DISTRICT OF COLUMBIA COURT OF APPEALS

LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, JOHN F. STEPHENS, STEVEN SALAITA, and THE AMERICAN STUDIES ASSOCIATION,

Defendants-Appellants,

v.

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES KUPFER, and MICHAEL BARTON,

Plaintiffs-Appellees.

Case No. 19-cv-1222

APPELLEES' BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction over Defendants-Appellants' ("Defendants") interlocutory appeal of the Superior Court's denial of Defendants' special motion to dismiss under the Anti-SLAPP Act ("Anti-SLAPP Motion") under the collateral order doctrine. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1220 (D.C. 2016).

Because there is no final judgment in this case, and no other decisions of the Superior Court in this case fall under an exception to the final judgment rule, this Court has jurisdiction to review the anti-SLAPP decision, ***only***. The brief that Defendants submitted to this Court argues for reversal of numerous decisions that were raised and decided under Rule 12(b)(6). The Superior Court's denial of Rule 12(b)(6) motions are not final and cannot be appealed at this stage of the case.

This Court also lacks jurisdiction over Defendants' request for an award of attorney's fees under the Anti-SLAPP statute. The Superior Court denied their Anti-SLAPP motion in its entirety; consequently, Defendants did not file a motion for attorney's fees, the Superior Court did not consider a fee award, and there is no order granting or denying attorney's fees. The Court of Appeals therefore lacks jurisdiction, as there is no Superior Court order on fees for the Court of Appeals to review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court correctly find that the Professors proffered evidence sufficient to satisfy the "likelihood of success" standard applied under the second prong of the Anti-SLAPP Act?

2. Did the Superior Court err when it found that the Anti-SLAPP Act is applicable to the Professors' claims, which arise from breach of corporate by-laws, misappropriation of corporate funds, withholding of information material to a vote by members, secretive changes to the American Studies Association's ("ASA") bylaws, and the removal of a successful and long-term editor of an ASA publication, resulting in the termination of that publication (a valuable asset to the ASA financially), although the claims do not arise from speech, expression, or expressive acts?

3. Should this Court dismiss Defendants' arguments seeking interlocutory appeal of non-final decisions, including the Superior Court's denial of Defendants' motions to dismiss pursuant to Rule 12(b)(6), where the rulings are not final and are not necessary to resolve – or even related to – the issues on interlocutory appeal?

STATEMENT OF FACTS

Drs. Simon Bronner, Michael Rockland, Michael Barton, and Charles Kupfer ("the Professors") are professors of American Studies and current or former

long-time members of the ASA. Dr. Bronner and Dr. Rockland are lifetime members of the ASA and recipients of the ASA's high honor, the Turpie Award. Dr. Bronner was the editor of the *Encyclopedia of American Studies* ("the *Encyclopedia*") and an officer of the ASA and a member of the National Council, by virtue of his role as editor of one of the ASA's flagship publications.

The ASA is academic association promoting the academic field of American Studies. Defendants Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, J. Kehaulani Kauanui, Jasbir Puar, John F. Stephens, and Steven Salaita are ASA members who have served on the ASA National Council or in other leadership positions. Each was heavily involved in pursuing the adoption of a boycott of Israeli colleges, universities, and other academic institutions ("the Academic Boycott"). All are leaders of the U.S. Academic and Cultural Boycott of Israel, or USACBI. Most serve on the USACBI Organizing Collective.

Beginning in 2012, Defendants sought to co-opt ASA's National Council and key ASA committees. The intention – well documented by Defendants' own documents – was to have the ASA to officially endorse a boycott of Israeli academic institutions consistent with the Academic Boycott organized, promoted and endorsed by USACBI.

Documents produced by Defendants, and quoted at length in the complaint, reflect email conversations where Defendants discussed running for seats on the

National Council solely to force the ASA to adopt the Academic Boycott – explicitly as Defendant Puar's request – and, chillingly, discussing amongst themselves whether or not to reveal that their intentions to ensure that the ASA adopted the Academic Boycott.

Documents produced by Defendants reveal that Defendant Puar, who sat of the Nomination Committee, manipulated the nominations such that only those who strongly supported the Academic Boycott were nominated to run for President of the ASA. Nominations were made such that members of USACBI's leadership – though a clear minority in the membership of the ASA – were placed to take over the National Council, even if they had no previous involvement in the ASA; in fact, one of the defendants was even planning to go abroad six or seven months into her three-year term, and knew she would not be involved with the ASA once her vote on the Academic Boycott, as a National Council member, was counted. The entire nomination process was manipulated to maximize the number of persons on the National Council who actively sought and promoted boycotting Israel.

Defendants ensured that only those intending to adopt the Academic Boycott were nominated to sit on the National Council; meanwhile, these nominees withheld from the ASA general membership that primary goal was to see the ASA adopt the Academic Boycott.

Defendants expended substantial efforts and resources to ensure that the ASA would adopt, promote, and sustain the Academic Boycott. Dissenting opinions and information unfavorable to the adoption of the Academic Boycott were suppressed. When Defendants were unable to secure adoption of the Academic Boycott by the National Council a compromise providing for a vote of the entire membership was made – but steps were also taken to ensure a favorable outcome for Defendants.

Defendants froze the ASA's membership rolls to prevent members adverse to the Academic Boycott from voting. An email exchange between Defendants John Stephens and Sunaina Maira reflects Defendant Stephens' view of the best date to freeze the rolls to minimize the number of votes opposing the Academic Boycott and maximize the number of votes in favor. An email from Defendant Stephens to Defendant Maira, quoted in the complaint, states: "for now the risk is to cut off supporters, no opponents. Once a vote is announced, the risk shifts dramatically in the other way." Defendant Stephens is an employee of the ASA, whose members (including the Professors) hold diverse views. His involvement – confirmed in correspondence that is cited and quoted in the complaint – is an indefensible breach to the ASA's wide membership.

When the members of the ASA finally voted on the Academic Boycott in November of 2013, Defendants claimed victory – but, in fact, they had lost the

vote. Less than the two-thirds required to pass a resolution voted in favor of the boycott. ASA Bylaws, Art. XI, sec. 3; and of most of the ASA members did not vote at all. Only 21% of the ASA's 3,853 actually voted for the measure. To pass with 1,252 voting, 835 would need to vote in favor.

Following the adoption of the Academic Boycott, the ASA's financial health declined substantially. The ASA incurred substantial expenses related to the Academic Boycott, including hiring an additional employee to handle the workload associated with the ASA's public position, as well as legal and public relations costs.. Meanwhile, revenues fell. The complaint explains in detail the response from the academic community; the reputation of the organization was shattered. Revenues fell. The ASA's 990s reflect the nonprofit operating at a great loss for each of the past three fiscal years; prior to the adoption of the Academic Boycott, and going back as far as 2002, the ASA only reported expenses greater than revenues in one year – 2008, during the Great Recession.

To cover the increase in expenses and decline in membership revenue resulting from the Academic Boycott, ***Defendants invaded the ASA's Trust and Endowment fund***. Because the ASA Bylaws did not allow for annual withdrawals from the Trust Fund of the size required, Defendants once again changed the Bylaws.

Beginning in fiscal year 2015 and continuing at least through the fiscal year

ending in July 2017, ***Defendants' Academic Boycott was funded with annual withdrawals of over $100,000 per year from the ASA Trust Fund***. Prior to the adoption of the Academic Boycott, and going back at least until 2002, there were no withdrawals from the fund. Documents produced by Defendants in discovery show that the withdrawals were made to cover the increase in expenses arising from the Academic Boycott, and a plan to continue annual withdrawals of over $100,000 per year.

According to the ASA's own 990s, hundreds of thousands of dollars were withdrawn from the fund. ASA's own documents, cited in the complaint, clearly state that these funds were withdrawn to pay for expenses related to the Academic Boycott, and – though Defendant's opening brief claims otherwise, these expenses cannot be attributed to this lawsuit. The expenditures started long before the Professors filed this suit. (They also far exceed reasonable costs for defending this litigation.)

STATEMENT OF THE CASE

On April 20, 2016, the Professors filed a complaint in the federal district court alleging both direct and derivative claims for breach of fiduciary duty, *ultra vires* acts, waste, breach of the D.C. Nonprofit Corporations Act, and breach of contract. On June 23, 2016, the Professors filed the First Amended Complaint ("FAC"). The amendment was made "as a matter of course" pursuant to Rule

15(a)(1)(b) of the Federal Rules of Civil Procedure. The FAC brought the same claims and allegations as the original complaint, including the exact same six counts.

In November of 2016, at the first annual meeting after the filing of the original complaint, the ASA's National Council changed the ASA Bylaws to revoke the provision of the bylaws that granted officer status and a place on the National Council to the editor of the *Encyclopedia of American Studies.*

The only person affected by that change was Dr. Bronner, but he was not informed. The change in the ASA Bylaws was kept very quiet – Dr. Bronner was not even informed after the change was made. As planned – and Defendants do not deny this – by the time the district court ruled on the FAC, Professor Bronner had been stripped of standing to bring new derivative claims or to amend the derivative claims in the FAC. Defendants actually rely on this change in their briefs, proud to show that none of the Professors are officers or directors (that is, National Council members) that can bring a derivative claim.

Defendants moved to dismiss the FAC on July 7, 2016. Defendants' first argument was that the district court could not exercise subject matter jurisdiction over the case because the amount in controversy did not exceed $75,000, the minimum required for diversity cases under 28 U.S.C. § 1331. The district court rejected Defendants' argument, stating: "Plaintiffs' claims plainly meet the low

standard for establishing a sufficient amount in controversy." *Bronner v. Duggan*, 249 F. Supp. 3d 27 (D.D.C. 2017)). The district court described not just monetary damages, but also the injunctive and declarative relief sought, and the FAC's allegations of "improper expenditure of ASA funds" and "attempt[s] to appropriate the assets and reputation of the ASA." *Id*.

Defendants were required to respond to the Professors' discovery requests in the summer of 2017. The discovery disputes were extensive, but, months after the documents were due, Defendants made the first large production and the results were shocking. In November 2017, the Professors moved to amend the complaint add additional claims and defendants. A new complaint was drafted, and a motion to amend was filed.

Defendants opposed the motion to amend; the district court granted the motion. *Bronner v. Duggan*, 324 F.R.D. 285 (2018). In the same decision, the district court directed the parties to submit supplemental briefs addressing the following question: whether D.C. Code § 29-406.31(d) immunizes the defendants from liability for monetary damages, and, if so, whether the amount in controversy in this case exceeds the minimum required for jurisdiction.[1]

[1] D.C. Code § 29-406.31(d) provides: "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: (2) An intentional infliction of harm[.]

The Professors argued that Defendants were not immunized by § 29-406.31(d), because their actions, as alleged, constituted "intentional infliction of harm," an explicit exception to § 29-406.31(d). In support of this argument, the Professors' supplemental briefs included explicit and exact references to information produced in discovery evidencing that Defendants acted to adopt and promote the Academic Boycott with knowledge that their actions would likely harm the ASA. Those references are also set forth in the Superior Court complaint.

Agreeing with the Professors, the district court found that D.C Code § 29-406.31(d) did not immunize Defendants from liability for monetary damages, as the SAC alleged intentional infliction of harm, invoking the second exception to the exculpation statute. *Bronner v. Duggan*, 317 F. Supp. 3d at 293–94. The District Court discussed and described, in detail, the findings underlying the ruling. *Id*.

Three years into the litigation, the federal district court revisited its initial finding in 2017, and its secondary finding in 2018 following the supplemental briefing, and found in 2019 that although the Professors' claims have merit, but do not satisfy the amount in controversy requirement for diversity jurisdiction in federal court. The federal district court stated:

> Having reviewed the briefing, the Court concludes that Plaintiffs may have meritorious claims arising from their individual injuries as ASA members.

Bronner v. Duggan, 364 F. Supp. 3d 9, 12 (D.D.C. 2019). Later in the decision, the federal court stated again,

> [T]he Court concludes that it lacks subject matter jurisdiction under 28 U.S.C. § 1332(a). [Citation] Plaintiffs have raised allegations and presented evidence indicating that they may have meritorious claims, but they must assert those claims before the proper tribunal.

Bronner v. Duggan, 364 F. Supp. 3d 9 at 22–23). Subsequently, the Professors filed in the Superior Court. Defendants moved to dismiss on numerous grounds, under both Rule 12(b)(6) and the Anti-SLAPP Act. All were rejected, except for Defendants' arguments that the statute of limitations expired while the case was pending in the federal district court; the Superior Court dismissed the breach of contract and ultra vires claims on statute of limitations grounds, but also found that other claims – including the breach of fiduciary duty and waste claims, *inter alia* – were preserved by the discovery rule, and that ongoing injury and damages were recoverable also recoverable.

The Superior Court rejected Defendants' Anti-SLAPP Motion, and Defendants sought this interlocutory appeal.

SUMMARY OF ARGUMENT

This is an interlocutory appeal of the Superior Court's denial of Defendants'

Anti-SLAPP motion. (Order at 35-37.) The Superior correctly found that the Professors' claims are "likely to succeed," for purposes of the Anti-SLAPP Act, D.C. Code § 16-5502(b). The Act requires a showing that the plaintiffs' claims are likely to succeed. The Professors have proffered substantial evidence from discovery, far more than is usually possible so early in a case, because they had the benefit of discovery in the federal action. Although Defendants do not actually argue that the Professors do not have evidence sufficient to satisfy to show that they are likely to succeed, Defendants do argue that the Superior Court erred because it did not demand the Defendants' actual documents – documents that Defendants marked confidential and refused to even allow the Superior Court to see.

The Professors did proffer those documents – all listed by bates number in the complaint, and also quoted at length. That proffer satisfies the second prong of D.C. Code § 16-5502(b).

The Professors further argue, below, that the Anti-SLAPP Act does not apply to this action, as the first prong is not satisfied. The claims brought by the Professors do not arise from speech, expressions, or expressive acts , as the statute requires.

ARGUMENT

The Superior Court correctly found that by filing this case Plaintiffs did not

violate the District of Columbia's law barring Strategic Litigation Against Public Policy. (D.C. Code § 16-5502.) That is so, first, because – as recognized now by both state and federal courts – Plaintiffs' claims have merit and are supported with evidence. *See, e.g., Bronner v. Duggan*, 364 F. Supp. 3d 9, 12, 22–23 (D.D.C. 2019). The court below correctly held that Plaintiff has causes of action that state valid legal claims, denying many of Defendants' arguments to dismiss under Rule 12(b)(6). (Order at 16-34.)

The Anti-SLAPP Act is designed ***only*** to "weed[] out meritless litigation," by which this Court meant "a suit that is filed, not to succeed" – because it is clear that the case will *not* succeed – but instead "to 'prevent or punish' the defendant's speech or advocacy." *Competitive Enter. Inst. v. Mann,* 150 A.3d 1213, 1235 (D.C. 2016). The trial court below, like the federal court that dismissed this case after concluding that the federal amount-in-controversy requirement was unmet, correctly found that because Plaintiffs' claims have merit, this is not a "meritless" case. (Order at 35-36.) Therefore, Anti-SLAPP Act does not apply. That holding is clearly correct and should be affirmed.

The trial court's holding is correct for the additional reason that the conduct Defendants have been sued for has nothing to do with speech, and everything to do with breaches of corporate by-laws, conversion of corporate funds, and good old-fashioned fraud. None of these activities constitutes speech, expression or

expressive activity, and the Anti-SLAPP Act thus does not protect Defendants' conduct at issue in this case. Even the fraud is no less actionable here, as it relates to misrepresentations and omissions in connection with the election of corporate officers, than it would be in any other contest for corporate control. The same is true for Plaintiffs' claims that Defendants improperly took money belonging to the American Studies Association and spent it to advance their own, rather than an appropriate ASA purpose. Indeed, one might, after reading Defendants' brief and those of their amici, make the mistake of believing that Plaintiffs' complaint seeks judicial resolution of the Middle East conflict, or sues the Defendants for speaking about that conflict or its participants. But any fair reading of the Complaint makes clear that plaintiffs have not sued Defendants for taking positions on foreign policy issues or for any other speech or expression. Plaintiffs sued Defendants because Defendants committed conduct that is clearly actionable in any other corporate context. Defendants are not immunized from DC corporation and tort law simply because they wanted to use the improperly taken money, and the fraudulently acquired status as ASA officers, to fund and promote their own speech about issues important to them.

In addition to challenging the trial court's Anti-SLAPP ruling, Defendants have sought to force this Court to address numerous other issues that appeared nowhere in their Notice of Appeal, and that indeed could not be appealed at this

stage of the case, including the entire trial court decision on all issues adverse to them. Defendants' brief also asks this Court to address numerous issues that they did not raise in any way below. As we show in greater detail below, these efforts are clearly improper. This Court need not, and indeed cannot, reach these issues.

I. THE SUPERIOR COURT CORRECTLY FOUND THAT THE PROFESSORTS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS.

As discussed above, the Anti-SLAPP Act only applies to ***frivolous*** claims based on the defendant's speech, expression or expressive conduct. To ensure that only frivolous claims are subject to dismissal under the Act, the second prong of the special motion to dismiss statute provides that a plaintiff may defeat an Anti-SLAPP motion by "demonstrat[ing] that the claim is likely to succeed on the merits[.]" D.C. Code § 16-5502(b). Here, the Superior Court found that the Professors successfully made that showing: "Plaintiffs have demonstrated that a number of their claims have merit. Plaintiffs have successfully demonstrated that they have evidence suggesting that there may have been a breach of fiduciary duty and that the resolution was improperly passed, costing the ASA to lose membership and funds." (Order at 35-36.)

This finding was clearly correct. The Unredacted Complaint proffers over 43 documents produced by Defendants in this litigation, each cited by Bates number. The Unredacted Complaint also includes numerous direct quotations

from those documents, all properly cited by reference to Defendants' production by Bates Number. Plaintiffs have thus supported their Complaint with numerous documents proffered in support of every claim, that are well in excess of the quantum required to defeat an Anti-SLAPP motion.

Defendants did not and still do not argue otherwise; they have not identified a single claim that is not supported by the evidence cited in the complaint, cited by Bates number, and direct quotations from those documents. Instead, Defendants' argument is carefully worded to suggest that the Superior Court erred because it did not require the Professors to ***produce*** the actual documents. This is the height of chutzpah: the documents Defendants complain have not been filed in court are all documents that ***Defendants designated confidential***, and that Defendants went to great lengths to prevent the Professors from even discussing in the trial court. Indeed, Defendants objected to Plaintiffs' filing even the Unredacted Complaint at all – even under seal. (The trial court overruled that objection and permitted the filing.) For Defendant to now, argue that the Superior Court erred by not requiring the actual documents, when for months the same Defendants argued that the Professors would violate a confidentiality order if they filed the Unredacted Complaint (even under seal) – even while Defendants filed their Anti-SLAPP motion – is, to put it mildly, disingenuous.

A. The Superior Court Did Not Err When it Found that the Professors Satisfied the Likelihood of Success Standard Without Requiring them to Submit Copies of Defendants' Confidential Documents.

Defendants' argument that the Superior Court erred when it found that the Professors demonstrated that they are "likely to succeed on the merits" does not mention the evidence cited and quoted in the complaint. Indeed, this section of Defendants' Brief – barely a full page long – does not even argue that the Professors do not have sufficient evidence to support every one of their claims. (*See* Defs.' Brief at 19-20.) Instead, Defendants argue that the Superior Court erred "by failing to require plaintiffs to present evidence to overcome defendants Anti-SLAPP motion." (Defs.' Brief at 19.) They further claims that "Plaintiffs have not proffered any evidence . . . although they purported to quote excerpt from e-mails and other documents in their complaint, they did not actually present a single document." *Id*.

The argument fails for Number of independently dispositive reasons. First, the Professors did not simply "***purport***[] to quote excerpts from emails and other documents in their complaint[.]" *Id*., emphasis added. The Professors' complaint was filed with the court and served on the parties. No one has to guess whether the complaint actually quotes and cites 43 documents 63 times, or if Plaintiffs only purport this to be so, as the complaint is part of the official record in this case. Defendants have the complaint, the Superior Court has the complaint, and this

Court has the complaint, including the direct quotations from Defendants' documents.

Second, Defendants never suggested that the quotations their documents appearing throughout Plaintiff's Complaint were inaccurate in any way. In the absence of any claim of inaccuracy, what reason would there have been for Plaintiffs to actually file the documents? And if there had been such a claim Plaintiff would have been – and remain now – fully capable of putting the documents into the record. Defendants' failure to raise these issues in the trial court defeats their argument here.

Third, there is no requirement that a plaintiff must produce hard copies of the actual documents to defeat an Anti-SLAPP motion. Indeed, Defendants state themselves that "Plaintiffs must produce '***or proffer*** . . . evidence that supports the claim.'" (Defs.' Brief at 19, quoting *Fridman v. Orbis Bus. Intel. Ltd.*, No. 18-CV-919, 2020 WL 3290907 at *7 (D.C. June 18, 2020.). To proffer is to offer; neither the statute nor the case law require an actual production of documents. *Proffer*, BLACK'S LAW DICTIONARY (4th ed. 2011)("to offer or tender (something esp. evidence) for immediate acceptance"). With the citation of forty-three of the Defendants' own documents, including numerous direct quotations, and a total of sixty-three citations, all cited by Bates number, the Professors clearly offered – and therefore proffered – overwhelming evidence in the complaint itself.

B. Defendants' Argument that the Superior Court Erred When it Did Not Require the Professors to Submit the Actual Documents to the Court Must Fail Because Defendants Themselves Prevented Plaintiffs From Submitting Them.

Defendants have gone to great lengths to conceal the documents they produced in discovery from the public and even from the Superior Court. As discussed in more detail in the Professors' Opposition to Defendants' Motion to File Under Seal, Defendants abused the Confidentiality Order issued by the federal district court where this case was previously pending by designating as confidential nearly every document they produced.

When the Professors filed the case in Superior Court after the dismissal of the federal action for lack of jurisdiction, they filed a redacted a version of the complaint in the public docket, and filed a motion for leave to file the unredacted version of the complaint under seal.[2] In an attempt to prevent the Professors from filing the Unredacted Complaint at all, Defendants opposed the motion to file it

[2] Many of the quotations and citations to Defendants' documents were not redacted in the public version, and they did not need to be because Defendants did not designate their documents confidential until after the Professors filed the Second Amended Complaint ("SAC") in the federal action on the public docket. Defendants never moved for the SAC to be withdrawn from the public docket and refiled under seal, so it remained public. Consequently, the pages of the complaint filed in Superior Court that are identical to the SAC include no confidential information. However, because there are new allegations in the superior court complaint, the evidence quoted and cited in support of those allegations is not yet public. These parts of the Superior Court Complaint were redacted from the publicly-filed complaint.

under seal. Defendants also opposed the Professors' motion to modify the protective order in the federal court to include Judge Rigsby and the Superior Court action. They also argued to both the Superior Court and the federal district court that the Professors' counsel had already violated the Confidentiality Order, simply by preparing the Unredacted Complaint – even though no one but the Professors' counsel had seen it.

Defendants took the outlandish position that Plaintiffs' filing the Unredacted Complaint – even under seal – would violate the Confidentiality Order ***because it would reveal to Judge Rigsby quotations from and citations to their documents. Having taken this position, they cannot now argue that Judge Rigsby erred in not requiring the Professors to provide him with the documents themselves.***

Even after the federal district court granted the Professors' motion and modified the confidentiality order to include Judge Rigsby and the superior court action, Defendants ***still*** refused to consent to filing the Unredacted Complaint under seal. They then filed another brief opposing the motion for leave to file the Unredacted Complaint under seal, arguing, again, that the Unredacted Complaint could not be filed at all.

By the time the Superior Court granted the motion to file under seal, Plaintiffs had filed six briefs in three motions in two different courts, and two months had passed. Defendants had already filed the Anti-SLAPP Motion. The

Motion did not identify any particular allegation that the Professors failed to support with evidence, and did not challenge the accuracy of any quotation in that pleading from Defendants' documents. Moreover, they did not argue that the Court must require the Professors to submit the actual documents, as they argue now. After two months of effort to prevent the Superior Court from seeing the Unredacted Complaint, they would not have suggested that the Superior Court should see the documents the Unredacted Complaint relies on. Nor should they be able to argue today that the Superior Court erred by not requiring the Professors to file them.

C. Defendants Never Argued that Any Particular Evidence Required to Satisfy the Likelihood of Success Standard Was Lacking.

Defendants' Anti-SLAPP Motion did not identify any type of evidence that the Professors were required but failed to proffer. Indeed, the entirety of the motion's discussion of the second prong of the Anti-SLAPP Act, is limited to four short paragraphs, and the arguments offered to show that the Professors are not "likely to succeed on the merits" are limited to the procedural issues raised by in the Rule 12(b)(6) motions. *See* Original Defendants' Motion to Dismiss Under Anti-SLAPP Act ("Anti-SLAPP Motion") at 10. Not having raised any actual argument pertaining to a shortcoming in the Professors' proffer of evidence, Defendants cannot do so for the first time on appeal.

D. Defendants' Argument that the Superior Court Erred by Not Detailing a Claim-by-Claim Analysis in the Order Fails and Is Irrelevant.

Although Defendants did not include a "claim by claim" analysis in their Anti-SLAPP motion, they now argue that the Superior Court erred by failing to detail a claim-by-claim analysis in the Order. Defendants offer no support for this argument. This Court has never held that the Superior Court must conduct a "claim by claim" analysis of issues that the movant never raised. Nor do Defendants offer any case law requiring a superior court to analyze an issue not briefed by the parties in *any* type of case.

Defendants' Brief quotes from the statute, but the language they cite is of no help to them. Of course, the statute allows for a defendant to challenge only a subset of claims under the Anti-SLAPP Act, and also provides for dismissal in part. But where the statute refers to "the claim at issue" and later, "the claim," it is referring to claims that are "at issue" because they were raised by the movant. The statute does not require or suggest that the Superior Court must do the Defendants' work, by reviewing each claim and looking for lapses in the proffer of evidence that Defendants did not identify or argue.

Defendants' citation of *Mann* works against their argument, not for it. (Defs.' Brief at 16.) The Defendants in *Mann* submitted a 72-page Motion to Dismiss Under the Anti-SLAPP Act that argued with specific detail exactly why

each claim, independently, should be dismissed.[3] Those specific arguments were raised in the movants' motion, addressed by the Superior Court, and are exactly the same arguments that were later reviewed in this Court's decision in *Mann*. That so-called "claim by claim" review was no more than the usual review of decisions to dismiss on two separate claims, both argued extensively by the movant and both decided by the Superior Court on the merits of those arguments. Nothing in the *Mann* decision requires the Superior Court to conduct a detailed analysis of points that were never made by the movant.

However - even of this Court finds that the Superior Court erred because it did not present a claim-by-claim analysis in the order, the Court should remand to the Superior Court, such that the parties can present a claim-by-claim analysis in briefs for the Superior Court to consider.

II. DEFENDANTS' RULE 12(B)(6) ARGUMENTS CANNOT BE REVIEWED ON INTERLOCUTORY APPEAL AND ARE NOT RELEVANT TO THE APPEAL OF THE ANTI-SLAPP MOTION.

A. The Court of Appeals Lacks Jurisdiction to Review the Rule 12(b)(6) Rulings.

Defendants' Brief does not include "an assertion that the appeal is from a

[3] In sharp contrast, even in this Court Defendants' argument on prong two's "likelihood of success" is less than two full pages – and contains no "claim by claim" analysis at all.

final order or judgment that disposes of all parties' claims, or information establishing this court's jurisdiction on some other basis," as Rule 28(a)(5) requires. Defendants could not have made such an assertion, as the Court of Appeals does not have jurisdiction to hear most of the arguments Defendants raise.

The bulk of Defendants' Brief argues that this Court should reverse the Superior Court's decisions denying Defendants' arguments to dismiss claims under Rule 12(b)(6) – not the Anti-SLAPP Act. *See* Defs.' Brief at 21-48 ("[The Superior Court] concluded that the remaining claims met the threshold set by Rule 12(b)(6) of the Superior Court Rules. This result was error." *Id*. at 22). Indeed, over 70 percent of the "Argument" section of Defendants' Brief is specific to the Superior Court's Rule 12(b)(6) decisions. The Professors moved to strike those pages from Defendants' Brief.

As the Motion to Strike explains, this Court lacks jurisdiction to hear appeals of the Rule 12(b)(6) rulings, as there is no final judgment in the case, and the Rule 12(b)(6) rulings do not fall under any exception to the final judgment rule.

The jurisdiction of the D.C. Court of Appeals is primarily set forth in D.C. Code, which provides jurisdiction over ***final orders*** of the Superior Court. D.C. Code §11-721(a)(1). Where there is no final order or judgment, interlocutory appeal is available only where one of a small number of explicit exceptions apply – none of which apply here. *West v. Morris*, 711 A.2d 1269, 1271 (D.C. 1998)

("[§11-721] bars an appeal unless the order appealed from disposes of all issues in the case; it must be final as to all the parties, the whole subject matter, and all of the causes of action involved.").

Where there is no final order and the exceptions listed in §11-721 do not apply, there is no appeal as of right, and there can be no appeal as of right until a final order is issued.[4] The Court of Appeals thus has no jurisdiction, unless the prospective appellant seeks, and is granted, a permissive appeal under the collateral order doctrine. *Jones v. Am. Express Co.*, 485 A.2d 607, 608 (D.C. 1984) (dismissing for lack of jurisdiction where there is no final judgment); *Paden v. Galloway*, 550 A.2d 1128 (D.C. 1988) (same).

The collateral order doctrine is an extremely narrow exception to the finality rule that applies only in a very limited set of circumstances. *See Meyers v. United States*, 730 A.2d 155, 157 (D.C. 1999); *Bible Way Church v. Beards*, 680 A.2d 419, 425 (D.C. 1996). The denial of the Anti-SLAPP special motion to dismiss in this case is appealable as an interlocutory order under the collateral order doctrine, pursuant to this Court's decision in *Mann*. That decision is specific to rulings on

[4] There is a procedure that allows for the Superior Court to sever one or more claims or parties and issue a final judgement with respect to the severed claims, in certain circumstances. See Rule 54(b) of the Superior Court Rules. The Superior Court did not sever any claims or parties in this case, and there was no motion requesting severance under Rule 54(b).

motions brought under the Anti-SLAPP Act, only. *Mann* does not provide for interlocutory appeal of any other decisions in the case, and Defendants do not argue that the collateral order doctrine applies to any of the other issues that they present for appeal in their brief.[5]

Defendants do not cite any authority supporting interlocutory appeal of the Rule 12(b)(6) rulings. Indeed, Defendants' Brief noticeably avoids any discussion of appellate jurisdiction. In other cases, appellate courts refused to exercise jurisdiction over Rule 12(b)(6) issues on interlocutory appeals, including appeals of Anti-SLAPP motions. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010) ("we lack jurisdiction to review that portion of Hallmark's Rule 12(b)(6) motion" during appeal of Anti-SLAPP motion); *Carbone v. Cable News Network, Inc*., 910 F.3d 1345, 1357–58 (11th Cir. 2018) (refusing to consider Rule 12(b)(6) arguments on interlocutory appeal); *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003) (dismissing appeal of Rule 12(b) decision on personal jurisdiction on interlocutory appeal of anti-SLAPP motion); *Hearts with Haiti, Inc. v. Kendrick*, 202 A.3d 1189, 1195 (Me. 2019) (in appeal seeking review of denial of Anti-SLAPP motion and denial of Rule 12(c) motion on statute of limitations grounds, decided

[5] Moreover, to seek an interlocutory appeal under the collateral order doctrine, Defendants would have been required to file, within 10 days, a request with Superior Court to approve the interlocutory appeal. There was no such request here, which would have been due on November 25, 2019.

only special motion to dismiss, "because no applicable exception to the final judgment rule exists, we do not reach the merits of the appeals from the other portions of the court's judgment.");[6] *see also District of Columbia v. Pizzulli*, 917 A.2d 620, 629 (D.C. 2007) ("In considering whether the District may argue issues other than immunity on its appeal from the denial of its motion to dismiss, we find the answer in our case law to be unambiguously clear: appellate review will ultimately be available if the District meets with an adverse outcome at trial, but not until then."); *Stein v. United States*, 532 A.2d 641, 647 (D.C. 1987) ("Resolution of the other issues which Stein presses upon us must wait until a final judgment is entered."); *Cohen v. Owens & Co*., 464 A.2d 904, 906 (D.C. 1983) ("The fact that [an] issue . . . is important, or even critical to the disposition of the case, is of no legal consequence in deciding the question of appellate jurisdiction."); *Gilda Marx,*

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[6] The Massachusetts Court of Appeals also refused to consider appeals of Rule 12(b)(6) rulings raised in interlocutory appeals of denials of the state's Anti-SLAPP statutes. Both decisions are currently unpublished. *See Rosario v. Caring Bees Healthcare, Inc*., 147 N.E.3d 1109, No. 19-P-1223, 2020 WL 3030581, at *4 (Mass. App. Ct. 2020) (unpublished table decision) ("Rosario's interlocutory appeal of the order denying her special motion to dismiss pursuant to the anti-SLAPP statue is . . . an appealable order. No such exception applies to motions to dismiss pursuant to rule 12(b)(6). The judge's order denying Rosario's motion to dismiss for failure to state a claim pursuant to rule 12(b)(6) is not a final judgment and is therefore not appealable."). *See also Boston Clear Water Co. LLC v. O'Brien*, 144 N.E.3d 307, No. 19-P-795, 2020 WL 1650707, at *1 n.4 (Mass. App. Ct. 2020) (unpublished table decision) (review of Rule 12(b)(6) order "is not an interlocutory appeal of the sort that is allowed . . . with respect to a dismissal pursuant to the anti-SLAPP statute").

Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 (D.C. Cir. 1996); *District of Columbia v. Simpkins*, 720 A.2d 894, 900 (D.C. 1998).

Defendants did not attempt to argue that the Court of Appeals has jurisdiction over the Rule 12(b)(6) decisions on this interlocutory appeal and did not (and cannot) cite authority that supports an exercise of jurisdiction over the Rule 12(b)(6) claims. The Court should grant the Professors Motion to Strike; alternatively, it should simply dismiss and refuse to consider the Rule 12(b)(6) arguments that Defendants present.

B. The Rule 12(b)(6) Issues Are Unrelated to the Anti-SLAPP Appeal.

Defendants' Anti-SLAPP motion argued that the Professors' claims do not satisfy the second prong of the Act because (they asserted, incorrectly) "[n]one of the counts in the Complaint present a viable cause of action[.]" (Anti-SLAPP Motion at 10.) Defendants did not argue that the Professors failed to proffer evidence in support of any of their claims; rather, they asserted that the claims should be dismissed for the procedural reasons they argued in their Rule 12(b)(6) motions. Specifically, they "argued" (in no more than two sentences) that all of the Professors claims were either barred by collateral estoppel or the statute of limitations, that aiding and abetting is not a claim recognized in the District, and that, as a matter of law, Plaintiff Bronner cannot allege tortious interference with

business relationship (or any claims related to his removal as the editor of the Encyclopedia of American Studies or the closure of the Encyclopedia as a consequence of their removing him when they had no editor to take his place). Defendants did not make these arguments in the Anti-SLAPP Motion; instead, they asked the Superior Court to presumed that that if they win the Rule 12(b)(6) Motion, they must automatically win the Anti-SLAPP Motion.

That presumption is wrong. As discussed below, Rule 12(b)(6) and the Anti-SLAPP Act involve entirely different inquiries, and dismissal under Rule 12(b)(6) does not require dismissal under the Anti-SLAPP Act or equate to a finding that plaintiffs failed to show the requisite *likelihood* of success to defeat the Anti-SLAPP motion.

C. The Rule 12(b)(6) inquiry and the Anti-SLAPP "likelihood of success" inquiry are entirely different analyses, and neither dictates the outcome of the other.

Having lost most of the arguments they raised in the Rule 12(b)(6) Motion, and also having lost the Anti-SLAPP Motion, Defendants argue that the Superior Court erred by not dismissing those claims under Rule 12(b)(6), and consequently that the Superior Court erred by not dismissing the case under the Anti-SLAPP Act. Defendants are simply wrong. ***Dismissal of a claim under Rule 12(b)(6) does not require dismissal under the Anti-SLAPP Act, nor does dismissal under the Anti-SLAPP Act establish failure to state a claim***. Motions to dismiss under

Rule 12(b)(6) and Anti-SLAPP motions involve entirely different inquiries. The Rule 12(b)(6) inquiry goes to whether the allegations in the complaint state a claim; a motion to dismiss may include procedural and other issues that are purely legal (as opposed to factual), and decided by a judge, not a jury. On the other hand, the Anti-SLAPP's second prong looks only at the quantum of evidence proffered by the plaintiff. *Mann*, 150 A.3d at 1232–33. This issue is discussed at length in the Professors' Motion to Strike, pp. 4-10 (*quoting Mann*, 150 A.3d at 1232–36).

The Ninth Circuit discussed the comparison in detail in a case where, much like here, the defendants sought appellate review of the Rule 12(b)(6) decision during their interlocutory appeal of an Anti-SLAPP motion in the same case. The Ninth Circuit held:

> [I]f a plaintiff stated no cognizable claim, then the defendant would be entitled to dismissal under Rule 12(b)(6). Thus, a Rule 12(b)(6) motion to dismiss may succeed where an anti-SLAPP motion to strike would not.
>
> The converse is also true. . . . [I]f a plaintiff has stated a legal claim but has no facts to support it, a defendant could prevail on an anti-SLAPP motion, though he would not have been able to win a motion to dismiss.
>
> The foregoing illustrates that neither the denial nor the grant of an anti-SLAPP motion "necessarily resolves," *Batzel,* 333 F.3d at 1023, a motion to dismiss regarding the same claim. That is, it is possible for an appellate court to hold that an anti-SLAPP special motion to strike should be granted or

> denied without thereby dictating the result of a motion to dismiss the same claim under Rule 12(b)(6).

Hilton, 599 F.3d at 902 ("[W]e lack jurisdiction to review that portion of Hallmark's Rule 12(b)(6) motion to dismiss the right of publicity claim because it is not inextricably intertwined with any properly appealable order.")*; see also Carbone*, 910 F.3d at 1357–58 (refusing to consider Rule 12(b)(6) arguments on interlocutory appeal of order finding anti-SLAPP Act not applicable).

In *Batzel*, the case cited in *Hilton*, the Ninth Circuit also refused to address the trial court's denial of a Rule 12(b)(2) motion as part of an interlocutory appeal of an anti-SLAPP motion. *Batzel*, 333 F.3d at 1023. As in this case, the Rule 12(b) issue was a procedural question – personal jurisdiction – that would never go to a jury, and was unrelated to the elements of the claims pleaded or the evidence proffered in support. "We can decide the anti-SLAPP issue entirely independently of the question of personal jurisdiction, and different legal standards apply to each issue. [Citation.] We therefore dismiss Cremers's appeal insofar as it challenges the denial of his motion to dismiss for lack of personal jurisdiction." *Id.* at 1023. *See also Ginx, Inc. v. Soho All*., 720 F.Supp.2d 342, 356 (S.D.N.Y. 2010) ("The Evanses' motion to dismiss is granted. Their application for relief under New York's Anti-SLAPP statute is denied."); *Boley v. Minn. Advocs. for Human Rights*, No. 08-CV-5908 (PJS/FLN), 2010 WL 346769, at *1 (D. Minn. Jan. 22, 2010) ("Because defendants have already prevailed on their statute-of-limitations

defense, the Court need not reach any of their many other defenses, including whether they are immunized from liability under [the Minnesota Anti-SLAPP Act]. Accordingly, defendants have not 'prevail[ed] in a motion under this chapter' and are not entitled to attorney's fees or damages [under the Act]."); *Rickmyer v. Browne*, 995 F.Supp.2d 989, 998 (D. Minn. 2014) (denying attorney's fees and damages under the Anti-SLAPP Act, because "the Court need not reach the question of whether Defendant is shielded from liability under the anti-SLAP statute," citing *Boley*).

III. THE SUPERIOR COURT DID NOT ERR BY DISMISSING CERTAIN CLAIMS ON STATUTE OF LIMITATIONS GROUNDS UNDER RULE 12(B)(6) AND NOT THE ANTI-SLAPP ACT.[7]

Defendants argue that the claims that were dismissed on statute of limitations grounds should have been dismissed under the Anti-SLAPP Act, not under Rule 12(b)(6). (Defs.' Brief at 17.) The reason? Defendants want this Court to award them fees under the Act. Even though Defendants still have not attempted to identify an actual claim that is not supported by evidence proffered in the complaint, and even after the federal judge that presided over this case for three

[7] The Professors' position is that the Superior Court did err in finding that the statute of limitations barred certain claims (and partial claims), but that is not a decision that can be appealed interlocutory. In their brief, Defendants argue that those dismissals should be converted from Rule 12(b)(6) dismissals to dismissals under the Anti-SLAPP. That argument wrong and is addressed in this section.

years found that the Professors have presented claims that appear meritorious *and* evidence to support them, Defendants ask this Court to take the dismissal of some claims under the statute of limitations, convert those dismissal orders so that they are dismissals under the Anti-SLAPP Act, and award them fees under the Act.

This Court has never done that, nor, as far as the Professors are able to ascertain, has any court ever done that. Nor have Defendants presented any authority in support of this highly unusual move. The claims that were dismissed on statute of limitations grounds, in whole or in part, were dismissed under Rule 12(b)(6) because Defendants *sought* their dismissal under Rule 12(b)(6) – not the SLAPP Act -- in their Rule 12(b)(6) motion, and also because that is the correct and only appropriate vehicle to dismiss claims on statute of limitations grounds. The claims could only be dismissed under the Anti-SLAPP Act if the Professors failed to proffer evidence of when the events at issue occurred. It is not disputed that the Professors have produced such evidence.

Dismissal of a claim on statute of limitations grounds (or any Rule 12(b)(6) grounds) does not equate to a violation of the Anti-SLAPP Act. *Hearts with Haiti*, 202 A.3d at 1195 (affirming dismissal on statute of limitations grounds and affirming denial of Anti-SLAPP motion); *Ginx*, 720 F.Supp.2d at 356 (granting motion to dismiss and denying Anti-SLAPP motion); *Boley*, 2010 WL 346769, at *1 (“Because defendants have already prevailed on their statute-of-limitations

defense, the Court need not reach . . . whether they are immunized from liability under [the Minnesota Anti-SLAPP Act,] Minn. Stat. § 554.03 [and] defendants . . . are not entitled to attorney's fees or damages [under the Act]); *Rickmyer*, 995 F.Supp.2d at 998 (following dismissal of claims under Rule 12(b)(6), "the Court need not reach the question of whether Defendant is shielded from liability under the anti-SLAPP statute . . . [and] Defendant Hoff's request for an award of attorney's fees and damages under the anti-SLAPP statute[]").

A. Defendants' argument that decisions on Rule 12(b)(6) and Anti-SLAPP motions are interchangeable for purposes of fees awards is simply and obviously wrong.

Defendants argue that they are entitled to attorney's fees under the Anti-SLAPP statute because, "if a Count cannot survive a Rule 12(b) motion, it necessarily fails under the far more demanding anti-SLAPP standard that it is likely to succeed on the merits." (Defs.' Brief at 17.) They rely on a footnote in *Mann* for this premise, but they misread the case and fail to consider the basis of that holding, which was specific to a question common to the two motions. *Id*., citing Mann, 150 A.3d at 1221, n.2. The claim that footnote 2 in *Mann* requires that every Rule 12(b)(6) dismissal, regardless of the basis, must be automatically converted to an Anti-SLAPP dismissal is simply wrong, and utterly unsubstantiated by that case, any other case, or the statute.

Defendant's illogical argument is that because *Mann* held that when the

plaintiff *in that case* satisfied prong two of the Anti-SLAPP Act, it "necessarily" defeated a motion to dismiss under Rule 12(b)(6) (*see* 150 A.3d at 1221 n.2), then it must be true that every time a plaintiff defeats an anti-SLAPP motion, it "necessarily" wins any motion to dismiss under Rule 12(b)(6) – regardless of whether there are any common questions across the two motions, as there was in *Mann*. Starting with that faulty premise, Defendants conclude that any loss on a Rule 12(b)(6) motion must be accompanied by a dismissal under the Anti-SLAPP Act and an award of attorney's fees. (Defs.' Brief at 17.)

If Defendants' theory were correct, there would be never be a Rule 12(b)(6) dismissal of any claim, no matter how partial, no matter what the basis, that did not automatically require that the court also dismiss the claim under the anti-SLAPP Act and an award of fees under the Act – so long as the first prong of the anti-SLAPP statute was satisfied. No state does this. This District does not do this.

Footnote 2 of *Mann* does not and cannot require that every time a court denies an anti-SLAPP motion – which only relates to the evidence required to establish the elements of the claim – it must also deny every Rule 12(b)(6) motion that applies to that claim, whether or not they go to the elements of the claims. That would simply turn anti-SLAPP litigation, as it is practiced in every jurisdiction, on its head.

B. Defendants' argument that Rule 12(b)(6) orders must be converted to Anti-SLAPP Act orders conflicts with the D.C. Code and Superior Court Rules.

Defendants' argument that the Superior Court erred by dismissing claims (and partial claims) under Rule12(b)(6) instead of the Anti-SLAPP Act also conflicts with the procedures set forth under the Superior Court Rules and the D.C. Code. Under the Superior Court rules, motions to dismiss for failure to state a claim – and that includes statute of limitations arguments – are brought under Rule 12(b)(6) and are due 21 days after the filing of the complaint. Superior Court Rule 12. Anti-SLAPP motions, however, are not due until 45 days after the filing of the complaint. D.C. Code § 16-5502. Following Defendants' theory, a court would err by ruling on a Rule 12(b)(6) motion even if it did so before any Anti-SLAPP motions were due. And ***every*** motion to dismiss in every case where Defendants later filed anti-SLAPP motions and the first prong was satisfied would have to be converted from a Rule 12(b)(6) dismissal to an Anti-SLAPP dismissal, because the Rule 12(b)(6) dismissals will always precede the Anti-SLAPP dismissals, if the Superior Court decides motions in the order that they are filed.

There is simply no indication that this is the outcome that the Council intended when it passed the Anti-SLAPP Act, including a filing deadline nearly twice as long as the deadline to file Rule 12(b)(6) motions.

IV. THE SUPERIOR COURT ERRED WHEN IT FOUND THAT THE ANTI-SLAPP ACT IS APPLICABLE TO THE PROFESSORS' CLAIMS.

Although the Superior Court denied Defendants' Anti-SLAPP Motion, correctly finding that the Professor's lawsuit is not a SLAPP suit, the Superior Court did find that Defendants satisfied the first prong of the Anti-SLAPP Act. On this point, the Superior Court erred.

The first prong of the Anti-SLAPP Act requires the movant to establish that the "claim aris[es] from an act in furtherance of the right of advocacy on issues of public interest[,]" (D.C. Code § 16-5502), which is explicitly defined to include only certain ***written or oral statements*** made in connection with an issue under consideration or review by a governmental body, or in a public forum or ***expression or expressive conduct*** that involves petitioning to the government or communicating views to the public on a public matter (§ 16-5501(1)).

As discussed below, numerous claims in this case do not arise from written or oral statements or expression or expressive conduct at all. The withdrawal of funds from the ASA's Trust Fund is not speech under any definition. Corporate waste does not arise from statements or expression. The claims arising from Professor Bronner's removal from the Encyclopedia, and the resulting shut down of the Encyclopedia of American Studies, do not arise from petitioning or communication of views to the public or in a public forum, or written or oral

statements in connection with any matter under review by the government. The numerous ***secret*** changes to the ASA bylaws, allowing the withdrawal of funds that the bylaws had forbidden, removing the editor of the Encyclopedia from the National Council and his position as an officer – which even he did not know about – clearly do not arise from a ***public*** statement, and do not speak to public issues. In none of these claims have Plaintiffs sued Defendants because of anything Defendants said or expressed.

Contrary to the assertions of Defendants' and their proposed amici, the "quintessential Anti-SLAPP case" is a defamation case. Other claims that actually ***arise*** from speech, expression, or expressive activity may also fall under the Anti-SLAPP Act. However, the claims brought by the Professors – corporate waste, breach of fiduciary duty, breach of contract, tortious interference, and aiding and abetting – do not arise from speech, expression, or expressive activity. There may very well be things Defendants want to say: but ***the actions for which they have been sued are from the wrongful takeover of a nonprofit corporation, in breach of its bylaws, and the unjustified expenditure of hundreds of thousands of dollars from the nonprofit's trust fund***. The SLAPP Act does not become relevant simply because, after Defendants illegally took the money, they chose to spend it in support of a political goal. The act of wrongfully allocating funds is not speech protected by the Anti-SLAPP Act, or the First Amendment. Stealing from Peter to

benefit Paul is still stealing, regardless of what Paul intends to do with the money.

A. The Superior Court Erred When It Found that the First Prong of the Anti-SLAPP Act Is Satisfied, Because the Professors' Claims Do Not Arise from Statements, Expression, or Expressive Conduct, as § 16-5502(1) Explicitly Requires.

Although the Superior Court denied Defendants' Anti-SLAPP motion, it did find that the first prong of the Act was satisfied. That finding was in error. The Superior Court's decision was based on its determination that the Academic Boycott is an issue of public interest. But this is an irrelevant, albeit, an undeniable fact, and one that the Professors conceded.

The point is irrelevant because the claims brought by the Professors do not "arise" from the Academic Boycott. No part of Plaintiffs' complaint charges the boycott, or advocacy for a boycott, as a basis for Defendants' liability. Instead, Plaintiffs' claims arise from numerous breaches of fiduciary duty, including misrepresentations to the membership of the ASA with respect to elections, *inter alia*, and the unjustified withdrawals of hundreds of thousands of dollars from the trust fund, the unjustified removal of Professor Bronner as the editor of *Encyclopedia of American Studies*, and violations of the ASA's bylaws and secretive changes to those bylaws.

The first prong of the Anti-SLAPP Act provides that the special motion to dismiss may apply to "any claim arising from an act in furtherance of the right of

advocacy on issues of public interest" D.C. Code § 16-5502. The term, "act in furtherance of the right of advocacy on issues of public interest" is defined explicitly in § 16-5501(1), as follows:

> (A) Any **written or oral statement** made:
>
> (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
>
> (ii) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any **other expression or expressive conduct** that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1), emphasis added. The Anti-SLAPP Act only applies to claims that actually arise from ***written or oral statements, or expressions or expressive conduct***. *See, e.g., Park v. Brahmbhatt*, No. 2015 CA 005686 B, 2016 D.C. Super. LEXIS 16, at *9 (D.C. Super. Ct. Jan. 19, 2016) ("Plaintiff has not demonstrated any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or in a place open to the public or a public forum in connection with an issue of public interest; or any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest"). ***Not one of the claims arises from a statement, expression, or expressive conduct***.

The Superior Court simply did not address this initial requirement in § 16-5501(1). Although the Superior Court quoted a subsequent part of the provision, finding that the "2013 resolution and associated acts constitute a communication of views to members of the public" (Order at 35), ***the Superior Court did not address the requirement that the actual claims arise from speech, expression, or expressive acts.***

Defendants did not argue below, and still do not argue, that any of Plaintiffs' claims arise from a "written or oral statement" or "other expression or expressive conduct." Instead, Defendants simply fail to acknowledge that § 16-5501's very specific definition of an "act in furtherance of the right of advocacy on issues of public interest" even exists, ignoring the clear language of the statute.

The approach to statutory construction in this jurisdiction is clear, and "[t]he burden on a litigant who seeks to disregard the plain meaning of the statute is a heavy one." *Nat'l Geographic Soc'y v. D.C. Dep't Emp. Servs*., 721 A.2d 618, 620 (D.C. 1998). "In interpreting a statute, we first look to its language; 'if the words are clear and unambiguous, we must give effect to its plain meaning.' *James Parreco & Son v. D.C. Rental Hous. Comm'n*, 567 A.2d 43, 45 (D.C. 1989) [further citation omitted]. The intent of the legislature is to be found in the language used." *Id*. The "Definitions" section of a statute is the first place to turn when applying a term used in a statute, and in this context, that definition is clear:

the Anti-SLAPP Act only covers acts in "furtherance of the right of advocacy on issues of public interest," where the acts are "written or oral statement[s]" or "other expression[s] or expressive conduct." D.C. Code § 16-5501(1). Because there are no such expressive acts at issue in Plaintiffs' Complaint, the SLAPP Act does not apply.

B. The D.C. Legislature Considered and Specifically Chose Not To Cover Non-Speech Under the Anti-SLAPP Act, and Intentionally Limited Coverage of the Anti-SLAPP Act to Protect Only Statements, Expressions, and Expressive Conduct.

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

The original proposal of the Anti-SLAPP Act of 2010 was written to cover any "act in furtherance of the right of free speech," rather than limiting coverage to "act[s]in furtherance of the right of advocacy on issues of public interest," as the

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

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

Although Defendants loosely claim otherwise, not a single claim alleged in the complaint involves speech or expressive conduct that ""involves petitioning the

government or communicating views to members of the public in connection with an issue of public interest." Not a single claim arises from a statement made to the public.

C. Defendants' Simplistic Assertions that the Plaintiffs' Claims All Arise From the Academic Boycott Is Simply Wrong.

As discussed above, Defendants do not even attempt to specifically argue that any of Plaintiffs' claims arise from statements, expressions, or expressive conduct that satisfy § 16-5501(1)'s definition of an "[a]ct in furtherance of the right of advocacy on issues of public interest[.]" Plaintiffs' claims do not arise from the Academic Boycott, but from numerous acts that were taken with full knowledge that they would "damage the ASA," that breached Defendants' fiduciary obligations to the organization and its members, violated the ASA's Constitution and bylaws, drained the ASA's Trust Fund of hundreds of thousands of dollars, and mislead the ASA's membership, *inter alia*.[8] The acts that caused this damage are not the Academic Boycott in itself, nor are they speech, expression, or expressive acts.

Critically, Defendants do not identify any particular statement, expression, or expressive conduct that they purport to form the basis of the claims for breach of

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

fiduciary duty, breach of contract, *ultra vires* acts, corporate waste, or any of Plaintiffs' claims. Defendants' tortured interpretation of "arising from" is flatly contradictory to case law that interprets and applies the term in Anti-SLAPP cases. *See Richmond Compassionate Care Collective v. 7 Stars Holistic Found., Inc*., 243 Cal.Rptr.3d 816, 824–26 (Cal. Ct. App. 2019).

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

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

> A cause of action does not "arise from" protected activity simply because it is filed after protected activity took place. [Citation] Nor does the fact "[t]hat a cause of action arguably may have been triggered by protected activity" necessarily mean that it arises from such activity.

Flores v. Emerich & Fike, 416 F.Supp.2d 885, 897 (E.D. Cal. 2006). Courts outside of California agree. *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 943 (Mass. 1998). "The special movant who 'asserts' protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits ***that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the***

petitioning activities." *Id.* Imposing this requirement on special movants under the statute would, according to the court, "serve to distinguish meritless from meritorious claims, as was intended by the Legislature." *Id.*

There is no District of Columbia case interpreting the term "arising from" as used in § 16-5502(a). This is likely because § 16-5501(1) winnows the types of claims where the Anti-SLAPP Act may apply to claims that arise from a "written or oral statement" or "expression or expressive conduct" made in connection with an issue of public interest. D.C. Code § 16-5501(1). This requirement eliminates the possibility that the Anti-SLAPP Act would apply to a claim for injury caused by anything but speech. Moreover, as the Court of Appeal clarified in *Mann*, the Anti-SLAPP Act applies only "when First Amendment rights of the defendant are implicated[.]" 150 A.3d at 1239, *see* discussion in section I.C, *supra*. Thus, in the analysis described in (and required by) the *Mann* court, the first step for a trial court presented with a motion under § 16-5502 is to consider "the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id*.at 1240 (internal citations and quotations omitted).

Between the clear language of both § 16-5501(1) and *Mann*, it could not be more clear that the Anti-SLAPP Act only applies to protected speech. Thus, there has not been a need for the D.C. courts to consider whether claims for injury that

are directly caused by acts that are not protected by the First Amendment may be deemed to "aris[e] from an act in furtherance of the right of advocacy on issues of public interest[.]" § 16-5502(a). It simply doesn't matter if the "act [is] in furtherance of the right of advocacy," because, unless the "act" is also speech that fits the definition in § 16-5501(1), (and is protected by the First Amendment) – the Anti-SLAPP Act does not and cannot apply. Thus, the D.C. courts have not needed to also address that claims like these - for breach of fiduciary duty, violation of corporate bylaws, and mismanagement of a nonprofit, *inter alia* - might be "arising from" an act protected by Anti-SLAPP Act.

V. THE COURT SHOULD NOT CONSIDER THE PROPOSED *AMICUS* BRIEFS BECAUSE THEY FAIL TO SATISFY THE REQUIREMENTS OF RULE 29 AND ONLY ADDRESS ISSUES NOT BEFORE THE COURT.

A. Palestine Legal, One Proposed *Amicus*, Identifies Itself as Counsel for Defendants in this case and Addresses No Issue Raised in this Appeal.

Palestine Legal identifies this case ***as one of its own cases*** on its web page. *See* https://palestinelegal.org/cases *and* https://palestinelegal.org/case-studies/2018/3/8/american-studies-association-sued-for-boycott. Palestine Legal was founded by the Center for Constitutional Rights ("CCR"), who are counsel in

this litigation, representing defendants Steven Salaita.[9] Indeed, Palestine Legal's website states, "The Center for Constitutional Rights (CCR) is Palestine Legal's founding partner. While Palestine Legal is an independent organization, we collaborate closely with CCR, and our attorneys are CCR Cooperating Counsel." https://palestinelegal.org/about.

In addition, Radhika Sainath, who signed and submitted the proposed *amicus* brief on behalf of Palestine Legal, is cooperating counsel between Palestine Legal and CCR. https://twitter.com/radhikasainath?lang=en. Moreover, during discovery, Defendants designated correspondence with Palestine Legal as "attorney-client privileged" on their privilege log. Sianath and Palestine Legal failed to disclose any of this information in their motion for leave to file an *amicus* brief, although they were required to do so.

Because Palestine Legal considers itself counsel for Defendants in this case, it cannot submit an *amicus* brief. Palestine Legal, and particularly Ms. Sainath, are disqualified as *amici* for defendants, as Palestine Legal is formally partnered with defense counsel, and Ms. Sainath serves as coordinating counsel between Palestine Legal and Defendant Salaita's counsel.

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[9] See the service list on this appeal, as well as the service list for the Superior Court case and the previous case in the federal district court, which show that at all times since Steven Salaita was added as a defendant in this litigation he has been represented by CCR.

Palestine Legal's proposed *amicus* brief provides no information or argument pertaining to any question before this court. Instead, it addresses this Court at length about Palestinian rights, and about the "Boycott, Divestment, and Sanctions" movement generally and on American college campuses. As will be evident, this discussion says nothing about breach of fiduciary duty, breach of corporate by-laws, or misappropriation of funds, or even about whether actions giving rise to these claims by Plaintiff can somehow be transmogrified into protected First Amendment activity.

Nothing said by Palestine Legal in its brief bears in the slightest on the issues raised on this appeal. This lawsuit does not seek a legal resolution of the Middle East conflict. Indeed, Professor Bronner's position is laid out quite specifically in the complaint: he does not stand for any side on the international issues, though he does oppose academic boycotts, regardless of who they are imposed against – as does the American Association of University Professors and the great majority of university leaders, academics and academic associations. But that popular opinion is not at issue on this appeal either.

The question raised by Defendants' appeal is whether the evidence proffered by the Professors satisfies the second prong of the Anti-SLAPP Act, as interpreted by this Court in *Mann*. Palestine Legal's proposed *amicus* does not even purport to address that question.

B. "Protect the Protests'" Proposed *Amicus* Brief Was Filed Well After the Deadline and Addresses No Issue Raised in this Appeal.

Days after the deadline, a motion for leave to file an *amicus* brief was filed, purportedly on behalf of the "members of the 'Protect the Protest' Task Force." This so-called "task force," which purports to speak for all of the members of 27 groups, but names only 9, and is signed not by an attorney on behalf of the "task force" but on behalf of "EarthRights International," only, was filed days late. The Professors opposed this motion for leave to file an *amicus* brief on that basis. The movants – who never sought permission to file after the deadline – did not even bother to file a reply asking the Court to consider their untimely motion.

Moreover, the proposed *amicus* brief simply does not address any issue raised in this appeal. As stated above, the question raised by Defendants' appeal is whether the evidence proffered by the Professors satisfies the second prong of the Anti-SLAPP Act, as interpreted by this Court in *Mann*. The brief offered by this proposed *amici* simply does not bear on that issue, nor does it claim to.

* * * *

For all the reasons detailed above, the Professors respectfully request that this Court deny the Defendants' appeal of the Superior Court's denial of the Anti-SLAPP motion.

Respectfully submitted,

Dated: August 6, 2020

Signed: */s/Jennifer Gross*

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CERTIFICATE OF SERVICE

I certify that on August 6, 2020, I caused to be filed the foregoing APPELLEES' BRIEF with the Clerk of Court for the District of Columbia Court of Appeals using the Court's online filing system, which will serve notice upon the Court of Appeals and the below-listed persons, and to be followed by service via First Class Mail.

Dated: August 6, 2020

Signed:

/s/Jennifer Gross

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CORPORATE DISCLOSURE STATEMENT

The Appellants, by and through their counsel, affirm that they are individual persons, not corporations, and that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.