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)*

APPELLEE'S BRIEF

Dated: February 26, 2010

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of the District of Columbia Court of Appeals, Appellee Greater Washington Community Foundation (f.k.a. the Community Foundation for the National Capital Region) (the "Community Foundation") declares that it is a not-for-profit, tax-exempt organization incorporated in the District of Columbia. The Community Foundation has no parent corporation. It issues no stock, and no publicly held corporation owns 10% or more of the Community Foundation.

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STATEMENT OF THE ISSUES

1. Whether the trial court correctly entered summary judgment in favor of the Community Foundation on MobilizeGreen's claim for breach of fiduciary duty, in light of facts that were explicitly undisputed in MobilizeGreen's response to the Defendants' Statement of Undisputed Fact ("DSUF") (JA0115-59) under Rule 56(b)(2) of the D.C. Superior Court Rules of Civil Procedure, judicial admissions, and the contract at issue in the case.

2. Whether the trial court correctly entered summary judgment in favor of the Community Foundation on MobilizeGreen's claim for breach of contract in light of the plain meaning of the parties' contract, the undisputed extrinsic evidence on point, or any other alternative grounds.

3. Whether, notwithstanding the answer to the first two questions, this Court may affirm the trial court's entry of summary judgment in favor of the Community Foundation on the alternative ground that MobilizeGreen failed to raise a genuine dispute of material fact as to its theory of injury or damages-in-fact.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is an appeal from a grant of summary judgment entered by Judge Neal E. Kravitz of the D.C. Superior Court in favor of the Community Foundation[1] on MobilizeGreen's claims for breach of fiduciary duty and breach of contract.[2]

This Court should affirm summary judgment against MobilizeGreen's fiduciary duty claim because MobilizeGreen cannot articulate any evidence-based explanation of what—in plain, practical terms—the Community Foundation had a duty to do for MobilizeGreen's benefit. MobilizeGreen relies on well-worn clichés about fact-intensive inquiries and relationships of trust and confidence. But fiduciary relationships are not so amorphous. They all involve some commitment, voluntarily undertaken, to act for the benefit of another. MobilizeGreen offers no explanation—and cites no admissible evidence—to address that key point.

MobilizeGreen cannot speak to this point because the key facts in this case are *explicitly* "[u]ndisputed" in MobilizeGreen's response to the Defendants' Statement of Undisputed Fact ("Pl.'s Resp. to DSUF") in the proceedings below.

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[1] The "Community Foundation" is Defendant-Appellee Greater Washington Community Foundation (f.k.a. Community Foundation for the National Capital Region). "MobilizeGreen" is Plaintiff-Appellant MobilizeGreen, Inc.

[2] After Judge Kravitz's entry of summary judgment, a single claim remained in the case. On MobilizeGreen's motion, Judge Fern F. Saddler entered judgment on that final remaining claim, so that MobilizeGreen could bring this appeal on its main claims for breach of fiduciary duty and breach of contract.

See JA0115-59. The parties only had one agreement to cooperate on one project. As to that one project, the Community Foundation played only a "limited" role. And the Community Foundation undertook that limited role for one sole purpose, which was to advance *its own* charitable mission, *not* to benefit MobilizeGreen.

Judge Kravitz correctly ruled that these facts, in light of this Court's decisions and longstanding principles governing fiduciary relationships, could not impose on the Community Foundation a fiduciary duty to act or give advice for the benefit of MobilizeGreen. This Court should affirm summary judgment against MobilizeGreen's claim for breach of fiduciary duty.

The Court also should affirm Judge Kravitz's entry of summary judgment against MobilizeGreen's breach of contract claim. This claim comes down to the question of which (if either) of the parties was responsible for securing the cooperation of a federal agency. Judge Kravitz ruled that extrinsic evidence demonstrated that the Community Foundation was *not* responsible for securing the federal government's cooperation. That was correct. If the trial court erred at all, it was in saying that one must resort to extrinsic evidence to answer this question in the first place, or in saying that such a small amount of extrinsic evidence bore on the question. The plain text of the parties' agreement, as well as explicitly "[u]ndisputed" facts, demonstrates that Judge Kravitz's ultimate conclusion was correct. The Court should affirm as to the contract claim as well.

Alternatively, this Court may affirm summary judgment because MobilizeGreen failed to raise a genuine issue of material fact as to its theory of injury or damages-in-fact. MobilizeGreen's inability to provide an evidence-based explanation of how (if at all) it was harmed by the Community Foundation's alleged wrongdoing is independently fatal to both of the claims on appeal.

STATEMENT OF FACTS

The record in this case may appear voluminous, but explicitly "[u]ndisputed" facts, judicial admissions, and legal instruments obviate the need to wade through the bulk of the record. The following facts are undisputed.

The Community Foundation is a tax-exempt charitable organization recognized under Section 501(c)(3) of the Internal Revenue Code. Pl.'s Resp. to DSUF ¶ 4 (JA0116). As of 2011 and 2012, "MobilizeGreen was not recognized by the IRS as a tax-exempt organization." Pl.'s Resp. to DSUF ¶ 11 (JA0118).

MobilizeGreen wanted to "help[] diverse college students secure hands-on job training through internships." Pl.'s Resp. to DSUF 14 (JA0118). It sought funding from the U.S. Forest Service; but "[b]ecause MobilizeGreen hadn't gotten its 501(c)(3) yet, the Forest Service told MobilizeGreen that it needed a fiscal sponsor." Pl.'s Resp. to DSUF ¶ 13 (JA0118) (internal punctuation altered).

MobilizeGreen accordingly asked the Community Foundation to sponsor the green internship project. *See* Pl.'s Resp. to DSUF ¶ 16 (JA0119). The project

"aligned with the Community Foundation's own charitable goals." Pl.'s Resp. to DSUF ¶¶ 14-15 (JA0118-19). However, "[t]he Community Foundation initially denied MobilizeGreen's request for fiscal sponsorship because of internal capacity issues related to its ability to comply with certain government accounting and audit requirements." Pl.'s Resp. to DSUF ¶ 16 (JA0119) (internal punctuation altered).

To allay these concerns, MobilizeGreen's CEO, , wrote: "We can contractually guarantee to the Foundation that we will have our 501(c)(3) status, have another fiscal sponsor, or will terminate the agreement prior to the receipt of actual funding by any government agency." Pl.'s Resp. to DSUF ¶ 17 (JA0119). Ms. accordingly "propose[d] a temporary fiscal sponsorship." *Id.*

The parties "entered an agreement captioned 'Agreement to Create a Sponsored Program Fund,' which the parties in this case call the 'Fiscal Sponsor Agreement.'" Pl.'s Resp. to DSUF ¶ 19 (JA0120).

In accordance with MobilizeGreen's "guarantee" (*supra*), the Agreement provides: "[t]his fund is established to provide temporary fiscal sponsorship for a period not to exceed November 1, 2011, at which time the Organization will transfer to another fiscal sponsor." Fiscal Sponsor Agreement ¶ 8 (JA0057). "[T]he Organization" is MobilizeGreen. *Id.* at 1 (JA0056).

"Undisputed" facts and the Fiscal Sponsor Agreement describe what the fiscal sponsorship in this case entailed.[3] The program being sponsored was the green internship program for diverse college students that MobilizeGreen sought to run. Pl.'s Resp. to DSUF ¶¶ 13-14 (JA0118-19).

The Community Foundation and MobilizeGreen both "understood with no problem" that, "[a]s a sponsored program fund of the Community Foundation, the project [became the Community Foundation's] project, because it's on [the Community Foundation's] 501(c)(3) and [the Community Foundation was] held liable and accountable for that." Pl.'s Resp. to DSUF ¶ 28 (JA0122).

The Fiscal Sponsor Agreement established a fund related to the sponsored program. Fiscal Sponsor Agreement at 1 (JA0056). Money received in connection with the sponsored program was given "irrevocably . . . to the Foundation." *Id.* The fund was "a component part of the Foundation and not a separate trust." Fiscal Sponsor Agreement ¶ 7 (JA0057).

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[3] The trial court correctly focused on the terms of *these* parties' relationship in *this* case. However, a widely regarded treatise on fiscal sponsorship provides broader context regarding what fiscal sponsorships generally involve. *See* Gregory L. Colvin, FISCAL SPONSORSHIP: 6 WAYS TO DO IT RIGHT (2d ed. 2005) ("Colvin Treatise") (relevant excerpts at JA0251-72). The Community Foundation also has offered the expert opinion of James Joseph regarding what fiscal sponsorships generally are, and how they are implemented in practice. *See generally* Expert Report of J. Joseph (JA0738-93). MobilizeGreen offered no competing expert opinion on this (or any other) topic.

The Community Foundation administered the sponsored program fund by reimbursing or paying expenses related to the program; documenting expenses; and seeking reimbursement from the Forest Service. Pl.'s Resp. to DSUF ¶¶ 36, 54 (JA0125, JA0154). "Apart from [alleged] delays, Ms. could not think of any [program] expenses that were never, ever paid" by the Community Foundation. Pl.'s Resp. to DSUF ¶ 61 (JA0139) (internal punctuation omitted).

Funding was reimbursed by the Forest Service. "[T]he Community Foundation entered a so-called Challenge Cost Share Agreement with the U.S. Forest Service (the 'Forest Service'), which the parties in this case call the 'Forest Service Agreement.'" Pl.'s Resp. to DSUF ¶ 31 (JA0123). That agreement provided: "The U.S. Forest Service shall reimburse the Community Foundation for the U.S. Forest Service's share of actual expenses incurred . . . ." Pl.'s Resp. to DSUF ¶ 36 (JA0125); Forest Service Agreement ¶ IV.A (JA0448).

Regarding money handled by the Community Foundation, MobilizeGreen "does not seek an ownership or vested interest in Forest Service funds in connection with the Forest Service Agreement," and it "could not identify any funds that MobilizeGreen entrusted to the Community Foundation." Pl.'s Resp. to DSUF ¶¶ 22, 40 (JA0121, 0126) (internal punctuation omitted).

MobilizeGreen "make[s] no claim regarding . . . the Forest Service Agreement." Pl.'s Resp. to DSUF ¶ 39 (JA0126) (internal punctuation omitted).

Administering the fund was the Community Foundation's "limited" role; MobilizeGreen otherwise "'designed, manned, managed, and ran' the internship program" itself. Pl.'s Resp. to DSUF ¶ 50 (JA0130). The Forest Service Agreement "authorized of MobilizeGreen to act as the Principal Cooperator Program Contact." Appellant's Br. at 6. "[T]he Community Foundation never had any relationships with any of MobilizeGreen's partners," and MobilizeGreen accordingly "was unable to state or provide evidence that the Community Foundation controlled MobilizeGreen's good will in any way." Pl.'s Resp. to DSUF ¶ 53 (internal punctuation omitted) (JA0131).

"The Community Foundation played no role in any other project related to MobilizeGreen" apart from the internship project contemplated by the Forest Service Agreement. Pl.'s Resp. to DSUF ¶ 52 (JA0130-31).

The Forest Service Agreement was not transferred by November 1, 2011. Undisputed facts explain why not. "The Community Foundation . . . agreed, pending Forest Service approval, to allow [MobilizeGreen] to shift fiscal sponsorship to a new entity (which [was] standing by to effect this transfer)." Pl.'s Resp. to DSUF ¶ 42 (JA0126). However, "Ms. . . . could not recall any communication from the Forest Service approving her request to transfer." Pl.'s Resp. to DSUF ¶ 43 (JA0127). The Forest Service's lack of approval prevented transfer of the Forest Service Agreement for legal reasons. *Infra* at 33.

The Community Foundation accordingly kept operating the sponsored program fund until the Forest Service Agreement terminated. The Forest Service Agreement was scheduled to terminate on September 30, 2012. Pl.'s Resp. to DSUF ¶ 36 (JA0125). MobilizeGreen never intended the Community Foundation to continue working on the project once the "original" Forest Service Agreement "terminated," and "MobilizeGreen and the Forest Service agreed to transfer the grant to another fiscal sponsor [L.A. Conservation Corps], effective October 1, 2012." Pl.'s Resp. to DSUF ¶¶ 63-65 (JA0140-41).[4]

Discovery revealed that MobilizeGreen did, indeed, continue its work with another fiscal sponsor "subsequent to September 30, 2012." Pl.'s Resp. to DSUF ¶ 71 (JA0143). Unfortunately, MobilizeGreen's new fiscal sponsor, the Los Angeles Conservation Corps ("LACC"), found that "MobilizeGreen's internship model presented extraordinary complexities" that led it "to discontinue working with MobilizeGreen" in mid- to late-2013. Pl.'s Resp. to DSUF ¶ 73 (JA0145). "LACC was not discouraged from working with MobilizeGreen by any delays in payment or other administrative errors (if any) by the Community Foundation while the

[4] MobilizeGreen's assertion that the Community Foundation terminated the Forest Service Agreement "without consulting or informing MobilizeGreen" (Appellant's Br. at 8) contradicts these undisputed facts. MobilizeGreen's cited support for that assertion is the court's order on the *motion to dismiss*, which assumed the truth of MobilizeGreen's initial allegations. No actual evidence supported that allegation, which (as noted) was abandoned on summary judgment.

Community Foundation was MobilizeGreen's fiscal sponsor." Pl.'s Resp. to DSUF ¶ 71 (JA0143). "Ms. has disclaimed any ability to contradict [LACC's] affidavit in this regard." Pl.'s Resp. to DSUF ¶ 74 (JA0146).

That is all undisputed in retrospect. But the Community Foundation only documented why LACC broke ties with MobilizeGreen after years of discovery.

Meanwhile, MobilizeGreen blamed the demise of its relationship with LACC on the Community Foundation. MobilizeGreen sued, claiming that it lost "$3.3 million worth of . . . 'business opportunities'" because of the Community Foundation's handling of the fiscal sponsorship. Pl.'s Resp. to DSUF ¶ 84 (JA0149).[5] "This $3.3 million damages figure represents the amount of additional 'net revenue' MobilizeGreen contends it would have recovered" but for the loss of key business partners like LACC. Pl.'s Resp. to DSUF ¶¶ 85-86 (JA0151-53). This is MobilizeGreen's *only* theory of injury. Pl.'s Resp. to DSUF ¶ 84 (JA0149).

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[5] MobilizeGreen's theory of breach as to the fiduciary duty claim is not at issue on this appeal, but it is summarized here for context. MobilizeGreen contends that the Community Foundation delayed reimbursement or payment of certain expenses. Pl.'s Resp. to DSUF ¶ 61 (JA0139). MobilizeGreen suggests that the Community Foundation's requests for documentation before paying certain expenses were unreasonable. *See* Appellant's Br. at 7.

However, undisputed expert opinion states "the Community Foundation's payment of expenses was reasonable and in accordance with the standards of conduct and care expected of fiscal sponsors." Expert Report of J. Joseph Subsec. IV.A (capitalization altered from original) (JA0767-72); Pl.'s Resp. to DSUF ¶ 62 (JA0139-40). MobilizeGreen's sole objection to this opinion was that it was hearsay. *Id.* But expert reports serve as affidavits supporting summary judgment. *Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 664-66 (D.C. 2008).

The Community Foundation moved for summary judgment on the fiduciary duty and contract claims, arguing that MobilizeGreen could not raise a genuine dispute of material fact regarding duty, breach, or injury. Judge Kravitz granted summary judgment without addressing breach (as to fiduciary duty) or injury. Summ. J. Order (JA0161-72). MobilizeGreen's appeal followed.

ARGUMENT

We address fiduciary duty and breach of contract in turn. *Infra* Sections I and II. Alternatively, this Court may affirm summary judgment against MobilizeGreen's claims because MobilizeGreen did not raise a genuine dispute of material fact as to injury or damages-in-fact. *Infra* Section III.

I. THE COMMUNITY FOUNDATION OWED NO FIDUCIARY DUTY TO MOBILIZEGREEN.

A. All Relevant Authorities Foreclose the Creation of a Fiduciary Relationship by Virtue of the Fiscal Sponsorship in This Case.

This case boils down to the essence of a fiduciary relationship. There are many kinds of fiduciary relationships. One thing they all have in common is that the fiduciary is under "a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." *Newmyer v. Sidwell Friends School*, 128 A.3d 1023, 1036 n.10 (D.C. 2015) (quoting Restatement (Second) of Torts § 874 cmt. a (Am. Law Inst. 1979)). A fiduciary is "held to a strict duty to

act with utmost good faith and loyalty, in furtherance of [the beneficiary's] interests." *Urban Investments, Inc. v. Branham*, 464 A.2d 93, 96 (D.C. 1983).

Such a weighty responsibility cannot be imposed upon a party unless that party does or says something to accept the responsibility. "[A] fiduciary relation . . . can exist only if the other [the alleged fiduciary] accepts the power." *E.g.*, Restatement (Second) of Agency § 15 cmt. b. "The hallmark of a fiduciary relationship is a voluntary and conscious assumption or acceptance of the duties of a fiduciary." *PulseCard, Inc. v. Discover Card Servs., Inc.*, 917 F. Supp. 1478, 1484 (D. Kan. 1996). "Fiduciary relationships cannot be established inadvertently and cannot be forced upon another party." *Id.*

D.C. law accordingly looks to whether the parties' interactions established "a special confidential relationship" obligating the fiduciary to advance the interests of the beneficiary. *See Urban Investments*, 464 A.2d at 96; *see also Geiger v. Crestar Bank*, 778 A.2d 1085, 1095 (D.C. 2001). Summary judgment against a fiduciary duty claim is appropriate where the plaintiff cannot raise a genuine dispute of material fact that the defendant undertook to act for the plaintiff's benefit. *E.g.*, *Fogg v. Fid. Nat'l Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (affirming summary judgment against fiduciary duty claim); *Newmyer*, 128 A.3d at 1036 n.10 (same); *Geiger*, 778 A.2d at 1095 (same).

The only question here is whether the Community Foundation voluntarily took on such duties by virtue of the parties' fiscal sponsorship arrangement. Explicitly "[u]ndisputed" facts and judicial admissions eliminate any other potential source of fiduciary responsibility in this case.

"Other than the Fiscal Sponsor Agreement, MobilizeGreen never signed or entered into any other agreement with [the Community Foundation]." Pl.'s Resp. to DSUF ¶ 24 (JA0121). "[T]he Community Foundation . . . served as MobilizeGreen's fiscal sponsor from on or about July 28, 2011, until September 30, 2012," which represents the entire span of their relationship. Compl. ¶ 1 (JA0025). The Fiscal Sponsor Agreement "sets forth what [MobilizeGreen] agreed to with the Community Foundation. . . . [W]hatever the relationship was supposed to be, it was in that document." Pl.'s Resp. to DSUF ¶ 25 (JA0121).

Each one of two considerations confirms that "that document" (*id.*) could not have created a fiduciary relationship in this case. They are as follows:

1. The express, sole purpose of the parties' fiscal sponsorship relationship could not give rise to a fiduciary duty.

The Fiscal Sponsor Agreement provides:

> PURPOSES. The purpose of the Fund is to further or carry out the educational and charitable uses and purposes of the Foundation, as more specifically set forth in its articles of incorporation and bylaws . . . .

Fiscal Sponsor Agreement ¶ 4 (JA0389). The parties' reference to one ("the") purpose means that it was the sole purpose of the agreement. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) ("The consistent use of the definite article in reference to [a thing] indicates that there is generally only one proper" instance of that thing.); *Glycobiosciences, Inc. v. Innocutis Holdings, LLC*, 189 F. Supp. 3d 61, 70 (D.D.C. 2016) ("The use of the definite article 'the' connotes specificity—that the parties intended to select those particular [things] and not others.").

The answer to the critical question—whether the parties' fiscal sponsor arrangement entailed a fiduciary relationship—therefore must be *no*. Because a fiduciary duty claim assumes that the defendant had an obligation to work for the plaintiff's benefit, a relationship entered "solely for the benefit" of *someone other than* the plaintiff, by definition, cannot serve as the "predicate for [plaintiff's] breach of fiduciary duty claim." *Fogg*, 89 A.3d at 514. In this case, the Fiscal Sponsor Agreement explicitly served to further the Community Foundation's charitable goals, *not* to help MobilizeGreen develop future business opportunities. The fiduciary duty claim accordingly fails.

2. The requirements of I.R.C. § 501(c)(3) independently preclude a fiduciary relationship from arising from the parties' fiscal sponsorship arrangement.

Moreover, the Community Foundation's bylaws require that it "be operated in accordance with the requirements of I.R.C. § 501(c)(3)." Pl.'s Resp. to DSUF ¶

4 (JA0116-17). Further, the Fiscal Sponsorship Agreement referenced "Section 501(c)(3) of the Internal Revenue Code" and provided:

> This Agreement shall be interpreted to conform to the requirements of the foregoing provisions of the federal tax laws and any regulations issued pursuant thereto. The Foundation is authorized to amend this Agreement to conform to the provisions of any applicable law or government regulation in order to carry out the purposes of this Fund.

Fiscal Sponsor Agreement ¶ 7 (JA0057). Section 501(c)(3), in turn, requires that a tax-exempt entity be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . ." Implementing regulations provide the same. *E.g.*, 26 C.F.R. § 1.501(c)(3)-1.

Two longstanding principles derive from these requirements.

First, money held by a fiscal sponsor "belong[s] to the [sponsor]." *Nevius v. Africa Inland Mission Int'l*, 511 F. Supp. 2d 114, 121 (D.D.C. 2007); *see also* Gregory L. Colvin, FISCAL SPONSORSHIP: 6 WAYS TO DO IT RIGHT (2d ed. 2005) ("Colvin Treatise") (explaining that a fiscal sponsor retains complete control and ownership over tax-exempt funds) (relevant excerpts at JA0251-72). Tax-exempt entities retain "all ownership and custody of . . . funds or property" donated to them to avoid being an impermissible "conduit" for donors. *Nat'l Foundation, Inc. v. United States*, 13 Cl. Ct. 486, 493 (1987). As with donors and donor advised funds, a sponsored person "has no legal recourse in the event he believes that his

charitable wishes are not being fulfilled, since funds donated to [the fiscal sponsor] are given without restriction." *Cf. id.* at 489 (regarding donor advised fund).

This explains why the Fiscal Sponsor Agreement provided that all money in the sponsored program fund was given "irrevocably" to the Community Foundation. *Supra* at 6. MobilizeGreen's admission that it claims no "ownership or vested interest" in the money also comports with this principle. *Supra* at 8.

Second, the tax laws have long distinguished between (i) the charitable mission of a tax-exempt entity, and (ii) the interests of a non-exempt entity that runs a project related to that mission. An exempt charity may sponsor a project run by a non-exempt organization (as MobilizeGreen was, in 2011-2012), provided that the money is "for the use of the [sponsoring organization], *and not for the organization receiving the grant*." IRS Rev. Rul. 66-79 (1966) (emphasis added) (JA0308-10). A sponsor of missionary activity complies with Section 501(c)(3) when it solicits contributions to fund missions abroad, provided that it "is not under the control of nor does it exist to serve the program of any particular mission." IRS Rev. Rul. 75-434 (1975) (JA0312-14). Critically, such a sponsor must "limit[] distributions to specific projects that are in furtherance of *its own* exempt purposes"; and "retain[] control and discretion as to the use of the funds and maintain[] records establishing that the funds were used for section 501(c)(3) purposes." IRS Rev. Rul. 68-489 (1968) (emphasis added) (JA0311).

In a phrase, the missionary is not the mission.

That distinction matters to fiscal sponsors, among other reasons, because sponsored organizations or persons do not necessarily pursue charitable work exclusively. *See, e.g.*, IRS P.L.R. 201922038 (May 31, 2019) (SA001-14); IRS P.L.R. 201408030 (Feb. 21, 2014) (JA0173-82). In a private letter ruling cited by MobilizeGreen's own brief, for example, the IRS notes, "you would serve as a fiscal sponsor of N's projects." IRS P.L.R. 201408030 at JA0175 (cited by Appellant's Br. at 18). But "N" was not exclusively pursuing charitable work. *Id.* at JA0179. The IRS revoked the *fiscal sponsor's* Section 501(c)(3) status, stating:

> You have not established a clear and definite differentiation between your activities and purpose and the activities and purpose of the related organization, N. *You appear to be operating for the benefit of N* . . . .

IRS P.L.R. 201408030 at JA0178 (emphasis added).

Another ruling explains what Section 501(c)(3) requires of fiscal sponsors:

> [S]ponsoring organizations need to not only have discretion and control over projects; but, also the funds that are expended by these projects. Otherwise these fiscal agreements become a conduit in nature and become a non-exempt activity.

IRS P.L.R. 201922038 (May 31, 2019) (SA011).

To maintain adequate control of its funds, the fiscal sponsor must retain "absolute discretion [to] refuse to make any grants or contributions." IRS P.L.R.

201922038 at SA011.[6] "The sponsor may lose its tax-exempt status for failure to exercise sufficient control over its funds." Colvin Treatise at 28 (JA0255).

These principles precluded the Community Foundation from operating the fiscal sponsorship for the benefit of MobilizeGreen and, thus, precluded a fiduciary relationship from arising in this case. *Nevius v. Africa Inland Mission Int'l*, 511 F. Supp. 2d 114, 121 (D.D.C. 2007). In *Nevius*, the defendant was "a non-profit religious organization . . . which sponsors missionaries." 511 F. Supp. 2d at 117. Under the parties' arrangement, Ms. Nevius raised donations to the sponsor, from which the sponsor would "deduct and retain" a percentage. *Id.* "[T]he remaining funds were to be provided to [Ms. Nevius]" to operate a mission in Africa. *Id.* After the parties' relationship soured, the sponsor terminated its sponsorship. Ms. Nevius alleged that the sponsor and "the local church were colluding to terminate her and the Project so they could turn the [mission] property into a 'bed and

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[6] The fiscal sponsor in that case flunked that test because it distributed funds based only on a "brief description" of requests for payment, with insufficient "invoices, purchase orders, building contracts, or other source documents . . . to ensure that funds were expended in the manner for which they were granted." *Id.* at SA011. This relates to the standard of care that would be at issue in any trial.

To that point, in this case, undisputed expert opinion says that the Community Foundation complied with the standards expected of fiscal sponsors. *See supra* n.5. MobilizeGreen's failure to adduce a contrary expert opinion would have made summary judgment on this point appropriate as well, because "only the standards of the profession—as articulated by an expert—can enlighten a jury" on a fiscal sponsor's proper responsibilities in this situation. *See Carleton v. Winter*, 901 A.2d 174, 179 (D.C. 2006) (affirming summary judgment against fiduciary duty claim); *Blair v. District of Columbia*, 190 A.3d 212, 230 (D.C. 2018) (same).

breakfast' inn for Whites." *Id.* at 118. Such actions allegedly "constitute[d] a breach of fiduciary duty" owed to her under D.C. law. *Id.* at 121.

The court dismissed this claim because, "[a]s set forth in [the sponsor's] by-laws, . . . [the sponsor] is organized as a tax-exempt charitable organization under 26 U.S.C. § 501(c)(3)." *Id.* The sponsor thus had to maintain "exclusive control, under its own policy, of both the administration and distribution of the funds." *Id.* "The mere fact that the donors designate[] [particular persons] to be supported by their donations . . . [does] not change the fact that the funds belong[] to the [sponsor]." *Id.* (internal punctuation omitted). "If the donations were to benefit a particular person, [the sponsor] would no longer be a charitable organization" under I.R.C. § 501(c)(3)—a result that was, as here, foreclosed by the sponsor's bylaws. *Id.* Thus, the fiscal sponsorship was *not* a fiduciary relationship.[7]

The same conclusion follows here. As noted above, a fiduciary duty imposes "a strict duty to act with utmost good faith and loyalty, in furtherance of [the beneficiary's] interests." *Urban Investments*, 464 A.2d at 96. If the Community Foundation were duty-bound to spend its money for the benefit of MobilizeGreen, then it would have ceded the absolute discretion over its money required to comply with Section 501(c)(3). The agreement here explicitly incorporated requirements

[7] *Nevius* does not use the phrase "fiscal sponsor," but the arrangement there describes fiscal sponsorship generally and parallels the parties' arrangement here.

foreclosing that result. *See Geiger*, 778 A.2d at 1092 (Incorporated "rules and regulations . . . are enforceable and require deference by this court.").

"Undisputed" facts and judicial admissions comport with this view of the parties' relationship. MobilizeGreen's project "aligned with the Community Foundation's own charitable goals." *Supra* at 4-5. But "[a]ny benefit that MobilizeGreen received was plainly incidental to the tax-exempt purpose for which the funds were intended." Pl.'s Opp. to MSJ at 30 (SA052).[8]

These important admissions confirm the lack of a fiduciary relationship between the parties in this case. An "incidental beneficiary" is one "who, though benefiting indirectly, is not intended to benefit from a contract and thus does not acquire rights under the contract." Beneficiary, BLACK'S LAW DICTIONARY (11th ed. 2019); Restatement (Second) of Contracts § 302 cmt. a ("incidental" beneficiary "does not" "acquire[] a right by virtue of a promise"). As benefits to MobilizeGreen were merely "incidental" to the purpose of the parties' relationship, securing those benefits could not have been the driving force behind it.

In short, the principles of Section 501(c)(3), as applied to fiscal sponsorships and as illustrated in *Nevius*, yield the same conclusion dictated by *Fogg* and the plain text of the parties' agreement. Summary judgment was properly entered.

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[8] Undisputed expert opinion explains that this is typically why people enter fiscal sponsorships. *See* Expert Opinion of J. Joseph ¶¶ 18-26 (JA0748-52).

B. MobilizeGreen Has Cited No Contrary Authority.

MobilizeGreen's appellate brief notably ignores *Fogg* and *Nevius*, which featured prominently in the Community Foundation's original briefing and Judge Kravitz's order. *E.g.*, Summ. J. Order at 5-6 (JA0165-66). Instead, MobilizeGreen raises a number of red herrings. We address each in turn.

1. Burdens on Summary Judgment and the Nature of Fiduciary Relationships

MobilizeGreen asserts that "the existence of a fiduciary relationship is a fact intensive inquiry that cannot simply be resolved as a matter of law." Appellant's Br. at 10. That is incorrect. This Court has done just that on several occasions. *E.g.*, *Fogg*, 89 A.3d at 514 (affirming summary judgment against fiduciary duty claim); *Newmyer*, 128 A.3d at 1036 n.10 (same); *Geiger*, 778 A.2d at 1095 (same).

Moreover, clichés regarding fact-intensive inquiries are not enough to avoid summary judgment. MobilizeGreen must identify a genuine dispute of material fact and support it with admissible evidence. Sup. Ct. R. Civ. P. 56(c). "The movant has the initial burden to demonstrate the absence of a genuine issue of material fact, but once the movant has done so, the burden shifts to the non-movant to show a factual dispute, by presenting admissible evidence of a *prima facie* case to support his cause of action." *Sibley v. St. Albans Sch.*, 134 A.3d 789, 801 (D.C. 2016). "[M]ere 'conclusory allegations' are insufficient to defeat the motion." *Newmyer*, 128 A.3d 1033.

This Court should reject any suggestion that it must do MobilizeGreen's work for it. *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005).[9] The Court should enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1037 (D.C. 2014).

To that point, MobilizeGreen has not disputed that a fiduciary relationship can only exist if a defendant undertook "to act for or give advice for the benefit of another upon matters within the scope of the relation." *Newmyer*, 128 A.3d at 1036 n.10 (quoting Restatement (Second) of Torts § 874 cmt. a). MobilizeGreen's own cited authorities agree. *E.g.*, *Church of Scientology Int'l. v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1028 (D.D.C. 1994) (quoting same and cited by Appellant's Br. at 11); *Gov't of Rwanda v. Rwanda Working Grp.*, 227 F. Supp. 2d 45, 64 (D.D.C. 2002) (quoting same and cited by Appellant's Br. at 10). Nor has MobilizeGreen disputed that "a fiduciary relation . . . can exist only if the other [the alleged fiduciary] accepts the power." Restatement (Second) of Agency § 15 cmt. b. This Court accordingly has held that the key question in fiduciary duty cases focuses on how "the parties"—plural—defined their relationship. *E.g.*, *Geiger*, 778 A.2d at 1095.

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[9] References to this Court's "independent review of the record" mean only that this Court's review is *de novo*. *See Jane W. v. President & Directors of Georgetown College*, 863 A.2d 821, 825 (D.C. 2004).

MobilizeGreen tries to cloud these issues by emphasizing that "fiduciary" relationships are relationships of "trust and confidence." Appellant's Br. at 10-12. While trust and confidence are necessary conditions of fiduciary relationships, no authority holds that a plaintiff can unilaterally impose fiduciary duties on a defendant. To the contrary, each of MobilizeGreen's cited cases explains what the relevant defendant allegedly did or said to undertake fiduciary duties:

- In *Government of Rwanda*, the relevant defendant signed contracts to provide "'lobbying services' for the benefit of the Government of Rwanda" and to act as its attorney. 227 F. Supp. 2d at 64.
- In *Gerson v. Gerson*, 179 Md. 171 (1941), two experienced businessmen persuaded their elderly, illiterate stepmother to sign two deeds that she could not understand. *Id.* at 172-73. The court found that the relevant defendants, in persuading the plaintiff to sign, undertook to give her "advice [and] information" and thus entered a "confidential relationship" with her. *Id.* at 177.
- In *Church of Scientology*, the public relations firm defendant committed to provide "ongoing public relations and public affairs counsel" on controversial issues to promote the church's public image. 848 F. Supp. at 1028. The court ruled that this constituted an

undertaking "to act for or give advice for the benefit" of the church. *Id.* (quoting Restatement (Second) of Torts § 874 cmt. a.).

- In *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 31 F. Supp. 3d 237 (D.D.C. 2014), the relevant defendant worked as an intern of the plaintiff, gaining access to the plaintiff's "confidential, proprietary, and secret information." *See id.* at 257. The court ruled that sufficient evidence existed to permit a finding that the defendant's internship made him an "agent," and thus a fiduciary, of the plaintiff. *Id.* at 258.
- In *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1 (D.D.C 2008), the court dismissed a fiduciary duty claim because the relevant defendant had no relationship, in his individual capacity, with plaintiff. *Id.* at 6.

Unlike these cases, MobilizeGreen has offered no evidence-based answers to at least two questions arising under these standards. First, MobilizeGreen cites no admissible evidence showing what—if Judge Kravitz got it wrong—"the scope of the [parties'] relation" actually was. Second, MobilizeGreen cites no admissible evidence showing what the Community Foundation did or said to accept a duty to act for its benefit. MobilizeGreen's silence on these key points is explained by its own "[u]ndisputed" admission: "[W]hatever the relationship was supposed to be, it was in [the Fiscal Sponsor Agreement]." Pl.'s Resp. to DSUF ¶ 25 (JA0121).

Relatedly, MobilizeGreen emphasizes the high hopes it had for the success of its project and that it expressed those hopes to the Community Foundation. Appellant's Br. at 12-13. But "[t]here is a crucial distinction between surrendering control of one's affairs to a fiduciary or confidant or party in a position to exercise undue influence and entering into an arms length commercial agreement, however its importance may be to the success of one's business." *Tekman v. Berkowitz*, 639 Fed. Appx. 801, 806 (3d Cir. 2016). D.C. law honors the same principle; otherwise, summary judgment could not have been entered against the plaintiffs in *Fogg* and *Geiger*, each of whom (like MobilizeGreen) entered agreements that were important to them. *See, e.g.*, *Fogg*, 89 A.3d at 513-14; *Geiger*, 778 A.2d at 1095. Moreover, these allegations say nothing about the Community Foundation's voluntarily undertaking to advance MobilizeGreen's interests. *Supra* at 22-24.

2. 501(c)(3) Organizations and Fiduciary Relations

MobilizeGreen argues that tax-exempt entities can take on fiduciary duties in other contexts, citing two examples in which tax-exempt entities became fiduciaries under ERISA. Appellant's Br. at 16 (citing *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344 (N.D. Ga. 2017); *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018)). But that argument is irrelevant to the trial court's grant of summary judgment, which was much narrower than MobilizeGreen suggests.

Judge Kravitz ruled that "[t]he Fiscal Sponsorship Agreement," "the circumstances surrounding the parties' relationship after the [alleged] termination of the Fiscal Sponsorship Agreement," and the "Challenge Cost Share Agreement . . . cannot serve as the basis for a breach of fiduciary duty claim." Summ. J. Order at 6-8 (JA0166-68). These were the only three sources of fiduciary duty alleged. Explicitly undisputed facts made it unnecessary to address any other situations in which a tax-exempt organization might enter a fiduciary relationship.

Further, there is an important difference between the fiscal sponsorship in this case and other situations in which a tax-exempt organization might take on a fiduciary role. Unlike pension benefits—which belong to the employees—the only money that the Community Foundation handled here belonged to the Community Foundation, which the Forest Service reimbursed. *Supra* at 7. MobilizeGreen disavowed any ownership interest in that money. *Supra* at 8. The Community Foundation played no other role vis-à-vis- MobilizeGreen. *Supra* at 7-8. The Community Foundation thus never undertook to control anything belonging to MobilizeGreen or to act in its interests, and the analogy to ERISA fails.

3. MobilizeGreen's Charitable Work

MobilizeGreen argues that Judge Kravitz's logic does not apply in this case, because MobilizeGreen pursued charitable work. Appellant Br. at 18-22. This is incorrect, both as a matter of law and of "[u]ndisputed" fact. It is also irrelevant.

As a matter of law, the relevant authorities *do* preclude a sponsorship from creating fiduciary duties owed to sponsored organizations—*even if* those sponsored organizations are doing charitable work. Thus, in *Nevius*, the sponsor did *not* owe a fiduciary duty to the sponsored person, even though the *sponsor* had allegedly diverted resources to support an apartheid-style "inn for Whites" in Africa, while the missionary pursued charitable work. 511 F. Supp. 2d at 118, 121.[10] IRS Revenue Rulings confirm that the missionary is not the mission. *Supra* at 16-17.

As a matter of "[u]ndisputed" fact, MobilizeGreen was not tax-exempt in 2011 and 2012. Pl.'s Resp. to DSUF ¶ 11 (JA0118). MobilizeGreen therefore was not obligated to pursue charitable work *exclusively*. IRS P.L.R. 201408030 at JA0178 (sponsored organization pursued non-charitable *and* charitable work).

Indeed, MobilizeGreen's argument on appeal contradicts its "[u]ndisputed" admission that its only alleged damages are $3.3 million in lost "net revenue" from "future business opportunities." *Supra* at 10. A plaintiff is "entitled only to damages resulting from" its theory of liability. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). MobilizeGreen's theory of damages thus implies that the fiscal sponsorship was intended to secure MobilizeGreen's business opportunities. But if that were true, the Community Foundation would stand in violation of Section 501(c)(3). *Supra* Subsec. I.A.2. The parties' agreement foreclosed any such duty.

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[10] These allegations were assumed to be true on a motion to dismiss. *See id.*

Furthermore, MobilizeGreen's allegation that it pursued charitable work is irrelevant to how the "parties" defined their relationship. *See Geiger*, 778 A.2d at 1094-95. A fiduciary relationship must be entered prospectively, as it is defined by "the scope of the relation" and must be entered voluntarily. *Supra* at 11-12. Stated differently, fiduciary duties cannot be "retroactively impos[ed] . . . on one half of a contractual relationship." *See, e.g.*, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 349 (4th Cir. 1998). That matters to a fiscal sponsor because the fiscal sponsor cannot commit, as a fiduciary relationship would require, to operating or spending its money to further the interests of the sponsored organization, which will not necessarily comport with the fiscal sponsor's charitable mission. *Supra* at 16-17. MobilizeGreen's allegation that it pursued charitable work means at most that—in retrospect—its interests aligned with, and stood to benefit *incidentally* from, the Community Foundation's interests. *Supra* at 20.

4. Industry Guidance Regarding Fiscal Sponsorships

MobilizeGreen next cites industry guidance regarding fiscal sponsorships that says "fiduciary." Appellant's Br. at 20-21. MobilizeGreen asserts that reference to such guidance is appropriate because "there is no[]" IRS or judicial guidance regarding fiscal sponsorships. Appellant's Br. at 21. *Nevius* and the IRS private letter rulings on point prove that assertion incorrect. *Supra* at 16-19.

Further, Judge Kravitz appropriately relied on the express terms in the Fiscal Sponsor Agreement, instead of the guidance cited by MobilizeGreen. This reflects that "express terms [of an agreement] are given greater weight than . . . usage of trade." Restatement (Second) of Contracts § 203 (1981).

Moreover, MobilizeGreen is misreading the guidance. That guidance refers to the principle that, when money is donated for a charitable purpose, "[a] charitable trust," and thus "a fiduciary relationship," arises that "subject[s] *the person by whom the property is held* to equitable duties to deal with the property for a charitable purpose." Restatement (Second) of Trusts § 348 (emphasis added). "In the case of a charitable trust there need not be and ordinarily is not a definite beneficiary, and the trustee is ordinarily not in a fiduciary relation to any specific person." *Id.* cmt. a. "The remedy for the violation of his duties by the trustee of a charitable trust is ordinarily at the suit of the Attorney General." *Id.* In short, anyone holding money for a charitable purpose is a fiduciary, answerable to the government, with a duty to use and account for it properly.

This is a hefty responsibility, and someone must take it on. Fiscal sponsors fill that role. Thus, a fiscal sponsor's fiduciary oversight entails "bear[ing] legal responsibility for ensuring that funds are used for their intended [charitable] purpose." Trust for Conservation Innovation, "Fiscal Sponsorship: 360 Degree Perspective" at 8 (Mar. 2014) (JA0718). "The fiscal sponsor adheres to high

standards of integrity in acting as a steward (1) for charitable, taxpayer and other funds entrusted to it for the public benefit, and (2) on behalf of the long-term interests of the programmatic cause, geographic region or demographic population at the center of its mission." NNFS Guidelines at 3 (JA0296). The IRS and state attorneys general "hold[] *the sponsor* legally responsible to see that its payments to the project further the sponsor's tax-exempt purposes," which alleviates sponsored organizations of the burden. Colvin Treatise at 3, 28 (JA0252, 0255). This responsibility, however, is owed to the public at large (represented by the IRS and state attorneys general), *not* the sponsored organization. *E.g.*, *Nevius*, 511 F. Supp. 2d at 121; Restatement (Second) of Trusts § 348 cmt. a.

In any event, MobilizeGreen's proffer of the industry guidance is too little, too late. This argument boils down to the suggestion that the technical term "fiscal sponsorship" in the Fiscal Sponsor Agreement implies a certain standard of care. But expert testimony is required to describe the standard of care established by the use of technical terms in a contract. *St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.*, 627 F. Supp. 2d 1, 12 (D.D.C. 2009); *see also Carleton*, 901 A.2d at 179; *Blair*, 190 A.3d at 230. MobilizeGreen offered no expert opinion on this point. The Community Foundation did. *See generally* Joseph Report (JA0738-93).

C. MobilizeGreen Should Not Be Allowed to Revive Abandoned Arguments In Its Reply Brief.

MobilizeGreen appears to have abandoned the argument, which was made to and rejected by Judge Kravitz, that the alleged termination of the Fiscal Sponsor Agreement on November 1, 2011 implied a different set of obligations after that date. To the extent MobilizeGreen tries to revive that argument in its reply brief, the "[u]ndisputed" fact that the Fiscal Sponsor Agreement controlled "whatever the relationship was supposed to be" proves that argument incorrect. *Supra* at 13. Further, the lack of a written contract does not create a fiduciary relationship. As the trial court ruled, MobilizeGreen identified no facts arising after the alleged termination of the written Fiscal Sponsor Agreement to show that the parties extended their relationship to one "founded upon trust and confidence," *Paul*, 543 F. Supp. 2d at 6, or that the Community Foundation voluntarily assumed such a relationship. Summ. J. Order at 7 (JA0167). The undisputed, narrow scope of the parties' relationship confirms that ruling was correct. *Supra* at 7-8.

MobilizeGreen also apparently abandoned the argument, made and rejected below, that the Fiscal Sponsor Agreement existed to serve MobilizeGreen's interests, just because Paragraph 5 of the Agreement gave MobilizeGreen the power to recommend payments. If MobilizeGreen tries to revive that argument, the Court should reject it as well. The Fiscal Sponsor Agreement must "be interpreted to conform to the requirements of" I.R.C. § 501(c)(3). *Supra* at 15. Paragraph 5

accordingly was subject to the "discretion and control" requirements discussed above. MobilizeGreen could not dictate payments in its own interest.

In this regard, MobilizeGreen's role is akin to that of a donor in a donor advised fund. *See Nat'l Foundation*, 13 Cl. Ct. at 492-93. Indeed, the Fiscal Sponsor Agreement derived from a donor advised fund agreement. Appellant's Br. at 5. With this fiscal sponsorship, as with a donor advised fund, the Community Foundation would strive to honor MobilizeGreen's requests, provided the distribution was "in consonance with § 501(c)(3) charitable purposes." *See Nat'l Foundation*, 13 Cl. Ct. at 492. But MobilizeGreen "has no legal recourse against [the Community Foundation] for the return of the contribution should [the Community Foundation] refuse to honor [MobilizeGreen's] request." *Id.* The Fiscal Sponsor Agreement thus ensured that the Community Foundation would "control[] every disbursement and ensure[] that the disbursement [was] applied to exempt purposes." *Id.* at 493. These requirements are incompatible with a fiduciary duty to act for MobilizeGreen's benefit. *Supra* at 17-18.

II. THE COMMUNITY FOUNDATION BREACHED NO CONTRACTUAL DUTY TO MOBILIZEGREEN.

Explicitly "[u]ndisputed" facts explain why the Forest Service Agreement was not transferred to MobilizeGreen's new fiscal sponsor by November 1, 2011. "The Community Foundation . . . agreed, pending Forest Service Approval, to allow [MobilizeGreen] to shift fiscal sponsorship to a new entity (which [was]

standing by to effect this transfer)." Pl.'s Resp. to DSUF ¶ 42 (JA0126). MobilizeGreen's CEO, Ms. said so to the Forest Service. *Id.* However, "Ms. . . . could not recall any communication from the Forest Service approving her request to transfer." Pl.'s Resp. to DSUF ¶ 43 (JA0127). "She further testified that '[i]f they [the USFS] had approved the transfer, we would have gone.'" *Id.* Under those circumstances, the federal Anti-Assignment Act prohibited the transfer of "any interest" in the Forest Service Agreement absent the Forest Service's "clear assent" to that transfer. 41 U.S.C. § 6305(a); *D&H Distrib. Co. v. United States*, 102 F.3d 542, 546 (Fed Cir. 1996).

The question is, thus, whether the Forest Service's declining to consent to that transfer means that the Community Foundation breached a contractual duty to MobilizeGreen. Any one of three separate considerations demonstrates that the answer to that question must be *no*. *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 628 (D.C. 1997) (Court may find "alternative basis" to affirm).

First, the Fiscal Sponsor Agreement unambiguously did *not* require the *Community Foundation* to secure the government's assent to transfer the Forest Service Agreement. MobilizeGreen bases its claim on this provision:

> This fund is established to provide temporary fiscal sponsorship for a period not to exceed November 1, 2011, at which time [MobilizeGreen] will transfer to another fiscal sponsor.

Fiscal Sponsor Agreement ¶ 8 (JA0057). Notably, the Fiscal Sponsor Agreement does *not* mention the Forest Service Agreement.

MobilizeGreen's claim therefore assumes that a transfer of *the fiscal sponsorship* and a transfer of *the Forest Service Agreement* were one and the same. If it were otherwise—*i.e.*, if transferring the fiscal sponsorship did not require transferring the Forest Service Agreement—then the Fiscal Sponsor Agreement did not obligate *anyone* to transfer the Forest Service Agreement, and summary judgment against the breach of contract claim should be affirmed.

Under that assumption, however, the trial court erred in holding that "[t]he agreement does not specify which of the parties is obligated to arrange and effect the transfer." Summ. J. Order at 9 (JA0169). The key provision takes the active voice, not the passive voice: "[MobilizeGreen] will transfer . . . ." "The voice of a verb within a sentence 'shows whether the subject acts (active voice) or is acted on (passive voice)—that is, whether the subject performs or receives the action of the verb.'" *Cologna v. Bd. of Trustees, Police & Firemen's Ret. Sys.*, 64 A.3d 995, 1000 (N.J. App. Div. 2013) (quoting Chicago Manual of Style § 5.112 (15th ed. 2003)). The agreement thus specifies MobilizeGreen, not the Community Foundation, as "the subject [who] performs." *See id.*

Second, even assuming that the trial court was correct that this provision was ambiguous, ample extrinsic evidence confirms that it was MobilizeGreen's burden

to secure the Forest Service's assent to the transfer. The trial court correctly observed that the email from Ms. to the Forest Service requesting consent to transfer the program (*supra* at 8) indicates that the parties understood it was MobilizeGreen's obligation to secure the government's consent. Summ. J. Order at 10 (JA0170); *see also* Restatement (Second) of Contracts § 203 (1981) ("course of performance" may be used to interpret agreements). But the trial court erred in saying that this was the "only" extrinsic evidence on point.

Indeed, it is "[u]ndisputed" that MobilizeGreen "propose[d] a *temporary fiscal sponsorship*"—the phrase employed in the Fiscal Sponsor Agreement—to implement its own "*guarantee* to the Foundation that we will have our 501(c)(3) status, have another fiscal sponsor, or will terminate the agreement prior to the receipt of actual funding by any government agency." Pl.'s Resp. to DSUF ¶ 17 (JA0119) (emphasis added). MobilizeGreen offered this guarantee because the Community Foundation was reluctant to enter a government contract. *Supra* at 5. As the "temporary fiscal sponsorship" provision implemented *MobilizeGreen*'s "guarantee," the burden to execute that provision must have been MobilizeGreen's.

Relatedly, it is "[u]ndisputed" that MobilizeGreen *did* negotiate with "the Forest Service . . . to transfer the grant to another fiscal sponsor," though that transfer was "effective October 1, 2012." Pl.'s Resp. to DSUF ¶ 65 (JA0140). This reflects the "[u]ndisputed" and admitted facts that Ms. was designated "the

Principal Cooperator Program Contact," and MobilizeGreen negotiated with the Forest Service to secure funding for the Forest Service Agreement. Pl.'s Resp. to DSUF ¶ 32 (JA0123-24); Appellant's Br. at 6. These facts confirm that MobilizeGreen was always the one to negotiate with the federal agency.

MobilizeGreen's sole evidence supposedly indicating that the Community Foundation had to secure the Forest Service's assent is that the Community Foundation was party to the Forest Service Agreement. Appellant's Br. at 23. To start, the fact of this relationship implies nothing about how the Community Foundation and MobilizeGreen defined their relationship with each other under the Fiscal Sponsor Agreement. Further, MobilizeGreen's argument ignores that the Community Foundation was reluctant to contract with the government until *MobilizeGreen* "guarantee[d]" the "temporary fiscal sponsorship." *Supra* at 5.

No reasonable factfinder could conclude, in light of these undisputed facts, that the parties understood the Forest Service Agreement to obligate the Community Foundation to execute *MobilizeGreen's* "guarantee." Thus, the "evidence demonstrates that only one view is reasonable—notwithstanding [any] facial ambiguity" in the contract, and summary judgment was appropriate. *Urban Masonry Corp. v. N&N Contractors, Inc.*, 676 A.2d 26, 32 (D.C. 1996).

Third, and in any event, the government's declining to approve the transfer implicated "contract impracticability doctrine." *Hester v. District of Columbia*,

505 F.3d 1283, 1286 (D.C. Cir. 2007). "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Id.* (quoting Restatement (Second) of Contracts § 261) (directing entry of summary judgment for defendant). Relatedly, "[if] the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.* (quoting Restatement (Second) of Contracts § 264).

This rule renders moot the question of who had the burden to transfer the Forest Service Agreement. No matter who had that burden, it is undisputed that the Forest Service was asked to approve the transfer, but it declined. *Supra* at 8.[11] The Anti-Assignment Act thus made the transfer impossible, which "discharged" the duty of the relevant party to effect the transfer. *Hester*, 505 F.3d at 1286.

III. MOBILIZEGREEN HAS NO PROOF OF INJURY OR DAMAGES.

This Court is "not limited to reviewing the legal adequacy of the grounds the trial court relied on for its ruling." *Kerrigan*, 705 A.2d at 628. Any "alternative

[11] No evidence suggests that the Forest Service's response would have been any different if the Community Foundation, rather than MobilizeGreen, had requested the transfer. *See Hester*, 505 F.3d at 1287.

basis" to affirm will do. *Id.* In this case, the Court may affirm because explicitly "[u]ndisputed" facts foreclose MobilizeGreen's theories of injury or damages.

A breach of fiduciary duty claim fails as a matter of law when its theory of injury is "predicated upon mere speculation." *See Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 710 (D.C. 2013) (affirming dismissal of fiduciary duty claim). A plaintiff likewise fails to make a *prima facie* case for breach of contract when its theory of damages is "speculative." *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 324-25 (D.C. 1999).

"[S]ummary judgment based on the asserted insufficiency of proof of damages" is appropriate where a plaintiff cannot "show that [damages] exist and are not entirely speculative." *Cormier*, 959 A.2d at 667 (citation and internal quotation marks omitted). In that regard, where (as here) a plaintiff's alleged damages depend lost business opportunities, summary judgment is warranted where plaintiff cannot identify "any *specific contract* that it would have . . . obtained" but for the defendant's alleged wrongdoing. *TRG Constr., Inc. v. D.C. Water & Sewer Auth.*, 70 A.3d 1164, 1169-70 (D.C. 2013) (emphasis added).

Those standards are fatal to MobilizeGreen's claims. MobilizeGreen's *only* theory of injury is that it lost "business opportunities." *Supra* at 10. This theory assumed the loss of "critical business partners," but MobilizeGreen identified "only two [potential] partners—LACC and the West Virginia Citizens

Conservation Corps ('WVCCC')—that it claims would have been willing and able to help [it] scale-up its original business model, but for the Community Foundation's alleged behavior." Pl.'s Resp. to DSUF ¶ 86 (JA0152-53).

As to the first, LACC declined to do further business with MobilizeGreen due to the "extraordinary complexities" of its model "[t]hroughout the time LACC worked with MobilizeGreen." Pl.'s Resp. to DSUF ¶ 73 (JA0145). LACC specifically stated that alleged "delays in payment or other administrative errors (if any)" did *not* discourage it from working with MobilizeGreen, and MobilizeGreen admitted that it could not contradict that explanation. *Supra* at 9-10.

As to the second, it is "[u]ndisputed" that WVCCC "never turned down an offer to work with MobilizeGreen," and WVCCC was "'willing to work with and MobilizeGreen' well after MobilizeGreen's relationship with the Community Foundation ended." Pl.'s Resp. to DSUF ¶ 75 (JA0146-47).

Thus, "[u]ndisputed" facts foreclose the existence of any "specific contracts" that MobilizeGreen lost because of the Community Foundation.

MobilizeGreen's lack of admissible evidence on damages provides yet another reason to affirm. *Sibley*, 134 A.3d at 801 (requiring "admissible" evidence to defeat summary judgment). Ms. admitted that "she would have to 'speculate' to explain 'what that $3.3 million represents.'" Pl.'s Resp. to DSUF ¶ 87 (JA0154). "When Ms. was asked . . . to 'walk us through how to calculate

how much net revenue per intern per week MobilizeGreen stood to recover," she declined. Pl.'s Resp. to DSUF ¶ 90 (JA0157). Ms. therefore is not competent to explain MobilizeGreen's alleged damages.

However, MobilizeGreen offered no expert opinions (on damages or otherwise). After MobilizeGreen disobeyed three discovery orders, Judge Kravitz sanctioned its "obstructionist and likely contemptuous behavior" by reopening discovery for the Community Foundation, but not MobilizeGreen. Order at 3 (Jun. 27, 2017) (SA003). Judge Kravitz also rejected MobilizeGreen's subsequent request to offer experts out of time. "It is clear from the record that the plaintiff has long understood the importance of expert testimony to the proof of its claim for damages, yet the plaintiff has provided no meaningful explanation for its failure to make timely disclosure of expert witnesses." Order at 2 (Nov. 29, 2017) (SA021). Remanding MobilizeGreen's claims for trial accordingly would be futile.

CONCLUSION

This Court should affirm the trial court's entry of summary judgment.

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Respectfully submitted,

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