No. 19-7017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIMON BRONNER, et al.

Appellants,

v.

LISA DUGGAN, et al.

Appellees.

JOINT MOTION FOR SUMMARY AFFIRMANCE

COME NOW the Appellees, The American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Neferti Tadiar, Chandan Reddy, John Stephens, J. Kehaulani Kauanui, Jasbir Puar, and Steven Salaita (collectively, "the Defendants" or "Defendants"), by and through the undersigned counsel, and hereby move for summary affirmance of the above-captioned appeal. For the reasons stated below, the District Court correctly dismissed this action for lack of subject matter jurisdiction.

BACKGROUND

Although the Plaintiffs' / Appellants' (hereinafter "Plaintiffs") pleadings below – the Complaint, the Amended Complaint, and the Second Amended Complaint – are all exceedingly long and overwrought, the essential facts are quickly stated. ASA is a non-profit organization for educators, researchers and students of American Studies; its membership is international in scope. In 2013, at the ASA national convention, the organization passed a Resolution in reference to a boycott of Israeli academic institutions. Plaintiffs are among those individuals who opposed the Resolution. In 2016, Plaintiffs filed this lawsuit, claiming breach of fiduciary duty, *ultra vires* action and a host of other claims arising out of adoption of the Resolution; Plaintiffs claimed diversity jurisdiction in the federal court. By Memorandum Order of March 31, 2017 [Document 28], the District Court (Contreras, J.) granted in part Defendants' Motion to Dismiss; most pertinently for the instant Motion, the Court dismissed all of Plaintiffs' derivative claims on the grounds that the statutory notice had not been provided to the Association.

On March 6, 2018, the Court granted leave for Plaintiffs to file their Second Amended Complaint [("SAC"), Document 59-1], adding more individuals as defendants and restating their claims. On August 27, 2018, Defendants filed a

Renewed Motion to Dismiss [Document 106] arguing *inter alia* that the District Court lacked subject matter jurisdiction because Plaintiffs had not demonstrated the likelihood of damages in excess of $75,000. On February 4, 2019, in a Memorandum Opinion the District Court granted that motion, and dismissed the case for lack of subject matter jurisdiction ("the Dismissal Opinion" [Document 122]. Having previously dismissed Plaintiffs' derivative claims, the District Court found that Plaintiffs could not seek damages for any injuries to the ASA (Dismissal Opinion at 15), and that it was "clear, to a legal certainty, that their remaining claims do not raise an amount-in-controversy exceeding $75,000." Dismissal Opinion at 19. This appeal followed; Plaintiffs have also filed a related lawsuit in the Superior Court for the District of Columbia.

ARGUMENT

Summary affirmance of an appeal is appropriate where the merits of the claim are so clear as to justify expedited action, *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (*citing United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969)) and "no benefit will be gained from further briefing and argument of the issues presented," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987). A dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *Am. Hosp. Ass'n v. Azar*, 895 F.3d 822, 825 (D.C. Cir. 2018) Here, it is

eminently clear that the District Court lacked subject matter jurisdiction, because Plaintiffs had not shown damages in excess of the $75,000 threshold.

It need only be briefly stated that subject matter jurisdiction does not exist where

> . . . from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to that amount, . . . the suit will be dismissed.
> *St. Paul Mercury Indemnity Co. v. Red Cab*, 303 U.S. 283, 288-89 (1938); *see also Rosenboro v. Kim*, 994 F.2d 13, 17 (D.C. Cir. 1993) (same).

Where a defendant has challenged a plaintiff's allegations concerning the jurisdictional amount – even an allegation that is sufficient from a pleading standpoint —"a factual issue emerges and the burden of establishing jurisdictional amount is thrust upon the claimant." *Gomez v. Wilson*, 477 F.2d 411, 420 (D.C. Cir. 1973); *see also Watkins v. Pepco Energy*, 2005 U.S. Dist. Lexis 16930, *6 (D.D.C. 2005) (dismissing for lack of jurisdiction). Further, the District Court has an "ongoing obligation to ensure that it is acting within the scope of its jurisdictional authority." *Hardy v. N. Leasing Sys., Inc.*, 953 F.Supp.2d 150, 155 (D.D.C. 2013). The District Court, therefore, properly invited additional argument on the issue of its jurisdiction. Dismissal Opinion at 6.

It is also well established that "mere conclusory allegations of jurisdiction" and "bald assertions of jurisdictional facts" are insufficient to resist a jurisdictional

challenge. *Roche v. Lincoln Prop. Co.*, 373 F.3d 610, 617 (4th Cir. 2004) *rev'd on other grounds,* 546 U.S. 81 (2005). Because federal courts are courts of limited jurisdiction and are empowered to act only in those instances authorized by Congress, there is a presumption against the existence of federal jurisdiction. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U.S. 327, 336 (1895); *Roche*, *supra* 373 F.3d at 617. Thus, in determining the existence of subject matter jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. §1322, the statute is to be strictly construed and all doubts are to be resolved against federal jurisdiction. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942).

In general, the court looks to the damages claimed at the commencement of the case in determining whether it possesses diversity jurisdiction. *Red Cab, supra* 303 U.S. at 289 – 90. However, as the Supreme Court has noted, "[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction … Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 473, 127 S. Ct. 1397, 1409 (2007); *see also Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 18 (D.C. Cir. 2015). One must, therefore, look to the SAC to determine whether there is diversity jurisdiction.

The District Court concluded from the SAC that the Plaintiffs had not met and could not meet the jurisdictional threshold of 28 U.S.C. § 1332. Dismissal Opinion at 11-19). The Plaintiffs had relied primarily if not exclusively on damages suffered by the Association to establish jurisdiction. But as the District Court properly noted, damages incurred by the Association could not be claimed by the Plaintiffs. Dismissal Opinion at 11-17. First, the derivative claims were properly dismissed because there was no dispute that Plaintiffs served notice on the Association merely two days before filing their lawsuit, far less than the ninety days required by law. *See* D.C. Code § 29-411.03; *see also* Mar. 31, 2017 Memorandum Opinion [Document 28] at 21-25. Nor is there any factual allegation in the SAC to suggest that, when the lawsuit was filed in 2016, a demand for litigation on the ASA National Council would have been futile. March 31, 2017 Memorandum Opinion at 26-29. By that point, three years had passed since passage of the Resolution, and the composition of the National Council had changed. March 31, 2017 Memorandum Opinion at 27. Because the Plaintiffs failed to provide the requisite demand on the Association before filing the lawsuit, their derivative claims were properly dismissed under Fed. R. Civ. P 23.1.

Next, the Court correctly found that without derivative claims, Plaintiffs could not seek damages for any alleged injuries to the ASA. Document 122, at 15. Reviewing the well-established prohibition on seeking relief for a third party, the

Court found that Plaintiffs failed to identify any other "cause of action by which they can assert ASA's claims," and "failed to otherwise demonstrate a 'hindrance to [ASA's] ability to protect [its] own interests.'" Dismissal Opinion at 14 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (internal quotation omitted)).

Counts One to Seven and Nine of the SAC all improperly sought damages incurred by ASA, as opposed to by the Plaintiffs themselves.[1] These include: a decrease in contributions to the Association (SAC ¶ 174); use of contributions for legal costs and "other support for the Resolution" (¶ 175); a decrease in membership fees collected (¶ 177); use of Association funds for retention of a media strategist and Public Relations consultant (¶ 182); "substantial legal costs defending the Resolution" (¶¶ 183, 185); and withdrawals from the Trust Fund to pay for some of these exceptional expenses (¶ 191). *See* Dismissal Opinion at 14.

None of these alleged damages remained viable, because they were all derivative in nature. A derivative action, by definition, seeks redress for a wrong to the corporation primarily, and to the shareholder (or, here, the member) only secondarily. *See* 12B Fletcher Cyc. Corp. ¶ 5908. Traditionally, the courts have used three tests to determine whether an action is derivative: the "direct harm" test,

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[1] *See Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir., 1984) ("Claims of corporate mismanagement must be brought on a derivative basis because no shareholder suffers a harm independent of that visited upon the corporation and the other shareholders."); *see also Burman v. Phoenix Worldwide Industries, Inc.*, 384 F.Supp.2d 316, 338 (D.D.C. 2005) (claim for breach of fiduciary duty arising out of failure to secure revenue was dismissed as stating only a derivative claim).

the "special injury" approach, and the "duty owed" approach. *Keller v. Estate of McRedmond*, 495 S.W.3d 852, 870 (Tenn. 2016). Whichever test is employed, "[t]he pertinent inquiry is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation" *Albany–Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419, 763 N.Y.S.2d 119 (3d Dept.2003) (internal quotations omitted); *cf. Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016) ("In a derivative action, the shareholder seeks to assert, on behalf of the corporation, a claim belonging not to him but to the corporation.") (*quoting Flocco v. State Farm Mut. Auto Ins. Co.*, 750 A.2d 147, 151 (D.C. 2000)). Thus, in *Keller*, *supra*, the claim that one member of a close corporation breached his fiduciary duty through mismanagement and self-dealing was derivative in nature and had to be asserted on behalf of the corporation itself. *See also Wallace v. Perret*, 28 Misc.3d 1023, 903 N.Y.S.2d 888 (2010) (limited partner's claim for breach of fiduciary duty and conversion was derivative); *Gaff v. FDIC*, 814 F.2d 311 (6th Cir. 1987) (Shareholder did not have standing to bring suit under federal banking law when only damage alleged was diminution in value of corporate shares); *Adjusters, Inc. v. Computer Sciences Corp.*, 818 F. Supp. 120 (E.D. Pa. 1993) (corporate president's claim that he had to fund the company with his own funds, thereby risking imposition of a tax lien and loss of home and car were derivative of the primary injuries suffered by the corporation); *Altrust*

Financial Svces, Inc. v. Adams, 76 So.2d 228 (Ala. 2011) (claims for damages for diminution in the value of stock were derivative); *Fisher v. Big Squeeze (N.Y.), Inc.*, 349 F.Supp.2d 483 (E.D.N.Y. 2004) (claim by minority shareholder of loss of value of fractional interest was derivative, even though plaintiff alleged he was the only shareholder affected).

In opposing Defendants' motions to dismiss, Plaintiffs did not argue directly that they were pressing derivative claims; instead, they maintained that whether they could bring such claims was a question of standing, not a question of jurisdiction. This was, however, incorrect. Where a case is in federal court on diversity grounds, it is not enough merely to have standing to bring a claim: the plaintiff must also demonstrate sufficient damages to meet the jurisdictional threshold. The Plaintiffs erroneously suggested that their standing to bring claims in this case was coextensive with an ability to recover damages allegedly suffered by the American Studies Association. The issue is, in fact, jurisdictional: because Plaintiffs could not recover damages to the corporate entity, they could not meet the necessary federal jurisdictional threshold.

In making their arguments below, the Plaintiffs relied primarily on *Daley v. Alpha Kappa Sorority, Inc.*, 26 A.3d 723 (D.C. 2011) and *Jackson v. George*, 146 A.3d 405 (2016) to claim that they could, in fact, claim damages suffered by the ASA. But neither case has anything to do with federal subject matter jurisdiction.

In *Daley*, the Court of Appeals permitted individual sorority members' claims to continue against the sorority and its directors, noting that the "individual rights of the plaintiffs were affected by the alleged failure to follow the dictates of the constitution and the by-laws and they thus had a 'direct personal interest' in the cause of action." *Daley*, 26 A.3d at 729, *citing Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1036 (Del. 2004)). As to *Jackson*, the rationale was the same, and the *Jackson* court cited *Daley* in that regard.

Neither *Daley* nor *Jackson* addressed the particular question now at issue: whether injuries other than those incurred by Plaintiffs individually could form the basis of federal subject matter jurisdiction. As the District Court correctly found, "*Daley* and *Jackson* concern a non-profit member's standing to seek relief based on the *member's* injuries, but not a non-profit member's standing to seek relief based on the *non-profit's* injuries." Dismissal Opinion at 16. The Defendants respectfully submit that there is a wide gap between the issue of "standing" to survive a motion to dismiss for lack of injury in Superior Court and the issue of quantum of damages that an individual plaintiff may claim for federal jurisdictional purposes. The District Court was thus correct in rejecting Plaintiffs' "clever attempt" to use those cases to overturn long-standing precedent regarding derivative claims. Dismissal Opinion at 14. Plaintiffs were required to demonstrate that they had each suffered, *individually*, more than $75,000 in damages, and

neither *Daley* nor *Jackson* enable Plaintiffs to avoid that basic, jurisdictional requirement.

The SAC does allege that Dr. Bronner was "unceremoniously kicked out of the National Council meeting" (*id.* at 39, ¶ 109), and that Dr. Barton was not allowed to vote on the Resolution (*id.* at 46-7, ¶ 126). These allegations, however, do not indicate what amount of damages these two men might have suffered. It is established that the party seeking federal jurisdiction must allege facts in support of such jurisdiction; conclusory statements alone do not establish the amount in controversy. *See Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044-45 (3rd Cir. 1993) ("person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation"); *Garza v. Bettcher Indus., Inc.*, 752 F. Supp. 753, 763-64 (E.D. Mich.1990) (*cited in McGhee v. Citimortgage, Inc.*, 834 F. Supp.2d 708 (E.D. Mich. 2011)). There are no facts set forth anywhere in the SAC that would assign a monetary value either to Dr. Bronner's removal from the meeting or to Dr. Barton's inability to vote.

Similarly, although the Plaintiffs did allege that dues in general had increased – at most by $155/year – they did not allege that their own dues have increased, nor how much more they individually might have had to pay in dues (*id.*

at 65-66, ¶ 185).[2] But even if they had experienced some increase in the dues they had to pay, their individual dues increases would have to amount to $75,000 per individual Plaintiff in order to meet the threshold, because it is well-established that parties may not aggregate their damages to meet the jurisdictional threshold. *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp.3d 26 (D.D.C. 2014) (citing *Snyder v. Harris,* 394 U.S. 332, 335, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) for the longstanding principle that multiple plaintiffs may not aggregate their claims to achieve the jurisdictional monetary threshold). Given that the dues for any ASA member have not increased more than $155 per year, and only in the last one or two years, the District Court accurately noted that damages of more than $ 75,000 for any of the Plaintiffs would take 625 years to accrue, and is thus not possible as a legal certainty. Dismissal Opinion at 18.

The SAC also alleges – directly quoting from D.C. case law – that Plaintiffs "were affected by the alleged failure to follow the dictates of the constitution and the by-laws" (SAC at 57, ¶ 161, 59, ¶ 167), and that they have suffered "significant economic and reputational damages" (*id.* at 73, ¶ 206; at 75 ¶ 214; 77-78 at ¶ 224). Again, there is no factual allegation anywhere in the SAC that would allow for an actual quantification of such "reputational damage." Nor for that matter did

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[2] Appellants Bronner and Rockland are "honorary lifetime members" (SAC, ¶¶ 14, 15) and therefore presumably do not pay yearly dues. Appellant Kupfer allowed his membership in ASA to lapse after 2014, so he does not pay any dues, either (*Id.*, ¶ 17).

Appellants seek any element of reputational damages in the *ad damnum* clause, or list any such damages in the Plaintiffs' Initial Disclosure. In fact, even in the face of the Motion to Dismiss on jurisdictional grounds, Plaintiffs were completely silent as to what "reputational damages" they might be claiming.

In addition, the SAC did seek both declaratory and injunctive relief. However, such claims do not independently convey jurisdiction in the federal courts; rather, they are alternative remedies for which a pecuniary interest over $75,000 must be demonstrated. Dismissal Opinion, pp. 18 – 19. *See*, *e.g.*, *Animal Legal Defense Fund v. Hormel Food Corp.*, 249 F. Supp.3d 53 (D.D.C. 2017) (the test for determining the amount in controversy when declaratory relief is requested is "the pecuniary result to either party which the judgment would directly produce"). The non-monetary relief requested was a declaration invalidating and vacating the Resolution and enjoining various activities by the Defendants. *See* SAC, *ad damnum* clause. If the District Court were to have ordered such relief, it would have cost nothing, and Plaintiffs could not, and did not, point to any facts, either alleged or demonstrated, that suggested the costs of such relief, were it ordered, would approach $75,000. This case is unlike, for example, one in which a party seeks an injunction ordering a dilapidated building to be brought up to code, which work would have a cost associated with it. There is nothing in the SAC that would suggest that it would cost any money whatsoever to *cease* supporting the

Resolution. Just as Plaintiffs had failed to allege any fact that would suggest that their individual claims for damages exceed $75,000, so too had they failed to demonstrate that any of the equitable relief requested might have any value approximating $75,000.

Finally, attorneys' fees are not counted towards the amount in controversy unless provided by contract or statute. *Goldman v. Fiat Chrysler Automobiles US, LLC*, 211 F. Supp. 3d 322, 325 (D.D.C. 2016) (*citing Griffin v. Coastal Int'l Sec., Inc.*, No. 06–2246, 2007 WL 1601717, at *3 (D.D.C. June 4, 2007)). Thus, while such fees might have been awarded to a successful litigant, they cannot support a finding of diversity jurisdiction.

While the SAC was overladen with allegations of how the individual Defendants breached their respective fiduciary duties and misled the ASA membership, it had scant or no allegations on the damages that the individual Plaintiffs had actually suffered, and utterly failed to allege *any* fact that would suggest damages in excess of $ 75,000. As such, the District Court clearly lacked subject matter jurisdiction, and the case was properly dismissed. Appellees, The American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Neferti Tadiar, Chandan Reddy, John Stephens, J. Kehaulani Kauanui, Jasbir Puar, and Steven Salaita, respectfully request that this Court summarily affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document complies with the type-volume limitation. The document does not exceed 20 pages and the number of words is 3,595.

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