No. 19-CV-861

In the

District of Columbia Court of Appeals

MOBILIZEGREEN, INC.,

Appellant,

v.

COMMUNITY FOUNDATION FOR THE CAPITAL REGION,

Appellee.

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

APPELLANT'S REPLY BRIEF

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MARCH 24, 2020

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INTRODUCTION

There is a narrow question before the Court in this appeal: whether there is a genuine dispute of material facts precluding the grant of summary judgment on MobilizeGreen's claims of breach of fiduciary duty and breach of contract. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (outlining standard to be applied at summary judgment stage). As demonstrated in MobilizeGreen's opening brief and below, disputed issues of material fact exist precluding the grant of summary judgment requiring that the decision of the trial court be reversed, and this case be remanded for further proceedings.

This Court is not being asked to weigh the evidence, inquire into credibility, or consider the comparative merits of any inferences that may be drawn in either party's favor. If questions of competing inferences or evidence do arise, the law requires the Court to defer its own judgment and instead allow the matter to go forward to the trier of fact. *Anderson*, 477 at 250. Summary judgment may only be granted, or affirmed, when "*no* reasonable juror, viewing the evidence in the light most favorable to the prevailing party, could have reached the verdict in that party's favor." *Trustees of Univ. of D.C. v. Vossoughi*, 963 A.2d 1162, 1180 (D.C. 2009) (*citing* Super. Ct. Civ. R. 50) (emphasis added).

In its brief the Community Foundation ("CFNR") repeatedly argues why the evidence it presents weighs in favor of its defenses. MobilizeGreen disagrees, but

that is a question for another day. MobilizeGreen has presented ample evidence to support its claims. There is a genuine dispute of material fact. This case must be allowed to proceed.

I. The Community Foundation Owed Fiduciary Duties To MobilizeGreen

CFNR willingly agreed to be a trusted advisor to MobilizeGreen, thereby becoming a fiduciary. The parties agree that D.C. law finds a fiduciary relationship where the "parties' interactions established 'a special confidential relationship.'" Appellee CFNR's Opposition to MobilizeGreen's Opening Brief ("Opp.") at 12 (*citing Urban Investments, Inc. v. Branham*, 464 A.2d 93, 96 (D.C. 1983)). A fiduciary relationship is defined broadly. *See Church of Scientology Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1028 (D.D.C. 1994). A party holding itself out as being knowledgeable in a particular subject area and agreeing to provide that service to an inexperienced party becomes the inexperienced entity's fiduciary. *Id.* A fiduciary relationship may also exist when one party demonstrated that another had violated the trust that it had "reasonably repose[d]." *Id.* (internal quotation omitted).

CFNR and MobilizeGreen disagree on what the facts prove on this issue, but there can be no reasonable disagreement that a genuine dispute of material facts exists.

Among other things, there is a dispute as to what the parties understood a "fiscal sponsorship" to mean, and what they contemplated when entering into the sponsorship agreement. Questions as to the parties' state of mind, and the weight and credibility of the supporting evidence are particularly best left to the trier of fact. *See, e.g., Blount v. Nat'l Ctr. for Tobacco-Free Kids*, 775 A.2d 1110, 1114 (D.C. 2001)(noting that summary judgment is "rarely appropriate" because "determination of a defendant's state of mind presents a question of fact"); *Washington Post Co. v. Keogh*, 365 F.2d 965, 967 (D.C. Cir. 1966) ("summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind"); *Nickens v. Labor Agency of Metro. Washington*, 600 A.2d 813, 820 (D.C. 1991) (determinations of motives are "rarely appropriate" at summary judgment). Genuine disputes of material fact exist over the following:

A. Whether the Community Foundation's Conduct Indicates that it Accepted the Role of Fiduciary

CFNR asserts that a fiduciary relationship cannot exist if CFNR did not accept the obligations and duties. Opp. at 22 (citing Restatement (Second) of Agency § 15 cmt. B). However, CFNR selectively quotes the Restatement to make its point. The full text of comment B refers only to principal/agent relationships—a specific subset of fiduciary relationships. *See* Restatement (Second) of Agency § 15 cmt. B ("A person may, by his sole act, create a power in another to act on his

account, but since agency is a fiduciary relation, it can exist only if the other accepts the power.") *compare with* Opp. at 22 ("a fiduciary relation . . . can exist only if the other [the alleged fiduciary] accepts the power.") (alterations in original).

Furthermore, even if acceptance were required in this instance, CFNR does not present a single case indicating that the acceptance must be in written form or contained within a written contract. Nor can they. Courts have found fiduciary relationships exist in a wide variety of situations where one party reasonably relied on the superior expertise of another even in the absence of a written acceptance of the duty. For example, in *Gerson v. Gerson*, two stepsons who were experienced businessmen were found to be fiduciaries of their elderly widowed stepmother. *Gerson v. Gerson*, 179 Md. 171, 177, 20 A.2d 567, 570 (1941) There was no agreement oral or written between the fiduciaries and the beneficiary; nevertheless, the court found that a fiduciary relationship existed given the superior position of the stepsons, their knowledge of the inferior position of their stepmother, and their providing her with advice upon which she relied. *Gerson*, 179 Md. at 177 (1941). The court in *Gerson* noted that "[i]t is settled by an *overwhelming* weight of authority that the principle extends 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*." *Id.* at 177–178 (emphasis added).

The court in *Gerson* further explained that the fiduciary "relation and duties involved in it need not be legal; it may be moral, social, domestic, or merely personal." *Id.* at 178. *See also Roberts-Douglas v. Meares,* 624 A.2d 405, 420 (D.C. 1992), *opinion modified on other grounds,* 624 A.2d 431 (D.C. 1993) (noting that if circumstances indicate that church leaders were in a position to influence parishioners, a relationship of trust and confidence sufficient to impose fiduciary duties may arise).

CFNR tries to distinguish additional cases relied upon by MobilizeGreen by seizing upon irrelevant factual differences. Opp. at 23–24. However, none of these differences alter the thrust of MobilizeGreen's argument—that fiduciary duties exist when examination of the facts shows that one party reposed trust and confidence in another that held a position of superior expertise or had the ability to access and/or utilize sensitive information, and that second party agreed to assist the inferior party in the furtherance of a task or goal. Thus, it is irrelevant that the particular expertise in *Government of Rwanda v. Rwanda Working Grp.*, involved lobbying; what is relevant is that, like here, defendant held itself out as an expert in this task and agreed to lend its expertise to plaintiff. 227 F. Supp. 2d 45 (D.D.C. 2002). Similarly, in *Council on American Islamic Relations Action Network, Inc. v. Gaubatz*, the court found defendant an agent of plaintiff, and therefore a fiduciary, not based on his specific contractual obligations or because only an

agent can be a fiduciary, but because the particular facts showed that defendant had access to sensitive information and thus, acquired an obligation to exercise heightened care and loyalty in his interactions with plaintiff. 31 F. Supp. 3d 237 (D.D.C. 2014). Finally, it is not relevant that in *Paul v. Judicial Watch, Inc.*, the court concluded that individual officers of an organization are not liable for the breaches of the organization's fiduciary duty. What matters is the holding of *Paul* that an organization in a relationship of trust and confidence to another entity, may owe fiduciary duties. 543 F. Supp. 2d 1 (D.D.C. 2008).

MobilizeGreen has presented ample evidence permitting a reasonable trier of fact to infer that CFNR knew that a great deal of confidence was being placed upon it, knowingly and willingly entered into the relationship with MobilizeGreen and accepted the role of trusted advisor. That evidence included:

- Testimony from MobilizeGreen's founder, [redacted], that she chose CFNR to serve as the fiscal sponsor because CFNR represented itself as being in a superior position and capable of providing support and guidance. Appellant's Opening Brief at 12.
- MobilizeGreen communicated its belief that it was entrusting CFNR with "critical funding" and with an enormous amount of financial resources critical to MobilzeGreen's project. *Id.* at 13.

- MobilizeGreen informed CFNR that if the Forest Service partnership could not be secured due to a lack of a fiscal sponsor, that the loss would be problematic. *Id.* In fact, as the controller of the disbursement of Forest Service Funds, CFNR must have been aware that it exercised enormous power over MobilizeGreen's primary funding stream and its relationship with the Forest Service.

A reasonable jury could conclude from these and the other facts presented that MobilizeGreen relied upon CFNR to play the role of trusted steward—much like the widow in *Gerson* relied upon her more experienced stepchildren, or the public relations firm in *Church of Scientology*. [1]

Likewise, the facts would allow a reasonable jury to find that CFNR was aware of the trust being placed upon it and knowingly undertook the role of fiscal sponsor. As discussed by MobilizeGreen in its Opening Brief, CFNR's own notes demonstrate its awareness of these facts. *Id.* at 13–14. Additionally, industry publications provided by CFNR during the summary judgment briefing also suggest that fiscal sponsors bear the responsibility of providing advice and counsel

[1] CFNR attempts to distinguish *Church of Scientology* by referring to its argument that it never undertook to act in a manner to benefit MobilizeGreen. Opp. at 23–24. This is plainly untrue, as CFNR was contractually obligated by the Cost Share Agreement ("CSA") to act in furtherance of the project and accordingly, further MobilizeGreen's charitable mission in tandem with its own. *See supra* Part. II at 11–12.

to the sponsored project—the same duty that can give rise to a fiduciary relationship. *See* JA_0300 (Ex. 3 to CFNR's Statement of Undisputed Facts) (listing "training, counsel, and technical assistance" as a recommended practice for fiscal sponsors).

CFNR only response to this evidence is to offer an alternate explanation for CFNR's understanding of the relationship. But it is the role of the jury—not the court on summary judgment—to resolve that dispute. Accordingly, summary judgment is not appropriate.

B. Whether Industry Custom Favors Finding a Fiduciary Relationship

MobilizeGreen has provided evidence that in the nonprofit world, it is customary for fiscal sponsors to be viewed as fiduciaries. CFNR asks this Court to affirm the grant of summary judgment despite this evidence and to find that no genuine dispute exists.

First, CFNR argues that the express terms of the Fiscal Sponsorship Agreement should be given greater weight than industry custom. Opp. at 29. This argument goes to the relative weight of the evidence provided by both sides, it does not demonstrate the absence of a dispute, and is not an appropriate basis to grant summary judgment.

Second, CFNR offers its own interpretation of the industry custom and argues that because it provided expert testimony, CFNR's account of the industry's practices should be accepted.[2] Again, at most CFNR offers an alternative set of interpretations and inferences than those provided by MobilizeGreen. Again, deciding which position should prevail is the responsibility of the fact finder, not a task for the court deciding a summary judgement motion.

Contrary to CFNR's argument, expert testimony is not required to prove the existence of a fiduciary relationship and to describe standards of care established under a contract, and neither case cited by CFNR so requires. Opp. at 30. In *St. Paul Mercury Ins. Co*. the court considered claims over the proper functioning of a highly technical and scientifically complex piece of sprinkler technology and held that when a matter is so "distinctly related" to specific science or professions beyond the understanding of the average person, the circumstances would require expert testimony to assist in interpreting the terms of a contract. *St. Paul Mercury*

[2] The unsworn expert report relied upon by CFNR should not be considered in deciding the summary judgment motion because it is inadmissible hearsay. *See Nnadili v. Chevron U.S.A., Inc*., 435 F. Supp. 2d 93, 105 (D.D.C. 2006) (noting that "unsworn expert report is not competent to be considered on a motion for summary judgment"). The report does not contain the language attesting, under penalty of perjury, to the true and correct nature of its contents as required under 28 U.S.C. § 1746(2), or Rule 56 of the Superior Court Rule of Civil Procedure. *Cormier v. D.C. Water & Sewer Auth*., 959 A.2d 658, 664 (D.C. 2008). Nor does it contain any sufficiently identical language.

Ins. Co. v. Capitol Sprinkler Inspection, Inc., 627 F. Supp. 2d 1, 11 (D.D.C. 2009). Similarly, in *Carleton*, the court considered questions of the specific duties a real estate agent owes to its customers when conducting a home inspection—another highly specific field filled with technical requirements and complexity. *Carleton v. Winter*, 901 A.2d 174, 179 (D.C. 2006).

Unlike in *St. Paul Mercury Ins.* and *Carleton*, there is no reason why establishing the existence of a fiduciary duty here requires expert testimony. In addition to presenting published industry guidance, MobilizeGreen presented the testimony of its co-founder, a longtime participant in the non-profit industry. A lay witness, like [redacted], may testify as to "personal experiences and observations and [the witness] used reasoning processes familiar to the average person in everyday life to reach their proffered opinion." *King v. United States*, 74 A.3d 678, 681 (D.C. 2013). A jury could consider her testimony and the other evidence presented, weigh that evidence against what was provided by CFNR and reach a conclusion that a duty existed. Such has been the case in most decisions applying District of Columbia law in determining whether a fiduciary relationship without resorting to expert evidence. *See Gerson*, 179 Md. at 177; *Council for American Relations*, 31 F. Supp. 3d at 341-42 ; *Rwanda*, 227 F. Supp. 2d at 45.

II. Finding a Fiduciary Relationship is Not Precluded As a Matter of Law

First, CFNR repeatedly argues that it could not have been a fiduciary and act in the interest of MobilizeGreen because as a not for profit organization under § 501(c)(3), it must operate solely for its own charitable benefit. CFNR's position rests on its misstatement of the law in its briefing to the trial court. Throughout its Motion for Summary Judgment, CFNR repeatedly characterized § 501(c)(3) as requiring an organization operate exclusively "for *their own* charitable purpose." CFNR's Brief in Support of Its Motion for Summary Judgment at 14 (emphasis added). The italicized phrase is not present in the statute. Appellant's Brief at 17. CFNR provides no authority supporting its earlier reading of the statute or contradicting MobilizeGreen's argument.

CFNR now, for the first time, asserts that MobilizeGreen was not in fact pursuing exclusively charitable work, and thus, this argument should be ignored. Opp. at 27. This argument has no basis in fact. It relies on MobilizeGreen not having yet obtained its tax-exempt status. *Id.* But MobilizeGreen's tax status does not speak to the work it undertook. There is nothing suggesting that MobilizeGreen performed any impermissible non-charitable work, unlike the organizations at issue in IRS P.L.R. 201408030 (at JA 0175, cited by Appellant's Brief at 18 and Opp. at 17). Moreover, the argument ignores the language in the Cost Share Agreement ("CSA") with the Forest Service, which required the funds to be used solely to further the MobilizeGreen project. If supporting MobilizeGreen was not

appropriately charitable, CFNR would not have been able to undertake the project at the outset.

Next, CFNR argues that it could not have been a fiduciary because the Forest Service funds belonged solely to it and not to Mobilize Green. MobilizeGreen does not, and has not, disputed the ownership of the funds. However, this fact is irrelevant to the question of whether CFNR was required to exercise the duties of care, loyalty, and good faith in distributing and managing the funds.

CFNR repeatedly argues that the Forest Service funds were akin to funds donated by a donor to a charitable trust. This comparison is wrong. The Forest Service funds bear a critical difference from standard donations: they were given for a specific purpose as outlined in the CSA—the contract between signed by the donor (Forest Service) and the sponsor (CFNR). The CSA requires the funds to be used to "help build the next generation of environmental leaders…through a new national program…called MobilizeGreen." (emphasis added) JA_0921. The CSA repeatedly underscores the importance that the funds be used solely to implement and benefit the MobilizeGreen program. *See, e.g.,* JA_0923 (requiring CFNR to submit invoices to receive Forest Service Funds and specifying that reimbursement will be predicated on CFNR's "full match to the project."). *See also*, JA_0926 (requiring that CFNR "shall adequately safeguard all such property and ensure that

it is used solely for authorized purposes" *i.e.* to implement the MobilizeGreen program). Furthermore, CFNR's own agreement with MobilizeGreen states that "[d]istributions from the Fund *shall* be made upon recommendation of [MobilizeGreen] as communicated by its authorized Officer." JA_0905. Again, if CFNR's argument were correct, then CFNR risked its tax-exempt status the moment it entered into the CSA with the Forest Service.

Furthermore, the cases that CFNR relies upon in making this argument are inapposite. CFNR does not cite a single case where funds had been given to the sponsor under a similar requirement. CFNR repeatedly leans on *Nevius v. Africa Inland Mission Int'l*, 511 F. Supp. 2d 114, 121 (D.D.C. 2007) to argue that monies held by a fiscal sponsor belong to the sponsor. But *Nevius* is inapposite because the case concerns a question, whether a missionary organization was operating as a trust on behalf of the individual missionary, that is not analogous to the one here. MobilizeGreen does not argue that CFNR should have existed as a charitable trust for any of MobilizeGreen's purposes. Instead, MobilizeGreen argues that pursuant to the CSA, the funds should have been distributed and disbursed under the standard of care required of a fiduciary.

The limited tax authority cited by CFNR is similarly inapposite. In asserting that fiscal sponsors may procure funding for sponsored projects provided that "it is not under the control of nor does it exist to serve the program of any particular

mission" CFNR looks to IRS Rev. Rule 75–434 (1975). Opp. at 16 (JA_0312-14). However, the language CFNR relies upon does not come from the holding of the IRS ruling—it merely describes the organization at issue within the letter. *Id.* CFNR's reliance on IRS Rev. Rul. 66–79 is also misplaced. Opp. at 16 (JA_0308-10). This ruling deals with instances where domestic organizations may transfer funds to foreign organizations—a topic that is irrelevant to the current case.

Finally, the fact that a fiscal sponsor may not act as a financial trust fund for the sponsored organization does not preclude the finding of a fiduciary relationship. A fiduciary's duties extend beyond using funds to further the interests of another. As demonstrated by cases cited by both parties, the role of the fiduciary is far broader. As illustrated by *Gerson*, a fiduciary is one who must, in recognition of their superior expertise, advise and guide the party it has that relationship with. *See also Church of Scientology*, 848 F. Supp. at 1028 (fiduciary's role is to provide counsel), *Council on American Islamic Relations*, 31 F. Supp. 3d 237, 341–342 (D.D.C. 2014) (fiduciary's role is to safeguard information known to be confidential and to provide guidance commensurate with the sensitivity). This is the same role that CFNR agreed to take on. *See* supra at 12.

CFNR also mistakenly relies on *Fogg* and *Geiger* to argue that the existence of fiduciary relationships can be resolved as a question of law, and without careful

examination of the particular facts. Opp. at 21. *Fogg v. Fid. Nat. Title Ins. Co.*, 89 A.3d 510, 513–14 (D.C. 2014), merely holds that the act of issuing title insurance does not by itself create a fiduciary duty beyond the terms of the title insurance policy. It does not make a sweeping statement regarding whether the existence of a fiduciary relationship is a question of law. Tellingly, *Fogg* was decided in circumstances where plaintiff did not allege any facts suggesting a special relationship based on trust. Likewise, in *Geiger* the court merely held that a bank ordinarily owes no fiduciary relationship to its depositors, and, on the specific facts of that case, found no reason to hold otherwise. *Geiger v. Crestar Bank*, 778 A.2d 1085, 1091, 1094 (D.C. 2001). Here, MobilizeGreen has provided evidence that fiscal sponsors are typically considered to be fiduciaries of the sponsored project, and that a fiduciary relationship based on trust and comparative expertise existed, was relied upon by MobilizeGreen, and was willingly accepted by CFNR. A reasonable trier of fact could infer from these allegations that CFNR owe fiduciary duties to MobilizeGreen.

III. A Genuine Dispute Exists Over Whether CFNR Breached Its Contractual Obligations to Transfer the Sponsorship

CFNR repeatedly argues that it was under no obligation to effectuate the transfer of the fiscal sponsorship to another tax-exempt organization. Opp. at 33. However, it does not address the fundamental contradiction inherent in its

argument: if the Forest Service funds belonged to CFNR and were solely within its control, how could MobilizeGreen have been the party to effectuate the transfer of the property to a different fiscal sponsor?

CFNR instead now argues that transferring of the fiscal sponsorship did not require transfer of the CSA and the funds granted under it. Opp. at 34. This is nonsensical. The CSA by its very terms obligated the funds to be used to administer MobilzeGreen's program. JA_0923. It was impossible for CFNR to keep the funds and the Fiscal Sponsorship Agreement and lose the sponsoree, because the funds would have no purpose. The only sensible way to transfer the fiscal sponsorship would be to transfer the funds needed to effectuate the sponsored project. Under CFNR's own argument, only CFNR controlled the funds and only it could effectuate the transfer.

Additionally, CFNR again points to MobilizeGreen's attempt to assist in such a transfer by contacting the Forest Service and potential new sponsors. Opp. at 34–35. However, it does not address MobilizeGreen's interpretation of these facts. Appellant's Brief at 24. As MobilizeGreen argues, a trier of facts could reasonably conclude that these communications were an attempt to salvage MobilizeGreen's program — and not, as evidence that it understood its own obligation to secure a transfer. Once again, all that is presented is a series of disputed interpretations and inferences. It was not for the trial court on summary

judgment, or this Court on appeal, to determine which interpretation should prevail. Those are factual questions for the trier of fact.

IV. There Are Genuine Disputes of Fact Concerning Damages

CFNR revives its argument that summary judgment should be granted on the question of damages. The trial court did not reach this issue, and this Court should decline to decide an issue the trial court did not decide. As a general matter, appellate courts customarily decline to opine on questions that a trial court did not resolve or reach. *Jaiyeola v. D.C.*, 40 A.3d 356, 372–73 (D.C. 2012) ("[I]t usually will be neither prudent nor appropriate for this court to affirm summary judgment on a ground different from that relied upon by the trial court. Among the reasons cited for this proposition are that the issues are not ripe for consideration, not clearly presented by the record or simply because it would be better to leave to the trial court the task of sifting through the summary judgment record."). *See also Klock v. Miller & Long Co.*, 763 A.2d 1147, 1152 (D.C. 2000) ("Because no statement of reasons was given by the trial court in rendering judgment, we do not reach nor address these questions."). CFNR provides no reason why this Court should deviate from this practice.

Even if the Court were to consider the question of damages, there is ample evidence creating a genuine dispute of material fact. The threshold for establishing the existence of damages at the summary judgment stage is low. The only question

asked is whether a party has asserted evidence sufficient to establish any damages. *Cormier*, 959 A.2d at 667. The question of the extent of the damages is one reserved for the jury. *See Hughes v. Pender*, 391 A. 2d 259, 264 (D.C. Cir. 1978). MobilizeGreen has put forward ample evidence to suggest that it sustained damages, including the loss of project funding, intern placements, increased liability, increased program costs, office space, and vendors and partners. MobilizeGreen's Brief in Opposition to CFNR's Motion for Summary Judgment at 45. This evidence includes:

- The sworn testimony of MobilizeGreen co-founder, [redacted], attesting to the impact of CFNR's actions on MobilizeGreen's future partnerships. Ex. 1 to MobilizeGreen's ("MG") Undisputed Facts ¶ 35 (JA_0811).
- The calculated loss of 770 intern placements over a 5-year period, and the corresponding loss of $3,313,292 in program revenue. Ex. 1 to MG's Undisputed Facts ¶ 36 (JA_0811-812).
- Damage to MobilizeGreen's industry goodwill, including loss of the ability to place future interns. Ex. 1 to MG's Undisputed Facts ¶ 39 (JA_0812).
- The incursion of costs and liabilities which would not have accrued but for CFNR's conduct. Ex. 1 to MG's Undisputed Facts ¶ 39 (JA_0812).

- Letters from MobilizeGreen partners refusing to conduct further projects with the organization in response to MobilizeGreen's inability to pay partners due to CFNR's delays in releasing funds. JA_0974-975.

CFNR wrongly characterizes these claims as solely lost business opportunities. Opp. at 38. Each of these categories of damages raises questions of fact reserved for the jury and cannot be resolved at this stage.

CFNR counters the testimony of MobilizeGreen's founder with its own citations to a variety of testimony from other non-profit organizations. Opp. at 38–39. But the direct testimony of MobilzeGreen's CEO challenges this testimony and offers alternate explanations for its future attempts at working with these non-profit organizations. JA_0811. *See also* MG Opp. to Summary Judgment at 47–49. These conflicting explanations and testimonial accounts are proof of a genuine dispute of fact. Both parties have provided competing testimony,[3] and as the claimant, MobilizeGreen is entitled to present its evidence to a jury and have the jury weigh the evidence and the credibility of those testifying and determine the amount of damages accordingly. When a claimant provides a list of several categories of damages, and if the person attesting to the losses is generally knowledgeable about the loss, it is not for the court at summary judgment to

[3] [redacted] is entitled to provide testimony as to the losses suffered by her own organization. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993) (permitting lay testimony of business owner to establish injury to business).

"decide whether, if the case had proceeded to trial, appellant would (or would not) have persuaded the fact finder of her version." *Samm v. Martin*, 940 A.2d 138, 142 (D.C. 2007).

CONCLUSION

Genuine disputes of material fact exist over issues critical to this litigation. MobilizeGreen has presented evidence from which a trier of fact could conclude that CFNR owed it fiduciary duties. Based upon the disputed evidence a reasonable trier of fact could also find that CFNR breached its contractual obligation to effectuate a transfer to a new fiscal sponsor. The trial court erred resolving these issues in summary judgment. This Court should reverse the trial court's erroneous rulings and remand the case for further proceedings.

Dated: March 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served electronically to the persons listed below on March 24, 2020.

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