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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, et al., **Plaintiffs,** **v.** **LISA DUGGAN, et al.,** **Defendants.**	**Civil Action No. 2019 CA 001712 B** **Judge Robert R. Rigsby** **Next Event: Motions Hearing, July 17, 2019**

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS UNDER THE ANTI-SLAPP ACT

COME NOW the Defendants, American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, by and through the undersigned counsel, and hereby respond to Plaintiffs' Opposition to Defendants' Motion to Dismiss under the Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*. These Defendants also incorporate by reference the arguments raised by the other Defendants in their Reply Memoranda. As argued below, Plaintiffs' arguments miss the mark.

Specifically, Plaintiffs misunderstand the D.C. Anti-SLAPP Act (the Act) in three fundamental ways:

1) They conflate the scope of the Act with the boundaries of First Amendment protection, leading to the absurd result that the Act would apply only as a shield against state action;

2) They assert that the Act does not apply to contractual and organizational governance claims, even though the nucleus of all their claims is their

opposition to Defendants' expression of opinion on an issue of Middle East politics; and

3) They contend that claims that are barred by the statute of limitations or collateral estoppel could nonetheless support a finding that they are likely to succeed on the merits, thus mischaracterizing the standard that this Court must apply under the Act.

The core reality is that Plaintiffs are using litigation to attempt to intimidate organizations such as ASA from adopting a Resolution critical of the policies of the Israeli government. Not to apply the Act in this case would render it effectively a dead letter.

A. Defendants' Speech is Protected by the Anti-SLAPP Act.

The purpose of the Act is to protect against lawsuits filed by private parties that are designed to chill political and other speech that is otherwise protected by the First Amendment. Competitive Enterprise Institute v. Mann, 150 A.3d 1213, 1231 (D.C. 2016). Contrary to Plaintiffs' assertions, they cannot escape coverage of the Act because their complaint alleges violations of "generally applicable laws"; claims arising from general tort and contract law are typically the basis for anti-SLAPP challenges. *See*, *e.g.*, Gardner v. Martino, 563 F.3d 981, 983 (9th Cir. 2009) (affirming dismissal of claim for intentional interference with economic relations); Baral v. Schnitt, 1 Cal.5th 376, 205 CalRptr.3d 475, 376 P.3d 604 (2016) (finding that claim for breach of fiduciary duty contained allegations of activity covered by Anti-SLAPP law); Navellier v. Sletten, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002) (dismissing breach of contract claim pursuant to Anti-SLAPP law); Serafine v. Blunt, 466 S.W.2d 352, 360 (Tex. Ct. App.

2015) (finding that counterclaim of tortious interference with contract was based on activity protected by Anti-SLAPP law). The Act is intended to supplement the protection against governmental infringement of expression rights by providing a shield against litigation by private parties that indirectly (through imposition of damages rather than by criminal convictions or civil penalties) seeks to penalize political speech.

Plaintiffs cite repeatedly the language from the U.S. District Court for the District of Columbia, claiming that there is "no First Amendment issue." By taking the quote out of context, they have distorted the meaning. In the federal court case, Defendants raised a direct First Amendment defense based on the concept that liability for the acts in question would violate the First Amendment under Shelley v. Kramer,[1] in which judicial enforcement of a restrictive covenant was found to constitute state action. It was in this context that Judge Contreras wrote that "there would be no First Amendment issue" if the Plaintiffs had prevailed.

In point of fact, Judge Contreras clearly identified the reason for that conclusion: that the state action required for finding a constitutional violation was not present. "This case does not present a First Amendment issue *because* the Court's passive enforcement of the obligations expressly assumed by the parties does not constitute state action." Bronner v. Duggan, 249 F.Supp.3d 27, 42 (D.D.C. 2017) (emphasis added). The sentence that Plaintiffs seek to distort in their mantra of partial quotation must be read in full. It states as follows:

> Thus, enforcement of Plaintiffs' rights derived from that contract [with the ASA] *would not constitute state action as contemplated under* Sullivan *and* Shelley, *meaning* that

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1 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)

> there would be no First Amendment issue with a judgment for Plaintiffs in this case.
> *Id.* (emphasis added)

Thus, it is flatly incorrect to assert, as Plaintiffs did, that Judge Contreras "explicitly rejected the very same First Amendment arguments" (Opposition at 3, italics and boldface deleted). Here, the Anti-SLAPP Act creates protection against private party lawsuits designed to chill speech. In federal court, there is no such statutory basis for a special motion to dismiss. This finding by Judge Contreras provides no escape for Plaintiffs for using litigation as an adjunct to their political opinions.

Defendants' speech falls easily within the purpose and scope of the Act, which requires that speech protected by the Act either be a public communication regarding an issue under consideration by a lawmaking body or "an issue of public interest." D.C. Code § 16-5501(1), (3) (2019). The complaint is filled with allegations of communicative acts and there can be no serious dispute that the Resolution is "an issue of public interest." Indeed, "BDS boycotts . . . rest on 'the highest rung of the hierarchy of First Amendment values.'" Amawi v. Pflugerville Ind. Sch. Dist., 373 F.Supp.3d 717, 745 (W.D. Tex. 2019) (on appeal).

As the California Supreme Court held in Baral, *supra*, it is wrong to allow

> artful pleading [by plaintiffs] to evade the reach of the anti-SLAPP statute. By mixing allegations of protected and unprotected activity, the pleader may avoid scrutiny of the claims involving protected activity. . . [T]he application of [the Anti-SLAPP Act] cannot reasonably turn on how the challenged pleading is organized. . . . It is arbitrary to hold that the same claim, supported by allegations of protected and unprotected activity in a single cause of action, escapes review if the plaintiff shows a probability of prevailing on the allegations that are *not* covered by the anti-SLAPP statute.
> 1 Cal.5th at 392-393.

B. Plaintiffs' Claims Are Based On Written and Oral Expression and Expressive Conduct, and Thus Are Covered by the Act

Plaintiffs next argue that their claims do not arise from Defendants' endorsement of the Academic Boycott. Again, they misrepresent the contents of their own Complaint. Every claim in that pleading arises directly from Plaintiffs' disagreement with the opinions contained in the Resolution. Their motives are patently evident on the face of the complaint: its 134 paragraphs of factual allegations and legal conclusions are littered with references to statements and expressive acts by the Defendants and with the opinions and beliefs held not only by those Defendants but also by others with whom Plaintiffs link the Defendants. This same attack on the Defendants' expression and expressive conduct is woven into virtually all of the Counts:

> Count One, ¶ 262 – Assertion of breach of fiduciary duties by Defendants' "misrepresentation and omission of material facts regarding (1) their personal political agenda and plan . . . to advance the purposes of the [organizers of the Academic Boycott];"
>
> Count Two, ¶ 266 – Assertion of breach of fiduciary duties by Defendants' by acting "to advance the political goals of an outside party [organizers of the Academic Boycott]";
>
> Count Three, ¶ 275 - Assertion of *ultra vires* acts "to force the [Academic Boycott] resolution on the American Studies Association.";
>
> Count Four, ¶ 283 - Assertion of *ultra vires* acts to block voting by individuals whose membership had expired and who opposed the Academic Boycott "solely on the basis of their beliefs";
>
> Count Five, ¶ 290 – Assertion of *ultra vires* acts because "efforts to influence Israeli legislation constitute a substantial part of the American Studies Association's activities, as do efforts to influence U.S. legislation at both the state and federal level.";

> Count Nine, ¶ 316 – Assertion of corporate waste based on "Individual Defendants' decision to use American Studies Association resources to advocate, conduct a vote on, . . . and then support the Academic Boycott";
>
> Count Ten, ¶ 321 – Assertion of breach of fiduciary duties by not offering to renew Plaintiff Bronner's contract "because they disagreed [with] his position on the Academic Boycott and considered him to be a Zionist."; and
>
> Count Twelve, ¶ 336 – Assertion of aiding and abetting breach of fiduciary duty by certain Defendants because they were "actively engaged in the effort . . . to usher through the Academic Boycott."

The cases cited by Plaintiffs in their Opposition are inapposite. For example, Plaintiffs quote at length from Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc., 32 Cal. App. 5th 458, 243 Cal. Rptr. 816 (2019), involving two private businesses that were competing to control the medical marijuana business in a particular locale. There, the court denied an anti-SLAPP motion to dismiss because the "essence of [the complaint before the court] was private actions the group took to restrain trade and monopolize the . . . market." *Id.* at 470. By contrast, the trial court in that case had noted that previous versions of the complaint contained assertions that defendants had contacted members of the local City Council and mobilized others to do so, which would have constituted grounds for the anti-SLAPP motion. *Id.*, 32 Cal.App. 5th at 465. In the case at bar, the allegations against Defendants include such actions as organizing open discussions of the Resolution at the annual meeting of the ASA, and thus resemble the type of conduct that the Richmond Collective court indicated would support an anti-SLAPP motion. Read correctly, Richmond Collective provides no support for Plaintiffs.

C. Plaintiffs Have Failed To Meet Their Burden Of Demonstrating That Their Claims Are Likely To Succeed On the Merits

Under the Anti-SLAPP Act, once Defendants have made "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," the burden shifts to the Plaintiffs to "demonstrate that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b) (2019). Plaintiffs fail to satisfy their burden in this second prong of the statutory standard for multiple reasons.

First, Plaintiffs seek to impose liability based on claims that are no longer, or never were, viable. Most are barred by the statute of limitations, others by collateral estoppel. It need hardly be said that claims which are barred by the statute of limitations or collateral estoppel cannot be used to show that they are likely to succeed on the merits. Additionally, some claims fail because they are derivative causes of action disguised as direct claims. Defendants have briefed them more fully in the Reply to the Opposition to the Motion to Dismiss under Rule 12, respectfully direct the Court's attention to that Reply, and incorporate herein the portions of it that are also relevant to this motion. In addition to demonstrating that the Complaint should be dismissed pursuant to Rule 12(b)(6) of the Superior Court Rules, these arguments also demonstrate that the Special Motion to Dismiss must be granted because Plaintiffs have failed to satisfy the second prong of the standard.

Second, Defendants are entitled to judgment on counts relating to Plaintiff Bronner's former role as editor of the Encyclopedia of American Studies because it is clear from the face of the contract that the ASA was under no obligation to renew his contract. This issue also is addressed more fully in Defendants' Reply to the Opposition to the Motion to Dismiss under Rule 12, and we incorporate those arguments by

reference. Again, his contractual claims are so closely intertwined with his opposition to the Resolution to bring those claims, as well, within the Anti-SLAPP Act.

Lastly – regardless of any arguments made in the Rule 12 briefs, and *even if* this Court finds that the statute of limitations, collateral estoppel and related issues do not bar Plaintiffs' claims -- Plaintiffs have failed to demonstrate that they are likely to succeed on the merits. In Competitive Enterprise Institute v. Mann, 150 A.3d 1213 (D.C. 2016), the D.C. Court of Appeals articulated the standard that the Plaintiffs must meet to defeat a motion to dismiss on Anti-SLAPP Act grounds. The statutory term "likely to succeed on the merits" means that "the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Id.* at 1233. Plaintiffs must come forward with affirmative evidence to show that they are likely to succeed at persuading reasonable jurors to believe their allegations.[2]

In their Opposition to Defendants' Anti-SLAPP motion, Plaintiffs neither produce nor proffer evidence in support of their many allegations. Instead, they rely on one sentence from the opinion in which Judge Contreras dismissed their claims in federal court, in which he stated that "they may have meritorious claims." Bronner v. Duggan, 364 F. Supp. 3d 9, 12 (D.D.C. 2019). That opinion, however, dismissed the action for lack of subject matter jurisdiction; any opinion of the Court on the merits of the case is clearly *dicta*. It certainly does not rise to the standard which this Court must apply in deciding the motion to dismiss under the Anti-SLAPP Act. Judge Contreras' statement,

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[2] As Plaintiffs are fond of reminding the Court, they have already undertaken extensive discovery in the federal court. Logically, if they had affirmative evidence to satisfy the requirements of the Act, they should have brought that forward.

standing alone, is insufficient to show that Plaintiffs are likely to succeed on the merits here, and thus cannot protect Plaintiffs from dismissal pursuant to the Anti-SLAPP Act.

CONCLUSION

For the reasons argued above, and for the reasons argued in Defendants Special Motion to Dismiss Under the Anti-SLAPP Act, Defendants, American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar respectfully request this Court enter an Order dismissing the Complaint with prejudice and awarding full costs and legal fees incurred by defendants in defending this action. D.C. Code 16-5502(a)-(b).

POINTS AND AUTHORITIES

1. Amawi v. Pflugerville Ind. Sch. Dist., 373 F.Supp.3d 717, 745 (W.D. Tex. 2019)
2. Baral v. Schnitt, 1 Cal.5th 376, 205 CalRptr.3d 475, 376 P.3d 604 (2016)
3. Bronner v. Duggan, 249 F.Supp.3d 27, 42 (D.D.C. 2017)
4. Bronner v. Duggan, 364 F. Supp. 3d 9, 12 (D.D.C. 2019)
5. Competitive Enterprise Institute v. Mann, 150 A.3d 1213, 1231 (D.C. 2016)
6. Gardner v. Martino, 563 F.3d 981, 983 (9th Cir. 2009)
7. Navellier v. Sletten, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002)
8. Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc., 32 Cal. App. 5th 458, 243 Cal. Rptr. 816 (2019)
9. Serafine v. Blunt, 466 S.W.2d 352, 360 (Tex. Ct. App. 2015)
10. Shelley v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)
11. D.C. Code § 16-5501 *et seq.*
    a. D.C. Code § 16-5502(b)
    b. D.C. Code 16-5502(a)-(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served via the Court's electronic filing service and by first-class mail, postage prepaid, this 28th of June 2019, on

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

SIMON BRONNER, et al., **Plaintiffs,**	
	Civil Action No. 2019 CA 001712 B
v.	**Judge Robert R. Rigsby**
LISA DUGGAN, et al., **Defendants.**	**Next Event: Motions Hearing, July 17, 2019**

REPLY MEMORANDUM IN SUPPORT OF

DEFENDANTS' SPECIAL MOTION TO DISMISS

Defendants Kehaulani Kauanui and Jasbir Puar respond to Plaintiffs' Opposition to Defendants' Special Motion to Dismiss Pursuant to D.C. Code §16-5501, *et. seq.* Kauanui and Puar incorporate by reference and join in the arguments raised by co-Defendants in their respective Oppositions, to the extent not inconsistent with the arguments below.

A. Introduction and Summary of Argument

Plaintiffs' opposition underscores precisely why their complaint should be dismissed with prejudice. Despite (or perhaps because of) their untenable legal and unsupported factual position, they misstate the standards governing anti-SLAPP jurisprudence, misrepresent the actual dispositive holdings of Judge Contreras in the federal action this suit mimics, and repeatedly cry out that they have "evidence" without citing an atom of it.

B. Having Complained About the Defendants' Political Activities Dozens of Times Throughout Their Complaint, Plaintiffs Now Disingenuously Disown Their Own Allegations.

After devoting over thirty paragraphs of their Complaint to claims that the Defendants are improperly seeking to influence legislation (Complaint, ¶¶ 11, 31, 142—161, 299 -- 309) Plaintiffs now brazenly disown their own allegations and deny that Defendants are being sued for their politically-based acts. The political basis for this suit is apparent in the very first sentence of the Complaint, describing defendants as "fellow collaborators" with a political group. The very next sentence accuses Defendants of subverting the ASA's "apolitical mission".[1] That Plaintiffs' leading argument rests on their denial of the plain allegations of their complaint speaks volumes about that argument's merits.

C. Plaintiffs Have Wrongly Conflated the anti-SLAPP Standards of the D.C. Code with the Exacting Constitutional Standards Required to Protect Against Judicial Enforcement of Unconstitutional Acts.

Plaintiffs originally filed this case in federal court where they are immunized from the District's anti-SLAPP laws under *Abbas v. Foreign Policy Group, LLC.* 783 F.3d 1428 (D.C. Cir. 2015). In an effort to nonetheless alert the District Court to the grave constitutional implications of such a suit the original defendants raised the issue by arguing that judicial enforcement of a private action which had the affect of muzzling speech was prohibited under *Shelley v. Kraemer*

[1] The Complaint referenced is, of necessity, the original Complaint filed in this action which omits secret material they have later added. Plaintiffs have refused to serve us with the complaint which contains this later-added material so we cannot comment on what they have concealed from us. Defendants Kauanui and Puar thus reserve their rights to renew and expand upon their Special Motion to Dismiss when (and if) they ever see the secretly added material.

334 U.S. 1, 13-14 (1948) which outlawed judicial enforcement of restrictive covenants. Judge Contreras rejected this argument, reasoning that judicial enforcement of obligations explicitly assumed by the parties (referring to the ASA by-laws) would not amount to state action. *Bronner v. Dugan*, 249 F.Supp.3d 27, 41-42 (D.D.C. 2017).

The question posed by the anti-SLAPP law is entirely different. The anti-SLAPP statute is not grounded in state action or pure First Amendment jurisprudence. Rather, the statute asks if the claim against the Defendants "arises from an act in furtherance on the right of advocacy on issues of public interest". *D.C. Code* §16-5502(b). This law certainly does not require and does not even *ask* if state action is involved. As such, the District Court's findings that state action was *not* involved have nothing to do with the anti-SLAPP analysis.

D. Plaintiffs Misstate Judge Contreras' Explicit Holding That Estops Them from Bringing a Derivative Action.

Perhaps nothing better illustrates the punitive and harassing nature of this litigation than Plaintiffs' insistence on advancing claims the District Court explicitly and conclusively dismissed. In his final order dismissing the federal suit with prejudice, Judge Contreras could not have been more blunt. In fact, he repeated this holding three times in a brief, ten-page opinion:

> However, the Court also concludes that Plaintiffs cannot seek relief for ASA's injuries because ASA is not a Plaintiff and Plaintiffs do not and cannot assert derivative claims on its behalf.

Bronner v. Dugan, 364 F.Supp.3d 9, 12 2019 U.S. Dist. LEXIS (D.D.C. 2019).

> "**Plaintiffs May Not Seek Damages for ASA's Injuries.**
>
> The parties' briefing raises a simple but crucial question: May plaintiffs collect damages for ASA's injuries without bringing a derivative action? Basic constitutional, prudential, and state law concerns dictate that the answer is no."

Id., at 18. (Emphasis in original).

And finally:

> Plaintiffs do not, and cannot, bring a derivative action on ASA's behalf under District of Columbia law. See *Bronner I*, 249 F.Supp.3d at 47.

Id., at 20.

Because Plaintiffs are collaterally estopped from advancing any derivative claims, Counts, 1, 2, 3, 4, 5, 9, and 12 should be dismissed with prejudice, as it is impossible for Plaintiffs to show that they are likely to succeed on the merits.

E. The Complaint Must Be Dismissed Because Plaintiffs Do Not Offer a Shred of Evidence to Justify a Finding That They Are Likely to Succeed on the Merits.

Although plaintiffs dotingly cite to *Competitive Enterprise Inst. v. Mann* over a dozen times in their opposition, they somehow omit one of the key points-- that an anti-SLAPP motion "will require the plaintiff to put his evidentiary cards on the table." 150 A.3d 1213 (D.C. 2016). Both logic and the weight of authority argue powerfully in favor of respecting the standard that the Council determined to be appropriate -- that faced with an anti-SLAPP motion the plaintiffs have the burden of producing evidence proving that they are "likely to succeed on the merits." *D.C. Code* §16-5502(b); *Doe v Burke* 133 A.3d 569, 571 (D.C. 2016); accord *Park v Brambhatt* 2016 D.C. Super. LEXIS 16.

But no matter how low they set the bar, plaintiffs fail even the lowest of hurdles. Even *Competitive Enterprise* requires, at the least, evidence that the complaint is not meritless. Not one bit of admissible evidence has been produced. Instead, plaintiffs repeatedly invoke the phrase that they have "raised allegations and presented evidence indicating that they may have meritorious claims." Pltff. Opp. at p. 18 (twice) and p. 20. Yet repetition will not cure the problematic nature of this phrase. What is the evidence? How has it been authenticated? And where, exactly is it

separated from mere allegations, which carry no weight in opposing a special motion to dismiss under the anti-SLAPP statute?

Mere allegations that "may" suggest the existence of a meritorious claim are not sufficient to demonstrate the likelihood of success. A demonstration requires evidence. None of the evidence is before this Court. And it is *this* Court which has the duty of weighing plaintiff's evidence. Where there is none, the case should be dismissed.

When special motions to dismiss are granted they must be dismissed with prejudice. *D.C. Code* §16-5502(d)

F. Conclusion

For these reasons, and for the reasons argued in Defendants' Special Motions to Dismiss, Defendants respectfully request that the Complaint be dismissed with prejudice.

Dated: June 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COME NOW the Defendants, American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, by and through the undersigned counsel, and hereby respond to Plaintiffs' Opposition to Defendants' Motion to Dismiss. Defendants will not repeat the arguments in that Motion; in addition, Defendants incorporate by reference and join in the arguments raised by co-Defendants in their respective Replies, to the extent not inconsistent with the arguments below.

A. Plaintiffs' Derivative Claims Are Barred

As Defendants have previously shown, the U.S. District Court dismissed all of Plaintiffs' derivative claims with prejudice, finding that Plaintiffs had failed to satisfy the requirements of D.C. Code § 29-411.03. As such, any and all derivative claims that Plaintiffs might seek to bring here are barred by collateral estoppel. In response, Plaintiffs claim that "the Complaint does not include a single derivative claim. Not one." This assertion does not withstand even the briefest of scrutiny.

It is axiomatic that a derivative claim is one brought by a shareholder to recover damages suffered by the corporation, while a direct claim is one brought by the shareholder to recover damages suffered by the shareholder, independent of the corporation. *See*, *e.g.*, 18 C.J.S. Corporations § 482. Counts One and Two of the Complaint seek, in part, "a return of funds to compensate *the American Studies Association* for financial damages …" (Complaint at 96, 97, emphasis added). Count Three seeks injunctive relief, in part, for "irreparable injury to *American Studies Association's* reputation" and seeks "damages from the Individual Defendants *incurred by the American Studies Association* …" (at 101, emphasis added). Count Four seeks "damages from the Individual Defendants *incurred by the American Studies Association* …" (at 103, emphasis added). Count Five seeks "damages from the Individual Defendants *incurred by the American Studies Association* …" (at 106, emphasis added). Count Nine seeks "damages from the Individual Defendants *on behalf of the American Studies Association*." (at 110, emphasis added). Count Twelve seeks, in part, "a return of funds to compensate *the American Studies Association for financial damages* …" (at 117, emphasis added). These Counts explicitly seek damages on behalf of ASA, and are therefore derivative in nature. Plaintiffs appear to have forgotten what they filed.

The only argument that Plaintiffs muster in their Opposition on this point is that they could not bring any derivative claims after November 2017, because "Defendants changed the bylaws …, stripping the editor of the Encyclopedia of the status of officer and member of the National Council …." Opposition at 9. Regardless of the veracity of this assertion, it is irrelevant. Collateral estoppel bars every derivative claim that the Plaintiffs might bring, regardless of whether they might still have the authority to bring it. Any and all derivative claims in the Complaint must fail as a matter of law.

B. Plaintiffs' Claims Are Time-Barred

1. Plaintiffs Misstate the Dates of Certain Events

The Opposition claims that the events that form the basis for Counts One, Nine, and Twelve all occurred within the last three years.[1] They are wrong.

Count One claims breach of fiduciary duty for "making … material misrepresentations and omissions to members when seeking election to the National Council and approval of the Academic Boycott …causing the [ASA[to adopt and implement the Academic Boycott .. [and incurring] the expected costs of the Academic Boycott, including … reputational and financial costs …" (Complaint at 96). The Boycott was adopted in 2013, so all of these events must have occurred in or before 2013.

Count Nine claims corporate waste for the "decision to use [ASA] resources to advocate, conduct a vote on, declare enacted, and then support the Academic Boycott …" (Complaint at 109). Again, that Boycott was adopted in 2013. While the decision in 2013 arguably had ramifications in later years, the cause of action accrued then. *See* Jones v. Howard Univ., 574 A.2d 1343, 1346 (D.C. 1990) ("The mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations.").

Count Twelve claims that "Defendants Maira, Kehaulani, and Puar were all actively engaged in the effort to stack the National Council with members who would usher through the Academic Boycott … Defendant Salaita acknowledged … that he was heavily involved in the effort to pass the Academic Boycott" (Complaint at 115). The other Defendants worked to get the Boycott adopted, and to change the Bylaws. Any efforts to get the Boycott adopted would

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[1] Plaintiffs also claim that the events for Counts Ten and Eleven occurred within the last three years. Since these Defendants did not argue otherwise, that will not be discussed here.

have occurred in or before 2013. The decision to amend the Bylaws was made in 2013 and 2014.

2. The "Discovery Rule" Does Not Help the Plaintiffs

Plaintiffs also claim that Counts One through Nine and Twelve are timely because "the factual bases for these claims were concealed by Defendants …." Plaintiffs here attempt to stretch the "discovery rule" past the breaking point.

First, however, we must segregate out those Counts in which even the hint of an invocation of the "discovery rule" is clearly inappropriate. Specifically: Counts Two and Nine seek recompense for the expense incurred in passing and then defending the Resolution; Count Four seeks injunctive relief for "Defendants' decision to freeze the [ASA] membership rolls as of November 25, 2013" (¶ 281); Count Five seeks injunctive relief for "efforts to influence Israeli legislation" from July 2013 to June 2015; Counts Six and Seven challenge the parliamentary procedures employed to adopt the Resolution, while Count Eight challenges Mr. Barton's exclusion from the voting rolls in 2013. All of these alleged acts happened in and around the effort to adopt the Resolution in 2012 and 2013, and could not possibly have been concealed for years. Plaintiffs cannot claim they remained ignorant of these events, even for the briefest of times.

Nor are any of the other Counts saved by the discovery rule. That rule, most commonly applied in malpractice cases, holds that the accrual of a cause of action may be delayed "where the relationship between the fact of injury and the alleged tortious conduct is obscure when the injury occurs …" Bussineau v. President & Dir. of Georgetown Univ., 518 A.2d 423, 425 (D.C. 1986) (*citing* Stager v. Schneider, 494 A.2d 1307, 1316 (D.C.1985)). "The discovery rule does not, however permit a plaintiff who has information regarding a defendant's negligence, and who

knows that she has been significantly injured, to defer institution of suit and wait and see whether additional injuries come to light." Colbert v. Georgetown Univ., 641 A.2d 469, 473 (D.C. 1994). As noted above, Counts One through Nine and Twelve all stem from the adoption of the Academic Resolution and Plaintiffs could not have helped but know how and when the Resolution was adopted. Since that adoption was accomplished in 2013, all those causes of action accrued at that time, and are now time-barred.

Plaintiffs also argue that Counts One, Three and Twelve could not be time-barred, because the existence of the alleged efforts to "stack the National Council" (Complaint ¶ 347) and to mislead the ASA membership as to the political leanings of the National Council candidates could not have been determined until receipt of discovery material in 2018. Once again, they are mistaken. The discovery rule does not act to save those claims that are intertwined with the more primary claims. Thus, in Morton v. Nat'l Med. Enterprises, Inc., 725 A.2d 462 (D.C. 1999), plaintiffs claimed that they had been negligently committed to, and treated in, psychiatric wards; such treatment, they later learned, was the result of a fraudulent scheme by the corporate defendants to maximize insurance payments for the treatment. In finding that the claims were all time-barred, the Court of Appeals held that the primary claims for each plaintiff were based on improper and negligent treatment. Those claims had accrued more than three years before suit was filed, and were thus stale. The fraud claims, moreover, were "completely dependent upon and intertwined with" the malpractice claims, and accrued at the same time. *See also* Burgess v. Pelkey, 738 A.2d 783, 786 (D.C. 1999); Tolbert v. Nat'l Harmony Mem. Park, 520 F.Supp.2d 209, 212 (D.D.C. 2007) ("when one cause of action accrues, the limitations period begins to run for all possible dependent or intertwined causes of

action, and if one claim is barred by the statute of limitations, then dependent or intertwined claims are also barred.").

Here, the primary claim – the *sine qua non* of this entire litigation – is the adoption of the Academic Resolution. Without that, none of the other claims would have been made; without it, the political philosophies of the National Council members would not have mattered one whit. To the extent that any of the actions taken to "stack" the National Council might be actionable – and, as discussed below, they are not – these claims are utterly dependent upon the claim arising from the adoption of the Resolution. Since the limitations period for the latter has already passed, so too have the periods for the former claims.

3. Tolling of the Limitations Period for Supplemental Jurisdiction Claims Also Does Not Avail

The federal tolling statute, 28 U.S.C. § 1367(d), does not apply here because none of the Plaintiffs' claims fell within the federal court's supplemental jurisdiction. Plaintiffs contend, however, that their individual claims are separate from any derivative claims; once the derivative claims fell, the individual claims were retained through the court's supplemental jurisdiction. This assertion stands directly contradictory to everything else in the Opposition as well as Plaintiffs' posture in the federal courts.

Plaintiffs have already argued – misreading the precedent from the Court of Appeals – that individual members of a non-profit had "standing to bring direct claims for injury to the nonprofit" (*see* Opposition at 5 – 8). They made the same argument in the federal court, most recently asserting that "The District Court reached the wrong result because it approached the question of standing as one of damages, instead of injury." (Opposition to Motion for Summary Affirmance, D.C. Circuit Court of Appeals, at 11). In their view, because they have standing, the District Court had, and should have retained, original jurisdiction over all the claims. They

also already argued that none of the Counts of the Complaint were derivative ("Not one." *See* Opposition at 8 - 10), and thus were not barred by collateral estoppel. These Counts, of course, are the exact same claims that were brought in the federal court. Nothing in the federal Complaint required the exercise of supplemental jurisdiction.

More importantly, the U.S. District Court never determined it had to exercise supplemental jurisdiction over any of Plaintiffs' claims. When original jurisdiction is lost, the federal court must determine whether to retain jurisdiction over the remaining, supplemental claims, considering such factors as "judicial economy, convenience, fairness [to the parties], and comity [between the federal and state judiciary]." Stevenson v. Severs, 158 F.3d 1332, 1334 (D.C. Cir. 1998) (*quoting* Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)). At no point did the District Court ever undertake such an exercise, which is a clear indication that the Court did not view any of the Plaintiffs' claims as potentially falling within its supplemental jurisdiction. Nor at any point did Plaintiffs ever assert that their direct claims might have fallen within the Court's supplemental jurisdiction.

Even if Plaintiffs were allowed, now, to reverse their position and argue that the individual claims were, in fact, separate and distinct from the derivative claims, their argument would still fail. As the D.C. Circuit Court of Appeals has stated, "If the federal claims are obviously frivolous or so attenuated and unsubstantial as to be absolutely devoid of merit, a federal court lacks subject-matter jurisdiction over those claims and, consequently, any local law claims." Decatur Liquors, Inc. v. District of Columbia, 478 F.3d 360, 363 (D.C. Cir. 2007) (*quoting* Hagans v. Lavine, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) (internal quotation marks and citations omitted)); *see also* Disability Support Alliance v. Geller Family Limited Partnership III, 160 F. Supp. 3d 1133, 1139 (D. Minn. 2016) (where plaintiffs

lacked standing to bring an ADA claim, "the Court cannot exercise supplemental jurisdiction over their state-law claims"). Plaintiffs never had viable derivative claims: there was little debate that Plaintiffs had made the pre-suit demand only two days before the litigation began, and thus clearly failed to meet the requirements of D.C. Code § 29-411.03. Their derivative claims, therefore, were so unsubstantial that no supplemental jurisdiction ever attached to any other claims.

4. Equitable Tolling Is Also Not Available

Finally, Plaintiffs argue that the statute of limitations should be equitably tolled, essentially because the U.S. District Court changed its mind about whether there was subject-matter jurisdiction. Plaintiffs here seize upon a unique decision, Simpson v. D.C. Office of Human Rights, 597 A.2d 392 (D.C. 1991), but that case does not help their cause. In Simpson, plaintiff's suit in the Superior Court was delayed for a number of unusual reasons, none of which was attributable to plaintiff's own actions.[2] Ultimately, the Court found that the *pro se* plaintiff in that case could not "have predicted ... the development of this court's 'contested case' jurisprudence." 597 A.2d at 402. No such surprise exists here. The jurisdictional threshold for diversity jurisdiction is pellucid, and the Court's jurisdiction had been challenged from the beginning of the litigation. Plaintiffs gloss over those facts, and ignore other cases in which a dismissal from the federal court did not equitably toll the limitations period. *See* Bond v. Serano, 566 A.2d 47 (D.C. 1989); Curtis v. Aluminum Assn., 607 A.2d 509 (D.C. 1992). The

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[2] Specifically, the Office of Human Rights found no probable cause on plaintiff's discrimination claim; originally, the Court of Appeals took jurisdiction of plaintiff's petition for review, but then dismissed on the parties' stipulation that the Commission on Human Rights would review the OHR determination. That review, however, was short-circuited when the Corporation Counsel opined that the Commission lacked the necessary authority. Plaintiff's appeal back to the Court of Appeals was first reinstated, then dismissed for lack of jurisdiction pursuant to the Court's opinion in an unrelated case. Only then did plaintiff file in the Superior Court.

question of subject-matter jurisdiction in the federal court had been in dispute since the beginning of that case; the fact that the U.S. District Court did not reach its decision immediately is not a basis for equitable tolling.

C. Plaintiffs' Claims for *Ultra Vires* Action Must Fail As a Matter of Law

Defendants have argued that Counts Three, Four and Five all fail as a matter of law, in addition to being time-barred. In response, Plaintiffs do not point to specific, express prohibitions of the actions challenged; rather, they seek to impugn the motives of the various individual Defendants. *Ultra vires* actions, however, are those "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation." Welsh v. McNeil, 162 A.3d 135, 150 n. 43 (D.C. 2017). Unless there is a specific prohibition in either statute or ASA procedure, the action cannot be *ultra vires*.

Count Three challenges the "diversity" of the candidates for National Council. As noted in the Motion to Dismiss, the problems was not with the race, creed, color, national origin, geographical allegiance, or even gender or sexual preference of any of the candidates for, or elected officials on, the National Council or Executive Committee, but rather with their position on one issue of geopolitics. Plaintiffs have no answer for this, other than to note that the nominating committee would also consider adjunct and non-tenured candidates. It should come as no surprise that an academic institution would take into consideration all strata of the academic community in maintaining diversity, even while actively ignoring opinions on the Middle East conflict. Plaintiffs are clutching at straws here, and their claim must fail.

Count Four attacks the decision to freeze the membership rolls as of a date certain; again, all Plaintiffs can muster is the imputation that the rolls had never been frozen before. That does not mean the action was prohibited, only that it was never before attempted. The ASA

Constitution merely states that a lapsed member "may be reinstated at any time." "May" is permissive, not mandatory, and there is no language in the Constitution stating how long it should take for reinstatement. Mr. Stephens testified that no such bylaw provision exists (*see* Opposition at 47). Nor have Plaintiffs alleged any provision that forbids "freezing" the membership rolls; this claim, too, fails.

Count Five, finally, alleges that the Defendants have sought to "influence legislation." Defendants have already noted that any allegation of influencing Israeli legislation is irrational: Plaintiffs essentially contend that because the Resolution was supported by USACBI and PACBI, and because those organizations have made demands on the Israeli government, ASA must be guilty, merely by association, of the same offense. Any internal legislation that ASA might have sought to influence was – by Plaintiffs' own allegations – directed at ASA. *See* Complaint, ¶¶ 153-156. Nothing in ASA's governing documents, or in US law, prohibits ASA from defending its own interests.

D. <u>The Claims Brought By Plaintiff Bronner Must Fail As a Matter of Law</u>

Counts Ten and Eleven both stem from the Council's decision not to renew Plaintiff Bronner's contract as Editor of the Encyclopedia. Although there is a long section on how the Bylaws were changed to remove the Editor as an officer of ASA (*see* ¶¶ 243 – 256), this only apparently meant that Bronner could no longer attempt to bring a derivative claim. As discussed above, however, the derivative claims were dismissed with prejudice for failure to make the proper demand under D.C. law; any change in the Bylaws would not have affected this.

Contrary to Plaintiffs' assertions, Defendants do not argue that Counts Ten and Eleven should be dismissed because of a lack of essential allegations. Whatever is contained in the Unredacted Complaint, therefore, is irrelevant. On the contrary, Counts Ten and Eleven must

fail because Plaintiff Bronner had no contractual expectation in a renewal of his appointment as Editor.

As Defendants have already argued, Bronner's contract clearly states that upon expiration or termination, "ASA shall have the right to appoint a new Editor-in-chief … without further obligation to the Editor." Exhibit 1 to Defendants' Opposition at 4, ¶ 11. Bronner had no contractual expectation in a renewal of his contract, and the fact that the National Council decided not to renew it is neither a breach of that contract nor a basis for any legal claim. *See* Paul v. Howard Univ., 754 A.2d 297, 309 (D.C. 2000) (where plaintiff had "no contractual right to indefinite tenure" her claims for intentional interference were properly dismissed).

Were these Counts to be based on the allegation that the Council's decision was because "Bronner is Jewish" (Complaint, ¶ 204) – an allegation that Defendants deny – Bronner still has no cause of action. The statute of limitations for a Human Rights Act violation is one year, and lapsed in 2017. Similarly, to the extent that Bronner is claiming reputational damage from "false information" spread by the Defendants (Complaint, ¶¶ 324, 325), the limitations period is again one year, from the date of the publication (D.C. Code § 12-301(4)). Again, it is time-barred.

It is therefore irrelevant whether the individual Defendants "secretly" planned not to renew the contract, or openly opposed such renewal. Where ASA had the contractual right not to renew, it cannot be faulted to choosing that option. It is equally irrelevant whether they undertook an exhaustive search for his replacement; it is irrelevant whether anyone on the Council liked Bronner or not. It is irrelevant whether Bronner thought his contract might be renewed. Where there is no contractual expectation of a renewal, there was no breach, and thus no interference with contract.

Finally, Count Ten claims a breach of fiduciary duty "to Plaintiff Bronner and to the American Studies Association" (Complaint, ¶ 322). The only damages that Bronner is claiming is the salary he would have received, had the contract been renewed. Since he had no expectation of renewal, these are not compensable damages. Moreover, to the extent that his ouster was some form of breach of duty to ASA, those claims are clearly barred by collateral estoppel.

For these reasons, and for the reasons argued in Defendants' Motion to Dismiss, Defendants respectfully request that the Complaint be dismissed with prejudice for failure to state a claim upon which relief might be granted.

POINTS AND AUTHORITIES

1. Bond v. Serano, 566 A.2d 47 (D.C. 1989)
2. Burgess v. Pelkey, 738 A.2d 783, 786 (D.C. 1999)
3. Bussineau v. President & Dir. of Georgetown Univ., 518 A.2d 423, 425 (D.C. 1986)
4. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)
5. Colbert v. Georgetown Univ., 641 A.2d 469, 473 (D.C. 1994)
6. Curtis v. Aluminum Assn., 607 A.2d 509 (D.C. 1992)
7. Decatur Liquors, Inc. v. District of Columbia, 478 F.3d 360, 363 (D.C. Cir. 2007)
8. Disability Support Alliance v. Geller Family Limited Partnership III, 160 F. Supp. 3d 1133, 1139 (D. Minn. 2016)
9. Hagans v. Lavine, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974)
10. Jones v. Howard Univ., 574 A.2d 1343, 1346 (D.C. 1990)

11. Morton v. Nat'l Med. Enterprises, Inc., 725 A.2d 462 (D.C. 1999)

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

13. Simpson v. D.C. Office of Human Rights, 597 A.2d 392 (D.C. 1991)

14. Stager v. Schneider, 494 A.2d 1307, 1316 (D.C.1985)

15. Stevenson v. Severs, 158 F.3d 1332, 1334 (D.C. Cir. 1998)

16. Tolbert v. Nat'l Harmony Mem. Park, 520 F.Supp.2d 209, 212 (D.D.C. 2007)

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

18. 28 U.S.C. § 1367(d)

19. D.C. Code § 12-301(4)

20. D.C. Code § 29-411.03

21. 18 C.J.S. Corporations § 482.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served via the Court's electronic filing service and by first-class mail, postage prepaid, this 28th of June 2019, on

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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

REPLY MEMORANDUM ON MOTION TO DISMISS ON BEHALF OF DEFENDANT NEFERTI TADIAR

COMES NOW the Defendant, Neferti Tadiar, by and through the undersigned counsel, and hereby responds to those portions of the Plaintiffs' Opposition to the Motions to Dismiss directed specifically at Professor Tadiar. This Defendant joins in, and incorporates by reference, the arguments raised by the Defendants generally as to why this complaint should be dismissed.

Plaintiffs first argue that this Court has personal jurisdiction over Professor Tadiar because the Federal Court found it had jurisdiction. This is something of a *non sequitur*: it is axiomatic that a plaintiff has the burden of establishing personal jurisdiction over a defendant. Daley v. Kappa Alpha Sorority, 26 A.3d 723, 727 (D.C. 2011); Holder v. Haarmann, 779 A.2d 264, 269 (D.C. 2001). The plaintiff must do so by alleging specific facts connecting the defendant with the forum. City of Moundridge v. Exxon, 471 F. Supp. 2d 20, 32 (D.D.C. 2007). Personal jurisdiction, therefore, depends upon the allegations in the pleadings before the Court, not upon unstated allegations that might have been in an earlier pleading in a different court.

Here, Plaintiffs allege the following about Professor Tadiar:

-- She is a member of the Organizing Collective and Advisory Committee of USACBI – a third-party organization not in this litigation (Complaint ¶¶ 20, 42).

-- She was a member of the programming committee for the 2013 Annual Meeting, and the ASA Activism and Community Caucus; she was instrumental in the "movement for [ASA] to adopt the USACBI Platform" and is a citizen of New York (*id.*). Nowhere do Plaintiffs allege where Professor Tadiar was when she led this alleged "movement" nor specifically when she served on these ASA committees.

-- She worked with other individual Defendants to get a similar Resolution passed at the Association for Asian American Studies in 2013 (¶ 70). There is no indication where that association's conference might have been held.

-- Prior to the 2013 ASA Annual Meeting, she had "communications" with some of the other individual Defendants (¶ 99).

Notably, there is no allegation, anywhere in the Complaint, to suggest that Professor Tadiar either coordinated efforts with someone located in the District of Columbia, sent any communications into the District of Columbia, or even stepped foot herself into the District of Columbia. There is no allegation that she had any planning involvement in the 2013 Annual Meeting, only that she was instrumental in "the movement". She might have exerted herself in this "movement" before the Annual Meeting was even scheduled.

Nor have Plaintiffs alleged that Professor Tadiar participated in any of the actions that form the basis of this lawsuit. She did not freeze the membership rolls; she did not set the procedures for the vote on the Resolution nor count the ballots; she did not advocate to use any Association funds either to defend or promote the Resolution. She had no input into whether

Bronner should be retained as Editor. To the extent that Plaintiffs have actually articulated any actionable conduct by any Defendant – and Defendants do not concede they have – Professor Tadiar had no involvement in any of it.

Plaintiffs thus have not alleged either that Professor Tadiar had any ongoing connection with the District of Columbia – in fact, they have not alleged that she had *any* connection with this jurisdiction – or that she took any specific action which pertains to this litigation. There is no basis, therefore, upon which to find either general or specific personal jurisdiction over Professor Tadiar in this court.

Similarly, Plaintiffs have failed to state any cognizable claim against Professor Tadiar. As a member of USACBI, clearly, she owes no fiduciary duty to ASA or its members; these are separate organizations. Nor do Plaintiffs even argue that they have; rather, they rely solely on a "flexible" idea of fiduciary relationship. Their cases, however, do not support this contention. Teltschik v. Williams & Jensen, 683 F.Supp.2d 33 (D.D.C. 2010) found a possible fiduciary relationship between attorney and client. Millenium Square Residential Assn. v. 2200 M Street LLC, 952 F.Supp.2d 234 (D.D.C. 2013) held that Board members of a condominium association may have a fiduciary duty towards the residential unit owners. In Vox Media, Inc. v. Mansfield, 322 F.Supp.3d 19 (D.D.C. 2018), the Court held that an employee who had "alleged control over [plaintiff's] credit card and travel accounts" had a fiduciary relationship with the employer. *Id.* at 25. None of these cases suggest that one member of a committee within a non-profit organization, especially a committee of undefined responsibility, necessarily has a fiduciary duty to the general membership.

Plaintiffs also cite to Paragraphs 78 – 90 of the Complaint; those paragraphs, however, speak to the activities of the Activism Caucus, but nowhere do Plaintiffs suggest that Professor

Tadiar participated in those activities. There is no allegation that Professor Tadiar did *anything* in these caucuses.

Thus, Plaintiffs have not alleged that the Activism Caucus or the programming committee had any fiduciary duty towards the general membership; there is no allegation as to the responsibilities held by these committees. There is no allegation that either of these committees specifically overstepped the boundaries of their authority. And, even if Plaintiffs overcome these hurdles, there is no allegation that Professor Tadiar, individually, participated in any of this allegedly tortious behavior.

Plaintiffs seek to tar Professor Tadiar with the same broad brush as the other individual Defendants. Their claims against her can be summarized as follows: because specific members of the National Council advocated a position with which the Plaintiffs disagree, and because Professor Tadiar agrees with that position and has supported it in a completely different organization, she should also be held liable in this action. Similarly, they claim that because other Defendants might have acted within the District of Columbia, and because Professor Tadiar was in accord with those actions, she should be subject to personal jurisdiction in this court through association. Neither contention withstands scrutiny.

For these reasons, as set forth more fully above and in the Motion to Dismiss, Defendant, Neferti Tadiar, respectfully requests that the claims against her should be dismissed for lack of personal jurisdiction and for failure to state a cause of action upon which relief might be granted.

POINTS AND AUTHORITIES

1. City of Moundridge v. Exxon, 471 F. Supp. 2d 20, 32 (D.D.C. 2007)
2. Daley v. Kappa Alpha Sorority, 26 A.3d 723, 727 (D.C. 2011)
3. Holder v. Haarmann, 779 A.2d 264, 269 (D.C. 2001)

4. Millenium Square Residential Assn. v. 2200 M Street LLC, 952 F.Supp.2d 234 (D.D.C. 2013)

5. Teltschik v. Williams & Jensen, 683 F.Supp.2d 33 (D.D.C. 2010)

6. Vox Media, Inc. v. Mansfield, 322 F.Supp.3d 19 (D.D.C. 2018)

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CERTIFICATE OF SERVICE

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES D. KUPFER, and MICHAEL L. BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, STEVEN SALAITA, JOHN STEPHENS, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No. 2019 CA 001712 B Judge Robert R. Rigsby Civil 2, Calendar 10 Next Court Date: July 17, 2019, 10 a.m. Event: Motion Hearing

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

Defendant Steven Salaita, by and through his undersigned counsel, hereby responds to Plaintiffs' Omnibus Opposition to Defendants' Special Motions to Dismiss Under the D.C. Anti-SLAPP Act ("A-S Opp'n") and to Plaintiffs' Omnibus Opposition to Defendants' Special Motions to Dismiss ("MTD Opp'n"). Dr. Salaita incorporates by reference and joins in the arguments in his co-Defendants' Replies, to the extent they are not inconsistent with his arguments.

INTRODUCTION

Plaintiffs sued Dr. Salaita because "he was heavily involved in the effort to pass the Academic Boycott before he was a member of the National Council." Compl. ¶ 337. This is the quintessential SLAPP. To the extent Plaintiffs plead any facts against Dr. Salaita, they are that he advocated for the American Studies Association's ("ASA") 2013 Resolution endorsing the call to boycott Israeli academic institutions—indisputably an issue of public interest. Dr. Salaita's advocacy is the basis of Plaintiffs' claims against him in Counts Three, Four, Five, and Twelve, which allege conduct prior to his tenure on the ASA National Council.

There are no allegations against Dr. Salaita for conduct during his National Council tenure, other than that he was one of more than twenty National Council members at the time. Plaintiffs did not sue any of those other National Council members, indicating that these claims also target Dr. Salaita for his advocacy for the 2013 Resolution. In Counts One, Two, and Nine, Plaintiffs allege that the ASA amended its bylaws (which they do not dispute was lawful), and that it expended funds to defend against their own litigation, which is also covered by the Anti-SLAPP Act as expressive conduct involving petitioning the government. In Counts Ten and Eleven, Plaintiffs allege that the ASA did not renew Bronner's contract, and that it changed the status of the editor of the Encyclopedia position, with no specific allegations against Dr. Salaita, much less any legal basis to assert claims against him, as discussed *infra*.

Plaintiffs' claims fail as a matter of law under Super Ct. Civ. R. 12 (b). Unable to cite allegations to support their claims against him, they turn the pleading standard on its head, arguing that Dr. Salaita might have had some role that would make him liable. Because Plaintiffs have failed to meet their burden to proffer evidence that they are likely to succeed against Dr. Salaita, their claims against him must be dismissed with prejudice under D.C.'s Anti-SLAPP Act. Plaintiffs cannot be allowed to abuse the judicial process to punish those with whom they disagree.

I. DR. SALAITA'S CONDUCT IS PROTECTED BY THE ANTI-SLAPP ACT.

Plaintiffs' claims against Dr. Salaita, to the extent they arise from any alleged acts by him, unquestionably arise from acts in furtherance of the right of advocacy on issues of public interest under the Anti-SLAPP Act. D.C. Code § 16-5502.[1] In Plaintiffs' entire Complaint, Dr. Salaita is only alleged to have advocated for the Boycott Resolution (Compl. ¶ 46), to have been associated with the USACBI as a member of the Organizing Collective (Compl. ¶¶ 46, 99, 337), and to have been a National Council member between July 1, 2015 and June 30, 2018, though Plaintiffs do not include any specific actions that Dr. Salaita might have taken at that time (Compl. ¶ 26). Although Plaintiffs claim, without explanation, that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is inapposite (A-S Opp'n 4 n. 2), they do not dispute that advocating for a political boycott is protected under the First Amendment (Def. Salaita's Special Mot. to Dismiss & Mot. to Dismiss 7, 9, 26 ("Sal. Mem.")), as is lawfully participating in organizations that are calling for political boycotts. *Claiborne*, 458 U.S. at 920 ("For liability to be imposed by reason of association alone,

[1] Whether the Anti-SLAPP Act provides for dismissal of claims when the First Amendment does not is irrelevant here, as the alleged activities of Dr. Salaita are also protected by the First Amendment. *See, e.g.*, Def. Salaita's Special Mot. to Dismiss & Mot. to Dismiss 26 ("Sal. Mem."). Plaintiffs' reliance on the First Amendment ruling in *Bronner v. Duggan*, 249 F. Supp. 3d 27 (D.D.C. 2017), is also inapposite, as the court found that its "interference with speech is passive and incidental to enforcement of a contract", so "would not constitute state action." *Id*. at 42. That court did not rule on the Anti-SLAPP Act. *Id*. at 41 n. 2. Moreover, the court's First Amendment ruling was issued in 2017, before Dr. Salaita was added as a party to the lawsuit in 2018, so did not apply to claims against him because they were not yet part of the complaint.

it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

Plaintiffs incorrectly claim that Defendants "do not even attempt to specifically argue" that Plaintiffs' claims satisfy § 16-5501(1)'s definition (A-S Opp'n 12)—but Dr. Salaita shows how each allegation and each set of claims against him arises from a statement, expression or expressive conduct that is covered by the Anti-SLAPP Act. *See, e.g.*, Sal. Mem. 7, 8, 16, 17, 24. The Resolution itself is a statement on the ASA's website; Dr. Salaita's advocacy of boycotts as a USACBI member, including his published opinion piece that Plaintiffs excerpt (Compl. ¶ 46), is a statement posted on-line; and finally, defending the Resolution, including by expending funds to defend against lawsuits, is expressive conduct petitioning the government—all in connection with an issue of public interest. Sal. Mem. 7-8.[2]

To the extent that Plaintiffs' Complaint asserts claims against Dr. Salaita, those claims *must* arise out of alleged conduct by Dr. Salaita.[3] Each and every one of those bare allegations is an act in furtherance of a right of advocacy. Plaintiffs' argument that the claims cannot violate the Anti-SLAPP Act because they "arise from violations of generally applicable laws and breach of duties that Defendants voluntarily and intentionally assumed" (A-S Opp'n 7) is contrary to the plain

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[2] Plaintiffs themselves admit that they brought claims that "aris[e] out of the December 15, 2013 boycott resolution" MTD Opp'n 17. And Plaintiffs' cases stating that a claim arises from protected activity when that activity underlies or forms the basis for the claim are not to the contrary. A-S Opp'n 14-15, citing, *e.g.*, *Flores v. Emerich & Fike*, 416 F. Supp. 2d 885 (E.D. Cal. 2006) (granting defendants' anti-SLAPP motion to strike all the claims against them in their entirety).

[3] Plaintiffs repeatedly refer to "Defendants" and "all Defendants" throughout the Complaint, even in places where Dr. Salaita could not possibly have been involved. For example, Plaintiffs allege that "Defendants decided to freeze the membership rolls" on November 25, 2013 (Compl. ¶ 123), when Dr. Salaita was not a member of the National Council and could not possibly have been involved in that decision. Regardless, generic allegations against all ten Defendants, without specifying who has taken what action, does not "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[L]umping" Dr. Salaita together with other defendants in "one broad allegation" results in "confusion of which claims apply to which defendants," thus "fail[ing] to satisfy [the] notice requirement of Rule 8(a)(2)." *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (citations omitted).

language of the Anti-SLAPP Act, not to mention its purpose. In addressing a nearly identical argument regarding California's very similar anti-SLAPP law, the California Supreme Court reasoned that the "logical flaw in plaintiffs' argument is its false dichotomy between actions that target the formation or performance of contractual obligations and those that target the exercise of the right of free speech. A given action, or cause of action, may indeed target both." *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) (quotations omitted). What matters is the "defendant's activity," not the "form of the plaintiff's cause of action". *Id.*

Once Defendants show that Plaintiffs' claims arise from an act in furtherance of the right of advocacy on issues of public interest, the burden shifts to Plaintiffs to show they are likely to succeed on the merits. D.C. Code § 16-5502 (b). The statute "requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016), *as amended* (Dec. 13, 2018). "This is a reversal of the allocations of burdens for dismissal of a complaint under [Rule 12 (b)(6)] which requires the moving party to show that the complaint's allegations, even if proven, would not state a claim as a matter of law; and for summary judgment under [Rule 56]." *Id*. at 1237. Plaintiffs' claims fail as a matter of law. They have not proffered a single piece of evidence to support their claims against Dr. Salaita, so have failed to satisfy their burden under the Anti-SLAPP Statute.

II. PLAINTIFFS' CLAIMS AGAINST DR. SALAITA MUST BE DISMISSED.

a. Plaintiffs Fail to Demonstrate Personal Jurisdiction Over Dr. Salaita.

Plaintiffs do not allege in their Complaint that Dr. Salaita had any contact with the District of Columbia to establish personal jurisdiction. Plaintiffs' reliance on ¶ 26 of their Complaint, alleging that Dr. Salaita was a member of the National Council when the ASA's bylaws were amended and withdrawals were taken from the Trust Fund (MTD Opp'n 54), does not confer

personal jurisdiction (even though the ASA was organized under D.C. law). *See* Sal. Mem. 10-13; *see, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum") (citation omitted). Nor is jurisdiction conferred by the only other allegation cited by Plaintiffs, that Dr. Salaita worked with USACBI closely during the process to pass the ASA resolution. MTD Opp'n 56, citing Compl. ¶ 46. Neither paragraph alleges any contacts Dr. Salaita had with the District of Columbia, much less sufficient contacts.

Having made no allegation in their Complaint that supports personal jurisdiction, Plaintiffs instead include in their brief a block quote describing allegations against the original Defendants from *Bronner*, which was decided before Dr. Salaita had been added as a Defendant. MTD Opp'n 54-55, quoting *Bronner, supra*, 249 F. Supp. 3d at 40-41. Plaintiffs claim that some of the allegations relied on by the *Bronner* court also apply to Dr. Salaita. *Id.* But the only allegations against Dr. Salaita are that he was a National Council member (after the Resolution was passed), and that he worked with USACBI during the process to pass the Resolution (before he was on the National Council). The pertinent allegations considered by the *Bronner* court are not alleged against Dr. Salaita.[4] Dr. Salaita was not a member of the National Council in 2013, and is not alleged to have engaged in any conduct in the District, much less a wrongful act that is the basis of Plaintiffs' claims against him.

[4] In their brief, Plaintiffs use the *Bronner* court's language, stating that Dr. Salaita "voluntarily participated in the 2013 annual meeting in the District of Columbia," where he "spoke" at a discussion of the Resolution. MTD Opp'n 55. But Plaintiffs make no such allegation against Dr. Salaita in their Complaint. Plaintiffs' brief also asserts that at the meeting, Dr. Salaita is "reported" to have said "'there is no other side.'" MTD Opp'n 55. Not only is this purported (and immaterial) quote not found in Plaintiffs' Complaint or the *Bronner* decision, but Plaintiffs cite no source for it whatsoever. But it is yet another statement subject to Anti-SLAPP protection.

Plaintiffs also fail to address any of the legal authority cited by Dr. Salaita, instead relying entirely on *Bronner, supra*, 249 F. Supp. 3d at 40-41, in which Dr. Salaita was not yet a Defendant, ignoring that personal jurisdiction is, in fact, personal. MTD Opp'n 54-55. The federal court found that each of the *original* Defendants "allegedly took part in the purportedly injurious activities of the ASA in the District of Columbia," *Bronner, supra*, 249 F. Supp. 3d at 40, an allegation that Plaintiffs do not make against Dr. Salaita. Since Plaintiffs have not and cannot allege Dr. Salaita engaged in any injurious activities in D.C., this Court lacks personal jurisdiction over him.

b. Plaintiffs Rockland, Kupfer, and Barton Have Not Shown That They Have Standing to Sue Dr. Salaita.

Plaintiffs' argument that "the Court of Appeals has twice held that members of a nonprofit have standing to bring direct claims for injury to the nonprofit" (MTD Opp'n 5), citing *Jackson v. George*, 146 A.3d 405 (D.C. 2016), and *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011), is simply wrong, as already decided. *Bronner v. Duggan*, 364 F. Supp. 3d 9, 20-21 (D.D.C. 2019), *appeal docketed*, No. 19-7017 (D.C. Cir. March 5, 2019); *see also*, Sal. Mem. 13-15, 17. *Jackson* and *Daley* require Plaintiffs to show that their individual rights have been affected—a "special injury." In *Jackson*, the D.C. Court of Appeals found that the lower court[5] properly concluded that because plaintiffs "alleged an injury particularized to them" (being barred from the church when others weren't), and a "personal financial stake" (the unauthorized use of

[5] In *Jackson*, defendants were improperly appointed as trustees of Jericho D.C., and then merged it with a newly-incorporated Jericho Maryland. 146 A.3d at 410. The board then terminated three of the plaintiffs' memberships to the church. *Id*. at 410-411. The Superior Court had held that plaintiffs had standing because the termination of their church memberships, a "special injury" was a result of the improperly appointed board. *George v. Jackson*, No. 2013 CA 007115 B, 2015 WL 12601885, at *5 (D.C. Super. Ct. Feb. 26, 2015). One plaintiff was dismissed from the suit for lack of standing because she had voluntarily terminated her membership. *Id*. at *7. The court also dismissed those claims that were not based on a special injury and were instead based on injuries to the church, including claims of breach of fiduciary duty, unjust enrichment, violation of the D.C. Nonprofit Corporation Act, and constructive fraud. *Id*. at *6.

their offerings), "they were entitled to proceed on the claims they brought on their own behalves, by which they sought relief from 'a special injury...not suffered equally by all' who affiliated with the church." [6] *Id*. at 415. Here, Plaintiffs Rockland and Kupfer cannot point to a single individual right that has been affected.[7]

Plaintiffs simply fail to recognize that they must, as a threshold matter, satisfy the basic constitutional requirements of standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (plaintiffs "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.") (citation omitted). Plaintiffs' breach of contract and *ultra vires* claims, as well as breach of fiduciary duty claims unrelated to the withdrawal of funds after July 2015, cannot possibly be traceable to Dr. Salaita as the conduct all occurred before he was a National Council member. Moreover, Plaintiffs Rockland and Kupfer have not alleged one concrete, particularized and special injury that they suffered as a result of the

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[6] Plaintiffs cite nothing to support their incorrect assertion that *Jackson* "does not require 'a special injury . . . not suffered equally by all'" and that "both the trial court and the Court of Appeal rejected that argument." MTD Opp'n 8. Plaintiffs also incorrectly claim that the *Jackson* plaintiffs' memberships were terminated after their complaint was filed (*id*.): their memberships were terminated on April 18, 2012 and their complaint was filed on October 15, 2013. *Jackson, supra*, 146 A.3d at 411. While Plaintiffs are right that the termination only involved a subset of the original plaintiffs (MTD Opp'n 8), it was only that subset of plaintiffs whose claims survived. *Jackson*, *supra*, 146 A.3d at 411 (plaintiff Gray dismissed because she had *voluntarily* left the church).

[7] In *Daley*, plaintiffs contended that their right to discuss and vote on their sororities' activities was violated when large expenditures to the sorority president were approved without their vote. *Daley, supra*, 26 A.3d at 726-27. In retaliation for suing, the plaintiffs' membership privileges were suspended. *Id*. at 727. The court held that the *Daley* plaintiffs had standing because "the individual rights of the plaintiffs were affected by the alleged failure to follow the dictates of the constitution and by-laws and they thus had a 'direct, personal interest' in the cause of action, even if 'the corporation's rights are also implicated.'" *Id*. at 729 (quotation omitted). Plaintiffs continue to repeat the fact that plaintiffs in *Daley* were "dues-paying members of a nonprofit" (MTD Opp'n 6), but always stop short of drawing this argument out. This is because Plaintiffs themselves are not dues-paying members. Plaintiffs Bronner and Rockland are honorary lifetime members of the ASA and do not pay membership dues; Plaintiffs Barton and Kupfer allowed their memberships to lapse in 2012 and 2014, respectively. Compl. ¶¶ 14-17.

alleged breaches of fiduciary duty, breach of contract, or *ultra vires* actions, and Plaintiff Barton has only alleged one concrete, particularized and special injury—the denial of the right to vote—which is not traceable to Dr. Salaita as he was not a National Council member at the time.[8]

Plaintiffs cite several cases that they argue stand for the proposition that their breach of fiduciary duty,[9] breach of contract,[10] and *ultra vires*[11] claims can be brought as direct claims. MTD Opp'n 3-5. But this is beside the point; the fatal flaw in Plaintiffs Rockland, Kupfer, and Barton's claims is that they cannot show that they have injuries that are caused by Dr. Salaita's conduct, and therefore do not have standing.[12] Plaintiffs fail on every argument as all the cases they cite are

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[8] Counts One and Two for breach of fiduciary duty allege harms to the ASA "and its members" generally. Compl. ¶¶ 262-63; 266-67. Counts Three, Four, and Five for breach of contract and *ultra vires* generally allege injury to the ASA. Compl. ¶¶ 274; 275; 284; 285; 292; 295; 296. When Plaintiffs attempt to allege their own injuries under those Counts, they do so in vague and general language, referring to injuries to "Plaintiffs" and "other members of the ASA" (Compl. ¶¶ 273, 283, 292), and to unspecified "economic and reputational damage" suffered by Plaintiffs (Compl. ¶¶ 277, 286, 297). Counts Six through Eight are not brought against Dr. Salaita. Count Nine alleges only injuries to the ASA. Compl. ¶ 317. Rockland, Kupfer and Barton are not injured by any of the conduct in Count Ten. Sal. Mem. 13-15. Count Eleven is only brought by Bronner. Count Twelve does not speak of any injuries at all. Compl. ¶¶ 335-43.

[9] Plaintiffs misplace reliance on *Willens v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126 (D.C. 2004), which did not address standing specifically, but in which two non-profit housing cooperative members had clearly suffered a concrete, particularized, and special injury when, unlike the rest of the members, they as individuals "did not receive their proportionate share of the corporate assets being distributed; they received nothing." *Id*. at 1134. Moreover, "[t]he propriety of suing the directors individually [was] not before [the court] . . . ." *Id*. at 1128 n. 1. In *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, the *cooperative itself* and its members sued the former directors, officers, and *other* corporate entities for breach of fiduciary duties and breach of contract. 441 A.2d 956, 959 (D.C. 1982).

[10] Plaintiffs' arguments on breach of contract fail because neither of the cases they cite stand for the proposition that nonprofit members can sue the nonprofit and its directors based on injuries suffered by the nonprofit or its members generally. In *Welsh v. McNeil*, a housing association member sued another member (not the association or its directors) and the court held that plaintiff had standing because of a provision in the housing association bylaws that allowed members to assert claims for injuries to the association. 162 A.3d 135, 139 (D.C. 2017). In *Meshel v. Ohev Sholom Talmud Torah*, which did not examine standing, plaintiffs invoked a provision of the bylaws of a congregation that required any claim of a member against the congregation that could not be resolved to be referred to a "Beth Din." 869 A.2d 343, 346 (D.C. 2005). The congregation refused to participate in a Beth Din, and those three members (but no others) sued. *Id*.

[11] Plaintiffs' argument on their *ultra vires* claims fails because the statute and cases they cite only allow individual members to bring such claims against the nonprofit itself, not against individual directors. *See* D.C. Nonprofit Corporation Act, D.C. Code § 29-403.04 (b).

[12] *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015) ("To *prevail* on a claim of breach of contract, a party must establish . . . damages caused by breach.") (quotation omitted); *Randolph v. ING Life Ins. &*

irrelevant to the question of standing, and in many cases support Dr. Salaita's argument that Plaintiffs must demonstrate a concrete, particularized, and special injury.

c. Counts Three Through Five Do Not State a Claim against Dr. Salaita Because They Preceded his Tenure, and are Time-Barred.

Plaintiffs do not explain how Counts Three and Five "are not necessarily limited to the period" prior to when Dr. Salaita became a National Council member in July 2015, and do not even argue that Count Four might not be so limited. MTD Opp'n 58. The Complaint fails to make any allegations underlying these Counts during the time that Dr. Salaita was on the National Council, and, on the contrary, alleges that they occurred prior to his tenure.[13] Sal. Mem. 15-16 (citing Compl. ¶¶ 94, 281, 290-91).

Effectively conceding that they have failed to state claims, Plaintiffs shamelessly argue that "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." MTD Opp'n 58. But Plaintiffs did not allege any such role. They have simply failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A "sheer possibility that a defendant has acted unlawfully," or pleading facts that are "merely consistent with" a defendant's liability does not meet the plausibility standard. *Iqbal*, *supra* note 4, 556 U.S. at 678 (quotations omitted).[14] Here, Plaintiffs' allegations are in

Annuity Co., 973 A.2d 702, 709 (D.C. 2009) ("[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby.") (quotations omitted).

[13] Even if Dr. Salaita were a Director during this time, Plaintiffs fail to address that *ultra vires* claims cannot be brought against him because members cannot bring direct (as opposed to derivative) ultra vires claims against individual directors, D.C. Code § 29-403.04 (b), and because they do not allege actions "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation." *Bronner*, *supra* note 1, 249 F. Supp. 3d at 47 (citation omitted). Plaintiffs also cannot bring breach of contract claims against Dr. Salaita for conduct prior to his time on the National Council because he was not a party to any contract.

[14] The D.C. Court of Appeals has "adopted the pleading standard articulated by the Supreme Court" in *Twombly* and *Iqbal*. *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016).

fact *inconsistent* with Dr. Salaita being liable, as the alleged conduct occurred prior to his tenure. Plaintiffs' acknowledgment that they need to go on a discovery fishing expedition to make out the basic elements of claims against Dr. Salaita is confirmation that these claims are meritless, and a quintessential Strategic Lawsuit Against Public Participation (SLAPP).

Counts Three, Four, and Five (as well as Count Twelve) against Dr. Salaita are also barred by the statute of limitations, and Plaintiffs' attempt to apply the discovery rule to extend it cannot succeed, as Plaintiffs do not allege any information regarding Dr. Salaita that they newly discovered in the last three years, or that was not publicly available.[15] *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 281 U.S. App. D.C. 339, 344, 890 F.2d 456, 461 (1989), *on reh'g* (Jan. 10, 1990) ("the District of Columbia Court of Appeals has indicated that the ability of an ordinary person to detect the violation 'is critical to this threshold question' of whether the discovery rule applies") (citation omitted). The crux of Plaintiffs' claims against Dr. Salaita under these Counts is that he is liable simply because he advocated for the ASA to pass the Boycott Resolution before he was even a member of the National Council. But Plaintiffs' Complaint cites an op-ed published on March 1, 2014 by Dr. Salaita saying that he worked with USACBI closely during the process to pass the ASA Resolution, and which Plaintiffs contend shows he "led the effort."[16] MTD Opp'n 55, citing Compl. ¶ 46. One of four allegations against Dr. Salaita in Plaintiffs' 343-paragraph Complaint is from discovery, and that is the allegation that as a "USACBI Leader[]," he emailed with ASA

[15] Dr. Salaita has not argued that those aspects of Count One, Two, and Nine that apply to him when he was a member of the National Council (the claims that relate to the Resolution-related expenditures) are time-barred. Counts Six, Seven, and Eight are not brought against Dr. Salaita.

[16] In fact, Dr. Salaita was mentioned in Plaintiffs' very first complaint in federal court filed on April 20, 2016, which described him as a National Council member who was "a vociferous advocate of a boycott of Israel, and a member of the organizing collective of USACBI," referencing a May 27, 2014 article written by him. Complaint at ¶ 69 (ii), *Bronner*, *supra* note 1, 249 F. Supp. 3d 27 (No. 16- 0740 (RC)).

members prior to the passage of the Resolution, which is obviously not new information, given Plaintiffs' prior allegation. Compl. ¶ 99. The discovery rule is inapplicable here.

Plaintiffs' arguments regarding equitable tolling are irrelevant to Counts Three, Four, and Twelve against Dr. Salaita as those claims against him were already time-barred when Plaintiffs first named him as a Defendant in the federal litigation on March 6, 2018. All the conduct alleged in these Counts occurred prior to the adoption of the Boycott Resolution in December 2013 and were untimely when they were first brought against Dr. Salaita in 2018, or with regard to new Count Twelve, in this Court in March 2019.

d. Plaintiff Bronner Fails to Respond Regarding Counts Ten and Eleven.

Plaintiff Bronner fails to respond to Dr. Salaita's arguments regarding Counts Ten and Eleven related to the non-renewal of Bronner's contract and the removal of the position of editor as *ex officio* officer and National Council member.[17] Bronner does not contest that as an officer, Dr. Salaita did not owe him a fiduciary duty. Sal. Mem. 20-22. That Dr. Salaita owed fiduciary duties to the ASA and its members (MTD Opp'n 37-38) is irrelevant, as Bronner is the only one who alleges a concrete injury, and brings his claims as a former contractor (editor), *ex officio* officer, and National Council member—not as a general member. Sal. Mem. 21-22.[18]

Plaintiffs also do not point to any actions that Dr. Salaita specifically took to interfere in Bronner's relationship with the ASA or to breach a fiduciary duty, except to state in broad, vague,

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[17] Plaintiffs do not contest that Rockland, Kupfer, and Barton lack standing to bring these claims as they have not alleged that they suffered any injury as a result. Although Plaintiffs argue that the Encyclopedia has "shut down," resulting in damage to the ASA, MTD Opp'n 37, Plaintiffs cannot assert standing based on the ASA's injuries. *Bronner*, *supra*, 364 F. Supp. 3d at 20.

[18] *See also Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429, 433 (4th Cir. 2000) (plaintiff's "claim for breach of fiduciary duty—that the directors did not follow fair procedures in deciding to terminate his employment—implicates his status not as a stockholder, but as an employee . . . directors cannot act as fiduciaries in their relationship with employees and at the same time discharge their fiduciary duties to the corporation of which they are directors.")

and general terms that Dr. Salaita, as a National Council member, owed fiduciary duties to all ASA members, and that "Defendants" discriminated against Bronner and removed him as editor because they did not want to work with him. MTD Opp'n 38. Out of more than twenty National Council members when Plaintiff Bronner's contract ended in 2016, Plaintiffs have sued only Dr. Salaita. Sal. Mem. 4; Compl. ¶¶ 19-27. A "sheer possibility" that Dr. Salaita acted unlawfully does not satisfy the plausibility pleading requirement. *Iqbal*, *supra* note 4, 556 U.S. at 678.

Bronner also does not contest that he had neither a right nor an expectation that his contract would be renewed, and thus cannot make out a tortious interference claim. Sal. Mem. 23. Finally, Plaintiffs do not contest that, as a matter of law, Dr. Salaita, as a National Council member, cannot be liable for tortiously interfering in a contract between the ASA and another. Sal. Mem. 24.

e. Plaintiffs Lack Standing for Claims for the Withdrawal of ASA Funds and Such Claims Cannot Be Brought for Litigation-Related Expenses.

Plaintiffs fail to allege any injuries that they (as opposed to the ASA) suffered under Counts One, Two, and Nine related to the withdrawal of funds for Resolution-related expenses. MTD Opp'n 51. Plaintiffs do not argue that Dr. Salaita specifically took any actions with regard to the use of ASA funds, and did not sue the 20+ other members of the National Council at the time. Plaintiffs do not dispute that amending the Bylaws to remove the word "small" did not in fact violate the Bylaws, as alleged. Sal. Mem. 17-18. Plaintiffs also fail to address the fact that the only Resolution-related expenditures alleged to have occurred during Dr. Salaita's time on the National Council were litigation expenses, which cannot be the basis of their claims. Sal. Mem. 18-19.

f. Plaintiffs Acknowledge That They Cannot State a Claim Against Dr. Salaita For Aiding & Abetting Breach of Fiduciary Duty Under Count Twelve.

Plaintiffs do not contest that the alleged conduct of Dr. Salaita related to aiding and abetting breach of fiduciary duty is protected by the First Amendment. MTD Opp'n 40. Plaintiffs do not

contest that they failed to make factual allegations supporting their claims that Dr. Salaita knew of a breach of fiduciary duty, or that he substantially assisted such a breach. *Id*. Plaintiffs rely on one allegation against Dr. Salaita: that his "substantial assistance, also knowing that the Academic Boycott would cause great damage" to the ASA and its members, constitutes aiding and abetting. MTD Opp'n 40, citing Compl. ¶ 337. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, *supra* note 4, 556 U.S. at 678. Plaintiffs complain that they need not set forth factual evidence to prove every element of their claims on a motion to dismiss. MTD Opp'n 40. But Plaintiffs have not set forth factual *allegations* to survive Super. Ct. Civ. R. 12. Separately, they have not provided any *evidence*, as the Anti-SLAPP Act requires them to do. Count Twelve is also time-barred. *Supra*, II.c.

g. Dr. Salaita Is Immune from Liability for Plaintiffs' Claims.

Dr. Salaita has asserted immunity under D.C. Code § 29-406.31 (d) and § 29-406.90. Sal. Mem. 27. Plaintiffs completely fail to address D.C. Code § 29-406.90, which immunizes Dr. Salaita from civil liability as a corporate volunteer unless the injury resulted from, inter alia, his willful misconduct or bad faith act beyond the ASA's authority.[19] Plaintiffs' conclusory allegations about the conduct of ten "Defendants," lumped together, are insufficient to show that an injury resulted from any willful misconduct or bad faith conduct by Dr. Salaita, especially when Plaintiffs allege *no* specific conduct by Dr. Salaita. *See, e.g., Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, No. 2009 CA 001256 B, slip op. at 13 (D.C. Super. Ct. Oct. 30, 2009), *aff'd on other grounds*, 41 A.3d 1250 (D.C. 2012) (dismissing board members from defamation lawsuit under predecessor

[19] Also, the corporation must maintain liability coverage of a minimum amount for immunity to apply. D.C. Code § 29-406.90 (c). Plaintiffs allege that in 2017, the "Executive Committee approved the purchase of liability coverage for Directors and Officers." Compl. ¶ 190. They have not alleged or provided evidence that the ASA's insurance is not statutorily sufficient. The federal court in *Bronner* did not rule on the application of D.C. Code § 29-406.90. *Bronner v. Duggan,* 317 F. Supp. 3d 284, 290 n. 4 (D.D.C. 2018).

to D.C. Code § 29-406.90,[20] where plaintiff did not allege sufficient facts to show willful misconduct or a bad faith act or omission outside the corporation's authority, instead simply making generalizations and conclusory statements).[21] The "Supreme Court made clear in *Iqbal* that allegations of motive, animus, purpose, knowledge, intent and the like are subject to the requirement that they must be supported by well-pleaded factual allegations in order to be accorded the presumption of veracity." *Bereston v. UHS of Delaware, Inc.*, 180 A.3d 95, 99 (D.C. 2018).

D.C. Code § 29-406.31 (d) also immunizes Dr. Salaita for damages claims unless they arose from his conduct that constituted an "intentional infliction of harm" D.C. Code § 29-406.31 (d)(2). Plaintiffs do not—and cannot—allege that Dr. Salaita acted with "actual knowledge" that his action or failure to act would cause harm. *Bronner, supra,* 317 F. Supp. 3d at 292 (quoting Model Nonprofit Corporation Act, § 2.02 (c) Official Comment at 2-12-13). The federal court's finding that Plaintiffs alleged intentional infliction of harm is not applicable to Dr. Salaita not only because the case was stayed when he was served with the complaint (after the court ordered briefing),[22] but more significantly because the allegations relied on by the court to find intentional infliction of harm have not been made against Dr. Salaita. *Id.* at 292-293. Every allegation cited by the court concerns conduct prior to Dr. Salaita's tenure on the National Council, except for the

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[20] Section 29-406.90 is, in every relevant aspect, identical to its predecessor § 29-301.113. *Compare* D.C. Code § 29-406.90 *with* 1992 D.C. Law 9-222 (Act 9-353) (containing the full text of now-repealed § 29-301.113 as amended in 1992).

[21] For the same reasons, Dr. Salaita is also immunized from liability under the Volunteer Protection Act, which is addressed by Defendants Kauanui and Puar.

[22] When the federal court granted Plaintiffs leave to file their Second Amended Complaint which added new defendants, including Dr. Salaita, it simultaneously stayed the proceedings pending the court's consideration of its subject matter jurisdiction. *Bronner v. Duggan*, 324 F.R.D. 285 (D.D.C. 2018). Plaintiffs served Dr. Salaita with the summons and complaint while the proceedings were stayed, just a few days before Defendants' subject matter jurisdiction brief was filed. Return of Serv./Aff. of Summons & Compl. Executed, *Bronner, supra*, 317 F. Supp. 3d 284 (No. 16-0740 (RC)); Defs.' Br. Regarding Subject Matter Jurisdiction, *Bronner, supra*, 317 F. Supp. 3d 284). The court lifted the stay the same day it found it had subject matter jurisdiction "for now," and directed Defendants to respond to Plaintiffs' complaint within 21 days. *Bronner, supra*, 317 F. Supp. 3d 284; Order, *Bronner, supra*, 317 F. Supp. 3d 284).

allegation that Defendants hired attorneys to defend against the backlash—namely, this litigation. *Id.* at 293. Even if Dr. Salaita were alleged to have participated in that decision, a board member does not intentionally inflict harm on an organization by defending it against litigation—directors have a duty to defend their organization against legal attack.[23] *See* Sal. Mem. 19 n. 14.

Finally, Plaintiffs argue that the Business Judgment Rule does not apply to the claims against Dr. Salaita because the Complaint alleged bad faith. MTD Opp'n 52-53. But Plaintiffs do not allege that Dr. Salaita engaged in any conduct in bad faith, nor can they, and their reliance on *Bronner*, *supra*, 317 F. Supp. 3d at 293-94, is unavailing, as discussed *supra.* The burden is on Plaintiffs to rebut the business judgment rule's presumptions and prevent its application here. *See Washington Bancocorporation v. Said*, 812 F. Supp. 1256, 1268 (D.D.C. 1993).

CONCLUSION

Dr. Salaita respectfully requests dismissal of Plaintiffs' Complaint against him, with prejudice, and seeks costs, attorneys' fees and any other relief the Court deems appropriate.[24]

Dated: June 28, 2019

Respectfully Submitted,

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[23] Even if Plaintiffs did claim Dr. Salaita intentionally harmed the ASA, Dr. Salaita is still immunized from claims for Plaintiffs' alleged injuries because they cannot seek relief for any injury to the ASA. *Bronner*, *supra*, 364 F. Supp. 3d at 18-20. Bronner is the only plaintiff who claims he suffered harm that could be traceable to Dr. Salaita's time on the board, *if* Plaintiffs had alleged that Dr. Salaita was involved, and acted intentionally to inflict harm against Plaintiff Bronner; but Plaintiffs did not so allege.

[24] Under the Anti-SLAPP Act, Dr. Salaita "is presumptively entitled to an award of fees unless special circumstances make a fee award unjust." *Mann*, *supra*, 150 A.3d at 1238 (citing *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016)).

POINTS AND AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009)
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)
Bereston v. UHS of Delaware, Inc., 180 A.3d 95 (D.C. 2018)
Berman v. Physical Med. Assocs., Ltd., 225 F.3d 429 (4th Cir. 2000)
Bronner v. Duggan, 249 F. Supp. 3d 27 (D.D.C. 2017)
Bronner v. Duggan, 324 F.R.D. 285 (D.D.C. 2018)
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Bronner v. Duggan, 364 F. Supp. 3d 9 (D.D.C. 2019), *appeal docketed*, No. 19-7017 (D.C. Cir. March 5, 2019)
Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)
Competitive Enter. Inst. v. Mann, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018)
Daley v. Alpha Kappa Alpha Sorority, Inc., 26 A.3d 723 (D.C. 2011)
Doe v. Burke, 133 A.3d 569 (D.C. 2016)
Flores v. Emerich & Fike, 416 F. Supp. 2d 885 (E.D. Cal. 2006)
Francis v. Rehman, 110 A.3d 615 (D.C. 2015)
Gen-Probe, Inc. v. Amoco Corp., Inc., 926 F. Supp. 948 (S.D. Cal. 1996)
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Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)
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NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)
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Poola v. Howard Univ., 147 A.3d 267 (D.C. 2016)
Randolph v. ING Life Ins. & Annuity Co., 973 A.2d 702 (D.C. 2009)
Rosen v. Am. Isr. Pub. Affairs Comm., Inc., No. 2009 CA 001256 B (D.C. Super. Ct. Oct. 30, 2009), *aff'd on other grounds*, 41 A.3d 1250 (D.C. 2012)
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Welsh v. McNeil, 162 A.3d 135 (D.C. 2017)
Willens v. 2720 Wisconsin Ave. Coop. Ass'n, Inc., 844 A.2d 1126 (D.C. 2004)
Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n, Inc., 441 A.2d 956 (D.C. 1982)

Statutes

D.C. Anti-SLAPP Act, D.C. Code § 16-5501, *et. seq.*
D.C. Nonprofit Corporation Act, D.C. Code § 29-403.04
D.C. Code § 29-406.31
D.C. Code § 29-406.90

Rules

Super. Ct. Civ. R. 11
Super. Ct. Civ. R. 12

Other Authorities

12B WILLIAM FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5908 (West 2019)
Model Nonprofit Corporation Act § 2.02

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I electronically filed the foregoing Reply in Support of Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.*, and in the Alternative, Motion to Dismiss Pursuant to Super. Ct. Civ. R. 12 (b) through the CaseFileX-press system, which sends notification to counsel of record who have entered appearances.

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