SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Hiram E. Puig-Lugo
vs.	:	Next Event: Oral Argument TBD Courtroom 317
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' FIRST SET OF CONTESTED SPECIAL MOTIONS TO DISMISS FILED OCTOBER 13, 2017 UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502

THIS OPPOSITION ADDRESSES:

(1) PLAINTIFFS' PROFFER OF MORE THAN SUFFICIENT EVIDENCE UPON WHICH A JURY COULD FIND THAT DEFENDANTS ACTED WITH ACTUAL MALICE.

(2) DEFENDANTS' FAILURE TO MEET THEIR BURDEN OF PROVING THAT PLAINTIFFS WERE "PUBLIC OFFICIALS" (NOT PRIVATE FIGURES) WHEN DEFENDANTS PUBLISHED THEIR DEFAMATORY REPORT.

(3) D.C. CHOICE-OF-LAW PRINCIPLES THAT DETERMINE THE ILLINOIS ANTI-SLAPP ACT, NOT THE D.C. ACT, APPLIES.

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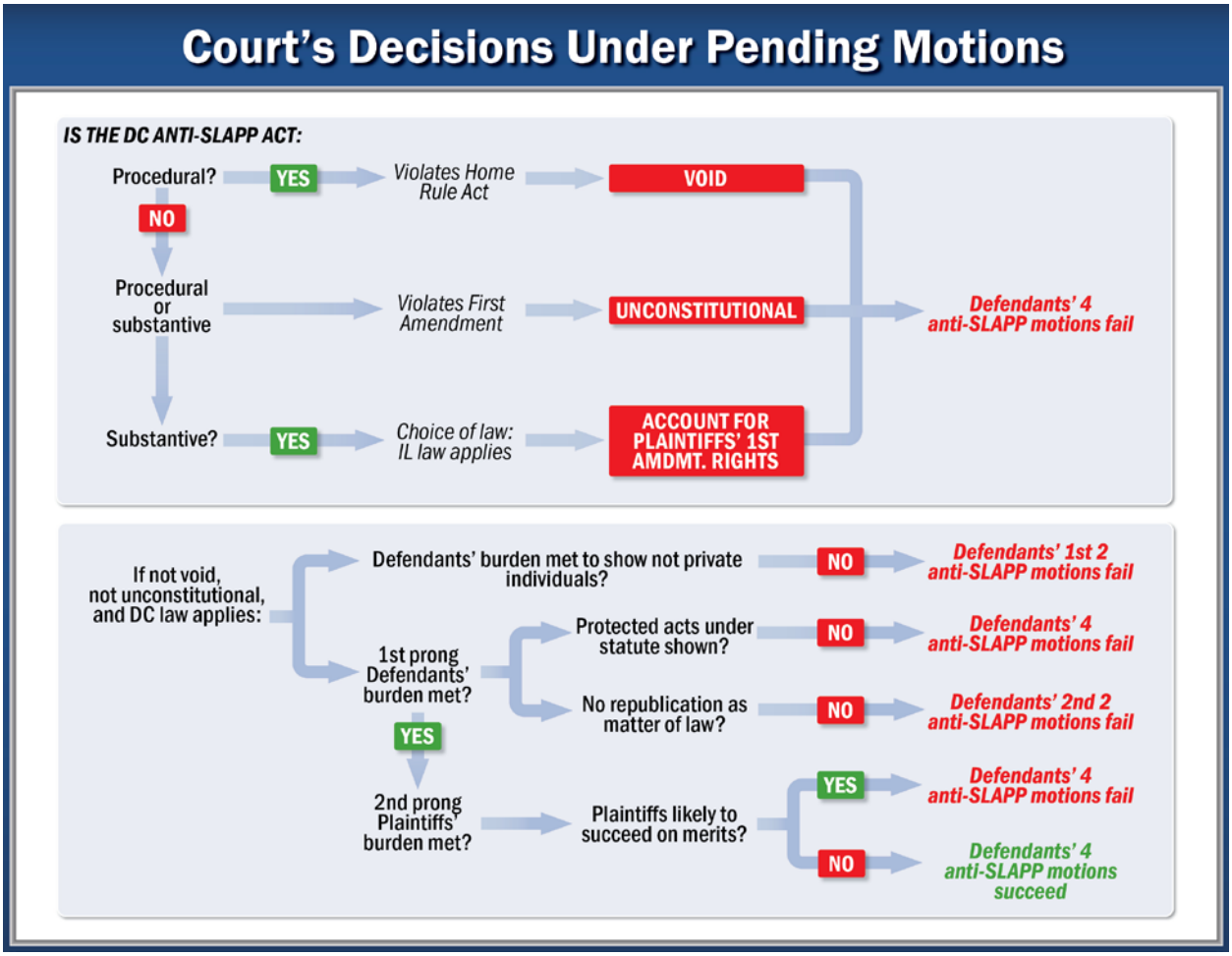

INTRODUCTION

This case arises from Defendants' publication of false and defamatory statements accusing Plaintiffs—retired military psychologists who, during their service, helped to end abusive interrogations that occurred after 9/11—of colluding with APA psychologists to enable the very abuses they worked to prevent. Specifically, it arises from the report (the "Hoffman Report" or "Report") of an investigation commissioned by Defendant APA from Defendants David Hoffman and Sidley Austin LLP in 2015, following claims that, in the aftermath of 9/11, the APA colluded with the Bush Administration, the CIA, and the U.S. military to enable psychologists' participation in torture.

Mr. Hoffman and Sidley were ostensibly tasked with "ascertain[ing] the truth following an independent review of all available evidence."[1] But they did not in fact set out to ascertain the truth. Instead, they published a prosecutorial hit piece designed to protect the APA and its Board members by concluding that only a few psychologists had secretly colluded on behalf of the APA and the Department of Defense ("DoD") to avoid creating obstacles to psychologists' participation in "abusive interrogation techniques"[2]—regardless of the documents and witness testimony uncovered during the investigation that contradicted those conclusions. As Defendant Hoffman has candidly admitted, Defendants wrote their Report to "ma[ke] their case" for their conclusion of collusion. He did not set out to provide a truthful account of "all available evidence."[3]

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[1] APA, APA Board of Directors Resolution Regarding Independent Review (Nov. 12, 2014; revised Nov. 28, 2014), *available at* https://www.apa.org/about/governance/board/independent-review.

[2] Compl. ¶ 16; *Former APA President Says Stephen Behnke Was 'Terminated,'* Huffington Post (videotaped interview of Dr. Nadine. Kaslow, Head of the APA Special Committee overseeing Hoffman and Sidley's investigation), *available at* https://www.huffpost.com/entry/former-apa-president-says-stephen-behnke-was-terminated_n_5b55c5fde4b0890b5cce23e6. References to "Complaint" or "Compl." refer to Plaintiffs' First Supplemental Complaint.

[3] Lori Foster et al., *Notes From the August 2015 APA Council of Representative Meeting*, 53 Industrial-Organizational Psychologist 143, 145 (Jan. 2016), *available at* https://tinyurl.com/yybff99t.

The result served the ends of the APA Board by enabling it to limit damage to itself and the APA by scapegoating what former APA President Dr. Nadine Kaslow (and head of the Special Committee overseeing Defendants' investigation) termed a "small underbelly" of psychologists.[4] The Report also burnished Mr. Hoffman's reputation as a pull-no-punches corruption-fighter, a reputation built as a governmental prosecutor and inspector-general that fueled his unsuccessful run for a U.S. Senate seat.

On the other hand, the Report destroyed the reputations and careers of the Plaintiffs in this case—Drs. Morgan Banks, Debra Dunivin, and Larry James—who had devoted years working to end abusive interrogations. They prevented abuses by educating interrogators, drafting guidelines, reporting abuses, and, at times, intervening directly. As a former member of the Judge Advocate General's Corps, Army Lt. Col. G. John Taylor, has testified:

> I am personally aware that Colonel Banks stopped the abuse of at least one detainee. The detainee had some of his blankets taken away during the night, and had been slapped in the stomach by a guard. Colonel Banks was incensed and immediately had the offending individual permanently removed from the facility. He consulted with me to insure that we could prevent that individual from having any further contact with our detainees. ***Colonel Banks continued to make sure that no abuse occurred*** while he was responsible for interrogations or for overall detainment. His presence at the U.S. high value detention facility at Bagram, Afghanistan, and later his involvement in developing a small but robust corps of operational psychologists, ***helped lay the groundwork for just and righteous treatment of detainees caught on the fields of battle***.[5]

But the Hoffman Report told a far different story. It spun a tale of multi-year collusion through a "joint enterprise" between DoD and the "small underbelly" of APA members—Plaintiffs here—intended to ensure that APA guidelines and actions would not stand in the way of abusive

[4]Compl. ¶ 268; *Report Reveals Close Ties Between Psychologists' Association And Pentagon*, WBUR (July 21, 2015) (Radio Interview with Dr. Nadine Kaslow), *available at* https://www.wbur.org/radioboston/2015/07/21/apa-pentagon.

[5] Taylor Aff. ¶ 6; Exhibit C. All emphases added unless otherwise noted.

interrogations.[6] In short, it falsely accused Plaintiffs of condoning, if not actively supporting, torture on behalf of the "joint enterprise" for over a decade. Then, to ensure the greatest possible publicity for their work, Hoffman or a member of his Sidley team leaked the Report before its formal publication to the very journalist whose attacks against the APA had prompted the investigation.[7] Predictably, Defendants set off a national and international media firestorm that publicly condemned Plaintiffs as "Psychologists Who Greenlighted Torture" and told the world that "Leading Psychologists Secretly Aided U.S. Torture Program."[8]

The accusations in the Hoffman Report, however, were false—and Defendants published them knowing they were false or, at a minimum, with reckless disregard for their truth or falsity. Since Defendants first published the Report in July 2015, voluminous testimonial and documentary evidence has emerged—most of it in Defendants' own investigation files and reviewed by and known to Defendants—that demonstrates the Report's factual assertions about Plaintiffs were false. Indeed, this voluminous evidence even led the ***APA's then-president to admit that there was "clear evidence" that Hoffman may have "distorted" matters in the report.***[9] As explained below, this evidence is more than sufficient for a jury to reasonably conclude not

[6] Hoffman Report at 9-10, 393. "[T]he partnership was not just between the two men, but rather their respective entities as well." (Hoffman Report at 393.) "This single exchange reveals clearly that Behnke viewed Banks as a partner in their joint enterprise of coordinating APA and DoD policy and messaging on interrogations." (Hoffman Report at 363.) The term "joint enterprise" has been employed to aid in war-crimes prosecutions; "joint venture," a term also used in the Report, has been used extensively in civil RICO cases such as the church abuse scandals, as Hoffman, a former federal prosecutor, was well aware. *See* United Nations International Residual Mechanism for Criminal Tribunals, *Three categories of JCE [Joint Criminal Enterprise]*, *available at* https://cld.irmct.org/notions/show/952/three-categories-of-jce#.

[7] *See infra* Background Part D.

[8] *See, e.g.*, N.Y. Times Editorial Board, *Psychologists Who Greenlighted Torture*, N.Y. Times (July 10, 2015), *available at* https://www.nytimes.com/2015/07/11/opinion/psychologists-who-greenlighted-torture.html; Rupert Stone, *Leading Psychologists Secretly Aided U.S. Torture Program*, Newsweek (July 10, 2015), *available at* https://www.newsweek.com/torture-cia-american-psychological-association-defense-department-352728.

[9] Affidavit of Larry James ¶ 14 (Nov. 14, 2019) ("James Aff.").

only that Defendants' statements about Plaintiffs were false, but that they published them with "actual malice."

Remarkably, however, despite that wealth of evidence, Defendants have steadfastly refused to retract or correct the Hoffman Report, and Defendants have even *republished* the Report to new readers. The Report still remains on the APA's website, and its false statements continue to generate damaging media coverage of Plaintiffs, who have no effective access to the media or other public forums to rebut the false accusations against them. Left with no other choice, Plaintiffs were compelled to file this lawsuit to restore their reputations and good names.

* * *

Shortly after Plaintiffs filed their Complaint and before discovery could occur, Defendants filed Special Motions to Dismiss under the D.C. Anti-SLAPP Act. In their Motions, Defendants argue that Plaintiffs' Complaint should be dismissed because (according to Defendants) Plaintiffs are "public officials" for purposes of their defamation claims and, therefore, must prove that Defendants published their false statements with "actual malice." They further argue that Plaintiffs cannot provide any evidence from which a jury could reasonably conclude that Defendants acted with actual malice.[10] Defendants are wrong on both points.

[10] Defendants' Special Motions to Dismiss do not challenge any other elements of Plaintiffs' claims. *See generally* Defs. Sidley Austin LLP, Sidley Austin (DC) LLP & David Hoffman's Mem. in Supp. of Contested Special Mot. to Dismiss Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 (Oct. 13, 2017) (**"Hoffman/Sidley First Special MTD"**); Def. APA's Mem. of P&As in Supp. of Its Contested Special Mot. to Dismiss Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 (Oct. 13, 2017) (**"APA First Special MTD"**); Defs. Sidley Austin LLP, Sidley Austin (DC) LLP & David Hoffman's Mem. in Supp. of Contested Special Mot. to Dismiss Count 11 of the First Supp. Compl. Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 (Mar. 21, 2019) (**"Hoffman/Sidley Second Special MTD"**); Def. APA's Mem. of P&As in Supp. of Its Contested Special Mot. to Dismiss the Supp. Compl. Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 (Mar. 21, 2019) (**"APA Second Special MTD"**).

This Consolidated Opposition to Defendants' Special Motions to Dismiss proceeds in **three parts,** following a brief factual background.[11]

First, it explains that, contrary to Defendants' contentions, the record contains more than sufficient evidence from which a jury could reasonably conclude that Defendants published their defamatory statements about Plaintiffs with actual malice—that is, with actual knowledge that they were false or with reckless disregard for their truth or falsity. That evidence includes overwhelming evidence of the type that courts have routinely held constitutes both direct and circumstantial evidence of actual malice. Among the evidence are documents actually possessed and actually reviewed by Defendants during their investigation; detailed, sworn affidavits from persons with direct knowledge of the facts at issue; and 27 affidavits from people Defendants interviewed attesting to Defendants' omission and mischaracterization of their statements that contradicted Defendants' preconceived conclusions.

Defendants do not address the vast majority of this evidence, and they ask the Court to consider the evidence they do address in isolation. But, as explained below, Defendants invite error: case law is clear that when considering evidence of actual malice, "[p]laintiffs are entitled to an ***aggregate consideration*** of all their evidence to determine if their burden [of demonstrating actual malice] has been met." *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir. 1987) (emphasis added); *Herbert v. Lando*, 441 U.S. 153, 170 (1979). Plaintiffs have proffered more than enough evidence to demonstrate Defendants' actual malice, and Defendants' Motions must be denied.

Second, this Consolidated Opposition explains that, contrary to Defendants' contention, Plaintiffs Banks, Dunivin, and James were private figures, not "public officials," at the time

[11] This Opposition is submitted in response to Defendants' First Special MTDs. Plaintiffs have filed a separate Opposition in response to Defendants' Second Special MTDs.

Defendants published their defamatory statements and, therefore, do not need to prove actual malice—only negligence—to prevail on their claims.[12] Defendants—who notably do ***not*** contend that Plaintiffs are "public figures"—largely ***assume*** that Plaintiffs are public officials.[13] But as explained below (*see infra* Argument Part II), contrary to Defendants' assumption and entirely distinguishable case law, Plaintiffs are not public officials for purposes of this case for two separate and independent reasons. First, Plaintiffs cannot be public officials for the simple reason that at the time Defendants published their defamatory statements (the relevant time period for this inquiry) Plaintiffs had long been retired from any public employment, and any "public official" status, if it had ever existed, had long since terminated. Second, even before Plaintiffs retired from public service, they were not "public officials" for defamation purposes because they did not satisfy the criteria for that status established by the U.S. Supreme Court and applied by other courts: they did not hold "high-ranking" positions with "substantial responsibility for or control over the conduct of governmental affairs," and in which they could "significantly … influence the resolution of … issues" of public importance. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *Kassel v. Gannett Co.*, 875 F.2d 935, 939 (1st Cir. 1989); *Lewis v. Elliott*, 628 F. Supp. 512, 519 (D.D.C. 1986).

Third, this Consolidated Opposition explains that, although Defendants *assume* that the D.C. Anti-SLAPP Act applies in this case, under settled choice-of-law principles, if the Court holds the D.C. Anti-SLAPP Act to be substantive (as Defendants have previously contended[14])

[12] Plaintiffs nonetheless address the issue of actual malice first in this Opposition because even private-figure plaintiffs must prove actual malice to obtain punitive damages, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), and Plaintiffs seek punitive damages in this case.this

[13] Hoffman/Sidley First Special MTD at 6; 12-13; incorporated by reference in the APA First Special MTD at 7.

[14] APA's Mem. in Supp. of Mot. to Dismiss at 17, *James v. Hoffman*, No. 17-cv-839 (Ohio C.C.P Apr. 7, 2017) (APA Ohio Anti-SLAPP Motion, *available at* https://tinyurl.com/sbmjkms, (pdf page 24)); Sidley Austin LLP and David Hoffman's Special Mot. to Dismiss at 10, *James v. Hoffman*, No. 17-cv-839 (Ohio C.C.P Apr. 7, 2017) (Hoffman's

rather than procedural, then the ***Illinois*** Anti-SLAPP Act, ***not*** the ***D.C.*** Anti-SLAPP Act, applies. As explained below (*see infra* Argument Part III), there is an actual conflict between the D.C. Anti-SLAPP Act and the Illinois Anti-SLAPP Act.[15] Based on the facts and allegations in this case, Illinois is the jurisdiction with the most significant relationship to the dispute, and the jurisdiction whose policy would be more advanced by applying its law. Thus, the Illinois Anti-SLAPP Act applies and the Special Motions to Dismiss must be denied.

RELEVANT FACTUAL BACKGROUND

Because Defendants' Special Motions to Dismiss omit critical information relevant to their resolution and misrepresent record evidence, Plaintiffs provide this brief background. To avoid voluminous briefing, the section provides only a high-level overview of the relevant facts, with specific record evidence discussed in the Argument sections to which it is relevant.

A. Defendant APA Faces Public Criticism and, in Response, Retains Defendants David Hoffman and Sidley Austin LLP to Investigate.

In the wake of 9/11, the APA—a private professional organization of psychologists—came under public scrutiny and criticism as increasingly vocal critics claimed that it had been complicit in enabling the Bush Administration's torture of detainees because it did not prohibit psychologists from supporting "enhanced" interrogations.[16] To give their campaign wide public visibility, APA critics collaborated with *New York Times* reporter James Risen, who then published a book that

and Sidley's Ohio Anti-SLAPP Motion, *available at* https://tinyurl.com/vmhp4g3 (pdf page 20)). Defendants do not address this point in their current motions.

[15] Illinois Citizen Participation Act, 735 Ill. Comp. Stat. 110/1 *et. seq.* (the "Illinois Anti-SLAPP Act").

[16] Compl. ¶ 2; APA, *APA Board of Directors Resolution Regarding Independent Review* (Nov. 12, 2014; revised Nov. 28, 2014), *available at* https://www.apa.org/about/governance/board/independent-review.

claimed the APA colluded with the CIA and the Bush Administration to enable the torture of detainees.[17]

Following the publication of Risen's book, public attacks on the APA reached their crescendo, forcing it to take action to protect its reputation.[18] To that end, the APA hired David Hoffman, a partner in the Chicago office of Sidley Austin LLP, to conduct an investigation "to ascertain the truth about [Risen's] allegations ... following an independent review of all available evidence."[19] ***Hoffman concluded that the evidence did not support Risen's claim*** that the APA colluded with the CIA.[20] However, the APA instructed Hoffman to interpret the scope of his assignment broadly. His investigation then expanded to cover more than a decade of events within the APA and cost $4.3 million, almost five times the original estimate.[21]

B. Defendants' Investigation Was Intentionally Flawed from the Outset.

Defendants' investigation was flawed from its inception, as Defendants began their inquiry relying heavily—and almost exclusively—on the APA critics who prompted the investigation and

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[17] Compl. ¶¶ 2-3, 27, 54, 79, 165, 173, 177; Steven Reisner, *Psychologists for Social Responsibility: An Open Discussion of the Hoffman Report and Where to Go from Here*, YouTube (Aug. 6. 2015), *available at* https://www.youtube.com/watch?v=lsru3chmkwo.

[18] Louise Richardson, *James Risen's 'Pay Any Price'*, N. Y. Times (Oct. 15, 2014), *available at* https://www.nytimes.com/2014/10/26/books/review/james-risens-pay-any-price.html; APA, *APA Board of Directors Resolution Regarding Independent Review* (Nov. 12, 2014; revised Nov. 28, 2014), *available at* https://www.apa.org/about/governance/board/independent-review; Roy Eidelson, Ph.D., *James Risen vs. the American Psychological Association*, Psychology Today (Oct. 23, 2014), *available at* https://www.psychologytoday.com/intl/blog/dangerous-ideas/201410/james-risen-vs-the-american-psychological-association.

[19] APA, *APA Board of Directors Resolution Regarding Independent Review* (Nov. 12, 2014; revised Nov. 28, 2014), *available at* https://www.apa.org/about/governance/board/independent-review.

[20] Hoffman Report at 11. The distinction between the CIA and DoD is critical because the legal documents underpinning their conduct of interrogations were very different. For example, no DoD policy ever permitted sleep deprivation (as opposed to sleep adjustment), as Hoffman says was allowed at the time of PENS. Similarly, stress positions (e.g., push-ups) were allowed briefly between December 2002 and January 2003 and then expressly prohibited by military policies, including some of those drafted by the Plaintiffs. None of the Plaintiffs had anything to do with the CIA interrogation program.

[21] Hoffman Report at 64.

adopting those critics' core thesis: that Plaintiffs had colluded to avoid creating obstacles to abusive interrogations.[22] Indeed, Defendants' approach was entirely consistent with Hoffman's admitted investigatory mantra: "Where there's smoke, there's usually fire."[23] Defendants thus had a preconceived goal from the very outset of their investigation and, as described in detail below, sought out testimony and evidence to support their desired conclusion while deliberately avoiding testimony and evidence that would contradict it and mischaracterizing voluminous testimony and evidence that did not support it.[24] As Hoffman admitted in a meeting with the APA Council (the APA's governing body), the Report set out to "ma[ke] their [the Sidley team's] case" to support his conclusions. [25]

Moreover, as described in detail in Argument I.C.5 below, the investigation's conduct flouted several accepted practices for internal investigations:[26]

Improper Investigatory Conduct.

- As documented in 27 affidavits from those interviewed, Defendants conducted interviews solely to build a case against Plaintiffs and ignored evidence that did not support their predetermined conclusions;[27]

[22] *See infra* Argument Part I.C.3.

[23] John P. Huston, *Former Mayor Criticizes $200,000 Highland Park Investigation*, Chicago Tribune (Feb. 19, 2013), *available at* https://www.chicagotribune.com/suburbs/highland-park/ct-xpm-2013-02-19-ct-tl-lk-0221-hp-transparency-report-20130220-story.html.

[24] *See infra* Argument Part I.C.1-2.

[25] Lori Foster et al., *Notes From the August 2015 APA Council of Representative Meeting*, 53 Industrial-Organizational Psychologist 143, 145 (Jan. 2016), *available at* https://tinyurl.com/yybff99t.

[26] *See also infra* Argument Part I.C.5.

[27] *See, e.g*. Sammons Aff. ¶¶ 4-5; Deutsch Aff Aff. ¶ 9; Lefever Aff ¶ 10; Swenson Aff. ¶6; Callahan Aff. ¶ 9; All Affidavits are attached as Exhibit C, alphabetically as Exhibits C-1 to C-34.

- Defendants avoided providing *UpJohn* warnings [28] as required by the D.C. Bar's ethics rules,[29] failed to warn interviewees that they were potential targets, and advised interviewees that they should not retain counsel.

Conflicts of Interest. The investigation was overseen by an APA Special Committee whose members had been deeply involved in the events the Report described and stood to benefit if the Report blamed others and exonerated them.

Leaking to the Media. Defendants leaked the Report to *The New York Times* to ensure the allegations would be broadcast around the world before Plaintiffs could respond.[30]

C. Defendants Publish a Report That Consciously Disregarded Evidence—and the Truth—to Carry out Defendants' Preconceived Goal of Exonerating the APA by Condemning a Few of Its Members—the Plaintiffs Here.

At the end of their "investigation," Defendants produced a report that was not the objective, neutral review of "all available evidence" called for in the APA's charge to Hoffman and Sidley. Rather, the Hoffman Report presented a false narrative that protected the APA and its Board by falsely stating that just a few APA members—including the Plaintiffs here—secretly colluded to shape APA policies and actions so they would not create obstacles to psychologists' participation in abusive interrogations on behalf of DoD.

More specifically, the Hoffman Report falsely stated that Plaintiffs colluded by:

- in 2005, acting to ensure that the guidelines issued by the APA's Psychological Ethics and National Security (PENS) Task Force—which were intended for psychologists involved in the detainee interrogation process—were no more restrictive than "existing" military guidelines which, Defendants falsely stated, were intentionally loose so as not to prohibit torture, including stress positions and sleep deprivation;[31]

- from 2006 to 2009, preventing the APA from banning psychologists' participation in national-security interrogations;[32] and

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[28] Banks Aff. ¶ 15; Dunivin Aff. ¶ 3; James Aff. ¶ 8.

[29] D.C. Bar, Ethics Opinion 269: Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation (Jan. 1997), *available at* https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion269.cfm.

[30] N.Y. Times Editorial Board, *Psychologists Who Greenlighted Torture*, N.Y. Times (July 10, 2015), *available at* https://www.nytimes.com/2015/07/11/opinion/psychologists-who-greenlighted-torture.html.

[31] Hoffman Report at 9-12.

[32] Hoffman Report at 9.

- from 1999 to 2014, mishandling ethics complaints to protect national-security psychologists from censure.[33]

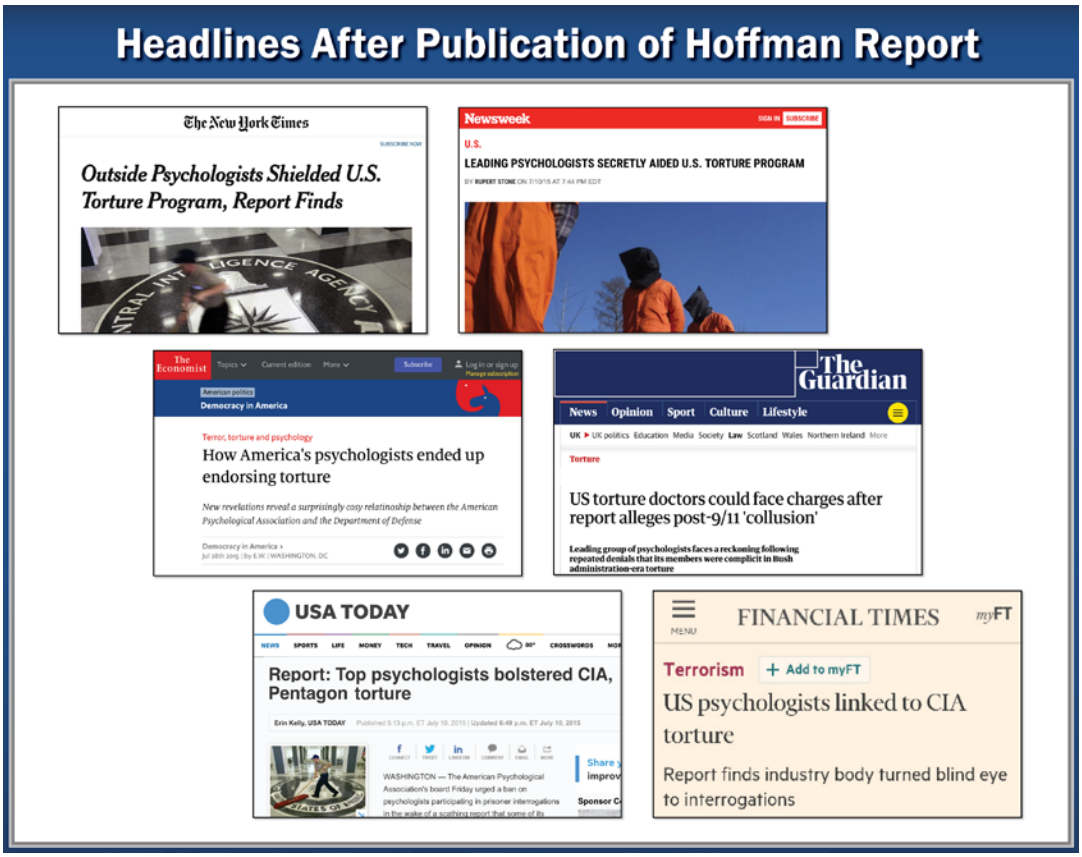
However, as detailed below (*see infra* Argument Part I.B), Defendants had in their possession, reviewed, and knew the contents of documents and witness testimony that directly contradicted each of these false conclusions.

D. The Hoffman Report Ignites a Media Firestorm Against Plaintiffs.

Predictably, the public outcry that the Hoffman Report created against Plaintiffs was swift and devastating. Before Plaintiffs had a chance to respond to the Report's allegations, an advance copy was leaked to James Risen at *The New York Times*—a leak that metadata evidence traces to Defendant Hoffman or a member of his Sidley team.[34] A national and international media firestorm immediately followed that condemned Plaintiffs:

[33] Hoffman Report at 10.

[34] On July 7, the Word file of the version of the Report that was ultimately published online by the *Times* as a .pdf was put into a .pdf file using a computer program with a different serial number than the program used to .pdf the document provided to APA and ultimately posted on the APA website. Metadata from the document published by the *Times* demonstrate that the last person in the document before it was converted into a .pdf was David Hoffman or someone from his team (Emily Maassen or James Platt, two former Sidley legal assistants). Moreover, there are no metadata indicating that any changes had been made in that document, or that the Word file had been printed or saved by anyone, between July 2 and July 7. According to an interrogatory answer from APA and other statements made by APA's Associate General Counsel to witnesses, and statements by APA's outside counsel, no one at APA or working on behalf of APA at the time, other than David Hoffman, had access to a Word file that could be e-mailed anywhere. (APA Interrogatory Answers, March 13, 2019, on file with Plaintiffs' Counsel.) As a result, no one else could have e-mailed a Word file of the Report that the *Times* could then transform into the .pdf on July 7. Gungor Aff. ¶¶ 7-17.



This wide dissemination of the Hoffman Report's false conclusions about Plaintiffs was entirely foreseeable and, as demonstrated by Hoffman's leak of the Report to a journalist with a vested interest in perpetuating his attacks against the APA and the Plaintiffs, intended.[35] Indeed, as Hoffman has candidly admitted with respect to his investigations, "I use the media to fan the flames."[36] In this case, the flames consumed Plaintiffs' reputations and devastated their careers and livelihoods.

[35] Compl. ¶¶ 29, 249-50.

[36] Newman Aff. ¶ 13.

E. The APA Endorses the Hoffman Report Even as Its Members Quickly Identify Its Many Falsehoods.

The APA immediately and uncritically endorsed the Hoffman Report and fired previous-Plaintiff Dr. Stephen Behnke.[37] In publicly endorsing the Report, Dr. Nadine Kaslow, the APA Board member responsible for overseeing Defendants' investigation, went so far as to identify Plaintiffs as part of a "small underbelly" of the APA, announce that Plaintiffs' "collusion" "enabled psychologists to be involved in abusive interrogation techniques," and suggest the possibility that the APA would refer the Report for criminal charges.[38]

At the same time the APA was publicly endorsing the Hoffman Report and condemning Plaintiffs, however, APA members began to identify numerous false statements in the Report, identify documents and evidence that Defendants ignored, and point out testimony they had provided in interviews that Defendants misrepresented or ignored in the Report. For example, just after the Report's release, APA member Linda Woolf (who supported the ban on psychologists' participation in interrogations that Plaintiffs were accused of colluding to block) sent previous-Plaintiff Behnke a letter stating:[39]

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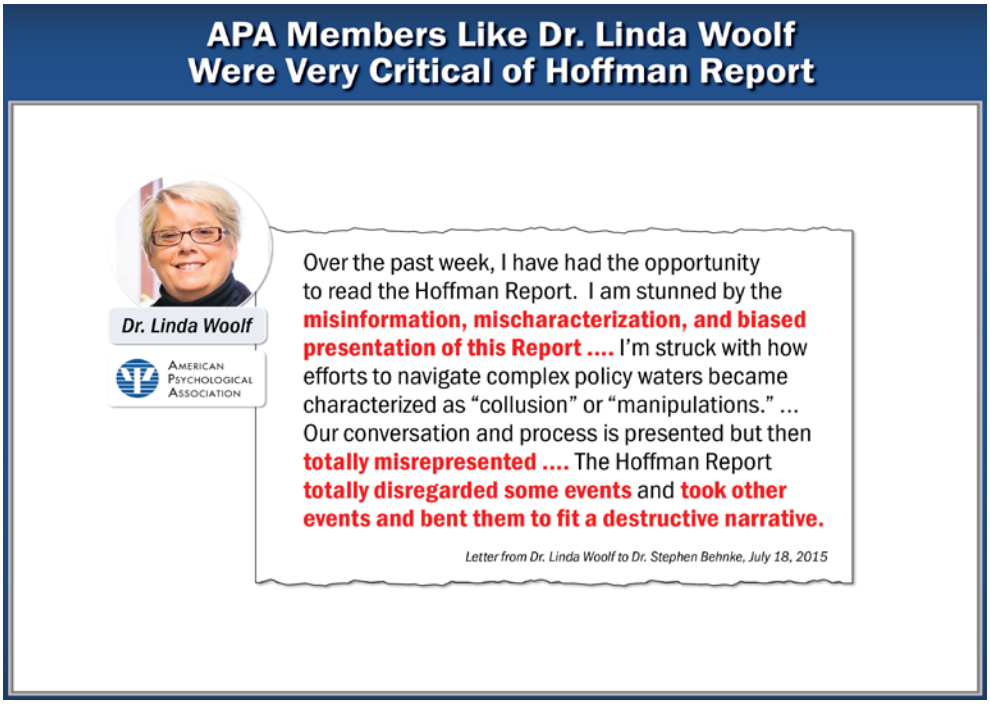
[37] Compl. ¶ 251; APA, *Press Release and Recommendation Actions: Independent Review Cites Collusion Among APA Individulas and Defense Department Officials in Policy on Interrogation Techniques** (July 10, 2015), *available at* https://tinyurl.com/ujaczsy; The APA Board later admitted that its firing of Dr. Behnke was "impulsive and not thought through." Affidavit of Robert J Resnick, *James v. Hoffman*, No. 17-cv-00839 (Ohio C.C.P May 8, 2017), *available at* https://tinyurl.com/y3aqu3sl; Resnick Aff. ¶ 5.

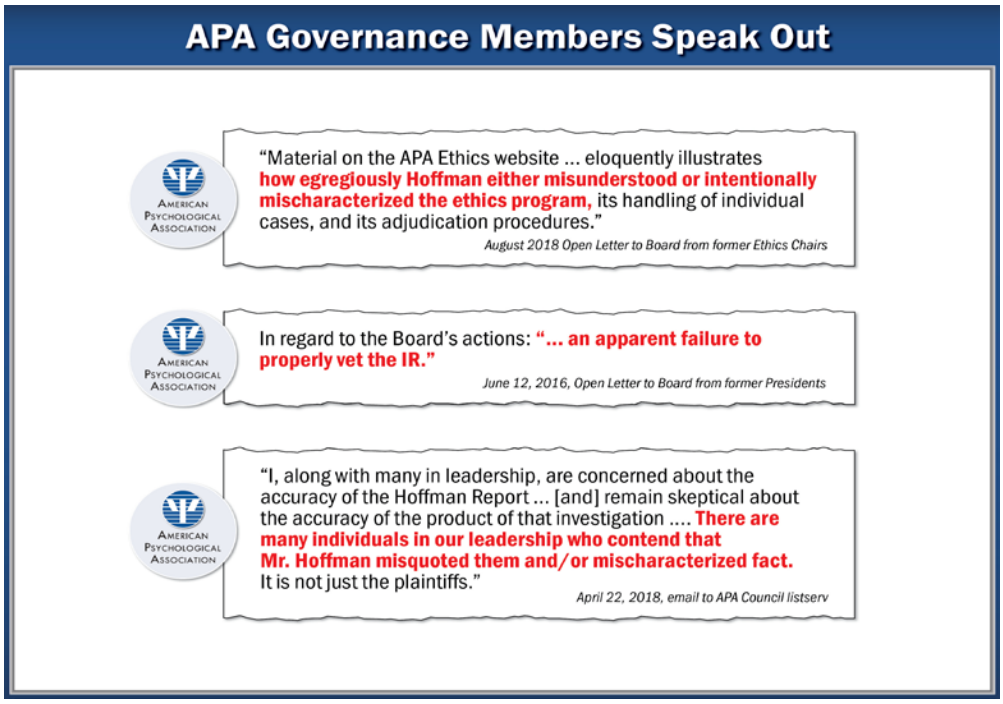
[38] Letter from Linda M. Woolf, Ph.D. to Stephen H. Behnke, PhD (July 18, 2015), *available at* https://tinyurl.com/y2raxte3; *Report Reveals Close Ties Between Psychologists' Association And Pentagon*, WBUR, available at https://tinyurl.com/yxe2ngmc; *Former APA President Says Stephen Behnke was 'Terminated'*, Huffington Post, available at https://tinyurl.com/yy2u3dua; Spencer Ackerman, *US Torture report: psychologists should no longer aid military, group says*, The Guardian (July 11, 2015), *available at* https://tinyurl.com/y4d7sh84

[39] Behnke Aff. ¶ 34.

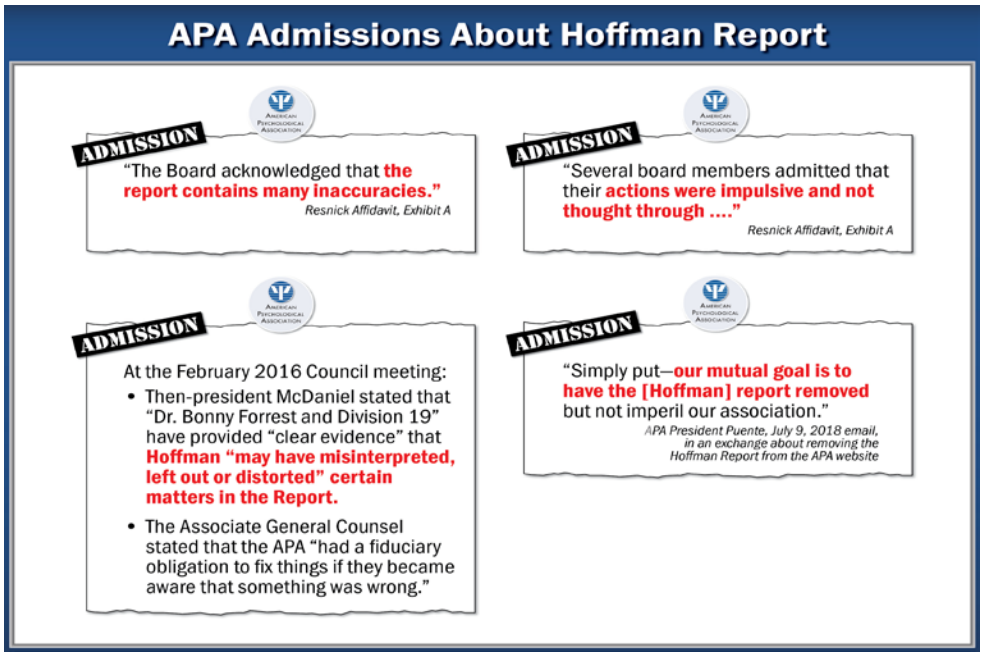


Ms. Woolf was not alone among APA members condemning the Hoffman Report. Many people whom Defendants interviewed and numerous former members of the APA's governing bodies, including eight former APA presidents and former chairs of its Ethics Committee, decried the Hoffman Report's falsities.[40] For example:

[40] Robert Kinscherff, *et al.*, *Open Letter to the APA Board of Directors from Former Chairs of the APA Ethics Committee*, APA (Feb. 16, 2016), *available at* https://www.apa.org/news/press/statements/ethics-chairs-letter01.pdf; Letter from Lori C. Thomas, *et al.* to APA Board of Directors, *et al*. (June 8, 2016), *available at* https://tinyurl.com/vpgrjgg; past APA Presidents' Open Letter to the Board of Directors, Council of Representatives, Divisions and Staff (June 11, 2016), *available at* https://www.apa.org/news/press/statements/past-presidents-letter.pdf; ; James Aff. ¶ 14; Newman Affidavit, Exhibit C to Plaintiffs' Second Opposition, Exhibit 1.



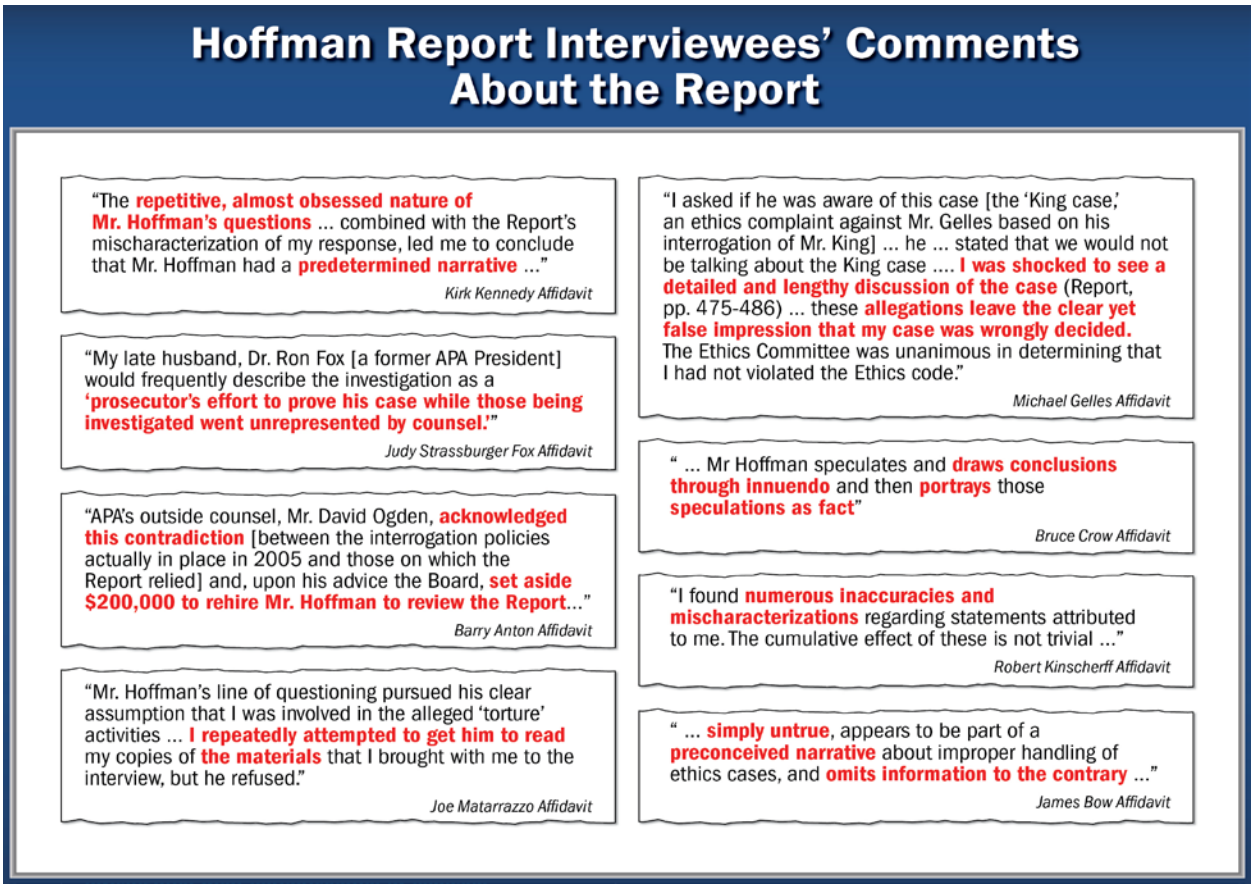
Tellingly, the APA Board itself, despite publicly standing by and continuing to endorse the Hoffman Report and its condemnation of Plaintiffs, privately admitted the failings of the Report and of the Board's reaction to it:[41]



[41] James Aff. ¶ 14; Newman Affidavit, Exhibit C to Plaintiffs' Second Opposition, Exhibit 1; Resnick Aff. ¶ 5.

Now, four years after the Report's publication, the accumulated evidence demonstrates not only that the Report's statements about Plaintiffs were false, but also that Defendants made them knowing that they were false or, at minimum, with reckless disregard for their truth or falsity. As detailed below (*see infra* Argument Part I), this evidence includes:

- documents in Defendants' possession that were known to, read by, and relied on by Defendants in preparing their Report;
- interview transcripts and more than 27 affidavits from those interviewed that show that Defendants intentionally omitted, mischaracterized, and deliberately avoided evidence that did not fit their preconceived narrative, and instead pursued only evidence that supported the conclusions they wanted to reach; and
- communications that show Defendants' reliance on sources they knew were biased and unreliable.[42]



[42] Compl. ¶¶ 8-11, 16, 21, 23, 53-58, 80-153, 178, 183-186, 267-69; Anton Aff. ¶ 11.

Despite this evidence, Defendants refused to retract or correct the Report's false and defamatory statements about Plaintiffs. This lawsuit followed.

ARGUMENT

As explained below, Defendants' Special Motions to Dismiss should be denied for three separate and independent reasons:

First, Plaintiffs proffer more than sufficient evidence of a kind courts have consistently found probative of "actual malice" and from which a jury could reasonably conclude that Defendants published their false and defamatory statements with actual malice.

Second, even if Plaintiffs could not proffer sufficient evidence of Defendants' actual malice (which they do), Defendants' motions should nevertheless be denied because, under the tests consistently applied by courts, Plaintiffs were "private figures," not "public officials," when Defendants published their defamatory statements. Consequently, they do not need to prove actual malice—only simple negligence—to prevail on their claims, and the record evidence clearly shows Defendants' negligence.

Third, if the Court holds the D.C. Anti-SLAPP Act to be substantive (as Defendants contended in Ohio and as the D.C. Attorney General has asserted in this case)[43] rather than procedural, then Defendants' Motions should be denied because under D.C.'s choice-of-law principles, the ***Illinois*** Anti-SLAPP Act, ***not*** the ***D.C.*** Anti-SLAPP Act, applies in this case.

I. Plaintiffs Proffer More than Sufficient Evidence from Which a Jury Could Reasonably Conclude Defendants Published Their Defamatory Statements with Actual Malice.

As explained below, contrary to Defendants' assertions, there is more than sufficient evidence in the record from which a jury could reasonably conclude that Defendants published

[43] Intervenor the District of Columbia's Brief in Support of the Anti-SLAPP Act of 2010 (November 15, 2019) at 8.

their defamatory statements about Plaintiffs with actual malice. That evidence includes both direct and circumstantial evidence of the types that courts have found to demonstrate actual malice.

A. The Actual Malice Standard Is Demanding But Not Prohibitive; Circumstantial Evidence of a Defendant's Knowledge of Falsity or Reckless Disregard Is Sufficient to Make a Reasonable Showing of Actual Malice.

Although the "actual malice" standard is rooted in the First Amendment, courts have cautioned that it is not an "insurmountable" hurdle, especially at preliminary stages of a case. As the D.C. Court of Appeals has admonished, "it is not the court's role, at the preliminary stage of ruling on a special motion to dismiss, to decide the merits of the case but to test the legal sufficiency of the evidence to support the claims." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016). In considering a special motion to dismiss, the review of which is akin to review of a motion for summary judgment, the court may not make credibility determinations or weigh the evidence, because that would supplant the role of the jury. *Id.* at 1235-36. Rather, the court may grant a special motion to dismiss only if "the court can conclude that the claimant could not prevail as a matter of law" even if all evidence and all inferences therefrom are viewed in the light most favorable to the plaintiff. *See id.* at 1236-38 & n.32.[44]

Importantly, the record evidence and well-pleaded facts in Plaintiffs' Complaint must be viewed in the context of what courts—including the U.S. Supreme Court—have held to constitute evidence of actual malice. As the Supreme Court has long recognized, defamation-defendants, unsurprisingly, "are prone to assert their good-faith belief in the truth of their publications," so

[44] Defendants are precluded from submitting new affidavits with their replies for two reasons. First, affidavits must be filed with the original motions. *See* D.C. Sup. R. Civ. P. 6(c) ("Time For Serving Affidavits. Any affidavit supporting a motion or opposition ***must be served with the motion*** or opposition unless the court orders otherwise."). Second, the Court has ordered that no surreplies may be filed, thus preventing Plaintiffs from responding to new material presented in Defendants' replies. *See* Sept. 17, 2019 Order; *see also Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85 (D.D.C. 2014) ("This Court has previously granted leave to file a surreply when the opposing party's reply brief included a supplemental declaration."). And, for that same reason—Plaintiffs' inability to respond to arguments first presented in a reply—Defendants may not raise any new arguments in their replies. *See Nippon Shinyaku Co. v. Iancu*, 369 F. Supp. 3d 226, 240 n.8 (D.D.C. 2019) ("Arguments raised for the first time in a reply brief are waived.").

"plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." *Herbert v. Lando*, 441 U.S. 153, 170 (1979). Thus, "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 183 (2d Cir. 2000) ("'Malice may be proved inferentially[.]'" (quoting *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 927 (2d Cir. 1987))).[45] Defendants' assertions that they believed their statements to be true are insufficient to allow them to prevail. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.").

In evaluating the sufficiency of such circumstantial evidence, ***courts must take a holistic approach that examines the totality of the evidence*** to determine whether, collectively, all the evidence is capable of giving rise to an inference of knowledge of falsity or reckless disregard for the truth. *Celle*, 209 F.3d at 183. ***A holistic—not piece-by-piece—approach is required because, as the D.C. Circuit has stated, "each individual piece of evidence cannot fairly be judged individually," and, thus, "[p]laintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden has been met."*** *Tavoulareas v. Piro*, 817 F.2d 762, 794 n.43 (D.C. Cir. 1987); *Houlahan v. World Wide Ass'n of Specialty Programs & Sch.*, No. 04-cv-1161, 2006 WL 2844190, at *7 (D.D.C. Sept. 29, 2006); *Aghmane v. Bank of Am., N.A.*, 696 F. App'x 175, 176-77 (9th Cir. 2017); *Celle*, 209 F.3d at 183. Indeed, the Supreme Court has stated that because "proof of 'actual malice' calls a defendant's state of mind into question," where lack

[45] *See also, e.g.*, *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 871 (W.D. Va. 2016); *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1087 (9th Cir. 2002); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988).

of fault is not clear, this element "***does not readily lend itself to summary disposition***." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (citing 10B Wright et al., *Fed. Prac. & Proc. Civ.* § 2730); *see also OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 49 (D.D.C. 2005) ("[T]he question of actual malice is ordinarily one for the jury[.]"); *Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) ("[S]tatements of … subjective intention are matters of credibility for a jury.").

As the Supreme Court has explained in discussing the types of evidence that can prove actual malice:

> As a general rule, ***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 statements of the defendant*, circumstances indicating the existence of *rivalry, ill will, or hostility* between the parties, [and] facts tending to show *a reckless disregard of the plaintiff's rights*[.]

Herbert, 441 U.S. at 164 n.12; *see also id.* at 165 n.15 (collecting cases).

Thus "[t]here is no doubt that evidence of ***negligence, of motive and of intent*** may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972); *Celle*, 209 F.3d at 183; *accord Tavoulareas*, 817 F.2d at 794. Thus, for example, although ***bias or ill will*** may not ***alone*** be sufficient to demonstrate actual malice, "evidence concerning motive" or bias ***is*** a relevant evidentiary building block toward proving actual malice. *Connaughton*, 491 U.S. at 668; *Celle*, 209 F.3d at 183. Similarly, although a ***failure to properly investigate*** may not ***alone*** prove actual malice, it ***is*** one piece of evidence that can support a finding of actual malice. *See, e.g.*, *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983); *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971).

Evidence of a defendant's ***purposeful avoidance of the truth***—which Plaintiffs' Complaint alleges in numerous ways on numerous occasions[46]—is especially powerful. *See Connaughton*, 491 U.S. at 692 ("Although failure to investigate will not alone support a finding of actual malice ... the purposeful avoidance of the truth is in a different category."); *Parsi v. Daioleslam*, 595 F. Supp.2 d 99, 108 (D.D.C. 2009) ("A failure to investigate adequately *could not* alone amount to actual malice, but purposeful avoidance of the truth *could*." (citing *Connaughton*, 491 U.S. at 692 (emphasis in original)); *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 900 (9th Cir. 1992).

Here, Plaintiffs proffer both direct and circumstantial evidence of Defendants' actual malice.

First, Plaintiffs proffer ***direct evidence*** that Defendants actually knew their defamatory statements about Plaintiffs to be false. That evidence includes documents in Defendants' possession that Defendants Hoffman and Sidley read and relied on in preparing the Hoffman Report, documents read or actually created by APA officials involved in the Report's publications (and republications), and testimony provided to Defendants by people they interviewed that directly contradicts Defendants' false statements about Plaintiffs.

Second, Plaintiffs proffer ***circumstantial evidence of the exact types that courts have repeatedly held constitute evidence of actual malice***. Taken either independently or collectively, this evidence is sufficient for the question of Defendants' actual malice to go to a jury. It includes evidence that Defendants:

- had a preconceived narrative for the Hoffman Report to malign Plaintiffs' character and consciously made the evidence conform to that narrative—including by using interviews only to support that preconceived narrative rather than to uncover the truth (as attested to by numerous affidavits)—while purposely avoiding evidence that would contradict their preconceived narrative;

[46] *See, e.g.*, Compl. ¶¶ 20, 23, 34, 91, 104, 189-99.

- knowingly relied on unreliable and biased sources despite obvious reasons to doubt their veracity;

- had a motive to make their false statements against Plaintiffs (namely, to pin blame on Plaintiffs and thereby exonerate APA Board members from public criticism) and were biased against Plaintiffs;

- intentionally conducted an investigation that departed egregiously from accepted professional standards for such investigations despite being under no time pressure; and

- refused to retract or correct their false and defamatory statements even after being presented with irrefutable evidence showing the falsity.

Defendants ignore many of these categories of circumstantial evidence—and even fail to cite binding U.S. Supreme Court case law directly on point.[47] Defendants likewise ignore much of the evidence that fits squarely within these categories. And when Defendants do acknowledge evidence, they ***invite error*** by asking the Court to view that evidence piece-by-piece, rather than holistically. *See, e.g.*, *Tavoulareas*, 817 F.2d at 794 (Plaintiffs entitled to "***aggregate consideration*** of all their evidence to determine if their burden [of demonstrating actual malice] has been met.").

B. Direct Evidence of Actual Malice: Plaintiffs Proffer Evidence That Defendants Knew Their Defamatory Statements Were False or Recklessly Disregarded Their Truth or Falsity.

Plaintiffs have alleged—and substantial record evidence demonstrates—that Defendants actually knew that their defamatory statements were false and/or recklessly disregarded their truth or falsity, thereby demonstrating actual malice.

As an initial matter, it is black-letter law that a publisher cannot feign ignorance or profess good faith when it possessed information that brought into question the truth of its statements. D.

[47] For example, Defendants Hoffman and Sidley fail to acknowledge *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 692-93 (1989), the U.S. Supreme Court's directly on-point and binding decision holding that "purposeful avoidance of the truth" demonstrates actual malice. Defendant APA, for its part, cites *Connaughton*, but omits its holding regarding the purposeful avoidance standard.

Elder, *Defamation: A Lawyer's Guide* § 7.12 (July 2016) (collecting cases). Actual malice can be inferred when a defendant publishes a defamatory statement that contradicts information known to him, even though he testifies that he believed the statement was not defamatory and was consistent with the facts within his knowledge. *Id.*; *see also, e.g., Tomblin v. WHCS-TV8,* 434 F. App'x 205, 211 (4th Cir. 2011) (summary judgment on the question of actual malice precluded where there was evidence that defendant was aware of "internal inconsistencies or apparently reliable information that contradict[ed] its libelous assertions"); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1070 (5th Cir. 1987) ("[P]laintiffs have prevailed after demonstrating that the author of a story knew facts disproving it[.]"); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1073 (3d Cir. 1988).

Critically, a pattern of failing to acknowledge contradictory information is not merely "a failure to investigate" or to connect the dots, or a rational interpretation of ambiguous information, as Defendants assert.[48] Rather, it supports a reasonable inference of actual knowledge of falsity or, at minimum, reckless disregard for the truth. *Tomblin*, 434 F. App'x at 211; *Zerangue*, 814 F.2d at 1070; *Schiavone*, 847 F.2d at 1073.

Here, substantial record evidence demonstrates that Defendants actually knew that their defamatory statements were false and/or recklessly disregarded their truth. Because a complete recitation of this voluminous direct evidence would require greater space than permitted here, this Opposition focuses on exemplar direct evidence demonstrating that Defendants knew that three major factual conclusions in the Hoffman Report were false and/or recklessly disregarded their truth or falsity. As noted above, these three primary conclusions stated that Plaintiffs colluded with the Department of Defense to support and enable torture by:

[48] Hoffman/Sidley First Special MTD at 20-21.

- in 2005, acting to ensure that the guidelines issued by the APA's Psychological Ethics and National Security (PENS) task force—which were intended for psychologists involved in the detainee interrogation process—were no more restrictive than "existing" military guidelines which, Defendants falsely stated, were intentionally loose so as not to torture, including stress positions and sleep deprivation;[49]

- from 2006 to 2009, preventing the APA from banning psychologists' participation in national-security interrogations;[50] and

- from 1999 to 2014, mishandling ethics complaints to protect national-security psychologists from censure.[51]

As explained herein, not only does the evidence demonstrate the falsity of those conclusions but Defendants (including the APA) had such evidence ***in their possession*** when they published the Hoffman Report and actually reviewed and knew the substance of that evidence. Further still, Defendants (including the APA in the majority of cases) had evidence ***in their possession*** that demonstrated the falsity of each of the 219 false statements listed in Exhibit A to the Complaint and actually reviewed and knew the substance of that evidence.[52]

[49] Hoffman Report at 9-12.

[50] Hoffman Report at 9.

[51] Hoffman Report at 10.

[52] *See* Compl. at Ex. A. At the hearing on September 6, 2019, the Court requested that Plaintiffs limit the amount of evidence presented in their Opposition and be selective in presenting that evidence. Plaintiffs have hyperlinked many documents of which the Court may take judicial notice, instead of filing the original document with their Opposition. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (the Court may take judicial notice of public documents whose authenticity is not disputed.) Copies of all documents are available in hard copy upon request. If the Court desires, Plaintiffs are prepared to walk the Court through all of this evidence during the hearing on Defendants' Special Motions to Dismiss. Finally, as noted in the chart, seven documents referenced in Ex. A were not in Hoffman's possession but provide the Court with additional evidence of omissions, distortions, or mischaracterizations of evidence in his possession (*see, e.g.,* False Statement 13, *Response to the Hoffman Independent Review*, The Society for Military Psychology (APA Division 19) Presidential Task Force, *available at* https://www.militarypsych.org/uploads/8/5/4/5/85456500/tf19_response_to_the_hoffman_report_div19_excom_approved.pdf).

1. Documents and Information Known to Defendants and in Their Possession Specifically About Plaintiffs That Demonstrate the Falsity of Defendants' Claims About Plaintiffs Supporting Interrogation Abuses.

As an initial matter, Defendants, in addition to actually possessing, actually reviewing, and actually knowing information that directly contradicts their specific false statements about Plaintiffs (*see infra* Parts I.B.2-7), Defendants actually possessed and actually reviewed evidence and testimony that Plaintiffs—far from supporting abusive interrogations—worked to prevent such abuses. For example:

- **Statements by Hoffman/Sidley Interviewee Jennifer Bryson.** ***Hoffman and Sidley actually interviewed*** Jennifer Bryson, a civilian interrogator at Guantanamo. As set forth in Ms. Bryson's attached affidavit, she told Defendants that Plaintiff Behnke "was absolutely opposed to torture" and worked to prevent it:

  > I told [the Sidley interviewer] that when Dr. Behnke found out that I was an interrogator at Guantanamo and asked me about this, his primary concern was whether abuses were going on. It was entirely clear to me that Dr. Behnke was absolutely opposed to torture and that this is the reason he wanted information about what was actually happening in DoD's Guantanamo interrogation. He was extremely concerned to make sure that APA was not inadvertently supporting detainee abuse.[53]

  BUT Hoffman and Sidley ignored that testimony and published opposite claims about Plaintiffs.

- **Statements by Hoffman/Sidley Interviewee Dr. Robert Fein.** ***Hoffman and Sidley actually interviewed*** PENS Task Force Member Dr. Robert Fein.[54] As set forth in Dr. Fein's attached affidavit, he told Defendants that Plaintiffs Behnke, Dunivin, and others were trying to "improve training" for interrogators, not encourage their abuses:

  > As documented in Mr. Hoffman's notes of my interview, I told him that people like Behnke, Col. Dunivin, and others were trying to improve training for human intelligence collectors to be more informed and useful advisors and monitors of military interrogators.[55]

[53] Bryson Aff. ¶ 11; Hoffman Report at 67.

[54] Fein Aff. ¶ 2.

[55] Fein Aff. ¶ 13.

BUT Hoffman and Sidley ignored that testimony and published opposite claims about Plaintiffs.

2. Documents and Information Known to Defendants and in Their Possession Demonstrate the Falsity of Defendants' First Primary False and Defamatory Conclusion About Plaintiffs.

Substantial record evidence demonstrates that Defendants actually knew the first primary conclusion about Plaintiffs in the Hoffman Report was false or, at a minimum, recklessly disregarded its truth or falsity. That first false primary conclusion was that:

> "key APA officials, principally the APA Ethics Director [Dr. Behnke] 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*."[56]

And that false conclusion rested on two false factual assertions:

> [1] "... then-existing DoD guidance ... used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation[.]"[57]
>
> [2] "... it was well known to APA officials at the time of the [PENS] report that the Bush Administration had defined 'torture' in a very narrow fashion[.]"[58]

That primary conclusion and its supporting factual assertions are false—and Defendants do not challenge their falsity in their Special Motions to Dismiss. The factual assertions are false for the simple reason that, by the time the PENS Task Force met, the earlier-existing narrow definition of "torture" had been withdrawn and interrogation policies governing the DoD then currently in place prohibited abusive techniques, including the sleep deprivation and stress position techniques that Defendants state were permitted. Indeed, as Defendants admit, Plaintiff Behnke helped draft the very provision of the PENS Guidelines (Statement 4) that includes those restrictive

[56] Hoffman Report at 9.

[57] Hoffman Report at 12.

[58] Hoffman Report at 12.

policies by reference.[59] As a result, the foundation for Hoffman's conclusion collapses: Plaintiffs had no reason for the collusion he alleges, even if they had not been adamantly opposed to interrogation abuses.

Notably, although Hoffman and Sidley refer to "existing interrogation" policies and guidelines, they never provide the actual DoD policies that were in place as of June 2005 when the PENS Task Force convened. Instead, they refer to old, outdated, and no-longer-in-force DoD policies from 2002, 2003, and late 2004, or to CIA policies. Yet documents in Defendants' possession, including those included in the Hoffman Report's binders of exhibits (which are still available on the APA's website), made it clear that Defendants' description of and conclusions about interrogation guidelines was wrong, and that restrictive interrogation policies were already in place when the PENS Task Force met.

Evidence of these facts known to Defendants and in Defendants' possession includes the following:

- **The Senate Armed Services Committee Report,[60] the Schlesinger Report,[61] the Martinez-Lopez Report,[62] and a book by Jack Goldsmith, Former Assistant Attorney General for the Office of Legal Counsel.** Defendants actually possessed. actually reviewed, and even cited in the Hoffman Report these four documents that set forth the correct timeline of relevant policies and demonstrated that Defendants relied on outdated, inapplicable policies in stating their conclusions.[63] Notably, ***Hoffman and Sidley actually relied on*** information in these four reports and ***actually cited*** these four reports ***BUT*** omitted citation to pages—directly adjacent to those they cited—that demonstrate that even (1) top-level governmental policies had become more restrictive since the 2002 and 2003 memoranda on which they rely, and (2) those policies prohibited the interrogation techniques they falsely state were allowed. The Schlesinger Report even contains a chart detailing the permissible interrogation techniques in Iraq, Afghanistan, and Guantanamo on various dates that sets forth a

[59] Hoffman Report at 12.

[60] *See* Hoffman Report at 138.

[61] *See* Hoffman Report at 352.

[62] *See* Hoffman Report at 352.

[63] *See* Hoffman Report at 153.

definitive account of the permissible interrogation techniques at the time of PENS. And contrary to Defendants' claims, those permissible techniques do not include sleep deprivation or stress positions. Hoffman and Sidley actually possessed and actually reviewed these documents, and they are still published and accessible in Hoffman's supporting materials on the APA's website.[64]

- **Withdrawal of Bush Administration Guidance Narrowly Defining "Torture."**[65] By the time the PENS Task Force met, the Bush Administration's Office of Legal Counsel had explicitly withdrawn earlier guidance that defined torture narrowly and had replaced it with guidance that specifically limited permissible interrogation techniques. ***Hoffman and Sidley actually acknowledge*** that the earlier guidance narrowly defining torture was withdrawn,[66] ***BUT*** they nevertheless rely on it elsewhere to falsely describe "existing" interrogation policy in 2005.[67] Such an internal contradiction supports a reasonable inference that Hoffman was shaping the evidence to fit his conclusions.

- **2014 APA Statements About Timeline of Withdrawal of Bush Administration Guidance Narrowly Defining "Torture."** In February 2014, the APA and its Committee on Legal Issues identified numerous falsities in critics' claims about the timeline for withdrawal of policies defining torture. The APA expressly stated that "much of the legal discussion in the [critics' timeline claims] is confused, inaccurate and/or incomplete," and it "relies on outdated law that has changed in the past several years and ignores the current legal authority on the issue with which the Item is concerned.[68] ***Hoffman and Sidley actually possessed*** copies of that statement and similar statements—including one from Cohen Milstein, a law firm hired by the APA to analyze the relevant policies in February 2014[69]—demonstrating that the foundation

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[64]APA, *Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security*, http://apa.org/news/press/statements/interrogations; entry July 2, 2015, *Attorney David H. Hoffman delivers the Independent Review Report relating to APA ethics guidelines, national security interrogations and torture, pursuant to the Nov. 12, 2014, resolution of the APA Board of Directors*: Exhibit Index and Binders 1-5.

[65] *See* Hoffman Report at 153.

[66] Hoffman Report at 153.

[67] "During the task force's pre-meeting communications, during its three-day meetings, and in preparing the task force report, Behnke and Banks closely collaborated to emphasize points that followed then-existing DoD guidance (which used high-level concepts and did not prohibit techniques such as stress positions and sleep deprivation)[.]" (Hoffman Report at 12.) As Ms. Bryson told Hoffman, then-existing DoD policies in Iraq, Guantanamo, and Afghanistan expressly prohibited, among other techniques, stress positions and sleep deprivation, which was never a technique approved by DoD. (*See* Bryson Aff. ¶ 6, Exhibit C; Compl. at Ex. C (Philbin Testimony (July 14, 2004).

[68] Kristen A. Hancock, *COLI's Preliminary Response to Council Business Item #23B: Implementation of the 2008 Membership to Remove Psychologists from All Settings That Operate Outside of International Law* (July 23, 2014), *available at* https://tinyurl.com/voz99o3; Behnke Aff. ¶¶ 10-11.

[69] Internal APA communications show multiple drafts of the Cohen Milstein opinion were provided to APA and ultimately to the critics to show their timeline and legal analyses were faulty and relied on legal opinions that had been withdrawn; Kristen A. Hancock, *COLI's Preliminary Response to Council Business Item #23B: Implementation of the 2008 Membership to Remove Psychologists from All Settings That Operate Outside of International Law* (July 23,

of their claim that Plaintiffs colluded to prevent the APA from putting in place strict interrogation guidelines was false. ***BUT*** they willfully ignored those statements and instead adopted a false timeline.

- **Interrogation "Standard Operating Procedures."** Hoffman and Sidley actually possessed at least four copies of the "standard operating procedures" governing interrogations at Guantanamo that had been drafted by Plaintiffs Banks and Dunivin before the PENS meetings. Those Procedures applied to all psychologists working at that DoD facility (regardless of service or agency affiliation) and expressly incorporated policies that limit permissible interrogation techniques and require psychologists to report any suspicions of abuse.[70] ***Hoffman and Sidley actually possessed that document, actually included it in their supporting materials and actually cited it*** in the Hoffman Report, ***BUT*** they deliberately omitted the fact that it limits permissible interrogation techniques and requires psychologists to report any suspicions of abuse. On Defendants' copy from Dr. James Bow (a former APA ethics chair interviewed during the investigation), its date (three months before the PENS Task Force even met) was heavily circled.[71]

- **PENS Listserv Posts About Restrictive Interrogation Policies.** Plaintiff James discussed the applicable restrictive local interrogation policies at least *five* times on the PENS listserv.[72] ***Hoffman and Sidley admit that they reviewed and analyzed those communications extensively,***[73] ***BUT*** they deliberately omit mention of them or their substance.[74] Plaintiff James also ***told Hoffman and his colleague Yasir Latifi about those policies*** in his interview with them and further specifically directed Hoffman to Banks and Dunivin for copies of the policies.[75] ***BUT*** Hoffman failed to acknowledge that and never addressed the policies with Banks and, despite Dunivin's requests, refused to provide her with information that would have allowed her to obtain clearance from DoD to discuss the policies.[76]

2014), *available at* https://tinyurl.com/voz99o3; Appendix A: Cohen Milstein, Independent Legal Review: Churchill New Business Item (June 16, 2014) Behnke Aff. ¶¶ 10-11.

[70] Bow Aff. ¶ 6; Dunivin Aff. ¶¶ 7-8; Hoffman Report at 233 n.923; Hoffman Report Binder 3, at pdf page 978, 285 (DODDON-000760-000772), *available at* https://www.apa.org/independent-review/binder-3.pdf.

[71] Bow Aff. ¶ 6 ("When I was interviewed, I provided the interviewers with [a file which they reviewed containing] the March 2005 Behavioral Science Consultation Team Standard Operating Procedure (SOP) for Guantanamo. My understanding was that this was the controlling SOP providing guidance and restrictions regarding interrogations for military psychologists at Guantanamo at the time of the PENS Task Force, but it was omitted from the Report.").

[72] Hoffman Report at 7, 247-64.

[73] Hoffman Report at 7, 247-64.

[74] Hoffman Report Binder 5, at pdf page 453, *available at* https://www.apa.org/independent-review/binder-5.pdf.

[75] James Aff. ¶ 6.

[76] Dunivin Aff. ¶ 7.

- **Key Language in PENS Statement Four.** ***Hoffman and Sidley extensively discussed the PENS Guidelines—including Statement Four***—in the Hoffman Report.[77] ***BUT*** they deliberately ignored the following language in PENS Statement Four that explicitly emphasizes the most recent interrogation rules *applicable to all psychologists working in DoD facilities* at the time of PENS:

> **PENS Statement Four**
> 4. Psychologists do not engage in behaviors that violate the laws of the United States, although psychologists may refuse for ethical reasons to follow laws or orders that are unjust or that violate basic principles of human rights. Psychologists involved in national security-related activities follow all applicable rules and regulations that govern their roles. Over the course of the recent United States military presence in locations such as Afghanistan, Iraq, and Cuba, such rules and regulations have been significantly developed and refined. Psychologists have an ethical responsibility to be informed of, familiar with, and follow the most recent applicable regulations and rules.[78]

- **Annotated PENS Guidelines.** ***Hoffman and Sidley actually possessed*** a copy of the first draft of the PENS Guidelines annotated by PENS Committee Member Jean Maria Arrigo, which included the above language from PENS Statement Four and attributes it to Plaintiff Behnke. ***Hoffman and Sidley actually extensively relied*** on Ms. Arrigo's notes, calling them the most "complete" portrayal of what happened at the PENS meeting.[79]

- **Statement of Jean Maria Arrigo.** ***Hoffman and Sidley actually possessed and actually reviewed*** a transcript of a tape recording by Ms. Arrigo stating that the PENS Task Force was "very, very firm about psychologists don't torture people, don't do all these things. ... That's what they want to be, a standard operating procedure."[80]

- **Statements by Hoffman/Sidley Interviewee Jennifer Bryson.** ***Hoffman and Sidley actually interviewed*** Jennifer Bryson, a civilian interrogator at Guantanamo, who told them that by 2004 (a year before the PENS Task Force), interrogators were required to use a computer menu of permitted interrogation techniques that did not permit techniques—such as stress positions and sleep deprivation.[81] ***BUT*** Hoffman and Sidley

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[77] Hoffman Report at 304-05, also stating "At this time, narrower definitions of torture prevailed through pronouncement of the OLC."

[78] APA, *Report of the American Psychological Association Presidential Task Force on Psychological Ethics and National Security*, at 5 (June 2005), *available at* https://www.apa.org/pubs/info/reports/pens.pdf.

[79] Hoffman Report at 264.

[80] Hoffman Report at 7, 289 & n.1292; Newman Aff. ¶ 9, Arrigo Notes: *Compare* Transcript of Interview of J.M. Arrigo, APA OPENS Task Force Meeting (June 2005), *available at* https://tinyurl.com/y5wat4t8, *with* Hoffman Report Binder 5, at pdf page 740, *available at* https://www.apa.org/independent-review/binder-5.pdf.

[81] Bryson Aff. ¶ 6. Sleep deprivation was a proposed interrogation technique in 2003 but never allowed for use by the Department of Defense. In fact, the Army Field Manual listed "abnormal sleep deprivation" as an example of physical

omitted that information and falsely stated, to the contrary, that military guidelines about interrogations at the times of the PENS meeting were too loose to prevent abusive interrogations involving stress positions and sleep deprivation.[82] That false claim is critical to Defendants' assertion that Plaintiffs colluded to ensure that APA did not promulgate restrictive guidelines for military psychologists: If the military guidelines were already restrictive— as military psychologists knew them to be—there was no motive for the claimed "collusion."

3. Documents and Information Known to Defendants and in Their Possession Demonstrate the Falsity of Defendants' Second Primary False and Defamatory Conclusion About Plaintiffs.

Substantial record evidence demonstrates that Defendants actually knew the second primary conclusion about Plaintiffs in the Hoffman Report was false or, at a minimum, recklessly disregarded its truth or falsity. That second false primary conclusion was that from 2006 to 2009, Plaintiffs engaged in a "pattern of secret collaboration to with APA" to prevent the APA from banning psychologists' participation in national-security interrogations.[83]

That conclusion is false—and, again, Defendants do not challenge its falsity in their Special Motions to Dismiss. It is false for the simple reason (among many reasons) that record evidence demonstrates that APA meetings were completely open and transparent such that a small group of members could not collude to prevent the APA from banning psychologists' participation in national-security interrogations.

Moreover, record evidence demonstrates that Defendants Hoffman and Sidley had actual knowledge of that openness and transparency that rendered their claim of collusion false. For example, Defendants actually possessed an e-mail to Plaintiff Behnke from Dr. Linda Woolf, a

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torture. (AFM 34.52, p. I-8, available at: https://tinyurl.com/y8za35cn (pdf p. 14).) Stress positions, such as standing or push-ups, were approved from December 2, 2002, to January 15, 2003, and then, along with sleep deprivation, were specifically prohibited by local policies. Throughout the Report, Hoffman conflates sleep adjustment, which is not prohibited by the Detainee Treatment Act or the Geneva Conventions, with sleep deprivation, which would violate the DTA and Geneva conventions. (Hoffman Report at 18, 66, 261, 263, 288, 300, 307, 400, 401.)

[82] Hoffman Report at 9, 12.

[83] Hoffman Report at 9.

strong proponent of banning abusive interrogation techniques and the participation of psychologists in such interrogations, utterly refuting accusations of secret collusion to defeat such a ban:

> All that I can say is that Judy Van Hoorn and I, representing the Society for the Study of Peace, Conflict, and Violence: Peace Psychology Division 48, were at the center of all of these conversations and as movers of the Resolution could not be excluded. ... [T]he changes were projected onto two giant video screens for the Council to review prior to voting. ... Council did have the opportunity to review, discuss, debate, challenge, etc. all of the changes prior to voting. ...
>
> Let me add that this was my first council meeting. I had envisioned a dark room with folks figuratively smoking cigars making decisions were made couched in groupthink, conformity, etc. It is actually very different than I expected and very open to debate. In fact, debate and extensive review/discussion were key components to all items presented before Council. It is also very organized as individuals get in line behind microphones for their chance to speak. Everyone is recognized in order so that no individuals can be denied an opportunity to present their concerns. Nothing gets voted on until all have had their chance or chances to express their ideas and concerns. Note that Council is very large with, I would estimate, well over two hundred representatives. ... And visitors are welcome from other organizations as well as the general membership.[84]

That document, which shows that the ban was defeated in an open and honest debate, was available on Plaintiff Behnke's hard drive, which Hoffman and Sidley imaged and reviewed.[85]

For its part, the APA had actual knowledge that the Hoffman Report's second primary conclusion was false because numerous APA Board Members participated in the events at issue and thereby had direct, first-hand knowledge of them.[86]

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[84] *Id.*

[85] *See* e-mail from L. Woolf to N. Thomas & S. Behnke re APA resolution on torture (Dec. 19, 2006, 11:04 a.m.), *available at* https://tinyurl.com/y44pjzlq

[86] See Exhibit B for a chart detailing involvement of APA Board members in events described in the Report.

4. Documents and Information Known to Defendants and in Their Possession Demonstrate the Falsity of Defendants' Third Primary False and Defamatory Conclusion About Plaintiffs.

Substantial record evidence likewise demonstrates that Defendants actually knew the third primary conclusion about Plaintiffs in the Hoffman Report was false or, at a minimum, recklessly disregarded its truth or falsity. That third false primary conclusion was that APA improperly handle ethics complaints to protect national-security psychologists from censure.[87] Specifically, Defendants falsely stated that the APA's Ethics Office was unwilling to fully investigate or act on complaints regarding psychologists who were involved in interrogations: "The limited steps taken by the Ethics Office to investigate ethics complaints facilitates interpreting the Rules in a way that is most favorable to the accused psychologist, which at times, is antithetical to a natural reading of the Rules."[88] Even more specifically, Defendants stated that with regard to the investigation of a complaint against Dr. James Leso, Plaintiff James' former student, the staff of the Ethics Office, led by Plaintiff Behnke, took little investigatory action beyond "conducting internet searches."[89]

That conclusion is false—and, again, Defendants do not challenge its falsity in their Special Motions to Dismiss. Moreover, Defendants actually possessed and actually reviewed evidence demonstrating its falsity. This evidence includes:

- **APA Board Statement About the Complaint Against Dr. James Leso.** ***Hoffman and Sidley actually possessed*** a statement that the APA Board issued when the Ethics Committee decided not to pursue a complaint against Dr. Leso, in which the APA Board explained that "[t]he amount of time, proactive information seeking and reviews devoted to the Leso complaint exceeded the standard activity in a typical case.[90] In full, the APA Board's statement provided:

[87] Hoffman Report at 10.

[88] Hoffman Report at 58.

[89] Hoffman Report at 60.

[90] APA, *APA Board of Directors and Ethics Committee Communiqué to the APA Council of Representatives in the matter of John Leso, PhD*, *available at* https://www.apa.org/ethics/leso-communique; APA, *Statement by the APA*

> The amount of time, proactive information seeking and reviews devoted to the Leso complaint exceeded the standard activity in a typical case.... [R]ather than one committee chair reviewing the file, two chairs reviewed it .... In addition, rather than one individual from the ethics office reviewing the file, four individuals did so: the ethics office director, the head of the office's adjudication program, an ethics investigator and the former director of the ethics office. All six came to the same conclusion. That based on the requirements set forth by the Ethics Committee Rules and Procedures, the record in this matter, read in its entirety, did not support bringing formal ethics charges against Dr. Leso. Reasons for this conclusion included that primary sources did not substantiate the allegations against Dr. Leso based on ... multiple reviews conducted by individuals with access to classified material found no evidence of wrongdoing and affirmative evidence of safeguarding detainees....[91]

BUT Hoffman and Sidley deliberately disregarded the APA Board's statement and published a completely opposite conclusion.

- **Evidence from the APA Ethics Office Obtained by Defendants.** ***Hoffman and Sidley actually possessed*** a list of all of the (voluminous) evidence that the APA Ethics Office had gathered and analyzed in reviewing the Leso Complaint—including the policy drafted by Banks and Dunivin prohibiting interrogation techniques Hoffman says were allowed. They obtained that list when Sidley partner and Hoffman colleague Danielle Carter traveled to Michigan to interview Dr. James Bow, the immediate past chair of the APA Ethics Committee, and review his copy of the Leso file. ***Hoffman and Sidley actually reviewed*** that evidence, which directly contradicted Defendants' claim that that the Ethics Office investigation of Dr. Leso consisted primarily of just internet searches and directly contradicted Defendants' statements about what the interrogation policies allowed.[92] ***BUT*** Hoffman and Sidley deliberately disregarded that evidence and published completely opposite conclusions.

- **Statements by Hoffman/Sidley Interviewee Dr. Robin Deutsch.** ***Hoffman and Sidley actually interviewed*** former APA Ethics Committee Chair Dr. Robin Deutsch.[93] As set forth in Dr. Deutsch's attached affidavit, he told Defendants that Plaintiff Behnke acted properly with regard to ethics complaints:

  > During my interview with Mr. Hoffman, questions he posed to me left me with the distinct impression that he had a preconceived narrative and had already concluded that the Director of the Ethics Office, Dr. Stephen

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Board of Directors on the "No Cause for Action" Decision Regarding the Ethics Complaint against Dr. John Leso (Feb. 20, 2014), *available at* https://www.apa.org/news/press/statements/leso-ethics-complaint.pdf

[91] *Id.*

[92] Bow Aff. ¶¶ 3-5, 7, Ex. A.

[93] Deutsch Aff. ¶ 3.

> Behnke, had engaged in inappropriate behavior. Mr. Hoffman's questioning implied that Dr. Behnke had attempted to exercise influence over the adjudication process in an effort to reach a particular outcome. While I do not recall a direct question as to whether I thought Dr. Behnke's behavior was proper, the information I provided in response to the series of questions posed would have communicated my experience that at no point did Dr. Behnke pressure me to reach any particular conclusion regarding the James ethics complaint, or any other ethics complaint.[94]

BUT Hoffman and Sidley ignored that testimony and published opposite claims about Plaintiffs.

5. Government Reports Known to Defendants and in Their Possession Demonstrate the Falsity of Defendants' Statements About Plaintiffs' Supposed "Collusion."

Further still, substantial record evidence—in the form of official government reports—demonstrates that Defendants actually knew that their overarching claims about Plaintiffs' supposed collusion to enable abusive interrogation techniques were false or, at a minimum, that they recklessly disregarded their truth or falsity.

In the leading case interpreting the D.C. Anti-SLAPP Act, the D.C. Court of Appeals held that the failure to mention exculpatory reports is an independently sufficient basis for finding actual malice. In *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016), a professor who wrote papers on global warming brought a defamation action against authors and publishers of articles that accused him of deception and academic misconduct. *Id.* at 1220. Several investigations and exculpatory reports followed that validated the plaintiff's methodology and found no evidence of misconduct. *Id.* at 1223. Nevertheless, the defendants' articles failed to mention those exculpatory reports. *Id.* at 1246-47. On that basis alone, the *Mann* court held that "a jury could find that [defendants'] defamatory statements were made with actual malice." *Id.* at

[94] Deutsch Aff. ¶ 9. *See generally id.* (providing additional, detailed, first-hand information rebutting additional false statements about Plaintiffs in the Hoffman Report).

1258. The court held that the defendants' objections to those reports were the proper subject of credibility arguments in front of a jury, not a reason to grant defendants' anti-SLAPP motions. *Id.* at 1261-62.

Here, multiple governmental agencies and bodies—including the Senate Armed Services Committee (SASC) and the FBI—investigated the same events that Hoffman investigated, looking at evidence provided by the critics on whom he relied, and found no reason to act. Hoffman references each of these reports in his Report.[95]

- **The Martinez-Lopez Report.** This report of an investigation for the Army Surgeon General into detainee medical operations during the time when Plaintiff James was working in Iraq and at Guantanamo states unequivocally that there was *"no indication that [Behavioral Science Consultation Team (BSCT)] personnel [who include military psychologists] participated in abusive interrogation practices"* and that there *was "clear evidence that BSCT personnel took appropriate action and reported any questionable activities when observed."* ***Hoffman and Sidley actually possessed and actually cited*** the Martinez-Lopez Report five times, and ***Hoffman actually interviewed*** the former Army Surgeon General who reviewed and approved its findings, General Kevin Kiley, and his assistant, Bruce Crow.[96] ***BUT*** Hoffman and Sidley deliberately omitted the Martinez-Lopez Report's exculpatory findings about Plaintiffs and state otherwise.[97]

- **The Schlesinger Report.** This report (discussed above) contained a list of allowed and prohibited interrogation techniques by date. No policy on the list ever permitted sleep deprivation, and stress positions (e.g., pushups) were prohibited by the time of PENS.[98] ***Hoffman and Sidley actually possessed and actually cited*** the Schlesinger Report, ***BUT*** deliberately omitted this exculpatory information in it.

- **The SASC Report.** This report (discussed above) provides the correct timeline of events affecting interrogation policies. ***Hoffman and Sidley actually possessed and***

[95] Hoffman Report at 138, 352.

[96] *See, e.g.*, Hoffman Report at 512 n.2517.

[97] Indeed, Defendants intentionally imply Plaintiffs' direct involvement in abuses by misleadingly stating that Plaintiff James was present at Guantanamo when the "most serious abuses" occurred to convince readers who do not know the true facts that James was involved in those abuses. (Hoffman Report Binder 5, at pdf pages 190, 285, *available at* https://www.apa.org/independent-review/binder-5.pdf; Crow Aff. ¶¶ 6-7.)

[98] *See supra* p. 28, Schlesinger Report, Evolution of Interrogation Techniques-GTMO; Interrogation Policies in Guantanamo, (referenced in Hoffman Report at 352; included in Hoffman Report Binder 4, at pdf pages 133-34, *available at* https://www.apa.org/independent-review/binder-4.pdf).

actually cited the SASC Report (and even cited pages immediately before and after the exculpatory pages),[99] ***BUT*** they do not refer to the timeline whatsoever.[100]

- **FBI Memoranda.** The FBI investigated twice the critics' allegations about collusion between the APA and the DoD and CIA and found no wrongdoing. APA's CEO sent an e-mail to senior staff regarding a public article confirming the finding in later 2014. ***Hoffman and Sidley actually possessed that e-mail, which was on the Behnke hard drive Hoffman imaged, BUT*** he never tells the reader that the FBI had investigated the critics claims and "did not find any criminal violations."[101]

6. The APA—Through Its Board Members—Had Actual Knowledge of the Falsity of the Statements About Plaintiffs in the Hoffman Report.

Finally, substantial record evidence demonstrates that Defendant APA actually knew that the statements and claims about Plaintiffs in the Hoffman Report discussed above were false or, at a minimum, recklessly disregarded their truth or falsity. This is so for the simple reason that numerous APA Board Members—in fact, a majority—participated in the events at issue and thereby had direct, first-hand knowledge of them.[102] They therefore likewise had actual knowledge of the falsity of Hoffman's and Sidley's statements about and descriptions of them.[103]

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[99] Hoffman Report at 138 n.486.

[100] *Timeline of Policies: Timeline Cited by Hoffman from the Senate Armed Services Committee Report and Other Sources*, *available at* https://tinyurl.com/y58nhmhp.

[101] *See* Cora Currier, *Psychologists are Rethinking Their Cozy Relationship with Bush Torture Program,* The Intercept (Nov. 14, 2014), *available at* https://tinyurl.com/y3373slg; e-mail From N. Anderson to E. Garrison & G. Mumford re Board Response to inquiries re Oct. 16 statement Risen book (Oct. 24, 2014), *available at* https://tinyurl.com/y6jm5uat (e-mail from APA's CEO acknowledging that FBI found no criminal wrongdoing); Behnke Aff. ¶ 29; Letter N. Raymond to Supervisory Special Agent K. Beuller (Oct. 15, 2012), *available at* https://tinyurl.com/y25dg274

[102] See Exhibit B for a chart detailing involvement of APA Board members in events described in the Report.

[103] *See id.* Of course, the APA, as an organization, acts through its Board Members, and cannot avoid liability through willful blindness or reliance. *See* D.C. Code § 29-406.30(e) ("In discharging board or committee duties a director ***who does not have knowledge*** that makes reliance unwarranted may rely on information, opinions, reports, or statements ... prepared or presented by [certain] persons[.]"); D.C. Code § 29-406.30(d) (similar); D.C. Code § 29-406.30(c) ("[A] director shall disclose, or cause to be disclosed, to the other board or committee members information not already known by them but known by the director to be material to the discharge of their decision-making or oversight functions[.]"); *see also Estate of Lemington for the Aged ex. rel. Estate of Lemington Home for the Aged v. Baldwin*, 777 F.3d 620, 629-30 (3d Cir. 2015) ("This is not a case where directors, acting in good-faith reliance 'on information, opinions, reports or statements' prepared by employees or experts, made a business decision to continue to employ an Administrator whose performance was arguably less than ideal.' The jury heard testimony that the Director Defendants received several independent reports documenting Causey's shortcomings and urging that she be replaced. The Director Defendants therefore had actual knowledge of her mismanagement, yet stuck their heads in

Indeed, as the record evidence confirms, a majority of APA Board members, as well as the APA's Assistant General Counsel, had made comments in e-mails, in internal APA documents, and in open forums that contradict the Hoffman Report's descriptions of events. For example, with regard to the Leso ethics complaint:

- **Statement of APA President Dr. Nadine Kaslow.** Dr. Kaslow, the President of the APA Board in 2014, wrote a communique regarding the "thoroughness" of the Leso investigation that directly contradicts the Hoffman Report's conclusion that ethics complaints were handed improperly:

  > ... as complete and careful a review of the available evidence was undertaken as possible. The review consisted of evidence (as opposed to supposition) and was conducted in a manner to ensure that the ethics process was kept insulated from political pressures.[104]

- **Statements of Dr. Jennifer Kelly and Anne Springer.** Dr. Jennifer Kelly, the liaison from the Board to the Ethics Committee, and Anne Springer, APA's Associate General Counsel, signed off on the closing of the Leso ethics complaint and explained the closing at length to other Board members in a briefing, providing information that directly contradicts the Hoffman Report's conclusion that ethics complaints were handed improperly.[105]

Additional evidence is listed in **Exhibit B**, which identifies and describes the involvement of APA Board members in the events discussed in the Hoffman Report and provides supporting APA Rosters, Council Minutes, and correspondence from historical business records.

C. Plaintiffs Proffer Circumstantial Evidence of Defendants' Actual Malice.

Plaintiffs have also alleged, and the record also contains, circumstantial evidence of the exact types that courts have repeatedly held constitute circumstantial evidence of actual malice.

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the sand in the face of repeated signs that residents were receiving care that was severely deficient." (internal citation omitted)).

[104] APA, *APA Board of Directors and Ethics Committee Communiqué to the APA Council of Representatives in the matter of John Leso, PhD*, *available at* https://www.apa.org/ethics/leso-communique.

[105] See Exhibit B. *Past APA Governance Actions by 2014, 2015 Non-Recused Board Members Described in the Report.*

As detailed in the following subsections, these types of evidence include (but are not limited to) the following:

1. adherence to a preconceived narrative or plan to malign Plaintiffs;
2. purposeful avoidance of the truth;
3. knowing reliance on unreliable and biased sources and witnesses;
4. motive to make false statements about Plaintiffs and bias against and ill-will toward Plaintiffs;
5. failure to adhere to accepted standards for conducting investigations; and
6. refusal to retract or correct their false and defamatory statements even after being presented with irrefutable evidence showing their falsity, and republication after learning of errors.

1. Defendants Had a Preconceived Plan to Condemn Plaintiffs and Made the "Facts" Conform to That Narrative.

A jury can find actual malice based on "a predetermined and preconceived plan to malign [the plaintiff's] character." *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969). Indeed, "'evidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story ***is*** evidence of actual malice, and may often prove to be ***quite powerful evidence***.'" *Harris v. City of Seattle*, 152 F. App'x 565, 568 (9th Cir. 2005) (quoting Rodney A. Smolla, 1 Law of Defamation § 3:71 (2d ed.)); *accord Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (finding actual malice because, *inter alia*, defendant "conceived of a storyline" and then published a defamatory article consistent with it"); *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016).

Here, Plaintiffs proffer substantial evidence that Defendants had a preconceived storyline for their defamatory Report ***and*** set out to make the evidence conform to it. Indeed, Plaintiffs further pled what that storyline was: that a "small underbelly" of psychologists (not the APA as a

whole) had colluded to enable "abusive interrogation techniques."[106] And Plaintiffs pled where Defendants adopted that storyline from: long-time critics of the Plaintiffs with a demonstrated animus against them. (*See infra* Part I.C.3.) As those critics have publicly acknowledged in interviews, they wanted Defendants to conclude that Plaintiffs' acts constituted an ongoing collusive venture that would defeat statute-of-limitations obstacles to their criminal prosecution—an end that, in their eyes, Defendants achieved. The narrative Hoffman constructed not only assumed Plaintiffs' culpability from the start, but also knit their actions into an ongoing collusive enterprise spanning many years.[107]

The most striking evidence that Defendant had a preconceived plan to blame a few, including Plaintiffs, for purportedly colluding with the Department of Defense to enable abusive interrogation practices—and deliberately avoided information and evidence that would contradict that preconceived storyline—comes from sworn affidavit testimony of the very people that Defendants interviewed in their "investigation." In sworn testimony, 20 people have stated that their interviewers appeared manifestly intent on pursuing a pre-formed conclusion that Plaintiffs

[106] First Compl. ¶¶ 15-16; Lori Foster *et al.*, *Notes From the August 2015 APA Council of Representative Meeting*, 53 Industrial-Organizational Psychologist 143, 145 (Jan. 2016), *available at* https://tinyurl.com/yybff99t; *Former APA President Says Stephen Behnke Was 'Terminated,'* Huffington Post, *available at* https://www.huffpost.com/entry/former-apa-president-says-stephen-behnke-was-terminated_n_5b55c5fde4b0890b5cce23e6.

[107] Letter N. Raymond to Supervisory Special Agent K. Beuller (Oct. 15, 2012), *available at* https://tinyurl.com/y25dg274; Weaponizing Health Workers: How Medical Professionals Were a Top Instrument in U.S. Torture Program, *Democracy Now!* (Dec, 23, 2014), https://www.democracynow.org/2014/12/23/weaponizing_health_workers_how_medical_professionals.

colluded to facilitate abuses and went out of their way to avoid information that contradicted that conclusion. A sample of just a few of these affidavits is illuminating:

> "During my interview ..., I had the distinct impression that the Sidley independent review had a **preconceived idea that the Ethics Office staff exercised undue influence o**ver the Ethics adjudication process. **In contrast**, I stated emphatically that the Ethics Office staff, including the Office director, had not attempted to exercise any influence over me as a reader, or over any aspect of the adjudication process in which I participated, in order to reach a particular outcome. This information was **not included** in the Report." (Callahan Aff. ¶ 9)
>
> "During my interview with Mr. Hoffman, questions he posed to me left me with **the distinct impression that he had a preconceived narrative and had already concluded** that the Director of the Ethics Office, Dr. Stephen Behnke, had engaged in inappropriate behavior." (Deutsch Aff. ¶ 9)
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> "That I was not asked about either the PENS Task Force or Dr. Behnke's approach to ethics policy, standards, and decision-making leads me to believe that Mr. Hoffman approached the interview with **a preconceived narrative for which he did not want additional information**. ...That I was not asked about the Gelles case leads me to conclude that Mr. Hoffman had **a preconceived narrative about the Ethics Office** and Committee's handling of that case and **was uninterested in additional information that might conflict with his narrative**."(Kinscherff Aff. ¶ 15)
>
> "During the interview, **Mr. Hoffman's questions indicated a preconceived narrative that Dr. Behnke had behaved inappropriately** in his job, particularly by exerting undue influence on the PENS Task Force process and outcome. I told Mr. Hoffman that I did not believe this to be the case. ... **The Report inaccurately describes** other APA staff actions, and these descriptions appear to be part of the preconceived narrative that staff acted improperly." (Shumate Aff. ¶ 6)
>
> "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." (Shumate Aff. ¶ 11)
>
> "The Report appears to adopt a **preconceived conclusion that I had acted improperly** and Ms. Carter **never questioned** me about the reasons for the suggestion to reduce the size of the task force." (Strassburger Fox Aff. ¶ 11)

Further indicating that Defendants had a preconceived plan to malign Plaintiffs and avoided contradictory information, the Hoffman Report repeatedly draws all possible inferences against Plaintiffs and consistently treats all positive statements about Plaintiffs with skepticism.

One especially damaging instance of a negative inference relates to e-mails between Plaintiff Banks and Dr. Behnke. Hoffman alleges that they were colluding secretly to further the

military's agenda, and that the evidence "strongly suggests . . . that records were destroyed in an attempt to conceal the collaboration."[108] To support that allegation, he relies on two false claims.

1. Because Plaintiff Banks labeled some e-mails as "eyes only" or asked that they be deleted, his intent was nefarious. Plaintiffs' review of Dr. Behnke's hard drive produced in discovery reveals approximately thirteen so labeled. Hoffman does not disclose that three copied other people; in fact, one copied APA General Counsel Nathalie Gilfoyle. Moreover, as the e-mails demonstrate, none contains content that shows a collusive intent.[109] Hoffman did not ask Plaintiff Banks or Dr. Behnke for an explanation of that labeling. If he had, he would have learned the true explanation: as a military officer, Plaintiff Banks could not participate publicly in a discussion with political overtones, and his testimony for SASC was confidential. That explanation is in fact alluded to in some of the e-mails.
2. Dr. Behnke deleted e-mails from Plaintiff Banks. In fact, Dr. Behnke's practice, about which he was never asked, was to move older e-mails to a folder labeled "deleted"—which remained on his computer. He never permanently deleted any e-mails. That folder was contained in the image of Dr. Behnke's hard drive created by the forensic investigation firm Hoffman hired. When Sidley produced that image during discovery, it took Plaintiffs' forensic expert less than 24 hours to confirm that no e-mails had been deleted. In fact, the e-mails Hoffman referred to were not even found in the "deleted" file, a fact that would have been obvious when he reviewed the e-mails; they were contained in archived files instead.[110]

[108] Hoffman Report at 396

[109] Gungor Aff. ¶15.

[110] *Id*.; If the Court desires, Plaintiffs can provide additional examples that demonstrate this pattern.

In addition, and tellingly, in February 2015, just three months into Defendants' investigation, former APA President Dr. Nadine Kaslow (the head of the Special Committee overseeing Defendants' investigation) admitted to Plaintiff Behnke that Hoffman would "find something" and stated that the APA should apologize for its actions.[111] Similarly, on February 5, 2015—again, just three months into the eight-month investigation—Dr. Kaslow told Dr. Morgan Sammons (a Navy military psychologist) that "heads were going to roll."[112] Dr. Sammons understood Dr. Kaslow's remark to unambiguously indicate that a conclusion had already been reached that people were going to be fired.[113]

2. Defendants Purposefully Avoided the Truth by Avoiding Information That They Knew Would Contradict Their Preconceived Narrative.

As explained above, the U.S. Supreme Court has held that a defendant's "purposeful avoidance of the truth" is independently sufficient to demonstrate a defendant's actual malice. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *see also Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 108 (D.D.C. 2009) (same); *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 900 (9th Cir. 1992) (same).[114]

Here, Defendants purposefully avoided obtaining truthful and correct information that contradicted their false and defamatory conclusions in numerous ways and on numerous occasions. Two examples are illustrative.

First, not only did Defendants deliberately omit from the Hoffman Report information that demonstrated the existence and application of restrictive interrogation guidelines that prohibited

[111] Behnke Aff. ¶ 7.

[112] Sammons Aff. ¶ 4.

[113] Sammons Aff. ¶ 4.

[114] *See also, e.g.*, *Aghmane v. Bank of Am., N.A.*, 696 F. App'x 175, 178-79 (9th Cir. 2017) (similar); *Straub v. CBS Broad*., Inc., No. 14-cv-5634, 2016 WL 1626108 , at *3 (E.D. Penn. Apr. 25, 2016) (similar); *Manzari v. Associated Newspapers, Ltd.,* No. 13-cv-6830, 2014 WL 12696744, at *1 n.1 (C.D. Cal. Feb. 3, 2014) (similar).

"torture" and abusive techniques such as sleep deprivation and stress positions (*see supra* Part I.B) and the inapplicability of older, outdated, looser guidelines, but Defendants intentionally avoided known lines of inquiry that would have further demonstrated those true facts. For example:

- **Defendants' Interview of Plaintiff Dunivin.** In Defendants' interview of Plaintiff Dunivin, Defendants focused exclusively on an out-of-date interrogation policy that Defendants claimed allowed for abuses.[115] Dunivin told Defendants that she needed to ask for clearance to provide more information and that, to make that request, she would need from them the questions they wished to explore.[116] ***BUT*** Defendants never provided those questions, despite repeated requests from Dunivin.[117] Instead, Hoffman stated by e-mail that Defendants were interested only in Dunivin's communications with the APA—an assurance that indicated not only a deliberate avoidance of evidence that contradicted Defendants' conclusions but also was false, as shown by the Hoffman Report's emphasis on the methods that "existing" DoD interrogation policies allegedly allowed because of their purported looseness.[118]

- **Defendants' Discussions with Plaintiff Banks.** Plaintiff Banks told Hoffman by e-mail that Defendants should interview Army Surgeon General Eric Schoomaker, who in large part made the decision to deploy Cols. Banks, Dunivin, and James to help prevent abuses: "I also encourage you to consider contacting his [Lieutenant General Kiley's] successor, LTG Eric Schoomaker. He was involved early on with the policy discussions that occurred on the topic, and later as the Surgeon General, maintained a very strong emphasis on making sure that we were always on the right ethical track in this mission."[119] Hoffman agreed it was a good idea and he should interview General Schoomaker.[120] ***BUT*** Hoffman never did so.[121] General Schoomaker's information about the interrogation policies actually in use at the time of the PENS meeting would have contradicted Hoffman's characterization of those policies.[122]

- **Defendants' Interview of Jennifer Bryson.** As described above (*see supra* Part I.B), Ms. Bryson explicitly told Defendants, during their interview of her, about changes that had resulted in the applicable interrogation policies prohibiting abusive interrogations and techniques.[123] Plaintiff James also told Defendants about those policies in his

[115] Dunivin Aff. ¶¶ 8-10.

[116] Dunivin Aff. ¶ 7.

[117] Dunivin Aff. ¶ 7.

[118] Dunivin Aff. ¶ 7.

[119] Banks Aff. ¶ 16.

[120] Banks Aff. ¶ 16.

[121] Banks Aff. ¶ 16.

[122] Banks Aff. ¶ 16.

[123] Bryson Aff. ¶ 6.

interview, and he referred to them five times in PENS listserv communications that Defendants actually possessed and actually reviewed.[124] ***BUT*** they deliberately avoided that information that contradicted their predetermined conclusions.[125]

Second, Defendants deliberately hid from Plaintiffs (and others) the fact Defendants had expanded their investigation beyond its initial focus, which was limited to allegations regarding *the CIA* in James Risen's book that had sparked the investigation.[126] As a result, Plaintiffs were unaware of the investigation's new, broader focus on *DoD policies* or that they were its targets.[127] Thus, Defendants effectively denied Plaintiffs (and others) the opportunity to respond directly to or provide information about the issues Defendants were investigating and the charges they would make.[128] A jury could reasonably conclude that Defendants did this to avoid receiving true facts and evidence from Plaintiffs (and others) that contradicted their predetermined conclusions to the contrary, and that this avoidance constituted actual malice.

Moreover, because Defendants do not contest Plaintiffs' well-pleaded allegations of purposeful avoidance, they have waived any arguments on this point and cannot raise them now. *McBride v. Merrell Dow & Pharms.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) ("Considering an argument advanced for the first time in a reply brief ... is not only unfair ... but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered."); *Craig v. District of Columbia*, 197 F. Supp. 3d 268, 274 n.3 (D.D.C. 2016) (similar).

[124] Hoffman Report at 7 & n.2, 247 & n.1073; James Aff. ¶ 6.

[125] Bryson Aff. ¶ 6.

[126] Banks Aff. ¶ 15; Dunivin Aff. ¶¶ 7-8; James Aff. ¶ 8.

[127] Banks Aff. ¶ 16; Dunivin Aff. ¶¶ 7-8; James Aff. ¶¶ 8.

[128] Banks Aff. ¶ 16; Dunivin Aff. ¶¶ 7-8; James Aff. ¶¶ 8.

3. Defendants Relied on Sources That They Knew Were Unreliable and Biased.

As the U.S. Supreme Court has explained—and Defendants concede—actual malice is established, independently, when a defamation-defendant relies on sources that he knows are biased or unreliable. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)) ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."); *see also* Hoffman/Sidley First Special MTD at 18.[129]

Here, the record evidence shows that Defendants had many obvious reasons to doubt the veracity and reliability of the sources on which they heavily relied.

First, Plaintiffs allege and the record evidence confirms that Defendants knowingly relied on, focused interviews on, and unquestioningly adopted "facts" from people who they knew were long-time, vocal critics of the Plaintiffs and the APA, including, most prominently, Drs. Stephen Soldz and Nathaniel Raymond.[130] Immediately after the APA retained Hoffman and Sidley, Hoffman flew to Boston to meet with Drs. Soldz and Raymond.[131] Defendants also treated these critics more favorably than other interviewees. For example, in contrast to Defendants' treatment of other people whom they interviewed, Defendants promised Drs. Soldz and Raymond confidentiality, set out to build their "trust," and heavily relied on them for documents and other

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[129] *See also, e.g.*, *Zimmerman v. Al Jazeera Am., LLC,* 246 F. Supp. 3d 257, 281-83 (D.D.C. 2017) ("[T]he D.C. Circuit has suggested that facts that cast doubt on the source's reliability may be probative of actual malice, assuming such facts are known to the defendant at the time of publication."); *Secord v. Cockburn*, 747 F. Supp. 779, 789 (D.D.C. 1990) (actual malice requirement demonstrated where "author was subjectively aware that the source was unreliable"); *Stern v. Cosby*, 645 F. Supp. 2d 258, 281 (S.D.N.Y. 2009) (similar).

[129] *See, e.g.*, *Bentley v. Bunton*, 94 S.W.3d 561, 595-96 (Tex. 2002); *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 169 (1992); *Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 275 (1998); *Stevens v. Sun Publ'g Co.*, 270 S.C. 65, 72 (1978); *Currier v. W. Newspapers, Inc.*, 175 Ariz. 290, 294 (1993).

[130] *See, e.g.*, fn. 134, *infra.*

[131] Hoffman Report at 172, n.704; Raymond interview (Dec. 2, 2014). Hoffman's engagement letter with APA was signed November 20, 2014, just before Thanksgiving. Engagement Letter D. Hoffman to N. Gilfoyle (Nov. 20, 2014), *available at* http://www.hoffmanreportapa.com/resources/Sidleyengagementletter.pdf.

information.[132] As Drs. Soldz and Raymond have publicly acknowledged in interviews, they wanted Defendants' investigation to defeat statute-of-limitations obstacles to criminal prosecution of Plaintiffs.[133]

Moreover, Defendants further knew that these critics (including Drs. Soldz and Raymond) were specifically biased against and held animus (and even racial animus) toward Plaintiffs. For example, Dr. Soldz publicly lamented in an online interview that Plaintiff James had gotten his job partly because he was "black," and even though "he doesn't show up for work" and "can't write an English sentence."[134] Nevertheless, rather than regarding the critics as sources about whom they should be as skeptical as about those they attacked, Defendants treated them as trusted collaborators.

Second, Hoffman and Sidley relied heavily on notes of the PENS meeting taken by Jean-Maria Arrigo (a civilian member of PENS),[135] even though they had been expressly cautioned by former APA President and PENS Task Force Observer Dr. Barry Anton that Dr. Arrigo and her notes were not reliable.[136] Moreover, further demonstrating Dr. Arrigo's lack of credibility, she

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[132] Zoe Tillman, *Sidley Austin*, National Law Journal (Feb. 29, 2016), *available at* https://www.law.com/nationallawjournal/almID/1202750790689/Sidley-Austin *and* https://tinyurl.com/ruq7uty; Nell Gluckman, *Sidley Partner Rattles Psychology Field With Torture Report*, The American Lawyer (July 18, 2015), *available at* https://www.law.com/americanlawyer/almID/1202732542839/?slreturn=20150620094116 *and* https://tinyurl.com/tn9dt96;

[133] In an online interview. Dr. Soldz says that Hoffman turned to him whenever he needed a document he could not find. *Psychologists for Social Responsibility: An Open Discussion of the Hoffman Report and Where to Go from Here*, YouTube (Aug. 6. 2015), *available at* https://www.youtube.com/watch?v=lsru3chmkwo (at 30 seconds). *See also* Weaponizing Health Workers: How Medical Professionals Were a Top Instrument in U.S. Torture Program, *Democracy Now!* (Dec, 23, 2014), https://www.democracynow.org/2014/12/23/weaponizing_health_workers_how_medical_professionals.

[134] *The Rule of Law Oral History Project: The Reminiscences of Stephen Soldz* at 36-38 (Columbia Univ. 2013), *available at* https://tinyurl.com/yxzwlsv3; *Oral History Interview with Stephen Soldz* at 36-38 (Columbia Univ., May 24 & Apr. 30, 2013), *available* at https://www.worldcat.org/title/oral-history-interview-with-stephen-soldz-2013/oclc/857652458

[135] Hoffman Report at 264; Harvey Aff. ¶ 14.

[136] Anton Aff. ¶ 11.

has openly peddled bizarre conspiracy theories, including claiming that the CIA was able to monitor an APA Council meeting electronically and affect its voting.[137]

Third, Defendants relied heavily on information from Dr. Trudy Bond even though she has previously repeatedly targeted Plaintiffs with false claims.[138] As Defendants well knew, Dr. Bond had previously submitted much of the information on which Defendants relied to the United Nations to urge war-crimes prosecutions of Plaintiffs and the Bush Administration, and she had filed unsuccessful ethics complaints against Plaintiff James in two states and Guam.[139] Nevertheless, Defendants relied on Dr. Bond uncritically and with no mention of her prior crusades against Plaintiffs.

Simply put, as this evidence more than reasonably suggests, Defendants wanted to save the APA from its increasingly vocal critics by scapegoating a "small underbelly" of psychologists to pacify the critics who had been attacking the APA. That is the very definition of bias.

4. Defendants Had a Motive to Defame Plaintiffs and Were Biased Against Them.

Although evidence of bias or ill-will is not ***alone*** sufficient to sustain a finding of actual malice, "evidence concerning motive," bias, "animosity," and ill will "***support*** a finding of actual

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[137] Hoffman Report at 264; Harvey Aff. ¶ 14 Anton Aff. ¶ 11.

[138] Hoffman Report at 520-22.

[139] *Going the Distance: Trudy Bond*, Expert Witness: Health Professionals on the Frontline Against Torture http://expertwitnessagainsttorture.com/trudy-bond/; *Dr. Trudy Bond et al v. Larry James (Ohio, 2010)*, Human Rights@Harvard Law, *available at* http://hrp.law.harvard.edu/areas-of-focus/previous-areas-of-focus/counterterrorism-human-rights/professional-misconduct-complaint-larry-james; Trudy Bond, *et al.*, *Shadow Report to the United Nations Committee Against Torture on the Review of the Periodic Report of the United States of America*, Human Rights@Harvard Law (Sept. 29, 2014), *available at* http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf; Trudy Bond, *et al.*, *Submission to the United Nations Committee Against Torture on the Review of the Periodic Report of the United States of America on the List of Issues Prior to Reporting* (June 27, 2016), *available at* https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_ICS_USA_24560_E.docx. James Aff. ¶ 13; *Innovative Lawyers award winner catches the mood of an age* (Dec. 7, 2015) Hoffman excerpt *available at* https://tinyurl.com/vmwm2y8.

malice." *Connaughton*, 491 U.S. at 668; *Celle*, 209 F.3d at 183, 186, 190; *Palin v. N.Y. Times Co.*, 940 F.3d 804, 814 (2d Cir. 2019) (recognizing that bias supports a finding of actual malice).[140]

Here, substantial record evidence shows APA Board members—including those overseeing Defendants' investigation and the Hoffman Report—were highly motivated to limit damage to themselves and the organization by scapegoating what former APA President Dr. Nadine Kaslow (head of the Special Committee overseeing Defendants' investigation) termed a "small underbelly" of psychologists.[141] Indeed, as explained above, just three months into Defendants' eight-month investigation, Dr. Kaslow stated that Hoffman would "find something" and that "heads were going to roll."[142]

Moreover, Dr. Kaslow—who was conflicted and, as her comments about Defendants' investigation demonstrate, highly biased—oversaw the expansion of Defendants' investigation far beyond its original limited scope into a sprawling expedition through a decade's worth of events.[143] Further still, far from having Hoffman and Sidley be independent, Dr. Kaslow was in frequent contact with them throughout the investigation.[144] Not surprisingly, the Hoffman Report that emerged perfectly aligned with Dr. Kaslow's goal of protecting herself and other APA Board members while blaming a "small underbelly" of psychologists—Plaintiffs.

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[140] *See also, e.g.*, *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) ("[I]ll will ***is*** considered circumstantial evidence of actual malice."); *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 315 n.10 (5th Cir. 1995) ("[E]vidence of ulterior motive can often bolster an inference of actual malice.").

[141] Compl. ¶ 16; *Former APA President Says Stephen Behnke was 'Terminated'*, Huffington Post, available at https://tinyurl.com/yy2u3dua.

[142] Behnke Aff. ¶ 7; Sammons Aff. ¶ 4.

[143] Behnke Aff. ¶¶ 4, 37; Exhibit B, Involvement of Directors in Underlying Events; Kaslow communique regarding the Leso ethics complaint issued while she was President of APA, just 10 months prior to her becoming head of the APA Special Committee overseeing the investigation: APA, *APA Board of Directors and Ethics Committee Communiqué to the APA Council of Representatives in the matter of John Leso, PhD*, *available at* https://www.apa.org/ethics/leso-communique. Her role in events Hoffman investigated should have resulted in her recusal.

[144] *Id.*

Notably, while bias against the Plaintiffs permeated Defendants' investigation and permeates the Hoffman Report, it is most strikingly demonstrated in three ways:

- **Defendants' Leaking of a Draft of the Hoffman Report to an APA Critic in the Media Before the Report's Release.** At the end of Defendants' "investigation," before they officially released the Hoffman Report, Hoffman and Sidley leaked an advance copy of the Report to James Risen, the *New York Times* reporter whose allegations had prompted the APA to hire him.[145] That leak began a flood of front-page media coverage that convicted the Plaintiffs in the public's view before they could defend themselves.[146] Even if Sidley had not leaked the Report, Defendants gave an advance copy to two of the most vocal critics of APA who were serving as Risen's sources, all but ensuring the Report's conclusions would quickly be broadcast.

- **Defendants' Use of Language Implying Criminality in the Report Despite Finding No Evidence of Crimes.** Even though Hoffman and Sidley told the APA that they found no evidence of any criminal activity, Defendants intentionally used language suggestive of criminal activity throughout the Report and in connection with Plaintiffs—terms such as "collusion," "joint venture," "joint enterprise" and "deliberate avoidance" that are drawn directly from the language of RICO litigation and war-crimes prosecutions.[147] It is implausible to assert that a sophisticated former prosecutor's use of that language was accidental and unwitting. And, in fact, the critics and others used the Report to renew their push for criminal and war-crimes prosecutions.[148] A jury may properly consider the use of such loaded language in determining actual malice.[149]

- **Defendants' Admission to Using Misleading Language.** At a meeting with the APA Council in August 2015, Hoffman admitted that terms such as "behind-the-scenes communication" would have been more accurate than loaded language like "collusion,"

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[145] See fn. 35, infra.

[146] *Id.;* James Risen, *American Psychological Association Bolstered C.I.A. Torture Program, Report Says*, The New York Times (April 30, 2015), available at https://tinyurl.com/y9qxee6m.

[147] "Former APA President Says Stephen Behnke Was 'Terminated'" *Huffington Post* (videotaped interview of Dr. Nadine. Kaslow, Head of the APA Special Committee overseeing Hoffman and Sidley's investigation), *available at* https://www.huffpost.com/entry/former-apa-president-says-stephen-behnke-was-terminated_n_5b55c5fde4b0890b5cce23e6.

[148] James Aff. ¶ 13; Spencer Ackerman, *US Torture report: psychologists should no longer aid military, group says*, The Guardian (July 11, 2015), *available at* https://tinyurl.com/y4d7sh84

[149] *See, e.g., Vascular Sols., Inc. v. Marine Polymer Techs., Inc.*, 590 F.3d 56, 61 (1st Cir. 2009) (holding that "scare phrasing" could properly be considered by a jury in determining actual malice); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 568 (La. Ct. App. 1980) (rejecting defendant's argument regarding its use of a particular term in its article, finding "that the statement is incapable of an innocent construction on the facts.").

but stated that he felt constrained by his charge from the APA to use the term "collusion."[150]

5. Defendants Failed to Adhere to Proper Investigation Practices.

A "departure from accepted standards" of professional conduct constitutes circumstantial evidence of actual malice. *Connaughton*, 491 U.S. at 693; *see also Church of Scientology Int'l v. Time Warner, Inc.*, 903 F. Supp. 637, 641 (S.D.N.Y. 1995) (holding that "an extreme departure from standard investigative techniques," especially coupled with bias, can constitute evidence of "more than mere carelessness—rather as purposeful avoidance of the truth").

Here, Defendants' conduct of the investigation departed egregiously from professional standards in the following significant ways:[151]

- **Improper Investigation Conduct and Goals.** As documented in 27 sworn affidavits from people interviewed by Defendants, Defendants conducted interviews not for the purpose of uncovering all relevant evidence wherever it leads and *then* forming conclusions based on that evidence, but rather conducted interviews only to build a case against Plaintiffs and disregarded testimony and evidence favorable to Plaintiffs.[152]

- **Conflicts of Interest; Investigation Overseen by Interested Persons.** Rather than have their investigation overseen by independent, disinterested persons—as Defendants knew is required[153]—Defendants' investigation was overseen by a Special Committee of the APA Board whose members (1) were not disinterested, (2) had been deeply involved in the events the Report described, and (3) stood to personally and

[150] *Notes from Mr. Hoffman's August 2015 Comments to Council*, *available at* https://tinyurl.com/yxxy98r8; Harvey Aff. ¶ 15.

[151] Hoffman and Sidley violated many of the markers identified in case law as part of a negligence standard in an internal investigation. *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1510 (D.D.C. 1987) ("The court notes that negligence in the context of an investigative report may include: (1) failure to pursue further investigation; (2) unreasonable reliance on sources; (3) unreasonable formulation of conclusions, inferences, or interpretations; (4) errors in note-taking and quotation of sources; (5) misuse of legal terminology; (6) mechanical or typographical errors; (7) unreasonable screening or checking procedures; (8) the failure to follow established internal practices and policies.").

[152] *See, e.g.*, Sammons Aff. ¶¶ 4-5; Deutsch Aff Aff. ¶ 9; Lefever Aff ¶ 10; Swenson Aff. ¶6; Callahan Aff. ¶ 9

[153] Holly J. Gregory (Sidley Austin LLP), *Board-Driven Internal Investigations*, Practical Law Journal (May 2016) ("The composition of the board committee should be independent of the company and the potential investigation targets and key witnesses," and "[m]embers of the board committee should expect to be interviewed at the outset by counsel to ensure that there are no disqualifying circumstances that could taint the independence of the investigation."), *available at* https://www.sidley.com/~/media/publications/may-2016-practical-law-journal.pdf.

professionally benefit from a report that built a case against a small group of persons (such as Plaintiffs) and thereby exonerated them (Board members) from criticism.[154]

- **Sandbagging Interviewees; Failure to Provide *Upjohn* Warnings.** Defendants deliberately avoided informing interviewees that they were potential targets of their investigation—despite questions from interviewees about the investigation's scope—while at the same time advising interviewees that they should *not* retain counsel[155] and avoiding providing *Upjohn* warnings to APA employees and others[156] as required by the D.C. Bar and binding ethical rules applicable to the Defendant-lawyers.[157]

- **Defendants' Leaks to the Media.** Defendants leaked a draft version of the Hoffman Report to *The New York Times* in order to have the Report's allegations broadcast around the world before Plaintiffs could respond. Defendants compounded that improper conduct by knowingly framing their false allegations in terms that suggested criminal conduct in order to encourage the media and others to seize upon the leaked information—even though Defendant Hoffman admitted privately that he found no criminal activity.[158]

- **Defendants Used False Claims of Privilege to Shield Evidence.** Even though the engagement letter between APA and Hoffman/Sidley expressly stated that that ***no*** attorney-client privilege would be claimed over any documents used in the investigation unless those underlying documents were already independently privileged, Defendants invoked claims of privilege to deny Plaintiffs access to documents and interview testimony to prevent Plaintiffs (and others) from rebutting

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[154] Even the critics understood that the "collusion" described by Hoffman, if it had existed, implicated all the APA Board members who were deeply involved in the events described but were not recused from acting on the Report. Dr. Stephen Soldz, one of the primary critics who worked with Hoffman during the investigation, said, "The other thing, which is elsewhere in there, is they blame a small group. And while this small group is like 20 of the top leaders of the association who were directly involved in the collusion, including the CEO, the deputy CEO, the current president, the director of their public affairs, their—as you said, their Ethics Office, the former science directorate, former practice directorate—in other words, the whole structure—but the report also documents that the group engaged directly in the collusion, were carrying out APA policy to make the Defense Department—to please the Defense Department. So, the association can't claim it was just this group of rogue people. It was not." Interview with Soldz, July 13, 2015. *Psychologists Collaborated with CIA & Pentagon on Post-9/11 Torture Program, May Face Ethics Charges*, Democracy Now! (July 13, 2015), *available at* https://tinyurl.com/y59nfguf; See also Stephen Soldz & Steven Reisner, *Opening Comments to the American Psychological Association (APA) Board of Directors*, Counter Punch (July 13, 2015), *available at* https://tinyurl.com/vj929b5. Soldz statement to the Board, July 2, 2015: "This years-long collusion was accompanied by false statements from every Board and every elected President over the last decade denying the existence of the collusion described in such detail by Mr. Hoffman."

[155] Behnke Aff. ¶ 9.

[156] Banks Aff. ¶ 15; Dunivin Aff. ¶ 3; James Aff. ¶ 8.

[157] D.C. Bar, *Ethics Opinion 269: Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation*, *available at* https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion269.cfm.

[158] N.Y. Times Editorial Board, *Psychologists Who Greenlighted Torture*, N.Y. Times (July 10, 2015), *available at* https://www.nytimes.com/2015/07/11/opinion/psychologists-who-greenlighted-torture.html.

their false conclusions.[159] As two affidavits from APA Board members attest, the materials over which privilege was claimed had previously been disclosed, and no litigation was anticipated at the time of the Report as would be necessary to claim work-product protection.[160]

6. Defendants Steadfastly Refused to Retract or Correct Their Defamatory Statements Despite Receiving Additional Evidence of Their Falsity.

"Evidence of the [defendant's] steadfast refusal to retract [is] properly considered as bearing on the issue of actual malice." *Tavoulareas v. Piro*, 763 F.2d 1472, 1477 (D.C. Cir. 1985); *see also, e.g.*, *Ventura v. Kyle*, 63 F. Supp. 3d 1001, 1014 (D. Minn. 2014) ("most authorities" so hold), *rev'd on other grounds*, 825 F. 3d 876 (2016).[161]

Here, Defendants have steadfastly refused to retract or correct their false and defamatory statements about Plaintiffs even though Plaintiffs have repeatedly provided Defendants with more and more (and more) evidence demonstrating the falsity of their statements. For example:

- **July 31, 2015.** Plaintiffs posted a comprehensive, factual "rebuttal" to the Hoffman Report, replete with credible evidence that contradicted the Report's conclusions, on the APA website on July 31, 2015.[162] *Defendants refused to retract or correct.*

- **August 2015.** On August 3, 2015, Plaintiffs' counsel telephoned APA's then-outside counsel, WilmerHale, to notify it of specific factual errors in the Report.[163] Throughout August, Plaintiffs' counsel had several phone calls with WilmerHale further identifying the Report's factual misrepresentations, including its misrepresentation of the timeline of interrogation policies.[164] *Defendants refused to retract or correct.*

- **September 2015.** Although Defendants issued an errata sheet and a revised Report that corrected *some* factual inaccuracies, Defendants corrected *none* of the serious

[159] See fn. 31, *infra;* Strickland Aff. ¶ 2; Anton Aff. ¶ 2.

[160] Engagement Letter D. Hoffman to N. Gilfoyle (Nov. 20, 2014), *available at* https://tinyurl.com/ybf6hhwp.

[161] *See also, e.g.*, *Suzuki Motor Corp. v. Consumers Union of U.S.*, 330 F.3d 1110, 1134 (9th Cir. 2003); *Golden Bear Distrib. Sys. of Tex., Inc.v. Chase Revel, Inc.*, 708 F.2d 944, 948-49 (5th Cir. 1983).

[162] In 2018, the APA removed Plaintiffs' comments, but a link to where they were moved is available here: https://www.apa.org/independent-review/responses; the full text of those comments is available here: https://tinyurl.com/w38oxor; and viewable here: https://tinyurl.com/y3vsdu6z; *see also* Dunivin Aff. ¶ 16.

[163] E-mail from B. Forrest to B. Wahl & T. Hentoff requesting retraction (Sept. 19, 2017), *available at* https://tinyurl.com/uean5u6; Compl. ¶¶ 287, 320

[164] Compl. ¶¶ 287, 320; Dunivin Aff. ¶ 16.

falsehoods that Plaintiffs and others pointed out prior to then.[165] *Defendants refused to retract or correct.*

- **November 2015.** In meetings with Defendants' counsel, Plaintiffs' lead counsel identified additional documents demonstrating the falsity of the Report's primary conclusions.[166] Many APA members also presented facts contradicting the Report's conclusions.[167] *Defendants refused to retract or correct.*

- **February 2016.** The APA Board decided to re-hire Defendants Hoffman and Sidley to review their conclusions about military interrogation policies, engaging them to produce a "supplemental" report that was due by June 8, 2016. Defendants never produced that supplemental report and have stated that it was "postponed indefinitely."[168] *Defendants refused to retract or correct*

- **February 2016.** In a February 2016 meeting with APA's governing Council, APA's then-president acknowledged that there was ***"'clear evidence' that Hoffman 'may have misinterpreted, left out or distorted' certain matters in the report,"*** and the Associate General Counsel stated that the APA "had ***a fiduciary duty to fix things*** if they became aware that something was wrong."[169] *Defendants refused to retract or correct.*[170]

- **July 2016.** In additional meetings with Defendants' counsel, Plaintiffs' lead counsel identified additional documents demonstrating the falsity of the Report's primary conclusions.[171] Many APA members also presented facts contradicting the Report's conclusions.[172] *Defendants refused to retract or correct.*

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[165] Errata Sheet Showing Revisions of September. 4, 2015 to the July 2, 2015 Report by Sidley Austin to the Special Committee of the Board of Directors of the American Psychological Association, *available at* https://www.apa.org/independent-review/errata-sheet.pdf.

[166] L. Morgan Banks et al., *Hoffman's Key Conclusion Demonstrably False: The Omission of Key Documents and Facts Distorts the Truth* (Oct. 2015), *available at* https://tinyurl.com/y6arqkkc.

[167] L. Morgan Banks et al., *Responses to the Hoffman Report*, http://www.hoffmanreportapa.com/releases.php

[168] APA, Press Release: APA Seeks Clarification of Relevance of Specific Defense Department Policies to Independent Review (Apr. 15, 2016), *available at* https://www.apa.org/news/press/releases/2016/04/independent-review; Jodi Andes, Hoffman Report Triggers Defamation Suit Against APA, *The National Psychologist* (May 24, 2017), *available at* https://nationalpsychologist.com/2017/05/hoffman-report-triggers-defamation-suit-against-apa/103850.html.

[169] Feb. 2016 APA Council Notes, *available at* https://tinyurl.com/y22dn98w; James Aff. ¶ 14.

[170] E-mail from B. Forrest to B. Wahl & T. Hentoff requesting retraction (Sept. 19, 2017), *available at* https://tinyurl.com/uean5u6; Compl. ¶¶ 287, 320.

[171] L. Morgan Banks et al., *Hoffman's Key Conclusion Demonstrably False: The Omission of Key Documents and Facts Distorts the Truth* (Oct. 2015), *available at* https://tinyurl.com/y6arqkkc.

[172] L. Morgan Banks et al., *Responses to the Hoffman Report*, http://www.hoffmanreportapa.com/releases.php

Critically, not only have Defendants simply refused to correct or retract the Hoffman Report's false statements; rather, Defendants have republished the Report to new readers,[173] thereby further demonstrating Defendants' actual malice. *See, e.g.*, Restatement (Second) of Torts § 580A cmt. d (1977) ("Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard."); *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (citing the U.S. Supreme Court and explaining that republications, retractions and refusals to retract are subsequent acts used to demonstrate a previous state of mind); *Hand v. Hughey*, No. 02-15-00239-CV, 2016 Tex. App. LEXIS 3934, at *18 (Tex. App. Apr. 14, 2016) (similar).

D. Defendants Fail to Acknowledge Key, Binding Precedent and Rely on Inapposite and Distinguishable Case Law.

Defendants misstate the law governing the actual malice inquiry in their Special Motions to Dismiss. Plaintiffs address a few of the most significant misstatements here.

Defendants' Incorrect Claim. Defendant APA claims that "Courts have also repeatedly declined to find actual malice when a defendant has commissioned an independent investigation by a law firm and then published the results of the investigation."[174]

Correct Statement of the Law. None of the cases upon which APA relies for this proposition were decided under the "actual malice" standard. Every single one was decided under the different "grossly irresponsible" standard applicable to certain types of cases under New York law. Although the APA acknowledges that the "grossly irresponsible" standard is inapplicable in this case, it contends that that standard is "*less demanding*" than the actual malice standard at issue

[173] *See generally* Pls.' Consol. Opp'n to Defs. Second Special MTDs. On August 21, 2018, the APA republished the September 4, 2015, Revised Hoffman Report on a separate webpage alongside additional materials relating to the Report, as advertised by the APA through an e-mail to its large listserv

[174] APA First Special MTD at 13.

here. That is simply false. Contrary to APA's representation,[175] the court in *Konikoff v. Prudential Insurance Co. of America*, 234 F.3d 92 (2d Cir. 2000) did *not* "observe" that the "grossly irresponsible" standard is "less demanding than the actual-malice standard." *See id.* at 104. Rather, the plaintiff in that case *argued* that it was a less demanding standard but the Second Circuit expressly *disagreed*, stating that it was simply a "different" test. Thus, *Konikoff*, as well as other New York cases cited by APA that applied the "grossly irresponsible" standard, are simply inapplicable here. [176]

Defendants' Incorrect Claim. Hoffman/Sidley claim that "allegations about the manner in which [an] investigation was conducted do not demonstrate actual malice."[177]

Correct Statement of the Law. The cases Hoffman/Sidley cite for this broad proposition stand for no such broad proposition. Virtually all of those cases involved an author's mere *reporting* of facts, but here, Hoffman /Sidley are not just the author of the Hoffman Report but also the ones conducting the investigation on which the Report's supposed facts are based. In reality, Sidley's case law simply reinforces the principle that, in conducting its investigation, Sidley was *not* entitled to simply ignore information in its possession which refuted its thesis. For example, in *Lohrenz v Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003) the court specifically recognized that "where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, *it may not ignore those doubts*, even though it had no duty to conduct the investigation in the first place." *Id.* at 1284-85. Similarly, in *Parsi*, 890 F. Supp. 2d 77, the court gave considerable consideration to plaintiffs' argument that the defendant

[175] APA First Special MTD at 14.

[176] *See, e.g.*, *Kamfar v. New World Rest. Grp., Inc.,* 347 F. Supp. 2d 38 (S.D.N.Y 2004); *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 875-76 (N.D.N.Y 1995); *Post v. Regan*, 677 F. Supp. 203, 209 (S.D.N.Y 1988).

[177] Hoffman/Sidley First Special MTD at 22.

ignored individuals who questioned the factual bases for his articles and stated that it was "required to examine the record closely to determine whether plaintiffs' allegation is supported." *Id.* at 87. The court recognized that "a willful blindness to competing evidence" would constitute evidence of malice. *Id.* at 53. While the courts in these cases ultimately found that there was no evidence in the cases before them of such conduct, these cases do nothing to advance Sidley's argument on the facts of this case.[178]

Defendants' Incorrect Claim. Hoffman/Sidley claim that that biases and motives are "irrelevant" to the question of actual malice.[179]

Correct Statement of the Law. Hoffman/Sidley fundamentally misstate the law. As explained above, case law—including from the U.S. Supreme Court and D.C. Court of Appeals—is clear that while bias or ill will may not ***alone*** be sufficient to demonstrate actual malice, "evidence concerning motive" or bias ***is*** a relevant evidentiary building block toward proving actual malice. *See, e.g.*, *Connaughton*, 491 U.S. at 668; *Mann*, 150 A.3d at 1259; *Palin v. N.Y. Times Co.*, 940 F.3d 804, 814, 2019 WL 5152444, at *7 (2d Cir. 2019); *Celle*, 209 F.3d at 183. Hoffman/Sidley's case law is completely in accord with *this* correct statement of the law. *See, e.g.*, *Parsi*, 890 F. Supp. 2d at 91; *Lohrenz*, 350 F.3d at 1284.

Defendants' Incorrect Claim. Hoffman/Sidley claim that the language used by an author in his defamatory statements can never constitute evidence of malice.[180]

Correct Statement of the Law. None of the cases Hoffman/Sidley cite for that proposition actually supports it. For example, in *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398

[178] *See Lohrenz*, 350 F.3d at 1285-86, *Parsi*, 890 F. Supp. 2d at 87; *White v. Laborer's Int'l Union*, 387 F. Supp. 53 (W.D. La. 1974); *Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 412 (6th Cir. 1991))

[179] Hoffman/Sidley First Special MTD at 23.

[180] Hoffman/Sidley First Special MTD at 24.

U.S. 6 (1970), the Supreme Court rejected the argument that a newspaper's *accurate* reporting about a fact demonstrated malice. In *Washington Post Co v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), the court did *not* state, as Sidley misleadingly suggests with an ellipsis, that "character and content of the publication ... [is] a constitutionally impermissible evidentiary basis for a finding of actual malice."[181] Rather, the Court stated that "[t]he Supreme Court held in *Times*, of course, that the character and content of the publication *there involved* was a constitutionally impermissible evidentiary basis for a finding of actual malice." *Id.* at 969. In other words, *Keough* merely held that the character and content of the publication *in that particular case* was insufficient—not, as Sidley would have it, that it is *never* a relevant consideration.

Defendants' Incorrect Claim. Defendants claim that post-publication evidence cannot be considered in determining actual malice.[182]

Correct Statement of the Law. That assertion flies in the face of U.S. Supreme Court precedent, the Restatement of Torts, and legions of cases. *See, e.g.*, *Herbert*, 441 U.S. at 164 n.12 ("As a general rule, any competent evidence, either direct or circumstantial, can be resorted to ... including threats, prior or subsequent defamations, subsequent statements of the defendant[.]"); *Tavoulareas*, 763 F.2d at 1477 ("Evidence of the [defendant's] steadfast refusal to retract [is] properly considered as bearing on the issue of actual malice."); *Ventura*, 63 F. Supp. 3d at 1001 ("most authorities" so hold); *Eramo*, 209 F. Supp. 3d at 874. As a leading defamation treatise explains, "evidence [can] ... relate back and provide inferential evidence of defendant's knowing

[181] Hoffman/Sidley First Special MTD at 24.

[182] Hoffman/Sidley First Special MTD at 25; APA First Special MTD at 15. The APA's partial quotation from *Sullivan* omits that the Court left open the question of whether conduct after the fact could be evidence of actual malice: "Nor is 'failure to retract ... adequate evidence of malice for constitutional purposes.' *Sullivan* at 286 ...." (APA First Special MTD at 15 n.5). The actual quotation: "It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 286 (1964). In 1979, the U.S. Supreme Court held in *Herbert v. Lando* subsequent information and actions could be relevant to actual malice. 441 U.S. at 153.

or reckless disregard of falsity at the time of publication." David Elder, *Defamation: A Lawyer's Guide* § 7.7 (July 2016).

Defendants' Incorrect Characterization of Plaintiffs' Argument. Defendants argue that they lacked actual malice because honest misinterpretations of facts do not constitute actual malice.[183]

Correct Statement of Plaintiffs' Argument. Plaintiffs do not argue that Defendants' actual malice is based on any honest misinterpretations of facts. Nor do Plaintiffs allege only that Defendants were negligent (although negligence would suffice for Defendants' liability (*see infra* Part II)). Rather, Plaintiffs allege that Defendants had actual knowledge that their defamatory statements about Plaintiffs were false or recklessly disregarded their truth or falsity. *That* is textbook actual malice.

II. Defendants Fail to Meet Their Burden of Demonstrating That Plaintiffs Were "Public Officials" at the Time of Defendants' Defamatory Publications.

Even if Plaintiffs have not shown that a jury could reasonably find that Defendants published their defamatory statements with actual malice—and Plaintiffs *have* made that showing—Defendants' Special Motions to Dismiss must be denied because Defendants cannot meet their burden of demonstrating that Plaintiffs Banks, Dunivin, and James were "public officials" at the time Defendants published their defamatory statements. And because they were not, they need not prove actual malice to prevail on their claims.[184]

Notably, ***Defendants do not contend that Plaintiffs Banks, Dunivin, or James were "public figures" (whether general-purpose or limited-purpose)*** at the time they published their

[183] Hoffman/Sidley First Special MTD at 24-25.

[184] Because even private-figure plaintiffs must prove actual malice to obtain punitive damages, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), and Plaintiffs Banks, Dunivin, and James seek punitive damages in this case, they nevertheless fully briefed the issue of actual malice above. *See supra* Part I.

defamatory statements; rather, ***Defendants contend only that Plaintiffs Banks, Dunivin, or James were "public officials."*** Thus, Defendants have waived any argument that Plaintiffs Banks, Dunivin, and James were "public figures." *See Nippon Shinyaku Co. v. Iancu*, 369 F. Supp. 3d 226, 240 n.8 (D.D.C. 2019) ("Arguments raised for the first time in a reply brief are waived.").

A. Defendants Bear the Burden of Proving That Plaintiffs (1) Were Public Officials (2) at the Time of Defendants' Defamatory Publications.

Although Defendants fail to acknowledge it in their Motions, Defendants bear the burden of proving that Plaintiffs Banks, Dunivin, and James are public officials. Under settled law, in determining whether a defamation-plaintiff is a private figure, public official, or public figure, courts "proceed[] upon the initial presumption that the defamation plaintiff is a private individual, subject to the defendant's burden of proving that the plaintiff is a public figure [or public official]." *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994)); *accord Gilmore v. Jones*, 370 F. Supp. 3d 630, 666 (W.D. Va. 2019) (same); *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 869 (W.D. Va. 2016) (same).[185]

Moreover, it is not sufficient to prove that a defamation-plaintiff was a public official at any time; rather, ***the defendants must prove that the plaintiff was a public official at the time of Defendants' publication of their defamatory statements.*** *See, e.g.*, *Eramo*, 209 F. Supp. 3d at 869 ("If [plaintiff] was a public official or limited-purpose public figure ***at the time of publication***,

[185] Indeed, this makes sense. Defendants raise lack of actual malice and the Anti-SLAPP Act as *affirmative defenses*, and the fact that a defendant bears the burden of proof on affirmative defenses does not change in the anti-SLAPP context. *See, e.g.*, *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015) ("Although the anti-SLAPP statute 'places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.'"); *Bently Reserve LP v. Papaliolios*, 160 Cal. Rptr. 3d 423, 434 (2013) ("When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court ... generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient[.]"); *see also* Br. of Amicus Curiae District of Columbia, *Adelson v. Harris*, No. 12-cv-6052, 2013 WL 435912, at *5 (S.D.N.Y. Feb. 4, 2013) (D.C. Attorney General: "Guidance from the California courts ... is instructive because the District's Act was modeled in substantial part on California's Anti-SLAPP Act.").

as part of her defamation case, she must prove by clear and convincing evidence that defendants acted with actual malice."); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154 (1967) ("[Plaintiffs] commanded a substantial amount of independent public interest ***at the time of the publications***; both ... would have been labeled 'public figures[.]'"). This requirement is uniform among federal and state courts.[186]

The temporal element of the private figure vs. public official inquiry is critically important because, as courts have recognized, a person who was at one time a "public official" loses "public official" status when he no longer holds the position that made him a public official. *See, e.g.*, *Senter v. Hatley*, No. 12-cv-2502, 2013 WL 4647539, at *12-13 (D.S.C. Aug. 29, 2013); *see also Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 169-72 (1979) (suggesting that the passage of time can erase even public-figure status) (Blackmun & Marshall, JJ., concurring in the result). The decision in *Senter* is illustrative. There, the plaintiff, a former police officer, brought a privacy claim for which, like defamation, the necessary showing of fault (actual malice or negligence) depended on whether he was a private figure, public official, or public figure. *Id.* at *12. The

[186] **Federal Cases:** *E.g.*, *Worrell-Payne v. Gannett Co.*, 49 F. App'x 105, 107 (9th Cir. 2002) ("[Plaintiff] was a 'public official' ***during the time of the publications***."); *Crane v. Ariz. Republic*, 972 F.2d 1511, 1516 (9th Cir. 1992) ("As an active, high-level prosecutor ***at the time of publication***, Henderson qualified as a public official[.]"); *Horne v. WTVR, LLC*, No. 16-cv-92, 2017 WL 1330200, at *5 (E.D. Va. Apr. 6, 2017), *aff'd*, 893 F.3d 201 (4th Cir. 2018) ("Because Horne was a public official ***at the time of the publication***, she must prove that WTVR acted with actual malice."); *Roskowski v. Corvallis Police Officers' Ass'n*, No. 03-cv-474, 2005 WL 555398, at *12 (D. Or. Mar. 9, 2005), *adopted*, 2005 WL 1429917 (D. Or. June 15, 2005), *aff'd*, 250 F. App'x 816 (9th Cir. 2007) ("[Plaintiff] was a public official ***at the time of the defamatory publications***[.]").

State Cases: *E.g.*, *Bowser v. Durham Herald Co.*, 638 S.E.2d 614, 615 (N.C. Ct. App. 2007) ("[P]laintiff was a public official of Durham County ***at the time of the publication*** of the article."); *Ballard v. Wagner*, 877 A.2d 1083, 1088 n.4 (Me. 2005) (***"[A]t the time of the publication***, Lieutenant Ballard was a public official."); *Hailey v. KTBS, Inc.*, 935 S.W.2d 857, 859 (Tex. Ct. App. 1996) ("If [plaintiff] was a public official ***at the time of publication*** of the alleged defamations, he cannot recover in the absence of clear and convincing evidence that appellees made false and defamatory statements about him with actual malice."); *Heeb v. Smith*, 613 N.E.2d 416, 419 (Ind. Ct. App. 1993) ("[Plaintiff], who was judge of the Fayette Superior Court ***at the time of the defamatory publication***, was a 'public official.'"); *Henrichs v. Pivarnik*, 588 N.E.2d 537, 542 (Ind. Ct. App. 1992) ("[Plaintiff]—who was a justice on the Indiana Supreme Court ***at the time of the defamatory publication***—was a 'public official[.]'"); *Furgason v. Clausen*, 785 P.2d 242, 250 (N.M. Ct. App. 1989) ("[Plaintiff] ***at the time of the publication*** in issue was not a limited public figure nor a public official."); *Mosesian v. McClatchy Newspapers*, 205 Cal. App. 3d 597, 603 (Ct. App. 1988) (determining "whether plaintiff was a public official ***at the time the articles were published***").

defendant argued that the plaintiff was a public official because he was a former police officer, and the plaintiff contended that he was a private figure because he had retired before defendant's act giving rise to his claim. *Id.* The Court agreed with the plaintiff, explaining that although street-level, highly visible police officers are public officials, "at the time of the purchase of the gym membership Plaintiff was no longer a police officer," so he was no longer a public official. *Id.*[187]

In this regard, ***the distinction between "public official" and "public figure" is critical.*** A public ***figure*** is subjected to the heightened actual malice requirement because he has "voluntarily assumed a role of special prominence in [a] public controversy" and thus "has access to channels of effective communication" (e.g., the media). *Wells v. Liddy*, 186 F.3d 505, 533 (4th Cir. 1999). Such persons do not suddenly lose that special prominence and ability to effectively communicate such that they easily regain their private figure status—so public figure status may be long-lasting. By contrast, a public ***official***—at least a public official who is not so prominent that he is *also* a public figure—is subject to the heightened actual malice requirement by virtue of his job. When he retires from that job, he is no longer a "public official." *See Senter*, 2013 WL 4647539, at *12-13. Such a person has not "voluntarily assumed a role of special prominence in [a] public controversy" that remains once he leaves the position that rendered him a public official. *Id.* at *13.

B. Defendants Misstate—and Overstate—Who Qualifies as a "Public Official": Only "High-Level" Government Officials with "Substantial Responsibility for or Control over the Conduct of Governmental Affairs" Are Public Figures.

Although Defendants state *part* of the definition of who qualifies as a "public official," they omit critical language that restricts the definition's scope. Specifically, while Defendants

[187] The *Senter* court did not hold all police officers to be public officials. Rather, that designation is limited to street-level police officers who are highly visible, are able to exercise force over citizens, and, if they abuse their authority, may deprive citizens of fundamental constitutional rights. *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981).

correctly recognize that the "public official" designation applies to persons "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," *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), they fail to acknowledge that the U.S. Supreme Court has admonished that "the category of 'public official' ... cannot be thought to include all public employees." *Hutchinson v. Proxmire,* 443 U.S. 111, 119 n.8 (1979); *see also Kassel v. Gannett Co.*, 875 F.2d 935, 939 (1st Cir. 1989) ("In a sense, every public employee is a 'public official'—but in the idiom of libel law, the term has a much narrower sweep."). Consistent with that admonishment, the Supreme Court and lower courts have limited the category of "public officials" to public employees "who are in a position significantly to influence the resolution of … issues" of public importance. *Rosenblatt*, 383 U.S. at 85; *Kassel*, 875 F.2d at 939. Thus, as the District Court for the District of Columbia has cogently explained, only "high-ranking"—not low- or mid-level—government officials are "public officials":

> It should be emphasized that this ruling [as to government officials] is ***limited to high-ranking Government officials***. It does not comprehend the entire Government personnel. The host of Federal, State, municipal and local government administrators, scientists, lawyers, physicians, secretaries, clerks, inspectors of various kinds, policemen, firemen, letter carriers, mechanics, laborers, and others, are not affected and are not deprived of their rights under the law of libel. By entering Government employment, a person does not lose any of his civil rights. The exception is ***limited to high-ranking Government officers*** in order to secure the constitutional freedom for every citizen to discuss and criticize his Government.

Lewis v. Elliott, 628 F. Supp. 512, 519 (D.D.C. 1986); *Clark v. Pearson*, 248 F. Supp. 188, 193-94 (D.D.C. 1965) (same); *Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343, 356 (D. Mass. 2017) ("'Public officials' are generally limited to high-level government employees[.]"); *Dodd v. Pearson*, 277 F. Supp. 469, 471 (D.D.C. 1967) (similar).

Stated differently, a public employee is not subjected to the heightened actual-malice standard "merely because a statement defamatory of [him] catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation." *Rosenblatt*, 383

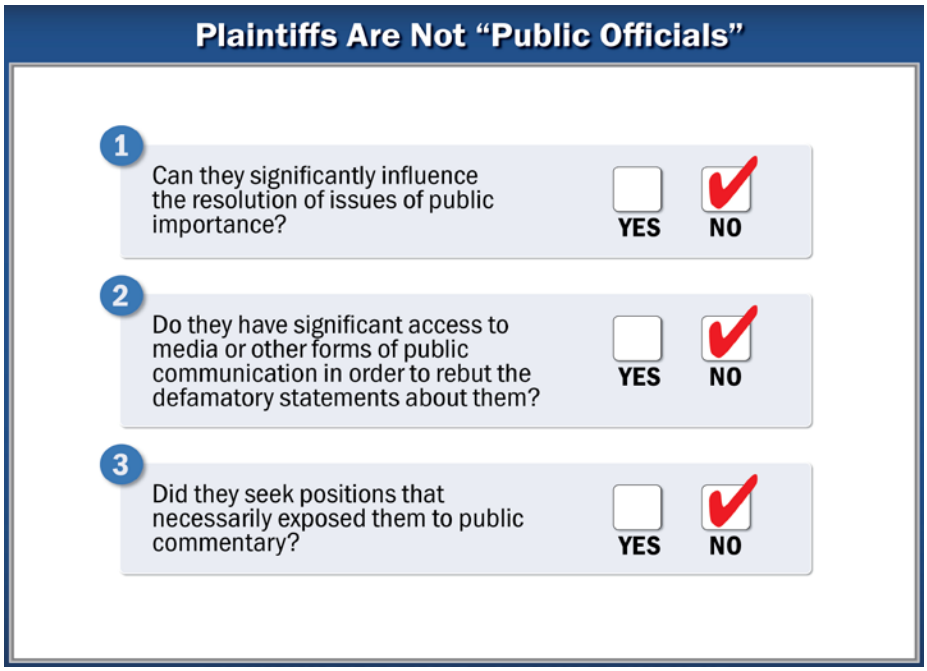
U.S. at 86 n.13. Instead, ***to be a "public official" for purposes of defamation law, a public employee must hold a high-ranking position with "substantial responsibility for or control over the conduct of governmental affairs," and in which he can "significantly … influence the resolution of … issues" of public importance.*** *Id.* at 85; *Kassel*, 875 F.2d at 939; *Lewis*, 628 F. Supp. at 519. In addition, "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Rosenblatt*, 383 U.S. at 86 n.13. "The inherent attributes of the position, not the occurrence of random events, must signify the line of demarcation." *Kassel*, 875 F.2d at 939.

Practically, to determine if a public employee is a "public official," courts ask three questions. As set forth in the First Circuit's seminal *Kassel* decision, courts ask:

1. Can the person significantly influence the resolution of issues of public importance?
2. Does the person have significant access to media or other forms of public communication in order to rebut the defamatory statements about them?
3. Did the person seek a position that necessarily exposed them to public commentary?

Kassel, 875 F.2d at 939-40. The *Kassel* court analogized this inquiry to a "three-legged stool"—without all three legs present, the stool falls over and the person is not a "public official." *See id.*

Here, as explained below, the answer to each question is "no" and, as a result, Plaintiffs are not public officials:



C. The Record Evidence Confirms That Defendants Cannot Demonstrate That Plaintiffs Were Public Officials at the Time Defendants Published Their Defamatory Statements.

Here, the record evidence confirms that Defendants cannot come close to meeting their burden of proving that Plaintiffs were public officials at the time Defendants published their defamatory statements. This is so for two separate and independent reasons:

First, the record evidence shows that Plaintiffs Banks, Dunivin, and James had long retired from public employment at the time Defendants published their defamatory statements.[188]

Second, even if Plaintiffs were not retired, their positions in the armed services did not rise to the level of high-ranking positions with "substantial responsibility for or control over the conduct of governmental affairs," in which they could can "significantly … influence the resolution of … issues" of public importance. *Rosenblatt*, 383 U.S. at 85 n.13; *Kassel*, 875 F.2d at 939; *Lewis*, 628 F. Supp. at 519.

[188] Compl. ¶¶ 39, 41-42; Banks Aff. ¶ 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

1. Because Plaintiffs Were Retired and Not Public Employees at the Time Defendants Published Their Defamatory Statements, They Were Not "Public Officials" as a Matter of Law.

Defendants' argument that Plaintiffs Banks, Dunivin, and James are "public officials" for purposes of their defamation claims here fails for the simple reason that, as pled in the Complaint and confirmed by record evidence, Plaintiffs Banks, Dunivin, and James had retired from their military service long before Defendants published their defamatory statements about them.[189]

In their Special Motions to Dismiss, Defendants discuss only Plaintiffs' prior service in the armed services and assert that it makes them "public officials" for purposes of this case. But as explained above, the law—which Defendants entirely ignore—is clear: Defendants must prove that Plaintiffs were public officials ***at the time of Defendants' publication*** of their defamatory statements. *See, e.g.*, *Eramo*, 209 F. Supp. 3d at 869; *Butts*, 388 U.S. at 154; cases cited *supra* note 186. At the time Defendants published their defamatory statements, Plaintiffs held no public office or public employment and were not engaged in any public service whatsoever.[190] Thus, they were not public employees at all, much less public employees "who are in a position significantly to influence the resolution of … issues" of public importance. *Rosenblatt*, 383 U.S. at 85. Regardless of whether Plaintiffs were ever or remained public *figures* after their government employment ended—an argument not raised by Defendants and therefore waived, *Nippon Shinyaku Co.*, 369 F. Supp. 3d at 240 n.8—any possible status as "public *officials*" had terminated. *See Senter*, 2013 WL 4647539, at *12-13.

[189] Compl. ¶¶ 39, 41-42; Banks Aff. ¶ 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

[190] Compl. ¶¶ 39, 41-42; Banks Aff. ¶ 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

2. Even if Plaintiffs Had Not Been Retired When Defendants Published Their Defamatory Statements, Defendants Could Not Meet Their Burden of Proving that Plaintiffs Were "Public Officials."

Even if Plaintiffs had not been retired when Defendants published their defamatory statements, the record evidence demonstrates that Defendants cannot meet their burden of proving that Plaintiffs were ever public officials for defamation purposes. Indeed, the record evidence proves that Plaintiffs were and always have been *private* figures.

1. Could Plaintiffs significantly influence the resolution of issues of public importance? No. To begin, when Defendants published the Hoffman Report, Plaintiffs held no public office or public employment, and they were not using their status as retired officers to put themselves in the public eye or attempt to influence public policies.[191]

Moreover, the record evidence shows that, during the years in which Plaintiffs participated in the APA activities that Defendant Hoffman investigated, their influence was limited, at most, to private APA deliberations about APA policies that had no effect on governmental policies.[192] Indeed, APA policies have (and can have) no binding effect on government employees or military personnel, including military psychologists.[193] Furthermore, Plaintiffs volunteered in APA activities solely as private individuals.[194] Plaintiffs Banks and James attended the PENS meetings in civilian clothes (not in uniform) during their free time (not when they were on duty), and they

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[191] Compl. ¶¶ 39, 41-42; Banks Aff. ¶ 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

[192] Compl. ¶¶ 13, 39, 41, 42, 221-22.

[193] A psychologist who did not want to be bound by APA policy would simply quit the organization. *See, e.g.*, John M. Grohol, *American Psychological Association's New Torture Policy is Unenforceable*, PsychCentral (July 8, 2018) *available at* https://psychcentral.com/blog/american-psychological-associations-new-torture-policy-is-unenforceable; APA, *Complaints Regarding APA Members*, *available at* https://www.apa.org/ethics/complaint/index (last visited Nov. 13, 2019); Letter from APA President Jessica Daniel to Tom McCaffrey (Acting Assistant Secretary of Defense for Health Affairs) (Sept. 21, 2018), *available at* https://www.apa.org/news/press/statements/detainee-policy-letter.pdf.

[194] Compl. ¶¶ 13, 39, 41, 42, 48, 221-22.

were not compensated for their time.[195] Plaintiff Dunivin was not even a member of the PENS Task Force.[196] Defendants' statements in the Hoffman Report that Plaintiffs spoke for the Department of Defense are false, as pleaded in Plaintiffs' Complaint and confirmed in Plaintiffs' affidavits.[197]

In addition, even if Plaintiffs' military roles during their service in Afghanistan and Iraq and at Guantanamo were relevant to this action or the public-official inquiry—and they are not, because Defendants' defamatory statements (and Plaintiffs' claims) relate only to Plaintiffs' volunteer work for the APA—Plaintiffs' authority in those roles did not rise to the level of "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85. Rather, as confirmed by Plaintiffs' record evidence—which must be taken as true because the Court may not weigh evidence or judge credibility at this stage, *Mann*, 150 A.3d at 1236, 1238 & n.32—Plaintiffs were simply mid-level officers whose responsibility was to draft and follow through with ***policies and directives issued by their superior, commanding officers***.[198] Beyond implementing policies decided above their level, Plaintiffs wielded no special influence and had no control over decisions about appropriate interrogation methods at the higher levels of government and the military.[199] To deem these psychologists to be "public officials" would undervalue privacy rights by "distort[ing] the plain meaning of the 'public official' category beyond all recognition." *Gertz*, 418 U.S. at 351.

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[195] Banks Aff. ¶ 6; James Aff. ¶ 4.

[196] Compl. ¶ 45; Dunivin Aff. ¶ 14.

[197] Compl. ¶¶ 39, 41, 42, 220-222; Banks Aff. ¶ 5; Dunivin Aff. ¶ 4; James Aff. ¶ 5.

[198] Compl. ¶¶ 13, 39, 41, 42, 221-222; Banks Aff. ¶ 5; Dunivin Aff. ¶ 4; James Aff. ¶ 5; Harvey Aff. ¶ 6; Taylor Aff. ¶ 10.

[199] Compl. ¶¶ 39, 41, 42, 221-22; Harvey Aff. ¶ 6; Taylor Aff. ¶ 10 [an Army officer and a Judge Advocate General, attesting to the inability of Plaintiffs to make policy].

In arguing that Plaintiffs were "public officials" during their military service, Defendants take out of context language in the Complaint that describes Plaintiffs as, for example, "drafting and implementing policies to ensure humane treatment, prevent abuses, and report any abuses that occurred."[200] Fairly read in context, that language simply described Plaintiffs' attempts to obey their orders from superior officers to end abusive interrogations; it did not characterize the scope of Plaintiffs' own policy-making authority or their function within the military policy-making hierarchy.[201] Within a large organization such as the military, "policies" are set at various levels; to focus on the word "policy" rather than on a person's actual function and authority is to focus on words, not the substance of the person's role.[202]

2. Do Plaintiffs have significant access to media or other forms of communication to rebut defamatory statements about them? No. As courts have repeatedly recognized, public officials "'enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Kassel*, 875 F.2d at 939-40; *accord Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990) ("[P]ublic officials, with superior access to the media, usually are better able than ordinary individuals to affect the outcome of those issues and to counteract the effects of negative publicity.").

Here, the record evidence establishes, beyond doubt, that Plaintiffs have ***not*** had access to the media or other forms of public communication that come remotely close to that of "public officials" as recognized by *Kassel* and *Gertz* criterion. The Hoffman Report has been widely

[200] Compl. ¶ 69; Sidley First Special MTD at 12.

[201] Compl. ¶ 69.

[202] Compl. ¶¶ 39, 41, 42, 221-22; Banks Aff. ¶¶ 5, 11; Dunivin Aff. ¶¶ 4, 13; James Aff. ¶¶ 5, 6; Harvey Aff. ¶ 6; Taylor Aff. ¶ 10.

reported on, with its allegations taken as true, by the national and international media.[203] By contrast, Plaintiffs' rebuttal of those allegations has received effectively no coverage by any media.[204] Moreover, even if Plaintiffs' prior service in the military were relevant to the question of their access to public forums, it confirms that Plaintiffs ***lacked*** such access: while members of the military, they were forbidden from speaking publicly about their work without express permission from their superiors.[205] Plaintiffs never served as spokespeople for the military,[206] and Plaintiffs never put (or tried to put) themselves in the public eye by speaking to the media.[207]

3. Did Plaintiffs seek a position that necessarily exposed them to public commentary? No. Courts recognize, and fairness dictates, that "[p]ersons who actively seek positions of influence in public life do so with the knowledge that, if successful in attaining their goals, diminished privacy will result." *Kassel*, 875 F.2d at 940. "The classic case, of course, is the aspirant to elective office: a candidate is on fair notice that adverse, even negligent, press coverage is a 'necessary consequence[] of that involvement in public affairs.'" *Id.* (quoting *Gertz*, 418 U.S. at 344). The opposite is also true: "many public-sector jobs seemingly imply no special prospect of life in a fishbowl. Those who have not jumped into the net, that is, those who have accepted public employment but have not assumed an influential role in ordering society, cannot

[203] Compl. ¶¶ 37-38, 264-66, 268.

[204] Banks Aff. ¶ 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

[205] Compl. ¶¶ 116, 197; Banks Aff. ¶¶ 5, 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

[206] Compl. ¶¶ 39, 41, 42; Banks Aff. ¶¶ 5, 18; Dunivin Aff. ¶¶ 4, 17; James Aff. ¶¶ 5, 17.

[207] Hoffman's and Sidley's Motion appends two pages from a book Dr. James wrote after he left the military in 2008 (six years before the book by James Risen that led to Hoffman's investigation) for the sole proposition that the PENS Task Force's conclusions were controversial. (Hoffman/Sidley First Special MTD at 6; Schlam Aff. at Ex. 2-F.) The Hoffman Report omits any discussion of Dr. James' book except in a footnote (Hoffman Report at 131 n.447). Defendants are now precluded from introducing in a reply additional portions of the book or new arguments related to it.

be said to have relinquished any significant part of their interest in safeguarding their good names." *Id.* (quotation marks omitted).

Here, nothing about Plaintiffs' positions as staff psychologists in the military, especially at their mid-level in the hierarchy, creates the expectation of media coverage. Plaintiffs became the subject of public attention only because of the actions of their attackers, including Defendants Hoffman and APA, not because they sought public exposure.[208] That publicity, which was forced on rather than sought or generated by them, cannot make Plaintiffs public officials (or public figures): As the U.S. Supreme Court has admonished: "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135-36; *accord Rosenblatt*, 383 U.S. at 86 n.13 (recognizing that plaintiffs' functions and positions did not "invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy").

D. Defendants' Wholly Distinguishable Case Law Does Not Change the Conclusion: They Cannot Demonstrate Plaintiffs Were Public Officials at the Time Defendants Published Their Defamatory Statements.

The cases string-cited by Defendant Sidley in the three paragraphs it devotes to asserting that Plaintiffs Banks, Dunivin, and James are public officials are wholly distinguishable:

- *Secord v. Cockburn*, 747 F. Supp. 779, 784 (D.D.C. 1990). The plaintiff, a major general who held "highly influential positions" and who appeared on network television multiple times, was held to be a public *figure* (***not*** a public *official*), which he did not dispute.

- *Davis v. Costa-Gavras*, 595 F. Supp. 982, 984, 987 (S.D.N.Y. 1984). The plaintiff, a naval captain, was a Commander of the U.S. Military Group and Chief of the U.S. Navy Mission to Chile, and therefore held a high-level position of substantial decision-

[208] Compl. ¶¶ 39, 41-42; Banks Aff. ¶ 18; Dunivin Aff. ¶ 17; James Aff. ¶ 17.

making authority and autonomy, in contrast to Plaintiffs. In addition, he did not contest his public official status.

- *MacNeil v. Columbia Broad. Sys. Inc.*, 66 F.R.D. 22, 24-25 (D.D.C. 1975). The plaintiff was a spokesperson for the Department of Defense who was filmed with his permission during "National Security Seminars" intended to present the military to the world. He therefore had significant access to media and was necessarily exposed to public commentary. In addition, the plaintiff did not dispute his status as a public official.

- *Arnheiter* v. *Random House, Inc.,* 578 F.2d 804, 805 (9th Cir. 1978). The plaintiff was a senior naval officer removed from his position as the commanding officer of a ship during wartime. The court found he "used every conceivable effort to gain public exposure and to make his case a 'cause celebre,'" thus rendering him both a public figure and public official.

- *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966). Plaintiff worked directly for an elected official in a very public-facing role on public issues. Despite finding that plaintiff to be a public official, the Court admonished: "But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.").[209]

* * *

In sum, Plaintiffs Banks, Dunivin, and James did not possess any of the characteristics of a public official. And even if they could have been deemed public officials at some former time during their military service (and they cannot be), they were unquestionably not public officials when Defendants published their defamatory statements about them.[210] Because Defendants have

[209] The articles attached to the Schlam Affidavit likewise have absolutely no relevance to the analysis. Of those articles, only four refer in passing to Plaintiffs, and Defendants do not cite any of them in support of their contention regarding Plaintiffs' status. (Hoffman/Sidley First Special MTD at 6, 12-13.) In any event, the articles, which merely discuss the Plaintiffs without quoting them, are inadmissible hearsay.

[210] Defendants cite *Gray v. Udevitz*, 656 F.2d 588, 590 n.3 (10th Cir. 1981) for the proposition that, if the defamatory remarks concern a person's conduct as a public official—which, in this case, they do not—he retains that status. Not only is *Gray* entirely distinguishable from the situation here because Defendants' defamatory remarks do ***not*** concern Plaintiffs' conduct when they were public employees, but other courts have held that a person who was at one time a "public official" loses "public official" status when he no longer holds the position that made him a public official, *e.g.*, *Senter*, 2013 WL 4647539, at *12-13. Moreover, the only commentary on the issue by the U.S. Supreme Court

not met their burden to show that Plaintiffs are public officials subject to the actual-malice standard, their Special Motions to Dismiss should be denied on this independent ground.

III. Defendants' Motions Must Be Denied Because Illinois' Anti-SLAPP Statute, Not the D.C. Anti-SLAPP Act, Applies to This Case.

Finally, Defendants' Special Motions to Dismiss under the D.C. Anti-SLAPP Act must be dismissed for another independent reason. Although Defendants have presumed that the D.C. Anti-SLAPP Act applies in this case and the Court has expressed a similar belief (and Plaintiffs have therefore briefed Defendants' Special Motions to Dismiss on the merits), under settled choice-of-law principles, if the Court holds the D.C. Anti-SLAPP Act to be substantive (as Defendants have previously contended) rather than procedural,[211] then the ***Illinois*** Anti-SLAPP Act,[212] ***not*** the ***D.C.*** Anti-SLAPP Act, applies in this case, and Defendants' Special Motions to Dismiss must be denied.

Critically, D.C. courts do not automatically apply D.C. substantive law to cases brought in D.C. Rather, where there is a conflict between the substantive law of D.C. and that of another state, D.C. courts will apply the substantive law of the jurisdiction with "the most significant relationship to the dispute, and [whose] policy would be more advanced by applying its law." *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013). Here, as explained below, **(A)** there is an actual conflict between the D.C. Anti-SLAPP Act and the

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states that the passage of time can erase even public *figure* status. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 169-72 (1979) (Blackmun & Marshall, JJ., concurring in the result).

[211] If the Court holds the D.C. Anti-SLAPP Act to be procedural—as it should—then it is void as violative of the Home Rule Act, as explained in Plaintiffs' Motion to Declare the D.C. Anti-SLAPP Void or Unconstitutional. (*See* Mem. of P&As in Supp. of Pls.' Opposed Mot. to Declare the D.C. Anti Slapp Stat. Unconstitutional, at 3-6.) Indeed, as Plaintiffs explain in that motion, the Court should hold the D.C. Anti-SLAPP Act void even if it concludes the Act is "substantive" because it indisputably enacts new *procedures* that D.C. Courts must apply to vindicate such purportedly "substantive" rights. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226-27 (D.C. 2016) ("The rights created by the [Anti-SLAPP] Act comprise a special *motion* to dismiss a complaint, and a special *motion* to quash discovery[.]").

[212] Illinois Citizen Participation Act, 735 Ill. Comp. Stat. 110/1 *et. seq.* (the "Illinois Anti-SLAPP Act").

Illinois Anti-SLAPP Act, and **(B)** based on the facts and allegations in this case, Illinois is the jurisdiction with the most significant relationship to the dispute and whose policy would be more advanced by applying its law. Accordingly, the ***Illinois*** Anti-SLAPP Act, ***not*** the ***D.C.*** Anti-SLAPP Act, applies in this case.[213]

A. There Is an Actual—and Dispositive—Conflict Between the Illinois Anti-SLAPP Act and the D.C. Anti-SLAPP Act that Requires a Choice-of-Law Analysis.

A choice-of-law analysis is required to determine which jurisdiction's Anti-SLAPP Act—Illinois' or D.C.'s—applies in this case because there is an actual conflict between those two Acts. Specifically, although the D.C. and Illinois Anti-SLAPP Acts both create a special procedure whereby a defendant can file a "special motion to dismiss" and receive expedited adjudication of claims, the Acts differ in the showing a defendant must make to satisfy its burden under the Act.

Relevant Provisions of the D.C. Anti-SLAPP Act. The D.C. Anti-SLAPP Act, under its plain terms, allows a defendant to satisfy its burden under the Act by simply "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." D.C. Code § 16-5502(b). As the D.C. Court of Appeals recognized in *Mann*, that is the ***only*** showing that a defendant needs to make. *Competitive Enters. Inst. v. Mann*, 150 A.3d 1213, 1227 (D.C. 2016)w. Once a defendant makes that showing, then a special motion to dismiss "shall be granted unless the [plaintiff] demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Code § 16-5502(b); *Mann*, 150 A.3d at 1227.

[213] Indeed, the choice-of-law analysis that follows would even favor application of the Massachusetts Anti-SLAPP Act before the D.C. Act. However, in light of the Court's September 6, 2019, Order that Plaintiffs limit briefing on threshold issues, this Opposition addresses only the Illinois Anti-SLAPP Act. Plaintiffs reserve the right argue the applicability of the Massachusetts Anti-SLAPP Act if the Court denies the applicability of the Illinois Anti-SLAPP Act.

Relevant Provisions of the Illinois Anti-SLAPP Act. The Illinois Anti-SLAPP Act, by contrast, requires a defendant to make a much more substantial showing. Although the Illinois Anti-SLAPP Act is worded similarly to the D.C. Anti-SLAPP Act, the Illinois Supreme Court has construed the Illinois Anti-SLAPP Act to require defendants to satisfy an "initial burden of proving that plaintiff's lawsuit was ***solely*** 'based on, relate[d] to, or in response to' their acts in furtherance of their rights of petition, speech or association, or to participate in government." *Sandholm v. Kuecker*, 962 N.E.2d 418, 434 (Ill. 2012) (quoting 735 Ill. Comp. Stat. 110/1(c)).[214] As the Illinois Supreme Court has explained, "[s]tated another way, where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation ... the lawsuit is not solely based on defendant's rights of petition, speech, association, or participation in government." *Id.* at 430. Only if defendants can make that showing that the plaintiff's claims are "***solely*** based on, relating to, or in response to" defendant's speech and not a genuine effort to obtain redress—which requires evidence of the plaintiff's subjective state of mind in bringing his claim—does the defendant satisfy its burden under the Act and thus shift the burden to the plaintiff to demonstrate that his claims are sufficiently meritorious. *Id.*

Thus, there is a conflict between the Illinois and D.C. Anti-SLAPP Acts that requires a choice-of-law analysis. If the ***Illinois*** Anti-SLAPP Act applies in this case—and as explained below, it does—then Defendants' Special Motions to Dismiss under the D.C. Act must be denied.

[214] The Illinois Supreme Court held this construction necessary to preserve the constitutionality of the statute by "strik[ing] a balance" and "recogniz[ing] that a solution to the problem of SLAPPs must not compromise either the defendants' constitutional rights of free speech and petition, or plaintiff's constitutional right of access to the courts to seek a remedy for damage to reputation." *Sandholm*, 962 N.E.2d at 431; *see also Ryan v. Fox TV Stations, Inc.,* 979 N.E.2d 954, 962 (Ill. App. Ct. 2012). Plaintiffs make a similar argument in their motion to find the D.C. Anti-SLAPP Act void and unconstitutional. Under the Illinois Act, Defendants could not meet their burden of showing that Plaintiffs have brought their claims "***solely*** 'based on, relat[ed] to, or in response to [defendants'] acts in furtherance of their rights of petition, speech or association, or to participate in government,'" and not for any other reason, such as to "genuinely seek[] relief for damages for the alleged defamation." *See id.* at 434 (quoting 735 Ill. Comp. Stat. 110/1(c)).

B. Under Settled D.C. Choice of Law Rules the Illinois Anti-SLAPP Act, Not the D.C. Anti-SLAPP Act, Applies to Plaintiffs' Claims.

Because there is an actual, true conflict between the Illinois Anti-SLAPP Act and the D.C. Anti-SLAPP Act, the Court must determine which law applies. Under D.C.'s choice-of-law test, the Illinois Anti-SLAPP Act applies.

As the D.C. Court of Appeals has explained, "[t]o determine which jurisdiction's substantive law governs a dispute, [the court] employ[s] a modified governmental interests analysis: "Under this analysis, '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.'" *Pietrangelo*, 68 A.3d at 714. "As part of this analysis, [the court] consider[s] the four factors enumerated 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."

Id. (quoting Restatement (Second) of Conflicts of Laws § 145). As the D.C. Court of Appeals has stated, "[t]he Restatement factors help to identify the jurisdiction with the most significant relationship to the dispute, that presumptively being the jurisdiction whose policy would be more advanced by application of its law." *Id.* ***Applying these factors confirms that the Illinois Anti-SLAPP Act, <u>not</u> the D.C. Anti-SLAPP Act, applies here.***

Although D.C. courts have yet to apply their choice-of-law test to competing anti-SLAPP statutes, other jurisdictions have considered conflicts between anti-SLAPP statutes in the context of materially similar "most significant relationship" choice-of-law analyses. *See TRG Constr., Inc. v. D.C. Water & Sewer Auth.*, 70 A.3d 1164, 1167 (D.C. 2013) (explaining that where D.C.

case law is "not well developed," D.C. courts look to decisions of other courts on "related issues" for guidance). Courts that have considered the issue have repeatedly held that ***two Restatement factors are most important to the anti-SLAPP choice-of-law inquiry: (1) the place where the conduct causing the injury occurred (factor (b)) and (2) the domicile of the speaker (factor (c))***. *See, e.g.*, *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) (applying Arizona defamation law but the Illinois Anti-SLAPP Act because defendants were Illinois citizens and "[a] state has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens, at least when, as in this case, the speech initiated within the state's borders"); *Underground Solutions, Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014) ("A speaker's residence ... is ... one of the 'central' factors to be considered ... because of a state's acute interest in protecting the speech of its own citizens, which counsels in favor of applying the anti-SLAPP statute of a speaker's domicile to his statements.").[215]

Importantly, the Restatement provides that the § 145 factors "are to be evaluated according to their relative importance with respect to the particular issue," Restatement (Second) of Conflicts of Law § 145(2), and the D.C. Court of Appeals has admonished that "a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale." *Washkoviak v. Sallie Mae*, 900 A.2d 168, 181 (D.C. 2006).

[215] *See also, e.g.*, *Sarver v. Chartier,* 813 F.3d 891, 898 (9th Cir. 2016); *O'Gara v. Binkley*, 384 F. Supp. 3d 674, 682 & n.5 (N.D. Tex. 2019) ("[I]n the anti-SLAPP context, courts typically consider the place where the allegedly tortious conduct occurred and the speaker's domicile in determining what state's law to apply. This is because the primary purpose behind an anti-SLAPP statute is to encourage and safeguard its citizens' constitutional rights."); *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1324 (D. Utah 2015) (applying California's anti-SLAPP statute because the defendant was from California and made his statements in California); *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1035 (N.D. Ill. 2013) (similar); *Glob. Relief Found. v. N.Y. Times Co.*, No. 01-cv-8821, 2002 WL 31045394, at *11 (N.D. Ill. Sept. 11, 2002) (similar).

Here, both the "place where the conduct causing the injury occurred" (factor (b)) and the "domicile of the speaker" (factor (c)) factors strongly weigh in favor of applying the Illinois Anti-SLAPP Act. Of the remaining two Restatement § 145 factors, "the place where the relationship is centered" (factor (d)) —likewise weighs in favor of applying the Illinois Anti-SLAPP Act, not the D.C. Anti-SLAPP Act; "the place where the injury occurred" (factor (a)) is neutral.

Factor B: The Place Where the Conduct Causing the Injury Occurred. Twelve of Plaintiffs' 13 claims are based on speech that originated with Hoffman and Sidley in Illinois. The causes of action against the APA, except one count relating to statements by Dr. Kaslow made in Georgia, involve repetition of Hoffman's statements, not statements originating independently from D.C. Moreover, Hoffman's management of the investigation and the writing of his Report took place from his office in Illinois, and the interviews he conducted took place around the country, not primarily in D.C. In fact, the Hoffman Report's list of locations where his team conducted interviews does not even include D.C. among the 14 cities and 10 states it names.[216]

Although the APA is organized in D.C., that does not affect the analysis of this factor, especially because the APA's relevant actions took place primarily through members participating by e-mail and telephone from around the country or at conventions held outside D.C. ***This factor thus weighs strongly in favor of applying the Illinois Anti-SLAPP Act.***

Factor C: The Domicile of the Speaker (and Other Parties). This factor also weighs strongly in favor of applying the Illinois Anti-SLAPP Act: Illinois is Defendant Sidley's principal place of business *and* state of organization, and Illinois is Defendant Hoffman's domicile and the

[216] Hoffman Report at 7. Metadata evidence shows that the two Sidley paralegals who worked in the Report document were also located in Illinois. Sidley asked Plaintiffs' counsel not to name any Sidley lawyers other than Hoffman as defendants, and the conduct of the other lawyers, some of whom were based in Illinois and some in D.C., is not at issue in this case. (*See* Gungor Aff. ¶ 12.)

only state in which he is licensed to practice law.[217] Thus, Illinois is the domicile of the defendants whose speech forms the basis for virtually all of Plaintiffs' claims in this action, which is the most important consideration under this Restatement factor. *See, e.g.*, *Chi*, 787 F. Supp. 2d at 803; *Underground Solutions*, 41 F. Supp. 3d at 726, and cases cited *infra* note 215. In contrast, although the APA is organized in D.C., the Board members involved in the republications of the Hoffman Report are scattered around the country. No Plaintiff is a resident or citizen of D.C.[218] ***This factor thus also weighs strongly in favor of applying the Illinois Anti-SLAPP Act.***

Factor D: The Place Where the Relationship Is Centered. This factor, like the others, weighs in favor of applying the Illinois Anti-SLAPP Act because the relationship among Defendants, which enabled and precipitated their tortious conduct and Plaintiffs' injuries in this case, is centered on Illinois. Defendant APA retained Defendants Hoffman and Sidley in Illinois and the management of the investigation and writing of the defamatory Report were centered in Illinois.[219] Indeed, because APA retained Defendants Hoffman and Sidley in Illinois through an engagement letter that specified that Illinois law would govern their relationship,[220] APA knowingly subjected itself to Illinois law and "establishe[d] a relationship" with Illinois that subjects it to Illinois law for choice-of-law purposes. *B.J. McAdams, Inc. v. Boggs*, 439 F. Supp. 738, 746 (E.D. Pa. 1977); *see also* Restatement (Second) Conflict of Laws § 292 (1) & cmt. c (principal bound by law of state of agent where "relationship between the principal and agent" has some connection to law applicable to agent and "it [is] reasonable to hold the principal bound by

[217] Compl. ¶¶ 29, 46-47. Sidley Austin (DC) is organized in Delaware. That state's anti-SLAPP statute could not apply in this case because its protections are limited to an applicant, permittee, or related person regarding a government licensing, permitting, or other decision. *See* Del. Code Ann. tit. 10, § 8136.

[218] Compl. ¶¶ 39, 41, 42.

[219] Compl. ¶¶ 29, 46-47, 249-50.

[220] The attorney-client relationship is the quintessential agency relationship. *Comm'r v. Banks*, 543 U.S. 426, 436 (2005).

the agent's act"). Under these circumstances—where the defamatory speech originated in Illinois from an Illinois citizen acting as agent for his principal—the mere fortuity of the principal's state of incorporation does not change the applicable law. *See, e.g.*, *Obras Civiles, S.A. v. ADM Secs., Inc.*, 32 F. Supp. 2d 1018, 1020 (N.D. Ill. 1999) (applying Arizona law where "[t]he only connection of Illinois to this case is the location in that state of the corporate headquarters of defendants").

Factor A: The Place Where the Injury Occurred. This factor, which is of little relevance in the present analysis, does not provide any reason to apply the D.C. Anti-SLAPP Act. As courts have explained, although the "place of injury" is usually an important factor in the choice-of-law analysis in tort cases, "in the anti-SLAPP context" it is "[a] less important [factor]." *See, e.g.*, *Chi*, 787 F. Supp. 2d at 803. And that is especially true when, as here, the injuries to Plaintiffs occurred in multiple states. *See, e.g.*, *Sarver*, 813 F.3d at 899 (holding, in determining the applicable anti-SLAPP law, that "[t]he multistate nature of [plaintiff's] alleged harms is central to the choice-of-law analysis. Because the film was distributed nationwide, and [plaintiff's] alleged injuries would most likely have occurred in multiple states, 'the place of injury will ***not*** play an important role in the selection of the state of applicable law.'" (quoting Restatement (Second) of Conflict of Laws § 145 cmt. e)).

* * *

Because the Restatement § 145 factors weigh overwhelmingly in favor of applying the Illinois Anti-SLAPP Act, Illinois is "the jurisdiction with the most significant relationship to the dispute," and is "presumptively … the jurisdiction whose policy would be more advanced by application of its law." *Pietrangelo*, 68 A.3d at 714. That presumption holds for this case.

Courts have repeatedly recognized that states have a strong interest in having their own anti-SLAPP law applied to their own citizens, and courts have even specifically held that ***Illinois*** has a strong interest in having its anti-SLAPP Act applied to its citizens. *See, e.g.*, *Chi*, 787 F. Supp. 2d at 803 ("Defendants are citizens of Illinois. ... Illinois thus has a strong interest in having its own anti-SLAPP statute applied [to claims against them]."); *Duffy v. Godfread,* No. 13-cv-1569, 2013 WL 4401390, at *4 (N.D. Ill. Aug. 14, 2013) ("States have strong interests in the application of their own anti-SLAPP laws to their own citizens' speech.").[221]

Moreover, not only does Illinois have a strong interest in having its Anti-SLAPP Act applied here, but its policies would be undermined if its Act is not applied. The Illinois Anti-SLAPP Act (unlike the D.C. Anti-SLAPP Act) contains an express "public policy" statement that emphasizes the Act's goal:

> ***[T]o strike a balance*** between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government[.]

735 Ill. Comp. Stat. Ann. 110/5. And the Illinois Supreme Court has emphasized that policy of striking a balance to interpret and guide decisions under the Act. *See Sandholm*, 962 N.E.2d at 431 ("The Act's intent to 'strike a balance' recognizes that a solution to the problem of SLAPPs must not compromise either the defendants' constitutional rights of free speech and petition, or plaintiff's constitutional right of access to the courts to seek a remedy for damage to reputation.").

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[221] *Intercon*, 969 F. Supp. 2d at 1035; *Doctor's Data, Inc. v. Barrett*, No. 10-cv-3795, 2011 WL 5903508 at *4 (N.D. Ill. Nov. 22, 2011); *Global Relief v. N.Y. Times*, No. 01-cv-8821, 2002 WL 31045394, at *10 (N.D. Ill 2002); *Underground Solutions*, 41 F. Supp. 3d at 725 (N.D. Ill. 2014); *World Kitchen, LLC v. Am. Ceramic Soc'y*, No. 12-cv-8626, 2015 WL 3429380, at *9-10 (N.D. Ill. May 27, 2015); *O'Gara v. Binkley*, 384 F. Supp. 3d 674, 682 (N.D. Tex. 2019); *Ousterhout v. Zukowski*, No. 11-cv-9136, 2012 U.S. Dist. LEXIS 190544, at *5 (N.D. Ill. Sept. 13, 2012); *Schering Corp. v. First DataBank, Inc.*, No. 07-cv-1142, 2007 WL 1176627, at *6 (N.D. Cal. Apr. 20, 2007); *Grant & Eisenhofer v. Brown*, No. 17-cv-5968, 2018 WL 3816721, at *4-6 (C.D. Cal. Feb. 16, 2018) (applying D.C. choice-of-law test and holding that the anti-SLAPP Act of the state whose citizens are defendants should apply).

In contrast, the D.C. Court of Appeals has recognized that the D.C. Anti-SLAPP Act creates ***imbalance*** by "significantly advantag[ing] the defendant." *Mann*, 150 A.3d at 1237.

As the D.C. Court of Appeals has explained, D.C. courts must apply "another state's law when (1) [that state's] interest in the litigation is substantial, and (2) 'application of District of Columbia law would frustrate the clearly articulated public policy of that state.'" *Herbert v. District of Columbia*, 808 A.2d 776, 779 (D.C. 2002). Here, as described above, Illinois clearly has a strong interest in having its own Anti-SLAPP Act applied to its own citizens for speech originating from Illinois. *See, e.g.*, *Chi*, 787 F. Supp. 2d at 803; *Underground Solutions*, 41 F. Supp. 3d at 726; and cases cited *supra* note 215. The application of the D.C. Act would "frustrate the clearly articulated public policy of [Illinois]" by subordinating Plaintiffs' rights. *See Herbert*, 808 A.2d at 779.

Accordingly, ***the Illinois Anti-SLAPP Act, <u>not</u> the D.C. Anti-SLAPP Act, must apply here Defendants' Special Motions to Dismiss must be denied for this additional reason.***

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Special Motions to Dismiss in their entirety.

Submitted this 15th day of November 2019. Editable versions of the proposed order submitted to JudgePuig-LugoESERVE@dcsc.gov.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, a true and correct copy of the foregoing Plaintiffs' Consolidated Opposition to Defendants' First Set of Contested Special Motions to Dismiss filed October 13, 2017, Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 was filed through the Court's Case File Express electronic filing system, which will automatically send a Case File Express Electronic Notice to Defendants' counsel of record that this filing is completed and available for download at their convenience.

/s/ John B. Williams
John B. Williams

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	**:**	**2017 CA 005989 B**
Plaintiffs,	**:**	**Judge Hiram E. Puig-Lugo**
vs.	**:**	
DAVID H. HOFFMAN, *et al.*,	**:**	**Next Event:**
Defendants.	**:**	

[PROPOSED] ORDER

Having reviewed Plaintiffs' and Defendants' respective motions, oppositions, and replies submitted in this matter and after oral argument held on February __, 2020, it is hereby:

ORDERED that:

1) Plaintiffs' January 8, 2019, Opposed Motion to Declare the D.C. Anti-SLAPP Act Void and Unconstitutional is **GRANTED.**
2) The American Psychological Association's (APA's) October 13, 2017, Contested Special Motion to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **DENIED.**
3) Hoffman's and Sidley's October 13, 2017, Contested Special Motion to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **DENIED.**
4) APA's March 21, 2019, Contested Special Motions to Dismiss Count 11 of the Supplemental Complaint under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **DENIED.**
5) Hoffman's and Sidley's March 21, 2019, Contested Special Motion to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **DENIED.**

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

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