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 Feb. 23, 2018**
***Defendants*.**	)	
	)	

DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID HOFFMAN'S OPPOSITION TO PLAINTIFFS' "MOTION FOR LIMITED DISCOVERY"

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INTRODUCTION

Plaintiffs have filed a motion for discovery purportedly needed to respond to Defendants' pending anti-SLAPP and arbitration motions. Although it is mislabeled a motion for "limited" discovery, the discovery requested instead is sweeping, including "[a]ll witness interview documents, memoranda, summaries, correspondence, or notes created during the [eight-month] investigation by Sidley." Plaintiffs' Opposed Motion for Limited Discovery ("Mot."), Freeh and Forrest Decl., Ex. A ("Ex. A") at 3. The motion should be denied in its entirety.

First, Plaintiffs continue to simultaneously, and wastefully, pursue their first-filed, identical defamation lawsuit in Ohio state court. As requested in Defendants' pending motion to stay, this case (the second-filed case) should be stayed pending the resolution of Plaintiffs' Ohio lawsuit.

Second, discovery in this case was stayed automatically by the filing of Defendants' anti-SLAPP special motions to dismiss. Under the D.C. Anti-SLAPP Act, Plaintiffs may obtain discovery only if they can show that (1) it is "targeted," (2) it "will enable the plaintiff to defeat the motion," and (3) "the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2). Plaintiffs fail to meet their burden at every step. The broad, burdensome discovery they seek is the opposite of "targeted." In fact, Plaintiffs did not even attempt to narrow the discovery they served at the outset of the case. And Plaintiffs have not come close to carrying their burden of explaining how any of the discovery will enable them to defeat the anti-SLAPP motions, which focus only on the element of "actual malice."

Nothing that Plaintiffs request would enable them to show that Defendants acted with actual malice. Indeed, Plaintiffs freely admit that some of the requests do not even have that purpose: Plaintiffs instead seek discovery related to the separate defamation element of "publication" even though that element is entirely unchallenged in Defendants' motions. As Defendants

explain in their anti-SLAPP motions, even if Plaintiffs could prove every allegation in the Complaint, they could not establish actual malice. Accordingly, there is no need for any discovery and certainly none should be allowed based on the deficient arguments Plaintiffs advance.

Third, Plaintiffs do not need and are not entitled to discovery to respond to the motions to compel arbitration. The arbitration motions raise questions of contract interpretation and pure questions of law, for which the only necessary documents are the employment agreements containing the arbitration clauses (which are attached to Defendants' motions). No discovery is necessary to resolve the motions.

The automatic discovery-stay provision in the Anti-SLAPP Act was purposely designed to prevent exactly what Plaintiffs seek to do here: impose burdensome discovery on Defendants before establishing that their defamation claim has merit. *See* D.C. Council, Comm. Pub. Safety & Judiciary, Report on Bill 18-893, "Anti-SLAPP Act of 2010" (Nov. 18, 2010), at 1 (expressing concern that "defendants of a SLAPP must dedicate a substantial[ ] amount of money, time, and legal resources"). The Court should deny Plaintiffs' motion.

BACKGROUND

A detailed discussion of the background of this litigation is provided in Sidley's anti-SLAPP motion. Sidley refers the Court to its anti-SLAPP motion and includes a brief background section here for context. *See* Sidley Special Mot. to Dismiss (filed Oct. 13, 2017) at 4-9.

One of the most contentious issues of the post-September 11 War on Terror has been the involvement of psychologists in the interrogations of national security detainees. In 2005, after reports of abuse at the Guantanamo Bay and Abu Ghraib prisons, APA convened a task force (known as the PENS Task Force) to make recommendations regarding the involvement of psychologists in national security interrogations. The Plaintiffs were all involved in the PENS Task Force. Colonels L. Morgan Banks and Larry James were members of the task force, Dr. Stephen

Behnke staffed the task force, Dr. Russell Newman served as an observer, and Colonel Debra Dunivin, who is married to Newman, made recommendations to APA's board about who should serve on the task force. Banks, James and Dunivin were also all military psychologists who, according to the Complaint, "took a leading role in creating policies and procedures" related to national security interrogations. *See, e.g.*, Compl. at 36.

The PENS Task Force issued recommendations that psychologists could participate in national security interrogations as long as they were "safe, legal, ethical, and effective." APA's Board approved the Task Force's recommendations. Following the adoption of the PENS Task Force recommended guidelines, Behnke, APA's Ethics Director, was the primary spokesperson for the APA regarding the guidelines and defended them in the press, at public forums, in articles written by him, and in testimony before the U.S. Senate.

The APA Board's decision was immediately controversial and led to years of public debate. Critics saw the Task Force and other activities as evidence of collusion between APA and the U.S. Government and advocated for a total ban on psychologists participating in national security interrogations. In 2014, *The New York Times* reporter James Risen published a book, titled *Pay Any Price*, about the War on Terror. The book discussed allegations that the outcome of the PENS Task Force was the result of collusion between APA and the U.S. Government.

In response to Risen's book, APA retained Sidley to conduct an internal investigation into the allegations. Sidley partner David Hoffman led the investigation. Over eight months, Sidley interviewed 148 people (some multiple times) and reviewed more than 50,000 documents. In July 2015, Sidley provided a 542-page report to APA detailing its findings and the bases for its conclusions and opinions (the "Report") (attached as Exhibit 2-A to Sidley's Motion to Compel Arbitration). APA made the Report and 7,600 pages of exhibits publicly available to further

the ongoing discussion about the allegations and psychologists' role in interrogations. Sidley provided a revised version of the Report in September 2015.

Plaintiffs disagree with some of the conclusions reached in the Report and have filed lawsuits in an attempt to silence APA and Sidley's public expressions on this issue of continuing national importance. Plaintiffs initially filed this suit in Ohio. When the trial court dismissed that suit for lack of personal jurisdiction, Plaintiffs both appealed that decision and filed a nearly identical complaint in this Court. The Complaint is 103 pages long and attaches a 45-page single-spaced chart containing 219 sets of allegedly false statements in the Report. Despite its length, the Complaint fails to allege facts sufficient to show that Sidley or APA made false statements about the Plaintiffs with actual malice, i.e., with knowledge or a high degree of suspicion that the statements were false.

In October, Sidley and APA filed (1) a motion to stay this case pending the resolution of Plaintiffs' Ohio lawsuit, (2) anti-SLAPP special motions to dismiss, and (3) motions to compel arbitration as to Behnke and Newman. After delaying for a month and a half, and letting the deadlines to respond to the anti-SLAPP and arbitration motions pass, Plaintiffs have now filed a motion to conduct discovery to enable them to prepare an opposition to those motions.[1] As explained below, Plaintiffs' requested discovery is neither warranted nor properly allowed.

[1] Plaintiffs assert that this dispute "has dragged on for more than two years." Mot. 2. But any delay is Plaintiffs' doing. They chose when to file their lawsuit and when they did file, they did so in a jurisdiction that lacked personal jurisdiction over Defendants. Now instead of proceeding in this Court, Plaintiffs continue to litigate in the Ohio courts, which will only further delay resolution of this case.

ARGUMENT

I. No Discovery Should Be Allowed and This Case Should Be Stayed Pending the Outcome of Plaintiffs' Appeal of Their First-Filed Ohio Case.

Plaintiffs' request for discovery should be denied because this case should be stayed for the reasons set forth in Defendants' Motion to Stay This Action in Favor of the Identically First-Filed Lawsuit in Ohio (filed Oct. 11, 2017). As explained in that motion, Plaintiffs originally filed this lawsuit in Ohio. After the Ohio trial court dismissed the case for lack of personal jurisdiction, Plaintiffs appealed that decision while also filing a nearly identical complaint in Washington DC. Plaintiffs are proceeding with the appeal of the Ohio decision; they filed their opening brief on November 27, 2017. They should not be allowed to simultaneously litigate the same case in two different forums. Allowing Plaintiffs to prosecute duplicative litigation wastes judicial and party resources. Until Plaintiffs' Ohio litigation is resolved, this case should be stayed.

II. Plaintiffs Have Failed to Satisfy Their Burden To Show that the Requested Discovery Is Permitted under the Anti-SLAPP Act.

Discovery on Plaintiffs' claims here is in any event stayed automatically by the filing of Defendants' anti-SLAPP motions, except in limited situations. *See* D.C. Code § 16-5502(c)(1). Plaintiffs must carry their burden of showing that their requested discovery (1) is "targeted," (2) "will enable the plaintiff to defeat the motion," and (3) "will not be unduly burdensome," before they can be permitted to conduct discovery. D.C. Code § 16-5502(c)(2). Plaintiffs have failed to satisfy their burden on all three requirements:

First, Plaintiffs' requests are not "targeted." To the contrary, the anti-SLAPP portion of Plaintiffs' discovery motion is extremely broad, seeking among other things (1) every document created by Sidley during its investigation, (2) Behnke's entire hard drive, containing thousands of e-mails and other documents, and (3) four depositions of non-party witnesses without any lim-

itations. Second, this wide-ranging discovery will impose burdens on Sidley and APA that include requiring a major production of documents, including internal documents that require privilege review. *See* Mot., Ex. A. Third, Plaintiffs woefully fail to meet their burden of showing that the discovery they are seeking will allow them "to defeat the motion[s]."

The anti-SLAPP motions make a single argument: even if all of the allegations in the Complaint are true, Plaintiffs cannot demonstrate that Sidley or APA acted with actual malice. *See* Sidley Special Mot. to Dismiss at 17 ("Plaintiffs fundamentally misapprehend the concept of actual malice. Under the proper application of the actual malice test, even assuming *arguendo* the truth of the non-conclusory factual allegations in the Complaint, Plaintiffs simply cannot meet their burden."). As explained more fully in the anti-SLAPP motions, "actual malice" in the defamation context requires a showing, by clear and convincing evidence, that the defendant knew that the statements challenged by a plaintiff were false, had a "high degree of awareness of probable falsity," or "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (quotation omitted). Plaintiffs' failure to allege (or ability to prove) facts sufficient to show by clear and convincing evidence that Sidley or APA acted with actual malice requires the dismissal of all counts in Plaintiffs' Complaint.[2]

Like their Complaint, Plaintiffs' motion to compel evinces a fundamental misunderstanding of what they are required to prove to defeat Defendants' anti-SLAPP motions. Plaintiffs cannot "show actual malice in the abstract[,] they must demonstrate actual malice *in conjunction*

[2] Plaintiffs assert that Defendants' anti-SLAPP motions are "partial" motions to dismiss. Mot. 3 n.2. They are not. Actual malice is a required element of all counts in the Complaint. For the same reason, Plaintiffs' contention that Defendants' anti-SLAPP motions address only acts "described in one claim" of the 12-count Complaint, *id.* at 2, is also wrong. Defendants' anti-SLAPP motions argue that Plaintiffs cannot establish that Defendants acted with actual malice as to any of the 12 counts asserted in the Complaint. *See* Sidley Special Mot. to Dismiss at 4 ("Sidley raises one discrete issue that will resolve this case *in toto*.").

with a false defamatory statement." *Tavoulareas v. Piro*, 817 F.2d 762, 794, 260 U.S.App.D.C. 39, 71 (D.C. Cir. 1987) (en banc). Nor, as explained in detail in the anti-SLAPP motions, can Plaintiffs establish actual malice by attempting to show that Defendants were biased, made a mistake, or did not conduct the investigation in a manner that Plaintiffs prefer. *See* Sidley Special Mot. to Dismiss at 20-25. To defeat Defendants' anti-SLAPP motions Plaintiffs would need to present facts showing that Defendants made the specific statements challenged in the Complaint with knowledge that the statements were false. Nowhere do Plaintiffs connect the requested discovery to any of the 219 sets of allegedly false statements attached to the Complaint. Nor do they even attempt to demonstrate that the requested discovery would enable them to prove that Defendants knowingly made any of those statements with knowledge that they were false. Instead, Plaintiffs' discovery requests are a fishing expedition.

For example, Plaintiffs request leave to serve four interrogatories on APA and to take the deposition of non-party Dr. Stephen Soldz, purportedly to establish the alleged *publication* of a leaked copy of the Report to *The New York Times* a few days before the APA's public distribution of the Report (leaked publication alleged in Count 3 of the Complaint). *See* Mot. 4. But Defendants' anti-SLAPP motions do not challenge the *publication* of the Report; the motions argue only that Plaintiffs cannot prove that Defendants published false statements about the Plaintiffs with actual malice. Plaintiffs try to justify this discovery by contending, erroneously, that "[u]nder the express language of the statute Plaintiffs are entitled to all discovery related to *showing a 'claim' will succeed on the merits*." Mot. 3 n.2 (emphasis added). That is not the standard. To the contrary, the statute instructs that targeted, non-burdensome discovery is allowed only when it is likely to "enable the plaintiff to *defeat the motion*." D.C. Code § 16-5502(c)(2) (emphasis added). Because the anti-SLAPP motions are not based on disputing the

publication element, all the discovery that Plaintiffs seek in order to find out who leaked a copy of the Report to *The New York Times* is irrelevant to the motion.[3]

Plaintiffs equally fail to meet their burden as to the other requested discovery, which they assert incorrectly and without support is necessary to establish actual malice.[4] As demonstrated below, none of those requests seeks information that would "enable the plaintiff to defeat the [anti-SLAPP] motion." D.C. Code § 16-5502(c)(2).[5]

Document Requests:

First Request: Plaintiffs seek "[a] mirror image copy of all electronic data contained on the personal computer and hard drive of Dr. Stephen Behnke and retrieved by Sidley on or about February 5, 2015, as part of its investigation of APA." Mot., Ex. A at 2. Plaintiffs claim that

[3] Although Plaintiffs also assert that the alleged publication to *The New York Times* is relevant to showing actual malice, they offer no argument or explanation as to why, nor could they. Even if Hoffman did give the Report to *The New York Times* a few days before APA's contemplated release of the Report to the public (he did not), such an action would not bear on whether he knew or believed of the falsity of any of the 219 sets of statements challenged in the Complaint.

[4] Plaintiffs cite dicta from *Hutchinson v. Proxmire*, 443 U.S. 111, 120 (1979), to support their argument that they should be permitted to conduct discovery before the Court decides whether Defendants acted with actual malice. *See* Mot. 3. Plaintiffs, however, fail to note that in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 n.7 (1986)—the very next case that Plaintiffs cite—the Supreme Court clarified that its statement in *Hutchinson* simply meant that the Court was reluctant to endorse a judicially created rule that would grant "special procedural protections" to libel defendants beyond the constitutional protections. Here, the D.C. Council has legislatively extended such special protections to libel defendants.

[5] Plaintiffs served the four document requests to Sidley, the four interrogatories to APA, and the deposition notices for Drs. Kelly and O'Beirne Kelly with Plaintiffs' Complaint, not in response to the anti-SLAPP motions. That Plaintiffs did not even attempt to narrow any of the requests in response to the anti-SLAPP motions seriously undermines Plaintiffs' argument that such discovery is either narrowly targeted or necessary to defeat the anti-SLAPP motions.

"Dr. Behnke's computer will contain email traffic that refutes many of Hoffman's factual assertions and conclusions, including Dr. Behnke's intent to delete emails." *Id.*[6] Plaintiffs offer nothing to back up this assertion. Indeed, the declaration submitted by Behnke in support of the motion identifies only emails on his computer that he claims would show that Hoffman allegedly misrepresented the scope of the investigation to him. *See* Behnke Decl. ¶¶ 5-6. Even assuming his allegation were correct (it is not), it is irrelevant to whether Sidley knowingly made any of the statements challenged in the Complaint with actual malice. *See Secord v. Cockburn*, 747 F. Supp. 779, 788-89 (D.D.C. 1990) ("[A]n author is under no duty to divulge the contents of a book prior to publication in order to provide the subject an opportunity to reply."). Plaintiffs offer no other substantiation or explanation for how the contents of Behnke's computer would show that Sidley knowingly made false statements.

Second Request: Plaintiffs seek any reports created by Sidley's e-discovery vendor about the contents of Behnke's computer. Plaintiffs offer no explanation for why this discovery is needed.

Third Request: Plaintiffs seek any APA conflict of interest policy or any correspondence concerning such a policy received by Sidley during its investigation. Plaintiffs' justification for this request is that "[a]lthough Hoffman asserts that Dr. Newman's actions constituted a conflict of interest, he discloses no specific APA policy that Dr. Newman allegedly violated." Mot., Ex. A at 3. But the Report never states that Newman violated an APA conflict of interest policy; it states only that he had an "obvious conflict of interest" participating in the PENS Task Force

[6] Plaintiffs do not explain how a forensic image of Behnke's computer would shed light on whether Sidley acted with actual malice when the Report discussed his "intent to delete emails." Behnke Decl. Ex. at 2. The Report quotes and cites Behnke's own e-mails to this effect, including one in which Behnke confirmed to Banks that he had "[d]ouble deleted" one of his e-mails at Banks' request. Report at 395.

given his wife's role as a military psychologist assisting with interrogations at Guantanamo Bay. Report at 13. Whether or not Sidley reviewed an APA conflict of interest policy is irrelevant to whether Sidley genuinely believed that Newman had a conflict of interest participating in the PENS Task Force. Plaintiffs have offered no valid basis for this discovery.

Fourth Request: Plaintiffs seek "all witness interview documents, memoranda, summaries, correspondence, or notes created during the investigation by Sidley." Mot., Ex. A at 3. In other words, Plaintiffs want everything Sidley created during an eight-month investigation. Plaintiffs concede that this request is not "targeted," *see id.* at 1 (admitting that one of the requests is not limited), and, therefore, it must be denied under District of Columbia Code § 16-5502.

Even if the request were limited, Plaintiffs in any event fail to meet their burden of showing that requiring this production of documents would enable them to establish that Sidley published any challenged statement with actual malice. Plaintiffs contend that they need Sidley's interview notes because they have "ten affidavits from witnesses Hoffman interviewed stating that his Report significantly distorted the substance of their interviews." Mot., Ex. 3. Plaintiffs cannot meet their burden of establishing a need for discovery at this stage of the case by making vague references to undisclosed information. For example, without seeing the affidavits, Defendants and the Court cannot evaluate whether the alleged distortions have anything to do with Plaintiffs, let alone any of the allegedly false statements. The Report is 542 pages long and addresses a wide-ranging number of issues, many having no bearing on Plaintiffs' claims. Again, in order to defeat the anti-SLAPP motion Plaintiffs must demonstrate that Sidley had knowledge that the specific statements Plaintiffs identify were false. *See Tavoulareas*, 817 F.2d 762 at 794.

Having elected not to support their discovery motion with these affidavits Plaintiffs have failed to meet their burden. Plaintiffs cannot rectify this failure by introducing them on reply because "a party may not raise new arguments in its reply brief" thereby denying opposing counsel "an opportunity to respond." *In re Huber*, 708 A.2d 259, 260 n.1 (D.C. 1998); *see also Childs-Pierce v. Util. Workers Union of Am.*, 383 F. Supp. 2d 60, 64 n.2 (D.D.C. 2005) ("The Court discourages attempts to create new issues of material fact by submitting affidavits in reply papers that could have been introduced earlier."), aff'd, 187 F. App'x 1 (D.C. Cir. 2006).

Finally, Plaintiffs' untested claims about the content of their undisclosed affidavits undercut any argument that they need to take discovery to develop arguments in opposition to the anti-SLAPP motions. The interview notes would, at most, confirm the evidence that Plaintiffs claim to already have.

Depositions:

Heather O'Beirne Kelly, Ph.D.: Plaintiffs say that Dr. O'Beirne Kelly will testify that "she confronted Hoffman during the investigation because he was omitting anything from their interview that was favorable to her, APA, or Plaintiffs" and that she told APA's General Counsel that Sidley "would produce a report that was false and defamatory." Mot., Ex. at 3. Assuming the truth of this assertion, it does not demonstrate actual malice on the part of Sidley. First, O'Beirne Kelly's supposed testimony is about what she said she thought the Report *would* contain, not whether the actual contents of the Report are false, let alone that Sidley knew the statements were false. *See OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 53 (D.D.C. 2005) (allegations about conduct of investigation "focus[ ] *improperly* on what more a reasonable reporter might have done in the circumstances, not on the defendants' state of mind" (emphasis added)). Second, O'Beirne Kelly's supposed testimony that the Report itself omitted points

favorable to the Plaintiffs would be irrelevant because "[p]ublishers and reporters do not commit a libel in a public figure case by publishing unfair one-sided attacks. . . . The fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false. The libel law does not require the publisher to grant his accused equal time or fair reply." *Westmoreland v. CBS Inc.*, 601 F. Supp. 66, 68 (S.D.N.Y. 1984); *see also Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (Publisher has "no . . . obligation to present a balanced view . . . . Nor [is it] liable for failing to perform the thorough professional investigation [plaintiffs] would have preferred."). Third, Plaintiffs again fail to identify any specific challenged statements to which the requested testimony would be relevant.

Jennifer F. Kelly, Ph.D.: Plaintiffs offer no explanation for why Kelly's deposition would be relevant to showing that Sidley knowingly published false statements. Indeed, Plaintiffs state that Kelly was not interviewed for the investigation. *See* Kelly Decl. Ex. at 4.

Dr. Michael Honaker: Plaintiffs contend that Dr. Honaker will testify that "his conversations with Hoffman during the investigation [ ] were omitted or distorted." Honaker Decl. Ex. at 4. Again, Plaintiffs fail to meet their burden of explaining what statements made by Honaker were omitted or distorted and how those supposed omissions and distortions demonstrate that Sidley knowingly made false statements about the Plaintiffs. Moreover, "an honest misinterpretation does not amount to actual malice," *Von Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106, 117 (D.C. Cir. 2017) (quotation omitted), and Sidley was not required to include all facts gathered during its investigation in the Report.

Dr. Stephen Soldz: The only reason Plaintiffs give for Dr. Soldz's deposition is to learn whether he leaked the Report to *The New York Times*. Mot. at 4. As explained above, *see supra* pp. 7-8, that is irrelevant to the anti-SLAPP motions.

III. If Anti-SLAPP Related Discovery Is Allowed, Plaintiffs Should Be Required To Pay Defendants' Costs.

Plaintiffs' request to conduct discovery should be denied. However, if any "targeted" discovery is permitted,[7] it should be conditioned "upon the [P]laintiff[s] paying any expenses incurred by [D]efendant[s] in responding to such discovery." D.C. Code 16-5502(c)(2). The D.C. Council included this provision because of concerns that "defendants of a SLAPP must dedicate a substantial[ ] amount of money, time, and legal resources." Report on Bill 18-893 at 1. The Council made clear Plaintiffs should bear discovery costs.

IV. Plaintiffs Are Not Entitled to Discovery Related to the Arbitration Motions.

Sidley incorporates by reference the arguments made in Part III of APA's opposition. As APA explains, Plaintiffs are incorrect that they are entitled to discovery before responding to the motions to compel arbitration, which raise a legal question as to the interpretation of the arbitration clauses in Newman's and Behnke's employment contracts.

Moreover, Plaintiffs' explanation for why they need the requested discovery is wrong. As it pertains to Sidley, Plaintiffs seek discovery to respond to Sidley's "alternative estoppel" argument. *See* Sidley Arb. Mot. (filed Oct. 11, 2017) at 10-14. But Plaintiffs misconstrue the doctrine of alternative estoppel. The inquiry the Court must undertake is whether Plaintiffs are equitably estopped from avoiding arbitration with Sidley, because "*the factual allegations in the complaint*" describe either identical claims against Sidley and APA or interdependent, concerted

[7] If discovery is allowed it must be "targeted" to issues raised in the anti-SLAPP motions and "not be unduly burdensome." D.C. Code § 16-5502(c)(2). Any depositions should therefore be limited to the specific issues identified in Plaintiffs' motion and the document requests should be limited to documents that Plaintiffs can demonstrate are necessary to defending against the anti-SLAPP motion. Plaintiffs should not be permitted to go on a fishing expedition through every document created by Sidley during its investigation under the guise of conducting targeted anti-SLAPP motion related discovery.

misconduct by them. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 36 (2d Cir. 2002) (emphasis added) (quotation omitted). The doctrine exists to police the Plaintiffs' pleadings and to estop them from pursuing identical claims in two different forums. There is no call for any factual inquiry beyond Plaintiffs' Complaint.

Finally, Plaintiffs' requests have nothing to do with the Sidley-APA relationship during the relevant time period. Plaintiffs seek documents created *after* Sidley delivered its revised Report in September 2015, including documents related to Sidley and APA's defense of this litigation and privilege communications between APA and its outside counsel, WilmerHale. Plaintiffs offer no explanation (nor could they) for why these documents have any bearing on Sidley's arbitration motion.[8]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel discovery should be denied.

Dated: December 14, 2017

Respectfully submitted,

/s/ Thomas G. Hentoff

John K. Villa (D.C. Bar No. 220392)
Thomas G. Hentoff (D.C. Bar No. 438394)
Eli S. Schlam (D.C. Bar No. 1004883)
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) 434-5804
E-mail:jvilla@wc.com
thentoff@wc.com
eschlam@wc.com
kcommons@wc.com
akasner@wc.com

[8] As noted above, all discovery is currently automatically stayed pursuant to the Anti-SLAPP Act. Plaintiffs' motion seeks leave to "engage" in discovery. Not. of Mot. 1. Sidley reserves the right to interpose objections, including privilege and immunity objections, to any discovery requests that the Court permits to proceed.

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

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 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