No. 19-CV-1222

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*In the*

# District of Columbia Court of Appeals

SIMON BRONNER, *et al.*,

*Appellees,*

*v.*

LISA DUGGAN, *et al.*,

*Appellants.*

*On Appeal from the Superior Court of the District of Columbia*
*(Honorable Robert R. Rigsby, Judge)*

# BRIEF FOR APPELLANTS

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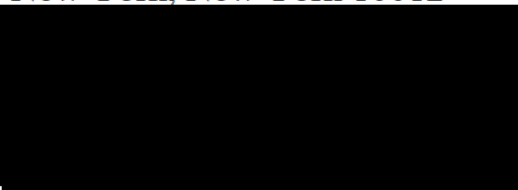

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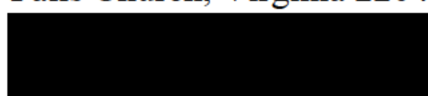

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*(For Continuation of Appearances See Inside Cover)*

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## APPELLEE'S CORPORATE DISCLOSURE STATEMENT

COME NOW the Appellants, The American Studies Association, Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, John Stephens, J. Kehaulani Kauanui, Jasbir Puar, and Steven Salaita, by their respective counsel, and pursuant to D.C. App. R. 28(a)(2) file their joint disclosure statement in order to enable the judges of this court to consider possible recusal:

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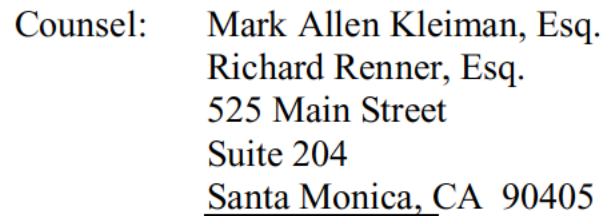

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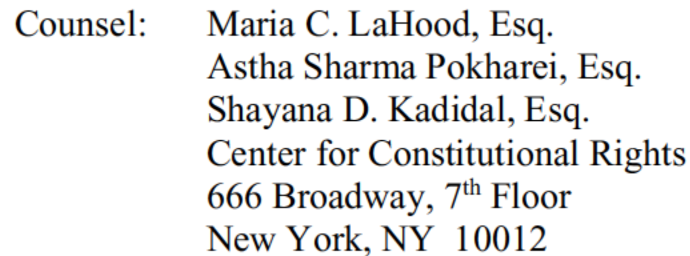

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**B. Parent corporation for the American Studies Association: None**

**Subsidiaries: None**

**Publicly held corporation holding more than 10% of stock: None**

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**DISTRICT OF COLUMBIA COURT OF APPEALS**

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**NO. 19-CV-1222**

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**AMERICAN STUDIES ASSOCIATION, *et al.*,**
**Appellants,**

**v.**

**SIMON BRONNER, *et al.*,**
**Appellees**

**Appeal from the Superior Court**
**for the District of Columbia**
**(Hon. Robert R. Rigsby, J.)**

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**JOINT BRIEF OF APPELLANTS**

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Did the Superior Court err in dismissing several of Plaintiffs' Counts under Rule 12(b)(6) rather than under the D.C. Anti-SLAPP Act, although it ruled that those claims arose out of an act in furtherance of a right of advocacy and failed to state a viable claim?

2. Did the Superior Court err in ruling that Plaintiffs satisfied their burden under the D.C. Anti-SLAPP Act in demonstrating that they are likely to succeed on the merits of their remaining claims, although Plaintiffs failed to

present any supporting evidence for those claims and those claims fail as a matter of law?

3. Did the Superior Court err in ruling that Defendants were not immunized from liability by the Volunteer Protection Act and the Business Judgment Rule, although they were volunteer nonprofit board members and officers who acted in their official capacity within the scope of their responsibilities?

## STATEMENT OF THE CASE

### A. The Prior Lawsuit

The present case is a sequel to the lawsuit brought by Plaintiffs in the U.S. District Court for the District of Columbia on April 20, 2016. That lawsuit, Case No. 1:16-cv-00740-RC ("the Federal Action"), claimed breach of fiduciary duty, corporate waste and other claims, all arising from the 2013 adoption of a resolution by the American Studies Association ("ASA") in support of Palestinian civil society's call for a boycott of Israeli academic institutions. On March 31, 2017, the District Court granted in part and denied in part Defendants' Motion to Dismiss, and specifically determined that Plaintiffs' derivative claims failed as a matter of law, as Plaintiffs had not given ASA the ninety-day notice required by D.C. Code § 29-411.03. It further found that Plaintiffs had failed to state a claim for *ultra vires* action. Bronner v. Duggan, 249 F.Supp.3d 27 (D.D.C. 2017)

("*Bronner I*"). On November 9, 2017, Plaintiffs moved to file a second Amended Complaint, both to add additional allegations and to add J. Kehaulani Kauanui, Jasbir Puar, John Stephens and Steven Salaita as Defendants. Ultimately, on February 4, 2019, the Court dismissed the entire case for lack of subject-matter jurisdiction, as Plaintiffs had failed to show recoverable damages in excess of $75,000. That decision was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. *Bronner v. Duggan*, ___ F.3d ___, 2020 WL 3393531 (D.C. Cir. June 19, 2020) ("*Bronner II*").

**B. The Current Lawsuit**

The instant lawsuit was filed on March 15, 2019 (App. 001); on March 20, Plaintiffs filed a Motion to File Unredacted Complaint Under Seal (App. 002). Pursuant to the briefing schedule set by the Court, on May 6 Defendants filed their Motions to Dismiss under Rule 12(b)(6) and Motions to Dismiss under the D.C. Anti-SLAPP Act (App. 005).

On June 7, 2019, the court permitted the filing of the Unredacted Complaint and set a hearing on the dispositive motions for July 17, 2019 (App. 006).[1] On November 15, 2019, the Court (Rigsby, J.) issued its ruling on the dispositive

[1] Although the Unredacted Complaint was deemed filed as of June 7, Plaintiffs' counsel did not serve it on counsel for Defendants Kauanui, Puar or Salaita until halfway through the motions hearing on July 17 (App. 247 – 251)

motions.[2] Specifically, the court first looked to the motions to dismiss under Rule 12(b)(6), and dismissed Counts Three, Four, Five, Six, Seven and Eight as time-barred, and dismissed as time-barred those portions of Counts Two and Nine pertaining to alleged misuse of funds occurring before March 2016. The court also dismissed Count One as against Defendant Salaita. The remaining counts survived the Rule 12(b)(6) motions. The Court then looked to the special motions to dismiss pursuant to the Anti-SLAPP Act. It first found that Defendants made a *prima facie* showing that Plaintiffs' claims arose out of an act in furtherance of a right of advocacy (App. 339), and then found that Plaintiff's remaining claims "do not need to be dismissed pursuant to the Anti-SLAPP Act" because Plaintiffs had "demonstrated that a number of their claims have merit." (*Id.*).

Defendants filed their Notice of Appeal on December 13, 2019, and moved to stay the proceedings in the Superior Court pending appeal. At the February 14, 2020 Scheduling Conference, the court stayed all proceedings pending this appeal.

**STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW**

ASA is a charitable corporation, organized under the laws of the District of Columbia, dedicated to the promotion of the study of American culture (App. 027, ¶ 17). John Stephens is the Executive Director of ASA (App. 117, ¶ 26); the remaining Defendants are, or were, members of the ASA National Council or

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[2] That Order was subsequently amended slightly on December 12, 2019.

ASA's Nominating Committee in various years from 2013 to 2018 (App. 028 - 029). With the exception of Dr. Stephens, all the individual Defendants were allegedly members of the United States Association for the Academic and Cultural Boycott of Israel ("USACBI") (*id.*). Although the ASA National Council included at least 23 members (*see* App. 138, Art. V, Sec. 1), only those believed to be members of USACBI were named as Defendants.

Dr. Bronner and Dr. Rockland are honorary lifetime members of ASA, and do not pay membership dues (App. 026 - 27, ¶¶ 14, 15; App. 136). Dr. Barton's membership in ASA lapsed in 2012 for non-payment of dues; although he reactivated his membership, he was not allowed to vote on the Resolution (App. 027, ¶ 16). Dr. Kupfer was also a member of ASA until 2014; in opposition to the Resolution, he allowed his membership to lapse, and presumably has not paid dues since (*id.*, ¶ 17).

In 2013, the ASA adopted a resolution supporting a boycott of Israeli academic institutions (the "Resolution"). Plaintiffs claimed that the adoption occurred through various improper maneuvers, such as excluding Dr. Barton from the National Council meeting, closing the voting rolls, and hiding dissenting viewpoints (*gen'lly*, App. 019 - 026).

Dr. Salaita was not on the National Council until July 2015 (App. 029, ¶ 26). Although Plaintiffs alleged that he was a member when the ASA's bylaws were

amended and "when large withdrawals were taken to cover expenses related to the Boycott Resolution" (*id.*), they do not allege that Dr. Salaita had any personal involvement in those actions. Of the dozens of National Council members who served from 2015-2018, only Dr. Salaita was sued. The only other paragraphs in the Complaint that mention Dr. Salaita relate only to advocacy he conducted on the Boycott Resolution before he was even a member of the National Council (App. 037, ¶ 46 (Dr. Salaita published a 2014 opinion piece entitled "Anti BDS activism and the appeal to authority"); App. 057, ¶ 99; App. 131, ¶ 337).

Neither Dr. Puar nor Dr. Tadiar served on the National Council. Rather, Dr. Tadiar served on the programming committee for the 2013 Annual meeting (App. 028, ¶ 20) and Dr. Puar began serving on the ASA's Nominating Committee in July 2010. (App. 029 ¶ 25). Plaintiffs claimed that Dr. Puar, as a new member of a six-person committee, controlled the nominating process, packed elected positions with supporters (App. 036, 041, 042, ¶¶ 45, 58, 60), and arranged it so that six of the ten "continuing voting members" of the National Council had endorsed calls for the boycott (App. 043, ¶ 62).

Dr. Kauanui was elected to the ASA's National Council in 2013 (App. 029, 052, ¶¶ 24, 90). Although she acknowledged in her campaign statement that she was on the Advisory Committee of USACBI (App. 044, ¶ 67), Plaintiffs still asserted that she deliberately concealed her support for USACBI, merely because

another candidate who was allegedly more explicit in his support lost in that same election (App. 044 – 45, ¶¶ 69, 70).

Additional allegations will be included with the discussion of the individual counts below.

## SUMMARY OF ARGUMENT

The D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, was enacted to protect against lawsuits intended to deter expressions on issues of public interest. To that end, the Act not only provides for a rapid dismissal of litigation that lacks a likelihood of success on the merits, but also provides for any award of attorneys' fees for the movant who successfully invokes the Act. As this court has stated, to defeat an Anti-SLAPP motion, the plaintiff must proffer evidence to support his claims; he may not rely solely on the allegations in the pleadings. Too, where an Anti-SLAPP motion is successful, either in whole or in part, the movants are presumptively entitled to an award of attorneys' fees and costs.

Here, the Superior Court erred in considering Defendants' motions to dismiss under Rule 12(b)(6) before considering their Anti-SLAPP motions, and by reviewing the Anti-SLAPP motions under the same analysis as the Rule 12(b)(6) motions. In so doing, the court not only failed to apply the stricter standard of the Anti-SLAPP Act, but also failed to award attorneys' fees for those claims that did not survive review.

Under the Anti-SLAPP analysis, none of Plaintiffs' claims should survive. First, this case clearly arises from an "expression … in connection with an issue of public interest." D.C. Code § 16-5501. The Resolution was in support of a boycott on a matter of public interest and was widely publicized, including on the ASA website. Even Plaintiffs' claims concerning the non-renewal of Professor Bronner's Editorship contract were not made in a content-neutral fashion, for they have sought to impose liability for that non-renewal on all Defendants, regardless of whether any individual Defendant might actually have been involved. Moreover, Plaintiffs make no effort to explain why, of the dozens of members of the National Council who served between 2013 and 2016, Plaintiffs sued only those individuals who expressed support for the Resolution. Clearly, even these claims are driven not by a desire for relief under the contract, but by animus against the Resolution itself and those who support it.

Any and all claims for any injury to ASA, or for remuneration for funds lost by ASA, must be dismissed under collateral estoppel. Most, if not all, of the claims in the Complaint fall within this category, and thus cannot succeed. Six of the counts – Counts Three, Four, Five, Six, Seven and Eight – were dismissed as time-barred under the D.C. three-year statute of limitations; that ruling was correct, although because it was made solely under Rule 12(b)(6), Defendants were improperly denied their attorneys' fees for those claims. The remaining claims

should also have been dismissed. Count One should have been dismissed for the same reason as Count Three, namely, that Plaintiffs were on inquiry notice long before 2016. Moreover, Counts One and Three must fail because there is no reason why the political opinions of candidates for National Council should be considered material.

Count Two – loss of revenue by ASA because of the Resolution – must fail because Plaintiffs have neither alleged nor demonstrated that ASA actually lost money after 2016. The Complaint admits that Plaintiffs have no evidence to suggest a diversion of funds, and the corporate Form 990 upon which they rely does not show what they claim. Nor, for that matter, can Plaintiffs claim damages for ASA's payment of legal fees, since those fees were incurred specifically to defend against the lawsuits that Plaintiffs had themselves brought. Count Nine, which claims for corporate waste, is entirely derivative in nature, and thus cannot stand. Moreover, none of the Plaintiffs have been harmed because there is no allegation that any of them actually pay dues to ASA.

Count Ten claims for the allegedly improper non-renewal of Bronner's contract as Editor of the ASA Encyclopedia. That contract, however, specifically states that it expired in December 2016, and ASA had the plenary right to appoint a new Editor "without further obligation" to Bronner. Where ASA had the absolute right not to renew the contract, there can be no claim for breach for its expiration.

Finally, neither Count Eleven (tortious interference) nor Count Twelve (aiding and abetting) can survive, both because there was no underlying tortious conduct and because all the actions of the Defendants were taken as officers and directors of the corporation. Since a corporation cannot conspire with itself, nor "aid and abet" itself, these claims are fatally deficient as a matter of law.

Two independent grounds for dismissal remain. First, the federal Volunteer Protection Act, 42 U.S.C. § 14501 *et seq.* immunizes Defendants against the conduct alleged to have harmed ASA, and there is no evidence that they willfully harmed Bronner. Second, the D.C. Nonprofit Corporation Act does not preempt or limit any rights Defendant may have under federal law. D.C. Code § 29.406-31(c)(3). Volunteers and officers or directors of a charitable organization are immune from suit, absent a showing of criminal action or willful misconduct. Plaintiffs have offered no evidence to support any such claim. Second, all the actions taken are protected under the D.C. business judgment rule, and Plaintiffs have failed to allege or show bad faith.

For these reasons, Appellants respectfully request that this Court remand the case to the Superior Court with instructions to dismiss all counts of the Complaint and to award attorneys' fees and costs to Defendants under the Anti-SLAPP Act.

## **ARGUMENT**

### A. **Standard of Review**

The appellate court reviews a denial of an Anti-SLAPP motion *de novo*. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1040 (D.C. 2014).

### B. **The Court Fundamentally Misapplied the Anti-SLAPP Act**

Strategic lawsuits against public participation ("SLAPPs"), while disguised as ordinary lawsuits and often including business tort claims, aim to weaponize the prospect of expensive litigation to dissuade individuals from advocating on issues of public interest. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9, 5-6 (1989); *see also Fridman v. Orbis Bus. Intelligence Ltd.*, ___ A.3d ___, 2020 WL 3290907, No. 18-CV-919 (D.C. June 18, 2020). The D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq*. ("Anti-SLAPP Act" or "Act"), was enacted to deter SLAPPs as well as to protect those targeted by SLAPPs by allowing them to "quickly and equitably end a meritless lawsuit." *Doe No. 1*, 91 A.3d at 1036 (D.C. 2014) *see also Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226–7 (D.C. 2016), as amended (Dec. 13, 2018), *cert denied sub nom Nat'l Review, Inc. v. Mann*, 140 S.Ct. 344 (2019).

The party seeking protection under the Act must first show that it applies, that is, that the claim "arises from an act in furtherance of the right of advocacy." D.C. Code § 16-5502(a); *Fridman*, 2020 WL 3290907 at *3. If the movant carries

that burden, the Plaintiffs must show that "the claim is likely to succeed on the merits." § 16-5502(b). If a movant prevails in whole or in part, they are presumptively entitled to fees and costs. § 16-5504(a); *see also Mann*, 150 A.3d at 1238.

The Act thus mitigates "the amount of money, time and legal resources that defendants named in such lawsuits must expend" (*Fridman*, 2020 WL 3290907 at *3) (internal quotations omitted); it "explicitly protects the right not to stand trial in a SLAPP," and has been analogized by this court to the protection afforded by the doctrine of qualified immunity. *Mann*, 150 A.3d at 1229 (*citing Doe No. 1*, 91 A.3d at 1039). Moreover, the "standards for adjudicating a special motion to dismiss and a Rule 12(b)(6) motion are materially distinct." *Fridman*, 2020 WL 32990907 at *7. Plaintiffs must proffer evidence capable of supporting their claims; they may not rely solely on the allegations in the complaint. *Id.* (*citing Mann*, 150 A.3d at 1233).

The Superior Court thus erred in three ways. First, the special motion to dismiss should have been considered at the outset, before the Rule 12(b)(6) motion. Second, each of the claims that were dismissed should have given rise to an award of attorneys' fees for Defendants. Third, the remaining claims should not

have been reviewed under the Rule 12(b)(6) standard, but under the more stringent Anti-SLAPP standard.[3]

**1. The Court Correctly Ruled That Plaintiffs' Claims Arise Out of An Act in Furtherance of a Right of Advocacy**

The Act defines "an act in furtherance of a right of advocacy" as, in pertinent part, "[a]ny written or oral statement made … in a public forum in connection with an issue of public interest; or any other expression … communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501. The Complaint arises out of the passage of the ASA's boycott Resolution in support of Palestinian rights, which Plaintiffs complain was misguided. Plaintiffs claim that the membership was misinformed, and that funds spent in support of the Resolution were "wasted." There can be little question that passage of the Resolution falls within the ambit of the Act. The Resolution, motivated by a concern for Palestinian rights, reflects an "effort to

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[3] Defendant Salaita preserves his right to appeal the Superior Court's finding that it had personal jurisdiction over him solely because he was sued in his capacity as an officer of ASA (App. 338). Personal jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis in original); *see also Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 163 (D.C. 2000) (no personal jurisdiction over corporation's non-resident officers based on allegations that they caused corporate activities to be performed in DC). Plaintiffs' sole allegation as to Dr. Salaita's contact with D.C. – that he lived in the District – was demonstrably false, as the Complaint was served at his home in Virginia.

change the social, political, and economic structure of a local environment," and is "designed to force governmental and economic change and to effectuate rights…." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914, 933 (1982). Other courts have held that boycotts related to Palestinian rights are a matter of public interest. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1047 (D. Ariz. 2018), vacated as moot, 789 F.App'x 589 (9th Cir. 2020) (preliminarily enjoining Arizona law targeting companies that engage in boycotts against Israel which "unquestionably touches on matters of public concern"); *Davis v. Cox*, 325 P.3d 255, 265 (Wash. Ct. App. 2014), rev'd on other grounds, 351 P.3d 862 (Wash. 2015) (granting Anti-SLAPP motion and dismissing case challenging food co-op's decision to boycott Israeli products, finding it was "in connection with an issue of public concern"). *See also Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1083 (N.D. Ill. 2015) (tweets criticizing Israel were "a matter of public concern").

The ASA Resolution was widely publicized, including the ASA website, and is therefore a written communication made in a public forum. *See Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015) ("website is a 'place open to the public,' because anyone with a working internet connection or access to one can view it."). Expending funds to defend against lawsuits challenging the Resolution is also protected under the Anti-SLAPP Act. *See*, *e.g.*, *Sheley v. Harrop*, 215 Cal.Rptr.3d 606, 620 (Cal. Ct. App.

2017) ("[L]itigation funding decisions … constitute protected petitioning activity" under California Anti-SLAPP law) (citations omitted).

Although Plaintiffs have endeavored to separate the non-renewal of Bronner's editorship contract from the other issues, they nonetheless assert that ASA's decision was based on Bronner's opposition to the Resolution and Defendants' statements regarding his opposition (*see, e.g.*, App. 127, ¶¶ 324 (Defendants breached their fiduciary duty to Plaintiff Bronner "by spreading false information about" him); 331 (Defendants made "false and pejorative statements" about Bronner, which "interfered with the renewal of his contract"); 201(b)). Moreover, of all the members of the National Council between 2012 and the present, Bronner sued only those who allegedly support USACBI. These Defendants were clearly singled out because of their opinions. Plaintiffs' claims clearly arise from the 2013 Resolution (and target those who supported it), thus falling within the ambit of the Act. *See*, *e.g.*, *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 203 Cal. App. 4th 450, 464, 473 (Cal. Ct. App. 2012) (claims arising out of calls to fire high school baseball coach plaintiff, including a claim of tortious interference, qualified for anti-SLAPP treatment as matter of public interest).

### 2. **The Court Failed to Apply the Anti-SLAPP Act in a Claim-By-Claim Analysis**

Having found that Plaintiffs' claims arose out of an act in furtherance of a right of advocacy, the court should have applied the Anti-SLAPP analysis to each of the Twelve Counts of the Complaint. "If a party filing a special motion to dismiss … makes 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, then the motion shall be granted unless the responding party demonstrates that *the claim* is likely to succeed on the merits...." D.C. Code § 16-5502(b) (emphasis added). *See also* § 16-5504(a) ("The court may award a moving party who prevails, *in whole or in part*" on an Anti-SLAPP motion to dismiss) (emphasis added). Indeed, this court has applied the Anti-SLAPP law claim-by-claim. *See Mann*, 150 A.3d at 1262 (affirming trial court's denial of the anti-SLAPP motion with regard to the plaintiff's defamation claims, but reversing with regard to the plaintiff's claim for intentional infliction of emotional distress).

If only a subset of Plaintiffs' Counts survive the Anti-SLAPP analysis, then Defendants' Anti-SLAPP motions should have been granted as to the Counts that failed. To know which Counts survived, the court should have weighed any actual evidence proffered by Plaintiffs in support of each Count for its likelihood of success on the merits. Instead of applying the rigorous Anti-SLAPP analysis laid

out by this court in *Mann* (described in greater detail below) to each Count, the trial court applied its Rule 12(b)(6) analysis, and denied Defendants' Anti-SLAPP motions in their entirety because "a number of [Plaintiffs'] claims have merit" and "*these claims* do not need to be dismissed pursuant to the Anti-SLAPP Act" (App. 340-41) (emphasis added). The trial court failed to identify which of the claims were likely to succeed on the merits, as required by the Act, and it failed to identify what evidence Plaintiffs had presented to support such a finding, as required by this court in *Mann*.

### 3. The Court Should Have Dismissed the Counts That Failed the 12(b)(6) Standard Under the Anti-SLAPP Act and Awarded Fees to Defendants

This court has held that the showing required for Plaintiffs to defeat an Anti-SLAPP motion "is more demanding than is required to overcome a Rule 12 (b)(6) motion to dismiss." *Mann*, 150 A.3d at 1221, n.2.; *Fridman*, 2020 WL 3290907 at *7 (the standards "are materially distinct"). In *Mann*, this court ruled that the plaintiff had satisfied his burden under the Anti-SLAPP Act to defeat a special motion to dismiss, and therefore necessarily defeated the 12(b)(6) motion as well. *Mann*, 150 A.3d at 1221 n. 2. Conversely, if a Count cannot survive a 12(b)(6) motion, it necessarily fails under the far more demanding Anti-SLAPP standard that it is likely to succeed on the merits. The Superior Court unfortunately inverted these analyses.

As discussed more fully below (Section C(2)(a), *infra*), the court did properly find that part of Counts Two and Nine and the entirety of Counts Three through Eight failed as a matter of law because they were untimely. As a matter of law, therefore, these Counts failed to meet the requirements of the second prong of the Anti-SLAPP Act, as Plaintiffs' burden of establishing the merits of their case includes demonstrating that their claims are timely. "A claim which is meritless because it is barred by the statute of limitations will cause just as much intimidation as a claim which is barred because of a constitutional defense." *Traditional Cat Assn., Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 357-8 (Cal. Ct. App. 2004) (holding that a statute of limitations defense can support an Anti-SLAPP motion under California law).

The court also properly ruled that Plaintiffs had failed to state a claim against Dr. Salaita under Count I because the Complaint fails to allege that Dr. Salaita made any misrepresentations when he ran for the National Council (App. 333), which, regardless, was after the Resolution was passed in 2013, so could not have affected its passage. Needless to say, Plaintiffs cannot carry their burden of showing that they are likely to succeed on the merits of such a deficient (and time-barred) claim.

By failing to apply the Anti-SLAPP Act to these Counts and instead dismissing them under Rule 12(b)(6) alone, the court failed to promote the Act's

goals to deter SLAPPs and to protect those targeted by them. The Act not only creates an immunity for defendants, but also alleviates the financial burden on SLAPP targets and deters SLAPP filers by awarding fees and costs to movants who prevail "in whole or in part." *Mann*, 150 A.3d at 1238; *Doe v. Burke*, 133 A.3d 569, 575-76 (D.C. 2016). Defendants were improperly denied this protection here.

#### 4. **As to the Counts that Survived the 12(b)(6) Motions, The Court Erred by Failing to Require Plaintiffs to Present Evidence to Overcome Defendants' Anti-SLAPP Motion**

As noted above, this court has recently affirmed that, to defeat an Anti-SLAPP motion, Plaintiffs must produce "or proffer … evidence that supports the claim." Relying on the mere allegations in the complaint is insufficient. *Fridman*, 2020 WL 3290907 at *7. "[T]hat evidence must be legally sufficient to permit a jury properly instructed on the applicable constitutional standard to reasonably find in the plaintiff's favor." *Mann*, 150 A.3d at 1221.

The trial court erred by failing to apply this standard in reviewing Counts One, Two, and Nine through Twelve, and instead applying the less stringent standard under Rule 12(b)(6). Plaintiffs have not proffered any evidence in support of these Counts – although they purported to quote excerpts from e-mails and other documents in their complaint, they did not actually present a single document. *See*, *e.g.*, *Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal. Rptr. 3d

1, 12 (Cal. Ct. App. 2015) ("An anti-SLAPP motion is an evidentiary motion … [the court] must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel."). This is especially telling in light of Plaintiffs' fundamental mis-reading of ASA's Form 990 filings, discussed *infra*.

Had the court applied the correct standard, it would have found that Plaintiffs failed to provide evidence that any of their claims are likely to succeed on the merits.

#### 5. Under the Anti-SLAPP Act the Court Should Have Awarded Fees to Defendants

The Act provides fees to any moving party who prevails "in whole or in part." D.C. Code Ann. § 16-5504(a); *see also Doe v. Burke,* 133 A.3d at 571, 578 (successful movants are presumptively entitled to an award of fees "unless special circumstances make a fee award unjust"). Since the court found that Plaintiffs' claims arise out of an act in furtherance of a right of advocacy, and since it dismissed several Counts for failing under the Rule 12(b)(6) standard, it should have also dismissed those claims under the Anti-SLAPP Act and awarded fees. Additionally, because Plaintiffs failed to present any evidence to support the remaining Counts, the court should have also dismissed those Counts that survived the 12(b)(6) motion but failed under the Anti-SLAPP Act. Plaintiffs have not argued that there are any special circumstances here, nor could they as this is a

quintessential SLAPP. The Superior Court should have awarded attorneys' fees to Defendants.

### C. The Superior Court Erred in Finding that Any of the Claims Had a Likelihood of Success on the Merits

Although the Superior Court dismissed with prejudice six of the twelve counts in the Complaint, Defendants respectfully submit that the trial court erred in finding that any of the counts of the Complaint demonstrated any likelihood of success on the merits. Defendants' motion under the Anti-SLAPP Act should have been granted in its entirety.

#### 1. Any Derivative Claims Are Barred by Collateral Estoppel

Throughout the Federal Action and into the instant litigation, Plaintiffs have sought to blur any distinction between their derivative claims and any claim they might have for direct injury. They seek restitution for damages purportedly suffered by ASA, but claim that D.C. law allows for "direct" claims for damage to an organization. A derivative action, by definition, seeks redress for a wrong to the corporation primarily, and to the shareholder (or, here, the member) only secondarily. *See Flocco v. State Farm Mut. Auto Ins. Co.*, 752 A.2d 147, 151 (D.C. 2000); *see also* 12B FLETCHER CYC. CORP. § 5908 (West 2019). To the extent that the Complaint seeks any damages on behalf of ASA itself – as opposed to Plaintiffs' own alleged injuries – the claims are derivative and barred by collateral estoppel. *Bronner II*, 2020 WL 3393531 at *9.

With few exceptions, the vast majority of the Counts in the Complaint clearly seek to recover damages on behalf of ASA, rather than for the individual Plaintiffs. Specifically, Counts One, Two, Four, Five, Nine and Twelve all seek to recover those damages suffered by ASA. Count Three seeks damages for ASA's "decreased revenues" along with some unidentified "reputational damages" for the Plaintiffs. In 2017, Plaintiffs' derivative claims in the Federal Action were dismissed for failure to comply with D.C. Code § 29-411.03. *Bronner I*, 249 F. Supp. 3d at 42 – 47. The dismissal of the derivative claims was essential to the final determination that the U.S. District Court lacked subject-matter jurisdiction, for without the derivative claims, Plaintiffs could not meet the $75,000 damages threshold for diversity jurisdiction. The dismissal of Plaintiffs' derivative claims, therefore, was fully decided and sufficiently essential to the final judgment to be barred by collateral estoppel. *See Wilson v. Hart*, 829 A.2d 511, 514 (D.C. 2003); *Keene Corp. v. U.S.*, 591 F. Supp. 1340, 1346 (D.D.C. 1984); *aff'd sub nom. GAF Corp. v. U.S.*, 818 F.2d 901 (D.C. Cir. 1987).

### 2. The Individual Counts Have No Likelihood of Success On the Merits

The Superior Court properly dismissed six of the twelve counts of the Complaint as time-barred (and limited the possible damages under two more), but otherwise concluded that the remaining claims met the threshold set by Rule 12(b)(6) of the Superior Court Rules. This result was error: all of the claims fail to

meet the threshold under the Anti-SLAPP Act for an evidentiary showing of a "likelihood of success on the merits."

a. The Applicable Statute of Limitations is Three Years

For all of Plaintiffs' claims, the statute of limitations is three years. *See* D.C. Code § 12–301. The instant lawsuit was filed on March 15, 2019; thus, Plaintiffs' claims must have accrued no earlier than March 15, 2016.

The Federal Action has no tolling effect here. As this Court has stated, "once a suit is dismissed, even if without prejudice, the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing." *Stewart-Veal v. District of Columbia*, 896 A.2d 232, 237 (2006). 28 U.S.C. § 1367(d) does allow for tolling of claims that fall under the court's supplemental jurisdiction, *see Stevens v. Arco Mgmt. of Washington, D.C., Inc.*, 751 A.2d 995 (D.C. 2000) (where Federal Tort Claim Act count was dismissed for lack of subject matter jurisdiction, § 1367(d) tolled the statute of limitations for the state law claim). However, by the plain language of § 1367(d), the tolling period does not affect claims that were originally brought under the federal court's original jurisdiction. *See*, *e.g.*, *Long v. Forty Niners Football Co., LLC*, 244 Cal. Rptr. 3d 887, 894 (Cal. Ct. App. 2019) (§ 1367(d) has no applicability where the case was filed under diversity jurisdiction and the federal court did not exercise

supplemental jurisdiction over any of plaintiff's claims); *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011) ("§ 1367(d) applies only where a federal court declines to exercise supplemental jurisdiction over state law claims after dismissing the federal claims").

Here, Plaintiffs did not invoke supplemental jurisdiction for any of their federal claims and maintained in the U.S. Court of Appeals that original jurisdiction existed. Nor did the District Court exercise supplemental jurisdiction over any of Plaintiffs' claims; on the contrary, it found that it lacked original jurisdiction over the entirety of Plaintiffs' case. There were, therefore, no state law claims over which the federal court exercised supplemental jurisdiction. Too, § 1367 was not intended to save a plaintiff from the ramifications of his voluntary choice of forum. The District of Columbia has long rejected any doctrine of equitable tolling. *See Namerdy v. Generalcar*, 217 A.2d 109, 113 (D.C. 1966); *Huang v. D'Albora, M.D.*, 644 A.2d 1, 4 (D.C. 1994). Thus, where a plaintiff's suit in the U.S. District Court was dismissed because of lack of complete diversity between the parties, his subsequent suit in the Superior Court was properly dismissed as time-barred. *Curtis v. Aluminum Ass'n*, 607 A.2d 509 (D.C. 1992).

In this light, the Superior Court properly dismissed the following counts as time-barred:

Count Four seeks injunctive relief for "Defendants' decision to freeze the [ASA] membership rolls as of November 25, 2013" (App. 118, ¶ 281). That is the only occurrence alleged where the membership rolls were frozen, and it lies far outside the three-year statute of limitations. Count Five seeks injunctive relief for alleged "efforts to influence Israeli legislation" (App. 120, ¶ 290), which constituted a "violation of the Statement of Election from approximately July 2013 until at least June of 2015" (*Id.*, ¶ 291). By its own terms, this claim is time-barred.

Counts Six and Seven claim that the Resolution was improperly adopted, because of allegedly illegal voting procedures (App. 122 - 3, ¶ 302) and because of a lack of quorum (App. 124, ¶ 307). That Resolution was adopted in December, 2013 (App. 074, ¶ 139), and any voting improprieties were alleged to have occurred then – well outside the three-year limitation period. Similarly, Count Eight claims that Mr. Barton was denied the right to vote on the Resolution. Again, that vote was held in 2013, and there is no other allegation that Mr. Barton sought to vote on anything else (App. 070 - 1, ¶¶ 127, 128). This claim, too, is time-barred.

b. <u>Count One is Time-Barred for the Same Reason as Count Three, and is Otherwise Fatally Deficient</u>

Count One claims breach of fiduciary duty arising out of "material misrepresentations and omissions to members, when seeking election to the

National Council and approval of the Academic Boycott" (App. 112, ¶ 262). Count Three claims that the nominating committee acted *ultra vires* by nominating USACBI supporters to the National Council, rather than individuals more "representative" of the Association's membership. All this, of course, occurred before the Academic Boycott was approved in December 2013 (App. 074 - 75, ¶ 139); the only defendant elected after 2013 was Dr. Salaita. To the extent that there were any misrepresentations when the Defendants were seeking election, they were all made before or during 2015, and these claims are time-barred.

The Superior Court's findings on these two counts were inconsistent. The court did not dismiss Count One against all Defendants, opining that "Plaintiffs would not have known about the individual Defendants' decision to withhold [their association with the USACBI] until they received that information in 2017." (App. 324). However, the court dismissed Count Three, finding that "at least … Bronner was aware of the Defendants' political association prior to the vote on the resolution, or shortly thereafter, through his own role as a member of the National Council and Executive Committee. Thus, Plaintiffs knew or could have discovered this information in 2013 or 2014 …" (App. 326).

The Court's ruling on Count Three was correct; its failure to apply the same reasoning on Count One was in error. According to the Complaint, the fact that at least some of the Defendants supported USACBI was known long before 2017.

*See* App. 037, ¶¶ 46 (Salaita's opinion piece published in 2014); 041, ¶ 58 (Puar served on the USACBI Advisory Board from 2010 through 2013); 043, ¶ 62 (prior to 2013, six of the ten voting members of the Council were USACBI Endorsers); 049, ¶ 79 (in 2012, Maira and Malini Johar Schueller, "both members of the USACBI Organizing Collective" became co-leaders of the Activism Caucus); 050 – 51, ¶ 84 (the efforts of the Activism Caucus to adopt the USACBI Boycott began at the 2012 ASA Annual Meeting). And, as the trial court noted, Bronner was a member of both the National Council and the Executive Committee for several years before 2016. Plaintiffs were thus long on inquiry notice that a disproportionate number of USACBI supporters had been nominated for the National Council. Count One should be time-barred, just as Count Three is.

These claims were not viable from the start, in any case. Counts One and Three both rest on two contentions: (1) nominating a number of USACBI supporters to the National Council violates the diversity requirement of Article IV, Section 2 of the ASA Constitution; and (2) Defendants acted nefariously in failing to highlight, in their campaign statements, their involvement with USACBI.

The first contention is nonsensical: like any other contract provision, Article VI, Section 2 must be read according to its normal, reasonable meaning. *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013). "Diversity" in this context refers to the race, creed, color, national origin, geographical allegiance, or

gender or sexual preference of any of the candidates for the National Council, as well as to the varying degrees of experience within the membership – from graduate students to senior professors (App. 195 - 98). To claim that "diversity" on the National Council required nominating candidates with different viewpoints on specific political matters – including on Israel and Palestine – is unreasonable, if not absurd.

The second contention fares little better. Plaintiffs have offered neither evidence nor even allegation to suggest that support of USACBI was a required disclosure in a campaign statement, or that it mattered at all to ASA members. Although Plaintiffs allege that another candidate, Dr. Alex Lubin, lost the election to Dr. Kauanui after Lubin mentioned a "pending resolution on the academic and cultural boycott of Israel" (App. 044 - 45, ¶ 69), they offer no grounds for any correlation between these facts. Dr. Lubin might have lost the election because Dr. Kauanui had a longer and more visible history of service to ASA, or was simply better known among her peers. In the end, it is *Plaintiffs alone* who believed USACBI support to be a disqualifying characteristic for a National Council candidate – all because they objected viscerally to the Resolution itself.[4]

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[4] This, in turn, reinforces the fact that Plaintiffs' entire complaint is a SLAPP suit: in their eyes, any disagreement with their political views must necessarily be a breach of fiduciary duty. This is the very essence of a SLAPP.

Defendants have found no case to suggest that a candidate for the board of a non-profit organization has the duty to disclose every aspect of her political viewpoint on any matter. Certainly, such a requirement would be unworkable: a candidate would have to exhaustively list every opinion they have ever held on every conceivable topic, lest they be sued years later for concealing an opinion that someone only belatedly found to be "important."

c. Count Two Is Both Time-Barred and Fatally Deficient

Count Two seeks damages for "diverting the funds, membership list … and other assets of [ASA]", "manipulating the nomination and voting process …" and "subverting the interests and resources of [ASA] …" in order to pass and then to defend the Resolution (App. 113, ¶ 266). Any actions taken to adopt the Resolution occurred in 2013; again, Bronner was on the National Council, and thus privy to its deliberations. Such claims are repetitive of Counts One and Three, and thus are equally time-barred.

Further, any claim for misuse of ASA funds is fundamentally derivative in nature, and thus barred by collateral estoppel. There is no claim for, and no evidence of, any damage to the Plaintiffs themselves, nor have Plaintiffs proffered any evidence of such damages. Although the Superior Court noted (App. 330) that "due to Plaintiffs' dues-paying member status, they may bring this claim on behalf of themselves, and it is not derivative," the fact is that Plaintiffs were *not* "dues-

paying members" and Plaintiffs have offered no evidence that they were. Neither Professors Bronner nor Rockland pay dues (App. 026 – 27, ¶¶ 14, 15). Professor Kupfer allowed his membership to lapse in 2014, and there is no allegation that Professor Barton remains a member today. Not only is there no evidence, but the Complaint does not even suggest that any of the Plaintiffs have suffered a loss of dues since 2016, and they therefore could not claim any direct injury from any misuse of funds. *Bronner II*, 2020 WL 3393531, at *10.

Plaintiffs also claim, without even a scintilla of evidence, that ASA's finances suffered because of the Resolution. Even the allegations in the Complaint fail to bolster this claim. First, they claim that contributions dropped because of the Resolution (App. 086, ¶ 178). However, annual contributions had historically averaged $54,928, with a range from $31,458 to $108,629 (App. 085, ¶ 176). The contributions for Fiscal Years 2014 and 2015 were $33,080 and $31,456 – which matched nicely with the contributions of $31,458 for FY 2012, one year *before* the Resolution was adopted (App. 086, ¶ 178). In fact, contributions for FY 2013, the year of the Resolution, were $70,544, approximately $49,000 of which was donated by supporters of USACBI and PACBI (*Id.*, ¶ 179). Far from adversely affecting contributions, the Resolution brought a one-year increase before settling back down to previous levels.

Similarly, although Plaintiffs claim that membership dropped because of the Resolution (App. 087, ¶ 184), they offer no evidence as to the membership dues collected in 2015 or thereafter. Plaintiffs alternatively claim that the records for FY 2015 are "the last year we have records for" (App. 086, ¶ 178), yet concede that these documents are "public documents and available online" and cite specifically to the Form 990 for FY 2017 (App. 083, ¶ 168). Nonetheless, they fail to allege what the more recent Form 990's reflect, which is that membership dues for 2015, 2016 and 2017 were significantly higher than for FY 2012. As with their claims of lost contributions, Plaintiffs fail to demonstrate any loss in membership dues since 2012.

Plaintiffs also lack evidence to suggest that membership dropped *because of* the Resolution. A mere temporal relationship does not suffice. *See*, *e.g.*, *Lasley v. Georgetown Univ.*, 688 A.2d 1381, 1387 (D.C. 1997) ("a proximate temporal association alone does not suffice to show a causal link"). Plaintiffs make no allegation that might suggest either causation or even correlation.

This leaves only one last aspect of Plaintiffs' claims of misuse of ASA resources: supposed withdrawals from the investment fund to defend the Resolution. In his deposition in the Federal Action, John Stephens testified that he had created a "separate budget" for support of the Resolution, and that he informed the Council that "they could not use the trust fund of the organization to support

the resolution." (App. 093. ¶ 195; *see also* App. 088, ¶ 186). Although Plaintiffs are dubious (*see* App. 091, ¶ 191), they nonetheless concede that "it is impossible to establish … to what extent support for the Resolution was in fact financed by the Trust Fund …" (App. 093, ¶ 196). In other words, Plaintiffs admit that they have absolutely no evidence to suggest that any funds were withdrawn from the investment fund to support the Resolution. The only evidence on that issue is sworn testimony from ASA's Executive Director that no such withdrawals were made. That is hardly a basis for a viable claim of misuse of funds.

What Plaintiffs *do* rely on is the fact that the Bylaws were amended in March 2016 to authorize the Trustees to "spend each year a maximum of 4% of the monthly average of the Fund's assets from the preceding year" (App. 084, ¶ 171).[5] The fact that withdrawals were authorized does not mean that any such withdrawals were made – and Plaintiffs offer no evidence of such withdrawals. Moreover, since Plaintiffs nowhere allege what the "monthly average of the Fund's assets from the preceding year" might have been, it is impossible to say whether such expenditures might have been significant enough to hurt the organization.

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[5] Although Plaintiffs allege that the National Council "did not inform the full membership" about these proposed changes to the Bylaws, App. 085, ¶174, neither notification to nor approval by the membership was required, as the National Council is authorized to amend the Bylaws (App. 148, Art. XIII).

They also cite to the Form 990 for FY 2017 for what they deem to be a "sale[] of securities of $268,085, and at a loss of $19,319", relying on Part VIII, Line 7 of the Form 990 (App. 083, ¶ 168). Although the document is not in the court record, it is nonetheless a public document,[6] and Appellants request that the Court take judicial notice of the filings. *See*, *e.g.*, *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003) (appellate court could take judicial notice of a newspaper article)); *U.S. ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich. 2003), *aff'd* 388 F.3d 209 (6th Cir. 2004), *cert den'd* 544 U.S. 949 (2005) (collecting cases where public records from reliable sources on the Internet are appropriate for judicial notice). The entry for Part VIII, Line 7 on the 2017 Form 990 is only for $56,411. Taken alone, this line is inconclusive: it could refer to movement within the investment fund itself, rather than the liquidation of any capital asset. There is nothing in Part III – Statement of Program Service Accomplishments – to suggest money was spent for the Resolution, and the balance sheet in Part X shows a drop in the value of the investment fund of less than $40,000. In leaping to their unfounded conclusion, Plaintiffs have taken one small part of this Form out of context, and have failed to explain how it fits with the rest of the document. For all their suspicions – and despite extensive discovery

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6 *See American Studies Assn.*, GUIDESTAR.ORG, https://www.guidestar.org/profile/23-7083450 (last visited, July 6, 2020).

in the Federal Action – they have no evidence that there were any large withdrawals from the investment fund after 2016.

Finally, Plaintiffs claim that, "at the end of 2016", ASA had incurred "$40K in unpaid legal expense [*sic*]", which was charged to ASA's credit card (App. 090 - 91, ¶ 190; *see also* App. 085, ¶ 175). Those legal fees were incurred in the Federal Action, which by the end of the fiscal year had already seen a significant motions practice. Plaintiffs cannot claim that the ASA was remiss in incurring legal fees, especially when Plaintiffs were the cause of those fees to begin with. *See, e.g., In re Symbol Techs. Sec. Litig.*, 762 F. Supp. 510, 516 (E.D.N.Y. 1991) ("defendants cannot be held liable for the costs of defending a potentially baseless suit."); *Kaplan v. First Hartford Corp*., 484 F. Supp. 2d 131, 144 (D. Me. 2007) ("Directors and officers usually have a duty to engage lawyers to defend the corporation even if they individually have failed to perform in some way that caused the litigation."); 3A FLETCHER CYC. CORP. § 1112 (West 2019) ("the payment of an attorney for legal services performed for the company is not improper."). The fact that Defendants have fought this lawsuit does not constitute a breach of fiduciary duty.

Finally, Plaintiffs fail to submit evidence or even allege that any of the individual Defendants were actually involved in the transactions above. Again, Drs. Puar and Tadiar were never on the National Council, while all other

Defendants but Dr. Salaita and John Stephens were off the Council long before 2016. Plaintiffs never mention Dr. Salaita at all in the 17 pages of allegations related to this Count. Again, their assumption that Defendants must be liable is based not on evidence, but on Defendants' support for the Resolution.

d. Count Nine Is Barred By Collateral Estoppel

Count Nine claims damages for waste arising out of the "use of [ASA] resources to advocate, conduct a vote on, declare enacted, and then support the Academic Boycott." (App. 125, ¶ 316). Any claim for corporate waste is derivative in nature. *See Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir., 1984) (claims of corporate mismanagement must be brought on a derivative basis because no shareholder suffers a harm independent of that visited upon the corporation). Regardless of whether Plaintiffs couch their claims under Count Nine as individual damages or damages to the Association, any claim for corporate waste has already been barred by the ruling of the federal courts.

In declining to dismiss Count Nine, the Superior Court cited to *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011) (*see* App. 331); that case, however, is not applicable here. In Daley, not only had the plaintiffs been ostracized from the alumni society they valued, but the alleged financial malfeasance had affected their own dues payments. This Court found that, in those circumstances, the individual plaintiffs might have direct claims against the

organization. *See also Bronner II*, 2020 WL 3393531*19 - 20. By contrast, here three of the four Plaintiffs haven't paid any dues since, at the latest, 2014 – and although Barton tried to renew his membership, there is no allegation that he is still a member, or has been since 2016. Plaintiffs have not alleged that they paid any dues that might have been wasted, and thus have no direct injury from any corporate waste.

e. Count Ten Fails As a Matter of Law

Count Ten revolves, first, around the decision to amend the ASA Bylaws to remove "the editor of the Encyclopedia of American Studies" as an *ex officio* member of the National Council (¶ 245); this was done, they allege, to prevent Bronner from re-pleading his derivative claims in the U.S. District Court (App. 108 - 9, ¶¶ 249 – 53). This contention is simply not correct. The U.S. District Court dismissed the derivative claims with prejudice because Plaintiffs had failed to provide the notice required under D.C. Code § 29-411.03. *Bronner I*, 249 F. Supp. 3d at 42 – 47. Regardless of whether the Editor remained a member of the National Council, Plaintiffs' derivative claims were still doomed.

Count Ten also claims breach of fiduciary duty arising from the Association's failure to renew Bronner's contract as Editor of the Encyclopedia of American Studies. These claims, along with the claims in Count Eleven, therefore, are unique to Professor Bronner, and to him alone. Neither Barton, Kupfer nor

Rockland have any interest in Bronner's contract. They were not injured by the termination of the contract, and lack any standing to make these claims. *See Democracy Partners v. Project Veritas Action Fund*, ___ F.Supp.3d ___, No. 17-1047 (ESH), 2020 WL 1536217 (D.D.C. March 31, 2020) (breach of fiduciary duty claim fails because plaintiffs could not show actual injury). Although they allege that ASA has lost a valuable asset, that does not affect them directly, and is thus a derivative action. As Counts One through Nine and Count Twelve should all fail as a matter of law, their involvement in this lawsuit effectively ends.

Bronner's claim under the contract cannot survive, because Bronner had no expectation of renewal. The contract upon which Bronner relies clearly states that it shall run from January 1, 2014 through December 31, 2016. Further, "[u]pon expiration or termination of this Agreement for any reason, ASA shall have the right to appoint a new Editor-in-chief … without further obligation to the Editor." App 207 - 08, ¶ 11. ASA had plenary authority not to renew the Editor contract, or to retain another Editor for the position. It therefore owed no duty to Bronner either to renew the contract or even to warn him it was not going to renew. *See*, *e.g.*, *Multicom Inc. v. Chesapeake and Potomac Tele. Co.*, No. 88-1886-OG, 1988 WL 118411 (D.D.C. Oct. 27, 1988) ("Even if C&P failed to exercise good faith in negotiating a renewal of its contract, these facts, standing alone, do not support a

cause of action for breach of fiduciary duty.”).[7]

Finally, Count Ten improperly sues all Defendants indiscriminately, claiming that they acted “as members of the National Council” (App. 126, ¶ 320). Bronner alleges that “as early as 2014”, the Executive Council decided they would not renew his contract (App. 102, ¶ 227), and in 2015, Duggan informed him that ASA would be looking for a “new home for the Encyclopedia” (App. 103, ¶ 229). Although Bronner was told he would be free to apply, it was clearly the intent of the Council to allow Bronner’s contract to terminate (*id.*). On January 5, 2017, Professor Holland was announced as the new Editor (App. 105, ¶ 235). However, in 2014, when the matter was discussed by the Executive Committee (App. 103, ¶ 229), only Duggan, Marez and Reddy of the named Defendants were actually on that board. In October, 2016, when Bronner was told that the matter was on the agenda for the next National Council Meeting (App. 104, ¶ 233), only Steven Salaita, of all Defendants, was actually on the Council – and there is no evidence or even allegation that Professor Salaita actually did anything. In addition, Drs.

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7 As Editor, Bronner was an independent contractor to ASA; Defendants did not owe him a fiduciary duty to renew his contract. “Officers and directors of a corporation owe a fiduciary duty to the corporation and to its shareholders,” *Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Co-op. Ass’n, Inc.*, 441 A.2d 956, 962 (D.C. 1982); *see also Byington v. Vega Biotechnologies, Inc.*, 869 F. Supp. 338, 345 (D. Md. 1994) (“Delaware cases speak only of the fiduciary duty owed by directors to the corporation itself” and not to its employees, as “[a]ny contrary rule would place intolerable and irreconcilable conflicts of interest upon the directors”).

Tadiar and Puar were never on the National Council at all, and Dr. Kauanui was never on the Executive Council. The Complaint improperly lumps all the Defendants together, regardless of any actual individual involvement.

f. Count Eleven Fails As a Matter of Law

Count Eleven claims that Defendants tortiously interfered with the editorship contract. This Count must fail as a matter of law, for two reasons. First, as noted above, after December 31, 2016, Bronner had no ongoing contractual relationship with ASA, and ASA had no further obligation towards him. ASA always had the authority not to renew the contract for any reason, and thus could not have breached that contract. As such, there could be no tortious interference, because "no wrongful breach of contract could result from [the] interference." *Dale v. Thomason*, 962 F.Supp. 181, 184 (D.D.C.1997) (citing *Bible Way Church v. Beards*, 680 A.2d 419, 432–33 (D.C.1996)); *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). Where the termination of the contract was no breach, there could be no tortious interference.

The second fatal flaw in Bronner's claim is that the only actions alleged were taken by officers and directors of ASA in their official capacity. Thus, the Executive Council decided in 2014 not to renew Bronner's contract (App. 102 - 03, ¶¶ 227, 229). In 2016, the Council amended the Bylaws (App. 107, ¶ 244); by

January 2017, the National Council chose one of its members, Professor Holland, to be the new Editor (App. 105, ¶ 235). There is no evidence, and not even an allegation anywhere in the Complaint, to suggest that any action was taken outside of the Council itself. It is established that an entity cannot tortiously interfere with its own contract, which means that none of its agents, directors or officers can do so, either. *See Press v. Howard Univ.*, 540 A.2d 733 (D.C. 1988) (no claim against university officials for their part in getting plaintiff fired); *Paul v. Howard Univ.*, 754 A.2d at 309.

Bronner seems to allege that Defendants acted with malice, based on unflattering characterizations of him in internal e-mails – after all, in his mind "[t]here is no question that his contract should have been renewed" (App. 129, ¶ 331). He claims that, in 2013 and 2014, Professor Duggan "and others" (never identified) grew antagonistic, and allegedly made disparaging comments about him because of his opposition to the Resolution (App. 098, ¶ 204). Disparaging comments do not demonstrate malice as a matter of law. Bronner indiscriminately aims these claims at all the Defendants, without regard to their roles in the ASA, and without troubling to even offer any evidence or allege the most basic of supporting facts.

Too, even if the National Council needed a specific reason not to renew the contract, Bronner provided just such reasons. First, the Federal Action was filed in

April, 2016, which meant that when the Editor contract expired, Bronner had been actively suing ASA for eight months. If nothing else, a decision not to renew Bronner as Editor while he was in contentious litigation with ASA would lie well within the business judgment of the National Council. Second, Bronner was the Chair of his department at Penn State – Harrisburg, and because of the Resolution, that department withdrew its membership in ASA. (App. 099, ¶ 205 n. 13). ASA has no duty to contract with someone who is actively opposing the organization.[8]

g. Count Twelve Fails as a Matter of Law

Finally, Count Twelve seeks damages for "aiding and abetting" on the theory that Defendants, in addition to allegedly breaching their own fiduciary duties, also encouraged their colleagues to do the same. "Aiding and abetting," however, has not been recognized as an independent tort. *See Flax v. Schertler*, 935 A.2d 1091, 1108 n. 15 (D.C.2007) (although there are predictions that the court would recognize the tort, "we have not done so to date"); *Acosta Orellana v. CropLife Int'l*, 711 F.Supp.2d 81, 107 (D.D.C.2010) ("[t]here does not appear to be

[8] Bronner's position is also hypocritical: he claims that he cannot be held responsible for the department's decision to withdraw, because he was only one man on the committee. (App. 099, n.13) However, even though the Defendants were only a handful of members of the National Council – or, in the case of Tadiar and Puar, not on the Council at all – they should be held personally responsible for every action of that body. Bronner cannot have it both ways.

case law in the District of Columbia that explicitly recognizes aiding and abetting as an actionable theory of liability").

Rather, the doctrine is employed to impose liability on individuals who provided assistance to the primary tortfeasor. *See*, *e.g.*, *Chen v. Bell-Smith*, 768 F.Supp.2d 121, 140-41 (D.D.C. 2011) (defendant is liable where he is aware of his role in the underlying tortious activity and "knowingly and substantially assist[s] the principal violation."). For there to be a viable claim for "aiding and abetting," there must be a direct tortfeasor and a viable claim in tort. As argued above, however, none of Plaintiffs' claims are viable – they are either time-barred, or fatally deficient.

More important, however, is the fact that none of the allegations relating to Count Twelve involve aiding or abetting. Rather, they concern the same direct action that Plaintiffs claimed were tortious in Counts One through Eleven. Maira, Kauanui and Puar sought to add USACBI supporters to the National Council (App. 131, ¶ 336); Salaita supported the Academic Boycott, as evidenced by an opinion piece he published in 2014 (*id.*, 037, ¶ 46, 131, ¶ 337); Stephens, as Executive Director, withdrew funds from the Trust Fund and terminated the contract with Bronner (App. 132, ¶ 340, 341). Further, as officers, directors and agents of ASA, none of the Defendants could "aid or abet" each other; just as with the claim of

tortious interference, a corporation cannot aid and abet itself. This claim must fail as a matter of law.

Finally, this claim rests on Defendants' actions of advocating for the Boycott Resolution as members of USACBI, which in itself is an exercise of Defendants' rights under the First Amendment and not unlawful. Lawful expressions of opinion cannot constitute "aiding and abetting." *See Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (finding that the First Amendment bars liability for state torts, including "civil conspiracy based on those torts," for peaceful picketing on a matter of public concern); *Claiborne,* 458 U.S. at 920 ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."). This claim is fatally flawed.

h. Defendants Are Immune from Liability

Under both federal law and the D.C. Code, volunteers and officers of a charitable organization are immune from liability for acts within their scope of responsibility; the only exceptions are for willful or reckless misconduct or "intentional infliction of harm" *See* D.C. Code § 29-406.31(d), and for similar acts directed towards an individual, *see also* 42 U.S.C. § 14503. Again, there is neither

evidence nor allegation of any act, by any Defendant, other than as a representative of ASA.[9]

To survive an Anti-SLAPP motion and avoid the immunity provided by law, Plaintiffs must provide evidence that each individual Defendant is liable for "a financial benefit to which [they] are not entitled" or an "intentional infliction of harm; a violation of § 29-406.33 [unlawful distribution]; or an intentional violation of criminal law." D.C. Code § 29-406.31(d). Because §29-406.90 provides an exception only for "willful misconduct," it provides greater protection than even the federal statute, and is not preempted. *See*, *e.g.*, *Waschle v. Winter Sports, Inc.*, 127 F.Supp.3d 1090, 1093-4 (D. Mo. 2015).

The plain language of the federal Volunteer Protection Act makes it clear that is intended to immunize all volunteer conduct other than intentional misconduct directed towards individuals or harm to the organization or entity on behalf of which they volunteer. ("Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization . . . against any volunteer of such organization or entity." 42 U.S.C. §14503(b)). And "no volunteer shall be liable for harm caused if the volunteer was acting within the scope of his/her responsibilities, and the harm was not caused by willful, reckless

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[9] Although John Stephens is not a volunteer, he is nonetheless an officer of the corporation (*see* App. 140, Art. II Sec. 3).

or criminal misconduct, gross negligence, or conscious, flagrant indifference." §14503(a). ASA is not suing any of these individuals Defendants. To defeat an Anti-SLAPP motion, therefore, *each* of the individual plaintiffs would have to submit evidence showing that *each* of the individual defendants acted with malicious intent or conscious indifference to their rights.

Plaintiffs offer no such allegations – and no evidence sufficient to meet the burden of production under the Anti-SLAPP Act. None of the Defendants have benefited financially (and there was no "unlawful distribution"), and none of the actions alleged in the Complaint rise to the level of a violation of criminal law. Instead, all that Plaintiffs have argued is that Defendants presumably understood that the Resolution would engender opposition within ASA, and thus "harm" the organization. This, however, does not rise to the level of "willful misconduct" – either in the sense of actual malice or evil motivation, or reckless indifference. *See*, *e.g.*, *Dalo v. Kivitz*, 596 A.2d 35, 41 (D.C. 1991).

It is unquestioned that Defendants held their political opinions honestly; it is also unquestioned that they believed that adoption of the Resolution was an appropriate expression of opinion. It is equally unquestioned that Plaintiffs disagreed on both scores, but that does not mean that either side is indubitably right. Defendants probably also understood that people like Plaintiffs would seek to annul the Resolution, and that forces outside of ASA would mass to seek

retribution. Defendants may even have anticipated that they would be victims of a SLAPP such as the instant litigation. Absent any allegation, however, that Defendants acted with malice or in reckless indifference to the results of their actions, they are immune from all of Plaintiffs' claims. *See Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1253 n. 7 (D.C. 2012)

Nor may Plaintiffs rely solely on any alleged financial risk suffered by ASA, for two reasons. First, as argued above, they have failed to either allege or demonstrate that ASA did, in fact, suffer any financial downturn because of the Resolution. Second, "willful misconduct" in this context means that the defendant knew his actions were "certainly likely to cause an injury to plaintiff." *Saba v. Compagnie Nationale*, 78 F.3d 664, 668 (D.C. Cir. 1996). To the extent that ASA suffered any injury, those are derivative claims that Plaintiffs may not bring. There is certainly no allegation or evidence that Defendants knew that their actions would cause harm to any of the Plaintiffs individually.[10]

Defendants, therefore, are immune from liability for any of the actions alleged in the Complaint, and Plaintiffs have failed to produce any evidence to suggest willful misconduct. This is an additional reason why Plaintiffs' claims

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[10] Bronner may argue that non-renewal of the Editor contract would cause him harm. That non-renewal, as argued above, was not a breach of the contract, and therefore could not be considered misconduct – willful or otherwise.

had no likelihood of success, and should have been dismissed under the Anti-SLAPP Act.

i. Defendants are Protected by the Business Judgment Rule

The lower court also erred by not finding that the business judgment rule rendered Plaintiffs' claims unlikely to succeed. The business judgment rule is a "presumption that … the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006) (quoting *Willens v. 2720 Wis. Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126, 1137 (D.C. 2004)). "The burden is on the party challenging the decision to establish facts rebutting the presumption. " *Id*..

"In practical terms, the business judgment rule means that the courts will not lightly overturn the decisions of corporate directors, absent a showing of bad faith or gross negligence." *Willens,* 844 A.2d at 1137 (citing *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000)). Nothing in the Complaint would rise to this level of misfeasance. Certainly, the fact that Plaintiffs oppose the Resolution does not mean that Defendants' support of it was gross negligence or bad faith; it just means that Plaintiffs and Defendants disagree. Which side has the advantage in that debate is a question best left to historians and ethicists. As a legal matter, however, Plaintiffs have failed 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); *see also Davis v. Cox*, 12 Wash. App. 2d 1022, 2020 WL 821042, at *6 (Wash. Ct. App. 2020) (finding that business judgment rule defeated fiduciary duty and ultra vires claims against non-profit board members for boycott of Israeli goods). Plaintiffs' claims thus have no likelihood of success on the merits, and should have been dismissed under the Anti-SLAPP Act.

## CONCLUSION

For the reasons argued more fully above, the Superior Court should have first considered the Defendants' motions to dismiss under the Anti-SLAPP Act, rather than the motions to dismiss under Rule 12(b)(6). Further, under that Act, it is clear that the entire case arose from the adoption of the Resolution, which is an expression of opinion on a matter of public interest. Further, none of Plaintiffs' claims had any likelihood of success on the merits, and should have been dismissed. Finally, under the Act, Defendants are entitled to an award of attorneys' fees associated with defending against Plaintiffs' claims.

Appellants therefore respectfully request that this Court remand the case to the Superior Court with instructions to dismiss all counts of the Complaint and to award attorneys' fees and costs to Defendants under the Anti-SLAPP Act.

Respectfully submitted,

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## STATUTES AND RULES RELIED UPON

**28 U.S.C. §1367. Supplemental jurisdiction**

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

**42 U.S.C. §14503. Limitation on liability for volunteers**

*(a) Liability protection for volunteers*

Except as provided in subsections (b), (c), and (e), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if-

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to-

(A) possess an operator's license; or
(B) maintain insurance.

*(b) Liability protection for pilots that fly for public benefit*

Except as provided in subsections (c) and (e), no volunteer of a volunteer pilot nonprofit organization that arranges flights for public benefit shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization if, at the time of the act or omission, the volunteer-

(1) was operating an aircraft in furtherance of the purpose of, and acting within the scope of the volunteer's responsibilities on behalf of, the nonprofit organization to provide patient and medical transport (including medical transport for veterans), disaster relief, humanitarian assistance, or other similar charitable missions;

(2) was properly licensed and insured for the operation of the aircraft;

(3) was in compliance with all requirements of the Federal Aviation Administration for recent flight experience; and

(4) did not cause the harm through willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.

*(c) Concerning responsibility of volunteers to organizations and entities*

Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

*(d) No effect on liability of organization or entity*

Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

*(e) Exceptions to volunteer liability protection*

If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

*(f) Limitation on punitive damages based on actions of volunteers*

*(1) General rule*

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

*(2) Construction*

Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

*(g) Exceptions to limitations on liability*

*(1) In general*

The limitations on the liability of a volunteer under this chapter shall not apply to any misconduct that-

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

*(2) Rule of construction*

Nothing in this subsection shall be construed to effect subsection (a)(3) or (f)

**D.C. Code § 16–5501. Definitions**.

For the purposes of this chapter, the term:

**(1)** "Act in furtherance of the right of advocacy on issues of public interest" means:

**(A)** Any written or oral statement made:

**(i)** In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

**(ii)** In a place open to the public or a public forum in connection with an issue of public interest; or

**(B)** Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

**(2)** "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

**(3)** "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests

rather than toward commenting on or sharing information about a matter of public significance.

**(4)** “Personal identifying information” shall have the same meaning as provided in § 22-3227.01(3).

**D.C. Code § 16–5502. Special motion to dismiss.**

**(a)** A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

**(b)** If a party filing a special motion to dismiss under this section makes 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, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

**(c)(1)** Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

**(2)** When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

**(d)** The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

**D.C. Code § 16–5504. Fees and costs**.

**(a)** The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

**(b)** The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

**D.C. Code § 29–406.31. Standards of liability for directors**.

**(a)** A director shall not be liable to the nonprofit corporation or its members for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

**(1)** None of the following, if interposed as a bar to the proceeding by the director, precludes liability:

**(A)** Subsection (d) of this section or a provision in the articles of incorporation authorized by § 29-402.02(c);

**(B)** Satisfaction of the requirements in § 29-406.70 for validating a conflicting interest transaction; or

**(C)** Satisfaction of the requirements in § 29-406.80 for disclaiming a business opportunity; and

**(2)** The challenged conduct consisted or was the result of:

**(A)** Action not in good faith;

**(B)** A decision:

**(i)** Which the director did not reasonably believe to be in the best interests of the corporation; or

**(ii)** As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

**(C)** A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct:

**(i)** Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and

**(ii)** After a reasonable expectation to such effect has been established, the director has not established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation;

**(D)** A sustained failure of the director to devote attention to ongoing oversight of the activities and affairs of the corporation, or a failure to devote timely attention, by making, or causing to be made, appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefor; or

**(E)** Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its members that is actionable under applicable law.

**(b)** The party seeking to hold the director liable:

**(1)** For money damages, also has the burden of establishing that:

**(A)** Harm to the nonprofit corporation or its members has been suffered; and

**(B)** The harm suffered was proximately caused by the director's challenged conduct;

**(2)** For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, also has whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

**(3)** For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, also has whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

**(c)** Nothing contained in this section:

**(1)** In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the nonprofit corporation under § 29-406.70(a)(3), alters the burden of proving the fact or lack of fairness otherwise applicable;

**(2)** Alters the fact or lack of liability of a director under another section of this chapter, such as the provisions governing the consequences of an unlawful distribution under § 29-406.33, a conflicting interest transaction under § 29-406.70, or taking advantage of a business opportunity under § 29-406.80; or

**(3)** Affects any rights to which the corporation or a director or member may be entitled under another statute of the District or the United States.

**(d)** Notwithstanding any other provision of this section, a director of a charitable corporation shall not be liable to the corporation or its members for money damages for any action taken, or any failure to take any action, as a director, except liability for:

**(1)** The amount of a financial benefit received by the director to which the director is not entitled;

**(2)** An intentional infliction of harm;

**(3)** A violation of § 29-406.33; or

**(4)** An intentional violation of criminal law.

**D.C. Code § 29–406.90. Immunity from civil liability for volunteer of corporation.**

**(a)** For the purposes of this section, the term "volunteer" means an officer, director, trustee, or other person who performs services for the corporation and who does not receive compensation other than reimbursement of expenses for those services.

**(b)** Any person who serves as a volunteer of the corporation shall be immune from civil liability except if the injury or damage was a result of:

**(1)** The willful misconduct of the volunteer;

**(2)** A crime, unless the volunteer had reasonable cause to believe that the act was lawful;

**(3)** A transaction that resulted in an improper personal benefit of money, property, or service to the volunteer; or

**(4)** An act or omission that is not in good faith and is beyond the scope of authority of the corporation pursuant to this chapter or the corporate charter.

**(c)** This section shall apply only if the corporation maintains liability insurance with a limit of coverage of not less than $200,000 per individual claim and $500,000 per total claims that arise from the same occurrence. This subsection shall not apply to any corporation having annual total functional expenses, exclusive of grants and allocations, of less than $100,000, and which is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code of 1986.

**(d)** This section shall not exempt the corporation from liability for the conduct of the volunteer, but the corporation shall be liable only to the extent of the applicable limit of insurance coverage it maintains.

**D.C. Code § 29–411.03. Demand**.

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A person shall not commence a derivative proceeding until:

**(1)** A demand in the form of a record has been delivered to the nonprofit corporation to take suitable action; and

**(2)** Ninety days have expired from the date the demand was effective unless:

**(A)** The person has earlier been notified that the demand has been rejected by the corporation; or

**(B)** Irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2020, a copy of the Appellants' Brief was served on the following through the Court's electronic filing system, and by first-class mail, postage prepaid:

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