IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19-7017

SIMON BRONNER, *et al.*,

Appellants,

v.

LISA DUGGAN, *et al.*,

Appellees

Appeal from the United States District Court
For the District of Columbia
Case No. 1:16-cv-00740-RC
(Hon. Rudolph Contreras, J.)

CORRECTED BRIEF OF APPELLEES,

THE AMERICAN STUDIES ASSOCIATION, LISA DUGGAN, SUNAINA MAIRA, CURTIS MAREZ, NEFERTI TADIAR, CHANDAN REDDY, AND JOHN STEPHENS

THOMAS C. MUGAVERO, ESQUIRE (#431512)

WHITEFORD, TAYLOR & PRESTON, LLP
3190 Fairview Park Drive, Suite 800
Falls Church, Virginia 22042
(703) 280-9260
(703) 280-8948 (facsimile)

APPELLEE'S CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28, and given that Appellants did not include the Certification in their Brief, Appellees hereby certify as follows:

(A) **Parties and Amici**:

The following are the parties who have appeared before the U.S. District Court, and are appearing in this appeal:

Plaintiffs/Appellants:

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

Defendants/Appellees:

The American Studies Association
Lisa Duggan
Curtis Marez
Neferti Tadiar
Sunaina Maira
Chandan Reddy
J. Kehaulani Kauanui
Jasbir Puar
Steven Salaita
John Stephens

(B) **Rulings Under Review**:

As best as can be determined, Appellants seek review of the following rulings:

1) Memorandum Opinion and Order of March 31, 2017, and specifically that portion of the ruling dismissing Plaintiffs' claims for *ultra vires* action (App. 076 – 082);

2) Memorandum Opinion and Order of February 4, 2019 (App. 345).

CORPORATE DISCLOSURE STATEMENT

The Appellee, The American Studies Association, by its undersigned counsel, and pursuant to Rule 26.1 files its disclosure statement in order to enable the judges of this Court to consider possible recusal:

There are no parent companies, subsidiaries or affiliates of The American Studies Association which have any outstanding securities in the hands of the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Cases

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

Statutes

Rules

Treatises

JURISDICTIONAL STATEMENT

In the District Court, the Plaintiffs asserted subject-matter jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The final Order dismissing the case for lack of subject-matter jurisdiction was entered on February 4, 2019 (App. 345) and the Notice of Appeal was filed on March 3, 2019 (App. 365).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly dismiss the instant action for lack of diversity subject-matter jurisdiction, where the only claims that were enumerated in the Second Amended Complaint were derivative in nature, where the District Court had already dismissed with prejudice any and all derivative claims, and where the Plaintiffs failed to articulate any individual damages incurred that would even approximate the $ 75,000 jurisdictional threshold?

2. Did the District Court correctly dismiss the Plaintiffs' claims of *ultra vires* activity, where none of the actions allegedly taken by the Defendants were expressly prohibited by either statute or the governing documents of The American Studies Association?

STATEMENT OF THE CASE

The Complaint in this case was filed on April 20, 2016, against Defendants Lisa Duggan, Curtis Marez, Avery Gordon, Neferti Tadiar, Sunaina Maira, Chandan Reddy, and the American Studies Association ("ASA").[1] On June 9, 2016, Defendants moved to dismiss (App. 13). In response, Plaintiffs filed an Amended Complaint (App. 15); the Court denied the Motion to Dismiss without prejudice as mooted by the Amended Complaints, and Defendants filed their Memorandum of Law on their Renewed Motion to Dismiss on July 7, 2016.

By Memorandum Order of March 31, 2017, the District Court granted in part and denied in part the Renewed Motion to Dismiss (App. 48 – 86; *Bronner v. Duggan*, 249 F.Supp.3d 27 (D.D.C. 2017)). In that Order, the Court determined that Plaintiffs' derivative claims failed as a matter of law, as Plaintiffs had not given ASA the ninety-day notice required by D.C. Code § 29-411.03. It further found that Plaintiffs had failed to state a claim for *ultra vires* action, but allowed "Plaintiffs' direct claims for waste, breach of contract and violation of the D.C. Nonprofit Corporation Act" to continue (App. 49). The Court also opined that it had subject-matter jurisdiction "because Plaintiffs have shown, beyond the low

[1] Mr. Gordon was dismissed as a Defendant by voluntary withdrawal on November 22, 2017 (App. 8).

standard of legal possibility, that they could recover more than $75,000 if they prevailed." (App. 57).

Defendants filed their Answer and Grounds of Defense on April 14, 2017, and an Amended Answer on April 28, 2017 (App. 11-12). On May 31, 2017, Defendants filed a Motion for Judgment on the Pleadings, arguing that under D.C. law, a claim for waste could only be a derivative claim, and should therefore be dismissed (App. 11). That motion remained pending until the final Order on February 4, 2019. On May 15, 2017, the parties filed their Initial Disclosures pursuant to Rule 26(a) (App. 100 – Plaintiffs' Initial Disclosures). In their Computation of Damages, Plaintiffs listed only: "(A) loss of revenue by the ASA …; (B) ASA funds expended … [and] (C) Attorneys' fees and expenses incurred by Plaintiffs." (App. 102).

Discovery continued, with periodic status reports from the parties. By Order of September 14, 2017, Plaintiffs were required to add any additional parties by November 1, 2017 (App. 10); on that date, however, Plaintiffs filed for an extension of time (App. 9), and on November 9, 2017, Plaintiffs filed their Motion for Leave to File Amended Complaint (*id.*). In addition to adding J. Kehaulani Kauanui, Jasbir Puar, and Steven Salaita as Defendants, the Second Amended Complaint ("SAC") added a number of additional allegations, which Plaintiffs asserted they had gleaned from document production (App. 105 – 191).

In granting the Motion for Leave to Amend, the Court, on March 6, 2018, requested supplemental briefing on the question of immunity for directors of non-profit organizations pursuant to D.C. Code § 29-406.3(d). *See* App. 192 - 209. In its Order, the Court specifically noted that "this Court has a continuing duty to examine its subject matter jurisdiction and must raise the issue *sua sponte* when it comes into doubt," and that "the only damages that Plaintiffs seek as 'damages from the individual Defendants incurred by [ASA]'" (App. 205).

The parties submitted their supplemental memoranda; Defendants argued, in part, that the Court lacked subject-matter jurisdiction because the only damages claimed in the SAC were derivative in nature, and were thus barred as a matter of law by the Court's prior ruling. In its Memorandum Order of July 6, 2018, however, the Court stated that the only issue before it was "the impact of [D.C.] Code § 29-406.31(d), which shields directors of charitable corporations from damages except in specific circumstances, on the Court's subject matter jurisdiction" (App. 285). While the Court did acknowledge Defendants' additional argument, it stated that "that argument should be raised in a well-fashioned motion to dismiss or motion for summary judgment … once those arguments are ripe for consideration, the Court will again reexamine its subject matter jurisdiction." (App. 293-4, n.5).

That motion to dismiss was filed on August 27, 2018; Defendants Salaita, Kauanui and Puar filed concurrent motions (App. 2-3). On February 4, 2019, the Court issued its Final Order, granting the motions to dismiss. (App. 344).

This appeal followed.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

Because the only issue before the Court is the lack of subject matter jurisdiction, based on the damages claimed by Appellants, the underlying factual allegations may be briefly stated. ASA is a nonprofit corporation, organized under the laws of the District of Columbia, dedicated to the promotion of the study of American culture (App. 115, ¶ 17). John Stephens is the Executive Director of ASA (App. 117, ¶ 26); the remaining Defendants are, or were, members of the ASA National Council in various years from 2013 to the present (App. 116 – 117). With the exception of Dr. Stephens, all the other 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. 34, ¶ 74), only those who were believed by the Appellants to be members of the USACBI were named as Defendants.

The SAC alleged that, prior the ASA annual meeting of 2013, the individual Defendants worked to place as many USACBI members as possible on the ASA National Council. Beginning at the annual meeting in 2012, the Defendants

allegedly sought to present a Resolution in support of Palestinian rights for adoption, and were successful in getting the matter placed on the agenda for discussion at the 2013 annual meeting (App. 138, ¶ 89). Plaintiffs claim that, through various alleged maneuvers, including excluding Dr. Barton from the National Council meeting, closing the voting rolls, and hiding dissenting viewpoints, the Resolution was adopted (*gen'lly*, App. 139 – 159).[2]

Dr. Bronner and Dr. Rockland are professors of American Studies and honorary lifetime members of ASA (App. 114, ¶¶ 13, 14). Dr. Barton is Professor Emeritus of American Studies; his membership in ASA lapsed in 2012 for non-payment of dues; although he attempted to reactivate his membership, he was not allowed to vote on the Resolution (App. 115, ¶ 15). Dr. Kupfer was also a member of ASA until 2014; in opposition to the Resolution, he allowed his membership to lapse. Each of the Plaintiffs are opposed to the Resolution and have undertaken this lawsuit to undo it completely.

Paragraphs 172 – 191 of the SAC detail the financial injury allegedly caused by adoption of the Resolution (App. 169 - 176). These include:

-- A decrease in contributions to the Association (App. 169 – 70, ¶ 174);

---

[2] It goes without saying that Defendants do not admit that there were any irregularities in the debate leading up to the adoption of the Resolution, nor in the vote on the Resolution itself, and assert that the Resolution was properly adopted by a majority vote. For purposes of this appeal, however, that dispute is not relevant.

-- Use of contributions for legal costs and "other support for the Resolution" (App. 170, ¶ 175);

-- A decrease in membership fees collected (*id.*, ¶ 177);

-- Use of Association funds for retention of a media strategist and Public Relations consultant (App. 171 – 2, ¶ 182);

-- "Substantial legal costs defending the Resolution" (App. 172 – 3, ¶¶ 183, 185);

-- A substantial increase in the levels of membership fees (App. 173, ¶ 185); and

-- Withdrawals from the Trust Fund to pay for some of these exceptional expenses (App. 176, ¶ 191)

In their nine Counts, therefore, Plaintiffs claimed the following:

-- Count One: "damages … that the American Studies Association incurred as a result of this breach of fiduciary duty." (App. 177, ¶ 194);

-- Count Two: "damages … that the American Studies Association incurred as a result of these breach [sic] of fiduciary duties." (App. 178, ¶ 197);

-- Count Three: "the award of injunctive relief and damages … incurred by the American Studies Association …" for the ultra vires act of

failing "to nominate Officers and National Council Reflecting Diversity of Membership" (App. 181, ¶ 207);

-- Count Four: Declaratory and injunctive relief and "damages … incurred by the American Studies Association" for the ultra vires act of freezing the membership rolls (App. 183 – 4, ¶ 215);

-- Count Five: Declaratory and Injunctive Relief and "damages … incurred by the American Studies Association" for the ultra vires act of attempting to influence legislation (App. 186, ¶ 225);

-- Count Six: Damages as set forth in Count Two, along with declaratory relief, for employing a voting process contrary to the Bylaws (App. 187, ¶ 230);

-- Count Seven: Damages as set forth in Count One, along with declaratory and injunctive relief for failing to meet the requirements of a quorum in voting on the Resolution (App. 188, ¶ 235);

-- Count Eight: Unstated damages incurred by Plaintiff Barton for exclusion from the vote on the Resolution (App. 189, ¶ 240);

-- Count Nine: "[D]amages … on behalf of the American Studies Association" for corporate waste (*Id.*, ¶ 244).

SUMMARY OF ARGUMENT

The question of subject matter jurisdiction remains open to challenge at any point during the pendency of an action in District Court, and if a plaintiff files an amended complaint, any determination of jurisdiction is governed by the allegations in that amended pleading. In this case, all of Plaintiffs' derivative claims were dismissed with prejudice, a ruling that Appellants do not challenge here. As such, the only cognizable claims for damages in the Second Amended Complaint were those incurred by the individual Plaintiffs. However, Plaintiffs failed to allege that they had incurred any amount of damages. It was thus clear to a legal certainty that Plaintiffs could not attain the jurisdictional threshold of $75,000 in damages. Diversity jurisdiction, therefore, was lacking, and the case was properly dismissed.

Moreover, Appellants have disavowed any argument on appeal as to the *ultra vires* claims that were actually articulated in their pleadings below; on the contrary, they chose on appeal to focus on an unidentified "corporate mission statement," which statement had not previously been a basis for their *ultra vires* arguments. An *ultra vires* claim can only arise from the violation of an express prohibition, in either statute or by-law; a "mission statement" does not qualify. Appellants' challenge to the dismissal of the *ultra vires* claims below fails to raise any valid argument.

For these reasons, the District Court's judgment should be affirmed.

ARGUMENT

A. Standard of Review

This Court reviews *de novo* a dismissal for lack of subject-matter jurisdiction. *See, e.g.*, *Am. Hosp. Ass'n v. Azar*, 895 F.3d 822, 825 (D.C. Cir. 2018); *Fla. Health Scis. Ctr. v. Sec'y of Health & Human Servs.*, 830 F.3d 515, 518 (D.C. Cir. 2016).

The Court reviews *de novo* the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019); *Coburn v. Evercore Tr. Co., N.A.*, 844 F.3d 965, 968 (D.C. Cir. 2016). It is "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief [with] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Coburn*, *supra*, 844 F.3d at 968 (internal citations and quotations omitted)

B. The District Court Properly Revisited The Issue of Subject-Matter Jurisdiction

1. Jurisdiction Was Based on the Allegations in the Second Amended Complaint

The Supreme Court articulated the standard for finding subject-matter diversity jurisdiction in *St. Paul Mercury Indemnity Co. v. Red Cab.*, 303 U.S. 283,

288-89 (1938). The Court there explained that if a plaintiff's claim is made in good faith, the sum claimed by the plaintiff controls, and it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. However, the Court also instructed that

> . . . if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to that amount, . . . the suit will be dismissed.

See also Rosenboro v. Kim, 994 F.2d 13, 17 (D.C. Cir. 1993) (same). While *Red Cab* concerned a case removed to federal court, the Court noted that where a case is originally instituted in federal court, the "plaintiff chooses his forum … [and] his good faith in choosing the federal forum is open to challenge . . ." by subsequent facts. 303 U.S. at 289 – 90.

The Supreme Court also noted, in a later case, "[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction … Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 473, 127 S. Ct. 1397, 1409 (2007); *see also Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 18 (D.C. Cir. 2015); *Curry v. U.S. Bulk*

Transp. Inc., 462 F.3d 536, 540 (6th Cir. 2006) ("diversity must be determined at the time of the filing of the amended complaint").

2. When Plaintiffs Filed The Second Amended Complaint, All Derivative Claims Had Been Dismissed With Prejudice

The law of the District of Columbia precludes the filing of a civil derivative action unless the requisite demand has been delivered to the corporation and ninety days had since elapsed. *Bronner v. Duggan*, 249 F.Supp.3d 27, 44 - 45 (D.D.C. 2017), *citing* D.C. Code § 29-411.03. In this case, as the District Court found, Plaintiffs delivered a formal demand letter only two days before filing suit, thereby failing to even approximate the ninety-day demand requirement. Moreover, the District Court found that Plaintiffs had not "shown that a majority of the 23-member National Council … as composed at the time of filing, even contributed to the actions at issue," and that Plaintiffs "have not shown anything more than 'mere allegations of improper motives' by citing to piecemeal statements of support by current councilmembers." (*id.*, 249 F.Supp.3d at 47). Thus, the Court found that Plaintiffs failed to show that demand would have been futile. All of Plaintiffs' derivative claims were dismissed prior to the filing of the Second Amended

Complaint pursuant to Fed. R. Civ. Proc. 23.1.[3] That ruling is not challenged on appeal.

The Second Amended Complaint did not repair the fatal deficiencies enumerated in the Court's prior opinion -- nor could it. Although Plaintiffs alleged that there was a concerted effort to pack the 2013 Board with USACBI supporters, and that "starting in 2012 and continuing for four consecutive years, every candidate … selected to run for American Studies Association President was a USACBI Endorser …" (App. 126, ¶ 53), there was absolutely no allegation anywhere in the 85-page document as to the character, or viewpoints, of the members of the National Council in 2016 when the lawsuit was commenced. There is no allegation that, after 2013, the Nominating Committee took any action to continue offering USACBI supporters for election to the National Council. While there is an implication that, in 2016, the President was a USACBI supporter, that is only one member of a 23-person board. The SAC lacks any factual allegation to suggest that, in 2016, a demand for litigation on the National Council would have been futile. Because Plaintiffs failed to provide the requisite demand

[3] Appellants complain that because the ASA Bylaws were amended, "Professor Bronner had been stripped of standing to bring new derivative claims or to amend the derivative claims in the FAC" (Brief at 14). This is not correct: Plaintiffs lost their right to derivative claims because they failed to follow the statutory procedures, and those claims were dismissed with prejudice.

on the Association before filing the lawsuit, they have failed to revive their derivative claims, and the same remained dismissed under Fed. R. Civ. P 23.1.

As a matter of law, therefore, when Plaintiffs amended their Complaint, any damages sought on behalf of the Association were not legally available, and thus could not form the basis for jurisdiction in the District Court. As the Court of Appeals for the Sixth Circuit noted in *Jones v. Knox Exploration Corp.*, 2 F.3d 181, 183 (6th Cir. 1993), "A distinction must be made … between subsequent events that change the amount in controversy and subsequent revelations that, in fact, the required amount was or was not in controversy at the commencement of the action." *See also State Farm Mut. Auto Ins. Co. v. Powell*, 87 F.3d 93, 97 (3rd Cir. 1996) (determination that one of three policies was not in effect was not a "subsequent event", and diversity jurisdiction did not attach); *McQueen v. Woodstream Corp.*, 672 F.Supp.2d 84, 87-88 (D.D.C. 2009), *appeal dismissed* 2010 WL 2574184 (D.C. Cir. 2010); *Charvat v. GVN Michigan, Inc.*, 531 F.Supp.2d 922 (S.D.Ohio 2008), *aff'd* 561 F.3d 623 (6th Cir. 2009) (after grant of partial summary judgment in a TCPA case, the amount recoverable fell below the jurisdictional threshold for diversity jurisdiction, and the case was dismissed).

The U.S. District Court for the District of Columbia faced a similar issue to the instant case in *Cuneo Law Grp. v. Joseph*, 920 F.Supp.2d 145 (D.D.C. 2013). In that case, plaintiff's claims for a twenty-percent share of attorneys' fees had

already been adjudicated and denied prior to its filing of the action against Joseph in the District Court. The District Court ruled that the application of claim preclusion meant that the plaintiff could not, as a legal certainty, reach the jurisdictional threshold for diversity jurisdiction.

The District Court in the instant matter, therefore, properly looked to the Second Amended Complaint to determine whether there is jurisdiction. Because that pleading failed to offer any new allegations regarding any alleged futility in making a pre-suit demand on the Board – and since Plaintiffs could not change the fact that they actually made such a demand only two days before filing their lawsuit – there was no reason to revisit the prior ruling that all of Plaintiffs' derivative actions failed as a matter of law. As that ruling remained the law of the case, the jurisdictional analysis following the filing of the Second Amended Complaint was necessarily informed by the fact that Plaintiffs could not claim any damages on behalf of the Association.

C. Plaintiffs Have Not Met the Jurisdictional Threshold

1. All the Claims in the SAC Were Derivative

It is clear from the allegations in the Second Amended Complaint that the only damages Plaintiffs sought below are those incurred by the Association; they are, in other words, derivative claims. This is fatal from a jurisdictional perspective.

A derivative action, by definition, seeks redress for a wrong done primarily to the corporation, and for damages incurred by the corporation. *See* 12B Fletcher Cyc. Corp. ¶ 5908. Traditionally, the courts have used three tests to determine whether an action is derivative: the "direct harm" test, the "special injury" approach, and the "duty owed" approach. *Keller v. Estate of McRedmond*, 495 S.W.3d 852, 870 (Tenn. 2016). Whichever test is employed, "[t]he pertinent inquiry is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation" *Albany–Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419, 763 N.Y.S.2d 119 (3d Dept. 2003) (internal quotations omitted)); *cf. Jackson v. George*, 146 A.3d 405, 415 (D.C. 2016) ("In a derivative action, the shareholder seeks to assert, on behalf of the corporation, a claim belonging not to him but to the corporation.") (*quoting Flocco v. State Farm Mut. Auto Ins. Co.*, 750 A.2d 147, 151 (D.C. 2000)). Thus, in *Keller*, *supra*, the claim that one member of a close corporation breached his fiduciary duty through mismanagement and self-dealing was derivative in nature and had to be asserted on behalf of the corporation itself. *See also Wallace v. Perret*, 28 Misc.3d 1023, 903 N.Y.S.2d 888 (2010) (limited partner's claim for breach of fiduciary duty and conversion was derivative); *Gaff v. FDIC*, 814 F.2d 311 (6th Cir. 1987) (Shareholder did not have standing to bring suit under federal banking law when only damage alleged was diminution in value of corporate

shares); *Adjusters, Inc. v. Computer Sciences Corp.*, 818 F. Supp. 120 (E.D. Pa. 1993) (corporate president's claim that he had to fund the company with his own funds, thereby risking imposition of a tax lien and loss of home and car were derivative of the primary injuries suffered by the corporation); *Altrust Financial Svces, Inc. v. Adams*, 76 So.3d 228 (Ala. 2011) (claims for damages for diminution in the value of stock were derivative); *Fisher v. Big Squeeze (N.Y.), Inc.*, 349 F.Supp.2d 483 (E.D.N.Y. 2004) (claim by minority shareholder of loss of value of fractional interest was derivative, even though plaintiff alleged he was the only shareholder affected).

Furthermore, any claim for corporate waste is derivative in nature. *See Cowin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir., 1984) ("Claims of corporate mismanagement must be brought on a derivative basis because no shareholder suffers a harm independent of that visited upon the corporation and the other shareholders."); *Burman v. Phoenix Worldwide Industries, Inc.*, 384 F.Supp.2d 316, 338 (D.D.C. 2005) (claim for breach of fiduciary duty arising out of failure to secure revenue was dismissed as stating only a derivative claim).

As described more fully above, Paragraphs 172 – 191 of the SAC detail the financial injury allegedly caused by adoption of the Resolution (App. 169 - 176), ranging from a decrease in contributions to ASA and of membership fees collected to "substantial legal costs" and withdrawals from the Association Trust Fund.

Moreover, Counts One through Seven and Count Nine seek only those damages incurred by the Association. Only Count Eight even hints at any damage allegedly suffered by one of the individual Plaintiffs – and that is by Dr. Barton alone. For each of the remaining Counts, the only damages sought were allegedly incurred by the Association, not by the individual Plaintiffs. Plaintiffs claim that ASA has lost "its good reputation and the good will that it had earned over more than six decades" (App. 113, ¶ 9), but there is no factual allegation that any of the individual Plaintiffs have suffered any loss of reputation within the academic community.

Plaintiffs also allege that they have "suffered significant economic and reputational damages" (*see* App. 181, ¶ 206; App. 183, ¶ 214; and App. 185 – 6, ¶ 224), but these are grossly conclusory. There is no allegation that Plaintiffs individually have lost any teaching positions, have been forced to withdraw from speaking engagements, or have had submissions for publication denied, because of the Resolution. There is no allegation as to the effect on the class size for any course taught by the Plaintiffs, or whether their rankings as professors within their respective institutions have diminished. Finally, while Plaintiffs do allege that dues in general have increased – at most by $155/year – they do not allege that their own dues have increased, nor how much more they individually might have had to pay in dues (App. 173 – 4, ¶ 185).

Plaintiffs have the obligation to set forth sufficient facts to support any finding that subject matter jurisdiction exists, and that their damages exceed $ 75,000. *Khadr v. United States*, 529 F.3d 1112 (2008) (affirming dismissal on motion for failure to establish subject matter jurisdiction); *Gomez v. Wilson*, 477 F.2d 411, 420 (D.C. Cir. 1973); *see also Watkins v. Pepco Energy*, 2005 U.S. Dist. Lexis 16930, *6 (D.D.C. 2005) (dismissing for lack of jurisdiction). But the only damages for which Plaintiffs asserted any factual basis were for damages allegedly suffered by the Association. The counts in the SAC are derivative by any of the tests used by the courts to define such claims. Since the District Court had already dismissed any and all derivative claims with prejudice, Plaintiffs had no basis upon which to meet the jurisdictional threshold.

2. The Key Issue is the Quantum of Damages, Not Standing

In both the court below and in their Appellant Brief, Appellants do not argue either that they should have been allowed to revive their derivative claims, or that their individual damages exceeded $ 75,000. In fact, they admit that they were seeking only derivative claims when they insist that "[t]hese damages are intended to make **the ASA** whole." (Brief at 38, emphasis in original). Still, Plaintiffs maintain, with obstinacy, that as long as they can demonstrate standing, they have satisfied the jurisdictional threshold. This is incorrect. Where a case is in federal court on diversity grounds, it is not enough merely to have standing to bring a

claim: the plaintiff must also demonstrate sufficient damages to meet the jurisdictional threshold. Appellants erroneously argue that their standing to bring claims in this case is coextensive with an ability to recover damages allegedly suffered by the American Studies Association. The issue is, in fact, jurisdictional because, if Plaintiffs cannot rely upon damages to the corporate entity to meet the federal jurisdictional threshold, they cannot meet the necessary threshold.

Plaintiffs interpret the D.C. Court of Appeals' decisions in *Daley v. Alpha Kappa Sorority, Inc.*, 26 A.3d 723 (D.C. 2011) and *Jackson v. George*, 146 A.3d 405 (2016) too broadly, and they gloss over significant and substantial differences between those two cases and the one before this Court. In *Daley*, the Court of Appeals permitted individual sorority members' claims to continue against the sorority and its directors, noting that the "individual rights of the plaintiffs were affected by the alleged failure to follow the dictates of the constitution and the by-laws and they thus had a 'direct personal interest' in the cause of action." (26 A.3d at 729, *citing Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1036 (Del. 2004)).

In *Tooley*, the court made clear the distinction between a claim personal to the individual plaintiff and that belonging to the entity.

> "We set forth in this Opinion the law to be applied henceforth in determining whether a stockholder's claim is derivative or direct. That issue must turn solely on the following questions: (1) who suffered the alleged harm

> (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? . . . a court should look to the nature of the wrong and to whom the relief should go."
> *Tooley*, 845 A.2d 1031, 1033, 1039 (Del. 2003).

Ultimately, the *Daley* Court found that where the individuals claimed that their dues payments had been misspent, and their personal memberships had been terminated in retaliation, they had sufficient individual injuries to create standing to sue. *See also Family Federation for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 244 (D.C. 2015) (An "important exception" lies "where an individual seeking enforcement … has a special interest distinguishable from the public at large.") (internal quotations omitted).

Each of the cases relied on by the *Daley* Court, moreover, involved an individual injury. *See Blodgett v. University Club*, 930 A.2d 210 (D.C. 2007) (member expelled from private club); *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop Ass'n*, 441 A.2d 956 (D.C. 1982) (cooperative association damaged by the developer's breach of fiduciary duty); *Willens v. 2720 Wisconsin Ave. Coop Association*, 844 A.2d 1126 (D.C. 2004) (individual member had standing to sue when the indebtedness of his neighbors on a special assessment was cancelled, but his was not). In *Waller v. Waller*, 49 A.2d 449 (Md. 1946), also cited in *Daley*, the Maryland Court of Appeals explained the rationale behind the derivative action and the requirement that the claims be first presented to the

entity's leadership. The *Waller* Court allowed, however, that a stockholder could maintain an action for "violations of duty arising from contract or otherwise owing directly from the officer to the injured stockholder, though such acts are also violations of duty owing to the corporation." *Waller*, 49 A.2d at 453. To demonstrate this principle, the *Waller* court cited a Pennsylvania case in which it had been held that "a stockholder could bring suit against the officers of the corporation for defrauding him of his patents, royalties, and other property, because the gravamen of his complaint was not the damage to the corporation or its stockholders in general but to himself personally." *Id.*

Although the D.C. Court of Appeals offered less analysis of the issue in *Jackson v. George*, 146 A.3d 405 (D.C. 2016), it is clear that it relied on *Daley* for its decision. In that case, the plaintiffs claimed that the defendants had breached their fiduciary duties as officers of a church, and as a result, the plaintiffs' individual tithes and offerings had been misused, and they had been individually barred from church property and facilities and from attending church services. These were injuries "particularized to [plaintiffs]" and thus did not require a demand on the corporation. *Jackson*, 146 A.2d at 415.

Moreover, neither *Daley* nor *Jackson* addressed the particular question before this Court: whether the plaintiffs could claim, as the basis for federal diversity jurisdiction, injuries other than those to the individual plaintiffs. There is

a wide gap between the issue of "standing" to survive a motion to dismiss for lack of injury in Superior Court and the issue of quantum of damages that an individual plaintiff may claim for federal jurisdictional purposes. Appellants' Brief does not address that issue, understandably. But a careful reading of those cases, including a review of the decisions relied upon by the *Daley* and *Jackson* courts, reveals that the Plaintiffs cannot rely upon those cases as a bridge to federal subject matter jurisdiction.

In both *Daley* and *Jackson*, the plaintiffs had alleged specific individual damages that they had suffered because of the alleged breaches by the non-profit corporation, and were determined for that reason to have standing to maintain an action in the Superior Court of the District of Columbia. By contrast, in the instant case, Plaintiffs have alleged no individual damages, no special interest which they hold apart from and independent of the corporation. On the contrary: as described above, with the exception of Count Eight of the SAC (which seeks unstated damages incurred by Mr. Barton for exclusion of his vote on the Resolution), all of the Plaintiffs' claims for relief seek either injunctive relief or "damages ... incurred by the Association." Plaintiffs cannot even claim that the dues that they pay into the Association's coffers has been misspent: Plaintiffs Bronner and Rockland are "honorary lifetime members" (App. 114 - 5, ¶¶ 14, 15) and therefore presumably do not pay yearly dues. Plaintiff Kupfer allowed his membership in ASA to lapse

after 2014, so he does not pay any dues after that point, either (App. 115, ¶ 17). The Plaintiffs here simply do not fit into the *Daley/Jackson* framework.

It is, therefore, not accurate to claim that "the third-party or shareholder standing rules do not apply" (Brief at 42). Rather, the *Daley* and *Jackson* courts recognized that members of a non-profit organization may suffer individual injuries other than the typical monetary losses which could befall the shareholders of a for-profit corporation, and would thus have standing to maintain an action. Indeed, the D.C. Code specifically envisions that derivative claims may be made on behalf of a non-profit corporation. *See* D.C. Code § 29-411.01 *et seq*. Appellants' strained interpretation would render that statute meaningless. Were members of a non-profit organization able in all circumstances to claim damages suffered by the organization as a direct claim, there would be no need for these provisions in the Code.

Appellants' arguments also entirely overlook the critical issue of choice of forum. It is true that in neither *Daley* nor *Jackson* was there any discussion of the value of the plaintiffs' individual claims. Those cases, however, were brought in the Superior Court for the District of Columbia, then appealed to the Court of Appeals for the District of Columbia. Neither of these courts has a jurisdictional threshold amount greater than $500; thus, it was irrelevant what the value of the injunctive or declaratory relief sought might have been. Too, neither opinion

parses which of the damages claimed by the plaintiffs might be derivative rather than direct; once it was determined that the plaintiffs had standing, their claims could continue, to one degree or another. The Appellants here have filed their action in the Superior Court (where motions to dismiss under both Superior Court Rule 12(b)(6) and the D.C. Anti-SLAPP statute, D.C. Code § 16-5501 *et seq*. now are pending). If their case is allowed to proceed, their individual claims for relief, no matter how insignificant in monetary value, might continue to trial. In this Court, however, they must demonstrate individual damages above the jurisdictional threshold.

3. To the Extent that Plaintiffs Are Asserting Individual Claims, They Have Failed to Meet the Court's Jurisdictional Threshold

Even assuming, *arguendo*, that the Plaintiffs suffered some individual harm (an assumption not borne up by the SAC), they have still failed to allege any basis to assume that their individual damages meet the $ 75,000 threshold for diversity jurisdiction in the federal courts. Moreover, while all of the factual allegations contained in the complaint are assumed to be true, "mere conclusory allegations of jurisdiction" and "bald assertions of jurisdictional facts" are insufficient. *Roche v. Lincoln Prop. Co.*, 373 F.3d 610, 617 (4th Cir. 2004), *rev'd on other grounds*, 546 U.S. 81 (2005). Because federal courts are courts of limited jurisdiction and are empowered to act only in those instances authorized by Congress, there is a presumption against the existence of federal jurisdiction. *Lehigh Min. & Mfg. Co.*

v. Kelly, 160 U.S. 327, 336 (1895); *Roche*, *supra* 373 F.3d at 617. Thus, in determining the existence of subject matter jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. §1322, the statute is to be strictly construed and all doubts are to be resolved against federal jurisdiction. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942).

Again, there are no allegations as to damages suffered by the Plaintiffs themselves. Although the Plaintiffs alleged that dues in general have increased – at most by $155/year – they did not allege that their own dues have increased, nor how much more they individually might have had to pay in dues (id. at 65-66, ¶ 185). But even if they had experienced some increase in the dues they had to pay, their individual dues increases would have to amount to $ 75,000 per Plaintiff in order to meet the threshold, because it is well-established that parties may not aggregate their damages to meet the jurisdictional threshold. *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26 (D.D.C. 2014) (*citing Snyder v. Harris*, 394 U.S. 332, 335, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) for the longstanding principle that multiple plaintiffs may not aggregate their claims to achieve the jurisdictional monetary threshold)). As the District Court pointedly noted, given that the dues for any ASA member have not increased more than $155 per year, it would take each Plaintiff 625 years to reach $ 75,000 in damages (App.

362). The increase in dues, therefore, does not satisfy the jurisdictional threshold to a legal certainty.

The SAC does allege that Dr. Bronner was "unceremoniously kicked out of the National Council meeting" (App. 147, ¶ 109), and that Dr. Barton was not allowed to vote on the Resolution (App. 154 – 5, ¶ 126). Plaintiffs also alleged – quoting from D.C. case law – that they "were affected by the alleged failure to follow the dictates of the constitution and the by-laws" (App. 165, ¶ 161; App. 167 – 8, ¶ 167), and that they have suffered "significant economic and reputational damages" (App. 181, ¶ 206; App. 183 ¶ 214; App. 185 – 6, ¶ 224). It is established, however, that the party seeking federal jurisdiction must allege facts in support of such jurisdiction; conclusory statements alone do not establish the amount in controversy. *See Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044-45 (3rd Cir. 1993), *cert. denied* 510 U.S. 964 (1993) ("person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation"); *Garza v. Bettcher Indus., Inc.*, 752 F. Supp. 753, 763-64 (E.D. Mich.1990) (*cited in McGhee v. Citimortgage, Inc.*, 834 F.Supp.2d 708 (E.D. Mich. 2011)).

There are no facts set forth anywhere in the SAC that would assign a monetary value either to Dr. Bronner's removal from the meeting or to Dr. Barton's inability to vote. Nor, for that matter did Plaintiffs seek reputational

damages in the *ad damnum* clause. Too, as noted above, even the Plaintiffs' Initial Disclosure failed to claim any individual damages. With regard to dues, even if one were to assume that each of the Plaintiffs saw his dues increase by the maximum amount, their damages would amount to $155 per Plaintiff (the increase went into effect in 2017); again, these cannot be aggregated.

Finally, claims for declaratory and injunctive relief do not independently convey jurisdiction in the federal courts; rather, they are alternative remedies for which a pecuniary interest over $ 75,000 must be demonstrated. *See, e.g., Animal Legal Defense Fund v. Hormel Food Corp.*, 249 F.Supp.3d 53 (D.D.C. 2017). The non-monetary relief requested is a declaration invalidating and vacating the Resolution and enjoining various activities by the Defendant. App. 190, SAC *ad damnum* clause. If the District Court were to order such relief, it would cost nothing. Finally, attorneys' fees are not counted towards the amount in controversy unless provided by contract or statute. *Goldman v. Fiat Chrysler Automobiles US, LLC*, 211 F. Supp. 3d 322, 325 (D.D.C. 2016) (*citing Griffin v. Coastal Int'l Sec., Inc., No. 06–2246*, 2007 WL 1601717, at *3 (D.D.C. June 4, 2007)). Just as Plaintiffs have failed to allege any fact that would suggest that their individual claims for damages exceed $75,000, so too have they failed to demonstrate that any of the equitable relief requested might have any value approximating $75,000.

Appellants now argue that the "value" of the injunctive relief sought exceeds $75,000, because they seek to have the Defendants replace the amounts withdrawn from the ASA Trust Fund over the last few years – which they place at $100,000 per year (Brief at 31 – 32). Similarly, they claim that the value of the declaratory judgment claim suffices, because they seek a declaration that "expenditures in furtherance of the Academic Boycott and withdrawals from the ASA Trust are illegitimate" (*id.* at 33). These arguments were not raised below, and are thus waived on appeal. *Kassman v. Am. Univ.*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) ("Litigative theories not pursued in the trial court ordinarily will not be entertained in an appellate tribunal. And '(q)uestions not properly raised and preserved during the proceedings under examination . . . will normally be spurned on appeal.'") (citations omitted); *see also McKenzie v. U.S. Citizenship & Immigration Servs., Dist. Dir.*, 761 F.3d 1149, 1155 (10th Cir. 2014), *cert. denied* 135 S.Ct. 970 (2015) (refusing to hear unpreserved arguments on appeal for lack of subject matter jurisdiction).

Equally importantly, however is the fact that these claims are not equitable in nature, but legal: Appellants seek an award of money from the Defendants back to ASA. Thus, they are derivative claims: they seek relief that would inure to ASA, and not to the individual Plaintiffs. Having failed to meet the statutory requirements for a derivative action, it is legally impossible for Plaintiffs to obtain

any relief on behalf of the ASA; all they can obtain is relief for their individual damages. The equitable relief enumerated in their Brief is not available to the Individual Plaintiffs.

Too, the paragraph in the SAC where Plaintiffs alleged that ASA will withdraw $95,000 per year for two years from the Trust Fund quotes the President as recommending, in 2017, that such withdrawals (for 2017 and 2018) be put aside due to "extraordinary legal expenses related to suits filed against us …" (App. 173, ¶ 185). The basis for these prior withdrawals, therefore, was to pay the legal fees for the instant lawsuit. Were it not for Plaintiffs' continued litigation efforts, these withdrawals would never have been necessary. Appellants cannot seriously be claiming that they are entitled to claim, as part of the jurisdictional threshold, the very damages that they are causing.

Finally, while it is true that punitive damages may be considered as part of the amount in controversy, that is generally only true when the plaintiff actually requests an award of punitive damages. *See Goldman*, *supra* 211 F. Supp. 3d at 326 n. 5 (D.D.C. 2016) ("this Court is aware of no authority stating it should consider the *potential* for punitive damages when they have not been requested") (emphasis in original) (citing *Lurie v. Mid-Atl. Permanente Med. Grp., P.C.*¸ 729 F. Supp. 2d 304, 334 (D.D.C. 2010)). Appellants here admit that they did not specifically ask for punitive damages, but merely sought "such other relief as is

just and equitable" (Brief at 35). Neither the District Court nor this Court is required to save the Plaintiffs from their own omissions. Too, since that argument was not raised in the District Court, it is waived here.

Moreover, "when it appears that . . . punitive damages comprise[] the bulk of the amount in controversy, . . . the claim must be given 'particularly close scrutiny.'" *Carroll v. Merriwether*, 921 F. Supp. 828, 829 (D.D.C. 1996) (quoting *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3rd Cir. 1993)); *see also Kahal v. J.W. Wilson & Assocs.*, 673 F.2d 547, 548 (D.C. Cir. 1982) ("Liberal pleading rules are not a license for plaintiffs to shoehorn essentially local actions into federal court through extravagant or invalid punitive damages claims"). In the District of Columbia, "punitive damages may be awarded only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages." *Tolson v. District of Columbia*, 860 A.2d 336, 345 (D.C. 2004). The prerequisite state of mind is categorized by "outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." *Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc.*, 492 A.2d 580, 593 (D.C. 1985); *Sere v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982) (*citing Riggs Nat'l Bank v. Price*, 359 A.2d 25, 28 (D.C. 1976)). Nowhere in the

SAC is there any allegation that any of the individual defendants acted with such evil intent or malice as to justify an award of punitive damages.

Finally – and even were a claim for punitive damages viable in this Complaint – the fact remains that there is a constitutional limit to the disparity between compensatory damages and punitive damages awarded. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."). As the District Court noted, the only quantifiable damages actually alleged in the Second Amended Complaint were for "misappropriation" of Plaintiffs' dues. That amounts to, at most, $120 per year for 3 years (from 2014 to 2017) and then $275 per year after that.[4] The total maximum amount of compensatory damages that might actually be claimed per Plaintiff, therefore, is $910. In order to reach the jurisdictional threshold of $75,000, each Plaintiff would have to collect $74,090 in punitive damages, or a ratio of 81.5 to 1. Certainly, the allegations in the Second Amended Complaint fall far short of asserting that Plaintiffs would be entitled to such a ratio

[4] In reality, the amounts are far less: Plaintiffs Bronner and Rockland are "honorary lifetime members" (SAC ¶¶ 13, 14) and therefore are exempt from paying dues. See Bylaws, Art. II, Sec. 1(c). Plaintiff Kupfer allowed his membership in ASA to lapse after 2014, so he does not pay any dues, either (*Id*., ¶ 16). The Plaintiffs may not actually be paying any dues that could potentially be mismanaged.

of punitive to compensatory damages. *See, e.g., McQueen v. Woodstream Corp.*, 672 F. Supp. 2d 84, 92 (D.D.C. 2009); *see also Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150 (D.D.C. 2007).

Thus, even under the most generous reading of the scant factual allegations in the SAC, Plaintiffs have failed to allege any fact that would suggest damages in excess of $ 75,000. Except for Count Eight (Barton's individual claim), all of the claims in the SAC are derivative in nature. In every other Count, Plaintiffs seek to recover those damages "incurred by" or "on behalf of" the American Studies Association," and seek equitable relief for the irreparable harm done to the Association. Plaintiffs have failed to offer anything other than conclusory statements that they suffered direct harm, that they suffered some injury that was not shared by the other members of the Association, or that the Defendants owed any special duty to Plaintiffs. Finally – and to the extent that any of the allegations in the SAC might be liberally construed to imply individual harm to the Plaintiffs – there is absolutely no basis upon which to conclude that such harm rises to the level required for diversity jurisdiction in this Court. There is no value placed on the denial of Dr. Barton's vote; there is no allegation that the increase in membership fees for each of the Plaintiffs approximates $75,000; there is no allegation that any of the Plaintiffs have incurred any expense because of the Resolution. Because the burden rests on the Plaintiff to demonstrate jurisdiction,

and because Plaintiffs have completely failed to meet this burden, the District Court properly dismissed the SAC for lack of subject matter jurisdiction.

D. The Claims of *Ultra Vires* Action Were Properly Dismissed

Because subject-matter jurisdiction for this case does not lie in the federal courts, there is no obligation to reach Appellants' second issue, whether the District Court properly dismissed the claims for *ultra vires* actions. Nonetheless, on this point, too, Appellants' arguments fail.

According to the Appellants' Brief, only one *ultra vires* claim is before this Court: whether "the acts of adopting the Academic Boycott and the acts taken to advance the Academic Boycott were outside the ASA's powers to act, as defined by the ASA's corporate mission statement" (Brief at 16). No such claim, however, was before the District Court. The three counts asserting *ultra vires* activity were: Count Three (failure to properly nominate officers); Count Four (freezing the membership rolls before the vote on the Resolution); and Count Five (attempting to influence legislation) (App. 179 – 186). The first two counts are not mentioned at all in the Appellants' Brief, while the last is specifically disavowed as an issue on appeal (Brief at 17). As such, any argument that these counts were improperly dismissed has been waived. *See CC1 Ltd. P'ship v. Nat'l Labor Relations Bd.*, 898 F.3d 26, 35 (D.C. Cir. 2018); *New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005)

(stating that petitioners waive arguments that they fail to raise in their opening briefs) (*citing Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002)).

The First Amended Complaint contained only one claim for *ultra vires* actions: Count Two, claiming that the adoption of the Resolution violated the Articles of Incorporation because it did not comport with the "promotion of the study of American culture." (App. 40, ¶ 82). Nowhere in either the First or Second Amended Complaint is there any reference to a "corporate mission statement", nor was any such document included in the Appendix. Too, Appellants specifically refer to a corporate mission statement as "set forth in ASA's Bylaws" (Brief at 43). Again, no such document was ever alleged in either the First or Second Amended Complaint. Appellants have failed to adequately explain exactly what *ultra vires* action they are seeking to prosecute, and have thus failed to preserve the issue for appeal.

If, however, their argument rests on the phrase quoted above – "promotion of the study of American culture" – then their argument betrays a fundamental misunderstanding of how the law of *ultra vires* is actually applied. *Ultra vires* actions are those "'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation." *Welsh v. McNeil*, 162 A.3d 135, 150 n. 43 (D.C. 2017) ("in its true sense the phrase ultra vires describes action which is beyond the purpose or power of the corporation."); *Bronner*, *supra* 249

F.Supp.3d at 47. Thus, while the phrase is often confused with "acts within the power of the corporation but exercised without complying with required procedure" (*Welsh*, *id.*), the concept is separate from a mere misuse of corporate power. In order for the act to be *ultra vires*, it must be expressly prohibited by statute or by-law.

Appellants argue that "[*u*]*ltra vires* acts constitute a larger set of activities [and] … include any acts outside of the corporate mission statement – whether or not they expressly violate the corporations' [*sic*] bylaws" (Brief at 44-45). This is exactly the opposite of the established law of *ultra vires* activity. Any number of activities by a corporate board might conflict with the organization's mission statement, with its avowed corporate philosophy, or with policies of corporate governance, thereby giving rise to a claim for breach of fiduciary duty or of mismanagement. That, however, is not what Appellants put forward here: they are claiming that the action was *ultra vires*, which is a very narrow subset of corporate actions that violate explicit prohibitions in either the controlling statutes or the corporation's by-laws. A "corporate mission statement", no matter how influential on the Council's decision-making process, simply does not rise to the level of statute or by-law.

Appellants have specifically declined to raise, on appeal, any issue related to the *ultra vires* claims that were actually alleged in their pleadings, and have thus

waived those arguments. Instead, they have chosen to proceed on the basis of an unidentified "corporate mission statement" which is neither specifically identified in the pleadings nor adequately described in their Brief. To the extent that they are referring to one phrase quoted in the First Amended Complaint, that phrase does not rise to the level of an explicit prohibition, and therefore does not fit within the narrow category of corporate actions that would be *ultra vires*. Appellants have not articulated any valid reason why the District Court erred in dismissing their *ultra vires* claims as a matter of law.

CONCLUSION

For the reasons argued above, the District Court properly found that it lacked subject-matter jurisdiction over the instant case. Given that all of Plaintiffs' derivative claims were dismissed with prejudice – a ruling that Appellants do not challenge here – and given that the Second Amended Complaint failed to allege any amount of damages incurred individually by the Plaintiffs, it is clear to a legal certainty that Plaintiffs could not attain the jurisdictional threshold of $ 75,000 in damages. Diversity jurisdiction, therefore, was lacking, and the case was properly dismissed.

Moreover, Appellants have disavowed any argument on appeal as to the *ultra vires* claims that were actually articulated in their pleadings below; on the contrary, they chose on appeal to focus on an unidentified "corporate mission

statement." An *ultra vires* claim can only arise from the violation of an express prohibition, in either statute or by-law; a "mission statement" does not qualify. Appellants' challenge to the dismissal of the *ultra vires* claims below fails to raise any compelling argument.

For these reasons, as set forth more fully above, Appellees, Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, and the American Studies Association, respectfully request that this Court affirm the judgment of the District Court.

Respectfully submitted,

/s/ Thomas C. Mugavero

Thomas C. Mugavero, Esquire (#431512)
WHITEFORD, TAYLOR & PRESTON, LLP
3190 Fairview Park Drive
Suite 800
Falls Church, Virginia 22042
(703) 280-9273
(703) 280-8948 (facsimile)
tmugavero@wtplaw.com

Attorneys for Appellees, American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document complies with the type-volume limitation. The document uses 14-point type, Times New Roman, does not exceed 38 pages and the number of words is 9160.

Respectfully submitted,

/s/ Thomas Mugavero
John J. Hathway, Esq. (#412664)
Thomas Mugavero, Esq. (#431512)
Whiteford, Taylor & Preston L.L.P.
1800 M Street, N.W., Suite 450N
Washington, D.C. 20036-5405
(202) 659-6800
jhathway@wtplaw.com
tmugavero@wtplaw.com
Counsel for Appellees American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar

STATUTES AND RULES RELIED UPON

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may

be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

> (1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of-
>
> > (A) every State and foreign state of which the insured is a citizen;
> >
> > (B) every State and foreign state by which the insurer has been incorporated; and
> >
> > (C) the State or foreign state where the insurer has its principal place of business; and
>
> (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

* * * *

D.C. Code § 29–406.31. Standards of liability for directors.

(a) A director shall not be liable to the nonprofit corporation or its members for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

> (1) None of the following, if interposed as a bar to the proceeding by the director, precludes liability:
>
> > (A) Subsection (d) of this section or a provision in the articles of incorporation authorized by § 29-402.02(c);

(B) Satisfaction of the requirements in § 29-406.70 for validating a conflicting interest transaction; or

(C) Satisfaction of the requirements in § 29-406.80 for disclaiming a business opportunity; and

(2) The challenged conduct consisted or was the result of:

(A) Action not in good faith;

(B) A decision:

(i) Which the director did not reasonably believe to be in the best interests of the corporation; or

(ii) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(C) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct:

(i) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and

(ii) After a reasonable expectation to such effect has been established, the director has not established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation;

(D) A sustained failure of the director to devote attention to ongoing oversight of the activities and affairs of the corporation, or a failure to devote timely attention, by making, or causing to be made, appropriate inquiry, when particular facts and circumstances of

significant concern materialize that would alert a reasonably attentive director to the need therefor; or

(E) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its members that is actionable under applicable law.

(b) The party seeking to hold the director liable:

(1) For money damages, also has the burden of establishing that:

(A) Harm to the nonprofit corporation or its members has been suffered; and

(B) The harm suffered was proximately caused by the director's challenged conduct;

(2) For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, also has whatever persuasion burden may be called for to establish that the payment sought is appropriate in the circumstances; or

(3) For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, also has whatever persuasion burden may be called for to establish that the equitable remedy sought is appropriate in the circumstances.

(c) Nothing contained in this section:

(1) In any instance where fairness is at issue, such as consideration of the fairness of a transaction to the nonprofit corporation under § 29-406.70(a)(3), alters the burden of proving the fact or lack of fairness otherwise applicable;

(2) Alters the fact or lack of liability of a director under another section of this chapter, such as the provisions governing the consequences of an unlawful distribution under § 29-406.33, a conflicting interest transaction under § 29-406.70, or taking advantage of a business opportunity under § 29-406.80; or

(3) Affects any rights to which the corporation or a director or member may be entitled under another statute of the District or the United States.

(d) 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; or

(4) An intentional violation of criminal law.

D.C. Code § 29–411.03. Demand.

A person shall not commence a derivative proceeding until:

(1) A demand in the form of a record has been delivered to the nonprofit corporation to take suitable action; and

(2) Ninety days have expired from the date the demand was effective unless:

(A) The person has earlier been notified that the demand has been rejected by the corporation; or

(B) Irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2019, a copy of the Appellee Brief was served on the following through the Court's electronic filing system, and by first-class mail, postage prepaid:

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

L. Rachel Lerman, Esq.
Barnes & Thornburg LLP
2029 Century Park East, Suite 300
Los Angeles, CA 90067-2904

Aviva Vogelstein, Esq.
The Louis D. Brandeis Center for
Human Rights Under Law
1717 Pennsylvania Avenue, N.W.
Suite 1025
Washington, D.C. 20006-4623

And via first-class mail, postage prepaid, upon:

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

Joel Friedlander, Esq. (admitted *pro hac vice)*
Friedlander & Gorris, P.A.
1201 N. Market Street, Suite 2200
Wilmington, DE 19801

Eric D. Roiter (admitted *pro hac vice)*
Lecturer in Law
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215

/s/ Thomas C. Mugavero
Thomas C. Mugavero