No. 19-CV-861

In the

District of Columbia Court of Appeals

MOBILIZEGREEN, INC.,

Appellant,

v.

COMMUNITY FOUNDATION FOR THE CAPITAL REGION, *et al.*,

Appellees.

Appeal from the Superior Court of the District of Columbia,
Civil Division No. CAB5764-14 *(Hon. Fern Flanagan Saddler, Judge)*

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE PARTIES

Plaintiff-Appellant:	MobilizeGreen, Inc. ("MobilizeGreen")
Counsel for Appellant:	Jeffrey D. Robinson, Lewis Baach Kaufmann Middlemiss PLLC; Surya Kundu, Lewis Baach Kaufmann Middlemiss PLLC; (Washington D.C.)
Defendant-Appellee:	The Community Foundation for the National Capital Region ("CFNCR")
Counsel for Appellee:	Matthew D. Edwards, Ain &Bank, P.C. (Washington D.C.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of the District of Columbia Court of Appeals, Appellant MobilizeGreen, Inc. ("MobilizeGreen"), declares that it is a not-for-profit, tax-exempt organization incorporated in the District of Columbia. MobilizeGreen has no parent corporation. It issues no stock, and no publicly held corporation owns 10% or more of MobilizeGreen.

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AND SUMMARY OF THE ARGUMENT

MobilizeGreen, Inc. ("MobilizeGreen") respectfully submits this Brief in furtherance of its Appeal of the Entry of Summary Judgment in favor of, appellee the Community Foundation of the National Capital Region ("CFNCR") entered in the Superior Court of the District of Columbia on March 11, 2019. JA_0162. The trial court erroneously granted summary judgment denying MobilizeGreen's claims that, while serving as fiscal sponsor, CFNCR breached its fiduciary duties to and its contract with MobilizeGreen. This error occurred because the trial court refused to recognize and/or inappropriately resolved multiple disputes of material fact that precluded the proper grant of summary judgment. The trial court's error was particularly egregious because it acted contrary to the clearly established District of Columbia law holding that determining whether a fiduciary duty exists is a highly factual inquiry rarely suitable for resolution on summary judgment.

STATEMENT OF THE ISSUES

The issues presented in this appeal are:

1. Whether the trial court erred in entering summary judgment in favor of CFNCR denying appellant MobilizeGreen's claim that CFNCR had breached fiduciary duties to MobilizeGreen despite the existence of disputed issues of material fact going to the inherently factual question of whether the parties were in a relationship of trust and confidence creating a fiduciary duty.

2. Whether the trial court erred in entering summary judgment in favor of CFNCR denying appellant MobilizeGreen's claim that CFNCR breached its contractional obligations to MobilizeGreen by finding that the parties' contract was ambiguous and then finding that MobilizeGreen had not presented extrinsic evidence supporting its interpretation of the contract when there was ample evidence from which the ultimate trier of fact could have found that the contract should be interpreted as MobilizeGreen contended.

STATEMENT OF THE CASE

MobilizeGreen initiated this matter by filing a complaint in the Superior Court of the District of Columbia on September 12, 2014 against CFNCR and four individual defendants who were associated with CFNCR. JA_0162. MobilizeGreen's complaint contained seven counts: 1) Breach of Fiduciary Duty; 2) Fraud; 3) Negligence; 4) Breach of Contract; 5) Defamation; 6) Defamation per se; and 7) Negligent Supervision. *Id.*

In October 2014, CFNCR removed the case to the United States District Court for the District of Columbia and moved to dismiss the action. *MobilizeGreen, Inc. v. Cmty. Found. for Nat'l Capital Region*, 101 F. Supp. 3d 36, 41 (D.D.C. 2015) MobilizeGreen's motion to remand was granted on April 29, 2015 and the matter returned to the trial court. JA_0162. In granting the remand the federal court determined, that resolution of this matter did not depend on a question of federal law. *MobilizeGreen*, 101 F. Supp. 3d at 46.

The case was re-opened in the Superior Court on May 11, 2015. JA_0162. Once again, the CFNCR moved to dismiss and on December 7, 2015, Judge Ross of the Superior Court denied the motion in part permitting MobilizeGreen to proceed with its claims of breach of fiduciary duty, breach of contract, and negligent supervision against CFNCR. JA_0163. CFNCR moved for summary judgment on December 5, 2017, and the motion was granted on March 11, 2019. *Id.*

The grant of summary judgment left one claim for trial. JA_0171. However, the legal standard established in the ruling precluded MobilizeGreen from prevailing on that claim. Accordingly, MobilizeGreen filed a motion to dismiss the remaining claim and enter final judgment. JA_0022. The motion was granted and an Order dismissing the entire case was entered on August 27, 2019. JA_0023. MobilizeGreen filed its Notice of Appeal on September 18, 2019.[1] *Id.* This Appeal is from a final order disposing of all remaining claims.

STATEMENT OF FACTS

Appellant MobilizeGreen is a District of Columbia non-profit corporation whose mission is "to build the next generation of environmental leaders, stewards, and volunteers from under-represented communities using [an] innovative internship, mentoring, career coaching, and collaborative partnership model." *MobilizeGreen,* 101 F. Supp. 3d at 39; *see also* JA_0118–0119. In furtherance of its mission, in the summer of 2011 MobilizeGreen "sought to create a national diversity internship pilot program using funds from the United States Forest Service." JA_0161. *See also MobilizeGreen*, 101 F. Supp. 3d at 39.

[1] MobilizeGreen filed a Consent Motion to Dismiss Individual Defendants on January 13, 2020. CFNCR consented to this voluntary dismissal without prejudice. Accordingly, MobilizeGreen's claims against the individual defendants are not addressed in this appeal.

As MobilizeGreen had not yet obtained §501(c)(3) status, it approached Appellee, CFNCR to act as its fiscal sponsor so that MobilizeGreen could obtain the Forest Service funding. JA_0161. Despite having concerns about its internal capacity to fulfill the responsibilities of a fiscal sponsor, CFNCR agreed to serve as a "temporary fiscal sponsor." *Id.* CFNCR then entered into an agreement with MobilizeGreen to serve as its fiscal sponsor from July 28, 2011 through November 1, 2011. *Id.*

Fiscal sponsorship is a common practice within the world of philanthropy. New nonprofit entities, eager to commence the work for which they were created, obtain the assistance and guidance of established organizations through the vehicle of fiscal sponsorship. JA_0801 at ¶ 5. *See* JA_0716. Fiscal Sponsors are typically larger, more established nonprofit organizations that have already been recognized as tax-exempt entities under IRS §501(c)(3). A fiscal sponsor typically agrees to manage the contributions to and expenditures of a sponsored nonprofit organization, because the sponsor's tax-exempt status allows it to receive funding that the new organization cannot receive directly until its own tax-exempt status is secured. *Id.*

The MobilizeGreen/CFNCR Agreement to Create a Sponsored Fund ("SPF Agreement") was modeled after a donor-advised fund agreement available on the CFNCR's website. JA_0904–908, JA_0803 ¶14. It provided for a "temporary fiscal

sponsorship for a period not to exceed November 1, 2011" at which time the program would transfer to another fiscal sponsor. JA_0169; *see also MobilizeGreen*, 101 F. Supp. 3d at 39. In recognition of the CFNCR's role and resource expenditure in guiding MobilizeGreen through its initial days, CFNCR was entitled to receive an annual administrative fee of 2% of any funds it received, or $500, whichever was the greater amount. *MobilizeGreen*, 101 F. Supp. 3d at 39; JA_0803 ¶14.

Following the signing of the SPF Agreement, CFNCR entered into a Challenge Cost-Share Agreement with the Forest Service to implement the MobilizeGreen program. JA_0161–162; *MobilizeGreen*, 101 F. Supp. 3d at 39; JA_0123 at ¶31. The Challenge Cost-Share Agreement included a Financial and Operation Plan, drafted with considerable input from MobilizeGreen. JA_0123–124 ¶32. Among other terms it: (i) authorized [redacted] of MobilizeGreen to act as the Principal Cooperator Program Contact (JA_0924), and (ii) obligated CFNCR to use the funds to train interns "with MobilizeGreen's...Basic Core Training" enumerating the precise training and tracking program designed by MobilizeGreen (JA_0923).

As November 1, 2011 neared, MobilizeGreen contacted and made arrangements with Social and Environmental Entrepreneurs ("SEE"), another tax-exempt organization, to take over the responsibilities of serving as the program's fiscal sponsor. JA_0061. MobilizeGreen and SEE finalized their agreement on October 11, 2011. *Id. See also* JA_0937–0946.

MobilizeGreen promptly notified CFNCR of its agreement with SEE to be its new fiscal sponsor and requested CFNCR's cooperation in effectuating the transfer as contemplated by the SPF and the Challenge Cost-Share Agreement. JA_0127–128, Response to ¶46. Transfer at that stage would have been easy because no funds had been paid by the Forest Service pursuant to the Challenge Cost Share JA_0804 at 20. Despite repeated requests, CFNCR did nothing to finalize the transfer. JA_0127–128, Response to ¶46. Instead, CFNCR began and continued to operate as recipient of federal funds for the purpose of executing MobilizeGreen's program. JA_0127–128, Response to ¶46; JA_0061–62.

During this period, MobilizeGreen fulfilled its responsibilities to run the program including submitting invoices for the reimbursement of program, expenses. *See e.g.* JA_0132–134 Response to ¶56; JA_0878-890. However, CFNCR repeatedly failed to timely perform its duties as fiscal sponsor, doing so despite concerns voiced by the Forest Service over the Foundation's mismanagement and MobilizeGreen's repeated complaints. JA_0132–134, Response to ¶56.

Among other failures, CFNCR (i) Refused to pay invoices despite prompt submission by MobilizeGreen and CFNCR's awareness of the urgent need for rapid reimbursement (JA_0132–134, Response to ¶56; JA_0805 at 23, 24; JA_0810 at 30; JA_0879–0890); (ii) repeatedly failed to timely pay invoices (JA_0121–122, Response to ¶26, JA_0879–0890); and (iii) failure to submit required monthly bills

to the Forest Service, and providing inaccurate accounting to the Federal Government (JA_0810 ¶30; JA_0879–0890).

After months of delay and tension, CFNCR — without consulting or informing MobilizeGreen — terminated the Challenge Cost-Share Agreement. JA_0062.

MobilizeGreen initiated this matter by filing a complaint in the Superior Court of the District of Columbia on Sept 12, 2014 against CFNCR and four individual defendants who were associated with CFNCR. *Id.*

STANDARD OF REVIEW

When reviewing an appeal from the grant of a motion for summary judgment, the Court reviews the trial court's decision de novo. *Critchell v. Critchell*, 746 A.2d 282, 284 (D.C. 2000). In doing so, the Court conducts "an independent review of the record, and [the] standard of review is the same as the trial court's standard in considering the motion for summary judgment." *Id.* (*citing Sherman v. District of Columbia*, 653 A.2d 866, 869 (D.C.1995)).

Summary judgment may be granted, "only when the pleadings and other materials on file demonstrate that no genuine issue of material fact remains for trial, and that the movant is entitled to judgment as a matter of law." *Phenix-Georgetown, Inc. v. Charles H. Tompkins Co.*, 477 A.2d 215, 221 (D.C. 1984). To prevail, the moving party bears the burden of showing the absence of *any* dispute of material

fact. *Id.* If evidence exists that would merely "permit the factfinder to hold for the non-moving party", the motion for summary judgment must be denied. *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C.1979). Any inferences must be drawn in favor of the non-moving party. *Anderson v. Libery Lobby,* 477 U.S. 242, 255 (1986) and summary judgment must not be granted if factual issues "may reasonably be resolved in favor of either party." *Id.* While the moving party's briefing and authorities are "closely scrutinized", the nonmovant's papers are to be "indulgently treated." *Blount v. Nat'l Ctr. For Tobacco-Free Kids*, 775 A.2d 1110, 1114 (D.C. 2001).

ARGUMENT

I. The Trial Court Committed Reversible Error In Ruling That As A Matter Of Law The Community Foundation Of The National Capital Region Did Not Owe Fiduciary Duties To MobilizeGreen.

Contrary to well established District of Columbia law that the existence of a fiduciary relationship is a highly factual inquiry, the trial court disregarded significant factual disputes and erroneously granted summary judgment concluding that CFNCR did not owe fiduciary duties to MobilizeGreen as a matter of law. The trial court erred in large part because of its mistaken conclusion that the laws and regulations governing §501(c)(3) organizations precluded CFNCR from having fiduciary obligations to MobilizeGreen.

A. There are Material Disputes of Fact Precluding the Grant of Summary Judgment Concerning Whether the Nature of the Parties' Relationship Created a De Facto Fiduciary Relationship Between MobilizeGreen and CFNCR.

District of Columbia law unambiguously provides that determining the existence of a fiduciary relationship is a fact intensive inquiry that cannot simply be resolved as a matter of law. D.C. law requires the court to look beyond the terms of contractual obligations and examine whether the "circumstances show that the parties extended their relationship beyond the limits of the contractual obligations to a relationship founded upon trust and confidence." *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 6 (D.D.C. 2008).

A fiduciary relationship will be found wherever there is "trust or confidence reposed by one person in the integrity and fidelity of another." *Government of Rwanda Working Grp.*, 227 F. Supp. 2d 45, 63–64 (D.D.C. 2002) (internal quotation omitted). *See also MobilizeGreen*, 101 F. Supp. 3d at 46 (noting that "[f]iduciary relationships arise when parties develop a certain amount of trust between themselves." (*citing Cordoba Initiative Corp. v. Deak*, 900 F.Supp.2d 42, 49 (D.D.C.2012)). Fiduciary principles apply "to every possible case in which a confidential relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other." *Gerson v. Gerson*, 20 A 2.d 567, 570 (Md. 1941) (internal quotations omitted).

As noted by the federal court before remanding this matter, the existence of a fiduciary a relationship is "a fact-intensive question, and the fact-finder must consider the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties." *MobilizeGreen*, 101 F. Supp. 3d at 46. Accordingly, "the District of Columbia courts have deliberately left the definition of a 'fiduciary relationship' open-ended, allowing the concept to fit a wide array of factual circumstances." *Council on American-Islamic Relations v. Gaubatz*, 31 F. Supp. 3d 237, 341 (D.D.C. 2014).

This inquiry does not rely on the stated titles of parties or on formal divisions of labor alone. *Gaubatz*, 31 F. Supp. 3d at 341–342 (D.D.C. 2014) (holding that there was a genuine dispute as to material fact as to whether an unpaid intern owed fiduciary duties to a large and well established organization when plaintiffs had produced evidence suggesting the intern had access to vast amounts of the organization's sensitive and proprietary materials, thereby suggesting that a trust and confidence had been conferred upon him). A party's own statements may also show the existence of a fiduciary relationship if it holds itself out as knowledgeable in a field needed by the other. *Church of Scientology Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1028 (D.D.C. 1994). Ultimately, because the inquiry is a fact intensive one, it is generally inappropriate for determination at the summary judgment stage. *Gaubatz*, 31 F. Supp. 3d at 257.

The summary judgment briefing presented to the trial court clearly established a genuine issue of material fact as to whether such a relationship "of great sensitivity, based on trust and confidence" existed between the fledgling organization, MobilizeGreen, and the CFNCR. *Church of Scientology,* 848 F. Supp at 1028.

MobilizeGreen provided ample evidence from which a trier of fact could conclude that it placed trust and confidence in CFNCR. That evidence included:

(1) [redacted] chose CFNCR as a fiscal sponsor because it represented, that it was in a superior position to provide MobilizeGreen support and guidance during its early stages and she believed and relied upon that representation. JA_0801–802 at 6–7, JA_0911 at 4; JA_0864 at 56:11-23.

(2) SPF Agreement specifically precluded CFNCR from using its control of the funds to pay itself an administrative fee higher than the greater of 2% or $500, with out "mutual agreement between [MobilizeGreen] and the Foundation." JA_0905 at ¶6.

(3) Challenge Cost-Share Agreement was replete with provisions demonstrating that the funding was to enable MobilizeGreen to operate the program it had proposed to the Forest Service – not for CFNCR to operate its own program. *See* supra at p. 6.[2]

[2] In its summary judgment order the trial court ruled that MobilizeGreen was estopped from claiming that the Challenge Cost-Share Agreement created a fiduciary relationship between it and CFNCR. JA_0167–168. While MobilizeGreen

(4) MobilizeGreen communicated that it was placing a great deal of trust and reliance upon CFNCR. JA_0892 (noting that MobilizeGreen intended to entrust CFNCR with "critical funding" of $250,000, the initial stages of a "5 year national agreement between the Forest Service and MobilizeGreen…worth millions of dollars" and the ability to serve "at least 500 youth").

(5) MobilizeGreen informed CFNCR that the loss of the Forest Service partnership would be "very problematic" for MobilizeGreen. *Id.*

MobilizeGreen also produced evidence from which a trier of fact could conclude that CFNCR was well aware of and accepted the trust and confidence MobilizeGreen placed in it.

(1) CFNCR's earliest notes on MobilizeGreen show that it knew that it was being asked to sponsor a grant over twice the amount as the entirety of MobilizeGreen's other donations. JA_0816.

(2) CFNCR knew that MobilizeGreen was relying upon it to fulfill the role of fiscal sponsor and safeguard "critical funding" and accepted this responsibility. JA_0892 (deeming MobilizeGreen's proposal as "reasonable.")

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disagrees with that ruling, it is not here challenging it. Rather, MobilizeGreen is here arguing that whether or not the Challenge Cost-Share Agreement by its terms created a fiduciary duty, its provisions are evidentiary of the existence of such a duty

(3) CFNCR knew that its failure to properly perform its obligations and duties as fiscal sponsor would mean MobilizeGreen risking "damage to [its] relationship" with the Forest Service and that the damage "could be irreversible". *Id.*

(4) CFNCR knew throughout its dealings with MobilizeGreen that its management of MobilizeGreen's funds would affect MobilizeGreen's relationships and goodwill with others active in its industry. JA_0835 at 17:11–13.

Knowing the weight of the trust that MobilizeGreen was placing in it, CFNCR not only accepted the obligations and duties of a fiduciary, it refused to relinquish them when MobilizeGreen, as originally contemplated and agreed, found another entity to serve as its fiscal sponsor — effectively holding MobilizeGreen hostage to the relationship. The Foundation cannot now claim that it was unaware that any special confidence was placed in it. Nor can it, despite the claims on its own website touting its expertise in the field, disclaim its superior position to the brand new MobilizeGreen. *See Gerson*, 20 A 2.d at 570 (Md. 1941) (holding that fiduciary duties arise when one party is in a position of superiority to the other.)

Given the evidence before it from which a finder of fact could conclude that MobilizeGreen and CFNCR had a relationship in which MobilizeGreen places its trust and confidence in CFNCR, the trial court erred in granting summary judgment denying MobilizeGreen's breach of fiduciary duty claim. District of Columbia does

not allow a court to take from the trier of fact the question of whether parties were in a fiduciary relationship on this record.

B. The Trial Court Incorrectly Interpreted and Relied Upon Tax Regulations in Holding that CFNCR Could Not Owe Fiduciary Duties to MobilizeGreen.

The trial court's conclusion that CFNCR did not owe fiduciary duties to MobilizeGreen despite the substantial evidence presented that MobilizeGreen and CFNCR had a relationship of trust and confidence rested largely on its finding that as a matter of law such relationship would be inconsistent with the CFNCR's obligation to operate within the confines of 26 U.S.C. § 501(c)(3). JA_0165–166. The trial court's conclusion is based upon a misreading of the obligations imposed by § 501(c)(3) and its implementing regulations, a failure to appreciate that supporting MobilizeGreen was consistent with CFNCR's charitable purpose, and ignoring the common industry understanding that fiscal sponsors owe fiduciary duties to those they sponsor.

1. Section 501(c)(3) does not expressly preclude non-profits from owing fiduciary duties as a matter of law.

By its plain language, § 501(c)(3) does not preclude finding a fiduciary relationship between a fiscal sponsor and the sponsored project. The statute is silent as to the issue of fiduciary obligations in fiscal sponsorship arrangements — neither "fiscal sponsorship" nor "fiduciary" appear anywhere within the Section. Nowhere in this section are tax-exempt organizations prohibited from acting as fiduciaries as

a matter of law. 26 U.S.C. § 501. Nor has the IRS issued any guidance or letter rulings precluding § 501(c)(3) organizations serving as fiduciaries. No court has ever held that a § 501(c)(3) cannot as a matter of law owe fiduciary duties. To the contrary, in other circumstances, tax-exempt organizations routinely owe fiduciary duties to other entities. For example, § 501(c)(3) does not prevent a nonprofit organization from owing fiduciary duties to the beneficiaries of any 403(b) retirement plans the organization may sponsor. *See, e.g. Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344 (N.D. Ga. 2017) (holding that plaintiffs, a number of beneficiaries of a tax-exempt organization's sponsored retirement plan, stated claim of breach of fiduciary duties against tax-exempt university regarding mismanagement of retirement funds); *Short v. Brown Univ.*, 320 F. Supp. 3d 363, (D.R.I. 2018) (describing the range of fiduciary duties that tax exempt organizations sponsoring retirement plans owe to plan beneficiaries).

The trial court's conclusion that § 501(c)(3) cannot serve as fiduciaries rests on a single sentence of § 501(c)(3), that defines an eligible organization as one that is "organized exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." 26 U.S.C. § 501(c)(3). The trial court reasoned that if an organization is organized exclusively for one of these purposes it cannot take on obligations to another organization. JA_0166. That reasoning ignores the fact that taking on obligations to others might well further a permissible

purpose. Such is the case when a § 501(c)(3) organization establishes a § 403(b) retirement plan and assumes fiduciary duties to participants to assist in recruiting and retaining the staff necessary to fulfill its qualifying purpose. Such also would be the case when, as here, a § 501(c)(3) organization agrees to serve as a fiscal sponsor to further the development and operation of a new non-profit that is pursuing a qualifying purpose. Obligating one's self to operate in a particular circumstance, in the best interest of another organization that is operating exclusively for a charitable or educational purpose, can clearly be a charitable or educational purpose in and of itself.

In the briefing below, CFNCR contributed to the trial court's erroneous conclusion by repeatedly arguing that § 501(c)(3) requires a tax-exempt organization to operate exclusively "for *their own* charitable purpose." CFNCR's Brief in Support of Its Motion for Summary Judgment, pp. 1, 12 14 (emphasis added). The phrase "their own" appears nowhere in the statute. Rather, as MobilizeGreen noted for the trial court, MobilizeGreen Opposition to Summary Judgment at 29, and as illustrated by the IRS publications discussed below, the statute merely requires tax-exempt organizations to operate for charitable purposes generally.

2. IRS guidance further contradicts the trial court ruling that CFNCR could not owe MobilizeGreen fiduciary duties as a matter of law.

Private letter rulings issued by the IRS, contrary to the trial court holding, support the conclusion that § 501(c)(3) organization can take on fiduciary obligations to other non-profits. The IRS has stated that "[un]der the law of taxation a given result at the end of a straight path is not made a different result because reached by following a devious path." I.R.S. P.L.R. 201609006 (Feb. 26, 2016) (*citing* Revenue Ruling 63-252) (internal quotation marks omitted) (*available at* JA_0183). Accordingly, a tax-exempt entity may serve as a fiscal sponsor to and turn funder contributions over to another entity so long as the ultimate recipient of the funds operates for a qualifying charitable purpose. *Cf.* I.R.S. P.L.R. 201408030 (Feb. 21, 2014) (where a tax-exempt organization had its § 501(c)(3) status revoked, not because it took on obligations to other entities, but because the sponsored organizations operated in substantial part to conduct non-qualifying political lobbying rather than § 501(c)(3) eligible purposes) (*available at* JA_0173).

This is further underscored by the IRS's own interpretation of § 501(c). In defining qualifying tax-exempt purposes, the IRS defines "charitable purpose" as used in its "generally accepted" form, and including "relief of the poor, the distressed, or the underprivileged." *See Exempt Purposes – Internal Revenue Code Section 501(c)(3),* Internal Revenue Service (Jan. 13, 2020), *available at*

https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3. This is precisely what MobilizeGreen sought to do with the Community Foundation's help.

Additional IRS publications further demonstrate that the language of § 501(c)(3) was not intended to prevent fiduciary relationships. Instead, the statute focuses on preventing improper use of tax-exempt status to benefit private interests. *See Inurement/Private Benefit – Charitable Organizations,* Internal Revenue Service (Jan. 13, 2020), *available at* https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations. These private interests are defined as interests belonging to the "creator, or the creator's family, shareholders of the organization, other designated individuals, or persons controlled directly or indirectly by such private interests." *Id.* Sponsored projects that serve charitable purposes do not appear on this clearly enumerated list. Nor is there any IRS guidance revoking an organization's tax-exempt status because it entered into a fiduciary relationship.

Finally, CFNCR's contract with the Forest Service demonstrates that tax-exempt organizations can enter into arrangements whereby they become fiduciaries to charitable projects. The Cost Share Agreement with the Forest Service expressly contemplates cooperation between the Forest Service and CFNCR to "help build the next generation of environmental leaders…*through a new national program…called*

MobilizeGreen." JA_0125 (emphasis added). If there truly were no dispute as to whether a tax-exempt organization could enter into a relationship where it received funds for the express use in a specific fiscal sponsorship, then CFNCR, a self-described experienced organization in the world of philanthropic funding (JA_0090), would not have entered into such an arrangement. To the contrary, the fact that CFNCR entered into such an agreement is further evidence that there is no conflict between maintaining tax-exempt status and incurring the obligation to act as a fiduciary to charitable projects by acting as fiscal sponsors.

3. Industry practice and custom demonstrates that fiscal sponsors may owe fiduciary duties to sponsored projects.

When a statute or regulation is silent as to a particular issue, courts may look to the customary understanding within the relevant fields and industry. *See Morissette v. United States,* 342 U.S. 246, 263 (1952) (noting that when statutes deal with "terms of art…it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."). As the relevant tax statute and IRS's public letter rulings do not explicitly address the issue, industry custom within the nonprofit world helps illustrate that a fiscal sponsor may be a fiduciary to the projects it supports.

As presented to the court below, authorities in the nonprofit field often describe the fiscal sponsor relationship as one that encompasses fiduciary duties. *See* MobilizeGreen Opposition at 5–6. It is generally understood that "fiscal sponsors…provide fiduciary oversight, legal and financial guidance, and audit compliance" to their sponsored projects. *Id.* at 5. JA_0717–718. In fact, the National Network of Fiscal Sponsors Guidelines — the same source described as the widely recognized "best practices for fiscal sponsorship" by the CFNCR's own expert, JA_0742–743; describe the fiscal sponsor as having fiduciary obligations to the project. *Guidelines for Comprehensive Fiscal Sponsorship* at 2, 7, available at JA_0242.

Both parties have acknowledged that fiscal sponsorship is a common practice. If the tax code precluded, as a matter of law, fiduciary relationships from arising in this common practice there would be statements to that effect. There is none – neither legislative, IRS issued, nor judicial.

II. The Trial Court Erred In Ruling That There Was No Genuine Dispute of Material Fact As To Whether CFNCR Breached Its Contractual Obligations To MobilizeGreen By Refusing To Transfer The Fiscal Sponsorship

There is no dispute that the parties entered into a contract and thus incurred a series of contractual obligations towards each other. JA_0120 ¶19, 20. There is also no dispute that this contractual relationship was intended to be temporary. JA_0119–120 ¶17,18; JA_096. There is, however, a dispute as to whose obligation

it was to effectuate the transfer of the Forest Service agreement and funding to the new fiscal sponsor MobilizeGreen had identified. The trial court ruled that the SPF Agreement was ambiguous as to this question. The court then ruled that MobilizeGreen failed to satisfy its burden of presenting extrinsic evidence that CFNCR had the obligation. In so ruling the trial court ignored the substantial evidence before it from which a fact finder could have concluded that the obligation was CFNCR's.

When a contract is ambiguous, the court considers extrinsic evidence to "determine what a reasonable person in the position of the parties would have thought the disputed language meant." *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006). This can include "the circumstances before and contemporaneous with the making of the contract, all usages—habitual and customary practices—which either party knows or has reason to know, the circumstances surrounding the transaction and the course of conduct of the parties under the contract." *Id.* When extrinsic evidence is presented, the resolution of any ambiguity is a question of fact to be determined by the ultimate fact finder. *Howard Univ. v. Best*, 484 A.2d 958, 966 (D.C.1984) ("[I]f a contract is ambiguous, and the evidence supports more than one reasonable interpretation, the interpretation is a question of fact for the jury.")

The first, and foremost, evidence from which the trier of fact could conclude that the SPF Agreement required CFNCR to obtain Forest Service consent to the transfer is the fact that the Challenge Cost Share Agreement was a contract between the Forest Service and CFNCR. While MobilizeGreen was the beneficiary and driving force behind the arrangement, it was not a party. JA_096 at ¶33; JA_0124 Response to ¶33 (noting that this is undisputed). The sole reason for the relationship between MobilizeGreen and CFNCR was the fact that MobilizeGreen could not contract directly with the Forest Service. A trier of fact could conclude on these basses alone that it was CFNCR, as the contractual party, which had the obligation to deal with the Forest Service to effectuate the transfer once MobilizeGreen had identified a replacement fiscal sponsor.

That conclusion is bolstered by CFNCR's arguments regarding the nature of the Challenge Cost Share Agreement and its obligations under it. CFNCR repeatedly asserted that under applicable tax exemption regulations, only it could exercise control over the funds and that such control necessarily must be complete. It further argued that the federal Anti-Assignment Act, 41 U.S.C. § 6305(a), prohibited the transfer of any interest in the relevant agreement to another party absent consent of the relevant government contracting officer. CFNCR's Brief In Support of Summary Judgment at 27–28. On this basis alone a trier of fact could reasonably conclude that it was CFNCR that had the responsibility under the SPF

Agreement to obtain the transfer authorization from the Forest Service, its counter party in the Challenge Cost Share Agreement.

The fact that MobilizeGreen contacted the Forest Service asking it to consent to a transfer of the fiscal sponsorship of the program, as the trial court noted, JA_0170, does not compel a different conclusion. MobilizeGreen's actions were consistent with it understanding that CFNCR was failing in its obligations to effectuate the transfer. The trier of fact could reasonably conclude that MobilizeGreen, after a series of communications in which the Foundation refused to honor its obligations, JA_0132–134 Response to ¶56, recognized the impending breach and contacted the Forest Service as an effort to salvage the program, not as evidence that it was obliged to accomplish a transfer of rights in a contract to which it was not a formal party. However one ultimately resolves these questions, what is critical here is that they are factual questions for the trier of fact, not matters for the trial court to resolve in a summary judgment motion,

CONCLUSION

MobilizeGreen presented ample evidence from which a trier of fact could conclude that CFNCR owed it fiduciary duties and that the SPF Agreement placed the obligation to effectuate transfer of the fiscal sponsorship arrangement on CFNCR. The trial court overstepped its role in resolving a summary judgment motion by arrogating to itself the resolution of the factual disputes this evidence

created. The trial court's actions were particularly egregious in granting summary judgment on the grounds that CFNCR did not owe fiduciary duties to MobilizeGreen – a question that District of Columbia law has clearly established is highly factual and not usually suitable for resolution by summary judgment. For the reasons set forth above, this Court should reverse the trial court's grant of summary judgment on the breach of contract and breach of fiduciary duty claims and remand this case to the Superior Court for trial.

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Respectfully submitted,

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