SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SIMON BRONNER, et al.,	:	
	:	
Plaintiffs,	:	Case No. 2019 CA 001712 B
v.	:	Hon. Robert R. Rigsby
	:	Calendar 2, Civil 10
LISA DUGGAN, et al.,	:	
	:	
Defendants.	:	

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pending before this Court are all Defendants' Special Motions to Dismiss filed pursuant to Section 16-5501 of the District of Columbia Code. This Court had previously denied those motions. Defendants appealed, and the Court of Appeals vacated this Court's decision and remanded the matter with instructions that this Court address the issues anew in light of the Court of Appeals opinion. *American Studies Ass'n v. Bronner,* 259 A.3d 728 (DC 2021).

Following issuance of the Court of Appeals opinion, this Court directed the parties to rebrief the issues raised by Defendants' motions. The Court heard oral argument on October 27, 2022. In light of the parties' written submissions and

oral argument, the Court now issues the following findings of fact and conclusions of law.

1. The Anti-SLAPP Act specifies the showing each party must make in the litigation of a special motion to dismiss. The initial burden is on the movant to "make[] a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." The burden then shifts to the responding party to "demonstrate[] that the claim is likely to succeed on the merits." Section 16-5502(b).

2. The Court of Appeals has directed that whether a plaintiff's case can proceed in the face of a SLAPP motion requires an assessment of whether each count of the complaint is "likely to succeed on the merits" as that term is to be understood under the SLAPP Act.

3. To defeat a motion brought under the SLAPP Act, a plaintiff must show that its claims arising out of acts in furtherance of the right of advocacy on issues of public interest are "likely to succeed on the merits." 16-5022(b). The Anti-SLAPP Act does not define the phrase "likely to succeed on the merits," nor any of its components, but the Court of Appeals has done so, both in this case and in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (DC. 2016).

4. The Court of Appeals has instructed that plaintiff must make "a proffer of admissible, credible evidence. A plaintiff must make more of a showing

to defeat an anti-SLAPP motion than is ordinarily required to defeat a 12(b)(6) motion; by itself, the facial validity of a claim is not normally sufficient to demonstrate the likelihood of success required by the Anti-SLAPP Act. That demonstration requires the plaintiff to make, and the court to evaluate, a proffer of evidence supporting the well-pled claim and overcoming any defenses asserted against it.

5. The Plaintiffs' Complaint in this case was filed after three years of litigation in federal court during which extensive discovery was conducted, including both the production of documents and deposition testimony. The Complaint makes extensive references to the materials produced in discovery, as well as to documents and other data available on the internet and the organic documents of Defendant American Studies Association.

6. Plaintiffs' Complaint in this Court quotes from many of these documents and references them by Bates number or, in the case of deposition testimony, transcript page and line.

7. All of the documents referenced in the Complaint that were produced in discovery, including emails of the defendants, are in the possession of the defendants.

8. Defendants claim that Plaintiffs' opposition to their SLAPP motion is deficient because Plaintiffs have not filed the actual documents or deposition

testimony of record with the Court. They argue that this disadvantages them because, they suggest, perhaps the complete document would reveal information that would discredit the Plaintiffs' allegations.

9. This argument by Defendants is unavailing. First, the law does not require that evidence be "filed" of record. It requires that the evidence be "proffer[ed]." The submission into the record of extensive quotations from documents can constitute such a proffer.

10. In addition, Defendants have all of the quoted documents in their own possession. If they had wished to point to some aspect of a document quoted by Plaintiffs other than the language that Plaintiffs have put before the Court, Defendants are fully capable of doing so.

11. The Court accordingly finds that the Plaintiffs have "proffer[ed]" evidence, and that their opposition to the Defendants' motions is not limited to mere allegations. The Court further finds that Defendants have access to all of the evidence Plaintiffs have put before the Court. The Court finds that neither Defendants nor the Court were in any way disadvantaged by Plaintiffs' decision to quote from, rather than attach, these materials.

12. This Court's assessment of Defendants' motions also takes into account the fact that many of the allegations that form the basis for Plaintiffs' claims are not disputed by the Defendants. For example, Plaintiffs invoke a

provision of the ASA Constitution requiring "diversity" among nominees to the Association's governing Council, and claim that Defendants violated this provision by nominating only candidates who supported the ASA's adoption of the resolution supporting Boycott, Disinvestment and Sanction of Israel. In their SLAPP Motion, Defendants do not dispute the factual allegation that forms the predicate of this claim – that is, they do not dispute Plaintiffs' factual claim that only BDS supporters were nominated to the Council by Defendants.

13. Where a SLAPP Motion does not dispute factual allegations, but instead advances only legal arguments that those allegations fail, a Plaintiff need not proffer evidence; it makes no sense to require evidence to substantiate factual allegations that are not contested. The same is true, after all, on a summary judgment motion: a party opposing summary judgment need only provide the court with a basis for concluding that plaintiff can prevail about material facts that are disputed.

14. For this reason, Plaintiffs are under no duty to submit, or to proffer, any evidence relating to factual claims that are not disputed by Defendants.

15. More generally, Plaintiffs' Complaint quotes from emails and deposition testimony and Defendants have not suggested to the Court that these quotations are inaccurate. For example, in Plaintiffs' Complaint ¶2, Plaintiffs quote an email in which an Individual Defendant stated "I don't care if [the

Resolution] splits the organization." Defendants do not deny that this email exists or claim that Plaintiffs have misquoted it.

16. Several legal principles form the basis for this Court's rulings. First, the Court of Appeals has instructed that, in evaluating a SLAPP motion, analysis "focuses on the claim not the claimant." 259 A.3d at 748. The Court of Appeals held that the SLAPP statute does not "authoriz[e] the trial court to explore the plaintiff's underlying motives in asserting a claim." Indeed, the Court of Appeals held that "no sensible reading of th[e statute's] language could lead to a conclusion that the Council intended courts to gauge a plaintiff's subjective reasons for filing their claims." *Id.* at 748.

17. Equally irrelevant, the Court of Appeals has made clear, are the *Defendants'* motives for engaging in the acts at issue. The fact, if it is a fact, that their actions were animated by an interest in a matter of public concern does not immunize otherwise illegal actions from attack. The Court of Appeals held it

> most implausible, for example, that the Anti-SLAPP Act enables a defendant sued for embezzling or misappropriating entrusted funds to file a special motion to dismiss based on a showing that the funds were used in furtherance of the right of advocacy on an issue of public interest. It would be strange to say such a lawsuit "arises from" statutorily protected activity rather than from the defendant's defalcation, regardless of whether the plaintiff disapproved of the defendant's speech; equally strange to suggest that the Anti-SLAPP Act was meant to benefit such a defendant.

18. For this reason, both Plaintiffs' motive in bringing the case, and Defendants' motives in committing the acts at issue, are completely irrelevant for purposes of the motions now before this Court.

19. Much of Defendants' attack on Plaintiffs' Complaint rests on the fact that Defendants used words to carry out the actions at issue. Thus, for example, the claim relating to improper counting of votes includes the fact that an allegedly incorrect result was announced. Similarly, the claims relating to Plaintiff Bronner's role as Editor of an ASA publication relate to the choice of an editor – itself a matter that concerns speech; the claim that only persons who agreed with Defendants were nominated to candidacies for leadership positions relates to the viewpoints of the persons nominated and those not nominated; and the claim that information was withheld from ASA members about the plans of the Individual Defendants as candidates also involves words.

20. But the law is clear that First Amendment rights are not threatened merely because words are spoken by the person engaging in challenged action. As the Supreme Court has held:

> it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated,
> evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be

> analyzed as one regulating the employer's speech rather than conduct. See *R. A. V. v. St. Paul*, 505 U. S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct").

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 62 (2006).

21. An additional relevant legal principle, related in some ways to the principle set forth in *Rumsfeld*, is that

> A director or officer [of a corporation] owes a duty to the corporation to avoid misleading it by making misstatements or omissions and to disclose the material facts known to the director or officer. The interested director or officer also has an obligation to explain the implications of a transaction when he or she is in a position to realize those implications and the disinterested superior or directors reviewing the transaction are not in a position to do so. See Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483 (1918). This disclosure obligation is fundamental to the fiduciary relationship.

Restatement of Corporate Governance (current Draft), §5.02 (Duty of Loyalty).

22. Relatedly, such an officer or director "has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship. Restatement of Agency §8.01. Comment a to that provision explains that "when taking action within the scope of an agency relationship, an agent's duty as a fiduciary is to act loyally for the principal's benefit." And § 8.10 provides that

> An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise.

23. An additional principle relevant here is a corporate officer's obligation to provide information to the corporation. Restatement of Agency § 8.11 states that "An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when

> (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
>
> (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

24. All of these principles are relevant here, because the actions at issue in this case all relate to the governance of the American Studies Association. Each of the Individual Defendants served, during the time period when they committed the acts here at issue, as an officer, director or agent of the American Studies Association. The above principles therefore define the obligations resting on each of the Individual Defendants' shoulders. Whether they complied with them is what matters. But the Court of Appeals has made clear that *why* Defendants did, or did not, fulfill these obligations is completely irrelevant to an analysis of whether Defendants' actions constitute protected expressive activity under the District's SLAPP statute.

25. That is the clear import of the Court of Appeals holding

> that for a claim to "arise from" an act in furtherance of public advocacy, a party's statutorily protected activity must itself be the basis for that party's asserted liability.

259 A.3d at 734. Thus,

> it was not enough to find that the 2013 Resolution constituted such an act [of public advocacy] (as that term is defined) and was related in some way to the non-speech conduct targeted in the plaintiffs' causes of action.

Ibid. (footnote omitted). Because that is the standard,

> the party filing a special motion to dismiss a claim must show that some form of speech within the Anti-SLAPP Act's protection is the basis of the asserted cause of action. A legally objectionable aspect of the speech itself – e.g., that the speech is defamatory or otherwise tortious, or violates a contract's prohibition – therefore must be the subject of the claim or an element of the cause of action.

Id. at 746.

26. The Court of Appeals' opinion's result is clear: for a claim to be vulnerable under the District's SLAPP Act, a legally objectionable aspect of "the speech itself" – something about its *content* -- must be the basis for the claim. The claim must be that Plaintiff is entitled to prevail because of *what* the Defendant said.

27. The American Studies Association was founded in 1951 for the sole purpose of advancing the academic field of American Studies. This singular objective is set forth in the American Studies Association Constitution, as follows:

> The object of the association shall be the promotion of the study of American culture through the encouragement of research, teaching, publication, the strengthening of relations

> among persons and institutions in this country and abroad devoted to such studies, and the broadening of knowledge among the general public about American culture in all its diversity and complexity.

American Studies Association Const. art. I, § 2 (as it read at the time of the events described herein, and at least until January 5, 2016). The American Studies Association served this mission for over sixty years, without straying from its sole purpose. Over that sixty-year period, and owing to the commitment and dedication of its members to their chosen field, the American Studies Association became the foremost academic organization for the study of American culture.

28. In October of 1971, twenty years after its founding, the American Studies Association reaffirmed its commitment to this singular objective when it elected to be bound by the District of Columbia Nonprofit Corporation Act. The Statement of Election to Accept of the American Studies Association ("Statement of Election") provides, "[t]he corporation is organized ***exclusively for education and academic purposes***." Statement of Election ¶ 3, § 4, emphasis added. The Statement of Election further prescribes that the "property, assets, profits and net income of this corporation are irrevocably dedicated to education purposes and no part of the net earnings of the corporation shall inure to the benefit of . . . its directors, officers, or other private persons, except . . . to pay reasonable compensation for services rendered . . . in furtherance of the purposes set forth in this paragraph THIRD." Statement of Election ¶ 3, § 3.

29. Further, the Statement of Election mandates that "No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office." Statement of Election, ¶ 3, § 4.

30. Statement of Election, ¶ 3, § 4, mirrors § 501(c)(3) of the Internal Revenue Code. The Internal Revenue Code limits tax-free status under § 501(c)(3) to entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.**"** Plaintiffs claim, and this Court finds, that failure to abide by this requirement places a non-profit's tax-free status at great risk.

31. The US Campaign for the Academic and Cultural Boycott of Israel, or USACBI, is a United States-based campaign focused on a boycott of Israeli academic and cultural institutions. Plaintiffs allege, and Defendants do not dispute, that USACBI was formed in 2009 by pro-Palestinian activists in the boycott, divestment and sanctions movement (BDS), including Individual Defendants J. Kehaulani Kauanui and Sunaina Maira, and Defendant Maira's husband, Magid Shihade, a Palestinian and at the time, a professor at Birzeit University, to facilitate

in the United States a widespread boycott of Israeli academic institutions. The academic boycott proscribes any academic engagement with Israeli universities, including intellectual discourse, collaboration on research, and even study abroad programs. USACBI also promotes a cultural boycott, including an aggressive public campaign to drive American musicians and artists to cancel concerts and other performances in Israel.

32. USACBI describes its mission as follows:

> Responding to the call of Palestinian civil society to join the Boycott, Divestment and Sanction movement against Israel, we are a U.S. campaign focused specifically on a boycott of Israeli academic and cultural institutions, as delineated by PACBI (Palestinian Campaign for the Academic and Cultural Boycott of Israel).

http://www.usacbi.org/mission-statement/.

33. Plaintiffs claim, and Defendants do not dispute, that Individual defendants Sunaina Maira, Neferti Tadiar, J. Kehaulani Kauanui, and Jasbir Puar are all members of USACBI and serve on either the USACBI Advisory Board (Kauanui, Puar) or the Organizing Collective (Maira), or both (Tadiar).

34. Plaintiffs claim, and Defendants do not dispute, that USACBI planning and decision-making is directed by the Organizing Committee and the Advisory Board (collectively, "USACBI Leadership").

35. It is undisputed that USACBI does not fund its activities out of its own budget. Instead, Plaintiffs claim, USACBI seeks to capture other, ostensibly

neutral organizations such as the American Studies Association and to use their budgets, reputations and resources to advance the goals of USACBI. USACBI is not incorporated, and does not have § 501(c)(3) status with the IRS. Plaintiffs support this claim by citation in ¶44 of the Complaint of the USACBI website, which is publicly available, and the validity of which Defendants have not disputed.

36. Plaintiffs claim that, in 2012, USACBI Leadership – including many of the defendants in this case – decided to focus on the adoption of the USACBI Boycott by the American Studies Association. Defendants do not dispute this. Plaintiffs allege that, among other things, it was agreed that the group should pack the American Studies Association National Council with as many USACBI Leaders and Endorsers as possible. Plaintiffs allege that Defendant Puar, who was then on the American Studies Association's Nominating Committee, would nominate them, solely for the purpose of assuring that the American Studies Association would adopt the USACBI Resolution.

37. Plaintiffs support this claim by reference to an email from Maira stating that, "Jasbir is nominating me and Alex Lubin for the Council and she suggests populating it with as many supporters as possible", and another from Puar stating that, "I think we should prepare for the longer-term struggle by populating elected positions with as [many] supporters as possible." Defendants do not

dispute the accuracy of these quotations from the emails or adduce any other language from the emails suggesting that the statements do not support Plaintiffs' allegations. The Court finds that these emails provide a factual basis for Plaintiffs' allegations regarding Defendants' plan to cause the ASA to adopt a BDS resolution; indeed, Defendants do not appear to dispute that claim.

38. Plaintiffs claim that, once on the National Council, the people so chosen would exploit the entities' resources for the ultimate purpose of causing the American Studies Association to adopt a boycott of Israel in conformity with the USACBI guidelines ("a USACBI Boycott").

39. Plaintiffs allege that, starting with the 2012 election, and continuing for four consecutive years, every candidate the Nominating Committee selected to run for American Studies Association President was a USACBI Endorser and a vocal and active member of the boycott movement. This was in sharp contrast to prior years, because not a single USACBI Endorser had been nominated for American Studies Association President before 2012, at least going back to June 2007. Defendants do not dispute these factual allegations.

40. On the basis of these factual allegations, Plaintiffs claim that, beginning in 2012, voting members of the American Studies Association had no option but to vote for a USACBI Endorser for American Studies Association President, although the voting members could not know that their votes were

facilitating a USACBI Boycott, because, Plaintiffs allege, the candidates consciously chose not to reveal their intentions to promote the boycott.

41. While Plaintiffs' claims in this case arise in part out of this alleged failure to disclose these candidates' views on the BDS resolution, Defendants do not argue in this Court that the candidates ***did*** disclose such information. Instead, their defense against Plaintiffs' claims rests on the legal argument that no such disclosure was required. The Court accordingly finds that no evidence would have been required be submitted at this stage to substantiate this aspect of Plaintiffs' claims. However, the Court also finds as a fact that Plaintiffs have submitted evidence to substantiate this aspect of their claim, including quotations from Defendants' emails to one another which expressly state that they have concluded that the information at issue should not be disclosed.

42. Plaintiffs claim that, when Individual Defendants ran for positions on the Nominating Committee, they chose not to disclose their true agenda: to place as many members of the USACBI Leadership in the American Studies Association National Council as possible. Defendants do not claim that these Individual Defendants did not have such a plan, nor do they claim that they disclosed the plan to those voting on their candidacies.

43. Plaintiffs claim that members of the American Studies Association who voted for these candidates could not have known that the outcome of that

election would be to stack the American Studies Association Leadership with USACBI Leaders and Endorsers, and ultimately, the American Studies Association's adoption of the USACBI Boycott. The evidence that Plaintiffs have put before the Court provides a factual basis for this claim.

44. At ¶69, the Complaint cites an email exchange between Alex Lubin, Defendants Maira and Kauanui, and other USACBI Organizing Committee members, Lubin wrote:

> I would welcome an expanded discussion of whether those of us nominated for the council should mention in our nomination statement our support for BDS I wonder if it is strategic to be self-identified
>
> as a BDS candidate, or whether we should merely mention our support for human rights, academic freedom for everyone, and international law.

Defendant Maira responded:

> I've been thinking this over and like Alex, I'm a bit unsure – personally, I feel it might be more strategic not to present ourselves as a pro-boycott slate. We need to get on the Council and I think our larger goal is support for the resolution, not to test support at this early stage from "outside" the NC.

David Lloyd then replied:

> I would definitely suggest not specifying BDS, but emphasizing support for academic freedom, etc. . . .

Nikhil Singh, who was already on the National Council, disagreed:

> [W]e all know that 'academic freedom' is not good enough.

> My real question: what do we hope to gain from election of pro-BDS members to the American Studies Association national council if we have not made any of the stakes of their election clear to the membership? . . .
>
> I think that not revealing something this important and intentional and then hoping later to use the American Studies Association national council as a vehicle to advance our cause will not work and may well backfire, because it will lack legitimacy.

(SM4308.)

45. Plaintiffs allege that, ultimately, of the three nominees in the discussion, only Alex Lubin actually mentioned BDS in his candidate statement; that this candidate lost the election; that neither Maira nor Kauanui mentioned the possibility of an American Studies Association resolution boycotting Israel; and that both of these candidates won. Defendants do not dispute the accuracy of the quotations set forth in the above-referenced paragraphs of the Complaint. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

46. As a legal matter, Plaintiffs claim that a nominee's commitment to the boycott of Israel and its academic and cultural institutions was a fact that was, and was believed by ASA members to be, material. Defendants dispute this. The Court finds that there is, at least, a genuine issue of material fact about whether a

candidate's views on the Resolution were material and should, therefore, have been disclosed.

47. In this connection the Court notes that the Defendants' own communications among themselves – stating that disclosure of the fact created an increased risk that a candidate making such disclosure might lose – suggest that the information is material and that Defendants knew it was material and indeed decided not to disclose it because it was material.

48. Plaintiffs claim that Defendants had turned the American Studies Association National Council from a body primarily comprised of American Studies professors and scholars, and otherwise diverse members (in terms of gender, ethnicity, national origin, religion, LGBTQ identification, and region, as well as personal interests and viewpoint), to one overwhelmingly comprised of individuals with a singular focus on adopting the USACBI Boycott.

49. Plaintiffs claim that, by manipulating the nominating process, and by covertly packing the American Studies Association Leadership with USACBI Leaders and Endorsers, the Individual Defendants breached their duty of loyalty and caused the American Studies Association to engage in an *ultra vires* action by violating the American Studies Association Constitution, which requires that the nominees presented by the nominating committee "shall be representative of the diversity of the association's membership" (Article VI, sec. 2). The Court finds

that there is at least a material dispute about whether the ASA's mandate of "diversity" includes a diversity of views on issues being discussed in ASA fora, and on which the ASA might take an official position.

50. Plaintiffs claim that the stacking of the American Studies Association Leadership was intentional, and the National Council was aware of it. In support of this they put before the Court a memo produced in discovery stating that Defendants were "working to elect council members who support BDS." (ASA 328.) Defendants do not dispute the accuracy of this quotation from this document.

51. Plaintiffs' Complaint sets forth detailed allegations regarding the steps taken by Defendants to induce the ASA to adopt the BDS resolution, and the alleged bias that infected their efforts – including emails suggesting that their conversations should be hidden so they could not be found later ("I'm not sure about putting this all on email"); admitting that "[w]e did have a strategic purpose in inviting these scholars'; that they were "not offering an equal invitation to other scholars to provide a balanced viewpoint" and acknowledging that their conduct "could be seen as "stacking the deck" in support of adoption of the BDS resolution. Complaint, ¶92, quoting an email produced in discovery, apparently from Defendant Dugan.

52. Plaintiffs' allegations relating to this failure to disclose are substantiated by quotations from ASA documents, publicly available web pages, and emails produced in discovery in this case. Defendants do not dispute the details of these allegations, and in any event, the Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

53. Plaintiffs allege that to a significant extent the Individual Defendants delegated authority over the ASA's actions relating to the BDS Resolution to USACBI. This allegation is substantiated by quotations, the accuracy of which Defendants do not dispute, from Defendants' email traffic. Complaint ¶¶105, 106, and emails quoted there. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations. The Court finds that, Plaintiffs have advanced a substantive claim that the delegation to an outside organization of effective control over when the ASA's boycott would end is, at least, a material fact that should have been disclosed to ASA members. It appears undisputed that it was not disclosed to them. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

54. Plaintiffs allege that Defendants controlled the content of information made available by the ASA to its members regarding the Resolution, and that this control was exercised to exclude communications opposing the Resolution or information suggesting that its adoption was unwise or not in the best interest of the ASA. This allegation is substantiated by quotation from deposition testimony and emails, the accuracy of which Defendants do not dispute. E.g., Complaint ¶¶114, 120-122, The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

55. Plaintiffs claim that Defendants froze the membership roll of the ASA at a particular date with the express intent of preventing some persons, including Plaintiff Barton and others, from voting, because these persons opposed the Resolution. This allegation is substantiated by quotations from deposition testimony and emails. Complaint ¶¶125, 134-136. Defendants do not dispute the accuracy of the Complaint's quotations from these documents or that they took the actions alleged, although they do dispute that they violated the law by doing so The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

56. Plaintiffs allege that the Resolution was not approved by the required fraction of those voting or eligible to vote. At ¶¶139-141, the Complaint sets forth the relevant statistics, none of which is disputed by Defendants. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

57. Plaintiffs allege that Defendants have caused the ASA to breach its own by-laws and IRS provisions barring the ASA from attempting to influence legislation. The allegation that the Defendants engaged in such activity is substantiated by quotations from the ASA website as well as Defendants' email traffic. Complaint ¶¶145, 148; 156-158. Defendants do not dispute the factual predicate for this claim – that is, that they have engaged, and caused the ASA to engage, in this conduct. Rather, Defendants argue that the activity is protected by the First Amendment. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations. The Court further finds that if the ASA's by-laws and IRS regulations prevent the ASA, as a charitable non-profit organization, from attempting to influence legislation, then such attempts are not protected by the First Amendment.

58. Plaintiffs allege that Defendants improperly withdrew funds from the ASA endowment and used the money to fund their political activities, including the efforts referenced above to influence legislation. These allegations are substantiated by documents produced in discovery and emails, quoted in Complaint¶¶167-171. While Defendants dispute these allegations, they do not dispute the accuracy of the statistics and quotations set forth in these paragraphs of the Complaint. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

59. Plaintiffs allege that adoption of the BDS Resolution, and Defendants' expenditure of resources to promote the resolution, have financially damaged the ASA. They substantiate this allegation by reference to the ASA's IRS Form 990 as filed over several years, showing the trend of donations; by emails, as well as by a sworn statement put into the record in this case by Defendant Stephens stating that certain resources were expended in "support for the Resolution." Complaint ¶¶172-191. Defendants dispute Plaintiffs' claim though they do not dispute the accuracy of the evidence quoted in the Complaint. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

60. Plaintiffs allege that Plaintiff Bronner was removed as editor of the Encyclopedia of American Studies, and that the Encyclopedia was effectively destroyed as an asset of the ASA, solely because of what Defendants believed to be Mr. Bronner's belief about the Resolution and his views on the dispute in the Middle East. The allegation is substantiated by quotation from Defendants' emails expressly linking their decisions about Bronner's tenure to his public position on the Resolution. Complaint ¶¶211-216. The Complaint also includes emails in which Defendants acknowledge that their actions with respect to Bronner might be found by a court (and by the ASA's Officers and Directors' Insurer) to have been taken because of his publicly expressed views on the Resolution. Complaint ¶¶218-220.

61. The email discussions about these issues include repeated warnings by Defendants to one another about the danger of having such discussion in emails. Complaint ¶218. The Court finds as a fact that such conduct is material to this case as it reveals Defendants' state of mind and intent. The Court further finds that it is highly unwise for people to send emails on a particular topic suggesting that it is unwise to send emails on that topic.

62. While Defendants dispute these allegations, they do not dispute the accuracy of the quotations set forth in these paragraphs of the Complaint. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to

carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

63. Plaintiffs allege that, while he remained Editor, Plaintiff Bronner was excluded from ASA meetings he was entitled to attend solely because of his political views. Complaint ¶¶221-225. While Defendants dispute these allegations, they do not dispute the accuracy of the quotations set forth in these paragraphs of the Complaint. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

64. Plaintiffs allege that Defendants pretended to have an open competition for the position of Editor of the Encyclopedia, and that Bronner would be eligible to participate in that competition, but that in reality they had no intention of allowing Bronner to be chosen as editor again. This allegation is substantiated by quotations from Defendants' emails to one another. Complaint ¶¶232-238. While Defendants dispute these allegations, they do not dispute the accuracy of the quotations set forth in these paragraphs of the Complaint. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

65. Plaintiffs allege that Defendants effectively destroyed the Encyclopedia as an asset rather than have Bronner continue as Editor. They substantiate this claim by reference to ASA financial documents produced in discovery, Complaint ¶237, and publicly viewable pages of the Encyclopedia itself. Complaint ¶¶238-241. While Defendants dispute these allegations, they do not dispute the accuracy of the statements made in these paragraphs of the Complaint regarding the content of these documents. The Court finds that the evidence Plaintiffs have put before the Court is sufficient to carry Plaintiffs' burden of demonstrating that they have a genuine factual basis for making these allegations.

66. Plaintiffs claim that the Individual Defendants who served as President, members of the Executive Council, and members of the National Council breached their fiduciary duties of candor and loyalty by obscuring their illicit political agenda when seeking elective office at the American Studies Association, and thereafter by subordinating the Association's obligations and purposes to their own personal political interests. The Court finds that there is a material factual dispute about whether these persons intentionally withheld material facts from ASA voters when running for ASA office. If material information was in fact withheld, the Court finds that Defendants would have breached their fiduciary duties to the ASA and to its members by withholding that information from ASA members when seeking ASA office.

67. As noted above, The Court of Appeals has explicitly rejected Defendants' argument that their alleged improper use of ASA funds is immunized because they used the money for speech. Counts II, V, IX (waste) and XII are all based on exactly this kind of abuse, by Defendants, of resources entrusted to the ASA and so by the ASA membership to the individual Defendants when these people were put in positions of authority as ASA officers and directors. Each of those counts alleges that Defendants misappropriated the ASA's resources to advance the individual Defendants' political goals, including spending the ASA's money on public relations, on lobbying, as well as on legal fees in this case in which counsel are paid to represent many Defendants even though the ASA is only one such Defendant and even though the ASA is not even named as a Defendant in many of the counts.[1]

68. Count I alleges that that the Individual Defendants made material omissions and misrepresentations in their communications to ASA members in connection with the Individual Defendants' campaigns to be elected to offices within the ASA. Whether Defendants fully and accurately disclosed material facts

[1] Plaintiffs claim that Defendants not only put their hands into the ASA's cookie jar in for these forbidden reasons: they *broke into* the cookie jar, altering the ASA's by-laws, without notice to the ASA membership, precisely in order to create for themselves the power to invade the ASA's endowment so it could be raided for this purpose. See Complaint ¶¶169-174. Defendants do not dispute that these changes in the by-laws were made as alleged by Plaintiffs. The Court finds that the Plaintiffs have adequately alleged and substantiated their claim that these changes were made for an improper motive and without adequate disclosure to the ASA membership.

is not a public policy issue; it is an antiseptic question of corporate law. See, *e.g.*, *Franchi v. Firestone*, 2021 Del. Chanc. LEXIS 91 (Del. Chanc. May 10, 2021). The only issue in any such dispute about corporate governance is whether all material facts were disclosed. That is not a question about protected speech.

69. Moreover, contrary to Defendants' suggestion, the claim is not that the Individual Defendants were disqualified from serving in positions of trust because of their views. It is instead that the substance of these candidates' views on the Resolution was a material fact that Defendants had a duty to disclose but failed to disclose.

70. The Complaint alleges clearly that these facts were not disclosed and it also alleges that they were material: that is the force of the fact, set forth clearly in the Complaint, that a candidate who accurately disclosed his view on the Boycott resolution lost his election campaign, while the Defendants who held the same view as this man but concealed them from the electorate, won. See generally, Complaint ¶¶ 66-77; 112-116; 117-122. Equally material, allege the Plaintiffs, and equally undisclosed, was the fact that the nominations committee had as an explicit goal (explicit to the committee's members, anyway) that it would "work[] to elect council members who support BDS." ¶74. Plaintiffs allege that any such policy was material and should have been disclosed; but that instead, it was kept a secret.

71. Materiality is a question of fact for the factfinder. *IP Network Sols., Inc. v. Nutanix, Inc.*, 2022 Del. Super. LEXIS 62, at *26 (DE Super. Feb. 8, 2022). Materiality has, more than plausibly, been alleged here.

72. Count two, like count one, focuses on questions of corporate governance, and in particular on whether access to the corporation's assets was allocated fairly. This, again, is a question of corporate governance totally unrelated to the substance of anyone's views, whether Plaintiff or Defendant.

73. The Complaint alleges that Defendants allocated access to the ASA's resources on the basis of the viewpoint of the person seeking such access, and that the expression of a viewpoint is speech for First Amendment purposes (as is the decision not to express a viewpoint). But as noted above, the fact that Defendants were animated by a particular belief about a matter of public interest does not immunize otherwise improper tactics of corporate governance. And whether Defendants did in fact discriminate on the basis of viewpoint is a purely factual question in which the substance of *Defendants'* views plays no role in the court's adjudication of Plaintiffs' claim. Thus, for example, the Complaint alleges that Defendants caused the ASA to pay travel expenses only for people who espoused the pro-BDS opinions, while refusing to do the same for people who had other views. (See, e.g., ¶94, quoting Defendant Marez's statement that "I don't think any scruples about appearing to stack the deck" should affect Defendants' conduct.)

The issue here is no different than it would be if access to a corporation's assets were allocated to favored family members at the expense of other non-family members who were disfavored.

74. Count Two also focuses on such pure corporate governance questions as whether votes were counted accurately and whether the right to vote was denied in breach of the corporation's governing documents. Yet again – this has nothing to do with anyone's speech.

75. Count Three presents the claim that, by nominating only people who would advance their political views, at the expense of the great many who disagreed with those views, Defendants breached the provision of the ASA Constitution which requires that nominees for ASA office "shall be representative of the diversity of the association's membership." Here yet again, prosecution of the claim has nothing to do with suppressing speech – instead, again, the claim is the exact opposite: it is that *Defendants* suppressed speech by not allowing anyone whose views differed from theirs to be nominated (or even heard).

76. Part of Count Two, and all of Counts Four, Six, Seven and Eight, focus on whether the ASA followed its own rules governing the right of members to vote, how votes were counted and what number of votes was required for the Resolution to pass, as well as on the claim – eminently borne out by the evidence – that Defendants manipulated the "debate" within the ASA about the resolution by

expending resources to promote their own view while also expending resources to suppress opposing views, and paying PR firms – with the ASA's money -- to counter such opposing views.

77. Voting questions are the bread and butter of corporation law and they are routinely presented to, and resolved by, the courts. See, e.g., *Blackrock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964 (Del. 2020); *In re Appraisal of Dell Inc.*, 143 A.3d 20 (Del. Ct. Chanc. 2016); *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (DE Ct. Chanc. 1988). Absolutely no speech is at issue in these claims, any more than there was a First Amendment claim in any of the above-cited Delaware corporate cases about corporate voting. Voting rights are allocated by corporate law and the organic and other governing documents of each corporate entity; claims about whether such rights have been breached have nothing whatsoever to do with protected speech. That remains true, the Court of Appeals has held in this case, regardless of the motivation of either the voters or the people whose corporate conduct is said to have violated the Plaintiffs' right to vote. The content of the Resolution being voted on has nothing to do with the merits of these claim, which focus exclusively on how whether the rules governing the conduct of these corporate actions were complied with: whether a quorum was present, how many votes were required for passage of the Resolution, how many votes were obtained, etc.

78. Count Five asserts that the ASA engaged in ultra vires activity by attempting to influence legislation, in breach of an explicit provision in the ASA's organic documents which preclude such activity. The Complaint alleges, and Defendants do not dispute, that BDS Resolution calls for and is an attempt to influence, legislation in Israel. Complaint ¶¶146-149. But the Complaint's allegation relating to ASA's attempt to influence legislation is not limited to the Resolution. The Complaint identifies numerous other instances in which the ASA has attempted to influence legislation, not only in Israel but in the United States. Complaint ¶¶ 153-161. The Complaint quotes not only ASA organic documents such as its Statement of Election, but also internal ASA communications. ¶156, noting that "the American Studies Association is logistically overwhelmed right now" as a result of its efforts to combat proposed state laws regulating barring states from doing business with entities that boycott Israel. (Such legislation would directly affect the ASA itself, as state universities and their employees, including ASA members, would be affected by such legislation.) Similarly, Count Nine invokes the organic provisions creating the ASA, and the tax code provisions defining its status as a non-profit, both of which bar the organization from engaging in lobbying activity. This Count charges that Defendants violated those provisions by raiding the ASA's endowment to fund public relations and lobbying activities that the entity is forbidden to engage in.

79. The ban in engaging in lobbying is also a requirement for maintenance of the ASA's status as a non-profit eligible to receive tax deductible donations; engaging in lobbying threatens that status, which is a clear harm to the Association. The ban on lobbying by tax-exempt non-profits is entirely consistent with the First Amendment, as the Supreme Court has explicitly held. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983).

80. District of Columbia law explicitly authorizes an action by members of a non-profit to challenge ultra-vires activity. If a ban on lobbying by tax-exempt entities can exist – and it must, if only because it is, permissibly, required by the United States tax code – then it has to be enforceable in court like any other limit on the powers of an organization's officers.

81. This claim is not an impermissible attack on any speech. See, *e.g.*, *Family Trust of Mass., Inc. v. United States,* 892 F.Supp.2d 149, 158-89 (D.C. 2012) (enforcing ban on tax exempt entities' engaging in lobbying). Federal law bars tax exempt organizations from both lobbying and campaigning for political candidates. The latter activity, of course, is a core First Amendment protected action; but absolutely no First Amendment issue is raised by the existence of the bar on such activity by tax-exempt corporations. See *Regan*, *supra.* If there is no First Amendment bar to the existence of that provision, then there can be no First Amendment bar to its enforcement.

82. Finally, enforcement of that ban does not relate to the content of speech but simply to whether lobbying activity – of any kind, in any political direction – was engaged in.

83. Counts Ten through Twelve relate to the Defendants' mistreatment of Plaintiff Simon Bronner and the actions they took to cause the ASA to breach its contractual obligations to him. None of these relate to any speech by Defendants, and none seeks any remedy that would suppress or punish speech. These counts charge that the Individual Defendants took action with respect to Bronner not because it was in the best interest of the ASA but because it was in the best interest of the Defendants and would advance their own private political agenda.

84. Even if the BDS Resolution was validly adopted, that does not mean that officers of the ASA acquire the legal right to drive out of the organization any member who disagrees with the Resolution or with Defendants about political issues in the Middle East. The ASA was, during the relevant time period, an academic society devoted, among other things, to "the broadening of knowledge among the general public about American culture in all its diversity and complexity." The Complaint alleges that it would be a breach of the fiduciary duty of an officer, director or agent of the ASA to remove another officer, agent or director from a position of trust within the ASA solely because the person so treated held a political opinion different from the person exercising the authority to

remove. The Court finds that this is a colorable legal claim, and that evidence has been proffered to the Court which make clear that Plaintiff has a valid factual basis for pleading that this is what occurred to Plaintiff Bronner.

85. Count Ten also charges that Defendants destroyed an ASA asset – a well-respected publication -- because its continued existence, with Plaintiff Bronner at its helm, did not suit the personal political preferences of the individual Defendants. This is, once again, a pure question of corporate governance. The claim here is the simple legal claim that a corporate officer breaches his or her fiduciary duty to the company by demoting or firing a successful subordinate, and destroying a corporate asset, simply because the officer doesn't like the employee's politics.

86. This Court's 2019 opinion on Defendants' Motions to Dismiss held that the statute of limitations on Plaintiffs' claims was not equitably tolled because, this Court explained, District of Columbia law requires, without any exceptions, that an action filed in the wrong jurisdiction does not ever stop the running of the statute of limitations clock. Slip op. at 19, citing *Bond v. Serano,* 566 A.2d 47, 49 (D.C. 1989).

87. After this Court's decision was issued in this case, the Court of Appeals decided *Neill v. D.C. Public Employee Relations Board,* 234 A.2d 177

(2020), which made clear that no such rigid rule remains in force in this jurisdiction. There the Court of Appeals explained that

> The appropriateness of equitable tolling "is a fact-specific question that turns on balancing the fairness to both parties." Brewer v. District of Columbia Office of Emp. Appeals, 163 A.3d 799, 802 (D.C. 2017) (internal brackets omitted). "[W]hether a timing rule should be tolled turns on" a variety of factors, such as the benefitting party's vigilance, the presence of "unexplained or undue delay[,]" whether "tolling would work an injustice to the other party," and "[t]he importance of ultimate finality in legal proceedings[.]" Id.

88. In this case, the federal trial court held, not once but twice, that the amount in controversy requirement *was* satisfied: it held:

> The Court concludes that it has both subject-matter and personal jurisdiction. It has subject-matter jurisdiction because Plaintiffs have shown, beyond the low standard of legal possibility, that they could recover more than $75,000 if they prevailed.

Bronner v. Duggan, 249 F.Supp.3d 27, 36 (D.D.C. 2017).

89. This Court takes judicial notice of the fact that the docket of the federal action shows issuance by the court in that action of second Order, on July 6, 2018, “confirming court’s subject matter jurisdiction.”

90. This Court takes judicial notice that the federal version of this case was dismissed for lack of subject matter jurisdiction on Defendants’ third attempt to get the case thrown out on that ground, on February 4, 2019. The Complaint before this Court was filed on March 15, 2019. Defendants do not claim that the

five weeks between federal court dismissal and the institution of the action in this Court suggest that Plaintiffs were dilatory.

91. The Court of Appeals in *Neill v. DC Pub. Empl. Rels. Bd.*, 234 A.3d 177 (2020) held that it was the plaintiff's diligence that played the largest part in determining whether a statute of limitations should be equitably tolled. See *Neill*, at 186, pointing to evidence of "unbroken effort" by the Plaintiff to file timely. Plaintiffs in this case demonstrated as much diligence as they conceivably could, and this standard is therefore satisfied. Once the federal trial court had held that it did indeed have subject matter jurisdiction, because the amount in controversy had been satisfied, there was nothing more that the Plaintiffs could have done to determine whether this was correct. They couldn't very well appeal this interlocutory decision, on which they had prevailed.

92. This is, it cannot be seriously disputed, a very unusual set of facts. Moreover, Defendants have argued that equitable tolling can only apply when there had been a change in the law between the time the case was initially filed and the time it was filed in the second court. But here there had been a change in the law: there had been a change in the law of the case, and it was only because of that change that Plaintiffs went from having secured federal jurisdiction to finding themselves without it.

93. For the foregoing reasons, this Court reverses its previous holding that the statute of limitations had run on Counts III, IV, V, VI, VII and VIII. As this Court had previously held that these counts otherwise state valid claims, the dismissal of those counts is reversed and they are reinstated.

Respectfully submitted,

/s/*Jerome Marcus*

Jerome M. Marcus
Admitted pro hac vice
Lori Lowenthal Marcus
Admitted pro hac vice
THE DEBORAH PROJECT
P.O. Box 212
Merion Station, PA 19066
VOICE: 610 664 1184
FAX: 610 664 1559
[redacted]

/s/*Jennifer Gross*

Jennifer Gross (DC Bar No. 1003811)
Benjamin L. England & Associates, LLC
810 Landmark Drive, Suite 126
Glen Burnie, MD 21061
Phone: (410) 220-2800
[redacted]

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served via the Court's electronic filing service this 1st day of December, 2022 to the following:

Maria C. LaHood
Astha Sharma Pokharel
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
[redacted]

Mark Allen Kleiman
KLEIMAN / RAJARAM
2907 Stanford Avenue
Venice, CA 90292
[redacted]

Richard R. Renner
KALIJARVI, CHUZI, NEWMAN & FITCH, PC
818 Connecticut Ave., NW, Suite 1000
Washington, DC 20006
[redacted]

Thomas C. Mugavero
WHITEFORD, TAYLOR & PRESTON L.L.P.
3190 Fairview Park Drive, Suite 800
Falls Church, Virginia 22042
(703) 280-9260
[redacted]

Jeffrey C. Seaman
WHITEFORD, TAYLOR & PRESTON L.L.P.
111 Rockville Pike
Suite 800
Rockville, MD 20850
(301) 804-3610
[redacted]

/s/ Jennifer Gross

_____

Jennifer Gross