IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LARRY C. JAMES, *et al.*,	:	**CASE NO. 2017 CV 00839**
Plaintiffs,	:	**Judge Timothy N. O'Connell**
vs.	:	**DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND APPLICATION TO STAY LITIGATION**
DAVID HOFFMAN, *et al.*,	:	
Defendants.	:	

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I. INTRODUCTION

Plaintiffs Stephen Behnke ("Behnke") and Russell Newman ("Newman") were long-time employees of the American Psychological Association ("APA") and are bound by the terms of the employment agreements that they signed with APA. Their employment agreements contain broad arbitration provisions that require them to arbitrate *any dispute* that may arise regarding the respective rights, duties or obligations under their employment agreements.[1] In the instant lawsuit, Behnke and Newman contend that they were defamed by statements made about them regarding the performance of their rights, duties or obligations as employees of APA. Their conduct during the time that they were each APA employees is central to the litigation and forms the basis for their claims. Pursuant to the provisions of their employment agreements, and well-settled law, the claims of Behnke and Newman asserted in this lawsuit must be submitted to arbitration, and this litigation must be stayed in its entirety until the arbitration proceedings, and any litigation related thereto, have been fully and finally resolved.[2]

II. FACTUAL BACKGROUND

A. APA and the Employment Agreements of Behnke and Newman

APA is the leading scientific and professional organization representing psychology in

[1] The Behnke and Newman arbitration provisions require the parties to submit to arbitration in the District of Columbia before a single arbitrator pursuant to rules agreed upon by the parties. *See* Ex. 1, Behnke Emp't Agmt. ¶ 14; Ex. 2, Newman Emp't Agmt. ¶ 15. In the absence of agreement among the parties, the American Arbitration Association must appoint an arbitrator, and the American Arbitration Association Employment Dispute Resolution Rules govern. *Id.* APA requests that in ordering Behnke and Newman to arbitrate, the Court give the arbitration parties twenty-one (21) days to agree upon an arbitrator and rules to govern the arbitration, and, in the event they cannot reach agreement, by the thirtieth (30th) day following the Court's order, Behnke and Newman be required to commence an arbitration proceeding in the District of Columbia before the American Arbitration Association. *See* APA's proposed Order, submitted as an Exhibit to APA's Motion to Compel Arbitration and Application to Stay Litigation.

[2] The instant Motion is without prejudice to APA's pending a Motion to Dismiss for Lack of Personal Jurisdiction and/or Forum Non Conveniens, and Special Motion to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502.

the United States, with more than 115,700 researchers, educators, clinicians, consultants, and students as its members nationally. *See* http://www.apa.org/about/index.aspx. Its mission is to advance the creation, communication, and application of psychological knowledge to benefit society and improve people's lives by, among other things, improving the qualifications and usefulness of psychologists by establishing high standards of ethics, conduct, education, and achievement. *Id*. APA is incorporated in the District of Columbia, and is governed by its non-profit organization statutes. At all relevant times, APA has been headquartered in Washington, D.C., where Behnke and Newman worked while they were APA employees.

Behnke was employed by APA from November 2000 to July 8, 2015 as APA's Director of the Office of Ethics. Aff. of Stephen Behnke, In Supp. of Pls' Consolidated Mem. in Opp. to Defs.' Mots. to Dismiss for Lack of Personal Jurisdiction and Forum Non Conveniens ("Behnke Aff.") ¶ 2. In that position, his duties included "administration of ethics case adjudication, providing staff support to the APA Ethics Committee, supporting APA governance-based policy development in the area of ethics, and providing education about psychological ethics to the profession and the public" as well as providing "staff support to the Presidential Task Force … for Psychological Ethics and National Security (PENS) in 2005." *Id*. Among other things, Behnke conducted the investigations, or provided staff support for investigations, of ethics complaints made to APA, including that of Plaintiff Larry James. *Id*. ¶¶ 3,4, 8. Behnke, who was himself a PENS Task Force member, also "provide[d] the staff support for the [PENS] Task Force as it worked on the charge given to it by the 2005 Board of Directors. *Id*. ¶ 10.

Newman was employed by APA from 1994 to 2007, Compl. ¶ 42, and at all times relevant to this litigation, he was the Executive Director for Professional Practice. Aff. of Russell Newman, In Supp. of Pls.' Consolidated Mem. in Opp. to Defs.' Mots. to Dismiss for

Lack of Personal Jurisdiction and Forum Non Conveniens ("Newman Aff.") ¶ 12. In that position, his duties included implementing legislative, legal, public education, and marketplace strategies to support psychology practitioners and to increase access to psychological services. Compl. ¶ 42. By virtue of his position as Executive Director for Professional Practice, Newman was invited to and did participate as a non-voting observer of the PENS Task Force, including by attending its June 24–26, 2005 in-person meeting. Newman Aff. ¶ 4.

At all relevant times, both Behnke and Newman were parties to employment agreements with APA that governed their relationships with APA. *See* Ex. 1, Behnke Emp't Agmt.; Ex. 2, Newman Emp't Agmt. Their employment agreements, which are substantially similar, include identical arbitration provisions that require the arbitration before a single arbitrator, in the District of Columbia, of any disputes that may arise regarding the parties' respective rights, duties or obligations. The arbitration provisions state in pertinent part:

> The parties agree that, in the event they are unable to resolve amicably *any dispute that may arise regarding their respective rights, duties or obligations* under this Agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules. In either case, the sole arbitrator may grant any relief as may be just and equitable, including specific performance and declaratory relief. The parties further agree that *the situs of such arbitration shall be Washington, D.C.* . . . .

Ex. 1, Behnke Emp't Agmt. ¶ 14; Ex. 2, Newman Emp't Agmt. ¶ 15 (emphasis added).

In addition to the broad arbitration provisions, Behnke's and Newman's employment agreements contain additional provisions pertinent to the parties' instant disputes. These include the following:

- Behnke and Newman were required to "[f]aithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of [the] Agreement," and "perform such activities as may be assigned" or "required," while "[r]efrain[ing] from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of [APA]." *See* Ex. 1, Behnke Emp't Agmt. ¶ 5; Ex. 2, Newman Emp't Agmt. ¶ 6;

- Behnke and Newman were prohibited from "at any time disclos[ing] confidential or proprietary information of [APA] without the written approval of APA's Chief Executive Officer." *See* Ex. 1, Behnke Emp't Agmt. ¶ 8; Ex. 2, Newman Emp't Agmt. ¶ 9;

- Behnke and Newman were precluded from "any outside consulting or employment undertaken . . . [unless] approved in writing in advance by APA's Chief Executive Officer." *See* Ex. 1, Behnke Emp't Agmt. ¶ 5; Ex. 2, Newman Emp't Agmt. ¶ 6; and

- APA had the right to terminate Behnke's employment "with cause," based on, among other grounds, "destruction of APA property," "dereliction of duty," "continued unsatisfactory performance," "misuse of Association resources," and "behavior in violation of [APA] policies," and after such termination APA "shall not be obligated to make any additional payment of compensation." *See* Ex. 1, Behnke Emp't Agmt. ¶ 6(ii).

In the instant action, Behnke and Newman have asserted claims that arise under the employment agreement provisions identified above.

B. The Investigation and IR

In 2014, APA determined to hire counsel to conduct an independent review (the "IR") relating to allegations that had been made that, following the attacks of September 11, 2001, APA had colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad. Ex. 3, Sidley Retainer Agmt. dated Nov. 20, 2014 (the "Sidley Retainer Agreement") at 1. After a thorough vetting process,

APA hired Sidley Austin LLP ("Sidley Austin") to conduct the IR, to be spearheaded by Sidley Austin partner David Hoffman ("Hoffman"; collectively, "Sidley"). *Id*. at 3. APA and Sidley agreed, and the Sidley Retainer Agreement made clear, that Sidley was to conduct the IR with complete independence, and wholly separate and apart from APA. *Id*. at 1. In the course of its work, Sidley interviewed Behnke and Newman. Compl. ¶ 201. At the time of his interview, Behnke was an APA employee, the Director of APA's Ethics Office, and Newman, although no longer an APA employee, was an active member of APA. *See* Compl. ¶¶ 29, 40, 201.

C. The Complaint Alleges that APA Defamed Behnke and Newman in Connection with their Rights, Duties or Obligations as APA Employees.

The Complaint alleges that Defendants made numerous defamatory statements about Behnke and Newman directly and specifically relating to their employment with APA. *See generally* Compl. ¶¶ 34, 40 (noting that Behnke was Director of the APA Ethics Office from 2000 to 2015, when APA terminated his employment), ¶ 42 (noting that Newman worked as Executive Director for the APA Practice Directorate from 1994 to 2007). Behnke and Newman have conceded that Sidley's work with regard to Behnke and Newman was undertaken in connection with their roles as APA employees. *Id.* ¶ 205 (alleging that Plaintiffs' actions "had been undertaken in their roles as APA employees or persons who were appointed by APA to become involved in its activities").

1. *Behnke*

The Complaint alleges that APA wrongfully discharged Behnke, causing him "grave personal, financial and emotional damage." Compl. ¶ 441. The Complaint further alleges that Defendants defamed Behnke by falsely asserting that, in his capacity as Director of the APA Ethics Office, Behnke mishandled ethics complaints in order to protect Department of Defense ("DoD") psychologists from censure. *See id.* ¶¶ 19, 135–50, Ex. A Statement Nos. 11, 56, 57,

98, 217. According to the Complaint, any "flaws" in Behnke's handling of ethics complaints identified in the IR "were flaws in the processes created by the APA Board, not an attempt by Dr. Behnke to protect specific military psychologists from censure." *Id.* ¶ 148. The Complaint further contends that APA defamed Behnke by falsely suggesting that, while he was acting in his capacity as Director of the APA Ethics Office, he "colluded" with DoD psychologists to influence APA policy in favor of the DoD, and that he helped to "issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." *Id.* ¶¶ 86, 210, 220, Ex. A Statement Nos. 5–8, 10, 45–46, 51, 114, 127, 135, 151, 158, 204. In addition, the Complaint specifically alleges that Behnke was defamed in connection with the following matters, all of which were undertaken in connection with his employment:

(i) his handling of ethics complaints (*id.* ¶¶ 19, 135–50, Ex. A Statement Nos. 11, 56, 57, 98, 217);

(ii) his participation in the PENS Task Force (*id.* ¶¶ 43, 72, Ex. A Statement Nos. 20, 37, 44);

(iii) his drafting of the PENS report language (*id.* ¶¶ 74, 87, Ex. A Statement Nos. 35, 42, 45, 106, 113, 123–25, 133, 154);

(iv) his drafting of a letter to the New York Times for Dr. Levant's signature (APA's then-President) (*id.* Ex. A Statement No. 45);

(v) his communications and work with others inside and outside of APA regarding the policies articulated in the PENS report (*id.* ¶¶ 5, 86, Ex. A Statement Nos. 20, 50, 105, 106, 114, 126, 128, 135, 142–44, 151, 154, 158, 160, 162–64, 172);

(vi) his speaking engagements that pertained to APA's policies regarding enhanced interrogation (*id.* Ex. A Statement No. 169);

(vii) his participation in politicking involving Council resolutions that were designed to undermine or water down the policy adopted by the PENS report (*id.* Ex. A Statement Nos. 166–68, 193–200);

(viii) his authoring of an APA casebook involving APA's position on enhanced interrogation (*id.* Ex. A Statement Nos. 84, 152, 153);

(ix) his attendance at a DoD training program for Behavioral Science and Consultation Team psychologists at Fort Huachuca, Arizona (paid for by DoD, which payments Behnke contends he remitted to APA, less reimbursement for his travel expenses) (*id.* ¶¶ 216–19, Ex. A Statement Nos. 49, 157);

(x) his alleged sharing of APA confidential internal discussions and strategy with DoD contacts in violation of APA policy (*id.* Ex. A Statement Nos. 161, 163, 173);

(xi) his speaking with reporters regarding APA policy on enhanced interrogation (*id*. Ex. A Statement No. 163);

(xii) his visit to Guantanamo in March 2007 as an APA employee (*id.* Ex. A Statement Nos. 173, 174);

(xiii) his use of his APA email account to communicate with others, including Plaintiffs, Dr. Gerald Koocher, and DoD representatives, regarding APA's enhanced interrogation policies and issues (*id.* ¶¶ 210–15, Ex. A Statement Nos. 47, 48, 82, 142, 166, 188, 210);

(xiv) his receipt of a request from Plaintiff Banks to delete Behnke's communications with Plaintiff Banks on the APA server (*id.* ¶¶ 213–15, Ex. A Statement Nos. 183, 184);

(xv) his receipt of three sets of documents and other DoD policies from a psychologist involved in Survival, Evasion, Resistance and Escape techniques (*id.* Ex. A Statement No. 191);

(xvi) his invitation to Joel Dvoskin to write a "con" statement to a petition being considered by APA's Council of Representatives to change the APA policy on enhanced interrogations that would have undermined the PENS principles, including a DoD Directive and Instruction and policies relating to behavioral science consultants and interrogations (*id.* Ex A. Statement Nos. 196–200);

(xvii) his selection of members of a Presidential Advisory Group on the Implementation of the Petition Resolution (*id.* Ex. A Statement Nos. 201–03);

(xviii) his revision of Standard 1.02 of the APA Ethics Code, and the criticism of him for not doing so promptly (*id*. Ex. A Statement Nos. 50, 55, 150, 208–14);

(xix) his alleged request to DoD, and to Plaintiffs Dunivin and Banks, to encourage comments regarding revisions to Standard 1.02 of the APA Ethics Code (*id.* Ex. A Statement No. 213); and

(xx) his communications and interactions with DoD psychologists in his capacity as an APA employee (*id.* ¶ 86, Ex. A Statement Nos. 20, 46–48, 50, 53, 106, 130, 144, 151, 158, 161, 163–64, 172, 180–83, 188, 190, 192).

2. *Newman*

As Newman himself admits, he "was asked by the Task Force chair to serve as a non-voting observer owing to [his] role at the APA as Executive Director for Professional Practice, responsible for addressing professional practice issues on behalf of the Association's membership." Newman Aff. ¶ 4. The Complaint alleges that the IR defamed Newman with regard to his rights, duties or obligations as an APA employee, including that:

(i) Newman was involved with the PENS Task Force in his capacity as an APA employee (*id*.);

(ii) he was intimately involved in the coordinated effort to align APA actions with DoD preferences, along with other APA officials (Compl. Ex. A Statement No. 21);

(iii) he had an obvious conflict of interest in working on the PENS Task Force because his wife, Plaintiff Dunivin, was one of the DoD psychologists who would be affected by APA policy on the issue of enhanced interrogation and had a strong bias on the issue (*id*. ¶¶ 44, 224–28, Ex. A Statement Nos. 24, 25, 86, 100, 102, 108, 148);

(iv) he inserted himself and influenced the PENS Task Force process and the outcome in important ways (*id.* Ex. A Statement No. 25);

(v) as a member of the PENS Task Force, Newman spoke forcefully about the importance of achieving APA's public relations goals in a manner that was inconsistent with the efforts of non-DoD psychologists who pushed for stricter, more specific ethical guidelines (*id*. Ex. A Statement No. 33, 37, 38, 99, 108);

(vi) he agreed with the strategy of deferring to DoD's preferences (*id*. Ex. A Statement No. 114);

(vii) in 2004, before the PENS Task Force was established, APA obtained a "clearly relevant" opinion from PricewaterhouseCoopers that the Newman-Dunivin marriage did not in itself create a conflict, but full disclosure, on a case-by-case basis, was necessary to minimize risks (*id.* ¶¶ 226, 227); and

(viii) he too "colluded" with DoD psychologists to influence APA policy in favor of the DoD, helping to issue ethical guidelines that would not constrain DoD's interrogation techniques (*see id*. ¶¶ 5, 19, 86, Ex. A Statement Nos. 5–8, 10, 127).

III. ARGUMENT

A. Behnke and Newman Are Required to Pursue their Claims in Arbitration in Washington, D.C.

Behnke's and Newman's employment agreements with APA contain broad arbitration clauses. Under federal arbitration law, which governs the question of arbitrability, their claims must be arbitrated, and under the Ohio Arbitration Act, which governs the procedures applicable to arbitration, the Court should compel Behnke and Newman to arbitrate their claims. In light of the strong federal (and Ohio) preference for arbitration of disputes, and the breadth of the arbitration clauses in Behnke's and Newman's employment agreements, this Court should order Behnke and Newman to commence arbitration proceedings in Washington, D.C., in accordance with their arbitration agreements with APA.

1. *Federal and Ohio Arbitrability Standards.*

The *federal* substantive law of arbitrability governs whether Behnke's and Newman's claims are within the scope of their arbitration agreements with APA and are therefore subject to arbitration. The Federal Arbitration Act ("FAA") applies to arbitration clauses in contracts that involve interstate commerce. *See* 9 U.S.C. §§ 1, 2. The Behnke and Newman employment agreements involve interstate commerce, as plainly alleged both in the Complaint and in Behnke's and Newman's own affidavits. *See, e.g.*, Behnke Aff. ¶¶ 2, 3 (Behnke "oversaw all activities of the APA Ethics Office," describing those activities, and noting that they "involved considerable education and consultation around the country to state psychological associations, state boards of psychology and to the public"); Compl. ¶ 42 ("[Newman] worked . . . on behalf of the nation's practicing psychologists and the patients they serve. . . . In that role, he implemented legislative, legal, public education, and marketplace strategies to support psychology practitioners and to increase access to psychological services."). As Behnke and

Newman have acknowledged, APA routinely engages in interstate commerce, including with its 115,700 national dues-paying members and substantial nationwide operations; and Behnke's and Newman's positions with APA involved nationwide oversight and effect. Compl. ¶¶ 40, 42, 47.

Where an employee's duties involve interstate activity, the FAA governs the question of the arbitrability of disputes involving that employee. *See, e.g.*, *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 602 (6th Cir. 1995) (holding that arbitration clause in employment agreement between executive and corporate employer was subject to FAA because the parties included in their agreement a provision that any disputes would be resolved by arbitration and FAA's exclusionary clause should be narrowly construed); *McCoy v. Cintas, Inc.*, No. 1:13-CV-134, 2013 WL 2620201, at *1 (S.D. Ohio June 11, 2013) (holding that, "[b]ecause Defendant clearly engages in interstate commerce, there is no dispute about whether the employment agreement at issue . . . falls within the scope of the FAA"); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (holding that agreements involved interstate commerce in part because one party "engaged in business throughout the southeastern United States" in connection with the agreements). Accordingly, here the federal substantive law of arbitrability governs the scope of the arbitration clauses in the Behnke and Newman employment agreements. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (directing courts to apply the "federal substantive law of arbitrability" where the FAA applies); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that "[f]ederal law in the terms of the [FAA] governs [the] issue [of arbitrability] in either state or federal court"), *superseded by statute on other grounds, as stated in Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).[3]

[3] That the Behnke and Newman employment agreements include a District of Columbia general choice-of-law provision does not alter this result. *See, e.g.*, *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 933–

2. *There Is a Strong Presumption of Arbitrability.*

When a party moves to compel arbitration, "the court must engage in a limited review to determine whether the dispute is arbitrable." *NCR Corp. v. Korala Assocs.*, 512 F.3d 807, 812 (6th Cir. 2008) (internal quotation marks omitted). In conducting its review, the court must determine whether "a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Id*. at 812–13.

Where parties have entered into an arbitration agreement, courts apply a "strong presumption in favor of arbitration" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 813; *Acad. of Med. v. Aetna Health, Inc.*, 108 Ohio St. 3d 185, 188, 2006-Ohio-657, ¶ 14, 842 N.E.2d 488, 492. The presumption of arbitrability is "particularly applicable," *AT&T Techs., Inc. v. Commc'ns Workers of Am.* 475 U.S. 643, 650 (1986), where an arbitration clause is broad, for instance when it covers "any dispute" that arises out of an agreement. *See, e.g.*, *NCR Corp.*, 512 F.3d at 813; *Simon v. Pfizer, Inc.*, 398 F.3d 765, 775 (6th Cir. 2005); *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 578 (6th Cir. 2003) (referring to such clauses as "extremely broad"); *Cales v. Armstrong World Indus., Inc.*, 2003-Ohio-1776, ¶¶ 19, 20, No. 02CA2851, 2003 WL 1798671, at *5 (Ohio Ct. App. Mar. 28, 2003). Where, as here, the arbitration clause is broad, "only an express provision *excluding* a specific dispute, or the most forceful evidence of a purpose to *exclude* the claim from arbitration, will remove the dispute from consideration by arbitrators." *NCR Corp.*, 512 F.3d at 813 (quoting *Solvay Pharms., Inc. v. Duramed Pharms.*,

38 (6th Cir. 1998) (holding that a general Ohio choice-of-law provision in an agreement was not an "unequivocal inclusion" of Ohio law of arbitrability); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (interpreting general choice-of-law provision in agreement to "cover[] the rights and duties of the parties, while the arbitration clause covers arbitration"). In any event, the FAA is "substantially similar" to the D.C. Revised Uniform Arbitration Act and thus the Court "may look to federal precedent for guidance" even if D.C. law governed arbitrability. *Giron v. Dodds*, 35 A.3d 433, 439 n.3 (D.C. 2012).

Inc., 442 F.3d 471, 482 n.10 (6th Cir. 2006)) (emphasis added). In other words, the court must order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646, 650 (6th Cir. 2008) (quoting *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 627 (6th Cir. 2004)). "This is because[] [t]he FAA manifests a liberal federal policy favoring arbitration agreements." *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 471 (6th Cir. 2009) (internal quotation marks omitted).

3. *Arbitration Is Required if the Litigation Necessarily Refers to the Contract or Relationship Subject to an Arbitration Provision.*

The key question for courts in Ohio and in the Sixth Circuit, in determining the arbitrability of a dispute, is whether the "action could be maintained without reference to the contract or relationship at issue." *Fazio v. Lehman Bros.*, 340 F.3d 386, 395 (6th Cir. 2003); *Acad. of Med.*, 2006-Ohio-657, ¶ 24, 108 Ohio St. 3d at 190, 842 N.E.2d at 494 ("[W]e agree with *Fazio* that 'a proper method of analysis . . . is to ask if an action could be maintained without reference to the contract or relationship at issue.'" (quoting *Fazio*, 340 F.3d at 395)). If the plaintiff *cannot* maintain the action "without reference to the contract or relationship at issue," then the action is within the scope of the arbitration agreement and the court should compel arbitration. *See id.*

The *Fazio* test embraces not only breaches of contract, but also torts that may arise involving parties to an arbitration agreement. *See id.*, 2006-Ohio-657, ¶¶ 28, 35, 108 Ohio St. 3d at 190, 192, 842 N.E.2d at 494, 495 (noting that "torts can be covered by arbitration clauses," and holding that claims relating to alleged fraud of a broker and brokerage houses were arbitrable in part because they "arose out of activities contemplated by those agreements"). In particular, defamation claims are considered within the scope of arbitration agreements. *See,*

e.g., *J.L. Moore, Inc. v. Settimo*, No. 1:10 CV 02819, 2011 WL 220005, at *2–3 (N.D. Ohio Jan. 20, 2011) (applying *Fazio* test and holding that defamation claim was within scope of arbitration clause); *cf. Aspero v. Shearson Am. Express, Inc.*, 768 F.2d 106, 109 (6th Cir. 1985) (holding, pre-*Fazio*, that employee's post-termination defamation claims were within scope of arbitration clause because "the proper question is whether resolution of the claim depends upon evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship").

4. *Behnke's and Newman's Claims Are Arbitrable under the Arbitration Clauses in their Employment Agreements.*

Here, all of the claims asserted by Behnke and Newman in the Complaint are arbitrable.[4] The extremely broad arbitration provisions of the Behnke and Newman employment agreements provide a presumption of arbitrability of "*any dispute* that may arise regarding their respective rights, duties or obligations under this Agreement." Ex. 1, Behnke Emp't Agmt. ¶ 14; Ex. 2, Newman Emp't Agmt. ¶ 15 (emphasis added). It is well-settled that the "any dispute" language is the touchstone of a broad arbitration clause. *See e.g.*, *NCR Corp.*, 512 F.3d at 813 (referring to an arbitration clause "covering *any* dispute arising out of an agreement" as "broad"); *Simon*, 398 F.3d at 775 (same); *Highlands*, 350 F.3d at 578 (such clauses are "extremely broad"); *Cales*, 2003-Ohio-1776, ¶¶ 19, 20, 2003 WL 1798671 at *5 (noting that the court had "found many lower federal court decisions that have afforded broad interpretations to the phrase 'any dispute,'" and concluding that the phrase "should be accorded a broad interpretation and should be read to include 'every' dispute arising thereunder"). The use of the phrase "any dispute" in

[4] An arbitration agreement typically survives the expiration or termination of the rest of a contract, as the United States Supreme Court has "recognized a 'presumption in favor of post-expiration arbitration of matters unless negated expressly or by *clear implication* [for] matters and disputes arising out of the relation governed by the contract." *Huffman v. Hilltop Cos.*, 747 F.3d 391, 394–95 (6th Cir. 2014) (quoting *Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 204 (1991)).

the employment agreements' arbitration clauses encompasses not only breach of contract claims, but also torts that arise out of the employment. *See, e.g.*, *Aspero*, 768 F.2d at 109 ("any dispute" included defamation and other claims); *Fazio*, 340 F.3d at 395 ("any controversy" included fraud claims); *cf. J.L. Moore*, 2011 WL 220005 at *2–3 ("any claims" included defamation and tortious-interference claims).

Given the breadth of the arbitration provisions, neither Behnke nor Newman can overcome the presumption of arbitrability that is basic to both federal and Ohio jurisprudence. *See, e.g.*, *NCR Corp.*, 512 F.3d at 813; *Acad. of Med.*, 2006-Ohio-657, ¶ 14, 108 Ohio St. 3d at 188, 842 N.E.2d at 492. Indeed, their arbitration clauses do not "express[ly] exclude[]" defamation or false-light claims from their scope, the only basis on which the broad arbitration provisions can be disregarded. *NCR Corp.*, 512 F.3d at 813 (quoting *Solvay*, 442 F.3d at 482 n.10). Behnke and Newman cannot demonstrate that it was the intent of the parties to exclude the claims they have asserted in the Complaint because no exclusions were ever agreed to. Nor can Behnke or Newman provide "the most forceful evidence of a purpose to exclude the claim[s] from arbitration," or establish "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers" their claims. *Id.* at 813; *Watson Wyatt & Co.*, 513 F.3d at 650 (quoting *Masco*, 382 F.3d at 627). As explained in further detail below, Behnke and Newman cannot maintain their claims without reference to their employment agreements and their rights, duties or obligations as employees of APA, and their claims fall squarely within the plain language of the arbitration clause.

a. *Behnke's employment rights, duties or obligations are central to his claims, rendering them arbitrable.*

Behnke's defamation and false-light claims are arbitrable under the *Fazio* test because he cannot maintain the claims set forth in the Complaint "without reference to" his employment

agreement and his position as an APA employee. *Fazio*, 340 F.3d at 395. Indeed, Behnke's rights, duties or obligations as the Director of APA's Ethics Office are integral to the allegations of the Defendants' wrongdoing as alleged in the Complaint.

As a threshold matter, Behnke cannot maintain his defamation and false-light claims against APA "without reference to" his role as APA's Ethics Director because it explains "the relationship between the parties." *See Stromberg v. Ltd. Brands, Inc.*, 2010-Ohio-1994, ¶ 15, 2010 WL 1820205, at *3 (Ohio Ct. App. May 6, 2010) (holding that "claim for negligent misrepresentation cannot be maintained without reference to the employment agreement" in part because "the employment agreement explains the relationship between the two parties"). The IR's allegedly defamatory statements that Behnke complains about relate to his conduct and activities in his capacity as Director of APA's Ethics Office. *See generally* Compl. ¶ 205 (alleging that plaintiffs' actions "had been undertaken in their roles as APA employees or persons who were appointed by APA to become involved in its activities"). That conduct "arose out of" Behnke's employment and employment agreement with APA. *See Fazio*, 340 F.3d at 395. As set forth in Section II.C.1 (i)–(xx) above, the Complaint and Exhibit A thereto set out numerous alleged defamatory statements pertaining to Behnke that are fundamental and integral to his duties and obligations as an APA employee. The statements in the IR that Behnke contends are libelous are essentially a critique of his performance as the Director of APA's Ethics Office, which make his claims arbitrable. *See Aspero*, 768 F.2d at 109 ("the proper question is whether resolution of the claim depends upon evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship"); *cf. Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 681 (3d Cir. 2000) (holding that a defamation claim was arbitrable because "alleged defamation was a description of [employee's]

activities while employed at [employer] and was contained in [employee's] termination letter" and thus the claim "arose out of his employment and its termination"). At their core, Behnke's claims pertain to his rights, duties or obligations pursuant to his employment agreement to "[f]aithfully and diligently" perform his job functions, "[r]efrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of [APA]," not "disclose confidential or proprietary information of [APA]," not undertake "any outside consulting or employment" without approval by APA, and not to engage in dereliction of duty, violate APA policies or perform unsatisfactorily. Ex. 1, Behnke Emp't Agmt. ¶¶ 5, 6, 8, 14. Resolution of his claims, then, will ultimately "depend[] upon [an] evaluation of [his] performance" as the Director of the APA Ethics Office "during the time of the contractual relationship." *Aspero*, 768 F.2d at 109.

In order to prove his allegations in the Complaint, Behnke will necessarily have to rely on the "rights, duties or obligations" under his employment agreement. Ex. 1, Behnke Emp't Agmt. ¶ 14. For example, Behnke contends that Defendants are liable for economic damages he sustained when he was improperly terminated from APA. Compl. ¶¶ 34, 40, 185, 250–51, 441. But Behnke's employment agreement precludes an award of economic damages because he was terminated for cause. *See* Ex. 1, Behnke Emp. Agmt. ¶ 6(ii) ("[i]n the event of a termination with cause … the Association shall not be obligated to make any additional payment of compensation of any kind to Employee…."). Behnke evidently intends to establish that he was "wrongful[ly] discharge[d]" by APA, Compl. ¶ 441; *see id.* ¶ 265, and in order to do so, he will have to demonstrate that he did not engage in, *inter alia*, "dereliction of duty," "continued unsatisfactory performance," and "behavior in violation of APA policies." Ex. 1, Behnke Emp't Agmt. ¶ 6(ii). Behnke will have to introduce evidence regarding his conduct as an APA

employee, his job duties and responsibilities, and his interaction with his superiors, colleagues and third parties. As Behnke's claim will necessarily involve conduct pertaining to his employment agreement and his duties as the Director of the APA Ethics Office, his claims are plainly arbitrable. *See Answers in Genesis*, 556 F.3d at 471 (holding that defamation claim was arbitrable where defense of truth would turn on meaning of agreement).

Behnke's claim that he was defamed by the IR's statements that he mishandled ethics complaints also arises under Behnke's duties as an APA employee. He cannot maintain his claim that Defendants defamed him by asserting that he mishandled ethics complaints "without reference to" his employment agreement and his position as an APA employee. *See* Compl. ¶¶ 19, 135–50, Ex. A Statement Nos. 11, 56, 57, 98, 217. On the merits, to prevail on these claims, the burden will be on Behnke to demonstrate that the factual statements in the IR were not only made with actual malice, but also that they were false, and that, as Director of APA's Ethics Office, he acted appropriately in handling ethics complaints. *See Savoy v. Univ. of Akron*, 2014-Ohio-3043, ¶ 18, 15 N.E.3d 430, 435 (Ohio Ct. App.) (holding that plaintiff must prove, *inter alia*, a "false statement" to prevail on a defamation claim); *see also J.L. Moore*, 2011 WL 220005, at *1–3 (holding that defamation claim was within scope of arbitration clause stating that "[a]ny claim arising out of or related to the Contract" is subject to arbitration, in part because proof of falsity would require analysis of whether party performed under the agreement). In order to do so, Behnke will be required to establish that he handled ethics complaints fairly, in accord with APA's established protocols and practices, and that he conducted these investigations "[f]aithfully and diligently" and "refrain[ed] from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of" APA. Ex. 1, Behnke Emp't Agmt. ¶ 5(i), (iii). As the Complaint references particular ethics investigations that were

conducted under Behnke's auspices, including investigations of Plaintiff James and Major John Leso, Behnke's rights, duties or obligations as APA's Ethics Office Director are directly at issue. Compl. ¶¶ 135–51. Behnke himself concedes that in an effort to prove his claims he intends to introduce evidence that he followed APA policies governing employees, which themselves "were flaw[ed]." *Id*. ¶ 148. As such, the operations of the Ethics Office, its policies and practices, Behnke's conduct in investigating ethics complaints, and his interactions with Ethics Office employees, Board members, APA's associate general counsel, complainants, complainees, and third parties would all be at issue.

Behnke's role as an APA employee is also intrinsic to his claim that he was defamed by the IR's conclusion that he "colluded" with DoD officials. Even assuming, only for purposes of this Motion, that the IR's conclusion regarding Behnke's collusion is actionable, and not merely opinion, *see, e.g.*, *Wampler v. Higgins*, 93 Ohio St. 3d 111, 132, 2001-Ohio-1293, 752 N.E.2d 962, 981–82 (Ohio Sp. Ct.), Behnke cannot maintain a defamation claim on this point "without reference to" his employment agreement and his position as an APA employee. To prove his claim on this issue, Behnke will have to demonstrate not only that Defendants made a statement of fact about him with actual malice, but also that the statement itself is false. *See, e.g.*, *Savoy*, 2014-Ohio-3043, ¶ 18, 15 N.E.3d at 435. In other words, Behnke will have to prove that, as the Director of the APA Ethics Office, he did *not* collude with DoD officials. Compl. ¶¶ 86, 210, 220; *see also id.* Ex. A Statement Nos. 5–8, 10, 45–46, 51, 114, 127, 135, 151, 158, 204. This will necessarily involve evidence pertinent to Behnke's authority and/or ability to influence APA policy, his actions undertaken in his position as the Director of the APA Ethics Office, his communications with Plaintiffs and DoD representatives, and his sharing of APA information with individuals outside of APA. These matters necessarily involve Behnke's "rights, duties or

obligations" as an APA employee, as well as his compliance with the duty of loyalty required of him pursuant to his employment agreement. *See* Ex. 1, Behnke Emp't Agmt. ¶¶ 5, 14; *cf. J.L. Moore*, 2011 WL 220005, at *2–3. To the extent that Behnke intends to prove that his degree of contact with DoD in the performance of his job duties was "normal," Compl. ¶¶ 133, he will necessarily put at issue the policies and practices of the APA Ethics Office and APA management, as well as his personal conduct – all under the umbrella of his employment agreement. *See* Ex. 1, Behnke Emp't Agmt. ¶ 5.

Similarly, Behnke's claim that Defendants defamed him in the IR's conclusion that "the facts 'strongly' suggest that [emails] were destroyed in an attempt to conceal…collaboration.'" cannot be adjudicated "without reference to" Behnke's employment agreement and his position as an APA employee. Compl. ¶ 213, Ex. A Statement Nos. 183, 184. The emails to which Behnke refers were on the APA server, and involved APA policy. *Id.* ¶ 214. In support of this claim, Behnke apparently intends to establish that he did not in fact destroy these records but, instead "archived all of his e-mails and placed them in a folder on the APA server to which Hoffman had access." *Id.* ¶¶ 213, 214; *see* Ex. A Statement Nos. 183, 184. Whether or not Behnke can prove this assertion, his proposed evidence involves his conduct as an APA employee, and APA policy regarding the preservation and destruction of documents. Moreover, the maintenance and nondisclosure of APA documents are expressly addressed in Behnke's employment agreement. Ex. 1, Emp't Agmt. ¶ 6(ii) (grounds for termination for cause include destruction of APA property, behavior in violation of APA policies, falsification of records, and misuse of APA resources), ¶ 5 (duty to "[f]aithfully and diligently" perform job functions and "[r]efrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of [APA]"). Litigation of claims regarding Behnke's alleged destruction of emails he

sent or received as an APA employee is encompassed within the scope of Behnke's employment agreement. *Id*.

Behnke's claim that he was defamed by an IR statement that he disclosed APA's confidential information to Plaintiff Banks, Compl. Ex. A Statement Nos. 161, 163, 173, also turns on analysis of Behnke's duties under his employment agreement. The nondisclosure of confidential APA information is specifically addressed in Behnke's employment agreement. *See* Ex. 1, Behnke Emp't Agmt. ¶ 8, ("Employee agrees that Employee will not at any time disclose confidential or proprietary information of the Association without the written approval of APA's Chief Executive Officer."); ¶ 5(iii)(no activity that is "contrary to the welfare, interests or benefits of [APA]"). In order to prove that he was defamed by a statement that he improperly disclosed confidential APA information to Plaintiff Banks, Behnke would need to show, among other things, either that the information he provided was not confidential or that its disclosure was approved by APA's Chief Executive Officer. *Id*. ¶ 8. The alleged defamatory statement and the evidence that will be needed to address it are within the scope of Behnke's duties as an APA employee, making this issue arbitrable. *See J.L. Moore*, 2011 WL 220005, at *2–3.

Behnke also contends that he was defamed by the IR's statements regarding payments he received from teaching DoD ethics workshops. Compl. ¶¶ 216–19, Ex. A Statement Nos. 49, 157. Again, assuming only for the purpose of this Motion that this could even be considered a potentially defamatory statement,[5] Behnke cannot litigate this claim "without reference to" his employment agreement and his position as an APA employee. *See* Compl. ¶¶ 216 –19, Ex. A

[5] The Complaint recites that the IR found that Behnke had conducted ethics classes for DoD, which directly paid APA for this work, except in two instances, in which Behnke represented that he had been paid directly and then remitted the payment to APA, minus his travel expenses. Compl. ¶ 216. The Complaint alleges that the IR asserts that there is some contrary evidence to Behnke's representation, and that Sidley was still receiving evidence from APA on this issue at the time of the preparation of the report. *Id*. Behnke contends that the IR left this issue open, which defamed him. *Id*. ¶ 218.

Statement Nos. 49, 157. Behnke's classes for DoD, and his payments for that work, were well within the scope of his employment agreement. *See* Ex. 1, Behnke Emp't Agmt. ¶ 5(ii) (employee required to devote full time to the business of APA, and outside consulting or employment must be approved in writing in advance by APA's CEO). Moreover, the litigation of this claim necessarily requires the parties to delve into APA's policies and practices with regard to employees providing services for the Government or other non-APA audiences, whether Behnke attended these sessions within the scope of his duties as an APA employee, whether he remitted the full amount he received for this work to APA, and whether it was permissible, as he suggested to Sidley, for DoD to pay his transportation costs, which he conceded he did not remit to APA (Compl. ¶ 216). These issues arise within the scope of Behnke's employment at APA and accordingly give rise to arbitrable claims. *See J.L. Moore*, 2011 WL 220005, at *2–3.

b. ***Newman's employment rights, duties or obligations are at the heart of his claims and are accordingly arbitrable.***

All of Newman's defamation claims are also arbitrable under the *Fazio* test because Newman cannot litigate those claims against Defendants "without reference to" his employment agreement and his position as an APA employee. *Fazio*, 340 F.3d at 395.

All of the allegedly defamatory statements made about Newman in the IR relate to his conduct and activities in his capacity as Executive Director for the APA Practice Directorate, *see generally* Compl. ¶ 205 (alleging that Plaintiffs' actions "had been undertaken in their roles as APA employees or persons who were appointed by APA to become involved in its activities"). As a threshold matter, Newman will be required to invoke the provisions of his employment agreement and his position as APA's Executive Director for Professional Practice because they explain "the relationship between the two parties." *Stromberg*, 2010-Ohio-1994, ¶ 15, 2010 WL

1820205, at *3.

Newman contends that his participation in the PENS Task Force was a function of his employment with APA as the Director of APA's Practice Directorate. Newman Aff. ¶ 4; Compl. ¶¶ 73, 229. Central to Newman's claims is that the IR defamed him by asserting that he had inadequately disclosed a conflict of interest while he was involved with the PENS Task Force—his marriage to Plaintiff Dunivin, who was a military psychologist and allegedly had a strong preference for having APA policy conform to DoD practices with regard to enhanced interrogation techniques. Compl. ¶¶ 44, 224–28, Ex. A Statement Nos. 13, 24, 25, 86, 88, 100–02, 108, 148. In support of his claim, Newman apparently intends to introduce evidence to establish that "APA had no conflict of interest policy at that time or at the time of PENS which prohibited Dr. Newman's participation in the Task Force," and that he nonetheless "disclosed the marriage to his Board and his superiors …." *Id.* ¶ 225. Newman also alleges that prior to his involvement with the PENS Task Force, APA obtained an opinion that although his marriage to Plaintiff Dunivin was not in itself a conflict of interest, it might have to be disclosed on a case-by-case basis. Compl. ¶¶ 226, 227.[6] At the heart of this claim are APA's policies and practices with regard to conflicts of interest, including what APA deems to be a conflict interest and for what purposes; whether compliance with those policies was an obligation of Newman's employment; whether those policies required disclosure of actual or potential conflicts of interest; when and to whom conflicts must be disclosed; in what format disclosure must be made; what actions must be taken within APA in the event of a conflict of interest, and the conduct of both Newman and his wife, Plaintiff Dunivin, regarding the disclosure of their relationship. But for APA policy and practice, and Newman's obligations as an APA employee, there could be no

[6] APA in fact will demonstrate that there was a financial conflict-of-interest policy that Newman signed, as well as one signed by Plaintiff Dunivin, that are pertinent to this claim.

assertion in the Complaint that the IR wrongfully concluded that Newman committed a breach of acceptable APA conduct. Newman cannot pursue a claim against APA regarding his conflict of interest without reference to the "rights, duties or obligations" he owed to APA under his employment agreement. Ex. 2, Newman Emp't Agmt. ¶ 15; Compl. ¶¶ 44, 224–29, Ex. A Statement Nos. 13, 24, 25, 86, 88, 100–02, 108, 148; *see J.L. Moore*, 2011 WL 220005, at *2–3.

Moreover, Newman has asserted that other conclusions set forth in the IR also defame him. *See supra* Section II.C.2 (i)-(viii). These allegations, at their core, concern the "rights, duties or obligations" Newman owed to APA under his employment agreement, including Newman's duty to "[f]aithfully and diligently" perform his job functions, and "[r]efrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of [APA]." Ex. 2, Newman Emp't Agmt. ¶ 6(i), (iii). Newman's rights, duties or obligations as an APA employee are fundamental to the resolution of his claims. *See Aspero*, 768 F.2d at 109.

Finally, to the extent that Newman contends that the IR asserted that he colluded with DoD officials to maintain loose APA ethics policies that would not constrain DoD, Compl. ¶¶ 5, 19, 86, Ex. A Statement Nos. 5–8, 10, 127, Newman's rights, duties or obligations as an APA employee would also be implicated, thereby requiring arbitration of that claim. Assuming only for purposes of this Motion that a statement regarding collusion can constitute the basis for a defamation claim, which it cannot,[7] in proving his cause of action Newman would need to establish not only that Defendants acted with actual malice, but also that the IR's statement about collusion is false. In so doing, Newman would be required to prove that, as Executive Director for the APA Practice Directorate, he did *not* collude with DoD psychologists. *Id.* ¶¶ 5, 19, 86, Ex. A Statement Nos. 5–8, 10, 127. Newman will be required to submit evidence and testimony

[7] The IR statements regarding collusion constitute opinion and cannot provide the basis for a defamation claim. *See, e.g., Wampler*, 93 Ohio St. 3d at 132, 2001-Ohio-1293, 752 N.E.2d at 981–82.

regarding what he did during the course of his employment for APA while serving on the PENS Task Force; his communications with DoD officials, Plaintiffs, and others inside and outside of APA regarding the formulation of APA policy; and his disclosure of APA information and strategy outside of APA. This evidence and testimony are squarely within the scope of Newman's employment agreement, which requires him to "[r]efrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of [APA]." Ex. 2, Newman Emp't Agmt. ¶ 6.

* * * * * * * * * *

In sum, under the *Fazio* test, for both Behnke and Newman, their respective job responsibilities, their actions as APA employees, and APA policies and practices are vital to their claims. Neither can maintain his claims against Defendants "without reference to" his "rights, duties or obligations" under his respective employment agreement. Ex. 1, Behnke Emp't Agmt. ¶ 14; Ex. 2, Newman Emp't Agmt. ¶ 15; *see Fazio*, 340 F.3d at 395. Even if the Court were to entertain doubts "concerning the scope of arbitrable issues" (and there should be none here), any doubts "should be resolved in favor of arbitration." *NCR Corp.*, 512 F.3d at 813; *see Moses H. Cone*, 460 U.S. at 24–25; *Acad. of Med.*, 108 Ohio St. 3d at 188, 2006-Ohio-657, ¶ 14, 842 N.E.2d at 492.

B. The Court Should Compel Arbitration under R.C. § 2711.02(A).

The Ohio Arbitration Act supplies the procedural mechanisms for enforcing the arbitration provisions in the Behnke and Newman employment agreements, notwithstanding the application of federal law in the determination of whether Behnke's and Newman's claims are arbitrable. *See Jankovsky v. Grana-Morris*, No. 2000-CA-62, 2001 WL 1018337, at *2 (Ohio Ct. App. Sept. 7, 2001) (applying R.C. § 2711.02 rather than § 3 of the FAA because "federal law would not control state court procedure, even though federal substantive law may apply to

interpretation of the contract").[8] The Ohio Arbitration Act provides a procedural mechanism by which a court may order a party to arbitrate its claims. Under the Ohio Arbitration Act, "[a] party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement." R.C. § 2711.03(A).[9] Following a five-day notice period, "[t]he court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement." *Id.*

Pursuant to R.C. § 2711.03(A), once the Court becomes satisfied that a dispute is arbitrable, it should issue an order directing the parties to proceed to arbitration in accordance with the agreement.[10] A court is deemed "satisfied" that arbitration should proceed once it concludes that there is a valid arbitration agreement, and that the parties' dispute is within the scope of the arbitration provision. *Id.; see also Int'l Union of Operating Eng'rs, Local 18 v. Norris Bros. Co., Inc.*, 2015-Ohio-1140, ¶ 25, 2015 WL 1375253, at *6 (Ohio Ct. App. Mar.26,

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[8] In any event, Ohio courts agree that the procedures under § 3 of the FAA and R.C. § 2711.02(B) are analogous. *E.g.*, *Pyle v. Wells Fargo Fin.*, 2005-Ohio-6478, ¶ 19, 2005 WL 3304098, at *3 (Ohio Ct. App. Dec. 6, 2005) (noting that "the Ohio Supreme Court has found that Section 3 of the FAA 'closely resembles' R.C. 2711.02 . . . and that the procedural requirements under these statutes are the same").

[9] Section 4 of the FAA contains a similar mechanism: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

[10] R.C. § 2711.03(A) states as follows:

> The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. Five days' notice in writing of that petition shall be served upon the party in default. Service of the notice shall be made in the manner provided for the service of a summons. The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.

2015) ("If the trial court determines that the validity or compliance with the arbitration provision is not in issue after hearing the parties, the trial court is then required to compel arbitration.").

Here, as demonstrated above, Behnke's and Newman's claims against Defendants are clearly arbitrable. *See supra*, Section III.A. Nor can there be any dispute that the Behnke and Newman employment agreements are valid and binding. *See* Ex. 1, Behnke Emp't Agmt.; Ex. 2, Newman Emp't Agmt. The Court should accordingly be satisfied that Behnke's and Newman's claims are arbitrable and compel arbitration of their claims "in accordance with the Agreement[s]." R.C. § 2711.03(A).

C. R.C. § 2711.02(B) Requires a Stay of this Action Pending Completion of the Arbitration Proceeding.

Once the Court decides to compel arbitration, it must stay the pending lawsuit in its entirety. R.C. § 2711.02(B) prescribes the standard for a stay of litigation pending arbitration. It provides:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, *upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall* on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

Id. (emphasis added). *See also See Krafick v. USA Energy Consultants, Inc.*, 107 Ohio App. 3d 59, 64, 667 N.E.2d 1027, 1030 (Ohio Ct. App. 1995) ("The language of this provision is mandatory and it 'shall' be enforced."); *N. Park Ret. Cmty. Ctr., Inc. v. Sovran Cos.*, 2011-Ohio-5179, ¶ 6, 2011 WL 4600700, at *2 (Ohio Ct. App. Oct. 6, 2011) ("R.C. 2711.02[B] is consistent with the Federal Arbitration Act, Section 3, Title 9, U.S. Code, which likewise states that the federal courts have no discretion to deny a stay if the issues raised are within the agreement to arbitrate."); *McDaniel v. Gateway Computer Corp.*, 2004-Ohio-5368, ¶ 9, 2004 WL 2260497, at

*2 (Ohio Ct. App. Sept. 24, 2004) ("If a suit is brought in court upon any issue that is referable to arbitration, the court in which such suit is pending shall stay the proceedings until arbitration is completed." (emphasis added) (citing 9 U.S.C. § 3; R.C. §§ 2711.02, 2711.03))

A court analyzes an application for a stay of litigation under R.C. § 2711.02(B) under the same standard as a motion to compel arbitration under R.C. § 2711.03(A); namely, the court must be "satisfied" that the matter at issue in the action is referable to arbitration under a valid arbitration agreement. *Marquez v. Koch*, 2012-Ohio-5466, ¶ 10, 2012 WL 5928196, at *2 (Ohio Ct. App. Nov. 19, 2012) (holding that the trial court erred in denying the appellant's motion to stay proceedings pending arbitration because the trial court had determined that the parties entered into an arbitration agreement and the agreement was enforceable). "Given both the judicial and legislative predisposition to resolving disputes by arbitration, a party opposing a motion to stay proceedings pending arbitration has a heavy burden." *Cheney v. Sears, Roebuck & Co.*, 2005-Ohio-3283, ¶ 6, 2005 WL 1515388, at *2 (Ohio Ct. App. June 28, 2005).

The stay mandated by R.C. § 2711.02(B) extends to *all* claims in the litigation, regardless of whether or not there are additional parties to the litigation who will not be arbitrating claims. "Where *any* claim in an action is subject to arbitration under R.C. § 2711.02(B), a court must stay the *entire* proceeding, although non arbitrable claims exist." *Jarvis v. Lehr*, 2014-Ohio-3567, ¶ 11, 2014 WL 4088093, at *3 (Ohio Ct. App. Aug. 20, 2014) (emphasis added). "Once a court determines an issue in the proceeding is covered by a written arbitration agreement, even claims involving nonsignatories to the arbitration agreement will be stayed under R.C. 2711.02(B)." *Id.* Thus, in a case involving multiple plaintiffs and multiple defendants—some of whom have signed an arbitration agreement and others of whom have not—if even only one claim between one plaintiff and one defendant is subject to an arbitration

agreement, the entire litigation must be stayed until arbitration of that claim is resolved. *BSA Invs., Inc. v. DePalma*, 173 Ohio App. 3d 504, 507, 2007-Ohio-4059, ¶¶ 13–17, 879 N.E.2d 222, 224–25 (Ohio Ct. App.).

The courts' reasoning for staying all proceedings while arbitration proceeds against fewer than all of the parties is grounded in the clear mandatory language of the statute, which by its express language provides the court no discretion to entertain some claims while subjecting others to arbitration. *Marquez*, 2012-Ohio-5466, ¶ 10, 2012 WL 5928196 at *2 ("we interpret a provision containing the word 'shall' as mandatory"); *BSA Invs.*, 173 Ohio App. 3d at 506–07, 2007-Ohio-4059, ¶ 11, 879 N.E.2d at 224 ("The trial court abused its discretion when it denied [defendant's] motion to stay proceedings pending arbitration, despite the fact that other parties were involved in the action.").

The mandatory nature of a stay in these circumstances has been universally recognized by Ohio courts. *See, e.g.*, *Raber v. Emeritus at Marietta*, 2016-Ohio-1531, ¶¶ 22–25, 49 N.E.3d 345, 351–52 (Ohio Ct. App.) (holding that the trial court erred in failing to stay nonarbitrable claims asserted by nonsignatories pending arbitration of claims governed by an agreement subject to the FAA); *Litman v. HCR Manorcare, Inc.*, 2015-Ohio-2637, ¶ 17, 2015 WL 3964026, at *3 (Ohio Ct. App. June 29, 2015) (concluding that the trial court committed reversible error in staying only the arbitrable claims); *Marquez*, 2012-Ohio-5466, ¶ 11, 2012 WL 5928196 at *2 (noting that "the presence of non-arbitrable claims and parties not subject to an arbitration agreement does not justify the denial of Appellants' motion to stay"); *Cheney*, 2005-Ohio-3283, ¶ 12, 2005 WL 1515388 at *3 ("Pursuant to R.C. 2711.02, when an action involves both arbitrable and non-arbitrable claims, the entire proceeding must be stayed until the issues that are subject to arbitration are resolved."). The Court lacks discretion to hold otherwise.

Here, because the claims of Behnke and Newman must be arbitrated, all further proceedings in this litigation must be stayed as a matter of course. *See, e.g.*, *Raber*, 2016-Ohio-1531, ¶¶ 22–25, 49 N.E.3d at 351–52; *Jarvis*, 2014-Ohio-3567, ¶ 11, 2014 WL 4088093, at *3; *BSA Invs., Inc.*, 173 Ohio App. 3d at 507, 2007-Ohio-4059, ¶¶ 13–17, 879 N.E.2d at 224–25. The Court has "no discretion to deny a stay if the issues raised are within the agreement to arbitrate," *N. Park Ret. Cmty. Ctr., Inc.*, 2011-Ohio-5179, ¶ 6, 2011 WL 4600700 at *2. The Court must stay all further proceedings in this case while Behnke, Newman, and APA arbitrate Behnke's and Newman's claims. At such time as the arbitration proceedings and any related litigation are final, this Court can resume litigation of the remainder of the claims pertinent to the other Plaintiffs. *McGuffey v. LensCrafters, Inc.*, 141 Ohio App. 3d 44, 50-53, 749 N.E.2d 825, 830–32 (2001).

IV. CONCLUSION

For the foregoing reasons, APA respectfully requests that this Court grant APA's motion to compel arbitration and order Plaintiffs Behnke and Newman to arbitrate their claims against APA in Washington, D.C., in accordance with the arbitration provisions in their employment agreements; and stay the entire action pending finality of the arbitration proceedings and any related litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 30th day of May, 2017, I electronically filed the foregoing Defendant American Psychological Association's Memorandum in Support of Its Motion to Compel Arbitration and Application to Stay Litigation with the Clerk of Courts using the Court's electronic filing system, which will send electronic notification of such filing to participants in the electronic filing system, and I certify that I have served by electronic mail or U.S. Mail the document to the parties not participating in the electronic filing system.

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Attorneys for Defendants Sidley Austin LLP and David Hoffman

/s/ J. Steven Justice
J. Steven Justice

Exhibit 1

EMPLOYMENT AGREEMENT

EMPLOYMENT AGREEMENT ("Agreement"), made and entered into between the American Psychological Association (hereinafter referred to as "the Association") and Stephen H. Behnke, JD, PhD, hereinafter referred to as "Employee").

WITNESSETH:

WHEREAS, the Association represents the nation's scientific and professional psychological interests before the public and Government and carries out other functions on a nonprofit basis; and

WHEREAS, the Association employs certain professionals and other staff personnel to assist it in performing its activities; and

WHEREAS, the Association desires to continue to employ the Employee on the terms provided herein; and the Employee desires to be an employee of the Association on the terms provided herein;

WHEREAS, the Association desires to continue to assign the Employee to the position of Director of Ethics;

NOW, THEREFORE, the Association and Employee agree as follows:

1. EMPLOYMENT. The Association hereby continues to employ Employee and Employee hereby accepts employment subject to and on the terms and conditions set forth herein.

2. TERM AND RENEWAL. The term of the employment under this Agreement commences on January 1, 2012 and shall continue until December 31, 2016, subject to early termination as is hereinafter provided. Any renewal of this employment Agreement shall be in writing and contain such terms and conditions as are mutually agreed upon in writing by the Association and Employee at that time. (Hereafter, the term "Agreement" shall include any renewal thereof unless the provision is modified in the written renewal agreement.) Any non-renewal decision shall be communicated in writing by the Association and shall be transmitted to Employee at least three months prior to the end of the term of this Agreement. Employee shall be paid regular compensation and benefits as specified in paragraphs 3 and 4, during such three months notice period regardless of whether notice is timely given by the Association. However, any failure by the Association to give Employee such three-months' notice shall not extend the term of this Agreement, require Employee to work beyond the term of this Agreement, or otherwise entitle Employee to any additional compensation other than that provided herein. In addition, if Employee remains ready and willing to renew the employment at the end of the term of this Agreement on terms and conditions acceptable to APA and APA determines that it will not renew, Employee shall be paid a lump sum amount equivalent to six (6) months of Employee's base annual salary at the rate in effect on the Employee's last day. The Association shall also pay the full cost of COBRA health benefits for three (3) months. If Employee does not continue to render services through the end of the term of this Agreement, then, Employee will not be entitled to the additional six (6) months compensation and three (3) months payment for COBRA as set forth in this subsection unless the Association waives the Employee's obligation to work.

3. COMPENSATION. For all services rendered by Employee under this Agreement, the Association shall pay Employee a base annual salary of $218,354 per year, payable in accord with APA's payroll policies as amended from time to time. Employee's base annual salary shall be reviewed periodically.

4. BENEFITS. The Association shall provide Employee with the standard benefits package, including leave accumulation and insurance, as described in the Employee's Policy and Procedures Manual, which is subject to change from time to time.

5. DUTIES. From and after the effective date hereof, Employee during the continuance of Employee's employment by the Association shall:

(i) Faithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of this Agreement;

(ii) Devote the equivalent of full time to the business of the Association and perform such activities as may be assigned by the Chief Operating Officer/Deputy CEO, or as may be required, from time to time; any outside consulting or employment undertaken by Employee must be approved in writing in advance by APA's Chief Executive Officer; and

(iii) Refrain from engaging in any activity which is, or may be, contrary to the welfare, interests, or benefits of the Association.

No later than the end of each calendar year of this Agreement, the Chief Operating Officer/Deputy CEO, shall conduct an annual review of Employee's performance.

6. TERMINATION. This Agreement shall terminate at the end of the term of employment, as set forth in Paragraph 2 hereof, or at the end of any renewal term, or may be terminated in the following manner:

(i) Without cause, Employee may terminate this Agreement at any time upon three (3) months' written notice to the Association, or, if by mutual written agreement, upon less than three months' written notice. In such event, Employee, if requested by the Association in writing, shall continue to render Employee's services and shall be paid Employee's regular compensation up to date of termination at which time Employee shall also be compensated for unused leave. If Employee does not give the Association three (3) months written notice of intent to terminate or if Employee does not comply with the Association's request to continue rendering services to the date of termination, then the termination will be treated as one under subparagraph (ii) immediately below. The notice requirement of this subparagraph may be waived by the Association in the event of extenuating circumstances;

(ii) The Association may terminate this Agreement with cause at any time by sending written notice to Employee specifying the cause of termination. Acts constituting grounds for termination with cause shall include, but not be limited to: insubordination; destruction of APA property; dereliction of duty; continued unsatisfactory performance; misuse of Association resources; behavior in violation of APA policies; falsification of records; violent, abusive or disruptive behavior; harassment; conduct in violation of state or federal laws; fraud or other acts of moral turpitude. In the event of a termination with cause, this Agreement shall terminate on the date of the mailing of such notice, the Association shall pay regular compensation up to the date of termination, and the Association shall not be obligated to make any additional payment of compensation of any kind to Employee, except unused leave or as required by law

(iii) The Association may terminate this Agreement without cause only upon three (3) months' written notice to Employee. In such event, Employee shall be paid regular compensation and benefits as specified in paragraphs 3 and 4, up to the date of termination, which shall be a date three months after receipt of written notice by Employee (Date of Termination). In addition, after the Date of Termination, Employee shall be paid a lump sum amount equivalent to six (6) months of Employee's base annual salary at the rate in effect on the Date of Termination. The Association shall also pay the full cost of COBRA health benefits for three (3) months. If Employee does not continue to render services through the Date of Termination (i.e., during the notice period), then, Employee will not be entitled to the additional six (6) months compensation and three (3) months payment for COBRA as set forth in this subsection unless the Association waives the Employee's obligation to work during the notice period.

(iv) If during the term of this agreement Employee should die, or become Disabled (as defined below), this agreement shall terminate. In such event, Employee (or Employee's estate) shall be paid Employee's compensation in accordance with Paragraph 3 for three (3) months after the date of termination. This provision does not limit any rights to short or long term disability benefits provided under the Association policies at the time disability occurs.

For purposes of this Paragraph 6(iv), Disabled shall mean Employee is unable to engage in any substantial gainful activity by reason of any medically-determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, or Employee is by reason of any medically-determinable physical or mental impairment which can be expected to result in death or can be excepted to last for a continuous period of not less than twelve (12) months, receiving income replacement benefits for a period of not less than three (3) months under an accident and health plan covering employees of the Association.

Upon termination of this Agreement for any reason, Employee shall cease using the title of Director of Ethics or in any other fashion holding himself out as an employee or agent of the Association.

7. NON-COMPETITION. Employee agrees that during the term of Employee's employment and for so long as Employee is receiving compensation from the Association, Employee will not engage in any activity in any capacity (including as a principal, agent, officer, employee or consultant) that competes or may compete, either directly or indirectly, with any activities of the Association. Employee further agrees that for one year after the latter of (a) the termination of that employment, whether with or without cause, and (b) the termination of Employee's receipt of compensation from the Association, Employee will not engage in any activity in any capacity that competes for the actual or potential membership of the Association.

8. CONFIDENTIALITY. Employee agrees that Employee will not at any time disclose confidential or proprietary information of the Association without the written approval of APA's Chief Executive Officer.

9. BREACH. If Employee breaches the terms of paragraph 7 or paragraph 8 of this Employment Agreement, the Association shall have no further obligation to make any additional payments of compensation of any kind to Employee, or to provide any further benefits, except as required by law. In addition, Employee acknowledges that a violation by Employee of the terms of paragraphs 7 or 8 would be a material breach of this Agreement, and Employee agrees that, in the case of such a violation, the Association would be entitled to injunctive relief from the courts. The parties agree that the provisions of this paragraph and paragraphs 7 and 8 are necessary and reasonable for the protection of the business and goodwill of the Association and that the violation of those provisions would cause irreparable harm to the Association. The parties further agree that the provisions of this paragraph and paragraphs 7 and 8 shall survive the termination of this Agreement.

10. ASSIGNMENT. This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors, and assigns. Neither Employee nor Employee's spouse/domestic partner, however, shall assign any part of Employee's or spouse's/domestic partner's rights under this Agreement unless the Association agrees thereto in writing. In the event of a merger, consolidation or reorganization involving the Association, this Agreement shall continue in force and become an obligation of the Association's successor and/or successors.

11. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement of the parties and supersedes any and all previous agreements between the parties. It may not be changed orally, but only by an agreement in writing between the parties. Any notice required or permitted to be given under the Agreement shall be sufficient if in writing and sent by registered mail to Employee's residence, or to the principal office of the Association. The parties to this Agreement hereby acknowledge that there exist no agreements, promises or understandings except as set forth herein.

12. SEVERABILITY/WAIVER. In the event that any provision of this Agreement shall be held invalid or illegal, the remaining provisions shall remain in force and effect and shall in all respects be binding on the parties. If either party waives a breach of this Agreement by the other party, that waiver will not operate or be construed as a waiver of later similar breaches.

13. GOVERNING LAW. This Agreement shall be deemed to have been made and executed in the District of Columbia and the legality, interpretation, construction, performance, obligations, and enforceability of this Agreement shall be determined under the substantive law of the District of Columbia.

14. ARBITRATION. Except as provided in Paragraphs 7, 8, and 9, the parties agree that, in the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this Agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules. In either case, the sole arbitrator may grant any relief as may be just and equitable, including specific performance and declaratory relief. The parties further agree that the situs of such arbitration shall be Washington, D.C., that the judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof, and that the losing party shall pay the arbitrator's fees.

15. LEGAL COUNSEL. Employee acknowledges he has read this Agreement and understands it, and that he has had the opportunity to consult with any attorney of Employee's choice prior to signing it and has done so.

16. EFFECTIVE DATE. This Agreement shall become effective on January 1, 2012

IN WITNESS WHEREOF, Employee and the Association, by its duly authorized officer, have caused this Agreement to be executed and have subscribed their names on this _____ day of _____.

Stephen H. Behnke, JD, PhD
Employee

12/8/11
Date

Witness

L. Michael Honaker, PhD
Chief Operating Officer and
Deputy CEO

12/8/11
Date

Witness

Norman B. Anderson, PhD
Executive Vice President and
Chief Executive Officer

12/9/11
Date

Cassandra E. Kemp
Witness

Exhibit 2

AMENDED EMPLOYMENT AGREEMENT, made and entered into effective as of January 1, 2003, between the American Psychological Association (hereinafter referred to as "the Association") and Russell S. Newman, PhD, JD, (hereinafter referred to as "Employee").

WITNESSETH:

WHEREAS, the Association represents the nation's scientific and professional psychological interests before the public and Government and carries out other functions on a nonprofit basis; and

WHEREAS, the Association employs certain professionals and other staff personnel to assist it in performing its activities; and

WHEREAS, the Association desires to continue to employ the Employee on the terms provided herein; and the Employee desires to continue to be an employee of the Association on the terms provided herein;

NOW, THEREFORE, the Association and Employee agree as follows:

1. EMPLOYMENT. The Association hereby continues to employ Employee and Employee hereby accepts employment subject to and on the terms and conditions set forth herein.

2. TERM AND RENEWAL. The term of the employment shall continue until December 31, 2007 ("Contract Termination Date"), subject to early termination as is hereinafter provided. Any renewal of this employment agreement shall be in writing and contain such terms and conditions as are mutually agreed upon in writing by the Association and Employee at that time. Any non-renewal decision shall be communicated in writing by the Association and shall be transmitted to Employee at least six months prior to the end of the term of this agreement, or any renewal thereof. However, any failure by the Association to give Employee such six-months, notice shall not extend the term of this agreement. However, if the Association fails to give Employee six-months' notice of a decision not to renew his contract, the Employee shall be entitled to Compensation and benefits as set forth in Paragraphs 3 and 4 for a period of six months after the Employee has been notified that his contract will not be renewed. At the conclusion of the six-month period, Employee shall then begin the Executive Leave Period as provided in Paragraph 5.

3. COMPENSATION. For all services rendered by Employee under this agreement, the Association shall pay Employee a base

[illegible] per year and a salary supplement of $50,000 per year ("Compensation"), payable in accord with ~~APA's~~ the Association's payroll policies as amended from time to time. Employee's base annual salary shall be reviewed periodically.

4. BENEFITS. The Association shall provide Employee with the standard benefits package, including leave accumulation and insurance, as described in the Employee's Policy and Procedures manual, which is subject to change from time to time. In addition, the Association shall pay the entire premium cost of that health and dental insurance. The Association shall also provide a parking space at no cost to Employee for Employee's personal use only.

5. PERSONAL TIME OFF (PTO) AND EXECUTIVE LEAVE. Employee will earn one month of executive leave for each twelve months of employment beginning with October 1, 1992, up to 12 months of leave. During Employee's term of employment, accrued executive leave shall be taken by the Employee solely to the extent such leave is consistent with the Employee's duties at the Association and the needs of the Association and subject to the approval of the Chief Executive Officer. On the Contract Termination Date, Employee will forfeit any unused PTO accumulated in accordance with Paragraph 4. Employee will remain employed following the Contract Termination Date until all remaining accrued executive leave has been exhausted ("Executive Leave Period"). During the Executive Leave Period, Employee will remain available to provide services to the Association and will continue to receive Compensation and benefits in accordance with Paragraphs 3 and 4. Employee's employment will terminate at the conclusion of the Executive Leave Period. If during the Executive Leave Period Employee is engaged in other activities or employment which make it not possible or appropriate for Employee to continue as an employee of the Association, or which cause Employee to be out of compliance with Paragraphs 6 or 8, Employee's employment shall cease upon written notice from APA. In such case, Association shall then make either a one-time payment, or monthly payments (the Association shall determine whether the payment shall be one-time or monthly), to Employee for the Compensation due through the end of the Executive Leave Period, but Employee shall not be entitled to benefits that would have been payable during the remainder of the Executive Leave Period.

6. DUTIES. From and after the date hereof, Employee during the continuance of Employee's employment by the Association shall:

(i) Faithfully and diligently do and perform such acts and duties and furnish such services required or reasonably contemplated by the terms of this agreement;

business of the Association (except as provided in Paragraph 5) and perform such activities as may be assigned by the Chief Executive Officer or as may be required, from time to time; any outside consulting or employment undertaken by Employee must be approved in writing in advance by APA's Chief Executive Officer; and

(iii) Refrain from engaging in any activity, which is, or may be, contrary to the welfare, interests, or benefits of the Association.

No later than the end of each calendar year the Chief Executive Officer shall conduct an annual review of Employee's performance.

7. TERMINATION. This agreement shall terminate on the Contract Termination Date, as set forth in Paragraph 2 hereof, (as extended through the Executive Leave Period as set forth in Paragraph 5) or at the end of any renewal term, or may be terminated in the following manner:

(i) Without cause, Employee may terminate this agreement at any time upon six (6) months, written notice to the Association. In such event, Employee, if requested by the Association in writing, shall continue to render Employee's services and shall be paid Employee's Compensation up to date of termination at which time Employee shall then enter into the Executive Leave Period pursuant to Paragraph 5. If Employee does not give the Association six (6) months written notice of intent to terminate or if Employee does not comply with the Association's request to continue rendering services to the date of termination, then the termination will be treated as one under subparagraph (ii) immediately below. The notice requirement of this subparagraph may be waived by the Association in the event of extenuating circumstances;

(ii) The Association may terminate this agreement with cause at any time by sending written notice to Employee specifying the cause of termination. Acts constituting grounds for termination with cause shall include, but not be limited to: insubordination; destruction of Association property; dereliction of duty;

unsatisfactory performance, misuse of Association resources; behavior in violation of Association policies; falsification of records; violent, abusive or disruptive behavior; harassment; conduct in violation of state or federal laws; fraud or other acts of moral turpitude. In the event of a termination with cause, this agreement shall terminate on the date of the mailing of such notice, the Association shall pay Compensation and provide benefits up to the date of termination, in accordance with Paragraphs 3 and 4, and the Association shall not be obligated to make any additional payment of Compensation of any kind to Employee, including Executive Leave under Paragraph 5, except unused leave as specified in Paragraph 4, or as otherwise required by law;

(iii) The Association may terminate this agreement without cause only upon six (6) months written notice to Employee. In such event Employee shall be paid Compensation and provided benefits as specified in Paragraphs 3 and 4, up to the date of termination, which shall be a date six months after receipt of written notice by Employee, (Date of Termination). In addition, after the Date of Termination, Employee shall be paid Compensation at the rate in effect on the Date of Termination for the lesser of (a) the remaining term of the agreement or (b) six months, provided that Employee shall exercise Employee's best effort to secure other reasonable employment and that the Compensation payable to Employee after the Date of Termination shall be reduced by any amounts received by Employee from other employment. If, during this period, Employee accepts other employment with Compensation equal to or greater than the Compensation Employee would have earned under this agreement, the Association's obligation to pay such Compensation after the Date of Termination will cease. Furthermore, if Employee does not continue to render services through the Date of Termination (i.e., during the notice period), then, Employee will not be entitled to Compensation after the Date of

subparagraph (iii) unless the Association waives the obligation to work during the notice period. In any event Employee will be given at least six (6) months notice of termination without cause and at least six (6) months notice of a decision not to renew this agreement. In addition, Employee shall receive a one-time payment, or monthly payments (the Association shall determine whether the payment shall be one-time or monthly), equal to the Compensation that would have been payable to Employee during the Executive Leave Period that was accumulated as of the Date of Termination.

(iv) If during the term of this agreement Employee should die, or become unable to perform the essential functions of the position with reasonable accommodation, this agreement shall terminate. In such event, Employee (or Employee's estate) shall be paid Employee's Compensation in accordance with Paragraph 3 for three months after the date of termination and shall be paid for all unused Executive Leave accumulated pursuant to Paragraph 5. This provision does not limit any rights to short or long term disability benefits provided under APA policies at the time disability occurs.

Upon termination of Employee's employment for any reason, Employee shall cease holding himself out as an employee or agent of the Association.

8. NON-COMPETITION. Employee agrees that during the term of Employee's employment and for so long as Employee is receiving Compensation from the Association (including during the Executive Leave Period), Employee will not engage in any activity in any capacity (including as a principal, agent, officer, employee or consultant) that competes or may compete, either directly or indirectly, with any activities of the Association. Employee further agrees that for one year after the later of (a) the termination of that employment, whether with or without cause, or (b) the termination of Employee's receipt of Compensation from the Association, Employee will not engage in any activity in any capacity that competes for the actual or potential membership of the Association.

9. CONFIDENTIALITY. Employee agrees that Employee will not at any time disclose confidential or proprietary information of

Chief Executive Officer.

10. BREACH. If Employee breaches the terms of Paragraph 8 or Paragraph 9 of this agreement, the Association shall have no further obligation to make any additional payments of Compensation of any kind to Employee, or to provide any further benefits, except as required by law. In addition, Employee acknowledges that a violation by Employee of the terms of Paragraphs 8 or 9 would be a material breach of this agreement, and Employee agrees that, in the case of such a violation, the Association would be entitled to injunctive relief from the courts. The parties agree that the provisions of this Paragraph and Paragraphs 8 and 9 are necessary and reasonable for the protection of the business and goodwill of the Association and that the violation of those provisions would cause irreparable harm to the Association. The parties further agree that the provisions of this Paragraph and Paragraphs 8 and 9 shall survive the termination of this agreement.

11. ASSIGNMENT. This agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors, and assigns. Neither Employee nor Employee's spouse/domestic partner, however, shall assign any part of Employee's or his/her rights under this agreement unless the Association agrees thereto in writing. In the event of a merger, consolidation or reorganization involving the Association, this agreement shall continue in force and become an obligation of the Association's successor and/or successors.

12. ENTIRE AGREEMENT. This agreement constitutes the entire agreement of the parties and supersedes any and all previous agreements between the parties. It may not be changed orally, but only by an agreement in writing supplied by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought. Any notice required or permitted to be given under the agreement shall be sufficient if in writing and sent by registered mail to Employee's residence, or to the principal office of the Association. The parties to this agreement hereby acknowledge that there exist no agreements, promises or understandings except as set forth herein.

13. SEVERABILITY/WAIVER. In the event that any provision of this agreement shall be held invalid or illegal, the remaining provisions shall remain in force and effect and shall in all respects be binding on the parties. If either party waives a breach of this agreement by the other party, that waiver will not operate or be construed as a waiver of later similar breaches.

14. GOVERNING LAW. This agreement shall be deemed to have been made and executed in the District of Columbia and the legality, interpretation, construction, performance, obligations,

the substantive law of the District of Columbia.

15. ARBITRATION. Except as provided in Paragraphs 8,9,and 10, the parties agree that, in the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules. In either case, the sole arbitrator may grant any relief as may be just and equitable, including specific performance and declaratory relief. The parties further agree that the situs of such arbitration shall be Washington, D.C., that the judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof, and that the losing party shall pay the arbitrator's fees.

16 LEGAL COUNSEL. Employee acknowledges that he has read this agreement and understands it, and that he has had the opportunity to consult with any attorney of Employee's choice prior to signing it and has done so.

17. EFFECTIVE DATE. This agreement is effective as of January 1, 2003.

IN WITNESS WHEREOF, Employee and the Association, by its duly authorized officer, have caused this agreement to be executed and have subscribed their names on this ____day of _____2003.

Russell S. Newman, PhD, JD — 12/18/03 — Date — Witness 12/18/

Norman B. Anderson, Ph.D. — 12/14/03 — Date — Witness 12/1

Executive Vice President and
Chief Executive Officer

Exhibit 3

SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN STREET
CHICAGO, IL 60603
(312) 853 7000
(312) 853 7036 FAX

David H. Hoffman
Partner

David.hoffman@sidley.com
(312) 853-2174

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SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

November 20, 2014

Nathalie Gilfoyle, Esq.
General Counsel
American Psychological Association
750 First Street, N.E.
Washington, DC 20002

Dear Ms. Gilfoyle:

We are pleased that the American Psychological Association ("the APA" or "you") has asked us to serve as its counsel in order to conduct an independent review relating to allegations that, following the attacks of September 11, 2001, the APA colluded with U.S. government officials to support torture with regard to the interrogations of detainees who were captured and held abroad. This letter governs the terms of your engagement of us in this matter ("the Matter").

If the terms of engagement and the other matters set forth in this letter are acceptable to the APA, please sign a copy of this letter and return it to me.

Client; Scope of Representation. The client in this Matter will be the APA, and not any APA division, affiliated organization, or individual APA director, officer, employee, or member. Sidley Austin LLP ("we" or "Sidley") will provide legal advice and assistance to the APA in connection with, and the scope of our engagement and duties to the APA shall relate solely to, this Matter (the "Representation"). We will report to the Special Committee of the Board of Directors ("the Special Committee"), whose authority and purpose is set out in the Resolution of the APA Board of Directors dated November 12, 2014.

Our Independence; Privileges; Certain Witness Communications. We understand that it is the intent of the APA that we conduct this review in a fully independent manner, and we will do so. We have been instructed that the sole objective of our review will be to ascertain the truth about the allegations described above, following an independent review of all available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to APA. At the conclusion of our independent review, we will present our final report to the Special Committee ("the Final Report"). We understand that the Board of Directors will subsequently make our final report available to the APA Council of Representatives, APA members, and the public.

We and the APA agree as follows with regard to the application of privileges to this Representation. First, except as provided in the sentences in parentheses that follow this sentence, the Final Report, and the work we do to gather facts and evidence in order to conduct our independent review and prepare the Final Report (the "Fact Finding Work"), will not be covered by, and the APA does not expect to assert a claim of, the attorney-client communication privilege as to those matters. (However, our review of documents with a pre-existing privilege will be covered by the attorney-client communication privilege and will not constitute a waiver of the privilege as to those documents, unless the Board or the Special Committee on behalf of the Board waives the privilege as to specific documents. If we decide that our Final Report should include, quote, describe or cite any such privileged documents, we will let the Special Committee know and request that the privilege be waived so that we can use the document in the Final Report.) Decisions regarding disclosure, if any, of any non-privileged factual materials collected in connection with the review that are not part of the Final Report will be made by the APA Board of Directors. Second, internal work product prepared by us as part of this work, including but not limited to notes, memos, drafts, and internal emails, will be presumptively considered by us and the APA as covered by the attorney work product doctrine as applicable. Third, other than the Final Report and communications of a factual nature that are part of the Fact Finding Work, all communications between us and (i) the Special Committee, and/or (ii) any in-house and external counsel assisting the Special Committee with regard to this Matter, will be presumptively considered by us and the APA as covered by the attorney-client communication privilege as applicable. Any decisions about waiver of attorney-client or work product privilege will be made by the APA Board of Directors, in consultation with Sidley with respect to the work product privilege that is applicable to any work product created by Sidley other than the Final Report.

We and the APA agree as follows with regard to our communications with individuals who wish to provide information to us during our independent review while limiting our knowledge or disclosure of their identity. First, if an individual wishes to provide us with information anonymously during our independent review (an "Anonymous Witness"), we may accept that information. Second, if an individual other than an APA director, officer or employee, who identifies himself or herself to us wishes to provide us with information while keeping his or her identity confidential from the APA or other entity (a "Confidential Witness"), we are authorized to agree, and to communicate to the person, that we will not provide his or her ~~identity to the APA or other~~ entity, unless ordered by a court to do so. In our independent review, the information provided by an Anonymous Witness or a Confidential Witness will be given the evidentiary weight that is appropriate under all the circumstances, including the anonymity or confidentiality of the witness' identity.

Fees and Expenses. Our fees relating to this Matter will be based on the 2014 billing rate, less a 15% discount, for each attorney and paralegal (as well as any other relevant timekeeper), as applicable, devoting time to this Matter. We will continue to base our fees on our 2014 billing rates for all work through June 30, 2015; for any work in 2015 after that date,

we will base our fees on our 2015 billing rates. The principal partners working on this matter will be David Hoffman and Danielle Carter. If other partners are going to perform substantial work on this matter, we will let you know in advance, along with their billing rates. Associates and paralegals will also work on this matter. We have provided you with the billing rates for Mr. Hoffman and Ms. Carter, and the range of billing rates for our associates and paralegals.

We will include on our bills charges for performing services such as messenger and overnight courier service, actual costs of reasonably necessary long-distance telephone, facsimile and telecopy, search and filing fees, and internal litigation and practice support services. Travel costs for Sidley attorneys or staff will be billed to APA at 50% of actual costs. If applicable, and if agreed to in advance by the APA, fees and expenses of others (such as outside experts, consultants, other non-legal professionals and local co-counsel) generally will not be paid by us, but will be billed directly to the APA. More detailed information with respect to our expense recovery policies and procedures, which are an integral part of our agreement with the APA as reflected in this letter, can be accessed on our website at: http://www.sidley.com/costrecoveryandpreadmittancebillingratepolicy/us/. These policies and procedures take into account, among other things, a number of special programs that we have entered into with certain of our vendors and independent service providers.

We will bill you monthly, and respectfully request that our bills be paid within 30 days after receipt, except as may be otherwise agreed by us.

Term of Engagement; Retention, etc. of Documents. Either the APA or Sidley may terminate this Representation at any time for any reason by written notice, subject on our part to applicable rules of professional conduct. If we terminate this Representation before it is concluded, we will take such steps as are reasonably practicable to protect the APA's interests in the Matter. Although it is not anticipated, if a court's permission were to be required for withdrawal from this Representation, we will promptly apply for such permission, and the APA will cooperate in such application and will engage successor counsel to represent the APA in the Matter.

Unless previously terminated, our Representation in this Matter will terminate upon the earlier of (i) the completion by us or abandonment by the APA of the Matter or (ii) our sending our final statement for services rendered in the Matter. Following such termination, if we have retained any otherwise nonpublic information that the APA has supplied to us in connection with the Matter, we will keep such information confidential in accordance with applicable rules of professional conduct. If, upon termination, the APA wishes to have any documents relating to this Matter and then in our possession delivered to the APA, you should so advise us. As used in this letter, "documents" means documents in any format, including hard copy documents and electronic documents (including emails). We reserve the right to retain copies of any documents delivered to the APA.

All of Sidley's work product in connection with the Representation is owned by Sidley, although all Sidley work product provided to the APA pursuant to this matter will be jointly owned by the APA and Sidley. Solely within Sidley, Sidley may use and permit others within Sidley to use such work product in whole or in part in other projects to the extent that such use is consistent with Sidley's confidentiality obligations to the APA. Such work product that Sidley provides to the APA may also be used by the APA, except to the extent that Sidley expressly states otherwise with respect to particular documents.

Upon the APA's request at the termination of the Representation, Sidley will provide the APA with Sidley's file relating to the Representation, including any documents or other property that the APA provided to Sidley in connection with the Representation. To the extent permitted by applicable law and ethical rules, the APA agrees that such file will not include Sidley's administrative records, time and expense reports, personnel and staffing materials, credit and accounting records, and internal Sidley work product (such as drafts, notes, and internal memoranda and emails), except to the extent such work product was previously provided by Sidley to the APA. The APA agrees that such file will not include any information revealing the identity of any Confidential Witness, as described above, unless ordered by a court. Sidley may make and retain a copy of the file provided to the APA.

If Sidley is required to respond to a subpoena or other formal request from a third party or a governmental agency for records or other information relating to the Representation, or to testify by deposition or otherwise concerning the Representation (a "Request"), Sidley will first, to the extent permitted by applicable law, consult with the APA as to whether it is the APA's wish that Sidley comply with the Request or resist it, to the extent that there is a basis for doing so. The APA will reimburse Sidley for its time and expense incurred in responding to any such Request, including time and expense incurred in reviewing documents, appearing at depositions or hearings, and otherwise addressing issues raised by the Request, and search and photocopy costs.

We reserve the right to transfer documents to the personnel responsible for administering our records retention program, for initial retention in accordance with our records retention procedures. For various reasons, including the minimization of unnecessary storage expenses, we also reserve the right to destroy or otherwise dispose of any documents retained by us, including documents transferred as described in the preceding sentence and documents otherwise retained by us. We may exercise the rights described in the preceding two sentences from time to time, whether or not in connection with the termination of the Representation, but our exercise of such rights will be subject to applicable rules of professional conduct and to any applicable written agreement between us and the APA. Except as otherwise described above, we have no obligation to retain or otherwise preserve any documents relating to the Matter.

After completion of this Representation, changes may occur in applicable laws or regulations that could have an impact on the APA's future rights and liabilities. Unless the APA

actually engages us after the completion of this Representation to provide additional advice on issues arising from this Representation, and we accept such engagement in writing, we will have no continuing obligation to advise the APA with respect to future legal developments.

Unless otherwise agreed to by us in writing, our Representation will not involve insurance coverage issues; if applicable, the Firm will not provide advice concerning any notification of insurance carriers, and will not be responsible for notifying such carriers or for follow-up communications with the carriers regarding the status of the matter.

Conflicts. We have numerous clients, and many of these clients rely upon us for general representation. Although we hope that it never happens, it is possible that an adverse relationship (including litigation) may develop in the future between the APA and one of our other current or future clients. If we are not representing the APA in that matter, and the matter in which the APA and another client have adverse interests is not substantially related to our representation of the APA in this Matter, the APA agrees that we may represent the other client, the APA waives any conflict arising from such representation, and the APA agrees it will not seek to disqualify or otherwise seek to prevent us from representing such other client. The APA acknowledges that it has had an opportunity to consult with other counsel (in-house or otherwise) prior to agreeing to this waiver, and has made its own decision about whether to do so.

You agree that this Representation of the APA does not give rise to an attorney-client relationship between us and any APA division or affiliated organization unless we have agreed otherwise in writing. You also agree that, during the course of our representation of the APA, we will not be given any confidential information regarding any APA division or affiliated organization. Accordingly, our representation of the APA in this Matter will not give rise to any conflicts of interest if our representations of any of our other clients are adverse to any APA division or affiliated organization.

Consent Regarding Privileged Sidley Communications. When issues arise concerning Sidley's professional duties and rights, including under applicable professional conduct rules, Sidley may seek confidential counsel from internal Sidley lawyers with responsibility or expertise in the areas in question, and in some instances from outside counsel as well. In such circumstances, some courts have concluded that a conflict of interest arises between a law firm and its clients, and have refused to recognize the law firm's communications as privileged. Sidley believes that it is in the mutual interest of Sidley and its clients that Sidley receive expert and confidential legal advice regarding its professional duties and rights in such circumstances. Accordingly, the APA consents to such consultation, waives any claim of conflict of interest that could result from such consultation, and agrees that this Representation will not be a basis for a waiver of any privilege that Sidley would otherwise have for such confidential consultation.

Privacy, Data Protection, and Confidentiality. Our applicable policies with respect to privacy, data protection and information security relating to personal information can be

accessed on our website at http://www.sidley.com/admin/onlineprivacy.asp. Subject to those policies and to applicable ethical confidentiality obligations, and unless otherwise directed by the APA, Sidley may use a variety of electronic communication systems in communicating internally with the APA and with others during the Representation, including cellular or satellite telephone calls, emails, facsimile transmissions, video conferencing and other forms of evolving electronic communications. Sidley uses outsourced nonlawyer personnel in its offices for a variety of support functions, including mailroom, photocopy, information technology and word processing, who are required by Sidley to agree to maintain the confidentiality of information relating to Sidley's clients.

Publicity. Unless instructed otherwise by the APA, Sidley may disclose that it is representing or has represented the APA in this Matter if the Matter has been publicly disclosed, such as by the APA's issuance of a press release or a filing with a court or regulatory authority. Unless the APA consents to the inclusion of additional information, Sidley's disclosure will be limited to the APA's name, the name of the other party or parties (if applicable), and a short description of the matter that contains only publicly-available information. Unless otherwise authorized by the APA, Sidley will make such disclosures only in Sidley's marketing materials, on its website, and in reports to information and ranking agencies such as Thomson Reuters and Chambers.

Governing Law and Choice of Forum. This letter shall be governed by, and construed in accordance with, the laws of the State of Illinois. Any claim arising under or relating to this Engagement Letter shall only be brought in the state or federal courts in such State, and the APA and Sidley each agree to submit to the jurisdiction of such courts.

Arbitration of Disputes. Except to the extent otherwise provided by law, any dispute or claim arising out of or in any way relating to an engagement governed by this letter or our relationship with the APA (including, without limitation, any claim of malpractice, breach of contract or relating to fees or charges for the Representation) shall be finally resolved by arbitration. The arbitration shall be conducted in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration (Effective November 1, 2007), except as they may be modified herein or by mutual agreement of the parties. The arbitration shall take place in Washington, D.C., or such other location as agreed to by the parties. Notwithstanding the foregoing, the parties consent to the jurisdiction of the federal or state courts having jurisdiction in the location where the arbitration is conducted as to judicial proceedings relating to any aspect of the arbitration, including motions to confirm, vacate, modify or correct an arbitration award.

The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the relevant party or its assets. The arbitration shall be conducted by one arbitrator, who shall be selected by agreement of the parties or, failing such agreement within 30

days after the initiation of the arbitration, by the CPR. The parties shall be responsible for paying the costs of the arbitration in accordance with CPR rules. The parties agree that the arbitration shall be kept confidential and that the existence of the proceeding and any element of it shall not be disclosed beyond the tribunal, the parties and their counsel, and any person necessary to the conduct of the proceeding. The confidentiality obligations shall not apply if disclosure is required by law or in judicial or administrative proceedings, or to the extent that disclosure is necessary to enforce the rights arising out of the award, provided that the parties agree to use best efforts to keep such disclosure confidential and agree, subject to court approval, to submit such disclosure to a court only under seal. Claims may not be brought in the arbitration proceeding by or on behalf of a purported class of claimants who are not parties to this engagement letter.

This agreement to arbitrate shall constitute an irrevocable waiver of each party's right to a trial by jury, as well as of any right to an appeal that would customarily be available in a judicial proceeding but that may be limited or unavailable in connection with such an arbitration. You acknowledge that you have had the opportunity to consult with other counsel (in-house or otherwise) prior to agreeing to this waiver, including regarding the waiver of jury trial and appeal rights, and have made your own decision about whether to do so.

Severability. If any provision of this letter is held to be unenforceable or invalid for any reason, the remaining provisions of this letter will continue in full force and effect.

We appreciate and look forward to the opportunity to work on this Matter.

Very truly yours,

David H. Hoffman

Agreed and Accepted:

By: