SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOY ELAINE DALEY, ET AL. Plaintiffs, v. ALPHA KAPPA ALPHA SORORITY, INC. ET AL. Defendants.	Case No: 2009 CA 004456 B Judge Todd E. Edelman Civil Cal 1 Next Event: Initial Conference March 2, 2012

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

On August 18, 2011, the District of Columbia Court of Appeals reversed this Court's dismissal of the First Amended Complaint and remanded for further proceedings. The Court of Appeals held that ". . . [Plaintiffs] here have clearly spelled out both the alleged wrongdoings committed with regard to an organization of which they are members and the requested relief." *Daley v. Alpha Kappa Alpha, Inc.*, 26 A.3d 723, 731 (D.C. 2011). The Court of Appeals found that (1) this Court had jurisdiction over Alpha Kappa Alpha Sorority, Inc. ("AKA") and the individual Defendants; (2) Plaintiffs had sufficiently alleged injuries caused by Defendants' conduct to establish standing; and (3) Plaintiffs had stated "cognizable claim[s]" sufficient to satisfy the pleading requirements of Rule 8. *Id.*[1]

[1] The appellate court affirmed dismissal only as to Defendant the AKA Educational Advancement Foundation and claims premised on the theory of corporate waste. *Daley*, 26 A.3d at 726.

Ignoring the law of the case established by the Court of Appeals, Defendants again challenge the sufficiency of Plaintiffs' Second Amended Complaint without presenting any new factual or legal theories warranting any different result than that ordered by the Court of Appeals.[2] Instead, Defendants simply recycle the same arguments testing the sufficiency of Plaintiffs' claims and launch a knowingly premature challenge to the merits of Plaintiffs' allegations supporting their intentional tort claims and request for an accounting. As the appellate court opined: "Dismissal with prejudice at the very outset of the litigation came too soon and blocked any consideration on the merits of the claims." *Daley*, 26 A.3d at 731. Defendants' assertion of previously rejected legal theories and confusion of proof with pleading requirements mandates denial of their motions and belies their improper objective to unnecessarily delay these proceedings warranting the imposition of sanctions pursuant to Rule 11.

BACKGROUND

In July 2009, Plaintiffs, members of Defendant AKA, brought this action alleging gross financial mismanagement by AKA and self-dealing by Defendant McKinzie and AKA leadership. Plaintiffs sought judicial relief because Defendants not only rebuffed Plaintiffs' internal attempts to address the alleged violation of the organization's Constitution and by-laws, but also retaliated against them by, *inter alia,* making defamatory allegations against them and suspending their membership. Plaintiffs asserted claims for breach of fiduciary duties, breach of contract, fraud, unjust enrichment, corporate waste and *ultra vires.* This Court dismissed the First Amended Complaint pursuant to Rule 12(b). The Court of Appeals reversed, finding that

[2] Defendant AKA ignores the appellate ruling altogether in its brief, and Defendant McKinzie makes only a passing, albeit erroneous reference to it in her motion. McKinzie Mot. at 2, n. 2.

Plaintiffs' allegations sufficiently alleged injury to confer standing and stated cognizable claims, except for corporate waste and those against the Foundation.

Following remand, Plaintiffs filed a Second Amended Complaint asserting the same causes of action upheld by the Court of Appeals and added four intentional tort claims and a request for an accounting. Second Am. Compl. ¶¶ 235-259. Defendants' Motions to Dismiss and to Stay Discovery merely reiterate arguments already rejected by the Court of Appeals and challenge the merits of the new allegations, which is improper at the pleading stage. Defendants offer no credible explanation for ignoring the relevant controlling authority mandating denial of their motions and the imposition of sanctions.[3]

ARGUMENT

I. Legal Standard

Defendants' Motions to Dismiss claim that Plaintiffs have not satisfied their Rule 8 pleading requirements and that, therefore, dismissal is appropriate under Super. Ct. Civ. R. 12(b)(6). In deciding a Rule 12(b)(6) motion, a court "constru[es] the complaint liberally in the plaintiff's favor," "accept[ing] as true all of the factual allegations contained in the complaint," *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 253 (D.C. Cir. 2008), "with the benefit of all reasonable inferences derived from the facts alleged." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

The District of Columbia is a notice pleading jurisdiction and, under Super. Ct. Civ. R. 8(a) and (e), a complaint is sufficient so long as it fairly puts Defendants on notice of the claim

[3] Plaintiffs intend to seek sanction pursuant to the procedure set forth at Rule 11(c)(1)(A).

against them. *Sarete, Inc. v. 1344 U Street Ltd. P'ship*, 871 A.2d 480, 497 (D.C. 2005); *see also Diamond v. Davis*, 680 A.2d 364, 371 n.8 (D.C. 1996). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* (citations omitted). "'The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in [District of Columbia] practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.'" *Id.* at 512-13 (quoting 5 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, p. 76 (2d ed.1990)). Plaintiffs have pled ample facts to state a claim under Rule 8, and have even provided allegations sufficient to satisfy a heightened pleading standard.

Contrary to Defendants' contention, Mot. at 8, the case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) did not "establish[] a new threshold for complaints" but, rather, "leaves the long-standing fundamentals of notice pleading intact." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008). The *Twombly* Court emphasized that a complaint "does not need detailed factual allegations." 550 U.S. at 545. Moreover, the Court denied "apply[ing] any 'heightened' pleading standard," because any heightened standard would have to arise from an amendment of the Federal Rules of Civil Procedure. *Id.* at 569 n.14.

When considering the sufficiency of Plaintiffs' pleadings on a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine

when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B WRIGHT & MILLER § 1357 (3d ed. 2004 and Supp.2007)). As discussed below, the detailed Second Amended Complaint filed by Plaintiffs, read in its entirety, more than satisfies the applicable pleading standard.

II. Defendants' Motions to Dismiss Counts I – VIII are Barred by the Law of the Case

The Court of Appeals has held in this case that it is "too early at the Rule 12(b) stage to conclude that any judicial relief [is] precluded" and that Plaintiffs "have clearly spelled out" their causes of action. *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 730 and 731 (D.C. 2011). The Court could not have been clearer about Plaintiffs' satisfaction of Rule 8. And yet, despite the fact that the Second Amended Complaint "essentially mirrors" the First Amended Complaint with regard to Counts I – VIII, McKinzie Mot. at 2, Defendants now seek dismissal again on Rule 12(b) grounds for many of the same claims at the same stage of litigation. In essence, Defendants have asked this Court to overrule the Court of Appeals holding that these claims should proceed. Such a request is barred by D.C. law under the "law of the case" doctrine.

The long-established law of the case doctrine prohibits "a trial court from reconsidering the same question of law that was presented to and decided by another court of coordinate jurisdiction when (1) the motion under consideration is substantially similar to the one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law." *Tompkins v. Washington Hosp. Ctr.*, 433 A.2d 1093, 1098 (D.C. 1981). As the Court of Appeals has repeatedly explained, the law of the case doctrine addresses "the need

for consistency," *Diamen v. United States*, 725 A.2d 501, 510 (D.C. 1999), and is vital in "discouraging 'judge-shopping' and multiple attempts to prevail on a single question." *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980). *See also United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950) ("The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter."). Indeed, it should be obvious that, without this doctrine, "a judge of the Superior Court would be free to rule . . . that the Court of Appeals erred . . . when the appellate court decided, on the same record, the very question which is now before the Superior Court judge." *Diamen*, 725 A.2d at 510. There is simply "no authority for such a startling proposition." *Id.*

Here, Defendants moved in September 2009 for dismissal on, *inter alia*, the grounds that the First Amended Complaint failed to state a claim under Rule 12(b)(6) with regard to Plaintiffs' claims for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, and ultra vires conduct. This Court granted the motion but the Court of Appeals subsequently reversed on August 18, 2011. *Daley*, 26 A.3d at 723. Speaking generally, the Court of Appeals held that the Plaintiffs had satisfied the relevant pleading standard, articulated in Super. Ct. Civ. R. 8(a), "hav[ing] clearly spelled out both the alleged wrongdoings committed with regard to an organization of which they are members and the requested relief." *Id.* at 731. (citing Rule 8(a)(2), (3)). Faced with this Court of Appeals decision, and without having advanced past the pleading stage, Defendants have now inexplicably moved again for dismissal on Rule 12(b) grounds.

All three elements of the law of the case doctrine articulated in *Tompkins v. Washington Hosp. Ctr.*, 433 A.2d 1093 (D.C. 1981), are satisfied. There can be no doubt that the current

motions to dismiss Counts I – VIII are "substantially similar to the one already raised before and ruled upon by the Court of Appeals." Both motions argue insufficient pleading under Rule 12(b)(6). Nor can there be any doubt that the Court of Appeals' decision "is sufficiently final." *Griffin v. United States*, 935 F. Supp. 1, 5 (D.D.C. 1995) ("when a case is appealed and remanded, the decision of the appellate court establishe[s] the law of the case, which must be followed by the trial court on remand."). And finally, Defendants have not alleged, nor can they, that "the prior ruling is . . . clearly erroneous in light of newly presented facts or a change in substantive law." *Tompkins*, 433 A.2d at 1098. As such, the law of the case bars Defendants' second attempt to challenge the sufficiency of Plaintiffs pleading for Counts I – VIII.

A. Plaintiffs Pled Their Breach of Contract Claims Sufficiently Under Rule 8

The law of the case doctrine applies perhaps most clearly to Defendants' Motions to Dismiss Plaintiffs' breach of contract claims. Defendants argue that the "Plaintiffs have failed to allege a personal contract between any of the Plaintiffs and any of the Defendants," warranting dismissal for "failure to state a cause of action." Mot. at 19; McKinzie Mot. at 6-8. This legal theory should be familiar to the Court. In their first Motion to Dismiss, Defendants argued that "Plaintiffs have failed to allege a contract between any of the Plaintiffs and any of the defendants." 2009 Mot. at 33. The Court of Appeals expressly rejected this position. It stated: "It is well established that the formal bylaws of an organization are to be construed as a contractual agreement between the organization and its members since the continuing relationship between the organization and its members manifests an implicit agreement by all parties concerned to abide by the bylaws." *Daley*, 26 A.3d at 731 (quoting *Meshel v. Ohev*

Sholom Talmud Torah, 869 A.2d 343, 361 (D.C. 2005)).[4] The Court then went on to hold that "the complaint does allege various violations of the constitution and by-laws" and, therefore, "[t]he breach of contract count should not have been dismissed." *Id.* at 731. Because this ruling is binding on the Court, Defendants' assertion that Plaintiffs have insufficiently pled their breach of contract claim must be rejected.

Although not expressly addressed in the Court of Appeals' opinion, Plaintiffs' allegations establish that the individual directors of AKA are properly named as Defendants with regard to Plaintiffs' breach of contract claims. As alleged, both Plaintiffs and the Directorate-Defendants are parties to a contract, memorialized in AKA's by-laws, under which Plaintiffs promise to pay dues and render service to the sorority, its mission and programs in accordance with the sorority's Constitution and bylaws; and in return, the Directorate promises to administer the sorority in accordance with the Constitution and bylaws. Second Am. Compl. ¶¶ 47-61. *See Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005).

As the vehicle through which an organization operates, directors are frequently named in cases sustained by the D.C. Court of Appeals. *See, e.g., Daley*, 26 A.3d at 731; *see also Willens v. 2720 Wisconsin Ave. Co-op. Ass'n, Inc.*, 844 A.2d 1126, 1128 (D.C. 2004) (ruling in favor of cooperative members who "sued the cooperative and its directors for breach of contract and breach of fiduciary duty in connection with [certain] decision[s]"). In this case, the Court of Appeals ruled in the jurisdiction portion of its opinion that AKA's directors and employees are not shielded from suit under "[t]he so-called corporate or fiduciary shield doctrine protecting

[4] Defendants unwittingly concede this point. They claim that "AKA's Constitution and Bylaws unambiguously set forth an agreement requiring the members" to take certain actions. Mot. at 22 (emphasis added).

employees who act for a corporation." *Daley*, 26 A.3d at 728. "Here, among other things, while the individual [defendants] as officers and directors were members of the Boule, it appears they were also in part acting in their individual capacities as such members" and, therefore are susceptible to suit. *Id.*

Defendants argue in the alternative that Plaintiffs' contract claims (as well as Plaintiffs breach of fiduciary duty claims) should be dismissed on the theory that Plaintiffs did not follow "AKA's Constitution and Bylaws [which] unambiguously set forth an <u>agreement</u> requiring the members" to appeal certain kinds of grievances to the Boule or Directorate for resolution. Mot. at 19-23 (emphasis added). In making this argument, Defendants concede that Plaintiffs and Defendants were parties to a binding AKA "agreement" or contract. Furthermore, setting aside Defendants' false contention that Plaintiffs failed to comply with applicable AKA rules, Defendants fail to provide any authority for the proposition that dismissal can be obtained under Rule 12(b)(6) on this basis. To the extent that Defendants seek to assert an "unclean hands" or "exhaustion of administrative remedies" defense, it is well-established that these would be "affirmative defense[s] that the defendant bears the burden of pleading and proving." *See Bowden v. United States,* 106 F.3d 433, 437 (D.C. Cir. 1997); *Howard v. Gutierrez*, 474 F.Supp.2d 41, 49-50 (D.D.C. 2007). Defendants, therefore, have provided no grounds for dismissal of Plaintiffs' breach of contract claims.

B. Plaintiffs Pled Their Ultra Vires Claims Sufficiently Under Rule 8

Defendants retrace familiar arguments again with regard to Plaintiffs' ultra vires claims. In the present motions, Defendants assert that "Plaintiffs have failed to plead facts substantiating the claim that the Directorate Defendants' decisions were beyond the powers expressly or

impliedly conferred upon the corporation as provided by AKA's Constitution and Bylaws or applicable state law." Mot. at 23. *See also* McKinzie Mot. at 13. Similarly, in their 2009 Motion to Dismiss, Defendants argued that "Plaintiffs cannot maintain their ultra vires claim" because the "Amended Complaint cites no statute that has allegedly been violated by any defendant, and does not identify any bylaw that has been violated." 2009 Mot. at 45-46. The Court of Appeals expressly rejected this position, both by acknowledging that Plaintiffs had "alleged [Defendants'] failure to follow the dictates of the constitution and by-laws," *Daley*, 26 A.3d at 729, and by expressly holding that Plaintiffs had, in fact, "alleged" the kind of "corporate action" that "is expressly prohibited by statute or by-law" and, therefore, "[t]he ultra vires count should not have been dismissed." *Id.* at 731.

Even if Defendants' argument were not barred by the law of the case doctrine, Defendants' own Memorandum of Points and Authorities highlights many of the facts that support Plaintiffs ultra vires claim. As Defendants acknowledge, Mot. at 23-26, the Second Amended Complaint makes numerous, specific allegations regarding the impropriety of massive surplus expenditures, as well as sums paid to Defendant McKinzie in violation of, *inter alia*, Article VII, Sec. 9 of the AKA Bylaws. *See* Second Am. Compl. ¶ 229. Defendants take the curious position that these allegations are a nullity because they dispute them on the merits. For example, they concede that Plaintiffs alleged in the Second Amended Complaint that Defendants violated certain bylaws—as they must, *see* 26 A.3d at 730—but attempt to disqualify this allegation on the basis that they dispute Plaintiffs' *interpretation* of the bylaws. Mot. at 24. Whereas Plaintiffs read the Article VII Section 9 phrase "in the budget" to mean the Boule-approved budget, *see* Second Am. Compl. ¶¶ 87-88, Defendants interpret this phrase to mean the Directorate has a free hand to expend extraordinary sums "when there are excess funds available

in AKA's budget." *See* Mot. at 23. Defendants have simply raised an issue of contract/by-law interpretation and a factual dispute that should be resolved on the merits. They have not, however, established any basis for judgment on this issue as a matter of law. As the Court of Appeals held, it is far "too early at the Rule 12(b) stage to conclude that any judicial relief [is] precluded" *Daley*, 26 A.3d at 730.

C. Plaintiffs Pled Their Breach of Fiduciary Duty Claims Sufficiently Under Rule 8

Defendants have also recycled their original Rule 12(b)(6) arguments challenging Plaintiffs' breach of fiduciary duty claims (Counts I – III). Mot. at 7-19; 2009 Mot. at 36-37. While the Court of Appeals did not find it necessary in its written opinion to specifically discuss Defendants' Rule 12(b)(6) challenge to the breach of fiduciary duty claims, it held generally that, "[i]n the last analysis," under R. 8(a)(2), (3), the Plaintiffs "have clearly spelled out both the alleged wrongdoings committed with regard to an organization of which they are members and the requested relief." *Daley*, 26 A.3d. at 731. Accordingly, the Court of Appeals reversed the initial dismissal, stating that it "came too soon," and remanded for "consideration on the merits." *See id.*

Moreover, the Court of Appeals ruled in Plaintiffs favor on the overlapping issue of whether Plaintiffs sufficiently alleged an "injury . . . traceable to the defendant's action" (in this case, breach of fiduciary duty) sufficient to confer standing. *Id.* at 729. In holding that Plaintiffs had standing to bring a breach of fiduciary duty claim against Defendants, the Court of Appeals had to determine the following:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal

> connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Mallof v. District of Columbia Bd. of Elections and Ethics, 1 A.3d 383, 394-395 (D.C. 2010).

As the above elements indicate, allegations of "the challenged action of the defendant" are a necessary predicate to satisfying the broader standing requirements. It is not possible, in other words, to adequately allege a causal connection between one's injury and the "conduct complained of" without alleging facts that set forth the underlying "conduct complained of." Therefore, in the course of holding that Plaintiffs adequately pled "an injury…traceable to the defendant's" breach of fiduciary duty, the Court of Appeals also confirmed the fact that Plaintiffs pled the underlying breach of fiduciary duty claims. Various courts have acknowledged this analytical overlap. *See, e.g., Bakhtiari v. Al-Khaledy*, 2011 WL 6945107, *6 (E.D.Mo. 2011) ("Rule 12(b)(1) standing arguments overlap significantly with …Rule 12(b)(6) arguments"); *Monroe v. Beard*, 536 F.3d 198, 205-206 (3rd Cir. 2008) ("To establish standing, '[t]he complaint must describe the underlying arguable claim well enough to show that it is 'more than mere hope,' . . . In other words, the underlying claim should be pled in a manner that satisfies Fed. R. Civ. P. 8(a).").

Perhaps in recognition of the fact that Plaintiffs have satisfied the Rule 8 pleading standard, Defendants make a self-serving attempt to raise the bar, claiming that "Plaintiffs fail to meet the *heightened pleading* requirements necessary to overcome the presumptions of the business judgment rule." Mot. at 9 (emphasis added). For this argument, Defendants rely on derivative cases—primarily *Behradrezee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006). As these cases reflect, derivative actions are subject to the pleading requirements of Rule 23.1, which "requires substantially more than Rule 8(a) notice pleading." *Id.* at 357. However, as

Defendants concede, *see* Mot. 5-6, the relevant pleading standard in this case is contained in Super Ct. Civ. R. 8—not Rule 23.1. This Court has acknowledged that Plaintiffs "did not file this case as a shareholder derivative suit," Order at 10 (February 1, 2010), and, as the Court of Appeals has explained, it is not appropriate to treat this case as if it were a derivative suit. *See Daley*, 26 A.3d at 729. Specifically, the Court of Appeals stated, the "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 accompanying emotion connotations is an uneasy fit." *Id.*

Other trial courts have rightly refused to conflate the heightened Rule 23.1 standards with the Rule 8 notice pleading standard. For example in *In re Dehon, Inc.*, 334 B.R. 55 (Bkrtcy. D. Mass. 2005), the court rejected the defendant's reliance "on language from Massachusetts decisions discussing the business judgment rule presumption in the context of shareholder derivative suits" because "those cases are governed by Massachusetts Rule of Civil Procedure 23.1, which requires claimants in such suits to allege certain facts with particularity," while the claims at issue were "not derivative." *Id.* at 65. Similarly, in *Continuing Creditors' Committee of Star Telecom. Inc. v. Edgecomb*, 385 F. Supp. 2d 449 (D. Del. 2004), the district court held that a direct bankruptcy claim alleging corporate misfeasance and malfeasance—even though it was "of a type most frequently challenged in derivate suits"—was "not subject to the more exacting standard imposed by Court of Chancery Rule 23.1 for derivative actions." *Id.* at 456-57.[5]

[5] Defendants' misplaced reliance on *Behradrezaee v. Dashtara*, 910 A.2d 349 (D.C. 2006) does nothing to advance their novel theory that a direct claim for breach of fiduciary duty is subject to heightened pleading standards. *Behradrezaee* deals only with whether a "complaint meets the pleading requirements of Rule 23.1." Moreover, it

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Even assuming, *arguendo*, that the business judgment rule provides a potential defense for Defendants with regard to Plaintiffs' breach of fiduciary duty claims,[6] it is the Defendants who have the sole burden, under Rule 8(c), of adequately pleading the business judgment rule as an affirmative defense in their Answer. *In re The Brown Schools*, 368 B.R. 394, 401 (Bkrtcy. D. Del. 2007) ("The application of the business judgment rule is an affirmative defense, the determination of which is not proper at the motion to dismiss stage.") (citing *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3rd Cir. 2005)); Superior Ct. Civ. R. 8(c) (requiring any basis of "avoidance or affirmative defense" to be "set forth affirmatively" in a "pleading to a precedent pleading"). In fact, not only is "the plaintiff . . . not under any obligation to plead on the subject of [an] anticipated defense," but "technically this [would be] improper pleading because these allegations are not an integral part of the plaintiff's claim for relief and lie outside his or her burden of pleading." WRIGHT & MILLER § 1276 (2d ed. 2001).[7]

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addresses the business judgment rule only in the distinct context of how it protects the business judgment to refuse a a shareholder's formal "demand" for a derivative suit. 920 A.2d at 361-62. It has no application in this case.

[6] "Generally, the business judgment rule will not apply where there is a breach of the duty of loyalty. Thus, the duty of loyalty must be satisfied before the business judgment rule is applicable to actions of corporate fiduciaries." FLETCHER CYC. CORP. § 837.60, p. 185; *see, e.g., Schultz v. 400 Coop. Corp.*, 292 A.D.2d 16 (N.Y. App. Div. 2002) (noting that "unequal treatment of shareholders is sufficient to overcome the directors' insulation from liability under the business judgment rule"). As the Supreme Court of Delaware has explained, the protections of the business judgment rule "can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Under these principles, and given the facts alleged, Plaintiffs maintain that the business judgment rule does not provide a defense in this case.

[7] Defendants ignore this long-established principle of pleading, relying on *In re Robotic Vision Systems, Inc.* 374 B.R. 36, 45 (Bkrtcy. D. N.H. 2007)—a nonbinding New Hampshire case, distinguishable as a bankruptcy decision. Even this outlier case, acknowledges that "most" Rule 12(b)(6) motions "are premised on a plaintiff's putative failure to state an actionable claim," not to allege an affirmative defense, but that some courts have allowed for an exception when "the facts establishing the defense are definitively ascertainable from the complaint" itself and "those facts suffice to establish the affirmative defense with certitude." *Id.* (citing *Nisselson v. Lernout,* 469 F.3d 143, 150 (1st Cir. 2006)).

Notwithstanding the fact that Plaintiffs need not plead around the business judgment rule to withstand a Rule 12(b)(6) challenge, the Second Amended Complaint does, in fact, contain many factual allegations, pertaining to multiple breaches of Defendants' fiduciary duty that demonstrate the kind of bad faith, self-interest, gross negligence, and fraud that, as Defendants concede, Mot. at 11, overcomes the business judgment rule. Without reciting the entire complaint, Plaintiffs would refer the Court to allegations in the Second Amended Complaint concerning Defendant McKinzie's stunning abuses of power and fraud (¶¶ 62-70, 148-152, 181-183, 210-226); self-motivated violation and manipulation of the AKA budgetary process (¶¶ 87-133, 185-197, 227-234); acts and omissions designed to shield abuses of the AKA budgetary process, and the Directors who committed them, from scrutiny (¶¶ 117-120, 134-147, 153-159, 177-179. 185-187, 255-259); and egregious acts of retaliation against fellow AKA sorors who sought to restore the integrity of AKA's management (¶¶ 71-86, 160-176, 236-253).

Unable to substantively dispute the adequacy of Plaintiffs' pleadings, Defendants attempt—as they do in connection with Plaintiffs' ultra vires claims—to dispute the veracity of Plaintiffs' allegations, demanding "documentary evidence that contains evidence of affirmative misconduct." Mot. at 12. For example, in response to highly specified allegations that Defendant McKinzie routinely used AKA funds to make personal purchases, Defendants argue that it is "mere conjecture" that the purchase of "items such as lingerie" are "personal in nature." Mot. at 10. Plaintiffs will stand by such inferences as being reasonable. Indeed, on a Rule 12(b)(6) motion, all reasonable inferences are made in the Plaintiffs' favor. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). This principle, however, appears to be a point of confusion for Defendants who expect Plaintiffs at the pleading stage to provide "conclusive evidence that the expenditures were personal in nature." Mot. at 10. "As a general proposition,

'[w]hether a director or officer has properly discharged his or her duty of loyalty is a question of fact to be determined in each case in view of all the circumstances.'" *Willens v. 2720 Wisconsin Ave. Co-op. Ass'n, Inc.*, 844 A.2d 1126, 1136 (D.C. 2004) (citing FLETCHER CYC. CORP. § 837.60, p. 186). Defendants, therefore, have provided no basis for dismissing Plaintiffs' breach of fiduciary duty claims.[8]

D. Plaintiffs Pled their Unjust Enrichment Claims Sufficiently Under Rule 8

Defendant McKinzie argues that Plaintiffs' unjust enrichment claim against her fails to state a claim under Rule 12(b)(6) on the basis that Plaintiffs did not plead around the business judgment rule under a heightened pleading standard employed in derivative suits like *Behradrezee v. Dashtara*, 910 A.2d 349 (D.C. 2006). McKinzie Mot. at 10-11. This argument must be rejected for the same reasons set forth above in reference to Plaintiffs' breach of fiduciary duty. Not only has the Court of Appeals said that Plaintiffs satisfied the pleading requirements of Rule 8, *see Daley*, 26 A.3d at 730, but it has made clear that this is not a derivative claim subject to the heightened pleading requirements like those imposed under Rule 23.1. Moreover, to the extent Defendant McKinzie wishes to assert the business judgment rule as a defense, it is her burden to do so, not Plaintiffs. It is, therefore, preposterous for the Defendant to seek judgment as a matter of law, at this stage of the litigation, on the basis of an

[8] Defendants also appear to be under the misapprehension that Directors of AKA do not have a fiduciary duty to AKA members. Mot. at 10. The D.C. Court of Appeals, however, has confirmed that Plaintiffs have "a direct claim" to enforce "the right to faithful representation." 26 A.3d at 720. *See also Willens v. 2720 Wisconsin Ave. Co-op. Ass'n, Inc.*, 844 A.2d 1126, 1136 (D.C.,2004) (Directors of a nonprofit corporation "owe[] the duties of a fiduciary to the corporation *and to its members*.") (emphasis added). Indeed, Defendant McKinzie concedes in her motion that Plaintiffs have sufficiently pleaded a direct claim against her for breach of fiduciary duty. McKinzie Mot. at 3, n.3. Any suggestion that Directors like Defendants Glover and James are exempt from this duty, premised either on their voting rights or otherwise, is unsupported and contradicted by Defendants' theory that that these Defendants "[i]n their capacity as directors ...are protected by the business judgment rule." Mot. at 9.

affirmative defense that the Defendants have not yet asserted. *In re The Brown Schools*, 368 B.R. 394, 401 (Bkrtcy. D. Del. 2007) ("The application of the business judgment rule is an affirmative defense, the determination of which is not proper at the motion to dismiss stage."). Plaintiffs have alleged a host of facts that, if true, would support a claim of unjust enrichment. Second Am. Compl. ¶¶ 62-70, 148-152, 181-183, 210-226. Therefore, Defendant McKinzie's motion to dismiss this claim should be rejected.

E. Plaintiffs Pled their Fraud Claim Sufficiently Under Rule 8

Defendant McKinzie makes the patently false assertion that "Plaintiffs' fraud allegations . . . merely consist[] of two sentences." McKinzie Mot. at 9. When considering the sufficiency of Plaintiffs' pleadings on a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-323 (2007) (citing 5B WRIGHT & MILLER § 1357 (3d ed. 2004 and Supp. 2007)). The allegations in the Second Amended Complaint, properly read together, and with the benefit of all reasonable inferences derived therefrom, plead a fraud claim under Rule 8.

"The essential elements of common law fraud are: (1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation *Bennet v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977). Plaintiffs allege that "on or about October 29, 2007, McKinzie knowingly and fraudulently, and with intent to deceive, misrepresented the resolutions of the Directorate with the intent to induce fraudulent cash disbursements to or for the benefit of Defendant McKinzie in

2007 totaling $345,000." Second Am. Compl. ¶ 210. Plaintiffs also allege that "McKinzie, knowingly and fraudulently, and with intent to deceive continued to misrepresent the resolutions of the Directorate with intent to induce additional fraudulent disbursements to or for the benefit of Defendant McKinzie totaling approximately $300,000 in 2008 and $300,000 in 2009." *Id.* ¶ 210. Many more specific factual allegations are set forth in ¶¶ 100-116, satisfying the requirement that a fraud be plead with particularity. Plaintiffs have identified the who, what and where, sufficient to put Defendants on notice of the claim in order to adequately respond.

Plaintiffs have also alleged many facts indicative of fraudulent acts committed by Defendant McKinzie, *see* Second Am. Compl. ¶¶ 62-70, 87-133, 148-152, including improper and unauthorized use of AKA funds for personal expenditures which were fraudulently represented to AKA as "gifts," or for "business purposes" or otherwise covered-up through questionable accounting practices. *See, e.g., id* ¶¶ 70, 148-152.

III. Plaintiffs Pled Claims for Defamation, False Light, and Intentional Infliction of Emotional Distress with Sufficiency Under Rule 8.

Defendants claim that the Second Amended Complaint "merely recite[s] black-letter elements" and "omit[s] any particularity" with regard to Plaintiffs' intentional tort claims. Mot. at 27. This is a startlingly false assertion given the detailed narrative provided in the Second Amended Complaint. The adequacy of Plaintiffs' pleadings is set forth for each intentional tort below.

A. Defamation

The elements of defamation are: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and

(4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Travelers Indem. Co. of Illinois v. United Food & Commercial Workers Intern. Union*, 770 A.2d 978, 989 (D.C. 2001). In pleading these elements, the D.C. Court of Appeals has held: "What is called for at the motion to dismiss stage is simply 'enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Williams v. Dist. Of Columbia*, 9 A.3d 484 (D.C. 2010) (quoting *Phillips v. County of Allegheny,* 515 F.3d 224, 234 (3d Cir. 2008); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007)). The Second Amended Complaint more than satisfies this standard. *See* Second Am. Compl. ¶¶ 71-86, 235-244.

Plaintiffs have alleged that "Defendants published and communicated false statements about Plaintiff Joy Elaine Daley regarding her service as AKA's North Atlantic Regional Director, including false statements about financial mismanagement and indiscretion." Second Am. Compl. ¶ 235. More specifically, it is alleged that "Defendant Barbara McKinzie urged AKA to audit Ms. Daley's past expense reporting, with the malicious intent of causing her financial harm, reputational harm, and to discredit her as an outspoken critic of McKinzie and other AKA leaders." *Id.* at ¶ 237. Defendant McKinzie concedes that she instigated the AKA audit. McKinzie Mot. at 16. The falsity of Defendant McKinzie's statements is evidenced, in part, by the fact that the New York court ruled Ms. Daley had not been a party to financial impropriety but rather had "fully complied" with AKA policy and that the sorority failed to produce "any evidence to demonstrate that any of . . . the disputed expenses were not incurred for the benefit of the Sorority." Second Am. Compl. ¶ 81, ¶ 239. At the pleading stage, however, the falsity of Defendants statements is assumed. *See Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001) ("when presented with a Rule 12(b)(6) motion to dismiss a defamation action,

we must assume, as the complaint alleges, the falsity of any express or implied factual statements."). Moreover, Defendants false, negative statements about Ms. Daley's employment as Regional Director and her financial dealings are *per se* defamatory and actionable without any showing of "special damages." *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 877-878 (D.C. 1998) ("One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect [her] fitness for the proper conduct of [her] lawful business, trade or profession . . . is subject to liability without proof of special harm.[9] Restatement (Second) of Torts § 573 (1977)."). Therefore, Plaintiffs have sufficiently pled an actionable, false defamatory statement.

Plaintiffs have also alleged facts in connection with Defendants' publication of these falsehoods. When Defendant McKinzie "convinced the sorority" (*i.e.*, members of the AKA Directorate at that time and Defendants in this case) to take action against Ms. Daley on false pretenses, *see* Second Am. Compl. ¶¶ 72-76, McKinzie published false statements to third parties. Plaintiffs have further alleged that Defendant "Sample-Oates and other Defendants . . . communicated the false allegation that Ms. Daley failed to follow AKA procedures and owed AKA large sums of money to various third parties, and ultimately the public, prior to, during, and after, [a] failed 2007 lawsuit against Ms. Daley." *Id.* ¶ 84. Moreover, it is fair—if not necessary—to infer from Plaintiffs allegations that other members of the AKA Directorate at that time (who are Defendants in this case) discussed and thus published the falsehoods at-issue in the course of taking administrative, and eventually legal, action against Ms. Daley in response to

[9] Plaintiffs have alleged that "Defendants' dissemination of falsehoods about Ms. Daley have caused her significant emotional distress, manifesting as hyper tension, difficulty sleeping and mental anguish." Second Am. Compl. ¶ 86. They have also "injure[d] Ms. Daley by impugning [her] professional reputation, by ascribing to her conduct that would adversely affect her fitness for the proper conduct of her profession and by damaging her reputation among and relationship with sorors, peers and colleagues." *Id.* ¶ 244.

them. Plaintiffs are not required to know and identify at the pleading stage, without the benefit of discovery, the exact identities of all the third parties within the AKA Directorate that Defendants McKinzie and Sample-Oates spoke to and who among them, in turn, published the same false statements to other third parties. The Court of Appeals made this very clear in *Williams v. District of Columbia*, 9 A.3d 484 (D.C. 2010). Plaintiffs, therefore, have adequately pled the existence of non-privileged[10] publication.

Finally, with regard to fault, Plaintiffs have unambiguously alleged that the falsehoods spread by Defendants McKinzie, Sample-Oates, and others among the Directorate-Defendants were retaliatory in their conception and disseminated "intentionally and maliciously . . . to discredit Ms. Daley." Second Am. Compl. ¶¶ 72-76. At a minimum, Plaintiffs allegations, if true, evidence negligence on behalf of Defendants who disseminated defamatory statements about Ms. Daley and took administrative and legal actions in furtherance of them, knowing they had no supporting evidence whatsoever. *Id.* ¶ 81. The Plaintiffs, therefore, have adequately pled their claim for defamation.[11]

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[10] Plaintiffs' publication allegations include falsehoods spread by Defendants prior to AKA's strike suit against Ms. Daley in New York. There is, therefore, no merit to Defendants' suggestion that Plaintiffs relied on privileged statements made for litigation. Mot. at 28. Nor is there merit to Defendant McKinzie's assertion that she is privileged to publish falsehoods as an employer, McKinzie Mot. at 15-16, especially given Plaintiffs' numerous, well pled allegations of malicious, retaliatory intent. Second Am. Compl. ¶ 72-73, 76, 237; *Smith v. District of Columbia*, 399 A.2d 213, 221 (D.C., 1979) (qualified privilege exists only "absence of malice").

[11] Defendant McKinzie suggests that Plaintiffs' defamation claim may be barred by a statute of limitations. McKinzie Mot. at 15. Plaintiffs dispute any such assertion and note that Defendants have the burden under Superior Ct. Civ. R. 8(c) of pleading a statute of limitation theory as an affirmative defense. WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1276 (2d ed. 2001). Plaintiffs have alleged that Defendants published defamatory remarks before, during, and after the period that is the focus of many of the allegations. Second Am. Compl. ¶ 84.

B. False Light

Defendants challenge the sufficiency of Plaintiffs' pleading of their false light claim on the basis that the Second Amended Complaint "fails to plead facts supporting publication of the alleged offensive statements." Mot. at 30. For the reasons already stated above in connection with Plaintiffs' defamation claim, publication has been alleged sufficiently under Rule 8(a). In short, Plaintiffs have alleged that Defendant McKinzie intentionally communicated false allegations of financial improprieties—supposedly committed by Ms. Daley during her tenure as Regional Director—to third parties, like her fellow AKA sorors. Second Am. Compl. ¶¶ 72-86. McKinzie, Sample-Oates, and other Defendants further discussed and disseminated (and thus published) these demonstrably false statements and imputations regarding Ms. Daley which, because of their falsity and implications for her integrity and reputation, placed her in a false light that would be offensive to a normal person. *Id.* These factual allegations, if true, establish a claim for false light. *Kitt v. Capital Concerns, Inc.*, 742 A.2d 856, 859 (D.C. 1999).

C. Intentional Infliction of Emotional Distress

Defendants argue that Plaintiffs fail to allege outrageous conduct on the part of Defendants sufficient to sustain their claim for Intentional Infliction of Emotional Distress. Mot. at 32. As set forth in the Second Amended Complaint, Defendants subjected Plaintiff Daley to a parade of malicious acts in retaliation for her attempts to challenge AKA leaders and address their gross mismanagement of the sorority. Second Am. Compl. ¶¶ 71-86, 250-253. The alleged facts that a group of AKA's Directorate, led by Defendant McKinzie, fabricated false accusations of financial impropriety for the sole purpose of humiliating Ms. Daley and suppressing her dissenting views on AKA management is one thing; but it is truly "outrageous" to additionally use these trumped-up charges as the pretext for harassing Ms. Daley with an

illegitimate inquisition into her AKA financial records, and to subject her to frivolous litigation. *Id.* In fact, Defendants' actions were so effective in their intent to harm Ms. Daley that her extreme emotional distress induced a condition of hypertension, for which she has had to seek medical attention, as well as a sleeping disorder. *Id.* at ¶ 253. These allegations, set forth in the Second Amended Complaint, if true, establish a claim for intentional infliction of emotional distress and thus satisfy the Rule 8(a) pleading standard.

IV. Plaintiffs' Pleadings Seeking an Accounting are Sufficient Under Rule 8

As Defendants point out, an accounting is an equitable remedy designed to provide a mechanism for those who do not otherwise have the means to determine whether funds in which they have an interest have been improperly diverted. Mot. at 34 (citing *Rosenak v. Poller*, 290 F.2d 748, 750 (D.C. Cir. 1961). "An equitable accounting is proper where a fiduciary relationship exists between the parties" and "where fraud or misrepresentation is alleged." *Greencort Condominium Ass'n v. Greencort Partners*, 2005 WL 2562909, *7 (Pa. Com. Pl., 2005) (citing *Rock v. Pyle*, 720 A.2d 137, 142 (Pa. Super.1998)); *see also Sergeants Benev. Ass'n Annuity Fund v. Renck*, 19 A.D.3d 107, 109 (N.Y. App. Div. 2005) ("the right to an accounting is premised on the existence of a confidential or fiduciary relationship").

The Second Amended Complaint clearly alleges that "[e]ach Directorate member has a fiduciary duty to uphold the Constitution and Bylaws of Defendant AKA and refrain from doing any harmful act to AKA or its members, which each defendant has failed to do." Second Am. Compl. ¶ 255. Plaintiffs set forth detailed allegations as to how "Defendants breached their fiduciary duties and duties of loyalty to Plaintiffs and AKA" by "grossly abus[ing] their leadership positions in the deposition of AKA assets," among other acts. *Id.* ¶¶ 256, 70, 87-133,

148-152. "Defendants have failed to disclose and misrepresented their disposition of AKA assets in many instances" and, both prior to, and in the context of this litigation, they have "ma[de] it impossible for Plaintiffs to know the amount of AKA assets that have been misappropriated or otherwise transferred without proper authority." ¶ 257-59. For example, "Plaintiffs have been denied access to the books, papers, and records of the defendant AKA Sorority," despite a "demand...to be allowed to inspect such books and records." *Id.* ¶ 179. An accounting in this case, therefore, is necessary, as well as equitable.

V. The Relief Sought in the Second Amended Complaint is Properly Pled

Finally, Defendants contend that "Plaintiffs fail to allege malice or similar ill will on the part of the Defendants and therefore their demand for punitive damages must be dismissed." Mot. at 36. Setting aside the fact that allegations of malice and ill-will are ubiquitous in the Second Amended Complaint (as discussed above with regard to the intentional tort claims), Plaintiffs' claims for relief are not susceptible to dismissal on a Rule 12(b)(6) motion. Defendants cite no authority to the contrary. Tellingly, they rely on a case in which the Court of Appeals was reviewing an *award* of punitive damages, not the plaintiff's prayer for relief. Mot. at 37 (citing *District of Columbia v. Hackson*, 810 A.2d 388, 396 (D.C. 2002)). Defendants' punitive damage argument, therefore, should be rejected.

Wheretofore, Plaintiffs request that Defendants' Joint Motion to Stay Discovery be denied.

Respectfully Submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOY ELAINE DALEY, ET AL. Plaintiffs, v. ALPHA KAPPA ALPHA SORORITY, INC. ET AL. Defendants.	Case No: 2009 CA 004456 B Judge Todd E. Edelman Civil Cal 1 Next Event: Initial Conference March 2, 2012

PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO STAY DISCOVERY

Plaintiffs, through counsel, respectfully oppose Defendants' Joint Motion to Stay Discovery pending resolution of Defendants' Motion to Dismiss.

Defendants seek to delay discovery in this case on the grounds that discovery might prove to have been unnecessary if the entire case is dismissed on the strength of Defendants' Motions to Dismiss, filed on January 12, 2012. *See* Mot. 2-4. It is clear, however, that Defendants' Motions to Dismiss are nothing more than a delay tactic—a fact made obvious by their frivolous recycling of the very same Rule 12(b)(6) arguments the D.C. Court of Appeals rejected on appeal from Defendants' 2009 Motion to Dismiss (September 1, 2009). Even if Defendants were to prevail in challenging the claims that are new to the Second Amended Complaint, at a bare minimum, the law of the case doctrine will bar Defendants' second Rule 12(b)(6) challenge to claims like Plaintiffs' breach of contract and ultra vires causes of action against AKA. *See Tompkins v. Washington Hosp. Ctr.*, 433 A.2d 1093, 1098 (D.C. 1981). This is because the Court of Appeals expressly upheld the sufficiency of Plaintiffs' pleadings. *Daley*

v. Alpha Kappa Alpha Sorority, Inc., 26 A.3d 723, 729 (D.C. 2011) (Plaintiffs "have clearly spelled out both the alleged wrongdoings committed with regard to an organization of which they are members and the requested relief").(citing Rule 8(a)(2), (3)).

Even if this Court were to grant Defendants' Motions to Dismiss unqualifiedly, Defendant McKinzie has moved only for partial dismissal, having conceded that Count I of the Second Amended Complaint "states a cause of action." McKinzie Mot. at 3, n.3. Accordingly, if we adopt Defendants' reasoning that discovery should proceed, or not proceed, based on the likelihood that this case will be dismissed in its entirety, Defendants Joint Motion should be denied.

Defendants request to delay discovery is unreasonable especially in light of the fact that Plaintiffs initiated this case in June 2009, and yet, it is still at the pleading stage—not only because of Defendants' first (ultimately unsuccessful) attempt to obtain dismissal, but also in large part because of their aggressive resistance to both Plaintiffs' first discovery requests (August 14, 2009) and requests to inspect AKA's books and records. Plaintiffs were forced to file a Motion to Compel (July 31, 2009) and to oppose a motion to stay discovery (September 4, 2009), much like the present one, that Defendants filed on October 1, 2009. In short, Defendants have made every possible effort to keep documents and witnesses material to Plaintiffs' claims out of reach for as long as possible. Plaintiffs are, therefore, understandably frustrated with the unreasonable delays occasioned by Defendants' efforts to obstruct discovery. This Joint Motion is an extension of those efforts and should be denied.

Wheretofore, Plaintiffs respectfully request that Defendants' Joint Motion to Stay Discovery be denied.

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