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THE NEW YORK ATTORNEY GENERAL'S PETITION AGAINST THE DONALD J. TRUMP FOUNDATION & ITS BOARD

- **SOME TAKEAWAYS FOR NONPROFIT
BOARD MEMBERS & THOSE WHO
ADVISE THEM**

➤ **DIRECTORS' & OFFICERS'
DUTIES & LIABILITIES**

RESPONDENTS:

- **DONALD J. TRUMP**
- **DONALD J. TRUMP JR.**
- **IVANKA TRUMP**
- **ERIC F. TRUMP**
- **THE DONALD J. TRUMP FOUNDATION**

- ✓ “The Foundation's Board existed in name only.”
- ✓ “Board members failed to exercise their fiduciary duty to provide oversight and control of the organization for at least nineteen years, from 1999 through the present.”
- ✓ “The Board has not met since 1999 and does not oversee the activities of the Foundation in any way.”
- ✓ “The Board has not set policy or determined the direction, operations or acts of the Foundation.”
- ✓ “In the absence of a functioning board, Mr. Trump [Donald] ran the Foundation according to his whim, rather than the law.”

(¶¶26-27)

➤ **DONALD J. TRUMP JR.**

➤ **IVANKA TRUMP**

➤ **ERIC F. TRUMP**

***What's wrong with
this picture?***

✓ **THREE OF THE FOUR
INDIVIDUAL RESPONDENTS
HAD NO ACTIVE ROLE IN
THE FOUNDATION**

- ✓ **NOTWITHSTANDING THEIR TOTAL LACK OF PARTICIPATION, THESE INDIVIDUAL DIRECTORS ARE STILL RESPONSIBLE FOR THE DEEDS, MISDEEDS, ACTIONS & OMISSIONS OF THE ORGANIZATION**
 - ✓ **Ostrich defense/Sergeant Schultz defense will not work under NY NPCL**
 - ✓ **Why?**

DUTIES OF A NONPROFIT DIRECTOR UNDER NEW YORK LAW

2 Fundamental Precepts:

1-Directors of Nonprofits have Legal Duties (often referred to as Fiduciary Duties).

- Lack of engagement, participation &/or knowledge are not exculpatory.**

2-There can be Personal Liability to Directors for Breaching these Legal Duties.

3 Fundamental Legal Duties of a Nonprofit Director Under New York Law:

- Duty of Care
- Duty of Loyalty
- Duty of Obedience

Duty of Care:

- ❖ A director must discharge the duties of his/her position in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

NPCL § 717(a)

- Oversight function.
- Requires familiarity with the organization's finances and activities and regular participation in its governance.

Duty of Care

A Roadmap:

- ✓ **Right From The Start: Responsibilities of Directors of Not-for-Profit Corporations (Charities Bureau, 2015)**
- ✓ **The Committee to Save Adelphi, et al. v. Diamandopoulos, et al. (Board of Regents, 1997)**
- ✓ **Internal Controls**
 - ❑ **Internal Controls And Financial Accountability For Not-For-Profit Boards (Charities Bureau, 2015)**
- ✓ **Policies & Procedures**
- ✓ **Critical Role of Audit Oversight**
 - ❑ **Independence Requirement**
- ✓ **AG's Trump Foundation Petition (Supreme Court, June 14, 2018)**

Duty of Loyalty:

- ❖ A director must act in the interest of the organization.
 - Requires undivided allegiance to the organization's mission when using the power of his/her position, or information concerning the organization or its property.
 - Conflicts of interest; related party transactions.

Duty of Obedience:

- ❖ Least understood and most often neglected of the 3 primary legal duties
- ❖ Why? The other 2 primary legal duties exist in the for-profit world, but the Duty of Obedience is strictly a not-for-profit law concept

What is the Duty of Obedience?

- ❖ to ensure that the organization complies with applicable laws and regulations and its internal governance documents and policies
 - Compliance with applicable laws and regulations is even more difficult than it sounds
 - Multiple layers of laws and regulations

AG's Petition:

Breaches of Fiduciary Duty By The Individual Directors: **(¶31)**

- **“because of the lack of oversight and direction, Mr. Trump was able to use the Foundation’s charitable assets to satisfy the obligations of, or otherwise benefit, himself and other entities in which he had an interest.”**

AG's Petition:

Breaches of Fiduciary Duty By The Individual Directors: (¶126, 29, 32)

- “Board played **no role in approving grants** that the Foundation has made and **failed to obtain annual reports** concerning the activities and operations of the Foundation **as required by NPCL § 519.**”
- “The Foundation also **failed to adopt a conflict of interest policy**, even though New York law since July 2014 required the Foundation to adopt such policy. See **NPCL § 715-a.**”
- “The Foundation also **did not have an investment policy**, even though New York law required it to have such a policy no later than 2010. See NPCL § 552(f)”
 - “Although in recent years the average monthly value of the Foundation’s assets was over \$1 million, the Foundation kept its funds in a money market account, earning negligible interest.”

**GOVERNANCE:
IT'S NOT ROCKET SCIENCE!**

AG's Petition:

Breaches of Duty By Directors:

(¶13)

“Making false statements in filings with the Attorney General, engaging in self-dealing, wasting charitable assets, or violating the Internal Revenue Code by, among other things, making expenditures to influence the outcome of an election. The Foundation’s directors failed to meet basic fiduciary duties and abdicated all responsibility for ensuing that the Foundation’s assets were used in compliance with the law.”

Breaches of Duty By Directors:

(13)

- ✓ making false statements in filings with the Attorney General
 - **Duty of Obedience**
- ✓ engaging in self-dealing
 - **Duty of Loyalty**
- ✓ wasting charitable assets
 - **Duty of Care**
- ✓ violating the Internal Revenue Code by, among other things, making expenditures to influence the outcome of an election
 - **Duty of Obedience**
- abdicated all responsibility for ensuring that the Foundation's assets were used in compliance with the law
 - **Duty of Care**
 - **Duty of Obedience**

Breaches of Duty By Directors:

(¶25, 26)

- ✓ “The Foundation is little more than an **empty shell** that functions with **no oversight by its board of directors**. The Foundation, which does not have any employees, **delegated its operations** to the accounting office of the Trump Corporation, Inc.”
- ✓ “Board members **failed to exercise their fiduciary duty to provide oversight and control** of the organization for at least nineteen years, from 1999 through the present.”

Breaches of Duty By Directors:

(¶199)

- ✓ **“Mr. Trump caused the Foundation to enter into transactions in which he had a financial interest without obtaining authorization from the Board or a determination by the Board that the transactions were fair, reasonable and in the Foundation’s best interest at the time of the transactions.”**

Examples of Foundation Activities:

(¶33, 35, 36)

- ✓ “Mr. Trump’s political committee extensively directed and coordinated the Foundation’s activities in connection with a nationally televised charity fundraiser for the Foundation in Des Moines, Iowa on January 28, 2016, and the disbursements of the proceeds from the event.”
- ✓ “In reality, the fundraiser was a Trump Campaign event in which the Foundation participated.”
- ✓ “The Iowa fundraiser was planned organized, financed, and directed by the Campaign.”

Examples of Foundation Activities:

(¶138, 40)

- ✓ “At the televised fundraising event, the podium was decorated with a sign that borrowed the Trump Campaign’s themes and slogans. The DonaldTrumpForVets.com website was displayed on a blue placard with a red border and star pattern identical to the design of the Campaign signs and billboards, with Mr. Trump’s name in capital letters and the Campaign’s trademarked slogan, Make America Great Again.”
- ✓ “Following the Iowa fundraiser, the Foundation ceded control over the charitable funds it raised to senior Trump campaign staff, who dictated the manner in which the Foundation would disburse those proceeds, directing the timing, amounts and recipients of grants.”

Examples of Foundation Activities:

(¶44, 49, 54)

- ✓ The **testimony** of the CFO of Trump’s business entity (The Trump Organization) “confirms that he used the Foundation’s charitable assets to **satisfy the Campaign’s requirements.**”
- ✓ “During campaign appearances, Mr. Trump personally distributed the presentation copies of Foundation checks to Iowa veterans groups.” (see photo below with symbols of the Campaign prominently featured on the presentation copy of the check)
- ✓ The actual “check was sent by Mr. Lewandowski (Campaign chair) from his address at the Campaign, not by the Foundation.”

Breaches of Duty By Directors:

(950)



Examples of Foundation Activities:

(¶155)

- ✓ At a Campaign event five months after the Iowa caucuses, “the charitable giving of the Foundation again became the centerpiece to a Campaign political event at which **Mr. Trump promoted his candidacy by announcing the grants the Foundation made to veterans groups from the proceeds of the Iowa fundraiser**. As at Iowa events, the **Campaign’s slogan was prominently displayed in connection with the announcement of the Foundation’s charitable giving.**”
- ✓ “ Mr. Trump reminded the press corps that he had raised millions of dollars for veterans at the Iowa event and again took credit personally for giving out the funds, stating, after reading out the names of each charity receiving a donation from the proceeds of the Iowa fundraiser, **‘nobody gave this kind of money – so I gave \$5,600,000.’** Mr. Trump also challenged the press to compare his efforts to those of his political opponent.”

Examples of Foundation Activities: (¶56)

- ✓ “On or about the same day, **the Campaign posted on its website** a chart identifying the **recipients** of the charitable, tax-free, grants given from the proceeds of the Fundraiser in Iowa five months earlier, and uploaded a news report under the headline, ‘Lewandowski: **Trump Campaign Gave Between \$5.5 - \$6 Million to Veterans Groups.**’”

“Additional Self-Dealing/Related Party Transactions”:

(¶72-90)

- ✓ \$100,000 to a foundation to settle a claim by the City of Palm Beach against Trump’s Mar-A-Lago resort.
- ✓ \$158,000 to a foundation to settle legal claims against the Trump National Golf Club.
- ✓ \$5,000 payment to the DC Preservation League, a charitable organization, for advertising space in charity event programs that was used to advertise Trump International Hotels.
- ✓ \$10,000 payment to a charitable organization for a painting of Mr. Trump purchased at an auction for that charity. The painting was used as décor at Trump National Doral Miami, owned by one of Trump’s business entities.
- ✓ \$32,000 payment to a land preservation charity that manages easements to satisfy a pledge made by a Trump business entity to provide funds to manage an easement.
 - “The Foundation’s Board failed to review or approve any of the above.”
 - After the commencement of the AG’s investigation: reimbursements + interest; IRS Form 4720, excise taxes on self-dealing + interest.

Breaches of Duty By Directors:

(¶133)

✓ “In 2016, the Board knowingly permitted the Foundation to be coopted by Mr. Trump’s presidential campaign, and thereby **violated its certificate of incorporation** and **state** and **federal law** by engaging in political activity and prohibited related party transactions.”

▪ Duty of Obedience

- ❖ **Federal law – All section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.**
 - **In certificate of incorporation (state law document)**
- ❖ **State law – Violated its certificate of incorporation**
- ❖ **State law – restrictions on related party transactions (NPCL §715)**

Breaches of Duty By Directors:

(¶160)

FORM 990

- ✓ “Mr. Trump’s wrongful use of the Foundation to benefit his Campaign was willful and knowing. Mr. Trump was aware of the prohibition on political activities and the requirement of restrictions on related party transactions. Among other things, he repeatedly signed, under penalties of perjury, IRS Forms 990 in which he attested that the Foundation did not carry out political activity. Mr. Trump also signed, again under the penalty of perjury, the Foundation’s Certificate of Incorporation, in which he certified that the Foundation would not use its assets for the benefit of its directors or officers and that it would not intervene in “any political campaign on behalf of any candidate.””

Breaches of Duty By Directors:

(¶66, 67)

FORM 990

- ✓ “In disclosing grant recipients to the IRS, the Foundation did not list on its Form 990-PF either the actual unlawful recipient of the \$25,000 check or the Utah based group assumed by Ms. Tarasoff to be the recipient, but rather, a third unrelated group with a similar name.” (actual unlawful recipient was a political organization)
- ✓ “The Foundation has no credible explanation for the false reporting of grant recipients to the IRS and the State of New York.”

IRS Form 990 Signature Block:

- **Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.**

Breach of Fiduciary Duties and Waste – NPCL §§717 & 720

- **“The Individual Respondents were each directors of the Foundation, and as such, owed fiduciary duties to the Foundation pursuant to NPCL §717.”**
- **“The Individual Respondents failed to discharge their duties as directors with the degree of care, skill, prudence, diligence, and undivided loyalty required of them in that, among other things, they:**
 - (a) **failed to hold at least one annual board meeting or to conduct a review [of] the Foundation’s assets, liabilities, revenues and disbursements as required by law;**
 - (b) **failed to provide oversight of the Foundation or control its activities;”**

Breach of Fiduciary Duties and Waste – NPCL §§717 & 720

- “(c) failed to institute and maintain internal controls;
- (d) failed to provide management or supervision of Trump Organization accounting staff assigned to the Foundation and permitted the Trump Organization accounting staff to disburse charitable assets entrusted to the Foundation without obtaining Foundation approval;
- (e) caused and/or allowed the Foundation to misuse charitable assets for the benefit of Mr. Trump and his personal and/or business interests;”

First Cause of Action (1 of 6)

(¶192, 93)

Breach of Fiduciary Duties and Waste – NPCL §§717 & 720

“(f) in violation of the Foundation’s certificate of incorporation and applicable provisions of the Code, caused and/or allowed the Foundation to participate and intervene on behalf of Trump in his candidacy for public office in 2016 and to influence the outcome of the election, and separately, on behalf of Pamela Bondi in her political campaign for Florida Attorney General in 2013.”

Relief Being Sought:

(¶94, 96)

“The Individual Respondents failed to discharge their fiduciary duties to the Foundation with the degree of care, loyalty, and obedience that was required of them.”

“Due to the foregoing acts and omissions, the Individual Respondents breached the fiduciary duties they owed to the Foundation, and are thus liable under N-PCL §§ 720(a)(1)(A) and (a)(1)(B) to account for their conduct in the neglect and violation of their duties in the management and disposition of corporate assets, to pay damages resulting from loss and waste of corporate assets, and should be enjoined from serving as an officer, director or trustee, or in any similar capacity, of any not-for-profit charitable organization incorporated or authorized to conduct business or solicit charitable donations in the State of New York.”
(DJ Trump: 10 years; other directors: 1 year)

Relief Being Sought:

(Page 39, ¶C)

“Directing each Individual Respondent to account for his or her conduct in the failure to perform his or her duties in the management of corporate assets, to make full restitution for waste and misuse of charitable assets, and to pay damages resulting from the breach of fiduciary duties.”

Relief Being Sought:

(¶101)

“Mr. Trump is liable under NPCL § 715(f) and EPTL § 8-1.9(c) . . . to account for profits from related party transactions not already accounted for; to the extent not already paid, pay the Foundation the value of charitable assets used in such transactions; return assets lost to the Foundation as a result of the transactions, to the extent not already returned; PAY THE FOUNDATION AN AMOUNT UP TO DOUBLE THE VALUE OF THE AMOUNT OF EACH BENEFIT IMPROPERLY BESTOWED.”

Relief Being Sought:

(¶115, 116)

- “As a result of the foregoing, the Foundation has acted beyond its capacity by persistently disregarding the limitations in its certificate of incorporation and the law, and it has conducted its business in a persistently illegal manner and abused its powers contrary to the public policy of the State of New York by operating without any oversight or control by a board of directors.”
- “Accordingly, the Foundation should be dissolved”

Relief Being Sought:

(¶117)

- “Simultaneous with the filing of this Petition for dissolution, the Attorney General has notified the Internal Revenue Service and the Federal Election Commission concerning potential violations of the Code and federal election law that may subject the Foundation and its directors and officers to substantial penalties or fines.”