SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Puig-Lugo
vs.	:	Status Conference
DAVID H. HOFFMAN, *et al.*,	:	February 8, 2019, 2:00 p.m. Courtroom 317
Defendants.	:	

PLAINTIFFS' MEMORANDUM AND AFFIDAVIT IN SUPPORT OF THEIR OPPOSED MOTION:

1) TO HOLD THE INITIAL SCHEDULING AND SETTLEMENT CONFERENCE DURING THE FEBRUARY 8, 2019, STATUS CONFERENCE, AND

2) TO FILE A SUPPLEMENTAL COMPLAINT

As set forth in the accompanying motion, Plaintiffs seek to convert the presently scheduled status conference into the mandatory initial scheduling and settlement conference required by Rule 16(b)(1). Plaintiffs also seek leave to file a supplemental complaint under Rule 15(d) that will assert one additional cause of action for Defendants' August 21, 2018, republication of the Revised Hoffman Report and allege two recent events.

I. Plaintiffs' Request to Convert the February 8, 2019, Status Conference to the Mandatory Scheduling and Settlement Conference

The initial scheduling and settlement conference required by Rule 16(b)(1) has not yet taken place. Such a conference is now appropriate because all actions in the Plaintiffs' Ohio suit have concluded, and Plaintiffs will not seek a writ of certiorari from the U.S. Supreme Court in regard to the Ohio Supreme Court's refusal to accept an

appeal from the Ohio Court of Appeals. A scheduling conference is especially necessary given the number of pending motions and the need for further briefing to address the issues raised in Plaintiffs' first filing in this case (the opposition filed on October 18, 2017) and in their July 3, 2018, responsive praecipe.

These issues include, in addition to Plaintiffs' request for discovery:

1. whether the D.C. Anti-SLAPP Act violates the Home Rule Act,
2. whether the Act is unconstitutionally broad and violates the Plaintiffs' First Amendment rights of access to the courts,
3. whether Defendants have met their preliminary burden under the Act,
4. whether Defendants have met their burden of proof that Plaintiffs are not private individuals, and
5. whether there is a valid agreement to arbitrate.

At this point, especially given the threshold discovery and constitutionality issues, it would be premature to hear argument on Defendants' Anti-SLAPP or Arbitration Motions. At the February 8 conference, Plaintiffs will request a continued extension of time to respond to Defendants' motions to enable the Court to consider Plaintiffs' pending Motion for Limited Discovery filed on November 30, 2017, and supplemented by the Declaration attached to this Motion.

Anti-SLAPP Motions. Based in part on recent precedent in jurisdictions with anti-SLAPP statutes, Plaintiffs are filing a motion to declare the D.C. Anti-SLAPP Act unconstitutional on the grounds that it is impermissibly overbroad on its face and denies citizens with legitimate grievances their First Amendment right of access to the courts. The motion also asserts that the Act violates the D.C. Home Rule Act by infringing on

the D.C. Courts' authority to determine the rules that govern their procedures, as the D.C. Attorney General warned before the Act was passed.[1]

If the Act is held unconstitutional, then the Defendants' Anti-SLAPP Motions fail in their entirety. However, should this Court conclude that the Act is constitutional, then two additional issues must be addressed: whether the Defendants have met their initial burden under the Act, and whether Plaintiffs are public figures. If Plaintiffs are private individuals, as they contend, then Defendants' Anti-SLAPP Motions fail because they rest *entirely* on the erroneous assumption that Plaintiffs must prove actual malice rather than negligence to sustain their defamation claims.[2]

If the Court were to proceed to consider the Anti-SLAPP Motions, then Plaintiffs should be allowed discovery to respond further to Defendants' assertion that they cannot demonstrate actual malice. In this regard, Plaintiffs have carefully considered the evidence that will be necessary and have significantly reduced their initial requests, as reflected in the attached Supplementary Declaration.

So far, Defendants have not only opposed all discovery (Sidley and Hoffman's Opposition to Plaintiffs' Motion for Limited Discovery; APA's Opposition to Plaintiffs' Motion for Limited Discovery; both Dec. 14, 2017), they have also obstructed Plaintiffs' effort to gather evidence without discovery. APA has threatened consequences for members who provide Plaintiffs with affidavits or other support

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[1] Letter of Peter Nickles, Attorney General for the District of Columbia, dated Sept. 17, 2010, attached to Report of the D.C. Council Committee on Public Safety on Bill 18-893, "Anti-SLAPP Act of 2010".

[2] Even if Plaintiffs were required to demonstrate actual malice, their Complaint sufficiently alleges actual malice under D.C. Superior Court Rule of Civil Procedure 9(b), which provides: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

(Supplemental Complaint, ¶¶ 289, 315-316); APA and Sidley have removed relevant documents from their websites (¶¶ 302-305); and Sidley has refused to provide Hoffman's interview notes based upon unsupportable claims of privilege and work-product protections (¶¶ 270-278). In the face of this stonewalling, discovery is all the more critical.

Discovery is warranted both under the plain language of the Anti-SLAPP Act, as the D.C. Court of Appeals has made clear (*see, e.g.*, *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016), *as amended* (Dec. 13, 2018)), and under Rule 56(d).

Under the Act, a special motion to dismiss shall be denied if "the responding party demonstrates that the claim is likely to succeed on the merits . . . . When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted." D.C. Code § 16-5502(b), (c)(2).

Plaintiffs' four document and three deposition requests meet both conditions: they will not be unduly burdensome, and they are likely to uncover facts that demonstrate actual malice on the part of the Defendants:

- Two of the depositions are of current or former APA employees who will testify that the Defendants published the Reports with knowledge of facts, documents, and other material in their possession, given to them or relayed by those employees, that showed statements in the Reports were false.
- The third deposition is of Dr. Stephen Soldz. In direct contrast to APA's defense that it had no knowledge of the Hoffman Reports' falsehoods, Dr. Soldz has stated that APA executives were deeply involved in the actions

falsely described in the Reports. Plaintiffs requested his deposition in the Ohio and D.C. actions and in Massachusetts, where Dr. Soldz is a party to the action, but have been unable to depose him because of the stays requested by Defendants.

- Based on affidavits provided to Plaintiffs, the document request for Mr. Hoffman's interview notes is likely to produce evidence that demonstrates actual malice. (Those notes are likely to be well-organized and primarily or entirely in electronic form, thus making them easy for a firm such as Sidley to produce.) Seventeen affidavits from witnesses Hoffman interviewed state that he distorted, mischaracterized, or cherry-picked statements from their interviews or purposely avoided following lines of inquiry that might have contradicted the Report's assertions. If the Court believes these affidavits will be helpful to its analysis, Plaintiffs will submit them promptly.
- The requested copy of an image of Dr. Behnke's hard drive provided to Sidley and Hoffman is likely to refute the contention that he intended to delete relevant e-mails to hide the "collusion" the Report alleges.

The necessity for discovery becomes even more apparent given the D.C. Court of Appeals' holding that the "likelihood of success" should be read to mirror the standards of Fed. R. Civ. P. 56. *Mann*, 150 A.3d at 1238 n.32 (stating that "*Abbas* [*v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015)] recognized that at the time, this court 'has never interpreted the D.C. Anti–SLAPP Act's likelihood of success standard to simply mirror the standards imposed by' Federal Rule 56. We do so now.") (internal citation omitted). The *Mann* holding finds support in a recent Ninth

Circuit decision in regard to the California anti-SLAPP statute. Because the D.C. Anti-SLAPP Act was modeled after the California statute, the District of Columbia Attorney General has stated, with respect to anti-SLAPP issues, "Guidance from the California courts … is instructive."[3]

In a case decided after Plaintiffs filed their November 30, 2017, Motion for Limited Discovery, the Ninth Circuit ruled:

> . . . when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Fed. R. Civ. P. 56 standard will apply. But in such a case, discovery *must be allowed,* with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court. A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure . . .

Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress, 890 F.3d 828, 834 (9th Cir. 2018), *amended*, 897 F.3d 1224 (Aug. 1, 2018), cert pet. filed 2018 WL 6192287, 18-696 (Nov. 21, 2018) (emphasis added).

Here, the "collision" is between the procedures of the Anti-SLAPP Act and the D.C. Rules, which follow the Federal Rules, but the conclusion is the same: Plaintiffs should be allowed discovery.[4]

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[3] *Adelson v. Harris*, No. 12-cv-6052, 2013 WL 435912 at *4 (S.D.N.Y., February 4, 2013) (Brief for Amicus Curie District of Columbia).

[4] D.C. Code § 11-946 ("Rules of Court. The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules.").

Rule 56(d) provides:

> (d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the [summary judgment] motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

Plaintiffs' request for discovery is fully warranted under Rule 56(d). Their November 30, 2017, Motion, supplemented by the Declaration attached to this Motion:

(1) identifies the probable facts that are unavailable and details how the discovery would allow for rebuttal of Defendants' state-of-mind defenses,

(2) states why these facts cannot be presented without additional time for discovery, and

(3) identifies past steps to obtain evidence of these facts.

As a general matter, District of Columbia courts routinely permit discovery to enable a plaintiff to meet the summary judgment standards of Rule 56. *See Convertino v. United States Dep't of Justice*, 684 F.3d 93, 95 n.1, 99 (D.C. Cir. 2012) (stating that "[a] Rule 56(f) motion requesting time for additional discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence" and noting that in 2010, Rule 56(f) became Rule 56(d)) (internal quotations omitted); *Travelers Indem. Co. of Illinois v. United Food & Commercial Workers Intern. Union*, 770 A.2d 978, 996 (D.C. 2001) (the grant of summary judgment was premature before affording discovery as provided in Rule 56(d) and elsewhere); *Flax v. Schertler*,

935 A.2d 1091, 1102 (D.C. 2007) (remanded to trial court because it failed to consider whether plaintiff was entitled to avoid summary judgment while she undertook discovery on her claims). *See also Secord v. Cockburn*, 747 F. Supp. 779, 786 (D.D.C. 1990) ("this Court of course recognizes that discovery must be exhausted before a court rules upon a dispositive motion for summary judgment.") (citing *Hutchinson v. Proxmire,* 443 U.S. 111, 120, 99 S.Ct. 2675, 2680, 61 L.Ed.2d 411 (1979) and *Herbert v. Lando,* 441 U.S. 153, 159-61, 99 S.Ct. 1635, 1640-41, 60 L.Ed.2d 115 (1979)).

Discovery is particularly necessary when the facts at issue involve defendants' state of mind, as they do when actual malice is at issue. In that circumstance, the U.S. Supreme Court has held that it is "*untenable* to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error." *Herbert*, 441 U.S. at 160 (emphasis added); s*ee also Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) ("Although Rule 56[d] facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'") (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Arbitration Motions. As to Defendants' Arbitration Motions, Plaintiffs have requested three documents and one deposition related to those motions, which under clear D.C. precedent must be treated as summary judgment motions. Accordingly,

Plaintiffs are entitled to discovery under Rule 56(d) before opposing the Motions, as set forth more fully below and in Plaintiffs' November 30, 2017, motion and accompanying 56(d) affidavit.

On this issue, courts have routinely held that motions to compel arbitration should be considered as summary judgment motions for the purpose of deciding whether discovery is needed.[5] Consequently, D.C. Superior Court Rule of Civil Procedure 56 applies to that decision. It provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . (2) allow time to obtain affidavits or declarations or to take discovery . . . ." D.C. Super. Ct. Civ. R. 56(d).

As the Supplemental Declaration by Plaintiffs' counsel attests, Plaintiffs' requests meet that standard. Plaintiffs' two document requests and one deposition request (of a witness who will also testify with respect to the Anti-SLAPP Motions) are tailored to focus solely on information within APA's and Sidley's possession that would negate their contentions that there is a valid agreement to arbitrate.

II. Plaintiffs' Request for Leave to File a Supplemental Complaint

[5] *Aliron Int'l, Inc. v. Cherokee Nation Indus.*, 531 F.3d 863, 865 (D.C. Cir. 2008) ("The district court properly examined [Defendant's] motion to compel arbitration under the summary judgment standard of Federal Rule of Civil Procedure 56(c), as if it were a request for 'summary disposition' of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate.") (internal citations omitted); *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991) ("Thus, the procedure to resolve 'deni[als] of the existence of the agreement to arbitrate' under the Arbitration Act mirrors the familiar summary judgment procedure."); *Travelers Indem. Co. of Illinois*, 770 A.2d at 995 n.21 ("it is incumbent on the court to make sure that the parties have had an opportunity to develop the record before ruling on a summary judgment motion, particularly where, as here, a party claims the need for discovery.") (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment appropriate only 'after adequate time for discovery')).

Pursuant to Rule 15(d) of the D.C. Superior Court Rules of Civil Procedure, Plaintiffs request leave to file a supplemental complaint reflecting three events that have occurred since their Complaint was filed on August 28, 2017:

- republication of the Revised Hoffman Report on the APA website on August 21, 2018;[6]
- the addition of documents to APA's website, including letters from former APA Presidents and Ethics Chairs, that contradict factual assertions in the Hoffman Reports; and
- the removal from the APA website of evidence (the first version of the Hoffman Report) referenced in Plaintiffs' original complaint, and the dispersal of other documents to separate pages from a single landing page that was also removed.

A copy of Plaintiffs' proposed Supplemental Complaint is attached as Exhibit A. The supplemental material appears on pp. 77-81 and 104-107 (Count 11).

Rule 15 (d) states that "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." When the new facts alleged in a supplemental pleading connect to the facts asserted in the original pleading, as do the events described above, a "court should liberally grant a party's request to file a supplemental pleading . . . [if] supplementation 'will not cause

[6] *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016) ("'[W]here substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred.' . . . . [R]epublication is . . . for the factfinder to determine.") (citations omitted).

undue delay of trial, inconvenience and will not prejudice the rights of any other party.'" *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 29 (D.D.C. 2007) (internal citation omitted); s*ee also Gomez v. Wilson*, 477 F.2d 411, 417 (D.C. Cir. 1973) ("[O]nce appellant is again in the District Court, he will be free to appropriately supplement his complaint. That may include allegation of recent incidents . . . ."); *El-Shifa Pharmaceutical Industries Company v. U.S.*, No. 01-cv-731, 2005 WL 8160733, at *2 (D.D.C. Sept. 22, 2005) ("Indeed, the new facts only augment the originally pled facts under the existing defamation claim.").

In this case, supplementing the Complaint will not cause delays and will not inconvenience or prejudice the Defendants. The case remains in its preliminary stages and remains stayed. The parties have had only two status conferences, and the initial scheduling and settlement conference required by D.C. Sup. Ct. R. Civ. Pr. 16(b)(1) has not taken place. The Defendants have neither answered the Complaint nor filed any of the motions specified in D.C. Sup. Ct. R. Civ. Pr. 12(b) as a means of asserting defenses. Plaintiffs' request to supplement their pleadings is therefore timely and creates no time pressure on Defendants to reply to the newly pleaded allegations.

Moreover, Defendants are clearly on notice of Plaintiffs' objections to the republication of the Revised Report. In Plaintiffs' July 23 Praecipe, they provided notice that they would add a new cause of action if the Hoffman Report were republished. They also expressed their concerns about the removal from the APA website of documents relied on in their Complaint. Both actions were taken at the direction of and under the supervision of the APA General Counsel and with Sidley's knowledge. Accordingly, Plaintiffs request that this Court grant leave to file the Supplemental Complaint

attached hereto as Exhibit A.

III. Conclusion

For the above-stated reasons, Plaintiffs respectfully ask this Court to:

a. convert the February 8, 2019, status conference into the initial scheduling and settlement conference required by Rule 16(b)(1);

b. consider Plaintiffs' Pending Request for Discovery and extend the scheduling of a hearing on Defendants' motions to permit that consideration; and

c. grant Plaintiffs' Request to File a Supplemental Complaint.

RULE 12-I CERTIFICATION

Plaintiffs contacted Defendants' Counsel on January 7, 2019 to obtain their consent to this motion and Defendants refused that consent.

Respectfully submitted,

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SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
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STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Puig-Lugo
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Defendants.	:	

SUPPLEMENTAL DECLARATION OF LOUIS J. FREEH, ESQ. AND BONNY J. FORREST, ESQ. IN SUPPORT OF LIMITED DISCOVERY REQUESTS PURSUANT TO DEFENDANTS' ANTI-SLAPP AND ARBITRATION MOTIONS

Louis J. Freeh and Bonny J. Forrest declare as follows:

1. We are two of the attorneys for the Plaintiffs in this action. Mr. Freeh, who represents Stephen Behnke, is duly admitted to practice law in New York and the District of Columbia. Ms. Forrest, who represents the other four Plaintiffs, is duly admitted to practice law in California and New York and admitted *pro hac vice* in this matter.

2. We make this declaration in further support of Plaintiffs' November 30, 2017, Motion for Discovery and their Motion to Continue the Hearing Date for Defendants' Pending Motions to enable the court to consider the November 30 Motion. Without discovery, Plaintiffs cannot fully respond to Defendants' pending Motions to Compel Arbitration and Special Motions to Dismiss Under the District of Columbia Anti-SLAPP Act. The material sought is germane to the issues raised by the Motions and is not speculative.

3. Plaintiffs filed their original request for discovery on November 30, 2017. Since that time the action has been stayed at Defendants' request, and there has been no opportunity for discovery. Plaintiffs have made all reasonable attempts over the last

three years to obtain the necessary information from other sources.

4. For the reasons discussed in Plaintiffs' present Motion and on the basis of the legal standards described in that Motion and the attached Exhibit A, Plaintiffs now renew their request for discovery under D.C. Superior Court Rules of Civil Procedure 26 and 56 and the D.C. Anti-SLAPP Act: D.C. Code § 16–5502 (c)(2) in order to respond to the Arbitration and Anti-SLAPP Motions.

5. In total, Plaintiffs request three depositions and make six document requests, three of which will likely result in Defendants stating that no responsive document exists. Based on information they have gathered from other sources, Plaintiffs will now withdraw the requests in their November 30 motion for four interrogatories and two depositions if Defendants agree to the stipulations described in Section III of Exhibit A attached hereto.

6. Plaintiffs have determined that, if the D.C. Anti-SLAPP Act applies to this lawsuit, to be in a position to respond fully to Defendants' pending motions, it will be essential to discover information regarding each of the items listed in the attached Exhibit A, for the specific reasons stated for each item in Exhibit A. This information is necessary to:

   - fully rebut Defendants' "state-of-mind" defense that Plaintiffs cannot prove actual malice by clear and convincing evidence, if the Court finds Plaintiffs are limited-purpose public figures or public officials who must prove actual malice rather than negligence,
   - demonstrate that no valid arbitration agreement exists that applies to the claims in this case, and

- demonstrate that Sidley and APA do not have a relationship so "intertwined" that, if a valid agreement to arbitrate with APA were to exist, Plaintiffs would also be compelled to arbitrate with Sidley.

Discovery to Respond to Defendants' Anti-SLAPP Motions

7. Plaintiffs contend that, as private individuals, they should not be required to prove actual malice and that, in any event, actual malice is adequately pled in their Complaint. Defendants have asserted an affirmative defense that Plaintiffs are public officials or limited-purpose public figures who must prove actual malice, and that actual malice is not adequately alleged in their Complaint. Defendants have therefore placed their "state of mind" directly at issue.

8. Plaintiffs have requested depositions of:

- A current APA employee who warned APA officials, including then-General Counsel Nathalie Gilfoyle, that Hoffman and Sidley were omitting from Hoffman's Report any favorable information that contradicted his false narrative, and that the Report would likely be false and defamatory. *Carbone v. CNN,* No. 1:16-CV-1720-ODE, 2017 U. S. Dist. LEXIS 216286, at *22-23 (N.D. Ga. Feb. 14, 2017), *aff'd,* 2018 WL 6565917 (11th Cir. December 13, 2018) (alleged errors brought to Defendant's attention without effect constitute evidence of actual malice).
- Dr. Michael Honaker, APA's former chief operating officer, who reportedly has an agreement with APA not to provide an affidavit without APA's involvement. He is expected to testify that he gave Hoffman evidence contradicting Hoffman's false narrative that Hoffman omitted from his

Reports, that at the time of the Reports' publication APA officials were aware of facts that contradicted the Reports' falsehoods, and that the parties did not intend that claims such as those now at issue be arbitrated.

- A non-party upon whom Hoffman relied extensively in constructing a narrative that guided his selection of facts and for information included in his Reports. The non-party, Dr. Stephen Soldz, has acknowledged that reliance.[1]

9. Plaintiffs have proffered four document requests for:

- A copy of Dr. Behnke's hard drive imaged by Hoffman and Sidley during the investigation (on or about February 5, 2015). That drive contains documents that refute factual assertions in the Hoffman Reports, including the assertion that Dr. Behnke intended to delete e-mails.
- Any factual reports created by the organization that imaged Dr. Behnke's hard drive. Any such reports would be relevant to the Hoffman Reports' assertion that Dr. Behnke deleted e-mails.
- Any conflict-of-interest policy regulating the conduct of APA staff or governance members, and any correspondence relating to such a policy. This request is relevant to the Hoffman Reports' assertion that Dr. Newman's actions constituted a conflict of interest.
- Copies of the interview notes or summaries created by Hoffman's team during their witness interviews. Those interviews are relied on extensively in the Reports. Based on conversations with and affidavits from some of those

[1] http://www.digitaljournal.com/pr/2645606 (press release representing that Soldz contributed "extensive research" to the Reports); https://www.youtube.com/watch?v=i9u1EOgeEqw (video in which Soldz states that whenever Hoffman needed a document he could not find, he called Soldz).

interviewed, Plaintiffs have reason to believe the notes will further demonstrate that Defendants acted with knowledge of the defamatory statements' falsity or in reckless disregard of the truth, including purposeful avoidance of information and documents, including documents in their possession, that contradicted falsehoods in the Reports. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1258 (D.C. 2016), *as amended* (Dec. 13, 2018) (evidence of actual malice would include the fact that Defendants had in their possession contradictory reports) (adding a new footnote 39 and revising former footnote 45 (now 46)); *see also Herron v. King Broadcasting*, 112 Wn. 2d 762, 777 (Wash. 1989) ("[W]hen a [defendant] does in fact conduct an investigation and his investigation does not support his false statement or brings to his attention facts which rebut the false statement, that is evidence from which a jury can infer reckless disregard.").

Defendants' Motions to Compel Arbitration

10. Plaintiffs contend there are no valid agreements to arbitrate with any of the Plaintiffs and that, even if there were, there was never any intention or meeting of the minds that the narrow arbitration clauses in the expired agreements would apply to claims such as the defamation claims in this suit. Plaintiffs also contend that Sidley is not entitled to assert any rights to arbitration under an employment agreement to which it was not a signatory.

11. APA has refused to produce any employment agreement under which it could claim the right to arbitrate for one of the two APA entities that employed Dr. Newman. The one agreement it has produced for the other entity has no survivability clause, is purportedly signed almost a year after the effective date, and is not properly attested

to as required by the express terms of the document.

12. Plaintiffs have requested the deposition of Dr. Honaker, who would also be deposed with regard to the anti-SLAPP motion. He has knowledge of the parties' lack of intent to arbitrate these claims and of Dr. Newman's employment status with two APA entities.

13. Plaintiffs make two document requests directly related to whether there existed a valid agreement to arbitrate and whether Sidley may rely on such an agreement:

- Any employment agreements between Dr. Newman and any APA entity other than the expired employment agreement already produced.
- Any written agreements between APA and Sidley after their November 14, 2014, engagement letter. In e-mails and public statements, the APA Board of Directors has referred to at least one later agreement and to "opinions" about the terms of the engagement.

Greater detail with respect to each of these requests and their relation to relevant case law is set forth in Exhibit A hereto, which is fully incorporated by reference and is made subject to the affirmative statements in this declaration, including the following attestation.

We declare under the penalty of perjury that the foregoing is true and correct to the best of our knowledge.

Executed on this 7th day of January, 2019.

/s/ Louis J. Freeh
Louis J. Freeh

/s/ Bonny J. Forrest
Bonny J. Forrest

EXHIBIT A TO FREEH AND FORREST DECLARATION

PLAINTIFFS' PENDING DISCOVERY REQUESTS AND THEIR RELATIONSHIP TO PLAINTIFFS' BURDEN IN OPPOSING DEFENDANTS' ANTI-SLAPP AND ARBITRATION MOTIONS

Plaintiffs now propose three depositions and six document requests. All but one—a request for notes and other documents relating to Hoffman's witness interviews—are extremely limited. Three of the six document requests are likely to result simply in Defendants confirming that there is no responsive document.

This Exhibit describes the continued relevance of each request to a specific aspect of the evidence Plaintiffs must proffer to respond to Defendants' Anti-SLAPP and Arbitration Motions. This Exhibit is fully incorporated into the Freeh and Forrest Declaration.

In summary, the discovery will produce facts that will assist Plaintiffs to demonstrate, if necessary, that:

1. Defendants acted with actual malice when they published the false and defamatory statements at issue;
2. Plaintiffs Behnke and Newman are not obligated to arbitrate the claims at issue with APA because there is no valid agreement to arbitrate, nor do Plaintiffs' claims arise from the employment agreements on which Defendants rely; and
3. even if APA had the right to demand arbitration, Plaintiffs Behnke and Newman could not be required to arbitrate with Hoffman and Sidley, third-party non-signatories to the Plaintiffs' employment agreements.

Plaintiffs therefore respectfully ask this Court to allow the discovery listed below pursuant to Plaintiffs' November 30, 2017, Motion.

I. DISCOVERY RELEVANT TO DEFENDANTS' ANTI-SLAPP MOTIONS

Defendants' Contentions:

Sidley Anti-SLAPP Motion p. 3: "To defeat this motion Plaintiffs must show that they are likely to succeed in presenting clear and convincing evidence that Sidley – a law firm retained to conduct an independent investigation for its client – knew that allegedly defamatory statements were false or had a high level of doubt as to their truthfulness, and included them in the Report anyway . . . . And Plaintiffs would have to establish that Sidley knowingly included false or highly doubtful information in a report it gave to its client despite its professional responsibility to provide candid advice."

APA Anti-SLAPP Motion p. 15: "[T]he circumstances surrounding APA's retention of Sidley to conduct the IR, APA's publication of the Report, and APA's actions after its publication, do not and cannot constitute actual malice as a matter of law. There was no 'high degree of awareness of . . . probable falsity' or 'serious doubts as to the truth' of the Report's statements."

Standard: Defendants omit the full definition of actual malice, which includes the purposeful avoidance of the truth, and omit Plaintiffs' right to prove actual malice through cumulative circumstantial evidence. *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 871 (W.D. Va. 2016) ("[B]ecause actual malice is a subjective inquiry, a plaintiff 'is entitled to prove the defendant's state of mind through circumstantial evidence.'") (quoting *Harte-Hanks Commc'ns., Inc. v. Connaughton*, 491 U.S. 657, 668, 109 S.Ct. 2678 (1989)).

An inference of actual malice can be bolstered by evidence that the speaker had obvious reasons to doubt an informant, and by evidence of motive or ill will, lack of care, or a preconceived story-line into which the speaker fit the evidence. "Although failure to adequately investigate a departure from journalistic standards, or ill will or intent to injure will not singularly provide evidence of actual malice, . . . proof of all three is sufficient to create a genuine issue of material fact." *Eramo*, 209 F. Supp. 3d at 872 (finding a reporter's preconceived storyline could lead a reasonable jury to find that the defendant had "obvious reasons to doubt" a witness's veracity or that a note showed a reporter "entertained serious doubts as to the truth of [her] publication."); *see also Harte-Hanks Communic'ns. Inc.*, 491 U.S. at 692 ("Accepting the jury's determination that petitioner's explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [plaintiff's] charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.") (citation omitted); *Herbert v. Lando*, 441 U.S. 153, 170 (1979) ("As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the

mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with 'convincing clarity.'") (citing *New York Times Co. v. Sullivan*, 376 U.S. at 376 U. S. 285-286) (footnote omitted)); *id*. at 164 n.12 ("See, *e.g.*, 50 Am. Jur.2d, [Libel and Slander] n. 7, § 455 [(1970)]: 'The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration.'").

A. Four Document Requests for Hoffman and Sidley

Relevance: Evidence directly related to Plaintiffs' potential burden to demonstrate actual malice under the relevant standards.

1. **A disk with a copy of an image of an electronic copy of a computer hard drive.** A mirror image copy of all electronic data contained on the personal computer and hard drive of Dr. Stephen Behnke and retrieved by LDiscovery on behalf of Sidley on or about February 5, 2015, as part of its investigation of APA. The mirror image should include active files, deleted files, deleted file fragments, hidden files, directories, all desktop folders, and any other data contained on the computer or stored on the APA back-up server.

   Dr. Behnke's computer will contain e-mail traffic and documents that refute many of Hoffman's factual assertions and conclusions, including the claim that Dr. Behnke intended to delete e-mails. These e-mails were in Sidley's and APA's possession on each occasion when they published the three versions of the Reports.

2. **Any factual reports created by LDiscovery for Sidley regarding the contents of Dr. Stephen Behnke's computer and any analyses of the computer files or deleted files by LDiscovery.** If LDiscovery created a report analyzing Dr. Behnke's hard drive for deleted e-mails, Plaintiffs are entitled to that analysis, given that Hoffman concludes with respect to Plaintiffs Behnke and Banks that "records were destroyed in an attempt to conceal the[ir] collaboration . . . ." Hoffman Report, p. 396. In fact, Dr. Behnke's regular business practice was to save e-mails in a file entitled "deleted e-mails" on his desktop.

   If LDiscovery did not produce any report, Sidley need only represent that to be the case.

3. **Any conflict-of-interest policy, or any correspondence concerning such a policy, regulating the conduct of APA staff or APA governance members in 2005 received or reviewed during Sidley's investigation of APA.**

   Although Hoffman asserts that Dr. Newman's actions constituted a conflict of interest, he discloses no specific APA policy that Dr. Newman allegedly violated. Moreover, although Hoffman discussed with Dr. Newman a financial conflict-of-interest policy, his Report does not mention it.

   If APA did not have such a policy, as Plaintiffs contend, Defendants need only represent that to be the case.

4. **Witness interview notes.** All witness interview documents, memoranda, summaries, correspondence, and notes created during the investigation by Sidley.

   Plaintiffs now have at least seventeen affidavits from witnesses Hoffman interviewed stating that his Reports significantly distorted, mischaracterized, or otherwise misrepresented the substance of their interviews. Hoffman's non-privileged interview notes will provide direct evidence that the Defendants acted with actual malice by distorting, mischaracterizing, or misrepresenting evidence to fit into a preconceived and false narrative. *See, e.g., Eramo,* 209 F. Supp. 3d at 871-72.

   Of the 148 witnesses interviewed, fewer than 20 could possibly be considered as speaking on behalf of APA such that they would be considered a client of Sidley. Moreover, APA and Sidley agreed in their engagement letter that no attorney-client privilege would be claimed except for very limited exceptions, none of which are applicable here. Moreover, as the Anton and Strickland Affidavits attached to Plaintiffs' November 30, 2017, motion establish, there was no litigation threatened or pending at the time of the investigation.

   Even if any notes or other documents were privileged or protected by the work-product doctrine, those protections have been waived; Hoffman and Sidley quote extensively – over 200 times – from those interviews throughout the Reports. *See, e.g.,* B*anneker Ventures, L.L.C. v. Graham,* 253 F. Supp. 3d 64 (D.D.C. 2017); *see also Doe v. Hamilton County Bd. of Educ.*, No. 1:16-cv-497, 2018 WL 542971, at *4 (E.D. Tenn. Jan. 12, 2018) ("In the instant case, the Board has placed the quality and substance of Attorney Bullard's mental impressions and opinions squarely at issue by indicating that it intends to use the contents of her report, which is replete with her mental impressions and opinions, in support of its defense in this case. . . . Therefore, the Board has effectively waived the work product privilege with respect to the Bullard Report, as well as the entire scope of the investigation performed by Attorney Bullard, and all materials,

communications, and information provided to Attorney Bullard as part of her investigation.").

B. Three Depositions

Relevance: Direct evidence of actual malice by each Defendant when they repeatedly published the Reports.

1. Dr. Heather O'Beirne Kelly, an APA employee, will testify (a) that she confronted Hoffman during the investigation because his questioning of her showed no interest in information that contradicted his assertions and (b) that he omitted contradictory information from his Reports. During the investigation, she also told APA staff, including then-General Counsel Nathalie Gilfoyle, that Hoffman would produce a report that was false and defamatory. She later reiterated that knowledge and other relevant information concerning actual malice to APA staff after the Report was first published, but before subsequent republications by the Defendants.

2. Dr. Michael Honaker is the former Chief Operating Officer of APA. He will testify as to his conversations with Hoffman during the investigation that were omitted from or distorted in the Reports, and to APA's knowledge, through its Board members' participation in the events discussed in the Reports, that the Reports falsely portrayed those events. (As set forth below, he will also testify with respect to the purported arbitration agreements asserted by Defendants.)

3. Dr. Stephen Soldz is a long-time critic of Plaintiffs who was a key source for Hoffman and who provided numerous documents and "extensive research" for the Reports.[1] Plaintiffs are entitled to understand what information Soldz supplied Hoffman. APA, Sidley, and Hoffman knew of Soldz's previous false allegations against Plaintiffs, his desire for criminal prosecutions of Plaintiffs, and the failure of the FBI and the Senate Armed Services Committee to find grounds for action. Dr. Soldz has also claimed that APA's Board and General Counsel were intimately involved in all of the events described in the Reports, an involvement that would have made them aware of the Reports' falsities when they were published.[2]

II. DISCOVERY RELEVANT TO THE ARBITRATION MOTIONS

Defendants' Contentions:

APA: APA first asserted a right to arbitrate with Dr. Behnke based on one expired employment agreement. With its reply to Plaintiffs' discovery motion, APA then produced three additional expired employment agreements.

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[1] https://www.youtube.com/watch?v=i9u1EOgeEqw
http://www.digitaljournal.com/pr/2645606.

[2] https://www.counterpunch.org/2015/07/13/opening-comments-to-the-american-psychological-association-apa-board-of-directors/

Similarly, APA asserted a right to arbitrate with Dr. Newman based on an employment agreement with one APA entity that expired in 2007 (the investigation took place in 2015). It is purportedly signed a year after its effective date and does not contain the required attestation. Dr. Newman was also employed by a second APA entity for which no employment agreement has been forthcoming.

Sidley: In asserting that Drs. Behnke and Newman are required to arbitrate their defamation claims with Sidley, a "stranger" to their expired employment agreements with APA, Sidley relies primarily on a version of equitable estoppel described by a few courts as "alternative estoppel." Sidley's Motion to Compel Arbitration, pp. 2 and 10.

Sidley cites as a primary authority for the "alternative estoppel" theory *CD Partners, L.L.C. v. Grizzle*, 424 F.3d 795 (8th Cir. 2005). *Grizzle* emphasizes a distinctive element of an alternative-estoppel theory: a "relationship between the signatory and nonsignatory defendants … sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Id.* at 798 (internal citations omitted).

Although that form of estoppel has not received a clear and consistent definition in the courts, under any definition it cannot apply where (i) the claims against Defendants are not identical, (ii) Plaintiffs are not making claims for wrongful termination under their expired employments agreements, and (iii) APA repeatedly represented to the Ohio court that it did not act in concert with Sidley. *See Stechler v. Sidley, Austin Brown & Wood, L.L.P.*, 382 F. Supp. 2d 580, 591-92 (S.D.N.Y. 2005) (denying Sidley's similar equitable estoppel claims because it was, as Defendants have repeatedly represented here, an "independent legal advisor"); *Goldman v. KPMG, L.L.P.*, 173 Cal. App. 4th 209 (2009) (denying Sidley estoppel claims); *Vassalluzzo v. Ernst Young LLP*, CV 06-4215-BLS2, 2007 WL 2076471 *5, 22 Mass. L. Rptr. 654 (Mass. Super. 2007) (denying Sidley estoppel claims, citing *DSMC, Inc. v. Convera Corp*., 273 F. Supp. 2d 14, 29-30 (D.D.C. 2002)).

Standards: *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. 1991) ("[T]he procedure to resolve 'deni[als] of the existence of the agreement to arbitrate' under the Arbitration Act mirrors the familiar summary judgment procedure."); *Keeton v. Wells Fargo Corp.*, 987 A.2d 1118, 1122 (D.C. 2010) ("The court also impermissibly determined that 'the parties reasonably entered into the agreement.' Given the factual nature of a reasonableness determination, especially in light of the unconscionability standard which demands a more developed record, the court's ruling was premature at best. On remand, the trial court should allow discovery, followed by an evidentiary hearing to determine the unconscionability [validity] of the arbitration clause.") (footnote omitted); *Azhar Ali Khan v. Parsons Glob. Servs., Ltd.*, 428 F.3d 1079, 1087-88 (D.C. Cir. 2005) (regarding discovery in the context of a motion to compel arbitration: "The court has long recognized that a party opposing summary judgment needs a 'reasonable opportunity' to complete discovery before responding to a summary judgment motion and that 'insufficient time or opportunity to engage in discovery' is cause to defer decision on the motion. [Defendant] attached three affidavits to its motion for summary judgment. Its motion was filed in lieu of an answer, before a scheduling order, discovery, or initial disclosures, and the motion relied upon information in [defendant's] sole control. In

response to the motion, [plaintiffs] filed two Rule 56[d] declarations by their counsel outlining the nature of the discovery they sought. As [plaintiffs] suggest, '[i]t makes no sense for [defendant] to assert that the key issue [of WCA coverage] in the case had already been 'determined' by its insurance carrier,' and as it was, [plaintiffs] were forced 'to operate in the dark, with no discovery — not even a copy of the alleged workmen's compensation insurance agreement [containing the alleged arbitration provision].' Because the district court never ruled on the [plaintiffs'] initial Rule 56[d] discovery request, on remand, the district court should address both Rule 56[d] declarations. Accordingly, we reverse the grant of summary judgment and remand the case to the district court for further proceedings. We do not rule on the [plaintiffs'] challenges to the arbitration clause in the Assignment Agreement as they still seek discovery regarding it." (citations omitted)); *rev'd* on other grounds *Azhar Ali Khan v. Parsons Global Services, Ltd.*, 521 F.3d 421, 428 (D.C. Cir. 2008) (the mere filing of a motion for summary judgment based on matters outside of the pleadings at the same time as a motion to compel arbitration is inconsistent with preserving the right to compel arbitration and automatically waives any right to arbitrate that may have existed).

A. Documents Requested from APA and Sidley

Relevance: Facts directly relevant to whether Sidley's and APA's relationship supports Sidley's "alternative estoppel" theory of arbitration against Plaintiffs by a non-signatory.

The November 14, 2014, engagement letter between APA and Sidley terminated as of October 2015. In emails and public statements, the APA Board of Directors referred to at least one later agreement and to "opinions" about the terms of the engagement. Plaintiffs therefore request all additional written agreements between APA and Sidley after the November 14, 2014, agreement, including, but not limited to:

a. The subsequent re-engagement of Hoffman and Sidley to issue a Supplemental Report pursuant to the APA announcement on April 15, 2016;
b. any agreements concerning allocation of liability or agreements to jointly defend these matters that may affect the "independence" of Sidley and Hoffman from APA; and
c. copies of all written opinions delivered by WilmerHale and Sidley Austin LLP with regard to this matter to which the Board of Directors referred in it's October 30, 2015, e-mail to the Council of Representatives.

At most, this request likely amounts to no more than five documents. If there are no responsive written agreements or opinions, then Defendants need only stipulate to that fact.

B. Documents Requested from APA

Relevance: Facts relevant to the existence of a valid agreement to arbitrate and the scope of any valid agreement.

1. A copy of any employment agreements between Dr. Newman and any APA entity other than the expired agreement on which Defendants rely. If there was no other agreement, APA need only stipulate to that fact.

If APA does not have a copy of the agreement between Dr. Newman and the APA Practice Organization, it need only represent that it has no document under which it may validly claim arbitration rights for that entity.

C. Deposition of the Former APA Chief Operating Officer

1. Dr. Honaker signed, on behalf of APA, the employment agreement with Dr. Behnke proffered by APA. He will testify about Dr. Newman's employment with more than one APA entity and about APA's lack of intent to arbitrate the issues raised by Plaintiffs' lawsuit.

III. DISCOVERY OBTAINED FROM OTHER SOURCES DURING THE PAST YEAR

1. **Deposition of Theresa McGregor, APA's affiant for the employment agreements proffered by APA.** Ms. McGregor attested that the employment agreements attached to APA's Motion to Arbitrate were the employment agreements between APA and Drs. Behnke and Newman. Plaintiffs are prepared to forego this deposition if APA will stipulate that Ms. McGregor has no knowledge regarding any additional employment agreements with Dr. Newman.

2. **Deposition of Dr. Jennifer F. Kelly.** Dr. Kelly was on the APA Board or in significant governance positions during the events discussed in the Hoffman Reports, and participated in a majority of those events. Dr. Kelly was neither interviewed for the investigation nor recused after the initial Report was issued. She had knowledge that the Report's accusations were false, given her participation in the underlying events, and she was obligated to share her knowledge with her fellow Board members. Pursuant to the D.C. Nonprofit Corporation Act's provisions regarding directors' duties, her knowledge invalidated the Board's ability to rely on Hoffman and Sidley. D.C. Code § 29-406.30.

   Plaintiffs have now compiled a list of Dr. Kelly's (and other Board members') duties from 15 years of APA's business records. They show that Dr. Kelly was intimately involved in the events described in the Reports, and thus had knowledge, based on her involvement as described in those records, that the Reports' descriptions of APA's actions were false when she voted to publish the Reports. Plaintiffs will forego Dr. Kelly's deposition if APA agrees not to object to Plaintiffs' submission of the compilation of APA business records.

3. **Four APA interrogatories**. Plaintiffs requested four interrogatories from APA in order to confirm that David Hoffman provided a copy of the initial Report to the *New York Times* prematurely in order to create a media firestorm that would engulf Plaintiffs. Plaintiffs' metadata expert will now testify that, based on the metadata in the *New York Times'* file available on its website, David Hoffman and his staff in Chicago were the last people to modify the *New York Times* file before it was converted to a PDF and put on the *Times'* website. Plaintiffs will forego these interrogatories given their expert's

affidavit and Ms. Wahl's representation to the Ohio Court that the Report was not "e-mailed to anyone" during this time. (Ohio hearing transcript, August 25, 2017, p. 29)