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 NATALIA COMBS GREENE Next Event: Written Discovery Closes/Fact Witness Deadline: December 17, 2009

DEFENDANTS' OPPOSITION TO PLAINTIFFS' COMBINED RULE 12 AND 56(F) MOTION REQUESTING DISCOVERY PRIOR TO OPPOSING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

COME NOW, ALPHA KAPPA ALPHA SORORITY, INC., ET AL., (hereinafter "AKA"), the twenty-four (24) individuals named in the Amended Complaint (hereinafter "Individual Defendants"), and the AKA Educational Advancement Foundation, Inc. (hereinafter the "Foundation"), by their undersigned attorneys, hereby submit their Opposition to Plaintiffs' Combined Rule 12 and 56(f) Motion Requesting Discovery Prior to Opposing Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and in support thereof, states the following:

INTRODUCTION

Plaintiffs' instant Motion, in the guise of a Rule 56(f) Motion, is a veiled attempt to conduct unlimited discovery, to confuse the court with irrelevancies, and to bolster the unsupported allegations asserted in their Amended Complaint. In seeking discovery prior to responding to Defendants' Motion to Dismiss, Plaintiffs intend to delay this court's

ruling on Defendants' Motion to Dismiss in the hopes of discovering facts to support their wholly unsubstantiated and meritless claims.

Plaintiffs filed this action to undo their suspension as members of AKA and seek the Court to inject them as the new leaders of the organization. The vehicle for accomplishing this objective is to pursue various claims, including misappropriation of funds, breach of contract and fraud against AKA and its Directorate. These claims primarily arise from the suspension of membership privileges of the lead plaintiff, Ms. Joy Daley.

Rather than proceed with an appeal of Ms. Daley's suspension or other remedies available within AKA's Bylaws, Ms. Daley and her friends, together with their counsel, initiated this litigation as a misguided and harmful effort to destroy the current leadership of AKA. Completely distorting the truth, Plaintiffs are engaged in a fundraising effort to support Plaintiffs' attacks on AKA and its current officers. This effort includes the web site "www.friendsoftheweepingivy.com,"[1] direct mail, email and advertisements in national newspapers that criticize AKA's budget, spending and management of the organization, and generally seek to erode support for the organization. The size of the campaign is substantial, including direct *ex parte* mail to this Court.[2] [3] *See* www.friendsoftheweepingivy.com.

Although Plaintiffs seek "sufficient discovery" prior to responding to Defendants' Motion to Dismiss, a closer look at this request reveals that it is an inappropriate attempt by Plaintiffs to seek unlimited discovery. *See* Pls.' R. 56(f) Mot. at p. 3. Plaintiffs

[1] In fact, Defendants have confirmed that this website is registered to Plaintiffs' counsels' law firm.
[2] The Court noted her objection to any such ex parte contacts at the Initial Conference to which Mr. Gray apologized and attempted to explain that it was from various supporters of his plaintiffs.
[3] At the Initial Scheduling Conference, the court censured the ex parte contacts it had received from Plaintiffs' supporters.

further assert that they "need discovery to justify judicial intervention into the affairs of a private corporation" and to "confirm on what basis the Directorate asserts that it has the authority to approve the huge payments to Defendant McKinzie." *Id.* As evidenced by their own arguments, Plaintiffs seek discovery as to every allegation in the Amended Complaint, thus demonstrating the plethora of legal and factual deficiencies in their Amended Complaint *See Graham v. Mukasey*, 608 F. Supp. 2d 50, 54 (D.D.C. 2009) ("A Rule 56(f) motion for additional discovery is not designed to allow 'fishing expeditions.'"). As such, their representation that they seek only "sufficient discovery" to oppose Defendants' motion to dismiss is simply untrue.

Defendants moved to dismiss Plaintiffs' Amended Complaint or, in the Alternative, for Summary Judgment. Defendants submit that the Court may rule on the Motion to Dismiss without considering any of evidence outside of the Amended Complaint which Plaintiffs reference in an attempt to bog down this court and create a dispute of fact.[4] Plaintiffs' Amended Complaint, containing the facts as alleged by Plaintiff, fails to state any legally sufficient claim pursuant to Rule 12(b)(6) and should be dismissed accordingly.[5]

They also fail to acknowledge how, under the current leadership, AKA has gone from a small organization with a negative budget to a large organization with a large budget that now can support its mission.

Instead of recognizing the mission of AKA, Plaintiffs, on the one hand, allege that "Defendant McKinzie plans to use the approximately $4 million surplus from the

[4] Even reviewing Plaintiffs' submissions, Defendants contend there is no genuine issue or material dispute of fact for purposes of summary judgment, but the Court may just consider the Amended Complaint together with its attachments as filed by Plaintiffs to find that the Plaintiffs fail to state an actionable claim.
[5] Super. Ct. Civ. R. 12 (b); *Taylor v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 859 A.2d 142, 146 (D.C. 2004)

2008 Boule for her personal projects…," but on the other hand, also allege that the Directorate *approved* AKA's 2008 Boule $4 million surplus spending as follows: "Liberian Women's Market Funds ($500,000); Ford Museum to acquire Rosa Parks Collection ($1 million); Smithsonian African American Museum Partnership ($500,000); Centennial Administration History Project ($570,000); and a 2010 Boule museum and finale in part to create living legacy wax statutes ($900,000)." *See* Pls.' R. 56(f) Mot.; *see*, Pls.' Am. Compl. at ¶ 104, 209.

Rather, Plaintiffs seek injunctive relief primarily, seek AKA's money for themselves (and not for the Sorority), and seek to have this Court inject itself into a private organization to elect a new Directorate and Supreme Basileus or to reinstate Ms. Daley -- all without legal basis. Plaintiffs instead attempt to confuse and overwhelm the court with a 150-page Amended Complaint, a 53-page Rule 56(f) Memorandum, several exhibits, and allegedly disputed statements of fact, while posting filings on their internet website. Further, Plaintiffs have inappropriately sought this court's relief as to issues of corporate governance, having failed to exhaust any of the remedies available through AKA's own internal procedures.

In their Rule 56(f) Motion, Plaintiffs attempt to muddle the basic, threshhold issues in this case, which include (1) lack of personal jurisdiction over the 25 individual defendants, who undisputedly do not reside near the District of Columbia,[6] and (2) assuming jurisdiction exists and DC law applies, the lack of individual liability for the Individual Defendants under D.C. Code § 29-971.06(b) for undisputedly acting in their management capacity as members of the AKA Directorate.

[6] The AKA Foundation, a separate legal entity, is considered for these purposes as an "individual defendant" in that, like the other 24 individual defendants, it is not located, headquartered or incorporated in DC.

Further, these plaintiffs lack any standing to seek the Court's intervention into a private organization's affairs, such as the Court's election of new Directorate members.. Both the Bylaws of AKA and the law of the District of Columbia prevent such interference by a court into a private, non-public organization with its own bylaws and constitution. Plaintiffs' failures to follow the bylaws of this private organization should not now become a matter of a protracted litigation inevitably damaging the reputation of AKA and each individual defendant without any meritorious claim existing under the law of the District of Columbia.

Plaintiffs' Motion concedes the deficiencies of their Amended Complaint as plead in explaining to the court that, "such additional facts would support the claims of the Amended Complaint." *See* Pls.' R.12(f) Mot. at p. 3. Now, Plaintiffs seek to use this litigation as a basis to support their public campaign to destroy AKA and the members of the AKA Directorate.

LEGAL ARGUMENT

A. Despite Plaintiffs' Attempt to Argue "Disputed" Facts, the Material Facts Are Undisputed.

All material facts relevant are contained in Plaintiffs' Amended Complaint, including the places of residence for all twenty-four (24) Individual Defendants and the geographical locations of all alleged acts of misconduct by the Defendants. *See* Pls.' Am. Compl. at ¶¶ 12-37, and generally.

Plaintiffs assert that "jurisdiction is appropriate over each Defendant based simply on: (1) the business contacts of the Sorority and the Foundation with the District of Columbia; (2) the individual Defendants' acceptance of office at the 2008 Boule legislative meeting in Washington, DC; and (3) the role of the individual Directorate

members as key leaders of the Sorority." *See* Pls.' Mot. at 8. Plaintiffs then proceed to argue general jurisdiction based on the allegation that AKA is a DC Corporation. *See* Pls.' Mot. Mem. at 11-12.

Plaintiffs' arguments regarding jurisdiction fail to recognize the requirements of DC's long arm statute, which was defined by the Court pursuant to the extent of the Fifth Amendment of the Constitution. It is the plaintiff's burden in the first instance to allege facts sufficient to place a defendant within the reach of the long-arm statute. *Jung v. Ass'n of Am. Med. Colleges*, 300 F.Supp.2d 119, 127 (D.D.C. 2004) (the facts to support personal jurisdiction must be established by affidavit or other evidence). Under the fiduciary shield doctrine recognized by DC, Plaintiffs cannot base personal jurisdiction against individual defendants merely because of the corporations of which they are members.

The Boule, undisputedly, is a meeting held every two years by AKA in different cities, and was held in Washington DC in 2008. *See* Pls. Am. Compl. at ¶ 97. This one time event, however, fails to be a sufficient basis for personal jurisdiction. Finally, some of the individual Defendants have appeared in DC for reasons totally unrelated to this claim, which again fails to be a basis for personal or specific jurisdiction, as set forth below.

a. *Facts in support of the Lack of Personal Jurisdiction over the Individuals*

Plaintiffs attempt to argue that there are fact issues negating a ruling on the lack of personal jurisdiction. It is undisputed, however, that the Boule was held in Washington, D.C. in 2008. *See* Pls.' SDF. at ¶ 3; Pls.' Add. Mat. Fac. at ¶ 7. More

relevant, however, is the undisputed fact that both AKA and the Foundation are headquartered in Chicago, Illinois, a fact which Plaintiffs concede. *See* SDF at ¶¶ 7-8.

Specifically, eighteen (18) of the twenty-four (24) Individual Defendants are named only once in the Amended Complaint when Plaintiffs identify their positions in the Directorate. *See* Pls.' SDF at ¶ 28. Similarly, Plaintiffs contend, and Defendants do not dispute, that the Foundation makes grants to students residing in the District and maintains a website. *See Id.* at ¶ 27. These facts do not make the Individual Defendants or the Foundation subject to the District's Long-Arm Statute. *See* D.C. Code § 13-423.

It is undisputed that Defendant McKinzie is a member of other organizations, both of which have no affiliation to AKA, for which she on occasion comes to the District. *See* Pls.' AMFD at ¶¶ 2-3. It is also undisputed that Defendant Glenda Glover owns real property in the District, but she does not reside in the District. *See* Pls.' AMFD at ¶ 6. It is also undisputed that Defendant Judge Vicki Miles-LaGrange, travels to the District from time to time in her capacity as a United States District Court Judge, and that Defendants Johnson and Jones were residents of the District while undergraduates at Howard University. *See* Pls.' R. 56(f) Mot. at 10. Defendants also do not dispute that the Foundation from time to time makes grants to students residing in the District. *Id.* at 13.

Furthermore, it is undisputed that AKA was originally incorporated under the Old Act in DC, but it is not required to maintain a registered agent in the District or otherwise do any business in the District. DC Courts have previously found that AKA is an Illinois corporation allowing for diversity jurisdiction in federal court. *See Jolevare v. AKA*, 521 F. Supp. 2d 1 n. 1 (D.D.C. 2001).

b. *There is no Basis for Personal Jurisdiction over the individual defendants and the foundation.*

Plaintiffs argue that because AKA is a DC Corporation, the Court has general jurisdiction over the Individual Defendants. *See* Pls.' Mot. Mem. at 11. District of Columbia courts have clearly, however, ruled that the mere fact that one is an officer or director of a company with its principal place of business in the District of Columbia is not a sufficient contact with the District to confer personal jurisdiction over the officer or director. *NAWA USA, Inc. v. Bottler*, 533 F.Supp.2d 52, 57 (D.D.C. 2008); *see also Flocco*, 752 A.2d at 162-63 ("the corporation ordinarily insulates the individual employee from the court's personal jurisdiction").

Plaintiffs cite *Bible Way Church of Our Lord Jesus Christ World Wide, Inc. v. Showell*, 578 F. Supp. 2d 164, 169-170 (D.D.C. 2008) to argue that if a corporation is incorporated in the District of Columbia, this court can then assume jurisdiction over individual members of the corporation. *See* Pls.' Mot. Mem. at 11. The Plaintiffs, however, fail to explain that in *Bible Way*, the Court specifically explained the doctrine of the *fiduciary shield* and found that "[t]he corporation ordinarily insulates the individual employee from the court's personal jurisdiction including when a corporation organized under the laws of DC is involved." *Id.* at 169 (*citing Wiggins v. Equifax Inc.*, 853 F. Supp. 500, 503 (D.D.C. 1994).

Rather, in *Bible Way*, the District Court specifically found that the Defendants admitted that there was no separate legal entity between the individual defendants and their organization. The Court found that, "[w]here the [Defendant's] Church's allegations indicate the absence of a separate corporate entity, and in the interests of

fundamental fairness, the Court will not apply the fiduciary shield doctrine to prevent the exercise of jurisdiction over the defendants." *See id.*, 578 F. Supp. 2d at 169-170 *citing Johns v. Rozet*, 770 F. Supp. 11, 18-19 (D.D.C. 1991)). This argument, however, is clearly inapplicable to these individual defendants where Plaintiffs specifically allege, and it is not disputed, that AKA is a separate legal entity from the individual Defendants. *See* Pls.' Am. Compl. at pars. 12, 38-40.

Therefore, as the *Bible Way* Court explained, "[t]here are two types of personal jurisdiction under District of Columbia law -- general and specific. The court may exercise general personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining [a] principal place of business in, the District of Columbia as to any claim for relief. The court may exercise specific personal jurisdiction over a non-resident if jurisdiction is applicable under the District of Columbia's long-arm statute." *See Bible Way*, 578 F. Supp. 2d at 169 (*citing* D.C. CODE § 13-422).

The undisputed facts herein, however, do not subject these individual Defendants and the Foundation to the District's Long-Arm Statute, as their contacts with the District are entirely outside of their role as AKA members, much less in relation to the claims made in the Complaint. *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 163 (D.C. 2000).

> When long-arm jurisdiction is based on transacting business in the District, only acts within the District related to the transaction of business can form the basis for personal jurisdiction. D.C. Code § 13-423 (b); Trerotola v. Cotter, 601 A.2d 60, 63 (D.C. 1991). Thus, any contacts of Rust and Trosino with the District of Columbia unrelated to the transactions complained of by plaintiff are irrelevant.

See Flocco, 752 A.2d at 161-62 (emphases added).

D.C. Code § 13-423 sets forth that, '(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's -- (1) transacting any business in the District of Columbia, etc.' *See id.* (emphases added). Plaintiffs can enumerate facts as to members of the Directorate, including that Barbara McKinzie travels to DC in relation to other organizations of which she is a member; or that Judge LaGrange appears in DC in her role as a federal judge, but each such fact fails to constitute a basis for personal jurisdiction under DC's long arm statute, which "extends as far as the Fifth Amendment's Due Process Clause permits." *See Flocco*, 752 A.2d at 162 (*citing Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 325 (D.C. 2000).

None of these cited contacts (or those learned of in some supplemental discovery) are relevant to a determination of personal jurisdiction over individual members of a corporation not residents of DC unless Plaintiffs' claims actually arose from that contact's transaction of business. Jurisdiction conferred by the District's Long Arm Statute "is restricted to claims arising from the particular transaction of business carried out in the District." *Berwyn Fuel, Inc. v. Emerson Hogan, Jr.*, 399 A.2d 79, 80 (D.C. App. 1979); *see also id.*; D.C. Code § 13-423.

Moreover, AKA maintains its principal place of business in Illinois. *See Jolevare*, 521 F. Supp. 2d 1 n. 1. AKA is not an active DC Corporation, and therefore, no such reliance can be imputed.[7] "Whether asserting general or specific personal jurisdiction, as a second step a plaintiff must make a prima facie showing that the court's exercise of jurisdiction satisfies the constitutional requirements of due process." *See Bible*

[7] As reflected by the DC government, [of which this court can take judicial notice of] AKA is a corporation that was registered in 1913 in the District of Columbia, and its status is not active, but exists under a delineation known as "Old Act" due to its inception in 1913.

Way, 578 F. Supp. 2d at 168 (citing U.S. CONST. amends. V & XIV; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

First, the claims alleged in the instant lawsuit do not arise from any acts that took place in the District or at the meeting of the 2008 Boule, and therefore, jurisdiction is improper pursuant to the Long-Arm Statute. *See* D.C. Code § 13-423. Further a one-time meeting is simply insufficient to create a basis for personal jurisdiction. *NAWA USA, Inc. v. Bottler*, 533 F.Supp.2d 52, 57 (D.D.C. 2008)("The allegation of a single board meeting in the District is simply insufficient to establish jurisdiction. NAWA makes no allegation that the February 2002 board meeting was related to the alleged improper sale of NAWA shares to Mr. Kanzlsperger at the June 21, 2003 board meeting.").

Furthermore, this action arises from breach of contract claims, including alleged misuse of AKA's funds, approval of inappropriate expenditures not provided for in AKA's budget, and Defendants' improper suspension of membership privileges. *See* Pls.' Am. Compl. at ¶¶1, 64-65, 77, 82, 86, 110, 204, and generally. In fact, the claims asserted specifically do not arise from the 2008 Boule, as Plaintiffs assert that the Directorate acted outside of the Boule's approved budget. *See* Am. Compl. at ¶¶ 49, 64, 65.[8]

[8] It is undisputed that AKA's budget is to be approved on a biennial basis by the Boule. *See* Pls.' Am. Compl. at ¶ 64. However, on numerous occasions Plaintiffs state that the acts complained of did not take place during the 2008 Boule. For instance, Plaintiffs' state that "[o]n July 15, 2007, the Directorate approved a $4,000/month pension stipend to be paid to Defendant McKinzie…" Pls. Am. Compl. at ¶ 81. In making this statement, Plaintiffs concede that this alleged conduct took place on July 15, 2007, nearly a year prior to the 2008 Boule in the District. Similarly, Plaintiffs allege that "the AKA Directorate approved the $250,000 payment to Defendant McKinzie … This $250,000 payment … was never … set forth in any detailed budget for approval by the Boule." *Id.* at ¶ 77; *see also Id.* at ¶¶ 80-88. Plaintiffs allege that Defendants' actions did not comply with the budget.

Even assuming *arguendo*, that this court finds that Defendants' alleged misconduct arose from their presence at the 2008 Boule, this single meeting does not constitute sufficient "minimum contacts" with the District for this court to exercise personal jurisdiction over the Individual Defendants. Plaintiffs cannot establish that the Individual Defendants, voluntary members of a non-profit organization based in Illinois, reasonably believe they can be haled into the District at any time. There is no basis in the Long-Arm Statute for this court to exercise specific personal jurisdiction over the Individual Defendants and the Foundation.

> The Defendants Stewart, M. Jones, Wilson, Groomes-McLendon, Johnson, Niles, Porch, Tarkington, Hopkins, Tucker, Archie, Miles-LaGrange, Sample-Oates, E. Jones, Brinkley, Doty, Bradford, Lewis, Sanchez, Robinson and Cochran, and the Foundation.

Further, Plaintiffs have failed to allege *any* individual conduct or wrongdoing against the individual Defendants, Stewart, M. Jones, Wilson, Groomes-McLendon, Johnson, Niles, Porch, Tarkington, Hopkins, Tucker, Archie, Miles-LaGrange, Sample-Oates, E. Jones, Brinkley, Doty, Bradford, Lewis, Sanchez, Robinson and Cochran, and the Foundation, who are merely sued in their capacities as Officers of the Directorate and Members of AKA while each *undisputedly* resides outside of the District of Columbia. *See* Am. Compl. The Foundation undisputedly is also both headquartered and incorporated in Illinois. *See* Am. Compl. at par. 3.

Individual Defendants Barbara McKinzie, Linda Glover and Betty James

With regard to the individual Defendants McKinzie, Glover and James, while they are specifically referred to in the Amended Complaint, the allegations are first, that Barbara McKinzie received too much money from AKA for her services in 2007 and even 2009 -- whereas the Boule was held in 2008. (*See* Am. Compl. at ¶¶ 72-93). The

specific allegations against Ms. McKinzie rest completely in claims of "too much" funds having been paid to her, all at times that have nothing to do with the 2008 Washington DC Boule. (*See* Am. Compl. at ¶¶ 72-93; *see also* American Express card allegations at pars. 125-129.).

Other than a speculative assumption that payments received by Ms. McKinzie (allegedly improperly) could have been discussed at the Boule, Plaintiffs fail to assert any other basis for personal jurisdiction in DC over Ms. McKinzie. It is undisputed that any payments made to her, payments that Plaintiffs allege were somehow improper, were undisputedly made to her at times and locations and pursuant to authorizations outside of the District of Columbia, but specifically from headquarters in Illinois. *See Id.*

The claims against Glover are only against her in her capacity as Treasurer and the duties relating to that role, wherein plaintiffs allege that Ms. Glover failed to generally maintain mechanisms for proper financial oversight. (*See* Am. Compl. at par. 113, 120, 155, 162-63).

Similarly the claims against Ms. James are also in that she generally failed to maintain proper oversight as Executive Director and that she, in that position, authorized transactions plaintiffs allege she shouldn't have. *See* Am. Compl. at 90, 93, 124, 155-56). Not one allegation suggests that any of these alleged transactions or acts from which the claims arise against Glover and James occurred in Washington, DC. *See* Am. Compl. generally. It is undisputed that AKA headquarters are maintained in Illinois where financial oversight occurs, as do the financial transactions.

In sum, Plaintiffs request for additional discovery was necessitated by their failure to carry their "burden of establishing personal jurisdiction by alleging factual

underpinnings for the exercise of such jurisdiction over the Defendants." *Crane v. New York Zoological Soc*., 894 F.2d 454, 456 (D.C. Cir. 1990). Dismissal of the Amended Complaint against the Individual Defendants and the Foundation is proper on these grounds, and this court should not reward Plaintiffs' failure to establish jurisdiction by allowing Plaintiffs to conduct discovery, where the question of personal jurisdiction is one of law.

B. Discovery Is Irrelevant to Plaintiffs' Lack of Standing / Relief Sought is Improper

Plaintiffs' claims are unmeritorious, first and foremost, because Plaintiffs fail to recognize that AKA is a voluntary and private non-profit organization that has its own remedies, and voting procedures set forth in its Bylaws, which allow the organization to determine its own bylaws, voting rights and other management issues and they are permitted to do so according to Illinois law. *§* 805 ILCS 105/107.40[9]. Plaintiffs attempt to portray disputed facts, but they lack standing as a matter of law, regardless of the facts alleged.

It is crucial for this court to note that the injuries alleged by the Plaintiffs are not in dispute. Other than the suspension of membership privileges of Defendant Daley, Plaintiffs state that they have been "personally damaged" because "the National dues,

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[9] *§ 805 ILCS 105/107.40. Voting Sec. 107.40. Voting*.

(a) The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the bylaws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

(b) The articles of incorporation or the bylaws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his or her vote and to give one candidate a number of votes equal to his or her vote multiplied by the number of directors to be elected, or to distribute such votes on the same principle among as many candidates as he or she shall think fit.

(c) If a corporation has no members or its members have no right to vote, the directors shall have the sole voting power. 805 ILCS 105/107.40

Foundation per capita tax payments, and registration fees I have paid over the years are being diminished in value by Defendant McKinzie's misuse of AKA funds." *See* Decls. of Daley, Vaughters, Ray, Holmes, B. Georges, Cameron, C. Georges, Tyus, attached to Pls.' R. 56(f) Mot.

Plaintiffs further lack standing to bring a claim on behalf of AKA. Plaintiffs concede that they have not and do not intend to bring a derivative action on behalf of AKA. *See* Pls.' 56(f) Mot. Mem. at p. 32. Nevertheless, Plaintiffs filed an Amended Claim in which they seek relief on behalf of AKA. *See* Pls.' Am. Compl. at p. 41, pars. 213, 218. It is well settled that in order for shareholders (or members of an association) to bring a derivative action on behalf of a corporation, plaintiffs must allege that the claim is brought derivatively *and* in compliance with the necessary procedural and substantive requirements which must be satisfied prior to asserting such a cause of action. *See* D.C. Super. Ct. Civ. R. 23.1; *Flocco v. State Farm Mu. Auto. Ins. Co.*, 752 A.2d 147, 151 (D.C. 2000); *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 470, n.6 (D.C. 2008).

Here, it is undisputed, and Plaintiffs' admit, that they haven not asserted a derivative action on behalf of AKA. However, it is beyond question that each of the claims in the Amended Complaint is an attempt to "redress ... alleged wrongs against the corporation's property interests" rather than to remedy injuries suffered by Plaintiffs *individually*. *Estate of Raleigh* 947 A.2d at 469. Plaintiffs have not, and cannot, identify any legal duties owed by any of the Defendants directly to the individual member Plaintiffs.[10]

[10] As Defendants set forth in their Motion to Dismiss,

The District of Columbia adheres to the well-established principle that "the directors of a corporation and not its shareholders manage the business and affairs of the corporation." Flocco, 752 A.2d at 151 (quoting

While a clever attempt to circumvent the evident lack of injury in the Amended Complaint, it remains undisputed that the funds Plaintiffs seek to recover *belong to AKA*, as they were paid by members in the form of dues and registration fees. *See* Pls.' Am. Compl., Prayer for Relief at pp. 41-42. Having conceded that their claims are *not* brought derivatively on behalf of AKA, Plaintiffs lack standing to maintain this action on behalf of AKA against its Directorate and Supreme Basilius.

Rather, the redress that Plaintiffs propose for this indirect purported harm to Plaintiffs, is the Court's direct interference into the management of the affairs of a private corporation through mostly injunctive relief to control who sits on the Directorate or as Supreme Basileus. *See* Pls.' Am. Compl. at 41-42.[11] The law of this jurisdiction, however, requires a finding of "irreparable injury," as injunctive relief is extraordinary relief and will not be granted lightly." *See In re Antioch University*, 418 A.2d 105, 109 (D.C. 1980) (*citing Wieck v. Sterenbuch*, 350 A.2d 384, 387 (emphasis added). By Plaintiff's own allegations, AKA is a private organization that has elections and that the leadership can be voted out of control.[12]

Levine v. Smith, 591 A.2d 194, 200 (Del. 1991) overruled on other grounds, Brehm v. Eisner, 746 A.2d 244 (Del. 2000); D.C. Code § 29-101.32 (a) (2001). This principle applies to non-profit, as well as to for-profit, corporations. D.C. Code § 29-301.18 (2001). The management authority of corporate directors includes decisions to litigate on behalf of the corporation. Flocco, 752 A.2d at 151 (citations omitted); D.C. Code § 29-101.04 (2) (2001); D.C. Code § 29-301.05 (2) (2001); Estate of Raleigh v. Mitchell, 947 A.2d 464, 469 (D.C. 2008). See Defs.' Mot. to Dismiss, p. 19.

[11] Plaintiffs seek: to permanently enjoin the Defendants from making payments or expenditures until AKA's full membership has had the opportunity to vote on each such expenditure -- in direct contradiction to the organization's bylaws; to require the Court to order that all meetings have posted public minutes; to remove the current President and Directorate with a specific plan to elect a new Directorate and officers -- in direct contradiction to the 2002, 2006 and 2008 elections; to enjoin the enforcement of existing contracts -- to the detriment of the organization and any potential embers who are involved in failing to comply with existing obligations; and arbitrary restoration of membership privileges -- in contradiction with the Bylaws of the organization. *See* Defs.' SMF 34.

[12] "The board of directors of AKA is known as the Directorate. With exception of the president and the first Vice President of the sorority who are elected for a four year term, the other Directorate members are

Plaintiffs, however, instead of seeking participation within the organization and its election process, or filing an Appeal for suspension of privileges in accordance with the Bylaws, Plaintiffs seek the extraordinary relief of injunctive relief from the court without any showing of "irreparable injury," (much less any injury in fact), and fail to show the element of redressability[13]. Plaintiffs seek completely inappropriate relief from this Court in addition to lacking any standing to bring such a cause of action.

C. This Court Should Not Inject Itself into an Internal Dispute Over AKA's Corporate Governance.

Plaintiffs argue that, "[h]owever Plaintiffs as individuals are harmed by the conduct alleged in the Amended Complaint as their dues, fees and assessments have been are increased thereby and their payments over the years to the Sorority are diminished in value." *See* Pls.' Mot. Mem. at p. 31. Plaintiffs concede that the Boule meets only *biennially* and that the Directorate has the power to conduct all business of AKA when the Boule is not in session. *See* Pls.' SDF at ¶¶ 11, 17. It is further undisputed that the Supreme Basileus (Defendant McKinzie) shall be provided a stipend from AKA when funds are available in the budget. *See* Pls.' SDF at ¶ 35.

Rather, than making any claims of concrete injury – much less "irreparable injury," Plaintiffs' claims are speculative claims of monetary damages, that dues paid over the years have not resulted in their chosen methods of spending or Daley's claims

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elected for a two year term at the biennial meeting of the Boulé by Boulé delegates." See Am. Compl. at par. 45.

[13] *See Lujan v. Defendants of Wildlife* (504 U.S. 555, 560 (1992)(Article III standing requirements are met when a party demonstrates (1) an injury in fact, (2) a causal connection between the injury and the conduct of which the party complains, and (3) redressability, i.e. that it is likely that a favorable decision will redress the injury. An injury in fact is one that is both (a) concrete and particularized …and (b) actual or imminent, not conjectural or hypothetical.)

for relief of her suspension by AKA. *See* Pls.' Am. Compl. at 41-42[14]. Plaintiffs rather seek the extraordinary relief of Court intervention and injection in to a private organization is clearly unwarranted on the face of Plaintiffs' Amended Complaint.

"Courts will not interfere to control the enforcement of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government." *Joie Jolevare v. Alpha Kappa Alpha Sorority, Inc.*, 521 F.Supp.2d 1, 9 (D.D.C. 2007); *Levant v. Whitley*, 755 A.2d 1036, 1043 (D.C. 2000) (further citations omitted).

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[14] WHEREFORE, the Plaintiffs pray that this Court enter judgment against the Defendants and in favor of the Plaintiffs, and award:
1) A permanent injunction enjoining and restraining each and all Defendants from taking any action that does not strictly follow the budget requirements set forth in Defendant AKA Constitution and Bylaws;
2) The return of all unapproved payments and expenditures, in an amount to be determined at trial;
3) A permanent injunction enjoining and restraining each and all Defendants from making any of the aforementioned payments or expenditures until the full membership of AKA has had the opportunity to vote on each payment or expenditure;
4) A permanent injunction enjoining and restraining each and all Defendants from authorizing any payments or expenditures not specifically set forth as a line item in the budget approved by the Boulé in 2006 and 2008, unless such payment or expenditures are approved after the full membership of Defendant AKA has had the opportunity to vote on each payment or expenditure;
5) That all meetings of the Directorate, except Executive Sessions, be transcribed and that such transcription and board minutes be regularly posted on the Defendant AKA members only website so that the AKA membership shall have proper notice of the discussion and votes occurring in the meetings of the Directorate;
6) Judicial removal of Barbara McKinzie as President.
7) Judicial removal of all current Directorate members, and a plan for the election of a new Directorate and officers that is consistent with the AKA Constitution and Bylaws;
8) To set aside any and all contracts entered between AKA and BMC Associates and/or defendant McKinzie with respect to professional services to be rendered on behalf of endowment funds from AKA members, and directing defendant McKinzie to refund any moneys or consideration paid into such endowment fund;
9) A permanent injunction enjoining and restraining each and all Defendants from adversely affecting the membership privileges and rights of Plaintiffs for bringing this action or other dissenting Defendant AKA members;
10) Restoration of the membership privileges of all of the Plaintiffs who have had withdrawal of privileges and/or suspensions by any one or all of the Defendants;
12) Actual and punitive damages suffered by the Plaintiffs, AKA and EAF from against the Defendants, jointly and severally, in excess of $50,000 and or such other amount determined at trial; and
13) Such other and further relief as this Court deems just and proper.

D. Plaintiffs Fail to State a Claim for Corporate Waste.

Put simply, Plaintiffs' corporate waste claim fails because Plaintiffs' have still not established that Defendants' conduct meets any of the elements required to state a claim for corporate waste.

The term "corporate waste" refers to an "exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *In re Greater Southeast Community Hospital Corp., I, et al v. Paul Tuft, et al*, 333 B.R. 506, 524 (Bankr. D.D.C. 2005). To prevail on such a claim, the Plaintiff must overcome a good faith presumption and show that the board's decision was "egregious or irrational." *Id.*

Indeed, it is undisputed that Defendant McKinzie was compensated for her services as President of AKA, and thus, Plaintiffs' contention that they "received no, or little, consideration" from Defendant McKinzie is meritless. Pls.' R. 56(f) Mot. at p. 51; *see also* Pls.' Am. Compl. at ¶ 14.

Plaintiffs further misstate the facts and highlight contradictions in their own Amended Complaint. For instance, Plaintiffs' state that Defendant McKinzie "plans to use the approximately $4 million surplus from the 2008 Boule for her personal projects…," but in Plaintiffs' also state that the Directorate *approved* AKA's 2008 Boule $4 million surplus spending as follows: "Liberian Women's Market Funds ($500,000); Ford Museum to acquire Rosa Parks Collection ($1 million); Smithsonian African American Museum Partnership ($500,000); Centennial Administration History Project ($570,000); and a 2010 Boule museum and finale in part to create living legacy wax statutes ($900,000)." *See* Pls.' R. 56(f) Mot.; *see also*, Pls.' Am. Compl. at ¶ 104, 209.

Such conclusory, patently inaccurate allegations do not suffice to establish a claim for corporate waste. Even assuming that Plaintiff alleged accurate facts, it is well established that courts "will not second guess business judgments" and that business decisions should not be governed by court intervention. *In re Greater Southeast Comm. Hosp.*, 333 B.R. at 524-525. In sum, because Plaintiffs have alleged no facts evidencing "disproportionately small" consideration given in exchange for corporate assets, they have failed to set forth a valid claim for corporate waste.

E. Plaintiffs' fail to state a claim for Ultra Vires violations.

Plaintiffs' ultra vires claim is barred by D.C. Code § 301.06, and Plaintiffs' instant Motion fails to establish otherwise. Rather, Plaintiffs' state only that the Defendants should be precluded from making this argument based on Defendants' previous contention that AKA is not governed by the D.C. Non-Profit Corporation Act.[15] *See* Pls.' R. 56(f) Mot. at p. 49. Even assuming, *arguendo*, that AKA is not governed by the DC Non-Profit Corporation Act, then the entire concept of "ultra vires" is inapplicable to AKA and all the Defendants and Plaintiffs' ultra vires claim must fail for this reason. However, assuming that D.C. Code § 301.06 applies to AKA, Plaintiffs' ultra vires claim is equally meritless against the Individual Defendants pursuant to the language of the statute. As previously stated in Defendants' Motion to Dismiss, an ultra vires action may only be brought "against the corporation." D.C. Code § 301.06. Thus, Plaintiffs' ultra vires claim cannot be sustained against the Individual Defendants.[16]

[15] In their Opposition to Plaintiffs' Motion to Compel Inspection of AKA's Books and Records, Defendants argued that AKA was exempt from the majority of provisions of the DC Non-Profit Corporation Act, as they were incorporated under the Old Act Statute, and therefore the right of inspection did not apply to them.

[16] Plaintiffs' ultra vires claim is equally meritless under Illinois' statute governing ultra vires actions. Specifically, 805 ILCA 105/103.15(a) states that an ultra vires claim may be asserted "by a member entitled to vote or by a director against the corporation…" Pursuant to this statute, Plaintiffs are barred

Further, Plaintiffs' have failed to state a valid ultra vires claim against AKA and the Foundation. Most significantly, Plaintiffs have failed to allege that the AKA and the Foundation violated a "statute or by-law," as required to sustain such a claim. *See Columbia Hosp. for Women Found. Inc. v. Bank of Tokyo-Mitsubishi, Ltd.,* 15 F. Supp. 2d 1, 11 (D.C. 1997). To the contrary, AKA's Constitution allows payment of a "stipend" to the President, a fact that the Plaintiffs concede. *See* Pls.' R. 56(f) Mot. at p. 50. Plaintiffs cannot point to a single statute or bylaw AKA or the Foundation violated. *Id* at 49-50; *see* Pls.' Am. Compl., generally. Because Plaintiffs cannot demonstrate that AKA and the Foundation violated a statute or bylaw, their ultra vires claim must be dismissed.

F. Plaintiffs' Unjust Enrichment Claims Fail as Plead.

Plaintiffs offer no factual support for their unjust enrichment claim against Defendant McKinzie. Aside from the fact that Plaintiffs do not have standing to maintain this claim, as discussed in more detail above, Plaintiffs have not, and cannot, establish the threshold element of an unjust enrichment claim, that "the plaintiff conferred a benefit on the Defendant." *News World Comm., Inc. v. Elaine J.S. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005). It is undisputed that AKA's corporate funds were used to compensate Defendant McKinzie for her services as President of AKA. *See* Pls.' Am. Compl., generally. While a portion of AKA's corporate assets are undoubtedly comprised of membership dues, Boule registration fees and other fees paid by members to the organization, once paid, these monies become the property of AKA and no longer belong to individual members.

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from bringing an ultra vires action altogether because they are neither voting members nor directors of AKA. Even assuming that the Plaintiffs possessed such requisite membership status, they would still be barred from asserting an ultra vires claim against the Individual Defendants pursuant to Illinois' statute.

Plaintiffs attempt to overcome this substantial deficiency by contending that Defendant McKinzie's compensation "directly impact[s] individual members." Pls.' R. 56(f) Mot. at p.48. However, because Defendant McKinzie was compensated with AKA' funds, AKA, and not the Plaintiffs, "conferred a benefit on [Defendant McKinzie]." *News World*, 878 A.2d at 1222. That individual members were allegedly "directly impact[ed]" by this compensation is irrelevant to an unjust enrichment claim. Pls.' R. 56(f) Mot. at p.48. Thus, the Plaintiffs' unjust enrichment claim cannot be sustained.

G. Plaintiffs Fail to Plead Fraud in Accordance with the Rules

Despite Plaintiffs' attempt to distract the court with conclusory allegations, Plaintiffs have failed to plead a proper cause of action for fraud against Defendant McKinzie. *See* Pls.' R. 56(f) Mot. at pp. 46-48. Of crucial significance is that Plaintiffs have merely stated the "buzz" words for a fraud claim, i.e., a (1) misrepresentation, (2) made with knowledge of its falsity (3) with the intent to deceive, but have failed to plead these accusations with particularity as required by law. *Id.*

To state a valid claim for fraud, the claim must be plead with particularity pursuant to DC Superior Court Rule 9(b). Specifically, the pleader must "state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *United States, ex rel. Williams v. Martin-Baker Aircraft Company, Ltd., et al*, 389 F.3d 1251, 1256 (D.C. Cir. 2004). In this instance, Plaintiffs state that Defendant McKinzie "misrepresented the resolutions of the Directorate" but Plaintiffs fail to provide the content of such representation, the fact represented, and the place where such "misrepresentation" took place. Pls.' R. 56(f) Mot. at p. 47; *see also* Pls.' Am. Compl. at ¶¶ 89, 183. Indeed, Plaintiffs have provided no

insights whatsoever into the fact which was allegedly misrepresented by Defendant McKinzie.

In their Motion, Plaintiffs cite numerous facts from their Amended Complaint that detail amounts paid to Defendant McKinzie, and yet they fail to allege that such payments were fraudulent. *See* Pls.' R. 56(f) Mot. at p. 46; *see also* Pls.' Am. Compl. at ¶¶ 77-81, 89-93. The fact that Defendant McKinzie requested, and received compensation from AKA is entirely lawful and provides absolutely no support for Plaintiffs' fraud claim. Because Plaintiffs have failed to state with particularity any of the elements necessary to plead a cause of action for fraud, and most importantly, because they do not even state the alleged fact misrepresented, this claim must be dismissed.

H. Plaintiffs Fail to State a Claim for Breach of Contract and Breach of Fiduciary Duty

Plaintiffs' instant Motion provides no basis for their breach of contract and breach of fiduciary duty claims. Significantly, Plaintiffs have not established that contractual and fiduciary relationships ever existed between the parties.

Concerning their breach of contract claim, Plaintiffs allege that AKA's Constitution and Bylaws constitute a contract between AKA's members and AKA and the Directorate. *See* Am. Compl. at ¶¶ 174, 179. This contention is simply not accurate. As Defendants previously cited in their Motion to Dismiss, the U.S. District Court for the District of Columbia, in a previous case against AKA, found no authority "which supports the proposition that a current or prospective member's pledge not to act in a certain manner constitutes a contract between that individual and a private, voluntary, and social organization." *Jolevare v. Alpha Kappa Alpha Sorority, Inc.*, 521 F.Supp.2d 1, 10

(D.D.C. 2007). Accordingly, AKA's Constitution and Bylaws do not constitute contracts between the Plaintiffs and the Individual Defendants, AKA, and the Foundation. Indeed, Plaintiffs cite no authority in support of a proposition contrary to the foregoing U.S. District Court ruling. *See* Pls.' R. 56(f) Mot. at pp. 41-44. Having failed to establish that a contractual relationship ever existed between the parties, Plaintiffs' breach of contract claim must be dismissed.

Similarly, Plaintiffs have failed to state a claim for breach of fiduciary duty against the Defendants, and their Amended Complaint and instant Motion are devoid of any facts evidencing that such a relationship existed between the parties in the first place. As plainly stated in *Friends of Tilden Park, Inc.*, "[o]fficers and directors of a corporation owe a fiduciary duty to the corporation" and not to its members. *Friends of Tilden Park, Inc. v. District of Columbia and Clark Realty Capital, LLC*, 806, A.2d 1201, 1210 (D.C. 2002). While Plaintiffs distinguish the facts of *Tilden Park* from the facts of the instant case, this distinction in no way diminishes the foregoing principle stated by that court. Even assuming, *arguendo*, that such a fiduciary relationship existed between the parties, Plaintiffs have not even alleged that the Individual Defendants derived a personal benefit from their actions, and they have not established that Defendant McKinzie's benefits constitute anything other than authorized compensation for her services. As such, Plaintiffs' breach of fiduciary duty claims should be dismissed.

CONCLUSION

Plaintiffs are not seeking "reasonable discovery" limited to a specific claim or issue. To the contrary, Plaintiffs admit that they seek discovery concerning "the substantive misconduct alleged in the Amended Complaint." Pls.' R. 56(f) Mot. at p. 4.

Rather, the lack of jurisdiction on the face of the complaint along with the very injunctive relief sought, with nearly no monetary damages claimed, reflect the legal deficiencies of the Complaint and should be dismissed in accordance with Rule 12(b).

The Plaintiffs instead seek to bring an internal political dispute to this Court in DC to seek the Court to inject itself into what is essentially an Illinois corporation to select its leadership, reinstate Ms. Daley and otherwise award monetary relief from AKA money to the plaintiffs, based on general unsupported allegations that fail to constitute a cause of action, assuming *arguendo* all facts in favor of the plaintiffs. AKA is a non-public private sorority legally permitted to declare its own Bylaws and voting processes, without interference from a governmental entity such as the DC Court. It has a right to choose to spend its surplus budget to support organizations such as "Liberian Women's Market Funds" or the Ford Museum to acquire Rosa Parks Collection or to any of the various organizations Plaintiffs' allege on which AKA spent money.

This purported motion for limited discovery seeks to obtain full discovery and pursue the litigation that Plaintiffs attempt to use for their very public campaign to destroy the current leadership of AKA, a private, voluntary, social organization comprised primarily of African-American women that was established in 1908 to "cultivate and encourage high scholastic and ethical standards, improve the social stature of the race, promote unity and friendship among college women, and keep alive within graduates an interest in college life and progressive movement emanating therefrom…" *Jolevare v. AKA*, 521 F. Supp. 2d 1 (D.D.C. 2007(Walton, J.))(*citing* AKA Constitution and Bylaws 2004).

Plaintiffs lack a legal basis to seek the injunctive relief sought, to seek the reinstatement of a suspended member and generally to interject itself into a private Illinois based corporation based on an internal political dispute. Indeed, Plaintiffs' request for discovery appears entirely limitless and should be denied by this court.

WHEREFORE, the foregoing premises considered, Defendants respectfully request that this Court deny Plaintiffs' Combined Rule 12 and 56(f) Motion Requesting discovery prior to opposing Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and that the Court grant Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

Respectfully Submitted,

//s//_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2009, a copy of the foregoing was served electronically on:

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/S/
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