No. 19-CV-1222

In the

District of Columbia Court of Appeals

SIMON BRONNER, *et al.*,

Appellees,

v.

LISA DUGGAN, *et al.*,

Appellants.

On Appeal from the Superior Court of the District of Columbia
(Honorable Robert R. Rigsby, Judge)

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STATEMENT OF JURISDICTION[1]

This Court has jurisdiction of an appeal from a denial of a motion under the Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.* *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1231 (D.C. 2016), as amended (Dec. 13, 2018), *cert denied sub nom Nat'l Review, Inc. v. Mann*, 140 S.Ct. 344 (2019). Plaintiffs argue that the Court lacks jurisdiction to consider whether their claims fail as a matter of law pursuant to Superior Court Rule 12(b)(6). Defendants do not appeal the Rule 12(b)(6) decision, but an Anti-SLAPP motion must be granted if "the claimant could not prevail as a matter of law, that is, after allowing for the weighing of evidence and permissible inferences by the jury." *Fridman v. Orbis Bus. Intelligence, Ltd.*, 229 A.3d 494, 504 (D.C., 2020) (*quoting Mann*, 150 A.3d at 1236). The showing required under an Anti-SLAPP motion "is more demanding than is required to overcome a Rule 12(b)(6) motion to dismiss." *Mann*, 150 A.3d at 1221, n.2. Thus, any claim that fails to withstand a challenge under Rule 12(b)(6) would logically also fail under an Anti-SLAPP motion, as long as it arose from an act in furtherance of a right of advocacy.

Therefore, to survive an Anti-SLAPP motion, Plaintiffs must demonstrate that their claims are "likely to succeed on the merits," and, at minimum, that those

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[1] This section was inadvertently omitted from Appellants' Brief.

claims do not fail as a matter of law. They did not do so; the Superior Court thus erred in denying Defendants' Anti-SLAPP motion.

ARGUMENT

A. Plaintiffs' Arguments Rely Upon Assertions Without Support in the Record

It is a bedrock rule of appellate practice that the record on appeal consists only of the materials filed in the Superior Court. *See* Rule 10(a) of the Rules of this Court; *see also Brookens v. United States*, 182 A.3d 123, 128 n.6 (D.C. 2018) (declining to consider proffered material outside the record). The parties are also required to cite specifically to the portions of the record upon which they rely. Rule 28(a)(10)(A). *See also Duggan v. Keto*, 554 A.2d 1126, 1144 n.23 (D.C. 1989)

Plaintiffs' Statement of Facts does not contain a single citation to the Appendix, leaving Defendants and the Court to comb through the Appendix to find support for these unsupported assertions. Plaintiffs have also repeatedly relied on "facts" that are nowhere within the record. For example, they claim that one Defendant "was even planning to go abroad six or seven months into her three-year term" and thus did not participate on the National Council after the Resolution was passed (Appellees Br. at 4). There is no reference in the record to support this accusation.

Similarly, Plaintiffs claim that Defendants proudly proclaim "in their briefs … that none of the Professors are officers or directors" (Appellees' Br. at 8).

Again, this is nowhere in the record. What Defendants have noted is that there is no evidence that any Plaintiffs paid any dues – and thus, they have no damages from the alleged misuse of ASA funds. Appellants' Br. at 30. Plaintiffs conspicuously do not respond to that contention.

Plaintiffs also claim that "Defendants' Academic Boycott was funded with annual withdrawals of over $100,000 per year from the ASA Trust Fund" to pay expenses for the Resolution (Appellees' Br. at 7 (emphasis omitted)). Although the Complaint does assert that in fiscal years 2015 and 2016, the Defendants "began withdrawing large amounts from the Trust Fund" (App. 082, ¶ 163), Defendants have already discussed, in detail, why this conclusory statement is unsupported by any facts (*see* Appellants' Br. at 31 - 32). Plaintiffs also concede that John Stephens testified in deposition that ASA's budget and trust fund were segregated from any expenses related to the Resolution (App. 093, ¶ 195), and Plaintiffs find it "impossible to establish … to what extent support for the Resolution was in fact financed by the Trust Fund …" (App. 093 - 4, ¶ 196). How one might conclude that the trust fund was "raided" because of the Resolution without "information as to the specific expenses incurred" is not explained. Plaintiffs also presume, without evidence, that funds withdrawn from the

trust fund "cannot be attributed to this lawsuit." Appellees' Br. at 7. This claim, too, is unsupported by the record.[2]

Finally, once Defendants had made a *prima facie* showing that the claims at issue arise from an act in furtherance of the right of advocacy on issues of public interest, Plaintiffs had the burden under the Anti-SLAPP Act of producing evidence that supported their claims. *Mann*, 150 A.3d at 1233. They did not meet that burden; neither in the trial court nor in their Appellate Brief have Plaintiffs demonstrated that their claims are supported by substantive evidence. Instead, Plaintiffs now try to excuse this failure with two untrue claims. First, they complain that they could not proffer evidence because the documents had been designated as "Confidential" under the federal Protective Order (Appellees' Br. at 16). This makes no sense: any factual assertions in the Redacted Complaint were by definition not "Confidential" (or else the information could not have been placed in the public record), and to the extent that Plaintiffs needed to produce "Confidential" documents, those could have been filed under seal. Plaintiffs' other untrue claim is that Defendants argued that Judge Rigsby could not see any "Confidential" information (Appellees' Br. at 20). Defendants specifically denied

[2] They also avow that the supposed withdrawals "far exceed reasonable costs for defending this litigation." (Appellees' Br. at 7). Given four years of litigation with numerous motions, thousands of documents produced, and now two separate appeals, the basis for their conclusion is not readily apparent.

any such limitation upon the trial court's ability (*see* Defs. Opposition to Motion to Amend Protective Order at 4, n. 1, *Bronner v. Duggan*, No. 1:16-cv-00740-RC (D.D.C. Apr. 11, 2019), ECF No. 127).[3]

B. The Court Properly Found that Defendants Had Met the First Prong of the Act, as Plaintiffs' Claims Arise From Acts in Furtherance of Advocacy

The Anti-SLAPP Act requires a *prima facie* showing that the claims in the lawsuit "arise[] from an act in furtherance of the right of advocacy." D.C. Code § 16-5502(a). Here, Plaintiffs' claims all arise from the passage of the 2013 Resolution, which is clearly an act in furtherance of advocacy on an issue of public interest. Although there is no D.C. case interpreting "arising from" specifically within the context of § 16-5502(a), "it is well settled that statutory language employing the phrase 'arising from' … effects a broad, general and comprehensive coverage." *D.C. Ins. Guar. Ass'n v. Algernon Blair, Inc.*, 565 A.2d 564, 568 (D.C. 1989) (citations and quotations omitted). "It has been held to suffice … that there

[3] Plaintiffs also claim that Palestine Legal "considers itself counsel" for Dr. Salaita. Appellees' Br. at 48. Palestine Legal is not counsel of record in this litigation, and as the web page cited explains, "Palestine Legal provided legal and advocacy support to the ASA in the run-up to the vote and in the aftermath of the resolution's success, as Israel advocacy organizations launched vigorous campaigns to … deter other academic organizations from passing similar resolutions …." *American Studies Association Sued for Academic Boycott*, PALESTINE LEGAL, https://palestinelegal.org/case-studies/2018/3/8/american-studies-association-sued-for-boycott (last updated July 18, 2019). Any claim of attorney-client privilege from such support years ago does not mean that Palestine Legal currently represents any Defendant in this litigation.

be a 'substantial connection' or nexus between that predicate and the claim." *Id.* (*citing Tandy & Wood, Inc. v. Munnell*, 540 P.2d 804, 806, 97 Idaho 142 (1975)). "[I]t is enough that the claim would not have arisen but for the presence of the asserted predicate." *Algernon Blair*, at 568 (*citing Auto-Owners Insurance Co. v. Transamerica Insurance Co.*, 357 N.W.2d 519, 521-22 (S.D.1984)). Absent the passage of the Resolution, Plaintiffs would not be pressing the myriad of claims against these Defendants.

Nor is it debatable that the Resolution constitutes protected activity.[4] The Resolution clearly spoke to an issue of public interest, which Plaintiffs concede. Appellees' Br. at 39; App. 0339. Too, it was published on the ASA's website and elsewhere, and thus is a "written or oral statement made … in a public forum in connection with an issue of public interest" (§ 16-5501(i)(A)(ii)).

Importantly, as courts interpreting anti-SLAPP acts in other states have cautioned, the question of whether Plaintiffs' claims "arise from" protected activity should not be evaluated "solely through the lens of a plaintiff's cause of action." *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98,

[4] Plaintiffs' cases do not help them here. In *Flores v. Emerich & Fike*, 416 F. Supp.2d 885, 912 (E.D. Cal. 2006), the court found that the claims did indeed arise out of protected activity and granted the defendants' anti-SLAPP motions in their entirety. In *Duracraft Corp. v. Holmes Prod. Corp.*, 427 Mass. 156, 159, 691 N.E.2d 935 (1998), the court opined that a non-disclosure agreement could remove otherwise protected speech from the scope of the Anti-SLAPP statute. There is no such agreement in this case.

110 (2010), *as modified on denial of reh'g* (Feb. 24, 2010). The "critical consideration" is what the cause of action is "based on." *Navellier v. Sletten*, 29 Cal. 4th 82, 89, 52 P.3d 703 (2002). Plaintiffs conflate the nature of their legal claims with the allegations of fact upon which those claims are made. Appellees' Br. at 13-14. The proscriptions of the Anti-SLAPP Act are not dependent upon the category of claims the plaintiff chooses to assert, but upon those acts attacked through the lawsuit. D.C. Code § 16-5502 (a).[5] "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier*, 29 Cal. 4th at 92, 52 P.3d at 711. Each of the actions alleged in the Complaint arises from the adoption of the 2013 Resolution and the defense thereof, necessitated by attacks by Plaintiffs and others. It is impossible to separate Plaintiffs' claims from the Resolution; Plaintiffs are wrong that their claims "do not arise from speech, expression, or expressive activity." Appellees' Br. at 38.

[5] Plaintiffs also misinterpret the legislative history of the Act. Appellees' Br. at 42-43. The amendment upon which they focus was not a limitation on the scope of protected conduct; rather, it was prompted by a comment from the ACLU that the "right of free speech" is a common term and broader than the "right of advocacy on issues of public interest," and using the latter phrase would clarify its meaning. Report on Bill 18–893, ACLU Testimony, at 4. Both the plain language of the Act and its legislative history thus cover the claims in this lawsuit.

Any decision to use ASA funds to defend against litigation challenging the Resolution is also protected under the Anti-SLAPP Act, as "conduct that involves petitioning the government…in connection with an issue of public interest." D.C. Code §§ 16-5501(1)(B). *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387, 131 S.Ct. 2488, 2494, 180 L.Ed.2d 408 (2011) ("the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.").

Plaintiffs also wrongly state that "no defendant even attempts to argue" that the claims relating specifically to Bronner "'arise' from the Academic Boycott." Appellees' Br. at 44, n.8. Defendants have addressed Plaintiffs' allegations that Defendants tortiously interfered by "widely shar[ing]" complaints within and outside the National Council (App. 130, ¶ 334), and that Defendants breached their fiduciary duties by "spreading false information" about Bronner (App. 127, ¶ 324) (*See* Appellants' Br. at 15). These are all matters of public interest, as they relate to Bronner's opposition to the boycott resolution and his attempt to undermine the ASA after the passage of the Resolution. App. 95-6 ¶ 201(b); App. 127, ¶ 321. Just as the Resolution is a matter of public interest, so too a nonprofit director's effort to undermine the organization because of that Resolution is undoubtedly of public interest.

In a similar case, a California Court of Appeals held that complaints to school officials about a high school basketball coach's fitness to coach, which led to the coach's firing, were protected under the anti-SLAPP statute. *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 203 Cal. App. 4th 450, 137 Cal.Rptr.3d 455 (Cal. Ct. App. 2012). There, as here, the ultimate alleged injury was a job loss, but the basis of the claims were statements about the plaintiff on a matter of public interest. *Id*. at 465. The court ultimately dismissed all of the claims brought by the coach under Anti-SLAPP. *Id*. at 469–477.

Finally, the tenor of both the Complaint and Appellees' Brief make it clear that this case is motivated solely by Plaintiffs' distaste for Defendants' political views. From the lengthy "history" of USACBI and its efforts to "delegitimize" the State of Israel (App. 34 – 35), to the numerous references to articles written by Defendants and their respective political opinions, Plaintiffs have concentrated not on the administration of ASA, but on Defendants' viewpoints. Nowhere is this more manifest than for Dr. Salaita: other than the fact that he served on the ASA National Council between 2015 and 2018, the only allegations about him are that he wrote a 2014 op-ed piece disclosing his work with USACBI (App. 37, ¶ 46) and advocated for the Resolution before he was on the National Council. (App. 057, ¶ 99; App. 131, ¶ 337). Too, all of Plaintiffs' claims are against all Defendants indiscriminately, even though they did not serve on the same committees at the

same time. For those actions allegedly taken by the National Council, Plaintiffs did not sue all the members, but only those who supported USACBI. The claim that this is solely about corporate governance is not viable.

Plaintiffs' opposition to the 2013 Resolution and their voluminous allegations about Defendants' political opinions demonstrate that every one of their claims arises from acts in furtherance of the right of advocacy on an issue of public interest, as defined by the Anti-SLAPP Act. The Superior Court thus correctly held that Defendants had met the first prong of the Act, requiring Plaintiffs to proffer evidence to demonstrate that their claims were likely to succeed on the merits. This, they failed to do.

C. Whether the Claims in the Complaint Fail as a Matter of Law Is Properly Before this Court

Appellees' Brief repeats verbatim the argument they raised in their Motion to Strike: namely, that this Court does not have jurisdiction to review whether any of the claims in the Complaint fail as a matter of law (*see* Appellees' Br., at 23 – 31). They argue that, because the Anti-SLAPP Act looks "only to the quantum of evidence proffered by the plaintiff," a claim which fails as a matter of law could not be the subject of an Anti-SLAPP motion. They are mistaken. As noted above, if a claim fails as a matter of law, it is not likely to succeed on the merits, and thus fails to meet the threshold standard under *Mann* and *Fridman*.

Plaintiffs' cases are inapposite, and do not address the specific interplay between Rule 12(b)(6) and Anti-SLAPP.[6] *See Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir, 2010) (defense raised was factual in nature, and could not be determined as a matter of law); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), *cert. denied* 541 U.S. 1085 (2004) (motion to dismiss for lack of personal jurisdiction had no relevance to an Anti-SLAPP analysis); *Hearts with Haiti, Inc. v. Kendrick*, 202 A.3d 1189 (Me. 2019) (allegations of sexual abuse did not fall within the first prong of the Anti-SLAPP statute); *Rosario v. Caring Bees Healthcare, Inc.*, 97 Mass. App. Ct. 1122, 2020 WL 3030581 (unpublished June 5, 2020) (remand required to properly analyze whether counterclaim for defamation met the first prong of the Anti-SLAPP statute). In *Boston Clear Water Co. LLC v. O'Brien*, 97 Mass. App. Ct. 1109, 2020 WL 1650707 (unpublished, 2020), both the motion to dismiss *and* the Anti-SLAPP motion were granted. There was thus a final judgment, and the issue of pendent jurisdiction did not arise.

Appellees cite *Hilton* for the proposition that a Rule 12(b)(6) might succeed where an Anti-SLAPP motion would not. As that court noted, however, that scenario occurs where a plaintiff fails to state a cognizable claim, *but the suit does not arise from protected conduct. Hilton*, 599 F.3d at 901-2. Where a suit *does*

[6] Appellants will not repeat the argument in their Opposition to the Motion to Strike in its entirety, but summarize it here.

arise out of protected conduct but the plaintiff fails as a matter of law to state a valid claim, then the claim would fail both under Rule 12(b)(6) and the Anti-SLAPP Act.

Plaintiffs also rely on two federal cases that considered the Minnesota Anti-SLAPP statute (MINN.STAT. §§ 554.01 *et seq.*). Unlike the D.C. Anti-SLAPP Act, the Minnesota statute requires a showing from plaintiff that the conduct giving rise to the lawsuit "is not immune from liability because the conduct constitutes a tort or violation of a constitutional right." Minn. Stat. §§ 554.02, subd. 2(2), (3), 554.03 (2004). This appears more like the rebuttal of an affirmative defense than the procedural challenge of the D.C. Anti-SLAPP Act. Thus, in *Rickmyer v. Browne*, 995 F.Supp.2d 989 (D.Minn), *aff'd* 587 Fed.Appx. 354 (8th Cir. 2014), the plaintiff's claims failed to state a cause of action under Rule 12(b)(6), and the Court did not need to reach the immunity issue under the Minnesota statute. Similarly, in *Boley v. Minn. Advoc. for Human Rights*, 2010 WL 346769 (D. Minn. 2010), the claims were dismissed on statute of limitations grounds, and the court did not need to reach the additional defense afforded by the Minnesota Anti-SLAPP statute. A more significant difference between the Minnesota and D.C. laws is that the former created an affirmative cause of action for parties who were sued in federal court in violation of the Anti-SLAPP statute to sue in state court. Minn. Stat. § 554.045; *Rickmyer* at 1017, n. 34; *Boley* at *1.

Finally, Appellees cite *Ginx, Inc. v. Soho All.*, 720 F.Supp.2d 342 (S.D.N.Y. 2010). That case, however, involved claims under 42 U.S.C. § 1981 and the Due Process Clause of the Fourteenth Amendment. The Court ultimately denied relief under the New York Anti-SLAPP statute, not because the claims were dismissed as a matter of law, but because "federal courts have declined to apply Anti-SLAPP statutes to federal claims" (720 F.Supp.2d at 366). Appellees correctly quoted the ultimate disposition of the case, but failed to understand how the *Ginx* Court came to that conclusion.

D. Plaintiffs Have Failed to Proffer Any Evidence to Suggest that their Claims Are Likely To Succeed

It is manifest that the Complaint arises, in its entirety, from acts in furtherance of the right of advocacy. Under the Anti-SLAPP Act, therefore, Plaintiffs were obliged to present evidence demonstrating that their claims were likely to succeed on the merits. In both the Superior Court and this Court, Plaintiffs offer no such evidence. Instead, Plaintiffs offer only pages of detailed exposition of Middle East politics, the effects of academic boycotts, the operations of USACBI, and lengthy quotes of emails from political opponents (including, curiously, quotes from persons who are not parties to this action and who were not members of the National Council).

Given the factual inaccuracies in Appellees' Statement of Facts (*see supra*, Section A), it would not be reasonable to accept the cherry-picked quotations alleged in the Complaint as a proffer of evidence (even if such allegations might be considered "evidence"). At a minimum, Plaintiffs should have submitted those quoted documents to the trial court for review and a determination whether those documents did, in fact, say what Plaintiffs claimed, and whether they actually supported Plaintiffs' claims. Plaintiffs also assert that Defendants do not argue that Plaintiffs do not have sufficient evidence, just that they failed to produce it. Appellees' Br. at 12, 16, 17. Plaintiffs "cannot rely on [their] pleading at all, even if verified, to demonstrate a probability of success on the merits." *Hecimovich, supra*, 203 Cal. App. 4th at 474, 137 Cal. Rptr. 3d at 474; *see also Oviedo v. Windsor Twelve Properties, LLC*, 212 Cal. App. 4th 97, 109, 151 Cal. Rptr. 3d 117, 126, n. 10 (2012) ("affidavits stating evidentiary facts should be required to oppose the motion (because pleadings are supposed to allege ultimate facts, not evidentiary facts)"). Again, their claim that they were unable to do because of the Protective Order cannot be countenanced.

Plaintiffs' contention that Defendants did not argue to the Superior Court that Plaintiffs had failed to provide evidence (Appellees' Br. at 16, 21) is also not credible. *See* Salaita Reply at 2, 4, 13; Kauanui and Puar Reply at 1, 4, 5; ASA Reply at 8. *See also Transcript of Hearing*, App. 0243 (Plaintiffs have to

"demonstrate the merit of their claim. And that means evidence. And they did not submit any evidence.").[7] As Defendants have argued extensively in their Brief, Plaintiffs failed to show that their claims were likely to succeed on the merits, and the Anti-SLAPP motions should have been granted in their entirety.

E. Plaintiffs' Claims Should Have Been Dismissed Under the Anti-SLAPP Act As Unlikely To Succeed On the Merits

As Defendants have already argued at length, each of the counts in the Complaint should have been dismissed under the Anti-SLAPP Act, as none were likely to succeed on the merits (*see* Appellants' Br., Section C). On the whole, Plaintiffs do not address these arguments, save to generally assert either that citations to 43 documents in the Complaint should have sufficed to support each of their claims or that Defendants did not, in the trial court, assert in their Anti-SLAPP motions that the claims were legally invalid. The latter is incorrect: each Defendant based their Anti-SLAPP arguments on the fact that Plaintiffs' claims were not likely to succeed on the merits for a number of reasons. The Superior Court was apprised of every element of Defendants' arguments. Nor, for that matter, did Plaintiffs argue the substance of any of their claims in the Superior

[7] Nor is it relevant that Defendants' *motions* did not argue that Plaintiffs had failed to proffer evidence; such a contention would have to await receipt of the Plaintiffs' oppositions, and thus could only be raised in a reply brief, which it was.

Court; they insisted, instead, that the Anti-SLAPP Act did not apply (incorrectly – see Section B *supra*).

Appellees' Brief does argue that those claims barred by the statute of limitations should only be considered under Rule 12(b)(6), because they think that such a motion is "the correct and only appropriate vehicle to dismiss claims on statute of limitations grounds" (at 33). This, too, is fallacious: while this Court has not yet had occasion to do so, other courts have held that a claim outside the limitations period fails under Anti-SLAPP. *See Yang v. Tenet Healthcare, Inc.*, 48 Cal.App.5th 939, 950 262 Cal.Rptr.3d 429, 436-7 (4th Dist., 2020) (claim for defamation has no probability of success on the merits because the claims are time-barred); *Traditional Cat Assn., Inc. v. Gilbreath*, 118 Cal.App.4th 392, 397–399, 405, 13 Cal.Rptr.3d 353 (4th Distr. 2004) (cause of action subject to dismissal under the anti-SLAPP statute because it was barred by the applicable statute of limitations).[8]

Any other argument on the merits of the claims can be found only in Appellees' Motion to Strike, not in their Brief. As such, these are not properly before the Court. *Wright v. Howard Univ.*, 60 A.3d 749, 752 n. 2 (D.C. 2013).

[8] Similar to the D.C. Act, the California Anti-SLAPP law provides that if the defendant shows that the action giving rise to the lawsuit is a statement of public interest, the plaintiff must "demonstrate a minimal probability of prevailing on the merits of the claim." *See Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 66-67, 124 Cal.Rptr.2d 507 (2002).

Regardless, a common theme runs throughout those arguments: that any legal defense that would doom a claim cannot be considered on an Anti-SLAPP motion because the only question is the quantum of evidence that plaintiffs might proffer (*see, e.g.*, Motion at 14-15, on aiding and abetting). As Defendants have already argued in their Opposition to the Motion to Strike (at 4 - 5), this is nonsensical. Whether a claim fails as a matter of law or for a lack of evidence, it is equally unlikely to succeed on the merits. The burden of defending a SLAPP is no lighter if the claims are ultimately dismissed as a matter of law, and a defendant is equally entitled to protection from claims that are factually baseless as to those that are legally doomed.

The Motion to Strike also asserts that collateral estoppel should not be considered because "there are no derivative claims in this lawsuit." Plaintiffs simply prefer not to *call* their claims derivative. Counts One, Two, Four, Five, Nine and Twelve all seek to recover damages incurred only by ASA, not by individual Plaintiffs. This is the very definition of a derivative action. Again, Plaintiffs rely on *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011), where plaintiffs claimed that their memberships had been unfairly terminated and their dues payments had been misspent; these individual injuries

created standing to sue.[9] By contrast, Plaintiffs here have not alleged any individual damage from any alleged breach of fiduciary duty. They have not even alleged that they have paid any dues to ASA since 2014.[10] As the Federal Court of Appeals noted, Plaintiffs "stretch [the] decision too far." *Bronner v. Duggan*, 962 F.3d 596, 604 (D.C. Cir. 2020).

Appellees also argued (Motion to Strike at 15 - 16), that this Court should not consider immunity under the federal Volunteer Protection Act (42 U.S.C. § 14503(b)) or the D.C. volunteer immunity statute (D.C. Code § 29-406.3) because of the rulings in the federal court (*id., citing to Bronner v. Duggan*, 317 F.Supp.3d 284 (D.D.C. 2018)).[11] Appellees misread the court's opinion, which was limited to a "specific, narrow issue." *Id.* at 285-6. After analyzing the statute and the legislative history, the Court concluded that certain allegations – that Defendants withheld information from ASA members before the vote in 2013,

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[9] On remand, the trial court ultimately found that the *Daley* plaintiffs had not in fact suffered any individual injury and that any suspension of membership was not compensable. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, No. 2009 CA 04456 B, slip op. at 45-46 (D.C. Super. Ct. May 14, 2013).

[10] Again, Bronner and Rockland do not pay dues (App. 026-7, ¶¶ 14, 15); Kupfer quit his membership in 2014 (*id.* ¶ 17), and Plaintiffs have not suggested that Barton remains a member of ASA.

[11] Contrary to Plaintiffs' assertion that the federal court found that their "claims have merit." (Appellees' Br. at 10, 13), the federal court merely noted, in *dicta*, that they "may have meritorious claims" when it dismissed them for lack of subject matter jurisdiction. *Bronner v. Duggan*, 364 F. Supp. 3d 9, 12, 22-23 (D.D.C. 2019).

used ASA resources to bring supporters to the convention, refused to publicize letters opposing the Resolution, pushed the Resolution through with fewer votes than required by the Bylaws, and hired attorneys and retained a "rapid response" media team to defend against the backlash – if assumed to be true, suggested willful misconduct. *Id.* at 293.

This opinion does not get Plaintiffs where they need to be. First, the U.S. District Court, as it must, assumed the allegations in the federal Complaint to be true; the Anti-SLAPP Act requires a greater showing from Plaintiffs. Plaintiffs have offered absolutely no evidence either that Defendants acted with willful misconduct or with an intent to harm Plaintiffs. Rather, the Complaint here makes it clear that Defendants acted according to their honestly held political beliefs. Plaintiffs simply disagree with those beliefs, and thereby condemn Defendants as "malicious." Second, the actions upon which the U.S. District Court based its opinion were all actions which, in this case, are time-barred and cannot support any finding of "willful misconduct." What might have passed muster under Rule 12(b)(6) in the federal case is insufficient under the Anti-SLAPP Act in *this* case to show "willful misconduct."

Without citing any authority, Plaintiffs also claim that the Business Judgment Rule is irrelevant to an Anti-SLAPP motion (Motion to Strike at 16). Again, this is incorrect. *See, e.g., Davis v. Cox*, 180 Wash.App. 514, 531, 325 P.3d

255, 265 (Wash. Ct. App. 2014), *rev'd on other grounds*, 351 P.3d 862 (Wash. 2015) (board members sued for boycott of Israel could avail themselves of the business judgment rule, thus dismissing case pursuant to Anti-SLAPP statute which required showing probability of prevailing on the merits). Plaintiffs also argue that the business judgment rule should not apply because "there is substantial evidence in the complaint showing an intentional infliction of harm" (Motion at 17). Any assertion in the Complaint that some Defendants acted in "bad faith" is conclusory, and does not amount to a sufficient proffer to show that passing a Resolution, defending the ASA against litigation, or failing to renew a contract, were not done in the best interests of the ASA. *See* Appellants' Br. at 47-48. These are precisely the types of decisions protected by the business judgment rule.

CONCLUSION

The Complaint here clearly arises from an act in furtherance of public advocacy: namely, the 2013 Resolution and the subsequent acts to defend it. Plaintiffs have not proffered any evidence to show that their claims were likely to succeed, and thus failed to show that their SLAPP suit should proceed. For the reasons argued above, and in their principal Brief, Appellants respectfully request that this Court remand the case to the Superior Court with instructions to dismiss all counts of the Complaint under the Anti-SLAPP Act and to award attorneys' fees and costs to Defendants.

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STATUTES AND RULES RELIED UPON

Minnesota Statute 554.02 **PROTECTION OF CITIZENS TO PARTICIPATE IN GOVERNMENT.**

Subd. 1. Applicability. This section applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation.

Subd. 2. Procedure. On the filing of any motion described in subdivision 1:

(1) discovery must be suspended pending the final disposition of the motion, including any appeal; provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted;

(2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;

(3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03; and

(4) any governmental body to which the moving party's acts were directed or the attorney general's office may intervene in, defend, or otherwise support the moving party.

Minnesota Statute 554.03 **IMMUNITY.**

Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2020, a copy of the Appellants' Brief was served on the following through the Court's electronic filing system, and by first-class mail, postage prepaid:

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