ORAL ARGUMENT NOT YET SCHEDULED

No. 19-7017

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

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

Plaintiffs-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,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:16-CV-00740-RC

BRIEF FOR DEFENDANT-APPELLEE DR. STEVEN SALAITA

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GLOSSARY

ASA	American Studies Association
CAB	Corrected Appellants' Brief
SAC	Second Amended Complaint

JURISDICTIONAL STATEMENT

On February 4, 2019, the United States District Court for the District of Columbia ("District Court") entered a final order dismissing this case, finding it did not have subject matter jurisdiction under 28 U.S.C. § 1332. App. 363-64. This Court has jurisdiction over the District Court's decision under 28 U.S.C. § 1291.

INTRODUCTION

The District Court correctly dismissed Plaintiffs' Second Amended Complaint ("SAC") for lack of subject matter jurisdiction, finding that Plaintiffs failed to satisfy the $75,000 amount-in-controversy required to maintain a diversity case in federal court. 28 U.S.C. § 1332(a). The only relief sought by Plaintiffs that could exceed the jurisdictional amount is for alleged injuries to the American Studies Association ("ASA"), not to Plaintiffs themselves. But as the District Court correctly found, Plaintiffs cannot seek relief for the ASA's injuries. Moreover, Plaintiffs fail to allege any cognizable claim against Defendant Dr. Salaita. Plaintiffs allege that he was one of dozens of National Council members when the ASA expended funds on legal fees to defend against this very lawsuit, but fail to allege any specific actions by Dr. Salaita related to any of their claims. Plaintiffs even fail to allege one single fact that would support personal jurisdiction over him. Plaintiffs' other allegations regarding Dr. Salaita expose the reason they target him—his outspoken advocacy for the rights of Palestinians and the right to boycott Israel to enforce those rights. The District Court's dismissal must be affirmed.

STATEMENT OF ISSUES

1) Whether the District Court correctly dismissed Plaintiffs' Second Amended Complaint for lack of subject matter jurisdiction where Plaintiffs failed to satisfy the amount-in-controversy requirement because they cannot seek relief for injuries to the ASA and did not allege any specific injury to themselves.
2) Whether Plaintiffs failed to state *ultra vires* and breach of contract claims against Dr. Salaita given that he was not a member of the ASA National Council when the alleged conduct occurred, and given that direct *ultra vires* claims cannot be brought by members against individuals.
3) Whether Plaintiffs failed to state breach of fiduciary duty and corporate waste claims against Dr. Salaita for being a member of the ASA's National Council when the ASA's bylaws were properly amended and funds were withdrawn to defend against Plaintiffs' lawsuit, when Dr. Salaita is not alleged to have been personally involved, and when Plaintiffs alleged no injury to themselves arising out of these claims.
4) Whether Plaintiffs failed to establish personal jurisdiction over Dr. Salaita given that they did not allege that he had any contact with the forum, and he does not reside in the District of Columbia.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In 2013, the ASA adopted a resolution regarding a boycott of Israeli academic institutions (the "Resolution"). *See, e.g.*, App. at 110, ¶ 3; 126-27, ¶ 54. Dr. Steven Salaita's term on the ASA's National Council began July 1, 2015, App. at 117, ¶ 26, long after the 2013 Resolution was adopted and the majority of the conduct complained of took place. *See, e.g.*, App. at 117-65, ¶¶ 28-161. Dr. Salaita's term ended June 30, 2018. App. at 117, ¶ 26.

Plaintiffs incorrectly allege (on "information and belief") that Dr. Salaita is a resident of the District of Columbia. App. at 117, ¶ 26. Dr. Salaita resides in the Commonwealth of Virginia. *See* Return of Serv./Aff. of Summons & Compl. Executed, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-0740 (RC)), ECF No. 84 (the process server's Aff. of Posting the Summons at Dr. Salaita's place of abode in Springfield, Va.).

The only allegation Plaintiffs make that Dr. Salaita had any responsibility for the events they complain of is in the section of the SAC identifying the parties, alleging that Dr. Salaita "was a member of the National Council" when the ASA's bylaws "were changed to allow large withdrawals" from the ASA's Trust and Development Fund, and "when large withdrawals were taken to cover expenses related to the Boycott Resolution." App. at 117, ¶ 26. Any Resolution-related

expenditures allegedly withdrawn from the ASA's Fund while Dr. Salaita was on the National Council were taken out to defend the ASA from Plaintiffs' own lawsuit—the "substantial legal costs defending the Resolution." App. at 172, ¶ 183. Plaintiffs do not allege that Dr. Salaita had any personal involvement in the actions alleged, including amending the bylaws or withdrawing funds to pay Resolution-related expenses. Plaintiffs also do not dispute that the National Council is authorized to amend the bylaws without approval by the membership. *See* Const. & Bylaws of the Am. Studies Ass'n ("ASA Const. & Bylaws"), Bylaws, Art. XIII § 1, Ex. 2 to Defs.' Mot. to Dismiss by ASA, Gordon, Maira, Reddy, Tadiar, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-0740 (RC)), ECF No. 14-2. Plaintiffs also do not allege how they, as opposed to the ASA, might have been injured by these withdrawals.

Of the dozens of National Council members who served from 2015-2018 (as Dr. Salaita did), or from 2014-2017, 2016-2019, or 2017-2020, and who therefore, according to Plaintiffs' allegations, could bear the same responsibility as Dr. Salaita, Plaintiffs chose to sue only one in their lawsuit—Dr. Salaita. App. at 115-17, ¶¶ 18-27; *see also* ASA Const. & Bylaws, Bylaws, Art. V § 1; *see also* App. at 50 (in which the District Court, in this case, considered the ASA Constitution and Bylaws in deciding a Motion to Dismiss because they were specifically referenced in Plaintiffs' Complaint).

Dr. Salaita is only mentioned in two other paragraphs in the SAC, both regarding events that occurred before he was a member of the National Council. One paragraph contains an excerpt of an op-ed Dr. Salaita wrote regarding the United States Campaign for the Academic and Cultural Boycott of Israel ("USACBI") that was published March 1, 2014, prior to his tenure on the National Council, with a corresponding footnote containing extraneous information about Dr. Salaita's termination by the University of Illinois due to his tweets regarding Israel and Palestine (App. at 124-25), tweets that a federal court found "implicate every 'central concern' of the First Amendment." *Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1083 (N.D. Ill. 2015). The other paragraph mentioning Dr. Salaita states that he was on email communications with some defendants when he was part of the USACBI Organizing Collective, also prior to his tenure on the ASA National Council. App. at 143. Dr. Salaita is not mentioned by name in any other allegation in the 244-paragraph SAC, and is not alleged to have been personally involved in any of the conduct of which Plaintiffs complain.

II. PROCEDURAL HISTORY

On April 20, 2016, Plaintiffs filed this lawsuit against the ASA and some of its members in the U.S. District Court for the District of Columbia. App. at 14. On March 31, 2017, the District Court (Contreras, J.) granted in part Defendants' Motion to Dismiss, dismissing all Plaintiffs' derivative claims on the grounds that

the statutory notice had not been provided to the ASA and because demand was not futile as a matter of law, and also dismissing Plaintiffs' *ultra vires* claim because they failed to allege facts showing that the boycott resolution was expressly prohibited by any statute or ASA bylaw. App. at 66-82.

On November 9, 2017, Plaintiffs sought leave to file a Second Amended Complaint ("SAC"), and add four new Defendants, including Dr. Salaita. App. at 9, 115-17, ¶ 17-27; Pls.' Mot. for Leave to File Am. Compl., *Bronner*, ECF No. 59. On March 6, 2018, the District Court granted Plaintiffs leave to file their SAC and add the new Defendants, but simultaneously stayed proceedings and ordered briefing on subject matter jurisdiction. App. at 192, 208-09. On March 6, 2018, Plaintiffs filed their SAC, adding new defendants, including Dr. Salaita. App. at 6. Dr. Salaita was served at his home in Virginia while the case was stayed, just a few days before Defendants' subject matter jurisdiction brief was due. Return of Serv./Aff. of Summons & Compl. Executed, ECF No. 84; Defs.' Br. Regarding Subject Matter Jurisdiction, ECF 85. The District Court lifted the stay on July 5, 2018, when it confirmed its subject matter jurisdiction "for now." Mem. Op., July 5, 2018, ECF No. 94, at 7. Order, July 5, 2018, ECF No. 92.

On August 27, 2018, all Defendants moved to dismiss the SAC. App. at 3. On February 4, 2019, the District Court dismissed the lawsuit for lack of subject matter jurisdiction, finding that Plaintiffs could not seek damages for the ASA's

alleged injuries, and that they otherwise failed to meet the amount-in-controversy necessary to pursue their action in federal court. App. at 354-55, 363. This appeal followed. Once the federal case was dismissed, Plaintiffs filed a nearly identical lawsuit in D.C. Superior Court, and Anti-SLAPP motions to dismiss that lawsuit are pending. *Bronner v. Duggan*, No. 2019 CA 001712 B (D.C. Sup. Ct. filed Mar. 15, 2019).

SUMMARY OF ARGUMENT

The District Court properly dismissed this case for lack of subject matter jurisdiction because Plaintiffs failed to satisfy the $75,000 amount-in-controversy required to maintain a diversity case in federal court. Fed. R. Civ. P. 12 (b)(1). Plaintiffs did not satisfy the statutory notice requirements to sue derivatively and otherwise lack standing to sue for alleged injuries to the ASA. Plaintiffs do not seem to seek relief for purported injuries to themselves, but relief for any such injuries—whether compensatory, declaratory or injunctive—could not satisfy the jurisdictional amount anyway.

Dismissal of Plaintiffs' SAC against Dr. Salaita could also be affirmed for failure to state a claim under Fed. R. Civ. P. 12 (b)(6). Plaintiffs' *ultra vires* and breach of contract claims fail against Dr. Salaita because they are for conduct alleged to have occurred before Dr. Salaita became a member of the ASA National Council. Plaintiffs' *ultra vires* claims against Dr. Salaita also fail as a matter of law because

members are statutorily precluded from bringing direct claims against directors, and because Plaintiffs fail to allege conduct that is *ultra vires*—beyond the power of the corporation.

Plaintiffs' fiduciary duty and waste claims related to the amendment of bylaws to allow for expenditures from ASA funds also fail because Plaintiffs have not alleged any injury to themselves related to these claims, they have not alleged that Dr. Salaita had any personal involvement in amending the bylaws or withdrawing funds, they do not dispute that the National Council is authorized to amend the bylaws without approval by the membership, and they are precluded by the Business Judgment Rule.

Moreover, if Dr. Salaita were alleged to have been involved in amending the bylaws or withdrawing funds to pay the ASA's legal fees, he did so within his duties as a volunteer nonprofit board member, and is thus immunized from damages under the federal Volunteer Protection Act, 42 U.S.C. §§ 14501 et seq. (2019), and under D.C. Code § 29-406.31 (2019).

Finally, dismissal of Plaintiffs' SAC against Dr. Salaita could also be affirmed for lack of personal jurisdiction, as Plaintiffs have not alleged that Dr. Salaita had any contact with the forum, much less a substantial connection. Fed. R. Civ. P. 12 (b)(2). The District Court's dismissal of Plaintiffs' SAC must be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECIDED THAT PLAINTIFFS DID NOT SATISFY THE AMOUNT IN CONTROVERSY REQUIREMENT.

The District Court correctly found that it lacked subject matter jurisdiction because Plaintiffs failed to satisfy the $75,000 amount-in-controversy required to maintain a diversity case in federal court. 28 U.S.C. § 1332(a); App. at 114, ¶ 11. This Court reviews the District Court's dismissal of a complaint for lack of subject matter jurisdiction *de novo*. *Munsell v. Dep't of Agric.*, 509 F.3d 572, 578 (D.C. Cir. 2007). Plaintiffs have failed to allege, or even assert, any injury to themselves that might give rise to a claim for relief that satisfies the jurisdictional amount. Plaintiffs insist that they are injured by allegedly improper expenditures of the ASA's funds, but Plaintiffs are precluded from seeking relief for the ASA's injuries because they have not brought a derivative action.

If it is "a legal certainty that the claim is really for less than the jurisdictional amount," then the case must be dismissed for lack of subject matter jurisdiction. *Martin v. Gibson*, 723 F.2d 989, 991 (D.C. Cir. 1983) (citations omitted). "[T]he burden of establishing the amount in controversy, to be sure, rests squarely with the litigant asserting jurisdiction." *Id*. The legal certainty test is met "when a specific rule of substantive law or measure of damages limits the amount of money recoverable by the plaintiff to less than the necessary number of dollars to satisfy the

requirement." *Doe v. Exxon Mobile Corp.*, 69 F. Supp. 3d 75, 98 (D.D.C. 2014) (quoting 14AA Charles Alan Wright, et al., *Federal Practice & Procedure* § 3713 (4th ed. 2011). Because it is legally certain that Plaintiffs cannot recover the jurisdictional amount, the District Court's dismissal of this case must be affirmed.

a. Plaintiffs Cannot Seek Relief for Injuries to the ASA.

To successfully state a claim for any kind of relief—injunctive, declaratory, compensatory, or punitive—a plaintiff is required to show (1) that they have suffered an "injury in fact," (2) that the injury is "fairly...trace[able] to the challenged action of the defendant," and (3) that it is "likely…that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). In seeking relief for expenditures from the ASA's funds, Plaintiffs admit that they are seeking "to make the ASA whole" (Corrected Appellants' Brief ("CAB") 38)—not to make themselves whole—and thereby ask this Court to carve out a broad exception to that requirement and to rule that individuals who are, or were, members of a nonprofit should be entitled to obtain relief for injuries to the nonprofit. This argument is based on a fundamental misunderstanding of two D.C. cases, *Daley v. Alpha Kappa Alpha Sorority, Inc.* and *Jackson v. George*, which simply do not allow Plaintiffs to seek relief for injuries that they themselves have not suffered.

In *Daley*, the D.C. Court of Appeals held that dues-paying members of the AKA sorority sufficiently alleged that they suffered their own distinct injuries, and had a "direct, personal interest" in the cause of action, when their representatives were prevented from discussing and voting on several large expenditures that the sorority legislative body made to the president, allegedly in violation of the constitution and bylaws, and when their sorority memberships were suspended in retaliation for bringing suit. 26 A.3d 723, 726-27, 729 (D.C. 2011). As the District Court in this case noted, the court in *Daley* did *not* decide that "non-profit members may ultimately secure relief for the *organization's* injuries rather than their own, without bringing derivative claims." App. at 360 (emphasis in original).[1]

In *Jackson v. George*, defendants were improperly appointed trustees of a church, Jericho D.C., which they merged with a newly-incorporated Jericho Maryland, and then terminated three of the plaintiffs' church memberships. 146 A.3d 405, 410-11 (D.C. 2016). The Superior Court held that plaintiffs had standing to bring claims for equitable relief because they had a "special injury" since their

[1] *Daley* was remanded, and the lower court found that plaintiffs had not in fact suffered any distinct injury through expenditures from the AKA's funds, and therefore were not entitled to damages for those expenditures. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, No. 2009 CA 04456 B, slip op. at 45-46 (D.C. Super. Ct. May 14, 2013). Plaintiffs could not seek damages for AKA's injury because they had not brought a derivative action. *Id.* at 46 n. 28. The court also ruled that while the plaintiffs were injured by the suspension of their memberships, this was not compensable. *Id*. at 46.

church memberships were terminated by an improperly appointed board. *George v. Jackson*, No. 2013 CA 007115 B, 2015 WL 12601885, at *5, 7 (D.C. Super. Ct. Feb. 26, 2015). Their monetary claims arising from the transfer of church assets were dismissed, however, because any injury resulting from the transfer was to the church, not the individual plaintiffs. *Id*. at *4. The Court of Appeals affirmed the lower court's ultimate decision to grant equitable relief because the plaintiffs had "alleged an injury particularized to them," namely being barred from the church when others were not, and had alleged a "personal financial stake." *Jackson v. George*, 146 A.3d at 415. The Court of Appeals held that they "were entitled to proceed on the claims they brought on their own behalves, by which they sought relief from 'a special injury… not suffered equally by all' who affiliated with the church." *Id*.

Plaintiffs rely on these two cases to argue that they are entitled to seek damages based on the ASA's expenditures (whether for themselves or for the ASA) without bringing derivative claims. CAB 38. But in *Jackson* and *Daley*, the plaintiffs were specifically *not* entitled to seek relief for allegedly improper expenditures from the non-profits' funds because they could not show that those expenditures had led to injuries to the plaintiffs themselves. Instead, those plaintiffs could only obtain relief owed to them for their *own* injuries - for example, having their memberships suspended or being barred from their church. *Daley v. Alpha Kappa Alpha Sorority*,

Inc., No. 2009 CA 04456 B, slip op. at 45-46 (D.C. Super. Ct. May 14, 2013); *Jackson*, 146 A.3d at 411-12.

Here, Plaintiffs have not alleged that the expenditure of the ASA's funds is an injury to them, and they certainly cannot seek relief for those expenditures because they have not brought a derivative action. This is particularly so since Plaintiffs are not "dues-paying members" of the ASA: Plaintiffs Bronner and Rockland are honorary lifetime members and do not pay dues, Kupfer's membership lapsed in 2014, and Barton is not alleged to have been a member after 2014. App. at 114-15, ¶¶ 13-16. But even if they were dues-paying members, *and* all of their dues were misspent, *and* this led to a distinct injury to Plaintiffs, they would have each had to pay membership dues for 625 years at the rate of $120 a year (App. at 173-74, ¶ 185) to reach $75,000 in damages, as the District Court found. App. at 362. This is, of course, impossible.[2]

[2] Although Plaintiff Barton argues that he was denied the right to vote, App. at 154-55, ¶¶ 126-28, any such deprivation that allegedly occurred in 2013 cannot be traceable to Dr. Salaita, who was not a member of the ASA National Council until 2015. *Lujan*, 504 U.S. at 560 (second requirement of Article III standing is traceability). And crucially, there is no monetary relief that Plaintiffs allege arises out of that injury. App. at 154-55, ¶ 126. Similarly, Plaintiffs allege that they "suffered significant economic and reputational damage," App. at 181, ¶ 206, but, as the District Court noted, Plaintiffs do not describe what that damage is, and they have abandoned this argument. App. at 361.

b. Plaintiffs' Claims for Injunctive and Declaratory Relief Do Not Satisfy the Amount in Controversy Requirement.

Plaintiffs argue, without irony, that they are entitled to equitable relief for "expenditures by the ASA" and "large withdrawals from the ASA Trust Fund" (CAB 30)—expenditures and withdrawals made to defend against the meritless and protracted litigation brought by Plaintiffs themselves. App. at 168-70, 172, ¶¶ 170-71, 175, 183 (describing "substantial legal costs" expended by the ASA in defending against lawsuits arising out of the boycott resolution). Plaintiffs seek "injunctive relief proscribing withdrawal[s] from the ASA Trust Fund," and "declaratory relief establishing, *inter alia*, that expenditures in furtherance of the Academic Boycott and withdrawals from the ASA Trust are illegitimate." CAB 30, 33. Plaintiffs do not argue that they are entitled to any other form of injunctive or declaratory relief.[3]

i. Plaintiffs Do Not Have Standing to Seek Injunctive and Declaratory Relief from Dr. Salaita for Future Expenditures by the ASA.

"[W]here the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing. Rather, [plaintiffs] must show [that they are] suffering an ongoing injury or face[ ] an immediate threat of injury." *Dearth v.*

[3] Plaintiffs do not argue that an injunction to compel the ASA to comply with its Constitution and to prohibit enforcement of the Boycott Resolution would count toward the amount-in-controversy. As the District Court rightfully found, such relief would not cost the ASA any money to implement, nor would the value of the rights Plaintiffs seek to enforce amount to $75,000 each. App. at 362-63; *see infra*, sec. I(b)(ii).

Holder, 641 F.3d 499, 501 (D.C. Cir. 2011). A declaration of a past violation would be no more "than a gratuitous comment without any force or effect." *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1284 (11th Cir. 2012) (quoting *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1348 (11th Cir. 1999)).

Plaintiffs argue that they are entitled to declaratory and injunctive relief to prohibit future expenditures from ASA funds. CAB 30. But Plaintiffs fail to articulate how they might be injured by such expenditures, or how this relief could remedy any other future injury. Any future improper expenditures from ASA funds might injure the ASA, but not Plaintiffs, particularly because they are not alleged to be dues-paying members. App. at 114-15, ¶¶ 13-16. Plaintiffs have not brought a derivative action and are therefore not entitled to injunctive or declaratory relief for those expenditures.

Moreover, injunctive and declaratory relief against Dr. Salaita would not remedy an injury even if there were one, because he is no longer on the ASA National Council, so could not effectuate such relief. *See, e.g., Lujan*, *supra,* 504 U.S. at 568-71 (redressability prong was not satisfied where any relief that the district court could have provided against the defendant was not likely to produce the action required to remedy the injury).

ii. Even If Plaintiffs Could Seek Declaratory or Injunctive Relief, Such Relief Would Not Satisfy the Amount in Controversy.

"In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). However, "objects which are merely collateral or incidental to the determination of the issue raised by the pleadings" cannot be taken into consideration. *Healy v. Ratta*, 292 U.S. 263, 268 (1934). Collateral or incidental objects include "any other impact on the rights or interests of third parties." 14AA Charles Alan Wright, et al., *Federal Practice and Procedure* § 3702.5 (4th ed. 2019 Update). When valuing injunctive relief, courts may look either to the "value of the right that plaintiff seeks to enforce or to protect…or to the cost to the defendants to remedy the alleged denial." *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978)).

Plaintiffs argue confusingly that "the value of the right that the Professors seek to enforce through injunction is easy to describe – it is exactly the amount to be withdrawn from the ASA for these purposes." CAB 31-32. But Plaintiffs do not articulate what the relevant "right" is, nor any reason why withdrawals of ASA funds might conceivably represent the value of *Plaintiffs'* rights. Any benefit that would accrue from reduced spending of ASA funds would accrue to the ASA, not to Plaintiffs, and therefore would be an incidental or collateral benefit that cannot be

counted towards the amount in controversy. 14AA Charles Alan Wright, et al., *Federal Practice and Procedure* § 3702.5 (4th ed. 2019 Update) (impact on the rights or interests of third parties cannot count toward amount in controversy). Additionally, halting improper future payments from ASA funds would not cost anything to implement, as found by the District Court. App. at 362.

Plaintiffs misplace reliance on *Information Strategies, Inc. v. Dumosch*, 13 F. Supp. 3d 135 (D.D.C. 2014), and incorrectly argue that the District Court here did not consider "additional components" in calculating the value for injunctive relief. CAB 32.[4] But in *Information Strategies*, a consulting company sought injunctive relief for a former employee's breach of a covenant not to compete and for misappropriation of trade secrets. 13 F. Supp. 3d at 141. The court there simply calculated the value of two distinct rights: first, the plaintiff's contractual rights under a covenant not to compete, which is regularly valued by courts by looking to the revenue generated by the former employee while working for the employer (*id.* at 142); and second, plaintiff's right to protect its trade secrets, which is regularly valued by courts by looking to the "nature and scale" of the company's business. *Id.*

[4] Plaintiffs ignore that the District Court reasoned that the relevant right might be "the right to be voluntary members of an apolitical, academic organization," though of course, as the district court noted, Plaintiffs do not explain how even this right might be worth $75,000, "nor is that right of the sort courts typically hold to be valuable." App. at 362-63.

at 143. In contrast, Plaintiffs here have articulated no valuable right, and certainly have not attached any monetary amount to it.[5]

c. The Court Was Obligated to Examine Whether It Had Subject Matter Jurisdiction.

In February 2019, the District Court granted Defendants' Motions to Dismiss Plaintiffs' SAC, confirming that Plaintiffs could not claim relief for injuries to the ASA without bringing a derivative action (which they were precluded from bringing), and deciding that they therefore did not satisfy the jurisdictional amount. Plaintiffs' argument that federal jurisdiction attached in 2017 fails at the outset, since "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. United States*, 549 U.S. 457, 473–74 (2007). Dr. Salaita and the other new Defendants were not even added as Defendants until 2018, when the Second Amended Complaint was filed, and when the action against them commenced. The decision on the Motion to Dismiss which Plaintiffs appeal was the newly added Defendants' first opportunity to challenge subject matter jurisdiction.[6]

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[5] In *Information Strategies*, the former employee had generated more than $1.5 million in business in one year, and the revenue from billing for his work alone exceeded $265,000. And the "nature and scale" of the company's business was valued at roughly $4.8 million. 13 F. Supp. 3d at 142-43.

[6] On March 6, 2018, when the District Court granted Plaintiffs leave to file their Second Amended Complaint and add new Defendants, including Dr. Salaita, it simultaneously stayed proceedings and ordered briefing on subject matter jurisdiction. App. at 192, 208-09. Dr. Salaita was served while the case was stayed,

Furthermore, Plaintiffs' argument that the District Court had already decided it had subject matter jurisdiction in 2017 is irrelevant as a federal court has an "ongoing obligation to ensure that 'it is acting within the scope of its jurisdictional authority.'" *Hardy v. N. Leasing Sys., Inc.*, 953 F. Supp. 2d 150, 155 (D.D.C. 2013) (quoting *Ha v. U.S. Dep't of Educ.*, 680 F. Supp. 2d 45, 46 (D.D.C. 2010)). *See also Jones v. Knox Exploration Corp*., 2 F.3d 181, 182 (6th Cir. 1993) (dismissing case although district court had previously ruled that amount in controversy was satisfied, when plaintiffs revealed on appeal that that amount was not actually in controversy at the commencement of the action).

Finally, Plaintiffs argue that the District Court's 2019 ruling that it lacked subject matter jurisdiction was a "subsequent event" that did not oust jurisdiction, but a court must distinguish "between subsequent events that change the amount in controversy," which have no impact on subject matter jurisdiction, and "*subsequent revelations* that…the required amount was or was not in controversy at the commencement of the action," which oust jurisdiction. *Cuneo Law Grp., P.C. v.*

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just a few days before Defendants' brief was due. Return of Serv./Aff. of Summons & Compl. Executed, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-0740 (RC)), ECF No. 84; Defs.' Br. Regarding Subject Matter Jurisdiction, *Bronner*, ECF 85. The District Court lifted the stay on July 5, 2018, when it confirmed its subject matter jurisdiction "for now." App. at 291; Order, July 5, 2018, *Bronner*, ECF No. 92. The only determination of whether the case should be dismissed which Dr. Salaita had an opportunity to brief resulted in the February 4, 2019 order, where the District Court dismissed the SAC for lack of subject matter jurisdiction. App. at 363.

Joseph, 920 F. Supp. 2d 145, 150–51 (D.D.C. 2013) (quoting *Jones v. Knox Exploration Corp.*, 2 F.3d at 183). "[I]f, from the proofs, the court is satisfied to a [legal] certainty that the plaintiff was never entitled to recover that amount…the suit will be dismissed." *Id*. at 150 (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)).

The District Court's February 2019 ruling reflects a "revelation" that Plaintiffs could never have obtained the relief requested because it was based on an injury to the ASA, and not to themselves, and therefore that the required amount was not in controversy at commencement of the action. *See, e.g.*, *id*. at 150-51 (ruling that some claims were barred by res judicata as of commencement of the action is a "'subsequent revelation' that the amount in controversy was, in fact, not in controversy at the time the plaintiffs filed their complaint") (relying on *Carlisle v. Matson Lumber Co.*, 186 F. App'x 219, 226-27 (3d Cir. 2006)); *Reilly v. Amy's Kitchen, Inc.*, 2 F. Supp. 3d 1300, 1303 (S.D. Fla. 2014) (prior ruling that plaintiff did not have standing to challenge products that she did not purchase ousted jurisdiction, and plaintiffs' challenges to the remaining products could not proceed as "the [c]ourt's determination that [p]laintiff lacks standing…is a subsequent revelation" that the required amount was never in controversy).

The cases cited by Plaintiffs do not address the question of whether relief that Plaintiffs never had standing to obtain can count towards the jurisdictional amount.

The two cases that Plaintiffs rely on simply stand for the uncontroversial point that where an action containing more than one claim satisfies the amount in controversy, and some counts are subsequently dismissed on the merits, dismissal of the case is not required even if the remaining counts fall below the jurisdictional amount. *See Parham v. CIH Props, Inc.*, 208 F. Supp. 3d 116, 118 n. 1, 123 n. 10 (D.D.C. 2016) (dismissal of tort claims for lack of sufficient evidence for plaintiff to prevail did not require dismissal of remaining contract claim even though jurisdictional amount would not have been satisfied by contract claim alone); *Paley v. Estate of Ogus*, 20 F. Supp. 2d 83, 93 n.13 (D.D.C. 1998) (if four out of five counts were to be dismissed on statute of fraud grounds, this would not oust jurisdiction over the remaining count).[7] Contrary to all of these cases, there was no subsequent event here—the

[7] The other cases cited by Plaintiffs are also inapposite. In *Red Cab Co.*, the plaintiff had filed a suit in state court claiming the jurisdictional amount in good faith, the defendant removed the case to federal court, and thereafter the plaintiff furnished the particulars of the claim, demonstrating that the amount recoverable was less than the jurisdictional amount. 303 U.S. at 295-96. But there was nothing at commencement of the action that suggested that the jurisdictional amount was certainly not recoverable, and crucially the Court ruled that it would be unfair to allow a plaintiff to reduce the jurisdictional amount that they themselves claimed simply to preclude a defendant from removing the case to federal court. *Id.* at 294-95. In *Pietrangelo*, the court determined that where a defendant voluntarily changed the policy that was the subject of the litigation after the case was filed and thereby incurred the cost of injunctive relief, that cost should still be included to calculate the amount in controversy as the voluntary change in policy was a "subsequent event." *Pietrangelo v. Refresh Club, Inc.*, No. 18-CV-1943 (DLF), 2019 WL 2357379, at *8 (D.D.C. June 4, 2019). In *Naegele v. Albers*, the action was commenced in 2003, nine years before a ruling from a California court that precluded certain of the plaintiff's claims which were not precluded at the

District Court simply determined that Plaintiffs never had standing to recover the jurisdictional amount, and that the amount was therefore never in controversy at the commencement of the action.

d. Plaintiffs Have Waived Punitive Damages, and in Any Case Are Not Entitled to Them.

In addition to failing to request punitive damages in their complaint, Plaintiffs failed to argue in the District Court that punitive damages should count towards the jurisdictional amount and thereby waived this argument. *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). In each case relied on by Plaintiffs, punitive damages had been explicitly alleged in the complaint,[8] or the

commencement of the action. 110 F. Supp. 3d 126, 137 (D.D.C. 2015), *aff'd*, 672 F. App'x 25 (D.C. Cir. 2016). The court rejected defendant's argument that the California court's ruling (which only occurred *after* commencement of the action) reduced the amount in controversy below the jurisdictional amount, ruling that "subsequent events" did not oust jurisdiction. *Id*. at 141. In *Nwachukwu v. Karl*, in examining the amount in controversy question for the first time, the court ruled that punitive damages claimed by plaintiff satisfied the amount in controversy, but acknowledged that "if it becomes apparent during the course of litigation that from the outset the maximum conceivable amount in controversy was less than the jurisdictional minimum, the court must dismiss the case." 223 F. Supp. 2d 60, 64-66 (D.D.C. 2002).

[8] *See* CAB 34, citing *Hartigh v. Latin*, 485 F.2d 1068, 1071-72 (D.C. Cir. 1973); *Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238, 240 (1943); and *Lopez*

plaintiffs had argued that punitive or liquidated damages should count toward the amount in controversy.[9]

Plaintiffs are also not entitled to punitive damages because nothing in Plaintiffs' SAC alleges that Dr. Salaita demonstrated "ill will, recklessness, wantonness, oppressiveness, [or] willful disregard" for Plaintiffs' rights. *Mason v. Rostad*, 476 A.2d 662, 667 (D.C. 1984) (citations omitted). Plaintiffs' only allegations against Dr. Salaita are that he advocated for the Resolution before he was even a director of the ASA (though there is no claim related to this allegation), and that he happened to be a member of the National Council when funds were expended to defend against litigation brought (by Plaintiffs) in response to the Resolution. App. at 117, 124-25, 143-44, ¶¶ 26, 46, 99.

Finally, where Plaintiffs are not entitled to any compensatory damages, or at the very most would be entitled to compensatory damages amounting to the minimal sum of membership dues that they might have paid to the ASA, punitive damages amounting to more than $75,000 would be excessive and violate due process. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("few awards

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v. Council on Am.-Islamic Relations Action Network, Inc., 741 F. Supp. 2d 222, 233 (D.D.C. 2010).

[9] *See* CAB 35-36, citing *Bartnikowski v. NVR, Inc.*, 307 F. App'x 730, 735 (4th Cir. 2009); *Doss v. Am. Family Home Ins. Co.*, 47 F. Supp. 3d 836, 841 (W.D. Ark. 2014); *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 829 (7th Cir. 2011).

exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process").

II. EVEN IF THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION, PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF AGAINST DR. SALAITA.

A dismissal for failure to state a claim is reviewed *de novo*. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014). Because this Court reviews "the district court's judgment, not its reasoning, [it] may affirm on any ground properly raised." *E.E.O.C. v. Aramark Corp., Inc.*, 208 F.3d 266, 268 (D.C. Cir. 2000). Where a complaint does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" dismissal is appropriate under Fed. R. Civ. P. 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id*. Plaintiffs' SAC has not come close to stating a claim for relief against Dr. Salaita, so dismissal could also be affirmed under Fed. R. Civ. P. 12(b)(6).[10]

[10] Count Six (for Breach of Contract for the Voting Process), Count Seven (for breach of the D.C. Nonprofit Corporation Act), and Count Eight (for Breach of Contract for the Denial of Right to Vote), are brought against Defendant ASA only, not against Dr. Salaita, so this section only addresses Counts One through Five, and Count Nine. *See* App. at 186-89, ¶¶ 226-40.

a. Plaintiffs' *Ultra Vires* and Breach of Contract Claims Fail Against Dr. Salaita.

Plaintiffs do not cite one single case to support their contention that the District Court erred when it dismissed their *ultra vires* claims. CAB 43-45. Despite Plaintiffs' unsupported assertion that Defendants acted outside the ASA's mission statement and that therefore their *ultra vires* claims should have survived, their claims against Dr. Salaita fail as a matter of law on the face of the Complaint.

First, as the District Court correctly found, "individual members of the nonprofit may only directly challenge an action as ultra vires by suing the corporation to enjoin the act." App. at 438, citing D.C. Code § 29-403.04(b)(1). The D.C. Code does not permit members to bring direct (as opposed to derivative) *ultra vires* claims against individual directors. D.C. Code § 29-403.04(b). *Ultra vires* claims challenging the power of a nonprofit to act may only be brought against the corporation, by the corporation, or by the D.C. Attorney General. *Id.* The individual member Plaintiffs simply cannot sue Dr. Salaita or other individuals for allegedly *ultra vires* acts.

Second, all the alleged conduct underlying Plaintiffs' *ultra vires* and breach of contract claims (Counts 3, 4, and 5) occurred before Dr. Salaita became a member of the ASA National Council in July 2015, so they must be dismissed for failing to state a claim against him. App. at 179-86, ¶¶ 198-225. Count three for "Failure to Nominate Officers and National Council Reflecting Diversity of Membership,"

alleges conduct prior to adoption of the 2013 Resolution. App. at 179. Count Four for "Freezing Membership Rolls to Prohibit Voting" alleges conduct prior to the 2013 vote. App. at 182. And Count Five for efforts to influence legislation constituting a "substantial part" of the ASA's activities, alleges conduct "at least with respect to" Fiscal Years 2012 and 2013, and "from approximately July 2013 until at least June of 2015." App. at 184, ¶¶ 218-19. All this alleged conduct occurred before Dr. Salaita was an ASA National Council member.

Finally, the District Court accurately found that "[a]ctions taken by the organization that are 'expressly prohibited by statute or by-law' or outside the powers conferred upon it by its articles of incorporation are *ultra vires*." App. at 430. (quoting *Compton v. Alpha Kappa Alpha Sorority, Inc.*, 64 F. Supp. 3d 1, 18 (D.D.C. 2014), aff'd, 639 F. App'x 3 (D.C. Cir. 2016)); *see also Daley*, 26 A.3d at 730 (emphasis omitted) (*quoting Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 7 (D.D.C. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998)). Plaintiffs have not alleged that Dr. Salaita violated any statute or bylaw, or exceeded the powers conferred by the ASA's constitution, so their *ultra vires* claims against him fail as a matter of law.

b. Plaintiffs' Breach of Fiduciary Duty and Corporate Waste Claims Fail Against Dr. Salaita.

The only claims that could even possibly be construed to be asserted against Dr. Salaita on the basis of his July 2015 - June 2018 tenure on the National Council

are the aspects of Counts One (Breach of Fiduciary Duty), Two (Breach of Fiduciary Duty) and Nine (Corporate Waste) that relate to purportedly improper expenditures from the ASA funds and amending the bylaws for this purpose. App. at 177-79, ¶¶ 194, 197. The only expenditures alleged to have been incurred during Dr. Salaita's term on the National Council that are even arguably related to the Resolution are the ASA's legal fees—which have been used to pay for this meritless and protracted litigation initiated by Plaintiffs.[11]

"[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby." *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 709 (D.C. 2009) (internal quotation omitted). Plaintiffs have not alleged that they were injured by any breach of fiduciary duty related to the ASA expenditures, or that Dr. Salaita profited from any alleged breach. Similarly, Plaintiffs' corporate waste claim does not (and cannot) allege any injury to themselves: even if the defensive expenditure of legal costs could be considered an

[11] Although Plaintiffs allege the ASA incurred Resolution-related expenses to retain a media strategist and Public Relations consultant and "arguably" for payments around the 2014 ASA meeting, these expenditures were made prior to July 2015 when Dr. Salaita joined the National Council. App. at 171-72, ¶ 182. Plaintiffs also allege the ASA incurred insurance costs "arising from the Resolution." App. at 173, ¶ 185. But the insurance purchase is alleged to have been approved by the Executive Committee, of which Dr. Salaita was not a member, not the National Council on which Dr. Salaita served. *Id*. Also, any attempt to assert an injury for the purchase of Directors and Officers Liability coverage insurance in response to the lawsuit that Plaintiffs themselves brought cannot be countenanced.

injury, it was an injury to the ASA, not to Plaintiffs. *See supra* I(a). Moreover, Plaintiffs actually caused any such injury, as it is their own lawsuit that the ASA is defending against. Plaintiffs cannot bootstrap an injury of their own making.

Even if Plaintiffs were to allege injuries related to these counts, such injuries cannot be traceable to Dr. Salaita any more than they are traceable to Plaintiff Bronner, who was also a National Council member until November 2016. *Lujan*, 504 U.S. at 560 (traceability is a requirement of Article III standing). In the allegations related to these Counts, Plaintiffs fail to mention Dr. Salaita even once: he is not alleged to have been involved in any decision regarding the amendment of the bylaws, in informing the membership about the amendment, in any decision related to the use of ASA funds, or in any public accounting of the funds (which is the responsibility of the Board of Trustees, not the National Council, on which Dr. Salaita sat). App. at 165-79; 189, ¶¶ 162-97; 241-44.

In any case, directors of a nonprofit cannot be held liable for expending funds to defend against litigation. Shareholders' claims against officers of a corporation are consistently "foreclosed when they merely allege damages based on the potential costs of investigating, defending, or satisfying a judgment or settlement for what might be unlawful conduct." *In re Cray Inc. Derivative Litig.*, 431 F. Supp. 2d 1114, 1134 (W.D. Wash. 2006) (citing cases in finding that derivative claim for costs of litigation are insufficient to state a claim for relief). *See also In re Symbol Techs.*

Secs. Litig., 762 F. Supp. 510, 516 (E.D.N.Y. 1991) ("defendants cannot be held liable for the costs of defending a potentially baseless suit."); 3A William Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 1112 (West 2019) ("the payment of an attorney for legal services performed for the company is not improper."). Moreover, "[d]irectors and officers usually have a duty to engage lawyers to defend the corporation even if they individually have failed to perform in some way that caused the litigation." *Kaplan v. First Hartford Corp.*, 484 F. Supp. 2d 131, 144 (D. Me. 2007).

Finally, Plaintiffs' allegations that the ASA violated its Bylaws when it amended them with regard to the Trust and Development Fund fail as a matter of law on the face of the Bylaws. Plaintiffs complain about amendments to the Bylaws that removed the word "small" to describe grants that could be made from the Trust and Development Fund, and that permitted expenditure of Trust Fund assets. App. at 166-67, ¶¶ 163-66. Although Plaintiffs allege that the National Council "did not inform the full membership" about these proposed changes to the Bylaws, App. at 167, ¶ 166, neither notification to nor approval by the membership was required, as the National Council is authorized to amend the Bylaws. ASA Const. & Bylaws, Bylaws, Art. XIII § 1.

Dismissal of Plaintiffs' fiduciary duty and waste claims could also be affirmed under the Business Judgment Rule, which is a "'presumption that in making a

business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006) (quoting *Willens v. 2720 Wis. Ave. Coop. Ass'n, Inc.*, 844 A.2d 1126, 1137 (D.C. 2004)). "Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption." *Id.* (quoting *Willens*, 844 A.2d at 1137); *see also Wash. Bancocorporation v. Said*, 812 F. Supp. 1256, 1268 (D.D.C. 1993). "In practical terms, the business judgment rule means that 'directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.'" *Willens*, 844 A.2d at 1137 (citing *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000)). Plaintiffs do not allege that Dr. Salaita had any financial interest at stake, or that defending the ASA against Plaintiffs' lawsuit was in bad faith, irrational, uninformed, or not in the best interests of the ASA.

c. Dr. Salaita is Immunized from Liability for Plaintiffs' Claims.

Dr. Salaita is immunized from damages under the federal Volunteer Protection Act ("VPA"), 42 U.S.C. §§ 14501 et seq. (2019), and under D.C. Code §

29-406.31 (2019). Under the VPA, "no volunteer of a nonprofit organization…shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization" if they were "acting within the scope of the volunteer's responsibilities" and "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." 42 U.S.C. § 14503(a).

Dr. Salaita was a volunteer member of the ASA's National Council from July 2015-June 2018, and although Plaintiffs do not allege Dr. Salaita engaged in any particular acts as a National Council member, any acts or omissions alleged by Plaintiffs would have been taken on behalf of the ASA and within the scope of his responsibilities. App. at 117, ¶ 26. Plaintiffs do not allege that Dr. Salaita engaged in the kind of misconduct that would exempt him from the VPA's immunity. The expenditure of legal fees to defend the ASA cannot be considered harm, but even if it were, it was not caused by "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." 42 U.S.C. § 14503(a).

Dr. Salaita is also immunized from liability for Plaintiffs' claims under the D.C. Code, pursuant to which nonprofit directors shall not be liable for "damages for any action taken, or any failure to take any action" except for, in relevant part, an "intentional infliction of harm." D.C. Code § 29-406.31(d). Dr. Salaita is not

even alleged to have been personally involved in amending the Bylaws or withdrawing funds, much less doing so with an intent to harm the ASA, but if he were, they indisputably would have been acts taken in his capacity as a National Council member.[12] Dr. Salaita cannot be liable for Plaintiffs' claims against him in light of the VPA and D.C. Code § 29-406.31(d).

III. THE DISTRICT COURT ALSO LACKED PERSONAL JURISDICTION OVER DR. SALAITA.

Plaintiffs bear the burden of establishing personal jurisdiction over Dr. Salaita. *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001). "In order to meet [their] burden, plaintiff[s] must allege specific facts on which personal jurisdiction can be based; [they] cannot rely on conclusory allegations." *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86, 89 (D.D.C. 2008). Plaintiffs do not allege one single fact to establish personal jurisdiction over Dr. Salaita, leaving aside their false allegation that he resides in the District of Columbia.[13]

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[12] The District Court's finding that Plaintiffs alleged that Defendants acted with an intent to harm the ASA is not to the contrary, *Bronner*, 317 F. Supp. 3d at 293, as it did not address the allegations against Dr. Salaita, he had not been served when briefing was ordered, and he was not a party to the briefing. *See, e.g.*, *Hoffman v. District of Columbia*, 730 F. Supp. 2d 109, 116 (D.D.C. 2010) (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)) ("neither claim preclusion nor issue preclusion may be used against a party that was not a party to the prior proceeding or in privity with a party to the prior proceeding").

[13] Dr. Salaita lives in Virginia, as evidenced by Plaintiffs' service of him at his home there. *See* Return of Serv./Aff. of Summons & Compl. Executed, *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019) (No. 16-0740 (RC)), ECF No. 84 (the

To exercise personal jurisdiction, the Court must "determine whether jurisdiction over a party is proper under the applicable local long-arm statute and whether it accords with the demands of due process." *United States v. Ferrara*, 311 U.S. App. D.C. 421, 424, 54 F.3d 825, 828 (1995). Given that Plaintiffs allege no contact that Dr. Salaita has had with the District, they can neither establish general jurisdiction (requiring continuous and systematic contacts), nor can they establish specific jurisdiction, which requires that a "controversy is related to or 'arises out of' a defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (internal quotation omitted). Jurisdiction is only proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis in original).[14]

process server's Aff. of Posting the Summons at Dr. Salaita's place of abode in Springfield, Va.); *see also* Va. Code Ann. § 8.01-296 (2018).

[14] To establish specific jurisdiction, there must be "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,'" to ensure that jurisdiction is not based solely on random, fortuitous, or attenuated contacts. *Burger King, supra,* 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In relevant part, the District of Columbia's long-arm statute permits personal jurisdiction over a non-resident defendant "as to a claim for relief arising from the person's…transacting any business in the District of Columbia" or "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia." D.C. Code §§ 13-423 (a)(1); (a)(3) (2019).

Plaintiffs have failed to make one single factual allegation that Dr. Salaita had any contact with the forum, much less a substantial connection. Plaintiffs did not allege that Dr. Salaita was personally involved in any decision to amend the bylaws in March or November 2016 or to withdraw Trust Funds, much less that he did so in the District of Columbia. The District Court's prior opinion in *Bronner v. Duggan*, which was decided before Dr. Salaita was added as a defendant, is not to the contrary. App. at 64 (finding personal jurisdiction over other individual defendants who "allegedly took part in the purportedly injurious activities of the ASA in the District of Columbia").[15] The pertinent allegations considered by the *Bronner* court are not alleged against Dr. Salaita, who did not engage in any conduct in the District, much less a wrongful act that is the basis for Plaintiffs' claims against him. He was

[15] Nor are the cases *Bronner* relies on to the contrary. In *Daley v. Alpha Kappa Alpha Sorority, Inc.*, plaintiffs alleged that defendant members of the Directorate had engaged in managerial wrongdoing at a week-long meeting in the District of Columbia at which all of the named defendants "voluntarily participated" in the meetings "or the actions relating thereto." 26 A.3d 723, 728 (D.C. 2011). In *Family Fed'n for World Peace & Unification Int'l v. Hyun Jin Moon*, defendant directors took over a D.C. non-membership nonprofit that was established for the benefit of Reverend Moon's Unification Church and amended its articles of incorporation to fundamentally alter its purpose to no longer support the Church, and defendant Preston Moon engaged in self-dealing to divert UCI's assets for his own interests. 129 A.3d 234, 241-42 (D.C. 2015). The court found that "the allegedly wrongful amendment of the Articles of Incorporation, indubitably occurred within the District by filing here." *Id.* at 243. In this case, however, Plaintiffs allege (albeit inadequately) wrongful amendment of the ASA's Bylaws, which, unlike amendment of Articles of Incorporation, do not require filing in the District of Columbia. *Compare* D.C. Code § 29-408.06 (2019) *with* D.C. Code § 29-408.20 (2019).

not a National Council member (nor did he have any other position charging him with "leading the ASA") in 2013 when the annual ASA meeting was held in the District of Columbia. Because Plaintiffs have alleged nothing to connect Dr. Salaita to the District of Columbia other than that he was on the National Council of a D.C. nonprofit corporation[16] (and their false allegation that he resides in D.C.), they have failed to meet their burden of establishing personal jurisdiction, and the case against him should be dismissed under Fed. R. Civ. P. 12 (b)(2).

[16] Dr. Salaita's former role as an ASA National Council member is insufficient to establish this Court's jurisdiction over him. "Personal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity." *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 163 (D.C. 2000). "Just because Defendants were employed by, or were members of the board of directors of, a company which does business in the District, is not by itself sufficient to establish minimum contacts." *NAWA USA, Inc. v. Bottler*, 533 F. Supp. 2d 52, 57 (D.D.C. 2008) (court lacked personal jurisdiction even though the corporation's principal place of business was in D.C. and former directors who assumed their responsibilities at a board meeting in D.C. allegedly misappropriated its funds). *See also Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554, 558 (D.D.C. 1981) (finding no personal jurisdiction over corporate officers and part-owners of a parent company of a District of Columbia corporation because while they "may have conducted substantial business in the District of Columbia, their activities were conducted on behalf of the corporation").

CONCLUSION

The District Court's dismissal of Plaintiffs' SAC should be affirmed by this Court.

Dated: November 6, 2019

Respectfully submitted,

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Dated: November 6, 2019

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STATUTES AND REGULATIONS RELIED UPON

**

Except for the following, all applicable statutes, etc., are contained in the Brief for Appellees, the American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Neferti Tadiar, Chandan Reddy, and John Stephens.

D.C. Code § 29-403.04. Ultra vires.

(a) Except as otherwise provided in subsection (b) of this section, the validity of corporate action shall not be challenged on the ground that the nonprofit corporation lacks or lacked power to act.

(b) The power of a nonprofit corporation to act may be challenged in a proceeding by:

> (1) A member, director, or member of a designated body against the corporation to enjoin the act;
>
> (2) The corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director or member of a designated body, officer, employee, or agent of the corporation; or
>
> (3) The Attorney General for the District of Columbia under § 29-412.20.

(c) In a derivative proceeding under subchapter XI of this chapter by a member, director, or member of a designated body under subsection (b)(1) of this section to enjoin an unauthorized corporate act, the Superior Court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

D.C. Code § 29-408.06. Articles of amendment.

After an amendment to the articles of incorporation has been adopted and approved in the manner required by this chapter and by the articles of incorporation, the nonprofit corporation shall deliver to the Mayor, for filing, articles of amendment, which shall set forth:

(1) The name of the corporation;

(2) The text of the amendment adopted;

(3) If the amendment provides for an exchange, reclassification, or cancellation of memberships, provisions for implementing the amendment if not contained in the amendment itself, which may be made dependent upon facts objectively ascertainable outside the articles of amendment in accordance with § 29-401.04;

(4) The date of the amendment's adoption; and

(5) If the amendment:

> (A) Was adopted by the incorporators, board of directors, or a designated body without member approval, a statement that the amendment was adopted by the incorporators or by the board of directors or designated body, as the case may be, and that member approval was not required; or
>
> (B) Required approval by the members, a statement that the amendment was duly approved by the members in the manner required by this chapter and by the articles of incorporation and bylaws.

D.C. Code § 29-408.20. Amendment by board of directors or members.

(a) Except as otherwise provided in the articles of incorporation or bylaws, the members of a membership corporation may amend or repeal the corporation's bylaws.

(b) The board of directors of a membership corporation or nonmembership corporation may amend or repeal the corporation's bylaws, unless the articles of incorporation or bylaws or § 29-408.21 or § 29-408.22 reserve that power exclusively to the members or a designated body in whole or part.

D.C. Code § 13-423. Personal jurisdiction based upon conduct.

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's --

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia;

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing; or

(7) marital or parent and child relationship in the District of Columbia if:

(A) the plaintiff resides in the District of Columbia at the time the suit is filed;

(B) such person is personally served with process; and

(C) in the case of a claim arising from a marital relationship:

(i) the District of Columbia was the matrimonial domicile of the parties immediately prior to their separation, or

(ii) the cause of action to pay spousal support arose under the laws of the District of Columbia or under an agreement executed by the parties in the District of Columbia; or

(D) in the case of a claim affecting the parent and child relationship:

(i) the child was conceived in the District of Columbia and such person is the parent or alleged parent of the child;

(ii) the child resides in the District of Columbia as a result of the acts, directives, or approval of such person; or

(iii) such person has resided with the child in the District of Columbia.

(E) Notwithstanding the provisions of subparagraphs (A) through (D), the court may exercise personal jurisdiction if there is any basis consistent with the United States Constitution for the exercise of personal jurisdiction.

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

VA Code § 8.01-296. Manner of serving process upon natural persons

Subject to the provisions of § 8.01-286.1, in any action at law or in equity or any other civil proceeding in any court, process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. By delivering a copy thereof in writing to the party in person; or

2. By substituted service in the following manner:

a. If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older; or

b. If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode, provided that not less than 10 days before judgment by default may be entered, the party causing service or his attorney or agent mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing. In any civil action brought in a general district court, the mailing of the application for a warrant in debt or affidavit for summons in unlawful detainer or other civil pleading or a copy of such pleading, whether yet issued by the court or not, which contains the date, time and place of the return, prior to or after filing such pleading in the general district court, shall satisfy the mailing requirements of this section. In any civil action brought in a circuit court, the mailing of a copy of the pleadings with a notice that the proceedings are pending in the court indicated and that upon the expiration of 10 days after the giving of the notice and the expiration of the statutory period within which

to respond, without further notice, the entry of a judgment by default as prayed for in the pleadings may be requested, shall satisfy the mailing requirements of this section and any notice requirement of the Rules of Court. Any judgment by default entered after July 1, 1989, upon posted service in which proceedings a copy of the pleadings was mailed as provided for in this section prior to July 1, 1989, is validated.

c. The person executing such service shall note the manner and the date of such service on the original and the copy of the process so delivered or posted under this subdivision and shall effect the return of process as provided in §§ 8.01-294 and 8.01-325.

3. If service cannot be effected under subdivisions 1 and 2, then by order of publication in appropriate cases under the provisions of §§ 8.01-316 through 8.01-320.

4. The landlord or his duly authorized agent or representative may serve notices required by the rental agreement or by law upon the tenant or occupant under a rental agreement that is within the purview of Chapter 14 (§ 55.1-1400 et seq.) of Title 55.1.

42 U.S.C. § 14503. Limitation on liability for volunteers

(a) Liability protection for volunteers

Except as provided in subsections (b), (c), and (e), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if--

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to--

(A) possess an operator's license; or

(B) maintain insurance.

(b) Liability protection for pilots that fly for public benefit

Except as provided in subsections (c) and (e), no volunteer of a volunteer pilot nonprofit organization that arranges flights for public benefit shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization if, at the time of the act or omission, the volunteer--

(1) was operating an aircraft in furtherance of the purpose of, and acting within the scope of the volunteer's responsibilities on behalf of, the nonprofit organization to provide patient and medical transport (including medical transport for veterans), disaster relief, humanitarian assistance, or other similar charitable missions;

(2) was properly licensed and insured for the operation of the aircraft;

(3) was in compliance with all requirements of the Federal Aviation Administration for recent flight experience; and

(4) did not cause the harm through 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.

(c) Concerning responsibility of volunteers to organizations and entities

Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(d) No effect on liability of organization or entity

Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(e) Exceptions to volunteer liability protection

If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(f) Limitation on punitive damages based on actions of volunteers

(1) General rule

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 or governmental entity unless the claimant establishes 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 rights or safety of the individual harmed.

(2) Construction

Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(g) Exceptions to limitations on liability

(1) In general

The limitations on the liability of a volunteer under this chapter shall not apply to any misconduct that--

(A) constitutes a crime of violence (as that term is defined in section 16 of Title 18) or act of international terrorism (as that term is defined in section 2331 of Title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) Rule of construction

Nothing in this subsection shall be construed to effect subsection (a)(3) or (f).

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I electronically filed the foregoing Brief for Defendant-Appellee Dr. Steven Salaita with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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