IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	)	
	)	
Plaintiffs,	)	CASE NO. 2017 CA 005989 B
	)	
v.	)	Judge Todd Edelman
	)	
DAVID H. HOFFMAN, *et al.*,	)	Next Event: Initial Conference
	)	February 23, 2018
Defendants.	)	9:30 a.m.
	)	Room 212

PLAINTIFFS' REPLY TO DEFENDANTS SIDLEY AND HOFFMAN'S OPPOSITION TO PLAINTIFFS' MOTION FOR LIMITED DISCOVERY IN PREPARATION FOR THEIR OPPOSITIONS AND EXPEDITED HEARINGS OR TRIAL

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Plaintiffs' discovery requests are targeted at two categories of evidence that will assist them in opposing Sidley's and Hoffman's ("Sidley") Anti-SLAPP Motion and Motion to Compel Arbitration:

- evidence of actual malice during and after the creation of the Hoffman Reports, and
- evidence that the nature of the Sidley-APA relationship negates any argument that Drs. Behnke and Newman are estopped from opposing arbitration with Sidley.

Although Sidley's Opposition asserts that the discovery requested is "sweeping," it is no broader than it need be. For example, without seeing the notes and other documents created or collected during Hoffman's investigation, it will be impossible to determine cumulative instances in which he omitted or mischaracterized information in his possession, or to provide documents to support the affidavits of those who assert that the Reports mischaracterize their interview testimony. Exhibit A lists Plaintiffs' discovery requests and describes the relevance of each.[1]

ARGUMENT

A. Information Obtained from Plaintiffs' Requests for Depositions and Documents Could Allow a Jury to Find That Defendants Acted with Actual Malice.

The U.S. Supreme Court has defined actual malice as the making of statements with knowledge that they are false or in reckless disregard of their truth. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). It has further refined that definition to include purposeful avoidance of the truth. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

Proof of actual malice often requires substantial discovery because it typically requires presenting a variety of circumstantial evidence reflecting the defendant's state of mind. *See Connaughton* 491 U.S. at 657, 668; *Tavoulareas v. Piro*, 817 F.2d 762, 790, 260 U.S.App.D.C.

[1] Plaintiffs incorporate by reference their Reply to APA's Opposition.

39 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987) ("[A] plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence."). *See generally Eramo v. Rolling Stone, LLC*, 209 F.Supp.3d 862, 871-75 (W.D. Va. 2016) (collecting cases on the types of evidence that constitute relevant circumstantial proof of actual malice). Furthermore, "[W]hether [a defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts." *Bose Corp. v. Consumers Union of United States, Inc.,* 692 F.2d 189, 196 (1st Cir. 1982), *aff'd,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Accordingly, a court will infer actual malice from objective facts. "These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice." *Bose, id.* While actual malice cannot be inferred from ill will or intent to injure alone, "[i]t cannot be said that evidence of motive or care never bears any relation to the actual malice inquiry." *Connaughton*, 491 U.S. at 668.[2]

Discovery is especially important when, as here, the manifestation of actual malice includes the intent to support a pre-conceived narrative, not only individual statements made with knowledge of their falsity or reckless disregard for their truth.

The discovery requested by Plaintiffs is targeted at evidence of actual malice. For example:

- Omitting material and taking information out of context, thus leading the reader to a false conclusion, may support a finding of actual malice. *Goldwater v. Ginzburg,* 414 F.2d 324

[2] In *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 49-50 (2d Cir. 2004), the Court held that equitable estoppel was unavailable to defendants based on misconduct that left them with unclean hands. Here, Hoffman's leak of a version of the Reports to *The New York Times*, which will be further established through interrogatories to APA, violated his obligations to the members of APA (including Plaintiffs). That misconduct negates Sidley's ability to rely on an equitable estoppel theory to compel arbitration.

(2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970); *Comp. Enter. Inst. v. Mann*, 150 A.3d 1213, 1253 (D.C. 2016) (finding the results of credible public investigations could allow a jury to find obvious reasons to doubt the veracity of defendants' statements). The discovery focuses on Hoffman's omission of facts available to him and his misleading use of facts taken out of context. *See also Schiavone Constr. Co. v. Time, Inc*., 847 F.2d 1069, 1090-92 (3d Cir. 1988) (finding a publisher's deletion of language that cast a different light on facts he reported could enable a jury to find by clear and convincing evidence that he acted with knowledge of actual falsity).

- Evidence that a defendant's attention was drawn to contrary information can be proof of publishing with reckless disregard. *Carbone v. Cable News Network, Inc*., Case 1:16-cv-01720-ODE (N.D. GA 2017). The requested discovery targets additional evidence, beyond that provided in the Complaint, that demonstrates Hoffman failed to include or purposefully avoided information contradicting his narrative.

- "[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence." *Eramo* at 872 (internal citation omitted). The depositions, especially that of Dr. Soldz, and the document requests target evidence that Hoffman set out to support a preconceived narrative drawn from those who had attacked Plaintiffs for many years and on whom he relied during the investigation.[3] The discovery also targets evidence that he set out to protect the APA directors who oversaw his investigation but had been involved in the events his Reports criticized and had reason to deflect criticism to others.[4]

[3] https://goo.gl/X3ssqh (interview with Dr. Soldz discussing the Report); https://goo.gl/NqiBzD (interview with Nathaniel Raymond, who with others was pressing for prosecutions of Plaintiffs by DOJ and International Criminal Court); https://goo.gl/o2kvh8 (Raymond letter to the FBI).
[4] https://goo.gl/msUH7f (video interview about the initial Hoffman Report with Dr. Nadine Kaslow, former APA president and head of the Special Committee overseeing the investigation);

- In *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262, (1968), the Supreme Court found that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant." The deposition of Dr. Soldz and the document requests will show that Hoffman had ample reason to distrust Dr. Soldz and the other critics of Plaintiffs on whom he relied. [5]

- Post-publication conduct can be used as circumstantial evidence of a defendant's state of mind at the time of publication. *Eramo* at 874 (citing Elder, *Defamation: A Lawyer's Guide* § 7.7 (July 2016)) (some types of evidence relate back to and provide inferential evidence of defendant's actual malice at the time of publication) (additional citations omitted)). The discovery focuses on relevant aspects of post-publication conduct.

B. To Oppose Sidley's Motion to Compel Arbitration, Plaintiffs Are Entitled to Discovery About the Nature of Sidley's Relationship with APA.

In asserting that Drs. Behnke and Newman are required to arbitrate their defamation claims with Sidley, a "stranger" to their expired employment agreements with APA, Sidley relies primarily on a version of equitable estoppel described by a few courts as "alternative estoppel." Sidley's Motion to Compel Arbitration, pp. 2 and 10. Although that form of estoppel has not received a clear and consistent definition in the courts, under any definition it cannot apply where the claims against Defendants are not identical and where APA represented to the Ohio court that

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https://goo.gl/b2z6oe (Kaslow communication regarding thoroughness of Leso ethics investigation; Hoffman attacked the investigation); https://goo.gl/9WNhMZ (Kaslow interview).

[5] Those critics, including Dr. Soldz, were sources for James Risen, the *New York Times* reporter who sparked Hoffman's investigation and to whom, on information and belief, both Hoffman and Soldz leaked versions of Hoffman's Reports. Sidley had every reason to doubt Risen's credibility and his use of sources. Its Washington D.C. office represented Dr. Wen Ho Lee, who subpoenaed Risen to force him to reveal his sources for his similarly false reporting and questionable conduct. *Lee v. US Dept. of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), aff'd sub nom. 413 F.3d 53 (D.C. Cir. 2005); *Lee v US Dept. of Justice*, 401 F.Supp.2d 123 (D.C. 2005). https://goo.gl/rxwpFG (news analysis of *The New York Times* and Risen's reporting).

it did not act in concert with Sidley.[6] However, the case Sidley cites as a primary authority for the "alternative estoppel" theory, *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005), emphasizes another element of an alternative-estoppel theory: a "relationship between the signatory and non-signatory defendants … sufficiently close that only by permitting the non-signatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Id.* at 798 (internal citations omitted).

If Defendants continue to rely on alternative estoppel, Plaintiffs are entitled to investigate the nature of Sidley and APA's relationship as it is reflected in documents other than the initial engagement letter, in which Sidley refers to "Our Independence." Sidley Engagement Letter, p. 1.[7] *See Stechler v. Sidley, Austin Brown Wood, LLP,* 382 F. Supp.2d 580, 591-92 (S.D.N.Y. 2005) (denying Sidley's similar equitable estoppel claims because it was an "independent legal advisor"); *Goldman v. KPMG LLP,* 173 Cal.App.4th 209 (2009) (denying Sidley estoppel claims); *Vassalluzzo v. Ernst Young LLP*, 06-4215-BLS2, 5 (Mass. Super. 2007) (denying Sidley estoppel claims, citing *DSMC, Inc. v. Convera Corp*., 273 F. Supp. 2d 14, 29-30 (D.D.C. 2002)).

As Plaintiffs demonstrated in their Motion for Limited Discovery, Defendants' Motions to Compel Arbitration should be regarded as summary-judgment motions. Although APA asserts a contrary position in Section III of its Opposition (adopted by Sidley on p. 13 of its Opposition), in its Motion to Compel Arbitration Sidley repeatedly cites *Fox v. Computer World Servs. Corp.,* 920 F.Supp2d 90, 96 (D.D.C 2013), which states that "[t]he appropriate standard of review for a motion to compel arbitration is … summary judgment."

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[6] "Plaintiffs allege well, Sidley was acting as your agent and so you are tied to whatever Sidley did. That is as a legal matter not correct. The retainer agreement …makes abundantly clear that this was an entirely independent investigation. Sidley did what it wanted where it wanted.…" Hearing Transcript, pp. 42-43: https://goo.gl/PbQ3J3.

[7] https://goo.gl/K1ZQPu, All links are to documents of which the Court may take judicial notice.

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Respectfully submitted,

/s/ Bonny J. Forrest
Bonny J. Forrest, Esq. (pro hac vice)
555 Front Street, Suite 1403
San Diego, California 92101
(917) 687-0271
Attorney for Plaintiffs Banks, Dunivin, James and Newman
bonforrest@aol.com

/s/ Louis J. Freeh
Louis J. Freeh, Esq. (D.C. Bar No. 332924)
Freeh Sporkin & Sullivan, LLP
2550 M St NW, First Floor
Washington, DC 20037
(202) 390-5959
Attorney for Plaintiff Behnke
bescript@freehgroup.com

/s/ James R. Klimaski
James R. Klimaski, Esq. (D.C. Bar No. 243543)
Klimaski & Associates, P.C.
1717 N St NW
Washington, DC 20036
(202) 296-5600
Attorney for all Plaintiffs
Klimaski@Klimaskilaw.com

Exhibit A
List of Plaintiffs' Discovery Requests

Depositions[1]

- **Deposition of Dr. Michael Honaker (relevant to Defendants' Anti-SLAPP and Arbitration Motions; requested by Plaintiffs' Motion for Limited Discovery).** Dr. Honaker, the former Chief Operating Officer of APA, gave Hoffman information that contradicted many of Hoffman's findings. For example, the Board was informed of Dr. Behnke's actions, including conducting ethics workshops for the Department of Defense, that Hoffman asserts were conducted without disclosure, and the Dunivin-Newman marriage had been fully disclosed.

- **Deposition of Dr. Heather Kelly (relevant to Defendants' Anti-SLAPP Motions; request served with the Complaint)**. Dr. Heather Kelly, an APA employee, warned Hoffman and the Chief Legal Officer of APA that Hoffman was ignoring information that ran contrary to the false narrative he set out to construct. She has subsequently reiterated this position to corporate officers of APA.

- **Deposition of Dr. Jennifer Kelly (relevant to Defendants' Anti-SLAPP Motions; request served with the Complaint).** Dr. Jennifer Kelly, an APA Board member, was significantly involved both in the underlying events described in the Hoffman Reports and in the re-hiring of Hoffman to review his own work. This deposition will establish that the Board had knowledge that, as a matter of law, made their reliance on Hoffman when APA published the Reports unwarranted. See D.C. Code §§29–406.30(d)(e)(f). It will also establish APA's failure to act after the Reports' publication despite having been presented with evidence that Hoffman's conclusions were false.

- **Deposition of Dr. Stephen Soldz (a non-party) (relevant to Defendants' Anti-SLAPP Motions; requested by Plaintiffs' Motion for Limited Discovery)**. Throughout his investigation, Hoffman relied heavily on long-time critics of the Plaintiffs and, in particular, on Dr. Soldz. Dr. Soldz's deposition will reveal the extent of Hoffman's reliance, including his alignment with Soldz's desire for a narrative of ongoing "collusion" to overcome perceived statute-of-limitations obstacles to prosecuting Plaintiffs.[2]

Four Document Requests to Sidley (relevant to Defendants' Anti-SLAPP Motions; served with the Complaint)

- The contents of Dr. Behnke's hard drive. It contains emails and documents reviewed by Hoffman and his team that directly contradict Hoffman's false narrative. Its content will also show knowledge and approval of Dr. Behnke's actions on the part of the APA Board.

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[1] Plaintiffs will drop their request to depose APA's affiant Theresa McGregor if APA will stipulate in writing that she has no knowledge relating to Dr. Newman's employment by APA's 501(c)(6) entity, as APA appears to represent in their Opposition.

[2] https://goo.gl/r4HvAr (news interview with Soldz).

- Any conflict-of-interest policy or correspondence concerning such a policy obtained by Sidley. Hoffman states that the Dunivin-Newman marriage represented a clear conflict of interest. This request is expected to show that Hoffman knew, but failed to disclose, that no APA policy forbade their participation in the events at issue in the Report. It is also expected to show that Hoffman knew, but failed to disclose, that an opinion obtained by APA found that the marriage did not in itself constitute a conflict.

- Any factual reports created by LDiscovery for Sidley regarding the contents of Dr. Stephen Behnke's computer and any analyses of the computer files or deleted files. LDiscovery (now Kroll) specializes in forensic investigations and recovering deleted emails or data. It imaged Dr. Behnke's hard drive two months into the investigation. If it created a report analyzing Dr. Behnke's hard drive for deleted emails, Plaintiffs are entitled to that analysis, given that Hoffman concludes with respect to Plaintiffs Behnke and Banks that "records were destroyed in an attempt to conceal the[ir] collaboration …." Hoffman Report, p. 396. In fact, Dr. Behnke's regular business practice was to save emails in a file entitled "deleted emails" on his desktop.

- Sidley's witness interview documents, memoranda, summaries, correspondence, and notes created during the investigation. At least ten of those interviewed, in addition to Plaintiffs, have stated that Hoffman misrepresented, mischaracterized, or omitted evidence from interviews. (See e.g., Levant Affidavit, paragraphs 7 and 8, and Swenson Affidavit, paragraphs 8 and 9, filed in the Ohio litigation).[3] As Plaintiffs' Motion for Limited Discovery demonstrates, notes of the Hoffman team's factual interviews are not privileged and not work product. They are discoverable to show cumulative direct evidence of actual malice.

Four Interrogatories to APA regarding the distribution of a Word file of the Report (relevant to Defendants' Anti-SLAPP Motions; served with the Complaint). The answers to these interrogatories will confirm evidence in Plaintiffs' possession that shows Hoffman leaked the Report to *The New York Times*. That evidence of excessive publication – publication that led to widespread and false media attacks on Plaintiffs – further adds to the evidence of Hoffman's actual malice. It also negates Sidley's use of an equitable doctrine to attempt to compel arbitration.

Three Document Requests (relevant to Defendants' Arbitration Motions; requested by Plaintiffs' Motion for Limited Discovery). Sidley's Motion to Compel Arbitration relies on a theory of "alternative estoppel" that requires a showing of a close relationship between Sidley and APA. Sidley's November 14, 2014, engagement letter with APA refers to "Our Independence." However, APA's Board has referred to subsequent engagements entered into with Sidley and to opinions rendered by Sidley on APA's behalf. To aid in defeating the Motion to Compel Arbitration, Plaintiffs request all additional written agreements after the November 14, 2014, agreement that define APA and Sidley's legal relationship.

[3] https://goo.gl/GMqTsc; https://goo.gl/M5ZywE