SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES KUPFER, and MICHAEL BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, JOHN F. STEPHENS, STEVEN SALAIT A, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No.: 2019 CA 001712 B Judge Robert R. Rigsby Next Court Date: June 14, 2019, 10:00 a.m. Event: Hearing on Special Motion to Dismiss

DEFENDANTS JASBIR PUAR'S AND KEHAULANI KAUANUI'S
SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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I. INTRODUCTION

Defendants Jasbir Puar and Kehaulani Kauanui renew their motion to specially dismiss all causes of action against them pursuant to the District's Anti-SLAPP Act, D.C. Code §16-5501 *et. seq*. Puar and Kauanui also adopt and incorporate the arguments set forth in their co-Defendants' briefs except where such arguments may be inconsistent with those advanced by Puar and Kauanui.

II. POSTURE OF THE CASE

Puar and Kauanui have been named in nine of the Plaintiffs' eleven counts. In four of them (Counts 2, 3, 4, and 5) the Court has already ruled that they are barred by the applicable statutes of limitations, so the only question remaining is whether the counts were intended to punish or prevent the expression of opposing points of view. *Sherrod v. Breitbart*, 843 F.Supp.2d 83, 85 (D.D.C. 2012). Under the statute, the only question for these causes of action is whether the claim arose from an act in furtherance of the right of advocacy on a matter of public interest. *D.C. Code* §16-5502)(b). We shall show how each of these causes of action arose from exactly that.

The remaining counts (Counts 1, 9, 10, 11, and 12) have yet to be dismissed. For each of these we will show both how they arose from an act in furtherance of the right of advocacy, and how the Plaintiffs cannot demonstrate a ***likelihood*** of success on the merits.

III. PLAINTIFFS' ALLEGATIONS AS TO PUAR AND KAUANUI[1]

A. Plaintiffs' General Allegations About Dr. Puar, Which Plaintiffs Incorporate Into Each Cause of Action, Demonstrate That Their Claims Against Her Arise From Acts in Furtherance of the Right of Advocacy

Dr. Puar, (who has had two books published by Duke University Press), is "infamous for anti-Semitic lectures condemning Israel . . " ¶46. Plaintiffs allege that she has "passed on vicious lies" about Israel and that Israel attempts to give Palestinians "the bare minimum for survival." ¶59. Despite being "infamous for anti-Semitic lectures" she allegedly concealed her political agenda when standing for election." ¶72.

Dr. Puar had also worked with other ASA leaders to gain support for a similar resolution from the Association for Asian American Studies. ¶70. Dr. Puar is a leader of the United States Ass'n for the Academic and Cultural Boycott of Israel (USACBI).[2] She helped to advance a program of getting the ASA to support a boycott by getting on the ASA's Nominating Committee and working to ensure that only boycott supporters were nominated for higher office. In doing this she concealed her agenda from the general ASA membership. ¶6. She served on the Nominating Committee from July 2010 through June 2013. ¶25. Although she was only one of six Nominating Committee members, she singlehandedly nominated her political allies. ¶45. This was done for the purpose of "promoting the USACBI agenda". ¶60. She was so skilled and

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[1] All allegations cited herein are taken from Plaintiffs' 354-paragraph, 114-page Complaint unless otherwise noted.

[2] Plaintiffs seek to distance themselves fom the allegation in their Second Amended Complaint in the federal action (¶42, Dkt. No. 81) that she joined USACBI seven years after she began serving on the ASA's Nominating Committee.

powerful that after just two years "on the Nominating Committee six of the ten continuing voting members of the ASA National Council were USACBI Endorsers." ¶61. She, along with two other Boycott endorsers had turned the Nominating Committee into a group that had Boycott support as its "singular focus". It was no longer diverse "in terms of gender, ethnicity, national origin, religion, LGBTQ identification, and region, as well as personal interests and viewpoint.)" ¶71.[3] This led to the breach of fiduciary duties and to *ultra vires* actions. ¶72

In 2013 58% of the nominees for the National Council endorsed the Boycott or were leaders of USACBI. ¶63. (This very closely approximated the percentage of ASA members who voted to support the Boycott in the general membership referendum.)

B. Plaintiffs' General Allegations About Dr. Kauanui, Which Plaintiffs Incorporate Into Each Count, Demonstrate That Their Claims Against Her Arise From Acts in Furtherance of the Right of Advocacy

It is for some reason important to the Plaintiffs that this Court know that Dr. Kauanui associates with Dr. Sunaina Maira, who is married to a Palestinian who is a Professor at Birzeit University. ¶35.

Dr. Kauanui served on the ASA National Council from July, 2013 through June, 2016, ¶24. While running for the National Council she publicly disclosed that she was on USACBI's Advisory Committee ¶67. She also disclosed her role in getting the Association for Asian American Studies to support the boycott. ¶¶69-70, 80.Despite these open statements, she stands

[3] Plaintiffs have made up the requirement for diversity "in terms of personal interests and viewpoint". This appears **nowhere** in the ASA's By-laws or its charge to the Nominating Committee.

accused of failing to disclose her "true reasoins" for serving on the National Council. ¶66. She concealed these reasons because she was part of a "cabal" ¶69.

Dr. Kauanui thereby breached some pre-existing fiduciary duty to the ASA and caused it to engage in *ultra vires* actions. ¶72. This was achieved by creating an ASA boycott coordination group composed of ASA National Council members who were also USACBI leaders. ¶105. In doing so they worked with USACBI leaderw sho were not involved with the ASA.

Dr. Kauanui also served on a National Council committee to revise the text of the boycott resolution and discussed the boycott in a way that was one-sided. ¶¶118-119. And finally, Dr. Kauanui shared with the entire National Council communicatios she had received from John Stephens, the ASA Executive Director. ¶119.

IV. NEARLY EVERY ALLEGATION AGAINST DEFENDANTS IS TIED DIRECTLY TO THEIR RIGHT OF ADVOCACY AROUND A MATTER OF PUBLIC INTEREST[4]

Taken together, Dr. Puar and Dr. Kauanui have joined an organization of academics (USACBI) that has a point of view about Israel which Plaintiffs dislike. One of the defendants (Dr. Puar) has written books published by a major academic press which one of Plaintiffs' friends dislikes. Doctors Puar and Kauanui have worked to persuade other academic organizations to support USACBI's goals through the traditional political methods of writing, speaking, and

[4] The only allegation that is *not* directly tied to speech is the racist and *ad hominem* attack suggesting that having a friend who is married to a Palestinian is suspicious.

serving on a committee and a board. One of them helped amend a resolution that was voted on by the ASA's general membership, and helped put out materials discussing the amended resolution. Every single element of this is in furtherance of advocacy on a matter of undeniable public interest.

V. SINCE DEFENDANTS MEET THE FIRST TEST OF THE ANTI-SLAPP ACT, THE COURT'S DISMISSAL OF COUNTS 2, 3, 4, AND 5 MUST BE TREATED AS DISMISSAL UNDER THE UNDER THE ACT.

Upon a *prima facie* showing that a claim arises from an act in furtherance of the right of advocacy upon a matter of public interest, the burden shifts to the Plaintiffs to demonstrate that the claim is nonetheless likely to succeed on its merits. *Doe v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014). As the Court has already ruled that Counts 2, 3, 4, and 5 cannot succeed at all as they are barred by the statute of limitations, there is *zero* chance that the claims will succeed on their merits. As to these claims the Special Motion to Dismiss should be granted.

VI. PLAINTIFFS CANNOT PROVE THAT THEY ARE LIKELY TO SUCCEED ON THE REMAINING COUNTS.

Counts 1, 9, 10, 11, and 12 have been carefully analyzed by counsel for our co-defendants. We write separately here only to point out the following:

A. Plaintiffs Must Meet a Higher Standard Than That Faced in a Summary Judgment Motion

Plaintiffs must now prove, as to each Count, that they are likely to succeed on the merits. *Doe v. Burke*, *supra*. It must be stressed that "likely to succeed" requires this Court to weigh evidence. The likelihood of success cannot be determined by simply considering a party's unsubstantiated allegations. This stands in sharp contrast to the summary judgement standard, in which the Supreme Court noted that:

> [C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment . . . . a "judge's function" at summary judgment is not 'to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 572 U.S. 650, 657-657, 134 S.Ct. 1861, 1866 (2014).

By contrast, determining who is likely to succeed requires that very weighing of evidence that requires so much higher a standard of proof from the Plaintiffs.

B. Neither Dr. Puar Nor Dr. Kauanui Could Have a Fiduciary Duty to the ASA while they Were Mere Candidates.

A threshold requirement for a breach of fiduciary duty claim is the existence of a fiduciary relationship. *Millenium Square Residential Ass'n v. 2200 M Street LLC,* 952 F.2d 234, 248 (D.D. C. 2013). Not a single case holds that a fiduciary duty can arise **before** one party reposes trust and confidence in the other. Thus, nothing either Dr. Puar or Dr. Kauanui did or did not say about their candidacies could become the basis for any claimed breach of duty. The duty arises

only when one *becomes* an officer. *12B Fletcher Cyc. Corp.* §5915.10 [2010] holding that a direct action may be brought against an *officer* for violations of a duty arising from contract or otherwise. *Daley v. Alpha Kappa Alpha Sorority* 26 A.3d 723, 729-730 (D.C. 2011).

C. Finally, Dr. Puar was never an officer.

It must be born in mind that Dr. Puar had no say over personnel, no say over expenditures, no say over by-law revisions, or anything like ti. Her remit began and ended with helping the five other members of her Nominating Committee with the selection of candidates. She was a volunteer member of one of the ASA's fairly large number of committees, and that is all.

VII. THE VOLUNTEER PROTECTION ACT IMMUNIZES DEFENDANTS

A. The Federal Volunteer Protection Act Applies to Dr, Kauanui as a Director and to Dr. Puar as a Member of the American Studies Association

The Nonprofit Corporation Act of 2010 affords the broadest possible immunity to a nonprofit's Directors, such as Kauanui. §29.406-31(c)(3) makes it clear that nothing in this section "[A]ffects any rights to which the corporation or a director or member may be entitled under another statute of the District or the United States". (Emphasis added.) It is thus clear that the rights and protections to nonprofit members and directors are intended to be cumulative. The District's statute supplements the federal VPA, and does not preempt it.

B. The VPA's Salutary Purposes Should be Given Broad Effect.

Suits against volunteers of nonprofit associations imperil the one of the cornerstones of American society, community-based volunteerism. Accordingly, Congress enacted the Volunteer Protection Act to clarify and limit the liability of volunteers and keep this important part of

society vigorous and flourishing. 42 U.S.C. §14501(a), (b). The Act provides in general that a volunteer of a nonprofit organization or governmental entity is not liable for harm which he or she caused if the volunteer was acting within the scope of the volunteer's responsibilities at the time of the act or omission, and the harm was caused by mere negligence and not willful or reckless misconduct intended to harm an individual or individuals. 42 U.S.C. §14503.

C. Defendants Are Immune from Suit Under the VPA Because There Are No Allegations That They Engaged in Intentional and Willful Misconduct Toward Any Individual.

To be sure, the Volunteer Protection Act (VPA) does not immunize harm "caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer . . ..". 42 U.S.C. §14503(a)(3) (emphasis added). In contrast to D.C. Code §29-406.31(d), however, the plain language of the federal exception renders it inapplicable to alleged misconduct directed against a corporation or organization itself. §14503(a)(3) creates an exception to immunity under the VPA only for conduct directed at an individual; there is no such exception for conduct directed at the volunteer's own corporation or nonprofit entity.

The VPA was intended to immunize volunteers from liability for harm they may have committed – unless it was committed "on behalf of the organization or entity" and directed at a third party, rather than the organization or entity itself. See §14503(a); §14503(b) ("Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization . . . against any volunteer of such organization or entity."); §14503(f):

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

The plain language of the VPA makes it clear that is intended to immunize all volunteer conduct other than intentional misconduct directed towards individuals or harm to the organization or entity on behalf of which they volunteer. Therefore, assuming, *arguendo,* that plaintiffs had adequately alleged that Dr. Kauanui or Dr. Puar had intended to harm the ASA, this intent is still insufficient to bring the alleged action outside the scope of the VPA because there is no allegation that Defendants acted with malice to any individuals, and certainly not to the specific individual plaintiffs who now claim they were harmed.

D. <u>Plaintiffs Have Not Alleged Facts Making It Plausible That Either Dr. Puar or Dr. Kauanui Acted Outside of the Scope of Their Responsibilities</u>.

Plaintiffs' promiscuous use of the phrase "ultra vires" does not imbue their allegations with magical properties. Dr. Puar had no fiduciary duty while she was running for a seat on the Nominating Committee and plaintiffs' claim that as a candidate in 2010 she concealed an intention to support a Resolution is belied by the plaintiffs' own chronology (Section 4 of this brief, supra.) Once elected, her only duty under the Bylaws was to see that as a whole, the

nominees maintained "a balance of age, racial, ethnic, regional, and gender participation" (Section 5, supra.)[5] There are no facts alleging she acted beyond the scope of her position in any way.

Dr. Kauanui similarly had no duty until she took her position as an elected member of the National Council and in any event, she was entirely forthright about her leadership role in the United States Academic Committee for the Boycott of Israel. (Section 6, supra). Although the plaintiffs do not like what she did once she was on the Council, there are no facts suggesting that she acted beyond the scope of her position. We have enumerated six instances before she joined the Council in which the ASA took positions on issues of social justice which might, and in some cases certainly would, cost it money, or which required involvement with legislation. We have identified another six that came up during her term as a National Council member. There is no basis to suggest that her acts were beyond the scope of her position. (Section 7, supra.)

E. Because Volunteer Immunity Under 42 U.S.C. §14503 is Analogous to Qualified Immunity Under 42 U.S.C. §1983, it is Appropriate to Resolve the Immunity Question via a 12(b)(6) Motion.

Although immunities may be plead as affirmative defenses, a defendant's entitlement to immunity should be resolved at the earliest stage possible so that, as here, the costs and expense of trial are avoided where a defense is dispositive. *McDonald v. Salazar*, 831 F.Supp. 3d 313,

[5]Dr. Puar does not agree that her presence as a mere volunteer on an ASA Committee establishes that she had a fiduciary duty, but she recognizes that this limited question is not amenable to resolution on a motion to dismiss.

325-326 (D.D.C. 2011)[6] Accord, *Ford v. Mitchell*, 890 F.Supp.2d 24, 32 (2012). The Circuit laid the groundwork for this reasoning in *International Action Center v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) in which Judge Roberts applied the immunity analysis to the facts as plead and held that dismissal based on qualified immunity was appropriate..

Similarly, the facts as plaintiffs have plead them do not come close to suggesting that either Dr. Kauanui or Dr. Puar acted outside the scope of their responsibilities or harbored any intent to harm the plaintiffs as individuals. The repeated cries of "ultra vires" are mere legal conclusions masquerading as facts. Where plaintiffs have failed to allege facts demonstrating an intent to harm them by means of acts beyond the scope of their volunteer responsibilities, dismissal is appropriate. *Probert v. Family Centered Servs. of Alaska*, 2011 U.S. Dist. LEXIS 161545, at *4-7 (D. Alaska Mar. 11, 2011).

At the very least, volunteer immunity under 42 U.S.C. § 14503 makes it impossible for plaintiffs to prove that they will prevail on liability for purposes of defeating defendants' anti-SLAPP motion.

VIII. CONCLUSION

The Court should find that all Counts naming either Dr. Puar or Dr. Kauanui involve claims arising from acts in furtherance of their right of advocacy on matters of public interest. The Court should accordingly grant their Special Motion to Dismiss Counts 2, 3, 4, and 5.

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[6]We need not claim that volunteers with nonprofit organizations fulfill a function as important as government officials. However, where a defendant can show a facial right to immunity, the social policy of shielding that defendant from personal monetary liability and harassing litigation argues for the earliest possible resolution of such claims.

The Court should also find that Plaintiffs have not demonstrated that it is likely they will succeed on the merits as to Counts 1, 9, 10, 11, and 12.. The Court should therefore grant the Special Motion to Dismiss as to those counts as well.

Dated: April 1, 2022

Respectfully submitted,

/s/ Richard R. Renner

Richard R. Renner, DC Bar #987624
921 Loxford Ter.
Silver Spring, MD 20901
301-681-0664
Rrenner@igc.org

Dated: April 1, 2022

/s/ *Mark Allen Kleiman*

Mark Allen Kleiman
(pro hac vice)
KLEIMAN / RAJARAM
2525 Main Street, Suite 204
Santa Monica, CA 90405
310-392-5455
310-306-8491 (fax)
mkleiman@quitam.org

Attorneys for Defendants
Kehaulani Kauanui and Jasbir Puar

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on April 1, 2022 a copy of the foregoing **DEFENDANTS JASBIR PUAR'S AND KEHAULANI KAUANUI'S SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT** served by electronic means through CaseFileXpress filing system, which sends notification to counsel of record who have entered appearances.

/s/ Richard R. Renner
Richard R. Renner