SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' SECOND SET OF CONTESTED SPECIAL MOTIONS TO DISMISS FILED MARCH 21, 2019 UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, D.C. CODE § 16-5502

THIS OPPOSITION ADDRESSES:

(1) DEFENDANTS' ARGUMENTS TO DISMISS COUNT 11 OF PLAINTIFFS' SUPPLEMENTAL COMPLAINT AND

(2) DEFENDANTS' FAILURE TO MEET THEIR INITIAL BURDEN UNDER THE D.C. ANTI-SLAPP ACT IN ANY OF THEIR FOUR SPECIAL MOTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

INTRODUCTION

As detailed in Plaintiffs' Consolidated Opposition to Defendants' First Special Motions to Dismiss, this case arises from false and defamatory statements published and re-published in the report of an internal investigation (the "Hoffman Report" or "Report") commissioned by Defendant APA and written by Defendants David Hoffman and Sidley Austin. Those statements falsely accused Plaintiffs of colluding with APA psychologists to ensure that APA actions and guidelines enabled abusive detainee interrogations.

In their Consolidated Opposition to Defendants' First Special Motions to Dismiss, Plaintiffs addressed the three issues raised in those Motions, explaining that:

1. The record contains more than sufficient evidence from which a jury could reasonably conclude that Defendants published their defamatory statements with actual malice—that is, with actual knowledge that they were false or with reckless disregard for their truth or falsity;

2. Plaintiffs Banks, Dunivin, and James were private figures, not "public officials," at the time Defendants published their defamatory statements, and, therefore, do not need to prove actual malice—only negligence—to prevail on their claims; and

3. Although Defendants *assume* that the D.C. Anti-SLAPP Act applies in this case, under settled choice-of-law principles, if the Court holds the D.C. Anti-SLAPP Act to be substantive (as Defendants have contended) rather than procedural, then the ***Illinois*** Anti-SLAPP Act, ***not*** the ***D.C.*** Anti-SLAPP Act, applies—and Defendants' Special Motions to Dismiss must be denied.

This Second Consolidated Opposition follows Defendants' two arguments for dismissal in their Second Set of Special Motions to Dismiss and a related argument in their First Special Motions:

First, Defendants contend they have satisfied their burden of "mak[ing] a prima facie showing that the claim[s] at issue arise[] from an act in furtherance of the right of advocacy on issues of public interest," as necessary to invoke the D.C. Anti-SLAPP Act. *See* D.C. Code § 16-5502(b). But Defendants fail to make that showing for two reasons. First, Defendants expressly

claimed that Hoffman was hired to investigate the factual truth about the events the Report described and that the Report was an objective presentation of those facts. Defendants are estopped from claiming now, when it is to their advantage to do so, that the multiple publications and republications were not of objective reports, but rather acts "in furtherance of the right of advocacy." Second, some of the publications at issue (those in Plaintiffs' Claims 1, 4, 5, and 9) were made in private forums, not "public forums" as required by the D.C. Anti-SLAPP Act. D.C. Code § 16-5501(1)(A)(ii).

Second, Defendants contend that Plaintiffs' Claim 11 fails because that claim does not relate to a republication of the Hoffman Report. But, Defendants cannot show as a matter of law, as they must, that the APA did not republish the Hoffman Report when it published a new link to the Report on a newly revised webpage, advertised the existence of that page (and link to it) through a mass e-mail to numerous people, and included on the webpage other documents directly related to the Report's content. Moreover, Defendants Hoffman and Sidley cannot demonstrate as a matter of law that it was not reasonably foreseeable that the APA would republish the Hoffman Report.

Accordingly, Defendants' Second Set of Special Motions to Dismiss should be denied.[1]

RELEVANT FACTUAL BACKGROUND

Because Defendants' Second Special Motions to Dismiss, like their first, omit and misrepresent critical record evidence, Plaintiffs provide this brief background section of facts relevant only to those Motions. The general background and facts relevant to Defendants' First Special Motions to Dismiss are set forth in Plaintiffs' Consolidated Opposition to those Motions.

[1] A chart of the decisions to be made under all pending motions precedes the proposed order attached to this Opposition.

A. Defendants Publish the Hoffman Report Multiple Times—Then Re-Publish It Again After Three Years to a New Audience.

As pleaded in Plaintiffs' Complaint, Defendants first published the Hoffman Report on APA's website on July 10, 2015, at the URL (website address) http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf.[2] Two months later, on September 4, 2015, Defendants published a revised version of the Hoffman Report at a different website address: http://www.apa.org/independnet-review/revised-report.pdf.[3]

As Defendants' Motions describe, the Report (as revised) was available via its own "landing page"—that is, a stand-alone page dedicated to the Report.[4] To view the Report, a person would go to the landing page dedicated to the Review, click on a link to the report, and then see the Report displayed on his computer screen.[5] The revised Hoffman Report remained available on that landing page until August 2018, at which time the APA disabled the page.[6]

On August 21, 2018, however, contemporaneously with the APA's disabling of the landing page, the APA directed readers to the Hoffman Report through a link on a separate webpage and, alongside the Report, published new content directly related to the Report's substance. That separate and newly revised webpage was announced in an August 21, 2018 e-mail to the list-serv

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[2] Compl. ¶ 2 & n.1. Three versions of the Hoffman Report were published or republished on ten occasions. Publicly available copies published by Hoffman and Sidley and republished by APA include a version published on the *New York Times*' website on July 10, 2015 (http://www.nytimes.com/interactive/2015/07/09/us/document-report.html) after it was leaked to the *Times* by Mr. Hoffman or a member of his team. (*See* Pls.' First Consol. Opp'n to Defs. Special MTDs at Background Part C.) The APA also republished a version of the Report on its website on July 10 (http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf), and a revised version on September 4, 2015 (http://www.apa.org/independent-review/revised-report.pdf and); Newman Aff. at Ex. C. References to "Complaint" or "Compl." refer to Plaintiffs' First Supplemental Complaint.

[3] Compl. ¶ 2 & n.1. Newman Aff. ¶ 3.

[4] *See* Def. APA's Mem. of P&As in Supp. of Its Contested Special Mot. to Dismiss the Supp. Compl. Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, at 3 (Mar. 21, 2019) (**"APA Second Special MTD"**); *see also* Dictionary.com, "Landing Page," https://www.dictionary.com/browse/landing-page.

[5] Newman Aff. ¶ 4.

[6] *See* APA Second Special MTD at 3.

for the APA's governing body, the Council of Representatives, and many other people who would not have received the 2015 communications about the Report's initial publications and republications.[7] This separate and newly revised webpage was (and is) titled "Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security," and is located at the URL https://www.apa.org/news/press/statements/interrogations.aspx.[8] Now, to view the Hoffman Report, a person goes to the "Timeline" landing page and clicks on the link to the Report, which then displays the Report.[9] The Hoffman Report (as revised) remains available there to this day.[10]

As the APA announced in that same August 21, 2018 e-mail, the APA contemporaneously published on the same "Timeline" webpage alongside the new link to the Hoffman Report:

> (1) a response to the Hoffman Report by APA's Division 19, the Society for Military Psychology;[11]

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[7] Compl. ¶ 295; *see also* Newman Aff. at Ex. 2 (Email from D. Ottaviano to APA Council); and Harvey Aff. at Ex. B. & Ex. 2.

[8] Compl. ¶ 295; *see also* Newman Aff. at Ex. 1 (Email from D. Ottaviano to APA Council); and Harvey Aff. at Ex. B. & Ex. 2.

[9] Newman Aff. ¶ 5. The first version of the Report, which the APA published on July 2, 2015, was removed from the APA website, and the APA changed the link to that first version of the Report—which remains available on other websites—to automatically redirect a reader the revised, September 4, 2015 version of the Report. *See* David Hoffman *et al*., *Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture,* Sidley Austin (July 2, 2015, revised Sept. 4, 2015), ("Hoffman Report"), *available at* http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf.

[10] APA subsequently reposted a number of the webpages it removed at different and separate locations. The original landing page was located at https://www.apa.org/404-error.aspx?url=http://www.apa.org/independent-review/index.aspx. *See* DC Psychological Association, Hoffman Report Links, http://www.dcpsychology.org/Hoffman-Report-Links (reflecting link to the Original Hoffman Report, which now re-directs to the Revised Hoffman Report).

[11] Sally Harvey *et al.*, *Response to the Hoffman Independent Review*, The Society for Military Psychology (APA Division 19) Presidential Task Force, *available at* https://www.militarypsych.org/uploads/8/5/4/5/85456500/tf19_response_to_the_hoffman_report_div19_excom_approved.pdf

(2) February 16, 2016[12] and May 15, 2016[13] letters from former chairs of the APA Ethics Committee;

(3) a June 12, 2016, letter from former APA Presidents;[14] and

(4) an entry dated February 16, 2017, stating "Five plaintiffs filed a lawsuit against the Association arising out of the publication of the Independent Review."[15]

Among their other contents, these documents identified falsehoods, omissions, and biases in the Hoffman Report. Despite that information, the APA republished the Report alongside those documents, thus reaffirming the Report's false and defamatory allegations.

As pleaded in the Complaint, the APA's republication of the Hoffman Report was reasonably foreseeable to Defendants Hoffman and Sidley.[16] First, the APA engaged Hoffman and Sidley for the express purpose of writing a report for the APA that it could then republish at its own discretion.[17] Second, Plaintiffs expressly warned Hoffman and Sidley—in a court filing—that Plaintiffs had become aware that the APA intended to republish the Hoffman Report before it did so, and Hoffman and Sidley responded by supporting the APA's republication.[18]

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[12] Robert Kinscherff, *et al.*, *Open Letter to the APA Board of Directors from Former Chairs of the APA Ethics Committee*, APA (Feb. 16, 2016), *available at* https://www.apa.org/news/press/statements/ethics-chairs-letter01.pdf

[13] Robert Kinscherff, *et al.*, *Open Letter from Former Chairs of the APA Ethics Committee to the Board of Directors: Perceived, Potential or Actual Conflicts of Interest in Attorney Hoffman Self-Review*, APA (May 15, 2016), *available at* https://www.apa.org/news/press/statements/ethics-chairs-letter02.pdf

[14] Past APA Presidents' Open Letter to the Board of Directors, Council of Representatives, Divisions and Staff (June 11, 2016), *available at* https://www.apa.org/news/press/statements/past-presidents-letter.pdf

[15] Compl. ¶ 295; APA, Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security, http://apa.org/news/press/statements/interrogations.

[16] Compl. ¶ 295 Newman Aff. ¶ 7.

[17] APA Retention Letter from David Hoffman (Sidley Austin) to Nathalie Gilfoyle (APA General Counsel) (Nov. 20, 2014), *available at* http://www.hoffmanreportapa.com/resources/Sidleyengagementletter.pdf.

[18] Compl. ¶¶ 529-30; *see also* Pls.' Praecipe (July 23, 2018); APA & Hoffman/Sidley's Resp. to Pls.' Praecipe (Sept. 13, 2018).

B. Defendants' Stated Goal in Publishing and Re-Publishing the Hoffman Report: A Recitation of Facts *Only*, Not Advocacy.

From the outset, Defendants have been clear and unwavering in their stated goal for their investigation and the Report that emerged from it: "to ascertain the truth" about allegations that the APA colluded with the Department of Defense to facilitate torture, and to report on Defendants' findings "wherever th[e] evidence leads"[19]—***not*** to advocate in any respect, much less to advocate for positions the APA might support.

The APA, for its part, made that stated goal clear in a public statement when it first retained Hoffman and Sidley:

> [T]o fulfill its values of transparency and integrity, the APA Board has authorized the engagement of David Hoffman of the law firm Sidley Austin to conduct an independent review of ***whether there is any factual support for the assertion*** that APA engaged in activity that would constitute collusion with the Bush administration to promote, support or facilitate the use of "enhanced" interrogation techniques by the United States in the war on terror. ...
>
> It is the intent of the Board that this review will be thorough and fully independent. ***The sole objective of the review is to ascertain the truth*** about the allegation 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.***[20]

During the course of Hoffman's and Sidley's investigation, the APA reaffirmed that their investigation would be a fact-finding mission and the Report would state the facts "[r]egardless" of what those facts were. In response to a *New York Times* article that raised questions about the APA's possible involvement in the facilitation of torture, the APA unequivocally stated:

> It is critical that Mr. Hoffman's review be ***fully independent*** and be perceived by the public as fully independent. ... ***His report will determine the facts.*** ...

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[19] APA, *Statement of APA Board of Directors: Outside Counsel to Conduct Independent Review of Allegations of Support for Torture* (Nov. 12, 2014), *available at* https://www.apa.org/news/press/releases/2014/11/risen-allegations.

[20] *Id.* All emphases added unless otherwise noted.

> ***Regardless of the outcome***, we believe the independent review is critical to the Association's being able to move forward.[21]

Hoffman and Sidley stated the same goal: objectivity about the facts, not advocacy. As Hoffman explained:

> Clearly, the APA's goal was "... to have someone produce a credible, thorough ***description of what happened***. In order to do that we have to hire someone who can be ***independent*** and have the credibility to show ***we've gotten to the bottom of the facts***."[22]

Thus, Defendants were all aligned in a shared purpose that was expressly and repeatedly stated: to conduct an objective investigation and report on the facts whatever they were found to be, not to advocate on behalf of the APA or for any other purpose.

C. Defendants Published—and Re-Published—the Hoffman Report on Multiple Occasions to Multiple Different Audiences, Some in Private, APA-Only Forums.

As reflected in Plaintiffs' Complaint, Defendants published or republished different versions of the Hoffman Report on multiple different occasions to multiple different audiences. Plaintiffs' 11 claims arising from these separate publications are set forth in the following table. Four publications were in private, internal APA-only forums that were not open or available to the public, and the claims arising from those publications are highlighted in green:

Count	Defendants	Publication at Issue & Date of Publication	Publisher & Audience
1	Hoffman & Sidley	Draft Hoffman Report June 27, 2015	Hoffman & Sidley ***to*** APA Board of Directors, including Special Committee (SC) of Board
2	APA, Hoffman, & Sidley	Draft Hoffman Report June 28, 2015	Board & SC ***to*** Reisner and Soldz

[21] APA, *APA Response to April 30 New York Times Article* (Apr. 30, 2015), *available at* https://www.apa.org/news/press/response/new-york-times.

[22] David Hoffman, Corporate Accountability Report, Sidley Austin, at 2 (Oct 28, 2015) (attached as **Exhibit A**).

3	APA, Hoffman, & Sidley	Final Hoffman Report Approx. July 2 & 7, 2015	Hoffman & Soldz ***to*** Risen
4	Hoffman & Sidley	Final Hoffman Report July 2, 2015	Hoffman & Sidley ***to*** Board and SC
5	APA, Hoffman, & Sidley	Final Hoffman Report July 8, 2015	Board & SC ***to*** APA Council
6	APA, Hoffman, & Sidley	Final Hoffman Report July 10, 2015	*The New York Times* ***to*** its website
7	APA, Hoffman, & Sidley	Final Hoffman Report July 10, 2015	Board & SC ***to*** APA website
8	APA	AOL Video & Radio Clips July 10, 2015	APA officials ***to*** media outlets
9	Hoffman & Sidley	Revised Hoffman Report Sept. 4, 2015	Hoffman and Sidley ***to*** SC and Board
10	APA, Hoffman, & Sidley	Revised Hoffman Report Sept. 4, 2015	Board & SC ***to*** APA website
11	APA, Hoffman, & Sidley	Revised Hoffman Report Aug. 21, 2018	APA ***to*** APA website

ARGUMENT

As explained below, Defendants' four Special Motions to Dismiss should be denied for two reasons in addition to those detailed in Plaintiffs' Consolidated Opposition to Defendants' First Special Motions to Dismiss.

First, Defendants fail to "make a prima facie showing that the claim[s] at issue arise[] from an act in furtherance of the right of advocacy on issues of public interest," as required by the D.C. Anti-SLAPP Act. *See* D.C. Code § 16-5502(b). Defendants fail to do so for the simple reason that they have repeatedly stated that the Hoffman Report was an objective recitation of facts—***not*** a work of advocacy. In addition, while the DC Anti-SLAPP Act requires that "an act in furtherance of the right of advocacy" must take place "in a place open to the public or a public forum," D.C. Code § 16-5501(1)(A)(ii), Defendants' publications at issue in Plaintiffs' Claims 1, 4, 5, and 9

occurred in private, internal APA-only forums that were not open or available to the public. Thus, those publications cannot as a matter of law constitute "act[s] in furtherance of the right of advocacy," and the D.C. Anti-SLAPP Act cannot apply to claims based on them.

Second, Defendants' Special Motions to Dismiss Count 11 of Plaintiffs' Complaint must be denied because Defendants cannot demonstrate as a matter of law that the APA's 2018 publication of the Hoffman Report—in a new location on a different webpage updated with numerous substantive comments and documents directly related to the Report's content and advertised by e-mail to numerous people—was not a "republication" for purposes of defamation law. Moreover, Defendants Hoffman and Sidley cannot demonstrate as a matter of law that it was not reasonably foreseeable that the APA would republish their Report.

I. Defendants Fail to Meet Their Initial Burden to "Make a Prima Facie Showing That Plaintiffs' Claims Arise From an Act in Furtherance of the Right of Advocacy."

Defendants' Special Motions to Dismiss should be denied because Defendants fail to "make a prima facie showing that the claim[s] at issue arise[] from an act in furtherance of the right of advocacy on issues of public interest," as required by the D.C. Anti-SLAPP Act. *See* D.C. Code § 16-5502(b).

As the D.C. Court of Appeals has explained, under the plain text of the D.C. Anti-SLAPP Act, ***"the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy*** on issues of public interest.'" *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1227 (D.C. 2016) (quoting D.C. Code § 16-5502(b)); *see also Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979) (explaining that a prima facie showing requires "a sufficient quantum of evidence which, if credited, would permit judgment in his favor unless contradicted by credible evidence offered by the opposing party"). As is clear from the statutory

text, a defendant must make that showing on a claim-by-claim basis. D.C. Code § 16-5502(b). Only after the defendant has made that showing does the burden shift to the plaintiff to demonstrate that his claims are likely to succeed on the merits. *Mann*, 150 A.3d at 1227.

Here, Defendants cannot make the prima-facie showing required under the D.C. Anti-SLAPP Act, and their Special Motions to Dismiss must be denied at the outset.

A. Defendants Cannot Make a Prima-Facie Showing That *Any* of Plaintiffs' Claims "Arise From an Act in Furtherance of the Right of Advocacy."

Defendants cannot make their required prima-facie showing because all of Plaintiffs' claims arise from Defendants' publication (and re-publication) of the Hoffman Report, which Defendants have repeatedly described as an objective, factual report of Mr. Hoffman's investigation—in other words, an objective assessment, not a work of advocacy.

As described above, Defendants made clear from the time the APA engaged Hoffman and Sidley that their goal was "to ascertain the truth" about allegations that the APA colluded with the Department of Defense to facilitate torture and to report on their findings "wherever th[e] evidence leads."[23] According to the APA, it engaged Hoffman and Sidley "to conduct an independent review of ***whether there is any factual support*** for the assertion that APA engaged in activity that would constitute collusion with the Bush administration" to facilitate torture, and ***"[t]he sole objective of the review is to ascertain the truth*** about [that] allegation ... 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."***[24] As APA then further explained to the public, "[Hoffman's] report will ***determine the facts," "[r]egardless" of***

[23] APA, *Statement of APA Board of Directors: Outside Counsel to Conduct Independent Review of Allegations of Support for Torture* (Nov. 12, 2014), *available at* https://www.apa.org/news/press/releases/2014/11/risen-allegations.

[24] *Id.*

what those facts showed.[25] And Hoffman and Sidley, for their part, likewise publicly stated that their goal was objectivity, not advocacy: "to have someone produce a credible, thorough ***description of what happened***" and to ***get "to the bottom of the facts."***[26]

Critically—and dispositively for Defendants' Special Motions to Dismiss—Defendants offer no evidence whatsoever to rebut their public characterization of their goals for the investigation and Report. *See Nader*, 408 A.2d at 48 (prima facie showing requires "a sufficient quantum of evidence which, if credited, would permit judgment in his favor unless contradicted by credible evidence offered by the opposing party"). Rather, Defendants try to dodge that indisputable fact by focusing on the ***separate*** "public interest" portion of the "act in furtherance of the right of advocacy on issues of public interest" requirement.[27] Regardless of whether the APA's alleged collusion with the Department of Defense or the treatment of detainees in military custody are issues of public interest, the fact remains that the publication of the Hoffman Report was not an "act in furtherance of the right of advocacy" on those issues.[28]

Indeed, further demonstrating that Defendants' publication of the Hoffman Report was not an "act in furtherance of the right of advocacy on issues of public interest," Defendants have successfully argued to this Court that Plaintiffs Behnke and Newman must submit their claims to

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[25] APA, *APA Response to April 30 New York Times Article* (Apr. 30, 2015), *available at* https://www.apa.org/news/press/response/new-york-times.

[26] Ex. A, David Hoffman, Corporate Accountability Report, Sidley Austin, p. 2

[27] *See* Defs. Sidley Austin LLP, Sidley Austin (DC) LLP & David Hoffman's Mem. in Supp. of Contested Special Mot. to Dismiss Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, at 10 (Oct. 13, 2017) (**"Hoffman/Sidley First Special MTD"**); Def. APA's Mem. of P&As in Supp. of Its Contested Special Mot. to Dismiss Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, at 8-9 (Oct. 13, 2017) (**"APA First Special MTD"**); Defs. Sidley Austin LLP, Sidley Austin (DC) LLP & David Hoffman's Mem. in Supp. of Contested Special Mot. to Dismiss Count 11 of the First Supp. Compl. Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, at 9 (Mar. 21, 2019) (**"Hoffman/Sidley Second Special MTD"**); APA Second Special MTD at 5.

[28] *See also* Legislative History, comments of the American Civil Liberties Union, September 17, 2010, p. 4, successfully suggesting a language change in the statute from "broader" language ("Act in furtherance of the right of free speech") to "narrower" language ("Act in furtherance of the right of advocacy on issues of public interest"). Available at https://tinyurl.com/yx6d9ocl; pdf p. 17.

arbitration in the first instance rather than litigate them because their claims relate to a private employment dispute to be decided under the terms of their expired employment agreements with the APA.[29] Having argued that Plaintiffs Behnke's and Newman's claims are a private matter between employer and employee, Defendants are estopped from now arguing the contrary position that their publications of the Hoffman Report on which Plaintiffs' claims are based were public acts of advocacy on matters of public interest. *See, e.g.*, *Nwokwu v. Allied Barton Sec. Serv.*, 171 A.3d 576, 585 n.20 (D.C. 2017) ("'[J]udicial estoppel' generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001))).

Because Defendants offer ***no evidence*** to rebut their public statements that their goal for the investigation and Report was objectivity, not advocacy, their Motions must be denied for that reason alone.

B. Defendants' Special Motions to Dismiss Claims 1, 4, 5, and 9 Fail Because the Publications on Which Those Claims Are Based Were Not Made in a Public Forum.

Defendants' Special Motions to Dismiss Claims 1, 4, 5, and 9 fail for the additional and independent reason that the publications on which those claims were based were not made "in a place open to the public or a public forum" or in "petitioning [to] the government or communicating views to members of the public." D.C. Code §§ 16-5501(1), 16-5502(b).

To satisfy their initial burden under the D.C. Anti-SLAPP Act, Defendants must "make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The Act rigidly defines "act in furtherance of the right of advocacy on issues of public interest" as follows:

[29] *See* Order (Mar. 26, 2019).

(A) Any written or oral statement made:

> (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
>
> (ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1).

Thus, to qualify as an "act in furtherance of the right of advocacy on issues of public interest," Defendants' publications must be made "in a place open to the public or a public forum" or in "petitioning [to] the government or communicating views to members of the public." *Id.* And, of course, Defendants must make that showing on a claim-by-claim basis. D.C. Code § 16-5502(b); *see also, e.g.*, *Ingber v. Ross*, 479 A.2d 1256, 1269 (D.C. 1984) ("[E]ach publication of a defamatory statement, including each republication, is a separate tort[.]"); Restatement (Second) of Torts § 576 (similar).

Here, Defendants cannot make a prima facie showing that their publications of the Hoffman Report on which Plaintiffs' Claims 1, 4, 5, and 9 are based were "act[s] in furtherance of the right of advocacy" because the publications were to private, non-public audiences and did not "communicate views to members of the public." Those four Claims are based on the following publications, all in private forums open only to the leadership of the APA, a private organization, not to the public:[30]

[30] *Turnbull v. Lucerne Valley Unified Sch. Dist.*, 234 Cal. Rptr. 3d. 488, 495 (2018) (Defendants did not show the acceptance of a note is protected as a 'written or oral statement or writing made in a place open to the public or a public forum.'"); *Contiki U.S. Holdings, Inc. v. Dilanzo*, No. B247620, 2015 WL 412997, at *4 (Cal. Ct. App. Feb. 2, 2015) ("[T]hree statements made by email—to a Contiki partner company, to the Operations Resource Manager of Contiki Holidays, United Kingdom, and to the author of a blog—were not made in a public forum because those emails were not public."); *Mazzaferri v. Mazzaferro*, No. A131261 2011 WL 5412459, at *5 (Cal. Ct. App. Nov. 9,

Claim	Publication at Issue & Audience
1	Hoffman and Sidley's publication of the Draft Hoffman Report ***to only*** the APA Board of Directors & Special Committee thereof (June 27, 2015)[31]
4	Hoffman and Sidley's publication of the Final Hoffman Report ***to only*** the APA Board of Directors and Special Committee thereof (July 2, 2015)
5	The APA's publication of the Final Hoffman Report ***to only*** the APA Council (July 8, 2015)
9	Hoffman and Sidley's publication of the Revised Hoffman Report ***to only*** the APA Board of Directors and Special Committee thereof (Sept. 4, 2015)

Each of these publications was made via secure, password protected websites or by e-mails directed only to select APA governance members. None of these publications was accessible to the public.[32]

Because none of the publications at issue in these four Claims was made "in a place open to the public or a public forum" or made in "petitioning the government or communicating views to members of the public," Defendants' Special Motions to Dismiss should be denied as to Plaintiffs' Claims 1, 4, 5, and 9 for this independent reason.

2011) ("[T]he Recorder's Office may be a repository of public information, it is not a *forum* for public *debate or discussion* on issues of public interest."); *Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP*, 53 Cal. Rptr. 3d 256, 260 (2007) ("a business letter addressed to the intended recipient—the president of the HMO—from an attorney for one of two shareholders of a corporation providing medical services to the HMO's members. As such, it does not fit the definition of a public forum."); *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 391 (2003) ("Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums.").

[31] In its March 13, 2019, response to Plaintiffs' fourth interrogatory, APA stated that it received the cover letter for the July 2, 2015, Report via a Sidley secure website and by e-mail from Sidley.

[32] James Aff. ¶ 7 (Exhibit C-17 to Plaintiffs' First Consolidated Opposition).

C. Even if the Hoffman Report Were a Work of Advocacy, Defendants Hoffman and Sidley Cannot Claim the Protection of the D.C. Anti-SLAPP Act Because They Did Not Advocate on Their Own Behalf, Only for the APA.

Even if the publications (and republications) of the Hoffman Report were "act[s] in furtherance of the right of advocacy"—and they were not—only the APA, not Hoffman or Sidley, can claim the protection of the Anti-SLAPP Act.

Courts that have examined the types of acts that qualify for protection under anti-SLAPP statutes have repeatedly held that ***"one seeking the protection of the statute must show that" he has acted "on [his or her] own behalf."*** *Cardno ChemRisk, LLC v. Foytlin*, 68 N.E.3d 1180, 1187 (Mass. 2017) (brackets in original); *Steinmetz v. Coyle & Caron, Inc.*, 862 F.3d 128, 137 (1st Cir. 2017) (recognizing that Massachusetts Anti-SLAPP Act "encompasses only parties who petition their government as citizens, not as vendors of services" (quotation marks omitted)); *Gaudette v. Mainely Media, LLC*, 160 A.3d 539, 543 (Me. 2017) (admonishing that Maine's Anti-SLAPP Act applies only when claims are based on "the moving party's exercise of ***the moving party's*** right of petition" (emphasis in original)). Indeed, in the exact situation in this case—where the board of an organization hired an independent investigator to conduct an investigation and the investigator then publishes statements about his investigation—the Massachusetts Supreme Judicial Court has expressly held that the Massachusetts Anti-SLAPP Act does ***not*** apply to claims based on the investigator's statements because the investigator "was not exercising ***his*** right to petition or to seek any redress ... but rather was acting solely on behalf of [an organization] as an expert investigator and witness." *Kobrin v. Gastfriend*, 821 N.E.2d 60, 65 (Mass. 2005).

So, too, here. It is not disputed (and could not possibly be disputed) that Hoffman and Sidley conducted their investigation and published the Hoffman Report solely at the request of and for the APA. Likewise, it is not disputed (and could not possibly be disputed) that Hoffman and Sidley were not acting as advocates on behalf of the APA (as in a typical attorney-client

relationship). That is clear from the APA's repeated statements that "[i]t is the intent of the [APA] that [Hoffman and Sidley's] review will be thorough and fully independent."[33]

Therefore, even if the APA could claim the protections of the D.C. Anti-SLAPP Act, Hoffman and Sidley cannot, and their Special Motions to Dismiss should be denied for this additional reason.

D. Even if the Hoffman Report Were a Work of Advocacy, Because Defendant APA Only Identifies Its Publication of the Hoffman Report *on Its Website* (Claim 7) as an Act of Advocacy, Its Special Motion to Dismiss Should Be Denied as to Claims 1-6 And 8-11.

Finally, because the APA asserts in its Special Motions to Dismiss only that a single publication of the Hoffman Report—its "publication of that Report on its website"—constitutes "an act in furtherance of the right of advocacy on issues of public interest,"[34] its Motions should be denied as to all of Plaintiffs' claims except Claim 7, which is based on that specific publication.[35]

As explained above, the D.C. Anti-SLAPP Act requires that a party seeking its protections "makes a prima facie showing that ***the claim at issue*** arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b); *accord Mann*, 150 A.3d at 1227. In other words, a defendant cannot broadly claim that the Act applies to a complaint as a whole; it must demonstrate the Act's applicability on a claim-by-claim basis. *See id.* That requirement is significant because, as noted above, "each publication of a defamatory statement,

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[33] APA, *Statement of APA Board of Directors: Outside Counsel to Conduct Independent Review of Allegations of Support for Torture* (Nov. 12, 2014), *available at* https://www.apa.org/news/press/releases/2014/11/risen-allegations.

[34] APA First Special MTD at 9.

[35] Sidley and Hoffman fail to claim that they undertook any "act" protected under the D.C. statute and instead assert that they merely "contemplated" that APA would publish the Report. (Hoffman/Sidley First Special MTD at 10; APA First Special MTD at 10; Hoffman/Sidley Second Special MTD at 10; APA Second Special MTD at 10.)

including each republication, is a separate tort." *Ingber v. Ross*, 479 A.2d at 1269 (quotation marks omitted); Restatement (Second) of Torts § 576.

Here, the APA contends ***only*** that it "has made a prima facie showing that its publication of the [Hoffman] Report ***on its website*** constitutes an 'act in furtherance of the right of advocacy on issues of public interest.'"[36] That publication is only the subject of Plaintiffs' Claim 7. Because the APA is limited to the arguments raised in its motions and cannot raise new arguments on reply, *Williams v. United States*, 52 A.3d 25, 50 n.104 (D.C. 2012), its Motions should be denied as to all of Plaintiffs' claims except Claim 7 for this additional reason.

II. Defendants Fail to Demonstrate as a Matter of Law That Their Republication of the Hoffman Report as Alleged in Claim 11 Is Not a "Republication" for Purposes of Defamation Law.

Even if Defendants could satisfy their initial burden under the D.C. Anti-SLAPP Act—and they cannot—their Second Special Motions to Dismiss Plaintiffs' Claim 11 fail because Defendants cannot demonstrate as a matter of law that the APA's 2018 publication of the Hoffman Report in a new location (and to new readers) was not a "republication" for purposes of defamation law. Nor can Defendants Hoffman and Sidley demonstrate as a matter of law that it was not reasonably foreseeable that the APA would republish the Report.

Because questions of publication and republication are questions of fact, to prevail on their Motions Defendants must prove that the publication at issue in Plaintiffs' Claim 11 is not a republication ***as a matter of law***. *See, e.g.*, *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016) ("[T]he question of whether plaintiff has proved the element of publication is a factual one for the jury. It follows, then, that republication is also for the factfinder to determine."); *Tavoulareas v. Piro*, 759 F.2d 90, 136 (D.C. Cir.), *vacated in part on other grounds*

[36] APA's First Special MTD at 9.

on reh'g, 763 F.2d 1472 (D.C. Cir. 1985), *and on reh'g*, 817 F.2d 762 (D.C. Cir. 1987) ("Responsibility for publication is a factual question which is normally for the jury to resolve."); *Etheredge-Brown v. Am. Media, Inc.,* 13 F. Supp. 3d 303, 307 n.2 (S.D.N.Y. 2014) ("The question whether the initial Internet publication of the allegedly defamatory article constitutes a republication is a question of fact, at least in part."). As explained below, Defendants cannot do so.

A. Defendants' 2018 Publication of the Hoffman Report on a Different Webpage to a New Audience Is a Separate Publication from Their 2015 Publication of the Hoffman Report.

Although Defendants attempt to complicate it, the issue of whether Defendants' 2018 publication of the Hoffman Report constitutes a publication separate from their 2015 publications turns on a simple fact: the publications took place at separate times and reached different audiences. Nothing more is necessary. Indeed, as discussed below, under settled law publication at separate times constitutes republication even if the republication reached the same audience.

As explained in Restatement (Second) of Torts § 577A—which has been repeatedly applied in the District of Columbia[37]—when determining if defamatory communications constitute separate publications, courts apply the commonsense rule that "each of several communications to a third person by the same defamer is a separate publication." Restatement (Second) of Torts § 577A(1). Moreover, as explained by the U.S. Supreme Court and the Restatement, that is true even where the ***same*** defamatory communication is repeated on separate occasions: the "'general rule [is] that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises.'" *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 n.3 (1984) (quoting

[37] *See, e.g.*, *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007); *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990).

Restatement (Second) of Torts § 577A cmt. a.). Thus, under this long-standing and commonsense rule, when a defendant publishes a defamatory statement and ***subsequently re-publishes that same defamatory statement or*** publishes a new defamatory statement about the plaintiff, those publications give rise to multiple causes of action.[38]

Here, Defendants' 2015 and 2018 publications of the Hoffman Report each constitutes a separate "publication" under this straightforward rule. It is undisputed that Defendants first published their revised Hoffman Report on the APA's website in 2015 and that it was viewed by many people at that time.[39] It is similarly undisputed that Defendants again published the Hoffman Report on the APA's "Timeline" webpage in 2018 (along with additional materials that related directly to the substance of the Hoffman Report). That alone would be enough to constitute republication. But even more, the APA advertised the newly revised webpage's existence by an e-mail to its Council of Representatives list-serv, which included people who would not have received its similar communications in 2015.[40] That e-mail caused the republished Hoffman Report to be viewed by different people than had viewed it in 2015.[41]

Because both publications of the Hoffman Report contained defamatory statements about Plaintiffs, and because each was published at a separate time to a different audience, each

[38] The Restatement provides a clear illustration of the operation of this rule: "On one occasion A says to B that C is a murderer. On a later occasion A repeats the same statement to B. On a third occasion A makes the same statement to D. Each of the three communications is a separate publication and C has three causes of action against A." Restatement (Second) of Torts § 577A illus. 1.

[39] Newman Aff. ¶ 6.

[40] APA continued to add new substance content to that page until September 18, 2019, most of which referred to the revised September 4, 2015, false and defamatory statements concerning Plaintiffs. *See* APA, Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security, http://apa.org/news/press/statements/interrogations (reflecting entries on various dates).

[41] Newman Aff. ¶ 6; Harvey Aff. ¶ 6. Although the viewership metrics are in Defendants' exclusive possession, they cannot reasonably contend that the audiences for these separate publications three years apart did not differ. Even if that were not the case, however, a separate publication three years after a previous publication is enough to constitute republication.

constitutes a separate "publication" as a matter of law and gives rise to separate causes of action. *See Keeton*, 465 U.S. at 774. Consequently, Defendants' Special Motions to Dismiss Plaintiff's Claim 11 must be denied.

1. The "Single Publication Rule" Does Not Render the 2015 and 2018 Publications the Same Publication.

Contrary to Defendants' contentions, this conclusion that the APA republished the Report in 2018 is not affected by the so-called "single publication rule." As the U.S. Supreme Court has explained, the single publication rule constitutes a narrow "exception" to the "general rule" that "each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises." *Keeton*, 465 U.S. 774 & n.3.

Under the single publication rule, a "single, integrated publication of a periodical or edition of a book or similar aggregate communication" is a single publication, *Foretich v. Glamour*, 753 F. Supp. 955, 960 (D.D.C. 1990), and "a single communication heard at the same time by two or more third persons is a single publication," Restatement (Second) of Torts § 577A(2). The rule's purpose is to "avoid[] multiplicity of suits, as well as harassment of defendants" that would be caused by a plaintiff bringing a separate defamation claim for every person who read a single defamatory book, article, or report. *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007).

Notably, and consistent with that purpose, ***the single publication rule does not apply*** to "separate ... publications on different occasions" or "republications" of a defamatory statement. Restatement (Second) of Torts § 577A cmt. d. "In these cases, the publication reaches a new group and the repetition justifies a new cause of action." *Id.* As D.C. courts have explained, "subsequent publications of the same material, such as new editions of a newspaper or book, or rebroadcast of

a television program, are new publications, or republications, that trigger a new cause of action[.]" *Foretich*, 753 F. Supp. at 960. As one court applying this rule cogently explained, "[i]t would seem plain on principle that no matter on how many separate occasions one may utter slanderous words about another (though all may refer to the same transaction) each slander constitutes a new cause of action." *Weaver v. Beneficial Fin. Co.*, 199 Va. 196, 200 (1957). Thus, as explained in the Restatement, the paradigmatic example of a republication is that of a newspaper with morning and evening editions: "[I]f the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication and there are ***two causes of action***." Restatement (Second) of Torts § 577A cmt. d.[42]

The facts make clear that the single publication rule does not apply here. As explained above, Defendants published statements alleged to be defamatory about Plaintiffs on separate occasions—in 2015 and later in 2018—and on different locations on the APA website. Moreover, the 2018 publication was advertised by e-mail to a different (although overlapping) audience. This is not a case where a single publication reached a single, large audience, thus warranting application of the single-publication rule; rather, Defendants ***republished*** allegedly defamatory statements about Plaintiffs on different occasions (years apart), thus giving rise to separate causes of action for defamation. *See Weaver*, 199 Va. at 200 ("[E]ach time defamatory matter is brought to the attention of a third person there is a new publication constituting a separate cause of action against the person responsible for such new publication.").

[42] The Restatement again provides a helpful illustration: "A publishes in a magazine of national circulation an article in which he describes B by name as a chronic drunkard.... reprints the same article in the next issue of his magazine. There are two publications." Restatement (Second) of Torts § 577A illus. 3, 5.

2. The Publication and Republication of the Hoffman Report on the Internet Does Not Render the 2015 and 2018 Publications the Same Publication.

In addition, again contrary to Defendants' contentions, the manner in which Defendants republished the Hoffman Report in 2018—via a hyperlink on the APA's "Timeline" website—does not render that republication the same as Defendants' original publication of the Report in 2015.

Defendants make much of the fact that, rather embedding the Hoffman Report directly on the "Timeline" webpage so that the entire text of that lengthy document displayed there, Defendants instead published there a hyperlink to the Report. But that is a distinction without a difference. As courts in the District of Columbia and elsewhere have repeatedly held, when a person posts a hyperlink to a document on a webpage, he incorporates that document into that webpage and publishes it on that webpage for purposes of defamation law. *See, e.g.*, *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 262 (D.D.C. 2013) ("And in referring to [plaintiff] as a warlord in his February 11, 2010 article, [defendant] provided a hyperlink to his January 27, 2010 article, thus incorporating that article by reference and providing the necessary context for the allegedly defamatory remark.").

A hyperlink constitutes the incorporation of a hyperlinked document by reference for a simple reason. As courts have explained, in the Internet era, "it is simply assumed that persons navigating the Internet understand hyperlinks as means of connecting one webpage to another," and, accordingly, courts have held that "clicking [a] hyperlinked phrase is the twenty-first century equivalent of turning over [a] cruise ticket." *Adelson v. Harris*, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013); *see also Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1119 (9th Cir. 2004) (noting "the ease of clicking on a link" and explaining that a person interested in linked materials could "logically be expected to follow those links to obtain information" about the linked

materials); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1202 (9th Cir. 2006) (noting the ease with which "any user" can click a link and view the linked content).

In other words, the hyperlinked materials are part and parcel of the document containing the hyperlink. It is thus not surprising that courts have expressly held in defamation cases that where, as here, a website contains a hyperlink to a second document, that second document is incorporated into the website containing the link. *See, e.g.*, *Boley*, 950 F. Supp. 2d at 262; *Nestle Purina PetCare Co. v. Blue Buffalo Co.*, No. 14-cv-859, 2015 WL 1782661, at *2, 11-12 (E.D. Mo. Apr. 20, 2015) (denying motion to dismiss defamation claims based on defendant's Facebook and Twitter posts that did not even name plaintiff but contained links to websites naming and making defamatory statements about plaintiff).[43] Accordingly, by publishing a hyperlink to the Hoffman Report on the APA's "Timeline" webpage, Defendants intentionally and unmistakably incorporated the Hoffman Report into and published the Hoffman Report on that webpage.

Even if Defendants' 2018 publication of the Hoffman Report did not constitute a republication for the reasons described above—and it does—it would ***still*** constitute a separate publication as a matter of law because Defendants added new, substantive content and commentary about the Report on the same webpage on which they republished it.

As courts to have addressed the question have uniformly held, "where substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred." *In re Davis*, 347 B.R. 607, 612 (W.D. Ky. 2006) (holding addition of "update" section below original article constituted republication of article); *Larue v. Brown*,

[43] *See also, e.g.*, *Werner v. Hewlett-Packard Co.*, No. 13-cv-10287, 2015 WL 1005332, at *2 (E.D. Mich. Mar. 5, 2015) (observing that an online document "expressly incorporate[d], through an electronic link," another document); *Barton v. Hewlett-Packard Co.*, No. 13-cv-554, 2014 WL 6966986, at *1 (W.D. Pa. Dec. 9, 2014) (same); *Rosado v. eBay Inc.*, 53 F. Supp. 3d 1256, 1260 & n.1 (N.D. Cal. 2014) (taking judicial notice of online agreement with other materials "[hyper]linked to and incorporated by reference" into it).

333 P.3d 767, 773 (Ariz. Ct. App. 2014) (holding addition of "updates" to articles constitutes republication of original articles giving rise to additional causes of action). As Defendants concede,[44] only where modifications to a website are "mere technical changes ... such as changing the way an item of information is accessed," or are otherwise "unrelated" to the defamatory content can there be no republication. *Davis*, 347 B.R. at 611.

Here, as Defendants have admitted, when they republished the Hoffman Report on the APA's "Timeline" webpage in 2018, they contemporaneously published on that page, along with the Report, the three documents and notation concerning this lawsuit described in Section A of the Factual Background.[45] Those documents and notation undeniably related to and commented on the Hoffman Report, including by quoting specific sections of the Report, reviewing its conclusions, and disputing its findings.

In *Davis*, the additional substantive material continued or expanded upon the original defamation. However, that is not a necessary condition for a court to find that a republication occurred because new substantive material has been added to the defamatory document's location. In *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862 (W.D. Va. 2016), an online magazine published a defamatory article about the plaintiff's treatment of an alleged rape on campus. A year after the article was first published, the magazine issued a statement, appended to the online article and on a separate URL, which acknowledged that the rape accusation could not be corroborated. The magazine argued that it could not be held liable for a republication since the statement was a

[44] Hoffman/Sidley Second Special MTD at 13; APA Second Special MTD at 6.

[45] As explained above (*see supra* Background Part A), these materials included (1) a Division 19 Task Force Response to the Hoffman Report; (2) February 16, 2016 and May 15, 2016 letters from former APA Ethics Chairs; (3) a June 12, 2016 letter from former APA Presidents; and (4) an entry for February 16, 2017 stating 'Five plaintiffs filed a lawsuit against the Association arising out of the publication of the Independent Review. *See* Compl. ¶ 295; APA, Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security, http://apa.org/news/press/statements/interrogations.

retraction of the original defamatory statements. The court rejected that argument, holding that "a reasonable jury could determine that the December 5th Editor's Note 'effectively retracted'" only a portion of the original article. *Eramo*, 209 F. Supp. 3d at 880.

Here, the documents that accompanied APA's reposting of the Report on a newly revised and substantively modified webpage were not even a retraction of any kind. They were merely documents from APA members criticizing the Report. In this circumstance, a jury could easily find that reposting the Report in the face of those criticisms—and then affirmatively directing APA members to a new location to read it—constituted a republication of the Report's defamatory content.

Because this is not a case involving the mere continued hosting of a statement on a single website,[46] the simple posting of a hyperlink without more,[47] the mere addition of or change to a URL on the same website,[48] or additions or changes to *unrelated* parts of a website,[49] Defendants'

[46] *See* APA Second Special MTD at 6 (citing *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012)).

[47] *See* APA Second Special MTD at 7-8 (citing *In re Philadelphia Newspapers*, 690 F.3d 161 (3d Cir. 2012); *Doctors Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087 (N.D. Ill. 2016); *Salyer*, 701 F. Supp. 2d 912, 917 (W.D. Ky. 2009); *Life Designs Ranch, Inc. v. Sommer*, 364 P.3d 129, 138 (Wash. Ct. App. 2015); *Haefner v. New York Media, LLC*, 82 A.D.3d 481 (N.Y. App. 2011); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495 (6th Cir. 2015); *Mirage Entm't, Inc. v. FEG Enteretenimientos S.A.,* 326 F. Supp. 3d 26 (S.D.N.Y. 2018); *United States ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058 (S.D. Wash. 2012)).

[48] *See* APA Second Special MTD at 8-9 (citing cases involving only *technical* changes to the material or adding an identical copy to a new URL *without adding any new substantive material related to the original defamatory material*, including *Canatella v. Van de Kamp,* 486 F.3d 1128 (9th Cir. 2007) (only change was allowing access to material through search mechanism); *Kinney v. Barnes*, No. B250188, 2014 WL 2811832 (Cal. Ct. App. 2014) (only changes were removing date and moving article to an archives section of website); *Yeager v. Bowlin*, 693 F.3d 1076 (involving modification of unrelated information to the website); *Martin v. Daily News, L.P.*, 951 N.Y.S.2d 87 (Sup. Ct. 2012) (involving the mere addition of "share buttons" permitting readers to share the material on social media); and *Life Designs Ranch*, 364 P.3d at 137 (no changes at all)).

[49] *See* APA Second Special MTD at 6-7 (citing cases involving only the addition of materials wholly unrelated to the previously published defamatory materials, including *Salyer*, 701 F. Supp. 2d at 917 ("[t]he mere act of editing a website to add unrelated content"); *Firth v. State*, 98 N.Y.2d 365, 371 (2002) (involving "the mere addition of *unrelated* information to a Web site"); *and Yeager*, 693 F.3d 1076 (involving the continued hosting of defamatory information while modifying unrelated information on website)).

case law is entirely distinguishable. Defendants' Special Motions to Dismiss Plaintiffs' Claim 11 must be denied.

B. Defendants Hoffman and Sidley Fail to Prove as a Matter of Law That the APA's Republication of the Hoffman Report in 2018 Was Not Reasonably Foreseeable to Them.

Finally, Defendants Hoffman and Sidley argue that they cannot be liable for the APA's republication of the Hoffman Report in 2018 because the republication was not reasonably foreseeable to them. Because the question of whether a publication or republication was reasonably foreseeable is generally a question of fact for the jury, Defendants must prove that the republication at issue in Plaintiffs' Claim 11 was not reasonably foreseeable as a matter of law to prevail on their Motions. *See, e.g.*, *Tavoulareas*, 759 F.2d at 136 ("Responsibility for publication is a factual question which is normally for the jury to resolve."); *Klayman v. Judicial Watch, Inc*., 22 F. Supp. 3d 1240, 1252 (S.D. Fla. 2014) (similar). They cannot so prove.

In arguing that they cannot be responsible for the APA's 2018 republication, ***Defendants Hoffman and Sidley grossly misstate the law.*** According to them, they cannot be held responsible unless they themselves "published or knowingly participated in publishing the defamation." (Hoffman/Sidley Second Special MTD at 10 (quoting *Tavoulareas*, 759 F.2d at 136).) But ***Tavoulereas holds the exact opposite of what Defendants Hoffman and Sidley assert:*** under D.C. law, "[t]he maker of a [defamatory] statement may be held accountable for its republication if such republication was reasonably foreseeable," and ***"there is no need to require proof that [defendant] knowingly participated in [another person's] republication" of his defamatory statements*** for the defendant to be liable for their republication. *Tavoulereas*, 759 F.2d at 136 n.56; *see also Caudle v. Thomason,* 942 F. Supp. 635, 640 (D.D.C. 1996) (denying motion to dismiss where complaint alleged that defendant "knew, or in the exercise of reasonable care should

have known, that such republication would occur").[50] Simply put, all that is necessary for a person to be held liable for another's republication of his defamatory statement is that the republication be "reasonably foreseeable" to that person. *Id.* All of Defendants Hoffman's and Sidley's legal arguments against their liability for the republication depend on their misstatement of the law and must be rejected.[51]

Here, not only do Plaintiffs allege in their Supplemental Complaint that it was reasonably foreseeable to Defendants Hoffman and Sidley that the APA would republish the Hoffman Report,[52] but the record evidence confirms that the republication was entirely foreseeable and even known to them. That evidence includes:

- Public statements by the APA that it would "undertake an aggressive communications program to inform members and the general public of the report's findings";[53]
- Public statements by the APA that "[a]fter reviewing the [Hoffman] [R]eport, the APA Board will make it available ... to the APA Council of Representatives, APA members and the public";[54]
- Public statements by the APA that it "will take actions in response to the report and the recommendations of the special committee as it finds appropriate";[55] and
- Defendants Hoffman and Sidley's September 13, 2018, Response to Plaintiffs' July 23, 2018, Praecipe informing the Court that the "APA ... may [] post the [Hoffman] Report on

[50] *See also, e.g.*, *Chandler v. Berlin*, No. 18-cv-2136, 2019 WL 1471336, at *6 (D.D.C. Apr. 3, 2019) ("The maker of a defamatory statement may be held accountable for its republication if such republication was reasonably foreseeable."); *Ingber*, 479 A.2d at 1269 (the original publisher will be liable if "the repetition was reasonably to be expected"); Restatement (Second) of Torts § 576.

[51] Defendants Hoffman and Sidley assert that they cannot be liable for the APA's republication of the Hoffman Report because they "had no authority to approve or disapprove" the republication (Hoffman/Sidley Second Special MTD at 11) and Plaintiffs cannot allege that "Sidley participat[ed] in any way in the challenged website changes" (*id.* at 5, 7-8, 11). But those arguments fail because they depend on Defendants' misstatement of the legal standard as requiring their active participation in the republication.

[52] Compl. ¶¶ 295-316.

[53] APA, *APA Response to April 30 New York Times Article* (Apr. 30, 2015), *available at* https://www.apa.org/news/press/response/new-york-times.

[54] APA, *Statement of APA Board of Directors: Outside Counsel to Conduct Independent Review of Allegations of Support for Torture* (Nov. 12, 2014), *available at* https://www.apa.org/news/press/releases/2014/11/risen-allegations.

[55] *Id.*

a third-party website," in which Defendants Hoffman and Sidley did not oppose or object to the APA's actions.[56]

Notably, courts have held far less than this evidence sufficient to demonstrate that republication was reasonably foreseeable to a defendant. For example, in *Stephan v. Baylor Medical Center*, 20 S.W.3d 880 (Tex. App. 2000), a case involving a scenario almost identical to that here, a hospital provided an investigatory report about a doctor to the Texas State Board of Medical Examiners as well as to the National Practitioner Data Bank ("NPDB") as part of an "adverse action report." The NPBD subsequently published the hospital's report and the doctor sued the hospital for defamation over the NPDB's republication. *Stephan*, 20 S.W.3d at 889. Like Hoffman and Sidley here, the hospital argued that it could not be held liable for that republication because it was not reasonably foreseeable that the NPDB would republish it and, in any event, the hospital no longer had the ability to control the report once it had provided it to the NPDB. The court flatly rejected the hospital's argument:

> Baylor argues that the single publication rule should apply to it because once it made its report, it "relinquished all right of control, title, and interest in the printed matter." It is clear the NPDB released the report at its discretion to others and not at Baylor's direction. ***Baylor made its report, however, with full knowledge of how the information would be used and potentially disseminated by the NPDB***. Although the general rule is that one is not liable for repetition of a defamatory statement by a third person, if a reasonable person would recognize that his actions create an unreasonable risk that the defamatory matter will be communicated to other parties, his conduct becomes a negligent publication to those parties with the same consequences as a direct and intentional communication.

Stephan, 20 S.W.3d at 889-890 (citations omitted).

[56] Pls.' Praecipe (July 23, 2018); APA & Hoffman/Sidley's Resp. to Pls.' Praecipe (Sept. 13, 2018). Defendants Hoffman's and Sidley's attempt to distinguish a republication that would occur on the APA website from one on a third-party website is unsupported by the case law and the facts. The only thing that matters is that it was foreseeable that the Report would be republished as long as Sidley did not object or disavow its contents, especially given Plaintiffs' notification that APA intended to republish the Report. (*See* Hoffman/Sidley Second Special MTD at 5-6).

In sum, based on this evidence, there is at the very least a fact dispute over whether the APA's republication of the Hoffman Report was reasonably foreseeable to Defendants Hoffman and Sidley. Consequently, their Special Motion to Dismiss Plaintiffs' Claim 11 should be denied.

CONCLUSION

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

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

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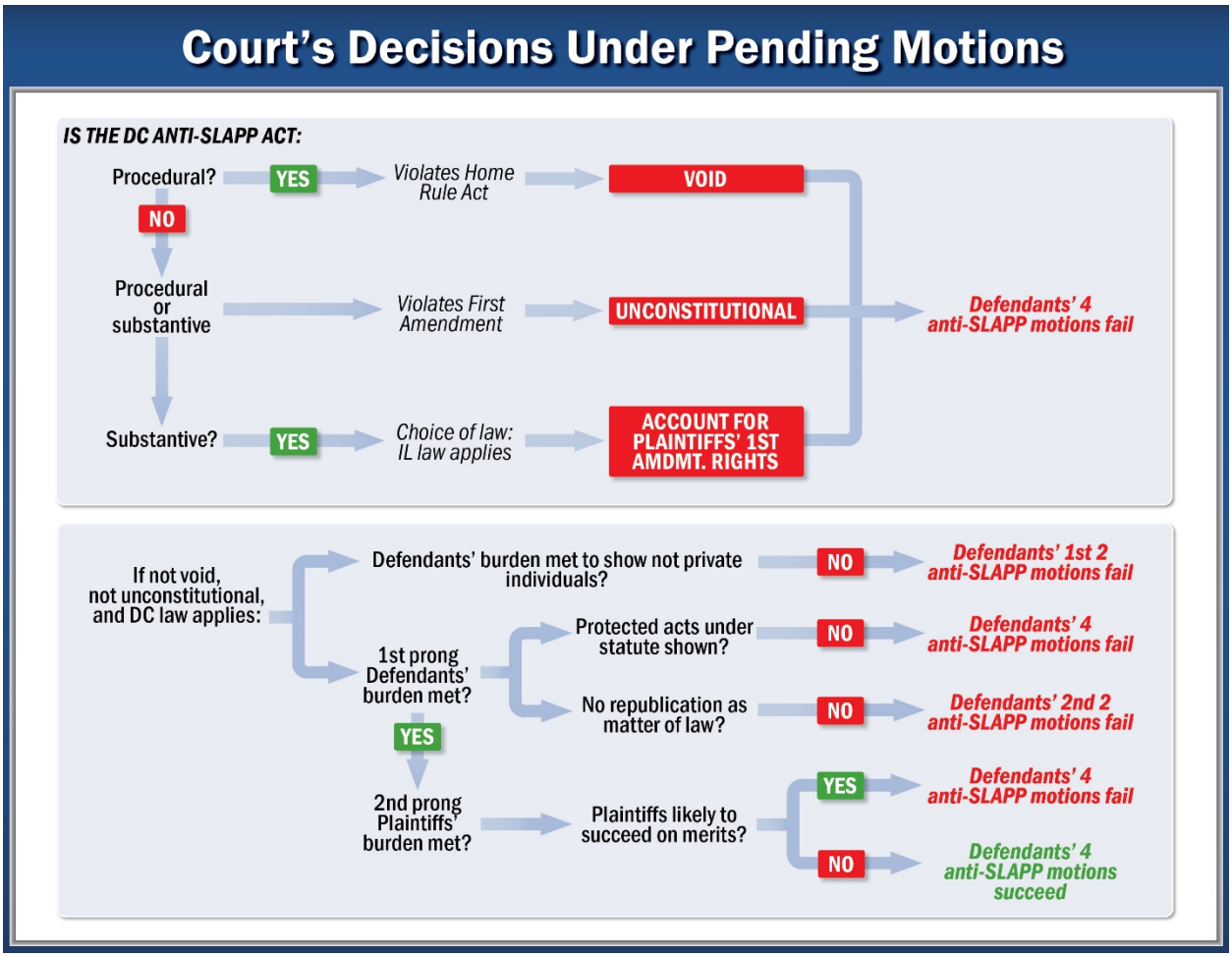
CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019 a true and correct copy of the foregoing Plaintiffs' Consolidated Opposition to Defendants' Second Set of Contested Special Motions to Dismiss Filed March 21, 2019, Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16- 5502 was filed through the Court's Case File Express electronic filing system, which will automatically send a Case File Express Electronic Notice to Defendants' counsel of record that filing is completed and available for download at their convenience.

/s/ John B. Williams
John B. Williams

OVERVIEW OF ISSUES IN PENDING MOTIONS



IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

[PROPOSED] ORDER

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

ORDERED that:

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

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

Copies to:

John B. Williams, Esq.
Fara N. Kitton, Esq.
Counsel for Plaintiffs Banks, Dunivin and James

Thomas A. Clare, Esq.
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John K. Villa, Esq.
Thomas G. Hentoff, Esq.
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Fernando Amarillas, Esq.
Andrew Saindon, Esq.
Counsel for Intervenor District of Columbia

EXHIBIT A

EXHIBIT A

Bloomberg BNA

Corporate Law & Accountability Report™

INTERNAL INVESTIGATIONS

Sidley Austin's David Hoffman Discusses Key Considerations For Companies Undertaking Internal Probes During Emerging Scandals

Earlier this year, an internal investigation led by Sidley Austin LLP partner David Hoffman blew the lid off the American Psychological Association's (APA) role in the Bush administration's "enhanced interrogation" program. The APA board hired Hoffman to conduct an internal investigation after an explosive book by New York Times journalist James Risen in October 2014 suggested that the APA colluded with the CIA and the Defense Department to assist the interrogation program. After interviewing 150 witnesses around the country and reviewing tens of thousands of documents, the Sidley team issued a report in July this year. The team found that leading APA officials did in fact collude with Defense Department officials to create and maintain permissive APA ethics policies that allowed psychologists to participate in potentially abusive detainee interrogations at Guantanamo Bay and elsewhere.

In an interview with Bloomberg BNA's Yin Wilczek, Hoffman says the APA case offers key lessons for companies caught in emerging scandals. He also says that the Justice Department's new policy on individual culpability may complicate matters,[1] and that data breaches are a growing area for internal investigations.

David Hoffman is a partner at Sidley Austin in its Chicago office, where he is co-head of the White Collar Practice in Chicago and leads that office's work on data-breach-related litigation and investigations. Among other career highlights, Hoffman was an Assistant U.S. Attorney in Chicago from 1998 to 2005, and Inspector General of the City of Chicago from 2005 to 2009. As Chicago IG, he led a 65-person office that conducted corruption investigations, and he established and supervised an external audit team that examined internal controls and compliance procedures throughout a $7-billion-per-year, 36,000-employee entity.

He is also a Lecturer in Law at the University of Chicago Law School where he has taught "Public Corruption and the Law" for the past six years. He is a graduate of Yale and the University of Chicago Law School and clerked for Chief Justice William Rehnquist.

BLOOMBERG BNA: In light of the APA situation, what do you see as some of the key challenges confronting companies that want to embark on an internal investigation?

Hoffman: Two of the most important considerations for companies that are deciding whether to initiate an internal investigation are: what is the likely scope of the investigation, and what does the company hope to ac-

[1] See the Yates Memorandum, available at http://www.justice.gov/dag/file/769036/download (13 CARE 1952, 9/11/15).

 ISSN 2330-6300

complish by conducting the investigation. Both of those questions can be very difficult to answer at the beginning, especially the second question regarding the company's goals.

The APA case was a fairly unique situation. How those key considerations played out with the APA was really quite interesting.

One of the biggest issues for the APA over the last 10 years has been the fallout from its decision during the Bush administration to issue ethical guidelines that allowed psychologists to participate in national security interrogations. There was intense external and internal criticism that these guidelines effectively permitted psychologists to participate in abusive interrogations and, in some circumstances, torture. Those who had set up the ethics guidelines strongly disputed this claim. But a substantial percentage of psychologists were deeply and passionately concerned about the issue, and saw it as a critical ethical problem that affected the very integrity of the profession.

The day after Risen's book was published, the APA issued a lengthy statement disputing all the claims made by Risen and the APA critics. But a couple of weeks later, the APA board adopted a different approach, and decided that the association needed a thorough, credible and independent investigation to figure out what happened, and a public airing of the investigation's findings regardless of what they were. And so they hired us to conduct an independent investigation, and they announced it publicly. They also announced that they would make our report public, without modifications. Their announcement stressed that they had instructed us to make our own independent judgments about how to conduct the investigation and what conclusions to draw, and said that we were to follow the evidence wherever it led, whether it made the APA look good or bad.

In the realm of internal investigations, it's atypical for a client to make an extensive public statement at the beginning of the engagement emphasizing that the investigation will be independent, at least when the government has not required an independent monitor, for instance. But there are times when it is critical for an entity's integrity or reputation that it establish publicly that the investigation will be truly independent and that there shouldn't be any doubts about the credibility of the investigation. Another example is Penn State University's investigation of the Jerry Sandusky scandal.

It also is unusual for there to be a public commitment at the beginning of the engagement that the report from the internal investigation will be made public. Internal investigation reports are sometimes made public, but the APA went out of its way to announce from the beginning that it would make the entire report public, obviously before knowing what the report would say or where the investigation would go.

The attorney-client privilege is "one of the trickiest areas of the law."

This connects back to what I was saying about having an understanding at the beginning of the matter about what your goals are in having an investigation conducted. Clearly, the APA's goal was, "We need to show our critics and our membership that we are going to have someone produce a credible, thorough description of what happened. In order to do that, we have to hire someone who can be independent and can have the credibility to show that we've gotten to the bottom of the facts." Over the years, an intense level of cynicism had grown around this issue, not only about the APA's initial decisions during the Bush administration but also as to the manner in which the APA had responded to its critics in the years since. Everyone knew that how they set up the internal investigation, what instructions they gave us, and how we conducted the investigation would be the subject of intense scrutiny in both the psychology and intelligence communities.

The APA would have anticipated of course that if the report was critical, there would be further negative attention in the short term. But it appears to have weighed the pros and cons and said, "We would rather have a factual public airing of what happened even if that comes with some criticism, rather than the alternative, which is to do what we've been doing." Their board was clearly thinking that for the long-term health of the APA, it needed to get beyond this issue, and they couldn't do so until they provided a credible, independent accounting of what happened.

That lesson translates to companies in many situations where they face the decision of, do we conduct an internal investigation, and if so, what should the scope be.

BBNA: Are there other considerations?

Hoffman: In addition to the scope and goals of the internal investigation, a third challenge for companies is handling potential disclosures to the government and/or interactions with the government.

The new guidelines recently announced by the DOJ signaling the department's increased focus on individual culpability certainly increase the difficulty in an already difficult area for companies. It's a minefield whenever potential wrongdoing is brought to a company's attention. There are a lot of judgment calls to be made.

While the DOJ's new policy may not make internal investigations more difficult, it will increase the complexity of a company's decision-making about whether or how to disclose information to the government and how to interact with the government.

The fourth challenge for companies is the attorney-client privilege. This is one of the trickiest areas of the law. Perhaps the biggest pressure point in this area is when a company is considering whether to disclose the results of its investigation to the government, because there are always potential consequences with respect to privilege. It's not black and white in terms of whether all, some, or none of the protections from the attorney-client or work product privileges remain in place. It can be very context specific.

To preserve the privilege when there is disclosure requires careful management of both the privilege during the investigation and then discussion of how the privilege will be affected if there is disclosure.

The recent decision in which the D.C. Circuit allowed KBR to shield certain internal investigation documents from a whistle-blower who had sued KBR under the

   ISSN 2330-6300

False Claims Act[2] was helpful because it confirms that if you follow *Upjohn*, then your investigation is a presumptively privileged process. Outside counsel needs to work with the client to be diligent about protecting that privilege, but it certainly can be done.

BBNA: What are some of the major pitfalls that companies should be aware of in initiating an internal investigation?

Hoffman: Number one, it can expose problems within the company. Second, it can be disruptive, and third, it can be costly.

These are discussions that we have in a very explicit way with boards and chief executive officers and general counsel before embarking on an internal investigation because these are legitimate concerns. However, it is always critical to consider the alternative.

Companies that already are facing a potential scandal can't compare the prospect of conducting an internal investigation with an ideal world. It obviously has to be compared with, "What would the world look like if we don't do an internal investigation?" That's not to say that an internal investigation is always the right answer, but the decision not to conduct a credible internal investigation will often create at least three problems: 1) you're potentially leaving an important corporate problem unaddressed; 2) you may create the likelihood that a whistle-blower will turn to the government or the press instead of the company's internal resources to deal with the problem, which is a very important point.

And 3) the decision not to deal with a problem that's presented to the company may be used against the company by the government or in litigation as evidence of the company intentionally ignoring the problem.

Again, every situation is different, so it doesn't mean that this analysis automatically points toward doing an internal investigation. But reviewing the costs and benefits of conducting an investigation versus not doing one is important in every situation. If a significant problem has been brought to the company's attention, there are going to be very substantial downsides in not doing an investigation. And that needs to be weighed against the alternative of doing one.

BBNA: What are some new developments in the world of internal investigations?

Hoffman: The SEC's case against KBR for impeding federal whistle-blower protections is one recent development.

One of the things to keep in mind is that the SEC will look askance on situations in which an employee is prohibited from telling the SEC about problems at the company, or if the company makes that very difficult to do. The key word in the regulation is "impede." You can't impede someone from communicating directly with the SEC about a possible securities law violation. Importantly, this doesn't mean that a company is prohibited from keeping its internal investigation confidential or from telling employees it is confidential, because there is a distinction between the process of conducting an internal investigation and the underlying facts. When an employee wants to talk to the SEC about the underlying facts, the SEC's interest is in making sure that that communication is not impeded.

But this still leaves room for a company to conduct a privileged confidential investigation in which it attempts to determine what the facts are. The company just can't say to its employees, "You can't talk about the facts with anyone else."

This ultimately points towards companies having a strong internal reporting and compliance system that is well known to employees and credible. That's the best and appropriate way to encourage whistle-blowers to report matters internally, rather than first running to the SEC or the government whenever there's a problem.

There also are situations in which it is advisable for companies to tell the government that it is conducting an internal investigation. Sometimes that's a very important and helpful step to take; examples include situations in which the government has already learned of the issue from a whistle-blower or otherwise. This in turn puts tremendous pressure on companies to ensure that their internal investigations are thorough and credible. Again, this relates back to the APA experience. There, it was clear that to the APA board, the most important issue to get right was publicly establishing the thoroughness and credibility of the investigation.

BBNA: Are there other new developments?

Hoffman: One growing area for internal investigations is data breaches. Target's experience illustrates that how a company handles a data breach can have a huge impact on its bottom line because it goes right to the issue of customer trust.

Within the cybersecurity sphere, the SEC's role in policing data breaches is evolving. The SEC's Enforcement Division has been conducting post-data breach investigations into whether companies' internal controls over financial reporting were sufficient as they relate to cybersecurity, and whether companies sufficiently disclosed the risks of data breaches.

In our view, it's still not clear whether the SEC's internal controls theory in this context is a valid one—other than perhaps in a situation with extreme facts—because it would require the SEC to delve into the technical details of a company's cybersecurity measures to determine if they were reasonable. That's a very tricky examination where the sophistication and frequency of cyber-attacks are so high and where all institutions in this country, including the most sophisticated government institutions such as the NSA, have been susceptible to attacks.

"In terms of internal investigations, the scope and number of government investigations into data breaches put pressure on how companies conduct internal investigations around such situations."

In terms of internal investigations, the scope and number of government investigations into data breaches put pressure on how companies conduct internal investigations around such situations.

Just as in any other white-collar investigation, it is important that the forensics investigation into a data

[2] *In re Kellogg Brown & Root Inc.* (13 CARE 1798, 8/14/15).

breach is conducted with an eye towards protecting the attorney-client privilege and gaining a thorough knowledge of what actually happened.

One thing that's unique about cybersecurity internal investigations is that it is very common that the facts remain cloudy no matter how good your investigation is. One important part of the investigation relates to the company's internal security measures and its response to the attack. But equally important is trying to understand the attack itself, which not infrequently is a sophisticated criminal act conducted by a person or entity in an unknown foreign location who anticipated that their actions would be scrutinized by experienced forensic investigators. It's often difficult to figure out not only who did the act, but how the act was done, and sometimes even whether it was successful. For instance, it's quite common to be uncertain about whether the hackers were able to exfiltrate data from the network, either because they hid their tracks or just because of the way the forensics data would show or not show an exit from the system.

In addition, data breaches rarely remain private. Accordingly, there is pressure for companies to think about crisis management and communications earlier in the process than in other more typical internal investigations. That in turn requires careful coordination between the company, outside counsel, and communications advisers to ensure that the legal, regulatory, and communications issues are being discussed together, and that these discussions preserve the attorney-client privilege.

CARE ISSN 2330-6300

EXHIBIT B

EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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

AFFIDAVIT OF SALLY HARVEY IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND SET OF SPECIAL MOTION TO DISMISS UNDER D.C. ANTI-SLAPP ACT

State of Texas)
) ss:
County of Comal)

1. I, Sally Harvey, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. From January to December 2017, I was President of the Society of Military Psychology, Division 19 of the American Psychological Association (hereinafter "APA") in which the military plaintiffs in this litigation are members. As President-elect, I chaired the Division 19 Presidential Task Force charged with the careful examination of the Report of the Independent Review to APA (hereinafter "Report") and, in that role, provided a detailed response to the APA in November 2015. A true and correct copy of the Division 19 task force response can be found published by the APA online at https://www.militarypsych.org/uploads/8/5/4/5/85456500/tf19_response_to_the_hoffman_report_div19_excom_approved.pdf

3. Our response found, among other things, no evidence that Division 19 or any Division 19 member supported torture or engaged in unethical behaviors with respect to interrogation support. It found that many of those interviewed by Mr. Hoffman and Sidley felt their witness statements were mischaracterized and that Mr. Hoffman and Sidley had evidence in their possession that contradicted and negated their conclusions but failed to include that evidence in the Report.

4. Our response also found that the Report's conclusions were based upon: an inaccurate understanding of Department of Defense (hereinafter "DoD") interrogation policies in place when the APA Psychological Ethics in National Security (hereinafter "PENS") Task Force met in June 2005; an inadequate understanding of how military interrogations are conducted; a misconception of military culture; and a deep bias against military psychology and military psychologists.

5. In advance of the August 2018 Council meeting when a business item proposing to remove the Hoffman Report from the APA website was pending, APA officials had been in communication with me, as the Council representative for Division 19, to negotiate removing the Report from the APA website and to then republish the Report on a third-party website. APA President Puente had earlier written to me in a July 9, 2018 email that, "our mutual goal is to have the report removed but not imperil the association." A true and correct copy of that email is attached herein as Exhibit 1.

6. Subsequently, on August 21, 2018, APA disabled the landing page where the Report was originally published and republished the September 4, 2015, Revised Report at a different URL on the APA public website. A true and correct copy of the newly revised webpage entitled "Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security," (hereinafter "Timeline") which includes the republication of the Revised Report, can be found at https://www.apa.org/news/press/statements/interrogations.aspx. A true and correct copy of an email from the APA General Counsel to the Council listserv announcing the republication is attached herein as Exhibit 2. To view the Report, a viewer would now go to the Timeline landing page, click on a readily identifiable link to the Report, and the Report displays on the viewer's screen. Because the email announcement of the republished Report was posted to the Council listserv, which included recipients who are not Council members as well as Council members who were different from those Council members receiving the Report in 2015, the Report reached new and different readers.

7. Along with the republication of the Revised Report, the posted Timeline also included four newly posted substantive documents that refuted the Report's factual conclusions and the occurrence of a relevant event regarding the lawsuit:

- The Society for Military Psychology (APA Division 19) Presidential Task Force "Response to the Hoffman Independent Review; (finding, among other things: no evidence that Division 19 or any Division 19 member supported torture or engaged in unethical behaviors with respect to interrogation support; that the Report's conclusions were based upon an inaccurate understanding of Department of Defense interrogation policies in place when the APA Psychological Ethics in National Security Force met in June 2005; an inadequate understanding of how military interrogations are conducted; a misconception of military culture; and a deep bias against military psychology and military psychologists. (See https://www.militarypsych.org/uploads/8/5/4/5/85456500/tf19_response_to_the_hoffman_report_div19_excom_approved.pdf.)

- Two letters from former chairs of the Ethics Committee, dated February 16, 2016

((https://tinyurl.com/svqz3nl), and May 15, 2016 (https://tinyurl.com/v4d3cda) noting numerous mischaracterizations and inaccuracies in the Report, concerns raised about the processes and procedures relied upon by Mr. Hoffman and his colleagues during the course of the investigation, and concerns about the process by which the Report was completed and prematurely "leaked," and concerns about what steps the Association has taken to identify who improperly released the report, among other issues.

- A letter from the former Presidents of APA, dated June 12, 2016, describing numerous problems with the investigation and the Report; (including, among other things: published recommendations regarding how APA should respond to the Report made by critics of the Association at the invitation of the Board of Directors when the critics themselves admitted they had not had time to carefully read much less absorb the Report; concerns about the validity and/or bias of the Report, and concerns about conflict of interest on the part of Hoffman and members of the Board itself; an apparent failure to properly vet the Report, failure to protect the rights and reputations of those portrayed negatively, lack of due process for employees who were forced to resign, and more. See https://tinyurl.com/qmgweog);

- An entry for Feb. 16, 2017 that states, "Five plaintiffs file a lawsuit against the Association arising out of the publication of the Independent Review.

A true and correct copy of the August 2018 Council Meeting Minutes approving the website changes can be found at https://www.apa.org/about/governance/council/minutes-summer-2018.pdf (p.9).

I declare under penalty of perjury that the foregoing is true and correct.

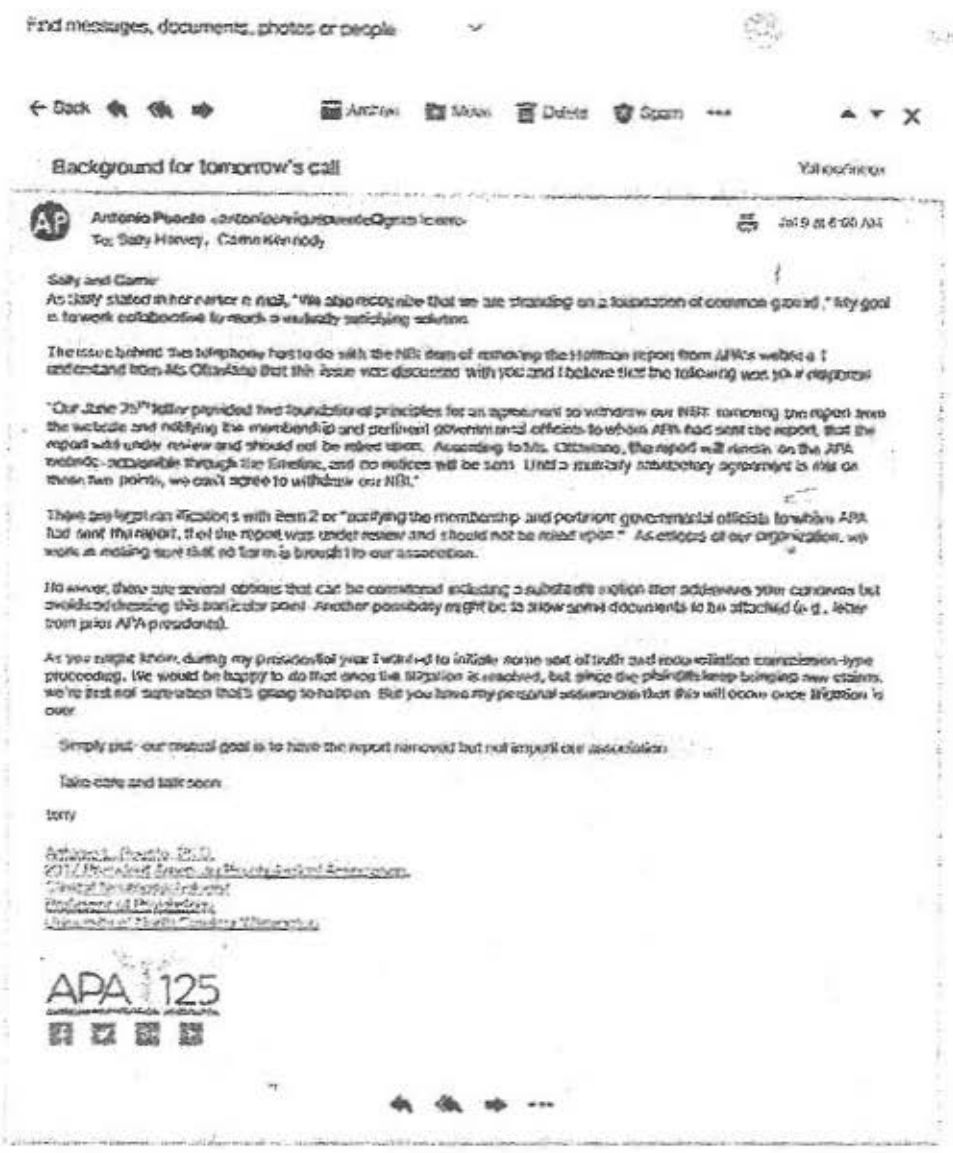
Sally Harvey

Sworn and subscribed to before a notary public in the State of Texas, this 14 day of November 2019.

KAREN LOWRY
Notary Public, State of Texas
Comm. Expires 03-15-2022
Notary ID 2514256

Notary Public

EXHIBIT 1



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Background for tomorrow's call

Antonio Puente <antonio.puente@gmail.com>
To: Sally Harvey, Carmen Kennedy

Jul 9 at 6:00 AM

Sally and Carmen

As Sally stated in her earlier e-mail, "We also recognize that we are standing on a foundation of common ground." My goal is to work collaborative to reach a mutually satisfying solution.

The issue behind the telephone has to do with the NBI item of removing the Hoffman report from APA's website. I understand from Ms. Ollendick that this issue was discussed with you and I believe that the following was your response:

"Our June 29th letter provided two foundational principles for an agreement to withdraw our NBI: removing the report from the website and notifying the membership and pertinent governmental officials to whom APA had sent the report, that the report was under review and should not be relied upon. According to Ms. Ollendick, the report will remain on the APA website - accessible through the timeline, and no notices will be sent. Until a mutually satisfactory agreement is met on these two points, we can't agree to withdraw our NBI."

There are legitimate questions with item 2 or "notifying the membership and pertinent governmental officials to whom APA had sent the report, that the report was under review and should not be relied upon." As citizens of our organization, we work in making sure that no harm is brought to our association.

However, there are several options that can be considered including a substitute motion that addresses your concerns but avoids addressing this particular point. Another possibility might be to allow some documents to be attached (e.g., letter from prior APA presidents).

As you might know, during my presidential year I wished to initiate some sort of truth and reconciliation commission-type proceeding. We would be happy to do that once the litigation is resolved, but since the plaintiffs keep bringing new claims, we're not sure when that's going to happen. But you have my personal assurances that this will occur once litigation is over.

Simply put - our mutual goal is to have the report removed but not imperil our association.

Take care and talk soon.

tony

[redacted]

APA 125

•••

EXHIBIT 2

From: Council Representatives List <COR@LISTS.APA.ORG> **On Behalf Of** Ottaviano, Deanne
Sent: Tuesday, August 21, 2018 1:54 PM
To: COR@LISTS.APA.ORG
Subject: [COR] Update on Implementation of Council NBI 13D

I am pleased to report that the website changes Council voted in favor of in NBI 13D have now all been implemented. There is no longer a featured landing page for the Independent Review, but links to the September 2015 Independent Review Report and the exhibits published on July 2015 remain available on the Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security, along with the following additional Timeline entries specified in the NBI, as amended: 1) the Division 19 Task Force Response to the Independent Review Report, 2) the February 16, 2016 and May 15, 2016, letters from former Ethics Chairs, 3) the June 12, 2016, letter from former APA Presidents, 4) an entry for February 16, 2017 stating, "Five plaintiffs filed a lawsuit against the Association arising out of the publication of the Independent Review."

I also want to correct my misstatement about the availability of the July 2, 2015 version of the Independent Review report on the APA website. I had been under the impression that that version was previously removed from the website, but apparently links to that version of the report had not previously been removed from all APA website locations. All links to the July 2015 version of the Independent Review report have now been removed from the APA website, although the July version remains available on a number of third-party websites. My apologies to Dr. Sally Harvey, with whom I had disagreed on that point during the Council meeting.

Deanne

Deanne M. Ottaviano
General Counsel
American Psychological Association

750 First Street NE, Washington, DC 20002
Tel. 202.336.6078
dottaviano@apa.org

EXHIBIT C

EXHIBIT C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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

AFFIDAVIT OF RUSSELL NEWMAN IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND SET OF SPECIAL MOTION TO DISMISS UNDER D.C. ANTI-SLAPP ACT

State of California)
) ss:
County of San Diego)

1. I, Russell Newman, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I was an initial Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force. Per order of the Court on March 26, 2019. I am a Claimant in an arbitration concerning the same matter,

3. The aforementioned investigation conducted by Mr. Hoffman resulted in a Report of the Independent Review (hereinafter "Report"), three versions of which were published and republished on ten occasions. Publicly available copies circulated and published by Hoffman/Sidley and republished by APA include: a version published in *The New York Times'* website on July 10, 2015, a true and correct copy of which can be found at http://www.nytimes.com/interactive/2015/07/09/us/document-report.html; a version republished by the APA on its website on July 10, 2015, a true and correct copy of which can be found at http://www.apa.org/independent-review/APA-FINAL-Report-7.2.15.pdf;

and a revised version of the Report published by APA on September 4, 2015, a true and correct copy of which can be found at https://www.apa.org/news/press/statements/interrogations.aspx.

4. The Revised Report was originally available via its own "landing page." To view it, the viewer would go to a landing page dedicated to the Independent Review, click on a link to the Report, and the Revised Report would display on their computer screen The Revised Report remained available on that landing page until August 2018, at which time the APA disabled the page.

5. Subsequent to some negotiation between the Society for Military Psychology (APA Division 19) and APA President Antonio Puente[1], on August 21, 2018, APA disabled the landing page where the Report was originally published and republished the September 4, 2015, Revised Report at a different URL on the APA public website. A true and correct copy of the newly revised webpage entitled "Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security," (hereinafter "Timeline") which includes the republication of the Revised Report, can be found at https://www.apa.org/news/press/statements/interrogations.aspx. Also, a true and correct copy of an email from the APA General Counsel to the Council listserv announcing the republication is attached herein as Exhibit 2. To view the Report, a viewer would now go to the Timeline landing page, click on a readily identifiable link to the Report, and the Revised Report displays on the viewer's screen. The first version of the Report, posted July 2, 2015, was removed from the APA website but the link for the first version of the Report, available on other websites, was also subsequently changed to automatically redirect a reader the September 4, 2015, Revised Report. The Revised Report continues to be available at that location.

6. Because the email announcement of the republished Report was posted to the Council listserv, which included recipients who are not Council members as well as 128 members of the Council who were not 2015 Council members and who would not have been on the Council listserv receiving that Report in 2015, the Report reached new and different readers.[2] A true and correct copy of the August 2018 Council Meeting Minutes approving the website changes can be found at https://www.apa.org/about/governance/council/minutes-summer-2018.pdf (p.9)

7. The number of republications of the Report after its initial publication by Mr. Hoffman was foreseeable. The engagement letter between Hoffman/Sidley and APA, itself, states, "We understand that the Board of Directors will subsequently make our final report available to the APA Council of Representatives, APA members, and the

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[1] The APA President Puente wrote to the Division 19 that, "our mutual goal is to have the report removed but not imperil the association." A true and correct copy of Dr. Puente's email is attached herein as Exhibit 1.

[2] When first published on the APA public website in 2015, the Report was viewed by many people at that time.

public." (p.2) A true and correct copy of the engagement letter can be found at https://tinyurl.com/ybf6hhwp. APA had been quite clear in public statements saying, "We will undertake an aggressive communications program to inform members and the general public of the report's findings. That outreach will include contact with national and international media, social media outreach and a same-day communications to all APA members." A true and correct copy of that public statement can be found at https://www.apa.org/news/press/response/new-york-times. Additional public statements said that "[a]fter reviewing the [R]eport, the APA Board will make it available ... to the APA Council of Representatives, APA members and the public" and that it "will take actions in response to the report and the recommendations of the special committee as it finds appropriate." A true and correct copy of these public statements can be found at https://www.apa.org/news/press/releases/2014/11/risen-allegations.

8. Along with the republication of the Revised Report, the posted Timeline also included four newly posted substantive documents that refuted the Report's factual conclusions and the occurrence of a relevant event regarding the lawsuit:

- The Society for Military Psychology (APA Division 19) Presidential Task Force "Response to the Hoffman Independent Review; (finding, among other things: no evidence that Division 19 or any Division 19 member supported torture or engaged in unethical behaviors with respect to interrogation support; that the Report's conclusions were based upon an inaccurate understanding of Department of Defense interrogation policies in place when the APA Psychological Ethics in National Security Force met in June 2005; an inadequate understanding of how military interrogations are conducted; a misconception of military culture; and a deep bias against military psychology and military psychologists. (See http://www.apadivisions.org/division-19/news-events/response-hoffman-report.pdf);

- Two letters from former chairs of the Ethics Committee, dated February 16, 2016 ((https://tinyurl.com/svqz3nl), and May 15, 2016 (https://tinyurl.com/v4d3cda) noting numerous mischaracterizations and inaccuracies in the Report, concerns raised about the processes and procedures relied upon by Attorney Hoffman and his colleagues during the course of the investigation, and The process by which the Report was completed and prematurely "leaked," including what steps the Association has taken to identify who improperly released the report, among other issues.

- A letter from the former Presidents of APA, dated June 12, 2016, describing numerous problems with the investigation and the Report; (including, among other things: published recommendations regarding how APA should respond to the IR made by critics of the Association at the invitation of the Board of Directors when the critics themselves admitted they had not had time to carefully read much less absorb the Report; concerns about the validity and/or bias of the IR, and a second regarding conflict of interest charges on the part of Hoffman and members of the Board itself; an apparent failure to properly vet the IR, failure to protect the rights and reputations of those portrayed negatively, lack of due

process for employees who were forced to resign, and more. See https://tinyurl.com/qmgweog);

- An entry for Feb. 16, 2017 that states, "Five plaintiffs file a lawsuit against the Association arising out of the publication of the Independent Review.

9. In conjunction with the newly posted material, certain material has been removed from the APA website. The prior web page that was replaced with the Timeline and republished Revised Report included the following statement describing Hoffman's charge to review "factual support" for the allegations against the APA:

> Report of the Independent Reviewer and Related Materials
>
> The APA Board of Directors engaged attorney David Hoffman of the law firm Sidley Austin in November 2014 to conduct an independent review of whether there was any factual support for the assertion that APA engaged in activity that would constitute collusion with the Bush administration to promote, support or facilitate the use of "enhanced" interrogation techniques by the United States in the war on terror. Following are links to the complete, unedited independent review and supplemental materials, press releases related to the report and documentation of action taken in response to the report by APA's Board of Directors, Council of Representatives and leadership.

In addition, on or about June 2, 2018, APA removed from the website the PENS Report. That report was returned to the website the next month following Plaintiffs' July 3 notification of concerns about changes to the website.

I declare under penalty of perjury that the foregoing is true and correct.

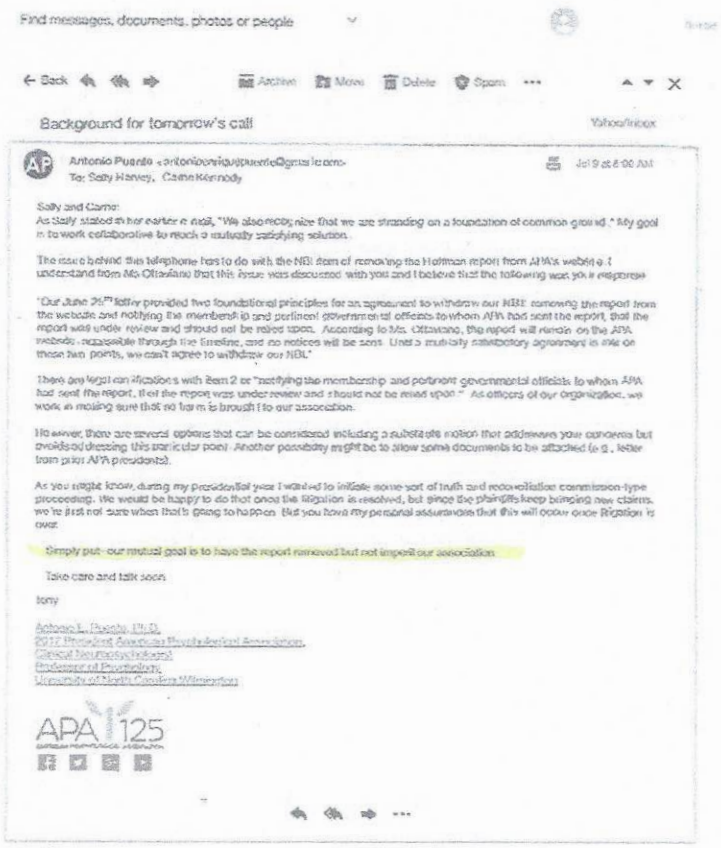
Russell Newman

Sworn and subscribed to before a notary public in the California, this 14 day of November 2019.

Notary Public

PETER GIEBLEWICZ
Commission No. 2291136
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
Commission Expires June 2, 2023

EXHIBIT 1



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Background for tomorrow's call

Yahoo/Inbox

Antonio Puente <antonio.puente@gmail.com>
To: Sally Harvey, Carrie Kennedy

Jul 9 at 8:00 AM

Sally and Carrie:
As Sally stated in her earlier e-mail, "We also recognize that we are standing on a foundation of common ground." My goal is to work collaborative to reach a mutually satisfying solution.

The issue behind this telephone has to do with the NBI item of removing the Hoffman report from APA's website. I understand from Ms Ottaviano that this issue was discussed with you and I believe that the following was your response

"Our June 26th letter provided two foundational principles for an agreement to withdraw our NBE removing the report from the website and notifying the membership and pertinent governmental officials to whom APA had sent the report, that the report was under review and should not be relied upon. According to Ms. Ottaviano, the report will remain on the APA website - accessible through the timeline, and no notices will be sent. Until a mutually satisfactory agreement is met on these two points, we can't agree to withdraw our NBI."

There are legal ramifications with item 2 re "notifying the membership and pertinent governmental officials to whom APA had sent the report, that the report was under review and should not be relied upon." As officers of our organization, we work to making sure that no harm is brought to our association.

However, there are several options that can be considered including a substitute motion that addresses your concerns but avoids addressing this particular point. Another possibility might be to allow some documents to be attached (e.g., letter from prior APA presidents).

As you might know, during my presidential year I worked to initiate some sort of truth and reconciliation commission-type proceeding. We would be happy to do that once the litigation is resolved, but since the plaintiffs keep bringing new claims, we're just not sure when that's going to happen. But you have my personal assurances that this will occur once litigation is over.

Simply put - our mutual goal is to have the report removed but not imperil our association.

Take care and talk soon

tony

Antonio E. Puente, Ph.D.
2012 President American Psychological Association
Clinical Neuropsychologist
Professional Psychology
University of North Carolina Wilmington

APA 125

EXHIBIT 2

From: Council Representatives List <COR@LISTS.APA.ORG> **On Behalf Of** Ottaviano, Deanne
Sent: Tuesday, August 21, 2018 1:54 PM
To: COR@LISTS.APA.ORG
Subject: [COR] Update on Implementation of Council NBI 13D

I am pleased to report that the website changes Council voted in favor of in NBI 13D have now all been implemented. There is no longer a featured landing page for the Independent Review, but links to the September 2015 Independent Review Report and the exhibits published on July 2015 remain available on the Timeline of APA Policies & Actions Related to Detainee Welfare and Professional Ethics in the Context of Interrogation and National Security, along with the following additional Timeline entries specified in the NBI, as amended: 1) the Division 19 Task Force Response to the Independent Review Report, 2) the February 16, 2016 and May 15, 2016, letters from former Ethics Chairs, 3) the June 12, 2016, letter from former APA Presidents, 4) an entry for February 16, 2017 stating, "Five plaintiffs filed a lawsuit against the Association arising out of the publication of the Independent Review."

I also want to correct my misstatement about the availability of the July 2, 2015 version of the Independent Review report on the APA website. I had been under the impression that that version was previously removed from the website, but apparently links to that version of the report had not previously been removed from all APA website locations. All links to the July 2015 version of the Independent Review report have now been removed from the APA website, although the July version remains available on a number of third-party websites. My apologies to Dr. Sally Harvey, with whom I had disagreed on that point during the Council meeting.

Deanne

Deanne M. Ottaviano
General Counsel
American Psychological Association

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