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.

REPLY MEMORANDA IN SUPPORT OF APPELLEES' 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, Steven Salaita, Kehaulani Kauanui and Jasbir Puar, by and through the undersigned counsel, and hereby respond to the Appellants' Opposition to the Motion for Summary Affirmance.

The Opposition advances two arguments: (1) that the matter is too complex for summary affirmance; and (2) that if Plaintiffs have standing to bring a suit, the District Court has subject matter jurisdiction over the dispute. Neither contention is sound. The "complexity" that Appellants perceive arises solely from their

fundamental misunderstanding of the District Court's decision, and of the concepts of "standing" and "damages." The matter, instead, may be stated in two points:

(1) The harms to the ASA which are alleged in this case can be brought by its members only as derivative claims, a process governed by the requirements of D.C. Code § 29-411.03. It is undisputed that Plaintiffs failed to meet the requirements of that statute, and thus may not bring derivative claims;

(2) Those individual harms alleged in the case for which Plaintiffs may have standing cannot possibly amount to $75,000, and Plaintiffs make no serious argument to the contrary.

Because of the $75,000 jurisdiction requirement, there are a myriad of cases in which injury is alleged that cannot be brought in Federal Court. This case happens to be one of them.

The District Court began its analysis with "a simple but crucial question: May Plaintiffs collect damages for ASA's injuries without bringing a derivative action?" (Mem. Op. at 11). It correctly answered that question in the negative. Long-standing corporate law mandates that an individual can only seek damages on behalf of the corporation through a derivative action. *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"); *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 469 (D.C. 2008) ("It is the corporate directors, and not its shareholders, who have the authority to manage the corporation, including decisions to litigate on behalf of the corporation.").

A shareholder may bring an independent claim if he suffers "injuries directly or independently of the corporation." *Labovitz v. Washington Times Corp.*, 172 F.3d 897, 901 (D.C. Cir. 1999) (quoting *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988)); *see also Family Fed'n for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 244 (D.C. 2015) (An "important exception" lies "where an individual seeking enforcement . . . has a special interest distinguishable from the public at large.") (internal quotations omitted). Thus, in *Daley v. Alpha Kappa Sorority, Inc.*, 26 A.3d 723 (D.C. 2011), 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." (26 A.3d at 729, citing *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004)). The *Daley* court found that ongoing dues-paying members had alleged sufficient individual injuries to create standing to sue where the President had received unprecedented payments in excess

of $250,000 in violation of the constitution and by-laws, and where the members had then been denied their membership privileges in retaliation. *Daley*, 26 A.3d at 729.[1]

Similarly, in *Jackson v. George*, 146 A.3d 405 (2016), the plaintiffs claimed that they had been individually barred from church property and facilities and from attending church services. The D.C. Court of Appeals reasoned that such claims were based on injuries "particularized to [plaintiffs]" and thus did not require a demand on the corporation. *Jackson*, 146 A.2d at 415.

In neither *Daley* nor *Jackson* did the D.C. Court of Appeals lift the requirement for derivative actions when harm to a non-profit corporate entity is alleged. Rather, the court recognized that "the same facts can give rise to several sets of claims, some of which are personal and some of which are derivative." *Id*. at 415 (citations omitted). A trial court's determination of whether claims are derivative or primary is to be affirmed unless there has been an abuse of discretion. *Id*. In this case, there was no error, much less abuse, in the District Court's ruling.

The Opposition would construe these two cases as somehow superseding or amending the controlling statute, and permitting an organization's member to unilaterally bring a claim for injuries or damages suffered solely by the organization

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[1] Ultimately, the *Daley* plaintiffs failed to provide "'admissible evidence of any compensable injury to themselves'". Mem. Op. at 17, n. 10 (quoting *Daley v. Alpha Kappa Alpha Sorority, Inc.*, No. 2009 CA 04456 B, slip op. at 45–46, 58 (D.C. Super. Ct. May 14, 2013)).

itself. *See* Opp'n 4 (arguing that *Daley* and *Jackson* "hold that members of a nonprofit have standing to bring direct claims for injury to the nonprofit"). This is simply incorrect.[2] Subchapter XI of the Non-Profit Corporation Act specifically governs lawsuits brought "in the right of a domestic nonprofit corporation" (D.C. Code § 29-411.01). The arguments advanced by the Opposition would read that subchapter out of the D.C. Code. Were it the case that any member of a non-profit organization could, on their own initiative, bring a direct action for injuries suffered only by the corporation, then the procedures, safeguards and standing requirements of § 29-411.01 *et seq.* would have no meaning whatsoever.

In this case, the District Court held that while the Plaintiffs may have standing to sue for their own independent injuries, those injuries do not result in damages exceeding $75,000. Given their myopic focus on the question of standing, Plaintiffs misunderstand the District Court's analysis (Mem. Op. 11-17), and instead claim in error that Defendants "do not agree" with that analysis. The fact is that the District Court began from the bedrock proposition that a plaintiff may not lay "claim to relief on the legal rights or interests of third parties" (Mem. Op. 11), then moved directly to the proposition that a shareholder might seek to vindicate the corporation's rights only on a derivative basis (*id.* at 13). Since, as the Court found, "Plaintiffs' claims

[2] Indeed, the *Jackson* court specifically reaffirmed that § 29-411.03(1) governs derivative claims. 146 A.3d at 415.

arise, in part, from ASA's injuries rather than their own" (*id.* at 14), they can claim relief for those injuries only in a derivative action (*id.* at 13). Here, Plaintiffs did *not* follow those statutory requirements, nor do they even attempt to argue that they did. They may not, therefore, claim any damages *on behalf of* ASA.

Contrary to their argument here (*see* Opp'n 12 – 13), it does not help Plaintiffs to assert that they would like any damages they seek on behalf of ASA's alleged injury to go to ASA instead of to themselves. Effectively a concession, Plaintiffs' argument reinforces the conclusion that there was no abuse of discretion in the District Court's analysis of which claims were primary and which derivative.

Although Plaintiffs might have *standing* to bring a claim for their individual damages, they have utterly failed to demonstrate that those damages reach anywhere near the $75,000 threshold for diversity jurisdiction. Nor, in fact, do they even attempt to do so. The question of the jurisdictional amount is "a factual issue…and the burden of establishing jurisdictional amount is thrust upon the claimant." *Gomez v. Wilson*, 477 F.2d 411, 420 (D.C. Cir. 1973). Neither the Second Amended Complaint nor any of Plaintiffs' arguments – either in this Court or in the District Court – raise any factual allegation that would suggest that the Plaintiffs each suffered more than $ 75,000 in damages.

Rather than actually substantiating any claim that they might have for individual damages, the Opposition instead makes two spurious arguments: (1) that

their claims for injunctive relief suffice; and (2) that the District Court should have counted a claim for punitive damages towards the jurisdictional threshold. The former argument was rejected by the District Court, which found that the "value" of injunctive relief is measured by "(1) the value of the right that the plaintiffs seek to enforce; or (2) the cost to the defendants to remedy the alleged denial of that right." Mem. Op. at 18, citing *Tatum v. Laird*, 444 F.2d 947, 951 (D.C. Cir. 1971). As Defendants noted in the District Court, the cost of repealing the Resolution would be nominal, and enjoining further "violations" of the Bylaws would also not cost anything.

Appellants now argue that they have alleged that ASA will withdraw $95,000 per year for two years from the Trust Fund (*see* Opp'n 20, Complaint at ¶ 185). That paragraph, however, quotes the President as recommending, in 2017, that such withdrawals (for 2017 and 2018) be put aside due to "extraordinary legal expenses related to suits filed against us …" (Second Am. Compl. at ¶ 185). Since it is now 2019, those two years of withdrawals would already have occurred, and no amount of injunctive relief is going to put them back. More pertinent is the fact that were it not for Plaintiffs' continued litigation efforts, these withdrawals would never have been necessary. Plaintiffs cannot seriously be claiming that they are entitled to claim, as part of the jurisdictional threshold, the very damages that they are causing.

Finally, while it is true that punitive damages may be considered as part of the amount in controversy, that is generally only true when the plaintiff actually requests an award of punitive damages. *See Goldman v. Fiat Chrysler Automobiles US, LLC*, 211 F. Supp. 3d 322, 326 n. 5 (D.D.C. 2016) ("this Court is aware of no authority stating it should consider the *potential* for punitive damages when they have not been requested") (emphasis in original) (citing *Lurie v. Mid-Atl. Permanente Med. Grp., P.C.*¸ 729 F. Supp. 2d 304, 334 (D.D.C. 2010)). Appellants here admit that they did not specifically ask for punitive damages, but merely sought "such other relief as is just and equitable" (Opp'n 16). Neither the District Court nor this Court is required to save the Plaintiffs from their own omissions.[3]

Moreover, "when it appears that . . . punitive damages comprise[] the bulk of the amount in controversy, . . . the claim must be given 'particularly close scrutiny.'" *Carroll v. Merriwether*, 921 F. Supp. 828, 829 (D.D.C. 1996) (quoting *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3rd Cir. 1993)); *see also Kahal v. J.W.*

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[3] In addition to failing to request punitive damages in their complaint, Plaintiffs also failed to argue in the District Court that punitive damages should count towards the jurisdictional threshold. As such, their arguments are waived here. *Kassman v. Am. Univ.*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) ("Litigative theories not pursued in the trial court ordinarily will not be entertained in an appellate tribunal. And '(q)uestions not properly raised and preserved during the proceedings under examination . . . will normally be spurned on appeal.'") (citations omitted); *see also McKenzie v. U.S. Citizenship & Immigration Servs., Dist. Dir.*, 761 F.3d 1149, 1155 (10th Cir. 2014) (refusing to hear unpreserved arguments on appeal for lack of subject matter jurisdiction).

Wilson & Assocs., 673 F.2d 547, 548 (D.C. Cir. 1982) ("Liberal pleading rules are not a license for plaintiffs to shoehorn essentially local actions into federal court through extravagant or invalid punitive damages claims"). In the District of Columbia, "punitive damages may be awarded only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages." *Tolson v. District of Columbia*, 860 A.2d 336, 345 (D.C. 2004). The prerequisite state of mind is categorized by "outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." *Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc.*, 492 A.2d 580, 593 (D.C. 1985); *Sere v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982) (citing *Riggs Nat'l Bank v. Price*, 359 A.2d 25, 28 (D.C. 1976)). Here, although Plaintiffs alleged that the individual Defendants acted intentionally and in "bad faith," there is no allegation that any of the individual defendants acted with such evil intent or malice as to justify an award of punitive damages.

Finally – and even were a claim for punitive damages viable in this Complaint – the fact remains that there is a constitutional limit to the disparity between compensatory damages and punitive damages awarded. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory

damages . . . will satisfy due process."). As the District Court noted, the only quantifiable damages actually alleged in the Second Amended Complaint were for "misappropriation" of Plaintiffs' dues. That amounts to, at most, $120 per year for 3 years (from 2014 to 2017) and then $275 per year after that.[4] The total maximum amount of compensatory damages that might actually be claimed per Plaintiff, therefore, is $910. In order to reach the jurisdictional threshold of $75,000, each Plaintiff would have to collect $74,090 in punitive damages, or a ratio of 81.5 to 1. Certainly, the allegations in the Second Amended Complaint fall far short of asserting that Plaintiffs would be entitled to such a ratio of punitive to compensatory damages. *See, e.g.*, *McQueen v. Woodstream Corp.*, 672 F. Supp. 2d 84, 92 (D.D.C. 2009); *see also Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150 (D.D.C. 2007). For these reasons, and for the reasons argued more fully in Appellees' Motion for Summary Affirmance, the Appellees hereto respectfully request that this Court summarily affirm the judgment of the District Court.

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[4] In reality, the amounts are far less: Plaintiffs Bronner and Rockland are "honorary lifetime members" (SAC ¶¶ 13, 14) and therefore are exempt from paying dues. See Bylaws, Art. II, Sec. 1(c). Plaintiff Kupfer allowed his membership in ASA to lapse after 2014, so he does not pay any dues, either (*Id.*, ¶ 16). The Plaintiffs may not actually be paying any dues that could potentially be mismanaged.

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 2,460.

Respectfully submitted,

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