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: Initial Conference September 18, 2009, 9:00 a.m.

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, pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the District of Columbia Superior Court Rules of Civil Procedure, for lack of standing, lack of personal jurisdiction and failure to state a claim upon which relief can be granted, hereby move this Court to dismiss Plaintiffs' Amended Complaint with prejudice. The attached Memorandum of Points and Authorities and Proposed Form of Order further support the Motion to Dismiss, which are also incorporated herein.

ORAL HEARING REQUESTED

Defendants respectfully request oral argument pursuant to Rule 12-I(f).

/S/
Julia Z. Haller

Rule 12-I Certification

The Undersigned contacted Plaintiffs in accordance with Rule 12-I, but Plaintiffs' counsel Edward Gray's office did not consent to the motion or the relief requested herein.

/S/
Aaron Handleman

Respectfully Submitted,

/s/
Aaron Handleman (#48728)
Julia Z. Haller (#466921)
ECCLESTON AND WOLF, P. C.
2001 S Street, N. W., Suite 310
Washington, DC 20009-1125
Telephone (202) 857-1696
Facsimile (202) 857-0762
Email: Handleman@ewdc.com
Haller@ewdc.com
Counsel for Defendants

/S/
Dale A. Cooter, Esquire
Donna S. Mangold, Esquire
Stephen Nichols, Esquire
5301 Wisconsin Avenue, NW
Suite 500
Washington, DC 20015
efiling@cootermangold.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of September, 2009, a copy of the foregoing was served electronically on:

Edward W. Gray, Esquire
Fitch Even Tabin & Flannery
One Lafayette Centre
1120 20th Street, N.W.
Suite 750 South
Washington, DC 20036
Facsimile (202) 419 7007

/S/
Julia Z. Haller

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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: Initial Conference September 18, 2009, 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT[1]

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, pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the District of Columbia Superior Court Rules of Civil Procedure, for lack of standing, lack of personal jurisdiction and failure to state a claim upon which relief can be granted, hereby move this Court to dismiss Plaintiffs' Amended

[1] Under the Superior Court Rules of Civil Procedure, when a party files a motion to dismiss for failure to state a claim, the Court is instructed to treat the motion as one for summary judgment if either party submits additional materials "outside the pleadings." Super. Ct. Civ. R. 12 (b); *Taylor v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 859 A.2d 142, 146 (D.C. 2004); *Scoville St. Corp. v. Dist. TLC Trust*, 857 A.2d 1071 (D.C. 2004); *Kitt v. Pathmakers, Inc.*, 672 A.2d 76, 79 (D.C. 1996) ("when the trial court decides a Rule 12 (b)(6) motion by considering factual material outside the complaint, the motion shall be treated as if filed pursuant to Rule 56"). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *see e.g., Colbert v. Georgetown University*, 641 A.2d 469, 472 (D.C. 1994) (en banc). Indeed, to survive summary judgment, the nonmoving party must produce specific facts showing that there is a genuine issue for trial, and may not rest upon the bald assertions of its pleadings. Super. Ct. R. Civ. P. 56(e). The mere existence of a "scintilla of evidence", however, is not enough to frustrate a motion for summary judgment. *Id.; Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Complaint with prejudice. This Memorandum of Points and Authorities and proposed form of Order, which is also incorporated herein, further support the Motion to Dismiss.

INTRODUCTION

A. Alpha Kappa Alpha Sorority, Inc.

AKA is a 101 year-old private not-for-profit corporation of over 250,000 members worldwide with a policy making body known as the Boule, which meets every two years and to which the chapters are subordinate. *See* AKA CONST. art. IV, § 1 and AKA Bylaws art. IV. Only active members (i.e., dues paying and in good standing) of AKA are eligible to participate in the Boulé, and only those active members designated as delegates, current corporate or administrative officers, and former International Presidents are entitled to vote when the Boulé is in session. *See* AKA CONST. art. III, § 1; AKA Bylaws art. IV.

The administrative division of the Boule is the Directorate (board of directors which number 18), which is duly elected at the Boule. *See* AKA CONST. art. V, § 1; AKA Bylaws art. I, § 5. The Directorate conducts the business of the sorority and is in charge of the day-to-day operations, including *membership and finance* issues, when the Boulé is not in session. *Id.* The Directorate has the governance responsibility and long-standing protocol to address issues raised by members through its internal processes. *Id.* The Directorate also has the power to make recommendations to the Boulé. *Id.*

The finance committee is a standing committee responsible for operation of the budget (presentation of fee changes to the Boule) and auditing of all accounts. *See* Bylaws, Article I, section 15(b). The sorority's financial records are audited by external certified public accountants annually, and the annual audit report is submitted to each

AKA chapter so that active members have the opportunity to review and examine the report.

B. Alpha Kappa Alpha Educational Advancement Foundation, Inc.

Formed in 1980 by leaders of AKA, Alpha Kappa Alpha Educational Advancement Foundation (hereinafter "Foundation") is a private, tax-exempt, not-for-profit Illinois corporation whose mission is "to promote lifelong learning"[2] by providing scholarships, fellowships, grants, and community assistance awards to deserving, academically talented students and to community service programs. It is not surprising that AKA leaders saw the need to establish the Foundation because the sorority has a distinguished, hundred-year history of providing "service to all mankind."[3]

The Foundation relies on contributions, gifts, and endowed funds to meet its philanthropic goals and effect change in the world. To date, the Foundation has awarded more than $1.7 million in scholarships and community awards to over 1,700 people and organizations internationally.[4] Although AKA and the Foundation share a rich history and commitment to education and service, there is one irrefutable fact: AKA and the Foundation are different legal entities.

The Foundation consists of a volunteer board of directors (which shapes policy, develops fund-raising strategies, and oversees the funding process), regular members (defined as members of AKA who pay separate dues to the Foundation), and honorary members (defined as individuals who have been nominated and elected for honorary membership). Thus, a woman can be a member of AKA without being a member of the Foundation and vice versa.

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[2] About EAF, http://www.akaeaf.org.
[3] *Id*.
[4] *Id*.

The Foundation's board of directors consists of thirteen (13) members, five of whom are AKA officers. (*See* Excerpt of Foundation Bylaws Ex. 4 at art. IV, § 2. The Foundation's board of directors has authority, inter alia, to administer the affairs of the Foundation and to approve its budget. *Id*. at art. IV, § 1. The Foundation's board of directors is not the same corporate body as the AKA Directorate.

Plaintiffs represent only 8 members, albeit not current, of the more than 250,000 members of the sorority. Plaintiffs, however, failed to proceed with any of the internal processes of the organization for asserting their alleged complaints. Instead they filed this action, based on a personal vendetta against the leaders of the organization, to air their purported grievances in the public eye.

Defendants hereby incorporate their Undisputed and Material Statement of Facts ("SMF") that are attached.

ARGUMENT

Plaintiffs make a myriad of unfounded, patently false accusations against AKA that should not be tolerated by this Court. While the accusations made against all Defendants at first appear severe, a closer look reveals that these claims are vague, conclusory, and wholly unsubstantiated by fact. Ultimately, the matters at issue in this action are an unfortunate waste of this Court's valuable time and resources, as they represent disagreements over management issues between members of a private, voluntary organization. As a preliminary matter, it is a well-established principle that Courts are unwilling to interfere with the management and internal affairs of voluntary associations, such as AKA and the Foundation.

Nevertheless, Plaintiffs' claims cannot be sustained against the Defendants. First, this Court lacks personal jurisdiction over all twenty-four (24) of the individually named Defendants and the Foundation, and, therefore, the claims against these individuals should be dismissed pursuant to Rule 12(b)(2) of the District of Columbia Superior Court Rules of Civil Procedure. Second, Plaintiffs generally lack standing to assert all of their claims, and, therefore, should be dismissed pursuant to Rule 12(b)(1). Plaintiffs further fail to set forth any proper damage claims, and have failed to meet the standard for injunctive relief. Lastly, Plaintiffs have failed to state claims for breaches of fiduciary duty, breaches of contract, fraud, unjust enrichment, ultra vires and corporate waste, and those claims should be dismissed pursuant to Rule 12(b)(6).

Plaintiffs also assert a fraud claim against Defendant McKinzie, but this allegation is broad, general and conclusory, and amounts to no more than a bare assertion. Plaintiffs, therefore, fail to meet the pleading requirements for fraud.

Thus, because this Court should not find itself embroiled in an internal dispute within a private, voluntary organization such as AKA, and because Plaintiffs have not, and cannot plead any set of facts which would entitle them to relief, Plaintiffs' entire Amended Complaint should be dismissed with prejudice.

I. THE AMENDED COMPLAINT MUST BE DISMISSED AS TO THE INDIVIDUAL DEFENDANTS AND THE FOUNDATION BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER THOSE DEFENDANTS.

A. This Court Lacks Jurisdiction Under the District of Columbia Long-Arm Statute

This Court lacks personal jurisdiction over all twenty-four (24) of the individually named Defendants and the Foundation; therefore, dismissal of the Amended Complaint

against these Defendants is proper. Of significance is that Plaintiffs have failed to carry their "burden of establishing personal jurisdiction by alleging factual underpinnings for the exercise of such jurisdiction over the defendant[s]." *Crane v. New York Zoological Soc.,* 894 F.2d 454, 456 (D.C. Cir. 1990); *see also Holder v. Haarman & Reimer Corp*., 779 A.2d 264, 269 (D.C. 2001). Pursuant to the District of Columbia's long-arm statute, this Court may exercise personal jurisdiction over a person who has sufficient contacts with the District, which may arise from, among other things, transacting business in the District, contracting to supply services in the District, causing tortious injury in the District by an act or omission in or outside the District, or possessing an interest in real property located in the District. D.C. Code § 13-423.[5] However, Plaintiffs fail to set forth grounds for personal jurisdiction with respect to all twenty-four (24) of the individually named Defendants and the Foundation, and therefore, Plaintiffs' claims cannot be maintained against these Defendants. Super. Ct. Civ. R. 12(b)(2).

Plaintiffs' Complaint fails to allege a single incident or action connecting the following twenty-four (24) Defendants or the Foundation to the forum jurisdiction pursuant to the provisions set forth in the District's long-arm statute. *See* SMF 3, 8.

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[5] D.C. Code § 13-423 in large part reads: Personal jurisdiction based upon conduct,
(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;
(2) contracting to supply services in the District of Columbia;
(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
(5) having an interest in, using, or possessing real property in the District of Columbia;
(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing; or
(7) marital or parent and child relationship in the District of Columbia if:…
(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

Plaintiffs allege the following:

1. Barbara McKinzie – Resident of Chicago, Illinois
2. Carolyn House Stewart – Resident of Thonotosassa, Florida
3. Melanie C. Jones – Resident of Country Club Hills, Illinois
4. Dorothy Buckhanan Wilson – Resident of Mequon, Wisconsin
5. Freddie Groomes-McLendon – Resident of Tallahassee, Florida
6. Glenda Glover – Resident of Jackson, Mississippi
7. Noel M. Niles – Resident of Troy, Michigan
8. Shayla N. Johnson – resident of Orlando, Florida
9. Pamela Bates Porch – Resident of Chicago, Illinois
10. LaVern M. Tarkington – Resident of Phoenix, Arizona
11. Schylbea J. Hopkins – Resident of Detroit, Michigan
12. Norma Jean Tucker – Resident of Oakland, California
13. Ruby Batts Archie – Resident of Danville, Virginia
14. Vicki Miles-LaGrange – Resident of Oklahoma City, Oklahoma
15. Evelyn Sample-Oates – Resident of Plymouth Meeting, Pennsylvania
16. Ella Spring Jones – Resident of Augusta, Georgia
17. Gwendolyn J. Brinkley – Resident of Houston, Texas
18. Juanita Sims Doty – Resident of Jackson, Mississippi
19. Tari Bradford – Resident of Shreveport, Louisiana
20. Betty N. James – Resident of Chicago, Illinois
21. E. Lavonne Lewis – Resident of Las Vegas, Nevada
22. Ranika Sanchez – Resident of Pittsburgh, Pennsylvania

23. Adria Robinson – Resident of Aurora, Colorado

24. Shaylyn Cochran – Resident of Mansfield, Ohio.

See Pls.' Am. Compl. at ¶ 13- 37; *see also* SMF 3, 8.

Aside from stating the foregoing Defendants' respective places of residence, none of which is in DC, and their positions in AKA, Plaintiffs fail to set forth a single connection between the individual Defendants and the District or between the Foundation and the District. *See id. See also,* SMF 9.

For instance, in accordance with the District's long arm statute, Plaintiffs have not alleged that any of the foregoing Defendants (a) transacted business in the District; (b) contracted to supply services or conduct business in the District; (c) caused tortious injury in the District by virtue of an act or omission in the District or outside the District;[6] (d) engaged in a persistent course of conduct, derived substantial revenue from goods used or consumed, or rendered any services in the District; or (e) possess an interest in real property located in the District. *See* D.C. Code § 13-423. Simply put, Plaintiffs have failed to allege that any of these Defendants engaged in activities other than those purportedly in Chicago Illinois, where AKA's principal office and the Foundation's headquarters are located.

"It is important to note that "as a general rule, courts cannot exert jurisdiction over individual corporate officers or employees 'just because the court has jurisdiction over the corporation.'" *Nat'l Cmty. Reinvestment Coalition v. NovaStar Fin., Inc.*, 2009 U.S. Dist.

[6] While Plaintiff fails to allege any tortious conduct on the part of any of the Defendants, it is important to note that even if such conduct was alleged, in order for this Court to have personal jurisdiction over an individual whose act or omission outside of the District of Columbia caused tortious injury in the District of Columbia, such jurisdiction is only proper where the individual "regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia." D.C. Code § 13-423(a)(4). In this instance, Plaintiffs have failed to allege that any of the individual Defendants have engaged in such activities in the District. Thus, personal jurisdiction is not proper pursuant to this provision of the long-arm statute.

LEXIS 53130 (D.D.C. June 22, 2009)(*citing Kopff v. Battaglia*, 425 F. Supp. 2d 76, 84 (*quoting Flocco v. State Farm Mu. Auto. Ins. Co.*, 752 A.2d 147, 162 (D.C. 2000)). The plaintiff therefore must demonstrate that the individual defendants are subject to personal jurisdiction "apart from any jurisdiction that might exist over their corporate-entity employers." *D'Onofrio*, 534 F. Supp. 2d at 90-91 (*citing Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)).

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. Association of American Medical Colleges, et al.*, 300 F.Supp.2d 119, 127 (D.D.C. 2004) (the facts to support personal jurisdiction must be established by affidavit or other evidence). This burden can be met only through specific factual allegations; the plaintiff cannot rely on conclusory allegations. *Jung v. American Medical Colleges*, 300 F.Supp.2d at 127. Moreover, in a case involving numerous defendants, the plaintiff must prove that each defendant has committed acts sufficient to give rise to personal jurisdiction. Thus, the fact that a forum properly exercises jurisdiction over one defendant does not confer personal jurisdiction over his remaining co-defendants. *Rush v. Savchuk*, 444 U.S. 320, 331-332, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980) ("the requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction."); *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 104 S.Ct. 1473, 1482 n.13, 79 L.Ed.2d 790 (1984) (due process requires that each defendant's contacts with the forum state be assessed individually in determining whether jurisdiction exists).

B. Exercise of Jurisdiction Over the Individual Defendants and the Foundation Violates the Constitutional Requirements of Minimum Contacts.

The long-arm statute has traditionally been interpreted in a manner "that is coextensive with the due process clause" of the Fourteenth Amendment to the Constitution. *Helmer v. Doletskaya*, 393 F.3d 201, 205 (D.C. Cir. 2004). Thus, as a practical matter, the outer limits of jurisdiction conferred by the long-arm statute are coextensive with those set forth in the Supreme Court's jurisprudence concerning the limits on personal jurisdiction imposed by the due process clause. The Supreme Court's due process jurisprudence provides that a court properly exercises personal jurisdiction only over one who has "purposefully established 'minimum contacts' with the [jurisdiction] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). To suffice to confer personal jurisdiction, these minimum contacts must be "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. v. Super. Ct. of Cal.*, 480 U.S. 102, 109, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). A defendant's conduct and connection with the forum state do not rise to the level of the required minimum contacts unless they are "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Courts applying these general principles to facts similar to those upon which the Amended Complaint is based have ruled that merely because a company has sufficient contacts with a forum to subject it to personal jurisdiction, it does not follow that its officers and directors are also subject to personal jurisdiction. *Flocco v. State Farm Mut. Auto Ins. Co.*, 752 A.2d 147, 163 (D.C. 2000). More specifically, District of Columbia

courts have 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 him. *NAWA USA, Inc. v. Bottler*, 553 F.Supp.2d 52, 57 (D.D.C. 2008). It follows from this that being an officer or director of a corporation organized under the laws of a forum does not suffice to grant the forum personal jurisdiction either, and cases in other jurisdictions have so held. *See, e.g., Platt Corp. v. Platt*, 17 N.Y.2d 234, 270 N.Y.S.2d 408, 217 N.E.2d 134 (1966). Instead, a forum acquires personal jurisdiction over a director of a corporation doing business within the forum only as a result of specific acts performed by the director within the forum. *See, Mozes v. Welch*, 638 F.Supp. 215, 222-224 (D.Conn. 1986), and cases cited therein.

Illustrative of this point is that both the factual allegations in the Amended Complaint and the attached Exhibits fail to demonstrate a connection between these twenty-four (24) Defendants and the District or the Foundation and the District. *See* SMF 3, 8, and 15*;* Pls.' Am. Compl. generally. Throughout these extensive allegations, Plaintiffs fail to establish, or even assert, that these twenty-four (24) Defendants and the Foundation conducted business or contracted to provide services in the District. *See* SMF 26.

Even the allegations against the Directorate generally make no reference to, or assert a connection with, the District. *See id.*, *see also* SMF 3, 8. In addition, the Exhibits to Plaintiffs' Amended Complaint[7] are equally worthless in establishing a connection between these twenty-four (24) Defendants and the District, as they fail to

[7] The Exhibits to the Complaint consist of AKA's Constitution and Bylaws, AKA's Manual of Standard Procedure, AKA's tax returns, and a letter from Defendant Evelyn Sample-Oates to AKA's members.

evidence that these Defendants engaged in any activities, whether business, contractual, or otherwise, in the District. *See* Exhibits to Pls.' Am. Compl.

Given that Plaintiffs have failed to assert a single fact that would bring this matter within the purview of any subsection of the District's long arm statute or the Constitution, the Amended Complaint must be dismissed against the aforementioned Defendants for lack of personal jurisdiction.

II. THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE THE PLAINTIFFS LACK STANDING.

A. Plaintiffs Have Suffered no Individual Injury by the AKA Defendants

Plaintiffs lack standing to maintain their monetary claims against the Defendants pursuant to Rule 12(b)(1), as they have not demonstrated that they have each been injured by the Defendants in their capacity as individuals.

Plaintiffs primarily seek injunctive relief, which they plead as a demand in favor of Plaintiffs, regarding relief sought in connection with the management of AKA. *See* SMF, pars. 1, 3, 4, 5, 6, 7, 8, 9, 10, 12.

Plaintiffs specify their demands for monetary damages as "a return of all unapproved payments and expenditures" or "actual and punitive damages suffered by the Plaintiffs, AKA and the Foundation from against the Defendants, jointly and severally, in excess of $50,000 and or such other amount determined at trial." *See Id.* at par. 2, 12.

Paramount to the demand for monetary damages, including punitive damages, is that neither AKA or the Foundation is a Plaintiff in this case. *See* SMF 1, 4 and 8. Rather, Plaintiffs commenced this action in their *individual capacity,* and therefore, can only recover for injuries that they, as individuals, sustained. *Id.*

Generally, federal standing jurisprudence holds:

> 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. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Plaintiffs have failed to satisfy any prongs of the foregoing standing analysis. Plaintiffs have not, and cannot, plead that they suffered an "injury in fact," other than specifics claim of a suspended membership status. *See* Pls. Am. Compl. generally, *see also Id.* at p. 28, par. 140.

Other than Ms. Daley's membership status, there are no allegations throughout the entire Amended Complaint setting forth a "concrete and particularized" injury suffered by each individual plaintiff. *See Am. Compl. generally*. Plaintiffs' claims are replete with generalized allegations of unapproved payments and expenditures and the wrongful suspension of membership privileges by Defendant McKinzie and the Directorate. However, Plaintiffs fail to set forth how they, as individuals, suffered an injury. This fact alone demonstrates that no "concrete and particularized" injury has been alleged with respect to each of the seven (7) Plaintiffs other than Ms. Daley. Having failed to identify a single injury suffered by any of the individual Plaintiffs, those seven Plaintiffs lack standing for failing to assert an "injury in fact."

Secondly, Plaintiffs fail to allege a causal connection between Ms. Daley's alleged injury of suspension, and the claims of alleged misconduct by any of the Defendants. Therefore, no causal connection exists between the Plaintiffs' non-existent harm and the Defendants' conduct.

Third, redressability by this Court is inapposite because there is no concrete injury suffered by the Plaintiffs to be redressed. Rather, the redress that Plaintiffs propose is the Court's unwarranted interference in the management of the affairs of a private corporation. (See Defs.' Argument below in § IV(B)).

Plaintiffs cannot maintain their causes of action against the AKA Defendants because these claims can only be exercised by AKA. 'As a prudential matter, the Supreme Court generally has required a litigant to "assert his own legal rights and interests; he cannot rest his claim to relief on the legal rights or interests of third parties."' *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1104 (D.C. 2008)(*citing Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *see also Singleton v. Wulff*, 428 U.S. 106, 113-114, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)). The Supreme Court, however, has recognized some instances in which the prohibition on the assertion of a third party's rights may be overlooked in certain situations, usually involving attorney-client, buyer-seller, or physician-patient relationships. *Id.* at 1005 (*citing Id.*) The District of Columbia Court of Appeals denied a hospital's claim regarding a denial of Medicaid benefits on behalf of former patients of the hospital of which the hospital was a direct beneficiary. *See id.* The Court recognized instances where such claims could be brought on a third party's behalf, but found that the hospital had no standing to bring the claims on behalf of its former patients.[8] The Court went on to analyze that the Supreme

[8] The DC Court recognized instances in which a litigant may have suffered an injury in and outlined the criteria set by U.S. Supreme Court: (1) "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the litigant must have a close relationship to the third party"; and (3) the litigant must demonstrate "some hindrance to the third party's ability to protect his or her own interests." *Id.* at 1105 (*citing Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)(citing Singleton).

Court "suggested that it required that a litigant must meet all three requirements in order to assert the rights of others." *Id.* at fn 9.

Here, Plaintiffs do not fall within any exception to the general rule because they cannot meet the three requirements. The party they would seek to bring a claim on behalf of, -- AKA, -- is a Defendant. Further, Plaintiffs fail to show any "injury in fact." Any alleged close relationship with the third party would be with AKA, which they have sued. Third they cannot demonstrate that the third party is hindered from protecting its own interests. The internal procedures at AKA allow for remedies of complaints, and elections resolve changes in management. *See* SMF 17, 23, 24.

For these reasons, Plaintiffs lack standing to maintain their claims against the AKA Defendants, and therefore, the Amended Complaint should be dismissed in its entirety with prejudice.

B. The Amended Complaint Should be Dismissed because it Asserts Causes of Action That Belong Exclusively to AKA

Even a cursory review of the Amended Complaint reveals that all of the claims set forth in that pleading seek relief that can only benefit AKA itself, not the individual Plaintiffs.[1] Thus, in addition to the lack of personal jurisdiction, this action should be dismissed because each of its separate counts states a cause of action that can only be brought – if at all – by AKA as authorized by its directors, but not by its members. In determining who is empowered to bring a lawsuit asserting causes of action on behalf of a corporation, courts look to the law of the state of incorporation. Behradrezaee v. Dashtara, 910 A.2d 349, 356 (D.C. 2006) ("The substantive law governing the powers of

[1] To the extent that the Amended Complaint contains allegations relating to disciplinary action against specific Plaintiffs, and although those allegations may arguably state individual, rather than corporate claims, they must also be dismissed for the reasons set forth in the various other arguments in this Motion.

a corporation derive from the state in which it is incorporated.") (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98-99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). See also, Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541, 548-549, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (in derivative actions, the question of whether a stockholder has standing to sue on behalf of the corporation is controlled by the law of the state of organization); Flocco v. State Farm Mut. Auto Ins. Co., 752 A.2d 147, 152 (D.C. 2000)(same). AKA is incorporated is the District of Columbia (Amended Complaint at ¶ 3), and thus, District of Columbia law determines the issue of standing.

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 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) (a corporation's shareholders cannot "sue individually to redress any alleged wrongs against the corporation's property interests"); *see also* Grimes v. Donald, 673 A.2d 1207, 1215 (Del.1996), overruled on other grounds, Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

Here, 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*. Plaintiffs have not, and

cannot, identify any legal duties owed by any of the Defendants directly to the individual member Plaintiffs. Nor do Plaintiffs articulate any pecuniary losses suffered by them individually. Although each count of the Amended Complaint purports to raise a claim in violation of rights belonging to "Plaintiffs and AKA," the actual allegations supporting each count only seek to redress harm allegedly done by Defendants to AKA *as an organization*. Since this action was not brought by AKA's duly-elected directors, yet exclusively addresses itself to "alleged wrongs against the corporation's property interests," rather than those belonging to the individual Plaintiffs, the Amended Complaint should be dismissed for this reason alone. Estate of Raleigh v. Mitchell, 947 A.2d 464, 469 (D.C. 2008).

C. The Amended Complaint Fails to Comply with the Requirements for Bringing a Derivative Action

One narrow exception to the general principle that only a corporation's directors may sue to vindicate corporate rights is the ability of shareholders (or members of an association) to bring a derivative action on behalf of the corporation. *See* D.C. Super. Ct. Civ. R. 23.1; *Flocco,* 752 A.2d at 151; *Estate of Raleigh v. Mitchell*, 947 A.2d at 470, n. 6. In the absence of an allegation that the claim is brought derivatively *and* compliance with the necessary procedural and substantive requirements, however, the claim still must be dismissed. *Estate of Raleigh v. Mitchell*, 947 A.2d at 470, n. 6. In the instant case, the Amended Complaint contains no allegations either purporting to bring the claims derivatively or purporting to comply with the substantive and procedural requirements of such a claim.

To pursue the derivative action remedy, a shareholder or member must first demonstrate to the court either that the entity (here, AKA) refused to proceed after a

suitable demand for action, or that a demand would have been futile. *See, e.g., Kamen,* 500 U.S. at 95-96, 111 S.Ct. 1711 (citation omitted); *Flocco,* 752 A.2d at 151 (citations omitted). "The purpose of the demand requirement is to affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interest will be promoted by not insisting on such right." *Kamen,* 500 U.S. at 96, 111 S.Ct. 1711 (internal quotations omitted; citations omitted). The demand requirement implements "the basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors or the majority of shareholders." *Kamen,* 500 U.S. at 101, 111 S.Ct. 1711. The same is true with regard to a voluntary not-for-profit membership organization. *See, e.g., Levant v. Whitley,* 755 A.2d 1036, 1049 (D.C.2000).

Pleadings in derivative suits are governed by Superior Court Rule of Civil Procedure 23.1. *Bazata v. National Ins. Co. of Washington,* 400 A.2d 313, 315-16 (D.C.1979). With regard to the demand requirement, Rule 23.1 provides, in pertinent part:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, *the complaint shall be verified* and shall allege, (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on the Court which it would not otherwise have. *The complaint shall also 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.* (Emphases added).

The rule thus requires, among other things, that a prospective derivative plaintiff describe in the complaint the particular *pre-suit* efforts that were made to demand that the board itself institute the action on behalf of the corporation, or to give particularized reasons for not making such an effort. These requirements are mandatory, not permissive. As the Court of Appeals recently stated in *Behradrezaee v. Dashtara*:

> [T]o pursue the derivative action remedy, a shareholder must first demonstrate to the court either that the corporation refused to proceed after a suitable demand for action or that a demand would have been futile.

910 A.2d at 354-355. Moreover, as the *Behradrezaee* Court further explained, the demand requirement is not simply a procedural requirement, it is an element of substantive law:

> Addressing the identical federal rule, the Supreme Court has stated that "[o]n its face, Rule 23.1 speaks only to the adequacy of the shareholder representatives pleadings." [Footnote omitted]. *Kamen,* supra, 500 U.S. at 96, 111 S.Ct. 1711. The rule itself does not create a demand requirement. Id. "[T]he function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance, not procedure.' " Id. at 96-97, 111 S.Ct. 1711 (quoting Daily Income Fund, supra, 464 U.S. at 543-44 & n. 2, 104 S.Ct. 831 (1984) (Stevens, J., concurring in judgment) (other citations omitted)); see also *Bazata*, supra, 400 A.2d at 316 (holding that, for purposes of Super. Ct. Civ. R. 41(b), demand is not jurisdictional, but an element of the shareholders claim).

910 A.2d at 356.

If a derivative complaint contains neither an allegation that a pre-suit demand was made on the corporation's board of directors, nor allegations adequately describing why such a demand would have been futile, then the Court must dismiss the complaint. *See, e.g.*, *Flocco,* 752 A.2d at 151; *DiLorenzo v. Norton*, 2009 W.L. 2391327 (D.D.C. 2009); *Beam Ex Rel. M. Stewart Living v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). Here, there is no allegation in the Amended Complaint that plaintiffs presented their concerns

to AKA's Directorate prior to filing the suit – nor could any such allegation truthfully be made. Nor does the Amended Complaint even allege – much less adequately plead with particularity – that such a pre-suit demand should be excused on account of its futility.[2] Thus, even if the Amended Complaint is read as stating derivative claims, it nevertheless must be dismissed for failure to comply with the substantive and procedural requirement of a derivative cause of action.[3]

D. Plaintiffs Lack Direct Standing to Maintain Their Claims Against the Foundation.[9]

Plaintiffs cannot maintain a single cause of action against the Foundation because they do not allege that the Foundation caused them personal or individual injury. In fact, all of allegations in the forty-two page Amended Complaint (albeit baseless allegations) are not *fairly traceable* to the Foundation's actions. For example, the allegations in the introductory paragraph, *see* Pls' Am. Compl., ¶ 1, are actually directed to sorority matters

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[2] In Aronson v. Lewis, 473 A.2d 805 (Del. Supr. 1984), overruled on other grounds, Brehm v. Eisner, 746 A.2d 244 (Del. 2000), the court stated: "mere directorial approval of a transaction, ***absent particularized facts supporting a breach of fiduciary duty claim***, or otherwise establishing the lack of independence or disinterestedness of a majority of the directors" is insufficient to excuse demand. 473 A.2d at 817. Defendants submit that even if they tried, Plaintiffs would be unable to adequately plead demand futility.

[3] Moreover, the Amended Complaint, to satisfy Rule 23.1, must also be verified, which it is not.

[9] Plaintiffs' standing to bring state law claims is a *threshold* issue and a matter of subject matter jurisdiction. *O'Sullivan v. City of Chicago*, 396 F.3d 843, 853 (7th Cir. 2005). Because the Foundation is incorporated under the General Not For Profit Act of Illinois, *see* 805 ILCS 105/1.01 et seq., this Court must apply Illinois state law to the resolution of substantive issues like standing. In Illinois, direct standing requires only some injury in fact to a legally cognizable interest. *Quad Cities Open, Inc. v. The City of Silvis*, 785 N.E.2d 1031, 1038 (Ill. App. Ct. 2003). The claimed injury (whether actual or threatened) must be (1) "distinct and palpable"; (2) "fairly traceable to the defendant's actions"; and (3) "substantially likely to be prevented or redressed by the grant of the requested relief." *Greer v. Illinois Housing Dev. Auth.*, 524 N.E.2d 561, 575 (Ill. 1988). (internal citations omitted). Though Illinois state courts are not required to follow federal law, *Greer*, 524 N.E.2d at 574, the analysis under federal law does not yield different result in this case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (stating that the three minimum requirements for constitutional standing are an injury in fact, causation, and redressability) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, (1992)). In its analysis of standing, this Court must accept as true all well-pleaded facts in Plaintiffs' complaint and draw all inferences that can reasonably be drawn in Plaintiffs' favor. *Int'l Union of Operating Eng'rs, Local 148 v. Ill. Dep't of Employment Security*, 828 N.E.2d 1104, 1110 (Ill. 2005). Even under this rubric, Plaintiffs lack the requisite standing to maintain this suit against the Foundation.

and AKA's constitution and bylaws, not the Foundation or the Foundation's bylaws. Nonetheless, Plaintiffs improperly discuss Defendants en masse, as if all Defendants are involved in or part of AKA's affairs. The contrary is true.

In Paragraphs 4-11[10] of the Amended Complaint, Plaintiffs allegedly identify themselves and their roles in the sorority. However, Plaintiffs do not allege they are members of or are in any way affiliated with the Foundation. In Paragraphs 14-37 of the Amended Complaint, Plaintiffs allegedly identify twenty-four (24) individual Defendants and their roles within AKA (i.e., as members of the AKA Directorate), not within the Foundation. Logically, it follows that any and all subsequent references to or allegations against these Defendants individually or collectively (albeit without merit) is limited to the context of AKA and/or the Directorate, unless otherwise noted.[11]

The Factual Allegations section, *see* Pls.' Am. Compl., ¶¶ 38-157, follows a similar pattern of alleging wrongdoing solely in the context of actions by AKA and/or its Directorate, but not the Foundation. All allegations (albeit patently false) against Ms. McKinzie, Dr. James, Ms. Glover, and other members of the Directorate are in the context of AKA, not the Foundation. In fact, all the Exhibits attached to the Amended Complaint, to wit the Constitution, Bylaws, Manual of Standard Procedure, Soror Code of Ethics, Code of Conduct for Directorate Members, tax returns, and correspondence, are alleged to belong AKA, not the Foundation. The Counts against the Foundation follow the same bad pattern of not alleging harm by the Foundation.

Of the ten counts in the forty-two page Amended Complaint, only three indirectly and impermissibly refer to the Foundation: Counts Five (breach of contract), Eight (Ultra

[10] Amended Complaint paragraphs that are not cited are not pertinent to the discussion of standing.
[11] For continued clarity, this Court should observe that by definition and *Plaintiffs' admission*, the AKA Directorate and Boulé are not the Foundation's board of directors or governing body.

Vires) and Ten (Corporate Waste) under the guise of "All Defendants." *See* Pls' Am. Compl. ¶¶ 178-181, 200-207, 214-218. However, lumping the Foundation with the other Defendants en masse is not sufficient for Plaintiffs to plead specific injury by the Foundation, especially when the Factual Allegations section, *see* Pls' Am. Compl., ¶¶ 38-157, and the specific allegations within these Counts all exclusively address, and therefore are limited to, the AKA Defendants.[12]

In sum, there are no allegations of direct harm to Plaintiffs attributable to the Foundation in the Amended Complaint. Furthermore, there are no allegations of wrongdoing, misappropriation of funds, breaches of duty, or improper disbursements of scholarships and awards by the Foundation and/or its board of directors anywhere in the four corners of the complaint. Therefore, Plaintiffs lack the requisite *direct* standing to maintain this suit against the Foundation. Plaintiffs have not alleged they are members of the Foundation entitled to bring derivative actions on its behalf.[13] Moreover, Plaintiffs

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[12] For example, the allegations in the breach of contract claim in Count Five (albeit meritless) refers to AKA's Constitution and Bylaws (i.e., sorority matters), not the Foundation or the Foundation's bylaws. This careless pleading spills over into Count Eight where Plaintiffs specifically allege that "the *named Defendants*, other than McKinzie, *are the current or former members of the Directorate of Defendant AKA*." Pls.' Am. Compl. ¶ 201 (emphases added). If this definition of "All Defendants" is controlling throughout the Amended Complaint, then Counts Five (breach of contract), Eight (Ultra Vires) and Ten (Corporate Waste)—all levied against "All Defendants"—exclude the Foundation, and Plaintiffs should reform the case caption immediately to reflect that there are no causes of action against the Foundation.

Even if this definition is not controlling and only limited to Count Eight, then the Foundation still does not fall within the scope of the Count because, as Plaintiffs have conceded, the Directorate is the board of directors for AKA, not the Foundation. In Count Ten, the Corporate Waste allegations are based on AKA compensation and pension plans that are not *fairly traceable* to the Foundation. Plaintiffs cannot disregard the corporate distinctions between AKA and the Foundation to piggyback allegations of harm by AKA and its members onto the Foundation.

[13] Although the Foundation's rights are its own and do not belong it its members, its rights may be championed indirectly by its members. *Adams v. Meyers*, 620 N.E.2d 1298, 1304-1305 (Ill. App. Ct. 1993). In Illinois, such derivative suits require that demand be made upon the entity in whose favor the action is brought, as well as a showing that such demand was refused, or a showing that demand is futile. *Id*. (citing *Karris v. Water Tower Trust & Savings Bank*, 389 N.E.2d 1359 (Ill. App. Ct. 1979); *see also* Fed. R. Civ. P. 23.1; *Gas Tech. Inst. v. Rehmat*, 524 F. Supp. 2d 1058, 1068 (N.D. Ill. 2007) (stating that derivative plaintiffs must state with particularity the efforts to obtain the action plaintiff desires from the entity in question and the failure to obtain that desired action, or the reason for not making the effort.).

have not pled that they have made a demand (and in fact have not made a demand) on the Foundation or its board of directors. Nor have Plaintiffs pled that demand against the Foundation would be futile. Most telling, Plaintiffs have not alleged any harm done to the Foundation by any Foundation entity (e.g., the Foundation's members and/or board of directors[14]).

Although Plaintiffs allege corporate waste—a cause of action that belongs solely to the corporation and thus must be pled derivatively—the corporate waste in Count Ten is actually limited to AKA and not the Foundation, as discussed above. Although Plaintiffs allege that Ms. McKinzie has secured benefits from Foundation vendors, *see* Count Seven for Unjust Enrichment Against McKinzie, Pls.' Am. Compl. ¶ 198, and that Ms. McKinzie changed the investment strategy of the Foundation, *see* Count Nine for Corporate Waste Against McKinzie, Pls.' Am. Compl. ¶ 211, these allegations, though meritless, must be brought on behalf of the Foundation derivatively in order for Plaintiffs to recover "[a]ctual and punitive damages suffered by . . . EAF." *See* Prayer for Relief, Pls.' Am. Compl. ¶ 12. Yet Plaintiffs have ignored such formalities and requirements. Therefore, Plaintiffs lack derivative standing to maintain this suit against or on behalf of the Foundation. Because Plaintiffs lack the requisite direct or derivative standing, this Court does not have subject matter jurisdiction over the causes of action against or on behalf of the Foundation.

III. PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF MUST FAIL

Plaintiffs' Amended Complaint, in addition to monetary relief, asks this Court to issue a permanent injunction enjoining the Defendants from taking any action which does not follow AKA's Constitution and Bylaws, for judicial removal of AKA's President and

[14] In fact, the Amended Complaint does not refer to the Foundation's board of directors at all.

all members of the Directorate, and to alter AKA's decision regarding the membership privileges of the Plaintiffs and other AKA members. *See* Am. Compl., "Prayer for Relief" at pp. 41-42. Plaintiffs fail, however, to plead any basis for such extraordinary relief, making such relief well outside of the parameters of relief available to the Plaintiffs before this Court.

While it is fundamental to the granting of an injunction that the court make specific findings on all prerequisites for such relief, the most important inquiry is that concerning" irreparable injury." *In re Antioch University*, 418 A.2d 105, 109 (D.C. 1980)(*citing Wieck v. Sterenbuch, 350* A2d 384, 387 (emphasis added). Injunctive relief is extraordinary relief and will not be granted lightly. *Id. (Id.* (*citing Vargas v. Chardon*, 405 F. Supp. 1348, 1353 (D. Puerto Rico 1975) (extraordinary remedy of preliminary injunction requires clear and convincing proof)). "[The] primary justification for the issuance of a preliminary injunction 'is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.'" *Id. (citing Wieck v. Sterenbuch*, supra at 387-88 (further citations omitted)).

In their Amended Complaint, Plaintiffs fail to set forth any claim of actual irreparable injury. As stated above, Plaintiffs have not, and cannot, specifically demonstrate that they suffered an "injury in fact," other than Daley's specific claim of a suspended membership status. *See* Pls. Am. Compl. generally, *see also Id.* at p. 28, par. 140. This allegation of one soror's specific membership status fails to constitute a basis for irreparable injury and does not justify the extraordinary measure of injunctive relief.

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 members 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* SMF 34.

Clearly, Plaintiffs fail to plead any alleged irreparable harm, but rather seek to inject the Court into taking control of a private organization's management and operations. Plaintiffs, however, specifically seek to control and decide on the appropriate spending and actually seek to elect themselves, through the Court, as President and Directorate, again evidencing the personal warfare at issue here and not any specific wrongdoing. *See* SMF 34, par. 7.

IV. THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In addition to the lack of personal jurisdiction and standing, Plaintiffs' Amended Complaint must be dismissed on the further grounds that Plaintiffs have failed to state a single valid cause of action against any of the Defendants pursuant to Rule 12(b)(6).

A. Standard for Dismissal Under Rule 12(b)(6)

In deciding a 12(b)(6) motion, a court "construe[es] the complaint liberally in the plaintiff's favor, accept[ing] as true all of the factual allegations contained in the complaint, with the benefit of all reasonable inferences derived from the facts alleged."

Aktieselskabet v. Fame Jeans Inc., 525 F.3d 8, 13 (D.C. Cir. 2008) (internal quotations and citations omitted).

However, a Rule 12(b)(6) motion to dismiss permits the defendant to test whether the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6) (2008). Dismissal is appropriate "if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "The court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal, v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *see Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) ("a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do").

B. It Would be Improper for this Court to Interfere in the Management of AKA, a Voluntary Membership Organization

Of primary importance is that AKA, as a private voluntary organization, has its own governing procedures, with which its members are expected to abide. *See AKA's Bylaws*, Article VI, Sec. 1. AKA's members also agree to be bound by AKA's decisions, including those made by the Directorate.

For instance, District of Columbia courts have dismissed similar claims where Plaintiffs were members of voluntary associations and brought suit against the association for suspension of certain privileges or enforcement of bylaws. "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) (*quoting Avin v. Verta*, 106 A.2d 145, 147 (D.C. 1954)); *see also NAACP v. Golding*, 342 Md. 663, 679 A.2d 554, 558 (Md. 1996) ("as a general rule, courts will not interfere in the internal affairs of a voluntary membership organization"). Specifically in a matter where a member of a private voluntary organization brought suit regarding her allegedly improper removal, the DC Court of Appeals found that she failed to establish an appropriate basis for judicial intervention [such as fraud] in the dispute over her removal as GWM, which involves the internal affairs and leadership of a private voluntary organization. *Levant v. Whitley*, 755 A.2d 1036, 1039 (D.C. 2000).

The only specific injury plead in the complaint is the suspension of Ms. Daley's membership status. Thus, Plaintiffs' purported "injury in fact" is Daley's claim of a suspended membership status. *See* Pls. Am. Compl. generally, *see also Id.* at p. 28, par. 140.

AKA's *Constitution and Bylaws* also provides for the withdrawal of individual privileges of a soror who violates the *Constitution and Bylaws*:

> SECTION 4. Withdrawal of individual privileges may include but shall not be limited to: forfeiture of the right to vote in chapter meetings, hold office, participate in or attend social affairs of the chapter or officially represent the chapter of Alpha Kappa Alpha Sorority, Incorporated until such time as the privileges are restored.

See SMF 23.

Plaintiffs, however, have not plead any claim of fraud with regard to Ms. Daley's suspension. *See* Am. Compl. at pars. 182-185. As held in *Levant*, there appears to be no "appropriate basis for judicial intervention in the dispute over her removal [], which

involves the internal affairs and leadership of a private voluntary organization." Plaintiffs instead seek to take control of the organization using the Court in lieu of seeking remedies through internal procedures set forth in the By Laws or through a normal scheduled election. *See* SMF 34.

C. Plaintiffs Have failed to State a Claim for Breach of Contract (Counts IV and V)

1. Plaintiffs' Claims are Barred by D.C. Code § 29-971.06

First, as discussed in greater detail in Section II(A) of this Motion, Plaintiffs lack standing to assert breach of contract claims against all Defendants, as they have not even asserted the existence of an "injury in fact." See *Riverside Hospital*, 944 A.2d at 1104. Furthermore, Plaintiffs have failed to state a cause of action for breach of contract against certain individually named Defendants, as these Defendants are shielded from liability pursuant to D.C. Code § 29-971.06. Specifically, 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, as Officers and Members of AKA, are shielded from liability for breach of contract pursuant to D.C. Code § 29-971.06, as Plaintiffs have failed to allege wrongdoing against these Defendants as individuals.

D.C. Code § 29-971.06 states in relevant part that

> (a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort. (b) A person is not liable for a breach of a nonprofit association's contract merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is a person considered to be a member by the nonprofit association. D.C. Code § 29-971.06(a)-(b).

Plaintiffs attempt to assert breach of contract claims against all individually named Defendants, but fail to allege that the foregoing individuals engaged in any specific acts of wrongdoing. Pursuant to D.C. Code § 29-971.06(b), this claim cannot stand simply because these Defendants are "authorized to participate in the management of the affairs" of AKA. *See* D.C. Code § 29-971.06(a)-(b).

For example, of the foregoing twenty-one individual Defendants, only Defendants Archie and Sample-Oates are referenced in the Amended Complaint. Even in these instances there are no allegations that these Defendants breached a contract. *See* Am. Compl. at ¶ 138-39.

Indeed, the other nineteen (19) Defendants are not referenced once in the Amended Complaint, and there are certainly no allegations that the other Defendants breached a contract. *See* Am. Compl. generally. Plaintiffs have alleged no facts that these Defendants engaged in misconduct or breached a duty owed. *See* Am. Compl. at ¶¶ 178-81. It is evident from the Amended Complaint that these Defendants are targeted merely because they hold managerial positions within AKA. Therefore, these Defendants are shielded from Plaintiffs' breach of contract claim by the language of D.C. Code § 29-971.06(b), which prohibits such actions brought "merely because the person is a member of the nonprofit association, [and] is authorized to participate in the management of the affairs…" D.C. Code § 29-971.06(b). Thus, this Court should dismiss Plaintiffs' breach of contract claim against these Defendants with prejudice.

In addition, Defendants McKinzie, Glover and James, while referred to specifically in the Amended Complaint, are also shielded from liability pursuant to D.C. Code § 29-971.06(b) because there are no allegations that these individuals entered into

any "contract." Defendant McKinzie did not, at any time, enter into a contract with, or owe a fiduciary duty to, the Plaintiffs, and Plaintiffs' Amended Complaint fails to demonstrate otherwise. *See* Am. Compl. It is undisputed that Defendants Glover and James did not, at any time, enter into a contract with the Plaintiffs, and Plaintiffs' Amended Complaint fails to demonstrate otherwise. *See* Am. Compl. It is also undisputed that Plaintiffs fail to allege any specific facts to substantiate their claims of misconduct against Defendants Glover and James. *Id.* It is undisputed that the individually named Defendants, at no time, entered into a contract with, or owed a fiduciary duty to, the Plaintiffs, and Plaintiffs' Amended Complaint fails to demonstrate otherwise. *See* Am. Compl. It is also undisputed that Plaintiffs fail to allege any specific facts to substantiate their claims of misconduct against any of the individually named Defendants. *Id.*

2. Plaintiffs Have Failed to Allege a Contract Between Any of the Plaintiffs and Any of the Defendants, or Any Breach of Any Contract

In any event, Plaintiffs' breach of contract claims cannot be sustained against any of the Defendants, including AKA, the Foundation, Defendant McKinzie, and all of the individually named Defendants, as Plaintiffs have failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. Significantly, Plaintiffs fail to specifically allege anywhere in the Amended Complaint that a contract exists, or ever existed, between the Plaintiffs and with any of the individual defendants, the Foundation and finally with AKA. *See* Am. Compl. Even if a contract is found to exist based on a soror's pledge and AKA's bylaws, Plaintiffs

have undisputedly failed to comply with the organization's Constitution, Bylaws and Manual of Standard Procedure.

In a prior case against AKA in the U.S. District Court for the District of Columbia, (in which Ms. Daley was also a plaintiff), the plaintiffs alleged that, "the Defendant[s] breached a contract when AKA did not follow its own policies and /or procedures…." *Jolevare v. Alpha Kappa Alpha Sorority*, Inc., 521 F. Supp. 2d 1, 8 (D.D.C. 2007). The court, however, went on to grant summary judgment to AKA for multiple reasons, and stated, "[f]irst, the plaintiffs have not cited, and the Court has not found, any legal 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." *Id.* at 10.

While there are circumstances in which this Court has found that bylaws can be considered an agreement between parties in different contexts other than a soror's pledge in a non-profit voluntary organization, nonetheless, this Court has held that in such instances, when the plaintiff fails to comply with those bylaws, the plaintiff's claims fail. *See Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005).

The Court of Appeals in *Ohev Sholom Talmud Torah* found that the bylaws of that congregation had specific provisions governing disputes between members of the congregation which the plaintiff failed to follow and instead filed suit in Superior Court for the District of Columbia. *See Id.* The Court of Appeals, therefore, in addressing the provisions of the Bylaws, held that "[g]iven the plain meaning of this contractual language, we conclude as a matter of law that Article II, Section 12 of the bylaws clearly and unambiguously sets forth an agreement requiring the congregation and its members

to submit 'controversies thereafter arising' between them to binding arbitration before a Beth Din of Orthodox Jewish rabbis." *See Id.* at 361. The Court, therefore, reversed and remanded the action to require an order for the matter to proceed before the said rabbis instead of in the litigation. *See Id.* at 364.

The court in *Jolevare v. Alpha Kappa Alpha Sorority*, Inc. specifically found that "the defendant complied with the policies and procedures of its Constitution & Bylaws and the Anti-Hazing handbook by affording the plaintiffs an opportunity to appeal their suspensions and challenge the fact-finding process and the organization's final determination." *Id.* at 11. The Court found, however, that the plaintiff failed to pursue the remedies within the organization and its bylaws before filing suit. *See Id.* The Court recognized that AKA's Constitution and Bylaws provide "that when a member disagrees with the ruling of the Regional Director, she may appeal the Regional Director's recommendation to the Supreme Basileus." *See* AKA's Constitution and Bylaws at 53. In addition, "if the decision rendered by the Supreme Basileus is unsatisfactory to the [member], the [member] may appeal in writing to the Directorate through the Supreme Basileus." *Id.* at 10; see also SMF 23. The court, therefore, found that "before the defendant was given an opportunity to resolve plaintiff Jolevare's appeal, this litigation was commenced and it was not until seven days later that plaintiff Tinker submitted her appeal to the sorority. Accordingly, there is no reason to conclude that the defendant [AKA] has not complied with its own internal policies and procedures." *See Id.* at 11.

AKA has significant internal procedures for members to file complaints. *See Id.* The Plaintiffs in the instant action do not allege that they followed any of the internal procedures regarding complaints before filing suit. *See* Pls.' Am. Compl. Further,

Defendants submit that Plaintiffs specifically did not follow internal procedures as set forth in the Bylaws for any complaints. *See See* SMF 23. Plaintiffs' breach of contract claims rest entirely on the assertion that Defendants "materially breached several terms of Article I, Sec. 5-14 of the AKA Constitution and Bylaws and the Code of Conduct for Directorate Members." *See* Am. Compl. at ¶¶ 174, 179. Absent from Plaintiffs' Amended Complaint are any assertions that AKA's Constitution and Bylaws or the Code of Conduct for Directorate Members constitute contracts, or that Plaintiffs at any time entered into contracts, either oral or written, with any of the Defendants. *See* Am. Compl. Even the extensive Exhibits attached to the Amended Complaint fail to demonstrate the existence of a contract between the parties. *See* Exhibits attached to Am. Compl. Plaintiffs further fail to plead any facts regarding their explicit failure to pursue the internal procedures regarding grievances within AKA, procedures that govern how to file complaints and that are to be followed when a member has a complaint. *See* SMF 23.

Under AKA's Bylaws, members must comply with all provisions of the Constitution and Bylaws and are subject to penalties for violations of said provisions. *See* SMF 22. For the foregoing reasons, Plaintiffs fail to state a breach of contract claim.

D. Plaintiffs Have Failed to State a Claim for Breach of Fiduciary Duty (Counts I-III)

Plaintiffs fail to assert a valid cause of action for breach of fiduciary duty against the Defendants, as no fiduciary duty exists between the parties. As an aside, Plaintiffs also lack standing to assert these claims against the Defendant because they have not alleged an "injury in fact" resulting from the Defendants' conduct. *See Riverside Hospital*, 944 A.2d at 1104. This standing argument is discussed in greater detail in Section 2(A) of this Motion.

Pertinent to Plaintiffs' groundless breach of fiduciary duty claim is the fact that "[o]fficers and directors of a corporation owe a fiduciary duty to the corporation … The directors' fiduciary obligation to a corporation means that they must manage the corporation solely in its best interest, not as a vehicle for promoting their personal beliefs or causes." *Friends of Tilden Park, Inc. v. District of Columbia and Clark Realty Capital, LLC*, 806 A.2d 1201, 1210 (D.C. 2002). Furthermore, as fiduciaries, directors "cannot, either directly or indirectly, … in any … transaction in which they are under a duty to guard the interests of the corporation, make any profit, or acquire any other personal benefit or advantage, not also enjoyed by the other shareholders." *Liliane Willens, et al v. Wisconsin Avenue Cooperative Association, Inc., et al*, 844 A.2d 1126, 1136 (D.C. 2004).

First, because a fiduciary duty runs only from the officers and directors of AKA to AKA as a nonprofit corporation, Defendants only "owe a fiduciary duty to the corporation" and not to the Plaintiffs as individuals. *Friends of Tilden Park, Inc.*, 806 A.2d at 1210. However, it is undisputed that AKA is not a Plaintiff to this action. Thus, because the Defendants owe no duty to the individual Plaintiffs, the Plaintiffs have no basis for their breach fiduciary duty claim as they cannot demonstrate that a fiduciary duty ever existed between the parties. On these grounds, this Court should dismiss Plaintiffs' claims for breach of fiduciary duty against all Defendants with prejudice.

Even assuming, *arguendo* that Plaintiffs have established that a fiduciary duty existed between the parties, their claims are resoundingly hollow and unfounded pursuant to Rule 12(b)(6). Significantly, there are no allegations anywhere in the Amended Complaint that Defendants "ma[d]e any profit, or acquire[d] any other personal benefit or

advantage, not also enjoyed by the other shareholders." *Willens*, 844 A.2d at 1136. While Plaintiffs accuse the Directorate Defendants of approving improper expenditures and failing to be good stewards of AKA's resources, such allegations are futile where Plaintiffs fail to allege the very essence of a claim for breach of fiduciary duty: that the Defendants derived a profit or other personal benefit in approving such expenditures. *See* Am. Compl. at ¶¶ 161-72. As such, Plaintiffs have failed to state a claim for breach of fiduciary duty against the Directorate Defendants and dismissal of these claims is proper.

Additionally, Plaintiffs have failed to state a valid cause of action for breach of fiduciary duty against Defendant McKinzie. It is undisputed that Defendant McKinzie, as the President of AKA, received compensation in consideration for the services she rendered to AKA in her capacity as President. While Plaintiffs disagree with her compensation and use of certain funds, the decision to provide compensation to McKinzie was a valid Directorate decision and does not evidence retention of a "profit" or "personal benefit" other than monies paid to Defendant McKinzie in consideration for her services. *See* Am. Compl at ¶¶ 158-60. A disagreement over Defendant McKinzie's compensation and expenditures is a matter to be resolved by AKA's management and not by this Court. Thus, the unsubstantiated accusations wielded against Defendant McKinzie evidence nothing more than a rift over the management of AKA and do not demonstrate a breach by Defendant McKinzie of her fiduciary duty to AKA. Dismissal of this claim against Defendant McKinzie is therefore proper.

E. Plaintiffs Have Failed to State a Claim for Fraud Against Defendant McKinzie (Count VI)

Plaintiffs have failed to state a valid cause of action for fraud against Defendant McKinzie. Specifically, Plaintiffs' fraud claim is entirely baseless and unsubstantiated

for two reasons. First, Plaintiffs have not alleged sufficient facts to establish the essential elements of fraud. Second, even assuming, *arguendo*, that Plaintiffs sufficiently state the essential elements of fraud, these elements have not been pled with particularity as required by law.

The essential elements of fraud are (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) with intent to deceive (5) and action taken in reliance upon the representation. *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977). In addition, "[o]ne pleading fraud must allege such facts as will reveal the existence of all the requisite elements of fraud … and allegations in the form of conclusions on the part of the pleader as to the existence of fraud are insufficient." *Id.* at 59-60.

Even assuming, *arguendo*, that Plaintiffs sufficiently state the necessary elements of fraud, dismissal is proper since these elements have not been pled with particularity. Pursuant to Rule 9(b) of the District of Columbia Superior Court Rules of Civil Procedure, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake … shall be stated with particularity." Super. Ct. R. of Civ. P. 9(b) (2009); *See Sarete, Inc. v. 1344 U Street Limited Partnership,* 871 A.2d 480, 483 (D.C. 2005); *See also Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996). Specifically, an allegation of fraud requires that "the pleader … 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).

Plaintiffs have alleged no facts against Defendant McKinzie that establish the requisite elements of fraud. Where Plaintiffs allege 'unapproved' action, they specifically qualify each such allegation with the language, '*upon information and belief*.' *See* SMF 23. Nowhere in the Amended Complaint do Plaintiffs specifically allege any specified 'misconduct' that proceeded without the approval of the Directorate, and thereby in accordance with powers granted to the Directorate. *See* SMF15, 16.

For instance, Plaintiffs have asserted only generalized, conclusory allegations of fraud against Defendant McKinzie in stating that she "knowingly and fraudulently with intent to deceive, misrepresented the resolutions of the Directorate with the intent to induce fraudulent cash disbursements…" Am. Compl. at ¶ 183. These allegations are entirely unfounded, as they do nothing more than state the "buzz" words for a fraud claim and constitute a "formulaic recitation of the elements of the cause of action." *Bell Atlantic Corp.*, 127 S. Ct. at 1964-65. Such a deficient pleading cannot stand.

Indeed, Plaintiffs' allegations concerning compensation paid to Defendant McKinzie, including disbursements made to her retirement account, provide no support whatsoever for their fraud claim. *See* Am. Compl. at ¶¶ 75-93. Aside from making the bare assertion that Defendant McKinzie "knowingly misrepresented" certain matters, the Plaintiffs' fraud claim is entirely unsupported by fact, such as dates, time, persons present, specificity of allegations. *See* Am. Compl. at ¶¶ 89, 183-85. Quite simply, Defendant McKinzie's compensation and use of funds, while clearly disagreeable to the Plaintiffs, is not a valid basis for a fraud claim. It should also be noted that Plaintiffs do not claim that Barbara McKinzie did not perform services in consideration of the compensation and use of funds that she received or that the directorate did not approve

any consideration paid. *See Id.* As such, their claim is one that does not allege a fraud. Accordingly, dismissal of Plaintiffs' fraud claim is proper on these grounds.

Furthermore, Plaintiffs' allegations that Defendant McKinzie "knowingly misrepresented," "induce[d]" and "solicited" members of the Directorate lack particularity pursuant to Rule 9(b) because they fail to state, even generally, when and where Defendant McKinzie made an alleged misrepresentation, the content of the representation, and the fact represented. *See* Am. Compl. at ¶¶ 72, 89*; See United States ex rel. Williams,* 389 F.3d at 1256.

Far from stating a claim for fraud against Defendant McKinzie with particularity, Plaintiffs have not alleged this claim even generally, leaving instead a severe disconnect between the alleged fraud and specific actions or representations by Defendant McKinzie which support these allegations. Thus, Defendant McKinzie respectfully requests that this Court dismiss Plaintiffs' fraud claim with prejudice.

F. Plaintiffs Have Failed to State a Clam for Unjust Enrichment (Count VII)

As a preliminary matter, Plaintiffs lack standing to maintain their unjust enrichment claim against Defendant McKinzie, as they have not demonstrated that they suffered an injury as a result of Defendant McKinzie's alleged unjust enrichment. *See Riverside Hospital*, 944 A.2d at 404. This argument is discussed more fully in Section 2(A) of this Motion. Unjust enrichment occurs only when "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *News World Communications, Inc. v. Elaine J.S. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005). In other words, a person is unjustly enriched when he/she "retains a benefit (usually money)

which in justice and equity belongs to another." *Pearline Peart v. D.C Housing Authority*, 2009 D.C. App. LEXIS 185, *7. "In such a case, the recipient of the benefit has a duty to make restitution to the other person 'if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for [the recipient] to retain it.'" *Id.* (*quoting* Rest. Restitution § 1).

In their claim for unjust enrichment, Plaintiffs assert the following baseless accusations against Defendant McKinzie: that she "induced" AKA and the Directorate to make certain payments "for the benefit of McKinzie," including payments toward her retirement plan and pension; that she received payments from unnamed vendors of AKA; and that she established an endowment fund to be managed, for a fee, by BMC Associates, a company allegedly owned and operated by Defendant McKinzie. *See* Am. Compl. at ¶¶ 187-99.

Plaintiffs, in their capacity as individuals, have not stated a valid cause of action for unjust enrichment against Defendant McKinzie. Plaintiffs allege that Defendant McKinzie was unjustly enriched through certain compensation provided to her by AKA. *See* Am. Compl. at ¶¶ 187-99. Of critical significance is that the alleged payments complained of were made to Defendant McKinzie *by* AKA and not by the Plaintiffs, a fact which the Plaintiffs concede. *See Id*. at ¶¶ 188, 190, 192-93. Thus, because it is undisputed that the Plaintiffs never "conferred a benefit on Defendant McKinzie," their claim for unjust enrichment must be dismissed. *See News World Communications, Inc.*, 878 A.2d at 1222.

While Plaintiffs' failure to satisfy the first element of unjust enrichment is dispositive of this issue, it may be instructive to address the remaining two elements for

arguments sake. In addition to not conferring a benefit on Defendant McKinzie, Plaintiffs do not assert how Defendant McKinzie's alleged retention of said benefits is unjust.

It is undisputed that Defendant McKinzie received authorized compensation from AKA in consideration for her services rendered as AKA's President. However, there is no evidence, nor has it even been alleged, that Defendant McKinzie's alleged receipt and retention of these funds was "unjust." Indeed, Plaintiffs do not assert that Defendant McKinzie retained benefits "which in justice and equity belong[ed] to another." *See Pearline Peart*, 2009 D.C. App. LEXIS 185, *7. To the contrary, it is well established that Defendant McKinzie, as President of AKA, performed services on behalf of AKA and was compensated by AKA in consideration for her services. The amount that she was compensated, while clearly disagreeable to the Plaintiffs, is not grounds for an unjust enrichment claim, as it was paid in exchange for Defendant McKinzie's services. Thus, this Court should dismiss Plaintiffs' unjust enrichment claim against Defendant McKinzie with prejudice.

G. Plaintiffs Have Failed to State a Claim for Ultra Vires Conduct (Count VIII)

Besides the fact that Plaintiffs do not have standing to assert an ultra vires claim against the Defendants because they have not even alleged an "injury in fact" (*see* discussion in Section 2(A) of this Motion), Plaintiffs have also not stated a valid ultra vires cause of action against any of the individual Defendants, AKA or the Foundation, and dismissal is therefore proper on these grounds. In their Amended Complaint, Plaintiffs assert that Defendants acted ultra vires to the powers and purposes set forth in AKA's *Bylaws* in allegedly approving certain amounts of compensation for Defendant

McKinzie, including a pension stipend, life insurance policy, and other expenditures. *See* Am. Compl. at ¶¶ 200-07. Ultimately, Plaintiffs cannot maintain their ultra vires claim against any of the Defendants because they have plead no facts in support of such a claim.

First, Plaintiffs' lack standing to maintain their ultra vires claim against all of the Defendants, as they have failed to establish an "injury in fact" pursuant to the standing analysis set forth in *Riverside Hospital*. This argument is set forth more fully in Section 2(A) of this Motion.

Additionally, Plaintiffs' ultra vires claim against the individually named defendants is woefully deficient and entirely misplaced in this litigation, as an ultra vires cause of action against the Foundation and the individual Defendants does not exist pursuant to D.C. Code § 29-301.06. D.C. Code § 29-301.06 states in relevant part that a claim for ultra vires may be asserted,

> (1) In a proceeding by a member or a director against the corporation to enjoin the doing of any act, or the transfer of real or personal property by or to the corporation … (2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against the incumbent or former officers or trustees of the corporation… (3) In a proceeding by the Mayor, as provided in this subchapter, to dissolve the corporation, or in a proceeding by the Mayor to enjoin the corporation from the transaction of unauthorized acts. D.C. Code § 29-301.06(1)-(2).

Based upon the language of this section of the Code, an ultra vires cause of action cannot be sustained against the individually named Defendants because, where a proceeding is brought by a "member or director" to "enjoin the doing of a certain act," such a proceeding can only be brought "against the corporation." *See Id.* As eight individual members of AKA commenced this action, they may only bring an ultra vires

cause of action against "the corporation," pursuant to D.C. Code § 29-301.06(1). Thus, Plaintiffs are precluded from sustaining an ultra vires claim against the individual Defendants as set forth in D.C. Code § 29-301.06(1).

Similarly, Plaintiffs' ultra vires claim against the Foundation is also unsustainable, as Plaintiffs do not allege to be "member[s] or director[s]" of the Foundation and therefore cannot bring an ultra vires cause of action against it. *See* D.C. Code § 29-301.06(1). Inherent in the language of D.C. Code § 29-301.06(1) is the condition that a member or director of a corporation may only bring an ultra vires action against the corporation of which he/she is a member. This is evidenced by the language of the statute, which authorizes actions brought by members or directors against "the corporation." *See Id.* This language suggests that members and directors are only authorized to bring ultra vires claims against "the corporation" of which they are members. Here, while the Foundation is indeed a not-for-profit corporation, the Plaintiffs do not allege that they are "member[s] or director[s]" of the Foundation and therefore they lack standing to assert an ultra vires claim against it according to D.C. Code §`29-301.06(1). Because the language of the Code specifically bars the Plaintiffs from bringing ultra vires actions against the individual Defendants and the Foundation, these claims should be dismissed against them with prejudice.

Additionally, Plaintiffs cannot maintain their ultra vires claim against any of the Defendants because they have failed to plead the elements of an ultra vires cause of action. The ultra vires doctrine "encompasses only corporate actions that are expressly prohibited by statute or by-law." *Columbia Hosp. for Women Found. Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1, 11 (D.C. 1997). The Amended Complaint cites

no statute that has allegedly been violated by any defendant, and does not identify any bylaw that has been violated.

While Plaintiffs do refer to Article VII, Sec. 9 of Defendant AKA's Bylaws, they nevertheless acknowledge that the provision directs AKA's Board of Directors to provide the President with a stipend when funds are available in the budget. The Directorate acted accordingly. The Amended Complaint alleges other acts by AKA's Board of Directors to which they object, but do not identify any bylaw that the Board allegedly violated.

Under the D.C. Nonprofit Corporate Act, no act of a corporation or conveyance of property shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer. D.C. Code § 29-301. Because Plaintiffs have failed to identify any action by any Defendant that violates a statute or bylaw, Plaintiffs fail to state an ultra vires claim against all Defendants.

H. Plaintiffs Have Failed to State a Claim for Corporate Waste (Counts IX and X)

As a preliminary matter, Plaintiffs lack standing to assert corporate waste claims against the Defendants because they have not demonstrated that they, as individuals, have been injured by the Defendants' conduct pursuant to the standard set forth in *Riverside Hospital.* *See* Section 2(A) of this Motion. Plaintiffs' lack of standing is discussed in greater detail in Section 2(A) of this Motion.

Furthermore, Plaintiffs' claim against the Defendants for corporate waste is wholly misplaced and unsubstantiated, as Plaintiffs fail to set forth any of the elements that are 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 Comm. Hospital Corp., I, et al v. Paul Tuft, et al*, 333 B.R. 506, 524 (Bankr. D.D.C. 2005). "To prevail on a waste claim …, the plaintiff must overcome the general presumption of good faith by showing that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." *Id.*

Here, in alleging that the Defendants committed corporate waste, Plaintiffs merely spew unsupported accusations as to Defendant McKinzie's alleged misuse of AKA's funds and the Defendants alleged improper approval of Defendant McKinzie's compensation. *See* Am. Compl. at ¶¶ 208-18. However, the Plaintiffs do not substantiate these accusations with any specific facts identifying the nature of the "gifts and travel" and "personal projects" on which Defendant McKinzie allegedly spent AKA's funds. *See* Compl. at ¶ 209. Moreover, Plaintiffs provide no explanation as to why the compensation paid to Defendant McKinzie, who is the President of an international non-profit organization, was in any way unreasonable or wasteful.

Most significant is that Plaintiffs, amidst their harsh words, do not state a claim for corporate waste against any of the Defendants, as they fail to satisfy the requirements necessary to maintain such a claim. First, they do not demonstrate, or even state, that Defendant McKinzie's compensation amounted 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 Comm. Hospital Corp.,* 333 B.R. at 524. Rather, Plaintiffs own Amended Complaint suggests quite the

opposite when it discusses AKA's long history and extensive membership, consisting of "over 950 chapters in cities, colleges and universities throughout the world, a global membership of over 200,000 and a financially active membership in excess of 50,000." *See* Am. Compl. at ¶¶ 39-40. These facts demonstrate that any compensation approved by the Defendants for Defendant McKinzie was warranted and in proportion to the services that she provided to AKA in presiding over such a large organization.

In *In re Greater Southeast Community Hospital Corp. v. Tuft*, the Court dismissed the plaintiff's corporate waste claim, stating that

> the Complaint does *not* allege that [plaintiff] received little or no consideration for these bargains, that the counterparties to these transactions failed to perform their end of the bargain, or that the transactions were made solely to benefit the individual directors and officers. The court will not second-guess business judgments … merely because the terms of certain deals were not, in hindsight, "fair" to [the plaintiff]. *In re Greater Southeast Comm. Hospital Corp.,* 333 B.R. at 524-25.

Similarly, in this instance, Plaintiffs do not allege that AKA received little or no consideration for the compensation given to Defendant McKinzie or that she did not perform her duties as president, which presumably served as the consideration for such compensation. Moreover, this Court should not "second guess business judgments" of the individually named Defendants in approving this compensation for Defendant McKinzie.

Lastly, Plaintiffs' corporate waste claim fails because Plaintiffs have not demonstrated, or even alleged, that the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." *In re Greater Southeast Comm. Hospital Corp.,* 333 B.R. at 524. Having failed to establish such egregious irrationality, the general presumption of good faith on

the part of the Defendants prevails. *See Id.* Thus, this Court should dismiss with prejudice Plaintiffs' corporate waste claims against both Defendant McKinzie and against all of the Defendants for failure to state a valid cause of action.

I. Plaintiffs' Claims Against the Foundation are Legally Insufficient Under Rule 12(b)(6)

Even under the failure to state a claim rubric, *Willmschen v. Trinity Lakes Improvement Ass'n*, 840 N.E.2d 1275, 1278 (Ill. App. Ct. 2005), all of Plaintiffs claims against the Foundation (i.e., Counts V, VIII, and X) must fail because Plaintiffs have not alleged any breach of contract (much less any basis for a contract), ultra vires, or corporate waste against the Foundation, although the Foundation is frivolously lumped together with the AKA defendants in the Counts in the Amended Complaint, as discussed above. This is not only impermissible but is also incurable. This is the second complaint (i.e., original complaint and then first amended complaint) Plaintiffs have filed against the Foundation, and they have failed to state a proper legal claim against it. Therefore, all Counts against the Foundation should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

CONCLUSION

WHEREFORE, the foregoing premises considered, Defendants respectfully request that this Honorable Court dismiss Plaintiffs' Amended Complaint in its entirety with prejudice against all of the Defendants pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) as set forth above.

Respectfully submitted,

/S/
Aaron Handleman (#48728)
Julia Z. Haller (#466921)
Eccleston and Wolf, P.C.
2001 S St., NW, Suite 310
Washington, DC 20009
(202) 857-1696 (telephone)
(202) 857-0762 (facsimile)
Handleman@ewdc.com
Haller@ewdc.com
Attorneys for Defendants

/S/
Dale A. Cooter, Esquire
Donna S. Mangold, Esquire
Stephen Nichols, Esquire
5301 Wisconsin Avenue, NW
Suite 500
Washington, DC 20015
efiling@cootermangold.com
Attorneys for Defendants