SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SIMON BRONNER, et al.,	:	
	:	
Plaintiffs,	:	Case No. 2019 CA 001712 B
v.	:	Hon. Robert R. Rigsby
	:	Calendar 2, Civil 10
LISA DUGGAN, et al.,	:	
	:	Next Court Date: October 27, 2022
Defendants.	:	Event: Motion Hearing

PLAINTIFFS' MEMORANDUM ON REMAND ON WHETHER PLAINTIFFS' CLAIMS ARISE FROM ACTS IN FURTHERANCE OF THE RIGHT OF ADVOCACY ON ISSUES OF PUBLIC INTEREST

This case is now before this Court on remand from the Court of Appeals, which, at the request of Defendants, wrote a detailed precedential opinion setting forth the law governing how a trial court should assess a defendant's assertion that a legal claim brought by a plaintiff runs afoul of the District of Columbia's SLAPP Act. That opinion, *American Studies Ass'n v. Bronner,* 259 A.3d 728 (DC App. 2021), held, first, that such a trial court must determine on a claim-by-claim basis whether each "claim arose from acts in furtherance of the right of advocacy on issues of public interest." At 743.

Recognizing that it had resolved an issue of first impression in this jurisdiction, the Court of Appeals went on to explain *how* to make that determination. It provided a detailed set of instructions on what trial courts should focus on, what facts matter, what facts are irrelevant, and why.

To illustrate its desired approach, the Court of Appeals then discussed each count in this case individually. The Court of Appeals left it for this Court, on remand, to decide in the first instance whether in fact each of plaintiffs' claims did indeed "arise from" such acts. But it provided some discussion about each count so the parties and this Court would have a useful

sense of how the analysis is supposed to be conducted. The Court of Appeals then remanded the matter to this Court so those instructions could be obeyed – first by the litigants, in their briefs, and then by this Court in its decision.

The Defendants have now filed three briefs at this stage, each of which completely ignores everything the Court of Appeals said. None of these three briefs makes any effort to fully quote the governing standard formulated by the Court of Appeals or to explain why the plaintiffs' claims fail to meet that standard. In addition, the Court of Appeals went out of its way to explain that the plaintiffs' motivation for filing their claims is irrelevant; Defendants not only ignore this holding but focus on precisely this – now clearly irrelevant – fact in their briefing to this Court on remand.

Finally, when it reviewed each count, the Court of Appeals also took the significant step of casting serious doubt on the possibility that several of plaintiffs' claims could have arisen from acts of advocacy. Defendants neither acknowledge these directly applicable statements nor make any effort to explain why this Court should conclude otherwise.

I. THE COURT OF APPEALS HOLDINGS IN THIS CASE WHICH ARE TO BE APPLIED ON REMAND

The Court of Appeals issued several holdings that must guide what this Court does now. First and most important, the Court of Appeals defined what the SLAPP statute means by its requirement that a claim "arise from" protected activity:

> We further hold 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.

259 A.3d at 734. Thus,

> it was not enough to find that the 2013 Resolution constituted such an act [of public advocacy] (as that term is defined) and was related in some way to the non-speech conduct targeted in the plaintiffs' causes of action.

Ibid. (footnote omitted). Because that is the standard,

> the 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 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.

Id. at 746. The Court of Appeals' opinion's result is clear: for a claim to be vulnerable under the District's SLAPP Act, a legally objectionable aspect of "the speech itself*"* – something about its *content* -- must be the basis for the claim. The claim must be that plaintiff is entitled to prevail because of *what* the defendant said, not merely the fact that the defendant spoke.

Of particular relevance to the case at this stage is the Court of Appeals' view about Defendants' argument that their uses of the ASA's resources are protected by the SLAPP Act because the resources were used to fund their speech about the Resolution and about BDS. The Court of Appeals held:

> We think it 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 say that the Anti-SLAPP Act was meant to benefit such a defendant.

Id. at 747, n. 78. This holding is of particular relevance because Counts II, V, IX (waste) and XII are all based on exactly this kind of abuse, by Defendants, of resources entrusted to the ASA and so by the ASA membership to the individual Defendants when these people were put in positions of authority as ASA officers and directors. Each of those counts alleges that Defendants misappropriated the ASA's resources to advance the individual Defendants' political goals, including spending the ASA's money on public relations, on lobbying, as well as on legal fees in this case in which counsel are paid to represent many Defendants even though the ASA is

only one such Defendant and even though the ASA is not even named as a Defendant in many of the counts.[1]

Finally, given the arguments Defendants offered in this Court both before the Court of Appeals opinion, in the Court of Appeals and again in this Court now, it is important for this Court to be conscious of the Court of Appeals' opinion relating to the motivation of the Plaintiffs. The Court of Appeals issued both a holding and a warning. In evaluating a SLAPP motion, the Court of Appeals admonished that analysis "focuses on the claim not the claimant." 259 A.3d at 748. The Court of Appeals held that the SLAPP statute does not "authoriz[e] the trial court to explore the plaintiff's underlying motives in asserting a claim." Indeed, "no sensible reading of th[e statute's] language could lead to a conclusion that the Council intended courts to gauge a plaintiff's subjective reasons for filing their claims." *Id.* at 748.

II. APPLICATION OF THESE LEGAL PRINCIPLES TO PLAINTIFFS' COMPLAINT SHOWS THAT NONE OF PLAINTIFFS' CLAIMS ARISE OUT OF PROTECTED ACTIVITY OF ANY KIND

Count One presses a garden variety claim regarding corporate governance – that the defendants who ran for ASA board seats failed to disclose a material fact, namely their plan to use their power to cause the ASA to adopt the BDS resolution. The claim, in other words, is that Defendants did NOT speak and did NOT express their views on this issue, and that, because those views were material facts, the failure to disclose them was a breach of duty.

Of course, no logic can transmogrify a claim that defendants did ***not*** reveal their views about the BDS resolution into an effort to suppress defendants' speech. The claim is exactly the

[1] Defendants not only put their hands into the ASA's cookie jar in for these forbidden reasons: they *broke into* the cookie jar, altering the ASA's by-laws, without notice to the ASA membership, precisely in order to create for themselves the power to invade the ASA's endowment so it could be raided for this purpose. See Complaint ¶¶169-174.

opposite – that Defendants should have expressed their views, but did not do so because they knew it was strategically unwise. That's the force of the allegation that another candidate with a better developed conscience, who felt he had to reveal his views, did so and lost the election. There's no way to make claim holding defendants to account for *not* speaking into a claim that their speech rights, on an issue of public importance, were suppressed.

Equally important, however, and dispositive under the Court of Appeals decision in this case, is the fact that in contests for corporate control a frequent litigation topic is the accuracy and completeness of disclosure, to shareholders, about the plans of the groups contending for the shareholders' votes. Corporate law, like securities law, makes the accuracy and completeness of disclosures regarding material facts into a central question. Such disputes ***never*** involve the First Amendment or any protected expressive activity, because the issue is simply materiality: did the disclosures reveal material facts?

Whether Defendants fully and accurately disclosed material facts is not a public policy issue; it is an antiseptic question of corporate law. See, *e.g., Franchi v. Firestone,* 2021 Del. Chanc. LEXIS 91 (Del. Chanc. May 10, 2021). The only issue in any such dispute about corporate governance, is whether all material facts were disclosed. That is not a question about protected speech.

The Complaint alleges clearly that these facts were not disclosed and it also alleges that they were material: that is the force of the fact, set forth clearly in the Complaint, that a candidate who accurately disclosed his view on the Boycott resolution lost his election campaign, while the Defendants, who held the same view as this man but concealed them from the electorate, won. See generally, Complaint ¶¶ 66-77; 112-116; 117-122. Equally material, and equally undisclosed, was the fact that the nominations committee had as an explicit goal (explicit to the

committee's members, anyway) that it would "work[] to elect council members who support BDS." ¶74. Any such policy was material and should have been disclosed; but it was kept a secret.

Materiality is a question of fact for the factfinder. *IP Network Sols., Inc. v. Nutanix, Inc.,* 2022 Del. Super. LEXIS 62, at *26 (DE Super. Feb. 8, 2022). Materiality has, more than plausibly, been alleged here. That's enough.

Count two, like count one, focuses on simple questions of corporate governance, and in particular on whether access to the corporation's assets was allocated fairly. This, again, is a simple question of corporate governance totally unrelated to the substance of anyone's views, whether plaintiff or defendant. It's true that the complaint alleges that *defendants* allocated access to the ASA's resources on the basis of the viewpoint of the person seeking such access; but whether that's true or not is a purely factual question in which the substance of *defendants'* views plays no role in the court's adjudication of plaintiffs' claim. Thus, for example, the Complaint alleges that Defendants caused the ASA to pay travel expenses only for people who espoused the pro-BDS opinions, while refusing to do the same for people who had other views. (See, e.g., ¶94, quoting Defendant Marez's statement that "I don't think any scruples about appearing to stack the deck" should affect Defendants' conduct.) [2] The issue here is no different than it would be if access to a corporation's assets were allocated to favored family members at the expense of other non-family members who were disfavored.

Count Two also focuses on such pure corporate governance questions as whether votes were counted accurately and whether the right to vote was denied in breach of the corporation's governing documents. Yet again – this has nothing to do with anyone's speech.

[2] Defendants were somewhat "concerned" about "appear[ances,]" however: Defendant Reddy, for example, worried "I'm not sure about putting this all on email." ¶92.

Count Three presents the claim that, by nominating only people who would advance their political views, at the expense of the great many who disagreed with those views, defendants breached the provision of the ASA Constitution which requires that nominees for "shall be representative of the diversity of the association's membership." Here yet again, prosecution of the claim has nothing to do with suppressing speech – instead, again, the claim is the exact opposite: it is that *Defendants* suppressed speech but not allowing anyone whose views differed from theirs to be nominated (or even heard). This is the exact opposite of an effort to suppress defendants' speech.

Part of Count Two, and all of Counts Four, Six, Seven and Eight focus on whether the ASA followed its own rules governing the right of members to vote, how votes were counted and what number of votes was required for the Resolution to pass, as well as on the claim – eminently borne out by the evidence – that Defendants manipulated the "debate" within the ASA about the resolution expending resources to promote their own view while also expending resources to suppress opposing views, and paying PR firms – with the ASA's money -- to counter such opposing views.

Voting questions are the bread and butter of corporation law and they are routinely presented to, and resolved by, the courts. See, e.g., *Blackrock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964 (Del. 2020); *In re Appraisal of Dell Inc.*, 143 A.3d 20 (Del. Ct. Chanc. 2016); *Blasius Industries, Inc. v. Atlas Corp*., 564 A.2d 651 (DE Ct. Chanc. 1988). Absolutely no speech is at issue in these claims, any more than there was a First Amendment claim in any of the above-cited Delaware corporate cases about corporate voting. Voting rights are allocated by corporate law and the organic and other governing documents of each corporate entity; claims about whether such rights have been breached have nothing

whatsoever to do with public speech. That remains true, the Court of Appeals in our case has reminded us, regardless of the motivation of either the voters or the people whose corporate conduct is said to have violated the plaintiff's right to vote.

Count Five asserts that the ASA engaged in ultra vires activity by attempting to influence legislation, in breach of an explicit provision in the ASA's organic documents which preclude such activity. Similarly, Count Nine invokes the organic provisions creating the ASA, and the tax code provisions defining its status as a non-profit, both of which bar the organization from engaging in lobbying activity. As this Count charges, Defendants violated those provisions by raiding the ASA's endowment to fund public relations and lobbying activities that the entity is forbidden to engage in.

The ban in engaging in lobbying is also a requirement for maintenance of the ASA's status as a non-profit eligible to receive tax deductible donations; engaging in lobbying threatens that status, which is a clear harm to the Association. The ban on lobbying by tax-exempt non-profits is entirely consistent with the First Amendment, as the Supreme Court has explicitly held. *Regan v. Taxation with Representation,* 461 U.S. 540 (1983).

District of Columbia law explicitly authorizes an action by members of a non-profit to challenge ultra-vires activity. If a ban on lobbying by non-profits can exist – and it must, if only because it is, permissibly, required by the United States tax code – then it has to be enforceable in court like any other limit on the powers of an organization's officers.

Defendants' claim that this count attacks speech once again ignores whole libraries of litigation which have nothing to do with the First Amendment or any protected speech activity. See, *e.g., Family Trust of Mass., Inc. v. United States,* 892 F.Supp.2d 149, 158-89 (D.C. 2012) (enforcing ban on non-profits' engaging in lobbying). Federal law bars tax exempt organizations

from both lobbying and campaigning for political candidates. The latter activity, of course, is a core First Amendment protected action; but absolutely no First Amendment issue is raised by the existence of the bar on such activity by non-profits. See *Regan*, *supra.* If there is no First Amendment bar to the existence of that provision, then there can be no First Amendment bar to its enforcement.

Finally, enforcement of that ban does not relate to the content of speech but simply to whether lobbying activity – of any kind, in any political direction – was engaged in.

Counts Ten through Twelve relate to the Defendants' mistreatment of Plaintiff Simon Bronner and the actions they took to cause the ASA to breach its contractual obligations to him. None of these relate to any speech by Defendant, and none seeks any remedy that would suppress or punish speech

Count Ten also charges that Defendants simply closed down (that is to say, destroyed) an ASA asset – a well-respected publication -- because its continued existence, with Plaintiff Bronner at its helm, did not suit the personal political preferences of the individual Defendants. This is, once again, a pure question of corporate governance. The claim here is the simple legal claim that a corporate officer breaches his or her fiduciary duty to the company by demoting or firing a successful subordinate, and destroying a corporate asset, simply because the officer doesn't like the employee's politics.

III. RECENT AUTHORITY REQUIRES REVERSAL OF THIS COURT'S HOLDING THAT THE STATUTE OF LIMITATIONS WAS NOT EQUITABLY TOLLED

This Court's 2019 opinion on Defendants' Motions to Dismiss held that the statute of limitations on Plaintiffs' claims was not equitably tolled because, this Court explained, District

of Columbia law requires, without any exceptions that an action filed in the wrong jurisdiction does not ever stop the running of the statute of limitations clock. Slip op. at 19, citing *Bond v. Serano,* 566 A.2d 47, 49 (D.C. 1989).

After this Court's decision was issued in this case, the Court of Appeals decided *Neill v. D.C. Public Employee Relations Board,* 234 A.2d 177 (2020), which made clear that no such rigid rule remains in force in this jurisdiction. There the Court of Appeals explained that

> The appropriateness of equitable tolling "is a fact-specific question that turns on balancing the fairness to both parties." Brewer v. District of Columbia Office of Emp. Appeals, 163 A.3d 799, 802 (D.C. 2017) (internal brackets omitted). "[W]hether a timing rule should be tolled turns on" a variety of factors, such as the benefitting party's vigilance, the presence of "unexplained or undue delay[,]" whether "tolling would work an injustice to the other party," and "[t]he importance of ultimate finality in legal proceedings[.]" Id.

In this case, the federal trial court had explicitly and categorically held that the amount in controversy requirement *was* satisfied: it held:

> The Court concludes that it has both subject-matter and personal jurisdiction. It has subject-matter jurisdiction because Plaintiffs have shown, beyond the low standard of legal possibility, that they could recover more than $75,000 if they prevailed.

Bronner v. Duggan, 249 F.Supp.3d 27, 36 (D.D.C. 2017).

The Court of Appeals in *Neill* held that it was the plaintiff's diligence that played the largest part in determining whether a statute of limitations should be equitably tolled. See *Neill,* at 186, pointing to evidence of "unbroken effort" by the Plaintiff to file timely. Plaintiffs in this case demonstrated as much diligence as they conceivably could, and this standard is therefore satisfied. Indeed, once the federal trial court had held that it did indeed have subject matter jurisdiction, because the amount in controversy had been satisfied, what more could the plaintiffs have done to determine whether this was correct? They couldn't very well appeal this interlocutory decision, on which they had prevailed.

This is, it cannot be seriously disputed, a very unusual set of facts. Moreover, Defendants have attempted to distinguish the authority Plaintiffs had relied on to show equitable tolling by pointing out that the rule Plaintiffs invoked applied only when there had been a change in the law. But here there had been a change in the law: there had been a change in the law of the case, and it was only because of that change that Plaintiffs went from having secured federal jurisdiction to finding themselves without it.

IV. NO OTHER ISSUES ARE BEFORE THIS COURT AT THIS TIME

Finally, Defendants advance a series of arguments that they have already tried and lost on, including the Volunteer Immunity Act. These matters have been briefed and decided upon and nothing in the Court of Appeals opinion provided Defendants with any basis for attempting to relitigate them.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Special Motions to Dismiss brought by Defendants under the District's SLAPP Act.

Respectfully submitted,

/s/

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[PROPOSED] ORDER

AND NOW, upon consideration of the parties briefing on remand sur Defendants' Speical Motions to Dismiss pursuant to D.C. Code §16-5501 *et seq.,* it is hereby ORDERED that the said motions are DENIED in their entirety.

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Hon. Robert R. Rigsby

CERTIFICATE OF SERVICE

I, Jerome M. Marcus, hereby certify that on this 6th day of May, 2022, I caused the foregoing Plaintiffs' Memorandum On Remand On Whether Plaintiffs' Claims Arise From Acts In Furtherance Of The Right Of Advocacy On Issues Of Public Interest to be served upon counsel for all parties through the FileExpress electronic filing system.

/s/