**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| SIMON BRONNER, MICHAEL ROCKLAND, CHARLES D. KUPFER, and MICHAEL L. BARTON,<br><br>Plaintiffs,<br><br>v.<br><br>LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, STEVEN SALAITA, JOHN STEPHENS, and THE AMERICAN STUDIES ASSOCIATION,<br><br>Defendants. | Case No. 2019 CA 001712 B<br><br>Judge Robert R. Rigsby<br>Civil 2, Calendar 10<br><br>Next Court Date: July 17, 2019, 10 a.m.<br>Event: Motion Hearing |

**STEVEN SALAITA'S REPLY IN SUPPORT OF HIS SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO D.C. CODE § 16-5501, *et seq.*, AND IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO SUPER. CT. CIV. R. 12 (b)**

Defendant Steven Salaita, by and through his undersigned counsel, hereby responds to Plaintiffs' Omnibus Opposition to Defendants' Special Motions to Dismiss Under the D.C. Anti-SLAPP Act ("A-S Opp'n") and to Plaintiffs' Omnibus Opposition to Defendants' Special Motions to Dismiss ("MTD Opp'n"). Dr. Salaita incorporates by reference and joins in the arguments in his co-Defendants' Replies, to the extent they are not inconsistent with his arguments.

## INTRODUCTION

Plaintiffs sued Dr. Salaita because "he was heavily involved in the effort to pass the Academic Boycott before he was a member of the National Council." Compl. ¶ 337. This is the quintessential SLAPP. To the extent Plaintiffs plead any facts against Dr. Salaita, they are that he advocated for the American Studies Association's ("ASA") 2013 Resolution endorsing the call to boycott Israeli academic institutions—indisputably an issue of public interest. Dr. Salaita's advocacy is the basis of Plaintiffs' claims against him in Counts Three, Four, Five, and Twelve, which allege conduct prior to his tenure on the ASA National Council.

There are no allegations against Dr. Salaita for conduct during his National Council tenure, other than that he was one of more than twenty National Council members at the time. Plaintiffs did not sue any of those other National Council members, indicating that these claims also target Dr. Salaita for his advocacy for the 2013 Resolution. In Counts One, Two, and Nine, Plaintiffs allege that the ASA amended its bylaws (which they do not dispute was lawful), and that it expended funds to defend against their own litigation, which is also covered by the Anti-SLAPP Act as expressive conduct involving petitioning the government. In Counts Ten and Eleven, Plaintiffs allege that the ASA did not renew Bronner's contract, and that it changed the status of the editor of the Encyclopedia position, with no specific allegations against Dr. Salaita, much less any legal basis to assert claims against him, as discussed *infra*.

Plaintiffs' claims fail as a matter of law under Super Ct. Civ. R. 12 (b). Unable to cite allegations to support their claims against him, they turn the pleading standard on its head, arguing that Dr. Salaita might have had some role that would make him liable. Because Plaintiffs have failed to meet their burden to proffer evidence that they are likely to succeed against Dr. Salaita, their claims against him must be dismissed with prejudice under D.C.'s Anti-SLAPP Act. Plaintiffs cannot be allowed to abuse the judicial process to punish those with whom they disagree.

## I. DR. SALAITA'S CONDUCT IS PROTECTED BY THE ANTI-SLAPP ACT.

Plaintiffs' claims against Dr. Salaita, to the extent they arise from any alleged acts by him, unquestionably arise from acts in furtherance of the right of advocacy on issues of public interest under the Anti-SLAPP Act. D.C. Code § 16-5502.[1] In Plaintiffs' entire Complaint, Dr. Salaita is only alleged to have advocated for the Boycott Resolution (Compl. ¶ 46), to have been associated with the USACBI as a member of the Organizing Collective (Compl. ¶¶ 46, 99, 337), and to have been a National Council member between July 1, 2015 and June 30, 2018, though Plaintiffs do not include any specific actions that Dr. Salaita might have taken at that time (Compl. ¶ 26). Although Plaintiffs claim, without explanation, that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is inapposite (A-S Opp'n 4 n. 2), they do not dispute that advocating for a political boycott is protected under the First Amendment (Def. Salaita's Special Mot. to Dismiss & Mot. to Dismiss 7, 9, 26 ("Sal. Mem.")), as is lawfully participating in organizations that are calling for political boycotts. *Claiborne*, 458 U.S. at 920 ("For liability to be imposed by reason of association alone,

[1] Whether the Anti-SLAPP Act provides for dismissal of claims when the First Amendment does not is irrelevant here, as the alleged activities of Dr. Salaita are also protected by the First Amendment. *See, e.g.*, Def. Salaita's Special Mot. to Dismiss & Mot. to Dismiss 26 ("Sal. Mem."). Plaintiffs' reliance on the First Amendment ruling in *Bronner v. Duggan*, 249 F. Supp. 3d 27 (D.D.C. 2017), is also inapposite, as the court found that its "interference with speech is passive and incidental to enforcement of a contract", so "would not constitute state action." *Id*. at 42. That court did not rule on the Anti-SLAPP Act. *Id*. at 41 n. 2. Moreover, the court's First Amendment ruling was issued in 2017, before Dr. Salaita was added as a party to the lawsuit in 2018, so did not apply to claims against him because they were not yet part of the complaint.

it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

Plaintiffs incorrectly claim that Defendants "do not even attempt to specifically argue" that Plaintiffs' claims satisfy § 16-5501(1)'s definition (A-S Opp'n 12)—but Dr. Salaita shows how each allegation and each set of claims against him arises from a statement, expression or expressive conduct that is covered by the Anti-SLAPP Act. *See, e.g.*, Sal. Mem. 7, 8, 16, 17, 24. The Resolution itself is a statement on the ASA's website; Dr. Salaita's advocacy of boycotts as a USACBI member, including his published opinion piece that Plaintiffs excerpt (Compl. ¶ 46), is a statement posted on-line; and finally, defending the Resolution, including by expending funds to defend against lawsuits, is expressive conduct petitioning the government—all in connection with an issue of public interest. Sal. Mem. 7-8.[2]

To the extent that Plaintiffs' Complaint asserts claims against Dr. Salaita, those claims *must* arise out of alleged conduct by Dr. Salaita.[3] Each and every one of those bare allegations is an act in furtherance of a right of advocacy. Plaintiffs' argument that the claims cannot violate the Anti-SLAPP Act because they "arise from violations of generally applicable laws and breach of duties that Defendants voluntarily and intentionally assumed" (A-S Opp'n 7) is contrary to the plain

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[2] Plaintiffs themselves admit that they brought claims that "aris[e] out of the December 15, 2013 boycott resolution" MTD Opp'n 17. And Plaintiffs' cases stating that a claim arises from protected activity when that activity underlies or forms the basis for the claim are not to the contrary. A-S Opp'n 14-15, citing, *e.g.*, *Flores v. Emerich & Fike*, 416 F. Supp. 2d 885 (E.D. Cal. 2006) (granting defendants' anti-SLAPP motion to strike all the claims against them in their entirety).

[3] Plaintiffs repeatedly refer to "Defendants" and "all Defendants" throughout the Complaint, even in places where Dr. Salaita could not possibly have been involved. For example, Plaintiffs allege that "Defendants decided to freeze the membership rolls" on November 25, 2013 (Compl. ¶ 123), when Dr. Salaita was not a member of the National Council and could not possibly have been involved in that decision. Regardless, generic allegations against all ten Defendants, without specifying who has taken what action, does not "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[L]umping" Dr. Salaita together with other defendants in "one broad allegation" results in "confusion of which claims apply to which defendants," thus "fail[ing] to satisfy [the] notice requirement of Rule 8(a)(2)." *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (citations omitted).

language of the Anti-SLAPP Act, not to mention its purpose. In addressing a nearly identical argument regarding California's very similar anti-SLAPP law, the California Supreme Court reasoned that the "logical flaw in plaintiffs' argument is its false dichotomy between actions that target the formation or performance of contractual obligations and those that target the exercise of the right of free speech. A given action, or cause of action, may indeed target both." *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) (quotations omitted). What matters is the "defendant's activity," not the "form of the plaintiff's cause of action". *Id.*

Once Defendants show that Plaintiffs' claims arise from an act in furtherance of the right of advocacy on issues of public interest, the burden shifts to Plaintiffs to show they are likely to succeed on the merits. D.C. Code § 16-5502 (b). The statute "requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016), *as amended* (Dec. 13, 2018). "This is a reversal of the allocations of burdens for dismissal of a complaint under [Rule 12 (b)(6)] which requires the moving party to show that the complaint's allegations, even if proven, would not state a claim as a matter of law; and for summary judgment under [Rule 56]." *Id*. at 1237. Plaintiffs' claims fail as a matter of law. They have not proffered a single piece of evidence to support their claims against Dr. Salaita, so have failed to satisfy their burden under the Anti-SLAPP Statute.

## II. PLAINTIFFS' CLAIMS AGAINST DR. SALAITA MUST BE DISMISSED.

### a. Plaintiffs Fail to Demonstrate Personal Jurisdiction Over Dr. Salaita.

Plaintiffs do not allege in their Complaint that Dr. Salaita had any contact with the District of Columbia to establish personal jurisdiction. Plaintiffs' reliance on ¶ 26 of their Complaint, alleging that Dr. Salaita was a member of the National Council when the ASA's bylaws were amended and withdrawals were taken from the Trust Fund (MTD Opp'n 54), does not confer

personal jurisdiction (even though the ASA was organized under D.C. law). *See* Sal. Mem. 10-13; *see, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum") (citation omitted). Nor is jurisdiction conferred by the only other allegation cited by Plaintiffs, that Dr. Salaita worked with USACBI closely during the process to pass the ASA resolution. MTD Opp'n 56, citing Compl. ¶ 46. Neither paragraph alleges any contacts Dr. Salaita had with the District of Columbia, much less sufficient contacts.

Having made no allegation in their Complaint that supports personal jurisdiction, Plaintiffs instead include in their brief a block quote describing allegations against the original Defendants from *Bronner*, which was decided before Dr. Salaita had been added as a Defendant. MTD Opp'n 54-55, quoting *Bronner, supra*, 249 F. Supp. 3d at 40-41. Plaintiffs claim that some of the allegations relied on by the *Bronner* court also apply to Dr. Salaita. *Id.* But the only allegations against Dr. Salaita are that he was a National Council member (after the Resolution was passed), and that he worked with USACBI during the process to pass the Resolution (before he was on the National Council). The pertinent allegations considered by the *Bronner* court are not alleged against Dr. Salaita.[4] Dr. Salaita was not a member of the National Council in 2013, and is not alleged to have engaged in any conduct in the District, much less a wrongful act that is the basis of Plaintiffs' claims against him.

[4] In their brief, Plaintiffs use the *Bronner* court's language, stating that Dr. Salaita "voluntarily participated in the 2013 annual meeting in the District of Columbia," where he "spoke" at a discussion of the Resolution. MTD Opp'n 55. But Plaintiffs make no such allegation against Dr. Salaita in their Complaint. Plaintiffs' brief also asserts that at the meeting, Dr. Salaita is "reported" to have said "'there is no other side.'" MTD Opp'n 55. Not only is this purported (and immaterial) quote not found in Plaintiffs' Complaint or the *Bronner* decision, but Plaintiffs cite no source for it whatsoever. But it is yet another statement subject to Anti-SLAPP protection.

Plaintiffs also fail to address any of the legal authority cited by Dr. Salaita, instead relying entirely on *Bronner, supra*, 249 F. Supp. 3d at 40-41, in which Dr. Salaita was not yet a Defendant, ignoring that personal jurisdiction is, in fact, personal. MTD Opp'n 54-55. The federal court found that each of the *original* Defendants "allegedly took part in the purportedly injurious activities of the ASA in the District of Columbia," *Bronner, supra*, 249 F. Supp. 3d at 40, an allegation that Plaintiffs do not make against Dr. Salaita. Since Plaintiffs have not and cannot allege Dr. Salaita engaged in any injurious activities in D.C., this Court lacks personal jurisdiction over him.

**b. Plaintiffs Rockland, Kupfer, and Barton Have Not Shown That They Have Standing to Sue Dr. Salaita.**

Plaintiffs' argument that "the Court of Appeals has twice held that members of a nonprofit have standing to bring direct claims for injury to the nonprofit" (MTD Opp'n 5), citing *Jackson v. George*, 146 A.3d 405 (D.C. 2016), and *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011), is simply wrong, as already decided. *Bronner v. Duggan*, 364 F. Supp. 3d 9, 20-21 (D.D.C. 2019), *appeal docketed*, No. 19-7017 (D.C. Cir. March 5, 2019); *see also*, Sal. Mem. 13-15, 17. *Jackson* and *Daley* require Plaintiffs to show that their individual rights have been affected—a "special injury." In *Jackson*, the D.C. Court of Appeals found that the lower court[5] properly concluded that because plaintiffs "alleged an injury particularized to them" (being barred from the church when others weren't), and a "personal financial stake" (the unauthorized use of

[5] In *Jackson*, defendants were improperly appointed as trustees of Jericho D.C., and then merged it with a newly-incorporated Jericho Maryland. 146 A.3d at 410. The board then terminated three of the plaintiffs' memberships to the church. *Id*. at 410-411. The Superior Court had held that plaintiffs had standing because the termination of their church memberships, a "special injury" was a result of the improperly appointed board. *George v. Jackson*, No. 2013 CA 007115 B, 2015 WL 12601885, at *5 (D.C. Super. Ct. Feb. 26, 2015). One plaintiff was dismissed from the suit for lack of standing because she had voluntarily terminated her membership. *Id*. at *7. The court also dismissed those claims that were not based on a special injury and were instead based on injuries to the church, including claims of breach of fiduciary duty, unjust enrichment, violation of the D.C. Nonprofit Corporation Act, and constructive fraud. *Id*. at *6.

their offerings), "they were entitled to proceed on the claims they brought on their own behalves, by which they sought relief from 'a special injury...not suffered equally by all' who affiliated with the church." [6] *Id*. at 415. Here, Plaintiffs Rockland and Kupfer cannot point to a single individual right that has been affected.[7]

Plaintiffs simply fail to recognize that they must, as a threshold matter, satisfy the basic constitutional requirements of standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (plaintiffs "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.") (citation omitted). Plaintiffs' breach of contract and *ultra vires* claims, as well as breach of fiduciary duty claims unrelated to the withdrawal of funds after July 2015, cannot possibly be traceable to Dr. Salaita as the conduct all occurred before he was a National Council member. Moreover, Plaintiffs Rockland and Kupfer have not alleged one concrete, particularized and special injury that they suffered as a result of the

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[6] Plaintiffs cite nothing to support their incorrect assertion that *Jackson* "does not require 'a special injury . . . not suffered equally by all'" and that "both the trial court and the Court of Appeal rejected that argument." MTD Opp'n 8. Plaintiffs also incorrectly claim that the *Jackson* plaintiffs' memberships were terminated after their complaint was filed (*id*.): their memberships were terminated on April 18, 2012 and their complaint was filed on October 15, 2013. *Jackson, supra*, 146 A.3d at 411. While Plaintiffs are right that the termination only involved a subset of the original plaintiffs (MTD Opp'n 8), it was only that subset of plaintiffs whose claims survived. *Jackson*, *supra*, 146 A.3d at 411 (plaintiff Gray dismissed because she had *voluntarily* left the church).

[7] In *Daley*, plaintiffs contended that their right to discuss and vote on their sororities' activities was violated when large expenditures to the sorority president were approved without their vote. *Daley, supra*, 26 A.3d at 726-27. In retaliation for suing, the plaintiffs' membership privileges were suspended. *Id*. at 727. The court held that the *Daley* plaintiffs had standing because "the individual rights of the plaintiffs were affected by the alleged failure to follow the dictates of the constitution and by-laws and they thus had a 'direct, personal interest' in the cause of action, even if 'the corporation's rights are also implicated.'" *Id*. at 729 (quotation omitted). Plaintiffs continue to repeat the fact that plaintiffs in *Daley* were "dues-paying members of a nonprofit" (MTD Opp'n 6), but always stop short of drawing this argument out. This is because Plaintiffs themselves are not dues-paying members. Plaintiffs Bronner and Rockland are honorary lifetime members of the ASA and do not pay membership dues; Plaintiffs Barton and Kupfer allowed their memberships to lapse in 2012 and 2014, respectively. Compl. ¶¶ 14-17.

alleged breaches of fiduciary duty, breach of contract, or *ultra vires* actions, and Plaintiff Barton has only alleged one concrete, particularized and special injury—the denial of the right to vote—which is not traceable to Dr. Salaita as he was not a National Council member at the time.[8]

Plaintiffs cite several cases that they argue stand for the proposition that their breach of fiduciary duty,[9] breach of contract,[10] and *ultra vires*[11] claims can be brought as direct claims. MTD Opp'n 3-5. But this is beside the point; the fatal flaw in Plaintiffs Rockland, Kupfer, and Barton's claims is that they cannot show that they have injuries that are caused by Dr. Salaita's conduct, and therefore do not have standing.[12] Plaintiffs fail on every argument as all the cases they cite are

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[8] Counts One and Two for breach of fiduciary duty allege harms to the ASA "and its members" generally. Compl. ¶¶ 262-63; 266-67. Counts Three, Four, and Five for breach of contract and *ultra vires* generally allege injury to the ASA. Compl. ¶¶ 274; 275; 284; 285; 292; 295; 296. When Plaintiffs attempt to allege their own injuries under those Counts, they do so in vague and general language, referring to injuries to "Plaintiffs" and "other members of the ASA" (Compl. ¶¶ 273, 283, 292), and to unspecified "economic and reputational damage" suffered by Plaintiffs (Compl. ¶¶ 277, 286, 297). Counts Six through Eight are not brought against Dr. Salaita. Count Nine alleges only injuries to the ASA. Compl. ¶ 317. Rockland, Kupfer and Barton are not injured by any of the conduct in Count Ten. Sal. Mem. 13-15. Count Eleven is only brought by Bronner. Count Twelve does not speak of any injuries at all. Compl. ¶¶ 335-43.

[9] Plaintiffs misplace reliance on *Willens v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126 (D.C. 2004), which did not address standing specifically, but in which two non-profit housing cooperative members had clearly suffered a concrete, particularized, and special injury when, unlike the rest of the members, they as individuals "did not receive their proportionate share of the corporate assets being distributed; they received nothing." *Id*. at 1134. Moreover, "[t]he propriety of suing the directors individually [was] not before [the court] . . . ." *Id*. at 1128 n. 1. In *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, the *cooperative itself* and its members sued the former directors, officers, and *other* corporate entities for breach of fiduciary duties and breach of contract. 441 A.2d 956, 959 (D.C. 1982).

[10] Plaintiffs' arguments on breach of contract fail because neither of the cases they cite stand for the proposition that nonprofit members can sue the nonprofit and its directors based on injuries suffered by the nonprofit or its members generally. In *Welsh v. McNeil*, a housing association member sued another member (not the association or its directors) and the court held that plaintiff had standing because of a provision in the housing association bylaws that allowed members to assert claims for injuries to the association. 162 A.3d 135, 139 (D.C. 2017). In *Meshel v. Ohev Sholom Talmud Torah*, which did not examine standing, plaintiffs invoked a provision of the bylaws of a congregation that required any claim of a member against the congregation that could not be resolved to be referred to a "Beth Din." 869 A.2d 343, 346 (D.C. 2005). The congregation refused to participate in a Beth Din, and those three members (but no others) sued. *Id*.

[11] Plaintiffs' argument on their *ultra vires* claims fails because the statute and cases they cite only allow individual members to bring such claims against the nonprofit itself, not against individual directors. *See* D.C. Nonprofit Corporation Act, D.C. Code § 29-403.04 (b).

[12] *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015) ("To *prevail* on a claim of breach of contract, a party must establish . . . damages caused by breach.") (quotation omitted); *Randolph v. ING Life Ins. &*

irrelevant to the question of standing, and in many cases support Dr. Salaita's argument that Plaintiffs must demonstrate a concrete, particularized, and special injury.

**c. Counts Three Through Five Do Not State a Claim against Dr. Salaita Because They Preceded his Tenure, and are Time-Barred.**

Plaintiffs do not explain how Counts Three and Five "are not necessarily limited to the period" prior to when Dr. Salaita became a National Council member in July 2015, and do not even argue that Count Four might not be so limited. MTD Opp'n 58. The Complaint fails to make any allegations underlying these Counts during the time that Dr. Salaita was on the National Council, and, on the contrary, alleges that they occurred prior to his tenure.[13] Sal. Mem. 15-16 (citing Compl. ¶¶ 94, 281, 290-91).

Effectively conceding that they have failed to state claims, Plaintiffs shamelessly argue that "it is certainly plausible that Defendant Salaita did have some ASA role during the relevant time periods for Counts Three, Four, and Five even before his election to the ASA National Council." MTD Opp'n 58. But Plaintiffs did not allege any such role. They have simply failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A "sheer possibility that a defendant has acted unlawfully," or pleading facts that are "merely consistent with" a defendant's liability does not meet the plausibility standard. *Iqbal*, *supra* note 4, 556 U.S. at 678 (quotations omitted).[14] Here, Plaintiffs' allegations are in

*Annuity Co.*, 973 A.2d 702, 709 (D.C. 2009) ("[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby.") (quotations omitted).

[13] Even if Dr. Salaita were a Director during this time, Plaintiffs fail to address that *ultra vires* claims cannot be brought against him because members cannot bring direct (as opposed to derivative) ultra vires claims against individual directors, D.C. Code § 29-403.04 (b), and because they do not allege actions "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation." *Bronner*, *supra* note 1, 249 F. Supp. 3d at 47 (citation omitted). Plaintiffs also cannot bring breach of contract claims against Dr. Salaita for conduct prior to his time on the National Council because he was not a party to any contract.

[14] The D.C. Court of Appeals has "adopted the pleading standard articulated by the Supreme Court" in *Twombly* and *Iqbal*. *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016).

fact *inconsistent* with Dr. Salaita being liable, as the alleged conduct occurred prior to his tenure. Plaintiffs' acknowledgment that they need to go on a discovery fishing expedition to make out the basic elements of claims against Dr. Salaita is confirmation that these claims are meritless, and a quintessential Strategic Lawsuit Against Public Participation (SLAPP).

Counts Three, Four, and Five (as well as Count Twelve) against Dr. Salaita are also barred by the statute of limitations, and Plaintiffs' attempt to apply the discovery rule to extend it cannot succeed, as Plaintiffs do not allege any information regarding Dr. Salaita that they newly discovered in the last three years, or that was not publicly available.[15] *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 281 U.S. App. D.C. 339, 344, 890 F.2d 456, 461 (1989), *on reh'g* (Jan. 10, 1990) ("the District of Columbia Court of Appeals has indicated that the ability of an ordinary person to detect the violation 'is critical to this threshold question' of whether the discovery rule applies") (citation omitted). The crux of Plaintiffs' claims against Dr. Salaita under these Counts is that he is liable simply because he advocated for the ASA to pass the Boycott Resolution before he was even a member of the National Council. But Plaintiffs' Complaint cites an op-ed published on March 1, 2014 by Dr. Salaita saying that he worked with USACBI closely during the process to pass the ASA Resolution, and which Plaintiffs contend shows he "led the effort."[16] MTD Opp'n 55, citing Compl. ¶ 46. One of four allegations against Dr. Salaita in Plaintiffs' 343-paragraph Complaint is from discovery, and that is the allegation that as a "USACBI Leader[]," he emailed with ASA

[15] Dr. Salaita has not argued that those aspects of Count One, Two, and Nine that apply to him when he was a member of the National Council (the claims that relate to the Resolution-related expenditures) are time-barred. Counts Six, Seven, and Eight are not brought against Dr. Salaita.

[16] In fact, Dr. Salaita was mentioned in Plaintiffs' very first complaint in federal court filed on April 20, 2016, which described him as a National Council member who was "a vociferous advocate of a boycott of Israel, and a member of the organizing collective of USACBI," referencing a May 27, 2014 article written by him. Complaint at ¶ 69 (ii), *Bronner*, *supra* note 1, 249 F. Supp. 3d 27 (No. 16- 0740 (RC)).

members prior to the passage of the Resolution, which is obviously not new information, given Plaintiffs' prior allegation. Compl. ¶ 99. The discovery rule is inapplicable here.

Plaintiffs' arguments regarding equitable tolling are irrelevant to Counts Three, Four, and Twelve against Dr. Salaita as those claims against him were already time-barred when Plaintiffs first named him as a Defendant in the federal litigation on March 6, 2018. All the conduct alleged in these Counts occurred prior to the adoption of the Boycott Resolution in December 2013 and were untimely when they were first brought against Dr. Salaita in 2018, or with regard to new Count Twelve, in this Court in March 2019.

**d. Plaintiff Bronner Fails to Respond Regarding Counts Ten and Eleven.**

Plaintiff Bronner fails to respond to Dr. Salaita's arguments regarding Counts Ten and Eleven related to the non-renewal of Bronner's contract and the removal of the position of editor as *ex officio* officer and National Council member.[17] Bronner does not contest that as an officer, Dr. Salaita did not owe him a fiduciary duty. Sal. Mem. 20-22. That Dr. Salaita owed fiduciary duties to the ASA and its members (MTD Opp'n 37-38) is irrelevant, as Bronner is the only one who alleges a concrete injury, and brings his claims as a former contractor (editor), *ex officio* officer, and National Council member—not as a general member. Sal. Mem. 21-22.[18]

Plaintiffs also do not point to any actions that Dr. Salaita specifically took to interfere in Bronner's relationship with the ASA or to breach a fiduciary duty, except to state in broad, vague,

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[17] Plaintiffs do not contest that Rockland, Kupfer, and Barton lack standing to bring these claims as they have not alleged that they suffered any injury as a result. Although Plaintiffs argue that the Encyclopedia has "shut down," resulting in damage to the ASA, MTD Opp'n 37, Plaintiffs cannot assert standing based on the ASA's injuries. *Bronner*, *supra*, 364 F. Supp. 3d at 20.

[18] *See also Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429, 433 (4th Cir. 2000) (plaintiff's "claim for breach of fiduciary duty—that the directors did not follow fair procedures in deciding to terminate his employment—implicates his status not as a stockholder, but as an employee . . . directors cannot act as fiduciaries in their relationship with employees and at the same time discharge their fiduciary duties to the corporation of which they are directors.")

and general terms that Dr. Salaita, as a National Council member, owed fiduciary duties to all ASA members, and that "Defendants" discriminated against Bronner and removed him as editor because they did not want to work with him. MTD Opp'n 38. Out of more than twenty National Council members when Plaintiff Bronner's contract ended in 2016, Plaintiffs have sued only Dr. Salaita. Sal. Mem. 4; Compl. ¶¶ 19-27. A "sheer possibility" that Dr. Salaita acted unlawfully does not satisfy the plausibility pleading requirement. *Iqbal*, *supra* note 4, 556 U.S. at 678.

Bronner also does not contest that he had neither a right nor an expectation that his contract would be renewed, and thus cannot make out a tortious interference claim. Sal. Mem. 23. Finally, Plaintiffs do not contest that, as a matter of law, Dr. Salaita, as a National Council member, cannot be liable for tortiously interfering in a contract between the ASA and another. Sal. Mem. 24.

**e. Plaintiffs Lack Standing for Claims for the Withdrawal of ASA Funds and Such Claims Cannot Be Brought for Litigation-Related Expenses.**

Plaintiffs fail to allege any injuries that they (as opposed to the ASA) suffered under Counts One, Two, and Nine related to the withdrawal of funds for Resolution-related expenses. MTD Opp'n 51. Plaintiffs do not argue that Dr. Salaita specifically took any actions with regard to the use of ASA funds, and did not sue the 20+ other members of the National Council at the time. Plaintiffs do not dispute that amending the Bylaws to remove the word "small" did not in fact violate the Bylaws, as alleged. Sal. Mem. 17-18. Plaintiffs also fail to address the fact that the only Resolution-related expenditures alleged to have occurred during Dr. Salaita's time on the National Council were litigation expenses, which cannot be the basis of their claims. Sal. Mem. 18-19.

**f. Plaintiffs Acknowledge That They Cannot State a Claim Against Dr. Salaita For Aiding & Abetting Breach of Fiduciary Duty Under Count Twelve.**

Plaintiffs do not contest that the alleged conduct of Dr. Salaita related to aiding and abetting breach of fiduciary duty is protected by the First Amendment. MTD Opp'n 40. Plaintiffs do not

contest that they failed to make factual allegations supporting their claims that Dr. Salaita knew of a breach of fiduciary duty, or that he substantially assisted such a breach. *Id*. Plaintiffs rely on one allegation against Dr. Salaita: that his "substantial assistance, also knowing that the Academic Boycott would cause great damage" to the ASA and its members, constitutes aiding and abetting. MTD Opp'n 40, citing Compl. ¶ 337. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, *supra* note 4, 556 U.S. at 678. Plaintiffs complain that they need not set forth factual evidence to prove every element of their claims on a motion to dismiss. MTD Opp'n 40. But Plaintiffs have not set forth factual *allegations* to survive Super. Ct. Civ. R. 12. Separately, they have not provided any *evidence*, as the Anti-SLAPP Act requires them to do. Count Twelve is also time-barred. *Supra*, II.c.

**g. Dr. Salaita Is Immune from Liability for Plaintiffs' Claims.**

Dr. Salaita has asserted immunity under D.C. Code § 29-406.31 (d) and § 29-406.90. Sal. Mem. 27. Plaintiffs completely fail to address D.C. Code § 29-406.90, which immunizes Dr. Salaita from civil liability as a corporate volunteer unless the injury resulted from, inter alia, his willful misconduct or bad faith act beyond the ASA's authority.[19] Plaintiffs' conclusory allegations about the conduct of ten "Defendants," lumped together, are insufficient to show that an injury resulted from any willful misconduct or bad faith conduct by Dr. Salaita, especially when Plaintiffs allege *no* specific conduct by Dr. Salaita. *See, e.g., Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, No. 2009 CA 001256 B, slip op. at 13 (D.C. Super. Ct. Oct. 30, 2009), *aff'd on other grounds*, 41 A.3d 1250 (D.C. 2012) (dismissing board members from defamation lawsuit under predecessor

[19] Also, the corporation must maintain liability coverage of a minimum amount for immunity to apply. D.C. Code § 29-406.90 (c). Plaintiffs allege that in 2017, the "Executive Committee approved the purchase of liability coverage for Directors and Officers." Compl. ¶ 190. They have not alleged or provided evidence that the ASA's insurance is not statutorily sufficient. The federal court in *Bronner* did not rule on the application of D.C. Code § 29-406.90. *Bronner v. Duggan,* 317 F. Supp. 3d 284, 290 n. 4 (D.D.C. 2018).

to D.C. Code § 29-406.90,[20] where plaintiff did not allege sufficient facts to show willful misconduct or a bad faith act or omission outside the corporation's authority, instead simply making generalizations and conclusory statements).[21] The "Supreme Court made clear in *Iqbal* that allegations of motive, animus, purpose, knowledge, intent and the like are subject to the requirement that they must be supported by well-pleaded factual allegations in order to be accorded the presumption of veracity." *Bereston v. UHS of Delaware, Inc.*, 180 A.3d 95, 99 (D.C. 2018).

D.C. Code § 29-406.31 (d) also immunizes Dr. Salaita for damages claims unless they arose from his conduct that constituted an "intentional infliction of harm" D.C. Code § 29-406.31 (d)(2). Plaintiffs do not—and cannot—allege that Dr. Salaita acted with "actual knowledge" that his action or failure to act would cause harm. *Bronner, supra,* 317 F. Supp. 3d at 292 (quoting Model Nonprofit Corporation Act, § 2.02 (c) Official Comment at 2-12-13). The federal court's finding that Plaintiffs alleged intentional infliction of harm is not applicable to Dr. Salaita not only because the case was stayed when he was served with the complaint (after the court ordered briefing),[22] but more significantly because the allegations relied on by the court to find intentional infliction of harm have not been made against Dr. Salaita. *Id.* at 292-293. Every allegation cited by the court concerns conduct prior to Dr. Salaita's tenure on the National Council, except for the

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[20] Section 29-406.90 is, in every relevant aspect, identical to its predecessor § 29-301.113. *Compare* D.C. Code § 29-406.90 *with* 1992 D.C. Law 9-222 (Act 9-353) (containing the full text of now-repealed § 29-301.113 as amended in 1992).

[21] For the same reasons, Dr. Salaita is also immunized from liability under the Volunteer Protection Act, which is addressed by Defendants Kauanui and Puar.

[22] When the federal court granted Plaintiffs leave to file their Second Amended Complaint which added new defendants, including Dr. Salaita, it simultaneously stayed the proceedings pending the court's consideration of its subject matter jurisdiction. *Bronner v. Duggan*, 324 F.R.D. 285 (D.D.C. 2018). Plaintiffs served Dr. Salaita with the summons and complaint while the proceedings were stayed, just a few days before Defendants' subject matter jurisdiction brief was filed. Return of Serv./Aff. of Summons & Compl. Executed, *Bronner, supra*, 317 F. Supp. 3d 284 (No. 16-0740 (RC)); Defs.' Br. Regarding Subject Matter Jurisdiction, *Bronner, supra*, 317 F. Supp. 3d 284). The court lifted the stay the same day it found it had subject matter jurisdiction "for now," and directed Defendants to respond to Plaintiffs' complaint within 21 days. *Bronner, supra*, 317 F. Supp. 3d 284; Order, *Bronner, supra*, 317 F. Supp. 3d 284).

allegation that Defendants hired attorneys to defend against the backlash—namely, this litigation. *Id.* at 293. Even if Dr. Salaita were alleged to have participated in that decision, a board member does not intentionally inflict harm on an organization by defending it against litigation—directors have a duty to defend their organization against legal attack.[23] *See* Sal. Mem. 19 n. 14.

Finally, Plaintiffs argue that the Business Judgment Rule does not apply to the claims against Dr. Salaita because the Complaint alleged bad faith. MTD Opp'n 52-53. But Plaintiffs do not allege that Dr. Salaita engaged in any conduct in bad faith, nor can they, and their reliance on *Bronner*, *supra*, 317 F. Supp. 3d at 293-94, is unavailing, as discussed *supra.* The burden is on Plaintiffs to rebut the business judgment rule's presumptions and prevent its application here. *See Washington Bancocorporation v. Said*, 812 F. Supp. 1256, 1268 (D.D.C. 1993).

## CONCLUSION

Dr. Salaita respectfully requests dismissal of Plaintiffs' Complaint against him, with prejudice, and seeks costs, attorneys' fees and any other relief the Court deems appropriate.[24]

Dated: June 28, 2019

Respectfully Submitted,

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[23] Even if Plaintiffs did claim Dr. Salaita intentionally harmed the ASA, Dr. Salaita is still immunized from claims for Plaintiffs' alleged injuries because they cannot seek relief for any injury to the ASA. *Bronner*, *supra*, 364 F. Supp. 3d at 18-20. Bronner is the only plaintiff who claims he suffered harm that could be traceable to Dr. Salaita's time on the board, *if* Plaintiffs had alleged that Dr. Salaita was involved, and acted intentionally to inflict harm against Plaintiff Bronner; but Plaintiffs did not so allege.

[24] Under the Anti-SLAPP Act, Dr. Salaita "is presumptively entitled to an award of fees unless special circumstances make a fee award unjust." *Mann*, *supra*, 150 A.3d at 1238 (citing *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016)).

## POINTS AND AUTHORITIES

Cases

*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)
*Bereston v. UHS of Delaware, Inc.*, 180 A.3d 95 (D.C. 2018)
*Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429 (4th Cir. 2000)
*Bronner v. Duggan*, 249 F. Supp. 3d 27 (D.D.C. 2017)
*Bronner v. Duggan*, 324 F.R.D. 285 (D.D.C. 2018)
*Bronner v. Duggan*, 317 F. Supp. 3d 284 (D.D.C. 2018)
*Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019), *appeal docketed*, No. 19-7017 (D.C. Cir. March 5, 2019)
*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)
*Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018)
*Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011)
*Doe v. Burke*, 133 A.3d 569 (D.C. 2016)
*Flores v. Emerich & Fike*, 416 F. Supp. 2d 885 (E.D. Cal. 2006)
*Francis v. Rehman*, 110 A.3d 615 (D.C. 2015)
*Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948 (S.D. Cal. 1996)
*George v Jackson*, No. 2013 CA 007115 B, 2015 WL 12601885 (D.C. Super. Ct. Feb. 26, 2015), *aff'd*, 146 A.3d 405 (D.C. 2016)
*Jackson v. George*, 146 A.3d 405 (D.C. 2016)
*Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 281 U.S. App. D.C. 339, 890 F.2d 456 (1989), *on reh'g* (Jan. 10, 1990)
*Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)
*Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343 (D.C. 2005)
*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)
*Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002)
*Poola v. Howard Univ.*, 147 A.3d 267 (D.C. 2016)
*Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702 (D.C. 2009)
*Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, No. 2009 CA 001256 B (D.C. Super. Ct. Oct. 30, 2009), *aff'd on other grounds*, 41 A.3d 1250 (D.C. 2012)
*Washington Bancocorporation v. Said*, 812 F. Supp. 1256, 1268 (D.D.C. 1993)
*Welsh v. McNeil*, 162 A.3d 135 (D.C. 2017)
*Willens v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126 (D.C. 2004)
*Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 441 A.2d 956 (D.C. 1982)

Statutes

D.C. Anti-SLAPP Act, D.C. Code § 16-5501, *et. seq.*
D.C. Nonprofit Corporation Act, D.C. Code § 29-403.04
D.C. Code § 29-406.31
D.C. Code § 29-406.90

Rules

Super. Ct. Civ. R. 11
Super. Ct. Civ. R. 12

Other Authorities

12B WILLIAM FLETCHER, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5908 (West 2019)
Model Nonprofit Corporation Act § 2.02

**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2019, I electronically filed the foregoing Reply in Support of Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.*, and in the Alternative, Motion to Dismiss Pursuant to Super. Ct. Civ. R. 12 (b) through the CaseFileX-press system, which sends notification to counsel of record who have entered appearances.

/s/Maria C. LaHood

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