

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

*CIVIL DIVISION*

JOY ELAINE DALEY, ET AL.

Plaintiffs,

v.

ALPHA KAPPA ALPHA SORORITY, INC.,  
ET AL.

Defendants.

CIVIL ACTION NO: 2009-ca-004456 B

JUDGE TODD E. EDELMAN

Next Event: Initial Conference  
March 2, 2012

**REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS**

Defendants, Alpha Kappa Alpha Sorority, Inc. ("AKA"), and the individual Defendants named in Plaintiffs' Second Amended Complaint (collectively the "Defendants"),<sup>1</sup> respectfully submit this Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss. In support thereof, Defendants state the following:

**I. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY.**

Plaintiffs rest their Opposition to Defendants' Motion to Dismiss on the proposition that the law of the case doctrine precludes the arguments contained within Defendants' Motion to Dismiss. Pls. Opp'n. Mot. to Dismiss. pp. 5-18. They assert that the claims stated in the Second Amended Complaint have been dealt with on the merits and that Defendants ignore the Court of Appeals' decision rendered in this action. This is simply untrue. The Court of Appeals did not address either the business judgment rule or Plaintiffs' failure to abide by AKA's internal dispute

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<sup>1</sup> Excluding the individual Defendant Barbara A. McKinzie who is represented by separate counsel.

procedures in their decision. Nor did the Court render a decision on any rule of law in connection with any cause of action alleged in the Second Amended Complaint.

The law of the case doctrine bars a trial court from reconsidering the same question of law that was presented to and decided by another court of coordinate jurisdiction. *Pannell v. D.C.*, 829 A.2d 474, 478 (D.C. 2003). This doctrine is applicable when: (1) the motion under consideration is substantially similar to one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law. *Duggan v. Keto*, 554 A.2d 1126 (D.C. 1989). An order denying a motion to dismiss is an interlocutory order and not a final order which would invoke the law of the case doctrine. *Washington v. Government of D.C.*, 152 A.2d 191, 192 (D.C. 1959). The first court is required to undertake a detailed judicial consideration of facts or hold a factual hearing and findings of fact necessary to render a ruling "sufficiently final." *See generally P.P.P. Productions, Inc. v. W&L, Inc.*, 418 A.2d 151, 152 (D.C. 1980).<sup>2</sup>

Defendants' Motion to Dismiss is premised fundamentally on two propositions: (1) that Plaintiffs failed to plead facts to overcome the presumptions of the business judgment rule; and (2) that Plaintiffs failed to plead facts demonstrating compliance with internal resolution procedures prior to initiating this action. Plaintiffs attempt to divert the Court's attention from these issues by hiding behind a misguided procedural argument - the law of the case doctrine.

Plaintiffs cannot state that there is a contrary ruling by any court on the issues of the business judgment rule or failure to follow internal procedure nor does the appellate record support this proposition. Close examination of the Court of Appeals' decision in this action

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<sup>2</sup> Plaintiffs provide an outmoded law of the case doctrine standard in their Opposition, but do not, and cannot, properly apply it to the facts of this case.

demonstrates that the Court of Appeals did not address either issue. Further, the Court of Appeals did not rule on any other issue of law stated against the individual Defendants in the Amended Complaint which could possibly preclude consideration of the instant Motion, which addresses the Second Amended Complaint.

**A. The Claims Contained Within the Amended Complaint and the Second Amended Complaint Are Not Substantially Similar.**

First, the issues involved in Defendants' first Motion to Dismiss are not substantially similar to those currently before this Court and, in fact, were not even considered by the Court of Appeals. *Pannell*, 29 A.2d at 478. Nowhere in the appellate record is there a legal or factual determination on the issues of whether Plaintiffs' pleading was sufficient to overcome the presumptions of the business judgment rule. Nor was there a legal or factual determination on whether Plaintiffs' pleading sufficiently stated a cause of action upon consideration that they failed to comply with AKA's internal dispute resolution procedures prior to seeking judicial intervention.

The Court of Appeals did not make a factual finding on these issues, and could not have, when they were not before the trial court. Most importantly, the Court of Appeals never got to the merits of, or made a judicial finding of fact on, any cause of action in the Second Amended Complaint.

The fact remains that the Court of Appeals limited its substantive analysis to the threshold procedural issues of standing and jurisdiction. *See Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723 (D.C. 2011). Plaintiffs concede this issue. *See* Pls. Opp'n Mot. to Dismiss p. 8. In fact, while Plaintiffs argue that Defendants, in the instant Motion, reiterate arguments already rejected by the Court of Appeals, this is inaccurate. The Court did not even

consider, let alone render a ruling on, the issues of the business judgment rule or failure to comply with internal procedures.

The Second Amended Complaint is a new complaint which contains new factual allegations and causes of action. Absent a final determination on the new issues, the law of the case doctrine is inapplicable.

**B. The Court of Appeals' Decision Lacks Finality.**

Second, the Court of Appeals' decision lacks the finality necessary to invoke the law of the case doctrine. The Court of Appeals' decision lacks finality for two reasons: (1) The Court of Appeals did make a factual determination on the issues or hold an evidentiary hearing; and (2) the Court of Appeals only decided threshold procedural issues as to the Defendants.

The Court of Appeals was not called upon to render findings of fact or evidentiary hearings necessary to implicate the law of the case doctrine. Absent finality, the law of the case doctrine does not preclude judicial determination of the instant Motion to Dismiss. *See Washington*, 152 A.2d at 192.

Also, Plaintiffs disregard the decision of the Court of Appeals which states "having dismissed all appellees for lack of jurisdiction other than AKA..." *Daley*, 26 A.3d at 730. Finality as to the causes of action in the Second Amended Complaint is lacking because the Court of Appeals merely decided on threshold procedural issues of standing and jurisdiction for the individual Defendants. It did not reach the merits, or undertake judicial consideration of any legal or factual issue in Plaintiffs' First Amended Complaint. In their Opposition, Plaintiffs ignore this fact to take the focus off of the real issues involved - the business judgment rule and failure to abide by internal dispute resolution procedures. Because the Court of Appeals'

determination lacked finality, the law of the case doctrine does not bar this Court's from entertaining the Defendants' instant Motion to Dismiss of the Second Amended Complaint.

**II. PLAINTIFFS' PLEADING FAILS TO OVERCOME THE PRESUMPTIONS OF THE BUSINESS JUDGMENT RULE, AND THEREFORE, THEIR CLAIMS FOR BREACH OF FIDUCIARY DUTY MUST BE DISMISSED.**

District of Columbia Courts apply the business judgment rule, as detailed in Defendants' Motion to Dismiss. For Plaintiffs to state a cause of action against the Directors of AKA for breach of fiduciary duty, they must plead facts that plausibly survive the presumptions of the doctrine. *See* Defs. Mem. Mot. to Dismiss pp. 7-8. In suits against directors, Plaintiffs must state how their allegations consist of more than mere second guessing. Plaintiffs fail to articulate such facts. Instead, they attempt erroneously characterize the doctrine as an affirmative defense and cite irrelevant case law.<sup>3</sup>

Plaintiffs also argue, without any substantive legal support, that the business judgment rule only applies to derivative actions. Pls. Opp'n. to Mot. to Dismiss p. 12-13. Again, this is a misstatement of the law. Further, Plaintiffs claim that Defendants "concede the relevant pleading standard in this case is contained within Super. Ct. Civ. R. 8." Pls. Opp'n to Mot. to Dismiss p. 13. Defendants make no such claim and, in fact, detail the District of Columbia's requisite pleading standard, set forth by the Supreme Court in *Iqbal*, extensively in their Motion to Dismiss. Defs. Memo. Mot. to Dismiss p. 6.

Plaintiffs' causes of action are based upon mere speculation, resulting from personal vendettas, that certain expenditures by Defendants were improper. This suit is barred by

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<sup>3</sup> Moreover, Plaintiffs repeatedly disclaim in their pleadings, including their Opposition, that they bring this action as a derivative claim. This is not a derivative action and is not pled as one. Despite this, Plaintiffs continue to fail to identify what legal claims they have against Defendants. Plaintiffs repeatedly fail to plead facts of any personal injury they sustained which they could possibly base their claims on.

Plaintiffs' failure to satisfy their threshold burden of pleading facts sufficient to overcome the presumptions of the business judgment rule.

Plaintiffs failed their burden of pleading which is a requirement for successfully stating a cause of action. Plaintiffs' attempt to shift this burden to Defendants, by characterizing the business judgment rule as an affirmative defense, which contradicts well-settled law. Further, Plaintiffs do not, and cannot, directly respond to their breach of fiduciary duty claims in light of the applicability of the business judgment rule. As a result of Plaintiffs' failure to remedy their pleading deficiencies, their claims for breach of contract fail as a matter of law.

### **III. PLAINTIFFS PROVIDE NO REASON FOR THEIR FAILURE TO FOLLOW AKA'S INTERNAL DISPUTE RESOLUTION PROCEDURES.**

Plaintiffs provide no response to their failure to follow AKA's internal dispute resolution procedures. AKA's governing documents set forth internal avenues for members to argue their grievances, including appealing problematic conduct to the Directorate or at the Boule. Plaintiffs concede that AKA's Constitution and Bylaws govern the conduct to which both parties must adhere, yet they fail to plead that they complied with the governing documents' internal dispute procedures thereby permitting them to seek judicial intervention. This may be deemed an admission by silence and therefore a waiver to the right of judicial relief. Moreover, despite Plaintiffs' assertion to the contrary, no court determination has been rendered on this issue and, therefore, the law of the case doctrine cannot serve to bar it from consideration.

**IV. THE COURT OF APPEALS DID NOT RENDER A FINAL DETERMINATION ON PLAINTIFFS' BREACH OF CONTRACT CLAIM.**

As detailed above, the law of the case doctrine applies when there has been a final determination on a matter of law by a court of parallel jurisdiction. The Court of Appeals did not address the breach of contract claim against the individual Defendants. *Daley*, 26 A.3d at 730. This lack of finality, and determination on the merits of the cause of action, precludes Plaintiffs' reliance on the law of the case doctrine. Further, for the reasons set forth in Defendants' current Motion to Dismiss, Plaintiffs fail to state a cause of action for breach of contract.

**VII. PLAINTIFFS CANNOT STATE A CAUSE OF ACTION FOR *ULTRA VIRES* AND THEIR CLAIM MUST BE DISMISSED AS A MATTER OF LAW.**

In their Opposition, Plaintiffs attempt to obfuscate the issues by providing unfounded legal propositions in support of their *ultra vires* claim. They further allege that it is precluded by the law of the case doctrine despite the Court of Appeals not rendering a final legal determination on this cause of action. Absent a final legal determination, the Court may consider Defendants' *ultra vires* challenge.

Plaintiffs interpret the provisions of AKA's Constitution and Bylaws in a self-serving manner in an attempt to create the appearance of improper conduct by Defendants that is *ultra vires*. Plaintiffs argue in their Opposition, and in support of their *ultra vires* claim, that the parties interpret certain provisions of the Bylaws differently, and therefore, this is a matter of contract/bylaw interpretation and a factual dispute that should be resolved on the merits. Pls. Opp'n to Mot. to Dismiss p. 11.

It is well-settled under District of Columbia law that, in the absence of facial ambiguity, the plain meaning of the contract governs. *Sagalyn v. Foundation for Preservation of Historic Georgetown*, 691 A.2d 107 (D.C. 1997). Plaintiffs concede that AKA's Constitution and Bylaws

are the applicable governing contract to which the parties are bound. Pls. Opp'n. to Mot. to Dismiss p. 8. They argue that a disagreement over Article 7, Section 9 of the Bylaws sustains their *ultra vires* claim.

Specifically, Plaintiffs argue that, while the plain language of Article 7, Section 9. states “in the budget” this actually means “in the budget approved by the Boule.” Pls. Opp'n. to Mot. to Dismiss p. 10. Plaintiffs attempt to contravene the plain meaning of this provision by improperly interpreting “in the budget” being the equivalent of “in the budget approved by the Boule.” Pls. Opp'n. to Mot. to Dismiss p. 10. Plaintiffs provide no explanation for inserting “approved by the Boule.” Their imposition of Boule approval of the budget is a self-serving presumption which is unsupported by the governing document.

While Plaintiffs argue that the issue of contract interpretation is a factual dispute that should be resolved on the merits, this proposition is in direct contravention of well-established principles of District of Columbia contract law. “In the budget” is not an ambiguous term because a reasonable person would not objectively find it facially confusing or interpret it as requiring Boule approval of the budget. *See Sagalyn*, 691 A.2d 107. Therefore, the Court should adopt the plain meaning of the Article for purposes of contract interpretation, and thus, not delve into wild interpretation issues because ambiguity is not present.

Further, in their Opposition, Plaintiffs only address the issue of violation of state law in connection with their *ultra vires* claim. Plaintiffs do not plead, in their Second Amended Complaint, facts supporting any violation of state law. Moreover, Plaintiffs have failed to plead facts supporting their allegations that Defendants' conduct was beyond the scope of the governing documents.

In the end, Plaintiffs simply base their claims on self-serving misinterpretations of AKA's Constitution and Bylaws. It is well-settled in the District of Columbia that the plain meaning of the governing documents govern. As the governing documents, on their face, do not support Plaintiffs' claims, their cause of action for *ultra vires* must be dismissed for failure to state a cause of action.

**VI. PLAINTIFF DALEY FAILS TO PLEAD WITH PARTICULARITY FACTS TO SUPPORT ANY OF HER INTENTIONAL TORT CLAIMS, AND THEREFORE, HER CLAIMS MUST BE DISMISSED.**

Plaintiff Daley fails to state a cause of action for any intentional tort.<sup>4</sup> In an attempt to circumvent her pleading deficiencies, Plaintiff Daley provides this Court with an improper standard for a motion to dismiss. Notably, Plaintiff Daley ignores the pleading requirements imposed by the Supreme Court in *Iqbal* and instead relies on an inaccurate reading of *Twombly*, *Iqbal's* predecessor. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Further, she relies on outdated District of Columbia law. Notice pleading is inapplicable in the District of Columbia after *Iqbal*. As detailed in Defendants' current Motion to Dismiss, Plaintiff Daley must recite more than "threadbare recitals" of wrongdoing and essential elements of a legal cause of action to survive a motion to dismiss. Defs. Memo. Mot. to Dismiss pp. 5-6. Inferences, such as those requested by Plaintiff Daley, are impermissible and cannot sustain a cause of action under the mandates of *Iqbal*. In the Second Amended Complaint, rather than set forth particular facts supporting their causes of action, Plaintiff Daley relies on a patchwork of

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<sup>4</sup> As pointed out in Defendants' Motion to Dismiss, Plaintiffs do not plead any facts indicating that the intentional tort claims are brought on behalf of any Plaintiff but Plaintiff Daley. The intentional tort claims are limited to Plaintiff Daley and are not brought by Plaintiffs collectively as they lead the Court to believe in their Opposition.

speculation and conclusory language of legalese in attempt for 0.0032% of AKA's membership to exact a costly vendetta against Defendants.

**A. Defamation**

In her Opposition, Plaintiff Daley makes no argument to suggest that the alleged defamatory statements are not protected as privileged. Privileged statements do not support a claim for defamation as detailed in Defendants' Motion to Dismiss. Defs. Mem. Mot. to Dismiss p. 28. Further, Plaintiff Daley continues to fail to identify the supposed recipients of the alleged defamatory statements necessary to support a defamation claim. Absent an identified recipient, it cannot be said that a third-party actually heard the alleged defamatory statements. Plaintiff Daley merely speculates that defamation occurred without pleading facts to support this assertion. Consequently, Plaintiff Daley's claim for defamation must be dismissed for failure to state a cause of action.

**B. False light**

In her Opposition, Plaintiff Daley relies on the proposition that she sufficiently pled publication necessary to a false light claim. Pursuant to *Iqbal*, Plaintiff Daley must plead facts sufficiently demonstrating publication. A mere thread-bare recitation of publication will not support a cause of action. As Plaintiffs' Second Amended Complaint fails to meet basic pleading requirements, Plaintiff Daley's false light claim must be dismissed.

**C. Intentional Infliction of Emotional Distress**

District of Columbia law is clear that there is no claim for the intentional infliction of emotional distress in this case. Defs. Memo. Mot. to Dismiss pp. 23-24. In her Opposition, Plaintiff Daley affirms that her injuries are limited to "hypertension...and a sleeping disorder." Pls. Opp. to Mot. to Dismiss p. 23. District of Columbia Courts have consistently held that these

are not actionable injuries for a claim for the intentional infliction of emotional distress. *See* Defs. Memo. Mot. to Dismiss p. 32. Plaintiff Daley fails to recognize District of Columbia law in her Opposition. Rather, she argues against the law and attempts to rest a cause of action on insufficient injuries.

Further, the alleged extreme and outrageous conduct Plaintiff Daley pleads, which involves alleged defamatory statements made by Defendants in connection with Plaintiff Daley's employment, are not recognized by District of Columbia Courts as actionable conduct under a theory of the intentional infliction of emotional distress. Def. Memo. Mot. to Dismiss p. 33. Again, Plaintiff Daley fails to recognize District of Columbia law in her Opposition. Consequently, because Plaintiff Daley does not plead an actionable injury or extreme and outrageous conduct by Defendants, her claim for the intentional infliction of emotional distress must be dismissed.

## **VII. PLAINTIFFS FAIL TO DEMONSTRATE ENTITLEMENT TO AN ACCOUNTING.**

Pursuant to AKA's Constitution and Bylaws, Plaintiffs have no right to review AKA's financial records. Financial decisions are left exclusively the domain of the Directorate and Finance committee - not to the members. Further, pursuant to the business judgment rule, Defendants' financial decisions are presumptively proper. However, Plaintiffs now attempt to argue breach of fiduciary duty by Defendants despite failing to plead facts to overcome the presumptions of the business judgment rule, in attempts to create a right to an accounting.

This drastic remedy is unwarranted upon consideration that Plaintiffs' demand is based upon unsupported recitals of Defendants' alleged wrongdoing which does not rise to the level of breach of fiduciary duty. Therefore, their request for an accounting is improper under the facts of this case.

**VIII. PLAINTIFFS FAIL TO SUFFICIENTLY PLEAD ALLEGATIONS OF MALICE BY ALL DEFENDANTS, AND THEREFORE, THEY FAIL TO MEET THE PLEADING REQUIREMENTS TO SUSTAIN A DEMAND FOR PUNITIVE DAMAGES.**

Plaintiffs' argument in support of their demand for punitive damages disregards well-settled law in the District of Columbia. In the District of Columbia, a plaintiff is required to plead, with clear and convincing evidence, a malicious state of mind by all Defendants. *D.C. v. Hackson*, 810 A.2d 388, 396 (D.C. 2002)(emphasis added); Defs. Mem. Mot. to Dismiss p. 37.

Rather than provide sufficiently detailed allegations of malice or ill-will in their Second Amended Complaint, Plaintiffs provide general unsupported allegations of ill-will and/or malice. In support of their claim, Plaintiffs allege that, "allegations of malice and ill-will are ubiquitous in the Second Amended Complaint." Pls. Opp. to Mot. to Dismiss p. 24. This inference, however, by no means equates to clear and convincing evidence of malice or ill-will necessary to establish an entitlement to punitive damages. Having failed their burden of pleading on punitive damages, this Court should dismiss Plaintiffs' claim for punitive damages.

WHEREFORE, for the reasons set forth above, and upon consideration of Defendants' Motion to Dismiss, Plaintiffs' Opposition thereto, Defendants' Reply, and the record in this case, the instant Second Amended Complaint must be dismissed.

Respectfully Submitted,

/s/

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of February 2012, a copy of Defendants' Reply to Plaintiffs' Opposition was electronically served via CaseFileXpress upon the following:

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