IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, et al., **Plaintiffs,** **v.** **LISA DUGGAN, et al.,** **Defendants**	**Civ. No. 2019 CA 001712 B** **Judge Robert R. Rigsby**

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COME NOW the Defendants, American Studies Association ("ASA"), Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, by and through the undersigned counsel, and pursuant to the Court's direction at the hearing on October 27, 2022, hereby submit their Proposed Findings of Fact and Conclusions of Law.

GENERAL FINDINGS

1. ASA is a nonprofit corporation, organized under the laws of the District of Columbia, dedicated to the promotion of the study of American culture (Complaint ("Comp."), ¶ 17).

2. John Stephens is the Executive Director of ASA (Comp. ¶ 26); the remaining Defendants are, or were, members of the ASA National Council or ASA's Nominating Committee in various years from 2013 to the present.

3. With the exception of Dr. Stephens, all the individual Defendants were allegedly members of the United States Association for the Academic and Cultural Boycott of Israel (USACBI) (Comp. ¶ 1).

4. In 2013, ASA adopted an Academic Resolution, which expressed support for boycott efforts by limiting interaction with Israeli academic institutions (the "Resolution"). (Comp. ¶¶ 3,

54). Plaintiffs oppose the Resolution. The instant Complaint raises a number of challenges to the promotion, adoption and defense of that Resolution by the ASA National Council.

5. Although the National Council included at least 23 members (Comp. ¶ 74), the only individuals named as Defendants are persons Plaintiff believes to be affiliated with USACBI (Comp. ¶ 1).

6. Plaintiffs Dr. Bronner and Dr. Rockland are honorary lifetime members of ASA (Comp. ¶¶ 13, 14). Plaintiff Dr. Barton's membership in ASA lapsed in 2012 for non-payment of dues; he reactivated his membership in 2013, but there is no allegation that he remained in good standing (Comp. ¶ 15). Plaintiff Dr. Kupfer was also a member of ASA until 2014; in opposition to the Resolution, he allowed his membership to lapse (Comp. ¶ 17).

7. Plaintiffs originally sued in the United States District Court for the District of Columbia. That court initially dismissed with prejudice any derivative claims asserted. *Bronner v. Duggan*, 249 F.Supp.3d 27 (D.D.C. 2017). Ultimately, the case was dismissed for failure to meet the minimum *ad damnum* requirements for federal diversity jurisdiction. *Bronner v. Duggan*, 364 F.Supp.3d 9 (D.D.C. 2019), *aff'd* 962 F.3d 596 (D.C.Cir. 2020).

8. The D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, sets a two-stage framework for motions to dismiss. First, the moving party must make a "*prima facie* showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). This showing is "not onerous." *Doe v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014). The burden then shifts to the non-movant to demonstrate "that the claim is likely to succeed on the merits." *Id.* If, as here, plaintiffs do not meet that burden, the claims must be dismissed and attorneys' fees awarded to the moving party. *Doe v. Burke*, 133 A.3d 569, 578 (D.C. 2016).

9. Unlike a motion to dismiss under Sup.Ct.R. 12(b)(6), the Anti-SLAPP special motion requires an evidentiary showing by the non-movant: it is "essentially an expedited summary judgment motion". *American Studies Assn. v. Bronner*, 259 A.3d 728, 740-41 (D.C. 2021).

10. A claim "arises from" an act in furtherance of public advocacy if the "party's statutorily protected activity [is] the basis for that party's asserted liability." *Bronner*, 259 A.3d at 734. "[T]he act underlying the plaintiff's cause or the act which forms the basis for the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." *Id.* at 746-7 (emphasis in original).

11. The Resolution constitutes an act in furtherance of the exercise of advocacy. The Resolution clearly spoke to an issue of public interest, which Plaintiffs concede. 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)). Finally, the actions taken by the National Council to promote the Resolution, or to defend it against opposition to its adoption, are also acts in furtherance of the exercise of advocacy.

12. The Court of Appeals explicitly left to this Court the analysis of each claim under the Anti-SLAPP statute, and whether its basis was "an act in furtherance of the right of advocacy on issues of public interest" or "any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." *See Bronner* at 750: "We express no view at this time as to whether the ASA defendants met their burden of showing that any of the plaintiffs' claims arise from acts in furtherance of the right of advocacy on issues of public interest … [T]his threshold issue should be examined, in the first instance, claim by claim, by the trial court."

13. In order to rebut the movant's *prima facie* case, the non-movant must "produc[e] or proffer … evidence that supports the claim." *Fridman v. Orbis Business Intelligence, Ltd.*, 229 A.3d 494, 506 (2020) (*quoting Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016), *as amended* (Dec. 13, 2018), *cert denied sub nom. Nat'l Review, Inc. v. Mann*, 140 S.Ct. 344 (2019)). "If the non-moving party fails to meet that standard, then the motion must be granted and the case will be dismissed with prejudice." *Fridman*, *supra* 229 A.3d at 502.

14. It is not enough for the non-movant to rely on the allegations in the Complaint, no matter how extensive those allegations might be. Otherwise, an Anti-SLAPP motion would afford no greater protection than a regular Rule 12(b)(6) motion, and "[a] plaintiff must make more of a showing to defeat an anti-SLAPP motion than is ordinarily required to defeat a 12(b)(6) motion." *Bronner*, *supra* at 740.

15. Plaintiffs have, in memoranda and at oral argument, proposed that their claims are generic corporate duty claims (notwithstanding the fact that, of the 23 members of the National Council, Plaintiffs named and sued only members who were allegedly members of or sympathetic to USACBI; see ¶ 5, above). But this Court is not constrained by Plaintiffs' characterizations of their claims. *See, e.g.*, *Finke v. The Walt Disney Co.*, 2 Cal.Rptr.3d 436, 445 (2nd Dist.), *review granted* 110 CalAppl4th 1210 (2003) *and dismissed as settled*, 79 P.3d 541 (Cal. 2003). "SLAPPs 'masquerade as ordinary lawsuits' … but a SLAPP plaintiff's true objective is to use litigation as a weapon to chill or silence speech." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (*quoting Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir.2003)).

16. Plaintiffs here have not proffered any evidence in response to the Anti-SLAPP motions. They rely instead on the assertions and quoted materials in the Complaint, and have argued that such allegations suffice. The Anti-SLAPP Act, however, requires that Plaintiffs proffer affirmative

evidence. At a minimum, Plaintiffs should have submitted the actual documents referenced in the Complaint.

With these preliminary findings, we turn to the individual Counts of the Complaint.

COUNTS ALREADY DISMISSED UNDER RULE 12(b)(6)

17. In its Order of December 12, 2019 (as amended), the Court dismissed Counts Three, Four, Five, Six, Seven and Eight of the Complaint under Rule 12(b)(6) as time-barred, as well as that portion of Count Two which pertained to alleged manipulation of the process of voting on the Resolution and of Counts Two and Nine for alleged misuse of funds before March 2016. As those claims have no likelihood of success on the merits, the only question that remains is whether they arise from an act in furtherance of the exercise of advocacy. Each is discussed in turn.

A. Count Two – Breach of Fiduciary Duty

18. Count Two asserts, in part, that the individual Defendants engaged in a long-term strategy of nominating like-minded candidates to the National Council in order to increase support for the Resolution.[1]

19. Specifically, Marez and Duggan "dedicated the great majority of their efforts" to the adoption of the Resolution (¶ 56); Puar (not a National Council member) "is infamous for anti-Semitic lectures condemning Israel" (¶ 58); and Reddy and Maira were involved in supporting a similar Resolution in the Association for Asian American Studies (¶¶ 70, 82). The Complaint contains no other information about the candidates' qualifications for membership on the National Council (or lack thereof).

[1] That portion of Count Two that deals with "misuse" of ASA funds is dealt with below, with Count Nine.

20. Plaintiffs allege that the Defendants sacrificed their loyalty to ASA to the interests of USACBI (Comp. ¶ 101).

21. Plaintiffs claim that the Defendants breached their fiduciary duty to ASA's members by placing their own "personal political interests over the interests and mission" of ASA (Comp. ¶ 265). Any other abilities or assets that these individuals might bring to the service of ASA were, by contrast, apparently inconsequential. The basis underlying Count Two, therefore, is the set of acts by the individual Defendants in support of the Resolution – and before that, in support of USACBI. The case, therefore, arises out of an act (or acts) in support of the exercise of advocacy.

22. Although Plaintiffs claimed at oral argument that the acts of the Defendants were the "definition" of a breach of fiduciary duty, Plaintiffs have provided no evidence of damage resulting from the Defendants' alleged breach.

B. Count Three – *Ultra Vires* and Breach of Contract

23. Count Three alleges that the nomination of individual Defendants for election to the ASA National Council was *ultra vires* and breached ASA's governing documents because those nominees did not represent "the diversity of the association's membership" (Comp. ¶ 272)

24. By contrast, Plaintiffs allege that "the great majority of members of the Association did not join to advocate for USACBI." (Comp. ¶ 273). According to Plaintiffs, it was the individual Defendants' act of advocating for USACBI and for the Resolution that allegedly made the National Council candidates insufficiently "diverse," and which disqualified them from service as ASA representatives.

25. The "diversity" requirement within Article IV of the ASA Constitution refers to inclusion on the basis of race, creed, national origin, or even gender or sexual preference, as well as

professional experience within the membership. It does not require that candidates for leadership have differing opinions on the Israeli/Palestinian conflict.

26. It is clear from the Complaint that that the pivotal factor at issue in this Count is "diversity" of viewpoint on a very specific subject – support for USACBI. The acts that form the basis of the claims in Count Three are the acts of advocacy by the individual Defendants in favor of USACBI and of the Resolution itself. Count Three thus arises out of an act in furtherance of the exercise of advocacy.

C. Counts Four and Eight – Breach of Contract and *Ultra Vires*

27. Count Four claims that the Defendants, in an *ultra vires* act, decided to freeze the voting rolls as of the day before announcement of the Resolution vote (Comp. ¶¶ 123, 135). Count Eight claims that, because of such *ultra vires* action, Plaintiff Barton was unable to vote (¶ 127).

28. The voting rolls were allegedly cut off to prevent people from renewing simply to vote against the Resolution (Comp. ¶¶135, 136). These acts allegedly allowed Defendants to force the Resolution on ASA, against the best interests of the entity itself (Comp. ¶ 275).

29. Nothing in the ASA Bylaws (attached to the Complaint) prohibits closing the voting rolls; Plaintiffs merely claim that it has never happened before. Plaintiffs essentially allege that the Defendants acted to forestall a flood of new members trying to enroll solely to oppose the Resolution.

30. The "act in furtherance of the exercise of advocacy" for Count Four, therefore, is the act of closing the voting rolls in order to support the passage of the Resolution – in itself, an act of advocacy. This act, which is the sole basis for Count Four, thus falls within the parameters of the Anti-SLAPP Act.

31. Count Eight, for its part, merely claims that Plaintiff Barton was caught up in this freezing of the rolls, and thus was unable to vote against the Resolution. Just as Count Four falls within the Anti-SLAPP Act, Count Eight does so as well.

D. Count Five – *Ultra Vires* and Breach of Contract

32. Count Five asserts that the Resolution is an attempt to influence Israeli legislation, and thus violates the Statement of Election of July 2013 (Comp. ¶ 292). The Resolution also allegedly divided ASA, causing damage to the organization (Comp. ¶¶ 295, 296).

33. In briefing, Plaintiffs have also alleged that the Resolution thus endangers ASA's standing as a non-profit corporation under Section 501(c)(3) of the U.S. Tax Code.

34. Nonetheless, at oral argument, Plaintiffs asserted that their claims were not directed at advocacy, but were instead generic corporate claims, based upon the concept that the Defendants had led the ASA to engage in *ultra vires* acts that could harm the entity.

35. Yet the U.S. District Court has already evaluated and rejected that argument. In its Memorandum Opinion of March 31, 2017, the District Court wrote, *inter alia*, as follows:

> The boycott resolution was . . . enacted for "academic purposes," at least to a point where it was not in violation of the ASA's founding documents . . . It also was reasonably in furtherance of the ASA's purpose of advancing education and the promotion of the study of American culture through encouraging research, teaching, and strengthening relations among persons and institutions in the United States and abroad . . . The boycott resolution was aimed both at encouraging academic freedom for Palestinians and strengthening relations between American institutions and Palestinians. At the very least, it was "reasonably in furtherance of the objects" of the ASA. . . . Thus, it was not contrary to the ASA's express purposes.

Bronner, et al. v. Duggan, et al., 249 F. Supp. 3d 27, 49 (D.D.C. 2017); *see generally* 249 F. Supp. 3d at 41 – 50, discussing and rejecting Plaintiffs' argument that the Resolution was *ultra vires*.

36. Count Five is a direct attack on the Resolution, its character, and its alleged effects on ASA. The Resolution clearly stands as the basis for the claims in Count Five. That Count arises out of the furtherance of advocacy, and falls within the Anti-SLAPP Act.

E. Counts Six and Seven – Breach of Contract and Breach of D.C. Non-Profit Act

37. Counts Six and Seven challenge the vote itself on the Resolution. Specifically, Count Six claims that the Resolution was an issue that would "require public action, speech or demonstration," and required an affirmative vote of two-thirds of those present (Comp. ¶ 302). Count Seven claims that D.C. Code § 29-405.24 requires that any vote be cast "by a quorum of that voting group" (Comp. ¶ 305). Plaintiffs allege that the vote on the Resolution met neither condition.

38. Count Six arises out of the character of the Resolution itself, as a statement of public policy (and thus of advocacy), and thus falls within the Anti-SLAPP Act.

39. Although Plaintiffs claim, in Count Seven, the lack of a quorum for the vote on the Resolution, they do not challenge any other action taken at the 2013 Annual Meeting, when the Resolution was adopted. Plaintiffs also do not claim the lack of a quorum for that Annual Meeting in general.

40. Count Seven is focused solely on the Resolution and the method of its passage. As the Resolution is an "act in furtherance of the right of advocacy" and as the circumstances of its passage form the basis of Count Seven, that Count falls within the Anti-SLAPP Act.

All of these Counts thus fall within the ambit of the Anti-SLAPP Act, as each are based upon either support for, or adoption of the Resolution. Each of these Counts have been dismissed

by the Court as time-barred, and thus have no likelihood of success on the merits. Each of these Counts, therefore, violate the D.C. Anti-SLAPP Act.

THE REMAINING COUNTS IN THE COMPLAINT

A. Count One – Breach of Fiduciary Duty

41. Count One is the counterpoint to Count Three: whereas the latter claims that the act of nominating individual Defendants to leadership positions within ASA violated the organization's governing documents, Count One alleges that those Defendants so nominated breached their fiduciary duty to ASA by not disclosing their support of USACBI and their intent to promote the Resolution. Specifically, Count One alleges that the nominees misrepresented their "personal political agenda and plan to suborn the Association to advance the purposes of the USACBI." (Comp. ¶ 262).

42. Again, there is no allegation in the Complaint as to the other qualifications of these nominees, and thus no grounds to conclude that they were not otherwise fit for nomination to their respective positions. As with Count Three, Count One rests on the implicit assertion that, solely because of their "personal political agenda," these nominees were disqualified from serving in ASA leadership positions.

43. The decision not to speak is entitled to as much protection under the First Amendment as is the decision to speak, and is considered expressive conduct. *See NAACP Legal Defense & Educational Fund v. Devine*, 560 F. Supp. 667, 676 (D.D.C. 1983). The basis for Count One is the Defendants' act of holding specific political views, expressing those views both outside and within ASA, and ultimately acting on those views to adopt the Resolution. The conclusion that Count One is "expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest" is

unavoidable. Indeed, Plaintiffs couch the claim as one of *mis*-representation by the Defendants (Comp. ¶ 262). Count One thus arises out of an act in furtherance of the right of advocacy, and falls within the Anti-SLAPP Act.

44. Regarding the likelihood of success, Count One must fail as time-barred. Just as Count Three was stale because Plaintiff Bronner was aware of the Defendants' political association through his role as member of the ASA Executive Committee and National Council, Count One is time-barred for the same reason.

45. Moreover, there is nothing in the law of the District of Columbia that requires a nominee for leadership in a non-profit organization to disclose every aspect of her political philosophy. Such a condition would be unworkable: any nomination would be open to challenge years later on one pretext or another.

46. For the preceding reasons, Count One thus has no likelihood of success on the merits, and should be dismissed.

B. Counts Two and Nine - Misuse of Funds and Corporate Waste

47. Count Two claims misuse of funds to defend the Resolution; Count Nine claims corporate waste from the use of ASA funds to "advocate, conduct a vote on, declare enacted, and then support the Academic Boycott". Both Counts rest on the assertion that adoption and defense of the Resolution amounted to corporate waste.

48. The Court's December 12, 2019 Order declined to dismiss these two Counts to the extent that they claim damages for misuse of corporate funds after 2016.

49. Expenditure of funds in the advancement of a political position constitutes expression protected by the First Amendment. *See Cruz v. FEC*, 542 F. Supp. 3d, 1, 7-8 (D.D.C. 2021) *aff'd*

FEC v. Ted Cruz for Senate, 2022 U.S. Exis 2403 (U.S., May 16, 2022) (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

50. A claim for corporate waste lies only where "the challenged transaction served no corporate purpose or where the corporation received no consideration at all." *White v. Panic*, 783 A.2d 543, 554 (Del. 2001); *see also Albert v. Tuft (In re: Greater Southeast Comty Hosp. Corp.)*, 333 B.R. 506, 524 (Bankr D.D.C. 2005) (*quoted with approval in Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 (D.C. 2011). If "any reasonable person might conclude that the deal made sense, then the judicial inquiry ends." *In re Lear Corp. Shareholder Litigation*, 967 A.2d 640, 656 (Del.Ch. 2008).

51. An essential element of both Counts Two and Nine is the allegation that no reasonable member of the National Council would act to either adopt or defend the Resolution, which in turn makes the character and content of the Resolution a necessary part of these claims.

52. Additionally, to the extent these claims are based upon expenditures of funds in advancement of the Resolution, those expenditures were themselves "act[s] in furtherance of the right of petition or free speech." *Cruz, supra.* Counts Two and Nine, therefore, arise out of the adoption and defense of the Resolution.

53. Any claim for misuse of funds is fundamentally 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). Since the federal court dismissed Plaintiffs' derivative claims with prejudice, any such claims are barred by collateral estoppel.

54. Although Plaintiffs allege that membership dropped because of the Resolution (Comp. ¶ 184), there is also no allegation, let alone evidence, as to the membership rates or dues collected

after 2013. Moreover, Plaintiffs claim contributions decreased while expenses increased, but they offer no evidence to support this, and the allegations in the Complaint are internally contradictory. *Compare* ¶ 178 (allegation that contributions decreased because of the Resolution) with ¶ 176 (after an increase in contributions in 2013, the levels went back to the historical average before the Resolution); *compare also* ¶ 166 (Defendants withdrew $112,000 from Trust Fund to finance expenses related to Resolution) with ¶ 191 ("it is impossible to establish … to what extent support for the Resolution was in fact financed by the Trust Fund.").

55. To the extent that Plaintiffs may be claiming damage for themselves as individuals, they have failed to demonstrate any such damages. Professors Bronner and Rockland do not pay dues (Comp. ¶¶ 14, 15). Professor Kupfer allowed his membership to lapse in 2014, and therefore hasn't paid any dues since then (¶ 17). Although the Complaint alleges that Professor Barton tried to renew his membership right before the vote on the Resolution, there is no allegation that he remains a member today. Nothing in the Complaint suggests that any of the Plaintiffs have suffered a loss of dues since 2016, or that they claim any direct injury from a misuse of funds.

56. On their face, neither Counts Two nor Nine demonstrate any likelihood of success on the merits. Any claim for corporate waste is barred by collateral estoppel, and there is no allegation in the Complaint to suggest that Plaintiffs might claim any individual damages.

C. Count Ten – Breach of Fiduciary Duty

57. In this Count, Plaintiffs claim that Defendants chose not to renew Bronner's contract as Editor of the ASA Encyclopedia on the basis of his – and their – acts of advocacy; Plaintiffs claim that the Council did not renew his contract "*solely* because [they] were unwilling to work with someone who disagreed with them." (¶ 259) (emphasis added). As the Complaint notes, Bronner's opposition extended beyond voicing his opinion: the Department at Penn State that he chaired

voted to leave ASA in protest (Comp. ¶ 205 n. 13). Too, by the time the contract ended in October, 2016, Bronner had been an active litigant against ASA in federal court for six months.

58. With regard to the nature of the alleged act at the core of this Count, Plaintiffs claim that the Defendants breached their fiduciary duty by removing Bronner from his position "for *no reason other than* because of his opposition to the Academic Boycott" (¶ 329) (emphasis added). Put another way, according to the Complaint the Defendants' breach of their fiduciary duty was an expression of disagreement with Bronner about the Resolution, and their continued support of that Resolution. The alleged breach of fiduciary duty is linked directly to the Resolution, and thus "arises from" an act in furtherance of public advocacy. As such, the Defendants' "statutorily protected activity [is] the basis for that party's asserted liability."

59. Moreover, because Count Ten asserts a claim for breach of fiduciary duty, it necessarily alleges that any defense of the Resolution was unreasonable – while any opposition was reasonable and not grounds for a refusal to renew the contract. The alleged reason for the termination was the parties' disagreement over the Resolution; as such, that Resolution forms the basis for Count Ten, and the claim arises out of the Resolution.

60. On its face, Count Ten cannot state a cognizable claim for breach. The contract itself, which is part of the court record, states that "[u]pon expiration or termination of this Agreement for any reason, ASA shall have the right to appoint a new Editor-in-chief … without further obligation to the Editor." Contract, ¶ 11. None of the Defendants, therefore, owed a fiduciary duty to Bronner either to renew the contract or even to warn him it was not going to renew. *See, e.g., Multicom Inc. v. Chesapeake and Potomac Tele. Co.*, 1988 WL 118411 (D.D.C. 1988) ("Even if C&P failed to exercise good faith in negotiating a renewal of its contract, these facts, standing alone, do not support a cause of action for breach of fiduciary duty.").

61. Moreover, the decision not to renew Bronner as Editor while he was in contentious litigation with ASA lies well within the business judgment of the National Council. Count Ten does not demonstrate any likelihood of success on the merits, and should be dismissed pursuant to the Anti-SLAPP Act.

D. Counts Eleven and Twelve – Tortious Interference and Aiding and Abetting

62. Count Ten claims that the Executive Council decided not to renew Bronner's contract; to the extent that any of the Defendants were not on the Executive Council at the time, Count Eleven claims that they tortiously interfered with Bronner's contract. Because Count Ten arises out of the Resolution, Count Eleven does, as well.

63. As discussed above, ASA had plenary authority not to renew Bronner's contract, and thus did not breach that contract. There could thus be no tortious interference, because "no wrongful breach of contract could result from [the] interference." *Dale v. Thomason*, 962 F.Supp. 181, 184 (D.D.C.1997) (*citing Bible Way Church v. Beards*, 680 A.2d 419, 432–33 (D.C.1996)); *Paul v. Howard Univ.*, 754 A.2d 297, 309 (D.C. 2000) (where plaintiff had "no contractual right to indefinite tenure" her claims for intentional interference were properly dismissed).

64. Moreover, Count Twelve claims that the individual Defendants "aided and abetted" each other in all the tortious actions alleged in the Complaint through their common support for USACBI. Notably, none of the allegations relating to Count Twelve involve aiding or abetting. Rather, they concern the same direct action that Plaintiffs claimed were tortious in Counts One through Eleven.

65. Since all the other Counts in the Complaint arise out of the Resolution – and since Count Twelve is specifically premised on the Defendants' common support of USACBI, which in itself

is an act in furtherance of the exercise of advocacy – Count Twelve also arises out of the Resolution.

66. Throughout the Complaint, Plaintiffs allege that the individual Defendants acted as officers, directors and/or agents of ASA, and within the scope of that relationship. As such, Counts Eleven and Twelve must fail, because an entity cannot interfere with its own contract, nor "aid and abet" itself, which means that none of its agents, directors or officers can do so either. *See Press v. Howard Univ.*, 540 A.2d 733 (D.C. 1988) (no claim against university officials for their part in getting plaintiff fired); *Paul v. Howard Univ.*, *supra* 754 A.2d at 309.

67. Counts Eleven and Twelve therefore do not demonstrate a likelihood of success on the merits, and should be dismissed under the Anti-SLAPP Act.

PLAINTIFFS' FAILURE TO REBUT THE *PRIMA FACIE* CASE

68. As noted above, the burden of showing a *prima facie* case under the Anti-SLAPP Act is "not onerous." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014). Once the first prong of the Anti-SLAPP motion is met, the burden falls on the non-moving parties – Plaintiffs here – to demonstrate that their claims are likely to succeed on the merits. This, in turn, "mandates the production or proffer of evidence that supports the claim." *Fridman v. Orbis Business Intelligence, Ltd.*, 229 A.3d 494, 506 (2020).

69. In rebutting the *prima facie* case, the Plaintiffs may not rest on the allegations in the Complaint; they must proffer specific evidence. *Fridman*, 229 A.3d at 506. "If the non-moving party fails to meet that standard, then the motion must be granted and the case will be dismissed with prejudice." *Id.* at 502.

70. Here, Plaintiffs have proffered no evidence whatsoever in response to Defendants' Anti-SLAPP motions. They have thus failed to rebut the Defendants' *prima facie* case.

71. At the October 27, 2022 hearing, Plaintiffs' counsel asserted that they could rely on those quotations throughout the Complaint of documents that were produced in discovery in the federal court. However, allegations of the contents of documents are not, in themselves, evidence.

72. Moreover, there is no indication that any of the quotations are complete, in and of themselves; rather, they are, in general, excerpts and fragments of larger documents. There is thus no evidence that these allegations are in fact accurate quotations, or that they were not taken out of context, thereby altering their meaning.

73. Discovery in the federal litigation was governed by a Protective Order, which Order has been made applicable to litigation in this Court. To the extent that any document was labeled "CONFIDENTIAL" in the federal litigation, it could be filed under seal here. There was, therefore, no procedural obstacle barring Plaintiffs from proffering evidence in support of their claims.

74. The only argument that Plaintiffs offer on the merits of their claims is a citation to *Neill v. D.C. Public Employee Relations Bd.*, 234 A.3d 177 (2020) – which they claim calls into question the long-standing rule against equitable tolling of the statute of limitations. That case, however, dealt with the application of Rule 544.4 of the Public Employees Relations Board, not with any application of the statute of limitations. *Neill* provides no support for Plaintiffs' position.

75. There is, therefore, no affirmative evidence in the record that would suggest that any of the Counts in the Complaint have a likelihood of success on the merits. Moreover, Plaintiffs have no offered any persuasive legal arguments in support of their claims.

76. As discussed above, none of the Counts in the Complaint demonstrate a likelihood of success on the merits on their face. The Anti-SLAPP Act, however, requires Plaintiffs to go

beyond their allegations and offer affirmative evidence. They have failed to do so, and their claims must be dismissed with prejudice.

POINTS AND AUTHORITIES

1. *Albert v. Tuft (In re: Greater Southeast Comty Hosp. Corp.),* 333 B.R. 506, 524 (Bankr D.D.C. 2005)

2. *American Studies Assn. v. Bronner*, 259 A.3d 728, 740-41 (D.C. 2021)

3. *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir.2003)

4. *Bible Way Church v. Beards*, 680 A.2d 419, 432–33 (D.C.1996)

5. *Bronner v. Duggan*, 249 F.Supp.3d 27 (D.D.C. 2017)

6. *Bronner v. Duggan*, 364 F.Supp.3d 9 (D.D.C. 2019), *aff'd* 962 F.3d 596 (D.C.Cir. 2020)

7. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)

8. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016), *as amended* (Dec. 13, 2018), *cert denied sub nom. Nat'l Review, Inc. v. Mann*, 140 S.Ct. 344 (2019)

9. *Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir., 1984)

10. *Cruz v. FEC*, 542 F. Supp. 3d, 1, 7-8 (D.D.C. 2021) *aff'd FEC v. Ted Cruz for Senate*, 2022 U.S. Exis 2403 (U.S., May 16, 2022)

11. *Dale v. Thomason*, 962 F.Supp. 181, 184 (D.D.C.1997)

12. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 (D.C. 2011)

13. *Doe v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014)

14. *Doe v. Burke*, 133 A.3d 569, 578 (D.C. 2016)

15. *Finke v. The Walt Disney Co.*, 2 Cal.Rptr.3d 436, 445 (2nd Dist.), *review granted* 110 CalAppl4th 1210 (2003) *and dismissed as settled*, 79 P.3d 541 (Cal. 2003)

16. *Fridman v. Orbis Business Intelligence, Ltd.*, 229 A.3d 494, 506 (2020)

17. *In re Lear Corp. Shareholder Litigation*, 967 A.2d 640, 656 (Del.Ch. 2008)

18. *Multicom Inc. v. Chesapeake and Potomac Tele. Co.*, 1988 WL 118411 (D.D.C. 1988)

19. *NAACP Legal Defense & Educational Fund v. Devine,* 560 F. Supp. 667, 676 (D.D.C. 1983)

20. *Neill v. D.C. Public Employee Relations Bd.*, 234 A.3d 177 (2020)

21. *Paul v. Howard Univ.*, 754 A.2d 297, 309 (D.C. 2000)

22. *Press v. Howard Univ.*, 540 A.2d 733 (D.C. 1988)

23. *White v. Panic*, 783 A.2d 543, 554 (Del. 2001)

24. D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*

25. D.C. Code § 16-5501(i)(A)(ii)

26. D.C. Code § 16-5502(b)

27. D.C. Code § 29-405.24

28. Sup.Ct.R. 12(b)(6)

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served via the Court's electronic filing service this 10th day of November 2002 to the following:

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