Nos. 20-CV-0714, 20-CV-0715

DISTRICT OF COLUMBIA COURT OF APPEALS

HYUN JIN MOON, *et al.*,

Defendants-Appellants,

v.

THE FAMILY FEDERATION FOR WORLD PEACE AND UNIFICATION INTERNATIONAL, *et al.*,

Plaintiffs-Appellees.

On Appeal from the District of Columbia Superior Court, Civil Division
(Case No. 2011 CA 003721 B)

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RULE 28(a)(2) STATEMENT

Pursuant to D.C. Ct. App. R. 28(a)(2)(A), Appellees list the following parties and counsel that were part of the proceedings in the D.C. Superior Court in Case No. 2011 CA 003721 B, or are part of this appeal:

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Pursuant to D.C. Ct. App. R. 28(a)(2)(B), Appellees provide the following corporate disclosure statement: in accordance with D.C. Ct. App. R. 26.1, Appellees, The Family Federation for World Peace and Unification International,

The Universal Peace Federation, and The Holy Spirit Association for the Unification of World Christianity Japan, state that no Appellee has a parent corporation or subsidiary or a corporation that holds 10% or more of its stock.

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STATEMENT OF THE CASE

Unification Church International (renamed "UCI" by the Director Defendants) is a District of Columbia taxable, nonprofit charitable corporation established in the 1970s to support the activities of the Unification Church. Plaintiffs-Appellees the Family Federation for World Peace and Unification International ("FFWPUI"), the Universal Peace Federation ("UPF"), and Holy Spirit Association for the Unification of World Christianity (Japan) filed this lawsuit in 2011 challenging the actions of UCI's board in 2009 and 2010.

Reverend Moon, the founder of the Unification Church, did not die until 2012, after the lawsuit was filed. Although Appellants emphasize a supposed succession dispute among Rev. Moon's widow and sons, Director Defendants' ("DD") Br. at 21-23; UCI Br. at 16-18, "the rightful successor to Reverend Moon as leader of the Unification Church is simply not at issue in this case." JA.0446. Unlike the plaintiff in *Moon v. Moon*, 833 F. App'x 876, 879 (2d Cir. 2020), the Plaintiffs here are not asking the court to declare "who the rightful successor to the late Rev. Sun Moon is."

The only claim at issue on appeal is the Count II breach of fiduciary duty claim. That claim alleges that Hyun Jin ("Preston") Moon, Jinman Kwak, Youngjun Kim, and Michael Sommer (collectively, the Director Defendants) breached their fiduciary duty to UCI, when, in 2010, they amended the articles of

incorporation to change UCI's charitable purposes so that UCI's purpose was no longer to support Unification Church activities and then diverted roughly half of UCI's assets to organizations the Director Defendants created, which, *by design*, had no affiliation with the Unification Church. These organizations included the Kingdom Investments Foundation ("KIF"), a Swiss entity the Defendants established in 2010 to receive a donation of approximately half of UCI's assets, roughly $470 million, and the Global Peace Foundation ("GPF"), a non-religious organization Preston Moon established in 2009, having announced his decision to walk a "separate path" from the Unification Church. Having found that the directors engaged in a gross abuse of fiduciary duty and intentionally acted to harm UCI, the trial court ordered that the Director Defendants be removed from the board and that they restore *to UCI* the funds wrongfully diverted to KIF and GPF.

Despite the focus of the Appellants' and amici's briefing on the First Amendment, this is not a lawsuit *against* a church. Here, the plaintiff Church is seeking relief from the court. Nor is it a suit against a religious organization. Even assuming UCI could be considered a religious organization, it is not a party to Count II. Count II is brought against the individual directors of UCI, who do not "perform[] vital religious duties" in their capacity as directors. *See Our Lady of Guadalupe Sch. v. Morrissey-Beru*, 140 S. Ct. 2049, 2066 (2020). Throughout the

litigation, the trial court has carefully eschewed wading into any ecclesiastical questions and has exclusively applied neutral principles of law.

Moon I. When the Appellants first moved to dismiss the case, they did not raise any First Amendment objections. *See* JA.0155-56. Only after their motion to dismiss was denied did they seize on the ecclesiastical abstention argument in a 2012 motion for judgment on the pleadings. Although the trial court granted that motion, JA.0201-32, this Court unanimously reversed. *Family Fed'n for World Peace and Unification Int'l v. Moon*, 129 A.3d 234, 238 (D.C. 2015) (*Moon I*). The Court noted then that "[t]his is not a suit directly against a church, synagogue, or mosque or their immediate leadership," distinguishing it from "more typical disputes evoking First Amendment considerations." *Id.* at 249.

As to the Count II breach of fiduciary duty claim, the Court noted that "[d]etermining . . . whether corporate assets were used in accordance with corporate laws [is] normally governed by neutral principles of law." *Id.* at 252. As the Court explained, "[i]t can be a breach of duty to change substantially the objects and purposes of the corporation." *Id.* (cleaned up). Turning to the allegations in the Complaint, the Court concluded: "it appears that a profound alteration in the corporation, perhaps recognized by the directors themselves in changing the name and amending the articles of incorporation, occurred under Preston Moon." *Id.* The Court concluded that "it would appear that this dispute is

susceptible to resolution by 'neutral principles of law' not requiring any forbidden inquiry into matters barred by the First Amendment." *Id.* at 249.

***Moon II*.** In 2016, the Plaintiffs moved for a preliminary injunction to halt the Director Defendants' further dissipation of UCI assets pending the resolution of the lawsuit. The trial court granted Plaintiffs' motion. JA.0233. In considering the likelihood of success on the merits of the breach of fiduciary claim, the trial court stated: "the original Articles of Incorporation are clear: from its inception, Unification Church International's primary mission was to support the Unification Church and to spread that organization's particular doctrine," known as the Divine Principle. Mem. Op. of July 22, 2016 at 18.

In 2018, the Court, again in a unanimous decision, affirmed the preliminary injunction. JA.0235-49 (*Moon II*). The Court rejected the Defendants' contention that the trial had "impermissibly resolved questions of religious belief and governance in contravention of the First Amendment" and found that, "at the time the preliminary injunction was litigated, there were no theological questions for the court to resolve regarding the Family Federation plaintiffs' duty of obedience claim." JA.0242, JA.0243. The Court noted that, "going forward, if it becomes apparent to the trial court that this dispute does in fact turn on matters of doctrinal interpretation or church governance, the trial court may revisit the question of

subject matter jurisdiction to avoid excessive entanglement with religion." JA.0243 (cleaned up).

With regard to the merits of the Count II breach of fiduciary duty claim, the Court of Appeals found "no basis to second guess the trial court's determination . . . that, in light of the multiple references to the Unification Church and the Divine Principle in the original articles of incorporation, it was clear that, from its inception, Unification Church International's primary mission was to support he Unification Church and to spread that organization's particular doctrine." JA.0243-44 (cleaned up). "Likewise, we see no basis to question the trial court's assessment that, by eliminating all references to the 'Unification Church' and 'the Divine Principle,' UCI defendants arguably had altered UCI's primary purpose." JA.0244 (cleaned up).

Summary Judgment. In 2018, both parties filed motions for summary judgment on the Count II breach of fiduciary claim. In addition, the Defendants filed a separate motion for summary judgment arguing that the case should be dismissed on First Amendment grounds. In an omnibus order, JA.0250-94, the trial court denied Defendants' motion for summary judgment on the First Amendment issue. JA.0259-64. With respect to the breach of fiduciary duty claim, the court concluded that "[a] determination can be made on neutral principles of law without any religious determinations." JA.0263. The court granted Plaintiffs'

motion for summary judgment in substantial part, ruling that the individual Defendants breached their fiduciary duty with respect to the amendment of UCI's articles of incorporation and the asset donations to KIF and GPF. JA.0292-93.

After noting that "'[i]t can be a breach of duty to change substantially the objects and purposes of the corporation,'" JA.0271 (quoting *Moon I*, 129 A.3d at 252), the court compared the text of the original and amended articles and found that the amendments substantially altered UCI's original purposes of supporting the Unification Church. Among other things, "the Amended Articles eliminate all references to the Unification Church and the Divine Principle," including "eliminat[ing] the reference to the Unification Church in the corporation's name." JA.0273. The court also ruled that the KIF and GPF donations were not consistent with UCI's original purpose. JA.0276-83. The court cited evidence in the record that "UCI sought to donate assets to KIF specifically because KIF is completely unaffiliated with the Unification Church" and that "GPF was created as an entity totally separate from the Unification Church." JA.0278; JA.0279.

The Trial Court's Remedies, Stay, and Judicial Estoppel Opinions. In October 2019, following extensive briefing on the remedies sought by Plaintiffs, the trial court held a month-long evidentiary hearing dominated by the testimony of the Director Defendants, who sought an opportunity to convince the court they had acted in good faith, which was only one of many factors in the consideration of

whether they should be removed. JA.0312-15. On December 4, 2020, the trial court issued an order removing the Director Defendants from the UCI board and holding them jointly and severally liable *to UCI* for a surcharge in the amount of roughly $470 million for the KIF donation and an additional $63 million for donations to GPF. JA.0409.

Based on the Director Defendants' testimony, as well as the voluminous documentary record developed at the hearing, and post-hearing briefing, the court found that the Director Defendants (1) displayed a "lack of care, lack of due diligence, lack of loyalty and obedience, and disregard of their fiduciary position," JA.0385; (2) intentionally inflicted harm on UCI, JA.0382-0384; (3) engaged in a "gross abuse of their position," JA.0382; (4) "caused UCI to lose about half of its assets" and "are not interested in getting those assets back to UCI," JA.0385; (5) "did not act in good faith when they approved donations" to the Swiss foundation and the Global Peace Foundation, JA.0389; and (6) gave their allegiance to "Preston Moon's personal agenda, and not to the best interest of UCI." JA.0385.

The trial court noted that, "[a]t the hearing, much time was spent on the schism between the Moon family and Preston Moon and his followers, and who was following Reverend Moon's vision." JA.0380. The court, however, rejected the Defendants' attempt to recast the case as a religious dispute, concluding that it "does not see a need to delve into this dispute because this case can be decided on

neutral principles by looking at the transactions at issue to determine whether they were in the best interest of the corporation." *Id.*

In denying Defendants' motion to stay the remedies order, the trial court again rejected Defendants' effort to reframe the case: "Despite Defendants' persistent contentions that this case requires the Court to impermissibly pick sides in a religious dispute, the Court has not made any church governance decisions or interpreted religious terminology. Rather the Court has applied neutral principles of law in granting summary judgment and awarding remedies." JA.0417.

Undaunted, in November 2020, the Defendants again sought dismissal of the case on First Amendment grounds, this time alleging that the Plaintiffs were judicially estopped from arguing that ecclesiastical abstention does not apply because FFWPUI had successfully asserted that defense in *Moon v. Moon*, 431 F. Supp. 3d 394 (S.D.N.Y. 2019), *aff'd*, 19 Civ. 1705 (RRB), 2020 U.S. App. LEXIS 35194 (2d Cir. Nov 5, 2020). The court rejected that argument, easily distinguishing that case from the instant case. JA.0443-46. After noting that the Defendants were simply "rehashing" their "tired" First Amendment arguments, the court observed that it "has concluded time and again that Plaintiffs' claims are not barred by the First Amendment." JA.0449-50. This appeal followed.

STATEMENT OF THE FACTS

A. The Unification Church and Unification Church International

1. *The Unification Church*

Reverend Sun Myung Moon founded the Holy Spirit Association for the Unification of World Christianity ("HSA-UWC") in 1954. JA.0252; JA.0320; JA.3765. The HSA-UWC came to be widely known as the "Unification Church." JA.0320; JA.1542. As Rev. Moon explained in 2004, "[t]he world has come to call us the Unification Church in place of our full name." JA.3767. Rev. Moon referred to himself as "the founder of the Unification Church," JA.3756, and otherwise adopted the "Unification Church" terminology. *See, e.g.*, JA.3756; JA.3766; JA.3767.

The Unification Church has branches throughout the world including (a) HSA-UWC (USA), JA.0322; JA.3859; PRX-672; (b) Plaintiff HSA-UWC (Japan), a major donor to UCI, JA.2968; (c) HSA-UWC (Korea), JA.3754, JA.2329, JA.2570; (d) the Unification Church of Spain, JA.2331; and (e) HSA-UWC (Brazil), JA.3092. *See also* JA.3845 (the Unification Church "had members and churches throughout the world"). Further, the 1980 articles of incorporation of Unification Church International (renamed UCI by the Director Defendants in

2010) refers to "Unification Churches organized and operated throughout the world" and the "theology of the Unification Church." JA.1418; JA.1419. [1]

The Divine Principle is a collection of the teachings of Reverend Moon and is an important theological text of the Unification Church. *See, e.g.*, JA.3670 (Preston Moon describing the Divine Principle as "the most important legacy that will have history forever remember Parents as True Parents of mankind and the True King of Peace"); JA.2442 (Michael Sommer testifying that the Divine Principle is "the core and most important" of Rev. Moon's eight theological texts).

Reverend Moon is sometimes referred to as True Father by Unification Church members, and he and his wife (now widow) Hak Ja Han Moon are jointly referred to as True Parents by Unification Church members. JA.1548. In a mid-1990s address celebrating the 50th anniversary of the Church, Rev. Moon announced his intent to place a greater "emphasis on the salvation of the family," rather than on "individual salvation." JA.3764; JA.3768. To underscore that emphasis, he "inaugurated the Family Federation for World Peace and Unification" ("FFWPU")" as the formal name of the Church, to be used in place of the "Holy Spirit Association for the Unification of World Christianity." JA.3768. *See also*

[1] References to PRX and DX exhibits are to the parties' remedies hearing exhibits, and references to "SJ" exhibits are to the parties' summary judgment briefing exhibits.

JA.0619 (Defendants' expert stating that HSA-UWC was "replaced with" FFWPU). Preston Moon testified that the FFWPU represented "the culmination of my father's lifelong efforts." JA.2957. FFWPU also was referred to as FFWPU International, or "FFWPUI," the name of the International Headquarters of the Unification Church. JA.0454. Preston Moon became Vice President of FFWPUI in 1998 (JA.1546; JA.3760); he ceased having any involvement with FFWPUI beginning in Spring 2008. JA.1572.

Once FFWPU, or FFWPUI, was established, its name was used interchangeably with that of the Unification Church, just as HSA-UWC had been. *See, e.g.*, JA.3763 (Reverend Moon stating that "the future of the Unification Church FFWPUI will be great"); JA.1220 (letter from Preston Moon referring to "FFWPU, the Unification Church"); JA.1311-12 (celebrating the "50th Anniversary of FFWPU (HSA-UWC)"); JA.2697 (Kim testimony that he has used the term Unification Church to refer to FFWPUI); JA.2834 (Kwak testimony agreeing that the Family Federation is sometimes called the Unification Church); *see also* JA.1729-30 (FFWPUI 30(b)(6) deposition excerpt); Pls. SJ Ex. 4 (referring to "FFWPU International, formerly HSA-UWC International").

Contrary to Appellants' contention that 1994 marked the "end of the Church era," DD Br. at 7-8, the Unification Church did not end in 1994 when FFWPU was established. Appellants' claim is proven false by countless post-1994 documents

referencing the Unification Church, including statements by Rev. Moon and Preston Moon. *See* JA.0343-44; *see also* JA.1218 (April 14, 2004 letter from UCI to HSA-UWC (Japan) requesting funding and stating: "As in the past, UCI will endeavor to advance the mission of the worldwide Unification Church."); JA.3668-72 (Preston Moon 2008 "Report to Parents," repeatedly referring to the Unification Church).

2. *Unification Church International*

A close associate of Rev. Moon, Bo Hi Pak, incorporated Unification Church International as a District of Columbia nonprofit charitable corporation in 1977. JA.0818-26; JA.1553-54. Unification Church International amended its articles of incorporation in 1980, JA.1416-20, to delete references to the nonprofit seeking tax-exempt status. JA.1555. The articles were not amended again until 2010. JA. 980-84. For ease of reference, the 1980 articles of incorporation will be referred to as the "original" articles and the 2010 articles as the "amended" articles.

Under the 1980 articles, the first, and primary, purpose of Unification Church International was: "To serve as an international organization assisting, advising, coordinating, and guiding the activities of Unification Churches organized and operated throughout the world." JA.1418. Each of the five charitable purposes identified in the articles of incorporation refers explicitly either to the Unification Church or Churches or to the Divine Principle. JA.1418-20.

Historically, in addition to supporting "brick and mortar" Unification Churches, UCI supported Unification Church activities, *e.g.*, organizations founded by or supported by Reverend Moon. JA.0344; JA.2829; JA.3874. Almost all the organizations that UCI historically supported were founded by Rev. Moon and/or Mrs. Moon, including the Washington Times, the Universal Ballet, the Professors World Peace Academy, CAUSA, IIFWP, Youth Federation for World Peace, and Women's Federation for World Peace. JA.0344-45; JA.2573-74; JA.3069; JA.3860-61; *see also* DX-357.0004; DX-593.0042; DX-593.096; DX-593.0128, DX-593.0192. Plaintiff HSA-UWC (Japan), also known as the Unification Church of Japan, made substantial donations to Unification Church International, averaging $100 million a year. JA.0327; JA.2968.

B. The Events Leading Up to the Director Defendants' Secretive Transfer of Half of UCI's Assets to a Nonreligious Swiss Foundation They Formed

As the trial court noted, "Defendants' actions unfolded amidst the conflict between Preston Moon and his parents," JA.0261, and "[t]his case is nothing more than the age-old struggle for power and money." JA.0380.

1. *Preston Moon Breaks with Rev. Moon and Church Leadership*

In March 2008, Preston Moon wrote a "Report to Parents," in which he was critical of Unification Church leaders and proposed a new direction for the Church. JA.0324; JA.1548-49; JA.3668-92. Specifically, Preston Moon advocated ending

the Unification Church as an institution and a religion in favor of a global interfaith movement. JA.0325; JA.3675 ("We should 'breakdown' the walls of religion, especially our own walls, and take on the challenge of a true inter-faith movement . . . rather than trying to protect and grow the institution of the Unification Church"); JA.3683 ("our movement has to come out of its 'church skin' and become a global inter-faith movement"). *See also* JA.3776 ("the Unification Movement must get rid of its church-centered framework"). In addition, Preston Moon tried to position himself to have responsibility for managing Unification Church assets around the world. JA.0325; JA.3677-78; JA.2953-54. He also wanted "all the major Providential Organizations," including FFWPU, to be "subordinate" to UPF, of which he was co-chair. JA.0325; JA.3676-77.

"Almost immediately after Preston Moon issued his Report, Rev. Moon rejected Preston Moon's suggestions and implemented changes in the organization." JA.0325. In April 2008, FFWPUI announced that True Parents had appointed Sean (Hyung Jin) Moon, Preston's brother, to be the International President of FFWPU. PRX-37. Sean supported a "denominational" rather than "interfaith" approach. JA.1550. Contrary to Preston's claims that he was aligned with Rev. Moon, Preston admitted that he knew it was his father's decision to appoint Sean (JA.0326; JA.2959). Sommer testified that Preston had a history of

taking positions at odds with Unification Church leaders and of being "strongly scolded" by Rev. Moon. JA.2407.

In March 2009, Rev. Moon summoned Preston to a meeting at Sokcho, Korea and directed him "to step down from UCI and spend one year with him." JA.2941; JA.2943; JA.1983. Preston did not step down from UCI, JA.2984, because, in his words, "I knew – my fear was that while I stepped down for one year, they would hijack everything in our movement. Because up until then, they had the Tongil Foundation; they controlled Japan; they controlled the Family Federation; and they controlled UPF." JA.2943. Shortly thereafter, Preston embarked on a plan of, in his words, "asymmetrical warfare," like "the terrorists do." JA.0331. In September 2009, Preston met with Rev. Moon in Las Vegas. Rev. Moon asked him to resign from all his positions, JA.0334; JA.3011, but Preston refused to be "dictated by what F [Father] M [Mother] my family says." JA.0334 (quoting PRX-96 at EP00096421).

Then, on November 4, 2009, FFWPUI announced that True Parents had appointed Sean as Chair and International President of UPF, replacing co-Chairs Preston Moon and Rev. Chung Hwan Kwak, Preston's father-in-law. JA.0334 (citing DX-733; DX-388; PRX-102); JA.1566-67. Other leadership positions in UPF were given to "elders that primarily had religious positions and more of a spiritual element of the movement." JA.2427-28. That same day, Preston wrote a

letter to UPF announcing that the Global Peace Festival series in 2010 and the December 2009 Global Peace Convention in Manila would not go forward as projects of UPF "and will have no formal or legal association with FFWPU. Rather, a separate GPF foundation is being established for this purpose." JA.1221. *See also* JA.1567-68. UCI then stopped donating money to UPF and started supporting GPF. JA.1570; JA.2902.

In February 2010, the board of directors of HSA-UWC (USA), the U.S. branch of the Unification Church, voted to remove Preston from its board of directors for cause, citing "multiple occasions" in which he had "disobeyed instructions from Reverend Moon and from the Church hierarchy." JA.0335 (citing JA.3008; quoting PRX-672).

2. *Preston Moon Stages a Takeover of UCI's Board of Directors*

During 2009, as he was increasingly at odds with Rev. Moon and feeling slighted by Rev. Moon's decision to sideline him, "Preston Moon then started to use Unification Church International as the vehicle to obtain more control." JA.0326. As President of UCI and chair of its board (JA.1557), Preston's first move was to overhaul the board of directors and replace them with individuals who would "unquestioningly follow" him. JA.0363; *see also* JA.1562 (the new board and Preston Moon were members of "one school of thought").

Among the directors removed were Douglas Joo and Peter Kim, individuals Preston Moon characterized as Church "clerics" and who had access to Rev. Moon. JA.2970; JA.2519. From January to August 2009, Preston Moon "replaced the board of directors . . . with directors loyal to him rather than to the Unification Church leadership." JA.0329. The entire composition of the board changed except for Preston Moon. *Id.* *See also* JA.0255 (detailing Preston's replacement of the entire board.); JA.0329-33 (post-hearing findings on the board overhaul); *see also* JA.1557-62. Preston ensured that the new directors would owe allegiance to him rather than to the charitable purposes of Unification Church International. Kwak and Kim are related to Preston Moon by marriage and had worked closely with him before. JA.0363, JA.0333, JA.2563-64, JA.2820-25. Sommer worked for Preston Moon affiliated organizations for 25 years, and Preston helped Sommer with his MBA tuition. JA.2574; JA.2878; JA2368-69.

With the takeover of the board complete in August 2009, Preston Moon and the other directors began planning the transfer of assets from Unification Church International beyond the reach of U.S. courts so they could no longer be used for the nonprofit's charitable purpose of supporting Unification Church activities.

C. The Heist

As of 2009, UCI, through its subsidiary Landmark Investment Company, owned valuable Korean real estate assets, including a 60% interest in Central City

and a majority interest in a property development known as Parc 1. Central City is a completed real estate development in the central business district of Seoul, with a Marriott hotel, major department store, other retail space, large convention hall, sports facility, movie theatre, and bus terminal. JA.0347; JA.1578; JA.3414-21. Parc 1 (also referred to as Y22, a shortened name of the property developer) is a development project in Seoul's commercial district, intended to include hotel, retail, and office space in twin towers of 72 and 54 floors. JA.0347; JA.1577; JA.3481. Together these assets were worth hundreds of millions of dollars.

1. *UCI's Articles Are Amended to Facilitate the KIF Transaction*

In November 2009, the UCI board appointed Paul Rogers "as UCI's agent for any threatened or actual litigation or other legal proceedings by or against UCI, its officers and directors." JA.0335 (quoting PRX-106). Rogers was variously described as the managing director, asset manager, or general partner with respect to Parc 1. JA.0352; JA.1579. In February 2010, UCI's outside litigation counsel Steven Salky emailed Rogers regarding "the donation of certain UCI owned real estate assets to a newly created Swiss foundation." JA.0467-68 (quoting Pls. SJ Ex. 65). After noting "the risk that such a donation could be challenged," Salky recommended that "[t]he purposes for which the Swiss foundation is organized should be consistent with, if not identical to, the purposes for which UCI is organized." JA.0468 (quoting Pls. SJ Ex. 65); *see also* JA.1580.

Another attorney, Deborah Ashford of Hogan Lovells, prepared the amended articles of incorporation for UCI, in tandem with drafting the donation agreement to the Swiss foundation. JA.0338; JA.3531. On March 12, 2010, Ashford emailed the legal team and Rogers a draft of amended articles of incorporation for Unification Church International. The transmittal email stated:

> Here is an attempt to "reform" the purposes clause in Unification Church International's corporate charter along the lines we have been discussing – to stay within a broad 'world peace and harmony' framework and to emphasize educational, cultural, media, and general business activities. I have not attempted to re-name the corporation, *but clearly it is a disconnect to be named 'Unification Church International' and not to be supporting Unification Churches* . . . so a new name is in order. I had previously suggested that 'UCI' be considered. I have kept as much as possible of the language in the current articles of incorporation, *while eliminating the Unification Church, Divine Principle, and most religious references.* I do propose to keep some 'religious' purposes, but to deemphasize them.

JA.0469 (quoting Pls. SJ. Ex. 68) (emphasis added); *see also* JA.1582.

On April 14, 2010, the UCI board voted to approve the amendments to the articles of incorporation. JA.0487; JA.1583. In addition to changing the name of the nonprofit from "Unification Church International" to "UCI," the amendments substantially altered the nonprofit's purposes, entirely deleting (1) the first purpose of supporting the "activities of Unification Churches," (2) all references to the Unification Church or Unification Churches; (3) all six references to the Divine Principle; and (4) all three references to God. *Compare* JA.1418-20 *with* JA.0982-83; *see also* JA.4135-36 (side-by-side comparison).

As the trial court found, "the evidence suggests [Preston Moon] was the driving force behind the amendments." JA.0340. The other directors blindly followed Preston's lead and took no interest in why the articles were being amended. JA.0338-39. There was no substantive discussion of the reason for amending the articles at the April 14, 2010 meeting. JA.0487; JA.0337.

The reason for the amendments, however, was clear: they were intended to pave the way for the KIF donation. *See* JA.0282 ("the record demonstrates that the Amended Articles served to broaden UCI's purposes in order to make donations to entities that are unaffiliated with the Unification Church."); JA.0337 ("UCI's articles were amended to facilitate the donation of substantial assets to the Kingdom Investments Foundation").[2]

2. *The Director Defendants Transfer Half of UCI's Assets to KIF*

The UCI board of directors first discussed the donation of the Parc 1 and Central City assets to a Swiss foundation on May 13, 2010, less than a month after the board voted to amend the articles. JA.0349; JA.1134-36. At the meeting, Richard Perea, outgoing UCI director and soon-to-be board member of KIF, and Rogers both told the board that Parc 1's affiliation with the Unification Church had

[2] Appellants try to disentangle the articles amendment from the donation to KIF. For example, in its Statement of Facts, UCI discusses the donation to KIF *before* the amendments. *See* UCI Br. At 19-21. But the chronology of these two events, the record, and the courts' findings refute any contention that they are unrelated.

become an impediment to project financing. JA.1134-35; JA.3026; JA.3535. According to Rogers, Parc 1 "need[s] to have a neutral owner that is not overtly linked to UM [*i.e.*, the Unification Movement] and this Swiss Foundation provides it well." JA.3526. *See also* JA.1587-88.

The directors believed that, under Swiss law, the foundation could not have a religious purpose or be dedicated to supporting a particular religious group. JA.0346; JA.3026 ("Swiss law made it very clear that it could not be a religious entity"). *See also* JA.1594 (Defendants do not dispute that Swiss counsel Walter Boss informed UCI that Swiss law did not allow the KIF Deed of Foundation to reference a particular religious organization). Indeed, the Deed of Foundation does not reference the Unification Church, Unification Movement, Unification theology, or Reverend Moon, when stating its purposes. JA.1116. Instead, its purposes are broad, abstract, and non-sectarian, including "furthering world peace, harmony of all humankind, interfaith understanding among all races, colors and creeds throughout the world." *Id.* This is "in keeping with" what Ashford described in a May 14, 2010 email as "the desire in the Swiss Foundation to eliminate any reference to a particular religion, or religious movement." Pls. SJ Ex. 75; JA.1593.

The UCI board of directors met again June 24, 2010, two days after KIF had been formed, to approve the donation. JA.1138-40; JA.1593. UCI did not undertake any formal or third-party valuation of the assets prior to their donation

and did not know the value of each of the donated assets. JA.1590-91. Moreover, "Defendants do not dispute that the UCI Board did not consider an alternative to donating the assets to KIF at the 2010 meeting when they voted to donate those assets." JA.1606. In a June 28, 2010 Donation Agreement, UCI agreed to "irrevocably transfer" to KIF the "Transferred Interests" identified in Exhibit A of the Donation Agreement, JA.1099, JA.1109, which included the Parc 1 and Central City assets, among others. All told, UCI donated to KIF $2 million in cash and assets having a historical book value of $467 million, approximately one-half of UCI's assets. JA.0347-48; JA.0367; JA.1602.

The Donation Agreement identifies the "Purpose of Funding the Foundation with the Transferred Interests," and lists four purposes, none of which references the Unification Church or the Divine Principle, although there is a passing reference to "the theology and principles of the Unification Movement." JA.1100. Although Appellants wrap themselves in the Donation Agreement's single reference to the Unification Movement, they had no way of ensuring that the transferred assets are used consistent with the agreement's terms. According to the Director Defendants, they relied on the fact that two long-time Unification Movement leaders would serve on KIF's board, DD Br. at 20, but that claim is belied by the Donation Agreement. After one year, KIF could change the composition of its board without UCI's consent. JA.1100. The UCI board was

informed that even the one-year "right of objection given to UCI is rather a contractual courtesy than a duty and, therefore, not *per se* enforceable." JA.3519.

Moreover, the Director Defendants acknowledge they have no visibility into how KIF is using the donated assets and whether KIF is complying with the Donation Agreement. JA.0358. UCI has not received any financial statements or activity reports from KIF since 2012. *Id.*; *see also* JA.2563-65; DD Br. at 21 ("KIF has resisted identifying its beneficiaries"); JA.1600 (Defendants do not dispute that KIF provided financial reports to UCI for one year only.). The Director Defendants have taken no steps to confirm whether KIF has complied with the Donation Agreement. JA.0358; *see also* JA.1607 ("Defendants do not dispute that Dr. Moon has not spoken with a director or officer of KIF 'about KIF's work.'"). As the trial court noted, "Swiss secrecy laws make the details of the transaction almost inscrutable," and the decision to choose "Swiss law as applied by the Swiss courts to govern any disputes" also was not in UCI's best interests. JA.0385; *see also* JA.1107.

To make matters worse, "the KIF transaction was intentionally veiled in secrecy and deviated from the usual way of conducting corporate business. The directors kept the donation to KIF secret from Reverend Moon and the Unification Church leadership, as well as from UCI's General Counsel Dan Gray." JA.0383; *see also* JA.0358-59; JA.1605 (Defendants do not dispute that Preston Moon did

not inform Rev. Moon or FFWPUI about the donation of the Central City and Parc 1 assets to KIF.).

The various rationales the Director Defendants offer for transferring half of UCI's assets to KIF are belied by contemporaneous documents and even their own testimony. First, their claim that the use of a Swiss foundation was driven by tax considerations, DD Br. at 19, is not plausible. There were no near-term tax benefits to UCI of donating the assets to KIF,[3] the directors failed to obtain any market valuation for the assets, and any savings "were illusory when balanced against the value of what they gave away." JA.0389. In any event, purported tax savings would not excuse diverting assets to a purpose not authorized by the articles of incorporation.

The Director Defendants also have argued that the transfer of Parc 1 to KIF was necessary to secure permanent project financing because the Central City asset had been pledged as collateral on a bridge loan coming due. *See* DD Br. at 19; JA.0356. Neither the minutes nor the unofficial notes of the May 13 or June 24 meetings, nor the package of materials emailed to the directors before the May 13

[3] Even Preston Moon acknowledged that the "[t]ax issues were more long-term issues," because UCI had a "tremendous amount" of net operating losses," JA.2933; JA.2938. Before they approved the donation, Paul Rogers informed the board that UCI had approximately *$700 million* in loss carryforwards, which could be used to offset tax liability. JA.3527.

meeting, discusses Central City being pledged as collateral or otherwise at risk. *See* JA.3278-JA.3522; JA.1134-36; JA.3525-30; JA.3580-83. The board materials identify a single $300 million bridge loan associated with the Parc 1 development, and UCI/Landmark's interest in Central City is not listed among the collateral for that loan. JA.1135; JA.3501.

The Director Defendants claim that a key reason they agreed to donate assets to KIF was to secure project financing for the Parc1 construction by using KIF as a "neutral intermediary to circumvent anti-Unification prejudice from lenders." DD Br. at 19. This claim squarely negates their defense that the donation to KIF did not breach their fiduciary duty to KIF because KIF was supposedly affiliated with the Unification Movement. Moreover, this rationale does not explain why the assets needed to be transferred outside the jurisdiction of the United States. But even the project finance rationale does not withstand scrutiny. The Defendants offered no evidence to explain why (1) assets owned by "Landmark Investment Company," a subsidiary of a D.C. nonprofit corporation renamed "UCI," would have any more direct association, in the minds of Korean lenders, with the Unification Church than "Kingdom Investments Foundation"; (2) how donating to KIF would remove the association of Parc 1 with the Unification Church when it was widely known that the Church continued to own the land on which the development was to be built; and (3) a consortium of lenders previously loaned

significant sums to the project ($300 million) without any apparent concern about affiliation with the Church. JA.0353-56.

Equally unsupported is the claim that the donation to KIF was key to moving the Parc 1 development forward. *See* DD Br. at 18. Previous delays associated with the project, including those caused by the Korean real estate financial crisis, had been resolved before the donation to KIF, and the project was moving ahead. JA.0355. Construction began in 2007, JA.0355, and, as of March 2010, the foundation was 100% complete. JA.3483. Term sheets for permanent project financing had been prepared (JA.3278; JA.3501-06), and "Paul [Rogers] was assuring us that he had raised most of it." JA.2933.

The Director Defendants never offered a clear rationale why the Central City asset also was transferred to KIF. And, as the trial court noted, "[t]hey stood by and watched when KIF sold the Central City property for close to $1 billion." JA.0389; *see also* JA.1602 (Defendants do not dispute KIF sold the Central City asset for several hundred million dollars). "Preston Moon and the rest of his board all testified that they have no idea what happened to the substantial proceeds of that sale." JA.0389.[4]

[4] In its Remedies Order, the trial court repeatedly found the Director Defendants' testimony as to why they amended the articles and donated assets to KIF and GPF to be not credible. JA.0338-42; JA.0350, JA.0356; JA.0384.

D. Preston Moon Forms Rival Nonreligious GPF Organization and Then Diverts Additional UCI Funds to It

Preston Moon founded the Global Peace Festival Foundation (later renamed the Global Peace Foundation ("GPF")) in March 2009. JA.1566; JA.3702. The initial directors were Defendants Moon, Kwak, and Sommer. JA.1566; JA.4001. Sommer also was the treasurer. JA.2526. Kwak has served on GPF's board of directors since 2009, JA.2782-83, and Defendant Kim served as its International President beginning in 2010. JA.2726.

GPF is not affiliated with the Unification Church and is not an activity of the Unification Church. Its corporate purposes, as stated in its certificate of incorporation, do not reference the Unification Church, Divine Principle, or the Unification Movement. JA.3703-04. It does not hold itself out to be a sectarian religious organization. *Id.* *See also* Pls. SJ Ex. 53 ("GPFF conscientiously avoids advocating any particular religious dogma or tradition"). Unlike other organizations supported by UCI, Rev. Moon was not GPF's founder. JA.2901. The Director Defendants assert that Rev. Moon "embraced" peace festivals organized by Preston, DD Br. at 14, but he did not embrace GPF. Reverend Moon did not attend any GPF events in 2009 or after. JA.2527-28. In 2009, Unification Church leaders directed Preston Moon to not go forward with a GPF Convention in the Philippines. JA.0360 (citing PRX-98; JA.2899-900); *see also* Pls. SJ Ex. 102 (Aug. 11, 2010 "open letter" to Preston Moon from numerous Unification Church

leaders stating "[y]ou have convened Global Peace Festivals in direct challenge to True Father's direct orders not to.").

Preston Moon repeatedly distanced GPF from the Unification Church, announcing that GPF was not affiliated with the Unification Church, FFWPU, or even the broader "Unification Movement." In his November 2009 letter to UPF, he stated that GPF events would have "no formal or legal association with FFWPU," but "[r]ather a separate GPF foundation is being established." JA.1220-21. In a 2017 address, Preston explained that he created GPF as a "separate vehicle to carry forward [his] mission," instead of using "organizations within the larger Unification Movement," which had "inherent legal, institutional and operational limitations." JA.4006-07. *See also* PRX-89 ("GPF is not a project of UPF or ancillary of UC"); JA.2647-48 (Kim testimony that he was committed to supporting GPF rather than UPF, "because Unification Church . . . they had a same organization founded by Reverend Moon [i.e., UPF], but actually what they're doing [is] destroying Reverend Moon's work").

From November 2009 until 2016, when the trial court enjoined further donations, UCI donated over $62 million to GPF, with the approval of the Director Defendants. JA.0405-06. Beginning fiscal year ending March 31, 2010, UCI ceased supporting UPF. Pls. SJ Ex. 48.

In September 2012, shortly after Rev. Moon died, Preston issued a statement: "I am now walking a separate path and have no part in any supposed 'succession struggle' within the Unification Movement." JA.3747. Preston inaugurated his own religious organization, the Family Peace Association, in 2017. JA.4007. He described it as a "new vehicle," with a "spiritual orientation," in contrast to GPF, but, like GPF, separate from the "organizations within the larger Unification Movement," which had "inherent legacy, institutional and operational limitations." *Id.*

E. The Appellants' Attempts to Thwart the Trial Court's Ability to Provide Remedies

After the trial court granted summary judgment and concluded that the Director Defendants breached their fiduciary duty, they "almost immediately appointed three new directors and sought, and were granted, indemnification." JA.0427; *see also* JA.2083-85; JA.0364-65. As the trial court explained, "[s]uch a consequential decision made in the face of Judge Cordero's ruling and a yet to be heard remedies hearing, is troubling." JA.0427.

SUMMARY OF ARGUMENT

1. The trial court's grant of summary judgment against the Director Defendants for breaching their fiduciary duty to UCI should be affirmed. In granting summary judgment, the trial court did not violate the First Amendment's ecclesiastical abstention doctrine. The breach of fiduciary duty claim is not against

a church, a religious organization, or individuals acting in a ministerial capacity or otherwise carrying out vital religious duties. The Director Defendants act in a secular capacity as directors of UCI. Moreover, the court exclusively applied neutral principles of law and did not make any determinations about who leads the Unification Church, how the Church should be governed, what religious beliefs the Director Defendants may hold, what religious practices they may engage in, or how to interpret Unification Church theology. This case poses none of the First Amendment concerns animating the ecclesiastical abstention doctrine.

The court correctly decided as a matter of law that the amendments to the UCI articles of incorporation substantially altered UCI purposes. This conclusion was based on a plain text comparison of the original and amended articles and did not require the court to resolve any ecclesiastical disputes. Even if there were ambiguity regarding whether the sweeping amendments substantially altered UCI's purposes, there was no genuine dispute that the purpose of the amendments was to substantially alter UCI's purposes to facilitate a donation of half of UCI's assets to a Swiss foundation that, under Swiss law, could not be affiliated with the Unification Church. Nor was there any genuine dispute of material fact that the donations to KIF and GPF contravened UCI's original purposes. By design, KIF had no religious purpose and was intended to have no affiliation with the Unification Church. Both Preston Moon and UCI's counsel conceded that KIF had

no affiliation with the Unification Church. Moreover, Preston Moon created GPF expressly to take a "separate path" from the Unification Church and intended for it to be a "separate vehicle" from organizations associated with the Church.

2. The trial court's decision to remove the Director Defendants and surcharge them for the amount of the wrongful KIF and GPF donations also should be affirmed. The court's remedies decision is based on neutral principles of law, and applies extensive factual findings to a multi-factor test, which considered, among other things, the seriousness of the breach, the directors' lack of care, and their inability to act in UCI's best interests rather than serving Preston Moon's interests. The court removed the Director Defendants based on their secular actions, not based on their religious beliefs or practices. The Director Defendants are free to disagree with the Unification Church, but they are not free, as fiduciaries of UCI, to alter its purposes from supporting the Unification Church and then divert over half of UCI's assets to organizations they created expressly to be unaffiliated with the Church.

Nor can there be any doubt that the court has the power to remove directors of a charitable nonprofit who have engaged in a gross abuse of their fiduciary duty and diverted substantial charitable assets to an unauthorized purpose. Director Defendants' reliance on a provision of the D.C. Nonprofit Corporations Act is misplaced because the statute became effective after the lawsuit was filed and, in

any event, does not foreclose this action or displace the longstanding equitable power of the court to provide remedies. The court's intervention is especially necessary here because UCI had neither shareholders nor a non-breaching director to bring a suit, because Preston Moon replaced the board to ensure that it would follow him in lockstep.

Finally, the court should deny UCI's request to remand the case back to the trial court – after ten years of litigation, extensive summary judgment and remedies briefing, and a month-long remedies hearing – simply because UCI did not actively participate in the hearing. UCI fails to identify how it was deprived of any interest protected by the Fourteenth Amendment Due Process Clause. UCI is not a party to the breach of fiduciary duty claim; its liberty or property interests were not at stake. A nonprofit charitable corporation does not have a due process right to maintain a board of directors found to have breached their fiduciary duty. Moreover, UCI never demonstrated any independence from the positions of the Director Defendants, even after they were found to have breached their fiduciary duty *to UCI*. UCI fails to demonstrate how the month-long hearing dominated by the testimony of the Director Defendants failed to sufficiently protect any supposed interest it had in keeping those directors on its board, nor does it identify any relevant evidence the court failed to consider as a result of UCI's non-participation.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR BREACH OF FIDUCIARY DUTY CLAIM

A. Because the Breach of Fiduciary Duty Claim Was Determined Using Neutral Principles of Law, the Ecclesiastical Abstention Doctrine Does Not Apply

There is no dispute that the First Amendment ecclesiastical abstention doctrine prohibits courts from deciding church leadership disputes or matters of church doctrine. *See* DD Br. at 26-29; UCI Br. at 24-27. This is well-traveled ground, illuminated by the Supreme Court's and this Court's jurisprudence and decisions by the Court in this case. *See Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952); *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710 (1976); *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246 (D.C. 2018); *Moon I*, 129 A.3d 248-49; *Moon II*, JA.0241. Indeed, many of the cases Appellants cite stand for this unremarkable proposition.[5]

[5] *See, e.g.*, *Samuel v. Lakew*, 116 A.3d 1252, 1261 (D.C. 2015) (dismissal affirmed because the "dispute here at bottom is about which clergy have the right to control [a church]"); *Congregation Beth Yitzhok v. Briskman*, 566 F. Supp. 555, 556-57, 558 (E.D.N.Y. 1983) (dismissal where claims required determination of the "proper succession to the post of Skolyer Rebbe," the leader of a Chassidic sect of Judaism); *Hines v. Turley*, 615 N.E.2d 1251, 1252, 1261 (Ill. Ct. App. 1993) (dismissal where case was essentially a "dispute over who is to be pastor of [the] Mount Sinai" church).

Nor is there any question that courts may resolve disputes involving religious organizations or religious property so long as the courts do so with neutral principles of law. *See* DD Br. at 28; UCI Br. at 25; *Jones v. Wolf*, 443 U.S. 595, 604 (1979) ("a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute"); (*Prince v. Firman*, 584 A.2d 8, 12 (D.C. 1990) ("Courts, as a general matter, are permitted to adjudicate disputes between church factions concerning the disposition of church property."); *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812 (D.C. 2012) (deciding pastor's contractual dispute with church using neutral principles of law).

The "'touchstone for determining whether civil courts have jurisdiction is whether the courts may employ neutral principles of law and ensure that their decisions are not premised on the consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" *Moon I*, 129 A.3d at 249 (quoting *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 816 (D.C. 2012)). This case readily passes that test.

In determining whether a case can be resolved using neutral principles of law, it is not relevant that the case includes "religious terms that lend the case a certain feel of ecclesiastical content." *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 357 (D.C. 2005). Thus, the facts that the articles of incorporation

reference the "Divine Principle" and that Preston Moon claims to be the "Fourth Adam" do not resolve the First Amendment inquiry. The Court instead must look "beneath the surface" and determine whether the legal claim at issue can be answered "exclusively through the objective application of well-established, neutral principles of law." *Id.*

The fact that the legal dispute bears some connection to an underlying ecclesiastical dispute also does not divest the court of subject matter jurisdiction. In *Meshel*, 869 A.2d 343, the Court of Appeals reversed the ecclesiastical abstention dismissal, despite the existence of an underlying dispute about governance of a synagogue. Because the question before the court – whether an arbitration provision in the congregation's bylaws was legally binding – could be resolved using neutral principles of law, ecclesiastical abstention was not appropriate. "Although the underlying dispute between the parties goes to the heart of the governing structure of Ohev Sholom and therefore may be beyond the jurisdiction of a civil court, the resolution of appellant's action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties' underlying dispute." *Id.* at 354. Similarly here, the existence of a supposed schism is irrelevant because the court did not reach any determinations about the schism in deciding the breach of fiduciary duty claim.

And, as the Court has previously held, the mere fact that UCI has a religious purpose does not foreclose consideration of the Plaintiffs' breach of fiduciary duty claim. To hold otherwise "would approach granting immunity to every nonprofit corporation with a religious purpose from breach of fiduciary duty suits and prevent any scrutiny of questionable transactions." *Moon I*, 129 A.3d at 253 (cleaned up).

Appellees could, and briefly will, quarrel with Appellants' characterization of some of the Supreme Court's First Amendment cases and their alteration of quotations to imply a broader holding than the Court adopted. For example, the Director Defendants quote *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), for the following proposition: "Judicial review of the way in which religious [entities] discharge [their] responsibilities . . . undermine[s their] independence . . . in a way that the First Amendment does not tolerate." DD Br. at 26. In fact, *Our Lady* more narrowly states: "Judicial review of the way in which *religious schools* discharge those responsibilities would undermine the independence *of religious institutions* in a way that the First Amendment does not tolerate." 140 S. Ct . at 2055 (emphasis added). "Those responsibilities" refers to "[t]he religious education and formation of students," which is "the very reason for the existence of most private religious schools." *Id.* UCI is not a religious school, and its directors perform a secular role. Similarly, UCI quotes *Jones v. Wolf*, 443

U.S. 595, 604 (1979), as follows: "[W]hen a court is confronted with a 'corporate charter' that 'incorporates religious concepts in the provisions relating to the ownership of property,' the court may not 'interpret[] . . . the instruments of ownership' if doing so 'would require the civil court to resolve a religious controversy.'" UCI Br. at 26. In fact, *Jones* says: "In addition, there may be cases where the deed, the corporate charter, or the constitution of the *general church* incorporates religious concepts in the provisions relating to the ownership of property." 443 U.S. at 604 (emphasis added). "UCI is not a church." JA.0341.

At bottom this appeal does not involve a dispute over settled principles of First Amendment jurisprudence. Instead, the dispute is over how the trial court reached its decisions. Appellants assert that the trial court resolved Plaintiffs' claims by deciding disputes about theology and the leadership of the Unification Church, whereas Appellees maintain that the trial court resolved no such disputes but instead based its decision on neutral principles of law. *See, e.g.*, DD Br. at 30; UCI Br. at 27. As noted in the Statement of the Case, the trial court, in various opinions, has rejected the Appellants' characterizations. Fatal to the First Amendment claim, Appellants are never able to pinpoint where the trial court supposedly resolved ecclesiastical disputes. Indeed, a review of the trial court's rationale for determining that the Director Defendants breached their fiduciary

duty and should be surcharged and removed establishes that the case was resolved using neutral principles of law.

1. *The Trial Court Applied Neutral Principles of Law in Determining That the Director Defendants Breached Their Fiduciary Duty When They Amended UCI's Articles in 2010*

In holding that the Director Defendants breached their fiduciary duty when they amended UCI's articles of incorporation to alter its charitable purpose, the trial court engaged in a straightforward exercise of contract interpretation, comparing the texts of the original and amended articles. JA.0272-74. "As the plain texts of the 1980 Articles and the Amended Articles unambiguously show, the Amended Articles substantially altered UCI's corporate purpose by eliminating any obligation to the Unification Church." JA.0276. The court engaged in a purely textual comparison, which led to the inescapable conclusion that the amendments substantially altered UCI's purposes.[6]

Because the breach of fiduciary duty claim turned "not on ecclesiastical interpretation but on contract interpretation," there is no basis for abstention. *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1254 (D.C. 2018). As the Court explained in *Steiner*, the "formation, interpretation, and enforcement of contracts are objective, well-established, neutral principles of law that civil

[6] *See* Part I.B.1 below for a detailed comparison of the original versus amended articles.

courts may apply, consistently with the First Amendment, in resolving disputes involving religious organizations." *Id.* (cleaned up).

Contrary to Appellants' claims, the court did not (1) "determine whether the Directors . . . deviated from the Church," (2) "identify . . . the 'true' theology or 'true' spiritual leader of the 'Unification Church,'" or (3) decide "that the Directors abandoned the Unification Church religion." *Compare* DD Br. at 30 *with* JA.272-76. Notably, the Director Defendants fail to cite any portion of the trial court's opinion where these supposed determinations were made.

Similarly, the Director Defendants vaguely claim that the court interpreted religious terms or concepts. *See* DD Br. at 31. In *Moon I*, the Court advised that "the trial court should not be called on to make a lengthy and painstaking interpretation of UCI's 'Divine Principle.'"" 129 A.3d at 253. Here, the court did not engage in *any* interpretation of the "Divine Principle," let alone "a lengthy and painstaking" one. It simply noted that all six references to the Divine Principle had been deleted. JA.0273.

Appellants claim that "Divine Principle" was simply replaced with references to the "theology and principles of the Unification Movement" and that "Unification Church" was simply replaced with "Unification Movement." DD Br. at 31. They further contend that determining whether those alterations are significant required a theological inquiry. DD Br. at 31. But, as the trial court

noted, the amendments replaced *repeated* references to the Unification Church and Divine Principle with a *single* reference to the Unification Movement. JA.0274. *See also* Part I.B.1 below. As the court concluded from its textual analysis, using neutral principles of law, "the repeated references to the Unification Church . . . carried significant . . . and non-duplicative meaning." JA.0274.

The Director Defendants also claim that the trial court "purported to resolve the longstanding *theological* debate over what Rev. Moon intended by the 'the end of the church era,' favoring the institutional-church faction over the decentralized-movement faction." DD Br. at 32. They offer no citation to the summary judgment opinion to support this claim. Far from resolving any theological debate, the court merely noted the inconsistency between the Defendants' claim that there is no functional difference between "Unification Church," as used in 1980, and "Unification Movement," as used in 2010, and their claim that Reverend Moon's supposed pronouncement of the "end of the church era" was a "pivotal moment in the history of the religion." JA.0275. Far from deciding in favor of "the institutional faction," the court simply noted that the "end of the church era" position, which the "decentralized-movement faction" propounded, supports the conclusion that the removal of references to the Unification Church enacted a

substantial change." JA.0275-26.[7] In addition to being inconsequential from a First Amendment standpoint, this observation about the inconsistency of Defendants' position was not integral to the Court's textual interpretation and related conclusion that the amendment substantially altered UCI's purposes.

In sum, the trial court's conclusion that the directors breached their duty of loyalty to UCI's purposes by amending the articles to substantially change its purposes was fully supported by a plain text comparison of the original and amended articles and did not involve the resolution of any ecclesiastical disputes.

[7] If Appellants are taken at their word, and the Unification Church had "fulfilled its providential role" and ended in the mid-1990s, DD Br. at 7, then "Unification Church," as used in 1980, cannot possibly mean the same thing as "Unification Movement" as used in 2010. If UCI could no longer fulfill its mission of supporting the Unification Church because the era of the Unification Church had supposedly ended, then Defendants should have sought judicial permission to amend the article under the doctrine of *cy pres* before changing the purposes to which existing assets were applied. *See* D.C. Code § 29-408.09(b) ("Property held in trust by a nonprofit corporation or otherwise dedicated to a charitable purpose shall not be diverted from its purpose by an amendment of its articles of incorporation unless the corporation obtains an appropriate order of the Superior Court"). Appellants also never explain why UCI waited until 2010 to amend its articles if it truly believed the Unification Church had ceased to exist. As the evidence showed, it continued to exist and the rationale for the 2010 amendment was the KIF donation, not the imagined demise of the Unification Church over a decade before.

2. *The Trial Court Applied Neutral Principles of Law in Determining That the Directors Breached Their Fiduciary Duty to UCI in Transferring Over Half of UCI's Assets to Rival Organizations They Created*

As the Court of Appeals explained in *Moon I*, Plaintiffs' breach of fiduciary duty claim asks the court to determine "whether corporate assets were used in accordance with corporate laws"—an inquiry that is "normally governed by neutral principles of law." 129 A.3d at 252. The trial court determined that the donations to KIF and GPF were not used in accordance with UCI's original purpose of supporting the Unification Church and its activities. In reaching this conclusion, the trial court did not make any determinations about church governance, liturgy, doctrine, or theology or otherwise resolve any ecclesiastical disputes.

Here, the Director Defendants made the court's task easy. Their own admissions and contemporaneous documentation (including incorporating documents of KIF and GPF and materials presented to the UCI board) left no room for any genuine dispute that the donations to KIF and GPF contravened UCI's original purposes. Contrary to the Director Defendants' assertion, DD Br. at 35, deciding that KIF and GPF are "separate from" and "unaffiliated with" the Unification Church did not require the court to trample on anyone's First Amendment rights or entangle the court in church governance or theology.

As to KIF, it was self-evident that the donation to KIF was not consistent with UCI's original purposes because the *very reason* for amending the articles to

remove all religious references, except the single reference to the Unification Movement, was to facilitate the donation to KIF, which could not, under Swiss law, have a religious purpose or support a particular religious group. According to the Director Defendants, the donation to KIF was necessary to facilitate the Parc 1 development because, unlike Unification Church International, KIF would have no association with the Unification Church or Unification Movement. *See* Statement of Facts Part C; JA.0256-57; JA.0278-79.

As to GPF, Preston Moon's own statements left no room for debate that, like KIF, it was created for the express reason of having no association with the Unification Church and to be a "separate vehicle" from "organizations within the larger Unification Movement." JA.4006-07. *See also* JA.1220-21 (Preston Moon's November 4, 2009 statement that GPF "will have no formal or legal association with FFWPU," which he referred to in the same statement as "FFWPU, the Unification Church"); Statement of Facts Part D above. In concluding that the donations to GPF were not consistent with UCI's original purpose, the trial court cited GPF's articles of incorporation (Pls. SJ Ex. 44 / JA.3702-04); contemporaneous statements of Preston Moon (Pls. SJ. Ex. 47 / JA.1220-21); Preston Moon's deposition testimony confirming GPF had no association with FFWPU (Def. SJ Ex. 184 at 172-73); a report from one of Defendant's experts showing that UCI ceased donations to UPF (Pls. SJ Ex. 48); and the 2010 letter to

Preston Moon from various church leaders regarding Rev. Moon's "strict orders" that Preston should cease GPF activities (Pls. SJ. Ex. 102). *See* JA.0257-58; JA.0279. There was no examination of religious doctrine or church governance.

The Defendants presented no evidence that KIF or GPF were associated with the Unification Church or that Rev. Moon supported the creation of and donations to KIF and GPF. Indeed, as noted in the Statement of Facts, Defendants kept the KIF creation and donation secret from Rev. Moon, and Preston Moon ignored Church directives to cease GPF activities. Rather Defendants argued that the donations were consistent with UCI's original purposes because GPF supported peace-building work and KIF promoted "harmony of all humankind" and "interfaith understanding." DD Br. at 20, 33; JA.1686; JA.1690. In *Moon II*, this Court rejected that argument: "the point is not that KIF and GPF espoused similar values to UCI (if indeed they did); rather the point is that KIF and GPF were unaffiliated with the Unification Church." JA.0245-46.

Contrary to Appellants' contentions, the court did not need to determine whether KIF's and GPF's institutional missions were broadly aligned with goals of the Unification Church or Rev. Moon's teaching. The point is that KIF and GPF were not affiliated with the Unification Church, and by donating over half of UCI's assets to them, the Defendants breached their fiduciary duty to the original, primary purpose of UCI: supporting the Unification Church and its activities.

Finally, the Appellants seize on a statement from the trial court that FFWPUI is the "authoritative religious entity at the head of the Unification Church." *See* DD Br. at 35 (quoting JA.265). They claim that, in so finding, the court resolved a religious leadership dispute. *Id.* at 34-37. That portion of the court's opinion, however, addressed the Defendants' argument that FFWPUI lacked standing to bring any claims. *See* JA.264-68. Appellants do not challenge that aspect of the court's opinion on appeal, and it was not a "material" fact as to the breach of fiduciary duty claim.

3. *None of Appellants' Cases Supports Abstention Here*

Appellants do not identify a single case where ecclesiastical abstention has been applied to bar a claim brought *by* a church against individuals operating in a secular capacity. Moreover, Appellants' parenthetical summary of the cases often misrepresents the actual holdings. According to the Director Defendants, *Hines v. Turley*, 615 N.E.2d 1251 (Ill. Ct. App. 1993), held that the "First Amendment barred inquiry into whether [a] religious nonprofit could 'carry out its purposes.'" DD Br. at 34. In that case, the trial court had dissolved the Mount Sinai Institutional Baptist Church and appointed a receiver; the appellate court reversed, concluding that the case was essentially a "dispute over who is to be pastor of Mount Sinai." 615 N.E.2d at 1252, 1261. Unremarkably, the appellate court concluded that courts are prohibited from deciding church leadership disputes.

Similarly, in *Wifp v. Hutterville Hutterian Brethren, Inc.*, 808 N.W.2d 678, 685 (S.D. 2012), DD Br. at 41, the court held that there was no jurisdiction to dissolve a church organization and distribute its assets, where the distribution decision would require resolution of an underlying controversy over church leadership and a determination of who was in "good standing" with the church.

The Director Defendants summarize *Metro. Philip v. Steiger*, 98 Cal. Rptr. 2d 605 (2000), as "abstaining from deciding 'which faction represents the "true" church,'" DD Br. at 36, leaving out the key point that the case was not dismissed on ecclesiastical abstention grounds. In that case, a church sued a breakaway faction seeking a determination that it was the rightful owner of certain church property. The trial court entered judgment in favor of the plaintiff church, and the appellate court affirmed.

B. Summary Judgment Was Appropriate Because There Were No Genuine Disputes of Material Fact

1. *There Was No Genuine Dispute of Material Fact That the Director Defendants Breached Their Fiduciary Duty When They Substantially Altered UCI's Purposes in the 2010 Amendment*

The Appellants do not appeal the trial court's holding that a director has a fiduciary duty to remain faithful to the corporation's original purposes. *See* JA.0271. This holding was consistent with this Court's acknowledgement in *Moon I* that "[i]t can be a breach of duty to 'change substantially the objects and purposes

of the corporation.'" 129 A.3d at 252 (quoting 7A *Fletcher Cyclopedia of the Law of Corps.* § 3718 (2006)). In a footnote, the Director Defendants claim this is a "novel legal theory" and ask the court to "refrain from actually adopting that minority view." DD Br. at 45 n.8. But "[a] footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014).

The trial court's conclusion that the 2010 amendments substantially altered UCI's purposes is correct as a matter of law. A corporation's articles of incorporation are construed in the same way as a contract. *Bronner v. Duggan*, 249 F. Supp. 3d 27, 47-48 (D.D.C. 2017); *see also* 7A *Fletcher Cyclopedia of the Law of Corps.* § 3640 (2014) (the "standard rules of contract interpretation apply" to articles of incorporation). As with contracts, interpretation of articles of incorporation "presents legal questions to be resolved by the text of the documents, unless that text is fairly susceptible to different interpretations." *Bronner*, 249 F. Supp. 3d at 48.[8] Where the contract (or, here, articles of interpretation) is unambiguous, extrinsic evidence is not used to interpret the contract, and its

[8] Whether a corporation's articles of incorporation are ambiguous also is a question of law. *DLY-Adams Place, LLC v. Waste Mgmt. of Md., Inc.*, 2 A.3d 163, 166 (D.C. 2010); *Bronner*, 249 F. Supp. 3d at 48; 7A *Fletcher Cyclopedia of the Law of Corps.*, § 3640.

interpretation may be resolved on summary judgment. *Byrd v. Allstate Ins. Co.*, 622 A.2d 691, 693 (D.C. 1993); *see also Fogg v. Fid. Nat'l Title Ins. Co*., 89 A.3d 510, 514 (D.C. 2014); *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983) (affirming trial court's grant of summary judgment because contract provisions at issue were unambiguous).

Under District of Columbia law, the court interprets contracts under the "objective" law of contracts, meaning that the "written language of the contract 'govern[s] the rights and liabilities of the parties, regardless of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite under[stand]ing, or unless there is fraud, duress, or mutual mistake.'" *Sahrapour v. Lesron, LLC*, 119 A.3d 704, 708 (D.C. 2015) (quoting *DSP Venture Grp., Inc. v. Allen*, 830 A.2d 850, 852 (D.C. 2003)). *See also* JA.0243 (*Moon II*) ("The UCI defendants acknowledge that articles of incorporation are analyzed under the 'objective law of contracts.'").

A contract is not ambiguous "merely because the parties disagree over its meaning, and courts are enjoined not to create ambiguity where none exists." *Washington Props. v. Chin, Inc.*, 760 A.2d 546, 548 (D.C. 2000) (affirming grant of summary judgment on contract claim because contract was unambiguous); *accord Bagley v. Found. for the Preservation of Historic Georgetown*, 647 A.2d 1110, 1113 (D.C. 1994).

Here, when comparing UCI's original articles of incorporation with the 2010 amendments adopted by the Director Defendants, there is no ambiguity as to whether the Director Defendants substantially altered the purposes for which Unification Church International was established. The amendments were sweeping in scope and ruthless in stripping away UCI's core purpose:

> 1. ~~To serve as an international organization assisting, advising, coordinating, and guiding the activities of Unification Churches organized and operated throughout the world.~~
>
> 2. To promote ~~the worship of God, and to study, understand and teach the Divine Principle, the new revelation of God, and, through the practical application of the Divine Principle, to achieve the~~ interdenominational, interreligious, and international unification of world Christianity and all other religions.
>
> 3. To ~~establish,~~ [promote and] support ~~and maintain, anywhere in the world, such place or places for the worship of God and for the study,~~ [the] understanding and teaching of the ~~Divine Principle as may be necessary or desirable, to further the~~ theology [and principles] of the Unification ~~Church~~ [Movement].
>
> 4. To publish and disseminate throughout the world, newspapers, books, tracts[,] ~~and~~ other publications [and forms of media] in order to ~~carry forward the dissemination and understanding of the Divine Principle, the unification or world Christianity and all other religions, or otherwise to~~ further the purposes of the Corporation.
>
> 5. To ~~sponsor~~ [promote] and conduct~~, cultural,~~ educational, [cultural, and] religious~~, and evangelical~~ programs for the purpose of furthering ~~the understanding of the Divine Principle, the unification of world Christianity and other religions,~~ world peace, harmony of all [hu]mankind, interfaith understanding ~~between~~ [among] all races, colors and creeds throughout the world~~, and for such other purposes consistent with the Divine Principle and the purposes of the Corporation~~.

JA.4135-4136 (a demonstrative exhibit comparing the original and amended articles); *see also* JA.1416-20 (1980 articles); JA.0980-84 (2010 articles).

It is self-evident from the text that the amendments fundamentally altered UCI's purpose by eliminating its primary mission of supporting the Unification Church and promoting the Unification Church religion. Three different Superior Court judges reached the same conclusion. *See* July 22, 2016 Mem. Op. at 16-19 (Judge Mott), *aff'd*, JA.0235-49 (*Moon II*); JA.0272-76 (Judge Cordero); JA.0337 (Judge Anderson).

Throughout the litigation, the Director Defendants have characterized the amendments as merely "stylistic" rather than substantive. DD Br. at 47; *see also id.* at 32 ("the amended articles 'incorporated all the purposes' in the prior version"). According to the Director Defendants, they simply replaced one term ("Unification Church") with its more "modern synonym" ("Unification Movement"), similar to using "administrative assistant" as a substitute for "secretary." *Id.* at 46. Similarly, they claim they simply replaced "Divine Principle" with a reference to the "theology and principles of the Unification Movement." *Id.* Proceeding from that false premise, they then argue the Superior Court erred in treating this stylistic change as substantial. They misleadingly reduce the Superior Court's textual analysis to the following: "The court found that the revised articles 'do not reference the Divine Principle' and that referring to

the 'Unification Movement' in lieu of the 'Unification Church' was a 'substantial change.'" DD Br. at 45 (citing JA.0273-76).

The Director Defendants' argument fails to engage with the scope of the amendments. Significantly, the first, primary purpose of UCI under the 1980 articles was "[t]o serve as an international organization assisting, advising, coordinating, and guiding the activities of Unification Churches organized and operated throughout the world." Defendants did not substitute "Unification Movement" for "Unification Church" in the 1980 articles' first purpose; they deleted the first purpose in its entirety. Of course, it would make little sense to substitute "Movement" for "Church" in the first purpose: "To serve as an international organization assisting, advising, coordinating, and guiding the activities of Unification Churches [Movements] organized and operated throughout the world." The very fact that this substitution does not work underscores that (1) the terms are not interchangeable, and (2) contrary to the Director Defendants' assertion (DD Br. at 48), "Unification Church" refers to an institution as well as a religion.

The primary purpose under the 2010 amendments is a version of the 1980 *fifth* purpose, but, even there, the 2010 amendment strips away all reference to the underlying religious purpose:

> To sponsor and conduct, cultural, educational, [and] religious, ~~and~~ ~~evangelical~~ programs for the purpose of furthering ~~the~~

~~understanding of the Divine Principle, the unification of world Christianity and other religions,~~ world peace, harmony of all mankind, interfaith understanding [among] all races~~, colors and creeds throughout the world, and for such other purposes consistent with the Divine Principle and the purposes of the Corporation~~.

Promotion of the Unification Church religion similarly is stripped out of the second purpose in the 2010 amendments:

> To promote ~~the worship of God, and to study, understand and teach the Divine Principle, the new revelation of God, and, through the practical application of the Divine Principle, to achieve~~ the interdenominational, interreligious, and international unification of world Christianity and all other religions.

The third purpose in the 1980 articles is to "establish, support and maintain, anywhere in the world, such place or places for the worship of God and for the study, understanding and teaching of the Divine Principle as may be necessary or desirable, to further the theology of the Unification Church." The 2010 amendments delete this purpose entirely and replace it with a generic purpose to "promote and support the understanding and teaching of the theology and principles of the Unification Movement." A vague purpose to support unstated "principles of the Unification Movement" is a far cry from the original purpose of establishing and supporting "place or places" for "the worship of God" and for "teaching of the Divine Principle" to "further the theology of the Unification Church, *i.e.*, to establish and support Unification Churches.

In amending the fourth purpose, Defendants again deleted the underlying religious purpose: "To publish and disseminate throughout the world, newspapers, books, tracts and other publications ~~in order to carry forward the dissemination and understanding of the Divine Principle, the unification or world Christianity and all other religions, or otherwise~~ to further the purposes of the Corporation."

Moreover, the Director Defendants did not simply replace all references to the Divine Principle with references to the "theology and principles of the Unification Movement." Although references to the Divine Principle appear throughout the 1980 articles, "theology and principles of the Unification Movement" appears only once in the 2010 articles. *Compare* PRX-17 *with* PRX-155; *see also* JA.4135-4136. In addition, the Director Defendants deleted references to "God," "church," "places of worship," and "evangelical."

Even assuming arguendo, the text could be considered ambiguous and extrinsic evidence relevant, the extrinsic evidence fully supports the conclusion that the amendments were not stylistic but rather were intended to align UCI's purposes with KIF's nonreligious purpose. JA.0282; JA.0337; JA.0346; JA.1594.

The Director Defendants claim that outside counsel Deborah Ashford proposed amending the UCI articles, "to update [UCI's] corporate documents" as part of an effort to "modernize and professionalize UCI," DD Br. at 16, but no

evidence supports that claim. In fact, "the evidence suggests [Preston Moon] was the driving force behind the amendments." JA.0340.

The Director Defendants also argue that none of their lawyers "ever advised against the amendments." DD Br. at 16. They similarly point to the role of lawyers and advisors with respect to the KIF transaction, *id.* at 19, and claim that "[n]one of the advisors ever provided the board with any reason not to approve the transaction." *Id.* at 20. Even aside from the fact there is no evidence the directors asked counsel to advise on the legality of changing UCI's corporate purpose, *see* J.A.0330-40, the trial court previously ruled that the business judgment rule defense, based on good faith reliance on advisors, is inapplicable in a breach of fiduciary duty case, JA.0281, a ruling Defendants do not appeal. Moreover, the Appellants have previously disavowed any reliance on an advice of counsel defense. *See* Defs.' Opp'n to Pls.' Mot. to Compel Produc. of Documents Relating to Elkin Report and Advice of Counsel (Aug. 6, 2019). Accordingly, they may not hide behind claims that lawyers or other advisors proposed or approved their actions.

In sum, Appellants point to no evidence that would allow the Court to conclude that the 2010 amendments were simply stylistic and did not substantially change UCI's original purpose. As the trial court explained: "the record demonstrates that the Amended Articles served to broaden UCI's purposes in order

to make donations to entities that are unaffiliated with the Unification Church." JA.0292. Accordingly, the trial court's determination that the Director Defendants breached their fiduciary duty when they amended the articles should be affirmed.

2. *There Was No Dispute of Material Fact That the Director Defendants Breached Their Fiduciary Duty When They Donated Over Half of UCI's Assets to KIF and GPF*

As discussed in Part I.A.2, the trial court correctly determined, using neutral principles of law, that the Director Defendants breached their fiduciary duty by donating substantial UCI assets to KIF and GPF, because those donations were not consistent with UCI's original purpose of supporting the Unification Church and its activities. *See also* Statement of Facts Parts C, D. By the Defendants' own admissions, KIF and GPF are not affiliated with the Unification Church. At his deposition, Preston Moon testified KIF was not affiliated with the Unification Church. Pls. SJ Ex. 8 at 324:10-12. At a June 13, 2016 hearing, the court asked, "Is the defense arguing that KIF is associated in any way with the Unification Church?" and UCI's counsel stated, "No, Your Honor." Pls. SJ Ex. 82 at 20:6-10. Preston Moon announced that GPF would have no association with "FFWPU, the Unification Church." JA.1220-21. Moreover, the Defendants never provided any evidence that KIF or GPF were affiliated with the Unification Church. Instead, they maintained, as they do on appeal, that the Unification Church does not exist as an institution or ceased to exist in the mid-1990s. That position is contradicted by

extensive evidence, including Preston Moon's 2008 "Report to Parents," where he repeatedly referred to the Unification Church as an existing institution. JA. 3668-72.

In contending that there was a genuine dispute of material fact regarding whether the donations to KIF and GPF were consistent with UCI's original purposes, the Director Defendants identify a few factual contentions, but these contentions were not genuinely disputed and were not material to the breach of fiduciary duty claim.

First, the Director Defendants claim that the court adopted a premise that UCI could only fund entities with an express, formal affiliation with the Unification Church. DD Br. at 47. But that is not true; the court acknowledged that, historically, UCI had supported a wide range of organizations, some of which were not officially affiliated with the Unification Church. *See* JA.0277-78 (giving examples of donations UCI made "to organizations not officially affiliated with the Unification Church"). The fact that KIF was not "officially" or "expressly" affiliated with the Unification Church was not the dispositive fact. The undisputed dispositive facts were: (1) KIF was expressly established to have no association with the Unification Church (JA.0256; JA.0278-79); (2) half of UCI's assets were donated to KIF (JA.0347), making them unavailable to be used for UCI's primary purpose of supporting Unification Church activities; and (3) unlike other UCI

donation recipients, Reverend Moon did not found or support KIF, but rather the KIF transaction was hidden from him (JA.0359). Similarly, with GPF, the dispositive facts are that GPF was established to be separate from the Unification Church and to receive funds that previously went to a Unification Church-affiliated organization (UPF) (JA.0257-58).

Second, the Director Defendants claim there was a factual dispute over whether KIF and GPF were affiliated with the "Unification Church religion, in the sense of promoting Rev. Moon's theology." DD Br. at 48-49. Again, there was no dispute that GPF supports peace-building activities or that KIF has as one of its purposes supporting interfaith harmony. Those facts are irrelevant. "[T]he point is not that KIF and GPF espoused similar values to UCI (if indeed they did); rather the point is that KIF and GPF were unaffiliated with the Unification Church." *Moon II*, JA.0245-46. The 1980 articles did not establish UCI for the purpose of supporting peace-building and interfaith harmony divorced from the context of the Unification Church and its dissemination of the Divine Principle.

Finally, no reasonable trier of fact could conclude that the donation of half of UCI's assets to KIF was consistent with UCI's *original* purposes when (1) the Director Defendants, after operating 30 years under the original purposes, substantially amended the articles on the eve of the KIF donation, and (2) the

contemporaneous documentation reflects an intent to align UCI's amended purposes with the nonreligious purposes of KIF.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN REMOVING THE DIRECTOR DEFENDANTS FROM THE BOARD OF UCI

A. The Trial Court's Removal Order Is Based on Neutral Principles of Law

Having determined that the Director Defendants breached their fiduciary duty to UCI, the court then proceeded to determine the appropriate remedies. In determining the surcharge amount, the court applied neutral principles of law, applying the "normal calculation of damages rules." JA.0314. On appeal, the Director Defendants do not challenge the surcharge calculation.

With respect to whether the Director Defendants should be removed, the court, using neutral principles of law ("advised by the relevant provisions [in] the current D.C. Nonprofit statute and the D.C. Uniform Trust Code"), considered the following non-exclusive factors: (1) whether the director grossly abused his position as director, (2) whether the director intentionally inflicted harm on the corporation, (3) the seriousness of the director's breach of loyalty, (4) the director's course of conduct, (5) the inadequacy of other available remedies, and (6) whether removal would be in the best interest of the corporation. JA.0314; *see also* JA.0379.

After a month-long hearing and extensive briefing, the trial court concluded that all these factors strongly weighed in favor of removal. The court noted that the Directors spent "much time" testifying on the "schism between the Moon family and Preston Moon." JA.0380. There was, however, no "need to delve into this dispute because this case can be decided on neutral terms by looking at the transactions at issue to determine whether they were in the best interest of the corporation." JA.0380. The court's findings were devastating to the Director Defendants. The court found repeated examples of the Director Defendants grossly abusing their position and intentionally harming UCI.

> In short, the directors used their position to serve the personal agenda set by Preston Moon. As the trustee and fiduciary to UCI's assets, instead of using the assets to support the work of the Unification Church as the articles require, they transferred the assets to entities directed by Preston Moon. This was a gross abuse of their position.

JA.0382. The Appellants' briefs are notably silent about most of the trial court's extensive factual findings.

UCI contends that the trial court entangled itself in theological controversies in deciding to remove the Director Defendants. UCI Br. at 29-34. First, UCI claims that the court resolved a theological question of what constitutes the "Unification Church" as used in the 1980 articles. UCI Br. at 30 (citing JA.0320-22). These findings are in the section labeled "Background Facts on the Unification Church." JA.0320. Acknowledging the existence of a church in the

factual background section of an opinion does not create a First Amendment problem.[9] Moreover, the Appellants cite no evidence that there was any theological question about what "Unification Church" meant in 1980. Further, there is no legitimate theological dispute that, in 2010, when the Director Defendants amended the articles, FFWPU was widely understood to be the embodiment of the Unification Church. They now attempt to delegitimize FFWPU by claiming that the Unification Church ended in the mid-1990s, but that claim is inconsistent with extensive contemporaneous documentation referencing the Unification Church after the mid-1990s and by the Defendants' own statements referring to the Unification Church, and to FFWPU as the Unification Church.

UCI then claims that the trial court resolved a theological dispute when, in the course of a long list of why the "directors' justifications for deleting references to Unification Church from the 1980 articles are not credible," JA.0342, the court cited testimony from one of the Director Defendants that references to the "end of the church era" were aspirational. UCI Br. at 32 (citing JA.0343). The court then

[9] *See* Order of December 23, 2016 at 7 n.3 ("To simply find the existence of a religious denomination is not to interfere with issues of religious polity or decide disputed theological issues; surely, for example, if the court were to find that a religious institution known to the world at large as the 'Roman Catholic Church' exists, the court could not be said to have declared that that institution is, in fact, the one true Christian church.").

cited extensive documentation and testimony demonstrating that the Unification Church continued to exist in 2010. *Id.* The Defendants cannot create a theological dispute by simply pretending the Church does not exist, especially when the continued existence of the Church is established by the Defendants' own documents and admissions, including Preston Moon's 2008 "Report to Parents." JA.3668-72.

Next, UCI claims that the trial court resolved a religious dispute when it found that the Director Defendants substantially altered UCI's purposes. UCI Br. at 32 (citing JA.0337; JA.0341). But the trial court was simply comparing the text of the original and amended articles, which is an application of neutral principles of law. In any event, this conclusion had already been reached in the summary judgment opinion by operation of neutral principles of law. *See* Part I.A.1 above.

UCI then claims that the trial court made a conclusion "about the rightful spiritual successor to Reverend Moon." UCI Br. at 33. UCI provides no citation to where the trial court made that determination. Later, UCI contends that "the trial court's 'gross abuse' finding rests on its view that Dr. Moon . . . had no legitimate claim to succeed his father as the spiritual leader of the Unification Movement." *Id.* at 36. Again, UCI provides no citation to anywhere in the court's 94-page opinion where that finding is made. In fact, the court's gross abuse finding rested on the secular conduct of Preston Moon and the other individual

Defendants as directors and fiduciaries of UCI. *See* JA.0380-82. Among other things, the court concluded that the "directors gave away half of the value of the corporation to an entity that, by law, could not have any religious affiliation." JA.0382.

Appellants offer no cases in which ecclesiastical abstention has been applied to divest a court of jurisdiction over claims against individuals acting in a secular capacity. Although Appellants do not expressly invoke the "ministerial exception," they rely on that line of precedent, citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Puri v. Khalsa*, 321 F. Supp. 3d 1233 (D. Or. 2018). *See* DD Br. at 26, 27, 34, 38, 42; UCI Br. at 25, 27, 35. The ministerial exception has no application here because the case does not involve "employment discrimination claims brought against [a] religious organization[]." *Our Lady*, 140 S. Ct. at 2061. But even under that exception, the Director Defendants would not qualify as "ministers," because, as directors of UCI they do not "perform[] vital religious duties." *Id.* at 2066. *See also Puri v. Khalsa*, 321 F. Supp. 3d 1233, 1246-48 (D. Or. 2018) (holding that the ministerial exception applied because, *inter alia*, the religious nonprofit corporation "required board members to be qualified as Sikh Dharma ministers" and "have important religious duties," including "choos[ing] and remov[ing] religious leaders" and "approv[ing]

religious decisions and governing documents"). Here, UCI's articles of incorporation and bylaws do not require the directors to have any religious affiliation and do not impose on them any religious duties. JA.1416-20; JA.0842-65. *See also* UCI Opp'n to Mot. for Remedies, at 11 (May 24, 2019) (UCI's "principal management and financial activities always have centered on operating its subsidiaries"). The Directors' removal poses no First Amendment threat.

B. The Superior Court Had the Authority to Remove the Directors

UCI's standing to challenge remedies for a claim to which it is not a party is dubious. Nonetheless, it argues that the court lacked power to remove its directors. First, UCI argues that a statute, made effective after this lawsuit was filed (D.C. Code § 29-406.09(a)) limits judicial removal of nonprofit directors to actions brought by the corporation or in a derivative suit. UCI Br. at 43-47. Second, they argue that the court lacks any non-statutory, equitable power to remove nonprofit directors. UCI Br. at 47-50. Both contentions are wrong.

1. *D.C. Code § 29-406.09(a) Does Not Apply to This Lawsuit*

UCI does not dispute that "statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given a retroactive or retrospective effect." *Bank of Am., N.A. v. Griffin*, 2 A.3d 1070, 1073-74 (D.C. 2010). UCI contends, however, that construing D.C. Code § 29-406.09(a) to abrogate the court's preexisting equitable power to remove

directors is actually a permissible "prospective" application of the statute, not a "retroactive" application. UCI Br. at 45-46. That contention is untenable.

The courts have set forth standards for determining when application of a later-enacted statute would be impermissibly "retroactive," distinguishing between "statutes that are purely procedural" and statutes that "have substantive consequences." *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 84 (D.D.C. 2012). Specifically, "if a statute would attach new legal consequences to events completed before its effective date – by impairing rights a party possessed when it acted," then the statute cannot apply in the absence of a clear legislative intent for retroactive application. *Metroil, Inc. v. ExxonMobil Oil Corp.*, 672 F.3d 1108, 1113 (D.C. Cir. 2012). Here, if the courts had the equitable power to remove directors when Plaintiffs filed this suit, then application of the current D.C. Code to abrogate that power would have the "substantive consequence" of impairing (indeed, eliminating) Plaintiffs' right to obtain that meaningful relief in the case it had pending when the statute was enacted. That would be a retroactive application of the statute. *See Bank of Am.*, 2 A.3d at 1076 (defendant was seeking to apply statute "retroactively" because taking away the preexisting common-law right of priority "would most certainly affect the substantive rights of litigants who had cases pending" when the new statute was passed).

To counter this authority, UCI points to a snippet of dicta from *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994). UCI Br. at 45-46. The Court in *Landgraf* rejected a litigant's reliance on a statute enacted after the events in question, emphasizing the longstanding "presumption against retroactivity" (511 U.S. at 286) and stating that a statute has impermissible retroactive effect if "it would impair rights a party possessed when he acted." *Id*. at 280. In providing some background from prior caselaw before making its ruling, the Court described situations where it sometimes had appropriately applied the law in effect at the time of decision—specifically, statutes "authoriz[ing] or affect[ing] the propriety of prospective relief," "conferring or ousting jurisdiction," or establishing "new procedural rule[s]." *Id*. at 273-75. UCI argues that its request to apply the D.C. Nonprofit Code to this suit falls within the first of these situations, but that argument misreads the Court's discussion.

The cases identified by the Court illuminate what it meant by a statute "affect[ing] the propriety of prospective relief" and when that concept justifies applying a new statute to a pending suit. Both *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921) (discussed by the Court), and *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (cited by UCI) applied section 20 of the Clayton Act to suits commenced before its enactment. The suits were brought by employers to enjoin peaceful picketing by labor unions, but section 20

expressly prohibited such injunctions. If the Court had declined to apply section 20 retroactively to the suits, it would have upheld injunctions of indefinite "*in futuro*" duration that every day would have directly conflicted with a clear public policy determination by Congress against judicial interference with "peaceable persuasion by employees." *Am. Steel*, 257 U.S. at 203. Indeed, that action would have been futile because the employees could have commenced their own actions to vacate the injunctions based on section 20, which unquestionably would have applied to the new actions.

The situation here is very different. Although the trial court's order removing UCI directors is injunctive in the jurisdictional sense, it orders one instance of compliance, not a continuing indefinite injunction against conduct like picketing that is recurring every day. More importantly, it does not contradict any public policy determination in the D.C. Nonprofit Code, which in fact blesses the judicial remedy of removing directors in appropriate circumstances. UCI would have no basis under that statute for bringing a new suit to undo the trial court's order by requiring appointment of the removed directors. In short, the current statute does not declare improper the relief of removing directors; it is not the sort of statute that the *Landgraf* Court meant in referring to a statute that "affects the propriety of prospective relief." 511 U.S. at 273.

2. *Even If D.C. Code § 29-406.09(a) Applies, It Permits Judicial Removal*

D.C. Code § 29-406.09(a) provides for removal actions in a judicial proceeding "commenced by or in the right of the corporation," if certain conditions are met. The provision on removal of directors by judicial proceeding does not purport to address equitable remedies for common law breach of fiduciary duty actions brought against directors. The granting of a statutory right to bring a removal action does not displace common law breach of fiduciary duty claims and the traditional equitable remedies associated with those claims. A court "should not construe a statute to displace courts' traditional equitable authority absent the clearest command or an inescapable inference to the contrary." *Miller v. French*, 530 U.S. 327, 340 (2000) (cleaned up).

Indeed, interpreting the statute to restrict the court's equity jurisdiction would be a violation of the Home Rule Act. Congress expressly granted the Superior Court jurisdiction "of any civil action or other matter, at law or in equity, brought in the District of Columbia." D.C. Code § 11-921(a)(6). Thus, "Congress expressly granted the Superior Court jurisdiction over all matters in equity." *Shoetan v. Link*, 2005-CA-5565, 2009 D.C. Super. LEXIS 5, at *15 (D.C. Super. Ct. Nov. 13, 2009). "Although the D.C. Council retains power in all areas which have traditionally fallen within its local regulatory domain, that power may not restrict the Superior Court's equity jurisdiction." *Id.* (cleaned up).

As a matter of equity – and common sense – it defies all principles of fairness and logic that a Court is empowered to remove directors in an action brought by a single director, as contemplated by D.C. Code § 29-406.09, but is powerless if the wrongdoing directors, as part of their malfeasance, have removed *all* loyal directors, leaving no director to act in the interests of the nonprofit corporation. The Court should not countenance Defendants' reliance on § 29-406.09 to deprive the Court of removal authority where Defendants actively evaded a statutory removal action by removing all directors loyal to UCI's purpose.

Moreover, the D.C. Nonprofit Corporation Act expressly contemplates that the court may "dissolve a nonprofit corporation, place a corporation in receivership, impose a constructive trust on compensation paid to a corporation's director . . . *or grant other* injunctive *or equitable relief* with respect to a corporation" in a proceeding by the Attorney General if the "corporation has continued to act contrary to its nonprofit purposes." D.C. Code § 29-412.20(a)(1)(C) (emphasis added). If the court has the equitable power to dissolve a nonprofit corporation or place it in receivership, then it necessarily has the power to provide the less draconian form of relief in the form of replacing the nonprofit corporation's breaching directors with those committed to serve the nonprofit's

purpose. *See* D.C. Code § 29-107.02 ("[u]nless displaced by particular provisions of this title, the principles of law and equity shall supplement this title").

To be sure, this is not a proceeding by the Attorney General, but, as Plaintiffs with special interest standing, Plaintiffs essentially stand in the shoes of the Attorney General. *Moon I*, 129 A.3d 234, 244 (D.C. 2015) (holding that special interest standing exists because "[t]he exponential expansion of charitable institutions justifies a reasonable relaxation of any rule limiting enforcement to a busy Attorney General"). Standing requires redressability. Implicit in the Court's decision to accord standing to Plaintiffs is Plaintiffs' ability to obtain remedies. The drafters of the current statute did not anticipate this unusual scenario where an entire board of directors would breach its fiduciary duty, leaving only Plaintiffs with special interest standing to ensure that the nonprofit's assets are used for their intended charitable purpose. But nothing in the statute precludes the remedies Plaintiffs seek and, indeed, it would violate the Home Rule Act to construe the statute to divest the Court of its equity jurisdiction to provide relief.

3. *The Court Has the Inherent Equity Power to Remove Directors*

UCI briefly asserts (UCI Br. at 47-48) that courts have no equitable jurisdiction to remove directors, citing as authority old legal encyclopedias while ignoring the Supreme Court and other precedents cited by the trial court. *See* JA.0376. And UCI erroneously states without citation that "D.C. courts have

never wielded inherent equitable authority to remove the directors of nonprofit corporations." UCI Br. at 47. In fact, the D.C. courts, both local and federal, have wielded such authority in the past. *See George v. Jackson*, No. 2013 CA 007115 B, 2015 D.C. Super. LEXIS 17, at *16 (D.C. Super. Ct. July 7, 2015), *aff'd*, 146 A.3d 405 (D.C. 2016) (relying on "equitable power" to remove directors—even after enactment of current D.C. Nonprofit Code); *Owen v. Bd. of Dirs.*, 888 A.2d 255, 270 (D.C. 2005) (relying on "equitable powers of the trial court to effect remedies" to put ousted directors on the board); *United States v. Mount Vernon Mortg. Corp.*, 128 F. Supp. 629, 636 (D.D.C. 1954), *aff'd*, 236 F.2d 724 (D.C. Cir. 1956) (removing directors without specific statutory authority). *See also Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974) (assuming court had power to remove corporate trustees but finding that it would be "unduly harsh" to do so in that case); Restatement of the Law on Charitable Nonprofit Organizations § 5.02(a) (Am. L. Inst., Tent. Draft No. 3, approved May 2019) (recognizing the equitable power of courts to remove directors of charitable nonprofit corporations).

C. The Superior Court Did Not Deprive UCI of Due Process or Otherwise Abuse Its Discretion in Limiting UCI's Role at the Remedies Hearing

UCI contends that the trial court violated due process and abused its discretion when it "denied UCI *any* opportunity to participate" in the remedies

hearing. UCI Br. at 38 (emphasis added). UCI is wrong because it both exaggerates its interest in the remedies proceeding and ignores its actual participation in that proceeding.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). When deprivation of such an interest is implicated, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). An "evidentiary hearing is [not] required"; rather, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." *Mathews*, 424 U.S. at 348-49 (internal quotation and citation omitted). Here, UCI has been deprived of no significant liberty or property interest that implicates the constitutional due process protection and, in any event, UCI received a sufficient "opportunity to be heard" that would satisfy any due process right that exists.

The judgment being appealed here is on Count II of the complaint, which was not brought against UCI but rather was brought against the Director Defendants for breach of fiduciary duty to UCI. Despite not being a defendant on that count, UCI participated in the briefing responding to Plaintiffs' motion for

summary judgment on Count II as well as in filing a motion to alter and amend that judgment in November 2018, and it does not contend that it was denied due process in connection with the summary judgment ruling.

UCI similarly participated in the proceedings to determine remedies. In January 2019, the parties (including UCI) filed competing proposals regarding how to proceed to determine remedies. The trial court then held status conferences on this topic in February and April 2019, at which counsel for UCI fully participated, while acknowledging that "[t]here was no liability established against my client, UCI" and that the claims remaining on other counts against UCI are not "going to be decided in the remedies proceeding." 2/21/19 Status Hr'g Tr. 16:8-9, 18:20-21; *see generally id*. at 16:2-17:9; 18:19-19:5; 4/09/19 Status Hr'g Tr. 8:25-12:16, 18:3-8, 20:24-25.

Thereafter, Plaintiffs filed a formal motion for remedies against the Director Defendants on Count II. Separate from the Director Defendants' opposition, UCI filed its own 20-page opposition to that motion. Def. UCI's Mem. of P. & A. in Opp'n to Pls.' Mot. for Remedies for the Individual Defs.' Breach of Fiduciary Duty (May 24, 2019). That opposition identified only two issues on which UCI believed an evidentiary hearing might be necessary: (1) to ascertain the Director Defendants' intent and possible good faith; and (2) to determine the suitability of the new directors proposed by Plaintiffs if the court decided to appoint new

directors (which it ultimately decided not to do). *Id*. at 10, 20. At subsequent oral argument on the motion, counsel for Preston Moon argued that the court could not impose remedies without holding a "lengthy" hearing addressed to why the individual defendants acted as they did and whether they acted in "good faith." 7/10/19 Mot. Hr'g Tr. 119:6-122:11. The court acceded to this request and scheduled an evidentiary hearing for the parties "to present evidence on whether the Director Defendants' actions were taken in good faith" and on the calculation of the surcharge amount. 7/19/19 Scheduling Order at 2.

UCI relies primarily on a colloquy that occurred on the fourth day of the remedies hearing in which the court questioned why UCI's counsel was making arguments over the admissibility of exhibits even though the subject of the hearing was "a limited issue about the good faith of the directors." JA.2606. Counsel stated that UCI had an interest in "the continuity of these directors" and in "the result of this proceeding" and that UCI's counsel had "privilege objections to make on behalf of UCI." JA.2605; JA.2606. The court acknowledged that UCI had an "interest" in this sense and could make privilege objections, but ruled that this interest did not entitle UCI to the same level of participation as the people who would be subject to the remedies—the actual defendants on Count II whose good faith was at issue. JA.2606; JA.2607. UCI's counsel did not object. JA.2607.

The court's ruling was clearly correct. Assuming arguendo that a corporation can be said to have an interest in who its directors are, that is not the sort of liberty or property interest that engages the Due Process Clause. UCI's counsel was anxious to show that his client should not be repaid the extraordinary sums that had been wrongfully conveyed away, and that the malfeasant directors should not be removed. Assuming arguendo it was even proper for *UCI* to advance that position, UCI was allowed adequate participation. UCI fully participated in briefing the remedies issues; it had no constitutional right to participate in the evidentiary hearing on the breach of fiduciary duty claim as if it were a party— particularly when the position that it advocated was in lockstep with what Preston Moon and the other Director Defendants sought.[10]

UCI also contends that the court abused its discretion by "excluding all of the evidence UCI sought to introduce" that "went directly to proving its own best interests," the sixth factor in the court's remedies analysis. UCI Br. at 41. But this contention compares apples to oranges. The court was assessing the best interests of a UCI that would act in furtherance of its purpose to support the Unification Church. UCI is talking about the best interests of a UCI unencumbered by that

[10] UCI cites five non-binding cases in support of its position that "UCI had a cognizable interest (to say the least) in the composition of its board." *See* UCI Br. at 39, n.11. But those cases are so far afield from the instant case that they do not merit a response.

purpose. The evidence that UCI sought to produce related to "the financial impact and the financial performance of UCI under these directors and the adverse impact of removal on that." JA.3230. For example, UCI sought to introduce evidence of "the turnaround of a UCI subsidiary, Ginseng UP, which saw its net profits improve from $600,000 per year to $1.8 million per year under the Director Defendants' tenure." UCI Br. at 42. The court rightly concluded that this evidence would be irrelevant to its analysis. In denying UCI's Motion for a Stay, the court said: "The Court knew full well UCI's position that Director Defendants should remain and that UCI had become profitable under Preston Moon's leadership." 12/30/20 Order at 10 n.6. But "[w]eighed against Judge Cordero's finding of a breach of fiduciary duty in changing the fundamental purpose of the corporation and giving away half of the company's assets, it is hard to imagine how the Board could remain." *Id*. Indeed, even if the removed directors had the financial acumen of Warren Buffett, it would not be in the best interest of a UCI dedicated to supporting the Unification Church to retain directors who "are hostile to the Unification Church" and "put their personal beliefs and animosities before the interests of UCI." JA.0391.

CONCLUSION

The judgment of the Superior Court should be affirmed.

April 22, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2021, I electronically filed the foregoing BRIEF OF APPELLEE with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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