DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 23-CV-240

SIMON BRONNER, *et al.*,
Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *et al.*,
Appellees

Appeal from the Superior Court
of the District of Columbia
(Hon. Robert R. Rigsby, J.)

BRIEF OF APPELLEES, LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDEN REDDY, JOHN STEPHENS AND THE AMERICAN STUDIES ASSOCIATION

Thomas C. Mugavero, Esq. #431512)
Jeffrey C. Seaman (#466509)
Whiteford, Taylor & Preston L.L.P.
3190 Fairview Park Drive, Suite 800
Falls Church, VA 22042
(703) 280-9260
Counsel for Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, John Stephens and the American Studies Association

APPELLEES' CORPORATE DISCLOSURE STATEMENT

COME NOW the Appellees, and pursuant to D.C. App. R. 28(a)(2) hereby file their disclosure statement in order to enable the judges of this court to consider possible recusal:

A. Parties and Counsel

1. **Appellants**

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

Counsel:
Jennifer Gross, Esq.
The Deborah Project, Inc.
7315 Wisconsin Avenue
Suite 400 West
Bethesda, MD 20814

Jerome M. Marcus, Esq.
Jonathan Auerbach, Esq.
Marcus & Auerbach LLC
1121 N. Bethlehem Pike, Suite 60-242
Spring House, PA 19477

Seth P. Waxman, Esq.
Julie Aust, Esq.
Wilmer Cutler Pickering Hale and Dorr, LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037

2. **Appellees**

The American Studies Association
Lisa Duggan
Curtis Marez
Neferti Tadiar
Sunaina Maira
Chandan Reddy
John Stephens

Counsel: Thomas C. Mugavero, Esq.
Jeffrey Seaman, Esq.
John Hathway, Esq.
Whiteford, Taylor & Preston L.L.P.
3190 Fairview Park Drive
Suite 800
Falls Church, VA 22042
(703) 280-9260
(703) 280-8948 (facsimile)

J. Kehaulani Kauanui
Jasbir Puar

Counsel: Mark Allen Kleiman, Esq.
Richard Renner, Esq.
12121 Wilshire Blvd.
Suite 810
Los Angeles, CA 90025
310-392-5455
310-306-8491 (fax)

Steven Salaita

Counsel: Maria C. LaHood, Esq.
Astha Sharma Pokharei, Esq.
Shayana D. Kadidal, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
[redacted]

B. Parent corporation for the American Studies Association: None

Subsidiaries: None

Publicly held corporation holding more than 10% of stock: None

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Cases

[1] Cases marked with an asterisk (*) are chiefly relied upon.

Statutes

Rules

Treatises

Regulations

DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 23-CV-240

SIMON BRONNER, *et al.*,
Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *et al.*,
Appellees

Appeal from the Superior Court
of the District of Columbia
(Hon. Robert R. Rigsby, J.)

BRIEF OF APPELLEES, LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR, SUNAINA MAIRA, CHANDEN REDDY, JOHN STEPHENS AND THE AMERICAN STUDIES ASSOCIATION

In 2013, the National Council of the American Studies Association adopted at its Annual Meeting a Resolution expressing support for boycott efforts against Israeli academic institutions. The Resolution placed no restrictions on the actions of the individual Association members, nor did it prevent Israeli professors from participating fully on an individual basis in Association programs. The Resolution was approved by super-majority vote at the Annual Meeting.

Appellants/Plaintiffs are four members of the Association who opposed the Resolution. Their contentions go beyond a simple challenge to the process by

which the vote was taken: they firmly believe that the mere act of supporting the Resolution – or, for that matter, adopting opinions consonant with the underpinnings of the Resolution – is so transgressive as to disqualify anyone from leadership in the Association. In order to protect what they saw as orthodoxy and to silence an opposing viewpoint, they filed suit in the federal court, only to be cast out on jurisdictional grounds. They immediately turned to the Superior Court, where their efforts have been unmasked as a SLAPP suit. Hoping to regain some camouflage of propriety, Plaintiffs now bring this appeal, and seek to prolong their campaign against a viewpoint with which they disagree.

These Appellees also join in the arguments made by co-Appellees, to the extent that those arguments do not contradict the points raised herein.

JURISDICTIONAL STATEMENT

The Superior Court (Rigsby, J.) dismissed all of the Counts in the Complaint pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, and/or Rule 12(b)(6) of the Superior Court Rules. That final judgment has been appealed to this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court properly dismiss certain counts in the Complaint as time-barred, where those causes of action accrued more than three years before the filing of this suit, and where the limitations period was not tolled by the federal lawsuit?

2. Did the Superior Court properly dismiss Counts 1-3, 5 and 9-12 of the Complaint pursuant to the Anti-SLAPP Act, where these counts all arose out of an act in furtherance of the right of advocacy on issues of public interest, and where those Counts had no likelihood of success on the merits?

3. Did the Superior Court properly find that the Plaintiffs failed to meet the second prong of the Anti-SLAPP analysis, where Plaintiffs did not submit any affirmative evidence in support of their claims, but instead relied on the unsupported allegations in the Complaint?

STATEMENT OF THE CASE

A. The Prior Lawsuit

The procedural history for this lawsuit has already been set forth in the Court's prior opinion, *American Studies Assn. v. Bronner*, 259 A.3d 728 (2021), and will be summarized here. In April 2016, Appellants filed suit in the U.S. District Court for the District of Columbia (Case No. 1:16-cv-00740-RC, "the

Federal Action"), claiming breach of fiduciary duty, corporate waste and other claims, all arising from the 2013 adoption of a resolution by the American Studies Association ("ASA") in support of Palestinian civil society's call for a boycott of Israeli academic institutions. The District Court first ruled that any derivative claims failed as a matter of law for Plaintiffs' failure to give ASA the ninety-day notice required by D.C. Code § 29-411.03, and that the Plaintiffs had failed to state any claim for *ultra vires* action. *See Bronner v. Duggan*, 249 F.Supp.3d 27 (D.D.C. 2017). After more motions practice, and a second amended complaint that added three new defendants, the District Court ultimately held that the Court lacked subject-matter jurisdiction and dismissed the entire case. *Bronner v. Duggan*, 364 F.Supp.3d 9 (D.D.C. 2019), *aff'd* 962 F.3d 596 (D.C. Cir. 2020).

B. The Current Lawsuit

The instant lawsuit was filed on March 15, 2019 (App. 003), and five days later, Plaintiffs filed a Motion to File Unredacted Complaint Under Seal (*Id.*). All Defendants filed Motions to Dismiss under Rule 12(b)(6) and Motions to Dismiss under the D.C. Anti-SLAPP Act (App. 006-7). On November 15, 2019, the Court (Rigsby, J.) issued its ruling on the dispositive motions[1], dismissing Counts Three, Four, Five, Six, Seven and Eight pursuant to Rule 12(b)(6) as time-barred, as well as those portions of Counts Two and Nine pertaining to alleged misuse of funds

[1] That Order was subsequently amended slightly on December 12, 2019.

occurring before March 2016. The court also dismissed Count One as against Dr. Salaita. The trial court summarily denied the Anti-SLAPP motions, holding only that Plaintiffs had "demonstrated that a number of their claims have merit." (*See* App. 291 - 328).

On appeal, this Court ruled that the trial court had erred in not considering each count of the Complaint individually for purposes of the Anti-SLAPP Act, and that to the extent that such claims arose "from an act in furtherance of the right of advocacy on issues of public interest," any of the counts dismissed pursuant to Rule 12(b)(6) should also have been dismissed under the Anti-SLAPP Act. *American Studies Assn.*, *supra* 259 A.3d at 741-3. The Court also clarified that a claim falls within the Act if the "party's statutorily protected activity [is] the basis for that party's asserted liability." *Id.*, at 734. "[T]he 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. The matter was remanded for further proceedings.

On remand, the parties submitted supplemental memoranda on the applicability of the Anti-SLAPP Act (App. 017-18). The Court held a hearing on October 27, 2022 and requested Proposed Findings of Fact and Conclusions of Law from both sides. Those memoranda were filed between November 10 and December 13 (App. 019). On March 1, 2023, the Court issued its Final Order,

ruling that all claims except Counts Four, Six, Seven, and Eight were dismissed pursuant to the Anti-SLAPP Act (App 356 - 381). Count Eight was dismissed under Anti-SLAPP as to Dr. Salaita. Since the four counts that fell outside the Anti-SLAPP Act had already been dismissed pursuant to Rule 12(b)(6), there were no claims that remained viable, and the lawsuit was dismissed with prejudice.

This appeal followed.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

ASA is a charitable corporation, organized under the laws of the District of Columbia, dedicated to the promotion of the study of American culture (App. 037, ¶ 17). John Stephens was, at the time of the events complained of, the Executive Director of ASA (App. 39, ¶ 26); the remaining Defendants were members of either the ASA National Council or Nominating Committee sometime between 2013 to 2018 (App. 038 - 039). Aside from Dr. Stephens, all the individual Defendants were allegedly members of the United States Association for the Academic and Cultural Boycott of Israel ("USACBI") (*id.*). Although the ASA National Council included at least 23 members (*see* App. 172, Art. V, Sec. 1), only those believed to be members of USACBI were named as Defendants.

Drs. Bronner and Rockland are honorary lifetime members of ASA, and do not pay membership dues (App. 036 - 37, ¶¶ 14, 15; App. 146, Art. II, Sec. 1(c)). Dr. Barton's membership in ASA lapsed in 2012 for non-payment of dues;

although he reactivated his membership, he was not allowed to vote on the Resolution (App. 037, ¶ 16). Dr. Kupfer was also a member of ASA until 2014; in opposition to the Resolution, he allowed his membership to lapse, and presumably has not paid dues since (*id.*, ¶ 17) (collectively, the Plaintiffs are referred to here as "the Professors").

At the 2013 Annual Meeting, the ASA adopted a resolution supporting a boycott of Israeli academic institutions (the "Resolution") (App. 63 – 64). The Professors claimed that the adoption occurred through various improper maneuvers, such as excluding Dr. Barton from the National Council meeting, closing the voting rolls, and hiding dissenting viewpoints (*gen'lly*, App. 029 - 036).

Dr. Salaita was not elected to the National Council until July 2015 (App. 039, ¶ 26). Although the Professors alleged that he was a member when the ASA's bylaws were amended and "when large withdrawals were taken to cover expenses related to the Boycott Resolution" (*id.*), they do not allege that Dr. Salaita had any personal involvement in those actions. The only paragraphs in the Complaint that mention Dr. Salaita relate solely to advocacy he conducted on the Boycott Resolution before he was even a member of the National Council (App. 047, ¶ 46; App. 057, ¶ 99; App. 131, ¶ 337). Of the dozens of National Council members who served from 2015-2018 (and who were thus serving at the time of the bylaw amendments and alleged spending decisions), only Dr. Salaita was sued.

Neither Dr. Puar nor Dr. Tadiar served on the National Council. Rather, Dr. Tadiar served on the programming committee for the 2013 Annual meeting (App. 038, ¶ 20) and Dr. Puar began serving on the ASA's Nominating Committee in July 2010. (App. 039 ¶ 25). Plaintiffs claimed that Dr. Puar, as a new member of a six-person committee, controlled the nominating process, packed elected positions with supporters (App. 046, 051, 052, ¶¶ 45, 58, 60), and arranged it so that six of the ten "continuing voting members" of the National Council had endorsed calls for the Resolution (App. 053, ¶ 62).

Dr. Kauanui was elected to the ASA's National Council in 2013 (App. 039, 062-3, ¶¶ 24, 90). Although she acknowledged in her campaign statement that she was on the Advisory Committee of USACBI (App. 054, ¶ 67), Plaintiffs still asserted that she deliberately concealed her support for USACBI, merely because another candidate who was allegedly more explicit in his support lost in that same election (App. 054 – 56, ¶¶ 69, 70).

Additional allegations will be included with the discussion of the individual counts below.

SUMMARY OF ARGUMENT

There is no tolling statute in the District of Columbia, and the pendency of the federal lawsuit did not affect either the accrual of Plaintiffs' causes of action or the running of the limitations period. Although Appellants argue that recent cases

have opened the door for equitable tolling, those cases all concern rules-based deadlines for judicial review, not statutes of limitations. As a matter of law, most of the claims in the Complaint accrued in 2013, and the instant lawsuit filed in 2019 comes too late. For these reasons, although the Court found that Counts Four, Six, Seven and Eight did not fall within the Anti-SLAPP Act, it properly dismissed those Counts pursuant to Rule 12(b)(6).

The remainder of the Counts, Counts 1-3, 5, and 9-12, all arose out of "an act in furtherance of the right of advocacy on issues of public interest" (D.C. Code § 16-5502(b)). Specifically, each of these Counts has, as the underlying act for the claim, the promotion of, advocacy for, or adoption of the Academic Resolution supporting boycott efforts against Israeli academic institutions. That Resolution, adopted in the 2013 Annual Meeting and published on the ASA website, is an expression of opinion on an issue of public interest, namely Israeli-Palestinian relations. It thus falls within the scope of the D.C. Anti-SLAPP Act. Nor does it matter, as Appellants claim, that the Counts all represent commonplace corporate disputes; the only reason that Plaintiffs have challenged any of the Association's corporate actions is because such actions were done in support of the Resolution.

Thus, Counts One and Three claim that the Defendants breached their fiduciary duty by not disclosing their support for the Resolution when campaigning for ASA's National Council, or by deliberately nominating candidates who

supported the Resolution. Counts Two and Nine assert that the National Council misused Association funds and committed waste by spending money on the Resolution. Count Five claims that the Resolution itself is a form of lobbying, which is not allowed for ASA. Count Ten claims that the only reason that the National Council decided not to renew Dr. Bronner's contract as Editor of the ASA Encyclopedia is because they supported the Resolution, and he did not. In each case, the corporate act – nominating candidates, allocating funds or setting policy – was challenged solely because it related to the Resolution. The Resolution, therefore, stands at the heart of each of these Counts. Finally, Counts Eleven and Twelve – which claim conspiracy and tortious interference with contract – are "catch-all" counts, asserting alternative theories of recovery for the same alleged actions. Just as the previous Counts arose out of the Resolution, so too do Counts Eleven and Twelve.

None of these Counts have a likelihood of success on the merits. Counts 1 and Three are time-barred, and there is no corporate obligation either to disclose a candidate's opinion on every possible issue, or to ensure that a slate has a sufficient group of differing opinions on every conceivable issue. Counts Two and Nine are both derivative in nature, and thus are collaterally estopped by the rulings in the federal lawsuit. Moreover, even taken at face value, none of the allegations in the Complaint would suggest that ASA suffered a significant financial loss as a result

of adoption of the Resolution. Count Five is both time-barred and collaterally estopped. Count Ten must fail because the Editor Contract explicitly permits the National Council to decide not to renew the contract for any reason. Thus, there can be no breach of fiduciary duty for failing to renew. Finally, Counts Eleven and Twelve fail because there can be no tortious interference with a contract in the absence of a breach of that contract, and because an association cannot conspire with its own representatives.

The Defendants made their prima facie case under the Anti-SLAPP Act; in order to avoid dismissal with prejudice, Plaintiffs were required to produce affirmative evidence to show a likelihood of success on the merits. Plaintiffs did not meet this burden, and in fact produced no evidence to oppose the Anti-SLAPP motions. Their argument that they should have been allowed to rely on the allegations in the Complaint is misplaced. First, as this Court has noted, an Anti-SLAPP analysis is akin to a summary judgment motion, and it is established that an opponent of a summary judgment motion must produce affirmative, admissible evidence to show a material fact at issue. Allegations in the complaint will not suffice. Second, the evidence to which Plaintiffs point are all quotations from e-mails and other documents, none of which are undisputed. Without putting the source documents into the record, Plaintiffs have failed to demonstrate that their quotes, and their interpretations, are at all accurate.

Moreover, those quotations are almost entirely related to events that occurred in 2012 and 2013, and thus relate to time-barred claims. Given that a stale claim has no likelihood of success on the merits, regardless of the quality of evidence supporting it, reliance on those quotes does not advance Plaintiffs' cause. In order to save Counts Two and Nine, and Count Ten, Plaintiff had to put forward affirmative evidence of the Association's finances, and how that has been affected by the adoption of the Resolution or by the non-renewal of the Editor contract. None of that evidence is in the record. Plaintiffs failed to meet the second prong of the Anti-SLAPP analysis, and their Complaint was properly dismissed with prejudice.

ARGUMENT

A. Standard of Review

The standard of review for dismissal on a motion to dismiss is *de novo*. The complaint must present "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Fourth Growth, LLC v. Wright*, 183 A.3d 1284, 1288 (D.C. 2018).

The standard of review on an Anti-SLAPP motion is also *de novo*. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1040 (D.C. 2014).

B. The Superior Court Properly Dismissed Counts Four, Six, Seven and Eight under Rule 12(b)(6) As Time-Barred

1. The Statute of Limitations Is Not Tolled Here

For all but a handful of causes of action, none of which are relevant here, the statute of limitations in the District of Columbia is three years. *See* D.C. Code § 12–301. The instant lawsuit was filed on March 25, 2019; thus, the Professors' claims must have accrued no earlier than March 25, 2016. As the Complaint makes clear, however, the majority of the Professors' claims accrued in 2012 and 2013, well outside the applicable limitations period.

Appellants argue that the limitations period should be tolled during the time that the case was pending in the federal court. The law in the District of Columbia, however, is directly to the contrary. This Court has repeatedly stated that there is no equitable tolling of the statute of limitations. In *Bond v. Serano*, 566 A.2d 47 (D.C. 1989), the plaintiff sued the District of Columbia in federal court in 1986; when the District moved to dismiss for lack of subject-matter jurisdiction, plaintiff immediately filed a companion case in Superior Court. A year after initially denying the District's motion, the federal court, *sua sponte*, dismissed the District from the federal lawsuit. This Court held that the pendency of the federal case did not toll the statute of limitations, and plaintiff's claims against the District were

time-barred.[2] Similarly, *Curtis v. Aluminum Assn*, 607 A.2d 509 (D.C. 1992) involved a suit in federal court against a limited partnership; a year later, the Supreme Court held in an unrelated case that the citizenship of limited partners had to be considered for purposes of diversity jurisdiction. Although the *Curtis* plaintiff filed a new suit in Superior Court before his federal case was dismissed, his claims were still held to be time-barred. *See also Huang v. D'Albora*, 644 A.2d 1 (D.C. 1994) (medical malpractice arbitration in Maryland did not toll limitations period); *Sayyad v. Fawzi*, 674 A.2d 905 (D.C. 1996) (timely suit in Superior Court was dismissed for failure to properly serve the defendants; by the time the plaintiff complied with the procedural requirements to file a new complaint, the limitations period had lapsed); *c.f. Stewart-Veal v. District of Columbia*, 896 A.2d 232 (D.C. 2006) (where prior complaint was dismissed for insufficiency of service of process, one-year limitation period for intentional torts was not tolled, although a negligence claim was still timely).

The cases cited by Appellants do not address statutes of limitations, but rather rules-based deadlines for judicial review. *Mathis v. Dist. of Columbia Housing Auth.*, 124 A.3d 1089 (D.C. 2015) involved application of D.C. App. Rule

---

[2] Appellants claim that *Bond* has been superseded (Br. at 33). It is not clear where Appellants might have gotten that impression, but it does not appear to have been from any statement by this Court, or from any ruling by the federal courts.

15, and review of an agency order. As the *Mathis* Court noted, "[t]he dividing line between jurisdictional and claim-processing rules has been in flux over the last decade." 124 A.3d at 1101. The deadline in Rule 15 was ultimately deemed non-jurisdictional. *Neil v. D.C. Pub. Empl. Rel. Bd.*, 234 A.3d 177 (D.C. 2020) involved a claim under the Comprehensive Merit Personnel Act (D.C. Code § 1-601.01 *et seq.*). The plaintiff claimed that the deadline set in 6B DCMR § 544.4 for review of an administrative order was not jurisdictional; the *Neil* Court, however, found that it did not need to reach that issue, as even equitable tolling could not excuse the multi-year delay in filing the review petition.

Finally, *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392 (D.C. 1991) is highly inapposite. In that case, after the Office of Human Rights issued a finding of no probable cause on plaintiff's claims, this Court took jurisdiction of the petition for review, but then dismissed on the parties' stipulation that the Commission on Human Rights would review the OHR determination. That review, however, was short-circuited when the Corporation Counsel opined that the Commission lacked the necessary authority. Plaintiff's appeal back to this Court was first reinstated, then dismissed for lack of jurisdiction pursuant to the Court's opinion in an unrelated case. Only then did plaintiff file in the Superior Court. Ultimately, the *Simpson* Court found that "procedural technicalities" were inappropriate within the statutory scheme of the Human Rights Act, where

claimants were generally unrepresented. 597 A.2d at 401-2. As such, her cause of action did not accrue until the date that this Court dismissed the reinstated appeal for lack of jurisdiction. Her complaint in the Superior Court was filed less than three years after that date. The issue on remand in *Simpson* was not equitable tolling of the statute of limitations, but rather the District's argument that plaintiff had failed to exercise due diligence in bringing her claim. *See* 597 A.2d at 403-4.

Simpson's unique facts, therefore, make it eminently distinguishable from the instant suit. Where Ms. Simpson was unrepresented for most of her litigation, Plaintiffs here have been represented by counsel from the beginning. Where Ms. Simpson was ultimately caught by unanticipated procedural complexities that delayed the accrual of her cause of action, it was clear early on that Plaintiff's claims in the federal court should fail. Where Ms. Simpson sought judicial review within days of the agency decision, the federal lawsuit here was not filed until April 2016, just a few months shy of the three-year limitation period for most of the claims.[3] By March, 2017, the U.S. District Court had dismissed any derivative claims for failure to comply with D.C. Code § 29-411.03; despite repeated motions in the federal court, Plaintiffs did not attempt to shore up their position by

[3] Appellant's Brief asserts that the suit was filed "a mere month after their claims *accrued*" (Br. at 34). Appellants are simply wrong. All of the claims in the federal suit, save for a claim on continuing loss of funds, occurred in 2012 and 2013, with the adoption of the Resolution.

proffering any evidence of individual damages. Ultimately, that failure doomed their federal suit (*see Bronner v. Duggan*, 962 F.3d 596, 609-610 (D.C.Cir. 2020)).

Simpson neither abrogated *Bond v. Serano* nor called it into question. Appellants are simply mistaken in their assertion that *Bond* "is both outdated and factually distinct." (Br. at 32). The cases cited *supra* are testament to this Court's unwavering adherence to the strict application of the statutes of limitations.[4]

As this Court has stated, "once a suit is dismissed, even if without prejudice, the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing." *Stewart-Veal, supra*, 896 A.2d at 237 (2006). Regardless of the history of the federal action, the statute of limitations started to run in 2013. The instant lawsuit, filed in 2019, comes far too late.

2. Counts Four, Six, Seven and Eight of the Complaint Were Properly Dismissed Under Rule 12(b)(6)

The trial court ruled that Counts Four, Six, Seven and Eight of the Complaint did not arise "from an act in furtherance of the right of advocacy on

[4] It is true that the *per curiam* opinion in *Bond* noted that "the issue may be worthy of *en banc* consideration." (566 A.2d at 49). However, no such review was held, and none of the subsequent cases have entertained the same possibility. Judge Farrell's observation still holds true: the Court is "not at liberty, as a coequal branch of government, to adopt a broad tolling exception to the time limitation which the legislature has placed on the right to litigate." *Bond*, 566 A.2d at 50 (Farrell, J., concurring).

issues of public interest." (App. 375- 377). Appellees do not contest that finding here; the counts remain dismissed as time-barred. Nonetheless, the Counts were properly dismissed.

Count Four seeks injunctive relief for "Defendants' decision to freeze the [ASA] membership rolls as of November 25, 2013" (App. 128 ¶ 281). The lawsuit filed in 2019 lies far outside the three-year statute of limitations for that occurrence. Similarly, Count Eight claims that Mr. Barton was denied the right to vote on the Resolution. Again, that election was held in 2013, and there is no other allegation that Mr. Barton sought to vote on anything else (App. 80 ¶¶ 127, 128). This claim, too, is time-barred.

Counts Six and Seven claim that the Resolution was improperly adopted, both because of illegal vote procedures (App. 132-3 ¶ 302) and because of a lack of quorum (App. 133-4 ¶¶ 306, 307). As the Resolution was adopted in December, 2013 (App. 084-5 ¶ 139), any voting improprieties obviously occurred then – well outside the three-year limitation period.

C. The Court Properly Dismissed Counts 1-3, 5 and 9-12 Pursuant to the Anti-SLAPP Act

1. The Resolution, and Support Thereof, Falls Within the Act

The D.C. Anti-SLAPP Act 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.* 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). If, as here, Plaintiffs do not meet that burden, the claims are properly dismissed. *Doe v. Burke*, 133 A.3d 569, 578 (D.C. 2016).

The Act defines "an act in furtherance of a right of advocacy" as, in pertinent part, "[a]ny written or oral statement made … in a public forum in connection with an issue of public interest; or any other expression … communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501. As this Court has noted, 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." *American Studies Assn.*, 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).

The claims in the Complaint arise entirely out of the passage of the ASA's Resolution in support of Palestinian rights: the Professors bemoan that the Resolution itself is misguided, that the membership was misinformed, and that funds spent in support of the Resolution were "wasted." Although the Professors ostensibly challenge the actions of the ASA National Council, they have sued individuals (Puar and Tadiar) who never served on the Council as well as Dr. Salaita, notwithstanding the complete absence of any allegation as to what he might have done while on the National Council. Clearly, specific individuals have been targeted as defendants solely because they supported, promoted, or advocated for the Resolution.

There can be little question that passage of the Resolution falls within the ambit of the Act. The Resolution, motivated by a concern for Palestinian rights, reflects an "effort to change the social, political, and economic structure of a local environment," and is "designed to force governmental and economic change and to effectuate rights…." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914, 933 (1982). Other courts have held that boycotts related to Palestinian rights are a matter of public interest. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1047 (D. Ariz. 2018), *vacated as moot*, 789 F.App'x 589 (9th Cir. 2020) (preliminarily enjoining Arizona law targeting companies that engage in boycotts against Israel); *Davis v. Cox*, 325 P.3d 255, 265 (Wash. Ct. App. 2014), *rev'd on other grounds*,

351 P.3d 862 (Wash. 2015) (granting Anti-SLAPP motion and dismissing case challenging food co-op's decision to boycott Israeli products). *See also Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1083 (N.D. Ill. 2015) (tweets criticizing Israel were "a matter of public concern").

The ASA Resolution was widely publicized, including on the ASA website, and is therefore a written communication made in a public forum. *See Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015) ("website is a 'place open to the public,' because anyone with a working internet connection or access to one can view it."). 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. *See, e.g.*, *Sheley v. Harrop*, 215 Cal.Rptr.3d 606, 620 (Cal. Ct. App. 2017) ("[L]itigation funding decisions … constitute protected petitioning activity" under California Anti-SLAPP law) (citations omitted). The only question, therefore, is whether each Count of the Complaint, taken individually, "arose out of" the Resolution.

2. Appellants' Invocation of General Corporate Law Has No Application to the First Prong of the Analysis

Appellants argue that their claims cannot "arise from" any act of advocacy, because each count sounds in general corporate law. Thus, they claim that "neither claim, for breach of fiduciary duties or corporate waste, has as an element

expressive conduct." (Br. at 37); that *ultra vires* actions cannot be countenanced, "regardless of Defendants' own purportedly expressive and ideological motivations" (at 41); and that protecting ASA's tax-exempt status is a valid interest of any Association member (at 41 – 2). The argument misconstrues the Act itself.

As this Court has noted, the first prong of the Anti-SLAPP analysis is met where the "act which forms the basis for the plaintiff's cause of action [is] *itself* … an act in furtherance of the right of petition or free speech." *American. Studies Assn.*, 259 A.3d at 746-7. This is a neutral test: it does not consider whether any liability might actually attach to the statutorily protected activity, but merely to whether the event precipitating the claim was an act in furtherance of the right of free speech. Thus, as this Court has noted, the burden of making a *prima facie* case is "not onerous." *Doe, supra*, 91 A.3d at 1043. Any examination of the merits of the claim itself is assigned to the *second* prong of the Anti-SLAPP analysis: whether the non-movant has a likelihood of success on the merits. *See City of Costa Mesa v. D'Alessio Investments, LLC*, 214 CalApp.4th 358, 371, 154 Cal.Rptr.3d 698 (2013) ("The merits of [plaintiff's] claims should play no part in the first step of the anti-SLAPP analysis"); *Coretronic Corp. v. Cozen O'Connor*, 192 Cal.App.4th 1381, 1388, 121 Cal.Rptr.3d 254 (2011) ("Arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis") (*both cited in Doe v. Kansas State Univ.*, 61 Kan.App.2d 128, 143, 499 P.3d 1136,

1143 (2021)). It thus does not matter, for the first prong of the Anti-SLAPP test, whether Plaintiffs might ultimately show a breach of corporate law; all that matters is the fact that in each case, the claim itself stems from Defendants' advocacy for the Resolution.

Appellants also misunderstand the import of the footnote in this Court's prior opinion (*see American Studies Assn.*, 259 A.3d at 747, n. 78) that the Anti-SLAPP Act would not "enable[] a defendant sued for embezzling … to file a special motion to dismiss …" A claim of embezzlement would be "merely tangentially related to protected speech" (*Id.*), since embezzlement is illegal regardless of why the money was stolen. The precipitating event is the theft of money, not the reason the money was stolen. Where the cause of action might be evaluated without reference to any speech whatsoever, there is no basis for an Anti-SLAPP motion. Thus, for example, a claim for discrimination in denying tenure did not arise out of any protected activity, as the core allegations centered on "evaluations of his performance and competency," and not upon any particular statements either by the plaintiff or by the tenure review board. *Park v. Bd. of Trustees of the Calif. State Univ.*, 239 CalApp.4th 1258, 1272, 192 Cal.Rptr.3d 78 (2015); *see also Caranchini v. Peck*, 355 F.Supp.3d 1052, 1063-1064 (D.Kan. 2018) (claims of defamation and slander fall within the Anti-SLAPP statute, while claims of harassment and conspiracy to incarcerate do not).

None of the claims here arise from *per se* illegal activity, nor can they be separated out from the Resolution's protected speech. Rather, the Professors assert that otherwise commonplace corporate actions – nominating candidates for director positions, adopting resolutions on matters of policy, and allocating funds to support Board-approved programs – are all tortious solely because those actions were undertaken in support of the Resolution, which the Professors oppose. As discussed more fully below, each of the Counts in the Complaint thus "arise from an act in furtherance of the right of advocacy."

Appellants' argument would likewise effectively neuter the Anti-SLAPP Act itself. It bears repeating that the fundamental purpose of the Act is to protect defendants from "a suit that is filed, not to succeed, but to prevent or punish the defendant's speech or advocacy." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1235 (D.C. 2016), *as amended* (Dec. 13, 2018), *cert denied sub nom. Nat'l Review, Inc. v. Mann*, 140 S.Ct. 344 (2019). That overarching purpose would be frustrated if imaginative drafting could immunize a SLAPP suit from challenge simply because the labels on the individual counts do not directly reference "speech." As the California courts have noted, "a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden-variety tort or contract action when in fact the claim is predicated on protective speech or petitioning activity." *Colyear v. Rolling*

Hills Cmty. Assn. of Rancho Palos Verdes, 9 Cal. App. 5th 119, 134, 214 Cal. Rptr. 3d 767, 779 (2017), *as modified on denial of reh'g* (Mar. 23, 2017); *cf. Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal. App. 4th 1264, 1272, 99 Cal. Rptr. 3d 805, 810 (2009).

The Professors cannot defend against an Anti-SLAPP motion merely by claiming that the counts in their Complaint are general corporate law disputes. Their claims are not content-neutral; on the contrary, each one rests on their unalloyed opposition to the Resolution as a statement of opinion. Moreover, to accept their position would be to allow avoidance of the protections of the Anti-SLAPP statute through artful drafting, which would render the statute toothless. Their main argument, therefore, should fail. As shown next, each of the claims arose out of the Resolution, and Plaintiffs had no likelihood of success on the merits.

3. Counts One (Breach of Fiduciary Duty) and Three (*Ultra Vires* and Breach of Contract)

These two Counts are complementary. Count One alleges that specific Defendants, nominated to leadership positions in the Association, 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." (App. 122, ¶ 262). Count One thus rests

on the assertion that, solely because of their "personal political agenda," these nominees were disqualified from serving in ASA leadership positions. 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). Indeed, Plaintiffs couch the claim as one of *mis*representation by the Defendants: in order to ensure their election to leadership positions, these Defendants actively hid their USACBI connections (App. 122, ¶ 262). The act upon which Count One is based is thus "expressive conduct …in connection with an issue of public interest" and falls within the Anti-SLAPP Act.

Similarly, Count Three alleges that the act of nominating those same Defendants for election was *ultra vires* and breached ASA's governing documents because those nominees did not represent "the diversity of the association's membership" (App. 125, ¶ 272), as "the great majority of members of the Association did not join to advocate for USACBI." (*Id*., ¶ 273). According to the Professors, it was the act of advocating for USACBI and for the Resolution that made the National Council candidates insufficiently "diverse," and disqualified them from service as ASA representatives. Were it not for the Defendants' pro-USACBI beliefs and their express support for the Resolution, there would have

been no cause to challenge either their nomination or their election to the National Council.

Clearly, for the Professors the pivotal factor at issue in Count Three is the Defendants' viewpoint on a very specific subject – support for USACBI. The acts that form the basis of these claims are the Defendants' support for and promotion of the goals of USACBI and the Resolution itself. Count Three thus arises out of an act in furtherance of the exercise of advocacy.

On the merits, both Counts One and Three are time-barred: this push to nominate USACBI members to the National Council occurred in 2010 (App. 051,¶ 58) through 2013 (App. 053, ¶ 62). There is no allegation of any such manipulation after those years.[5] Moreover, even if the political philosophies of the candidates were not known before the 2012 or 2013 elections, they were certainly disclosed prior to the adoption of the Resolution in 2013. Further, as the trial court noted, Dr. Bronner was a member of the National Council at the time and was thus aware of the Defendants' political associations (App. 312). Plaintiffs were clearly on notice of the claim in 2013. As this Court has noted, "where the court grants a 12(b)(6) motion because no relief can be granted on a claim as a matter of law, the plaintiff cannot show a likelihood of success on the merits of that claim for the

[5] Professor Salaita is the only individual identified as elected after 2013; his individual presence on the National Council, regardless of his political persuasions, could not be a hindrance to "diversity."

purposes of the anti-SLAPP motion." *American Studies Assn., supra* 259 A.3d at 741.

Further, both these Counts rest on two contentions: (1) nominating USACBI supporters to the National Council violates the requirement of diversity found in Article IV of the ASA Constitution; and (2) Defendants acted nefariously in failing to emphasize their involvement with USACBI. The first contention is nonsensical: like any other contract provision, Article VI must be read according to its normal, reasonable meaning. *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013). "Diversity" in this context 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 – from graduate students to senior professors.[6] To claim that "diversity" specifically required nominating candidates with different viewpoints on the Israel/Palestine conflict is absurd.

The second contention fares little better. No statute or case-law requires a candidate for organizational election to disclose every aspect of her political viewpoint, from transgender rights to vegetarianism. Such a requirement would be

---

[6] Indeed, Plaintiffs allege that Defendants "turned the … National Council from a body primarily composed of … otherwise diverse members (in terms of gender, ethnicity, national origin, religion, LGBTQ identification, and region, as well as personal interests and viewpoint) to one overwhelmingly comprised of individuals with a singular focus on adopting the USACBI Boycott." App. 056-57, ¶ 71 (emphasis added). Apparently, supporting Palestine eradicates every other personality trait, leaving only an automaton.

unworkable: a candidate would have to exhaustively list every opinion ever held on every conceivable topic, lest they be accused years later of concealing an opinion that someone belatedly found to be "important." Appellants try to rescue their position by asserting that "[i]t is undisputed that support for the Resolution was an issue highly material to a nominee's candidacy" and that "the Resolution was disfavored by most ASA members." (Br. at 40). These points are certainly not "undisputed," as the relevant allegations (¶¶ 56 and 96) were specifically denied. App. 199, 205. Too, without some formal poll of the Association membership, one wonders how the Professors could even justify such a sweeping generalization. Neither Count One nor Count Three has any reasonable likelihood of success on the merits, and both were properly dismissed.

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

In Count Two, Plaintiffs claim in part that Defendants breached their fiduciary duty by engaging in those activities covered by other Counts: "manipulating the nomination and voting process" (Count Four), "miscounting votes" (Counts Six and Seven), and "withholding voting rights from certain members" (Count Eight). All of this was done "to further their personal political interests" (App. 123-4, ¶ 266) and as part of a long-term strategy of nominating like-minded candidates to the National Council to increase support for the Resolution. This part of Count Two, therefore, arises from the set of acts by the

individual Defendants in support of the Resolution – and before that, in support of USACBI. The claim, therefore, arises out of an act (or acts) in support of the exercise of advocacy. Further, because this part of Count Two simply iterates otherwise time-barred claims, it too is time-barred.

The remainder of Count Two claims misuse of funds to defend the Resolution; for its part, 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. 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)). Each of these Counts, therefore, arises out of the Resolution.

Appellants claim that *Cruz* does not apply because it "involved whether corporations could spend their *own money* on speech" as opposed to "resources from members or donors" Br. at 38, emphasis in original. Their attempted distinction is illogical: once money is received by ASA, whether through annual dues, donations, or proceeds from sales of various ASA products, it becomes ASA's own funds, to spend as the National Council sees fit. One might wonder

whether it would be a breach of fiduciary duty to spend the annual dues of those members who supported the Resolution on non-Resolution activities.

Moreover, 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). 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. 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.

i. Any Claim for Waste is Collaterally Estopped

On the merits, both of these Counts must fail. Any claim for misuse of ASA funds is fundamentally derivative in nature, and thus barred by collateral estoppel.

The federal court dismissed the derivative claims because the Professors had not given ASA the ninety-day notice required by D.C. Code § 29-411.03. *Bronner v. Duggan*, *supra* 249 F.Supp.3d at 47. Appellants concede this point, but seek to avoid the inevitable conclusion by misquoting the District Court's ruling. In their version the District Court "'dismissed the derivative claims because Plaintiffs had failed to make a demand on the National Council, not because the claims themselves … lacked merit.'" (Br. at 48-49). In reality, the Court's statement is that the derivative claims were dismissed because "Plaintiffs had failed to make a demand on the National Council, not because the claims themselves, if ASA had asserted them on its own, lacked merit." *Bronner v. Duggan*, 324 F.R.D. 285, 293 n. 2 (D.D.C. 2018) (emphasis added). By omitting the underlined phrase, Appellants completely changed the meaning of the sentence. The Professors' derivative claims were dismissed on the merits.

Because the derivative claims are collaterally estopped, any claim for waste cannot survive. *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 the corporation); *see also Wallace v. Abramson*, 1988 WL 19256 (D.D.C. 1988) ("Suits challenging alleged mismanagement must be brought as derivative actions." (*quoting Pullman–Peabody Co. v. Joy Mfg. Co.*, 662 F.Supp. 32, 35 (D.N.J.1986)). There is,

moreover, neither allegation nor evidence of any damage to the Plaintiffs themselves. The Professors cannot claim the loss of their own membership dues, because they are not "dues-paying members." Bronner and Rockland do not pay dues (Complaint ¶¶ 14, 15). Kupfer hasn't paid dues since 2014 (¶ 17), and there is no allegation that Barton is currently an ASA member. Nothing in the Complaint suggests that any of the Plaintiffs have individually suffered a loss of dues since 2016, and they could not claim any direct injury from any misuse of funds.

ii. Plaintiffs' Allegations Do Not Support a Claim for Misuse of Funds

Even Plaintiffs' own allegations fail to show either a misuse or loss of funds. The Complaint asserts that membership dropped after adoption of the Resolution (App. 097, ¶ 184), but there is no evidence as to the amount of membership dues collected after 2015. The Professors also lack any facts to suggest that membership dropped because of the Resolution. A mere temporal relationship does not suffice. *See, e.g., Lasley v. Georgetown Univ.,* 688 A.2d 1381, 1387 (D.C. 1997) ("a proximate temporal association alone does not suffice to show a causal link"). By Plaintiffs' reckoning, nearly two-thirds of the members voting on the Resolution supported it (App. 84 – 85, ¶ 139); given this, it is hard to assume that a majority of ASA members would have quit over the Resolution.

The Professors also claim that there was a decrease in revenue because of the Resolution (App. 092, ¶ 163), and claim that annual contributions had historically averaged $54,928 per year (App. 095 – 96, ¶ 176). Interestingly, they admit that contributions were $30,556 in 2008, $33,959 in 2009 and $31,458 in 2012 (*id.* and ¶ 178). They do not include any data for 2010 or 2011, so they have failed to show any strong resurgence in contributions for those years. The contributions for FY2014 and 2015 were $33,080 and $31,456, and as such were comparable to the prior years (App. 096, ¶ 178). Contributions for FY2013, the year of the Resolution, were $70,544 (*Id.*, ¶ 179). According to the Complaint, there was a one-year *increase* in revenue with the adoption of the Resolution, before a return to previous levels. Plaintiffs' own allegations belie the claim that donations suffered because of adoption of the Resolution.

This leaves only Plaintiffs' claims of improper withdrawals from the investment fund to defend the Resolution. John Stephens testified in deposition that he had created a "separate budget" for support of the Resolution, and informed the Council that "they could not use the trust fund … to support the resolution." (App. 103, ¶ 195; *see also* App. 098 – 99, ¶ 186). Although Plaintiffs are dubious (App. 101, ¶ 191), they concede that "it is impossible to establish … to what extent support for the Resolution was in fact financed by the Trust Fund …" (App. 103,

¶ 196).[7] The Professors thus have absolutely no evidence that any funds were withdrawn from the trust fund to support the Resolution, against sworn testimony from ASA's Executive Director that no such withdrawals were made. There is no basis for a claim of waste.

While the Professors complain that the Bylaws were amended in March 2016 to authorize the Trustees to withdraw "a maximum of 4% of the monthly average of the Fund's assets from the preceding year" (*see* App. 094, ¶ 171), they offer no allegation of any actual withdrawals. They also do not allege what that "monthly average of the Fund's assets" might have been, so it is impossible to say how significant such withdrawals might have been. There is nothing nefarious in amending the bylaws to permit discretionary spending by the National Council.[8]

The Professors also cite to the Form 990 for "FY 2017" to show a "sale[] of securities of $268,085, and at a loss of $19,319", (App. 093, ¶ 168).[9] The IRS Form 990 is a multi-page document covering every aspect of a non-profit's

---

[7] It should be noted that in all the pages from John Stephens' deposition that Plaintiffs attached to their opposition to the Rule 12(b)(6) motion to dismiss, they did not include any page concerning the Association's finances.

[8] The only reason Plaintiffs oppose the Bylaw amendment is because it allegedly facilitated funding for the Resolution. Again, their claim that the Bylaws were improperly amended arises out of the Resolution, and their antipathy to this political statement.

[9] Interestingly, although Plaintiffs concede that ASA's Form 990's are "public documents and available online" they also claim that the FY 2015 records are "the last year we have records for" (App. 096, ¶ 178).

finances, and one part of one entry alone means little or nothing. The entry cited does not necessarily mean that the stocks were liquidated: it shows only that the funds were moved and the market value decreased. For all their suspicions – and despite extensive discovery in the federal litigation – they provide no basis for assuming any large withdrawals were taken from the investment fund after 2016.

The second prong of the Anti-SLAPP analysis requires affirmative evidence demonstrating a likelihood of success on the merits. Although Plaintiffs argue that they made a sufficient "proffer," the fact remains that there is absolutely no evidence anywhere in the record to support these bald allegations of financial mismanagement. Neither income statements nor the publicly-available Form 990s were offered into the record. The bald and internally contradictory allegations in the Complaint are of no worth whatsoever.

Finally, the Professors claim that, "at the end of 2016," ASA had incurred "$40K in unpaid legal expense" in the federal litigation (App. 100, ¶ 190; *see also* App. 095, ¶ 175). Again, there is no evidence of this, but even so, the Professors cannot possibly be claiming that the Association was remiss in incurring legal fees by defending against Plaintiffs' own lawsuit. *See, e.g., Kaplan v. First Hartford Corp.*, 484 F.Supp.2d 131, 144 (D.Me. 2007) ("Directors and officers usually have a duty to engage lawyers to defend the corporation even if they individually have failed to perform in some way that caused the litigation"); 3A FLETCHER CYC.

CORP. § 1112 (West 2019) ("the payment of an attorney for legal services performed for the company is not improper.").

Neither Count Two nor Count Nine have any reasonable likelihood of success on the merits. The claims are derivative in nature, and thus collaterally estopped by the rulings of the U.S. District Court. Further, the Complaint itself is self-contradictory, with no real assertions that might support Plaintiffs' claims. Both of these Counts were properly dismissed.

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

Count Five asserts that the Resolution is an attempt to influence American and Israeli legislation, and thus violates the Statement of Election of July 2013 (App. 130, ¶ 290). The Resolution also allegedly divided ASA, causing damage to the organization (App. 131, ¶¶ 295, 296). In their Brief, Appellants have also alleged that the Resolution thus endangers ASA's standing as a non-profit corporation. (Br. at 42). 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.

The Resolution was adopted in 2013, so any claim that it was improper is now time-barred. Further, 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, supra, 249 F. Supp. 3d at 49; *see generally* 249 F. Supp. 3d at 41 – 50, discussing and rejecting Plaintiffs' argument that the Resolution was *ultra vires*. Count Five has already failed on the merits.

6. Count Ten – Breach of Fiduciary Duty

Count Ten asserts that Defendants breached their fiduciary duty by removing Bronner from his position "for no reason other than because of his opposition to the Academic Boycott" (App. 139, ¶ 329). Because of Bronner's "organic expression of dissent" (App. 109, ¶ 209), and after Bronner's commencement of the federal litigation (App. 118, ¶ 249), Defendants amended the Bylaws to remove the Editor from his *ex officio* position (App. 117 – 118, ¶¶ 245, 247). Defendants then chose not to renew Bronner's contract as Editor "solely because [they] were unwilling to work with someone who disagreed with them." (App. 121, ¶ 259).

This Count goes beyond a mere disagreement over policy. As Plaintiffs freely admit, Bronner actively undermined ASA: his Department at Penn State voted to leave ASA in protest (App. 109, ¶ 205 n. 13), and by mid-2016 he was an active litigant against ASA. As such, Defendants' decision not to renew his contract was part of their support for, and defense of, the Resolution. Too, central to Count Ten is the claim that Bronner's actions in *opposing* the Resolution were reasonable and proper, while the Defendants' actions in *supporting* it were unreasonable and a breach of their fiduciary duty. Again, the Professors claim that no reasonable person would support the Resolution, and the actions of the Defendants therefore were unlawful. Finally, as the trial court noted, "an editorial decision to not publish information on a website available to the public … is in itself a form of expression." App. 378. As such, Count Ten arises out of the Resolution, and the first prong of the Anti-SLAPP analysis is met.[10]

Although the Professors have endeavored to separate the non-renewal of Bronner's editorship contract from the other issues, they nonetheless assert that ASA's decision was based on Bronner's opposition to the Resolution and

---

[10] Plaintiffs also incorrectly allege that Bronner was removed as an *ex officio* member of the National Council in order to prevent him from re-pleading his derivative claims (App. 118-9, ¶¶ 249 – 253). Again, the federal Court dismissed those claims with prejudice because Plaintiffs had failed to provide the notice required under § 29-411.03. *Bronner, et al. v. Duggan*, 249 F. Supp. 3d 27, 42 – 47 (D.D.C. 2017).

Defendants' statements regarding his opposition (*see, e.g.*, App. 105-106, ¶ 201(b); 137 - 8, ¶ 324 (Defendants breached their fiduciary duty to Plaintiff Bronner "by spreading false information about" him); and ¶ 331 (Defendants made "false and pejorative statements" about Bronner, which "interfered with the renewal of his contract")). Moreover, of all the members of the National Council at the time of the contract expiration, Bronner sued only those who allegedly support USACBI. These Defendants were clearly singled out because of their opinions. Plaintiffs' claims clearly arise from the 2013 Resolution (and target those who supported it), thus falling within the ambit of the Act. *See, e.g.*, *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 203 Cal. App. 4th 450, 464, 473 (Cal. Ct. App. 2012) (claims arising out of calls to fire high school baseball coach plaintiff, including a claim of tortious interference, qualified for anti-SLAPP treatment as matter of public interest).

Count Ten also fails on the merits. First, Bronner alleges that ASA decided "as early as 2014" that it would not renew his contract (App. 112, ¶ 227), and in 2015, Duggan informed him that ASA would be looking for a "new home for the Encyclopedia" (App. 113, ¶ 229). Any claim arising from these events are time-barred: the only event that arguably falls within the applicable limitation period would be the actual non-renewal of Bronner's contract in December 2016.

However, Bronner has no viable claim arising out of the contract's expiration. The contract itself 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." *See* Contract, App. 384-5, ¶ 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."). 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 was properly dismissed pursuant to the Anti-SLAPP Act.

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

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. Further, 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.

Since all the other Count discussed above 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.

As argued above, ASA had the authority not to renew Bronner's contract for any reason, and thus could not have breached that contract. Where there is no breach, there can be no claim for tortious interference. *See Dale v. Thomason*, 962 F.Supp. 181, 184 (D.D.C.1997); *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). Moreover, the only actions alleged in the Complaint were by officers and directors of ASA in their official capacity, and an entity cannot tortiously interfere with its own contract. *See Press v. Howard Univ.*, 540 A.2d 733 (D.C. 1988) (no claim against university officials for their part in getting plaintiff fired).

Similarly, none of the Defendants could "aid or abet" each other; just as with the claim of tortious interference, a corporation cannot aid and abet itself. Finally, Count Twelve relies on Defendants' advocacy of the Resolution, which in itself is

an exercise of Defendants' rights of free speech and not unlawful. Lawful expressions of opinion cannot constitute "aiding and abetting." *See Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (finding that the First Amendment bars liability for state torts, including "civil conspiracy based on those torts," for peaceful picketing on a matter of public concern); *Claiborne*, *supra* 458 U.S. at 920 ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

D. In Order to Avoid Dismissal, Plaintiffs Were Required to Produce Affirmative Evidence

As discussed above, with the exception of Counts Four, Six, Seven, and Eight, each claim in the Complaint arises out of the Resolution, and the first prong of the Anti-SLAPP analysis is therefore met.[11] Moreover, given the allegations in the Complaint, the Professors could not show a likelihood of success on the merits.

Dismissal of the complaint was appropriate, as well, because the Professors failed to meet the second prong of the Anti-SLAPP analysis. Once the *prima facie* case is made, the burden fell on the Professors to demonstrate that their claims were likely to succeed on the merits. This, in turn, "mandates the production or proffer of evidence that supports the claim." *Fridman v. Orbis Business*

[11] Again, those four Counts were properly dismissed pursuant to Rule 12(b)(6).

Intelligence, Ltd., 229 A.3d 494, 506 (2020) (*quoting Mann*, *supra* 150 A.3d at 1240 (D.C. 2016)). "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*, 229 A.3d at 502.

Plaintiffs did not even attempt to meet this burden of production. In response to the Defendant's Motions to Dismiss under Rule 12(b)(6), Plaintiffs proffered various iterations of the ASA Bylaws as well as select pages from John Stephens' deposition. *See* App. 241 – 290. Those exhibits, however, provide no support for Plaintiffs' claims. In response to the Anti-SLAPP Motions, they submitted no exhibits, referenced no documents from the federal case, and proffered no evidence to support their claims. Appellants argue that they had no obligation to submit affirmative evidence, because they "quote[] extensively from Defendants' own documents." Br. at 45. They also claim that "Defendants' answers admitted the accuracy of most of the quotations in the complaint." *Id.* This position is both legally and factually mistaken.

As a legal matter, a litigant may not rely on the allegations in the pleadings to meet the second prong of the Anti-SLAPP analysis. As this Court has noted, "the Act's special motion to dismiss is in essence an expedited summary judgment motion." *Banks v. Hoffman*, ___ A.3d ___, No. 20-CV-0318 at 19 (D.C. Sept. 7, 2023). If, as the *Banks* court held, an Anti-SLAPP motion must be treated like a

motion for summary judgment, then the same standard for proffer of evidence must apply. It is well-established that in opposing a motion for summary judgment, a party may not rely on the allegations in the pleadings. *See, e.g., Miller v. American Coalition of Citizens with Disabilities, Inc.*, 485 A.2d 186, 191 (D.C. 1984) (party opposing summary judgment must proffer evidence under oath); *Ferguson v. District of Columbia*, 629 A.2d 15, 19 (D.C. 1993) (expert's unsupported assertion insufficient to create issue of fact to defeat summary judgment); *Capital Construction Co., Inc. v. Plaza West Cooperative Assn., Inc.*, 604 A.2d 428, 432 (D.C. 1992); *Yates v. District Clothing*, 241 A.2d 596, 599 (D.C. 1969) ("Appellant may not hold back any evidence or fail to make full disclosure of the facts upon which [s]he relied for recovery. Disclosure under summary judgment must be full and complete."). *See also Clampitt v. Amer. Univ.*, 957 A.2d 23, 36 (D.C. 2008) (to avoid summary judgment, plaintiff was required to "set forth significant probative evidence …"); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968), *on reh'g*, 424 F.2d 854 (D.C. Cir. 1970).

Appellants' reliance on *U.S. Bank Trust v. Omid Land Grp.*, 279 A.3d 374 (D.C. 2022) is misplaced. In that case, the plaintiff moved to amend the complaint on the same day that dispositive motions were due; its opposition to a motion for summary judgment incorporated the arguments made in its motion to amend. The trial court, however, denied the motion to amend and refused to consider the

amended complaint. As this Court noted, however, "the amended complaint alleged, based on properly authenticated documentary evidence in the record, that the condominium foreclosure sale was invalid …" *Omid*, 279 A.3d at 381. Since the amended complaint and the "authenticated documentary evidence" had been part of the argument on summary judgment motions, it was deemed an abuse of discretion to ignore it completely. *Omid*, however, does not stand for the proposition that summary judgment might be opposed without any affirmative evidence whatsoever.

As a factual matter, Appellants' argument is absurd. The Defendants to this brief (as opposed to co-Defendants, who have not yet filed Answers) did admit that certain quoted language in specific paragraphs of the Complaint could be found in published articles (App. 197) and ASA governing documents (App. 202), but that does not mean that Defendants "admitted" that Plaintiffs had accurately quoted any particular document, or that the interpretation that Plaintiffs gave any such e-mail was correct. *See, e.g.*, App. 215 – 217, ¶¶ 178 – 186.[12] As the Defendants have generally denied any allegation as to the context or accuracy of any quotation, Plaintiffs would have had to produce the actual document to show that their

[12] It is also illustrative that, in their Brief, Appellants do not point to any particular paragraph or quotation that Defendants have supposedly "admitted," and thus that any specific point has been established. Where concrete examples are lacking, Appellants' sweeping generalization is unwarranted.

assertions were correct. Absent affirmative evidence, the Professors have nothing but unverified allegations.

Appellants' failure to specify *which* quotations they believe were admitted is material in another way. The vast majority of the quotations that Appellants claim were "admitted" were purportedly made during the period from 2012 to 2013, and partly into 2014, when the Resolution was being proposed, adopted and then initially defended (*see* those citations to the Joint Appendix contained in Appellants' Brief at 23). Any claims from this time period are barred by the statute of limitations. As such, these claims had no likelihood of success; no amount of affirmative evidence could save them.

By contrast, the Professors point to no material quoted in the Complaint that might support those claims that are not time-barred: specifically, the Association's alleged declining financial health, and the reasons for non-renewal of Bronner's contract. There is no financial data anywhere in the record to suggest that adoption of the Resolution had any effect on ASA's finances, and, as discussed above, the Professors' allegations concerning annual contributions and ASA's investments are simply not credible. The second prong of an Anti-SLAPP analysis required production of, at a minimum, ASA's Form 990s (themselves publicly available), as well as those financial records that would show an actual loss of revenue. The Professors claimed that they obtained all this information in discovery in the

federal suit; there was no bar to presenting it to the Superior Court. Plaintiffs failed to even proffer any evidence to suggest that ASA faced financial difficulties.

As for the termination of Bronner's position as Editor: again, the contract unambiguously permitted non-renewal. The National Council's motivation is irrelevant, and none of the quotations in the Unredacted Complaint can save that claim. Notably, Plaintiffs proffered absolutely no affirmative evidence (as opposed to allegation) as to the value of the Encyclopedia, the levels of readership before and after the termination, nor even the rate of article submissions. They did not even produce evidence as to Bronner's "reputational damage and lost prospects for speaking at conferences." (App. 137, ¶ 325).

It should also be noted that those quotations relied on by the Professors as evidence of the viability of their claims are, in the main, either expressions of support for the Palestinian cause or derision of the Professors' opposition to the Resolution – as if the only evidence that could be pertinent to this litigation goes to Defendants' political views. Once again, Appellants' own arguments clarify that this is a SLAPP suit. The Professors' argument, that they "provided ample evidence," is groundless (*see* Br. at 45). With the exception of ASA's governing documents, the Professors put no evidence of any kind into the record. Nor, for that matter, have they properly proffered any evidence. As noted above, with very few exceptions, the Defendants did not admit that any of the quotations in the

Complaint were accurate, and certainly did not admit that the Professors' interpretation of those quotations was appropriate. Without the underlying documents in the record, those quotations are not evidence: they are simply unadmitted allegations.

CONCLUSION

For the reasons argued above, four of the Counts in the Complaint, although not within the scope of the Anti-SLAPP Act, are nonetheless time-barred, and were properly dismissed under Rule 12(b)(6). The remainder of the Counts all arise out of an act "in furtherance of the right of advocacy on issues of public interest," and the first prong of the Anti-SLAPP analysis is thus met. Having established the *prima facie* case, the Professors were required to produce affirmative evidence to show that their claims were likely to succeed on the merits. Based on the allegations in the Complaint, none of these Counts had any viability, and Plaintiffs did not produce a single piece of evidence to show any likelihood of success. They failed to meet the second prong of the Anti-SLAPP analysis, and their claims were properly dismissed pursuant to the Anti-SLAPP Act.

Appellees, the American Studies Association, Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, and John Stephens, respectfully request that this Court affirm the judgment of the Superior Court.

Respectfully submitted,

/s/ Thomas C. Mugavero

Thomas C. Mugavero, Esquire (#431512)
Jeff C. Seaman, Esquire (#466509)
WHITEFORD, TAYLOR & PRESTON LLP
3190 Fairview Park Drive
Suite 800
Falls Church, VA 22042
(703) 280-9273
(703) 280-8948 (facsimile)
[redacted]
Attorneys for Appellants, American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar

STATUTES AND RULES RELIED UPON

§ 16–5502. Special motion to dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes 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, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2023, a copy of the Appellees' Brief was served on the following through the Court's electronic filing system:

Jennifer Gross, Esq.
The Deborah Project, Inc.
7315 Wisconsin Avenue
Suite 400 West
Bethesda, MD 20814

Jerome M. Marcus, Esq.
Jonathan Auerbach, Esq.
Marcus & Auerbach LLC
1121 N. Bethlehem Pike, Suite 60-242
Spring House, PA 19477

Seth P. Waxman, Esq.
Julie Aust, Esq.
Wilmer Cutler Pickering Hale and Dorr, LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037

Mark Allen Kleiman, Esq.
Richard Renner, Esq.
12121 Wilshire Blvd., Ste. 810
Los Angeles, CA 90025

Maria C. LaHood, Esq.
Astha Sharma Pokharei, Esq.
Shayana D. Kadidal, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

/s/ Thomas C. Mugavero
Thomas C. Mugavero

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

23-CV-240
Case Number(s)

THOMAS C. MUGAVERO, ESQ.
Name

OCTOBER 19, 2023
Date

[redacted]
Email Address