, they have to be broadcasted all over the city because their a life of Governmental entity in California, and the decisions they rely on make that

distinction.

Count five Wood and Special Committee to APA Council, credit communication. Six, New York Times to it's website. Now, that's an interesting because one of their arguments is they say, the publication's on the way to the final publication in the reply. Originally, APA, pages 7 and 8, they claim for count seven, publication of the report in 2017. They deny a republication occurred, so I'm not quite certain how you deny a republication and then claim protection for it. So there's no Act under the statute. You certainly didn't claim, as you should in your motion, let's assume they're argument's right, that you get the acts along the way, you should have claimed them in your motion, that's your prima facie case. That's not hard to make, you say we published all these things along the way and this is what happened, so we want protection for all of them, but they never claimed that protection.

Number eight, Hasslow videos, audio tapes, they never deal with it at all. They never claim protection for that. Count nine, Hoffman and Sidley to the Special Committee and Board again, a second time, private communication. Ten, revised Hoffman Report, Board and Special Committee on the APA website. Again, they talked today about that, we did a retraction. Well that was at

the time we were in talking to them about all the problems in the report and they continued to exclude it. We've given them clear evidence, that's Mann, that the report's wrong, they do nothing with it. Count eleven, again the APA to AT website, they dispute they published it at all. If I may sum up, talked a lot, thank you for listening.

THE COURT: That's okay.

MS. FRAZIER: We believe reasonable inferences based on Nader v. D. Torodito and Mann. APA's publishing of the report in spite of their extreme and clearly demonstrated involvement and cognizant of contrary statements that make data conclusions in the report for over a decade supports a reasonable inference not B, not the only, they can argue all they want that our inference is wrong, but that's a jury argument, supports an inference that the Special Committee and the Board published the report with knowledge of falsity.

For Mr. Hoffman and Sidley, quoting portions of the report with explicit unambiguous findings of no collusion the wrong interrogations techniques. The description of interrogations techniques that were withdrawn is consistent with the inference that Hoffman falsified, distorted and omitted evidence from the report purposefully. Such that the Court could find that he

acted with conscious disregard or direct knowledge of falsity.

If you have a reason to suspect falsity and come upon contrary evidence, you have a duty to investigate that. Houlihan v. Worldwide Association Specialty Programs, Tavalerus, I always say that wrong, on the second or third remand, ill will evidence of bad faith, Mann evidence of bad faith, the Supreme Court purposeful avoidance, hard hanks, my colleague, Mr. Clare was able to go through all of that adeptly. I appreciate your patience. Mr. Oliveri will just briefly, I promise briefly address choice of law for you and publication. Thank you.

THE COURT: Thank you, Ms. Forrest.

MR. OLIVERI: Thank you, Your Honor, I'll be incredibly brief. I know we've been going for a while now. My name is Joe Oliveri, from Clear Loft. I'd like to start with the issues of republication and touch on a couple of issues that Mr. Hentoff spoke about in his argument. First and foremost, the starting point for the republication analysis, is that because the question of publication and the question of republication is ultimately a factual question that a jury resolves, at this threshold stage, it's the defendant's burden to prove that there was no republication as a matter of law.

So what is the standard? That is the standard that we're looking at. The question of republication, what constitutes republication? The Supreme Court has held that even when the same defamatory communication is communicated to people on separate occasions like a morning and evening edition of the newspaper, each of those are separate publications as a matter of law, capable of giving rise to separate causes of action. Here, what we have is the Hoffman Report, originally published at a URL in 2015.

In 2018, this URL was added to the timeline, or was put onto the timeline page. At the same time, actually I think I misspoke. The URL was also on this APA timeline page. In 2018, related materials are added alongside that URL. Case law has held, and it's in both parties' briefs, that when substantive material is added to a website, and that material is related to defamatory material that's already on the website, if republication has occurred. The reason being, the new material is drawing a new audience to the defamatory statement, it's reiterating it, it's adding context to that already posted defamatory material.

THE COURT: Does that apply if the added material consists of criticisms of that report?

MR. OLIVERI: It does, Your Honor, let me

explain why. That may seem a little bit antithetical, however what we see here and in the case law, comments on the material, anything is drawing new eyes or capable of drawing new eyes to that material.

THE COURT: All right, so wait a second. I go on the Washington Post and I'm a reporter for the Washington Post and I write an article. And you know, there's that comment section where all source of questionable individuals add comments. Every time somebody writes absolute something insane in that comment section, that's a republication?

MS. FORREST: No, no, no, I think that's completely different, Your Honor. In that case, if you have other people, it's an open forum, people are adding comments, when you have the authors of the original defamatory material, post-related material on it, in the Larue case that both parties cite, comments were added, not open forum comments like in the Washington Post website, Your Honor, rather comments by the same defendant, that it posted in the original defamatory material. A case that's cited in both parties' brief is actually pretty interesting, that Romo case, which my firm litigated. In that case, the republication that was found by the jury, was a republication that the defendant argued, tried to water down its defamatory material. The

defendant took the position that this republication, the additional statement that was added, was an attempted retraction. It tried to water down comments akin to hear the defendant's taking the position that a lot of the material that they added was critical of the report, was still held to be a republication because that new material was added, it drew more eyes to the defamatory content.

Now the defendant's lawyers have argued and have much of the fact that the Hoffman Report on the timeline was not posted there itself, it was a link to the Hoffman report, rather than say I suppose imbedding a scrollable image of the document on the website. D. C. Courts have held that posting a hyperlink to a document, incorporates it in the website as if it were there on the screen for people to view. Courts have said, and I think the analysis, it's the modern day equivalent of turning over a cruise ticket and seeing what's on the backside. People know how hyperlinks work, and now acts to incorporate the document by reference here. Such that hyperlink materials are part and parcel of that document. We see that a lot now with Twitter posts where characters are limited, but people are putting links in that may not themselves even mention the plaintiff, but it's held to incorporate the linked document.

Briefly, the case law that the parties discuss I think there's a lot of case law, and the defendant's brief on this point might actually invite Your Honor to take a close look at that. In looking through it myself, in every case they cite in which a republication of a hyperlink was held not to be a publication. It's because that republication was made without the addition of related materials. The Kline case, the wife designs ranch, the doctors data the first case. It was all either solely republication, or solely reposting, let me not confuse terminology, solely reposting of a hyperlink without any additional information. In the cases where there was related information, the Romo case, the Davis case, the Larue case, courts held that there was in fact a republication as a matter of law. And I think APA had said in its brief, took the position that well the added related materials have to be defamatory themselves in order for it to turn the original posting into a republication, and that's simply not the case.

They cited an enigma software group case that just simply didn't make that holding whatsoever, but rather it held in accord with the general rule, that where substantive material was added to a website, and it was related to the defamatory material that was already posted, a republication occurs. Let me turn to Sidley

here, because separate and apart from APA republishing this material, Sidley has taken the position in the papers and in the reply that Sidley cannot be liable, Mr. Hoffman cannot be liable because they did not play an active role in posting or republishing the Hoffman Report, or adding the related materials themselves. Again, that's not what the law is. The law in fact says that the maker of a defamatory statement may be held accountable for its republication, if that republication was reasonably foreseeable, and there is no need to require proof that the defendant knowingly participated in another person's republication, The Tolula-Rias case, Your Honor. Tolula-Rias does not, as the defendants state in their briefing, require the defendant to actually participate in that publication.

So the question is really a factual question of what is reasonably foreseeable, and again, because it's a fact question, at this summary judgment standard stage, the question is whether the defendants have offered enough evidence to Your Honor, in your gatekeeping role, to hold that as a matter of law, no jury can possibly reasonably find a republication here.

THE COURT: Mr. Oliveri, hold that. This analysis is identical to the motion for summary judgment, or analogous to?

MR. OLIVERI: It's analogous to, Your Honor. I think, I don't have the language in front of me, the Mann Court has referred back to a previous case that said we had never held that it was akin to a summary judgment standard we now self-hold. I think it's akin, but I would refer Your Honor to the specific language of the case that we could certainly pull up for you. In any sense, in any event, it is a gatekeeping function. What is the evidence here, that bears on the question of reasonable foreseeability of republication to Sidley and Hoffman. There's a number of pieces of evidence that we cite in our briefs that the defendants did not address in theirs. There are three public statements by the APA.

The APA had stated that it would undertake an aggressive communications program to inform members in the general public of the report's findings. The APA publicly stated that quote, after reviewing the Hoffman Report, the APA Board will make it available to the APA Council of Representatives, APA members, and the public. The APA said quote, it will take actions in response to the report and recommendations as a special committee finds appropriate. I think most telling of all, the engagement letter in which the APA hired Sidley Austin and Mr. Hoffman to undertake the investigation and publish the report, stated quote, we understand, and this

was the engagement letter authored by Sidley Austin, quote, we understand that the Board of Directors of the APA will subsequently make our final report available to the Council of Representatives, APA members, and the public.

Simply put, there is certainly sufficient evidence from which a jury could reasonably conclude that the Sidley Austin knew that the APA would be publishing and republishing this report. There is no case law that holds that Sidley would have had to have been -- that it would have been reasonably foreseeable to Sidley that it would be published on a specific occasion in a specific location. The defendants don't cite any case law holding that, because that is not a requirement, it is just reasonable, foreseeability overall. I don't want to belabor that point, so I'd like to briefly touch upon the choice of law question, Your Honor.

THE COURT: Can I ask you a question before we move on?

MR. OLIVERI: Of course.

THE COURT: Are you saying that if there is an issue that amounts to a factual question, that a jury would decide the Anti-Slap Act is inapplicable?

MR. OLIVERI: I don't think that's what I was trying to say. What I was saying here is with regard to

the reasonably foreseeability of republication, the question of republication is a fact question, so under the Anti-Slap Act right now, Your Honor is in his threshold role, his gatekeeping function that if there is no evidence that it was reasonably foreseeable, then the motion succeeds and is granted. But if there is a factual question, if we have proffered the plan as proffered sufficient evidence to which a jury could find republication, then the motion should be denied, not that the statute is inapplicable.

So just returning to Mann, Your Honor, the language said the applicability of the Anti-Slap statute, all this recognized that at the time this Court has never interpreted the D. C. Anti-Slap Act's likelihood of success standard to simply mirror the standards imposed by Rule 56. We do so now, so it's a mirroring of the standard, just to get back to you on that, so note 32 in there. Now I want to briefly touch upon choice of law. It may seem that at the end of argument about the Anti-Slap statute, I'm telling you, Your Honor, that it does not apply. That's exactly what I'm telling you, and let me explain briefly why, if you'll indulge me. The parties agree and Sidley addresses this question in its reply memorandum, the ABA does not, but the parties agree that there is an actual conflict between the Illinois and

D. C. Anti-Slap Acts.

The parties agree that the choice of law is analysis is thus necessary, and they agree that D. C. Law provides that where there's an actual conflict of laws, you apply the law of the jurisdiction with the most significant relationship to the dispute who's policy would be more enhanced by applying its law. Parties agree that the four restatement factors are what you look at to determine that question, and the parties agree that the choice of analysis applies to any of these five acts in that Your Honor has fond the act to be substantive for purposes of this case I think composition to the plaintiff's dispute, but in light of Your Honor's ruling for the choice of law analysis that controls.

So the two most important factors, the most important factor, the place of the conduct causing the injury favors the Illinois Act. Why? Twelve of the thirteen counts in this case are based on speech that originated with Hoffman and Sidley in Illinois. The counts against the APA simply involve republication or repetition of those defamatory statements in the Hoffman Report. Hoffman's management of the investigation in writing of the report happened in Illinois. How the defendants concede in the reply, that Sidley lawyers authored the report in Illinois because they say that

some of the attorneys in their D. C. office also worked on it, but Hoffman, it's undisputed, was based in Illinois. The defendants concede in their reply that Sidley lawyers authored the report in Illinois.

They say that some of the attorneys in their DC office also worked on it. But Hoffman, it's undisputed, was based in Illinois. The interviews conducted as part of this report, parts of this investigation were, occurred around the country, not in DC. The APA's actions took place through phone calls and e-mails with individuals across the country. Again, original publication by Sidley and Hoffman, not the APA, including the evidence cited in the briefing that Sidley may have leaked an advance copy of the report to the media. The parties dispute what this metadata evidence shows. So, again, fact question, but that's also coming from Illinois.

The second most important factor, the domicile of the speaker and other parties also favors the application of Illinois law here. Sidley Austin's principal place of business is in Illinois. It's state of organization is Illinois. Mr. Hoffman is domiciled in Illinois and Illinois is the only state in which he is licensed to practice law. And the conduct here in publishing the Hoffman report was taken in his capacity

as a lawyer, as evidenced again through that engagement letter.

None of the plaintiffs here are residents of DC and although APA is organized in DC, its board members that were involved in the coordinating the investigation are scattered across the country, not in the District of Columbia.

THE COURT: I'm just curious. If you're the plaintiffs and you decide where you're going to file a lawsuit and it is your understanding that all this stuff happened in Illinois, why did you go to Ohio, Massachusetts and the District of Columbia?

MR. OLIVERI: Sure. That's a fair question, Your Honor. And this gets into the difference between the inquiries regarding jurisdiction and choice of law, which often times they go hand in glove, but DC, under the doctrine of decoupage (phonetic sp.), you have to look individually at each claim to see the applicable law. Plaintiffs attempted to file this suit, actually, in Ohio, which also had connections. The defendants opposed jurisdiction there and that lawsuit was dismissed for lack of jurisdiction. However, the defendants stated that they would consent and not challenge personal jurisdiction in the District of Columbia. Rather than continuing to fight jurisdictional battles, all the while

the merits are remaining unadjudicated and the plaintiff's damages are accruing, Plaintiff's said fine. You win on jurisdiction. Defendants will file in the District of Columbia. That doesn't, though, change the question of the applicable law. That's a secondary inquiry, separate from jurisdiction.

The place where the relationship is centered also factors into the choice of law analysis. And here, that relationship is centered in Illinois. The relationship between the defendants is the key relationship for purposes of this prong because it's the relationship among the defendants here that ultimately led to the plaintiff's injury. In cases like an employee employer injury case or railroad passenger operator, for example, the relationship between plaintiff and the defendant may be a more germane relationship, but here we have an independent tort. Therefore, I think the case all favors looking at the relationships between the parties here. There wasn't necessarily a plaintiff defendant relationship. We're left to look with the relationships among the defendants. And here, I think the most important fact here is the engagement letter, where APA retains Sidley, retained Mr. Hoffman, contained a provision that specifically specified that Illinois law would govern the relationship. It's an incredibly

telling piece of evidence that they, themselves, contemplated that Illinois would govern --

THE COURT: Okay.

MR. OLIVERI: -- the result of their work.

THE COURT: You weren't here for those hearings. I don't, that makes no difference to me. Because the way that letter reads to me is if there are disputes between the parties to that contract, and the plaintiffs were not parties to that contract.

MR. OLIVERI: Understood, Your Honor. I won't belabor that point but I would just push back just a very little bit to say that may be right, Your Honor, but it still shows the thinking and the thoughts between the parties here. But again, I won't belabor that point. The last point I want to make here is the policy question. And that is, the District of Columbia also favors applying the law of the jurisdiction whose policies would be most served or conversely not applying the law of the jurisdiction whose polices would not be upset here. The Illinois act contains an express public policy statement that states, the policy is to strike a balance between the rights of persons to file lawsuits for injuries and the constitutional rights of persons to petition. The Illinois Supreme Court has emphasized that policy.

By contrast, the DC Anti-SLAPP Act has no public policy statement and the DC Court of Appeals in Mann emphasized that the DC act creates an imbalance by significantly advantaging the defendants. Here, in light of that, Illinois's policy of having its own speakers, the defendants here, Illinois residents, Hoffman and Sidley, balance those rights against the rights of putative plaintiffs would be harmed if DC law were to apply. By contrast, DC law, Anti-SLAPP law, does not have a specific public policy statement that would be offended by the application of Illinois law. And I don't want to belabor these points, Your Honor, so I'll leave that at that. I know we've been going for a while. Thank you.

THE COURT: Yes, sir. I appreciate it. Thank you.

MS. FORREST: Your Honor, can I address three factual issues just real quick that came up?

THE COURT: Sure.

MS. FORREST: Real quick. Thank you. Your Honor mentioned at the beginning that our papers were rejected. We filed at about noon on that Friday.

THE COURT: Nothing to worry about.

MS. FORREST: Okay.

THE COURT: I was simply explaining why there's

a certain --

MS. FORREST: Great.

THE COURT: -- chronology that appears in the court record.

MS. FORREST: Thank you.

THE COURT: It seems to be --

MS. FORREST: They thought it was the same set of --

THE COURT: -- you know, anti-intuitive.

MS. FORREST: -- papers. We were on the phone with them --

THE COURT: Yes.

MS. FORREST: -- all afternoon.

THE COURT: Yes.

MS. FORREST: My apologies.

THE COURT: I know.

MS. FORREST: Okay.

THE COURT: Don't worry about that.

MS. FORREST: Thank you. Second issue, I want to correct, and I don't want to get sideways with you. We've been doing so well today. Okay? Chronology because you weren't on the case.

THE COURT: Uh-huh.

MS. FORREST: We get dismissed in Ohio on a Friday, August 25th. Sidley says if you file in DC, we

won't object to jurisdiction. Otherwise, Supreme Court has come down while we were in Ohio with a major Supreme Court case on jurisdiction. We go, we file. On the same two days before they file the SLAPP motions with Judge Edelman, we never got to see Judge Edelman. We, they file a motion to say we don't want to file a 12(B)(6) or any other preliminary motions. So, they didn't file those preliminary motions. They file the SLAPP motions. Judge Edelman dismisses them a moot because of the stay.

So, the situation we're in, which was immediately acknowledged by the judge in Massachusetts, was I had no jurisdiction in Ohio. I filed in, on the following Monday in DC, but I don't know if I have jurisdiction or if they're going to contest it again. DC appeals precedent on point. If you don't know you have jurisdiction certain, you have to file in every available jurisdiction. So, I go up and I file in Massachusetts, and that case has been stayed. That's the secrets in defense.

I appreciate Your Honor's point on the affidavits. There's a Court of Appeals case pending right now that was argued, what is the purpose of the hearing. Isn't the purpose of the hearing to tender evidence? Is it not? Do you get to tender new evidence? Do you have to stick with what you filed? I appreciate

the issue of surprise.

THE COURT: Well, since when have you had those documents?

MS. FORREST: I think they're all this past week.

THE COURT: I mean --

MS. FORREST: What I'm happy to do --

THE COURT: -- giving it to opposing counsel in the middle of a hearing --

MS. FORREST: What I'm --

THE COURT: -- when you've had these documents for a while?

MS. FORREST: I'm happy to tender it and then they can have a response to it in writing, if they'd like.

THE COURT: No. I'm sorry.

MS. FORREST: Okay.

THE COURT: I'm sorry.

MS. FORREST: That's fine.

THE COURT: You know, it's like the pleadings were filed, this hearing was set, we've been traveling down this path for a while now.

MS. FORREST: Understood. Thank you.

THE COURT: Okay? Thank you. What's your response? Who's going to go first, Ms. Wahl or Mr.

Hentoff?

MR. HENTOFF: I'd like to go first, Your Honor.

THE COURT: Okay. I mean, do you agree or disagree that there was all this evidence that contradicted the conclusions that Mr. Hoffman reached in his report?

MR. HENTOFF: Your Honor, I could not disagree more strongly. And we cover that in our reply brief. Give me a moment, please. So, we cover that in our reply brief at largely pages 18 to 22. And that's what I said when I got up, Your Honor, which is the plaintiffs just misstate what Sidley's report said about interrogation policies and then they cite to a number of reports that say things that don't contradict what the report said. So, we address almost everything that Ms. Forrest said, the reports that she listed. We address in that page range and around that page range, where we say this is what the report actually said. And I thought what Ms. Forrest said is pretty emblematic of that. She said Sidley said things in pages nine through 12. That's a lot of pages. In our reply brief, we talked about the actual words that were used and we show what they meant. So that's, the short answer to your question is we address in the reply brief that nothing that the plaintiff submitted contradicted what the Sidley report

said.

Your Honor asked me about serious doubts. That's from the Saint Amant (phonetic sp.) case, and we cite it and quote it at page 17 of our opening brief. So, I'd like to address a number of the plaintiff's comments and I'll do it as succinctly as I can. I'm back to the actual malice standard. One thing you don't see discussed in the plaintiff's briefing is the clear and convincing evidence standard, and that's important in a case like this. And the Mann case talked about the importance of it, which is the burden on the plaintiffs is to show that the finder of fact could have, could find clear and convincing evidence that, again, that what?

That Sidley knowingly made false statements about the three plaintiffs or subjectively believed that they were saying things that were probably false? The burden on the plaintiffs is to show that on summary judgment they've got enough evidence that a finder of fact could have an abiding conviction that the plaintiffs have probably proved their case. And I think there's a reason why we don't hear that from them because it's so important in this case. Mr. Clare talked about the ability to aggregate circumstantial evidence. What I'd like to point out is, Mr. Clare said there are six types of circumstantial evidence that courts have considered in

actual malice cases. And I believe, I'm not sure if it's in there but there's an excellent presentation about defamation law on the DC Bar website that Mr. Clare's law firm presented recently. And these are sort of well-known six categories, so it's no coincidence that they make these six allegations against Sidley, because that's sort of the building blocks. That's what they have to allege. But the main point that I want to make is, I think we do a very good job in our reply in properly presenting their legal relevance but then showing the everything that the plaintiffs try to say about why Sidley had a preconceived notion or a bias, we deal with that in our reply and as a factual matter, it falls away.

The plaintiffs contradict themselves. They have no evidence because they're stuck. An independent law firm without a bias came in and was hired because they were independent, and they made findings that the plaintiffs don't like. So, they went to the six buckets that they're supposed to go to to try to make an argument. And we present, we show why they failed and that's why, even if you could, and you can't aggregate circumstantial evidence. But there has to be some, and they don't have any. And also, it's not enough to have one piece of circumstantial evidence and then a second one. Mr. Clare talked about a wall. And it's a high

wall because of the clear and convincing evidence standard and two bricks don't make a wall. The Eramo case that Mr. Clare talked about, the Court, I guess in denying summary judgment, the Court found there were a number of pieces of evidence against Rolling Stone in that case. Preconceived narrative, on its own, didn't get the plaintiffs over the hump. And as we note in our reply brief, the argument, and of course, the Eramo case is the famous Rolling Stone case about the woman that said she was raped in the fraternity and it turned out she had fabricated it and the whole thing fell apart. It's a very extreme case. And in that case, the Court held that the reporter, not, didn't merely have, there was actually evidence of a preconceived narrative but then she altered the facts to fit that narrative and that's what helped that case survive summary judgment.

Purposeful avoidance. Mr. Clare makes it seem like purposeful avoidance is a pretty common thing in actual malice cases but it isn't because the basic law is if the plaintiff's argument is, wow, the defendants did a terrible investigation, they're not very good at this, they missed all these things, they're negligent, in an actual malice case, that's a defense. Negligence and incompetence, which didn't happen here, but if it did happen in a case, that's a defense. That's why people

like being media lawyers. Purposeful avoidance is rare. The leading case which they cite is Harte-Hanks. In Harte-Hanks, there was all this information that the reporter had that the allegation that somebody had given a bribe was not true. And there were two witnesses. And one of the witnesses who would have said it was not true, which was made available to them and they didn't interview the witness.

A tape recording which was represented to them as disproving the story was made available to them and they didn't go look for it. That's a rare circumstance. The Tally case, which I talked about, the 2019 Sports Illustrated case in the Tenth Circuit, takes that head on and said when you have this evidence, an extensive investigation, and you don't have the countervailing evidence of reasons to disbelieve things, that's in no way purposeful avoidance.

THE COURT: Let me ask you something. What should I make of the affidavits that contest that the way certain statements were omitted from or misconstrued in the report?

MR. HENTOFF: A couple things, Your Honor. We address those affidavits in our reply brief. And the burden's on the plaintiff. They got to show what's the statement in the report that's about one of the

plaintiffs that shows that Sidley made that statement thinking it was probably false. And the affidavits don't do that. A lot of the affidavits, as we say in our report, they address things the report didn't say. So, one of the affidavits that the plaintiffs present most prominently in their direct evidence section was someone who said Colonel Banks worked to prevent abuse. There's nothing in the report that said he didn't.

So that's an affidavit that doesn't refute anything in the report. A lot of the affidavits talk about the report's criticism of the APA ethics adjudication process. Almost none of them are about the plaintiffs in this case. The plaintiffs in this case were not on the ethics committee of the APA. That, those were employees, or the ethics office, those were employees, the ethics committee, those are officers of the APA. So those statements don't have anything to do with the plaintiffs. But even if they did, we show in our reply brief that the complaints in those affidavits just don't square with the simple review of the report.

THE COURT: Well, it is, was Sidley Austin aware of the IG report? Was Sid aware of anything that Jack Goldsmith wrote?

MR. HENTOFF: Those are terrific examples. Okay? The IG report talked about, through the history of

interrogations and I'm not remember which theater. Okay? And it talked about, in part, the development of policies. And what plaintiffs actually cite to is an appendix at the end of the report that just lists polices. That's what it does. Okay? It just lists policies. But my point is, we show in our reply brief that when the Sidley report talked about then existing DOD guidance, we show that in context they were talking about the guidance for psychologists who support interrogations and not the rules for interrogators about what techniques they can use.

So, when Ms. Forrest cites to the report about what techniques interrogators can use, that has nothing to do with what we were talking about. That's my point. So, it doesn't contradict what we were pointing, talking about. Now, the Jack Goldsmith book. Yes, Sidley was aware of it. And the Jack Goldsmith book just said something that was common knowledge, which was you have the so-called torture memos in 2002 that were drafted by John Yoo that said certain techniques don't qualify as torture and so they're allowed. And then in 2004, Jack Goldsmith withdrew those torture memos.

At the end of 2004, I guess acting OLC Levin issued new memos, new OLC memos, and then in 2005, Mr. Bradbury at the OLC issued new memos and Sidley cited the

2005 memos. Okay? The 2005 memos, which were active at the time of PENS and the report said they were active at the time of PENS and those memos said waterboarding is not torture. Okay? And simply said it, we cite the page number in our reply brief, but there's no issue of withdrawn memos because we cited the in effect memos in 2005 and say this was in effect at the time of PENS. And just to add to this a little bit, after the Yoo memos were withdrawn, the Levin memo was presented by OLC in December of 2014 and has a footnote.

And the footnote says we've withdrawn the Yoo memo, but every activity that occurred under the Yoo memo is still okay. It's not even any different in any significant sense. Now a definition of torture still applies across all the memos. And then I finally say plaintiffs have even tried. Okay. It's an interesting policy discussion, but how does that show that Sidley made a false statement knowingly about one of the plaintiffs?

So, I'd just like to continue with a few more things. Ms. Forrest said the report said it's all a joint venture. This illustrates our point. It's a 542 page report. It has a lot of different things in it. Okay? You have to look at the specific statement. For example, it didn't say the ethics adjudications was all a joint

venture involving, you know, Colonel Banks. Everything that Ms. Forrest said about the PENS Leserve (phonetic sp.) about statement four of the PENS guidelines. We talked about that in our reply brief. And again, Ms. Forrest illustrated our point. She said, hey, the PENS guidelines were pretty good because they specifically said go look at the local policies. But that's our point. The point of the report was there were people in the PENS task force that wanted the APA guidelines to have specific prohibitions on things like stress positions. And what APA ultimately did is said, well, we're not going to have our own guidelines about specific prohibitions.

We're going to defer to the military. So, when Ms. Forrest cites statement four of the PENS task force, which says look to the current military policies, that's my point. That supports what the report said.

Ms. Forrest talked about one of the 150 people were interviewed who said a couple of things and Ms. Forrest said one of the things that he said wasn't captured in the interview. Well, I looked at the page number that she cited, and I've got my copy of the Sidley reports color coded, so I can see which passages the plaintiffs have sued over of the 219, not even in there. It's not even a statement that they're saying is false and

defamatory. I must confess I'm still a little unclear about how I was wrong about saying colonel, but it's still colonel. And we didn't cherry pick the complaint.

We looked at the relevant parts of the complaint where they talked about how important their job was and how consequential it was for something that had a lot of authority over the lives of people. How were you going to support interrogations of detainees? I mean, I can't imagine a clearer case of a public official for having responsibilities that are significant enough that the public should care about a report about them.

Rosenblatt, which is the Supreme Court case from 1966, I think remains the key case. One thing I neglected to mention in my, initially is the plaintiffs do cite a mid-1980's federal DC District Court case that uses the language they need to be high ranking officials. That, they don't cite, I think they, oh, so they do, I'm sorry, that quoted verbatim, like in 1966 or 65 DDC case, only point I want to make is Rosenblatt came out later. So admittedly, the 80's case is after Rosenblatt, but Rosenblatt controls and other cases have said this high ranking statement, it's wrong. It's not limited to high ranking people and we cite the leading defamation treatise by Judge Sack of the Second Circuit and they also say, and the treatise says, looking all the cases,

it's not limited to high ranking people. Okay.

Public forum. We're now on the coverage of the act. We state in our reply, this is very important, whether speech is protected under the Anti-SLAPP Act, under the definition, there are three ways to be protected under section one. It's something or something or something. So public forum is one of the ways. But we're also covered by the third way, which is any other expression that involved, and I'm doing ellipses here, but any other expression that involves communicating views to members of the public in connection with an issue of public interest. And that's what Sidley did and that's what APA did in distributing the report. And the plaintiffs make the argument that, well, Sidley just delivered the report to the board of directors and then the board decided to publish it.

That's true. But the act protects expression that involves communicating views to the public, involves, not constitutes, but involves, and that's critical in this case because at the very beginning, when Sidley was retained, APA said we will make this public. Sidley knew APA was making it public. It provided the report to its client. The only entity that could decide whether to make it public is the client. And the client did make it public.

So absolutely, Sidley's preparation of a report for the public is protected, because it involves communicating views to the public. The law doesn't say, well, if the reporter submits a draft to the editor, the reporter's not protected. The language is clear and it's also a remedial statute, so we have to give the language a reasonable and broad meaning to effectuate the remedial nature of the statute.

All right. I'm nearing the end. Mr. Oliveri on republication. Our count 11 reply brief covers all of this. Mr. Oliveri made a couple of statements that are inaccurate. Our motion accurately stated that count 11 of the complaint failed even to plausibly allege any facts that Sidley had any involvement in this, these website changes that we're talking about. APA made website changes three years after the report. Sidley had nothing to do with it.

So, the plaintiffs have to be stuck with the complaint they actually filed, not the complaint that they wish they filed. And their complaint made two allegations against Sidley. Okay? The first allegation was this conclusory allegation that Sidley was actually involved in the website changes. We responded that's completely conclusory but no basis to say that Sidley had anything to do with these August 2018 website changes.

In their reply brief, silence. They've abandoned that point. Then they say, well, it was reasonably foreseeable. And they provided allegations in their complaint as to why it was reasonably foreseeable to Sidley. Both of the examples were not from 2015, as Mr. Oliveri says. They're from 2018 about briefs that the plaintiff here filed. And we talk about that in our opening brief and another reply brief.

It doesn't matter. If they're saying something was reasonably foreseeable to us in 2018, we didn't do anything in 2018. Now they say they wish they'd made the allegation it was reasonably foreseeable to us in 2015. We didn't do it. And if they had done it, and we say this in our paper, it wouldn't matter because if they had said it was reasonably foreseeable to us in 2015, we'd say, look.

Actual malice is still what is the state of mind of the defendant at the time of publication, which was September 2015, so we'd have just said see our original motion. That's our state of mind in 2015. So, all of the assertions that Sidley, you know, didn't take into account, their arguments are wrong. And I want to be clear about one thing. We've never said that the APA republication on the website in 2015 was not foreseeable. We've never made that argument. We've accepted that. So

there really is no factual or legal basis for trying to make Sidley liable for these website changes, which as Ms. Wahl has demonstrated, aren't even a republication, anyway, but there's no basis to bring Sidley into that. If anything, it's an example of why this case really should come to an end, because plaintiffs have not been able to make their case, yet they keep trying to expand it.

Finally, choice of law. Plaintiffs also filed a motion to invalidate the statute, brought in the DC Attorney General, did a lot of briefing, didn't win on that. Again, we say this in our reply brief but it's very clear that the great weight of the governmental interest in this case rests in the District of Columbia, where the plaintiffs brought their case. Most important thing, the two most important things are first place of the conduct and then domicile of speakers. The conduct is the speech. The speech came from APA. APA is a DC entity.

The plaintiffs may say that APA is, their board of directors are spread around, but they weren't sued. They're seeking millions of dollars from APA, which is a DC association. APA made the decision to publish in DC. Sidley was their lawyer. Sidley had no authority to publish the report. The reason we're here in court with

a defamation case is because APA made good on its word and it decided to publish. The place of the conduct was DC. That was the dominant publication in this case.

There's an allegation that Sidley was involved, that Sidley leaked the report, frivolous. It's not disputed, it's not a factual dispute. Plaintiff submitted an affidavit from an expert, which didn't say Sidley sent the report. We submitted an affidavit from an expert that said everything plaintiff's expert said is correct. The metadata doesn't show any proof that Sidley had anything to do with leaking the report. The only dispute is between the plaintiff's expert and plaintiff's lawyers. It is a frivolous allegation. The dominant publication in this case was the client's, APA's decision to make good on its word, publish the report to the public. Therefore, the greatest weight of government interest is here in DC. And I'll add --

THE COURT: If the dominant, are you saying that was the dominant publication? Was there a previous publication that wasn't dominant?

MR. HENTOFF: So, the plaintiffs have broken up their case into multiple complaints. So, one of their counts is Sidley gave the report to the board, special board, the board of directors. Another count is the special board sent it out to a smaller group and then

another count is put on the website. By dominant publication, I mean it's the publication that went the furthest. Okay?

THE COURT: So, are you saying that if an attorney conducts the job for which she was hired to do and then she turns over a work product to her client that that constitutes publication?

MR. HENTOFF: Well, under defamation law, it's an if. That's an interesting question under DC law and I think that would take us afield. But generally, a publication under defamation law is a publication to a third party. So interesting question whether a lawyer to a client's a publication, but you know, if they're third parties and we haven't challenged that as one of the publication counts.

Mr. Oliveri didn't mention one fact, which is in our briefs. They sued Sidley's DC partnership. That's one of the defendants. That's one of the clients I'm representing. They agree that the domicile of the defendants, of the speaker's important. We've got DC, also. So, clearly, and then on top of that, the weight of the parties' relationship is the plaintiffs and the defendants. And this is about what the people did at the PENS task force and what they did with APA. Why was there a big controversy? There wasn't a controversy in

Illinois. There was a controversy in Washington DC. DC is clearly the jurisdiction that is the greatest interest in this case and in the protection of the decision of APA to make good on its word and publish this report.

So, my concluding thought is, we're at the end. We've said this is a case without merit. The protection of the DC Anti-SLAPP Act means it should be ended. One observation I have is one would expect in a defamation case, by the time we got to this point, that there would be a clear statement in the brief. Here is a statement about Colonel Donovan, Colonel Banks, Colonel James, in a brief. It's a false statement. Here's why Sidley made that false statement. We don't get that. Instead, we get all of this multiplication of discussions about everything. There's a reason that we don't have this clear statement in our mind. It's because it's not there. And it's time to end the case. Thank you, Your Honor.

THE COURT: Mr. Hentoff, thank you. Ms. Wahl?

MS. WAHL: I'm well aware that I'm the one standing between lunch and bathroom breaks, so I will be quick. Mr. Clare made a comment about the three Saint Amant factors and indicated that they are not an exclusive list. Actually, the DC case law says, there's language to the effect that that is the exclusive list.

And then there's one other case that says, no, that's illustrative and you can have other circumstances. But the three Saint Amant factors are really significant because they are of such gravitas and so important that these other circumstantial factors, the other six buckets don't come close. And there's no question that here we don't have fabrication of evidence, anonymous sources and the other issues of that nature. Instead, we have, well, did Nadine Kaslow mean that she was trying to blame somebody else? Well, it's not of the same nature as literally fabricating something or pretending there's a source that doesn't exist. Mr. Clare made this great analogy about the wall. The problem is that the bricks that add up to the wall each have to be bricks. And if bricks don't stand, the sum of those bricks are not greater than the individual parts. And I think what we have last spent the last two and a half hours demonstrating is that not a single one of those bricks stands, with or without mortar, they just don't add up to actual malice.

Ms. Forrest said something about this is a joint enterprise and that's why all of the analogies or all of the so-called evidence involving Dr. Behnke should be allowed. The plaintiffs are three individuals. It's not a joint enterprise. The evidence has to be linked

between those plaintiffs and facts and statements about those plaintiffs. The case law couldn't be more clear. You can't sort of make a cloud about, well, they're part of the group. That is who the connection has to be tied through. There's got to be a connection between an individual defendant, an individual statement, and an individual plaintiff, and they cannot do that and have not done that here. The studies they refer to that were in everybody's file, everybody should have known that that showed actual malice. There were no crimes. The FBI said there were no issues here. Actually, that has almost nothing to do with this case because if 18 studies, or whatever the number was that Ms. Forrest quoted, said that there was no problem here, then APA would never have had to hire Sidley to go look at this issue.

What Sidley looked at was totally different. They had access to all of APA's internal information. They interviewed all of these people. The other studies were different matters. APA went about this for its own purposes. The senate had its own reasons, but APA conducted, had Sidley conduct this independent review for very definite reasons and opened its files and made its members all, and officers and employees available. That was not covered in any other report.

Ms. Forrest made reference to the fact that, well, these resolutions, these policies were an open process. And yet, the evidence that she, herself, has supplied through her briefs were that there were private e-mails being exchanged between Dr. Behnke and Dr. Banks for your eyes only. They were the only ones who were exchanging these e-mails. How is that part of an open process? There's no evidence in the record that these private e-mails were then shared with counsel or anyone else. It is not mutually exclusive to have council meetings, committee meetings and still have parties working behind the scenes. Clearly, they were doing that because that's what the e-mails are that she's so nervous about.

Very important. Counsel for the plaintiffs keep talking about the reasonable inferences that they're entitled to. We would submit, Your Honor, that there are no reasonable inferences that go as far as they're suggesting. It is not reasonable to say that somebody who was on the board of APA in 2015, who may or may not have read the entire 542 pages and understood all of it and voted to release the report, remembered that she served on a committee in 2006 where the issue of a resolution was discussed and she may not have been there for that meeting or she may have been, who knows. She

may not have remembered. And because her committee discussed this question that was then maybe incorporated into some evidence that went into the report, that that is a reasonable inference that she knew something in the report was false. Nothing about that is reasonable. That is too many remote non-connections to constitute actual malice.

Ms. Forrest made a number of references to conversations with David Ogden. We submit, Your Honor, that, as you stated, Ms. Forrest is not a witness in this case, there are no affidavits that reference David Ogden and that portion of her argument should be disregarded completely. She also made further comments about what people would testify to. Again, we would urge Your Honor to disregard that because we're not here to talk about what will happen down the road. The question is, do they have a case that they can demonstrate now. They have not done so.

Republication. The two cases that stick in my mind, anyway, and I believe there were only three that were cited by the plaintiffs with regard to why the 2018 changes to the website constitute republication. The two cases that they cited are worlds different from what happened here. In Eramo, there was a banner ad in an appendix to the original report that changed everything.

It added new facts. In the LeRue (phonetic sp.) case, there were statements published on a website and there were comments added by Ms. LeRue, I believe, well, the defendant. She added new allegations about the supposed sexual abuse that restated the prior statements and added new facts. This is a totally different ball game.

There's nothing about the changes to the website in 2018 that restated the original report. Mr. Oliveri said republication is a fact and that's why here the Court should find there's been republication. There's no factual dispute about what happened here. Mr. Fredley (phonetic sp.), who is the APA affiant who is essentially the webmaster, they haven't refuted anything he said. He said what happened. They haven't disregarded that, they haven't refuted that, it is not rebutted. We know what happened. The question is a question of law. Does that constitute republication under the very clear case law? It is not.

Last and I don't think least is the choice of law question. APA is a DC corporation. Its only office is in the District of Columbia. It, the PENS task force met in the District of Columbia. At the filing of the first complaint, two of the plaintiffs were DC residents. The meetings that happened that are discussed in the report where all of these committees discussed the 2007

proposal all the way on up to 2014, these meetings took place in the District of Columbia, by and large. The ethics office personnel all acted in the District of Columbia. Clearly, the center of gravity in this case is the District of Columbia. The only thing that happened in Illinois was Mr. Hoffman presumably went home and went to bed there. And the agreement, the retainer agreement between Sidley and APA, as the Court has already seen, the Illinois factor only comes in if there is a dispute between Sidley and APA. That's not what we're talking about here. No question that the center of gravity of this dispute is the District of Columbia. The witnesses are here, APA is here, Sidley acted here and it is the District of Columbia that has the most significant interest in this dispute and its law should apply. Thank you.

THE COURT: Thank you. All right. Just give me a second, please. All right. First of all, I'd like to thank counsel across the board for the very well written and thoroughly researched briefs that they filed in support of their respective positions, as well as being prepared to thoroughly defend the positions that we're advancing in our conversation today. Today is February the 21st. An order will issue from chambers resolving the motions no later than March 20th.

Thank you very much. Have a good afternoon.

ALL PARTIES: Thank you, Your Honor.

(Thereupon, the recording ended abruptly.)

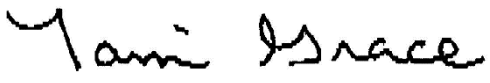
√ Digitally signed by Tami Grace

ELECTRONIC CERTIFICATE

I, Tami Grace, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of STEPHEN BEHNKE, ET AL V. SIDLEY AUSTIN, LLP, ET AL, Case No. 2017 CAB 005989 in said Court, on the 21st day of February, 2020.

I further certify that the foregoing 106 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 28th day of February, 2020.



Transcriber

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*,	)	
	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	
DAVID D. HOFFMAN, *et al.*,	)	
	)	

ORDER

This matter comes before the Court on (1) Defendant American Psychological Association's ("APA's") Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code § 16-5502, filed October 13, 2017; (2) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's (collectively "Sidley Austin's") Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502, filed October 13, 2017; (3) Defendant APA's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, filed March 21, 2019; and (4) Defendants Sidley Austin's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502, filed March 21, 2019. On November 15, 2019, Plaintiffs filed a consolidated Opposition to APA and Sidley Austin's (collectively "Defendants'") Second Set of Contested Special Motions to Dismiss filed March 21, 2019. On November 18, 2019, Plaintiffs filed a consolidated Opposition to Defendants' First Set of Contested Special Motions to Dismiss filed October 13, 2017. On December 13, 2019, Defendants filed Reply briefs in support of their Special Motions to Dismiss. On February 21, 2019, the Court held a hearing on the parties' Special Motions to Dismiss.

This case involves the Independent Review Report ("the Report") that Defendant APA commissioned Defendant Sidley Austin to perform and subsequently published on its website. The Report addressed the ongoing national conversation about the role of psychologists in national security interrogations and explored whether APA officials had colluded with the Bush administration, CIA, or U.S. military officials to support the torture of persons detained after the events of September 11, 2001. The Report reached various conclusions in that regard, including that "key APA officials…colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." Report at 9. The Plaintiffs, who are three former Army Colonels, disagree with the Report's conclusions and have brought claims of defamation *per se*, defamation by implication, and false light against the Defendants.[1]

To begin, it is important to note that Special Motions to Dismiss do not require this Court to determine whether the information in the Report is accurate or inaccurate. The purpose of such motions is not to determine whether a defendant actually committed the tort of defamation, but "whether the defendant is entitled to immunity from trial." *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016). Thus, the role of the court is to determine whether or not the motion to dismiss should be granted, when all statutory requirements are satisfied, as a matter related to issues that concern public participation. To that end, a court must determine whether a defendant has made a prima facie case that the D.C. Anti-SLAPP Act is applicable, and if so, whether a plaintiff has shown that a defendant either knew that contested statements were false or acted with reckless disregard of their falsity. Here, the amended complaint also raises concerns about the legal implications of an alleged subsequent republication.

[1] Two other Plaintiffs who were APA officials have been referred to arbitration consistent with their employment contracts with the APA. Those former Plaintifs are Dr. Stephen Benhke and Dr. Russell Newman.

The Court has considered the parties' pleadings, the relevant case and statutory law, and the entire record. For the following reasons, the Defendants' four Special Motions to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 to 5505 are granted.

I. BACKGROUND:

On August 28, 2017, Plaintiffs filed a Complaint against Defendants asserting ten counts of defamation *per se*, one count of defamation by implication, and one count of false light. On February 4, 2019, Plaintiffs filed a Supplemental Complaint adding an additional count of defamation *per se*.[2]

The Plaintiffs are three individuals who served as military psychologists and retired as Army Colonels. Plaintiff Dr. L. Morgan Banks, III ("Plaintiff Banks") served as the Director of Psychological Applications for the United States Army's Special Operations Command. Supp. Compl. ¶ 39. In that role, Dr. Banks "provided ethical as well as technical oversight for all Army Special Operation Psychologists." *Id.* For her part, Plaintiff Dr. Debra L. Dunivin ("Plaintiff Dunivin") served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center, where she "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command." *Id.* ¶ 41. In addition, Dr. Dunivin "served in the Army Inspector General's inspection of detention facilities." *Id.* Finally, Plaintiff Dr. Larry C. James ("Plaintiff James") served as Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. *Id.* ¶ 42.

The Defendants are (1) the APA, a Washington, D.C. based non-profit professional organization for psychologists, *id.* ¶ 48, (2) David Hoffman, a partner at Sidley Austin LLP, *id.* ¶

[2] The defamation *per se* count added in the Supplemental Complaint appears as Count 11 and is the subject of two of the four Special Motions to Dismiss.

46, (3) Sidley Austin LLP, a law firm comprised of a group of limited liability partnerships, *id.* ¶ 47, and (4) Sidley Austin (DC) LLP. *Id.*

After September 11, 2001, reports of detainee abuse, the use of enhanced interrogation techniques and the role of psychologists in those interrogations became a topic of public scrutiny. Supp. Compl. ¶ 70; Oct. 13, 2017 Sidley Austin Mot. at 4. In 2004, as media coverage of this topic continued to increase, the *New York Times* published an article about the role that psychologists played in enhanced interrogations. Supp. Compl. ¶ 70; Oct. 13, 2017 Sidley Austin Mot. at 4. In response to the *New York Times* article, the APA established the PENS[3] Task Force "to explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." Supp. Compl. ¶ 71. Plaintiffs Banks and James were members of the PENS Task Force. *Id.* ¶ 73. Plaintiff Dunivin was not a member of the PENS Task Force but made recommendations to the APA about who should be selected to serve on the task force. *Id.* ¶ 45. In the end, the PENS Task Force did not ban psychologists from assisting in interrogations. Oct. 13, 2017 Sidley Austin Mot. at 5. Rather, the PENS Task Force drafted twelve statements framing "ethical guidelines for psychologists involved in interrogations." Oct. 13, 2017 Sidley Austin Mot. at 5; *see also* Supp. Compl. ¶ 75. The APA Board adopted these statements on July 1, 2005. Supp. Compl. ¶ 77.

Nine years after the PENS Task Force completed its work, *New York Times* Reporter James Risen published the book titled *Pay Any Price.* Oct. 13, 2017 Sidley Austin Mot. at 8. In his book, Risen claimed that the "APA colluded with the U.S. government to support torture, including that the outcome of the PENS Task Force was a result of collusion between APA and the Government." Oct. 13, 2017 Sidley Austin Mot. at 8 (citing Compl. ¶¶ 2, 3). In response to the allegations, in 2014 the APA retained the law firm Sidley Austin to conduct an independent

[3] PENS stands for Psychological Ethics and National Security. Supp. Compl. ¶ 72.

review into Risen's contentions that the APA colluded with the government to support torture. Oct. 13, 2017 Sidley Austin Mot. at 1.

The investigation spanned more than eight months, interviewed approximately 150 individuals, and studied more than 50,000 documents as part of the independent review. *Id.* at 8. It resulted in a report that consists of 541 pages and 7,600 pages of exhibits. Oct. 13, 2017 Sidley Austin Mot. at 8; Oct. 13, 2017 APA Mot. at 4. Sidley Austin provided the Report to the APA in July 2015. Oct. 13, 2017 Sidley Austin Mot. at 8. On July 10, 2015, a leaked copy of the Report was published on *The New York Times'* website. Oct. 13, 2017 APA Mot. at 4. On that day, the APA published the Report on its website. *Id.* Two months later, on September 4, 2015, a revised version of the Report was posted on the APA's website. Nov. 15, 2019 Pls. Opp'n at 3.

The Report identified Plaintiff Banks as "the key DoD official [with whom the APA Ethics Director] partnered with…," and Plaintiff Dunivin as "the other DoD official who was significantly involved in the confidential coordination effort…." R. at 12-13. The Report reached several conclusions including:

- "[K]ey APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." *Id.* at 9.

- "[I]n the three years following the adoption of the 2005 PENS Task Force Report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitely prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. The principal APA official involved in these efforts was once again the APA Ethics Director, who effectively formed an undisclosed joint venture with a small number of DoD officials to ensure that APA's statements, and actions fell squarely in line with DoD's goals and preferences." *Id.*

- "We did not find evidence to support the conclusion that APA officials actually knew about the existence of an interrogation program using 'enhanced interrogation techniques.'" *Id.*

- Ethics complaints were mishandled to protect national-security psychologists from censure. *Id.* at 10.

Plaintiffs allege that the Report contains false and defamatory statements that "destroyed their reputations and careers." Nov. 18, 2019 Pls. Opp'n at 2. In response to Plaintiffs' initial and supplemental complaints, Defendants filed four Special Motions to Dismiss under the D.C. Anti-SLAPP Act.

II. CHOICE OF LAW:

As a threshold matter, the Plaintiffs argue that all four Special Motions to Dismiss must be denied because the Illinois Anti-SLAPP Act, not the D.C. Anti-SLAPP Act, applies to this case. Nov. 18, 2019 Pls. Opp'n at 73-82. The parties agree that there is a conflict between the Illinois Anti-SLAPP Act and the D.C. Anti-SLAPP Act. *See* Nov. 18, 2019 Pls. Opp'n at 75; Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 40.

Whenever a dispute arises about the applicable choice of law, the D.C. Court of Appeals uses "the governmental interests analysis" to resolve the conflict. *Hercules & Co. v. Shama Rest.*, 556 A.2d 31, 40 (D.C. 1989)(citing *Kaiser-Georgetown Cmty. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985)). Under this approach, "the choice of law turns on which jurisdiction has 'the most significant relationship to the dispute,' and 'which jurisdiction's policy would be more advanced' by applying its law." *USA Waste of Md., Inc. v. Love*, 954 A.2d 1027, 1031 (D.C. 2008). When applying this standard, the Court of Appeals has relied on the four factors listed in the Restatement (Second) of Conflicts of Laws § 145:

a) "the place where the injury occurred;

b) the place where the conduct causing the injury occurred;

c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and

d) the place where the relationship is centered."

District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995) (citation omitted).

Based on these factors as applied to the controversy here, the Court concludes that the governmental interests of the District of Columbia outweigh the governmental interests of the State of Illinois, because the District of Columbia is both the jurisdiction with the most significant relationship to the dispute and with the greater interest in the outcome.

First, the injuries identified in the Supplemental Complaint occurred primarily in the District of Columbia. Notably, Plaintiffs' Supplemental Complaint states the following:

- "[T]he false and defamatory statements made by Defendants about Plaintiffs were intentionally published and republished in the District of Columbia by each of the Defendants." Supp. Compl. ¶ 60.

- "As a result of that circulation, Plaintiffs were all injured by the defamatory statements in the District of Columbia…." *Id.*

- "The publications and republications of the defamatory materials were widely circulated in the District of Columbia by each of the Defendants." *Id.* ¶ 61.

Second, the Supplemental Complaint stems from alleged defamatory statements made in the Report that were later published on the APA's website. The Plaintiffs stress that Defendant Hoffman drafted the report in Illinois, but ignore the role that attorneys from Sidley Austin's DC office played in the process. Indeed, it is noteworthy that Sidley Austin's DC office is a defendant in this case and that the Report lists several attorneys from that office among its authors. *See* Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 42-43. Moreover, it was the APA, an organization based in Washington, D.C., that hired Defendant Sidley Austin to conduct an investigation into the actions of its employees, and where the principal publication occurred. Supp. Compl. ¶ 60. Therefore, the District of Columbia is the primary place where the conduct

causing the injury occurred and possesses a stronger interest in addressing the consequences of speech made within its borders.

Third, the domicile, residence, place of incorporation and place of business of the parties favor applying the laws of the District of Columbia and not the laws of the State of Illinois. While none of the Plaintiffs reside in Illinois, two of the four Defendants are located in the District of Columbia.[4]

Fourth, the relationship between the parties is centered in the District of Columbia despite the Plaintiffs' claim that an engagement letter between the Defendants identifies the laws of Illinois as the norms applicable to disputes between them. Nov. 18, 2019 Pls. Opp'n at 79. The Plaintiffs were not parties to the engagement letter between the Defendants. There is no indication in the letter that Defendants intended to apply the provision about the laws of Illinois to third parties. Thus, the retainer agreement is irrelevant to this lawsuit, which is unrelated to any dispute between the signatory to the letter. Moreover, the relationship between the Plaintiffs and the APA is centered in the District of Columbia. Plaintiffs James and Dunivin are former members of APA's governing council, Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 42-43, and Plaintiffs James and Banks were members of the PENS Task Force. Supp. Compl. ¶ 73. Finally, the Plaintiffs relationship with Defendants Sidley Austin (DC) is based solely on a report which was published and largely prepared in the District of Columbia.

Therefore, after reviewing the four pertinent factors, the Court finds that the governmental interests of the District of Columbia outweigh the minimal governmental interests of the State of Illinois. As the Plaintiffs recognize, "the jurisdiction with the most significant

[4] APA's principal place of business and place of incorporation is the District of Columbia. Supp. Compl. ¶ 60. Sidley Austin (DC) LLP's principal place of business is the District of Columbia. *Id.* ¶ 47. Sidley Austin LLP's principal place of business is Illinois. *Id*. David Hoffman lives in Illinois. *Id.* ¶ 46. Plaintiff Banks lives in North Carolina. *Id*. ¶ 39. Plaintiff Dunivin lives in California. *Id.* ¶ 41. Plaintiff James lives in Ohio. *Id.* ¶ 42.

relationship to the dispute… [is] presumptively…the jurisdiction whose policy would be more advanced by application of its law." Nov. 18, 2019 Pls. Opp'n at 76 (quoting *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013)). Here, that jurisdiction is the District of Columbia.

III. LEGAL STANDARDS:

A. The D.C. Anti-SLAPP Act

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Mann*, 150 A.3d at 1226 (quoting legislative history). The Anti-SLAPP Act tries "to deter SLAPPs by 'extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.'" *Id*. at 1235 (quoting legislative history). "Consistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation." *Id*. at 1239.

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.'" *Id*. at 1227 (quoting D.C. Code § 16-5502(b)).

"Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits.'" *Id*. at 1227 (quoting § 16-5502(b)). "[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or

proffer of evidence that supports the claim." *Id.* at 1233. "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id*. at 1232. "This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Id*. at 1232-33.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Id*. at 1227. As such, Section 16-5502(d) requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing." Finally, Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice."

B. Defamation

"To succeed on a claim for defamation, a plaintiff must prove (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Mann*, 150 A.3d at 1240 (quotation and brackets omitted).

In defamation cases that rely on statements made about public officials, plaintiffs must present clear and convincing evidence that a defendant acted with actual malice. *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 84 (D.C. 1980). "A plaintiff may prove actual

malice by showing that the defendant either (1) had subjective knowledge of the statement's falsity, or (2) acted with reckless disregard for whether or not the statement was false." *Mann*, 150 A.3d at 1252 (quotation omitted); *see New York Times v. Sullivan*, 376 U.S. 254, 280-81 (1964). "The 'reckless disregard' measure requires a showing higher than mere negligence; the plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *Mann*, 150 A.3d at 1252 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). In comparison to the standard used for statements about public officials, the standard of care for defamation of private individuals is that of negligence. *See Kendrick v. Fox Television*, 659 A.2d 814, 821 (D.C. 1995).

C. Republication

Whether the publisher of a defamatory statement may be liable for republication depends on whether the publisher "edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience." *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 880 (W.D. Va. 2016)(internal citations omitted). "In the context of internet articles…courts have held that 'a statement on a website is not republished unless the statement itself is *substantively altered or added to*, or the website is directed to a new audience.'" *Id.* (internal citations omitted) (emphasis added). Thus, the relevant inquiry focuses on whether there has been a change in the content of the defamatory statement or whether the publisher actively sought a new audience.

IV. ANALYSIS:

Plaintiffs advance three arguments to counter the Special Motions to Dismiss filed here. First, Plaintiffs argue that Defendants failed to make a prima facie case under the D.C. Anti-SLAPP Act that the Plaintiffs' claims address an act in furtherance of the right of advocacy on

issues of public interest. Second, Plaintiffs contend that they are private figures, not public officials, and that negligence is the appropriate standard to evaluate their claims. Finally, Plaintiffs maintain that they have shown they are likely to succeed on the merits of their defamation and false light claims.

The Court will address each argument in turn.

A. Prima Facie Showing

The D.C. Anti-SLAPP Act requires that defendants make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." § 16-5502(b). This burden is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014). Section 16-5501 defines an "act in furtherance of the right of advocacy on issues of public interest" to include "[a]ny written or oral statement made … [i]n connection with an issue under consideration or review by [any governmental] body; or… [i]n a place open to the public or a public forum in connection with an issue of public interest; … or [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1)(A)-(B).

Plaintiffs contend that Defendants have not satisfied their burden under the D.C. Anti-SLAPP Act because (1) the Report "was an objective recitation of facts-not a work of advocacy," Nov. 15, 2019 Pls. Opp'n at 8, and (2) four of Plaintiffs' defamation claims are based on publications of the Report that "occurred in private-internal APA-only forums that were not open or available." *Id.* at 9. Both arguments are without merit.

(1) The Right of Advocacy

First, Plaintiffs argue that because "the APA engaged Sidley 'to conduct an independent review of ***whether there [was] any factual support*** for the assertion that APA engaged in

activity that would constitute collusion…' to facilitate torture, and 'the ***sole objective of the review [was] to ascertain the truth*** about that allegation…." that the goal of the Report was objectivity, not advocacy. *Id.* at 10.

This assertion relies on a narrow definition of the term advocacy. The public is interested in facts as well as opinions, and whether or not Defendants Sidley Austin were originally hired to collect facts, they provided factual information and related conclusions to the public through a report about issues of public interest in the United States. Thus, the Report squarely fits within the parameters of the D.C. Anti-SLAPP Act as it is "expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest," § 16-5501(1)(B), and is a "written… statement made… [i]n a place open to the public or a public forum in connection with an issue of public interest." § 16-5501(1)(A)(ii).

Plaintiffs also contend that even if the Report is a work of advocacy, only Defendant APA could claim the protections of the D.C. Anti-SLAPP Act because Defendants Sidley Austin prepared the Report at the request of the APA and were not acting as advocates of their own beliefs. Nov. 15, 2019 Pls. Opp'n at 16-17. Again, Plaintiffs are asking the Court to apply a narrow definition of the term advocacy when no such restriction appears in the D.C. Anti-SLAPP Act. Such a narrow application of the D.C. Anti-SLAPP Act would defeat the Act's purpose to protect speech. In any event, the Report could be construed as advocating for psychologists to regulate their profession and delineate their ethical guidelines without military or governmental agencies seeking to influence the process and for the APA to insure its independence.

(2) Public Forum

Second, Plaintiffs contend that Claims 1, 4, 5, and 9 of the Supplemental Complaint are outside the scope of the D.C. Anti-SLAPP Act "because the publications [of Claims 1, 4, 5, and

9] were to private, non-public audiences." Nov. 15, 2019 Pls. Opp'n at 13 ("Those four Claims are based on…publications, all in private forums open only to the leadership of the APA…."). However, § 16-5501(1) applies in the disjunctive either to statements "[i]n a place open to the public or a public forum in connection with an issue of public interest; … *or* [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." (Emphasis added). Even if those four Claims do not involve Defendants publishing the Report to the public at large, each Claim involves either Defendant APA or Defendants Sidley Austin engaging in expression that communicates information to members of the public within the meaning of the D.C. Anti-SLAPP Act.

As for the remaining claims in the Supplemental Complaint, Plaintiffs do not contest that related statements qualify as a "written or oral statement made…in a place open to the public or a public forum in connection with an issue of public interest; … or any other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1)(A)-(B).

(3) Issues of Public Interest

Third, it is evident that the Report discusses "issues of public interest," a proposition that Plaintiffs do not seem to challenge. As discussed above, the Report centers on two main issues: (1) the role of psychologists in national security interrogations; and (2) whether APA officials colluded with DoD officials to support the torture of detainees after September 11, 2001. It is undeniable that extensive reporting, discussion and analysis of these issues in the media, in government, in the courts, and in the press have been taking place for years. As such, those developments place the topics discussed in the Report squarely within the category of matters

considered to be of public concern. Thus, it is clear that the Report addresses an "issue of public interest" within the meaning of § 16-5501(3).

For all these reasons, the Defendants have satisfied the requirement to make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.

B. Public Official Designation

Whether a plaintiff is a public official is a question of law to be decided by the Court. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). As the Supreme Court noted in *Rosenblatt*,

> The "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. "Public official" cannot be thought to include all public employees. The position occupied by the official must be distinguished from the controversy in which he has become embroiled, for it is the former that must inherently invite public scrutiny.

Id. at 85-86.

Plaintiffs argue that they are private figures because Plaintiffs were retired from their military service at the time the Report was published and were "mid-level officers whose responsibility was to draft and follow through with policies and directives issued by their superior, commanding officers." Nov. 18, 2019 Pls. Opp'n at 65-68. These assertions misstate relevant law and contradict statements made in the Plaintiffs' Supplemental Complaint.

(1) Plaintiffs' statuses as Public Officials did not terminate after their retirement for purposes of this defamation suit.

The passage of time does not automatically cause a public official to lose public official status if the public official's former role is still a matter of public interest, or if the alleged defamatory statements address the public official's past performance in that role. *See Rosenblatt*, 383 U.S. at 87 n.14 (concluding that plaintiff, former area supervisor, was a public official noting

"it is not seriously contended, and could not be, that the fact that [plaintiff] no longer supervised the Area when the column appeared has significance here….[T]he management of the Area was still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to [plaintiff], referred to his performance of duty as a county employee"); *Crane v. Ariz. Republic*, 972 F.2d 1511 (9th Cir. 1992)(affirming the district court's decision that plaintiff, a former prosecutor, was not a public official because "the article…addresses neither [plaintiff's] performance of official duties nor any misconduct engaged in while a prosecutor," but concluding that plaintiff should be considered a public official for portions of the article related to activities undertaken while a prosecutor); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978)(concluding that former commanding officer of a United States Navy vessel was a public official for a defamation suit involving statements made in a book published after plaintiff was removed from his position as "such a person holds a position that invites public scrutiny and discussion and fits the description of a public official under *New York Times*"); *Worrell-Payne v. Gannett Co.*, 49 Fed. Appx. 105, 107 n.1 (9th Cir. 2001)(affirming district court decision that plaintiff, former executive director of the Boise City/Ada County Housing Authority, was a public official "because management of the Authority…was 'still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong,'" despite termination from employment and the passage of two years).[5] Thus the relevant inquiry is not,

[5] This application of the *New York Times* rule for public officials is in line with the current understanding of the passage of time as it relates to limited- purpose public figures. *See Partington v. Bugliosi*, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995)("The Supreme Court has specifically declined to address whether an individual's status as a public figure can change over time…. However, it appears that every court of appeals that has specifically decided this question has concluded that the passage of time does not alter an individual's status as a limited purpose public figure. *See Street v. Nat'l Broad. Co.,* 645 F.2d 1227 (6th Cir. 1981), *cert. dismissed,*454 U.S. 1095 (1981); *see also Contemporary Mission v. New York Times Co.,* 842 F.2d 612 (2d Cir. 1988), *cert. denied,* 488 U.S. 856 (1988); *Wolston v. Reader's Digest Ass'n, Inc.,* 578 F.2d 427, 431 (D.C. Cir. 1978), *rev'd on other grounds,* 443

as Plaintiffs contend, centered *only* on a person's status at the time of publication, but on whether disputed comments relate to events that took place while the person was a public figure and those events remained the subject of public concern.

Here, the Report clearly addresses Plaintiffs' performances of their official duties in matters of public interest. The Report's narrative, as Plaintiffs contend, is that, "Plaintiffs… 'colluded' to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations." Supp. Compl. ¶ 5. Plaintiffs further assert that the Report makes three primary allegations: "ensuring that the guidelines issued for psychologists involved in the interrogation process were no more restrictive than 'existing' military guidelines… preventing the APA from banning psychologists participating in national-security interrogations; and…mishandling ethics complaints to protect national-security psychologists from censure." *Id.* ¶ 19. These conclusions directly relate to Plaintiffs' former roles as Army Colonels and psychologists and the actions they undertook in controversial events related to their specific military positions. Moreover, at the time the Report was published, psychologists' involvement in interrogations was "still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong." *Rosenblatt*, 383 U.S. at 87 n.14.

(2) Plaintiffs Satisfy the Criteria for Public Officials established by the U.S. Supreme Court

Plaintiff Banks served as the Director of Psychological Applications for the United States Army's Special Operations Command where he "provided ethical as well as technical oversight for all Army Special Operation Psychologists." Supp. Compl. ¶ 39. Plaintiff Dunivin served as

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U.S. 157 (1979); *Brewer v. Memphis Publ'g Co., Inc.,* 626 F.2d 1238 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981); *Time, Inc. v. Johnston,* 448 F.2d 378, 381 (4th Cir. 1971).")

Chief of the Department of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center where she "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command," and "served in the Army Inspector General's inspection of detention facilities." *Id.* ¶ 41. Plaintiff James served as Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. *Id.* ¶ 42. These positions comfortably fit within the hierarchy of public officials as provided in *Rosenblatt*.

Furthermore, the Supplemental Complaint provides a plethora of examples demonstrating Plaintiffs' "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 88. Specifically, the Supplemental Complaints asserts as follows:

- "The military Plaintiffs…became directly and energetically involved in drafting policies and implementing training and oversight…." Supp. Compl. ¶ 12
- "The military…Plaintiffs then worked to ensure that the APA guidelines were drafted so that military psychologists could use them within the military…." *Id.* ¶ 13.
- "The military Plaintiffs…were charged with drafting and implementing policies…." *Id.* ¶ 69.
- "Given the role of Plaintiffs Banks and James in helping to put local policies in place, it is not a surprise that those policies…were incorporated by reference into Statement Four of the PENS Guidelines." *Id.* ¶ 117.
- "The Military Plaintiffs Took a Leading Role in Creating Policies and Procedures to Prevent Abusive Interrogations." Supp. Compl. Heading 4 at 36.
- **"**In the aftermath of the abuses at interrogation sites after 9/11…Plaintiffs…were called upon to help put in place policies…." *Id.* ¶ 122.
- "[Plaintiff] Banks was ordered to work with the Army's Inspector General to investigate and decide how to prevent future abuses." *Id.* ¶ 123.
- "[Plaintiff] James [was asked] to serve in Iraq, with the role of drafting policies and instituting procedures…." *Id.*

- "[Plaintiff] Dunivin volunteered to play a similar role [to Dr. James in Iraq] at Guantanamo." *Id.*

- "[Plaintiff] Banks became an author of the Army Inspector General's Report….and at the time of PENS, [Plaintiff] Banks was consulting to the Army on a revision to the Army Field Manual." *Id.* ¶ 125.

- "[Plaintiff] James…outline[d] the beginnings of a SOP to prevent abuses….While in Iraq [Plaintiff] James trained staff on appropriate interviewing techniques that were consistent with those documents." *Id.* ¶ 127.

- "[Plaintiff] Dunivin…was involved in drafting the Guantanamo SOP that instructed BSCTs to ensure interrogation policies were followed and to report violations." *Id.* ¶ 129.

Accordingly, the Court concludes that the Plaintiffs, former Army Colonels, are public officials for purposes of this defamation suit and must show that Defendants acted with actual malice to promote their claims.

C. Likelihood of Success on the Merits

Once Defendants make a prima facie case, the burden shifts to Plaintiffs to offer evidence that would permit a jury properly instructed on the applicable legal and constitutional standards to reasonably find that Defendants are liable for defamation. *See Mann*, 150 A.3d at 1232. "The precise question here, therefore, is whether a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." *Id*. at 1236.

(1) Republication

Count 11 of Plaintiffs' Supplemental Complaint alleges,

> On August 21, 2018, the General Counsel and Board of APA republished the [Report] on the APA website at a new URL. They directed Council members and others to the [Report] through an email to the Council listserv, which includes persons who are not Council members, and by publishing on the APA's public website the Board minutes authorizing the republication. Those minutes contain a link to the [Report]. The website is accessible to the public, not only to APA members.

Supp. Compl. ¶ 524. Plaintiffs assert that these actions constitute a republication for the "simple fact [that] the publications took place at separate times and reached different audiences. Nothing more is necessary." Nov. 15, 2019 Pls. Opp'n at 18. Defendants dispute Plaintiffs' characterization of the August 2018 changes to the APA website and argue that the Report was not republished. Mar. 21, 2019 APA Mot. at 11; Mar. 21, 2019 Sidley Austin Mot. at 2.

First, Defendants note that the August 2018 website change did not create a new URL for the Report. Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 4. Rather, after August 2018, the Report could no longer be accessed via its own landing page but only through a link on the APA website's Timeline page ("the Timeline"). Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 5. Prior to August 2018, "the Report could always be accessed by a link to the Report from the Timeline." Mar. 21, 2019 APA Mot., Ex. A Fredley Aff. ¶ 4. Therefore, after the August 2018 changes, "[t]he link to the Report…[was] at the same place on the Timeline as it was when it was originally posted to the APA website." Mar. 21, 2019 APA Mot. at 9.

Second, Defendants argue that they did not direct a new audience to the Report by emailing and posting the meeting minutes approving the website change because the meeting minutes contained a link to the Timeline only, not the Report. Mar. 21, 2019 APA Mot. at 4; Mar. 21, 2019 Sidley Austin Mot. at 12. The Timeline contains approximately 170 links. Mar. 21, 2019 APA Mot. at 4.

Third, and finally, Defendants assert that adding to the Timeline links to four documents commenting on the Report did not modify the substance of the Report. Mar. 21, 2019 APA Mot. at 10, Ex. A Fredley Aff. ¶ 6; Mar. 21, 2019 Sidley Austin Mot. at 13.

The Court concludes that as a matter of law, the APA's actions on August 21, 2018 do not constitute republication. Because the Timeline always contained a link to the Report, the record does not support Plaintiffs' position that the "APA republished the [Report] on the APA website at a new URL," Supp. Compl. ¶ 524, and that "the Report was published on separate occasions and on different locations." Nov. 15, 2019 Pls. Opp'n at 21. Moreover, there is no evidence that Defendant APA intended to, or actually did, reach a new audience.

Similarly, Plaintiffs' contention that Defendant APA sought a new audience by emailing its Council of Representatives exaggerates the available evidence. The record shows that the email sent to the APA's Council of Representatives contained only a link to the Timeline, a webpage with over 170 links, and notified Council members that the motion to remove the Report from its landing page was passed. Mar. 21, 2019 APA Mot. at 4. Also, the August 2018 meeting minutes posted on the APA's website contains links to the Timeline, not the Report. *Id.* In fact, the August 2018 meeting minutes consists of twenty two pages of information, most of which does not relate to or reference the Report. Mar. 21, 2019 APA Mot., Ex. 1. Finally, there was no modification, or revision, to the Report. The addition of links to the Timeline commenting on the Report is insufficient to republish the Report as these additional links did not link to the Report and did not appear on the same webpage as the Report. Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 5. Accordingly, there was no republication of the Report as a matter of law and Plaintiffs' Count 11 must be dismissed.

(2) Actual Malice

The Plaintiffs must present clear and convincing evidence that Defendants acted with actual malice given their status as public officials. Actual malice exists where a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or

not.'" *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times Co.*, 376 U.S. at 279-80).

The Plaintiffs received the opportunity to conduct targeted discovery prior to filing their oppositions to the Defendants' motions as permitted under D.C. Code § 16-5502(c)(2). Specifically, on February 8, 2019, this Court granted in part Plaintiffs' motion for limited discovery to include the following information:

- Depositions of Drs. Michael Honaker, Heather Kelly, and Stephen Soldz.[6]
- Answers to the four interrogatories to Defendant APA served with the Complaint.
- A mirror image copy of all electronic data contained on the personal computer and hard drive of Dr. Stephen Behnke retrieved by Defendants Sidley Austin as part of its investigation.
- The witness interview notes or communications created during the Sidley Austin investigation for the 18 witnesses from whom the Plaintiffs received affidavits.

Despite this discovery, Plaintiffs fail to proffer evidence that a reasonable jury could find to be clear and convincing proof that Defendants knew that facts stated in, or reasonably implied by, the Report were false or that they published the Report with reckless disregard of the falsity of these stated or implied facts.

Nevertheless, Plaintiffs contend that several categories of information, when subjected to "a holistic examination" and viewed in the aggregate, combine to provide "more than enough evidence to demonstrate Defendants' actual malice." Nov. 18, 2019 Pls. Opp'n at 5 (citing *Tavoulares v. Piro*, 817 F. 2d 762, 794 (D.C. Cir. 1987)).

The foundation for this argument rests with thirty five individual witness statements found in Exhibit C, which is part of Plaintiffs' Consolidated Opposition to Defendants' First Set

[6] This Court subsequently vacated the provision for depositions in an order dated September 25, 2019.

of Contested Special Motions to Dismiss filed March 21, 2019,[7] under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5002. The statements consist of thirty four affidavits from different persons and a memorandum from Dr. L. Michael Honaker. *See generally,* Exhibit C. In addition, five affidavits consist of declarations from current and former plaintiffs and two individuals that Sidley Austin did not interview as part of the investigative process.[8] Thus, twenty eight statements relate to individuals interviewed during the investigation who are not or who have not been plaintiffs in this case.

First, Plaintiffs argue that during their investigation, Defendants had documents and government reports in their possession that contradicted the Report's conclusions. Nov. 18, 2019 Pls. Opp'n at 21. However, Plaintiffs fail to explain whether the entities that issued those governmental reports had access to the same documents, email exchanges and witnesses used as sources for the Report. Similarly, it is unclear to what extent those reports were commissioned with mandates comparable to the directive that APA provided to Sidley & Austin for the internal review, focused on the same issues explored in that investigation or applied different ethical or procedural rules in reaching their conclusions. Thus, the mere existence of those reports does not support the claim that Defendants acted with malice in drafting the Report.

Similarly, Plaintiffs present affidavits of multiple witnesses contending that information they provided was not included in the Report or disagreeing with how their declarations were portrayed. When one considers the scope of the investigation, the number of witnesses and the volume of materials reviewed, it is difficult to understand how omitting a comment here or an opinion there would amount to malice. *See,* Affidavit of Susan Brandon in Support of Plaintiffs'

[7] Defendants' First Set of Contested Special Motions to Dismiss was filed October 13, 2017.
[8] Affiant Donna Beavers expressed disagreement with the Report's conclusions, but was not interviewed. Affiant Arman Gungor is a Certified Computer Examiner who described metadata found and emails retrieved during his analysis of electronic data. *See generally* Exhibit C.

Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 1 ("The Report is not an accurate characterization of my comments in the interview"); Affidavit of Robert J. Sternberg in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 4 ("To this day, I believe that the Report seriously misrepresented what I said"); Affidavit of Harry Matarazzo in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("Notably, certain written and verbal information that Dr. Matarazzo provided was not present, while other information was set forth in an equivocal manner"); and Affidavit of Scott Shumate in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 3 ("The Report's description of my understanding of interrogations appears to be cherry-picked from available information in order to portray me in a biased and misleading light"). Notably, these comments and similar comments from other affiants address disagreements with the Report about what a specific affiant said or did not say. These omissions and mischaracterizations, even if true, do not support an inference that Defendants acted with malice with respect to specific conclusions about the Plaintiffs found in the Report.

Next, Plaintiffs maintain that Defendants undertook the internal review process with a preconceived agenda to specifically target the Plaintiffs in this case, relied on biased and unreliable sources and purposely avoided the truth. Nov. 18, 2019 Pls. Opp'n at 21. Again, this argument is rooted in declarations within attached affidavits that echo each other in tenor and vocabulary. *See* Affidavit of Jennifer Bryson in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("During the interview, I was struck by a definite sense that the Sidley interviewer was targeting

Dr. Behnke in the service of a preconceived narrative…"); Affidavit of Lisa Callahan in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("I was given the distinct impression that the Sidley independent review was intended to find evidence that the Ethics Office staff had exercised undue influence over the ethics adjudication process"); Affidavit of Armand Cerbone in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 1 ("During my interview, Ms. Carter questioned me about, among other things, Dr. Behnke in a manner that evidenced a preconceived narrative …"); Affidavit of Robin Deutsch in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 3 ("During my interview with Mr. Hoffman, questions he posed left me with the distinct impression that he had a preconceived narrative and had already concluded that … Dr. Stephen Behnke, had engaged in inappropriate behavior"); Affidavit of Elizabeth Swenson in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("… it had been my impression … that Sidley Austin interviewers had an agenda and a preconceived narrative…"). Aside from these statements perhaps representing opinion testimony, it is not possible to tell from this record where along the investigative process involving some 150 witnesses these specific interviews took place, and what information investigators had received prior to the interviews leading them to focus their inquiry. Thus, the impressions of these affiants, even if true, would not support a finding of malice.

Furthermore, Plaintiffs question the Defendants reliance on four allegedly biased witnesses in reaching the Report's conclusions. *See* Nov. 18, 2019 Pl. Opp'n at 45. Those witnesses were Drs. Stephen Soldz, Nathaniel Raymond, Jean María Arrigo and Trudy Bond. *Id.*

at 45-46. However, those four individuals were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed. The possibility that these witnesses were biased does not suffice to establish malice. At best, the Plaintiffs have shown that Defendants Sidley Austin received contradictory and diverse statements, opinions and recollections during the investigation. Such inconsistencies are not uncommon in extensive investigations and do not suffice to show that Defendants had subjective knowledge of the Report's falsity, or acted with reckless disregard for whether or not the statements in the Report were false.

With respect to Plaintiffs' argument that Defendants purposely avoided the truth, the evidence proffered does not satisfy the clear and convincing evidence standard. Indeed, the evidence that Plaintiffs describe is not the entirety of the information compiled during the internal review and their argument ignores the length of the investigative process. Although the record shows that Defendants Sidley Austin interviewed a handful of Plaintiffs' critics, that fact does not establish that Defendants Sidley Austin had "obvious reasons to doubt the veracity" of these sources. *See St. Amant*, 390 U.S. at 732. Furthermore, Defendants Sidley Austin did not "rely on a single, questionable source without fact-checking, interviewing additional witnesses, or seeking independent support," to avoid the truth and establish a predetermined narrative. *Talley v. Time, Inc.*, 923 F.3d 878, 904 (10th Cir. 2019) (citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 157-58 (1967)); *accord Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 688, 692 (1989). To the contrary, it is undisputed that Defendants Sidley Austin interviewed about 150 witnesses, performed follow up interviews with 50 witnesses, and reviewed some 50,000 documents during the course of their eight-month investigation. Sidley Austin Reply to Nov. 15, 2019 Opp'n at 25. As such, the evidence that Plaintiffs present fails to show that Defendants Sidley Austin pursued

a preconceived outcome, relied on biased and unreliable sources that impacted the conclusions of the investigation and purposely avoided the truth. Here, a reasonable jury properly instructed on the law would be hard-pressed to find clear and convincing evidence of actual malice.

Additionally, Plaintiffs contend that the Defendants' investigation departed from accepted professional standards and that Defendants refused to retract the Report after publication. Nov. 18, 2019 Pls. Opp'n at 21. Plaintiffs charge of improper investigation fails as a "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *See Tavoulareas,* 817 F.2d at 794 (emphasis in original). Aside from stating their conclusions, the Plaintiffs fail to make this necessary connection. Moreover, Plaintiffs fail to establish any duty on behalf of Defendants to retract or correct the Report post publication, particularly after legal action related to the contents of the report had been filed. In any event, the actual malice standard turns on whether Defendants were subjectively aware that the statements in the Report were false or acted in reckless disregard of their falsity, at the time the statements were made. It is a standard that Plaintiffs have not satisfied. Therefore, even when combining the various arguments that Plaintiffs advance, considering the totality of the record in this case, Plaintiffs fail to proffer clear and convincing evidence that Defendants made any defamatory statements in the Report with knowledge that a statement was false or with reckless disregard of its falsity. Thus, their claims are not likely to succeed at trial.

Finally, it is important to point out a string of email communications that took place from on or about March 7, 2006 to on or about July 2, 2007, which are appended as Exhibit C to the Affidavit of Arman Gungor in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act. Mr. Gungor recovered these

undeleted emails from the Behnke hard drive that was provided in discovery. *Id.* ¶ 18. The purpose of the communications was to coordinate responses to public discussions about APA policies and to blunt criticisms related to treatment of detainees and interrogation practices. Participants in these exchanges included current and former Plaintiffs Dr. Stephen Behnke, Dr. Larry James and Dr. L. Morgan Banks, III, as well as affiants Dr. Michael Gelles and Dr. Robert Fein. Curiously, the emails include phrases like "Eyes Only," "Your eyes only," "Please delete after reading this," and "Please review and destroy." Since this correspondence was disclosed in discovery which the Defendants provided, it is safe to assume that investigators reviewed and considered the emails in reaching their conclusions.[9]

IV. CONCLUSION:

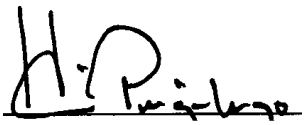
The D.C. Anti-SLAPP Act was enacted to protect the right of advocacy on issues of public interest. The Act allows defamation suits involving statements about issues of public interest to proceed, provided that the subjects of the alleged defamatory statement offer evidence that they are likely to succeed on the merits. Plaintiffs have failed to provide such evidence. Accordingly, this 11th day of March, 2020, it is ordered that:

1. Defendant American Psychological Association's Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code § 16-5502 is **GRANTED**.
2. Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 is **GRANTED**.

[9] In the alternative, assuming without deciding that Plaintiffs were private individuals instead of public officials for purposes of this defamation action, Plaintiffs have failed to proffer evidence in this record that in publishing the Report the Defendants "fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others."*Kendrick,* 659 A.2d at 822.

3. Defendant American Psychological Association's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **GRANTED**.
4. Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502 is **GRANTED**.
5. This case is dismissed with prejudice.

It is so **ORDERED.**



Honorable Hiram E. Puig-Lugo
Associate Judge
Signed in Chambers

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SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*,	)	
	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	
DAVID D. HOFFMAN, *et al.*,	)	
	)	

AMENDED ORDER

This matter comes before the Court on (1) Defendant American Psychological Association's ("APA's") Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code § 16-5502, filed October 13, 2017; (2) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's (collectively "Sidley Austin's") Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502, filed October 13, 2017; (3) Defendant APA's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, filed March 21, 2019; and (4) Defendants Sidley Austin's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502, filed March 21, 2019. On November 15, 2019, Plaintiffs filed a consolidated Opposition to APA and Sidley Austin's (collectively "Defendants'") Second Set of Contested Special Motions to Dismiss filed March 21, 2019. On November 18, 2019, Plaintiffs filed a consolidated Opposition to Defendants' First Set of Contested Special Motions to Dismiss filed October 13, 2017. On December 13, 2019, Defendants filed Reply briefs in support of their Special Motions to Dismiss. On February 21, 2019, the Court held a hearing on the parties' Special Motions to Dismiss.

This case involves the Independent Review Report ("the Report") that Defendant APA commissioned Defendant Sidley Austin to perform and subsequently published on its website. The Report addressed the ongoing national conversation about the role of psychologists in national security interrogations and explored whether APA officials had colluded with the Bush administration, CIA, or U.S. military officials to support the torture of persons detained after the events of September 11, 2001. The Report reached various conclusions in that regard, including that "key APA officials…colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." Report at 9. The Plaintiffs, who are three former Army Colonels, disagree with the Report's conclusions and have brought claims of defamation *per se*, defamation by implication, and false light against the Defendants.[1]

To begin, it is important to note that Special Motions to Dismiss do not require this Court to determine whether the information in the Report is accurate or inaccurate. The purpose of such motions is not to determine whether a defendant actually committed the tort of defamation, but "whether the defendant is entitled to immunity from trial." *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016). Thus, the role of the court is to determine whether or not the motion to dismiss should be granted, when all statutory requirements are satisfied, as a matter related to issues that concern public participation. To that end, a court must determine whether a defendant has made a prima facie case that the D.C. Anti-SLAPP Act is applicable, and if so, whether a plaintiff has shown that a defendant either knew that contested statements were false or acted with reckless disregard of their falsity. Here, the amended complaint also raises concerns about the legal implications of an alleged subsequent republication.

[1] Two other Plaintiffs who were APA officials have been referred to arbitration consistent with their employment contracts with the APA. Those former Plaintifs are Dr. Stephen Benhke and Dr. Russell Newman.

The Court has considered the parties' pleadings, the relevant case and statutory law, and the entire record. For the following reasons, the Defendants' four Special Motions to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 to 5505 are granted.

I. BACKGROUND:

On August 28, 2017, Plaintiffs filed a Complaint against Defendants asserting ten counts of defamation *per se*, one count of defamation by implication, and one count of false light. On February 4, 2019, Plaintiffs filed a Supplemental Complaint adding an additional count of defamation *per se*.[2]

The Plaintiffs are three individuals who served as military psychologists and retired as Army Colonels. Plaintiff Dr. L. Morgan Banks, III ("Plaintiff Banks") served as the Director of Psychological Applications for the United States Army's Special Operations Command. Supp. Compl. ¶ 39. In that role, Dr. Banks "provided ethical as well as technical oversight for all Army Special Operation Psychologists." *Id.* For her part, Plaintiff Dr. Debra L. Dunivin ("Plaintiff Dunivin") served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center, where she "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command." *Id.* ¶ 41. In addition, Dr. Dunivin "served in the Army Inspector General's inspection of detention facilities." *Id.* Finally, Plaintiff Dr. Larry C. James ("Plaintiff James") served as Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. *Id.* ¶ 42.

The Defendants are (1) the APA, a Washington, D.C. based non-profit professional organization for psychologists, *id.* ¶ 48, (2) David Hoffman, a partner at Sidley Austin LLP, *id.* ¶

[2] The defamation *per se* count added in the Supplemental Complaint appears as Count 11 and is the subject of two of the four Special Motions to Dismiss.

46, (3) Sidley Austin LLP, a law firm comprised of a group of limited liability partnerships, *id.* ¶ 47, and (4) Sidley Austin (DC) LLP. *Id.*

After September 11, 2001, reports of detainee abuse, the use of enhanced interrogation techniques and the role of psychologists in those interrogations became a topic of public scrutiny. Supp. Compl. ¶ 70; Oct. 13, 2017 Sidley Austin Mot. at 4. In 2004, as media coverage of this topic continued to increase, the *New York Times* published an article about the role that psychologists played in enhanced interrogations. Supp. Compl. ¶ 70; Oct. 13, 2017 Sidley Austin Mot. at 4. In response to the *New York Times* article, the APA established the PENS[3] Task Force "to explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." Supp. Compl. ¶ 71. Plaintiffs Banks and James were members of the PENS Task Force. *Id.* ¶ 73. Plaintiff Dunivin was not a member of the PENS Task Force but made recommendations to the APA about who should be selected to serve on the task force. *Id.* ¶ 45. In the end, the PENS Task Force did not ban psychologists from assisting in interrogations. Oct. 13, 2017 Sidley Austin Mot. at 5. Rather, the PENS Task Force drafted twelve statements framing "ethical guidelines for psychologists involved in interrogations." Oct. 13, 2017 Sidley Austin Mot. at 5; *see also* Supp. Compl. ¶ 75. The APA Board adopted these statements on July 1, 2005. Supp. Compl. ¶ 77.

Nine years after the PENS Task Force completed its work, *New York Times* Reporter James Risen published the book titled *Pay Any Price.* Oct. 13, 2017 Sidley Austin Mot. at 8. In his book, Risen claimed that the "APA colluded with the U.S. government to support torture, including that the outcome of the PENS Task Force was a result of collusion between APA and the Government." Oct. 13, 2017 Sidley Austin Mot. at 8 (citing Compl. ¶¶ 2, 3). In response to the allegations, in 2014 the APA retained the law firm Sidley Austin to conduct an independent

[3] PENS stands for Psychological Ethics and National Security. Supp. Compl. ¶ 72.

review into Risen's contentions that the APA colluded with the government to support torture. Oct. 13, 2017 Sidley Austin Mot. at 1.

The investigation spanned more than eight months, interviewed approximately 150 individuals, and studied more than 50,000 documents as part of the independent review. *Id.* at 8. It resulted in a report that consists of 541 pages and 7,600 pages of exhibits. Oct. 13, 2017 Sidley Austin Mot. at 8; Oct. 13, 2017 APA Mot. at 4. Sidley Austin provided the Report to the APA in July 2015. Oct. 13, 2017 Sidley Austin Mot. at 8. On July 10, 2015, a leaked copy of the Report was published on *The New York Times'* website. Oct. 13, 2017 APA Mot. at 4. On that day, the APA published the Report on its website. *Id.* Two months later, on September 4, 2015, a revised version of the Report was posted on the APA's website. Nov. 15, 2019 Pls. Opp'n at 3.

The Report identified Plaintiff Banks as "the key DoD official [with whom the APA Ethics Director] partnered with…," and Plaintiff Dunivin as "the other DoD official who was significantly involved in the confidential coordination effort…." R. at 12-13. The Report reached several conclusions including:

- "[K]ey APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." *Id.* at 9.

- "[I]n the three years following the adoption of the 2005 PENS Task Force Report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitely prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. The principal APA official involved in these efforts was once again the APA Ethics Director, who effectively formed an undisclosed joint venture with a small number of DoD officials to ensure that APA's statements, and actions fell squarely in line with DoD's goals and preferences." *Id.*

- "We did not find evidence to support the conclusion that APA officials actually knew about the existence of an interrogation program using 'enhanced interrogation techniques.'" *Id.*

- Ethics complaints were mishandled to protect national-security psychologists from censure. *Id.* at 10.

Plaintiffs allege that the Report contains false and defamatory statements that "destroyed their reputations and careers." Nov. 18, 2019 Pls. Opp'n at 2. In response to Plaintiffs' initial and supplemental complaints, Defendants filed four Special Motions to Dismiss under the D.C. Anti-SLAPP Act.

II. CHOICE OF LAW:

As a threshold matter, the Plaintiffs argue that all four Special Motions to Dismiss must be denied because the Illinois Anti-SLAPP Act, not the D.C. Anti-SLAPP Act, applies to this case. Nov. 18, 2019 Pls. Opp'n at 73-82. The parties agree that there is a conflict between the Illinois Anti-SLAPP Act and the D.C. Anti-SLAPP Act. *See* Nov. 18, 2019 Pls. Opp'n at 75; Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 40.

Whenever a dispute arises about the applicable choice of law, the D.C. Court of Appeals uses "the governmental interests analysis" to resolve the conflict. *Hercules & Co. v. Shama Rest.*, 556 A.2d 31, 40 (D.C. 1989)(citing *Kaiser-Georgetown Cmty. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985)). Under this approach, "the choice of law turns on which jurisdiction has 'the most significant relationship to the dispute,' and 'which jurisdiction's policy would be more advanced' by applying its law." *USA Waste of Md., Inc. v. Love*, 954 A.2d 1027, 1031 (D.C. 2008). When applying this standard, the Court of Appeals has relied on the four factors listed in the Restatement (Second) of Conflicts of Laws § 145:

a) "the place where the injury occurred;

b) the place where the conduct causing the injury occurred;

c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and

d) the place where the relationship is centered."

District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995) (citation omitted).

Based on these factors as applied to the controversy here, the Court concludes that the governmental interests of the District of Columbia outweigh the governmental interests of the State of Illinois, because the District of Columbia is both the jurisdiction with the most significant relationship to the dispute and with the greater interest in the outcome.

First, the injuries identified in the Supplemental Complaint occurred primarily in the District of Columbia. Notably, Plaintiffs' Supplemental Complaint states the following:

- "[T]he false and defamatory statements made by Defendants about Plaintiffs were intentionally published and republished in the District of Columbia by each of the Defendants." Supp. Compl. ¶ 60.

- "As a result of that circulation, Plaintiffs were all injured by the defamatory statements in the District of Columbia…." *Id.*

- "The publications and republications of the defamatory materials were widely circulated in the District of Columbia by each of the Defendants." *Id.* ¶ 61.

Second, the Supplemental Complaint stems from alleged defamatory statements made in the Report that were later published on the APA's website. The Plaintiffs stress that Defendant Hoffman drafted the report in Illinois, but ignore the role that attorneys from Sidley Austin's DC office played in the process. Indeed, it is noteworthy that Sidley Austin's DC office is a defendant in this case and that the Report lists several attorneys from that office among its authors. *See* Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 42-43. Moreover, it was the APA, an organization based in Washington, D.C., that hired Defendant Sidley Austin to conduct an investigation into the actions of its employees, and where the principal publication occurred. Supp. Compl. ¶ 60. Therefore, the District of Columbia is the primary place where the conduct

causing the injury occurred and possesses a stronger interest in addressing the consequences of speech made within its borders.

Third, the domicile, residence, place of incorporation and place of business of the parties favor applying the laws of the District of Columbia and not the laws of the State of Illinois. While none of the Plaintiffs reside in Illinois, two of the four Defendants are located in the District of Columbia.[4]

Fourth, the relationship between the parties is centered in the District of Columbia despite the Plaintiffs' claim that an engagement letter between the Defendants identifies the laws of Illinois as the norms applicable to disputes between them. Nov. 18, 2019 Pls. Opp'n at 79. The Plaintiffs were not parties to the engagement letter between the Defendants. There is no indication in the letter that Defendants intended to apply the provision about the laws of Illinois to third parties. Thus, the retainer agreement is irrelevant to this lawsuit, which is unrelated to any dispute between the signatory to the letter. Moreover, the relationship between the Plaintiffs and the APA is centered in the District of Columbia. Plaintiffs James and Dunivin are former members of APA's governing council, Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 42-43, and Plaintiffs James and Banks were members of the PENS Task Force. Supp. Compl. ¶ 73. Finally, the Plaintiffs relationship with Defendants Sidley Austin (DC) is based solely on a report which was published and largely prepared in the District of Columbia.

Therefore, after reviewing the four pertinent factors, the Court finds that the governmental interests of the District of Columbia outweigh the minimal governmental interests of the State of Illinois. As the Plaintiffs recognize, "the jurisdiction with the most significant

[4] APA's principal place of business and place of incorporation is the District of Columbia. Supp. Compl. ¶ 60. Sidley Austin (DC) LLP's principal place of business is the District of Columbia. *Id.* ¶ 47. Sidley Austin LLP's principal place of business is Illinois. *Id*. David Hoffman lives in Illinois. *Id.* ¶ 46. Plaintiff Banks lives in North Carolina. *Id*. ¶ 39. Plaintiff Dunivin lives in California. *Id.* ¶ 41. Plaintiff James lives in Ohio. *Id.* ¶ 42.

relationship to the dispute… [is] presumptively…the jurisdiction whose policy would be more advanced by application of its law." Nov. 18, 2019 Pls. Opp'n at 76 (quoting *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013)). Here, that jurisdiction is the District of Columbia.

III. LEGAL STANDARDS:

A. The D.C. Anti-SLAPP Act

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Mann*, 150 A.3d at 1226 (quoting legislative history). The Anti-SLAPP Act tries "to deter SLAPPs by 'extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.'" *Id*. at 1235 (quoting legislative history). "Consistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation." *Id*. at 1239.

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.'" *Id*. at 1227 (quoting D.C. Code § 16-5502(b)).

"Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits.'" *Id*. at 1227 (quoting § 16-5502(b)). "[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or

proffer of evidence that supports the claim." *Id.* at 1233. "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id*. at 1232. "This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Id*. at 1232-33.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Id*. at 1227. As such, Section 16-5502(d) requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing." Finally, Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice."

B. Defamation

"To succeed on a claim for defamation, a plaintiff must prove (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Mann*, 150 A.3d at 1240 (quotation and brackets omitted).

In defamation cases that rely on statements made about public officials, plaintiffs must present clear and convincing evidence that a defendant acted with actual malice. *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 84 (D.C. 1980). "A plaintiff may prove actual

malice by showing that the defendant either (1) had subjective knowledge of the statement's falsity, or (2) acted with reckless disregard for whether or not the statement was false." *Mann*, 150 A.3d at 1252 (quotation omitted); *see New York Times v. Sullivan*, 376 U.S. 254, 280-81 (1964). "The 'reckless disregard' measure requires a showing higher than mere negligence; the plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *Mann*, 150 A.3d at 1252 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). In comparison to the standard used for statements about public officials, the standard of care for defamation of private individuals is that of negligence. *See Kendrick v. Fox Television*, 659 A.2d 814, 821 (D.C. 1995).

C. Republication

Whether the publisher of a defamatory statement may be liable for republication depends on whether the publisher "edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience." *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 880 (W.D. Va. 2016)(internal citations omitted). "In the context of internet articles…courts have held that 'a statement on a website is not republished unless the statement itself is *substantively altered or added to*, or the website is directed to a new audience.'" *Id.* (internal citations omitted) (emphasis added). Thus, the relevant inquiry focuses on whether there has been a change in the content of the defamatory statement or whether the publisher actively sought a new audience.

IV. ANALYSIS:

Plaintiffs advance three arguments to counter the Special Motions to Dismiss filed here. First, Plaintiffs argue that Defendants failed to make a prima facie case under the D.C. Anti-SLAPP Act that the Plaintiffs' claims address an act in furtherance of the right of advocacy on

issues of public interest. Second, Plaintiffs contend that they are private figures, not public officials, and that negligence is the appropriate standard to evaluate their claims. Finally, Plaintiffs maintain that they have shown they are likely to succeed on the merits of their defamation and false light claims.

The Court will address each argument in turn.

A. Prima Facie Showing

The D.C. Anti-SLAPP Act requires that defendants make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." § 16-5502(b). This burden is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014). Section 16-5501 defines an "act in furtherance of the right of advocacy on issues of public interest" to include "[a]ny written or oral statement made … [i]n connection with an issue under consideration or review by [any governmental] body; or… [i]n a place open to the public or a public forum in connection with an issue of public interest; … or [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1)(A)-(B).

Plaintiffs contend that Defendants have not satisfied their burden under the D.C. Anti-SLAPP Act because (1) the Report "was an objective recitation of facts-not a work of advocacy," Nov. 15, 2019 Pls. Opp'n at 8, and (2) four of Plaintiffs' defamation claims are based on publications of the Report that "occurred in private-internal APA-only forums that were not open or available." *Id.* at 9. Both arguments are without merit.

(1) The Right of Advocacy

First, Plaintiffs argue that because "the APA engaged Sidley 'to conduct an independent review of ***whether there [was] any factual support*** for the assertion that APA engaged in

activity that would constitute collusion…' to facilitate torture, and 'the ***sole objective of the review [was] to ascertain the truth*** about that allegation…." that the goal of the Report was objectivity, not advocacy. *Id.* at 10.

This assertion relies on a narrow definition of the term advocacy. The public is interested in facts as well as opinions, and whether or not Defendants Sidley Austin were originally hired to collect facts, they provided factual information and related conclusions to the public through a report about issues of public interest in the United States. Thus, the Report squarely fits within the parameters of the D.C. Anti-SLAPP Act as it is "expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest," § 16-5501(1)(B), and is a "written… statement made… [i]n a place open to the public or a public forum in connection with an issue of public interest." § 16-5501(1)(A)(ii).

Plaintiffs also contend that even if the Report is a work of advocacy, only Defendant APA could claim the protections of the D.C. Anti-SLAPP Act because Defendants Sidley Austin prepared the Report at the request of the APA and were not acting as advocates of their own beliefs. Nov. 15, 2019 Pls. Opp'n at 16-17. Again, Plaintiffs are asking the Court to apply a narrow definition of the term advocacy when no such restriction appears in the D.C. Anti-SLAPP Act. Such a narrow application of the D.C. Anti-SLAPP Act would defeat the Act's purpose to protect speech. In any event, the Report could be construed as advocating for psychologists to regulate their profession and delineate their ethical guidelines without military or governmental agencies seeking to influence the process and for the APA to insure its independence.

(2) Public Forum

Second, Plaintiffs contend that Claims 1, 4, 5, and 9 of the Supplemental Complaint are outside the scope of the D.C. Anti-SLAPP Act "because the publications [of Claims 1, 4, 5, and

9] were to private, non-public audiences." Nov. 15, 2019 Pls. Opp'n at 13 ("Those four Claims are based on…publications, all in private forums open only to the leadership of the APA…."). However, § 16-5501(1) applies in the disjunctive either to statements "[i]n a place open to the public or a public forum in connection with an issue of public interest; … *or* [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." (Emphasis added). Even if those four Claims do not involve Defendants publishing the Report to the public at large, each Claim involves either Defendant APA or Defendants Sidley Austin engaging in expression that communicates information to members of the public within the meaning of the D.C. Anti-SLAPP Act.

As for the remaining claims in the Supplemental Complaint, Plaintiffs do not contest that related statements qualify as a "written or oral statement made…in a place open to the public or a public forum in connection with an issue of public interest; … or any other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1)(A)-(B).

(3) Issues of Public Interest

Third, it is evident that the Report discusses "issues of public interest," a proposition that Plaintiffs do not seem to challenge. As discussed above, the Report centers on two main issues: (1) the role of psychologists in national security interrogations; and (2) whether APA officials colluded with DoD officials to support the torture of detainees after September 11, 2001. It is undeniable that extensive reporting, discussion and analysis of these issues in the media, in government, in the courts, and in the press have been taking place for years. As such, those developments place the topics discussed in the Report squarely within the category of matters

considered to be of public concern. Thus, it is clear that the Report addresses an "issue of public interest" within the meaning of § 16-5501(3).

For all these reasons, the Defendants have satisfied the requirement to make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.

B. Public Official Designation

Whether a plaintiff is a public official is a question of law to be decided by the Court. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). As the Supreme Court noted in *Rosenblatt*,

> The "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. "Public official" cannot be thought to include all public employees. The position occupied by the official must be distinguished from the controversy in which he has become embroiled, for it is the former that must inherently invite public scrutiny.

Id. at 85-86.

Plaintiffs argue that they are private figures because Plaintiffs were retired from their military service at the time the Report was published and were "mid-level officers whose responsibility was to draft and follow through with policies and directives issued by their superior, commanding officers." Nov. 18, 2019 Pls. Opp'n at 65-68. These assertions misstate relevant law and contradict statements made in the Plaintiffs' Supplemental Complaint.

(1) Plaintiffs' statuses as Public Officials did not terminate after their retirement for purposes of this defamation suit.

The passage of time does not automatically cause a public official to lose public official status if the public official's former role is still a matter of public interest, or if the alleged defamatory statements address the public official's past performance in that role. *See Rosenblatt*, 383 U.S. at 87 n.14 (concluding that plaintiff, former area supervisor, was a public official noting

"it is not seriously contended, and could not be, that the fact that [plaintiff] no longer supervised the Area when the column appeared has significance here….[T]he management of the Area was still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to [plaintiff], referred to his performance of duty as a county employee"); *Crane v. Ariz. Republic*, 972 F.2d 1511 (9th Cir. 1992)(affirming the district court's decision that plaintiff, a former prosecutor, was not a public official because "the article…addresses neither [plaintiff's] performance of official duties nor any misconduct engaged in while a prosecutor," but concluding that plaintiff should be considered a public official for portions of the article related to activities undertaken while a prosecutor); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978)(concluding that former commanding officer of a United States Navy vessel was a public official for a defamation suit involving statements made in a book published after plaintiff was removed from his position as "such a person holds a position that invites public scrutiny and discussion and fits the description of a public official under *New York Times*"); *Worrell-Payne v. Gannett Co.*, 49 Fed. Appx. 105, 107 n.1 (9th Cir. 2001)(affirming district court decision that plaintiff, former executive director of the Boise City/Ada County Housing Authority, was a public official "because management of the Authority…was 'still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong,'" despite termination from employment and the passage of two years).[5] Thus the relevant inquiry is not,

[5] This application of the *New York Times* rule for public officials is in line with the current understanding of the passage of time as it relates to limited- purpose public figures. *See Partington v. Bugliosi*, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995)("The Supreme Court has specifically declined to address whether an individual's status as a public figure can change over time…. However, it appears that every court of appeals that has specifically decided this question has concluded that the passage of time does not alter an individual's status as a limited purpose public figure. *See Street v. Nat'l Broad. Co.,* 645 F.2d 1227 (6th Cir. 1981), *cert. dismissed,*454 U.S. 1095 (1981); *see also Contemporary Mission v. New York Times Co.,* 842 F.2d 612 (2d Cir. 1988), *cert. denied,* 488 U.S. 856 (1988); *Wolston v. Reader's Digest Ass'n, Inc.,* 578 F.2d 427, 431 (D.C. Cir. 1978), *rev'd on other grounds,* 443

as Plaintiffs contend, centered *only* on a person's status at the time of publication, but on whether disputed comments relate to events that took place while the person was a public figure and those events remained the subject of public concern.

Here, the Report clearly addresses Plaintiffs' performances of their official duties in matters of public interest. The Report's narrative, as Plaintiffs contend, is that, "Plaintiffs… 'colluded' to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations." Supp. Compl. ¶ 5. Plaintiffs further assert that the Report makes three primary allegations: "ensuring that the guidelines issued for psychologists involved in the interrogation process were no more restrictive than 'existing' military guidelines… preventing the APA from banning psychologists participating in national-security interrogations; and…mishandling ethics complaints to protect national-security psychologists from censure." *Id.* ¶ 19. These conclusions directly relate to Plaintiffs' former roles as Army Colonels and psychologists and the actions they undertook in controversial events related to their specific military positions. Moreover, at the time the Report was published, psychologists' involvement in interrogations was "still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong." *Rosenblatt*, 383 U.S. at 87 n.14.

(2) Plaintiffs Satisfy the Criteria for Public Officials established by the U.S. Supreme Court

Plaintiff Banks served as the Director of Psychological Applications for the United States Army's Special Operations Command where he "provided ethical as well as technical oversight for all Army Special Operation Psychologists." Supp. Compl. ¶ 39. Plaintiff Dunivin served as

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U.S. 157 (1979); *Brewer v. Memphis Publ'g Co., Inc.,* 626 F.2d 1238 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981); *Time, Inc. v. Johnston,* 448 F.2d 378, 381 (4th Cir. 1971).")

Chief of the Department of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center where she "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command," and "served in the Army Inspector General's inspection of detention facilities." *Id.* ¶ 41. Plaintiff James served as Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. *Id.* ¶ 42. These positions comfortably fit within the hierarchy of public officials as provided in *Rosenblatt*.

Furthermore, the Supplemental Complaint provides a plethora of examples demonstrating Plaintiffs' "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 88. Specifically, the Supplemental Complaints asserts as follows:

- "The military Plaintiffs…became directly and energetically involved in drafting policies and implementing training and oversight…." Supp. Compl. ¶ 12
- "The military…Plaintiffs then worked to ensure that the APA guidelines were drafted so that military psychologists could use them within the military…." *Id.* ¶ 13.
- "The military Plaintiffs…were charged with drafting and implementing policies…." *Id.* ¶ 69.
- "Given the role of Plaintiffs Banks and James in helping to put local policies in place, it is not a surprise that those policies…were incorporated by reference into Statement Four of the PENS Guidelines." *Id.* ¶ 117.
- "The Military Plaintiffs Took a Leading Role in Creating Policies and Procedures to Prevent Abusive Interrogations." Supp. Compl. Heading 4 at 36.
- **"**In the aftermath of the abuses at interrogation sites after 9/11…Plaintiffs…were called upon to help put in place policies…." *Id.* ¶ 122.
- "[Plaintiff] Banks was ordered to work with the Army's Inspector General to investigate and decide how to prevent future abuses." *Id.* ¶ 123.
- "[Plaintiff] James [was asked] to serve in Iraq, with the role of drafting policies and instituting procedures…." *Id.*

- "[Plaintiff] Dunivin volunteered to play a similar role [to Dr. James in Iraq] at Guantanamo." *Id.*

- "[Plaintiff] Banks became an author of the Army Inspector General's Report….and at the time of PENS, [Plaintiff] Banks was consulting to the Army on a revision to the Army Field Manual." *Id.* ¶ 125.

- "[Plaintiff] James…outline[d] the beginnings of a SOP to prevent abuses….While in Iraq [Plaintiff] James trained staff on appropriate interviewing techniques that were consistent with those documents." *Id.* ¶ 127.

- "[Plaintiff] Dunivin…was involved in drafting the Guantanamo SOP that instructed BSCTs to ensure interrogation policies were followed and to report violations." *Id.* ¶ 129.

Accordingly, the Court concludes that the Plaintiffs, former Army Colonels, are public officials for purposes of this defamation suit and must show that Defendants acted with actual malice to promote their claims.

C. Likelihood of Success on the Merits

Once Defendants make a prima facie case, the burden shifts to Plaintiffs to offer evidence that would permit a jury properly instructed on the applicable legal and constitutional standards to reasonably find that Defendants are liable for defamation. *See Mann*, 150 A.3d at 1232. "The precise question here, therefore, is whether a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." *Id*. at 1236.

(1) Republication

Count 11 of Plaintiffs' Supplemental Complaint alleges,

> On August 21, 2018, the General Counsel and Board of APA republished the [Report] on the APA website at a new URL. They directed Council members and others to the [Report] through an email to the Council listserv, which includes persons who are not Council members, and by publishing on the APA's public website the Board minutes authorizing the republication. Those minutes contain a link to the [Report]. The website is accessible to the public, not only to APA members.

Supp. Compl. ¶ 524. Plaintiffs assert that these actions constitute a republication for the "simple fact [that] the publications took place at separate times and reached different audiences. Nothing more is necessary." Nov. 15, 2019 Pls. Opp'n at 18. Defendants dispute Plaintiffs' characterization of the August 2018 changes to the APA website and argue that the Report was not republished. Mar. 21, 2019 APA Mot. at 11; Mar. 21, 2019 Sidley Austin Mot. at 2.

First, Defendants note that the August 2018 website change did not create a new URL for the Report. Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 4. Rather, after August 2018, the Report could no longer be accessed via its own landing page but only through a link on the APA website's Timeline page ("the Timeline"). Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 5. Prior to August 2018, "the Report could always be accessed by a link to the Report from the Timeline." Mar. 21, 2019 APA Mot., Ex. A Fredley Aff. ¶ 4. Therefore, after the August 2018 changes, "[t]he link to the Report…[was] at the same place on the Timeline as it was when it was originally posted to the APA website." Mar. 21, 2019 APA Mot. at 9.

Second, Defendants argue that they did not direct a new audience to the Report by emailing and posting the meeting minutes approving the website change because the meeting minutes contained a link to the Timeline only, not the Report. Mar. 21, 2019 APA Mot. at 4; Mar. 21, 2019 Sidley Austin Mot. at 12. The Timeline contains approximately 170 links. Mar. 21, 2019 APA Mot. at 4.

Third, and finally, Defendants assert that adding to the Timeline links to four documents commenting on the Report did not modify the substance of the Report. Mar. 21, 2019 APA Mot. at 10, Ex. A Fredley Aff. ¶ 6; Mar. 21, 2019 Sidley Austin Mot. at 13.

The Court concludes that as a matter of law, the APA's actions on August 21, 2018 do not constitute republication. Because the Timeline always contained a link to the Report, the record does not support Plaintiffs' position that the "APA republished the [Report] on the APA website at a new URL," Supp. Compl. ¶ 524, and that "the Report was published on separate occasions and on different locations." Nov. 15, 2019 Pls. Opp'n at 21. Moreover, there is no evidence that Defendant APA intended to, or actually did, reach a new audience.

Similarly, Plaintiffs' contention that Defendant APA sought a new audience by emailing its Council of Representatives exaggerates the available evidence. The record shows that the email sent to the APA's Council of Representatives contained only a link to the Timeline, a webpage with over 170 links, and notified Council members that the motion to remove the Report from its landing page was passed. Mar. 21, 2019 APA Mot. at 4. Also, the August 2018 meeting minutes posted on the APA's website contains links to the Timeline, not the Report. *Id.* In fact, the August 2018 meeting minutes consists of twenty two pages of information, most of which does not relate to or reference the Report. Mar. 21, 2019 APA Mot., Ex. 1. Finally, there was no modification, or revision, to the Report. The addition of links to the Timeline commenting on the Report is insufficient to republish the Report as these additional links did not link to the Report and did not appear on the same webpage as the Report. Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 5. Accordingly, there was no republication of the Report as a matter of law and Plaintiffs' Count 11 must be dismissed.

(2) Actual Malice

The Plaintiffs must present clear and convincing evidence that Defendants acted with actual malice given their status as public officials. Actual malice exists where a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or

not.'" *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times Co.*, 376 U.S. at 279-80).

The Plaintiffs received the opportunity to conduct targeted discovery prior to filing their oppositions to the Defendants' motions as permitted under D.C. Code § 16-5502(c)(2). Specifically, on February 8, 2019, this Court granted in part Plaintiffs' motion for limited discovery to include the following information:

- Depositions of Drs. Michael Honaker, Heather Kelly, and Stephen Soldz.[6]
- Answers to the four interrogatories to Defendant APA served with the Complaint.
- A mirror image copy of all electronic data contained on the personal computer and hard drive of Dr. Stephen Behnke retrieved by Defendants Sidley Austin as part of its investigation.
- The witness interview notes or communications created during the Sidley Austin investigation for the 18 witnesses from whom the Plaintiffs received affidavits.

Despite this discovery, Plaintiffs fail to proffer evidence that a reasonable jury could find to be clear and convincing proof that Defendants knew that facts stated in, or reasonably implied by, the Report were false or that they published the Report with reckless disregard of the falsity of these stated or implied facts.

Nevertheless, Plaintiffs contend that several categories of information, when subjected to "a holistic examination" and viewed in the aggregate, combine to provide "more than enough evidence to demonstrate Defendants' actual malice." Nov. 18, 2019 Pls. Opp'n at 5 (citing *Tavoulares v. Piro*, 817 F. 2d 762, 794 (D.C. Cir. 1987)).

The foundation for this argument rests with thirty five individual statements found in Exhibit C, which is part of Plaintiffs' Consolidated Opposition to Defendants' First Set of

[6] This Court subsequently vacated the provision for depositions in an order dated September 25, 2019.

Contested Special Motions to Dismiss filed March 21, 2019,[7] under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5002. The statements consist of thirty four affidavits from different persons and one memorandum from Dr. L. Michael Honaker. *See generally,* Exhibit C. Five affidavits represent statements from current and former plaintiffs consistent with the claims alleged in the complaint. Two affidavits are statements from individuals that Sidley Austin did not interview as part of the investigative process.[8] The remaining twenty eight statements come from persons interviewed during the investigation who are not or who have not been plaintiffs in this case.

First, Plaintiffs argue that during their investigation, Defendants had documents and government reports in their possession that contradicted the Report's conclusions. Nov. 18, 2019 Pls. Opp'n at 21. However, Plaintiffs fail to explain whether the entities that issued those governmental reports had access to the same documents, email exchanges and witnesses used as sources for the Report. Similarly, it is unclear to what extent those reports were commissioned with mandates comparable to the directive that APA provided to Sidley & Austin for the internal review, focused on the same issues explored in that investigation or applied different ethical or procedural rules in reaching their conclusions. Thus, the mere existence of those reports does not support the claim that Defendants acted with malice in drafting the Report.

Besides affidavits from current or former litigants, the Plaintiffs proffer declarations from multiple witnesses contending that information they provided was not included in the Report or disagreeing with how their declarations were portrayed. When one considers the scope of the investigation, the number of witnesses and the volume of materials reviewed, it is difficult to

[7] Defendants' First Set of Contested Special Motions to Dismiss was filed October 13, 2017.
[8] Affiant Donna Beavers expressed disagreement with the Report's conclusions, but was not interviewed. Affiant Arman Gungor is a Certified Computer Examiner who described metadata found and emails retrieved during his analysis of electronic data. *See generally* Exhibit C.

understand how omitting a comment here or an opinion there would amount to malice. *See,* Affidavit of Susan Brandon in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 1 ("The Report is not an accurate characterization of my comments in the interview"); Affidavit of Robert J. Sternberg in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 4 ("To this day, I believe that the Report seriously misrepresented what I said"); Affidavit of Harry Matarazzo in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("Notably, certain written and verbal information that Dr. Matarazzo provided was not present, while other information was set forth in an equivocal manner"); and Affidavit of Scott Shumate in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 3 ("The Report's description of my understanding of interrogations appears to be cherry-picked from available information in order to portray me in a biased and misleading light"). Notably, these comments and similar comments from other affiants address disagreements with the Report about what a specific affiant said or did not say. These omissions and mischaracterizations, even if true, do not support an inference that Defendants acted with malice with respect to specific conclusions about the Plaintiffs found in the Report.

Next, Plaintiffs maintain that Defendants undertook the internal review process with a preconceived agenda to specifically target the Plaintiffs in this case, relied on biased and unreliable sources and purposely avoided the truth. Nov. 18, 2019 Pls. Opp'n at 21. Again, this argument is rooted in declarations within attached affidavits that echo each other in tenor and vocabulary. *See* Affidavit of Jennifer Bryson in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2

("During the interview, I was struck by a definite sense that the Sidley interviewer was targeting Dr. Behnke in the service of a preconceived narrative…"); Affidavit of Lisa Callahan in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("I was given the distinct impression that the Sidley independent review was intended to find evidence that the Ethics Office staff had exercised undue influence over the ethics adjudication process"); Affidavit of Armand Cerbone in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 1 ("During my interview, Ms. Carter questioned me about, among other things, Dr. Behnke in a manner that evidenced a preconceived narrative …"); Affidavit of Robin Deutsch in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 3 ("During my interview with Mr. Hoffman, questions he posed left me with the distinct impression that he had a preconceived narrative and had already concluded that … Dr. Stephen Behnke, had engaged in inappropriate behavior"); Affidavit of Elizabeth Swenson in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("… it had been my impression … that Sidley Austin interviewers had an agenda and a preconceived narrative…"). Aside from these statements perhaps representing opinion testimony, it is not possible to tell from this record where along the investigative process involving some 150 witnesses these specific interviews took place, and what information investigators had received prior to the interviews leading them to focus their inquiry. Thus, the impressions of these affiants, even if true, would not support a finding of malice.

Furthermore, Plaintiffs question the Defendants reliance on four allegedly biased witnesses in reaching the Report's conclusions. *See* Nov. 18, 2019 Pl. Opp'n at 45. Those

witnesses were Drs. Stephen Soldz, Nathaniel Raymond, Jean María Arrigo and Trudy Bond. *Id.* at 45-46. However, those four individuals were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed. The possibility that these witnesses were biased does not suffice to establish malice.

At best, Plaintiffs have shown that Defendants Sidley Austin received contradictory and diverse statements, opinions and recollections during the investigative process. Such different opinions and diverse statements are to be expected in matters subject to exhaustive debate in the public arena.[9] Moreover, inconsistencies and conflicting recollections are not uncommon in extensive investigations involving large numbers of witnesses. Combined with other arguments that Plaintiffs have raised, these factors do not support claims that Defendants had subjective knowledge of the Report's falsity, or acted with reckless disregard for whether or not the statements in the Report were false.

With respect to Plaintiffs' argument that Defendants purposely avoided the truth, the evidence proffered does not satisfy the clear and convincing evidence standard. Indeed, the evidence that Plaintiffs describe is not the entirety of the information compiled during the internal review and their argument ignores the length of the investigative process. Although the record shows that Defendants Sidley Austin interviewed a handful of Plaintiffs' critics, that fact does not establish that Defendants Sidley Austin had "obvious reasons to doubt the veracity" of these sources. *See St. Amant*, 390 U.S. at 732. Furthermore, Defendants Sidley Austin did not "rely on a single, questionable source without fact-checking, interviewing additional witnesses, or seeking independent support," to avoid the truth and establish a predetermined narrative. *Talley v. Time, Inc.*, 923 F.3d 878, 904 (10th Cir. 2019) (citing *Curtis Pub. Co. v. Butts*, 388 U.S.

[9] As discussed above, the use of enhanced interrogation or torture, the appropriate treatment of detainees and the proper role of psychologists in these situations exemplify topics subject to extensive public debate.

130, 157-58 (1967)); *accord Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 688, 692 (1989). To the contrary, it is undisputed that Defendants Sidley Austin interviewed about 150 witnesses, performed follow up interviews with 50 witnesses, and reviewed some 50,000 documents during the course of their eight-month investigation. Sidley Austin Reply to Nov. 15, 2019 Opp'n at 25. As such, the evidence that Plaintiffs present fails to show that Defendants Sidley Austin pursued a preconceived outcome, relied on biased and unreliable sources that impacted the conclusions of the investigation and purposely avoided the truth. Here, a reasonable jury properly instructed on the law would be hard-pressed to find clear and convincing evidence of actual malice.

Additionally, Plaintiffs contend that the Defendants' investigation departed from accepted professional standards and that Defendants refused to retract the Report after publication. Nov. 18, 2019 Pls. Opp'n at 21. Plaintiffs charge of improper investigation fails as a "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *See Tavoulareas,* 817 F.2d at 794 (emphasis in original). Aside from stating their conclusions, the Plaintiffs fail to make this necessary connection. Moreover, Plaintiffs fail to establish any duty on behalf of Defendants to retract or correct the Report post publication, particularly after legal action related to the contents of the report had been filed. In any event, the actual malice standard turns on whether Defendants were subjectively aware that the statements in the Report were false or acted in reckless disregard of their falsity, at the time the statements were made. It is a standard that Plaintiffs have not satisfied. Therefore, even when combining the various arguments that Plaintiffs advance, considering the totality of the record in this case, Plaintiffs fail to proffer clear and convincing evidence that Defendants made any defamatory statements in the Report with

knowledge that a statement was false or with reckless disregard of its falsity. Thus, their claims are not likely to succeed at trial.

Finally, it is important to point out a string of email communications that took place from on or about March 7, 2006 to on or about July 2, 2007, which are appended as Exhibit C to the Affidavit of Arman Gungor in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act. Mr. Gungor recovered these undeleted emails from the Behnke hard drive that was provided in discovery. *Id.* ¶ 18. The purpose of the communications was to coordinate responses to public discussions about APA policies and to blunt criticisms related to treatment of detainees and interrogation practices. Participants in these exchanges included current and former Plaintiffs Dr. Stephen Behnke, Dr. Larry James and Dr. L. Morgan Banks, III, as well as affiants Dr. Michael Gelles and Dr. Robert Fein. Curiously, the emails include phrases like "Eyes Only," "Your eyes only," "Please delete after reading this," and "Please review and destroy." Since this correspondence was disclosed in discovery which the Defendants provided, it is safe to assume that investigators reviewed and considered the emails in reaching their conclusions.[10]

IV. CONCLUSION:

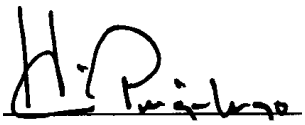
The D.C. Anti-SLAPP Act was enacted to protect the right of advocacy on issues of public interest. The Act allows defamation suits involving statements about issues of public interest to proceed, provided that the subjects of the alleged defamatory statement offer evidence that they are likely to succeed on the merits. Plaintiffs have failed to proffer evidence that satisfies this standard.

[10] In the alternative, assuming without deciding that Plaintiffs were private individuals instead of public officials for purposes of this defamation action, Plaintiffs have failed to proffer evidence in this record that in publishing the Report the Defendants "fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others."*Kendrick,* 659 A.2d at 822.

Accordingly, this 12th day of March, 2020, it is ordered that:

1. Defendant American Psychological Association's Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code § 16-5502 is **GRANTED**.
2. Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 is **GRANTED**.
3. Defendant American Psychological Association's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **GRANTED**.
4. Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502 is **GRANTED**.
5. This case is dismissed with prejudice.

It is so **ORDERED.**



Honorable Hiram E. Puig-Lugo
Associate Judge
Signed in Chambers

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