IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, et al., **Plaintiffs,** **v.** **LISA DUGGAN, et al.,** **Defendants.**	**Civil Action No. 2019 CA 001712 B** **Judge Robert R. Rigsby** **Next Event: Initial Scheduling Conference, June 14, 2019**

MOTION TO DISMISS UNDER ANTI-SLAPP ACT

COME NOW the Defendants, American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, by and through the undersigned counsel, and pursuant to the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, hereby moves to dismiss the above-referenced Complaint. In support thereof, Defendants state as follows:

Pursuant to Rule 12-I, the undersigned affirms that on May 6, 2019, an e-mail was sent to Plaintiffs' counsel, seeking consent for this motion. Plaintiffs declined to consent, thereby necessitating the filing of this motion.

These Defendants also understand that the other Defendants in this action will be filing their own Anti-SLAPP motions. To the extent not inconsistent with the arguments contained herein, these Defendants adopt and incorporate the arguments put forth by any other Defendant in this litigation.

I. INTRODUCTION

The "BDS" Movement – short for boycott, divestment and sanctions – has arisen in response to Israel's occupation of Palestinian territory and to its treatment of Palestinian citizens and refugees. Its proponents seek to pressure the Israeli government to end its occupation of the West Bank, Gaza, and the Golan Heights, to end discrimination against Arab-Palestinian citizens of Israel, and otherwise to comply with international law.[1] Not surprisingly, the BDS movement has engendered opposition, and various groups have stepped up efforts to suppress efforts by BDS supporters on campuses and elsewhere to join their campaign.[2]

In 2013, the membership of the American Studies Association ("ASA") – a nonprofit organization of scholars and teachers of American studies in U.S. universities – ratified the decision by the ASA National Council to endorse the Academic Boycott, as described in greater detail below.

Plaintiffs are four ASA members who opposed the resolution; represented by pro-Israeli public interest groups, including the Louis D. Brandeis Center, they have persisted in a plethora of claims against ASA and individual members, all based on the contention that ASA was wrong to endorse the Academic Boycott. Cutting through the miasma of verbiage, they have alleged that:

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1 *See, e.g.,* Nathan Thrall, "How the Battle Over Israel and Anti-Semitism is Fracturing American Politics," N.Y. Times Magazine, Mar. 28, 2019, available at https://www.nytimes.com/2019/03/28/magazine/battle-over-bds-israel-palestinians-antisemitism.html?searchResultPosition=27.

2 New York Times Editorial Board, "Curbing Speech in the Name of Helping Israel," New York Times, Dec. 18, 2018, available at https://www.nytimes.com/2018/12/18/opinion/editorials/israel-bds.html?searchResultPosition=16.

- Some persons believe that BDS supporters are "extreme" or "controversial", ¶¶ 35-41;
- Certain individual defendants agree with the principles of BDS (¶¶ 42-46), while others do not;
- Certain individual defendants worked for at least a year to bring the question of whether to endorse the BDS before the ASA, ¶¶ 47-77; and
- The supporters of ASA endorsement of the Academic Boycott succeeded in their efforts. ¶¶ 78-122.

It is also clear, from the Complaint, that:

- Plaintiffs disagree with the methods used by the defendants to see that non-members could not suddenly join or rejoin the ASA solely in order to vote on the BDS endorsement, ¶¶ 123-141;
- Plaintiffs believe that defendants spent too much time on BDS-related issues, ¶¶ 142-161;
- Plaintiffs believe that the efforts to "defend" the Resolution, caused in part by a promotion of a "backlash" by those groups supporting Plaintiffs against the Resolution, has caused significant expense for the organization. ¶¶ 162-196; and
- Professor Bronner believes that he should have had his contract renewed as editor of the Encyclopedia of American Studies, despite the fact that his contract had expired, ASA was under no legal obligation to renew it, and he was actively engaged in litigation against ASA. ¶¶ 197-259.

Plaintiffs' claims fail as a matter of law on multiple grounds that mandate dismissal independent of the D.C. Anti-SLAPP law. *See* Defendants' Motion to Dismiss

filed concurrently with this Motion. But because this lawsuit falls within the scope of the Anti-SLAPP Act, and indeed epitomizes the very harms that the Act seeks to prevent, Defendants are entitled to relief in addition to the order of dismissal. D.C. Code § 16-5504. This memorandum addresses only issues unique to the Anti-SLAPP Act.

II. FACTUAL BACKGROUND

Pursuant to ASA's governing documents, the Resolution to endorse the Academic Boycott was adopted by a committee of the ASA and forwarded for decision to the National Council.[3] The Executive Committee ("EC") of the National Council first discussed the resolution during its May 2013 meeting, and called for an open session of the Council during the November 2013 ASA annual meeting. Approximately 745 ASA members attended that open session, during which 44 persons spoke. In addition, prior to the annual meeting, all ASA members were encouraged to contact the EC directly by email to express their views concerning the resolution.[4]

The National Council remained in session for eight days after the open session ended, and ultimately voted unanimously to adopt the resolution. Although not required to, the Council exercised its discretion to withhold final action until after a vote of the membership. "In an election that attracted 1252 voters, the largest number of participants in the organization's history, 66.05% of voters endorsed the resolution, while 30.5% of voters voted no and 3.43% abstained."[5]

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3 The National Council has full discretion to "conduct the business" of the ASA. ASA Constitution and Bylaws, Art. V, Sec. 2. *See* Constitution and Bylaws, attached to the Complaint.

4 ASA Statement of National Council, available at https://theasa.net/node/4804.

5 ASA public statement, available at https://theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions.

Nor was the Resolution an anomaly for ASA: it had previously condemned apartheid in South Africa and urged divestment from U.S. corporations with operations there, condemned anti-immigrant discrimination in Arizona and in other states, and spoken out in support of the Occupy movement, and of the rights of the economically disenfranchised. *See* ASA public statement, attached hereto as Exhibit A.

The Resolution, which Plaintiffs seek to nullify, is explicitly *limited* to formal institutional arrangements ("limited to a refusal on the part of the ASA in its official capacities to enter into formal collaborations with Israeli academic institutions, or with scholars who are expressly serving as representatives or ambassadors of those institutions"). It excludes individual scholars from its scope, "expressly not endorsing a boycott of Israeli scholars engaged in individual-level contacts and ordinary forms of academic exchange ..." and is intentionally non-binding on its members. *Id.*

The Complaint here reads as a jeremiad against the BDS movement. It castigates persons unrelated to this lawsuit for their opinions on Palestinian rights (Complaint ¶¶ 37-40); includes a lengthy quote from an article about why academic boycotts are always bad (¶41); and declaims as to which proposals for peace are or are not "extreme" (¶40). Although Plaintiffs purport to be concerned with the fiduciary duties of the individual Defendants, and with an alleged "infiltration" and a "takeover" of the ASA, their true goal is to suppress speech by intimidating organizations from making a decision on the merits whether to join the Academic Boycott.

On its webpage, the Brandeis Center *boasted* that the American Anthropological Association (AAA) fell 40 votes short (out of 4,800 votes cast) of adopting a BDS resolution because of the lawsuit that it had filed in federal court against the ASA:

> The BDS movement attributes this dramatic defeat in part to LDB's lawsuit against the American Studies Association (ASA) for passing the same type of resolution. Some AAA members apparently understood that their anti-Semitic resolution would likely be unlawful and could subject the association to costly litigation and humiliating defeat.[6]

In essence, the Brandeis Center is advertising itself as adept at using litigation to distort debate through threats of further litigation, the very activity that the Anti-SLAPP Act was enacted to prevent.

III. THE ANTI-SLAPP ACT MANDATES DISMISSAL OF PLAINTIFFS' CLAIMS.

Plaintiffs' suit – now in its second incarnation[7] – presents a textbook example of a "strategic lawsuit against public participation" (or SLAPP), and should be dismissed under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*

The District of Columbia enacted its Anti-SLAPP Act ("the Act") in 2010 to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." Council of the Dist. of Columbia, Report of Cmte. On Pub. Safety and the Jud. On Bill 18-893 (Nov. 18, 2010) ("Committee Report"). "Following the lead of other jurisdictions, which have similarly

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6 https://brandeiscenter.com/aaa-boycott-fails-ldb-lawsuit-credited/. *See also* Elizabeth Redden, "Israel Boycott Battle Heads to Court," Inside Higher Ed, Apr. 21, 2016, available at https://www.insidehighered.com/news/2016/04/21/lawsuit-targets-american-studies-associations-stance-israel-academic-boycott (Ken Marcus, then president of the Brandeis Center, stated that "This is not just about the American Studies Association . . . It's about any association officer or director who is thinking about using their association as a tool to advance their own ideological agenda.")

7 Plaintiffs first filed the claims presented herein in the U.S. District Court for the District of Columbia, in a case that has now been dismissed for failure to state a claim that satisfies the minimum requirements for the value of a cause of action under federal diversity jurisdiction. *Bronner v. Duggan*, 364 F.Supp.3d 9 (D.D.C. 2019), now on appeal before the U.S. Court of Appeals for the D.C. Circuit.

enacted absolute or qualified immunity to individuals engaging in protected actions, [the Act] extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously." *Id.* at 4.

The D.C. Anti-SLAPP Act enhances the ability of a defendant "to fend off lawsuits ... filed to punish the opponent or prevent the expression of opposing points of view." *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012). Since its enactment, the Act has proven essential to promoting free and fair debate on all sides of contentious issues. Its enforcement has protected speech involving allegations of corruption against the President of the Palestinian Authority[8] as well as accusations of dishonesty against "birthers" who questioned whether President Obama was born in the United States.[9] As the District Council recognized in enacting the statute, SLAPP "cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights...The impact is not limited to named defendants' willingness to speak out, but prevents others from voicing concerns as well." *Committee Report, supra* at 1. This is precisely the situation here, as plaintiffs have conceded by their boasting about how this lawsuit influenced the AAA vote.

The Act adopts a two-stage, burden-shifting framework for motions to dismiss SLAPP claims. In the first stage, the moving party must 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." D.C. Code § 16-5502(b). Once that showing is made, the burden shifts to the plaintiff to demonstrate "that the claim is likely to succeed on the merits." *Id.* If

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8 *Abbas v. Foreign Policy Group, LLC.*, 783 F.3d 1328 (D.C.Cir. 2015).

9 *Farah v. Esquire Magazine, Inc.*, 863 F.Supp.2d 29 (D.D.C. 2012).

plaintiffs cannot demonstrate a likelihood of success on the merits, as plaintiffs in this case cannot, the special motion to dismiss shall be granted.

A. Plaintiffs' Claims Arise from Speech Protected by the D.C. Anti-SLAPP Act

The Act defines the speech that it protects – "an act in furtherance of the right of advocacy on issues of public interest" – as follows:

> (A) Any written or oral statement made:
>
> i. In connection with an issue under consideration by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
>
> ii. In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.
>
> (3) The term "issue of public interest" means: An issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product or service in the market place.
>
> D.C. Code §16-5501(1).

All of the claims asserted by the plaintiffs herein arise, in one way or another, from the ASA's decision to endorse the Academic Boycott and the communicative actions related to that decision, all of which fall within the scope of both prongs of D.C. Code §16-5501. The Resolution pertains to issues under consideration by numerous government bodies and it was communicated both within the ASA and to the general public via the ASA web

page.[10] §16-5501(1)(A). Alternatively, the ASA unquestionably engaged in "expression ... that involves ... communicating views to members of the public in connection with an issue of public interest." *See* §16-5501(1)(B).

Similarly, there can be no doubt that the disputes over treatment of Palestinian scholars by both the Israeli and U.S. governments satisfy the statute's definition of "issue of public interest" on multiple grounds, such as: the safety of Palestinian students and scholars; the well-being of the international academic community of which the ASA has been a vibrant part; and the actions of numerous public figures, including politicians in the United States and abroad. *See* §16-5501(3).

The heart of the Anti-SLAPP Act is its purpose of fostering free and unfettered debate. "Under [*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)] ... BDS boycotts are not only inherently expressive, but as a form of expression on a public issue, rest on 'the highest rung of the hierarchy of First Amendment values.'" *Amawi v. Pflugerville Ind. Sch. Dist.*, ___ F. Supp. 3d ____, 2019 WL 1865288 (W.D. Tex. 2019) at 14.

B. Plaintiffs Cannot Establish a Likelihood of Success on the Merits of Their Claims.

The Anti-SLAPP motion "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." *Committee Report, supra* at 1. Once the burden has shifted to plaintiffs, a SLAPP case can continue

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[10] Plaintiffs concede this point by their unsupported allegation that defendants not only engaged in activity covered by the Anti-SLAPP Act, but also that they spent too much of their time and the organization's resources in pursuing this expression. See Complaint, Count V.

only if the plaintiffs can demonstrate, taking into account "any heightened fault and proof requirements," that they meet the standard for resisting a summary judgment motion. *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016).

As argued more fully in the Motion to Dismiss, the majority of Plaintiffs' counts are barred by the three-year statute of limitations, and the entirety of Plaintiffs' derivative claims are barred by collateral estoppel. Further, Plaintiffs have no claim for *ultra vires* action, and Professor Bronner had no contractual expectation in the renewal of his contract as Editor of the Encyclopedia; the failure to renew that contract was not a breach of the agreement, and thus there can be no claim for "tortious interference" or "aiding and abetting." None of the counts in the Complaint present a viable cause of action.

The D.C. Anti-SLAPP Act requires that all discovery be stayed until the Court has ruled on the pending motion; the only permitted exception is where limited "targeted discovery" would not be unduly burdensome. D.C. Code § 16-5502(c)(2). Plaintiffs may seek to bring this within that very narrow exception. They, however, have already received the benefit of substantial discovery from the years of litigation in the U.S. District Court, including tens of thousands of pages of document production as well as a day-long deposition of Defendant Stephens. Granting Plaintiffs any further discovery, pursuant to this motion, would further impose litigation burden and expense on the Defendants and undermine the very purpose that the District Council sought to advance by adopting the Anti-SLAPP Act. This Court, therefore, should proceed immediately to a consideration of whether plaintiffs can demonstrate, by a proffer of admissible evidence, the likelihood of success on any of their claims.

Certainly, nothing in the complaint satisfies the burden that plaintiffs must meet under the Anti-SLAPP Act. Plaintiffs make much of the statement by Judge Contreras of the U.S. District Court that they "*may have* meritorious claims," Complaint at 1, and repeated statements that plaintiffs "have *alleged*" facts that *would* support claims that some defendants acted with harmful intent, Complaint at 6 -7. (Emphasis added.) Mere allegations, however, will not suffice. And where, as here, there are claims based on conduct that has First Amendment protection, special common law rules heighten the authority of the court to more closely scrutinize the weight of whatever evidentiary proffers are made by plaintiffs. *Aequitron Med. Inc., v. CBS, Inc.*, 964 F. Supp. 704, 709-10 (S.D.N.Y. 1997) ("where the tortious interference claim is based on conduct that sounds in defamation, the special rules of defamation apply.")

CONCLUSION

The lawsuit in this case strikes at the heart of a vigorous public dialogue now underway. In an effort to overturn the results of an internal organizational dispute that they lost, plaintiffs seek to hold the ASA and a number of its individual leaders liable for making reasonable and legitimate administrative decisions. Plaintiffs have every right to oppose BDS and vigorously assert their support for Israeli policies, but not to seek to intimidate those with whom they disagree by driving up the costs of that disagreement by pursuing lawsuits such as this.

WHEREFORE, Defendants respectfully request this Court enter an Order dismissing the Complaint with prejudice and awarding full costs and legal fees incurred by defendants in defending this action. D.C. Code 16-5502(a)-(b).

POINTS AND AUTHORITIES

1. *Abbas v. Foreign Policy Group, LLC.*, 783 F.3d 1328 (D.C.Cir. 2015).

2. *Aequitron Med. Inc., v. CBS, Inc.*, 964 F. Supp. 704, 709-10 (S.D.N.Y. 1997)

3. *Amawi v. Pflugerville Ind. Sch. Dist.*, ___ F. Supp. 3d ____, 2019 WL 1865288 (W.D. Tex. 2019)

4. *Bronner v. Duggan*, 364 F.Supp.3d 9 (D.D.C. 2019)

5. *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016)

6. *Farah v. Esquire Magazine, Inc.*, 863 F.Supp.2d 29 (D.D.C. 2012)

7. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)

8. *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012)

9. D.C. Code § 16-5501 *et seq.*
   a. D.C. Code §16-5501
   b. D.C. Code § 16-5502

10. Council of the Dist. of Columbia, Report of Cmte. On Pub. Safety and the Jud. On Bill 18-893 (Nov. 18, 2010)

11. ASA public statement, available at https://theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions

12. ASA Statement of National Council, available at https://theasa.net/node/4804

13. Nathan Thrall, "How the Battle Over Israel and Anti-Semitism is Fracturing American Politics," N.Y. Times Magazine, Mar. 28, 2019, available at https://www.nytimes.com/2019/03/28/magazine/battle-over-bds-israel-palestinians-antisemitism.html?searchResultPosition=27

14. New York Times Editorial Board, "Curbing Speech in the Name of Helping Israel," New York Times, Dec. 18, 2018, available at https://www.nytimes.com/2018/12/18/opinion/editorials/israel-bds.html?searchResultPosition=16

Respectfully submitted,

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I certify that a true copy of the foregoing was served via the Court's electronic filing service, this 6th of May 2019, upon:

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What Does the Boycott Mean?

What Does the Boycott of Israeli Academic Institutions Mean for the ASA?

1) Who is calling for the boycott?

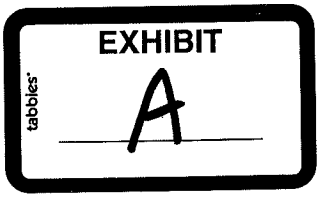
This boycott is called for by Palestinian civil society, including academics. The boycott is part of a larger movement, BDS, which stands for Boycott, Divestment, and Sanctions.

In 2004, the International Court of Justice issued an advisory opinion that the wall Israel built on Palestinian territory was illegal. In 2005, a majority of Palestinian civil society groups and organizations organized together in protest against Israel's violations of Palestinian human rights. These organizations have called for non-violent tactics of boycotts, divestments, and sanctions against Israeli academic and cultural institutions. As with South Africa, Israel's system of racial discrimination, at all institutional levels, constitutes apartheid as recognized by international law under the 2002 Rome Statute of the International Criminal Court.

The American Studies Association is one of several academic associations that have been asked to participate in a boycott of Israeli academic institutions. The Association for Asian American Studies already voted in Spring 2013 to support this boycott.

2) Why boycott Israeli academic institutions?

Israeli academic institutions function as a central part of a system that has denied Palestinians their basic rights. Palestinian students face ongoing discrimination, including the suppression of Palestinian cultural events, and there is sanctioning and ongoing surveillance of Palestinian students and faculty who protest Israeli policies. Israeli universities have been a direct party to the



annexation of Palestinian land. Armed soldiers patrol Israeli university campuses, and some have been trained at Israeli universities in techniques to suppress protestors.

3) Why is this issue relevant to the American Studies Association?

The ASA is an organization that supports the protected rights of students, scholars, and peoples everywhere to freedoms of expression, thought, and movement. The ASA has long played an important role in critiquing racial, sexual, and gender inequality in the United States. It condemned apartheid in South Africa and urged divestment from U.S. corporations with operations there. It has condemned anti-immigrant discrimination in Arizona and in other states. It has spoken out in support of the Occupy movement, and of the human dignity and rights of the economically disenfranchised.

In addition, the United States is the world's strongest supporter of Israel, providing the majority of Israel's military and foreign aid, and providing political support for settlement expansion. As a U.S.-based organization, the ASA condemns the United States' significant role in aiding and abetting Israel's violations of human rights against Palestinians and its occupation of Palestinian lands through its use of the veto in the UN Security Council.

By responding to the call from Palestinian civil society for an academic boycott of Israeli institutions, the ASA recognizes that 1) there is no effective or substantive academic freedom afforded to Palestinians under the conditions of Israeli occupation; and that 2) Israeli institutions of higher learning are a party to Israeli state policies that violate human rights. The National Council's decision to honor the call for the Academic Boycott of Israeli institutions is an ethical stance, a form of material and symbolic action. It represents a principle of solidarity with scholars and students deprived of their academic freedom and an aspiration to enlarge that freedom for all, including Palestinians.

4) What does the boycott mean for the ASA?

The ASA understands boycott as limited to a refusal on the part of the ASA in its official capacities to enter into formal collaborations with Israeli academic institutions, or with scholars who are

expressly serving as representatives or ambassadors of those institutions (such as deans, rectors, presidents and others), or on behalf of the Israeli government, until Israel ceases to violate human rights and international law.

We are expressly not endorsing a boycott of Israeli scholars engaged in individual-level contacts and ordinary forms of academic exchange, including presentations at conferences, public lectures at campuses, and collaboration on research and publication. U.S. scholars are not discouraged under the terms of the boycott from traveling to Israel for academic purposes, provided they are not engaged in a formal partnership with or sponsorship by Israeli academic institutions. The academic boycott of Israeli institutions is not designed to curtail dialogue. Rather, it emerges from the recognition that these forms of ordinary academic exchange are often impossible for Palestinian academics due to Israeli policies. We also recognize that there are inherent difficulties in parsing these distinctions, and that ASA members will want to engage in discussion about guidelines for action.

As a large member organization representing divergent opinions, the National Council further recognizes the rights of ASA members to disagree with the decision of the National Council. The Council's endorsement of the resolution recognizes that individual members will act according to their conscience and convictions on these complex issues. As an association that upholds the principle of academic freedom, the ASA exercises no legislative authority over its members. By contrast, it is a civil offense for scholars within Israel to endorse this boycott.

5) Would Israeli scholars be permitted to participate in the ASA conference or to be invited to my campus to speak in general, even if they relied on Israeli university funding?

Yes. This boycott targets institutions and their representatives, not individual scholars, students, or cultural workers who will be able to participate in the ASA conference or give public lectures at campuses, provided they are not expressly serving as representatives or ambassadors of those institutions, or of the Israeli government.

*In accordance with the "yes" answer immediately above, Israeli academics attended our 2014-2016 conventions and are on the program for our 2017 convention. The ASA will not prohibit

anyone from registering or participating in its annual conference.

6) Would ASA members be permitted to work with Israeli scholars, Palestinian scholars in Israel, and/or collaborate with Palestinian research institutions in Israel?

Under most circumstances, yes. The academic boycott does not seek to curtail dialogue between U.S. and Israeli scholars. Collaboration on research and publications between individual scholars does not fall under the ASA boycott. However, the boycott does oppose participation in conferences or events officially sponsored by Israeli universities. Routine university funding for individual collaborations or academic exchanges is permitted.

In general, the ASA recognizes that members will review and negotiate specific guidelines for implementation on a case-by-case basis and adopt them according to their individual convictions.

7) What is required for an Israeli university to no longer be subject to the boycott?

The boycott is designed to put real and symbolic pressure on universities to take an active role in ending the Israeli occupation and in extending equal rights to Palestinians. The international boycott, divestment, and sanctions movement has called for a boycott (http://www.usacbi.org/mission-statement/) to be in effect until these conditions are met.

8) Is the academic boycott a violation of academic freedom?

Like other academic organizations, including the American Association of University Professors (AAUP), the ASA unequivocally asserts the importance of academic freedom and the necessity for intellectuals to remain free from state interests and interference as a general good for society. Over the years, the ASA has passed several resolutions in support of intellectual freedom. In our view, the academic boycott doesn't violate academic freedom but helps to extend it. Under the current conditions of occupation, the academic freedom of Palestinian academics and students is severely hampered, if not effectively denied. Palestinian universities have been bombed, schools have been closed, and scholars and students deported. The ordinary working conditions for Palestinian academics and students are severely constrained by restrictions on movement to and from work, on international travel, and by discriminatory permit systems. Israeli scholars critical of their

country's policies also face sanction since it is a civil offense for scholars in Israel to endorse the boycott. The goal of the academic boycott is to contribute to the larger movement for social justice in Israel/Palestine that seeks to expand, not further restrict, the rights to education and free inquiry.

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Civil Division

SIMON BRONNER, et al., **Plaintiffs,** **v.** **LISA DUGGAN, et al.,** **Defendants.**	**Civil Action No. 2019 CA 001712 B** **Judge Robert R. Rigsby**

ORDER

UPON CONSIDERATION of the Motion to Dismiss under the Anti- SLAPP Act, filed on behalf of Defendants, American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, and upon consideration of any opposition thereto and the record herein, it is hereby this ___ day of _____, 2019

ORDERED, that the Motion is hereby GRANTED; and further

ORDERED, that the above-captioned Complaint is hereby dismissed with prejudice as to these Defendants; and further

ORDERED, that Defendants shall submit an Attorneys' Fees Affidavit and supporting documentation by _____, 2019.

_____

Judge Rigsby
Superior Court for the District of Columbia

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES KUPFER, and MICHAEL BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, JOHN F. STEPHENS, STEVEN SALAIT A, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No.: 2019 CA 001712 B Judge Robert R. Rigsby Next Court Date: June 14, 2019, 10:00 a.m. Event: Hearing on Special Motion to Dismiss

SPECIAL MOTION TO DISMISS OF DEFENDANTS KAUANUI AND PUAR PURSUANT TO D.C. CODE §16-5501, et. seq., DECLARATION OF MARK ALLEN KLEIMAN IN SUPPORT THEREOF

1. Introduction and Summary of Argument

Plaintiff have sued eight scholars, an academic executive, and an academic association because they do not like their politics. Although Plaintiffs admit that nearly the exact same case was dismissed by Judge Contreras in the United States District Court, they tell *this* Court only a half-truth. Judge Contreras did much more than dismiss the case for failure to meet the amount-in-controversy requirement for diversity jurisdiction. He also ruled that the plaintiffs were "ineligible to proceed derivatively under District of Columbia law" and that "they fail to state cognizable *ultra vires* claims. Accordingly the Court will dismiss Plaintiffs' derivative claims and *ultra vires* claim." *Bronner v. Dugan*, 249 F.Supp.3d 27, 32 (D.D.C. 2017). Although Plaintiffs have not scrupled to admit this, they are collaterally estopped from pursuing the derivative claims of the 1st, 2nd, 3rd, 4th, 5th, 9th, and 12th causes of action. [1]

Should this Court find that any causes of action survive, Kehaulani and Puar will demonstrate that they arise from acts in furtherance of their right of advocacy on public issues (D.C. Code § 16-5502(b)), and that plaintiffs cannot demonstrate they are likely to proceed on the merits.

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[1] Kehaulani and Puar join in the arguments advanced by their co-defendants. Kehaulani and Puar also object to being forced to file this motion when many allegations have been concealed from them. Kehaulani and Puar have yet to be served with the actual complaint. The have only a *redacted* complaint – (and not even that since eleven paragraphs are missing entirely – with only one line of text for each such "paragraph". Plaintiffs have not blacked out text – they have simply not even written it yet. If the Court grant plaintiffs leave to insert eleven paragraphs' worth of new matter that means that defendants have not been served with the actual complaint. We would argue that this failure of service means that our forty-five days in which to file an anti-SLAPP motion under 16-5502(a) would only begin to run when we are served with the actual complaint, rather than one with placeholders for hidden allegations we cannot yet address, and would ask leave of this Court to file a complete Special Motion to Dismiss once we have the full complaint.

Defendants have sought to be succinct. Yet faced with a 37,000-word complaint that takes 118 pages and 354 paragraphs, cannot adequately adequately argue both prongs of the Special Motion to Dismiss, that (a) the claims against them arise from acts in furtherance of their right of advocacy on public issues; and (b) why plaintiffs cannot demonstrate they are likely to proceed on the merits within the Court's page limitations. This Special Motion to Dismiss fully sets forth why the first prong of the motion is satisfied. This brief then enumerates and briefly summarizes each of the defendants' arguments about why the second prong, plaintiffs' inability to prove they will prevail on the merits is satisfied, with a more complete argument set forth in the accompanying Motion to Dismiss Pursuant to Local Rule 12(b)(6).

2. Defendants Were Sued Because of Political Activities and Speech Around Palestine / Israel and the Proper Approach to Achieving Justice – a Matter of Public Interest

Defendants have been sued because of their political activities. They stand accused of running for office, helping allies get elected, and arguing for their organization to take a political position about Palestine. This was already a hotly debated topic when President Carter wrote *Peace, Not Apartheid*.[2] The debate has continued. In 2010 General David Petraeus testified before the Senate Armed Services Committee :

> Israeli-Palestinian tensions often flare into violence and large-scale armed confrontations. The conflict foments anti-American sentiment, due to a perception of U.S. favoritism for Israel. Arab anger over the Palestinian question limits the strengt and depth of U.S. partnerships with governments and peoples in the AOR and weakens the legitimacy of moderate regimes in the Arab world. Meanwhile, al-Qaeda and other militant groups exploit that anger to mobilize support. The conflict also gives Iran influence in the Arab world through its clients, Lebanese Hizballah and Hamas.

[2] James Earl Carter, *Peace, Not Apartheid* (2006).

Statement of General David H. Petraeus, U.S. Army Commander U.S. Central Command on the Posture of U.S. Central Command 16 Mar. 2010, p. 12 [Exhibit A attached hereto]

Similarly, Marine Corps General Jim Mattis, shortly after stepping down from the same position in 2013, warned that the United States was paying a security price "every day", warning that continued settlement construction was liable to turn Israel into an apartheid state, concluding "That didn't work too well the last time I saw it practiced in a country."[3]

This conflict, and the repeatedly observed similarity between Israel and South Africa has prompted many scholars and activists to adopt the tactic that contributed so strongly to the end of apartheid in South Africa – a campaign of boycott, divestment, and sanctions, or BDS. The BDS campaign has grown to the point that the Netanyahu government considers it a "major strategic threat to Israel", with the Israeli government devoting at least $25 million to combatting it in the United States and Europe.[4] [Exhibit C]. This has led to a systematic and well-financed assault on academic freedom wherever it involves speech supporting justice for Palestine. A joint report of the Center for Constitutional Rights and Palestine Legal has documented numerous smear campaigns, efforts to fire or muzzle professors, legal attacks on protected speech, and bogus civil right complaints.[5] [Exhibit D]. The political fight has now spread across the nation, with many

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[3] Barak Ravid, "Former U.S. General: Settlements Liable to Turn Israel Into an Apartheid State" Haaretz, July 25, 2013 (Exhibit B), available at https://www.haaretz.com/.premium-u-s-pays-price-for-mideast-conflict-1.5312651, last visited May 5, 2019.

[4] Sophie McNeil, "BDS: Israeli Government Vows to Fight International Sanctions Movement, Labelling it a 'Strategic Threat'". Australian Broadcasting Company, June 9, 2015, (Exhibit C), https://www.abc.net.au/news/2015-06-09/israeli-government-vows-to-fight-bds/6533092, visited May 5,2019

[5] "The Palestine Exception to Free Speech: A Movement Under Attack in the US." (Exhibit D) https://ccrjustice.org/the-palestine-exception, last visited May 5, 2019.

states passing laws prohibiting anyone who contracts with a state or receives a state benefit from supporting boycott efforts. These laws have been repeatedly struck down. See, *Koontz v. Watson* 283 F.Supp.3d 1007 (D.Kan. 2018); *Jordahl v. Brnovich* 336 F.Supp.3d 1016 (D. Ariz. 2018); *Amawi v. Pflugerville Indep. School Dist.*, Nos. 1:18-CV-1091-RP and 1:18-CV-1100-RP, 2019 U.S. Dist. LEXIS 70208 (W.D. Tex).

3. The ASA's Proud Tradition of Free Speech and Principled Action is Attacked

Plaintiffs forget, and would have this Court forget, that the Association is not a profitmaking business, and that not every decision is about maximizing income or minimizing costs. As an academic association profoundly concerned with American culture and values the ASA has had a long history of making decisions very like the boycott resolution, even where those decisions entered national or international politics and even where they may have cost the Association some money. In 1998 the ASA supported an NAACP initiative to boycott certain hotel chains[6]. In 2002 the ASA announced it would not site meetings in California or Washington, two states which had passed initiatives outlawing affirmative action. In 2004 the ASA announced that it would heavily favor unionized hotels for its meetings and would add "labor disputes" as grounds for cancelling hotel contracts. In 2005 the ASA criticized the Cuban government for imposing travel restrictions on academicians. In 2006 the ASA passed a resolution calling for an end to the U.S. war in Iraq.[7] In 2010 the ASA declared that it would no longer hold meetings at Hyatt

[6] This and the examples which follow are all on the ASA's website at either https://theasa.net/about/advocacy/resolutions-actions/actions or https://theasa.net/node/4899, each last visited on May 5, 2019.

[7] This resolution, if put into action, would have required Congressional action and efforts to influence legislation as surely as the resolution Plaintiffs complain of.

hotels until all organizing issues with all unions at any Hyatt property had been resolved. In 2015 the ASA opposed the ban the UAE had imposed on an American researcher. In 2015 the ASA notified the State of Georgia that it would suspend plans to locate an upcoming annual meeting in Atlanta if the state passed a threatened "Religious Freedom Restoration Act" which would have invoked religious grounds to excuse discrimination against the LGBTQ communities and Muslims. In 2015 the ASA declared its opposition to all state legislation allowing the carrying of concealed weapons on college campuses. In 2016 the ASA declared it would not site meetings in North Carolina if that state passed the "bathroom ban" legislation which had been proposed targeting transgender students. In 2016 the ASA declared it would speak out forcefully against attacks on academic freedom in Turkey. In 2016 the ASA declared its opposition to the Dakota Access Pipeline.

The ASA has a history of outspoken involvement in issues involving freedom and social justice, even where the issues directly implicated legislation and even where the ASA's positions could cost it significant money. None of these have led to suits accusing the ASA or its officers of placing political interests above the interests of the ASA or its members.

4. <u>The ASA and Its Volunteers Are Attacked for Exercising Their Right to Speak</u>

Generally, most of the claims against Puar and Kehaulani rest on the theory that they and others somehow "packed" key Committee and Board positions within the ASA to pass a boycott resolution. Yet Plaintiffs admit that the issue was ultimately referred to the general membership for a referendum (Complaint, ¶¶102-104), and that the boycott resolution passed by a more than

2:1 margin.[8] Although plaintiffs struggle mightily to complain about what information the membership received, the sheer size of the landslide makes the entire "covert takeover" story seem quite irrelevant to the vote's outcome. It is nonetheless clear that Puar has been attacked for books she has written, (Complaint, ¶¶58-59), her alleged efforts to 'sneak' onto ASA's Nominating Committee, (Complaint ¶61), and getting allies to stand for election (Complaint ¶60). Even if they were all true, these allegations amount only to garden variety politicking. Kehaulani is likewise attacked for the National Council "packing" scheme (Complaint ¶¶68, 336) despite the Council's essential irrelevance to the landslide membership vote in favor of the boycott resolution.

5. Plaintiffs Cannot Demonstrate a *Likelihood* of Success on the Merits

Once defendants have made a *prima facie* showing that the suit against them "arises from an act in furtherance of the right of advocacy on issues of public interest" (D.C. Code § 16-5502(b) the plaintiffs have the burden of proving a likelihood of success.

Plaintiffs cannot meet this burden because:

(1) Plaintiffs are collaterally estopped from burdening this Court with an effort to relitigate derivitative claims and *ultra vires* claims by Judge Contreras' ruling in *Bronner v. Dugan*, 249 F.Supp.3d 27, 32 (D.D.C. 2017).

(2) Plaintiffs' personal claims against Puar and Kauanui are barred by the applicable statute of limitations D.C. Code § 12–301. With a bare handful of exceptions which are not pertinent here, §12-301 establishes a three-year statute of limitations for personal injury claims.

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[8] ASA public statement, available at https://theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions.

(3) Plaintiffs cannot demonstrate that they are likely to overcome the immunity defendants are afforded under the federal Volunteer Protection Act, 42 U.S.C. §1450.

(4) Plaintiffs cannot demonstrate a likelihood they will prevail on their allegations of aiding and abetting. First, the "aiding and abetting" theory has never been accepted in the Superior Court. Second, plaintiffs utterly fail to establish who the alleged "primary wrongdoer" is whom Kauanui and Puar aided and abetted. Third, plaintiffs cannot demonstrate that these defendants had actual knowledge of a specific breach of any alleged fiduciary duty. Fourth, Plaintiffs fail to establish any reasonable inference that Kauanui's or Puar's actions substantially assisted a primary wrongdoer in harming plaintiffs; and cannot even establish a probable link between defendants' actions and any harm the plaintiffs have actually suffered.

(5) Plaintiffs have not plead facts demonstrating that their claims are facially plausible;

(6) Plaintiffs cannot show that Puar's candidacy for the Nominating Committee breached any fiduciary to them.

(7) Plaintiffs cannot show that Puar's service on the Nominating Committee breached any fiduciary to them.

(8) Plaintiffs cannot show that Kauanui's candidacy for the National Council breached any fiduciary to them.

(9) Plaintiffs cannot show that Kauanui's service on the National Council Committee breached any fiduciary to them.

6. CONCLUSION

Bringing derivative and *ultra vires* claims in Superior Court while failing to disclose that these exact same claims were dismissed with prejudice by Judge Contreras only serves to highlight why this case epitomizes a SLAPP suit. It should be dealt and dismissed.

Dated: May 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on May 6, 2019 a copy of the foregoing **SPECIAL MOTION TO DISMISS OF DEFENDANTS KAUANUI AND PUAR PURSUANT TO D.C. CODE §16-5501, et. seq., DECLARATION OF MARK ALLEN KLEIMAN IN SUPPORT THEREOF** served by electronic means through CaseFileXpress filing system, which sends notification to counsel of record who have entered appearances.

/s/ Richard R. Renner

Richard R. Renner

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, et al., **Plaintiffs,** **v.** **LISA DUGGAN, et al.,** **Defendants.**	**Civil Action No. 2019 CA 001712 B** **Judge Robert R. Rigsby** **Next Event: Initial Scheduling Conference, June 14, 2019**

MOTION TO DISMISS ON BEHALF OF DEFENDANTS AMERICAN STUDIES ASSOCIATION, LISA DUGGAN, SUNAINA MAIRA, CURTIS MAREZ, CHANDAN REDDY, JOHN STEPHENS AND NEFERTI TADIAR

COME NOW the Defendants, American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, by and through the undersigned counsel, and pursuant to Rule 12(b)(6) of the Superior Court Rules of Procedure, hereby move to dismiss the above-referenced Complaint for failure to state a cause of action upon which relief might be granted.

Pursuant to Rule 12-I, the undersigned hereby affirms that on May 6, 2019, an e-mail was sent to Plaintiffs' counsel, seeking consent for this motion. Plaintiffs declined to consent, thereby necessitating the filing of this motion.

Although the Complaint is overlong, its essential allegations can be briefly stated. In 2013, ASA adopted a Resolution in favor of the call for boycotts, divestment and sanctions ("BDS") against Israeli institutions (Plaintiffs call the Resolution the "Academic Boycott"). Plaintiffs believe that this Resolution was misguided. In 2016, Plaintiffs filed a complaint in the U.S. District Court for the District of Columbia, *Bronner, et al. v. Lisa Duggan, et al.*, 1:16 cv

00740 (RC) (D.D.C.) ("the Federal Action"), which was litigated for nearly three years before it was dismissed for lack of subject matter jurisdiction. That case is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit. Any further factual allegations will be discussed below.

A. Standard for a Motion to Dismiss

The standard for granting a motion to dismiss is well-established: in considering a motion under Rule 12(b)(6), the Court must accept as true all well-pleaded allegations, and may consider any documents attached to such complaint. However, legal conclusions and general allegations need not be accepted by the Court. *In re Estate of Barfield*, 736 A.2d 991 (D.C. 1999). Moreover, a well-pleaded complaint must "tender more than naked assertions devoid of further factual enhancement." *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 709 (D.C. 2013) (internal quotations omitted), *citing Bell Atlantic Corp. v. Twombly*, 550 US 544, 570, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). The statute of limitations may be raised on a motion to dismiss. *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C. 2008).

B. Plaintiffs' Claims Are Time-Barred

For all but a handful of causes of action, none of which are relevant here, the statute of limitations in the District of Columbia is three years. *See* D.C. Code § 12–301. The instant lawsuit was filed on March 25, 2019; thus, Plaintiffs' claims must have accrued no earlier than March 25, 2016. As the Complaint makes clear, however, the vast majority of Plaintiffs' claims accrued in 2012 and 2013, well outside the applicable limitations period.

Count One claims breach of fiduciary duty arising out of "material misrepresentations and omissions to members, when seeking election to the National Council and approval of the Academic Boycott" (¶ 262). The Academic Boycott was approved in December, 2013 (¶ 139), so any "misrepresentations" must have occurred then. None of the Defendants were elected to either the Nominating Committee or the National Council after 2015: Puar elected in 2010 to the Nominating Committee (¶ 58); and Duggan elected President in 2013 (¶ 55). Kauanui and Maira were elected to National Council in 2013 (¶ 90). Marez was elected to the National Council in July 2012 (¶ 19); Maira, in June 2013 (¶ 21); Reddy in 2012 (¶ 23); Kauanui, in July 2013 (¶ 24); and Salaita, in July 2015 (¶ 26). To the extent that there were any misrepresentations when the Defendants were seeking election, they were all made before or during 2015, and these claims are time-barred.

Count Two seeks damages for "diverting the funds, membership list … and other assets of [ASA]", " manipulating the nomination and voting process …" and "subverting the interests and resources of [ASA] …" in order to pass the Resolution (¶ 266). These actions all occurred in 2013, when the Resolution was adopted. Although Plaintiffs claim that monies were withdrawn from the Trust Fund in 2016 to cover "at least in part, expenses related to the Academic Boycott and decline in revenue" (¶ 163), this was the result of a decision made in 2014 (¶ 193). Again, these claims are time-barred.

Count Three seeks injunctive relief for the failure to nominate candidates for National Council who were "representative of the diversity of the association's membership". Allegedly, the push to nominate USACBI members to the National Council occurred in 2010 (¶ 58) through

2013 (¶ 62). There is no allegation of any such manipulation after those years.[1] Certainly, any complaint about the nomination process between 2010 and 2013 is time-barred.

Count Four seeks injunctive relief for "Defendants' decision to freeze the [ASA] membership rolls as of November 25, 2013" (¶ 281). That is the only occurrence alleged where the membership rolls were frozen, and it lies far outside the three-year statute of limitations. Count Five seeks injunctive relief for alleged "efforts to influence Israeli legislation" (¶ 290), which constituted a "violation of the Statement of Election from approximately July 2013 until at least June of 2015" (¶ 291). By its own terms, this claim is time-barred.

Counts Six and Seven claims that the Resolution was improperly adopted, both because of illegal vote procedures (¶ 302) and because of a lack of quorum (¶ 307). That Resolution was adopted in December, 2013 (¶ 139), and any voting improprieties occurred then – well outside the three-year limitation period. Similarly, Count Eight claims that Mr. Barton was denied the right to vote on the Resolution. Again, that election was held in 2013, and there is no other allegation that Mr. Barton sought to vote on anything else (¶¶ 127, 128). This claim, too, is time-barred.

Count Nine claims damages for waste arising out of the "use of [ASA] resources to advocate, conduct a vote on, declare enacted, and then support the Academic Boycott …" (¶ 327). The advocacy for and announcement of the election of the Resolution occurred in 2012 and 2013; by 2015 at the latest, the Association was allegedly withdrawing funds from the Trust Fund to pay for expenses related to the Resolution (¶ 189). As with the other claims, this claim is time-barred.

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[1] Professor Salaita is the only individual alleged to have been elected after 2013; his solitary presence on the National Council, regardless of his political persuasions, could not be a hindrance to "diversity."

Finally, Count Twelve alleges that Maira, Kehaulani, and Puar "stack[ed] the National Council with members …" who would support the Resolution (¶ 347), while Salaita was involved in support of the Resolution (¶ 348) and Stephens authorized "large expenditures … in furtherance of the Academic Boycott … [and] to change the bylaws to allow for large withdrawals from the ASA Trust Fund." (¶ 349, 351). Mr. Stephens also assisted in removing Mr. Bronner as editor of the Encyclopedia (¶ 352, 353). Since the Academic Boycott vote was in 2013 and the National Council was allegedly "stacked" in 2012, while the plan to pay for expenses to defend the Resolution was alleged to have been formulated in 2013 and 2014, these are all time-barred. Only some of the events concerning Bronner arguably occurred after 2015.

For each of these Counts – One through Nine, and Twelve – all of the events complained of occurred well before March 2016, and are thus time-barred. The only events that allegedly occurred in or after 2016 were those involving Bronner's status as Editor of the Encyclopedia. Every other claim is time-barred on its face.

The existence of the Federal Action has no effect here. As the Court of Appeals has stated, "once a suit is dismissed, even if without prejudice, the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing." *Stewart-Veal v. District of Columbia*, 896 A.2d 232, 237 (2006). Nor can the concept of "continuing violation" save the Plaintiffs' claims. The only possible continuing behavior one could read into the allegations in the Complaint would be the Association's refusal to abandon the Resolution (even though not specifically alleged).[2] "The mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations." *Jones v. Howard Univ.*,

[2] Again, this excludes any allegations regarding Bronner's status as editor of the Encyclopedia.

574 A.2d 1343, 1346 (D.C. 1990); *Molovinsky v. Monterey Cooperative, Inc.*, 689 A.2d 531, 534 (D.C. 1997).

Nor does federal law toll the running of the limitations periods. As the Supreme Court has noted, "When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement … the district court, beyond all question, has original jurisdiction over that claim … [and the court] can turn to the question whether it has a … basis for exercising supplemental jurisdiction over the other claims in the action." *Exxon Mobil Corp. v. Allapattah Svces, Inc.*, 545 U.S. 546, 559, ___ S.Ct. ___, ___ L.Ed.2d ___ (2005). "When district courts dismiss all claims independently qualifying for the exercise of federal jurisdiction, they ordinarily dismiss as well all related state claims." *Artis v. District of Columbia*, ___ U.S. ___, 138 S.Ct. 594, 597, 199 L.Ed.2d 473 (2018).

28 U.S.C. § 1367(d) permits for tolling for "any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a) …" § 1367 thus applies only where the federal complaint presents *both* claims for which there is original jurisdiction *and* closely-related claims which otherwise should be brought in state court. *See*, *e.g.*, *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1058 (D.C. 2014) (§ 1367 tolled supplemental state-law claims where plaintiff filed a "RICO" action in federal court); *Stevens v. Arco Mgt. of Washington, D.C., Inc.*, 751 A.2d 995 (D.C. 2000) (where Federal Tort Claim Act count was dismissed for lack of subject matter jurisdiction, § 1367(d) tolled the statute of limitations for the state law claim).

By the plain language of this provision, the tolling period does not affect claims that were originally brought under the federal court's original jurisdiction. *See*, *e.g.*, *Long v. Forty Niners Football Co., LLC*, 33 Cal.App.5th 550, 244 Cal. Rptr. 887, 894 (Ct. App. 2019) (§ 1367(d) has

no applicability where the case was filed under diversity jurisdiction and the federal court did not exercise supplemental jurisdiction over any of plaintiff's claims); *Parrish v. HBO & Co.*, 85 F. Supp. 2d 792, 796 (S.D. Ohio 1999) (the legislative history of the statute intended that it would only apply to supplemental claims); *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011) ("§ 1367(d) applies only where a federal court declines to exercise supplemental jurisdiction over state law claims after dismissing the federal claims").

The Plaintiffs here did not even seek to invoke the supplemental jurisdiction of the federal court for any of their claims.[3] Nor did the District Court exercise supplemental jurisdiction over any of the Plaintiffs' claims; on the contrary, it found that it lacked original jurisdiction over the entirety of Plaintiffs' causes of action. There were, therefore, no state law claims over which the federal court exercised supplemental jurisdiction. 28 U.S.C. § 1367(d) does not apply, and no tolling period applies to save these claims.

The purpose of 28 U.S.C. § 1367 is to promote judicial efficiency, and to protect "a plaintiff disinclined to litigate simultaneously in two forums [from choosing] between forgoing either her federal claims or her state claims." *Artis v. District of Columbia*, *supra* 138 S.Ct. at 607; *see also Gudenkauf v. Stauffer Communications, Inc.*, 896 F.Supp. 1082, 1084 (D.Kan. 1995) (*cited in Arco Mgt.*, *supra* 751 A.2d at 1002). The statute was not intended, however, to save a plaintiff from the ramifications of his voluntary choice of forum. The District of Columbia has longed rejected any doctrine of equitable tolling. *See Namerdy v. Generalcar*, 217 A.2d 109, 113 (D.C. 1966); *Huang v. D'Albora, M.D.*, 644 A.2d 1, 4 (D.C. 1994). Thus, where a plaintiff's suit in the U.S. District Court was dismissed because of lack of complete diversity

[3] Indeed, their position in the federal court continues to be on appeal that the U.S. District Court has original diversity jurisdiction over all the claims in their Complaint.

between the parties, his subsequent suit in the Superior Court was properly dismissed as time-barred. *Curtis v. Aluminum Assn.*, 607 A.2d 509 (D.C. 1992).

Plaintiffs chose to seek original jurisdiction for all their claims in the federal court, and have continued to seek access to that forum, even in light of immediate challenges to the court's jurisdiction. Neither § 1367 nor the law in the District of Columbia can save their lawsuit from the three-year statute of limitations.

C. Plaintiffs' Derivative Claims Are Also Barred By Collateral Estoppel

In addition to the claims being time barred, all derivative claims are also barred by collateral estoppel. A derivative action, by definition, seeks redress for a wrong to the corporation primarily, and to the shareholder (or, here, the member) only secondarily. *See Flocco v. State Farm Mut. Auto Ins. Co.*, 750 A.2d 147, 151 (D.C. 2000); *see also* 12B Fletcher Cyc. Corp. ¶ 5908. In 2017, the Plaintiffs' derivative claims in the Federal Action were dismissed for failure to comply with D.C. Code § 29-411.03. Specifically, the Court found that Plaintiffs had only given two days' notice to the ASA National Council before filing suit, rather than the statutorily-mandated ninety days, and that Plaintiffs had failed to demonstrate that a demand on the National Council would be futile. *See Bronner, et al. v. Duggan*, 249 F. Supp. 3d 27, 42 – 47 (D.D.C. 2017). In the same opinion, the Court found that it had subject matter jurisdiction over the case; its dismissal of Plaintiffs' derivative claims was thus a ruling on the merits.

Collateral estoppel applies where "(1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." *Wilson v. Hart*, 829 A.2d 511, 514 (D.C. 2003). Even where a complaint is dismissed in the federal

court for lack of subject matter jurisdiction, collateral estoppel still applies to those issues which were necessarily decided by the court. *Keene Corp. v. U.S.*, 591 F.Supp. 1340, 1346 (D.D.C. 1984). The dismissal of the derivative claims was essential to the 2019 determination that the U.S. District Court lacked subject-matter jurisdiction, for without the derivative claims, Plaintiffs could not meet the $75,000 damages threshold for diversity jurisdiction. The dismissal of Plaintiffs' derivative claims, therefore, was fully decided and sufficiently essential to the final judgment to be barred by collateral estoppel.

Notwithstanding the fact that the federal case is now on appeal, the District Court's dismissal acts to preclude any and all derivative claims that Plaintiffs might raise in this lawsuit. *See Jordan v. Wash. Metro. Area Transit Auth.*, 548 A.2d 792, 795 n.4 (D.C. 1988) (the pendency of an appeal does not alter the effect of the judgment or order from which the appeal is taken); *see also El-Amin v. Virgilio*, 251 F.Supp.3d 208, 211 (D.D.C. 2017) ("an order is 'final' for *res judicata* purposes even though it is pending on appeal"). Thus, any claim in this litigation for damages incurred by the Association, as opposed to the individual Plaintiffs, should be dismissed as barred by collateral estoppel.

Furthermore, any claim for corporate waste is derivative in nature. *See Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir., 1984) (Claims of corporate mismanagement must be brought on a derivative basis because no shareholder suffers a harm independent of that visited upon the corporation). Regardless of whether Plaintiffs couch their claims under Count Nine as individual damages or damages to the Association, any claim for corporate waste has already been barred by the U.S. District Court's ruling.

The vast majority of the Counts in the Complaint clearly seek to vindicate rights of the American Studies Association, and to recover damages on its behalf, rather than for the

individual Plaintiffs. Specifically, Counts One, Two, Four, Five, Nine and Twelve all seek to recover those damages suffered by ASA. Count Three seeks not only "reputational damages" for the Plaintiffs but also damages for ASA's "decreased revenues". Counts Six and Seven (alternative counts), seek main an order invalidating and vacating the Resolution. To the extent that these Counts seek damages allegedly incurred by the Association, those are derivative in nature, and are barred by collateral estoppel.

D. Plaintiffs' Claims for *Ultra Vires* Action Must Fail as a Matter of Law

Counts Three, Four and Five all assert claims of *ultra vires* activity: specifically, that Defendants acted unlawfully by: (1) failing to adequately provide for diversity in the National Council (Count Three); (2) freezing the membership rolls before the vote on the Resolution (Count Four); and (3) engaging in activity designed to "influence legislation" (Count Five). Each of these counts should be dismissed on the statute of limitations. They also fail for separate reasons: the actions complained of are not *ultra vires*.

Corporate actions deemed *ultra vires* are those "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation." *Welsh v. McNeil*, 162 A.3d 135, 150 n. 43 (D.C. 2017); *see also Bronner*, *supra* 249 F.Supp.3d at 47. Thus, while the phrase is often confused with "acts … exercised without complying with required procedure" (*Welsh*, *id.*), the concept is separate from a mere misuse of corporate power. In order for the act to be *ultra vires*, it must be expressly prohibited by statute or by-law. None of the acts alleged in Counts Three through Five meet that requirement.

Count Three claims that "the candidates [for election in ASA] were not 'representative of the diversity of the association's membership.'" Complaint, ¶271. Like any other contract provision, Section 2 of the Constitution is interpreted according to its plain language.

Abdelrhman v. Ackerman, 76 A.3d 883, 887 (D.C. 2013) (interpretation of contract is a question of law; granting motion to dismiss on basis of contract interpretation); *Clark v. Mutual Reserve Fund Life Assoc.*, 14 App. D.C. 154 (1899) (corporate constitution and bylaws are part of the contract between the corporation and its members). Thus, the phrase "the diversity of the association's membership" in Article VI, Section 2 of the Constitution must be read according to its normal, reasonable meaning.

The lack of "diversity" that Plaintiffs allege has nothing to do with the race, creed, color, national origin, geographical allegiance, or even gender or sexual preference of any of the candidates for, or elected officials on, the National Council or Executive Committee – all those factors which normally go into the concept of "diversity."[4] On the contrary: Plaintiffs are upset because by 2013, "six of the ten continuing voting members of the National Council were USACBI Endorsers." (¶ 62). Of the nearly infinite ways that human beings could differ from one another, Plaintiffs have seized upon this question and elevated it to a position of importance. To claim that "diversity" on the National Council required nominating candidates with different viewpoints on the Israel/Palestine conflict is unreasonable, if not absurd. Certainly, there is nothing in the D.C. Non-Profit Corporation Act or in the Bylaws which requires that members of the National Council hold differing viewpoints of global politics in a Board of Directors. The Defendants' alleged actions at Count Three, therefore, cannot be *ultra vires*.

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[4] *See also* Bylaws, Article VIII ("Conventions"), Section 4, which provides as follows:

> . . . The chair(s) when preparing recommendations for Committee members shall choose the best qualified members consistent with reasonable representation of the major fields of American Studies scholarship and the **diversity of the association's membership in order to maintain a balance of age, racial, ethnic, regional, and gender participation**. (Emphasis added)

Count Four asserts that the Defendants acted *ultra vires* in freezing the voting rolls before the vote on the Resolution, thus "freezing out" Barton (Complaint, ¶281). However, the ASA Constitution, Article 2, Sections 2 and 3 provide as follows:

> Sec. 2. Any member whose dues are six months in arrears shall be dropped from the rolls. Members who are so dropped may be reinstated at any time by the payment in advance of one year's dues.
> Sec. 3. Only individual members in good standing shall have the right to vote or hold office in the association.

There is nothing in the Constitution – or in the Bylaws – to suggest that a lapsed membership must be reinstated ***immediately*** upon payment, nor that all the prerequisites of membership must, automatically and unequivocally, be reinstated upon payment of dues.

It boots nothing for Barton to allege that ASA's "long-standing practice" was to allow lapsed members to vote immediately upon reinstatement; in order for an act to be *ultra vires*, it must violate an express provision of the governing documents. Nothing in either the Constitution or the Bylaws expressly prohibits a refusal to allow a lapsed member to vote immediately upon payment of past dues, and Count Four must fail as a matter of law.

Finally, Count Five asserts that the Resolution was *ultra vires* because it amounts to "efforts to influence Israeli legislation." See Complaint ¶¶145-152. This improperly equates the political activity of outside organizations with the Resolution itself. Plaintiffs begin by describing the demands of organizations known as USACBI and PACBI on the Israeli government. They complain that the demands would "require dramatic change in Israeli law." Complaint, ¶145. They then assert that the ASA "Boycott adopts the platform of USACBI and PACBI;" they come to this conclusion not on the basis of the language of the Resolution, but rather on the basis of "certain emails between the individual defendants." Complaint, ¶148.

"Therefore," Plaintiffs boldly conclude, the Resolution is an attempt to influence Israeli legislation. ¶149. Such a conclusory *non sequitur* cannot stand.

Plaintiffs also assert that the ASA impermissibly committed resources to influencing U.S. legislation. ¶¶153-156. Plaintiffs allege that legislatures responded to the Resolution with proposed laws to prohibit funding to the ASA and others who promote such boycotts. The activity of the ASA and Defendants in response to that legislation was, as the Complaint itself points, out, self-defense. This sort of activity has been exempted from the definition of "propaganda" or "attempt[s] to influence legislation" by the IRS, consistent with the common-sense concept that an entity should not be prohibited from defending itself.[5]

E. Counts Ten and Eleven Must Fail as a Matter of Law

Counts Ten and Eleven both deal with the Association's alleged failure to renew Bronner's contract as Editor of the Encyclopedia of American Studies. Specifically, the individual Defendants allegedly made disparaging comments about Bronner because of his opposition to the Resolution – i.e., in 2013 and 2014 (¶¶ 203, 204). "As early as 2014", Defendants decided they would not renew Bronner's contract (¶ 227), and in 2015, Duggan informed him that there would be "a call for proposals for a new home for the Encyclopedia" (¶ 229). Although Defendants "struggled over the language", that call was never sent out (¶¶ 230, 233). On January 5, 2017, Professor Holland was announced as the new Editor (¶ 235). Plaintiffs further contend that, in November 2016, the Bylaws were amended to remove "the editor of the Encyclopedia of American Studies" as an *ex officio* member of the National Council

[5] I.R.C. §4945 exempts from the definition of taxable expenditures any that are made "in connection with an appearance before, or communication to, any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation …" 26 U.S.C. § 4945 (e)(2). The IRS has, through General Counsel Memorandum 34289 concluded that this section applies to 501(c)(3) organizations.

(¶ 245); this was done, they allege, in order to prevent Bronner from re-pleading his derivative claims in the U.S. District Court (¶¶ 249 – 253).

This last contention can be dealt with briefly. The U.S. District Court did not dismiss the derivative claims on procedural grounds; on the contrary, those claims were dismissed with prejudice because Plaintiffs had utterly failed to provide the notice required under § 29-411.03. *Bronner, et al. v. Duggan*, *supra* 249 F. Supp. 3d at 42 – 47. Regardless of whether the Editor remained a member of the National Council, Plaintiffs' derivative claims were still doomed.

The alleged disparaging comments, as well as the failure to issue a call for proposals, all happened between 2014 and 2015, and as such are time-barred.[6] The only event that arguably falls within the applicable limitation period would be the decision in 2016 not to renew. Bronner's contract. However, according to the Complaint, this decision had already been made in 2014 (*see* ¶ 238), so the events in 2016 were only the effects of that decision – and thus would be equally time-barred. *See Molovinsky v. The Monterey Cooperative, Inc.*, *supra* 689 A.2d at 535 ("[T]he mere failure to right a wrong … cannot be a continuing wrong …").

Most importantly, however, the failure to renew the contract cannot give rise to any cognizable claim, because Bronner had no expectation of renewal. Attached as Exhibit 1 hereto is the applicable contract, which Plaintiffs make reference to but don't attach to the Complaint or set forth any of its key provisions; they in fact belie his claims.[7] That contract clearly states that it shall run from January 1, 2014 through December 31, 2016. Further, "[u]pon expiration or termination of this Agreement for any reason, ASA shall have the right to appoint a new Editor-

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[6] In fact, the federal pleadings never mentioned these alleged attempts to get rid of Mr. Bronner, so not even a reliance on 28 U.S.C. § 1367 could save these claims.

[7] Because this document is central to Plaintiffs' claims under Counts Ten and Eleven, it may be considered without converting this motion to one for summary judgment. *See Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1025 (D.C. 2007).

in-chief … without further obligation to the Editor." Exhibit 1 at 4, ¶ 11. Once the Agreement terminated, ASA had plenary authority *not* to renew it. After December 31, 2016, Bronner had no ongoing contractual relationship with ASA. As such, none of the Defendants could have interfered with the contract, and his claims must fail as a matter of law. *Paul v. Howard Univ.*, 754 A.2d 297, 309 (D.C. 2000) (where plaintiff had "no contractual right to indefinite tenure" her claims for intentional interference were properly dismissed).

Although Mr. Bronner claims "[t]here is no question that his contract should have been renewed" (¶ 331), this contention cannot be taken seriously. The Federal Action was filed in April, 2016, which meant that when the Agreement expired, he had been actively suing ASA for eight months. That fact alone would justify not renewing the Agreement. If nothing else, a decision to remove Bronner from his position as Editor while he was in contentious litigation with ASA would lie well within the business judgment of the National Council.

CONCLUSION

As discussed above, the vast majority of Plaintiffs' claims are time-barred, and because there were no claims in the Federal action that fell within the court's supplemental jurisdiction, the statute of limitations has not been tolled. Moreover, all of Plaintiffs' derivative claims are barred by collateral estoppel. Further, and alternatively, the actions that Plaintiffs claim were *ultra vires* were not expressly prohibited by any statute or bylaw, and thus were no actionable. Finally, Bronner had no contractual expectation that his position as Editor would be renewed, and thus there could be no claim for either tortious interference with contract or "aiding and abetting" the breach of that contract. For these reasons, Defendants respectfully request that the Complaint be dismissed with prejudice for failure to state a claim upon which relief might be granted.

POINTS AND AUTHORITIES

1. *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013)

2. *Artis v. District of Columbia*, ___ U.S. ___, 138 S.Ct. 594, 597, 199 L.Ed.2d 473 (2018)

3. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)

4. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007).

5. *Bronner, et al. v. Duggan*, 249 F. Supp. 3d 27, 42 – 47 (D.D.C. 2017)

6. *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011)

7. *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1025 (D.C. 2007)

8. *Clark v. Mutual Reserve Fund Life Assoc.*, 14 App. D.C. 154 (1899)

9. *Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir., 1984)

10. *Curtis v. Aluminum Assn.*, 607 A.2d 509 (D.C. 1992)

11. *El-Amin v. Virgilio*, 251 F.Supp.3d 208, 211 (D.D.C. 2017)

12. *Exxon Mobil Corp. v. Allapattah Svces, Inc.*, 545 U.S. 546, 559, ___ S.Ct. ___, ___ L.Ed.2d ___ (2005)

13. *Flocco v. State Farm Mut. Auto Ins. Co.*, 750 A.2d 147, 151 (D.C. 2000)

14. *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1058 (D.C. 2014)

15. *Gudenkauf v. Stauffer Communications, Inc.*, 896 F.Supp. 1082, 1084 (D.Kan. 1995)

16. *Huang v. D'Albora, M.D.*, 644 A.2d 1, 4 (D.C. 1994)

17. *In re Estate of Barfield*, 736 A.2d 991 (D.C. 1999)

18. *Jones v. Howard Univ.*, 574 A.2d 1343, 1346 (D.C. 1990)

19. *Jordan v. Wash. Metro. Area Transit Auth.*, 548 A.2d 792, 795 n.4 (D.C. 1988)

20. *Keene Corp. v. U.S.*, 591 F.Supp. 1340, 1346 (D.D.C. 1984)

21. *Long v. Forty Niners Football Co., LLC*, 33 Cal.App.5th 550, 244 Cal. Rptr. 887, 894 (Ct. App. 2019)

22. *Molovinsky v. Monterey Cooperative, Inc.*, 689 A.2d 531, 534 (D.C. 1997)

23. *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C. 2008)

24. *Namerdy v. Generalcar*, 217 A.2d 109, 113 (D.C. 1966)

25. *Parrish v. HBO & Co.*, 85 F. Supp. 2d 792, 796 (S.D. Ohio 1999)

26. *Paul v. Howard Univ.*, 754 A.2d 297, 309 (D.C. 2000)

27. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 709 (D.C. 2013)

28. *Stevens v. Arco Mgt. of Washington, D.C., Inc.*, 751 A.2d 995 (D.C. 2000)

29. *Stewart-Veal v. District of Columbia*, 896 A.2d 232, 237 (2006)

30. *Welsh v. McNeil*, 162 A.3d 135, 150 n. 43 (D.C. 2017)

31. *Wilson v. Hart*, 829 A.2d 511, 514 (D.C. 2003)

32. 28 U.S.C. § 1367(d)

33. D.C. Code § 12–301

34. Rule 12(b)(6), Superior Court Rules of Procedure

35. Rule 12-I, Superior Court Rules of Procedure

36. 12B Fletcher Cyc. Corp. ¶ 5908

37. I.R.C. §4945

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES KUPFER, and MICHAEL BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, JOHN F. STEPHENS, STEVEN SALAIT A, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No.: 2019 CA 001712 B Judge Robert R. Rigsby Next Court Date: June 14, 2019, 10:00 a.m. Event: Hearing on Special Motion to Dismiss

MOTION TO DISMISS COMPLAINT

Defendants Kehaulani Kauanui and Jasbir Puar submit this Motion to Dismiss the Second Amended Complaint pursuant to Rule 12(b)6). As more fully set forth in the accompanying Memorandum in Support of Motion to Dismiss, which is incorporated herein by reference, the Complaint should be dismissed in its entirety.

Dated: May 6, 2019

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES KUPFER, and MICHAEL BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, JOHN F. STEPHENS, STEVEN SALAIT A, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No.: 2019 CA 001712 B Judge Robert R. Rigsby Next Court Date: June 14, 2019, 10:00 a.m. Event: Hearing on Special Motion to Dismiss

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION AND SUMMARY OF ARGUMENT

In a 350-paragraph complaints Plaintiffs recycle claims that have been dismissed with prejudice by Judge Contreras of the U.S. District Court and allege that eight scholars caused the American Studies Association (ASA) to breach a contract with them, engage in the *ultra vires* prohibition of their right to vote, spend a "substantial part" of the ASA's money on influencing unspecified legislation, and wasted corporate assets by engaging in advocacy.

Stripped of its rhetoric, plaintiffs complain Puar, Kauanui, and others plotted to "stack" key ASA committees and boards with political allies to sneak a politically controversial resolution past the membership. Yet these great conspirators, ignored their power to behave underhandedly and instead put the resolution up for a referendum to the general membership – where it passed by more than a 2:1 margin. Undaunted by facts, plaintiffs accuse Kauanui and Puar of violating wholly fictitious "duties" before they ever were on ASA boards or committees, and the abusing their powers to cause harm. Kauanui and Puar join in the arguments of their codefendants the other 12(b)(6) motions.[1]

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[1] They also protest plaintiffs' refusal to serve them with the actual complaint. Although neither Kauanui nor Puar has **ever** objected to plaintiffs filing the full complaint, Plaintiffs have not given it to them. We have only a *redacted* complaint – (and not even that since eleven paragraphs are missing entirely – with only one line of text for each such "paragraph". Plaintiffs have not blacked out text – they have simply not even written it yet. If the Court grant plaintiffs leave to insert eleven paragraphs' worth of new matter that means that defendants have not been served with the actual complaint. This failure of service should afford defenants (should we need it) another opportunity to move for dismissal of whatever complaint Plaintiffs ultimately deign to file. We would argue that this failure of service means that our time in which to file a 12(b)(6) motion should only begin to run when we are served with the actual complaint, rather than one with placeholders for hidden allegations we cannot yet address, and would ask leave of this Court to file a complete Motion to Dismiss once we have the full complaint.

2. **PLAINTIFFS ARE COLLATERALLY ESTOPPED FROM WASTING THIS COURT'S TIME WITH MANY CAUSES OF ACTION WHICH HAVE ALREADY BEEN DISMISSED**.

Although Plaintiffs admit that nearly the exact same case was dismissed by Judge Contreras in the United States District Court, they tell *this* Court only a half-truth. Judge Contreras did much more than dismiss the case for failure to meet the amount-in-controversy requirement for diversity jurisdiction. He also ruled that the plaintiffs were "ineligible to proceed derivatively under District of Columbia law" and that "they fail to state cognizable *ultra vires* claims. Accordingly the Court will dismiss Plaintiffs' derivative claims and *ultra vires* claim." *Bronner v. Dugan*, 249 F.Supp.3d 27, 32 (D.D.C. 2017). Although Plaintiffs have not scrupled to admit this, they are collaterally estopped from pursuing the derivative claims of the 1st, 2nd, 3rd, 4th, 5th, 9th, and 12th causes of action, which should be summarily dismissed.

3. **PLAINTIFFS' PERSONAL CLAIMS AGAINST PUAR AND KAUANUI ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS D.C. CODE § 12–301.**

The statute of limitations for the causes of action plaintffs have advanced is three years. Since the complaint was filed on March 25, 2019, the any cause of action which accrued before March 25, 2016 is barred by the statute of limitations.

Count One alleges breach of fiduciary duties of loyalty, care, candor and good faith by making or causing to be made material misrepresentations and omissions to members, when seeking election to the National Council and approval of the Academic Boycott" (Complaint, ¶ 262). The boycott resolution was approved in January, 2013. Kauanui was elected to the

National Council in July, 2013. (Complaint, ¶ 24). Puar was *never* on the National Council. These claims are time-barred.

Count Two seeks compensation for diversion of funds, membership lists and unspecified other assets. Although plaintiffs allege that trust fund money was withdrawn in 2016, the withdrawal was pursuant to a 2014 decision. (Complaint, ¶ 193). These claims are also time-barred.

Count Three again concerns an alleged lack of ideological diversity among people who were nominated to the National Council. Yet the nominations about which plaintiffs complain occurred before the boycott resolution was passed. (Complaint, ¶¶ 58, 62). This cause of action is also time barred.

Count Four concerns a one-time decision made in November, 2013 (Complaint, ¶281) so it is also time barred.

Count Five concerns alleged election violations which occurred between 2013 and 2015 (Complaint, ¶¶ 290, 291) and is also time barred.

Count Nine alleges waste of ASA resources which last occurred in 2015. (Complaint, ¶ 190) and as such, is time barred.

Count Twelve is an otherwise problematic omnibus "aiding and abetting" count. The only thing which occurred as late as 2016 is the nonrenewal of plaintiff Bronner's contract. All of the other claimed misdeeds and damages are time barred.

Kauanui and Puar join the the ASA's additional arguments regarding the statute of limitations.

4. **THE VOLUNTEER PROTECTION ACT IMMUNIZES DEFENDANTS**

A. **The Federal Volunteer Protection Act Applies to Kauanui as a Director and to Puar as a Member**

The Nonprofit Corporation Act of 2010 affords the broadest possible immunity to a nonprofit's Directors, such as Kauanui. §29.406-31(c)(3) makes it clear that nothing in this section "[A]ffects any rights to which the corporation or a director or member may be entitled under another statute of the District **or the United States**". (Emphasis added.) It is thus clear that the rights and protections to nonprofit members and directors ate intended to be cumulative. The District's statute supplements the federal VPA, and does not preempt it.

B. **The VPA's Salutary Purposes Should be Given Broad Effect**.

Suits against volunteers of nonprofit associations imperil the one of the cornerstones of American society, community-based volunteerism. Accordingly, Congress enacted the Volunteer Protection Act to clarify and limit the liability of volunteers and keep this important part of society vigorous and flourishing. 42 U.S.C. §14501(a), (b). The Act provides in general that a volunteer of a nonprofit organization or governmental entity is not liable for harm which he or she caused if the volunteer was acting within the scope of the volunteer's responsibilities at the time of the act or omission, and the harm was caused by mere negligence and not willful or reckless misconduct intended to harm an individual or individuals. 42 U.S.C. §14503.

C. **Defendants Are Immune from Suit Under the VPA Because There Are No Allegations That They Engaged in Intentional and Willful Misconduct Toward Any *Individual*.**

To be sure, the Volunteer Protection Act (VPA) does not immunize harm "caused by

willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the *individual* harmed by the volunteer . . ..". 42 U.S.C. §14503(a)(3) (emphasis added). In contrast to D.C. Code §29-406.31(d), however, the plain language of the federal exception renders it inapplicable to alleged misconduct directed against a corporation or organization *itself*. §14503(a)(3) creates an exception to immunity under the VPA only for conduct directed at an individual; there is no such exception for conduct directed at the volunteer's own corporation or nonprofit entity.

The VPA was intended to immunize volunteers from liability for harm they may have committed – unless it was committed "on behalf of the organization or entity" and directed at a third party, rather than the organization or entity itself. *See* §14503(a); §14503(b) ("Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization . . . against any volunteer of such organization or entity."); §14503(f):

> Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization . . . unless the claimant established by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the right or safety *of the individual harmed.* (Emphasis added).

The plain language of the VPA makes it clear that is intended to immunize all volunteer conduct other than intentional misconduct directed towards individuals or harm to the organization or entity on behalf of which they volunteer. Therefore, assuming *arguendo* that

plaintiffs had adequately alleged that Dr. Kauanui or Dr. Puar had intended to harm the ASA, this intent is still insufficient to bring the alleged action outside the scope of the VPA because there is no allegation that Defendants acted with malice to any individuals, and certainly not to the specific individual plaintiffs who now claim they were harmed.

D. **Plaintiffs Have Not Alleged Facts Making It Plausible That Either Dr. Puar or Dr. Kauanui Acted Outside of the Scope of Their Responsibilities**.

Plaintiffs' promiscuous use of the phrase "ultra vires" does not imbue their allegations with magical properties. Dr. Puar had no fiduciary duty while she was running for a seat on the Nominating Committee and plaintiffs' claim that as a candidate in 2010 she concealed an intention to support a Resolution is belied by the plaintiffs' own chronology (Section 4 of this brief, *supra*.) Once elected, her only duty under the Bylaws was to see that as a whole, the nominees maintained "a balance of age, racial, ethnic, regional, and gender participation" (Section 5, *supra*.)[2] There are no facts alleging she acted beyond the scope of her position in any way.

Dr. Kauanui similarly had no duty until she took her position as an elected member of the National Council and in any event, she was entirely forthright about her leadership role in the United States Academic Committee for the Boycott of Israel. (Section 6, *supra*). Although the plaintiffs do not like what she did once she was on the Council, there are no facts suggesting that she acted beyond the scope of her position. We have enumerated six instances before she joined

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[2] Dr. Puar does not agree that her presence as a mere volunteer on an ASA Committee establishes that she had a fiduciary duty, but she recognizes that this limited question is not amenable to resolution on a motion to dismiss.

the Council in which the ASA took positions on issues of social justice which might, and in some cases certainly *would*, cost it money, or which required involvement with legislation. We have identified another six that came up during her term as a National Council member. There is no basis to suggest that her acts were beyond the scope of her position. (Section 7, *supra.*)

E. **Because Volunteer Immunity Under 42 U.S.C. §14503 is Analogous to Qualified Immunity Under 42 U.S.C. §1983, it is Appropriate to Resolve the Immunity Question via a 12(b)(6) Motion**.

Although immunities may be plead as affirmative defenses, a defendant's entitlement to immunity should be resolved at the earliest stage possible so that, as here, the costs and expense of trial are avoided where a defense is dispositive. *McDonald v. Salazar*, 831 F.Supp. 3d 313, 325-326 (D.D.C. 2011).[3] *Accord*, *Ford v. Mitchell*, 890 F.Supp.2d 24, 32 (2012). The Circuit laid the groundwork for this reasoning in *International Action Center v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) in which Judge Roberts applied the immunity analysis to the facts as plead and held that dismissal based on qualified immunity was appropriate..

Similarly, the facts as plaintiffs have plead them do not come close to suggesting that either Dr. Kauanui or Dr. Puar acted outside the scope of their responsibilities or harbored any intent to harm the plaintiffs as individuals. The repeated cries of "*ultra vires*" are mere legal conclusions masquerading as facts. Where plaintiffs have failed to allege facts demonstrating an intent to harm them by means of acts beyond the scope of their volunteer responsibilities,

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[3] We need not claim that volunteers with nonprofit organizations fulfill a function as important as government officials. However, where a defendant can show a facial right to immunity, the social policy of shielding that defendant from personal monetary liability and harassing litigation argues for the earliest possible resolution of such claims.

dismissal is appropriate. *Probert v. Family Centered Servs. of Alaska*, 2011 U.S. Dist. LEXIS 161545, at *4-7 (D. Alaska Mar. 11, 2011)

At the very least, volunteer immunity under 42 U.S.C. § 14503 makes it impossible for plaintiffs to prove that they will prevail on liability for purposes of defeating defendants' anti-SLAPP motion.

5. **PLAINTIFFS HAVE NOT PLEAD FACTS SUFFICIENT TO MAKE FACIALLY PLAUSIBLE CLAIMS.**

Although a motion to dismiss requires that the plaintiffs' factual allegations be taken as true, the complaint "must contain sufficient factual matter … to state a claim to relief that is plausible on its face." *BEG Invs. L.L.C. v. Alberti*, 85 F.Supp.3d 15, 24-25 (D.D.C. 2015) (internal quotation marks and citations omitted). A claim is facially plausible only when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks omitted). "A court need not accept a plaintiff's legal conclusions as true, nor must a court presume the veracity of legal conclusions that are couched as factual allegations." *Id.*, (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, (2007). Conclusory allegations of law and unwarranted inferences are insufficient to avoid dismissal under this standard. *Id.* at 569. Where facts are merely *consistent with* possible misconduct a court may reject claims as implausible and thus dismiss a complaint. *BEG Invs. L.L.C. v. Alberti* at 43-44 (holding that bad faith is notoriously easy to allege and difficult to prove, and that more must be provided before the doors to discovery swing open.) Applying this standard, we shall show that the plaintiffs simply have not plead facts sufficient to make out plausible claims.

6. **PLAINTIFFS HAVE NOT PLED FACTS SUFFICIENT TO ESTABLISH A CLAIM THAT KAUANUI OR PUAR ARE LIABLE FOR HAVING AIDED AND ABETTED ANY OTHER TORTIOUS CONDUCT**

Plaintiffs never admit that District of Columbia courts have never accepted"aiding and abetting" as even a viable legal theory. *Chen v. Bell-Smith*, 768 F.Supp.2d 121, 140 (D.D.C. 2011), *Flax v. Schertler*, 935 A.2d 1091, 1108-08 (D.C. App. 2007). As a case of first impression in the District, Plaintiffs offer a fatally weak basis for assessing such a theory.

It is black letter law in such cases that only someone who provides substantial assistance to the primary violator or primary tortfeasor may be liable for aiding and abetting. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 168-169 (1994), *Halberstam v. Walsh*, 472, 487-488 (D.C. Cir. 1983; *Amtrak v. Veolia*, 791 F.Supp.2d 33, 56 (D.C. Cir. 2011). So who is the "primary violator" in this case? We know this matters because in *Amtrak* the nature and extent of the primary violator's relationship with the supposed aider-abettor was a major factor in determining whether the aider provided "substantial assistance" to the violator. *Id.*, at 52.

Yet plaintiffs *never* identify a "primary violator" who Puar or Kauanui are accused of assisting. They never say *who* Puar aided or *who* Kauanui abetted. Plaintiffs have made up a tale about "collusion" as a means of tarring everyone they can think of – and without having to establish facts that would make this plausible. This speculation is far too weak a bridge to support a a novel legal theory.

A second threshold question for liability is "What did they know? And when did they know it." In an aiding-abetting case "the complaint must allege the defendant's actual knowledge of the specific breach of fiduciary duty for which it seeks to hold the defendant[s]

liable." A general allegation that Puar or Kauanui knew that other unnamed persons were involved in wrongful or illegal conduct is not enough. *Casey v US Bank,* 127 Cal.App.4th 1138, 1152, 2005 Cal.App. LEXIS 462.

Plaintiffs have failed to set out facts that lead to a reasonable inference that either defendant substantially assisted a primary tortfeasor who acted wrongfully and harmed any of the plaintiffs. Throughout 37,000 words of invective, three of the plaintiffs (Rockland, Kupfer, and Barton) have said not a word about any individual injuries they sustained. Bronner's alleged injury is that a contract he had with the ASA was not renewed after it expired. First, Bronner simply glides past the question of whether there even *is* a claim for "tortious non-renewal of contract". Second, the Complaint repeatedly refers to things "Defendants" did or "Defendants" did not do – without the slightest hint about who stands accused of what. As but one example, many of the key internal decisions are made by ASA's 6-member Executive Committee. (Complaint, ¶50.) Even at the peak of what Plaintiffs breathlessly characterize as "stacking the deck", the defendants never even has a majority on the Executive Committee. At most they had three of the six members. (Complaint, ¶¶ 19, 22, 23). Yet Kehaulani, who was never on the Executive Committee and was only one of twenty members of the National Council, somehow bears responsibility for the actions of a Committee she was never on and which the defendants never controlled. It is even more implausible that Puar, who was not even a National Council member somehow bears this responsibility. The idea that Kauanui or Puar controlled the outcome of either Executive Committee *or* National Council decisions requires assumptions so

heroic they deserve a medal.[4] It is the duty of this Court to curb such overheated speculation. "The line between a reasonable inference that may permissibly be drawn by a jury from basic facts and an impermissible speculation is not drawn by judicial idiosyncracies. The line is drawn by laws of logic." *Chapman v. Mayfield*, 329 P.3d 12, 16 2014 Ore.App. LEXIS 775.

7. **PLAINTIFFS HAVE TWICE CONJURED UP NON-EXISTENT DUTIES AND THEN CLAIMED THE DEFENDANTS BREACHED THEM**.

Plaintiffs begin from the flawed premise that Puar and Kauanui breached some fiduciary duty while campaigning for their offices.[5] First, Dr. Puar was never a director, officer, or agent of the American Studies Association. As a mere candidate to become a volunteer member of a committee she did not have a fiduciary relationship with the ASA. Second, nothing Kauanui did before she became an elected member of the ASA's National Council could have violated a fiduciary duty because she had no such duty until she became a member of the Council in July 2013. (Complaint, ¶24.) The threshold requirement for a breach of fiduciary duty claim is the existence of a fiduciary relationship. *Millennium Square Residential Ass'n v. 2200 M. Street LLC.*, 952 F.2d 234, 248 (D.D.C. 2013). Although the District of Columbia's caselaw permits a degree of elasticity in defining such a relationship no case has held that the duty can arise **before** one party reposes trust and confidence in the other. Thus, nothing Puar did or did not say about her candidacy could itself be the basis for any claimed breach of duty.

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[4] Indeed, plaintiffs admit that in the midst of this supposedly successful conspiracy, Kauanui and other boycott supporters had no control and precious little influence over National Council decisions about the boycott itself. (Complaint, ¶194).

[5] If the limited space this in this brief allows, we shall demonstrate that not only is this untrue, but that plaintiffs **know** it is untrue.

Not one speck of authority supports the myth that a fiduciary relationship inheres before a candidate is elected to a corporation's board. The duty arises when one *becomes* an officer. *(12B Fletcher Cyc. Corp.* §5915.10 [2010] holding that a direct action may be brought against an *officer* of a corporation for violations of a duty arising from contract or otherwise *Daley v. Alpha Kappa Alpha Sorority*, 26 A.3d 723, 729-730 (D.C. 2011). Plaintiffs' lard their complaint with misleading citations such as *Willens v. 2720 Wisconsin Avenue Cooperative Association,* 844 A.2d 1126-1136 (D.C. 2004). The defendant in that case was a cooperative association, and in a cooperative, **all** the activities of the association are for the benefit of the cooperative's members. *Brannan v. Stark,* 185 F.2d 871, 881 (D.C. Cir. 1950). The distinction is critical, as Judge Contreras himself pointed out, there is a significant difference between the fiduciary duties the agents of a a cooperative housing association, owe to its members and the duties a nonprofit or other corporation owes to *its* members. *Boomer Dev., LLC v. Nat'l Ass'n of Home Builders of the United States*, 258 F. Supp. 3d 1, 22 n.18 (D.D.C. 2017).

Plaintiffs compound this flaw by disingenuously taking one word (diversity), ripping it from its widely understood and acknowledged context, and repeating it like a magical incantation. (Complaint, ¶¶ 6, 48, 64, 65, 72, 75, 123). Plaintiffs' insistence that under-representation of Zionists somehow violates an imagined rule borders on sophistry. The Constitution and Bylaws of the American Studies Association define "diversity" only once, at Art. VII, §4, as a "reasonable representation of the major fields of American Studies scholarship and the diversity of the association's membership in order to maintain a balance of age, racial,

ethnic, regional, and gender participation."[6] The ASA did not seek to maintain a diversity of interests or viewpoints any more than it sought diversity of height, weight, or dietary preferences. Indeed, a quest for viewpoint diversity would have required the ASA to give 25% of it's positions to Americans who think President Obama was not born in the United States, and 20% to Americans who think he is a Muslim. The Bylaws require no such thing. Plaintiffs are so unable to show an actual breach of duty or *ultra vires* action that they simply make them up.

8. **PLAINTIFFS HAVE NOT, AND CANNOT PLEAD FACTS THAT PLAUSIBLY MAKE OUT A CLAIM FOR WASTE OR MISAPPROPRIATION OF THE ASA'S ASSETS OR USE OF THOSE ASSETS TO SERVE DEFENDANTS' INTERESTS.**

This remarkable allegation is so attenuated as to require a brief review of the law of corporate waste, the claim plaintiffs attach to Count Nine of their jeremiads. The allegation of "corporate waste" must be plead and proven to a very demanding standard. (*Daley v. Alpha Kappa Alpha Sorority*, 26 A.3d at729-730 holding that even allegations that the corporation had wasted nearly half a million dollars [$250,000 in a lump sum payment and $48,000 per year for four years] does not meet this demanding standard.)

> Corporate waste claims must articulate an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which a reasonable person might be willing to trade, and must be egregious or irrational. The essence of a waste claim is the diversion of corporate assets for improper and unnecessary purposes, and to meet that standard, the conduct must be

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[6] Bronner v. Duggan, U.S. District Court D.D.C., Dkt. No. 14-2, filed 06/09/16, Case: 1:16-cv-00740-RC., p. 17.

> exceptionally one-sided. Courts are very deferential to the business judgment of officers and directors of a corporation in decisionmaking, and a claim of waste, even where authorized, will be upheld only where a shareholder can show that the board irrationally squander[ed] corporate assets. If any reasonable person would find that the corporation's decision made sense, the judicial inquiry ends.

Id., (internal quotation marks and citations omitted.)

There is simply no way that the National Council's steps, in which Dr. Kauanui joined, could have been the proximate cause of cognizable corporate waste under this standard.

9. **MISSION IMPLAUSIBLE**

Plaintiffs artfully skirt Rule 11when they allege that "Defendant Jasbir Puar **is** a member of the USACBI Advisory Committee, and **was** a member of the American Studies Association Nominating Committee from July of 2010 through June of 2013." (Complaint, ¶6). This subtle change of tense does not reveal *when* Puar joined the USACBI – or even when she first learned of it. Plaintiffs allege that *they* know what her "true agenda" was – but never disclose why they think they know this. (Complaint, ¶61). Plaintiffs are silent about who, exactly Puar nominated in 2011, and why.

Plaintiffs' claim that "defendants obtained control of the nominations process" and that "[t]he scheme was advanced by defendant Jasbir Puar." (Complaint, ¶6). But Puar was a brand new member of a six-person committee. (See Constitution and Bylaws, Art. IV, §1).[7] Nowhere in this novel-length Complaint do plaintiffs explain how Puar single-handedly controlled the

[7] Bronner v. Duggan, U.S. District Court D.D.C., Dkt. No. 14-2, filed 06/09/16, Case: 1:16-cv-00740-RC., p4.

nomination process. Nowhere do they explain how a new ASA committee volunteer managed to "ensure that only signed supporters of USACBI were nominated for .... President". *Id.* Nor do Plaintiffs suggest that anyone helped her. These telltale phrases about "ensuring" nominations and imposing "this restriction" and a "pledge of allegiance" are hallmark examples of conclusions masquerading as factual allegations, the very kind of artful pleading which *Iqbal* teaches us are "not entitled to the presumption of truth". *Ashcroft v. Iqbal*, 556 U.S. at 679. Although Puar is quite public about her values and her beliefs, Plaintiffs are without even a scrap of evidence that Puar secretly harbored this ingenious plan when she ran for the Nominations Committee. "Implausible" is a polite term for this leap of logic.

10. CONCLUSION

Plaintiffs have tried to conjure duties the defendants to not have and have accused them of ill intent while bereft of facts making such malice plausible. This case should be dismissed.

Dated: May 6, 2019

Respectfully submitted,

/s/ Richard R. Renner

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on May 6, 2019 a copy of the foregoing **MOTION TO DISMISS COMPLAINT** served by electronic means through CaseFileXpress filing system, which sends notification to counsel of record who have entered appearances.

/s/ Richard R. Renner

Richard R. Renner

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, et al., **Plaintiffs,** **v.** **LISA DUGGAN, et al.,** **Defendants.**	**Civil Action No. 2019 CA 001712 B** **Judge Robert R. Rigsby** **Next Event: Initial Scheduling Conference, June 14, 2019**

MOTION TO DISMISS ON BEHALF OF NEFERTI TADIAR

COMES NOW the Defendant, Neferti Tadiar, by and through the undersigned counsel, and pursuant to Rules 12(b)(2) and (6) of the Superior Court Rules of Procedure, hereby moves to dismiss the above-referenced Complaint for lack of personal jurisdiction and for failure to state a cause of action upon which relief might be granted.[1]

Pursuant to Rule 12-I, the undersigned hereby affirms that on May 6, 2019, an e-mail was sent to Plaintiffs' counsel, seeking consent for this motion. Plaintiffs declined to consent, thereby necessitating the filing of this motion.

A. Standard for a Motion to Dismiss

The standard for granting a motion to dismiss is well-established: in considering a motion under Rule 12(b)(6), the Court must accept as true all well-pleaded allegations, and may consider any documents attached to such complaint. However, legal conclusions and general allegations need not be accepted by the Court. *In re Estate of Barfield*, 736 A.2d

[1] The arguments for dismissal herein are made by Defendant Tadiar in addition to those arguments made in the separate Motion to Dismiss filed this date in conjunction with Defendants ASA, Duggan, Maira, Marez, Reddy and Stephens.

991 (D.C. 1999). Moreover, a well-pleaded complaint must "tender more than naked assertions devoid of further factual enhancement." *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 709 (D.C. 2013) (internal quotations omitted), *citing Bell Atlantic Corp. v. Twombly*, 550 US 544, 570, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

B. Argument

The gravamen of the Plaintiff's Complaint is that the membership of the American Studies Association improperly adopted a Resolution at the ASA's 2013 Annual meeting endorsing a boycott of Israeli academic institutions. The Plaintiffs disagree with the terms of the Resolution, and seek to undo it by this action.

Although there are several reasons why the allegations against all Defendants should be dismissed (see the motions to dismiss filed by the other Defendants herein), the purpose of this Motion is to identify additional reasons why the claims against Neferti Tadiar fail. These additional reasons can be succinctly summarized as follows: the allegations identify neither a basis for personal jurisdiction over Neferti Tadiar nor a duty owed by Neferti Tadiar to the Plaintiffs. A review of the unduly-lengthy and unnecessarily-detailed Complaint reveals that the Plaintiffs have sued Professor Tadiar because they consider they consider her a political opponent. This is not sufficient to establish personal jurisdiction or a *prima facie* cause of action.

1. Lack of Allegations Sufficient to Establish Personal Jurisdiction.

In the "Jurisdiction and Venue" section of the Complaint, the Plaintiffs seek to establish personal jurisdiction on the bases that "the Individual Defendants were acting as officers and directors of the American Studies Association," and that the American Studies Association meeting was held in the District of Columbia. Complaint, ¶13. The Complaint is defective in this regard from the outset, because a plaintiff "must establish the court's jurisdiction over each defendant through specific allegations in his complaint." *Elemary v. Holzman*, 533 F. Supp. 2d 116, 121 (D.D.C. 2008). Plaintiffs "may neither 'rely on conclusory allegations' nor 'aggregate factual allegations concerning multiple defendants in order to demonstrate personal jurisdiction over any individual defendant.'" *Holzman*, 533 F. Supp. 2d at 122. Plaintiffs have done precisely that, however.

It is axiomatic that a plaintiff has the burden of establishing personal jurisdiction over a defendant. *Daley v. Kappa Alpha Sorority*, 26 A.3d 723, 727 (D.C. 2011); *Holder v. Haarmann*, 779 A.2d 264, 269 (D.C. 2001). The plaintiff must do so by alleging specific facts connecting the defendant with the forum. *City of Moundridge v. Exxon*, 471 F. Supp. 2d 20, 32 (D.D.C. 2007).

Because Professor Tadiar was, as Plaintiffs recognize, not a resident of the District of Columbia, the Plaintiffs must establish that this Court has jurisdiction over her via the long-arm statute, D.C. Code §13-423. *Family Federation for World Peace v. Moon*, 129 A.3d 234, 242 (D.C. 2015); *Daley*, 26 A3d at 727. That statute provides as follows:

> **(a)** A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia;

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing; or

(7) marital or parent and child relationship in the District of Columbia if:

. . .

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

There are two types of personal jurisdiction – general and specific. A forum may exercise "general" jurisdiction over an individual only where the individual's contacts with the forum have been "continuous and systematic." *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 330-31 (D.C. 2000); *D'Onofrio v. SFX Sports*, 534 F. Supp. 2d 86, 90 (D.D.C. 2008). There are no such allegations in this Complaint.

Specific jurisdiction may be exercised by a court only when contacts sufficient to satisfy due process exist. The pivotal question in this analysis is whether the complaint alleges "some act by which the defendant purposefully avails itself to the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Thompson Hine v. Taieb*, 734 F.3d 1187, 1189 (D.C. Cir. 2013). Contacts with

the forum must result proximately from actions by the defendant himself that create a "substantial connection" with the forum state. *Id., citing Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985). The test for determining whether sufficient minimum contacts exist is not a mechanical, rigid one. Rather, "the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 271 (D.C., 2001), citing *Burger King*.

The only allegations in the Complaint about Defendant Tadiar's actions assert that Tadiar acted as a conduit of communication between non-ASA-members and ASA members about the plans to adopt the Resolution, during the planning for and throughout the annual meeting. ¶ 99. This *de minimis* activity, by someone who is not even an officer or director of the organization, substantially differs from the roles and actions of the defendants in *Daley v. Kappa Alpha Sorority*, 26 A.3d 723 (D.C. 2011). In that case, the plaintiffs had sued the directors of the sorority for managerial misconduct of a District of Columbia entity committed in the District of Columbia during a days-long meeting. Compare also *Family Federation v. Moon*, 129 A.3d 234 (D.C. 2015). In *Family Federation*, plaintiffs brought an action on behalf of the D.C. non-profit religious corporation (UPF) that had been a recipient of funds from the Unification Church until defendant Moon ousted several of the directors of the Unification Church. After the ouster, he allegedly replaced the ousted directors with his own, 'hand-picked' associates. Moon renamed the organization UCI. He then allegedly diverted funds from UCI to himself and to purposes inconsistent with the Unification Church's governing documents. The *Family Federation* court likened the case to *Daley*, and noted that the defendant

directors of the corporation had taken actions that went "to the very essence of the corporation's existence." 129 A.3d at 243. Thus they, like the directors in *Daley*, could "clearly anticipate being hauled into" a District of Columbia court. *Id.*

Daley and *Family Federation* are useful to illustrate the absence of a sufficient contact in this case because those two cases are recent and concern non-profit D.C. corporations. What the instant Complaint presents regarding Neferti Tadiar is far less "substantial" than the bases for jurisdiction against the defendants in *Family Federation* and *Daley*. The defendants in that case were directors of the D.C. corporations, and as such, could reasonably be expect to be hailed to court in the forum where that corporation was resident. As a non-resident volunteer member of a programming committee for the annual meeting, Professor Tadiar presents a substantially different profile for personal jurisdictional purposes. Neferti Tadiar submits the Complaint does not assert acts by her that constitute a "substantial connection" with the District of Columbia, and that hauling her into this court is not consistent with 'fair play and substantial justice.' She accordingly requests that the Complaint be dismissed against her pursuant to Rule 12(b)(2).

2. The Factual Allegations Do Not Establish A Cause of Action Against Neferti Tadiar.

According to the Complaint, the Plaintiffs claim that Professor Tadiar was associated with an organization called USACBI, a group whose ideas Plaintiffs adamantly oppose. Plaintiffs identify Professor Tadiar as a "member of both the Organizing Collective and the Advisory Committee of the USACBI." Complaint, ¶¶20, 42. They allege that she was a member of the programming committee for the American Studies

Association 2013 Annual Meeting, and the American Studies Association Activism and Community Caucus. Complaint, ¶20. She was, according to Plaintiffs, "a leader of the movement for American Studies Association to adopt the USACBI Platform through the Academic Boycott." *Id.* She had, they allege, worked to pass an academic boycott at another organization called the Association for Asian American Studies. Complaint, ¶¶70, 80. They complain that, prior to and before the annual meeting, Professor Tadiar communicated with persons not members of the ASA in organizing the movement to adopt the Resolution. ¶99. The Complaint contains nothing more about Professor Tadiar. She was not, nor is she alleged to have been, a member of the National Council of the ASA.

The Complaint, thus, utterly fails to allege anything that would establish that Neferti Tadiar had any duty to the Plaintiffs, or any contractual relationship with the Plaintiffs, or any authority to authorize any of the allegedly tortious acts identified in the Complaint. The Plaintiffs have improperly and imprecisely grouped her with the other "Individual Defendants," who were at one time or another part of the governing body of the ASA.

None of the Counts of the Complaint identify Neferti Tadiar individually; thus the Counts that are made against "All Defendants" or "Individual Defendants" will be considered herein. Those are as follows:

> Count One: "Breach of Fiduciary Duties Against Individual Defendants by All Plaintiffs (Material Misrepresentation and Omissions in Connection with Elections to Office and Seeking Member Approval of Academic Boycott and Amendment of Bylaws);"
>
> Count Two: "Breach of Fiduciary Duties Against Individual Defendants by All Plaintiffs (Duty of Loyalty and Good Faith, Misappropriation and Misuse of Assets of the American Studies Association);"

Count Three: "Ultra Vires and Breach of Contract Action Against All Defendants by All Plaintiffs (Failure to Nominate Officers and National Council Reflecting Diversity of Membership);"

Count Four: "Ultra Vires Action and Breach of Contract Against All Defendants by All Plaintiffs (Freezing Membership Rolls and Prohibiting Voting);"

Count Five: "Ultra Vires Action and Breach of Contract Against All Defendants by All Plaintiffs (Substantial Part of Activities Attempting to Influence Legislation);"

Count Nine: "Corporate Waste Against All Defendants by All Plaintiffs;"

Count Ten: "Breach of Fiduciary Duty by Plaintiff Bronner and All Plaintiffs Against All Defendants (Removal of Plaintiff Bronner from Position as Editor of the Encyclopedia, Ex Officio Officer, and Member of the National Council);" and

Count Eleven: "Tortious Interference with Contractual Business Relations by Plaintiff Bronner Against the Individual Defendants."

As discussed below, the Plaintiffs' shotgun-style approach to the pleadings in this case fails to state any cause of action against Neferti Tadiar. She had no role in the governance of ASA, and cannot be held liable under the allegations of the Complaint.

Fiduciary Duty Counts (One, Two and Ten)

In order to support a claim for breach of fiduciary duty, the plaintiff must establish that the defendant had a fiduciary duty to them in the first place. *Schapiro, Lifschitz & Schram v. R.E. Hazard*, 24 F. Supp. 2d 66, 74 (D.D.C. 1998). It has been held that officers and directors of a corporation owe fiduciary duties to the corporation and shareholders in maintaining the affairs of the corporation. *Wisconsin Ave. Associates v. 2720 Wisconsin Ave. Corp.*, 441 A.2d 956 (D.C. 1982). But as the Court of Appeals has explained, "the managers of a nonprofit corporation's affairs directors are *conceptually different from members* in a critical respect," in that the directors owe a fiduciary duty to the corporation.

Friends of Tilden Park, Inc. v. D.C., 806 A.2d 1201, 1210 (D.C. 2002) (emphasis added). Members, by contrast, do not.

Neferti Tadiar is not alleged to be, and never was a National Council member. The Complaint alleges that she was a member of the ASA, who served on a committee to program the annual meeting. The allegations of the Complaint do not place her in a position to owe a fiduciary duty to any of the Plaintiffs. The Plaintiffs' conclusory allegations that Professor Tadiar owed them a fiduciary duty are insufficient to meet the requirements of Rule 12. Without more, their claims in Counts One, Two and Ten fail.

***Ultra Vires* Counts (Three, Four and Five)**

In light of the allegations regarding Professor Tadiar's role (or lack thereof) relative to the ASA, the factual allegations of the Complaint fail to establish a necessary element of the claims set forth in these Counts. With regard to Count Three, the factual allegations do not provide the basis for a claim that Neferti Tadiar had any role in the selection of sufficiently "diverse" candidates. Nor is there any factual basis upon which to conclude that she had any participation in – or even authority to participate in – the "freezing" of the voting rolls. Thus Count Four fails. In Count Five, Plaintiffs allege that the Defendants failed to "abide by the Statement of Election" by engaging in acts ostensibly on behalf of the ASA, and in so doing "abusing their power." ¶¶292, 297. Again, the complete lack of any allegation concerning Professor Tadiar's role relative to governance is fatal to the claims. The language of Count Five is directed at persons who may have had authority to commit such acts. Neferti Tadiar, although Plaintiffs consider her a political enemy, was not among them. Count Five fails against her as a matter of law.

Corporate Waste Count (Nine)

Plaintiffs complain in Count Nine about the "Individual Defendants' decision to use American Studies Association resources to conduct a vote on, declare enacted, and then support" the Resolution, and about their failure to apply "reasonable business judgment." ¶ 316. They complain of Defendants' "withdrawals" of money from the Trust Fund. ¶ 317. Again, their failure to provide any factual allegations as to Professor Tadiar's involvement in these alleged actions dooms their claims against her, since she was not in a position to "conduct a vote, . . , declare enacted, . . . support" the Resolution with ASA assets, or to authorize withdrawals from the Trust Fund.

For the preceding reasons, all claims against Neferti Tadiar should be dismissed under Rule 12(b)(6).

POINTS AND AUTHORITIES

1. *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013)
2. *Artis v. District of Columbia*, ___ U.S. ___, 138 S.Ct. 594, 597, 199 L.Ed.2d 473 (2018)
3. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)
4. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007).
5. *Elemary v. Holzman*, 533 F. Supp. 2d 116, 121 (D.D.C. 2008)
6. *Daley v. Kappa Alpha Sorority*, 26 A.3d 723, 727 (D.C. 2011)
7. *Holder v. Haarmann*, 779 A.2d 264, 269 (D.C. 2001)
8. *City of Moundridge v. Exxon*, 471 F. Supp. 2d 20, 32 (D.D.C. 2007)
9. D.C. Code §13-423
10. *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 330-31 (D.C. 2000)
11. *D'Onofrio v. SFX Sports*, 534 F. Supp. 2d 86, 90 (D.D.C. 2008)
12. *Thompson Hine v. Taieb*, 734 F.3d 1187, 1189 (D.C. Cir. 2013)

13. *City of Moundridge v. Exxon*, 471 F. Supp. 2d 20, 32 (D.D.C. 2007)
14. *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985)
15. *Family Federation v. Moon*, 129 A.3d 234 (D.C. 2015)
16. *Schapiro, Lifschitz & Schram v. R.E. Hazard*, 24 F. Supp. 2d 66, 74 (D.D.C. 1998)
17. *Wisconsin Ave. Associates v. 2720 Wisconsin Ave. Corp.*, 441 A.2d 956 (D.C. 1982)
18. *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201, 1210 (D.C. 2002)

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served via the Court's electronic filing service, this 6th of May 2019, upon:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES D. KUPFER, and MICHAEL L. BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, STEVEN SALAITA, JOHN STEPHENS, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No. 2019 CA 001712 B Judge Robert R. Rigsby Civil 2, Calendar 10 Next Court Date: June 14, 2019, 10 a.m. Event: Initial Scheduling Conference

STEVEN SALAITA'S OPPOSED SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO D.C. CODE § 16-5501, *et seq.*, AND IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO SUPER. CT. CIV. R. 12 (b)

Defendant Steven Salaita, by and through the undersigned counsel, and pursuant to the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, and Super. Ct. Civ. R. 12 (b)(1), (b)(2), and (b)(6), hereby moves to dismiss Plaintiffs' Complaint. In support thereof, Dr. Salaita states as follows: Pursuant to Rule 12-I, the undersigned affirms that on May 6, 2019, an e-mail was sent to Plaintiffs' counsel, seeking consent for this Motion. Plaintiffs declined to consent, thereby necessitating the filing of this Motion. Dr. Salaita also adopts and incorporates the arguments put forth in other Defendants' motions to dismiss in this litigation, to the extent not inconsistent with the arguments contained herein.

INTRODUCTION

Dr. Salaita specially moves this Court to dismiss Plaintiffs' Complaint ("Compl.") against him pursuant to the District of Columbia Anti-SLAPP Act of 2010 ("Anti-SLAPP Act"), which requires dismissal where there is "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," unless Plaintiffs "demonstrate that the claim is likely to succeed on the merits". D.C. Code § 16-5502 (b) (2019). Plaintiffs' case against Dr. Steven Salaita is the quintessential Strategic Lawsuit Against Public Participation (SLAPP), aimed at punishing his advocacy on an issue of public interest: boycotts for Palestinian rights.

Plaintiffs' claims fail on numerous grounds. Plaintiffs fail to allege any facts that would support personal jurisdiction over Dr. Salaita (save their knowingly false allegation that he resides in the District of Columbia), or subject matter jurisdiction over the claims of Plaintiffs Rockland, Kupfer, and Barton, who lack standing. Plaintiffs also fail to state any cognizable or timely claim against Dr. Salaita. Plaintiffs' specific allegations expose the reason Dr. Salaita is being targeted here—his outspoken advocacy for the rights of Palestinians and the right to boycott Israel to enforce those rights. Plaintiffs' meritless, harassing lawsuit against Dr. Salaita

should be dismissed pursuant to the District of Columbia Anti-SLAPP Act, and in the alternative, under D.C. Super. Ct. Civ. R. 12 (b)(1), 12 (b)(2), and 12 (b)(6).

STATEMENT OF FACTS

In 2013, the American Studies Association ("ASA") adopted a public Resolution endorsing the call of Palestinian civil society for a boycott of Israeli academic institutions (the "Resolution"). *See, e.g.,* Compl. ¶¶ 4, 5; *see also Boycott of Israeli Academic Institutions*, AM. STUDIES ASS'N (Dec. 4, 2013), https://www.theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions. Defendant Dr. Steven Salaita's term on the ASA's National Council began July 1, 2015, Complaint ¶ 26, long after the 2013 Resolution was adopted and the majority of the conduct complained of took place. *See, e.g.,* Compl. ¶¶ 28-161. Dr. Salaita's term ended June 30, 2018.[1] Compl. ¶ 26.

Plaintiffs incorrectly allege (on "information and belief") that Dr. Salaita is a resident of the District of Columbia. Compl. ¶ 26. Plaintiffs are well aware that Dr. Salaita resides not in D.C., but in the Commonwealth of Virginia: the caption of the Complaint lists his Virginia address, and Virginia is where they served him in this case, and where they served him in 2018 in the federal litigation. Aff. of Service of Summons & Compl., Mar. 27, 2019; Return of Service/Aff. of Summons & Compl. Executed, Apr. 5, 2018, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-0740), *appeal docketed*, No. 19-7017 (D.C. Cir. Mar. 5, 2019), ECF No. 84.

In addition to the paragraph identifying Dr. Salaita as a party, Complaint ¶ 26, the only other three paragraphs in the Complaint that mention Dr. Salaita each explicitly relate to advocacy he conducted on an issue of public interest, before he was even a member of the

[1] Plaintiffs incorrectly allege elsewhere that Dr. Salaita is currently a National Council member. Compl. ¶¶ 26, 46.

National Council. One allegation contains an excerpt from an opinion piece written by Dr. Salaita and published March 1, 2014, prior to his tenure on the National Council, entitled "Anti-BDS activism and the appeal to authority," in which he states that he worked with the United States Campaign for the Academic and Cultural Boycott of Israel (USACBI) "for around five years—closely during the process to pass the American Studies Association resolution." Compl. ¶ 46. That allegation's corresponding footnote contains extraneous information about Dr. Salaita's termination by the University of Illinois due to his tweets criticizing Israel (*see* Compl. ¶ 46 n. 5), tweets that a federal court found were "a matter of public concern" and "implicate every 'central concern' of the First Amendment." *Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1083-84 (N.D. Ill. 2015).

Another allegation states that Stephen (sic) Salaita was on email communications with some defendants when he was part of the USACBI Organizing Collective, also prior to his tenure on the ASA National Council, and that a "subset of the Organizing Collective was involved in 'organizing' the movement to adopt the USACBI Platform and Boycott" at the ASA. Compl. ¶ 99. The last allegation regarding Dr. Salaita states that he "acknowledged publicly that he was heavily involved in the effort to pass the Academic Boycott before he was a member of the National Council," Complaint ¶ 337, apparently referencing the above-mentioned opinion piece. The Complaint goes on to state a legal conclusion that Dr. Salaita's "substantial assistance, also knowing that the Academic Boycott would cause great damage" to the ASA constitutes aiding and abetting breach of fiduciary duty. Compl. ¶ 337. Dr. Salaita is not mentioned in any other allegation in the 343-paragraph Complaint. Plaintiffs have clearly targeted Dr. Salaita only for his advocacy of a boycott of Israel.

The only allegation Plaintiffs make that Dr. Salaita had any responsibility for the events they complain of while he was a National Council member is in the section of the Complaint identifying the parties, alleging that Dr. Salaita "was a member of the National Council" when the ASA's bylaws "were changed to allow large withdrawals" from the ASA's Trust and Development Fund, and "when large withdrawals were taken to cover expenses related to the Academic Boycott." Compl. ¶ 26. Such withdrawals were allegedly taken to defend the ASA against litigation related to the Resolution.[2] Compl. ¶ 175. Plaintiffs do not, however, allege that Dr. Salaita had any personal involvement in amending the bylaws or withdrawing funds to pay Resolution-related expenses, or otherwise misusing ASA assets. Of the dozens of National Council members who served from 2015-2018 (as Dr. Salaita did), or from 2014-2017, 2016-2019, or 2017-2020, and who, therefore, according to Plaintiffs' allegations, could bear the same responsibility as Dr. Salaita, Plaintiffs chose to sue only one in their lawsuit—Dr. Salaita. Compl. ¶¶ 19-27; *see also* Compl., Ex. B, Bylaws of the Am. Studies Ass'n, Art. V § 1. Even Plaintiff Bronner served on the National Council from 2011-2016, albeit as an *ex officio* member. Compl. ¶¶ 14, 198, 243, 331.

Dr. Salaita is not mentioned in any other allegation in the Complaint, including with regards to Plaintiff Bronner's allegations that his contract with the ASA was not renewed at the end of his term as editor of the Encyclopedia of American Studies ("Encyclopedia"), and that the editor position ceased to be an *ex officio* officer and non-voting National Council member. Compl. at Count 10.

[2] Plaintiffs contradictorily allege both that they cannot "determine whether funds were withdrawn" from the ASA Trust Fund to cover Resolution-related expenses, Compl. ¶ 193, and that "it is clear…that the withdrawals from the Trust Fund in 2016 and 2017 did cover Resolution-related expenses to some extent." Compl. ¶ 196 (citing to Compl. ¶¶ 162-171).

On April 20, 2016, Plaintiffs filed a very similar lawsuit against the ASA and some of its members in the U.S. District Court for the District of Columbia. Compl., *Bronner, supra*, 364 F. Supp. 3d 9, ECF No. 1. On March 31, 2017, the District Court (Contreras, J.) granted in part Defendants' Motion to Dismiss, dismissing all Plaintiffs' derivative claims on the grounds that the statutory notice had not been provided to the ASA and because demand was not futile as a matter of law, and also dismissing Plaintiffs' *ultra vires* claim because they failed to allege facts showing that the boycott resolution was expressly prohibited by any statute or ASA bylaw. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 42-50 (D.D.C. 2017). On March 6, 2018, Plaintiffs filed a Second Amended Complaint, adding to their lawsuit four new defendants, including Dr. Salaita, who had joined the ASA National Council *after* adoption of the Resolution. Second Am. Compl., *Bronner*, *supra*, 364 F. Supp. 3d 9, ECF No. 81. In February 2019, the District Court dismissed the lawsuit for lack of subject matter jurisdiction, finding that Plaintiffs lacked standing to seek damages for the ASA's alleged injuries, and that they failed to meet the amount in controversy necessary to pursue their action in federal court. *Bronner*, *supra*, 364 F. Supp. 3d 9. Plaintiffs have appealed the dismissal, and brought this case in Superior Court. Plaintiffs have filed and served a redacted Complaint, and moved to file an unredacted Complaint under seal, which Plaintiffs have not yet seen. Pls.' Mot. to File Unredacted Compl. Under Seal, Mar. 20, 2019.

ARGUMENT

I. THE ANTI-SLAPP ACT APPLIES TO PLAINTIFFS' CLAIMS.

a. The Purpose of the Anti-SLAPP Act.

The District of Columbia's Anti-SLAPP Act provides protections from claims, like those brought by Plaintiffs against Dr. Salaita, which "aris[e] from an act in furtherance of the right of

advocacy on issues of public interest." D.C. Code § 16-5502 (a) (2019). Plaintiffs' lawsuit arises from the ASA Resolution, which is clearly an act in furtherance of advocacy on an issue of public interest. Specifically, Plaintiffs' claims against Dr. Salaita arise from his advocacy in favor of the Resolution. The purpose of the Anti-SLAPP Act is to ensure that defendants have the "'ability to fend off'" lawsuits "'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016), *as amended* (Dec. 13, 2018) (quoting D.C. Council, Report of Comm. on Pub. Safety & Judiciary on Bill 18–893 at 1 (Nov. 18, 2010) ("Report on Bill 18–893"). The D.C. Anti-SLAPP Act's protections are "broad." *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.D.C. 2012), *aff'd sub nom. Farah v. Esquire Magazine*, 407 U.S. App. D.C. 208, 736 F.3d 528 (2013). This lawsuit brought by Plaintiffs, political opponents of boycotts of Israel (*see, e.g.,* Compl. ¶¶ 108, 132, 200, 200 n.11), is a prototypical SLAPP, which the D.C. Legislature intended to address:

> Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially [sic] amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well.

Report on Bill 18–893 at 1.

Once Dr. Salaita shows that the claims arise from an act in furtherance of the right of advocacy on an issue of public interest, Plaintiffs bear a heavy burden in overcoming the protections of the Anti-SLAPP Act: they must show that they are "likely to succeed on the merits" of their claims. D.C. Code § 16-5502 (b) (2019).

A. The Claims against Dr. Salaita Arise from an Act in Furtherance of the Right of Advocacy.

The claims against Dr. Salaita arise out of the ASA's passage of a Resolution endorsing a call to boycott Israeli academic institutions, and Dr. Salaita's advocacy for the boycott. Both of these are acts in furtherance of the right of advocacy under D.C. Code § 16-5501 (1). As described above, the four paragraphs of allegations in this Complaint that mention Dr. Salaita boil down to two allegations: that Dr. Salaita was associated with efforts to pass the ASA's boycott Resolution before he was on the National Council and that he was a member of the ASA National Council when the ASA made expenditures to defend against litigation targeting the ASA for the boycott Resolution. *See supra* Statement of Facts at 2-4.

Like the boycotts at issue in *NAACP v. Claiborne Hardware Co.*, endorsement of a boycott of Israeli academic institutions is "designed to force governmental and economic change and to effectuate rights…." 458 U.S. 886 (1982). The ASA Resolution was widely publicized in public fora. For example, the ASA published on its website the Resolution,[3] a Council Statement on the Resolution,[4] and an FAQ, "What Does the Boycott Mean?"[5] The Resolution itself is therefore protected by the Anti-SLAPP Act as a "written or oral statement made...[i]n a place open to the public or a public forum in connection with an issue of public interest" (D.C. Code § 16-5501 (1)(A)(ii) (2019)) and an "expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501 (1)(B) (2019). *See Abbas v. Foreign Policy Grp., LLC*,

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[3] *Boycott of Israeli Academic Institutions*, AM. STUDIES ASS'N (Dec. 4, 2013), https://www.theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions

[4] *Council Statement on the Resolution*, AM. STUDIES ASS'N, https://www.theasa.net/node/4804 (last visited May 6, 2019).

[5] *What Does the Boycott Mean?*, AM. STUDIES ASS'N, https://www.theasa.net/node/4805 (last visited May 6, 2019).

975 F. Supp. 2d 1, 11 (D.D.C. 2013), *aff'd*, 414 U.S. App. D.C. 465, 783 F.3d 1328 (2015) (a public "website is a 'place open to the public,' because anyone with a working internet connection or access to one can view it."). Likewise, Dr. Salaita's advocacy of boycotts, including the op-ed that Plaintiffs point to, also undeniably qualifies as an act in furtherance of the right of advocacy as an "expression or expressive conduct that involves…communicating views to members of the public" and a "written or oral statement made...[i]n a place open to the public or a public forum in connection with an issue of public interest" D.C. Code §§ 16-5501 (1)(A)(ii), 16-5501 (1)(B) (2019). And finally, defending the Resolution, including by expending funds to defend against lawsuits challenging the Resolution, is protected under the Anti-SLAPP Act as "expression or expressive conduct that involves petitioning the government…in connection with an issue of public interest." D.C. Code §§ 16-5501 (1)(A), (1)(B) (2019). *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). Plaintiffs' claims against Dr. Salaita unequivocally arise from alleged acts in furtherance of the right of advocacy.

B. A Boycott of Israeli Academic Institutions Is An Issue of Public Interest.

Boycotts motivated by a concern for Palestinian rights are unquestionably an issue of public interest. D.C. Code § 16-5501 (3) ("'Issue of public interest' means an issue related to health or safety; environmental, economic, or community well-being…or a good, product, or service in the market place"). An "issue of public interest" includes statements "commenting on or sharing information about a matter of public significance," as opposed to statements "protecting the speaker's commercial interests". *Id.* Stemming from a commitment to "the pursuit of social justice," the ASA Resolution endorsed "the call of Palestinian civil society for a

boycott of Israeli academic institutions" in an effort to advocate for the "well-being, the exercise of political and human rights, the freedom of movement, and the educational opportunities of Palestinians."[6] The Supreme Court has held that a peaceful politically-motivated boycott is protected under the First Amendment, describing it as an "effort to change the social, political, and economic structure of a local environment," *Claiborne*, *supra*, 458 U.S. at 933. Other courts have held that boycotts related to Israel are undeniably an issue of public interest. *See Jordahl v. Brnovich,* 336 F. Supp. 3d 1016, 1047 (D. Ariz. 2018), *appeal docketed,* No. 18-16896 (9th Cir. Oct. 3, 2018) (preliminarily enjoining Arizona law targeting companies that engage in boycotts against Israel which "unquestionably touches on matters of public concern"); *Davis v. Cox,* 180 Wash. App. 514, 531, 325 P.3d 255, 265 (Wash. Ct. App. 2014), *rev'd on other grounds*, 183 Wash. 2d 269, 351 P.3d 862 (Wash. 2015) (granting Anti-SLAPP motion and dismissing case challenging food co-op's decision to boycott Israeli products, finding it was "in connection with an issue of public concern"). *See also Salaita v. Kennedy*, *supra*, 118 F. Supp. 3d at 1084 (tweets criticizing Israel were "a matter of public concern").

C. Plaintiffs Cannot Demonstrate That Their Claims Are Likely to Succeed on the Merits.

The Anti-SLAPP Act requires dismissal if there is "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," unless Plaintiffs "demonstrate that the claim is likely to succeed on the merits". D.C. Code § 16-5502 (b) (2019). This Court should evaluate "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." *Competitive Enter. Inst.*, *supra*, 150 A.3d at 1232. Because

[6] *Boycott of Israeli Academic Institutions*, *supra* note 3.

Plaintiffs are unable to meet this burden with regard to their claims against Dr. Salaita, the Anti-SLAPP Act requires that they be dismissed with prejudice, and that costs be awarded to Dr. Salaita.

Dr. Salaita also moves to dismiss this action pursuant to D.C. Super. Ct. Civ. R. 12 (b)(1) for lack of personal jurisdiction, (b)(2) for lack of subject matter jurisdiction as to Plaintiffs Rockland, Kupfer, and Barton for lack of standing, and (b)(6) for "failure to state a claim upon which relief can be granted," including that most if not all claims are time-barred. D.C. Super. Ct. Civ. R. 12 (b)(1), 12 (b)(2), and 12 (b)(6). To the extent that dismissal is warranted under Rule 12 (b), however, it means that Plaintiffs are not "likely" to succeed, and Dr. Salaita respectfully submits that he is entitled to the additional relief mandated by the Anti-SLAPP Act.

II. PLAINTIFFS' CLAIMS AGAINST DR. SALAITA ARE NOT LIKELY TO SUCCEED AND SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.

Plaintiffs bear the burden of establishing personal jurisdiction over Dr. Salaita. *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001). "In order to meet [their] burden, plaintiff[s] must allege specific facts on which personal jurisdiction can be based; [they] cannot rely on conclusory allegations." *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86, 89 (D.D.C. 2008). Plaintiffs do not allege one single fact to establish personal jurisdiction over Dr. Salaita, leaving aside their false allegation that he resides in the District of Columbia; Dr. Salaita lives in Virginia, as Plaintiffs are aware, given that they served him at his home there.[7] *See* Aff. of Service of Summons & Compl., Mar. 27, 2019; *see also* Va. Code Ann. § 8.01-296 (2018).

[7] In Plaintiffs' federal case, they also alleged that Dr. Salaita resided in the District of Columbia (Second Am. Compl. ¶ 26, *Bronner*, *supra*, 364 F. Supp. 3d 9, ECF No. 81), and then served him at his home in Virginia. *See* Return of Serv./Aff. of Summons & Compl. Executed, *Bronner*, *supra*, 364 F. Supp. 3d 9, ECF No. 84 (the process server's Aff. of Posting the Summons at Dr. Salaita's place of abode in Springfield, Va.). Plaintiffs then took umbrage when Dr. Salaita

To exercise personal jurisdiction, the Court must "determine whether jurisdiction over a party is proper under the applicable local long-arm statute and whether it accords with the demands of due process." *United States v. Ferrara*, 311 U.S. App. D.C. 421, 424, 54 F.3d 825, 828 (1995). Given that Plaintiffs allege no contact that Dr. Salaita has had with the District, they can neither establish general jurisdiction (requiring continuous and systematic contacts), nor can they establish specific jurisdiction, which requires that a "controversy is related to or 'arises out of' a defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (internal quotation omitted).

To establish specific jurisdiction, there must be "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,'" to ensure that jurisdiction is not based solely on random, fortuitous, or attenuated contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In relevant part, the District of Columbia's long-arm statute permits personal jurisdiction over a non-resident defendant "as to a claim for relief arising from the person's…transacting any business in the District of Columbia" or "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia." D.C. Code §§ 13-423 (a)(1); (a)(3) (2019). Jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* that create a

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pointed out that their allegation regarding his residence was false, claiming they did not know when they filed (in 2018). Pls.' Opp'n to Mots. to Dismiss Second Am. Compl. by Defs. Kauanui, Puar, & Salaita 8-9, *Bronner*, *supra*, 364 F. Supp. 3d 9, ECF No. 113. Plaintiffs have now repeated that same false allegation here in their Superior Court Complaint, which they again served on Dr. Salaita in Virginia. Aff. of Service of Summons & Compl., Mar. 27, 2019. Plaintiffs can no longer claim they did not know Dr. Salaita does not reside in the District of Columbia, or that they had any good faith basis for believing he did.

'substantial connection' with the forum." *Burger King*, *supra*, 471 U.S. at 475 (emphasis in original).

Plaintiffs have failed to make one single factual allegation that Dr. Salaita had any contact with the forum, much less a substantial connection. Plaintiffs have not even alleged that Dr. Salaita was personally involved in any decision to amend the bylaws in March or November 2016, to withdraw Trust Funds, or in any actions regarding the editor of the Encyclopedia position, much less that he did so in the District of Columbia. Nor do Plaintiffs allege that any involvement he might have had in the effort to pass the ASA Resolution before he was a member of the National Council occurred in D.C.

Bronner v. Duggan, which was decided before Dr. Salaita was added as a defendant in that case, is not to the contrary. 249 F. Supp. 3d at 40 (finding personal jurisdiction over other individual defendants who "allegedly took part in the purportedly injurious activities of the ASA in the District of Columbia").[8] Dr. Salaita is not alleged to have engaged in any conduct in the District, much less a wrongful act that is the basis for Plaintiffs' claims against him. He was not a National Council member (nor did he have any other position charging him with "leading the

[8] Nor are the cases *Bronner* relies on to the contrary. In *Daley v. Alpha Kappa Alpha Sorority, Inc.*, plaintiffs alleged that the defendant members of the Directorate had engaged in managerial wrongdoing at a week-long meeting in the District of Columbia at which all of the named defendants "voluntarily participated" in the meetings "or the actions relating thereto." 26 A.3d 723, 728 (D.C. 2011). In *Family Fed'n for World Peace & Unification Int'l v. Hyun Jin Moon*, defendant directors took over a D.C. non-membership nonprofit that was established for the benefit of Reverend Moon's Unification Church and amended its articles of incorporation to fundamentally alter its purpose to no longer support the Church, and defendant Preston Moon engaged in self-dealing to divert UCI's assets for his own interests. 129 A.3d 234, 241-42 (D.C. 2015). The court found that "the allegedly wrongful amendment of the Articles of Incorporation, indubitably occurred within the District by filing here." *Id.* at 243. In this case, however, Plaintiffs allege (albeit inadequately) wrongful amendment of the ASA's Bylaws, which, unlike amendment of Articles of Incorporation, do not require filing in the District of Columbia. *Compare* D.C. Code § 29-408.06 (2019) *with* D.C. Code § 29-408.20 (2019).

ASA") in 2013 when the annual ASA meeting was held in the District of Columbia. Because Plaintiffs have alleged nothing to connect Dr. Salaita to the District of Columbia other than that he was on the National Council of a D.C. nonprofit corporation[9] (and their false allegation that he resides in D.C.), they have failed to meet their burden of establishing personal jurisdiction, and the case against him should be dismissed under Super. Ct. Civ. R. 12 (b)(2).

III. BECAUSE PLAINTIFFS ROCKLAND, KUPFER, AND BARTON LACK STANDING, THEIR CLAIMS ARE NOT LIKELY TO SUCCEED AND SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

To satisfy the requirements for standing, Plaintiffs must show: "(1) an injury in fact; (2) a causal connection between the injury and the conduct of which the party complains; and (3) redressability." *Padou v. District of Columbia Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013). The injury must be "attributable to the defendant." *Id.* (quotations omitted). Plaintiffs Rockland and Kupfer are each mentioned in two paragraphs in the entire Complaint, (Compl. ¶¶ 15, 17, 248), where Plaintiffs do not allege that they have suffered any concrete injury. As decided by the court in the federal litigation, Plaintiffs cannot seek relief for injuries

[9] Dr. Salaita's former role as an ASA National Council member is insufficient to establish this Court's jurisdiction over him. "Personal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity." *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 163 (D.C. 2000). "Just because Defendants were employed by, or were members of the board of directors of, a company which does business in the District, is not by itself sufficient to establish minimum contacts." *NAWA USA, Inc. v. Bottler*, 533 F. Supp. 2d 52, 57 (D.D.C. 2008). In *NAWA USA, Inc.*, the court lacked personal jurisdiction because plaintiff failed to allege "specific facts demonstrating that each defendant had a 'substantial connection' with the District of Columbia," even though the corporation's principal place of business was in D.C. and former directors who assumed their responsibilities at a board meeting in D.C. allegedly misappropriated its funds. *Id. See also Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554, 558 (D.D.C. 1981) (finding no personal jurisdiction over corporate officers and part-owners of a parent company of a District of Columbia corporation because while they "may have conducted substantial business in the District of Columbia, their activities were conducted on behalf of the corporation").

suffered by the ASA. *Bronner*, *supra*, 364 F. Supp. 3d 9.[10] Members of a corporation can only bring claims on their own behalf for relief from "a special injury…not suffered equally by all." *Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016) (internal quotations omitted). They have alleged no special injury that would not have been suffered by all ASA members generally, and they have alleged no injury arising from a violation of the bylaws or their contractual rights. Plaintiff Barton has alleged that he was denied a right to vote, but that injury is not traceable to any action that Dr. Salaita might have taken as it occurred before Dr. Salaita was a member of the National Council. In fact, the federal court found that although Plaintiffs included conclusory allegations that they had suffered some damages, "nowhere in Plaintiffs' complaint or briefing do they explain what that damage is." *Bronner*, *supra*, 364 F. Supp. 3d at 21. Plaintiffs' Complaint filed in this Court is almost identical to the complaint that was filed in federal court, with the exception of the allegations related to non-reappointment of Plaintiff Bronner as editor of the Encyclopedia and the removal of that position as *ex officio* officer and National Council member. None of the allegations related to those claims state an injury to Plaintiffs Rockland, Kupfer, and Barton. In fact, Plaintiffs' Prayer for Relief only seeks damages for injury to Plaintiff Bronner for any claim; it does not seek any damages for any of the other Plaintiffs.

[10] Collateral estoppel precludes Plaintiffs from relitigating issues in this Court that were previously litigated in the federal litigation. *See, e.g., Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999) (internal quotations omitted) (collateral estoppel or issue preclusion bars relitigation of an issue when "(1) the issue is actually litigated[;] ... (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; [and] (4) under circumstances where the determination was essential to the judgment, and not merely dictum.") Collateral estoppel prevents relitigation of issues that a federal court resolved of necessity even where it dismissed the complaint for lack of subject matter jurisdiction. *Keene Corp. v. United States*, 591 F. Supp. 1340, 1346 (D.D.C. 1984), *aff'd sub nom. GAF Corp. v. United States*, 260 U.S. App. D.C. 252, 818 F.2d 901 (1987). Moreover, an "order is 'final' for *res judicata* purposes even though it is pending on appeal". *El-Amin v. Virgilio*, 251 F. Supp. 3d 208, 211 (D.D.C. 2017) (quotations omitted).

Compl. 117-18. As these Plaintiffs lack standing, their claims against Dr. Salaita should be dismissed for lack of subject matter jurisdiction.

IV. PLAINTIFFS' CLAIMS ARE NOT LIKELY TO SUCCEED AND SHOULD BE DISMISSED BECAUSE THEY FAIL TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

Where a complaint does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" dismissal is appropriate under Rule 12 (b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Plaintiffs have not come close to sufficiently alleging that Dr. Salaita has acted unlawfully. Their Complaint fails to state a claim for relief against Dr. Salaita, and therefore Plaintiffs cannot succeed on the merits of their claims. Their claims against Dr. Salaita should therefore be dismissed under D.C. Code § 16-5502 (b) and Super. Ct. Civ. R. 12 (b)(6).

A) Counts Three Through Eight Irrefutably Do Not State a Claim against Dr. Salaita Because They Were Not Brought Against Him or They Are Based on Conduct that Preceded his Tenure and are Time-Barred.

All of the alleged conduct underlying Counts Three, Four, and Five, which are each *ultra vires* and breach of contract claims, occurred before Dr. Salaita became a member of the ASA National Council in July 2015, so they must be dismissed for failing to state a claim against him. Compl. ¶¶ 268-98. Count Three, for "Failure to Nominate Officers and National Council Reflecting Diversity of Membership," alleges conduct prior to adoption of the 2013 Resolution. Compl. 94. Count Four, for "Freezing Membership Rolls to Prohibit Voting" alleges conduct prior to the 2013 vote. Compl. ¶ 281. And Count Five, for efforts to influence legislation constituting a "substantial part" of the ASA's activities, alleges conduct "at least with respect to"

Fiscal Years 2012 and 2013, and "from approximately July 2013 until at least June of 2015". Compl. ¶¶ 290-1.[11]

Moreover, because all of the conduct alleged in Counts Three, Four, and Five occurred prior to June 2015, and most of it in 2013, Plaintiffs' claims are barred by the statute of limitations.[12] D.C. Code §§ 12-301 (7), (8) (2019). *Wright v. Howard Univ.*, 60 A.3d 749, 751 (D.C. 2013) (applying three year statute of limitations to breach of contract claim).

Even if Plaintiffs' *ultra vires* claims did not precede Dr. Salaita's time on the National Council, and even if they were not time-barred, they still fail, as members cannot bring direct (as opposed to derivative) *ultra vires* claims against individual directors. D.C. Code § 29-403.04 (b) (2019).

Finally, Plaintiffs *ultra vires* claims fail because they do not allege actions that were "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation". *Bronner*, *supra*, 249 F. Supp. 3d at 47.

Count Six (for Breach of Contract for the Voting Process), Count Seven (for breach of the D.C. Nonprofit Corporation Act), and Count Eight (for Breach of Contract for the Denial of Right to Vote), are brought against Defendant ASA only, not against Dr. Salaita. *See* Compl. ¶¶ 291-313.

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[11] Plaintiffs' allegations regarding the ASA's efforts to defend itself against legislation (Compl. ¶¶ 153-161) also fail because § 501(c)(3) organizations are not "influenc[ing] legislation" when they oppose legislation that "might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization." 26 U.S.C. § 4945 (e)(2); *see also* 26 U.S.C. § 4911 (d)(2)(c) (2019).

[12] All allegations in Counts Three, Four, and Five arise out of the ASA Resolution, and the allegations of influencing or opposing legislation irrefutably arise out of an act in furtherance of the right of advocacy, namely the ASA's alleged efforts to oppose "an issue under consideration or review by a legislative, executive, or judicial body" that might affect the organization. D.C. Code § 16-5501 (1)(A)(i) (2019).

B) Plaintiffs Are Not Likely to Succeed Under Counts One, Two and Nine Related to Use of ASA Funds for Legal Services Because Plaintiffs Allege No Special Injury and Otherwise Fail to State a Claim.

The only aspects of Counts One and Two for breach of fiduciary duty and Count Nine for corporate waste that apply to Dr. Salaita all relate to Resolution-related expenditures by the ASA. Compl. ¶¶ 260-7. These claims related to the ASA's expenditure of funds to defend its decision to pass the Resolution is an act in furtherance of the right of advocacy: defending against lawsuits arising from the Resolution is protected petitioning activity, and otherwise publicly supporting the Resolution is also protected. D.C. Code §§ 16-5501 (1)(A), (1)(B) (2019). Because Plaintiffs cannot state a claim against Dr. Salaita under these Counts, they are not "likely" to succeed on the merits, and should be dismissed under the Anti-SLAPP Act.

As decided by the federal court, Plaintiffs cannot bring claims for the ASA's injuries. *Bronner*, *supra*, 364 F. Supp. 3d 9. Therefore, to succeed on Counts One, Two or Nine against Dr. Salaita, Plaintiffs must show that they suffered a special injury (not suffered by all members) that affected their individual rights, and is traceable to Dr. Salaita. *Jackson*, *supra*, 146 A.3d at 415. Plaintiffs do not allege that they suffered any special injury, and cannot show that their individual rights were affected.

Plaintiffs' allegations that the ASA violated its Bylaws when it amended them with regard to the Trust and Development Fund fail as a matter of law on the face of the Bylaws. Plaintiffs complain about amendments to the Bylaws that removed the word "small" to describe grants that could be made from the Trust and Development Fund, and that permitted expenditure of Trust Fund assets. Compl. ¶¶ 169-74. Although Plaintiffs allege that the National Council "did not inform the full membership" about these proposed changes to the Bylaws, Compl. ¶174, neither notification to nor approval by the membership was required, as the National Council is

authorized to amend the Bylaws. Compl., Ex A, ASA Constitution & Bylaws, Bylaws, Art. XIII § 1.

Even if Plaintiffs were to allege injuries related to these counts, those injuries cannot be traceable to Dr. Salaita any more than they are traceable to Plaintiff Bronner, who was also a National Council member until November 2016. In roughly 17 pages of allegations related to these Counts, Plaintiffs fail to mention Dr. Salaita even once: he is not alleged to have been involved in any decision regarding the amendment of the bylaws, in informing the membership about the amendment, in any decision related to the use of ASA funds, or in any public accounting of the funds (which is the responsibility of the Board of Trustees, not Dr. Salaita). Compl. ¶¶ 162-96; 260-7; 314-8.

The only aspects of Count Two and Nine that arise out of expenditures alleged to have been incurred during Dr. Salaita's term on the National Council that even arguably relate to the resolution are the ASA's "substantial legal costs defending the Resolution" (Compl. ¶187),[13] but Plaintiffs cannot prevail on this claim, for even if the defensive expenditure of legal costs could be considered an injury, it was an injury to the ASA, not to Plaintiffs. Plaintiffs not only suffered no special injury from the ASA's expenditure of legal fees, they actually caused any such injury,

[13] Although Plaintiffs do not, and cannot, allege that the new website was a Resolution-related expense (Compl. ¶¶ 175), they do allege that the ASA incurred Resolution-related expenses to retain a media strategist and Public Relations consultant and "arguably" for payments around the 2014 ASA meeting, but these expenditures were made prior to July 2015 when Dr. Salaita joined the National Council. Compl. ¶ 186. They are also time-barred for that reason. D.C. Code § 12-301(8) (2019); *Duggan v. Keto*, 554 A.2d 1126, 1144 (D.C. 1989) (applying three year state of limitations to breach of fiduciary duty claim). Plaintiffs also allege the ASA incurred insurance costs "arising from the Resolution." Compl. ¶ 190. But the insurance purchase is alleged to have been approved by the Executive Committee, of which Dr. Salaita was not a member, not the National Council on which Dr. Salaita served. Compl. ¶ 190. Also, if Plaintiffs are suggesting that the ASA purchased Directors and Officers Liability coverage insurance in response to the lawsuit that Plaintiffs themselves brought, their claim fails for the same bootstrapping reason as the legal expenses, explained below.

as it is their lawsuit that is being defended against. Plaintiffs cannot bootstrap an injury of their own making.[14]

C) Plaintiffs are Not Likely to Succeed and Fail to State a Claim Against Dr. Salaita Under Counts Ten And Eleven Related To Non-Reappointment of Plaintiff Bronner and Removal of the Editor as *Ex Officio* Officer and Member of National Council.

Counts Ten for Breach of Fiduciary Duty and Eleven for "Tortious Interference With Contractual Business Relations" boil down to the same set of allegations: Plaintiff Bronner was not reappointed as editor of the Encyclopedia of American Studies after his contractual term ended on December 2016, and the ASA bylaws were amended in November 2016 to remove the position of editor of the Encyclopedia as an *ex officio* officer and National Council member.[15] Compl. ¶¶ 314-26. Plaintiffs Rockland, Kupfer, and Barton lack standing to bring these claims as they have not alleged that they suffered any injury under Counts Ten or Eleven, and cannot allege any injury as a result of Plaintiff Bronner no longer being editor of the Encyclopedia, or by the current editor not being an *ex officio* officer or member of the National Council. Compl. ¶¶ 268-270. *See, supra,* Sec. III. Plaintiff Bronner's claim that he was not reappointed editor is

[14] Shareholders' claims against officers of a corporation are consistently "foreclosed when they merely allege damages based on the potential costs of investigating, defending, or satisfying a judgment or settlement for what might be unlawful conduct." *In re Cray Inc. Derivative Litig.*, 431 F. Supp. 2d 1114, 1134 (W.D. Wash. 2006) (citing cases in finding that derivative claim for costs of litigation are insufficient to state a claim for relief). *See also In re Symbol Techs. Sec. Litig.*, 762 F. Supp. 510, 516 (E.D.N.Y. 1991) ("defendants cannot be held liable for the costs of defending a potentially baseless suit."); 3A WILLIAM FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1112 (West 2019) ("the payment of an attorney for legal services performed for the company is not improper."). Moreover, "[d]irectors and officers usually have a duty to engage lawyers to defend the corporation even if they individually have failed to perform in some way that caused the litigation." *Kaplan v. First Hartford Corp.*, 484 F. Supp. 2d 131, 144 (D. Me. 2007).

[15] Plaintiffs have included several placeholders in their Complaint, labeled "REDACTED," in the sections related to these claims. Dr. Salaita reserves the right to amend this Motion if and when he is served with Plaintiffs' unredacted Complaint, and reserves the right to treat the unredacted Complaint as an Amended Complaint.

time-barred, as he alleges that some Defendants sought to remove him "from his position as editor of the Encyclopedia as early as December 2013," and "decided they would not renew his contract" as "early as 2014." Compl. ¶¶ 227, 329. *See* D.C. Code § 12-301(8) (2019); *Duggan v. Keto*, *supra* note 13, 554 A.2d at 1144. Moreover, Dr. Salaita was not even on the National Council until July 2015.

1. Plaintiff Bronner Has Not Alleged and Cannot Allege that Dr. Salaita Owed Him a Fiduciary Duty, or Breached Any Fiduciary Duty.

Plaintiff Bronner cannot succeed on Count Ten against Dr. Salaita for breach of fiduciary duty, which requires him to show that "(1) defendant owed plaintiff a fiduciary duty; (2) defendant breached that duty; and (3) to the extent plaintiff seeks compensatory damages—the breach proximately caused an injury." *Henok v. Chase Home Fin., LLC*, 915 F. Supp. 2d 162, 168 (D.D.C. 2013) (quotations omitted). "[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby." *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 709 (D.C. 2009) (internal quotation omitted).

Plaintiffs do not allege that Dr. Salaita owed Plaintiff Bronner a fiduciary duty, or that he breached any such duty—there is no mention of him at all in roughly 20 pages of allegations regarding this claim, much less any mention of actions he took to breach a fiduciary duty. Even if the claim is not time-barred, Plaintiffs do not allege any specific fiduciary duty that may have been breached when Plaintiff Bronner's term as editor of the Encyclopedia of American Studies was not renewed. Compl. ¶¶ 197-259. It is not a breach of fiduciary duty to choose not to renew a contract.[16]

[16] Dr. Salaita could not have breached a fiduciary duty even under the former bylaws, as his only role as National Council member would have been to ratify the Executive Committee's

Plaintiffs also do not allege a breach of fiduciary duty when the bylaws were amended to remove the position of editor as *ex officio* officer and non-voting member of the National Council. Compl. ¶¶ 243-6. The Bylaws plainly allow such an amendment and do not require notice of the change to be sent to the full membership, so Plaintiffs' allegation that such a notice was not sent is immaterial. Compl. Ex. B, Bylaws of the Am. Studies Assoc., Art. XIV; Compl. ¶ 248. To the extent that another Defendant did not notify Plaintiff Bronner, who was a non-voting member, Plaintiffs do not allege that it was any more Dr. Salaita's duty to provide notice than it was Plaintiff Bronner's, who was also on the National Council. Compl. ¶ 257. Regardless, Plaintiffs do not allege that Plaintiff Bronner was injured as a result of this amendment. Compl. ¶¶ 257-59 (alleging damages arising out of end of tenure as editor, but not as a result of amendment); ¶ 247 (alleging that, far from being injured, Plaintiff Bronner did not even realize that the amendment had in any way impacted the position of editor until years after his tenure as editor).

Finally, Dr. Salaita did not owe a fiduciary duty to Plaintiff Bronner as a fellow National Council member, so Plaintiff Bronner cannot satisfy the first element required to make out a claim against Dr. Salaita. "Officers and directors of a corporation owe a fiduciary duty to the corporation and to its shareholders," *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Co-op. Ass'n, Inc.*, 441 A.2d 956, 962 (D.C. 1982), and not to other directors, officers, or employees. *See, e.g., Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 377 (2d Cir. 1980) (a director does not owe fiduciary duties to other directors of a corporation); *Byington v. Vega Biotechnologies, Inc.*, 869 F. Supp. 338, 345 (D. Md. 1994) ("Delaware cases speak only of the fiduciary duty owed by directors to the corporation itself and its shareholders," and not to its employees, as

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designation of Plaintiff Bronner as editor. Compl. Ex. B, Art. V, § 1(g). The Executive Committee is not alleged to have designated Plaintiff Bronner.

"[a]ny contrary rule would place intolerable and irreconcilable conflicts of interest upon the directors"). Because Plaintiff Bronner is bringing this claim on his own behalf for the injuries he allegedly suffered personally as an editor, *ex officio* officer, and National Council member, Plaintiff Bronner cannot prevail as Dr. Salaita did not owe him a fiduciary duty.

2. Plaintiff Bronner Has Not Alleged and Cannot Allege That Dr. Salaita Tortiously Interfered in His Relationship with the ASA as Plaintiff Bronner Was Not Entitled to Reappointment as Editor and Dr. Salaita Cannot as a Matter of Law Interfere in the Relationship.

Plaintiff Bronner also cannot succeed on Count Eleven for "Tortious Interference With Contractual Business Relations." Compl. ¶¶. 327-34. A prima facie case of tortious interference with a contractual or business relation requires "(1) existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages." *Onyeoziri v. Spivok*, 44 A.3d 279, 286 (D.C. 2012) (quotations omitted). Plaintiff Bronner does not state a claim for tortious interference against Dr. Salaita for the amendment of the ASA's bylaws because he does not allege any damages resulted from removal of the editor position as an *ex officio* officer and National Council member. Compl. ¶¶ 257-9 (alleging damages to Plaintiff Bronner); ¶ 247 (Plaintiff Bronner did not realize that the amendment impacted the editor position until years after his tenure). What remains is the claim for tortious interference resulting in the ASA's decision to not renew Plaintiff Bronner's contract as editor of the Encyclopedia, which is time-barred, as noted above.

In any case, Plaintiff Bronner does not—and cannot—allege facts to show that Dr. Salaita interfered with any relations between Plaintiff Bronner and the ASA. Again, in roughly 20 pages of allegations regarding this claim, Defendant Salaita is not mentioned once. Compl. ¶¶ 197-270;

330-345. Indeed, Plaintiffs allege that any plans to remove Plaintiff Bronner—which were allegedly made in 2013 and 2014 before Dr. Salaita was a member of the National Council—were hidden "from anyone not carrying them out," Compl. ¶¶ 201(d), 227, 329, which Dr. Salaita is not alleged to have done. Dr. Salaita is not alleged to have interfered as a member of the National Council, or prior to becoming a member. Because Plaintiffs have not and cannot allege that Dr. Salaita interfered, Plaintiff Bronner cannot make out a claim against Dr. Salaita for tortious interference with contractual or business relations.

Plaintiff Bronner's claim also fails because he did not have a contractual right to be re-hired as editor of the Encyclopedia, nor did he have a reasonable expectation that he would be. *Robertson v. Cartinhour*, 867 F. Supp. 2d 37, 60 (D.D.C. 2012), *aff'd*, 553 F. App'x 1 (D.C. Cir. 2014) (internal quotations omitted) ("To state a claim for tortious interference in the District of Columbia, the business expectancy must be "commercially reasonable to anticipate" and "requires a probability of future contractual or economic relationship and not a mere possibility."). Plaintiff Bronner alleges he was "stripped" of his position and "removed"—he was not; his term as editor of the Encyclopedia came to an end in December 2016 as provided for in his contract. Compl. ¶ 331. Plaintiff Bronner cannot succeed on a claim for tortious interference simply because he was not re-hired as editor. *See Paul v. Howard Univ.*, 754 A.2d 297 (D.C. 2000) (plaintiff "had no contractual right to indefinite tenure; hence the [defendants] could not have interfered with her contractual relations").[17]

[17] *See also, Montes v. Cicero Pub. Sch. Dist. No. 99*, 141 F. Supp. 3d 885, 900 (N.D. Ill. 2015) (where employer had not renewed employment contract with plaintiff, "the mere hope of continued employment, without more, does not, in our opinion, constitute a reasonable expectancy" sufficient to state a cause of action for intentional interference with business expectancy against third party defendants).

Finally, as a matter of law, Plaintiffs cannot succeed on a claim that Dr. Salaita interfered in Plaintiff Bronner's relationship with the ASA simply by virtue of being a National Council member starting in 2015, as a claim of tortious interference must be asserted against a defendant who is not a party to the contract or business relationship. *See Donohoe v. Watt*, 546 F. Supp. 753, 757 (D.D.C. 1982), *aff'd*, 230 U.S. App. D.C. 70, 713 F.2d 864 (1983) ("It is a well settled principle of law that this tort arises only when there is an interference with a contract between the plaintiff and a third party"). As a member of the National Council, Dr. Salaita was a director of the ASA, and he cannot be held liable for tortiously interfering in a relationship between the ASA and another. *See, e.g., Paul*, *supra,* 754 A.2d at 309 (officers of a University act as the University's agents and thus cannot be held liable for tortiously interfering with a contract between the University and a third party).[18]

D) Plaintiffs Are Not "Likely" to Succeed Against Dr. Salaita on Count Twelve for Aiding and Abetting Breach of Fiduciary Duty Because it is Time-barred, Fails to State a Claim, and Targets Protected Advocacy.

Count Twelve for Aiding and Abetting Breach of Fiduciary Duty arises out of Dr. Salaita's "heav[y] involve[ment] in the effort to pass the academic boycott." Compl. ¶ 348. Advocacy for the Resolution is unquestionably an act in furtherance of the right of advocacy. D.C. Code § 16-5501 (1) (2019). Plaintiffs' claim fails because it is time-barred, because Plaintiffs have not alleged that Dr. Salaita knowingly and substantially assisted in breaching any fiduciary duty, and because Dr. Salaita's advocacy is protected by the First Amendment.

[18]"[I]n order to recover for interference with contractual relations by a supervisor *who is not an officer*, a plaintiff must present evidence that the supervisor acted with malice.") (emphasis added). *Id; but see Nickens v. Labor Agency of Metro. Wash.*, 600 A.2d 813, 820 (D.C. 1991) ("we hold that a corporate officer may be held liable for interfering with the contract of an employee of the corporation provided he is shown to have acted maliciously or for his own benefit, rather than for the benefit of the corporation."). Regardless, Plaintiffs have not alleged that Dr. Salaita acted at all, much less maliciously or for his own benefit.

Plaintiffs' claim that Dr. Salaita aided and abetted a breach of fiduciary duty through his involvement in an effort to pass the Resolution before he was on the National Council is barred by the three year statute of limitations because the Resolution passed in 2013. Compl. ¶ 337; DC Code § 12-301(7); *Duggan v. Keto*, *supra,* 554 A.2d at 1144 (applying three year state of limitations to claim of breach of fiduciary duty).[19] Count Twelve is time-barred, as the statute of limitations expired at latest in 2016. D.C. Code § 12-301 (2019) (statute of limitation begins to run "from the time the right to maintain the action accrues").

Even if this claim were timely, it would still fail. A cause of action for aiding and abetting breach of fiduciary duty has not expressly been recognized in the District of Columbia. *See Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 (D.C. 2013); *Lannan Found. v. Gingold*, 300 F. Supp. 3d 1, 29–30 (D.D.C. 2017). Jurisdictions that have recognized the tort require plaintiffs to show: "(1) a fiduciary duty on the part of the primary wrongdoer, (2) a breach of this fiduciary duty, (3) knowledge of this breach by the alleged aider and abettor, and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." *Pietrangelo, supra,* 68 A.3d at 711 (quotation omitted). Even if Plaintiffs could show a breach of fiduciary duty, which they have not, Plaintiffs have failed to allege that Dr. Salaita had knowledge of any such breach, or that he substantially assisted the wrongdoing. That Dr. Salaita "was heavily involved in the effort to pass the Academic Boycott before he was a

[19] Plaintiffs' untimeliness is not excused just because they filed a similar case earlier in federal court. *See Bond v. Serano*, 566 A.2d 47, 56 (D.C. 1989) (statute of limitations on personal injury lawsuit in state court was not tolled by the pendency of a suit which was filed earlier in federal court and then dismissed for lack of subject matter jurisdiction); *Curtis v. Aluminum Ass'n.*, 607 A.2d 509 (D.C. 1992) (where plaintiff's suit in U.S. District Court was dismissed because of lack of complete diversity between the parties, his subsequent suit in the Superior Court was properly dismissed as time-barred); *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 52–53 (D.D.C. 2006) ("District of Columbia precedent firmly holds that statutes of limitations are not equitably tolled when a similar cause of action, filed within the limitations period, has been dismissed for lack of subject matter jurisdiction.").

member of the National Council," Compl. ¶ 337, is irrelevant as the Resolution itself is not alleged to be a breach of a fiduciary duty, nor could it be. And alleging a legal conclusion—that his "substantial assistance, also knowing" that the Resolution "would cause great damage" to the ASA—does not make it so, and still does not allege he knew of a breach or that he substantially assisted it.

Finally, the First Amendment protects any peaceful advocacy Dr. Salaita conducted prior to his term on the National Council. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (finding that the First Amendment bars liability for state torts, including "civil conspiracy based on those torts," for peaceful picketing on a matter of public concern). *See also, Claiborne*, *supra*, 458 U.S. at 913 (peaceful political boycotts constitute "expression on public issues" and therefore "rest[] on the highest rung of the hierarchy of First Amendment values." (internal quotations omitted)); *Jordahl, supra,* 336 F. Supp. 3d at 1043 (a "restriction of one's ability to participate in collective calls to oppose Israel unquestionably burdens the protected expression of [those] wishing to engage in such a boycott").

Plaintiffs do not, and under the First Amendment cannot, allege that Dr. Salaita knew about or substantially assisted in any breach of another Defendant's fiduciary duty simply because he was associated with efforts to pass the boycott Resolution. *See Claiborne*, *supra*, 458 U.S. at 920 ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."). Dr. Salaita is not alleged to have substantially assisted in any specific underlying breach of fiduciary duty. Under the First Amendment, it cannot be that *anyone* who advocates for the boycott Resolution is liable for aiding and abetting any alleged breach of fiduciary duties by other Defendants.

1. Dr. Salaita is Immune from Liability for Plaintiffs' Claims.

a. The D.C. Code Immunizes Dr. Salaita from Liability for Plaintiffs' Claims.

Dr. Salaita is immunized from liability for "damages for any action taken, or any failure to take any action" as a director of a charitable organization, except for, in relevant part, an "intentional infliction of harm." D.C. Code § 29-406.31 (d) (2019). As argued above, Dr. Salaita, who was a volunteer National Council member, is not alleged to have been personally involved in amending the Bylaws and withdrawing funds to defend the ASA from legal attack, or doing anything in relation to Plaintiff Bronner's tenure as editor, much less doing so to intentionally inflict harm on Plaintiffs or the ASA.[20]

Dr. Salaita is also immune under D.C. Code § 29-406.90, which immunizes corporate volunteers from civil liability unless the injury was a result of willful misconduct, a crime, a transaction resulting in improper personal benefit, or a bad faith act beyond the scope of the corporation's authority, as long as the ASA's liability insurance coverage is statutorily sufficient. D.C. Code § 29-406.90(b) and (c). Similarly, Plaintiffs fail to allege that Dr. Salaita engaged in any conduct that would exempt him from the protection of D.C. Code § 29-406.90. Dr. Salaita is therefore immune from liability for Plaintiffs' claims against him under D.C. Code §§ 29-406.31(d) and 29-406.90.

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[20] The District Court's finding (prior to Dr. Salaita being named as a Defendant in that litigation) that Plaintiffs had plausibly alleged that the "Individual Defendants acted with an intent to harm the ASA" is not to the contrary. *Bronner*, 317 F. Supp. 3d at 293. As argued above, the Complaint does not allege that Dr. Salaita, who was not a party to the federal subject matter jurisdiction briefing, acted with any intent to harm, and certainly does not make any specific factual allegations that would support such a conclusory allegation. The federal court's prior findings regarding other defendants with different allegations against them, before Dr. Salaita was even a party to the case, cannot bind Dr. Salaita. *See, e.g., Hoffman v. District of Columbia*, 730 F. Supp. 2d 109, 116 (D.D.C. 2010) (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)) ("neither claim preclusion nor issue preclusion may be used against a party that was not a party to the prior proceeding or in privity with a party to the prior proceeding").

b. The Volunteer Protection Act Immunizes Dr. Salaita from Liability for Plaintiffs' Claims.

Under the Volunteer Protection Act, in relevant part, "no volunteer of a nonprofit organization…shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization" if they were "acting within the scope of the volunteer's responsibilities" and "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. §§ 14501 et seq., § 14503(a) (2018). Dr. Salaita was a volunteer member of the ASA's National Council from July 2015-June 2018, and although Plaintiffs do not allege Dr. Salaita engaged in any particular acts as a National Council member, any acts or omissions alleged by Plaintiffs would have been taken on behalf of the ASA and within the scope of his responsibilities. Compl. ¶ 26. Again, the expenditure of legal fees to defend the ASA cannot be considered harm, but even if it were, it "was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." 42 U.S.C. § 14503(a). Accordingly, the Volunteer Protection Act immunizes Dr. Salaita from liability for Plaintiffs' claims against him.

c. Plaintiffs' Fiduciary Duty and Waste Claims Should Be Dismissed under the Business Judgment Rule.

The Business Judgment Rule is a ""presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006) (quoting *Willens v. 2720 Wis. Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126, 1137 (D.C. 2004)). "Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption." *Id.*

"In practical terms, the business judgment rule means that 'directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.'" *Willens*, *supra*, 844 A.2d at 1137 (citing *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000)). Plaintiffs do not allege that Dr. Salaita had any financial interest at stake, or that defending the ASA against Plaintiffs' lawsuit or anything that might have been done with respect to Plaintiff Bronner's tenure as editor was in bad faith, irrational, uninformed, or not in the best interests of the ASA. Plaintiffs' claims should be dismissed under the Business Judgment Rule.

V. PLAINTIFFS' CLAIMS AGAINST DR. SALAITA SHOULD BE DISMISSED UNDER THE ANTI-SLAPP ACT AND HE SHOULD BE AWARDED THE COSTS OF LITIGATION, INCLUDING REASONABLE ATTORNEY FEES.

Because Dr. Salaita has shown that Plaintiffs' claims arise "from an act in furtherance of the right of advocacy on issues of public interest," and Plaintiffs cannot "demonstrate[] that the claim is likely to succeed on the merits," this Court must dismiss Plaintiffs' claims against Dr. Salaita under the Anti-SLAPP Act with prejudice. D.C. Code § 16-5502 (b).[21] If Plaintiffs' claims against Dr. Salaita are dismissed under the Anti-SLAPP Act, he is entitled to recover costs and attorneys fees. D.C. Code Ann. § 16-5504 (under the Anti-SLAPP Act, this Court "may award a moving party who prevails, in whole or in part…the costs of litigation, including

[21] *See, e.g., Metabolife Int'l, Inc. v. Wornick*, 72 F. Supp. 2d 1160, 1162 (S.D. Cal. 1999), *aff'd in part, rev'd in part*, 264 F.3d 832 (9th Cir. 2001) (addressing anti-SLAPP motions before addressing motions to dismiss for lack of personal jurisdiction, and dismissing on anti-SLAPP grounds); *Harmoni Int'l Spice, Inc. v. Bai*, No. CV 16-00614-BRO (ASx), 2016 WL 6542731, at *13 (C.D. Cal. May 24, 2016) (dismissing claims for lack of personal jurisdiction and subsequently addressing whether defendants' anti-SLAPP motion would prevail).

reasonable attorney fees." *See also, Doe v. Burke*, 133 A.3d 569, 574 (D.C. 2016) (for costs to be awarded under § 16-5504(a) of the Anti-SLAPP Act, the lawsuit does not have to be a "classic" SLAPP suit, and "frivolousness or wrongful motivation" on the part of the plaintiff is not required).[22] Dr. Salaita must be relieved of the heavy burden of defending himself against the meritless but unrelenting efforts by Plaintiffs to silence him through litigation—in this Court, in U.S. district court, and potentially in future actions elsewhere.[23]

CONCLUSION

Dr. Salaita respectfully requests that this Court dismiss Plaintiffs' Complaint against him in its entirety, with prejudice, and seeks costs, attorneys' fees and any other relief the Court deems appropriate.

Dated: May 6, 2019

Respectfully Submitted,

/s/ Shayana Kadidal
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[22] There may also be grounds for sanctions here. *See, e.g.,* Super. Ct. Civ. R. 11(c) (award of sanctions against attorney may be available for a pleading that is used "for any improper purpose, such as to harass" (Super. Ct. Civ. R. 11(b)(1)), or if "the factual contentions [lack] evidentiary support". Super. Ct. Civ. R. 11(b)(3). *See also Jones v. Campbell Univ.,* 322 F. Supp. 3d 106, 109 (D.D.C. 2018) (ordering monetary sanctions against plaintiff's counsel under Fed. R. Civ. Pro. 11 for personal jurisdiction arguments, after finding that court did not have personal jurisdiction over defendants).

[23] In the alternative, Plaintiffs' claims against Dr. Salaita must be dismissed under Super. Ct. Civ. R. 12(b)(1), 12(b)(2), or 12(b)(6).

Points and Authorities

1. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
2. *Behradrezaee v. Dashtara*, 910 A.2d 349 (D.C. 2006)
3. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)
4. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011)
5. *Bronner v. Duggan*, 249 F. Supp. 3d 27 (D.D.C. 2017)
6. *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019), *appeal docketed*, No. 19-7017 (D.C. Cir. Mar. 5, 2019)
7. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)
8. *Byington v. Vega Biotechnologies, Inc.*, 869 F. Supp. 338 (D. Md. 1994)
9. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018)
10. *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86 (D.D.C. 2008)
11. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011)
12. *Davis v. Cox,* 180 Wash. App. 514, 531, 325 P.3d 255 (Wash. Ct. App. 2014), *rev'd on other grounds*, 183 Wash. 2d 269, 351 P.3d 862 (Wash. 2015)
13. *Doe v. Burke*, 133 A.3d 569 (D.C. 2016)
14. *Donohoe v. Watt*, 546 F. Supp. 753 (D.D.C. 1982), *aff'd*, 230 U.S. App. D.C. 70, 713 F.2d 864 (1983)
15. *Duggan v. Keto*, 554 A.2d 1126 (D.C. 1989)
16. *El-Amin v. Virgilio*, 251 F. Supp. 3d 208 (D.D.C. 2017)
17. *Family Fed'n for World Peace & Unification Int'l v. Hyun Jin Moon*, 129 A.3d 234 (D.C. 2015)
18. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012), *aff'd sub nom. Farah v. Esquire Magazine*, 407 U.S. App. D.C. 208, 736 F.3d 528 (2013)
19. *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147 (D.C. 2000)
20. *Harmoni Int'l Spice, Inc. v. Bai*, No. CV 16-00614-BRO (ASX), 2016 WL 6542731 (C.D. Cal. May 24, 2016)

21. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)

22. *Henok v. Chase Home Fin., LLC*, 915 F. Supp. 2d 162 (D.D.C. 2013)

23. *Hoffman v. District of Columbia*, 730 F. Supp. 2d 109 (D.D.C. 2010)

24. *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264 (D.C. 2001)

25. *In re Symbol Techs. Sec. Litig.*, 762 F. Supp. 510 (E.D.N.Y. 1991)

26. *In re Cray Inc. Derivative Litig.*, 431 F. Supp. 2d 1114 (W.D. Wash. 2006)

27. *Jackson v. George*, 146 A.3d 405 (D.C. 2016)

28. *Jones v. Campbell Univ.,* 322 F. Supp. 3d 106 (D.D.C. 2018)

29. *Jordahl v. Brnovich,* 336 F. Supp. 3d 1016 (D. Ariz. 2018), *appeal docketed,* No. 18-16896 (9th Cir. Oct. 3, 2018)

30. *Kaplan v. First Hartford Corp.*, 484 F. Supp. 2d 131 (D. Me. 2007).

31. *Keene Corp. v. United States*, 591 F. Supp. 1340 (D.D.C. 1984), *aff'd sub nom. GAF Corp. v. United States*, 260 U.S. App. D.C. 252, 818 F.2d 901 (1987)

32. *Lannan Found. v. Gingold*, 300 F. Supp. 3d 1 (D.D.C. 2017)

33. *Metabolife Int'l, Inc. v. Wornick*, 72 F. Supp. 2d 1160 (S.D. Cal. 1999), *aff'd in part, rev'd in part*, 264 F.3d 832 (9th Cir. 2001)

34. *Montes v. Cicero Pub. Sch. Dist. No. 99*, 141 F. Supp. 3d 885 (N.D. Ill. 2015)

35. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)

36. *NAWA USA, Inc. v. Bottler*, 533 F. Supp. 2d 52 (D.D.C. 2008)

37. *Nickens v. Labor Agency of Metro. Wash.*, 600 A.2d 813 (D.C. 1991)

38. *Snyder v. Phelps*, 562 U.S. 443 (2011)

39. *Onyeoziri v. Spivok*, 44 A.3d 279 (D.C. 2012)

40. *Padou v. District of Columbia Alcoholic Beverage Control Bd.*, 70 A.3d 208 (D.C. 2013)

41. *Paul v. Howard Univ.*, 754 A.2d 297 (D.C. 2000)

42. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697 (D.C. 2013)

43. *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554 (D.D.C. 1981)

44. *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702 (D.C. 2009)

45. *Robertson v. Cartinhour*, 867 F. Supp. 2d 37 (D.D.C. 2012), *aff'd*, 553 F. App'x 1 (D.C. Cir. 2014)

46. *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015).

47. *Treadway Cos., Inc. v. Care Corp.,* 638 F.2d 357 (2d Cir. 1980)

48. *United States v. Ferrara*, 311 U.S. App. D.C. 421, 54 F.3d 825 (1995)

49. *Willens v. 2720 Wis. Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126 (D.C. 2004)

50. *Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Co-op. Ass'n, Inc.*, 441 A.2d 956 (D.C. 1982)

51. *Wright v. Howard Univ.*, 60 A.3d 749 (D.C. 2013)

52. 3A WILLIAM FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1112

53. 26 U.S.C. § 4911

54. 26 U.S.C. § 4945

55. 42 U.S.C. § 14501 et seq.

56. 42 U.S.C. § 14503

57. D.C. Code § 12-301

58. D.C. Code § 16-5501

59. D.C. Code § 16-5502

60. D.C. Code § 29-403.04

61. D.C. Code § 29-406.31

62. D.C. Code § 29-406.90

63. D.C. Code § 29-408.06

64. D.C. Code § 29-408.20

65. Super. Ct. Civ. R. 12 (b)(1)

66. Super. Ct. Civ. R. 12 (b)(2)

67. Super. Ct. Civ. R. 12 (b)(6)

68. Va. Code Ann. § 8.01-296

69. *Boycott of Israeli Academic Institutions*, AM. STUDIES ASS'N (Dec. 4, 2013), https://www.theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions

70. *Council Statement on the Resolution*, AM. STUDIES ASS'N, https://www.theasa.net/node/4804

71. *What Does the Boycott Mean?*, AM. STUDIES ASS'N, https://www.theasa.net/node/4805

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES D. KUPFER, and MICHAEL L. BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, STEVEN SALAITA, JOHN STEPHENS, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No. 2019 CA 001712 B Judge Robert R. Rigsby Civil 2, Calendar 10 Next Court Date: June 14, 2019, 10 a.m. Event: Initial Scheduling Conference

[PROPOSED] ORDER GRANTING DEFENDANT STEVEN SALAITA'S SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO D.C. CODE § 16-5501, *et seq.*,

Upon consideration of Defendant Steven Salaita's Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.*, and in the Alternative, Motion to Dismiss Pursuant to Super. Ct. Civ. R. 12 (b), Plaintiffs' opposition brief, and Defendant Salaita's Reply brief, it is hereby

ORDERED that Defendant Salaita's Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.,* is GRANTED in its entirety, and that all claims for relief against Defendant Salaita are hereby DISMISSED with prejudice and without leave to amend; and

ORDERED that pursuant to D.C. Code § 16-5504 (a), Defendant Salaita, as the prevailing party, may be awarded the costs of litigation, including reasonable attorneys' fees, which the Court will consider upon a Motion for costs and fees.

IT IS SO ORDERED.

Dated: _____, 2019

_____
Robert R. Rigsby
Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that, on June 7, 2019, at the request of the Court, *see* Order (May 10, 2019) (trace number ED301J001499186); Order (Jun. 7, 2019) (trace number ED301J001534832), I electronically refiled Defendant Salaita's *Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, et seq., and in the Alternative, Motion to Dismiss Pursuant to Super. Ct. Civ. R. 12 (b)*, originally filed on May 6, 2019 in a single document together with an *Unopposed Motion to File Motion in Excess of Fifteen Pages* and its proposed order. Filing was made through the CaseFileXpress system, which sends notification to counsel of record who have entered appearances.

/s/ Shayana Kadidal
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