SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et al.*,	)	
	)	
v.	)	2017 CA 005989 B
	)	Judge Hiram E. Puig-Lugo
	)	
DAVID D. HOFFMAN, *et al.*,	)	
	)	

AMENDED ORDER

This matter comes before the Court on (1) Defendant American Psychological Association's ("APA's") Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code § 16-5502, filed October 13, 2017; (2) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's (collectively "Sidley Austin's") Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502, filed October 13, 2017; (3) Defendant APA's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502, filed March 21, 2019; and (4) Defendants Sidley Austin's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502, filed March 21, 2019. On November 15, 2019, Plaintiffs filed a consolidated Opposition to APA and Sidley Austin's (collectively "Defendants'") Second Set of Contested Special Motions to Dismiss filed March 21, 2019. On November 18, 2019, Plaintiffs filed a consolidated Opposition to Defendants' First Set of Contested Special Motions to Dismiss filed October 13, 2017. On December 13, 2019, Defendants filed Reply briefs in support of their Special Motions to Dismiss. On February 21, 2019, the Court held a hearing on the parties' Special Motions to Dismiss.

This case involves the Independent Review Report ("the Report") that Defendant APA commissioned Defendant Sidley Austin to perform and subsequently published on its website. The Report addressed the ongoing national conversation about the role of psychologists in national security interrogations and explored whether APA officials had colluded with the Bush administration, CIA, or U.S. military officials to support the torture of persons detained after the events of September 11, 2001. The Report reached various conclusions in that regard, including that "key APA officials…colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." Report at 9. The Plaintiffs, who are three former Army Colonels, disagree with the Report's conclusions and have brought claims of defamation *per se*, defamation by implication, and false light against the Defendants.[1]

To begin, it is important to note that Special Motions to Dismiss do not require this Court to determine whether the information in the Report is accurate or inaccurate. The purpose of such motions is not to determine whether a defendant actually committed the tort of defamation, but "whether the defendant is entitled to immunity from trial." *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016). Thus, the role of the court is to determine whether or not the motion to dismiss should be granted, when all statutory requirements are satisfied, as a matter related to issues that concern public participation. To that end, a court must determine whether a defendant has made a prima facie case that the D.C. Anti-SLAPP Act is applicable, and if so, whether a plaintiff has shown that a defendant either knew that contested statements were false or acted with reckless disregard of their falsity. Here, the amended complaint also raises concerns about the legal implications of an alleged subsequent republication.

[1] Two other Plaintiffs who were APA officials have been referred to arbitration consistent with their employment contracts with the APA. Those former Plaintifs are Dr. Stephen Benhke and Dr. Russell Newman.

The Court has considered the parties' pleadings, the relevant case and statutory law, and the entire record. For the following reasons, the Defendants' four Special Motions to Dismiss under the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 to 5505 are granted.

I. BACKGROUND:

On August 28, 2017, Plaintiffs filed a Complaint against Defendants asserting ten counts of defamation *per se*, one count of defamation by implication, and one count of false light. On February 4, 2019, Plaintiffs filed a Supplemental Complaint adding an additional count of defamation *per se*.[2]

The Plaintiffs are three individuals who served as military psychologists and retired as Army Colonels. Plaintiff Dr. L. Morgan Banks, III ("Plaintiff Banks") served as the Director of Psychological Applications for the United States Army's Special Operations Command. Supp. Compl. ¶ 39. In that role, Dr. Banks "provided ethical as well as technical oversight for all Army Special Operation Psychologists." *Id.* For her part, Plaintiff Dr. Debra L. Dunivin ("Plaintiff Dunivin") served as Chief of the Departments of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center, where she "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command." *Id.* ¶ 41. In addition, Dr. Dunivin "served in the Army Inspector General's inspection of detention facilities." *Id.* Finally, Plaintiff Dr. Larry C. James ("Plaintiff James") served as Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. *Id.* ¶ 42.

The Defendants are (1) the APA, a Washington, D.C. based non-profit professional organization for psychologists, *id.* ¶ 48, (2) David Hoffman, a partner at Sidley Austin LLP, *id.* ¶

[2] The defamation *per se* count added in the Supplemental Complaint appears as Count 11 and is the subject of two of the four Special Motions to Dismiss.

46, (3) Sidley Austin LLP, a law firm comprised of a group of limited liability partnerships, *id.* ¶ 47, and (4) Sidley Austin (DC) LLP. *Id.*

After September 11, 2001, reports of detainee abuse, the use of enhanced interrogation techniques and the role of psychologists in those interrogations became a topic of public scrutiny. Supp. Compl. ¶ 70; Oct. 13, 2017 Sidley Austin Mot. at 4. In 2004, as media coverage of this topic continued to increase, the *New York Times* published an article about the role that psychologists played in enhanced interrogations. Supp. Compl. ¶ 70; Oct. 13, 2017 Sidley Austin Mot. at 4. In response to the *New York Times* article, the APA established the PENS[3] Task Force "to explore the ethical dimensions of psychology's involvement and the use of psychology in national security-related investigations." Supp. Compl. ¶ 71. Plaintiffs Banks and James were members of the PENS Task Force. *Id.* ¶ 73. Plaintiff Dunivin was not a member of the PENS Task Force but made recommendations to the APA about who should be selected to serve on the task force. *Id.* ¶ 45. In the end, the PENS Task Force did not ban psychologists from assisting in interrogations. Oct. 13, 2017 Sidley Austin Mot. at 5. Rather, the PENS Task Force drafted twelve statements framing "ethical guidelines for psychologists involved in interrogations." Oct. 13, 2017 Sidley Austin Mot. at 5; *see also* Supp. Compl. ¶ 75. The APA Board adopted these statements on July 1, 2005. Supp. Compl. ¶ 77.

Nine years after the PENS Task Force completed its work, *New York Times* Reporter James Risen published the book titled *Pay Any Price.* Oct. 13, 2017 Sidley Austin Mot. at 8. In his book, Risen claimed that the "APA colluded with the U.S. government to support torture, including that the outcome of the PENS Task Force was a result of collusion between APA and the Government." Oct. 13, 2017 Sidley Austin Mot. at 8 (citing Compl. ¶¶ 2, 3). In response to the allegations, in 2014 the APA retained the law firm Sidley Austin to conduct an independent

[3] PENS stands for Psychological Ethics and National Security. Supp. Compl. ¶ 72.

review into Risen's contentions that the APA colluded with the government to support torture. Oct. 13, 2017 Sidley Austin Mot. at 1.

The investigation spanned more than eight months, interviewed approximately 150 individuals, and studied more than 50,000 documents as part of the independent review. *Id.* at 8. It resulted in a report that consists of 541 pages and 7,600 pages of exhibits. Oct. 13, 2017 Sidley Austin Mot. at 8; Oct. 13, 2017 APA Mot. at 4. Sidley Austin provided the Report to the APA in July 2015. Oct. 13, 2017 Sidley Austin Mot. at 8. On July 10, 2015, a leaked copy of the Report was published on *The New York Times'* website. Oct. 13, 2017 APA Mot. at 4. On that day, the APA published the Report on its website. *Id.* Two months later, on September 4, 2015, a revised version of the Report was posted on the APA's website. Nov. 15, 2019 Pls. Opp'n at 3.

The Report identified Plaintiff Banks as "the key DoD official [with whom the APA Ethics Director] partnered with…," and Plaintiff Dunivin as "the other DoD official who was significantly involved in the confidential coordination effort…." R. at 12-13. The Report reached several conclusions including:

- "[K]ey APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines." *Id.* at 9.

- "[I]n the three years following the adoption of the 2005 PENS Task Force Report as APA policy, APA officials engaged in a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitely prohibited psychologists from participating in interrogations at Guantanamo Bay and other U.S. detention centers abroad. The principal APA official involved in these efforts was once again the APA Ethics Director, who effectively formed an undisclosed joint venture with a small number of DoD officials to ensure that APA's statements, and actions fell squarely in line with DoD's goals and preferences." *Id.*

- "We did not find evidence to support the conclusion that APA officials actually knew about the existence of an interrogation program using 'enhanced interrogation techniques.'" *Id.*

- Ethics complaints were mishandled to protect national-security psychologists from censure. *Id.* at 10.

Plaintiffs allege that the Report contains false and defamatory statements that "destroyed their reputations and careers." Nov. 18, 2019 Pls. Opp'n at 2. In response to Plaintiffs' initial and supplemental complaints, Defendants filed four Special Motions to Dismiss under the D.C. Anti-SLAPP Act.

II. CHOICE OF LAW:

As a threshold matter, the Plaintiffs argue that all four Special Motions to Dismiss must be denied because the Illinois Anti-SLAPP Act, not the D.C. Anti-SLAPP Act, applies to this case. Nov. 18, 2019 Pls. Opp'n at 73-82. The parties agree that there is a conflict between the Illinois Anti-SLAPP Act and the D.C. Anti-SLAPP Act. *See* Nov. 18, 2019 Pls. Opp'n at 75; Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 40.

Whenever a dispute arises about the applicable choice of law, the D.C. Court of Appeals uses "the governmental interests analysis" to resolve the conflict. *Hercules & Co. v. Shama Rest.*, 556 A.2d 31, 40 (D.C. 1989)(citing *Kaiser-Georgetown Cmty. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985)). Under this approach, "the choice of law turns on which jurisdiction has 'the most significant relationship to the dispute,' and 'which jurisdiction's policy would be more advanced' by applying its law." *USA Waste of Md., Inc. v. Love*, 954 A.2d 1027, 1031 (D.C. 2008). When applying this standard, the Court of Appeals has relied on the four factors listed in the Restatement (Second) of Conflicts of Laws § 145:

a) "the place where the injury occurred;

b) the place where the conduct causing the injury occurred;

c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and

d) the place where the relationship is centered."

District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995) (citation omitted).

Based on these factors as applied to the controversy here, the Court concludes that the governmental interests of the District of Columbia outweigh the governmental interests of the State of Illinois, because the District of Columbia is both the jurisdiction with the most significant relationship to the dispute and with the greater interest in the outcome.

First, the injuries identified in the Supplemental Complaint occurred primarily in the District of Columbia. Notably, Plaintiffs' Supplemental Complaint states the following:

- "[T]he false and defamatory statements made by Defendants about Plaintiffs were intentionally published and republished in the District of Columbia by each of the Defendants." Supp. Compl. ¶ 60.
- "As a result of that circulation, Plaintiffs were all injured by the defamatory statements in the District of Columbia…." *Id.*
- "The publications and republications of the defamatory materials were widely circulated in the District of Columbia by each of the Defendants." *Id.* ¶ 61.

Second, the Supplemental Complaint stems from alleged defamatory statements made in the Report that were later published on the APA's website. The Plaintiffs stress that Defendant Hoffman drafted the report in Illinois, but ignore the role that attorneys from Sidley Austin's DC office played in the process. Indeed, it is noteworthy that Sidley Austin's DC office is a defendant in this case and that the Report lists several attorneys from that office among its authors. *See* Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 42-43. Moreover, it was the APA, an organization based in Washington, D.C., that hired Defendant Sidley Austin to conduct an investigation into the actions of its employees, and where the principal publication occurred. Supp. Compl. ¶ 60. Therefore, the District of Columbia is the primary place where the conduct

causing the injury occurred and possesses a stronger interest in addressing the consequences of speech made within its borders.

Third, the domicile, residence, place of incorporation and place of business of the parties favor applying the laws of the District of Columbia and not the laws of the State of Illinois. While none of the Plaintiffs reside in Illinois, two of the four Defendants are located in the District of Columbia.[4]

Fourth, the relationship between the parties is centered in the District of Columbia despite the Plaintiffs' claim that an engagement letter between the Defendants identifies the laws of Illinois as the norms applicable to disputes between them. Nov. 18, 2019 Pls. Opp'n at 79. The Plaintiffs were not parties to the engagement letter between the Defendants. There is no indication in the letter that Defendants intended to apply the provision about the laws of Illinois to third parties. Thus, the retainer agreement is irrelevant to this lawsuit, which is unrelated to any dispute between the signatory to the letter. Moreover, the relationship between the Plaintiffs and the APA is centered in the District of Columbia. Plaintiffs James and Dunivin are former members of APA's governing council, Sidley Austin Reply to Pls. Nov. 18, 2019 Opp'n at 42-43, and Plaintiffs James and Banks were members of the PENS Task Force. Supp. Compl. ¶ 73. Finally, the Plaintiffs relationship with Defendants Sidley Austin (DC) is based solely on a report which was published and largely prepared in the District of Columbia.

Therefore, after reviewing the four pertinent factors, the Court finds that the governmental interests of the District of Columbia outweigh the minimal governmental interests of the State of Illinois. As the Plaintiffs recognize, "the jurisdiction with the most significant

[4] APA's principal place of business and place of incorporation is the District of Columbia. Supp. Compl. ¶ 60. Sidley Austin (DC) LLP's principal place of business is the District of Columbia. *Id.* ¶ 47. Sidley Austin LLP's principal place of business is Illinois. *Id.* David Hoffman lives in Illinois. *Id.* ¶ 46. Plaintiff Banks lives in North Carolina. *Id.* ¶ 39. Plaintiff Dunivin lives in California. *Id.* ¶ 41. Plaintiff James lives in Ohio. *Id.* ¶ 42.

relationship to the dispute… [is] presumptively…the jurisdiction whose policy would be more advanced by application of its law." Nov. 18, 2019 Pls. Opp'n at 76 (quoting *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714 (D.C. 2013)). Here, that jurisdiction is the District of Columbia.

III. LEGAL STANDARDS:

A. The D.C. Anti-SLAPP Act

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Mann*, 150 A.3d at 1226 (quoting legislative history). The Anti-SLAPP Act tries "to deter SLAPPs by 'extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.'" *Id.* at 1235 (quoting legislative history). "Consistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation." *Id.* at 1239.

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.'" *Id.* at 1227 (quoting D.C. Code § 16-5502(b)).

"Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits.'" *Id.* at 1227 (quoting § 16-5502(b)). "[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or

proffer of evidence that supports the claim." *Id.* at 1233. "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id.* at 1232. "This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Id.* at 1232-33.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Id.* at 1227. As such, Section 16-5502(d) requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing." Finally, Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice."

B. Defamation

"To succeed on a claim for defamation, a plaintiff must prove (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement met the requisite standard; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Mann*, 150 A.3d at 1240 (quotation and brackets omitted).

In defamation cases that rely on statements made about public officials, plaintiffs must present clear and convincing evidence that a defendant acted with actual malice. *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 84 (D.C. 1980). "A plaintiff may prove actual

malice by showing that the defendant either (1) had subjective knowledge of the statement's falsity, or (2) acted with reckless disregard for whether or not the statement was false." *Mann*, 150 A.3d at 1252 (quotation omitted); *see New York Times v. Sullivan*, 376 U.S. 254, 280-81 (1964). "The 'reckless disregard' measure requires a showing higher than mere negligence; the plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *Mann*, 150 A.3d at 1252 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). In comparison to the standard used for statements about public officials, the standard of care for defamation of private individuals is that of negligence. *See Kendrick v. Fox Television*, 659 A.2d 814, 821 (D.C. 1995).

C. Republication

Whether the publisher of a defamatory statement may be liable for republication depends on whether the publisher "edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience." *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 880 (W.D. Va. 2016)(internal citations omitted). "In the context of internet articles…courts have held that 'a statement on a website is not republished unless the statement itself is *substantively altered or added to*, or the website is directed to a new audience.'" *Id.* (internal citations omitted) (emphasis added). Thus, the relevant inquiry focuses on whether there has been a change in the content of the defamatory statement or whether the publisher actively sought a new audience.

IV. ANALYSIS:

Plaintiffs advance three arguments to counter the Special Motions to Dismiss filed here. First, Plaintiffs argue that Defendants failed to make a prima facie case under the D.C. Anti-SLAPP Act that the Plaintiffs' claims address an act in furtherance of the right of advocacy on

issues of public interest. Second, Plaintiffs contend that they are private figures, not public officials, and that negligence is the appropriate standard to evaluate their claims. Finally, Plaintiffs maintain that they have shown they are likely to succeed on the merits of their defamation and false light claims.

The Court will address each argument in turn.

A. Prima Facie Showing

The D.C. Anti-SLAPP Act requires that defendants make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." § 16-5502(b). This burden is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014). Section 16-5501 defines an "act in furtherance of the right of advocacy on issues of public interest" to include "[a]ny written or oral statement made … [i]n connection with an issue under consideration or review by [any governmental] body; or… [i]n a place open to the public or a public forum in connection with an issue of public interest; … or [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1)(A)-(B).

Plaintiffs contend that Defendants have not satisfied their burden under the D.C. Anti-SLAPP Act because (1) the Report "was an objective recitation of facts-not a work of advocacy," Nov. 15, 2019 Pls. Opp'n at 8, and (2) four of Plaintiffs' defamation claims are based on publications of the Report that "occurred in private-internal APA-only forums that were not open or available." *Id.* at 9. Both arguments are without merit.

(1) The Right of Advocacy

First, Plaintiffs argue that because "the APA engaged Sidley 'to conduct an independent review of ***whether there [was] any factual support*** for the assertion that APA engaged in

activity that would constitute collusion…' to facilitate torture, and 'the ***sole objective of the review [was] to ascertain the truth*** about that allegation…." that the goal of the Report was objectivity, not advocacy. *Id.* at 10.

This assertion relies on a narrow definition of the term advocacy. The public is interested in facts as well as opinions, and whether or not Defendants Sidley Austin were originally hired to collect facts, they provided factual information and related conclusions to the public through a report about issues of public interest in the United States. Thus, the Report squarely fits within the parameters of the D.C. Anti-SLAPP Act as it is "expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest," § 16-5501(1)(B), and is a "written… statement made… [i]n a place open to the public or a public forum in connection with an issue of public interest." § 16-5501(1)(A)(ii).

Plaintiffs also contend that even if the Report is a work of advocacy, only Defendant APA could claim the protections of the D.C. Anti-SLAPP Act because Defendants Sidley Austin prepared the Report at the request of the APA and were not acting as advocates of their own beliefs. Nov. 15, 2019 Pls. Opp'n at 16-17. Again, Plaintiffs are asking the Court to apply a narrow definition of the term advocacy when no such restriction appears in the D.C. Anti-SLAPP Act. Such a narrow application of the D.C. Anti-SLAPP Act would defeat the Act's purpose to protect speech. In any event, the Report could be construed as advocating for psychologists to regulate their profession and delineate their ethical guidelines without military or governmental agencies seeking to influence the process and for the APA to insure its independence.

(2) Public Forum

Second, Plaintiffs contend that Claims 1, 4, 5, and 9 of the Supplemental Complaint are outside the scope of the D.C. Anti-SLAPP Act "because the publications [of Claims 1, 4, 5, and

9] were to private, non-public audiences." Nov. 15, 2019 Pls. Opp'n at 13 ("Those four Claims are based on…publications, all in private forums open only to the leadership of the APA…."). However, § 16-5501(1) applies in the disjunctive either to statements "[i]n a place open to the public or a public forum in connection with an issue of public interest; … *or* [a]ny other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." (Emphasis added). Even if those four Claims do not involve Defendants publishing the Report to the public at large, each Claim involves either Defendant APA or Defendants Sidley Austin engaging in expression that communicates information to members of the public within the meaning of the D.C. Anti-SLAPP Act.

As for the remaining claims in the Supplemental Complaint, Plaintiffs do not contest that related statements qualify as a "written or oral statement made…in a place open to the public or a public forum in connection with an issue of public interest; … or any other expression or expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest." § 16-5501(1)(A)-(B).

(3) Issues of Public Interest

Third, it is evident that the Report discusses "issues of public interest," a proposition that Plaintiffs do not seem to challenge. As discussed above, the Report centers on two main issues: (1) the role of psychologists in national security interrogations; and (2) whether APA officials colluded with DoD officials to support the torture of detainees after September 11, 2001. It is undeniable that extensive reporting, discussion and analysis of these issues in the media, in government, in the courts, and in the press have been taking place for years. As such, those developments place the topics discussed in the Report squarely within the category of matters

considered to be of public concern. Thus, it is clear that the Report addresses an "issue of public interest" within the meaning of § 16-5501(3).

For all these reasons, the Defendants have satisfied the requirement to make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest.

B. Public Official Designation

Whether a plaintiff is a public official is a question of law to be decided by the Court. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). As the Supreme Court noted in *Rosenblatt*,

> The "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. "Public official" cannot be thought to include all public employees. The position occupied by the official must be distinguished from the controversy in which he has become embroiled, for it is the former that must inherently invite public scrutiny.

Id. at 85-86.

Plaintiffs argue that they are private figures because Plaintiffs were retired from their military service at the time the Report was published and were "mid-level officers whose responsibility was to draft and follow through with policies and directives issued by their superior, commanding officers." Nov. 18, 2019 Pls. Opp'n at 65-68. These assertions misstate relevant law and contradict statements made in the Plaintiffs' Supplemental Complaint.

(1) Plaintiffs' statuses as Public Officials did not terminate after their retirement for purposes of this defamation suit.

The passage of time does not automatically cause a public official to lose public official status if the public official's former role is still a matter of public interest, or if the alleged defamatory statements address the public official's past performance in that role. *See Rosenblatt*, 383 U.S. at 87 n.14 (concluding that plaintiff, former area supervisor, was a public official noting

"it is not seriously contended, and could not be, that the fact that [plaintiff] no longer supervised the Area when the column appeared has significance here....[T]he management of the Area was still a matter of lively public interest...and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to [plaintiff], referred to his performance of duty as a county employee"); *Crane v. Ariz. Republic*, 972 F.2d 1511 (9th Cir. 1992)(affirming the district court's decision that plaintiff, a former prosecutor, was not a public official because "the article...addresses neither [plaintiff's] performance of official duties nor any misconduct engaged in while a prosecutor," but concluding that plaintiff should be considered a public official for portions of the article related to activities undertaken while a prosecutor); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978)(concluding that former commanding officer of a United States Navy vessel was a public official for a defamation suit involving statements made in a book published after plaintiff was removed from his position as "such a person holds a position that invites public scrutiny and discussion and fits the description of a public official under *New York Times*"); *Worrell-Payne v. Gannett Co.*, 49 Fed. Appx. 105, 107 n.1 (9th Cir. 2001)(affirming district court decision that plaintiff, former executive director of the Boise City/Ada County Housing Authority, was a public official "because management of the Authority...was 'still a matter of lively public interest...and public interest in the way in which the prior administration had done its task continued strong,'" despite termination from employment and the passage of two years).[5] Thus the relevant inquiry is not,

[5] This application of the *New York Times* rule for public officials is in line with the current understanding of the passage of time as it relates to limited- purpose public figures. *See Partington v. Bugliosi*, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995)("The Supreme Court has specifically declined to address whether an individual's status as a public figure can change over time.... However, it appears that every court of appeals that has specifically decided this question has concluded that the passage of time does not alter an individual's status as a limited purpose public figure. *See Street v. Nat'l Broad. Co.*, 645 F.2d 1227 (6th Cir. 1981), *cert. dismissed*,454 U.S. 1095 (1981); *see also Contemporary Mission v. New York Times Co.*, 842 F.2d 612 (2d Cir. 1988), *cert. denied*, 488 U.S. 856 (1988); *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427, 431 (D.C. Cir. 1978), *rev'd on other grounds*, 443

as Plaintiffs contend, centered *only* on a person's status at the time of publication, but on whether disputed comments relate to events that took place while the person was a public figure and those events remained the subject of public concern.

Here, the Report clearly addresses Plaintiffs' performances of their official duties in matters of public interest. The Report's narrative, as Plaintiffs contend, is that, "Plaintiffs… 'colluded' to block the APA from taking any effective steps to prevent psychologists' involvement in abusive interrogations." Supp. Compl. ¶ 5. Plaintiffs further assert that the Report makes three primary allegations: "ensuring that the guidelines issued for psychologists involved in the interrogation process were no more restrictive than 'existing' military guidelines… preventing the APA from banning psychologists participating in national-security interrogations; and…mishandling ethics complaints to protect national-security psychologists from censure." *Id.* ¶ 19. These conclusions directly relate to Plaintiffs' former roles as Army Colonels and psychologists and the actions they undertook in controversial events related to their specific military positions. Moreover, at the time the Report was published, psychologists' involvement in interrogations was "still a matter of lively public interest…and public interest in the way in which the prior administration had done its task continued strong." *Rosenblatt*, 383 U.S. at 87 n.14.

(2) Plaintiffs Satisfy the Criteria for Public Officials established by the U.S. Supreme Court

Plaintiff Banks served as the Director of Psychological Applications for the United States Army's Special Operations Command where he "provided ethical as well as technical oversight for all Army Special Operation Psychologists." Supp. Compl. ¶ 39. Plaintiff Dunivin served as

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U.S. 157 (1979); *Brewer v. Memphis Publ'g Co., Inc.,* 626 F.2d 1238 (5th Cir. 1980), *cert. denied,* 452 U.S. 962 (1981); *Time, Inc. v. Johnston,* 448 F.2d 378, 381 (4th Cir. 1971).")

Chief of the Department of Psychology at Walter Reed Army Medical Center and Walter Reed National Military Medical Center where she "consulted with commanders in Guantanamo, Iraq, and the Army Medical Command," and "served in the Army Inspector General's inspection of detention facilities." *Id.* ¶ 41. Plaintiff James served as Chief of the Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center, and as Director of Behavioral Science at Guantanamo and Abu Ghraib, Iraq. *Id.* ¶ 42. These positions comfortably fit within the hierarchy of public officials as provided in *Rosenblatt*.

Furthermore, the Supplemental Complaint provides a plethora of examples demonstrating Plaintiffs' "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 88. Specifically, the Supplemental Complaints asserts as follows:

- "The military Plaintiffs…became directly and energetically involved in drafting policies and implementing training and oversight…." Supp. Compl. ¶ 12
- "The military…Plaintiffs then worked to ensure that the APA guidelines were drafted so that military psychologists could use them within the military…." *Id.* ¶ 13.
- "The military Plaintiffs…were charged with drafting and implementing policies…." *Id.* ¶ 69.
- "Given the role of Plaintiffs Banks and James in helping to put local policies in place, it is not a surprise that those policies…were incorporated by reference into Statement Four of the PENS Guidelines." *Id.* ¶ 117.
- "The Military Plaintiffs Took a Leading Role in Creating Policies and Procedures to Prevent Abusive Interrogations." Supp. Compl. Heading 4 at 36.
- "In the aftermath of the abuses at interrogation sites after 9/11…Plaintiffs…were called upon to help put in place policies…." *Id.* ¶ 122.
- "[Plaintiff] Banks was ordered to work with the Army's Inspector General to investigate and decide how to prevent future abuses." *Id.* ¶ 123.
- "[Plaintiff] James [was asked] to serve in Iraq, with the role of drafting policies and instituting procedures…." *Id.*

- "[Plaintiff] Dunivin volunteered to play a similar role [to Dr. James in Iraq] at Guantanamo." *Id.*

- "[Plaintiff] Banks became an author of the Army Inspector General's Report....and at the time of PENS, [Plaintiff] Banks was consulting to the Army on a revision to the Army Field Manual." *Id.* ¶ 125.

- "[Plaintiff] James...outline[d] the beginnings of a SOP to prevent abuses....While in Iraq [Plaintiff] James trained staff on appropriate interviewing techniques that were consistent with those documents." *Id.* ¶ 127.

- "[Plaintiff] Dunivin...was involved in drafting the Guantanamo SOP that instructed BSCTs to ensure interrogation policies were followed and to report violations." *Id.* ¶ 129.

Accordingly, the Court concludes that the Plaintiffs, former Army Colonels, are public officials for purposes of this defamation suit and must show that Defendants acted with actual malice to promote their claims.

C. Likelihood of Success on the Merits

Once Defendants make a prima facie case, the burden shifts to Plaintiffs to offer evidence that would permit a jury properly instructed on the applicable legal and constitutional standards to reasonably find that Defendants are liable for defamation. *See Mann*, 150 A.3d at 1232. "The precise question here, therefore, is whether a jury properly instructed on the law, including any applicable heightened fault and proof requirements, could reasonably find for the claimant on the evidence presented." *Id.* at 1236.

(1) Republication

Count 11 of Plaintiffs' Supplemental Complaint alleges,

> On August 21, 2018, the General Counsel and Board of APA republished the [Report] on the APA website at a new URL. They directed Council members and others to the [Report] through an email to the Council listserv, which includes persons who are not Council members, and by publishing on the APA's public website the Board minutes authorizing the republication. Those minutes contain a link to the [Report]. The website is accessible to the public, not only to APA members.

Supp. Compl. ¶ 524. Plaintiffs assert that these actions constitute a republication for the "simple fact [that] the publications took place at separate times and reached different audiences. Nothing more is necessary." Nov. 15, 2019 Pls. Opp'n at 18. Defendants dispute Plaintiffs' characterization of the August 2018 changes to the APA website and argue that the Report was not republished. Mar. 21, 2019 APA Mot. at 11; Mar. 21, 2019 Sidley Austin Mot. at 2.

First, Defendants note that the August 2018 website change did not create a new URL for the Report. Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 4. Rather, after August 2018, the Report could no longer be accessed via its own landing page but only through a link on the APA website's Timeline page ("the Timeline"). Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 5. Prior to August 2018, "the Report could always be accessed by a link to the Report from the Timeline." Mar. 21, 2019 APA Mot., Ex. A Fredley Aff. ¶ 4. Therefore, after the August 2018 changes, "[t]he link to the Report…[was] at the same place on the Timeline as it was when it was originally posted to the APA website." Mar. 21, 2019 APA Mot. at 9.

Second, Defendants argue that they did not direct a new audience to the Report by emailing and posting the meeting minutes approving the website change because the meeting minutes contained a link to the Timeline only, not the Report. Mar. 21, 2019 APA Mot. at 4; Mar. 21, 2019 Sidley Austin Mot. at 12. The Timeline contains approximately 170 links. Mar. 21, 2019 APA Mot. at 4.

Third, and finally, Defendants assert that adding to the Timeline links to four documents commenting on the Report did not modify the substance of the Report. Mar. 21, 2019 APA Mot. at 10, Ex. A Fredley Aff. ¶ 6; Mar. 21, 2019 Sidley Austin Mot. at 13.

The Court concludes that as a matter of law, the APA's actions on August 21, 2018 do not constitute republication. Because the Timeline always contained a link to the Report, the record does not support Plaintiffs' position that the "APA republished the [Report] on the APA website at a new URL," Supp. Compl. ¶ 524, and that "the Report was published on separate occasions and on different locations." Nov. 15, 2019 Pls. Opp'n at 21. Moreover, there is no evidence that Defendant APA intended to, or actually did, reach a new audience.

Similarly, Plaintiffs' contention that Defendant APA sought a new audience by emailing its Council of Representatives exaggerates the available evidence. The record shows that the email sent to the APA's Council of Representatives contained only a link to the Timeline, a webpage with over 170 links, and notified Council members that the motion to remove the Report from its landing page was passed. Mar. 21, 2019 APA Mot. at 4. Also, the August 2018 meeting minutes posted on the APA's website contains links to the Timeline, not the Report. *Id.* In fact, the August 2018 meeting minutes consists of twenty two pages of information, most of which does not relate to or reference the Report. Mar. 21, 2019 APA Mot., Ex. 1. Finally, there was no modification, or revision, to the Report. The addition of links to the Timeline commenting on the Report is insufficient to republish the Report as these additional links did not link to the Report and did not appear on the same webpage as the Report. Mar. 21, 2019 APA Mot. at 3; Mar. 21, 2019 Sidley Austin Mot. at 5. Accordingly, there was no republication of the Report as a matter of law and Plaintiffs' Count 11 must be dismissed.

(2) Actual Malice

The Plaintiffs must present clear and convincing evidence that Defendants acted with actual malice given their status as public officials. Actual malice exists where a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or

not.'" *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016) (quoting *New York Times Co.*, 376 U.S. at 279-80).

The Plaintiffs received the opportunity to conduct targeted discovery prior to filing their oppositions to the Defendants' motions as permitted under D.C. Code § 16-5502(c)(2). Specifically, on February 8, 2019, this Court granted in part Plaintiffs' motion for limited discovery to include the following information:

- Depositions of Drs. Michael Honaker, Heather Kelly, and Stephen Soldz.[6]
- Answers to the four interrogatories to Defendant APA served with the Complaint.
- A mirror image copy of all electronic data contained on the personal computer and hard drive of Dr. Stephen Behnke retrieved by Defendants Sidley Austin as part of its investigation.
- The witness interview notes or communications created during the Sidley Austin investigation for the 18 witnesses from whom the Plaintiffs received affidavits.

Despite this discovery, Plaintiffs fail to proffer evidence that a reasonable jury could find to be clear and convincing proof that Defendants knew that facts stated in, or reasonably implied by, the Report were false or that they published the Report with reckless disregard of the falsity of these stated or implied facts.

Nevertheless, Plaintiffs contend that several categories of information, when subjected to "a holistic examination" and viewed in the aggregate, combine to provide "more than enough evidence to demonstrate Defendants' actual malice." Nov. 18, 2019 Pls. Opp'n at 5 (citing *Tavoulares v. Piro*, 817 F. 2d 762, 794 (D.C. Cir. 1987)).

The foundation for this argument rests with thirty five individual statements found in Exhibit C, which is part of Plaintiffs' Consolidated Opposition to Defendants' First Set of

[6] This Court subsequently vacated the provision for depositions in an order dated September 25, 2019.

Contested Special Motions to Dismiss filed March 21, 2019,[7] under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5002. The statements consist of thirty four affidavits from different persons and one memorandum from Dr. L. Michael Honaker. *See generally,* Exhibit C. Five affidavits represent statements from current and former plaintiffs consistent with the claims alleged in the complaint. Two affidavits are statements from individuals that Sidley Austin did not interview as part of the investigative process.[8] The remaining twenty eight statements come from persons interviewed during the investigation who are not or who have not been plaintiffs in this case.

First, Plaintiffs argue that during their investigation, Defendants had documents and government reports in their possession that contradicted the Report's conclusions. Nov. 18, 2019 Pls. Opp'n at 21. However, Plaintiffs fail to explain whether the entities that issued those governmental reports had access to the same documents, email exchanges and witnesses used as sources for the Report. Similarly, it is unclear to what extent those reports were commissioned with mandates comparable to the directive that APA provided to Sidley & Austin for the internal review, focused on the same issues explored in that investigation or applied different ethical or procedural rules in reaching their conclusions. Thus, the mere existence of those reports does not support the claim that Defendants acted with malice in drafting the Report.

Besides affidavits from current or former litigants, the Plaintiffs proffer declarations from multiple witnesses contending that information they provided was not included in the Report or disagreeing with how their declarations were portrayed. When one considers the scope of the investigation, the number of witnesses and the volume of materials reviewed, it is difficult to

[7] Defendants' First Set of Contested Special Motions to Dismiss was filed October 13, 2017.
[8] Affiant Donna Beavers expressed disagreement with the Report's conclusions, but was not interviewed. Affiant Arman Gungor is a Certified Computer Examiner who described metadata found and emails retrieved during his analysis of electronic data. *See generally* Exhibit C.

understand how omitting a comment here or an opinion there would amount to malice. *See,* Affidavit of Susan Brandon in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 1 ("The Report is not an accurate characterization of my comments in the interview"); Affidavit of Robert J. Sternberg in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 4 ("To this day, I believe that the Report seriously misrepresented what I said"); Affidavit of Harry Matarazzo in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("Notably, certain written and verbal information that Dr. Matarazzo provided was not present, while other information was set forth in an equivocal manner"); and Affidavit of Scott Shumate in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 3 ("The Report's description of my understanding of interrogations appears to be cherry-picked from available information in order to portray me in a biased and misleading light"). Notably, these comments and similar comments from other affiants address disagreements with the Report about what a specific affiant said or did not say. These omissions and mischaracterizations, even if true, do not support an inference that Defendants acted with malice with respect to specific conclusions about the Plaintiffs found in the Report.

Next, Plaintiffs maintain that Defendants undertook the internal review process with a preconceived agenda to specifically target the Plaintiffs in this case, relied on biased and unreliable sources and purposely avoided the truth. Nov. 18, 2019 Pls. Opp'n at 21. Again, this argument is rooted in declarations within attached affidavits that echo each other in tenor and vocabulary. *See* Affidavit of Jennifer Bryson in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2

("During the interview, I was struck by a definite sense that the Sidley interviewer was targeting Dr. Behnke in the service of a preconceived narrative…"); Affidavit of Lisa Callahan in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("I was given the distinct impression that the Sidley independent review was intended to find evidence that the Ethics Office staff had exercised undue influence over the ethics adjudication process"); Affidavit of Armand Cerbone in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 1 ("During my interview, Ms. Carter questioned me about, among other things, Dr. Behnke in a manner that evidenced a preconceived narrative …"); Affidavit of Robin Deutsch in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 3 ("During my interview with Mr. Hoffman, questions he posed left me with the distinct impression that he had a preconceived narrative and had already concluded that … Dr. Stephen Behnke, had engaged in inappropriate behavior"); Affidavit of Elizabeth Swenson in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act, at 2 ("… it had been my impression … that Sidley Austin interviewers had an agenda and a preconceived narrative…"). Aside from these statements perhaps representing opinion testimony, it is not possible to tell from this record where along the investigative process involving some 150 witnesses these specific interviews took place, and what information investigators had received prior to the interviews leading them to focus their inquiry. Thus, the impressions of these affiants, even if true, would not support a finding of malice.

Furthermore, Plaintiffs question the Defendants reliance on four allegedly biased witnesses in reaching the Report's conclusions. *See* Nov. 18, 2019 Pl. Opp'n at 45. Those

witnesses were Drs. Stephen Soldz, Nathaniel Raymond, Jean María Arrigo and Trudy Bond. *Id.* at 45-46. However, those four individuals were only a fraction of the approximately 150 witnesses interviewed and 50,000 documents reviewed. The possibility that these witnesses were biased does not suffice to establish malice.

At best, Plaintiffs have shown that Defendants Sidley Austin received contradictory and diverse statements, opinions and recollections during the investigative process. Such different opinions and diverse statements are to be expected in matters subject to exhaustive debate in the public arena.[9] Moreover, inconsistencies and conflicting recollections are not uncommon in extensive investigations involving large numbers of witnesses. Combined with other arguments that Plaintiffs have raised, these factors do not support claims that Defendants had subjective knowledge of the Report's falsity, or acted with reckless disregard for whether or not the statements in the Report were false.

With respect to Plaintiffs' argument that Defendants purposely avoided the truth, the evidence proffered does not satisfy the clear and convincing evidence standard. Indeed, the evidence that Plaintiffs describe is not the entirety of the information compiled during the internal review and their argument ignores the length of the investigative process. Although the record shows that Defendants Sidley Austin interviewed a handful of Plaintiffs' critics, that fact does not establish that Defendants Sidley Austin had "obvious reasons to doubt the veracity" of these sources. *See St. Amant*, 390 U.S. at 732. Furthermore, Defendants Sidley Austin did not "rely on a single, questionable source without fact-checking, interviewing additional witnesses, or seeking independent support," to avoid the truth and establish a predetermined narrative. *Talley v. Time, Inc.*, 923 F.3d 878, 904 (10th Cir. 2019) (citing *Curtis Pub. Co. v. Butts*, 388 U.S.

[9] As discussed above, the use of enhanced interrogation or torture, the appropriate treatment of detainees and the proper role of psychologists in these situations exemplify topics subject to extensive public debate.

130, 157-58 (1967)); *accord Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 688, 692 (1989). To the contrary, it is undisputed that Defendants Sidley Austin interviewed about 150 witnesses, performed follow up interviews with 50 witnesses, and reviewed some 50,000 documents during the course of their eight-month investigation. Sidley Austin Reply to Nov. 15, 2019 Opp'n at 25. As such, the evidence that Plaintiffs present fails to show that Defendants Sidley Austin pursued a preconceived outcome, relied on biased and unreliable sources that impacted the conclusions of the investigation and purposely avoided the truth. Here, a reasonable jury properly instructed on the law would be hard-pressed to find clear and convincing evidence of actual malice.

Additionally, Plaintiffs contend that the Defendants' investigation departed from accepted professional standards and that Defendants refused to retract the Report after publication. Nov. 18, 2019 Pls. Opp'n at 21. Plaintiffs charge of improper investigation fails as a "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *See Tavoulareas,* 817 F.2d at 794 (emphasis in original). Aside from stating their conclusions, the Plaintiffs fail to make this necessary connection. Moreover, Plaintiffs fail to establish any duty on behalf of Defendants to retract or correct the Report post publication, particularly after legal action related to the contents of the report had been filed. In any event, the actual malice standard turns on whether Defendants were subjectively aware that the statements in the Report were false or acted in reckless disregard of their falsity, at the time the statements were made. It is a standard that Plaintiffs have not satisfied. Therefore, even when combining the various arguments that Plaintiffs advance, considering the totality of the record in this case, Plaintiffs fail to proffer clear and convincing evidence that Defendants made any defamatory statements in the Report with

knowledge that a statement was false or with reckless disregard of its falsity. Thus, their claims are not likely to succeed at trial.

Finally, it is important to point out a string of email communications that took place from on or about March 7, 2006 to on or about July 2, 2007, which are appended as Exhibit C to the Affidavit of Arman Gungor in Support of Plaintiffs' Memorandum in Opposition to Defendants' Special Motion to Dismiss Under the D.C. Anti-SLAPP Act. Mr. Gungor recovered these undeleted emails from the Behnke hard drive that was provided in discovery. *Id.* ¶ 18. The purpose of the communications was to coordinate responses to public discussions about APA policies and to blunt criticisms related to treatment of detainees and interrogation practices. Participants in these exchanges included current and former Plaintiffs Dr. Stephen Behnke, Dr. Larry James and Dr. L. Morgan Banks, III, as well as affiants Dr. Michael Gelles and Dr. Robert Fein. Curiously, the emails include phrases like "Eyes Only," "Your eyes only," "Please delete after reading this," and "Please review and destroy." Since this correspondence was disclosed in discovery which the Defendants provided, it is safe to assume that investigators reviewed and considered the emails in reaching their conclusions.[10]

IV. CONCLUSION:

The D.C. Anti-SLAPP Act was enacted to protect the right of advocacy on issues of public interest. The Act allows defamation suits involving statements about issues of public interest to proceed, provided that the subjects of the alleged defamatory statement offer evidence that they are likely to succeed on the merits. Plaintiffs have failed to proffer evidence that satisfies this standard.

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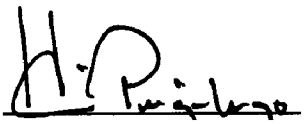
[10] In the alternative, assuming without deciding that Plaintiffs were private individuals instead of public officials for purposes of this defamation action, Plaintiffs have failed to proffer evidence in this record that in publishing the Report the Defendants "fail[ed] to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others." *Kendrick,* 659 A.2d at 822.

Accordingly, this 12th day of March, 2020, it is ordered that:

1. Defendant American Psychological Association's Contested Special Motion to Dismiss Under the D.C. Anti-SLAPP Act D.C. Code § 16-5502 is **GRANTED**.
2. Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5502 is **GRANTED**.
3. Defendant American Psychological Association's Contested Special Motion to Dismiss Count 11 of the Supplemental Complaint Under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 is **GRANTED**.
4. Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Count 11 of the First Supplemental Complaint Under the District of Columbia Anti-SLAPP Act D.C. Code § 16-5502 is **GRANTED**.
5. This case is dismissed with prejudice.

It is so **ORDERED.**



Honorable Hiram E. Puig-Lugo
Associate Judge
Signed in Chambers

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