# SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
# CIVIL DIVISION

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| Ms. Joy Elaine Daley, et al.<br><br>Plaintiffs,<br><br>v.<br><br>Alpha Kappa Alpha Sorority, Inc., et al.<br><br>Defendants. | ) | CASE NO. 2009 CA 004456 B<br><br>Judge: Natalia M. Combs Greene<br>Next Court Date: December 17, 2009<br>Next Event: Deadline for Discovery Requests |

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' COMBINED RULE 12 AND 56(f) MOTION REQUESTING DISCOVERY PRIOR TO OPPOSING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

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Plaintiffs, through counsel, submit this memorandum of points and authorities in support of their motion for an Order denying Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment ("Motion to Dismiss"). Alternatively, Plaintiffs seek an Order continuing consideration of Defendants' Motion to Dismiss pursuant to Super. Ct. Civ. R. 12 and 56(f) until sufficient discovery has been conducted by Plaintiffs. By requesting discovery now, this memorandum of points and authorities also opposes Defendants' Motion to Stay. A Proposed Form of Order and Declarations from the Plaintiffs support this motion for discovery ("Motion for Discovery").

## I. INITIAL STATEMENT

This case concerns whether the members or the Board of Directors (the "Directorate") control the governance of Alpha Kappa Alpha Sorority, Inc. ("AKA" or "Sorority"). The Sorority is a venerable institution with a rich history, incorporated since 1913 in the District of Columbia as a private, non-profit membership corporation.

In this memorandum Plaintiffs explain: (1) what is already known regarding the misconduct of Defendants; (2) Plaintiffs' legal support as to why the known facts are actionable; (3) what additional facts Plaintiffs expect to learn through formal discovery; and (4) how such additional facts would support the claims of the Amended Complaint.

In their Motion to Dismiss and supporting documents, Defendants fail to even mention that Plaintiffs, as dues-paying AKA members are participants in AKA's Boule legislative body and that, as such, Plaintiffs have a legitimate claim to participate in the

governance of the Sorority. Nor do Defendants acknowledge that Plaintiffs' concerns are of sufficient importance that judicial intervention is appropriate. Instead, Defendants suggest that the present disputes should be resolved internally without court intervention and contend that the eight Plaintiffs have no rights which the Directorate must respect or of which this Court should take notice.

Defendants argue that Plaintiffs' entire Amended Complaint should be dismissed for an asserted lack of standing, lack of personal jurisdiction and failure to state a claim upon which relief can be granted. In support of their motion, Defendants assert forty-one (41) allegedly undisputed facts, most of which are, in fact, legal conclusions. The alleged undisputed facts are vigorously contested by Plaintiffs.

Plaintiffs need discovery to demonstrate properly that the controverted facts are material to this litigation and to establish additional facts, unaddressed by Defendants, that prove the Plaintiff's standing, this Court's jurisdiction over all of the Defendants and the substantive misconduct alleged in the Amended Complaint. Given the high burden of proof that Plaintiffs face, Plaintiffs also need discovery to justify judicial intervention into the affairs of a private corporation. Further, since Defendants apparently seek to unilaterally modify and interpret the AKA Constitution and Bylaws, only discovery can confirm on what basis the Directorate asserts that it has the authority to approve the huge payments to Defendant McKinzie. [1]

The waste, fraud, negligence and retaliatory discipline associated with these payments are not mere words and legal formalisms. These allegations arise from real

[1] For the first time to Plaintiffs' knowledge, Defendants are amending the Sorority's governing documents in an odd year (2009) in which the biennial Boule legislative meeting has not occurred. Certain of these 2009 amendments are apparently intended to affect how the AKA Constitution and Bylaws can be amended *See* Decl. of Joy Daley §37.

events involving: the deliberate sanctioning of Plaintiffs for speaking the truth and the payment in 2007 and 2009 of over one million dollars ($1,000,000.00) to Defendant McKinzie.[2] Further, this amount is simply a conservative estimate of the payments to Defendant McKinzie. This million dollar estimate does not include any payments to Defendant McKinzie in 2008. Defendant McKinzie's pursuit of AKA money is simply shocking, unconscionable and exceeds any misconduct ever previously asserted in cases involving non-profit corporations in the District of Columbia.

Importantly, this Motion for Discovery is not a mere fishing expedition. Plaintiffs have established that Defendant McKinzie has a substantial revenue stream to protect. *See* Defs.' Resp. to Req. to Admit attached hereto as Exhibit 3 to Decl. of Edward Gray. As alleged in the Amended Complaint, no Supreme Basileus prior to Defendant McKinzie ever received payments of this magnitude from the Sorority. *See* Pls. Am. Compl. at ¶ 73. In fact, in a press article in the August 20, 2009 *Washington Post*, Defendant McKinzie's immediate predecessor, Linda White, is reported to have told the *Washington Post* reporter that she took no compensation.[3]

Protecting her revenue stream provides a real incentive to Defendant McKinzie to conceal the total amount of payments to her and how and why she has managed to maintain Directorate support to continue to receive these payments.

Protecting this revenue stream also explains the secrecy and blind loyalty Defendant McKinzie and her Directorate supporters have required of AKA members, and

[2] This figure of $1,000,000.00 is derived from the following: 2007 IRS 990 listing a payment of $375, 000.00; 2007 Authorized Pension Payment of $360,000.00; and 2009 payment of $499,900.00

[3] Former Supreme Basileus, Linda White is reported as having said in reference to her compensation as Supreme Basileus, "I treated it as a voluntary position" in the August 20, 2009 Newsstand Edition of the *Washington Post* Ian Shapira, *Members of Black Sorority at Odds Over Leader's Spending*, The Washington Post, August 20, 2009, A3..

why they have misused AKA rules in order to punish whistleblowers seeking to disclose the improper payments. Defendants suspended Plaintiffs solely to punish them for filing suit – even though those suspensions are unprecedented and just plain wrong. Clearly, Defendant McKinzie has not acted alone in creating this revenue stream to herself. She has needed the active cooperation and inattention of the Foundation and Directorate to build this revenue stream.

Of course, the precise actions that Defendant McKinzie has undertaken to secure this cooperation and inattention are presently unknown to Plaintiffs. Plaintiffs seek discovery to provide answers to questions about specific occurrences and conduct. Obviously, the Foundation and Directorate are at risk of liability to repay the huge payments to Defendant McKinzie. Accordingly, they will not voluntarily permit formal discovery. Based on the information elicited so far through informal discovery, it is highly probable that formal discovery will eliminate Defendants' contentions that the payments to Defendant McKinzie are justified.

The discovery sought herein is not for purposes of delay and Plaintiffs have not been dilatory in seeking the requested information. Such requests for discovery are to be liberally granted where, as here, the non-moving party demonstrates that additional discovery is critical to obtaining facts essential to a proper defense to the motion.

Over ninety days ago, Plaintiffs served each Defendant with document requests and interrogatories along with the Complaint, Summons and Initial Order. Plaintiffs have not received any responses from any Defendant and are now faced with Defendants' Motion to Stay.

Defendants are not entitled to a motion to dismiss or summary judgment on any count or a stay of discovery. The Amended Complaint properly alleges the misconduct of Defendants. There are many material facts genuinely in dispute with respect to the defenses raised by Defendants including whether Plaintiffs have exhausted all potential remedies within the AKA before commencing litigation. Plaintiffs had no other reasonable option. The misconduct and injury alleged by Plaintiffs is real and already partially established.

## II. ARGUMENT

Defendants assert that: (1) this Court lacks personal jurisdiction over most of Defendants; (2) Plaintiffs lack standing; and that (3) Plaintiffs are entitled to summary judgment on all counts. These assertions are incorrect. Taking the allegations of the Amended Complaint as true, Defendants' Motion to Dismiss should be denied. Further, Defendants' so-called Statement of Undisputed Facts does not change this conclusion as it contains many so-called undisputed facts which are obviously disputed by the parties. Those aspects of Defendants' Statement of Undisputed Facts which are not disputed provide Defendants with no basis to seek summary judgment. Defendants have moved to dismiss so early in the case simply to avoid any formal discovery into their misconduct.

If the Court wishes to consider further Defendants' Motion to Dismiss and supporting evidence, Plaintiffs request that the Court allow discovery pursuant to Super. Ct. Civ. R. 12 and Super. Ct. Civ. R. 56(f) for the Plaintiffs to further support the Amended Complaint and to properly respond to the Defendants' Motion. The need for discovery will be addressed below with respect to each of Defendant's claims and defenses.

## A. PERSONAL JURISDICTION

Defendants assert that this Court does not have personal jurisdiction over any of the Defendants with the exception of the Sorority. Plaintiffs contend that jurisdiction is appropriate over each Defendant based simply on: (1) the business contacts of the Sorority and the Foundation with the District of Columbia; (2) the individual Defendants' election and acceptance of office at the 2008 Boule legislative meeting in Washington, DC; and (3) the role of the individual Directorate members as key leaders of the Sorority. For the reasons more specifically explained below, if permitted discovery, Plaintiffs can better establish these jurisdictional facts as to each Defendant.

It is true that Plaintiffs bear the burden of establishing personal jurisdiction over each defendant. *Atlantigas v. Corp. v. Nisource, Inc*., 290 F. Supp. 2d 34, 42 (D.D.C. 2003). However, while a court cannot rely on "conclusory allegations" alone, it should take all well plead jurisdictional facts as true and resolve any factual discrepancies in the plaintiff's favor. *Crane v. N. Y. Zoological Soc'y*, 282 U.S. App. D.C. 295, 894 F.2d 454, 456 (D.C. Cir. 1990). Further, where, as here, no discovery has taken place, a plaintiff may defeat a motion to dismiss based upon lack of personal jurisdiction "by making mere factual allegations to establish a prima facie showing of jurisdiction." *GTE New Media Servs. Inc. v. Ameritech Corp*., 21 F. Supp. 2d 27, 36 (D.D.C. 1998). "A Plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest defendant defeat the jurisdiction of [the trial court] by withholding information on its contacts with the forum." *Eric T. v. Nat'l Med. Enters.*, 700 A.2d 749, 759 n.21 (D.C. 1997) (quoting *El-Fadl v. Cent. Bank of Jordan*, 316 U.S. App. D.C. 86, 75 F.3d 668, 676 (D.C. Cir. 1996). Surely the Defendants would withhold jurisdictional

facts to avoid liability for the large payments to Defendant McKinzie. The discovery requested by Plaintiffs will support this Court's jurisdiction over Defendants, many of whom have significant undisclosed contacts with the District of Columbia and who are also subject to jurisdiction based upon their attendance at the 2008 Boule meeting as discussed below.

There are two types of personal jurisdiction in the District of Columbia: (1) general personal jurisdiction, an "all purpose" adjudicatory authority to entertain a suit against a defendant without regard to the claim's relationship to defendant's forum-linked activity; and (2) specific personal jurisdiction, to entertain controversies based on acts of a defendant that touch and concern the forum. *Kopff v. Battaglia,* 425 F. Supp. 2d 76, 81 (D.D.C. 2006). Each type of personal jurisdiction is relevant to these Defendants.

**1. General Personal Jurisdiction.**

A District of Columbia court can exercise general personal jurisdiction over a defendant two ways: (1) the Court may have general personal jurisdiction pursuant to District of Columbia Code Section 13-422 because defendant is domiciled in, organized under the laws of, or maintaining its principal place of business in the District of Columbia; or (2) the Court may have general personal jurisdiction pursuant to District of Columbia Code Section 13-334, because the defendant is "present" in the District of Columbia by virtue of the defendant's "continuous and systematic" contacts in the District of Columbia. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 415-16 (1984).

**a) Personal Jurisdiction Based on D.C. Code § 13-422**

"A District of Columbia court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, the District of Columbia as to any claim for relief." *D.C. Code § 13-422*. Alpha Kappa Alpha Sorority, Inc. is a non-profit corporation organized under the laws of the District of Columbia. It is not disputed that the District of Columbia has general jurisdiction over the Sorority.

In addition to AKA, other individual Defendants may be subject to jurisdiction under *D.C. Code § 13-422*. Defendant Glenda Glover maintains a residence, owns real property, pays taxes and runs a business in the District of Columbia.[4] *See* Decl. Carol Ray at ¶ 39 attached hereto as Exhibit C. In addition, Defendants Shayla M. Johnson and Melanie C. Jones list District of Columbia as a home address in a 2009 official AKA publication, the *Ivy Leaf*. (Summer, 2009 issue, p. 86, attached as an Exhibit 1 to the Declaration of Gray). Also, Defendant McKinzie and other Defendants such as Hon. Vicki Miles-LaGrange regularly conduct personal and professional business in the District of Columbia. Plaintiffs request reasonable discovery into the Defendants' contacts with the District of Columbia to establish jurisdiction. *See Eric T. v. Nat'l Med. Enters*., 700 A.2d 749, 759 n.21 (D.C. 1997) ("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of [the trial court] by withholding information on its contacts with the forum."). As mentioned above, the Defendants cannot be expected to voluntarily admit jurisdictional facts which might expose them to significant personal financial liability.

[4] Residence of Charles H. and Glenda B. Glover, 4034 Lee Street, N.E., Washington, District of Columbia, 20019.

**b) Personal Jurisdiction Based on D.C. Code § 13-334**

Section 13-334 of the District of Columbia Code provides an alternative basis for a court's general jurisdiction. *See Ross v. Prod. Dev. Corp.*, 736 F. Supp. 285, 289 (D.D.C. 1989). District of Columbia Code Section 13-334, which "predates the D.C. long-arm statute, continues to exist as an independent basis for personal jurisdiction." *Id.* at 290 (citing *Ramamurti v. Rolls-Royce Ltd.*, 454 F. Supp. 407, 409 n. 2 (D.D.C. 1978), aff'd, 198 U.S. App. D.C. 92, 612 F.2d 587 (1980). For general jurisdiction under Section 13-334, the plaintiff must show that the defendant "carries on a consistent pattern of regular business activity within the jurisdiction." *Trerotola v. Cotter*, 601 A.2d 60, 63 (D.C. 1991).

It is undisputed that the individual Defendants are officers, directors or former officers and directors of AKA. By voluntarily becoming officers or directors of a District of Columbia non-profit corporation, they have accepted all the duties, responsibilities and protections the laws of the District of Columbia provide. It is further undisputed that, Defendant's positions as members of the Directorate entitle them to great authority within the Sorority. In fact, Defendants contend that the Directorate has complete control of the Sorority, except perhaps when the biennial Boule legislative meeting is in session. *See* Defs' Mot. to Dis. at 5. In *Bible Way Church of our Lord Jesus Christ World Wide, Inc., v. Showell*, Virginia based Church leaders were held subject to District of Columbia court jurisdiction on the grounds that their leadership and control over a District of Columbia Church justified imposing jurisdiction upon them under the leadership control and alter-ego doctrines. 578 F. Supp. 2d. 164, 168 (D.C.C. 2008).

> "[Non-resident defendants] hold themselves out as controlling officers of the Church, a District of Columbia corporation, and therefore the exercise of general personal jurisdiction over them satisfies both District of Columbia law and the Constitution."

*Id*. Here, Defendants admit they exercise significant control over the Sorority, a District of Columbia corporation, and thus are subject to this Court's jurisdiction based on *Bible Way*.

Defendants are also subject to this Court's jurisdiction based on their business contacts with the District of Columbia. Contrary to Defendants' claims in the Dangerfield Declaration, at least certain of the Defendants have sufficient regular business activity with the District of Columbia to satisfy this requirement for general personal jurisdiction. For example, Defendant McKinzie carries on a consistent pattern of regular business activity within the District of Columbia through board memberships in District of Columbia based organizations and attendance at numerous social, business and public events in the District of Columbia. *See* Decl. of Catherine Georges at ¶ 39 attached hereto as Exhibit E.

In addition, Defendants Melanie C. Jones and Shayla M. Johnson are or were students at Howard University at the time they participated in many of the Directorate decisions which are the subject of this litigation. They each undoubtedly have a consistent pattern of business activity with the District of Columbia. *See* Decl. of Catherine Georges at ¶ 39; Decl. Carol Ray at ¶ 39, 40; Decl. of Frances Tyus at ¶ 16 attached hereto as Exhibits E, C, and H; Decl. of Joy Daley ¶ 46 attached hereto as Exhibit A. Many of the remaining individual Defendants have likely traveled to the District of Columbia on numerous occasions to conduct business and Plaintiffs request reasonable discovery regarding all the individual Defendants' contacts within the District

of Columbia. Defendant Educational Assistance Foundation ("Foundation") regularly receives applications from and makes grants to students residing in the District of Columbia. It also electronically solicits and receives contributions via its commercially active website, www.akaeaf.org, and otherwise. *See* Gray Decl. at ¶ 11. Thus, Defendant Foundation's contacts with the District of Columbia are "continuous and systematic" under *Helicopteros Nacionales*, supra.[5]

Although there can be little doubt that Defendant Foundation is thus subject to the general jurisdiction of this Court, the requested discovery would further support the Defendant Foundation's own characterization of its website business as " a major business tool" generating over 1.7 million hits per annum as evidencing significant contacts with the District of Columbia.

**2. Specific Personal Jurisdiction under the District of Columbia Long Arm Statute**

For defendants whose contacts with the District of Columbia are insufficiently "continuous and systematic" to confer general jurisdiction, specific personal jurisdiction may be found if the plaintiff demonstrates that: (1) the District of Columbia's long arm statute, *D.C. Code § 13-423,* authorizes jurisdiction; and (2) the exercise of jurisdiction comports with the federal requirement of constitutional due process. *D'Onofrio v. SFX Sports Group, Inc.*, 534 F. Supp. 2d 86, 90 (D.D.C. 2008).

The D.C. long-arm statute states in relevant part:

[5] In *Gorman v. Ameritrade Holding Corp*. the D.C. Circuit explained that jurisdiction under Section 13-334(a) may be based on a defendant's website "contact" with the District of Columbia when the contacts with the District are "continuous and systematic." 293 F.3d 506, 512 (D.C. Cir. 2002).

> (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;
>
> ***
>
> (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.

D.C. Code § *13-423*.

Section 13-423(a)(1) "is given an expansive interpretation" and it is well established that the section is "coextensive with the due process clause." *Mouzavires v. Baxter*, 434 A.2d 988, 992 (D.C. 1981). Thus, the inquiry is whether the non-resident defendants had sufficient minimum contacts with the jurisdiction in order to satisfy due process. *Id*. Due process is satisfied where a plaintiff shows "minimum contacts" between the defendant and the forum, ensuring that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co., 326 U.S. at 316. GTE New Media Services Inc. v. BellSouth Corp., 339 U.S. App. D.C. 332, 199 F.3d 1343, 1347 (D.C. Cir. 2000)*. Under this standard, "the defendant's conduct and connection with the forum state [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

As previously discussed, Defendant Foundation's business activities within the District of Columbia are sufficiently "ongoing and systematic" to subject it to this Court's general jurisdiction. This same conclusion may also be appropriate respecting Defendants Barbara McKinzie, Vicky Miles LaGrange, Glenda Glover, Melanie C Jones and Shayla M. Johnson.

In addition, these Defendants and all the remaining Defendants have transacted business in the District of Columbia relating to the claims brought in this case. Specifically, all of the Defendants were present at the 2008 Boule meeting in the District of Columbia. *See* Decl. of Tyus at ¶ 16. At the 2008 Boule legislative meeting Barbara McKinzie, Carolyn House Stewart, Melanie C. Jones, Shaylah M. Johnson, Noel Marie Niles, Dorothy B. Wilson, Glinda Glover, Freddie Grooms-McLendon, Evelyn Sample-Oats, Ruby B. Archie, Ella S. Jones, Schylbea J. Hopkins, Junaita S. Doty, Pamila B. Porch, Vicki Miles- LaGrange, Gwendolyn Brinkley, Lavern Tarkington and Norma Tucker were sworn into office and accepted the duties, responsibilities and protections the laws of the District of Columbia that attach to their positions. Defendants, by virtue of their attendance, voting and investiture at the 2008 Boule meeting, are responsible for the acts and omissions of which Plaintiffs complain respecting the manner in which 2008 Boule legislative meeting was conducted. *See* Pls. Amen. Comp. ¶94, 95, 96 and 97.

At this 2008 Boule legislative meeting, all Defendants were present and were active in their roles as Directors. All had the opportunity to observe and object to the leadership's failure to secure 2008 Boule legislative meeting approval of - or even permit discussion respecting Defendant Barbara McKinzie's 2007 compensation of $ 250,000.

As plead in the Amended Complaint, Defendant McKinzie’s $250,000 compensation was approved by the Directorate in 2007 prior to the 2008 Boule legislative meeting, but was never presented to a Boule legislative meeting for approval. The 2008 Boule legislative meeting thus offered Defendants the opportunity to secure Boule approval of this payment. It is undisputed that no such 2008 Boule legislative meeting approval was ever sought. Defendants' acts and omissions respecting the 2008

Boule legislative meeting, all well plead in the Amended Complaint and supported by Declarations filed with this Opposition, alone provide sufficient basis personal jurisdiction in the District of Columbia upon the individual directors, not subject to the general jurisdiction of this Court.

In the District of Columbia, a single act can establish sufficient minimum contacts to constitute transacting business under the long-arm statute. *See Richter v. Analex Corp.,* 940 F. Supp 353, 360 (D.D.C. 1996). In *Richter,* the court found sufficient contacts for long-arm jurisdiction based upon a single District of Columbia meeting in which notes taken during the meeting referring to "'certain bonuses' which might well refer to the consulting agreements and bonuses at issue." even though the defendant denied discussing the dispute over the bonuses at the meeting. *Id.* The 2008 meeting of the Boule took place in the District of Columbia and Defendants' above-described actions and omissions at the 2008 Boule legislative meeting relate directly to Plaintiffs' claims in the Amended Complaint. Defendants' District of Columbia contacts are more extensive than the contacts found sufficient in *Richter*.

"The only nexus required by [D.C. Code § 13-423] (a)(1) . . . between the District of Columbia and the nonresident defendant is 'some affirmative act by which the defendant brings itself within the jurisdiction and establishes minimum contacts.'" *Berwyn Fuel, Inc., v. Hogan*, 399 A.2d 79, 80 (D.C. 1979) (citation omitted). The attendance by Defendants at the 2008 Boule meeting establishes such affirmative acts.

> We [The District of Columbia Court of Appeals] have held that even a small amount of in-jurisdiction business activity is generally enough to permit the conclusion that a nonresident defendant has transacted business here. **Thus a single act may be sufficient to constitute transacting business, so long as that contact is voluntary and deliberate, rather than fortuitous.** What guides our minimum contacts inquiry, then, is a

> search for meaningful acts reflecting purposeful, affirmative activity within the District of Columbia. When such a connection to the forum state is established, due process is satisfied because the defendant should reasonably anticipate being haled into court there.

*Jackson v. Loews Wash. Cinemas, Inc.*, 944 A.2d 1088, 1093-1094 (D.C. 2008) (emphasis added) (citations omitted). Defendants deliberately and voluntarily became officers and directors of a District of Columbia non-profit corporation and attended the 2008 Boule legislative meeting in the District of Columbia. Moreover, as officers and directors of a District of Columbia non-profit corporation, Defendants should have reasonably anticipated being haled into court in the District of Columbia.

### 3. Fiduciary Shield Doctrine is Inapplicable

Defendants argue that their positions as officers and directors of a District of Columbia corporation do not confer personal jurisdiction upon them and that any acts taken on behalf of the corporation in the District of Columbia can not be attributed to the individual who is merely acting as an employee. This view is incorrect. The fiduciary shield or corporate shield doctrine is an equitable, judge-made exception to jurisdiction. "Under the fiduciary shield doctrine, a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person." *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 520 (9th Cir. 1989); *see also* 4 C. Wright & A. Miller, Federal Practice and Procedure Sec. 1069 at 370 (2d ed. 1987).

However, the fiduciary shield doctrine is not a blanket shield; each defendant's contacts with the forum state must be assessed individually. *Calder v. Jones*, 465 U.S.

783, 790 (1984). As discussed above, in *Bible Way*, a District of Columbia District court denied application of the corporate or fiduciary shield doctrine where Virginia based Church leaders sought to be shielded from District of Columbia jurisdiction with respect claimed misconduct as regards a District of Columbia Church which they controlled. *See Bible Way Church of our Lord Jesus Christ World Wide, Inc., v. Showell*, supra.

Even apart from the leadership control and alter-ego exceptions of *Bible Way*, the fiduciary shield doctrine, is often criticized. *See* Lynn C. Tyler, Personal Jurisdiction: Is It Time to Stick a Fork in the Fiduciary Shield Doctrine?, 40-APR Res Gestae 9, 14 (1997); Robert A. Koenig, Personal Jurisdiction and the Corporate Employee: Minimum Contacts Meet the Fiduciary Shield, 38 Stan. L. Rev. 813, 827 (1986). Furthermore, courts have held that the fiduciary shield doctrine is not applicable in jurisdictions such as the District of Columbia. *See Davis*, 885 F.2d at 522; *Dove Air, Inc. v. Bennett*, 226 F.Supp.2d 771, 780 (W.D.N.C. 2002) ("It has been the law of this Circuit since 1983 that this doctrine will not apply where jurisdiction is asserted under a long-arm statute that extends its reach to the limits of the due process clause, as does the North Carolina statute"). The fiduciary shield doctrine is based on state corporate laws and not constitutional due process. *Id.* Thus, where, as here, a state's long-arm statute allows jurisdiction to the extent allowed by the Constitution, employing the fiduciary shield to insulate employees is inconsistent with the wide reach of the statute. *Id.*; *AARP v. American Family Prepaid Legal Corp., Inc.*, 604 F.Supp.2d 785, 799 (M.D.N.C., 2009) ("However, this 'fiduciary shield' doctrine does not apply where the state's long-arm statute is co-extensive with due process.").

Nevertheless, Defendants have cited cases in which courts have applied this

doctrine. However, all the cases cited by Plaintiffs involve foreign corporations. None of the cases cited by Defendants shielded the officers or directors of a District of Columbia corporation from a District of Columbia court's jurisdiction. This makes sense because the fiduciary shield doctrine is an equitable doctrine and equity does not require that a District of Columbia corporation director be shielded from the jurisdiction of a District of Columbia court. "Whether the [fiduciary shield doctrine] will apply in a particular case depends entirely on whether it will advance the notions of fairness to allow an individual to invoke its protection. In some cases, it will not." *American Directory Service Agency v. Beam*, 131 F.R.D. 635, 641 (D.D.C. 1990). Here, AKA is a District of Columbia corporation and it is not unfair or unforeseeable for officers and directors to be haled into court in the jurisdiction in which their corporation is organized.[6] Analogously finding personal jurisdiction in West Virginia over non-resident directors of a West Virginia charters corporation, the Fourth Circuit held:

> This is not a random or fortuitous exercise of jurisdiction, and we have no problem in holding that, by accepting and exercising directorships with Mid Allegheny, the defendants purposefully invoked the benefits and protections of West Virginia law. Of course, it may be something of a fiction to say that a corporation is a resident of the chartering State. Nevertheless, "in many respects . . . the law acts as if State chartering of a corporation has meaning." *Shaffer v. Heitner, 433 U.S. at 226, n.4* (Brennan, J., concurring and dissenting). For purposes of diversity jurisdiction, a corporation is considered a citizen of the chartering State, as well as the State of its principal place of business. See *28 U.S.C. § 1332(c)*. Indeed, the entire structure of basic corporate law is built upon a series of fictions, most notably the fiction that a corporation is something

[6] Several States have enacted statutes specifically establishing jurisdiction over the officers and directors of domestic corporations or foreign corporations headquartered in that State. The Illinois long-arm statute states:

> Any person, whether or not a citizen or resident of this State…thereby submits… to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:…
> (12) The performance of duties as a director or officer of a corporation organized under the laws of this State or having its principal place of business within this State.

735 ILCS 5/2-209 (2009).

> that really exists, rather than being merely a creature of state law described on papers filed with the State. Directors and officers derive many benefits from the legal fiction of the corporation. It does not seem unfair to require them in turn to shoulder one of the few burdens of such a fiction. The defendants had full knowledge that Mid Allegheny was a West Virginia corporation when they accepted and exercised directorships. And, accepting a directorship is not a frivolous business. The law imposes substantial responsibilities, and substantial liability, upon corporate directors. Therefore, it seems perfectly reasonable to require defendants Hawk and Griffith to defend this action, concerning their conduct as directors, in a West Virginia court.

*Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 530 (4th Cir. 1987) (emphasis added). "[T]he District had a 'significant interest . . . in holding its corporations liable for the full extent of the negligence attributable to them.'" *Drs. Groover, Christie & Merritt, P.C. v. Burke*, 917 A.2d 1110, 1119 (D.C. 2007). Fairness dictates that directors of an entity chartered in the District of Columbia be subject to personal jurisdiction in the District of Columbia.

> "The chartering State has an unusually powerful interest in insuring the availability of a convenient forum for litigating claims involving a possible multiplicity of defendant fiduciaries and for vindicating the State's substantive policies regarding the management of its domestic corporations."

*Shaffer v. Heitner*, 433 U.S. 186, 222 (1977) (Brennan, J., concurring and dissenting). If the individual Defendants were shielded from liability in the instant case, the District of Columbia would be unable to hold foreign officers and directors of its corporations accountable for their misconduct. A District of Columbia court should not apply the fiduciary shield doctrine to officers and directors of a domestic corporation. Given that equitable principles govern this doctrine, Plaintiffs should be permitted discovery to ascertain the full extent and nature of Defendants' control over the Sorority and their

personal contact with the District of Columbia. All such facts are relevant to the equitable principles underlying the fiduciary shield doctrine.

**4. Jurisdictional Discovery**

Plaintiffs request immediate jurisdictional discovery to establish which Defendants are properly subject to the general or long-arm jurisdiction of this Court to rebut the fiduciary shield doctrines which Defendants have asserted. "A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of [the trial court] by withholding information on its contacts with the forum." *Eric T. v. Nat'l Med. Enters.*, 700 A.2d 749, 759 n.21 (D.C. 1997) (quoting *El-Fadl v. Cent. Bank of Jordan*, 316 U.S. App. D.C. 86, 75 F.3d 668, 676 (D.C. Cir. 1996). Defendants offer only the conclusory affidavit of Deborah Dangerfield, only recently named Executive Director of the Sorority, to support the assertion that Defendants lack minimum contacts with the District of Columbia. Given that the Dangerfield Declaration omits the facts that Defendants Glover, Shayla Johnson and Melanie Jones reside in the District, that Defendant Vicki Gaines-Miles regularly attends judicial, business and personal activities in the District of Columbia and that other Defendants are Howard alumni, it is clear that little weight should be given to the Dangerfield Declaration's summary and incorrect assertions. Many, if not all, of the Defendants have regular personal, business and AKA related contacts within the District of Columbia. Further, all of the individual Defendants attended the 2008 Boule legislative meeting and/or assumed the duties of their office at the 2008 Boule which was held in the District. If jurisdiction is not conceded by Defendants based on these facts, Plaintiffs have made a sufficient showing of other plausible contacts with the District to

entitle Plaintiffs to discovery to inquire further about the extent of Defendants' contacts within the District of Columbia.

**B. STANDING**

Defendants also seek to dismiss Plaintiffs' claims on the grounds that Plaintiffs lack standing. In particular, Defendants argue that Plaintiffs lack standing because Plaintiffs have not demonstrated that they have been injured by Defendants in their capacity as individuals. Defendants also seek dismissal on the ground that the Directorate owes a fiduciary duty only to the Sorority and not to AKA's members. These arguments are incorrect. Plaintiffs, as members of AKA, have standing to bring this action and are entitled, as members, to the loyalty, attention and independent, disinterested judgment of the Directorate. As the Amended Complaint properly alleges, these obligations were not met by Defendants in approving or permitting the payments to Defendant McKinzie and in wrongfully disciplining Plaintiffs. The corporate structure of the Sorority provides that the Sorority is a member-driven organization, and the fiduciary duty of the Directorate to the members is, accordingly, clear and unambiguous. As such, the Directorate was obliged to secure member approval of the payments to Defendant McKinzie.

"[S]tanding 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." *Riverside Hosp. v. District of Columbia Dep't of Health*, 944 A.2d 1098, 1104 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130,

119 L. Ed. 2d 351 (1992) (internal quotation marks and ellipses omitted)).[7] Injury-in-fact involves the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Miller v. Bd. of Zoning Adjustment*, 948 A.2d 571, 574 (D.C. 2008) (citations omitted). The Supreme Court has observed that standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500, (1975) (explaining also that actual or threatened injury required by Art. III may exist solely by virtue of legal rights, the invasion of which creates standing.). Plaintiffs' standing is based upon their present or former status as dues paying members in AKA which makes them members of the Boule, the legislative, policy-making and governing body of AKA. Plaintiffs thus have a legally protected interest in the governance of AKA which has been violated by Defendants through their fraudulent, negligent and unlawful acts, or omissions. Plaintiffs' injury at the hands of Defendants is demonstrated by Defendants' unabashed suspension of Plaintiffs for asserted violation of AKA rules and procedures. These suspensions have injured Plaintiffs directly by denying them the right to vote and otherwise participate in Sorority activities. The Directorates' conduct has thus embarrassed and humiliated Plaintiffs and, as a direct result of the deliberate, willful and indifferent conduct of Defendants, caused Plaintiffs' substantial, personal and economic contributions to the Sorority to become diminished in value to Plaintiffs. (*See* Declarations of all Plaintiffs, Exhibits A-H). Moreover, Plaintiffs are also individually harmed by the special monetary assessments required to financially support the outrageous payments to Defendant McKinzie and the perquisites of the Directorate which are used by Defendant McKinzie

[7] District of Columbia courts generally "look to federal jurisprudence to define the limits of 'cases and controversies' that our enabling statute empowers us to hear." *Community Credit Union Servs., Inc. v. Federal Express Servs. Corp.*, 534 A.2d 331, 333 (D.C. 1987).

to secure the ongoing support and acquiescence by the Directorate to the payments to Defendant McKinzie. It is these personal, direct, economic and emotional injuries that confer standing upon Plaintiffs.

**1. AKA's Certificate of Incorporation, Constitution and Bylaws Create a Fiduciary Duty from the Directorate to Dues Paying Members.**

Defendants concede that directors owe a fiduciary duty to the organization. They, however, deny that a duty is also owed to the members. This incorrect view overlooks the non-profit corporation laws of the District of Columbia, AKA's Certificate of Incorporation, Constitution and Bylaws. These combine to impose a duty upon the Directorate to show loyalty to the voting members of the Sorority who Defendants admit are the policy making authority of the Sorority. ( *See* Defs Mot. to Dis. p.5).

Title 29, Chapter 3, Section 29-301.12 of the District of Columbia Code provides:

> "A corporation may have 1 or more classes of members or may have no members. If the corporation has 1 or more classes of members, the designation of such classes or classes, the manner and election or appointment and the rights of the members of each class shall be set forth in the articles of incorporation or bylaws. If the corporation has no members, that fact shall be set forth in the articles of incorporation. A corporation may issue certificates evidencing membership therein."

This provision makes clear that District of Columbia non-profit corporations have broad latitude with respect to the rights granted to members. These rights can range from none at all to those specific rights as may be established in the "articles of incorporation or the bylaws." In the Certificate of Incorporation of the AKA, which has never been altered or modified since its adoption in 1913, it is clear that the Directorate is

subordinate to the membership.[8] The authority of the membership over the Sorority is further supported by the AKA Constitution and Bylaws. *See* AKA Const. Art III, Sec. 1; AKA Const. Art. IV.

Indeed, Defendants concede that in AKA, members are given substantial rights to control the organization. *See* Defs.' Mot. to Dis. at 5. In confirmation of this membership role, Defendants have elected treatment for federal tax purposes under 501(c)(7) of the Internal Revenue Code. IRC 501(c)(7) organizations are membership organizations primarily supported by funds paid by their members and are formed for the pleasure, recreations and non-profit purposes of its *members*. *See* IRC 501(c)(7). Thus, under District of Columbia law, the Internal Revenue Code and AKA's Constitution and bylaws, AKA is an organization established for its members, run by its members and gives its members significant rights. It is these documents which create the fiduciary duty of the Directorate to the members.

**a) The Sorority's Governance History**

The Sorority was incorporated in 1913 in response to a governance dispute that erupted in those early days.[9] The initial Certificate of Incorporation, which has never been amended or modified, created a governance structure which was intended by the incorporators to forestall future governance disputes. It is Defendants' deliberate cause of the current controversy. The history of the Sorority is helpful in understanding the how and the why of its deliberate, member driven governance approach.

[8] *See* Articles Fourth and Sixth of the Certificate of Incorporation attached as Exhibit J.
[9] *See* www.thequangerquality.com/nellie.htm (last visited October 1, 2009)

In 1913, Alpha Kappa Alpha Sorority, Inc. was incorporated in Washington, D.C. with a stated purpose to be "educational and to promote the intellectual standard and mutual uplift of its members." In furtherance of its goals, the AKA charter vested significant control of the Sorority's conduct in the members through an institutional structure in which the "Supreme Chapter" or "Boule" was designated as the AKA's principal decision and policy making body and the final arbiter of all disputes. The Boule is comprised of the financially active members of AKA. *See* AKA Bylaws Art. 4 § 2. The critical governance role of the Boule is deliberately de-emphasized by Defendants for reasons that are at the heart of the instant controversy.

Contrary to Defendants' recent description of the Directorate as having unlimited governance over the Sorority, the Directorate is the administrative division of the Boule authorized to act only when the Boule legislative meeting is not in session. It will be noticed by this Court that five (5) states continue to have legislatures which convene biennially. In 1913, when the AKA was incorporated, the practice of biennial legislative bodies was widespread. [10] Thus, the Directorate is not supreme, but is merely tasked to execute the Boule directives which are established in its biennial meetings. Between meetings, the Boule operates through the AKA local chapters. These chapters are intended to plan the action the Sorority will take at the next Boule legislative meeting. *See* AKA Bylaws Art. 3 § 12; Art. 8 § 31. In the interim between Boule legislative meetings, the Directorate is expected to execute the Boule legislative directives from the prior Boule legislative meeting and make only those day to day decisions which cannot be handled by AKA's corporate staff or otherwise reasonably be deferred until the

[10]Texas, Nevada, North Dakota, Oregon and Montana all have biennial legislatures. As recently as 1940, forty (40) other states had biennial legislatures. *See* National Conference of State Legislatures, www.ncsl.org (last visited October 1, 2009)

succeeding Boule legislative meeting. There is no constitutional impediment to the Directorate seeking guidance from the Boule between Boule legislative meetings should that be necessary. In fact, the presence of the Regional Directors of the Sorority on the AKA Directorate is designed to institutionalize the transfer of information from the AKA regions to the Directorate.

**b) The Importance of the AKA Constitution and Bylaws.**

It is undisputed that all activities of the Boule, the Boule Meeting, the Regions and the Directorate are to be conducted in accordance with the Constitution, By-laws and Rules of the AKA. However, there is a material controversy over how the Constitution and Bylaws may be amended, by whom, and which printed documents correctly state those rules.[11] As shown by the Declaration of Joy Elaine Daley, there has never previously been a odd year number revision of the AKA documents, such revisions being confined to Boule years which are always even years. *See* Decl. of Joy Daley ¶ 37, *supra*. Thus, there is a dispute over which version of the MOSP is the official version of the Sorority. Summary judgment is inappropriate where the very corporate documents of AKA are in dispute.

The policy making body of AKA is the Boule. AKA Const. Art III, Sec. 1. Even certain executive powers of AKA lie in the Boule. And, the Boule has final authority in all policy decisions and adjudications. AKA Const, Art. IV, Sec. 2, and MOSP page 2. The Directorate is merely the administrative division of the Boule. AKA Const. Art III, Sec. 2. Article IV of the AKA Constitution merely describes how often the Boule shall meet, who shall act as the officers for that meeting, who in addition to the delegates have

[11] Defendants assert a new 2009 version of the MOSP as a controlling document.

voting privileges at that meeting, and what shall constitute a quorum at that meeting. Every active member of AKA who meets all financial requirements for the current year, is a member of the Boule. AKA Bylaws, Art IV, Sec. 1. The Past Supreme Basilei are active members of the Boule for life without financial obligations to the Sorority. AKA Bylaws, Art IV, Sec. 2. The Boule legislative meeting shall meet biennially in the summer. AKA Const. Art IV, Sec. 1b.

The active members of AKA are the Boule, and they are the "voting members" of AKA. The active members elect the delegates only to facilitate voting during the Boule legislative meeting, but the delegates are only representatives of the Boule at the biennial legislative meeting. In addition to selecting delegates, active members have many other “voting privileges” provided by the AKA Constitution, such as voting to admit new members, to suspend members, to elect chapter officers, approve chapter budgets, programs, and meeting agendas, and even to amend AKA's Constitution and Bylaws. All the “voting rights” are retained and exercised by the active members in between Boule meetings. The Directorate has the power to conduct the administrative business of the Sorority when the Boule “meeting” is not in session. (AKA Const. Art V, Sec. 1b). But, as the administrative division of the Boule, the Directorate is only authorized to conduct the business approved by the Boule legislative meeting. Thus, the Directorate lacks the authority to approve unilaterally the huge payments to Defendant McKinzie.

It is this particular corporate structure, which has been properly alleged by Plaintiffs in the Amended Complaint and supported by this Memorandum, that gives Plaintiffs standing to maintain this action. None of the cases relied upon by Defendants involve members with the same corporate relationship to their corporations as Plaintiffs

have to the Sorority and to the other Defendants. Indeed, the cases cited by Defendants involved plaintiffs seeking to enforce the rights of third parties. For instance, Defendants cite *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1105 (D.C. 2008) and *Singleton v. Wulff*, 428 U.S. 106, 113 (U.S. 1976) where a hospital and doctors, respectively, sought to assert the rights of its patients denied Medicaid reimbursements. These facts are inapplicable to the instant case. Here, Plaintiffs are asserting their own rights afforded by virtue of AKA's specific corporate structure and the AKA Constitution and Bylaws.

Due to AKA's governance structure, Defendants, as officers and directors of AKA, themselves owe a fiduciary duty to Plaintiffs. District of Columbia law recognizes that directors of membership organizations owe a fiduciary duty to the members, not just to the entity. "The fiduciary concept is not limited to stock corporations but applies to membership organizations as well… Like promoters or directors of a corporation, developers of a housing cooperative occupy a fiduciary position with respect to the individual members of the cooperative." *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n*, 441 A.2d 956, 963 (D.C. 1982). The individual Plaintiffs, as members of AKA and the Boule, are entitled to a Directorate that enforces AKA leadership's compliance with the AKA Constitution and Bylaws of the Sorority. As alleged in the Amended Complaint and supported by the Motion and Declarations, Plaintiffs are concretely and personally harmed by the breach of duty by Defendants. This harm occurs in the District of Columbia as well as throughout the country in that Plaintiffs' membership status has been suspended and diminished in value throughout the entire United States.

Moreover, each Plaintiff has suffered economic harm as a result of the Defendants' acts and omissions. As alleged in the Amended Complaint, AKA funds its mission and programs primarily through dues and fees assessed to the membership. *See* Pls. Amend. Comp. ¶ 61. The huge payments admittedly to and for the benefit of Defendant Barbara McKinzie are significant although presently only partially known. These admitted amounts can alone affect the size of AKA member dues and nature of its programs. Indeed, the relationship between AKA dues and Defendant McKinzie's compensation has been expressly admitted by Defendants. [12] Further, such large payments, in an organization the size of AKA can be material to AKA's financial health as well as its ability to pursue AKA programs and member benefits. Plaintiffs are entitled to formal discovery to ascertain the impact of these payments upon the financial condition of the Sorority. As member dues and fees required for AKA membership are AKA's primary funding source, any material diminution in AKA's balance sheet will require greater future contributions from the members in the form of increased dues and fees. Even if, hypothetically, AKA had other revenue sources than member dues to fund the exorbitant McKinzie compensation, Defendant's McKinzie's compensation should still be approved by the membership as required by the AKA Constitution and Bylaws. Defendants cannot seriously argue that the Bylaw provision authorizing a stipend to the Supreme Basileus means that the Directorate can alone authorize payments to Defendant of a million dollars or more.

Defendants further argue that Plaintiffs seek to bring a cause of action that belongs solely to AKA. To support this argument, they cite state case law for the

[12] See Decl. of Edward W. Gray, Jr. at ¶__ (Defendant McKinzie gave a PowerPoint presentation where she admits that her compensation comes from money levied on members at a rate of less then 63 cents per month or $7.50 for the year per member.)

proposition that a corporation's shareholders cannot bring an action to redress wrongs against the corporation's property interests. *See* Pl. Mot. at 19. However, Plaintiffs as individuals are harmed by the conduct alleged in the Amended Complaint as their dues, fees and assessments have been and are increased thereby and their payments over the years to the Sorority are diminished in value. (*See* Declarations of all Plaintiffs, Exhibits A-H).

For the purpose of a motion to dismiss or for summary judgment, this Court must take as true the Amended Complaint's allegations that: (1) the AKA dues and member payments are the major source of revenue of the Sorority; and (2) all Plaintiffs have all been denied the benefits of full membership in retaliation for complaining about the misconduct and breaches of fiduciary duty by Defendants. Pls.' Amed. Compl. ¶ 61, 141.

None of the cases cited by Defendants involve the concrete personal injury and direct causation by Defendants that are present in this case. In *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 149 (D.C. 2000) heavily relied upon by Defendants, there was no personal injury caused or alleged by the plaintiff. There, Flocco, a State Farm shareholder sued State Farm, its executives, President Clinton and Clinton attorney, Robert Bennett regarding State Farm's indemnification of President Clinton respecting the litigation brought by a public interest firm over the claims of Paula Jones. Flocco, a small shareholder of a large insurance company objecting to the company's decision to defend a single individual insured has no bearing on the instant case. The defense of President Clinton did not risk the reputation or financial strength of State Farm, nor did it injure Mr. Flocco in any cognizable way. Nor did State Farm corporate documents

entitle shareholders to decide or voice an opinion about the individual insurance decisions of the company. Here, the facts are quite different. Plaintiffs are more than mere shareholders – they are Sorority leaders of long-standing having served in prominent roles in earlier administrations in the Sorority. (*See* Declarations of all Plaintiffs, Exhibits A-H). The Corporate Charter entitles Plaintiffs and all dues paying members to participate in Boule legislative meeting decisions and to attend Boule legislative meetings. The Charter, and the Constitution and Bylaws carefully define an elaborate balance of power between members of the Boule legislature and the Directorate. Nothing remotely like this balance of power applied to State Farm shareholders like Flocco. Moreover, Defendants' suspension of Plaintiffs' membership rights certainly have greater impact upon Plaintiffs than the impact upon Mr. Flocco of State Farm indemnifying President Clinton.

Defendants also contend that this action should have been brought as a derivative action. However, there is no legal requirement that the instant case be brought as a derivative action. If Plaintiffs' claims were solely or even largely based on injury to AKA, a derivative action might be appropriate.[13] Here, however, Plaintiffs have been suspended and forced to defend themselves in the Sorority or in court because they dared to complain about Defendants misconduct and breach of duty. These injuries are real and personal. Plaintiffs also have been injured in being denied the right to participate in sorority activities including the right to vote and influence outcomes in the Sorority's decision making process as provided in the AKA Constitution and Bylaws. Few things are more personal or real than the right to vote and to participate in the political process. Until they were wrongfully suspended, Plaintiffs were entitled to these rights as are all

[13] Bender v. Jordan, 439 F.Supp. 2d. 139, 171 (D.D.C. 2006).

dues-paying members. In addition to losing their votes, Plaintiffs have seen their dues squandered to pay compensation and other benefits to Defendants' without appropriate approval by the Boule legislative body of such major changes in the Sorority. The unapproved and wasteful expenditures, all properly alleged, have increased and threaten to increase further the dues, fees and assessments of Plaintiffs. A potential order by this Court can redress these injuries by affording Plaintiffs reinstatement, an opportunity to support their claims and an opportunity to be heard, and by enjoing and recovering all improper payments in violation of the AKA Constitution and Bylaw or the law. Plaintiffs thus have individual standing to bring this action and thus are not required to bring it as a derivative action.

Based on the above facts, Plaintiffs have established they have standing to maintain this action. Plaintiffs have sufficiently shown the basic elements of standing, namely, they have (1) injury in fact – an invasion of a legally protected interest; (2) a causal connection between the injury and the conduct of which the party complains; and (3) it is likely that a favorable decision will redress the injury. The formal discovery sought by Plaintiffs will further support the personal nature of the injuries inflicted upon them and confirm Defendants' precise roles in inflicting those injuries.

### C. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED. THE MOTION IS PREMATURE AS NO SUBSTANTIVE DISCOVERY HAS BEEN PROVIDED AND THE PLAINTIFFS DO NOT YET HAVE THE FACTS ESSENTIAL TO FULLY JUSTIFY THEIR OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants have also moved to dismiss this action based on the Plaintiffs' alleged failure to state any claim upon which relief can be granted. In support of their motion,

Defendants have relied on facts outside of the pleadings as they concede by filing their Statement of Undisputed Facts. If, in support of a motion to dismiss, a moving party submits additional materials outside of the pleadings, the Court shall treat the motion as one for summary judgment. *See* Super. Ct. Civ. R. 12. As Defendants have submitted additional materials, their motion should be treated as a motion for summary judgment under Super. Ct. Civ. R. 56. *See, e.g., Kitt v. Pathmakers, Inc*., 672 A.2d 76, 79 (D.C. 1996); *Fulwood v. Porter*, 639 A.2d 594, 598 (D.C. 1994).

A trial court considering a defendant's motion for summary judgment must view the pleadings, discovery materials and affidavits or other materials in the light most favorable to the plaintiff and may grant the motion only if a reasonable jury could not find for the plaintiff as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001) (citing *Nader v. De Toledano, 408 A.2d 31, 42 (D.C. 1979)*; *Bailey v. District of Columbia, 668 A.2d 817, 819 (D.C. 1995)*. The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is a genuine issue of material fact in dispute. *Grant, 786 A.2d at 583* (citing *O'Donnell v. Associated Gen. Contractors of Am., Inc., 645 A.2d 1084, 1086 (D.C. 1994))*. The non-moving party may not simply rest on conclusory allegations or denials of the movant's pleadings to establish that a genuine issue of material fact is in dispute. *Boulton v. Inst. of Int'l Educ., 808 A.2d 499, 502 (D.C. 2002)*; Super. Ct. Civ. R. 56(c). Summary judgment is a remedy that should be granted sparingly, especially in cases involving intent or motive. *See Hollins v. Federal Nat. Mort. Ass'n*., 760 A.2d 563, 570 (D.C. 2000).

### 1. Standard under Rule 56(f)

Superior Court Civil Rule 56(f) “affords protection against the premature or improvident grant of summary judgment by permitting a non-movant to file an affidavit stating how discovery would enable him or her to effectively oppose the summary judgment motion.” *D'Ambrosio v. Colonnade Council of Unit Owners*, 717 A.2d 356, 359 (1998) (alterations omitted). “The purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition.” *First Chicago Int'l v. United Exch*. Co., 267 U.S. App. D.C. 27, 32, 836 F.2d 1375, 1380 (1988) (citing *First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). The court has a "duty under Rule 56 (f) to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment." 11 Moore's Federal Practice § 56.10[64][a] (3d ed. 2000). Rule 56(f) requests should be "liberally construed." *Id*.

Under Rule 56 (f) a court "may deny a motion for summary judgment or order a continuance to permit discovery if the party opposing the motion adequately explains why, at that timepoint, it cannot present by affidavit facts needed to defeat the motion." *Strang v. United States Arms Control & Disarmament Agency*, 275 U.S. App. D.C. 37, 39, 864 F.2d 859, 861 (1989). A party must have been diligent in pursuing discovery before the summary judgment motion it is opposing was made. *See Nidds v. Schindler Elevator Corp*., 113 F.3d 912, 921 (9th Cir. 1997). Further, the party opposing summary judgment must specify why additional discovery is necessary. *See Ben Ezra, Weinstein, & Co., Inc., v. America Online, Inc.*, 206 F.3d 980, 987 (10th Cir. 2000)

Defendants have filed this Motion before answering the substantive discovery requests propounded over ninety (90) days ago with the service of the initial Complaint. There is no question that Plaintiffs have been diligent in pursuing discovery and attempting to elicit facts to support Plaintiff's allegations. Indeed, there is a motion to compel access to the Sorority's books and records presently briefed and pending in this Court. Further, Plaintiffs served each Defendant with document requests and interrogatories along with service of the original Complaint, Summons and Initial Order over three months ago. Plaintiffs have not received any responses to Plaintiffs interrogatories and document requests that were served on Defendants. Moreover, the Plaintiffs, through counsel, have repeatedly corresponded with Defendants counsel requesting that AKA allow inspection of its books and records. Despite Plaintiffs' diligent attempts at obtaining relevant information to support its case, Defendants have failed to provide substantive responses beyond admitting the accuracy of certain payment information adduced by Plaintiffs during informal discovery efforts.

The additional facts sought by Plaintiffs as needed to respond properly to Defendants motions will be addressed with respect to each claim to which Defendants assert they are entitled to summary judgment. Plaintiffs have previously discussed Defense claims that Plaintiffs lack standing or that this Court lacks jurisdiction over the Defendants. Plaintiff now address Defendants' assertion that Plaintiffs have failed to state a case justifying intervention.

### 2. The Business Judgment Rule is Inapplicable Where Directors Have a Personal Interest in the Outcome of their Votes.

Defendants claim Plaintiffs' case should be dismissed because the Court should

not interfere with the management of a voluntary membership organization. While courts have often followed this rule, the law of the District of Columbia and other jurisdictions is clear that a court will intervene when an appropriate basis is shown for such judicial intervention. *See Jolevare v. Alpha Kappa Alpha Sorority, Inc.* 521 F. Supp. 2d 1, 24-25 (D.D.C.2007); *Levant v. Whitley*, 755 A.2d 1036, 1043-44 (D.C. 2000): *Blodgett v. University Club,* 930 A.2d 210, 230 (D.C. 2007). The thorough consideration of Plaintiffs' claims and the court opinions in these cases show that District of Columbia courts do not take serious claims lightly and will carefully consider whether judicial intervention is appropriate.

District of Columbia courts consider " the necessity for intervention," and that, "[t]he extent to which deference is due to the professional judgment of the association will vary both with the subject matter at issue and with the degree of harm resulting from the association's action." *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Sch., Inc.*, 139 U.S. App. D.C. 217, 432 F.2d 650, 655-56 (D.C. Cir. 1969)(footnotes omitted). Similarly, Maryland courts have found judicial intervention is appropriate in an association case where: (1) "property rights or a pecuniary interest is at stake;" (2) "economic necessity" exists; (3) "either property rights or civil rights are at stake;" (4) contractual rights are implicated; (5) "officers [of the association] acted fraudulently or in bad faith;" (6) the association has breached its fiduciary duty to its members; (7) "the seriousness of the injury to the individual [outweighs] the association's interest in autonomy and freedom from judicial oversight." *National Ass'n for the Advancement of Colored People v. Golding,* 679 A.2d 554, 560 (Md. 1996); Tackney v. USNA Alumni Assoc., Inc. 971 A.2d 309, 316-17 (Md. App.

2009).

Contrary to the assertions of the Defendants, Plaintiffs are not seeking to litigate minor disagreements over the Sorority's management. The fraud of Defendant McKinzie and the negligence of the Directorate in permitting the uncontrolled payments to McKinzie exceeds any misconduct ever previously discussed in reported decisional law in the District of Columbia or Maryland. It is also noteworthy that in comparison to the present case, *Levant, Jolevare* and *Blogett* concern comparatively unimportant organizational misconduct. Nonetheless, in each of those cases, the courts investigated carefully whether judicial intervention was appropriate. The present case certainly justifies such an investigation as never has more compelling evidence of serious misconduct been alleged or shown so clearly at such an early stage in the litigation.

Plaintiffs specifically allege that they have been suspended for whistleblowing about the huge payments to Defendants. Further, that these payments were induced by fraud, and permitted only because the Directorate flagrantly ignored the AKA Constitution and Bylaws and failed to exercise even minimal due care and attention to the supervision of Defendant McKinzie. It is properly alleged that Defendant McKinzie committed fraud with respect to unauthorized compensation, and that the actions of all Defendants materially hurt the Sorority's financial condition. The connection between Defendants compensation and Plaintiffs dues has been admitted by Defendants. *See* Defendant McKinzie PowerPoint Presentation attached as Attachment 4 to the Decl. of Edward W. Gray, Jr. Through informal discovery, Plaintiffs have provided this Court with proof of a flow of payments to Defendant McKinzie which provide ample evidence of misconduct, fraud and inattention to duty by Defendants. It is notable that Defendants

make no attempt to quantify precisely what Defendant McKinzie has been paid during her tenure as head of the Sorority. Nor do they seek to deny or explain how Defendant McKinzie's Directorate approved 2007 compensation of $250,000 could morph into $375,000.00 by the time the AKA's 2007 990 was filed with the IRS. The very size of these payments and the fact that the amount paid exceeded what was approved raises serious questions about fraud and neglect of duty by the Directorate. To seek to dismiss this action without addressing these specific and well plead allegations is inappropriate and should be denied.

Plaintiffs need further discovery to show the full extent of the payments to Defendant McKinzie and the nature of Defendants' acts and omissions in breach of their fiduciary duty. Such a showing will eliminate any doubt that Plaintiffs state a case where judicial intervention is appropriate and, indeed, imperative. Among the facts that have already been plead and not controverted are that the Sorority has never adopted a conflict of interest policy despite being urged to do so by a 2006 committee that investigated alleged receipt of vendor kickbacks and self interested investment dealings by Defendant McKinzie. Further, Plaintiffs have properly alleged that Defendants have filed tax returns with the IRS falsely claiming that such a conflict of interest policy existed for the Sorority. This conduct suggests that the Directorate does not take seriously its duty to supervise the conduct of the Sorority even when that conduct casts the entire organization, including Plaintiffs, in a bad light. The Amended Complaint also properly alleges that the Directorate has never properly investigated the allegations against Defendant McKinzie and has further permitted Defendant McKinzie and others to punish Plaintiffs by suspending their rights to participate in the Sorority. This retaliatory

conduct should never be permitted by the Directorate without a thorough and independent appraisal of such allegations. Plaintiffs properly allege, and it is not denied, that Defendants have never sought such an independent investigation. This failure is a clear breach of fiduciary duty owed to Plaintiffs by the Directorate.

Plaintiffs believe that discovery will show that these are but a partial list of the misconduct occurring at the Sorority and the Foundation. It is believed that the overlapping boards of the Sorority and the Foundation permit misconduct that benefits Defendant McKinzie and other Defendants. Discovery will show whether preliminary relief is warranted in that the precise amount of the payments to Defendant McKinzie can be determined. Discovery will show whether preliminary relief is warranted to stop Defendant McKinzie's misuse of AKA funds and prohibit any further retaliatory action against Plaintiffs. Discovery will also show whether any Sorority or Foundation funds have been misused by Defendant McKinzie to secure Directorate acquiescence in the payments to Defendant McKinzie. The large payments to Defendant McKinzie may have jeopardized the financial stability of the Sorority and the Foundation. These possibilities put into reasonable jeopardy the value of the considerable work and financial resources that Plaintiffs have invested in the Sorority and the Foundation. Formal discovery therefore is warranted and appropriate. In addition, as these facts are not answered or conceded by Defendants, there are material facts in dispute as to whether Defendants breached their fiduciary duty and that McKinzie committed fraud possibly eroding entirely the value of Plaintiffs' life's work to the Sorority and the Foundation.

Plaintiffs request the Court allow discovery to proceed at once so that Plaintiffs may inspect the AKA's books and records to enable them to present facts to counter the Defendants assertions.

### 3. Plaintiffs State a Claim under Breach of Contract

Defendants assert that Plaintiffs' claims are barred under District of Columbia Code Section 29-971.06. This provision is inapplicable. Section 29-971.06 applies to *unincorporated* organizations. The D.C. Code states:

> For the purposes of this chapter, the term:
>
> 2) "Nonprofit association" means an unincorporated organization, other than one created by a trust, consisting of 2 or more members joined by mutual consent for a common, nonprofit purpose.

D.C. Code §29-971.01. As AKA is an incorporated entity, District of Columbia Code Section 29-971.06 does not apply and thus does not shield Defendants from liability.

In addition, Defendants claim that because the conduct of individual Defendants is not enumerated in the Amended Complaint, Plaintiffs' claims must fail. However, without any discovery is it impossible to determine who in the Directorate authorized the improper actions. Defendants can not refuse to allow any discovery and then claim that Plaintiffs must establish which particular individuals of the Directorate were negligent and in what specific ways. Obviously, without discovery Plaintiffs cannot determine or precisely allege the specific role of each member of Directorate respecting the conduct alleged in the Amended Complaint. However, it is properly alleged that there is a contract relationship between Plaintiffs and the members of the Directorate. The contract consists of Plaintiffs' promise to pay dues and render service to the Sorority, its mission and programs in accordance with the Sorority's Constitution and Bylaws. In return, the

Directorate promises to administer the Sorority in accordance with the Sorority's Constitution and Bylaws.

Therefore, Defendants' failure to enforce and adhere to the AKA Constitution and Bylaws constitutes a breach of contract. Plaintiffs request discovery so they may determine the precise actions and omissions of the individual members of Directorate that comprise these breaches. Plaintiffs' damages are their personal and financial injuries including diminution in the value of their dues payments and efforts in service of the Sorority as well as denial of their rights to participate in the Sorority and the Foundation as a result of their suspensions. AKA's books and records should show the votes of particular Defendants. They should also show what facts were brought to the attention of the Directorate respecting non-compliance by the Directorate with its obligations. Further, breach of contract can occur not only by action, but can also be committed by inaction. Plaintiffs allege with great specificity that Defendants have been lax in managing the compensation of Defendant McKinzie who appears able to raise her compensation at will, without prior knowledge or approval of the Directorate.

Contrary to Defendants' assertions, the wrongful compensation of Defendant McKinzie, abuse of the disipinary process to punish whistleblowers and failure to properly investigate and prevent misconduct are alleged with sufficient specificity to state a proper claim of injury to Plaintiffs respecting wrongful diminution of the value of the dues and expenses paid by Plaintiff during their long tenures with the Sorority. Formal discovery through the answers to the interrogatories, document requests and depositions of Defendants will provide even greater specificity to these breach of contract claims.

Defendants appear to claim that there is no contract between Defendants and

Plaintiffs. However, Defendants also concede that the Court of Appeals has found a valid contract in some comparable instances involving membership organizations. *See* Def. Mot. to Dismiss at 34; *Meshel v. Ohev Sholom Talmud Torah*, 849 A.2d 343, 361 (D.C. 2005); see also *Blodgett v. University Club,* 930 A.2d 210, 225-27 (D.C. 2007) (declining to intervene, however, treated the organization's by-laws as a contract). In *Meshel,* the Court held

> It is well established that the formal bylaws of an organization are to be construed as a contractual agreement between the organization and its members, *Willens v. Wisconsin Ave. Coop. Ass'n,* 844 A.2d 1126, 1135 (D.C. 2004); *Local 31, Nat'l Ass'n of Broadcast Employees & Technicians (AFL-CIO) v. Timberlake,* 409 A.2d 629, 632 (D.C. 1979), since the continuing relationship between the organization and its members manifests an implicit agreement by all parties concerned to abide by the bylaws. *Maine Central R.R. Co., supra,* 395 A.2d at 1120-21; *Johnson, supra,* 189 N.E.2d at 772. We thus construe the corporate bylaws of Ohev Sholom as a written contractual agreement between the congregation and its members.

*Meshel,* 849 A.2d at 354. The *Meshel* court went on to enforce the bylaws and compel arbitration under the Uniform Arbitration Act. *Id*.

Defendants, however, attempt to argue the inapplicability of these decisions by asserting that a contract claim must fail when a plaintiff fails to follow that contract; i.e. exhaust internal remedies. *See* Def. Mot. to Dismiss at 34. Even if true as a statement of legal principle, Defendants cannot avail themselves of that principle as a basis for their summary judgment motion as they cannot provide undisputed evidence that Plaintiffs did not abide by AKA's procedures, if any. Plaintiffs have consistently maintained that they have not violated the AKA Constitution and Bylaws. *See* Decl. generally. Further, they have used every available means to secure voluntary redress. *See* Decl. of Gray pg. 24.

On the other hand, Plaintiffs specifically allege that Defendants failed to abide by

their own obligations under the AKA Constitution and Bylaws. These allegations must be taken as true unless Defendants can demonstrate that there is no material factual controversy respecting the falsity those allegations. Defendants do not attempt to meet that burden. Whether the Directorate may approve unilaterally the payments to Defendant McKinzie is a disputed issue in this case. Plaintiffs have provided through informal discovery substantial, albeit partial evidence of Defendant's McKinzie's shocking compensation for 2007 and 2009. It is noteworthy that Defendants make no attempt to explain or discuss Defendant McKinzie's compensation for the intervening year of 2008 which is clearly germane and material to this controversy. Defendant's Motion for Summary Judgment should be denied on this basis alone.

Further, Defendants' undenied suspension of Plaintiffs and Defendants' continuing refusals to grant access to the Sorority's books and records are evidence that the Defendants have behaved improperly and have failed to comply with the AKA Constitution and Bylaws which specify the processes for member discipline and which make no mention of subjecting members to discipline for whistleblower conduct or for bringing suit. If permitted discovery, Plaintiffs will show that Defendants systematically failed to follow AKA's governing documents and used the disciplinary process to stifle dissent and punish members who dared to question the leadership.

**4. Defendants Breached their Fiduciary Duty**

As argued above, Defendants owe a fiduciary duty to Plaintiffs. Defendants cite *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, (D.C. 2002) for the proposition that Defendants do not owe Plaintiffs a duty. *Tilden*, however, is not applicable. In *Tilden Park* plaintiffs were attempting to sue under associational standing.

The Court held that the Tilden Park plaintiffs were not owed a duty because plaintiffs were not *members* of the non-profit corporation. *See Tilden Park*, 806 A.2d at ___.

> The persons whom [plaintiff] claims to represent are not its members, however. By the terms of its articles of incorporation, Friends has no members. Confronted with this inconvenient fact, [plaintiff] argues in this court that it nonetheless has standing to sue as the representative of its "supporters" among the neighborhood residents whose environmental interests are at stake. These supporters, Friends suggests, are its de facto if not its de jure members. The record, though, does not bear out this claim.

*Id*. In addition, Defendants argue that Directorate and McKinzie did not derive a personal benefit from their actions. This is very much in dispute. If allowed discovery, Plaintiffs will provide ample evidence of the personal benefit enjoyed by Defendants as a result of their actions. The evidence will show that McKinzie personally benefited from receiving over a million dollars in unwarranted compensation. In addition, discovery will show that other individual Defendants personally benefited through lucrative Sorority contracts directed towards their relatives, lavish and unwarranted gifts, free transportation and meals and other meaningful benefits designed to induce and effective in securing their breach of duty. See Gray Decl. ¶___.

Moreover, contrary to Defendants' Motion to Dismiss, Plaintiffs allege that the payments to Defendant McKinzie were approved by the Directorate. Specifically, Plaintiffs allege:

> 77. Upon information and belief, the AKA Directorate approved the $250,000 payment to Defendant McKinzie even though they never received written documentation supporting that amount as appropriate. This $250,000 payment to Defendant McKinzie was never expressly authorized by the AKA membership or set forth in any detailed budget for approval by the Boulé.
> 78. Although the payment approved by the AKA Directorate was for $250,000, in 2007 Defendant McKinzie received at least $375,000 in compensation from Defendant AKA. (*See* Exhibit F, 2007 Form 990 for Defendant AKA.)
> 79. Upon information and belief, the additional compensation paid to Defendant McKinzie in 2007 was never approved by the AKA Directorate.
> 80. Upon information and belief, the payment of $375,000 in compensation to Defendant McKinzie was never expressly authorized by the Directorate, the AKA membership or set forth in any detailed budget for approval by the Boulé.

Pls.' Am. Compl. at ¶¶ 77-80. These allegations from the Amended Complaint expressly state the Directorate allow Defendant's McKinzie's 2007 compensation to increase from the approved level of $250,000.00 to $375,000 without Defendant McKinzie ever obtaining approval from the Directorate for this increase. Proper Directorate conduct would not allow an executive level employee to increase their compensation substantially without approval. Nor would the Directorate have allowed either the $250,000.00 or $375,000.00 payment to occur without obtaining the required approval by the membership except that Directorate was willfully or negligently indifferent. Thus, the Amended Complaint states a proper breach of fiduciary duty claim. Plaintiffs were injured as a proximate result of this breach since their suspensions would not have occurred had their never been any improper compensation to Defendant McKinzie. Formal discovery will reveal other examples of indifference by the Directorate to its obligations to the membership such as assuring that the Constitution and Bylaws of the Sorority are not modified without prior member approval.

**5. Plaintiffs Stated a Fraud Claim Against Defendant McKinzie**

Defendants argue that Plaintiffs fail to correctly plead its fraud allegations against Defendant McKinzie. However, Plaintiffs' Amended Complaint meets the requirements for pleading fraud. "The essential elements of a cause of action for fraudulent misrepresentations are: (1) a false representation; (2) in reference to material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) causing one to act upon the representations." Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. 1977).

Plaintiffs allege that "on or about October 29, 2007, McKinzie knowingly and fraudulently with intent to deceive, misrepresented the resolutions of the Directorate with the intent to induce fraudulent cash disbursements to or for the benefit of Defendant McKinzie in 2007 totaling $345,000." Amended Compl. ¶ 183.

In addition, Plaintiffs plead with particularity the facts to support the allegations. *See Sarete, Inc. v. 1344 U Street Limited Partnership,* 871 A.2d 480, 483 (D.C. 2005). To support this allegation Plaintiffs allege the following facts:

> 77. Upon information and belief, the AKA Directorate approved the $250,000 payment to Defendant McKinzie even though they never received written documentation supporting that amount as appropriate. This $250,000 payment to Defendant McKinzie was never expressly authorized by the AKA membership or set forth in any detailed budget for approval by the Boulé.
> 78. Although the payment approved by the AKA Directorate was for $250,000, in 2007 Defendant McKinzie received at least $375,000 in compensation from Defendant AKA. (*See* Exhibit F, 2007 Form 990 for Defendant AKA.)
> 79. Upon information and belief, the additional compensation paid to Defendant McKinzie in 2007 was never approved by the AKA Directorate.
> 80. Upon information and belief, the payment of $375,000 in compensation to Defendant McKinzie was never expressly authorized by the Directorate, the AKA membership or set forth in any detailed budget for approval by the Boulé.
> 81. On July 15, 2007, the Directorate approved a $4,000/month pension stipend to be paid to Defendant McKinzie for four years after she leaves office for a total of $192,000.
>
> ***
>
> 89. Upon information and belief, on or about October 29, 2007, McKinzie knowingly misrepresented the resolutions of the Directorate with the intent to induce and did induce payments for the benefit of Defendant McKinzie in 2007 totaling at least $71,000.
> 90. Upon information and belief, Defendant Betty James has, with the assistance of Robert Brooks of Brooks, Faucett & Robertson LLP, made or authorized the aforesaid disbursements in 2007 to benefit Defendant McKinzie totaling $345,000 (*See* Exhibit I)
> 91. The aforesaid disbursements referenced in Exhibit I claim to fund Defendant McKinzie's retirement account as follows:
>
> a. Payment of $175,000 to "a defined benefit Keogh retirement plan for the benefit of Barbara A. McKinzie of the 2007 contribution amount required to meet the terms provided for by the Directorate in their July 2007 meeting;"
>
> b. Payment of $3,000 to "Endow, Inc. for their annual administration

fees for management of the retirement plan's recordkeeping and compliance matters.;"

c. Payment of $65,000 to "the Internal Revenue Service of the 2007 U.S. income tax liability resulting from the receipt of the compensation amount required to fund the [McKinzie's] Keogh retirement plan;"

d. Payment of $6,000 to "the Illinois Department of Revenue of the 2007 Illinois income tax liability resulting from the receipt of the compensation amount required to fund [McKinzie's] Keogh retirement plan;" and

e. Payment of $96,000 to "Barbara A. McKinzie of the remaining compensation ordered by the Directorate. It is the balance of the compensation required to be paid to be able to fund [McKinzie's] Keogh retirement plan."

92. Upon information and belief, the above payments totaling $345,000 to or for the benefit of Defendant McKinzie in 2007 were not approved by the Directorate.

93. Upon information and belief, Defendant Betty James has continued to make disbursements in 2008 and 2009 to or for the benefit of Defendant McKinzie for large amounts of money.

Pl. Amend. Compl. ¶¶ 77-81, 89-93. These allegations satisfy the requirement that a fraud be plead with particularity. Plaintiffs have identified the who, what and where sufficient to put Defendants on notice of the claim in order to adequately respond.

**6. Defendant McKinzie was Unjustly Enriched**

Defendants claim that Plaintiffs' claims must fail because they do not have standing and that any benefits received by McKinzie are not "unjust." Def. Mot. p. 43. Plaintiffs do have standing as members of the Boule and as individuals personally harmed by Defendants. Defendant McKinzie's exorbitant compensation and other benefits directly impact the individual members. *See* Defendant McKinzie's PowerPoint Presentation, *supra*. In addition, AKA regularly makes assessments against the members to fund deficits. Such deficits might not exist if Defendant McKinzie had not unjustly channeled AKA funds for her personal benefit. Again, discovery will provide a more concrete accounting of just how much money was unjustly paid to Defendant McKinzie

and the impact of those payments upon the dues obligations of Plaintiffs and the programs of the Sorority.

The Amended Complaint makes clear that money paid to Defendant McKinzie was unjust. First, the amount approved by the Directorate was determined without proper documentation, diligence or Boule approval. Second, Defendant McKinzie caused payments to be made to herself in significant excess of the payments approved by the Directorate. How could such excess payments happen if there was proper oversight by the Directorate? These acts and omissions are unjust, fraudulent and they violate AKA's Constitution and By-laws. Defendants seem to argue that it proper for an employee to ask for twenty dollars from a clerk knowing that the clerk is only authorized to give ten dollars, and nevertheless taking fifty when the clerk is not looking. Plaintiffs argue that both employee and the clerk breach their duty.

**7. Plaintiffs have Properly Plead *Ultra Vires***

Defendants allege that Plaintiffs do not properly assert the doctrine of *ultra vires* against the Defendants. Defendants' main argument is that Plaintiffs lack standing. The standing of the individual Plaintiffs is discussed above and is equally applicable here.

Defendants' second argument is that D.C. Code § 29-301.06 shields Defendants. However, Section 29-301.06 is part of the current District of Columbia Non-Profit Corporation Act. AKA was incorporated under the old District of Columbia incorporation law which has no such provision. Defendants have already claimed in this Court that the current District of Columbia Non-Profit Corporation Act does not apply to them. Defendants should make up their minds whether they want protection of the

predecessor or the current District of Columbia Non-Profit Corporation Act. Defendants are entitled to claim the protection of either, but not both.

Third, Defendants claim that Defendants have not violated any bylaw or statute. This is simply untrue and goes to the very heart of the controversy. Although the AKA Constitution may allow for a stipend, the very word stipend means a modest payment. The authorization of a "stipend" simply does not allow make appropriate the payment of more than a million dollars to Defendant McKinzie without Boule legislative meeting approval.

Allowing Plaintiffs to inspect AKA's books and records would provide the necessary facts to support and state with greater particularity the precise amounts paid to Defendant McKinzie and the timing and other circumstances of those payments in relationship to the approval by the Directorate, if any. These payment and approval issues are clearly material and are presently in dispute. However, sufficient evidence has been obtained through informal discovery to demonstrate that the amounts of these payments and questions respecting the circumstances of those payments are non-trivial matters fully warranting judicial inquiry under District of Columbia law. *See Jolevare v. Alpha Kappa Alpha Sorority, Inc*. 521 F. Supp. 2d 1, 24-25 (D.D.C.2007); *Levant v. Whitley,* 755 A.2d 1036, 1043-44 (D.C. 2000): *Blodgett v. University Club,* 930 A.2d 210, 230 (D.C. 2007).

**8. Plaintiffs Have Properly Alleged Corporate Waste.**

Defendants' argue that Plaintiffs have not properly alleged corporate waste. *See* Defs. Mot. to Dismiss at 47. As argued above, Plaintiffs have standing to bring this claim because it is their dues that fund AKA and the waste by Defendants has caused AKA to

increase dues and seek assessments to cover shortfalls. Plaintiffs plead the elements of corporate waste as the Plaintiffs specifically allege that:

> 77. Upon information and belief, the AKA Directorate approved the $250,000 payment to Defendant McKinzie even though they never received written documentation supporting that amount as appropriate. This $250,000 payment to Defendant McKinzie was never expressly authorized by the AKA membership or set forth in any detailed budget for approval by the Boulé.
>
> ***
>
> 209. McKinzie spent more than $500,000 on unapproved lawsuits and legal services, misused Defendant AKA's corporate credit card and funds to pay for gifts and travel for herself and friends, and plans to use the approximately $4 million surplus from the 2008 Boulé for her personal projects, as alleged herein.
>
> 210. These expenditures of AKA funds are beyond the outer limits of McKinzie's discretion and amount to gifts to McKinzie and her friends for which AKA has not required or received any reciprocal benefit or consideration. In making or proposing these expenditures, McKinzie did not exercise sound business judgment and did not engage in a proper exercise of the affirmative obligations of a director or officer of a District of Columbia non-profit corporation.
>
> 211. Defendant McKinzie changed the investment strategy of the sorority and the foundation thereby increasing the exposure of AKA assets to market risk.
>
> 212. Defendant McKinzie caused payments in excess of what was approved by the Directorate to fund a Keogh retirement account for her benefit.
>
> 213. Defendant AKA, the foundation and their members sustained injury due to the wasteful transactions engaged in by McKinzie.

Pl. Amend. Compl. ¶¶ 77, 209-213. As shown, Plaintiffs alleged that AKA paid unreasonable sums and received no, or little, consideration for its assets. Allowing Plaintiffs to inspect AKA's books and records and receipt of substantive discovery responses would provide the necessary facts to support and state with greater particularity the precise amounts paid by AKA and any consideration received.

**9. The Foundation Is Properly A Party To This Action.**

The Foundation is properly a defendant in this case. The Foundation is merely an

agent through which AKA funds charitable endeavors. There is little semblance of individual identity between the two entities. Defendant McKinzie is the President of both AKA and the Foundation and the entities have interlocking boards. *See* Foundation Website, Gray Decl. Exhibit 2. It is suspected that the Foundation's assets were used to improperly influence the Directorate or to fund Defendant McKinzie's excessive compensation or both. Discovery will determine the exact role of the Foundation in the misdeeds.

**10. Discovery Will Determine Whether Injunctive Relief is Appropriate.**

Defendants incorrectly assert that Plaintiffs fail to allege irreparable injury. On the contrary, Plaintiffs allege that Defendant McKinzie has obtained large payments of AKA funds for her personal compensation, personal projects and other benefits not authorized by the AKA members. The amount of these payments is well over a million dollars, large enough that Defendants, individually or collectively, may be unable to repay these amounts to the Sorority or the Foundation. Thus, it is untrue that irreparable injury is not alleged. Owing to Defendants' misconduct, draconian dues and fee increases upon Plaintiffs may be inevitable. It is true that Plaintiffs are unable to allege the precise amount of these probable dues and fee increases at this time. However, this inability results solely from Defendants' total refusal to voluntarily provide the discovery requested by Plaintiffs. Defendants have refrained from moving for injunctive relief at this time precisely because of uncertainty as regards the financial impact of Defendants misconduct on the financial health of the organization. However, such uncertainty is precisely why discovery is warranted. In its absence, Plaintiffs cannot prevent their investment in the Sorority from being made worthless by a total breakdown of the

financial condition of the Sorority and the Foundation.

Defendants further argue that removal of individual members of the Directorate is an extraordinary and inappropriate remedy that should not be contemplated by the Court. While removal of directors may be an extraordinary remedy, it is appropriate in cases where an organization's future is put at risk by a profligate leader. In *Adelphi University v. Board of Regents of the State of N.Y.*, 652 N.Y.S.2d 837, 229 A.D.2d 36 (N.Y.A.D. 3 Dept. 1997), a New York court upheld the Board of Regents removal of eighteen (18) of the nineteen (19) Adelphi University trustees for failures with respect to their duties of care and loyalty. *Adelphi*, like the present case, was a dispute over the looting of a non-profit organization by a talented, but abusive leader with an overly compliant board. This problem is unfortunately not without precedent in the non-profit world. *See* Harvey Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems and Proposed Reforms*, 23 J. Corp. L. 631 (1998). Prof. Goldschmid recommends judicial removal of overly compliant directors unwilling to brook a "corporate despot." *Id*. Moreover, the ABA's Model Nonprofit Corporation Act, Third Edition specifically provides for the judicial removal of a director who "engaged in fraudulent conduct with respect to the corporation or its members, grossly abused the position of director, or intentionally inflicted harm." *See* Model Nonprofit Corporation Act, Third Edition §809(a) (1) (2008).

Despite the real and present injury to Plaintiffs caused by Defendant McKinzie's pursuit of financial gain, Plaintiffs have refrained from seeking preliminary relief until discovery shows that it is fully warranted. Plaintiffs request for a permanent injunction is completely appropriate and well supported by the *Adelphi* decision.

## III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to deny Defendants' Motion for Summary Judgment and permit immediate discovery as requested.

Respectfully Submitted,

/s/

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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

| | | |
|---|---|---|
| Ms. Joy Elaine Daley, et al.<br><br>Plaintiffs,<br><br>v.<br><br>Alpha Kappa Alpha Sorority, Inc., et al.<br><br>Defendants. | ) | CASE NO. 2009 CA 004456 B<br><br>Judge: Natalia M. Combs Greene<br>Next Court Date: December 17, 2009<br>Next Event: Deadline for Discovery Requests |

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

Plaintiffs, through counsel, respectfully move, pursuant to Superior Court Rules of Civil Procedure 12 and 56(f), for an Order continuing consideration of Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment ("Motion to Dismiss") pursuant to Super. Ct. Civ. R. 12 and 56(f) until sufficient discovery has been conducted by Plaintiffs. Alternatively, Plaintiffs seek an Order denying Defendants' Motion to Dismiss in its entirety.

As argued in the accompanying Memorandum of Points and Authorities, Plaintiffs need discovery to properly demonstrate that the controverted facts are material to this litigation and to establish additional facts establishing the Plaintiff's standing, this Court's jurisdiction over all of the Defendants and the substantive misconduct alleged in the Amended Complaint.

WHEREFORE, for the reasons stated above, Defendants respectfully request the Court enter an Order continuing consideration of denying Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment pursuant to Super. Ct. Civ. R. 12 and 56(f) until sufficient discovery has been conducted by Plaintiffs, or alternatively, an Order denying Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment.

Respectfully Submitted,

_____/s/_____

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Counsel for Plaintiffs

RULE 12-1 CERTIFICATION

The undersigned has conferred with counsel for Plaintiffs pursuant to Super. Ct. Civ. R 12-I, and counsel for Defendants has not consented to this motion.

_____/s/_____
Edward W. Gray, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October 2009, a copy of the foregoing PLAINTIFFS' COMBINED RULE 12 AND 56(f) MOTION REQUESTING DISCOVERY PRIOR TO OPPOSING DEFENDANTS' MOTION TO DISMISS OR,

IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF was served electronically on:

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