

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

DISTRICT OF COLUMBIA : Case Number: 2021 CA 1809 B
v. : Judge: Shana Frost Matini
DELTA PHI EPSILON, INC., *et al.* : Mediation: October 4, 2022

ORDER

This matter comes before the Court upon consideration of Plaintiff District of Columbia’s (the “District”) Motion for Summary Judgment (“Mot.”), filed April 8, 2022. On June 16, 2022, Defendants filed an Opposition (“Opp.”),¹ and on July 8, 2022, the District filed a Reply (“Reply”) thereto.² The Court has considered the filings, the relevant law, and the entire record. For the reasons contained herein, the Court grants in part and denies in part the District’s Motion.

Background

The District, through the Office of the Attorney General (“OAG”), brought this action for equitable relief pursuant to D.C. Code §§ 29-412.20(a)(1)(b)-(c) against Defendants Delta Phi Epsilon, Inc (“DPE” or “House Corporation”),³ Delta Phi Epsilon Foundation For Foreign

¹ Defendants’ opposition contains an exhibit list with exhibits numbered 1-41, and appended to the opposition are two exhibits (Ex. A and B). Rather than uploading exhibits 1-41 to CaseFileXpress to make them part of the official court docket, Defendants mailed a USB flash drive with their exhibits to Chambers. On August 4 and August 8, 2022, the Court emailed all counsel reminding Defendants to submit their exhibits on the public docket by filing the documents with CaseFileXpress. The Court also reminded the parties of its supplemental order which requires that parties provide a paper copy of any filing that exceeds 25 pages. *See* Supplement to the General Order for the Civil Division at 2 (Matini, J.). The Court received a hard copy of Defendants’ exhibits mailed to Chambers; however, as of the issuance of this Order, Defendants’ exhibits have not been uploaded to CaseFileXpress and, thus, the exhibits are still not part of the official court record. As Defendants’ exhibits are not on the official court record, the Court cannot consider Defendants’ exhibits 1-41. *See, e.g., Blandford v. District of Columbia Jail*, 593 F. Supp. 2d. 255, 256 n.2 (D.D.C. 2009) (“A court cannot consider documentary evidence that has not been submitted on the record.”).

² On July 28, 2022, the Court granted the District’s Motion to Submit Newly Discovered Evidence. *See* Order (July 28, 2022). The Motion included an Amended Statement of Undisputed Material Facts. *See* Mot. to Submit New Evid. On August 30, 2022, Defendants filed a Response to the Amended Statement of Undisputed Facts. *See* Resp. at 1.

³ The District refers to Delta Phi Epsilon, Inc., as “the Fraternity;” however, Defendants assert that the District deliberately misuses the term “Fraternity.” *See generally* Opp. at 3-15. Notwithstanding the fact that the identity of

Service Education (the “Foundation”), and Terrance Boyle (“Mr. Boyle”) (hereinafter “Defendants”) for violations of the Nonprofit Corporation Act (“NCA”), D.C. Code §§ 29-401.01 *et seq.*, and common law. *See generally* Compl. In its Complaint, the District seeks a constructive trust, receivership, or other appropriate injunctive or equitable relief. *See id.* On January 17, 2022 fact discovery closed, and on February 25, 2022 expert discovery closed. *See* Order (Sept. 1, 2021).

Standard of Review

To prevail on a motion for summary judgment, the moving party must demonstrate, based on the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact and that it is entitled to judgment in its favor as a matter of law. *Wash. Invest. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 573 (D.C. 2011); Super. Ct. Civ. R. 56(a). The Court must view the pleadings, discovery materials, and affidavits or other materials in the light most favorable to the non-moving party and may grant the motion only if a reasonable fact finder, having drawn all reasonable inferences in favor of the non-moving party, could not find for the non-moving party based on the evidence in the record. *Wash. Invest. Partners*, 28 A.3d at 573 (citations omitted).⁴

The moving party has the initial burden of proving that there is no issue of material fact in genuine dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is an issue of material fact in genuine dispute.

DPE is undisputed and that the District’s reference to DPE as a Fraternity is immaterial, for purposes of this Order, Delta Phi Epsilon, Inc., will be referred to as “DPE” or the “House Corporation.”

⁴ Summary judgment “is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.” *Mixon v. Washington Metropolitan Area Transit Authority*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations omitted). “Summary judgment may have once been considered an extreme remedy, but that is no longer the case,” and indeed District of Columbia courts have “recognized that summary judgment is vital.” *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

Mixon, 959 A.2d at 57. A conclusory allegation or denial is not sufficient to establish a genuine factual dispute. *Boulton v. Inst. of Int’l Educ.*, 808 A.2d 499, 502 (D.C. 2002). Rather, there must be “some significant probative evidence tending to support the complaint so that a reasonable fact-finder could return a verdict for the non-moving party.” *Lowery v. Glassman*, 908 A.2d 30, 36 (D.C. 2006) (internal quotation marks omitted).

In addition, a party “cannot stave off the entry of summary judgment through [m]ere conclusory allegations,” *id.* (citation and internal quotation marks omitted), and “mere speculations are insufficient to create a genuine issue of fact and thus withstand summary judgment.” *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) (citation and internal quotation marks omitted). Rather, the “party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial.” *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 950-51 (D.C. 2012) (citation and internal quotation marks omitted).

Undisputed Facts⁵

DPE is a membership-based 501(c)(7) non-profit corporation incorporated under the laws of the District of Columbia. Pl. SUMF ¶¶ 1, 3. Founded in 1920, DPE’s nonprofit purpose is to foster and promote foreign trade of the United States. *Id.* ¶ 1. DPE’s voting members include (1) “all present and former directors of the Fraternity who are [also] Life Members,” and (2) “initiates,” or “all those initiated by the Alpha Chapter . . . and not later expelled.” *Id.* ¶ 3. Pursuant to the bylaws, DPE is required to maintain a five-member board comprised of three

⁵ This Undisputed Facts section is formulated from the District’s Amended Statement of Undisputed Material Facts (“Pl. SUMF”), included as Attachment B to their Motion to Submit Newly Discovered Evidence, Defendants’ Statement of Disputed Facts (“Def. SMF”), and Defendants’ Response to the District’s Amended Statement of Undisputed Material Facts. The Court, as required, views these facts in the light most favorable to Defendants as the non-moving party. *See Hunt*, 66 A.3d at 990 (citation omitted).

inactive (i.e. alumni) initiates and two active (i.e. student) initiates, *id.* ¶ 5, and is required to have an annual general meeting for all members, *id.* ¶ 4. DPE’s federal tax filings state that its exempt purpose is “to provide housing and recreation to participants.” *Id.* ¶ 8.

At the time of DPE’s founding, it was the only existing chapter; however, over the years additional chapters were organized, making DPE the “Alpha Chapter.” Pl. SMF ¶ 2. In 1940, DPE acquired real property located at 3401 Prospect Street N.W., in the Georgetown neighborhood in the District of Columbia (the “Alpha House” or “3401 Prospect”) for \$27,500. *Id.* ¶ 6. The Alpha House served as DPE’s headquarters, providing housing and a meeting place for social gatherings. *Id.* ¶ 7. From 1983 until around 2019, Mr. Boyle took responsibility for managing the Alpha House. *Id.* ¶ 36.

The Foundation is a 501(c)(3) nonprofit corporation, incorporated under the laws of the District of Columbia, and formed in 1962. Pl. SMF ¶ 9; *see also id.* ¶ 10 (the Foundation received its 501(c)(3) status in 1985). Governed by a seven-member board of trustees, *id.* ¶ 14, the Foundation’s charitable purpose includes issuing scholarships to individuals pursuing studies in foreign trade, *id.* ¶ 10, and the development and dissemination of information with respect to educational, charitable, and scientific activities in fields related to foreign service, foreign relations, and foreign commerce of the United States, *id.* ¶ 11. Between 2010 through 2019, DPE sponsored various events and provided refreshments for the events. *Id.* ¶ 34.

The Foundation’s bylaws provide that the Foundation shall raise money to award scholarships, Pl. SMF ¶ 13, and that the Foundation’s trustees shall meet as necessary, Def. SMF ¶ 32. There is no evidence that the Foundation has ever issued a scholarship, Pl. SMF ¶ 13, and between 2015-2020, the Foundation’s trustees did not hold any regular board meetings, *id.* ¶ 32.

Further, the Foundation’s articles of incorporation prohibit the Foundation’s earnings from being distributed to its members, trustees, officers, or other private persons. *Id.* ¶ 12.

Mr. Boyle served as an officer of the Foundation, and as a director and secretary of DPE from the 1980s until his resignation in 2021. Pl. SMF ¶¶ 15, 82. In 1990, Mr. Boyle, acting on his own behalf and as the Foundation’s treasurer, with reliance on the Foundation’s corporate resolution signed by the Foundation’s president, purchased property at 1245 34th Street N.W., in the Georgetown neighborhood in the District of Columbia (the “34th Street Property”) for \$345,000. *Id.* ¶¶ 17, 19. The purchase closed in May 1990. *Id.* ¶ 26. The Foundation and Mr. Boyle were co-purchasers of the 34th Street Property, with each party owning a 50% interest. *Id.* ¶ 22. The Foundation paid \$150,000 for the down payment of the 34th Street Property and Mr. Boyle paid \$50,000. *Id.* ¶ 20.⁶ The remaining cost of the 34th Street Property was covered by a bank loan co-signed by Mr. Boyle and the Foundation. *Id.* ¶ 21; Def. SMF ¶ 20.

According to the co-ownership agreement between Mr. Boyle and the Foundation, the 34th Street Property was intended to serve as an investment for the Foundation. Pl. SMF ¶ 23. Under the agreement, Mr. Boyle would live at the 34th Street Property rent-free in exchange for maintaining and managing the real estate and assuming the full mortgage, tax, and insurance obligations. *Id.* ¶ 24. On September 22, 1990, Mr. Boyle sent an invitation for a housewarming party at the 34th Street Property which he described as “a house of his own.” *Id.* ¶ 85. Mr. Boyle has been living at the 34th Street Property full time since around 1993-1994. *See* Def. SMF ¶ 26.

⁶ While Defendants contend that the contract price has more specifics in terms of the down payment and purchase price, Defendants’ response to the District’s facts is in part unsupported by citations to the record. *See* Def. SMF ¶20. In any event, Defendants do not dispute the total amount paid by both parties. *Id.*

In approximately 1998, Mr. Boyle took sole ownership of the 34th Street Property. Pl. SUMF ¶ 27.⁷ The Foundation relinquished “all right, title, and interest” upon that payment, and in exchange the Foundation received \$150,000 from Mr. Boyle. *Id.* ¶¶ 24, 26-29. Mr. Boyle paid the amount in cash installments over a period of time and concluded sometime before 1998. Def. SMF ¶ 27. According to the District of Columbia tax records, the 34th Street Property’s 2023-tax assessed value is over \$1.1 million. Pl. SMF ¶ 30. The Foundation never used the 34th Street Property for any of its nonprofit activities. *Id.* ¶ 31.

In 2019, Mr. Boyle announced his retirement, Pl. SMF ¶ 36, and asked DPE to consider the future of the Alpha House, including whether to sell the house and purchase a new house, hire a manager to supervise the existing house, or donate the house to another fraternity or university, *id.* ¶¶ 37-38. Mr. Boyle sent updates and information regarding the Alpha House via a newsletter called The Sun. *Id.* ¶ 67. The Sun was circulated to a group of individuals that included Washington-area alumni of the Fraternity. *Id.* The future of the Alpha House was also discussed at DPE’s February 2019 annual general meeting. *Id.* ¶ 38. In 2019, DPE’s assets consisted of the Alpha House as well as approximately \$300,000 held in bank accounts. *Id.* ¶ 40.

In December 2019, DPE’s three-member board,⁸ which included Mr. Boyle, authorized Mr. Boyle to list the Alpha House for sale. Pl. SMF ¶ 41. Mr. Boyle engaged a realtor on December 15, 2019, to assist DPE with the sale. *Id.* ¶ 42. The Alpha House was initially listed for sale in December 2019 for \$3.9 million, and DPE was identified as seller. *Id.* ¶¶ 41-43.

⁷ Plaintiff asserts that Mr. Boyle took full ownership of the property in 1998, whereas the Defendant indicates that the Foundation decided to end its half ownership of the property “well before 1998.” Def. SMF at ¶ 27. Nevertheless, the fact that Mr. Boyle took over the sole ownership over the 34th Street Property is not disputed.

⁸ DPE’s board consisted only of three individuals at the time because there was no one serving as an “elected President or an elected House Manager of the Alpha Chapter” of the Fraternity. *See* Pl. Ex. 23 (DPE 2019 Board Mtg. Minutes).

At DPE’s February 2020 annual general meeting, a majority of DPE members voted to authorize DPE to sell the Alpha House. Pl. SMF ¶¶ 44-45.⁹ Mr. Boyle hired a tax law and accounting firm, PBMares, to provide advice on the sale of the Alpha House and the capital gains tax consequences. *Id.* ¶¶ 48-49. On May 12, 2020, PBMares provided a letter summarizing its analysis based on the information Mr. Boyle provided to the firm, and concluded that, given the Foundation’s tax-exempt status, DPE could donate the Alpha House to the Foundation without incurring any taxes. *Id.* ¶¶ 52, 55. PBMares further concluded that the Foundation could sell the Alpha House without incurring any capital gains tax. *Id.* ¶ 55.

The Alpha House was on the market for several months, and on May 6, 2020, an entity named 3401 Prospect Street NW, LLC, owned by real estate developer Nashville Peart (“Mr. Peart”), responded to the offer. Pl. SMF ¶ 51. The parties agreed on a purchase price of \$2.6 million. *Id.*

On May 12, 2020, Mr. Boyle made an offer to purchase a new, smaller house in Georgetown (the “O Street Property”). Pl. SMF ¶ 57. That same day, Mr. Boyle and two other DPE directors voted to donate the Alpha House to the Foundation without any restriction, and on May 28, 2022, the Foundation’s trustees accepted the donation. *Id.* ¶ 58. Mr. Boyle and DPE’s board president, Matthew Schmidt (“Mr. Schmidt”) effectuated the transfer of the Alpha House deed on June 1, 2020. *Id.* ¶ 59.

The Alpha House sale was a seller-financed transaction. Pl. SMF ¶ 62.¹⁰ The Foundation’s trustees met on June 21, 2020, and approved a seller-financing proposal, *id.* ¶ 65,

⁹ Defendants assert that the vote passed by an overwhelming majority of the votes and not just a majority of the votes. Def. SMF ¶ 45. This dispute is not material.

¹⁰ Defendants do not dispute that the sale was a seller-financed transaction; however, they assert, without proper reference to the record, that Mr. Peart lost his financing due to a TOPA complaint which caused the title insurance company to no longer want to be involved in the sale. Def. SMF ¶ 62.

under which the Foundation would agree to sell the Alpha House to Mr. Peart for \$2.6 million, in exchange for an \$800,000 down payment, a balloon note in which Mr. Peart promised to pay the Foundation the remaining \$ 1.8 million in June 2022, and in the interim, monthly interest payments of approximately \$11,000, *id.* ¶ 63. The Foundation’s trustees did not conduct or request any due diligence procedure paperwork regarding Mr. Peart’s ability to make the \$1.8 million balloon note. *Id.* ¶ 65.¹¹ The seller-financed balloon note was secured against the Alpha House, such that Mr. Peart’s failure to make the balloon payment would result in the property returning to the Foundation. *Id.* ¶ 66.

The Alpha House sale closed on June 22, 2020. Pl. SMF ¶ 71. As part of the transaction, Mr. Peart was presented with and signed a non-disclosure agreement pertaining to the sale of the Alpha House. *Id.* ¶ 69.¹² On June 25, 2020, Mr. Boyle issued an edition of The Sun in which he disclosed that DPE donated the Alpha House to the Foundation and that the Foundation had sold the property. *Id.* ¶ 72. The documents effecting the donation and sale of the Alpha House do not require the Foundation to use the proceeds from the sale of the Alpha House to purchase a new Alpha House. *Id.* ¶ 73.

In February 2021, at DPE’s annual general meeting, Mr. Boyle moved to ratify the May 12, 2020, decision by the DPE Board of Directors to donate the Alpha House, without restriction, to the Foundation. Pl. SMF ¶¶ 75-76. The motion passed. *Id.* ¶ 77.¹³ At Mr. Boyle’s deposition in

¹¹ While Defendants assert that the Foundation relied on their agents in determining the advisability of seller-financing, Def. SMF ¶ 65, Defendants provide no admissible evidence or citations to the record to support their factual assertion. Thus, Defendants’ assertion cannot serve to rebut the District’s factual assertion.

¹² Defendants contend that Mr. Boyle wanted the non-disclosure agreement as a protection against rumored and feared efforts by DPE members to oppose the transaction. Def. SMF ¶ 69. Nonetheless, it is undisputed that Mr. Boyle secure a non-disclosure agreement from Mr. Peart.

¹³ The February 2021 motion to ratify the DPE Board’s decision of May 2020 passed with most of the voted in favor cast by proxies held by Mr. Boyle. Pl. SMF ¶ 77. The identification and validity of those proxies are subject to dispute between parties. *Id.* ¶80; Def. SMF ¶ 80.

January 2022, Mr. Boyle stated that he needed to “go back and count the names again to make sure [he] got the right total” in counting the votes at the February 2021 meeting. *Id.* ¶ 80.

Following the February 2021 meeting, DPE members formally asked to inspect or receive a copy of DPE’s membership list due to concerns regarding the validity of proxies. *Id.* ¶ 78.

In February 2022, DPE held another annual general meeting. Pl. SMF ¶ 83. At the meeting, Mr. Boyle acted as the *de facto* secretary, *id.*, and DPE’s officers moved for a vote in support of the board’s 2020 decision to donate the Alpha House to the Foundation. *Id.* ¶ 84.

Analysis

The District seeks summary judgment, asserting that Defendants’ misconduct violates the NCA, Defendants’ own governing documents, and common law. *See generally* Mot.

Specifically, the District contends that (1) Mr. Boyle has unlawfully derived a private benefit from the Foundation; (2) the Foundation has failed to fulfill its stated public purposes; (3) DPE divested its most valuable assets without approval of its members; (4) DPE’s governance failures violate the NCA; and that (5) Mr. Boyle violated his fiduciary duties to both DPE and the Foundation. *Id.* at 1-2.

Defendants oppose, asserting that summary judgment should be denied because the District failed to respond to Defendants’ discovery requests. Opp. at 16-17. In response, the District contends that Defendants’ discovery disputes are belated, unfounded, and do not defeat summary judgment. Reply at 2.

I. Discovery Dispute

With respect to Defendants’ contention that summary judgment is inappropriate because there are remaining discovery disputes, *see* Opp. at 16, Defendants’ argument is wholly unavailing. First, discovery has long since closed: the deadline to complete fact discovery was

January 17, 2022, and the deadline to complete expert discovery was February 25, 2022. *See* Order (Sept. 1, 2021). Pursuant to Super. Ct. Civ. R. 16(b)(5)(E), after the close of discovery, no “motion related to discovery [may be] filed, except by leave of court on a showing of good cause.” Defendants have not complied with this provision.

In any event, if in response to a motion for summary judgment, the non-movant shows “by affidavit or declaration, that for specified reasons, it cannot present facts essential to justify its opposition, the court may” defer consideration the motion, allow time to take discovery, or issue any other appropriate order. *See* Super. Ct. Civ. R. 56(d); *see also Beegle v. Restaurant Mgmt., Inc.*, 679 A.2d 480, 487 n.8 (D.C. 1996) (“Filing of the affidavit is required to preserve the... contention that disposition of the motion should be delayed pending discovery and to avoid the premature grant of summary judgment.”). Here, Defendants have failed to include an affidavit or declaration asserting the specified reasons the Court should defer summary judgment. Thus, the Court considers the District’s Motion on the merits.

II. Private Benefit

The District contends that it is entitled to summary judgment because Foundation funds were used to subsidize the purchase of Mr. Boyle’s private home in violation of the NCA and common law. *See* Mot. at 10. Specifically, the District asserts that Mr. Boyle’s use of \$150,000 from Foundation assets constitutes (1) an illegal loan, (2) private inurement of nonprofit funds, (3) an interested transaction, and (4) unjust enrichment of Mr. Boyle to the detriment of the foundation. *See* Mot. 10-14.

On April 6, 1990, the Foundation’s president signed a corporate resolution authorizing Mr. Boyle to invest the Foundation’s funds “as he deems best” in either “bank certificates of deposit” or “in the purchase of real estate” and identified the 34th Street Property as a potential

real estate investment. *See* Pl. Ex. 11 (Apr. 1990 Corp. Res.). On March 27, 1990, Mr. Boyle signed a contract for the purchase of the 34th Street Property, and on April 20, 1990, an addendum was added to the contract, adding the Foundation as a co-purchaser of the property. *See* Pl. Ex. 10 (34th Street Sales Contract). Mr. Boyle and the Foundation agreed to purchase the property as tenants in common, each owning one-half interest in the property. *See* Pl. Ex. 12 (Co-Ownership Agr. at ¶ 2). Mr. Boyle paid \$50,000 and the Foundation paid \$150,000 toward the down payment. *Id.* at ¶ 3 The agreement provided that the Foundation’s ownership was “solely for investment purposes,” and permitted Mr. Boyle to occupy the Foundation’s portion of the property rent free, in exchange for all management responsibility. *Id.* at ¶ 6-7. The agreement also provided that upon sale of the property, each co-owner would receive 50% of the “net sale price, after all closing costs are paid and each co-owner’s respective obligations... have been satisfied.” *Id.* ¶ 13.

On March 21, 1998, the Foundation issued a resolution, signed by the Foundation’s president and treasurer, transferring all of the Foundation’s right, title, and interest in the property to Mr. Boyle in exchange for \$150,000. *See* Pl. Ex. 15 (Mar. 1998 Corp. Res. & Cert.).

A. *Illegal Loan*

“A nonprofit corporation shall not lend money to or guarantee the obligation of a director or officer of the corporation.” D.C. Code § 29-406.32(a). The District asserts that the “Foundation effectively made a \$150,000 interest-free loan to [Mr.] Boyle that facilitated his purchase” of the 34th Street Property, Mot. at 10, which the “Foundation *never* used,” and which Mr. Boyle “used... as his private residence,” Reply at 3 (emphasis in original).

Defendants dispute that the \$150,000 was a loan, asserting that the Foundation’s intent was to make the 34th Street Property “its headquarters forever,” Pl. Ex. 3 (Boyle Dep. 281:16-

17), and that the Foundation was buying the property “to get a claim on a piece of property that ultimately it would get total ownership of for its use,” *id.* at 283:12-17. Defendants contend that the Foundation reevaluated its investment because the 34th Street Property was “non-income producing” Def. SMF ¶ 26, and, as a result, the Foundation “chose to end its half ownership,” *id.* ¶ 27.¹⁴

In viewing the facts in the light most favorable to Defendants as the non-moving party, the Court finds that there is a genuine dispute as to whether the transaction at issue constituted a “loan” to Mr. Boyle, whether the trustees reasonably believed that property was a good investment that would benefit the Foundation in the long term, and whether \$150,000 in exchange for the Foundation’s half-ownership of the property was a good return on its investment. The reasonableness of the trustees’ decision to invest in the property requires a credibility determination that cannot be made in assessing a summary judgment motion. As to the return on investment, there is no evidence in the record as to what a reasonable return on investment would be for the 34th Street Property in 1998, or how such a determination would be made. Thus, the Court finds that the District has not demonstrated with undisputed material facts that Defendants violated D.C. Code § 29-406.32(a).

B. *Private Inurement*

Under the NCA, “a nonprofit corporation” is prohibited from paying “dividends or mak[ing] distributions of any part of its assets, income, or profits to its members, directors, delegates, members of a designated body, or officers.” D.C. Code § 29-404.40(a). The Foundation’s Articles of Incorporation require that “[n]o part of the net earnings of said

¹⁴ While Defendants assert that the “the housing bubble of the 1990s made sure that there could be no increase in equity paid in 1998 to the DPE Foundation as return on its \$150,000 investment,” *id.* ¶ 20, this assertion is not supported by admissible evidence in the record and therefore not considered by the Court.

corporation shall inure to the benefit of, or be distributed to, its members, trustees, officers or other private persons.” Pl. Ex. 8 (Foundation’s Amend. Art. of Incorpor. ¶ 6). Moreover, the District of Columbia Court of Appeals has asserted that a non-profit organization’s net income shall not inure to the benefit of “any private shareholder or individual.” *Legislative Study Club, Inc. v. District Of Columbia Board of Zoning Adjustment*, 359 A.2d 153, 155 (D.C. 1976); see also *Airlie Found., Inc. v. United States*, 826 F. Supp. 537, 549 (D.D.C. 1993) (“To be eligible for exempt status, ‘no part of an organization’s net earnings may inure to the benefit of any private shareholder or individual.’”).

“[E]arning may inure to an individual when a particular individual... ‘reap[s] commercial benefits from the operation of the instrumentality, though they do not do so by direct... payment over to them of its earnings.’” *Airile*, 826 F. Supp. at 550 (citation omitted). Here, the Foundation co-purchased and co-owned the 34th Street Property until 1998. Pl. SMF ¶¶ 23, 24. While both Mr. Boyle and the Foundation received a 50% ownership interest in the 34th Street Property, *id.* ¶ 22, Mr. Boyle contributed only \$50,000 for his 50% interest, whereas the Foundation paid three times as much—\$150,000—for its 50% interest. *Id.* ¶ 20.

Regardless of the Foundation’s purpose for co-purchasing the 34th Street Property, and regardless of whether Mr. Boyle provided a benefit to the Foundation in return, Pl. SMF ¶ 24 (asserting that Mr. Boyle maintained and managed the real estate and assumed the mortgage, tax, and insurance obligations), it is undisputed that Mr. Boyle received a significant value at the expense of the Foundation (one-half an ownership interest in the 34th Street Property at one-third the Foundation’s cost), and used this Property—Foundation property—for his personal benefit as a private home for nearly thirty years. See Pl. Ex. 12 (Co-Ownership Agr. at ¶¶ 6-7) (the agreement permitted Mr. Boyle to occupy the Foundation’s portion of the property rent free). As

such, Mr. Boyle reaped a private benefit from both his ownership of and the use of the 34th Street Property, *Airile*, 826 F. Supp. at 550, violating the prohibition on private inurement in the NCA and the Foundation’s Articles of Incorporation. Thus, the Court grants summary judgment to the District as to its claim for private inurement.

C. Interested Transaction

Generally, courts addressing an allegedly self-dealing transaction examine the “entire fairness” of the transaction. *Pub. Invest, v. Bandeirante Corp.* 740 F.2d 1222, 1234 n.72 (D.C. Cir. 1984). Moreover, D.C. Code § 29-406.70(a) provides that conflicting interest transactions “shall not be void or voidable solely for that reason” if “[t]he material facts as to the relationship or interest and as to the contract or transaction are disclosed,” or the transaction “is fair as to the corporation,” D.C. Code § 29-406.70(a)(1), (3).

The District asserts that the “purchase and subsequent transfer of the 34th Street Property to Boyle fail to meet the fairness test” because “[t]here is nothing in the record to support that the transaction was approved by a majority of the Foundation’s disinterested trustees based on full knowledge of the transaction and due diligence as to its fairness to the nonprofit.” Mot. at 13. Here, the only evidence in the record is the signed corporate resolution. Pl. Ex. 11 (Apr. 1990 Corp. Res.). On April 6, 1990, Joseph F. LeMoine (“Mr. LeMoine”), the Foundation’s president, signed a corporate resolution certifying that the Foundation’s trustees resolved and adopted that Mr. Boyle was “authorized to invest the Foundation’s funds as he deems best either in bank certificates of deposit or in the purchase of real estate – whether the property at 1245 34th Street, NW, in Washington, DC, or other suitable property...” *Id.* As such, the District has not demonstrated undisputed material facts that would support a conclusion as a matter of law that the transaction was a conflicting interest transaction that was not subject to an exception in D.C.

Code § 29-406.70, and the Court denies summary judgment to the District on its interested transaction claim.

D. Unjust Enrichment

“The doctrine of unjust enrichment applies ‘when a person retains a benefit (usually money) which in justice and equity belongs to another.’” *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 556 (D.C. 2016) (quoting *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 63 (D.C. 2005)). “The elements of an unjust enrichment claim are ‘(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.’” *Falconi-Sachs*, 142 A.2d at 556.

The District contends that “the Foundation conferred upon [Mr.] Boyle the benefit of \$150,000,” and that Mr. Boyle “has, since 1990 and continuing to this day, enjoyed the benefit of owning and using his Georgetown property as his private residence” to the detriment of the Foundation’s “non-profit purpose.” Mot. at 13.

Here, the Court finds that the Foundation conferred a benefit on Mr. Boyle. *See* section II(B) *supra* (finding that Mr. Boyle impermissibly benefitted from the Foundation’s co-ownership of the 34th Street Property). However, the Court cannot determine on the record before it whether Mr. Boyle unjustly retained that benefit, *Falconi-Sachs*, 142 A.2d at 556, after paying the Foundation \$150,000 in exchange for sole ownership of the property, Pl. Ex. 15 ((Mar. 1998 Corp. Res. & Cert.)). Therefore, the Court denies summary judgment on the District’s claim for unjust enrichment.

III. Public Purpose

The District contends that Foundation has failed to pursue its nonprofit purpose because the Foundation did not issue scholarships, hold trustee meetings, or engage in any activity. *See* Mot. at 14. The Foundation’s Articles of Incorporation identify its nonprofit purpose as the “making of scholarship awards and loans,” as well as developing and encouraging “dissemination of information” with respect to foreign service, foreign relations, and foreign commerce. Pl. Ex. 8 (Foundation’s Amend. Art. of Incorp. ¶ 5). The Foundation’s bylaws further provide that the Foundation will “raise money for awards as scholarships and, to that end, have a committee of scholars to choose the scholarship recipients.” Pl. Ex. 9 (Foundation Bylaws, Art. V § 2).

The District contends that despite funds raised by donations, the “Foundation has never convened a scholarship committee or made a scholarship award.” Mot. at 14. Defendants do not dispute that the Foundation never made a scholarship award; however, Defendants contend the failure to issue an award was a result of the Foundation’s decision to put the funds in an “endowment fund.” Pl. Ex. 3 (Boyle Dep. at 32:19-33:7 (noting that donations would “go into an endowment fund, which would be intact, and the interest on it would go for programming”)).

Here, noting that the facts must be viewed in the light most favorable to the nonmoving party, the Court accepts Mr. Boyle’s proffer in his deposition that the Foundation kept donations in an endowment fund. Pl. Ex. 3 (Boyle Dep. at 32:19-33:7). Whether Mr. Boyle’s proffered reason for the Foundation’s failure to issue scholarships is sufficient requires the Court to make a credibility determination which is inappropriate when considering a motion for summary judgment.

The District further contends that the Foundation has failed to pursue its purpose because it has not held a meeting in over a five-year period. Mot. at 14. Here, the Court finds that the Foundation's failure to hold a meeting over a five-year period does not violate the Foundation's purpose. The NCA provides only that a board "may hold regular or special meetings," D.C. Code § 29-406.20 (emphasis added), and the Foundation's own bylaws only require the Board to meet as "necessary," Pl. Ex. 9 (Foundation Bylaws, Art. IV § 1). Thus, there is no requirement to hold regular meetings, and the failure to hold regular meetings does not violate the Foundation's purpose.

The District's contends that the Foundation "engaged in no activity," Mot. at 14, because the flyers do not identify any affiliation with the Foundation. Pl. SMF ¶ 34 (citing Pl. Ex. 19 (flyers for various events)). Here, it is undisputed that refreshments for the events were provided by DPE and the Alpha House. *Id.* However, given the interconnectedness of the organizations, despite the flyers failure to identify the Foundation as a co-sponsor, the Court finds that there is a dispute as to whether the Foundation participated in the organization and sponsorship of the events. Moreover, it is undisputed that the various speaker events were related to foreign relations. Pl. Ex. 19 (flyers for various events). Given that the dissemination of information related to foreign relations is a part of the Foundation's nonprofit purpose, Pl. Ex. 8 (Foundation's Amend. Art. of Incorpor. ¶ 5), the Court finds that there is a material factual dispute as to whether the Foundation's participation in these events is sufficient to fulfill the Foundation's purpose. Therefore, the Court denies summary judgment to the District insofar as it contends that the Foundation violated its public purpose.

IV. DPE Valuable Asset

The District contends that the donation of the Alpha House to the Foundation was unauthorized and violated the NCA and common law. *See* Mot. at 14.¹⁵ D.C. Code § 29-410.02 requires member approval of actions that are either (1) outside of the usual course of activities of the non-profit, D.C. Code § 29-410.01(a)(A), or where (2) the transaction divests more than 67% of the non-profit assets, D.C. Code § 29-410.01(a)(B). Where member approval is required, “the board must present the proposed transaction to the membership for approval and prior to the meeting issue a notice.” D.C. Code § 29-410.02(d).

Here, there is no factual dispute that donating the Alpha house to the Foundation was not in the usual course of activities for DPE. The primary purpose of DPE was to “provide housing and recreation to participants” Pl. Ex. 2 (DPE 2018 Form 990), and this was done through the Alpha House which served as the primary place for social gathering, *see* Pl. Ex. 3 (Boyle Dep. at 44:5-49:19) (describing Alpha House history). Moreover, it is also undisputed that donating the Alpha House divested DPE of more than 67% of its assets. The Alpha House sold for \$2.6 million, Pl. Ex. 41 (Settlement Statement), and DPE’s other assets consisted of around \$300,000 in the bank, Pl. Ex. 22 (DPE Dec. 2019 BB&T Bank Acct. Stmts.). Thus, the Alpha House represented around 90% of DPE’s assets.

Given that the donation of the Alpha House was not in the usual course of activities and divested DPE of more than 67% of its assets, the donation required membership notice and approval. D.C. Code § 29-410.02. It is undisputed that DPE did not obtain prior approval for the

¹⁵ The District’s argument that the donation violated common law is grounded in a theory that because the Foundation violated the NCA by donating the Alpha House without prior member approval, “the Foundation is and will continue to be unjustly enriched by the Alpha House transaction.” Mot. at 17. Because the Court finds that the District is entitled to summary judgment on the theory that the donation violated the NCA, it need not address the District’s common law claim.

donation of the Alpha House; while the membership voted to sell the Alpha House, they did not agree to donate it to the Foundation.¹⁶ On May 12, 2020, DPE's Board voted in favor of a motion made by Mr. Boyle to donate the Alpha house without restriction to the Foundation. *See* Pl. Ex. 30 (May 2020 DPE Board Minutes). On May 28, 2020, the Foundation trustees convened and voted in favor of receiving the donation, selling the Alpha house, and purchasing another property. *See* Pl. Ex. 31 (May 2020 Foundation Board Minutes). Then on June 21, 2020, the transfer of the Alpha House occurred. *See* Pl. Ex. 32 (June 2020 Transfer). Thus, DPE membership was not given notice and an opportunity to vote on the donation of the Alpha House to the Foundation prior to the authorization of the donation.

At the February 2021 annual general meeting, DPE membership voted to retroactively authorize the Board's decision to donate the house without restriction to the Foundation. *See* Pl. Ex. 43 (February 2021 DPE Membership Meeting Minutes). While the membership retroactively approved the donation of the Alpha House, the NCA plainly requires prior authorization.¹⁷ Moreover, Mr. Boyle's various updates to DPE membership through *The Sun*, to the extent that these emails discussed the donation of the Alpha House to the Foundation, do not constitute the necessary membership notice and approval as required by D.C. Code § 29-410.02.¹⁸ Therefore,

¹⁶ On December 11, 2019, the DPE Board voted to instruct Mr. Boyle to list the Alpha House for sale. *See* Pl. Ex. 23 (2019 DPE Board Minutes). Then on February 29, 2020, at the DPE annual meeting, the membership passed a motion declaring that the "House should be sold as soon as possible for as much as possible." Pl. Ex. 25 (2020 DPE Membership Meeting Minutes).

¹⁷ The District contends that even if DPE could retroactively authorize the board's decision to donate the Alpha house to the Foundation, the February 2021 authorization was not valid. Mot. at 16. The Court need not address whether the retroactive authorization was valid because the plain language of the statute requires prior authorization. *See* D.C. Code § 29-410.02

¹⁸ Moreover, the Court does not consider the content in the various issues of *The Sun* that Defendants' included in their exhibits because the exhibits are not properly on the record.

the Court grants summary judgment to the District insofar as it finds that DPE violated the NCA when it donated the Alpha House to the Foundation without prior member authorization.

V. DPE Governance Failure

The District contends that it is entitled to summary judgment for DPE's continued governance failures of (1) allowing Mr. Boyle to continue as an officer despite his resignation, and (2) DPE's failure to meet the NCA's record and voting procedures. Mot. at 18. DPE's Articles of Incorporation allow for DPE's board of directors to delegate officer duties when an "officer of this corporation is absent for any other reason." Pl. Ex. 4 (DPE Art. of Incorporation Art. VII § 7). Mr. Boyle has been a board member of DPE since approximately 1982, and most recently served as its secretary. *See* Pl. Ex. 3 (Boyle Dep. 27:8-9). Mr. Boyle resigned from his officer position with DPE in August 2021. *Id.* at 24:22-35:5.

Leading up to the 2022 annual general meeting, despite his resignation, Mr. Boyle continued to act as the secretary of DPE, sending instructions for joining the meeting and requesting proxies be sent to the secretary email or his personal email account. *See* Pl. Ex. 46 (Email Chain at 2-3). While Mr. Boyle was acting as secretary despite his resignation, DPE's Articles of Incorporation permit non-officers to perform officer duties if it is delegated by the board of directors. *See* Pl. Ex. 4 (DPE Art. of Incorporation Art. VII § 7). Here, there is no evidence in the record as to whether Mr. Boyle's action had board approval. Thus, the District has not presented sufficient evidence to establish that Mr. Boyle's actions in fact violated DPE's Articles of Incorporation.

The Court further finds that the District has not established that DPE failed to meet the NCA's books and records and voting procedures. A membership corporation is required to either (1) "prepare an alphabetical list" of all the members entitled to vote and provide that list for

“inspection by any member,” D.C. Code § 29-405.20 (a)-(b), or (2) “may state in a notice... that the corporation has elected to proceed under” D.C. Code § 29-405.20(f). D.C. Code § 29-405.20(f). When proceeding under subsection (f), where a member seeks to inspect the membership list, the corporation shall “deliver to the member making the demand an offer of a reasonable alternative method of achieving the purpose identified in the demand without providing access” to the membership list. *Id.* Here, the District has not put forth undisputed material facts to show that DPE violated D.C. Code § 29-405.20(a)-(b) or (f). Thus, the Court denies summary judgment to the District on its claims that DPE violated the NCA’s governance and recordkeeping requirements.

VI. Mr. Boyle’s Fiduciary Obligations

The District contends that Mr. Boyle breached his fiduciary duties to the House Corporation and the Foundation. Mot. at 19. Officers and directors of a corporation owe fiduciary duties to the corporation and its members. *See Willens v. 2720 Wis. Ave. Coop. Ass’n*, 844 A.2d 1126, 1136 (D.C. 2004); *Wisconsin Ave. Associates, Inc. v. 2720 Wisconsin Ave. Cooperative Assoc.*, 441 A.2d 956, 962 (D.C. 1982). Among these duties are the duty of loyalty and the duty to act in the best interest of the corporation. *Id.* Specifically, officers and directors are required to act “[i]n good faith” and “in the best interests of the nonprofit corporation.” D.C. Code § 29-406.30(a); D.C. Code § 29-406.42(a). “[B]reach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby.” *Randolph v. ING Life Ins. & Annuity Co.*, 973 A.2d 702, 709 (D.C. 2009) (internal citation omitted).

As to the Foundation, the District contends that Mr. Boyle breached his fiduciary duty when he used Foundation funds for the 34th Street Property and, while under his management, the Foundation did not further its nonprofit purpose. Mot. at 19. Here, given the analysis *supra* in

section II(b), the Court finds that the District has demonstrated as a matter of law that Mr. Boyle, as an officer of the Foundation, breached his fiduciary duty to be loyal and act in the best interest of the corporation when he obtained a benefit from his co-ownership of the 34th Street Property. *See Airile*, 826 F. Supp. at 550; *Randolph*, 973 A.2d at 709.

As to DPE, the District asserts that Mr. Boyle breached his fiduciary duty with the transfer of the Alpha House, securing the nondisclosure agreement with the sale of the property, relying on PBMares letter against the memberships wishes, denying DPE members to review the voting records and membership lists, and continuing to act as a secretary after his resignation. Mot. at 19. In 2019 and 2020, Mr. Boyle was one of three directors of DPE, and as such, had a fiduciary duty to DPE. *See* Pl. Ex. 23 (Dec. 2019 DPE Board Minutes); Pl. Ex. 30 (May 2020 DPE Board Minutes). Because the Court has found a dispute of material fact as to whether DPE denied members access to the voting records, and whether Mr. Boyle's continued actions as secretary after he resigned violated the NCA, *see supra* section III and V, the Court cannot find, as a matter of law, that Mr. Boyle breached his fiduciary duty with regard to these actions.

With regard to the transfer and sale of the Alpha House, the Court finds that Mr. Boyle's actions causing DPE to donate the Alpha House to the Foundation without prior approval from the membership, *see supra* section IV, constituted a breach of his duty of loyalty and good faith to DPE. The Court is unable to find, however, that as a matter of law, Mr. Boyle's breach caused injury. While Mr. Boyle's breach caused DPE to violate the NCA, there remains a question of fact as to whether DPE, as the beneficiary, was injured by this action, or whether Mr. Boyle, as the fiduciary, profited from this action.

Conclusion

Accordingly, it is this 21st day of September 2022, hereby:

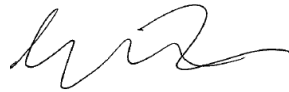
ORDERED that the District's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED that summary judgment is **GRANTED** in favor of the District on its claims that Mr. Boyle used Foundation funds to subsidize his private home; that the donation of the Alpha House violated the NCA; and that Mr. Boyle breached his fiduciary duties to the Foundation; and it is further

ORDERED that summary judgment is **DENIED** on the District's claim that the Foundation failed to pursue its non-profit purpose; that DPE violated the NCA's governance and recordkeeping requirements; and that Mr. Boyle breached his fiduciary duties to DPE; and it is further

ORDERED that the parties shall submit all required paperwork to the Multidoor Dispute Resolution Center no later than September 23, 2022 and participate in the mediation scheduled for October 4, 2022.

SO ORDERED.



Judge Shana Frost Matini
Superior Court of the District of Columbia

Copies served electronically upon counsel of record