NO ORAL ARGUMENT DATE SCHEDULED

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

NO. 19-7017

SIMON BRONNER, *et al.*,
Appellants,

v.

LISA DUGGAN, *et al.*,
Appellees

Appeal from the United States District Court
For the District of Columbia
Case No. 1:16-cv-00740-RC
(Hon. Rudolph Contreras, J.)

JOINT BRIEF OF APPELLEES

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APPELLEES' CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28, and given that Appellants did not include the Certification in their Brief, Appellees hereby certify as follows:

(A) **Parties and Amici**:

The following are the parties who have appeared before the U.S. District Court, and are appearing in this appeal:

Plaintiffs/Appellants:

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

Defendants/Appellees:

The American Studies Association
Lisa Duggan
Curtis Marez
Neferti Tadiar
Sunaina Maira
Chandan Reddy
J. Kehaulani Kauanui
Jasbir Puar
Steven Salaita
John Stephens

(B) **Rulings Under Review**:

As best as can be determined, Appellants seek review of the following rulings:

1) Memorandum Opinion and Order of March 31, 2017, and specifically that portion of the ruling dismissing Plaintiffs' claims for *ultra vires* action (App. 076 – 082);

2) Memorandum Opinion and Order of February 4, 2019 (App. 345).

CORPORATE DISCLOSURE STATEMENT

The Appellee, The American Studies Association, by its undersigned counsel, and pursuant to Rule 26.1 files its disclosure statement in order to enable the judges of this Court to consider possible recusal:

There are no parent companies, subsidiaries or affiliates of The American Studies Association which have any outstanding securities in the hands of the public.

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JURISDICTIONAL STATEMENT

In the District Court, the Plaintiffs asserted subject-matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). The final Order dismissing the case for lack of subject-matter jurisdiction was entered on February 4, 2019 (App. 345) and the Notice of Appeal was filed on March 3, 2019 (App. 365). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly dismiss the instant action for lack of diversity subject-matter jurisdiction where Plaintiffs cannot seek relief for injuries to the ASA, did not allege any specific injury to themselves, and failed to articulate any individual damages incurred that would even approximate the $75,000 jurisdictional threshold?

2. Did the District Court correctly dismiss the Plaintiffs' claims of *ultra vires* activity where none of the actions allegedly taken by Defendants were expressly prohibited by either statute or the governing documents of The American Studies Association or exceeded the powers conferred by its constitution, and where direct *ultra vires* claims cannot be brought by members against individual Defendants?

3. Did Plaintiffs fail to state any claims against Dr. Salaita given that he was not a member of the ASA National Council when the alleged conduct occurred, except for when the ASA's bylaws were properly amended and funds were withdrawn to defend against Plaintiffs' lawsuit, and where Plaintiffs alleged no injury to themselves arising out of these claims?

4. Did Plaintiffs fail to establish personal jurisdiction over Dr. Salaita where they did not allege he had any contact with the forum, and where he does not reside in the District of Columbia?

5. Should the District Court have dismissed the case as to the individual Appellees because they are immune from suit under the federal Volunteer Protection Act, 42 U.S.C. §14501 *et seq.*?

STATEMENT OF THE CASE

The Complaint in this case was filed on April 20, 2016, against Defendants Lisa Duggan, Curtis Marez, Avery Gordon, Neferti Tadiar, Sunaina Maira, Chandan Reddy, and the American Studies Association ("ASA").[1] On June 9, 2016, Defendants moved to dismiss (App. 13). In response, Plaintiffs filed an

[1] Mr. Gordon was voluntarily dismissed as a Defendant on November 22, 2017 (App. 8).

Amended Complaint (App. 15) and Defendants filed their Memorandum of Law on their Renewed Motion to Dismiss on July 7, 2016.

By Memorandum Order of March 31, 2017, the District Court granted in part and denied in part the Renewed Motion to Dismiss (App. 48 – 86; *Bronner v. Duggan*, 249 F.Supp.3d 27 (D.D.C. 2017)). In that Order, the Court determined that Plaintiffs' derivative claims failed as a matter of law as Plaintiffs had not given ASA the ninety-day notice required by D.C. Code §29-411.03. It further found that Plaintiffs had failed to state a claim for *ultra vires* action, but allowed "Plaintiffs' direct claims for waste, breach of contract and violation of the D.C. Nonprofit Corporation Act" to continue (App. 49). The Court also opined that it had subject-matter jurisdiction "because Plaintiffs have shown, beyond the low standard of legal possibility, that they could recover more than $75,000 if they prevailed." (App. 57).

Defendants filed their Answer and Grounds of Defense on April 14, 2017, and an Amended Answer on April 28, 2017 (App. 11-12). On May 31, 2017, Defendants filed a Motion for Judgment on the Pleadings, arguing that under D.C. law, a claim for waste could only be a derivative claim, and should therefore be dismissed (App. 11). That motion remained pending until the final Order on February 4, 2019. On May 15, 2017, the parties filed their Initial Disclosures pursuant to Rule 26(a). In their Computation of Damages, Plaintiffs listed only:

"(A) loss of revenue by the ASA …; (B) ASA funds expended … [and] (C) Attorneys' fees and expenses incurred by Plaintiffs." (App. 102).

On November 9, 2017, Plaintiffs filed their Motion for Leave to File Amended Complaint (*id.*). In addition to adding J. Kehaulani Kauanui, Jasbir Puar, John Stephens and Steven Salaita as Defendants, the Second Amended Complaint ("SAC") added a number of additional allegations, which Plaintiffs alleged they had gleaned from document production (App. 105 – 191). In granting the Motion for Leave to Amend, the Court, on March 6, 2018, stayed the proceedings and requested supplemental briefing on the question of immunity for directors of non-profit organizations pursuant to D.C. Code § 29-406.3(d). *See* App. 192 - 209. In its Order, the Court specifically noted that "this Court has a continuing duty to examine its subject matter jurisdiction and must raise the issue *sua sponte* when it comes into doubt," and that "the only damages that Plaintiffs seek in their Second Amended Complaint are 'damages from the individual Defendants incurred by [ASA]'" (App. 205).

Dr. Salaita was served at his home in Virginia while the case was stayed, just a few days before Defendants' subject matter jurisdiction brief was due. Return of Serv./Aff. of Summons & Compl. Executed, ECF No. 84; Defs.' Br. Regarding Subject Matter Jurisdiction, ECF 85.

As part of their supplemental memoranda, Defendants argued that the Court lacked subject-matter jurisdiction because the only damages claimed in the SAC were derivative in nature, and were thus barred as a matter of law by the Court's prior ruling. In its Memorandum Order of July 6, 2018, however, the Court stated that the only issue before it was "the impact of [D.C.] Code § 29-406.31(d), which shields directors of charitable corporations from damages except in specific circumstances, on the Court's subject matter jurisdiction" (App. 285). While the Court did acknowledge Defendants' additional argument, it stated that "that argument should be raised in a well-fashioned motion to dismiss or motion for summary judgment…once those arguments are ripe for consideration, the Court will again reexamine its subject matter jurisdiction." (App. 293-4, n.5).

On August 27, 2018, all Defendants moved to dismiss the SAC (App. at 3). On February 4, 2019, the Court issued its Final Order, granting the motions to dismiss. (App. 344).

This appeal followed. Plaintiffs have also filed a nearly identical lawsuit in D.C. Superior Court; Defendants moved to dismiss, which motions were granted in part and denied in part. Defendants' motions to dismiss under the D.C. Anti-SLAPP statute were denied, and that issue is currently on appeal to the D.C. Court of Appeals.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

A. Plaintiffs' Allegations

Because the only issue before the Court is the lack of subject matter jurisdiction, the underlying factual allegations may be briefly stated. ASA is a nonprofit corporation organized under the laws of the District of Columbia (App. 115, ¶ 17). John Stephens is the Executive Director of ASA (App. 117, ¶ 26); the remaining Defendants are, or were, members of the ASA National Council or other ASA committees in various years from 2013 to the present (App. 116 – 117). With the exception of Dr. Stephens, all the individual Defendants were allegedly members of, or sympathetic to, the United States Association for the Academic and Cultural Boycott of Israel (USACBI) (*id.*). Although the ASA National Council included at least 23 members (*see* App. 34, ¶ 74), only those Plaintiffs believed to be aligned with USACBI were named as Defendants.

Plaintiffs alleged that individual Defendants worked to place as many USACBI members as possible on the ASA National Council. In 2012, Defendants allegedly sought to present a Resolution in support of Palestinian rights for adoption. In 2013, the ASA adopted a resolution endorsing a boycott of Israeli academic institutions (the "Resolution"). (App. at 110, ¶ 3; 126-27, ¶ 54). Plaintiffs claimed that the adoption occurred through various improper maneuvers, including prematurely closing the voting rolls, preventing Dr. Barton from voting

on the Resolution, and refusing to publish dissenting viewpoints (*gen'lly*, App. 139 – 159).[2]

Dr. Bronner and Dr. Rockland are honorary lifetime members of ASA (App. 114, ¶¶ 13, 14). Dr. Barton's membership in ASA lapsed in 2012 for non-payment of dues; although he reactivated his membership, he was not allowed to vote on the Resolution (App. 115, ¶ 15). Dr. Kupfer was also a member of ASA until 2014; in opposition to the Resolution, he allowed his membership to lapse.

Plaintiffs incorrectly allege (on "information and belief") that Dr. Salaita is a resident of the District of Columbia. App. at 117, ¶ 26. As the full record reflects, Dr. Salaita resides in the Commonwealth of Virginia.[3] Dr. Salaita was not on the National Council until July, 2015 (App. 117, ¶ 26); Plaintiffs alleged only that he "was a member of the National Council" when the ASA's bylaws "were changed to allow large withdrawals" from the ASA's Trust and Development Fund, and "when large withdrawals were taken to cover expenses related to the Boycott Resolution." (App. 117, ¶ 26). Plaintiffs do not allege that Dr. Salaita had any personal involvement in the actions alleged, including amending the bylaws or

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[2] Defendants do not concede any irregularities in the debate leading up to the adoption of the Resolution, nor in the vote on the Resolution itself. For purposes of this appeal, however, that dispute is not relevant.

[3] See Return of Serv./Aff. of Summons & Compl. Executed, ECF No. 84 (service accomplished by posting the Summons at Dr. Salaita's home in Springfield, Va.).

withdrawing funds to pay Resolution-related expenses, only that he served on the National Council. Of the dozens of National Council members who served from 2015-2018 (as Dr. Salaita did), or from 2014-2017, 2016-2019, or 2017-2020, only Dr. Salaita was sued. (App. 115-17, ¶¶ 18-27).

Dr. Puar did not serve on the National Council. Rather, she began serving on the ASA's Nominating Committee in July 2010. (App. 117 ¶ 25). Plaintiffs claimed that in her first two years on the committee, Dr. Puar controlled the nominating process (App. 110-111, ¶ 5), packed elected positions with boycott supporters (App. 124; 128-129, ¶¶ 45, 58, 60), and arranged it so that six of the ten "continuing voting members" of the National Council had endorsed calls for the boycott (App. 129-130, ¶ 62).

Dr. Kauanui was elected to the ASA's National Council in 2013 (App. 117, 138-139, ¶¶ 24, 90) after acknowledging in her campaign statement that she was on the Advisory Committee of USACBI (App. 131, ¶ 67). Plaintiffs alleged that Dr. Kauanui deliberately concealed her support for USACBI during the campaign, because another candidate who was allegedly more explicit later lost his campaign in the same election which Dr. Kauanui won (App. 131–2, 133-134, ¶¶ 69, 70). Dr. Kauanui voted, along with all other National Council members, to submit the boycott resolution to the entire ASA membership, even though she was allegedly unhappy about this (App. 145, ¶ 104). She worked with colleagues both within the

ASA's National Council and outside of the ASA to support the boycott resolution (App. 145-146, ¶ 105), served on a subcommittee of the National Council to revise the text of the resolution and accompanying documents (App. 151, ¶ 118), and received emails about the membership and balloting process from the ASA's Executive Director, which she forwarded to the entire National Council (App. 156-158, ¶¶ 134-136).

B. Plaintiffs' Claimed Damages

Paragraphs 172 – 191 of the SAC detail the financial injury allegedly caused by adoption of the Resolution (App. 169 - 176). These include:

-- A decrease in contributions to the Association (App. 169 – 70, ¶ 174);

-- Use of contributions for legal costs and "other support for the Resolution" (App. 170, ¶ 175);

-- A decrease in membership fees collected (*id.*, ¶ 177);

-- Use of Association funds for retention of a media strategist and Public Relations consultant (App. 171 – 2, ¶ 182);

-- "Substantial legal costs defending the Resolution" (App. 172 – 3, ¶¶ 183, 185);

-- A substantial increase in the levels of membership fees (App. 173, ¶ 185); and

-- Withdrawals from the Trust Fund to pay for some of these exceptional expenses (App. 176, ¶ 191)

In their nine Counts, Plaintiffs claimed the following:

-- Count One: "damages … that the American Studies Association incurred as a result of this breach of fiduciary duty." (App. 177, ¶ 194);

-- Count Two: "damages … that the American Studies Association incurred as a result of these breach [sic] of fiduciary duties." (App. 178, ¶ 197);

-- Count Three: "the award of injunctive relief and damages … incurred by the American Studies Association …" for the ultra vires act of failing "to nominate Officers and National Council Reflecting Diversity of Membership" (App. 181, ¶ 207);

-- Count Four: Declaratory and injunctive relief and "damages … incurred by the American Studies Association" for the ultra vires act of freezing the membership rolls (App. 183 – 4, ¶ 215);

-- Count Five: Declaratory and Injunctive Relief and "damages … incurred by the American Studies Association" for the ultra vires act of attempting to influence legislation (App. 186, ¶ 225);

-- Count Six: Damages as set forth in Count Two, along with declaratory relief, for employing a voting process contrary to the Bylaws (App. 187, ¶ 230);

-- Count Seven: Damages as set forth in Count One, along with declaratory and injunctive relief for failing to meet the requirements of a quorum in voting on the Resolution (App. 188, ¶ 235);

-- Count Eight: Unstated damages incurred by Plaintiff Barton for exclusion from the vote on the Resolution (App. 189, ¶ 240);

-- Count Nine: "[D]amages … on behalf of the American Studies Association" for corporate waste (*Id.*, ¶ 244).

SUMMARY OF ARGUMENT

The question of subject matter jurisdiction remains open to challenge at any point during the pendency of an action in District Court, and if a plaintiff files an amended complaint, any determination of jurisdiction is governed by the allegations in that pleading. In this case, all of Plaintiffs' derivative claims were dismissed with prejudice, a ruling that they do not challenge here. As such, the only cognizable claims for damages in the Second Amended Complaint were those incurred by the individual Plaintiffs. However, Plaintiffs failed to allege that they had incurred any amount of damages. It was thus clear to a legal certainty that

Plaintiffs could not attain the jurisdictional threshold of $75,000 in damages. Diversity jurisdiction, therefore, was lacking, and the case was properly dismissed.

Moreover, Plaintiffs have disavowed any argument on appeal as to the *ultra vires* claims that were explicitly articulated in their pleadings below; on the contrary, they chose on appeal to focus on an unidentified "corporate mission statement," which statement had not previously been a basis for their *ultra vires* arguments. An *ultra vires* claim can only arise from the violation of an express prohibition, in either statute or by-law, or an act outside the corporation's powers. Additionally, Plaintiffs cannot bring direct *ultra vires* claims against the individual Defendants. Plaintiffs' challenge to the dismissal of the *ultra vires* claims below fails to raise any valid argument.

Furthermore, the individual defendants are immunized from liability under the federal Volunteer Protection Act because there are no plausible allegations that any of the alleged acts were willful or reckless misconduct intended to harm an individual or individuals, or that any act by Defendants was an "intentional infliction of harm."

Dr. Puar was never a director, officer, or agent of the ASA, and thus did not have a fiduciary relationship with the ASA or its members. For her part, nothing Dr. Kauanui did before she became an elected member of the ASA's National Council could have violated a fiduciary duty because she had no such duty until

she became a member of the Council in July 2013. Indeed, Plaintiffs' claims that Dr. Puar singlehandedly controlled a six-member nominating committee to secretly "stack the deck" are inherently implausible. Similar claims that Dr. Kauanui voting, along with all 22 other members of the unanimous National Council, to allow the general membership to vote on (and pass) a resolution "caused" corporate waste or impermissible lobbying is implausible. This is especially so since the ASA has a long history of public engagement on national and international issues.

As for Dr. Salaita, Plaintiffs' claims against him fail as a matter of law because the alleged tortious conduct occurred before Dr. Salaita became a member of the ASA National Council. Plaintiffs have also not alleged that Dr. Salaita had any personal involvement in amending the bylaws or withdrawing funds, they do not dispute that the National Council is authorized to amend the bylaws without approval by the membership, and they are precluded by the Business Judgment Rule.

Finally, the District Court lacked personal jurisdiction over Dr. Salaita, as Plaintiffs have not alleged that Dr. Salaita had any contact with the forum, much less a substantial connection. Fed. R. Civ. P. 12 (b)(2).

For these reasons, the District Court's judgment should be affirmed.

ARGUMENT

A. Standard of Review

This Court reviews *de novo* a dismissal for lack of subject-matter jurisdiction. *See, e.g., Am. Hosp. Ass'n v. Azar*, 895 F.3d 822, 825 (D.C. Cir. 2018). The Court reviews *de novo* the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019); *Coburn v. Evercore Tr. Co., N.A.*, 844 F.3d 965, 968 (D.C. Cir. 2016) ("a formulaic recitation of the elements of a cause of action will not do.").

B. The District Court Properly Revisited The Issue of Subject-Matter Jurisdiction

1. Jurisdiction Was Based on the Allegations in the Second Amended Complaint

The Supreme Court articulated the standard for finding subject-matter diversity jurisdiction in *St. Paul Mercury Indemnity Co. v. Red Cab.*, 303 U.S. 283, 288-89 (1938):

> . . . if, 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.

See also Rosenboro v. Kim, 994 F.2d 13, 17 (D.C. Cir. 1993) (same). The legal certainty test is met "when a specific rule of substantive law or measure of damages limits the amount of money recoverable by the plaintiff to less than the necessary number of dollars to satisfy the requirement." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 98 (D.D.C. 2014) (*quoting* 14AA Charles Alan Wright, et al., *Federal Practice & Procedure* § 3713 (4th ed. 2011). Too, where the "plaintiff chooses his forum … his good faith in choosing the federal forum is open to challenge . . ." by subsequent facts. *Red Cab*, *supra* 303 U.S. at 289 – 90.

The Supreme Court noted, in a later case, "[t]he state of things and the originally alleged state of things are not synonymous … 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 Curry v. U.S. Bulk Transp. Inc.*, 462 F.3d 536, 540 (6th Cir. 2006) ("diversity must be determined at the time of the filing of the amended complaint").

Too, Dr. Salaita and the other new Defendants were not even added as Defendants until 2018, when the Second Amended Complaint was filed, and when the action against them commenced. The decision on the Motion to Dismiss which Plaintiffs appeal was the newly added Defendants' first opportunity to challenge subject matter jurisdiction.

2. When Plaintiffs Filed the Second Amended Complaint, All Derivative Claims Had Been Dismissed With Prejudice

The law of the District of Columbia precludes the filing of a civil derivative action unless the requisite demand has been delivered to the corporation and ninety days has since elapsed. D.C. Code § 29-411.03. In this case, as the District Court found, Plaintiffs delivered a formal demand letter only two days before filing suit, and had not demonstrated that a demand would have been futile. Specifically, the District Court found that Plaintiffs had not "shown that a majority of the 23-member National Council … as composed at the time of filing, even contributed to the actions at issue," and "have not shown anything more than 'mere allegations of improper motives' by citing to piecemeal statements of support by current councilmembers." *Bronner v. Duggan*, 249 F.Supp.3d 27, 47 (D.D.C. 2017). Thus, all of Plaintiffs' derivative claims were dismissed prior to the filing of the Second Amended Complaint pursuant to Fed. R. Civ. Proc. 23.1.[4] That ruling is not challenged on appeal.

The Second Amended Complaint did not repair the fatal deficiencies enumerated in the Court's prior opinion -- nor could it. Although Plaintiffs alleged

[4] Plaintiffs complain that because the ASA Bylaws were amended, "Professor Bronner had been stripped of standing to bring new derivative claims or to amend the derivative claims in the FAC" (Brief at 14). This is not correct: Plaintiffs lost their right to derivative claims because they failed to follow the statutory procedures, and those claims were dismissed with prejudice.

that there was a concerted effort to pack the 2013 Board with USACBI supporters (App. 126, ¶ 53), there was no allegation in the 85-page document as to the viewpoints of the National Council members in 2016 when the lawsuit began. The SAC lacks any factual allegation to suggest that, in 2016, a demand for litigation on the National Council would have been futile. Plaintiffs thus failed to revive their derivative claims, and the same remained dismissed under Fed. R. Civ. P 23.1. As a matter of law, therefore, when Plaintiffs amended their Complaint, any damages sought on behalf of the Association were not legally available, and could not form the basis for jurisdiction in the District Court.

Plaintiffs incorrectly argue that the Court's March 2017 ruling was a subsequent event that should not oust jurisdiction. The 2019 ruling instead reflected a subsequent "revelation" that Plaintiffs could never have obtained the relief requested because it was based on an injury to the ASA, and not to themselves, and therefore that the required amount was not in controversy at commencement of the action. As the Court of Appeals for the Sixth Circuit noted in *Jones v. Knox Exploration Corp.*, 2 F.3d 181, 183 (6th Cir. 1993), "A distinction must be made … between subsequent events that change the amount in controversy and subsequent revelations that, in fact, the required amount was or was not in controversy at the commencement of the action." *See also State Farm Mut. Auto Ins. Co. v. Powell*, 87 F.3d 93, 97 (3rd Cir. 1996) (determination that one

of three policies was not in effect was not a "subsequent event", and diversity jurisdiction did not attach); *McQueen v. Woodstream Corp.*, 672 F.Supp.2d 84, 87-88 (D.D.C. 2009), *appeal dismissed* 2010 WL 2574184 (D.C. Cir. 2010); *Charvat v. GVN Michigan, Inc.*, 531 F.Supp.2d 922 (S.D. Ohio 2008), *aff'd* 561 F.3d 623 (6th Cir. 2009) (after grant of partial summary judgment in a TCPA case, the amount recoverable fell below the jurisdictional threshold for diversity jurisdiction, and the case was dismissed); *Cuneo Law Grp. v. Joseph*, 920 F.Supp.2d 145 (D.D.C. 2013) (claim that had already been adjudicated could not be considered for subject-matter jurisdiction).

The District Court in the instant matter, therefore, properly looked to the Second Amended Complaint to determine whether there is jurisdiction. Its prior ruling that Plaintiffs' derivative actions failed as a matter of law remained the law of the case, and the jurisdictional analysis following the filing of the Second Amended Complaint was necessarily informed by the fact that Plaintiffs could not claim any damages on behalf of the Association.

C. Plaintiffs Have Not Met the Jurisdictional Threshold

1. All the Claims in the SAC Were Derivative

It is clear from the allegations in the Second Amended Complaint that the only damages Plaintiffs sought below are those incurred by the Association; they

are, in other words, derivative claims. This is fatal from a jurisdictional perspective.

A derivative action, by definition, seeks redress for a wrong done to the corporation, and for damages incurred by the corporation. *See* 12B Fletcher Cyc. Corp. ¶ 5908. Traditionally, the courts have used three tests to determine whether an action is derivative: the "direct harm" test, 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 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, thereby risking imposition of a tax lien were derivative of the

primary injuries suffered by the corporation); *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).

Furthermore, any claim for corporate waste is derivative in nature. *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.").

As described more fully above, the only financial injuries alleged in the Second Amended Complaint -- ranging from a decrease in contributions to ASA and of membership fees collected to "substantial legal costs" and withdrawals from the Association Trust Fund – were incurred by the Association. Moreover, Counts One through Seven and Count Nine seek only those damages incurred by the Association. Only Count Eight even hints at any injury allegedly suffered by one of the individual Plaintiffs – and that is by Dr. Barton alone. For each of the remaining Counts, the only damages sought were allegedly incurred by the Association, not by the individual Plaintiffs.

Although Plaintiffs allege that they have "suffered significant economic and reputational damages" (*see* App. 181, ¶ 206; App. 183, ¶ 214; and App. 185 – 6,

¶ 224), these are grossly conclusory. There is no allegation that Plaintiffs individually have lost any teaching positions or have had submissions for publication denied because of the Resolution. There is no allegation as to whether their rankings as professors within their respective institutions have diminished. Plaintiffs claim that ASA has lost "its good reputation and the good will that it had earned over more than six decades" (App. 113, ¶ 9), but there is no factual allegation that any of the individual Plaintiffs have suffered any loss of reputation within the academic community. Finally, while Plaintiffs do allege that dues in general have increased – at most by $155/year – they do not allege that their own dues have increased, nor how much more they individually might have had to pay in dues (App. 173 – 4, ¶ 185). Indeed, they don't allege they pay dues at all.

Plaintiffs have the obligation to set forth sufficient facts to support any finding that subject matter jurisdiction exists, and that their damages exceed $75,000. *Khadr v. United States*, 529 F.3d 1112 (2008) (affirming dismissal on motion for failure to establish subject matter jurisdiction); *Gomez v. Wilson*, 477 F.2d 411, 420 (D.C. Cir. 1973). But the only damages for which Plaintiffs asserted any factual basis were for damages allegedly suffered by the Association. Since the District Court had already dismissed any and all derivative claims with prejudice, Plaintiffs had no basis upon which to meet the jurisdictional threshold.

2. The Key Issue is the Quantum of Damages, Not Standing

In both the court below and in their Appellate Brief, Plaintiffs do not argue that their individual damages exceeded $75,000; indeed, as argued below, they do not articulate any individual injury, and thus may not have Article III standing. They admit that they are seeking only derivative claims when they insist that "[t]hese damages are intended to make **the ASA** whole." (Brief at 38, emphasis in original). Still, Plaintiffs maintain with obstinacy that because D.C. law accords them the opportunity to bring direct individual claims, they can also bring claims for alleged injury to the ASA notwithstanding their failure to properly bring derivative claims. This is incorrect. Regardless of whether Plaintiffs might be able to show standing for some of their claims, they must still demonstrate sufficient damages to meet the jurisdictional threshold for federal diversity jurisdiction. Without derivative claims, Plaintiffs cannot seek damages on behalf of the ASA, so those alleged damages do not and cannot count toward the jurisdictional minimum.

Plaintiffs interpret the D.C. Court of Appeals' decisions in *Daley v. Alpha Kappa Sorority, Inc.*, 26 A.3d 723 (D.C. 2011) and *Jackson v. George*, 146 A.3d 405 (2016) too broadly, and they gloss over differences between those two cases and the one before this Court. 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." (26 A.3d at 729, *citing Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1036 (Del. 2004)).

Tooley made clear the distinction between a claim personal to the individual plaintiff and that belonging to the entity:

> That issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?
> *Tooley*, 845 A.2d 1031, 1033, 1039 (Del. 2003).

The *Daley* Court, applying these same principles, found that where the plaintiffs claimed that their dues payments had been misspent, and their personal memberships had been terminated in retaliation, they had sufficient individual injuries to create standing to sue.[5] *See also Family Federation 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

[5] *Daley* was remanded, and the lower court ultimately found that plaintiffs had not in fact suffered any distinct injury through expenditures from the AKA's funds, and therefore were not entitled to damages for those expenditures. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, No. 2009 CA 04456 B, slip op. at 45-46 (D.C. Super. Ct. May 14, 2013). Plaintiffs could not seek damages for AKA's injury because they had not brought a derivative action. *Id.* at 46 n. 28. The court also ruled that while the plaintiffs were injured by the suspension of their memberships, this was not compensable. *Id*. at 46.

from the public at large.") (internal quotations omitted). As the District Court in this case noted, the court in *Daley* did *not* decide that "non-profit members may ultimately secure relief for the *organization's* injuries rather than their own, without bringing derivative claims." App. at 360 (emphasis in original).

Although the D.C. Court of Appeals offered less analysis of the issue in *Jackson v. George*, 146 A.3d 405 (D.C. 2016), it is clear that it relied on *Daley* for its decision. In that case, the plaintiffs claimed that because of the defendants' breach of fiduciary duty as officers of a church, the plaintiffs' individual tithes and offerings had been misused, and they had been individually barred from attending church services. These were injuries "particularized to [plaintiffs]" and thus did not require a demand on the corporation. *Jackson*, 146 A.2d at 415. But in *Jackson* and *Daley*, the plaintiffs could only obtain relief owed to them for their *own* injuries; they were specifically *not* entitled to seek relief for allegedly improper expenditures from the non-profits' funds because they could not show that those expenditures had led to injuries to the plaintiffs themselves. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, No. 2009 CA 04456 B, slip op. at 45-46 (D.C. Super. Ct. May 14, 2013); *Jackson*, 146 A.3d at 411-12.

Neither *Daley* nor *Jackson* addressed the particular question before this Court: whether the plaintiffs could claim, as the basis for federal diversity jurisdiction, injuries other than those to the individual plaintiffs. In both cases, the

plaintiffs had alleged specific individual damages that they had suffered because of the alleged breaches by the non-profit corporation, and were determined for that reason to have standing to maintain an action in the Superior Court of the District of Columbia. By contrast, in the instant case, Plaintiffs have alleged no individual damages, no special interest which they hold apart from and independent of the corporation. On the contrary: as described above, with the exception of Count Eight of the SAC (which seeks unstated damages incurred by Mr. Barton for exclusion of his vote on the Resolution), all of Plaintiffs' claims for relief seek either injunctive relief or "damages ... incurred by the Association." Plaintiffs cannot even claim that the dues that they pay into the Association's coffers have been misspent: Plaintiffs Bronner and Rockland are "honorary lifetime members" (App. 114 - 5, ¶¶ 14, 15) and therefore do not pay yearly dues. Plaintiff Kupfer allowed his membership in ASA to lapse after 2014, so he did not pay any dues after that point, either (App. 115, ¶ 17). Plaintiffs' claims here simply do not fit into the *Daley/Jackson* framework.

It is therefore not accurate to claim that "the third-party or shareholder standing rules do not apply" (Brief at 42). Rather, the *Daley* and *Jackson* courts recognized that members of a non-profit organization may suffer individual injuries other than the typical monetary losses which could befall the shareholders of a for-profit corporation, and would thus have standing to maintain an action.

Nor is it accurate to claim that derivative claims against non-profit organizations have been eliminated. Indeed, the D.C. Code specifically envisions that derivative claims may be made on behalf of a non-profit corporation. *See* D.C. Code § 29-411.01 *et seq*. Plaintiffs' strained interpretation would render that statute meaningless. Were members of a non-profit organization able in all circumstances to claim damages suffered by the organization as a direct claim, there would be no need for these provisions in the Code.

Plaintiffs' arguments also entirely overlook the critical issue of choice of forum. Both *Daley* and *Jackson* were brought in the Superior Court for the District of Columbia, then appealed to the Court of Appeals for the District of Columbia. Neither of these courts has a jurisdictional threshold amount greater than $500; thus, it was irrelevant what the value of the injunctive or declaratory relief sought might have been. Once it was determined that the plaintiffs had standing, their claims could continue, to one degree or another. Plaintiffs here have now filed their action in the Superior Court. If that case is allowed to proceed, their individual claims for relief, no matter how insignificant in monetary value, might continue to trial. In this Court, however, Plaintiffs must demonstrate individual damages above the jurisdictional threshold.

3. To the Extent that Plaintiffs Are Asserting Individual Claims, They Have Failed to Meet the Court's Jurisdictional Threshold

Once the derivative claims were removed from the equation, it was clear that Plaintiffs had failed to show that their individual damages meet the $75,000 threshold for diversity jurisdiction in the federal courts. "[M]ere conclusory allegations of jurisdiction" and "bald assertions of jurisdictional facts" are insufficient. *Roche v. Lincoln Prop. Co.*, 373 F.3d 610, 617 (4th Cir. 2004), *rev'd on other grounds*, 546 U.S. 81 (2005); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044-45 (3rd Cir. 1993), *cert. denied* 510 U.S. 964 (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)). 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).

Although the Plaintiffs alleged that dues in general have increased – at most by $155/year – they did not allege that they even pay dues, much less that their own dues have increased, nor how much more they individually might have had to pay in dues (*id.* at 65-66, ¶ 185). 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 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). As the District Court pointedly noted, it would take each Plaintiff 625 years to reach $75,000 in damages (App. 362). The increase in dues, therefore, does not satisfy the jurisdictional threshold to a legal certainty.

The SAC does allege that Dr. Bronner was "unceremoniously kicked out of the National Council meeting" (App. 147, ¶ 109), and that Dr. Barton was not allowed to vote on the Resolution (App. 154 – 5, ¶ 126). Plaintiffs also summarily alleged – quoting from D.C. case law – that they "were affected by the alleged failure to follow the dictates of the constitution and the by-laws" (App. 165, ¶ 161; App. 167 – 8, ¶ 167), and that they have suffered "significant economic and

reputational damages" (App. 181, ¶ 206; App. 183 ¶ 214; App. 185 – 6, ¶ 224). 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. Nor, for that matter did Plaintiffs seek reputational damages in the *ad damnum* clause. Even the Plaintiffs' Initial Disclosure failed to claim any individual damages.

Finally, claims for declaratory and injunctive relief 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. *See, e.g., Animal Legal Defense Fund v. Hormel Food Corp.*, 249 F.Supp.3d 53, 59 (D.D.C. 2017). The non-monetary relief requested is a declaration invalidating and vacating the Resolution and enjoining various activities by the Defendant (App. 190, SAC *ad damnum* clause). If the District Court were to order such relief, it would cost nothing.[6] Just as Plaintiffs have failed to allege any fact that would suggest that their individual claims for damages exceed $75,000, so too have 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

[6] Moreover, injunctive and declaratory relief against most of the individual Defendants would not remedy an injury even if there were one, because they are no longer on the ASA National Council, so could not effectuate such relief.

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)).

Plaintiffs now argue that the "value" of the injunctive relief sought exceeds $75,000, because they seek to have Defendants replace the amounts withdrawn from the ASA Trust Fund – which they place at $100,000 per year (Brief at 31–32). Similarly, they claim that the value of the declaratory judgment claim suffices, because they seek a declaration that "expenditures in furtherance of the Academic Boycott and withdrawals from the ASA Trust are illegitimate" (*id.* at 33). These arguments were not raised below, and are thus waived on appeal. *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.") (citations omitted); *see also McKenzie v. U.S. Citizenship & Immigration Servs., Dist. Dir.*, 761 F.3d 1149, 1155 (10th Cir. 2014), *cert. denied* 135 S.Ct. 970 (2015) (refusing to hear unpreserved arguments on appeal for lack of subject matter jurisdiction).

More significantly, however, these claims are not equitable in nature, but legal: Plaintiffs seek an award of money from Defendants back to ASA. Thus, they are derivative claims: they seek relief that would inure to ASA, and not to the

individual Plaintiffs. Having failed to meet the statutory requirements for a derivative action, it is legally impossible for Plaintiffs to obtain any relief on behalf of the ASA; all they can obtain is relief for their individual damages. They have no basis upon which to claim the return of funds into the ASA Trust Fund.

Plaintiffs misplace their reliance on *Information Strategies, Inc. v. Dumosch*, 13 F. Supp. 3d 135 (D.D.C. 2014), and incorrectly argue that the District Court here did not consider "additional components" in calculating the value for injunctive relief. CAB 32. But in *Information Strategies*, the court calculated the value of distinct rights: the plaintiff consulting company's contractual rights under a covenant not to compete, which is regularly valued by courts by looking to the revenue generated by the former employee while working for the employer (13 F.Supp.3d at 142); and the plaintiff's right to protect its trade secrets, which is regularly valued by courts by looking to the "nature and scale" of the company's business. *Id.* at 143. In contrast, Plaintiffs here have articulated no valuable right, and certainly have not attached any monetary amount to it.

Plaintiffs similarly allege that ASA would withdraw $95,000 per year for two years from the Trust Fund, and quoted 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 …" (App. 173, ¶ 185). The basis for these prior withdrawals, therefore, was to pay the legal fees for the instant lawsuit.

Were it not for Plaintiffs' continued litigation efforts, these alleged withdrawals would never have been necessary. Plaintiffs cannot seriously be asserting that they are entitled to claim, as part of the jurisdictional threshold, the very damages that they are causing. In any case, directors of a nonprofit cannot be held liable for expending funds to defend against litigation. Shareholders' claims against officers of a corporation are consistently "foreclosed when they merely allege damages based on the potential costs of investigating, defending, or satisfying a judgment or settlement for what might be unlawful conduct." *In re Cray Inc. Derivative Litig.*, 431 F. Supp. 2d 1114, 1134 (W.D. Wash. 2006) (citing cases that derivative claims for costs of litigation are insufficient to state a claim for relief). *See also In re Symbol Techs. Secs. Litig.*, 762 F. Supp. 510, 516 (E.D.N.Y. 1991) ("defendants cannot be held liable for the costs of defending a potentially baseless suit."); 3A William Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 1112 (West 2019) ("the payment of an attorney for legal services performed for the company is not improper."). Moreover, "[d]irectors 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." *Kaplan v. First Hartford Corp.*, 484 F. Supp. 2d 131, 144 (D. Me. 2007).

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*, *supra* 211 F. Supp. 3d at 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)). Plaintiffs here admit that they did not specifically ask for punitive damages, but merely sought "such other relief as is just and equitable" (Brief at 35). Neither the District Court nor this Court is required to save Plaintiffs from their own omissions. Too, since that argument was not raised in the District Court, it is waived here.

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); *see also Kahal v. J.W. 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 where there is "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); *Tolson v. District of Columbia*, 860 A.2d 336, 345 (D.C.

2004). Nowhere in the SAC is there any allegation that any of the individual Defendants acted with such evil intent or malice as to justify an award of punitive damages.

Finally, even if there were a viable claim for punitive damages, 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 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. 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. Nothing in the SAC justifies 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).

Except for Count Eight (Barton's individual claim), all the claims in the SAC are derivative in nature. Plaintiffs have failed to offer anything other than

conclusory statements that they suffered direct harm, that they suffered some injury that was not shared by the other members of the Association, or that Defendants owed any special duty to Plaintiffs. Finally – and to the extent that any of the allegations in the SAC might be liberally construed to imply individual harm to Plaintiffs – there is absolutely no basis upon which to conclude that such harm rises to the level required for diversity jurisdiction in this Court. Because Plaintiffs completely failed to meet their burden to demonstrate jurisdiction, the District Court properly dismissed the SAC for lack of subject matter jurisdiction.

D. The Claims of *Ultra Vires* Action Were Properly Dismissed

Because subject-matter jurisdiction for this case does not lie in the federal courts, there is no obligation to reach Plaintiffs-Appellants' second issue, whether the District Court properly dismissed the claims for *ultra vires* actions. Nonetheless, on this point, too, Plaintiffs' arguments fail.

According to Plaintiffs' Brief, only one *ultra vires* claim is before this Court: whether "the acts of adopting the Academic Boycott and the acts taken to advance the Academic Boycott were outside the ASA's powers to act, as defined by the ASA's corporate mission statement" (Brief at 16). No such claim, however, was before the District Court. The First Amended Complaint had only one *ultra vires* count, alleging that Defendants "operat[ed] the ASA as 'a social justice' organization" (App. 40, ¶ 83). The SAC had three counts asserting *ultra vires*

activity: Count Three (failure to properly nominate officers); Count Four (freezing the membership rolls before the vote on the Resolution); and Count Five (attempting to influence legislation) (App. 179 – 186). The first two counts are not mentioned at all in Appellants' Brief, while the last is specifically disavowed as an issue on appeal (Brief at 17). As such, any argument that these counts were improperly dismissed has been waived. *See CC1 Ltd. P'ship v. Nat'l Labor Relations Bd.*, 898 F.3d 26, 35 (D.C. Cir. 2018); *New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (stating that petitioners waive arguments that they fail to raise in their opening briefs).

Nowhere in either the First or Second Amended Complaint is there any reference to a separate "corporate mission statement", nor was any such document included in the Appendix. Too, Plaintiffs specifically refer to a corporate mission statement as "set forth in ASA's Bylaws" (Brief at 43), which was not alleged below. Although the First and Second Amended Complaints specifically quote Art. I, §2 of the ASA Constitution in its entirety (App. 20, 118), such aspirational language does not constitute a "corporate mission statement." Plaintiffs have failed to adequately explain exactly upon what basis they claim *ultra vires* action, and have thus failed to preserve the issue for appeal.

If, however, their argument does rest on the phrase, "promotion of the study of American culture," then they betray a fundamental misunderstanding of the law

of *ultra vires*. *Ultra vires* actions are those "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation." *Welsh v. McNeil*, 162 A.3d 135, 150 n. 43 (D.C. 2017) ("in its true sense the phrase *ultra vires* describes action which is beyond the purpose or power of the corporation."); *Bronner*, *supra* 249 F.Supp.3d at 47. Thus, while the phrase is often confused with "acts within the power of the corporation but exercised without complying with required procedure" (*Welsh*, *id.*), the concept is separate from a mere misuse of corporate power. In order for the act to be *ultra vires*, it must be expressly prohibited by statute or by-law or have exceeded the powers conferred by the ASA's constitution.

Plaintiffs argue that "[*u*]*ltra vires* acts constitute a larger set of activities [and] … include any acts outside of the corporate mission statement – whether or not they expressly violate the corporations' [*sic*] bylaws" (Brief at 44-45). This is exactly the opposite of the established law of *ultra vires* activity. Any number of activities by a corporate board might not be specifically enumerated within the organization's avowed corporate philosophy, and might give rise to a potential claim for mismanagement. That, however, is not what Plaintiffs assert here: they claim that the action was *ultra vires*, which requires a violation of explicit prohibitions in either the controlling statutes or the corporation's by-laws or acts outside the corporation's powers. The ASA's passage of a resolution is

indisputably within the ASA's powers. That the Resolution challenged here is on an issue of public interest, the question of the U.S.'s significant role in enabling Israel's violations of international law abroad and the right of scholars to political dissent, does not—and cannot—transform the ASA's act of passing a resolution into one that is *ultra vires.*

The ASA has had a long history of adopting policy resolutions, even where those decisions entered national or international politics and even where they may have cost the Association some money. In 1998, the ASA supported an NAACP initiative to boycott certain hotel chains.[7] In 2004, the ASA announced that it would heavily favor unionized hotels for its meetings and would add "labor disputes" as grounds for cancelling hotel contracts. In 2005, the ASA criticized the Cuban government for imposing travel restrictions on academicians. In 2006, the ASA passed a resolution calling for an end to the U.S. war in Iraq. In 2015, the ASA notified the State of Georgia that it would suspend plans to locate an upcoming annual meeting Atlanta if the state passed a threatened "Religious

[7] This and the examples which follow are all on the ASA's website at either https://theasa.net/about/advocacy/resolutions-actions/actions or https://theasa.net/node/4899, last visited on January 3, 2020 and were fully described in Dkt. 109, at pp. 9-10. This Court may take judicial notice of the fact that the ASA has issued these resolutions - facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2). "Judicial notice may be taken at any stage of the proceeding." Fed. R. Evid. 201(d).

Freedom Restoration Act" which would have invoked religious grounds to excuse discrimination against the LGBTQ communities and Muslims. In 2016, the ASA declared it would not hold meetings in North Carolina if that state passed the "bathroom ban" legislation, which had been seen as targeting transgender students. In 2016, the ASA declared it would speak out forcefully against attacks on academic freedom in Turkey. In 2016, the ASA declared its opposition to the Dakota Access Pipeline. Clearly, the Resolution that Plaintiffs oppose lies equally within the ASA's authority.

Finally, as the District Court correctly found, "individual members of the nonprofit may only directly challenge an action as *ultra vires* by suing the corporation to enjoin the act." App. at 438, *citing* D.C. Code § 29-403.04(b)(1). The D.C. Code does not permit members to bring direct (as opposed to derivative) *ultra vires* claims against individual directors. D.C. Code § 29-403.04(b). *Ultra vires* claims challenging the power of a nonprofit to act may only be brought against the corporation, by the corporation, or by the D.C. Attorney General. *Id.* The individual member Plaintiffs simply cannot sue the individual Defendants for allegedly *ultra vires* acts.

Plaintiffs have specifically declined to raise, on appeal, any issue related to the *ultra vires* claims that were actually alleged in their pleadings, and have thus waived those arguments. Instead, they have chosen to proceed on the basis of an

unidentified "corporate mission statement" which is neither specifically identified in the pleadings nor adequately described in their Brief. To the extent that they are referring to one phrase quoted in the First Amended Complaint, that phrase does not rise to the level of an explicit prohibition, and therefore does not fit within the narrow category of corporate actions that would be *ultra vires*. Plaintiffs have not articulated any valid reason why the District Court erred in dismissing their *ultra vires* claims as a matter of law.

E. The Claims Against the Late-Added Defendants Fail As a Matter of Law

An appellate court may affirm a dismissal for any reason properly raised by the parties. *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008); *accord*, *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011). Affirmation of the district court's decision on Rule 12(b)(1) is fully merited. However, out of an abundance of caution, Defendants point out that there are also abundant reasons to affirm the dismissal based on Rule 12(b)(6).

1. The Individual Defendants Are Immune From Suit Under the Federal Volunteer Protection Act

Under the Volunteer Protection Act (VPA, 42 U.S.C. § 14501 *et seq.*) "no volunteer of a nonprofit organization…shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization" if they were "acting within the scope of the volunteer's responsibilities" and "the harm was not caused by

willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. § 14503(a). § 14503(a)(3) creates an exception to immunity under the VPA only for conduct directed at an individual; there is no such exception for conduct directed at the volunteer's own corporation or nonprofit entity.

Although immunities may be pled as affirmative defenses, a defendant's entitlement to immunity should be resolved at the earliest stage possible so that, as here, the costs and expense of trial are avoided where a defense is dispositive. *McDonald v. Salazar*, 831 F.Supp.3d 313, 325-326 (D.D.C. 2011); *accord*, *Ford v. Mitchell*, 890 F.Supp.2d 24, 32 (2012). The Circuit laid the groundwork for this reasoning in *International Action Center v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) in which Judge Roberts applied the immunity analysis to the facts as pled.

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

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

As argued below (*see* Section E(2), *infra*), Dr. Puar had no fiduciary duty while she was running for a seat on the Nominating Committee, and Plaintiffs' claim that as a candidate in 2010 she concealed an intention to support a boycott resolution is belied by Plaintiffs' own chronology. Once elected, her only duty under the Bylaws was to see that as a whole, the nominees maintained "a balance of age, racial, ethnic, regional, and gender participation." There are no facts alleging she acted outside of the scope of her position in any way. Dr. Kauanui similarly had no duty until she took her position as an elected member of the National Council, and in any event, she was entirely forthright about her leadership role in USACBI. Plaintiffs nowhere allege any facts suggesting that she acted beyond the scope of her position.

Dr. Salaita was a volunteer member of the ASA's National Council from July 2015 - June 2018, and although Plaintiffs do not allege Dr. Salaita engaged in any particular acts as a National Council member, any acts or omissions alleged by Plaintiffs would have been taken on behalf of the ASA and within the scope of his responsibilities. App. at 117, ¶ 26. Plaintiffs do not allege that Dr. Salaita engaged in the kind of misconduct that would exempt him from the VPA's immunity. The expenditure of legal fees to defend the ASA cannot be considered harm, but even if it were, it was not caused by "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." 42 U.S.C. § 14503(a).

The analogous D.C. Code provisions also provide immunity for the individual Defendants. Under D.C. law, nonprofit directors shall not be liable for "damages for any action taken, or any failure to take any action" except for, in relevant part, an "intentional infliction of harm." D.C. Code § 29-406.31(d). The facts alleged do not come close to suggesting that any of the Appellees acted outside the scope of their responsibilities or harbored any intent to harm the plaintiffs as individuals. The repeated cries of "*ultra vires*" are mere legal conclusions masquerading as facts. Dr. Salaita is not even alleged to have been personally involved in amending the Bylaws or withdrawing funds, much less doing so with an intent to harm the ASA. The individual Defendants cannot be

liable for Plaintiffs' claims against them in light of the VPA and D.C. Code § 29-406.31(d).

2. Dr. Puar's Service on the Nominating Committee Never Breached a Fiduciary Duty to the ASA

The threshold requirement for a breach of fiduciary duty claim is the existence of a fiduciary relationship. *Millennium Square Residential Ass'n v. 2200 M. Street LLC.*, 952 F.2d 234, 248 (D.D.C. 2013). No case has held that the duty can arise before one party reposes trust and confidence in the other. Thus, nothing Dr. Puar did or did not say about her candidacy could itself be the basis for any claimed breach of duty. Plaintiffs do not even allege, nor can they, that Dr. Puar was even involved with the USACBI when she sought a position on the ASA's Nominating Committee in 2010.

Too, Plaintiffs allege that from the moment she joined the Committee, Dr. Puar "obtained control of the nominations process" to "impose this restriction" of "a pledge of allegiance" to the USACBI so that the membership would be asked to vote for her "chosen candidates" (App. 110-111;¶5). These phrases -- "control", "restriction", and a "pledge of allegiance" – are at best conclusions masquerading as factual allegations. There is not a single word in the SAC about how Dr. Puar allegedly controlled the five other committee members.

3. Dr. Kauanui's Service on the Nominating Committee Never Breached a Fiduciary Duty to the ASA

Plaintiffs admitted that Dr. Kauanui publicized her leadership of USACBI right in her campaign statement (App. p.131, ¶67), thereby negating any possibility of concealment. To conceal this shortcoming, Plaintiffs allege that Dr. Kauanui's disclosure was deliberately kept too vague to be informative, because she "knew" that a commitment to a boycott "was material" to ASA members (App. 132-133; ¶70) and that she knew it was "material" because another candidate, Dr. Alex Lubin, referenced "a pending resolution on the academic and cultural boycott of Israel" and lost the election (App. 132, ¶69). Plaintiffs do not explain, however, how Dr. Kauanui could possibly have "known" that Dr. Lubin would ultimately lose the very same election in which Dr. Kauanui herself was a candidate. Plaintiffs also did not take into account the numerous other factors that might have explained why she won and Dr. Lubin lost.[8]

Too, Dr. Kauanui served on the National Council from July of 2013 through June of 2016 (App. 117; ¶24). Plaintiffs alleged that she placed her personal interests in the boycott resolution "over the interests of the American Studies Association and its members" (App. 134, ¶ 75), that she worked with colleagues,

[8] It could have been because he is a white male, or because Dr. Kauanui had a longer and more prominent history of service to the ASA, or it could have been that Dr. Lubin, who had spent the two previous years overseas, was not in close enough touch with his colleagues.

both within and without the ASA, to support the resolution (App. 145-146, ¶ 105), and that she voted, along with every single other member of the National Council, to submit the boycott proposal to a vote of the ASA's general membership (App. 145, ¶ 104). This recitation of alleged calumnies sheds no light on what Dr. Kauanui did that was wrong, or how it proximately caused harm.

As discussed above, the Association has a long history of adopting resolutions similar to the one Plaintiffs now oppose. Plaintiffs never alleged why a vote on *this* Resolution should not have been taken, or how any individual National Council member's vote proximately caused harm to either Plaintiffs or the Association as a whole. Persuasion and compromise, further, lie at the heart of democratic undertakings. There is simply nothing improper about revising a proposal to make it more popular or in trying to persuade colleagues to vote for it. None of this actionable.

3. Plaintiffs' Breach of Fiduciary Duty and Corporate Waste Claims Fail Against Dr. Salaita

The only claims that could even possibly be construed to be asserted against Dr. Salaita on the basis of his July 2015 - June 2018 tenure on the National Council are the aspects of Counts One (Breach of Fiduciary Duty), Two (Breach of Fiduciary Duty) and Nine (Corporate Waste). (App. at 177-79, ¶¶ 194, 197). The only expenditures alleged to have been incurred during Dr. Salaita's term on the National Council that are even arguably related to the Resolution are the ASA's

legal fees – which have been used to pay for this meritless and protracted litigation initiated by Plaintiffs.[9]

"[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby." *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 709 (D.C. 2009) (internal quotation omitted). Plaintiffs have not alleged that they were injured by any breach of fiduciary duty related to the ASA expenditures, or that Dr. Salaita profited from any alleged breach. Moreover, Plaintiffs actually caused the injury of which they complain, as it is their own lawsuit that the ASA is defending against. Plaintiffs cannot bootstrap an injury of their own making.

Even if Plaintiffs were to allege injuries related to these counts, such injuries cannot be traceable to Dr. Salaita any more than they are traceable to Plaintiff Bronner, who was also a National Council member until November 2016. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (traceability is a requirement of Article III standing). In the allegations related to these Counts, Plaintiffs fail to

[9] Although Plaintiffs allege the ASA incurred Resolution-related expenses to retain a media strategist and Public Relations consultant and "arguably" for payments around the 2014 ASA meeting, these expenditures were made prior to July 2015 when Dr. Salaita joined the National Council (App. 171-72, ¶ 182). Too, the insurance costs "arising from the Resolution" (App. 173, ¶ 185) are alleged to have been approved by the Executive Committee, of which Dr. Salaita was not a member, not the National Council on which Dr. Salaita served. *Id*.

mention Dr. Salaita even once: he is not alleged to have been involved in any decision regarding the amendment of the bylaws, in informing the membership about the amendment, in any decision related to the use of ASA funds, or in any public accounting of the funds (which is the responsibility of the Board of Trustees, not the National Council, on which Dr. Salaita sat). App. 165-79; 189, ¶¶ 162-97; 241-44.

Further, Plaintiffs' allegations that the ASA improperly amended its Bylaws with regard to the Trust and Development Fund fail as a matter of law on the face of the Bylaws. Plaintiffs complain about amendments to the Bylaws that removed the word "small" to describe grants that could be made from the Trust and Development Fund, and that permitted expenditure of Trust Fund assets (App. 166-67, ¶¶ 163-66). Although Plaintiffs allege that the National Council "did not inform the full membership" about these proposed changes to the Bylaws (App. 167, ¶ 166), neither notification to nor approval by the membership was required, as the National Council is authorized to amend the Bylaws. ASA Const. & Bylaws, Bylaws, Art. XIII § 1.

Finally, dismissal of Plaintiffs' fiduciary duty and waste claims could also be affirmed under the Business Judgment Rule, which is a "'presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best

interests of the company.'" *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006) (*quoting Willens v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126, 1137 (D.C. 2004)). "Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption." *Id.* (quoting *Willens*, 844 A.2d at 1137); *see also Wash. Bancocorporation v. Said*, 812 F. Supp. 1256, 1268 (D.D.C. 1993). "In practical terms, the business judgment rule means that 'directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.'" *Willens*, 844 A.2d at 1137 (citing *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000)). Plaintiffs do not allege that Dr. Salaita or any other Defendant had any financial interest at stake, or that defending the ASA against Plaintiffs' lawsuit was in bad faith, irrational, uninformed, or not in the best interests of the ASA.

4. The District Court Lacked Personal Jurisdiction Over Dr. Salaita

Plaintiffs bear the burden of establishing personal jurisdiction over Dr. Salaita. *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001). "In order to meet [their] burden, plaintiff[s] must allege specific facts on which

personal jurisdiction can be based; [they] cannot rely on conclusory allegations." *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86, 89 (D.D.C. 2008).

Other than their false allegation that he resides in the District of Columbia, Plaintiffs do not allege one single fact to establish personal jurisdiction over Dr. Salaita. Plaintiffs did not allege that Dr. Salaita was personally involved in any decision to amend the bylaws in March or November 2016 or to withdraw Trust Funds, much less that he did so in the District of Columbia. He was not a National Council member (nor did he have any other position charging him with "leading the ASA") in 2013 when the annual ASA meeting was held in the District of Columbia.

To exercise personal jurisdiction, the Court must "determine whether jurisdiction over a party is proper under the applicable local long-arm statute and whether it accords with the demands of due process." *United States v. Ferrara*, 311 U.S. App. D.C. 421, 424, 54 F.3d 825, 828 (1995). Given that Plaintiffs allege no contact that Dr. Salaita has had with the District, they can neither establish general jurisdiction (requiring continuous and systematic contacts), nor can they establish specific jurisdiction, which requires that a "controversy is related to or 'arises out of' a defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (internal quotation omitted). Jurisdiction is only proper "where the contacts proximately result from actions by the

defendant *himself* that create a 'substantial connection' with the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis in original).

Dr. Salaita's former role as an ASA National Council member is insufficient to establish jurisdiction. "Personal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity." *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 163 (D.C. 2000). "Just because Defendants were employed by, or were members of the board of directors of, a company which does business in the District, is not by itself sufficient to establish minimum contacts." *NAWA USA, Inc. v. Bottler*, 533 F. Supp. 2d 52, 57 (D.D.C. 2008) (court lacked personal jurisdiction even though the corporation's principal place of business was in D.C. and former directors who assumed their responsibilities at a board meeting in D.C. allegedly misappropriated its funds); *see also Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554, 558 (D.D.C. 1981) (finding no personal jurisdiction over corporate officers and part-owners: while they "may have conducted substantial business in the District of

Columbia, their activities were conducted on behalf of the corporation").[10]

Because Plaintiffs have alleged nothing to connect Dr. Salaita to the District of Columbia other than that he was at one time, on the National Council of a D.C. nonprofit corporation (and their false allegation that he resides in D.C.), they have failed to meet their burden of establishing personal jurisdiction, and the case against him should be dismissed under Fed. R. Civ. P. 12 (b)(2).

CONCLUSION

For the reasons argued above, the District Court properly found that it lacked subject-matter jurisdiction over the instant case. Given that all of Plaintiffs' derivative claims were dismissed with prejudice – a ruling that they do not challenge here – and given that the Second Amended Complaint failed to allege any amount of damages incurred individually by the Plaintiffs, it is clear to a legal

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[10] *Daley v. Alpha Kappa Alpha Sorority, Inc.* is not to the contrary, as plaintiffs there alleged that defendant members had engaged in managerial wrongdoing at a week-long meeting in the District of Columbia at which all of the named defendants "voluntarily participated" in the meetings "or the actions relating thereto." 26 A.3d 723, 728 (D.C. 2011). Likewise, *Family Fed'n for World Peace & Unification Int'l v. Hyun Jin Moon*, found that the defendant directors' "allegedly wrongful amendment of the Articles of Incorporation, indubitably occurred within the District by filing here." 129 A.3d 234, 243 (D.C. 2015). In this case, however, Plaintiffs allege (albeit inadequately) wrongful amendment of the ASA's Bylaws, which, unlike amendment of Articles of Incorporation, do not require filing in the District of Columbia. *Compare* D.C. Code § 29-408.06 (2019) *with* D.C. Code § 29-408.20 (2019).

certainty that Plaintiffs could not attain the jurisdictional threshold of $75,000 in damages. Diversity jurisdiction, therefore, was lacking, and the case was properly dismissed.

Moreover, Plaintiffs have disavowed any argument on appeal as to the *ultra vires* claims that were actually articulated in their pleadings below; on the contrary, they chose on appeal to focus on an unidentified "corporate mission statement." An *ultra vires* claim can only arise from the violation of an express prohibition, in either statute or by-law; a "mission statement" does not qualify. Plaintiffs' challenge to the dismissal of the *ultra vires* claims below fails to raise any compelling argument.

Finally, Plaintiffs have failed to state viable claims against the individual Defendants. The volunteer-immunity statutes, both federal and in the District of Columbia, protect against the Plaintiffs' claims. There is no viable allegation that either Dr. Puar, Dr. Kauanui or Dr. Salaita breached any fiduciary duty or acted improperly. Too, the Court lacks personal jurisdiction over Dr. Salaita.

For these reasons, as set forth more fully above, Defendants Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, Jasbir Puar, Kehaulani Kauanui, Steven Salaita, and the American Studies Association, respectfully request that this Court 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 uses 14-point type, Times New Roman, and the number of words is 12,946.

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STATUTES AND RULES RELIED UPON

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may

be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

> (1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of-
>
> > (A) every State and foreign state of which the insured is a citizen;
> >
> > (B) every State and foreign state by which the insurer has been incorporated; and
> >
> > (C) the State or foreign state where the insurer has its principal place of business; and
>
> (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

* * * *

42 U.S.C. §14503. Limitation on liability for volunteers

(a) Liability protection for volunteers

Except as provided in subsections (b), (c), and (e), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if-

> (1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to-

(A) possess an operator's license; or

(B) maintain insurance.

(b) Liability protection for pilots that fly for public benefit

Except as provided in subsections (c) and (e), no volunteer of a volunteer pilot nonprofit organization that arranges flights for public benefit shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization if, at the time of the act or omission, the volunteer-

(1) was operating an aircraft in furtherance of the purpose of, and acting within the scope of the volunteer's responsibilities on behalf of, the nonprofit organization to provide patient and medical transport (including medical transport for veterans), disaster relief, humanitarian assistance, or other similar charitable missions;

(2) was properly licensed and insured for the operation of the aircraft;

(3) was in compliance with all requirements of the Federal Aviation Administration for recent flight experience; and

(4) did not cause the harm through willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.

(c) Concerning responsibility of volunteers to organizations and entities

Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(d) No effect on liability of organization or entity

Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(e) Exceptions to volunteer liability protection

If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

> (1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.
>
> (2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.
>
> (3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.
>
> (4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(f) Limitation on punitive damages based on actions of volunteers

(1) General rule

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

(2) Construction

Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(g) Exceptions to limitations on liability

(1) In general

The limitations on the liability of a volunteer under this chapter shall not apply to any misconduct that-

> (A) constitutes a crime of violence (as that term is defined in section 16 of title 18) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;
>
> (B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));
>
> (C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;
>
> (D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) Rule of construction

Nothing in this subsection shall be construed to effect subsection (a)(3) or (f).

D.C. Code § 29–403.04. Ultra vires.

(a) Except as otherwise provided in subsection (b) of this section, the validity of corporate action shall not be challenged on the ground that the nonprofit corporation lacks or lacked power to act.

(b) The power of a nonprofit corporation to act may be challenged in a proceeding by:

(1) A member, director, or member of a designated body against the corporation to enjoin the act;

(2) The corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director or member of a designated body, officer, employee, or agent of the corporation; or

(3) The Attorney General for the District of Columbia under § 29-412.20.

(c) In a derivative proceeding under subchapter XI of this chapter by a member, director, or member of a designated body under subsection (b)(1) of this section to enjoin an unauthorized corporate act, the Superior Court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

D.C. Code § 29–406.31. Standards of liability for directors.

(a) A director shall not be liable to the nonprofit corporation or its members for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

(1) None of the following, if interposed as a bar to the proceeding by the director, precludes liability:

(A) Subsection (d) of this section or a provision in the articles of incorporation authorized by § 29-402.02(c);

(B) Satisfaction of the requirements in § 29-406.70 for validating a conflicting interest transaction; or

(C) Satisfaction of the requirements in § 29-406.80 for disclaiming a business opportunity; and

(2) The challenged conduct consisted or was the result of:

(A) Action not in good faith;

(B) A decision:

(i) Which the director did not reasonably believe to be in the best interests of the corporation; or

(ii) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(C) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct:

(i) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and

(ii) After a reasonable expectation to such effect has been established, the director has not established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation;

(D) A sustained failure of the director to devote attention to ongoing oversight of the activities and affairs of the corporation, or a failure to devote timely attention, by making, or causing to be made, appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefor; or

(E) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its members that is actionable under applicable law.

(b) The party seeking to hold the director liable:

(1) For money damages, also has the burden of establishing that:

(A) Harm to the nonprofit corporation or its members has been suffered; and

(B) The harm suffered was proximately caused by the director's challenged conduct;

(2) For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, also has whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

(3) For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, also has whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(c) Nothing contained in this section:

(1) In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the nonprofit corporation under § 29-406.70(a)(3), alters the burden of proving the fact or lack of fairness otherwise applicable;

(2) Alters the fact or lack of liability of a director under another section of this chapter, such as the provisions governing the consequences of an unlawful distribution under § 29-406.33, a conflicting interest transaction under § 29-406.70, or taking advantage of a business opportunity under § 29-406.80; or

(3) Affects any rights to which the corporation or a director or member may be entitled under another statute of the District or the United States.

(d) Notwithstanding any other provision of this section, a director of a charitable corporation shall not be liable to the corporation or its members for money damages for any action taken, or any failure to take any action, as a director, except liability for:

(1) The amount of a financial benefit received by the director to which the director is not entitled;

(2) An intentional infliction of harm;

(3) A violation of § 29-406.33; or

(4) An intentional violation of criminal law.

D.C. Code § 29-408.06 Articles of amendment.

After an amendment to the articles of incorporation has been adopted and approved in the manner required by this chapter and by the articles of incorporation, the nonprofit corporation shall deliver to the Mayor, for filing, articles of amendment, which shall set forth:

(1) The name of the corporation;

(2) The text of the amendment adopted;

(3) If the amendment provides for an exchange, reclassification, or cancellation of memberships, provisions for implementing the amendment if not contained in the amendment itself, which may be made dependent upon facts objectively ascertainable outside the articles of amendment in accordance with § 29-401.04;

(4) The date of the amendment's adoption; and

(5) If the amendment:

(A) Was adopted by the incorporators, board of directors, or a designated body without member approval, a statement that the amendment was adopted by the incorporators or by the board of directors or designated body, as the case may be, and that member approval was not required; or

(B) Required approval by the members, a statement that the amendment was duly approved by the members in the manner required by this chapter and by the articles of incorporation and bylaws.

D.C. Code § 29-408.20 Amendment by board of directors or members.

(a) Except as otherwise provided in the articles of incorporation or bylaws, the members of a membership corporation may amend or repeal the corporation's bylaws.

(b) The board of directors of a membership corporation or nonmembership corporation may amend or repeal the corporation's bylaws, unless the articles of incorporation or bylaws or § 29-408.21 or § 29-408.22 reserve that power exclusively to the members or a designated body in whole or part.

D.C. Code § 29–411.03. Demand.

A person shall not commence a derivative proceeding until:

(1) A demand in the form of a record has been delivered to the nonprofit corporation to take suitable action; and

(2) Ninety days have expired from the date the demand was effective unless:

(A) The person has earlier been notified that the demand has been rejected by the corporation; or

(B) Irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

F.R.C.P. Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

* * *

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

F.R.C.P. Rule 23.1. Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

F.R.C.P. Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including

materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection

in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

* * *

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2020, a copy of the Joint Brief of Appellees was served on the following through the Court's electronic filing system, and by first-class mail, postage prepaid:

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