

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*, : CASE NO. 2017 CA 005989 B
 :
 Plaintiffs, : Judge Puig-Lugo
 :
 vs. : Next Scheduled Event:
 : February 8, 2019 Status Hearing
 :
 DAVID H. HOFFMAN, *et al.*, :
 :
 Defendants. :

**DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND
DAVID H. HOFFMAN'S CONTESTED MOTION TO COMPEL ARBITRATION OF
COUNT 11 OF THE FIRST SUPPLEMENTAL COMPLAINT**

Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman (collectively, "Sidley") respectfully request an Order compelling Plaintiffs Dr. Stephen Behnke and Dr. Russell Newman ("Plaintiffs") to arbitrate the single new count, Count 11, of Plaintiffs' First Supplemental Complaint, for the reasons set forth in the attached Memorandum of Points and Authorities in Support of this Motion.

A proposed Order is attached.

Oral Hearing Requested.

Dated: March 21, 2019

Respectfully submitted,

/s/ Thomas G. Hentoff

John K. Villa (D.C. Bar No. 220392)

Thomas G. Hentoff (D.C. Bar No. 438394)

Krystal R. Commons (D.C. Bar No. 987768)

Alexander J. Kasner (D.C. Bar No. 1046343)

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

Washington, D.C. 20005

Telephone: (202) 434-5000

Email: jvilla@wc.com

thentoff@wc.com

kcommons@wc.com

akasner@wc.com

Attorneys for Defendants Sidley Austin
LLP, Sidley Austin (DC) LLP, and David H.
Hoffman

RULE 12-I(A) CERTIFICATION

Pursuant to District of Columbia Rule of Civil Procedure 12-I(A), counsel for Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, David H. Hoffman hereby certify that counsel for Defendants conferred with counsel for Plaintiffs, who do not consent to the relief sought in this motion.

/s/ Thomas G. Hentoff
Thomas G. Hentoff

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STEPHEN BEHNKE, <i>et al.</i>,	:	CASE NO. 2017 CA 005989 B
Plaintiffs,	:	Judge Puig-Lugo
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Defendants.

**DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND
DAVID H. HOFFMAN’S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF CONTESTED MOTION TO COMPEL ARBITRATION OF
COUNT 11 OF THE FIRST SUPPLEMENTAL COMPLAINT**

Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman (collectively, “Sidley”) hereby move for an Order compelling Plaintiffs Dr. Stephen Behnke and Dr. Russell Newman (“Plaintiffs”) to arbitrate the claim set forth in the single new count of the February 4, 2019 Supplemental Complaint on exactly the same grounds as stated in Sidley’s October 13, 2017 motion to compel arbitration of Plaintiffs’ original Complaint.¹

On October 13, 2017, Sidley filed its motion to compel Plaintiffs to arbitrate the claims they brought against Sidley in their 2017 Complaint. On March 7, 2019, Plaintiffs filed their opposition to Sidley’s arbitration motion, and on March 14, 2019, Sidley filed its reply in support of its arbitration motion. Sidley’s motion, alongside APA’s motions to similarly compel arbitration of Plaintiffs’ claims, is fully briefed and currently pending.²

¹ Plaintiffs added this new count as Count 11 and renumbered old Counts 11 and 12 as Counts 12 and 13.

² There is no need for Sidley to renew its pending arbitration motion directed to the original Complaint since Plaintiffs’ Supplemental Complaint—filed under Rule 15(d) rather than 15(a)—merely adds one new count based on allegations about post-Complaint conduct. To be clear,

On February 4, 2019, Plaintiffs filed their First Supplemental Complaint. The Supplemental Complaint adds the new allegation that, in August 2018, by virtue of changes APA made to its website, all Defendants “republished the September 4, 2015, Revised Report.” Supp. Compl. ¶¶ 295-300, 523-51. On the basis of this allegation, Plaintiffs have added a new count of defamation, Count 11, brought “against All Defendants.” *Id.* ¶¶ 523-51.³

If the Court orders Plaintiffs to arbitrate their claims against arbitration-agreement-signatory APA, this Court should also order Plaintiffs to arbitrate the new Count 11 of the Supplemental Complaint against Sidley (in addition to all the claims against Sidley in the original complaint). In support, Sidley incorporates by reference here the arguments made in (1) its pending October 13, 2017 motion to compel arbitration of Plaintiffs’ original Complaint, Sidley Arb. Mot. 7-15 (arguing that Plaintiffs must arbitrate their claims against nonsignatory Sidley under the identical-claims and concerted-misconduct forms of equitable estoppel); (2) Sidley’s March 14, 2019 reply brief in support of that motion, Sidley Reply 1-5 (same); (3) APA’s October 13, 2017 motion to compel arbitration of the Supplemental Complaint, APA Arb. Mot. 3-7 (arguing that Plaintiffs’ claims fall within scope of their broad arbitration

Sidley continues to seek arbitration of all claims in the Complaint, for the reasons set forth in its October 13, 2017 arbitration motion.

³ Pursuant to D.C. Superior Court Rule 15(d), no response to the Supplemental Complaint has yet been ordered. After filing this arbitration motion, Sidley will file today a special motion to dismiss this new count (Count 11) of the Supplemental Complaint under the District of Columbia’s Anti-SLAPP Act, to comply with the 45-day deadline set forth in the Anti-SLAPP Act, D.C. Code § 16-5502(a). Sidley files this arbitration motion first to foreclose any arbitration-waiver argument. Because arbitrability is generally considered a threshold issue, Sidley reiterates its request that the Court address this motion in conjunction with its pending motion to compel arbitration, prior to addressing Defendants’ anti-SLAPP motions. *See* Sidley Arb. Mot. 3 n.1.

agreements); and (4) APA's March 14, 2019 reply in support of that motion, APA Reply 5 (same). Sidley raises no new arguments in this arbitration motion.

For the reasons stated, this Court should order Plaintiffs to arbitrate Count 11 of the Supplemental Complaint alongside the original Complaint counts brought against Sidley.⁴

Dated: March 21, 2019

Respectfully submitted,

/s/ Thomas G. Hentoff

John K. Villa (D.C. Bar No. 220392)

Thomas G. Hentoff (D.C. Bar No. 438394)

Krystal R. Commons (D.C. Bar No. 987768)

⁴ In a Rule 12-I meet-and-confer email, Plaintiffs' counsel asserted that Sidley "expressly represented to the Court on February 14 that [Sidley] would not file another arbitration motion with regards to the supplemental complaint." 3/19/2019 email from B. Forrest to T. Hentoff. This is incorrect. First, at the February 8 hearing, Sidley counsel said this about the Supplemental Complaint: "We now have a clock running . . . under the D.C. anti-SLAPP Act. We[']ve got 45 days and, *of course, we're going to . . . file our arbitration motion[] as it relates to that one single count with those new allegations. . . .*" 2/8/2019 Tr. at 44-45 (emphasis added). The Court responded: "Let's set a schedule to provide limited discovery, okay? Let's put aside any other potential motions." *Id.* at 45.

Second, at the February 14 hearing, responding to the Court's preference to focus first on discovery, counsel reiterated that Sidley would file this arbitration motion later: "I believe we're OK *for now in arbitration with regard to that new claim. . . .* I'm a little concerned that under the D.C. Anti-SLAPP Act we have a 45-day statutory deadline," falling on March 21, to address the Supplemental Complaint, "and it's my plan . . . to make sure we don't waive it consistent with how the Court wants to handle the case and it's not time sensitive *at this moment*, so I don't think we need to resolve it *at this hearing*." 2/14/2019 Tr. at 36 (emphasis added). The 45-day deadline has now arrived and, as stated at both hearings, Sidley is now filing this arbitration motion and the anti-SLAPP motion, both directed to new Count 11. Later in the hearing there was a discussion of APA filing a supplement to their pending arbitration motion that included argument about a newly issued "Supreme Court decision," and Sidley counsel stated that "Sidley will not be filing a supplement," *id.* at 40-41, simply meaning no supplement to their already-filed brief directed to the original Complaint to address the new Supreme Court case.

At no time has Sidley ever represented that it would waive the filing of an arbitration motion pertaining to the Supplemental Complaint.

Finally, this arbitration motion directed to new Count 11 has no impact on the case schedule. It simply incorporates the arguments already made in Sidley's original arbitration motion. There is nothing new for Plaintiffs to respond to and accordingly no prejudice to Plaintiffs from the filing of this motion.

Alexander J. Kasner (D.C. Bar No. 1046343)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Email: jvilla@wc.com
thentoff@wc.com
kcommons@wc.com
akasner@wc.com

Attorneys for Defendants Sidley Austin LLP, Sidley
Austin (DC) LLP, and David H. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2019, 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 and Defendant APA.

/s/ Thomas G. Hentoff

Thomas G. Hentoff

**IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

STEPHEN BEHNKE, <i>et al.</i>,	:	CASE NO. 2017 CA 005989B
Plaintiffs,	:	Judge Puig-Lugo
vs.	:	Next Scheduled Event:
	:	May 8, 2019 Status Hearing
	:	
DAVID H. HOFFMAN, <i>et al.</i>,	:	
Defendants.	:	

[PROPOSED] ORDER

Upon consideration of Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman’s Motion to Compel Arbitration of Count 11 of the First Supplemental Complaint, it is **ORDERED** that the Motion is **GRANTED**. Plaintiffs Behnke and Newman shall arbitrate the claims they have asserted in the instant litigation, including Count 11 of the Supplemental Complaint and all remaining claims asserted in both Plaintiffs’ Complaint and Supplemental Complaint, in an arbitration proceeding in Washington D.C. Plaintiffs Behnke and Newman shall confer with all Defendants to reach agreement with regard to the selection of an arbitrator and rules to govern in the arbitration. If the parties are unable to reach agreement within a period of twenty-one (21) days of entry of this order, Plaintiffs Behnke and Newman shall commence an arbitration action in the District of Columbia before the American Arbitration Association within thirty (30) days following the entry of this Order.

Dated: _____

SO ORDERED.

Judge Puig-Lugo

COPIES TO:

Thomas G. Hentoff
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

Louis J. Freeh
FREEH SPORKIN & SULLIVAN, LLP
2550 M Street, N.W., First Floor
Washington, D.C. 20037

Barbara S. Wahl
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20006

Bonny J. Forrest
555 Front Street, Suite 1403
San Diego, CA 92101

John B. Williams
WILLIAMS LOPATTO PLLC
1200 New Hampshire Ave., N.W., Suite 750
Washington, D.C. 20036