DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 23-CV-0240

SIMON BRONNER, *et al.*,

Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *et al.*,

Appellees.

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

BRIEF OF APPELLEE DR. STEVEN SALAITA

---

*Maria C. LaHood (admitted pro hac vice)
Astha Sharma Pokharel (admitted pro hac vice)
Shayana D. Kadidal (#454248)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
[redacted]

Counsel for Steven Salaita

APPELLEE'S CORPORATE DISCLOSURE STATEMENT

COMES NOW Appellee Steven Salaita, by his respective counsel, and pursuant to D.C. Court of Appeals Rules 28(a)(2) and 28(b) files his disclosure statement in order to enable the judges of this court to consider possible recusal:

A. Parties and Counsel

1. **Appellants**

Simon Bronner
Michael Rockland
Charles D. Kupfer
Michael L. Barton

Counsel: Jennifer Gross
Olsson Frank Weeda Terman Matz PC
2000 Pennsylvania Avenue, N.W., Suite 4003
Washington, D.C. 20006

Jerome M. Marcus
Lori Lowenthal Marcus
The Deborah Project
P.O. Box 212
Merion Station, PA 19066

Seth P. Waxman
Julie Aust
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

2. **Appellees**

The American Studies Association
Lisa Duggan
Curtis Marez
Neferti Tadiar
Sunaina Maira
Chandan Reddy

John Stephens

Counsel: Thomas C. Mugavero
Whiteford, Taylor & Preston LLP
3190 Fairview Park Drive, Suite 800
Falls Church, VA 22042-4510

Jeffrey C. Seaman
Whiteford, Taylor & Preston LLP
111 Rockville Pike, Suite 800
Rockville, MD 20850

J. Kehaulani Kauanui
Jasbir Puar

Counsel: Mark Allen Kleiman
Kleiman/Rajaram
12121 Wilshire Boulevard, Suite 810
Los Angeles, CA 90025-1166

Richard Renner
Tate & Renner
921 Loxford Terrace
Silver Spring, MD 20901

Steven Salaita

Counsel: Maria C. LaHood
Astha Sharma Pokharel
Shayana D. Kadidal
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Page(s)

Cases

[1] Cases marked with an asterisk (*) are chiefly relied upon.

Rules

Statutes

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues before the court are:

1) Whether the Superior Court properly found that Plaintiffs' claims against Dr. Salaita are governed by the D.C. Anti-SLAPP Act, given that they are based on his advocacy for the Boycott Resolution, or arise from other acts in furtherance of the right of advocacy on issues of public interest.

(2) Whether the Superior Court properly dismissed Plaintiffs' claims against Dr. Salaita under the Anti-SLAPP Act for failing to demonstrate a likelihood of success on the merits because they did not allege that he was personally involved in the complained-of conduct, the claims are time-barred, or they otherwise fail to state a claim against him.

STATEMENT OF THE CASE

This court reviewed the procedural history of this case and the nearly identical federal case that preceded it in *American Studies Association v. Bronner,* JA 341-343, and the American Studies Association ("ASA") Defendants have summarized it in their Brief. Appellants' Opening Br. ("AOB") 20-27. A few points warrant mention. Dr. Salaita was not named as a Defendant in the federal case until Plaintiffs filed their Second Amended Complaint on March 6, 2018, more than four years after the Boycott Resolution was adopted. Second Am. Compl., *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019), (No. 16-cv-00740-RC), ECF No. 81.

Plaintiffs incorrectly claim that when this case was previously before this court, it "concluded that Counts 1-4, 6-7, and 10-12" "are unlikely to trigger the Anti-SLAPP Act." AOB 25 (citing JA 354). While this court noted that certain Counts "do not appear to be based on the Resolution itself" (JA 354) in reviewing the Superior Court's prior decision, this court did not consider whether any other protected activity was the basis of Plaintiffs' claims. It instead remanded, making clear that "We express no view at this time as to whether the ASA defendants met their burden of showing that any of the plaintiffs' claims arise from acts in furtherance of the right of advocacy on issues of public interest." JA 355.

Upon remand, after supplemental briefing, the Superior Court conducted a claim-by-claim analysis and found that each claim against Dr. Salaita arose from activity protected under the Anti-SLAPP Act. JA 372-377, 379-381. It then found that each claim failed to state a claim against Dr. Salaita, so dismissed every claim against him under the Anti-SLAPP Act. *Id*. Plaintiffs do not appeal the dismissal of Counts One and Four against Dr. Salaita. AOB 34 n.7.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

In December 2013, the American Studies Association (ASA) adopted a public Resolution endorsing the call of Palestinian civil society for a boycott of Israeli academic institutions (the "Resolution" or "Boycott Resolution"). JA 31, ¶ 4.[2]

Plaintiffs make two allegations against Defendant Dr. Salaita. First, Plaintiffs allege that he advocated for the Boycott Resolution prior to joining the ASA National Council in 2015. JA 39, 47, ¶¶ 26, 46. In an op-ed published in 2014, Dr. Salaita stated that he worked with the United States Campaign for the Academic and Cultural Boycott of Israel ("USACBI") "for around five years—closely during the process to pass the American Studies Association resolution." JA 47, ¶ 46; *see also* JA 141, ¶ 337. USACBI is a "United States-based campaign focused on a boycott of Israeli academic and cultural institutions." JA 42, ¶ 35. It "lobbies organizations to boycott Israeli academic and cultural institutions as a form of protest against the state's treatment of Palestinians." JA 340.

---

[2] The Resolution was passed, as articulated in its text, because of the ASA's recognition that the United States plays a "significant role" in supporting Israel's violations of international law, including its occupation of Palestine; its conviction that there is "no effective or substantive academic freedom for Palestinian students" under occupation; and its dedication to "the right of students and scholars to pursue education and research without undue state interference." *Boycott of Israeli Academic Institutions*, Am. Studies Ass'n (Dec. 4, 2013), https://www.theasa.net/node/4912. Documents that are "referenced in the complaint and are central to appellant's claim" can be considered in connection with a motion to dismiss. *Oparaugo v. Watts*, 884 A.2d 63, 76 n.10 (D.C. 2005).

Second, Plaintiffs allege that Dr. Salaita served on the ASA National Council starting July 1, 2015, a year and a half after the Resolution was adopted, and ending June 30, 2018. JA 39, ¶ 26. The National Council serves as the Board of Directors of the ASA and consists of more than 20 members. JA 172, Compl. Ex. C., ASA Bylaws, art. V, § 1-2. Plaintiffs did not sue any other National Council member who began serving after the Resolution was passed—only Dr. Salaita. JA 38-39, ¶¶ 19-27. Plaintiffs allege that while Dr. Salaita was serving on the National Council, funds were withdrawn from the ASA Trust and Development Fund (the "Trust Fund") "to cover expenses related to the Academic Boycott." JA 39, ¶ 26. Plaintiffs allege that such withdrawals were made to defend the ASA against litigation related to the Resolution. JA 95, ¶ 175. The ASA Trust Fund is not administered by the National Council, but by a separate Board of Trustees, on which Dr. Salaita did not sit. JA 149, Compl. Ex. A, ASA Constitution & Bylaws, Constitution art. VIII, § 6; JA 178, Compl. Ex. C, ASA Bylaws, art. XIII, § 2.

Plaintiff Bronner alleges that during the time Dr. Salaita served on the National Council, Bronner's contract as editor of the Encyclopedia of American Studies was not renewed after his term ended on December 31, 2016 because Defendants, though not Dr. Salaita personally, "widely shared" "false information" about him related to his opposition to the Boycott Resolution and his efforts to undermine the ASA after it was passed. JA 382; JA 136-138, 140 ¶¶ 319–26,

334. Bronner also alleges that Defendants stopped publishing additional entries on the online Encyclopedia, a public, "free and open-source online resource" that relates to American Studies, though he does not allege that Dr. Salaita personally had any involvement in these decisions. JA 104-105, 115, ¶¶ 197, 199, 234, 236–38.

Plaintiff Kupfer's ASA membership lapsed in 2014. JA 37, ¶ 17. Plaintiff Barton's membership lapsed in 2012 and he only rejoined the ASA for one year in 2013 to vote against the Resolution, JA 37, ¶ 16; JA 80, ¶ 127, but he does not allege he remained a member of the ASA and continued to pay dues after that. Plaintiffs Bronner and Rockland do not allege that they ever paid membership dues, since they are honorary lifetime ASA members. JA 36-37, ¶¶ 14-15; JA 146, art. II, § 1(c).

Plaintiffs do not allege that Dr. Salaita had any personal involvement in *any* of the acts or omissions they complain of while he was on the National Council, and Plaintiffs have not alleged any other facts related to Dr. Salaita. It is clear that Dr. Salaita was named as a Defendant in this case solely because he advocated in favor of the ASA's Boycott Resolution.

SUMMARY OF ARGUMENT

The Anti-SLAPP Act provides for dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest" that Plaintiffs cannot demonstrate are "likely to succeed on the merits." D.C. Code § 16-5502(a), (b). Plaintiffs do not appeal the dismissal of Counts One and Four against Dr. Salaita,

AOB 34 n.7, meaning that they do not contest that those claims against him were based on activity protected under the Anti-SLAPP Act, and they do not contest that those claims were not likely to succeed against him.[3] Counts One and Four against Dr. Salaita relate to events that occurred before his tenure on the National Council began in July 2015, as do the claims against him under Counts Three, Five, Eleven, and Twelve, and parts of Counts Two and Nine.

The only allegation against Dr. Salaita from before he was on the National Council is that through USACBI, he advocated that the ASA should endorse the call for a boycott of Israeli academic institutions. JA 39, 47, 67-68, 141, ¶¶ 26, 46, 99, 337. Since the only allegation against Dr. Salaita before July 2015 (when he joined the National Council) is his expression of support for the Boycott Resolution, that expression is necessarily the only possible "basis of the asserted cause[s] of action" that relate to that time period. JA 351. As the Superior Court found, and Plaintiffs have not challenged, the Boycott Resolution is on an issue of public interest. JA

[3] Plaintiffs' Opening Brief only mentions Dr. Salaita: 1) to state that they do not appeal Counts One and Four against Dr. Salaita (and that the Superior Court dismissed Count Four against him); 2) to note that unlike all other Defendants in this case, he was *not* an "ASA member[] and officer[] in 2013" when the Boycott Resolution was passed (AOB 7); 3) mistakenly when they mean to refer to Defendant John Stephens (AOB 15, citing JA 78-80, 209-210); and 4) in a bald-faced misrepresentation of their Count Twelve allegations that directly contradict their Complaint. AOB 43 n.8.

306.[4] Dr. Salaita's advocacy in support of the ASA Resolution endorsing a boycott of Israeli academic institutions is protected under the Anti-SLAPP Act as expression that involves "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).

The remaining claims in Counts Two and Nine and Count Ten against Dr. Salaita arise from his time on the National Council. Counts Two and Nine allege that funds were withdrawn from the ASA Trust Fund to cover expenditures to "defend" the Resolution in litigation brought by Plaintiffs themselves. JA 39, 99-101, 103, 123-124, 135 ¶¶ 26, 187, 189-90, 196, 266, 316. Plaintiffs allege that the use of ASA assets was tortious *because* they were used to support or defend the Resolution, JA 39, 99-101, 123-124, 135, ¶¶ 26, 189-90, 266, 316, which communicates views to members of the public in connection with an issue of public interest. For this and other reasons detailed *infra* at Sections II(D)(a), (b), Counts Two and Nine arise from acts in furtherance of the right of advocacy on issues of public interest.

Count Ten claims that Defendants (but not Dr. Salaita specifically) breached their fiduciary duty "by spreading false information" about him that they "widely

[4] The Superior Court found that the Resolution "related to the ability of foreign scholars to work on relevant issues safely, freely, and without fear of persecution. This is related to community well-being . . . ." JA 306 (citing D.C. Code § 16-5501(3)).

shared" to "the National Council and outside of the National Council" because they disagreed with his position on the Boycott. JA 137, 140, ¶¶ 324, 326. Count Ten also claims that Defendants (but not Dr. Salaita specifically) breached their fiduciary duty by not publishing additional entries on the public online Encyclopedia regarding American Studies. JA 104, 114-115 ¶¶ 197, 234, 236–38. Both claims under Count Ten therefore arise from statements in "a place open to the public or a public forum" or "expression . . . that involves . . . communicating views to members of the public." D.C. Code §§ 16–5501(1)(A)(ii), (1)(B), as discussed *infra* Section II(E)(b).

Once Dr. Salaita has met his burden of establishing that the claims against him arise from his protected advocacy, the burden shifts to Plaintiffs to show that they are "likely to succeed on the merits." D.C. Code § 16-5502(b). A plaintiff will fail to satisfy this burden if their claim fails as a matter of law, including for failure to state a claim upon which relief can be granted or for failing to make a "satisfactory evidentiary proffer" of "admissible, credible evidence." JA 344-345.

As the Superior Court ruled, each claim against Dr. Salaita failed to state a claim against him. First, Plaintiffs do not allege Dr. Salaita's personal involvement in any of the actions that form the basis of any of the Counts. JA 372, 374, 376, 379. This is necessarily true for claims that arise out of events that occurred *prior* to his tenure on the National Council when he had no fiduciary duty or other leadership

obligations to the ASA or its members: Counts One and Four which Plaintiffs concede are SLAPPs (AOB 34 n.7), Counts Three, Five, Eleven, Twelve, and parts of Counts Two and Nine. Plaintiffs also did not allege that Dr. Salaita was personally involved in any of the actions alleged to occur *during* his tenure on the National Council which began July 1, 2015: the remaining parts of Counts Two and Nine, and Count Ten. JA 374, 379. Second, as the Superior Court ruled, most Counts are time-barred: Counts Three, Five, Twelve, and parts of Counts Two and Nine, JA 373-374, 375, 377, 380; Count Eleven is similarly time-barred. Finally, the claims against Dr. Salaita otherwise fail as a matter of law on the face of the Complaint, as discussed below.

ARGUMENT

I. Legal Standards

A. Standard of Review

The Superior Court's application of the Anti-SLAPP Act is reviewed *de novo*. *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 580 (D.C. 2022).

B. Appropriate Application of the Anti-SLAPP Act

The Anti-SLAPP Act provides protections from claims "arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). Under the Anti-SLAPP Act, Dr. Salaita must meet his burden of showing that the claims against him have "a substantial connection or nexus to a protected

act," or that "some form of speech within the Anti-SLAPP Act's protection is the basis of the asserted cause[s] of action" against him. JA 351. In other words, one must show that the "'conduct by which plaintiff claims to have been injured falls within' the statutory definition of protected activity." JA 352 (quoting *Equilon Enters., LLC v. Consumer Cause, Inc.*, 52 P.2d 685, 693 (Cal. 2002)).

Plaintiffs' overarching argument that claims cannot arise from protected activity as long as they purport to assert a violation of law misapprehends the D.C. Anti-SLAPP Act and this court's precedent. Plaintiffs argue, for example, that Counts Two and Nine do not arise from protected activity simply because they allege misuse of corporate assets, and in particular because neither breach of fiduciary duty nor corporate waste claims, in the abstract, have "an element [of] expressive conduct." AOB 37. This would mean that most claims would be beyond the reach of the Anti-SLAPP Act, which is not what the Anti-SLAPP Act says, nor what this court has found. This court ruled that courts should "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." JA352 (quoting *Park v. Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905, 908 (Cal. 2017)). Courts must therefore look to the "subject of the claim," JA 351, or the factual allegations that support the elements of a claim, not simply the hornbook legal elements. Contrary to Plaintiffs' argument, the application of the Anti-SLAPP Act is not limited to a claim that "Defendants'

personal views on the Boycott or Israel are wrong." AOB 3. The Anti-SLAPP Act applies when the claim is "based on" protected activity. JA 354.

The Superior Court dismissed the claims against Dr. Salaita under the Anti-SLAPP Act because they failed on the face of the Complaint. Therefore, Plaintiffs' incorrect assertion that allegations in their unverified Complaint constitute a "proffer of admissible, credible evidence" (AOB 46) is inapposite to Dr. Salaita and does not save Plaintiffs' claims against him, as the Superior Court examined the entire Complaint—including those alleged excerpts—and correctly ruled that each Count against Dr. Salaita fails to state a claim on its face. In other words, even if every factual allegation in Plaintiffs' Complaint is accepted as true and supported by evidence—Plaintiffs failed to state any claim against Dr. Salaita.[5]

Although the Superior Court also correctly found that Plaintiffs failed to proffer evidence to support their claims against Dr. Salaita (*see, e.g.,* JA 307), that is an independent reason to find that Plaintiffs are not likely to succeed on the merits under the Anti-SLAPP Act, and need not be reached. Nevertheless, Plaintiffs are

[5] For this reason, this court's recent decision in *Banks v. Hoffman* is inapposite: "To be clear, our analysis in this opinion governs when, as occurred in the instant case, the Superior Court considers materials outside the complaint when deciding an Anti-SLAPP Act special motion to dismiss (i.e., when in essence the court considers whether to grant summary judgment). We do not address in this opinion application of the Anti-SLAPP Act when the Superior Court resolves an Anti-SLAPP Act special motion to dismiss on the ground that the complaint failed to state a claim (i.e., when discovery is not an issue)." *Banks v. Hoffman*, No. 20-CV-0318, 2023 WL 5761926, at *12 n.27 (D.C. Sept. 7, 2023).

simply wrong that this court should accept the excerpts included in their unverified Complaint as a satisfactory proffer of "admissible, credible" evidence. AOB 45-46. Allegations are not admissible evidence. *See Jane W. v. President & Dirs. of Georgetown Coll.,* 863 A.2d 821, 827 (D.C. 2004) ("Absent verification, these allegations, alone, cannot create an issue of material fact."*)*; *Newton v. Off. of the Architect of the Capitol*, 840 F. Supp. 2d 384, 397 (D.D.C. 2012) (allegations in a complaint are not evidence); *Moran v. Selig*, 447 F.3d 748, 759, 759 n.16 (9th Cir. 2006) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc)) (while allegations in *verified* complaint may serve as evidence for purposes of summary judgment "if it is based on personal knowledge and sets forth specific facts admissible in evidence," allegations in *unverified* complaint cannot).[6]

To support their argument, Plaintiffs rely on *U.S. Bank Trust, N.A. v. Omid Land Group, LLC*, where this court ruled that the D.C. Superior Court erroneously failed to consider allegations in plaintiff's proposed amended complaint as part of the summary judgment record. 279 A.3d 374, 378 (D.C. 2022). Plaintiffs misunderstand that case. In *Omid Land Group*, this court took issue with the fact that

[6] Not only is Plaintiffs' Complaint not verified, but Plaintiffs cannot have even read the unredacted version, filed in D.C. Superior Court on June 21, 2019, without violating the Protective Order, which precludes the parties (as opposed to their counsel) from reviewing information designated confidential. Protective Order ¶ 8, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-cv-00740-RC), ECF No. 52.

the Superior Court failed to consider a *new claim* that plaintiff added into the amended complaint and referenced in the summary judgment proceedings, *id*. at 376-77, 379, but that claim was "based on properly authenticated . . . evidence" that was already "in the record," *id*. at 381, including an advertisement for sale that was included as an exhibit to the summary judgement motion, and a trustees' deed of foreclosure that was included as an exhibit to the motion and to the original *verified* complaint. *Id*. at 379–80. Here, Plaintiffs want this court to accept as "admissible, credible evidence" unauthenticated allegations in an unverified complaint.[7] That is improper.

II. Each of Plaintiffs' Claims Against Dr. Salaita Arise from Protected Activity Under the Anti-SLAPP Act and Fail to State a Claim, So Cannot Succeed on the Merits.

A. Counts One (Breach of Fiduciary Duty for Material Misrepresentations and Omissions) and Four (Ultra Vires Action and Breach of Contract for Freezing Membership Roles to Prohibit Voting)

a. Arise From Protected Activity

[7] Although Plaintiffs attempt to rely on the Answer filed by some Defendants in the Superior Court, AOB 23, 45, Dr. Salaita did not answer the Complaint, as the proceedings were stayed pending appeal. JA 14-15 (Docket entries of February 14, 2020 of Oral Ruling Granting Defendants' Opposed Written Motion to Stay Proceedings Pending Appeal and Stay Entered). Regardless, in analyzing whether Plaintiffs stated a claim, the factual allegations are presumed true, *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 709 (D.C. 2013), so any Answer is irrelevant.

Plaintiffs do not appeal the Superior Court's Anti-SLAPP dismissal of Counts One and Four against Dr. Salaita, AOB 34 n.7, which the court found were based on activity protected under the Anti-SLAPP Act (communicating views to members of the public on an issue of public interest) because the only allegation against Dr. Salaita from that time period was that he advocated for the 2013 Resolution. JA 372, 376. By explicitly not appealing Counts One and Four, Plaintiffs concede that those claims against Dr. Salaita are based on advocacy protected by the Anti-SLAPP Act. Counts Three, Five, Eleven and Twelve (and parts of Two and Nine) also occurred prior to Dr. Salaita's tenure on the National Council and can only be based on the exact same protected advocacy, according to the Complaint's allegations.

b. Cannot Succeed on the Merits

Because Plaintiffs do not appeal Counts One and Four against Dr. Salaita, they also concede that those claims against him are not likely to succeed on the merits. AOB 34 n.7. But the Superior Court dismissed those counts for reasons that apply equally to all other counts, and which require their dismissal under the Anti-SLAPP Act. First, the Superior Court ruled that Count One was unlikely to succeed on the merits against Dr. Salaita because "Plaintiffs have not alleged any misrepresentations by Dr. Salaita when he ran for office[,]" JA 372;[8] in other words,

[8] The Superior Court had previously found that Count One against Dr. Salaita failed to state a claim under Superior Court Civil Rule 12(b)(6) for the same reason (JA 319), contrary to Plaintiffs' assertion in their brief. AOB 22.

that they failed to allege any personal involvement by Dr. Salaita in this claim. As described below, this basis for dismissal also applies to all other Counts. Second, as to Count Four, the court ruled that the claim arose from actions that occurred in 2013 and was therefore time-barred. JA 376. As described below, this basis for dismissal also applies to Counts Three, Five, Eleven, Twelve, and parts of Counts Two and Nine.

B. Count Three (Ultra Vires and Breach of Contract for Failure to Nominate Officers and National Council Reflecting Diversity of Membership)

a. Arises From Protected Activity

Count Three (for ultra vires and breach of contract for failure to nominate officers and National Council reflecting diversity of membership) preceded the ASA's Resolution, during which time Dr. Salaita is only alleged to have advocated for the Boycott Resolution. Like other pre-National Council claims, Count Three against Dr. Salaita therefore arises from, or is based on, his advocacy in support of the Resolution, which is expression that involves "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).[9]

[9] And as the Superior Court found, Plaintiffs' claims against other Defendants also come under the Anti-SLAPP Act because they claim that some Defendants nominated too many officer or director candidates (including other Defendants), who endorsed—or publicly stated their support for—USACBI. JA 375; JA 49-50, 53, 124-125, ¶¶ 53-55, 62-65, 269. This Count therefore arises from those

b. Cannot Succeed on the Merits

Under Count Three Plaintiffs allege that, prior to the vote on the Boycott Resolution in 2013, some other Defendants nominated too many candidates for various leadership positions who would support the Resolution, thereby violating the ASA's Constitution. JA 124-127. As the Superior Court ruled, this claim is barred by the three-year statute of limitations (D.C. Code § 12–301) because it occurred in 2013, prior to that year's election, or 2014 at the latest. JA 312, 375.

Plaintiffs insist that this Court should equitably toll the statute of limitations based on Plaintiffs' filing in federal court, contrary to this court's precedent. *Bond v. Serano*, 566 A.2d 47, 48-49 (D.C. 1989). But even if equitable tolling were available, it would not toll any claims against Dr. Salaita that arise out of acts prior to March 6, 2015, because he was only added as a defendant to the federal case when the Second Amended Complaint was filed on March 6, 2018, so the three-year statute of limitations had already run. Second Am. Compl., *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-cv-00740-RC), ECF No. 81.

Equitable tolling is not available, however, when an action was initially timely filed in federal court but dismissed for lack of subject matter jurisdiction, as this court unequivocally ruled in *Bond v. Serano*. 566 A.2d at 48-49. Plaintiffs rely on

---

Defendants' public expressions about USACBI and academic boycotts, which is "expression that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).

Simpson v. District of Columbia Office of Human Rights, in which this court acknowledged but simply distinguished the holding in *Bond* because, although the act that the *Simpson* plaintiff complained of occurred in 1981, more than three years before 1988 when she filed her claim in D.C. Superior Court, the plaintiff did not have a clear right to bring the claim in Superior Court until the law was clarified in 1985. 597 A.2d 392, 401 (D.C. 1991). In contrast, Plaintiffs here always had the right to file their Complaint in D.C. Superior Court. They chose to file in federal court, where the Anti-SLAPP Act does not apply, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015), claiming that they satisfied the amount-in-controversy required for diversity suits. But Plaintiffs knew that they did not: they could not sue based on injuries to the ASA because, as they acknowledged early in the litigation and as the District Court had ruled by the time they added Dr. Salaita to the lawsuit in 2018, they had failed to meet the pre-suit demand requirement necessary to bring a derivative action. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 43 (D.D.C. 2017). And Plaintiffs failed to allege in their Complaint—which they amended twice—any damages that even remotely satisfied the amount-in-controversy requirement. *Bronner v. Duggan*, 364 F. Supp. 3d 9, 21-23 (D.D.C. 2019), *aff'd*, 962 F.3d 596 (D.C. Cir. 2020).[10]

[10] And it would certainly not be equitable to reward Plaintiffs for dilatory or harassing tactics, or for filing in federal court to avoid application of the D.C. Anti-SLAPP Law. *See Neill v. D.C. Pub. Emp. Rels. Bd.*, 234 A.3d 177, 186 (D.C. 2020)

This Count also fails against Dr. Salaita on its face because he was not alleged to have been personally involved: (1) he was not on the National Council until July 2015, long after the complained-of elections; (2) Plaintiffs' only allegation against Dr. Salaita during this time is that he advocated for the boycott Resolution; (3) Plaintiffs do not allege in their Complaint or argue that he was a part of any ASA Nominating Committee before, during, or after his tenure on the National Council. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do . . . Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted).

C. Count Five (Ultra Vires and Breach of Contract for Substantial Part of Activities Attempting to Influence Legislation)

a. Arises From Protected Activity

Under Count Five, Plaintiffs claim that from July 2013 to June 2015, Resolution-related efforts to influence legislation were *ultra vires* and constituted a substantial part of the ASA's activities in violation of the ASA's Statement of Election. JA 130, ¶¶ 290-91. Dr. Salaita did not join the ASA National Council until July 2015, JA 39, ¶ 26, so the only allegation against him for Count Five is that he

---

(equitable tolling turns on a variety of factors including "whether 'tolling would work an injustice to the other party'") (citation omitted).

advocated for the ASA Resolution, or communicated "views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). Count Five against Dr. Salaita therefore arises from activity protected under the Anti-SLAPP Act.

Moreover, Count Five casts the Resolution itself as an attempt to influence legislation, and is therefore based on the Resolution, which is protected under the Anti-SLAPP Act. JA 354; *see also* JA 376-377 (the Superior Court found that Count Five arises from the Resolution and directly challenges it). Finally, as the Superior Court also found, this Count arises from legislative advocacy, or statements "[i]n connection with an issue under consideration or review by a legislative . . . body," D.C. Code § 16-5501(1)(A)(i), and from "expression . . . that involves petitioning the government." D.C. Code § 16-5501(1)(B); JA 376.[11]

Plaintiffs again fundamentally misunderstand the application of the Anti-SLAPP Act by arguing that their claim is not merely that the ASA engaged in lobbying, but that lobbying was a substantial part of its activities in violation of its Statement of Election. AOB 41-42. Regardless, the basis of Plaintiffs' claim is lobbying — statements regarding an issue under consideration by a legislative body,

[11] These are alternative findings, and either is sufficient. Under the Anti-SLAPP Act, statements in connection with an issue under consideration or review by a legislative body are considered in the public interest without regard to the issue. D.C. Code § 16-5501(1)(A)(i).

or expression involving petitioning the government. Plaintiffs may argue such lobbying was sufficiently excessive to violate the law when attempting to show they are likely to succeed on the merits — that is irrelevant to this prong, and in fact is a concession that protected activity is the basis of Count Five.

b. Cannot Succeed on the Merits

As the Superior Court ruled, Count Five is based on actions between July 2013 and June 2015 that were known or easily discovered by Plaintiffs, and is therefore barred by the three-year statute of limitations. Again, even if equitable tolling applied, which it does not, it would not toll this claim against Dr. Salaita that arises out of acts prior to March 6, 2015, because he was not sued in Federal Court until March 6, 2018.

Count Five also fails against Dr. Salaita because all the acts underlying it occurred prior to July 1, 2015 when Dr. Salaita joined the National Council, during a time when he was not bound by the Statement of Election, and could not have acted *ultra vires*. *See Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 7 (D.D.C. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998) ("Ultra vires doctrine encompasses only corporate actions that are expressly prohibited by statute or by-law.").

D. Count Nine (Corporate Waste) and Count Two (Breach of Fiduciary Duty of Loyalty and Good Faith, Misappropriation and Misuse of Assets of the American Studies Association).

Count Nine (for corporate waste) and Count Two (for breach of fiduciary duty for misuse of assets) contain allegations from before and after Dr. Salaita joined the National Council.

a. Arise From Protected Activity - Pre-National Council

Before Dr. Salaita was on the National Council, he is only alleged to have advocated for the Resolution. JA 39, 47, ¶¶ 26, 46. Like all the other claims against Dr. Salaita based on his advocacy for the Resolution, these too fall under the Anti-SLAPP Act because they arise from protected expression communicating views to members of the public on an issue of public interest. D.C. Code § 16-5501(1)(B).

Plaintiffs' pre-2015 allegations against other Defendants also arise from protected activity as they claim ASA resources were misused in declaring the Boycott Resolution enacted, and on the ASA website, blogs, or communications sharing information about the Boycott Resolution. *See, e.g.,* JA 58, 60, ¶¶ 76, 83. These are all protected expression communicating views to members of the public, D.C. Code § 16-5501(1)(B), as well as public statements in connection with an issue of public interest. D.C. Code §§ 16-5501(1)(A)(ii).[12] *See, e.g., Abbas v. Foreign*

[12] Although Plaintiffs' Complaint does not allege funds were used for lobbying, to the extent Plaintiffs argue they were (AOB 17), lobbying is protected as "expressive conduct that involves petitioning the government," D.C. Code § 16-

Pol'y Grp., LLC, 975 F. Supp. 2d 1, 11 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015) (a "website is a 'place open to the public,' because anyone with a working internet connection or access to one can view it.").

b. Arise From Protected Activity - National Council

The claims against Dr. Salaita under Counts Two and Nine that arise from when he was on the National Council (from July 1, 2015 to June 30, 2018) allege that funds were withdrawn from the ASA Trust Fund to cover expenditures to "support" and "defend" the Resolution. JA 39, 99-101, 103, 123-124, 135, ¶¶ 26, 187, 189-90, 196, 266, 316. The only expenditures related to the Resolution alleged to be made during Dr. Salaita's tenure on the National Council were to defend the ASA from this litigation that Plaintiffs brought. *Id*. Plaintiffs claim the use of funds to defend against litigation regarding the Resolution was a breach of fiduciary duty (Count Two) and constituted corporate waste (Count Nine).

As the Superior Court found, the Resolution itself constitutes an act in furtherance of a right to advocacy under the Anti-SLAPP Act, as it "communicat[es] views to members of the public in connection with an issue of public interest." JA 371, citing D.C. Code § 16-5501(1)(B). The Resolution is also a statement made

---

5501(1)(B), and statements "[i]n connection with an issue under consideration or review by a legislative . . . body." D.C. Code § 16-5501(1)(A)(i).

"[i]n a place open to the public or a public forum in connection with an issue of public interest." D.C. Code § 16-5501(1)(A)(ii).

Additionally, litigation related to the Resolution is an act in furtherance of a right of advocacy, as it consists of "expression or expressive conduct that involves petitioning the government," D.C. Code § 16-5501(1)(B), and written or oral statements made "[i]n connection with an issue under . . . review by a . . . judicial body." D.C. Code § 16-5501(1)(A)(i). Just as lobbying is advocacy before a legislative body, litigation is advocacy before a judicial body.

Counts Two and Nine have "a substantial connection or nexus to" these protected acts. JA 351. The basis of Plaintiffs' claim is that the use of ASA assets was unlawful *because* they were used to enact, support, defend, or enforce the Resolution. JA 39, 99-101, 123-124, 135, ¶¶ 26, 189-90, 266, 316; *see also* JA 144.[13] If the funds were not used in relation to the Resolution, then under Plaintiffs' own theory of liability, they would not state claims for a breach of fiduciary duty for misuse of assets or corporate waste. The Resolution is not tangential; it "is the basis of the asserted cause[s] of action," JA 351, or the basis for the asserted liability – Plaintiffs have not alleged any independent basis for liability separate and apart from

[13] Plaintiffs' Complaint states that they are seeking relief for damages "representing the amounts of all money expended, and the value of all American Studies Association assets appropriated, in the service of getting the Academic Boycott enacted; defending it and/or the American Studies Association after such enactment; or enforcing the Academic Boycott after it was enacted." JA 144.

the purpose for which the funds were used: enactment, support, defense, and enforcement of the Resolution. As this court opined, "Count nine alleges that the individual appellants' use of funds to 'declare enacted' the 2013 Resolution amounted to corporate waste," so it "appear[s] to be based on the 2013 Resolution." JA 354 (quoting JA 135, ¶ 316). This is true also for claims based on allegations that funds were used to "support," "defend," or "enforce" the Resolution.

Plaintiffs argue that Counts Two and Nine do not arise from protected activity simply because they allege misuse of corporate assets and because neither breach of fiduciary duty nor corporate waste claims, in the abstract, have "an element [of] expressive conduct." AOB 37. Plaintiffs are essentially arguing that if the hornbook legal elements of a claim do not require statements or expressive conduct, they cannot be dismissed under the Anti-SLAPP Act. That would limit application of the Anti-SLAPP Act to defamation and few if any other claims, contrary to its statutory language, its legislative history, and this court's precedent. To the contrary, this court found that courts should "consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." JA 352, quoting *Park*, 393 P.3d at 908. In applying the Anti-SLAPP Act, courts must therefore look to the factual allegations purported to supply the elements of a claim, not simply the abstract legal elements.

Specifically, in Count Two, Plaintiffs claim that using assets in support of the Resolution was a breach of fiduciary duty. Under their theory of liability, to show a breach of fiduciary duty (one of the elements of the claim), they would need to show that assets were used in relation to the Resolution. JA 123-24, ¶ 266; JA 144. The Resolution is not tangential to Plaintiffs' claim; it is the subject of it — if the assets were used for some other purpose that Plaintiffs did not find objectionable, Plaintiffs would not have a claim that the assets were misused and a fiduciary duty was breached. *Contra Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 (D.C. 2011) ("The heart of appellants' case focuses on the absence of Boule approval [for the use of funds] . . . ").

With regard to Count Nine, as stated in Plaintiffs' Complaint, the "essence of a waste claim is 'the diversion of corporate assets for improper or unnecessary purposes.' *Daley v. [Alpha] Kappa Alpha Sorority, Inc.,* 26 A.3d 723, 730 (D.C. 201[1])." JA 135, ¶ 315. In supplying that element, Plaintiffs allege that the "improper or unnecessary purpose" in this case was the Resolution, including advocating for it, declaring it enacted, supporting and defending it. JA 135, ¶ 316; JA 144. The Resolution is therefore "the subject of the claim or an element of the cause of action asserted." JA 351.

Although Plaintiffs try to argue that their concern is with the expenditure of funds, it is actually the purpose for which the funds were used—the Resolution and

support for it, including litigation to defend it—not the withdrawal of funds by itself, that they claim was tortious. In contrast, the Anti-SLAPP Act would not apply in a hypothetical case in which a defendant stole money from a corporation and used it to publish his manifesto, because the plaintiff's claims there would not be based on what he used the money for — they would be based on his lack of authority to take the funds in the first place. Unlike such an embezzlement case, Plaintiffs do not allege or state a claim that the assets were stolen, that they were taken without authority, or that the withdrawals were procedurally improper. *See* JA 352 n.78. They allege that funds were misused or wasted because (and only because) they were used for an allegedly improper purpose: the Resolution and litigation to defend it. This is enough to satisfy the first prong of the Anti-SLAPP Act.

Moreover, the United States Supreme Court "has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element." *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). And indeed, courts have found that funding expression—including litigation—is itself expression. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (NAACP's solicitation and financing of litigation are a form of "expression and association protected by the First [Amendment]."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("prohibition on corporate independent expenditures [on political speech] is thus a ban on speech"); *Rusheen v. Cohen*, 128 P.3d 713, 718

(Cal. 2006) ("filing, funding, and prosecution" of a civil action is "communicative conduct" under the California Anti-SLAPP Act). *See also Sheley v. Harrop*, 215 Cal. Rptr. 3d 606, 620 (Cal. Ct. App. 2017) (finding California Anti-SLAPP Act applies to claims that funding litigation breached fiduciary duty and wasted corporate assets).

"[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," *Buckley,* 424 U.S. at 19, the purpose of the Anti-SLAPP Act, to prevent and remedy the problem of claims brought "to punish or prevent the expression of opposing points of view,"[14] would be severely hampered if a shareholder of a corporation or a member of a nonprofit association could sue the entity and evade the Anti-SLAPP Act by casting any claim as one for misuse of assets in support of protected speech they sought to challenge. *See also Ted Cruz for Senate v. Fed. Election Comm'n*, 542 F. Supp. 3d 1, 4, 7-8 (D.D.C. 2021) *aff'd sub nom. Fed. Election Comm'n v. Cruz*, 596 U.S. 289 (2022) ("effective speech requires spending money"). "[A] plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a 'garden variety breach of contract [or] fraud claim' when in fact the liability claim is based on protected speech or conduct." *Collondrez v. City of Rio Vista*, 275

[14] D.C. Council, Rep. of Comm. on Pub. Safety & Judiciary on Bill 18-893, at 1 (Nov. 18, 2010).

Cal. Rptr. 3d 895, 902 (Cal. Ct. App. 2021), *review denied* (June 30, 2021) (quoting *Martinez v. Metabolife Int'l, Inc.*, 6 Cal. Rptr. 3d 494, 499 (Cal. Ct. App. 2003)).

The Superior Court agreed with this argument, finding that "expenditure of funds for the advancement of the 2013 resolution" is based on protected activity, as are funds used to support the Resolution, or to pay legal fees to defend it. JA 373 (citing *Citizens United,* 558 U.S. at 339; *Cruz*, 542 F. Supp 3d at 7-8). Plaintiffs attempt to distinguish these cases because they involved corporations spending their own money on speech, whereas here, they assert that Defendants improperly took resources from members or donors (the ASA is a non-profit corporation), and "then tried to immunize that conduct by using the funds on speech." AOB 38. But that is incorrect — Plaintiffs do not allege the resources were improperly taken, but only that they were improperly used on enacting, supporting, and defending the Resolution. This is sufficient to satisfy the first prong of the Anti-SLAPP Act.

c. Cannot Succeed on the Merits

Count Two and Nine fail against Dr. Salaita because some parts are time-barred, because Plaintiffs fail to allege any involvement by Dr. Salaita in decisions or actions related to withdrawals of ASA assets, and because the claims otherwise fail as a matter of law.

First, as the Superior Court ruled, any claim that arises out of the use of ASA resources prior to March 2016 is barred by the three-year statute of limitations. JA

373–374. As argued above, equitable tolling is not applicable, but even if it were based on Plaintiffs' filing in federal court, it would not toll any claims against Dr. Salaita that arise out of acts prior to March 6, 2015, because he was not sued until March 6, 2018. Second Am. Compl., *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-cv-00740-RC), ECF No. 81. Moreover, Dr. Salaita owed no fiduciary duty to the ASA prior to joining the National Council in July 2015, and the only factual allegation against him prior to July 2015 is that he advocated for the Resolution, so he clearly cannot be liable for the use of ASA resources before then. JA 141, ¶ 337.

Second, as to the remaining parts of Counts Two and Nine which pertain to withdrawals from the ASA's Trust Fund after July 2015 to pay legal fees to defend against *Plaintiffs' own lawsuit* (JA 99-101, ¶¶ 189, 190; AOB 18), as the Superior Court ruled, "Plaintiffs have not alleged any facts . . . that Dr. Salaita had a role in withdrawals from the ASA Trust Fund." JA 374. Plaintiffs' only allegation about Dr. Salaita related to these Counts is that "[h]e was a member of the National Council when the American Studies Association's bylaws were changed to allow large withdrawals from the American Studies Association's Trust and Development Fund, and when large withdrawals were taken to cover expenses related to the Academic Boycott." JA 39, ¶ 26. But Plaintiffs allege in their Complaint (and concede in their Brief) that it was the Board of Trustees (which Dr. Salaita was *not* on), not the

National Council, that made decisions related to withdrawals from the Trust Fund. JA 149, Compl. Ex. A, ASA Constitution & Bylaws, Constitution art. VIII, § 6; JA 167-168, Compl. Ex. B, ASA Constitution & Bylaws, Bylaws art. XIII, § 2; JA 177-178 Compl. Ex. C, ASA Constitution & Bylaws, Bylaws Art. XIII, § 2; AOB 6-7. This Court need not accept as true factual allegations—much less legal conclusions—contradicted by exhibits to the Complaint or matters subject to judicial notice. *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004). There are no other allegations related to these Counts that reference Dr. Salaita.

Third, as the Superior Court ruled, Plaintiffs' claims under Counts Two and Nine otherwise fail as a matter of law. Plaintiffs lack standing to bring derivative claims based on injuries to the ASA related to the use of ASA funds (JA 374), not only because they are collaterally estopped from doing so based on the federal court's 2017 ruling, but also because the basis of that ruling—that Plaintiffs failed to make a pre-suit demand at least ninety days before filing any derivative claim as required under D.C. law—is still true. *Bronner v. Duggan*, 249 F. Supp. 3d at 43.

Although a plaintiff may be able to bring claims against a nonprofit based on their own injuries as a member, Plaintiffs have not alleged they are personally injured by the use of ASA funds. JA374. Plaintiffs cite *Daley v. Alpha Kappa Alpha Sorority, Inc.,* a case in which this Court held that dues-paying members of a nonprofit have standing to complain when "allegedly the organization and its management do not

expend those funds in accordance with the requirements of the constitution and by-laws of that organization." 26 A.3d at 729. But the Plaintiffs in *Daley* were *dues-paying* members of the nonprofit, and as such it was their money that was allegedly being misused. In contrast, Plaintiff Kupfer's membership lapsed in 2014, JA37 ¶ 17; Plaintiff Barton's membership lapsed in 2012 and he only rejoined the ASA for one year in 2013 to vote against the Resolution, JA 37, ¶ 16, JA 80, ¶ 127, but does not allege he remained an ASA member or continued to pay dues after that; Bronner and Rockland are honorary lifetime ASA members so do not pay dues. JA 36-37, ¶¶ 14, 15; JA 146, Compl. Ex. A, ASA Constitution & Bylaws, Constitution art. II, § 1; JA 160, Compl. Ex. B, ASA Constitution & Bylaws, Bylaws art. II, § 1; JA 170, Compl. Ex. C, ASA Constitution & Bylaws, Bylaws art. II, § 1.

Finally, the expenditures that Plaintiffs complain of were neither a breach of fiduciary duty nor corporate waste. As to breach of fiduciary duty, unlike in *Daley*,[15] Plaintiffs here do not argue that Defendants lacked authority to make withdrawals from the Trust Fund, or that the withdrawals were procedurally improper.[16]

---

[15] "The heart of appellants' case focuses on the absence of Boule approval [for the use of funds] . . . " *Daley*, 26 A.3d at 730.

[16] Plaintiffs allege in their Complaint, though they have not raised in their Brief, that the amendment to the ASA's bylaws was made "without informing the members," JA 92, 95, ¶¶ 164, 174, but they cannot claim that this was procedurally improper because neither notification to nor approval by the membership was required, as the National Council is authorized to amend the Bylaws. JA 158, Compl. Ex A, ASA Constitution & Bylaws, Bylaws, art. XIII § 1.

Plaintiffs' absurd argument against Dr. Salaita is that it was a breach of fiduciary duty to pay legal fees to defend against the meritless lawsuit *that Plaintiffs themselves* brought against the ASA. It is plainly not a breach of fiduciary duty to defend the ASA against a lawsuit, especially a meritless one that was dismissed by a federal court and the D.C. Superior Court for being a SLAPP. 3A Fletcher Cyc. Corp. § 1112 (West 2023) ("the payment of an attorney for legal services performed for the company is not improper."); *Kaplan v. First Hartford Corp*., 484 F. Supp. 2d 131, 144 (D. Me. 2007) ("Directors and officers usually have a duty to engage lawyers to defend the corporation even if they individually have failed to perform in some way that caused the litigation"); *In re Cray Inc. Derivative Litig.*, 431 F. Supp. 2d 1114, 1134 (W.D. Wash. 2006) (citing cases finding that derivative claim for potential costs of litigation are insufficient to state claims for breach of fiduciary duty and corporate waste). Similarly, as to corporate waste, "it is difficult to see" how the use of corporate funds to defend against a SLAPP filed against the corporation "could be deemed corporate waste under the demanding standard set forth above." *Daley*, 26 A.3d at 730.

E. Count Ten (Breach of Fiduciary Duty) and Eleven (Tortious Interference with Contractual Business Relations) Related to Plaintiff Bronner and the Encyclopedia

Count Eleven (for tortious interference) contains allegations from before Dr. Salaita joined the National Council, and Count Ten (for breach of fiduciary duty) contains allegations from after Dr. Salaita joined the National Council.

a. Arise From Protected Activity - Pre-National Council

Under Count Eleven, Plaintiff Bronner alleges that Defendants breached their fiduciary duty and tortiously interfered with his contract to be editor of the Encyclopedia of American Studies. JA 138-140, ¶¶ 327–334. Plaintiff Bronner explicitly alleges that Dr. Salaita could only be liable for tortious interference with his contract before he was a member of the National Council and became a fiduciary. JA 140, ¶ 332. Plaintiffs' Complaint states:

> To the extent that Defendants acted to interfere with Plaintiff Bronner's contract in a period of time when they were not fiduciaries of Plaintiff Bronner and the American Studies Association, they are liable for interference with the contractual business relationship between Plaintiff Bronner and the association.

Id.

Again, Plaintiffs' only allegation against Dr. Salaita from before he joined the National Council is that he advocated for the Boycott Resolution, JA 39, 47, ¶¶ 26, 46, or communicated "views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). That allegation is therefore the

subject of Count Eleven against Dr. Salaita. Moreover, one of the elements of a tortious interference claim is that defendant must intentionally interfere with a valid contractual or other business relationship. *See, e.g., Close It! Title Servs., Inc. v. Nadel*, 248 A.3d 132, 141 (D.C. 2021).[17] Given that the only allegation against Dr. Salaita from the time period is that he advocated for the Resolution, communicating his views, that is the only possible activity that can supply that element of the claim.

Plaintiff Bronner's other allegation is that Defendants (at large) interfered with his contract by making "false and pejorative misstatements" (JA 139-140, ¶ 331) about Bronner which were "widely shared" to "the National Council and outside of the National Council." JA 140, ¶ 334. Even if that could be the basis of Count Eleven against Dr. Salaita (although the Complaint does not allege that Dr. Salaita specifically made these statements, much less identify any such statement by Dr. Salaita), such statements also fall under the Anti-SLAPP Act as discussed *infra* Section II(E)(b). Either way, the alleged speech is the "subject of the claim or an element of the cause of action asserted," JA 351, so Count Eleven against Dr. Salaita is based on activity protected by the Anti-SLAPP Act.

[17] This court has noted that in enacting the Anti-SLAPP Act, the DC Council Committee Report identified business torts such as interference with contract as a claim associated with SLAPPs. JA 352 n.82 (citing Comm. Rep. at 2).

b. Arise From Protected Activity - National Council

Under Count Ten for breach of fiduciary duty from when Dr. Salaita was on the National Council, Plaintiff Bronner does not name Dr. Salaita specifically, but claims that Defendants breached their fiduciary duty "[b]y spreading false information" about him that they "widely shared" to "the National Council and outside of the National Council" because they disagreed with his position on the Boycott. JA 137-138, ¶¶ 324–26. Bronner alleges Defendants did so to convince others not to renew his contract as editor of the Encyclopedia of American Studies after it expired on December 31, 2016. JA 137, ¶ 324; *see also* JA 382, Editor Agreement at 1. As the Superior Court found, these claims arise out of expression protected under the Anti-SLAPP Act. JA 378. The information that Defendants shared "widely" about Plaintiff Bronner was related to his opposition to the Resolution, an issue of public interest, and his efforts to undermine the ASA after the Resolution was passed, including his role in getting the department he chaired to withdraw from the ASA in response to the Resolution JA 105-106, 109 ¶¶ 201(b), 205 n.13. This claim is based on widely "spreading false information" and arises from statements in "a place open to the public or a public forum" or "expression . . . that involves . . . communicating views to members of the public." D.C. Code §§ 16–5501(A), (1)(B). *See* JA 349 (describing cases where direct link between claims

and speech are apparent).[18] Count Ten therefore arises out of expression protected under the Anti-SLAPP Act.

Plaintiff Bronner also claims there was a breach of fiduciary duty because Defendants did not publish additional entries on the online Encyclopedia. JA 114-115, ¶¶ 234, 236–38. The Encyclopedia is "an online encyclopedia of topics, persons, issues and events in American Studies" that is a "free and open-source online resource." JA 104-105, ¶¶ 197, 199. The Encyclopedia entries that the ASA posts online are in connection with issues of public interest, and this claim arises from statements in "a place open to the public or a public forum" (D.C. Code § 16–5501(1)(A)(ii)) or "expression . . . that involves . . . communicating views to members of the public." D.C. Code §§ 16–5501(1)(B). This claim therefore arises out of expression protected under the Anti-SLAPP Act. As the Superior Court found with regard to "decisions involving publishing entries on the Encyclopedia, these claims arise from an editorial decision to not publish information on a website available to the public, which is in itself, a form of expression." JA 378, citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) ("freedom of

[18] *See also Toufanian v. Lorenz*, No. 2020 CA 35 B, 2021 WL 8821262, at *4 (D.C. Super. Ct. June 27, 2021) (although plaintiff in tortious interference claim alleged that defendant's criticisms of plaintiff, shared with individuals and published in New York Times, "were spurred by some sort of a personal vendetta," the criticisms were related to issue of public interest and were protected by Anti-SLAPP Act).

speech" is "a term necessarily comprising the decision of both what to say and what *not* to say"). *See also Lawless v. Mulder*, No. 2021 SC3 000441, 2021 WL 4854260, at *3 (D.C. Super. Ct. Oct. 05, 2021) (editorial decision not to publish certain information is protected under D.C. Anti-SLAPP Act).[19]

c. Cannot Succeed on the Merits

Counts Ten and Eleven fail as a matter of law for several reasons. First, Count Eleven for tortious interference with contractual business relations can only be based on actions Dr. Salaita took before he joined the National Council in July 2015, as Plaintiffs acknowledge in their Complaint, JA 140, ¶ 332, because a party cannot interfere in its own contract. *See Donohoe v. Watt*, 546 F. Supp. 753, 757 (D.D.C. 1982), *aff'd*, 713 F.2d 864 (1983) ("It is a well settled principle of law that this tort arises only when there is an interference with a contract between the plaintiff and a third party"). This claim against Dr. Salaita is barred by the three-year statute of limitations.

Second, as the Superior Court ruled, Plaintiffs do not allege that Dr. Salaita had any involvement in, or interfered in, either the decision not to renew Bronner's contract or the decision to not publish additional entries on the Encyclopedia. JA 379. There is no mention of Dr. Salaita in 27 pages of allegations related to these

[19] *See also Navellier v. Sletten*, 52 P.3d 703, 709 (Cal. 2002) (protecting misrepresentations, failure to disclose, and omissions under the Anti-SLAPP Act); *Suarez v. Trigg Labs., Inc.,* 207 Cal. Rptr. 3d 411, 415 (Cal. Ct. App. 2016) (same).

Counts (JA 102-130). There is no allegation that Dr. Salaita personally did or said anything to interfere with Bronner's contract as editor of the Encyclopedia before he was a member of the National Council, and there is no allegation that once Dr. Salaita joined the National Council he had any role in the ASA's decision to not renew Bronner's contract. In fact, Dr. Salaita had no duty related to Bronner's contract after it expired because the Bylaws at the time required the Executive Committee (which Dr. Salaita was *not* on, JA 163, Art. V, § 7 (listing members of Executive Committee)) to designate the editor of the Encyclopedia. JA161 (ASA Bylaws Art. IV, § 2). There is also no allegation that Dr. Salaita was personally involved in decisions related to publish or not publish articles in the Encyclopedia. To survive, a complaint must allege "more than the mere possibility of misconduct," and "'naked assertion[s]' devoid of 'further factual enhancement . . .'" cannot state a claim for relief. *Iqbal*, 556 U.S. at 678, 679.

Third, Counts Ten and Eleven both otherwise fail as a matter of law on the face of the Complaint. As the Superior Court ruled, by the time Bronner's contract expired, he was in active litigation against the ASA, and it is not a breach of fiduciary duty to not renew the contract of someone who is suing the corporation.[20] JA 378.

[20] Bronner also failed to show under Count Ten that amendment of the Bylaws to remove the position of editor as *ex officio* officer and non-voting member of the National Council is a breach of fiduciary duty. JA117-JA118 ¶¶ 243–46, 248. The Bylaws plainly allow such an amendment and do not require notice to be sent to the full membership. JA 168, Art. XIV.

Similarly, there is no claim for tortious interference when a contract simply comes to an end and there is no longer a right or a reasonable expectation of a future contractual relationship. *Id*. *See also Robertson v. Cartinhour*, 867 F. Supp. 2d 37, 60 (D.D.C. 2012), *aff'd*, 553 F. App'x 1 (D.C. Cir. 2014) (internal quotations omitted) ("To state a claim for tortious interference in the District of Columbia, the business expectancy must be "commercially reasonable to anticipate" and "requires a probability of future contractual or economic relationship and not a mere possibility."); *Paul v. Howard Univ.*, 754 A.2d 297, 309 (D.C. 2000) (plaintiff "had no contractual right to indefinite tenure; hence the [defendants] could not have interfered with her contractual relations").[21] Bronner does not allege that he had a contractual right or a reasonable expectation that his editor contract would be renewed. Even if historically the editor's contract had been renewed at the end of each term, JA 111, ¶ 223, it is not reasonable to expect that it would be, especially once Bronner had sued the ASA.

[21] Plaintiffs also argue in their brief that Defendants interfered with other contractual relationships with other unnamed "entities who contracted with Bronner." AOB at 20. Plaintiffs have never before made this argument, and nowhere in their Complaint or brief do they say what these entities might be.

F. Count Twelve (Aiding and Abetting Breach of Fiduciary Duty)

a. Arises From Protected Activity

Count Twelve (for aiding and abetting breach of fiduciary duty) against Dr. Salaita is based on his advocacy in support of passage of the ASA Resolution "before he was a member of the Nation Council," as explicitly stated in Plaintiffs' Complaint, JA 141, ¶ 337, and as found by the Superior Court. JA 314-15. Plaintiffs falsely claim that Dr. "Salaita's aiding and abetting is predicated on his conduct from 2015 through 2018, when it was undisputed that he was on the National Council." AOB 43, FN 8, citing JA39, 195. Under Count Twelve, Plaintiffs' Complaint states:

> Similarly, Defendant Salaita acknowledged publicly that he was heavily involved in the effort to pass the Academic Boycott before he was a member of the National Council. His substantial assistance, also knowing that the Academic Boycott would cause great damage to the American Studies Association and its members, also constitutes aiding and abetting breach of fiduciary duty.

JA 141, ¶ 337.[22] Dr. Salaita's advocacy to pass the ASA Resolution is protected under the Anti-SLAPP Act as expression that involves "communicating views to

[22] In 2019, Plaintiffs conceded that it was Dr. Salaita's actions "prior to his election to the ASA National Council" that "support the claim for aiding and abetting breach of fiduciary duty in Count Twelve." Pls.' Omnibus Opp. to Defs.' Motion to Dismiss at 59, *Bronner v. Duggan*, No. 2019 CA 0001712 B (D.C. Super. Ct. Jun 4, 2019).

members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).

b. Cannot Succeed on the Merits

Because Count Twelve against Dr. Salaita is predicated on his advocacy to get the ASA to pass the Resolution, JA 141, ¶ 337, the claim against him is based on acts that occurred prior to December 2013, when the Resolution was passed. Plaintiffs have known of the passage of the Resolution since 2013 and have known of Dr. Salaita's advocacy since at least 2014, when, as they recognize, he publicly acknowledged it in an op-ed. *Id*. This claim against Dr. Salaita is therefore barred by the three-year statute of limitations, and was untimely when Plaintiffs first added him as a defendant in the federal case in March 6, 2018.

Even if this claim were not time-barred, it otherwise fails as a matter of law. This Court has not recognized aiding and abetting breach of fiduciary duty as a valid claim in D.C. *See Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711 (D.C. 2013). Even if it were to recognize such a claim, Plaintiffs must allege "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). Plaintiffs have not alleged

that Dr. Salaita had knowledge of any fiduciary duty breach in the effort to pass the Resolution in 2013, or that he substantially assisted that breach. Plaintiffs' legal conclusion that his "substantial assistance, also knowing" that the Resolution "would cause great damage" to the ASA (JA 141, ¶ 337) is insufficient to state a claim because it is a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). *See also Bereston v. UHS of Del., Inc.*, 180 A.3d 95, 99 (D.C. 2018) ("allegations of . . . knowledge . . . must be supported by well-pleaded factual allegations in order to be accorded the presumption of veracity").

Finally, the First Amendment protects any peaceful advocacy Dr. Salaita conducted, including his advocacy for the Resolution. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (finding that the First Amendment bars liability for state torts, including "civil conspiracy based on those torts," for First Amended protected activity). *See also, NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982) (peaceful political boycotts constitute "expression on public issues" and therefore "rest[] on the highest rung of the hierarchy of First Amendment values.") (internal quotations omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's decision dismissing each of Plaintiffs' claims against Dr. Salaita under the Anti-

SLAPP Act, and remand to the Superior Court to determine reasonable attorneys' fees and costs under the Anti-SLAPP Act.

Respectfully submitted,

/s/Maria C. LaHood

Maria C. LaHood (admitted *pro hac vice*)
Astha Sharma Pokharel (admitted *pro hac vice)*
Shayana D. Kadidal (#454248)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
[redacted]

Attorneys for Appellant Steven Salaita

STATUTES AND RULES RELIED UPON

D.C. Code § 12-301:

Limitation of time for bringing actions.

[(a)] Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments -- 15 years;

(2) for the recovery of personal property or damages for its unlawful detention -- 3 years;

(3) for the recovery of damages for an injury to real or personal property -- 3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment -- 1 year;

(5) for a statutory penalty or forfeiture -- 1 year;

(6) on an executor's or administrator's bond -- 5 years; on any other bond or single bill, covenant, or other instrument under seal -- 12 years;

(7) on a simple contract, express or implied -- 3 years;

(8) for which a limitation is not otherwise specially prescribed -- 3 years;

…

D.C. Code § 16-5501(1):

Definitions.

For the purposes of this chapter, the term:

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

(A) Any written or oral statement made:

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

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

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

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

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

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

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

D.C. Code § 16-5502(a)-(b):

Special motion to dismiss.

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

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2023, a copy of Appellee Dr. Steven Salaita's Opening Brief was served on the following through the Court's electronic filing system:

Jennifer Gross
Olsson Frank Weeda Terman Matz PC
2000 Pennsylvania Avenue, N.W., Suite 4003
Washington, D.C. 20006

Jerome M. Marcus
Lori Lowenthal Marcus
The Deborah Project
P.O. Box 212
Merion Station, PA 19066

Seth P. Waxman
Julie Aust
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

/s/Maria C. LaHood
Maria C. LaHood

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Maria C LaHood

Signature

23-cv-0240

Case Number(s)

Maria C. LaHood

Name

10/20/2023

Date

[redacted]

Email Address