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 DEFENDANT APA'S OPPOSITION TO PLAINTIFFS' MOTION FOR LIMITED DISCOVERY IN PREPARATION FOR THEIR OPPOSITIONS AND EXPEDITED HEARINGS OR TRIAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER SOURCES

STATUTES

ARGUMENT

A. Defendants' Request for a Stay Is Without Merit Under D.C. Court of Appeals Precedent.

Plaintiffs have offered to dismiss their Ohio appeal if Defendants file all their pre-answer motions, in conformity with D.C. Superior Court Rule of Civ. Proc. 12(g), and if, after seeing those motions, Plaintiffs conclude they will not be prejudiced by dismissing the appeal. That offer provides Defendants a path within their control toward ending the Ohio litigation.

Even if that were not so, however, D.C. Court of Appeals precedent does not sanction a stay: "an injunction prohibiting a party from bringing suit concurrently in another state with jurisdiction over the matter bears a very heavy burden of justification .... [O]nly in extraordinary cases should the remedy be available ...." *Auerbach v. Frank*, 685 A.2d 404, 406-409 (D.C. 1996). Defendants do not cite this case.

Defendants' request for a stay does not meet that test. The continuation of the Ohio appeal imposes no undue burden on them. They requested and received a month-long extension of their briefing obligations in Ohio and now have nothing due until January 17. Having argued in Ohio that this case belongs in the District of Columbia courts, they should not delay our proceeding in the jurisdiction and venue of their choice.

B. The Requested Discovery Targets Evidence Directly Relevant to Defeating Defendants' Anti-SLAPP Motions and Motions to Compel Arbitration.

APA's Opposition addresses each of the four requested depositions and the four interrogatories propounded to APA. Sidley and Hoffman's Opposition also addresses each deposition, as well as the document requests served on them and the document requests relevant to arbitration. In the interest of efficiency, Plaintiffs describe the specific need for all the requested discovery in identical exhibits (Exhibit A) to each of their Replies. This Reply addresses the one deposition most relevant to evidence of actual malice on the part of the APA Board and the four

interrogatories requesting information in APA's possession.

Plaintiffs' requested discovery targets only evidence that should be before the Court as it considers the Anti-SLAPP Motions and Motions to Compel Arbitration. The discovery is therefore appropriately focused and timely.

1. The Requested Discovery Targets Further Evidence of Actual Malice That Will Defeat the Anti-SLAPP Motions.[1]

As Plaintiffs have previously argued, Illinois rather than D.C. anti-SLAPP law should govern this case. Even if the D.C. anti-SLAPP statute were to govern, the defamatory speech at issue would not be protected by it. However, if this Court were to hold that the D.C. statute applies and that Plaintiffs are not private figures, then the question to be resolved is whether Plaintiffs' proof is sufficient such that a jury properly instructed on the law, including any applicable heightened fault and proof requirements, ***could*** reasonably find for Plaintiffs on the evidence presented. *Comp. Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016). The Plaintiffs' discovery requests go to the very heart of that inquiry.

Deposition of Dr. Jennifer Kelly. In its Anti-SLAPP Motion, APA asserts that its Board could justifiably rely on Hoffman and Sidley when it authorized the publication of the Hoffman Reports. APA Anti-SLAPP Motion, pp. 13, 21-22. However, at least five of the seven non-recused members of the Board had been intimately involved in the underlying events described in the Reports. As a matter of D.C. law, the knowledge they gained from that involvement negates the Board's ability to rely on Hoffman and Sidley. D.C. Code § 29–406.30 (d) and (e) state that (emphases added):

> (d) In discharging board or committee duties, a director ***who does not have knowledge that makes reliance unwarranted*** may rely on the performance by any of the persons [to whom the board may delegate functions] ….
> (e) In discharging board or committee duties a ***director who does not have knowledge that***

[1] This section incorporates by reference Section A of Plaintiffs' Reply to Sidley's Opposition.

> ***makes reliance unwarranted*** may rely on information, opinions, reports, or statements … prepared or presented by any of the persons specified in subsection (f) of this section.

See Creditors Ex Rel. Estate of Lemington Home for the Aged v. Baldwin (In re Lemington Home for the Aged), 777 F.3d 620, 630 (3d Cir. 2015) (nonprofit officers and directors who possess contrary knowledge are not entitled to rely on the advice of financial and legal advisors).

At this point, Plaintiffs seek to depose only one Board member, Dr. Jennifer Kelly, about her extensive involvement in (a) the underlying matters described in the Reports and (b) the Board's failure to correct the Reports' false statements in the face of mounting evidence contradicting Hoffman's factual conclusions. Both aspects of Dr. Kelly's involvement make her testimony directly relevant to the issue of actual malice on the part of APA. *See Gambardella v. Apple Health Care, Inc.*, 969 A.2d 736, 748-750 (Conn. 2009).

Interrogatories to APA. Plaintiffs' four interrogatory requests are designed to confirm evidence in Plaintiffs' possession that Hoffman leaked a Word file of one version of the Reports to *The New York Times* reporter whose allegations sparked his investigation. That leak constitutes excessive publication and therefore contributes to the evidence of Hoffman's actual malice. *See Noonan v. Staples*, 556 F.3d 20, 31 (1st Cir. 2009) (summary judgment denied because excessive publication satisfied the common-law "actual malice" exception to the state statute at issue).

2. The Requested Discovery Targets Evidence That the Relevant Arbitration Clauses Do Not Govern the Claims in This Case.

Defendants seek to compel arbitration with Drs. Behnke and Newman. There is no valid agreement to arbitrate, however, and, even if there were, APA waived its right to arbitration when it refused Plaintiffs' request to arbitrate and proceeded to litigate. (See Anton Affidavit attached to Plaintiffs' Motion for Limited Discovery.) Moreover, APA's demand for arbitration requires finding that Plaintiffs' claims "arise under" the arbitration clauses in Drs. Behnke and Newman's employment agreements and that the parties intended those clauses to apply to defamation claims.

In analyzing the arbitration clauses' language – "any dispute that may arise regarding their respective rights, duties or obligations under this Agreement …" – APA's Motion to Compel Arbitration relies on "any dispute" without giving effect to the remaining language. APA Motion to Compel Arbitration, pp. 8-10. However, the "under this Agreement" limiting language has now been construed narrowly by eight of the 11 federal circuits that have addressed the issue. *See Cape Flattery Ltd. v. Titan Mar., LLC,* 647 F.3d 914, 924 (9th Cir. 2011) ("under an arbitration agreement covering disputes 'arising under' the agreement, only those disputes 'relating to the interpretation and performance of the contract itself' are arbitrable."). *See also Leadertex v. Morganton Dyeing Finishing Corp.*, 67 F.3d 20, 28 (2d Cir. 1995) (finding defamation claims were not covered even by the "broad" arbitration clause at issue in that case).

On those grounds, the motion to compel arbitration should fail. However, the deposition of Dr. Michael Honaker, APA's former Chief Operating Officer, remains relevant for two reasons:

First, Dr. Newman was employed by two entities within APA: a 501(c)(3) and a 501(c)(6). APA has produced no information about the terms of his employment with the 501(c)(6). Thus, he is entitled to depose Dr. Honaker regarding the terms of that employment and the impact those terms have on the "arising under" requirement.

Second, Drs. Behnke and Newman are entitled to depose Dr. Honaker concerning their lack of intent to arbitrate the claims set forth in Plaintiffs' Complaint. (See Newman and Behnke affidavits attached to Plaintiffs' Motion for Limited Discovery.) It is well established that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he or she has not agreed to submit. *Masurovsky v. Green,* 687 A.2d 198, 205 (D.C. 1996). Parole evidence is admissible to determine whether the parties intended such an agreement: the determination "'depends wholly upon the intent of the parties and must be ascertained from the

written contract, the conduct and language of the parties and the surrounding circumstances." *Standley v. Egbert*, 267 A.2d 365, 367 (D.C. 1970) (internal citation omitted)

C. Defendants Failed to Claim Protection in Their Anti-SLAPP Motions for 11 of 12 Claims in Plaintiffs' Complaint. Pending Discovery Is Now Due on Those Claims.

D.C.'s anti-SLAPP statute requires Defendants to assert protection for the acts giving rise to each of Plaintiffs' claims, in each of their causes of action, on a claim-by-claim basis. Discovery is stayed only as to a claim for which the defendant makes out a prima facie case. D.C. Code §§ 16–5501; 5502. *See e.g. Baral v. Schnitt*, 376 P.3d 604, 617 (Cal. 2016) ("…the moving defendant bears the burden of identifying all allegations of protected activity….").

APA's Anti-SLAPP Motion claims protection only for the act of one "publication" described in Count 7 of Plaintiffs' Complaint. APA Anti-SLAPP Motion, p. 8. Consequently, APA has failed to move for anti-SLAPP protection for 11 of the 12 Counts, and that failure is fatal to their Special Motion to Dismiss. Sidley and Hoffman do not describe any act that would allow them to claim protection under the D.C. anti-SLAPP statute, instead claiming they merely "contemplated" APA's publishing of the Report detailed in Count 7. Sidley Anti-SLAPP Motion, p. 10; Sidley Opposition to Plaintiffs' Motion for Limited Discovery, p. 6, fn. 2.

Defendants' time to file any additional motion claiming protection for Plaintiffs' other claims expired on October 28, 2017. (Those claims are listed in Exhibit B.) *Sherrod v. Breitbart,* 720 F.3d 932, 938 (D.C. 2013). Under D.C. Superior Court Rule of Civ. Proc. 26, Defendants must now answer Plaintiffs' interrogatories, produce documents, and schedule the depositions that Plaintiffs served with the Complaint and that are relevant to the other claims.[2]

[2] APA represents on p. 3, fn 4 of its Opposition that "Plaintiffs' request for discovery in that [Ohio] case was denied." Plaintiffs filed no Ohio motion seeking discovery. On March 27, 2017, as Plaintiffs were attempting to schedule depositions, Defendants sought a stay on discovery. The judge granted that motion the next day without briefing from Plaintiffs. Plaintiffs submitted a response stating that they reserved the right to request later discovery. https://goo.gl/L9PU5S

Dated: December 21, 2017

Respectfully submitted,

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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

Exhibit B
List of Counts in Plaintiffs' Complaint

COUNT/ AGAINST	DATE OF PUBLICATION OR REPUBLICATION; REPORT VERSION OR NATURE OF STATEMENT	PUBLISHER/AUDIENCE (ACTS GIVING RISE TO PLAINTIFFS' CLAIM)
1 Hoffman Sidley	June 27, 2015 **DRAFT**	Hoffman and Sidley ***to*** APA Board of Directors (Board) (including the Special Committee (SC) overseeing Hoffman's investigation) Publication in many states; none in District of Columbia
2 ALL	June 28, 2015 **DRAFT**	Board and SC ***to*** Reisner and Soldz in New York and Massachusetts
DEFENDANTS GIVEN FIRST WRITTEN NOTICE THAT ACCUSATIONS IN THE REPORT WERE FALSE AND EVIDENCE OF ANOTHER CREDIBLE INVESTIGATION CONTRADICTING THE REPORT'S FINDINGS[1]		
3 ALL	On or about July 2, 2015 On or about July 7, 2015	On information and belief, Soldz gave electronic access to the draft report **to** Risen on or about July 2; Hoffman gave a Word file of the final report **to** Risen on or about July 7.
4 Hoffman Sidley	July 2, 2015 **FINAL**	Hoffman and Sidley ***to*** Board and SC
5 ALL	July 8, 2015 **FINAL**	Board and SC ***to*** APA Council
6 ALL	July 10, 2015	*The New York Times* ***to*** its website
7 ALL	July 10, 2015 **FINAL**	Board and SC ***to*** APA website
8 APA	July 10, 2015 **AOL VIDEO; RADIO CLIPS**	APA ***to*** various media outlets
DEFENDANTS GIVEN SECOND WRITTEN NOTICE THAT ACCUSATIONS IN THE REPORT AND ITS TIMELINE OF EVENTS WERE FALSE		
9 Hoffman Sidley	September 4, 2015[2] **REVISED**	Hoffman and Sidley ***to*** SC and Board
10 ALL	September 4, 2015 **REVISED**	Board and SC ***to*** APA website

Count 11: Defamation by Implication
Count 12: Invasion of Privacy; False Light

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[1] See *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007), quoting the Restatement (Second) of Torts § 580A, cmt. d (2006): "Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard."

[2] Although APA attempts to treat this act as post-publication conduct, it is a separate act, giving rise to a separate cause of action. Defendants are required to assert protection for the separate claim described in Plaintiffs' separate cause of action under D.C. Code § 16–5502 (b). APA Anti-SLAPP Motion, p. 21.