IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	)	
	)	
***Plaintiffs*,**	)	**CASE NO. 2017 CA 005989 B**
	)	
v.	)	**Judge Todd Edelman**
	)	
DAVID H. HOFFMAN, *et al.*,	)	**Next Event: Initial Scheduling**
	)	**Conference Dec. 1, 2017**
***Defendants*.**	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID HOFFMAN'S CONTESTED MOTION TO COMPEL ARBITRATION

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INTRODUCTION

Pursuant to arbitration provisions in employment agreements between Defendant American Psychological Association ("APA") and Plaintiffs Dr. Stephen Behnke and Dr. Russell Newman, APA has today filed a motion to compel arbitration of these Plaintiffs' claims against it (the "APA Arbitration Motion"). For the reasons stated in that motion, and pursuant to equitable doctrines of *alternative estoppel* discussed here, Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman (together "Sidley") hereby move for the same relief: an Order compelling arbitration of Behnke's and Newman's claims against Sidley.

Behnke and Newman are two of the five Plaintiffs in this lawsuit who have brought defamation claims against Sidley and APA (collectively, "Defendants"). The claims relate to a 541-page report (the "Report") by Sidley investigating and evaluating allegations that had been made regarding APA's issuance of ethical rules and/or guidelines in 2002 and 2005, and related actions, which determined whether and under what circumstances psychologists who were APA members could ethically participate in national security interrogations. During the time period covered in the Report, Behnke and Newman were both full-time employees of APA—Behnke was Director of the APA Ethics Office (from 2000 to 2015) and Newman was Executive Director for the APA Practice Directorate (from 1994 to 2007). Complaint ("Compl.") ¶¶ 35, 40, 43.

As part of their employment with APA, Behnke and Newman signed agreements containing arbitration clauses that require them to arbitrate "any dispute that may arise regarding the rights, duties, and obligations under" the employment agreements. Exs. 2-B, 2-C. Accordingly, as set forth in detail in the APA Arbitration Motion, because Behnke's and Newman's defamation claims all concern statements about the manner in which each of them exercised or performed his "rights, duties or obligations" as an APA employee, their claims against APA must be submitted to arbitration. *See* APA Arb. Mot. 8-14.

Behnke's and Newman's defamation claims against APA and Sidley are based on the same set of extensive allegations set forth in the Complaint: that APA and Sidley purportedly acted together to engage in wrongful acts that harmed these Plaintiffs by making and publishing false and defamatory statements about them. Nothing in Behnke's or Newman's employment agreements with APA precludes arbitration of their claims against Sidley. Although Sidley is not a signatory to the employment agreements, the Court may compel Plaintiffs to arbitrate their claims against Sidley under the equitable doctrine known as "alternative estoppel." *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005).

Federal courts in the District of Columbia apply a test for this equitable doctrine, under which Sidley, a nonsignatory to the arbitration agreement, may compel arbitration by showing that Plaintiffs are bringing identical claims against both the signatory and nonsignatory defendants, arising from Plaintiffs' underlying employment. *Fox v. Comput. World Servs. Corp.*, 920 F. Supp. 2d 90, 103 (D.D.C. 2013). Moreover, numerous courts apply another test for alternative estoppel, under the doctrine of "concerted misconduct." *Bailey v. ERG Enters., LP*, 705 F.3d 1311, 1321 (11th Cir. 2013). Pursuant to this approach, a nonsignatory may compel arbitration by showing that Plaintiffs base their claims on allegations that the signatory and nonsignatory Defendants committed substantial, interdependent misconduct, *id.*, in making and publishing allegedly false and defamatory statements about Plaintiffs.

Under either test, compelling arbitration of claims against a nonsignatory serves the purposes of preventing plaintiffs from pursuing two identical sets of claims in two different forums, one set against the signatory and the other against the nonsignatory, and protecting the signatory defendant from having to participate as a third party in the parallel litigation despite having made a good-faith agreement to arbitrate that very dispute. *See Grigson v. Creative Artists Agency*

L.L.C., 210 F.3d 524, 528 (5th Cir. 2000); *Fox*, 920 F. Supp. 2d at 103.

The two approaches to alternative estoppel are not mutually exclusive. If Sidley can satisfy either one of the two approaches, Plaintiffs should be ordered to arbitrate their claims. Sidley satisfies both.[1]

BACKGROUND

In response to longstanding public allegations that APA secretly colluded with the U.S. government to support enhanced interrogation techniques, including a 2014 book by journalist James Risen that gave the allegations renewed attention, APA engaged Sidley in 2014 to conduct an independent review of "allegations that had been made regarding APA's issuance of ethical guidelines in 2002 and 2005, and related actions." Report (Ex. 2-A) at 1[2]; *see also* Compl. ¶ 3. APA asked Sidley to investigate "all the evidence" and "go wherever the evidence leads." Compl. ¶ 15.

The Sidley team was led by David Hoffman, a Sidley partner. The investigation took eight months; Sidley conducted interviews of approximately 150 people and reviewed more than 50,000 documents. *See* Report (Ex. 2-A) at 6-7. In July 2015, the investigation culminated in Sidley providing to APA a report detailing its investigation, findings, and conclusions, which Sidley reissued with revisions in September 2015. The 541-page Report explained in detail the bases of Sidley's conclusions and opinions; in July 2015 APA made the Report and 7,600 pages of exhibits publicly available and in September 2015 made the revised Report publicly available.

Sidley reached a number of conclusions based on its review of the evidence, including

[1] Sidley has submitted this motion at the same time as a special motion to dismiss under the District of Columbia's Anti-SLAPP Act. Because arbitrability is generally considered a threshold issue, Sidley requests that the Court address the arbitration motion first.

[2] All citations to the Report are to the September 4, 2015 revised version, attached as Ex. 2-A.

that "key APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." Report (Ex. 2-A) at 9.

One particular focus of the Report was events surrounding the task force that APA established to "explore the ethical dimensions of psychology's involvement and use of psychology in national security-related investigations." Compl. ¶ 71. The PENS Task Force, "'PENS' standing for Psychological Ethics and National Security ('Task Force' or 'PENS')," met in 2005. *Id.* ¶¶ 71, 75. As APA employees, Plaintiffs Behnke and Newman were both involved in the formation and the deliberations of the PENS Task Force, and Behnke continued to be involved in Task Force business for several months afterward. Report (Ex. 2-A) at 13.

The Report also provided Sidley's conclusions about a number of other matters including the APA Ethics Office's handlings of ethics complaints during Behnke's time as director; disclosure issues surrounding seminars that Behnke gave the U.S. military on behalf of APA; Behnke working with Plaintiff Col. Morgan Banks to maintain the secrecy of their interrogation and ethics-related communications; and the adequacy of Newman's disclosures of his marriage to Plaintiff Col. Debra Dunivin, whose work involved issues relating to detainee interrogations. *See, e.g.*, Report (Ex. 2-A) at 13-14, 36-37, 58-63, 358-71.

Behnke and Newman joined in a single, detailed Complaint against both APA and Sidley as co-Defendants. The Complaint alleges that the Report—commissioned by APA, and provided by Sidley to APA, Compl. ¶ 365—contains 219 sets of statements that Plaintiffs allege to be false. Plaintiffs argue that APA and Sidley are both liable for the tort of defamation on the basis of every one of the 219 sets of statements listed in Exhibit A to their Complaint, alleging that all

Defendants acted together. *See, e.g.*, Compl. ¶¶ 487, 494, 496. Specific allegations in the Complaint delineate identical instances of defamation by "All Defendants." Compl. ¶¶ 321-535.

The APA Arbitration Motion explains in detail that the defamation claims that Behnke and Newman have asserted in the Complaint take issue with how the Report, and later APA comments about the Report, characterized Behnke's and Newman's performance of their jobs as APA employees in connection with their "rights, duties or obligations" under their employment agreements. At page 9, the APA Arbitration Motion identifies and discusses more than twenty statements in the Report, alleged by Behnke to be false and defamatory, which comment on the manner in which he performed his job as APA Ethics Director, including his work on the PENS Task Force. At pages 13-14, the APA Arbitration Motion likewise identifies and discusses eight statements in the Report, alleged by Newman to be false and defamatory, which comment on the manner in which he performed his job as APA Executive Director for Professional Practice, including his work on the PENS Task Force.

Each Plaintiff signed an employment agreement with APA with an arbitration provision requiring him to submit to arbitration "any dispute that may arise regarding their respective rights, duties or obligations under this agreement." Exs. 2-B, 2-C. Therefore, in accordance with the language of the agreements, APA on October 13, 2017 filed its motion to compel arbitration. As the Complaint itself acknowledges: the Report concerned Plaintiffs' "actions, *all* of which had been undertaken in their roles as APA employees." Compl. ¶ 205 (emphasis added).

The Complaint also clearly, prominently, and repeatedly alleges that APA's and Sidley's

purported defamation of Behnke and Newman was carried out by APA and Sidley working interdependently and in concert, which is to say acting jointly, in combination, and in cooperation.[3] The Complaint makes clear the view that if not for APA and Sidley working together to commission, investigate, prepare, and publish the Report, the allegedly false and defamatory statements about Behnke and Newman never would have been made public.

By way of example, the Complaint alleges that: a Special Committee of the APA Board retained Sidley to conduct the investigation and issue the Report, Compl. ¶¶ 2, 4, 60; the APA Special Committee set and then permitted the expansion of the parameters of the investigation, *id.* ¶¶ 3, 156, 166, 187; the APA Special Committee oversaw the Sidley investigation, *id.* ¶ 16, which according to the Complaint was of questionable "'independence,'" *id.* ¶¶ 145, 274; Sidley was purportedly biased because it made a case to support its conclusions that "aligned with the desire of some APA Board members to put controversy behind them, and insulate themselves," *id.* ¶¶ 15-16; Sidley allegedly "repeatedly violated the acknowledged norms for conducting an investigation" and the APA Special Committee allegedly "failed to exercise effective oversight" to stop the purported violations; "[t]he Special Committee" thus "allowed what was to have been an independent investigation . . . to become instead an investigation designed to clear them of responsibility," *id.* ¶ 162; Sidley submitted a Report to the Special Committee that purportedly contained a number of false and defamatory statements about Behnke and Newman, *id.* ¶¶ 243, 248; APA's Board published the Report to the public despite purportedly knowing facts that contradicted its assertions and without adequately reviewing, *id.* ¶¶ 25, 42, 231-35, 238, 241, 251,

[3] We set forth here the Complaint's factual allegations solely to show Plaintiffs' statements regarding the scope and nature of their lawsuit against APA and Sidley. Nothing herein should be construed as agreement with any of the Complaint's factual allegations or agreement that any of the allegations can sustain a valid cause of action against any Defendant.

252; and both APA and Sidley purportedly should have but did not give Behnke and Newman an adequate opportunity to respond to the Report's assertions, *id.* ¶¶ 253, 258.

In sum, the Complaint alleges that Behnke's and Newman's claims arise from allegedly false and defamatory statements made by APA and Sidley working interdependently and in concert from the commissioning of the Report to its publication and that had it not been for the joint efforts of APA and Sidley, Behnke and Newman would not have been defamed.

ARGUMENT

Plaintiffs Behnke and Newman signed employment agreements containing arbitration clauses that broadly cover any dispute regarding their rights, duties or obligations as APA employees. The agreements contain no provisions expressly limiting arbitration to the parties to the agreements. APA's motion establishes that Plaintiffs' claims alleging defamation and false light invasion of privacy against APA (and similarly against Sidley) fall within the scope of these arbitration agreements and thus must be arbitrated. APA Arb. Mot. 8-14.[4] These same claims also allege that the purported defamation was the result of concerted misconduct by APA and Sidley.[5]

Although Sidley was not a signatory to Behnke's and Newman's employment agreements, courts regularly order plaintiffs to arbitrate against nonsignatory defendants under circumstances present here, pursuant to principles of equitable estoppel. *See, e.g.*, *Fox*, 920 F.

[4] Behnke's false light invasion of privacy claim is based on the same facts as his defamation claim; Newman did not bring a false light claim. Compl. ¶¶ 528-535.

[5] As the APA motion explains, the Federal Arbitration Act ("FAA") and federal law more generally govern whether Behnke's and Newman's claims are within the scope of their arbitration agreements with APA and therefore subject to arbitration. APA Arb. Mot. 5-6. The FAA applies to arbitration clauses in contracts involving interstate commerce; as noted in the APA motion, the Behnke and Newman employment agreements involve interstate commerce. *See, e.g.*, *Dowley v. Dewey Ballantine, LLP*, No. 05-622 (EGS), 2006 WL 1102768, at *2 (D.D.C. Apr. 26, 2006). Once the Court determines the dispute is subject to arbitration, D.C. law under D.C. Code § 16-4407 provides the procedures for enforcing arbitration. *See Parker v. K & L Gates, LLP*, 76 A.2d 859, 869 (D.C. 2013).

Supp. 2d at 105 n.6; *Kelleher v. Dream Catcher, L.L.C.*, No. 1:16-cv-02092 (APM), 2017 WL 4443409, at *3 (D.D.C. Oct. 4, 2017); *see also Ragone v. Atl. Video*, 595 F.3d 115, 126-27 (2d Cir. 2010); *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 383 (5th Cir. 2008).

Therefore, pursuant to the equitable doctrine known as "alternative estoppel," Sidley may obtain an order requiring Behnke and Newman to arbitrate not only their claims against APA, but their claims against Sidley as well. Courts analyze an "alternative estoppel" motion using a two-step inquiry. First, the nonsignatory seeking to compel arbitration must show the plaintiff's arbitration clause does not expressly prohibit arbitration of disputes against a nonsignatory. Here, Behnke and Newman agreed to arbitration clauses with no express limitation on who may compel or be subjected to arbitration.

Second, the nonsignatory must show that the plaintiff is equitably estopped from avoiding arbitration. The D.C. Court of Appeals has not addressed equitable estoppel in the context of arbitration, but it has held that "federal court decisions construing and applying the federal arbitration act may be regarded as persuasive authority" on the scope of arbitrability. *Hercules & Co., Ltd. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1072-73 (D.C. 1991). Federal courts have adopted two different forms of alternative estoppel applicable here. First, under the law applied by D.C. federal courts, the defendant may show that the plaintiff is bringing identical claims, arising out of his employment, against the signatory defendant and the nonsignatory defendant. Second, under the "concerted misconduct" approach of numerous federal courts, the defendant may show that the plaintiff is basing his claims on allegations of interdependent misbehavior between all those defendants. Satisfaction of either form of estoppel results in an order compelling plaintiffs to arbitrate against the nonsignatory defendant.

Behnke and Newman have brought identical defamation claims against APA and Sidley

concerning Behnke's and Newman's performance of their respective duties under their employment agreements, based on allegations that all Defendants committed concerted, interdependent wrongdoing. Under either approach to alternative estoppel, Plaintiffs must arbitrate their claims against Sidley.

I. The APA-Employee Arbitration Clauses Do Not Preclude Arbitration of Disputes Involving Nonsignatories.

The APA Arbitration Motion explains in detail why Behnke's and Newman's defamation claims are covered by the arbitration clauses by virtue of the claims concerning a "dispute . . . regarding" these Plaintiffs' "rights, duties or obligations" under their employment agreements with APA. *See* APA Arb. Mot. 7. Courts interpret such arbitration provisions broadly, both because of the provisions' plain text and because of the federal and state policy favoring arbitration. *Fox*, 920 F. Supp. 2d at 101; *Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1996).

The scope of arbitration is a matter of contract. *See 2200 M St. LLC v. Mackell*, 940 A.2d 143, 151 (D.C. 2007). Nonsignatory arbitration will therefore not be allowed if the plain text of the contract clearly contemplates and forbids it. *See Sherer*, 548 F.3d at 382.

Behnke and Newman each signed employment agreements containing clauses requiring the parties to arbitrate "any dispute that may arise regarding their respective rights, duties or obligations under" the employment agreement. Exs. 2-B, 2-C. The parties did not expressly limit the scope of the arbitration clause to contract signatories but instead agreed to mandated arbitration over "any dispute" regarding their employment. D.C. courts have found that similar arbitration clause language is to be construed broadly. *W & T Travel Servs., LLC v. Priority One Servs., Inc.*, 69 F. Supp. 3d 158, 167 (D.D.C. 2014) (characterizing arbitration provisions covering "'all claims, disputes and matters in question arising out of, or relating to, this Subcontract'" as "broad" (citation omitted)). Moreover, "[c]ourts have generally drawn a distinction between

arbitration clauses that are restricted to the parties specifically identified in the agreement," which bars nonsignatory arbitration, "and broadly worded arbitration clauses, which are not restricted to the signatories to the agreement." *Clarendon Nat'l Ins. v. Lan*, 152 F. Supp. 2d 506, 520 (S.D.N.Y. 2001). This Court should therefore conclude that the language in the employment contracts' arbitration clauses does not preclude nonsignatory arbitration.

II. Under the Doctrine of Alternative Equitable Estoppel, the Court Should Require Behnke and Newman To Arbitrate Their Claims Against Sidley.

Federal courts regularly apply equitable estoppel to compel nonsignatory arbitration under the FAA. *See, e.g.*, *Ragone*, 595 F.3d at 126; *Sherer*, 548 F.3d at 383. Particularly, federal district court judges in the D.C. Circuit have applied equitable estoppel principles to enforce an arbitration agreement against a nonsignatory. *Fox*, 920 F. Supp. 2d at 103 n.6; *see also Kelleher*, 2017 WL 4443409, at *3; *Khan v. Parsons Glob. Servs., Ltd.*, 480 F. Supp. 2d 327, 341 (D.D.C. 2007), *rev'd on other grounds*, 521 F.3d 421, 380 U.S. App. D.C. 320 (D.C. Cir. 2008).

There are multiple forms of equitable estoppel pursuant to which courts have held that a signatory to an arbitration agreement must arbitrate with a nonsignatory. The doctrine that applies here is what some courts have called "alternative estoppel." *CD Partners*, 424 F.3d at 799. Under the doctrine of alternative estoppel, a nonsignatory may obtain an order compelling arbitration when a comparison of the signatory plaintiff's claims against a signatory defendant and a nonsignatory defendant shows that the issues, parties, and wrongs alleged are sufficiently closely related. *Id.* Two different approaches may be applied here, either of which would be sufficient for this Court to hold that Sidley may compel Plaintiffs to arbitrate. First, D.C. federal courts have looked to whether the plaintiff has raised identical claims against all defendants arising from a plaintiff's underlying employment. Second, numerous other federal courts have looked to whether the plaintiff has alleged substantially interdependent and concerted misconduct by all

defendants. Under either approach, Plaintiffs must arbitrate their claims against Sidley.

A. Because Plaintiffs Have Raised Identical Claims, Arising from Their Employment with APA, Against All Defendants, They Must Arbitrate Their Claims Against Sidley.

Under the approach that federal courts in the District of Columbia have applied, a plaintiff may be compelled to arbitrate the entirety of its case when the plaintiff makes the same claims, arising from his employment, against the signatory and nonsignatory defendants. The federal district court case law distills this approach down to two key questions:

1. Are the plaintiff's "claims against the signatory and non-signatory defendants . . . identical"?
2. Did the "claims ar[i]se from one plaintiff's employment with [the signatory] defendants," therefore relating back to the employment agreement and arbitration clause?

Fox, 920 F. Supp. 2d at 103 (quoting *Khan*, 480 F. Supp. 2d at 341) (quotation omitted). If, as here, the answer to each question is yes, then the plaintiff must arbitrate. In adopting this approach, the District Court for the District of Columbia endorsed the long-standing principle that estoppel should be equitably applied to prevent plaintiffs from pursuing two identical sets of claims (one against the signatory defendant and one against the nonsignatory defendant) in two different forums arising from the same dispute that is subject to arbitration. *See id.*

In the first D.C. federal court case to set forth this approach—*Khan v. Parsons Global Services, Ltd.*—plaintiffs accused defendants of various tortious acts, including "claims of . . . negligence . . . against *all* of the defendants." 480 F. Supp. 2d at 341 (emphasis in original).[6]

[6] On appeal in *Khan*, the D.C. Circuit ruled that defendants had waived their right to compel arbitration because they had sought arbitration "in the alternative" while also moving for (and obtaining) summary judgment. *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 427, 428 (D.C. Cir. 2008). Here, by contrast, Sidley has expressly requested that this arbitration motion be decided first, prior to consideration of "the merits of the plaintiff[s'] claims," in the concurrently

The plaintiffs sought to divide the cases against the defendants, pursuing arbitration against those defendants who signed an arbitration clause, and pursuing parallel litigation against those defendants who did not sign the arbitration clause. The court rejected this attempt. It held that because plaintiffs brought identical claims against all defendants, and because the negligence tort claims "presumably ar[ose] from [plaintiff's] employment with the [signatory] defendants," and thus were "intertwined with the employment agreement," arbitration against all defendants was appropriate even if some defendants did not sign the arbitration agreement. *Id.*

In the district court's subsequent decision in *Fox v. Computer World Services Corp.*, in which plaintiff accused all defendants of "discrimination and retaliation" in the wake of his employment termination, the court again rejected the plaintiff's attempt to keep the nonsignatory defendants from the arbitration. 920 F. Supp. 2d at 95, 103-04. "As in *Khan*, Fox's claims against all defendants are identical." *Id.* at 103-04. The court further determined that plaintiff's claims of discrimination and retaliation "arose from his employment . . . and are thus intertwined" with the employment and arbitration agreement. *Id.* The court therefore held that avoiding arbitration would be inequitable. *Id.*

Under this test, Plaintiffs must arbitrate their claims against Sidley. Plaintiffs have brought identical claims against APA and Sidley. Compl. ¶ 1. The Complaint is based on "documents and other facts" applying to both APA and Sidley, *id.* ¶ 5, alleging that Sidley and APA together "set out to punish" the Plaintiffs, Compl. ¶ 12. Specific defamation counts in Plaintiffs' Complaint are explicitly brought against "All Defendants." Compl. ¶¶ 321-535. All counts are based upon the underlying contents of Exhibit A, which lists 219 sets of statements in the Report

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filed anti-SLAPP motion. *Id.* In addition, Sidley timely filed the anti-SLAPP motion as required before the expiration of 45 days after service of the Complaint. *See* D.C. Code § 16-5502(a).

that Plaintiffs allege to be false. Compl. Ex. A. Plaintiffs allege those statements were made by APA and Sidley, acting together through the investigation and publication of the Report.

In addition, for the reasons explained above and in APA's motion, *see* APA Arb. Mot. 8-14, Plaintiffs' claims arise from their employment with APA, therefore satisfying the second requirement of alternative estoppel. Plaintiffs' claims are based on their disagreement with how the Report characterized their performance of their "rights, duties or obligations" as employees and under their employment agreements. Each Plaintiff takes issue with the manner in which the Report evaluates his job performance pursuant to his employment agreement. The very Report in question concerned Plaintiffs' "actions, *all* of which had been undertaken in their role as APA employees." Compl. ¶ 205 (emphasis added). Plaintiffs' defamation claims against the Sidley defendants therefore arise from Plaintiffs' employment with APA: the Complaint makes reference to Plaintiffs' employment and relies upon their alleged compliance with their employment obligations.

In short, because "the plaintiffs [have] asserted identical tort claims" against APA and Sidley, *and* because all of their claims arise from their underlying employment, equity demands that the Plaintiffs be compelled to arbitrate those claims against all Defendants. *Fox*, 920 F. Supp. 2d at 103.

B. Because Plaintiffs Have Alleged Concerted Misconduct By All Defendants, They Must Arbitrate Their Claims Against Sidley.

A number of federal courts have also set forth a second view of alternative estoppel known as the "concerted misconduct" doctrine. Under this independent, widely used form of alternative equitable estoppel, a nonsignatory defendant may obtain an order equitably estopping plaintiffs from avoiding arbitration where the signatory plaintiffs allege "substantially interdependent and concerted misconduct by both the nonsignatory and one or more . . . signatories to

the contract." *Grigson*, 210 F.3d at 527 (emphasis and internal quotation marks omitted); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). In following this approach, courts look to whether "the factual allegations in the complaint" describe interdependent, concerted misconduct between an arbitration signatory and a nonsignatory defendant. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 36 (2d Cir. 2002) (internal quotation marks omitted). So long as the allegations against all defendants "are based on the same facts and are inherently inseparable," a nonsignatory can compel arbitration. *MS Dealer*, 177 F.3d at 948. Under this approach, at least one court has ordered a plaintiff employee to arbitrate her defamation claim against a law firm (retained by the plaintiff's employer, a co-defendant in the action, to conduct an internal investigation) that did not sign the arbitration clause in plaintiff's employment agreement, "because the complaint alleges that the defendants engaged in concerted misconduct." *Lash & Goldberg LLP v. Clarke*, 88 So. 3d 426, 427-28 (Fla. Dist. Ct. App. 2012) (reversing trial court and ordering nonsignatory arbitration).

The concerted-misconduct doctrine protects a defendant who has signed an arbitration agreement from defending against plaintiff's allegations in multiple forums. The plaintiff and signatory defendant agreed to arbitration as an alternative to the time and expense of litigation. *Grigson*, 210 F.3d at 528. If the plaintiff is permitted to bring parallel litigation against a co-defendant where the central allegations are the same and concern all defendants, the defendant who signed the agreement will be forced to participate in the litigation anyway. *Id.*

The concerted misconduct doctrine applies here to require arbitration of Behnke's and Newman's defamation claims against Sidley. As demonstrated above, Behnke and Newman allege substantial concerted misconduct by APA and Sidley. According to the Complaint, if not for the interrelated allegedly wrongful actions of APA and Sidley plaintiffs never would have

been defamed. Plaintiffs admit that "[e]ach of the Plaintiffs[']claims arise out of a common nucleus of facts: the same set of publications and republications, one investigation, and one alleged 'joint-venture' or 'joint-enterprise . . . . Common issues of law and fact govern all of Plaintiffs[']claims which arise out of the same activities and defamatory statements." Compl. ¶ 65. Plaintiffs' claims against Sidley and APA are therefore "based on the same facts and are inherently inseparable." *MS Dealer*, 177 F.3d at 948 (internal quotation marks omitted).

These allegations include, among other things, that APA commissioned Sidley to conduct the investigation, Compl. ¶¶ 2, 4, 60; APA oversaw Sidley's investigation, but Sidley's investigation was not "independent" and in fact Sidley aligned its conclusions with the desires of APA board members, *id.* ¶¶ 16, 145, 274; and the false and defamatory statements contained in Sidley's Report would never have been distributed to the public had APA properly exercised its oversight role or acknowledged contrary facts in its possession, *id.* ¶¶ 25, 42, 162, 231-235, 238, 241, 251, 252. Behnke and Newman have thus alleged concerted and interrelated misconduct by both signatory APA and nonsignatory Sidley. Accordingly, this Court should order that these claims be arbitrated with Behnke's and Newman's claims against APA.

CONCLUSION

For the reasons stated in the APA Arbitration Motion and herein, the Court should order Plaintiffs Behnke and Newman to arbitrate their claims against Sidley.

Dated: October 13, 2017

Respectfully submitted,

/s/ Thomas G. Hentoff

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, a true and correct copy of the foregoing document was filed through the Court's electronic filing system, which will automatically send copies to counsel for Plaintiffs.

/s/ Thomas G. Hentoff
Thomas G. Hentoff