SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THE FAMILY FEDERATION FOR WORLD PEACE AND UNIFICATION INTERNATIONAL, et al.,	)	**Case No. 2011 CA 003721B**
***Plaintiffs*,**	)	**Civil 1, Calendar 4**
v.	)	**Judge Natalia M. Combs Greene**
HYUN JIN MOON, et al.,	)	**Next Event: Status Report Due September 9, 2011**
***Defendants*.**	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Defendant UCI, then known as Unification Church International, was established in the 1970s for the purpose of supporting the worldwide activities of the Unification Church. To that end, the head of the Church, Reverend Sun Myung Moon, provided UCI's original funding to be managed in trust for the Church, and for more than three decades UCI acted to further that purpose using hundreds of millions of dollars in contributions provided by other Unification Churches across the world. Principal among these was the Japanese Church, which contributed the bulk of UCI financing with the understanding that such funds would be used only to support the activities of the Unification Church.

That all changed when Rev. Moon designated Defendant Preston Moon's younger brother, Sean Moon, to succeed Rev. Moon as head of the Unification Church. Preston Moon responded by hijacking UCI and cutting its ties to the Unification Church. He engineered the removal of UCI directors loyal to the Church and replaced them with directors loyal to himself.

He had the reconstituted Board amend UCI's Articles of Incorporation to eliminate its stated purpose of supporting the Unification Church's activities – indeed, even changing the name of the corporation to "UCI" to eliminate any reference to the Unification Church. The corporation began to divert its assets to support Preston Moon's personal activities, which are unrelated to the Unification Church and were not contemplated by those who had provided funds to UCI. In this suit, the primary donor, principal intended beneficiaries, and wrongfully ousted former directors of UCI seek to halt this departure from UCI's mission and to redirect its activities back to the proper use of its assets – consistent with the expectations of its donors and the principles under which it operated for its first 30 years.

Defendants' Motion to Dismiss does not seriously dispute these facts. Instead, Defendants argue that the courts are essentially powerless to stop Preston Moon from subverting the mission of UCI. First, Defendants argue that, no matter how unlawful and egregious their conduct, no one other than the Attorney General has standing to challenge Preston Moon's actions in seizing control of UCI for his own purposes. Second, they argue that Preston Moon acted lawfully when he orchestrated a takeover of UCI and converted it to his own purposes. According to Defendants, Plaintiffs failed to prepare adequate written documentation of UCI's purpose and governing principles, which supposedly left a loophole that Preston Moon could exploit using his authority as UCI President and Board Chairman. In essence, Defendants maintain that they have pulled off "the perfect heist."

Defendants, however, are mistaken on both counts. The manner in which UCI was founded did not give the Individual Defendants carte blanche to divert the corporation's assets to serve their personal interests. The power to act does not imply an absence of legal constraints on how that power is exercised. Here, Preston Moon and the other Defendants on the Board he

controlled may have had the power to take certain actions, but the exercise of that power was subject to their fiduciary obligations to act in furtherance of UCI's purposes – obligations that he and they ignored.

Nor do standing principles shield Defendants from being held accountable for their wrongful behavior. D.C. law provides that, in addition to the Attorney General, those with a "special interest" in a charitable corporation's affairs can enforce breaches of fiduciary obligations by officials of that corporation. Here, Plaintiffs include intended beneficiaries of UCI, its primary source of funding, and its former directors who were wrongfully removed in order to facilitate Defendants' scheme to subvert UCI's purpose. These persons and entities have a special interest in UCI's affairs, and in its officials' adherence to their fiduciary duties, wholly distinct from the public's general interest in the lawful operation of charitable corporations. The law entitles them to protect those interests without depending upon the hope that an Attorney General will find time on his agenda to bring suit to require the corporation's management to comply with its obligations.

Accordingly, this Court should reject Defendants' attempts to insulate their conduct from scrutiny, and allow this case to go forward to determine whether that conduct was lawful.

FACTUAL BACKGROUND

Reverend Sun Myung Moon founded the Unification Church in Seoul, Korea in 1954. Compl. ¶ 22. As the Unification Church expanded, Rev. Moon and his close advisor Dr. Bo Hi Pak moved from South Korea to the United States in 1971 to continue the Unification Church's worldwide activities. *Id.* ¶ 26. In 1972, Rev. Moon began using the name "Unification Church International" to describe the Unification Church's activities because the Church was expanding internationally. *Id.*

In 1975, Rev. Moon directed Dr. Pak to open a bank account in the District of Columbia in the name of Unification Church International. Rev. Moon provided the initial funds from an account held in his name, and he requested other Unification Church entities, principally Plaintiff The Holy Spirit Association for the Unification of World Christianity (Japan) (the "Japanese Church"), to contribute funds to the new account, and they did so. Rev. Moon directed Dr. Pak to hold those funds in trust solely for the benefit of the Unification Church and its related activities. *Id.* ¶ 27. As the hierarchical apex of the Unification Church, Plaintiff The Family Federation for World Peace and Unification International (the "Family Federation") is the ultimate beneficiary of the Unification Church International trust. *Id.* ¶¶ 11, 29. Plaintiff Universal Peace Federation ("UPF") was established to advance the principles of the Unification Church and is also a major beneficiary of the trust. *Id.* ¶¶ 12, 29.

By 1977, more than $7 million was held in the Unification Church International trust's account. In order to manage these assets, Rev. Moon directed Dr. Pak in February 1977 to establish a District of Columbia nonprofit corporation to implement the purposes of the trust. The corporation was named Unification Church International (referred to here for convenience as "UCI," although the name of the corporation was not changed to "UCI" until 2010). *Id.* ¶ 30. At the direction of Rev. Moon, Dr. Pak changed the Unification Church International bank account to reflect that the trust funds in that account would be held by Unification Church International, the corporation, as opposed to Unification Church International, the unincorporated trust entity. *Id.* Rev. Moon appointed Dr. Pak to be the President of UCI and a member of its Board of Directors, posts that he held until July 1991. *Id.* ¶ 31.

Rev. Moon intended for the corporation to implement the purposes of the Unification Church International trust and for the directors of the corporation to serve as trustees to ensure

that the corporation and its assets would be administered for the benefit of the Unification Church. *Id.* ¶ 30. The directors understood and accepted this responsibility. *Id.* The Articles of Incorporation evidenced this intent, stating that UCI will "guid[e] the activities of Unification Churches organized and operated throughout the world" and that it will "teach the Divine Principle" (which is the theological textbook of the Unification Church). *Id.* ¶ 32. For the next three decades, UCI operated in accordance with its original mission and purpose. *Id.* ¶ 36. During that time, Rev. Moon designated the individuals to serve on UCI's Board of Directors, and all individuals so designated were duly elected. *Id.* ¶ 37. Rev. Moon or the President of the Family Federation also appointed the individuals to serve as President of UCI. *Id.* ¶¶ 38, 43, 47.

In Spring 2006, Rev. Moon designated his son, Defendant Preston Moon, to be a director of UCI, and he was duly elected. *Id.* ¶ 46. The President of the Family Federation then designated Preston Moon to be President and Chairman of the Board of UCI. *Id.* ¶ 47.

In 2008, Rev. Moon designated Preston's younger brother Sean to be the President of the Family Federation and the next head of the worldwide Church. *Id.* ¶ 54. That decision disappointed Preston Moon, and he resolved not to take direction from his younger brother. *Id.* ¶ 55. Instead, he began a series of steps to take control of UCI and divorce the corporation from the Church and the mission for which it was formed. *Id.* ¶ 56. He first used his positions to orchestrate a takeover of the UCI Board of Directors. In January 2009, he convened a clandestine UCI Board meeting in Arizona, instructing all directors not to bring cell phones or laptops to the meeting in order to isolate them from contact with Unification Church authorities. *Id.* ¶¶ 57, 58. At that meeting, he moved the election to the Board of two of his close business associates, Defendants Sommer and Perea, even though, unbeknownst to the other directors, they had not been designated or approved by Rev. Moon or the Family Federation. *Id.* ¶¶ 58, 59.

Preston Moon also requested that directors Thomas Walsh and Victor Walters resign from the Board, even though neither Rev. Moon nor the Family Federation had asked for or approved their resignations. *Id.* ¶¶ 60, 61. After those two directors complied with the Chairman's request to resign, Defendants Preston Moon, Sommer, and Perea constituted a majority of the five-member Board, with Plaintiffs Drs. Douglas Joo and Peter Kim being the minority directors. When Rev. Moon learned of these changes in the summer of 2009, he designated two additional people to be added to the Board, and advised Drs. Joo and Kim to take steps to have them elected. *Id.* ¶ 63. When Drs. Joo and Kim convened a Board meeting for this purpose, however, the other directors refused to attend, thereby depriving the Board of a quorum. *Id.* ¶ 64. Two weeks later, in August 2009, Preston Moon convened another Board meeting at which he, Sommer, and Perea, voted to remove Drs. Joo and Kim from their positions as Directors. *Id.* ¶ 66.

In the summer of 2009, shortly before he was removed as a director, Dr. Joo learned that Preston Moon had caused UCI or its subsidiaries to engage in three different self-dealing transactions with entities that he controlled, including a $5.9 million purchase of property, a $2 million loan, and a lucrative consulting arrangement. *Id.* ¶¶ 49-51. Dr. Joo questioned those transactions at the August 2009 Board meeting, but the vote to remove him and Dr. Kim as directors prevented either of them from examining those transactions. *Id.* ¶¶ 65-67.

Preston Moon, Sommer, and Perea rejected Rev. Moon's subsequent directive to restore Drs. Joo and Kim to the Board and instead arranged for the election of two of Preston Moon's brothers-in-law, Defendants Jinman Kwak and Youngjun Kim, without the approval of Rev. Moon. *Id.* ¶¶ 73-75, 78. Thereafter, Preston Moon continued to ignore repeated directions from Rev. Moon and the Family Federation to resign as Chairman and to restore the Board's

membership to directors approved by Rev. Moon so that UCI could operate in accordance with its original purposes. *Id.* ¶¶ 90, 95-97. As a result of Preston Moon's unauthorized and improper actions, the Japanese Church halted its donations to UCI. *Id.* ¶ 80.

On April 14, 2010, Preston Moon had the reconstituted Board amend the UCI Articles of Incorporation to remove all references to the Unification Church, its mission, and the advancement of the Divine Principle. *Id.* ¶ 83. The Amended Articles purport to reconstitute UCI as an organization with purposes separate and apart from the Unification Church. *Id.* The amendments even changed the formal name of the corporation from Unification Church International to UCI, thereby obliterating all traces of the corporation's connection to the Unification Church. *Id.* Preston Moon and the other Defendants caused these amended Articles to be filed with the District of Columbia government in Washington, D.C. *Id.* ¶ 84.

In November 2009, Preston Moon resigned from his leadership positions at Plaintiff UPF. *Id.* ¶ 81. Subsequently, he announced that he would use an entity known as the Global Peace Festival Foundation ("GPFF") for his own purposes. *Id.* ¶ 82. GPFF had previously been created under the auspices of UPF and the guidance of the Unification Church, but now it would no longer be associated with the Unification Church. *Id.* With his funding from the Japanese Church cut off, Preston Moon and the individual defendants began selling off UCI assets and using the proceeds of these sales to fund the activities of GPFF. *Id.* ¶¶ 82, 89. UCI also ceased making contributions to entities associated with the Unification Church, including Plaintiff UPF. *Id.* ¶ 88. Preston Moon, with the help of the other individual defendants, also caused subsidiaries of UCI to encumber their assets in order to support his personal projects and businesses. *Id.* ¶ 92. And the individual Defendants have begun dissipating UCI's assets by orchestrating the

sale of real property, including the sale for $113 million of a building located in Washington D.C. *Id*. ¶¶ 93-94.[1]

STANDARD OF REVIEW

As Defendants note, the D.C. Court of Appeals, in *Mazza v. Housecraft LLC*, 18 A.3d 786, 790-91 (D.C. 2011), has adopted the standard for reviewing a motion to dismiss under Rule 12(b)(6) set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The "only issue . . . is the legal sufficiency of the complaint." 18 A.3d at 790 (quoting *Grayson v. AT&T Corp.*, 15 A.3d 219, 228-29 (D.C. 2011) (en banc)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 791 (quoting *Iqbal*, 129 S. Ct. at 1950). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. The court "accept[s] the allegations of the complaint as true, and construe[s] all facts and inferences in favor of the plaintiff." *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009); *In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006). The standard does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

Applying that standard here, it is clear that Plaintiffs' claims are well pleaded and that Plaintiffs have standing to bring these claims.

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[1] As Plaintiffs noted in their June 17, 2011 Opposition to Defendant UCI's Motion for Protective Order, Defendants have continued to sell off assets even after the Complaint was filed in this case. The 417-room Sheraton Hotel was sold on May 26, 2011 for an undisclosed amount, and Defendants have also announced plans to sell a business jet aircraft that UCI purchased in 2000 with millions of dollars in donated funds. *See* Opp'n to Defs.' Mot. for Protective Order at 3-4 (June 17, 2011).

ARGUMENT

I. COUNT I OF THE COMPLAINT SETS FORTH A WELL-PLEADED CLAIM THAT UCI WAS ESTABLISHED AS A CHARITABLE TRUST, AND PLAINTIFFS HAVE STANDING TO BRING SUIT TO ENFORCE THE TERMS OF THE TRUST

Defendants contend that Count I should be dismissed on the grounds that Plaintiffs lack standing to sue for breach of trust and that the complaint does not adequately plead the existence of a trust. Defs.' Mem. of Points & Auths. in Supp. of Their Jt. Mot. to Dismiss the Compl. ("Mem.") at 13-26 (July 8, 2011). Neither of these arguments has any merit.

A. Plaintiffs Have Standing to Challenge Defendants' Breach of Their Fiduciary Trust Obligations

1. The Japanese Church Has Standing as a Settlor of the Trust

Section 19-1304.05(c) of the D.C. Uniform Trust Code explicitly provides that "[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust." The Code defines a "settlor" as "a person . . . who creates, *or contributes property to*, a trust." D.C. Code § 19-1301.03(16) (emphasis added). These two provisions clearly establish that the Japanese Church has standing to enforce Defendants' fiduciary trust obligations. The complaint alleges that the Japanese Church was a co-settlor, along with Rev. Moon, of the UCI trust because it contributed substantial sums of money to the trust bank account opened by Dr. Pak in the name of Unification Church International. Compl. ¶¶ 27, 28, 100.

Defendants concede that a settlor has standing and that the Japanese Church contributed funds to the Unification Church International bank account. They argue, however, that the complaint does not adequately allege that the Japanese Church is a settlor because it does not allege that the Japanese Church "intend[ed] to create a trust relationship." Mem. at 14-15. To the extent Defendants suggest that the Japanese Church did not intend to contribute funds to a

trust, that argument is flatly contradicted by the complaint, which specifically alleges that "the Japanese Church donated funds to the Corporation with the intent that these funds and any assets acquired by UCI with those funds would be held in trust for the benefit of the Unification Church." Compl. ¶ 44.

If Defendants' argument instead is that the Japanese Church did not "create" the trust in the first instance, the argument is misconceived because there is no such requirement to qualify as a settlor in the D.C. Code or in the case law. To be sure, a trust cannot be created unless a settlor intends to create one, but that principle does not affect the Japanese Church's standing. Section 19-1301.03(16) is stated in the disjunctive; an entity can become a settlor either by creating a trust or by contributing property to it, and the Japanese Church qualifies as a settlor by virtue of the second part of the statutory definition. The complaint alleges, with considerable support, that Rev. Moon manifested the requisite intent to create a trust when he provided funds to Dr. Pak to open the bank account. *See* Compl. ¶ 27; *infra* pp. 15-17. The Japanese Church contributed to that trust and thereby became a co-settlor. *See also* D.C. Code § 19-1301.03(16) (expressly recognizing that "more than one person" can be a settlor of a trust).

Defendants misstate the allegations of the complaint in contending (Mem. at 15) that the Japanese Church cannot be a settlor because it made contributions before Rev. Moon established the trust. The complaint alleges that "the first $70,000 placed" in the bank account came from Rev. Moon and that he instructed Dr. Pak to hold the bank account funds in trust for the Unification Church. Compl. ¶ 27. That is when the trust was established, and the Japanese Church's contributions to the account came later.

2. The Family Federation and UPF Have Standing as Beneficiaries of the Trust

Defendants argue that the Family Federation and UPF do not have standing as trust beneficiaries because D.C. Code § 19-1304.05(c) expressly provides standing only to settlors, not beneficiaries. Mem. at 13-14. But that section states that "a settlor . . . , among others," has standing, and the D.C. Uniform Trust Code makes clear that beneficiaries are included among these "others." *See, e.g.,* D.C. Code §§ 19-1310.01 (providing remedies for breach of the "duty the trustee owes to a beneficiary"); 19-1310.05(a) (establishing statute of limitations during which "[a] beneficiary [must] commence a proceeding against a trustee for breach of trust"); 19-1310.09 (describing when a "trustee is not liable to a beneficiary for breach of trust"). Indeed, the comment to the Uniform Trust Code model for D.C. Code § 19-1310.01 explicitly states that "[b]eneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust." Uniform Trust Code § 1001 cmt. (2010).

Defendants' contention that the Family Federation and UPF are not the right kind of beneficiaries to have standing is also meritless. Mem. at 14. Defendants rely on the distinction drawn in a Uniform Trust Code comment between mandatory and discretionary beneficiaries – specifically, between beneficiaries "expressly named in the terms of the trust and . . . *designated* to receive distributions," on the one hand, and "organizations that *might* receive distributions in the trustee's discretion but that are not named in the trust's terms." Uniform Trust Code § 110 cmt. (2010) (emphasis added). Plaintiffs here clearly fall into the first category – those having standing – as the complaint alleges that they were mandatory beneficiaries under the terms of the trust. Compl. ¶¶ 27, 29, 100, 101. Indeed, that allegation is at the heart of Count I. Defendants are free to argue to the factfinder that the trustees had "discretion" not to support the Unification Church, but that position is contrary to the allegations of the complaint (as well as to the text of

UCI's original Articles of Incorporation, Compl. ¶ 32), and therefore it lends no support to a motion to dismiss. Defendants seize on the word "expressly" in the comment, but that phraseology surely contemplates the more common situation where there exists a written trust instrument. In the situation presented here, where there is no formal trust instrument but the bank account was opened in the name of Unification Church International and Rev. Moon specifically designated the Church as a beneficiary, the comment's limitation to "expressly named" and "designated" beneficiaries is met.

3. Drs. Joo and Kim Have Standing as Cotrustees of the Trust

As noted above, the comment to Uniform Trust Code § 1001 states that "cotrustees have standing to bring a petition to remedy a breach of trust." Uniform Trust Code § 1001 cmt. (2010). That section is carried forward verbatim into D.C. Code § 19-1310.01, which governs remedies for breach of trust. And, as also noted above, the Code elsewhere provides that "a settlor . . . , among others," has standing to sue "to enforce the trust," thus providing a specific statutory authorization for "others" like trustees to bring suit to challenge deviations from the trust's proper purposes. D.C. Code § 19-1304.05(c). It is evident that trustees are included within this authorization given that they generally have the power and duty to "take reasonable steps to enforce claims of the trust" and to "[p]rosecute . . . judicial proceeding[s] in any jurisdiction to protect trust property." *Id.* §§ 19-1308.11, 19-1308.16(24). Thus, there can be little doubt that Plaintiffs Joo and Kim, who remain trustees (Compl. ¶¶ 14, 15, 70, 71), have standing to bring the breach of trust claim.

Ignoring this explicit language addressing cotrustee standing, Defendants ask the Court to draw a contrary inference from the fact that trustees are not expressly mentioned in the following comment to Uniform Trust Code § 405(c) (2010): "The grant of standing to the settlor does not

negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests." *See* Mem. at 15-16. That language does not purport to be exclusive and thus could not justify disregarding the express statement that "cotrustees have standing." Uniform Trust Code § 1001 cmt. (2010). Moreover, the D.C. Code provides that the "common law of trusts and principles of equity supplement this chapter," except as modified by statute. D.C. Code § 19-1301.06. Nothing in the Code purports to eliminate cotrustee standing to sue for breach of trust, which is well settled in the common law. *See, e.g.*, Restatement (Second) of Trusts § 200 cmt. e (1959) ("If there are several trustees, one or more of them can maintain a suit against another to compel him to perform his duties under the trust . . . or to compel him to redress a breach of trust."); *id.* at § 391 ("A suit can be maintained for the enforcement of a charitable trust by . . . a co-trustee."); Restatement (Third) of Trusts § 94(2) (Tentative Draft No. 5, 2009) ("A suit for the enforcement of a charitable trust may be maintained . . . by a co-trustee . . . ."); 5 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts, § 37.3.10, at 2439 (5th ed. 2008) ("when there are several trustees, any one or more of them may maintain an action against the others to enforce the trust or to compel the redress of a breach of trust.").

Defendants also assert that the complaint does not adequately allege that Drs. Joo and Kim are trustees, noting that there are no specific "written or spoken words that establish [their] appointment." Mem. at 16. But no particular talismanic words, or any words at all, need be used to appoint a trustee. A trusteeship can be accepted by conduct. D.C. Code § 19-1307.01(a)(2) ("a person designated as trustee accepts the trusteeship . . . by . . . exercising powers or performing duties as trustee"). The complaint alleges that Drs. Joo and Kim understood and accepted their responsibility to serve as trustees when they were appointed and began to serve as directors. Compl. ¶¶ 30, 38, 42. And the fact that Drs. Joo and Kim were removed from the UCI

Board as part of Preston Moon's unlawful takeover has no bearing on their continuing fiduciary obligation to serve the trust. They were appointed to serve the trust by Rev. Moon, he has not removed them or relieved them of responsibility, and therefore they continue to serve as trustees. *Id*. ¶¶ 14-15, 70-71.[2]

B. The Complaint Sets Forth a Well-Pleaded Claim That UCI Was Originally Created and Remains a Charitable Trust

A trust "'is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.'" *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983) (quoting Restatement (Second) of Trusts § 2 (1959)). The complaint alleges that Rev. Moon created such a trust when he directed Dr. Pak to open a bank account in the name of Unification Church International, with funds provided by Rev. Moon, and directed him to "hold the funds . . . in trust solely for the benefit and support of the Unification Church and its related activities." Compl. ¶ 27.

The complaint's allegations establish that all the necessary elements of a trust were satisfied at that time. Those elements are: "1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; 2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for [its] benefit; (3) trust property, which is held by the trustee for the beneficiary." *Cabaniss*, 464 A.2d at 91 (citing the Restatement (Second) of Trusts § 2 and cmts. (h)-(k), § 23 and cmt. (a), § 24 and cmt. (b), § 32 and cmts. (a)-(n) (1959)). Dr. Pak was appointed to be the trust's first trustee when it was

[2] Contrary to Defendants' assertion (Mem. at 16), Dr. Joo's August 4, 2009, letter to UCI is fully consistent with his and Dr. Kim's continued service as trustees. It was appropriate for trustees charged with protecting the trust to refuse to assist UCI in obtaining funds to be used improperly against the direction of Rev. Moon and in contravention of the trust purposes.

created; the Unification Church was identified as a beneficiary; and the funds in the bank account were the trust property that was held and managed for the Church's benefit by Dr. Pak. Compl. ¶ 27.

Defendants nevertheless assert that the complaint does not adequately plead the creation of a trust, but even the authorities that they rely upon refute their arguments.

1. The Complaint Sufficiently Alleges That Rev. Moon Intended to Form a Trust

Defendants primarily contend that the complaint fails adequately to allege that Rev. Moon intended to form a trust. Mem. at 18-20. In particular, they attack the complaint's allegation (¶ 27) that "Reverend Moon directed Dr. Bo Hi Pak to hold the funds . . . in trust" for the sole benefit of the Church, characterizing it as a "threadbare statement" amounting to "a self-serving, conclusory allegation that is not entitled to a presumption of truth." Mem. at 18. That allegation, however, is a factual assertion concerning the directions given by Rev. Moon; it is not a "conclusory" legal assertion. Therefore, the very authority relied upon by Defendants makes clear that the allegation must be accepted as factually true for purposes of Defendants' motion to dismiss. *See Mazza v. Housecraft LLC*, 18 A.3d 786, 790-91 (D.C. 2011) ("When there are well-pleaded factual allegations, a court should assume their veracity," but "legal conclusions" "are not entitled to the assumption of truth"). Defendants' further objection that the complaint does not allege "the actual words" used by Rev. Moon (Mem. at 18) is similarly refuted by Defendants' cited authority, which states that "[n]o particular form of words or conduct is necessary to manifest an intention to create a trust." *Cabaniss*, 464 A.2d at 91.

Moreover, Defendants are mistaken in contending that Plaintiffs' allegations regarding the formation of a charitable trust are limited to "a single line" of the complaint. Mem. at 17. The intent required to create a trust "may be manifested 'by written or spoken language or by

conduct, in light of all surrounding circumstances.'" *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss*, 464 A.2d at 91). Here, the complaint not only points to the spoken directions given by Rev. Moon to Dr. Pak, but also contains numerous other allegations relating to the surrounding circumstances and the principals' consistent course of conduct that further evidence the intent to form a trust.

Rev. Moon and Dr. Pak worked together in Korea for 14 years on Unification Church activities and then moved to the United States together in 1971 for the specific purpose of expanding the Unification Church. Compl. ¶¶ 23, 27. To that end, they adopted the name Unification Church International. *Id*. ¶ 27. Thus, when Rev. Moon gave Dr. Pak a large sum of money and directed him to open a bank account in the name of Unification Church International, Dr. Pak certainly did not understand Rev. Moon's directions as intending the funds for Dr. Pak's unfettered use without owing any fiduciary obligation to the Church, as Defendants suggest. *See* Mem. at 18-19. Instead, he understood Rev. Moon as directing him to use the funds in the interests of the entity in whose name the bank account was opened and for whom he had been working with Rev. Moon for almost 20 years.

Dr. Pak's subsequent actions further evidence that understanding. When Dr. Pak established a corporation to manage the assets in the bank account, the Articles of Incorporation made clear that the corporation was expected to use the assets to serve the Church. Compl. ¶ 32. In particular, the Articles stated that the corporation's role would be "assisting, advising, coordinating, and guiding the activities of Unification Churches organized and operated throughout the world" and helping to teach the Divine Principle. *Id*. For more than 30 years, both before and after the incorporation, UCI operated in accordance with the mission and purposes set forth in the Articles. *Id*. ¶ 36. For example, the Japanese Church contributed

hundreds of millions of dollars to UCI over that period to be used to support the Unification Church's mission, and UCI invested and distributed those funds to support Unification Church activities. *Id*. ¶ 39. Dr. Pak and the other officials in charge of the corporation operated it under the direction of Rev. Moon, including following the consistent practice of appointing to the UCI Board only individuals designated by Rev. Moon. *Id*. ¶¶ 37, 38. Defendants simply ignore this course of conduct, even though it confirms that Dr. Pak understood Rev. Moon's directions in 1975 to be that the funds were being given to be held in trust for the Unification Church, not for his unfettered use.

In reality, Defendants' arguments address more the likelihood that Plaintiffs will be able to "prove the existence of such a trust" than they address the legal sufficiency of the trust allegations in Plaintiffs' complaint. Mem. at 18. Defendants state that the law views oral trusts with "skepticism" and requires the creation of such a trust to be proved by "clear and convincing" evidence. *Id*. Evidently, Plaintiffs and Defendants disagree over whether Plaintiffs can meet that evidentiary standard. But this is not the time to assess the weight of Plaintiffs' evidence. Whether Rev. Moon intended to form a trust is a quintessentially factual question that cannot be resolved on a motion to dismiss. *See, e.g.*, *Edgington v. Fitzmaurice*, (1885), 29 Ch.D. 459, 483 (Bowen L.J.) ("The state of a man's mind is as much a fact as the state of his digestion.").

What is relevant here about the authorities cited by Defendants is that they uniformly recognize the existence of oral trusts and reject the proposition that a trust can be created only through a written instrument. For example, the D.C. Code section cited by Defendants is entitled "Evidence of oral trust" and specifically provides that "a trust need not be evidenced by a trust instrument." D.C. Code § 19-1304.07. Despite this settled proposition, Defendants' argument

rests primarily on noting the absence of specific writings like a "trust instrument [or] memorandum" or use of the word "trust" in UCI's original Articles of Incorporation. Mem. at 18, 19. Because no kind of writing is legally required to establish a trust, these arguments of Defendants lend no support to their motion to dismiss. Moreover, Defendants ignore that there is also written evidence supporting the trust allegation – namely, opening the bank account in the name of Unification Church International. Compl. ¶ 27. In sum, the complaint sufficiently alleges the requisite intent to form a trust.

2. Defendants' Other Objections to the Existence of a Trust Lack Merit

As a fallback position, Defendants argue that the trust created in 1975 could not legally have survived the establishment of the corporation in 1977 as the titleholder to the bank account. Mem. at 24-26. But Defendants' argument rests on the invalid assumption that the corporation must be treated as displacing the trust. *See* Mem. at 24 (because trust *res* was conveyed to the corporation, formation of UCI "had the legal effect of separating the trust from its *res* and terminating the trust's existence"). Trust law is clearly to the contrary. The trustee of a trust, in this case Dr. Pak, has "[p]ower to form a corporation or other entity . . . for the purpose of carrying on business or investment activities of the trust." Restatement (Third) of Trusts § 86 cmt. e (2007). In that setting, "[t]he trustee's various fiduciary duties apply both, initially, to decisions involved in creating an entity and, thereafter, to operation of the entity." *Id.*; *see also* D.C. Code § 19-1308.02(g) (governing how trustee should act in voting shares of a corporation owned by the trust); 5 Scott and Ascher on Trusts § 37.3.1.1, at 2408 ("trustees may form a corporation to administer the trust").

This is precisely what the complaint alleges here. Rev. Moon, along with other Unification Church entities, provided funds to create a trust in 1975 for the benefit of the

Unification Church, with Dr. Pak as trustee. In 1977, Dr. Pak incorporated Unification Church International to serve the same purposes, and Dr. Pak and his successors as officials of UCI were subject to the same fiduciary duties as trustees in managing the corporation that Dr. Pak was subject to when he was the trustee of the unincorporated trust.

Defendants also assert that the complaint is deficient because it does not state that Dr. Pak took title to the trust property. Mem. at 20-22. But the complaint states that Dr. Pak was instructed to manage the funds for the benefit of the Church, that he opened the bank account in the name of Unification Church International, and that he transferred the funds to the corporation. Compl. ¶¶ 27, 30. These allegations demonstrate that he had dominion and control over the funds sufficient to create a trust relationship. *See Cabaniss*, 464 A.2d at 92 (delivery of checks with instructions to open a trust account was sufficient transfer of control).

Defendants next argue that the complaint is deficient because it states that the original $70,000 in trust property came from "an account held in Reverend Moon's name" without stating that the funds were owned by Rev. Moon. Mem. at 22-23. But even accepting Defendants' assertion that the funds had been held by Rev. Moon "in his capacity as trustee for the Unification Church," that would not undermine the allegation that Rev. Moon and Dr. Pak created a trust in 1975. Trust funds can be used to establish a new trust. *See* D.C. Code § 19-1308.15(a)(2)(A) ("A trustee . . . may exercise . . . [a]ll powers over the trust property which an unmarried competent owner has over individually owned property"). Indeed, the practice is common enough that the term "trust decanting" is used to describe it. *See, e.g.*, William R. Culp, Jr. & Briani Bennett Mellin, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 Real Prop., Tr., and Est. L.J. 1 (2010).

The authorities cited by Defendants do not remotely support their position. Section 16 of the Third Restatement addresses "ineffective" or "uncompleted" transfers of property, with the quoted language from the comment suggesting a lack of ownership as one of many reasons why an effective transfer might not have occurred. Restatement (Third) of Trusts § 16 cmt. b (2003). Here, there is no question that Rev. Moon's transfer of the $70,000 to Dr. Pak to open the Unification Church International bank account was effective. Section 18 of the Second Restatement addresses a settlor's "capacity" to transfer property, and the quoted language from the comment refers to a *purported* settlor who "has an interest which cannot be transferred by him." Restatement (Second) of Trusts § 18 cmt. a (1959). According to Defendants' assertion, Rev. Moon had a transferable interest in the funds since it was permissible for him to use funds he held in trust for the Church in order to establish another trust in the United States for the benefit of the Church.

Finally, Defendants also argue (Mem. at 23-24) that the complaint does not adequately allege that Preston Moon "was designated, and accepted the appointment," as trustee. As previously discussed, however, neither a writing nor any particular spoken words are legally required to create a trust relationship. A trustee can accept a trusteeship through conduct, including "by accepting delivery of the trust property" or by "exercising powers or performing duties as trustee." D.C. Code § 19-1307.01(a)(2). The complaint alleges that "it was intended and understood that the Directors of the Corporation would serve as trustees of its assets" (Compl. ¶ 101) – an allegation that is well supported by the long course of conduct discussed above. Contrary to Defendants' suggestion (Mem. at 23-24), it was not necessary for the complaint to allege a second time in specific reference to Preston Moon that he, like the other Directors designated by Rev. Moon, understood that he would serve as a trustee when he became

a director of UCI. *See* Compl. ¶ 104. When Preston Moon accepted Rev. Moon's and the President of the Family Federation's designations and began to manage UCI's assets as President and to exercise his powers as a Board member, he accepted the fiduciary responsibilities of a trustee that came with those powers.

II. COUNT II OF THE COMPLAINT STATES VALID CLAIMS FOR BREACH OF FIDUCIARY DUTIES OF OBEDIENCE AND LOYALTY, AND PLAINTIFFS HAVE STANDING TO RAISE THOSE CLAIMS

Independent of the trust claims in Count I, Count II of the complaint rests on UCI's status as a non-profit charitable corporation organized to serve a particular purpose, which makes its directors subject to fiduciary duties. Those fiduciary duties include a duty of obedience to the particular charitable mission the corporation was organized to promote and a duty of loyalty, which encompasses a duty not to divert assets for personal gain. Defendants have breached these duties, and acted *ultra vires*, by causing UCI to depart from its fundamental corporate purpose of supporting the Unification Church and instead using UCI to promote their own interests.

Defendants' primary objection to this count is the argument that Plaintiffs lack standing to assert a claim for Defendants' breach of their fiduciary duties. *See* Mem. at 4-13. Defendants do not dispute that Plaintiffs have a substantial and particularized interest in UCI's governance; rather, they argue that *no one*, other than the Attorney General, has standing to challenge any action taken by UCI's board of directors no matter how far afield such action takes the entity from its intended corporate mission. That assertion is incorrect as a matter of law, as are Defendants' other subsidiary objections to the pleading of the breach of fiduciary duty and *ultra vires* claims. Plaintiffs have a "special interest" in UCI's mission, distinct from the general public, which provides them with standing to remedy the directors' breach of fiduciary duty. There is no legal basis for dismissing Count II.

A. Plaintiffs Have Special Interest Standing

In most jurisdictions, a public officer like the Attorney General has been empowered to bring suit to enforce the terms of a charitable trust because of the concern that otherwise there usually would be "no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public." *Queen of Angels Hosp. v. Younger*, 66 Cal. App. 3d 359, 365 (Cal. App. 2d Dist. 1977). That power is sometimes exclusive because of the difficulty of "establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefited class" and the need to prevent a multiplicity of lawsuits by "a large number of individuals who might benefit incidentally from the trust." *Hooker v. Edes Home*, 579 A.2d 608, 612 (D.C. 1990). Given its rationale, however, that general rule of exclusivity does not apply "where an individual seeking enforcement of the trust has a 'special interest' in continued performance of the trust distinguishable from that of the public at large." *Id*. Defendants concede that "[c]ase law pertaining to 'special interest' standing to enforce charitable trusts applies equally to charitable corporations" like UCI. Mem. at 8 n.5 (citing *Hooker*, 579 A.2d at 611 n.8 (D.C. 1990)); *see also Owen v. Bd. of Dirs. of Wash. City Orphan Asylum*, 888 A.2d 255, 260 (D.C. 2005) ("*Orphan Asylum II*"). That case law establishes two requirements for special interest standing, both of which are satisfied here, and therefore Plaintiffs have standing to bring the claims set forth in Count II.

Where a charitable corporation's governing instruments "establish a set of criteria identifying a limited class of potential beneficiaries," whom the corporation is intended to support, those persons have a "special interest" distinct from the public at large in ensuring the corporation adheres to its fundamental purposes. *Bd. of Dirs. of Wash. City Orphan Asylum v. Bd. of Trs. of Wash. City Orphan Asylum*, 798 A.2d 1068, 1075-76 (D.C. 2002) ("*Orphan*

Asylum I"); *Hooker*, 579 A.2d at 616. Such persons may sue to protect their interest when a "major change from the manner in which the [corporation] has been administered in the past" is threatened. *Hooker*, 579 A.2d at 616; *see also Orphan Asylum I*, 798 A.2d at 1074 (persons with "a special interest in a charitable corporation's conformity with its act of incorporation" can sue to prevent action that "threatens to alter the fundamental nature of the institution").

In *Hooker*, the Court of Appeals examined the instruments governing a charitable corporation and determined it had been established to benefit aged, indigent widows in good health who resided in Georgetown. 579 A.2d at 609-10, 615-16. The Court held that this class of persons was definite enough to have a special interest in enforcing the purposes of the corporation, and it allowed plaintiffs falling within this class to sue to prevent the corporation from closing a home for indigent widows. *See id.* at 615. The Court emphasized that closing the home would be a "major change" in the charity's operation that "distinguish[es] the proposed action from an ordinary exercise of day-to-day discretion." *Id.* at 616; *see also id.* at 617 ("fundamental change"). Similarly, in *Orphan Asylum I*, the Court of Appeals allowed a group of wrongfully ousted corporate directors to bring suit as "persons who have a special interest in the enforcement of a trust" when those in charge of a charitable corporation threatened to terminate funding for the traditional beneficiary of the entity and "instead fund such charitable organizations . . . as the Trustees may select." 798 A.2d at 1075, 1077.

Under these established principles, Plaintiffs here have special interest standing because: (1) they collectively represent a sufficiently narrow class of beneficiaries specifically identified by UCI's original Articles of Incorporation; and (2) they are challenging actions taken by UCI's board that threaten to alter the fundamental nature of UCI.

1. Plaintiffs Are Specifically Identified Beneficiaries of UCI

Defendants argue that UCI's Articles of Incorporation do not define a sufficiently narrow class of beneficiaries to confer special interest standing. Mem. at 9-11. But Defendants' own quotation of UCI's original Articles of Incorporation refutes this claim. Those Articles make clear that UCI was established particularly for the benefit of the Unification Church and the promotion of its message as embodied in the Divine Principle, which is the theological textbook of the Church containing the essential religious teachings of Rev. Moon. *See* Compl. ¶ 32. Specifically, the original Articles state that UCI was established to:

- "assist[], advis[e], coordinat[e], and guid[e] the activities of Unification Churches organized and operated throughout the world" (Mem. Ex. A, Art. Third, A(2));
- promote the "study, understand[ing] and teach[ing] [of] the Divine Principle" and through practical application of this Principle to achieve "unification of world Christianity and all other religions" (*id.* at A(3));
- "establish, support and maintain" places for the "study, understanding and teaching of the Divine Principle" to "further the theology of the Unification Church" (*id.* at A(4));
- "carry forward the dissemination and understanding of the Divine Principle" (*id.* at A(5));
- sponsor and conduct "cultural, educational, religious, and evangelical programs for the purpose of furthering the understanding of the Divine Principle" (*id.* at A(6)).

Those Articles of Incorporation particularly identify the Unification Church and those institutions responsible for promoting the Church's theological message as the Corporation's specifically intended beneficiaries. Contrary to Defendants' assertion (Mem. at 10), the identified class of beneficiaries is not too "expansive" to have a "special interest" in UCI. If anything, the class is more "sharply defined" than the class of widows afforded standing in *Hooker*, which was defined using imprecise terms like "indigent," "aged," and "in good health." *See* 579 A.2d at 615.

Indeed, Defendants' objection has it exactly backwards. In *Hooker*, the court recognized that it was well settled that "a clearly identified intended beneficiary" has special interest standing, giving as an example a situation "where the trust was created to benefit identified . . . entities (*e.g.*, a specific church or charitable organization)." 579 A.2d at 612 (citing Restatement (Second) of Trusts § 391 cmt. c (1959)). The more difficult question in *Hooker* was whether that principle applied to the Edes Home where the beneficiaries were "not identified with that degree of particularity." *Id*. In this case, the Church is "a clearly identified intended beneficiary" falling within the scope of what the *Hooker* court regarded as a clear case for special interest standing. The beneficiary class is well defined and gives Plaintiffs a "special interest" distinct from that of the general public in the lawful operation of the charitable corporation.

Plaintiffs here are the proper parties to bring suit to protect the interests of UCI's intended class of beneficiaries. Plaintiff Family Federation is "the authoritative religious entity that directs Unification Churches worldwide, and "[i]ts edicts and instructions must be followed by Church regional presidents and national leaders." Compl. ¶ 11. The International President of the Family Federation is "the spiritual leader and head of the Unification Church." *Id*. ¶ 55. As such, the Family Federation has special interest standing to ensure that UCI adheres to its corporate purpose of advancing the mission of "Unification Churches organized and operated throughout the world." Mem. Ex. A, Art. Third, A(2).

Plaintiff UPF is an intended beneficiary of UCI because it "exists to advance the principles of the Unification Church through charitable, educational and other means," because "UCI was established to support UPF," and because throughout its history, "UCI regularly made substantial contributions to UPF." Compl. ¶ 12. As an essential institution used by the Unification Church to promote "cultural, educational, religious, and evangelical programs for the

purpose of furthering the understanding of the Divine Principle" (Mem. Ex. A, Art. Third, A(6)), and as a longtime and substantial beneficiary of UCI, UPF has special interest standing to bring this suit alongside the Family Federation.

Plaintiffs Drs. Joo and Kim were members of UCI's board of directors before they were improperly removed as part of Preston Moon's scheme to seize control of UCI. Compl. ¶¶ 14-15. Like the wrongfully ousted directors in *Orphan Asylum I*, Drs. Joo and Kim have standing as "persons who have a special interest in the enforcement of a trust" because UCI's directors are entrusted with safeguarding UCI's corporate mission, and Drs. Joo and Kim were wrongfully removed from the UCI board for dutifully carrying out this responsibility. 798 A.2d at 1075. *See also* D.C. Code § 19-1307.03(g)(2) (trustees must "exercise reasonable care to . . . [c]ompel a cotrustee to redress a serious breach of trust").

The Japanese Church also has standing to bring these claims. The Japanese Church has served as the "primary funding instrument" for UCI throughout its history. Compl. ¶ 13. The Japanese Church contributed funds to UCI with the specific understanding that this money "would be used only to support endeavors consistent with the purposes of . . . UCI's corporate mission and purpose." *See id.* Accordingly, the Japanese Church has special interest standing to ensure that UCI continues to use its money to further its mission of benefiting the Unification Church. *See Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S. 2d 426, 435, 436 (N.Y. App. Div. 1st Dep't 2001) (persons donating money to a non-profit corporation for specifically identified purposes have "a special, personal interest in the enforcement of the gift restriction" and may sue to "enforce the terms of their own gifts") (internal quotation marks omitted); Restatement (Third) Trusts § 94 cmt. g(3) (Tentative Draft No. 5, 2009) ("The settlor of a charitable trust has a special interest in the performance of the trust's charitable purpose(s)" and

has standing to enforce those purposes where the settlor is "a major contributor relative to the trust's total funding.").

Defendants err in contending that Judge Burgess's decision in *Steinbronn v. Times Aerospace USA, LLC*, No. 2009 CA 009127 R(RP) (D.C. Super. Ct.), forecloses Plaintiffs' argument for special interest standing. *See* Mem. at 11. The meager and undifferentiated interest claimed by the plaintiff there is dwarfed by Plaintiffs' strong special interest in UCI's governance presented in this case. Steinbronn was a former employee of UCI who asserted merely that he was "involved" in the Unification Church as a "member." Judge Burgess ruled that his involvement as a member was an insufficient basis on which to grant him special interest standing. *See* Mem. Ex. E at 45: 8-9 ("Your client is a member. [He] doesn't assert any special interest other than what you've said."). That ruling has no bearing at all on Plaintiffs' claims for special interest standing.

Defendants erroneously suggest that Plaintiffs' position is undermined by Judge Burgess's comment that granting standing to Steinbronn would open the door to inappropriate "case-by-case" inquiries into whether a given plaintiff has special interest standing. Mem. at 11. That comment was directed to the specific concern that courts would be asked to differentiate between innumerable Church members based on their degree of "involvement." Mem. Ex. E at 45. Judge Burgess was not foreclosing special interest standing in a different case involving a different class of plaintiffs. To the contrary, Judge Burgess recognized that, under *Hooker*, one "could establish stand[ing]" if one is "part of a small class of beneficiaries" to whom "services were directed" by a "charitable institution such as [UCI]" and one is suing to "correct something that goes to [the] existence of the entity." *Id*. at 44: 10-18; *see also Hooker*, 579 A.2d at 615 ("A suit by a representative of a class of potential beneficiaries should aim to vindicate the interests

of the entire class and should be addressed to trustee action that impairs those interests, not the interests of a given individual.").

In contrast to *Steinbronn*, Plaintiffs here are not former employees of UCI suing simply on the basis of their "involvement" as members of the Unification Church. Rather, Plaintiffs include the corporate embodiment of the Unification Church and the primary donor, principal intended beneficiaries, and wrongfully ousted former directors of UCI. If these plaintiffs do not have a "special interest" in the governance of UCI, a corporation established specifically for the benefit of the Church and the "further[ance] [of its] theology," then no one does. *See* Mem. Ex. A, Art. Third, A(4); *Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.2d 520, 528, 221 U.S. App. D.C. 179 (D.C. Cir. 1982) ("for enforcing fiduciary duties, justice requires someone to have standing"). They fall within the "very defined contours" identified by Judge Burgess in the case law of this jurisdiction for special interest standing to prevent UCI's leadership from breaching its fiduciary duties. *See* Mem. Ex. E at 45.

2. Plaintiffs Are Challenging Actions Threatening the Fundamental Nature and Purpose of UCI

Plaintiffs also satisfy the second *Hooker* requirement because this suit challenges actions taken by the director Defendants that have resulted in "a basic change in the nature" of UCI culminating in "the complete elimination of [Plaintiffs'] status as preferred beneficiaries" of the Corporation. *Hooker*, 579 A.2d at 617, 614 (internal quotation omitted).

Defendants argue that Plaintiffs challenge nothing but "proper and lawful exercises of Board authority" to accomplish "routine discretionary actions" that are "quintessentially within the discretion of the Board" to take because they were statutorily authorized to amend UCI's Articles of Incorporation. Mem. at 12, 13 (citing D.C. Code § 29-301.34). Specifically, Defendants contend, it was "[m]ere re-wording" to amend those Articles by striking all reference

to UCI's corporate purpose of supporting the Unification Church and by substituting wording enabling them to advance their own interests instead (Mem. at 12); there was nothing "extraordinary" about removing directors who stood in the way of Defendants' plan to gain control of UCI and its assets because removal of directors is authorized by the corporation's bylaws (*id.* (citing Art. II §§ 1.4, 2, and 11 of UCI's bylaws)); and their decision to break with UCI's 30-year history of funding Unification Church institutions and causes and instead direct UCI's assets toward their own ends was a "routine discretionary action[]" permitted under D.C. law and UCI's governing instruments (*id.* at 13 (citing D.C. Code § 29-301.18 and Art. III § 9 of UCI's bylaws)). Simply put, Defendants assert that they were entitled to seize control of UCI as they did because they used legitimate corporate powers to do so and that these actions did not alter UCI's essential purpose. Defendants' position is flawed for several reasons.

Most fundamentally, Defendants confuse having the naked power to act with the lawful exercise of that power when the power is held in a fiduciary capacity. The case of *Hollinger International v. Black*, 844 A.2d 1022 (Del. Ch. 2004), is instructive in this regard. There, the Delaware Court of Chancery held that certain corporate bylaw amendments validly adopted under Delaware law had no legal force because they were "adopted for an inequitable purpose and have an inequitable effect." *Id.* at 1080. The court explained that, "[i]n general, there are two types of corporate law claims." *Id.* at 1077. "The first is a legal claim, grounded in the argument that corporate action is improper because it violates a statute, the certificate of incorporation, a bylaw or other governing instrument, such as a contract." *Id.* at 1077-78. "The second," the court continued, "is an equitable claim, founded on the premise that the directors or officers have breached an equitable duty that they owe to the corporation and its stockholders." *Id.* at 1078. The court noted the "classic" principle underlying this second type of claim that

"'inequitable action does not become permissible simply because it is legally possible.'" *Id.* (quoting *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)); *see also id.* (courts are required "to act when statutory flexibility is exploited for inequitable ends").

Here, many of Plaintiffs' claims are of the second variety identified in *Hollinger*. They rest on the ground that Defendants have breached their equitable duties as directors of UCI – principally, their fiduciary "duty of obedience" to ensure UCI adheres to the specific mission and purpose for which it was formed.

As one court has put it:

> It is axiomatic that the board of directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the "duty of obedience." It requires the director of a not-for-profit corporation to "be faithful to the purposes and goals of the organization," since "[u]nlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the *raison d'etre* of the organization.

In re Manhattan Eye, Ear & Throat Hosp., 715 N.Y.S.2d 575, 593 (N.Y. Sup. Ct. 1999) (citation omitted); *see also Summers v. Cherokee Children & Family Servs.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002) ("central purpose of fiduciary duties of officers and directors of nonprofit corporations is to ensure that a corporation's resources are used to achieve the corporation's purposes") (internal quotation marks omitted); *Oberly v. Kirby*, 592 A.2d 445, 469 n.17 (Del. 1991) ("special duty of the fiduciaries of a charitable corporation to protect and advance its charitable purpose"); Restatement (Third) of Trusts § 86 & cmt. b (2007) (equivalent principle in trust law).

In *In re Manhattan Eye, Ear & Throat Hospital*, the court dealt with a non-profit corporation organized "to establish, provide, conduct, operate and maintain a hospital in the City, County and State of New York . . . and [to] maintain[] a school for post graduate instruction" in the treatment of several enumerated illnesses. 715 N.Y.S.2d at 577. The corporation's board of

directors sought approval to sell the corporation's hospital property and to terminate the academic residency program it administered, and instead to operate a chain of medical diagnostic and treatment centers that the board asserted would better serve the organization's financial interests. *See id.* at 578. The court rejected this attempt to effect such a fundamental change, holding that "the duty of obedience . . . mandates that a board, in the first instance, seek to preserve its original mission," and reasoning that the board had not established that the corporation "cannot continue to operate" as it was originally intended. *Id.* at 595, 597.

Similarly, in *Queen of Angels Hospital v. Younger*, 66 Cal. App. 3d 359 (Cal. App. 2d Dist. 1977), the court dealt with a non-profit corporation established to administer a hospital whose board of directors desired to lease the corporation's hospital property and use the proceeds to open a chain of medical outpatient clinics. *See id.* at 363-64. The California court summarized its ruling as follows: "The question is whether [the corporation] can cease to perform the primary purpose for which it was organized. That, we believe, it cannot do." *Id.* at 368. The court reasoned: "The articles of incorporation alone – without resort to additional evidence – compel the inference that although Queen is entitled to do many things besides operating a hospital, essential to all those other activities is the *continued operation of a hospital*." *Id.* (emphasis added). The court also emphasized the non-profit corporation's long course of conduct: "This conclusion is made inescapable by the undisputed additional evidence that, from 1927 when Queen was first incorporated, until 1971, when the lease agreement was entered into, Queen of Angels Hospital Corporation did in fact continuously operate a hospital." *Id.* Significantly, the court explained:

> [T]he issue is not, as plaintiffs contend, whether the operation of clinics serving the poor in the areas in which they live is as worthy a use of charitable funds. We can assume that such operation would be a desirable purpose for a nonprofit corporation. This corporation is, however, bound by its articles of incorporation.

Id. at 368-69; *see also id.* at 369 ("issue is not whether the new and different purpose is equal to or better than the original purpose, but whether that purpose is authorized by the articles").

Here, Preston Moon and the directors loyal to him have breached the duty of obedience they owe to UCI in numerous ways. The most egregious of these breaches was the amendment of UCI's Articles of Incorporation in April 2010 to strike all reference to the Unification Church and the Divine Principle – the particular institution and cause that UCI was specifically incorporated to serve – and to reconstitute the organization as "UCI," an entity intended to serve the interests of Preston Moon. That the amended Articles arguably still have *some* charitable purpose, such as to promote the "international unification of world Christianity" (Mem. at 12), does not mean that it was not a fundamental change to discard UCI's previous purpose of advancing the interests of the Unification Church.

These amendments alone are sufficient to establish that Preston Moon and the UCI director Defendants have breached their duty of obedience to UCI's charitable mission and purpose. The April 2010 amendments were not, as Defendants risibly contend (*id.*), a "[m]ere re-wording" of UCI's Articles of Incorporation, but instead amounted to a complete overhaul of the Corporation. Indeed, one wonders why the board of directors felt compelled to make such a drastic change to the UCI Articles if, as Defendants argue, striking all reference to the Unification Church was not intended to change the "fundamental purposes" of the Corporation. *See id.* As one court has observed, amending a corporate charter is potent "evidence that the Board knew that it was [effecting] a fundamental change in the corporation's mission, which indeed it was doing." *In re Manhattan Eye, Ear & Throat Hosp.*, 715 N.Y.S.2d at 595. In addition, Defendants have breached their duty of obedience by diverting UCI funding away from

Unification Church entities and causes in contravention of the longstanding donative practices of UCI. Compl. ¶¶ 88, 105.

Accordingly, Plaintiffs are challenging a program of inequitable conduct resulting in "a basic change in the nature" of UCI as it existed for over 30 years (*Hooker*, 579 A.2d at 617), not, as Defendants would have it, a series of "routine discretionary actions" reflecting a simple "decision to donate UCI's funds to support one entity instead of another." Mem. at 13. Like the situation in *Hooker*, Preston Moon has placed UCI and those who have a special interest in its governance "at a crossroads they are unlikely to face again." 579 A.2d at 617. These are precisely the type of circumstances for which the special interest standing doctrine exists.

B. Defendants' Allegations of Pleading Defects in Count II Are Without Merit

Defendants raise several objections to the pleading of Count II, arguing: (1) Plaintiffs' breach of duty of obedience claim is improperly pled as a derivative action on behalf of UCI, *see* Mem. at 4-6; (2) Plaintiffs failed to plead that Defendants breached a duty owed directly to them, *see id.* at 6-7; and (3) the complaint does not allege the requirements for an *ultra vires* cause of action, *see id.* at 7-8. None of these arguments has merit.

1. Plaintiffs Can Maintain an Action Derivatively on Behalf of UCI

The duty of obedience and loyalty claims discussed in section II-A, *supra*, are not formal derivative claims brought on behalf of UCI. Rather, they are claims brought on behalf of entities and persons with a "special interest" in UCI governance in order to protect those interests from the adverse consequences of breaches of fiduciary duty owed to the corporation's mission and purpose. The New York Court of Appeals aptly described these kinds of special interest claims as giving rise to "quasi-derivative standing to vindicate [a non-profit corporation's] interests," in

particular, to enforce the Board's "duty of obedience to honor [the corporation's] not-for-profit mission." *Consumers Union of U.S., Inc. v. New York*, 840 N.E.2d 68, 81 (N.Y. 2005).

But Count II is also pled as a formal derivative action on behalf of UCI, and Defendants argue that this aspect of the complaint contravenes D.C. law. Mem. at 4-5. Relying on a creatively redacted quotation from section 29-301.06(2) of the D.C. Nonprofit Corporations Act, Defendants argue that "only members of a non-profit corporation have standing to bring a derivative suit on the corporation's behalf." *See id*. Since UCI has no members, Defendants maintain that "a derivative action cannot be brought on its behalf by anyone." *Id*. at 5.

At the outset, we note that Section 29-301.06(2) applies only to assertions of "ultra vires" action, and therefore, by its terms, it does not apply to Plaintiffs' allegations that Defendants have breached their fiduciary duties as UCI directors. *See* Compl. ¶ 117 (alleging the actions taken by Defendants were both ultra vires *and* breaches of Defendants' fiduciary duties). In any event, the full text of the D.C. statute reveals that it authorizes others, in addition to "members," to bring a derivative suit on the corporation's behalf. The statute provides that such suits may be brought "by the corporation, whether acting directly or *through a receiver, trustee, or other legal representative*, or through members in a representative suit, against the incumbent or former officers or trustees of the corporation." D.C. Code § 29-301.06(2) (emphasis added). Thus, far from precluding Plaintiffs from bringing a derivative suit, this provision authorizes them to bring suit if they fall within the term "legal representative."

The term "legal representative" as used in the D.C. Nonprofit Corporations Act has not been interpreted in any reported decisions, but in construing the meaning of that term where it appears elsewhere in the D.C. Code, the Court of Appeals has held that "a *broad* definition of the term should be applied." *In re Estate of Wilson*, 416 A.2d 228, 231-32 (D.C. 1980). "In its

broadest sense," a legal representative is simply "'one who stands for or acts on behalf of another.'" *Krasnyi Oktyabar, Inc. v. Trilini Imps.*, 578 F. Supp. 2d 455, 464 (E.D.N.Y. 2008) (quoting Black's Law Dictionary (rev. 8th ed. 2004)); *see also Thomas v. Doyle*, 187 F.2d 207, 210, 88 U.S. App. D.C. 95 (D.C. Cir. 1950) (quoting *New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 597 (1886) ("[t]he term 'legal representatives' . . . is sufficiently broad to cover all persons who, with respect to [a deceased's] property, stand in his place and represent his interests"). And including directors in that term would place D.C. law in step with other jurisdictions with similar statutes identifying persons who can bring derivative actions on behalf of non-profit corporations. *See, e.g.*, *Consumers Union*, 840 N.E.2d at 80 n.20 (noting that section 720(b) of the New York Non-Profit-Law explicitly authorizes "a director or officer" to bring a derivative action on behalf of the corporation, along with a receiver, trustee or member). Accordingly, nothing in the D.C. Nonprofit Corporations Act forecloses also pleading Count II here as a formal derivative suit alleging that Defendants have breached their fiduciary duties owed to UCI.[3]

Defendants also argue that Plaintiffs' derivative claim on behalf of UCI should be dismissed on the authority of Judge Burgess's decision in *Steinbronn*, asserting repeatedly, but erroneously, that Steinbronn brought a "derivative" claim. Mem. at 5-6. In fact, counsel for Steinbronn expressly stated at the hearing that "I deliberately did not plead this case as a derivative case." *Id*. Ex. E at 42: 6-7. Therefore, Judge Burgess had no reason to consider the rules for bringing a formal derivative action, and he certainly did not endorse the argument that

[3] Defendants also note that D.C. Superior Court Rule of Civil Procedure 23.1, which is entitled "Derivative actions by shareholders," requires a plaintiff in such actions to allege that he or she "'was a shareholder or member at the time of the transaction of which [he or she] complains.'" Mem. at 5 n.3. That pleading requirement obviously is inapplicable here, where the corporation has no members or shareholders, and Plaintiffs do not claim derivative standing as a shareholder.

Defendants make here. Rather, Steinbronn argued only that he had "derivative-type" special interest standing like that discussed in section II-A *supra*, and that is the only issue that Judge Burgess addressed when he ruled that Steinbronn's unexceptional interest as a former employee of UCI and member of the Church did not rise to the level needed to confer special interest standing. *See id*. at 43:10-45:20. As discussed above (*supra* pp. 27-28), that ruling by Judge Burgess has no bearing on this case because each Plaintiff has a substantial "special interest" that Steinbronn lacked.

2. Count II of the Complaint Also Sufficiently Alleges Breaches of Duty Owed Directly to Plaintiffs

Even apart from the individual special interest and formal derivative claims alleged in Count II, Plaintiffs can maintain this action on the basis that Defendants have breached duties owed directly to Plaintiffs themselves, either as beneficiaries of UCI, as wrongfully ousted directors of UCI, or as a donor whose money is being improperly used. Defendants argue, however, that the complaint alleges breaches only of duties owed to UCI, not of duties owed to any of the Plaintiffs. Mem. at 6. That is incorrect. All Plaintiffs allege in Count II that they have been "injured by the Individual Defendants' acts and omissions," including Defendants' failure to "use the assets of [UCI] to support the mission and activities of the Unification Church," their amendment of the Articles of Incorporation to eliminate references to the Unification Church, and their "removal of Directors [of] the Corporation . . . in violation of UCI's longstanding and uniform custom and practice." *See* Compl. ¶¶ 117-21. These allegations are based on breaches of duties owed to the Plaintiffs, not just to UCI. *See Daley v. Alpha Kappa Alpha Sorority, Inc.*, -- A.3d -- , No. 10-CV-220, 2011 D.C. App. LEXIS 505, at *11-12 (D.C. Aug. 18, 2011) ("[T]he individual rights of the plaintiffs were affected by the alleged failure to follow the dictates of the constitution and by-laws and they thus had a direct,

personal interest in the cause of action, even if the corporation's rights are also implicated.") (internal quotation marks omitted).

Specifically, in considering the scope of judicial oversight over charitable corporations, the Court of Appeals has repeatedly been guided by the rules governing charitable trusts. *See, e.g., Orphan Asylum II*, 888 A.2d at 255, 260 (D.C. 2005) ("[R]ules governing charitable trusts [may] be applied to charitable corporations."). One of the most fundamental of these rules is that those overseeing a charitable trust owe a duty of loyalty directly to the trust's beneficiaries. The D.C. Code defines the trustee's duty of loyalty as follows: "A trustee shall administer the trust solely in the interests of the beneficiaries." D.C. Code § 19-1308.02(a); *see also, e.g.,* D.C. Code § 19-1308.01 (defining a trustee's "[d]uty to administer" as follows: "[t]he trustee shall administer the trust in good faith in accordance with its terms and purposes and the interests of the beneficiaries"). Thus, the complaint alleges a breach of a duty owed to the Family Federation and UPF as beneficiaries when it alleges that Defendants breached their fiduciary duties by amending the Articles of Incorporation and causing UCI to cease funding entities associated with the Church. Compl. ¶¶ 49-51, 82-89, 117.

Similarly, Plaintiffs Dr. Joo and Dr. Kim have a direct cause of action based on a breach of duty owed to them because Defendants wrongfully deprived them of their positions on the UCI board of directors and impeded them from performing their duties as trustees. *Id.* ¶¶ 66-73. In *Orphan Asylum I*, the Court of Appeals recognized that loss of a governance position with a charitable corporation is cognizable as a direct cause of action when it held that the wrongfully ousted board members there were "intermediate beneficiaries of a trust." 798 A.2d 1068, 1075 (D.C. 2002); *see also id.* at 1074-75 ("The Directors are asserting their own interest in serving in the capacity accorded them by the statute.").

Finally, the Japanese Church has a direct cause of action because it donated money to UCI with the expectation that this money would be used for particular purposes, but Defendants have thwarted that expectation. *See Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S. 2d 426, 435 (N.Y. App. Div. 1st Dep't 2001) ("To hold that . . . Mrs. Smithers has no standing to institute an action to enforce the terms of the Gift is to contravene the well-settled principle that a donor's expressed intent is entitled to protection.").

3. Count II of the Complaint Also Sufficiently Alleges That Defendants Acted *Ultra Vires*

Defendants also object to Plaintiffs' Count II claims based on *ultra vires* acts, contending both that Plaintiffs lack standing to raise these claims and that the claims lack substance because Plaintiffs have failed to challenge any action that UCI was "without capacity or power to do." Mem. at 7-8. Both of these assertions are incorrect.

With respect to standing, Defendants rely entirely on section 29-301.06(1) of the D.C. Nonprofit Corporations Act, arguing that it permits only members or directors to challenge *ultra vires* actions and that none of the Plaintiffs qualify because Drs. Joo and Kim are not currently directors. *See* Mem. at 7. But that subsection addresses only suits to *enjoin* the doing of a corporate act. As discussed above (*supra* pp. 34-35), subsection (2) of the statute expressly authorizes others, including "legal representatives," to challenge *ultra vires* actions. More importantly, as discussed in detail in section II-A (*supra* pp. 22-33), Plaintiffs do not rest their standing to challenge *ultra vires* actions by UCI upon a specific authorization in the D.C. Code. Rather, they rely on the judicially recognized principle of "special interest" standing, which clearly encompasses challenges to *ultra vires* actions. *See Hooker v. Edes Home*, 579 A.2d 608, 610, 611 (D.C. 1990) (noting that the complaints alleged "*ultra vires*" acts by the Trustees); *Orphan Asylum I*, 798 A.2d at 1073 (noting that the complaint alleged "that the Trustees in their

governance of the corporation had engaged in breaches of fiduciary duty . . . and *ultra vires* acts").

With respect to the substance of the claims, Defendants argue that they had "the power to take each of the actions" alleged to be *ultra vires* because the D.C. Code authorizes corporations to amend their Articles, to elect and remove directors, and to sell corporate assets. *See* Mem. at 7-8. But those general authorizations do not give directors the power to change the fundamental purposes of the corporation. As the leading treatise explains, "a general corporation law that 'all the corporate powers shall be vested in and exercised by a board of directors' . . . refers merely to the ordinary business transactions of the corporation, and does not extend to other acts . . . such as the reconstruction of and fundamental changes in the corporate body" like those at issue here. 2 W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 540, at 638-39 (2006). Nor do the general corporate law provisions free Defendants from their fiduciary responsibilities. Indeed, the D.C. Code itself prohibits the sort of self-dealing alleged in the complaint. *Compare* D.C. Code § 29-301.27 ("no part of the income of a corporation shall be distributed to its members, directors, or officers"), *with* Compl. ¶ 51 ("Preston Moon . . . caused . . . a direct subsidiary of UCI . . . to enter into a consulting agreement" with an entity he owns and controls); *compare* D.C. Code § 29-301.28 ("No loans shall be made by a corporation to its directors and officers"), *with* Compl. ¶ 50 ("Preston Moon . . . caused UCI to lend two million dollars to" an entity he owns and controls).

The courts similarly recognize that corporate actions can be *ultra vires* even if they are taken in formal compliance with standard governing procedures. For example, "[i]f disinterested directors approved a transaction that posed a clear threat to the charitable purpose or the assets of the corporation, their approval would be an *ultra vires* act." *Oberly v. Kirby*, 592 A.2d 445, 469

n.17 (Del. 1991). Nor can corporate officials insulate themselves from an *ultra vires* challenge simply by following the proper procedures to amend the Articles of Incorporation. Defendants may have had the *power* to amend the articles, but the exercise of that power is constrained by their fiduciary obligation to act consistently with the corporation's mission. *See* 7A Fletcher Cyc. Corp. § 3718, at 395-96 (power to amend the Articles "cannot be exercised to change the corporation in such a manner as to make an entirely different kind of corporation or to change substantially the objects and purposes of the corporation") (footnotes omitted); *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 759 (N.Y. 1985) ("an amendment of the charter of a [non-profit] corporation which changes the purpose to which funds received by it for a limited purpose may be applied is not within the discretionary authority of the trustees alone").[4]

Moreover, the notion that Defendants' actions were consistent with the corporate by-laws is incorrect. The complaint alleges that, although the "written Bylaws of UCI are silent regarding the nomination of corporate Directors, . . . from the Corporation's establishment in 1977 through 2008, Reverend Sun Myung Moon . . . designated all individuals to serve on the Board of Directors, and all individuals so designated by Reverend Moon during this period were duly elected Directors of the Corporation." Compl. ¶ 37. This longstanding practice was a "binding convention regarding the method by which Directors of the Corporation are to be nominated." *Id.* Since "a valid by-law may be established by usage" (*Walker v. Johnson*, 17 App. D.C. 144, 161 (D.C. Cir. 1900)), the "binding convention" for appointing UCI directors gained the force and effect of a corporate bylaw. *See Nat'l Confederation of Am. Ethnic Grps. v.*

[4] Indeed, Defendants' own statements in the motion to dismiss effectively acknowledge that they have acted *ultra vires*. Defendants state that they were "obligated by law and [UCI's original] Articles" to use UCI's money "to further its stated corporate purposes" of benefiting the Unification Church (*see* Mem. at 31, 32), which makes their decisions to amend the Articles and to cease funding Unification Church entities and causes *ultra vires*.

Genys, 457 A.2d 395, 399 (D.C. 1983) ("long and continuous usage of proxy voting has the force and effect of a bylaw"); *Dousman v. Kobus*, No. 19258-NC, 2002 Del. Ch. LEXIS 67, at *13, 16 (Del. Ch. June 6, 2002) ("bylaw provision was amended by implication" because of "definite and uniform custom or usage") (internal quotation marks omitted); *Mgmt. Techs. v. Morris*, 961 F. Supp. 640, 646 (S.D.N.Y. 1997) ("[bylaws] may be adopted and amended by acquiescence and custom and usage as well as by explicit action taken with all pertinent formality"). Given this legal principle, the complaint's allegations support the factual conclusion that UCI had an implied bylaw requiring that directors be selected and removed only in accordance with Rev. Moon's wishes, which therefore is sufficient to state a claim that Defendants' actions to gain control of UCI's board flouting that bylaw were *ultra vires*.

III. COUNT III STATES A VALID AGENCY CAUSE OF ACTION

A. The Complaint Sufficiently Alleges That Preston Moon Assented to Act as an Agent of the Family Federation

Defendants' first objection rests primarily on the assertion that the complaint does not "allege that Preston Moon ever, orally or in writing, consented to be The Family Federation's agent." Mem. at 26. The complaint, however, specifically alleges that Preston Moon "agreed to act on behalf of the Family Federation and subject to the Family Federation's control and direction." Compl. ¶ 125. Further specificity is not required at this stage of the case. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("heightened fact pleading of specifics" is unnecessary to defeat motion to dismiss, just "enough facts to state a claim to relief that is plausible on its face").

In any event, the premise of Defendants' objection is legally erroneous because there is no requirement that a person agree orally or in writing to serve as an agent. To the contrary, section 1.03 of the Restatement (Third) of Agency states that a "person manifests assent or

intention [to become an agent] through written or spoken words *or other conduct*" (emphasis added). The comment adds that, even though assent and intention may be expressed explicitly, "often they are inferred from surrounding facts and circumstances." Restatement (Third) of Agency § 1.03 cmt. e (2006). In particular, "prior dealings or an ongoing relationship frame the context" in which conduct can be understood as assent to an agency relationship. *Id*. The complaint sufficiently alleges that Preston Moon consented to be an agent of the Family Federation through his conduct in accepting positions as President and Chairman of UCI in light of the surrounding facts and circumstances of his and UCI's agency relationship with the Church.

UCI was specifically designated as a "providential organization" within the Church. Compl. ¶¶ 11, 16. The heads of these organizations, which are established to advance the principles of the Church, are appointed by and subject to removal by the head of the Church. *Id*. ¶¶ 11, 34. In this hierarchical structure, the President of UCI managed UCI assets "[u]nder the direction of Reverend Sun Myung Moon." *Id*. ¶ 39. In 2006, the head of the Family Federation designated Preston Moon to become President of UCI. *Id*. ¶ 47. As the son of Rev. Moon and as a person who had held leadership positions in different Church entities (*id*. ¶¶ 4, 81), Preston Moon was familiar with the structure of the Church and with the fact that the heads of providential organizations were subject to the direction and control of the Family Federation.

Thus, there is no basis for challenging as implausible the specific allegation in the complaint that, when he accepted the position as head of UCI, "Preston Moon agreed to act on behalf of the Family Federation and subject to the Family Federation's control and direction," that is, that he "became an agent of the Family Federation." *Id*. ¶¶ 125, 47. *See Judah v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000) (recognizing existence of assent through "conduct"); *Green v.*

H&R Block, Inc., 735 A.2d 1039, 1049 (Md. 1999) ("embarking on the purpose of the agency is, itself, a sufficient indication of consent" in certain circumstances). Moreover, Preston Moon's conduct after becoming UCI President further confirms that he understood he was accepting an agency relationship when he began to serve. He commenced his takeover of the Board by calling a meeting at which other UCI directors were told "to leave behind their cell phones and computers" in order to "isolate" them "from the Family Federation and other Unification Church authorities." Compl. ¶ 58. Preston Moon was motivated to take these precautions by his knowledge that the directors were obligated to comply with directions from the Church authorities, and he understood that he was agreeing to the same obligation when he became a director and President of UCI.

B. The Complaint Sufficiently Alleges That Preston Moon Was Subject to the Control of the Family Federation

Defendants argue that Preston Moon was not subject to the control of the Family Federation in his capacity as President and Chairman of UCI because Plaintiffs have referred to "no document" that establishes such control. Mem. at 27. But documents are not necessary to evidence an agency relationship; the relationship can also be shown by a course of dealing, such as the longstanding practice within the Unification Church that heads of "providential organizations" like UCI must obey the instructions of the Family Federation and act subject to its control. *See supra* pp. 25, 42; *see also, e.g., Judah*, 744 A.2d at 1040 ("courts will look both to the terms of any contract that may exist and to the actual course of dealings between the parties" when assessing a principal's right of control).

The fact-intensive five-factor test that Defendants quote from *Jackson v. Loews Wash. Cinemas, Inc.*, 944 A.2d 1088, 1097 (D.C. 2008), lends further support to Plaintiffs' position that the complaint sufficiently pleads Preston Moon's status as an agent because four of the five

factors indicate the existence of an agency relationship. *See* Mem. at 26. Preston Moon was "select[ed] and engage[d]" by the International President of the Family Federation to serve as the Chairman and President of UCI (*see* Compl. ¶ 47); the Family Federation had "the power to discharge" heads of providential organizations like UCI (*see id.* ¶¶ 11, 34; 43); the Family Federation had "the power to control the servant's conduct," which they exercised by directing the management of UCI assets for a period of more than three decades (*see id*. ¶ 39, 125); and UCI's work was intimately connected to the "regular business" of the Church since it is a providential organization that was "established to support the mission and activities of the Unification Church" (*id*. ¶ 16). Indeed, at the time that Preston Moon became President, UCI's Articles of Incorporation stated that UCI would serve to assist and guide "the activities of Unification Churches organized and operated throughout the world." Mem. Ex. C, Art. Third, § 2.[5]

IV. THE COMPLAINT SUFFICIENTLY ALLEGES A CLAIM AGAINST THE OTHER INDIVIDUAL DEFENDANTS FOR AIDING AND ABETTING PRESTON MOON'S BREACHES OF FIDUCIARY DUTIES

A. The Complaint Sufficiently Alleges the Knowledge Element of Aiding and Abetting Liability

Although Defendants correctly note that "knowledge of [the] breach by the alleged aider and abettor" is an element of an aiding and abetting claim, the very case they cite makes clear that, contrary to Defendants' position, direct knowledge of the precise nature of the illegal act is not required. Rather, a "general awareness of wrongdoing on the part of the one being aided or

[5] The only *Jackson* factor that does not weigh in favor of agency is "payment of wages." But this does not negate the inference of an agency relationship since all UCI Presidents dating back to Dr. Pak traditionally served without compensation, yet they still managed UCI under the direction of Rev. Moon. *Id*. ¶¶ 39, 41. As the Restatement recognizes, "[m]any agents act or promise to act gratuitously." Restatement (Third) of Agency § 1.01 cmt. d (2006).

abetted is sufficient to show knowledge on the part of an aider and abettor." *Nat'l R.R. Passenger Corp. v. Veolia Transp. Serv. Inc.*, 592 F. Supp. 2d 86, 94, 96 (D.D.C. 2009) (*Veolia I*) (denying motion to dismiss aiding and abetting claim because defendant's knowledge "can reasonably be inferred from the facts alleged"); *see also Halberstam v. Welch*, 705 F.2d 472, 488, 227 U.S. App. D.C. 167 (D.C. Cir. 1983) (affirming finding of aiding and abetting liability and specifically noting that "[i]t was not necessary that [defendant] knew specifically that [her co-defendant] was committing burglaries"). The "requisite intent and knowledge may be shown by circumstantial evidence," and "the exact level of knowledge necessary for liability remains flexible and must be decided on a case-by-case basis." *Nat'l R.R. Passenger Corp. v. Veolia Transp. Serv. Inc.*, --- F. Supp. 2d ----, No. 07-1263, 2011 U.S. Dist. LEXIS 49215, at *51 (D.D.C. May 9, 2011) (*Veolia II*) (internal quotation marks omitted); *see also id*. at *54 (denying motion for summary judgment on aiding and abetting claim since a reasonable jury "could accept or reject the defendants' denial of knowledge").

Here, the complaint alleges that each of the Individual Defendants served on the UCI Board of Directors and thus each was aware of the duties of obedience, loyalty, and care owed by members of the Board of Directors to UCI. *See* Compl. ¶¶ 17-21, 58-59, 74-75, 114-16. Nevertheless, during their tenure on the UCI Board, the Individual Defendants undertook numerous actions that caused UCI to engage in self-dealing, *ultra vires* acts, and other improper uses of UCI funds. *Id.* ¶¶ 4-7, 12-13, 56, 58-59, 64, 66-68, 73-76, 79-80, 82-89, 92-94, 117. Given that these individuals knew that they each owed duties of loyalty and obedience to UCI, their authorization, support, and participation in these improper actions is sufficient to support an inference that they had a "general awareness of wrongdoing" being committed by Preston Moon and the other individual defendants. *See Veolia I*, 592 F. Supp. 2d at 96 (denying motion to

dismiss because allegations supported inference that defendant had "sufficient knowledge that the acts being committed by the three employees were impermissible").

B. The Complaint Sufficiently Alleges That Defendants Kim and Kwak Took Actions Aiding and Abetting Preston Moon in Breaching His Fiduciary Duties

Defendants also seek dismissal of the claims against Defendants Kim and Kwak based on the purported "absence of any individualized factual allegations" against them. Mem. at 29. As noted above, there are ample allegations against Defendants Kim and Kwak because they both served on the UCI Board of Directors, and during their tenure, they and the Board authorized, supported, and participated in numerous acts that contravened the mission and purpose for which UCI was established, including self-dealing transactions, diversion and dissipation of assets, and *ultra vires* acts. *See* Compl. ¶¶ 4-7, 12-13, 20-21, 82-89, 92-94, 114-17. Thus, neither defendant can credibly claim that allegations against them are "non-existent." *See* Mem. at 29.

Defendants' argument that these allegations can be disregarded as insufficiently "individualized" – because they use the descriptive short-hand term "Individual Defendants" or "UCI Board of Directors" rather than listing each individual by name – has no support in either law or logic, and neither of the cases Defendants cite remotely stand for that proposition. In both cases, the motion to dismiss was granted because the plaintiff had failed to plead an essential element of its claim. *See Invamed, Inc. v. Barr Labs.*, 22 F. Supp. 2d 210, 218, 219 (S.D.N.Y. 1998) (dismissing monopolization claims for failing to plead "anticompetitive behavior" since "monopoly power is not unlawful *per se*, but rather becomes illegal as a result of anticompetitive behavior"); *Hasenfus v. Corporate Air Serv.*, 700 F. Supp. 58, 62 (D.D.C. 1988) (finding conspiracy allegation insufficient to support personal jurisdiction over defendants because plaintiffs "fail to allege that any overt, tortious act occurred in the District"). In neither case did

the court find that using a collective term to refer to multiple defendants rendered those allegations insufficient.[6] A complaint need only provide "fair notice of what the plaintiff's claim is and the grounds on which it rests." *Taylor v. DC Water & Sewer Auth.*, 957 A.2d 45, 50 (D.C. 2008). The detailed allegations of wrongful acts by the UCI Board while Defendants Kim and Kwak served as directors more than surpasses this threshold.

V. THE ALLEGATIONS OF THE COMPLAINT SET FORTH VALID CLAIMS BY THE JAPANESE CHURCH AGAINST UCI UNDER COUNTS IV, V, AND VI, AND THE JAPANESE CHURCH HAS STANDING TO RAISE THOSE CLAIMS

Independent of the allegations in Counts I-III, Plaintiffs have also properly alleged contract-based causes of action in Counts IV, V, and VI. Defendants contend, however, that these claims should be dismissed for both lack of standing and failure to state a claim. Both of Defendants' objections are without substance.

A. The Japanese Church Has Standing to Bring Counts IV, V, and VI

Defendants argue that the Japanese Church lacks standing to bring the contract-based counts, without regard to whether it has alleged viable claims under those counts. Mem. at 30-31. Thus, Defendants take the startling position that a contracting party does not have standing to enforce its rights under the contract. Defendants point to no authority supporting such a view of contract law, and we are aware of none.

Defendants rely almost exclusively on a 3-2 decision of the Connecticut Supreme Court, *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997), for the

[6] We note that Defendants' selective quotation from *Invamed* is misleading. The language in full reads: "Assuming Invamed alleges the Affiliates' market power in the clathrate market sufficiently, it, aside from its conclusory use of the term 'Defendants,' does not allege, let alone establish, that the Affiliates independently engaged in conduct unlawful under the Sherman Act." *Invamed*, 22 F. Supp. 2d at 218. This language shows that the court found the complaint inadequate, not because it used the collective term "Defendants," but because the plaintiff did not allege anti-competitive conduct. *See id.* at 217-20.

proposition that "a donor to a charitable corporation does not have standing to sue the organization" for improper use of donated funds. Mem. at 30.[7] That decision has no relevance here. First, the "sole issue" in *Herzog* was whether the plaintiff had "statutory standing" under Connecticut's Uniform Management of Institutional Funds Act. *Herzog*, 699 A.2d at 996. Second, *Herzog* did not address a contract claim, and its reasoning is inapplicable "where the donor alleges that he provided funds to a charitable institution pursuant to a contract." *Pearson v. Garrett-Evangelical Theological Seminary, Inc.*, No. 11-cv-0019, 2011 U.S. Dist. LEXIS 51342, at *13 (N.D. Ill. May 13, 2011). Third, and most importantly, the D.C. Code in important respects rejects the common law case law that the *Herzog* court found persuasive in its reasoning.

According to *Herzog*, the common law rule was that "the donor's right [to have a charity adhere to the conditions placed on a gift] is enforceable only at the instance of the attorney general." 699 A.2d at 998. Though it acknowledged that this limitation does not apply to persons with a "special interest," the court asserted that this was a narrow exception that does not include "the settlor or his heirs." *Id*. at 999 n.4 (citing Restatement (Second) of Trusts § 391 (1959)).[8] In contrast, as discussed above (*supra* pp. 11-14, 22-23), D.C. law rejects the notion that only the Attorney General can enforce the terms of a restricted gift. Indeed, the D.C. Code

[7] Defendants surprisingly also cite repeatedly to *Hooker v. Edes Home*, 579 A.2d 608, 611-12 (D.C. 1990), but the plaintiffs in *Hooker* were beneficiaries, not donors. *Hooker* does not address donor standing, and to the extent it bears on the issue it supports Plaintiffs' position, not Defendants'. In upholding the plaintiffs' standing in that case, *Hooker* rejected the notion put forth in *Herzog*, and by Defendants here, that only the Attorney General can sue to require a charitable organization to use contributed funds for their intended purposes.

[8] It is questionable whether the *Herzog* court correctly characterized the common law. *See, e.g.*, *Pearson*, 2011 U.S. Dist. LEXIS, at *8, 10 (noting that the Illinois case relied upon in *Herzog* did not involve a claim that money was donated "pursuant to a specific agreement that was later breached"); *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435 (N.Y. App. Div. 1st Dep't 2001) (citing *Herzog*, but treating it as an outlier and declining to follow it).

explicitly provides that settlors do have standing to sue for breach of trust. D.C. Code § 19-1304.05(c); *see also* Uniform Trust Code § 405 cmt. (2010) (observing that settlor standing is "[c]ontrary to Restatement (Second) of Trusts Section § 391"). Since a settlor is defined as a person who contributes property to a trust (D.C. Code § 19-1301.03(16)), this provision reflects a very different approach to donor standing than that of the *Herzog* court. The D.C. Code instead reflects the view that "the Attorney General's interest in enforcing gift terms is not necessarily congruent with that of the donor," and therefore the donor's interests "are best served by continuing to accord standing to donors to enforce the terms of their own gifts concurrent with the Attorney General's standing." *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426, 435-36 (N.Y. App. Div. 1st Dep't 2001).

In light of these fundamental differences between the principles adopted in the D.C. Code and those relied upon in *Herzog*, it is fair to say that the views of the dissent in *Herzog* are more pertinent to this case. As the dissent aptly said, the majority's crabbed view of standing was "simply an approval of a donee . . . 'double crossing the donor,' and doing it with impunity unless an elected attorney general does something about it." *Herzog*, 699 A.2d at 1002 (McDonald, J., dissenting); *see also Banner Health Sys. v. Long*, 663 N.W.2d 242, 250 (S.D. 2003) ("[a]ny other rule of law would allow a charitable nonprofit corporation to eviscerate the charitable purpose for which it was formed without recourse for those who donated funds for that purpose"). That is not the law in the District of Columbia.

B. Counts IV Through VI of the Complaint State Valid Claims for Relief

1. The Complaint Sufficiently Alleges a Valid Breach of Contract Claim

The complaint alleges that the Japanese Church contributed hundreds of millions of dollars in exchange for UCI's promise to use those funds for the purposes for which they were

contributed – that is, to support Unification Church-related activities. Compl. ¶¶ 44-45, 132-34. The complaint thus adequately alleges that UCI breached a contract with the Japanese Church when it diverted those contributions to purposes for which they were not intended.

In response, Defendants suggest that the court should show "skepticism" towards the contract claim because there is no written contract, and "experienced businessmen engaged in a complex transaction" would be expected to prepare a written contract. Mem. at 31 (quoting *Strauss v. Newmarket Global Consulting Grp., LLC*, 5 A.3d 1027, 1036 (D.C. 2010)). This suggestion is completely misconceived. First, "skepticism" does not raise a claim of legal insufficiency and is therefore irrelevant at the motion to dismiss stage where the complaint's factual allegations are taken as true. Second, the contracting parties were not "experienced businessmen" seeking to protect their individual interests in a commercial transaction against potential self-serving actions by the other contracting party. They were amicable parties – foreigners unfamiliar with American corporate conventions – who were pursuing a shared charitable interest in bringing their religious message to the United States. *See* Compl. ¶¶ 22-27. They would not have been expected to negotiate a formal contract concerning the use of the contributions, but rather would reasonably have used the kind of oral communications and written correspondence cited in the complaint. *Id.* ¶¶ 44-45, 133. The premise of Defendants' plea for "skepticism" is therefore absent.

Defendants also raise two more specific objections to the contract claim, arguing that the complaint does not allege consideration for the contract and that it does not allege a manifestation of the parties' intent to be bound by the agreement. Mem. at 31-34. These objections are without merit.

a. The Complaint Sufficiently Alleges Consideration for the Contract Between UCI and the Japanese Church That Was Breached

Defendants argue failure of consideration because "UCI already was obligated by law and its Articles to perform the promise that [the Japanese Church] claims to have extracted in return for its donations" – namely, to use the funds to advance the purposes of the Unification Church. *See id*. at 31.[9] But the contractual promise went beyond the obligations imposed by UCI's original Articles. The Japanese Church communicated with two presidents of UCI, Dr. Pak and Dr. Joo, concerning "the need for the funds and how the funds would be used by" UCI. Compl. ¶ 45. *See, e.g.*, Ex. A at 2 (Apr. 14, 2004 Letter from D. Joo to the Japanese Church) (requesting that the Japanese Church contribute $84 million to UCI for "UCI's projects and activities planned for the coming fiscal year" detailed in the letter). These were specific promises not contained in the Articles that provided consideration for the contract.

b. The Complaint Sufficiently Alleges All Other Contractual Elements Essential to the Breach of Contract Claim

Defendants also contend that the complaint is deficient for failure to allege "agreement as to all the material terms and an objective manifestation of the parties' intent to be bound" by the contract. Mem. at 32. This argument erroneously faults the complaint for failing to provide contract details when in fact the material terms of the alleged contract were straightforward. The Japanese Church would contribute millions of dollars to UCI to be "held in trust for the benefit of the Unification Church and used to support Unification Church-related activities" in exchange for UCI's promise to so use the funds. *See* Compl. ¶ 44. Contrary to Defendants' assertion

[9] We note that this contention flatly contradicts the main thrust of Defendants' position in this litigation. Defendants elsewhere contend that they were free to amend UCI's Articles of Incorporation to delete all references to the Unification Church as an "ordinary exercise[ ] of discretion" and that these amendments and the subsequent decision not to fund Church activities did not "run afoul of" the law. Mem. at 11-13.

(Mem. at 33), the complaint does not allege an "entirely unilateral" contract; it specifically alleges that "UCI promised to use [the funds] solely for the purposes for which they were donated." Compl. ¶ 44.[10]

The manifestation of the parties' intent to be bound by this contract was equally simple, and it was recorded in correspondence between UCI presidents and Japanese Church leaders. *See* Compl. ¶ 45; Ex. B (collection of correspondence between UCI and Japanese Church detailing the conditions on each requested contribution). An example is the April 14, 2004 letter from then-UCI President Joo to then-Japanese-Church President Hideo Oyamada in which UCI requested a contribution and detailed how it would be used. *See* Ex. A. In this letter, UCI stated that it would use the Japanese Church's requested donation to support:

> 1. Conferences, seminars, programs and activities, including Ocean Church, which support and promote the teachings of the Unification Church, and the Church's mission of world peace and world restoration;
>
> 2. Educational and cultural programs of the Unification Church and affiliated organizations;
>
> 3. Publications and other media which promote moral and family values, international cooperation, world peace and similar purposes and objectives of UCI and the worldwide Unification Church movement;
>
> 4. Business and other projects that, economically or otherwise, support the purposes and objectives of UCI and the worldwide Unification Church movement.

Id. at 1-2. UCI thereby promised to use the requested contribution for these delineated purposes and no others. Each letter request and each subsequent contribution was premised on the understandings set forth in the correspondence, as alleged by the Japanese Church in the

[10] Determining whether a contract was formed is generally an intensely factual inquiry, and therefore it is not surprising that none of the authorities cited by Defendants on this point involved motions to dismiss the complaint. Indeed, Defendants' primary authority specifically states that "determination of what the parties consider to be the material terms of their agreement is a question of fact." *Strauss*, 5 A.3d at 1033.

complaint. *See* Compl. ¶ 45; Ex. B (correspondence). Even UCI's current general counsel, Daniel Gray, recognized the existence of this bilateral agreement when he wrote to Peter Kim that "the entire $10 Million donation [made by the Japanese Church] . . . will be used exclusively for the advised purpose." *See* Ex. C at 1 (Aug. 17, 2009 Letter from D. Gray to P. Kim).[11]

2. The Complaint Sufficiently Alleges a Promissory Estoppel Claim

In the District of Columbia, a defendant can be held liable under a promissory estoppel theory when "there [is] a promise which reasonably leads the promisee to rely on it to his detriment, with injustice otherwise not being avoidable." *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736, 739, 115 U.S. App. D.C. 335 (D.C. Cir. 1963) (citing Restatement of Contracts § 90 (1932)). The complaint properly alleges such a claim, as an alternative to a breach of contract claim, because it alleges: (1) that UCI promised to use the Japanese Church's contributions for the purposes for which they were intended; (2) that the Japanese Church relied on that promise to its detriment in deciding to contribute funds to UCI; and (3) that the Japanese Church suffered an injustice when UCI broke its promise and diverted the funds to other uses. Compl. ¶¶ 44-45, 140-47.

Defendants argue that these allegations are inadequate because: (1) as a matter of law, a donor cannot suffer injury from misappropriation of donated funds (Mem. at 34-36), and (2) there is allegedly "no threat of injustice here because the Attorney General is specifically (and

[11] Defendants err in contending that the complaint's reference to a letter from Peter Kim to UCI's general counsel on August 19, 2009, "plead[s] [the Japanese Church] out of its contract claim" because it refers to the Japanese Church's contributions as "voluntary." *See* Mem. at 34 (citing Mem. Ex. K). This language is unremarkable; most contract formation occurs voluntarily. In any event, the letter was not written by one of the contracting parties, but rather by wrongfully ousted UCI director Peter Kim on behalf of the Korean Mission Foundation. Thus, the quoted statements are not probative of the Japanese Church's understanding of the relationship with UCI. The purpose of the correspondence was not to explain the contractual relationship, but instead to give UCI notice that the Mission Foundation, a Unification Church entity, disapproved of Preston Moon's manipulation of the UCI board of directors. *See* Compl. ¶ 78.

solely) tasked" with "preventing any misuse of funds by charitable corporations" (*id*. at 35). To support these propositions, Defendants again rely on the Connecticut Supreme Court's *Herzog* decision, making the same assertions that they make in arguing for lack of standing. As explained *supra* at pp. 47-49, the *Herzog* case does not reflect the law in the District of Columbia.

Defendants' assertion that monetary damages are not available for promissory estoppel claims is also incorrect. *See id*. at 35-36. A "promissory estoppel claim generally entitles a plaintiff to the damages available on a breach of contract claim." *Aceves v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 231 (Cal. App. 2d Dist. 2011). *See also, e.g., SJ Props. Suites v. Specialty Fin. Grp., LLC*, 733 F. Supp. 2d 1021, 1033 (E.D. Wis. 2010) ("The remedy for promissory estoppel is either money damages or an order specifically enforcing the promise."). The cases cited by Defendants are fully consistent with the availability of damages under a promissory estoppel theory. In *Moss v. Stockard*, 580 A.2d 1011, 1034-35 (D.C. 1990), the court reversed a damages award on a promissory estoppel claim only because it would have yielded a "double recovery" in light of the plaintiff having already recovered the same damages in a different lawsuit. In *Mamo v. District of Columbia*, 934 A.2d 376, 386 (D.C. 2007), the court rejected a promissory estoppel claim because the plaintiff failed to demonstrate reasonable reliance on the promise, but the court said nothing about the availability of a damages remedy when promissory estoppel is established.

3. The Complaint Sufficiently Alleges an Unjust Enrichment Claim

Under D.C. law, "[u]njust enrichment occurs when: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *Peart v. D.C. Hous. Auth.*, 972 A.2d 810, 813

(D.C. 2009) (internal quotation marks omitted). The complaint properly alleges an unjust enrichment claim, as an alternative to the breach of contract and promissory estoppel claims, based on UCI's misappropriation of funds contributed by the Japanese Church that were not used for their intended purposes. Compl. ¶¶ 149-54.

Relying again on the *Herzog* case, Defendants argue that "UCI cannot on the alleged facts have been enriched at [the Japanese Church's] expense" because a donor is divested of any interest in donated property, even when the contribution was made subject to conditions. Mem. at 36. Again, *Herzog* is not the law in the District of Columbia. *See supra* pp. 47-49. *See also Stock v. Augsburg College*, No. C1-01-1673, 2002 Minn. App. LEXIS 421, at *14-15 (Minn. Ct. App. Apr. 16, 2002) ("A conditional gift is one that is conditioned on a donee's performance of an act; and if the condition is not fulfilled then the donor may recover the gift. . . . The condition may be imposed by law or implied in fact in order to prevent *unjust enrichment*.") (emphasis added).

VI. THE COURT HAS PERSONAL JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

Plaintiffs have alleged facts supporting personal jurisdiction over the individual defendants pursuant to the D.C. long-arm statute, D.C. Code § 13-423(a). Section (a)(1) establishes jurisdiction over a person "transacting any business in the District" that is the subject of the claim for relief. Here, Plaintiffs' claims arise out of Defendants' misappropriation of the assets and governance of UCI, a charitable corporation incorporated in the District. Among the specific improper acts alleged as a basis for relief are the Defendants' selling property in the District and filing amended Articles of Incorporation for UCI in the District, which plainly qualify as transacting business in the District. These acts also caused tortious injury to Plaintiffs and to District resident UCI, which establishes personal jurisdiction under section 13-423(a)(3).

1. The Individual Defendants Can Be Subjected to Personal Jurisdiction for Claims Based on Actions Taken in Their Official Capacity

Defendants argue that the "fiduciary shield" doctrine immunizes the individual defendants from personal jurisdiction, asserting that *Flocco v. State Farm Insurance Co.*, 752 A.2d 147 (D.C. 2000), stands for the general proposition that acts conducted in one's official capacity as a corporate officer should be ignored for jurisdictional purposes and "only conduct that is undertaken in a person's individual capacity counts for jurisdictional purposes." Mem. at 42 (citing 752 A.2d at 162). This is not the law. *Flocco* itself states that "we explicitly decline to adopt such an absolute 'fiduciary shield' doctrine, which would be difficult to reconcile with Supreme Court precedent." 752 A.2d at 163 n.20. Indeed, it is well established that the "transacting any business" provision of the D.C. long-arm statute "extends as far as the Fifth Amendment's Due Process Clause permits." *Id*. at 162; *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 325-26 (D.C. 2000) (en banc); *Helmer v. Doletskaya*, 393 F.3d 201, 205, 364 U.S. App. D.C. 178 (D.C. Cir. 2004). And the "fiduciary shield doctrine is not available where the forum state's long-arm statute is coextensive with the full reach of due process." *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 525 (4th Cir. 1987) (internal quotation marks omitted).

Instead, the *Flocco* court recognized that the "critical [question] is whether the nonresident's 'conduct and connection with the forum state are such that he [or she] should reasonably anticipate being haled into court there.'" 752 A.2d at 162 (quoting *Trerotola v. Cotter*, 601 A.2d 60, 64 (D.C. 1991) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The court simply found that personal jurisdiction was not reasonably anticipated on the facts of that case, where the non-resident CEO and Vice-President of a nationwide insurance company were named as defendants for allegedly instructing employees to

make a payment to a policyholder located in the District. That ruling has little relevance here where the defendants are the controlling directors of a District corporation charged with taking actions that had significant effects in the District, including changing the mission of that corporation so that Defendants could divert its assets from their intended purposes. *See Daley v. Alpha Kappa Alpha Sorority, Inc.*, -- A.3d -- , No. 10-CV-220, 2011 D.C. App. LEXIS 505, *8, 7 (D.C. Aug. 18, 2011) (officials of a non-profit corporation "could reasonably anticipate being required to defend their actions in the courts of the District" when those actions "dealt with the management of a District of Columbia corporation").

Defendants cannot shield themselves from the District's jurisdiction through the expediency of meeting in Arizona to conduct the affairs of a District corporation. As the Supreme Court explained in *Calder v. Jones*, 465 U.S. 783, 789-90 (1984), when out-of-state persons engage in activity aimed at another jurisdiction, they should anticipate being haled into court in that other jurisdiction consistent with due process. That principle clearly justifies personal jurisdiction over directors of a resident corporation who arrange to avoid the forum state when making corporate decisions.

The Fourth Circuit addressed this point in *Pittsburgh Terminal*, 831 F.2d at 528 (footnote omitted): "Excellent reasons exist for allowing a State to assert jurisdiction over non-resident directors of domestic corporations. A chartering State has a strong, even compelling, interest in providing a forum for redressing harm done by corporate fiduciaries, harm endured principally by a resident of that State, the corporation." The directors of the West Virginia corporation involved there knew that the corporate decisions at issue "could have been given effect only in West Virginia by virtue of the laws of West Virginia under which [the corporation] operated," and therefore it was reasonable for them to anticipate being sued in West Virginia. *Id*. at 527.

See also Texva, Inc. v. Boone, 300 S.W.3d 879, 887 (Tex. App. 2009) (personal jurisdiction over non-resident officer and director in suit charging "misfeasance in the operation of the domestic corporation"); *Ellwein v. Sun-Rise, Inc.*, 203 N.W.2d 403, 405 (Minn. 1972) (personal jurisdiction over non-resident directors who authorized improper issuance of stock of resident corporation). The Fourth Circuit concluded its opinion with language that is equally applicable here (831 F.2d at 530):

> The defendants had full knowledge that Mid Allegheny was a West Virginia corporation when they accepted and exercised directorships. And, accepting a directorship is not a frivolous business. The law imposes substantial responsibilities, and substantial liability, upon corporate directors. Therefore, it seems perfectly reasonable to require defendants . . . to defend this action, concerning their conduct as directors, in a West Virginia court.

In *Covington & Burling v. International Marketing & Research, Inc.*, No. 01-0004360, 2003 D.C. Super. LEXIS 29 (D.C. Super. Ct. Apr. 17, 2003), this Court found personal jurisdiction over corporate officers of a company that transacted business in the District. There was no allegation of specific acts performed by those individuals, but the Court held that they were subject to its jurisdiction because they were "the only corporate officers of [the company] and set company policies and procedures." *Id.* at *17. *See also Nat'l Cmty. Reinvestment Coalition v. Novastar Fin., Inc.*, 631 F. Supp. 2d 1, 8 (D.D.C. 2009) (rejecting fiduciary shield doctrine where the corporate officer exerted "significant influence" over the company's policies). The case for personal jurisdiction is considerably stronger here where Defendants not only are the directors who control UCI but also are alleged to have personally orchestrated the unlawful conduct of removing the Plaintiff directors and changing the Articles of Incorporation.

In *Flocco*, the court was concerned about the absence of a "limiting principle" for the corporate defendant's employees if the court found personal jurisdiction on those facts (752 A.2d at 164), and it held that the plaintiff should proceed against the defendants in an "appropriate

forum" (*id*. at 165). Here, finding personal jurisdiction would not open the door to jurisdiction over any other individual, and surely there is no more appropriate or convenient forum for this suit than UCI's home in the District. *See Pittsburgh Terminal*, 831 F.2d at 528 n.9; *Ellwein*, 203 N.W.2d at 405-06.

2. The Complaint Sufficiently Alleges Grounds for the Exercise of Personal Jurisdiction Over the Defendants

Defendants also argue (Mem. at 37-40) that the allegations of the complaint are insufficient to support personal jurisdiction because they "lump together" the alleged actions of the individual defendants, rather than containing separate allegations for each individual director. This argument is without merit. Defendants rely on two cases for their argument, *NAWA USA, Inc. v. Bottler*, 533 F. Supp. 2d 52 (D.D.C. 2008), and *Murphy v. PriceWaterhouseCoopers, LLP*, 357 F. Supp. 2d 230, 242-43 (D.D.C. 2004). Neither case remotely suggests that a court lacks personal jurisdiction over individuals that agree to take collective action if the complaint does not plead the allegations in separate paragraphs for each individual.

In *Murphy*, the case on which Defendants primarily rely, a complaint brought by two employees in the D.C. office of a worldwide organization of more than 20,000 employees was dismissed because it failed to "alleg[e] that the individual defendants specifically made decisions regarding employees in the [defendant's] District of Columbia office or had any contact with that office or the plaintiffs." *Id*. at 243. Whether the allegations were "lumped together" or pled separately for each individual played no role in the court's decision.

This case is completely different from *Murphy* because the complaint does allege that "the individual defendants specifically made decisions" regarding the unlawful actions taken in the District to seize control of UCI and divert its assets from their intended purpose. In particular, the complaint alleges that all of the individual defendants subverted UCI's mission

and purpose by amending the Articles of Incorporation and causing those amendments to become effective by filing them with the proper D.C. government officials in the District. Compl. ¶¶ 83, 84. The complaint also alleges that Defendants Sommer and Perea took other actions that were necessary predicates in the takeover scheme that culminated in the revision of the Articles of Incorporation in the District. *See id*. ¶¶ 64 (preventing a quorum at meeting called to elect new directors chosen by Rev. Moon); 66 (voting to remove Drs. Joo and Kim as directors); 74 (voting to elect Kwak and Youngjun Kim to the Board). And the complaint alleges that after the takeover was completed, all of the individual defendants took steps to dissipate the assets of UCI, a District corporation, including the sale of property located in the District. *See id*. ¶¶ 92-94. It is simply untenable for Defendants to contend (Mem. at 39), without citing any authority, that selling a $113 million building is not transacting business in the District unless the "decision[ ] to sell" was also made in the District.

With respect to Preston Moon, there are additional specific allegations that establish grounds for personal jurisdiction over him, including self-dealing transactions. Compl. ¶¶ 49-51, 58, 60-61, 66, 82. Moreover, the complaint alleges that Preston Moon was a trustee of the UCI trust created by Rev. Moon in 1975, and that creates a distinct basis for personal jurisdiction over him in addition to the D.C. long-arm statute. *See* D.C. Code § 19-1302.02(a) ("By accepting the trusteeship of a trust having its principal place of administration in the District of Columbia . . . , the trustee submits personally to the jurisdiction of the courts of the District of Columbia regarding any matter involving the trust."); Compl. ¶ 104.[12]

[12] The notion that the complaint does not sufficiently "differentiate" between the individual defendants so that "the court can determine which defendant did what" (Mem. at 39-40) is unsupportable. Plaintiffs allege that the directors of UCI took steps, through collective action of the Board, to seize control of UCI and divert its assets. Thus, each individual defendant, acting in his capacity as a director of UCI, transacted business in the District from which the claims arose.

Finally, Defendants' argument that Plaintiffs have failed to allege that Defendants engaged in an "act" in the District causing "tortious injury" in the District must be rejected. Mem. at 40. As Defendants acknowledge, the amendment of the Articles of Incorporation pursuant to the UCI Board decision reached by all defendants occurred in the District. That was an "act" by Defendants in the District that caused tortious injury, as was the sale of the Massachusetts Avenue property. And, on Defendants' theory that economic injury occurs at the location of the original event which caused the injury (*id.*), Plaintiffs suffered economic injury in the District both from the sale of the property and from the amendment of the Articles of Incorporation.

CONCLUSION

The motion to dismiss should be denied.

Dated: August 31, 2011

Respectfully submitted,

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