SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOY ELAINE DALEY, *et al.*	:	
	:	
v.	:	Case No. 2009 CA 004456 B
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ALPHA KAPPA ALPHA SORORITY, INC., *et al.*	:	
	:	

OPINION AND ORDER

The Court grants Plaintiffs' motion for summary judgment on their claim against defendant Alpha Kappa Alpha Sorority, Inc. ("AKA") for equitable relief for wrongful suspension and orders AKA to restore Plaintiffs' membership rights and privileges. The Court grants summary judgment for Defendants on all of Plaintiffs' other claims.

As the Court reviewed the pending summary judgment motions in advance of the settlement conference scheduled for May 23, 2013, it came to realize that it would resolve these motions in a way that disposes of all the claims in the case. The Court did not think it fair or even possible to conduct the settlement conference without disclosing its views about the pending motions, nor would it be appropriate to defer a ruling simply in the hope that uncertainty about the Court's rulings would make the parties more willing to settle. Although this Opinion and Order results in a final judgment on all claims, the Court believes that it is still worthwhile to proceed with the settlement conference. A settlement would avoid further costly and potentially protracted litigation in both this Court (concerning any motions for reconsideration) and the Court of Appeals. If any party takes the position that the settlement conference should be canceled, that party should attempt to gain the agreement of the other parties and file any appropriate motion by May 20, 2013.

I. BACKGROUND

Eight members of Alpha Kappa Alpha Sorority, Inc. ("AKA") filed this action against AKA and twenty-two individual defendants, all of whom were officers or directors of the sorority. For the sake of simplicity, the Court, unless otherwise indicated, uses the term "Defendants" to refer to all defendants except Barbara A. McKinzie, who is in a different posture than the other individual Defendants and is separately represented.

The Court's February 22, 2013 Order summarizes the allegations in the Second Amended Complaint ("SAC").

The parties have briefed eight motions for summary judgment: one by Plaintiffs; six by Defendants; and one by Ms. McKinzie. On May 10, 2013, the Court held a hearing at which it asked questions about Plaintiffs' motion concerning their wrongful suspension claim.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56(c), summary judgment shall be granted forthwith if the record shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995); *Smith v. Washington Metropolitan Area Transit Authority*, 631 A.2d 387, 390 (D.C. 1993). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Washington Metropolitan Area Transit Authority*, 959 A.2d 55, 58 (D.C. 2008) (quotations omitted). "A genuine issue of material fact exists if the record contains 'some significant probative evidence … so that a reasonable fact-finder would return a verdict for the non-moving party.'" *Brown v. 1301 K Street Limited Partnership*, 31 A.3d 902, 908 (D.C. 2011) (citation omitted). To determine which facts

are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court must consider the evidence in the light most favorable to the non-moving party and grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Avenue, LLC*, 962 A.2d 261, 263 (D.C. 2008); *Tucci v. District of Columbia*, 956 A.2d 684, 690 (D.C. 2008). The Court is required to "conduct an independent review of the record to determine whether any relevant factual issues exist by examining and taking into account the pleadings, depositions, and admissions along with any affidavits on file, construing such material in the light most favorable to the party opposing the motion." *District of Columbia v. Verizon Washington, DC Inc.*, 963 A.2d 1144, 1155 (D.C. 2009). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, are jury functions, not those of a judge" deciding a motion for summary judgment. *Anderson,* 477 U.S. at 255.

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Osbourne,* 667 A.2d at 1324. If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Bruno v. Western Union Financial Services, Inc.*, 973 A.2d 713, 716 (D.C. 2009) (quotations and citations omitted); *Osbourne*, 667 A.2d at 1324. Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt v. District of Columbia*, 2013

D.C. App. LEXIS 246, at *6 (D.C. May 2, 2013) (quotation and citation omitted); *Bruno*, 973 A.2d at 717 (non-moving party "must produce at least enough evidence to make out a prima facie case in support of his [or her] position"). "Mere conclusory allegations in response to a properly supported motion are insufficient to avoid summary judgment." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 951 (D.C. 2012) (citations omitted). Rather, the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Id.* at 950 (quotation and citation omitted). In addition, "[w]hile the jury may draw reasonable inferences from the evidence, it may not base its verdict on guess or speculation." *Id*. at 951; *Hunt*, 2013 D.C. App. LEXIS 213 at *6 (non-moving party's "mere speculations are insufficient to create a genuine issue of fact and thus withstand summary judgment") (quotation and citation omitted).

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment concerning their suspensions by AKA in August 2009, two months after they filed this lawsuit. The stated grounds for the Plaintiffs' suspensions relate to their participation in this lawsuit and in a website called www.friendsoftheweepingivy.com. *See* Pl. Ex. G; Pl. Ex. E (Sample-Oates Dep. 72:6-22). Plaintiffs' primary contention is that AKA violated its Constitution and Bylaws when it suspended them for actions that do not violate the Constitution or Bylaws. Plaintiffs also contend that Defendants violated § 15 of Article VI of the Bylaws because Plaintiffs did not get a hearing with the Directorate on their appeals of their suspensions "at the earliest appropriate time."

Plaintiffs contend in Count Five that AKA breached its contract with them by suspending them and denying a timely hearing because the Bylaws constitute a contract. The Court of

Appeals held in this case, "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 v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 731 (D.C. 2011) (quotation and citations omitted); *see* February 12, 2012 Order at 10. For purposes of this motion, the Court assumes that other governing documents like the Manual of Standard Procedure, which in turn includes the Soror Code of Ethics, comprise part of the contract between AKA and its members.

The only claim that relates to the suspensions and that the Court addresses is the breach of contract claim against AKA. Because AKA breached its contract with Plaintiffs and is obligated to reinstate them, it does not make any practical difference whether any individual Defendant breached any contractual or fiduciary duty to Plaintiffs, or whether Plaintiffs are entitled to any equitable relief against any individual Defendant (some of whom are no longer in a position to do anything to restore Plaintiffs' membership rights and privileges).[1] For the reasons discussed in Part V below, plaintiffs are not entitled to monetary damages relating to their suspensions from any individual Defendant – or from AKA.

[1] Plaintiffs' only claims for wrongful suspension against individual Defendants other than Ms. McKinzie are for breach of contract in Count Five. (With respect to Ms. McKinzie, Plaintiffs allege that her role in the suspensions constituted a breach of contract (Count One) and a breach of fiduciary duty (Count Four).) The only breach of fiduciary duty claim in Count Three against the other individual Defendants relating to the suspensions is that they breached their fiduciary duties by not adopting ethics recommendations in 2006 that would have prevented Ms. McKinzie from suspending dissenting members. SAC ¶ 193. Plaintiffs do not allege in Count Three that the Directorate Defendants breached a fiduciary duty by suspending Plaintiffs or denying them a hearing until this case was resolved.

A. Scope of disciplinary authority

Plaintiffs contend that AKA's Constitution and Bylaws authorize suspension of sorors only for violations of the Constitution or Bylaws, and that the two stated bases for their suspensions (relating to their participation in this lawsuit and the website) do not violate the Constitution or Bylaws. Defendants do not dispute that Plaintiffs were not suspended for violations of the Constitution or Bylaws, but they contend that AKA has authority to suspend members for violations of other governing documents, including violations of the Code of Ethics, and that Plaintiffs committed such violations.

There is a genuine dispute whether AKA's authority to suspend members is limited to violations of the Constitution or Bylaws. The same principle that applies to interpretation of contracts applies to interpretation of governance documents of a nonprofit corporation: "Summary judgment is appropriate where a contract is unambiguous since, absent such ambiguity, a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *See DLY-Adams Place, LLC v. Waste Management of Maryland, Inc.*, 2 A.3d 163, 166 (D.C. 2010) (citation omitted). "[A] contract is ambiguous if there is more than one interpretation that a reasonable person would ascribe to the contract, while viewing the contract in the context of the circumstances surrounding its making." *Parker v. U.S. Trust Company,* 30 A.3d 147, 150 (D.C. 2007) (brackets, quotations, and citation omitted). "Extrinsic evidence may include the circumstances before and contemporaneous with the making of the contract, all usages – habitual and customary practices – which either party knows or has reason to know, the circumstances surrounding the transaction and the course of conduct of the parties under the contract." *Tillery v. D.C. Contract Appeals Board*, 912 A.2d 1169, 1176-77 (D.C. 2006).

It also makes sense to apply in the context of contract interpretation the principles developed in the context of statutory construction concerning the maxim "*expressio unius est exclusio alterius*." This maxim "is useful where the context shows that the draftsmen's mention of one thing does really necessarily, or at least reasonably, imply the preclusion of alternatives." *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 427 (D.C. 2009) (quotations, ellipses, and citation omitted). However, the maxim "must be applied with a considerable measure of caution." *Id*.

AKA's Constitution and Bylaws do not make unambiguously clear that they set forth all possible grounds for suspension or other discipline. The fact that § 1 of Article VI of the Bylaws (Pl. Ex. H) requires penalties or sanctions to be imposed "when an individual member … violates her … obligations under the Constitution and Bylaws" does not necessarily support a negative inference that penalties or sanctions cannot be imposed for other misfeasance or nonfeasance. An organization may not be able to anticipate in its Constitution and Bylaws all types of conduct that may warrant suspension or expulsion. Even if a reasonable jury could conclude that the Bylaws' mention of punishment on one ground implies the preclusion of punishment on alternative grounds, the jury could also conclude that the ground specified in the Bylaws is not exhaustive, and that AKA has the authority to suspend members for actions that do not violate the Constitution or Bylaws but that do violate a provision of another governing document. A jury would have to determine, based on any extrinsic evidence that the parties may present at trial about the purpose and intent of the Constitution and Bylaws, whether and to what extent AKA can suspend members for actions that violate other governing documents.

B. Defendants' stated rationales for suspension

Neither the Court nor a jury need resolve the hypothetical scope of AKA's authority to suspend members because no reasonable jury could conclude that AKA's stated reasons for suspending these Plaintiffs were consistent with a reasonable interpretation of AKA's governing documents other than the Constitution and Bylaws, or that these documents gave Plaintiffs fair notice that their actions exposed them to suspension.

At the May 10 hearing, AKA expressly confirmed the Court's understanding of three important and related principles. First, AKA agrees that sorors can be suspended or otherwise disciplined only for cause. Second, AKA agrees that a soror can be suspended only for violating a rule contained in a governing document formally adopted by the sorority, such as the Manual of Standard Procedure. Third, AKA agrees that it must give members fair notice of any policy or procedure whose violation could lead to suspension, so that sorors could comply with the policy or procedure and avoid suspension.

None of the documents that AKA contends is a "governing" document can reasonably be interpreted to prohibit, or to give Plaintiffs fair notice that it prohibited, either the bringing of this lawsuit or participation in the website. Therefore, even if AKA can suspend a soror for a violation of a governing document other than the Constitution and Bylaws, its decision to suspend Plaintiffs was unjustified.[2]

[2] The Court's ruling makes it unnecessary to decide whether or how the business judgment rule applies to breach of contract claims against AKA. Individual directors and officers may be protected from liability if their decisions are based on reasonable but incorrect interpretations of contractual documents, but it does not necessarily follow that AKA's interpretation of those documents is entitled to deference in a breach of contract claim.

1. The lawsuit

AKA contends that it had the right to suspend Plaintiffs because they brought this lawsuit.

Defendants state that "[t]he substantive validity of Plaintiffs' allegations bears no relevance to Plaintiffs' suspensions, because Plaintiffs were suspended for the form – not the substance – of their concerns." Def. Opp. at 9 n.5. Thus, Defendants take the position that they could suspend Plaintiffs for filing this lawsuit even if Ms. McKinzie in fact used AKA as her personal piggy-bank, even if directors and officers knowingly acquiesced in gross misuse of AKA funds, and even if Defendants had rebuffed or squelched every attempt by any Plaintiff to resolve the issue within the sorority.

Because Defendants contend that the merits of the lawsuit are irrelevant to the suspensions, the question becomes: what about the "form" of the lawsuit would permit a reasonable jury to conclude that the suspensions were justified? Defendants offer two sets of answers.

a. Tone

Defendants argue that even if Plaintiffs' allegations about AKA and its leadership were true, their disrespectful and combative tone justified the suspensions. Paragraphs 3 and 5(a-b) of the Code of Ethics require any dissent or criticism to be reasonably respectful and constructive. *See also* Pl. Ex. G at DALEY002330 (letter to Ms. Daley suggesting that "destructive dissent" is grounds for punishment). However, the governing documents expressly authorize dissent and action to protect AKA from misappropriation, and Defendants do not explain how Plaintiffs crossed the line from respectful to disrespectful actions to protect the Sorority's financial interests.

The governing documents on which AKA relies expressly permit sorors to express their views about matters relating to the sorority, specifically including financial improprieties and mismanagement by the leadership. Section 17 of Article III of the Bylaws acknowledges that "individuals" may issue "statements, … opinions, and protests," so long as they do so in their name and not in AKA's name. *See* Pl. Ex. H. At least equally important, ¶ 7(g) of the Code of Ethics provides that sorors agree "[t]o maintain financial integrity in financial matters related to the Sorority by … [r]eporting the misappropriation of Chapter funds and/or property to the appropriate authority and taking the necessary action to protect or retrieve funds and/or property belonging to the Sorority." *See* Def. Ex. A at 73. Thus, the Code of Ethics permits, if not requires, a soror not only to report any misappropriation to "the appropriate authority," but also to take "necessary action" to protect the Sorority's financial interests.

Any attempt by a soror to carry out her duties under ¶ 7(g) of the Code of Ethics concerning misappropriation necessarily involves criticism of the people involved in the misappropriation, and there is no nice way to accuse a person of misappropriation or violation of a fiduciary duty. Defendants do not identify any provision of the Code of Ethics that gave Plaintiffs fair notice of how their allegations crossed the line between destructive or disrespectful dissent and constructive or respectful dissent in this context. Defendants also do not point to any evidence in the record that would permit a reasonable jury to conclude that Plaintiffs could have stated their allegations in a way that was materially more respectful or constructive.

Defendants invoke ¶ 5(f) of the Code of Ethics, which obligates sorors to "abid[e] by and actively support[] official Chapter and Sorority decisions even in the event of personal disagreement." Def. Opp. at 3 & 8; Stewart Dep. 163:1-12 ("They were suspended because they failed to officially support the decision of the Sorority, even in the event of personal

disagreement.") (Def. Ex. B). Because AKA states that "[t]he substantive validity of Plaintiffs' allegations bears no relevance to Plaintiffs' suspensions," Def. Opp. at 9 n.5, AKA contends that sorors have a duty to actively support actions with which they honestly, reasonably, and indeed *correctly* disagree.[3] Similarly, Defendants suggest that its leadership could suspend sorors for "unauthorized" criticism. *See* Def. Opp. at 3. However, no reasonable juror could interpret ¶ 5(f) to give directors and officers the power to muzzle critics by prohibiting them from questioning actions of the leadership or by requiring them to pre-clear dissenting comments that they would otherwise be permitted to make.

Interpreting ¶ 5(f) as broadly as AKA argues would prove far too much. It would nullify § 17 of Article III of the Bylaws, which expressly allows individual "protests." Moreover, AKA's interpretation would prohibit sorors from complying with ¶ 7(g) of the Code of Ethics and reporting a misappropriation of funds or taking "necessary action" if their initial report went nowhere within AKA. *See Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009) (a contract "must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms") (quotation and citation omitted). It would also render null the policy requiring binding arbitration of any dispute between a soror and AKA (*see* Section III.B.2.b below): whether a soror initiates a proceeding in a court or before an arbitrator, she is going outside AKA to challenge misconduct and not abiding by, much less actively supporting, a decision with which she personally disagrees. Defendants' interpretation of ¶ 5(f) would even preclude a candidate for an elected AKA office from criticizing the decisions of incumbents or trying to persuade sorors to vote for a new leadership team that would take a different approach.

[3] AKA also seems to read out of ¶ 5(f) its limitation to "official" decisions, because the decisions challenged by Plaintiffs other than the Directorate's approval of certain payments to Ms. McKinzie do not appear to be official.

Defendants suggest that Plaintiffs were suspended because they were not conciliatory. Def. Opp. Pl. MSJ Counterstatement of Disputed Material Facts ¶ 30. However, Defendants do not offer any admissible evidence demonstrating that they were willing to do anything to address Plaintiffs' concerns, much less that they offered even to discuss a compromise resolution and that Plaintiffs rebuffed them. If any individual Defendant was more conciliatory than any Plaintiff, Defendants do not offer any admissible evidence of that fact. Defendants' continued insistence that Plaintiffs had an overriding obligation under ¶ 5(f) of the Code of Ethics to actively support leadership decisions with which they disagreed suggests that Defendants equate conciliation with capitulation.

In short, Defendants offer no evidence that would permit a reasonable jury to conclude that AKA's governing documents categorically prohibited sorors from taking action, including filing a lawsuit, concerning misappropriation of AKA funds and other misconduct by AKA directors and officers, or provided fair notice that sorors gave up their right to file such a lawsuit. If AKA adopted a governing document that authorized directors and officers who misappropriated or knowingly allowed the misappropriation of hundreds of thousands of dollars to punish sorors who blew the whistle on their misconduct, one would expect the document to be clear on this point. Directors and officers may want dictatorial power to censor any soror who disagrees with any of their actions, but AKA's governing documents cannot reasonably be interpreted to give those directors and officers absolute immunity from either criticism or lawsuits, regardless of the validity of a soror's concerns.

Defendants suggest that the lawsuit justified the suspensions because the lawsuit "harms the image of AKA." Def. Opp. at 7. However, Defendants do not offer evidence that would permit a reasonable jury to conclude that any harm resulted from the form of the lawsuit, and not

from the mismanagement that gave rise to the lawsuit and from retaliation against the sorors who brought it. Some harm to AKA's image, or at least the leadership's image, is inherent in any lawsuit challenging misappropriation of over $1 million through abuse or knowing neglect of fiduciary duty by AKA's leaders. Defendants do not offer any evidence that would permit a reasonable jury to infer that the form of the lawsuit caused gratuitous or unnecessary harm to AKA's image, or that any changes in the wording of the allegations would have caused less harm to AKA's image. Nor do Defendants offer any evidence from which a reasonable jury could conclude that the membership intended to authorize the leadership to discipline sorors whose lawsuits against the sorority had collateral effects on the sorority's image, or that any governing document gave sorors fair notice of this basis for suspension.

At the May 10 hearing, AKA contended that the form of the lawsuit justified Plaintiffs' suspensions because filing the lawsuit violated the duty in the preamble to the Code of Ethics "to protect [AKA] from legal liability." AKA had no answer to the Court's inquiry about how AKA could square that contention with its position (discussed in the next section) that sorors may pursue claims against AKA in an arbitration before a neutral third party. Indeed, AKA's theory would mean that a soror could never seek damages from AKA in any forum on any basis, including discrimination based on sex or race, personal injury caused by the negligence of an AKA employee, or violations the terms of a gift or bequest to AKA. AKA's theory would mean that *any* lawsuit the Plaintiffs filed would have violated the Code of Ethics – no matter what form it took. However, AKA offered no evidence that would permit a reasonable jury to interpret this provision to deny any legal remedy to victims of wrongful conduct by AKA and its agents. Rather, the only reasonable way to interpret this provision is to require sorors not to take actions in their capacity as directors, officer, employees, or members that would subject AKA to

liability. Nor has AKA presented evidence from which a reasonable jury could conclude that this provision gave sorors fair notice that it stripped them of rights they would otherwise have to file a lawsuit against AKA.

b. Exhaustion

The second reason that AKA gave for suspending Plaintiffs involves a failure to exhaust allegedly longstanding remedies before filing this lawsuit. The letter suspending Ms. Daley states that "it has long been the policy of the Sorority to suspend any member who initiated and maintains litigation against the Sorority without having first exhausted her options under the Sorority's established policies and procedures." *See* Pl. Ex. G. Plaintiffs offer evidence that none of AKA's governing documents in June 2009 put them on notice of any exhaustion requirement and that it was not until July 2009 (a month after they filed their lawsuit) that the Directorate formally approved a litigation policy that required members to exhaust any options before they filed a lawsuit against the sorority. Even then, AKA did not amend any governing document to include any exhaustion requirement or otherwise provide notice of the policy to the membership.[4] The burden therefore shifted to Defendants to offer evidence that Plaintiffs knew or should have known that the policy at the time they filed their lawsuit required them to exhaust remedies, and Defendants have not carried their burden.

[4] Plaintiffs could reasonably rely on information that other sorors had sued AKA without exhausting any non-judicial remedies. *See* Pl. Motion at 10 (listing prior lawsuits). Defendants do not dispute that these other sorors did not exhaust any remedies and were not disciplined as a result. Ms. McKinzie asserted in a letter to Ms. Daley that those lawsuits were different because they related to sorors' rights as elected officers or employees. *See* Ex. G at DALEY002334. Even putting aside the fact that Defendants offer no admissible evidence to support the factual allegations in this letter, AKA does not cite any governing document that makes an exception for such lawsuits, and AKA's failure to suspend those sorors was, at a minimum, consistent with Plaintiffs' understanding the AKA had no exhaustion requirement.

The only specific pre-litigation option that Defendants identify is binding arbitration. AKA currently has a policy requiring sorors to go through arbitration before taking AKA to court: "The policy is: 'To reduce legal fees for both the Sorority and its members, it is required that prior to taking a suit related to Alpha Kappa Alpha to court, sorors *must* go through the AKA Arbitration process.'" Def. Ex. I. However, AKA's current president testified that AKA's mediation policy manual was published in 2010. Stewart Dep. 168:19-21 (Pl. Reply Ex. A). At the May 10 hearing, AKA confirmed that the record contains no admissible evidence that any policy requiring arbitration was communicated to the membership before 2010, or that any Plaintiff was aware of the arbitration requirement before the lawsuit was filed.[5] Plaintiffs therefore did not have notice of this policy when they filed this lawsuit in June 2009, and AKA's admission that it cannot suspend members for violating policies of which they do not have fair notice precludes a jury from finding that Plaintiffs' failure to go through binding arbitration justified their suspension.[6]

If AKA's policy requires sorors to exhaust any option other than arbitration, no governing document identifies, or puts sorors on fair notice of, that option. Just as the letter suspending Ms. Daley does not identify the options that she failed to exhaust (*see* Pl. Ex. G), Defendants offer no evidence that any governing document identified those options or that AKA

[5] Ms. Stewart testified that "it was communicated to the membership in 2008 that we were working on this" policy requiring arbitration. Stewart Dep. 168:21-23 (Pl. Reply Ex. A). But it is irrelevant whether members were aware in June 2009 that AKA was *considering* the policy. The only relevant fact is whether sorors were aware that AKA had *adopted* the policy (and incorporated it in a governing document).

[6] It is also telling that AKA never asked the Court to compel arbitration or stay this case pending arbitration. Moreover, the arbitration policy allows AKA as well as sorors to initiate arbitration if there is a dispute between it and a soror, and if AKA thought binding arbitration was required or even appropriate, it could have gone to the American Arbitration Association in mid-2009 to start the process. Defendants' letters to Plaintiffs about their suspensions did not explicitly identify their failure to arbitrate as a basis for the suspension, or advise them that they could end the suspensions by pursuing binding arbitration instead the lawsuit.

otherwise communicated them to the membership. More fundamentally, Defendants do not offer any admissible evidence that AKA incorporated in any governing document an exhaustion requirement before June 2009. When the Court asked AKA at the May 10 hearing to identify any option other than arbitration that Plaintiffs had to exhaust before filing their lawsuit, AKA responded that any soror has an opportunity to raise an issue during an "open mike" opportunity at the Boule. However, AKA admitted that no governing document requires any soror to do so or puts sorors on fair notice that they must raise their concerns with the Boule before filing a lawsuit.

In sum, Defendants offer no evidence that, at the time they filed their lawsuit, Plaintiffs had actual or constructive notice of any exhaustion requirement, or that AKA had adopted in a governing document a requirement that sorors had to exhaust specific options before filing a lawsuit against AKA.

2. The website

Defendants also contend that AKA had the right to suspend Plaintiffs because of their participation in the website. To the extent that AKA relied on a violation of the prohibition in § 4 of Article VI of the Bylaws of "unauthorized communication in the name of Alpha Kappa Alpha Sorority, Incorporated," no reasonable jury could conclude that this reliance was justified. Plaintiffs presented evidence that it was clear that the website was not in AKA's name. Sample-Oates Dep. 80:3-23 (Pl. Ex. E). Although this evidence shifted to Defendants the burden to create a genuine issue about this fact, they present no admissible evidence that any Plaintiff made any criticism in the website "in the name of Alpha Kappa Alpha Incorporated" – before or after the disclaimer was added to the website. *See* Pl. Mem. at 11-12; Def. Mem. at 3 & 7 n.2. The excerpts from the website provided by Defendants (*see* Def. Ex. D-H) make it obvious to any

visitor that participants were speaking against the actions of the sorority's leadership and that they were not speaking for it. Defendants complain about use of AKA's colors and the ivy leaf on the website, but they provide no evidence from which any reasonable jury could infer that this was not fair use of any trademark or that any visitor would reasonably conclude that the website was an official AKA website because of its use of AKA colors or an AKA symbol. Defendants also present no evidence that § 11 of Article XII of the Bylaws put sorors on fair notice that incidental use of AKA's colors or symbols would subject a soror to suspension.

Defendants cite no AKA document that regulates speech of sorors on websites differently from speech in face-to-face conversation. For the reasons discussed in Section III.B.1.a above, Defendant cite no AKA governing document that can reasonably be interpreted to prohibit, or provide fair notice that it prohibits, one soror from expressing a personal view that officers or directors breached their fiduciary duty or from soliciting financial help in taking action necessary to remedy misappropriation of AKA funds.

Defendants assert, "The FOTWI Website openly challenges Directorate decisions with a confrontational and derogatory tone, including allegations of 'inappropriate expenditures,' 'wrongful disciplinary measures,' and 'lack of transparency.'" Def. Statement ¶ 22. Paragraph 7(g) of the Code of Ethics obligates sorors to report and take action concerning "misappropriation," and the words on the website are comparable to that term. No jury could reasonably construe these terms used on the website as gratuitously confrontational or derogatory.[7]

[7] The current president of AKA testified, "some of the language in the letters that were written back and forth between Joy and to other members of the Directorate calling us spineless and cowards and puppets and just awful stuff." Stewart Dep. 165:5-9 (Def. Ex. B). Defendants offer no evidence that any such terms were used on the website, and there is no evidence that any individual Plaintiff (and not another disaffected soror) was responsible for any posting using

B. "Earliest appropriate time"

Plaintiffs contend that AKA violated § 15(b) of Article VI of the Bylaws by failing to schedule a hearing before the Directorate on their appeals "at the earliest appropriate time." The most obvious remedy for a failure to hold a timely hearing would be not reinstatement but an order to hold the hearing forthwith. However, the Court need not decide what remedy for the indefinite delay of the hearing is appropriate because it orders reinstatement on other grounds. The Court addresses the timing of the hearing for the sake of completeness.

AKA refused to hear the appeal while this case is pending. Def. Opp. Ex. M. Citing Ms. McKinzie's letter stating the Directorate was not prepared to hear the appeal while the case was pending, Defendants state, "the Supreme Basileus concluded that an appeal to the Directorate is inappropriate while Plaintiffs maintain a costly suit against AKA." Def. Opp. at 9.

If AKA's position were that the basis for the suspensions related to the substance – or lack of substance – of Plaintiffs' allegations, AKA's decision to wait to adjudicate the appeal until the case is resolved may have been reasonable. However, as explained above, Defendants contend that "[t]he substantive validity of Plaintiffs' allegations bears no relevance to Plaintiffs' suspensions, because Plaintiffs were suspended for the form – not the substance – of their concerns." Def. Opp. at 9 n.5. Whether the lawsuit is pending or not, and whether Plaintiffs win or lose, are therefore irrelevant to whether the suspensions were justified. Nothing that happened during the lawsuit would make the original suspensions based on the "form" of the lawsuit more or less justified.

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these terms – or that AKA's governing documents permit a soror to be disciplined for something another soror said. To the extent that Ms. Stewart was complaining about the use of these words in a letter, AKA did not suspend Ms. Daley or any other Plaintiff for anything they said in a letter.

The letter indefinitely postponing the hearing indicates that AKA would reinstate Plaintiffs if they reimburse AKA for the cost of the lawsuit. Def. Opp. Ex. M. However, even though that cost to AKA continues to increase as long as the lawsuit remains pending in the trial court or on appeal, that fact does not warrant a delay in the hearing because a hearing is not necessary to determine the amount of AKA's attorney fees and costs.

Any contested issue relating to suspension was ripe for decision as soon as AKA suspended Plaintiffs.[8]

IV. DIRECTOR AND OFFICER LIABILITY

Three of Defendants' motions involve the liability of the individual Defendants who were directors and officers: (1) the renewed motion for summary judgment involving the need for expert testimony relating to the exercise of business judgment; (2) the third summary judgment motion involving the business judgment rule; and (3) the sixth summary judgment motion concerning the "volunteer" defendants.[9]

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[8] Defendants complain that Plaintiffs did not present evidence that they timely filed their appeals from the Regional Directors' decisions to the Supreme Basileus. Def. Opp. at 10. Defendants cite Section 15(a) of Article VI of the Bylaws requiring suspended sorors to appeal to the Supreme Basileus no later than 60 days after a Regional Director suspended them, and Plaintiffs waited 62-82 days. Def. Opp. at 4. However, Plaintiffs had no reason in their summary judgment motion to anticipate this argument and present evidence to rebut it because Ms. McKinzie denied the appeals on substantive grounds, not for untimeliness. Moreover, Defendants do not contend that any delay prejudiced Ms. McKinzie's ability to adjudicate the appeal, and no claim of prejudice would be viable because her ability to address the purported grounds for the suspension (based on "form" rather than substance) would not be harmed by the passage of a few days or weeks after the 60-day deadline. Nor do Defendants offer evidence that when it adopted the Constitution and Bylaws, the membership intended to make the 60-day deadline jurisdictional (like the 30-day deadline for appealing judgments of this Court to the Court of Appeals).

[9] For simplicity, the Court uses the following shorthand citations for briefs and exhibits relating to Defendants' seven summary judgment motions: MSJ#2A refers to Defendants' renewed motion for summary judgment relating to expert testimony; MSJ#3 refers to Defendants' third summary judgment motion; and so on for MSJ#4, MSJ#5, and MSJ#7.

Plaintiffs' breach of fiduciary duty claims fall into two categories: breaches by directors; and breaches by officers. First, Plaintiffs allege that the members of the Directorate ("Directorate Defendants") breached their fiduciary duties by (1) voting to pay Ms. McKinzie $250,000 in compensation plus a $4,000/month pension stipend, and to purchase a $1 million life insurance policy on Ms. McKinzie's life, all "without requesting proper evidence that such compensation was true, fair or reasonable," (2) approving use of a $4 million dollar surplus without approval by the Boule, (3) "failing to require proper audits of AKA's cash disbursement records, permitting the expense account of Defendant McKinzie and Defendant [Betty Nolan] James to be used without control or proper evidence that the expenditures were made for the benefit of AKA and its members," and (4) not implementing the due process safeguards recommended in 2006 by the Fact-Finding Committee. SAC ¶¶ 189-91 & 193. Second, Plaintiffs allege that Defendant Glenda Glover and Ms. James breached their fiduciary duty as officers by (1) approving Ms. McKinzie's expense reports containing personal items, (2) failing to require proof that her expenses were for AKA's benefit, and (3) failing to provide complete and accurate financial information and statements to AKA members. SAC ¶ 186; *see* Pl. Opp. MSJ#2A at 9.

A. The business judgment rule

As the Court of Appeals stated in this case, "Courts are very deferential to the business judgment of officers and directors of a corporation in decisionmaking." *Daley*, 26 A.3d at 730. The business judgment rule establishes "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Armenian Assembly of America, Inc. v. Cafesjian*, 772 F. Supp. 2d 20, 104 (D.D.C. 2011) (citing *Behradrezaee v. Dashtara*, 910 A.2d

349, 361 (D.C. 2006)); *see Willens v. 2720 Wisconsin Ave. Cooperative Association, Inc*., 844 A.2d 1126, 1137 (D.C. 2004). "If any reasonable person would find that the corporation's decision made sense, the judicial inquiry ends." *Daley*, 26 A.3d at 730 (citing *In re Lear Corp. Shareholder Litigation*, 967 A.2d 640, 656 (Del. Ch. 2008)); *Armenian Assembly*, 772 F. Supp. 2d at 104 ("Where the rule applies, the business judgment of the fiduciary will be respected by the [fact-finder] absent an abuse of discretion.").[10]

In the terminology of *Blodgett v. The University Club*, 930 A.2d 210, 227 (D.C. 2007), deference to business judgments precludes juries from "second-guessing" discretionary decisions by directors and officers.[11] On the other hand, deference does not mean that directors and officers have *carte blanche* to engage in misconduct. Still, the question is not what the trier of fact would have done if the trier of fact were the officer or director, but rather whether the actual officer or director reasonably exercised her discretion. *See Armenian Assembly*, 772 F. Supp.

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[10] Generally, "the business judgment rule will not apply where there is a breach of the duty of loyalty." *Willens*, 844 A.2d at 1137 (quotation and citation omitted). In its February 22, 2013 Order at 11-12 n.3, the Court stated, "The plaintiffs' allegations against the movants do not appear to implicate this duty of loyalty because the plaintiffs do not allege that these defendants obtained any financial or other personal benefit from their alleged breaches of fiduciary duty." In the current round of summary judgment motions, Plaintiffs make only a conclusory assertion in a footnote that "by engaging in retaliatory, self-interested conduct, Defendants violated their duty of loyalty." Pl. Opp. MSJ#2A at 8 n.2. "The bare mention of this claim in a footnote … does not suffice to preserve the argument for [the Court's] consideration." *Robles v. United States*, 50 A.3d 490, 493 n.5 (D.C. 2012) (quotation and citation omitted). In any event, Plaintiffs offer no admissible evidence from which a jury could infer that any director or officer other than Ms. McKinzie obtained any financial or other personal benefit from their or Ms. McKinzie's alleged breaches of fiduciary duty.

[11] The parties argue about the relevance of *Blodgett*. Defendants argue that "pursuant to the holding in *Blodgett*, this Court should not second-guess Defendants' discretionary decisions." Def. Mem. MSJ#3 at 7. Plaintiffs assert that "*Blodgett* does not give Defendants a license to avoid responsibility for misappropriation, bad faith conduct, and blatant violations of AKA's governing documents." Pl. Opp. MSJ#2A at 2. Both of these statements are true – and entirely unhelpful. *See* Def. Reply MSJ#3 at 2 ("Defendants agree" that "fraud, misappropriation and self-dealing must not enjoy protection under *Blodgett*"). *Blodgett* is neither controlling nor irrelevant.

2d at 104. "[W]hether a director or officer has properly discharged his or her [fiduciary duty] is a question of fact to be determined in each case in view of all the circumstances." *Willens*, 844 A.2d at 1136 (quoting *Fletcher Cyclopedia of the Law of Corporations* § 837.60).[12]

More specifically for directors of nonprofit corporations like AKA, D.C. Code § 29-406.30 sets forth a standard of care:

> (a) Each member of the board of directors, when discharging the duties of a director, shall act: (1) In good faith; and (2) In a manner the director reasonably believes to be in the best interests of the nonprofit corporation.
>
> (b) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

Neither party disputes the Court's prior conclusion that § 29-406.30 provides a fair statement of the duties of AKA directors during the period at issue. *See* February 22 Order at 9 n.2. The "reasonable belief" standard in § 29-406.30 is functionally equivalent to the business judgment rule. *See Armenian Assembly*, 772 F. Supp. at 103 (directors of a nonprofit corporation have a fiduciary duty to exercise a "reasonable amount of diligence and care") (quotation and citation omitted).

B. Expert testimony

In its February 22, 2012 Order, the Court denied Defendants' initial motion for summary judgment on Plaintiffs' breach of fiduciary duty claims. In that motion, Defendants contended that Plaintiffs needed expert testimony to prove their claims that any Defendant breached her fiduciary duty as a director or officer of AKA. Plaintiffs have not identified any expert witness

[12] The duties that directors owe are fiduciary duties. *See Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1210 (D.C. 2002) (citing *Fletcher Cyclopedia of the Law of Corporations* § 844.10). Directors owe this duty not only to the corporation but also to its members. *Willens*, 844 A.2d at 1136.

on corporate governance or the duties of directors and officers of nonprofit corporations, and the time to designate experts has passed. The Court denied the prior motion because Defendants did not establish "that the alleged breaches are so ambiguous or subtle or complicated that a lay jury cannot determine without expert assistance whether any of the defendants breached their fiduciary duties." February 22 Order at 1. If Plaintiffs had any proverbial "smoking gun" showing that any other defendant knew that Ms. McKinzie was corrupt and knowingly facilitated her corrupt activities, expert testimony may be unnecessary. *See id*. at 18. On the other hand, expert testimony could be necessary for Plaintiffs to carry their burden to prove, for example, that a particular defendant did not become informed enough in connection with a decision-making function, or did not devote enough attention to an oversight function. *See id*. at 14. The Court stated, "It may be that this issue can be resolved before trial on a more fully developed record – either through a motion *in limine* by the plaintiffs or a renewed motion for partial summary by the defendants." *Id*. at 18.

Defendants have now renewed their motion. Although they have not developed the record as fully as they might have, they have offered enough evidence relating to the alleged breaches of fiduciary duty that the Court can determine whether or not expert testimony is required. For their part, Plaintiffs still have not offered any smoking gun or other evidence that would permit a reasonable jury to conclude without expert testimony that the director and officer Defendants breached their fiduciary duties to AKA. Indeed, on some issues, Plaintiffs have not offered any evidence or information that would permit a lay juror (or expert witness) to conclude that any individual Defendant violated her fiduciary duties.

The Court does not repeat here its discussion of the legal standard to determine whether Plaintiffs must provide expert testimony about the standard of care for members of the AKA

Directorate and whether they breached it. *See* February 22 Order 9-14. The main issue is whether the scope of the duties imposed on the AKA Directorate, and the application of the business judgment rule to those duties, are beyond the average juror's knowledge. If they are, Plaintiffs must offer expert testimony in order to overcome the presumption under the business judgment rule and establish that no reasonable person would find that the director's or officer's decision made sense.

1. Payments to Ms. McKinzie

Plaintiffs contend that the Directorate Defendants violated their duties by authorizing unjustified compensation to Ms. McKinzie and by failing to prevent Ms. McKinzie from misappropriating large amounts of money from AKA. These contentions generally involve Ms. McKinzie's four-year term as president from 2006 to 2010.[13]

a. Approval of Ms. McKinzie's compensation

Historically, AKA had not provided a salary for presidents, but § 9 of Article VII of the AKA Bylaws provides, "The Supreme Basileus shall be provided a stipend when funds are available in the budget." In July of 2007, Ms. McKinzie solicited members of the Directorate to support a $250,000 stipend for her. After a presentation on behalf of the Finance Committee

[13] Plaintiffs contend that when Ms. McKinzie served as treasurer before she became president, she got a kickback of over $20,000 from a travel consultant hired by AKA and that she had a conflict of interest when she recommended that AKA invest $1.6 million with Salomon Smith Barney, where Ms. McKinzie was a financial consultant and stood to receive increased compensation because of AKA's investment. SAC ¶¶ 66-68. AKA commissioned a Fact-Finding Committee to investigate these issues, and the Committee was unable to reach a definitive conclusion about whether Ms. McKinzie engaged in wrongdoing. Fact-Finding Committee Report (SAC Ex. K at 9). Defendants offer evidence that this investigation preceded the tenure of all or most of the Directorate Defendants and that they were not aware of the Fact-Finding Committee's report. *See* Def. Mem. MSJ#2A at 6. Plaintiffs do not offer admissible evidence from which a reasonable jury could infer that (1) these Defendants knew or should have known information that the Fact-Finding Committee failed to uncover and that definitively established that Ms. McKinzie engaged in wrongdoing, or (2) these Defendants otherwise violated their fiduciary duties by failing to pursue this issue during their tenure.

regarding the reasonableness of the compensation, and without Ms. McKinzie's presence or participation, the Directorate approved the $250,000 payment. After a presentation by the Human Resources Committee, the Directorate approved a $4,000/month stipend for Ms. McKinzie to be paid for four years, a purchase of a life insurance policy for Ms. McKinzie, and payments for Ms. McKinzie's retirement plan. *See* Def. Mem. MSJ#2A at 10 and Ex. F, G, H, I, & K.

The individual Defendants proffer admissible evidence that would permit a reasonable jury to conclude that their decision to approve the $250,000 and other payments to Ms. McKinzie was reasonable: the Directorate approved Ms. McKinzie's compensation after proponents presented information justifying their recommendation and after the recommendation was discussed. As a result, the burden under Rule 56 shifted to Plaintiffs to present admissible evidence that the Directorate Defendants knew that the compensation they approved was unjustified or excessive, or that no reasonable director could conclude based on the information presented to the Directorate that the compensation was fair and reasonable. The issue is not whether the evidence permits a reasonable jury to conclude that these payments were excessive or undeserved, but rather whether the evidence permits a reasonable jury to conclude that no conscientious director could conclude, based on the information she had, that the payments were appropriate. It is the Directorate, and not the jury, that has the authority to decide the amount of compensation that AKA's president should receive, and directors violate their duty to AKA only if they abuse their substantial discretion.

It would require expert testimony to establish that the information known to the Directorate Defendants would have caused any reasonable director to vote against the recommendation. Plaintiffs offer evidence that two directors disagreed with the Directorate's

decision: Ms. James objected to the payment and voted against it, and Defendant Evelyn Sample-Oates abstained based on her philosophy that officers should serve out of love of the organization. Pl. Opp. MSJ#2A Counterstatement of Material Facts at 5 ¶ 21; Def. Reply MSJ#2A Ex. A.[14] However, the fact that some members of the Directorate disagreed with the decision does not constitute proof that other members violated the business judgment rule by coming to a different conclusion. The mere fact that some directors objected to all or part of the payments does not mean that the other directors could not reasonably hold a different opinion. To the contrary, the fact that the Directorate acted only after hearing opposing points of view indicates that it acted responsibly. If a jury could find that directors breached their fiduciary duty based solely on evidence that one member of the board disagreed with the majority, the business judgment rule would effectively become a dead letter; this rule does not protect only unanimous decisions. Plaintiffs present no evidence that directors who voted for the proposal actually agreed with Ms. James or Ms. Sample-Oates and voted in favor anyway. In these circumstances, testimony from an expert on corporate governance and compensation of officers of nonprofit corporations is necessary.

According to Plaintiffs, "There was insufficient documentation upon which to base the Directorate's decision to approve the $250,000 payment to Defendant McKinzie." Pl. Opp. MSJ#2A Counterstatement of Material Facts at 11 ¶ 74. Here again, without expert testimony about minimum standards for directors making compensation decisions, a jury would be

[14] Plaintiffs generally lump all of the individual Defendants together, without addressing each one's specific knowledge and actions. Plaintiffs apparently seek to hold Ms. James and Ms. Sample-Oates responsible for decisions of the Directorate that they did not support, and Plaintiffs do not explain why they are suing Ms. Glover for failure to stop unauthorized payments to Ms. McKinzie even though she tried to do so. *See* pages 30-31 & 33 below.

speculating about how much documentation a reasonable director would require.[15] To the extent Plaintiffs suggest that the information on which the Directorate relied had to be in writing, they would have to provide expert testimony that no responsible director could rely on information provided only orally. Indeed, Plaintiffs do not explain how anyone – whether expert or lay – could reasonably conclude that information that is provided orally somehow becomes more reliable if it is also provided in writing. Plaintiffs present no evidence that any director understood AKA's Constitution or Bylaws, or any law, to require written confirmation of information orally provided – or indeed that AKA's Constitution or Bylaws or any statute or judicial decision actually required written documentation.

Plaintiffs contend that the Directorate relied on information that Ms. McKinzie negotiated a favorable settlement with the IRS that saved AKA almost $1 million, and that this information was wrong because Robert E. Brooks was the person who actually negotiated the deal. Pl. Opp. MSJ#2A at 12 & 14. However, Plaintiffs present no competent evidence that would permit a reasonable jury to conclude that the Directorate had information that conclusively established that Ms. McKinzie deserved no significant credit for the settlement, or that any director in fact believed that Ms. McKinzie deserved no significant credit. At a minimum, Plaintiffs would need a qualified expert to opine that no reasonable director could conclude on the basis of the information presented to the Directorate that Ms. McKinzie deserved significant credit. More fundamentally, the evidence proffered by Plaintiffs would not support a jury finding that the

[15] Plaintiffs argue that Ms. Sample-Oates believed that there was insufficient documentation to justify approval of the $250,000 payment. Pl. Opp. MSJ#2A at 13. The cited page of Ms. Sample-Oates' deposition does not support that argument: she testified only that there was no documentation, not that the documentation was inadequate or that she believed documentation was somehow required. Pl. Opp. MSJ#2A Ex. E at 46:4-19. Her abstention was in fact based on a philosophical difference with Section 9 of Article VII of the AKA Bylaws. Def. Reply MSJ#2A Ex. A.

Directorate Defendants had information irrefutably establishing that Ms. McKinzie did not deserve the compensation that the Directorate approved or that the Directorate Defendants otherwise abused their discretion to determine reasonable compensation for AKA officers.[16]

Notably, the Court of Appeals upheld dismissal of Plaintiffs' corporate waste claims under the business judgment rule. The Court of Appeals cited the principle that "[c]ourts are very deferential to the business judgment of officers and directors of a corporation in decision-making," and it continued, "a claim of waste, even where authorized, will be upheld only where a shareholder can show that the board irrationally squandered corporate assets." *Daley*, 26 A.3d at 730 (quotations and citation omitted). The Court of Appeals then held, "While the appellants make serious allegations about expenditures of the sorority's funds, it is difficult to see how the expenditures could be deemed corporate waste under the demanding standard set forth above." *Id*. It is equally difficult to see how the expenditures could be deemed a breach of fiduciary duty under the same demanding standard, with or without expert testimony: if Plaintiffs' claims under the ultra vires doctrine concerning Ms. McKinzie's compensation cannot survive the business judgment rule, neither can their breach of fiduciary duty claims challenging the same decision by the Directorate. The business judgment rule applies to both types of claims, regardless of their label. At a minimum, expert testimony would be needed to explain why these payments constituted an irrational squandering of AKA's assets.[17]

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[16] Plaintiffs contend that Ms. McKinzie provided false information to the Directorate on which the Directorate relied in approving her compensation. Original Complaint ¶¶ 144 & 153. That contention suggests that the cause of any problem with the approval of Ms. McKinzie's compensation was Ms. McKinzie, not any individual Directorate Defendant. Plaintiffs do not allege, much less present admissible evidence, that any director knew or should have known that this information was false and relied on it anyway.

[17] The Court of Appeals allowed Plaintiffs to proceed with their ultra vires claims about misuse of AKA funds only to the extent they were based on "the absence of Boule approval." *Daley*, 26 A.3d at 730. More specifically, Plaintiffs' ultra vires claim depends on a showing that

b. Misappropriation

Plaintiffs allege that the Directorate Defendants breached their fiduciary duties concerning other payments to Ms. McKinzie not because they approved them but because they failed to detect and stop payments that constituted misappropriation. According to Plaintiffs, the improper payments to Ms. McKinzie fell into three categories: (1) personal charges in her expense reports; (2) personal income taxes; and (3) compensation payments not approved by the Directorate. For purposes of this motion, the Court assumes that AKA made all of these payments and that all of them were unjustified.[18]

The Directorate Defendants offer admissible evidence that they did not know about these financial improprieties at the time they occurred, they relied on annual audits by an outside company and other controls to uncover any significant misappropriation of AKA funds, and they ultimately took action to recover money when they concluded that Ms. McKinzie misappropriated it.

AKA took actions "expressly prohibited by statute or by-law." *Id*. (quoting *Columbia Hospital for Women Foundation, Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 7 (D.D.C. 1997), *aff'd*, 159 F.3d 636 (1998)). For the reasons discussed in Section IV.C. below, Plaintiffs offer no evidence from which a reasonable jury could infer that the Bylaws required the next Boule to approve any decision the Directorate made when the Boule was not in session, and to the extent that Plaintiffs contend the principles of corporate governance require members of nonprofit corporations to approve spending decisions in these circumstances even if the corporation's governing documents do not require such approval, Plaintiffs would need expert testimony. Plaintiffs have not identified any statute that Defendants expressly violated. Defendants are therefore entitled to summary judgment on the ultra vires claim, which challenges the same actions covered by the breach of fiduciary duty claim.

[18] Plaintiffs contend, "Simply *nothing* in the AKA governing documents permits embezzlement and misappropriation …." Pl. Opp. at 8. That contention is unquestionably true, and indeed the Code of Ethics affirmatively requires sorors to protect the financial integrity of the sorority. The issue is whether the evidence permits a reasonable jury to conclude that any AKA director knew or should have known that Ms. McKinzie was embezzling or misappropriating money and then should have done more to stop and redress her wrongful actions.

Accordingly, the burden shifted to Plaintiffs to produce enough evidence to overcome the presumption under the business judgment rule that the directors acted reasonably and in good faith, and to support a jury verdict in their favor. *See Armenian Assembly*, 772 F. Supp. 2d at 104. Plaintiffs do not offer a smoking gun that proves that any individual Defendant *knew* that Ms. McKenzie was taking money from AKA to which she was not entitled – for example, a personal email in which a board member admitted that she knew Ms. McKinzie was stealing money but that she was afraid to stand up to Ms. McKinzie, or testimony that Ms. McKinzie admitted in a meeting of the Directorate, when confronted with an expense report, that she charged to her AKA credit card personal items that had no relationship to her duties as president. Because the alleged breaches are ambiguous or complicated enough (*see* February 22 Order at 1), Plaintiffs need expert testimony to prove that the information the Directorate Defendants had would convince any reasonable director that Ms. McKinzie received payments to which she was not entitled and that some kind of immediate response was necessary.

The closest thing to a "smoking gun" offered by Plaintiffs is evidence that on one occasion, Ms. Glover informed the Directorate that in her opinion, Ms. McKinzie charged to AKA some expenses that were clearly not business related, and that the Directorate did not then take any action. *See* Def. Mem. MSJ#2A at 5.[19] Plaintiffs do not offer evidence that Ms. Glover informed the Directorate of the information on which she based her opinion, or what specific information she provided. Plaintiffs also cite Ms. Glover's resignation letter dated November 1, 2008. Pl. Opp. MSJ#2A at 10-11 & Ex. C. However, that letter also does not state the basis for her opinion that Ms. McKinzie had engaged in "inappropriate financial actions" and "spending habits" or identify any information that Ms. Glover provided to the Board (including about the

[19] The evidence cited by Defendants does not support their characterization that the Directorate "resolved the issue in Defendant McKinzie's favor." Def. Mem. MSJ#2A at 12.

amount of any improper payments) that would require any responsible director to conclude that immediate action was required. The Directorate was not necessarily required to accept Ms. Glover's opinion. Plaintiffs would therefore need expert testimony to establish that no responsible director would have failed to follow up in these circumstances.

Defendants present admissible evidence that AKA paid Ms. McKinzie's personal income taxes with Directorate approval; and that Ms. McKinzie received $375,000 instead of the $250,000 stipend approved by the Directorate. However, Defendants present evidence that the Directorate was not aware until 2010 that AKA had paid Ms. McKinzie's personal taxes. *See* Def. Mem. MSJ#2A at 5. Moreover, Plaintiffs present no admissible evidence that any Directorate Defendant actually knew about either of these payments until 2011 or 2012 through later investigations. Plaintiffs therefore need expert testimony to prove that the Directorate Defendants should have known about these payments sooner than they did and therefore taken sooner the actions that they took later after additional investigation provided corroborating evidence.

At least without expert testimony, it would be speculative to conclude that an individual member of the Directorate could have determined on her own that Ms. McKinzie received any unauthorized payments. A team of professional auditors from Edward R. Kirby & Associates ("Kirby") spent weeks or months combing through credit card receipts, and Kirby then found only that several payments were questionable and that "the preliminary findings to date would warrant a much more detailed examination and analysis of the books and records of the AKA." SAC ¶¶ 148-50, Ex. L at 2 (Kirby Report Summary at 13). Expert testimony would be necessary to prove that volunteer directors who were not professional accountants or auditors could have ferreted out financial improprieties that annual audits by trained accountants did not uncover.

Expert testimony would also be necessary to prove that the Directorate should have acted more quickly than it did to investigate the matter once it learned of these possible payments and to make a demand on Ms. McKinzie to repay the money. The undisputed evidence shows that after the Directorate got initial allegations of financial improprieties, it obtained the results of audits by Kirby and Ragland and of a forensic audit by William Thullen in 2012. *See* May 1, 2013 Order. In these circumstances, expert testimony would be required to establish that any responsible director with the information known to the Directorate Defendants at the time would have acted more quickly than the Directorate did to get additional information and then to make a demand on Ms. McKinzie to repay the money. Put differently, expert testimony would be required to prove that no "reasonable person would find that the corporation's decision [to get more information before going after Ms. McKinzie] made sense." *See Daley*, 26 A.3d at 730. More specifically if it was unreasonable for any director to believe that AKA required more evidence of financial improprieties than Ms. Glover provided before it should sue Ms. McKinzie for repayment or even make a demand for repayment, expert testimony would be required to establish that fact.[20]

Plaintiffs allege that Ms. James, as Executive Director, failed to properly oversee Ms. McKinzie's expense accounts and that she approved Ms. McKinzie's expense reports even when they contained personal items. Ms. James offers admissible evidence that she was not aware of any improper payments, so the burden shifts to Plaintiffs to prove that Ms. James knew or should

[20] Plaintiffs contend that the Ragland report and other information that the Directorate obtained after Plaintiffs filed this action and before AKA made a demand on Ms. McKinzie demonstrate that the Director Defendants' actions were outside the business judgment rule. *See* Pl. Opp. MSJ#2A at 11 (citing Ragland report). The reasonableness of Defendants' actions or inaction is judged not in hindsight but based on information available to directors at the time they acted or failed to act. These subsequent events demonstrate that the Directorate continued to obtain information from independent experts, and that when the Directorate obtained additional information of misappropriations, it took action.

have known that Ms. McKinzie was seeking and obtaining payment of personal expenses and that Ms. James did nothing about it. Defendants have not proffered admissible evidence about any specific payment that Ms. James approved and that she knew was for a personal item. Plaintiffs would therefore need expert testimony to establish that Ms. James should have done more as Executive Director to oversee Ms. McKinzie's expense accounts, that she should have known that the annual audits were insufficient to detect major misappropriations, or that she could and should have done more than the auditors did to uncover possible financial improprieties or irregularities.

The same is true of Ms. Glover. Ms. Glover served as Treasurer and Chair of the Finance Committee until she resigned in 2008 because she felt that the Directorate did not respond appropriately to her concerns about Ms. McKinzie's "inappropriate financial actions." *See* Pl. Opp. MSJ#2A at 10-11 & Ex. C.[21] Plaintiffs do not offer evidence from which a reasonable jury could conclude that any responsible officer (a) would have done more than Ms. Glover did to monitor Ms. McKinzie's expenditures, (b) would not have relied, or would have relied less, on other employees and outside auditors to detect and report any misappropriation, (c) would have uncovered the problem sooner than Ms. Glover did, and/or (d) would have responded differently than Ms. Glover did when she got (unspecified) information that persuaded her that Ms. McKinzie was taking money for personal expenses. Accordingly, only expert testimony could establish that Ms. Glover breached her fiduciary duty.

[21] Membership on a committee may put a director "in a position to recognize red flags and accordingly investigate," but "general allegations, based simply on a defendant's membership on a board or committee, without more, do not trigger liability as a matter of law." *In re Coinstar Inc. Shareholder Derivative Litigation*, 2011 U.S. Dist. LEXIS 131817 (W.D. Wash. 2011) (quoting *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Lundgren*, 579 F. Supp. 2d 520, 532 (S.D.N.Y. 2008).

2. Failure to oversee AKA's finances

Plaintiffs contend that the Directorate Defendants breached their fiduciary duties because they knew or should have known that AKA's controls were inadequate and would allow major misappropriations to occur undetected. Directors may be liable for failing to ensure that the corporation has "information and reporting systems … that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance." *In re Caremark Int'l*, 698 A.2d 959, 970 (Del.1996).[22] Claims that directors allowed a bad situation to develop and continue and thereby violated a duty to be active monitors of corporate performance (without any conflict of interest or facts suggesting suspect motivation) are "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Id*. at 967; *see In re Bank of America Corporate Securities Litigation*, 2013 U.S. Dist. LEXIS 59783, at *37-38 (S.D.N.Y. 2013). Directors may be liable if they ignored "red flags" – that is, "facts showing that the board … was aware that [the corporation's] internal controls were inadequate." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006); *King v. Baldino*, 409 Fed. Appx. 535, 537 (3d Cir. 2010); *see In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 123 (Del. Ch. 2009) (quotation and citation omitted).

Plaintiffs do not offer evidence that the Directorate Defendants actually knew or believed, before the 2012 Ragland report, that AKA's internal controls were inadequate. In 2012, Ragland found that "[l]ack of management and governance oversight resulted in systemic

[22] These cases cited in the text arise in the context of whether the plaintiffs complied with the procedural prerequisites for filing a shareholder derivative action under Rule 23.1, but the principles apply in other contexts.

problems stemming from a lack of internal accounting control over cash, accounts payable, cash disbursements, and credit card uses," and that "[t]he auditors' reports were substandard, notwithstanding the significant role that management plays in the financial reporting." Pl. Opp. MSJ#2A Ex. D at 29. To the extent Ragland found in 2012 deficiencies in governance oversight, expert testimony would be required to establish that any responsible director should have understood even before Plaintiffs filed their lawsuit in June 2009 that (1) the Directorate needed to provide more oversight, (2) AKA's controls were inadequate and would allow major misappropriations to occur undetected, and (3) the Directorate could not reasonably rely on the annual audits by an independent accounting firm to detect any misappropriation of AKA funds or any failure in AKA's controls. Ragland's report in 2012 does not by itself establish that any Directorate Defendants knew or should have known *earlier* of "red flags" that clearly signaled a lack of internal accounting control or the substandard quality of auditors' reports.[23] Moreover, Ms. Stewart testified that she disagreed with Ragland's conclusions and debated with Ragland the validity of its conclusions. Def. Opp. Pl. MSJ Ex. J (Stewart Dep. 199:1-21). Plaintiffs do not provide evidence that would permit a lay jury to conclude that Ms. Stewart's views were preposterous on their face, nor do they present expert testimony that no reasonable director would share her views at the time.

Similarly, for the reasons discussed on pages 30-31 above, a jury could not conclude without expert testimony that Ms. Glover's allegations of inappropriate financial actions by Ms. McKinzie based on unspecified information were sufficient to put the Directorate on notice that controls were inadequate or a financial calamity was imminent.

[23] To the extent that Ragland criticizes management oversight, expert testimony would be needed to establish that Ms. James or Ms. Glover personally were the culprits. Ragland did not find that the lack of management oversight included a lack of oversight by Ms. James or Ms. Glover personally.

There is no genuine dispute that AKA obtained annual audits from independent accountants, and absent admissible evidence of information that put the Directorate on actual or constructive notice that the annual audits were incomplete or otherwise inadequate, expert testimony would be needed to demonstrate that the Directorate could not reasonably rely on the audits to detect any misappropriation of AKA funds or any failure in AKA's controls. The mere fact that an audit did not uncover a financial irregularity or impropriety does not support a conclusion that the audit was inadequate, much less that lay directors knew or should have known when they got the audit results that the audit was inadequate.

Plaintiffs contend that Defendants must establish "the extent to which AKA relied upon those professionals and the extent to which that reliance was reasonable." Pl. Opp. MSJ#2A Counterstatement of Undisputed Material Facts at 8 ¶ 43. However, the burden is on Plaintiffs to show either that Defendants did not rely on the audits or that their reliance was unreasonable – not the other way around. As the party with the burden of proof under the business judgment rule, the Plaintiffs must offer either factual evidence that Defendants did not rely at all on the audits, or expert testimony that AKA could not reasonably rely on these professionals, or at least not to the extent that it did.

For the same reasons, Plaintiffs would require expert testimony to support their contention that "the Directorate devoted little attention to their [sic] oversight functions" (even putting aside the lack of evidence about how much attention the Directorate Defendants actually devoted to these functions). *See* Pl. Opp. MSJ#2A at 10. To the extent Plaintiffs contend that the Directorate Defendants did not devote enough "time, thought and study" to comply with the Directorate Code of Conduct, they need expert testimony to establish how much "time, thought and study" a responsible director would devote – and that additional "time, thought and study"

would have caused the Directorate Defendants to realize that AKA's controls were inadequate. *See* Pl. Opp. MSJ#3 at 9; Pl. Opp. MSJ#3 Ex. C at 74. Without expert testimony, the jury would be left to speculate about whether the information the Directorate had was sufficient to cause a responsible director to reevaluate AKA's internal controls, what additional oversight was necessary, and how any additional oversight would have prevented any of the financial improprieties that occurred.[24]

Plaintiffs argue that expert testimony is unnecessary because AKA's Bylaws require the Treasurer to monitor all receipts and expenditures of the corporate office. *See* AKA Bylaws Article I, § 10. However, the Bylaws do not explain what type of monitoring the Treasurer should perform, so expert testimony is necessary to establish the minimum level and intensity of monitoring that any responsible treasurer should perform, and to show that additional monitoring would have led to the discovery and proof of misappropriations.

Plaintiffs contend that "[e]ven if the sorority's governing documents do not require each individual to review and understand AKA's financial statements, the law does." Pl. Opp. at 10. Here again, if minimum standards for directors required the Directorate Defendants to review and understand more of AKA's financial statements than they did, expert testimony would be required to establish this fact.

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[24] As far as the record reveals, the first time a serious issue arose about a substantial misappropriation by an AKA officer was during Ms. McKinzie's presidency when AKA had been in existence for almost a century since its incorporation in 1913. *See* SAC ¶ 12. Volunteers achieved leadership positions after they earned trust based on years of devoted and uncompensated service. If it was wholly unreasonable in these circumstances for directors and officers to see a minimal risk of misappropriation and to be reluctant to conclude that a fellow director and officer betrayed that trust, testimony of an expert on governance of nonprofit institutions would be necessary to establish that fact, and that the need for immediate improvements to AKA's monitoring system was indisputable. [25] To the extent that Ms. Daley and others did provide information to sorors about financial improprieties, AKA had no reason to do so.

Finally, Plaintiffs allege that Ms. James as Executive Director made investment purchasing decisions for AKA without the benefit of an independent investment advisor. SAC ¶¶ 134-35. However, Defendants presented evidence that AKA did retain Merrill Lynch as its financial advisor. Def. Mem. MSJ#3 at 8. In response, Plaintiffs do not present any contrary evidence, arguing only that the deposition on which Defendants rely is inconclusive. Pl. Opp. MSJ#2A Counterstatement of Undisputed Material Facts at 9 ¶ 45. At trial, the burden would be on Plaintiffs to present evidence that AKA did not retain Merrill Lynch, and the Court would expect Plaintiffs to present that evidence now. But even if the Court assumes that AKA did not retain Merrill Lynch, Plaintiffs would need expert testimony to prove that no responsible officer or director would rely on investment advice from the sources the Directorate had, and that it was foolhardy for AKA to proceed without an independent investment advisor given the size of its portfolio, the nature of its investments, and its other sources of investment advice.

The Court agrees with Plaintiffs that Defendants did not have "absolute discretion" about how to monitor, account for, and oversee AKA's money. Pl. Opp. MSJ#3 at 11. Contrary to Plaintiffs' assertion, Defendants do not claim "that the governing documents gave them the discretion to neglect their oversight duties of AKA's finances in a way that permitted ongoing fraud and embezzlement." *See* Pl. Opp. MSJ#3 at 9. However, directors and officers do have substantial discretion about how to do their jobs and, more specifically, to decide whether to review or strengthen their organization's internal controls and monitoring systems. The fact that financial improprieties occurred does not necessarily mean that any director or officer knew or should have known that AKA's information and reporting systems were inadequate. Plaintiffs must prove what a reasonably diligent and competent director would have done based on the

information available to the individual Defendants, and Plaintiffs need expert testimony to carry their burden.

In sum, without expert testimony, Plaintiffs cannot carry their heavy burden to prove that directors "utterly failed to implement any reporting or information system or controls," or that, "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *See Stone*, 911 A.2d at 370.

3. Failure to adopt ethics recommendations

Plaintiffs allege that members of the Directorate breached their fiduciary duty by failing to implement the due process safeguards recommended by the 2006 Fact-Finding Committee, which in turn allowed Ms. McKinzie to deprive dissenting members their right to an appeal of their suspensions and withdrawals of privileges. SAC ¶¶ 189, 191, 193 & 196; Pl. Opp. 11-12. The Fact-Finding Committee in 2006 recommended amendments to AKA's Constitution and Bylaws, including "Training for each Directorate in both Alpha Kappa Alpha's governing policies as well as those that legally govern all organizations similarly situated to ours," and new procedures for investigations of alleged infractions by sorors. *See id.* ¶¶ 156-57, Ex. K at 10. There is no genuine dispute that AKA did not implement these recommendations.

The Directorate Defendants offer evidence that they joined the Directorate after the Fact-Finding Committee made its recommendations, and they were not aware of those recommendations. Def. Mem. MSJ#2A at 6. Plaintiffs do not offer any contrary evidence. Expert testimony would be required to prove that the Directorate Defendants had a duty to inform themselves about recommendations made before they joined the Directorate.

Even if Plaintiffs could overcome their lack of evidence that each Directorate Defendant was aware of these recommendations and affirmatively decided not to implement them during her term, Plaintiffs would need expert testimony to prove that no responsible director could conclude that the existing provisions and procedures were adequate, or that their training for service on the Directorate was adequate. "Aspirational ideals of good corporate governance practices for boards of directors … are not required by the corporation law and do not define standards of liability" for directors. *Brehm v. Eisner*, 746 A.2d 244, 255-56 (Del. 2000); *see Clark v. District of Columbia,* 708 A.2d 632, 636 (D.C. 1997) (holding internal practices establish the standard of care "would create the perverse incentive for the [defendant] to write its internal operating procedures in such a manner as to impose minimal duties upon itself in order to limit civil liability rather than imposing … requirements upon its personnel that may far exceed those followed by comparable institutions."); *Snowder v. District of Columbia*, 949 A.2d 590, 603 (D.C. 2008) (internal "procedures may bear on the standard," but "expert testimony would still be required to establish the standard of care."). Thus, Plaintiffs need expert testimony to establish minimum standards for good corporate governance practices – practices that no reasonably competent and responsible fiduciary would fail to adopt. Plaintiffs offer no evidence that the due process safeguards and training in 2006-2010 were so grossly inadequate that no responsible director could find them adequate. It is not enough for Plaintiffs to offer evidence from which a jury could infer that AKA's policies and practices could or should have been better.

Moreover, Plaintiffs do not offer any evidence – expert or otherwise – from which a reasonable jury could find that the failure to implement the due process safeguards recommended

by the Fact-Finding Committee allowed Ms. McKinzie to deprive dissenting members their right to appeal their suspensions and withdrawals of privileges. SAC ¶¶ 189, 191, 193.

4. Failure to provide financial information

Plaintiffs allege that Ms. Glover and Ms. James breached their fiduciary duty as officers by failing to provide complete and accurate financial information and statements to AKA members. SAC ¶¶ 178-79 & 186; Pl. Opp. MSJ#3 at 12-13. Defendants provide admissible evidence that AKA's leadership did provide substantial information to the membership, including oral presentations by the Treasurer regarding AKA's finances, written reports relating to AKA's finances, and proposed budgets. *See* Def. Mem. MSJ#2A at 15 and Ex. P & Q. The burden is therefore on Plaintiffs to create a triable issue of fact for the jury. Plaintiffs do not present any admissible evidence that any of this information was false, much less that any Defendant knew or should have known that the information was false. Nor do Plaintiffs explain what additional information the Bylaws or minimum standards of corporate governance required the members to get – or how provision of that information would have prevented any of the financial improprieties alleged by Plaintiffs.[25]

At a minimum, expert testimony would be necessary to establish that any responsible officer would or should have known that the information available to the membership was inaccurate, misleading, or materially incomplete, and that members lacked information essential to make informed decisions about whether, for example, to approve proposed budgets.

C. Violation of the business judgment rule

In their third summary judgment motion, the individual Defendants contend that they are entitled to summary judgment because the undisputed facts establish they did not violate the

[25] To the extent that Ms. Daley and others did provide information to sorors about financial improprieties, AKA had no reason to do so.

business judgment rule with respect to any of the actions or failures to act challenged by Plaintiffs. The Court need not resolve most of these issues because, for the reasons explained in the preceding section, Plaintiffs cannot carry their burden without expert testimony. As the Court observed at several points in the preceding section, the evidence proffered by Plaintiffs on some issues would not permit a lay jury to conclude that the Directorate Defendants abused their discretion and failed to meet the minimum standards for any director or officer of a nonprofit corporation.

Plaintiffs' allegations that Defendants' violations of the Bylaws constitute an abuse of discretion do not necessarily require testimony by an expert on corporate governance. To the extent that the Bylaws are unambiguous, the jury does not need expert testimony to determine whether the individual Defendants violated them. To the extent that the Bylaws are ambiguous, extrinsic evidence about their purpose or consistent application may make expert testimony unnecessary. However, to the extent Plaintiffs contend that ambiguous Bylaws should be interpreted consistent with basic principles of corporate governance, Plaintiffs need expert testimony. *See* page 37 above.

Plaintiffs contend that the Directorate Defendants violated the Bylaws because they failed to submit the Directorate's decision about Ms. McKinzie's compensation when the Boule was not in session for approval at the next Boule. Pl. Opp. MSJ#3 at 8-9. There is no genuine dispute that the Boule was not in session when the Directorate approved the $250,000 payment to Ms. McKinzie. Def. Mem. MSJ#3 at 7. Plaintiffs assert, "Any decisions made by the Directorate when the Boule is not in session must be submitted for approval at the next Boule." Pl. Opp. MSJ#3 Counterstatement of Material Facts ¶ 58. To support this assertion, however, they do not cite any specific provision of the Constitution and Bylaws, and the Court could not

find any section of the Constitution or Bylaws that contains any such requirement. Section 1(a) of Article V of the Constitution states that "The Directorate shall have the power to conduct the business of the Sorority when the Boule is not in session," but this Section does not state that the Boule must later approve decisions made by the Directorate while the Boule was not in session. Nor does Section 2 of Article IV of the Constitution, which defines the "Powers of the Boule," require Boule approval of any of the Directorate's decisions, much less all of them. Section 1 of Article III of the Constitution makes the Boule the "policy making body" of AKA, not the executive body that implements the policies adopted by the Boule. Section 5 of Article I of the Bylaws, which enumerates the duties of the Directorate, does not require it to obtain Boule approval for any decision that implements a policy adopted by the Boule. The only approval relevant to this lawsuit that the Boule must make is of the budget of estimated income and expenditures presented by the Supreme Tamiouchos. *See* AKA Bylaws Article 1, § 10.

Plaintiffs do not offer extrinsic evidence that any ambiguous provision of the Bylaws was intended to require the Boule to give after-the-fact approval to any decision of the Directorate, such as evidence that the Directorate followed a consistent practice of requesting such approval from the next Boule. Nor do they offer expert testimony that minimum standards of corporate governance require boards of nonprofit corporations to submit for membership approval each of their decisions, or even certain types of decisions, and it is difficult to imagine how a large membership organization could function if its "policy making body" (which the Boule is under § 1 of Article III of the Constitution) also had to approve every decision made by the board of directors. Moreover, Plaintiffs do not offer evidence that if Defendants had submitted to the next Boule any of the decisions that they made while the Boule was not in session and that Plaintiffs

challenge, the Boule would have rejected them, or that the Directorate decided not to seek approval of any decision because it expected that the Boule would overrule that decision.

Plaintiffs allege that the Directorate Defendants breached their fiduciary duties by approving use of a $4 million dollar surplus without approval by the Boule. Pl. Opp. MSJ#2A at 9-11; *see* SAC ¶ 139 (the Directorate approved spending $4 million surplus and shifting several million dollars from cash and cash equivalents to investments without Boule approval). Although § 4 of Article 1 of the Bylaws requires the treasurer to present a budget to the Boule for approval, Plaintiffs cite no specific provision of the Constitution or Bylaws that prohibits the Directorate from making mid-course changes within the outlines of the budget unless there is an emergency or unless the next Boule ratifies the change. *See* Def. Mem. MSJ#2A at 9. Plaintiffs do not present admissible evidence that these payments conflicted with the budget approved by the Boule. Nor do Plaintiffs offer expert testimony that boards of nonprofit corporations cannot adjust spending during the course of the fiscal year within the outlines of a budget approved by the membership when the revenues or needs of the organization diverge from prior expectations, or that no responsible director could conclude that the board has flexibility to shift money in these circumstances. *See* Def. Opp. MSJ#2A Ex. D (Glover Dep. 206:17-207:6). In addition, Plaintiffs do not present any evidence that the Boule would not have approved the modifications of the budget if the Directorate had asked it to do so.

For these reasons, to the extent that Plaintiffs' breach of fiduciary claims do not require expert testimony, they have failed to provide admissible evidence from which a reasonable jury could conclude that individual Defendants violated the Constitution or Bylaws or otherwise violated their fiduciary duties.

D. Volunteer defendants

In their sixth motion for summary judgment, Defendants move for summary judgment on the claims against the "volunteer" Defendants – that is, the Defendants who served on the Directorate without compensation – on the ground that both the current and former acts governing nonprofit corporations makes them immune from liability for actions that they took in good faith and that they believed to be in the best interest of AKA. The Court's discussion of the business judgment rule in Sections IV.B and IV.C above effectively resolves the issue: Plaintiffs have not offered evidence, including expert testimony, that would support a jury finding that the Directorate Defendants acted in bad faith or abused their discretionary authority.[26]

V. DAMAGES

In their fifth motion for summary judgment, Defendants contend that Plaintiffs are not entitled to actual or punitive damages for any of their claims because they have not provided admissible evidence of any compensable injury to themselves.[27] The Court agrees.

A. Misconduct other than suspensions

Plaintiffs offered no evidence that any alleged financial improprieties or other alleged breaches of fiduciary duties by the individual Defendants, except the suspensions of Plaintiffs, injured them personally. Financial improprieties such as excessive compensation for Ms. McKinzie, may have upset them, but as explained in Section V.B below, a plaintiff may not

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[26] In their reply, the "volunteer" Defendants raise for the first time an argument that they are protected by the Federal Volunteer Protection Act, 42 U.S.C. § 14501 *et seq*. *See* Def. Reply MSJ#6 at 3. Because Defendants did not make this argument in their original motion and did not give Plaintiffs a chance to respond, the Court does not consider this argument.

[27] The Court of Appeals' decision in this case does not resolve whether Plaintiffs have raised a triable jury issue with respect to damages for injuries to themselves. The Court of Appeals held, "It was too early, at the Rule 12(b) stage, to conclude that any judicial relief was precluded" for any violation by AKA of its bylaws." *Daley*, 26 A.3d at 370. The Court of Appeals did not hold that Plaintiffs suffered any personal injury that is compensable through damages (or redressable through equitable relief), including with respect to their suspensions.

recover damages for emotional distress relating to any breach of contract or fiduciary duty. Equally important, Plaintiffs do not seek any damages (or equitable relief) on behalf of AKA for injury to the sorority. Thus, for example, to the extent that Ms. McKinzie obtained payments to which she was not entitled, AKA was damaged and has the right to sue her directly to recover those payments, but Plaintiffs do not seek damages in AKA's stead.[28]

B. Suspensions

Because the only conduct by Defendants that arguably damaged Plaintiffs individually was the improper suspensions of their memberships, the only issue with respect to damages is whether their suspensions caused any legally compensable damages. For the reasons explained below, Plaintiffs have not offered admissible evidence of any damages that are compensable as a matter of law, and they cannot recover punitive damages because they did not suffer compensable actual damages.

1. Actual damages

Plaintiffs have not presented evidence of any damages that are recoverable in their breach of contract claim concerning their wrongful suspension and delayed hearing. Plaintiffs' damages primarily involve the hurt, frustration, shame, humiliation, embarrassment, and anger that they felt as a result of their suspensions. As Plaintiffs acknowledge, "Generally, 'damages for mental anguish suffered by reason of breach [of a contract] are not recoverable ….'" Pl. Opp. MSJ#5 at

[28] Plaintiffs have not complied, or attempted to comply, with the procedural requirements of Rule 23.1 for derivative actions. One of these requirements is that the complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort." The original complaint contains no such allegation. The only allegation in the original complaint concerning any demand was that Plaintiffs demanded to inspect books and papers. Complaint ¶ 127. However, they did not allege that even this demand was made to the Directorate or to any comparable authority. Plaintiffs make no particularized allegations about any reason for their failure to make a demand.

12 (quoting *Howard University v. Baten*, 632 A.2d 389, 392 (D.C. 1993)). As discussed on page 5 & n.1 above, Plaintiffs' only claims relating to the suspensions against AKA and the individual Defendants other than Ms. McKinzie are for breach of contract, and Plaintiffs contend, consistent with *Daley*, 26 A.3d at 731, that that their suspensions constitute a breach of contract because the Bylaws constitute a contract. *See* Pl. Opp. MSJ#5 at 12-13. Because Plaintiffs' claims concerning their suspensions are rooted in contracts, Plaintiffs may not recover damages for emotional distress caused by their suspensions.

Although Plaintiffs do not allege that Defendants other than Ms. McKinzie breached their fiduciary duty by suspending them, Plaintiffs may not avoid the rule against recovery of emotional distress damages by recasting their breach of contract claims as tort claims based on breach of fiduciary duty. *See* Pl. Opp. at 6 ("Breach of fiduciary duty is a tort action.") (citing *Berriochoa Lopez v. United States*, 309 F. Supp. 2d 22, 26 n.7 (D.D.C. 2004)).[29] The District of Columbia recognizes "a duty to avoid negligent infliction of serious emotional distress," but due to the "historic skepticism of emotional distress claims," it allows recovery of damages for emotional distress for a tortious breach of that duty "only where the defendant has an obligation to care for the plaintiff's emotional well-being or the plaintiff's emotional well-being is necessarily implicated by the nature of the defendant's undertaking to or relationship with the plaintiff, and serious emotional distress is especially likely to be caused by the defendant's negligence." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 & 795 (D.C. 2011) (en

[29] *Cf. EDCare Management, Inc. v. Foley*, 2012 D.C. App. LEXIS 440, at *1 (D.C. July 13, 2012) ("a breach of contract claim may not be recast as a tort claim.") (citing *Choharis v. State Farm Fire & Casualty Co.*, 961 A.2d 1080 (D.C. 2008)); *Sherman v. Adoption Center of Washington, Inc.*, 741 A.2d 1031, 1036 n.11 (D.C. 1999) ("The same factors negating any liability for breach of contract apply equally to the tort-based claims of breach of fiduciary duty and wrongful adoption/malpractice, as any duties imposed under such theories could not, in the circumstances here, exceed that contained in the contract itself.").

banc). Here, unlike the doctor in *Hedgepeth*, AKA did not have an obligation to care for its members' emotional well-being, a member's emotional well-being is not necessarily implicated by the nature of her relationship with a voluntary nonprofit corporation, and suspension from a voluntary organization is not especially likely to cause serious emotional distress. Although "the existence of a contract can be evidence of the special relationship or undertaking that may give rise to tort liability," "whether a claim for emotional distress damages will be cognizable in tort … will depend on whether the plaintiff can prove the elements of the tort of negligent infliction of emotional distress" set out" in *Hedgepeth*. *Id.* at 802 n.18. Ms. Daley and the other Plaintiffs cannot prove the elements of the tort of negligent infliction of emotional distress set out in *Hedgepeth*.

Damages for loss of income relating to loss of any economic benefits of membership would be recoverable, but Plaintiffs do not claim that that they lost money because they were unable to make or maintain connections that would have helped them in their businesses or professions.

Because the law protects an individual's interest in her reputation, damages for injury to reputation are different than damages for emotional distress. *See Hedgepeth*, 22 A.3d at 809-10 ("We routinely allow recovery for pain and suffering as 'parasitic' damages when the plaintiff's emotional distress is caused by the defendant's invasion of another legally-protected interest, such as freedom from physical injury.").[30] However, damages for injury to reputation are ordinarily not recoverable as a matter of law in breach of contract cases. *Flynn v. AK Peters, Ltd.*, 377 F.3d 13, 22 (1st Cir. 2004) ("damages for injury to reputation are usually not available in contract actions" unless "plaintiffs have provided evidence of specific harm that is

[30] The Court dismissed the defamation claim in its February 29, 2012 Order.

proximately related to their reputational injury"); *Rice v. Community Health Ass'n*, 203 F.3d 283, 288 (4th Cir. 2000) ("Courts have universally rejected claims for damages to reputation in breach of contract actions reasoning that such damages are too speculative and could not reasonably be presumed to have been contemplated by the parties when they formed the contract.") (collecting cases); *Ainbinder v. Money Center Financial Group, Inc.*, 2013 U.S. Dist. LEXIS 47103, at *33-34 (E.D.N.Y. Feb. 28, 2013) ("In general, damages to reputation are not recoverable in a breach of contract action under New York law," and a party may recover them only if it "can prove specific business opportunities lost as a result of its diminished reputation") (quotations and citations omitted); *Rapacki v. Chase Home Financial LLC*, 797 F. Supp. 2d 1085, 1091 (D. Or. 2011) ("A claim asserting a breach of the implied covenant of good faith and fair dealing is a contract claim under which reputation, emotional distress, and punitive damages are unavailable."); *Stancil v. Mergenthaler Linotype Co.*, 589 F. Supp. 78, 85 (D. Hawaii 1984) ("this Court adopts the majority view that damages for injury to reputation are not properly awardable in a breach of contract suit."); *O'Leary v. Sterling Extruder Corp.*, 533 F. Supp. 1205, 1209-10 (D. Wis. 1982) ("The courts seem to be in general agreement that damages for injury to reputation are not properly awardable in a breach of contract suit.") (collecting cases). The Court is not aware of any cases in this jurisdiction rejecting this accepted principle.

Here, Plaintiffs have not alleged, much less offered any evidence, that any injury to their reputation caused them any economic loss – for example, that their earning power was reduced because people were not willing to do business with people whose AKA memberships have been suspended. *See Flynn*, 377 F.3d at 22. Those few Plaintiffs who mention injury to their reputations come back to the embarrassment and other emotional hurt they suffer because sorors view them differently than they previously did. *See* Pl. Opp. MSJ#5 at 10 nn.15 & 17 & 11

nn.18-20. Allowing recovery of damages for injury to reputation in the circumstances of this case would create an exception that would effectively swallow the rule in the District of Columbia that plaintiffs may not recover damages for emotional distress caused by a breach of contract.[31]

2. Punitive damages

As Plaintiffs acknowledge, they cannot recover punitive damages unless they suffer compensable actual damages. *See* Pl. Opp. MSJ#5 at 4 & 11. Because Plaintiffs may not recover even nominal compensatory damages, they are not entitled to any punitive damages.

Moreover, even if Defendants were liable for actual damages for their breach of contract in wrongfully suspending Plaintiffs (and they are not liable for the reasons discussed in the preceding section), Defendants would not be liable for punitive damages for the breach because "[p]unitive damages will not lie for breach of contract, even if it is proven that the breach is willful, wanton, or malicious." *Oliver v. Mustafa*, 929 A.2d 873, 879 n.3 (D.C. 2007) (quoting *Bernstein v. Fernandez*, 649 A.2d 1064, 1073 (D.C. 1991)). "The only exception to that rule recognized in the District of Columbia is that where the alleged breach of contract merges with, and assumes the character of, a willful tort, punitive damages will be available." *Oliver*, 929 A.2d at 879 n.3. However, that exception does not apply in this case.

[31] Plaintiffs identify no facts or circumstances that warrant any exception to the "American Rule" that each party generally bears it own litigation costs. *See* Pl. Opp. MSJ#5 at 3 & n.4. Plaintiffs acknowledge that they may not recover attorney fees as part of damages in a jury verdict. *Id.* Damages relating to Plaintiffs' suspensions do not implicate the common-fund doctrine because they do not benefit other members of AKA.

VI. RES JUDICATA

In their fourth motion for summary judgment, Defendants contend that Ms. Daley's (and only Ms. Daley's) claims are barred under the doctrine of res judicata because they arise from the same cause of action as *AKA v. Daley*. AKA brought that case against Ms. Daley in a New York state court in 2007, alleging that she held herself out as an officer of the sorority after her term expired, and that she failed to account for about $30,000 of an advance. In one paragraph of an affidavit in support of her motion for summary judgment, Ms. Daley discussed the background of the case, and stated that she was convinced that AKA commenced the action in retaliation because she spoke out about Ms. McKinzie's financial improprieties. Def. Ex. C ¶ 4. Most of the affidavit addressed the substance of the allegations concerning her use of stationery and accounting for advances. The New York court granted summary judgment to Ms. Daley because AKA did not submit any evidence concerning the claim about use of stationery and AKA failed to issue a standard for documentation of expenses. Def. Ex. E at 4-6. The order does not mention the retaliation claim and denied the request for sanctions "because it cannot be said that the plaintiff's claims are frivolous or completely without merit." *Id*. at 6. The day after the New York court granted Ms. Daley' motion, she and the other plaintiffs filed this lawsuit.

Res judicata principles did not require Ms. Daley to counterclaim against AKA in the New York case regarding alleged misconduct by Ms. McKinzie and other AKA officers when AKA chose to sue Ms. Daley in New York for conduct that is entirely separate from the conduct of AKA that Ms. Daley criticized. The general rule is that failure to assert a permissive (vs. compulsory) counterclaim does not preclude the party from asserting that claim in a later case: "The fact that [the claim] might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the

prior judgment res judicata as respects it." *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 671 (1944). "Not only is the permissive counterclaim rule deliberately designed to give a choice between counterclaim and independent action, but most permissive counterclaims are sufficiently unrelated to the original claim that ordinary res judicata principles would suggest the same result." *See* C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4414 at 323-24 (2d ed. 2002). Here, Ms. Daley made relatively brief comments about vindictiveness in an affidavit that focused on AKA's claims against her, and she never contended that Ms. McKinzie's alleged actions somehow allowed her to misrepresent herself as a current officer or to misappropriate money from AKA in the form of advances.

The Court need not decide any conflict of laws issue because both the District of Columbia and New York follow this general rule. In *Henderson v. Snider Bros., Inc.*, 439 A.2d 481, 486 (D.C. 1981) (en banc), the Court of Appeals discussed *Mercoid*, explaining its holding that when "the counterclaim raised in the second suit was an independent claim against the plaintiff and unrelated to the matter raised in the original cause of action," the defendant "was not bound to raise it in the earlier action and that it was not now barred." *Id*. at 486. *Henderson* held that a party's failure to raise as a defense to a foreclosure action a contention that the other party fraudulently induced it to purchase the property barred the party from prosecuting a subsequent action for fraud because "the defense of fraud is not an independent claim and cannot be considered as being separate and distinct from the underlying agreement and the obligation sued upon." *Id*. Here, Ms. Daley's retaliation argument in the New York case was independent

of whether she misrepresented her status as an officer of AKA or committed any impropriety in connection with advances from AKA.[32]

The governing principles in New York are the same. "Where a defendant may interpose a claim as a counterclaim but fails to do so, the doctrine of res judicata in the sense of claim preclusion does not apply to prevent him from subsequently maintaining an action on that claim." *Pace v. Perk*, 81 A.D.2d 444,460 (N.Y. App. Div. 1981) (citing Restatement (Second) of Judgments 2d) (footnote omitted); *see RA Global Services v. Avicenna Overseas Corp.*, 843 F. Supp. 2d 386, 390 (S.D.N.Y. 2012) (following *Pace*).

Because Ms. Daley's claim against AKA would have been a permissive (not compulsory) counterclaim in the New York action, her failure to assert it in that case does not bar her from asserting it here.

Ms. Daley argues that AKA waived any res judicata defense because it did not include this defense in its answer. *See Goldkind v. Snider Bros., Inc.*, 467 A.2d 468, 471 (D.C. 1983) ("failure to raise affirmative defenses [under Rule 8(c)] constitutes a waiver of those defenses"). Rule 15(a) provides that leave to amend an answer "shall be freely given when justice so requires." "Reasons that may justify denying leave to amend" include "futility of amendment." *Miller-McGee v. Washington Hospital Center*, 920 A.2d 430, 436 (D.C. 2007) (quotation and citation omitted). It makes no practical difference whether the Court grants leave to amend and

[32] This analysis is consistent with the case on which Defendants primarily rely. *See* Def. Mem. at 5-7. *Faulkner v. Government Employees Ins. Co.*, 618 A.2d 181, 183 (D.C. 1992), observed that "[r]es judicata does not bar litigation of an issue merely because it is in some remote way related to an issue litigated in a prior action," and it is only "[i]f the two issues arise out of the same cause of action [that] the subsequent claim will be barred if the issue was actually litigated or if it could have been litigated in the prior proceeding." Here, AKA's claim against Ms. Daley in the New York case, and Ms. Daley's claim against AKA in this case, do not arise out of the same cause of action. Nor do they share a "common nucleus of facts." *See id*.

rejects the res judicata defense on the merits, or denies leave to add this defense because it is futile.[33]

VII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In their seventh motion for summary judgment, Defendants argue that there is no genuine dispute that their alleged conduct was not outrageous enough, and that Ms. Daley's emotional distress was not severe enough, to satisfy two elements of the tort of intentional infliction of emotional distress.[34] No reasonable jury could infer from the admissible evidence that Ms. Daley has satisfied these two elements of the tort with respect to her suspension.

"In order to establish a prima facie case of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Williams v. District of Columbia*, 9 A.3d 484, 493-94 (D.C. 2010) (quotation and citation omitted); *Howard University v. Best*, 484 A.2d 958, 986 (D.C. 1984). "Our case law establishes strict tests for the elements of intentional infliction of emotional distress." *Orberg v. Goldman Sachs Group*, slip op. at 7-8 (D.C. April 11, 2013).

"The concept of 'outrageousness' is central to the tort," and "the requirement of outrageousness is not an easy one to meet." *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (quoting *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 (D.C. 1994)), *amended on other grounds*, 720 A.2d 1152 (D.C. 1998); *Orberg*, slip op. at 7-8. "To establish the required degree of outrageousness … , the plaintiff must allege conduct so outrageous in character, and so extreme

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[33] The Court's conclusion makes it unnecessary to address Plaintiffs' other arguments against granting leave to amend, as well as Defendants' arguments concerning statutes of limitations in New York. *See* Def. Reply at 2-3.

[34] The Court previously dismissed the claims of all the other Plaintiffs for intentional infliction of emotional distress in its February 29, 2012 Order.

in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Wood v. Neuman*, 979 A.2d 64, 77 (D.C. 2009) (quotation and citation omitted); *see Larijani v. Georgetown University*, 791 A.2d 41, 44 (D.C. 2002) (quoting and citing *Homan* and *Drejza*). "Liability will not be imposed for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *District of Columbia v. Tulin*, 994 A.2d 788, 800 (D.C. 2010) (quotation and citation omitted). "Actions which violate public policy may constitute outrageous conduct sufficient to state a cause of action for infliction of emotional distress." *Best*, 484 A.2d at 986 (citation omitted). For example, "[c]reation of a hostile work environment by racial or sexual harassment [in violation of the D.C. Human Rights Act] may, upon sufficient evidence, constitute a prima facie case of intentional infliction of emotional distress." *Id*. (citation omitted). "It is for the trial court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery …." *Id*. at 985 (citation omitted).

Case law also sets "a high standard" for the element of severe emotional distress, "requiring emotional distress of so acute a nature that harmful physical consequences might be not unlikely to result." *Ortberg*, slip op. at 10 (quotation and citation omitted). "Recovery is not allowed merely because conduct causes mental distress." *Id.* "A person may intentionally inflict some worry and concern, so long as he or she refrains from conduct intended or likely to cause physical illness." *Id*. (quotation, citation, and brackets omitted). "To recover, the plaintiff must demonstrate an intent on the part of the alleged tortfeasor to cause a disturbance in the plaintiff's emotional tranquility so acute that harmful physical consequences might result." *Wood*, 979 A.2d at 77 (quotation, brackets, and citation omitted).

A. Outrageousness

False accusations of sexual harassment or embezzlement by an employee are not enough to constitute outrageousness conduct. *Kerrigan v. Britches*, 705 A.2d 624, 628 (D.C. 1997); *Williams v. District of Columbia*, 9 A.3d 484, 494 (D.C. 2010). Ms. Daley cites *Best*, 484 A.2d at 986. Pl. Opp. MSJ#7 at 6. Defendants' alleged misconduct here is analogous not to sexual harassment of an employee by her supervisor that violates the D.C. Human Rights Act and that makes out a prima facie case of intentional infliction of emotional distress, but to employer-employee conflicts involving interference with her responsibilities and disagreement about administration that does not constitute a statutory violation or establish a prima facie case of intentional infliction of emotional distress. *Compare Best*, 484 A.2d at 985-86, *with id*. at 986-87. Although Ms. Daley was not an employee of AKA, her differences with the then-leadership began when she served as AKA's North Atlantic Regional Director and interacted with Ms. McKinzie and others who held other leadership positions within the organization. *See* SAC ¶¶ 71-73; *but see* Pl. Opp. MSJ#7 at 9-10. For the reasons explained in Part III above, Plaintiffs' suspensions were unjustified, and a reasonable jury could conclude that the motivations of the individual Defendants for the suspensions and denial of a hearing were retaliatory or even vindictive. But in the context of dispute among members of a voluntary organization, a reasonable jury could not conclude that Ms. McKinzie's acts, individually or collectively, and the facilitation of or acquiescence in those acts by other AKA officials, were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See Wood*, 979 A.2d at 77.

Ms. Daley cites *Compton v. Alpha Kappa Alpha Sorority Inc*. Civil Action No. 13-262 (RMC) (D.D.C. April 11, 2013). About a week after two colleges students filed this action alleging that AKA's Howard University chapter wrongfully denied them entry, AKA sent them a letter stating that the Directorate had withdrawn their privileges because they filed the lawsuit. Focusing on "the immediate impact here caused by Ms. Compton's fear of testifying," the United States District Court for the District of Columbia found "that the actions of AKA were deplorable and inadvisable, as at least AKA now concedes, and had the impact of impeding testimony." *Compton,* slip op. at 5 & 6. Here, there is no claim that AKA's actions deterred Ms. Daley or the other Plaintiffs; indeed, AKA's aggressive response may have only stoked their resolve to persevere. Moreover, Ms. Daley was not a college student, but an adult who held senior positions in AKA. *Compton* does not support a conclusion that Ms. Daley can meet the demanding requirement of outrageousness for this tort.

B. Severe emotional distress

Ms. Daley alleges that Defendants' conduct produced "sleeplessness, hypertension, and anxiety." Pl. Opp. MSJ#7 at 11. She contends that she made a visit to a doctor because of the strain. However, the doctor's records indicate that her one visit was prompted by an upper respiratory tract infection, and that the only medication he prescribed was for hypertension (which she did not take). *See* Def. Reply MSJ#7 Ex. A. The doctor's records do not suggest that Ms. Daley told the doctor that her elevated blood pressure was due to mental anguish or extreme stress, and in any event, she offers no expert testimony about the cause of her hypertension. No reasonable jury could infer from these facts that Ms. Daley's emotional distress went beyond worry and concern, and was of so acute a nature that harmful physical consequences might be not unlikely to result.

VIII. BARBARA McKINZIE

For the reasons stated in Section V.B above, Plaintiffs are not entitled to damages for their wrongful suspensions, so even though a jury could reasonably conclude that Ms. McKinzie was the driving force behind their suspensions, Plaintiffs have no claim against her for damages. Nor do they have any claim against Ms. McKinzie for equitable relief because AKA suspended them, and Ms. McKinzie is out of office and thus has no authority to reinstate the Plaintiffs.

Ms. McKinzie's alleged misappropriation of funds and other misconduct damaged AKA but not Plaintiffs, so although AKA may have a claim against her, Plaintiffs do not have any claim against her for damages for wrongdoing unrelated to their suspensions. Moreover, because Ms. McKinzie is out of office and indeed suspended, no equitable relief against her can remedy or redress any misconduct during her term as president, and in any event, any equitable relief relating to such misconduct would likewise benefit AKA and not Plaintiffs.

For these reasons, Plaintiffs have no claim against Ms. McKinzie upon which relief can be granted, and Ms. McKinzie is entitled to summary judgment.

IX. SEALING

The Court is not filing this Opinion and Order under seal. AKA would face a substantial burden to justify the sealing of any portion of this Opinion and Order. A "presumptive public right of access" under the common law applies to courts' dispositions of motions. *Mokhiber v. Davis*, 537 A.2d 1100, 1106-07 & 1111 (D.C. 1988). "[P]ublic scrutiny can serve to inform the public about the true nature of judicial proceedings, and public knowledge of the courts is essential to democratic government because it is essential to rational criticism and reform of the justice system." *Id*. at 1110. The right of public access to summary judgment rulings is also protected by Rule 77(b), which provides that "[a]ll trials upon the merits shall be conducted in

open court," because summary judgment is the functional equivalent of a trial: a decision on the merits based on an assessment of admissible evidence.[35] Moreover, every federal appellate court that has considered the issue has concluded that the First Amendment guarantees a qualified right of access to civil trials and related court proceedings and records. *N.Y. Civil Liberties Union v. N.Y. City Transit Authority*, 652 F.3d 247, 258 (2d Cir. 2011) (collecting cases). "Both [the common law and the constitutional right of access] ensure a presumption of access and permit a court to bar disclosure only when the specific interests favoring secrecy outweigh the general and specific interests favoring disclosure." *Mokhiber*, 537 A.2d at 1108.

This Opinion and Order does not contain any information that AKA advised the Court at the May 10 hearing should not be public. It contains one indirect reference to an executive session of the Directorate, but AKA's representations at the May 10 hearing do not establish that this reference would cause substantial and articulable harm to an important interest of AKA or of any individual, and that this specific harm outweighs the general and specific interests favoring disclosure.

X. CONCLUSION

For these reasons, the Court orders that:

1. Plaintiffs' motion for summary judgment on their claim for equitable relief for their wrongful suspensions is granted.

2. Plaintiffs' suspension from membership is terminated, and AKA shall forthwith allow them to exercise all the rights and privileges of membership.

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[35] If the Court conducted a jury trial at which the parties presented the same evidence they presented through deposition testimony in connection with the summary judgment motions, and the Court then granted a Rule 50 motion, Rule 77(b) would require the Court to make its ruling in open court, unless a party demonstrated that its privacy interests outweigh the public right of access. The same test for sealing or closure applies in the summary judgment context.

3. Defendants' fourth motion for summary judgment on res judicata grounds is denied.

4. Defendants' other motions for summary judgment are granted.

5. The Court enters summary judgment for Defendants except on their claim against AKA for equitable relief for their wrongful suspensions.

6. The Court will proceed with the settlement conference scheduled for May 23, 2013.

7. The pretrial conference and trial are vacated.

Anthony C. Epstein
Judge
Signed In Chambers

Dated: May 14, 2013

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Docketed on May 14, 2013