

Before the New York State Attorney General
and the Internal Revenue Service

In the Matter of the National Transportation Diversity Council, Inc.

COMPLAINT and REFERRAL

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

I. FACTS 3

 A. *Interested Parties* 3

 B. *Background* 4

 C. *TDC Provides Networking and Advocacy Services to Businesses and Executives, and has Potential Conflicts of Interest that may be Inconsistent with its Exempt Purposes* 5

 1. *TDC’s Board and Leaders are Largely Executives of Transportation Companies that Seek Business from Public Transportation Agencies and Executives of those Public Agencies* 6

 2. *While TDC Does not Disclose Sources of Revenue or Beneficiaries of Expenditures, it Receives “Sponsorships” and other Contributions from Corporations doing Business with Public Transit Agencies* . . 9

 3. *The Program Services on TDC’s Website Focus Largely on Benefiting Corporate and Executive Members’ Interests* 11

 a. *TDC’s Website Promotes its Political Advocacy and Networking for Corporate Interests and Provides Few Details to Verify its Training Activities* 11

 b. *TDC’s Relationship with AIAI Suggests that it is More like a Trade Association than a Charitable Organization* 15

 D. *TDC Corporate Documents and Government Filings* 15

 1. *TDC’s Certificate of Incorporation* 15

 2. *TDC’s Bylaws* 17

 3. *TDC has not Filed Required Annual Reports to the Charities*

| | | |
|-----|---|----|
| | <i>Bureau of the Attorney General for Many Years</i> | 19 |
| 4. | <i>TDC’s Annual IRS Returns Contain Disparities and Irregularities</i> | 19 |
| | a. Conflicts of Interest | 20 |
| | b. Revenue and Expenses | 21 |
| | c. Lobbying | 23 |
| | d. Excess Benefit and Interested Person Transactions, Director Independence | 23 |
| | e. TDC claims that it is and is not a membership organization | 24 |
| | f. TDC did not provide required program service information | 25 |
| II. | ARGUMENT | 25 |
| | <i>The IRS and New York Attorney General Should Investigate Whether TDC has Breached its Legal Obligations as a 501(c)(3) New York Not-for-Profit</i> | |
| A. | <i>The Available Evidence Suggests TDC and its Leaders are Acting Outside the Scope of TDC’s Exempt Purposes for the Benefit of its Leaders and Entities with which they are Affiliated</i> | 25 |
| | 1. Payments to Sampson or TDC by New Flyer, if they Occurred, and Sampson’s Pursuit of New Flyer’s Interests, May Pose Conflicts of Interest and Violate Sampson’s Duties of Loyalty and Obedience to TDC | 28 |
| | 2. Other Conflict of Interest Issues | 28 |
| | 3. Excess Benefits and Related Party Transactions | 31 |
| | 4. Potential Lack of Independence of Directors | 33 |
| B. | <i>The IRS should Investigate whether and the extent to which TDC engaged in Lobbying</i> | 35 |
| C. | <i>The IRS and New York Attorney General should Investigate TDC’s Claim that it is not a Membership Organization and its Failure to Report Dues Income</i> | 36 |

D. *The IRS should Investigate TDC’s Failure to Declare Scholarship and Sponsorship Income, and whether it has Paid any Scholarships* 37

E. *The New York Attorney General should Investigate Violations of Law by TDC with Respect to its Registration Statements and Solicitation of Contributions* 37

F. *The IRS should Investigate whether TDC is Providing Claimed Program Services to its Members* 39

G. *The New York Attorney General and IRS Should Consider the Following Remedies* 40

CONCLUSION 42

SUMMARY OF ARGUMENT

The National Transportation Diversity Council (TDC), a New York not-for-profit corporation that is tax-exempt under § 501(c)(3) of the Internal Revenue Code (IRC), has potential conflicts of interest that are inconsistent with its exempt purposes.

New Flyer of America (New Flyer), a multi-billion dollar bus manufacturer, has engaged TDC to help the company respond to complaints by its workers and non-profit community organizations about discrimination and unfair working conditions in the company's production facilities in Alabama, New York, Kentucky, Minnesota and California.

A central tenet of the law governing non-profit public charities such as TDC is that they are to function exclusively for their exempt charitable, scientific and educational purposes, and not for the personal benefit of their leaders. The available evidence suggests TDC and its leaders, particularly its President and CEO Dwayne Sampson, may be acting outside the scope of TDC's exempt purposes, for the benefit of its leaders and entities with which they are affiliated.

The IRS and New York Attorney General should therefore investigate whether TDC has breached its legal obligations as a New York not-for-profit corporation that is tax-exempt under IRC § 501(c)(3), including the following:

- Whether TDC has violated its duty to ensure that no part of its earnings or assets inure to the benefit of any officer or director or other private individual, including
 - Whether TDC is falsely claiming that its president Dwayne Sampson works for it for 40 hours per week with no compensation, or whether New Flyer is paying Mr. Sampson, while publicly claiming its partnership is with TDC, in conflict with TDC's exempt purposes and Sampson's duties of loyalty and obedience to TDC's non-profit mission and purpose; and
 - Whether Sampson/TDC's pursuit and defense of New Flyer's pecuniary interests is consistent with Sampson's duties to TDC and/or TDC's exempt purposes.
 - Regarding TDC's conflict of interest policy, whether
 - TDC has a written conflicts of interest policy, as required by New York law;
 - TDC has failed to make its conflicts of interest policy available to members of the public upon request; and
 - TDC or its directors or officers violated other elements of New York or federal conflict of interest law, especially with respect to the relationship between Sampson, New Flyer and TDC, including reporting, recording, monitoring, and enforcing compliance with its conflicts of interest policy.
 - Whether TDC has engaged in "related party" or "excess benefits transactions" under the IRC or New York not-for-profit law.
 - Whether TDC's Board members are truly "independent," based on whether
 - a director received payments over \$10,000 from TDC as an independent contractor; or

- a voting member of the governing body or their family member was involved in an “Interested Person” transaction with the organization.
- Whether TDC has falsely reported that it engages in no lobbying activity or has violated the restrictions on lobbying activity by a 501(c)(3) organization.
- Whether TDC falsely reported to the IRS that it does not have members and violated the rights of its members under New York law, given that it collects membership dues from anyone who will pay them via its website, and the rights and powers of “members” under TDC’s Bylaws meet the definition of “member” under the IRC as persons with right to participate in the organization’s governance, specifically by electing members of the governing body or approving significant decisions of the governing body.
- Whether TDC failed to report any income from member dues before 2018 even as it was actively soliciting member dues on its website.
- Whether TDC faces liability for its failure to report any scholarship income or expenditures, and its failure to report its solicitation of donations for scholarships and “sponsorships” as “fundraising activities” on any of its Schedule Gs.
- The consequences for TDC’s disregard of the New York Attorney General’s responsibility to protect the public interest by
 - failing to file annual reports with the Charities Bureau of the Attorney General, which are required by New York law, since at least 2016, and possibly since 2011; and
 - soliciting contributions outside the purposes reported on its Registration Statement, and without the statements that are required to accompany solicitations under New York law.
- Whether TDC is providing claimed program services to its members;

We also ask the New York attorney General and IRS to consider appropriate remedies, including

- Whether the Attorney General should bring an action for removal and/or misconduct against Sampson;
- Whether TDC’s registration should be discontinued or revoked;
- Whether TDC should be enjoined from soliciting or collecting funds;
- Whether a civil penalty should be assessed against TDC;
- Whether TDC should be dissolved as a New York not-for-profit corporation; and
- Whether TDC should be required to dissolve as a 501(c)(3) charity, and, at best, incorporate as a 501(c)(6) Business League.

I. FACTS

A. *Interested Parties*

The National Transportation Diversity Council, Inc. (TDC) is a not-for-profit corporation under § 402 of New York's Not-for-Profit Corporation Law (N-PCL), which has held a tax-exempt status under § 501(c)(3) of the Internal Revenue Code since 2012.¹ TDC says it was founded in October 2010.² Its stated exempt purposes include

To support transportation infrastructure in developing countries . . . ;
To initiate a global diversified workforce of transportation and construction professionals . . . ;
To encourage and support diversity in ownership and senior management throughout the transportation industry. . . ; and
To expose young people to the opportunities for ownership and employment in the transportation field...³

In practice, TDC's board members and leadership are almost exclusively executives of companies that seek business from transit agencies, current high level transit agency managers, including several who interface with private contractors, and former transit managers who have gone on to work for companies that do business with their former employers.⁴ On its website, TDC touts its success in helping its business members in "accessing business opportunities at agencies and institutions across the country,"⁵ and states that it "engages" elected leaders to "ensure that the field is level to allow our corporate membership to participate without hindrance."⁶

¹ Certificate of Incorporation of National Transportation Diversity Council, Inc., filed with New York Department of State May 16, 2011. TDC incorporation documents, including its Certificate of Incorporation, are attached as Exhibit A. On June 16, 2011, Dwayne Sampson, as President of the National Transportation Diversity Council, filed a "Certificate of Assumed Name" adopting the "assumed name" of Transportation Diversity Council, Inc. See Exhibit A. For information regarding TDC's 501(c)(3) status, see ProPublica Nonprofit Explorer, "National Transportation Diversity Council Tax Filings by Year," <https://projects.propublica.org/nonprofits/organizations/273959732>.

² TDC website, "Leadership[,] Dwayne C. Sampson," <http://tdc-ntl.org/leadership/dwayne-c-sampson>.

³ TDC's exempt purposes, set forth in paragraph 3 of its Certificate of Incorporation, attached as Exhibit A, are quoted in their entirety at note 69 *infra*.

⁴ See Section I.B.1 and accompanying footnotes *infra*.

⁵ TDC website, "Navigate-Advocacy," <http://tdc-ntl.org/navigate-%E2%80%93advocacy>.

⁶ *Id.*

New Flyer of America Inc. and New Flyer Industries Canada ULC (New Flyer),⁷ are the North American arm of a multi-billion dollar⁸ global bus manufacturer known as NFI Group, Inc. (NFI).⁹ New Flyer has engaged TDC as a consultant to help the company respond to complaints by its workers and non-profit community organizations about discrimination and unfair working conditions in the company's production facilities in Alabama, New York, Kentucky, Minnesota and California.

Jobs to Move America (JMA) is a strategic policy center that works to transform public spending and corporate behavior using a comprehensive approach that is rooted in racial and economic justice and community organizing. JMA seeks to advance a fair and prosperous economy with good jobs and healthier communities for all.¹⁰

B. *Background*

In October 2019, workers employed by New Flyer disclosed serious concerns regarding race and gender discrimination and dangerous and unhealthy working conditions at New Flyer's publicly subsidized bus manufacturing facility in Anniston, Alabama to researchers from Alabama A&M University.¹¹

New Flyer rejected demands from a coalition of Alabama residents, civil rights groups, and workers to negotiate an enforceable, national "Community Benefits Agreement" to create better jobs, equal opportunity, and healthier communities for New Flyer workers.¹² Instead, on the Martin Luther King, Jr. holiday in 2020, New Flyer announced they had entered into a "partnership" with TDC to create a so-called "Community Benefits Framework".¹³

⁷ New Flyer website, "About New Flyer," <https://www.newflyer.com/company/about/>.

⁸ Market Watch, "NFI Group Inc." Available online at <https://www.marketwatch.com/investing/stock/nfi/financials>. Last accessed June 30, 2020.

⁹ NFI Website, "Company," <https://www.nfigroup.com/>.

¹⁰ Jobs to Move America, "Who We Are: Mission, Vision and Values." <https://jobstomoveamerica.org/mission-vision-values/>

¹¹ Jobs to Move America, "Alabama coalition and prominent Black union leaders send letters to New Flyer denouncing company's phony diversity initiative," February 4, 2020. Available online at <https://jobstomoveamerica.org/press-release/alabama-coalition-and-prominent-black-union-leaders-send-letters-to-huge-canadian-bus-manufacturer-ceo-denouncing-companys-phony-diversity-initiative/>

¹² Jobs to Move America, "Alabama community coalition asks bus manufacturing behemoth to negotiate first nationwide Community Benefits Agreement," October 15, 2019. Available online at <https://jobstomoveamerica.org/press-release/alabama-community-coalition-asks-bus-manufacturing-behemoth-to-negotiate-first-nationwide-community-benefits-agreement/>

¹³ New Flyer of America, "On Martin Luther King, Jr. Day, New Flyer of America and Transportation Diversity Council announce commitment to a National Community Benefit Framework Extolling Workforce Development, Diversity, Training and Hiring," January 20, 2020. Available online at <https://www.newflyer.com/2020/01/on-martin-luther-king-jr-day-new-flyer-of-america-and-transportation-diversity-council-announce-commitment-to-a->

In correspondence with JMA, TDC has represented itself as acting “on behalf” of New Flyer.¹⁴ Its President and CEO, Dwayne Sampson, has penned op-eds and provided quotes for press releases defending New Flyer from charges it has mistreated and discriminated against workers and lauding its purported support for diversity and inclusion efforts.¹⁵ Sampson and TDC worked with New Flyer to produce a Community Benefits “Framework” that the Alabama Coalition for Community Benefits referred to as “a heavy-handed attempt to shut down the coalition ... which has been organizing to hold New Flyer accountable ...”¹⁶

C. *TDC Provides Networking and Advocacy Services to Businesses and Executives, and has Potential Conflicts of Interest that may be Inconsistent with its Exempt Purposes*

A review of TDC’s website reveals that TDC supports executives in the public and private sector transportation and construction industries to network with each other, and advocates for public policies that protect the interests of companies and executives in that industry. TDC’s activities, structure, and leadership create the appearance of conflicts of interest that may be incompatible with the function of a charitable organization under § 501(c)(3) of the Internal Revenue Code and § 402 of the New York State Not-for-Profit Corporations Law.¹⁷ JMA acknowledges that there are real challenges for business people of color in accessing public contracts. JMA also believes that eliminating barriers to business opportunities for Black, Latino and women-owned

[national-community-benefit-framework-extolling-workforce-development-diversity-trai/](#). Also see Jobs to Move America, “Alabama coalition and prominent Black union leaders,” *supra* note 11.

¹⁴ See, e.g., September 19, 2019 letter from TDC VP Thalia Goldsboro-Patton to JMA Southern Program Director Patricia Todd. Available from counsel.

¹⁵ See, e.g., Dwayne Sampson, “Transportation Diversity Council President and CEO defends New Flyer against New York Post allegations,” *Mass Transit*, March 31, 2020. Available online at <https://www.masstransitmag.com/management/blog/21131910/oped>. Dwayne Sampson, “Ending Workforce Discrimination is Up to Us,” *The Dallas Weekly*, March 12, 2020. Available online at <https://www.dallasweekly.com/articles/op-ed-ending-workforce-discrimination-is-up-to-us/>. “New Flyer expands partnership with Transportation Diversity Council,” *BUSRide*, October 11, 2019. Available online at <https://busride.com/new-flyer-expands-partnership-with-transportation-diversity-council/>. “On Martin Luther King, Jr. Day, New Flyer of America and Transportation Diversity Council announce commitment to a National Community Benefit Framework Extolling Workforce Development, Diversity, Training and Hiring,” *Yahoo! finance*, January 20, 2020. Available online at <https://finance.yahoo.com/news/martin-luther-king-jr-day-182100125.html>. “New Flyer of America in partnership with TDC Launches its National Community Benefits Framework; Establishes New Model of Local Support for People and Communities,” *New Flyer of America*, March 11, 2020. Available online at <https://www.newflyer.com/2020/03/new-flyer-of-america-in-partnership-with-tdc-launches-its-national-community-benefits-framework-establishes-new-model-of-local-support-for-people-and-communities/>.

¹⁶ “Alabama Community-Labor Coalition Denounces New Flyer’s So-Called Diversity Initiative,” *Jobs to Move America*, March 12, 2020. Available online at <https://jobstomoveamerica.org/press-release/alabama-community-labor-coalition-denounces-new-flyers-so-called-diversity-initiative/>.

¹⁷ See Argument below.

businesses is an important policy goal. What is significant here, however, is the many ways in which it appears TDC and its leaders have failed to adequately separate their private, personal interests from TDC's public, charitable purposes. And that TDC leaders are using a charitable not-for-profit corporation to help a huge for-profit corporation (New Flyer) discredit serious complaints of discrimination and unfair treatment from workers and community members in Alabama.

1. *TDC's Board and Leaders are Largely Executives of Transportation Companies that Seek Business from Public Transportation Agencies and Executives of those Public Agencies*

TDC's board members and leadership are almost exclusively executives of companies that seek business from transit agencies, current high-level transit agency managers, including several who interface with private contractors, and former transit managers who have gone on to own or work for companies that do business with their former employers. There do not appear to be any frontline workers or frontline worker representatives in the leadership of TDC.

These are the affiliations of TDC's directors and principal officers:

- Dwayne Sampson, TDC's President and CEO, is a former Superintendent of Maintenance Operations for New York's MTA,¹⁸ an immense public transportation agency that includes the New York City Transit Authority and MTA Bus Company (the public agencies that provides New York City's subway and bus service),¹⁹ the Long Island Railroad (public agency that provides commuter railroad service between New York City and Long Island),²⁰ the Metro-North Railroad (public agency that provides commuter railroad service between New York City and its suburbs on Connecticut and New York state),²¹ MTA Bridges and Tunnels (a public agency which operates seven bridges and two tunnels into and out of New York City),²² and MTA Construction and Development (which contracts with private, for-profit entities to build infrastructure such as stations, signals, and new buses and trains).²³

¹⁸ According to the TDC website, Mr. Sampson and TDC teamed with Smalls Electrical and Construction, another entity affiliated with TDC that does business with New York City public transit agencies, to form the Bronx Design and Construction Academy. TDC website, "Leadership[,] Dwayne C. Sampson[,] Founder and President/CEO," <http://tdc-ntl.org/leadership/dwayne-c-sampson>.

¹⁹ MTA website, "About NYC Subways and Buses," <http://web.mta.info/nyct/facts/ffintro.htm>.

²⁰ MTA website, "Long Island Railroad - General Information," <http://web.mta.info/lirr/about/GeneralInformation/>.

²¹ MTA website, "Metro North Railroad," <http://web.mta.info/mnr/html/generalinformation.html>.

²² MTA website, "MTA Bridges and Tunnels," <https://new.mta.info/bridges-and-tunnels>.

²³ MTA website, "Construction and Development," <https://new.mta.info/agency/construction-and-development>.

Sampson is also the President and CEO of Sampson Management Enterprise, Inc., which was incorporated in New York on February 21, 2017.²⁴ In TDC's Forms 990 filed with the IRS, TDC claims Sampson devotes 40 hours per week to TDC, yet it also claims he does not receive compensation from TDC.²⁵

- Cosema (Connie) E. Crawford, who is listed in TDC's tax and corporate filings as Chairperson of the TDC Board of Directors, and on TDC's website as Chair of the "Advisory Board,"²⁶ is described on TDC's website as Senior Vice President of the Louis Berger Group, an infrastructure engineering firm. Louis Berger's work has included publicly funded transit projects in the New York city metropolitan area such as the Newark and JFK AirTrains (both AirTrains are under the jurisdiction of the Port Authority of New York and New Jersey), among many others.²⁷
- Frank Otero, listed on TDC's tax filings and Certificate of Incorporation as a Director²⁸ and on TDC's website as an Advisory Board member,²⁹ is the President and CEO of PACO Technologies, Inc. PACO Group, a related entity³⁰ of which TDC Vice President Luis Lugo, Jr. is President and CEO, is listed as a "Founding Partner" of TDC on its website.

²⁴ OpenCorporates, "Sampson Management Enterprise, Inc.," available online at https://opencorporates.com/companies/us_ny/5088194. Also see the LinkedIn page for Dwayne C. Sampson, <https://www.linkedin.com/in/dwayne-sampson-590baab/>.

²⁵ See, e.g., ProPublica Nonprofit Explorer, "National Transportation Diversity Council form 990 for period ending December 2018." Available online at https://projects.propublica.org/nonprofits/display_990/273959732/09_2019_prefixes_26-27%2F273959732_201812_990_2019092016675354. The same hours are also claimed for all years 2013-2017. ProPublica Nonprofit Explorer, "National Transportation Diversity Council Tax Filings by Year," *supra* note 1, <https://projects.propublica.org/nonprofits/organizations/273959732>.

²⁶ See, for example, Part VII.A. of TDC's IRS Form 990 for the year 2018, "Officers, Directors, Trustees, Key Employees, Highly Compensated Employees, and Independent Contractors," which lists Ms. Crawford TDC title as "Charu [sic] Person." *Id.* TDC's 2011 Certificate of Incorporation lists Ms. Crawford as "Chairperson" as well. Exhibit A. TDC's CHAR 410 (a mandatory registration statement for Charitable organizations filed with the New York Attorney General in 2012) also lists Ms. Crawford as "Chair" under "Officers, Directors and Key Employees." Compare to Ms. Crawford's page on the TDC website, which lists her as Advisory Board Chair: TDC website, "Connie Crawford[,] Advisory Board Chair," <http://tdc-ntl.org/leadership/connie-crawford>.

²⁷ Louis Berger website, "Projects," <https://www.louisberger.com/our-work/projects>.

²⁸ See *id.* and Exhibit A, attached. Also see TDC's 2011 Registration Statement with the Charities Bureau of the New York Attorney General (CHAR 410), on file with counsel.

²⁹ TDC website, "Frank Otero[,] Advisory Board Member," <http://tdc-ntl.org/leadership/frank-otero>.

³⁰ Entering the URL www.pacogroup.com into a web browser leads to the website for PACO Technologies, www.pacotechnologies.com. Both companies share an address at 110 William Street in New York City. Compare <http://www.pacotechnologies.com/contact/> to <https://www.bloomberg.com/profile/company/0855001D:US>. Also see TDC website, <http://tdc-ntl.org/leadership/luis-lugo-jr>.

- According to TDC’s tax filings and its Certificate of Incorporation, James H. Harding Jr. is a Director of TDC.³¹ According to the TDC website, he is 1st Vice Chair of TDC’s Advisory Board.³² His professional title is listed on TDC’s website as Vice President of Intergovernmental Affairs and Community Relations for the New York MTA Bus Company and Long Island Bus,³³ two large MTA agencies that provide public transportation in the New York City metropolitan area.³⁴
- Sheila Jordan, TDC’s “Secretary” according to the website, is a “Senior Consultant with over 20 years of corporate experience . . . Ms. Jordan works with senior management to link the HR strategy to the overall organizational strategy to address a variety of human resources issues including change management and workforce performance.”³⁵
- TDC’s Bylaws also require that the organization have a Treasurer, but no one is designated with that title on TDC’s website or its filings with the New York AG or the IRS.³⁶

TDC lists more than twenty (20) additional members of its “leadership” team, the vast majority of whom either serve as high-level executives of for-profit entities that do business with public transportation agencies, or are high level executives or managers of those agencies.³⁷ Many of

³¹ See, e.g., TDC’s Form 990 for the year 2018, *supra* note 25. https://projects.propublica.org/nonprofits/display_990/273959732/09_2019_prefixes_26-27%2F273959732_201812_990_2019092016675354. Also see TDC’s 2011 Registration Statement with the Charities Bureau of the New York Attorney General (CHAR 410), on file with counsel.

³² TDC website, “Jim Harding[,] Advisory Board First Chair,” <http://tdc-ntl.org/leadership/jim-harding>.

³³ Notwithstanding the listing on TDC’s website of Long Island Bus as a current affiliation for Mr. Harding, public bus service in New York’s Nassau and Suffolk Counties is no longer provided by Long Island Bus, an MTA agency. After the MTA voted to cease all bus service to Nassau County in 2011 due to the County’s refusal to fund its share of the service, Nassau County began providing public transportation through an entity called Nassau Inter-County Express (NICE), which is operated by Nassau County in alliance with Veolia Transportation. Suffolk County public transportation is provided by a county agency, Suffolk County Transit. See Wikipedia, “Nassau Inter-County Express, Privatization and NICE,” https://en.wikipedia.org/wiki/Nassau_Inter-County_Express#MTA_Long_Island_Bus. Also see Wikipedia, “Suffolk County Transit,” <https://www.longisland.com/bus-stations/>, https://en.wikipedia.org/wiki/Suffolk_County_Transit.

³⁴ His career positions listed on the TDC website also include, *inter alia*, member of the Board of Directors of the MTA; Director of Legislative Affairs for the Governor of the State of New York; Chair of the New York state Dr. Martin Luther King, Jr. Holiday Commission; Co-Chair with the NYC Police Commissioner of the “Tactical Narcotics Team (TNT)”); and Deputy Commissioner of the NYC Fire Department. TDC website, “Jim Harding[,] Advisory Board First Chair,” *supra* note 32.

³⁵ TDC website, “Leadership[,] Sheila Jordan,” <http://tdc-ntl.org/leadership/sheila-jordan>.

³⁶ TDC Bylaws, attached as Exhibit B, Art. III, Sec. 1. See Section I.C.2 *infra*.

³⁷ See TDC website, “Leadership[,] Dwayne C. Sampson[,] Founder and President/CEO,” *supra* note 18.

these leaders are designated as Vice Presidents of TDC and may be “officers” as defined in TDC’s Bylaws.³⁸ The for-profit entities they own or manage include transportation-oriented companies in the construction sector such as Smalls Construction, Inc. and NewPOT Solutions, Inc.; the Rizzo Group, which represents real estate developers to address governmental land use, building code and zoning issues; law firms specializing in government contracts for corporate entities; IT firms such as PEMCCO, Inc.; insurance brokers for transit agencies such as National Consultants, Inc.; and management consultants for governmental entities such as PRM Consulting Group, LLC.³⁹

According to TDC’s website and other publicly available documents, some of the other publicly-funded transportation projects on which TDC leaders have been executive decision-makers employed by parties to both sides of contracts between public agencies and private companies include the 5 Stations Jamaica Line rehabilitation for New York’s MTA, New York City Transit’s 34th St Herald Square Station, 231st Street station and Linden Track Shop, MTA’s Jamaica Van Wyck Station, the MTA Metro North High Bridge Train Wash Facility, the Communications Rooms at Grand Central Station, Chicago Transit Authority’s Blue Line Renovation, and the RTD’s Denver Union Station Project.⁴⁰

Some of TDC’s top leaders, such as President and CEO Dwayne Sampson, have their own consultancies.⁴¹

2. *While TDC Does not Disclose Sources of Revenue or Beneficiaries of Expenditures, it Receives “Sponsorships” and other Contributions from Corporations doing Business with Public Transit Agencies*

Because TDC does not disclose the names of the individuals and entities it makes payments to, it is not possible to determine whether the consultancies or private corporate projects of TDC

³⁸ “The officers of the Corporation shall be a President, a Secretary, a Treasurer *and such other officers, if any, including one or more Vice Presidents*, as the Board of Directors may from time to time appoint.” TDC Bylaws, attached as Exhibit B, Article III, Section 1 (emphasis supplied).

³⁹ TDC website, <http://tdc-ntl.org/leadership/jeffrey-j-smalls>; <http://tdc-ntl.org/leadership/kevin-potter>; <http://tdc-ntl.org/leadership/karen-p-lee-hucks>; <http://tdc-ntl.org/leadership/lewis-askew-jr-leed-ap>; <http://tdc-ntl.org/leadership/herman-ross>; and <http://tdc-ntl.org/leadership/monique-l-poydras-jd>.

⁴⁰ See TDC website, <http://tdc-ntl.org/leadership/jeffrey-j-smalls>; and TDC website, <http://tdc-ntl.org/leadership/luis-lugo-jr>. Also see Smalls Electrical Construction, Inc., Featured Projects. Available online at http://smallselectrical.com/electrical_projects.html.

Smalls Electrical Construction, Inc., Current projects. Available online at http://smallselectrical.com/current_projects.html.

Smalls Electrical Construction, Inc., Completed Projects. Available online at http://smallselectrical.com/completed_projects.html.

⁴¹ As noted *supra*, TDC President and CEO Dwayne Sampson is also the President and CEO of Sampson Management Enterprise, Inc. Advisory Board 2nd Vice Chair Mysore Nagaraja is co-founder and Char of Spartan Solutions, LLC. <http://tdc-ntl.org/leadership/mysore-nagaraja>. Advisory Board member Nathaniel Ford founded the Ford Transportation Group, LLC. <https://www.linkedin.com/in/nathanielpford/>.

Board members and leaders, such as Mr. Sampson’s consultancy, are the beneficiaries of the over \$250,000 TDC spent on “outside labor” from 2013-2018.⁴² However, in 2017, the year New Flyer says it launched its partnership with TDC,⁴³ TDC’s spending on “outside labor” increased by 136% from the previous high in 2016.

Similarly, because TDC does not disclose the sources of its revenue, it is not possible to trace the portion of TDC’s nearly \$1 million in revenue between 2013 and 2018 that came from the corporate “sponsors” and “partners” with which its leaders are affiliated.⁴⁴ It is noteworthy that in 2017, the year New Flyer and TDC announced their affiliation, TDC’s revenue jumped 73%.⁴⁵ Given TDC’s lack of transparency about the sources of its funding, it is not possible to ascertain the portion of this increase in revenues attributable to financial support from New Flyer.

What is clear, however, is that TDC receives “sponsorships” and other contributions from corporations doing business with Public transit agencies. On TDC’s website, the costs of such sponsorships for the 2020 Transportation Diversity Council-MIT summit are as follows:

| | |
|------------------------|----------------------|
| Gold Summit Sponsor: | \$10,000 |
| Silver Summit Sponsor: | \$5000 |
| Bronze Summit Sponsor: | \$2000 ⁴⁶ |

⁴² See Part IX of TDC’s IRS Forms 990, ProPublica Nonprofit Explorer, “National Transportation Diversity Council Tax Filings by Year,” *supra* note 1, available online at <https://projects.propublica.org/nonprofits/organizations/273959732>, which show spending on “outside labor” of \$75,653 in 2018, \$110,101 in 2017, \$46,371 in 2016, \$1900 in 2015, \$10,842 in 2014, and \$7150 in 2013.

⁴³ New Flyer of America, “New Flyer of America in partnership with TDC Launches its National Community Benefits Framework,” March 11, 2020. <https://www.newflyer.com/2020/03/new-flyer-of-america-in-partnership-with-tdc-launches-its-national-community-benefits-framework-establishes-new-model-of-local-support-for-people-and-communities/> Also see May 10, 2020 letter from NFI CEO Paul Soubry to NFI Team, available from counsel. Also see “New Flyer Lands LA Metro Contract for up to 100 60 foot Electric Buses,” METRO Magazine, October 11, 2017, <https://www.metro-magazine.com/sustainability/news/725809/new-flyer-lands-la-metro-contract-for-up-to-100-60-foot-electric-buses>, and Joseph Bebon, “LA Metro Awards Major Orders for New Flyer CNG, Electric Transit Buses,” NGT News, October 12, 2017, <https://ngtnews.com/la-metro-awards-major-orders-new-flyer-cng-electric-transit-buses>.

⁴⁴ According to Part VIII of TDC’s IRS Forms 990, TDC’s total revenue in these years, always reported as a single aggregated sum in the “Contributions, Gifts, Grants” section of Part VIII of the 990, was as follows:
2018: \$192,250 reported as “membership dues”
2017: \$274,277 reported as “federated campaigns”
2016: \$158,763 reported as “federated campaigns”
2015: \$180,602 reported as “federated campaigns”
2014: \$87,658 reported as “federated campaigns”
2013: \$84,523 reported as “fundraising events”
Supra note 1, <https://projects.propublica.org/nonprofits/organizations/273959732>.

⁴⁵ *Id.*

⁴⁶ TDC website, “TDC Summit,” <http://tdc-ntl.org/tdc-summit>. TDC seems to have maintained the Sponsorships at this cost level since at least 2016. *Id.*, “TDC-MIT Transportation and Infrastructure Summit,” <http://tdc-ntl.org/events/tdc-mit-transportation-and-infrastructure-summit>.

At the same time, TDC promotes for-profit businesses affiliated with its officers and leadership on its website. These include

Sponsors:

Louis Berger Group – TDC Board Chair Connie Crawford is Senior Vice President.
Smalls Electrical Construction, Inc. – TDC Advisory Board member Jeffrey J. Smalls is President and CEO.

Founding Partners:

Spartan Solutions LLC – TDC Advisory Board 2nd Vice Chair Mysore Nagaraja is Chairman.
Smalls Electrical Construction, Inc.– TDC Advisory Board member Jeffrey J. Smalls is President and CEO.
NewPOT Solutions, Inc. - Kevin Potter, TDC Vice President of Member Services is President and CEO.
Paco Group, Inc. – Luis Lugo, Jr., TDC Vice President for DBE/MWBE (Disadvantaged Business Enterprise/Minority and Women Business Enterprise) Services is President and CEO.
National Insurance Consultants, Inc. - Herman Ross, TDC West Coast Regional Representative, is President and CFO.
PEMCCO Inc. - Prescott Sherrod, TDC Southeast Regional Representative, is President and CEO.⁴⁷

TDC’s website contains a page allowing viewers to pay to “Join TDC” in several “membership categories” with different levels of “dues payment.” The dues schedule ranges from \$1500 for “other businesses;” to \$1000 for non-profits, academic institutions and public agencies; to \$150 for individuals and \$50 for students.⁴⁸ TDC did not begin reporting revenues from membership dues to the IRS until 2018.⁴⁹

3. *The Program Services on TDC’s Website Focus Largely on Benefiting Corporate and Executive Members’ Interests*
 - a. TDC’s Website Promotes its Political Advocacy and Networking for Corporate Interests and Provides Few Details to Verify its

⁴⁷ See TDC website, “Founding Partners,” <http://tdc-ntl.org/founding-partners>, and Sponsors, <http://tdc-ntl.org/news/welcome-newest-internsvolunteers/>. Also see TDC website, <http://tdc-ntl.org/leadership/mysore-nagaraja>; <http://tdc-ntl.org/leadership/jeffrey-j-smalls>; <http://tdc-ntl.org/leadership/kevin-potter>; <http://tdc-ntl.org/leadership/luis-lugo-jr>; <http://tdc-ntl.org/leadership/herman-ross>; and <http://tdc-ntl.org/leadership/prescott-sherrod>.

⁴⁸ TDC website, “Join TDC,” <http://tdc-ntl.org/join-tdc>.

⁴⁹ ProPublica Nonprofit Explorer, “National Transportation Diversity Council Tax Filings by Year,” *supra* note 1, available online at <https://projects.propublica.org/nonprofits/organizations/273959732>.

Training Activities

TDC offers two main programs to its membership: the [STEAM](#)⁵⁰ initiatives, primarily marketed towards individuals seeking professional development opportunities in the transportation and construction industries, and the [ENGINE](#)⁵¹ program that primarily supports business and institutional members of TDC. Several of these initiatives focus on the goal of enhancing diversity in the U.S. transportation industry. Others, however, focus on providing political advocacy and pecuniary benefits to members that may be inconsistent with the exempt purposes of a 501(c)(3) organization.

TDC's website includes links describing its work under each letter of the ENGINE acronym:

Engage – Agency Interaction: “TDC keeps corporate members and industry professionals fully engaged in dynamic interaction with clients and agencies in the transportation and construction sectors.” This includes

- meet-and-greets that “bring together agency representatives and TDC members . . . as the foundation for doing business;”
- making “a database of project solicitations from agencies and institutions . . . available to the membership;”
- marketing TDC corporate members to “agencies and institutions...such that they seek the participation of TDC members in the execution of projects;
- all so that members can “project and grow their services.”⁵²

These efforts to provide networking for representatives of public agencies and corporations which seek business from those agencies, to make public agency project solicitations available to corporate members, and to market corporate members to public agencies so they will seek to include those members in carrying out public projects, all for the purpose projecting and growing corporate member services, are explicitly directed towards generating profits for corporate members, several of whom serve as directors and officers of TDC.

Navigate – Advocacy TDC explicitly promotes itself as an “**advocate** for members in accessing business opportunities at agencies and institutions across the country.” This means

- ensuring “that our members are partners in the formulation and execution of transportation and construction projects,” particularly through
- “Political Liaison Services” that “*apply a tactical approach in engaging the vital players in the formulation of government policy. TDC seeks out and engages senate and congressional members of committees that deliberate on transportation, construction and education issues and ensure[s] that the field is level to allow our corporate membership to participate without hindrance.*”⁵³

⁵⁰ TDC website, “STEAM Initiatives,” <http://tdc-ntl.org/steam-initiatives>.

⁵¹ TDC website, “ENGINE,” <http://tdc-ntl.org/engine>

⁵² TDC website, “Engage - Agency Interaction,” <http://tdc-ntl.org/engage-%E2%80%93-agency-interaction>

⁵³ TDC website, “Navigate-Advocacy,” <http://tdc-ntl.org/navigate-%E2%80%93-advocacy>.

(Emphasis supplied) As noted below, despite TDC’s assertion on its website that it advocates for its corporate members by engaging members of Senate and Congress who sit on committees that deliberate on transportation and construction issues to ensure a level playing field for its corporate members, in every annual IRS Form 990 it has filed since 2013, TDC has answered “No” to the question whether it engages in lobbying activities, and failed to file the Schedule C required of 501(c)(3) organizations that engage in lobbying activities.⁵⁴

Grow – Opportunities TDC enables “corporate membership access to opportunities in the transportation and construction industry” by:

- enhancing “the benefits of professional interaction between corporations that belong to a **trade organization**,” (emphasis supplied) and
- facilitating “joint venture partnerships between corporate members.”⁵⁵

Trade organizations do not qualify for tax-exempt status under § 501(c)(3) of the Internal Revenue Code. They are organized as “Business Leagues” under § 501(c)(6) of the IRC. (See discussion of TDC partner AIAI and Argument below.)

Innovate – Trends & Sustainability TDC says it monitors emerging trends in transportation and construction industries as they impact technology and sustainability.⁵⁶

Network – Business to Business TDC says it fosters and holds business fairs oriented towards historically underutilized and minority, women, and disabled-owned businesses, as well as business networking events for “lively business interactions.”⁵⁷ Again, this type of activity may be more appropriate for a 501(c)(6) trade association than a 501(c)(3) charitable organization.

Educate – Training & Resources. TDC claims to have a Transportation, Education & Construction Institute (“TECI”) that provides both “executive” and “staff” training and development. Notably, this “Institute” appears to have no online presence other than this single entry on TDC’s website.⁵⁸

In short, many of TDC’s ENGINE initiatives seem oriented towards helping its corporate members generate a profit through taxpayer-funded business generated by public sector executive members, including via political engagement and advocacy.

⁵⁴ ProPublica Nonprofit Explorer, “National Transportation Diversity Council Tax Filings by Year,” *supra* note 1, available online at <https://projects.propublica.org/nonprofits/organizations/273959732>.

⁵⁵ TDC website, “G-Grow,” <http://tdc-ntl.org/grow>.

⁵⁶ TDC website, “Innovate - Trends and Sustainability,” <http://tdc-ntl.org/innovate-%E2%80%93-trends-and-sustainability>.

⁵⁷ TDC website, “Network-Business to Business,” <http://tdc-ntl.org/network-%E2%80%93-business-business>.

⁵⁸ TDC website, “Educate - Training and Resources,” <http://tdc-ntl.org/educate-%E2%80%93-training-resources>

TDC's individually oriented STEAM initiatives purportedly include:

S - Scholarships:⁵⁹ TDC claims that it provides "Transportation, Education & Construction (TEC) Scholarships to qualified students." There is no indication on the website providing the number, dollar amount, dates, or frequency with which these scholarships are granted, or the identity of any recipients. There is, however, a prominent button soliciting donations, ostensibly to fund the TEC Scholarships. TDC's annual IRS submissions contain no report of any scholarship income or expenditures. Nor did TDC report its solicitation of donations for scholarships and "sponsorships" as "fundraising activities" on any of its Schedule Gs.

T - Training & Education: TDC "Training" is focused not on manufacturing skills but on business topics such as "leadership competency," "identifying financial resources for business opportunities," and "building partnerships." The only information under "education" refers to the Bronx Design & Construction Academy, a New York City public charter school which is not accessible to New Flyer manufacturing employees, all of whose manufacturing facilities are located outside the New York City metropolitan area.⁶⁰

E - Employment: This section lists "public sector" job opportunities with New York's MTA only, and, as of the date of this report, has *no paid employment opportunities* under its "private sector" listings.⁶¹

A - Apprenticeship, Internships & Fellowships: This section refers to a so-called "Transportation, Education and Construction (TEC) Opportunities Program" to provide "apprenticeships, internships, and fellowships at agencies and related businesses." There is no information on the site about any individual placed in an apprenticeship, internship or fellowship through this program.⁶²

M - Mentoring: TDC claims that it provides mentor training programs, matching, and fairs, but once again the website provides no concrete information about any such program activities.⁶³

⁵⁹ TDC website, "TDC's TEC Scholarship," <http://tdc-ntl.org/tdcs-tec-scholarship>

⁶⁰ TDC website, "Training and Education," <http://tdc-ntl.org/training-education>, In 2013, TDC co-sponsored an "engineering day" with New York's MTA, that included students from TDC's Bronx Design and Construction Academy, in which "Engineers and architects working on the Second Avenue Subway, East Side Access, No. 7 Extension and Fulton Center projects, presented their own project work . . ." MTA news release, reported in US Official News (Pakistan), 3/2/13. PACO Technologies and the PACO Group, of which, respectively, TDC Board members Frank Otero and VP Luis Lugo, Jr. are President and CEO, list these as construction management projects of their companies. See notes 29 and 30, *supra*.

⁶¹ TDC website, "E-Employment," <http://tdc-ntl.org/employment>.

⁶² TDC website, "Apprenticeship, Internships & Fellowships," <http://tdc-ntl.org/apprenticeship-internships-fellowships>.

⁶³ TDC website, "Mentoring and Coaching," <http://tdc-ntl.org/mentoring-coaching>.

This analysis provides some indication of the much higher relative priority TDC places on corporate advocacy and networking as opposed to its exempt purposes under § 501(c)(3).

b. TDC’s Relationship with AIAI Suggests that it is More like a Trade Association than a Charitable Organization

TDC is a member of the Association for the Improvement of American Infrastructure (AIAI),⁶⁴ which closely resembles TDC in its purposes and function. According to [AIAI](#)’s website, AIAI, much like TDC, is a

member-led organization made up of the leading minds in the industry, solely dedicated to moving P3s [public-private partnerships] forward and strengthening American infrastructure. . . We serve as a resource for industry leaders, legislators, municipal officials and other key decision makers as they consider P3 as an alternative solution to address our Nation’s infrastructure. Our mission is to create an environment where public and private entities work to promote growth and sustainability of America’s Infrastructure, fostering innovative solutions in the form of policy, product and delivery.⁶⁵

Yet, unlike TDC, AIAI is not a 501(c)(3) charity to which donations are tax deductible, it is a 501(c)(6) “Business League” to which donations are not tax deductible.⁶⁶

D. *TDC Corporate Documents and Government Filings*

1. *TDC’s Certificate of Incorporation*

TDC’s original Certificate of Incorporation was filed with the New York Department of State on May 16, 2011, under § 402 of New York’s Not-for-Profit Corporation Law (N-PCL).⁶⁷ § 402 of the N-PCL requires that a Certificate of Incorporation state the purposes for which the corporation is formed and the names and addresses of its initial directors, among other requirements.

Cosema (Connie) E. Crawford is designated Chairperson, and Frank Otero and James H. Harding, Jr. are designated as the Directors of TDC. These three individuals, along with TDC

⁶⁴ Association for the Improvement of American Infrastructure, “Our Members[,] Transportation Diversity Council,” available online at <https://aii-infra.info/our-members/transportation-diversity-council/>.

⁶⁵ Association for the Improvement of American Infrastructure, “About,” <https://aii-infra.info/about/>.

⁶⁶ ProPublica Nonprofit Explorer, “Association for the Improvement of American Infrastructure,” available online at <https://projects.propublica.org/nonprofits/organizations/461424040>.

⁶⁷ Exhibit A.

President Dwayne Sampson, continue to be reported as Chair and Directors in all of TDC's publicly available filings with the IRS and the State of New York, including the most recent.⁶⁸

The avowed purposes set forth in TDC's Certificate of Incorporation (paragraph 3) focus on encouraging and promoting diversity, especially among executives and high-level managers in the transportation industry, as well as general statements supporting transportation infrastructure for economic growth and technological advancement.⁶⁹

The Certificate provides that "...the purposes of the Corporation shall be limited to charitable, scientific and educational purposes within the meaning of §§ 170(c) and 501(c)(3) of the Internal Revenue Code of 1954, as amended." It also adds that,

The Corporation ... is not formed for pecuniary-profit or financial gain, and no part of the assets, income or profit of the Corporation is distributable to, or inures to the benefit of its members, directors, or officers or any private person except to the extent permissible under the Not-for-Profit Corporation Law.

⁶⁸ See Secs. D.3 and 4 *infra*.

⁶⁹ Thus, the purposes set forth in paragraph 3 of the Certificate of Incorporation, attached as Exhibit A, are the following:

"To support the necessary transportation infrastructure for economic growth and technological advancement in developing countries, advance global development of U.S. Technology, and, thereby, expand U.S. employment opportunities domestically and worldwide.

To enhance the vision and understanding of the transportation industry domestically and internationally among diverse populations and in developing countries.

To initiate a global diversified workforce of transportation and construction professionals well-equipped to deal with technical and theoretical challenges for the future on highways, airports, trains, buses, waterways, bicycles and high speed rail, including a core of professionals for leadership roles as senior managers; board members, chief executive officers, and owners of a variety of private organizations and public agencies related to Transportation and Construction. [Focused on executives and high level managers]

To encourage and support diversity in ownership and in senior management throughout the transportation industry in all its various facets and manifestations throughout the United States and abroad. [Focused on owners and high level managers]

To enter into Public-Private partnerships designed to encourage and promote diversity in hiring, management and ownership in the transportation industry through employment and job fairs, seminars and the maintenance of a data bank of qualified individuals seeking opportunities in the Industry. [Focused on owners and high level managers]

To expose young people to the opportunities for ownership and employment in the transportation field through lectures, seminars, conferences, media presentations, and local community activities in cooperation with public, private and trade schools, community and four year colleges, and through local mentoring programs with members of the transportation industry, both private and public.

To do all things reasonably necessary or desirable to effectuate the above purposes; provided, however, that the purposes of the Corporation shall be limited to charitable, scientific and educational purposes within the meaning of §§ 170(c) and 501(c)(3) of the Internal Revenue Code of 1954, as amended."

Exhibit A, Paragraph 2. Similarly, paragraph 11 states,

“[n]o part of the net earnings of the Corporation shall inure to the benefit of any member, director, officer, or other private person, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above.”

Id. This language is included to comply with provisions of New York and federal not-for-profit and tax law, discussed in the Argument below, intended to ensure that every 501(c)(3) not-for-profit corporation be operated exclusively for tax-exempt purposes and that none of its income, assets or property benefit its leaders or any private individual.

2. *TDC's Bylaws*

TDC's Bylaws, filed with the New York Attorney General Charities Bureau on August 30, 2012,⁷⁰ establish that it is a membership organization.⁷¹ According to Article I of the Bylaws, people become members simply “by agreeing to adhere to the doctrines, tenets, beliefs, rules, and regulations of the Corporation.” Any other qualifications for membership, “including dues,” are established by the directors or the membership, as either body may deem appropriate.⁷² These are the only qualifications for or limits upon membership established in the Bylaws. As noted above, the membership information on the website provides that dues payments are required for membership.

Under its Bylaws, TDC cannot function without members. Pursuant to the Bylaws, an annual meeting of the members is mandatory; it “shall” take place once a year, for the purpose of electing directors and any “such other business as may come before the meeting.”⁷³ Members representing 10% of the votes to be cast, or the Board or the President, may call a special meeting, with no limitation on the business to be conducted and decided upon.⁷⁴ All membership meetings function on the principle of one member one vote.⁷⁵

The Board of Directors, as distinguished from the members, must be composed of at least three people. Directors are elected annually by the members and must continue in office until a

⁷⁰ “Bylaws of National Transportation Diversity Council, Inc.” Attached as Exhibit B. As observed at note 1 *supra*, NTDC operates under the “assumed name” of Transportation Diversity Council, Inc.

⁷¹ See Articles I and II of TDC's Bylaws, attached as Exhibit B.

⁷² *Id.*

⁷³ See Exhibit B, TDC Bylaws Art. I, Sec 2. At all membership meetings, a quorum is 10% of votes entitled to be cast, in person or by proxy. Art. I, Sec 7.

⁷⁴ See Bylaws Art I, Sec. 4.

⁷⁵ See Art. I, Sec. 9. Members may take action without meeting by unanimous written consent. Art. I, Sec. 10.

successor is elected. Any director may be removed with or without cause by majority vote of “all the members” at a special meeting called for that purpose.⁷⁶ A vacancy that occurs by removal of a director without cause “shall be filled by a vote of the members.” The Board may add new directors or temporarily fill vacancies of directors who were not removed for cause, but both categories of directors, newly added or replacement, must stand for election at the annual membership meeting.⁷⁷

While directors do not receive compensation for serving as such, “nothing herein shall be construed to prevent a director from serving the corporation in another capacity for which compensation is received.”⁷⁸ However, the Board is forbidden from permitting “any part of the net earnings or capital to inure to the benefit of any member or other private individual.” The Board has general power to manage and control the corporation’s affairs and property, to regulate its own action, and to distribute and pay money; but it may not change the fundamental and basic purposes of the organization as expressed in the Certificate of Incorporation.⁷⁹

Article III establishes that the “Officers” of TDC, as distinct from the Board of Directors, include a President, a Secretary, a Treasurer and “such other officers, including one or more Vice Presidents, as the Board of Directors may from time to time appoint.”⁸⁰ Any officer may be removed by majority vote of the Board.⁸¹ As discussed in Section I.C above, TDC has designated numerous individuals with titles, including various Vice Presidents. These individuals may be “officers” within the meaning of TDC’s Bylaws.

As noted above, TDC does not appear to have a Treasurer. This omission is significant, as, among other duties,

The Treasurer shall have the custody of all funds and securities of the Corporation which may come into the Treasurer's hands. The Treasurer shall keep or cause to be kept full and accurate accounts of receipts and disbursements of the Corporation, and shall deposit all monies and other valuable effects of the Corporation in such banks or depositories as the Board of Directors may designate.⁸²

Beyond those specific duties, the Board controls the deposit, expenditure and investment of

⁷⁶ See Art. II, Sec. 1.

⁷⁷ See Art. II, Sec. 2.

⁷⁸ See Art. II, Sec. 4.

⁷⁹ See Art. II, Sec. 5.

⁸⁰ See Art. III, Section 1.

⁸¹ See Art. III, Sec. 4.

⁸² Art. III, Sec. 8.

funds.⁸³

Art VI requires the corporation to keep at its office both an account book and a minute book, which contains, among other things, the minutes of meetings of the members and the Board of Directors.

3. *TDC has not Filed Required Annual Reports to the Charities Bureau of the Attorney General for Many Years*

As of March 2020, TDC had not filed the annual reports with the Charities Bureau of the Attorney General, which New York law requires, since at least 2016.⁸⁴ JMA has been unable to obtain any such a report from TDC since it originally filed its registration as a charity.

TDC's Registration Statement contains only the following statement of the purposes of the organization, a handwritten version of the first of several purposes set forth in the Certificate of Incorporation:

To support the necessary transportation infrastructure for economic growth and technological advancement in developing countries, advance global development of U.S. Technology, and, thereby, expand U.S. employment opportunities domestically and worldwide.

Under the law, this statement is a significant component of TDC's filings with the state Charities Bureau because it describes the *only* purpose for which TDC may solicit contributions from New York residents or entities. (CHAR 410, Item 7).

4. *TDC's Annual IRS Returns Contain Disparities and Irregularities*

The IRS requires tax-exempt organizations to file an annual organization information return, and 501(c)(3) organizations such as TDC must also file the return on a Form 990. TDC's IRS Forms 990 for the years 2013-2108 are available online from ProPublica, "an independent, non-profit newsroom that produces investigative journalism in the public interest."⁸⁵ A review of TDC's Forms 990 from 2013-18 reveals a number of omissions and apparent misstatements of fact. Notably, aside from revenue and expenses, none of TDC's 990 filings differ in a material way. All checklists and questions are answered without year-to-year changes.

a. *Conflicts of Interest*

Under Part VI, Section B (Policies) of its 2013-2018 Forms 990, TDC consistently claims

⁸³ See Article IV.

⁸⁴ March 23, 2020 email from Charities Bureau of New York Attorney General, available from counsel.

⁸⁵ ProPublica Nonprofit Explorer, "National Transportation Diversity Council Tax Filings by Year," *supra* note 1, available online at <https://projects.propublica.org/nonprofits/organizations/273959732>.

- to have a written conflicts of interest policy (and to have a written whistleblower policy),
- that officers and directors are required to make annual disclosures of interests that could give rise to conflicts, and
- that TDC regularly and consistently “monitors and enforces compliance with” the conflicts of interest policy.

Part VI instructs the filing organization to describe in Schedule O how it “regularly and consistently monitor[s] and enforce[s] compliance with the [conflict of interest] policy.” TDC’s Schedule O response for this line consistently says only, “[t]his document was prepared and agreed to by all Board members.”

Part VI also instructs the filer to “[d]escribe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.” Schedule O Supplemental Information regarding this line says, “[a]ll documents are made available upon request.” However, Jobs to Move America requested information from Dwayne Sampson as President and CEO of TDC, inter alia, the “organization’s Articles of Incorporation and Bylaws and other **governing documents including the organization’s Conflict of Interest Policy,**” by letter dated March 3, 2020, and followed up the same request by letter dated April 20, 2020. (Emphasis supplied.) TDC did not respond until May 27, 2020, nearly 3 months following JMA’s request, when its Vice President and General Counsel Lewis Askew excluded TDC’s Conflict of Interest Policy and governing documents from the list of documents it would permit JMA to inspect.⁸⁶ Given TDC’s refusal to permit JMA to inspect its conflict of interest policy, TDC’s assertion to the IRS that its conflict of interest policy is available to the public upon request therefore appears to be false.

Every year since 2013, under Part VII A, Officer and Director compensation, TDC has listed four officers on its Form 990:

- Dwayne Sampson (President) is listed as providing 40 hours per week to TDC, Cosema Crawford (Chairperson) as providing 2 hours per week, Frank Otero (Director) as 2 hours per week, and James Harding, Jr (Director) as 0 hours per week.
- TDC claims that none of the officers/directors receive any compensation, and that it has no other employees receiving compensation.

In addition, TDC’s office address is Mr. Sampson’s personal residence in New York City, which is also the official address for Mr. Sampson’s consultancy business. While this fact in and of itself may not be a conflict of interest, it may be relevant in determining whether Mr. Sampson is inappropriately mingling his personal interests with those of the non-profit organization that he directs.

The Argument section below addresses the importance of investigating whether Mr. Sampson’s purportedly uncompensated full-time work for TDC is funded by New Flyer, and the extent to

⁸⁶ JMA also requested and TDC denied JMA’s request for a copy of the “organization’s board meeting minutes from 2013 to 2019.”

which that would constitute a conflict of interest and use of the organization’s assets to benefit an officer.

b. Revenue and Expenses.

Some of the information found in the Forms 990 in statements of revenue and expenses raise questions about potential conflicts and breaches of duty, and are summarized on this chart:

| TDC --- Forms 990 | | | | | | |
|--------------------------------------|-----------------|-----------------|------------------|------------------|------------------|------------------|
| | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
| Total Revenue | \$84,523 | \$87,658 | \$180,602 | \$158,763 | \$274,277 | \$192,250 |
| Contributions, Gifts, Grants & Other | \$84,523 | \$87,658 | \$180,602 | \$158,763 | \$274,277 | \$192,250 |
| Cash Contributions - Total | N/A | \$87,658 | \$180,602 | \$158,763 | \$274,277 | \$192,250 |
| Fundraising Events | \$84,523 | \$0 | \$0 | \$0 | \$0 | \$0 |
| Total Functional Expenses | \$84,052 | \$91,018 | \$169,288 | \$144,334 | \$299,032 | \$161,366 |
| Advertising & Promotion | \$0 | \$0 | \$0 | \$4,907 | \$0 | \$0 |
| Office Expense | \$0 | \$0 | \$0 | \$577 | \$0 | \$0 |
| Occupancy | \$4,230 | \$6,880 | \$0 | \$0 | \$0 | \$0 |
| Travel | \$31,489 | \$49,201 | \$158,720 | \$90,362 | \$179,959 | \$74,869 |
| Insurance | \$757 | \$1,610 | \$0 | \$0 | \$1,065 | \$0 |
| Other Expenses - Total | \$13,076 | \$20,727 | \$10,568 | \$48,488 | \$118,008 | \$86,497 |
| OUTSIDE LABOR | \$7,150 | \$10,842 | \$1,900 | \$46,371 | \$110,101 | \$75,653 |
| TROPHIES | \$733 | \$500 | \$500 | \$0 | \$0 | \$0 |
| COMPUTER & PRINTER | \$3,818 | \$0 | \$0 | \$0 | \$0 | \$0 |
| BANK CHARGES | \$118 | \$41 | \$0 | \$0 | \$0 | \$0 |
| LEGAL AND TELEPHONE | \$0 | \$4,184 | \$0 | \$0 | \$0 | \$0 |
| LEGAL AND PROFESSIONAL | \$0 | \$0 | \$2,000 | \$139 | \$2,000 | \$0 |
| OFFICE SUPPLIES | \$0 | \$0 | \$2,958 | \$0 | \$0 | \$0 |
| TELEPHONE | \$0 | \$0 | \$0 | \$1,978 | \$1,150 | \$7,299 |
| CATERING | \$0 | \$0 | \$0 | \$0 | \$1,100 | \$2,168 |
| All Other Expenses | \$1,257 | \$5,160 | \$3,210 | \$0 | \$3,657 | \$1,377 |

The following are potential disparities and irregularities:

Part IX of TDC's IRS Forms 990 shows spending on "outside labor" of \$75,653 in 2018, \$110,101 in 2017, \$46,371 in 2016, \$1900 in 2015, \$10,842 in 2014, and \$7150 in 2013. Thus, despite having no paid employees or compensated directors or officers, TDC has spent over \$250,000 on "outside labor" between 2013 and 2018. In 2017, the year it was retained by New Flyer, TDC spent \$110,101 on outside labor, an increase in that line item by 136% from the year 2016.

TDC's travel expenses also vary wildly. For example, TDC claimed \$179,959 in travel expenses in 2017, the year it was retained by New Flyer, far more than the \$90,362 it claimed in 2016 and the \$74,869 it claimed in 2018. TDC provides no breakdown of specific travel expenses, the program purposes or members served by these expenditures, or the identit(ies) of the traveler(s).

According to Part VIII of TDC's IRS Forms 990, TDC's total revenue from 2013-2018, always reported as a single aggregated sum in the "Contributions, Gifts, Grants" section of Part VIII of the 990, was as follows:

2018: \$192,250 reported as "membership dues"
2017: \$274,277 reported as "federated campaigns"
2016: \$158,763 reported as "federated campaigns"
2015: \$180,602 reported as "federated campaigns"
2014: \$87,658 reported as "federated campaigns"
2013: \$84,523 reported as "fundraising events"

Despite the facts that TDC was formed in 2011 as a membership organization entitled to collect dues, and that it solicits dues payments on its website, TDC does not report income from membership dues until 2018.

TDC does not list any expenses for "conferences, conventions and meetings," despite the Summits TDC organizes, for which they charge and receive registration fees.

Although TDC's website features a prominent button soliciting donations,⁸⁷ ostensibly to fund scholarships, TDC's annual IRS submissions do not report any scholarship income or expenditures. Specifically, TDC's Forms 990s do not include *any* amount expended under "grants and other assistance to...individuals" (part IX, line 2), where scholarship expenditures would presumably be recorded. Nor do any of the Forms 990 contain a Schedule I, on which charities are required to report expenditures of more than \$5,000 in aggregate grants and other assistance, affirm their recordkeeping regarding grants and assistance, and explain how they monitor the use of grant funds. As explained in IRS Publication 4221-PC, *Compliance Guide for 501(c)(3) Public Charities*⁸⁸:

"A public charity that makes grants to individuals must keep adequate records and case histories to demonstrate that the grants serve its charitable purposes. Case histories on

⁸⁷ TDC website, "TDC's TEC Scholarship," supra note 59, <http://tdc-ntl.org/tdcs-tec-scholarship>.

⁸⁸ Available online at <https://www.irs.gov/pub/irs-pdf/p4221pc.pdf>.

grants to individuals should show names, addresses, purposes of grants, manner of selection and relationship (if any) that the recipient has with any members, officers, trustees or donors of the organization.”⁸⁹

Nor did TDC report its solicitation of donations for scholarships and “sponsorships” as “fundraising activities” on any of its Schedule Gs.

c. Lobbying

In Part IV of its Forms 990, TDC claims to not have engaged in any direct or indirect political campaign or lobbying activities between 2013 (the first year for which a Form 990 is available) and 2018. Yet, as noted in Section I.C above, TDC explicitly promotes itself as an “**advocate** for members in accessing business opportunities at agencies and institutions across the country,” particularly through “Political Liaison Services” that “*apply a tactical approach in engaging the vital players in the formulation of government policy. TDC seeks out and engages senate and congressional members of committees that deliberate on transportation, construction and education issues and ensure[s] that the field is level to allow our corporate membership to participate without hindrance.*” (Emphasis supplied)⁹⁰ Despite this claim, TDC has failed every year to file a Schedule C with its Forms 990. The IRS requires 501(c)(3) organizations to file a Schedule C recording lobbying expenditures if that organization has engaged in *any* lobbying activity.

d. Excess Benefit and Interested Person Transactions, Director Independence

Part IV also asks, “Did the organization engage in an excess benefit transaction with a disqualified person during the year?”⁹¹ TDC answered no. This issue is discussed in the Argument below.

Also in part IV, TDC claims to

- be owed no money by,
- have made no payments, grants or other assistance to, and
- not have been party to a business transaction with

officers, directors, disqualified persons, a substantial contributor or employee thereof, or to a 35% controlled entity or a family member of any of these persons.

⁸⁹ *Id.* at 16.

⁹⁰ TDC website, “Navigate-Advocacy,” supra note 53, <http://tdc-ntl.org/navigate-%E2%80%93-advocacy>.

⁹¹ The definitions of “Disqualified person” and “excess benefit transaction” are discussed in the text accompanying notes 101-107 in Section II.A.3, *infra*.

In Part VI of the Forms 990, TDC claims that all four voting members of its governing body⁹² are independent. The independence of TDC’s governing body is discussed in the Argument below.

e. TDC claims that it is and is not a membership organization

Every year since 2013, TDC has answered “no” to the question, “did the organization have **members** or stockholders.” (Emphasis supplied) This assertion appears to be false, as the rights and powers of “members” under Articles I and II of TDC’s Bylaws meet the definition of “member” in the Form 990 instructions as persons with right to participate in the organization’s governance, specifically by electing members of the governing body or approving significant decisions of the governing body:

. . . [M]ember means any person who, pursuant to a provision of the organization's governing documents or applicable state law, has the right to participate in the organization's governance . . . Members don't include governing body members. For purposes of Part VI, a membership organization includes members with the following kinds of rights.

1. The members elect the members of the **governing body** (but not if the persons on the governing body are the organization's only members) or their delegates.
2. The members approve significant decisions of the governing body. . .⁹³

(Emphasis in original) Again, pursuant to TDC’s Bylaws, its members both elect and remove members of the governing body (Article I, Section 2 and Article II, Section 1) and have the power to approve significant decisions of the governing body, such as ratifying or overruling vacancy appointments by the Board (Art. II, Sec. 2), calling special meetings (Art. I, Sec. 4), or taking action by unanimous consent without meeting (Art. I, Sec. 10).

f. TDC did not provide required program service information

⁹² The four individuals TDC has consistently identified as officers and directors in Part VII of its 990s are President Dwayne Sampson, Board Chair Connie Crawford, and Directors Frank Otero and James H. Harding, Jr. Given that TDC’s members elect its Board of Directors and are permitted to call meetings on any topic, there is a legitimate question as to whether the organization’s membership is its governing body.

⁹³ Internal Revenue Service, “Instructions for Form 990 Return of Organization Exempt From Income Tax (2019),” available online at <https://www.irs.gov/instructions/i990#idm140229396853488>. The full definition of *member* in the Form 990 instructions is, “(without regard to what a person, including a corporation or other legal entity, is called in the governing documents) any person who, pursuant to a provision of the organization's governing documents or applicable state law, has the right to participate in the organization's governance or to receive distributions of income or assets from the organization. Members don't include governing body members. For purposes of Part VI, a membership organization includes members with the following kinds of rights.

1. The members elect the members of the **governing body** (but not if the persons on the governing body are the organization's only members) or their delegates.
2. The members approve significant decisions of the governing body.
3. The members can receive a share of the organization's profits or excess dues or a share of the organization's net assets upon the organization's dissolution.”

Id. (emphasis in original)

Another omission from TDC's Forms 990 is in Part III, which requires the organization to describe its program service accomplishments for "each of its three largest programs services, as measured by expenses." Despite TDC's claims on its website to numerous program accomplishments, detailed above, **TDC did not respond to this question in any of its Forms 990**, despite the form's three separate spaces in which it could do so, also leaving blank the space in which it could fill in narrative information and the space for other program services. In response to the direction to detail program service accomplishments for its three largest programs, TDC regularly supplies only a single dollar figure representing the organization's *total* expenses for the year without itemizing by program service. In response to the prompt for a description of the organization's mission, TDC offers only a vague description, with no underlying details:

To enhance the vision and understanding of the transportation industry domestically and internationally among diverse populations and in developing countries.

II. ARGUMENT

The IRS and New York Attorney General Should Investigate Whether TDC has Breached its Legal Obligations as a 501(c)(3) New York Not-for-Profit

A. *The Available Evidence Suggests TDC and its Leaders are Acting Outside the Scope of TDC's Exempt Purposes for the Benefit of its Leaders and Entities with which they are Affiliated*

A central tenet of the law governing non-profit public charities such as TDC that they are to function exclusively for their exempt charitable, scientific and educational purposes, and not for the personal benefit of their leaders. Thus, IRC § 501(c)(3) requires that every 501(c)(3) organization be operated exclusively for tax-exempt purposes and that "no part of [its] net earnings ... inures to the benefit of any private shareholder or individual ..." IRC §§ 4945 and 4941 prohibit the diversion of corporate property in any manner to benefit any member, director or officer or any private individual. Similarly, N-PCL § 102(5) bars a not-for-profit corporation from permitting its assets, income, or profit to inure to the benefit of an officer or director of the corporation, except as permitted by the N-PCL. Additionally, § 515 (a) of the N-PCL prohibits the distribution of any part of the income of a not-for-profit corporation to the directors or officers of the corporation.⁹⁴

The N-PCL limits the activities of a not-for-profit corporation to those set forth in the purpose clause of the certificate of incorporation. N-PCL § 202(a). An officer or director of a not-for-profit may be held liable for breaching their duties of loyalty and obedience. N-PCL § 720.⁹⁵

⁹⁴ A not-for-profit corporation may, however, pay "reasonable compensation" to an officer or director, but that officer or director may not participate in the deliberation or vote on their compensation. N-PCL § 515(b).

⁹⁵ There are exceptions and limits to these duties. However, as set forth *infra*, the "business judgment" defense available to officers and directors of for-profit corporations, which forecloses inquiry into "disinterested and honest"

Under the duty of loyalty, officers and directors must pursue the interests and non-profit mission of the corporation with undivided allegiance, placing the interests of the entity above any private interests, *See, e.g. S.H. & Helen R. Scheuer Foundation, Inc. v. 61 Associates*, 582 N.Y.S.2d 662, 665 (App. Div. 1992). Similarly, under the common law duty of obedience, officers and directors must adhere to the purpose of the not-for-profit corporation and pursue its mission. *See, e.g., Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc.2d 126, 152 (Sup. Ct. 1999); *Alco Gravure, Inc. v. The Knapp Foundation*, 479 N.E.2d 752 (NY 1985).

Unlike a for-profit corporation, whose duty extends to its shareholders, the ultimate beneficiary of a 501(c)(3) not-for-profit corporation is the public, who must depend on the state to represent and protect their interests. *See 64th Associates, L.L.C. v. Manhattan Eye, Ear and Throat Hospital*, 2 N.Y.3d 585, 590 (NY 2004) (“...[T]he statute contemplates significant public oversight of the finances and major transactions of [not-for-profit] entities.”); *Herbert H. Lehman College Foundation Inc. v. Fernandez*, 292 A.D.2d 227, 228, 739 N.Y.S.2d 375 (1st Dept. 2002) (“...[T]he directors of a not-for-profit corporation do not act on behalf of shareholders . . . and its board. They act on behalf of beneficiaries who have no direct voice in governing the corporation and must depend on the state to protect their interests.”). Also *see In re: Long Island College Hospital*, 980 N.Y.S.2d 276, 41 Misc.3d 1210A, *slip op.* at 2 (Sup. Ct. Kings Cty. 2013) (“...the ultimate beneficiary of a not-for-profit corporation is the public.”); and *see generally* Victoria B. Bjorklund, Daniel L. Kurtz, James J. Fishman, *Nonprofit Law and Practice: Tax Analysis*, 3rd ed., § 9.01[1].

The Attorney General has a fundamental role in protecting the public interest by ensuring that a not-for-profit corporation adheres to its exempt purpose and mission. *See 64th Associates, L.L.C.*, 2 N.Y.3d at 590 (Attorney General “represent[s] the public interest” and has “standing to maintain several types of actions against not-for-profit corporations, such as to dissolve a not-for-profit . . .; to sue directors for violations of their duties of care, loyalty and obedience; and to enforce any right given to members, directors or officers”); and *Manhattan Eye, Ear & Throat Hospital*, 186 Misc.2d at 151 (Attorney General has duty to “ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions.”)

When a director or officer causes a not-for-profit corporation to act outside the scope of its exempt purposes, it is a breach of their fiduciary duty. *Id.* at 152 (duty of obedience “requires the director of a not-for-profit corporation to ‘be faithful to the purposes and goals of the organization’”); *Family Federation for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 252 (DC Ct. App. 2015) (“It can be a breach of duty to “change substantially the objects and purpose of the corporation”), citing 7A *Fletcher Cyclopaedia of the Law of Corporations* § 3718 (2006)).

In addition, when a director or officer has an interest in a decision of the not-for-profit, the “business judgment” defense to a charged breach of the duty of loyalty is not available. *Levy v.*

decisions of corporate actors, is not available to officers and directors of not-for-profit corporations where, as here, a director has an interest in a transaction. *See, e.g., S.H. & Helen R. Scheuer Family Found, Inc. v. 61 Assocs.*, 582 N.Y.S.2d 662, 664 (App. Div. 1992). N-PCL § 715(b) and (c) set forth requirements for non-profit boards with respect to related party transactions. IRS self-dealing rules are applicable only to private foundations, not public charities like TDC.

Young Adult Institute, 102 F. Supp.3d 426, 430 (S.D.N.Y. 2015)(“It is black letter, settled law that when a corporate director or officer has an interest in a decision, the business judgment rule does not apply”), citing *Croton River Club, Inc.*, 52 F.3d 41, 44, (2d Cir, 1995). *Patrick v. Allen*, 355 F.Supp.2d 704, 710 (S.D.N.Y. 2005)(“Directors may benefit from the business judgment rule ‘only if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudiced exercise of judgment’”), citing *Auerbach v. Bennett*, 47 N.Y.2d 619, 631 (1979). A director is considered interested in a transaction “if the director stands to receive ‘a direct financial benefit from the transaction which is different from the benefit to shareholders generally.’” *Patrick* at 711, quoting *Marx v. Akers*, 644 N.Y.S.2d 121 (NY 1996).

The facts set forth in Section I above establish that the purposes reflected in TDC’s real world activities are not limited to the “charitable, scientific, and educational” ones set forth in its Certificate of Incorporation. For example, TDC’s

- provision of business acquisition and corporate networking opportunities to its members;
- “advocacy” by “engaging” members of Senate and Congress who sit on committees that deliberate on transportation and construction issues “to ensure a level playing field” for its corporate members, to the extent it is substantial;
- public promotion of corporate members from which it receives funding and whose executives serve as TDC directors and officers;
- public defense of its corporate partner New Flyer from charges of discrimination and unsafe working conditions; and
- the fact that TDC’s business affairs and Mr. Sampson’s separate consulting business are all conducted out of Mr. Sampson’s home

taken together, are inconsistent with the exempt purposes of a 501(c)(3) organization.⁹⁶

Given these and the multiple possible additional conflicting interests and potential breaches of duty found in the analysis of TDC’s structure, leadership, activities, and government filings, the New York Attorney General should investigate whether these activities by TDC Board members, especially President and CEO Dwayne Sampson, may conflict with their duty to show undivided allegiance to and use the corporation’s resources only for the stated mission and purpose of the organization. *Manhattan Eye, Ear & Throat Hospital*, 186 Misc.2d 126 at 152.

Again, we do not challenge the laudable goal of identifying business opportunities for Black, Latino and women-owned businesses. However, TDC pursues profit for private corporations and their executives who are TDC members or leaders, and for corporate sponsors like New Flyer by bringing them together with public agency heads who are also affiliated with TDC for the express purpose of having those agencies hire those companies, and by publicly advocating for their interests with elected leaders and the public. This improperly mingles TDC’s public, charitable purposes with the private, pecuniary interests of its leaders and members.

1. Payments to Sampson or TDC by New Flyer, if they Occurred, and Sampson’s Pursuit of New Flyer’s Interests, May Pose Conflicts of

⁹⁶ Internal Revenue Service, “Exempt Purposes - Internal Revenue Code Section 501(c)(3),” <https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3>.

Interest and Violate Sampson's Duties of Loyalty and Obedience to TDC

Perhaps the chief conflict of interest that the IRS and New York Attorney General should investigate arises from TDC's claim that its president Dwayne Sampson works for it for 40 hours per week with no compensation. It is reasonable to inquire how Dwayne Sampson is supporting himself if he is working full time for TDC. While it would be lawful for TDC to pay reasonable compensation to Mr. Sampson directly for services rendered to TDC, it would create a conflict of interest arguably inconsistent with Mr. Sampson's duties of loyalty and obedience to TDC for New Flyer to pay him. The IRS and New York Attorney General should determine whether New Flyer has paid (a) Mr. Sampson or his consultancy; or (b) TDC as a pass-through to Mr. Sampson or his consultancy, and if so, whether TDC made false statements to the contrary to the IRS. The large increases in TDC expenditures for "outside labor" and "travel expenses" in the very year New Flyer first retained TDC reinforces the importance of addressing this question.

If New Flyer made payments to Sampson, that money belongs to TDC. Both New Flyer and TDC have made repeated public statements that NF's partnership is with TDC as an entity, not Sampson as an individual. New Flyer payments to Sampson, whether directly to him or to his consultancy, would be a use of TDC assets and income for the pecuniary benefit of the organization's President and CEO, in conflict with the law governing not-for-profit corporations which are tax exempt under § 501(c)(3). Moreover, Sampson's use of TDC to pursue and defend the pecuniary interests of New Flyer, described in the Facts section, also raises the issue of whether Sampson has violated his duties of loyalty and obedience to TDC, and whether he has caused TDC to violate its exempt purposes.

2. Other Conflict of Interest Issues

A not-for-profit organization such as TDC is required by New York law to have a conflict of interest policy.⁹⁷ The Form 990 Part VI instructions define a "conflict of interest" as arising

when a person in a position of authority over an organization, such as an officer [or] director, . . . can benefit financially from a decision he or she could make in such capacity, including indirect benefits such as to family members or businesses with which the person is closely associated.

So, for example, if TDC President and CEO Dwayne Sampson has benefited financially from his use of TDC to defend New Flyer's interests, that could constitute a conflict of interest. It is important for the public to know whether TDC has any such conflicts, especially given its high profile and supposedly independent role enforcing New Flyer's Community Benefits Framework.

Given TDC's express refusal to permit JMA to inspect its conflict of interest policy and governing documents, TDC's claim to the IRS that it makes its governing documents, conflict of interest policy, and financial statements available to the public "upon request" is false.

⁹⁷ N-PCL Sec. 715-A, EPTL Sec. 8-1.9(d).

TDC's failure to explain how it monitors and enforces compliance with its conflict of interest policy, beyond the assertion that the policy itself was prepared and agreed to by its Board members, is inconsistent not only with IRS guidance policy, but with New York law.⁹⁸ The Form 990 instructions for this line state,

The description should include an explanation of which persons are covered under the policy, the level at which determinations of whether a conflict exists are made, and the level at which actual conflicts are reviewed. Also explain any restrictions imposed on persons with a conflict, such as prohibiting them from participating in the governing body's deliberations and decisions in the transaction.⁹⁹

TDC's response does not describe any restrictions imposed on persons with a conflict. And, if it is the case that TDC directors are responsible for making determinations regarding their own conflicts, that does not meet the intent of the relevant New York and Federal laws.

N-PCL §715-A requires that every New York not-for-profit corporation "adopt . . . a conflict of interest policy to ensure that its directors, officers and key persons act in the corporation's best interest and comply with applicable legal requirements," and that the conflict of interest policy "shall include, at a minimum, the following provisions:"

- (1) a definition of the circumstances that constitute a conflict of interest;
- (2) procedures for disclosing a conflict of interest or possible conflict of interest to the board or to a committee of the board, and procedures for the board or committee to determine whether a conflict exists;
- (3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict . . . ;
- (4) a prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict;
- (5) a requirement that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and

⁹⁸ See discussion below of N-PCL 715-A.

⁹⁹ Internal Revenue Service, "Instructions for Form 990 Return of Organization Exempt From Income Tax (2019)," *supra* note 93, available online at <https://www.irs.gov/instructions/i990#idm140229397472432>

(6) procedures for disclosing, addressing, and documenting related party transactions in accordance with section seven hundred fifteen of this article.

N-PCL §715-A(b). The N-PCL also provides that

The conflict of interest policy shall require that prior to the initial election of any director, and annually thereafter, such director shall complete, sign and submit to the secretary of the corporation or a designated compliance officer a written statement identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director annually resubmit such written statement. The secretary of the corporation or the designated compliance officer shall provide a copy of all completed statements to the chair of the audit committee or, if there is no audit committee, to the chair of the board.

N-PCL §715-A(c).¹⁰⁰

The New York Attorney General and the IRS should investigate

- whether TDC has a written conflicts of interest policy, as required by New York law;
- TDC's failure to make its conflicts of interest policy available to members of the public upon request;
- any and all transactions involving TDC and New Flyer, especially given TDC's high profile role developing and enforcing New Flyer's Community Benefits Framework and defending New Flyer, a multi-billion dollar for-profit corporation, from public criticism;
- the extent to which any conflict and its resolution, including but not limited to the use of funds originating with New Flyer to hire Sampson or an entity which Sampson controls, were documented in TDC's records, including but not limited to Board meeting minutes, as required by New York law;
- whether Sampson or any other officer or director provided annual written statements to the Secretary identifying possible conflicts of interest as required by New York law, and whether those statements identified any transactions involving New Flyer; and
- TDC's failure to monitor and enforce compliance with the conflict of interest policy, and its apparent reliance on directors to review and make determinations regarding their own conflicts.

¹⁰⁰ Also see New York Attorney General Charities Bureau, "Conflicts of Interest Under Not-for-Profit Corporation law" (September 2018), available online at https://www.charitiesnys.com/pdfs/Charities_Conflict_of_Interest.pdf: "The Policy must require that each officer, director and key employee submit to the Secretary prior to initial election to the board, and annually thereafter, a written statement identifying possible conflicts of interest. That statement should include, to the best of the individual's knowledge, any entity of which the director is an officer, director, trustee, member, owner, or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director has or might have a conflicting interest."

3. Excess Benefit and Related Party Transactions

The IRS and New York Attorney General should investigate whether TDC has engaged in “excess benefit transactions” with any “disqualified persons.”¹⁰¹ As noted above, under IRC § 501(c)(3), the tax-exempt organization must ensure that “no part of [its] net earnings ... inures to the benefit of any private shareholder or individual ...” To enforce this prohibition, IRC § 4958 proscribes “excess benefit transactions” between public charities like TDC¹⁰² and “disqualified persons” (generally, those in a position to exercise “substantial influence” over the organization).¹⁰³ Similarly, under N-PCL § 715(f), a nonprofit cannot enter into any transaction, agreement, or arrangement in which a “related party” (i.e., directors, officers, “key people,” and their relatives) has a financial interest, either directly or through ownership in an outside entity, unless certain procedures are followed before the time such transaction occurs.

According to Pamela A. Mann, the former Chief of the New York Attorney General Charities Division, an excess benefit transaction

is one in which the economic benefit provided to the disqualified person is greater than the return benefit to the applicable tax-exempt organization. IRC § 4958(c)(1)(A). In short, the deal is lopsided in favor of the disqualified person. . . Both direct and indirect economic benefits, e.g., benefits provided to a disqualified person through a controlled entity or an intermediary, may be considered excess benefit transactions. Treas. Reg. § 53.4958-4(a)(2). . . If a supporting organization makes a grant, loan, payment of compensation or similar payment to a substantial contributor, or a related person, of the

¹⁰¹ Internal Revenue Service, “Public Charities,” available online at <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities>.

¹⁰² TDC is a “public charity” because it has “an active program of fundraising and receive contributions from many sources, including the general public, governmental agencies, corporations, private foundations or other public charities,” and it “[r]eceive[s] income from the conduct of activities in furtherance of the organization’s exempt purposes.” Pamela A. Mann, “Nonprofit Governance,” Carter, Ledyard & Milburn LLP (2013). Available online at https://www.clm.com/docs/7189727_1.pdf.

¹⁰³ Voting members of the governing body, presidents, chief executive officers, chief operating officers, and chief financial officers are presumed to have substantial influence. Treas. Reg. § 53.4958-3. In addition, the following family members of those in positions of substantial influence are also considered to be disqualified persons: spouse, ancestors, children, grandchildren, great-grandchildren, spouses of children, grandchildren and great-grandchildren, brothers and sisters and their spouses. IRC § 4958(f)(4). Entities as well as individuals can be disqualified persons. An entity where 35% of the control is held by one or more disqualified persons is itself a disqualified person. Treas. Reg. § 53.4958-3(a)(2). The determination of whether a person (including an entity) is in a position to exercise substantial influence over the organization is measured by the person’s actual powers and duties and not by title alone. The IRS evaluates all the relevant facts and circumstances in determining whether an individual has substantial power or influence. Treas. Reg. § 53.4958-3(e). Non-profit organizations exempt under IRC § 501(c)(3) are deemed not to be disqualified persons, and organizations exempt under IRC § 501(c)(4) are deemed not to be disqualified persons with respect to other IRC § 501(c)(4) organizations. Treas. Reg. § 53.4958-3(d). See Mann, “Nonprofit Governance,” *supra* note 102.

supporting organization, the entirety of the prohibited payment is subject to the excise tax.¹⁰⁴

The IRS regulations contain complex “safe harbor” procedures which, if followed, “afford the disqualified person a rebuttable presumption that the transaction was reasonable.”¹⁰⁵

The applicable Treasury regulation, “Definition of disqualified person,” notes that an excess benefit transaction could include, for example, “when benefit is provided to an organization in which a disqualified person has a financial interest.”¹⁰⁶ The instructions for this line on the Form 990 state, “An excess benefit transaction can have serious implications for the disqualified person that entered into the transaction with the organization, any organization managers that knowingly approved of the transaction, and the organization itself.”¹⁰⁷

Mr. Sampson, as the President, CEO, and chief public spokesperson for TDC, exercises “substantial influence” over the organization and is therefore a “disqualified person.” He and his consultancy are also “related” parties to TDC. The other directors may also be “disqualified” and “related,” along with other individuals identified as leaders on the website who may be officers within the meaning of TDC’s Bylaws. Given that TDC’s members are empowered to both elect and have the power to remove directors, as well as to call meetings for any purpose, the members arguably have “substantial influence” over the organization for determining whether they are “disqualified persons” subject to the “excess benefits” rule as well.

The following facts all raise serious questions about whether TDC has engaged in excess benefits and/or related party transactions with disqualified persons such as directors, other leaders, or members of the organization:

¹⁰⁴ Mann, “Nonprofit Governance,” *supra* note 102. Public charities, other than supporting organizations, are excluded from the definition of disqualified person for this purpose.

¹⁰⁵ For the safe harbor provisions to apply, the decision about the transaction must be made in advance by the board (or an authorized committee thereof), composed entirely of individuals who do not have a conflict of interest with respect to the transaction and, thus, are truly “disinterested.” Treas. Reg. § 53.4958-6(a)(1). The Board or committee must have obtained and relied upon appropriate comparability data in making its decision. Treas. Reg. § 53.4958-6(a)(2). The disqualified persons, or those for whom the transaction presents a conflict of interest, may meet with other members to answer questions, but may not be present during debate and voting on the transaction. Treas. Reg. § 53.4958-6(c)(1)(ii). The board or committee must document the basis for its decision within 60 days of the action taken, or before their next meeting. The documentation must include: a) the terms of the transaction and the date approved; b) the members of the board, or committee, who participated in the discussion and who voted on it; c) the comparability data relied upon and how it was compiled; and d) the actions of any member of the board or committee having a conflict of interest with respect to the transaction. Treas. Reg. § 53.4958-6(a)(3), (c)(3). See Mann, “Nonprofit Governance,” *supra* note 102.

¹⁰⁶ 26 CFR § 53.4958-3.

¹⁰⁷ Internal Revenue Service, “Instructions for Form 990 Return of Organization Exempt From Income Tax (2019),” *supra* note 93, available online at <https://www.irs.gov/instructions/i990#idm140229425220096>.

- TDC’s lack of transparency about the identities of persons or entities to whom it makes payments and from whom it receives revenue;
- Sampson’s advocacy for New Flyer interests and the questions about his receipt of payments from New Flyer;
- the multiple overlapping and potentially conflicting interests represented on its “leadership” team; and
- the appearance of “pay to play” in some of the events and activities it has organized.

TDC has not been transparent about transactions involving directors or officers, including Mr. Sampson and New Flyer. In addition to the foregoing general questions, the IRS and New York Attorney General should specifically investigate whether TDC hired Mr. Sampson as “outside labor” to consult for New Flyer, and if so, whether such compensation outweighed any benefit to TDC or demonstrated noncompliance with the above mentioned requirements of the N-PCL or Treasury Regulations. Alternatively, the IRS and New York Attorney General should determine whether New Flyer is a “member” of TDC. If so, New Flyer also appears to be exercising “substantial influence” over TDC, as evidenced by its use of TDC to generate positive press and public sentiment, via Sampson’s op-eds and TDC’s stamp of approval on the Community Benefits Framework. In either case, the relationship provides clear benefits to New Flyer and brings TDC’s activities far afield from the organization’s exempt purposes. Indeed, it is difficult to see how TDC could have benefited, in a manner consistent with its exempt purposes, from payments from New Flyer to Sampson or his consultancy.

In short, the IRS and New York Attorney General should investigate the veracity of TDC’s claims that (1) it has not engaged in “excess benefit transactions” with “disqualified persons, and (2) it is not owed money by, and has not made payments to or been party to a business transaction with, officers, directors, disqualified persons, a substantial contributor or employee or family member thereof.

4. Potential Lack of Independence of Directors

For the same reasons, the IRS should also investigate the independence of the members of TDC’s Board, by determining whether

- a director received payments over \$10,000 from TDC as an independent contractor; or
- a voting member of the governing body or their family member was involved in an “Interested Person” transaction with the organization.

“Independent” has a very specific meaning under the Internal Revenue Code. The Form 990 instructions (IRS.gov) state that a director is considered independent, only if, among other factors and at all times during the organization’s relevant tax year:

- the director did not receive total compensation or other payments in amounts exceeding \$10,000 during the organization’s tax year from the organization (or from related organizations) as an independent contractor;¹⁰⁸ and

¹⁰⁸ Other than reimbursement of expenses under an accountable plan or reasonable compensation for services provided in the capacity as a director. See instructions to Form 990. Internal Revenue Service, “Instructions for

- neither the voting member of the governing body, nor any of their family members, were involved in an “Interested Person” transaction with the organization (whether directly or indirectly through affiliation with another organization) during the organization’s tax year.

For purposes of this analysis, “Interested Person” transactions include “excess benefit” transactions (defined in text accompanying note 104 above) and business transactions affecting interested persons.¹⁰⁹ An “interested person” for purpose of a “business transaction” is

- a current and/or former officer, director, trustee, or key employee;
- a family member of such person;
- an entity more than 35% owned directly or indirectly, individually or collectively, by one or more such person; or
- an entity (other than a tax-exempt entity) of which such person was serving at the time of the transaction as
 - an officer, director, trustee, key employee, partner or member with direct or indirect ownership interest in excess of 5%, or shareholder with an ownership interest in excess of 5%.¹¹⁰

In short, if TDC engaged in a business transaction with a voting member of the TDC governing body, or one of their family members; or a non-tax exempt entity of which one of those voting members was an officer, director or more than 5% owner, that governing body member is not independent. If a governing body member received more than \$10,000 a year from TDC as an independent contractor, that member is not independent, and TDC should have filed Schedule Ls (see note 109 above) regarding those transactions. Again, without an itemized list of qualifying

Form 990 Return of Organization Exempt From Income Tax (2019),” *supra* note 93, available online at <https://www.irs.gov/instructions/i990>, <https://www.irs.gov/instructions/i990#idm140229397029536>.

¹⁰⁹ Schedule L to the Form 990 requires an organization to report information on certain financial transactions and arrangements between the organization and an “Interested Person.” There are four parts to Schedule L, each with its own separate definition of “Interested Person”:

- Part I – excess benefit transactions (transactions where the Interested Person received a benefit in excess of fair market value);
- Part II – loans to and from Interested Persons;
- Part III – grants or assistance benefitting interested persons (generally refers to receipt by an Interested Person of a scholarship, internship, prize or award from the organization); and
- Part IV – business transactions affecting interested persons.

Part IV of Schedule L to the Form 990 defines the term “Interested Person” to mean any of the following: (1) a current and/or former officer, director, trustee, key employee; (2) a family member of any person listed in (1); (3) an entity more than 35% owned directly or indirectly, individually or collectively, by one or more person listed in (1); or (4) an entity (other than a tax-exempt entity) of which a person listed in (1) was serving at the time of the transaction as (A) an officer, (B) a director, (C) a trustee, (D) a key employee, (E) a partner or member with direct or indirect ownership interest in excess of 5%, or (F) a shareholder with an ownership interest in excess of 5%. Note that the organization is not required to report business transactions under Part IV of Schedule L if the transactions do not meet minimum reporting thresholds, as described in the instructions to Schedule L. Internal Revenue Service, “2019 Instructions for Schedule L (Form 990 or 990-EZ),” available online at <https://www.irs.gov/pub/irs-pdf/i990sl.pdf>. TDC has never filed a Schedule L.

¹¹⁰ *Id.*

transactions, parties to the transactions, and total amounts spent on these transactions, it is impossible to gauge the veracity of TDC's claim that all four of its top officers and directors are independent.

B. *The IRS should Investigate whether and the extent to which TDC engaged in Lobbying*

The IRS should also investigate whether TDC has falsely reported that it engaged in no lobbying activity, and/or whether it has violated the restrictions on lobbying activity by a 501(c)(3) organization.

TDC broadly claims to the IRS that it engages in no lobbying whatsoever, yet on its website touts its efforts to influence elected leaders on behalf of its corporate members, including Senators and members of Congress who sit on the committees that directly affect the interests of TDC's members. Despite this claim, TDC has never filed a Schedule C, which is required of organizations that engage in *any* lobbying activity, with its Forms 990. The IRS and the New York Attorney General should investigate whether TDC is misleading members and potential members by falsely claiming to engage in legislative advocacy on issues of concern to its corporate membership, or, if it is engaging in such advocacy, whether it is filing false reports with the IRS.

Apart from whether TDC is lobbying at all, there is a separate question as to whether its lobbying is "substantial." According to the IRS,

. . . no organization may qualify for section 501(c)(3) status if a substantial part of its activities is attempting to influence legislation (commonly known as lobbying). . . Legislation includes action by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office), or by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. . .¹¹¹

The IRS "considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial."¹¹² It is impossible to determine whether TDC's self-proclaimed legislative advocacy is "substantial", because TDC has never filed the documents that would permit the IRS to make that determination.

The IRS should therefore investigate whether TDC has violated restrictions on lobbying by a 501(c)(3) organization, by auditing the time or expenditures TDC has devoted to its claimed activity of engaging members of Congress and the Senate.

¹¹¹ Internal Revenue Service, "Lobbying," available online at <https://www.irs.gov/charities-non-profits/lobbying>.

¹¹² Internal Revenue Service, "Measuring Lobbying: Substantial Part Test," available online at <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test>.

C. *The IRS and New York Attorney General should Investigate TDC's Claim that it is not a Membership Organization and its Failure to Report Dues Income*

The IRS and New York Attorney General should investigate TDC's conflicting claims regarding whether it has members. As set forth *supra*, TDC established itself as a membership organization under Articles I and II of its Bylaws, and cannot function without members.¹¹³ The rights and powers of "members" under TDC's Bylaws meet the definition of "member" in the Form 990 instructions as persons with right to participate in the organization's governance, specifically by electing members of the governing body or approving significant decisions of the governing body. TDC solicits membership dues on its website. Yet TDC has consistently claimed on its Forms 990 that it does not have members.

The board of directors of a nonprofit with a membership structure, such as TDC, must afford the members of the organization all of the rights outlined in the N-PCL and in the organization's bylaws.¹¹⁴ As a charitable corporation, if TDC wanted to opt out of being a membership organization, it would have had to specifically state so in its Bylaws or Certificate of Incorporation. N-PCL § 601(a). It has not done so.

If TDC claims that it has only one member, Mr. Sampson, that would violate the N-PCL § 601 requirement that it have at least three. Claiming that only Mr. Sampson or the top three officers are members would violate the Bylaws, which open membership to any person who pays dues and agrees to adhere to TDC's doctrines and rules, and do not limit membership to either the President or the top three officers. Such a claim would also be inconsistent with TDC's collection of membership dues from any person or entity that views its website, without notifying those members that they do not have the rights granted to members under TDC's Bylaws or the N-PCL.

¹¹³ N-PCL 601(c)(4) provides that ". . . membership may be effected and evidenced by . . . [s]uch method . . . as is prescribed by the certificate of incorporation or the by-laws." As noted *supra*, the only qualifications mentioned in the TDC Bylaws are payment of dues, which the facts show TDC solicits and collects on its website, and agreement to adhere to the "doctrines, tenets, beliefs, rules, and regulations of the Corporation." Bylaws Art. I, Sec. 1. Exhibit B.

¹¹⁴ The governance rights of members include the power to: a) adopt, amend or repeal bylaws; b) restrict the rights of the board of directors to amend bylaws (N-PCL § 602(b),(c)); c) elect and remove directors (N-PCL §§ 703-06); d) change the size of the board (N-PCL § 702(b)); e) call special meetings for the election of directors (N-PCL § 603(c)). Significant corporate events that must be approved by the members include: a) authorizing the amendment of the certificate of incorporation (N-PCL § 802); b) approval of fundamental changes in the structure of the organization such as mergers and dissolutions (NPCL §§ 510, 906, 908, 1002); c) approval of sale of all or substantially all of an organization's assets (N-PCL §§ 510, 511). Members also have the right to receive or review certain corporate records or information, Specifically: 1) corporate books and records; 2) lists of directors and officers (§ 621, 718); 3) an annual report concerning various financial data as well as the number of members and change in membership (§ 513(b)) ; 4) a list of members of record and minutes of membership meetings (§621(b)); and 5) information related to indemnification and insurance provided to directors and officers (§§ 725(c)(1), 726(d)). See Mann, "Nonprofit Governance," *supra* note 102.

The IRS and the New York Attorney General should investigate the qualifications TDC's members or Board have established for membership,¹¹⁵ whether it has held the required annual membership meetings with requisite notice and kept records of such meetings, and whether it has extended to its dues paying members all of their rights under the Bylaws and law, including but not limited to the rights under N-PCL § 603(b) and the Bylaws to elect directors annually and to remove them with or without cause. Moreover, as TDC has long solicited dues from its members on its website, but until 2018 did not report those dues to the IRS, the IRS should also investigate TDC's failure to report any income from member dues before 2018, and determine the amount of dues TDC has collected and from whom.

D. *The IRS should Investigate TDC's Failure to Declare Scholarship and Sponsorship Income, and whether it has Paid any Scholarships*

TDC's annual IRS submissions contain no report of any scholarship income or expenditures. Specifically, TDC's Forms 990 do not list *any* amount expended under "grants and other assistance to...individuals," (part IX, line 2) where scholarship expenditures would presumably be recorded. Nor did TDC report its solicitation of donations for scholarships and "sponsorships" as "fundraising activities" on any of their Schedule Gs. The only revenue reported in 2018 is for "membership dues," notwithstanding TDC's solicitation of scholarship and "sponsorship" donations independently of membership dues.

The IRS should also investigate TDC's failure to report any scholarship income or expenditures, and its failure to report its solicitation of donations for scholarships and "sponsorships" as "fundraising activities" on any of its Schedule Gs. Given TDC's failure to report scholarship or grant assistance, and the absence of any information about scholarship recipients on TDC's website, both the IRS and the New York Attorney General should investigate whether in fact TDC is providing the scholarships it solicits contributions for on its website.

E. *The New York Attorney General should Investigate Violations of Law by TDC with Respect to its Registration Statements and Solicitation of Contributions*

One of the ways New York's Attorney General carries out her responsibility to protect the public interest is by requiring charities to register, submit annual reports, solicit contributions only for exempt purposes listed on their registration, and include statements accompanying solicitations that advise potential contributors of their rights under New York law.

As set forth in the Facts section, as of March 2020, TDC had not filed the annual reports that New York law requires with the Charities Bureau of the Attorney General since at least 2016.¹¹⁶

¹¹⁵ TDC cannot be heard to claim that it has more than one class of member with different sets of rights, as the N-PCL § 601(b) provides for a not-for-profit that has two or more classes of members to set forth "the designation and characteristics of each class and the qualifications and rights of, and limitations upon, the members of each class" in "the certificate of incorporation, the by-laws or, if the by-laws so provide, a resolution of the board." No such language appears in TDC's Certificate of Incorporation (Exhibit A) or Bylaws (Exhibit B), nor has any such resolution been provided to JMA in response to its information request.

¹¹⁶ March 23, 2020 email from Charities Bureau of New York Attorney General, available from counsel.

JMA has been unable to unearth such a report from TDC since 2011. Under New York law, charitable organizations that are required to register with the Charities Bureau of the New York Attorney General (i.e., organizations that solicit contributions from New York residents or entities, and charitable organizations that are incorporated in New York) must file annual reports.¹¹⁷ Since, as shown above, TDC both solicits contributions from New York residents and entities and is incorporated in New York, it must file annual reports.¹¹⁸ The only possible applicable exemption to this filing requirement is where the organization is a membership organization as defined in New York Estates, Powers and Trusts Law § 8-1.4(b)(6). However, this exemption is unavailable to charitable corporations and 501(c)(3) organizations such as TDC.¹¹⁹

Given its failure to file annual reports, TDC also appears to be in violation of NY Exec Law § 172-d.10, which makes it unlawful to “[s]olicit for a charitable purpose or engage in any other fund raising activities without being a registered charitable organization in compliance with all filing requirements of this article...”

NY Exec Law §§ 174-b.1 requires any solicitation by a registered charitable organization required to file financial reports with the Charities Bureau to include a statement that a person may obtain a copy of the last such report on request. The statement must include the address of both the organization and the Attorney General. NY Exec Law §§ 174-b.2 requires, *inter alia*, that any solicitation by any charitable organization include a) a clear description of the program activities for which it is raising funds, and b) a statement including the website and telephone number of the New York Attorney General where an individual can receive information on charitable organizations. TDC’s website solicitations of contributions for dues, scholarships and

¹¹⁷ New York State Department of Law (Office of the Attorney General), Charities Bureau, “Summary of Annual Filing Requirements,” available online at <https://www.charitiesnys.com/pdfs/Annual%20Filing%20Requirements.pdf>.

There are two statutes that require registration of organizations:

- Article 7-A: Article 7-A of the Executive Law (Article 7-A) requires registration of charitable and other nonprofit organizations that solicit contributions from New York State (including residents, foundations, corporations, government agencies and other entities).

- EPTL: Section 8-1.4 of the Estates, Powers and Trusts Law (EPTL) requires registration of charitable organizations that are incorporated, are formed or otherwise conduct activity in New York State.

Based on these two registration statutes, there are three registration types for organizations registered with the Charities Bureau:

- Article 7-A: Organizations registered pursuant to Article 7-A only and not registered under the EPTL.

- EPTL: Organizations registered pursuant to the EPTL only and not registered under Article 7-A.

- Dual: Organizations registered pursuant to both Article 7-A and the EPTL. *Id.*

¹¹⁸ Based on its gross revenues, for the year 2017, TDC was required to file an audited financial report and an independent CPA review report pursuant to New York Exec. Law §172-b.2 (gross revenues between \$250,000 and \$750,000). In the years 2013-2016 and 2018, TDC was required to file an unaudited financial report and an independent CPA review report. New York Exec. Law §172-b.2-a. (From 2014 until June 30, 2017, §172-b.2-a applied to organizations with gross revenues of less than \$250,000, and before 2014, it applied to organizations with gross revenues under \$100,000. Also see Bjorklund, Kurtz, and Fishman, *Nonprofit Law and Practice*, § 10.03[2][f].

¹¹⁹ Bjorklund, et al., *Nonprofit Law and Practice*, § 10.01[3], fn 34.

sponsorships contain no such statements. The New York Attorney General should therefore also investigate TDC's failure to include the statements required by law in its online solicitations of contributions.

TDC declares in its Registration Statement that the purpose of "support[ing] the necessary transportation infrastructure for economic growth and technological advancement in developing countries" is the *only* purpose for which TDC will solicit contributions from New York residents or entities. (CHAR 410, Item 7) Thus, to the extent TDC solicits contributions for any other purpose, it may not be acting consistently with its Registration Statement, which its President certified "under penalties for perjury."¹²⁰ Moreover, Under NY Executive Law § 172-d.4, it is unlawful to "[f]ail to apply contributions in a manner substantially consistent with the ... registration statement of the charitable organization or the purposes expressed therein." Based on a review of TDC's website, the op-eds and press statements written by TDC and its President, and the Framework Agreement TDC produced with New Flyer, it appears that virtually all of the contributions to TDC have been for activities inconsistent with the statement of purpose in its registration form, as they are virtually all for domestic activities as opposed to activities in developing countries.¹²¹

Because TDC has failed to file legally required annual reports with the Charities Bureau of the New York Attorney General, or to include the statements of program activities required in its Form 990 filings (see below), it is impossible without further investigation by the New York Attorney General and the IRS to more precisely ascertain how TDC has applied its contributions. However, all of the available evidence suggests that TDC, almost without exception, has applied contributions to activities that do not fit within the statement of purpose contained in its registration statement.

F. *The IRS should Investigate whether TDC is Providing Claimed Program Services to its Members*

¹²⁰ NY Exec Law 172.2 provides, "The registration form shall be signed under penalties for perjury by the president or other authorized officer and the chief fiscal officer of the organization."

¹²¹ With the exception of a 2015 trip to Cuba: According to an Alabama ABC affiliate, the Transportation Diversity Council organized a trip to Cuba for members of the Birmingham, Alabama transit authority that was financially sponsored by a global private transit company, MV Transportation. The ABC affiliate reported that MV and Louis Berger, the engineering firm with which TDC Chair Connie Crawford was an executive, later attended a meeting at Birmingham City Hall to make what the Chair of the City Council Transportation Committee said was "a sales pitch from companies that privatize transportation" to Birmingham government and transit agency leaders. The Transportation Committee Chair asserted,

[p]ublic transportation is not a for-profit business and we've been struggling to use every dime on our transit system and to build faith in our transit system and somebody's profiting . . . I can't imagine anyone going to this length to destroy our transit system without having a way to make a buck off of it somewhere down the line.

Lauren Walsh, "Questions surround Cuba trip, transportation meeting, BJCTA Director leaving," ABC 33/40 News, October 12, 2015. <https://abc3340.com/news/local/questions-surround-cuba-trip-transportation-meeting-bjcta-director-leaving>.

As noted in the Facts section, despite TDC's expansive claims of numerous ambitious program accomplishments on its website, **TDC has never detailed any program service accomplishments on any of its Form 990 despite the direction to describe such accomplishments for its three largest programs.** In addition to sanctioning TDC for the not supplying required information about its programs, the IRS and/or the New York Attorney General should investigate whether TDC is in fact providing the program services it claims on its website, given the lack of concrete evidence that it is.

G. *The New York Attorney General and IRS Should Consider the Following Remedies*

The Attorney General may bring an action to remove a director. N-PCL § 706(d). The Attorney General may also bring an action of misconduct against an officer or director. N-PCL § 720(b). Should the AG's investigation confirm that Sampson's pursuit of conflicting interests has violated his duties of loyalty and obedience to TDC, he should be removed and subject to an action for misconduct.

Under Article 11 of the N-PCL, the New York Attorney General has the authority to bring a special proceeding seeking dissolution of a not-for-profit corporation in the public interest. Certainly, the gravity of the violations discussed above, if verified by an investigation by the Attorney General and/or the IRS, would suggest dissolution of TDC is in the public interest.

At a minimum, if TDC has violated any of the provisions of the Bylaws or law with respect to membership, or if it has collected membership dues from people it has failed to accord the rights of membership, it should be required to refund the membership dues it has received.

As a consequence of TDC's failure to file its annual reports, its registration to solicit contributions in New York state should be considered "discontinued," according to NY Exec Law § 172.7,¹²² and the Attorney General is required to cancel TDC's registration. NY Exec Law § 172-b.5.¹²³

Following her investigation, the Attorney General should exercise her authority under NY Exec Law § 175 to prosecute an action for violation of the Executive Law provisions governing

¹²² NY Exec Law § 172.7 states, "[i]n no event shall a registration of a charitable organization to solicit contributions in New York pursuant to this article continue, or be continued, in effect after the date such organization should have filed, but failed to file, a financial report in accordance with the requirements of section one hundred seventy-two-b of this article, and such organization shall not be eligible to file a new registration pursuant to this article until it shall have filed the required financial report or reports with the attorney general. If any such report is subsequently filed such organization shall file a new registration pursuant to this article, upon the payment of a re-registration fee of one hundred fifty dollars to the attorney general."

¹²³ "The attorney general shall cancel the registration of any organization which fails to comply with [§ 172-b.1, 2 or 3] within the time therein prescribed, or fails to furnish such additional information as is requested by the attorney general within the required time; except that the time may be extended by the attorney general for a period not to exceed one hundred eighty days. Notice of such cancellation shall be mailed to the registrant at least twenty days before the effective date thereof." NY Exec Law § 172-b.5.

solicitation and collection of funds, including but not limited to an action enjoining TDC from continuing to solicit or collect funds; canceling any registration statement previously filed with the Attorney General; awarding restitution, damages, penalties and costs; removing any director or other person responsible for the violation; and dissolving the corporation. The Attorney General should also exercise her authority under NY Exec Law § 177 to assess a civil penalty against TDC, as well as revoking its registration.

Finally, as discussed in the Facts section above, in practice TDC functions more like a trade organization than a public charity. Trade organizations do not qualify for tax-exempt status under § 501(c)(3) of the Internal Revenue Code. They are organized as “Business Leagues” under § 501(c)(6) of the IRC.¹²⁴ Contributions to business leagues such as trade organizations are not tax deductible, but they may engage in some lobbying activities. If, as its website seems to indicate, TDC seeks to function as a trade organization, then, at a minimum, it must be required to give up its 501(c)(3) status and, if it desires to continue pursuing its present purposes, reorganize as a 501(c)(6) organization. Indeed, 501(c)(6) status seems more appropriate for an entity that functions in practice as TDC does.

¹²⁴ According to the IRS,

“Section 501(c)(6) of the Internal Revenue Code provides for the exemption of business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues, which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. An organization that otherwise qualifies for exemption under Internal Revenue Code section 501(c)(6) will not be disqualified merely because it engages in some political activity. In addition, the organization may engage in lobbying that is germane to accomplishing its exempt purpose without jeopardizing its exemption. A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. **Trade associations** and professional associations **are business leagues.**” (Emphasis supplied.) IRS, “Business Leagues,” available online at [https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues#:~:text=Section%20501\(c\)\(6,of%20any%20private%20shareholder%20or.](https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues#:~:text=Section%20501(c)(6,of%20any%20private%20shareholder%20or.)

CONCLUSION

For all the foregoing reasons, Jobs to Move America respectfully requests that the IRS and the New York Attorney General conduct investigations and commence actions against TDC for violations of federal and state tax and not-for-profit corporation law.

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New York, New York
August 5, 2020

Respectfully submitted,



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