Case No. 19-7017

In the

United States Court of Appeals

for the

District of Columbia Circuit

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

v.

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

Appeal from a Decision of the United States District Court for the District of Columbia, Case No. 1:16-cv-00740-RC · Honorable Rudolph Contreras, U.S. District Judge

APPELLANTS' OPPOSITION TO THE MOTION FOR SUMMARY AFFIRMANCE

JEROME M. MARCUS, ESQ.
MARCUS & AUERBACH LLC
1121 North Bethlehem Pike, Suite 60-242
Spring House, Pennsylvania 19477
(215) 885-2250 Telephone
jmarcus@marcusauerbach.com

L. RACHEL LERMAN, ESQ.
BARNES & THORNBURG LLP
2029 Century Park East, Suite 300
Los Angeles, California 90067-2904
(310) 284-3871 Telephone
rlerman@btlaw.com

JENNIFER GROSS, ESQ.
THE DEBORAH PROJECT, INC.
7315 Wisconsin Avenue, Suite 400 West
Bethesda, Maryland 20814
(301) 349-1302 Telephone • jenniegross10@gmail.com

Counsel for Appellants Simon Bronner, Michael Rockland, Charles D. Kupfer and Michael L. Barton

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PRELIMINARY STATEMENT

After three years of litigation in the trial court, during which Defendants made no fewer than four facial attacks on Plaintiffs' Complaint – three of which were unsuccessful – Defendants now tell this Court that the issues are so simple that no merits briefing is required at all. On a jurisdictional question where the standard requires that it "must appear to a legal certainty" that Plaintiffs' claims do not satisfy the minimum requirement (*St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 282, 288 (1938)), Defendants ask this Court to hold that all issues presented on appeal "are so clear" that summary affirmance is proper. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987).

Defendants are absolutely wrong – indeed, their desperation to prevent this Court from a careful review of the merits speaks volumes about Defendants' own confidence in their arguments. As we show below, Defendants' substantive argument rests on a flat misreading of binding authority governing the standing of the members of a nonprofit organization to challenge their entity's actions. For very good reasons adopted as dispositive by the District of Columbia Court of Appeals, those standards are sharply different from, and substantially broader than, the standards governing the right of a shareholder in a for-profit entity to challenge management decisions by the corporation.

Plaintiffs also bring several other legal issues to this Court with respect to which the trial court erred, and with respect to which Defendants' plea for summary affirmance obsures both the facts and the law. For example, the Complaint alleges – and discovery shows clearly – that the individual Defendants in this case took hundreds of thousands of dollars out of the modest endowment of the American Studies Association, and improperly used that money to fund Defendants' own personal political campaigns. These acts were in flat violation of the ASA's charter, which bars the organization from advocating for legislation. They were also committed without anything close to full disclosure ot the ASA's members.[1]

The trial court proceeded on the erroneous understanding that the four individual plaintiffs were suing to have all of this money awarded to them personally, and it dismissed Plaintiffs' claims in part on the ground that that these individual Plaintiffs were not entitled to that money. Awe will show in detail in our brief on the merits, however, this understanding is entirely incorrect: the individual Plaintiffs have never sought to be personally awarded with these funds.

[1] Indeed, so eager were Defendants to prevent their own members from discovering these facts that they have designated almost every document produced in discovery as "Confidential," thereby preventing their dissemination to the ASA's membership.

The impact of this error on the trial court's conclusions regarding injury, damage, and standing, is far reaching. Plaintiffs are entitled to the opportunity to explain these issues to this Court, which cannot effectively review the decision below without the benefit of explanation, on that issue and several others.

For all of the foregoing reasons, summary affirmance, is totally inappropriate in this case.

ARGUMENT

The instant motion for summary affirmance fails because it does not come close to meeting the high standard governing award of such relief. "A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987).

A trial court decision can be summarily affirmed only if "[t]he [appellate] court [has] conclude[d] that no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers*, 819 F.2d at 297-98. Thus, where a case is based on affirmance of numerous sub-issues, summary affirmance is rarely appropriate. Similarly, cases involving complex issues are likely to require "further briefing and argument" and thus are rarely amenable to summary disposition. *Id.*

Summary affirmance is inappropriate in this case for all of these reasons.

I. THE DISTRICT COURT'S RULING ON STANDING IS INCORRECT AND CERTAINLY CANNOT BE SUMMARILY AFFIRMED.

The trial court struggled over the questions presented in this appeal, and particularly this first question: whether and how to account for injury incurred by the American Studies Association and its members for purposes of the amount-in-controversy calculation. The issue has been briefed in detail four times, first in in June of 2017, then in November of 2017, again in April and March of 2018, and finally in September and October of 2018. Not until February of 2019 did the District Court rule on the issue.

The issue is indeed complex and multi-faceted. Indeed, Plaintiffs could not possibly fully brief this issue in the 5,200 words allowed in this response brief.

A. The District Court Decision Is Incorrect, and Certainly Not Amenable to Summary Affirmance, Because It Conflicts with Controlling Authority from the District of Columbia Court of Appeals that Holds that Appellants Have Standing to Bring the Claims at Issue.

Two cases from the District of Columbia Court of Appeals: *Daley v. Alpha Kappa Alpha*, 26 A.3d 723 (D.C. 2011) and *Jackson* v. *George*, 146 A.3d 405 (D.C. 2016), hold that members of a nonprofit have standing to bring direct claims for injury to the nonprofit, even though shareholders of a for-profit entity would be

barred from bringing the exact same claims. Because this case is governed by District of Columbia law, Plaintiffs argued below and will demonstrate in their merits brief that these cases require reversal of the trial court's ultimate decision on this issue. As we show below, Defendants flatly misread these cases, and their argument – for affirmance at all, never mind summary affirmance – fails for that reason alone.

Daley involves claims of fiscal mismanagement of Alpha Kappa Alpha sorority ("AKA"), a nonprofit incorporated in the District of Columbia, including large payments to the sorority president from the sorority's coffers. *Daley*, 26 A.3d at 726-27. The *Daley* plaintiffs, dues-paying members of AKA, brought claims against AKA and the individual defendants for breach of fiduciary duty, breach of contract, *ultra vires* acts, and corporate waste – the same types of claims at issue here. The plaintiffs alleged "that judicial intervention is necessary to restore those funds" to AKA and to "enjoin the appellees from taking any further action that would harm AKA" – exactly what Appellants/Plaintiffs here seek. *Id.*

The trial court dismissed the plaintiffs' claims on the grounds that they were brought "in the members' own names rather than as a derivative suit." *Id.* at 729. The District of Columbia Court of Appeals reversed, criticizing the lower court for adopting "too expansive a view of the requirement of derivative suits." *Id.* The court held:

> On its face, it would seem almost self-evident that members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payment of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization.
>
> . . . .
>
> [T]he 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.

Id.

Daley properly recognized that this is a question of *standing*, and analyzed it as such. "In order to establish standing, a party must demonstrate: (1) concrete injury, (2) that the injury is traceable to the defendant's action, and (3) that the injury can be redressed." *Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992). Applying these three elements – an injury, traceable to defendants, that can be redressed –the Court of Appeal held that "it would seem almost self-evident" that the dues-paying members of a nonprofit "have standing to complain" when "the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws" of the organization. *Id*.

This is not a particularly surprising holding, as there is no reason why caselaw that addresses the ability of shareholders in for-profit corporations to bring

claims ***should*** apply outside of the shareholder context. *See U.S. Gypsum Co. v. Quigley Co.* (*In re G-I Holdings, Inc.*), 755 F.3d 195, 208 (3d Cir. 2014). In *U.S. Gypsum*, the Third Circuit also rejected the application of the shareholder standing rule outside of the for-profit, shareholder context, and held:

> We can see no reason why the direct/derivative inquiry should apply in this situation. Under the case law, the distinction applies to claims brought by shareholders in a corporation.

Id.

The D.C. Court of Appeals reaffirmed the *Daley* holding in *Jackson v. George*. *Jackson* involved the alleged takeover of Jericho Baptist Ministries ("Jericho"), a church in the District of Columbia. In brief, the case alleged that trustees of Jericho incorporated a new church in Maryland, merged the two churches, and transferred the Jericho's assets to the Maryland church. The *Jackson* plaintiffs, longtime members of the Jericho congregation, also alleged that the seating of four trustees and the removal of two others was invalid, such that any actions by the board of trustees, including the merger, were invalid as well.

The *Jackson* defendants argued that the plaintiffs lacked standing to bring direct claims arising from mismanagement of the church's assets. Relying on *Daley*, the trial court held that plaintiffs did have standing, even though the complaint "'speaks largely of injuries to the Church and its assets and property[.]'" *Jackson*, and the Court of Appeals affirmed. *Jackson,* 146 A.3d at 415 ("[the trial

court] recognized the court's cautionary words about 'too expansive a view of the requirement of derivative suits' when allegations are made against a nonprofit corporation and its leaders").

The claims brought by Appellants/Plaintiffs are indistinguishable from those in *Daley* and *Jackson.* The ASA is a nonprofit incorporated in the District of Columbia. Plaintiffs/Appellants are longtime members of the ASA who have invested both financially and personally in the ASA and its mission. They bring allege mismanagement of the ASA by fiduciaries who exploit the ASA's assets for their own purposes, and bring claims for breach of fiduciary duty, *ultra vires* acts, breach of contract, violation of the D.C. Nonprofit Corporations Act, and corporate waste.

B. Because the Issue Turns on Standing, Movants Do Not and Cannot Show that *Daley* and *Jackson* Do Not Apply.

Movants incorrectly claim that "[n]either *Daley* nor *Jackson* addressed the particular question now at issue: whether injuries other than those incurred by Plaintiffs individually could form the basis of federal subject matter jurisdiction." (Joint Motion for Summary Affirmance ("Motion") at 10.) Movants are absolutely wrong. *Daley* and *Jackson* clearly hold that members of a nonprofit have standing to bring direct claims arising from mismanagement of the nonprofit and expenditures made in violation of the nonprofit's constitution and bylaws.

Standing is based on injury, not damages. *Daley*, 26 A.3d at 728-29 ("to establish standing, a party must demonstrate: (1) concrete injury, (2) that the injury is traceable to the defendant's action, and (3) that the injury can be redressed") (citing *Lujan*, 504 U.S. at 560-61). Once standing is established, these claims brought by members of a nonprofit under *Daley* and *Jackson* are treated like any other claim. Thus, in a diversity case like this one, if the amount-in-controversy satisfies the minimum requirement, the federal court has jurisdiction. There is no additional hurdle to establish subject matter jurisdiction, no "particular question now at issue" to resolve.

The amount-in-controversy requirement applicable to diversity cases in federal court is assessed as the value of the appropriate remedy or remedies as provided law. Thus, the amount-in-controversy may include monetary damages in an amount appropriate to compensate the plaintiff under applicable law. It may also include punitive damages, injunctive relief, declaratory relief, and other remedies, valued under applicable law.

Movants argue that Plaintiffs' claims fail because they seek "alleged damages [that] were all derivative in nature." (Motion at 7-9.) Yet Movants also argue that the question of whether Plaintiffs can bring these claims is not a question of standing. (Motion at 9.) But the question of whether a claim is direct of derivative clearly *is* a question of standing. Indeed, the District Court analyzed

the issue in a discussion of standing in the very decision that Movants ask this Court to summarily affirm. (Decision at 11-17.)

Movants "submit that there is a wide gap between the issue of 'standing' to survive a motion to dismiss for lack of injury in Superior Court and the issue of quantum of damages that an individual plaintiff may claim for federal jurisdictional purposes." (Motion at 10.) The gap is not wide at all but unmeasureable, because the concepts of standing, on the one hand, and the "quantum of damages" a plaintiff may "claim" for purposes of the amount-in-controversy, on the other are wholly different concepts.

Moreover, while Movants seek summary affirmance of the underlying decision, even they do not agree that the trial court's analysis is correct: thus, it is only the outcome in the district court that Movants agree with, not the reasoning. The District Court appropriately approached the question of whether plaintiffs could bring claims for mismanagement of the ASA as one of standing, and analyzed the issue in a seven-page discussion of standing. (Decision at 11-17.) Movants must disagree with the analysis in the underlying decision if they do not believe that the question is one of standing. But because the District Court ultimately concluded that the amount-in-controversy did not meet the minimum requirement and dismissed the case – an outcome that Movants clearly favor – they seek affirmance on a summary basis.

C. The District Court's Decision Is Incorrect, And Certainly Not Amenable to Summary Affirmance, Because It Analyzes Standing as a Question of Damages Instead of Injury and Incorrectly Assumes that Plaintiffs Personally Seek as Damages the Hundreds of Thousands of Dollars of ASA Funds Withdrawn and Misused by Defendants.

Although the District Court correctly analyzed the issue as a question of standing, it reached the wrong outcome. The District Court found that Plaintiffs lack standing, even though it acknowledged that *Daley* and *Jackson* hold that members of a nonprofit have standing to bring claims for mismanagement of the nonprofit – claims that shareholders in a for-profit business cannot bring.

The District Court reached the wrong result because it approached the question of standing as one of damages, instead of injury. The underlying decision sets forth the following question: "The parties' briefing raises a simple but crucial question: May Plaintiffs collect damages for ASA's injuries without bringing a derivative action?" (Decision at 11.) This initial exposition of the issue foreshadows the fundamental flaw in the District Court's reasoning: Instead of asking whether Plaintiffs are injured, whether the injury is was caused by plaintiffs, and whether the injury is redressable, the District Court frames the question around the availability of monetary damages of the same amount as the ASA could claim.

Following *Lujan*, *Daley* and *Jackson* both approach standing as a question of injury, not whether "Plaintiffs can collect damages."[2] Those cases apply here.

The District Court's approach to the question of standing is critical to this appeal, as the underlying decision reflects a belief and concern that Plaintiffs seek to personally collect damages equal to the amount withdrawn from the ASA's trust fund – approximately $300,000 as of a year ago. But Plaintiffs do ***not*** seek to personally recover such damages. Instead, they seek injunctive and declaratory relief, including restoration of funds to the ASA – just as the *Daley* and *Jackson* plaintiffs sought.

This fundamental misunderstanding that may well have been pivotal to the outcome. The underlying decision states,

> to the extent the Individual Defendants injured ASA, only ASA may seek damages for those injuries.
>
> . . . .
>
> This conclusion aligns with the policy considerations underlying the shareholder standing doctrine. **Plaintiffs claim that—merely by their position as ASA members—they are entitled to collect hundreds of thousands of dollars allegedly misappropriated from ASA's trust fund.** If the Court agreed, it would be opening the floodgates to duplicative litigation as other ASA members rushed to collect the same damages.

[2] A claim for damages is not required for standing. A plaintiff may have standing to bring a claim for injunctive and declaratory relief, or a claim for habeas corpus.

(Decision at 15 and at n.8 (emphasis added).) The injunctive and declarative relief that Plaintiffs actually seek would not create the perverse incentives for "multitudinous litigation" that the shareholder standing rule prevents in cases brought by shareholders in for-profit entities.

The District Court's discussion of *Daley* and *Jackson* is complicated by the District Court's assumption that Plaintiffs seek to personally collect, for themselves, $300,000 of misused ASA funds. Although the decision confirms that *Daley* and *Jackson* provide standing for members of a nonprofit to bring claims that shareholders in a for-profit company could not bring (thus acknowledging that the shareholder standing caselaw does not apply), the District Court sought to distinguish those cases on the grounds that the *Daley* and *Jackson* plaintiffs did not seek to secure to themselves financial damages born by the exploited nonprofits. The decision states:

> *Daley* and *Jackson* indicate that nonprofit members may directly suffer certain injuries from organizational mismanagement that for-profit shareholders do not. Those cases do not, however, speak to whether nonprofit members may ultimately secure relief for the organization's injuries rather than their own, without bringing derivative claims. **In other words, *Daley* and *Jackson* concern a nonprofit member's standing to seek relief based on the member's injuries, but not a nonprofit member's standing to seek relief based on the nonprofit's injuries.**

(Decision at 16.)

Because the Plaintiffs here do not seek that relief to themselves, but instead seek reimbursement to the ASA – exactly what the *Daley* Plaintiffs sought – the District Court's reasoning fails. The decision does not otherwise distinguish *Daley* and *Jackson*.

D. It Is Far from Clear that Movants Will Win on the Merits, as the District Court Agrees that *Daley* and *Jackson* Hold that Members of a Nonprofit Have Standing to Assert Direct Claims for Mismanagement of the Nonprofit.

Although the underlying decision begins with discussion of the shareholder standing rule, and more generally, the third-party standing rule, ultimately, the District Court did ***not*** find that either rule bars members of nonprofits from asserting direct claims for "organizational mismanagement," *id*., or that such claims could only be brought as derivative claims. To the contrary, the decision states that members of a nonprofit ***do*** have standing to assert direct claims that shareholders in a for-profit entity could only bring derivatively. (Decision at 16 ("*Daley* and *Jackson* indicate that nonprofit members may directly suffer certain injuries from organizational mismanagement that for-profit shareholders do not").)

In the lower court, Movants argued that *Daley* and *Jackson* found standing because the claims were for individual injuries and sought damages specific to themselves – *i.e*., that they brought claims that even a shareholder in a for-profit entity could bring directly, because they were not "derivative in nature" under the tests set forth in cases like *Cowin v. Bresler*, 741 F.2d 410 (D.C. Cir. 1984). (*See*

Motion at 7 ("the courts have used three tests to determine whether an action is derivative").) The District Court did not adopt that argument; instead, it explicitly acknowledges that under *Daley* and *Jackson* hold otherwise:

> [Because members had] a "direct, personal interest" in the action by virtue of their ongoing financial and emotional relationship with the organization, they had standing to bring their claims directly. [*Daley* at 729,] (*quoting Franchise Tax*, 493 U.S. at 336).

(Decision at 16.)

Movants cite numerous cases that hold that claims brought by shareholders must be brought derivatively. (*See* Decision at 7-9.) But all of these cases involve shareholders in for-profit companies – and primarily publicly-traded companies. *See, e.g.*, *Cowin v. Bresler*, 731 F.2d 410 (D.C. Cir. 1984) (claims under the Securities Exchange Act of 1934 as well as common law claims for loss of stock value involving a for-profit entity incorporated in Delaware); *Burman v. Phoenix Worldwide Indus*., 384 F. Supp. 2d 316 (D.D.C. 2005) (involving claims of misrepresentation for the purchase of stock in a for-profit corporation), and cases cited in the Motion at 7-9. None of these cases contain any holding that limits the application of *Daley* and *Jackson* to a nonprofit incorporated in the District of Columbia.

II. THE DECISION IS NOT AMENABLE TO SUMMARY AFFIRMANCE BECAUSE ADDITIONAL FINDINGS IN THE DECISION ARE AT ISSUE.

A. The Decision Fails to Account for Punitive Damages

The active complaint on November 9, 2017, just three weeks after Defendants produced nearly 20,000 documents, approximately tripling the size of their production. Plaintiffs did not have nearly sufficient time to digest all of the materials before filing the new complaint, and did not specifically plead punitive damages, but did include a request for any "such other relief as is just and equitable" in the prayer for relief. (Compl., p. 82.)

On July 5, 2018, the District Court ruled on a question it raised *sua sponte* – what, if any, impact does District of Columbia Code § 29-406.31(d), which shields directors of charitable corporations under certain circumstances, have on the Court's jurisdiction? The District Court found that there would be no effect, as the Complaint alleged "intentional infliction of harm," an explicit exception to § 29-406.31(d)(2). *Bronner v. Duggan*, 317 F. Supp. 3d 284, 293-294 (D.D.C. 2019) ("Plaintiffs have plausibly alleged that the Individual Defendants acted with an intent to harm the ASA"). The decision lists the numerous allegations that show the defendants acted with intent to harm:

> Plaintiffs allege that the Individual Defendants "purposefully and intentionally withheld material information from [ASA] members, including the fact that the Individual Defendants expected that if the [Resolution] was adopted, [the ASA]

would be widely attacked throughout the academic world and the press, and that this would harm [the ASA's] reputation, its members' relationships with their universities, and [the ASA's] size, strength, and finances." SAC ¶ 113; see also Pls.' Br. at 2 (quoting an email in which an Individual Defendant stated, "I don't care if [the Resolution] 'splits' the organization"). More specifically, for instance, Plaintiffs allege that the Individual Defendants conspired to "pack" key ASA positions and the ASA's National Council with supporters of the Resolution, without disclosing that plan to the ASA's membership. See SAC ¶ 54–55, 60, 69. The Individual Defendants also allegedly used ASA resources to attract speakers supporting the Resolution, while consciously declining to provide opposing viewpoints and recognizing the appearance of a conflict of interest that could undermine the ASA's legitimacy with its members. See SAC ¶ 91–94. According to Plaintiffs, the Individual Defendants similarly refused to publicize letters and other correspondence opposing the Resolution, including correspondence warning that "the passage of the Resolution would be destructive to the [ASA]." See SAC ¶ 104, 109, 114–16. The Individual Defendants then allegedly subverted the ASA's voting procedures to push the Resolution through the ASA's membership approval process with far fewer votes than required by the ASA's bylaws. See SAC ¶ 123, 134–37. Finally, knowing that the Resolution would cause significant backlash against the ASA, Defendants allegedly misappropriated ASA funds to hire attorneys and retain a "rapid response" media team to defend against that backlash. See SAC ¶ 170–71, 185–89.

Based on these allegations, Plaintiffs claim that Defendants violated their duties to the ASA and its members, violated the ASA's bylaws, and violated D.C. law in furtherance of a Resolution that they knew was likely to harm the organization. Defendants contend that the Complaint shows "that the Defendants acted in conformance with their overall philosophy, and thus believed that their actions were right and proper," Defs.' Opp'n at 10, but that contention does not help if, as alleged, Defendants' "philosophy" was at odds

> with the ASA's organizational health. Plaintiffs' allegations align with the Model Act's Official Comment that intentional harm occurs when a director intentionally takes action, knowing that the action will harm the organization.

Id.

Pursuant to Federal Rule of Civil Procedure 54(c), "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Accordingly, the amount of controversy is determined by "considering the judgment that would be entered if the plaintiff prevailed." *Asbury-Castro v. GlaxoSmithKline,* 352 F.Supp.2d 729, 733 (N.D.W. Va. 2005) (citing *Hutchens v. Progressive Paloverde Ins. Co.*, 211 F.Supp.2d 788, 791 (S.D.W.Va. 2002).

Thus, the value of a potential claim and remedy are included in the assessment of the amount-in-controversy even where if the plaintiff did not plead them, as long as the complaints plaintiff pleads the requisite elements. *See Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730, 735 (4th Cir. 2009) (factoring liquidated damages towards the $75,000 amount-in controversy requirement where plaintiff asks for "all relief available under North Carolina law" but does not specifically ask for such damages).

The same principle applies to unspecified claims for punitive damages. *See, e.g., Back Doctors Ltd. v. Metro. Prop. and Cas. Ins. Co.*, 637 F.3d 827, 821 (7th Cir. 2011) (counting a potential punitive damages award towards the amount-in-

controversy requirement where plaintiff successfully plead elements for such damages but did not specifically ask for them); *Doss v. Am. Family Home Ins., Inc.*, 47 F.Supp.3d 836, 841 (W.D. Ark. 2014) ("the relevant question here is whether the allegations in the Complaint constitute the type of conduct that could potentially support an award of punitive damages").

In the District of Columbia, defendants may be liable for punitive damages for a breach of fiduciary duty when their acts are "accompanied by fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury." *Gov't. of Rwanda v. Rwanda Working Group*, 227 F.Supp.2d 45, 70 (D.D.C. 2002) (citing *Hendry v. Pelland,* 73 F.3d 397, 400 (D.C. Cir. 1996)).

The District Court has already found that the Complaint alleges that Defendants acted not only recklessly, but that acted intentionally, "knowing that the action will harm the organization." *Bronner v. Duggan*, 317 F. Supp. 3d at 293-294. The same allegations satisfy the elements of punitive damages.

Having adequately alleged punitive damages, the amount-in-controversy should account for potential punitive damages, but the District Court did not do so. Appellants intend to include this issue in their appeal. Therefore, summary adjudication is not appropriate, as this issue will require additional briefing from

both sides, and it is not clear that the amount-in-controversy finding will be affirmed.

B. Appellants Appeal the Court's Finding on Injunctive Relief.

The District Court found, to a legal certainty, that the injunctive and declarative relief sought could not reach $75,000. Appellants appeal this finding, rendering the underlying decision unamenable for summary affirmance, as the parties will need to brief the issue, and it is not certain that the Movants will win on the merits.

The District Court ruled that the requests for injunctive or declaratory relief satisfy the amount-in-controversy requirement, because "there is no indication that such relief would cost ASA any money to implement." (Decision at 18.) Appellants will argue that this finding misconstrues the authority for measuring the cost of an injunction to Defendants.

For example, the cost to Defendants of an injunction preventing them from withdrawing more funds from the ASA Trust Fund is not limited to the cost of "administering" that injunction, but also the loss incurred by Defendants on account of the injunction itself. For example, the Complaint cites documents stating that Defendants/Appellees plan to withdraw $95,000 a year for the next two years. (Compl. ¶ 185.) If an injunction prevents Defendants from making these planned withdrawals, $190,000 will not pass from the Trust Fund to

Defendants/Appellees. The injunction would thus cost Defendants/Appellees $190,000.

The authority cited in the decision supports this position. In *Tatum v. Laird*, the court noted the cost of compliance with an injunction. 444 F.2d 947, 951 (1971) ("it seems likely that if all the relief sought by appellants were granted, . . . the cost to the Army of complying with such a decree might well exceed $10,000.") *Tatum* quotes *Ronzio v. Denver & R.G.W.R.R.*, 116 F.2d 604, 606 (10th Cir. 1940) with approval:

> In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.

Tatum, 444 F.2d at n.6. Here, the "object sought to be accomplished" is the prevention of large, unjustified withdrawals from the trust fund, and the "pecuniary result . . . which the judgement would directly produce" includes the loss of the funds the Individual Defendants expected to receive, and to use for their own purposes. That amount is significantly larger than the cost of implementing the injunctive relief as it is described in the decision.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court deny Appellee's Motion for Summary Affirmance.

EXECUTED on this 9th day of May, 2019, in Bethesda, Maryland.

By: /s/ Jennifer Gross
Jennifer Gross, Esq.
THE DEBORAH PROJECT, INC.
7315 Wisconsin Avenue
Suite 400 West
Bethesda, MD 20814
(301) 349-1302
jenniegross10@gmail.com

CERTIFICATE OF COMPLIANCE

I certify that this Opposition complies with the type-volume limitation set forth in Fed. R. App. P. 27(d)(2)(A) and Fed. Circ. R. 27(c). This Opposition uses a proportional typeface and 14-point font, and contains 4,837 words.

Dated: May 9, 2019

By: /s/ Jennifer Gross

Jennifer Gross, Esq.
THE DEBORAH PROJECT, INC.
7315 Wisconsin Avenue
Suite 400 West
Bethesda, MD 20814
(301) 349-1302
jenniegross10@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2019, I electronically filed the foregoing Appellants' Opposition to the Motion for Summary Affirmance with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 9, 2019

By: /s/ Jennifer Gross

Jennifer Gross, Esq.
THE DEBORAH PROJECT, INC.
7315 Wisconsin Avenue
Suite 400 West
Bethesda, MD 20814
(301) 349-1302
jenniegross10@gmail.com