SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SIMON BRONNER, MICHAEL ROCKLAND, CHARLES D. KUPFER, and MICHAEL L. BARTON, Plaintiffs, v. LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI KAUANUI, JASBIR PUAR, STEVEN SALAITA, JOHN STEPHENS, and THE AMERICAN STUDIES ASSOCIATION, Defendants.	Case No. 2019 CA 001712 B Judge Robert R. Rigsby Civil 2, Calendar 10

DEFENDANT DR. STEVEN SALAITA'S RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Omissions and Inaccuracies in Plaintiffs' Proposed Findings of Fact and Conclusions of Law

A. There is No Mention of Dr. Salaita in Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

Plaintiffs propose no factual findings or legal conclusions about Dr. Salaita: he is not mentioned even once in their filing. This omission underscores yet again what Dr. Salaita has argued since Plaintiffs filed this Complaint: Plaintiffs have no basis for bringing any of their claims against him, and they therefore cannot succeed on the merits of those claims. *See* Salaita's Proposed Findings of Fact and Conclusions of Law ("Salaita Proposed Concl.") ¶¶ 10, 12 (Plaintiffs have not alleged facts or proffered evidence to support their claims against Dr. Salaita).

B. Plaintiffs Misapprehend the Anti-SLAPP Act's Burden-Shifting Framework.

Plaintiffs' proposal reveals their misunderstanding of the D.C. Anti-SLAPP Act. D.C. Code § 16-5501, *et. seq*.

First, Plaintiffs incorrectly propose, with no citations to law, that the Court conclude that "where a SLAPP Motion does not dispute factual allegations, but instead advances only legal arguments that those allegations fail, a Plaintiff need not proffer evidence; it makes no sense to require evidence to substantiate factual allegations that are not contested." Pls.' Proposed Findings of Fact and Conclusions of Law ("Pls.' Proposed Concl.") ¶ 13.

The Court must reject this proposal because it reveals a serious misunderstanding of the Anti-SLAPP Act's burden allocation framework. The Act requires that once a defendant (the moving party) satisfies the "arising from" prong of the Act on any claim, the plaintiff (the non-moving party) must proffer legally sufficient evidence to demonstrate they can succeed on that claim. *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 750 (D.C. 2021). There is no requirement that defendants dispute factual allegations. A California court has addressed this precise argument raised by plaintiffs opposing a motion to dismiss under the California anti-SLAPP law, which has

a similar framework to D.C.'s. *Navellier v. Sletten*, 131 Cal. Rptr. 2d 201, 210 (Cal. Ct. App. 2003). Although defendant had "'moved to strike solely on issues of law and did not contest or allege that there was no evidence of damages. . .'" in a breach of contract claim, the court ruled that "where . . . the motion to strike meets the 'arising from' prong of the anti-SLAPP test, the plaintiff must satisfy the second prong of the test and 'establish *evidentiary* support for [its] claim'" that the breach caused damage. *Id*. (quoting *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002)).

Once defendants satisfy their burden under the first prong on a particular claim, that claim must be dismissed unless plaintiffs can carry their burden under the second prong through evidence. *Bronner*, 259 A.3d at 750 ("If the court concludes the movant has made the necessary showing [under the first prong], *it must grant the special motion* unless the responding party demonstrates the claim is 'likely to succeed on the merits . . . .'") (emphasis added). The D.C. Court of Appeals has clarified that once the "arising from" prong is satisfied, the Anti-SLAPP Act's burden allocation framework is more advantageous to the defendant (the moving party) than the summary judgment framework:

> A comparison of the procedures usually available in civil litigation makes clear that the complement of provisions of the Anti–SLAPP Act impose requirements and burdens on the claimant that significantly advantage the defendant . . . The Act also places the initial burden on the claimant to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection . . . *This is a reversal of the allocation of burdens* . . . for summary judgment under Superior Court Rule of Civil Procedure 56, which requires the moving party to wait until discovery has been completed and then shoulder the initial burden of showing that there are no material facts genuinely in dispute and that the movant is entitled to judgment as a matter of law on the undisputed facts.

Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1237 (D.C. 2016), *as amended* (Dec. 13, 2018) (emphasis added) (citations omitted).

Dr. Salaita has shown that he has satisfied his burden under the first prong of the Anti-SLAPP Act for all claims against him. That is enough to dismiss those claims unless, under the second prong, Plaintiffs proffer legally sufficient evidence that meets "the substantive evidentiary standards that apply to the underlying claim and related defenses and privileges" to support their claims. *Id.* at 1236. But, under the second prong, each of Plaintiffs' claims against Dr. Salaita fail because: (1) there are no allegations in the Complaint regarding Dr. Salaita's personal involvement in any of the events related to the claims against him; (2) Plaintiffs have not proffered any evidence that demonstrates Dr. Salaita's personal involvement in any of the events related to those claims (this is true even if the Court accepts Plaintiffs' argument that the excerpts in their Complaint constitute evidence, which it should not because that contention is unsupported by law, *see infra* Section I(C)); and (3) the claims fail as a matter of law, including because most of them are time-barred. *See generally* Salaita Suppl. Mem. in Supp. of Special Mot. to Dismiss, Apr. 1, 2022.

Second, Plaintiffs consistently conflate the first prong of the Anti-SLAPP Act with the second. In discussing a number of Counts, they propose that this Court conclude that, while certain claims may arise from expression or expressive conduct covered under the first prong of the Anti-SLAPP Act, that expression loses coverage under the first prong because courts and legislatures are permitted to regulate or prohibit it. *See, e.g.*, Pls.' Proposed Concl. ¶¶ 20 (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006)), 68, 73, 78, 81, 85. But the question under the first prong is not whether the claim arises out of legally permissible expression: a defendant satisfies their burden under the first prong by simply showing that the claim at issue arises from *any* expression or expressive conduct covered by the Act. *Fells v. Serv. Emps. Int'l Union*, 281 A.3d 572, 580 (D.C. 2022) (burden under the first prong is "not onerous"). The question of whether the expression is lawful goes to the second prong: a claim can survive if the plaintiff is

able to demonstrate with legally sufficient evidence that, despite the fact that the claim arises from covered expression or expressive conduct, the claim is likely to succeed on the merits. *Id*. at 585. That is the case, for example, when a court is faced with an Anti-SLAPP motion seeking to dismiss a defamation claim: it must first assess whether the claim "arises from" speech, which it generally does in defamation claims, and only then assess whether the plaintiff is likely to succeed on the merits of the claim that it is defamatory and therefore prohibited. *See, e.g., id.* at 584-85 (defamation claim arose out of expression covered by first prong of Anti-SLAPP Act, but plaintiff was likely to succeed on the merits of his claim that the speech was defamatory so claim survived Anti-SLAPP dismissal). If a plaintiff is able to shoulder this burden under the second prong, then the Anti-SLAPP motion fails, but that does not mean that the claim did not in the first place "arise from" expression under the first prong.

Third, Plaintiffs propose, with no legal support, that this Court conclude that, for a claim to "arise from" expression under the first prong, "something about [the] *content*" of the expression must be the basis of the claim. Pls.' Proposed Concl. ¶ 26. This is wrong. There is no such requirement in either the Anti-SLAPP Act or the Court of Appeals' ruling on this case. *See* Salaita Suppl. Reply Mem. in Supp. of Special Mot. To Dismiss, May 27, 2022, at 2-3.

C. The Court Must Reject Plaintiffs' Proposed Conclusion that Allegations in a Complaint Constitute Evidence.

Plaintiffs incorrectly propose that this Court find that the allegations in their unverified Complaint—namely, the alleged excerpts of certain documents—constitute a "proffer" of evidence. Pls.' Proposed Concl. ¶ 9. Even if this Court accepts this conclusion, which it should not, there is no mention of Dr. Salaita's personal involvement in relation to any of the claims in those excerpts. Therefore, even if accepted as evidence, they are insufficient for Plaintiffs to meet their burden under the second prong for any of their claims against Dr. Salaita.

More fundamentally, Plaintiffs cite no legal support for this proposed conclusion, which this Court must reject. *See Newton v. Off. of the Architect of the Capitol*, 840 F. Supp. 2d 384, 397 (D.D.C. 2012) (allegations in a complaint are not evidence); *Moran v. Selig*, 447 F.3d 748, 759, 759 n.16 (9th Cir. 2006) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc)) (while allegations in a *verified* complaint may serve as evidence for purposes of summary judgment "if it is based on personal knowledge and sets forth specific facts admissible in evidence," allegations in an *unverified* complaint cannot); *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (allegations in unverified complaint do not "constitute competent summary judgment evidence.").[1]

Additionally, Plaintiffs' argument also rests on their claim that Defendants have "all of the quoted documents in their own possession" and so could verify whether the excerpts are accurate. Pls.' Proposed Concl. ¶ 10. But Dr. Salaita does not have all of the quoted documents in his possession; he was not involved in discovery in the federal litigation where those documents were produced, as he was only added as a Defendant afterwards. Second Am. Compl., *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-cv-00740-RC), ECF No. 81 (filed March 6, 2018). And even if accepted as evidence, the quoted documents fail to substantiate Plaintiffs' claims against Dr. Salaita. *See infra* Section II.

[1] Not only is Plaintiffs' Complaint not verified, but they cannot have even read the unredacted version, filed in D.C. Superior Court on June 21, 2019, without violating the Protective Order. The Protective Order precludes the parties (as opposed to their counsel) from reviewing information designated confidential. Protective Order ¶ 8, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-cv-00740-RC), ECF No. 52 (excluding anyone other than counsel for parties, original authors and recipients, the court, and testifying and non-testifying experts from viewing confidential information).

II. Plaintiffs' Proposed Findings Reveal that All of Their Claims Against Dr. Salaita Arise from Acts in Furtherance of the Right of Advocacy and are Not Likely to Succeed on the Merits.

A. Those Counts Already Dismissed Under Rule 12(b)(6): Counts I, III, IV, V, and Parts of Counts II and IX.

Prong 1: Plaintiffs do not propose any findings or conclusions related to any actions that Dr. Salaita specifically took before July 2015, when his tenure on the ASA National Council began, although the events relating to Counts I, III, IV, V, and parts of Counts II and IX occurred before July 2015. Therefore, the Court should find as Dr. Salaita has proposed (Salaita Proposed Concl. ¶¶ 16-19) that "the basis of the asserted cause[s] of action" (*Bronner*, 259 A.3d at 746) against Dr. Salaita is the only allegation related to him from this time period: his pre-July 2015 advocacy as a member of USACBI in support of the ASA resolution, which is covered under the Anti-SLAPP Act as expression that involves "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).

The Court should also accept Dr. Salaita's proposed conclusion, unaddressed by Plaintiffs, that these and all other Counts also arise from acts of Defendants generally, though not Dr. Salaita specifically, that are covered under the first prong of the Anti-SLAPP Act. This is described in greater detail below.

Prong 2: Also as described in greater detail below, Plaintiffs include a number of proposed conclusions regarding the merits of their claims under Counts I, III, IV, V, and Parts of Counts II and IX. But this Court does not need to address those arguments as it has already ruled that those claims fail against Dr. Salaita or all Defendants under D.C. Super. Ct. Civ. R. 12(b)(6), including because they are time-barred, so they cannot succeed on the merits and must be dismissed under the Anti-SLAPP Act if the "arising from" prong is satisfied. *Bronner,* 259 A.3d at 734.

This Court must reject Plaintiffs' proposed conclusion that the D.C. Court of Appeals "made clear" that its ruling in *Bond v. Serano*, 566 A.2d 47, 49 (D.C. 1989) (per curiam), where it held that the statute of limitations is not tolled by the pendency of a suit filed earlier in federal court and dismissed for lack of subject matter jurisdiction, is no longer "in force in this jurisdiction." Pls.' Proposed Concl. ¶ 87 (citing *Neill v. D.C. Pub. Emp. Rels. Bd.*, 234 A.3d 177 (D.C. 2020)). The Court of Appeals in *Neill* does not mention *Bond*, much less overrule it; nor is *Neill* relevant to the issue. The excerpt that Plaintiffs quote from *Neill* is simply the court's restatement (quoting a 2017 case) of the general standard that courts use to determine the appropriateness of equitable tolling in any case. *Neill*, 234 A.3d at 186.[2]

B. Count I (Breach of Fiduciary Duty for Material Misrepresentations and Omissions in Connection with Elections and Vote on the Resolution)

Prong 1: Plaintiffs concede that their claims under Count I arise out of Defendants' failure to disclose (in written and oral statements) certain viewpoints to ASA members, Defendants' choices regarding what "content of information" to share with ASA members, and "communications" regarding the Resolution and in connection with ASA elections. Pls.' Proposed Concl. ¶¶ 41, 54, 68. Plaintiffs also concede that the decision not to express a viewpoint is protected speech. *Id*. at ¶ 73. These decisions were allegedly made in connection with communications shared with ASA members and the broader public through candidate statements, the ASA website, and through other means of communication, on an issue of public interest (the Resolution, Israeli policy, and academic boycotts generally) and "[i]n connection with an issue under consideration" by an "official proceeding authorized by law" (the ASA elections or the vote on the Resolution).

[2] Even if equitable tolling were to apply here, it would not toll the claims against Dr. Salaita, who was not sued until the Second Amended Complaint was filed on March 6, 2018, nearly five years after the Resolution was passed. Second Am. Compl., *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-cv-00740-RC), ECF No. 81.

Salaita Proposed Concl. ¶¶ 22-24 (citing D.C. Code § 16-5501(1)(A)(i), 1(A)(ii), (1)(B)). This satisfies the first prong of the Anti-SLAPP Act.

Prong 2: Plaintiffs' proposals regarding the merits of their claims under Count I (i.e. whether Defendants had a duty to disclose certain facts, whether all material facts were disclosed, their statement that "[m]ateriality is a question for the factfinder," and that they have a "factual basis for this claim," Pls. Proposed Concl. ¶¶ 43, 44, 68-71) are irrelevant to Dr. Salaita because this Count has already been dismissed under Rule 12(b)(6) for failing to state a claim against him, and therefore cannot succeed on the merits. Salaita Proposed Concl. ¶ 26.

C. Count II (Breach of Fiduciary Duty for Misuse of Assets) and Count IX (Corporate Waste)

Prong 1: Plaintiffs' proposals do not address Dr. Salaita's extensive argument, supported by Supreme Court precedent, that claims that arise from expenditures on expression (including expenditures on public relations, lobbying, and legal fees, Pls.' Proposed Concl. ¶ 67) arise from expression itself. Salaita Proposed Concl. ¶¶ 28-36. Plaintiffs cite to a footnote in the D.C. Court of Appeals' opinion on this case in which it explained that it is "implausible . . . that the Anti-SLAPP Act enables a defendant sued for embezzling or misappropriating entrusted funds to 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*, 259 A.3d at 747 n.78; Pls.' Proposed Concl. ¶¶ 17, 67. But Plaintiffs do not claim here that funds were embezzled, or that the withdrawal of funds was unlawful for any reason other than the fact that it was used for expression related to the Resolution.[3] Plaintiffs' claim is that the withdrawal of ASA funds was a breach of fiduciary duty

[3] Plaintiffs state in a footnote that Defendants "alter[ed] the ASA's by-laws, without notice to the ASA membership," but do not claim that this violates any law or bylaw. Pls.' Proposed Concl. ¶ 67 n.1. That is because such an amendment was proper, as the ASA Bylaws did not require the National Council to notify the membership before amendment. Compl., Ex. A, ASA Constitution & Bylaws, Bylaws art. XIII § 1 (May 2013).

and corporate waste *because* the funds were used to defend litigation (or for public relations, or lobbying) related to the Resolution (an issue of public interest). The fact that those funds were used for expression related to the Resolution forms the asserted basis of those claims. Plaintiffs would have no asserted basis for their claims if the funds were used for something else. Therefore, the claims arise from expression covered by the first prong. Salaita Proposed Concl. ¶¶ 28-36. That the speech was dependent on expenditures does not "introduce a nonspeech element." *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (per curiam), *superseded by statute on other grounds,* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).[4]

Prong 2: Contrary to Plaintiffs' proposed conclusion, Dr. Salaita's argument that Counts II and IX "arise from" expression that satisfies the first prong of the Anti-SLAPP Act does not automatically mean that he is "immunized." Pls.' Proposed Concl. ¶ 67. It simply means that, to overcome dismissal under the Act, Plaintiffs must present evidence that they are likely to succeed on the merits against Dr. Salaita, which includes showing his personal involvement.

But Plaintiffs do not respond to Dr. Salaita's proposed conclusion that because the Court already ruled that parts of Counts II and IX that are related to events that occurred before March 2016 are time-barred, Am. Order of Dec. 12, 2019 ("Am. Order") 21, 24, it must necessarily rule those parts of the claim are not likely to succeed on the merits. *Bronner*, 259 A.3d at 741. They

[4] Plaintiffs argue that part of Count II is also related to "whether votes were counted accurately and whether the right to vote was denied." Pls.' Proposed Concl. ¶ 74. But Plaintiffs' proposed findings do not address Dr. Salaita's point that this claim against him can only arise out of expression that involved "communicating views to members of the public in connection with an issue of public interest," D.C. Code § 16-5501(1)(B), as the only allegation related to him from the relevant time period is that he advocated for the Resolution as a USACBI member. Compl. ¶¶ 26, 46; Salaita Proposed Concl. ¶¶ 16-18. On the second prong, this Court has already found that the voting portion of the claim is time-barred, Am. Order at 21, so it cannot succeed on the merits.

also propose no finding addressing Dr. Salaita's point that any remaining claims under Count II[5] arising from acts occurring before March 2016 are time-barred. Salaita Proposed Concl. ¶ 38 n.2.

As to the remaining portions of Counts II and IX (those portions arising from events that occurred after March 2016), Plaintiffs do not mention Dr. Salaita in their proposed findings: they propose no findings that address Dr. Salaita's point that they have not demonstrated his involvement in decisions related to withdrawals from the ASA fund (which is actually administered by the Board of Trustees, which Dr. Salaita was not on). Salaita Proposed Concl. ¶¶ 39-40. While Plaintiffs point to allegations in their Complaint (incorrectly describing them as evidence) of "statistics and quotations," "documents . . . and emails," and statements from another Defendant (Pls.' Proposed Concl. ¶¶ 58-59), none of those materials mention Dr. Salaita and therefore they are not legally or factually sufficient to demonstrate his liability under these Counts. They also propose no findings that any Plaintiff has paid membership dues since 2014, and therefore cannot demonstrate any injury. Salaita Proposed Concl. ¶ 41; *Bronner v. Duggan*, 962 F.3d 596, 609 (D.C. Cir. 2020) ("Bronner and Rockland, as honorary lifetime members, do not owe dues and Kupfer has not paid dues since 2014"). And they propose no findings addressing Dr. Salaita's point that there is no breach of fiduciary duty as a matter of law when funds are used to defend the corporation in litigation, and they do not proffer evidence to demonstrate that any decision to defend the ASA against litigation was unreasonable or otherwise a breach of fiduciary duty. Salaita Proposed Concl. ¶ 42.

[5] Although most claims under Count II related to events that occurred before March 2016 and all claims under Count IX related to events that occurred before March 2016 were dismissed by this Court as time-barred, there were parts of Count II alleged to occur prior to March 2016 that the Court found were preserved by the discovery rule. Am. Order 20. As Dr. Salaita has argued, the Court should dismiss those claims against him because they are also time-barred. Salaita Proposed Concl. ¶ 38 n.2.

D. Count III (*Ultra Vires* and Breach of Contract for Failure to Nominate Officers and National Council Reflecting Diversity of Membership)

Prong 1: Plaintiffs propose that this Court should conclude that Count III arises from the nomination of certain individuals (some of whom are Defendants). Pls.' Proposed Concl. ¶ 75. But they also concede that their claim is that the nominations were improper *because* of those Defendants' expressed "political views," not because there was any other impropriety in the nomination process. *Id*. All other facts remaining the same, had those individuals, including some Defendants, held and expressed views against, as opposed to in support of, the Resolution, Plaintiffs would have no basis for this claim, and therefore the claim arises out of that expression covered under the Anti-SLAPP Act. D.C. Code § 16-5501(1)(B).

Prong 2: Count III is not likely to succeed because it is time-barred. Am. Order 22.

E. Count IV (*Ultra Vires* and Breach of Contract for Freezing Membership Rolls to Prohibit Voting)

Prong 1: Plaintiffs propose that this Court should conclude that the Anti-SLAPP Act does not apply to Count IV because voting questions are routinely resolved by courts, Pls.' Proposed Concl. ¶ 77, again demonstrating their fundamental misunderstanding of the Act. The question is not whether a claim is justiciable; it is whether it is based on activity covered by the first prong of the Anti-SLAPP Act, and whether it is likely to succeed under the second prong. Plaintiffs' only allegation against Dr. Salaita around the time membership rolls were frozen is that he advocated for the Resolution. Compl. ¶ 46. So Count IV is either based on Dr. Salaita's communicating his views in support of the Boycott, D.C. Code § 16-5501(1)(B), or it has no factual basis whatsoever, in which case it is frivolous and subject to Rule 11 sanctions. D.C. Super. Ct. Civ. R. 11(b).

Prong 2: Count IV is not likely to succeed because it is time-barred. Am. Order 22.

F. Count V (*Ultra Vires* and Breach of Contract for Substantial Part of Activities Attempting to Influence Legislation)

Prong 1: Plaintiffs concede that their claims under Count V arise out of "attempt[s] to influence legislation," including the Resolution directly (Pls. Proposed Concl. ¶ 78); and also concede, as they did during the October 27, 2022 hearing on the Anti-SLAPP motion, that lobbying is "core First Amendment protected action." Pls.' Proposed Concl. ¶ 81. This Court must therefore find, as Dr. Salaita has proposed, that this Count arises from Defendants' efforts to oppose "an issue under consideration or review by a legislative . . . body" that might affect the organization, D.C. Code § 16-5501(1)(A)(i), and as "[a]ny other expression . . . that involves petitioning the government." D.C. Code § 16-5501(1)(B).

Plaintiffs propose that although the claims arise from legislative advocacy, Defendants have not satisfied the first prong of the Anti-SLAPP Act because a court has to be able to enforce the limitation on a non-profit from receiving tax subsidies if a "substantial part" of its activities constitute legislative advocacy. Pls.' Proposed Concl. ¶¶ 79-81. Again, the question under the "arising from" prong is not whether this claim is justiciable. It is whether it arises from covered expression. The question of whether Defendants engaged in so much legislative advocacy that it was a "substantial part" of their activity and violated the ASA statement of election or tax regulations is a question on the merits of the claim, which is left to the second prong. This is much like any defamation claim, which naturally "arises from" expression and is still subject to regulation. *See, e.g.*, *Fells*, 281 A.3d at 580.

Plaintiffs cite *Regan v. Taxation With Representation of Washington* to support their conclusion that a claim that arises from legislative advocacy does not arise from expression, but in that case the Court actually accepted in dicta that lobbying is "First Amendment activity," namely speech, 461 U.S. 540, 546, 548 (1983), and held that "tax exemptions and tax-deductibility

[through 501(c)(3) status] are a form of subsidy," but that the First Amendment does not require the federal government to *subsidize* First Amendment activity. *Id*. at 543-545. In other words, legislative advocacy is indeed expression, but the regulation of federal subsidies for that expression is permissible. Similarly, here, a claim that arises from legislative advocacy arises from expression, but Plaintiffs could prevail on the Anti-SLAPP motion if they could demonstrate that they are likely to succeed on the merits of their claim that the ASA's legislative advocacy formed a "substantial part" of the ASA's activities.

Prong 2: Under the second prong, this Court cannot adopt Plaintiffs' conclusion (unsupported by any evidence) that a "substantial part" of the ASA's activity constituted legislative advocacy because Plaintiffs cannot succeed on the merits for another reason: this Count is time-barred. Am. Order 22-23.

G. Count X (Breach of Fiduciary Duty) and XI (Tortious Interference)

Prong 1: Plaintiffs' proposed conclusions do not address Dr. Salaita's point that their claims against him arise from (1) "widely shar[ing]" opinions and "spreading false information" about Plaintiff Bronner (Salaita Proposed Concl. ¶ 53), and (2) deciding what to publish and not publish on the Encyclopedia (*id*. at ¶ 56), which are both expression covered by the first prong of the Anti-SLAPP Act.

Prong 2: Plaintiffs propose no findings that Dr. Salaita was personally involved in anything related to Plaintiff Bronner and his contract as editor of the Encyclopedia; in the ASA's decision to not enter into a new contract with Bronner; or in anything related to the Encyclopedia itself. Salaita Proposed Concl. ¶ 57. They say their claim is "substantiated" by (1) alleged emails (Pls.' Proposed Concl. ¶¶ 60, 64) in which they say "Defendants" (without clarifying who exactly) criticized Plaintiff Bronner's public position on the Resolution, but they do not allege, argue, or demonstrate that Dr. Salaita himself said anything in those emails that substantiate their claims

against him; (2) unspecified "quotations" (*id*. at ¶ 63), but they do not allege, argue, or demonstrate that there is anything in those "quotations" that substantiated their claims against Dr. Salaita; and (3) financial documents and public pages of the Encyclopedia (*id*. at ¶ 65), but they do not allege, argue, or demonstrate that Dr. Salaita had any involvement in decisions related to the Encyclopedia. This utter lack of any allegation or evidence linking Dr. Salaita to this claim means that it cannot succeed on the merits and fails under the second prong of the Anti-SLAPP Act.

H. Count XII (Aiding and Abetting Breach of Fiduciary Duty)

Prong 1: Plaintiffs' proposed conclusions do not address Dr. Salaita's point that their claim against him under Count XII is that his advocacy to the public, including ASA members, on the Resolution (in other words, his speech supporting a boycott), aided and abetted passage of the Resolution and therefore that their claim "arises from" expression covered by the Act. Salaita Proposed Concl. ¶ 62.

Prong 2: In Plaintiffs' proposed findings and conclusions, they propose that the Court conclude that Count XII "relate[s] to Defendants' mistreatment of" Plaintiff Bronner, Pl. Proposed Concl. 83, but that is incorrect as to their claim against Dr. Salaita, which, as pled in the Complaint, relates solely to aiding and abetting the passage of the Resolution. Compl. ¶ 337. Again, Plaintiffs do not address their claim against Dr. Salaita under Count XII at all. Plaintiffs are not likely to succeed on the merits of this claim against Dr. Salaita because they have not proffered any evidence to substantiate that he knew of an underlying breach of fiduciary duty and substantially assisted it; and because it is time-barred, as the allegations against him precede the 2013 Resolution, and they had notice of the facts underlying the claim against him at least since his 2014 public op-ed. Compl. ¶¶ 46, 337.

III. Conclusion

Counts I, III, IV, and V must be dismissed against Dr. Salaita under the Anti-SLAPP Act because Dr. Salaita has met his burden of showing that they arise from expression covered by the Act, and Plaintiffs cannot possibly meet their burden because this Court has already determined they fail as a matter of law against him or all Defendants. **Counts II and IX** must be dismissed because they arise from expression (expenditures on expression) covered by the Act, and Plaintiffs cannot meet their burden because (1) this Court has already determined that parts of those Counts fail as a matter of law; and (2) the remaining parts also fail as a matter of law and Plaintiffs have presented no evidence to substantiate their claims against Dr. Salaita. **Count X and XI** must be dismissed because they arise from expression (statements about Plaintiff Bronner and entries in the Encyclopedia) covered by the Act, and Plaintiffs cannot meet their burden under the second prong because they fail as a matter of law and Plaintiffs have presented no evidence to substantiate their claims against Dr. Salaita. **Count XII** must be dismissed because it arises from expression (Dr. Salaita's pre-July 2015 advocacy in support of the Resolution) covered by the Act and Plaintiffs cannot meet their burden because it fails as a matter of law and Plaintiffs have presented no evidence to substantiate their claims against Dr. Salaita. Dr. Salaita respectfully requests dismissal of Plaintiffs' claims against him under the Anti-SLAPP Act, with prejudice, and seeks costs, attorneys' fees and any other appropriate relief.

Dated: December 8, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2022, I electronically filed Defendant Salaita's Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law through the eFileDC system, which sends notification to counsel of record who have entered appearances, and also electronically served the following.

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