NO ORAL ARGUMENT DATE SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7017

SIMON BRONNER, MICHAEL ROCKLAND,
CHARLES D. KUPFER and MICHAEL L. BARTON,

Appellants,

v.

LISA DUGGAN, CURTIS MAREZ, NEFERTI TADIAR,
SUNAINA MAIRA, CHANDAN REDDY, J. KEHAULANI
KAUANUI, JASBIR PUAR, STEVEN SALAITA, JOHN
STEPHENS and the AMERICAN STUDIES ASSOCIATION,

Appellees.

**BRIEF FOR APPELLEES J. KEHAULANI KAUANUI
And JASBIR PUAR**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 19-7017

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties

The Appellants are Simon Bronner, Michael Rockland, Charles D. Kupfer, and Michael L. Barton, who were the Plaintiffs in the District Court. The Appellees are Lisa Duggan, Curtis Marez, Neferti Tadiar, Sunaina Maira, Chandan Reddy, J. Kehaulani Kauanui, Jasbir Puar, Steven Salaita, John Stephens, and the American Studies Association, who were the Defendants in the District Court.

Ruling Under Review

At issue in this appeal is the February 4, 2019 Order and Memorandum Opinion and Order by the Honorable Rudolph Contreras, granting each of the Defendants' Motions to Dismiss.

Statement of Related Cases

This case has not been previously before the Court save for Appellees' Motion for Summary Affirmance of the District Court's decision, and there are no pending or related cases.

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly applied the legal standards to the allegations and dismissed for lack of jurisdiction the claims raised.

2. Whether any other reason properly raised by any of the parties is a proper basis for dismissal.

3. Whether the case should be dismissed because the actions Appellants complain of, even if taken, ASA's Constitution.

4. Whether the case should be dismissed as to the individual Appellees because they are immune from suit under the federal Volunteer Protection Act, 42 U.S.C. §14501 *et. seq*.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

COUNTERFACTUAL STATEMENT

Summary of the Allegations Against Appellees Kehaulani and Puar

Essentially, Appellants have sued Dr. Puar and Dr. Kauanui because they disagree with their political views. In fact, Appellants lavish attention on Dr. Puar, who has written two highly acclaimed academic books published by Duke University Press, going to great lengths to quote a wildly inaccurate and defamatory *Wall Street Journal* account of a lecture she gave more than two years after the events over which Appellants claim to be aggrieved. (Appellants' App. p.128; ¶ 59). They also

accuse both defendants of pro-boycott activities that have nothing at all to do with the ASA, but instead involve an entirely different academic association. (Appellants' App. pp.132-133; 136; 145; ¶¶ 70, 80, 102.) Appellants' allegations against Dr. Puar and Dr. Kauanui may be summarized as follows:

A. Charging Allegations Against Dr. Puar

Dr. Puar was a member of USACBI in November 2017. (Appellants' App. p.123; ¶ 42).[1] Seven years before that, she began serving on the ASA's Nominating Committee, in July 2010. (Appellants' App. p.117 ¶ 25).[2] When she ran for the Nominating Committee she "chose not to disclose her true agenda" of supporting an academic boycott by packing the ASA's leadership (Appellants' App. p.129; ¶61). Dr. Puar controlled the nominating process, imposing the restriction that only signed supporters of BDS would be nominated for ASA President and choosing the candidates herself (Appellants' App. pp. 110-111; ¶ 5). Dr. Puar packed elected positions with supporters, solely to assure that the ASA would adopt the boycott resolution, thus manipulating the takeover of the ASA (Appellants' App. pp.124; 128-129; ¶¶ 45, 58, 60). She encouraged Sunaina Maira and Kehaulani Kauanui to

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[1] All paragraph references in the discussion of Appellants' charging allegations are to Appellants' App. pp.105-191, the Second Amended Complaint.

[2] The Nominating Committee is comprised of six members elected "by the membership-at-large for staggered terms of three (3) years, two (2) members to be elected annually." (Dkt. No. 14-2, p. 4, ASA Bylaws, Art. VI, §1).

run for seats on the National Council without revealing that they were USACBI leaders (Appellants' App. p.131; ¶ 68).[3] Within two years of joining the six-member Nominating Committee Dr. Puar had arranged it so that six of the ten "continuing voting members" of the National Council had endorsed calls for the boycott (Appellants' App. pp.129-130; ¶ 62). Appellants conclude by alleging that this concealment caused the ASA to engage in *ultra vires* actions, (Appellants' App. pp. 133-134; ¶ 72), a claim which was dismissed from the suit. *Bronner v. Duggan*, 249 F.Supp.3d 27, 32 (D.D.C. 2018).[4]

B. **Charging Allegations Against Dr. Kauanui**.

Dr. Kauanui was elected to the ASA's National Council in 2013 (Appellants' App. pp. 117; 138-139; ¶¶ 24, 90) after acknowledging in her campaign statement that she was on the Advisory Committee of the United States Academic Committee

[3] Curiously, the immediately preceding paragraph acknowledges that Kehaulani's campaign statement directly referred to her position on the USACBI Advisory Committee. (Appellants' App. p.¶ 67) and the paragraph before that acknowledges that Maira's campaign statement said she wanted to "support the mission of the public university and the work of student and faculty activists challenging privatization and debt, as well as about the role and responsibilities of the U.S. university in relation to questions of incarceration, surveillance war, **occupation**, and neoliberalism." It also states she had "organized a resolution on the war in Iraq and discussions of boycott and divestment opposing the U.S.-backed occupation and violations of human rights and academic freedom in Palestine" (Appellants' App. p.130-131; ¶ 66), emphasis added.)

[4] Appellants s also extraneously accuse Dr. Puar of involvement in getting a similar resolution passed by the Association for Asian American Studies (Appellants' App. pp.132-133; 136; ¶¶ 70, 80).

for the Boycott of Israel (Appellants' App. p.131; ¶ 67). She only decided to run for this office after Dr. Puar suggested this as a tactic to advance a boycott resolution (Appellants' App. p.131; ¶ 68). Dr. Kauanui's "vague references" to the committee leading the boycott campaign were intended to conceal her plan from the ASA membership, which elected her (Appellants' App. pp.131-132; ¶ 69). She knew that concealing this mattered long before the election when she wrote her campaign statement, because another candidate who was allegedly more explicit later lost his campaign in the same election which Dr. Kauanui won (Appellants' App. pp.133-134; ¶ 70). This concealment, while she was still a candidate and before she assumed a position on the National Council breached some pre-existing duty of loyalty to ASA members and caused the ASA to engage in *ultra vires* actions, (Appellants' App. pp.132-133; ¶ 72), a claim which was dismissed from the suit. *Bronner v. Duggan*, 249 F.Supp.3d at 32. Dr. Kauanui breached her duties of candor and loyalty to the ASA by "subordinating the Association's obligations and purposes to their own political interests." (Appellants' App. pp.134; ¶ 73). Dr. Kauanui placed her personal interest in the boycott resolution over the interests of the ASA and its members by failing to ensure that all points of view were represented on the National Council and thereby breached her "fiduciary duties to the voting membership" (Appellants' App. p.134; ¶ 75).[5] Dr. Kauanui voted along with all

[5] The basis for assuming that there *is* a fiduciary duty to the voting membership, or why that includes representation of diverse viewpoints, which is nowhere in the

other National Council members, to submit the boycott resolution to the entire ASA membership, even though she was unhappy about this (Appellants' App. p.145; ¶ 104). She then worked with colleagues both within the ASA's National Council and outside of the ASA to support the boycott resolution (Appellants' App. pp.145-146; ¶ 105). Dr. Kauanui served on a subcommittee of the National Council to revise the text of the resolution and accompanying documents (Appellants' App. p.151; ¶ 118). She also received emails about the membership and balloting process from the ASA's Executive Director, which she forwarded to the entire National Council (Appellants' App. pp.156-158; ¶¶ 134-136).

SUMMARY OF THE ARGUMENT

The District Court reasonably interpreted the second amended complaint. The District Court then applied the correct legal standards to the construed claims and appropriately dismissed them for lack of jurisdiction.

Furthermore, the District Court may be affirmed upon any other grounds properly raised by the parties below. Thus, this case can and should also be dismissed upon the following three grounds:

Bylaws, is never articulated. It is likewise unexplained how the National Council, which neither nominates nor elects its own members or even the members of the Nominating Committee, has any control over this process.

First, the acts which Appellants allege the American Studies Association has undertaken do not constitute *ultra* vires actions because they did not violate the American Studies Association's Constitution.

Second, the individual defendants are immunized from liability under the federal Volunteer Protection Act because there are no plausible allegations that any of the acts alleged by Appellants were willful or reckless misconduct intended to harm an individual or individuals.

In addition to these general arguments, the facts alleged by Appellants fail to make out claims specifically against Professor Kauanui or Professor Puar.

First, Dr. Puar was never a director, officer, or agent of the American Studies Association. As a mere candidate to become a volunteer member of a committee she did not have a fiduciary relationship with the ASA or its members. Further, Appellants' own allegations make it implausible that she misrepresented her candidacy for the Nominating Committee.

Second, nothing Dr. Kauanui did before she became an elected member of the ASA's National Council could have violated a fiduciary duty because she had no such duty until she became a member of the Council in July 2013.

Third, many of the allegations against the ever-growing throng of "individual defendants" fail to set forth what either Dr. Puar or Dr. Kauanui did that violated any hypothetical or actual duty.

Fourth, Appellants' actual claims that Dr. Puar singlehandedly controlled a six-member nominating committee to secretly "stack the deck", are inherently implausible. Similar claims that Dr. Kauanui voting, along with all other members of the unanimous National Council, to allow the general membership to vote on (and pass) a resolution "caused" corporate waste or impermissible lobbying is implausible. This is especially so since the ASA has a long history of public engagement on national and international issues.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss under either Rule 12(b)(1) or 12(b)(6). *King v. Jackson*, 487 F.3d 970, 972 (D.C. Cir. 2007); *Osborn v. Visa, Inc.*, 797 F.3d. 1057, 1062 (D.C. Cir. 2015.)

When a party files a motion to dismiss under Rule 12(b)(1) the plaintiffs bear the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction. *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F.Supp. 2d, 172, 176 (D.D.C. 2004.) Because subject matter jurisdiction focuses on a court's power to hear the plaintiffs' claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority. For this reason, Appellees' "'factual allegations in the complaint...will bear closer scrutiny in resolving [the] 12(b)(1) motion' than in

resolving [the] 12(b)(6) motion for failure to state a claim." *Id.* at 13-14 (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (2d ed. 1987) (alternation in original)). *Bank of Am., N.A. v. FDIC*, 908 F. Supp. 2d 60, 76 (D.D.C. 2012)

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts "may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

II. **THE DISTRICT COURT PROPERLY EXAMINED APPELLANTS' COMPLAINT UNDER THE CORRECT LEGAL STANDARD AND DID NOT ERR BY FINDING IT LACKED JURISDICTION TO HEAR APPELLANTS' CLAIMS.**

Appellants Kauanui and Puar join in each of the jurisdictional arguments made by the other appellants.

III. **THE DISTRICT COURT'S ORDER OF DISMISSAL MAY BE AFFIRMED UPON ANY OTHER GROUNDS PROPERLY RAISED BY ANY OF THE PARTIES**

An appellate court may affirm a dismissal for any reason properly raised by the parties. *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008). *Accord*, *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011). Affirmation of the district court's decision on Rule 12(b)(1) is fully merited. However, out of an abundance of caution, Appellees point out that there are also abundant reasons to affirm the dismissal based on Rule 12(b)(6).

A. **The Individual Defendants Are Immune From Suit Under the Federal Volunteer Protection Act Because There Are No Allegations Showing That They Engaged in Intentional and Willful Misconduct Toward any *Individual*.**

To be sure, the Volunteer Protection Act (VPA) does not immunize harm "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 . . ..". 42 U.S.C. §14503(a)(3) (emphasis added). In contrast to D.C. Code §29-406.31(d), however, the plain language of this exception renders it inapplicable to alleged misconduct directed against a corporation or organization *itself*. §14503(a)(3) creates an exception to immunity under the VPA only for

conduct directed at an individual; there is no such exception for conduct directed at the volunteer's own corporation or nonprofit entity.

The VPA was intended to immunize volunteers from liability for harm they may have committed – unless it was committed "on behalf of the organization or entity" and directed at a third party, rather than the organization or entity itself. *See* §14503(a); §14503(b) ("Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization . . . against any volunteer of such organization or entity."); §14503(f):

> Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization . . . unless the claimant established by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the right or safety *of the individual harmed.*
>
> (Emphasis added).

The plain language of the VPA makes it clear that is intended to immunize all volunteer conduct other than intentional misconduct directed towards individuals or harm to the organization or entity on behalf of which they volunteer. Therefore, assuming *arguendo* that plaintiffs had adequately alleged that individual Appellees,

and specifically Dr. Kauanui or Dr. Puar, had intended to harm the ASA, this intent is still insufficient to bring the alleged action outside the scope of the VPA because there is no allegation that Appellees acted with malice to any individuals, and certainly not to the specific individual plaintiffs who now allege they were harmed.

1. Appellants Have Not Alleged Facts Making It Plausible That Either Dr. Puar or Dr. Kauanui, or Any of the Other Individual Appellees, Acted Outside of the Scope of Their Responsibilities.

Appellants' repeated invocation of the phrase "ultra vires" does not imbue their allegations with magical properties. Dr. Puar had no fiduciary duty while she was running for a seat on the Nominating Committee and their claim that as a candidate in 2010 she concealed an intention to support a boycott resolution is belied by the Appellants' own chronology Once elected, her only duty under the Bylaws was to see that as a whole, the nominees maintained "a balance of age, racial, ethnic, regional, and gender participation" (Section 5, *supra*.)[6] There are no facts alleging she acted outside of the scope of her position in any way.

Dr. Kauanui similarly had no duty until she took her position as an elected member of the National Council and in any event, she was entirely forthright about her leadership role in the United States Academic Committee for the Boycott of

[6] Dr. Puar does not agree that her presence as a mere volunteer on an ASA Committee establishes that she had a fiduciary duty, but she recognizes that this limited question is not amenable to resolution on a motion to dismiss.

Israel. Although the Appellants do not like what she did once she was on the Council, there are no facts suggesting that she acted beyond the scope of her position. Appellees have enumerated six instances before the boycott resolution was passed in which the ASA took positions on issues of social justice which might, and in some cases certainly *would*, cost it money, or which required involvement with legislation, and another six that came up during Dr. Kauanui's term as a National Council member. There is no basis to suggest that her acts or those of the other individual Appellees were beyond the scope of her position.

2. **Because Volunteer Immunity Under 42 U.S.C. §14503 is Analogous to Qualified Immunity Under 42 U.S.C. §1983, it is Appropriate to Resolve the Immunity Question via a 12(b)(6) Motion.**

Although immunities may be plead as affirmative defenses a defendant's entitlement to immunity should be resolved at the earliest stage possible so that, as here, the costs and expense of trial are avoided where a defense is dispositive. *v. Salazar*, 831 F.Supp. 3d 313, 325-326 (D.D.C. 2011).[7] *Accord*, *Ford v. Mitchell*, 890 F.Supp.2d 24, 32 (2012). The Circuit laid the groundwork for this reasoning in *International Action Center v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) in which Judge Roberts applied the immunity analysis to the facts as plead.

[7] We need not claim that volunteers with nonprofit organizations fulfill a function as important as government officials. However, where a defendant can show a facial right to immunity, the social policy of shielding that defendant from personal monetary liability and harassing litigation argues for the earliest possible resolution of such claims.

Similarly, the facts alleged do not come close to suggesting that either Dr. Kauanui or Dr. Puar, or their fellow individual appellees, acted outside the scope of their responsibilities or harbored any intent to harm the plaintiffs as individuals. The repeated cries of "*ultra vires*" are mere legal conclusions masquerading as facts. Where Appellants have failed to allege facts demonstrating an intent to harm them by means of acts beyond the scope of their volunteer responsibilities, dismissal is appropriate. *Probert v. Family Centered Servs. of Alaska*, 2011 U.S. Dist. LEXIS 161545, at *4-7 (D. Alaska Mar. 11, 2011)

B. **THE ASA HAS A LONG HISTORY OF POLITICAL ADVOCACY; THE BOYCOTT RESOLUTION IS NOT AN *ULTRA* VIRES ACT BECAUSE IT DOES NOT VIOLATE ITS CONSTITUTION AND IS ENTIRELY CONSISTENT WITH NUMEROUS PRIOR ACTIONS**.

Appellants' *ultra vires* theory ignores that the Association is an academic and association, not a profit-making business, and that not every decision it makes is about maximizing income or minimizing costs. In fact, the ASA has had a long history of making decisions very like the boycott resolution, even where those decisions entered national or international politics and even where they may have cost the Association some money. In 1998 the ASA supported an NAACP initiative

to boycott certain hotel chains[8]. In 2002 the ASA announced it would not site meetings in California or Washington, two states which had passed initiatives outlawing affirmative action. In 2004 the ASA announced that it would heavily favor unionized hotels for its meetings and would add "labor disputes" as grounds for cancelling hotel contracts. In 2005 the ASA criticized restrictions the Cuban government for imposing travel restrictions on academicians. In 2006 the ASA passed a resolution calling for an end to the U.S. war in Iraq.[9] In 2010 the ASA declared that it would no longer hold meetings at Hyatt hotels until all organizing issues with all unions anywhere had been resolved. In 2015 the ASA opposed the ban the UAE had imposed on an American researcher. In 2015 the ASA notified the State of Georgia that it would suspend plans to locate an upcoming annual meeting Atlanta if the state passed a threatened "Religious Freedom Restoration Act" which would have invoked religious grounds to excuse discrimination against the LGBTQ communities and Muslims. In 2015 the ASA declared its opposition to all state legislation allowing the carrying of concealed weapons on college campuses. In 2016 the ASA declared it would not site meetings in North Carolina if that state passed the "bathroom ban" legislation which had been proposed targeting

[8] This and the examples which follow are all on the ASA's website at either https://theasa.net/about/advocacy/resolutions-actions/actions or https://theasa.net/node/4899, each last visited on August 27, 2018 and were fully described in Dkt. 109, at pp. 9-10.

[9] This resolution, if put into action, would have required Congressional action and efforts to influence legislation as surely as the boycott resolution.

transgender students. In 2016 the ASA declared it would speak out forcefully against attacks on academic freedom in Turkey. In 2016 the ASA declared its opposition to the Dakota Access Pipeline.

It is thus clear that the Association has had and continues to have a history of outspoken involvement in issues involving freedom and social justice, even where the issues directly implicated legislation, and even where the ASA's positions could cost it significant money. None of these have led to suits accusing the ASA or its officers of placing political interests above the interests of the ASA or its members.

C. PLAINTIFFS HAVE NOT PLEAD FACTS MAKING FACIALLY PLAUSIBLE CLAIMS AGAINST APPELLEES PUAR AND KAUANUI.

Although a motion to dismiss requires that the plaintiffs' factual allegations be taken as true, "it must contain sufficient factual matter … to state a claim to relief that is plausible on its face." *BEG Invs. L.L.C. v. Alberti*, 85 F.Supp.3d 15, 24-25 (D.D.C. 2015) (internal quotation marks and citations omitted). A claim is facially plausible only when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks omitted). "A court need not accept a plaintiff's legal conclusions as true, *see id.,* nor must a court presume the veracity of legal

conclusions that are couched as factual allegations." *Id.*, (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)

Conclusory allegations of law and unwarranted inferences are insufficient to avoid dismissal under this standard. *Id.* at 569. Where facts are merely *consistent with* possible misconduct a court may reject claims as implausible and thus dismiss a complaint. *BEG Invs. L.L.C. v. Alberti* at 43-44 (holding that bad faith is notoriously easy to allege and difficult to prove, and that more must be provided before the doors to discovery swing open.) Applying this standard, we shall show that the plaintiffs simply have not plead enough facts to make out plausible claims.

1. **Dr. Puar's Candidacy for the Nominating Committee Never Breached a Fiduciary Duty to the ASA.**

The threshold requirement for a breach of fiduciary duty claim is the existence of a fiduciary relationship. *Millennium Square Residential Ass'n v. 2200 M. Street LLC.*, 952 F.2d 234, 248 (D.D.C. 2013). Although the District of Columbia's caselaw permits a degree of elasticity *id.* no case has held that the duty can arise before one party reposes trust and confidence in the other. Thus, nothing Dr. Puar did or did not say about her candidacy could itself be the basis for any claimed breach of duty.

Plaintiffs' claims that Dr. Puar harbored a hidden intention to singlehandedly take over the Nominating Committee are fatally flawed. Plaintiffs admit that Dr.

Puar ran for a committee seat in 2010 (Appellants' App. p.129; ¶61), three full years before her first involvement with efforts to get a boycott resolution passed by the Association for Asian American Studies (Appellants' App. pp.132-133; ¶70). Plaintiffs do not even allege, nor can they, that Dr. Puar was even involved with the USACBI when she sought a position on the ASA's Nominating Committee in 2010. Plaintiffs are reduced to alleging that Dr. Puar did so good a job of concealing her intent to support a boycott resolution that she hid it even from herself. This leap of logic exemplifies implausibility.

2. **Dr. Puar's Service on the Nominating Committee Never Breached a Fiduciary Duty to the ASA.**

The Nominating Committee had six members (fn. 2, *supra*). From the moment she joined the Committee Dr. Puar "obtained control of the nominations process" to "impose this restriction" of "a pledge of allegiance" to the USACBI so that the membership would be asked to vote for her "chosen candidates" (Appellants' App. pp.110-111;¶5). These telltale phrases about "control", "restriction", and a "pledge of allegiance" are hallmark examples of conclusions masquerading as factual allegations, the very kind of artful pleading which *Iqbal* teaches us are "not entitled to the presumption of truth". *Ashcroft v. Iqbal*, 556 U.S. at 679.

One can search all 244 paragraphs of the Second Amended Complaint and not find a word about what Dr. Puar allegedly did to control the five other committee

members. Of course, it is possible that Dr. Puar exercised some hidden power of persuasion or that she blackmailed them. But it is simply not plausible.

3. **Dr. Kauanui's Candidacy for the Nominating Committee Never Breached a Fiduciary Duty to the ASA.**

Again, although Plaintiff's Second Amended Complaint is laden with case citations, none of them stand for the principle that a fiduciary relationship inheres before a candidate is elected to a corporation's board. The duty does not arise until a board officer *becomes* an officer. (12B Fletcher Cyc. Corp. §5915.10 (2010) holding that a direct action may be brought against an *officer* of a corporation for violations of a duty arising from contract or otherwise "and owing directly from the officer to the injured shareholder.) *Daley v. Alpha Kappa Alpha Sorority*, 26 A.3d 723, 729-730 (D.C. 2011).

And even the plaintiffs' claim of concealment is much more problematic, since they admit, as they must, that Dr. Kauanui publicized her leadership of the United States Academic Committee for the Boycott of Israel right in her campaign statement (Appellants' App. p.131; ¶67). The idea that this bold declaration amounted to concealment is bereft of plausibility. To conceal this shortcoming, Plaintiffs tell an even less plausible story about a candidate who did *not* get on the Council, Dr. Alex Lubin. Dr. Lubin's candidacy statement referenced "a pending resolution on the academic and cultural boycott of Israel" (Appellants' App. pp.131-132; ¶69). Dr.

Lubin, who ran at the same time as Dr. Maira and Kauanui lost the election. On this slender fact plaintiffs build a scaffold of unsupported conclusions – that *before* the election Dr. Kauanui "knew" that a commitment to a boycott "was material" to ASA members (Appellants' App. pp.132-133; ¶70) and that she therefore "carefully planned" her subterfuge (¶69). This inverts the chronology, for Dr. Kauanui could not possibly have "known" this before Dr. Lubin lost the same election in which Dr. Kauanui herself was a candidate. It also makes very generous assumptions about why she won and Dr. Lubin lost. It could have been because he is a white male, or because Dr. Kauanui had a longer and more prominent history of service to the ASA, or it could have been that Dr. Lubin, who had spent the two previous years overseas, was not in close enough touch with his colleagues. That Dr. Kauanui's victory is merely *compatible with* hypothetical knowledge that mentioning a boycott resolution would cost her votes does not make this more plausible than less sinister explanations. It thus fails the *Iqbal* test.

4. **Dr. Kauanui's Service on the National Council Never Breached a Fiduciary Duty to the ASA and Never Proximately Caused Injury to Any of the Plaintiffs.**

Dr. Kauanui served on the National Council from July of 2013 through June of 2016 (Appellants' App. p.117; ¶24). Throughout that period the National Council had twenty voting members. (Dkt. No. 14-2, pp. 3-4, Art. V, §1. Once on the

Council, Dr. Kauanui is alleged to have done the following things the plaintiffs do not like:

1. She failed to "ensure that the National Council fairly represented the diversity of the membership – in interests and point of view as well as other characteristics." (Appellants' App. p.134; ¶75).
2. She placed her personal interests in the boycott resolution "over the interests of the American Studies Association and its members" *Id*.
3. She voted, along with every single other member of the National Council, to submit the boycott proposal to a vote of the ASA's general membership (Appellants' App. p.145; ¶104);
4. She worked with colleagues, both within and without the ASA, to support the resolution (Appellants' App. pp.145-146; ¶105);
5. She worked on a National Council subcommittee to revise the text of the boycott resolution and its supporting documents (Appellants' App. p.151; ¶118); and
6. When she received two emails plaintiffs do not like from the ASA's Executive Director, she forwarded them to the entire Council for consideration. (Appellants' App. pp.155-158; ¶¶ 134-136).

Yet this recitation of alleged calumnies sheds no light on what Dr. Kauanui did that was wrong, or how it proximately caused harm.

Failing to ensure that the National Council represented diverse viewpoints. First, the responsibility for diversity rests with the six-member Nominating Committee, not the National Council (Dkt. No. 14-2, pp. 4-5, Art. VI, §2. There was nothing that Dr. Kauanui, has a National Council member should have done to interfere with this. Second, the only definition of diversity in the Bylaws specifies that the Association should "maintain a balance of age, racial, ethnic, regional, and gender participation" (*Id.* at p.17). The Association did not seek to maintain diversity of interests or viewpoints any more than it did height, weight, or dietary preferences. Plaintiffs are so unable to show an actual breach of duty or *ultra vires* action that they simply make one up.

Placing personal interests in the boycott resolution above the interests of the ASA or its members. As pointed out in III.B., supra, the Association has had a long history of making decisions very much like the one about which Appellants complain, and there are no allegations suggesting that Appellees elevated personal interests or disregarded the interests of the Association.

Joining in the National Council's Unanimous Vote to Refer the Boycott Resolution to the General Membership for an Open, Democratic Vote. Although Appellants complain about this act, they never explain why a vote should not have been taken, or how any individual National Council member's vote proximately caused harm to either the plaintiffs or the Association as a whole.

Here the Appellants' claim, like the allegation that Dr. Kauanui elevated her personal interests above the Association, are so attenuated as to require a brief review of the law of corporate waste, the claim plaintiffs attach to Count Nine of their jeremiads. The allegation of "corporate waste" must be plead and proven to a very demanding standard. (*Daley v. Alpha Kappa Alpha Sorority*, 26 A.3d at729-730 holding that even allegations that the corporation had wasted nearly half a million dollars ($250,000 in a lump sum payment and $48,000 per year for four years) does not meet this demanding standard.

> Corporate waste claims must articulate an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which a reasonable person might be willing to trade, and must be egregious or irrational. 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. 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 squander[ed] corporate assets. If any reasonable person would find that the corporation's decision made sense, the judicial inquiry ends.
>
> *Id.*, (internal quotation marks and citations omitted.)

There is simply no way that the National Council's steps, in which Dr. Kauanui joined, could have been the proximate cause of cognizable corporate waste under this standard.

Working to Persuade ASA Members to Support the Resolution and Serving on a National Council Subcommittee to Rewrite the Resolution and Supporting Documents.

Appellants never explain how this is wrongful. Persuasion and compromise lie at the heart of democratic undertakings, whether in the Congress or in the American Studies Association. There is simply nothing improper about revising a proposal to make it more popular or in trying to persuade colleagues to vote for it. That Appellants dislike the results of the Association's referendum on the resolution does not make it plausible that garden-variety politicking to achieve those results is somehow wrongful. There is nothing in the law or logic that supports the allegation that either of these acts were improper, or that they proximately caused *anything*, much less harm to the Association or to the plaintiffs.

Forwarding two emails sent by the ASA Director to the entire National Council. The Kafkaesque nature of this accusation may be illustrated through a simple hypothetical. We would ask this Court to imagine Appellants' reaction had Dr. Kauanui *not* forwarded these emails to all twenty-plus members of the National Council and had instead kept them to herself or had shared them with only a few trusted confederates. Dr. Kauanui would then be accused of being secretive to keep this information from the broader National Council membership and to thus control the vote. As with so many of Appellants' other allegations, this charge is the very type of unwarranted inference that *Iqbal* abjured – the amplification of something that is merely *compatible* with a theory of liability when a theory of wrongdoing is nor more plausible than a benign theory – that Dr. Kauanui wanted to ensure that the entire twenty-plus National Council, both voting and nonvoting members, had complete information.

Appellants have tried to create duties Dr. Kauanui didn't have. They have attributed malicious intent where no evidence makes that attribution any more plausible than benign intent. They have singled out one social justice position out over a dozen the ASA has taken and have tried to hang a price tag on that decision because they happen to disagree with it. None of this actionable. All of it cries out for finding that additional grounds exist for dismissing this complaint.

CONCLUSION

Appellants have tried to claim as their own injuries which are not theirs; have sought to conjure duties the defendants do not have and have accused them of ill intent while bereft of facts making such malice plausible. For the foregoing reasons, this Court should affirm the judgment below.

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CERTIFICATE OF COMPLIANCE
FRAP 32(a)(7)(C)

The text for this Brief for Appellees was prepared using Times New Roman, 14 point and -- including the Statement of Issues but omitting those items described in Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1) – contains 5630 words as counted by Microsoft Word 2016.

/s/ Mark Allen Kleiman
MARK KLEIMAN (#61630)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2019, I caused a true and correct copy of the above Brief for Appellees to be served upon Appellants, by filing the Brief for Appellees on the Court's CM/ECF system.

/s/ Mark Allen Kleiman
MARK KLEIMAN (#61630)