SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SIMON BRONNER, *et al.*, *Plaintiffs*, v. THE AMERICAN STUDIES ASSOCIATION, *et al.*, *Defendants*.	Case No. 2019 CA 001712 B Judge Robert R. Rigsby

ORDER

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

BACKGROUND[1]

I. The American Studies Association

In 1951, the American Studies Association ("ASA") was founded for the purpose of advancing the academic field of American Studies. Compl. ¶ 28. The ASA's constitution expressly

[1] This section is duplicative of the background section in the Court's Amended Order filed on December 12, 2019.

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

Any individual who is interested in the study of American culture can become a member of the ASA upon the "payment of one year's individual dues."[2] Compl. Ex. 1 ("ASA Constitution and Bylaws") ASA Constitution Art. II, Sec. 1(a). Members who are in good standing "have the right to vote or hold office in the [ASA]." ASA Constitution Art. II, Sec. 3.

The ASA originally had five officers: the president, the vice president, the executive director, the editor of the American Quarterly, and the Editor of the Encyclopedia of American Studies. ASA Constitution Art. IV, Sec. 1. Two, the president and vice president, are elected, while the remainder are appointed by an Executive Committee (described below) with ratification of two-thirds of the voting members of a National Council (described below). ASA Constitution Art. IV, Sec 1. The vice president is elected for a one-year term by the membership at large from a selection of two nominees, who are chosen by a Nominating Committee (described below). ASA

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

Constitution Art. IV, Sec. 3. After serving one year as vice president, that individual then automatically serves one year as president of the ASA. ASA Constitution Art. IV, Sec. 2.

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

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

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

position to stand for election before the membership at large. ASA Constitution Art. VI, Sec. 2, 4. The nominees are required to be "representative of the diversity of the association's membership." ASA Constitution Art. VI, Sec. 2.

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

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

The Palestinian Campaign for the Academic and Cultural Boycott of Israel ("PACBI") was founded by Omar Barghouti when he was working and studying at Tel Aviv University in 2009. Compl. ¶ 37. Barghouti allegedly does not believe in a two-state solution; instead he and PACBI call for "a complete right of return to the land we now know as Israel for people who claim to be descendants of Arabs who left Israel at the beginning of the 1948 war." Compl. ¶ 38. Allegedly, the only way to allow for a "complete right of return" is to ensure the end of the state of Israel as a Jewish state. *Id.*

In 2009, pro-Palestinian activists formed the United States Campaign for the Academic and Cultural Boycott of Israel ("USACBI"), a US based campaign which encourages the boycott of Israeli academic and cultural institutions. Compl. ¶ 35. The mission of USACBI is defined as:

"Responding to the call of Palestinian civil society to join the Boycott, Divestment and Sanction movement against Israel, we are a U.S. campaign focused specifically on a boycott of Israeli academic and cultural institutions, as delineated by PACBI." Compl. ¶ 36. Their boycott "proscribes any academic engagement with Israeli universities, including intellectual discourse, collaboration on research, and even study abroad programs" until the complete right of return has been satisfied. Compl. ¶¶ 35, 39.

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

III. Infiltration of the ASA

Beginning in 2010, Plaintiffs allege that members of USACBI began to infiltrate the ASA with the intention of having the ASA join the boycott of Israeli academic and cultural institutions. *See* Compl. ¶¶ 61-77. From 2012 to 2016, every president of the ASA was a member or supporter of USACBI. Compl. ¶ 53. In the 2013 elections, seven of the twelve nominees were supporters of the USACBI and were interested in having the ASA join the boycott. Compl. ¶ 63. Plaintiffs allege that this selection of nominees was a violation of the ASA's bylaws because the nominees were not representative of the general population's opinion on the boycott. Compl. ¶ 64 (Plaintiffs allege that there were 800 USACBI endorsers in 2013 and 4,000 ASA members, so even if all 800 endorsers were ASA members, which they were not, at most only 20% of the ASA would have supported the boycott, which is a much smaller percentage than the 58% of the nominees who were boycott supporters).

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

IV. Lead up to the 2013 Annual Meeting

In 2012, Defendants Sunaina Maria and Malini Johar Schueller, both supporters of the USACBI, became co-leaders of the Academic and Community Activism Caucus ("Activism Caucus"). Compl. ¶ 79. The Activism Caucus is an ASA sponsored Caucus of ASA members intended to provide a network and resource exchange for scholars within the ASA interested in academic activism and social justice within American Studies. Compl. ¶ 78. In late 2012, Defendants Mairia and Schueller began to use the Activism Caucus and its resources, such as its website, to promote adoption of the USACBI to the exclusion of other relevant issues in American Studies at that time. Compl. ¶¶ 82-83. At the 2012 Annual Meeting in particular, the Activism Caucus worked to foster interest in joining the USACBI boycott. Compl. ¶ 84. Bill Mullen, a member of USACBI, manned a table at the Annual Meeting where he asked ASA members

entering the meeting to sign a petition endorsing a resolution to join the USACBI boycott. *Id.* Fewer than 150 members signed the petition.[3] Compl. ¶ 85.

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

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

V. The 2013 Annual Meeting

At the 2013 Annual Meeting, the ASA planned to hold several sessions which touched on the USACBI boycott or topics related to the boycott.[4] Compl. ¶¶ 91-92. Plaintiffs allege that the leadership of the ASA intentionally decided only to invite those scholars who were pro-boycott and refused to present any individuals who would have a negative opinion on the boycott. Compl.

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

[4] While it seems clear that several sessions were planned, it is unclear whether these sessions were actually held.

¶ 92. In an attempt to facilitate bringing particularly sympathetic scholars to the meeting, i.e. those scholars who had faced severe difficulties in traveling from universities in Israel due to their opinions on the Israel/Palestine Conflict, the ASA leadership discussed using ASA resources to provide the scholars with a waiver of registration, a travel stipend, and hotel rooms.[5] Compl. ¶¶ 92-94. In addition, throughout planning these sessions, the ASA leadership was heavily in contact with USACBI leaders to receive feedback about the best way to convince members to join the boycott. Compl. ¶¶ 99-101.

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

After this decision was reached, Plaintiffs allege that the individual Defendants began to use their positions within the ASA to ensure that any individuals who spoke out against joining the boycott were silenced. Compl. ¶ 105. For example, Plaintiff Simon Bronner, who was the editor of the Encyclopedia of American Studies and a member of the Executive Committee and National Council as a result of that position, was removed from the November 25, 2013 National Council meeting due to his opinion that the ASA should not join the boycott. Compl. ¶¶ 107-111. Letters written by ASA members in opposition to the boycott were never published, circulated, or provided to the ASA membership at large. Compl. ¶¶ 112-16. Defendants formed a subcommittee, comprised of USACBI leaders and supporters, to create, revise, and distribute, with USACBI input, materials in support of the boycott. Compl. ¶¶ 117-22. Defendants also planned to use ASA

[5] Though it appears that this was discussed, Plaintiffs have not alleged that any funds or complementary rooms were provided to speakers who attended the conference.

resources to pay for public relations professionals due to outraged opinions that could potentially surface as a result of these actions. Compl. ¶ 122. Finally, Defendants enacted an unprecedented freeze of the membership rolls. Compl. ¶ 123. On November 25, 2013, before announcing that the membership at large would vote on this issue, Defendants froze the membership rolls in an attempt to prevent those opposed to joining the boycott from voting on the resolution. Compl. ¶ 123-37. As a result, Plaintiff Michael Barton, who had been vocal in his opposition to the boycott, was prevented from voting on the resolution due to this freeze because he paid his dues and renewed his membership on the day of the vote. Compl. ¶¶ 127-28.

In December 2013, the ASA held its 2013 Annual Meeting. Compl. ¶ 139. At the annual meeting, the ASA held a vote on adopting the resolution to join the USACBI boycott.[6] *Id.* Of the ASA's 3,853 registered and eligible members at the time of the 2013 Annual Meeting, only 1,252 attended the annual meeting, and only 827 voted in favor of the resolution. *Id.* The leadership of the ASA decided that this vote indicated that the membership had adopted the resolution. Compl. ¶ 9. The resolution passed at the 2013 annual meeting called for the ASA to adopt the USACBI and PACBI's positions on the Israel/Palestine Conflict. Compl. ¶ 148.

VI. Use of ASA Resources after the Resolution

Plaintiffs allege that the adoption of the boycott significantly harmed the ASA's financial position in the years after it adopted the boycott. The ASA has a Trust and Development Fund. Compl. ¶ 162. From June 20, 2008 to June 30, 2015, no withdrawals had been made from that fund. *Id.* From July 1, 2015 to June 30, 2016, the ASA's fiscal year, Defendants withdrew over $112,000 from the trust fund. Compl. ¶ 163. Plaintiffs allege these funds were used to cover expenses related to the boycott and to cover the decline in revenue following the adoption of the

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

boycott. *Id.* In order to permit the large withdrawals, Defendants had to make significant changes to the ASA's bylaws, which they did without informing the members. Compl. ¶¶ 164. Despite the changes to the bylaws, Plaintiffs allege that Defendants' withdrawal and use of the money from the fund was still in contravention of the approved procedures and use in the bylaws. Compl. ¶¶ 169-74.

In addition to utilizing ASA resources, the boycott also caused the ASA to suffer financial injury in the form of decreased revenues. Compl. ¶ 176-85. First, member contributions decreased after adopting the boycott. Prior to adopting the boycott, the ASA received $50,394 on average in annual member contributions. Compl. ¶ 176. Contributions dropped to $31,548 in 2012, $33,080 in 2014 and $31,456 in 2015.[7] Compl. ¶178. Second, revenue received from membership fees also decreased after adopting the boycott. Prior to the adopting the boycott the ASA received an average of $266,948 in membership fees. Compl. ¶ 182. Revenue from membership fees fell 14% in 2012 when the topic of the boycott was brought up to the ASA members. Compl. ¶ 183.

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

VII. Treatment of Plaintiff Bronner

After the resolution was adopted, Plaintiff Bronner was targeted by the leadership of the ASA for his opinion against the boycott. First, Plaintiff Bronner alleges that Defendants began to

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

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

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

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

In 2013, after the resolution had been passed, the leadership of the ASA began to take action against Plaintiff Bronner by limiting his involvement in the National Council and Executive Committee. Compl. ¶ 216. In 2016, Defendants even went so far as to inappropriately amend the

bylaws to strip Plaintiff Bronner of his position as an officer of the ASA. Compl. ¶ 245. This change was made at the November 2016 National Council meeting, and Defendants worked to ensure that Plaintiff Bronner would not be present or provided with the materials of the meeting as they worked to undermine his position. Compl. ¶ 246. Plaintiff Bronner alleges that this change was made intentionally to prevent him from brining a derivative suit. Compl. ¶ 251.

In addition to undermining his position as Editor, Defendants were working to remove Plaintiff Bronner from the position entirely. Defendants decided to fake an open call for a new editor and encouraged Plaintiff Bronner to apply, despite the fact that they had predetermined that they would not renew his contract. Compl. ¶¶ 224, 226. In reality, Defendants were personally soliciting Sharon Holland to step into the position as soon as Plaintiff Bronner's contract expired. Compl. ¶ 228. No open call for applications was ever sent out; however, after the 2016 National Council meeting, which Plaintiff Bronner was not invited to, the ASA announced that Ms. Holland was the new Editor of the Encyclopedia. Compl. ¶¶ 234-235. Since Ms. Holland's appointment, no new entries or updates have been made to the Encyclopedia. Compl. ¶ 236. Plaintiffs allege that the Encyclopedia is now shut down. Compl. ¶ 242. As a result of Defendant's failure to renew his contract, Plaintiff lost $8,500 a year, as well as opportunities to speak at conferences. Compl. ¶ 258.

VIII. Procedural History

In April 2016, Plaintiffs filed suit in the District Court for the District of Columbia. On March 31, 2017, the District Court found that Plaintiff had failed to satisfy the procedural requirements for bringing a derivative action under D.C. code § 29-411.03(2) and accordingly dismissed the derivative claims brought on ASA's behalf. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 52 (D.D.C. 2017). On March 6, 2018, the District Court granted Plaintiffs leave to file a Second

Amended Complaint. *Bronner v. Duggan*, 324 F.R.D. 285, 295 (D.D.C. 2018). On February 4, 2019, the District Court reviewed the Second Amended Complaint to determine whether it had subject matter jurisdiction and concluded that Plaintiffs did not meet the amount in controversy requirement. *Bronner v. Duggan*, 364 F. Supp. 3d 9, 21 (D.D.C. 2019). The District Court accordingly dismissed Plaintiffs' suit for lack of subject matter jurisdiction. *Id.* at 23.

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

On December 12, 2019, this Court dismissed Counts Three, Four, Five, Six, Seven, and Eight of the Complaint under Rule 12(b)(6) as time-barred and the portion of Count Two which pertained to manipulation of the voting process of the Resolution and Count Nine for misuse of funds before March 2016.

On Defendants' interlocutory appeal, the Court of Appeals vacated and remanded the denial of the Special Motion to Dismiss for the Court to apply the two-step analysis under the Anti-SLAPP Act to each challenged claim. *See American Studies Ass'n v. Bronner*, 250 A. 3d. 728, 749 (D.C. 2021).

STANDARD OF REVIEW

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

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

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

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

The "prima facie showing required to support a special motion to dismiss a claim under the District of Columba Anti-SLAPP Act is a showing that the claim is based on the movant's

protected activity, i.e., that such activity is an element of the challenged cause of action." *Bronner,* 259 A. 3d at 748.

"If the plaintiff cannot meet that burden [to establish a likelihood of success], the motion to dismiss must be granted, and the litigation is brought to a speedy end." *Mann,* 150 A.3d at 1227. Section 16-5502(d) provides, "If the special motion to dismiss is granted, dismissal shall be with prejudice." Section 16-5502(d) also requires the Court to hold an "expedited hearing" on the motion and to issue a ruling "as soon as practicable after the hearing."

Where a court grants a 12(b)(6) motion "on a claim as a matter of law, the plaintiff cannot show a likelihood of success on the merits of that claim for the purposes of the anti-SLAPP motion." *Bronner,* 259 A. 3d at 743. "A plaintiff must make more of a showing to defeat an anti-SLAPP motion that is ordinarily required to defeat a 12(b)(6) motion; by itself, the facial validity of a claim is not normally sufficient to demonstrate the likelihood of success required by the Anti-SLAPP Act." *Id.* at 740. "That demonstration requires the plaintiff to make, and the court to evaluate, a proffer of evidence supporting the well-pled claim and overcome any defenses asserted against it. A plaintiff unable to make a satisfactory evidentiary proffer will face dismissal and a potential award of attorneys' fees and costs to the defendant." *Id.*

ANALYSIS

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

Defendants have alleged that this claim is brought in violation of D.C. Code § 16-5501, *et seq.* ("the Anti-SLAPP Act") for the sole purpose to limit the Defendants' ability to speak.

To come within the scope of the Anti-SLAPP Act, Plaintiffs' claims must arise "from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a); *see also Bronner,* 259 A. 3d at 748.

First, an act in furtherance of the right of advocacy on issues of public interest includes "communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). The Court is persuaded that the 2013 resolution constitutes an act in furtherance of a right to advocacy. The 2013 resolution constitutes a communication of views to members of the public. Second, it is on an interest of public interest. An issue of public interest includes "an issue related to . . . environmental, economic, or community well-being." D.C. Code § 16-5501(3). The resolution related to the ability of foreign scholars to work on relevant issues safely, freely, and without fear of persecution. This is related to community well-being, and thus an issue of public interest. Finally, the 2013 resolution was publicized in a public forum. *See Abbas v. Foreign Policy Grp., LLC,* 975 F. Supp. 2d 1, 11 (D.D.C. 2013).

The issue now before the Court is whether Plaintiffs' claims arise from the 2013 resolution or any other alleged act in furtherance of the right of advocacy on issue of public interest. Once the prima facia showing has been made, Plaintiffs are required to demonstrate that the claim is likely to succeed on the merits. D.C. Code § 16-5502(b).

As to Plaintiffs' position that allegations in their unverified Complaint constitute a "proffer" of evidence, allegations and references to unattached documents in an unverified pleading are not evidence.

i. Count I – Breach of Fiduciary Duty for Material Misrepresentations and Omissions

As to Count I of the Complaint, Plaintiffs allege that the individual Defendants breached their fiduciary duties of loyalty, care, candor, and good faith to the ADA by not disclosing their alleged "personal political agendas" and costs concerning the 2013 resolution.

Whilst this Count seems related to the 2013 resolution, the act that is the basis of the alleged breach appears to be Defendants' act of withholding their specific political views prior to the 2013 resolution. Here, the Defendants' political views are alleged to be aligned with the 2013 resolution and the decision not to speak is entitled to as much protection under the First Amendment as is the decision to speak. *See NAACP Legal Defense & Educational Fund v. Devine*, 560 F. Supp. 667, 676 (D.D.C 1983).

As to Dr. Salaita, the only allegations related to Dr. Salaita is that he advocated that the ASA should endorse a boycott of Israeli academic institutions and as such, was Dr. Salaita communicating views to members of the public in connection with an issue of public interest.

As such, the Court is persuaded that the Defendants' have satisfied their burden under the first prong of the Anti-SLAPP Act and the burden shifts to Plaintiffs to proffer evidence to support this Count. The Court is not persuaded that this Count is likely to succeed on the merits. The basis of this Count is that nominees of a leadership position in a non-profit organization failed to disclose their political philosophy which as discussed previously, can form the basis of protected speech. As to Dr. Salaita, Plaintiffs cannot succeed on the merits of their claims because Plaintiffs have not alleged any misrepresentations by Dr. Salaita when he ran for office. Additionally, Plaintiffs have not proffered any evidence to support that this claim is likely to succeed on the merits.

Accordingly, Count I of the Complaint for Breach of Fiduciary Duty is **DISMISSED.**

ii. <u>Count II – Breach of Fiduciary Duty for Misuse of ASA Assets and Count IX – Corporate Waste</u>

As to Count II, Plaintiffs allege that the individual Defendants misused assets of the ASA to further their own personal political interests and advance the goals of the USACBI. Count IX alleges that these misused assets constitute corporate waste.

Here, the Court is persuaded that the alleged acts of all other Defendants "arise from" an act in furtherance of the right of advocacy on issues of public interest. While the Counts clearly reference the 2013 resolution, the Plaintiffs allege that the individual Defendants misused and misappropriated these funds in furtherance of their support of the 2013 resolution. *See Bronner,* 259 A. 3d at 747 n. 78.[8] However, expenditure of funds for the advancement of the 2013 resolution can be seen as being based on the Defendants' protected activity of independent expenditures in support of the 2013 resolution. *See Citizens United v. FCC,* 558 U.S. 310, 339 (2010) ("prohibition on corporate independent expenditures [on political speech] is thus a ban on speech."); *see also Cruz v. FEC,* 542 F. Supp. 3d, 1, 7-8 (D.D.C. 2021). This protection also extends to funds used to public relations and/or lobbying if said funds were made for the advancement or support of the 2013 resolution.[9] As to legal fees spent by the ASA defending litigation related to the 2013 resolution, such expenses seem to clearly arise from the 2013 resolution.

As such, the Court is persuaded that the Defendants' have satisfied their burden under the first prong of the Anti-SLAPP Act and the burden shifts to Plaintiffs to proffer evidence to support this Count. As an initial matter, the Court reiterates the same ruling as it did when deciding Defendants' 12(b)(6) motions, specifically that any acts occurring before March 2016 are time-

[8] "We think it most implausible, for example, that the Anti-SLAPP Act enables a defendant sued for embezzling or misappropriating entrusted funds to file a special motion to dismiss based on a showing that the funds were used in furtherance of the right of advocacy on an issue of public interest. It would be strange to say such a lawsuit "arises from" statutorily protected activity rather than from the defendant's defalcation, regardless of whether the plaintiff disapproved of the defendant's speech; equally strange to suggest that the Anti-SLAPP Act was meant to benefit such a defendant."

[9] Lobbying is protected as an expressive conduct that involves petitioning the government. D.C. Code §16-5501(1)(B).

barred and therefore not likely to succeed on the merits. See Am. Order of Dec. 12, 2019 ("2019 Am. Order").[10]

Additionally, Plaintiffs have failed to proffer any evidence to support that their claims are likely to succeed on the merits. Plaintiffs have not alleged any facts nor proffered evidence as to Dr. Salaita that Dr. Salaita had a role in withdrawals from the ASA Trust Fund since Dr. Salaita joined the ASA National Council in 2015. As to corporate waste, claims "must articulate an exchange of corporate assets for consideration so disproportionally small as to lie beyond the range at which a reasonable person might be willing to trade and must be egregious or irrational." *See Daley v. Alpha Kappa Sorority, Inc.*, 26 A. 3d, 723, 730 (D.C. 2011) (internal citations and quotations omitted). Furthermore, as any claim of misuse of ASA funds are fundamentally derivative in nature, said claims are barred as there are no claims for nor evidence of damages to the Plaintiffs themselves and because the federal court dismissed Plaintiffs' derivative claims with prejudice, said claims are barred by collateral estoppel. *See Cowin v. Bresler*, 741 F. 2d 410, 414 (D.C. 1984). Plaintiffs have not alleged any facts or proffered evidence of any individual damages or injuries suffered because of use of ASA assets.

Accordingly, Count II for Breach of Fiduciary Duty and IX for Corporate Waste are **DISMISSED.**

iii. Count III – *Ultra Vires* and Breach of Contract for Failure to Nominate Officers and National Council Reflecting Diversity of Membership

As to Count III, Plaintiff alleges ultra vires and Breach of Contract failing to nominate officers and national council reflecting diversity of membership.

[10] The Court partially based its original ruling on *Bond v. Serano*, 566 A. 2d 47, 49 (D.C. 1989). Plaintiffs rely on *Neill v. D.C. Pub. Emp. Rels. BD.,* 234 A. 3d 177 (D.C. 2020) in support of their argument that Plaintiffs were diligent in filing their suit but *Neill* neither overrules nor mentions the holding in *Bond*.

Here, the crux of this Count is predicated on the ASA constitution, specifically that nominees for each elected leadership position shall be "representative of the diversity of the association's membership". The issue with the diversity of the association's membership as alleged however, is that the association's nominees contained too many representatives that supported the 2013 resolution. In fact, the Plaintiffs' only issue with the diversity and qualifications of the individual Defendants appears to solely be based on their support of the 2013 resolution. As such, Count III arises out of the 2013 resolution.

As the Court is persuaded that the Defendants' have satisfied their burden under the first prong of the Anti-SLAPP Act, the burden shifts to Plaintiffs to proffer evidence to support this Count. The Court reiterates the same ruling as it did when deciding Defendants' 12(b)(6) motions, specifically that it is time-barred. See 2019 Am. Order. The Court also notes that Plaintiffs have failed to proffer any evidence to support that their claims are likely to succeed on the merits.

Accordingly, Count III is **DISMISSED.**

iv. Count IV and VIII – Ultra Vires and Breach of Contract for Freezing Membership Rolls to Prohibit Voting

As to Count IV, Plaintiffs allege *ultra vires* and breach of contract by the individual Defendants in an effort to prevent voting. This Count stems from the allegations that on November 25, 2013, concurrently with the submission of the proposed 2013 resolution, the Council, through Stephens, froze the membership rolls of the ASA and thus prevented any members whose dues were in arrears from being reinstated and eligible to vote during the ten-day voting period. As to Count VIII, Plaintiff Barton alleges that because of said freeze, he was deprived of his ability to vote.

As to Plaintiffs' allegations against Dr. Salaita, Dr. Salaita was not a member of the Council until 2015 and therefore, the only allegation against Dr. Salaita related to this time period is that he advocated for the 2013 resolution.

As to the other individual Defendants on the Council, the Complaint alleges that the act that forms the basis of these Counts is that these Defendants, contrary to the ASA constitution, improperly froze the membership rolls. The Court is not persuaded that this act of freezing membership rolls arose from the 2013 resolution nor contributed to the furtherance of the 2013 resolution. *See Bronner*, 259 A. 3d at 749, 750.

Now, as Dr. Salaita has satisfied the burden of the first prong of the Anti-SLAPP Act, the Plaintiffs have the burden to prove they are likely to succeed on the merits. The Court reiterates the same ruling as it did when deciding Defendants' 12(b)(6) motions, specifically that it is time-barred. See 2019 Am. Order. The Court also notes that Plaintiffs have failed to proffer any evidence to support that their claims are likely to succeed on the merits.

Accordingly, Count IV is **DISMISSED** against Dr. Salaita.

v. Count V – Ultra Vires and Breach of Contract for Substantial Part of Activities Attempting to Influence Legislation

As to Count V, Plaintiffs allege that the actions of the individual Defendants here was an effort to influence both Israeli and U.S. legislation.

Here, there is no question that the claim arises from legislative advocacy and as such, this Count arises from Defendants' actions to oppose an issue under consideration or review by a legislative body and/or an expression involving petitioning the government. See D.C. Code §16-55-1(1)(B). It is not disputed that the 2013 resolution for and is an attempt to influence legislation. See Pls. Proposed Concl. ¶78. Whilst the Plaintiff alleges that this a generic corporate claim, the first prong of the Anti-SLAPP analysis is satisfied as this Count arises from the 2013 resolution

and is directly challenging the 2013 resolution itself, as well as its subsequent effects. *See also Bronner, et al. v. Duggan,* et al., 249 F. Supp. 3d 27, (D.D.C. 2017).

As the Defendant have satisfied the burden of the first prong of the Anti-SLAPP Act, the Plaintiffs now have the burden to prove they are likely to succeed on the merits. The Court reiterates the same ruling as it did when deciding Defendants' 12(b)(6) motions, specifically that it is time-barred. See 2019 Am. Order. The Court also notes that Plaintiffs have failed to proffer any evidence to support that their claims are likely to succeed on the merits.

Accordingly, Count V is **DISMISSED.**

vi. Count VI and VII – Breach of Contract and Breach of D.C. Nonprofit Corporation Act.

Here, Count VI alleges that that 2013 resolution was not lawfully passed because the vote on the 2013 resolution was not held on the first full day of the annual meeting, did not possess a two-thirds majority, and that the final vote tally did not include votes by members not present at the annual meeting. Count VII alleges that contrary to Section 29.405.24 of the D.C. Nonprofit Corporation Act, the 2013 resolution did not possess a quorum and thus was invalid.

The Court is not persuaded here that the claims satisfy the first prong of the Anti-SLAPP Act. Plaintiffs' claims here, while relating to the 2013 resolution, is focused on circumstances behind the voting of the 2013 resolution, specifically that the 2013 resolution did not possess the requisite majority vote and that the vote did not satisfy quorum requirements. *See Bronner,* 259 A. 3d. at 749, 750. When focused on the claims themselves, the failure to properly conduct a vote itself is not a protected activity even if the vote is.

As such, for purposes of a special motion to dismiss brought under the Anti-SLAPP Act, the Defendants have not satisfied the first prong.

vii. Count X – Breach of Fiduciary Duty and Count XI – Tortious Interference

Under Count X and XI, Plaintiffs claim that Defendants breached their fiduciary duty and tortiously interfered with contractual business relationships by removing Plaintiff Bronner as editor of the Encyclopedia.

The Court is persuaded that these claims satisfy the first prong of the Ant-SLAPP Act. Plaintiffs' claims here, take issue with the ASA's allegedly unjustified renewal of Bronner's editorial contract and issues with the non-publication of the Encyclopedia. Defendants argue that the spread of information through email arises from a written statement and the decision to shut down the Encyclopedia is a form of expression protected under the Anti-SLAPP Act. Here, the information that Defendants shared about Plaintiff Bronner was concerning his opposition to the Resolution, which is an issue of public interest, and the Defendants' views of his efforts to undermine the ASA. Compl. at ¶202. Additionally, the Complaint alleges that Plaintiff Bronner was removed from his position "for no reason other than because of his opposition to the Academic Boycott". Compl. at ¶320. As to decisions involving publishing entries on the Encyclopedia, these claims arise from an editorial decision to not publish information on a website available to the public, which is in itself, a form of expression. *See Riley*, 487 U.S. 797 ("[F]reedom of speech is a term necessarily comprising the decision of both what to say and what not to say.").

Since the Defendants here have met their burden under the Anti-SLAPP Act, the burden shifts to Plaintiffs to present evidence to show they are likely to succeed on the merits. Plaintiffs have not proffered any evidence that it is a breach of fiduciary duty for the ASA to not enter into a contract with an individual who is in active litigation nor that Plaintiff Bronner would have a reasonable expectation that his contract would be renewed during this active litigation. Said action can be reasonably construed an action that lies within the business judgment of the National Council. Furthermore, the Contract on its face, states that upon expiration, the ASA shall have the

right to appoint a new Editor without any obligations to Bronner. As such, it cannot be articulated that a duty was owed to Bronner to renew said contract. *See Multicom Inc. v. Chesapeake and Potomac Tel. Co.*, 1988 WL 118411 (D.D.C. 1988). Moreover, a party, cannot tortiously interfere with its own contract. *See Press v. Howard University,* 540 A. 2d, 733 (D.C. 1988)

Additionally, as to Dr. Salaita, there is no evidence proffered that Dr. Salaita himself was personally involved in anything related to Bronner, his contract as editor; nor the ASA's decision to not renew said contract.

Accordingly, Counts X and XI are **DISMISSED.**

viii. Count XII – Aiding and Abetting

Count XII of the Complaint alleges that individual Defendants aided and abetted the National Council in a wrongful act by engaging in an effort to stack the National Council with members who support the 2013 resolution. Count XII also alleges Defendant Stephens' misuse of funds constituted waste.

First and foremost, Count XII appears to be a catch-all predicated upon some of the previous allegations of tortious wrongdoing as alleged in the Complaint. Importantly, none of the allegations relating to Count XII involve actual aiding or abetting and rather concern the same actions that Plaintiffs claimed were breaches of fiduciary duty in the previous Counts. The Court reiterates its analysis as set forth in the previous of counts of breach of fiduciary duty as it pertains to actions arising out of the 2013 resolution itself. As the alleged aiding and abetting arises from the 2013 resolution, the Court is persuaded that the Defendants have satisfied their initial burden under the Anti-SLAPP Act.

As to Dr. Salaita, the only allegation in this Count is that Dr. Salaita publicly acknowledged that he was involved in the effort to pass the 2013 resolution before he was a member of the

National Council. Compl. at ¶337. As Plaintiffs' claims arise from Dr. Salaita's public statements in support of the 2013 resolution, the first prong of the Anti-SLAPP Act is satisfied.

As Defendants have satisfied their burden, Plaintiffs must now prove a likelihood of success on the merits. Plaintiffs are not likely to succeed here as Plaintiffs have not proffered any evidence, including any evidence to substantiate that Dr. Salaita nor any other Defendants knew of any underlying breach nor evidence of any aiding and abetting. *See Halberstam v. Welch,* 705 F. 2d 472, 477 (D.C. 1983). Additionally, as the actions alleged here were by officers and directors in their official capacity, Plaintiffs' claim fails because an entity cannot aid and abet itself nor can lawful expressions of opinion constitute aiding and abetting. *See Press v. Howard University,* 540 A. 2d, 733 (D.C. 1988). The Court further applies and reiterates the same analysis set forth previously that the claims here are time-barred.

Accordingly, Count XII is **DISMISSED.**

CONCLUSION

Accordingly, and based on the entire record herein, it is this the 1st day of March, 2023, hereby

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

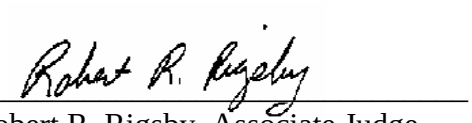
ORDERED that Motion to Dismiss Under Anti-SLAPP Act on Behalf of Defendants American Studies Association, Lisa Duggan, Sunaina Maira, Curtis Marez, Chandan Reddy, John Stephens and Neferti Tadiar, filed on May 6, 2019, is **GRANTED IN PART**; it is further

ORDERED that Steven Salaita's Opposed Special Motion to Dismiss Plaintiffs' Complaint Pursuant to D.C. Code § 16-5501, *et seq.*, and, in the Alternative, Motion to Dismiss

Pursuant to Super. Ct. Civ. R. 12(b), filed on June 7, 2019, is **GRANTED IN PART**; and it is further

ORDERED that Count I, Count II, Count III, Count V, Count VIII, Count IX, Count X, Count XI, and Count XII of Plaintiffs' Complaint are **DISMISSED** and that Defendant Salaita is dismissed from Count IV under the Anti-SLAPP Act**.**

SO ORDERED.



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

Copies counsel of record via Odyssey.