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 SALAITA, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	**Case No. 2019 CA 001712 B** **Judge Robert R. Rigsby** JURY TRIAL DEMANDED
PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS	

Plaintiffs Simon Bronner, Michael Rockland, Michael L. Barton, and Charles D. Kupfer (collectively, "Plaintiffs"), hereby submit this opposition memorandum in response to the four Motions to Dismiss, filed by Defendants Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens, Neferti Tadiar, and the American Studies Association ("ASA"); Defendants J. Kehaulani Kauanui and Jasbir Puar; and Defendant Steven Salaita.[1]

This is not Defendants' first attempt to dismiss these claims. Indeed, many of the arguments presented have been raised – and rejected – numerous times. For all of the reasons set detailed below, Defendants' Motions to Dismiss fail.

I. THE DISTRICT OF COLUMBIA COURT OF APPEAL HAS SPECIFICALLY HELD – TWICE – THAT MEMBERS OF NONPROFIT ENTITIES HAVE STANDING TO BRING EXACTLY THESE CLAIMS AS DIRECT CLAIMS.

Defendant Salaita – and only Defendant Salaita – argues that Plaintiffs lack standing to bring the asserted claims.[2] Not one of the other Defendants questions Plaintiffs' standing. Indeed, the issue of standing is not even hinted at in either of the other briefs – and for good reason. First, Defendant Salaita does not and cannot argue that Plaintiffs lack standing to bring many of the claims in the complaint. Second, Defendant Salaita's argument ignores binding precedent from the District of Columbia Court of Appeals that specifically holds that members of a nonprofit have standing to bring

[1] Although every defendant filed a motion to dismiss, the three sets of counsel representing the various defendants filed four separate briefs. To eliminate redundancy Plaintiffs file this omnibus opposition to all motions to dismiss under Rule 12(b), and use the following notation to distinguish between the Defendants' briefs. Defendants Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens, Neferti Tadiar, and ASA are referred to as "the Original Defendants" and their brief is abbreviated as "Original Defs' Br." The brief filed by Defendants Kauanui and Puar is abbreviated as "Kauanui/Puar Br." and the brief filed by Defendant Salaita is abbreviated as "Salaita Br."

[2] In fact, Defendant Salaita argues that Plaintiffs Barton, Kupfer, and Rockland lack standing on every single claim, and that he (Defendant Salaita) should thus be dismissed as a Defendant for lack of subject matter jurisdiction. It is unclear why, when Defendant Salaita does not argue that Plaintiff Bronner lacks standing, he nonetheless argues that the entire case against him should be dismissed in this section of his motion. (Salaita Br. at 15.)

claims for mismanagement of the nonprofit. *Daley v. Alpha Kappa Alpha Sorority, Inc*., 26 A.3d 723, 728-30 (D.C. 2011); *Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016). These cases bring the very same claims Plaintiffs bring here, and are indistinguishable on the facts and the law.

A. Defendants Do Not, and Cannot, Argue that Plaintiffs Cannot Bring Direct Claims for Breach of Contract, *Ultra Vires* Acts, and Breach of Fiduciary Duty.

Defendant Salaita makes sweeping but vague assertions about standing, but fails to address, much less analyze, most of the claims alleged in the Complaint. The relevant law and underlying facts vary across the Complaint's twelve counts. Defendants paint them all with a broad brush – and the wrong color paint.

1. Breach of contract

It is a long-standing and clearly established matter of law that the bylaws of an organization "are akin to a contract enforceable by all individual members." *Welsh v. McNeil*, 162 A.3d 135, 157 (D.C. 2017); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005) ("It is well established that the formal bylaws of an organization are to be construed as a contractual agreement between the organization and its members"); *Daley*, 26 A.3d 723, 731 (D.C. 2011) (*quoting Meshel*); *Willens*, 844 A.2d at 1135. A party to a contract clearly has standing to bring a claim for violation of that contract. Defendants never specifically refer to the breach of contract claims asserted in Counts Three, Four and Five or attempt to make any real argument that Plaintiffs lack standing to bring these breach of contract claims, nor could they.

2. Ultra vires acts

Plaintiffs also clearly have standing to bring the *ultra vires* claims in Counts Three, Four, and Five. As this Court held in this very case:

> ***A member of an organization may directly sue that organization*** to enjoin actions that the organization did not have power to execute. *See* D.C. Code § 29-403.04(b)(1); *see also Daley v. Alpha Kappa Alpha Sorority, Inc*., 26

> A.3d 723, 729 (D.C. 2011). Actions taken by the organization that are 'expressly prohibited by state or by-law' or outside the powers conferred upon it by articles of incorporation are ultra vires.

Bronner v. Duggan, 249 F. Supp. 3d 27, 47 (D.D.C. 2017) ("*Bronner I"*), *emphasis added*. These *ultra vires* claims arising from violations of explicit bylaws, and they are appropriately brought as direct claims, under this Court's holding and under D.C. Nonprofit Corporations Act § 29-403.04(b), which provides that "The power of a nonprofit corporation to act may be challenged in a proceeding by: (1) A member, director, or member of a designated body against the corporation to enjoin the act; [or] (2) The corporation, directly, derivatively, or through a receiver trustee, or other legal representative."

3. <u>Breach of fiduciary duty</u>

Under binding authority, claims for breach of fiduciary duty are properly brought as direct claims. *See Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n*, 441 A.2d 956, 962-63 (D.C. 1982) (directors and developers of a housing cooperative must act in good faith on behalf of the cooperative's individual members) (hereinafter, *Wisconsin Avenue*). The plaintiffs in *Wisconsin Avenue* brought direct claims for breach of fiduciary duty and breach of contract. Citing numerous cases holding that fiduciaries owe a duty not only to the corporation or membership organization, but to the individual stockholders or members as well, the *Wisconsin Avenue* court held:

> Officers and directors of a corporation owe a fiduciary duty to the corporation ***and to its shareholders***, which requires them to act in good faith in managing the affairs of the corporation. *See, e.g., United States v. Byrum*, [408 U.S. 125, 142 (1972)]; *SEC v. Chenery Corp.*, [318 U.S. 80, 85 (1943)]; *McKay v. Wahlenmaier*, [226 F.2d 35, 44 (1955)]; *Johnson v. American General Insurance Co.*, 296 F. Supp. 802, 809 (D.D.C. 1969). . . .
>
> Similarly, promoters of a corporation stand in a fiduciary relation to ***both the corporation and its stockholders***, which requires them to act with the utmost good faith and to ***disclose fully all material facts to both the corporation and its stockholders***.

Wisconsin Avenue, 441 A.2d at 962-63, emphasis added. *See also Willens v. 2720 Wis. Ave. Coop. Ass'n*, 844 A.2d 1126, 1136 (D.C. 2004) ("directors of the Cooperative owed the duties of a fiduciary to the corporation ***and to its members***," emphasis added) and *Daley*, 26 A.3d at 729 ("the right of faithful representation" is "a direct claim").

B. The D.C. Court of Appeals Has Explicity Held – Twice – that Members of a Nonprofit Organization Have Standing to Bring Claims for Mismanagement that Injures the Organization.

The Court of Appeals has twice held that members of a nonprofit have standing to bring direct claims for injury to the nonprofit, even though shareholders of a for-profit entity would be barred from bringing the exact same claims. *Daley v. Alpha Kappa Alpha*, 26 A.3d 723 (D.C. 2011); *Jackson* v. *George*, 146 A.3d 405 (D.C. 2016).

Daley involves claims of fiscal mismanagement of Alpha Kappa Alpha sorority ("AKA"), a nonprofit incorporated in the District of Columbia, including large payments to the sorority president from the sorority's coffers. *Daley*, 26 A.3d at 726-27. The *Daley* plaintiffs, dues-paying members of AKA, brought claims against AKA and the individual defendants for breach of fiduciary duty, breach of contract, *ultra vires* acts, and corporate waste – the same types of claims at issue here. The plaintiffs alleged "that judicial intervention is necessary to restore those funds" to AKA and to "enjoin the appellees from taking any further action that would harm AKA" – exactly what Appellants/Plaintiffs here seek. *Id.*

The trial court dismissed the plaintiffs' claims on the grounds that they were brought "in the members' own names rather than as a derivative suit." *Id.* at 729. The District of Columbia Court of Appeals reversed, criticizing the lower court for adopting "too expansive a view of the requirement of derivative suits." *Id.* The court held:

> On its face, it would seem almost self-evident that members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payment of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization.
>
> . . . .
>
> [T]he total equation of a stockholder in a for-profit corporation complaining of financial losses with a member of a nonprofit corporation in an on-going dues-paying basis aimed at social and charitable purposes and the accompanying emotional connotations is an uneasy fit.

Id.

Daley properly recognized that this is a question of *standing*, and analyzed it as such. "In order to establish standing, a party must demonstrate: (1) concrete injury, (2) that the injury is traceable to the defendant's action, and (3) that the injury can be redressed." *Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992). Applying these three elements – an injury, traceable to defendants, that can be redressed –the Court of Appeal held that "it would seem almost self-evident" that the dues-paying members of a nonprofit "have standing to complain" when "the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws" of the organization. *Id*.[3]

The Court of Appeals reaffirmed the *Daley* holding in *Jackson v. George.* *Jackson* involved the alleged takeover of Jericho Baptist Ministries ("Jericho"), a church in the District of Columbia. In brief, the case alleged that trustees of Jericho incorporated a new church in Maryland, merged the two churches, and transferred the Jericho's assets to the Maryland church. The *Jackson* plaintiffs,

[3] This is not a particularly surprising holding, as there is no reason why caselaw that addresses the ability of shareholders in for-profit corporations to bring claims should apply outside of the shareholder context. *See U.S. Gypsum Co. v. Quigley Co.* (*In re G-I Holdings, Inc*.), 755 F.3d 195, 208 (3d Cir. 2014) ("We can see no reason why the direct/derivative inquiry should apply in this situation. Under the case law, the distinction applies to claims brought by shareholders in a corporation.").

longtime members of the Jericho congregation, also alleged that the seating of four trustees and the removal of two others was invalid, such that any actions by the board of trustees, including the merger, were invalid as well.

The *Jackson* defendants argued that the plaintiffs lacked standing to bring direct claims arising from mismanagement of the church's assets. Relying on *Daley*, the trial court held that plaintiffs did have standing, even though the complaint "'speaks largely of injuries to the Church and its assets and property[.]'" *Jackson*, and the Court of Appeals affirmed. *Jackson,* 146 A.3d at 415 ("[the trial court] recognized the court's cautionary words about 'too expansive a view of the requirement of derivative suits' when allegations are made against a nonprofit corporation and its leaders").

The claims brought by Appellants/Plaintiffs are indistinguishable from those in *Daley* and *Jackson.* The ASA is a nonprofit incorporated in the District of Columbia. Plaintiffs/Appellants are longtime members of the ASA who have invested both financially and personally in the ASA and its mission. They bring allege mismanagement of the ASA by fiduciaries who exploit the ASA's assets for their own purposes, and bring claims for breach of fiduciary duty, *ultra vires* acts, breach of contract, violation of the D.C. Nonprofit Corporations Act, and corporate waste.

C. Defendant Salaita Does Not Even Mention the Holding in *Daley* and Only Briefly Mentions (and Misstates) the Holding in *Jackson.*

Defendant Salaita is careful not to cite *Daley* anywhere near his argument on standing.[4] He does cite to *Jackson v. George*, and flatly misconstrues the holding. Cherry-picking language, Defendant Salaita argues that *Jackson* holds that "[m]embers 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

[4] Defendant Salaita cites the *Daley* case on other grounds, in his argument on personal jurisdiction, only. *See* Salaita Br. at 12 n. 8.

been suffered by all ASA members generally[.]" Salaita Br. at 14.

Jackson v. George does not require "a special injury . . . not suffered equally by all," as Defendant Salaita asserts. Indeed, that is exactly what the *Jackson* defendants argued – and both the trial court and the Court of Appeal rejected that argument. Relying on *Daley*, the trial court held that the plaintiffs had standing, even though the complaint "'speaks largely of injuries to the Church and its assets and property,'" and the Court of Appeals affirmed. *Jackson,* 146 A.3d at 415 ("[the trial court] recognized the court's cautionary words about 'too expansive a view of the requirement of derivative suits' when allegations are made against a nonprofit corporation and its leaders"). There was only one claim that was arguably "a special injury" in *Jackson* – removal from the church rolls – and that claim arose *after* the filing of the complaint, and only involved a subset of the *Jackson* plaintiffs. The *Jackson* court clearly did not rely on the existence of a "special injury" to find standing where the complaint "speaks largely of injuries to the Church and its assets and property," and *Jackson*'s reliance on *Daley*, including "the [*Daley*] court's cautionary words about 'too expansive a view of the requirement of derivative suits' when allegations are made against a nonprofit corporation and its leaders," easily disproves Defendant Salaita's suggestion otherwise.

II. DEFENDANTS' ARGUMENT THAT DERIVATIVE CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL IS BOTH MEANINGLESS – BECAUSE PLAINTIFFS BRING NO DERIVATIVE CLAIMS – AND WRONG.

Defendants argue that "all derivative claims are also barred by collateral estoppel." (Original Defs' Br. at 8; Kauanui/Puar Br. at 2.) The Complaint does not include a single derivative claim. Not one. Defendants' argument that Plaintiffs' derivative claims are barred is nonsensical.

As Defendant are well aware, Plaintiffs have not attempted to bring a derivative claim since 2016. At that time, Plaintiffs argued that demand on the ASA's National Council would have been futile. The Court disagreed, but by the time the Court's decision was issued, Defendants had changed

the bylaws of the ASA, stripping the editor of the Encyclopedia of American Studies of the status of officer of the ASA and his position as a member of the National Council. That editor, of course, was Plaintiff Bronner, who in 2016 was able to bring derivative claims because, as an officer of the ASA, he satisfied the requirement that only a "director or member of a designated body" (D.C. Code § 29-411.02) could bring derivative claims.

The Complaint describes these events in detail. (Compl. ¶¶ 243-56.) Defendants changed the bylaws in November 2017, stripping the editor of the Encyclopedia of the status of officer and member of the National Council (and without informing the membership of the ASA or even Plaintiff Bronner himself). And, despite an order documented in a hearing transcript that Defendants produce documents pertaining to changes in the bylaws, Defendants have failed – perhaps refuse – to produce any documents on this change in the bylaws.

Once Plaintiff Bronner was stripped of the status that once allowed him to bring a derivative claim – and then was stripped even of his position as editor of the Encyclopedia, although the Defendants had no one to replace him, ultimately leading to the discontinuation of the Encyclopedia altogether – he could not bring a derivative claim, and did not try. Thus, there are no derivative claims brought in this Complaint. There were no derivative claims brought in the SAC, either.

To the extent that Defendants' intent may be to argue that collateral estoppel bars Plaintiffs from bringing ***direct*** claims that arise from the same set of events as the ***derivative*** claims that were dismissed over two years ago, Defendants are wrong. Defendants also know that they are wrong, because they made the very same argument to the Federal Court long ago, and the Federal Court told them they were wrong:

> The Court dismissed the derivative claims because Plaintiffs had failed to make a demand on the National Council, not because the claims themselves, if ASA had asserted them on its own, lacked merit. The claims that

> Plaintiffs seek to assert sound in breaches of fiduciary duty, breaches of contract, and ultra vires action, which the D.C. Court of Appeals has suggested may be asserted directly by shareholders and members of non-profit organizations under certain circumstances. *See Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016); *Daley v. Alpha Kappa Alpha Sorority, Inc*., 26 A.3d 723, 729-30 (D.C. 2011).

Bronner v. Duggan, 324 F.R.D. at 293 & n.2 (D.D.C. 2018) ("the new claims that Plaintiffs assert do not appear to be the same as those that this Court has already rejected").

III. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED.

Defendants variously argue that Plaintiffs' claims One through Nine and Twelve are untimely under D.C.'s three-year statute of limitations.[5] Only Defendant Salaita claims that Counts Ten and Eleven are untimely.[6] Defendants' reliance on the statute of limitations defense fails as to all of these Counts.

First, several of Plaintiffs' claims are timely because they arise out of actions and injuries that occurred less than three years before the filing of this case. These claims pertain to the termination of Plaintiff Bronner from ASA positions (Counts Ten and Eleven), the improper withdrawal and misuse of the ASA Trust Fund (Counts Nine and Twelve), and the amendment of the ASA bylaws to accomplish these actions (Counts One, Ten and Twelve).

Second, Counts One through Nine and Twelve include claims that are timely because the factual bases for these claims were concealed by Defendants, and Plaintiffs only obtained the documents and information that exposed these claims in 2017 via diligent pursuit of discovery in the prior federal action. (Compl. at 1-3.) These claims include the claims against Defendants Kauanui, Puar, Stephens, and Salaita, and other claims added to the federal lawsuit in the Second Amended

[5] Original Defs' Br. at 2-5; Kauanui/Puar Br. at 2-3; Salaita Br. at 10. Note that Counts Six through Eight are asserted only against Defendant ASA.
[6] Salaita Br. at 19-22.

Complaint submitted on November 6, 2017.

Finally, the statute of limitations period for Counts One through Nine was tolled by the federal tolling provision of 29 U.S.C. § 1367(d). Counts One through Nine assert the same claims Plaintiffs alleged in the second amended complaint in their federal lawsuit. Plaintiffs filed the federal lawsuit on April 20, 2016, less than two years and five months after the improper passage of the ASA anti-Israel boycott resolution on December 15, 2013, and they filed this case just thirty-nine days after the district judge dismissed the federal action without prejudice on February 4, 2019 and indeed while the appeal of that dismissal was still pending – as it is still pending as of the filing of this brief. The statute of limitations should also be tolled for Counts One through Nine due to "extraordinary circumstances" because the district judge's sudden dismissal of the federal action after nearly three years of litigation was an unanticipated reversal of previous orders in that case.

A. Legal Standard

The statute of limitations is an affirmative defense that must be pled by the party asserting it. *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005) (citing *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 734 (D.C. 2000). Moreover, "the plaintiff does not have an obligation to anticipate a potential limitations defense in the complaint or meet a potential defense with counterarguments and evidence before it is raised." *Daniels v. Potomac Elec. Power Co.*, 100 A.3d 139, 143 (D.C. 2014). On a Rule 26(b) motion to dismiss, the court should not dismiss a claim on the basis of the statute of limitations defense unless the plaintiff can allege no plausible set of facts that would overcome the defense. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 608 (D.C. Cir. 2013) (holding that if a plaintiff's potential "rejoinder to the affirmative defense is not foreclosed by the allegations in the complaint, dismissal at the Rule 12(b)(6) stage is improper") (internal quotation marks and citations omitted).

Under D.C. Code § 12-301, the statute of limitations for the claims asserted in this case is three years "from the time the right to maintain the action accrues." *See* D.C. 12-301(8). "Although what constitutes accrual of a cause of action is a question of law, when accrual actually occurred in a particular case is a question of fact for the fact finder." *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 945 (D.C. 2003). "This is particularly so where the discovery rule applies because '[t]he critical question in assessing the existence *vel non* of inquiry notice is whether the plaintiff exercised reasonable diligence under the circumstances in acting or failing to act on whatever information was available to him.'" *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d at 945 (quoting *Ray v. Queen*, 747 A.2d 1137, 1141-42 (D.C.2000)). In this regard, "[w]hat is 'reasonable under the circumstances' is a highly factual analysis." *Diamond v. Davis*, 680 A. 2d 364, 372 (D.C. 1986).

B. Claims for Actions and Injuries Occurring Within Three Years of the Filing of the Complaint Are Timely.

Several of Plaintiffs' claims are clearly timely because they arise out of actions and injuries that occurred less than three years before this case was filed. These claims pertain to: (1) Plaintiff Bronner's termination from ASA positions (Counts 10, 11 & 12); (2) the improper withdrawal and misuse of the ASA Trust Fund (Counts 9 & 12); and (3) the amendment of the ASA bylaws to accomplish these actions (Counts 1, 10 & 12).

Plaintiff Bronner was removed from his positions as an *Ex Officio* Officer of the ASA, and as a Member of the ASA's National Council by improper amendment of the ASA bylaws in November 2016, (Complaint, ¶¶ 243-256), and he was removed from his position as editor of the ASA's Encyclopedia of American Studies in December 2016. (Complaint, ¶¶ 232-235). The announcement that he had been replaced was not made until January 5, 2017, and the ASA's abandonment of the Encyclopedia of American Studies would not become apparent for some time after the January 2017

announcement. *Id.* Claims arising out of these actions and injuries are included in Counts Ten (breach of fiduciary duties), Eleven (tortious interference with contractual business relations), and Twelve (aiding and abetting breach of fiduciary duties).[7]

During 2016 and continuing for several years, Defendants improperly withdrew and spent many thousands of dollars from the ASA's Trust Fund to pay expenses arising out of the anti-Israel boycott. (Complaint, ¶¶ 162-175). In addition, Defendants improperly amended ASA's bylaws sometime in March 2016 to carry out these withdrawals. *Id.* Claims arising out of the misuse of the ASA Trust Fund are included in Counts Nine (corporate waste) and Twelve (aiding and abetting breach of fiduciary duties).

Claims pertaining to the improper amendment of the ASA bylaws to accomplish each of these actions are included in Counts One (breach of fiduciary duties), Ten (breach of fiduciary duties), and Twelve (aiding and abetting breach of fiduciary duties).

The statute of limitations for each of these claims is three years. D.C. Code § 12-301(8) (2019). Because each of these claims arise out of actions and injuries that occurred less than three years before the filing of the Complaint in this case, they are timely and not barred by the statute of limitations.

C. The Claims Added in the Second Amended Complaint in the Federal Action Based Upon Information Discovered in 2017 Are Timely.

Counts One through Nine and Twelve include claims that are timely because the factual bases for these claims were concealed by Defendants, and Plaintiffs only obtained the documents and information that exposed these claims in 2017 via diligent pursuit of discovery in the prior federal lawsuit. These claims include the claims against Defendants Kauanui, Puar, Stephens, and Salaita,

[7] As noted above, only Defendant Salaita argues that Counts Ten and Eleven are untimely.

and other claims added to the federal lawsuit in a second amended complaint.

Although a cause of action is generally said to accrue at the time of injury, "[w]here the relationship between the fact of injury and the alleged tortious conduct may be obscure, we determine when the statute of limitations begins to run by applying the 'discovery rule.'" *Colbert v. Georgetown University*, 641 A.2d 469, 472-473 (D.C. 1994) (en banc) (citing *Bussineau v. President Directors of Georgetown College*, 518 A.2d 423, 425-26 (D.C. 1986)). When the "discovery rule" applies, "the statute of limitations will not run until plaintiffs know or reasonably should have known that they suffered injury **due to the defendants' wrongdoing**." *Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 299 (D.C. 2001) (emphasis added).

Plaintiffs first filed their federal lawsuit against Defendants Duggan, Marez, Tadiar, Maira, Reddy and the ASA on April 20, 2016 ("Federal Action" or "2016 Complaint"). Discovery did not commence in the Federal Action until after April 26, 2017. On November 9, 2017, based upon new information obtained in discovery in the Federal Action (primarily between August and November 2017), Plaintiffs requested leave to file a Second Amended Complaint ("SAC") alleging nine counts for relief and adding Defendants Kauanui, Puar, Stephens, and Salaita as new defendants.

On March 6, 2018, the District Court granted Plaintiffs leave to file the SAC. *Bronner v. Duggan*, 324 F.R.D. 285 (2018) ("*Bronner II*"). In its ruling, the District Court described the SAC as follows:

> In their [second] amended complaint, Plaintiffs have significantly expanded on their factual allegations and now seek to add four new defendants who held senior leadership roles at ASA: Jasbir Puar, J. Kehaulani Kauanui, Steven Salaita, and John Stephens (the "New Defendants"). *See* Pls.' Mot. at 1–2. In addition, Plaintiffs assert several new claims that they contend were revealed in the course of discovery. Specifically, they assert several new claims sounding in breach of fiduciary duties and claims for breach of contract and *ultra vires* acts. *See* Pls.' Mot. at 1.

Bronner II, 324 F.R.D. at 290.

The District Court accepted Plaintiffs' assertion that they were diligent in investigating these claims and that the claims were based upon new information obtained in discovery that could not have been presented earlier:

> In this case, Defendants argue that plaintiffs were both aware of the New Defendants and that they had a role in the Boycott Resolution. *See* Defs.' Opp'n at 9. Defendants point out that these New Defendants were identified in the Plaintiffs' original complaint and claims that they were discussed in certain early discovery requests and responses (though Defendants have not included those discovery materials in its submission to the Court). *See* Defs.' Opp'n at 9–10. Nevertheless, it is one thing to be aware of someone's existence and general role in an enterprise or transaction, but it is quite something else to have a sufficient factual predicate upon which to assert a claim. Plaintiffs argue in their motion that the proposed complaint "rests on newly discovered evidence that the Plaintiffs could not have presented to the Court earlier," including "factual matters that . . . identify additional parties who are culpable." Pls.' Mot. at 8 (emphasis added). Defendants give the Court no reason to doubt that this is the case, and the fact that Plaintiffs might have been aware of these persons' mere existence at an earlier stage is neither surprising nor does it, in and of itself, suggest that Plaintiffs were dilatory in asserting their claims.

Bronner II, 324 F.R.D. at 292.

The District Court oversaw the discovery process in the Federal Action and properly accepted Plaintiffs' contention that they had been diligent in investigating the circumstances surrounding the 2013 Boycott Resolution. Plaintiffs obtained new documents and information in 2017 in discovery that was previously concealed by the Defendants and was unavailable to Plaintiffs outside of the legal discovery process. The new information exposed new claims and evidence of wrongdoing by additional defendants that Plaintiffs could not otherwise have discovered prior to this time.

Just as in the Federal Action, Defendants offer this Court absolutely no evidence suggesting that Plaintiffs could have known earlier than 2017 of the facts giving rise to these claims. Therefore, Defendants' motion to dismiss these claims as untimely is without basis and should be denied.

D. The Statute of Limitations Was Tolled for Counts One Through Nine During the Pendency of the Federal Action.

1. The Tolling Provision of 28 U.S.C. § 1367(d) Applies to the Claims Asserted in the Federal Action

This case is the continuation of Plaintiffs' Federal Action filed April 20, 2016. Plaintiffs diligently litigated their claims in federal court for nearly three years, until the district judge abruptly dismissed the Federal Action "without prejudice" on February 4, 2019, when – explicitly reversing his own previous ruling to the contrary – the federal judge decided for the first time that his dismissal of Plaintiffs' derivative claims two years earlier eliminated the basis for original jurisdiction in federal court. The claims recently dismissed from the Federal Action and re-asserted here in Counts One through Nine are timely by operation of the federal tolling provision of 28 U.S.C. § 1367(d).[8]

Title 28 U.S.C. § 1367, which deals with supplemental jurisdiction in federal court, provides in relevant part:

> (a) . . . in any civil action of which the district courts have original jurisdiction, the district courts **shall have** supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . .
>
> (c) The district court **may decline to exercise** supplemental jurisdiction over a claim under subsection (a) if --
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> the claim raises a novel or complex issue of State law,
>
> the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> the district court has dismissed all claims over which it has original jurisdiction, or

[8] Section 1367(d) tolling applies to all of the claims in Counts One through Nine. Nevertheless, the timeliness of those claims in Counts One through Nine that were added to the SAC based upon new information obtained in 2017 through federal discovery do not depend on § 1367(d) tolling. *See* Section II.C., *supra*.

> in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> (d) The period of limitations 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 dismissal of the claim under subsection (a), **shall be tolled** while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
>
> (e) As used in this section, the term "State" includes the District of Columbia . . .

28 U.S.C. § 1367 (emphasis added).

Section 1367(d) tolls the limitations period for claims over which a federal court has supplemental jurisdiction until thirty days after the claims are dismissed from the federal action. In *Artis v. District of Columbia*, 583 U.S. ___, 138 S.Ct. 594, 598 (2018), the Supreme Court clarified that "§ 1367(d)'s instruction to 'toll' a state limitations period means to hold it in abeyance, i.e., to stop the clock." In other words, the "clock" only begins to run again on the 31st day after it is dismissed, unless State law provides for a longer tolling period. *Id.*

Here, Plaintiffs filed the Federal Action on April 20, 2016, less than two years and five months after the improper passage of the ASA anti-Israel boycott resolution on December 15, 2013. Plaintiffs filed this case just thirty-nine days after the district judge dismissed the Federal Action without prejudice on February 4, 2019. By operation of § 1367(d), the statute of limitations "clock" stopped as to Plaintiffs' claims arising out of the December 15, 2013 boycott resolution on April 20, 2016,[9] and did not begin to run again until March 6, 2019. When Plaintiffs filed the Complaint in this case on March 15, 2019, only nine days were added to the less-than-two-years-and-five-months that had passed prior to the filing of the initial complaint in the Federal Action. Therefore, less than three

[9] As discussed below, the claims alleged in the SAC against Defendants Duggan, Marez, Tadiar, Maira, Reddy, and the ASA related back to the date of the original complaint pursuant to Fed. R. Civ. P. 15.

years of the limitations period had run when Plaintiffs filed this case, and it is therefore timely.[10]

Defendants contend Plaintiffs are not entitled to § 1367(d) tolling because Plaintiffs alleged only diversity jurisdiction pursuant to 28 U.S.C. § 1332 as the basis for federal subject matter jurisdiction in their federal complaint. However, the District Court's rulings demonstrate that the federal court in fact had supplemental jurisdiction over Plaintiffs' direct claims pursuant to § 1367(a), although that did not become apparent until the District Court's final order.

The original DC-Complaint filed on April 20, 2016 asserted both derivative and direct claims for damages, injunctive, and declaratory relief against Defendants Duggan, Marez, Tadiar, Maira, Reddy, and the ASA, arising out of the improper manipulation of the ASA for political purposes to pass an anti-Israel boycott resolution in December 2013. Plaintiffs filed an amended and verified complaint with the same claims on June 23, 2016 ("the 2016 Complaint").[11] Subject matter jurisdiction in the Federal Action was based upon diversity of citizenship pursuant to 28 U.S.C. § 1332, which provides in relevant part:

> (a) The district courts shall have **original jurisdiction** of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States . . .
>
> (e) The word "States", as used in this section, includes . . . the District of Columbia . . .

28 U.S.C. § 1332(a)(1) and (e) (emphasis added).

On July 7, 2016, the defendants moved to dismiss the 2016 Complaint, and the motion was

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[10] Stated differently, since only nine days elapsed between the 30th day after the Federal Action was dismissed and the day the current case was filed in this Court, any claim that accrued on or after April 29, 2013 (three years minus nine days before the Federal Action was filed) would be timely under the three-year limitations period.

[11] The 2016 Complaint related back to the date of the original Complaint pursuant to Fed. R. Civ. P. 15.

fully briefed by August 1, 2016.

The District Court finally ruled on the motion to dismiss the 2016 Complaint approximately eight months later, on March 31, 2017.[12] In its ruling, the District Court first addressed "the Defendants' argument that Plaintiffs do not exceed the $75,000 amount-in-controversy requirement to maintain this diversity suit."[13] *Bronner I*, 249 F. Supp. 3d at 37. Reviewing the general allegations of the 2016 Complaint, the District Court summarized the injuries alleged as follows:

> Plaintiffs allege that since the boycott, several members of the ASA have resigned in protest of the boycott, financially depriving the ASA of membership dues for years to come. Compl. ¶ 60. Moreover, Plaintiffs allege that the ASA has experienced a significant decline in reputation because of the boycott. The ASA is alleged to have suffered financial harm as a result of the boycott because of an alleged decrease in donations and an increase in public-relations spending required by the need to deal with the public backlash resulting from the boycott. Compl. ¶ 61. Although Plaintiffs do not allege any specific amounts of damages in their complaint, they do, in their "Jurisdiction and Venue" section, assert that "the amount in controversy exceeds $75,000." Compl. ¶ 9.

Id. at 34. Specifically addressing the defendants' challenge to the amount-in-controversy, the District Court stated:

> Plaintiffs' claims plainly meet the low standard for establishing a sufficient amount in controversy. The complaint asserts that over $75,000 is in controversy in the case, albeit in a cursory fashion. *See* Compl. ¶ 9. It is far from legally certain that Plaintiffs could not recover over $75,000. The complaint seeks monetary, injunctive, and declarative relief for waste, breach of contract, breach of fiduciary duties, *ultra vires* acts, and violation of the D.C. Nonprofit Corporation Act. *See* Compl. at 25–31. It specifically alleges that the ASA will lose membership dues from many former members for years to come. Compl. ¶ 60. The complaint also specifically states that the boycott resolution has "resulted in the improper expenditure of ASA funds related to membership dealings, public relations, legal

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[12] *See* DC-DE 27-28. The March 31, 2017 Memorandum Opinion (DC-DE 28) is published as *Bronner v. Duggan*, 249 F. Supp. 3d 27 (D.D.C. 2017) ("*Bronner I*").

[13] The District Court noted that, "[t]he parties here do not dispute diversity of citizenship." *Bronner I*, 249 F. Supp. 3d at 37.

> matters, and ... employee time and effort," and that Individual Defendants are "consciously attempting to appropriate the assets and reputation of the ASA to achieve purposes ... at odds with[ ] [the] purposes and mission ... [of] the ASA." Compl. ¶¶ 80, 84.

Id. at 38. Thus, the District Court determined that the amount-in-controversy was satisfied and that subject matter jurisdiction existed over the Federal Action. *Id.*

After confirming subject matter jurisdiction, the District Court dismissed Plaintiffs' derivative claims based upon its finding that Plaintiffs had not satisfied the required pre-suit notice for derivative claims or proven that notice should be waived as futile. *Id.* at 42-47. This left only direct claims remaining in the case, which the Court then allowed to proceed. *Id.* at 32.

Significantly, the District Court's March 31, 2017 opinion gave no indication that the dismissal of the derivative claims had any impact on Plaintiffs' ability to continue to satisfy the amount-in-controversy requirement for diversity jurisdiction. On the contrary, the clear implication of the District Court's order allowing the case to proceed was that the damages recoverable via the surviving direct claims satisfied the amount-in-controversy even without the derivative claims. Indeed, Plaintiffs' direct claims also sought damages on behalf of the ASA.[14]

Following the District Court's March 31, 2017 ruling, the defendants answered the 2016 Complaint and the Federal Action proceeded to discovery. On November 9, 2017, based upon new information obtained in discovery, Plaintiffs requested leave to file the SAC, alleging nine counts for relief and adding Defendants Kauanui, Puar, Stephens, and Salaita.

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[14] Because the District Court ruled that it had subject matter jurisdiction and the action would proceed, there was no reason at that time for Plaintiffs to assert (or even consider) that the federal court's jurisdiction over Plaintiffs' surviving direct claims must be based upon supplemental jurisdiction. Only much later, when the District Court ruled on April 4, 2019 that Plaintiffs did not have standing to recover damages on behalf of the ASA via direct claims, did it become clear that the District Court's March 31, 2017 dismissal of Plaintiffs' derivative claims eliminated the basis for original jurisdiction over the Federal Action. As discussed below, dismissal of the claims that provide original jurisdiction leaves a district court will supplemental jurisdiction over the remaining "state-law" claims pursuant to § 1367(a).

On March 6, 2018, the District Court granted Plaintiffs leave to file the SAC. The claims against the four new defendants and other new claims in the SAC based upon newly discovered information in 2017 did not accrue before their discovery in 2017.[15] In addition, the claims in the SAC against the original defendants in the Federal Action (Defendants Duggan, Marez, Tadiar, Maira, Reddy and the ASA) related back to the original April 20, 2016 DC-Complaint pursuant to Fed. R. Civ. P. 15(c), which provides in relevant part:

> (c) Relation Back of Amendments.
>
> (1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when:
>
> . . .
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . .

Regarding the relation of the new claims to the original complaints, the District Court stated in its opinion granting leave to file the SAC: "Plaintiffs do not depart drastically from the theories advanced in the first two complaints. Indeed, Defendants do not dispute that Plaintiffs' new claims advance theories for relief that stem from and are otherwise related to the passage of the Boycott Resolution." *Bronner II*, 324 F.R.D. at 291.

At the same time, the District Court *sua sponte* directed the parties to submit briefs on the issue of whether a provision of the D.C. Nonprofit Corporation Act limiting director liability would bar Plaintiffs from recovering damages from the defendants such that Plaintiffs would be unable to satisfy the amount-in-controversy requirement for diversity jurisdiction. *See Bronner II*, 324 F.R.D. at 293-95. Although the issue involved the amount-in-controversy requirement, the question appeared

[15] *See* Section II.C. above.

to assume that Plaintiffs could otherwise recover damages on behalf of the ASA via their direct claims. Moreover, in the portion of its opinion granting Plaintiffs leave to file the SAC, the District Court noted that Plaintiffs had a good faith basis for pursuing their claims directly:

> Defendants do claim that Plaintiffs are attempting to repackage former derivative claims as direct claims. But the Court does not view this alone as an indication of bad faith. The Court dismissed the derivative claims because Plaintiffs had failed to make a demand on the National Council, not because the claims themselves, if ASA had asserted them on its own, lacked merit. The claims that Plaintiffs seek to assert sound in breaches of fiduciary duty, breaches of contract, and *ultra vires* action, which the D.C. Court of Appeals has suggested may be asserted directly by shareholders and members of non-profit organizations under certain circumstances. *See Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016); *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729–30 (D.C. 2011).

Bronner II, 324 F.R.D. at 293 n.2.

On July 5, 2018, the District Court determined that Plaintiffs had alleged conduct by the defendants that would not be shielded by the provision in question, and once again confirmed that it had subject matter jurisdiction over the action.[16] Accordingly, the District Court ordered the defendants to respond to the SAC. *Bronner III*, 317 F. Supp. 3d at 291.

The defendants filed new motions on August 27, 2018, including motions to dismiss the SAC, and the motions were fully briefed by November 7, 2018.

On February 4, 2019, the District Court ruled on the motions to dismiss the SAC.[17] In a surprising departure from its previous decisions in the case, the District Court now ruled that Plaintiffs could not pursue ***damages*** incurred by the ASA via direct claims. Of course, the District Court had already dismissed Plaintiffs' derivative claims on March 31, 2017.

After determining that Plaintiffs could not seek damages for ASA's injuries, the District Court

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[16] *Bronner v. Duggan*, 317 F. Supp. 3d 284 (D.D.C. 2018) ("*Bronner III*").

[17] *Bronner v. Duggan,* 364 F. Supp. 3d 9, 15 (D.D.C. 2019) ("*Bronner IV*").

turned to "Plaintiffs' remaining claims," which it described as direct claims for "damages and injunctive relief for their own injuries." *Id.* at 17-19. The District Court concluded that "[Plaintiffs'] remaining claims do not raise an amount-in-controversy exceeding $75,000," and dismissed the Federal Action without prejudice for lack of subject matter jurisdiction. *Id.*[18]

Section 1367(a) makes clear by its terms that once a district court has original jurisdiction over an action, the district court automatically has supplemental jurisdiction over all other claims that form part of the same case or controversy. Section 1367(c) grants a district court discretion to "decline to exercise supplemental jurisdiction" over such claims in certain limited circumstances, including "if . . . the district court has dismissed all claims over which it has original jurisdiction." § 1367(c)(3).

This understanding of § 1367 is supported by the case law. In *Shanaghan v. Cahill*, 58 F. 3d 106 (4th Cir. 1995), a plaintiff brought a diversity action in federal court seeking recovery on three separate debts, which when aggregated satisfied the amount-in-controversy required by § 1332(a). When two of the claims were dismissed and the remaining claim alone did not meet the amount-in-controversy threshold, the district court determined that it was required to dismiss the remaining claim for lack of subject matter jurisdiction under § 1332. *Id.* at 108-109. However, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the case to the district court, holding that § 1367(a) provided supplemental jurisdiction over the remaining claim, and the district court erred in failing to exercise its discretion as to whether to retain jurisdiction pursuant to § 1367(c). *Id.*

Because § 1367 applies, its tolling provision applies as well, and the applicable statute of limitations did not run during the pendency of the Federal Action or for 30 days after the dismissal of

[18] Plaintiffs filed a timely notice of appeal on March 3, 2019 and that appeal is currently pending before the U.S. Court of Appeals for the D.C. Circuit.

that action became final.

In *Stevenson v. Severs*, 158 F.3d 1332 (D.C. Cir. 1998), the district court granted summary judgment on a plaintiff's three claims in a federal diversity action. On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed summary judgment on two of the claims, but reversed judgment on the third claim. Because the third claim alone did not meet the amount-in-controversy threshold under § 1332, the Court of Appeals remanded the case to the district court with instructions to exercise its discretion whether to retain supplemental jurisdiction over the claim under § 1367(c). The Court of Appeals explained:

> In the typical exercise of supplemental jurisdiction, a district court finds that a state claim is "so related" to a federal cause of action that it forms "the same case or controversy," *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); in the interest of efficient use of judicial resources, the court therefore asserts supplemental jurisdiction over the state law claim. As the Fourth Circuit has held, however, "the statute is not limited to cases where the original basis for federal jurisdiction was a federal question. It clearly provides for the operation of supplemental jurisdiction in diversity cases." *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir.1995). Indeed, the statute plainly provides for the exercise of discretion whenever "the district court has dismissed all claims over which it has original jurisdiction" irrespective of whether original jurisdiction arose from diversity of citizenship or existence of a federal question. 28 U.S.C. § 1367(c)(3).

Stevenson v. Severs, 158 F.3d at 1334.

Here, the jurisdictional significance of the District Court's March 31, 2017 dismissal of Plaintiffs' derivative claims[19] only came into view once the District Court ruled on April 4, 2019 that Plaintiffs could have only recovered damages on behalf of the ASA via derivative claims (and not direct claims).

In its March 31, 2017 opinion, the District Court focused on allegations of harm to the ASA

[19] *Bronner v. Duggan*, 317 F. Supp. 3d 284 (D.D.C. 2018) ("*Bronner III*").

and determined that the amount-in-controversy for diversity jurisdiction was satisfied. At that point, the District Court did not differentiate between Plaintiffs' derivative and direct claims as to the amount-in-controversy, since Plaintiffs sought damages on behalf of the ASA via both types of claims.

But when the District Court ruled on April 4, 2019 that it was ***only*** Plaintiffs' derivative claims that had satisfied the amount-in-controversy, then it became clear that the dismissal of those claims on March 31, 2017 constituted the dismissal of the only claims that formed the basis for original jurisdiction pursuant to the federal diversity statute, 28 U.S.C. § 1332. Nevertheless, as the caselaw cited above makes clear, upon dismissal of Plaintiffs' derivative claims, the district court still had supplemental jurisdiction over the direct claims pursuant to 28 U.S.C. § 1367(a). The District Court properly had discretion to retain jurisdiction and continue with the case.[20] Once the federal court had supplemental jurisdiction over Plaintiffs' remaining claims pursuant to § 1367(a), the tolling provision of § 1367(d) applies to those claims.

The D.C. Court of Appeals has held that "the language of the statute, case-law, and the tenets of judicial economy underlying the statute's enactment" all warrant a broad reading of the tolling provision of § 1367(d) to apply whenever the claim that provides the underlying basis for original jurisdiction is dismissed, without regard to the reason for such dismissal. *Stevens v. ARCO Management of Washington, D.C., Inc.*, 751 A.2d 995, 998-1003 (D.C. 2000). Likewise, in this case, failure to apply § 1367(d) to toll the limitations in this case "would work against judicial efficiency . .

[20] Alternatively, it would also be possible to consider Plaintiffs' direct claims as continuing to provide original jurisdiction until the District Court's April 4, 2019 ruling that Plaintiffs did not have standing to seek damages on behalf of the ASA via direct claim. Under this scenario, once the District Court dismissed the direct claims for ASA's damages, the District Court would still have supplemental jurisdiction pursuant to § 1367(a) over "Plaintiffs' remaining claims" (in the District Court's own words) for damages and injunctive relief for individual harm.

. [and] tend to compel prudent federal litigants who present state claims to file duplicative and wasteful protective suits in state court."

Accordingly, Counts One through Nine are timely by operation of § 1367(d).

2. Equitable Tolling: New Ruling of District Court Regarding Subject Matter Jurisdiction

In addition to the tolling provision of § 1367(d), the statute on Plaintiffs' claims in Counts One through Nine was tolled during the time Plaintiffs were pursuing their claims in the Federal Action pursuant to the "extraordinary circumstances" doctrine because the Federal Court's dismissal came long after an explicitly contrary ruling by the same court, upon which Plaintiffs appropriately relied. The "extraordinary circumstances" doctrine for tolling the statute of limitations was applied in *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C. 1991) (*Simpson*), a case with facts analogous to the circumstances in our case.

In *Simpson*, a plaintiff submitted an employment discrimination complaint to the District of Columbia Office of Human Rights (the "District") that was subsequently dismissed upon a finding of no probable cause. *Id.* at 396. The plaintiff sought to appeal the administrative determination by filing a notice of appeal in the D.C. Court of Appeals. *Id.* The District moved to dismiss the appeal for lack of jurisdiction, but a motions division of the Court denied the motion. *Id.* The appeal was nevertheless later dismissed pursuant to a stipulation between the plaintiff and the District that the Commission would review the administrative determination. *Id.* After the Commission found that it could not review the determination, the plaintiff's appeal was reinstated in the D.C. Court of Appeals. *Id.* The Court of Appeals subsequently dismissed the appeal "without prejudice" for lack of jurisdiction, citing an intervening opinion clarifying that the only recourse from such an administrative determination would be to file a civil action in the Superior Court. *Id.* The Plaintiff later filed a civil

action in Superior Court to challenge the administrative determination, but the action was dismissed based on D.C.'s three-year statute of limitations. *Id.*

On appeal, the Court of Appeals agreed that the statute of limitations had run by the time the plaintiff finally filed her civil action in the Superior Court. Nevertheless, the Court of Appeals held that it was appropriate to treat the plaintiff's claim as having accrued as of the date the Court of Appeals dismissed her appeal without prejudice and directed her to file a civil action in the Superior Court. The Court of Appeals explained its decision by focusing on the timing of a then-recent change in the law governing the plaintiff's claims:

> Ms. Simpson [argues] that this court's decision in *Lamont* made a substantive change in the law, and that prior to *Lamont* claimants had no reason to believe that they were obliged to (or even had the right to) seek review of OHR decisions in the Superior Court. According to Ms. Simpson, "courts have recognized the inappropriateness and the inequity of applying a new statute of limitations to some preexisting claims, and have permitted litigants to proceed where [their actions] would otherwise be timebarred, or ***where substantial changes in the law on which parties relied have occurred***." *See, e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-57, 30 L.Ed.2d 296 (1971). . . . Although *Lamont* did not overrule prior precedent . . . that decision could reasonably be characterized as having decided "an issue of first impression whose resolution was not clearly foreshadowed." *Huson*, supra, 404 U.S. at 106, 92 S.Ct. at 355. The uncertainty as to which tribunal should review OHR's decision is reflected by the parties' stipulated dismissal of the appeal to enable the Human Rights Commission to consider the matter, and the subsequent opinion of the Corporation Counsel which precluded pursuit of that avenue. Moreover, the initial denial by a motions panel of this court of OHR's motion to dismiss the petition for review may have reinforced Ms. Simpson's belief that she had come to the correct tribunal. *See Frain v. District of Columbia*, 572 A.2d 447, 450-51 (D.C. 1990).
>
> We agree with the Supreme Court of Alaska that where two constructions as to the limitations period are possible, the courts prefer the one which gives the longer period in which to prosecute the action. *Safeco Inc. Co. of Am. v. Honeywell*, 639 P.2d 996, 1001 (Alaska 1981). "If there is any reasonable doubt in a statute of limitations problem, the [c]ourt will resolve the question in favor of the complaint standing and against the challenge."

> *Saunders v. Holloway Const. Co., Inc.*, 724 F. Supp. 640, 642 (W.D. Ark. 1989).

Id. at 401, emphasis added.

Similarly in our case, Plaintiffs filed their Federal Action asserting both derivative and direct claims seeking damages on behalf of the ASA in reliance on District of Columbia case law and standard principles of federal subject matter jurisdiction. Although the District Court dismissed the derivative claims on March 31, 2017, it nevertheless ruled explicitly that the amount in controversy requirement was satisfied and therefore that subject matter jurisdiction was proper, and it accordingly allowed the case to proceed as to Plaintiffs' direct claims. The District Court subsequently granted Plaintiffs leave to file the SAC, and also issued later order confirming subject matter jurisdiction and directing the defendants to respond to the SAC. Only on April 4, 2019, after nearly three years of litigating their claims in federal court, did the District Court issue a new and inconsistent ruling that subject matter jurisdiction had been eliminated nearly two years earlier by the dismissal of Plaintiffs' derivative claims. Furthermore, rather than dismiss Plaintiffs' remaining claims for failure to meet the amount-in-controversy, the District Court should have acknowledged that it had supplemental jurisdiction over those claims and exercised its discretion pursuant to § 1367(c) to determine whether or not to retain jurisdiction over the case. This case presents extraordinary circumstances in which the Court should toll the limitations period for the duration of the Federal Action, and deny Defendants motions to dismiss.

IV. DEFENDANTS ARE NOT EXCULPATED FROM LIABILITY BY D.C. CODE § 29-406.31 OR THE VOLUNTEER PROTECTION ACT.

After extensive briefing specific to this narrow issue, the District Court found that the Defendants are not exculpated under D.C.'s nonprofit code, § 29-406.31(d), which protects directors of nonprofits from liability for monetary damages under certain circumstances, because the complaint

alleged conduct that constitutes intentional infliction of harm on the ASA – an explicit exception to the exculpation provision. The court's findings are set forth in detail in *Bronner v. Duggan*, 317 F. Supp. 3d 284 (D.D.C. 2018). In summary, the Court found:

> In light of the Model Act's Official Comment and the case law, **Plaintiffs have plausibly alleged that the Individual Defendants acted with an intent to harm the ASA**.
>
> Plaintiffs allege that the Individual Defendants "purposefully and intentionally withheld material information from [ASA] members, including the fact that the Individual Defendants expected that if the [Resolution] was adopted, [the ASA] would be widely attacked throughout the academic world and the press, and that this would harm [the ASA's] reputation, its members' relationships with their universities, and [the ASA's] size, strength, and finances." SAC ¶ 113; see also Pls.' Br. at 2 (quoting an email in which an Individual Defendant stated, "I don't care if [the Resolution] 'splits' the organization"). More specifically, for instance, Plaintiffs allege that the Individual Defendants conspired to "pack" key ASA positions and the ASA's National Council with supporters of the Resolution, without disclosing that plan to the ASA's membership. See SAC ¶ 54-55, 60, 69. The Individual Defendants also allegedly used ASA resources to attract speakers supporting the Resolution, while consciously declining to provide opposing viewpoints and recognizing the appearance of a conflict of interest that could undermine the ASA's legitimacy with its members. See SAC ¶ 91-94. According to Plaintiffs, the Individual Defendants similarly refused to publicize letters and other correspondence opposing the Resolution, including correspondence warning that "the passage of the Resolution would be destructive to the [ASA]." See SAC ¶ 104, 109, 114-16. The Individual Defendants then allegedly subverted the ASA's voting procedures to push the Resolution through the ASA's membership approval process with far fewer votes than required by the ASA's bylaws. See SAC ¶ 123, 134-37. Finally, knowing that the Resolution would cause significant backlash against the ASA, Defendants allegedly misappropriated ASA funds to hire attorneys and retain a "rapid response" media team to defend against that backlash. See SAC ¶ 170-71, 185-89.
>
> Based on these allegations, Plaintiffs claim that Defendants violated their duties to the ASA and its members, violated the ASA's bylaws, and violated D.C. law in furtherance of a Resolution that they knew was likely to harm the organization. Defendants contend that the Complaint shows "that the Defendants acted in conformance with their overall philosophy, and thus believed that their actions were right and proper," Defs.' Opp'n at 10, but that contention does not help if, as alleged, Defendants' "philosophy" was at odds with the ASA's organizational health. . . . Defendants here not only

> allegedly subverted the ASA's voting procedures, but also allegedly improperly diverted its resources and misled its members in service of a harmful purpose. Accordingly, Plaintiffs have alleged that Defendants' conduct rises to the level of intent to harm the ASA, and therefore that Defendants are not shielded from damages by D.C. Code § 29-406.31(d).

Bronner v. Duggan, 317 F. Supp. 3d at 293-94 (*Bronner III*).

Now, three defendants argue that they are exculpated under either § 29-406.31(d), the federal exculpation statute (which also has an exception that includes intentional infliction of harm – an exception that is actually ***broader*** than the D.C. statute's exception), or both. Their arguments all fail.

A. The Federal Court's Decision Applied to All Defendants, Including Defendant Salaita.

Defendant Salaita (only) argues that he is exculpated under D.C. Code § 29-406.31(d), and that the District Court's decision does not apply to him because it was "prior to [him] being named as a Defendant in that litigation[.]" Salaita Br. at 27, n.20 ("The federal court's prior findings regarding other defendants with different allegations them, before Dr. Salaita was even a party to the case, cannot bind Dr. Salaita".) This assertion is absolutely false. Defendant Salaita was a party to the case, and the Federal Court's findings in no way excluded him.

As is clear from the above excerpt, the Federal Court's findings were based on the SAC, which named all of the Defendants named in this case, including Defendant Salaita. The briefing on this issue was ordered by the Federal Court in the same order granting Plaintiffs' Motion to File the SAC, and ordering the court clerk to file the SAC as the active complaint in the case, which the clerk immediately did. That order was dated March 6, 2018, and the Court clerk filed the SAC as the active complaint the same day. The Court's decision in *Bronner III* was issued on July 6, 2018 – four months later, to the day.

The decision in *Bronner III* applied to all Defendants, including Defendant Salaita. His claim that the decision precedes his involvement in the case is flatly incorrect.

B. Intentional Acts Find No Safe Harbor in the VPA.

Defendants Kauanui and Puar do not dispute that the finding of intentional infliction of harm applies to them, and thus do not (and cannot) argue that they are immunized under D.C. Code § 29-406.31. Yet they, along with Defendant Salaita – but none of the other defendants – argue that they should be immunized under the federal Volunteer Protection Act ("VPA"). The VPA also has an exception for misconduct, and ***the VPA's exception is broader than D.C. Code § 29-406.31(d). The VPA's exception applies even to gross negligence and recklessness***:

> (a) Liability protection for volunteers. Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if . . .
>
> (3) 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.S. § 14503.

Because Kauanui, Puar, and Salaita cannot argue that the SAC does not allege intentional infliction of harm, they cannot possibly argue that the SAC does not allege willful misconduct, much less gross negligence or reckless misconduct, and to their credit, they do not really attempt to do so. Instead, Defendants Kauanui and Puar rely on a tortured parsing of the exception. But the interpretation they urge the Court to adopt is unsupported and unsupportable.

Defendants argue that the exception applies "only for conduct directed at an individual; there is no such exception for conduct directed at the volunteer's own corporation or nonprofit entity." (Kauanui/Puar Br. 5.) They argue that the language, "to the rights or safety of the individual harmed by the volunteer" modifies not only "flagrant indifference" but also "willful or criminal misconduct" and "gross negligence" and "reckless conduct." They hope the this Court will adopt a reading of the statute that defies both logic and the basic grammar, such that the Court will impose a requirement

that the exception for intentional conduct applies only if the defendant intended to harm an *individual*, and does not apply if the defendant intended to harm an entity – even a nonprofit entity, to which the defendant owed a fiduciary duty. The argument is clearly wrong. What's more, it is irrelevant – because even if Defendants' illogical reading were accurate, and allegations of harm sustained by the respective Plaintiffs were required, the Complaint contains exactly those allegations.

First, Defendants do not cite a single case, or any authority, that supports this interpretation.[21] There is no indication that any court or any person – not even so much as a student law review note – has ever previously interpreted the statute in this way.

Second, this interpretation is illogical. Under Defendants' argument, not even criminal misconduct would fall under the exception, unless the criminal acts were "directed at the individual harmed" – and that *individual* cannot be the nonprofit itself.[22] Indeed, if the clause "to the rights or safety of the individual harmed by the volunteer" applies not only to "flagrant indifference" but also to willful misconduct, gross negligence, and reckless misconduct, all three of the terms would be meaningless as well. All forms of willful misconduct, gross negligence, and reckless misconduct also constitute flagrant indifference.

Third, this tortured interpretation does not make grammatical sense. We would have to read the statute as including types of "misconduct to the rights or safety of the individual" and "gross

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[21] At the August 15 status conference, counsel for Defendants Kauanui and Puar stated that they relied on New York cases that interpret the exception in this way. The written motion cites no such cases; Plaintiffs' research found none.

[22] Moreover, gross negligence by definition is not "directed" at any individual, and the same is true for reckless misconduct. Even if one could imagine a circumstance where gross negligence was directed at an individual, it would then be indistinguishable from willful misconduct and intentional infliction of harm, which do not require an intent to cause the actual injury, but merely an intent to act knowing that the injury to the victim would likely result. Thus, the inclusion of "gross negligence" and "reckless misconduct" in the statute would be meaningless.

negligence to the rights and safety of the individual." Indifference to the rights or safety of an individual makes sense. Misconduct to the rights and safety of an individual does not.

Regardless, even under the defendants' interpretation, the exception would still apply to Kauanui, Puar, and Salaita and the other defendants, because the SAC ***does*** allege that their conduct harmed the Plaintiffs as well as the ASA:

> Plaintiffs allege that the Individual Defendants "purposefully and intentionally withheld material information from [ASA] members,
>
> Plaintiffs claim that Defendants violated their duties to the ASA and its members, violated the ASA's bylaws, and violated D.C. law in furtherance of a Resolution that they knew was likely to harm the organization. . . .
>
> Defendants here not only allegedly subverted the ASA's voting procedures, but also allegedly improperly diverted its resources and misled its members in service of a harmful purpose.

Bronner III at 293-94. Violations of the duties owed to the members – breach of bylaws, *ultra vires* claims, and breach of fiduciary duties – ***are injuries to the members***. *See Daley v. Alpha Kappa Alpha Sorority, Inc*., 26 A.3d 723, 729 (D.C. 2011).

Defendants argue that subsection (e) of the VPA supports their argument. Subsection e states:

> (e) Limitation on punitive damages based on the actions of volunteers.
>
> (1) General rule. 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 or governmental entity unless the claimant establishes 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 rights or safety of the individual harmed.

This adds nothing to Defendants' argument. First, this provision applies only to punitive damages. If it were intended to be exactly the same as the exception for all damages, it would serve no purpose. All this provision does is remove gross negligence and reckless misconduct from the exceptions for

purposes of punitive damages.

V. THE CLAIMS BROUGHT BY PLAINTIFF BRONNER EASILY SURVIVE THESE MOTIONS TO DISMISS.

This Court is already well aware of Counts 10 and 11, which present the only claims included in the Complaint that were not also included in the SAC.[23] Because Defendants deemed over 90% of the documents they produced as Confidential under the Confidentiality Order issued by the Federal Court, any claims that Plaintiffs sought to add after the SAC could not be filed in the public docket without significant redactions. Thus, Plaintiffs filed the Complaint with redactions ("the Redacted Complaint"), excluding factual information not previously disclosed. Allegations underlying Counts 10 and 11 were heavily redacted, as Defendants' confidentiality designations required. Plaintiffs did not include any information from Defendants' Confidential documents in the Redacted Complaint, and sought leave to file the Complaint without redactions ("the Unredacted Complaint") under seal.

Defendants – after designating nearly all of their productions Confidential – opposed Plaintiffs' Motion, in an attempt to keep the Unredacted Complaint from this Court. When the party that designated documents confidential also opposes a motion to file the material under seal, the motivations are clearly not maintaining the confidentiality of the designated material. Defendants simply did not want this Court to see the Unredacted Complaint. Indeed, Defendants went so far as to argue to ***this Court*** that Plaintiffs violated the ***Federal Court's*** Confidentiality Order. Defendants then made the same argument to the Federal Court, which responded quickly, rejecting Defendants' claim that Plaintiffs had violated the Confidentiality Order and ordering that the Unredacted Complaint could be filed under seal in the Court. Yet, with the sole exception of Defendant Salaita, Defendants still refused to consent to Plaintiffs' Motion to File the Unredacted Complaint Under Seal.

[23] The SAC was submitted with a motion for leave to amend in November 2017.

This Court granted Plaintiffs' Motion to File the Unredacted Complaint Under Seal on June 7, 2019, and ordered that Plaintiffs do so by June 21, 2019 – one week from this filing – and Plaintiffs will do so. But today, Plaintiffs are in the impossible situation that Defendants surely foresaw. Defendants now argue that Plaintiffs' Redacted Complaint fails to state claims, having prevented Plaintiffs from filing the Unredacted Complaint (even under seal).

This Court should not countenance such gamesmanship. Defendants should not be permitted to move to dismiss claims under Rule 12(b)(5) if Defendants, themselves, have prevented Plaintiffs from presenting their allegations – even under seal.

Plaintiffs will file the Unredacted Complaint on or before June 21, 2019. Plaintiffs position is that the Counts 10 and 11, which are dependent on materials designated Confidential by Defendants, and that this Court has not seen – solely because Defendants refused to consent to filing under seal – cannot be dismissed for failure to state a claim before Plaintiffs are able to actually state their claims.

A. Defendants' Arguments that Plaintiff Bronner's Claims Are Time Barred Because the Defendants *Secretly* Decided to Remove Him Years Earlier Must Fail.

Even limited from presenting the factual information uncovered in Defendants' own documents, it is clear that even if one or more Defendants was insistent on removing Plaintiff Bronner from his position as editor shortly after the adoption of the Academic Boycott – and thus, as Defendants seek to argue, outside of the statute of limitations – Plaintiff Bronner did not and could not know of this of plan, because Defendant Duggan told him, explicitly, by email, that he was invited and encouraged to apply to his contract. Complaint ¶ 229. Defendants may wish that that email could be deemed confidential – along with over 90% of their documents – but Defendant Duggan sent it to Plaintiff Bronner and it is in his possession.

Furthermore – even if Plaintiff Bronner knew that Defendants sought to replace him with

another editor, he could not possibly have known – or even imagined – that Defendants' search for a new editor was a sham, that there would never be a call for proposals, and that if Defendants were unable to find a new editor that also suited their view on the Academic Boycott, they would shut down all work on the Encyclopedia, and go so far as to make a public announcement that a new editor had accepted the position, when in fact this new "editor" would never work on the Encyclopedia, nor would anyone work on the Encyclopedia, because Defendants preferred to shut down this valuable asset rather than have an opponent of the Academic Boycott on the ASA's National Council.

Regardless of the parties' opposing viewpoints, it cannot be denied that the question of whether or not Plaintiff Bronner knew or should have known that of the truly offensive disparaging comments about him that Defendants made to each other, and whether or not he knew or should have known that not only were they planning to remove him, but also to shut down the Encyclopedia rather than have him to continue to serve as editor, these are clearly factual questions. Defendants may attempt to argue these points on a motion for summary judgment; however, on a motion to dismiss, where this Court must accept the Plaintiffs' allegations as true, the discovery rule – a fact-intensive inquiry – prevents dismissal at this phase.

B. Plaintiff Bronner's' Claims in Counts 10 and 11 Cannot Be Dismissed as Simple, Justified Decisions Not to Renew His Contract.

The Redacted Complaint sets forth substantial and sufficient allegations showing that Defendants secretly planned to remove Plaintiff Bronner from his position as editor of the Encyclopedia, as *ex officio* officer of the ASA, and as member of the National Council, for reasons clearly unrelated to his performance in any of these roles or the performance of the Encyclopedia. The Unredacted Complaint provides significant additional allegations. Because Defendants previously argued that Plaintiffs violated the Confidentiality Order simply by referencing the

existence of documents, without disclosing any contents, Plaintiffs are not in a position to say any more about the allegations underlying Counts 10 and 11.

That said, to the extent that Defendants attempt to argue that Counts 10 and 11 must fail because Plaintiff Bronner did not have a right to renewal of his contract, Defendants are simply wrong. Plaintiff Bronner's claims do not arise from a simple decision not to renew his contract. Plaintiff Bronner brings claims under Counts 10 and 11 that include breach of fiduciary duty; the breach of fiduciary duty claims are in no way dependent on a simple decision not to renew his contract. Defendants also conveniently avoid mentioning the damage they also imposed on the ASA when they shut down, apparently permanently, a substantial asset of the ASA – one the ASA purchased just a few years before, and that had strong readership under Plaintiff Bronner – simply to punish Plaintiff Bronner, and to avoid working with him after he opposed their conduct with respect to the Academic Boycott. Defendants further avoid even acknowledging the sham they conducted, pretending (and publicly announcing) that they appointed a replacement editor that they knew would not serve in the position, and knowing that the only plan for the Encyclopedia was to simply shut it down – without telling anyone.

C. Defendant Salaita's Breach of Fiduciary Duty to Plaintiff Bronner

With regard to Count Ten, Defendant Salaita argues that he did not owe any fiduciary duty to Plaintiff Bronner or violate any fiduciary duty in relation to the termination of Plaintiff Bronner from his position as editor of the ASA's Encyclopedia of American Studies or removing Plaintiff Bronner from his position as an *ex officio* officer and member of the ASA National Council. (Salaita Motion at 20-22).

Defendant Salaita, as a voting member of the ASA's governing National Council, owed fiduciary duties to the ASA and its members to act in good faith and in the best interests of the ASA.

In this capacity, Defendant Salaita had a fiduciary duty to treat all members equally. *See Willens v. 2720 Wisconsin Ave. Co-op Ass'n Inc.*, 844 A.2d 1126, 1136 (D.C. 2004) (board members "'owe a fiduciary duty to act solely in the interests of *all* shareholders.'. . . the 'unequal treatment of shareholders' may violate the fiduciary duty of loyalty") (quoting *Ackerman v. 305 East 40th Owners Corp.*, 592 N.Y.S. 365, 367 (App. Div. 1993)). The Complaint alleges that Defendants removed Plaintiff Bronner from these positions "because they disagreed [with] his position on the Academic Boycott and considered him to be a Zionist" and that these actions "were taken to Plaintiff Bronner's detriment and to the detriment of the American Studies Association and all of its members." (Compl. ¶ 321). Defendants discriminated against Plaintiff Bronner and took action specifically against him because of Defendants' political agenda and not in the best interests of the ASA and its members. Moreover, the removal of Plaintiff Bronner from his position as editor of the Encyclopedia and ceasing the active operation of the Encyclopedia, a valuable ASA asset, simply for the purpose of reducing Plaintiff Bronner's ASA involvement and to harm Plaintiff Bronner violated these duties as well. (Compl. ¶¶ 322-326).

VI. THE COMPLAINT STATES VALID CLAIMS FOR AIDING AND ABETTING THAT SURVIVE THE MOTIONS TO DISMISS.

A. Aiding and Abetting Is a Viable Claim Under District of Columbia Law.

Defendants Kauanui, Puar, and Salaita (only) argue that Plaintiffs' claims for aiding and abetting must fail, because District of Columbia courts "have never accepted 'aiding and abetting' as even a viable legal theory." Kauanui/Puar at 9; *see also* Salaita at 25. But the very case rely on proves them flatly wrong. Indeed, the court in *Chen v. Bell-Smith* – a case Defendants cite for the assertion that D.C. Courts do not accept aiding and abetting "as even a viable legal theory" – involved an aiding and abetting claim under D.C. law that the court allowed to go forward. That decision even sets forth the elements of a successful claim: "courts applying D.C. law have found aiders and

abettors liable for the underlying tort where (1) the defendant assists the primary violator in performing "a wrongful act that causes an injury; (2) the defendant [is] generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance; and (3) the defendant . . . knowingly and substantially assist[s] the principal violation." 768 F. Supp. 2d 121, 140-41 (D.D.C. 2011), quoting *Halberstam v. Welch*, 705 F.2d 472, 477-78 (D.C. Cir. 1983).

Indeed, this very court recently rejected a motion to dismiss claims for aiding and abetting. *THEC-HCG-NCCL Joint Venture, et al. v. Cohen Mohr, LLP, et al*., Case No. 2017 CA 002122, order dated August 31, 2017. In *Cohen Mohr*, the defendants made the very same argument that Defendants make here. This Court rejected that argument:

> [Defendants] claim that aiding and abetting is not a valid claim under the law of the District of Columbia. Contrary to Defendants' assertions, however, the Court's statement in *Sundberg v. TTR Realty, LLC* [109 A.3d 1123, 1129 (D.C. App. 2015)] that the District of Columbia has "not recognized the tort of aiding and abetting" was merely an acknowledgment that none of the court's prior cases had recognized the tort, not an affirmative statement about the current state of tort law in the District of Columbia.

Cohen Mohr at 9. This Court then set forth the elements of a claim for aiding and abetting, and explicitly stated that the claim "focused on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendants agreed to join the wrongful conduct." *Id*., citing *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983).

This Court was not the first court applying District of Columbia law to allow claims of aiding and abetting to proceed; indeed, multiple aiding and abetting claims have survived motions to dismiss in the federal courts in the D.C. Circuit since *Halberstam v. Welch*. *See, e.g., Lannan Foundation v. Gingold*, 300 F. Supp. 3d 1, 29-30 (D.D.C. 2017) (rejecting argument for dismissal on grounds that D.C. does not recognize claim; "While, it is true that the District of Columbia Court of Appeals has

never expressly decided whether a cause of action exists for aiding and abetting the breach of a fiduciary duty, courts applying District of Columbia law have nonetheless found aiders and abettors liable for the underlying tort when certain criteria are met"); *Ehlen v. Lewis*, 984 F. Supp. 5, 10 (D.D.C. 1997) ("Aiding and abetting a fiduciary duty occurs when the defendant 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other' nonetheless," quoting *Halberstam v. Welch*, 705 F.2d at 477); *Amtrak v. Veolia Transp. Servs*., 592 F. Supp. 2d 86, 94-97 (D.D.C. 2009).

B. The Complaint Alleges the Elements of Aiding and Abetting Under District of Columbia Law.

Defendants Kauanui and Puar further argue that the complaint does not identify a "primary violator" that they provided "substantial assistance to." Kauanui/Puar Br. at 6. The Complaint states quite clearly, "Although Defendants Maira and Kauanui were not on the National Council until after the [2013] election, their actions in concert with Defendant Puar and other fiduciaries constitute aiding and abetting breach of fiduciary duty. Correspondence between defendants clearly show that all three new that their efforts, in concert with fiduciaries, would cause damage to the American Studies Association and its members." (Compl. ¶ 336; see also ¶¶ 337-43, regarding Defendants Salaita and Stephens.)

Of course, Defendants Kauanui and Puar have not produced any discovery in this litigation; moreover, the documents that evidence their involvement are now marked Confidential, and Defendants have not agreed to Plaintiffs' proposal that this Court adopt the Confidentiality Order. Yet these Defendants, along with Defendant Salaita, argue repeatedly that the Complaint does not set forth specific factual evidence to prove every element the claims. That is not required in a motion to dismiss, of course; if it were, every claim that survived a motion to dismiss would simultaneously be

proven on the merits.

VII. DEFENDANTS KAUANUI AND PUAR'S ASSERTION THAT THE *ULTRA VIRES* CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL IS UTTERLY FALSE AND MISLEADING, AND HAS ALREADY BEEN REJECTED BY THE FEDERAL COURT.

Defendants Kauanui and Puar (only) make this astounding assertion: "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.' . . . 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." Kauanui/Puar Br. at 2.[24]

The argument that the *ultra vires* claims are barred by collateral estoppel is wrong, and has already been explicitly rejected by the Federal Court. Defendants Kauanui and Puar are not quoting from the Federal Court's recent decision to dismiss the case for lack of jurisdiction, and the suggestion that the *ultra vires* claims, or any claims, were dismissed on the merits in the Court's recent decision is absolutely false – as is apparent from the opinion.

Instead, Defendants Kauanui and Puar are referring to ***an entirely different*** **ultra vires** ***claim brought in the 2016 complaint*** and dismissed without prejudice in 2017.

There is, of course, no rule prohibiting amending a complaint to include a claim that is the same *type* of claim as another that was previously dismissed without prejudice. Such a rule would turn Rule 15 on its ear. *See* Fed. R. Civ. Proc. 15(a)(2) ("The court should freely give leave when

[24] As discussed in section II, *supra*, this complaint brings no derivative claims, and the Federal Court explicitly rejected the argument that Plaintiffs could not bring direct claims based on the same facts as the derivative claims.

justice so requires").

Indeed, a Plaintiff can even amend a complaint to include a claim that is not only the same *type* of claim, but is also based on the *same factual allegations* as one previously dismissed without prejudice, if, for example, the Plaintiff includes additional factual information that resolves the Court's concerns about the presentation of the claim in the earlier complaint. This happens frequently.

Defendants do not specifically argue that any of the three new *ultra vires* claims is exactly the same as the previously-dismissed claim, nor can they.[25] The new *ultra vires* claims in Counts Three, Four, and Five do not allege that the Resolution itself is *ultra vires*, as the original *ultra vires* claim did. Instead, the new *ultra vires* claims allege that ***particular actions taken by Defendants violate specific provisions of the ASA bylaws***.

Indeed, the Original Defendants attempted to make the same argument in their opposition to Plaintiffs' Motion to File the SAC. The Federal Court flatly rejected the argument: "Moreover, to the extent that Plaintiffs are asserting *ultra vires* claims, it is apparent from the Complaint that Plaintiffs have made efforts to cure defects that the Court identified in its prior opinion." *Bronner v. Duggan*, 324 F.R.D. at 293 & n.2 (D.D.C. 2018) ("the new claims that Plaintiffs assert do not appear to be the same as those that this Court has already rejected"). Defendants do not reference this holding, which is directly on point.[26]

There is simply no question about it: the *ultra vires* claims in this complaint have not been

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[25] Although Plaintiffs did not replead the same *ultra vires* claim that was dismissed in 2017, such a claim would not necessarily be precluded, as the claim was not dismissed with prejudice.

[26] In fact, Defendants never once cite to the Court's (March of 2018) decision allowing Plaintiffs to amend and file the SAC, although they previously made nearly all (if not all) of the arguments brought in the Original Defs.' Brief in their Opposition to Plaintiffs' the Motion to Amend.

dismissed, and they are not foreclosed by the dismissal of a different *ultra vires* claim (without prejudice). Indeed, none of Plaintiffs' claims were dismissed following the 2017 decision, until the February 2019 decision, which dismissed only on the basis of the amount-in-controversy.

VIII. THE CLAIMS FOR *ULTRA VIRES* ACTS, BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, VIOLATION OF THE NONPROFIT CORPORATIONS ACT AND CORPORATE WASTE HAVE SURVIVED NUMEROUS CHALLENGES IN THE FEDERAL COURT AND REMAIN VIABLE.

A. No Defendant Challenged the Breach of Contract or Violation of the Nonprofit Corporations Act Claims.

None of the Defendants argue that the Complaint does not state a claim for breach of contract or for violation of the Nonprofit Corporations Act. These claims therefore go forward.

B. The Complaint States Valid Claims For *Ultra Vires* Acts That Continue to Survive Defendants' Facial Attacks.

The Complaint alleged claims for *ultra vires* acts; each alleges violation of specific provision of the ASA's Constitution and bylaws. (*See* Compl. at pp. 98-105, Counts 3, 4, and 5, brought with parallel claims for breach of contract.) These claims were originally brought in the SAC and have survived previous facial attacks.

The arguments raised by the Original Defendants are simply wrong, for all the reasons stated below. They are also inappropriate on a motion to dismiss. Defendants are not arguing that Plaintiffs fail to state a claim for violation of the various bylaws; rather, Defendants make factual arguments pertaining to what the bylaws were intended to require, and how they have been interpreted in other circumstances. These are factual questions that cannot serve as the basis for dismissal during the pleading stage.

1. Count Three: Packing the National Council with Supporters of the Resolution in Violation of the ASA Constitution, Article VI, § 2.

Count Three alleges that Defendants' actions to pack the National Council with USACBI

founders and endorsers – including ensuring that every single candidate for President nominated by the Nominating Committee was an active supporter of an academic boycott of Israel and had publicly endorsed USACBI – violated the ASA Constitution, article VI (Elections), § 2, attached hereto as Exhibit A.[27] Count Three correctly cites to, and quotes from, article VI, § 2:

> 199. Pursuant to the American Studies Association Constitution, "The Nominating Committee shall nominate candidates for the office of [President Elect], member of the Council, and members of the Nominating Committee. It shall present two nominees for each elected position. Nominees shall be representative of the diversity of the association's membership." (American Studies Association Const., art. VI, § 2.)

(SAC ¶ 199.) ***Defendants would have the Court believe that article VI of the ASA Constitution includes a definition of "the diversity of the association's membership." It does not.***

Rather than deal with the actual language of the provision at issue, Defendants instead quote an unrelated bylaw. The provision quoted in Defendants' brief is thus not in article VI or any other article of the ASA Constitution. It is an excerpt from the ASA Bylaws, which until March 2016 was a separate document from the ASA Constitution.

The bylaw quoted by Defendants is not a generally applicable provision, but instead one that governs only the planning of conventions. The provision includes no information extraneous to that purpose. It does not mention, and does not pertain to, the ASA nominating committee or elections to the National Council or the presidency.

Contrary to Defendants' arguments, Defendants John Stephens testified explicitly that the nominating committee's mandate under the ASA Constitution, art. VI, § 2, was ***not*** limited to ensuring diversity only with respect to "age, racial, ethnic, regional, and gender" variation – the

[27] This citation is to the ASA Constitution as it was at the time of the events alleged in the complaint. The ASA has since revised the Constitution and bylaws at least twice.

qualities mentioned in ASA Bylaw art. VII, § 4. Defendant Stephens testified that the ASA had implemented corrective action to ensure that at least one adjunct professor was on the National Council, in order to satisfy the diversity mandate. Adjunct, contingent and non-tenured status in employment is clearly not included in "age, racial, ethnic, region, and gender" – the factors that Defendants excerpt from an unrelated bylaw. And, as Defendant Stephens, long-time executive director of the ASA, testified explicitly, although adjunct and contingent (non-tenured) status in employment is also not covered by the employment discrimination laws, reparations were made to ensure diversity with respect to adjunct and contingent employment status:

> 21 Q. Okay. So you would agree with me that
> 22 contingency in your employment or being an adjunct
> 23 professor is not a category that is watched and
> 24 enforced by the EEOC?
> 25 A. Right.
> 1 Q. It's not religion, race, nationality, gender;
> 2 right?
> 3 A. Right.
> 4 Q. And yet it is an issue with respect to
> 5 diversity among the membership at ASA that there was a
> 6 change made to ensure that that type of diversity was
> 7 reflected?
> 8 A. Yes. And the reason is that somewhere in the
> 9 area of 50 to 60 percent of our membership is in that
> 10 category, and there's no one who actually wears
> 11 that -- was wearing that suit or outfit that was --
> 12 that had a voice on the board.

(Exh. B at 218:21-219:12.)

Defendants argue for dismissal because contract provisions – in this case, the ASA's Constitution – should be "interpreted according to its plain language." (Original Defs.' Brief at 10.) We agree wholeheartedly: but that maxim necessarily means that ***the provision should be interpreted according to its own plain language – not the language of another, inapplicable provision***.

Moreover, as the Federal Court previously held, in interpreting *ultra vires* claims, "'a long-standing pattern of practice of corporate behavior may give rise to a by-law.'" *Bronner I*, 249 F. Supp. 3d at 48, *quoting Family Fed.'n for World Peace*, 129 A.3d 234, 251 (D.C. 2015). We cannot imagine a better interpreter of the ASA Constitution, art. VI, § 2, than the executive director, testifying here against the ASA's interest.

2. Count Four: Freezing the Membership Roles to Prevent Dissenters from Voting Against the Resolution in Violation of the ASA Constitution, Article 2, § 2.

Count Four clearly and specifically alleges violation of the ASA Constitution, art. 2, § 2, which section provides that a member who is dropped from the rolls of the ASA membership for failure to timely pay his or her annual dues "may be reinstated at any time" merely by paying his or her annual dues. Defendant Stephens testified explicitly to this long-standing practice. (Exh. B, 150:3-23, 151:18-23, 154:14-155:4, 155:16-156:1.)

Defendants apparently believe that "may be reinstated at any time" means that reinstatement can occur at the time that best suits the political goals of the Individual Defendants. Once again, however, Defendants' self-serving and strained interpretation clearly contradicts the deposition testimony of Defendant John Stephens, the plain reading of the ASA Constitution, the long-standing pattern and practice of the ASA, and, quite frankly, the experience of every person who has ever paid dues to renew his or her membership in any non-profit organization.

Defendant Stephen's testimony is quoted in the SAC. After confirming that no members could have known there would be a vote on the academic boycott of Israel until November 25, and that the membership rolls were intentionally frozen on the morning of November 25, such that no members in arrears would be able to pay their dues to renew their membership in time to vote on the academic boycott of Israel, Defendant Stephens confirmed that the decision to freeze the membership

rolls (to prevent long-time ASA members in arrears from voting on the academic boycott) was a first and only occurrence. His correspondence with other defendants at the time clearly reveals that this aberration in the ASA's long-standing policy had one purpose: to prevent members who might disagree with the Individual Defendants from voting.

Defendant Stephens testified, against his interest, as executive director of the ASA, as follows:

> Q. Is there any place in the bylaws that accounts for suspending the provision in the bylaws that says that membership is reactivated upon payment of dues in arrears?
> THE WITNESS: Not that I'm aware of.
> Q. Okay. Has this ever happened at any time that you recall?
> A. No.
> . . .
> Q. And so the experience of members in the American Studies Association who, if they're procrastinators like me, who always do things at the very last minute, the experience of those people is that they can wait until a day before an election, pay their dues, and vote?
> A. Yes.
> . . .
> Q. So up to the day that they were already banned from voting, they had no previous awareness that if they didn't pay their dues on time, this vote would happen and they would already be banned from taking part?
> A. Well, no one would have known that because no one knew there was going to be a support vote until November 25.
> Q. But on November 25 when that group got together and said, "We're going to do a support vote," they could have said, "So let's give folks five days to get their money in arrears to pay up their debt so that they can take part"?
> A. Yes.
> Q. But they didn't do that?
> A. No.
> . . .
> Q. That heads up that you weren't going to be able to vote came after it was too late for people to pay their arrears and be able to vote?
> A. They froze the membership roster on November 25.
> Q. With no warning?
> A. That was the board decided to freeze that --
> Q. I hear you.
> A. -- and they told me to instruct Johns Hopkins to hold all orders for membership until the vote was over.

(Exh. B at 150:3-23, 151:18-23, 154:14-155:4, 155:16-156:1.)[28]

The Complaint also quotes from correspondence between Defendant Stephens and Defendant Kauanui, then shared with other Individual Defendants serving on the ASA National Council, that quite obviously reflect the Defendants' intention to limit voting by persons they believed were more likely to oppose the resolution. Thus, these facts also go toward Plaintiffs' claims for breach of fiduciary duties.

For purposes of Defendants' Motion to Dismiss, the issue is whether Plaintiffs have identified a bylaw that was violated by Defendants, recognizing that "'a long-standing pattern of practice of corporate behavior may give rise to a by-law.'" *Bronner I*, 249 F. Supp. 3d at 48, *quoting Family Fed.'n for World Peace*, 129 A.3d 234, 251 (D.C. 2015). Plaintiffs have clearly done so.

3. Count Five: A Substantial Amount of the ASA's Activities Spent Attempting to Influence Legislation in Violation of the ASA's Statement of Election and the Tax Law Regulating Tax-Exempt Entities.

Defendants further argue that although the ASA spends an extensive, and certainly substantial, amount of time and resources spent on activities challenging legislation at the state level, that these activities do not violate the ASA's commitment under its Statement of Election, because (so say Defendants) these activities fall under exceptions specified in the tax code.

Claim Five alleges a violation of an express bylaw – that "No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation . . ." (Statement of Election, ¶ 3, § 4, attached hereto as Exh. C.) ***At issue is the extent to which the ASA's activities are focused on influencing legislation***. Documents produced in

[28] If Defendant Stephens' testimony is not enough, discovery produced by Defendants in this case reveals that the ASA routinely sends emails to members in arrears reminding them before every other election that if they quickly pay their dues, they will be able to vote in the election.

discovery reflect an inordinate amount of ASA time and many thousands of ASA dollars dedicated to influencing the federal, state, and local legislatures, assemblies, and councils here in the United States – as well as in Israel. This claim turns on the whether a "substantial part" of the ASA's activities go to influencing legislation, not whether any particular act alone, or even the resolution, itself, constitutes an *ultra vires* act.

The Original Defendants argue in a footnote that I.R.C. § 4945 exempts expenditures made "in connection with an appearance before, or communication to, any legislative body which might affect the existence of the private foundation." (Original Defs' Br. at 13 n.5.) Even if this provision, which is clearly specific to private foundations, did apply to the ASA, it would not impact the claim, as the great bulk of the expenditures were not spent "in connection with an appearance before, or communication to, any legislative body[.]" *Id*.[29]

C. The Complaint States Valid Claims Breach Of Fiduciary Duty That Survive The Motions To Dismiss.

Defendants Kauanui and Puar argue that Plaintiffs have "conjured up non-existent duties" by including allegations that these Defendants concealed their true motivations and intentions when presenting themselves as candidates for ASA positions on the ASA National Council and ASA Nominating Committee, respectively. (Kauanui Motion at 11-13). Defendant Puar suggests that her

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[29] Defendants cite to Memorandum 34289 to claim that § 4945 applies to nonprofit charities under § 501(c)(3). Memorandum 34289 related to a provision of the 1969 Tax Reform Act (new at the time); 50 years later, and following numerous amendments to the tax code and regulations, there is no basis to assume this Memorandum – drafted before any of the relevant tax provisions – alters the structure of the nonprofit tax statutes and regulations that succeeded it.

Moreover, the Memorandum does more harm than good to Defendants' argument, as it clearly excludes the types of lobbying and propaganda alleged in the SAC from any exception. The Memorandum makes clear that any "exception for legislative activities applies only with respect to appearances before, or communications with, governmental bodies and does not apply to 'grass-roots' types of legislative activities. *See* Code section 4945(e) as amplified by H. Rept. No. 91-413, (Pt. 1), 91st Cong., 1st Sess., p. 33 (1969)." 1970 GCM LEXIS 85, *18, GCM 34289 (I.R.S. May 03, 1970)."

three-year tenure on the ASA Nominating Committee, responsible for selecting the official candidates for the leadership positions of the ASA, was of little significance and created no duty of loyalty or candor for her towards the ASA or its members. But these arguments ignore that actions that Defendant Puar took as a member of the ASA Nominating Committee in seeking out and nominating USACBI activists to infiltrate and "pack" the ASA's leadership in order to use the ASA and its resources to further the USACBI's political interests to the detriment of the ASA. They likewise ignore the actions taken by Defendant Kauanui as a member of the ASA's governing National Council, secretly working in coordination with the USACBI to push through the Boycott Resolution, manipulate the ASA's procedures, and redirect the purpose and resources of the ASA from its original purpose.

"District of Columbia law has deliberately left the definition of 'fiduciary relationship' flexible, so that the relationship may change to fit new circumstances in which a special relationship of trust may properly be implied." *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 46 (D.D.C. 2010). "Whether a fiduciary relationship exists is a fact-intensive question, and the fact-finder must consider 'the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties.'" *Millennium Square Residential Ass'n v. 2200 M. Street LLC*, 952 F. Supp. 2d 234, 248-249 (D.D.C. 2013) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996)). *See Vox Media, Inc. v. Mansfield*, 322 F. Supp. 3d 19, 25 (D.D.C. 2018) (Although defendant argued that he was not a fiduciary "because he had a 'relatively low-level position' and 'was not an officer or director, or even the head of a department,'" the Court found: "Given Mr. Mansfield's alleged control over Vox's credit card and travel accounts and its alleged expectation that he would serve the company faithfully, it is plausible that Mr. Mansfield had a fiduciary relationship with Vox.")

D. The Complaint States a Valid Claim For Corporate Waste That Survives The Motions To Dismiss.

Plaintiffs' claim for waste was brought in the 2016 Complaint, and has survived numerous facial attacks. Now, Defendants Kauanui and Puar argue that the complaint fails to state a claim for waste. The reason they give is not that plaintiffs have not alleged the elements of a waste claim, but that (they claim) the facts will not meet the standard. Again, this is a factual question, not a one to be decided on a motion to dismiss.

The complaint clearly alleges "consideration so disproportionately small as to lie beyond the range at which a reasonable person might be willing to trade" (Kauanui/Puar Br. at 13, quoting *Daley v. Alpha Kappa Alpha Sorority*, 26 A.3d at 729-30) – indeed, the ASA received ***nothing*** in exchange for the vast expenditures from trust fund; the only benefit was to the personal political interests of the Defendants, all at the expense of the ASA. The Complaint not only alleges, but presents specific evidence showing that the Defendants were aware that their acts would damage the organization – and that they simply did not care., They placed their personal interests in an Academic Boycott over the ASA, and they admitted it to each other. They discussed the damage that would come to the ASA. These allegations – well supported by Defendants' own documents – clearly satisfies *Daley*'s formulation of the "essence of a waste claim," that is, "the diversion of corporate assets for improper and unnecessary purposes" – "exceptionally one-sided." *Id*.

E. The Business Judgment Rule Is Clearly Inapplicable.

Defendant Salaita asserts that the waste claim and the breach of fiduciary duty claims should be dismissed "pursuant to the business judgment rule." Salaita Brief at 28-29. Other than quoting directly from two cases for the most general statement about the "business judgement rule," this argument states only that the Complaint does not allege that Defendants' conduct "was in ***bad faith***, irrational, uninformed, ***or not in the best interest of the ASA***." (Salaita Brief at 29.)

The Complaint clearly alleges bad faith, and the business judgment rule does not apply when bad faith is alleged. *Armenian Assembly of Am., Inc. v. Cafesjian*, 772 F. Supp. 2d 20, 103-04 (D.D.C. 2011) ("the business judgment rule does not apply where the officers or directors '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").

The Complaint could not more clearly allege that the acts of the Defendants were taken not only with lack of concern for the effect on the ASA, but with the understanding and belief that the ASA would, indeed, suffer harm. The Federal Court laid out in detail how the allegations reflect a lack of good faith:

> Plaintiffs claim that Defendants violated their duties to the ASA and its members, violated the ASA's bylaws, and violated D.C. law in furtherance of a Resolution ***that they knew was likely to harm the organization***. . . .
>
> Defendants here not only allegedly subverted the ASA's voting procedures, but also allegedly improperly diverted its resources and misled its members ***in service of a harmful purpose***. . . .
>
> In light of the Model Act's Official Comment and the case law, ***Plaintiffs have plausibly alleged that the Individual Defendants acted with an intent to harm the ASA***.
>
> Plaintiffs allege that the Individual Defendants "purposefully and intentionally withheld material information from [ASA] members, including the fact that the Individual Defendants expected that if the [Resolution] was adopted, [the ASA] would be widely attacked throughout the academic world and the press, and that ***this would harm [the ASA's] reputation, its members' relationships with their universities, and [the ASA's] size, strength, and finances***." SAC ¶ 113[.] . . . The Individual Defendants also allegedly used ASA resources to attract speakers supporting the Resolution, while consciously declining to provide opposing viewpoints and ***recognizing the appearance of a conflict of interest that could undermine the ASA's legitimacy with its members***. *See* SAC ¶ 91-94. According to Plaintiffs, the Individual Defendants similarly refused to publicize letters and other correspondence opposing the Resolution, including correspondence ***warning that "the passage of the Resolution would be***

> ***destructive to the [ASA]."*** *See* SAC ¶ 104, 109, 114-16. The Individual Defendants then allegedly subverted the ASA's voting procedures to push the Resolution through the ASA's membership approval process with far fewer votes than required by the ASA's bylaws. *See* SAC ¶ 123, 134-37. Finally, ***knowing that the Resolution would cause significant backlash*** against [**21] the ASA, Defendants allegedly misappropriated ASA funds to hire attorneys and retain a "rapid response" media team to defend against that backlash. *See* SAC ¶ 170-71, 185-89.
>
> Based on these allegations, Plaintiffs claim that Defendants violated their duties to the ASA and its members, violated the ASA's bylaws, and violated D.C. law in furtherance of a Resolution that they knew ***was likely to harm the organization***. . . . Defendants here not only allegedly subverted the ASA's voting procedures, but also allegedly improperly diverted its resources and misled its members ***in service of a harmful purpose***. Accordingly, ***Plaintiffs have alleged that Defendants' conduct rises to the level of intent to harm the ASA***, and therefore that Defendants are not shielded from damages by D.C. Code § 29-406.31(d).

Bronner v. Duggan, 317 F. Supp. 3d 284, 293-94 (D.D.C. 2018).

IX. THIS COURT HAS PERSONAL JURISDICTION OVER ALL DEFENDANTS.

A. Defendant Salaita

Defendant Salaita argues that this Court lacks personal jurisdiction over him because he does not live in the District of Columbia and the Complaint does not show that he had substantial contact with the forum." (Salaita Motion at 10-13). Defendant Salaita also makes much of the fact that the Complaint alleges "[o]n information and belief" that he resides in the District of Columbia, when service of process was served upon him at his home in West Springfield, Virginia. (Salaita Motion at 10-11 n.7).

With regard to the allegation of Defendant Salaita's residence, Plaintiffs submit that the current Complaint was prepared using the SAC previously filed in the Federal Action, which was dismissed without prejudice on April 4, 2019. In attempting to file the Complaint as speedily as possible in this Court, Plaintiffs unintentionally failed to update and verify Defendant Salaita's place of residence in the Complaint.

In any event, as with all other Individual Defendants, this Court has personal jurisdiction over Defendant Salaita pursuant to D.C.'s long-arm statute regardless of his current residence. As stated in ¶ 26 of the Complaint:

> Defendant Steven Salaita is a member of the USACBI Organizing Collective and a current member of the American Studies Association National Council. His term began on July 1, 2015, and will end on June 30, 2018. He was a member of the National Council when the American Studies Association's bylaws were changed to allow large withdrawals from the American Studies Association's Trust and Development Fund, and when large withdrawals were taken to cover expenses related to the Academic Boycott. . . .

This Court has personal jurisdiction over Defendant Salaita, for all of the same reasons it has jurisdiction over the other individual defendants - none of whom live in D.C. or were alleged to live in D.C. In the prior Federal Action, the federal court found jurisdiction over all of the original defendants, and explained the basis for this holding in detail. *Bronner I*, 249 F. Supp. 3d at 40-41.

The District Court explained the basis for personal jurisdiction over the original defendants as follows:

> This case falls squarely within the holdings in *Family Federation for World Peace* and *Daley* and leads the Court to the conclusion that, taken together, the facts weigh in favor of finding personal jurisdiction. Individual Defendants all voluntarily served as officers of the ASA which is a District of Columbia nonprofit corporation located in the District of Columbia and organized under District of Columbia law. Compl. ¶¶ 15-21. Their respective positions charged them with leading the ASA. *See* ASA Const. & Bylaws, Const., Art. IV (outlining the governing structure of the ASA); Compl. ¶ 28 (noting that Defendant Marez was the president of the ASA). Individual Defendants also voluntarily participated in the 2013 annual meeting in the District of Columbia. Compl. ¶ 30. Each Individual Defendant allegedly took part in the purportedly injurious activities of the ASA in the District of Columbia: Defendants Marez and Gordon co-hosted the discussion of the resolution where dissenting ideas were allegedly suppressed, as in Daley; Defendant Tadiar helped organize the programming of the 2013 convention, which included the allegedly ultra vires act of introducing, debating, and voting on the boycott resolution; Defendants Maira, Duggan, and Reddy were members of the National Council and

> Executive Committee at the time. *See* Compl. ¶¶ 16-21. Moreover, Individual Defendants together led the effort to adopt the allegedly inappropriate boycott resolution, and allegedly did so with the intent to alter the nature and purpose of the ASA, a District of Columbia entity, as in *Family Federation for World Peace*. Compl. ¶¶ 2, 30.
>
> As the D.C. Court of Appeals concluded in *Daley*, Individual Defendants' attendance at the meeting in D.C. where they allegedly suppressed ideas and mismanaged the ASA was not "fortuitous." *See* 26 A.3d at 728. Nor was it fortuitous that Individual Defendants assumed leadership positions in the D.C. nonprofit organization. *See Family Federation for World Peace*, 129 A.3d at 243. Taken together, given that the allegedly injurious acts occurred at a meeting in the District of Columbia and Individual Defendants voluntarily assumed leadership roles in the District of Columbia organization they allegedly injured, the Court finds that each Individual Defendant could reasonably anticipate being hauled into a District of Columbia court to answer for alleged wrongdoing in connection with their roles in the boycott resolution. And, because the Court finds specific jurisdiction over each defendant, the Court need not limit its analysis of Plaintiffs' claims to activity that took place within the District of Columbia. *See Daley*, 26 A.3d at 728 (citing D.C. Code § 13-423).

Bronner I, 249 F. Supp. 3d at 40-41.

These same allegations apply to Defendant Salaita. Like the original defendants, Defendant Salaita "voluntarily served as [an] officer[ ] of the ASA which is a District of Columbia nonprofit corporation located in the District of Columbia and organized under District of Columbia law." He also "voluntarily participated in the 2013 annual meeting in the District of Columbia," where he spoke at "the discussion of the resolution where dissenting ideas were allegedly suppressed," – indeed, he is reported to have said at that meeting, with respect to the debate, "there is no other side" – and he "led the effort to adopt the allegedly inappropriate boycott resolution, and allegedly did so with the intent to alter the nature and purpose of the ASA, a District of Columbia entity." Defendant Salaita's own statements affirm that he, along with the others, led the effort. As alleged in the Complaint:

> 46. An opinion piece written by Stephen Salaita – a current member of both the American Studies Association National Council and USACBI

> Leadership – confirms that USACBI was behind the American Studies Association Resolution (and that USACBI lacks its own resources):
>
> I've worked with USACBI for around five years—***closely during the process to pass the American Studies Association resolution*** . . . . USACBI doesn't accept funding from governments, corporations, or political parties. When we need money, we get it the old-fashioned way: everybody chips. What we lack in material resources is exceeded by the efficiency of unfettered praxis.
>
> . . . USACBI does not need the endorsement of university presidents or lawmaking bodies. Nor does it want their endorsement, which would constitute an abdication of what BDS works to accomplish, decolonization of the institutions those bodies exist to enrich and represent.

(Compl. ¶ 46).

Defendant Salaita cannot identify any reason why this Court's reasons for finding jurisdiction over every other defendant in this case does not also apply to him. The Court has personal jurisdiction.

B. <u>Defendant Tadiar</u>

Defendant Tadiar argues that this Court lacks personal jurisdiction over her, claiming that "[t]he 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 [Boycott] Resolution, during the planning for and throughout the annual meeting." (Tadiar Motion at 5). Defendant Tadiar's characterization of the Complaint's allegations is incorrect, and there is clearly sufficient basis to assert personal jurisdiction over her for claims arising out of her leadership role in organizing and promoting the Boycott Resolution at ASA's 2013 National Convention in D.C.

The U.S. District Court for the District of Columbia correctly determined that it had personal jurisdiction over Defendant Tadiar in the prior Federal Lawsuit in this District. *See Bronner I*, 249 F. Supp. 3d at 40-41 (quoted at length above). Contrary to Defendant Tadiar's characterization, her role in the ASA, the 2013 D.C. National Convention, and the plotting and promotion of the Boycott

Resolution went far beyond simply "act[ing] as a conduit of communications." (Tadiar Motion at 5).

Defendant Tadiar ignores the important role she played as a member of the ASA's Activism and Community Caucus ("Activism Caucus"), which spearheaded the Boycott Resolution effort. (Compl. ¶¶ 20, 78-90). Moreover, although not an executive officer of the ASA, Defendant Tadiar did serve in a leadership capacity as an active member of the ASA Programming Committee, a position in which she participated in planning and organizing the 2013 ASA National Convention in the District of Columbia, at which the Boycott Resolution was presented and promoted to the detriment of the ASA. (Compl. ¶¶ 20, 91). As the District Court found: "given that the allegedly injurious acts occurred at a meeting in the District of Columbia and Individual Defendants voluntarily assumed leadership roles in the District of Columbia organization they allegedly injured, . . . each Individual Defendant could reasonably anticipate being haled into a District of Columbia court to answer for alleged wrongdoing in connection with their roles in the boycott resolution." *Bronner I*, 249 F. Supp. 3d at 41. Accordingly, personal jurisdiction over Defendant Tadiar in this case is proper in this District.

X. DEFENDANT-SPECIFIC ARGUMENTS

A. Defendant Salaita

Defendant Salaita argues that Counts Three, Four, and Five do not state a claim for relief against him because the conduct underlying these Counts occurred before he became a member of the ASA National Council in July 2015. (Salaita Motion at 15-16). He also argues that Count Twelve fails to state a claim against him for aiding and abetting breach of fiduciary duty because Plaintiffs do not allege that Defendant Salaita "had knowledge of any such breach, or that he substantially assisted the wrongdoing." (Salaita Motion at 25).

Count Three alleges that Defendants are liable for *ultra vires* acts and breach of contract

because they violated ASA governing documents and obligations to oversee and ensure that the nominees for ASA leadership positions reflected the diversity of ASA membership. (Compl. at 98-101). Count Four alleges that Defendants are liable for *ultra vires* acts and breach of contract because they violated ASA governing documents and obligations by freezing the ASA membership rolls and stripping members of their right to vote. (Compl. at 101-103). Count Five alleges that Defendants are liable for *ultra vires* acts and breach of contract because they violated ASA governing documents and obligations by causing a substantial part of ASA efforts and resources to be devoted to propaganda and influencing legislation in Israel and the United States.

Contrary to Defendant Salaita's argument, the Complaint alleges that the violation in Count Three "continued for years" (Compl. ¶ 271), and that the violations in Count Five extended "until at least June of 2015" (Compl. ¶ 291). Therefore Counts Three and Five are not necessarily limited to the period before Defendant Salaita himself became a member of the ASA National Council on July 1, 2015.

Moreover, Defendant Salaita was one of four new defendants added in the Federal Action via the SAC proposed in November 2017 based upon new information Plaintiffs obtained from other defendants in discovery in the fall of 2017. Plaintiffs have not had the opportunity to obtain discovery from Defendant Salaita to determine what other positions, roles, or activities he may have been involved in prior to being elected to the ASA National Council that may be relevant to these claims. Given the information obtained from other defendants in discovery, it is certainly plausible that Defendant Salaita did have some ASA role during the relevant time periods for Counts Three, Four, and Five even before his election to the ASA National Council. For example, Defendant Salaita was among the participants in a secretive USACBI email group with other Defendants who were in ASA positions that was established and used to plot the infiltration and manipulation of the ASA to

promote the Boycott Resolution. In addition, Defendant Salaita acknowledged in 2014 that he was involved in the USACBI's efforts to use the ASA to promote USACBI's political agenda: "I've worked with USACBI for around five years -- closely during the process to pass the American Studies Association resolution . . ." (Compl. ¶ 46). Moreover, insofar as Defendant Salaita participated in and assisted other Defendants who were in ASA positions to infiltrate and manipulate the ASA to promote the USACBI's political agenda to the detriment of the ASA prior to his election to the ASA National Council, these allegations support the claim for aiding and abetting breach of fiduciary duty in Count Twelve.

B. Defendant Tadiar

Defendant Tadiar asserts that the Complaint does not state a claim for relief as to her because there are no allegations that would establish that she "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. (Tadiar Motion at 7). More specifically, she argues that the claims for breach of fiduciary duty in Counts One, Two, and Ten fail because the Complaint does not allege that she was a member of the ASA National Council, and she did not have any fiduciary duty to the ASA or its members. (Tadiar Motion at 8-9). She next claims that Counts Three, Four, and Five must fail because the allegations do not show that she had authority to cause any *ultra vires* acts with regard to the ASA (Tadiar Motion at 9), and that Count Nine for corporate waste should be dismissed because there is no allegation that she participated in the withdrawal of money from the ASA Trust Fund (Tadiar Motion at 10).

However, these arguments ignore that important role Defendant Tadiar played as a member of the ASA's Activism and Community Caucus ("Activism Caucus"), which spearheaded the Boycott Resolution effort before and during the ASA National Convention in D.C. in November 2013 and

mobilized support for the Resolution's vote in December 2013. (Compl. ¶¶ 20, 78-90). Moreover, the ASA's Activism Caucus devoted and expended ASA resources to organizing and promoting the Boycott Resolution to the detriment of the ASA. *Id.* Defendant Tadiar also worked on the ASA's Programming Committee, which planned and organized the November 2013 National Convention at which pro-Boycott speakers were featured and the voices of opponents of the Boycott Resolution were muted. (Compl. ¶¶ 20, 91). Defendant Tadiar was also among the participants in a secretive USACBI email group with other Defendants who were in ASA positions that was established and used to plot the infiltration and manipulation of the ASA to promote the Boycott Resolution. (Compl. ¶ 99).

As discussed earlier, "District of Columbia law has deliberately left the definition of 'fiduciary relationship' flexible, so that the relationship may change to fit new circumstances in which a special relationship of trust may properly be implied." *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d at 46. "Whether a fiduciary relationship exists is a fact-intensive question, and the fact-finder must consider 'the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties.'" *Millennium Square Residential Ass'n v. 2200 M. Street LLC*, 952 F. Supp. at 248-249 (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996)). *See Vox Media, Inc. v. Mansfield*, 322 F. Supp. 3d at 25.

Accordingly, the allegations of the Complaint are sufficient to support the claims against Defendant Tadiar and her motion to dismiss should be denied.

Respectfully submitted,

Dated: June 14, 2019 Signed: /s/*Jennifer Gross*

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CERTIFICATE OF SERVICE

I certify that on June 14, 2019, I caused to be filed PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS with the Clerk of Court for the Superior Court for the District of Columbia through the CaseFileXpress system.

Dated: June 14, 2019 Signed: /s/*Jennifer Gross*

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 SALAITA, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	**Case No. 2019 CA 001712 B** **Judge Robert R. Rigsby** Next Court Date: July 17, 2019 JURY TRIAL DEMANDED

PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' SPECIAL MOTIONS TO DISMISS UNDER THE D.C. ANTI-SLAPP ACT

Plaintiffs Simon Bronner, Michael Rockland, Michael L. Barton, and Charles D. Kupfer (collectively, "Plaintiffs"), hereby submit this opposition memorandum in response to the three Special Motions to Dismiss pursuant to the D.C. Code § 16-5501 *et seq*. ("the Anti-SLAPP Act" or "the Act"), filed by Defendants Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens, Neferti Tadiar, and the American Studies Association ("ASA"); Defendants J. Kehaulani Kauanui and Jasbir Puar; and Defendant Steven Salaita.[1]

INTRODUCTION

As we show below, the D.C. Anti-SLAPP Act only protects activity covered by the First Amendment of the federal Constitution. Yet in this very case, assessing Defendants' effort to escape liability for exactly the same conduct and claims at issue here, Federal District Court Judge Contreras held that Defendants' conduct was not protected by the First Amendment. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 41-42 (D.C. 2017) ("there would be no First Amendment issue with a judgment for Plaintiffs in this case").

Defendants' motions fail for the independently dispositive reason that the activity at issue in this case is exactly the kind of activity that the Anti-SLAPP Act does not reach, and is specifically defined ***not*** to cover. Here again, Defendants have completely ignored the relevant authorities, including the definitional section of the statute they purport to invoke. That section, § 16-5501(1), is

[1] Although every defendant moved for dismissal under the Anti-SLAPP act, the three sets of counsel representing the various defendants filed three separate briefs. There is no defendant-specific argument in the briefs, and it is unclear why Defendants did not file a single brief. To eliminate redundancy and avoid unnecessary burden on both the court and on Defendants, who will next draft reply briefs, Plaintiffs file this single brief in response to the special motions to dismiss under the Anti-SLAPP Act filed by each of the three sets of defense counsel, and use the following notation to distinguish between the Defendants' briefs. Defendants Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens, Neferti Tadiar, and ASA are referred to as "the Original Defendants" and their brief is abbreviated as "Original Defs' Br." The brief filed by Defendants Kauanui and Puar is abbreviated as "Kauanui/Puar Br." and the brief filed by Defendant Salaita is abbreviated as "Salaita Br."

left unmentioned in their brief. Yet standards that provision imposes are completely unsatisfied by the simple corporate breaches at issue in this case. None of Defendants' actions at issue in this case is expressive activity, and none of it is protected by DC law.

ARGUMENT

I. THE ANTI-SLAPP DOES NOT AND CANNOT APPLY BECAUSE IT IS LIMITED TO SPEECH PROTECTED BY THE FIRST AMENDMENT, AND, AS THE FEDERAL COURT THAT PRESIDED OVER THIS CASE FOR THREE YEARS EXPLICITLY HELD, THE FIRST AMENDMENT DOES *NOT* PROTECT THE DEFENDANTS AGAINST PLAINTIFFS' CLAIMS.

The Anti-SLAPP Act applies to conduct protected under the First Amendment, and only to conduct protected by the First Amendment. *See Competitive Enterprise Institute v. Mann* ("*CEI v. Mann*"), 150 A.3d 1213, 1239 (D.C. 2016) (the Anti-SLAPP Act is "a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to *First Amendment* protection"). Thus, it is striking that Defendants even ***attempt*** a special motion to dismiss under the Anti-SLAPP Act, because ***Defendants cannot purport that the First Amendment protects them from these claims, when the Federal District Court judge that presided over this case for three years explicitly rejected the very same First Amendment arguments***. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 41-42 (D.C. 2017) ("there would be no First Amendment issue with a judgment for Plaintiffs in this case").

Defendants do not even attempt argue that the Anti-SLAPP Act's provision for special motions to dismiss (§ 16-5502) could possibly provide for dismissal of claims when the First Amendment does not, nor could they. As the Court of Appeal has explained, it is only ***because*** the Anti-SLAPP Act applies to speech protected by the First Amendment that it is constitutionally permissible to place "the heightened legal and proof requirements" that § 16-5502 allow. *CEI v.*

Mann at 1239. Defendants failure to even acknowledge Judge Contreras' finding that Defendants' conduct is not protected by the First Amendment – while at the same time relying on the same First Amendment arguments that Judge Contreras rejected, and even the same inapposite and irrelevant caselaw – is misleading to this Court.[2]

As Judge Contreras correctly found, Plaintiffs' claims arise from specific acts that violated Defendants' obligations to the ASA and its members, under principles of corporate, tort, and contract law – laws that have only an incidental effect on speech, if any. The First Amendment does not protect Defendants from liability for these acts. *Bronner v. Duggan*, 249 F. Supp. 3d at 42 ("Plaintiffs' claims all arise under generally-applicable laws. [Citations.] They also only seek to enforce rights created at the initiation of private parties; Individual Defendants voluntarily assumed roles where their right to expression would be limited by bylaws, the common law, and statute. Because Defendants voluntarily assented to these laws and the ASA's constitution and bylaws, . . . there would be no First Amendment issue with a judgment for Plaintiffs in this case.").

As the Court of Appeal explained in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1239 (D.C. 2016), the Anti-SLAPP Act's "heightened legal and proof requirements apply when ***First Amendment rights*** of the defendant are implicated" – not to any act that is purported to be related to one's advocacy. *Id*. The Court of Appeals thus held:

> It bears remembering that the fact that a defendant can make a threshold showing that the claim arises from activities "in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502 (a), does not mean that the defendant is immunized from liability for common law claims. *See Duracraft Corp. v. Holmes Prods. Corp*., [691 N.E.2d 935, 943 & n.19] (Mass. 1998) . . .

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[2] *See, e.g.,* Salaita Br. at 7, citing *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1986) to support claim argument that Defendants' conduct is protected under the First Amendment, and Original Defs' Br. at 9 (same). Defendants made the same arguments in their motion to dismiss the First Amended Complaint.

> Thus, the special motion to dismiss in the Anti-SLAPP Act must be interpreted as a tool calibrated to take due account of the constitutional interests of the defendant **who can make a prima facie claim to First Amendment protection** and of the constitutional interests of the plaintiff who proffers sufficient evidence that **the First Amendment protections** can be satisfied at trial; it is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act. *See, e.g., Sandholm v. Kuecker*, 962 [N.E.2d 418, 429-30] (Ill. 2012) (noting that Illinois statute is aimed solely at "meritless, retaliatory SLAPPs" and "was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute").

Id.

The Court of Appeals' reliance on *Duracraft Corp. v. Holmes Prods. Corp*. and *Sandholm v. Kuecker* on this issue is instructive, as both cases deny motions to dismiss under Anti-SLAPP statutes because the claims, though tangentially related to a matter of advocacy, did not arise from speech or expressive conduct covered by the respective statutes.

Duracraft involved claims for breach of contract (specifically, breach of a nondisclosure agreement) and breach of fiduciary duty brought by Duracraft Corporation against a former employee ("Marino") and his new employer, Holmes Products. Holmes Products was engaged in a trademark dispute with Duracraft Corporation. Marino's testimony in a deposition in the trademark dispute was alleged to violate the nondisclosure and Marino's fiduciary duties to his former employer.

The Massachusetts anti-SLAPP statute is far more broad than the D.C. statute, and most other anti-SLAPP statutes; it applies "In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth" (Mass. G.L. c. 231, § 59H), and is not restricted to claims that arise from "the right of advocacy on issues of public interest," as the D.C. Act is (D.C. Code §§ 16-5501 & 16-5502). Thus, testimony in a deposition

appears to be protected under the breadth of the Massachusetts statute, even if the testimony is not related to a matter of public interest.

Yet the Massachusetts Supreme Court denied the special motion to dismiss the breach of contract and breach of fiduciary claims, for exactly the same reasons that Judge Contreras denied these Defendants' previous motion to dismiss this case under the First Amendment – there are numerous, viable claims that only incidentally affect protected speech. The *Duracraft* court held:

> focusing on the defendants' petitioning activity and ignoring Duracraft's claims -- that a contractual obligation precludes Marino's exercise of otherwise protected petitioning activity -- fails to test fully whether Duracraft's claim lacks merit. **Many preexisting legal relationships may properly limit a party's right to petition, including enforceable contracts in which parties waive rights to otherwise legitimate petitioning.** A quintessential example of such a waiver is a settlement agreement, in which a party releases legal claims against an adversary that otherwise properly could be prosecuted by petitioning the court. But **neither this example nor contractual or fiduciary relationships in general exhaust the conceivable occasions in which a party assumes obligations that in turn limit the party's subsequent free exercise of speech and petitioning rights**. Furthermore, **we are aware of no case that has immunized alleged breaches of such preexisting legal obligations based on constitutional protection** . . . nor have we found cases dismissing such claims under anti-SLAPP statutes of other jurisdictions.

Duracraft, 427 Mass. at 165-66.

The federal district court rejected defendants' First Amendment arguments for exactly the same reasons; indeed, the language is quite similar. The federal court in this case held:

> there is a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects on" expression, *see Cohen v. Cowles Media Co*., 501 U.S. 663, 669 (1991). . . . To hold otherwise would mean that courts could never enforce non-disclosure agreements. *See United Egg Producers v. Standard Brands, Inc*., 44 F.3d 940, 943 (11th Cir. 1995) (holding that court enforcement of a settlement agreement is not state action for constitutional purposes). . . .
>
> . . . Plaintiffs ask the Court to enforce the contract that the Plaintiffs and Defendants freely entered into when they voluntarily subjected themselves

> to the constitution and bylaws of the ASA. *See Meshel*, 869 A.2d at 361. Defendants, Plaintiffs argue, voluntarily assumed certain obligations toward the ASA when they took on leadership positions within the organization, and that they violated those obligations through their roles in passage of the boycott resolution. *See* Compl. ¶¶ 79–80, 83– 84, 88–89, 92–93.
>
> Plaintiffs' claims all arise under generally-applicable laws. [Citations.] They also only seek to enforce rights created at the initiation of private parties; Individual Defendants voluntarily assumed roles where their right to expression would be limited by bylaws, the common law, and statute. Because Defendants voluntarily assented to these laws and the ASA's constitution and bylaws, . . . there would be no First Amendment issue with a judgment for Plaintiffs in this case.

Bronner v. Duggan, 249 F. Supp. 3d 27, 42 (D.C. 2017) ("there would be no First Amendment issue with a judgment for Plaintiffs in this case").[3]

Plaintiffs' claims are not subject to dismissal under the Anti-SLAPP Act for the very same reasons that the federal court district court found that "there would be no First Amendment issue with a judgment for Plaintiffs" in this very case. *Id*. The claims arise from violations of generally applicable laws and breach of duties that Defendants voluntarily and intentionally assumed. Holding Defendants accountable for these breaches does not infringe on their First Amendment rights or their "right of advocacy on issues of public interest." § 15-5502. Nor does enforcement of applicable laws, "simply because their enforcement . . . has incidental effects on" expression. *Cohen v. Cowles Media Co*., 501 U.S. 663, 669 (1991).

Defendants state repeatedly that Plaintiffs' claims "arise" out of the passage of the academic boycott and their individual advocacy for the boycott, and they do their best to suggest that these

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[3] The string cite following the statement, "Plaintiffs' claims all arise under generally-applicable laws," reads as follows: "*See Armenian Genocide Museum & Mem'l, Inc. v. Cafesjian Family Found., Inc*., 607 F. Supp. 2d 185, 190–91 (D.D.C. 2009) (setting forth the elements of breach of fiduciary duty); *Adamski v. McHugh*, No. 14-cv- 0094 (KBJ), 2015 WL 4624007, at *6 (D.D.C. July 31, 2015) (describing the law governing ultra vires claims); *Daley*, 26 A.3d at 730 (describing the doctrine of waste); *Compton v. Alpha Kappa Alpha Sorority, Inc*., 64 F. Supp. 3d 1, 16 (D.D.C. 2014) (setting forth the elements of breach of contract), *aff'd*, 639 F. App'x 3 (D.C. Cir. 2016); D.C. Code § 29-405.24 (outlining the procedures all nonprofit organizations must follow)." *Bronner v. Duggan*, 249 F. Supp. 3d 27, 41-42 (D.C. 2017).

actions are protected by the First Amendment, but are careful not to specifically claim that the underlying acts are protected by the First Amendment. Instead, Defendants carefully avoid any reference to the fact that the First Amendment issue was litigated at all, much less that the federal court found that the First Amendment offered no protection against Plaintiffs' claims. We are not aware of a single case where, despite a finding that the act claimed to be "in furtherance of the right of advocacy on issues of public interest" did not enjoy First Amendment protection, the Anti-SLAPP Act was applied, and Defendants certainly do not cite one. Indeed, such a finding would likely violate the plaintiffs' own constitutional rights to petition, as it would place a high bar on the plaintiffs' right to pursue a claim, even though the underlying conduct was not protected under the First Amendment.

II. THE ANTI-SLAPP ACT DOES NOT APPLY BECAUSE THE CLAIMS AT ISSUE DO NOT ARISE FROM STATEMENTS, EXPRESSION OR EXPRESSIVE CONDUCT AS THE STATUTE EXPLICITLY REQUIRES.

A. Plaintiffs' Claims Do Not Arise From a "Written or Oral Statement" or "Expression or Expressive Conduct" as § 16-5502(1) Explicitly Requires.

The Anti-SLAPP Act provides for parties to file a special motion to dismiss "any "claim arising from an act in furtherance of the right of advocacy on issues of public interest[.]" D.C. Code § 16-5502. The term, "act in furtherance of the right of advocacy on issues of public interest" is defined explicitly in § 16-5501(1), as follows:

> (A) Any **written or oral statement** made:
>
> (i) In connection with an issue under consideration or review 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.

D.C. Code § 16-5501(1), emphasis added. The Act does not apply to any other types of conduct or acts, whether or not they are conducted "in furtherance of the right of advocacy on issues of public interest[.]" D.C. Code § 16-5502.

Every one of the Defendants ignored this critical requirement of the Anti-SLAPP Act: it only applies to claims that actually arise from ***written or oral statements, or expressions or expressive conduct***. *See, e.g., Park v. Brahmbhatt*, 2016 D.C. Super. LEXIS 16, *9 (Civ. No. 2015 CA 005686 B, Jan. 19, 2016) ("Plaintiff has not demonstrated any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or in a place open to the public or a public forum in connection with an issue of public interest; or any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest"). Not one of the claims in the Complaint arises from a statement, expression, or expressive conduct.

Defendants do not actually argue that any of Plaintiffs' claims arise from a "written or oral statement" or "other expression or expressive conduct." Instead, Defendants simply fail to acknowledge that § 16-5501's very specific definition of an "act in furtherance of the right of advocacy on issues of public interest" even exists, ignoring the clear language of the statute. Defendants' attempts to convince this court to apply the anti-SLAPP statute to claims that are not encompassed by the statute's clear language must fail.

The approach to statutory construction in this jurisdiction is clear, and "[t]he burden on a litigant who seeks to disregard the plain meaning of the statute is a heavy one." *Nat'l Geographic*

Soc'y v. D.C. Dep't of Emp't Servs., 721 A.2d 618, 620 (D.C. 1998). "In interpreting a statute, we first look to its language; 'if the words are clear and unambiguous, we must give effect to its plain meaning.' *James Parreco & Son v. District of Columbia Rental Hous. Comm'n*, 567 A.2d 43, 45 (D.C. 1989) [further citation omitted]. The intent of the legislature is to be found in the language used." *Id*.

Of course, the "Definitions" section of a statute is the first place to turn when applying a term used in a statute. Thus, in *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016), when interpreting the language "unless the responding party demonstrates that the claim is likely to succeed on the merits" in § 16-5502, only after finding that "neither the phrase nor any of its components is defined in the statute," did the Court of Appeal "look to 'the language of the statute by itself to see if the language is plain and admits of no more than one meaning.'" *Id.*, quoting *Rodriguez v. District of Columbia*, 124 A.3d 134, 146 (D.C. 2015). Then, only after finding ambiguity in the plain language of the statute with respect to the words "likely to succeed on the merits" did the Court of Appeal turn "to legislative history and other aids to construction." 150 A.3d at 1235 ("Lacking a statutory definition, clear dictionary definition, or application as a term of art that reasonably can be borrowed from another context, the Anti-SLAPP Act's 'likely to succeed on the merits' leaves us with 'textual uncertainty.' *Cass v. District of Columbia*, 829 A.2d 480, 486 (D.C. 2003)").

There is no textual uncertainty here. The Anti-SLAPP Act provides a "statutory definition," of an "act in furtherance of the right of advocacy on issues of public interest," and that definition encompasses, only, "written or oral statement[s]" and "other expression[s] or expressive conduct." D.C. Code § 16-5501(1). Defendants' extensive (and, as discussed below, inaccurate) assertions

about legislative intent notwithstanding, the Act clearly does not apply to these claims.[4]

B. The D.C. Legislature Considered and Specifically Rejected Including Non-Speech Under the Anti-SLAPP Act and Intentionally Limited Coverage of the Anti-SLAPP Act to Statements, Expressions, and Expressive Conduct.

If the Council of the District of Columbia ("the Council") sought to cover not just speech, but any "act in furtherance of the right of advocacy on issues of public interest," it easily could have done so. Instead, the Council rejected proposed language that could have been read to include non-speech conduct, even if the conduct were taken "in furtherance of the right of advocacy on issues of public interest." In the period between the original proposed legislation and the adoption of the Anti-SLAPP Act of 2010, the Council ensured that final legislation restricted the protection of the Anti-SLAPP Act to protected speech.

The original proposal of the Anti-SLAPP Act of 2010 was written to cover any "act in furtherance of the right of free speech," rather than limiting coverage to "act[s]in furtherance of the right of advocacy on issues of public interest," as the Act as adopted does. ("Referral of Proposed Legislation, Anti-SLAPP Act of 2010," dated July 7, 2010, Attachment to the Report on Bill 18-893, "Anti-SLAPP Act of 2010" (Nov. 18, 2010).) Under the originally proposed legislation, the definition of an act "in furtherance of the right of free speech" included the following: "(B) Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest." Thus, this original formulation could have been read to include conduct that was not, itself, protected speech, if that conduct was taken in "furtherance" of the right to petition or the right of free speech.

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[4] Defendants' extensive arguments on legislative intent are substantively incorrect. The record shows that the legislature intended for the Anti-SLAPP Act to protect speech that is entitled to First Amendment protection. The claims at issue in this case do not implicate the First Amendment. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 41-42 (D.D.C. 2017).

That language was rejected by the Council, who instead limited the breadth of the Act to "act[s] in furtherance of the right of advocacy on issues of public interest," and replaced the language, "any other conduct in furtherance of" with "any other expression or expressive conduct" in the definition that today is codified in § 16-505(1). Thus, today, the Act does not cover ***any*** (non-expressive) conduct that "involves petitioning the government or communicating views to members of the public in connection with an issue of public interest," but instead only covers "expressions or expressive conduct" that does so.

Although Defendants loosely claim otherwise, not a single claim alleged in the complaint involves speech or expressive conduct that ""involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." Not a single claim arises from a statement made to the public.[5]

C. Defendants' Simplistic Assertions that the Plaintiffs' Claims All Arise From the Academic Boycott – "In One Way or Another" – Is Simply Wrong.

As discussed above, Defendants do not even attempt to specifically argue that any of Plaintiffs' claims arise from statements, expressions, or expressive conduct that satisfy § 16-5501(1)'s definition of an "[a]ct in furtherance of the right of advocacy on issues of public interest[.]" Completely ignoring § 16-5501(1), Defendants instead make sweeping statements that they "have being sued for their political activities" (Kauanui/Puar Br. 3), that Plaintiffs' claims "arise, in one way or another," from the Academic Boycott (Original Defs' Br. at 8, *see also* Salaita Br. at 7).

Defendants are wrong. Plaintiffs' claims do not arise from the Academic Boycott, but from numerous acts that were taken with full knowledge that they would "damage the ASA," that breached Defendants' fiduciary obligations to the organization and its members, violated the ASA's

[5] Moreover, the issues do not satisfy the Anti-SLAPP Act's definition of "issue of public interest" for this purpose, as set forth in § 16-5501.

Constitution and bylaws, drained the ASA's Trust Fund of hundreds of thousands of dollars, and mislead the ASA's membership, *inter alia*.[6] The acts that caused this damage are not the Academic Boycott in itself, nor "communicative actions related to" the Academic Boycott.[7] (Original Defs' Br. at 8.)

Critically, Defendants do not identify any particular statement, expression, or expressive conduct that they purport to form the basis of the claims for breach of fiduciary duty, breach of contract, *ultra vires* acts, corporate waste, or any of Plaintiffs' claims. Instead, they attempt to tie the conduct that violated their duties to the Plaintiffs and to the members of the ASA to "their political activities" (Kauanui/Puar Br. at 3) and to the Academic Boycott, as though any circumstantial connection to the BDS movement is sufficient to show that a claim "arises from" advocacy.

Defendants' tortured interpretation of "arising from" is flatly contradictory to case law that interprets and applies the term in Anti-SLAPP cases. Earlier this year, the California Court of Appeal issued a very strong opinion rejecting defendants' appeal of the denial of an Anti-SLAPP motion seeking to strike antitrust claims, including conspiracy to restrain trade. *Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc*., 52 Cal. App. 5th 458, 468-470 (2019). The defendants had argued that the claims were covered by the California's Anti-SLAPP statute, because they were (circumstantially) related to petitioning. The Court of Appeal rejected that argument, holding that the "gravamen, the thrust, of the cause of action" was the private, anticompetitive actions

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[6] This list does not include the claims relating specifically to Plaintiff Bronner and the Encyclopedia of American Studies, which no defendant even attempts to argue "arise" from the Academic Boycott.

[7] Although even if Plaintiffs did bring claims that "arose from" the Academic Boycott or "communicative actions related to" the Academic Boycott, that in itself also would not be sufficient to show that the Anti-SLAPP Act should apply. As discussed above, the Anti-SLAPP Act's "heightened legal and proof requirements apply when ***First Amendment rights*** of the defendant are implicated" – not to any act that is purported to be related to one's advocacy. The requirements of § 16-5501(1) must also be satisfied.

to prevent the plaintiff from obtaining space to operate a medical marijuana dispensary, not petitioning. "Whatever the protected activity, it was at the most incidental." *Id.* at 470. The court held:

> Our Supreme Court has recently put it this way: "A claim arises from protected activity when that activity underlies or forms the basis for the claim. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal. Rptr. 2d 519, 52 P.3d 695]; *Equilon Enterprises v. Consumer Cause, Inc*. [(2002)] 29 Cal.4th [53,] 66 [124 Cal. Rptr. 2d 507, 52 P.3d 685]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114 [81 Cal. Rptr. 2d 471, 969 P.2d 564].)" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062–1063 [217 Cal. Rptr. 3d 130, 393 P.3d 905] (*Park*).)
>
> "Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citations.] … [T]he focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) … .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1063.)

Richmond Compassionate Care Collective v. 7 Stars Holistic Found., Inc., 32 Cal. App. 5th 458, 467-68, 243 Cal. Rptr. 3d 816, 823-24 (2019).

Defendants here have carefully avoid even mentioning the types of claims at issue, much less the underlying conduct. They certainly do not identify the acts "that give[] rise to [the] asserted liability," and they could not possibly argue that those acts are protected speech.

Other courts have rejected attempts to expand the interpretation of "arising from" to include claims that are not based on protected speech.

> "A cause of action does not "arise from" protected activity simply because it is filed after protected activity took place. *Cashman*, 29 Cal. 4th at 76-

> 77. Nor does the fact "[t]hat a cause of action arguably may have been triggered by protected activity" necessarily mean that it arises from such activity. *Cashman*, 29 Cal. 4th at 78. The trial court must instead focus on the substance of the plaintiff's lawsuit in analyzing the first prong of a special motion to strike. *Scott v. Metabolife Intern., Inc.*, 115 Cal. App. 4th 404, 413-414, 9 Cal. Rptr. 3d 242 (2004); see also *Cashman,* 29 Cal. 4th at 78. In performing this analysis, the California Supreme Court has stressed, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *Cashman*, 29 Cal. 4th at 78 (emphasis in original). In other words, "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." *Id.*

Flores v. Emerich & Fike, 416 F. Supp. 2d 885, 897 (E.D. Cal. 2006). Courts outside of California agree. The Massachusetts Supreme Court adopted a construction of the term "'based on' that would exclude motions brought against meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated." *Duracraft Corp*., 691 N.E.2d at 943. "The special movant who 'asserts' protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits ***that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.***" *Id*. Imposing this requirement on special movants under the statute would, according to the court, "serve to distinguish meritless from meritorious claims, as was intended by the Legislature." *Id*.

The Illinois Supreme Court adopted the same construction.

> In light of the clear legislative intent expressed in the statute to subject only meritless, retaliatory SLAPP suits to dismissal, we construe the phrase "based on, relates to, or is in response to" in section 15 to mean *solely* based on, relating to, or in response to "any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15 (West 2008). . . . Our construction of the phrase "based on, relates to, or is in response to," in section 15 similarly allows a court to identify meritless SLAPP suits subject to the Act. This interpretation also serves to ameliorate the "particular danger inherent in anti-SLAPP statutes *** that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs'

> own rights to seek redress from the courts for injuries suffered." Mark J. Sobczak, Comment, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. Ill. U. L. Rev. 559, 575 (2008).

Sandholm v. Kuecker, 2012 IL 111443, ¶¶ 47-48, 356 Ill. Dec. 733, 746, 962 N.E.2d 418, 431.

There is no District of Columbia case interpreting the term "arising from" as used in § 16-5502(a) ("A party may file a special motion to dismiss any claim *arising from* an act in furtherance of the right of advocacy on issues of public interest within 45 days of service of the claim"). This is likely because § 16-5501(1) winnows the types of claims where the Anti-SLAPP Act may apply to claims that arise from a "written or oral statement" or "expression or expressive conduct" made in connection with an issue of public interest. D.C. Code § 16-5501(1); *see* discussion in section I.A., *supra*. This requirement eliminates the possibility that the Anti-SLAPP Act would apply to a claim for injury caused by anything but speech. Moreover, as the Court of Appeal clarified in *Competitive Enterprise Institute v. Mann*, the Anti-SLAPP Act applies only "when First Amendment rights of the defendant are implicated[.]" 150 A.3d at 1239, *see* discussion in section I.C, *supra*. Thus, in the analysis described in (and required by) the *Mann* court, the first step for a trial court presented with a motion under § 16-5502 is to consider "'the statements at issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the *First Amendment* protect.' *N.Y. Times v. Sullivan*, [376 U.S. 254, 285 (1964)]." *Mann*, 150 A.3d at 1240.

Between the clear language of both § 16-5501(1) and *Mann*, it could not be more clear that the Anti-SLAPP Act only applies to protected speech. Thus, there has not been a need for the D.C. courts to consider whether claims for injury that are directly caused by acts that are not protected by the First Amendment may be deemed to "aris[e] from an act in furtherance of the right of advocacy on issues of public interest[.]" § 16-5502(a). It simply doesn't matter if the "act [is] in furtherance of the right of advocacy," because, unless the "act" is also speech that fits the definition in § 16-5501(1),

(and is protected by the First Amendment) – the Anti-SLAPP Act does not and cannot apply.[8] Thus, the D.C. courts have not needed to also address that claims like these - for breach of fiduciary duty, violation of corporate bylaws, and mismanagement of a nonprofit, *inter alia* - might be "arising from" an act protected by Anti-SLAPP Act.

III. THE SPECIAL MOTION TO DISMISS MUST BE DENIED BECAUSE PLAINTIFFS EASILY SHOW THAT THE CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS UNDER *COMPETITIE ENTERPRISES INSTITUTE V. MANN*.

Pursuant to § 16-5502, even if Defendants were able to make a prima facie showing that the "claim[s] at issue arise[] from an act in furtherance of the right of advocacy on issues of public interest" – and they are clearly unable to make that showing – the special motion to dismiss must be denied if "the responding party demonstrates that the claim is likely to succeed on the merits[.]" D.C. Code § 16-5502(b). In *Competitive Enterprise Institute v. Mann*, the landmark decision interpreting § 16-5502, the Court of Appeal held that to satisfy § 16-5502(b)'s standard of "likely to succeed on the merits," the respondent in the motion must only "present an evidentiary basis that would permit a reasonable, properly instructed jury to find in the plaintiff's favor." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1262-63 (D.C. 2014). In a lengthy and detailed analysis, the Court of Appeals held that any higher standard would violate the constitutional rights of the plaintiff(s). 150 A.3d at 1232-40. This standard allows for dismissal of meritless claims arising from protected speech, but not dismissal of claims that 1) are not meritless, and/or 2) do not arise from protected speech. The claims brought by plaintiffs here fit neither category.

Defendants make a number of arguments intended to show that, despite Judge Contreras' clear

[8] As the *Mann* court made clear, the Anti-SLAPP Act cannot apply to an act that is not protected speech without violating the Constitutional rights of the *Plaintiff*, who also has a right to petition the courts, as well as a right to a jury trial.

statements otherwise, no "reasonable, properly instructed jury" could find for Plaintiffs on any of their claims. Plaintiffs address these arguments below.

A. Defendants Misstate the Standard for Dismissal Under § 16-5502.

The standard for "likely to succeed on the merits" allows for claims to proceed ***if any reasonable jury could find for the plaintiff***. This is clearly a lower standard than one that asks the court to estimate the probability of success, or to determine, on the facts, whether the claims have merit. The Court of Appeals held that this formulation of the standard is required; a higher standard would render the statute unconstitutional, as it would allow the judge to substitute his or her view of the facts for that of a jury in violation of the Seventh Amendment. "We, therefore, conclude that to remove doubt that the Anti-SLAPP statute respects the right to a jury trial, ***the standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that the claimant could not prevail as a matter of law***, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Competitive Enter. Inst. v. Mann*, 150 A.3d at 1236.

Defendants do their best to avoid stating this standard, as they surely must do if they hope to argue that these claims should be dismissed. Even when dismissing the case for lack of federal jurisdiction (only), Judge Contreras concluded the opinion with the final sentence, "Plaintiffs have raised allegations and presented evidence indicating that they may have meritorious claims, but they must assert those claims before the proper tribunal." *Bronner v. Duggan*, 364 F. Supp. 3d 9, 23 (D.D.C. 2019).

Defendants do not and cannot reconcile Judge Contreras' statement that "Plaintiffs have raised allegations and presented evidence indicating that they may have meritorious claims" with a finding that "no reasonable jury properly instructed" could find that the same claims are meritorious. Thus,

they wholly avoid discussing the standard at all. The Original Defendants cite *Competitive Enterprise Institute v. Mann* without stating the major holding in the case. Original Defs' Br. at 10, including a partial quote of just the words "any heightened fault and proof requirements" (*Mann*, 150 A.3d at 1236) to argue that plaintiffs subject to an Anti-SLAPP motion must "meet the standard for resisting a summary judgment motion." Original Defs' Br. at 10.

The standard is not the quite the same as the standard for a summary judgment motion, however. Indeed, the *Mann* Court explained that the anti-SLAPP special motion to dismiss and a Rule 56 summary judgment ***are not redundant***.

> Our interpretation of the requirements and standard applicable to special motions to dismiss ensures that the Anti-SLAPP Act provision is not redundant relative to the rules of civil procedure. A defendant may still file a motion to dismiss a complaint at the onset of litigation under Rule 12, based solely on deficiencies in the pleadings. *See* Super. Ct. Civ. R. 12 (a) (requiring that motion for failure to state a claim must be filed within 20 days of service of complaint). The Anti-SLAPP Act gives the defendant the option to up the ante early in the litigation, by filing a special motion to dismiss that will require the plaintiff to put his evidentiary cards on the table and makes the plaintiff liable for the defendant's costs and fees if the motion succeeds. D.C. Code § 16-5502 (a) (requiring that special motion to dismiss be filed within forty-five days of service of the complaint); *id.* § 16-5504 (a) (providing for costs and fees). Even if the Anti-SLAPP special motion to dismiss is unsuccessful, the defendant preserves the ability [**46] to move for summary judgment under Rule 56 later in the litigation, after discovery has been completed, or for a directed verdict under Rule 50 after the presentation of evidence at trial.

Mann, 150 A.3d at 1238.

The standard is also clearly not the same as that for a motion to dismiss, although Defendants make no attempt to show that their arguments under 12(b)(6) also satisfy the different and higher standard set forth in *Mann*. See Original Defs' Br. at 10-11 ("As argued more fully in the Motion to Dismiss . . . None of counts in the Complaint present a viable cause of action"). Of the four paragraphs in section III of the Original Defs' Brief (pp. 9-11), the longest argues only that ***if***

Plaintiffs seek discovery under § 16-5502(c)(2) while the Special Motion to Dismiss is pending – something that Plaintiffs have not sought to do – ***then*** that imaginary motion should be denied.

The Original Defendants then spend one paragraph recounting (without disputing the accuracy) statements in the introduction to the Complaint:

> 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 *would* support claims that some defendants acted with harmful intent, Complaint at 6-7. (Emphasis [in Original Defs' Br.].) Mere allegations, however, will not suffice.

Original Defs' Br. at 11. This is a striking comment. Under *CEI v. Mann*, the standard to survive a special motion to dismiss is whether ***any "reasonable, properly instructed jury" could find for plaintiffs***. *CEI v. Mann*, 150 A.3d at 1262-63. We are unsure where the gap is between claims that "a reasonable, properly instructed jury" ***could*** find to be meritorious, and claims brought by plaintiffs who, three years into the litigation, the judge asserted "raised allegations and presented evidence indicating that they may have meritorious claims." *Bronner v. Duggan*, 364 F. Supp. 3d at 23. Defendants certainly make no attempt to identify the level of proof that might meet Judge Contreras' description of the claims in this case, but fail to satisfy the *Mann* standard. We are unable to imagine what it might be.

In the same paragraph, the Original Defendants also argue that when claims are "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)[.]" (Original Defs' Br. at 11.) Defendants do not explain how this principle should apply to an Anti-SLAPP special motion to dismiss, nor could they. *Aequitron* holds only that, "under Minnesota law, where

[a] tortious interference claim is based on conduct that sounds in defamation, the special rules of defamation apply." *Aequitron Med. v. CBS, Inc*., 964 F. Supp. 704, 709 (S.D.N.Y. 1997) Those special rules require a showing of malice if the plaintiff alleging defamation is a person in the public eye and knowledge that the alleged defamatory sta. *Id*. ("Aequitron's tortious interference . . . claim raises two issues: First, whether, as CBS contends, the 'special rules of defamation' apply . . . and, second, if so, whether Aequitron has presented sufficient evidence to raise a genuine issue of fact as to whether CBS acted with actual malice and whether CBS knew that the statements in question were false"). This was the only issue in *Aequitron*, which was not an Anti-SLAPP case, and did not otherwise discuss any "special common law rules" that "heighten the authority of the court to more closely scrutinize the weight of whatever evidentiary proffers" are made by plaintiffs in any other type of case, and which did not bear, at all, on the standard for determining whether claims challenged under § 16-5502 are "likely to succeed on the merits."

B. The District Court Explicitly Held That Plaintiffs Are Not Barred from Bringing *Ultra Vires* Claims or Direct Claims for Mismanagement of the ASA.

Defendants Kauanui and Puar argue that Plaintiffs are barred by collateral estoppel from bringing derivative claims and *ultra vires* claims, after Judge Contreras dismissed, without prejudice, one *ultra vires* claim and (actual) derivative claims that were brought in the First Amended Complaint ("FAC"). (Kauanui/Puar Br. at 7.) The Original Defendants also argue, in just a few words, that Plaintiffs' "derivative claims are barred by collateral estoppel" – although Plaintiffs bring no derivative claims. The Original Defendants made this same argument in a previous brief, and Judge Contreras flatly rejected it in a published opinion, for obvious reasons.

First, the dismissal of one *ultra vires* claim, without prejudice, in no way prevents or bars the presentation of one or more different *ultra vires* claim in an amended complaint. Indeed, a plaintiff

may even bring the same claim that was previously dismissed in a new, amended complaint, if the amended complaint alleges facts to support the claim that were not included in the initial complaint.

Second, as Judge Contreras made clear, the derivative claims were not dismissed on their merits, but on procedural grounds, and cannot serve as a bar to direct claims arising from the same facts, because, *inter alia*, the court made no decision on the merits of those claims. Judge Contreras held:

> The Court dismissed the derivative claims because Plaintiffs had failed to make a demand on the National Council, not because the claims themselves, if ASA had asserted them on its own, lacked merit. The claims that Plaintiffs seek to assert sound in breaches of fiduciary duty, breaches of contract, and ultra vires action, which the D.C. Court of Appeals has suggested may be asserted directly by shareholders and members of non-profit organizations under certain circumstances. *See Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016); *Daley v. Alpha Kappa Alpha Sorority, Inc*., 26 A.3d 723, 729-30 (D.C. 2011).

Bronner v. Duggan, 324 F.R.D. at 293 & n.2 (D.D.C. 2018) ("the new claims that Plaintiffs assert do not appear to be the same as those that this Court has already rejected").

The claims brought in the SAC, and now in this complaint, are not brought as derivative claims, and thus cannot be dismissed for failure to conform to procedural rules that only apply to derivative claims. Moreover, even if the previously dismissed derivative claims did serve as a bar to the same claim brought directly – and they clearly do not – the current complaint brings __ claims that were not brought in the first amended complaint as either direct or derivative claims, and thus are clearly cannot barred under the doctrine of collateral estoppel.

C. Defendants' New Statute of Limitations Arguments Address Few Claims, Fail with Respect to Those Claims, and Cannot Support Dismissal Under § 16-5502, Because Statute of Limitations Arguments Do Not Bear on Whether a Claim Is "Likely to Succeed on the *Merits*."

Defendants' statute of limitations arguments simply do not bear on their special motions to

dismiss under § 16-5502. The statute of limitations defense is an affirmative defense, and Defendants bear the burden of showing that the . *Logan v. Lasalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1019-20 (D.C. 2013); *Brin v. S.E.W. Investors*, 902 A.2d 784, 800-01 (D.C. 2006), *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 579 (D.C. 2011) "As the 'part[ies] pleading the statute [of limitations] defense,' [Defendants] had 'the burden of proof unless the claim [was] barred on its face' (which, we have determined, it was not)," quoting *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005).) It is rarely appropriate to grant a Rule 12(b)(5) motion to dismiss on statute of limitations grounds, before the defendants have answered the complaint and before discovery. *Brin v. S.E.W. Inv'rs*, 902 A.2d 784, 795 (D.C. 2006) ("At the Rule 12 (b)(6) stage, a court should not dismiss on statute of limitations grounds unless the claim is time-barred on the face of the complaint"); *Logan v. Lasalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1019-20 (D.C. 2013); *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005).

Moreover, where statute of limitations issues involve questions of fact, they must be resolved by a jury, not the judge. **"**Although '[w]hat constitutes the accrual of a cause of action is a question of law . . .[,] when accrual actually occurred in a particular case is a question of fact' to be resolved by the fact-finder." *Brin v. S.E.W. Inv'rs*, 902 A.2d 784, 795 (D.C. 2006), quoting *Diamond v. Davis*, 680 A.2d 364, 370 (D.C. 1996). "In all cases to which the discovery rule applies, the inquiry is highly fact-bound and requires an evaluation of all of the plaintiff's circumstances." *Diamond,* 680 A.2d at 372. "Unless the evidence regarding the commencement of the running of the statute of limitations is so clear that the court can rule on the issue as a matter of law, the jury should decide the issue on appropriate instructions." *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 892 n.29 (D.C. 2003); *Brin v. S.E.W. Inv'rs*, 902 A.2d 784, 795 (D.C. 2006), quoting *Lively*. The plaintiff also must be able to present arguments with the benefit of discovery and presentation of evidence. *Hillbroom v.*

PricewaterhouseCoopers LLP, 17 A.3d 566, 579 (D.C. 2011) (remanded for, "at the very least, discovery regarding facts material to the issue of when appellants' cause of action accrued").

Setting aside for purposes of argument that there are claims that ***clearly*** arise within the statute of limitations – Defendants do not actually argue that Counts 10 and 11 did not occur within statute of limitations, nor do they present any sensible argument that the withdrawals from the ASA's Trust Fund, or the changes in the bylaws that were made to allow these vast withdrawals (and to remove the status of *ex officio* officer and member of the National Council from the editor of the Encyclopedia) did not occur within the statute of limitations, *inter alia*.

Moreover, all of the remainder of claims – every one – is subject to the discovery rule. As discussed in Plaintiffs' Opposition to Rule 12(b) Motions, Plaintiffs did not and could not know of the facts that underlying the claims presented for the first time in the SAC. Defendants concealed their wrongful acts avoid liability. Not until discovery did Plaintiffs learn, for example, that Defendants manipulated the membership rolls to prevent those long-time members that they thought would oppose the Academic Boycott from voting on the Academic Boycott. Or that Defendants discussed over email how they would pack the National Council with advocates for the academic boycott, and their decision not to disclose their primary intention in their election statements. There was never any indication to plaintiffs that Defendants would intentionally – and admittedly – damage the ASA to promote a boycott that they hoped (and planned) would spread to other associations if only one decent-sized academic association would be the first to pass it. Nor did, or could, any plaintiff or other member know the extent that defendants would dedicate ASA resources on the Academic Boycott and closely related issues. Plaintiffs did not and could not know any of this until the information was uncovered in discovery just before the SAC was filed, and these are just a few examples of claims that plaintiffs did not and could not know of before October of 2017.

The discovery rule is clearly at issue, and the date that the statute of limitations begins to run on each one of these claims is a fact-intensive determination that cannot be made by the judge on a motion to dismiss, and much less a special motion to dismiss under the Anti-SLAPP Act. *Brin v. S.E.W. Inv'rs*, 902 A.2d 784, 795 (D.C. 2006); *Diamond v. Davis*, 680 A.2d 364, 370 (D.C. 1996); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 892 n.29 (D.C. 2003). The Court of Appeal has made clear that a judge cannot dismiss under the Anti-SLAPP Act where there are questions of fact; the judge cannot usurp the role of a jury and decide questions of fact for purposes of determining whether a claim or claims are "likely to succeed" under § 16-5502. Among other things, a dismissal that requires a factual determination at the pleading stage and pursuant to the Anti-SLAPP Act would violate the Seventh Amendment. It would also be in contravention to the legislative intent behind the Anti-SLAPP Act.

As discussed above, the D.C Council sought to prevent *meritless* claims arising from *protected* speech. We were not able to identify any case that upheld, or even addressed, dismissal of any claim under § 16-5502 solely on statute of limitations grounds. Such an outcome would not be on the merits of the claim, and would impose an unfair burden on a plaintiff that presented a potentially meritorious claim. Under any other circumstances, a plaintiff would be afforded at least one opportunity to amend their complaint to plead facts that show that the claim or claims fell within the statute of limitations. Moreover, under any other circumstances, no such determination would even be made at the pleading stage, and particularly not if the discovery rule or another fact-intensive issue, were at issue. To treat these claims differently – to dismiss under the Anti-SLAPP Act, eliminating the opportunity to amend – would violate the Seventh Amendment rights of the plaintiffs, the decision in *CEI v. Mann*, and the intent of Council, who only allowed for dismissal under the Anti-SLAPP Act on the *merits* of a claim.

For all of the reasons detailed above, Plaintiffs respectfully request that this Court deny the Defendants' Special Motions to Dismiss Under the Anti-SLAPP Act.

Respectfully submitted,

Dated: June 14, 2019 Signed: /s/*Jennifer Gross*

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CERTIFICATE OF SERVICE

I certify that on June 14, 2019, I caused to be filed PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' SPECIAL MOTIONS TO DISMISS UNDER THE D.C. ANTI-SLAPP ACT with the Clerk of Court for the Superior Court for the District of Columbia through the CaseFileXpress system.

Dated: June 14, 2019 Signed: /s/*Jennifer Gross*