SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, *et al.*,

Plaintiffs,

v.

THE AMERICAN STUDIES ASSOCIATION, *et al.*,

Defendants.

Case No. 2019 CA 001712 B
Judge Robert R. Rigsby

AMENDED ORDER[1]

This matter is before the Court on six motions: 1) Special Motion to Dismiss of Defendants Kauanui and Puar Pursuant to D.C. Code § 16-5501, filed on May 6, 2019; 2) Defendants Kauanui and Puar's Motion to Dismiss Complaint, filed on May 6, 2019; 3) Motion to Dismiss on Behalf of Defendants American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, filed on May 6, 2019; 4) Motion to Dismiss Under Anti-SLAPP Act on Behalf of Defendants American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, filed on May 6, 2019; 5) Motion to Dismiss on Behalf of Neferti Tadiar, filed May 6, 2019; and 6) Steven Salaita's Opposed Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.*, and, in the Alternative, Motion to Dismiss Pursuant to Super. Ct. Civ. R. 12(b), filed on June 7, 2019. The Court discusses each below.

[1] This Amended Order is being issued to remove the seal requirement and to correct one error in the ordered language which incorrectly stated that Defendant Salaita was dismissed from Count II. As discussed in the body of the Order, Defendant Salaita was supposed to be dismissed from Count I.

BACKGROUND[2]

I. The American Studies Association

In 1951, the American Studies Association ("ASA") was founded for the purpose of advancing the academic field of American Studies. Compl. ¶ 28. The ASA's constitution expressly states that the object of the ASA is the "promotion of the study of American culture through the encouragement of research, teaching, publication, the strengthening of relations among persons and institutions in this country and abroad devoted to such studies, and the broadening of knowledge among the general public about American culture in all its diversity." *Id.* In 1971, the ASA elected to be bound by the District of Columbia Nonprofit Corporation Act. Compl. ¶ 30. The Statement of Election reaffirmed that the ASA had been organized for educational and academic purposes. *Id.* The Statement of Election also mandated that the ASA was prohibited from devoting a "substantial part of [its] activities" to "the carrying on of propaganda, or otherwise attempting, to influence legislation," and from participating or intervening in political campaigns. Compl. ¶ 31.

Any individual who is interested in the study of American culture can become a member of the ASA upon the "payment of one year's individual dues."[3] Compl. Ex. 1 ("ASA Constitution and Bylaws") ASA Constitution Art. II, Sec. 1(a). Members who are in good standing "have the right to vote or hold office in the [ASA]." ASA Constitution Art. II, Sec. 3.

The ASA originally had five officers: the president, the vice president, the executive director, the editor of the American Quarterly, and the Editor of the Encyclopedia of American

[2] For the purposes of this Order, the Court assumes that the facts as alleged in Plaintiffs' Un-Redacted Complaint are true.

[3] The Constitution also provides for two other types of members. First, it permits cultural or educational non-profit organizations interested in the study of American culture to become members upon the payment of institutional dues. ASA Constitution Art. II, Sec. 1(b). Second, it allows for honorary members who are elected by the National Council and are exempt from dues. ASA Constitution Art. II, Sec. 1(c).

Studies. ASA Constitution Art. IV, Sec. 1. Two, the president and vice president, are elected, while the remainder are appointed by an Executive Committee (described below) with ratification of two-thirds of the voting members of a National Council (described below). ASA Constitution Art. IV, Sec 1. The vice president is elected for a one year term by the membership at large from a selection of two nominees, who are chosen by a Nominating Committee (described below). ASA Constitution Art. IV, Sec. 3. After serving one year as vice president, that individual then automatically serves one year as president of the ASA. ASA Constitution Art. IV, Sec. 2.

The ASA is run by a National Council which is comprised of the president, the vice president, the immediate past president, thirteen elected members, two elected student members, one elected secondary education member, one elected international member, and the three appointed officers who are non-voting members. ASA Constitution Art. V, Sec. 1. The Council is responsible for conducting the business, setting fiscal policy, and overseeing the general interests of the ASA. ASA Constitution Art. V, Sec. 2. The Council conducts all its business at annual business meetings, at least one of which must be held each year. *Id.*

The Executive Committee is responsible for transacting "necessary business in the interim between the annual business meetings of the Council." ASA Constitution Art. V, Sec. 3. The Executive Committee is comprised of six individuals: the president, the vice president, the immediate past president, and three voting members of the Council, who are elected by the Council. ASA Constitution Art. V, Sec 3. The financial affairs of the ASA are managed by the Finance Committee, which is comprised of the vice president, three voting members of the Council, who are elected by the Council, and the executive director, serving as a non-voting member. ASA Constitution Art. V, Sec. 4.

Any member interested in holding an elected position must be nominated for the position. Nominations can be made either by petitions carrying the signatures of at least twenty-five members or by the Nominating Committee. ASA Constitution Art. VI, Sec. 2-3. The Nominating Committee is comprised of six members, elected by the membership at large, and is headed by a chair appointed by the president from among the committee's membership. ASA Constitution Art. VI, Sec. 1. The Nominating Committee is responsible for presenting two nominees for each elected position to stand for election before the membership at large. ASA Constitution Art. VI, Sec. 2, 4. The nominees are required to be "representative of the diversity of the association's membership." ASA Constitution Art. VI, Sec. 2.

When issues of public interest arise, the Executive Committee is permitted to speak on behalf of the ASA on those public issues that directly affect the work of its members as scholars and teachers or directly affect the ability of the ASA to meet and conduct its business. ASA Bylaws Art. XI, Sec. 1. If an issue arises which either the Executive Committee or the Council thinks requires public action, speech or demonstration by the association at a particular meeting, then the Council must meet to formulate a response. ASA Bylaws Art. XI, Sec. 3. The Council then must convene an emergency meeting of the membership on the first day of the annual meeting to recommend a course of action and conduct a public discussion. *Id.* After the discussion, a "vote of two-thirds of those in attendance may approve the recommended action." *Id.*

II. The United States Association for the Academic and Cultural Boycott of Israel and the Palestinian Campaign for the Academic and Cultural Boycott of Israel

The Palestinian Campaign for the Academic and Cultural Boycott of Israel ("PACBI") was founded by Omar Barghouti when he was working and studying at Tel Aviv University in 2009. Compl. ¶ 37. Barghouti allegedly does not believe in a two-state solution; instead he and

PACBI call for "a complete right of return to the land we now know as Israel for people who claim to be descendants of Arabs who left Israel at the beginning of the 1948 war." Compl. ¶ 38. Allegedly, the only way to allow for a "complete right of return" is to ensure the end of the state of Israel as a Jewish state. *Id.*

In 2009, pro-Palestinian activists formed the United States Campaign for the Academic and Cultural Boycott of Israel ("USACBI"), a US based campaign which encourages the boycott of Israeli academic and cultural institutions. Compl. ¶ 35. The mission of USACBI is defined as: "Responding to the call of Palestinian civil society to join the Boycott, Divestment and Sanction movement against Israel, we are a U.S. campaign focused specifically on a boycott of Israeli academic and cultural institutions, as delineated by PACBI." Compl. ¶ 36. Their boycott "proscribes any academic engagement with Israeli universities, including intellectual discourse, collaboration on research, and even study abroad programs" until the complete right of return has been satisfied. Compl. ¶¶ 35, 39.

USACBI is run by an Organizing Committee and Advisory Board, which primarily strategize ways to encourage academic associations and institutions to adopt the boycott of Israeli academic institutions. Compl. ¶ 43. USACBI does not have its own budget, instead it partners with other organizations, encouraging them to join the boycott, to further its agenda. Compl. ¶ 44.

III. Infiltration of the ASA

Beginning in 2010, Plaintiffs allege that members of USACBI began to infiltrate the ASA with the intention of having the ASA join the boycott of Israeli academic and cultural institutions. *See* Compl. ¶¶ 61-77. From 2012 to 2016, every president of the ASA was a member or supporter of USACBI. Compl. ¶ 53. In the 2013 elections, seven of the twelve nominees were

supporters of the USACBI and were interested in having the ASA join the boycott. Compl. ¶ 63. Plaintiffs allege that this selection of nominees was a violation of the ASA's bylaws because the nominees were not representative of the general population's opinion on the boycott. Compl. ¶ 64 (Plaintiffs allege that there were 800 USACBI endorsers in 2013 and 4,000 ASA members, so even if all 800 endorsers were ASA members, which they were not, at most only 20% of the ASA would have supported the boycott, which is a much smaller percentage than the 58% of the nominees who were boycott supporters).

During the course of their campaigns, none of the nominees indicated that they wanted the ASA to join the boycott or stated that they were USACBI supporters. Compl. ¶¶ 66-68. Plaintiffs further allege that the nominees actively coordinated and planned to conceal their association and interest in the USACBI from the ASA membership in order to get elected. Compl. ¶ 69. Plaintiffs allege that Defendants Puar, Kauani, Maira, Marez, and Duggan all hid their intent to join the USACBI boycott when they ran for positions in the ASA and thusly breached their fiduciary duty of candor owed to ASA members. Compl. ¶ 72. They further breached their duty of loyalty by encouraging the ASA to engage in *ultra vires* actions, manipulating the nomination process, and packing the ASA leadership with USACBI supporters. *Id.*

IV. Lead up to the 2013 Annual Meeting

In 2012, Defendants Sunaina Maria and Malini Johar Schueller, both supporters of the USACBI, became co-leaders of the Academic and Community Activism Caucus ("Activism Caucus"). Compl. ¶ 79. The Activism Caucus is an ASA sponsored Caucus of ASA members intended to provide a network and resource exchange for scholars within the ASA interested in academic activism and social justice within American Studies. Compl. ¶ 78. In late 2012,

Defendants Mairia and Schueller began to use the Activism Caucus and its resources, such as its website, to promote adoption of the USACBI to the exclusion of other relevant issues in American Studies at that time. Compl. ¶¶ 82-83. At the 2012 Annual Meeting in particular, the Activism Caucus worked to foster interest in joining the USACBI boycott. Compl. ¶ 84. Bill Mullen, a member of USACBI, manned a table at the Annual Meeting where he asked ASA members entering the meeting to sign a petition endorsing a resolution to join the USACBI boycott. *Id.* Fewer than 150 members signed the petition.[4] Compl. ¶ 85.

Despite this alleged lack of interest, at the 2012 National Council meeting held during the Annual Meeting, the National Council addressed the topic of a resolution and circulating a petition to join the USACBI boycott. Compl. ¶ 87. Defendant Marez, vice president at the time, announced that he planned to organize "a major plenary session, entitled 'Town Hall: The United States and Israel/Palestine' at the 2013 Annual Meeting." *Id.* The president at the time, Matthew Frye Jacobson, noted that several of the ASA caucuses had drafted statements or resolutions about the boycott which were to be vetted at the caucus meetings during the 2012 Annual Meeting. *Id.*

In May 2013, the Executive Committee held a meeting. Compl. ¶ 89. The Executive Committee refused to adopt a resolution in support of the USACBI Boycott, but Defendants were informed that the National Council would discuss the matter at the 2013 Annual Meeting. *Id.* In June 2013, several new individuals appear to have begun terms on the National Council. Compl. ¶ 90. In 2013, nine of the twenty voting members on the National Council were USACBI supporters. *Id.*

[4] The ASA continued to circulate the petition until the next Annual Meeting. Compl. ¶ 95. At the next meeting, Plaintiffs allege that between 400 and 450 individuals had signed the petition, though Defendants stated that 800 people had signed the petition. Compl. ¶ 96.

V. The 2013 Annual Meeting

At the 2013 Annual Meeting, the ASA planned to hold several sessions which touched on the USACBI boycott or topics related to the boycott.[5] Compl. ¶¶ 91-92. Plaintiffs allege that the leadership of the ASA intentionally decided only to invite those scholars who were pro-boycott and refused to present any individuals who would have a negative opinion on the boycott. Compl. ¶ 92. In an attempt to facilitate bringing particularly sympathetic scholars to the meeting, i.e. those scholars who had faced severe difficulties in traveling from universities in Israel due to their opinions on the Israel/Palestine Conflict, the ASA leadership discussed using ASA resources to provide the scholars with a waiver of registration, a travel stipend, and hotel rooms.[6] Compl. ¶¶ 92-94. In addition, throughout planning these sessions, the ASA leadership was heavily in contact with USACBI leaders to receive feedback about the best way to convince members to join the boycott. Compl. ¶¶ 99-101.

In the weeks immediately predating the 2013 Annual Meeting, the National Council attempted to adopt a resolution joining the USACBI boycott without putting it to a vote of the membership. Compl. ¶ 103. No such agreement could be reached, thus the National Council agreed that it would unanimously endorse the resolution to join the boycott while also requiring the membership to vote on endorsing the decision as well. *Id.*

After this decision was reached, Plaintiffs allege that the individual Defendants began to use their positions within the ASA to ensure that any individuals who spoke out against joining the boycott were silenced. Compl. ¶ 105. For example, Plaintiff Simon Bronner, who was the editor of the Encyclopedia of American Studies and a member of the Executive Committee and National Council as a result of that position, was removed from the November 25, 2013 National

[5] While it seems clear that several sessions were planned, it is unclear whether these sessions were actually held.
[6] Though it appears that this was discussed, Plaintiffs have not alleged that any funds or complementary rooms were provided to speakers who attended the conference.

Council meeting due to his opinion that the ASA should not join the boycott. Compl. ¶¶ 107-111. Letters written by ASA members in opposition to the boycott were never published, circulated, or provided to the ASA membership at large. Compl. ¶¶ 112-16. Defendants formed a subcommittee, comprised of USACBI leaders and supporters, to create, revise, and distribute, with USACBI input, materials in support of the boycott. Compl. ¶¶ 117-22. Defendants also planned to use ASA resources to pay for public relations professionals due to outraged opinions that could potentially surface as a result of these actions. Compl. ¶ 122. Finally, Defendants enacted an unprecedented freeze of the membership rolls. Compl. ¶ 123. On November 25, 2013, before announcing that the membership at large would vote on this issue, Defendants froze the membership rolls in an attempt to prevent those opposed to joining the boycott from voting on the resolution. Compl. ¶ 123-37. As a result, Plaintiff Michael Barton, who had been vocal in his opposition to the boycott, was prevented from voting on the resolution due to this freeze because he paid his dues and renewed his membership on the day of the vote. Compl. ¶¶ 127-28.

In December 2013, the ASA held its 2013 Annual Meeting. Compl. ¶ 139. At the annual meeting, the ASA held a vote on adopting the resolution to join the USACBI boycott.[7] *Id.* Of the ASA's 3,853 registered and eligible members at the time of the 2013 Annual Meeting, only 1,252 attended the annual meeting, and only 827 voted in favor of the resolution. *Id.* The leadership of the ASA decided that this vote indicated that the membership had adopted the resolution. Compl. ¶ 9. The resolution passed at the 2013 annual meeting called for the ASA to adopt the USACBI and PACBI's positions on the Israel/Palestine Conflict. Compl. ¶ 148.

[7] It is not clear on which day of the Annual Meeting the ASA held the vote on the resolution adopting the boycott; Plaintiffs only allege that the vote was not held on the first day of the Annual Meeting.

VI. Use of ASA Resources after the Resolution

Plaintiffs allege that the adoption of the boycott significantly harmed the ASA's financial position in the years after it adopted the boycott. The ASA has a Trust and Development Fund. Compl. ¶ 162. From June 20, 2008 to June 30, 2015, no withdrawals had been made from that fund. *Id.* From July 1, 2015 to June 30, 2016, the ASA's fiscal year, Defendants withdrew over $112,000 from the trust fund. Compl. ¶ 163. Plaintiffs allege these funds were used to cover expenses related to the boycott and to cover the decline in revenue following the adoption of the boycott. *Id.* In order to permit the large withdrawals, Defendants had to make significant changes to the ASA's bylaws, which they did without informing the members. Compl. ¶¶ 164. Despite the changes to the bylaws, Plaintiffs allege that Defendants' withdrawal and use of the money from the fund was still in contravention of the approved procedures and use in the bylaws. Compl. ¶¶ 169-74.

In addition to utilizing ASA resources, the boycott also caused the ASA to suffer financial injury in the form of decreased revenues. Compl. ¶ 176-85. First, member contributions decreased after adopting the boycott. Prior to adopting the boycott, the ASA received $50,394 on average in annual member contributions. Compl. ¶ 176. Contributions dropped to $31,548 in 2012, $33,080 in 2014 and $31,456 in 2015.[8] Compl. ¶178. Second, revenue received from membership fees also decreased after adopting the boycott. Prior to the adopting the boycott the ASA received an average of $266,948 in membership fees. Compl. ¶ 182. Revenue from membership fees fell 14% in 2012 when the topic of the boycott was brought up to the ASA members. Compl. ¶ 183.

[8] Plaintiffs acknowledge that these low numbers are not entirely unheard of; in 2008 member contributions were only $30,556 and in 2009 they were only $33,959. Plaintiffs attribute the low contribution amount in those years to the economic recession rather than any action taken on behalf of the ASA. Compl. ¶ 176.

The ASA's expenses also increased as a result of the boycott. Compl. ¶¶ 186-96. The ASA has had to hire a media strategist, pay for additional travel to conferences, as well as fund special programs to defend the ASA's reputation. Compl. ¶ 186. The ASA has even had to contemplate creating separate budgets for the ASA's boycott in an attempt to deal with these extra expenditures. Compl. ¶ 195.

VII. Treatment of Plaintiff Bronner

After the resolution was adopted, Plaintiff Bronner was targeted by the leadership of the ASA for his opinion against the boycott. First, Plaintiff Bronner alleges that Defendants began to exclude Plaintiff Bronner from National Council meetings before his term as Editor of the Encyclopedia of American Studies ("the Encyclopedia") was concluded. Compl. ¶ 216. As Editor of the Encyclopedia, Plaintiff Bronner was a member of the Executive Committee and National Council. *See supra* Sec. I. Prior to the 2013 resolution, Plaintiff Bronner had been involved in the work done by both the Executive Committee and National Council. Compl. ¶ 216. In 2014, however, the leading members of the ASA intentionally began to minimize his presence at meetings and exclude him from as many meetings as possible. Compl. ¶ 217-220. Plaintiff Bronner alleges that this attempt to freeze him out was done solely because of his views on the boycott. Compl. ¶ 210.

Second, Plaintiff Bronner alleges that the ASA intentionally targeted him by refusing to reappoint him as Editor of the Encyclopedia. Compl. ¶¶ 234-35. The Encyclopedia was established in 2001 by Miles Orvell as a joint project between the ASA and Johns Hopkins University Press ("JHUP"). Compl. ¶ 197. In 2013, the ASA purchased the Encyclopedia from JHUP for $18,000.00 and agreed to pay JHUP $15,000.00 annually through December 2019 to host the Encyclopedia. Compl. ¶ 200.

Plaintiff Bronner took over as Editor on October 15, 2011, after Mr. Orvell resigned. Compl. ¶ 198. Plaintiff Bronner alleges that his contract, which did not begin until 2014, provided for renewals at the end of every term, and that prior to Plaintiff Bronner, the ASA had, as a matter of course, renewed the Editor's contract at the end of his term so long as the Editor wished to remain. Compl. ¶ 223.

In 2013, after the resolution had been passed, the leadership of the ASA began to take action against Plaintiff Bronner by limiting his involvement in the National Council and Executive Committee. Compl. ¶ 216. In 2016, Defendants even went so far as to inappropriately amend the bylaws to strip Plaintiff Bronner of his position as an officer of the ASA. Compl. ¶ 245. This change was made at the November 2016 National Council meeting, and Defendants worked to ensure that Plaintiff Bronner would not be present or provided with the materials of the meeting as they worked to undermine his position. Compl. ¶ 246. Plaintiff Bronner alleges that this change was made intentionally to prevent him from brining a derivative suit. Compl. ¶ 251.

In addition to undermining his position as Editor, Defendants were working to remove Plaintiff Bronner from the position entirely. Defendants decided to fake an open call for a new editor and encouraged Plaintiff Bronner to apply, despite the fact that they had predetermined that they would not renew his contract. Compl. ¶¶ 224, 226. In reality, Defendants were personally soliciting Sharon Holland to step into the position as soon as Plaintiff Bronner's contract expired. Compl. ¶ 228. No open call for applications was ever sent out; however, after the 2016 National Council meeting, which Plaintiff Bronner was not invited to, the ASA announced that Ms. Holland was the new Editor of the Encyclopedia. Compl. ¶¶ 234-235. Since Ms. Holland's appointment, no new entries or updates have been made to the Encyclopedia.

Compl. ¶ 236. Plaintiffs allege that the Encyclopedia is now shut down. Compl. ¶ 242. As a result of Defendant's failure to renew his contract, Plaintiff lost $8,500 a year, as well as opportunities to speak at conferences. Compl. ¶ 258.

VIII. Procedural History

In April 2016, Plaintiffs filed suit in the District Court for the District of Columbia. On March 31, 2017, the District Court found that Plaintiff had failed to satisfy the procedural requirements for bringing a derivative action under D.C. code § 29-411.03(2) and accordingly dismissed the derivative claims brought on ASA's behalf. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 52 (D.D.C. 2017). On March 6, 2018, the District Court granted Plaintiffs leave to file a Second Amended Complaint. *Bronner v. Duggan*, 324 F.R.D. 285, 295 (D.D.C. 2018). On February 4, 2019, the District Court reviewed the Second Amended Complaint to determine whether it had subject matter jurisdiction and concluded that Plaintiffs did not meet the amount in controversy requirement. *Bronner v. Duggan*, 364 F. Supp. 3d 9, 21 (D.D.C. 2019). The District Court accordingly dismissed Plaintiffs' suit for lack of subject matter jurisdiction. *Id.* at 23.

Plaintiffs filed this suit on March 15, 2019 alleging twelve counts. All defendants moved to dismiss under D.C. Code § 16-5501, *et seq.* and Super. Ct. Civ. R. 12. On July 17, 2019, the Court held a hearing on Defendant's Motions to Dismiss. These motions are now ripe for adjudication.

STANDARD OF REVIEW

I. Super. Ct. Civ. R. 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007). A plaintiff's

complaint must contain a short and plain statement of the claim for relief, such that the complaint "puts the defendant on notice of the claim against him." *Sarete, Inc. v. 1344 U St. Ltd. P'Ship*, 871 A.2d 480, 497 (D.C. 2005); *see generally* Super. Ct. R. Civ. P. 8(a). A complaint must, at a minimum, contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Super. Ct. Civ. R. 8(a)(2).

When considering a motion to dismiss, the Court must accept as true all of the allegations put forth in the complaint, and construe all facts and inferences in favor of the non-moving party. *See Murray v. Wells Fargo Home Mort.*, 953 A.2d 308, 316 (D.C. 2008). Dismissal for failure to state a claim upon which relief can be granted is warranted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *See id.* However, the allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Additionally, the complaint must provide more than mere labels and legal conclusions couched as fact. *See Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). The complaint need not include "detailed factual allegations," but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Mazza v. House Craft, LLC*, 18 A.3d 786, 790 (D.C. 2011).

II. Anti-SLAPP Act (D.C. Code § 16-5502(a))

"A 'SLAPP' (strategic lawsuit against public participation) is an action 'filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (quoting legislative history). The Anti-SLAPP Act tries "to deter SLAPPs by 'extend[ing] substantive rights to defendants in a SLAPP, providing them with the ability to file a special

motion to dismiss that must be heard expeditiously by the court.'" *Id.* at 1235 (quoting legislative history). "Consistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights, true SLAPPs can be screened out quickly by requiring the plaintiff to present her evidence for judicial evaluation of its legal sufficiency early in the litigation." *Id.* at 1239.

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protections of the Act by 'mak[ing] 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.'" *Mann*, 150 A.3d at 1227 (quoting D.C. Code § 16-5502(b)). "Once that prima facie showing is made, the burden shifts to the nonmoving party, usually the plaintiff, who must 'demonstrate[] that the claim is likely to succeed on the merits.'" *Mann*, 150 A.3d at 1227 (quoting § 16-5502(b)). "[O]nce the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Id.* at 1233. "[I]n considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id.* at 1232. "This standard achieves the Anti-SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles, while preserving the claimant's constitutional right to a jury trial." *Id.* at 1232-33.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Mann*, 150 A.3d at

1227. Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice." Section 16-5502(d) also requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing."

ANALYSIS

I. Motions to Dismiss Pursuant to Rule 12(b)(6)

Each Defendant has moved to dismiss all claims in Plaintiffs' Complaint under Super. Ct. Civ. R. 12(b)(6). The Court reviews each argument below.

A. Statute of Limitations

Defendants first allege that the statute of limitations bars all of Plaintiffs' claims, except for Counts X and XI. The parties agree that the events alleged in Counts I-IX and XII all occurred prior to March 2016. Defendants thus allege that the claims are barred by the statute of limitations because they occurred prior to March 2016, and the suit in the District Court did not toll the statute of limitations. Plaintiffs allege that the statute of limitations does not bar their claims for three reasons: (1) tolling pursuant to 28 U.S.C. § 1367; (2) equitable tolling; and (3) the discovery rule.

First, Plaintiffs allege that their claims were tolled pursuant to 28 U.S.C. § 1367. Specifically, Plaintiffs argue that the nonderivative claims originally filed in the District Court must be construed as supplemental to the derivative claims because the nonderivative claims were not dismissed until the Court dismissed the derivative claims. The Court disagrees.

28 U.S.C. § 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." For claims brought under supplemental jurisdiction, the statute of

limitations is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d). If Plaintiffs' claims were brought supplementally, the statute of limitations would not have run on those claims since Plaintiffs brought their suit only a year and a half after the incidents alleged in this case occurred.

At the time of dismissal, Plaintiffs' Second Amended Complaint was the only governing complaint before the District Court. *See Adams v. Quattlebaum*, 219 F.R.D. 195, 197 (D.D.C. 2004) (citing *Washer v. Bullitt County*, 110 U.S. 558, 562 (1884)) (recognizing that any amended pleading supersedes a prior pleading); *see also* Fed. R. Civ. P. 15. Thus, in order to determine which of Plaintiffs' claims were brought under original or supplemental jurisdiction in the District Court, the Court only needs to review the claims brought in the Second Amended Complaint.

With the exception of the Claims brought specifically on behalf of Plaintiff Bronner (Counts X and XI) and Count XII for aiding and abetting, the claims brought in this suit appear to be identical to those brought in the District Court. Compl. at pgs. 2-3; *Bronner v. Duggan*, 364 F. Supp. 3d 9, 14 (D.D.C. 2019). The District Court's order and a review of the claims brought in the District Court make it clear that Plaintiffs brought all their claims under original jurisdiction.

First, Plaintiffs have continually alleged that the claims in this suit, which mirror the Second Amended Complaint, are not derivative. *See* Pls.' Opp'n 12(b)(6) at 9. The Court agrees that the claims brought here are not derivative, as discussed more in-depth below. If the claims brought here are not derivative, then none of the claims brought in the Second Amended Complaint were derivative either. Thus, none of these claims could be the "derivative claims" that Plaintiffs allege formed basis for jurisdiction in the District Court. Since there were no derivative claims, Plaintiffs' claims all must have been brought under original jurisdiction.

Second, in the District Court case, Plaintiffs argued that the District Court had original jurisdiction under 28 U.S.C. § 1332(a). *Bronner*, 364 F. Supp. 3d at 16. Plaintiffs were thus arguing that the Court has original jurisdiction over all their claims, not just a portion of them.

Finally, the order of dismissal in the District Court makes it clear that Plaintiffs were attempting to seek original jurisdiction over their claims. In the February 4, 2019 order dismissing Plaintiffs' suit for lack of subject matter jurisdiction, the District Court found that Plaintiffs could not meet the amount in controversy because they were improperly seeking damages on behalf of the ASA. *Bronner*, 364 F. Supp. 3d at 18-21. The District Court recognized that while Plaintiffs might be able to bring their claims for breach of fiduciary duty directly as dues paying members of a member-funded association, the District Court found that those claims did not permit Plaintiffs to seek damages on behalf of the ASA; rather, Plaintiffs were only permitted to seek the damages they had personally suffered for these breaches. *Bronner*, 364 F. Supp. 3d at 21. After the damages being brought on behalf of the ASA were removed, the District Court found that the remaining damages suffered by the individual Plaintiffs did not meet the required amount in controversy to satisfy subject matter jurisdiction and accordingly dismissed Plaintiffs' complaint. *Bronner*, 364 F. Supp. 3d at 21-22. Thus, the Court must conclude that there were no derivative claims brought in the Second Amended Complaint, and thus, Plaintiffs sought original jurisdiction for all their claims.

Since Plaintiff's claims were all brought under the District Court's original jurisdiction, 28 U.S.C. § 1367(d) does not apply to toll the statute of limitations for these claims. As Plaintiffs' claims stem from actions that occurred prior to March 2016, Plaintiffs claims are barred by the statute of limitations in this suit unless some other tolling provision applies. *See Bond v. Serano*, 566 A.2d 47, 49 (D.C. 1989) (holding that filing suit in federal court prior to the

statue of limitations which is subsequently dismissed for lack of subject matter jurisdiction does not toll the statute of limitations for a later state suit).

Second, Plaintiffs allege that equitable tolling should apply to the facts of this case. In *Bond v. Serano*, 566 A.2d 47, 49 (D.C. 1989), however, the Court of Appeals expressly found that equitable tolling should not apply when a party selects the wrong forum to litigate. Though Plaintiffs alleges this case is analogous to *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C. 1991), *Simpson*, is drastically different from the instant case. *Simpson* dealt with an agency appeal where the procedural law governing the suit had recently changed and the Court of Appeals had directed the plaintiff to refile the suit in the Superior Court. *Id.* at 399-402. No such circumstances can be found in the instant suit.

Finally, Plaintiffs argue that either the discovery rule applies to the claims brought here. In the District of Columbia, statute of limitations does not begin to run until the plaintiff has "discovered or should have discovered all the essential elements of a possible cause of action." *East v. Graphic Arts Indus. Joint Pension Trust*, 718 A.2d 153, 158 (D.C. 1998). Since this is a fact specific analysis, the Court will discuss this argument in relations to each claim below.

a. Count I: Breach of Fiduciary Duties Against the Individual Defendants by All Plaintiffs (Material Misrepresentations and Omissions in Connection with Elections to Office and Seeking Member Approval of Academic Boycott and Amendment of the Bylaws

In Count I Plaintiffs allege that the individual Defendants breached their fiduciary duties to the ASA when they failed to disclose:

> (1) their personal political agenda and plan to suborn the [ASA] to advance the purposes of the USACBI by causing the [ASA] to adopt and implement the Academic Boycott, and (2) the expected costs of the Academic Boycott, including, *inter alia*, reputational and financial costs and the loss of good will.

Compl. ¶ 262. Plaintiffs have further represented that they did not learn of the facts underlying this claim until 2017 when, through the discovery process in the District Court, Plaintiffs discovered emails between the individual Defendants which showed that the individual Defendants intentionally withheld their association with the USACBI in an effort to win their elected positions. Pl.'s Opp'n at 13. The Court is persuaded that Plaintiffs would not have known about the individual Defendants' decisions to withhold that information until they received that information in 2017. Therefore, the Court is persuaded that the discovery rule should apply to this claim and that it is not barred by the statute of limitations.

b. Count II: Breach of Fiduciary Duties Against the Individual Defendants by All Plaintiffs (Duty of Loyalty and Good Faith, Misappropriation and Misuse of Assets of the American Studies Association)

In Count II Plaintiffs allege that the individual Defendants breached their fiduciary duties by:

> (1) Misappropriating, misusing and diverting the funds, membership list, reputation, good will, institutional structure, processes and other assets of the [ASA] and its members to further their personal political interests over the interests and mission of the [ASA] and its members, (2) conferring an unequal and unfair advantage to supporters of the Academic Boycott over opponents by manipulating the nomination and voting process, miscounting votes, causing the violation of [ASA] Constitution and bylaws, withholding voting rights from certain members and denying opponents access to the [ASA's] online and other resources to communicate to fellow [ASA] members their opposition to the resolution and (3) subverting the interests and resources of the [ASA] and its members to advance the political goals of an outside party, namely the USACBI.

Compl. ¶ 266. Part of this claim is barred by the statute of limitations, while another part is not. The first part, misuse of the membership lists and funds in order to promote the individual Defendants' own goals, is likely preserved by the discovery rule. If the individual Defendants were trying to misuse the ASA as pled in the Complaint, then the Plaintiffs were likely not aware

of this fact until they received emails stating their purpose in 2017. Thus, this part of the claim is not barred by the statute of limitations.

The second part of the claim, manipulation of the voting process, miscounting votes, and denying members the right to vote, is barred by the statute of limitations. While Plaintiffs allege that they were not aware of the intricacies of the whole process, Plaintiffs were aware most, if not all, of the facts underlying this claim in 2013 or 2014 at the latest. For example, they were aware that Plaintiffs froze the voting rolls when one of the Plaintiffs was not permitted the right to vote on the resolution. Further, who was allowed to vote was known at the time of the vote, or close to the time of the vote. Thus, this part of the claim would be barred by the statute of limitations because Plaintiffs knew, or should have known, about these claims in 2014 or 2014.

The final part of the claim is likely partially barred by the statute of limitations. Shortly after the resolution was passed, Plaintiffs knew, or through diligent research, could have discovered, that ASA funds were being improperly used to support the USACBI. Plaintiff Bronner himself was a member of the leadership board during this period and likely could have easily discovered how funds were being used. This claim does seem to allege, however, that the individual Defendants continue to misuse ASA funds currently. Thus, the statute of limitations has not run on those funds that were allegedly misused from March 2016 to present.

Accordingly, section two of this count is barred by the statute of limitations, but the remaining parts are not.

c. Count III: Ultra Vires and Breach of Contract Action Against All Defendants by All Plaintiffs (Failure to Nominate Officers and National Council Reflecting Diversity of Membership)

In Count III, Plaintiffs allege that the nominating committee failed to nominate candidates for the elected positions in the ASA that were representative of the association's

diversity. Compl. ¶ 269. The Court is not persuaded that this claim is preserved by the discovery rule. Plaintiffs admit that the individual Defendants named in this count were openly associating with the USACBI prior to becoming involved with the ASA. Compl. ¶¶ 54-64. Further, at least Plaintiff Bronner was aware of Defendants' political association prior to the vote on the resolution, or shortly thereafter, through his own role as a member of the National Council and Executive Committee. Thus, Plaintiffs knew or could have discovered this information in 2013 or 2014 at the latest and this Count is barred by the statute of limitations.

d. Count IV: Ultra Vires Action and Breach of Contract Against All Defendants by All Plaintiff (Freezing Membership Rolls to Prohibit Voting)

In Count IV, Plaintiffs allege that Defendants committed an *ultra vires* act when they froze the membership rolls prior to the vote on the resolution. Compl. ¶ 281. This claim is not preserved by the discovery rule. Plaintiffs were aware as soon as Plaintiff Barton was prohibited from voting at the 2013 Annual Meeting that Defendants had committed this act. Further, this act is clearly outside of the three year statute of limitations window. Accordingly, this claim is barred by the statute of limitations.

e. Count V: Ultra Vires Action and Breach of Contract Against All Defendants by All Plaintiff (Substantial Part of Activities Attempting to Influence Litigation)

In Count V, Plaintiffs allege that Defendants acted *ultra vires* when they adopted the resolution joining the USACBI because it was an attempt to influence litigation. Compl. ¶ 295-96. Further, from July 2013 to June 2015, Plaintiffs allege that Defendants consistently tried to influence litigation through the ASA. Compl. ¶¶ 290-91. These claims are not protected by the discovery rule. The actions taken on behalf of the ASA from July 2013 to June 2015, including the resolution in December 2013, were all known to Plaintiffs, or could have easily been

discovered by Plaintiffs, as soon as they were taken. These were official statements and decisions on behalf of the ASA which were known to all involved. Thus, the discovery rule does not preserve these claims. Further, they are outside the three year time period of the statute, and are thus barred.

f. Count VI (In the Alternative): Breach of Contract Against Defendant American Studies Association by All Plaintiffs (Voting Process Contrary to Bylaws)

In Count VI, Plaintiffs allege that Defendants breached the bylaws of the ASA when they held the vote on the resolution. Compl. ¶ 302. Specifically Plaintiffs allege that the resolution was not lawfully passed because:

> (a) the ultimate vote tally, and the only tally publicly available, is not limited to votes cast at the Annual Meeting, but includes votes by hundreds of other members who were not present at the Annual Meeting; (b) a two-thirds majority of the 1,252 members who allegedly voted on the resolution would have been 834 or 835, while the alleged number of those supporting the Academic Boycott falls short; (c) the vote was not held on the first full day of the annual meeting that occurred that year, November 20, 2013.

Compl. ¶ 302. All of this information was known or could have been discovered shortly after the vote in 2013. The information about the vote was announced shortly after the resolution was passed. Compl. ¶ 139. Thus, this claim is not protected by the discovery rule and is barred by the statute of limitations.

g. Count VII (In the Alternative): Breach of D.C. Nonprofit Corporation Act Against Defendant American Studies Association by All Plaintiffs

In Count VII, Plaintiffs allege Defendants violated D.C. Code § 29-405.24 by failing to pass the resolution with a quorum of members. Compl. ¶ 307. Plaintiffs were aware of the number of individuals who had voted on the resolution shortly after the resolution was passed and the results were announced. Compl. ¶ 139. Thus, this claim is not preserved by the discovery rule and is barred by the statute of limitations.

h. Count VIII: Breach of Contract Against Defendant American Studies Association by Plaintiff Barton (Denial of Right to Vote)

In Count VIII, Plaintiffs allege that Defendants breached the bylaws of the ASA when they froze the membership rolls and refused to let members who had recently renewed their membership vote on the decision to adopt the resolution. Compl. ¶ 312-13. As discussed above, Plaintiffs would have been aware of this breach as soon as Plaintiff Barton was denied the right to vote on the resolution in 2013. Thus it is not preserved by the discovery rule and is barred by the statute of limitations.

i. Count IX: Corporate Waste Against All Defendants by All Plaintiffs

In Count IX, Plaintiffs allege that Defendants have committed corporate waste by improperly using the ASA's resources to promote the USACBI. Compl. ¶ 316. Similar to the claims in Count II, some of this waste appears to have been ongoing. Those items of waste that happened prior to March 2016 would be barred by the statute of limitations, but those decisions that happened after March 2016 would not be. Thus, this claim is not barred in its entirety, but Plaintiffs would be prevented from seeking any damages related to actions which occurred prior to March 2016.

j. Count X, Count XI, and Count XII

Counts X, XI and XII were not brought before the District Court. Nevertheless, Defendants have alleged they are barred. Counts X and XI both deal with Plaintiff Bronner's removal from his position as Editor of the Encyclopedia. Plaintiff Bronner was removed from this position in late 2016. Compl. ¶ 234-235. Thus, these claims are not barred by the statute of limitations.

Count XII alleges aiding and abetting breach of fiduciary duty. Compl. ¶ 335. Similar to the above allegations of breach of fiduciary duty it appears that a number of the facts which

underlie this claim were only discovered in 2017. Thus, the discovery rule preserves this claim and it is not barred by the statute of limitations.

k. Conclusion

Accordingly, Count III, Count IV, Count V, Count VI, Count VII, and Count VIII are barred by the statute of limitations and must be dismissed.

B. Collateral Estoppel

Defendants next allege that several of Plaintiffs claims are derivative and therefore precluded by collateral estoppel.[9] Specifically, Defendants argue that the District Court already found that Plaintiffs' are prevented from bringing any derivative claims because Plaintiffs failed to comply with the demand requirements in D.C. Code § 29-411.03 and Plaintiffs could not demonstrate that the pre-suit demand was futile as a matter of law. *See Bronner v. Duggan*, 249 F. Supp. 3d 27, 45-47 (D.D.C. 2017). Plaintiffs allege that these claims are not derivative and thus they should not be dismissed.

A claim is barred by collateral estoppel when "the issue in the new case [is] one that was actually litigated and decided in the prior case, by a final and valid disposition on the merits, after a full and fair opportunity for litigation by the same parties or their privies, where the issue was necessarily decided in disposing of the first action, and not mere dictum." *Smith v. Jenkins*, 562 A.2d 610, 617 (D.C. 1989). Here, there is no dispute that 1) the parties are the same, 2) there was a final decision on the merits when the District Court dismissed Plaintiff's derivative claims, and 3) that District Court necessarily found that Plaintiffs could not bring a derivative claim because they had failed to comply with D.C. Code § 29-411.03. Thus, the only question this Court must decide is whether these claims are derivative claims.

[9] As the Court has already dismissed several claims above, the Court shall only discuss those claims that were not dismissed under the statute of limitations.

"In a derivative action, the shareholder seeks to assert, on behalf of the corporation, a claim belonging not to him but to the corporation." *Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016) (quoting *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 151 (D.C. 2000)). Where a complaint alleges a "'direct, personal interest' in the cause of action," however, the plaintiff has brought a primary suit "even if 'the corporation's rights are also implicated." *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729 (D.C. 2011) (quoting *Franchise Tax Board of Cal. V. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336 (1990)). Further, the Court of Appeals has recognized that

> members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payments of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization.

Id. Courts have wide discretion to determine whether a complaint states a derivative or primary action. *Jackson*, 146 A.3d at 415.

Here, the Court is not persuaded that Plaintiffs brought derivative claims. In Count I Plaintiffs allege that the individual Defendants breached their fiduciary duties to the ASA when they failed to disclose:

> (1) their personal political agenda and plan to suborn the [ASA] to advance the purposes of the USACBI by causing the [ASA] to adopt and implement the Academic Boycott, and (2) the expected costs of the Academic Boycott, including, *inter alia*, reputational and financial costs and the loss of good will.

Compl. ¶ 262. Though inelegantly stated, the Court is persuaded that this suggests a violation of the bylaws or constitution and the duty owed by Defendants to the members of the ASA. Plaintiffs also alleged that they were dues paying members and that a large portion of the ASA's budget came from membership dues. Compl. ¶ 34. Thus, due to Plaintiff's dues-paying member status, they may bring this claim on behalf of themselves, and it is not derivative.

Similarly, in Count II Plaintiffs allege that the individual Defendants breached their fiduciary duty to the ASA by:

> (1) Misappropriating, misusing and diverting the funds, membership list, reputation, good will, institutional structure, processes and other assets of the [ASA] and its members to further their personal political interests over the interests and mission of the [ASA] and its members, (2) conferring an unequal and unfair advantage to supporters of the Academic Boycott over opponents by manipulating the nomination and voting process, miscounting votes, causing the violation of [ASA] Constitution and bylaws, withholding voting rights from certain members and denying opponents access to the [ASA's] online and other resources to communicate to fellow [ASA] members their opposition to the resolution and (3) subverting the interests and resources of the [ASA] and its members to advance the political goals of an outside party, namely the USACBI.

Compl. ¶ 266. This claim specifically states that funds were misused, members were denied the right to vote, and the purposes and interests of the ASA were subverted in direct contravention of the ASA Constitution and bylaws. Additionally, as stated above, Plaintiffs have alleged they were dues paying members. Compl. ¶ 34. Thus, as dues paying members, Plaintiffs may bring this suit directly, and it is not a derivative claim.

In Count IX, Plaintiffs allege that Defendants committed corporate waste by spending ASA funds on the USACBI, which was not in the best interest of the association. Compl. ¶ 316. Though the Court of Appeals does not appear to have explicitly stated that individual members of dues-paying organizations have the right to sue for corporate waste, they did imply that this could be the sort of claim such members could bring since misuse of the organization's funds would be a misuse of the member's contribution. *See Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729-30 (D.C. 2011). Thus, the Court is persuaded that this is not a derivative claim and that as dues paying members, Plaintiffs may bring this claim directly.

Finally, in Count XII, Plaintiffs allege aiding and abetting breach of fiduciary duty. Specifically, Plaintiffs argue that the individual Defendants were all involved in the decisions

which caused breaches in their fiduciary duties to the ASA, and thus they should all be equally liable. Since, at its heart, this claim is based on the underlying breach of fiduciary duties, the Court is persuaded, based upon the above analysis, that Plaintiffs may bring this suit directly. Thus, it is also not derivative.

Since these claims are not derivative, they are not barred by collateral estoppel.

C. Failure to State a Claim

Defendants also allege that Plaintiffs have failed to state a claim for any of the remaining counts. The Court will address the remaining claims in turn.

a. Count I: Breach of Fiduciary Duties Against the Individual Defendants by All Plaintiffs (Material Misrepresentations and Omissions in Connection with Elections to Office and Seeking Member Approval of Academic Boycott and Amendment of the Bylaws)

As discussed above, Count I alleges that the individual Defendants breached their fiduciary duties to the ASA and its members by failing to disclose several relevant pieces of information while running for office. Compl. ¶ 262. Defendants allege this count does not state a claim for two reasons. First, Defendants allege that this claim fails to state a claim for breach of fiduciary duty because prior to obtaining office, the individual Defendants owed no fiduciary duty to the ASA or its members. The Court is not persuaded that the duties of one running for office of an association should be read so narrowly. While it is clear that an officer of a corporation owes a fiduciary duty to the corporation, *see Daley*, 26 A.3d at 729-30, whether a fiduciary relationship exists prior to an individual taking that position, such as while running for office or while officer elect, is a fact specific analysis that will depend on the relationship of the individual to the association, not simply the title that individual holds. *See Sind v. Pollin*, 356 A.2d 653, 654 (D.C. 1979) (recognizing that whether a fiduciary relationship exists depends upon the nature of the relationship and agreement between the parties); *see also, Hedgepeth v.*

Whitman Walker Clinic, 22 A. 3d 789, 794, 800-02 (D.C. 2013) (recognizing that in determining whether a special relationship, such as a fiduciary relationship, exists is a fact specific analysis that will depend on the nature of the relationship). Thus, the Court is not persuaded that the individual Defendants did not owe some duty of loyalty or care to the ASA simply because they were not officers at the time. Accordingly, this count has stated a claim.

Second, Defendant Salaita alleges that this claim does not state a claim against him personally because he was not involved in the ASA at this time of the events referenced in Count I. The Complaint does not allege that Defendant Salaita made any misrepresentations when he ran for his position, thus, this claim must be dismissed as to Defendant Salaita.

b. Count II: Breach of Fiduciary Duties Against the Individual Defendants by All Plaintiffs (Duty of Loyalty and Good Faith, Misappropriation and Misuse of Assets of the American Studies Association)

In Count II, as discussed above, Plaintiffs allege that Defendants breached their fiduciary duty when they failed to act in the best interest of the ASA in passing the resolution to join the USACBI and by taking actions in furtherance of the resolution.[10] Compl. ¶ 266. Plaintiffs have alleged that the individual Defendants owed some duty to the ASA through their leadership positions, and that the individual Defendants breached that duty by forcing the ASA to commit acts that are outside of its constitution. This is sufficient to state a claim here.

Though several of the individual defendants allege that this has not stated a claim against them individually, the Court is persuaded that the claim references a number of timeframes where the ASA's funds were being misappropriated. Without further information on who specifically took or approved of the relevant actions, which is a factual dispute more

[10] The Court is only addressing those parts of the claim that are not barred by the statute of limitations.

appropriately decided at a later date, the Court cannot dismiss any individual Defendants at this time.

c. Count IX: Corporate Waste Against All Defendants by All Plaintiffs

In Count IX, Plaintiffs allege that Defendants committed corporate waste when they improperly diverted ASA funds to the USACBI against the ASA's interest. Compl. ¶ 316. "The essence of a waste claim is 'the diversion of corporate assets for improper and unnecessary purposes,' and to meet that standard, the conduct must be 'exceptionally one-sided.'" *Daley*, 26 A.3d at 730 (quoting 3A FLETCHER CYC. CORP. § 1102 at 150-51 (2010)). "Courts are very deferential to the business judgment of officers and directors of a corporation in decision-making, and a claim of waste, even where authorized, will be upheld only where a shareholder can 'show that the board irrationally squandered corporate assets.'" *Id.* (quoting *White v. Panic*, 783 A.2d 543, 554 (Del. 2001)).

Here, Plaintiffs have alleged sufficient facts to state a claim for corporate waste. Plaintiffs have alleged that Defendants knowingly and improperly passed a resolution, forcing the ASA to take a position contrary to its bylaws, and subsequenlty spent money supporting and defending that resolution. Compl. ¶¶ 78-141, 175-96. This sort of spending constitutes diversion of corporate assets for an improper or unnecessary purpose if Plaintiffs can demonstrate that the resolution was improperly passed. It further suggests that the board might have irrationally squandered corporate assets. *Daley*, 26 A.3d at 730. Thus, the Court is convinced that Plaintiffs have stated a claim at this time.[11]

d. Count X: Breach of Fiduciary Duty by Plaintiff Bronner and all Plaintiffs Against All Defendants (Removal of Plaintiff Bronner from

[11] This is subject to the above finding regarding the statute of limitations, which may bar or limit the Plaintiffs' ability to recover for damages.

Position as Editor of the Encyclopedia, Ex Officio Officer, and Member of the National Council)

In Count X, Plaintiffs alleged that Defendants breached their fiduciary duty to Plaintiff Bronner when they removed him as Editor of the Encyclopedia and its associated positions within the ASA. As fiduciaries to members of the association, Defendants had a duty not to act in their own self-interest, but rather in the interest of the association. *See Wisconsin Ave. Associates, Inc. v. 2720 Wisconsin Ave. Cooperative Asso.*, 441 A.2d 956, 963 (D.C. 1982). Here, Plaintiffs have alleged that Defendants acted in their own self interest when they prevented Plaintiff Bronner from carrying out his duties and improperly removed Plaintiff Bronner from his position because they did not agree with his political views. Compl. ¶¶ 197-259. They further have stated that this was done intentionally to the detriment of the ASA because the Encyclopedia has since been shut down. *Id.* This is sufficient to state that Defendants had breached their fiduciary duty to Plaintiff Bronner in this case.

e. Count XI: Tortious Interference with Contractual Business Relations by Plaintiff Bronner Against the Individual Defendants

In Count XI, Plaintiffs allege that the individual Defendants tortiously interfered with Plaintiff Bronner's ability to renew his contract for his position as Editor of the Encyclopedia. In order to state a claim for tortious interference with a contractual business relationship a plaintiff must state: "(1) existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages." *Whitt v. Am. Prop. Constr., P.C.*, 157 A.3d 196, 202 (D.C. 2017). Here, the Court is persuaded that Plaintiffs have stated a claim for tortious interference with a contractual business relationship.

First, Plaintiff has alleged that he had a contract for his position as editor that had been regularly renewed. Compl. ¶ 223. Second, as members of the National Board with Plaintiff Bronner, Defendants were aware of the relationship. Third, Plaintiff has alleged that Defendants intentionally interfered with his ability to renew his contracts by falsely stating there would be an open call for editors, never permitting him to submit for renewal, and generally preventing him from working within the ASA because of his political view. Compl. ¶¶ 197-259. Finally, Plaitintiff Bronner has alleged that he has suffered monetary and personal damages as a result of this personal interference, specifically alleging that he was previously paid for holding this prestigious position, which he no longer receives. Compl. ¶ 325. This is sufficient to state a claim.

Defendants allege that this claim must nevertheless be dismissed because Plaintiff Bronner's contract had expired and they had no duty to renew the contract with him. While the contract may have expired, Plaintiffs have alleged that there was a long pattern of renewing the contract, which Defendants then interfered with. Thus, the mere expiration of Plaintiff Bronner's prior contract is insufficient to suggest that Plaintiff Bronner has not stated a claim here.

f. Count XII: Aiding and Abetting Breach of Fiduciary Duty by All Plaintiffs Against Defendants Sunaina Maira, J. Kehaulani Kauanui, Jasbir Puar, and John Stephens, Steven Salita

In Count XII, Plaintiffs allege that all Defendants have engaged in aiding and abetting breach of fiduciary duty. Though this claim has not been explicitly recognized by the Court of Appeals at this time, the Court of Appeals has also not indicated that it would explicitly prohibit such a claim. *Pietrangelo v. Wilmber Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 711-12 (D.C. 2013). Although not yet officially recognized, the Court of Appeals has indicated that in order to state a claim for aiding and abetting breach of fiduciary duty a plaintiff must allege: "(1)

a fiduciary duty on the part of the primary wrongdoer, (2) a breach of this fiduciary duty, (3) knowledge of this breach by the alleged aider and abettor, and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." *Id.* Here, the Court is persuaded, based on the Court of Appeal's dicta, that Plaintiffs have stated a claim for aiding and abetting breach of fiduciary duty.

First, as discussed above, the Court is currently persuaded that Plaintiffs have sufficiently alleged there was some fiduciary duty on the part of some of these Defendants which was breached. Further, Plaintiffs have alleged that the remaining Defendants had knowledge of this breach because they helped actively participate in encouraging the breaching behavior, namely encouraging the improper passage of the 2013 resolution. This is sufficient to state a claim at this time, and accordingly, this count is not dismissed.

D. Volunteer Protection Act Immunization

Finally, Defendants allege that they are immunized from this suit entirley as officers of a nonprofit organization. First, Defendants cite to D.C. Code § 29-406.31(d) which states:

> Notwithstanding any other provision of this section, a director of a charitable corporation shall not be liable to the corporation or its members for money damages for any action taken, or any failure to take any action, as a director, except liability for:
>
> (1) The amount of a financial benefit received by the director to which the director is not entitled;
>
> (2) An intentional infliction of harm;
>
> (3) A violation of § 29-406.33
>
> (4) An intentional violation of criminal law.

This section does not save Defendants from liability, however, since Plaintiffs have alleged that Defendants intentionally inflicted harm on the ASA and its members.

Second, Defendants cite to 42 U.S.C. § 14503, which states that volunteers to a nonprofit organization cannot be held liable for harm caused by an act or omission if "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." Plaintiffs have alleged, however, that Defendants' willful misconduct that has harmed the ASA and her members. Thus, Defendants are not protected by this act either and the claims may proceed against them.

E. Personal Jurisdiction

Defendants Salaita and Tadiar allege that the Court lacks personal jurisdiction over them. Both Defendants have served as officers or leaders within the ASA, a District of Columbia organization, and are being sued for their actions in that capacity. This is sufficient to provide jurisdiction over these Defendants. *See* D.C. Code § 13-423.

F. Request for Damages

Plaintiffs' have made several requests for damages that inappropriately seek derivative damages. For example, for the breach of fiduciary duty claims "Plaintiffs seek a return of funds to compensate the [ASA] for financial damages, and are also entitled to recover damages, including punitive damages, from the Individual Defendants, as a result of this breach of fiduciary duty." Compl. ¶¶ 263, 267, 343. In addition, for the corporate waste claim, Plaintiffs seek "to recover damages from the Individual Defendants on behalf of the American Studies Association." Compl. ¶ 318. While Plaintiffs might have been able to state direct claims for breach of fiduciary duty and corporate waste, that does not entitle them to seek derivative damages on behalf of the ASA. Any request for damages on behalf of the ASA is impermissible, and Plaintiffs may only proceed on the damages that they have personally suffered.

II. Motions to Dismiss Pursuant to D.C. Code § 16-5501, *et seq.*

Defendants have alleged that this claim is brought in violation of D.C. Code § 16-5501, *et seq.* ("the Anti-SLAPP Act") for the sole purpose to limit the ASA's ability to speak. The Court is not presently persuaded that the Plaintiffs are so unlikely to win on the merits of their claims that this Complaint should be barred by the Anti-SLAPP Act.

To come within the scope of the Anti-SLAPP Act, Plaintiffs' claim must arise "from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a); *see also Mann*, 150 A.3d at 1227. The Court is persuaded that Defendants have made a prima facia showing that the claims in this case fall under the act. First, an act in furtherance of the right of advocacy on issues of public interest includes "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). The 2013 resolution and associated acts constitute a communication of views to members of the public. Second, it is on an interest of public interest. An issues of public interest includes "an issue related to . . . environmental, economic, or community well-being." D.C. Code § 16-5501(3). The resolution related to the ability of foreign scholars to work on relevant issues safely, freely, and without fear of persecution. This is related to community well-being, and thus an issue of public interest.

Once the prmia facia showing has been made, Plaintiffs are required to demonstrate that the claim is likely to succeed on the merits. D.C. Code § 16-5502(b). Here, the Court is persuaded that Plaintiffs have met that burden. Plaintiffs have demonstrated that a number of their claims have merit. Plaintiffs have successfully demonstrated that they have evidence suggesting that there may have been a breach of fiduciary duty and that the resolution was

improperly passed, costing the ASA to lose membership and funds. The Court is thus persuaded that these claims do not need to be dismissed pursuant to the Anti-SLAPP Act.

III. Scheduling Conference

Since this case will be proceeding, a scheduling conference is set for February 14, 2020 at 10:00 AM in Courtroom 201 so that the parties may select a track and proceed with discovery. Should the parties agree to a track prior to that date, they may file a praecipe requesting a scheduling order.

CONCLUSION

Accordingly, and based on the entire record herein, it is this the 12th day of December, 2019, hereby

ORDERED that this Amended Order shall be effective *nunc pro tunc* to November 15, 2019; it is further

ORDERED that Special Motion to Dismiss of Defendants Kauanui and Puar Pursuant to D.C. Code § 16-5501, filed on May 6, 2019, is **DENIED**; it is further

ORDERED that Defendants Kauanui and Puar's Motion to Dismiss Complaint, filed on May 6, 2019, is **GRANTED IN PART**; it is further

ORDERED that the Motion to Dismiss on Behalf of Defendants American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, filed on May 6, 2019, is **GRANTED IN PART**; it is further

ORDERED that Motion to Dismiss Under Anti-SLAPP Act on Behalf of Defendants American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, filed on May 6, 2019, is **DENIED**; it is further

ORDERED that Motion to Dismiss on Behalf of Neferti Tadiar, filed May 6, 2019, is **DENIED**; it is further

ORDERED that Steven Salaita's Opposed Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.*, and, in the Alternative, Motion to Dismiss Pursuant to Super. Ct. Civ. R. 12(b), filed on June 7, 2019, is **GRANTED IN PART**; and it is further

ORDERED that Count III, Count IV, Count V, Count VI, Count VII, and Count VIII of Plaintiffs' Complaint are **DISMISSED** and that Defendant Salaita is dismissed from Count I; it is further

ORDERED that a Scheduling Conference is set for February 14, 2020 at 10:00 A.M. in Courtroom 201.

SO ORDERED.

Robert R. Rigsby

Robert R. Rigsby, Associate Judge
Superior Court of the District of Columbia

Copies to:

Jerome M. Marcus
Jmarcus@marcusauerbach.com
Jonathan Auerbach
auerbach@marcusauerbach.com
Jennifer Gross
Jenniegross10@gmail.com
Counsel for Plaintiffs

John J. Hathway
jhathway@wtplaw.com
Thomas Mugavero
tmugavero@wtplaw.com
Jeff C. Seaman
jseaman@wtplaw.com
Counsel for ASA Defendants

Richard R. Renner
rrenner@kcnlaw.com
Counsel for Defendants Kehaulani Kauanui and Jasbir Puar

Shayana Kadidal
kadidal@ccrjustice.org
Counsel for Defendant Steven Salaita