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 004456B Judge Natalia M. Combs Greene Next Court Event: December 17, 2009 Written Discovery Closes/Fact Witness Deadline

DEFENDANT AKA EDUCATIONAL ADVANCEMENT FOUNDATION, INC.'S OPPOSITION TO PLAINTIFFS' COMBINED RULES 12 AND 56(f) MOTION REQUESTING DISCOVERY PRIOR TO OPPOSING DEFENDANTS' MOTION TO DISMISS OR , IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

COME NOW, AKA EDUCATIONAL ADVANCEMENT FOUNDATION, INC. (the "Foundation"), by its undersigned attorneys, hereby submits its Opposition to Plaintiffs' Combined Rules 12 and 56(f) Motion Requesting Discovery Prior to Opposing Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

I. Introduction

Plaintiffs' motion for discovery is a deliberate attempt to delay judicial dismissal of their legally deficient complaint in the hopes of fishing for some factual allegations that will stick against the Foundation. This desperate approach will not work because it is patently obvious from a liberal reading of the four corners of the First Amended Complaint (and of the instant motion for discovery) that this litigation really concerns Alpha Kappa Alpha Sorority, Inc. ("AKA"), not the Foundation. *See* Pls. Mot. for

Discovery at 3 ("This case concerns whether the members or the Board of Directors (the 'Directorate') control the governance of Alpha Kappa Alpha Sorority, Inc."). Yet, Plaintiffs have intentionally and inexcusably entangled the Foundation in a web of misrepresentations to this Court.

Instead of refuting the Foundation's position that the First Amended Complaint does not actually set forth any causes of action against the Foundation (*see, e.g.*, Defs. Mot. to Dismiss at 23-26, 49), Plaintiffs refuse to tell this Court (and thus refuse to provide the Foundation adequate notice) about why this suit should be maintained against the Foundation. Instead of pinpointing *one* paragraph in the two hundred eighteen paragraphed-First Amended Complaint that definitively and unabashedly alleges that the Foundation wronged Plaintiffs, Plaintiffs beg for additional discovery. This procedural machination will not work because discovery cannot salvage a complaint that fails to state a cause of action against the Foundation.

II. Legal Argument

A. The First Amended Complaint is defective as a matter of law and should be dismissed under Rule 12(b)(6).

An analysis of the four corners of the First Amended Complaint exposes Plaintiffs' failure to state a cause of action against the Foundation. There are twenty-six (26) named defendants in the caption of the First Amended Complaint: AKA Sorority, the Foundation, and 24 individual Defendants, who are named *solely* in their positions as members of the board of directors of the Sorority ("the Directorate"), not as members of the board of directors of the Foundation. The First Amended Complaint alleges that AKA, a non-profit organization incorporated in the District of Columbia, and the

Foundation, a non-profit organization incorporated in Illinois, are separate legal entities. Therefore, this Court must read the First Amended Complaint closely to ferret and distinguish allegations of wrongdoing by the Foundation (albeit none) from allegations of wrongdoing by the AKA Sorority and/or members of the AKA Directorate. This is no small task particularly in view of Plaintiffs' repeated efforts to conflate the defendants and/or attribute the actions of a subset of defendants to all of the defendants.

The four corners of the First Amended Complaint barely mention the Foundation at all. For example, the First Amended Complaint specifically names the Foundation as a defendant in the Caption. The jurisdiction/venue section (Am. Compl. at ¶ 3) and the identification of parties section (Am. Compl. at ¶ 13) also specifically reference the Foundation. However, the Factual Allegations Section mentions the Foundation infrequently.

In particular, the Foundation surfaces in a section titled "Failed Financial Oversight by Directorate," which undisputedly raises allegations against the AKA Directorate, not against the Foundation. *See* Am. Compl. at ¶¶ 111, 112, 115, 116, 118. Although this section alleges facts regarding the oversight of the Foundation's federal tax returns, potential IRS claims based on these tax returns, and the Foundation's investments, there are no allegations of wrongdoing by the Foundation against the Plaintiffs in this section. *Id*. Additionally, there are no allegations of wrongdoing by the Foundation against the Plaintiffs in the "Board's Failure to Adopt Ethics Recommendation" Section that alleges that the Foundation represented to the IRS that it had a written conflict of interest policy. *See* Am. Compl. at ¶136.

This is the extent to which the Factual Allegations Section even mentions the Foundation at all. The First Amended Complaint does not allege that the Foundation (1) made unapproved or improper payments to anyone, (2) suspended membership privileges of the Plaintiffs, (3) formed a contract with the Plaintiffs, (4) breached a contract with the Plaintiffs, (5) misappropriated funds, (6) owed or breached a duty to Plaintiffs, (7) failed to oversee anything, (8) is responsible for the operation of the AKA Sorority, or (9) caused the Plaintiffs harm. Additionally, Plaintiffs do not allege they are members of the Foundation or have derivative or direct standing.[1] The rest of the allegations in the First Amended Complaint directly target AKA Sorority and/or members of the AKA Directorate. In fact, all Exhibits attached to the First 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 to the Foundation.

Thus, it is clear from the four corners of the First Amended Complaint that this lawsuit is really about AKA, and not the Foundation. Therefore, there is no way for the Plaintiffs to maintain this suit against the Foundation unless the enumerated causes of actions themselves provide a factual and/or legal basis. Simply put, they do not.

The only causes of action purportedly raised against the Foundation are those that lump "All Defendants" together, namely Counts Five (breach of contract), Eight (Ultra Vires) and Ten (Corporate Waste). *See* Am. Compl. ¶¶ 178-181, 200-207, 214-218.

[1] Even if Plaintiffs had raised such allegations against the Foundation, these allegations would still be non-actionable. *See generally* Defs. Oppn. to Discovery Motion filed herewith; *see generally* Defs. Mot. to Dismiss.

Count Five alleges that Defendants breached several provisions of the "*AKA* Constitution and Bylaws and the Code of Conduct for *Directorate*." Am. Compl. at ¶ 179 (emphases added). However, neither the First Amended Complaint nor Count Five alleges that the Foundation, a separate legal entity with its own bylaws, is bound by the "AKA Constitution and Bylaws and the Code of Conduct for Directorate," thereby making a breach by the Foundation impossible.

Instead, Count Five is limited to alleged breaches of the *AKA* Sorority governance documents (not the Foundation's governance documents) based on alleged payments to Defendant McKinzie and a lack of financial transparency. Even if these allegations were accepted as true for the purposes of this Rule 12(b)(6) analysis, they cannot possibly be attributable to the Foundation because Count Five and the entirety of the First Amended Complaint allege that these actions were taken only by members of the *AKA* Directorate, not by the Foundation. Therefore, Plaintiffs fail to state a breach of contract claim against the Foundation.

Count Eight (ultra vires) explicitly alleges that it is limited to the actions of the Directorate in the context of AKA matters. *See* Am. Compl. at ¶ 206 ("The actions of the Directorate described herein are ultra vires to the purposes of *AKA*, harmful to the Plaintiffs and *AKA*, resulted in the waste of *AKA* funds, and frustrated the legitimate aims and purposes of *AKA*.") (emphases added); *see also id.* at ¶ 201 ("The named Defendants, other than McKinzie, are the current or former members of the Directorate of Defendant AKA."). In the First Amended Complaint, it is undisputed that the *AKA* Directorate is not the Foundation. Therefore, contrary to the representation of the title of Count Eight, Plaintiffs fail to state an ultra vires claim against the Foundation.

Finally, the allegations in Count Ten (corporate waste) are based on the alleged approval of *AKA* funds to Defendant McKinzie by members of the *AKA* Directorate, not by the Foundation. Am. Compl. at ¶¶ 214-218. Therefore, contrary to the representation of the title of Count Ten, Plaintiffs fail to state a corporate waste claim against the Foundation. Thus, even under the most favorable analysis, Plaintiffs' failure to assert causes of action against the Foundation in the four corners of the First Amended Complaint cannot survive a Rule 12(b)(6) motion. Even if the Court were to venture outside of the complaint to do a Rule 56 analysis (though not required in this instance), the result would be the same —a ruling in favor of the Foundation. The discovery Plaintiffs now seek in lieu of challenging the dismissal motion cannot cure their legally deficient complaint.

B. Discovery, jurisdictional or otherwise, is improper.

The sine qua non of discovery is a legally sufficient cause of action against a party. Therefore, Plaintiffs are not entitled to seek discovery against the Foundation until they raise a valid cause of action against the Foundation.[2] *Evitts v. DaimlerChrysler Motors Corp.*, 834 N.E.2d 942, 952 (Ill. App. Ct. 1st Dist. 2005) ("Discovery is not necessary where a cause of action has not been stated."). Plaintiffs move for discovery because they *suspect* that the Foundation's funds were used to influence the members of the Directorate and/or fund McKinzie. *See* Pls. Mot. for Discovery at 51-52. However, a mere suspicion is not a sufficient predicate for a discovery request, especially when this

[2] Plaintiffs seek discovery under Rule 56(f) to respond to Defendants' alternative Motion for Summary Judgment. However, additional discovery is not required for the Plaintiffs to respond to Defendants' Rule 12(b)(6) motion for dismissal. To the extent the Court finds that Plaintiffs do not address the 12(b)(6) motion in their Rule 56(f) motion, the Court should grant Defendants' Rule 12(b)(6) motion as unopposed.

Court has all the information it needs to decide the Foundation's pending 12(b)(6) motion to dismiss. *See Mutlu v. State Farm Fire & Cas. Co.*, 785 N.E.2d 951, 962 (Ill. App. Ct. 1st Dist. 2003) (stating that a trial court may properly quash a discovery request when it has sufficient information upon which to decide a defendant's motion to dismiss). Plaintiffs' mere suspicion of wrongdoing is no more than the fishing expeditions that the laws in the state of Illinois and this District proscribe. *See Redelmann v. Claire-Sprayway, Inc.*, 874 N.E.2d 230, 244 (Ill. App. 1st Dist. 2007) (affirming the trial court's stay of discovery pending the resolution of a motion to dismiss because it was unwilling to permit a plaintiff who failed to plead facts establishing a cause of action to "go on a fishing expedition"); *see also Graham v. Mukasey*, 608 F. Supp. 2d 50, 54 (D.D.C. 2009) ("A Rule 56(f) motion for additional discovery is not designed to allow 'fishing expeditions.'").

Even if Plaintiffs' suspicion were allowed in this context, their suspicion is not that the Foundation did anything wrong. To the contrary, they suspect that someone used Foundation funds to do something to influence someone to do something in the context of Sorority matters. Therefore, even under these spurious suspicions, the Foundation would not be a proper party to this lawsuit.[3]

Plaintiffs appear to base their suspicion on the minor overlap between the members of the Directorate and the members of the board of directors of the Foundation— namely, five out of thirteen members of the board of directors of the

[3] This is particularly true in light of the fact that Plaintiffs do not allege derivative standing to bring claims on behalf of the Foundation. *See* Defs. Mot to Dismiss at 23-26, 49; Pls. Mot for Discovery at 32.

Foundation are also members of the AKA Directorate. Mere overlap, without more, does not justify discovery, especially when Plaintiffs have alleged no wrongdoing by the Foundation. Plaintiffs cannot haul the Foundation into court solely based on an overlap in membership no more than Plaintiffs could haul into court any other organization to which members of the Directorate belong. To afford Plaintiffs additional discovery in this context would relieve Plaintiffs of their obligation to raise factual allegations against the Foundation in advance of discovery in favor of Monday morning quarterbacking.

This Court should not allow Plaintiffs to fish for allegations against the Foundation. Instead, the Court should not only deny the motion for discovery but should also stay discovery pending resolution of Defendants' outstanding motion to dismiss. *See Redelmann*, 874 N.E.2d at 244 (affirming the trial court's stay of discovery pending the resolution of a motion to dismiss).

III. Conclusion

For the foregoing reasons, Defendant Foundation respectfully requests this Court to deny Plaintiffs' Combined Rules 12 and 56(f) Motion Requesting Discovery Prior to Opposing Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and stay discovery pending resolution of Defendants' outstanding motion to dismiss.

Respectfully Submitted,

//s//_____

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CERTIFICATE OF SERVICE

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

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/S/

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