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**
	)	
v.	)	**Next Event: Status Hearing**
	)	**May 8, 2019 2:00 PM**
DAVID H. HOFFMAN, *et al.*,	)	**Courtroom 317**
	)	
***Defendants*.**	)	
	)	

REPLY BRIEF IN SUPPORT OF DEFENDANTS SIDLEY AUSTIN LLP, SIDLEY AUSTIN (DC) LLP, AND DAVID H. HOFFMAN'S CONTESTED MOTION TO COMPEL ARBITRATION

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Plaintiffs Dr. Stephen Behnke and Dr. Russell Newman ("Plaintiffs") cannot dispute that (1) D.C. federal courts apply alternative equitable estoppel to require nonsignatory arbitration where plaintiffs assert identical claims, arising out of their employment, against signatory and nonsignatory defendants alike; (2) D.C. federal courts have made clear that such a rule is in fact based on an interpretation of local D.C. law; and (3) this form of estoppel covers the precise allegations of Plaintiffs' Complaint. *See* pp. 1-4, *infra*. Plaintiffs' two-sentence argument that their claims do not satisfy the test for identical-claims estoppel, Opposition ("Opp.") 3 n.2, is wrong. *See* pp. 3-4, *infra*. And Plaintiffs fail even to attempt to dispute that their claims satisfy the test for another widely applied form of equitable estoppel, concerted-misconduct estoppel.[1]

The out-of-state arbitration-estoppel case law urged by Plaintiffs would impose inequitable burdens if the claims against APA are sent to arbitration. While arbitrating Plaintiffs' defamation claims arising from 219 allegedly false sets of statements in the Sidley Report, APA would also have to be involved as a third-party in the Superior Court litigation of Plaintiffs' identical claims against Sidley. To avoid a result that deprives APA of the benefit of the arbitration it bargained for, this Court should order arbitration of the claims against Sidley as well.[2]

I. Sidley, Not Plaintiffs, Makes Its Estoppel Argument Under D.C. Law

Plaintiffs' invocation of *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), Opp. 4, is a red herring. *Arthur Andersen* holds that federal courts must apply state law as to arbitrability. *Id.* at 630-31. Here, however, as Sidley already pointed out, Sidley Memorandum ("Mem.") 8, the "D.C.

[1] Even under a summary judgment-like standard, Opp. 3-4, "the party resisting arbitration [still] bears the burden of proving that the claims at issue are unsuitable for arbitration." *Sakyi v. Estée Lauder Cos.*, 308 F. Supp. 3d 366, 375 (D.D.C. 2018).

[2] Sidley incorporates the arguments in APA's motion to compel arbitration reply brief that Plaintiffs' claims are arbitrable.

Court of Appeals has not squarely addressed whether arbitration agreements can be enforced by non-signatories." *Kelleher v. Dream Catcher, L.L.C.*, 278 F. Supp. 3d 221, 224 (D.D.C. 2017). In such circumstances, the D.C. Court of Appeals has held that "federal court decisions construing and applying" the scope of arbitrability are "persuasive authority in construing and applying" D.C. law as to arbitrability because the standards for arbitrability under federal and D.C. law are "substantially similar." *Hercules & Co., Ltd. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1072-73 (D.C. 1991).

Likewise, even where D.C. local law on arbitrability is unsettled, the D.C. federal district court attempts to interpret it. *See Kelleher*, 278 F. Supp. 3d at 224 ("Applying District of Columbia law here," nonsignatories "could have invoked the Contract's arbitration clause . . . under equitable principles of estoppel.") (cited at Mem. 8, 10). This includes when applying the very identical-claim estoppel that requires Plaintiffs here to arbitrate. *See id.* at 224-26 (applying "District of Columbia law" for identical-claim estoppel); *Sakyi v. Estée Lauder Cos.*, 308 F. Supp. 3d 366, 376, 377 (D.D.C. 2018) (applying "the law of the District of Columbia").

Thus, where local D.C. arbitrability authority is lacking, the D.C. Court of Appeals instructs courts to look to federal cases as persuasive authority, and D.C. federal courts attempt to interpret D.C. law. Those are the cases on which Sidley relies. None of that contravenes *Arthur Andersen*.[3] And Plaintiffs for their own part fail to cite any case applying D.C. law on nonsignatory arbitration.

II. Plaintiffs' Arbitration Clauses Do Not Expressly Preclude Nonsignatory Arbitration

Plaintiffs argue as a threshold matter that their arbitration clauses preclude nonsignatory arbitration. Opp. 6-9. This is incorrect. The clauses do not expressly state who is subject to

[3] Plaintiffs assert that Defendants' cited cases wrongly apply federal law, Opp. 5, 14 n.11; they do not. *Khan v. Parsons Global Services, Ltd.*, 480 F. Supp. 2d 327, 340-41 (D.D.C. 2007), rejected California law under choice-of-law principles. *Ragone v. Atlantic Video*, 595 F.3d 115, 121 (2d Cir. 2010), explicitly applied New York state law. *Lash & Goldberg LLP v. Clarke*, 88 So. 3d 426, 427-28 (Fla. Dist. Ct. App. 2012), explicitly applied Florida state law.

arbitration but rather require that Plaintiffs arbitrate "*any* dispute that may arise" regarding their employment, with no indication that the dispute must be between signatories. Opp. 6 (emphasis added). "When the agreement's terms do not *expressly state* whether a signatory may be compelled to arbitrate with a nonsignatory, . . . equitable estoppel" is available, *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (emphasis added), as many cases hold, Mem. 9-10.[4]

III. This Court Should Apply Equitable Estoppel and Compel Plaintiffs to Arbitrate

A. "Identical Claims" Estoppel, Adopted by D.C. Federal Courts, Applies

D.C. federal courts, including two expressly interpreting D.C. law, apply "identical claims" estoppel to compel a signatory to arbitrate against a nonsignatory where the plaintiff "asserts the exact same claims, based on the same operative set of facts" against all defendants. *Sakyi*, 308 F. Supp. 3d at 385 (quoting *Kelleher*, 278 F. Supp. 3d at 225-26).

Plaintiffs' claims satisfy that standard. They bring identical defamation claims against "All Defendants," based on the same underlying contents of Exhibit A (that is, the same 219 sets of statements in the Report that Plaintiffs allege to be false). Mem. 6, 12-13. Indeed, the Complaint admits that "[e]ach of the Plaintiffs[']claims arise out of a common nucleus of facts," including "the same set of publications and republications." Suppl. Compl. ¶ 65.

Plaintiffs make the hypertechnical argument that some of the counts are brought against only Sidley, Opp. 3 n.2, but Plaintiffs do not and cannot deny that they bring identical defamation claims against Sidley and APA for the exact same content of the same exact Report. Plaintiffs' breaking up the counts of the Complaint, for instance, to specify that Sidley first delivered the Report to APA

[4] Plaintiffs' cases, Opp. 7-8, are distinguishable because the parties there, unlike here, expressly agreed to limit arbitration only to those disputes between the signatories. *See Norman v. Occupational Safety Ass'n*, 776 So. 2d 788, 791 (Ala. 2000) (clause limited arbitration to disputes "between the . . . parties to this agreement"); *In re Liberty Refund Anticipation Loan Litig.*, 2014 WL 3639189, at *4-5 (N.D. Ill. July 23, 2014) ("disputes against the [signatory]").

and APA then made the Report available to the public, Suppl. Compl. ¶¶ 322-42, 386-406, 465-81, does not alter the reality that the defamation claims against Defendants are identical and thus subject to estoppel. *See Sakyi*, 308 F. Supp. 3d at 386; *Kelleher*, 278 F. Supp. 3d at 226.

B. "Concerted Misconduct" Estoppel Also Applies

The D.C. federal district court has also cited the concerted misconduct form of equitable estoppel, Mem. 13-15, as a valid approach to nonsignatory arbitration. *Sakyi*, 308 F. Supp. 3d at 385 ("[E]quitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." (quoting *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir. 2000)). Concerted-misconduct equitable estoppel is widely employed among federal and state courts in compelling nonsignatory arbitration.[5]

Plaintiffs do not even attempt to argue that their Complaint's extensive allegations of concerted misconduct, Mem. 5-7, fail to satisfy this test. Plaintiffs instead rely heavily on out-of-state cases like *Goldman v. KPMG, L.L.P.*, 173 Cal. App. 4th 209 (2009), which limit application of equitable estoppel to claims that are based on the terms of the employment agreement itself. Opp. 10-11. *But see* Domke on Commercial Arbitration § 13:12 (2018) (concerted misconduct is a valid form of estoppel, distinct from this reliance-on-agreement estoppel). In *Goldman*, an intermediate California state appellate court determined that nonsignatory defendant Sidley Austin LLP could not compel arbitration through concerted misconduct equitable estoppel. *Id.* at 229. Plaintiffs do not

[5] *See, e.g.*, *In re Midland Mgmt, Inc.*, 2019 WL 398169, at *7 n.3 (S.D. Cal. Jan. 31, 2019); *Dropp v. Diamond Resorts Int'l, Inc.*, 2019 WL 332399, at *5 (D. Nev. Jan. 25, 2019); *Blue Cross & Blue Shield v. DL Inv. Holdings, LLC*, 2018 WL 6583882, at *6 (N.D. Ga. Dec. 14, 2018); *Johnson v. Nissan N.A., Inc.*, 2018 WL 6803741, at *5 (N.D. Cal. Sept. 14, 2018); *Green v. Fishbone Safety Sols., Ltd.*, 303 F. Supp. 3d 1086, 1094 (D. Colo. 2018); *Discovery Res., Inc. v. Ernst & Young U.S. LLP*, 62 N.E.3d 714, 720 (Ohio Ct. App. 2016); *Machado v. System4 LLC*, 28 N.E.3d 401, 409 (Mass. 2015); *Meister v. Stout*, 353 P.3d 916, 921 (Colo. App. 2015).

explain why this Court should adopt California state law, especially when federal courts have interpreted D.C. law to be to the contrary. Nor do Plaintiffs mention the numerous other states that apply concerted misconduct equitable estoppel, including to compel a signatory plaintiff to arbitrate her defamation claims against a nonsignatory law firm retained by her employer to complete an internal investigation, *Lash*, 88 So. 3d at 427-28.

D.C. federal courts have also rejected Plaintiffs' argument that equitable estoppel requires that the nonsignatory have "some corporate affiliation," Opp. 13, with the signatory defendant. *See Fox v. Comput. World Servs. Corp.*, 920 F. Supp. 2d 90, 104 n.8 (D.D.C. 2013) (estoppel theory of nonsignatory arbitration "not based on whether the non-signatory was the direct employer, . . . agent" or affiliate of signatory); *Sakyi*, 308 F. Supp. 3d at 384 (compelling arbitration even where "no indication" signatory was "parent compan[y], subsidiar[y], or affiliate[d] with" nonsignatory).

C. Equity Requires Nonsignatory Arbitration

Equity requires nonsignatory arbitration here particularly because Plaintiffs have alleged identical claims against and concerted misconduct by all Defendants. As *Sakyi* explains, under D.C. law, "requiring arbitration between the plaintiff and [signatory defendant], while allowing litigation between the plaintiff . . . and [nonsignatory defendant] would deprive [the signatory defendant] of the benefit of the Arbitration Agreement," *Sakyi*, 308 F. Supp. 3d at 386, because the signatory would still have to be involved in the related litigation. In particular, a signatory such as APA faces the "additional costs" of participating in these dual proceedings, with the possibility for duplicative depositions and discovery expenses given that the same claims and allegations are at issue in arbitration and litigation. *Id.*

Dated: March 14, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 14th day of March, 2019, a true and correct copy of the foregoing Reply Brief in Support of Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman's Contested Motion to Compel Arbitration 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
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