Jeremy D. Bailie (Pro Hac Vice)
Florida Bar No. 118558
Weber, Crabb & Wein, P.A.
Telephone: (727) 828-9919
Facsimile: (727) 828-9924
Jeremy.Bailie@webercrabb.com
5453 Central Avenue
St. Petersburg, Florida 33710

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

TERRI LESLEY, Plaintiff, v. HUGH BENNETT, SUSAN BENNETT, AND KEVIN BENNETT, Defendants,	)	Case No. 2:23-cv-00177-ABJ

DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

JEREMY D. BAILIE, ESQ. (Pro Hac Vice)
Florida Bar No. 118558
WEBER, CRABB & WEIN, P.A.
5453 Central Avenue
St. Petersburg, Florida 33710
Telephone: (727) 828-9919
Facsimile: (727) 828-9924
Primary: Jeremy.Bailie@webercrabb.com
Secondary: honey.rechtin@webercrabb.com
Attorneys for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

[1] A copy of this opinion is included as Appendix A.

State Cases

[2] A copy of this opinion is included as Appendix B.

Federal Statutes

State Statutes

Federal Rules

INTRODUCTION

Plaintiff, Terri Lesley, was a public figure and government official who placed herself in the forefront of an incredibly divisive issue being debated throughout our country—materials in libraries containing sexual themes and images that many believe are not appropriate for children's consumption. Like many citizens, Defendants voiced their concerns in the forums available to them—the county commission, the library board, and by meeting with Ms. Lesley. And Defendants were not alone in their concern. Many citizens in the community were similarly concerned about the materials being placed and kept in the library's children's section.

Ultimately, Ms. Lesley was terminated by the government officials that controlled her job—not Defendants—for her failure to perform in the role as they wished her to perform. In retaliation for Defendants' exercising their First Amendment rights, Ms. Lesley has filed this lawsuit against Defendants attempting to lay the blame for the results of her actions at Defendants' feet. As explained herein, Ms. Lesley's claims irreconcilably conflict with Defendants' First Amendment rights, are time-barred, and otherwise fail to state a cause of action.

Defendants, Hugh Bennett, Susan Bennett, and Kevin Bennett, by and through undersigned counsel, pursuant to Fed. R. Civ. P. 12(b)(6), hereby file this Motion to Dismiss and request this Court dismiss Plaintiff's Amended Complaint with prejudice.

BACKGROUND FACTS

At the outset, for this Court to conduct its review, the Amended Complaint must be stripped of its bare legal conclusions and incendiary rhetoric—leaving only the well-

pled factual allegations regarding Defendants' actions. *Westenbroek v. Fraternity*, 23-CV-51-ABJ, 2023 WL 5533307, at *4, n.1 (D. Wyo. Aug. 25, 2023) (reviewing a similar Complaint that despite containing seventy-two pages, only included four-and-a-half pages with the actual claims).[3] For instance, Plaintiff begins her Complaint by describing her history of involvement in library work, beginning with her birth and early childhood. *See* Doc. 13, ¶¶ 8—28. Plaintiff then describes actions taken by members of the Campbell County Commission, her bosses, relating to what she describes as LGBTQIA+ books in the Campbell County library system. *See* Doc. 13, ¶¶ 29—49. These allegations are irrelevant and have nothing to do with Defendants.

The Bennetts were first mentioned when Plaintiff alleged they spoke at the County Commission meeting on July 7, 2021, and voiced their objection to their government including books they found morally objectionable in the children's section of a library funded by taxpayer dollars. *See* Doc. 13, ¶ 52 (Hugh Bennett); ¶ 53 (Kevin Bennett); and ¶ 54 (Susan Bennett). After noting the books Defendants wished to be moved from the children's section of the library (Doc. 13, ¶¶ 55), Plaintiff then pointed to statements made by *other* members of the community that had no connection to the Bennetts. *See* Doc. 13, ¶ 57.

Plaintiff, again wandering from allegations about Defendants' actions, describes an incident she alleges occurred when one of her bosses—a county commissioner—wrote to her and expressed uneasiness about an upcoming magician show to be held at the

[3] Plaintiff's Shotgun Pleading style, incorporation of all the allegations of the foregoing paragraphs into each subsequent count, muddies the water and prevents this Court, or Defendants, from ascertaining which facts support which claim for relief.

county library. *See* Doc. 13, ¶¶ 60—78. The only involvement Plaintiff alleges (with any facts) is that Kevin and Hugh Bennett appeared *at a County Commission meeting* and voiced their opposition to the performance occurring at the public library. *See* Doc. 13, ¶¶ 80—83. Plaintiff then alleges certain members of the County Commission spoke among themselves about organizing efforts in the community to remove books from the public library with which the commissioners disagreed. *See* Doc. 13, ¶¶ 84—86.

Plaintiff then alleges Defendant, Hugh Bennett, published a print magazine (Anybody's Autos) wherein he described his efforts to "advocate for [the magic show's] cancellation." *See* Doc. 13, ¶¶ 87. Plaintiff then seeks to tie the actions of an organization "MassResistance" in other situations, in other states, to Defendants, but provides no facts for this leap in logic. Plaintiff only alleges Kevin Bennett was the "founder of the MassResistance Wyoming Chapter" and that he "organized a booth at the County Fair in August 2021" allegedly seeking to persuade others in the community of his views about the library's choice of books and the magician performance. *See* Doc. 13, ¶¶ 95. Plaintiff then alleges that this group, MassResistance Wyoming (not Defendants), paid for billboards that invited viewers to get involved in this issue, namely, by contacting their "County Commissioners" and telling them there that are "inappropriate youth books in library." *See* Doc. 13, ¶ 97.

Following this, Plaintiff again points to the community at large (¶¶ 98—106; 111—115) and attempts to cast (without any factual allegation) the Bennetts as the leaders of everyone who came to speak at the County Commission, including the County Commissioners. Again, Plaintiff repeatedly only points to comments made *at the County*

Commission meeting where the Bennetts voiced their displeasure with the actions taken by Plaintiff, a public employee controlled by the County Commission. *See* Doc. 13, ¶¶ 108—110; 119. She provides no other facts showing any organizing efforts or facts to show the Bennetts led any type of group.

The next chapter in Plaintiff's story regards Hugh and Susan Bennett's purported attempt to "imprison[]" Plaintiff for not removing the books Mrs. Bennett found objectionable. *See* Doc. 13, p. 25 ("Hugh and Susan Bennett . . . Try to Have Terri Lesley Arrested and Imprisoned"). In sum, while Plaintiff belabors each step in the process, the crux of the matter is that Hugh and Susan Bennett went to the Campbell County Sheriff's Office and allegedly "formally accused" Plaintiff of "offering and disseminating obscene material to children" at the library. *See* Doc. 13, ¶ 122. They purportedly "filed a criminal complaint against [Plaintiff]." *See* Doc. 13, ¶ 125. Apparently, the Campbell County Sheriff was not sure whether the facts brought before him were subject to prosecution, so he referred the matter to the Campbell County Attorney's office for a second opinion. *See* Doc. 13, ¶¶ 136—38.

Plaintiff creatively cuts from Ms. Bennett's testimony before the County Commission to create the illusion that the Bennetts had contacted the Sheriff's office as a part of some ultimatum—Plaintiff would have to remove the books, or they would call the police. *See* Doc. 13, ¶ 125—28. In fact, the opposite is true. The quoted statements merely present the opposite scenario—Plaintiff engaged in conduct the Bennetts believed might have violated the law and they contacted the appropriate authority *asking* if that was a violation of the law. *See* Doc. 13, ¶ 128. And Mrs. Bennett's

statement in this context makes sense. Of course, they would not have contacted law enforcement had Plaintiff not engaged in the behavior they believed to be illegal. At no point does Plaintiff point to any comment by Defendants that they *are in the future* going to file a criminal charge if Plaintiff did not do their bidding.

In fact, apparently this was not an easy analysis even for the County Attorney assigned to this matter. Plaintiff alleges the County Attorney had to "devote[] considerable time to research the criminal statutes and attendant case law" to make the charging decision in this case. *See* Doc. 13, ¶ 138. The crux of the attorney's analysis was that the materials referenced "did not meet the legal criteria for being considered 'obscene' as defined by Wyoming law," an analysis the Bennetts strongly disagreed with (as they had the right to do). *See* Doc. 13, ¶ 137. Plaintiff characterizes the Bennetts' speaking about the charging decision as some nefarious scheme, but, in reality, her allegations merely show the Bennetts spoke at public meetings disagreeing with the charging decision by the County Attorney's office. *See* Doc. 13, ¶ 141—46. Plaintiff then, as before, turns the focus to *other* members of the community and blames the Bennetts for their actions. *See* Doc. 13, ¶ 148. Plaintiff provides no factual basis to blame Defendants for the actions of others.

Finally, Plaintiff ends where it all began, she places the blame for all her troubles at the feet of the Bennetts. The Bennetts did not sit on the Library Board. The Bennetts did not sit on the County Commission. Each action of both of those boards, through their appropriately elected and selected members, was in no way controlled by the Bennetts. *See* Doc. 13, ¶ 154—198.

In sum, Plaintiff paints with a broad-brush alleging Defendants are responsible for the behavior of the Campbell County Library Board, Campbell County Commission, and essentially all other members of the community that expressed similar sentiments as the Bennetts. Plaintiff stretches much too far. Defendants simply advocated in the appropriate forums petitioning their government officials to take steps they felt should be followed. Plaintiff may strongly disagree with the actions ultimately taken by the government, but the blame does not lie with the Bennetts, nor are the Bennetts legally liable for exercising their First Amendment rights.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A motion under Rule 12(b)(6) tests the sufficiency of the complaint and whether that "short and plain" statement has been provided. *Robbins v. Oklahoma*, 519 F.3d 1242, 1246 (10th Cir. 2008). Although Rule 8 does not require "detailed factual allegations" it demands more than an unadorned accusation that the defendant caused harm. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint does not suffice if it tenders "naked assertions devoid of further factual development." *Id.* (quoting *Bell Atlantic Corp.*, 550 U.S. at 557). "A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Westenbroek*, 23-CV-51-ABJ, 2023 WL 5533307, at *4. "*Iqbal* clarified that 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Ashcroft*, 556 U.S. at 678–79).

MEMORANDUM OF LAW

Ms. Lesley's complaint brings six claims: (1) a violation of the Ku Klux Klan Act (42 U.S.C. § 1985(3)) to "marginalize and harm LGBTQ+ community members and remove LGBTQ+ themed or content including books from the library system, in violation of the rights of Ms. Lesley and other protected persons."; (2) Civil Conspiracy "to deny the LGBTQ community the equal privileges and immunities of citizenship, and the use, benefits and privileges of property and/or contractual relationships."; (3) defamation against Hugh and Susan Bennett based on the statements purportedly made to the Campbell County Sheriff's Office; (4) defamation against all Defendants based on allegations that Defendants stated Plaintiff "committed crimes" and purportedly accused Plaintiff of "child abuse"; "pornography"; and "felonious conduct."; (5) intentional infliction of emotional distress against all Defendants for allegedly "subjecting Plaintiff to a constant barrage of toxic, harmful, unlawful, threatening statements"; and (6) abuse of process against Hugh and Susan Bennett for the "filing of a criminal complaint" with the Campbell County Sheriff's Office.

Each claim fails to state a cause of action. Not only are much of Plaintiff's claims time-barred, but Plaintiff seeks to impose liability for Defendants exercising their constitutional rights. To permit these claims to move forward would have a profound chilling effect on citizens' First Amendment rights and the ability of citizenry to object to actions/inactions by government officials. This Court should dismiss this Complaint.

I. DEFENDANTS DID NOT CONSPIRE TO VIOLATE PLAINTIFF'S CIVIL RIGHTS NOR DOES SECTION 1985(3) APPLY TO PLAINTIFF'S CLAIMS

Plaintiff's primary claim, and the sole basis for jurisdiction in this Court, is her claim for discrimination based on 42 U.S.C. § 1985(3).[4] To state a § 1985(3) claim, she must prove she "was injured in her person or property" by: (1) two or more persons; (2) who were motivated by a race-based or other class-based invidiously discriminatory animus; that was (3) "'aimed at interfering with rights' that are 'protected against private, as well as official, encroachment.'" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267–68 (1993) (quoting *United Broth. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983)).

Plaintiff's claim fails since she cannot show that any actions by Defendant were motivated by a race-based or other class-based invidiously discriminatory animus that has been recognized by any court. Her claims also fail since she cannot show that any right was violated, certainly not one that is protected against private enforcement. Her claim fails and it should be dismissed with prejudice.

A. Plaintiff Fails Section 1985's Requirement to Plead She Has Been Subjected to Class-Based Animus

The Supreme Court has held that § 1985(3) claims are limited to those claims where there is proof (or a factual allegation, at this stage) that the defendant had some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Court

[4] Since the parties are not diverse, if this Court dismisses Count I of this Complaint, it should also dismiss without prejudice the remaining claims. 42 U.S.C. § 1367(c)(3).

explained this element is a critical bulwark preventing the use of "§ 1985(3) as a general federal tort law." *Bray*, 506 U.S. at 268 (quoting *Griffin*, 403 U.S. at 102). The Court has yet to resolve the question of whether anything other than racial animus satisfies § 1985(3). *Id.* In the one case that has come before the Court since *Griffin* seeking to answer that question, the Court rejected the attempt to extend the "class" to individuals opposed to abortion. *Id.* Courts, including the Tenth Circuit, have routinely refused to expand the statute's reach to non-race-based classes. *Wilhelm v. Cont'l Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983).

The Tenth Circuit, following the Supreme Court's guidance, has explained that § 1985(3) cannot be extended beyond what Congress intended. *Id.* Congress intended this statute to aid efforts "combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.* The Tenth Circuit refused to expand § 1985(3)'s reach:

> [W]e find nothing therein to give any encouragement whatever to extend § 1985 to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned. In fact from *Scott* we get a signal that the classes covered by § 1985 should not be extended beyond those already expressly provided by the Court.

Id.

The Tenth Circuit rejected the plaintiff's attempt to define the "class-based animus" to include discrimination against handicapped individuals. *Id.* at 1177.

> We are concerned with a statute enacted for a particular purpose and to meet particular conditions. . . . However, the classes or groups to be protected are instead to be derived from statutory construction. This in our view the Supreme Court has done in *Scott* and *Griffin*. . . . Thus after referring to *Griffin* and noting that the Court there withheld judgment as to whether § 1985(3) "went any farther than its central concern—combatting the violent and other efforts of the Klan and its allies to resist

> and to frustrate the intended affects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here." Thus the Court also withheld judgment, but the significant part of the statement is that the refusal to go farther was placed on the reason—lacking other evidence of congressional intention. This came after the examinations of such history-evidence in *Griffin* and *Scott*, as well as prior cases. We must conclude that a class of "handicapped persons" was not in the contemplation of Congress in 1871, and was not included as a class in what is now § 1985(3).

Id.

The question for this Court, then, is whether Plaintiff is a part of a class of persons that was "in the contemplate of Congress in 1871" as the Tenth Circuit has required. *Id.*; *see also Brown v. Reardon*, 770 F.2d 896, 905 (10th Cir. 1985). Plaintiff's claim under § 1985(3) fails to ever describe the "class" she purports to be a part of. *See* Doc. 13, ¶¶ 199—208. She pays lip service to this requirement by pleading there was "class-based invidious discriminatory animus." *See* Doc. 13, ¶¶ 206. Not only can this bare legal conclusion be ignored, but she fails to even suggest what this "class" might be. Reading between the lines, it seems Plaintiff suggests the class is "LGBTQ+ community and their allies," although such is far from clear. *See* Doc. 13, ¶¶ 205. Nor has Plaintiff made any effort to show that Congress intended to extend § 1985(3) in such a manner. *Wilhelm*, 720 F.2d at 1176. And this Court would be the *first* to recognize such a class. No court, to the best of undersigned counsel's research, has ever held that § 1985(3) recognizes "LGTBQ individuals" or "LGTBQ allies" as a class that can be subject to "class-based animus" as required by § 1985(3).

As a factual matter, Plaintiff's complaint is her own undoing. Plaintiff fails to cite any statement by any Defendant that belittles or expresses ill will toward any member of the LGTBQ community. Just the opposite is true. Plaintiff alleged that Mrs. Bennett

told the County Commission that she and her family—"we love everyone"—including the LGTBQ community, belying the claim of invidious discrimination. *See* Doc. 13, ¶ 54.

Plaintiff has failed to plead there was a "class-based animus" at the center of Defendants' actions. As a result, her § 1985(3) claim fails as a matter of law.

B. Plaintiff Fails to Identify Any Right that is Protected Against Private Conspiracies

As explained above, § 1985(3) was not intended to federalize tort law. Notwithstanding that Plaintiff has failed to plead (and cannot prove) any class-based animus, Plaintiff has not pleaded any right was violated that is protected against private enforcement. Plaintiff claims that her "constitutional rights" have been violated, without identifying which, if any, were violated. *See* Doc. 13, ¶ 201. Plaintiff uses the phrase "in violation of the rights" but each time fails to allege what "right" is being violated. *See* Doc. 13, ¶¶ 200, 230—34, 205, 207. She pays lip service to this requirement ("rights that are by definition are protected against private . . . enforcement") but provides no specificity as to which right has been violated. *See* Doc. 13, ¶ 207. At best, her complaint could be read to extend to the "right" to "equal protection or equal privileges and immunities" as set forth in the Constitution.

Plaintiff must be alluding to a Fourteenth Amendment Equal Protection claim. The problem with such a claim is the text of the Fourteenth Amendment itself:

> No ***State*** shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any ***State*** deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV (emphasis added).

The key phrase in the text of the Fourteenth Amendment is "[n]o State" shall perform any of the prohibited acts. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); see also *Tilton v. Richardson*, 6 F.3d 683, 687 (10th Cir. 1993) (holding that the plaintiff's "Fifth and Fourteenth Amendment claims likewise fail as these Amendments do not erect a shield against merely private conduct however discriminating or wrongful.") (citations omitted); see also *Downie v. Powers*, 193 F.2d 760, 765 (10th Cir. 1951) (same); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1446 (10th Cir. 1995) (same). There can be no dispute, a claim arising out of the Fourteenth Amendment's right to "equal protection" or "equal rights" can only be brought against a State or state actor.[5]

Plaintiff has failed to state a claim under § 1985(3) and Count I should be dismissed with prejudice.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR CIVIL CONSPIRACY

Plaintiff's civil conspiracy claim fails for much the same reason as her claim in Count I. To establish a claim for civil conspiracy, a plaintiff must plead facts showing: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the

[5] The Supreme Court has only recognized two rights that are protected against private action under § 1985(3): the right to be free from involuntary servitude and the right of interstate travel in the context of the Thirteenth Amendment. *Bray*, 506 U.S. at 278. Plaintiff does not allege either of these claims.

proximate result. *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1146 (10th Cir. 2016). Critically, a plaintiff must allege an unlawful act (e.g., a tort) was committed. *Savant Homes, Inc.*, 809 F.3d 1133; see also *White v. Shane Edeburn Const., LLC*, 2012 WY 118, ¶ 30 (Wyo. 2012) (holding that "a plaintiff cannot claim civil conspiracy . . . without an underlying cause of action in tort.").[6]

Plaintiff does not allege any unlawful act occurred. Plaintiff merely states, that "[o]ne or more unlawful acts were performed to accomplish the goal or one or more acts were performed to accomplish the unlawful goal." *See* Doc. 13, ¶ 213. Plaintiff never alleges any facts to support that bare legal conclusion, which this Court should not accept as true. *Ashcroft*, 556 U.S. 662. At best, Plaintiff alleges the alleged unlawful act of the civil conspiracy was "to deny the LGBTQ community the equal privileges and immunities of citizenship, and the use, benefits and privileges of property and/or contractual relationships." *See* Doc. 13, ¶ 211. Again, these claims are apparently based on the Fourteenth Amendment, which is not applicable to non-State actors. *Shelley*, 334 U.S. at 13; *Tilton*, 6 F.3d at 687. Plaintiff fails to plead a claim for civil conspiracy and Count II should be dismissed with prejudice.

III. PLAINTIFF'S CLAIMS FOR DEFAMATION BASED ON DEFENDANTS' REPORTING OF A POTENTIAL CRIME FAIL AS A MATTER OF LAW

Plaintiff alleges a claim for defamation against Defendants, Hugh and Susan Bennett, based on their "fil[ing] a criminal complaint against the Plaintiff, stating, among other things that the Plaintiff is guilty of criminal offense and sexual

[6] Because the remainder of Plaintiff's claim arise under state law, this Court applies Wyoming substantive law since, in resolving state law claims, "federal courts are to apply state substantive law and federal procedural law." *Huff v. Shumate*, 360 F. Supp. 2d 1197, 1200 (D. Wyo. 2004) (citations omitted).

misconduct." *See* Doc. 13, ¶ 216. Plaintiff's claims are time-barred. Moreover, Plaintiff has not pleaded the actual malice requirement to impose defamation liability on an individual for statements made about a public official.

A. Plaintiff's Claims are Time-Barred

Wyoming has a one-year statute of limitations for defamation. Wyo. Stat. § 1-3-105(a)(v)(A); *Cantu v. Flextronics Am., LLC*, 2:12-CV-00279-ABJ, 2014 WL 12768318, at *2 (D. Wyo. Aug. 21, 2014) (dismissing a defamation claim filed after the expiration of the one-year statute of limitation). Plaintiff had one year to file her Complaint from when Defendants allegedly spoke to the Campbell County Sheriff's Office on September 29, 2021. *See* Doc. 13, ¶ 122. Thus, Plaintiff would have needed to file her defamation claim before September 29, 2022. It is indisputable that Plaintiff did not file a claim on that basis within that time allotted. Her initial Complaint in this action was filed on September 27, 2023. *See* Doc. 1. Plaintiff's claim must be dismissed with prejudice.

B. Plaintiff Fails to Plead Defendants Acted with Actual Malice

Even on the merits, Plaintiff's claim fails. She is undisputedly a public figure since her role was one of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Hill v. Stubson*, 2018 WY 70, ¶ 17 (Wyo. 2018) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). As such, to bring a claim for defamation, she must comply with the First Amendment's actual malice requirement set forth in *New York Times v. Sullivan* (e.g. that Defendants knew the statement was false). *Id.*

The crux of Plaintiff's claim is that Defendants, Hugh and Susan Bennett, filed a criminal complaint against her. As with the other counts, Plaintiff pays lip service to the legal requirements but fails to prove any *facts* to support her claims. *See* Doc. 13, ¶ 219 (pleading the verbatim language of the actual malice requirement, without any factual allegations showing it was met). Plaintiff's Complaint, read as a whole, easily disproves Plaintiff's claims that Defendants filed a criminal complaint alleging Plaintiff was "disseminating obscene material to children," a criminal violation, with actual knowledge that criminal activity did not occur. *See* Doc. 13, ¶ 122. Rather than showing the Sheriff's office dismissed the complaint out of hand as being without any legitimate basis, Plaintiff alleges that the Sheriff's office was unsure of the legal basis for the claim and sought advice from the County Attorney. *See* Doc. 13, 136—38. And it was not an easy analysis even for the County Attorney assigned to this matter. Plaintiff alleges the County Attorney had to "devote[] considerable time to research the criminal statutes and attendant case law" to make the charging decision in this case. *See* Doc. 13, ¶ 138.

Plaintiff cannot meet her burden to show Defendants acted with actual malice since she pleaded that even the Sheriff and County Attorney had to undertake significant legal analysis to determine whether crimes were committed. Certainly, if the legal experts were not sure whether a crime was committed, untrained lay individuals cannot be held civilly liable for defamation since Plaintiff's own allegations show there was a complete absence of actual malice.

Plaintiff's claim is time-barred and fails as a matter of law. This Court should dismiss Count III with prejudice.

IV. PLAINTIFF'S REMAINING DEFAMATION CLAIMS ARE TIME-BARRED AND DO NOT SURVIVE CONSTITUTIONAL SCRUTINY

Like Count III, Plaintiff alleges a claim for defamation against all Defendants based on their purportedly stating "Plaintiff had committed crimes" and "accus[ed] the Plaintiff of 'child abuse,' 'pornography,' and 'felonious conduct.'" *See* Doc. 13, ¶ 224—26. Plaintiff's claims are time-barred. And Plaintiff has not pled facts to satisfy the actual malice requirement to impose defamation liability.

A. Plaintiff's Claims are Time-Barred

Wyoming has a one-year statute of limitations for defamation. § 1-3-105(a)(v)(A); *Cantu*, 2:12-CV-00279-ABJ, 2014 WL 12768318, at *2. Plaintiff had one year to file her Complaint from when Defendants allegedly made the defamatory statements. Plaintiff's most recent allegation about a statement by any Defendant is June 20, 2022. *See* Doc. 13, § 182. Thus, Plaintiff would have needed to file her claim before June 20, 2023. It is indisputable that Plaintiff did not file a claim within that time. Her initial Complaint in this action was filed on September 27, 2023. *See* Doc. 1. As such, Plaintiff's claim must be dismissed with prejudice.

B. Plaintiff's Claims are Defeated by Defendants' First Amendment Rights to Free Speech and Right to Petition

Defendants' challenged speech was almost exclusively them speaking to the County Commission, the Library Board, or Plaintiff herself. *See* Doc. 13, ¶¶ 52—55, 57, 80—83, 108—10, 119; 125—128, 141—46. Plaintiff identifies two other instances: (1) the so-called "publication"—a generous term for Hugh Bennett's self-published automotive advertising magazine (*See* Doc. 13, ¶ 87), and (2) the report to the Sheriff's office of potential illegal conduct (*See* Doc. 13, ¶¶ 121, 125). Plaintiff fails to point to any

defamatory statement in the magazine, and Plaintiff's claims about the report to the Sheriff fail. *See*, *supra*, Section III(B). Plaintiff is essentially taking issue with Defendants exercising their First Amendment rights to speak on matters of public concern and to petition their government to address their concerns. Should this Court permit this claim to proceed, it would have a substantial chilling effect as ordinary citizens would be fearful of speaking in public on important public issues lest they be hauled into federal court and face civil liability.

1. Statements at Issue in Count IV

Plaintiff claims Defendants defamed her by making statements "accus[ing] Plaintiff of [] crimes" and "accusing the Plaintiff of 'child abuse,' 'pornography,' and 'felonious conduct.'" *See* Doc. 13, ¶¶ 223, 226. That is the sum total of what has been pleaded against Defendants in Count IV as the statements at issue. As discussed above, Plaintiff has failed to show actual malice in the statement(s) made to law enforcement leaving only the claims regarding "child abuse" and "pornography." *See* Doc. 13, ¶ 226.

First, Plaintiff does not plead any fact showing Defendants accused Plaintiff of child abuse. The only place in the Complaint that references a statement including the words "child abuse" is when Plaintiff pleaded the statement made by Susan Bennett, but it actually does *not* accuse Plaintiff of committing child abuse. *See* Doc. 13, ¶ 128. Rather, Susan Bennett states that, in her opinion, the behavior of Plaintiff is "disrespect[ful] to children who have had child abuse" in their past and that "a child that's been a victim of child abuse can be very harmed" by the materials Plaintiff insisted be included in the library. *See* Doc. 13, ¶ 128. Of course, this was Plaintiff's opinion, and she was entitled to express that opinion. But in no way does Plaintiff plead

that Ms. Bennett accused Plaintiff of "child abuse." That is stretching the statement far beyond the plain meaning of the words used and is twisting the words out of context to create a defamatory statement.

Second, Plaintiff does not plead any fact showing Defendants accused Plaintiff of "pornography." The only place in the Complaint that references a statement including the word "pornography" is when Plaintiff pleaded that there was some un-pled statement made by Hugh Bennett that alleges certain books contained "pornography" and he strongly disagreed with the decision to allow these books to be placed in the children's section. *See* Doc. 13, ¶ 124. Plaintiff seemingly conflates Defendants' use of the word "pornography," something that is surely in the eye of the beholder, with the legal term "obscene" that describes illegal material. *Miller v. California*, 413 U.S. 15, 18, n.12 (1973) (explaining the difference between pornography and obscene material and noting that former is protected from government interference and the latter is not). In his concurrence, Justice Stewart provided us the oft-quoted line—"I know it when I see it"—explaining that it is impossible to precisely define the line between pornographic and legally obscene material. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Defendants pointed to explicit pictures, themes, and story lines that in their opinion rose to the level of pornography. Defendants rightfully presented the County Commission and Library Board with their opinion as to the materials being placed in the County Library and their moral disagreement with that choice (a choice shared by the County Commission). Just as great legal minds reviewed videos and had varying

opinions as to whether the material was pornographic, Defendants reviewed the materials being placed in the library and expressed their opinion that the material was pornographic. But in any event, it cannot be said that Defendants acted with *actual* knowledge that the material in question was not pornographic.

2. Plaintiff's Claims Fail First Amendment—Free Speech and Petition Clause—Scrutiny

As a public official, Plaintiff's claims are governed by *NYT v. Sullivan*'s heightened standard for public figure plaintiffs. *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 912 (Wyo. 1992). The First Amendment places a constitutional limitation on the application of state law defamation claims "prohibit[ing] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In order to prove her claim, Plaintiff must "prove[] with *convincing clarity* that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Dworkin*, 839 P.2d at 912 (emphasis added).

The entire purpose of the First Amendment is to provide ample freedom to debate important issues of public concern. *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 681 (1998). "[The Supreme] Court has emphasized that the First Amendment 'embraces at the least the liberty to discuss publicly . . . all matters of public concern." *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 534 (1980) (internal quotations omitted). It has stated repeatedly "that expression on

public issues 'has always rested on the highest rung of the hierarchy of First Amendment values," and that speech on matters "of public concern" is "entitled to special protection." *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)); see also *Connick v. Myers*, 461 U.S. 138, 145 (1983) (same).

Defendants' actions are also protected by the First Amendment right to petition. The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances," granting people not only the freedom to stand up and speak out against perceived injustices, but also protects their right to take action to change things taking place in their government of which they disapprove. U.S. Const. amend. I. "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). Because the Petition Clause was inspired by the same ideals that resulted in the First Amendment freedoms to speak, publish, and assemble, it has been stated that there is no basis for granting greater constitutional protection to statements made in a petition than other First Amendment expressions, or vice versa. *McDonald v. Smith*, 472 U.S. 479 (1985). Accordingly, the right to petition is no more or less sacred than the right to free speech, and as there may be an abuse of the right of free speech, so may there be an abuse of the right to petition. *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990). Although the right to free speech and the right to petition are separate guarantees, they are

related and generally subject to the same constitutional analysis. *Wayte v. United States*, 470 U.S. 598, 610 (1985).

Plaintiff was on the losing side of a hotly-contested debate in the community about the appropriate type of books that should be made available to children in public libraries. Plaintiff now swings for the fences claiming Defendants are liable for damages because they showed up at County Commission meetings and Library Board meetings and advocated for their worldview. Plaintiff should not be permitted to bring a claim against Defendants with the goal of stopping them from expressing their opinions and punishing them for petitioning their government to take actions they believe are necessary and are aligned with their worldview.

Plaintiff's claims are time-barred. And even if they were timely, they fail to satisfy the actual malice standard required of a public figure. Defendants did not accuse Plaintiff of a crime with actual knowledge a crime had not occurred. Defendants did not accuse Plaintiff *at all* of committing child abuse. And Defendants' legally-protected opinion about materials that in their view are pornographic is not actionable. Plaintiff's claim fails and it should be dismissed with prejudice.

V. PLAINTIFF DID NOT PLEAD AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

For a plaintiff to plead a claim for intentional infliction of emotional distress, she must allege (1) the defendant intentionally or recklessly; (2) participated in extreme and outrageous conduct; (3) which caused the plaintiff; (4) severe emotional distress. *Hoblyn v. Johnson*, 2002 WY 152, ¶ 39 (Wyo. 2002). Critical here, Plaintiff must plead facts showing there was "extreme and outrageous conduct" and that she suffered "severe

emotional distress." "Extreme and outrageous conduct" is conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Larsen v. Banner Health Sys.*, 2003 WY 167 (Wyo. 2003). Severe emotional distress is distress which is so severe that "no reasonable man could be expected to endure it." *Leithead v. Am. Colloid Co.*, 721 P.2d 1059, 1066 (Wyo. 1986); *Cook v. Shoshone First Bank*, 2006 WY 13 (Wyo. 2006). As a public figure, basing her claim on statements made by Defendants (*see* Doc. 13, ¶ 229), she must also meet the actual malice standard for this claim. *Spence v. Flynt*, 816 P.2d 771, 774 (Wyo. 1991) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). This Court has a gatekeeping function and must not permit claims to proceed where the plaintiff cannot state a claim and show both "extreme and outrageous conduct" and "severe emotional distress." *Hatch v. State Farm Fire & Cas. Co.*, 930 P.2d 382, 396 (Wyo. 1997); *Hoblyn*, 2002 WY 152.

In *Hatch*, the Wyoming Supreme Court catalogued all the instances of conduct alleged that were "extreme and outrageous conduct" by defendant. *Hatch*, 930 P.2d at 396. The defendant made the plaintiffs fill out lengthy, seemingly unnecessary paperwork to substantiate the claim for fire damage to their home and required it in such a time frame that the plaintiffs had to "take sick leave, vacation, weekends, and evenings to complete it." *Id.* The defendant sent people to the plaintiffs' home without permission and without notice. *Id.* The defendant threatened to cancel their insurance policy, conducted an interview under oath with an attorney that was 'sarcastic,' 'aggressive,' and 'hostile.'" *Id.* The defendant also refused to give the plaintiffs

information they were entitled to about their claim, withheld information that was exculpatory, all while assisting the county attorney in attempting to prosecute one plaintiff for arson. *Id.* And, despite having a female investigator at the home, sent a male investigator to go through the wife's and daughter's drawers, personal things, and personal clothing. *Id.* All of this was simply not enough. *Id.* The court explained the conduct was certainly "insensitive or inappropriate" but it was not "so outrageous in character or extreme in degree to reach the level of being beyond all possible bounds of decency;" nor was it "atrocious and utterly intolerable in a civilized community." *Id.*

In *Hoblyn*, the Wyoming Supreme Court rejected the claim of "severe emotional distress" since "[t]here [wa]s no evidence of the impact of this alleged distress" on the plaintiff's life, which would include "missed work, inability to sleep or engage in hobbies and activities previously enjoyed, diminished ability to socialize or handle the necessary functions of everyday life, or memory loss." *Id.* At a minimum, those things must be pled for a plaintiff to state a claim, since she must later prove them in order to survive summary judgment.

Here, Plaintiff merely states a legal conclusion as to these elements without including any factual basis. *See* Doc. 13, ¶¶ 229—32. There are no factual allegations as to what allegedly constitutes the "extreme and outrageous conduct" in this case, or facts explaining the "severe emotional distress" Plaintiff has allegedly endured. This claim fails as a matter of law and must be dismissed with prejudice.

VI. PLAINTIFF'S ABUSE OF PROCESS CLAIM FAILS SINCE THERE WAS NO PROCESS ISSUED AGAINST HER

The sole basis for Plaintiff's abuse of process claim is Defendants' speaking with the Sheriff about potential criminal liability and Plaintiff's allegation a "criminal complaint" was filed. *See* Doc. 13, ¶ 125. Notably, Plaintiff does not provide this complaint or any case number where a criminal case was *actually* initiated. Nor does she plead any facts showing that she suffered any damage as the result of the inquiry with the Sheriff's office. Plaintiff's claim is time-barred and is legally insufficient.

A. Plaintiff's Claim is Time-Barred.

Wyoming has a one-year statute of limitations for malicious prosecution, which is the analogous claim to abuse of process. § 1-3-105(a)(v)(C); Plaintiff had one-year to file her Complaint from when Defendants allegedly spoke to the Campbell County Sheriff's Office on September 29, 2021. *See* Doc. 13, ¶ 122. Thus, Plaintiff would have needed to file her claim before September 29, 2022. It is indisputable that Plaintiff did not file a claim on that basis within that time allotted. Her initial Complaint in this action was filed on September 27, 2023. *See* Doc. 1. As such, Plaintiff's claim must be dismissed with prejudice.

B. Plaintiff Has Not (and Cannot) Plead an Abuse of Process Since No Process was Issued

In order for Plaintiff to plead a claim for abuse of process, she must allege "(1) an ulterior purpose; and (2) a willful act in the use of the process which is not proper *in the regular conduct of the legal proceeding*." *The Tavern, LLC v. Town of Alpine*, 2017 WY 56 (Wyo. 2017) (emphasis added). "The gist of the action for abuse of process lies in the improper use of process *after it is issued*." *Dean v. Kochendorfer*, 237 N.Y. 384 (1924)

(emphasis added); see also *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259 (10th Cir. 1998). Plaintiff must allege that there was some misconduct within an *ongoing* proceeding to state a claim for abuse of process. It is not enough to allege that a case was brought with ill intent, there must be an "affirmative act" by the defendant "involved in the use of the process which is not proper to the regular prosecution of the proceedings is necessary for this tort to exist." *Bosler v. Shuck*, 714 P.2d 1231, 1235 (Wyo. 1986). In other words, there must be an affirmative act within an ongoing case, not the initial filing of a case without probable cause.

Plaintiff alleges that Defendants filed a criminal complaint, but nothing more. *See* Doc. 13, ¶ 235. It is undisputed no process actually occurred. No case was ever initiated. Plaintiff only alleges that Defendants filed a criminal complaint, but does not plead that she was arrested, that charges were filed, or that anything further happened. Not only does this show no process was ever issued (e.g. there can be no abuse of non-existent process), but also that Plaintiff suffered no damage since she never incurred any damages based on a criminal complaint that never was accepted or turned into actual charges. This claim must also be dismissed with prejudice.

CONCLUSION

At its heart, Plaintiff's Complaint takes issue with the public advocacy performed by Defendants (successfully). That is not a basis for civil liability under § 1985(3), common law civil conspiracy, common law defamation, intentional infliction of emotional distress, or abuse of process. This Court should dismiss Plaintiff's Amended Complaint with prejudice.

DATED: January 8, 2024

Respectfully submitted,

/s/ Jeremy D. Bailie
Jeremy D. Bailie (*Pro Hac Vice)*
Florida Bar No. 118558
Weber, Crabb & Wein, P.A.
5453 Central Avenue
St. Petersburg, Florida 33710
Telephone: (727) 828-9919
Facsimile: (727) 828-9924
Primary: Jeremy.Bailie@webercrabb.com
Secondary: honey.rechtin@webercrabb.com

D. Stephen Melchior, Esquire
Melchior Law Firm, PC
Wyoming Bar No.: 5-2885
Phone: (307) 637-2323
Fax: (307) 637-2313
Email: steve@melchlaw.com
2010 Warren Avenue
Cheyenne, WY 82001
Local Counsel

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 8, 2024, a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF portal, which will serve all counsel of record:

Qusair Mohamedbhai
Iris Halpern (Pro Hac Vice)
Azra Taslimi (Pro Hac Vice)
RATHOD | MOHAMEDBHAI LLC
2701 Lawrence Street
Denver, CO 80205
qm@rmlawyers.com
ih@rmlawyers.com
at@rmlawyers.com
Attorneys for Plaintiff

/s/ Jeremy D. Bailie
Attorney

2014 WL 12768318
Only the Westlaw citation is currently available.
United States District Court, D. Wyoming.

Danita L. CANTU (Pro Se), Plaintiff,
v.
FLEXTRONICS AMERICA, LLC, Defendants.

Case No. 2:12–CV–00279–ABJ
|
Signed 08/21/2014

Attorneys and Law Firms

Danita L. Cantu, Cheyenne, WY, pro se.

Jennifer J. Walt, Littler Mendelson, San Francisco, CA, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Alan B. Johnson, United States District Judge

***1** This matter arises from plaintiff's amended complaint which alleges state-law claims of defamation, negligence, intentional infliction of emotional distress, and wrongful termination and racial discrimination under Title VII. Defendant filed the instant motion to dismiss arguing that Plaintiff has failed to state a plausible claim for relief. For the following reasons, defendant's motion, ECF No. 24, is **GRANTED.**

BACKGROUND

The Court has set out the general background for this case in its previous order, ECF No. 20. In that order, the Court dismissed Plaintiff Danita Cantu's previous Complaint without prejudice. Plaintiff accordingly filed a motion for leave to file an Amended Complaint on December 12, 2013, and Defendant Flextronics America, LLC filed a Motion to Dismiss the proposed Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). [ECF No. 24]. The Magistrate granted Plaintiff's motion for leave to file an amended complaint, and he also granted Plaintiff's motion for additional time to respond to Defendant's motion to dismiss. Accordingly, the Court finds that Defendant's motion is now properly before the Court.

STANDARD OF REVIEW

In *Ashcroft v. Iqbal*, the Supreme Court articulated a two-step approach for district courts to use when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See* 556 U.S. 662, 679 (2009). First, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id. Iqbal* clarified that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. The Court has stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plausibility lies somewhere between possibility and probability; a complaint must establish more than a mere possibility that the defendant acted unlawfully but the complaint does not need to establish that the defendant probably acted unlawfully. *See id.* "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

DISCUSSION

I. State Law Claims

A. Defamation

First, Defendant argues that Plaintiff's state-law claim of defamation is time-barred by Wyoming's applicable statute of limitations. Plaintiff counters that the applicable statute of limitations "must be tolled in light of Defendant's continued reliance on the information contained" in the documents. [ECF No. 31]. In this manner, Plaintiff seems to

be arguing that Defendant's use of the documents is a single "continuing tort." However, "the continuing-tort doctrine is inapplicable here because [the original document] was a discrete, potentially actionable occurrence" of defamation. *McBride v. Peak Wellness Ctr., Inc.*, 688 F.3d 698, 710 (10th Cir. 2012).

***2** Wyoming has a one-year statute of limitations for defamation (libel and slander). Wyo. Stat. § 1-3-105(a)(v)(A); *see Wagner v. Campbell County, Wyo.*, 695 F.Supp. 512, 517 (D. Wyo. 1988). The documents that Plaintiff seems to claim as the basis for her defamation claim seem to have been created in November of 2008, at the latest. [*See* ECF No. 22-1 at ¶¶ 4.11, 5.1.1-5.1.4, 5.5.1]. Thus, Plaintiff would have needed to file a defamation claim before November of 2009. It is indisputable that Plaintiff did not file a claim on that basis within that timeframe. Defendant's motion is **GRANTED** as to this claim, and Plaintiff's claim for defamation is, therefore, **DISMISSED WITH PREJUDICE.**

B. Negligence, IIED, and Wrongful Termination

Defendant next argues that Plaintiff's state-law claims of negligence, intentional infliction of emotional distress, and wrongful termination are time-barred because Plaintiff did not file her claims within the four-year statute of limitations.

First of all, "[f]ederal courts apply state rules concerning statutes of limitations because such statutes embody a substantive decision by that State that actual service on ... the defendant is an integral part of the several policies served by the statute of limitations." *U.S. ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1225 (10th Cir. 2008) (internal quotations omitted). Thus, state law determines when "an action is 'commenced' for the purposes of the state statute of limitations." *Id.* at 1226. Wyoming state law dictates that

> For purposes of statutes of limitation, an action shall be deemed commenced on the date of filing the complaint as to each defendant, if service is made on the defendant ... within 60 days after the filing of the complaint. If such service is not made within 60 days the action shall be deemed commenced on the date when service is made.

Wyo. R. Civ. P. 3.

Thus, "[a] complaint must be served within sixty days in order for the action to commence on the date the complaint was filed. If it is not, the action commences on the date of service of process." *Hammons v. Int'l Playtex, Inc.*, 676 F. Supp. 1114, 1116 (D. Wyo. 1988), judgment vacated, 872 F.2d 963 (10th Cir. 1989).

It seems undisputed that Plaintiff's negligence, IIED, and wrongful termination claims accrued, at the latest, on February 5, 2009. Wyoming's statute of limitations for these claims is four years. *See* Wyo. Stat. 1-3-105(a)(iv)(C); *Woodard v. Cook Ford Sales, Inc.*, 927 P.2d 1168, 1169 (Wyo. 1996) ("Negligence actions are governed by a four-year limitation."); *Gustafson v. Bridger Coal Co.*, 834 F. Supp. 352, 358 (D. Wyo. 1993) ("the four year statute of limitations applies to the tort of intentional infliction of emotional distress."). Thus, Plaintiff's action must have commenced no later than February 5, 2013.

Plaintiff initially filed her original Complaint on December 21, 2012. [ECF No. 1]. However, she did not request this Court to serve her Complaint until August 15, 2013. [ECF No. 7]. Even if her state-law claims in her Amended Complaint could refer back to the commencement of the original action, her claims could not have commenced earlier than August 16, 2013 when a summons was issued by order of this Court. [*See* ECF No. 9].

Plaintiff also argues that her state-law claims were tolled when she filed her complaint with the EEOC. The Second, Seventh, and Ninth Circuit have all held "as a matter of federal law that filing an EEOC charge does not toll the time for filing state tort claims, including those that arise out of the same nucleus of facts alleged in the charge of discrimination filed with the EEOC." *Castagna v. Luceno*, 744 F.3d 254, 258 (2d Cir. 2014); *see also Arnold v. United States*, 816 F.2d 1306, 1312-1313 (9th Cir. 1987); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322-323 (7th Cir. 1992) ("the time for filing [the plaintiff's state-law claim] is not tolled by the filing of a discrimination charge with the EEOC."). Plaintiff proposes no persuasive argument as to why this Court should not follow the logic of those learned courts.

***3** Accordingly, this Court finds that Plaintiff's state-law claims for negligence, IIED, and wrongful termination are

time-barred, and they are, therefore, **DISMISSED WITH PREJUDICE.**

II. Racial Discrimination

The second issue.

> Title VII makes it unlawful "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." A plaintiff proves a violation of Title VII either by direct evidence of discrimination or by following the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a three-step analysis requires the plaintiff first prove a *prima facie* case of discrimination.

Khalik v. United Air Lines, 671 F.3d 1188, 1192 (10th Cir. 2012) (internal citations omitted).

To set forth a general Title VII discrimination case, "a plaintiff must demonstrate: "(1) [s]he was a member of a protected class; (2) [s]he was qualified and satisfactorily performing [her] job; and (3) [s]he was terminated under circumstances giving rise to an inference of discrimination." *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012). Once the Plaintiff has established a *prima facie* case,

> [t]he burden then shifts to the defendant to produce a legitimate, non-discriminatory reason for the adverse employment action. If the defendant does so, the burden then shifts back to the plaintiff to show that the plaintiff's protected status was a determinative factor in the employment decision or that the employer's explanation is pretext.

Khalik, 671 F.3d at 1192 (internal citations omitted).

"While the 12(b)(6) standard does not require that Plaintiff establish a prima facie case in her complaint, the elements of each cause of action help to determine whether Plaintiff has [alleged] a plausible claim." *Id.*

The central issue as to Plaintiff's Title VII discrimination claim is whether she has pled sufficient facts alleging that she was "terminated under circumstances giving rise to an inference of discrimination." *Barlow*, 703 F.3d at 505. "Plaintiffs can establish evidence of [this] prong in various ways, such as 'actions or remarks made by decisionmakers,' 'preferential treatment given to employees outside the protected class,' or 'more generally, upon the timing or sequence of events leading to plaintiff's termination.' " *Id.*

In the instant case, Plaintiff has not alleged that any of her supervisors or managers made racial remarks, and she does not allege that any of her supervisors or managers engaged in overtly racist conduct. Second, Plaintiff seems to have alleged only one non-conclusory statement regarding preferential treatment. In that allegation, Plaintiff was cited for not complying with Verizon procedures while another employee, Stephanie Harrison, was not cited. [ECF No. 22-1 at ¶ 5.1.4]. However, Plaintiff alleges that Harrison is a "Verizon employee" instead of an employee of Defendant Flextronics. *Id.* It is difficult to determine how employees of different companies could be properly compared to determine "preferential treatment." *See Johnson v. Kroger Co.*, 319 F.3d 858, 867 (6th Cir. 2003) ("In the context of personnel actions, the relevant factors for determining whether employees are similarly situated often include the employees' supervisors, the standards that the employees had to meet, and the employees' conduct.").

***4** Lastly, Plaintiff has failed to identify a nexus between her race and "the timing or sequence of events leading to her termination." *Barlow*, 703 F.3d at 505. Further, she has not alleged facts as to how her "protected status was a determinative factor in the employment decision," and she has not alleged any facts that show her former "employer's explanation is pretext." *Khalik*, 671 F.3d at 1192.

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiff Danita Cantu's state-law claims for defamation, negligence, intentional infliction of emotional distress, and wrongful termination are all time-barred under Wyoming's statute of limitations. Her Title VII claim for racial discrimination again fails to state a plausible claim for relief. Accordingly, Defendant's motion to dismiss, ECF No. 24, is hereby **GRANTED**, and Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE.**

All Citations

Not Reported in Fed. Supp., 2014 WL 12768318

End of Document

2023 WL 5533307
Only the Westlaw citation is currently available.
United States District Court, D. Wyoming.

Jaylyn WESTENBROEK, Hannah Holtmeier, Allison Coghan, Grace Choate, Madeline Ramar, and Megan Kosar, on behalf of themselves and derivatively on behalf of Kappa Kappa Gamma Fraternity, Plaintiffs,

v.

Kappa Kappa Gamma FRATERNITY, an Ohio non-profit corporation, as a Nominal Defendant and as a Direct Defendant, Mary Pat Rooney, President of the Fraternity Council of Kappa Kappa Gamma Fraternity, in her official capacity, Kappa Kappa Gamma Building Co., a Wyoming non-profit corporation, and Artemis Langford, Defendants.

Case No. 23-CV-51-ABJ
|
Signed August 25, 2023

Attorneys and Law Firms

John G. Knepper, Law Office of John G. Knepper LLC, Cheyenne, WY , for Plaintiffs Jane Doe I, Jane Doe II, Jane Doe III, Jane Doe IV, Jane Doe V, Jane Doe VI, Jane Doe VII.

Casandra A. Craven, Longhorn Law LLC, Cheyenne, WY, John G. Knepper, Law Office of John G. Knepper LLC, Cheyenne, WY, for Plaintiffs Jaylyn Westenbroek, Allison Coghan, Grace Choate, Madeline Ramar, Megan Kosar.

Natalie Marie McLaughlin, I, Pro Hac Vice, Brian W. Dressel, Pro Hac Vice, Vorys Sater Seymour and Pease LLP, Columbus, OH, Scott P. Klosterman, Williams Porter Day & Neville, Casper, WY, for Defendants Kappa Kappa Gamma Fraternity, Kappa Kappa Gamma Fraternity Council President.

Rachel M. Berkness, Freeburg Law, Jackson, WY, for Defendant Artemis Langford.

ORDER GRANTING DEFENDANTS' *MOTION TO DISMISS* (ECF NO. 19), DISMISSING, WITHOUT PREJUDICE, PLANTIFFS' *FIRST AMENDED VERIFIED MEMBER DERIVATIVE COMPLAINT FOR BREACH OF FIDUCIARY DUTIES* (ECF NO. 6), AND DISMISSING AS MOOT DEFENDANT ARTEMIS LANGFORD'S *MOTION TO DISMISS* (ECF NO. 22)

Alan B. Johnson, United States District Judge

***1** THIS MATTER comes before the Court following Defendants', Kappa Kappa Gamma Fraternity, an Ohio non-profit corporation ("KKG", "Kappa Kappa Gamma", or "Kappa"), Mary Pat Rooney, President of the Fraternity Council of Kappa Kappa Gamma Fraternity ("Rooney"), and Kappa Kappa Gamma Building Co., a Wyoming non-profit corporation ("KKG Building Co.") (collectively, "Defendants"), *Motion to Dismiss*, filed on June 20, 2023. ECF No. 19. Pursuant to Fed. R. Civ. P. 12(b)(1), (2), and (6), Defendants move to dismiss Plaintiffs', Jaylyn Westenbroek, Hannah Holtmeier, Allison Coghan, Grace Choate, Madeline Ramar, and Megan Kosar (collectively, "Plaintiffs"), *First Amended Verified Member Derivative Complaint for Breach of Fiduciary Duties* ("*Complaint*") (ECF No. 6), due to lacking subject matter jurisdiction over KKG Building Co., lacking personal jurisdiction over Rooney, and Plaintiffs' failure to state a claim upon which relief can be granted. ECF Nos. 19, at 2; 20.

Having reviewed the filings, the applicable law, and being otherwise fully advised, the Court **GRANTS** Defendants' *Motion to Dismiss* (ECF No. 19) and **DISMISSES, WITHOUT PREJUDICE,** Plaintiffs' *Complaint* (ECF No. 6).

Separately, the Court **DISMISSES AS MOOT** Defendant's, Artemis Langford ("Langford"), *Motion to Dismiss with Prejudice* ("Langford's *Motion to Dismiss*") (ECF No. 22), filed on June 20, 2023.

BACKGROUND

Embittered by their chapter's admission of Artemis Langford, a transgender woman, six KKG sisters at the University of Wyoming sue their national sorority and its president. Plaintiffs, framing the case as one of first impression, ask the Court to, *inter alia*, void their sorority sister's admission, find that KKG's President violated her fiduciary obligations by betraying KKG's bylaws, and prevent other transgender women from joining KKG nationwide. A "woman", say Plaintiffs, is not a transgender woman. Unadorned, this case condenses to this: who decides whether Langford is a Kappa Kappa Gamma sister? Though given the opportunity to vote this past fall, not the six Plaintiffs. Not KKG's Fraternity

Council. Not even this federal Court. The University of Wyoming chapter voted to admit – and, more broadly, a sorority of hundreds of thousands approved – Langford. With its inquiry beginning and ending there, the Court will not define "woman" today. The delegate of a private, voluntary organization interpreted "woman", otherwise undefined in the non-profit's bylaws, expansively; this Judge may not invade Kappa Kappa Gamma's freedom of expressive association and inject the circumscribed definition Plaintiffs urge. Holding that Plaintiffs fail to plausibly allege their derivative, breach of contract, tortious interference, and direct claims, the Court dismisses, without prejudice, Plaintiffs' causes of action. This Court outlines the case's posture, [1] its standard of review, and its disposition in the pages that follow.

***2** Founded in 1870, Kappa Kappa Gamma is a non-profit organization based in Dublin, Ohio. ECF Nos. 6, ¶¶ 21, 25, 28; 6-1, at 49, 55–56. [2] Today, KKG spans 140 college campuses and boasts 210,000 living alumnae. ECF No. 6, ¶ 26. Of note are policies from KKG's national headquarters and the University of Wyoming's KKG chapter; bear with me as I summarize both. Broadly, KKG's "purposes", *inter alia*, are:

> A. *To unite women*, through membership, in a close bond of friendship, seeking to instill in them a spirit of mutual love and helpfulness, to the end that each member and the Fraternity-at-large [3] may attain social, moral, and intellectual excellence;
>
> B. To establish chapters at various colleges and universities, provide for the proper organization, installation, and operation, *with each chapter having the right and responsibility to select members of its choice in accordance with Fraternity standards and procedures*[.]

ECF No. 6-1, at 52 (emphasis added). KKG has *Bylaws* ("bylaws"), *Standing Rules*, [4] and *Fraternity Policies*. ECF Nos. 6, ¶ 53; 6-1, at 2–30, 109–38, 140–61. While the KKG bylaws state that "[a] new member shall be a woman", no bylaw defines "woman". ECF No. 6-1, at 6. [5]

In 2018, KKG published a *Guide for Supporting our LGBTQIA+ Members* ("2018 *Guide*"). [6] ECF Nos. 6, ¶ 5; 6-1, at 32–43. The 2018 *Guide* states:

> Kappa Kappa Gamma is a single-gender organization *comprised of women and individuals who identify as women* whose governing documents do not discriminate in membership selection except by requiring good scholarship and ethical character.
>
> ...
>
> Each Kappa chapter has the final choice of its own members.... [T]he chapter is well within its right to offer [a] potential member [who is transgender] a bid.

ECF No. 6-1, at 32, 35 (emphasis added). While KKG's bylaws do not reflect the "and individuals who identify as women" addition, accompanying documents, including KKG's *Position Statements* [7] in 2021 and *FAQs* [8] in 2022, both published ahead of KKG's 2022 biennial convention, do. *Id.* at 105 (same language *supra*), 183 (same); *cf. id.* at 2–30, 58–86. [9] An Illinois resident and volunteer, Rooney heads KKG's eight-member Fraternity Council, consisting of directors and by extension staff tasked with supervising chapters nationwide. ECF Nos. 6, ¶¶ 22, 71; 26, at 3. [10] Plaintiffs equate KKG's Fraternity Council to a corporation's board of directors. *E.g.*, ECF No. 6, ¶ 4.

***3** Founded in 1927, the KKG, or Gamma Omicron, chapter at the University of Wyoming ("the UW chapter") has forty-four members and an on-campus house today. ECF Nos. 6, ¶ 78; 6-1, at 200. Plaintiffs [11] are six – some current and some graduated – chapter members and undergraduates at the University. ECF Nos. 6, ¶¶ 1, 15–20; 20, at 1. Because KKG headquarters has a "live-in rule", all UW chapter members must reside within the on-campus house in Laramie, Wyoming, signing a contract with KKG Building Co. [12] to do so. ECF No. 6-1, at 148, 165–76. Like KKG's governing documents, neither the UW chapter's *Bylaws*, [13] nor its *Standing Rules*, define "woman". *Id.* at 185–98, 200–09.

During fall 2022 recruitment, the UW chapter voted to admit Langford, a transgender [14] woman. ECF No. 6, ¶ 116. Per KKG protocol, Langford was subsequently approved by KKG headquarters prior to her initiation to the chapter. *Id.*, ¶¶ 68, 139, 141; ECF No. 6-1, at 120. Following Langford's admission, Plaintiffs accuse Langford [15] of salacious impropriety at the chapter house and elsewhere. [16]

Plaintiffs' four claims include: (1) a derivative [17] cause of action, pursuant to Ohio Rev. Code Ann. § 1702.12(I)(1)(c), [18] against Rooney (ECF No. 6, ¶¶ 159–67) ("Count I");

(2) breach of contract against KKG and KKG Building Co. (*id.*, ¶¶ 168–72) ("Count II"); (3) tortious interference with a contract against KKG (*id.*, ¶¶ 173–75) ("Count III"); and (4) a direct [19] cause of action against KKG and Rooney (*id.*, ¶¶ 176–79) ("Count IV"). Plaintiffs request three declaratory judgments from this Court, ordering: (1) that Langford is ineligible for KKG membership and voiding, *ab initio*, her admission; (2) Defendants' violation of their obligations to KKG by admitting Langford; and (3) Defendants' violation of Plaintiffs' housing contracts. *Id.* at 70. Plaintiffs also seek preliminary and permanent injunctive relief preventing Defendants from "seeking or encouraging" transgender women to join KKG, damages, and attorneys' fees and costs. *Id.* [20]

STANDARD OF REVIEW

***4** Defendants challenge Plaintiffs' *Complaint* on three bases – and three Federal Rules of Civil Procedure. I begin with a dose of procedural background; federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly, federal courts are presumed to lack jurisdiction "unless and until a plaintiff pleads sufficient facts to establish it." *See Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994) (internal citation omitted). If jurisdiction is challenged, the party asserting jurisdiction must demonstrate its existence by a preponderance of the evidence. *See id.* First, when considering a Fed. R. Civ. P. 12(b)(1) challenge to subject matter jurisdiction and the movant challenges the allegations set forth in the complaint, the Court must accept those allegations as true. *See Holt v. United States*, 46 F.3d 1000, 1002–03 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). Second, Plaintiffs bear the burden of establishing personal jurisdiction. *See Far W. Cap., Inc. v. Towne*, 46 F.3d 1071, 1075 (10th Cir. 1995). If, however, the Court resolves the pending motion on the basis of their *Complaint*, Plaintiffs need only make a prima-facie showing of personal jurisdiction. *See OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). Plaintiffs can make such a showing by alleging, "via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *See AST Sports Sci., Inc. v. CLF Distrib., Ltd.*, 514 F.3d 1054, 1057 (10th Cir. 2008). Like a Fed. R. Civ. P. 12(b)(1) challenge, the Court accepts as true all well-pleaded facts in the *Complaint* and resolves all factual disputes in Plaintiffs' favor. *See Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008).

Third, when considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, district courts follow a two-pronged approach. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id. Iqbal* clarified that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions", and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. The Court stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Plausibility lies somewhere between possibility and probability; a complaint must establish more than a mere possibility that Defendants acted unlawfully, but the complaint does not need to establish that Defendants probably acted unlawfully. *See id.*

ANALYSIS

The Court dismisses KKG Building Co. and Plaintiffs' four claims without prejudice. First, Plaintiffs fail to plead this Court's subject matter jurisdiction over KKG Building Co. Second, Plaintiffs demonstrate this Court's personal jurisdiction over Rooney. Third, while Plaintiffs demonstrate futility under Ohio law, their derivative claim against Rooney fails to escape KKG's First-Amendment-protected freedom of expressive association to include transgender members. Fourth, Plaintiffs fail to allege any breach of contract. Fifth, Plaintiffs fail to allege any tortious interference of contract. Sixth, Plaintiffs fail to allege a direct claim against Rooney under Ohio law. Below, the Court proceeds from the courthouse door to the courtroom, addressing challenges to jurisdiction and on the merits, *seriatim*.

A. *The Court's Subject Matter Jurisdiction over Plaintiffs' Breach of Contract Claim against*, inter alia, *KKG Building Co. (*i.e., *Count II).*

***5** Plaintiffs fail to allege this Court's subject matter jurisdiction over KKG Building Co. Defendants move to dismiss Count II, alleging breach of contract against, *inter alia*, KKG Building Co., for lack of subject matter jurisdiction. *See* ECF Nos. 20, at 7–8; 26, at 4–5. Plaintiffs appear to concede, parroting language from their *Complaint* that they do not seek damages from KKG Building Co. but consider it a required party. [21]

Preliminarily, the Court admits its confusion disentangling Plaintiffs' Count II, which Plaintiffs seem to recognize. [22] Count II in Plaintiffs' *Complaint* appears to sue KKG Building Co.; yet, in their response, Plaintiffs clarify that they sue KKG for *two* breach of contract claims. This section addresses KKG Building Co.'s status vis-à-vis Count II.

To proceed under this Court's diversity jurisdiction, 28 U.S.C. § 1332, as Plaintiffs do, "all [ ] plaintiff[s] need[ ] to do is allege an amount in excess of $75,000 and [they] will get [their] way, unless [ ] defendant[s] [are] able to prove 'to a legal certainty' that the plaintiff's claim cannot recover the alleged amount." *McPhail v. Deere & Co.*, 529 F.3d 947, 953 (10th Cir. 2008) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)) (internal citation omitted); ECF No. 6, ¶ 13. In *Young*, U.S. District Judge James O. Browning opined:

> The statutory amount-in-controversy requirement, which presently stands at $75,000.00, must be satisfied *as between a single plaintiff and a single defendant* for a federal district court to have original jurisdiction over the dispute; a plaintiff cannot aggregate independent claims against multiple defendants to satisfy the amount-in-controversy requirement, nor can multiple plaintiffs aggregate their claims against a single defendant to exceed the threshold. If multiple defendants are jointly liable, or jointly and severally liable, on some of the claims, however, the amounts of those claims may be aggregated to satisfy the amount-in-controversy requirement as to all defendants jointly liable for the claims. Similarly, multiple plaintiffs may aggregate the amounts of their claims against a single defendant if the claims are not separate and distinct.

Young v. Hartford Cas. Ins. Co., 503 F. Supp. 3d 1125, 1172–73 (D.N.M. 2020) (internal quotations and citations omitted) (emphasis added). Here, Plaintiffs' *Complaint* and response cement that they, explicitly, do not levy claims against or seek damages from KKG Building Co. Plaintiffs also do not seek injunctive or declaratory relief from KKG Building Co. *See* ECF No. 6, at 70 ("Plaintiffs pray for ... [a] declaratory judgment that the Defendants have violated the housing contract[.]") (presumably referring to KKG and/or Rooney); *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 897 (10th Cir. 2006) ("The Tenth Circuit has followed what has commonly been referred to as the 'either viewpoint rule' which considers either the value to the plaintiff or the cost to defendant of injunctive and declaratory relief as the measure of the amount in controversy for purposes of meeting the jurisdictional minimum.") (internal quotation omitted). Plaintiffs also do not allege that KKG Building Co. is jointly liable with its co-defendants. Nor is this a case where unquantifiable variables prevent the Court from declaring to a legal certainty that no jury would award Plaintiff more than $75,000; Plaintiffs, in their words, do not seek damages from KKG Building Co. and, when prompted by Defendants to their amount-in-controversy flaw, fail to respond. Accordingly, because Plaintiffs do not seek damages against KKG Building Co. and fail to plead an amount in controversy as to that Defendant, the Court dismisses KKG Building Co. from Count II for lacking subject matter jurisdiction.

***6** But wait, say Plaintiffs, KKG Building Co. is a Fed. R. Civ. P. 19(a)(1)(B) required party. "When applying Rule 19, a district court must first determine whether the absent party is necessary to the lawsuit[.]" *See Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999) (citing Fed. R. Civ. P. 19(a)). Necessity weighs three factors, including: "(1) whether complete relief would be available to the parties already in the suit, (2) whether the absent party has an interest related to the suit which as a practical matter would be impaired, and (3) whether a party already in the suit would be subjected to a substantial risk of multiple or inconsistent obligations." *Rishell v. Jane Phillips Episcopal*

Mem. Med. Ctr., 94 F.3d 1407, 1411 (10th Cir. 1996) (footnote omitted). [23] "If a necessary person cannot be joined, the court proceeds to the second step, determining 'whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, because the absent person ... is indispensable' to the litigation at hand." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003) (quoting Fed. R. Civ. P. 19(b)) (internal brackets omitted).

Plaintiffs bear the burden of demonstrating KKG Building Co.'s necessity, yet, beyond bare allusion to Fed. R. Civ. P. 19(a)(1)(B), make no effort to do so. *See Davis*, 192 F.3d at 951; ECF Nos. 6, ¶ 23; 24, at 17. Nor is it apparent to the Court whether joinder, in Plaintiffs' view, is warranted under Fed. R. Civ. P. 19(a)(1)(B)(i) or (ii). *See* Fed. R. Civ. P. 19(a)(1)(B); *see also* ECF No. 25, at 2, 4–8 (arguing for Langford's joinder under Fed. R. Civ. P. 19(a)). Considering, *sua sponte*, KKG Building Co.'s necessity under *Rishell*'s factors, none weigh in favor of KKG Building Co.'s joinder.

First, Plaintiffs fail to establish that complete relief cannot be granted among KKG and Rooney. [24] Though difficult to decipher, [25] Plaintiffs clarify that, under Count II, KKG's "actions" breached "two" contracts, including Plaintiffs' membership contracts with KKG in Ohio and their housing contracts with KKG Building Co. in Wyoming. ECF No. 24, at 14. As to Count III, Plaintiffs seemingly allege that KKG tortiously interfered with Plaintiffs' housing contracts – and, like Count II, not any improper action by KKG Building Co. ECF No. 6, ¶¶ 23 ("Plaintiffs do allege that Kappa Kappa Gamma Fraternity has interfered with their contractual relationship with [KKG Building Co.]."), 175. Because both contractual claims attack KKG's actions, not KKG Building Co., [26] complete relief can be granted among KKG and/or Rooney.

***7** Second, KKG Building Co. does not have an interest in this suit at risk of impairment. The Court's review of the housing contracts, in fact, belies Plaintiffs' contention that KKG Building Co. contracted with Plaintiffs to "provide housing in accordance with the Bylaws, Standing Rules, and Policies of Kappa Kappa Gamma." ECF Nos. 6, ¶ 170; 24, at 14. The only applicable section of the housing contracts states:

> **5. Other Services.** *The chapter* [*i.e.*, the UW chapter] *shall provide the student such services* as are customarily furnished by the chapter to residents of the chapter house, subject to this contract, the Kappa Kappa Gamma Fraternity *Bylaws*, *Standing Rules and Policies*; and rules and regulations of the chapter, including, without limitation, the House Rules attached hereto as Exhibit, subject to any changes may be made by the chapter, House Board or the Fraternity at any time.

ECF No. 6-1, at 166–67 (identifiers omitted) (emphasis added). Notified of the lacking contractual language supporting their claim, Plaintiffs, once again, fail to respond. *See* ECF Nos. 20, at 19; 24. Thus, a key allegation to keep KKG Building Co. in this lawsuit – that KKG Building Co. is contractually obligated to provide housing per headquarters policy – withers under the Court's glancing scrutiny; if anything, the UW chapter must abide by such policies, not KKG Building Co. ECF No. 6, ¶ 170. Furthermore, it is KKG's policies that underpin the sorority's alleged breach and tortious interference; under Plaintiffs' view, this case turns on KKG's governing documents, not an independent non-profit confined to housing issues, of which any interests held are adequately represented by KKG and/or Rooney. *See id.*, ¶¶ 170, 175; *EquiMed, Inc. v. Genstler*, 170 F.R.D. 175, 179 (D. Kan. 1996) (finding that joinder of an absent party was not necessary if its interests were adequately represented by present parties) (citing *Rishell*, 94 F.3d at 1411–12); *Portable Solar, LLC v. Lion Energy, LLC*, No. 22-CV-00026-DAK, 2022 WL 3153869, at *2 (D. Utah Aug. 8, 2022) (noting that in tortious interference cases, courts should determine necessity "by evaluating whether the absent party's rights or obligations under an existing contract have necessarily become implicated"). However ineloquent, Plaintiffs' housing contracts with KKG Building Co., while possibly relevant to damages down the road, are *not* the subject of this litigation. *See Wolf Mountain Resorts, LC v. Talisker Corp.*, No. 07–CV–00548DAK, 2008 WL 65409, at *3 (D. Utah Jan. 4, 2008) ("It is well-established that a party to a contract *which is the subject of the litigation*

is considered a necessary party.") (internal citation omitted) (emphasis added).

Third, there is no evidence to support an assertion that KKG or Rooney would be subject to a substantial risk of multiple or inconsistent obligations if KKG Building Co. was removed from this lawsuit. "Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident." *Sonnett v. Lankford*, No. 15–CV–0024–SWS, 2016 WL 9105175, at *2 (D. Wyo. Mar. 16, 2016) (internal quotation omitted). In short, nothing before the Court indicates that KKG or Rooney's abilities to protect their interests would be hindered by dismissing KKG Building Co.

Therefore, the Court finds that KKG Building Co. is not a Fed. R. Civ. P. 19(a)(1)(B) necessary party. [27] The action proceeds, as does the Court, without KKG Building Co.

B. *The Court's Personal Jurisdiction over Rooney.*

***8** Shouldering their burden, Plaintiffs demonstrate this Court's personal jurisdiction over Rooney. The parties dispute Rooney's contacts with Wyoming. On one hand, Plaintiffs say that this Court has specific jurisdiction over a derivative suit against Rooney, a corporate official, in Wyoming, where alleged injury, past and future, occurred. *See* ECF No. 24, at 2 (citing *Newsome v. Gallacher*, 722 F.3d 1257 (10th Cir. 2013)). Defendants counter that Plaintiffs levy no allegation that Rooney directed any conduct at Wyoming. *See* ECF No. 26, at 3–4.

Plaintiffs assert one sect of personal jurisdiction – to wit, specific – which allows this Court to haul a nonresident defendant to Wyoming federal court. *See OMI Holdings, Inc.*, 149 F.3d at 1090–91. [28] Specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation, citation, and brackets omitted). "To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show that jurisdiction is legitimate under the laws of the forum state [29] and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Towne*, 46 F.3d at 1074.

Notably, "[s]pecific jurisdiction is proper if (1) the out-of-state defendant 'purposefully directed' its activities at residents of the forum State, and (2) the plaintiff's alleged injuries 'arise out of or relate to those activities.' " *XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 840 (10th Cir. 2020) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Challenged today, purposeful direction [30] "calls for an inquiry into whether [Plaintiffs] have shown that [Rooney's] acts were (1) intentional, (2) 'expressly aimed' at Wyoming, and (3) done with 'knowledge that the brunt of the injury would be felt' in Wyoming." *Eighteen Seventy, LP v. Jayson*, 32 F.4th 956, 959 (10th Cir. 2022) (quoting *Dudnikov*, 514 F.3d at 1072). [31]

***9** Plaintiffs plead Rooney's [32] purposeful direction. Plaintiffs allege that Rooney, despite "aware[ness]" of Langford's ineligibility, "violated [her] fiduciary duties to [KKG] when [she] procured and approved the initiation of" Langford. ECF No. 6, ¶¶ 49, 105. Thus, the first element, intentional action, is satisfied; the record contains no suggestion that Rooney acted unintentionally when, accepted as true, she approved Langford's initiation following the UW chapter's invitation. While the parties disagree when Rooney, or others on the Fraternity Council, knew about Langford's invitation to join the UW chapter, Rooney's approval of Langford's induction, as alleged, occurred thereafter. *See* ECF Nos. 20, at 12 n.6; 24, at 8.

The second element, express aiming at Wyoming, is more difficult for Plaintiffs, but is nonetheless cleared. Yes, Plaintiffs' *Complaint* lacks reference to Rooney's dealings with the UW chapter as President or her personal sign-off on Langford's admission thirteen hundred miles away. The email from Executive Director [33] Kari Kittrell Poole – informing Plaintiffs that their "concerns were reviewed by several national officers of the organization" and "we believe proceeding with [Langford's] initiation is the appropriate next step" – goes both ways; while that email could refer to any of the other six members of the Fraternity Council, excluding Rooney, it is obviously feasible that the Fraternity Council's corporate secretary was referring to the president [34] of that body when she used "we". ECF No. 6, ¶¶ 93, 141. Forgoing separation of their purposeful direction analysis by element, Defendants lean upon, without naming, the fiduciary shield doctrine. *See* ECF No. 20, at 8–9 (quoting *Christian v. Loyakk, Inc.*, No. 19-CV-220-F, 2023 WL 170868, at *14 (D. Wyo. Jan. 12, 2023)) (also quoting *Virgin Enter. Ltd. v. Virgin LLC*, No. 19-CV-220-F, 2019 WL 13222758, at *3

(D. Wyo. Dec. 30, 2019), that dealt with foreign service of process and is inapposite). Under that doctrine,[35] even if a particular employee has "substantial contacts" with the forum state, "those contacts will not count against the employee in the personal jurisdiction analysis so long as the employee acted solely on the corporation's behalf." *Newsome*, 722 F.3d at 1275. Given that Rooney undoubtedly has not had "substantial contacts" with Wyoming, Defendants appear to be arguing that contacts by Rooney's "workforce" (*e.g.*, KKG-employed alumnae advisers at the UW chapter or Executive Director Poole)[36] in Wyoming do not convey this Court's personal jurisdiction over Rooney. ECF No. 6, ¶ 74; *see, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 286 (2014) ("Due process requires that a defendant be haled into court in a forum State based on h[er] own affiliation with the State, not based on the ... 'attenuated' contacts [s]he makes by interacting with other persons affiliated with the State.") (quoting *Burger King Corp.*, 471 U.S. at 475).

***10** Fair enough. Nevertheless, accepting Plaintiffs' allegation that Rooney approved Langford as true, as I must, the " 'focal point' " of Rooney's actions occurred in Wyoming. *See Dudnikov*, 514 F.3d at 1076–77 (quoting *Calder v. Jones*, 465 U.S. 783, 789 (1984)). Langford's admission, however minor among thousands across 140 chapters each fall and spring, occurred at a KKG chapter house in Wyoming; Rooney's alleged sign-off was an "intentional action[ ] that [was] expressly aimed at" Wyoming. *See id.* (finding express aiming where the defendants intended "to halt a Colorado-based sale by a Colorado resident" and the presiding-state's location was obvious from an eBay auction page) (emphasis altered). Moreover, a corporate officer[37] may be sued in a derivative action where the injury occurred. *See, e.g.*, *Newsome*,[38] 722 F.3d at 1268–69 (finding personal jurisdiction where corporate directors expressly aimed their wrongdoing at Oklahoma when they saddled a subsidiary company, knowing it "operated exclusively" in Oklahoma, with overwhelming debt).

The final element of purposeful direction "concentrates on the consequences of the defendant's action–where was the alleged harm actually felt by the plaintiff." *Dudnikov*, 514 F.3d at 1075. I look, once again, to *Newsome*, where the Tenth Circuit found that a Delaware corporation and its creditors, to whom the defendants owed fiduciary duties, were injured primarily in Oklahoma because "the individual defendants knew that the brunt of any injury to [the corporation] would be felt in Oklahoma." *See* 722 F.3d at 1269 (citing *Dudnikov*, 514 F.3d at 1077). KKG operates via its Gamma Omicron chapter in Wyoming; when Rooney approved Langford's admission, injury, if any, would occur on campus in Laramie, Wyoming. ECF No. 6, ¶¶ 166–67. Therefore, Rooney "purposefully directed" her activities at Wyoming.[39] *See Dudnikov*, 514 F.3d at 1078 (internal quotation marks omitted).

Plaintiffs demonstrate this Court's personal jurisdiction over Rooney. The Court proceeds to the merits.

C. *Count I: Plaintiffs' Derivative Claim.*

Defendants critique Count I in two ways, including Plaintiffs': (1) failure to demonstrate futility under Ohio law; and (2) seeking of relief contravening a voluntary organization's freedom of association. While Plaintiffs demonstrate futility under Ohio law, their derivative claim against Rooney[40] fails to escape KKG's First-Amendment-protected freedom of expressive association to include transgender members.

1. Ohio Civ. R. 23.1 Futility.

***11** I begin with Defendants' argument of lacking Ohio Civ. R. 23.1 specificity. Due to KKG's incorporation in Ohio, Ohio law governs Plaintiffs' derivative claim.[41] "When members bring a derivative action against a nonprofit corporation, they are enforcing a corporate right just as shareholders in for-profit corporations." *Russell v. United Missionary Baptist Church*, 92 Ohio App. 3d 736, 739 (12th Dist. 1994); Ohio Rev. Code Ann. § 1702.12(I)(1)(c). Governing derivative actions, Ohio Civ. R. 23.1 states:

> **Derivative Actions by Shareholders.** ... The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and, if necessary, from the shareholders and the reasons for his failure to obtain the action or for not making the effort.

Ohio Civ. R. 23.1; *see also* Fed. R. Civ. P. 23.1(b)(3)(A).[42] " '[N]o shareholder has an independent right to bring suit *unless* the board [of directors] refuses to do so *and* that refusal i[s]

wrongful, fraudulent, or arbitrary, or is the result of bad faith or bias on the part of the directors.' " *In re Cardinal Health, Inc. Derivative Litig.*, 518 F. Supp. 3d 1046, 1064 (S.D. Ohio 2021) (quoting *Drage v. Procter & Gamble*, 119 Ohio App. 3d 19, 24 (1st Dist. 1997)) (emphasis in original). Failure to make this pre-suit demand is excused, however, when a plaintiff can demonstrate that the demand would have been futile. *Id.* (citing *Drage*, 119 Ohio App. 3d at 25).

> Ohio courts have found a demand presumptively futile '*where the directors are antagonistic, adversely interested, or involved in the transactions attacked*.' Likewise, for example, a demand may also be excused 'when all directors are named as wrongdoers and defendants in a suit, when there is self-dealing by the directors such that the directors gain directly from the challenged transactions, or when there is domination of nondefendant directors by the defendant directors.'

In re Ferro Corp. Derivative Litig., 511 F.3d at 618–19 (quoting *Bonacci*, 1992 WL 181682, at *4 and *Carlson*, 152 Ohio App. 3d at 681) (emphasis added). Defendants argue that Plaintiffs' failure to elevate their concerns to the Fraternity Council and identify violated KKG bylaws belies futility. *See* ECF No. 20, at 11–12. Plaintiffs counter, sans state authority, that they and other relatives [43] pestered KKG for months prior to Langford's induction and were ultimately rejected by Executive Director Poole's email in mid-November 2022. *See* ECF Nos. 24, at 10; 6, ¶ 165; 6-1, at 45–47.

***12** Plaintiffs plead specific facts to demonstrate that the Fraternity Council, akin to Kappa's board of directors, [44] is "antagonistic, adversely interested, or involved in the transactions attacked." *See In re Ferro Corp. Derivative Litig.*, 511 F.3d at 618; *see also Leff v. CIP Corp.*, 540 F. Supp. 857, 868–69 (S.D. Ohio 1982) (when evident from a complaint that the directors of a corporation would oppose a derivative suit, formal demand on the directors is considered futile and unnecessary). Though demand futility in Ohio is no "easy task," [45] further efforts by Plaintiffs to convince the Fraternity Council to alter their stance on admitting "individuals who identify as women" would be futile. For months ahead of Langford's induction, Plaintiffs, their families, and counsel petitioned Executive Director Poole, Rooney, KKG district and content directors, and KKG alumni representatives to overrule the UW chapter's decision. ECF Nos. 6-1, at 178–79; 24, at 9–11; 27-1, at 1. Addressing KKG leadership, including Rooney, Plaintiffs' counsel communicated the crux of their future claims, including "a breach of contract and a violation of Kappa Kappa Gamma's by-laws and standing rules", recounted their failed efforts thus far (*e.g.*, being "told that their values don't align with those of Kappa so they should reconsider being in Kappa"), and requested that the Fraternity Council "legally alter the sorority's membership requirements and conduct a valid vote in accord with existing rules or halt the illegal course of conduct being pursued[.]" ECF No. 6-1, at 179–80 (internal quotation marks and errant comma omitted). Rooney, Executive Director Poole, and other Fraternity Council members are the same officers who purportedly approved Langford; under Plaintiffs' theory, Rooney and other directors violated KKG's bylaws [46] – of course the Fraternity Council would oppose Plaintiffs' federal lawsuit. Finding futility under Ohio Civ. R. 23.1, the Court forges on.

2. Kappa Kappa Gamma's Freedom of Expressive Association.

After much leadup, the Court turns to the gravamen of Plaintiffs' lawsuit. Their derivative claim condenses to this: from 1870 to 2018, KKG defined "woman" to exclude transgender women; any new definition may not be enacted, *ultra vires*, without a KKG bylaw amendment. [47] Expectedly, Defendants counter: private organizations may interpret their own governing documents and define "woman" as including transgender women. [48]

Defendants are correct. Defining "woman" is Kappa Kappa Gamma's bedrock right as a private, voluntary organization – and one this Court may not invade. Below, I apply Ohio and U.S. Supreme Court jurisprudence to the facts at bar.

First, Ohio law is highly deferential to associational interpretation. "As a general rule, Ohio courts are unwilling to interfere with the management and internal affairs of a voluntary association." *Redden v. Alpha Kappa Alpha Sorority, Inc.*, No. 09CV705, 2010 WL 107015, at *5 (N.D. Ohio Jan. 6, 2010). More specifically:

> [T]hose who become members of non-profit corporations are presumed to have joined them with knowledge of their nature and the law applicable to them, and to have consented to be bound by the principles and rules

> of government, *or the policy which they have adopted, or may adopt* .. . [T]he member has, by voluntarily becoming a member of the order, chosen his forum for the redress of his grievances, and *unless there has been some palpable violation of the constitution or laws of the corporation whereby he has been deprived of valuable rights, the civil courts will not interfere.*

***13** *Powell v. Ashtabula Yacht Club*, No. 953, 1978 WL 216074, at *3 (11th Dist. Dec. 4, 1978) (internal citations omitted) (emphasis added) (rejecting a member's plea to overturn the termination of his club membership where the club met due process requirements, including facilitating the member's presence and opportunity to be heard at a hearing); *see Stibora v. Greater Cleveland Bowling Ass'n*, 63 Ohio App. 3d 107, 113 (8th Dist. 1989) (" 'A voluntary association may, without direction or interference by the courts, for its government, adopt a constitution, by-laws, rules and regulations which will control as to all questions of discipline, *or internal policy and management*, and its *right to interpret and administer the same is as sacred as the right to make them.*' ") (quoting *State ex rel. Givens v. Superior Court of Marion Cnty.*, 233 Ind. 235, 238 (1954)) (emphasis added); *Putka v. First Catholic Slovak Union*, 75 Ohio App. 3d 741, 748 (8th Dist. 1991), *cert. denied*, 503 U.S. 986 (1992) ("Generally speaking, in matters of policy, discipline or internal economy of a voluntary association, wherein the members have mutually agreed upon a charter or rules, the decision of the association itself is supreme.") (internal citation omitted).

I turn to guidance from the United States Supreme Court. In *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (Rehnquist, C.J.), the Court held that the application of New Jersey's nondiscrimination law, requiring the Boy Scouts to appoint James Dale, an openly gay man as a scoutmaster, ran "afoul of the Scouts' freedom of expressive association."[49] *Id.* at 656. The Court found that a state compelling the Scouts to include Dale would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Id* at 653–54. "[T]he First Amendment simply *does not require that every member of a group agree on every issue* in order for the group's policy to be 'expressive association.' The Boy Scouts takes an official position ... and that is sufficient for First Amendment purposes."[50] *Id.* at 655 (emphasis added). Chief Justice Rehnquist concluded:

> 'While the law is free to promote all sorts of conduct in place of harmful behavior, *it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one*, however enlightened either purpose may strike the government.'

Id. at 661 (quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995)) (emphasis added). *Dale*'s takeaway for the Court: the government may not defy the internal decision-making of a private organization, including the criteria governing that entity's membership.[51]

***14** Voluntary organizations beget benefits and drawbacks. KKG provides community on campus and a professional network for life,[52] Forty-four women in Laramie seemingly prioritized those benefits when they rushed. Membership, on the other hand, relinquishes a dose of personal autonomy. That organization may say or publish something anathema to one or a faction of members. Take the 2018 *Guide*, speech that Plaintiffs undoubtedly disagree with. Just as the Boy Scouts were "an expressive association" entitled to First Amendment protection, so too is Kappa Kappa Gamma.[53] *See Dale*, 530 U.S. at 647–56, 650 ("It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."). The law, or this Court, may not interfere with – whether promoting or discouraging – that speech. *Dale* controls today, interestingly with the shoe on the other foot.[54] Whether excluding gay scoutmasters in *Dale* or including transgender women in Kappa, this Judge may not invade Kappa's sacrosanct, associational right to engage in protected speech. KKG's "official position" of admitting transgender women, even if decreed by a mere "delegate", is speech which this Court may not impinge. *See Dale*, 530 U.S. at 655; *Sebelius*, 723 F.3d at 1149 (Hartz, J., concurring). Notably, there are also two associational layers before the Court. Not only did KKG headquarters publish their willingness to accept transgender women in 2018, the UW chapter voted to associate with Langford in 2022. *See Dale*, 530 U.S. at 658 ("Impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment.") (internal quotation and brackets omitted). Cognizant of Langford's gender identity, the UW chapter determined that she met *their* criteria for membership, including, *inter alia*, "integrity, respect, and regard for others"; KKG confirmed the same

thereafter. ECF No. 6-1, at 6–7. Their decisions lie beyond the purview of this Court.

Plaintiffs respond that Kappa's freedom of expressive association does not insulate the organization from amendment of its own bylaws. I disagree, especially where Plaintiffs cannot point the Court to the bylaw that defines "woman" the way they wish. Of course, an organization binds itself via its bylaws. [55] Those bylaws state that a new Kappa "shall be a woman". [56] ECF No. 6-1, at 6. The parties diverge from there. Whereas Plaintiffs circumscribe "woman", their delegate augmented the same. *See* ECF No. 24, at 11. In the Court's view, that is a lawful interpretation – explicitly authorized per the sorority's *Standing Rules* – of an otherwise-silent bylaw. *See* ECF No. 6-1, at 119 ("The administrative duties of Fraternity Council shall include ... [i]nterpreting the Fraternity *Bylaws* and *Standing Rules*[.]"). Plaintiffs' plea that the Court interpret "woman" as it was in 1870 clashes with this and other Courts' deference to organizational autonomy, or the notion that organizations deserve considerable latitude to interpret their own bylaws. For instance, the *Powell* court in Ohio spotlighted an exception to courts' general unwillingness to interfere with a voluntary association when "there has been some palpable violation of the constitution or laws of the corporation whereby [the member] has been deprived of valuable rights." 1978 WL 216074, at *4. Plaintiffs make no such showing. Instead, they ask this Court to overrule one interpretation and inject another. The Court refuses to do so.

***15** Though an akin bylaw-interpretation, derivative challenge is non-existent, the Court's approach today, from a policy perspective, is practical. This Court cannot step in every time a member, or even multiple members, cries foul when a bylaw is disparately interpreted; if it did, KKG and its Fraternity Council would spend their days responding to derivative suits from their thousands of current members and 210,000 alumnae. *See also Barrash v. Am. Ass'n of Neurological Surgeons, Inc.*, No. 13–cv–1054, 2013 WL 4401429, at *6 (S.D. Tex. Aug. 13, 2013) (noting that such interference would subject a non-profit, private organization to "frustration at every turn" and cause it "to founder in the waters of impotence and debility"). Our federal and state courts would similarly be overrun with disgruntled members challenging large organizations. Consider, also, that KKG supervises 140 chapters nationwide; reception of contested speech in today's climate will obviously vary. Finally, Plaintiffs' alternative recourse lies within their chapter and organization, not this Court. An appeal to other chapters is one such route; disassociation, while drastic, is another.

In summary, the delegate of a private, voluntary organization, in pursuit of "inclusiv[ity]", broadened its interpretation of "woman". ECF No. 6-1, at 105. The Court will not interfere with its result, nor invade the organization's freedom of expressive association. Accordingly, this Court dismisses Count I. [57]

D. *Count II: Plaintiffs' Breach of Contract Claim.*

Plaintiffs fail to demonstrate any breach of contract. Plaintiffs allege KKG's breach of two contracts, including Plaintiffs': (1) membership contracts with KKG under Ohio law; and (2) housing contracts with KKG Building Co. under Wyoming law. [58] *See* ECF Nos. 24, at 14; 6-1, at 163, 165–76. Defendants respond that Plaintiffs do not allege any plausible breach of their housing contracts. *See* ECF Nos. 20, at 18; 26, at 7.

Defendants are correct on both contracts. I begin with Plaintiffs' membership contracts with KKG. Under Ohio law, "[t]o establish a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damages or loss resulting from the breach." *In re Fifth Third Early Access Cash Advance Litig.*, 925 F.3d 265, 276 (6th Cir. 2019) (internal quotation omitted); *Tel. Mgmt. Corp. v. Goodyear Tire & Rubber Co.*, 32 F. Supp. 2d 960, 969 (N.D. Ohio 1998) ("A breach of contract is a failure without legal excuse to perform any promise that forms a whole or a part of a contract.") (internal citation omitted). Entirely unalleged in their *Complaint*, Plaintiffs supplement that KKG's admission of Langford in the UW chapter house "created a breach of contract as to ... the sorority experience[.]" *See* ECF No. 24, at 14. While Plaintiffs and KKG formed a membership contract and Plaintiffs appear to have performed, any demonstration of element (3) is absent; Plaintiffs fail to point the Court to any contractual breach by KKG. *See* ECF No. 6-1, at 163. The Court admits its confusion as to what contractual language KKG, in Plaintiffs' view, breached. *See id.*; *Allied Erecting and Dismantling Co., Inc. v. Genesis Equip. & Mfg., Inc.*, 649 F. Supp. 2d 702, 728 (N.D. Ohio 2009) ("[W]here a contract is clear and unambiguous, the court need not ... go beyond the plain language of the agreement to determine the rights and obligations of the parties.") (internal quotation omitted). If anything, the membership contract primarily outlines Plaintiffs' obligations. *See id.*

Plaintiffs make no effort to contend otherwise.[59] Giving effect to the membership contract before the Court, KKG undertook no contractual obligation to reject transgender women. Accordingly, Plaintiffs fail to allege a breach of their membership contracts.

***16** Reverting to Wyoming law, I turn to Plaintiffs' housing contracts.[60] Here, a breach of contract claim consists of: (1) " 'a lawfully enforceable contract;' " (2) " 'an unjustified failure to timely perform all or any part of what is promised [*i.e.*, the breach];' " and (3) " 'entitlement of the injured party to damages.' " *Peterson v. Meritain Health, Inc.*, 508 P.3d 696, 705 (Wyo. 2022) (quoting *Halling v. Yovanovick*, 391 P.3d 611, 616–17 (Wyo. 2017)) (internal brackets omitted). Plaintiffs allege that KKG breached their housing contracts by allowing transgender women to live in the chapter house in violation of KKG's governing documents. *See* ECF Nos. 6, ¶¶ 170–72; 24, at 14. Once again, though, Plaintiffs fail to cite the Court to any explicit breach within the housing contracts; the Court's analysis, thus, fails at element (2). ECF No. 6-1, at 165–76. As developed in Section A. *supra*, the Court's review of the housing contract contradicts Plaintiffs. Within those contracts, any obligations to comply with KKG's "*Bylaws, Standing Rules and Policies* ('Fraternity standards')" were either undertaken by the UW chapter or Plaintiffs themselves. *See, e.g.*, *id.* at 166–67, 168 ("The student ... shall, at all times, comply with all ... the Fraternity Standards. The student acknowledges that it is their responsibility to seek out, read and understand ... the Fraternity standards and they agree to follow the same.").[61] Plaintiffs fail to show how KKG's receptive stance towards transgender women "forms the whole or part of" their housing contracts. *See Reynolds v. Tice*, 595 P.2d 1318, 1323 (Wyo. 1979). Nowhere in the housing contracts do the parties contract an obligation to "provide housing in accordance with" KKG's governing documents; Plaintiffs may not impose such an obligation on Defendants absent from those contracts. ECF No. 6, ¶ 170.

Accordingly, the Court dismisses Count II.[62]

E. *Count III: Plaintiffs' Tortious Interference Claim.*

Plaintiffs also fail to allege any tortious interference of contract. Plaintiffs claim that KKG[63] tortiously interfered with their housing contracts by inducting a transgender woman in violation of KKG's governing documents. ECF No. 6, ¶¶ 173–75. Defendants regurgitate that, without a breach of a housing contract, there can be no tortious interference with that contract. *See* ECF No. 20, at 20.

I concur with Defendants. To show tortious interference with a contract, Plaintiffs must allege: "(1) the existence of the contract; (2) the defendant's knowledge; (3) intentional and improper interference *inducing or causing a breach*; and (4) resulting damages." *First Wyo. Bank v. Mudge*, 748 P.2d 713, 715 (Wyo. 1998) (emphasis added) (citing Restatement (Second) of Torts, § 766 (Am. Law. Inst. 1979)). Inseverable from the Court's analyses above, Plaintiffs make no effort to demonstrate that KKG induced or caused a breach or termination of their housing contracts. *See USI Ins. Servs. LLC v. Craig*, No. 18-CV-79-F, 2019 WL 5295533, at *9–10 (D. Wyo. Apr. 9, 2019) (rejecting a tortious interference claim where a plaintiff failed to show a breach of contract "[s]ince the third element of this tort requires an underlying breach of a contract"); ECF No. 24, at 14–20. Plaintiffs fail to even attempt their burden. *See* ECF No. 24; *Gore v. Sherard*, 50 P.3d 705, 710 (Wyo. 2002) (internal citation omitted). Given Plaintiffs' failure to allege a breach or termination by KKG, the Court need go no further.

Accordingly, the Court dismisses Count III.[64]

F. *Count IV: Plaintiffs' Direct Claim.*

Plaintiffs fail to allege a direct claim against Rooney. Count IV appears to allege that Plaintiffs suffered direct injuries due to KKG and Rooney's admission of Langford. ECF No. 6, ¶¶ 176–79. Defendants argue that Plaintiffs' contention that they suffered "individual legal harm distinct" from their derivative claim on behalf of all Kappa members is wanting. *See* ECF No. 20, at 20–22. Plaintiffs copy and paste allegations within their *Complaint* in response. *Compare* ECF No. 24, at 16–17, *with* ECF No. 6, ¶ 12.

***17** Plaintiffs have not shown a special duty, nor a separate and distinct injury, to sustain their direct claim. Unlike a derivative action filed on behalf of a corporation, a shareholder may bring a direct action "against a director or officer[65] of the corporation '(1) where there is a special duty, such as contractual duty, between the wrongdoer and the shareholder, *and* (2) the shareholder suffered an injury separate and distinct from that suffered by other shareholders.' " *Morgan v. Ramby*, Nos. CA2010–10–095, CA2010–10–101, 2012 WL 626209, at *4 (12th Dist. Feb. 27, 2012) (quoting *Herman's, Inc. v. Sach–Dolmar Div.*, 87 Ohio App. 3d 74, 77 (9th Dist. 1993)) (emphasis in original);

see also Heaton v. Rohl, 193 Ohio App. 3d 770, 782 (11th Dist. 2011) (noting that a shareholder may bring a direct action where they demonstrate a special duty *or* a separate and distinct injury) (internal citation omitted).

First, Plaintiffs do not allege a special duty. Injury flowing "from a breach of corporate fiduciary duty" – as Plaintiffs briefly allude to – "amounts to nothing more than loss of the [non-profit corporation's] value, which is an injury shared in common with all other stockholders," or here, KKG members nationwide, and should be brought as a derivative action. *See* ECF No. 24, at 16; *Barr v. Lauer*, No. 87514, 2007 WL 117502, at *2 (8th Dist. Jan. 18, 2007); *Carlson*, 152 Ohio App. 3d at 679 ("As a general proposition, claims for breach of fiduciary duties on the part of corporate directors or officers are to be brought in derivative suits."); *see also Weston v. Weston Paper & Mfg. Co.*, 74 Ohio St. 3d 377, 379 (Ohio 1996) (rejecting plaintiffs' argument that breach-of-fiduciary-duties claims against corporate directors should be allowed as a direct action in the absence of injury separate and distinct from the corporation). Moreover, for reasons articulated in Section C. above, Plaintiffs have not shown that Rooney breached any fiduciary duty to Plaintiffs by interpreting "woman" expansively.

Second, they also do not demonstrate a separate and distinct injury. Plaintiffs allege that their "loss of privacy, frustration of contractual expectations, and emotional distress" from Langford's induction are unique injuries. ECF No. 6, ¶ 179. However, Plaintiffs sue Rooney, not their sorority sister; thus, only their frustrated contractual expectations merit consideration. Under Plaintiffs' theory, Rooney's actions contravene their pre-rush intent to join an organization that excludes transgender women. Yet, injury, if any, from Rooney's purported orchestration of Langford's admission inured to all KKG members alike, whether in Laramie or beyond, not merely Plaintiffs. In other words, Plaintiffs' putative injury – association with a transgender woman – technically affected all KKG members. Therefore, Plaintiffs' claims at bar, forgoing their determined unviability, belong as a derivative suit rather than a direct action. *See Grand Council of Ohio v. Owens*, 86 Ohio App. 3d 215, 220 (10th Dist. 1993) (determining that plaintiffs brought a derivative claim by "look[ing] to the nature of the alleged wrong rather than the designation used by plaintiffs"). Therefore, Plaintiffs fail to plead a special duty, nor a separate and distinct injury, to sustain their direct claim.

Accordingly, the Court dismisses Count IV. [66]

G. *Dismissal without Prejudice and Langford's* Motion to Dismiss *(ECF No. 22)*.

***18** Finally, Defendants argue that the Court should dismiss Plaintiffs' claims with prejudice. *See, e.g.*, ECF Nos. 20, at 22; 26, at 10. " '[A] dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) *and* granting leave to amend would be futile.' " *Seale v. Peacock*, 32 F.4th 1011, 1027 (10th Cir. 2022) (quoting *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (internal citation omitted)) (emphasis in original) (brackets omitted). Defendants make no effort to argue futility and do not otherwise explain why dismissal with prejudice is appropriate; accordingly, the Court will dismiss Plaintiffs' claims without prejudice. [67]

Furthermore, due to the Court's dismissal today of Plaintiffs' four claims, the Court also dismisses Langford's *Motion to Dismiss* (ECF No. 22) as moot. [68]

CONCLUSION

For the foregoing reasons, Plaintiffs' four claims fail. Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant KKG Building Co. is dismissed. Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs' four claims against Defendants KKG and Rooney are dismissed without prejudice.

Therefore, IT IS **HEREBY ORDERED** that Defendants', Kappa Kappa Gamma, Rooney, and KKG Building Co., *Motion to Dismiss* (ECF No. 19) is **GRANTED**.

Furthermore, IT IS **HEREBY ORDERED** that Plaintiffs' *First Amended Verified Member Derivative Complaint for Breach of Fiduciary Duties* (ECF No. 6) against Defendants is **DISMISSED WITHOUT PREJUDICE**.

Finally, IT IS **HEREBY ORDERED** that Defendant Langford's *Motion to Dismiss with Prejudice* (ECF No. 22) is **DISMISSED AS MOOT**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 5533307

Footnotes

1 Recounting the pertinent facts, *infra*, the Court wades through a well-researched, yet meandering, complaint; for example, despite a seventy-two-page complaint excluding attachments, Plaintiffs devote four-and-a-half pages to their actual claims. Only the facts relevant to the four claims Plaintiffs bring against Defendants are outlined today. Those facts are accepted as true for the purpose of resolving the motion at bar. ECF No. 6; *see also* ECF Nos. 20, 24, 26. The Court also looks to documents attached as exhibits to Plaintiffs' *Complaint. See* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991) ("A written document that is attached to the complaint as an exhibit is considered part of the complaint and may be considered in a Rule 12(b)(6) dismissal.") (internal citations omitted).

2 KKG filed its *Articles of Incorporation* with the Ohio Secretary of State in 1930. ECF No. 6-1, at 56.

3 KKG considers itself a "fraternity" in its governing documents. *E.g.*, ECF No. 6-1, at 5. However, emulating Plaintiffs and our national discourse, the Court refers to KKG as a "sorority".

4 The *Standing Rules* state that "[a]ctive members shall be responsible for selecting new members of their chapter." ECF No. 6-1, at 111.

5 When a new member, following acceptance of a local chapter's invitation, accepts admission to KKG and annually thereafter, she pledges to "uphold the [KKG] *Bylaws, Standing Rules and Policies* as well as [her] chapter Bylaws and Standing Rules." ECF No. 6-1, at 163.

6 The parties dispute when KKG began to allow transgender women to qualify for membership. While Defendants allege that Kappa has allowed transgender women admission since 2015, Plaintiffs respond that "there is no evidence of this fact." *See* ECF Nos. 20, at 3; 24, at 3. The parties agree that KKG published its *Guide* in 2018. *See* ECF Nos. 6, ¶ 5; 20, at 4.

7 The *Position Statements* also note that "[e]ach chapter of Kappa Kappa Gamma has the final choice of its own members." ECF No. 6-1, at 183.

8 The *FAQs* state:

> We also look to NPC [National Panhellenic Conference ("NPC")] policy as an NPC member organization. The NPC Recruitment Eligibility (2020) policy states: 'For the purpose of participation in Panhellenic recruitment, woman is defined as an individual who consistently lives and self-identifies as a woman. Each women's-only NPC member organization determines its own membership selection policies and procedures.'
>
> ...
>
> **Why are we including gender-neutral pronouns in the revised documents?**
>
> This change is coming from a Convention resolution that formed Kappa's Diversity, Equity and Inclusion Committee. Kappa Kappa Gamma was founded 150 years ago on the principles of integrity, respect and regard for others. *Kappa has reflected on the path forward, and we are beginning with actions that speak to our belief that all members are valued. This is one of those action steps. We want to be as inclusive of all members as we can be.*

ECF No. 6-1, at 105 (emphasis in original and added).

9 *See also* ECF No. 6-1, at 59 ("Inclusivity. Since diversity, equity and inclusion have been a focus and the subject of a previous resolution at [the] Convention, a concerted effort has been made to make sure the language of the documents is inclusive.").

10 *See also* Kappa Kappa Gamma Fraternity Council, available at: https://www.kappakappagamma.org/why-kappa/our-leadership-team/fratemity-council/ (accessed Aug. 25, 2023).

11 In accordance with Tenth Circuit guidance, the Court twice denied Plaintiffs' request to proceed anonymously in this matter. ECF Nos. 3, 5. On April 20, 2023, complying with the Court's instruction, Plaintiffs filed an amended complaint featuring their true names. ECF No. 6.

12 Though not seeking damages from KKG Building Co., Plaintiffs allege that KKG Building Co. is a Fed. R. Civ. P. 19(a)(1)(B) required party to this action because five Plaintiffs signed housing contracts with KKG Building Co. for the 2022–23 academic year. ECF No. 6, ¶¶ 23, 84.

13 The UW chapter *Bylaws* state that membership "shall be in accordance with the provisions of the Fraternity [*i.e.*, KKG] *Bylaws*." ECF No. 6-1, at 200.

14 "Transgender" is a broad, umbrella term that is often used for individuals whose brain sex, gender identity, or gender expression either does not or is perceived not to match the physical sex they were assigned at birth. *See* Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 399 n.1 (2012).

15 Like KKG Building Co., Plaintiffs do not seek damages or relief from Langford, but label her a Fed. R. Civ. P. 19(a)(1)(B) required party. ECF No. 6, ¶ 1 n.2.

16 Given Plaintiffs' dual dearth of claims against Langford and their inability to connect their allegations concerning Langford's behavior to their four causes of action against the remaining Defendants, the Court sees no reason to recount Plaintiffs' peripheral allegations against Langford.

17 A derivative cause of action against an Ohioan non-profit corporation "seeks to vindicate the duty owed by the board of the corporation to the corporation as a whole and not a duty that is owed to a particular member or shareholder." *Wood v. Cashelmara Condo. Unit Owners Ass'n, Inc.*, No. 110696, 2022 WL 1422807, at *4–5 (8th Dist. May 5, 2022).

18 Ohio law provides members of non-profit corporations with a derivative cause of action on behalf of the corporation; § 1702.12, *inter alia*, states:

> (I)(1) No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except as follows:
>
> ...
>
> (c) By a member as such or by or on behalf of the members against the corporation, a director, an officer, or a member as such.

Ohio Rev. Code Ann. § 1702.12(I)(1)(c); *see also* ECF No. 6, ¶ 46.

19 "A shareholder brings a derivative action on behalf of the corporation for injuries sustained by or wrongs done to the corporation, and a shareholder brings a direct action where the shareholder is injured in a way that is separate and distinct from the injury to the corporation." *HER, Inc. v. Parenteau*, 147 Ohio App. 3d 285, 291 (10th Dist. 2002).

20 Defendants, excluding Langford, filed their *Motion to Dismiss*, coupled with a *Memorandum in Support*, on June 20, 2023. ECF Nos. 19, 20. Plaintiffs responded in their *Response in Opposition* on July 5, 2023, to which Defendants replied on July 12, 2023. ECF Nos. 24, 26.

21 *Compare* ECF No. 6, ¶ 23 ("Plaintiffs do not seek damages directly from Kappa Housing Corp., but Plaintiffs do allege that [KKG] has interfered with their contractual relationship with this Defendant. As such, Plaintiffs believe the Kappa Housing Corporation is a required party to this litigation.") (citing Fed. R. Civ. P. 19(a)(1)(B)), *with* ECF No. 24, at 17–18 (*near-verbatim* language).

22 ECF No. 24, at 14 ("Plaintiffs admit that there may be some ambiguities in the Complaint, but only because there are actually two different contracts. There is the contract between Kappa and its members under Ohio corporate law. And there is the contract with the Kappa Kappa Gamma Housing Corporation ... *Through Defendant Kappa's actions, they have created a breach of contract* as to both the sorority experience and paid housing experience that these young women were promised.") (emphasis added);

23 Identical in effect to *Rishell*'s three-factor test, Fed. R. Civ. P. 19(a) states:

> (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

24 *See Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1183 (D.N.M. 2010) (" 'Complete relief refers to relief as between the persons already parties to the action and not as between a present party and the absent party whose joinder is sought.' ") (quoting *Champagne v. City of Kan. City, Kan.*, 157 F.R.D. 66, 67 (D. Kan. 1994)).

25 *See also* ECF Nos. 24, at 14 ("Plaintiffs admit that there may be some ambiguities in the Complaint, but only because there are actually two different contracts."), 20, at 17 n.8 ("To the extent Plaintiffs purport to allege a breach of contract claim against Kappa or Rooney, the Court should dismiss it because Plaintiffs do not allege that either is a party to the [KKG Building Co.] [c]ontracts.").

26 ECF No. 6, ¶ 171 ("Langford's access to and presence in the sorority house violates the housing contract that Plaintiffs signed."), ¶ 175 ("Through their [*i.e.*, KKG and/or Rooney's] initiation of Langford, Defendants have prevented Plaintiffs from having the benefit of the Housing Contract that they signed."), at 70 (requesting "[a] declaratory judgment that the Defendants [*i.e.*, KKG and/or Rooney] have violated the housing contract").

27 Because KKG Building Co. is not a necessary party, the Court need not proceed with an indispensability analysis under the Tenth Circuit's second step. *See Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1098 (10th Cir. 2003).

28 This Court holds " 'considerable leeway in deciding a pretrial motion to dismiss for lack of personal jurisdiction.' " *Tungsten Parts Wyo., Inc. v. Glob. Tungsten and Powders Corp.*, No. 21-CV-99-ABJ, 2022 WL 19263451,

at *3 (D. Wyo. Jul. 13, 2022) (quoting *Cheyenne Publ'g, LLC v. Starostka*, 94 P.3d 463, 469 (Wyo. 2004) (internal citation omitted)). The Court also makes that determination " 'on the basis of pleadings and other materials called to its attention.' " *Id.* (quoting *Staroskta*, 94 P.3d at 469).

29 Wyoming's long-arm statute, Wyo. Stat. § 5-1-107(a), confers jurisdiction "on any basis not inconsistent with the Wyoming or United States constitution."

30 Purposeful direction, or purposeful availment, requires that the defendant "deliberately ... engaged in significant activities within the forum State or deliberately directed [her] activities at the forum State, so that [she] has manifestly availed [her]self of the privilege of conducting business there." *XMission, L.C.*, 955 F.3d at 840 (internal quotation, citation, and brackets omitted).

31 Additionally, if the Court determines that the minimum contacts standard is satisfied, exercising personal jurisdiction over Rooney "must always be consonant with traditional notions of fair play and substantial justice." *Dudnikov*, 514 F.3d at 1080 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

32 Plaintiffs' suing of only KKG's President, Rooney, and not other Fraternity Council members, is also debated. *See* ECF Nos. 20, at 10 n.5; 24, at 7 n.2 ("The law does not require more, but if there is a concern, Plaintiffs can sue more directors. [ ] Plaintiffs are open to whatever direction is provided."). § 1702.12(I)(1)(c) does not appear to require naming all directors or officers as defendants. *See* Ohio Rev. Code Ann. § 1702.12(I)(1)(c) ("... against ... *a* director, *an* officer[.]") (emphasis added); *see also In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 618–19 (6th Cir. 2008) ("[A] [pre-suit] demand may also be excused [from Ohio Civ. R. 23.1] 'when all directors are named as wrongdoers and defendants in a suit[.]' ") (quoting *Carlson v. Rabkin*, 152 Ohio App. 3d 672, 681 (1st Dist. 2003)). Due to its inability, however, to locate any state authority on this question, the Court reserves judgment.

33 ECF No. 6-1, at 21 ("An Executive Director, employed by the Fraternity, shall serve as the chief administrative officer and corporate secretary of the Fraternity and perform such duties as defined by Fraternity Council.").

34 "The members of Fraternity Council shall be the *officers* of the Fraternity: the President, the Four Vice Presidents, and the Treasurer." ECF No. 6-1, at 18 (emphasis added).

35 Though the Wyoming Supreme Court has not expressly adopted the fiduciary shield doctrine, the Tenth Circuit invoked the doctrine under an application of Wyoming law. *See Newsome*, 722 F.3d at 1277.

36 While this Judge is near-numb to hyperbole, Plaintiffs' statement that "every single [chapter] decision is made by the 'workforce' that Rooney commands" is plainly inaccurate. *See* ECF No. 24, at 7. Per the UW chapter's *Bylaws*, KKG advisers may not vote during recruitment of new members. *See* ECF No. 6-1, at 208 ("Advisers shall serve in an advisory capacity without a vote."). The KKG bylaws outline the same. *See id* at 27 ("Advisers to each of the chapter officers ... shall serve in an advisory capacity without vote.").

37 Defendants do not offer, nor can this Court unearth, controlling authority indicating that Rooney's volunteer status on the Fraternity Council dictates a contrary outcome than would a compensated officer. *See* ECF Nos. 20, at 8–9; 26, at 3–4; *see also Bronner v. Duggan*, 249 F. Supp. 3d 27, 40 (D.D.C. 2017) (finding that, despite the volunteer service of a governing body's officers, the directors could still anticipate being hauled into a Washington, D.C. court to account for their activities).

38 Defendants' interpretation of *Newsome*, that a fiduciary can be subject to personal jurisdiction *if* that fiduciary has contacts with the forum state, lacks support. *See* ECF No. 26, at 3 (citing 722 F.3d at 1264, which merely outlined personal jurisdiction's general contours). Defendants also fail to engage with *Newsome*'s analysis of

the purposeful direction elements. *See* 722 F.3d at 1268–74; ECF No. 20, at 9. Their reply offers no additional authority that compels the Court otherwise. *See* ECF No. 26, at 3–4.

39 Because Defendants do not challenge personal jurisdiction on any basis but purposeful direction (*i.e.*, specific jurisdiction's initial element), the Court declines from engaging in unbriefed analyses concerning Plaintiffs' alleged injuries "aris[ing] out of or relat[ing] to those activities [above]" or " 'offend[ed] traditional notions of fair play and substantial justice.' " *See XMission, L.C.*, 955 F.3d at 840 (internal quotation omitted); *Dudnikov*, 514 F.3d at 1080 (quoting *Int'l Shoe Co.*, 326 U.S. at 316); ECF Nos. 20, at 8–9; 26, at 3–4.

40 *See* ECF No. 6, ¶¶ 163 ("[T]he directors of the Sorority have violated their duties of loyalty, care, and obedience/compliance."), 166 ("As a result of Defendant's behavior ..."), 167 ("[T]he behavior of Defendant Rooney and other Fraternity Council members will result in the chapter's closure[.]").

41 Both parties appear to stipulate that, due to its incorporation in Ohio as a private, non-profit corporation, KKG is governed by Ohio law. *See* ECF Nos. 20, at 9; 24, at 11–12; 6-1, at 23 ("The Fraternity shall be governed in accordance with the laws of the state of Ohio[.]"); *see, e.g.*, *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222, 1228 (10th Cir. 2016) (noting that "federal common law should adopt the futility law of the state of incorporation of the company on behalf of which the plaintiffs are bringing suit"); *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 179 n.10 (3d Cir. 2005) (applying the law of the state of incorporation to breach of fiduciary duty claims); *Baker-Bey v. Delta Sigma Theta Sorority, Inc.*, No. 12–1364, 2013 WL 1742449, at *4 (E.D. Pa. Apr. 23, 2013) (same).

42 "[Ohio] Civ. R. 23.1 and Fed. R. Civ. P. 23.1 are essentially the same." *Bonacci v. Ohio Highway Exp., Inc.*, No. 60825, 1992 WL 181682, at *4 (8th Dist. Jul. 30, 1992) (spacing altered).

43 *See also* ECF No. 27-1, at 1 (*i.e.*, the mother of Plaintiff Holtmeier's email to a KKG officer). Though the email's date is unlisted, the Court presumes, based on the reference to Langford's accepting a bid "today", that the email was sent in October or early November 2022.

44 *See* Ohio Rev. Code Ann. §§ 1702.01(K) (" 'Directors' means the persons vested with the authority to conduct the affairs of the corporation irrespective of the name, such as trustees, by which they are designated."), 1702.30(B) ("A director shall perform the duties of a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. A director serving on a committee of directors is acting as a director."); ECF No. 6-1, at 18 ("Fraternity Council serving hereunder shall have the power, authority and responsibilities of and shall perform the functions provided for directors under the Ohio Nonprofit Corporation Law.").

45 *In re Ferro Corp. Derivative Litig*, No. 04CV1626, 2006 WL 2038659, at *5 (N.D. Ohio Mar. 21, 2006).

46 ECF No. 6, ¶¶ 163–65.

47 *See* ECF Nos. 24, at 11–14; 6, ¶ 104.

48 *See* ECF No. 20, at 12–15.

49 Freedom of expressive association is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Dale*, 530 U.S. at 647.

50 *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1149 (10th Cir. 2013) (en banc) (Hartz, J., concurring) ("[An organization's] speech or conduct may reflect the view of only a bare majority of the members, *or even just the view of the members' delegate*–such as the editor of a newspaper or the pastor

of a congregation. It suffices that the speech or conduct represents an 'official position.' ") (quoting *Dale*, 530 U.S. at 655) (emphasis added).

51 Advanced by Defendants, *Bostock*, by contrast, is inapposite today. *See Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (Gorsuch, J.). There, the Court held that "it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex" because "to discriminate on th[is] ground[ ] requires an employer to intentionally treat individual employees differently because of their sex." *Id.* at 1741–42. Justice Gorsuch concluded that Title VII "prohibit[s] [employers] from firing employees on the basis of ... transgender status." *Id.* at 1753. Both sides misapply *Bostock.* Defendants say that if the Supreme Court interpreted "discrimination because of sex" as protecting transgender individuals, so too may Kappa interpret its bylaws "to be similarly inclusive." *See* ECF No. 20, at 14. Plaintiffs respond that the law's ordinary meaning at enactment (*i.e.*, KKG's definition of "woman" in 1870) "usually governs." *See* ECF No. 24, at 12–13. Neither argument assists the Court today. Had the UW chapter or KKG denied Langford admission because she was transgender, *Bostock*, though addressing employer discrimination, would certainly amplify. On the other hand, *Bostock* concerned the Court's statutory interpretation of Title VII and not a private organization's internal bylaws. *See, e.g.*, 140 S. Ct. at 1738 ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending the statutes outside the legislative process reserved for the people's representatives.").

52 In fact, each year of their KKG membership, Plaintiffs signed the following: "I recognize that membership in Kappa Kappa Gamma offers me many benefits and the opportunity for friendship, mutual support, personal growth and intellectual development. I understand that the privilege of membership comes with great responsibility." ECF No. 6-1, at 163; *see also 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2315 (2023) (Gorsuch, J.) ("In *Dale*, the Boy Scouts offered what some might consider a unique experience.") (citing 530 U.S. at 649–50).

53 *See Iota XI Chapter of the Sigma CHI Fraternity v. Paterson*, 538 F. Supp. 2d 915, 923 (E.D. Va. 2008), *aff'd on other grounds*, 566 F.3d 138 (4th Cir. 2009) (extrapolating *Dale* to find that "a college fraternity is no different from the Boy Scouts"); *see also Schultz v. Wilson*, 304 F. Appx. 116, 120 (3d Cir. 2008) (unpublished) ("A social group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political, social, or cultural importance.") (internal citation omitted). The 2018 *Guide* was obviously such a stance by KKG. Because this matter presents no governmental action, which, in part, distinguishes *Dale*, the Court sees no reason to conduct *Dale*'s three-step analysis regarding a group's expressive association claim. *See* 530 U.S. at 650–56.

54 Plaintiffs do not engage with *Dale.* Had they, Plaintiffs would likely contend that the Fraternity Council's unilateral decision to admit transgender women violated the members' First Amendment rights because it "force[d] the organization to send a message ... that [it] accepts" transgender women for KKG membership, belying their views. *See* Dale, 530 U.S. at 650; *see also Green v. Miss United States of Am., LLC*, 52 F.4th 773, 802 (9th Cir. 2022) (rejecting a transgender applicant's plea to "use the power of the state to force Miss United States of America to express a message contrary to what it desires to express"). *Dale*'s posture, however, lends little to Plaintiffs; there, the Court considered the constitutionality of a state's nondiscrimination law compelling expression, rather than a member's challenge to an expressive decision of their voluntary organization. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984) (Brennan, J.) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.").

55 ECF No. 6-1, at 23 ("The Fraternity *Bylaws* shall constitute the code of regulations of the Fraternity.").

56 The Court sees no reason to disturb the governance process by which the Fraternity Council published its *Position Statements* in 2021 and *FAQs* in 2022 ahead of KKG's biennial convention in 2022. Any issue that Plaintiffs raise with respect to KKG's putatively improper counting of the two-thirds vote necessary for bylaw amendment belong before the sorority, not this Court. *See also* ECF No. 6-1, at 24 (mandating a two-thirds convention vote to amend a KKG bylaw, sans any requirement regarding the Fraternity Council's method (*e.g.*, voice or written) of counting votes).

57 ECF No. 6, ¶¶ 159–67.

58 Finding that KKG Building Co. was not a Fed. R. Civ. P. 19(a)(1)(B) required party within Section A. *supra*, the Court dismissed KKG Building Co. from this lawsuit.

59 If Plaintiffs argue that KKG breached their membership contracts by redefining "woman" sans a bylaw amendment, they, similarly, fail to direct the Court to the contractual provision within their membership contracts that KKG allegedly violates. Even when liberally construing Plaintiffs' *Complaint* to incorporate an unpled breach of contract claim, the Court cannot do counsels' job for them.

60 *See* ECF No. 6-1, at 173 ("This contract is made with reference to and shall be construed in accordance with the laws of Wyoming in which state it shall be performed by the parties.").

61 Separately, KKG's bylaws state that *members* of KKG Building Co., described as "members of the Fraternity", "shall agree to be bound by ... the Fraternity *Bylaws, Standing Rules* and *Policies*." *See* ECF No. 6-1, at 23–24.

62 ECF No. 6, ¶¶ 168–72.

63 The Court admits its confusion by Plaintiffs' usage, twice, of "Defendants" within Count III. ECF No. 6, ¶ 175. However, because Plaintiffs use "Defendant Kappa Kappa Gamma" earlier in that paragraph and fail to clarify, even when prompted, the error in their response, the Court construes Count III as against solely KKG. *Id.*; *see* ECF Nos. 20, at 20 n.10; 24, at 17 ("Plaintiffs do allege that Kappa Kappa Gamma Fraternity has tortiously interfered with their contractual relationship with [KKG Building Co.]").

64 ECF No. 6, ¶¶ 173–75.

65 Though Plaintiffs appear to sue KKG and Rooney under Count IV, direct actions under Ohio law are only sanctioned against a corporation's director or officer. *Cf.* ECF No. 6, ¶ 179. Therefore, the Court solely considers Plaintiffs' direct claim against Rooney.

66 ECF No. 6, ¶¶ 176–79.

67 If Plaintiffs wish to amend their complaint, the Court advises Plaintiffs that they devote more than 6% of their complaint to their legal claims against Defendants. It also counsels Plaintiffs to provide more factual detail, where feasible, as well as highlight the Defendant(s) it sues under each count and relevant state statutes and authority. Finally, if provided another opportunity to clarify unclear language within an amended complaint, Plaintiffs should not copy and paste their complaint in lieu of elaboration or legal research that assists the Court in disentangling their claims. *See, e.g.*, ECF No. 24, at 14, 16–19.

68 Langford moves to dismiss herself because, *inter alia*, she is not a Fed. R. Civ. P. 19(a)(1)(B) required party. *See* ECF Nos. 23, at 4; 27, at 2, 4. Plaintiffs respond: "if Langford stipulates that [s]he is not a required party, Plaintiffs would support h[er] dismissal." ECF No. 25, at 13 n.4. Langford did not reply. ECF No. 27. Without addressing the substance of Langford's motion, the Court notes the irrelevancy of Langford's alleged behavior. The crux of Plaintiffs' lawsuit is their derivative claim against Rooney and contractual claims against KKG. Unbefitting in federal court, Langford's unsubstantiated behavior at the UW chapter house has no

bearing on Plaintiffs' legal claims. The Court, however, acknowledges that Plaintiffs' requested relief seeks to void Langford's KKG membership.

End of Document