No. 23-cv-0240

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SIMON BRONNER, *ET AL.*,

Plaintiffs-Appellants,

v.

AMERICAN STUDIES ASSOCIATION, *ET AL.*,

Defendants-Appellees.

On Review from the D.C. Superior Court No. 2019 CA 001712 B (Rigsby, J.)

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September 19, 2023

RULE 28(a)(2)(A) STATEMENT

The parties are Plaintiffs/Appellants Simon Bronner, Charles Kupfer, Michael Barton, and Michael Rockland and Defendants/Appellees American Studies Association, Lisa Duggan, Curtis Marez, Neferti Tadiar, Chandon Reddy, John Stephens, Sunaina Maira, Jasbir Puar, J. Kehaulani Kauanui, and Steven Salaita.

Before the Superior Court, Plaintiffs/Appellants were represented by Jennifer Gross. Defendants/Appellees were represented by Thomas C. Mugavero, Richard R. Renner, and Shayana D. Kadidal.

Plaintiffs/Appellants are represented in this Court by Seth P. Waxman, Julie Aust, Jerome M. Marcus, and Jennifer Gross. Defendants/Appellees are represented by Thomas C. Mugavero, Jeffrey C. Seaman, Richard R. Renner, and Shayana D. Kadidal.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under D.C. Code § 11-721(a)(1). The Superior Court issued a final order disposing of all claims on March 1, 2023. Plaintiffs filed a timely petition for review on March 21, 2023. D.C. App. R. 4(a)(1).

STATEMENT OF ISSUES

1. Whether the Superior Court erred in dismissing as untimely Counts 2-9, in full or in part, when the statute of limitations was equitably tolled.

2. Whether the Superior Court erred in dismissing Counts 1-3, 5, and 9-12 under the Anti-SLAPP Act.

   A. Whether the court improperly applied this Court's mandate regarding Step One of the Anti-SLAPP Act, *ASA v. Bronner,* 259 A.3d 728 (D.C. 2021) ("*Bronner II*"), to conclude that Counts 1-3, 5, and 9-12 "arise[] from" a protected activity under D.C. Code § 16-5502(b).

   B. Whether the court improperly concluded, under Step Two of the Act, that Plaintiffs' claims were not likely to succeed.

STATEMENT OF THE CASE

This case was brought by four professors, long-time members of the American Studies Association ("ASA"), an academic society incorporated in 1951 for the sole purpose of promoting the study of American culture. Beginning in 2012, Defendants engineered a systematic and covert takeover in order to cause the ASA to adopt a boycott proscribing academic engagement with Israeli universities (the "Boycott Resolution"), in contravention of ASA bylaws forbidding substantial political involvement. Because Defendants knew their intended agenda was both overwhelmingly disfavored by ASA membership and would likely harm the institution, they employed illegal corporate tactics to ensure that Boycott supporters were elected and that the Resolution passed. First, they secretly obtained control of the ASA nomination process to ensure that only Boycott supporters were nominated for leadership positions. Next, they leveraged ASA resources to facilitate adoption of the Boycott. Then, in violation of the ASA constitution, they froze membership and voting rolls one week before announcing that membership would vote on the Boycott, which they knew would disenfranchise anti-Boycott members who had withheld membership fees in protest. Finally, with only 21% of members in support, Defendants declared the Resolution passed—in clear violation of both ASA bylaws and D.C. law.

When the Resolution wrought predictable financial havoc on the ASA, and its Encyclopedia (a major source of income) was shuttered, Plaintiffs sued Defendants—their fiduciaries who were bound by corporate bylaws and entrusted with the wellbeing of the ASA. Plaintiffs charged violations of the ASA's constitution and bylaws, D.C. statutes on corporate governance, and other corporate torts. Plaintiffs sued first in federal court; and when the federal court determined that it had lost jurisdiction—three years after filing and after twice ruling to the contrary—Plaintiffs immediately sued in Superior Court.

Throughout this litigation, Defendants have attempted to immunize their illegal conduct by claiming that Plaintiffs' real goal is to stifle speech about the Boycott and the Israeli-Palestinian conflict. But this case is not about speech, the merits of an academic boycott of Israel, or indeed, the positions expressed in any of Defendants' statements at all. There is no claim here, for example, that Defendants' personal views on the Boycott or Israel are wrong. Rather, Plaintiffs' claims concern corporate governance: They seek recompense for the financial harm wrought by Defendants' violations of laws, bylaws, and fiduciary obligations. This Court has held, in this very case, that the Anti-SLAPP Act was not "meant to benefit" people or entities like Defendants, who are accused of "misappropriating entrusted funds" but then claim immunity because the misappropriated "funds were used in furtherance of the right of advocacy." Joint Appendix ("JA") 352 (*ASA v.*

Bronner, 259 A.3d 728, 740-41 (D.C. 2021) ("*Bronner II*")). Additionally, Plaintiffs have "proffer[ed]" sufficient evidence to overcome any challenges to their claims, JA345. Finally, Plaintiffs' claims are not barred by the statute of limitations, as the Superior Court wrongly held.

The judgment should be reversed.

STATEMENT OF FACTS

A. The Anti-SLAPP Act

A "SLAPP," or "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 Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016) (quoting Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893, at 1 (Nov. 18, 2010) ("Anti-SLAPP Report")). "[T]he D.C. Anti-SLAPP Act was designed to protect targets of … meritless lawsuits by creating 'substantive rights with regard to a defendant's ability to fend off' a SLAPP." *Id.* (quoting Anti-SLAPP Report at 1). In creating these rights, lawmakers were trying to protect "normal, middle-class and blue-collar Americans" and other "grassroots activis[ts]" from being "sued into silence" by litigants not trying to "win the lawsuit," but to "punish the opponent and intimidate them into silence." *See* Anti-SLAPP Report at 1-3.

Litigants who feel they have been targeted by a SLAPP lawsuit are

empowered, under the Anti-SLAPP Act, to file a "special" motion to dismiss. D.C. Code § 16-5502. This is "essentially an expedited summary judgment motion" that demands a slightly elevated burden of proof and "accelerates the consideration of available defenses," such that a targeted litigant may bring time-consuming and non-meritorious claims to a speedy end. JA344-346 (*Bronner II*).

Courts analyze these special motions under a "two-step analysis." JA355 (*Bronner II*). At Step One, the movant must "make[] 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." D.C. Code § 16-5502(b). Should the movant prevail, at Step Two the burden shifts to the plaintiff to "demonstrate[] that the claim is likely to succeed on the merits." *Id.* A claim is likely to succeed when "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." *Mann*, 150 A.3d at 1232.

B. Factual Background

1. The American Studies Association and the parties

The American Studies Association ("ASA") is the nation's largest and oldest organization dedicated to the promotion of the study of American culture. JA37-38. It was founded in 1951 for the sole purpose of advancing the academic field of American Studies. JA40.

In 1971, the ASA incorporated under the D.C. Nonprofit Corporation Act. JA41. The ASA thus agreed that it would be "organized exclusively for education and academic purposes." JA285. It also agreed that "no substantial part of [its] activities" would be "carrying on propaganda, or otherwise attempting, to influence legislation." JA286.

The ASA's leadership includes five officers: the president, vice president, executive director, editor of the *American Quarterly* journal, and editor of the Encyclopedia of American Studies ("the Encyclopedia"). JA242-243.[1] The president and vice president were elected; all others were appointed. JA242. All five officers were members of the National Council, alongside other elected members, and were responsible for conducting ASA's "business," setting "fiscal policy," and "oversee[ing]" the ASA's "general interests." JA243. An Executive Committee implemented the National Council's directives. JA48-49. The president ensured that the ASA's "chartered obligations and purposes" are fulfilled. JA49, 57.

A Board of Trustees, which consisted of the vice president and four ASA members appointed by the president, managed the ASA's "Trust and Development Fund." JA149. This Fund was designed to ensure "the long-term financial stability

[1] This discussion reflects the ASA constitution and bylaws as they read in 2012-2013, a copy of which begins at JA146.

of the association," and Trustees were required to direct it "in a fiscally sound and socially responsible manner." *Id.*

Plaintiffs-Appellants are four professors of American Studies who are longtime members of the ASA. Simon Bronner was a professor at Pennsylvania State University, an honorary lifetime member of the ASA, a former editor of the Encyclopedia of American Studies, and former member of the ASA National Council. JA36-37. Michael Rockland is a professor at Rutgers. JA37. Michael Barton and Charles Kupfer are professors at Pennsylvania State University. *Id.*

Defendants-Appellees are the ASA and the individuals who transformed it from a neutral academic organization to one that has publicly endorsed a political boycott proscribing any engagement with Israeli universities, including intellectual discourse, research collaboration, or study abroad programs.

Defendants Kauanui and Maira are two founding members of the United States Campaign for the Academic and Cultural Boycott of Israel ("USACBI"). JA42-43. Defendants Maira, Tadiar, Kauanui, and Puar are all members of USACBI leadership. JA38-39.

Except for Defendant Salaita, who was on the ASA National Council from 2015 through 2018, the individual Defendants were all ASA members and officers in 2013, who served on either the ASA National Council, Executive Committee,

Activism Caucus, Nominating Committee, or as Executive Director or President. JA36-39.

2. Efforts to achieve ASA adoption of the Boycott

In 2012, USACBI leadership, including many of the defendants in this case, began a concerted effort to capture the ASA and compel it to publicly adopt the Boycott. Defendants perpetuated these efforts through a systematic and covert three-step process, in which they first obtained control of ASA's nominations process, ensuring that only Boycott supporters were nominated for leadership positions; leveraged ASA resources to encourage adoption of the Boycott; and, when that failed, manipulated and violated ASA voting procedures to force the Boycott through.

a) Defendants covertly pack the ASA National Council

Defendant Puar was on the ASA Nominating Committee from 2010 to 2013. JA51-52. Beginning in 2012, in coordination with USACBI leadership, Puar began to focus on getting the ASA to adopt a resolution to academically boycott Israel—the "Boycott Resolution"—starting with a concerted, covert effort to "populat[e] [the National Council] with as many supporters as possible." JA47-47, 197-198; *see also* JA57. Puar did not disclose any such intention during her candidacy for the Nominating Committee. JA51-52.

This effort involved manipulation of the ASA nomination process. ASA

leadership is elected by members, who may each vote for one of two candidates per open position. All candidates for president, National Council, and Nominating Committee are selected by the Nominating Committee itself, save a few irrelevant exceptions. JA48. ASA nominees are required to "be representative of the diversity of the association's membership." JA53, 148.

Before June 2012, no members of USACBI leadership were on the ASA Executive Committee or National Council or had ever been nominated for ASA president. JA49. But starting in 2012, and for four consecutive years, every candidate the Nominating Committee selected for president favored the Boycott—rendering ASA members with no option but to vote for a Boycott endorser for ASA president. *Id*. And in 2013, the three National Council members selected by the National Council to sit on the Executive Committee were also Boycott supporters. JA56. That same year, seven of the twelve Nominating Committee nominations for open positions were Boycott endorsers. JA53.

But ASA members largely did not know that were voting for Boycott endorsers. Neither Defendant Marez (2012 president) nor Defendant Duggan (2013 president) disclosed their plans to usher in a boycott. JA49-50. Nor did Maira or Kaunaui—successful 2013 National Council candidates. JA53-54.

Defendants intentionally hid their Boycott agenda from ASA members. Maira explained that it would "be more strategic not to present ourselves as a pro-

boycott slate," because the candidates "need[ed] to get on the Council and … our larger goal is support for the resolution, not to test support at this early stage from 'outside.'" JA54-55, 201-202. Another Boycott advocate agreed it would be better to "emphasiz[e] support for academic freedom" rather than "specifying [the Boycott]," despite a third member cautioning that "not revealing something this important *and intentional* and then hoping later to use the American Studies Association national council as a vehicle to advance our cause will not work and may well backfire." JA55 (emphasis added). Ultimately, of the three nominees in that discussion, the only one to publicly declare support for the Boycott lost the election. Maira and Kauanui obscured their motives—and won. *See* JA54-56.

In short, Puar, Kauanui, Maira, Marez, and Duggan all attained elected ASA leadership positions in part by concealing their own agendas, which they knew to be material to ASA members. *See* JA57. They did so in violation of their fiduciary duties to the ASA, including the duty to "fully disclose all material facts" to the association. *Wisc. Ave. Assocs. v. 2720 Wisc. Ave. Co-op. Ass'n*, 441 A.2d 956, 962-963 (D.C. 1982); JA96.

By Defendants' design, the candidates they advanced did not reflect the diversity of ASA membership as required by the ASA constitution. JA148, 124-

127. As of 2013, of 4,000 ASA members, at most only 800 endorsed a boycott. JA53, 66, 205.[2]

b) Defendants exploit ASA resources to advance the Boycott

Packing the ASA leadership with covert Boycott supporters provided USACBI with the infrastructure to reach thousands of academics. In 2012, two USACBI leaders, Malini Schueller and Maira, assumed leadership of the ASA's Activism Caucus—designed to advance "issues of academic activism and social justice specific to American Studies"—and singularly dedicated it to adoption of the Boycott Resolution. JA59-60.

At ASA's 2012 annual meeting, Schueller and Maira stationed a USACBI representative next to the ASA registration table to encourage ASA members to "sign a petition endorsing the [Boycott]." JA60-61, 203. Fewer than 150 members did so. JA61. Indeed, during the next year, the Activism Caucus would push for Boycott signatures but secured them from, at most, 20% of ASA's then-membership. JA66, 205; *see supra* n.2.

As president-elect, Marez announced at the 2012 ASA meeting that he planned to organize "a major plenary session, entitled 'Town Hall: The United

[2] Defendants represented to the ASA body in 2013 that the total number of Boycott supporters at the time was approximately 800; Plaintiffs allege that the true number was 400-450. JA53, 66, 205.

States and Israel/Palestine' at the 2013 Annual Meeting," when ASA leadership would be stacked with Boycott supporters. *See* JA61-63. Then-president Matthew Jacobson, an outgoing officer, warned Defendants that "any[]" statement "that the executive committee or council issues on behalf of the organization and the membership needs to conform to the by-laws." JA61-62, 204.

At the 2013 meeting, the National Council invited pro-Boycott speakers to give "prime-time sessions" on the subjects of "Palestine in Crisis" and "Academic Freedom and the Right to Education: The Question of Palestine." JA63, 204-205. Despite Defendants' fiduciary obligation to treat all members equally, to avoid putting their own political interests above the interests and mission of the ASA, and to avoid conferring unique benefits or advantages on themselves, *Willens v. 2720 Wisc. Ave Co-op Assn*, 844 A.2d 1126, 1136 (D.C. 2004), they invited no speakers to present alternate views. JA63.

Defendants were fully aware that they were inviting only pro-Boycott speakers, but then-president Marez had no "scruples about appearing to stack the deck." JA65-66. Additionally, despite "know[ing] the American Studies Association does not have funds it devotes to travel expenses for invited guests," JA65, and despite his fiduciary obligation not to confer "unequal" benefits on certain ASA members, *Willens*, 844 A.2d at 1136, Marez pushed to provide foreign pro-Boycott advocates with "a waiver of registration and travel stipend."

JA63-65, 205. Defendant Reddy acknowledged in one email that these plans were covert, intentional, and likely to cause backlash if publicly known:

> I'm not sure about putting this all on email, … We did have a strategic purpose in inviting these scholars. … The strategy as discussed at Executive Committee was that any interference with the scholar's travel would give [ASA] a reason to address academic freedom issues … It is true that the invitation for these scholars to speak could be seen as "stacking the deck" by the EC.

JA63-65, 205. Throughout, Kauanui, Maira and Tadiar communicated with USACBI leadership on the progress of the ASA Boycott campaign. JA67-68, 206.

c) Failing to pass the Boycott Resolution through the stacked National Council alone, Defendants put it to membership vote

In November 2013, the National Council unsuccessfully attempted to adopt a resolution joining the Boycott without putting it to membership vote. JA69-70. The Council did agree to endorse the Boycott Resolution, but only if the ASA membership approved it—a condition Kauanui explained to USACBI leadership was "difficult for me and Sunaina to stomach—but it was the only way." JA69-70, 206-207. Maira and Kauanui formed a Google group entitled "ASA-boycott-coordination," along with USACBI leaders unaffiliated with the ASA, which strategized different ways to garner support for the upcoming vote. JA70-71, 206-207.

One method Defendants took was the unprecedented step of removing Plaintiff Bronner—editor of the Encyclopedia and member of the National

Council—from the 2013 National Council meeting. JA71-72, 207-208. Defendants did so after discussing over email that Bronner opposed the resolution and was communicating that view to other members. *Id.* Defendants also refused to post information questioning or condemning the Resolution on the ASA website. JA73-74, 208. Defendants undertook these actions in violation of their fiduciary obligations to treat all ASA members equally, to put the best interests of the ASA above their own personal interests, and to disclose all material facts regarding important decisions impacting the future of the ASA. *See Willens*, 844 A.2d at 1136.

Defendants also formed a pro-Boycott subcommittee of the National Council to, among other things, draft talking points for the media and reluctant members adopted from USACBI materials and with USACBI guidance. JA76-77, 208-209. Correctly anticipating that adopting the Boycott would eventually require the ASA to "put out … fires," JA78; *see infra* pp.16-18, and in violation of their fiduciary obligation to put the interests of the ASA above their own and to act for the benefit of the ASA collective, *Willens*, 844 A.2d at 1136, Defendants inquired amongst themselves "whether the cost of public relations professionals could be paid from ASA funds." JA77-78, 209.

d) Defendants freeze ASA membership rolls one week before voting on the Resolution

On November 25, 2013, Defendants froze ASA's membership rolls, an act neither contemplated nor permitted by the ASA constitution. JA78-80, 209-210. A week later, they announced that ASA members would vote on the Boycott Resolution and instructed membership officers "to hold all orders for membership until the vote was over." JA54.

All ASA members in good standing enjoyed "the right to vote or hold office in the association." JA134-135, 147. Members whose dues were six months behind did not, but they could be "reinstated at any time by the payment in advance of one year's dues." JA78, 209. As Salaita admitted, the ASA typically permitted all ASA members to "wait until a day before an election, pay their dues, and vote[.]" JA78-80, 209-210. But by freezing the membership rolls, Defendants blocked many longtime ASA members—such as Plaintiff Barton—from voting on the Boycott Resolution, JA80, 210, in violation of both the ASA constitution and Defendants' fiduciary obligation to act for the benefit of the ASA collective. *Willens*, 844 A.2d at 1136; JA147.

Defendants froze membership rolls specifically to manipulate the voting process. Prior to announcing the vote, Stephens sent a series of emails to Kauanui explaining that while he knew some "opponents" of the resolution were "withholding their renewals as a protest," "once a referendum is announced [they] may move to renew in order to vote[.]" JA82-83, 211. Accordingly, Stephens

proposed that "the day we announce any vote is the cutoff date for voter registration." JA82, 211. Defendants ultimately decided to cut off registration even earlier. JA83, 211.

3. Defendants hold an untimely vote and announce, in contravention of the bylaws and D.C. law, that ASA membership adopted the Boycott Resolution

The National Committee put the Boycott Resolution to a vote during a ten-day period in December 2013. In order to pass such a resolution under Section 29-405.24 of the D.C. Nonprofit Corporation Act, the Council required "a majority of the votes entitled to be cast on the matter by the voting group." JA84-85. Less than one-third of ASA members voted—resulting in no quorum. Thus, the Resolution failed to pass under the D.C. Nonprofit Corporation Act. *See id.*

In addition, only 827 members voted for the resolution—less than the two-thirds of those voting as the ASA constitution required for adoption (and only one-fifth of total membership). JA84-85, 211. Nor did the vote take place as the ASA constitution required—on the first day of the November annual meeting—but thereafter in December. JA84, 158. Thus, the Resolution failed to pass under two provisions of the relevant ASA bylaws. JA84-85, 211.

Nonetheless, in violation of both the bylaws and D.C. law, and acting outside the scope of their constitutional authority, Defendants declared the Boycott Resolution enacted. JA88. Defendants have admitted that they "received some

communication from persons opposing the Resolution" that "argued that the procedure of adoption was flawed, or that it was unfair." JA208.[3]

4. Defendants' post-Resolution actions harm the ASA

Immediately after, and in direct response to, the ASA's passing of the Boycott Resolution, federal and state governments introduced or passed legislation prohibiting state universities from expending tax dollars on groups that boycott Israel; condemning the ASA Boycott; and prohibiting government funding of the ASA. JA90, 213.

In response, Defendants expended significant ASA time and resources lobbying against such legislation, in violation of ASA bylaws prohibiting it from spending a "substantial part of [its] activities … carrying on [] propaganda, or otherwise attempting, to influence legislation." JA286, 90-91, 213. In fiscal year 2016 alone, Defendants withdrew over $112,000 from the ASA's trust fund to cover Boycott-related expenses. *See* JA92-93, 214. Indeed, ASA finances were so strained as a result of the backlash that, in March 2016, Defendants amended the ASA's bylaws to remove limiting language on their ability to spend Fund resources. JA93-94, 214. Defendants did so in violation of their fiduciary obligation to act for the benefit of the ASA collective, *Willens*, 844 A.2d at 1136,

[3] The ASA's Boycott statement is available on its website. ASA, *Boycott of Israeli Academic Institutions* (Dec. 4, 2013).

as well as their duty not to waste corporate assets, *Daley v. Alpha Kappa Alpha Sorority*, 26 A.3d 723, 730 (D.C. 2010).

Under Defendants' leadership, the ASA reported a loss of $19,319 in fiscal year 2017. JA93, 214. The following year, compounding their corporate waste, they charged "$40k in unpaid legal expenses … against the ASA's American Express account" to cover "[e]xtraordinary expenses." JA95, 215. And after Defendants' takeover of the ASA, annual contributions decreased from an average of $50,394 from fiscal years 2003 through 2012 to the low $30,000s in most years following the takeover. *See* JA95-96, 215.

The ASA's membership also fell. Dues fell by 14% in fiscal year ("FY") 2012. JA97, 216. And although dues rose slightly in FY 2013 (likely due to the enrollment of pro-Boycott supporters for the purpose of passing the Resolution), they fell again in FY 2014 and did not recover in FY 2015. JA97-98, 216-217.

5. Defendants harm Plaintiff Bronner

Plaintiff Bronner was editor of the Encyclopedia from 2011 through 2013. JA104-105, 218-219. As editor, he was also a member of the Executive Committee and National Council, active in both roles. JA84. But after the Boycott Resolution passed in 2013, Defendants excluded Bronner from Council and Committee meetings due to his refusal to support the Boycott. JA105-107, 110-111; Sealed Joint Appendix ("SJA") 95-99, JA220. In November 2016,

Defendants—[redacted]—sought to evade this violation by stripping membership on the National Council from the editor of the Encyclopedia role. SJA95; JA117, 223. Defendants undertook these actions in violation of their fiduciary obligations to treat ASA members equally and to put the best interests of the ASA above their own personal interests. *See Willens*, 844 A.2d at 1136.

[redacted] so instead they blocked renewal of Bronner's contract. SJA93-94; JA111.[4] Never, in the entire history of the Encyclopedia, had the ASA removed an editor at the end of the term if the editor wished to remain. JA111, 221.

Bronner's removal as editor was directly contrary to the best interest of the ASA. The Encyclopedia flourished under Bronner's leadership—increasing its net surplus from $3,617 in 2010 to $9,625 in 2011, to $18,950 in 2012. Following his removal, the Encyclopedia froze: No entries at all were made or updated from December 2016 through 2019. SJA104-105; JA222-223. Defendants undertook all of these actions in violation of their fiduciary obligations to put the best interests

[4] [redacted].

of the ASA above their own personal interests, s*ee Willens*, 844 A.2d at 1136, as well as in violation of their fiduciary duty not to squander corporate assets, *Daley*, 26 A.3d at 730.

Bronner's removal caused him reputational damage and the loss of $42,500 in editorial salary, as well as opportunities to present in his position as editor. JA120. By removing Bronner, Defendants tortiously interfered with his presumptively ongoing contractual relationship with both the ASA and other entities who contracted with Bronner on the basis of his editor position. *NCRIC v. Columbia Hosp. for Women Med. Ctr.*, 957 A.2d 890, 900 (D.C. 2008).

PROCEDURAL HISTORY

A. Federal Court Proceedings

Plaintiffs first filed the relevant claims in this case—breach of fiduciary duty, ultra vires acts, waste, breach of the D.C. Nonprofit Corporations Act, and breach of contract—in federal court in April 2016. *Complaint, Bronner v. Duggan*, No. 16-cv-00740, ECF No. 1 (D.D.C. Apr. 20, 2016). After multiple rounds of dispositive briefing, that court twice held that it had subject-matter jurisdiction. 249 F. Supp. 3d 27, 52 (D.D.C. 2017); 317 F. Supp. 3d 284, 289 (D.D.C. 2018). The parties began discovery, and Defendants produced emails, financial records, and some deposition testimony.

Nearly three years after Plaintiffs filed suit, the court reversed its prior

jurisdictional holding. While "Plaintiffs may have meritorious claims arising from their individual injuries as ASA members," the court now concluded it lacked subject-matter jurisdiction because the amount-in-controversy requirement was not satisfied. 364 F. Supp. 3d 9, 12, 21 (D.D.C. 2019). Plaintiffs promptly appealed, *Notice of Appeal*, No. 16-cv-00740, ECF No. 124 (D.D.C. Mar. 3, 2019), and also filed this action in Superior Court.

B. State Court Proceedings

Bronner I. Plaintiffs' complaint alleges that Defendants breached their fiduciary duties by making material misrepresentations while seeking office and soliciting member approval of the Boycott and bylaw amendments (Count 1) and misusing the ASA's assets (Count 2); breached contracts and/or exceeded corporate authority by refusing to nominate officers reflecting the diversity of the membership (Count 3), freezing membership rolls to prohibit voting (Count 4), leveraging a substantial part of the ASA's activities to influence legislation (Count 5), conducting voting processes in a manner contrary to ASA bylaws (Count 6), denying Barton the right to vote (Count 8), and removing Bronner from his offices and memberships (Count 10); violated the D.C. Nonprofit Corporation Act regarding quorum procedures (Count 7); committed corporate waste by leveraging ASA resources against ASA's best interests (Count 9); committed tortious interference with the renewal of Bronner's contract as editor (Count 11); and aided

and abetted breach of fiduciary duty by substantially assisting one another in the previous acts (Count 12). JA122-143.

Defendants filed motions to dismiss both under D.C. Superior Court Rule 12(b)(6) and the "special" anti-SLAPP provision, arguing that Plaintiffs' claims were untimely and improperly "arise, in one way or another," from the Boycott Resolution, which was "an act in furtherance of the right of advocacy on issues of public interest." No. 2019-CA-001712-B, motions from May 6, 2019, through June 7, 2019.

On the Rule 12(b)(6) motions, the court held (in "*Bronner I*") that the statute of limitations barred or partially barred Plaintiffs' claims that "stem[med] from actions that occurred prior to March 2016": those set forth in Counts 3 through 8, and those aspects of 2 and 9 pertaining to events before March 2016. JA208 (*Bronner v. ASA*, 2019 WL 13091903, at *9, 11-12 (2019)). The remaining claims—Counts 1, 10-12, and those aspects of 2 and 9 pertaining to events after March 2016—were timely filed and were not otherwise deficient under Rule 12(b)(6). JA309-311, 314, 318-323.

As to the Anti-SLAPP Act motions, the Court summarily concluded "that Defendants have made a prima facia showing that the claims in this case fall under the [A]ct" because "[t]he [Boycott] resolution and associated acts" were "of public interest" and "constitute[d] a communication of views to members of the public."

JA325 (*Bronner I*). But the court held that Plaintiffs' claims were "likely to succeed on the merits" because they "demonstrated that they have evidence suggesting that there may have been a breach of fiduciary duty and that the resolution was improperly passed, [caus]ing the ASA to lose membership and funds." JA325-326.

In ruling that Plaintiffs "demonstrated that they have evidence" of their claims, the court implicitly rejected Defendants' argument that the "[m]ere allegations" in the complaint "would not suffice." *Motion to Dismiss Under Anti-SLAPP Act* at 11, No. 2019 CA 001712 B (May 6, 2019). And indeed, Plaintiffs' complaint quoted extensively from publicly available documents and discovery materials produced by Defendants—even going so far as to identify the quoted material by Bates number and/or deposition transcript page. *E.g.*, JA20-21, 52, 55-57, 62-68, 70-74, 76-83, 88, 90, 92-93, 95-103, 115; SJA101-102. Defendants themselves supplied additional evidentiary support to Plaintiffs' complaint, by admitting or not refuting Plaintiffs' the accuracy of Plaintiffs' quotations, in their December 2019 answer. JA197-199, 201-202, 204-218, 222.

Bronner II. Defendants appealed the Superior Court's denial of their Anti-SLAPP motions. In an extensive opinion addressing matters of first impression, this Court vacated the Superior Court's Anti-SLAPP ruling and remanded the case. JA339 (*Bronner II*). In so doing, it clarified several facets of the Anti-SLAPP Act:

First, the Court explained that "[t]he anti-SLAPP special motion to dismiss is essentially an expedited summary judgment motion" that requires dismissal "when a claim is legally insufficient for any reason, including the defenses that may be raised against it," such as a statute-of-limitations defense. JA344-345 (*Bronner II*).

Second, the Court held that the Superior Court's evaluation of Plaintiffs' claims "did not comply with the Anti-SLAPP Act" because "[t]he court did not explicitly discuss each claim's individual likelihood of success or the sufficiency of the evidence supporting each claim, nor did it identify which specific counts passed muster." JA347-348 (*Bronner II*).

Third, the Court emphasized the "narrowness and precision" of the Act's language and explained that "for a claim to 'arise from' an act in furtherance of public advocacy, a party's statutorily protected activity must itself be the *basis* for that party's asserted liability." JA339 (*Bronner II*) (emphasis added). The Court thus rejected the Superior Court's "expansive" ruling that Plaintiffs' claims "fall under the [Act]" simply "because the Resolution was 'related to community well-being, and thus an issue of public interest.'" JA352. Specifically, "it was not enough [for the Superior Court] to find that the [Boycott] Resolution constituted" an act in furtherance of the right of advocacy "and was related in some way to the non-speech conduct targeted in the plaintiffs' causes of action." JA350. Rather, Defendants "must 'demonstrate that *conduct by which plaintiff claims to have been*

injured falls within' the statutory definition of protected activity." JA352 (emphasis added) (citation omitted).

This Court then found that "there is serious question whether a number of [Plaintiffs'] claims are based on the speech—the Boycott Resolution—that constituted the ASA defendants' assertedly protected activity." JA354 (*Bronner II*). Specifically, the Court concluded that Counts 1-4, 6-7, and 10-12 "do not appear to be based on" the Boycott Resolution and are unlikely to trigger the Anti-SLAPP Act. *Id.*

Finally, the Court explained that, at Step Two, an anti-SLAPP plaintiff must "make, *and the court [must] evaluate*, a proffer of evidence supporting the well-pled claim and overcoming any defenses asserted against it." JA345 (*Bronner II*) (emphasis added). The Court did not evaluate Plaintiffs' proffers. Nor did it directly address how the "proffer" requirement should apply where, as here, the evidence in support of Plaintiff's claims is largely based on direct quotations of Defendants' statements—the accuracy of which Defendants do not dispute. *See supra* p.23.

Bronner III. On remand, without explanation, the Superior Court reversed its prior determination that Plaintiffs' evidentiary proffers satisfied the Anti-SLAPP Act's requirements. JA371 (*Bronner v. ASA, Order*, No. 2019 CA 001712 B (Mar. 1, 2023) ("*Bronner III*")).

First, without addressing its prior ruling that Plaintiffs had "demonstrated that they have evidence" sufficient "to demonstrate that the claim[s are] likely to succeed on the merits," JA369 (*Bronner I*), the court held *as to exactly the same evidence* that "allegations and references to unattached documents in an unverified pleading are not evidence." JA371 (*Bronner III*). Nor did the court address Plaintiffs' argument that the complaint made "extensive references to the materials produced in discovery, as well as to documents and other data available on the internet and the organic documents of the Defendant American Studies Association," from which the complaint "quotes … and references [] by Bates number or, in the case of deposition testimony, transcript page and line." *Plfs.' Prop. Findings of Fact and Conclusions of Law* at 3, No. 2019 CA 001712 B (Dec. 1, 2022); *see supra* p.23.

Next, the court held that nine of the twelve Counts set forth in Plaintiffs' complaint (Counts 1-5 and 9-12) satisfied Step One of the Anti-SLAPP Act. JA371-380 (*Bronner III*). The court held that Plaintiffs were unlikely to succeed on any of these claims at Step Two in part because it found Plaintiffs proffered no "evidence" in support of any of them. JA372-380.

Finally, the court, citing *Bond v. Serano*, 566 A.2d 47, 49 (D.C. 1989), "further applie[d] and reiterate[d[the same analysis set forth previously that the claims here are time-barred," JA373, 375-376, 380 (*Bronner III*)—applying that

ruling not only to the counts previously held barred but also now, inexplicably, Count 12, which the court had previously ruled in *Bronner I* was not "barred by the statute of limitations." JA314-315.

Ultimately, the Superior Court dismissed all Counts save Count 4, from which it dismissed Defendant Salaita. JA381, 302 (*Bronner III*). Defendants have demanded over $2 million in attorney's fees. *Motions for Attorney Fees*, 2019 CA 001712 B (Mar. 15 & 20, 2023). The court stayed briefing on fees pending the outcome of this timely appeal. *Order Granting Motion*, 2019 CA 001712 B (Mar. 24, 2023).

STANDARD OF REVIEW

This Court reviews de novo a grant of a motion to dismiss under either Rule 12(b)(6) or the Anti-SLAPP Act. *Close It! Title Services v. Nadel*, 248 A.3d 132, 138-139 (D.C. 2021). The Court also reviews "the relevant definitional provisions in D.C. Code §16-5501 *de novo*." *Id.*; *Saudi Am. Pub. Rel. Affairs Comm v. Inst. for Gulf Affairs*, 242 A.3d 602, 610-611 (D.C. 2020).

SUMMARY OF ARGUMENT

1. The Superior Court erred in refusing to equitably toll the three-year statute of limitations for Counts 2 through 9 and 12 while Plaintiffs' claims were pending in federal court. This Court has held that "whether a timing rule should be tolled" depends primarily on a plaintiffs' diligence and any alleged prejudice to the

opposing party. *Mathis v. D.C. Housing Authority*, 124 A.3d 1089, 1104 (D.C. 2015). There is no dispute that Plaintiffs here were diligent, and Defendants have not alleged prejudice.

The court erred in ignoring this precedent and reflexively applying *Bond*, which held that reasonable mistakes as to jurisdiction could not equitably toll a statute of limitations when, in 1989, the District of Columbia had not yet adopted a general common-law equitable tolling doctrine. But *Bond* has been superseded. It is also distinguishable because Plaintiffs here, unlike the plaintiff in *Bond*, were diligent in pursuing their claims.

2. The Superior Court erred in concluding that Counts 1 through 5 and 9 through 12 all "arise[] from" protected activity under the Anti-SLAPP Act. In *Bronner II*, this Court explained that the Act only applies when "[a] legally objectionable aspect of the protected speech itself [is] … the subject of the claim or an element of the cause of action asserted." JA352. None of Plaintiffs' claims include protected conduct as an element or basis of the claim. As this Court explained, "[i]t would be strange to say that such a lawsuit 'arises from' statutorily protected activity rather than from the defendant's defalcation" when, as here, Defendants are accused of inherently improper and non-expressive conduct but then attempt to shield that conduct by arguing it was "tangentially related" to speech. JA352, 352 n.78 (*Bronner II*).

3. The Superior Court's Step Two analyses are also error-riddled. First, the court failed to understand that the evidence presented in Plaintiffs' complaint constituted a sufficient proffer of evidence. Second, compounding its equitable tolling error, the court concluded that the statute of limitations barred most of Plaintiffs' claims. Third, the court found a First Amendment violation without ever locating state action. Fourth, it incorrectly deemed two claims barred by collateral estoppel. Fifth, the court simply misunderstood the legal basis of two of the claims. Finally, the court's dismissal of an aiding and abetting count fails for the same reasons as its dismissal of the underlying torts.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED (COUNTS 2-9 AND 12)

The Superior Court erred in refusing to equitably toll the three-year statute of limitations for Counts 2-9 and 12 while those claims were pending in federal court. Instead of applying the test announced in *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392 (D.C. 1991)—a test that indisputably warrants relief here—the court reflexively applied *Bond*, *supra* p.26—a case that is both factually distinct and has been functionally superseded. Both errors require reversal.[5]

[5] The Superior Court separately erred in dismissing Count 12 as untimely. In *Bronner I*, it reasoned that Count 12 was not "barred by the statute of limitations" because "it appears that a number of the facts which underlie this claim were only discovered in 2017." JA314-315. It inexplicably reversed itself in *Bronner III*.

A. The Court Should Have Equitably Tolled The Statute Of Limitations

The District of Columbia applies a simple test to determine "whether a timing rule should be tolled," which is "whether there was unexplained or undue delay and whether tolling would work an injustice to the other party." *Mathis*, 124 A.3d at 1104 (citing *Simpson*, 597 A.2d at 403-04). The court also considers "the benefitting party's vigilance" and "[t]he importance of ultimate finality in legal proceedings." *Neil v. D.C. Pub. Empl. Rel. Bd.*, 234 A.3d 177, 186 (D.C. 2020) (quoting *Brewer v. D.C. Office of Empl. Appeals*, 163 A.3d 799, 802 (D.C. 2017)). Whether a statute of limitations should be equitably tolled is "a fact-specific question that turns on balancing the fairness to both parties." *Id.*

Simpson is instructive: In that case, plaintiff Simpson submitted a discrimination complaint to the D.C. Office of Human Rights that was subsequently dismissed. 597 A.2d at 396. This Court held it had jurisdiction over Simpson's appeal, but Simpson then dismissed her appeal after the D.C. Commission on Human Rights agreed to review its determination. *Id.* After the Commission found it could not do so, Simpson reinstated her appeal but then dismissed it when an intervening opinion clarified that Superior Court was the

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JA380-381. This latter dismissal was presumably in error, and this Court should reinstate Count 12.

appropriate venue. *Id.* When Simpson attempted to bring her action in Superior Court, it was dismissed under the statute of limitations.

This Court agreed that the statute of limitations had run, *id.* at 400, but equitably tolled Simpson's claim. It explained that Simpson's filing in this Court had been reasonable in part because that court's "initial" finding that it had jurisdiction "may have reinforced Ms. Simpson's belief that she had come to the correct tribunal," and that the intervening decision was a "substantial change[] in the law on which parties relied." *Id.* at 401 (quotation omitted). The court then explained D.C.'s preference that "where two constructions as to the limitations period are possible, the courts prefer the one which gives the longer period in which to prosecute the action." *Id.* (citation omitted)).[6]

Similarly here, when Plaintiffs initially timely filed this action in federal court, they did so in reliance on D.C. caselaw and principles of federal jurisdiction. Contrary to the Superior Court's finding that *Simpson* "is drastically different," JA309 (*Bronner I*), here as in *Simpson*, the federal court "reinforced [Plaintiffs'] belief that [they] had come to the correct tribunal," *Simpson*, 597 A.2d at 401, by ruling, twice, that it had subject-matter jurisdiction—once in 2017, 249 F. Supp. 3d 27, 38; and again in 2018, 317 F. Supp. 3d at 289. It was not until nearly three

[6] The court did not assess, but remanded, the issues of prejudice and Simpson's diligence and good faith. *Simpson*, 597 A.2d at 404.

years after Plaintiffs had filed their initial suit, in February 2019, that the court reversed itself and determined that the amount-in-controversy requirement was not satisfied in light of its dismissal of certain of Plaintiffs' claims. 364 F. Supp. 3d at 21-22. As in *Simpson*, the operative legal circumstances "governing the suit had recently changed" as a result of the court's determinations that were fully out of Plaintiffs' control. JA309 (*Bronner I*). By promptly filing in Superior Court after the federal action was dismissed, Plaintiffs acted with the utmost "vigilance" in pursuing their claims, *Neill*, 234 A.3d at 186 (citation omitted), and Defendants have never alleged prejudice. This Court should equitably toll all claims in this case.

B. *Bond* Neither Reflects Current Law Nor Fits The Facts Of This Case

Bond v. Serano—on which the court below solely relied—is both outdated and factually distinct. In that case, plaintiff Bond was barred from equitably tolling his negligence suit when, 13 days before his statute of limitations expired, he filed a complaint in federal court that was immediately dismissed for lack of jurisdiction. 566 A.2d at 48-49. The *Bond* court reluctantly refused to toll those 13 days, concluding that it was bound by precedent rejecting principles of equitable tolling in the District of Columbia. *Id.* at 49 ("Two members of the division … believe that the issue may be worthy of *en banc* consideration").

First, Bond has been superseded. While it has been intermittently cited, *see, e.g.*, *East v. Graphic Arts Indus. Joint Pension Trust*, 718 A.2d 153, 156 (D.C. 1998) (but noting two equitable exceptions to *Bond*), it has been surpassed by a series of cases developing a robust equitable tolling doctrine stemming from the 1991 *Simpson* decision, *see supra* pp.29-32. As far as counsel can tell, this Court last cited *Bond* in *Brookens v. United States*, 182 A.3d 123 (D.C. 2018), for the principle that statutes of limitations "promote fairness." *Id.* at 130. Meanwhile, as Plaintiffs pointed out to the Superior Court on remand, this Court held at least as recently as 2020 that equitable tolling is a valid defense to a statute of limitations. *Pls.' Remand Memo*. at 10, 2019 CA 001712 B (June 8, 2022) (quoting *Neill*, 234 A.3d at 186). The court erred in refusing to apply this Court's contemporary, binding tolling doctrine and relying on *Bond*.

Second, Bond is in any event "distinguishable." *Simpson*, 597 A.2d at 402. As *Simpson* held on similar facts, there is "substantial reason to question whether the *Bond* decision should control" where a court itself induces a plaintiff's reliance on its own jurisdiction and where "substantial changes" in the operative legal circumstances took place. *Id.* at 401. Additionally, the plaintiff in *Bond* did not file his first complaint until 13 days before his statute of limitations expired, leaving no time to act once the court determined it did not have jurisdiction. 566 A.2d at 47-48. By contrast, Plaintiffs acted with supreme diligence by filing their

initial claims a mere month after their claims *accrued*. JA303 (*Bronner I*). And Plaintiffs acted with identical diligence when, upon the federal court reversing itself and dismissing the case, they promptly re-filed in Superior Court. *Supra* p.20. Thus, even if *Bond* still reflects a baseline rule regarding reasonable mistakes as to jurisdiction, this Court should toll Plaintiffs' claims using *Simpson*'s modern equitable principles: Plaintiffs' "unbroken effort" to "diligently s[eek] review" and Defendants' lack of prejudice. *Neill*, 234 A.3d at 186 (citations omitted).

II. THE COURT ERRED IN DISMISSING COUNTS 1-3, 5, AND 9-12 UNDER THE ANTI-SLAPP ACT[7]

"Under the District's Anti-SLAPP Act, the party filing a special motion to dismiss must first show entitlement to the protection of the Act by," at Step One, "'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 (brackets in original) (quoting D.C. Code § 16-5502(b)). "Once that … showing is made, the burden shifts to the nonmoving party, … who must," at Step Two, "demonstrate[] that the claim is likely to succeed on the merits.'" *Id.* (footnote omitted; brackets in original). The court below erred at both steps. At Step One, it improperly dismissed nine counts that were, at most, "tangentially"

[7] Plaintiffs do not appeal dismissal of Salaita from Counts 1 and 4.

related to expressive conduct. JA352 (*Bronner II*). At Step Two, it misapplied the standard governing likelihood of success on the merits.

A. Counts 1-3, 5, And 9-12 Do Not "Arise[] From" A Protected Activity Within The Meaning Of D.C. Code § 16-5502(b)

The "prima facie showing required to support a special motion to dismiss a claim … is a showing that … the movant's protected activity … is an element of the challenged cause of action." JA354 (*Bronner II*). In this Court's first review of this matter, it explained that the "narrowness and precision" of the Act's language and history "strongly indicates the legislature did not intend the Act's protections to stretch too far." JA350-351. As to language, the Court noted that "where a claim is said to 'arise from' some predicate, there must be a 'substantial connection' or nexus between the predicate and the claim." JA351 (cleaned up) (quotation omitted). As to history, the Court explained that the D.C. Council rejected a version of the Act that defined "'an act in furtherance of the right of free speech' … to include not only speech but also "*any other conduct* in" its furtherance. JA352-353. Thus, the enacted language is targeted to safeguard only conduct that is *itself* expressive.

This Court explained the ultimate standard as follows:

> [T]he party filing a special motion to dismiss a claim must show that some form of speech within the Anti-SLAPP Act's protection is the basis of the asserted cause of action. A legally objectionable aspect of the protected speech itself—e.g., that the speech is defamatory or

> otherwise tortious, or violates a contract's prohibition—therefore must be *the subject of the claim or an element of the cause of action asserted*.

JA351 (*Bronner II*) (emphasis added). "[T]he 'arising from' requirement is not always easily met," and "the mere fact an action was filed after a protected activity took place does not mean it arose from that activity." *Id.* (quotation omitted). Rather, "the act underlying the plaintiff's cause or the act which forms *the basis for the plaintiff's cause of action* must *itself* have been an act in furtherance of the right of petition or free speech." JA351-352 (first emphasis added; quotation omitted).

As explained below, none of Plaintiffs' Counts has "[a] legally objectionable aspect of the protected speech itself" as "the subject of the claim or an element of the claim or an element of the cause of action asserted." JA351 (*Bronner II*).

1. Counts 2 and 9 do not "arise from" protected speech activity because they allege misuse of corporate assets

In *Bronner II*, this Court offered clear instruction regarding how the Superior Court should evaluate the claims that Defendants improperly appropriated ASA resources and used them on purportedly expressive activity:

> 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 that 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.

JA352. Counts 2 and 9 allege precisely this kind of abuse of resources entrusted to ASA leadership. They allege that Defendants breached their fiduciary duties of care, loyalty, good faith, and candor by misappropriating funds, subverting various ASA resources, and manipulating voting processes, JA123-124, and that these acts also constituted corporate waste, JA135-136. The Superior Court found as to these counts that

> expenditure of funds for the advancement of the [Boycott] resolution can be seen as being based on the Defendants' protected activity of independent expenditures in support of the [Boycott] resolution.

JA373 (*Bronner III*). This is *precisely* the reasoning this Court said "upsets the delicate balance that the [Anti-SLAPP Act] was intended to strike." JA352 (*Bronner II*). It is "not enough to find that the [Boycott] Resolution constituted [a protected act] (as the term is defined) and was related in some way to the non-speech conduct targeted in the plaintiffs' causes of action." JA350, 352. Because the Superior Court failed to find—and *could not* have found—that the misappropriation was "expressive conduct," D.C. Code §16-5501(1)(B), its Anti-SLAPP determination must be reversed. This is particularly so because neither claim, for breach of fiduciary duties or corporate waste, has as an element expressive conduct. *Wisc. Ave. Assocs.*, 441 A.2d at 962-963 (fiduciary duties); *Daley*, 26 A.3d at 730 (waste).

Citizens United v. FEC, 558 U.S. 310, 320-321 (2010) and *Ted Cruz for Senate v. FEC*, 542 F. Supp. 3d 1, 5 (D.D.C. 2021), cited by the court, do not apply because they both involved whether corporations could spend their *own money* on speech. Neither case involved claims that, as here, corporations improperly took resources from members or donors and then tried to immunize that conduct by using the funds on speech. JA352 (*Bronner II*). Accordingly, Counts 2 and 9 do not trigger the Anti-SLAPP Act.

2. Counts 1, 3, 5, and 10-11 do not "arise from" protected speech activity but are rather violations of corporate bylaws, D.C. law, and contractual obligations

As with the allegations regarding misuse of corporate resources, Counts 1, 3, 5, and 10-11 involve clear violations of contract, D.C. law, or other professional obligations that are themselves unrelated to expressive conduct. Even if "tangentially related to protected speech," none of these Counts trigger the Anti-SLAPP Act because none of "the act[s] underlying the plaintiff's cause or the act which forms the basis for the plaintiff's cause of action [was] *itself* … an act in furtherance of the right of petition or free speech." JA351-352 (*Bronner II*).

Count 1 alleges that Defendants breached their fiduciary duties through material misrepresentations and omissions regarding their intention to cause the ASA to adopt the Boycott Resolution and the foreseeable costs of that action. JA122. The Superior Court concluded in *Bronner III* that

> the act that is the basis of the alleged breach appears to be Defendants' act of withholding their specific political views prior to the [Boycott] resolution … and the decision not to speak is entitled to as much protection under the First Amendment as is the decision to speak.

JA372. That misconstrues Plaintiffs' claim. Plaintiffs do not allege Defendants violated their fiduciary duties by failing to disclose personal political views; indeed, Kauanui included in her campaign statement that she was "on the Advisory Committee of USACBI." JA54. Plaintiffs instead claim a violation of corporate *governance*: that Defendants failed to disclose *their plans for ASA*—specifically their intention to cause adoption of the Boycott—a fact highly material to their candidacies. "[P]romoters of a corporation stand in a fiduciary relation to both the corporation and its stockholders, which requires them to act with the utmost good faith and to disclose fully all material facts to both the corporation and its stockholders." *Wisc. Ave. Assocs.*, 441 A.2d at 962-963.

Indeed, Defendants understood just how material the Boycott was to their candidacies because they intentionally agreed to conceal that fact from their future constituents. *E.g.*, JA54, 201-202; *see supra* pp.9-10. As with the other counts, that Defendants' intentional withholding of material information from their constituents related tangentially to Defendants' speech interests does not establish that Defendants' violation of their fiduciary duty "arose from" protected speech.

Count 3 alleges that Defendants engaged in *ultra vires* actions and breached their contracts by violating the ASA constitution's mandate that all "nominees

shall be representative of the diversity of the association's membership" and that the National Council shall "oversee the general interests of the association." JA124-127 (quoting ASA Const., art. VI § 2; art. V § 2). The Superior Court found that this triggered the Anti-SLAPP Act because "the Plaintiffs' only issue with the diversity and qualifications of the individual Defendants appears to solely be based on their support of the [Boycott] resolution," and as such, "Count III arises out of the [Boycott] resolution." JA375 (*Bronner III*).

Again, this misconstrues Plaintiffs' claim. "Actions 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.*" *Bronner*, 249 F. Supp. 3d at 47 (citation omitted). ASA's constitution requires that the Nominating Committee put forward candidates "representative of the diversity of the association's membership," JA148, which the ASA defined to include diversity in the candidates' goals and priorities for the ASA. As Stephens explained, the Nominating Committee was "instructed" that the candidates "should reflect" not just diversity of backgrounds, but also of different views on "the issues [] that the association is facing[.]" JA263-265. It is undisputed that support for the Resolution was an issue highly material to a nominee's candidacy, JA54-56, 201-202, and that Defendants were aware that the Resolution was disfavored by most ASA members. JA66, 205. Defendants' deliberate attempts to undermine

candidate diversity regarding "the issues [] that the association is facing," JA265, violated the ASA's constitution regardless of Defendants' own purportedly expressive and ideological motivations for doing so. Count 3 does not trigger the Anti-SLAPP Act.

Count 5 alleges that Defendants engaged in *ultra vires* actions and breached their contracts by "exceed[ing] the powers conferred upon them by the certificate of incorporation, the bylaws, and the state statutes regulating corporate powers," *Daley*, 26 A.3d at 731; *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005) ("the formal bylaws of an organization are to be construed as a contractual agreement"). Specifically, Defendants violated the ASA Statement of Election that "[n]o substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation." JA129-132. The court below believed that this "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 expression involving petitioning the government." JA376 (*Bronner III*).

Plaintiffs' claim is not about speech, but about adhering to constitutional mandates that guarantee the ASA its tax-exempt status. Plaintiffs' claim is not that Defendants engaged in propaganda or lobbying *simpliciter*, but that they fundamentally transformed the ASA from a neutral academic organization to one

that, in violation of its charter and enactment provisions, is a lobbying vehicle engaging in propaganda as a "*substantial part* of the activities of the corporation." JA286. This claim turns on the fact that Defendants committed an act that ASA bylaws "expressly prohibited," *Bronner*, 249 F. Supp. 3d at 47—bylaws required to comply with the federal tax requirement that, to maintain tax-exempt status, a nonprofit institution must not "devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise." 26 C.F.R. § 1.501(c)(3)-1(b)(3). Transforming the ASA's structure in violation of this precept did not trigger the Anti-SLAPP Act.

Counts 10 and 11 allege that Defendants breached their fiduciary duty and interfered with Plaintiff Bronner's contractual business relationships by removing Bronner as editor of the Encyclopedia contrary to the best business interest of the ASA, effectively shutting down a crucial ASA asset: the Encyclopedia. JA136-140. The Superior Court in *Bronner III* thought these claims triggered the Anti-SLAPP Act because:

> the information that Defendants shared about Plaintiff Bronner was concerning his opposition to the Resolution, which is an issue of public interest, and … decisions involving publishing entries on the Encyclopedia … arise from an editorial decision to not publish information on a website …, which is itself, a form of expression.

JA378. This reasoning suffers from the same fatal defect. The lower court did not find, as this Court requires, that the claims of breach of fiduciary duty or

interference with business contracts involve expressive conduct as "an element of the claim"; nor did it find that removing Bronner was inherently an "aspect of the protected speech itself." JA351 (*Bronner II*). Even if, as the court thought, Defendants' speech was "related in some way to the non-speech conduct targeted in the plaintiffs' causes of action," JA350, that would not trigger the Anti-SLAPP Act.

3. Count 12 did not "arise from" protected speech activity

Count 12 alleges that Defendants aided and abetted multiple breaches of fiduciary duty by fellow defendants. JA140-143. The court below deemed Count 12 "a catch-all predicated upon some of the previous allegations of tortious wrongdoing," and therefore dismissed based on its analysis of those claims.[8]

But the allegations in Count 12 did not involve expressive conduct for the same reasons that the prior substantive counts did not. "Aiding and abetting the breach of fiduciary duty occurs when the defendant 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or

[8] The Court also noted that Count 12 separately arises from protected activity as to Salaita because Plaintiffs' only allegation as to him is that he "publicly acknowledged that he was involved in the effort to pass the 2013 resolution before he was a member of the National Council." JA379-380 (*Bronner III*). But Salaita's aiding and abetting is predicated on his conduct from 2015 through 2018, when it was undisputed that he was on the National Council. JA39, 195.

encouragement to the other' nonetheless." *Ehlen v. Lewis*, 984 F. Supp. 5, 10 (D.D.C. 1997) (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

None of Plaintiffs' claims trigger the Anti-SLAPP Act.

B. Plaintiffs' Claims Are Likely To Succeed On The Merits

"[T]hat a defendant can make a threshold showing [at Step One] does not mean that the defendant is immunized from liability for common law claims." *Mann*, 150 A.3d at 1239. Rather, the special motion "shall be denied" if the plaintiff "demonstrates that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b). Under the "likely to succeed" standard, "[t]he precise question … is whether a jury properly instructed on the law … could reasonably find for the claimant on the evidence presented." *Mann*, 150 A.3d at 1236. In this way, "the special motion to dismiss" is "a tool calibrated to take due account of the constitutional interests of" both parties, "not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case." *Id.* at 1239.

The court below erred in concluding that Plaintiffs' claims were unlikely to succeed. First, the court based much of its holding on its incorrect view that Plaintiffs had not provided a proffer of evidence—entirely disregarding the complaint's extensive quotes from Defendants themselves obtained in discovery. Second, the court erred in concluding that many of Plaintiffs' counts were time-barred, as previously explained. Third, it incorrectly held that Count 1 posed a

First Amendment concern. Fourth, Counts 2 and 9 are not barred by collateral estoppel. Fifth, the court misapprehended that Counts 10 and 11 allege fiduciary breach and tortious interference, not breach of contract. Finally, dismissal of Count 12, alleging aiding and abetting, fails for the same reasons.

1. Plaintiffs proffered sufficient evidence (Counts 1-3, 5, 9-12)

For several counts, the Superior Court inexplicably reversed its prior determination that Plaintiffs' complaint "demonstrated they have evidence" sufficient "to demonstrate that the claim[s are] likely to succeed on the merits." JA325 (*Bronner I*). Reviewing exactly the same materials it had considered previously, the court held that "allegations and references to unattached documents in an unverified pleading are not evidence." JA371 (*Bronner III*).

This was error in two respects. First, Plaintiffs provided ample evidence. The complaint quotes extensively from Defendants' own documents. And Defendants' answer admitted the accuracy of most of the quotations in the complaint. The evidence offered in the complaint was thus substantiated by document citations *and Defendants' own admissions*. *See supra* pp.22. The court's cursory analysis on this issue, and its disregard of the evidence before it—evidence it had previously considered sufficient under the same standard, JA325 (*Bronner I*)—is alone cause for reversal.

Second, Plaintiffs were not obligated to provide "evidence" in the form of

"attached" documents. They were required to make "a *proffer* of admissible, credible evidence." JA345 (*Bronner II*) (emphasis added). In *Mann*, 150 A.3d at 1233, this Court explained that the Anti-SLAPP act requires "something more than argument based on the allegations in the complaint." In *Bronner II*, this Court clarified that "[t]he requisite 'something more'" is not a steep burden. It is merely "a *proffer* of admissible, credible evidence … supporting the well-plead claim and overcoming any defenses asserted against it." JA345 (emphasis added).

In the summary judgment context—which this Court has said is "essentially" the same as the anti-SLAPP standard, JA345 (*Bronner II*)—this Court has held that a lower court erred by failing to consider "[t]he allegations and evidence referenced in the … complaint." *U.S. Bank Trust v. Omid Land Grp.*, 279 A.3d 374, 378 (D.C. 2022). This Court's precedent thus establishes that the evidence included in the complaint constituted a "proffer of admissible, credible evidence." JA346.

2. Plaintiffs' claims are not time-barred (Counts 2-9, 12)

For the reasons discussed, *supra* pp.29-33, Plaintiffs' claims were equitably tolled.

3. Count 1 does not run afoul of the First Amendment

A "properly instructed" jury "could reasonably find that [Count 1] is supported in light of the evidence that has been produced or proffered in connection with the motion." *Mann*, 150 A.3d at 1232. Plaintiffs allege that

Defendants breached their fiduciary duties by deliberately concealing from ASA members their "personal political agenda" to "advance the purposes of the USACBI" by causing the ASA to adopt the Resolution. JA122. The Superior Court held Count 1 unlikely to succeed because "the decision not to speak is entitled to as much protection under the First Amendment as is the decision to speak." JA372 (*Bronner III*). But this is wrong for two reasons. First, it is black-letter law that enforcement of "generally applicable laws do not offend the First Amendment simply because their enforcement ... has incidental effects on" expression. *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991). And more fundamentally, to trigger First Amendment protection, the infringement upon speech must have arisen from state action. *See Blum v. Yaretsky*, 457 U.S. 991, 1002-1003 (1982). Enforcement of Defendants' obligations to Plaintiffs, expressly assumed by Defendants in their roles as ASA leadership, would in no way constitute state action. The court's "transform[ation]" of that "private right … into governmental action by the mere fact of court enforcement of it" obliterates "the distinction between private and governmental action[.]" *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968).

4. Counts 2 and 9 are not barred by collateral estoppel

Count 2 (JA123-124) alleges that Defendants "breached their fiduciary duties" by misusing ASA resources, "manipulating the nomination and voting

process," including by "withholding voting rights from certain members," and "denying [Boycott] opponents access to the [ASA]'s online and other resources." Count 9 (JA136) alleged corporate waste for Defendants' trust fund withdrawals.

Plaintiffs have demonstrated likelihood of success on these counts. A properly instructed jury could readily conclude that the loss of hundreds of thousands of dollars constituted corporate waste and a breach of Defendants' fiduciary duties. The court below did not address the merits of these counts because it concluded—citing a case involving a for-profit entity—that the claims were derivative and thus barred by collateral estoppel. JA374 (*Bronner III*). That was doubly wrong. As this Court has explained, "the total equation of a stockholder in a for-profit corporation complaining of financial losses with a member of a nonprofit corporation in an on-going dues-paying basis aimed at social and charitable purposes and the accompanying emotional connotations is an uneasy fit." *Daley*, 26 A.3d at 729. And both "the suspension of membership" and "the right to faithful representation" are direct claims. *Id*.

And in any event, collateral estoppel would not bar adjudication. Although the district court did "dismiss[] Plaintiffs' derivative claims with prejudice," JA374, collateral estoppel applies only to "final judgment[s] *on the merits*." *Modiri v. 1342 Rest. Grp.*, 904 A.2d 391, 394 (D.C. 2006) (emphasis added). As the district court explained, it "dismissed the derivative claims because Plaintiffs

had failed to make a demand on the National Council, not because the claims themselves … lacked merit." *Bronner v. Duggan*, 324 F.R.D. 285, 293 n.2 (D.D.C. 2018).

5. Plaintiffs are likely to succeed on Counts 10-11

Counts 10 and 11 relate to the removal of Bronner from his seat as editor of the Encyclopedia and on the National Council. The complaint contains substantial and sufficient evidence that defendants secretly planned to take Bronner's position for reasons entirely unrelated to his or the Encyclopedia's performance.

The Superior Court treated these counts as if they alleged a breach of contract and found no breach. *See* JA378-379 (*Bronner III*). But Plaintiffs did not plead breach of contract with respect to Bronner's removal. Counts 10 and 11 plead breach of fiduciary duty and tortious interference with contract. The record contains ample evidence for a jury to find in Plaintiffs' favor on both counts.

As detailed above, Bronner's removal as editor was decidedly contrary to the best interest of the ASA; indeed, it effectively shuttered the Encyclopedia. A jury could reasonably conclude that this sabotage of one of ASA's most significant assets was a breach of Defendants' fiduciary duties. *See Wisc. Ave. Assocs.*, 441 A.2d at 962-963.

A jury could also reasonably conclude that Defendants' interference with Bronner's contract with the ASA constituted tortious interference. Tortious

interference requires "'(1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of a breach of the contract; and (4) damages resulting from the breach.'" *Casco Marina Dev. v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 83 (D.C. 2003). Defendants deny neither the existence nor their knowledge of the contract. And Plaintiffs' evidence establishes the "procurement" of a breach: Defendants themselves made the decision to terminate Bronner's positions, depriving him of $42,500 in salary "he certainly would have" received if Defendants had not "removed him." JA104-121.

6. Count 12 survives for the same reasons

Aiding and abetting requires knowing and substantial assistance in a wrongful act. *See Halberstam*, 705 F.2d at 478. As explained above, defendants together engineered the takeover of the ASA, violated its bylaws, and shuttered the Encyclopedia. Each Defendant also aided and abetted the others in this scheme. Count 12 surmounts the Anti-SLAPP threshold.

CONCLUSION

This Court should reverse and remand.

Respectfully submitted,

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September 19, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-page limitations of D.C. Ct. App. R. 32(a)(5), (6).

1. Exclusive of the exempted portions of the brief, as provided in D.C. Ct. App. R. 32(a)(6), the brief contains 50 pages.

2. The brief, including footnotes, has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2023, a copy of the foregoing brief has been served electronically, through the appellate e-filing system, upon Thomas C. Mugavero, Jeffrey C. Seaman, Richard R. Renner, and Shayana D. Kadidal.

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Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

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2. Any information revealing the identity of an individual receiving mental-health services.

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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Seth P. Waxman
Signature

No. 23-cv-0240
Case Number(s)

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ADDENDUM

STATUTORY ADDENDUM
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Division II. Judiciary and Judicial Procedure.
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DC ST § 16-5501

§ 16-5501. Definitions.

Effective: September 26, 2012
Currentness

For the purposes of this chapter, the term:

(1) “Act in furtherance of the right of advocacy on issues of public interest” means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) “Claim” includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) “Issue of public interest” means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term “issue of public interest” shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) “Personal identifying information” shall have the same meaning as provided in § 22-3227.01(3).

Credits
(Mar. 31, 2011, D.C. Law 18-351, § 2, 58 DCR 741; Sept. 26, 2012, D.C. Law 19-171, § 401, 59 DCR 6190.)

DC CODE § 16-5501

Add.1

Current through April 26, 2023. Some sections may be more current, see credits for details.

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Add.2

West s District of Columbia Code Annotated 2001 Edition
Division II. Judiciary and Judicial Procedure.
Title 16. Particular Actions, Proceedings and Matters. (Refs & Annos)
Chapter 55. Strategic Lawsuits Against Public Participation.

DC ST § 16-5502

§ 16-5502. Special motion to dismiss.

Effective: September 26, 2012
Currentness

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes 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, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

Credits
(Mar. 31, 2011, D.C. Law 18-351, § 3, 58 DCR 741; Apr. 20, 2012, D.C. Law 19-120, § 201, 58 DCR 11235; Sept. 26, 2012, D.C. Law 19-171, § 401, 59 DCR 6190.)

DC CODE § 16-5502
Current through April 26, 2023. Some sections may be more current, see credits for details.

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