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**

REPLY TO PLAINTIFFS' 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 hereby reply to Plaintiffs' Proposed Findings of Fact and Conclusions of Law. Defendant, Dr. Steven Salaita, has filed his Reply Memorandum, and Defendants here join in those arguments.

In their Proposed Findings of Fact, these Defendants argued that all of the Counts in the Complaint arose from an act in furtherance of public advocacy, and therefore satisfied the first prong of the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.* As such, the burden shifted to the Plaintiffs to demonstrate that their claims were likely to succeed on the merits. Under D.C. law, Plaintiffs were required to proffer or produce evidence to support their claims. Because review of a motion under the Anti-SLAPP Act is akin to a motion for summary judgment, and requires more of a showing than a motion under Rule 12(b)(6) of the Superior Court Rules of Procedure, Plaintiffs could not rely solely on the allegations in the Complaint. Defendants further argued that none of the Counts in the Complaint had any likelihood of success on the merits:

approximately half of those Counts had already failed under Rule 12(b)(6), and the remaining counts were deficient for a variety of substantive reasons. Moreover, as Plaintiff had failed to proffer any admissible evidence to support their claims, the case should be dismissed under the Anti-SLAPP Act.

Defendants will not repeat those arguments here; indeed, Plaintiffs have barely touched upon those points in their filing. Rather, as described more fully below, Plaintiffs' arguments are conceptually invalid: they stress points that are not relevant to the Anti-SLAPP analysis, and ignore the framework by which Anti-SLAPP motions are considered. Ultimately, Plaintiffs have failed to demonstrate that their claims should be allowed to proceed.

A) Plaintiffs argue that they need not actually submit documentary evidence to support their claims, because all the referenced documents were produced in the federal court and are thus in Defendants' possession (*See* Plaintiff's Proposed Findings of Fact ("PFF") at ¶ 7). Plaintiffs further argue that Defendants are capable of submitting those documents into evidence, and thus cannot thus be "disadvantaged" (PFF ¶¶ 8, 10). The two-pronged process of the Anti-SLAPP Act is not intended to protect a movant from "disadvantage," but to force Plaintiffs to demonstrate from the beginning that their claims have substantive merit. Defendants have no obligation to put any evidence into the record: once Defendants have shown a *prima facie* case – which is "not onerous" (*see Doe v. Burke*, 91 A.3d 1031, 1043 (D.C. 2014)) – the burden lies entirely with the Plaintiffs to rebut that showing. If Plaintiffs fail to do so, as is the case here, the Anti-SLAPP Act mandates that the case be dismissed with prejudice.

B) Nor may Plaintiffs merely rely on the allegations in their Complaint. Again, an Anti-SLAPP motion is akin to a motion for summary judgment; in the latter, it is well-established that a party may not rely on the allegations in the pleadings. *See, e.g.*, *Hudson v. Hardy*, 412 F.2d

1091, 1094 (D.C. Cir. 1968), on reh'g, 424 F.2d 854 (D.C. Cir. 1970). Too, as Defendants have noted, Plaintiffs have only quoted excerpts from various documents. Those excerpts are not evidence of the full documents, but only those portions which Plaintiffs chose to highlight.

C) It is neither accurate nor pertinent for Plaintiffs to argue that specific factual allegations might have been "conceded" by the Defendants. *See*, *e.g.*, PFF, ¶¶ 13, 58-9. Because Plaintiffs have the affirmative obligation to submit admissible evidence into the record, they may not rely on Defendants' silence as to specific factual points, unless the record reflects an affirmative admission of fact. Further, what Plaintiffs claim has been conceded is most assuredly in dispute. Defendants expressly deny that individuals were nominated to leadership positions within ASA solely because they are (or were) BDS supporters (*see* PFF ¶ 13). And, Defendants have repeatedly noted the inherent inconsistencies and misstatements in Plaintiffs' allegations of how the endowment fund has been handled (*see* PFF ¶¶ 58-59; *see also* Defendants' Proposed Findings of Fact at ¶ 54; Defendants' Supplemental Memorandum of Law in Support of Defendant's Motion to Dismiss under Anti-SLAPP Act (filed April 1, 2022) at 10 – 12). In addition to failing to acknowledge the requirements of the Anti-SLAPP Act, Plaintiffs also appear to have forgotten the arguments made throughout this case.

D) Plaintiffs have also twisted the statement by the Court of Appeals that the Anti-SLAPP Act does not "call for an inquiry into the plaintiff's motives …" *American Studies Ass'n v. Bronner*, 259 A.3d 728, 748 (D.C. 2021). The appellate court made it clear that the fundamental question was whether the claims arose out of a protected act, not what the plaintiff's underlying

motives were in bringing the lawsuit.[1] Plaintiffs claim, however, that this means that "[t]he fact … that [Defendants'] actions were animated by an interest in a matter of public concern does not immunize otherwise illegal actions from attack." (PFF ¶ 17). This is decidedly not what the Court of Appeals intended, and it ignores the two-prong analysis of the Anti-SLAPP Act. The first prong of that analysis rests solely on whether the claims arise from public advocacy. There is no issue of "immunity"; the inquiry then shifts to whether the stated claims have a likelihood of success. Plaintiffs would seek to substitute their own formula, whereby an action could not arise from the act of public advocacy, no matter what, if Plaintiffs subjectively believe the act to be "illegal."

E) Effectively, Plaintiffs would argue that if the complaint alleges that the challenged conduct was improper, it would not matter that it had arisen out of an act in furtherance of public advocacy – which would eliminate any of the protections afforded by the Anti-SLAPP Act. They compound their error by asserting that the reason for any allegedly improper conduct is "completely irrelevant" to the question of whether the matter arose from "protected expressive activity." (PFF ¶ 24). Conceptually, the argument is untenable; as a matter of law, it runs directly contrary to the requirements of the Anti-SLAPP Act. *See* (F), below.

F) Defendants have demonstrated that each of the Counts meet the first prong of the Anti-SLAPP Act. Rather than address the second prong, as they are legally obligated to do, Plaintiffs argue instead that their claims should proceed because other plaintiffs, in other lawsuits, have successfully prosecuted claims under the same legal theories. *See* PFF ¶¶ 72, 74 – 80, 81. This is, to put it bluntly, nonsensical. Any theory of recovery not recognized by D.C. law could

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[1] Defendants have already argued that the Court should also not be blind to the overall tenor of the allegations in the complaint, and in this case to the fact that Plaintiffs go out of their way to attack USACBI, the overall BDS movement, and anyone associated with it. Since Plaintiffs have never addressed this point, it will not be resurrected here.

and would be adequately addressed by a Rule 12(b)(6) motion, and there would thus be no need for an Anti-SLAPP procedure. On the contrary, the Anti-SLAPP Act is specifically intended to address those claims that, while jurisprudentially facially valid, nonetheless seek to punish advocacy. The Court of Appeals has determined in a variety of scenarios that, even though a claim articulates a cause of action, it can still be barred by the Anti-SLAPP statue. *See, e.g., Competitive Enterprises Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016) (defamation), *Fells v. Service Employees Int'l Union*, 281 A.3d 572 (D.C. 2022) (invasion of privacy and intentional infliction of emotional distress), *Nicdao v. Two Rivers Public Charter School, Inc.*, 275 A.3d 1287 (D.C. 2022) (private nuisance). Similarly, the issuance of a discovery subpoena – arguably a neutral procedural tool – can invoke Anti-SLAPP considerations. *Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014).

G) Plaintiffs argue that Counts Two through Five are questions of "corporate governance" (PFF, ¶¶ 74 – 80). This Court has already ruled, however, that those counts are barred by the statute of limitations. It does not matter whether they might or might not have been feasible before; the fact remains that those Counts have no likelihood of success on the merits. On that point, Plaintiffs once again cite to *Neill v. D.C. Pub. Empl. Rels. Bd.*, 234 A.3d 177 (2020) for the bald assertion that equitable tolling is no longer a "rigid rule" (PFF ¶¶ 86-92). Nothing in that case justifies Plaintiffs' misguided interpretation. In the District of Columbia, there is no doctrine of equitable tolling. Plaintiffs' claims are time-barred.

H) On Counts Two and Nine (misuse of corporate funds), Plaintiffs argue that "the Court of Appeals has explicitly rejected Defendants' argument that their alleged improper use of ASA funds is immunized because they used the money for speech." (PFF ¶ 60). Plaintiffs' interpretation of the Court of Appeals opinion is erroneous. What the Court of Appeals said was that a "defendant sued for embezzling … [could not] file a special motion to dismiss based on a

showing that the funds were used in furtherance of the right of advocacy on an issue of public interest." *Bronner*, *supra* 259 A.3d at 747 n. 78. In other words: the act of embezzlement is itself independent of the act of advocacy; a claim for the former does not "arise out of" the latter. Plaintiffs here, however, do not claim defalcation – there is no allegation that any of the Defendants took ASA money for their own personal use. Rather, Plaintiffs claim that the use of ASA resources on the Resolution constituted corporate waste, and that no reasonable director would have chosen to spend any money on the Resolution. As Defendants have already argued, the nature of the Resolution thus forms the basis for the cause of action: had ASA adopted a resolution with which Plaintiffs agreed, there would be no claim for waste. It is only because the Defendants chose to advocate on behalf of Palestinians that Plaintiffs believe funds have been "wasted." And as noted in the Proposed Findings of Fact and Conclusions of Law, and at oral argument, expenditure of money in the advancement of political speech is itself an act of advocacy. *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. Lexis 2403 (U.S., May 16, 2022) (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Thus, the act at issue in the Plaintiff's "misuse use of funds" claims is an act protected by the Anti-SLAPP statute.

I) Plaintiffs also argue that the corporate waste extends to the fact that the undersigned counsel has been retained to defend individuals, in addition to the ASA itself, in this very lawsuit (PFF ¶ 60). This is the height of presumption: Plaintiffs bring unfounded and inflammatory claims against a broad swath of members of the ASA National Council, and then claim that ASA has no legal right or authority to lodge a defense. There is no authority for this position.

J) Finally, on Count Ten – breach of fiduciary duty for failing to renew Plaintiff Bronner's contract as Editor of the ASA Encyclopedia – Plaintiffs make Defendants' argument for them. Although they start by asserting that nothing about the claim relates to any speech by

Defendants (PFF ¶ 83), they then assert that the only reason Bronner's contract was not renewed was because Defendants sought to "drive out of the organization any member who disagrees with the Resolution" (PFF ¶ 84). As Defendants have noted, Count Ten rests solely on the allegation that Bronner's opposition to the Resolution was reasonable, while the support for the Resolution was so unreasonable as to constitute breach of fiduciary duty. Thus, Plaintiffs establish on the face of the Complaint, albeit perhaps unintentionally, that the act at issue in Count Ten was an act of advocacy. And thus the first prong of the Anti-SLAPP Act is met.

K) Plaintiffs do not even attempt to address the second prong of the Anti-SLAPP Act for Count Ten: they provide absolutely no evidence to suggest that ASA was obligated to renew Bronner's contract, or that ASA's action were unreasonable. Certainly, Plaintiffs fail to produce any evidence suggesting that any of the individual Defendants were instrumental in removing Bronner.[2]

CONCLUSION

With regard to each Count, Plaintiffs fail to remove the basis of their claims – whether it be overt speech, a decision not to speak, or the expenditure of funds in furtherance of a right of advocacy – from the protections afforded by the Anti-SLAPP Act. As Defendants have argued previously, all the Counts in the Complaint arise from an act in furtherance of public advocacy. With regard to those Counts already dismissed pursuant to Rule 12(b)(6), the analysis concludes there and judgment is in order under the Anti-SLAPP statute on those Counts. Regarding those Counts not already dismissed pursuant to Rule 12(b)(6), Plaintiffs have failed to show that they have a likelihood of success on any of the claims. For the reasons stated in Defendants' Proposed

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[2] Plaintiffs also claim that the quality of the Encyclopedia has deteriorated since Bronner's departure. Again, there is no evidence proffered on that issue.

Findings of Fact and Conclusions of Law, and for the reasons argued herein, Defendants American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, respectfully request that the Complaint be dismissed with prejudice, and that Defendants be awarded their attorneys' fees under the Anti-SLAPP Act.

Respectfully submitted,

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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 13th day of December 2022 to the following:

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